For The Defense™

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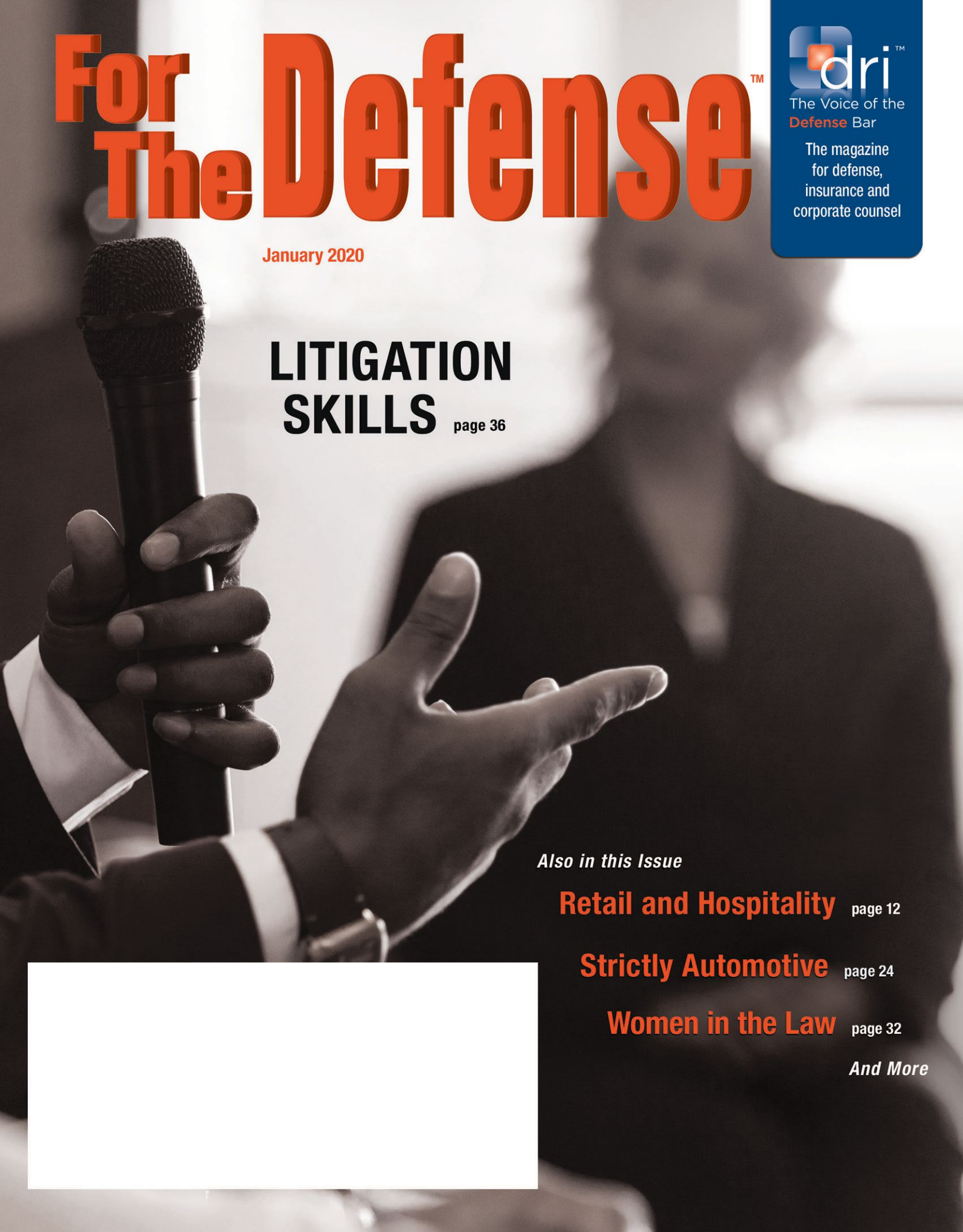
The Voice of the Defense Bar
The magazine for defense, insurance and corporate counsel

January 2020



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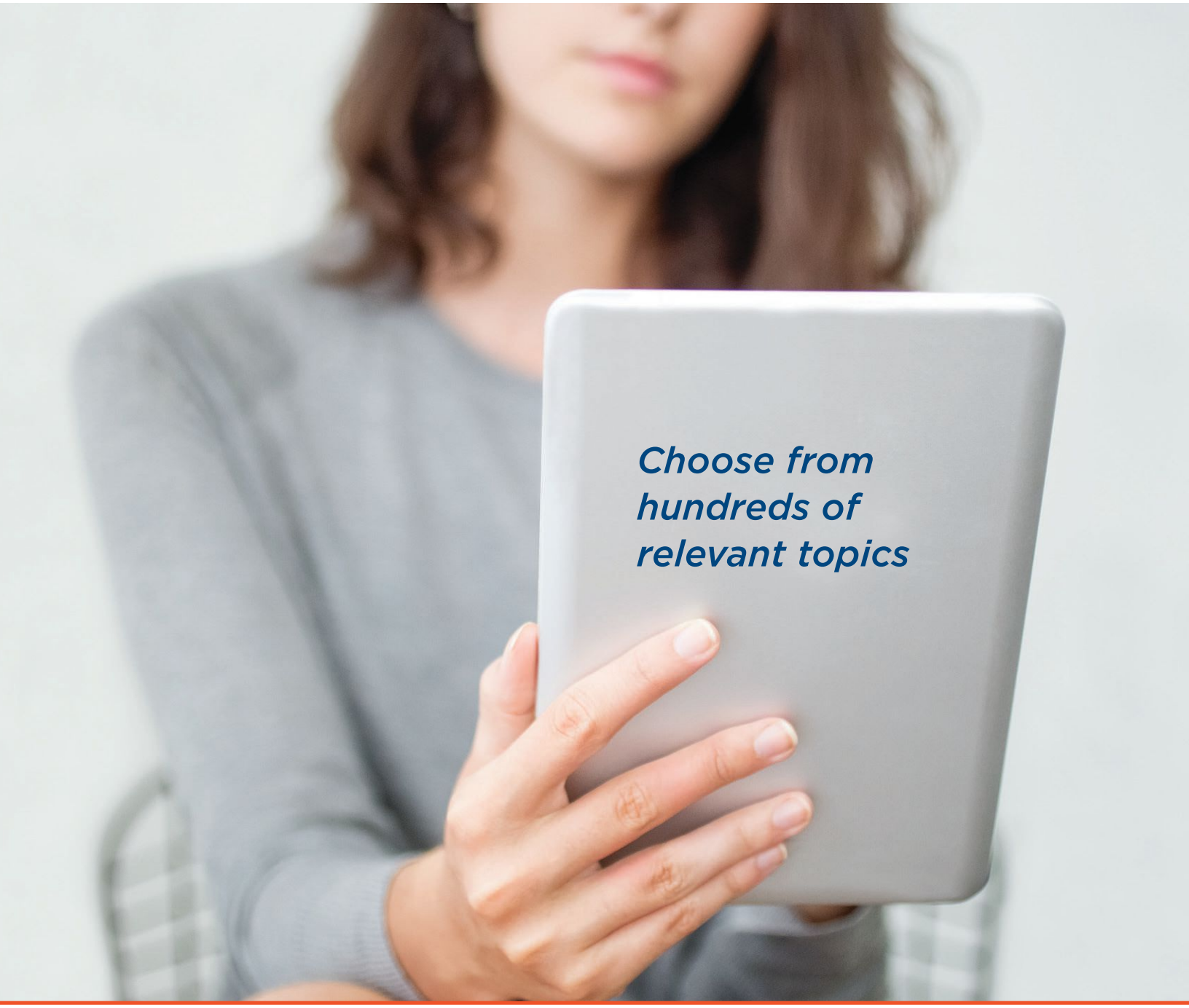

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A Paramount Duty

Chaos Reigns Without the Rule of Law

By John R. Kouris, DRI Executive Director

Last July, I was in the audience at the NFJE's 2019 Annual Judicial Symposium in Chicago. The opening session traditionally features remarks from a handful of NFJE leaders, including the incoming president, who this year was my colleague and friend, Dan D. Kohane of Buffalo. From the podium, he delivered one of the most profound speeches I have been privileged to hear in my twenty-one years as Executive Director. Although Dan's remarks were addressed to the more than one hundred and forty state appellate and supreme court justices, he was, in a sense, speaking to all lawyers, judges, and guardians of our system of justice. He spoke about the "Rule of Law"—a mantra of sorts for the preservation of civil justice and society in general. Even though I have contemplated the meaning of the term on many occasions during my professional life, until Dan's talk, I had never understood the full impact that the Rule of Law has on individuals' lives. His story delivered on a July morning was a lesson of history, a lesson of life, and a lesson of love. With his permission, I share Dan's speech with you in the hope it will be as meaningful to you as it was to me.

– John

I am a first-generation American. I am here because of the collapse of the rule of law and the subsequent victory over that collapse. Over my life, I learned that fact, and it is because of my respect for the rule of law and for an independent judiciary that I stand before you as incoming president of the NFJE.

Indeed, I was the first of my family born in the United States. My parents, Jewish, were both born in the second decade of the last century in Germany. They were Germans, and they were Jews, and they were citizens. Like all citizens, they were protected by the rule of law. As a teenager, my father was an agitator as anti-Jewish laws started to become the norm, and at the urging of people who "knew," ended up fleeing the country by himself in 1936 to Palestine at age eighteen. He did not see his parents again for almost twelve years, until 1948.

My father's parents were able to escape the destruction of the rule of law and fled to Italy, where they were protected by wonderful Italian Catholics in a detention camp for four years. They left behind their family; almost none of them survived.

The U.S. government resisted allowing many European refugees into the country during World War II but eventually, under a program pressed by Eleanor Roosevelt, they were allowed into the country, not as refugees, but as political interns. For a year, my paternal grandparents were quarantined in the only European refugee camp during WWII, Operation Safe Haven in Oswego, New York. When the War ended, instead of being sent back to Europe, Congress succumbed to pressure and passed a law that permitted them to become naturalized Americans. They were taken out of Oswego, crossed the border at Niagara Falls, and then immediately re-crossed into New York; and now my father's parents, supported by the rule of law, were processed.

My mother's parents left their parents and siblings behind and also escaped into Palestine. The family they left behind in Germany succumbed to the collapse of the rule of law and were caught up in the horror of the Holocaust. My parents met and married in British-run Palestine, my older sister was born in Israel, and then my parents, as immigrants, moved to the United States in August of 1952. My mother smuggled me into the country in utero. My parents and sister became naturalized citizens. By fate, since I was born in the United States, I was born a citizen.

The rule of law had collapsed in Germany, starting in the late 1920s, and the Nazi government, wrapping its arms around that collapse, tried to create a new society, a new Reich, with a government recognizing that to flourish and survive, it had to continue to reject the rule of law that protected its citizens.

Eventually, with many millions of deaths as a backdrop, that government was defeated, and the rejection of the rule of law was crushed.

The lesson is clear: the protection and preservation of the rule of law is paramount to freedom.

You, as appellate judges and justices, are the guardians and protectors of the rule of law and fight that battle every day. As lawyers, we admire you, respect you, and honor your mission.

On The Record, continued on page 4

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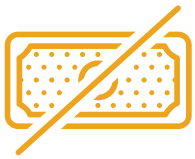

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Members on the Move


Amy E. Furness

Amy E. Furness, co-managing shareholder at Carlton Fields PA in Miami, was elected vice president–sustaining of PLAC, formerly the Product Liability Advisory Council. Ms. Furness steps into the role after completing her term as PLAC secretary/treasurer. PLAC is a not-for-profit association of product manufacturers, suppliers, retailers, and select regulatory, litigation, and appellate professionals.


Richard K. Traub

Michael S. Knippen is the new firm chair of Traub Lieberman Straus & Shrewsberry LLP in Chicago. Mr. Knippen was elected by the management committee after **Richard K. Traub**, founder and managing partner, transitioned to chair emeritus for the firm.

Share your career highlights and professional achievements. Email MembersOnTheMove@dri.org.

On The Record, from page 1

As Dwight Eisenhower said, the "clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law." Another put it this way, the "bedrock of democracy is the rule of law and that means we have to have an independent judiciary who can make decisions independent of the political winds [that] are blowing."

When I started out as a lawyer, I did not consider how important it was to preserve and protect the independence of the judiciary and rule of law. Close to forty years of practice has taught me what is now so very clear. As I started trying cases, handling appeals, and getting involved with local and state bar associations, DRI, and its sister organizations, I started to comprehend the connection between what my parents and grandparents suffered and what goes on today.

As a trial lawyer, an appellate lawyer, and an active participant in the quest for civil justice, I learned the role of independent appellate courts in preserving the rule of law, in making certain that the political winds blowing, the passion of public discourse, the biases and prejudices that often lead to the rule of law being abrogated, cannot and will not rule the day.

You protect us from those who want to reject the rule of law. You assure civil justice and refuse to allow those who might encourage a different approach to democracy and democratic principles to win.

You do so because of your independence from the legislature and from the executive and outside influences.

Alexander Hamilton, in Federalist 78, spoke so eloquently about the critical nature of judicial independence, after he described the powers of the executive and the legislative branches:

> The general liberty of the people can never be endangered by the judiciary; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. There is no liberty, if the power of judging be not separated from the legislative and executive powers.

Diversity and Inclusion in DRI: A Statement of Principle

dri™ Committed to Diversity

DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation.

Diversity is a core value at DRI. Indeed, diversity, which includes sexual orientation, is fundamental to the success of the organization, and we seek out and embrace the innumerable benefits and contributions that the perspectives, backgrounds, cultures, and life experiences a diverse membership provides.

Inclusiveness is the chief means to increase the diversity of DRI's membership and leadership positions. DRI's members and potential leaders are often also members and leaders of other defense organizations. Accordingly, DRI encourages all national, state, and local defense organizations to promote diversity and inclusion in their membership and leadership.

Calendar

Upcoming events of interest to DRI members and other defense lawyers

For more information about any of these events, call DRI Customer Service at (312) 795-1101, or visit our website at www.dri.org.

January 22–24	Women in the Law Seminar	Scottsdale, AZ
January 30–31	Civil Rights and Governmental Tort Liability Seminar	San Diego, CA
February 5–7	Product Liability Conference	New Orleans
February 20–21	Toxic Torts and Environmental Law Seminar	Phoenix
March 18–20	Litigation Skills Seminar	Las Vegas
March 26–27	Medical Liability and Health Care Law Seminar	Austin, TX
April 1–3	Construction Law Seminar	Chicago
April 1–3	Insurance Coverage and Claims Institute	Chicago
April 29–May 1	Life, Health, Disability and ERISA Seminar	New Orleans
April 30–May 1	Trucking Law Seminar	Austin, TX
May 6	Cannabis Law Seminar	Boston
May 6–8	Drug and Medical Device Litigation Seminar	Boston
May 7–8	Retail and Hospitality Litigation Seminar	Orlando, FL
May 14–15	Business Litigation Super Conference	Minneapolis
May 14–15	Intellectual Property Litigation Seminar	Minneapolis
May 15	Fidelity and Surety Roundtable	Chicago
May 20–22	Employment and Labor Law Seminar	Denver
June 4–5	Hot Topics in International Law Seminar	Tel Aviv, Israel
June 11–12	Diversity for Success Seminar & Corporate Expo	Chicago
June 24–26	Young Lawyers Seminar	Atlanta, GA
September 10–11	Fire Science Litigation Seminar	Washington, DC
September 10–11	Nursing Home/ALF Litigation Seminar	Nashville
October 21–24	DRI Summit	Washington, DC
November 6	Insurance Coverage Forum	Hartford, CT

DRI for Life

Love, Solidarity, and Support

By Christopher A. Kenney

Several years ago, I had the privilege of serving on the DRI Board of Directors. It was fun, rewarding, and worthwhile. As a director, I contributed to the formation of the DRI for Life Committee. This committee was created to help our members help each other. It offers tools and resources to promote the health and well-being of the DRI's nearly 20,000 members. You may ask, "well, who really needs this committee?" I recently learned that I do.

Just two months ago, I was in New Orleans attending the DRI Annual Meeting with my wife, Patty. As a bonus, my son Mike, a senior at Tulane in New Orleans, joined us for the festivities on Thursday evening. As always, DRI threw an extraordinary party that night. Little did we suspect the dire news that would confront us the following morning.

On the morning of October 18, we learned that our son Joe died suddenly at our family home that day. Joe was twenty-four, the second of our four children, and our oldest son. He had type 1 diabetes, but lived an extremely active, fun-filled life. On that fateful day, Joe unexpectedly went into diabetic seizures that caused him sudden heart failure. We were devastated as we flew back to Boston to pick up the pieces.

When we landed at Logan Airport my phone blew up with emails and texts from DRI friends, offering their condolences and expressing their eagerness to assist and comfort my family. We had a police escort from the airport to our home in Sudbury. The next day, Emily Coughlin, DRI president-elect, arrived with her husband, Joe. They came straight from the airport after returning from the DRI meeting. Their only stop on the way to our house was to pick up food for us so we would not have to cook dinner that night.

The services were a beautiful celebration of Joe's life. I was humbled and gratified by the overwhelming kindness, friendship, and support we received. Conspicuous among the people who attended the services was a large contingent of defense lawyers who had come from near and far to pay their respects. The Coughlins were there, once again. My fellow DRI board members from back in the day, Patrick Paul (Arizona) and Peggy Ward (Maryland), flew in for the services. Many other defense lawyers from across the country joined us in a solemn show of friendship and loyalty. A magnificent floral display prominently communicated DRI's sincere condolences on our loss. That was followed by a generous donation from DRI to a special memorial fund we established in Joe's memory to research diabetes treatment and find a cure.

Over the eight weeks since we lost Joe, I've heard early and often from DRI officers, staff, directors, members, and friends. Their support was communicated by messages, mass cards, flowers, and food. It was a beautiful display of friendship from the DRI community. I will never forget it.

This time, "the bell tolled" for the Kenney family. Our pain and loss were made more bearable by the love, solidarity, and support we received from the DRI family. DRI was there for me, and I am with DRI for Life.

■ Christopher A. Kenney is a co-founder of Kenney & Sams PC in Boston. A nationally recognized litigator and advocate, Mr. Kenney has successfully tried cases and argues appeals before the state and federal courts in Massachusetts and several other states. He served as the 2018–2019 President of the Massachusetts Bar Association and was the Director of the 2018 IADC Trial Academy at Stanford University Law School. He served for three years on the Board of Directors of DRI.

Ohio Association of Civil Trial Attorneys Presents Awards and Elects Officers/Trustees

The **Ohio Association of Civil Trial Attorneys** (OACTA) is an organization of attorneys, corporate executives, and managers who devote a substantial portion of their time to the defense of civil lawsuits and the management of claims against individuals, corporations, and governmental entities. The mission of OACTA is to promote fairness, excellence, and integrity in the civil justice system by providing resources and education to attorneys and others dedicated to the defense of civil actions. OACTA presented awards to recognize attorneys for their service to OACTA, the profession, and the community during its Legal Excellence Awards Luncheon and Annual Business Meeting on November 21, 2019, in Cleveland.

The *Excellence in Advocacy Award* was presented to James L. McCrystal, Jr., of Sutter O'Connell Co. in Cleveland. The *Distinguished Contributions to the Profession Award* was presented to Gretchen Koehler Mote from the Ohio Bar Liability Insurance Co. in Columbus. Robert P. Rutter, of Rutter & Russin in Cleveland, was the recipient of the *Respected Advocate Award*. Benjamin C. Sassé, of Tucker Ellis LLP in Cleveland, received the *Outstanding Advocacy Award*. Zachary B. Pyers, of Reminger Co. LPA. in Columbus, received the *Outstanding Young Lawyer Award*. The *Committee Chair of the Year Award* was presented to Christopher F. Mars of Bonezzi Switzer Polito & Hupp Co. LPA in Cleveland. The *Frank Seth Hurd Member of the Year Award* was presented to Gary L. Grubler from Grange Insurance Company in Columbus. OACTA congratulates these award recipients for their outstanding contributions and their dedication to the profession!

Ohio Association of Civil Trial Attorneys Elects 2020 Officers/Trustees

The Ohio Association of Civil Trial Attorneys (OACTA) also elected new officers and trustees for 2020 during its Annual Meeting on November 21, 2019, in Cleveland.

New officers include president, Jamey T. Pregon, American Family Insurance, Columbus; vice president, Natalie M. E. Wais, Young & Alexander Co. LPA, Cincinnati; treasurer, Benjamin C. Sassé, Tucker Ellis LLP, Cleveland; secretary, David W. Orlandini, Collins, Roche, Utley & Garner LLC, Dublin; and immediate past president, James N. Kline, Bonezzi Switzer Polito & Hupp Co. LPA, Cleveland.

Trustees elected include Alexander M. Andrews, Ulmer Berne LLP, Columbus; Susan M. Audey, Tucker Ellis LLP, Cleveland; Patrick S. Corrigan, Staff Counsel for the Cincinnati Insurance Company, Cleveland; Thomas F. Glassman, Bonezzi Switzer Polito & Hupp Co. LPA, Cincinnati; Melanie Irvin, Branch, Columbus; Mark F. McCarthy, Tucker Ellis LLP, Cleveland; Paul W. McCartney, Bonezzi Switzer Polito & Hupp Co. LPA, Cincinnati; Jill K. Mercer, Nationwide Insurance, Columbus; Michael M. Neltner, Staff Counsel for the Cincinnati Insurance Company, Cincinnati; David J. Oberly, Blank Rome, LLP, Cincinnati; Daniel A. Richards, Weston Hurd LLP, Cleveland; and Elizabeth T. Smith, Vorys Sater Seymour & Pease LLP, Columbus.

The Art of Preparation

Cross-Examining Difficult Experts

By Lyn P. Pruitt
and Lauren S. Grinder

By following certain strategies, you can devise and deliver an effective cross-examination of even the most difficult expert witness with dispatch.

An expert witness may be difficult for a variety of reasons. The expert may be likeable and persuasive to the jury. The expert may be arrogant and refuse to acknowledge even obvious points. The expert may be openly combative and aggressive. But no matter why the expert is difficult, he or she likely knows more than anyone in the courtroom about a subject relevant to the case. Still, the opposing trial lawyer must examine the expert before the jury. This is a formidable task, even for an experienced trial lawyer who relishes learning and studying each subject a new case presents. But while a trial lawyer may not realistically match the

■ Lyn P. Pruitt is a partner at Mitchell Williams Selig Gates & Woodyard PLLC in Little Rock, Arkansas. She has been trial and lead counsel on numerous national trial teams, defending class actions and pharmaceutical and medical products. Ms. Pruitt is a longtime DRI Drug and Medical Device Committee member, she is also a regent in the American College of Trial Lawyers and holds memberships in the IATL, the American Board of Trial Advocates, the American Inns of Court, and the Arkansas Bar Foundation. Lauren S. Grinder is an associate in Mitchell Williams's litigation practice group. She joined the firm after clerking for three years in US District Court for the Eastern District of Arkansas for the Honorable J. Leon Holmes. While in law school at the University of Arkansas, Ms. Grinder served as a research and teaching assistant to Professor Robert B. Leflar and served on the editorial board of the *Arkansas Law Review*.

expert's knowledge and understanding about the subject at hand, the trial lawyer can become an expert in a universally relevant subject: making complex issues simpler by understanding what to emphasize and what to avoid. Becoming an expert in this subject requires extensively preparing for each cross-examination. And deploying this expertise effectively before the jury requires a combination of confidence and humility. The following tips and strategies provide tools to assist you in crafting and executing an effective cross-examination of even a difficult expert witness.

Types of Experts

It is imperative to understand the type of expert you will cross-examine. Expert witnesses can be classified as one of two types: trial horses or neophytes. *See* F. Lee Bailey & Kenneth J. Fishman, Excellence in Cross-Examination §6:1 (2018). A trial horse may have spent more time in the courtroom than any of the lawyers there, making a living from testifying. With these experts, the cross-examining lawyer must be especially careful to maintain control confidently over the expert and the testimony elicited. Craft your questions narrowly and do not give the expert a chance to clarify what he or she has already explained to the jury on direct. Francis L. Wellman, The Art of Cross Examination 78 (rev. 1923).

A neophyte, on the other hand, may be less familiar with courtroom tactics, but he or she may present as more credible to the jury than a seasoned trial horse. With these experts, the cross-examining lawyer may need to proceed skillfully with humility to avoid offending the jury. *See* George J. Lavin Jr. & Chilton Davis Varner, Silent Advocacy: A Practical Primer for the Trial Attorney 66 (2006).

Preparing to Cross-Examine Experts: Prepare, Prepare, Prepare!

A trial lawyer cannot know what to emphasize and what to avoid without preparing. To be prepared adequately, you must at least consider the type of case, the expert's complete background, and the expert's prior testimony. Considering the type of case requires a pragmatic approach. *See* Bailey & Fishman, *supra*, at note 2. Expert discovery is expensive, and the extent to which experts are used depends on the possible recovery and the parties' ability to pay the fees and costs associated with using experts. *Id.* The slogan "Millions for defense, but not one cent for tribute," attributed to Federalist U.S. Representative Robert Goodloe Harper, may have stirred up patriotic sentiment in favor of a war with France, but your client will likely have a different mentality. The trial lawyer should remain grounded in the reality that sometimes the cost of the defense outweighs the significance of a defense verdict. The cost of experts is a significant component of this reality.

If the client believes the case warrants the cost of expert discovery, it is important to learn about the opposing expert's complete background. This includes the expert's education, published writings, and presentations. Do not merely focus on where the expert was educated and trained, though the reputation of the institution does affect the jury's perception of the expert. Consider these questions as well: Was the expert on a debate or drama team? Which courses that are relevant to the subject matter at issue did the expert take? Who taught those courses? Which textbook was required? *Id.* If the expert has given presentations that are on point, check to see whether there was a question and answer session after the presentation. This could provide insight into how the expert responds to challenges and the expert's ability to speak extemporaneously. *Id.* While researching the expert, look for weaknesses, especially as those weaknesses compare with the expert or experts who you will present on the issue. Juries notice when one expert trained at a premier institution and the other trained on a tropical island. And do not automatically assume that the representations the expert presents through curriculum vitae are accurate. Corroborate each representation because a misrepresentation, however slight, can be valuable impeachment material. *See* Thomas C. O'Brien & David O'Brien, *Effective Strategies for Cross-Examining an Expert Witness*, Litigation, Fall 2017, at 26–28.

A background inquiry is not complete without reviewing the expert's prior testimony, whether provided during a deposition or at trial. Depending on the applicable rules and the judge's standing orders regarding discovery, opposing counsel may or may not be required to provide a list of prior testimony in connection with an expert disclosure. If there is no such requirement, request this information from opposing counsel before the expert's deposition. Review prior testimony for general admissions about concepts that help your case and for opinions that contradict those presented in your case. The more specialized the expert's knowledge, the more likely it is that the expert has testified at least once regarding the same issue raised in your case. F. Lee Bailey and Kenneth J. Fishman explain what can occur when an expert has testified repeatedly on the same subject matter:

> The inclination to furnish up an opinion that satisfies the needs of the lawyer who had the estimable good judgment to approach *this* expert, as against others available, provides its own impetus to please. As a consequence, when an expert has testified more than once as to the same issue, one can fairly expect to find conflicts between the two transcripts.

See Bailey & Fishman, *supra*, at §6:2

These conflicts undermine the jury's confidence in the expert's credibility, but they also give your expert the opportunity to explain the contradictions and why the opposing expert's opinion in your case is contrary to the prevailing view in the field. And of course, consider prior litigation to which the expert was a party. Even if the prior litigation concerned an entirely different subject matter, you can use testimony provided by the opposing expert to study how the expert behaves, understand the expert's personality, and consider how the expert responds when challenged. *Id.*

Show the jury with your questions and attitude that no matter how the expert behaves, you are honestly interested and actively engaged in learning the truth.

The Expert's Personality

The expert's personality sets the tone for the cross-examination. *Id.* §6:3. There are two extremes: those who are imperious, haughty, and pedantic, and those who are genuine, understated, and likeable. *Id.* Most experts will fall somewhere in between these two extremes, and they may even move along the spectrum during the cross-examination, depending on your attitude, comments by the judge, or the expert's own sensitivity. The cross-examining lawyer should maintain awareness of the expert's attitude and react accordingly. It is easy to trudge robotically through an outline without modulating your questions and demeanor. But a good trial lawyer frequently evaluates what is going on around him or her and will treat the opposing expert with whatever combination of kindness, courtesy, or aggression the jury believes befits the expert based on his or her personality. Gerry Spence, Win Your Case 196 (1st ed. 2005). *See* Bailey & Fishman, *supra*, at §6:3. Show the jury with your questions and attitude that no matter how the expert behaves, you are honestly interested and actively engaged in learning the truth. *See* Spence, *supra*, at 197.

Learn the Expert's Dialogue

Learning the expert's dialogue requires a trial lawyer to know not only the terms of art in the expert's field—for example, myocardial infarction versus heart attack—but also to know the rules and principles in the expert's field that apply to the case. *Id.* §6:4. Using these terms of art, rules, and principles comfortably will increase the jury's confidence in you. There are many resources for a trial lawyer willing to take the time to learn. These resources include online, DVD, and audiotape courses. One example is *The Great Courses*, where you can learn about a wide variety of subjects, from quantum physics to master photography. *Id.* Learn from your own testifying expert as well, who will know the details of the case and help focus your efforts on the most important terms of art, rules, and principles. Of course, your client will pay for your expert's time, so use that time efficiently.

Closing Doors

Executed correctly, the deposition of the expert witness will set you up for a successful cross-examination at trial. But correct execution requires forethought and preparation. The goals are to force the expert to define his or her opinions clearly and specifically and then systematically to exclude other variations of those opinions. *Id.* Do not be embarrassed to ask what an expert in the field may characterize as a dumb question, if the expert provides only complex answers that you do not fully understand. Once you have constructed a fence around the opposing expert's opinions, you can prevent the expert from transforming those opinions to complement the plaintiff's theory of the case better as it develops. It is more difficult to fence in a trial horse. These experts will skillfully attempt to keep open the doors that you seek to close. When this happens, it helps to draw subtly on the expected testimony of your own expert or experts. Are there areas of your experts' testimony with which this expert may agree? If so, you may be able to elicit testimony from the opposing expert that corroborates the testimony of your experts and jibes with your theory of the case. While it is tempting during the deposition to launch a full-on assault on a difficult expert's credibility and challenge the expert's more dubious opinions, it is in most instances wiser to lay low in the bushes and save the ammunition for an ambush at trial. Of course, you must always consider how much you must establish in a deposition for your motion practice and consult with your client on what is most important and what is most likely to occur.

Actual Cross-Examination

You cannot effectively cross-examine an expert witness—or any witness—without setting clearly delineated goals and creating a plan for how to accomplish each goal. One plan that should generally be avoided is directly challenging the opposing expert on the substance of his or her own opinions. Gerry Spence explains what happens even when a trial lawyer has extensive knowledge of an expert's field:

> We can argue all day and deep into the night, and despite our superior current academic knowledge he will win the argument, because the argument seems to be, as it is, an argument between a lawyer and a scientific expert. The jury has to decide who is to be believed—the lawyer who is an expert in the law, or the witness who is an expert in his science. The winner is preordained.

See Spence, *supra*, at 230.

More fruitful subjects of questioning include weak aspects of the opposing expert's curriculum vitae, facts favorable to your case, and aberrations in the expert's methodology, highlighting parts of your expert's testimony with which the expert agrees and emphasizing information that the expert does not know or did not know when he or she formed the opinion. *See* O'Brien, at 27–30. For example, did the expert have access to the allegedly defective product but fail to test it? Make sure the jury knows. These peripheral subjects can undermine the expert's opinion, especially if you are able to produce a stronger expert with more solid opinions and methodology.

By the time the opposing expert testifies at trial, you will have fenced in his or her opinions. You must maintain this fence during the trial and preclude the expert

from venturing outside of it while he or she explains the opinions and methodology for arriving at those opinions. This requires control. There are six primary methods for controlling an expert during cross-examination: (1) the expert's own discipline; (2) learned treatises; (3) other expert testimony; (4) facts of the case; (5) bias; and (6) the expert's report. Peter L. Murray, Basic Trial Advocacy 343–52 (1995).

To most experts, achieving a good result in one case is not worth jeopardizing their professional reputation. These experts would prefer to agree with others in their field and learned treatises on issues clearly at odds, or at least inconsistent with, the plaintiff's theory of the case. If the expert authoritatively and convincingly espouses a theory or opinion with which you anticipate your expert providing more convincing testimony, you may use your expert to "neutralize" the opposing expert's testimony. *Id*. 346. Force the opposing expert to acknowledge that your expert is esteemed in the field and has done more work in the subject area. Of course, this only works if your expert truly is the superior authority on the issue.

The facts of the case, bias, and the expert report are consistent bases for controlling the opposing expert and undermining his or her own testimony. You should know the facts better than the expert, which will allow you to check the expert if he or she attempts to provide opinions inconsistent with the facts. Bias is an obvious manner of controlling a paid expert. This is especially true when the expert is paid an exorbitant amount and the jury is mostly blue collar. *See* O'Brien, at 29. Use the expert's report against him or her. Cull qualifying statements from the report and use those statements to craft strong leading questions, highlighting any uncertain variables. *See* Murray, *supra*, at 350. Focus on any favorable facts included in the report and emphasize those facts.

Finally, do not let your emotions—anger, frustration, and resentment or even glee and satisfaction—get in the way. The jury will not know everything that you know about the expert and will perceive him or her differently. Be mindful. Losing your cool, even with an expert who acts like a bully, will likely hurt your client more than the opposing party.

How to Handle Specific Characteristics of Expert Witnesses

Experts are difficult in different ways. Some may refuse to answer the question asked directly and instead drone on, filibustering to avoid answering. Others may give a new opinion while testifying at trial, and the judge may allow it. You must be prepared for these contingencies, but you must also listen closely to the answers an expert provides, even if you think you know what he or she will say and how he or she will act. An expert may behave differently at trial than during the deposition.

If an expert is evasive, it is important to emphasize this characteristic to the jury. These questions and statements, excerpted from *Silent Advocacy*, can be helpful:

- This is one of those simple questions.
- Then your answer to my question is [yes] [no]?
- Is that another way of saying yes?
- Does your answer mean yes?
- Are you having trouble understanding my questions?
- Didn't that question call for a "yes" or "no" answer?
- That does not answer my question. Let me try again.
- I appreciate your answer, but that was not my question.
- I understand all that, but can you answer my question?

See Lavin *supra*, at 67–68.

The tone of these questions will depend on how clear it is that the witness is dodging your questions. If it is obvious the expert is arrogant, and the evasive answering has continued for several questions, then you likely will have permission from the jury to question the expert sharply. *Id.* 66. But if the expert is likeable, and the evasive answering has been only intermittent, you may not have permission to reprimand the witness. In this case, it may be better to say: "I don't think that answers my question. Let me try one more time." This will focus the jury on the nature of the expert's answers and provides a basis for sharpness if the expert witness continues avoiding your questions.

If an expert provides a new opinion at trial, and the judge allows it, do not show surprise. Neither should you fume about the unfairness of the judge's decision. This will get in the way of addressing the new opinion. Most new opinions are provided in response to, or arise out of, opinions provided by opposing experts. Sit down with your expert and discuss what the opposing expert could possibly say in response. Then, prepare for the opposing expert to provide that opinion at trial. If the expert provides a new opinion for which you are unprepared, point out to the jury that this is a new opinion. Find out why, if this opinion is relevant to the case, this opinion was not provided at an earlier date. Was there something that the expert did not know when he or she formed the original opinions? If so, can we trust the original opinions? If not, what is the basis for the new opinion? Show the jury that the new opinion is self-serving and unreliable.

The first step in successfully cross-examining an expert at trial is one taken at the outset of the case, when the trial lawyer humbly acknowledges that there is more to learn.

Conclusion

If adequately prepared, the trial lawyer can use the opposing expert to highlight the trial lawyer's own skill. But if inadequately prepared, the opposing expert will eviscerate even an experienced trial lawyer and tarnish his or her credibility before the jury. Cross-examining an expert witness well requires making an ongoing commitment to learning. It is difficult for some trial lawyers to adhere to such a commitment because it implies that there are things that they do not know. Avoid this pitfall. The first step in successfully cross-examining an expert at trial is one taken at the outset of the case, when the trial lawyer humbly acknowledges that there is more to learn. FD

The Time Is Now

Readying Your Clients for the California Consumer Privacy Act

By Jean-Paul P. Cart

The principles expressed in the California legislation underlie legislation that other state governments across the country have started to develop and enact.

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The California Consumer Privacy Act of 2018 (the CCPA) has significant implications for businesses across the country. Yet it came into existence quickly, and with need for an assortment of amendments and implementing regulations that make its requirements a moving—but rapidly stabilizing—target. This is, in part, a result of its unique procedural history. The bill was first proposed in February 2017. It then languished in the inactive legislative file for months. But in a whirlwind of activity between June 21 and June 28, 2018, the bill was whisked through the legislative process, quickly amended, passed, and ultimately signed as AB 375 by then-Governor Jerry Brown.

Presumably, the California legislature never intended to craft its response to complicated consumer privacy issues in only seven days. But a similar ballot initiative qualified to appear on the ballot for the then-upcoming November 2018 election. If this ballot measure had been approved by California voters, the resulting law would have been largely immune from legislative amendment—a major problem, given the rapidly changing technological and privacy landscape, and the drafting problems commonly found in such ballot initiatives. Because the sponsors of this ballot initiative agreed to withdraw it if the legislature acted on its own, the CCPA was amended, passed, and signed at breakneck speed.

Due to the speed with which it was passed, and the complexity of the issues at play, the CCPA expressly contemplated the issuance of later regulations and amendments. Indeed, section 1798.185 of the CCPA initially required the California attorney general to issue regulations by January 1, 2020. That will not happen, however, as a later bill (SB-1121) extended that deadline to July 1, 2020, and the California Office of the Attorney General did not release draft regulations until October 10, 2019. Yet at core, what the California legislature hoped to achieve regarding consumer privacy was readily reflected in the CCPA as passed in June 2018:

> [I]t is the intent of the Legislature to further Californians' right to privacy by giving consumers an effective way to control their personal information, by ensuring the following rights:
>
> (1) The right of Californians to know what personal information is being collected about them.
> (2) The right of Californians to know whether their personal information is sold or disclosed and to whom.
> (3) The right of Californians to say no to the sale of personal information.
> (4) The right of Californians to access their personal information.
> (5) The right of Californians to equal service and price, even if they exercise their privacy rights.

See AB 375 at §2(i) (Cal. 2018).

Each of these new rights will come into being when the CCPA became effective on January 1, 2020, and each will create a new set of obligations and potential liabilities—though there will be a six-month grace period before the law can be enforced. As explained in the primer that follows, businesses will be able to meet some of these obligations easily and quickly, while others will require months of active planning and investment.

Who Must Comply with the CCPA?

The CCPA applies to all for-profit business entities (regardless of form) that collect personal information from "consumers" (defined in the CCPA as California residents), do business in California, *and* meet at least one of the following criteria: (1) have gross annual revenues in excess of $25,000,000; (2) annually buy, receive, sell, or share the personal information of 50,000 or more consumers, households, or devices; or (3) derive 50 percent or more of their annual revenues from selling consumers' personal information. Cal. Civ. Code §1798.140(c)(1). Businesses should take particular note that a single consumer might provide information from several "devices," which may dramatically reduce the practical implications of the 50,000 "consumers, households, or devices" threshold. For purposes of meeting this criterion, the activities of affiliates and entities under common control are considered if they share common branding. Cal. Civ. Code §1798.140(c)(2). (That is, businesses cannot use legal-entity gamesmanship to avoid CCPA obligations.)

Notably, the CCPA does not restrict a business's ability to collect or sell a consumer's personal information if "every aspect of that commercial conduct takes place wholly outside of California." Cal. Civ. Code §1798.145(a)(6). This exemption requires that "the business collected that information while the consumer was outside of California, no part of the sale of the consumer's personal information occurred in California, and no personal information collected while the consumer was in California is sold." *Id*. Thus, a business outside of California cannot benefit from this exemption if it collects information via a website accessed from California. Moreover, non-California businesses must always keep in mind that California's long-arm jurisdiction statute authorizes a California court to "exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." *See* Cal. Civ. Code §410.10. That is, the jurisdictional reach of a California court is as long as is constitutionally permissible, and it covers situations where an out-of-state business maintains an e-commerce website accessible to California consumers. *See Amini Innovation Corp. v. JS Imports, Inc.*, 497 F. Supp. 2d 1093 (C.D. Cal. 2007).

What Information Is Regulated Under the CCPA?

The CCPA regulates the collection, use, and sale of "personal information." The law defines personal information very broadly, to cover information that "identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." Cal. Civ. Code §1798.140(o). The definition includes, among other things: (1) names and aliases; (2) email addresses; (3) IP addresses; (4) Social Security, driver's license, or passport numbers; (5) characteristics of protected classifications; (6) commercial information, such as purchasing histories; (7) biometric information; (8) internet activity such as browsing history;

(9) geolocation data; (10) audio or visual information; (11) professional or employment information; and (12) educational information. Cal. Civ. Code §1798.140(o)(1)(A)–(J). The definition of personal information also covers "[i]nferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes." Cal. Civ. Code §178.140(o)(1)(K).

Diffuse, unorganized, and unsophisticated data collection and storage practices will, in turn, make CCPA compliance difficult.

The CCPA's definition of "personal information" excludes information that has been de-identified or aggregated. *See* Cal. Civ. Code §178.140(o)(2). And while the definition of personal information excludes information that is publicly available—as recently and further clarified by the AB 874 (Cal. 2019) amendment to the CCPA—a business developing a compliance strategy should closely consider whether public information could be used to undermine or avoid its de-identification techniques. *See id*. For example, if a consumer's address is publicly available, and a business has attempted to de-identify that consumer's data by using his or her address as a proxy (in place of his or her name), the business's attempt at de-identification will fall short and could run afoul of the CCPA.

What Rights Does the CCPA Establish?

The CCPA establishes four categories of rights: a right to know, a right to opt out, a right to demand deletion, and a right to equal service.

The Right to Know

The "right to know" requirements of the CCPA fall into three primary categories, each of which will require a specific compliance strategy.

First, section 1798.100(b) states that a business that collects a consumer's personal information must "at or before the point of collection, inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used." The law prohibits businesses from collecting categories of information outside the scope of this notification. As a practical matter, businesses can comply with section 1798.100(b) by updating their website privacy policies—which are already required under the 2013 amendments to the California Online Privacy Protection Act—or other disclosures provided to consumers before personal information is collected.

Second, section 1798.100(a) states that a consumer "shall have the right to request that a business that collects a consumer's personal information disclose to that consumer the categories and specific pieces of personal information the business has collected." That is, on receiving a "verifiable consumer request"—a term with significant implications that businesses should revisit once the California attorney general issues final regulations—a business must promptly, and at no cost to the consumer, provide all personal information that it has collected from or about that consumer, explain the sources from which that information was collected, and explain its business purpose for collecting that information. *See* Cal. Civ. Code §1798.110. And according to section 1798.130(a), businesses subject to the CCPA must take affirmative steps to give consumers two or more ways to submit requests, including a toll-free telephone number or website address, at a minimum. (Note, however, that the AB 1564 (Cal. 2019) amendment clarifies that a business that operates and interacts with consumers exclusively online must only provide an email address for requests.)

Developing systems and processes to respond to these requests may be challenging for many businesses. Diffuse, unorganized, and unsophisticated data collection and storage practices will, in turn, make CCPA compliance difficult. (In this respect, CCPA could provide a boon for customer relationship management providers and data management companies.)

Third, businesses must take special note that section 1798.100 and its various implementing statutes also grant consumers a right to know if their personal information has been shared with or sold to a third party, including the categories of information disclosed, and the categories of third parties to which the information has been disclosed. *See* Cal. Civ. Code §§1789.110, 1789.115. A business must process requests for this information following the same requirements listed above; however, compliance with this requirement of the CCPA will require diligent and pro-active measures to track closely how consumers' personal information is used and/or disclosed.

Finally, while the California Office of the Attorney General regulations have not yet been finalized, the proposed regulations impose a fairly short turn-around time on right to know requests: acknowledgment of receipt within ten days; and a response within forty-five days, with one forty-five-day extension permitted. (And the proposed regulations impose a similarly tight turn-around time on demands to delete, as explained below.)

The Right to "Opt Out"

The CCPA grants consumers the right to demand that businesses not sell their personal information to third parties. *See* Cal. Civ. Code §1798.120. The CCPA refers to this as a "right to opt out." *Id*. Note, however, that the CCPA prohibits a business from knowingly selling personal information regarding those under sixteen years of age unless the consumer "opts in" by affirmatively consenting, and for those under thirteen years of age, consent can only be provided by a parent or legal guardian. *See* Cal. Civ. Code §1798.120(d). Notably, the opt-in process for minors will be addressed in detail in the final regulations, and the proposed regulations imply that a rather burdensome process may be required in some circumstances.

Additionally, the CCPA requires businesses that sell personal information to affirmatively disclose to consumers that they have the right to opt out, in most cases through the businesses' privacy policies. *See* Cal. Civ. Code §1798.120(b). Businesses must also provide a method for consumers to submit opt-out requests. This includes providing a "clear and conspicuous link on

the business' Internet homepage, titled 'Do Not Sell My Personal Information,'" which links to a page allowing the consumer to opt out. *See* Cal. Civ. Code §1798.135(a)(1). Importantly, businesses cannot make opting out a complicated process, and specifically, they cannot require a consumer to create a login profile or account to opt out. *See id*.

The Right to Demand Deletion

Section 1798.105 of the CCPA grants consumers the right to demand that a business delete personal information about them. This right attaches only to information that the business has received *from* the consumer, and therefore, excludes information collected (or purchased) from other sources. Moreover, businesses are not required to delete personal information in certain situations, such as where the information is necessary to complete a transaction or to detect security incidents or hacking attempts, where the information is tied to protected speech, or where a legal obligation prohibits its deletion, among other circumstances. *See* Cal. Civ. Code §1798.105(d).

Businesses will have an obligation to inform consumers of their right to demand that their personal information be deleted. *See* Cal. Civ. Code §1798.105(b). A business can satisfy this obligation by updating its privacy policy, though creating the actual mechanism for evaluating and implementing deletion requests may be challenging and time-consuming, depending on how well a business has organized and cataloged its data.

The Right to Equal Service

Finally, the CCPA broadly prohibits discrimination in pricing and/or making services available to consumers who exercise their rights under the CCPA. That is, a business generally cannot refuse to serve, or charge a higher price to, a consumer who requests his or her information, opts out of third-party disclosures, or demands that the business delete the consumer's personal information. *See* Cal. Civ. Code §1798.125. In fact, a business cannot even *suggest* that a consumer "will receive a different price or rate for goods or services or a different level or quality of goods or services" if the consumer exercises their rights under the CCPA. Cal. Civ. Code §1798.125(a)(1)(D).

There are, however, two exceptions to the general rule explained above. First, a business may charge different rates or provide differential services if that difference is "reasonably related to the value provided to the consumer by the consumer's data." Cal. Civ. Code §1798.125(a)(2). Second, the CCPA allows a business to offer "financial incentives" to collect personal information. *See* Cal. Civ. Code §1798.125(a)(2) 1798.125(b). Any such "financial incentive" program is subject to strict disclosure and cancellation requirements, as well as a prohibition against practices that are "unjust, unreasonable, coercive, or usurious in nature." *See id*. Accordingly, businesses should use this exception cautiously, in a manner free of deception, and only on close review and analysis of the final (and forthcoming) implementing regulations.

How Does the CCPA Affect Employee–Employer Relationships?

When first passed, many commentators described the CCPA as one of the most significant pieces of employment legislation in years. That is, while the CCPA was primarily targeted toward consumer relationships, the definition of "consumer" was based on where a person lived, not how the person interacted with a business. As a result, all California employees were "consumers" under the CCPA and gained the rights discussed above with respect to their employers.

This issue was addressed, and (at least temporarily) resolved by AB 25 (Cal. 2019). This amendment clarified that the CCPA does not create access or deletion rights for personal information collected from job applicants, employees, business owners, directors, officers, medical staff, or contractors. However, this exception expires on January 1, 2021, and AB 25 was intended to prompt further legislation to apply the CCPA's core concepts to the employee–employer relationship in California.

Who Will Enforce the CCPA?

With one exception discussed below, the CCPA does not create a new private right of action. Instead, it authorizes the California attorney general to bring civil actions to enforce the requirements and prohibitions of the CCPA. *See* Cal. Civ. Code §1798.155(a). The California attorney general may seek penalties of up to $7,500 per intentional violation (*see* Cal. Civ. Code §1798.155(b)), or up to $2,500 per unintentional violation (*see* Cal. Bus. & Prof. Code §17206), but only *if* the business does not correct the violation within thirty days from receipt of a notice of noncompliance by the attorney general.

The only private right of action created under the CCPA is in section 1798.150, which allows consumers to seek statutory damages of $100 to $750 per consumer in the event of a data breach occurring "as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect." Cal. Civ. Code §1798.150(a)(1). As with a civil action by the California attorney general, this private right of action is also limited by a thirty-day notice-and-cure period—though this will be of a little use to most businesses after a malicious data breach. *See* Cal. Civ. Code §1798.150(b)(1).

On February 22, 2019, Senator Hannah-Beth Jackson introduced proposed legislation (SB 561) that would have dramatically expanded the consequences of noncompliance. The bill sought to expand the private right of action discussed above, to cover any situation in which a consumer's rights under the CCPA had been violated. It would also have removed the thirty-day notice-and-cure provision currently in place. If SB 561 had become law, it would have created a new cottage industry of "citizen enforcers" who would—as in the Proposition 65 and California Unruh Civil Rights Act or Americans with Disabilities Act contexts—professionally sought and pursued CCPA violations. Thankfully for businesses, this amendment failed. However, legislative reluctance to create a broad private right of action may have been tied to lingering uncertainly stemming from the steady stream of amendments to the CCPA, and the then-unreleased proposed implementing regulations. In other words, the legislature may take up the issue again once the CCPA stabilizes.

Conclusions and Recommendations

The rights and obligations the CCPA creates pose new and unique challenges that merit close attention and active planning. The CCPA went into effect on January 1, 2020,

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Considerations for Choosing Candidate Claims

Maximizing the Success of Early ADR Through Pre-Suit Mediation

By B. Rose Miller

Pre-suit mediation can decrease litigation costs, shrink new lawsuit volume, and crucially, protect a company's brand.

Nearly a decade ago, while serving as the program chair for the first DRI Retail and Hospitality Seminar, I launched my private practice specializing in early dispute resolution. I had just ended a lengthy in-house career managing customer litigation for The Home Depot. My optimism about the future of alternative dispute resolution (ADR) methods, and pre-suit mediation, in particular, as a powerful claims management tool, stemmed from my employer's well-documented success using the approach to shrink litigation costs by millions of dollars annually and reducing new lawsuit volume as of 2008 by 30 percent. *See* B. Rose Miller, "Choosing a Mediator within Pre-suit ADR Constraints," *For The Defense*, Aug. 2009, at 53. This belief was further bolstered by colleagues from other in-house legal departments who, stymied by skyrocketing legal costs and high caseloads, approached me with their interest in trying pre-suit mediation as a cost-effective alternative to traditional claims management.

Since then, I have been fortunate to partner with truly visionary risk management and legal professionals at over ten national and regional retail, restaurant, hospitality, and manufacturing companies, helping them create and run their own early ADR programs. These leaders took a chance that the success of The Home Depot's ADR process that I developed could be replicated, tweaked, and even improved to enhance their own company's unique risk management objectives.

One of my clients featured on the program panel for the 2019 DRI Retail and Hospitality Conference, Publix Supermar-

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kets, has hit a home run year after year since 2012, using the approach systematically. Publix, similar to The Home Depot, has achieved significant savings through early ADR screening and execution as part of its claims team's daily matter management. Others, such as Inspire Brands, also represented on the panel, added pre-suit mediation more recently and selectively. Inspire Brands has already achieved significant savings from key settlements in claims that the company chose not to litigate to protect the company's brand and resources.

For this article, I draw on my experience working with these and other clients over the past decade—all of which have achieved success through early ADR—to share considerations and strategies for identifying claims to include in a company's pre-suit mediation program. My objective is to help in-house claim and lawsuit managers considering adding pre-suit mediation to their matter management arsenal to maximize the effectiveness of their process through recommendations on candidate claim selection. I also hope to educate those individuals who serve as neutrals and may be called on to mediate pre-suit claims about various aspects of their role in the process. Finally, I share my insight with outside counsel advocates for the defense on ways they may be called upon to assist in helping clients resolve claims pre-suit, and the importance of their role defending claims to their client's successful pre-suit mediation efforts.

Establishing Claim Criteria Using a Liability Assessment

When I share with a new client prospect my other clients' settlement statistics from pre-suit mediation, which often exceed 75 percent, I am always asked, "What is the secret to picking the right claims to include?" Of course, even with settlement rates at this high percentile, and the accompanying savings from reducing litigation volume, you do not want to usurp the effectiveness of a good adjusting process by offering to mediate too many claims pre-suit. Among other problems, the cost could reduce the net financial benefit of reaching early settlements. So, how do you decide which ones simply to try to negotiate, when to offer to mediate them, or which claims you should choose to exclude and defend? It is important for each company using the process to establish their own core criteria to identify ADR candidate claims, and then to establish a protocol for candidate screening.

When assessing claims for possible pre-suit mediation, the first criterion a company should apply is whether this is a claim that the company would like to settle rather than litigate. This determination requires an efficient claims-intake process that affords an early and effective investigation of liability facts. The common challenge all defendants face, however, especially in premises liability claims brought against retailers, is that investigating these incidents is not the full-time job of their sales resources. Few clients have the luxury of having dedicated personnel on the scene of accidents to shepherd the investigation from start to finish.

Flagging claims that present adverse liability concerns as soon as possible in this process is paramount, since any delay investigating a loss is usually costly. Employees quit or are terminated, and evidence is lost or is not retained. Tracking down liability facts later in the life of a claim, even if successful, takes more time and resources. The most expensive "vendors" that a company can bring in to complete liability investigations generally are outside defense counsel, especially once cases are in litigation. Therefore, a successful ADR program needs to have the right resources in place to conduct investigations as promptly and thoroughly as possible. Ideally, this will happen within the first six months of the claim life, but certainly no later than six months to a year prior to the expiration of the statute of limitations.

Should a company include claims where the company is uncertain of some liability facts, or where the facts are hotly disputed between the parties? If, from the initial review, it appears that the claim presents adverse liability problems, even where the investigation is not complete, this claim may still be a great candidate for pre-suit mediation. Among these types of claims are those that have known evidence problems that cannot be fixed by a company's defense team, such as claims that involve missing incident reports or statements, destroyed video or photographic evidence, or perhaps key fact witnesses who were terminated under less than ideal conditions and cannot be located. In these situations, you know the claim exposure can, and probably will, worsen with discovery, but the other side does not know this yet, prior to formal discovery. This uncertainty on both sides of a negotiation as to where a claim might go if litigated can be just the push needed to get a reasonable settlement on the books.

When assessing claims for possible pre-suit mediation, the first criterion a company should apply is whether this is a claim that the company would like to settle rather than litigate.

Claims with disputed liability facts are often excellent candidates for pre-suit mediation. Through opening sessions and caucus during the mediation, key misunderstandings can often be clarified to recalibrate and tighten the negotiating window for the claim. This would most likely not be possible in over-the-phone negotiations.

Early mediation also provides an important chance for your corporate representative or settlement advocate to meet the claimant and assess the type of witness that the claimant might make in the venue, including the claimant's perceived credibility. This assessment can be a strong predictor of how a jury would respond to the claimant's case at trial. Without pre-suit mediation, the claimant's deposition usually provides the first opportunity for the company, through defense counsel, to size up the claimant's veracity and potential jury appeal. Depositions occur after suit is filed and typically after written discovery has been accomplished, so they can be highly adversarial.

In addition, mediation of claims usually doesn't happen until a year or more after suit filing, further ratcheting up the acrimony, as well as costs, for both sides.

At pre-suit mediation, a settlement counsel or corporate representative appears on the company's behalf with the objective of trying to settle the claim. An apology can be extended where appropriate, for the difficulties the claimant has faced without admitting liability. For claims brought against retail and hospitality defendants, where the claimant is typically a customer, appreciation for the claimant's business can be acknowledged. This cordiality sets the stage for discussing differences in perspective on liability and case value, usually without acrimony or fear of shutting down negotiations. Often, in this setting, the claimant will hear the factual disputes and key legal arguments that the defense will make for the first time that present often unexpected potholes in the road to any recovery the claimant may seek through the court system. This dialogue can also help to reset expectations for dollar settlements.

Some clients will allow smaller dollar claims to mediate pre-suit, however, when they are already planning to send a representative to the venue to negotiate other claims that perhaps have higher perceived exposure.

I offer a word of caution here about the information-gathering benefits of pre-suit mediation. It is extremely important from my experience not to develop a reputation for using the process only as a thinly veiled effort at informal discovery if the intention is not to make a good-faith offer to settle the claim. I share the same advice with counsel for claimants when I see one coming to the table with seemingly unrealistic and intractable demands. This type of practice can easily backfire if you want a reputation for fair dealing, and it can result in great difficulty convincing parties to agree to the process again in the future. For corporate defendants, word gets around quickly among the well-connected members of the plaintiffs' bar if you tend to come to the table with less authority than is fair to resolve the claims on a consistent basis, seriously damaging a company's overall ADR program effectiveness.

Most of my clients generally exclude from consideration for pre-suit mediation claims they previously denied. An exception to this rule may arise, however, where the claim presents a compelling damages picture with significant defense fees and costs expected. Clients may choose to allow these claims to proceed through early mediation, suggesting a compromise offer to avoid litigation, especially where payback medical obligations may be reduced through negotiations with providers and lienholders to effectuate a settlement. Sometimes making a time-limited compromise offer that comes off the table after pre-suit mediation can force the other side to be more realistic about its chances of prevailing with its claim in the court system.

The ADR process may be used to put an offer on the file that represents the cost of defense, or something close to it, to see if litigation can be avoided. Again, having a good faith basis for the strong defense arguments presented is critical to keeping good will with the plaintiffs' bar for the company's ADR process. It is also important to set expectations properly during initial conversations with opposing counsel about ADR scheduling. If the company has previously denied a claim, takes another look, and then intends to make an offer through pre-suit mediation, but still views the claim as one presenting very little exposure, the company should consider telling this to the claimant's attorney. The claimant and his or her counsel will hopefully appreciate the candor, and if the attorney and claimant don't feel the process is worth their time, given expectations, they can decline the invitation. Often, I find the attorney representing a claimant with unrealistic expectations appreciates the opportunity afforded by the ADR process for the client simply to have his or her grievance heard. The claimant also may benefit from the perspectives shared at early mediation from the company's advocate and the mediator on how the facts and legal arguments may differ from initial perceptions. Plaintiffs who have been influenced by billboard advertisements and commercials promising high-dollar settlements often learn for the first time at mediation that their case has problems. Even when the claim cannot settle, a claimant's attorney frequently values the chance that the process provides to give the claimant even a compromise offer and perspective, and a chance to make a decision about the outcome of the claim, rather than put it in the hands of a judge or jury when there is significant risk the outcome may be disappointing.

Nearly all my clients exclude claims presenting evidence of fraud, unless the suspected fraud will be very difficult to prove. In that context, a cost-of-defense-type analysis for possible authority may be considered. Any negotiation opportunity offered should again include a caveat that the claim is valued only for a strict compromise, backed up with good-faith arguments for the defense.

Damages and Causation Considerations When Screening Claims for Pre-Suit ADR

After determining the claim presents liability facts that are likely adverse to the company's interests, most of my clients use additional criteria to screen candidate claims, based on the amount and type of damages asserted. This is especially true where causation is argued, but not yet proven. Should a company consider certain threshold dollar levels for claimed damages that exclude certain categories of claims, both on the high and low end? Possibly so, but I recommend that you use these considerations with some flexibility.

On initial consideration, claims that present special damages under a certain dollar amount may not seem to be cost-effective candidates for pre-suit mediation, even when resources are significantly leveraged, either by limiting time for the negotiating session or where multiple claims are batched in the same venue for negotiations. Some clients will allow smaller dollar claims to mediate pre-suit, however, when they are already planning to send a repre-

sentative to the venue to negotiate other claims that perhaps have higher perceived exposure. The value the company places on the claim for settlement may contrast with what the claimant's attorney and his or her client believe the claim is worth, and mediation may help close the claim after a claims examiner's efforts using telephone and email negotiations have failed. A company may already have retained a mediator under a fixed fee who can allocate a reduced amount of time based on a schedule for the smaller exposure matters to justify the process cost. In my career at The Home Depot managing litigation, I was compelled by our data analyses showing that litigation costs often were two or three times higher than the settlement value of the claim if an opportunity had been created to convince the claimant to settle before suit was filed.

When targeting a claim asserting more significant exposure for pre-suit mediation, it is important before scheduling the mediation to consider what information is needed for whoever will have the company's authority during the mediation to be comfortable extending a settlement offer adjusted to the exposure. A claim that poses significant exposure is not likely a claim that you want to mediate with other claims in a multiple-matter format. The parties should first agree to a dedicated, future date that allows ample time for all post-incident medical or wage-loss records to be gathered from the claimant. The mediation timing should also consider whether the in-house claims and the legal teams need any kind of analysis, including medical, liability, human factors, or accident reconstruction, to help them define the claim's ultimate potential exposure and possible settlement value.

With higher exposure claims, clients may require that they receive records independently from the treating providers through medical authorizations, instead of simply from a claimant's attorney. These records may also include those that establish a party's baseline condition. Pre-incident medical records dating back three to five years, or more, before the date of loss may be requested to assess any preexisting conditions and analyze causation.

Finally, the company may want to run the higher exposure claim by outside defense counsel, who would litigate the case if it does not settle, to get an opinion on the viability of legal theories, possible verdicts, and settlement value. The company may desire an independent counsel's input on unusual legal issues. Or the company may want to get additional opinions on the claim exposure in the venue, information about the counsel's experience with the judge before whom the claim would likely be litigated and tried, or perhaps information about previous experience with the counsel representing the claimant. Outside counsel may be asked to conduct scene investigations or to interview employee witnesses to help evaluate their credibility and forecast how they may be perceived by a jury. Outside counsel may also be asked to perform background investigations on the claimant, including following up on index hits and performing docket searches to discover as much information as possible about prior claims or accident experience, or possibly to obtain a prior criminal history that could affect the claimant's credibility.

Pre-Suit ADR to Address "Still Treating" Claims

What about claims where the attorney represents that the client is "still treating," rebuffs or ignores requests for a demand, and seemingly puts off efforts to try to negotiate? Can and should these claims be pulled into pre-suit mediation? There are many reasons why claims tend to stagnate, despite claims examiners' best efforts to move the files along to a negotiation.

National and regional consolidations of plaintiff firms have created more and more mega-sized "mill" practices that draw clients through call centers, using advertisements on buses and buildings. It is my experience that claimants' attorneys with this type of high-claim volume often are not up-to-date on the status of their clients' medical treatment, so a slow response rate, or a failure to respond at all, may simply be due to the fact that they have not had a chance to get up to speed on a file. A more ominous sign may be that the firm is attempting to manage the claimant's care proactively, with providers treating under liens or letters of protection. These providers often don't (or represent that they do not) accept insurance or Medicare, running up exorbitant bills to inflate demands, and ultimately, "boardable" special damages at trial.

My experience with these mill firms is that claims are often handled from intake up to suit filing by legal assistants or case managers with little oversight at the pre-suit stage from the attorney who would ultimately handle the claim in suit. These attorneys need to settle a portion of their claims for the firm handling them to remain profitable, and the settlements fund the cases that they intend to litigate and take to trial. The attorneys are also likely dealing with calls from frustrated clients wanting immediate results. A pre-suit mediation invitation that extends the opportunity for an in-person resolution near the claimant's and the attorney's locale, with the prospect that release documents would be on hand, ready to be signed if the claim settles, and the promise that a check would be delivered soon after settlement, will often attract the attention of even the most recalcitrant attorneys.

Targeting deadlines for receipt of demands with plenty of follow up can help bring in records and much more quickly accelerate a stalled claim into a negotiation posture at pre-suit mediation. The mediation invitation also requires that, at least in theory, the attorney who may ultimately litigate the claim review the file and share the invitation with the client. The attorney is forced to prepare for the mediation, then spend time with the client in person during the actual negotiating session. This can also help the attorney and the client more fully appreciate weaknesses in the case that were not previously considered or evaluated, and perhaps reconsider initially unreasonable demands.

Occasionally, my clients encounter situations where claimants' attorneys send their settlement demands, bills, and records and appear ready to begin negotiations to resolve their claims, and then, for the first time, assert that a provider has recommended that the claimant have a future surgery. Should the company proceed to mediation anyway, and try to cut off treatment before costly procedures occur that will drive up the bills, making settlement later likely more expensive and difficult to achieve? Can pre-suit mediation potentially help with these types of claims? This

is a question that my clients do not answer uniformly. Some clients would rather make an offer that includes at least some premium toward a possible future surgery to try to cut off the potential future exposure. Others prefer to send a strong message in advance of any proposed mediation that they will not pay for surgeries that are "recommended" when it is uncertain if these procedures will ever happen, particularly where causation for the underlying injury may still be disputed.

Generally, claims in states with longer statutes of limitation work well for pre-suit ADR, since there is more time for investigation, record gathering, communication between claims examiners and the claimants' firms, and negotiation before suits are filed.

The increased frequency with which claimants receive treatment under letters of protection have brought this issue to a boil in many states. Treating providers with a stake in the outcome of potential litigation partner with claimants' attorneys to drive up the cost of procedures artificially, and they even sometimes suggest surgeries that arguably may not be necessary. Pre-suit mediation can be a very effective process through which the company can share a hard stance that it will not pay for surgeries and other procedures that the company does not believe will happen or that would not be compensable anyway, based on causation arguments. With the assistance of a strong mediator, the settlement advocate can play out the "what ifs" at mediation to illuminate why a settlement offered now should be accepted, or the advocate can argue that the reasonableness, necessity, and cost of procedures undertaken later may be successfully challenged in litigation.

Methods for Screening Candidate Claims

Once candidate claims have been investigated to determine liability facts, receive a least a preliminary review of causation for claimed damages, and otherwise meet the company's basic criteria to warrant a settlement offer, the actual referral of the claim to pre-suit mediation can take place in various ways. Some clients use data reports to cull claims for inclusion, based on such factors as aging, claim type, and venue. This is a particularly effective way to get an ADR process started to target certain areas of the country, for example. Companies that closely analyze legal fees may have certain venues where they pay significantly more on average to defend claims and where they have a higher volume of aging matters. Others target claims from venues where they have been hit with bad verdicts, received adverse discovery rulings, or historically failed to achieve rulings that were favorable to the defense on summary judgment, especially with premises liability claims.

Generally, claims in states with longer statutes of limitation work well for pre-suit ADR, since there is more time for investigation, record gathering, communication between claims examiners and the claimants' firms, and negotiation before suits are filed. As a result, ADR can save companies costs on the damages side; it has been the experience of most of my clients that the longer claims stay open, the more claimants continue to treat for alleged injuries, even undergoing surgical procedures that may not be necessary or related.

Florida, where the statute of limitations for personal injury/premises liability claims is four years, is a very popular venue for almost all my clients who have claims there. In addition to having some extremely litigious, high-verdict area communities, the demographics in Florida also feature an aging population ripe with challenges for adjusting and settling claims. A significant portion of claimants have pre-incident degenerative disease processes already underway that in and of themselves may warrant medical treatment at the time of the subject accidents. Some members of the plaintiffs' bar use letters of protection particularly aggressively in Florida. They are also notorious for directing their clients to medical and other treatment providers who will run up bills and often perform questionable procedures, while refusing to accept insurance or Medicare. These factors all drive up and artificially inflate the medical bills over time prior to claim resolution.

The second method to screen candidate claims for ADR involves establishing customized criteria for a company's claims-adjusting team to use on a weekly basis as they work their files. From my experience, this is the best method for sustaining a lasting and systematic pre-suit ADR process that will achieve maximum results. Well-trained claims examiners can help persuade the claimant's attorney to agree to early ADR. Where senior leadership incentivize it, and the company offers proper education and encouragement, claims examiners can become extremely savvy in encouraging pre-suit ADR as an extension of their adjusting process. They can learn to recognize when the ADR process may be able to bring the parties closer in negotiations and, ultimately, help get more of their claims settled earlier. Where claims that have stagnated can be moved into ADR, claims examiners can focus their time and efforts closing more files through telephone negotiations from their desks, increasing their overall efficiency.

Incorporating pre-suit ADR into a company's routine matter management takes practice, patience, and training, but the payoff can be significant, reflecting positively on all team members and the outside partners, such as outside counsel, who help adjust and settle claims for their clients.

The Role of Outside Defense Counsel on Early ADR Claims

Another key factor affecting how companies may succeed by using early ADR processes stems from their ability to select and retain the right outside legal partners to help them enhance their results. A dedicated outside settlement counsel or corporate representative retained for the specific

role of accomplishing settlement is a hallmark of the pre-suit ADR approach. However, a successful, early ADR model also depends on the effectiveness of a company's chosen outside defense counsel in these matters. I always advise new client prospects contemplating pre-suit mediation that if they are not willing ultimately to defend their company's brand through trial, a pre-suit ADR program will not be as successful over time as it otherwise would have been. Achieving a reasonable early settlement inherently depends on how the claimant's attorney views the threat of a vigorous defense from their expected opponent in litigation as an alternative to settlement.

It is vital when considering which claims to include in a pre-suit ADR program that a company routinely track and continually analyze its history defending claims in litigation. The company should conduct ongoing internal reviews of the theories of liability brought against them, which present similar fact patterns and arguments, and regularly solicit the input and advice of its retained outside counsel experienced in litigating these issues on any trends. The company should also benchmark with other companies, using its regional and national trends as the basis. What is the company's history with defending claims that fall into the same categories, where the plaintiffs' attorneys asserted similar allegations? These theories often weave and bob as the plaintiffs' attorneys strategize on ways to get around summary judgment, overcome unfavorable past precedent in motions practice, and rebound from unfavorable verdicts at trial.

The "mode of operation" theory is an example of one way that plaintiffs' attorneys try to generate liability exposure for retail companies from a pattern or practice of merchandising products, or through some other component or practice of store operations. In many of these matters, if a claim were viewed solely based on its facts, it would be more likely to be dismissed outright or lost at trial. These theories are routinely asserted to try to get around summary judgment or to create arguments for liability in many venues.

Feedback from defense counsel based on their experience defending other clients in given venues, often with the same players, can provide additional benchmarking assistance to help companies track and forecast plaintiffs' lawyers' theories and tactics. A defendant may then choose to test these theories through litigation rather than early settlement, where the claims and theories may yield more favorable defense outcomes. If the company wins one of these cases at trial or through summary judgment, it could have a very positive effect on the ability to settle similar future claims for much more reasonable numbers. The company can possibly include claims with similar theories that will be costly to defend in an early resolution group as viable for pre-suit mediation—and use the previous positive results to persuade the opposing counsel why their clients should take only a fraction of the perceived settlement value. Alternatively, the company may choose to deny or defend all claims in these categories through litigation and up to trial.

Conclusion

In the past decade, pre-suit mediation has continued to grow in popularity and is now embraced by some of the most innovative claims and legal departments in the country as an indispensable method to protect their brand, keeping claim and lawsuit volumes in check. It has certainly not yet reached "disrupter" status for the defense community as we know it, nor do I expect it ever will. Two main reasons why the process is successful, in my view, are because the burdens of litigation and the threat of trial can be presented effectively to a claimant through early mediation as less desirable alternatives than settling for a fair number early. Both sides gain a significant benefit by giving the process a try.

Whether a company can achieve measurable financial results from a more aggressive and systematic use of a pre-suit ADR approach depends on how its leadership drives risk management resources and stakeholders from a more passive to a more proactive litigation-avoidance philosophy. Unless a company is willing to embrace and continuously push change from the top down, the prospect for substantial savings through the approach is more limited. Adding the tool of pre-suit mediation to long-established, traditional adjusting methods also requires the dedication of company leadership to training and providing proper resources for claims investigations and analysis. It takes a company that knows how much it spends to defend claims, and it takes a company that is not afraid to measure itself and challenge stakeholders throughout the entire process to improve.

A systematic and aggressive candidate-screening approach may be a stretch goal for some companies. However, with initiative, training, and the services of a strong and experienced pre-suit settlement advocate, any claims department can use these same principles and the process described here to achieve great results through pre-suit mediation. Even resolving just a handful of problem claims that otherwise would likely take years to bring to closure through litigation can bring substantial savings to the bottom line. Closing these files without the risk of an adverse verdict will also go a long way toward protecting the company's brand from the potential pitfalls of bad litigation and public trial outcomes. FD

California, from page 15

with a six-month grace period, and businesses subject to it must be ready. Compliance with several aspects of the CCPA will be as simple as updating privacy policies and disclosures. Other aspects present larger hurdles. For instance, businesses must have in place the infrastructure necessary to respond to and implement requests for information, requests for deletion, and requests for opt-outs. Moreover, businesses that sell consumer personal information should treat the CCPA as a significant threat to the viability of their business models, and they should plan accordingly.

As explained above, the CCPA has been amended many times since its passage in June 2018, and the final implementing regulations are still months away. The CCPA will likely be amended again several times in the near term—to say nothing of the potential for preemption by legislation currently being discussed at the federal level. But the core ideas animating the CCPA are not likely to change, and in fact, they are being developed and implemented by other state governments across the country. FD

Finding the Right Expert

Expert Witness Retention and Management in Personal Injury Litigation

By Megan S. Peterson

By doing your ground work, you can identify potential candidates, choose wisely, manage your expert, and achieve good results for your client.

When defending personal injury cases, one frequent question is whether an expert witness should be retained. The principal goal of expert retention in most defense litigation is to contain the client's exposure, while keeping costs in check and maintaining efficiency. Ultimately, your expert should align with your theory of the case and help bring resolution to fruition, while not breaking the bank. In many instances, associates and young partners are tasked with identifying, vetting, and managing the defense's experts. However, as a younger practitioner, experience and a referral base are still growing, making the task more complex and likely more time-consuming and costly. With some suggestions and tips, any practitioner, whether an experienced trial lawyer or a new associate, can manage the task competently and produce good results.

Research the Role Your Expert Will Fill

After you've investigated your case and understand the facts at issue, begin considering whether you may need an expert and what role the expert will need to fill in your case. Often, the best way to do this is to research your jury charges and the elements needed for the plaintiff's burden of proof. In fact, at the outset of your case, it is wise to research the foundation for a motion for summary judgment. You will better understand how you can develop your case for motion practice and the facts needed from the plaintiff and witnesses. The research also will allow you to assess whether and to what extent expert testimony is typically needed in similar cases. With this research, you will know whether the plaintiff needs to hire an expert to meet his or her burden of proof and can anticipate the plaintiff's needs, as well as yours as you develop rebuttal opinions.

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Sometimes, such thorough preparations are not realistic. You may receive opposing counsel's expert designation or report and, at that point, realize that you may need an expert in your case. However, whether you anticipated the expert retention, or were broadsided by an expert report with little time to spare on your own deadlines, you still must ensure that whoever you hire is right for your case and will address the issues appropriately. To this end, be wary of a scheduling or case management order that separates deadlines for expert designations or disclosures and expert reports. In such instances, you may only know *who* your opponent has hired but not *what* that expert's opinions will entail, and thus designating your own expert will be more challenging. Strive to obtain a scheduling order from the court that provides you with both the identity of and opinions held by the opposing expert, or the report of the expert, with sufficient time to identify and obtain a report from the experts who you intend to retain.

Thus, once you have the benefit of knowing who opposing counsel retained, begin researching that individual. Under the federal rules, opposing counsel must provide you with their expert's qualifications or credentials and a list of previous testimony for at least a period of four years. Fed. R. Civ. P. 26(a)(2)(B). Research the cases in which the opposing expert has previously testified or been retained. Do they involve similar facts? Can you get a copy of the expert's report or affidavits from the previous cases? Were the expert's opinions challenged or limited? In doing so, you will better understand the opposing expert's history and potential weaknesses in expected testimony or opinions. When researching, pay attention to the experts hired by the defense in those cases that effectively counteracted your opposing expert. Those individuals should be on your list of who to contact.

Identify Potential Experts

Once you understand the legal standards in your case, and hopefully have the benefit of the report from your opposing counsel's experts, the search for your own defense experts should begin. Perhaps you only need a liability expert in your case to assess the safety of the condition at issue. You may need a biomechanical engineer to assess whether the incident could have caused the injuries, or a human factors expert to weigh in on whether the incident could have been avoided if the plaintiff had taken more timely action. Some cases require different and unique expert types that you may never have had to use before. The search begins.

As suggested previously, in researching your opposing expert, always be mindful of the experts who were retained by the defense in the opposing expert's previous cases, particularly if a favorable result was obtained in motion practice or at trial. The same approach is appropriate as you are researching supporting cases for a summary judgment. The next step is to call the defense lawyer; chances are he or she is willing to help and share her experiences in the case involving the expert. You will likely collect valuable information, such as pitfalls to avoid, or even copies of depositions or reports.

However, if you are starting with a blank slate, a similar approach can be taken to begin gathering potential experts. Ask colleagues—both in your firm and elsewhere—for recommendations. Contact DRI substantive law committee members or those in your local defense or trade organization for recommendations. DRI's own resources, such as the committees' "Community" pages for posting requests for recommendations, or the DRI Expert Witness Database, can prove great starting points. Thomson Reuters offers expert witness search assistance, where they will search available experts and schedule interviews for you, with their fee incorporated into the expert's retention should you choose to hire the recommendation. Contact the larger forensic expert witness groups for assistance locating someone uniquely suited to your case. Once you have your list of experts, the next step is to determine who is the best fit for your case.

Investigate Your Own Potential Expert

Just as you researched your opposing expert, it is essential to research those you seek to hire for your own case. You must obtain information from the expert, as well as third parties, to evaluate fully the expert's appropriateness and fitness to withstand any challenges that may arise.

First, contact the expert to ask for a copy of his or her curriculum vitae or resume and the rate that expert typically charges. Set up a phone or in-person interview to get to know the expert and explain the facts of your case and the role that you seek the expert to fill. Find out if he or she has handled similar cases or issues and discuss the methodology that would be used to render opinions. Inquire about previous testifying experience and get a list of prior testimony to assess similarity in cases. Although previous testifying experience is not always essential, balance inexperience with the likelihood that your expert may be deposed or testify at trial. Consider the expertise and aggressiveness of your opposing counsel. If opposing counsel has a reputation for vigorous cross-examination, perhaps you should opt for an expert with testifying experience. A skilled expert with weak testimony does not advance your case.

Second, don't take what the expert tells you at face value. Conduct independent research. Search generally online to determine if the expert has written publicly available articles or blog posts. Are those posts favorable to your case, or would they present a method of attack for opposing counsel? Check whether the expert received any sort of press mentions, positive or negative. If he or she has social media accounts, particularly LinkedIn, determine whether he or she posts professional information; and again, are the posts favorable, or would they perhaps weaken the expert's opinions in your case?

Third, conduct legal research to ensure that the expert can withstand a *Daubert* challenge. Under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, courts must assess the expert's fitness by applying the following standards:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the *testimony is based on sufficient facts or data*;
>
> (c) the testimony is the product of *reliable principles and methods*; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.

Expert Witness, continued on page 55

Pay Attention to the Road

Current Regulatory, Legislative, and Litigation Trends Affecting Advanced Driver Assistance System and Highly Automated Vehicle Technologies

By Bard D. Borkon

As highly automated automobile technologies continue to develop at breakneck speed, government agencies and courts have started to address the many legal questions arising on this new frontier.

Attorneys handling cases involving advanced driver assistance system (ADAS) and highly automated vehicle (HAV) technologies should be mindful of recent trends involving federal and state government regulatory agencies and legislators, as well as emerging case law. The National Highway Traffic Safety Administration (NHTSA) is taking steps to modernize its regulations to encourage and complement the development of automated vehicle technologies. Meanwhile, various states are encouraging the automotive industry to test HAVs or autonomous vehicles (AVs) within their borders. On the civil litigation front, plaintiffs are pursuing "lack of" ADAS technology claims, as well as claims that the technology did not

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properly perform, including technologies such as forward collision warning, lane change assistance, and pedestrian avoidance. Courts are also beginning to address defendants' arguments that such claims are preempted by federal law, as reflected in NHTSA's policy statements. This article will summarize several important developments in these areas.

Federal Regulatory Activity

The National Highway Safety Administration's activities related to automated vehicles have continued to evolve. In addition to issuing policy statements and encouraging adherence to voluntary standards, among other things, in May 28, 2019, NHTSA published an advanced notice of proposed rulemaking on testing and verifying compliance with existing crash-avoidance federal safety standards for automated driving-system-dedicated vehicles that don't have traditional manual controls.

Federal Automated Vehicle Policies

In 2016, NHTSA began publishing a series of policy statements regarding automated vehicles. *See Federal Automated Vehicles Policy: Accelerating the Next Revolution in Roadway Safety,* NHTSA (Sept. 2016); *A Vision for Safety*: *Automated Driving Systems 2.0,* NHTSA (Sept. 2017); *Preparing for the Future of Transportation, Automated Vehicles 3.0,* NHTSA (Oct. 2018). Through these policies, the agency seeks to further its goals of encouraging technological advancements and innovation, while also providing a reasonable degree of safety for the motoring public. These policy statements offer "voluntary guidance and policy considerations for a range of industry sectors, including: manufacturers and technology developers, infrastructure owners and operators, commercial motor carriers, bus transit, and State and local governments." *See* Press Release, US Department Transportation, US Department of Transportation Releases 'Preparing for the Future of Transportation: Automated Vehicles 3.0'(Oct. 4, 2018). Thus far, however, NHTSA has refrained from promulgating regulations that establish design specifications or performance criteria for automated vehicle technologies.

The "*Automated Driving Systems 2.0*" policy statement includes voluntary guidance for manufacturers, encouraging an allocation of responsibility among federal, state, and local governments and emphasizing the need to develop public acceptance of automated vehicle technology. In this document, NHTSA provides

guidance to AV designers by identifying twelve key safety-related considerations that should be addressed in the design process of Society of Automotive Engineers (SAE) Level 3–5 automated vehicles (see Illustration 1).

The twelve safety-related areas are system safety; operational design domain; object and event detection and response; fallback (minimal risk condition); validation methods; human machine interface; vehicle cybersecurity; crashworthiness; post-crash ads behavior; data recording; consumer education and training; and federal, state, and local law. *See Automated Driving Systems 2.0, supra,* at 5–15. Then NHTSA encourages AV designers to publish "Voluntary Safety Self-Assessment" (VSSA) documents that reflect how the twelve safety considerations are being addressed, without revealing highly proprietary information. *Id.* at 16. As of the date of writing this article, sixteen companies had published their VSSAs on NHTSA's website. *See* Company VSSA Disclosures, Automated Driving Systems Voluntary Safety Self-Assessment Disclosure Index, NHTSA, https://www.nhtsa.gov.

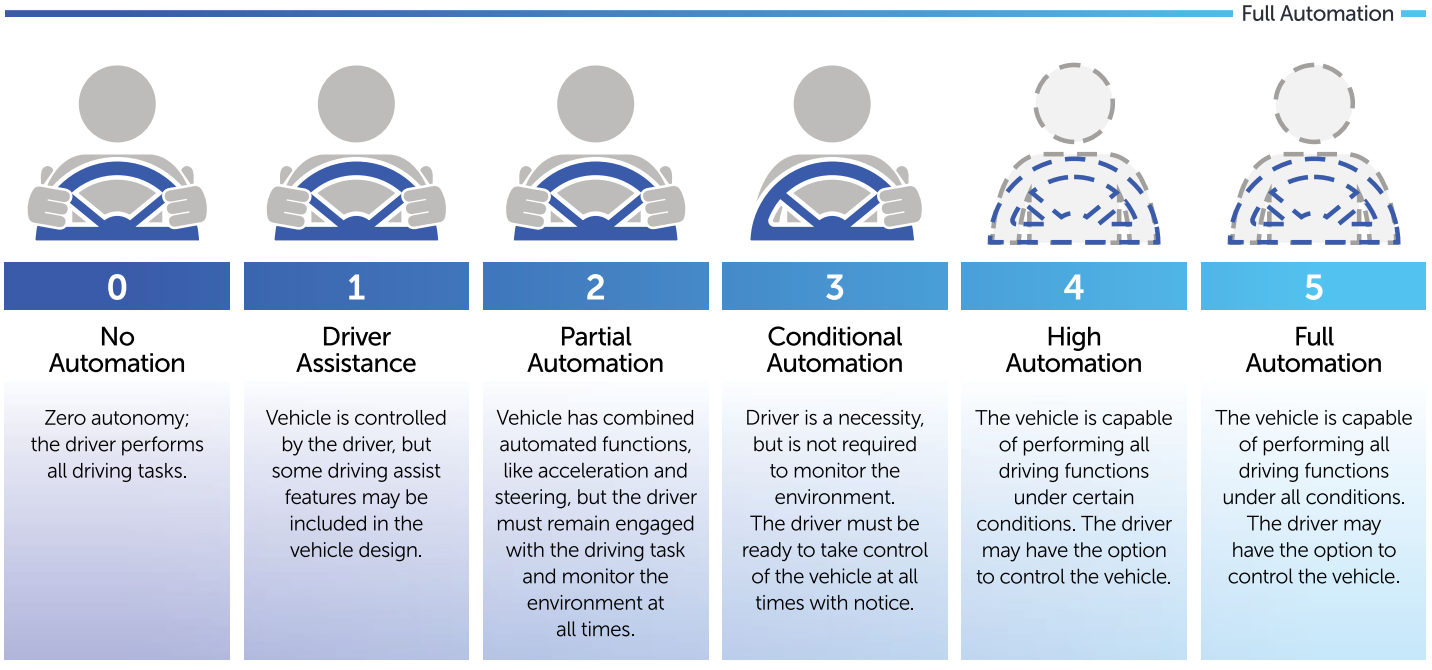
The "*Automated Driving Systems 3.0*" publication complements, but does not replace, NHTSA's *Automated Driving 2.0*, having a focus on future preparedness for automated vehicles and including guidance for training and licensing of automated vehicle test drivers. *Automated Driving Systems 3.0* introduced six principles that reflect "a clear and consistent Federal approach to shaping policy for automated vehicles," which are (1) prioritizing safety, (2) remaining technologically neutral, (3) modernizing regulations, (4) encouraging consistent regulatory and operational environments, (5) proactively preparing for automation, and (6) protecting American freedoms (*e.g.*, the freedom to drive one's own vehicle). *See Automated Vehicles 3.0, supra*, at iv–v.

Other Recent Federal Activity

On January 18, 2017, NHTSA denied a petition of rulemaking jointly submitted by Consumer Watchdog, the Center for Auto Safety, and Public Citizen. The petition sought to require that all automobiles be equipped with various types of automatic emergency braking (AEB) systems. The petition was denied by NHTSA "because the Agency has already taken significant steps to incentivize the installation of these technologies in a way that allows for continued innovation and technological advancement." Automatic Emergency Breaking Standards, 83 Fed. Reg. 8391, 49 C.F.R. 571, Docket No. NHTSA-2017-0005(Jan. 25, 2017). In its denial, NHTSA cited the success of the agency's expanded New Car Assessment Program (NCAP), which provides information on whether an automobile offers various ADAS technologies. *Id.* The program has "resulted in 20 light vehicle manufacturers, representing more than 99 percent of light motor vehicle sales in the United States, committing to voluntarily installing forward crash warning and crash imminent braking." *Id.*

More recently, on June 19, 2018, NHTSA issued a cease-and-desist letter to the company selling the "Autopilot Buddy" device, which was intended to disable Tesla's safety feature that warns the driver when hands are removed from the steering wheel. *See* Press Release, NHTSA, Consumer Advisory: NHTSA Deems 'Autopilot Buddy' Product Unsafe (June 19, 2018). NHTSA stated that the "product was intended to

Illusration 1: SAE Automation Levels



The Five Society of Automotive Engineers (SAE) Automation Levels (From NHTSA, A Vision for Safety: Automated Driving Systems 2.0 4 (Sept. 2017)).

circumvent motor vehicle safety and driver attentiveness" and was therefore unacceptable. *Id.* This action signals that NHTSA will not hesitate to act when it sees a technology that is likely to pose an unreasonable risk of accidents to the motoring public.

Then on May 28, 2019, NHTSA published an advanced notice of proposed rulemaking, which sought the following:

> public comment on the near- and long-term challenges of testing and verifying compliance with existing crash avoidance (100-series) Federal Motor Vehicle Safety Standards (FMVSSs) for automated driving system-dedicated vehicles (ADS-DVs) that lack traditional manual controls necessary for a human driver to maneuver the vehicle and other features intended to facilitate operation of a vehicle by a human driver, but that are otherwise traditional vehicles with typical seating configurations.

See 84 Fed. Reg. 24,433, 24,436 Docket No. NHTSA-2019-0036 (May 28, 2019). In the notice, NHTSA mentioned that Google, for example, had raised concerns about how it could certify 100-series Federal Motor Vehicle Safety Standards (FMVSS) compliance for a vehicle that lacked controls "such as a steering wheel, accelerator pedal, or brake pedal." 84 Fed. Reg. at 24,436. The proposed rulemaking notice, therefore, suggests potential amendments to the FMVSS, such as removing the requirement of a manual foot-controlled brake or modifying required test procedures to refer to alternative (non-manual) controls. *Id.* at 24,438–39. These proposals reflect NHTSA's commitment to removing regulatory barriers that could interfere with the development and ultimate proliferation of various types of autonomous vehicle technologies.

In its proposed rulemaking notice dated May 28, 2019, NHTSA also announced it intends to issue two more proposals for removing regulatory barriers for ADS technologies in the FMVSS 200-series crashworthiness standards, and to address issues "pertaining to telltales, indicators, and warnings in ADS-DVs." 84 Fed. Reg. at 24,433.

At least one other U.S. Department of Transportation agency has also explored ways to remove regulatory impediments to the development of ADS technologies. On March 26, 2018, the Federal Motor Carrier Safety Administration (FMCSA) issued an advanced notice of proposed rulemaking, requesting public comment on existing Federal Motor Carrier Safety Regulations (FMCSRs) to determine if updated, modified, or eliminated regulations were needed to facilitate the introduction of automated driving systems equipped on commercial vehicles. 83 Fed. Reg. 12,933. In this notice, the FMCSA stated that it was particularly

> interested in comments concerning how different interpretations of the applicability of FMCSRs to ADS equipped [commercial vehicles] could represent a barrier, *e.g.*, whether the FMCSRs, under certain conditions, could be read to require, or not require, the presence of a trained commercial driver in the driver's seat. To the extent commenters do identify unnecessary barriers, how could FMCSA use its available regulatory relief mechanism to appropriately remove or reduce those barriers?

Id. at 12,935. One specific example of a current regulation that may change is the prohibition against using hand-held devices while driving a commercial vehicle; the notice asks, should "a human driver in a CMV [commercial motor vehicle] with ADS be allowed to use a hand-held wireless phone while the ADS is in complete control of the vehicle?" *Id.* at 12,935–36.

Thus, if anything, current federal agency activity reflects a desire to remove regulatory barriers to the development of ADAS and HAV technologies, rather than enact new regulations to govern them.

Congressional Legislative Activity

Congress has introduced two significant acts that may have bearing on cases involving advanced driver assistance systems and highly automated vehicle technologies: the Safety Ensuring Lives Future Deployment and Research in Vehicle Evolution Act and the American Vision for Safer Transportation through Advancement of Revolutionary Technologies Act.

SELF DRIVE Act (2017)

The Safety Ensuring Lives Future Deployment and Research in Vehicle Evolution (SELF DRIVE) Act passed the House of Representatives on September 6, 2017. H.R. 3388, 115th Cong. (2017). The act is intended to foster "the safe and innovative development, testing, and deployment of self-driving cars." *See* Energy and Commerce Republicans, House Passes Bipartisan Legislation Paving the Way for Self-Driving Cars on America's Roads (2017). It also would preempt state legislation aimed at regulating the design, manufacturing, or performance of self-driving vehicles. Further, the bill instructed the U.S. Department of Transportation to require safety assessment certifications for the development of a highly automated vehicle or an automated driving system. The Senate received the bill on September 7, 2017, and then referred the bill to the Committee on Commerce, Science, and Transportation. The bill has not yet been voted on by the Senate.

Thus, if anything, current federal agency activity reflects a desire to remove regulatory barriers to the development of ADAS and HAV technologies, rather than enact new regulations to govern them.

AV START Act (2017)

In September 2017, Senator John Thune (R-S.D.) introduced the American Vision for Safer Transportation through Advancement of Revolutionary Technologies (AV START) Act. *See* S. 1885, 115th Cong. (2017). This bill is in some ways similar to the SELF DRIVE Act in that it seeks to preempt states from regulating safety evaluations of HAVs or ADAS. Even though the AV START Act initially had bipartisan support, the bill did not receive

a vote in the full Senate during the 115th Congress, and its future status is uncertain at best.

State Executive Branch and Legislative Activities

Many states have issued executive orders or proposed and passed legislation concerning automated driving systems. (See Illustration 2.) The states' approaches to automated driving take many forms and vary in scope. California has been very active, passing eight bills since 2016, while other states have avoided passing laws altogether. Other states with significant legal activity related to HAV technology include Arizona, Florida, and Pennsylvania. As explained below, many states have adopted laws to define terms, manage safety concerns, allocate funding, and regulate testing for autonomous vehicles using a variety of measures and controls.

Public safety appears to be a common concern for various states' governors.

State Executive Orders

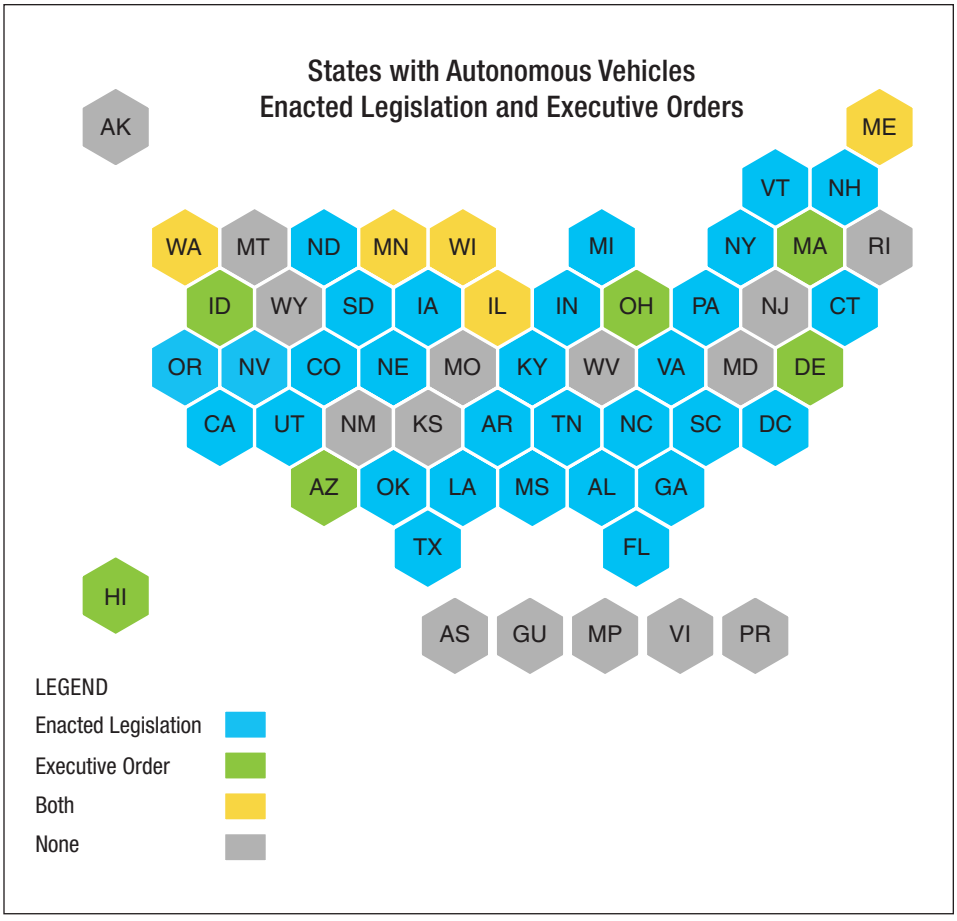
The governors of eleven states, ranging from Hawaii to Maine, have issued executive orders for promoting or assessing autonomous vehicles. *See* Nat'l Conf. State Legislatures, Self-Driving Vehicles Enacted Legislation (Oct. 9, 2019). (The National Conference of State Legislatures (NCSL) maintains a searchable, real-time autonomous vehicles legislative database, tracking autonomous vehicle bills that have been introduced in the fifty states and the District of Columbia. *See* NCSL, Autonomous Vehicles Legislative Database (AV database) (available online)). Public safety appears to be a common concern for various states' governors. In 2015, Governor Doug Ducey of Arizona directed various state agencies to "undertake any necessary steps to support the testing and operation of self-driving vehicles on public roads in Arizona." Ariz. Executive Order 2015-09, *updated by* Ariz. Executive Order 2018-04.

Massachusetts Governor Charlie Baker created a working group in 2016 with the expectation that the group will work with experts, the legislature, and automatic vehicle companies "to encourage the development of autonomous vehicles and their component parts in Massachusetts, and to that end," the legislature "shall work with companies in the sector to support innovation and development and consider proposing changes to statutes or regulations that would facilitate the widespread deployment of highly automated vehicles in Massachusetts while ensuring the safety of the public." *See* Mass. Executive Order No. 572.

Additionally, executive orders issued in 2017 and 2018 by other governors either establish advisory councils or opportunities to allow for vehicle testing in their respective states. Delaware, Minnesota, and Maine established advisory councils by executive order. These advisory councils are tasked with developing recommendations for strategies that assess and prepare the state's transportation network for innovations in automated vehicle technology. *See* NCSL, Self-Driving Vehicles Enacted Legislation, *supra*.

An order issued by Hawaii's Governor David Ige requires certain agencies to work with companies to facilitate AV testing. The governors of Washington, Wisconsin, Idaho, and Illinois each issued orders compelling pilot programs and interagency work groups to specify requirements for legislature involvement, review state laws that impede testing and deployment, and identify potential partnerships to leverage benefits of autonomous vehicles. Ohio's governor implemented similar orders with registration requirements for companies under a program called DriveOhio. *See id.*

Illustration 2



From Self-Driving Vehicles Enacted Legislation, Nat'l Conf. State Legislatures

State Legislation

So far, twenty-nine states and Washington, D.C., have enacted legislation related to autonomous vehicles. NCSL, Self-Driving Vehicles Enacted Legislation, *supra*. In 2018, fifteen states introduced eighteen bills related to autonomous vehicles. *Id*. According to the NCSL, "[a]utonomous vehicles seem poised to transform and disrupt many of the basic, longstanding fundamentals of the American transportation system." *Id*.

At least twelve states have legislation that defines terms such as "automated driving system," "fully autonomous vehicle," "operator," "human operator," "dynamic driving task," and "autonomous technology." These definitions are used often in pilot programs or to assist in automated vehicle compliance with functioning transportation systems. *See id*. (discussing Colorado; Connecticut; Florida; Georgia; Illinois; Louisiana; Michigan; Nebraska; Nevada; Tennessee; Texas; and Washington, D.C.).

Some of the recent legislation involves truck platooning and provides exemptions from laws against following too closely behind another vehicle. States that have adopted this type of legislation are Alabama, Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Pennsylvania, and Wisconsin. Other states have adopted legislation that is for vehicle platooning, not just truck platooning, including California, Georgia, Indiana, Nevada, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Utah. *See id.*

Alabama and North Dakota passed laws facilitating studies of self-driving vehicles. *Id.* Many states now regulate autonomous technology testing through legislative direction; Arkansas, North Carolina, and Utah each regulate testing and demonstrations in this manner. *See id.* New York amended its 2017 automated vehicle-testing requirements bill in 2018, requiring AV testing proposals to provide "a law enforcement interaction plan… that includes information for law enforcement and first responders regarding how to interact with such a vehicle in emergency and traffic enforcement situations." A.B. 9508, 2018 Leg., 240th Sess. (N.Y. 2018) (amending S.B. 2005 (N.Y. 2017)).

Some states are using legislation to allocate funding in this area. Pennsylvania has allocated funds for autonomous and connected vehicle-to-vehicle-related technology applications in transportation systems. *See* NCSL, AV database, *supra*. California is encouraging funding when "feasible and cost-effective to use advanced technologies and communication systems in transportation infrastructure to recognize and accommodate advanced automotive technologies." *Id.* California has had the most legislative activity, with eight bills between 2012 and 2018. *Id.* The eight bills address pilot projects for driver-less vehicles and authorize "the California Highway Patrol to adopt safety standards and performance requirements to ensure the safe operation and testing of autonomous vehicles[.]" *Id.*

In comparison, Florida, Illinois, and Tennessee prevent local laws that would prohibit the testing and/or use of vehicles equipped with Automated Driving Systems. *See* NCSL, AV database, *supra*. For example, Tennessee approved the Automated Vehicles Act, which preempts local regulation of ADS-operated vehicles. *Id.* The Automated Vehicles Act "[s]pecifies that the ADS shall be considered a driver for liability purposes when it is fully engaged and operated properly," and "[m]akes it a class A misdemeanor to operate a motor vehicle on public roads in the states without a human driver in the driver's seat without meeting the requirements of this Act," *i.e.*, the vehicle must be "in high or full automation mode." *Id.*

In 2018, Oregon created an AV task force charged with developing legislative recommendations for the use of autonomous vehicles on the state's highways. *Id.* Oregon's recommended legislation must be consistent with federal law, federal guidelines, and must address licensing and registration, law enforcement, accident reporting, cybersecurity, insurance, and liability. *See id.* (citing H.B. 4063, 2018 Leg., 79th Sess. (Or. 2018)). Vermont and Washington passed laws requiring task force meetings to make recommendations for AV legislation. *Id.* Other legislative efforts include public reporting. Washington D.C. passed a bill to publish a study on the effects of autonomous vehicles on the economy, government revenue, infrastructure, environment, public health, and public safety, among other things. *Id.*

Cases Addressing ADAS or HAV Technology

Courts have started to address both cases alleging a lack of advanced driver safety technology and product liability and negligence-based cases involving vehicles equipped with ADAS or autonomous technologies. A brief primer reviewing a selection of these cases is offered at the end of this article.

These advisory councils are tasked with developing recommendations for strategies that assess and prepare the state's transportation network for innovations in automated vehicle technology.

Conclusion

Advanced driver assistance system and highly automated vehicle technologies are developing and proliferating at a rapid rate. Thus far NHTSA has refrained from promulgating new regulations to set design specifications or performance criteria and has instead signaled its intent to modernize and streamline existing regulations so as not to stifle innovation. The agency has also made it clear that it will strive to maintain consistency in the regulatory environment to avoid a "patchwork quilt" of laws that vary from state to state.

If the Arizona Court of Appeals' decision in *Dashi* (summarized in the primer at the end of this article) is any indicator, courts are receptive to NHTSA's priorities, which, for one, may make it much more difficult for plaintiffs' "lack of" ADAS technology lawsuits to gain traction. Time will tell whether and to what extent preemption arguments will become a consistently effective tool for defense lawyers practicing in this area.

Overview of Recent Cases Addressing ADAS or HAV Technology

Recent Product Liability Cases Alleging "Lack of" Advanced Driver Safety Technology

Federal Preemption of "Lack of" ADAS Technology Claims:
Dashi v. Nissan North America, Inc., No. 1 CA-CV 18-0389, 2019 WL 2479936, at *2 (Ariz. Ct. App. June 13, 2019)

In *Dashi*, the Arizona Court of Appeals affirmed the trial court's ruling that a common law tort claim, alleging that Nissan's vehicle was defective because it lacked automatic emergency braking was preempted by NHTSA's refusal to require AEB through federal standards. The court reviewed the U.S. Department of Transportation and NHTSA's policies and interests regarding the development of ADAS technologies such as AEB and concluded that Dashi's "lack of AEB" tort claim was impliedly preempted because the federal government has declined to adopt a specific standard enabling manufacturers to have options pertaining to which type of AEB to adopt, and a claim like Dashi's "erects an obstacle in DOT and NHTSA's path to 'the accomplishment and execution of… [federal] purposes and objectives.'" 2019 WL 2479936, at *3 (internal quotations omitted).

The Arizona Court of Appeals relied on the Supreme Court's analysis in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), which recognized NHTSA's emphasis on allowing manufacturers to choose different safety system technologies as a way to achieve a particular objective, which in *Geier* was the development of different types of passive restraint systems. *Id.* at *2. The *Dashi* court also noted NHTSA's express refusal to require AEB, citing the fact that in January 2017, NHTSA denied a consumer advocacy group's petition for a rule to mandate such technology in passenger cars. *Id.* at *4. The court also relied heavily on NHTSA's expressly stated views on implied preemption. *Id.* at *5–6. For example, in its October 2018 policy statement regarding automated vehicles, NHTSA said:

> Under Federal law, no State or local government may enforce a law on the safety performance of a motor vehicle or motor vehicle equipment that differs in any way from the Federal standard. The preemptive force of the Federal safety standard does not extend to State and local traffic laws, such as speed limits. Compliance with the Federal safety standard does not automatically exempt any person from liability at common law, including tort liability for harm caused by negligent conduct, except where preemption may apply. *The Federal standard would supersede if the effect of a State law tort claim would be to impose a performance standard on a motor vehicle or equipment manufacturer that is inconsistent with the Federal standard.*

See Automated Vehicles 3.0, supra, at 6 (citing *Geier*) (citations omitted) (emphasis added). The court therefore concluded:

> Dashi's claims would frustrate NHTSA's federal regulatory objectives by thrusting a jury-imposed AEB standard on Nissan inside Arizona's borders. The claims would disrupt NHTSA's careful balance, diminish its non-traditional efforts, compromise its ultimate safety goals, muzzle innovation and competition in this evolving space, and strip the federal government of leverage in NHTSA's ongoing negotiation efforts.

2019 WL 2479936, at *8.

Maskiell v. Nissan, Case No. CV 2017-002695 (Ariz. Super. Ct. Nov. 2017):

This case involved a multiple-vehicle crash that occurred when the plaintiff fell asleep while driving a 2015 Nissan Quest, crossed two lanes of traffic, and collided with two vehicles. The plaintiff alleged the Nissan Quest was defective because it did not include available driver assistance technologies, such as lane-departure warning and attention-monitoring systems. Nissan filed a motion for partial summary judgment based on federal preemption.

The Maricopa County Superior Court granted Nissan's motion for partial summary judgment, concluding that "NHTSA's 2016 and 2017 policy statements and its January 2017 decision to deny rulemaking proceedings to mandate these technologies reflects the federal government's intention to preempt this field 'to incentivize the installation of these technologies in a way that allows for continued innovation and technological advancement.'" *Maskiell v. Nissan Motor Co. Ltd.*, CV 2017-002695 (Ariz. Super. Ct. Oct. 8, 2018) (granting motion for partial summary judgment) (quoting 82 Fed. Reg. 8391(January 25, 2017)). The court went on to reason that "[s]etting a standard too early in the stage of technological evolution runs the risk of inadvertently stymieing innovation and stalling the development and introduction of successively better versions of these technologies."

Waughon v. Ford Motor Co., Case No. 19CA01867 (Alachua County Cir. Ct., FL, May 2019)

The decedent was ejected from his vehicle due to a collision and was fatally injured as a result. The complaint includes allegations of wrongful death, product liability, and negligence. The vehicle collided with a commercial tractor-trailer that was blocking a traffic lane. Among other claims, the complaint asserts that the subject vehicle had "conspicuously absent safety features [that] failed to prevent or diminish the violent forces which led to the death." More specifically, the plaintiff alleges that the subject 2016 Ford Fiesta should have been equipped with certain forward collision avoidance and warning systems.

Hesselbacher v. Ford Motor Co., Case No. 2:18-cv-04777-DLR (D. Ariz. Dec. 2018)
In this product liability suit, the plaintiff died when she was struck by a truck that "was not equipped with pedestrian collision avoidance technology." The minor plaintiffs also suffered serious injuries in the collision. The case was removed to federal district court December 2018.

The federal district court issued an initial scheduling order that set a specific deadline for completing fact discovery specific to Ford's defense that the plaintiff's "lack of" collision avoidance technology claim was preempted by federal law. The initial scheduling order contemplated that the parties would brief the preemption issue before litigating other aspects of the case. On July 2, 2019, Ford notified the court that it had withdrawn its preemption defense, and a new scheduling order was entered. *See* No. 2:18-cv-04777-DLR, at dkt. nos. 40-41.

Cox v. Ford Motor Co., Case No. 2:18cv2289 (D. Kan. June 2018)
This case arises out of a head-on car collision that occurred June 2016. The plaintiff alleges Ford failed to equip its 2013 Lincoln with any type of lane departure warning system or lane assist technology, which led to a collision that killed four and injured two others. The complaint states that these technologies were available and feasible when the vehicle was designed, manufactured, and sold in 2013 and were utilized on other models the same model year. The case is pending as of the date of the writing of this article.

Recent Product Liability and Negligence Cases Involving Vehicles Equipped with ADAS or Autonomous Technologies

Miel v. First Texas Honda, Case No. D-1-GN-19-003365 (Travis Cty. Dist. Ct., Tex., June 2019)
The complaint alleges the co-defendant was test driving a new vehicle owned by First Texas Honda, when he rear-ended the vehicle occupied by the plaintiffs, resulting in injuries. The plaintiffs further allege that the co-defendant was told by the salesperson to allow the automatic braking system to stop the car as part of the sales demonstration; however, the automatic braking system did not stop the car and the collision followed.

Wong v. Daimler AG, et al., Case No. HG19009805 (Alameda Cty. Super. Ct., CA, March 2019)
The plaintiff's complaint alleges that Mercedes-Benz's forward collision avoidance system is defective, as it failed to stop a collision with another vehicle, causing injuries to the plaintiff.

Lieberman v Schumacher Auto Group, Case No. 2018ca004355 (Palm Beach Cty. Cir. Ct., FL, April 2018)
On a test drive, the defendant car dealership's employee crashed into a tree while demonstrating a vehicle's "Eye Sight" technology, which is designed to apply automatic braking when drivers are about to collide with an object or other car. The plaintiffs, passengers in the vehicle, were injured in the crash. This action is set for jury trial for the period of September 23, 2019, through November 29, 2019.

Huang v. Tesla, Inc. and State of California, 19CV346663 (Santa Clara Cty. Super. Ct., CA April 2019)
This wrongful death suit arises out of a crash that occurred while the driver was utilizing Tesla's "Autopilot" feature and collided with a barrier going in excess of 70 mph. The plaintiff's allegations include (1) negligence due to failures of the Autopilot technology system, (2) improperly designed crash-avoidance system, and (3) collision into a median caused by the Autopilot feature. In a news article, the plaintiff's attorney said, "Mrs. Huang lost her husband, and two children lost their father because Tesla is beta testing its Autopilot software on live drivers." *See "Tesla sued by family of Apple engineer killed in Autopilot crash*," Washington Post, May 1, 2019. The NTSB issued a preliminary report and determined the car was in Autopilot mode and the plaintiff's hands were on the wheel for 34 seconds total in the minute before the crash, but not detected in the last 6 seconds. *Id*.

Wood v. State of Ariz., Case No. CV2019-090948 (Ariz. Super. Ct. Mar. 2019)
In this case, a safety driver was at the wheel of an Uber vehicle that was operating in autonomous mode. The vehicle struck a pedestrian crossing the street outside a crosswalk zone, who later died from her injuries. The plaintiff filed negligence claims against the State of Arizona and City of Tempe. The vehicle had onboard dash cameras, and according to NTSB, the investigation addressed "the operating condition of the vehicle, driver interaction with the vehicle and opportunities for the vehicle or driver to detect of the pedestrian."

A media report described the significance of the case this way:

> This is the first time an autonomous vehicle operating in self-driving mode has resulted in a human death and that has huge implications for the future of AV's and their use on the road. It's possible the safety driver involved could be held legally responsible, as their role is to ensure safe operation of the vehicle, but in many ways the outcome of this incident will define the path forward for AV regulation.

Darrell Etherington, *Uber Self-Driving Test Car Involved in Accident Resulting in Pedestrian Death*, Time Crunch, Mar. 19, 2018.

The Power of Product Knowledge

The Perspective of Women Litigators in Talc Cases

By Karleen F. Murphy, Mahsa Kashani Tippins, and Claire C. Weglarz

"Good leaders inspire people to have confidence in their leader. Great leaders inspire people to have confidence in themselves."

—Eleanor Roosevelt

According to the United States Census Bureau, women make up 38 percent of the legal profession. Jennifer Cheeseman Day, Number of Women Lawyers at Record High, but Men Still Highest Earners, US Census Bureau (May 8, 2018), www.census.gov. These numbers vary slightly when we see the number of women in various roles, including leadership roles, in private practice, according to different sources. *See* Figure 1. (For Figure 1 data sources, see the end of the article).

While the discrepancy between men and women in positions of power continues to be part of law firm culture, the trend toward a more balanced gender representation is not only having a noticeable effect now, but we suspect it will have a marked difference in the future with more women working as summer associate and associates.

One common trait shared by many women leaders is the determination to overcome the challenges of their profession and rise through the ranks of a still male-dominated field. Good women leaders inspire and remind us to claim a seat at the table, build our brand, and create our mark through passion and dedication. Although the progress and advancement of women lawyers has been slower than expected, there is still a lot to applaud. In this article, we will discuss the advantages of a female's perspective when it comes to

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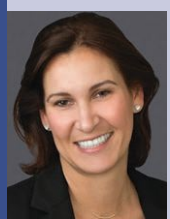


handling pretrial matters, trying cases, and managing nationwide litigation.

A Female's Perspective: Pre-Trial Litigation

The legal field remains male dominated, despite more women than ever graduating from law school. While in 2017, 50.3 percent of law school graduates were female, the statistics of women in legal practice pale in comparison to the number of men practicing in a field. For example, according to a 2015 report by the American Bar Association, only 32 percent of lead counsel or trial counsel in civil litigation are women. Only 16.5 percent of lead attorney roles in multidistrict litigation have gone to women since 2014, according to a 2017 study by Dana Alvare of Temple University, Beasley School of Law. Only 23 percent of mergers and acquisitions attorneys are women. (*2017 ALM Report*). Only 12 percent of patent court attorney appearances were made by women, a 2017 study by Docket Alarm, a legal analytics firm, found. And the International Chamber of Commerce found in a 2017 survey that in a pool of 1,488 arbitrators, only 16.7 percent were women. Talc litigation experiences the same lack of female representation.

The Value of Being a Woman in Talc Litigation

Generally speaking, being the only woman, or one of the few women in the room, holds high value in litigation. The unique setting of talc litigation only increases this value, thus placing women in an ideal position to excel and distinguish themselves for career advancement.

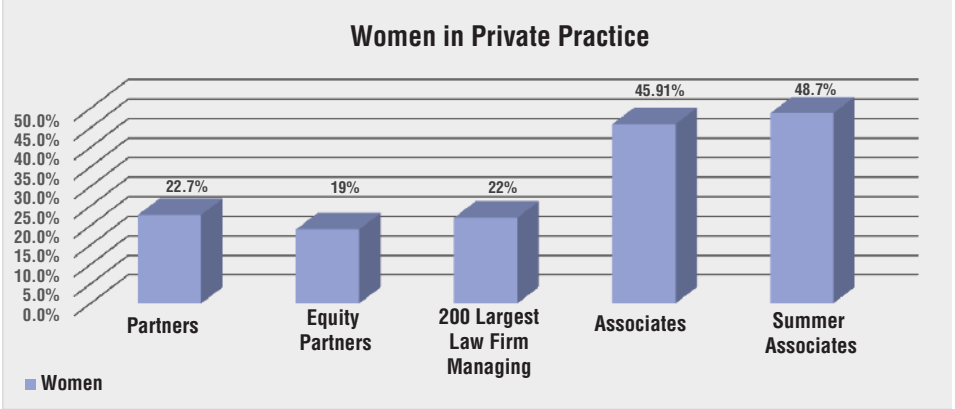
The Plaintiff's Deposition: The First Opportunity to Distinguish and Demonstrate Value

The plaintiff is often the key witness in a talc case, and thus the examiner's experience with the plaintiff is an essential tool that carries over to trial and assists with settlement evaluation. This knowledge makes the examiner a key participant in the litigation from the beginning and keeps the examiner relevant throughout the case.

Due to the nature of the product and the sensitivity of topics at issue in a talc case, the deposition is one of the first and best opportunities to demonstrate the unique value of a woman in talc litigation. It is crucial for a woman to take the lead role as the examiner at the deposition.

The primary reason why the deposition is a good place to assert oneself as a woman in

Figure 1



talc is because of the product. Talc cases involve personal injury or death-related claims due to the alleged use of cosmetic talcum powder products for personal hygiene and beauty, as well as baby powder used for diaper changes. Product knowledge is a powerful examination tool during a deposition, and women typically have more product knowledge than men in this area. Almost every woman has used the products at issue—either on themselves or on another person. While men may have had the products used on them, it was often their mothers or another female caregiver handling the talc. The result is that from the start, both the plaintiff and the female examiner have detailed knowledge about the purchase, use, application, cleanup, and practical considerations involved in the use of cosmetic products.

Firsthand experience with the product at issue also puts the female examiner in the best position to determine veracity and challenge the plaintiff's testimony. As a result, the deposition examiner starts on a higher or level playing field with the plaintiff, can control the dialogue, and is in a better position for damage control at the deposition. When discussing use of products that both the plaintiff and defense counsel have experience or are very familiar with, a plaintiff is less likely to exaggerate or distort the facts. For example, is it credible that it took five minutes to apply baby powder during a diaper change? Or that the stated amount of product was used on the body? Or is it credible that an eight-year-old boy would still be bathing with his nine-year-old sister?

Moreover, it is not just being more familiar with the product that makes a woman a better examiner but also that these cases involve discussing highly sensitive issues that women are more comfortable discussing, especially with another woman. For example, these cases involve discussing cancer, medical treatment, death, infertility from chemotherapy, loss of the ability to have children, loss of consortium and marital intimacy, and loss of sexual relations, as well as emotional and psychological issues that relate to damages and the value of the case. Additionally, the cases involve deposition questions about a product used for personal hygiene in genital areas, whether it is an ovarian cancer case where a woman applied the product to her genitals, or an asbestos-contamination talc case where a male used the product on his genitals.

The deposition examiner must be comfortable and confident talking about these issues with the plaintiff. Generally, women are more comfortable discussing sensitive issues, particularly with other women who understand the heightened sensitivity involved when discussing these issues in a public place (such as a conference room filled with other attorneys who are strangers to the plaintiff). The simple facts are that women understand women, and women understand these deposition issues better than men. Women have the inherent ability to make the plaintiff feel more comfortable discussing difficult topics and will not likely forgo deposition examination on these topics that are critical to assessing the value of the case.

The deposition is also an ideal place to start asserting oneself because, while it is harder to get the chair at counsel table, which is still primarily dominated by men, the deposition scene is not as competitive as the trial counsel table from a gender standpoint. A simple explanation is supply and demand: there are more depositions than trials, therefore, more opportunities for everyone to participate. Also, while men do not typically fight for a deposition lead, they will fight for a lead trial counsel role. Lastly, most often depositions are attended by associates rather than partners, so it is easier to assert oneself for the lead role at a deposition.

Tips for Women in Talc Litigation During Pre-Trial Matters

To excel means that women must address stereotypes and adversaries and then break through those barriers to attain lead positions. Respect and professionalism are two key concepts for success. First, demand respect from others and demonstrate it to others, including those who are disrespectful to you. Always be professional, and do not ever personally attack adversaries with disparaging comments. You will be challenged as a woman, as a lawyer, and personally attacked at depositions by hostile witnesses, opposing counsel, and even your co-counsel (both men and women). Never respond in kind. Remember that bad conduct is not only unacceptable, but it is being recorded by the court reporter and will be highlighted to the judge in any motion practice regarding deposition happenings, and in turn, that conduct might negatively affect your case, business reputation, and job.

Second, understand stereotypes and "know your audience." Expect and manage resistance. Educate opponents by showing them intelligence and ability rather than responding with hostility, disrespect, or emotion. When a woman walks into a room, people wonder or doubt if she can do the job, whereas they assume that a man can do it. Lead by example and show that you are the best person for the job. Gracefully winning against an adversary proves an excellent point.

When you walk into the deposition room and find that men surround the table, take the lead on the deposition. Intimidation is only intimidation if you let it be intimidating. Take charge and command of the room with the attitude that this was always your job.

Assert your ability to be in a better position to examine the plaintiff on sensitive issues and do not second-guess yourself.

Seek sophisticated roles such as representing a corporate witness at deposition; deposing the plaintiff or other key, third-party witnesses; and arguing crucial pre-trial motions at court to gain pre-trial experience with the judge.

A Female's Perspective: Trying Talc Cases

Most trial lawyers will tell you that jury selection is the most important phase of a jury trial. In doing so, it is crucial to seat a group of people who will at least have the ability to empathize (as opposed to sympathize) with your client. Finding those empathetic jurors is crucial because jurors are not judging your case solely on the cold, hard facts. Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 Wm. & Mary L. Rev. 1201 (1992).

It has only been since 1968 that every state in the United States has allowed women to sit on juries. Elizabeth M. Schneider *et al.*, *Constitutional Perspectives on Sex Discrimination in Jury Selection* (1975). The history of a woman's privilege to serve on a jury is a subject worthy of its own article. But setting aside that digression, it should follow that half of a jury in a contaminated cosmetic talc case trial on average will be women.

In addition to the women sitting on your cosmetic talc case jury, most cosmetic talc plaintiffs are women. Women know when,

why, how, and where cosmetic products are used. Women know what types of cosmetic products are used for any given situation. Women can place themselves into a situation where they are using your client's cosmetic talc products. And women know the extent that other women know this information. All these factors play into a juror's empathy for the issue that she is to decide.

Creating empathy for your corporate client in a cosmetic talc case takes more than a good corporate story. While the corporate representative is said to be the face of the corporation, it is the attorneys for the corporation who the jurors will see, hear, and judge as credible or not during the entire trial. This is where a woman trial attorney can be especially advantageous in a cosmetic talc trial. This is not an industrial product that most, if not all, jurors and attorneys in the courtroom have never used. Cosmetic talc products are almost universally used by women.

- Only 32 percent of all attorneys appearing in civil cases are women.
- Only 27 percent of attorneys appearing as trial attorneys are women.
- Only 24 percent of attorneys appearing as lead counsel are women.
- Only 21 percent of attorneys appearing as lead counsel in tort cases are women.

Today, even in a multi-defendant trial, women trial attorneys most often find that they are the only woman at the table. In a 2015 study entitled, *First Chairs at Trial: More Women Need Seats at the Table,* the authors conclude: "What these numbers show is that the steps to the role of lead counsel and trial attorneys are much steeper for women than men." Stephanie A. Scharf & Roberta D. Liebenbert, *First Chairs at Trial: More Women Need Seats at the Table* (2015).

In her 2006 article, Jan Nielsen Little identified a woman's ability to empathize as a one of ten reasons why women make great trial attorneys. Jan Nielsen Little, *Ten Reasons Why Women Make Great Trial Lawyers*, Daily Journal (June 1, 2006). In the pre-cosmetic talc litigation era, she wrote: "To imagine and even vicariously feel what a client is going through, or a witness, or a juror, while evidence is being presented, enhances the ability to deal effectively with that evidence." The full list is as follows:

1. Women are strong.
2. Women are effective authority figures.
3. Women are resourceful.
4. Women read people.
5. Women empathize.
6. Women "tend and befriend."
7. Women prefer collaboration to coercion.
8. Women make up half the audience.
9. Women worry.
10. Women don't get caught up in the game.

Each of these traits contributes to the overall theme of creating empathy in jurors for your cosmetic talc corporate client. Moreover, each of these traits separately highlights the advantages of hiring women trial attorneys in women-centric cases such as cosmetic talc litigation.

A Female's Perspective: Managing Litigation

We constantly see women with different personalities and leadership styles rise to management positions, which reveals one thing: effective leaders are not cut from the same cloth. While the first wave of female leaders in the law adopted many of the rules of conduct that spelled success for men, the current wave is making its way to the top not by adopting the style and habits that proved successful for men, but by drawing on the skills and attitudes that they developed as women litigators. They are succeeding because of—not despite—characteristics generally considered feminine and inappropriate in leaders.

The success of women shows that a nontraditional leadership style is just as well suited to some work environments as the traditional leadership styles and can increase a client's chances of success. The concept of achieving a successful outcome through different methods is no different from general mathematical principles where the sum of different numbers result in the same response (*i.e.*, 1+7=8, 2+6=8, 3+5=8, 4+4=8). We should not shy away from diversity in leadership styles.

In a survey sponsored by the International Women's Forum, several similarities and differences were identified between men and women. Notably, the similarities end when men and women describe their leadership performance and how they influence those with whom they work. Men are more likely to engage in a "transactional" leadership style. (Transactional and transformational leadership were concepts that were first articulated by James McGregor Burns in *Leadership* (1978), later explained by Bernard Bass in *Leadership and Performance Beyond Expectations* (1985) and evaluated by Judy B. Rosener in "Ways Women Lead," November–December 1990 issue of *Harvard Business Review*). They view job performance as a series of transactions with subordinates, meaning that they exchange rewards for positive performance or punishment for inadequate performance. Men are also more likely to use power that comes from their position and formal authority.

Women, on the other hand, are more likely to engage in "transformational" leadership. They get subordinates to transform their own interests into the interest of the group with an eye toward a broader goal. Women are more likely to gain power through personal characteristics such as charisma, interpersonal skills, or personal contacts as opposed to organizational stature. In general, these types of women leaders believe that people perform best when they feel good about themselves and their work, so they try to create situations that contribute to that feeling. How do they do that? By encouraging participation, sharing power and information, enhancing the self-worth of others, and energizing others.

Of course, inspiring others and being charismatic is not the key to becoming a leader. It should go without saying that to become a leader, a woman must be hard working, diligent, well read, intelligent, and creative when defending clients in litigation. Once a woman is a leader, she would be well served to inspire her team.

Figure 1 Data Sources

- National Association for Law Placement, *2017 Report on Diversity in U.S. Law Firms* (Dec. 2017), http://www.nalp.org.
- Destiny Peery, 2017 Annual Survey Report on Promotion and Retention of Women in Law Firms, National Association of Women Lawyers (2017), http://www.nawl.org.
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- Rigel C. Farr, Law Firm Associates Can Play an Important Role in Diversity Effort, Legal Intelligencer (Feb. 1, 2019), http://www.law.com.

From the Chair

An Innovative Resource—Beyond the Mock Trial

By Guy E. Hughes

Success as a litigator begins long before you set foot in the courtroom. The Litigation Skills Committee continues its innovative formula to help you to succeed.

■ Guy E. Hughes is a partner with Casey Bailey & Maines PLLC in Lexington, Kentucky, where he has a broad-based litigation practice handling matters in the areas of product liability, fire loss, trucking law, and premises liability, as well as the defense of professional liability claims. Mr. Hughes work has also included representation of recreational product, automobile, and motorcycle manufactures, as well as work for a Class I Railroad with trials throughout the Commonwealth of Kentucky. Mr. Hughes serves as chair of the DRI Litigation Skills Committee.

It seems like yesterday that I was writing this piece to introduce DRI's membership to the Litigation Skills Workshops that we were starting in conjunction with numerous substantive law committees. Since that time, we've helped design and lead a multitude of workshops that have provided

DRI members with hands-on intensive training that will increase their effectiveness as attorneys. The feedback to date has been great, and we look forward to creating additional workshops in the coming year. As I mentioned last year in this column, it is our goal as a committee to be the go-to source for all aspects of litigation, and we are continuing our efforts to meet that challenge.

This year's Litigation Skills Seminar, *Enhancing Your Skills*, March 18–20 in Las Vegas, Nevada, is another amazing opportunity to see some of the foremost attorneys from across the country perform the skills that we all need to master to serve our clients to the best of our abilities. While we have previously put on mock trials, this year's seminar is unique in that we are taking a single fact pattern and going through the litigation steps leading to trial. Seminar attendees will watch a national expert perform a live demonstration of how to prepare a corporate witness for deposition, and then see those skills put to the test during a live deposition of the witness. Experienced litigators will also demonstrate how to navigate deposing sympathetic fact witnesses and how to challenge the opinions of skilled expert witnesses. We will also learn about cutting-edge technology that can be used in the courtroom and then watch that technology used during a live oral argument session. Our seminar chair, Patrick Causey, and his vice chair, Pamela Lee, along with many others, have worked tirelessly to create a one-of-a-kind seminar that won't just tell you what you should do, but show you what to do through the lens of a single case and some of the best attorneys in the business. In addition to this world-class CLE, attendees will have the chance to be involved with our service project, dine-arounds, a Young Lawyers' dinner, a Women in the Law luncheon, and a host of other opportunities to reconnect with colleagues and friends. Although it is possible that I am just a little biased, this is without a doubt the must-attend seminar for anyone hoping to become a better litigator and trial attorney. Please join us in Las Vegas. You won't regret it, and your clients will thank you. For more information, please visit: https://www.dri.org/education-cle/seminars.

While our annual seminar and litigation workshops provide wonderful opportunities for our members to increase their skills and value to their clients, our publications committee, led by Megan Pizor, continues to provide timely, extremely well-written and interesting articles and other publications designed to make your life easier. From this excellent issue of *For The Defense*, to our committee newsletter, *Trials & Tribulations*, as well as other special publications, Ms. Pizor, along with Vice Chair Christopher Turney, Brian Rubin, Nicholas Rauch, and all of our authors provide the information we need to do our jobs better. As the chair, I can't thank all of them enough for the hard work and dedication they put into meeting each and every deadline and continuing to raise the bar for the level of resources we provide to our members.

I hope that as you read the articles that make up this year's edition of *FTD*, peruse a *Trials & Tribulations*, attend a Litigation Skills Workshop, or join us in Las Vegas for a tremendous seminar, our committee's work (and they all work extremely hard for you) is creating opportunities and resources that will make us the go-to source for litigation for all members of DRI. As always, we can use your help and ideas, and we would love to find a place for you to provide your talents in our committee. If you would like to become more involved or have an idea for our seminar, one of our publications, or for a litigation workshop, please feel free to reach out to me at ghughes@cbmlaw.net or Kyle Lansberry, our vice chair, at klansberry@lewiswagner.com. We look forward to your input and ideas as we move forward.

In closing, I've had the absolute pleasure of chairing this committee for the last year and am honored that I get to do so for a second. Wonderful people got me involved in this committee over fifteen years ago, and I count them as some of my closest colleagues and friends to this day. Not only have I had the opportunity to help with some of the most innovative and interesting seminars, meet some of the country's finest attorneys, and learn from a vast number of experts, but I've had a blast doing it with others who share a passion for becoming a better practicing attorney and helping the next generation of defense counsel to do the same. I truly appreciate the opportunity that I've been provided, and I hope that I have been able to help move our committee forward and provide resources for a few more people along the way. Thanks and enjoy the articles! FTD

The Corporate Witness

A Defense Approach to the 30(B)(6) Deposition

By Sheila Kazemian
and J. Lewis Glenn, Jr.

Selecting a capable representative and preparing that representative carefully will mean that your 30(b)(6) deposition will go well.

While the deposition of a corporate representative may seem mundane and tedious, a weak defense strategy from a counselor who takes a Federal Rule of Civil Procedure 30(b)(6) deposition lightly can derail the course of litigation. The defense of a 30(b)(6) witness is more intricate than that of a fact witness and carries with it the consequence of binding the corporation to unfavorable testimony. A 30(b)(6) deposition may be effectively defended through appropriately selecting and preparing a corporate representative and using effective defense strategies. The key elements to a strong defense of your witness are understanding the law, prepping your witness with your legal theories on the matter in mind, and anticipating opposing counsel's tactics. Adhering to these practices will allow you to present a knowledgeable and strong witness who represents your client's corporate interests in a beneficial manner.

Notice

The movant *must* serve a notice of deposition or subpoena (notice) that describes the topics of discussion during the deposition with reasonable particularity, so that a knowledgeable corporate representative is selected. Additionally, the notice must provide the defending party with enough information to prepare the corporate representative for the deposition properly. The movant may also serve a request for production of documents with its notice. *See* Fed. R. Civ. P. 30(b)(2). Counsel may object to the movant's notice with the standard, applicable objections if the requests are overly broad, vague, unduly burdensome, or objectionable on other grounds.

Rule 30(b)(6) specifically states:

> **Notice or Subpoena Directed to an Organization.** 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; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify

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about information known or reasonably available to the organization.

The movant's notice of deposition needs to be constructed with "*reasonable particularity*."

The notice will likely cover topics "*known or reasonably available*" to the organization. This doesn't mean that every topic or question is explicitly stated in extreme detail in the notice. It just means that the topics of discussion are described with enough detail for the deponents and their counsel to prepare for the deposition satisfactorily. On the other hand, in *Sprint Commc'ns Co., L.P. v. Theglobe.com, Inc.,* the court found that "the requesting party must take care to designate, with *painstaking specificity*, the particular subject areas that are intended to be questioned, and that are relevant to the issue in dispute." 236 F.R.D. 524, 528 (D. Kan. 2006) (emphasis added). The scope of the deposition should also be established. Courts have held that overly broad or form notices are not acceptable. *Alexander v. Federal Bureau of Investigation*, 188 F.R.D. 111, 114 (D.D.C. 1998) (finding that a notice to depose on "any matters relevant to this case" was not an example of reasonable particularity). *But see Prokosch v. Catalina Lighting, Inc.,* 193 F.R.D. 633, 638 (D. Minn. 2000) (finding that the movant needs to state "with painstaking specificity" the topics of discussion during a deposition). For example, "including, but not limited to" language is insufficient and overly broad. *Tri-State Hospital Supply Corp.,* 226 F.R.D. 118, 125 (D.D.C. 2005); *Reid v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (holding that deposition topics must have discernible parameters to follow, and a notice is not feasible "where the defendant cannot identify the outer limits of the areas of inquiry noticed.").

Failing to follow the notice requirements of Rule 30(b)(6) are grounds for objection. While a good-faith effort should be made between parties to resolve issues related to notice, a protective order may be filed to prevent the moving party from raising the objectionable topics during deposition.

Pick Your Deponent Wisely

The deponent will need to provide "complete, knowledgeable, and binding answers on behalf of the corporation." *Marker*, 125 F.R.D. at 126; *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168 (D.D.C. 2003). *See also* Am. Bar Ass'n, Civil Discovery Standards 19(b) & 19(f). Unlike a typical deposition, which names the individual who the moving party wishes to depose, the ball is in your court when it comes to choosing the 30(b)(6) corporate representation. The role of a corporate representative differs substantially from that of other fact witnesses and requires an individual to testify on the corporation's behalf about the topics presented in a formal Rule 30(b)(6) deposition notice served by opposing counsel. While the individual chosen does not need to have the *most knowledge* of the situation, the designated individual should be thoroughly experienced in the topics of discussion and should be able to respond accurately. This will prevent common "bandying," where parties present multiple representatives who all disclaim knowledge of various practically obtainable information. You may be faced with a motion to compel if opposing counsel is aware that you have produced an unresponsive witness who lacks knowledge on the issues, and you were aware of another witness who was more knowledgeable and responsive.

The corporate representative may be an officer, director, manager, or someone else who has sufficient knowledge to answer questions in a deposition (whether the person is hired for the purposes of the deposition or the person is a former employee). If more than one deponent is required, these individuals should be identified and their areas of expertise should be explained. Be cautious when designating a witness who has extensive personal knowledge related to the case. Ideally, the witness will have enough knowledge to provide articulate responses but will not have so much personal knowledge as to lead to questions or testimony that mixes personal knowledge with corporate knowledge. The corporate representative witness is to testify on behalf of *the corporation*, not him- or herself.

Sharpen the Axe

Counselors have a duty to prepare their deponent. *Securities and Exchange Commission v. Morelli*,143 F.R.D. 42, 45 (S.D.N.Y. 1992) (finding the witnesses need to be prepared so "that they can answer fully, completely, and unevasively, the questions posed."); *Buycks-Roberson v. Citibank Federal Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995) (reasoning the duty to prepare a corporate representative for a 30(b)(6) deposition goes beyond personal involvement or knowledge). Witness presentation is extremely important. Make sure that you set aside ample time for preparation because the corporate representative needs to be a well-prepared deponent. Applicable materials should be reviewed. Counselors may present the corporate designee with previous deposition testimony, exhibits, and a summary of the facts and issues of the case, and they should corroborate with the witness which materials need to be retrieved and reviewed. This may include pulling and examining audit trails, policies or procedures, personnel files, or other corporate documents that are necessary to review before the deposition testimony is provided. (For a comprehensive reference, *QBE Ins. Corp. v. Jordan Enterprises, Inc.,* 277 F.R.D. 676 (S.D. Fla. 2012), lays out case law governing 30(b)(6) depositions and the preparations of deponents). It is the corporate representative's duty to aide in retrieving relevant information and then interpreting the information on behalf of the

Be cautious when designating a witness who has extensive personal knowledge related to the case. Ideally, the witness will have enough knowledge to provide articulate responses but will not have so much personal knowledge as to lead to questions or testimony that mixes personal knowledge with corporate knowledge.

corporation for the purposes of the representative's deposition and/or suit. This preparation will help you build your own knowledge of the suit facts and circumstances.

Further inquiry needs to be made if the witness does not know an answer to a question during witness preparation, or if the required documents, such as an audit, policy, or electronic medical record, are not readily available but are easy to get. Therefore, it is crucial that the preparation timeline have ample time to investigate, review, and prepare fully. A simple prep the morning before the deposition will obviously be insufficient in these situations and could easily be disastrous during deposition. Consider staging a mock deposition so that the deponent is comfortable answering difficult questions. A mock deposition may also shed light on additional information or documentation that needs to be located and reviewed.

Rule 30(b)(6) presents little guidance as to whether a 30(b)(6) deponent can respond to questions outside the scope of the topics identified in the notice.

Just as the corporation has an obligation to prepare its witness properly, the corporate representative needs to make a *reasonable or good-faith effort* to get the information necessary to answer anticipated questions effectively. The 30(b)(6) witness must also be apprised on the subject matter of the suit and claims raised, and the corporation's stance on these issues should be explored to determine how the information gathered can help present a strong defense behind the deponent's testimony.

Don't limit your internal investigation and witness preparation to matters strictly referenced in the notice. Opposing counsel can still ask and receive responses to inquiries outside the scope of their own notice during deposition, despite your objections.

Do limit what the 30(b)(6) witness reviews. Imagine being in a deposition and the corporate representative accidently refers to reviewing materials or documents that are privileged. Remember that the movant may attempt to obtain preparation materials in discovery. Depending on the court, this may be permitted.

The corporation also needs a witness who can comprehend opposing counsel's tricky questions, isn't susceptible to being taken off course by attempted intimidation, and can convey the corporation's persona with confidence. A well-prepared witness will help safeguard against any inadvertent statements that may be attributed to the corporation and will understand the limits of his or her testimony when objections are made to off-topic lines of questioning.

Defend the Deposition

To ensure the deponent answers on behalf of the entity, be cognizant of how the plaintiff's counsel directs his or her questions. Questions related to the issues of the suit should be carefully answered to ensure the responses are based on the entity's knowledge; this includes questions that seem to be directed at the deponent and not the entity. For example, "When did you learn…." or "How do you implement policies and procedures?" The deponent should answer questions in terms of the organization.

"I don't know" answers may be considered a failure to appear to testify. *See Black Horse Lane Assn. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) ("In reality if a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it."). If the deponent does not know the answer, but knows who would, it is appropriate to identify the individual capable of providing a more adequate response. If your 30(b)(6) witness is confronted with a line of questioning outside the scope of the notice, but within the personal knowledge of the witness, consider offering to produce the same witness as a fact witness. The deponent can serve as a fact witness in a deposition that starts at the close of the 30(b)(6) deposition.

Allowing your witness to answer questions outside the scope of the 30(b)(6) notice runs the risk of impeachment during trial, waiving attorney–client or work-product privilege, or binding the corporation.

Counsel should object to questions that invade a privilege. This will ensure that the issue is preserved. Note that facts communicated to an attorney are not protected by the attorney–client privilege. *Great American Ins. Co. v. Vegas Const.*, 251 F.R.D. 534 (D. Nev. 2008). Make strategic objections, especially if a 30(b)(6) witness is asked a question outside the scope of the notice. Off-topic questions should be objected to as exceeding the scope of the notice, or on the grounds that the questions exceed the scope of the corporate knowledge of the witness. But keep in mind that your witness may still respond to these types of questions.

Rule 30(b)(6) presents little guidance as to whether a 30(b)(6) deponent can respond to questions outside the scope of the topics identified in the notice. Federal courts are split on whether the examination can go outside the scope of the deposition notice. The narrow view, as followed by the court in *Paparelli v. Prudential Insurance Co.*, is that the examination must be confined to matters stated "with reasonable particularity" in the deposition notice. *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 730 (D. Mass. 1985). Or the court may follow the *King v. Pratt & Whitney* holding that is broader and more accepting of questions outside the scope or the notice, if the questions fit within the general discovery rules. *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995).

Paparelli involved a plaintiff injured by the "pre-opening" feature of an elevator. A court order was issued compelling the defendant to produce all documents involving similar accidents. The defendant produced documents concerning a single claim, prompting a 30(b)(6) notice. The notice sought a witness knowledgeable about "the details of any search conducted by Westinghouse in an endeavor to comply with the attached order." At the 30(b)(6) deposition, however, the plaintiff sought to question the witness about matters not described in the subject of the deposition. The defendant's counsel instructed the witness not to answer, and the plaintiff's counsel sought sanctions.

The *Paparelli* court held that the scope of discovery was limited to the areas of inquiry stated in the notice of deposition.

Although the court could find nothing in the text of the rule or the advisory notes, it concluded that such a limitation is implied by the procedures established in the rule and by the advisory committee's reasons for adopting the rule. If a party could ask a deponent to testify about matters that are totally unrelated to the matters listed in the notice, the court reasoned, the purpose of the rule would be effectively thwarted.

The majority of courts follow *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995). In *King*, the plaintiff served 30(b)(6) notices that outlined three issues to be covered. At the deposition, deponents were asked questions that went beyond the scope of the three issues. The defendant's counsel objected, terminated the deposition, and sought a protective order to limit the scope of questioning to those areas described in the notices. The *King* court declined to follow *Paparelli*, believing that there was a better reading to Rule 30(b)(6). In holding that the scope of discovery is not limited in a 30(b)(6) deposition to the subjects described in the notice, the court reasoned, "[the p]laintiff could simply re-notice a deponent under the regular notice provisions and ask him the same questions that were objected to." *Id.* at 476.

Consider the following example: When a hospital's designated agent was unable to provide knowledgeable answers regarding several noticed deposition topics, the court ruled it as being the same as a nonappearance warranting sanctions in the form of attorneys' fees and costs for preparing and taking the deposition. *Omega Hosp., LLC v. Community Ins. Co.*, 310 F.R.D. 319 (E.D. La. 2015).

Optimally, counselors can resolve any issues in an informal and efficient manner. If not, a party may move for a protective order, or sanctions, when appropriate.

Regardless, corporate counsel should immediately object to any line of questioning that exceeds the scope of the notice, because failing to do so, as mentioned, may result in waiving the objection. Counsel for the deponent would be wise to object to any line of questioning outside of the scope of the notice to ensure that the corporation preserves its right to contend that the deposition response is not binding.

Assume that the opposing attorney's questioning will exceed the scope outlined in the Rule 30(b)(6) notice to ensure that the designated witness is fully prepared. As soon as the deposing attorney exceeds the scope of the deposition notice, corporate counsel must object and make a record of all objections. If opposing counsel agrees to set limits for certain topics, make sure to set forth all stipulations on the record.

Protective Orders

A protective order is the proper relief when counsel instructs the 30(b)(6) witness to refrain from providing an answer in instances where opposing counsel asks questions outside the scope of the 30(b)(6) notice, or if the witness genuinely has no knowledge of, or access to, the information sought. A motion for a protective order must include "certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. P. 26(c)(1).

Also, consider filing a protective order under Rule 26(c) if your deponent has already testified and the plaintiff gives notice of a subsequent Rule 30(6)(b) deposition. Raise the issue that an additional deposition request is unduly burdensome or ask the plaintiff's counsel why an additional deposition is needed and if the same witness should be produced.

Sanctions

Sanctions may be sought when the designated witness lacks knowledge of the topics included in the notice of deposition. Courts have authority to impose sanctions, including reasonable attorneys' fees, due to the "failure to appear." Sanctions have been imposed when the witness did not have knowledge about the subject matter, the witness was not prepared to testify, and where the witness did not have authority to speak for all parties represented. *See, e.g.*, *Black Horse Lane Assn. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) ("In reality if a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it."); *Res. Trust Corp.*, 985 F.2d at 197; *Paul Revere Life Ins. Co. v. Jafari*, 206 F.R.D. 126 (D. Md. 2002); *T&W Funding Co. XII, LLC v. Pennant Rent-a-Car Midwest, Inc.*, 210 F.R.D. 730 (D. Kan. 2002); *Intl. Assn. of Machinists & Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479 (D. Md. 2005); *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("Producing an unprepared witness is tantamount to a failure to appear.").

Rule 30(b)(6) deposition statements are binding. However, most courts have held that the statements are not judicial admissions (binding statements that may not be refuted at trial or on appeal). Research your jurisdiction's stance on the issue. Some jurisdictions have held that 30(b)(6) testimony is an evidentiary admission, while others view it as something to be explained or refuted by subsequent testimony.

Sanctions have been imposed when the witness did not have knowledge about the subject matter, the witness was not prepared to testify, and where the witness did not have authority to speak for all parties represented.

Is Rule 30(B)(6) Testimony Binding on a Corporation?

A deponent will have the opportunity to review and sign deposition testimony once it is transcribed. Most courts have permitted substantive changes to a deposition transcript as long as an explanation is provided. Note that the original testimony may still be used for impeachment. *Indus. Hard Chrome v. Hetran, Inc.*, 92 F.Supp. 2d 786, 791 (N.D. Ill. 2000) ("testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes.").

Because a Rule 30(b)(6) designated witness is presented for the purpose of speaking for the corporation, and therefore

"must testify to both the facts within the knowledge of the business entity and the entity's opinions and subjective beliefs," testimony of a Rule 30(b)(6) witness is binding on the corporation. *United States v. Taylor*, 166 F.R.D. at 361. As discussed earlier, the 30(b)(6) designee testifies as if he or she is the organization itself. Thus, the deponent's testimony binds the corporation and may be used against it just as an individual's deposition testimony may.

Although most courts have held that Rule 30(b)(6) statements are not judicial admissions, a small number of courts have held that Rule 30(b)(6) statements are judicial admissions that are conclusively binding and may not be controverted by the party at trial or on appeal of the same case.

Although most courts have held that Rule 30(b)(6) statements are not judicial admissions, a small number of courts have held that Rule 30(b)(6) statements *are* judicial admissions that are conclusively binding and may not be controverted by the party at trial or on appeal of the same case. In such an instance, the court may refuse to hear trial testimony that differs from deposition testimony unless the party "can prove that the information was not known or was inaccessible at the time of the deposition." *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998). Most courts, however, as mentioned above, hold that Rule 30(b)(6) statements are evidentiary admissions, meaning that evidence presented at trial may explain or contradict a statement made at a Rule 30(b)(6) deposition. So while the testimony of a 30(b)(6) witness is not a judicial admission, "it is binding in the sense that it constitutes the official testimony of the corporation." *Monopoly Hotel Group, LLC v. Hyatt Hotels Corporation*, 2013 WL 12246988 (N.D. Ga. 2013).

As recently as May 11, 2018, in *Snapp v. Burlington Northern Santa Fe Railway Co.*, the United States Court of Appeals for the Ninth Circuit further cemented the standard for a 30(b)(6) designee's testimony, agreeing with the Second, Seventh, Eighth, and Tenth Circuits that while such testimony is an evidentiary admission, it does not have conclusive effect and can be corrected, explained, or supplemented by the corporation with additional evidence. 2018 WL 2168653 (9th Cir. May 11, 2018). In reaching this holding, the court joined its sister circuits in holding that a 30(b)(6) designee's admissions are for evidentiary purposes only, and not giving it conclusive effect on a motion for judgment.

Although a corporation is not "estopped from denying the truth of 30(b)(6) deposition testimony," counsel should carefully consider the effectiveness of such a strategy at trial. While "[a] witness is free to testify differently from the way he or she testified at deposition," the witness "risk[s]… having his or her credibility impeached by the introduction of the deposition." *R & B appliance parts, Inc. v. Amana Co., L.P.*, 258 F. 3d 783, 786-87 (8th Cir.2001).

Conduct a proper investigation so that new information is not discovered before trial to prevent the court from precluding new documents or testimony. Or be prepared to prove that the documents or information were not accessible during the discovery period.

Consider filing motions in limine to preclude the testimony of a newly named witness who represents the opposing party's entity if opposing counsel names a different trial witness who represents that entity and who also is able to testify on matters that the previous witness could not.

While there is opportunity to introduce differing testimony or new evidence, opposing counsel may still move to impeach your witness during trial with the previous deposition testimony.

Summarizing: A Quick Guide to Preparing and Defending a Rule 30(b)(6) Deposition Properly

Review the notice of deposition. Carefully read the notice to ensure that it is proper and identifies the deposition topics with reasonable particularity. If any topics are vague or excessive, assert objections and make a good faith effort to resolve the matter with the deposing party. Remember that parties are required to provide sufficient detail to enable effective preparation of the corporate representative.

Select the appropriate representative. Choose someone who is articulate and willing to take the time to prepare adequately for a thorough deposition. Remember, the witness has a duty to review whatever information is reasonably at the disposal of the organization to provide knowledgeable responses. But be mindful that whatever the representative reviews in preparation for the deposition is discoverable.

Prepare the witness to be the persuasive face of the corporation and confidently present the corporation's position. After all, the deponent's testimony will be binding as an evidentiary admission by the corporation.

Familiarize the witness with the topics described in the deposition, but go beyond that: provide the witness with a detailed overview of the case and prepare him or her for questions that potentially exceed the scope of the subjects outlined in the notice. If the information is too much to handle, have the witness make a cheat sheet. Just be prepared to produce it to the deposing party.

A prepared witness can answer any question. The only time to instruct your witness not to answer is when the question invades a privilege or the terms of a court order.

Be ready to object. Even if your witness is ready to respond to areas of inquiry not mentioned in the notice, always object when a question goes beyond the scope. This way, the issue is preserved on the record. Otherwise, you may waive your objection.

Good advice bears repeating: Be prepared! If you select a strong representative and prepare that representative thoroughly, chances are your 30(b)(6) deposition will go smoothly.

Thinking of a Master Plan

The Basics of Strategy in the Discovery Process

By Sean C. Griffin

The best strategy will establish goals for the discovery process that go beyond creating a "checklist."

Nicky Porter didn't see what the problem was.

"I don't know what else you want from a discovery plan," she said. We have a lay discovery cutoff, we have deadline for expert discovery, another deadline for dispositive motions. It's all there."

Ellery King sat forward in his chair. "You are technically correct," he said.
"That's the best kind of correct."
"That's what most lawyers think. But I think we can do more than the minimum here."
"But what's wrong with this plan?"
"If you want to be an excellent attorney, it's not enough not to do things wrong. You have to do them right."
Nicky sighed. "Okay, what's not right about this plan?"
"Your discovery plan doesn't have a plan," Ellery said.
"What kind of plan?"
"A plan that advances your litigation strategy."
"A litigation strategy! We just got the complaint. Do we already need a litigation strategy?"
"You either fail to plan, or you plan to fail."

Federal Rule of Civil Procedure 26(f)(2) requires the parties to meet and confer to do the following:

- "Consider the nature and basis of their claims and defenses."
- Consider "possibilities for promptly settling or resolving the case."
- "Make or arrange for" initial disclosures.
- Discuss any issues about preserving discoverable information.
- Develop a proposed discovery plan.

Most attorneys treat these as checklist requirements. They sit down with a plaintiff's attorney, read aloud each item on the list (for the first time since their last discovery conference), and discuss each item in turn. This fulfills Rule 26's requirements, but it does little to advance a client's strategic goals.

To advance your client's strategic goals, you have to have a strategy. That strategy will depend on the case, but in any case, you and your client will need to set certain goals for the discovery process. These goals may include limiting discovery costs (especially costs relating to document production); forcing the plaintiff to state explicitly the bases for the claim, if the complaint

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does not stave off a potential class action; and gauging the plaintiff's attitude toward settlement.

Rule 16(b) makes the discovery plan due twenty-one days before the scheduling conference, which, in turn, must occur ninety days after service or sixty days after any defendant's appearance. Thus, using your discovery plan to advance your strategy requires you to formulate a strategy very early in the litigation—probably within days of receiving the complaint. The more detailed your strategy, and the earlier you formulate it, the better your discovery plan will serve your client's interests. Well-thought-out discovery plans will take a good, hard look at initial disclosures, interrogatories, and privilege logs.

Initial Disclosures

The next week, Nicky was pacing around in Ellery's office.
"The initial disclosures are 100 percent accurate," she said. "I've double-checked them, then I double-checked my double check."
"I'm sure they are," Ellery said.
"So, they're perfect."
"Just because something is perfect does not mean it cannot be improved."

In the early 2000s, the phrase "shock and awe" entered the public consciousness. The phrase referred to an early, overwhelming show of force that would so thoroughly overwhelm the opposition that the resulting demoralization would render it unwilling, or even unable, to fight back.

Few, if any, entities can muster a sufficient show of force to "shock and awe" an opponent into immediate submission. However, most entities can exhibit a show of force that will signal a readiness and ability to mount a vigorous opposition. The key is to start your show of force early—in your initial disclosures.

Rule 26 requires you to provide this information, without waiting for a discovery request:

- the name, address, and telephone number of every person likely to have discoverable information that the disclosing party may use to support its claims or defenses, including the subject matter of that information;
- a copy (or a description by category and location) of all documents, electronically stored information, and tangible things the disclosing party may use to support its claims or defenses;
- a computation of damages; and insurance information.

Many attorneys do not take these requirements seriously. Rule 26 advises that "[a] party is not excused from making initial disclosures because it has not fully investigated its case." Fed. R. Civ. P. 26(a)(1)(D). And many attorneys take this to heart, choosing to send initial, vague disclosures that reflect the incomplete state of their investigation:

- Witness A can be reached through counsel. Witness A has information generally relating to the allegations in the complaint.
- Witness B can be reached through counsel. Witness B has information relating to the defendant's treatment of the employee.
- Witness C can be reached through counsel. Witness C has information generally relating to payment of the plaintiff's invoices.

Conceivably, some attorneys propounding these disclosures imagine that they are "hiding the ball" for as long as possible, thereby delaying their opponents' discovery of their case (and their case's weaknesses). In reality, propounding vague initial disclosures announces to opposing counsel that you have not yet interviewed the key witnesses in your case, and you have little idea what they will say at deposition or trial. This, in turn, means that the propounding attorney does not have a firm grasp on the case or the subject matter.

Nicky asked, "Why do we have to improve our initial disclosures? Why don't we just dash off the initial disclosures and move on?"
"Move on to what?"
"Written discovery, then depositions. We keep the costs down until we get to trial. The trial is the point, right?"
"Really? What percentage of the case do you think discovery is?"
Nicky thought for a second. "Maybe 50 percent."
"Guess again."
"75 percent?"
Ellery shook his head. "Most cases don't go to trial. For most cases, discovery is the closest you get to trial. So, discovery is your only chance to prove your case to the only decision maker who matters."
"The judge?"
"No," Ellery said. "Opposing counsel."

Depending on who you ask, between 80 and 99 percent of civil litigation resolves before trial—by settlement, summary judgment, or otherwise. *See* Lynn Langton & Thomas H. Cohen, Civil Bench and Jury Trials in State Courts, 2005, Bur. Justice Stat. (Oct. 28, 2008); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone*, Judicat., vol. 101, no. 4, Winter 2017, at 26, 28; Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. Times, Aug. 7, 2008. In Florida, for example, only about 5 percent of case dispositions occurred after trial. Florida Office State Courts Admin., "Circuit Civil Overview," in *Florida's Trial Courts Statistical Reference Guide FY 2017–*18 4-22 (Feb. 2019).

This means that your case probably will not make it to trial. It will probably settle, which means that discovery will provide your only chance to "try" the case, and you and the opposing counsel will be the only jury. Therefore, if you are an experienced defense attorney with a strong case, you should understand the benefits of conveying the strength of your case to your client and opposing counsel during discovery.

The initial disclosure requirement provides an unmatched opportunity to shock and awe your opponent at the start of litigation. Just as vague initial disclosures signal that the proponent does not have a handle on his or her case, specific initial disclosures signal a well-prepared defendant.

Compare the vague disclosures above to the following:

- Witness A was the plaintiff's co-worker for three years. She witnessed the plaintiff's unsafe work practices with respect to the equipment at issue on several occasions. On one such occasion, the defendant company relied on witness A's eyewitness account to place a written reprimand in the plaintiff's employment file, which the plaintiff did not dispute at the time.
- Witness B saw the accident (as the complaint defines that term). Witness B

is an experienced crane operator. She is expected to testify that she saw the plaintiff looking down and away from the equipment as the crane swung toward the building. Witness B is also expected to testify that she noticed that the plaintiff only had one hand on the equipment, although from her experience, she knows that the crane in use requires two hands to operate properly. Witness B is expected to testify that she tried to warn the plaintiff, but he heeded her warning too late to avoid the accident.

- Witness C is expected to testify that he went out with the plaintiff to several bars the night before the accident (as the complaint defines the term). Witness C is expected to testify that he returned the plaintiff to his home at 2 a.m. and that the plaintiff had advised him that he had a 7 a.m. shift.

These disclosures outline clearly and specifically several possible defenses against the cause of action. They also notify the plaintiff's attorney that defense counsel has done the homework necessary to mount a substantial defense against this particular claim. The speed with which the defense attorney has done so signals that the defendant intends to mount an aggressive, thoroughly prepared defense, and this, in turn, will encourage many plaintiffs' attorneys to take a more reasonable approach to a quick settlement. Granted, few plaintiffs will settle immediately upon receiving initial disclosures no matter how good they are, but at least the early preparation necessary to draft thorough initial disclosures gives defense counsel a head start.

An aggressive, organized document production can provide the same benefits. If you know enough about a case to file an answer, then you have reviewed a lot of relevant, non-privileged documents. Produce these documents during initial disclosures. You will have to produce them at some point, and there is rarely, if ever, a benefit to delaying production.

You should do more than just dump documents on the plaintiff's counsel, however. Unlike Rule 34, which requires parties to "produce documents as they are kept in the ordinary course of business," or "organize and label them to correspond to the categories in the request," a party can organize its initial document production in whatever order suits its interests. Fed. R. Civ. P. 34(b)(2)(D).

Take advantage of this flexibility to organize your documents to maximize their persuasive power. In an initial production, you can usually assume that the plaintiff's attorney will read the documents in the order that you produce them, which means that you can control how the documents shape the narrative in opposing counsel's mind. For example, you can make your key document the first document in the production, or you can put all the documents relating to your strongest defense first. If you have a "bad" document, you can surround it with documents providing necessary context.

A thorough, organized, initial document production notifies opposing counsel that you have done your research and are prepared to litigate this case aggressively. In contrast, a meager document production in a complex case signals that you are still figuring out your case and have not finished even an initial document review. Guess which case is a better candidate for early, favorable resolution.

Interrogatories

Nicky asked, "The interrogatories are good, right?"
"They're good," Ellery said.
"I thought about the information we will need to defend this case, and I asked questions relating to what we need."
"You did."
"But?"
"But you're asking a lot of questions here."
"Yeah," Nicky said. "That's the point of interrogatories."
"Again, you are technically correct. But what's the real point?"

A lot of attorneys—especially junior attorneys—see interrogatories as their chance to make opposing counsel do a bunch of homework for free. After all, attorneys get to ask a question that "relate[s] to any matter that may be inquired into under Rule 26(b)," that is, "any nonprivileged matter that is relevant to any party's claim or defense…." So many attorneys issue scattershot interrogatories to try to get a lot of information with a little effort. As a side benefit, inexperienced attorneys often revel in the opportunity to force opposing counsel to expend a lot of effort.

This is a mistake. Rule 33(a) only allows twenty-five interrogatories, including subparts. Consequently, you should design each interrogatory you issue to elicit a specific response that will prove useful at trial and that you cannot elicit through document requests or requests for admissions. If you cannot craft a pointed interrogatory, you may as well serve nothing at all.

In fact, poorly crafted interrogatories can be worse than nothing. You don't have to wait thirty days to get nothing. More importantly, broad, vague interrogatories yield only a slew of boilerplate objections and vague, meaningless responses, which, in turn, force you to initiate a protracted, expensive discovery fight. At the end of the fight, you revise your interrogatory to the one you should have propounded in the first place, and opposing counsel revises his or her response to the one that he or she could have given you at the outset, but is still less than what you requested. Then you give up because you realize how much money you will have to bill your client, and how much money you will have to forgo because you cannot bill your client for what you did.

So, use interrogatories sparingly. Opposing counsel tend not to know their case well enough to give useful answers, or they refuse to respond usefully because they know it will cost your client too much to compel them to do so.

Having said that, two interrogatories prove useful in most if not all litigation:

- If you dispute the genuineness or authenticity of any document that any party has produced in this case, state all bases for your dispute.
- If you refused to admit any party's request for admission, state all reasons for the denial.

Of course, these are not the only two, useful interrogatories in any case. But these two interrogatories signal to opposing counsel that you are preparing for trial—a signal that is especially useful in the early stages of a case. Additionally, because Federal Rule of Civil Procedure 26(e) requires parties to supplement their responses, these interrogatories can force

plaintiffs' counsel to alert you if their view of the case changes.

On the other side, the fact that no one else takes interrogatory responses seriously does not mean that you should do likewise. As with initial disclosures, thorough, detailed interrogatory responses—even to vague questions—can show the other side that you have investigated your case and prepared a vigorous defense. Objections have their place, but I try to answer interrogatories as completely as possible.

Speaking of objections, most attorneys issue a list of boilerplate objections at the beginning, then repeat each objection at the beginning of each response. Upon receiving interrogatory responses, most attorneys skip the boilerplate objections and go straight to the responses to see if they have anything to argue about. Absent privilege or confidentiality issues, try not to object to interrogatories that are legitimately aimed to elicit discoverable information—even if you can. The plaintiff is offering you a chance to explain your position in a more considered manner than a witness could at deposition. Use these opportunities to present your case to one-half of your likely "jury." Of course, many interrogatories are simply too objectionable to go unchallenged, but not all of them. (Also, if the plaintiff's counsel does move to compel, the judge will appreciate that you did not assert the same objections to every single interrogatory.)

Certifying your interrogatory responses provides another opportunity to forward your strategy. Because a party must certify its interrogatory responses, preparing thorough responses allows you to teach your client about the case, and it helps ensure that your client representative can legitimately affirm the interrogatory responses at deposition. Again, this will require preparing your client, or client representatives, early and thoroughly. (This approach doubles as early deposition preparation.)

Privilege Logs

If you have handled your initial document production properly, then responding to plaintiffs' document requests should pose little difficulty. After all, you have already produced all documents relating to any claim or defense, so plaintiff's counsel will not ask for any additional documents, right?

Of course not. Plaintiff's counsel will issue numerous broad document requests to attempt to probe perceived or potential weaknesses in your case. Plaintiff's counsel may have poorly described their client's claims, or they may consider new claims. You may think up new defenses or counterclaims. Continued investigation may reveal the relevance of documents that previously seemed irrelevant. Nonetheless, if you have produced substantial documents at the initial disclosure stage, that production can often blunt plaintiff's counsel's typical complaints that your client is withholding documents or otherwise obstructing discovery.

In terms of preempting plaintiffs' complaints about your document production, your privilege logs can either hurt or help you. They can either provide the plaintiff fodder to run to the court spinning tales of a pernicious obstruction campaign, or they can demonstrate your transparency and thoughtfulness about discovery.

Rule 26 requires a party withholding information or documents based on privilege to (1) expressly make the claim, and (2) describe the information or documents withheld sufficiently "to enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5). Too many attorneys delegate this task to junior associates or paralegals without adequate supervision. Left to their own devices, most paralegals will simply list the documents by type, date, sender, recipient or recipients, the subject line, and the privilege asserted (as marked in your document management program of choice). For about 80 percent of privilege assertions, this will suffice, because a recognized attorney's name will appear as a sender or recipient, and most opposing counsel will leave it at that.

For the other 20 percent, however, this approach sets up the privilege holder for a losing battle. If a client sent its attorney an email with the subject line, "FW: Accident," it is far from certain that the email is privileged. Is the email truly seeking confidential legal advice? Is the email simply forwarding a statement by a company employee regarding the accident, which may not be privileged? Is the email part of a chain, only part of which may be privileged? Other than the recipient's status as an attorney, what indications do the other parties have that the email relates to the seeking or providing confidential legal advice? An aggressive plaintiff's attorney will force you to scramble to answer these questions, in the context of a motion to compel, which will waste thousands of dollars of your client's money.

Aside from risking unnecessary motions practice, a sloppy privilege log suggests that counsel has not carefully considered the potentially relevant privilege issues. This, in turn, suggests that the attorney has not carefully reviewed the potentially relevant documents. Again, you want to send exactly the opposite signal.

In short, a privilege log is too important to leave in the hands of an inexperienced, unsupervised paralegal or junior attorney. An experienced attorney should review the log carefully to ensure that it explains thoroughly and specifically the grounds for all privileges asserted, not just "AC/WP" followed by the subject line in the withheld letter or email.

Further, a well-prepared privilege log will take special care to explain documents for which the privilege is not readily apparent. For example, a document that recounts a privileged conversation with an attorney can still be privileged, even if no attorney has ever seen the document. A report can qualify as work product even if no attorney helped prepare it. *See* Fed. R. Civ. P. 26(b)(3) (protecting from discovery documents "prepared in anticipation of litigation or for trial by or for another party *or* its representative (including the other party's attorney….")) (emphasis added). Many attorneys will question including such documents in the privilege log, and you should take the time to describe such documents specifically.

Positioned to Win

Ellery stopped by Nicky's office. "How did the settlement conference go?"
"We settled," Nicky said.
"For how much?"
Nicky told him the number. "The client wants to celebrate," she said.
"I would imagine."
"She said she wants some really good bourbon."
"Do you need a recommendation?"
Nicky opened a desk drawer. "No need," she said. "I have prepared."

Break It Down

How Methodical Investigation Can Cast Doubt on a Psychological Expert's Competence and Methodology

By Renée Welze Livingston

By picking apart the opinions of an opponent's psychological expert and exposing an evaluation's subjectivity and weaknesses, you can challenge the expert's opinions.

Unlike physical harm sustained by a personal injury plaintiff—burns, broken bones, a severed nerve, a traumatic amputation—which can be observed and objectively tested with reliable diagnostic tests, psychological injury claims involve mental illness, psychological conditions, thought processes, and brain function, all of which are not easily detectable and which are, for the most part, based on the subjective complaints of the plaintiff. One cannot "see" them or "feel" them, and someone cannot even definitively or reliably "test" for them.

For example, if a plaintiff reports having regular nightmares of an allegedly traumatic event, there is no way objectively to prove or disprove whether those nightmares were truly experienced, their frequency, or their content. Similarly, if a plaintiff reports that the effect of an earlier trauma has resolved, but the current incident resulted in "far worse" symptoms and functional impairment, it can be nearly impossible to refute that type of subjective characterization. In practice,

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because there is no objective backstop, psychological experts have greater freedom to leap to subjective and conclusory opinions about prior and current functioning, and ultimately, about psychological injury. Not infrequently, such opinions can deviate grossly from the established criteria that psychological experts use to objectify diagnoses. An ill-supported, conclusory opinion based on a subjective description of symptoms can affect a damages evaluation or jury verdict significantly if it is left unchallenged. So how can a civil defense lawyer prepare a case to test the reliability of, and challenge, a mental or psychological diagnosis?

There are two key ways to break down the opinions of a mental health expert. The first involves thoroughly investigating the expert's background, experience, and qualifications to challenge competency, impartiality, and credibility. The second confronts head-on deviations in a written report from established and industry-accepted protocols.

With proper preparation and tools, the weak opinions of psychological experts can be forcefully challenged in persuasive ways. By understanding how to position the defense case to undermine a psychological expert's competence and credibility effectively, the defense can either preclude unsupported opinions at trial or substantially undermine the effect that those opinions may have on jurors.

Admissibility of Psychological Opinions Generally

The admissibility of psychological opinion is, similar to any expert opinion, subject to the rules of evidence in the tribunal where the matter is pending. In federal court, Rule 702 of the Rules of Evidence provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

In California, Evidence Code section 720(a) provides: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Section 801 states:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Clearly, psychological injury, diagnosis, causation, and reasonable and appropriate treatment are subjects that require testimony from an expert to aid the trier of fact. In federal court, the trial judge is charged with the responsibility of acting as a gatekeeper to exclude unreliable expert testimony. *Kumho Tire Co. v. Carmichael,* 119 S. Ct. 1167 (1999). Nonetheless, the exclusion of expert testimony is still the exception rather than the rule. In fact, the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595.

Assuming the court, in its role as gatekeeper, allows an expert to testify at trial, a vigorous cross-examination (following, hopefully, an equally vigorous cross-examination at deposition) that highlights inadequacies or misrepresentations in experience and qualification, and/or bias and subjectivity in the administration and interpretation of psychological tests and assessments, will significantly undermine an expert's opinions and affect the jury's view of injuries and damages.

Challenging a Psychological Expert's Competence and Credibility

There are two key ways to break down the opinions of a mental health expert. The first involves thoroughly investigating the expert's background, experience, and qualifications to challenge competency, impartiality, and credibility. The second confronts head-on deviations in a written report from established and industry-accepted protocols.

Attacking the Qualifications and Competence of the Expert

Effective cross-examination of a psychological expert will begin with a deep dive into an expert's qualifications and credentials, with the goal of uncovering nuggets of information—big or small—that can be used to undermine credibility. The following discusses several places to look.

Curriculum Vitae, Resumes, and Other Professional Summaries

In almost every case, practitioners obtain current "CVs" and resumes of psychological experts. It is standard protocol at deposition to ask an expert if there are any significant additions or changes to his or her CV. Usually, there is little deviation

or discussion, and the inquiry ends there. However, if the expert has been practicing a while, it is very likely that his or her CV has been modified over the years for any number of reasons: to pursue a particular academic appointment, to reflect a shift in research or focus, or as is sometimes the case, to suit a particular case. Changes in how education, degrees, or professional activities are represented can signal prior misrepresentations. Shifts in research, publication topics, and clinical experience, or an affiliation with a particular company or medical group, can show a lack of current knowledge, bias, or expertise puffery for a particular case. In our office, for example, expert CVs are maintained on file so that changes in emphasis and claimed expertise over time can be identified and analyzed. While the inquiry should include a request for prior versions of CVs from the expert, a usually more fruitful source of information will come from defense colleagues who have crossed paths with the expert in the past.

Objective Verification of Key Training, Certifications, Degrees, and Licenses

All too often, defense practitioners accept at face value representations made on a CV or in deposition about an expert's training. This is particularly true with psychological experts who often claim to have completed supplemental training with less traditional educational providers. It can therefore be fruitful to collect copies of licenses, certifications, and degrees directly from the institutions together with published institutional requirements.

Prior Deposition and Court Testimony

We all know that prior sworn testimony of an expert, whether at deposition or trial, can be the key to the credibility kingdom. This is particularly true with psychological experts, partly because of the very subjective nature of the opinions and the tendency of psychological experts to characterize mental diagnoses across physical injury lines. For example, if you can gather opinion testimony about the many times an expert has diagnosed post-traumatic stress disorder (PTSD) in cases involving everything from auto accidents to dog bites and employment torts, this can undermine the credibility of a similar diagnosis in your case, which perhaps involves yet another type of accident. Similarly, if you can locate testimony about why a certain test was used in one case, you might be able to plant doubt about why it was not used in your case. The cross-examination possibilities are endless, but they will depend on the number and breadth of the transcripts acquired. Though this can be a time-consuming, and therefore, expensive process, it can provide the "case-breaker" areas of attack at trial. Since jurors tend to view expert testimony with skepticism anyway, even a few body blows derived from prior deposition or trial testimony can have a devastating effect on the opposing expert's credibility.

Establishing the Genesis of Referral

There is no question that a referral to a psychologist or psychiatrist for evaluation by the plaintiff's attorney is an implicitly biased process. Why else would an attorney representing a personal injury plaintiff send a client for evaluation by a psychological expert than to establish psychological injury? Experienced experts will usually deflect this type of bias with broad statements espousing their reputation, training, and integrity, which is exactly what you want to elicit as a building block for challenges to accepted protocols. The important distinctions here are that this psychological expert is not the treating provider, did not receive the engagement by medical referral, did not participate in patient–psychotherapist visits with the plaintiff, and did not implement or carry out a treatment plan. Thus, the evaluation is driven largely by the quantity and quality of the information provided to the expert by the plaintiff and the attorney. The manner and method by which such an evaluating expert receives this information is controlled by the plaintiff's attorney, which is in stark contrast to the defense psych expert, for whom quantity and quality usually carries the day. One method often used by plaintiff psychological experts to acquire seemingly "objective" data to support a psychological diagnosis involves administering the SCL-90 R, a four-page "Symptom Checklist" (a self-reported symptom-distress questionnaire) that covers a wide variety of feelings and situations on the emotional spectrum. The checklist then invites the plaintiff to rank each item on the list on a scale of 0 to 4 (0 = "not at all," 1 = "a little bit," 2 = "moderately," 3 = "quite a bit," and 4 = "extremely"). Naturally, this checklist gives the plaintiff, who is being seen by a "friendly" litigation expert, freedom to exaggerate symptoms in a way that is difficult to challenge. Not surprisingly, the written list also suggests many other symptoms that the plaintiff might not have otherwise thought of on his or her own.

One method often used by plaintiff psychological experts to acquire seemingly "objective" data to support a psychological diagnosis involves administering the SCL-90 R, a four-page "Symptom Checklist" (a self-reported symptom-distress questionnaire) that covers a wide variety of feelings and situations on the emotional spectrum.

Attacking Credibility by Showing Subjective Elements of Evaluation

Many publications provide established guidelines for conducting a thorough forensic psychological or neuropsychological evaluation and for preparing the detailed written assessment. *See*, *e.g.*, G. Glancy *et al.*, *AAPL Practice Guideline for the Forensic Assessment*, J. Am. Acad. Psychiatry Law, vol. 43, issue 2 suppl. (2015); M.D. Lezak *et al.*, Neuropsychological Assessment (5th ed., 2012, Oxford

Univ. Press). Thus, when a report does not follow established protocol, it can be good fodder for challenge and cross-examination by a well-prepared defense attorney.

For experienced personal injury defense practitioners, it is not uncommon to see reports from psych experts that include broad, sweeping conclusions about psychological diagnoses and impairment without concrete reference to the actual data to support the opinions. For example, in a recent report that we received in a case involving a forty-five-year-old male with pre-incident diagnosis of sleep apnea, the psychologist stated in the report:

> Claimant shared of his ongoing ruminations and concerns about his future financial wellbeing and career options. Coupled with his depressive symptomatology and anxiety, he shared of his reoccurring thoughts, memories and visualizations regarding his industrial injury. He also shared of his physical reactivity to stress and anxiety and of a startle response to benign situations. He spent a great deal of time discussing his notable sleep disturbance that he attributes to his industrial injury, wherein he frequently and consistently awakens after several hours of sleep in mid-cycle and is unable to return to sleep, which he has found to be increasingly anxiety-provoking and distressing. He did acknowledge that he occasionally compensates with daytime naps.

In his statement of "Objective Findings and Psychological Test Results" the evaluator went on to state:

> From all of the evidence available to this consultant, *which includes the acceptance of a veracity of the history as related by the claimant* that is associated with his industrial injury, coupled with his current clinical presentation, psychometric test results, and a review of his *submitted medical records and related documentation*, this consultant opines that claimant is suffering from a Major Depressive Disorder of a Moderate Severity and a Generalized Anxiety Disorder. He also presents with the clinical hallmarks of an individual suffering from Posttraumatic Stress Disorder.

Elsewhere, the consulting psychologist concludes: "Claimant presents with pronounced psychiatric symptomatology which includes depression, anxiety, phobic reactions, ruminations, physical reactivity, which meets the clinical diagnostic criteria of a Posttraumatic Stress Disorder."

In this case, the expert spent just *two* hours with the plaintiff, one hour administering tests (including the self-reported symptom checklist), and four hours reviewing medical records and case documents *provided to him by the attorney.*

Significantly, he did not do the following: (1) review pre-incident medical treatment records; (2) interview the plaintiff's wife of eighteen years, *even though she accompanied him to the appointment,* or gather any other collateral source of information about the plaintiff's pre-incident psycho-social condition; (3) consider the implications of the plaintiff's *lifelong history of methamphetamine use and abuse* (including on the date of the incident); (4) consider the implications of plaintiff's attention deficit hyperactivity disorder (ADHD) diagnosis and prescription medication; and (5) explore the effect of the plaintiff's multi-year prior incarceration in state prison.

According to Bruce Leckart, Ph.D., a forensic psychologist and professor emeritus of psychology at California State University at San Diego, the weakest link in any psychological report is a doctor's diagnosis. *See* G.M. Filisko, *How Lawyers Can Effectively Cross-Examine Psychiatrist and Psychologists*, ABA J., July 2017. Dr. Leckart provides two key recommendations for cross-examining a psychological expert. First, do not ask the examining mental health expert about the plaintiff directly, but instead confine questions *to the report.* The reason for this is quite simple: if you ask a doctor about the plaintiff, he or she will feel free to provide information not in the report, which can be used to justify his or her opinions. For example, in reference to the report quoted above, rather than ask the examiner what the *plaintiff said* about the frequency, duration, pattern of use over time, and the effect of methamphetamine use, and what constituted "abuse," ask the examiner where *in the report* is the data set forth to support any conclusion that the prior use and abuse did not contribute to the plaintiff's current psychological condition.

First, do not ask the examining mental health expert about the plaintiff directly, but instead confine questions *to the report.*

Second, stick to the criteria established in the current version of the Diagnostic and Statistical Manual of Mental Disorders (currently DSM-5). If there is insufficient data in the expert report demonstrating that the patient has met the specific diagnostic criteria, the opinion will be discounted. Thus, in reference to the report quoted above, rather than asking the doctor to identify the basis for the diagnosis of PTSD, ask where *in the report* he or she lists the specific complaints made by the plaintiff indicating that he or she met the required DSM-5 diagnostic criteria for PTSD. For each criterion, the examiner should be able to provide the qualitative nature of the specific complaint reported by the plaintiff, as well as a description of their frequency, intensity, duration, onset, and course.

Conclusion

Effective cross-examination of a psychological expert can be one of the most important skills that a trial attorney can have in his or her toolkit. It can certainly have a significant effect on a jury's view of damages and the client's financial exposure. While it may seem daunting at first, especially upon first reading a lengthy written report that has pages of seemingly "objective" criteria to support a DSM diagnosis, by methodically gathering data that can test the credibility of an expert's qualification, experience, and impartiality, and highlighting gaps in methodology as it compares to established psychological protocol, a defense attorney can effectively reduce the effect of opinions from an adverse psychological expert.

Early Mediation

A Tool for Creating Efficiencies

By Heather Dawn Wiltshire Clement and David M. Goodman

Mediation and other forms of alternative dispute resolution effectively resolve many cases, but it is a wise attorney who knows when to mediate and when to litigate.

All clients, regardless of which side of the courtroom they sit, want the same thing: a fast resolution to their legal issues and a favorable outcome. Melding these two goals, however, is easier said than done. Motion practice, depositions, and discovery can all delay a case from reaching trial and can rack up extraordinary costs in the process. This is where mediation comes in. Mediation, as well as other forms of alternative dispute resolution (ADR), offers an abundance of benefits that can help bring about a fast and favorable resolution to a client's legal issues. On the other hand, mediation and other forms of ADR are not suitable for every case, and counsel should assess each case individually to decide whether ADR is able to resolve an issue. Being able to do this efficiently and effectively is an essential skill that all attorneys need.

The Benefits of Mediation

To know when to use early mediation and other forms of ADR, attorneys need a thorough understanding of the benefits that these tactics offer. Only by having a complete understanding of these benefits can counsel make a fast and informed decision on whether a case is appropriate for early mediation.

When most attorneys consider whether to mediate, the initial benefits that come to mind are saving time and saving the client money. While these benefits certainly stand out the most, there are plenty of additional benefits that often go unnoticed. In summarizing the benefits of ADR, authors Thomas Jensen, Cariann Beaudoin, and Katina Thornock identified the following:

1. The process is voluntary.
2. The parties determine the timing.
3. The process is flexible.
4. The process is efficient.

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5. The parties control the process.
6. It avoids precedent.
7. The process may preserve relationships.
8. It permits creative remedies.

Thomas D. Jensen, Cariann E. Beaudoin, & Katina C. Thornock, *Strategically Using Alternative Dispute Resolution in Litigation*, In-House Defense Quarterly, Fall 2011, at 4, 5.

The benefits offered by flexibility and being able to control the process and timing are frequently overlooked when considering ADR, but they are often equally important considerations. In a personal injury context, these considerations can allow parties to limit their discovery requests significantly when liability is obvious, and the only question involves damages. For example, defense counsel may only need the medical records from a specific doctor to evaluate damages in a case. Instead of submitting omnibus discovery demands, which would produce unnecessary documents in this context, early mediation gives counsel the flexibility to request specific documents that would help lead to a fast resolution.

Even where early mediation is not likely to be successful, it may still offer benefits to a case. By offering to mediate at the beginning of a case, both parties have the opportunity to come together to discuss the case in a meaningful way, which presents a host of benefits for both sides. Described as "intangible benefits" by author Doug McQuiston, early mediation allows both sides to reset their expectations for the case sooner, the parties can retain more actual and less emotional control over the case, and the parties can get a better idea of what the essence of the case actually is, which can allow for more pointed discovery. Doug I. McQuiston, *Next-Level Mediation and ADR*, For The Defense, (Apr. 2018), at 74, 80.

Early mediation also allows counselors who are unfamiliar with each other to meet and get a better idea of each other's style and their thoughts on what is important in the case. Gerald Albrecht & Lincoln S. LeVarge, *Smart Mediations: The Who, What and How of Successful Mediations*, Lit. Managmt., (Winter 2016), at 47.

Even if the case does not settle that day, the intangible benefits of early mediation will help the case as it progresses. Just by meeting early in an attempt to mediate, you can get a better idea of what your adversary is looking for, you can lay out your expectations for the case, both parties can narrow discovery significantly, and you can build a trusting and working relationship with opposing counsel.

When Early Mediation and ADR Are Undesirable

Equally important to knowing when early mediation and ADR are beneficial to a case is knowing when they are not. Authors Thomas Jensen, Cariann Beaudoin, and Katina Thornock identified several situations where ADR and early mediation would be undesirable:

1. When a jury trial is desired to set a precedent or to bind non-parties,
2. When delay is preferred,
3. When a case involves substantial legal issues,
4. When a case has witness credibility problems,
5. When your adversary is being unreasonable, or
6. When a party desires extensive discovery.

See Jensen, *supra,* at 5.

Along similar lines, a case that you believe has strong grounds to be resolved through a motion to dismiss or a motion for summary judgment should not be submitted to early mediation or ADR. *See* Erika J. Gardner and Robert D. Lang, *The Importance of Teamwork: InHouse and Outside Counsel Cooperation for Mediation Success*, In-House Defense Quarterly, Winter 2012, at 62, 63.

In most cases, however, whether early mediation or ADR is desirable will come down to the type of relief that your client seeks. For example, in disputes where the plaintiff is looking for more than just money and wants some sort of vindication or a sense of fair treatment, early mediation or ADR may be ideal. *See* Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 Harv. Negot. L. Rev. 103, 115 N.26 (2005). Thus, if the plaintiff is seeking a type of relief that is based more in equity, it may be a good indication that early mediation or ADR are appropriate. That is not to say, however, that cases where the plaintiff is seeking money alone are inappropriate for early mediation or ADR. Rather, for the reasons stated above, these types of cases may still benefit from the process. Instead, knowing that the plaintiff wants something more than just money should provide an indication that early mediation or ADR is a proper avenue to lead to a suitable resolution of the case sooner.

Which Cases to Mediate and When to Start the Process

As discussed above, early mediation has several benefits, but to recognize those benefits early on in a case and use them to your client's benefit are skills that all attorneys must develop. There are many cases that are obvious candidates for early mediation. For example, you would want to mediate early in a case where the damages sought outweighs the cost of discovery or trial. You would not want your client to incur unreasonable discovery or litigation fees if those fees would be more than the potential damages awarded. Another example is a case where only minor issues separate the parties. It would be a poor use of time to bring a case to trial just to resolve minor issues that could have been resolved by discussing them sooner.

Subtle things such as venue, however, though less obvious, can be instrumental in determining whether to mediate. For example, in New York, jury awards can vary greatly from county to county. Gardner, *supra,* at 64. Therefore, if the case is brought in a county that traditionally gives low awards, the cost of discovery or the cost of trial may make early mediation desirable. Early mediation may also be desirable in cases where you know that your client or the witnesses would make poor impressions at trial. If you know that your client would come across as arrogant or insensible at trial, it would be beneficial to try early mediation even before depositions are taken. Gardner, *supra*, at 63.

Perhaps the best way to evaluate whether your case is right for early mediation is simply by sitting down with your client and identifying what their goals are. *See id*. at 62. If the client's goals are to resolve the dispute early and to preserve a good relationship with the opposing side, early mediation is ideal.

Overall, the faster you can get a sense of where the case will go, what your cli-

ent's goals are, and what is likely to come out during discovery, the faster you will be able to evaluate whether early mediation is appropriate.

Simply knowing that early mediation may benefit your case is only half the battle; the other half is knowing the right time to submit the case to mediation. As mentioned above, if you know your client would make a poor witness, you should suggest early mediation before opposing counsel deposes your client and makes the same determination. If opposing counsel is known for settling, then suggesting early mediation may be beneficial. On the other hand, it may be more beneficial to wait until the eve of trial to make your negotiating hand stronger if you know that opposing counsel is uneasy about taking the case to trial.

If you choose to mediate close to trial, you should attend the mediation with your trial exhibits ready to go, and even with some motions that you plan on making before the trial begins. Jensen, *supra*, at 7. This way opposing counsel can see that you are ready for trial and willing to try the case if the mediation does not work out.

There is no one right or wrong time to submit a case to mediation. Rather, you will have to evaluate each case on a case-by-case basis and determine whether mediation should be sought early or later in the litigation process. This decision should be made based on the strength of your case, the goals of your client, and the style of opposing counsel.

Which Cases to Arbitrate

Arbitration shares many of the same benefits of early mediation, with the additional benefit (or risk) of binding the parties to the outcome. Arbitration, similar to mediation, is generally cheaper, faster, and more private than litigation. As in mediation, arbitration also allows the parties to choose the arbitrator or arbitrators for the case. This means the parties can choose arbitrators based on specific qualities that an arbitrator has. For example, when a case revolves around a business custom or technical insight, the parties can choose arbitrators who have extensive knowledge in the field. As a result, arbitration would be desirable in a case where it would be difficult and time-consuming to explain to a judge or jury the relevant technical background that would be necessary to understand the case.

Also similar to mediation, arbitration does not follow formal rules of evidence, which can give parties more leeway in evidentiary issues. Jensen, *supra,* at 9. Thus, you may want to arbitrate a case that you know may present evidentiary difficulties. Along similar lines, arbitrators do not have to follow traditional discovery rules, which can limit costly and time-consuming "fishing expeditions." *Id*.

Unlike mediation, however, an arbitrator is not bound to follow a process that the parties agree to. Arbitrators have the authority to make discovery, procedural, and evidentiary decisions. *Id*. Therefore, if both parties have already agreed on what the dispute issues are and have agreed on what evidence is necessary, then arbitration is not desirable. Additionally, arbitrators are traditionally more likely to make a "compromise award" and do not have to explain their decisions. *Id*. This can cause further problems because parties have limited appeal rights from an arbitrator's decision. *Id*.

Conclusion

Mediation and other forms of ADR are tools that attorneys can use to bring about a desired solution for a client. When used correctly, they can offer creative solutions that benefit both parties in a way that a traditional trial could not. Thus, knowing when to mediate a case or when to use ADR is an essential skill for all attorneys. It takes time and practice to perfect, but when that happens, you will be in a better position to represent your client's interests and bring their case to a successful conclusion. FD

To Pay or Not to Pay, That Is the Question

Addressing the Expert Deposition-Preparation Expense Question in Federal Court

By Albert W. Copeland II

Whether a discovering party must pay for an expert witness's preparation time for a deposition is a thorny interpretive issue in federal courts. While courts across the country agree that the party seeking discovery must pay some expert fees under Federal Rule of Civil Procedure 26, jurists and lawyers disagree about the scope of the expert fee-shifting provision in the rule. *See, e.g., Borel v. Chevron U.S.A. Inc.*, 265 F.R.D. 275, 277 (E.D. La. 2010) (summarizing the federal court split on deposition preparation expenses).

For example, is reviewing deposition transcripts or spending time speaking with retaining lawyers about a case reimbursable? *See, e.g., Benson v. Wells Fargo Bank, N.A.*, No. CIV 16-5061-JLV, 2017 WL 2772119, at *19 (D.S.D. June 26, 2017). How about the time experts spend gathering documents? *See, e.g., Healthier Choice Flooring, LLC v. CCA Glob. Partners, Inc.*, No. 1:11-CV-2504-CAP, 2013 WL 12101905, at *21 (N.D. Ga. Jan. 4, 2013), *report and recommendation adopted*, No. 1:11-CV-2504-CAP, 2013 WL 12108229 (N.D. Ga. Jan. 30, 2013). The scope of travel time, too, is not so clear when it comes to reimbursable expenses. *See, e.g., Nester v. Textron, Inc.*, No. 1:13-CV-920 RP, 2016 WL 6537991, at *4 (W.D. Tex. Nov. 3, 2016). The supposed answer to this question lies in Federal Rule of Civil Procedure 26(b)(4)(E), which provides as follows:

> (E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:
>
> (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and
>
> (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

Fed. R. Civ. P. 26(b)(4)(E). The confusion specifically derives from the phrase "time spent responding to discovery." While the advisory committee notes provide that an expert's fees for the deposition "will ordinarily be borne by the party taking the deposition[,]" courts have conceded that the note provides limited guidance on this recurring issue. *See Eastman v. Allstate Ins. Co.*, No. 14CV00703WQHWVG, 2016 WL 795881, at *5 (S.D. Cal. Feb. 29, 2016). As a result, there is considerable ambiguity about how counsel should proceed in these situations.

For guidance, consider a 2016 California federal district court's summary of four current approaches to resolving this issue. *See Eastman v. Allstate Ins. Co.*, 2016 WL 795881, at *5. First, some courts provide that "reasonable preparation time" is reimbursable. *Id.* A second approach incorporates the "reasonable preparation time" standard, but excludes any time that the expert spends consulting with the retaining party's attorney. *Id.* A third approach takes an opposing position and states that deposition preparation is not reimbursable under the "time spent in responding to discovery" provision in Rule 26(b)(4)(E)(i). *Id.* The final approach is that expert deposition preparation time is only appropriately reimbursable either in complex cases, or in extenuating circumstances. *Id.* In the Eleventh Circuit, where I practice, courts have recognized the federal split on this issue, *see, e.g., Fell v. United States*, No. 3:15CV541/MCR/EMT, 2017 WL 2819040, at *4 n.7 (N.D. Fla. June 9, 2017), *report and recommendation adopted*, No. 3:15CV541/MCR/EMT, 2017 WL 2817881 (N.D. Fla. June 29, 2017), though the "reasonableness" standard appears to be the approach adopted by several district courts within the jurisdiction. *See, e.g., Equal Employment Opportunity Comm'n v. Winn-Dixie Montgomery, LLC*, No. CA 09-0643-C, 2011 WL 13248687, at *2 (S.D. Ala. Jan. 27, 2011); *Advanced TeleMedia, L.L.C. v. Charter Commc'ns, Inc.*, No. CIVA105CV2662-RLV, 2006 WL 3422669, at *14 (N.D. Ga. Nov. 27, 2006). In other words, there is a considerable variety of approaches and modifications in resolving expert deposition expense quarrels among litigants in federal court.

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Fortunately, there is one way to avoid resorting to motion practice to answer this question if there is no precedent in your jurisdiction on this question: the Rule 26(f) Report. Make sure to discuss this topic in your meet-and-confer conference and to break down which costs will be covered by each party. If necessary, break down the expenses by line item; for example, list in bullet points all relevant categories such as travel expenses, discussion time with attorneys, reviewing documents, and gathering materials, to name a few. This type of specificity will inevitably save time and expense when a potential conflict emerges. Be sure to come prepared with the current law in your jurisdiction, and to justify your position, for example, why deposition-preparation expenses should not be covered. Finally, be prepared to negotiate. Especially in complex cases, when litigation continues for years and cooperation with opposing counsel is key, starting off discovery on a positive and constructive note about expenses will set the tone for a professional relationship, and it will also signal to the other side that you have done your homework. It's a win-win for everyone. FD

Expert Witness, from page 23

579 (1993). Confirm whether your own expert has been challenged, struck, or limited in previous cases. Evaluate his or her list of previous cases and find out the outcomes. You may uncover an opinion limiting the expert's testimony of which he or she was previously unaware. In conducting such research, you can assess whether he or she has been relied upon for motion practice or at trial and whether the result was favorable.

Finally, balance the proficiency of your proposed expert with the unique needs of your case, including the need to contain costs. If you are searching for an expert who is particularly scarce and thus are obligated to hire someone across the country, perhaps the need outweighs the cost considerations. Alternatively, are you simply hiring a counter-expert to pressure resolution and do not anticipate that the expert will be deposed? In assessing the needs of your case and weighing the costs and complications that may arise from retaining the expert, you are doing your client a service by ensuring that you are selecting the best expert for your case within the parameters that are reasonable, considering the overall value and complexity of the case.

Engaging with Your Expert

After deciding which expert to retain, the work of managing your expert and achieving a favorable opinion begins. At the outset, obtain a budget for the work expected so that you can gauge the progression of costs as you advance toward different stages of the case, whether report drafting, deposition testimony, or trial preparations. All engagement with and work done by your expert should be guided by cost concerns. In assessing the materials to provide to your expert, ensure that you provide all available documentation and supporting materials on which the expert will base his or her opinions, but do not simply dump your entire file on the expert. Make strategic decisions, with input from your expert, about which information is truly needed for the opinions. For example, if you are dealing with a record-reviewing physician or surgeon, provide the records and films necessary to opine about the relevant body part or medical condition; sending all medical records is not always the most helpful approach.

Know the law in your jurisdiction for disclosure of expert materials, particularly in state courts. Distinguish between your testifying experts and non-testifying, consulting experts, because the rules for disclosure vary. *See* Fed. R. Civ. P. 26(a)(2). The Federal Rules of Civil Procedure exempt from disclosure any draft reports, but state laws may differ. Fed. R. Civ. P. 26(b)(4)(B) ("Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded."). Notably, this exemption is not absolute, allowing for production of draft reports in certain instances. *See, e.g.*, Fed. R. Civ. P. 26(b)(4)(d) (excluding discovery of work product from a consultant absent "showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means"); *United States ex rel. Wall v. Vista Hospice Care*, 319 F.R.D. 498, 510 (N.D. Tex.2016) (finding that "Rule 26(b)(4)(B) extends work-product protection to any draft of such a report," even if the draft was written by defense counsel).

Additionally, your communications with the expert under the Federal Rules of Civil Procedure are protected from disclosure unless they deal with compensation of, facts provided or relied on by, or assumptions made by the expert. Fed. R. Civ. P. 26(b)(4)(C). However, your state-specific rules may vary, rendering draft reports or communications with the expert discoverable. Be mindful of the information that you include in your correspondence with the expert to ensure that it is neutral and free from your mental impressions of the case.

Once employed, your expert can aid you in evaluating the opposing expert. Ask your expert where he or she agrees and disagrees with the opposing expert. Find out if there are any gaps in the reliance data or methodology. For example, your expert may be aware of a scientific or medical article that controverts or questions an opinion of your opposing expert. Use your expert to help develop lines of questions, particularly if the questions that you need require specialized scientific or medical knowledge. Equipped with this article, you can examine the expert more thoroughly and develop testimony to aid you in a *Daubert* challenge or to establish a foundation for the jury to question the opposing expert's credibility at trial.

Conclusion

Experts often prove a useful tool in supporting trial themes and defense strategy, as well as counteracting and rebutting the plaintiff's expert's evidence that was developed to meet the ultimate burden of proof. Using proper screening and investigation techniques can help ensure that you select the best expert, while also considering costs and the unique needs presented by your case. Take advantage of the resources available to you, through your existing legal network and through organizations such as DRI. Lay the appropriate foundation with your retained experts, confirm the scope and details of the work to be provided, and use your expert's knowledge to aid aspects of the case beyond mere report production. With this roadmap, engaging and managing expert witnesses in personal injury litigation should be a smooth ride. FD

Each month, DRI welcomes new members from the United States and Canada and abroad. Some of these new members have been recommended by current members actively involved in advancing goals shared by DRI. Any individual who recommends a new member is recognized as an "Advocate" for DRI.

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2020 Seminar Schedule

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January 22–24	**Women in the Law** | Scottsdale, AZ
January 30–31	**Civil Rights and Governmental Tort Liability** | San Diego, CA
February 5–7	**Product Liability Conference** | New Orleans, LA
February 20–21	**Toxic Torts and Environmental Law** | Phoenix, AZ
March 18–20	**Litigation Skills** | Las Vegas, NV
March 26–27	**Medical Liability and Health Care Law** | Austin, TX
April 1–3	**Construction Law** | Chicago, IL
April 1–3	**Insurance Coverage and Claims Institute** | Chicago, IL
April 29–May 1	**Life, Health, Disability and ERISA** | New Orleans, LA
April 30–May 1	**Trucking Law** | Austin, TX
May 6	**Cannabis Law** | Boston, MA
May 6–8	**Drug and Medical Device Litigation** | Boston, MA
May 7–8	**Retail and Hospitality Litigation** | Orlando, FL
May 14–15	**Business Litigation Super Conference** | Minneapolis, MN
May 14–15	**Intellectual Property** | Minneapolis, MN
May 15	**Fidelity and Surety Roundtable** | Chicago, IL
May 20–22	**Employment and Labor Law** | Denver, CO
June 4–5	**Hot Topics in International Law** | Tel Aviv, Israel
June 11–12	**Diversity for Success** | Chicago, IL
June 24–26	**Young Lawyers** | Atlanta, GA
September 10–11	**Fire Science** | Washington, DC
September 10–11	**Nursing Home/ALF Litigation** | Nashville, TN
October 21–24	**2020 DRI Summit** | Washington, DC
November 19–20	**Asbestos Medicine** | San Diego, CA
December 3–4	**Insurance Coverage and Practice Symposium** | New York, NY
December 3–4	**Professional Liability** | New York, NY

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