

# QFDCCUARTERLY

## FDCC

FEDERATION OF DEFENSE  
& CORPORATE COUNSEL

### THE MASTERS MANUAL

THE ART OF CROSS-EXAMINATION

*Sandra F. Clark*

TRIAL USE OF COMPUTER-GENERATED ANIMATIONS AND SIMULATIONS

*Thomas M. Goutman and Guy A. Cellucci*

THE PRESENTATION OF PROBABILITY TO THE JURY

*Latha Raghavan and Mark P. Donohue*

*Masters Manual Classics*

THE TEN COMMANDMENTS OF CROSS-EXAMINATION

*Timothy A. Pratt*

PROFESSIONALISM IN DEPOSITIONS: THE SOUND OF SILENCE

*E. Phelps Gay*

PROSPECTIVE JUROR QUESTIONNAIRES MADE EASY

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PARTNERING IN COMPLEX LITIGATION

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## INTRODUCTION

In this issue of the QUARTERLY, we are pleased to bring you three new articles that will appear in The Masters Manual, which we introduced in the 2008 winter edition of the QUARTERLY. These articles continue the tradition of providing practical advice about issues common to litigation. Even before The Masters Manual was introduced, FDCC members and their associates published articles in the QUARTERLY that deserve to be recognized as “Masters Manual” articles. To acknowledge the timeless value of these articles, we are also republishing four QUARTERLY “classics” in this Masters Manual issue of the QUARTERLY.

Many of our readers will recall Sandra Clark’s presentation on cross-examination in the Trial Masters Program at the 2010 Annual Meeting. Now, we are pleased to publish Ms. Clark’s article “The Art of Cross Examination” in The Masters Manual. Ms. Clark’s thorough explanation of how to master the “art” of cross-examination is supplemented by transcripts of cross-examination conducted by many talented and experienced FDCC members. The article also addresses technology and psychology, especially as those topics relate to improving traditional cross-examination methods. Juries will appreciate and understand the corporate defendant’s story when defense counsel use these techniques. In “The Art of Cross-Examination,” Sandra Clark cites Timothy Pratt’s article “The Ten Commandments of Cross-examination” and explains that Mr. Pratt “underscores the theme that cross-examination is an art, and that three factors combine to create this ‘artistic’ success – personality, presence, and persuasion.” Ms. Clark advises her readers that Mr. Pratt’s “article is full of insight and examples and should be read in its entirety.” We agree, as do others who over the years have requested permission to reproduce Mr. Pratt’s article. Mr. Pratt’s article is a classic, worthy of a Masters Manual designation and is therefore, republished in this Masters Manual issue of the QUARTERLY.

In “Trial Use of Computer-Generated Animations and Simulations,” Thomas M. Goutman and Guy A. Celluci explain why computer-generated animations and simulations can be enormously persuasive and potentially case-defining evidence when used to supplement lay and expert witness testimony. This comprehensive article explains the difference between animations and simulations and why that difference matters. It also includes practical advice when using animations and simulations during a trial as well as a compendium of case law highlighting how various jurisdictions have ruled on issues pertaining to computer-generated animations and simulations.

Juries must take into account statistical evidence and probabilities in virtually every trial. Latha Raghavan and Mark P. Donohue tackle this subject in “The Presentation of Probability to the Jury.” They note that “the only way to assess

uncertainty is with the consideration of probabilities. The jury, therefore, inevitably considers probabilities when assessing evidence—that is, the jury considers how probable it is that the events occurred as each side presents them.” As the authors explain with a practical examples and insights, it is imperative for lawyers to present statistical evidence in a way that does not distort the jury’s understanding of the facts. To do so, lawyers must understand how jurors (and even some judges) may misapprehend statistical evidence. If they anticipate these problems, lawyers can effectively present evidence of probabilities and counter an opponent’s misleading use of statistical evidence and help a jury reach an accurate verdict.

In addition to Timothy Pratt’s “The Ten Commandments of Cross-examination” mentioned above, this issue of *The Masters Manual* includes three other articles that we have designated as “classics.” E. Phelps Gay was the 2004 recipient of the FDCC’s Andrew C. Hecker award for the best QUARTERLY article “Professionalism in Depositions: The Sound of Silence” which we have selected as a classic worthy of inclusion in *The Masters Manual*. Even though the obstructive deposition conduct that characterized litigation in the 1980’s and 1990’s is largely behind us now, it is useful to be reminded of the history that led to the 1993 amendments to Federal Rule of Civil Procedure 30(d) and state innovations that improved discovery practice. As Mr. Gay writes in the conclusion to his article,

Effective advocacy in an adversarial system can survive and flourish without obstreperous and obstructive deposition conduct by counsel. As witnesses testify without unnecessary interruption, counsel can turn their professional skills to the evidence adduced and the legal issues that surround such evidence. In the process, depositions can return to their original function as efficient vehicles for the discovery of information relevant to the resolution of a dispute.

Every lawyer needs a thoughtful prospective juror questionnaire and a method for tabulating the results and this is why we selected Jack Daniels and Annie Knafo’s 2005 article “Prospective Juror Questionnaires Made Easy” for inclusion in *The Masters Manual*. In this article, the authors share their years of experience and fresh perspective on juror questionnaires. They explain the value of juror questionnaires and the type of questions to ask, the information that can be elicited, and how to use that information when selecting a jury. Their article provides a sample questionnaire and instructions for coding the results, and it

explains how to use the information to rank potential jurors on a continuum from “most favorable” to “most risky.”

The final “classic” for this issue of The Masters Manual is Glen M. Pilié’s article entitled “Partnering in Complex Litigation.” When The Masters Manual was introduced, Tim Pratt wrote: “This Manual will serve as a comprehensive written reference for our members and will present practical and tactical solutions to some of the most challenging problems we face.” Mr. Pilié’s article certainly satisfies these criteria. His article explains how corporate counsel partner with lawyers from more than one firm to create a virtual law firm, the challenges that exist and “the critical importance of getting partnering ‘right’ in the context of complex litigation.” Each challenge that Mr. Pilié identifies is thoroughly explained, and the reader is rewarded with a wealth of ideas and solutions that only an experienced corporate litigation manager could generate.

We would again like to thank Frank Ramos, who developed and promoted the concept of The Masters Manual, and Latha Raghavan, Chair of the Publications Committee, for their consultations regarding the articles we selected for this issue of The Masters Manual. We look forward to identifying additional QUARTERLY articles as “classics” that we can include in future issues of The Masters Manual and we welcome recommendations of past QUARTERLY articles that FDCC members think are worthy of inclusion in The Masters Manual. In addition, we look forward to publishing new Masters Manual articles and especially encourage participants in the FDCC Trial Masters Program to formalize their remarks as articles for future issues of The Masters Manual.

Patricia Bradford  
Alison Julien  
Co-Editors, FDCC Quarterly

# The Art of Cross-Examination<sup>†</sup>

Sandra F. Clark

## I.

### INTRODUCTION

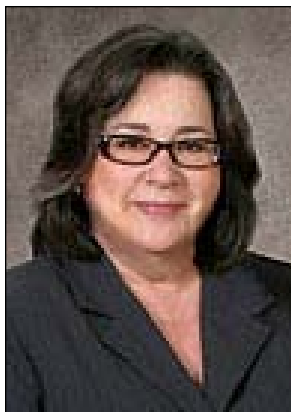
Juries constantly evaluate witnesses to determine what the truth is. They make tentative decisions about who is winning and who is losing, and who is good and who is bad.<sup>1</sup> A jury often makes up its mind early in a trial, long before a defendant even puts on a witness. Juries frequently identify with an individual plaintiff instead of a large corporate defendant and see themselves as being able to level the playing field. During voir dire and opening statement, the defense attorney outlines his client's story and sets the themes of the case. The attorney then fills in the details of the defendant's story by cross-examining the plaintiff's own witnesses through well-prepared and effective questioning. Oftentimes, the case has already been won or lost by the time the defense calls its own witnesses. The better the cross-examination of the plaintiff's witnesses, the fewer witnesses the defense will need to call in its own case, thus depriving a good plaintiff's attorney of the opportunity to cross-examine the defense witnesses in front of the jury.

This Article presents a composite of cross-examination techniques that may be useful in effectively conveying a corporate defendant's story. The Article also addresses the uses of technology and psychology to improve upon traditional cross-examination methods and to assist in finding the art in the process.

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<sup>†</sup> Submitted by the author on behalf of the FDCC Toxic Tort and Environmental Law section. The author acknowledges the able assistance of David Red of MehaffyWeber, Beaumont, Texas.

<sup>1</sup> Robert A. Spanner, *The Truth about the Orthodoxy of Cross-Examination*, 16 INTELL. PROP. LITIG. 1 (2005).



*Sandra F. Clark is a shareholder in the Beaumont, Texas office of MehaffyWeber where she concentrates on cases involving personal injury defense, complex commercial litigation, and products liability. She had tried more than 25 complex cases to verdict and she obtained one of the top 10 defense verdicts recognized by the National Law Journal in 2001. In addition, Ms. Clark is a member of the Multidistrict Litigation Advisory Committee for the Texas Asbestos MDL. Ms. Clark is a member of the State Bar of Texas and is admitted to practice before the United States District Courts for the Eastern and Southern Districts of Texas and the United States Court of Appeals for the Fifth Circuit. She is also board certified in Personal Injury Trial law by the Texas Board of Legal Specialization. Ms. Clark is a member of the Professionalism Committee of the State Bar of Texas, the Advisory Committee of the Texas Board of Legal Specialization, the Texas Bar Foundation, the American Inns of Court, the Federation of Defense and Corporate Counsel, the Products Liability Advisory Council, the American and Texas Bar Associations, the American Board of Trial Advocates-Houston Chapter, Texas Association of Defense Trial Attorneys, and the Defense Research Institute. She has been listed in the Best Lawyers in America since 2000 and Texas Monthly Super Lawyers since 2003. Ms. Clark was also listed as one of the Top 50 Female Super Lawyers in Texas and as one of the Top 100 Super Lawyers in the Houston Area for 2006 and 2007.*

## II. STRATEGIC CROSS-EXAMINATION

“Cross-examination is the ‘great engine’ for getting at the truth.”<sup>2</sup>

### A. Primary Purposes of Cross-Examination

Cross-examination generally serves two primary purposes:

**Destructive Cross:** The goal of destructive cross is to discredit the testifying witness or another witness. This type of cross is designed to reduce the credibility of the witness or the persuasive value of the opposition’s evidence.<sup>3</sup> The use of impeachment material is a key to destructive cross, as it provides the ability to attack and discredit the bases for the

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<sup>2</sup> RALPH ADAM FINE, DIRECT AND CROSS-EXAMINATION OF EXPERT WITNESSES TO WIN, SM060 A.L.I.-A.B.A. 267 (2007), adapted from RALPH ADAM FINE, THE HOW-TO-WIN TRIAL MANUAL (Juris 3d rev. ed. 2005).

<sup>3</sup> Fred T. Friedman, *Cross-Examination Skills*, 1 (2007), <http://www.ncids.org/Defender%20Training/2007%20Defender%20Trial%20School/Cross-Examination%20—%20Friedman.pdf>.

witness's statements or opinions. The cross-examiner's goal is to establish control of the witness both in his mind and in the mind of the jury. The jury expects that, and as the trial proceeds, if the attorney excels in cross, the jury will look forward to what will happen next.<sup>4</sup>

**Supportive Cross:** Cross-examination is the defense lawyer's opportunity to tell his story and to make significant points with the jury. Jury research shows that the jury determines who should win a case early in a trial. Defense attorneys should rarely wait until their case-in-chief to develop their arguments because by then it may be too late. Research also shows that jurors pay closer attention to cross than to any other part of a case. Supportive cross-examination can be used to bolster the questioner's own theory of the case and to tell the defense's story. It should develop or expand on favorable aspects of the case not developed on direct examination.<sup>5</sup> This testimony may support your witnesses or assist in impeaching other witnesses.

In many jurisdictions—especially in state courts—cross-examination is not limited in scope to the areas covered on direct. In those jurisdictions, cross can often yield helpful testimony given by experts from other cases or from other sources such as published articles and now from blogs or e-communication. Once a witness is on the stand, he is fair game. Cross may also bring out from fact witnesses helpful testimony that was carefully avoided in their direct testimony.

Effective cross should result in a defendant needing to call fewer witnesses. Strategically, the defense attorney may call fewer witnesses for several reasons:

- To avoid repetition of facts or details clearly brought out in the case already;
- To move the case along toward close without appearing to delay;
- To put on only key witnesses who will stand up well on cross themselves;
- To prevent giving a skilled attorney on the other side a chance to score major points, thus ending on a high note during the defense case.

Before conducting cross-examination, the attorney must think strategically. Is cross-examination necessary for each witness? The answer is no. Of course, it is difficult to say “no questions,” and most attorneys take the bait. Instead, the attorney should ask “Did that witness's testimony hurt my case? If so, would asking questions improve or reinforce the bad?” Only if asking questions would improve the situation should the lawyer cross-examine the witness.

Usually testimony of family members in a death or serious injury case hurts the defendant's case; however, a jury expects these witnesses to be emotional and sympathetic. Jurors will have compassion for them and will probably identify with them. Consider declining to

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<sup>4</sup> Kevin W. Holt, *Tips for Effective Cross-Examination*, LITIG. NEWS, Winter 2006, available at <http://www.gentrylocke.com/getarticlepdf.aspx?id=164>.

<sup>5</sup> *Id.*

question family members unless you cannot get critical evidence into the case in any other way. The jury knows that the family probably exaggerated its story, and a defense attorney does not need to point out the obvious. In a recent very high-profile pharmaceutical case, the judge privately stated—after the case had been resolved—that the defense’s decision to extensively cross-examine the widow about her relationship with her husband and her husband’s other health issues was a disaster. Most of that evidence had already been introduced through medical records and the testimony of other witnesses. The jury was angered by what it saw as heavy-handed and inconsiderate tactics on the part of the company. And the old adage provides that if a party (or attorney) makes the jury mad, he loses the case. The defense strategically decided to have a female attorney question the widow. However, that cross-examination was her only assignment in front of the jury during the entire case. It was an obvious ploy, and the jury did not like it.

Other considerations in the decision of whether to cross a witness and how extensive the cross should be are the following:

How important is the witness to your case or the plaintiff’s case?

Does the jury expect cross?

Will the jury think you are conceding everything the witness said if you do not cross?

Did the plaintiff’s attorney leave out an area you consider important on direct that may be a trap if you ask about it? (Obviously, if you have deposed the witness, this trap should not be a real potential.)

Can the witness be controlled?

Do you want to give the witness a chance to repeat his direct testimony?

Can the witness be impeached?<sup>6</sup>

Typically, the jury will have an initially favorable view of non-party fact witnesses. So at the close of direct, the jury will most likely feel familiar and friendly toward the fact witness.<sup>7</sup> For this reason, you must carefully control the tone of the cross-examination of fact witnesses. A harsh cross-examination of such a witness, even if he is hostile toward the defense, will generally not be well-received by the jury.<sup>8</sup>

### B. *Develop a Plan*

All cross-examinations must be carefully planned. You should separately evaluate and establish a goal for each witness. Determine the type of witness. Is he hostile, helpful, or neutral? Decide the facts you must prove with each witness. If you can further your story

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 44.

<sup>8</sup> *Id.*

through the plaintiff's fact or expert witnesses, could that reduce the number of witnesses you need to call? Each part of a trial should be interrelated and should reinforce the other parts. Cross-examination is an integral part that should help the jury understand your client's story. Each cross should have a purpose, and the overall purpose must be to advance the case objectives and goals.<sup>9</sup>

Asking leading questions with yes or no answers enables the cross-examiner to "testify," and is the general rule to follow in cross. Each question should be intended to advance the goals defense counsel has already established for this particular witness. Each question should fit within the planned scope of the examination.<sup>10</sup> In most cases, juries will reject the testimony of an evasive witness who cannot or will not answer simple questions with simple answers.<sup>11</sup> The success of a cross-examination depends as much on what is not asked as on what is. Do not ask the question unless it fits within the plan, it furthers the goals of the defense, and the answer is either already known or does not matter.<sup>12</sup>

When developing the plan for each witness (including fact witnesses), the attorney should outline the points to be made with that witness. How can the cross of this witness contribute to the defense story and themes? If the witness will not concede anything helpful, use the cross-examination to show that the witness is biased and undermine the credibility of the plaintiff's story. If the witness's bias is obvious, you may be able to expand his negative testimony to show that it is contrary to the experience of the jury and not to be believed.

### C. *Effective Rules of Engagement*

Judge Ralph Fine has provided valuable advice to attorneys conducting cross-examination:

*Do not* ask a question on cross-examination *unless* it satisfies one of the following rules:

1. The jury already knows the answer before the witness responds, or
2. The answer cannot hurt you, or
3. You have *immediate* impeaching material.<sup>13</sup>

Judge Fine also provided a sample cross-examination and a critique of that examination. Many of his points are worth careful consideration. In his opinion, a lawyer should rarely object to the admission of evidence in front of the jury. In most trials today, evidence is pre-admitted and objections have been previously made, but there are occasions to ob-

<sup>9</sup> Alan B. Parker, *Planning Cross-Examination*, FOR THE DEFENSE, Sept. 2001, at 21.

<sup>10</sup> Friedman, *supra* note 3, at 44.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> FINE, *supra* note 2, at 237.

ject during witness testimony. Unless the objection is necessary to preserve the record for appeal, it usually should not be made. An objection only reinforces the testimony or document, and Judge Fine believes that “winning lawyers are truth givers in their trials.”<sup>14</sup> He believes that objecting in front of a jury makes the jury think the attorney has something to hide. Obviously, the attorney may need to object to protect the witness, to make a point with the jury, or to stop egregious behavior. In Judge Fine’s example, however, the witness is answering questions very well, yet plaintiff’s counsel objects to a question. The attorney may be technically correct, but the objection does not advance his case. Judge Fine believes that the testimony was actually helping the objecting attorney, so the objection served no purpose<sup>15</sup>

Judge Fine offers additional advice for cross-examining attorneys, both before and during questioning. First, he suggests that prior to cross, counsel should make sure that opposing counsel has been given all documents so that he does not slow your cross by asking to review long exhibits. Of course, this rule does not apply to a document that the attorney has held in reserve for effect. Second, Judge Fine points out that asking the court to limit a witness’s answers to “yes” or “no” on cross is a futile and damaging effort. He observes that asking the court to admonish the witness appears to be whining and an admission that the questioner does not control the witness. He further points out that arguing with a witness is like beating a dead horse, and results in calamity.<sup>16</sup> Finally, he reiterates that an attorney should start his cross on a strong point, and should avoid using “okay,” “I see,” or “alright” after an answer because such language merely emphasizes the negative.

### 1. The Commandments—Revisited

Cross-examination does have some other generally accepted rules. The Ten Commandments discussed by Irving Younger years ago have been modified and updated by esteemed attorneys such as Tim Pratt.<sup>17</sup> Pratt underscores the theme that cross-examination is an art, and that three factors combine to create this “artistic” success—personality, presence, and persuasion. His article is full of insight and examples and should be read in its entirety. Some points, however, deserve special emphasis. To be an effective cross-examiner, the attorney must *prepare*. Throughout this Article, the concept of preparation is emphasized more than once. It is a huge mistake to think that you can do an effective job of cross by winging it.

Some important tips on developing the art (and practicality) of cross-examination include the following:

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<sup>14</sup> *Id.* at 29.

<sup>15</sup> *Id.* at 30.

<sup>16</sup> *Id.* at 35.

<sup>17</sup> See Timothy A. Pratt, *The Ten Commandments of Cross-examination*, 53 FED’N DEF. & CORP. COUNS. Q. 257 (2003), reprinted in 61 FED’N DEF. & CORP. COUNS. Q. 178 (2011).

- Establish goals for each cross;
- Outline the topics to cover;
- Allow the jury to see that the attorney knows and is committed to the case and that the opposing witness respects the attorney as an able adversary;
- Cross the witness on the essential controversy of the case;
- Master all prior depositions, articles, and other documents for each witness;
- Consider whether you can impeach professional witnesses by their prior testimony or statements in published articles; they often do not review that information and may forget what they have said in the past; and
- Investigate new and critical resources for an expert on the Internet, including the witnesses' own websites and their employers' websites, as well as common forms of social networking.

One particularly effective cross-examination occurred in a *Daubert* hearing involving Tim Pratt and Gene Williams (both FDCC members) with Tim asking questions of a very qualified witness who was being challenged. That exchange illustrates the importance of finding out all you can about a witness—or, in this case, a website:

Q: You are on staff at M. D. Anderson Cancer Hospital?

A: Yes.

Q: Isn't it true that M. D. Anderson Cancer Hospital has a web page?

A: Yes.

Q: Have you ever had any articles published on the M. D. Anderson web page?

A: A few.

Q: Do you remember one of your articles that appeared on the web page just three months ago?

A: I think so.

Q: In that article, you talked about T-cell lymphoma, the very type of cancer involved in this case?

A: I believe so.

...

Q: And, therefore, you wanted to be as accurate as possible?

A: Of course.

Q: Turn to page four of the article.

A: Okay.

Q: In this article, which you published on the web page just three months ago, you talk about what is known regarding the cause of T-cell lymphoma, isn't that right?

A: Yes.

Q: Isn't it true that you said the following: "No one knows what causes T-cell lymphoma." Is that what you wrote just three months ago?

A: That's what it says.<sup>18</sup>

(The witness was excluded.)

Pratt further specified a number of cross-examination tips that every good trial attorney should take to heart:

- While it is generally a good rule to lead the witness, leading questions can grow tiresome.<sup>19</sup>
- Vary the routine of questions.<sup>20</sup>
- "Often, it is best to have the answer come from the mouth of the witness."<sup>21</sup>
- "Know the difference between tough and mean, between confidence and arrogance, and between control and dominance."<sup>22</sup>
- One of the most difficult things for lawyers to do is quit. You need to continuously evaluate the cross. How is the jury responding? Has cross gone on too long?<sup>23</sup>

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<sup>18</sup> *Id.* at 260–61.

<sup>19</sup> *Id.* at 263.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 265.

<sup>22</sup> *Id.* at 266.

<sup>23</sup> *Id.*

- There are two times to quit: when the witness has been discredited or has made a monumental concession, and when the witness has defeated the questioner.<sup>24</sup> It is better to start and stop on a high note. How many attorneys regret asking that one extra question? Ask yourself, how much better can it get? Also, keep in mind that the witness could come back with a zinger of his own if given the opportunity.<sup>25</sup>
- Be “organized, effective and quick to the point.”<sup>26</sup>
- Know your impeachment materials and have them readily available. With newer technology, have the documents and impeachment material loaded in trial-presentation software to eliminate piles of documents, notebooks, depositions, etc.<sup>27</sup>
- Use impeachment evidence sparingly. Do not impeach on minor points. The jury will not be impressed and may think you are harassing the witness.<sup>28</sup>
- If you are doing a high-tech presentation, practice. Do not fumble with the technology, and always have a back-up plan.<sup>29</sup>
- If the witness is strong and cagy and the questioner is a match for every detail, the jurors will likely think the lawyer and witness are smart, but may have no idea what is going on.<sup>30</sup>
- Technical points generally bore the jury (and everyone else, except perhaps, the witness).<sup>31</sup>
- It is the duty of the cross-examiner to simplify the case so that the jury understands it.<sup>32</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 267.

<sup>27</sup> *Id.* at 268.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 268–69.

<sup>31</sup> *See id.* at 269.

<sup>32</sup> *Id.*

## 2. Don't Anger the Jury

In addition to concentrating on the effect your cross-examination will have on the witness and the goals of your case, you must always be aware of the effect you are having on the jury. If you alienate or anger the jury, all of your other work may be for naught. To avoid angering the jury, keep the following tips in mind:

- Do not demand a “yes” or “no” answer. Cutting off a witness who wants to explain an answer may offend the jury. After the witness gives an explanatory answer, the attorney might ask, “Is that a yes?” One way to get the “yes” or “no” answer is to ask shorter, more direct questions.
- Do not appear as a “cross” examiner. Not every witness can be destroyed. The attorney should not be rude, loud, or emotional. The jury should have the emotional response, not the lawyer.<sup>33</sup> In a recent trial, one particularly capable, tall, and very imposing plaintiff’s attorney with a loud voice had only one temperament—aggressive. At first the jury liked him and watched him closely, but as time wore on, he became predictable and tiresome.
- Do not treat every witness as a liar. Jurors do not believe that every witness will lie under oath (especially those not being paid to testify). They may distrust a “hired” gun, but not every witness. Jurors react more favorably to the idea that a witness may be mistaken, misinformed, or potentially biased. In short, jurors may identify with the witness.<sup>34</sup> In a recent trial, the jury gave each of four adult children a significant amount of money for the loss of their elderly father. One of the adult children lived several states away and rarely saw his parents. On post-trial interview, the jury foreman said he identified with that adult child because the foreman could rarely visit his own parents, but he did not think that should diminish his loss if they died. Attempting to distinguish among the adult plaintiffs in cross-examination backfired because of an unusual sensitivity or perhaps even a feeling of guilt of a key juror. That juror, by the way, sided with the defense on liability and argued strongly against punitive damages (which the jury declined to award), but he agreed that the award to each adult child should be the same.
- Do not argue with a witness. Jurors may not side with the witness, but at a minimum, they will not like argumentative tactics.
- Do not interrupt an evasive witness, but go back and repeat your question. Do not rephrase it. Repeat it verbatim. Eventually, the witness will look either obstructionist or ridiculous to the jury.

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<sup>33</sup> *How to Cross-Examine Witnesses Without Alienating Your Jurors*, TRIALTHEATER.COM, <http://www.trial-theater.com/articles/alienate.htm> (last visited Jan. 5, 2011).

<sup>34</sup> *Id.*

### 3. Be Flexible

Despite the prior discussion of established cross-examination techniques, the attorney should remember not to stay too tied to the traditional rules of cross-examination. Allow yourself flexibility, and make cross-examination an art.

Outlines are necessary, at least to a point. An outline keeps the questions organized, keeps impeachment materials at hand, ensures the questions are in the right order, and so on. The outline should be made, but not followed too rigidly.<sup>35</sup> If you are too attached to the outline, you may fail to do the following:

- Keep eye contact with the witness to maintain control and observe his manner in answering questions.<sup>36</sup>
- Recognize that the best question may arise from the witness's answer, not the outline.<sup>37</sup> For example

Q: Are you a married man?

A: No, my wife died.

Q: That is too bad. What was her cause of death?

A: She suffocated.

Then, instead of following up on that answer, the attorney makes the mistake of reading from the outline:

Q: What is your current address?

- Refrain from looking at the outline too often. It makes you seem dependent and insecure.
- Do not feel compelled to ask everything in the outline.<sup>38</sup>

Non-leading questions also have their place, particularly in situations like the following:

- When the witness is uncomfortable with the facts, a leading question may let him off the hook, whereas an open-ended question could elicit the damaging information.<sup>39</sup>

Q: What were you doing as you approached the intersection?

A: I was driving. (She said this haltingly because she was also talking to her child in the back seat, trying to read the GPS, and texting her husband.)

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<sup>35</sup> Spanner, *supra* note 1, at 12.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 13.

Q: So, you did not see the light change?

A: No.

- When the witness has been thoroughly discredited.<sup>40</sup>
- When the witness is tied to a favorable fact. In that case, you should have the witness state that fact.<sup>41</sup>

Even “bad” answers can work if the “bad answer” is contrary to the jury’s common experience or demonstrably untrue, and it will be discrediting. In either instance, counsel should allow the witness to walk off the cliff and give the bad answer.<sup>42</sup>

The “art” of cross is not just about what the witness says, but also his appearance when saying it.<sup>43</sup> It is how the questioner presents the question, how the witness refuses to give a straight answer, or whether the questioner refuses to accept a reasonable answer.<sup>44</sup> It is about answers contrary to the jury’s common sense or experience.<sup>45</sup> It is about the open-ended question that reiterates a significant point to the jury to which the answer does not matter.<sup>46</sup>

### III.

#### CROSS-EXAMINATION OF EXPERTS

Cross-examination of expert witnesses can be the most crucial component of a trial. Whichever side does the most effective job will probably win the case. However, cross-examination of technical experts may be daunting. Their testimony may be full of scientific and medical terminology, or epidemiological information that is far beyond the understanding of the jury or the court.<sup>47</sup>

“Lawyers rely heavily on expert testimony to provide powerful, convincing evidence.”<sup>48</sup> You are not the only one, however, who will be able to cross-examine witnesses. The other side gets its opportunity as well. The importance of preparing your witnesses cannot be overemphasized, and it should occur well before trial. It is a common tactic for plaintiffs’

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Monique Weiner, Thinking Outside the Science—Strategies for Cross Examining the Technical Expert, Address Before the DRI Toxic Torts and Environmental Law Committee Meeting, October 2009.

<sup>48</sup> Deborah Gander, *Prescription for Powerful Expert Testimony: Brilliant Direct and Cross-Examinations Take Proper Preparation*, 43 TRIAL 40, 40 (2007).

attorneys to subpoena opposition witnesses to testify in the plaintiff's case-in-chief. Plaintiffs' attorneys may also call your corporate trial representative to testify (even if he does not know the facts of the case), or ask the court to compel the attendance of your corporate representatives or other corporate witnesses at trial. You should prepare for this possibility and have those witnesses ready for cross-examination before the trial begins.

#### A. *Preparing Your Own Witness*

When you are preparing your own witness for cross-examination, keep the following tips in mind:

- Make your witness understand the elements you have to prove and how his testimony fits within that proof.<sup>49</sup>
- Be sure the witness is familiar with any prior deposition testimony he has given in order to prevent the witness from opening the door to impeachment evidence or facts excluded from the case.<sup>50</sup>
- Make sure your witness understands the standards of proof in the jurisdiction (which may be “reasonable probability”), and that he does not waffle by giving answers such as, “anything is possible.”<sup>51</sup>
- Prepare the witness for cross-examination in particular, not just direct. No matter how good the witness's credentials are, and no matter how well he tells the story on direct, the testimony may be a complete failure (and could damage your entire case) if the witness is not prepared for cross-examination.
- Conduct practice cross-examinations for any inexperienced witnesses, and make it as realistic a cross as possible.<sup>52</sup>
- Consider videotaping your practice cross-examinations so the witnesses can become familiar with the process and learn to avoid distracting mannerisms.
- When preparing your witness, be careful not to waive a privilege or let the witness stumble into testifying about all the things he did to get ready to testify. Skilled plaintiff's attorneys always ask witnesses about their preparation; at best the witness usually appears uncomfortable answering the questions, and at worst the witness provides a sound bite about how “the witness had to be coached to testify” and had to “rehearse telling the truth.”

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

### B. *Attacking Credibility of Opposing Expert Witnesses*

“Recognizing that ‘professional expert witnesses are available to render an opinion on almost any theory, regardless of merit,’ judges are directed to act as ‘gatekeepers’ for all expert testimony.”<sup>53</sup> For expert testimony to be admissible, the expert must be qualified, and the testimony must be both relevant and reliable.<sup>54</sup> Courts applying *Daubert* have broad discretion to consider a variety of factors.

At the deposition phase of a case, the attorney may ask open-ended questions to obtain all of an expert’s opinions.<sup>55</sup> The deposition, however, should also include specific leading questions that assist in proving your case.<sup>56</sup> Further, the deposition should include questions that may undermine the reliability of the expert’s opinions for use in a *Daubert* hearing if the expert is to be challenged. Cross-examination is the time for the questioner to shine (but not necessarily present a show). The jury will be paying close attention, waiting to see what the questioner is going to do. Jurors expect some fireworks, especially regarding the major experts. The questioner should not be arrogant or rude, although some simply cannot restrain themselves.<sup>57</sup> The attorney should not try to argue too much about things within the witnesses’ fields of expertise because most witnesses know more about the science, medicine, or technical fields than the attorneys, and most attorneys—although not all—will lose that battle.<sup>58</sup> The jury may be interested in the sparring between the expert and the attorney for a while, but will soon get bogged down in details if the topics are too complicated, therefore missing the points you are trying to make. We have all seen trials in which the attorney and witness have a great scientific debate enjoyed by no one but themselves. However, in a final note on this point, there are some skilled attorneys who are so well prepared that they can beat an expert at his own game—a sight to behold that almost always impresses even an unsophisticated jury.

Generally, on cross, the attorney should evoke short answers by asking short questions. Asking long, complicated questions in depositions or at trial makes it very difficult to clearly impeach the witness. Move the examination along and do not skip around too much or appear unorganized. Many lawyers have had the unfortunate experience of attempting to impeach a witness with a two-part question only to receive a non-responsive answer and have the judge rule that the question at trial was different from the question at deposition, therefore nullifying the impeachment.

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<sup>53</sup> Ricardo G. Cedillo, *Practical Tips on Cross-Examination of Expert Witnesses*, 33 *Advoc.* 44, 44 (quoting *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995)).

<sup>54</sup> *FED. R. EVID.* 702.

<sup>55</sup> Gander, *supra* note 48, at 42.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 43.

<sup>58</sup> *Id.* at 44.

If an expert shows significant evidence of bias, on deposition it may be better to obtain the concessions the witness is willing to make before questioning him on bias. Starting with bias puts the witness on the defensive, and he will often be reluctant to concede helpful facts or opinions. At trial, that is a judgment call. If the witness has been willing to concede important facts or opinions, then the bias can be downplayed at the end. For example, consider the following exchange:

Q: Dr. \_\_\_\_\_, you, like all the other experts in this case, charge for your litigation consulting, correct?

Q: In fact, didn't you charge \$500 per hour for everything from reviewing records to spending the night in Beaumont, Texas?

Q: Is it true that you have testified forty times in cases similar to this one, and that thirty-nine of those were at the request of plaintiffs' lawyers?

Then when delivering your argument, you are able to say something like this: "Even Dr. \_\_\_\_\_, plaintiff's hired expert, agreed that he had never made a diagnosis on the basis such scant evidence."

If the expert is unwilling to concede anything helpful, then bias is the place to start. A very effective cross-examination can involve questioning the witness extensively about bias (especially a hired-gun type expert), then following with something along these lines:

Q: Dr. \_\_\_\_\_, you came here from a trial in Florida, tomorrow you go to California?

Q: In all these trials, in all these states, you use the same slides, the same facts, the same opinions?

Q: And you gave the same testimony today—without reviewing a single document, deposition, or shred of evidence about Mrs. Jones' case—that you will give tomorrow in another plaintiff's case?

Q: Charging \$500 per hour each and every time?

Then stop. If this questioning is done effectively, the questioner has dismissed the expert as a hired gun whose opinions are not worth revisiting.

The following deposition cross of a well-qualified expert did a good job of undermining the reliability of the expert's methodology:

Q: When you are listed as an expert, do you require that the firms you work with provide you with your expert designation so that you can approve it?

A: I would say that's varied or been variable.

Q: You haven't approved it for this case?

A: I have not, no.

Q: Have you provided two reports?

A: Yes.

Q: Do these two reports contain all the opinions that you intend to offer with respect to this case?

A: Yes.

Q: I think you mentioned earlier in your deposition, that mesothelioma can be difficult to diagnose?

A: Yes.

Q: You would also agree it's a diagnostic dilemma to distinguish adenocarcinoma from epithelial mesothelioma?

A: I think that can be difficult, yes.

Q: In your opinion, what is the gold standard, if there is one, for distinguishing between the two? If you could have the best material available, what would it be?

A: Well, the best material would be probably an autopsy that occurred very shortly after the person died.

A: I think probably at this point in time the best specimen that we get is what is called a video-assisted thorascopic biopsy.

Q: Do you have any information with respect to the gross appearance of this particular tumor?

A: The only—not what somebody saw with their eyes, but I do have information about what Dr. \_\_\_\_\_ said about it and what I was told he said about it.

Q: Who told you what he said?

A: Plaintiff's counsel.

Q: You understand that for years this tumor was diagnosed as an adenocarcinoma?

A: Yes.

Q: And that diagnosis had been made by several local physicians?

A: Well, as far as how many people made the diagnosis, I thought, you know, you basically look to the pathology report.

Q: The pathologist diagnosed adenocarcinoma initially?

A: Yes.

Q: And did you ever receive a copy of plaintiff's death certificate?

A: I did not, no.

Q: You are not familiar with the fact that it stated that he was diagnosed with lung cancer?

A: That wouldn't surprise me at all.

Q: Have you personally ever diagnosed an epithelial mesothelioma on the basis of a fine needle biopsy and the two stains done in this case?

A: Fine needle aspiration biopsy, yes. The two stains that were done in this case . . . no, I don't think so.

Q: In a perfect world you would have wanted more material in order to do additional stains?

A: In a perfect world, yes.

Q: It is a potential risk when you are dealing with a destained slide that you might get a false positive or a false negative on the restained slide?

A: I guess that's a possibility, yes.

Q: What stains would you have done in addition to the ones you did if you had more slides or tissue?

A: I would do a CK5/6 for a positive stain. . . . I would have done a test for a substance called desmin.

Q: Can you point me to any articles in the literature, medical literature, that would recommend diagnosing an epithelial mesothelioma based on a fine needle biopsy and the two stains that you did?

A: Not necessarily, no.

Q: For you to have complete confidence in your diagnosis, you would have preferred to have had additional tissue to do additional staining; is that fair?

A: Yes.

Q: You don't believe it's an adenocarcinoma?

A: I don't believe it's an adenocarcinoma, but I would not be critical because I don't know if I've said this to you already, I think—I can't tell the difference and I almost have gotten to the point I don't think cytologists can tell the difference between an adenocarcinoma and a mesothelioma.<sup>59</sup>

The case was tried and the same witness testified. The cross from the deposition was very helpful in setting up the last questions on cross at trial:

Q: So the first three preferred and best ways to evaluate pathological material were not available to you?

A: That is correct.

Q: So the fourth best way, won't you agree, is to evaluate tissue collected by fine-needle biopsy?

A: Yes.

Q: And again, you didn't have the opportunity to do that?

A: That is correct.

Q: And as we said, we're at the fourth level of what you would actually prefer in your criteria of diagnosing a disease?

A: Yes.

Q: So, essentially, as a last resort you have slides to look at, right?

A: Yes, uh-huh.

Q: And these were slides that were, what, ten years old when you saw them?

A: That is correct.

Q: Well, normally, more times than not, you don't have to de-stain the slides, do you?

A: That is correct. No.

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<sup>59</sup> Cross conducted by Michele Smith, MehaffyWeber, Beaumont, Texas.

Q: And, as I think you said in your deposition, you have never before diagnosed a mesothelioma with a fine-needle biopsy and with only two stained slides?

A: That's correct, I have not.<sup>60</sup>

The expert further admitted that he had reviewed thousands of cases before this one and had never made a diagnosis based on the analysis used in this case.

Simple admissions elicited from plaintiff's experts may debunk their testimony. Debunking an expert's opinion is an attempt to show the jury that the expert's testimony is contrary to common sense.<sup>61</sup> In *Daubert*, the court noted that the "adjective 'scientific' implies a grounding in the methods and procedures of science."<sup>62</sup> There is no room for speculation or conjecture in connection with expert testimony under the *Daubert* ruling.<sup>63</sup> The "average juror" may not be able to fully understand complex scientific principles or appreciate the subtlety of the cross-examination; however, he will be able to recall that an expert witness conceded his testimony was speculative or mere conjecture.<sup>64</sup> It is therefore crucial "to elicit from the witness that at least some component of his testimony is speculative, conjectural, uncertain, or unreliable."<sup>65</sup>

To secure admissions and factual testimony from the expert that tend to support either the defendant's theory of the case or the defendant's valuation of plaintiff's damages, the questioner should attempt to impeach plaintiff's experts. Impeachment can be accomplished by

1. Demonstrating bias, prejudice, or clear partisanship;
2. Pointing to prior inconsistent statements contained in reports, letters, prior deposition or trial testimony, articles, writings, etc;
3. Demonstrating that the testimony of the expert is contrary to recognized authorities;
4. Demonstrating that the testimony is unreasonable or improper; or
5. Demonstrating that the expert's credentials or qualifications do not entitle his opinions to consideration.<sup>66</sup>

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<sup>60</sup> Trial cross by M.C. Carrington, MehaffyWeber. The defense won at trial.

<sup>61</sup> Weiner, *supra* note 47.

<sup>62</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993).

<sup>63</sup> *Id.*

<sup>64</sup> John P. Freedenberg & Neil A. Goldberg, *Defense Counsel's Approach to Cross-Examination in the Post-Daubert Era*, FOR THE DEFENSE, June 1996, at 15.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 15–16.

Defense counsel skillfully impeached plaintiff's toxicologist with his own words in a series of trials involving dioxin exposures. There, the witness was either unfamiliar with his earlier testimony or was hoping no one would find it. In one trial, he testified on cross-examination as follows:

Q: Doctor, you told this jury that you're board certified in toxicology. Are you board certified by the American Board of Forensic Toxicology?<sup>67</sup>

A: No.

Q: What about the American Board of Toxicology? Are you certified by that organization?

A: No.

Q: Have you ever tried to get certified by the American Board of Toxicology?

A: I think back when I got out of school I took the first two parts of the examination. No, I think I took the whole examination and I failed the third session but never repeated it. It was early in—I'm involved in enough organizations, and the American Board of Toxicology is geared primarily toward research in animal study.

Q: You said you took the entire test once and passed sections one and two but not three; is that right?

A: Yes, that's what I recall. It's been a long time.

Q: You actually did take section three twice and you failed it twice, didn't you?

A: I don't think I took it again. I intended to.

Q: Do you remember testifying in a case called Lucy Marie Allen versus Azknobel Codings in October of 1997, sir?

A: Yes.

Q: On page three you were asked at line 17: You have taken section three twice; is that fair? Yes, I passed section one and two but not three. Question: And you failed section three twice now; is that right? Your answer: Yes. I have devoted my studies to this case last fall, this case instead of my exam prep. Does that refresh your recollection?

A: It does. It does actually, and I appreciate that.

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<sup>67</sup> Cross by Deb Kuchler, Kuchler Polk Schell Weiner & Richeson, New Orleans, Louisiana.

This exchange also shows that website research can pay off:

Q: If we could please, pull up the website from the organization that gives this test, and let's look at what's covered by section three, the section that you failed twice. Section three covers general principles and applied toxicology, doesn't it, sir?

A: That's what it states.

Q: It also covers—let's see. Let's get to the parts that apply to this case. Environmental toxicology was part of the section that you failed twice; is that right?

A: This is not the section that I had trouble with. I used the terms section one, two and three in that deposition. But I don't know that my use of those numbers corresponds with the—I need to see the title of this again. Does it say section three?

Q: It sure does. You see the Roman numeral three right there?

A: Okay. Yeah. The section that I had trouble with was the animal studies section. One of the other two sections has to do very much with animal study models, and it was called methods of toxicology. And that's what I had trouble with, not that.

Q: So, you're telling the jury that when you testified under oath and said you failed section three, which covers forensic toxicology, and I think that's what you told the ladies and gentlemen of the jury that you do for a living. You're a forensic toxicologist, right?

A: That's right.

In the next of the series of dioxin trials, the following exchange occurred with the same witness:

Q: Okay. Now, Dr., you said that you were not certified by the American Board of Toxicology because you failed a portion of the test twice; once in 1995 and then again the same portion the next year in 1996. Is that what you told us?

A: I did, that's correct.

Q: What portion of the test did you not pass?

A: I believe it was a portion that had to do with reproduction carcinogenesis and a number of other—of developmental toxicology and some other areas that were largely animal issues. The carcinogenesis and mutagenesis, developmental toxicology was all human, as opposed to forensic or public health aspects.

Q: I'd like to put up on the board, please, the American Board of Toxicology's classification of the three sections of the test. Of the sections that they list here, section one, section two, section three, which one of those sections did you fail?

A: I think it was two. The one I talked about, about the mutagenesis, carcinogenesis, developmental and reproductive. If you look under two, I believe that was the section.

Q: Okay. And under number two we see that that includes carcinogenesis, which you told us means causing cancer. That was part of the section that you failed?

A: Yes. Although this particular test had nothing to do with human epidemiological studies or public health issues or causation, but rather the mechanisms involved in the animal models and performing the studies and that type of thing. It really wasn't as relevant as the forensic examinations that I took a year later and passed.

Q: But what caused Mr. Strong's cancer is what you're here to talk to this jury about and carcinogenicity was among the issues on the section you failed?

A: That's correct.

Q: Among the issues in the section you failed we also see hematopoietic toxicity; isn't that right?

A: Yes.

Q: Isn't multiple myeloma a hematopoietic cancer?

A: Yes, it is.

Q: And that's among the subjects in the section that you failed twice; is that right?

A: Correct.

“Defense counsel should never lose sight of the significant benefits flowing from admissions by the expert during the course of cross-examination. If such admissions can be secured, they may contradict” the expert's prior testimony or the testimony of other experts called by the plaintiff.<sup>68</sup>

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<sup>68</sup> Freedenberg & Goldberg, *supra* note 64, at 16.

The goal of cross is to secure a statement from an expert that the “average juror will easily understand, retain, and which defense counsel can focus on during summation.”<sup>69</sup> A concession by the expert that even a portion of his testimony is “speculative,” “unreliable,” or “conjectural” can be essential to undermine the expert’s opinion in the eyes of the jury,<sup>70</sup> and may assist in either limiting or excluding an expert’s testimony altogether. An expert’s opinion will be viewed with skepticism if counsel is able to show that the assumptions and deductions the expert relies on are incorrect. The scope of defense counsel’s cross-examination initiatives is limited only by his skill, aggressiveness, and imagination.

### C. *Effective Cross-Examination of Fact Witnesses*

Trial attorneys often overlook the importance of the testimony of fact witnesses and instead are more focused on the testimony of experts. The jury, however, does not overlook fact witnesses. The testimony of fact witnesses may be a significant factor in the jury’s decision. The examination of every fact witness in any trial should receive extensive pre-trial preparation. Defense lawyers have the opportunity and the challenge of eliciting the desired testimony by cross-examining plaintiff’s fact witnesses.<sup>71</sup> The better your cross-examination of plaintiff’s fact witnesses, the fewer fact witnesses you may need to call to support your case.

Fact witnesses may be hostile, neutral, or friendly. Prior to conducting the cross-examination of a fact witness, the questioner must determine whether the witness is hostile. Because a hostile, negatively motivated witness is a possibility, there must be a plan in place to deal with such a witness. If the fact witness is neutral or friendly to the defense, then the attorney or someone from the defense team should meet with the witness and discuss the scope of his testimony.<sup>72</sup> Fact witnesses can be used to validate and provide the foundation for an expert’s opinion and exhibits, and they can also provide supportive testimony to tell the defense’s side of the story.

A hostile fact witness must be controlled on cross-examination. The questioner must determine the goal or goals for that witness and must provide little wiggle room. There may be questions that elicit bias on the part of the witness. In the following example, the witness was hostile to the company’s position, but was also a co-worker who had first-hand knowledge of the working conditions at the exposure site and had given some very negative testimony on direct. This witness needed to provide helpful testimony regarding workplace safety, which was part of the trial story. The cross was done by Mike Foradas of Kirkland and Ellis, who kept a very hostile witness under control:

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> James. M. Campbell, *Cross-Examination of Fact Witnesses*, FOR THE DEFENSE, March 2000, at 42.

<sup>72</sup> *Id.*

Q: The buildings themselves, they were washed down at the end of each shift, were they not?

A: They was washed down all during the day, sir.

Q: So during the day, people would come in and wash them down and get the dust and debris out?

A: Yes.

Q: And that was important, not just because it was dusty, but you wouldn't want to slip on something, it was just good housekeeping practice, right?

A: Yes, sir.

Q: And the lunchrooms, you mentioned, those are also cleaned frequently. You said many times during the day the lunchroom would be cleaned out, right?

A: Sometimes.

Q: If they got dirty?

A: Yes, sir.

Q: In fact, the other trades would get pretty upset at you if you were blowing dust (with an air hose) toward them, right?

A: Yeah.

Q: And that's both common courtesy and it's sort of safety, you don't want to be blowing debris at people, right?

A: That's right.

Q: Now, you talked a little bit about respirators on your direct examination. There were three kinds of respirators that were in use at one time or another?

A: Yes, sir.

Q: And so you would use those to keep stuff out of your nose and your ears and your mouth?

A: Yeah.

Q: And they actually had nose clips, so you would put the mouth bit in your mouth, right?

A: Yes.

Q: And you'd put a nose clip on your nose?

A: Sometimes.

Q: But it was available to use it that way?

A: It was available, yes sir.

Q: You would use it to get out of the gases and the dust, right?

A: Yes sir, but mostly for gas.

Q: And the people who worked back in the gas house would use those two-cartridge respirators, right?

A: Sometimes.

Q: They were certainly available for them to use?

A: Yes.

Q: And there was also a full-face respirator, right?

A: Yes, sir.

Q: And that would cover your whole face?

A: Yes, sir.

Q: Section folks would come out and make sure the respirator fit okay in case you wanted to use it?

A: Right.

...

Q: And that wouldn't be your recollection, I take it, that they didn't use those two-cartridge or full-face respirators?

A: No, sir. They used just the mouth-bit respirator.

Q: So his recollection is obviously a little different than yours, if that's what he said?

A: It's a little different.

A: We're two different individuals.

Q: That happens, people remember things differently?

A: Yeah, m-h'm.

Q: And you said he'd get as much overtime as he could get, and I take it everybody would like to try to do the job on overtime that they normally did, if possible, right, because you would be good at it, and it would be a little easier work?

A: No. It was for the benefit of the money is the only reason we done the overtime.

Q: No, I understand why you would want to do the overtime. I'm saying, if you're doing the overtime, you try to do the job you normally do, if you can?

A: If you can, or unless there's an easier job.

...

Q: [Y]ou could get into trouble for violating those safety rules, as I understand it?

A: Yes sir.

Q: I think one of the witnesses called it an unpaid vacation?

A: Yeah.

Q: And the Supervisors and your Union Stewards would both beat those safety rules into your heads?

A: Yes, sir.

Q: And one rule that you knew about was if you were working around heavy dust, if you thought it was heavy, you should use protection, right?

A: Yes, sir.

Q: And you would personally do that yourself?

A: Yes.

Every potential witness in a case should be deposed in contemplation of the potential cross-examination of that witness at trial. You must obtain clear answers to clear questions. Also, during the deposition, the questioner must consider how the question and answer

will appear in a typed transcript. If the question or answer is equivocal or imprecise, the effectiveness of the transcript to impeach or control the witness at trial will be reduced or eliminated.<sup>73</sup> The depositions of fact witnesses are crucial because that particular witness may not be called to testify at trial, and the only testimony the jury hears may be in the form of video clips from the depositions. The attorney attending the deposition should be prepared to do a trial cross of the witness. If the witness has anything helpful to say about the company, its rules, core values, safety record, practices and procedures, or reputation, try to bring that out at least to some degree during the deposition. It is not ideal at trial to present a video clip of plaintiff's questions to the witness to try to show the jury that the entire deposition was not bad for your client.

Unless counsel clearly understands the goals of the cross-examination in advance, the cross-examination is doomed to be an unfocused exercise with neither a beginning nor an end. Counsel may be unable to obtain proof that an accident happened in a certain way, proof of certain foundational matters, proof that will discredit the plaintiff's theory or his experts, or proof that will provide the basis for the admission of certain exhibits.<sup>74</sup> If the fact witness is hostile or motivated to assist the plaintiff, develop a plan for staying away from problem points. However, if these points have already been raised, develop a plan for how to address and deal with each problem and a plan to impeach the witness.<sup>75</sup>

#### IV.

#### USE OF TECHNOLOGY IN CROSS-EXAMINATION

"Technology is great, and it works. . . . It spoils you. Now that I have it, I can't imagine going back to the old way."

Judge Edward C. Prado (W.D. Tex.)<sup>76</sup>

"The juries and the lawyers love it. It is really worth doing."

Judge Catherine D. Perry (E.D. Mo.)<sup>77</sup>

While technology is the rage, not all courts or attorneys are in the same technological place. There are still attorneys who do not have sophisticated trial technology available to them, and they may not use even the basics. This reality, however, is changing very quickly.

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<sup>73</sup> *Id.* at 43.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Courtroom Technology Used Increasingly to Enhance Proceedings*, THE THIRD BRANCH, May 2003, [http://www.uscourts.gov/News/TheThirdBranch/03-05-01/Courtroom\\_Technology\\_Used\\_Increasingly\\_to\\_Enhance\\_Proceedings.aspx](http://www.uscourts.gov/News/TheThirdBranch/03-05-01/Courtroom_Technology_Used_Increasingly_to_Enhance_Proceedings.aspx).

<sup>77</sup> *Id.*

More courts are embracing technology. They are turning to paperless files and electronic file and serve requirements, forcing litigants toward technology. It is axiomatic that use of technology improves trial presentations, increases efficiency in handling evidence, and improves the effectiveness of cross-examination.

A. *New Age of Courtroom Technology*

Many federal courts have evidence presentation systems that enable judges or lawyers to show jurors (and each other) photographs, documents, and other exhibits on a network of monitors.<sup>78</sup> Some also allow or mandate video conferencing, which permits witnesses to offer testimony during trial without actually being present in the courtroom.<sup>79</sup> Video conferencing technology has not only been used to allow witnesses to testify from remote locations in a trial, but it has also enabled some courts to conduct hearings with witnesses and attorneys located in multiple locations.

While many (if not most) federal courtrooms are equipped with state-of-the-art technology, state courts generally vary from tech-friendly to virtually Luddite, though technology is usually a priority in the construction of new court facilities. Harris County, Texas, for example, equipped all thirty-nine courtrooms in its new civil courts building with the latest evidence presentation systems. Each courtroom contains a video system that allows the presentation of all types of evidence, including exhibits, PowerPoint presentations, timelines, charts, animations, and video clips of depositions. The system's master controls—including an override—are at the bench, and each jury box has eight 15" LCD flat-screen monitors. Counsel tables have connections for laptops and touch-panel monitors. Wireless access to the Internet is also available to the courts and the attorneys throughout the facility.<sup>80</sup>

No matter how useful it is, technology is no substitute for preparation (that word again). In fact, using sophisticated high-tech presentations in trials takes even more preparation than the more traditional low-tech methods. The attorney cannot simply plug in the case and put it on auto-pilot; technology should enhance the trial, not distract from it.<sup>81</sup> The trial lawyer must continue to develop his case themes, present key documents and testimony, provide compelling jury presentations, and effectively examine and cross-examine witnesses.<sup>82</sup> To be effective, an attorney must not stumble or fumble with technology; he must use it seamlessly in front of the judge and jury. If used properly, technology can go a long way toward winning an argument or a case. If not, it can also be a significant factor in a loss. It takes

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Court Technology*, HARRIS COUNTY DISTRICT COURTS, <http://www.justex.net/CivilCenter/CivilCourtTechnology.aspx> (last visited Jan. 9, 2011).

<sup>81</sup> Katrina Grider, *Goodbye Flip Charts, Hello Plasma Screens*, 68 TEX. B. J. 567, 567 (2005).

<sup>82</sup> *Id.*

time and patience to integrate evidence into a cross-examination outline. The attorney or others assisting the defense must review each deposition clip and exhibit to make sure they are crucial to the examination and that each is carefully identified. The attorney or trial technician must be able to find the clip or exhibit immediately.

### 1. Improve Your Case

Studies have shown that jurors retain only 20% of information that is *told* to them, but retain a much higher percentage of information that is *shown* to them.<sup>83</sup> Younger jurors probably expect visual presentations, as they have never known life without them. This is true of judges as well as jurors from younger generations. Jurors do not like to be lectured with long-winded opening statements or closing arguments. Some attorneys think they are so eloquent that they need do nothing more than talk to the jury. They are wrong. Jurors lose interest and retain very little of what is said. They may recall only an impression of the speaker.<sup>84</sup> After several hours of purely spoken closing argument, the jury ceases to hear words, and the attorney's voice becomes little more than white noise. Studies also show that individuals form an impression, whether good or bad, within minutes of seeing and hearing an attorney.<sup>85</sup> Juries often decide who should win based on the stories told during opening statements.<sup>86</sup> Using well-prepared exhibits and other demonstratives is critical to success, and should be done from the beginning of the trial.

While some courtrooms are still not equipped with evidence presentation equipment, almost all courts will allow attorneys to set up and use their own equipment. If you decide to use your own equipment, however, make sure you are prepared to do so effectively. Setting up evidence presentation equipment in a small, round courtroom, for example, is a challenge and should be done in advance of trial—it will be worth the effort. In a small, awkward space, it is better to avoid cluttering the area with too much equipment, which is distracting and can cause delay and confusion. It is sometimes preferable for the parties to agree to use the same equipment set-up, but that does not always happen. Prior to trial, the equipment must be tested to make sure it works properly and that the operator (whether the attorney or an assistant) is proficient with each piece of equipment. In a recent trial, the plaintiff's lawyer had his paralegal assist with videoclips and exhibits. She did not do a good job. The defendant's system worked very well, and it made a difference.

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Douglass F. Noland, *Opening Statements: "Ten Points in Making an Effective Opening Statement,"* 841 PLI/LIT. 267, 269–70 (2010).

<sup>86</sup> *Id.*

The person in charge of using the equipment must practice with it. He must choose the exhibits, video clips, and other documents to present to the jury carefully and must know exactly where these items fit into the overall presentation of evidence in the direct and cross-examination of witnesses. Video clips must be viewed in advance and carefully edited for minimum playing time. The attorney should use only important sound bites and should avoid their overuse. Using too many video clips simply dilutes their effectiveness and becomes tedious to watch. This point cannot be overemphasized. It is obvious that video has been overused when the jury groans audibly as the next video is introduced.

## 2. Back-Up Plan

No matter how well he prepares, the attorney should always have a back-up plan in case equipment fails for some reason. He should have multiple copies of any exhibits (to hand to the jury if allowed) and hard copies of depositions marked to show to a witness for impeachment, and counsel should be ready to proceed with the examination of a witness without comment or delay in the event of technological malfunction.

While useful, a high-tech approach is not the only way to effectively cross-examine a witness. During cross-examination, the questioner could write important points made with that witness on a flip chart that stays in the courtroom. Deviating from the use of technology in this instance may show the jury that these points are truly important. Using a flip chart also indicates that the attorney has not prepackaged the entire case. The points from the flip chart can later be put into a PowerPoint presentation and revisited during closing argument.

## 3. Technology Options

No matter what device or technology you decide to use, choose it carefully. The current state-of-the-art multimedia systems consist of fast, high-capacity computers that integrate presentation media and allow the manipulation of demonstrative evidence, including graphics, animation, video, documents and audio.<sup>87</sup> Such a system provides a clear picture and the flexibility of being able to use multiple types of media at the same time. Another advantage is the capacity for information storage and retrieval.<sup>88</sup> This system is superior for cross-examination because it gives the attorney the ability to move quickly among a series of documents, exhibits, and video clips. (While helpful, the use of such systems requires more planning and advanced preparation).<sup>89</sup>

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<sup>87</sup> Suann Ingle, *Presentation Technology: A Comparison for Courtroom Use*, [http://www.suanningle.com/public\\_ftp/ABA\\_Network\\_04\\_2000.pdf](http://www.suanningle.com/public_ftp/ABA_Network_04_2000.pdf), at 2 (last visited Jan. 10, 2011). An earlier version of Ingle's article was published in the Spring 2001 issue of NETWORK, the newsletter for the American Bar Association's Business Law Section.

<sup>88</sup> *Id.* at 3.

<sup>89</sup> *Id.* at 2.

However, the media system is only as effective as the attorney using it, who must be familiar with each document and deposition and must seamlessly integrate this evidence into his cross-examination to avoid confusion. Even jurors in smaller, more rural venues still expect a professional presentation and no longer view technology as a big-ticket item available only to the wealthier and more powerful parties. Today, everyone is familiar with video depositions. Prior to use in trial, however, there are questions that should be considered regarding the video depositions.<sup>90</sup> The attorney should know the following:

- Has the video been digitized or converted (have VHS tapes or DVDs been converted to an MPEG-1 format?);
- Has the transcript of the video deposition been secured in a 24–25 line transcript with page breaks?; and
- Have the CDs, DVDs, MPEG-1 files, and ASCII text files all been synchronized?

Only after these steps have been taken is the video deposition ready to be used during cross-examination. Once the video deposition has been loaded into the presentation software, the attorney can create reviewable designations and counter designations, edit impeachment clips, and begin building folders or electronic binders for individual witnesses.<sup>91</sup>

Once a distinct set of trial (or deposition) exhibits have been scanned and labeled, they too can be loaded into the trial presentation software for use alongside the video depositions and other graphics. The trial presentation software allows the attorney to move easily from one deposition clip to another, from exhibit to exhibit. It allows the exhibits to be highlighted in advance and the important parts pulled out for easy reference to show a witness and the jury.

Though high-tech systems can be very helpful when trying a case, flip charts, photographs, whiteboards, and magnetic boards still have their place in the courtroom. These “old technologies” can still be used to change the pace of cross and to add a variety of media to keep the presentations or questions from getting monotonous.

In addition, though a Visual Document Presenter (also known as an “Elmo”) may be considered old technology today, it can still be effectively used in cross-examination because the attorney can hold up a transcript and then show pages from a prior deposition to both the witness and the jury simply by placing it on the Elmo. This presentation system also has the benefit of not requiring a lot of advanced preparation. It is good to have available for use with an exhibit, article, or book that may be used on direct, especially if you want to show other pages or passages on cross.

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<sup>90</sup> Chris Broyles, *Going to Trial: Technology Checklist for Litigation Support Professional*, (FTI Consulting, Chicago, IL).

<sup>91</sup> *Id.*

Though using an Elmo is often helpful, keep in mind that it may add to the clutter in a small courtroom. Moreover, someone must focus it during each use, and if done unskillfully, that failure to use the technology effectively may add to the amusement of the jury. Keep in mind that an Elmo should be used sparingly to avoid becoming tedious.

Despite the Elmo's limitations, it is still preferable to an overhead projector. While an overhead projector may still be used in trial to show exhibits to witnesses and the jury, the use of transparencies is dated and may actually interfere with the jury's understanding instead of aiding it.<sup>92</sup> The transparencies are difficult to see and have no versatility.

#### 4. Use of Video Depositions

Video depositions may be used at trial for two purposes: testimony and impeachment.<sup>93</sup> For either use, the creation and compilation of video clips must occur prior to trial. However, further editing during trial is essential, especially regarding running time. The shorter the clip, the better and more effective it is. In addition to playing the video itself (which should show the witness as well as a scrolling text of the testimony), most software platforms allow you to "link" documents to certain portions of the video. These documents can be highlighted, or important passages can be enlarged for emphasis and displayed alongside the image of the testifying witness.

Traditionally, attorneys have used written deposition transcripts on cross to show the jury a witness's prior inconsistent statements. When faced with these inconsistencies, the witness is forced to explain why he made the earlier statements, or the current inconsistent one. In these circumstances, the witness has options other than admitting that his present testimony is erroneous—usually stating that he was confused or misunderstood the question during the deposition. Sometimes a witness may respond by accusing the cross-examiner of causing the problem. If a witness is well-prepared and familiar with prior testimony—including inconsistent statements—he will be ready with some plausible reason for the discrepancies. Jurors observing the witness see someone whose demeanor on the stand appears credible while the written transcript may seem vague, and the jury may not understand the setting of a deposition. Impeachment via video clips is generally effective because most jurors are impressed by seeing a witness impeached through a video of his own words.<sup>94</sup> Succinct excerpts from the witness's videotaped depositions can clarify what really happened on deposition and show that the witness was not confused (or harassed) when he made the statements. Today's video technology allows the cross examiner to index and play selected portions of videotaped depositions with minimal interruption in the examination process.

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<sup>92</sup> Ingle, *supra* note 87, at 1-2.

<sup>93</sup> STEPHANIE A. SCHARF ET AL., *PRAC'G L. INST., PRODUCT LIABILITY LITIGATION: CURRENT LAW, STRATEGIES AND BEST PRACTICES*, 40-41 (2009).

<sup>94</sup> *Id.*

*a. Impeach with Video*

Impeachment clips must be short, on point, accurate, and worthwhile. Some judges will not allow the use of video clips for impeachment, and, even if they do, will intervene if the video impeachment appears to slow down the testimony. If they do not really impeach, such clips will fall flat. The attorney must have properly marked hard copies of the prior transcripts to provide the witness during the cross-examination to avoid the appearance of unfairness.

Video clips are subject to objection on at least the basis of completeness. Thus, if the clips are clumsily edited—or worse, do not really impeach the witness—they damage the credibility of the proffering attorney rather than the witness and will probably be shut down by the court. Displaying the impeachment testimony in a line/page presentation on a screen for the jury to see is an alternative to the use of video clips and may work well to provide a change of pace.

Practice with equipment and video clips to make sure they are precise and call up the exact points you want to make. How many times have you seen an attorney show a video clip of the wrong testimony, one that is too long or inaudible, or one that did not remove excluded testimony? How many times has a jury watched an attorney or assistant have to find the right document, struggle with equipment, or start the testimony again? If this problem occurs consistently during a trial, the jury is left with questions about the competence of the attorney, his team, and its commitment to the case.

*b. Undermine Basis of Opinions*

Video clips may be used to attack the basis of an expert's opinion, not just to impeach the expert with his prior statements. For example, in a recent trial, the plaintiff's attorney used video clips from five co-workers to contradict the testimony of an expert. (This tactic was used over objections by defense counsel. The court concluded that these videos were already in evidence and therefore could be used for this purpose.) This technique was very effective because it allowed counsel to show the witness and jury for a second time the testimony that contradicted the facts on which an expert relied in formulating his opinion. Plaintiffs' counsel did not have to use hypotheticals with the witness. The attorney then asked obvious questions of the expert and proved the following:

- That the expert had no personal knowledge of the working conditions involved;
- That he had never been to the building that he had described; and
- That he disagreed with five eyewitnesses.

Some courts would not allow the use of video clips of other witnesses to cross the expert because doing so does not constitute impeachment through a witness's own prior statements. The defense objected on the grounds that it was cumulative, repetitious, not proper impeachment, and that the clips were incomplete, thus giving short sound bites rather than the entire testimony. The court allowed their use for the purpose of questioning the basis of the expert's opinion, however and the tactic was very effective. The cross frustrated the

witness because there was little he could say except that he disagreed with some of the witness's observations. The tactic was creative, but the proffering attorney took too long with this approach, and it lost some of its effectiveness. There can, indeed, be too much of a good thing.

#### 5. Tips for Presenting Evidence

When using technology to present evidence, remember the following:

- Do not overuse video clips in cross-examination;
- Do not crowd PowerPoint slides;
- Focus on the impact of the evidence;
- Use technology to make your strongest points;
- Practice, practice, practice;
- Do not stumble, hesitate, or waste time;
- If something goes wrong, move on quickly;
- Find your own style;
- Prepare your own outline and questions;
- Be comfortable with the pace of the questions and material;
- Be prepared for an equipment malfunction, have alternate means to continue, and do not let the malfunction interrupt the flow;
- Start and end strong; and
- Do not be afraid to shorten the cross-examination.

#### B. *Live Web Streaming*

Live video streaming is a technology on the rise, and, in certain circumstances, courts have found it to be worthwhile. For instance, in *In re Disney Shareholders*, the court implemented live web streaming from the courtroom during trial proceedings.<sup>95</sup> The *Disney* trial was one of the first to be made available to the public via the Internet using web streaming technology.<sup>96</sup> The audio and video feeds also featured a scrolling text transcript and images of the exhibits as they were shown to witnesses.<sup>97</sup> Both live feed and on-demand file ver-

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<sup>95</sup> Kim Moninghoff, *Courtroom Connect's Webstreaming of Court Proceedings in In Re Disney Shareholders*, COURTROOM 21 CT. AFFILIATES WHITE PAPERS 1 (2005), [http://www.courtroomconnect.com/company/news/articles/archives/Disney\\_White\\_Paper.pdf](http://www.courtroomconnect.com/company/news/articles/archives/Disney_White_Paper.pdf).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

sions of the transcripts were available. The trial teams using the live feed were pleased with the results.<sup>98</sup> Members of the teams not present in the courtroom were able to access the proceedings from their hotel rooms and offices using their laptops.<sup>99</sup> Support team members were able to send comments and questions to the trial team in the courtroom based on the live feed.<sup>100</sup> Expert witnesses were able to view live testimony without having to actually be present in the courtroom.

Of course, whenever technology is used so broadly, it is imperative that those relying on it have a back-up plan. Anything can malfunction and interrupt the process for a period of time, including the audio, video, transcript, network, email, or Internet connection.<sup>101</sup> Most of the participants interviewed after the *Disney* trial, however, thought that web streaming technology was effective for a large trial and that it reduced costs by allowing lawyers and witnesses to avoid travel and save time.

Recently, in the Texas Asbestos Multidistrict Litigation, certain designated parties began beta testing the use of live Internet-based audio and video streaming for depositions, especially for those occurring out of state. Obviously, the ability to set up videoconference depositions has been available for years, but there have always been difficulties with this technology. Distorted pictures, distorted sound, and static on phone lines were frequent problems, and out-of-synch video and audio rendered the questioning tedious at best. The video use of documents was clumsy as well. To avoid some of these issues in the protocol being tested, the court-reporting firm provided the necessary equipment to the participants. Prior to the deposition start time, the participants call in just like a conference call. The audio feed can be transmitted through the Internet, but so far the quality is better with a polycom speakerphone, which is provided at the deposition location. Using this system, the deponent will be able to see the questioner, and vice versa. Documents can be shared with the witness, with all parties being able to view the documents at the same time. The court reporter marks documents electronically and uploads real-time transcripts. So far, drawbacks identified with this technology include the extensive amount of bandwidth necessary to accommodate the streaming video, and the inability to accommodate large, multi-party depositions.

A number of services, including West LiveNote Stream, currently offer the capability of live audio and video for depositions, arbitrations, and trials, allowing people to participate from multiple locations. Participants need only a broadband Internet connection and the latest Microsoft Internet Explorer browser. The convenience of this technology results in cost savings for time and travel to depositions or other appearances in out-of-the-way places. The parties are able to take live testimony in trials, hearings, or depositions and show this testimony to judges, juries, and other members of their trial teams with limited cost. Most companies offer technology that provides a live picture, a scrolling real-time transcript,

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<sup>98</sup> *Id.* at 4.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 5.

and an audio feed for the testimony. Depending on the technology, the questioner can show exhibits to those observing the testimony at the same time he shows the document to the witness. The questioner can receive comments and suggestions from others on his team who are observing the testimony offsite. The livestream technology will be improved upon and will be used more frequently in the future. Courts have promulgated guidelines for such use and litigants can expect more in the future.<sup>102</sup>

### C. *Social Networking*

No discussion of the uses of technology in the courtroom would be complete without a mention of social networking websites. Regardless of their original intent, social networking sites such as Facebook and MySpace have become treasure troves of information, some of it perfect for use in cross-examination. Users of these sites post comments, photos, and videos, build online networks, and in general share information with friends and complete strangers. As most people are rather casual in what they post on these sites, the savvy lawyer can find lots of useful—or even shocking—information, photographs, and videos regarding his own client, the opposing party, opposing counsel, expert and fact witnesses, and prospective jurors. These sites may contain relevant information that could be used for impeachment on cross-examination.

While they are the largest and best-known sites, Facebook and MySpace represent the tip of the social networking iceberg. Sites exist for just about any interest that one can have, including LawLink, “the first and largest social network for law professionals.”<sup>103</sup> Other sites such as Flickr and YouTube are designed for posting and sharing photographs and videos. Blogs are very easy to set up these days and permit individuals to post their personal journals on the Internet and create newsletters and opinion forums. Twitter and Pownce are microblogs, which typically limit individual posts to around 140 characters or fewer, but which have tens of millions of users.

As previously stated, individuals, experts, and employers often have websites. It is imperative to search each one prior to deposition or trial. They may contain recently posted articles, collections of documents, opinions (at times rather radical), financial information, locations, businesses, or many other types of helpful information. These postings may be more current than published literature, and they may be a tremendous source of cross-examination material.

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<sup>102</sup> For an example of one court’s rules for the use of live-feed testimony, see the Appendix to this Article.

<sup>103</sup> LAWLINK: THE ATTORNEY NETWORK, <http://www.lawlink.com/about.aspx> (last visited Jan. 10, 2011).

## V. THE PSYCHOLOGY OF CROSS-EXAMINATION<sup>104</sup>

“There is no other instrument so well adapted to discovery of the truth as cross-examination, and as long as it tends to disclose the truth it should never be curtailed or limited.”<sup>105</sup> As stated earlier in this Article, cross-examination is one of the primary methods our legal system employs to safeguard accuracy and truthfulness. Despite its importance, cross-examination remains one of the most difficult skills to utilize effectively.

In recent years, experienced trial attorneys have utilized quantifiable aspects of human behavior and psychology to improve cross-examination techniques. A shrewd examiner can implement even the most basic knowledge of human psychology to achieve effective results in the courtroom. Social psychology teaches that most people will respond in predictable and quantifiable ways when faced with certain stimuli. Social psychology principles, when grafted onto traditional courtroom techniques, produce new insights into old methods and help today’s litigators use a more modern understanding of human behavior and cognitive bias to their advantage.

The purpose of this section of the Article is to extract information from social science studies for use in effective cross-examination. This section is divided into two sub-parts, the psychology of the witness, and the psychology of the jury. These two topics overlap, but are distinct and worth discussing separately. Understanding witness psychology helps the examiner elicit favorable testimony, and understanding jury psychology allows the examiner to draw information from the witness to maximum effect.

### A. *Courtroom Psychology Generally*

The psychology of the cross-examined witness focuses on interpersonal interaction, whereas jury psychology focuses on theories and research pertaining to persuasion.<sup>106</sup> Using psychological tools to elicit favorable testimony from witnesses can be extraordinarily effective. Understanding how people react to the method and content of questioning, body language, posture, and vocal intonation are invaluable tools when attempting to elicit positive testimony from an uncooperative witness. However, research into jury psychology has unveiled what should come as no surprise: using intimidation and control techniques against witnesses must be tempered by the realization that no one likes a bully.<sup>107</sup>

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<sup>104</sup> The author acknowledges the fine work of Lee Ziffer of Kuchler Polk Schell Weiner & Richeson, LLC in New Orleans, Louisiana, in the preparation of these materials on the use of psychology in cross-examination.

<sup>105</sup> *State ex rel Eng’g Comm’n v. Peak*, 265 P.2d 630, 637 (Utah 1953).

<sup>106</sup> See Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 LAW & PSYCHOL. REV. 301 (2005).

<sup>107</sup> Margaret Gibbs et al., *The Effect of Cross-Examination Tactics on Simulated Jury Impressions*, Paper presented at the Annual Meeting of the Eastern Psychological Association (Arlington, VA, Apr. 9–12, 1987), available at <http://www.eric.ed.gov/PDFS/ED289090.pdf> (last visited Jan. 11, 2011).

To put psychological understanding to good use, an examining attorney must achieve the desired result from the witness *and* elicit the desired response from the jury. Juries respond negatively to an attorney's overuse of intimidation and control.<sup>108</sup> Therefore, an attorney should employ these techniques keeping in mind that manipulating a witness is not a goal in and of itself. Rather, the purpose of controlling a witness is to make a favorable impression on the jury. Intimidating a witness into submission will not score the examiner any points. After all, a cross-examination will go better if the witness and jury respect you. Though you do not want the witness to hate you, you especially do not want the jury to hate you.

### B. *The Psychology of the Witness*

One of the fundamental "rules" of cross-examination is that the examining attorney should be in control.<sup>109</sup> Unlike direct examination, where the jury's focus should be placed on the witness, an attorney conducting cross-examination should focus the jury's attention on himself.<sup>110</sup> Cross-examination should not only be used to discredit the witness or witness's assertions, but also to elicit testimony favorable to the attorney's case. Keeping that in mind, witnesses are unlikely to willingly help an adverse attorney's cause or contradict themselves, especially if it hurts their case. As a result, a cross-examining attorney should control the conversation, attempting to highlight harmful facts and use psychological techniques to elicit favorable witness responses.<sup>111</sup>

#### 1. Manipulation of Personal Space and Body Language

A trial attorney can increase the adverse witness's anxiety level if the attorney enters the witness's personal space.<sup>112</sup> Research shows that when an attorney invades a witness's personal space, that invasion suggests dominance and increases the witness's nervousness and anxiety.<sup>113</sup> In turn, nervousness and anxiety make the witness more submissive to the attorney's questioning. It is also thought that a witness has difficulty responding confidently to questions when the examiner is within the witness's personal space.<sup>114</sup>

Similarly, something as innocuous as courtroom positioning conveys powerful messages to a witness. Commentators suggest that during cross-examination, attorneys refrain from using podiums, notes, legal pads, or other aids.<sup>115</sup> These items are psychological "barriers"

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<sup>108</sup> *Id.* at 6.

<sup>109</sup> FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 8 (4th ed. 1948).

<sup>110</sup> Mark R. Kosieradski, *The Impressive Cross-Examination*, 45 *TRIAL* 44, 44 (2009).

<sup>111</sup> *Id.*

<sup>112</sup> Stanley L. Brodsky et al., *Attorney Invasion of Witness Space*, 23 *LAW & PSYCHOL. REV.* 49, 58–59 (1999).

<sup>113</sup> *Id.* at 59.

<sup>114</sup> *Id.*

<sup>115</sup> Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 *N.C. L. REV.* 481, 481 (1987).

between the attorney and witness, and they serve to decrease witness anxiety. The podium, for example, is thought to be a symbolic barrier between the attorney and witness. Without the podium, the witness is less protected and more exposed.<sup>116</sup> Psychologically, this lack of a barrier between attorney and witness creates higher levels of anxiety in the witness and makes the witness's answers appear unconfident. Moreover, a witness is more inclined to agree with the attorney's leading questions when feeling insecure.<sup>117</sup>

## 2. Playing into Vanity

Most people want to look knowledgeable, important, and intelligent, and witnesses are no different.<sup>118</sup> This desire is particularly true for expert witnesses, who are paid for the express purpose of appearing knowledgeable, important, and intelligent. Given the format of a cross-examination, it is relatively easy to allow witnesses to "paint themselves into a corner." In the end, some witnesses would rather avoid losing face in a courtroom than preserve their own case.<sup>119</sup> It is important to develop a cross-examination that will force the witness to make a damaging admission no matter how the question is answered.<sup>120</sup> If the answer is "yes," the witness will admit the substantive aspects of the cross-examination. If the answer is "no," the witness will acknowledge his inexperience or lack of knowledge of the facts.<sup>121</sup>

The following case illustrates this point. In a personal injury action involving a motorcycle accident, the defense called an industry expert to opine about the necessity of various safety mechanisms available on motorcycles. One such safety mechanism was a "kill switch," which operated to immediately cut all power to the engine should the driver encounter a stuck throttle. Essentially, the expert's opinion was that people do not need kill switches because there are far better ways to kill the engine, for example, by hitting the brakes. Consider the cross-examining attorney's recount of his questioning of the expert witness:

Q: Are you familiar with the Motorcycle Safety Foundation?

He rambled on for three minutes telling the jury about what a wonderful organization this was.

Q. Do they put out any publications?

Once again, . . . his rambling answer went on for another three minutes. He applauded the Motorcycle Safety Foundation for the publications they put out to promote safety in the operation of motorcycles.

<sup>116</sup> Brodsky et al., *supra* note 112, at 58.

<sup>117</sup> *Id.*

<sup>118</sup> See Robert S. Campbell, Jr., *Cross Examination*, 8 UTAH B. J. 35 (1995).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 37.

<sup>121</sup> *Id.*

Q. Are their publications any good?

He once again spent several minutes applauding their efforts.

Q. Do you consider those publications authoritative?

He agreed that they were indeed authoritative.

Q. Have you ever seen their publication on safe motorcycle operations?

He rambled on about all the publications that he had read and about how important they were to him and how important they were to the safety of the public. [The questioning attorney] offered, as an exhibit, one of the publications from the Motorcycle Safety Foundation after he agreed that that publication was authoritative.

[The witness was asked] to turn to page 147 and read it aloud. It read as follows: “Sometimes when you operate a motorcycle you will encounter a stuck throttle. It is inevitable. You must be prepared to properly deal with this emergency. Rule #1—Don’t hit the brakes. Hitting the brakes will take the motorcycle out of control and create the danger of a fall. Rule #2—Hit the kill switch. Rule #3—Put in the clutch and bring the motorcycle to a controlled stop.”<sup>122</sup>

Despite having had no knowledge of the publication’s content, the witness agreed that it was authoritative and agreed to the applicability of a text that contradicted his own expert opinion. Although this example is anecdotal, it illustrates the lengths to which witnesses will go to appear credible in the eyes of the jury, even at the risk of painting themselves into a corner. An expert in the field of motorcycle safety could scarcely deny knowledge of an organization such as the Motorcycle Safety Foundation, nor could he deny the credibility of such an organization. To do so would make him appear unknowledgeable or false in the jury’s eyes, leaving the witness in an impossible situation.

### 3. The Loaded Question

One study has shown that perceptions of a witness’s credibility can be influenced by presumptions inserted into cross-examination questions.<sup>123</sup> Implying something negative about the witness’s reputation in a cross-examination question was shown to affect the jury’s perception of that witness.<sup>124</sup> Whether the presumptuous question resulted in an outright denial, an admission, or an objection from the witness’s attorney—even when that objection was sustained—jurors indicated that the question itself damaged the witness’s credibility.<sup>125</sup>

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<sup>122</sup> Paul L. Strittmatter, *Cross-Examination*, (Strittmatter Kessler Whelan Coluccio, Seattle, WA) Jan. 2009, at 40–42, available at [www.strittmatter.com/pdf/skwc-CrossExamination.pdf](http://www.strittmatter.com/pdf/skwc-CrossExamination.pdf).

<sup>123</sup> See Saul M. Kassin et al., *Dirty Tricks of Cross-Examination: The Influence of Conjectural Evidence on the Jury*, 14 *LAW & HUM. BEHAV.* 373 (1990).

<sup>124</sup> *Id.* at 378.

<sup>125</sup> *Id.*

Interestingly, the study found that when the negatively charged question was met with a denial or objection, jurors indicated that they understood the unsupported presumption was false. However, jurors still reported lower overall credibility ratings for the witness than did a control group that was not presented with the negatively charged question.<sup>126</sup> The study's authors believed that consciously, jurors rejected the negative implication when the opposing attorney objected or the witness denied its truth. Subconsciously, however, jurors were affected by the negative question, and found the witness to be less credible as a result.<sup>127</sup> The inescapable conclusion was that implications built into cross-examination questions have a subconscious effect on juror's perceptions of a witness's credibility. As the study's authors put it, "even when the [witness] denied the charge, even when his attorney objected to the question, and even though many subjects . . . did not accept the cross examiner's presumption, the witness became 'damaged goods' as soon as the reputation question was raised."<sup>128</sup>

The study's findings comport with general understandings of how people process information. First, research in communication suggests that when people hear a speaker offer a premise in conversation, they assume that the speaker has an evidentiary basis for that premise.<sup>129</sup> Second, research in persuasion techniques has revealed that people often remember the contents of a message, but forget the source.<sup>130</sup> From a practical standpoint, these findings suggest that juror perceptions of a witness or the facts can be influenced by loaded questions. The study indicated that even when these questions are met with denial or objection, the "bell has been rung."

#### 4. Is This Ethical?

The forgoing study, revealing that merely asking a loaded question can influence juror perceptions, introduces a potentially sticky ethical situation. The rules of evidence and trial procedure that guide the questioning of witnesses are intended to facilitate the jury's quest for the truth.<sup>131</sup> In theory, direct and cross-examination should thus enhance the credibility of witnesses who are accurate and honest, while diminishing the credibility of those who are inaccurate or dishonest. In other words, it should heighten the jury's fact-finding competence.<sup>132</sup> However, if an attorney can influence a jury's perception of credibility by

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 380.

<sup>128</sup> *Id.* at 381.

<sup>129</sup> Robert Hopper, *The Taken-for-Granted*, 7 HUM. COMM. RES. 195 (1981).

<sup>130</sup> Anthony R. Pratkanis et al., *In Search of Reliable Persuasion Effects: III. The Sleeper Effect is Dead. Long Live the Sleeper Effect*, 54 J. PERSONALITY & SOC. PSYCHOL. 203, 204 (1988).

<sup>131</sup> CHARLES T. McCORMICK, *McCORMICK ON EVIDENCE* (Edward W. Cleary ed., 1972).

<sup>132</sup> Kassin et al., *supra* note 123, at 373–74.

merely interposing a baseless accusation, these fundamental precepts are undermined. With powerful tools come responsibility, and experts have raised viable concerns about unethical uses of scientific methods of courtroom persuasion.<sup>133</sup> Such ethical questions raised by the use of psychological techniques in cross-examination are beyond the scope of this Article.

### C. *The Psychology of the Jury*

The jury is the most important player in the courtroom cast. Many attorneys make the mistake of placing too much emphasis on influencing a witness's answers through psychological techniques while ignoring how the jury might perceive this manipulation. Although helpful, many techniques ignore the fact that using psychology to control a witness is not an end unto itself. Rather, the purpose of controlling a witness is to make a favorable impression on the jury and improve the chances of winning the case. After all, making a witness look bad or untrustworthy during cross-examination is pointless unless the jury is persuaded by your efforts. An attorney may succeed in berating a witness until he contradicts himself or breaks down. However, intimidating a witness into submission will not score the examiner any points with the jury. For a technique to be effective, it must achieve the desired result from the witness *and* elicit the desired response from the jury. Therefore, an understanding of juror perceptions is vital to understanding the psychology of cross-examination.

#### 1. The Importance of Cross-Examination to the Jury

From a juror's perspective, cross-examination is one of the more interesting aspects of the courtroom drama. Television programs glorify the cross-examination as the crux of a case. Although dramatized aspects of a court case are fictional, jurors tend to view cross-examination as one of the most important tests of the lawyer's case. A fact-finder expects that a witness on direct examination will support the side responsible for calling the witness. This cognitive bias does not hold true on cross-examination, where jurors expect a witness to fight the examiner tooth and nail before admitting to a harmful or damaging fact. Therefore, fundamental facts of a case, if elicited through a hostile witness, may be given more weight by the jury. Moreover, studies have shown that jurors are more attentive during cross-examination than during other parts of the trial.<sup>134</sup> Jurors also expect a cross-examiner to be aggressive and hostile, and the witness to be stalwart. When the witness concedes a key point, jurors perceive the examiner to have won a victory.<sup>135</sup>

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<sup>133</sup> See Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 481 (1987).

<sup>134</sup> Robert M. Bray & Norbert L. Kerr, *Methodological Considerations in the Study of the Psychology of the Courtroom*, in *THE PSYCHOLOGY OF THE COURTROOM* 287 (Norbert L. Kerr & Robert M. Bray eds., 1982).

<sup>135</sup> *Id.*

Nonetheless, juries tend to sympathize with lay witnesses and may hold an inherent distrust of attorneys.<sup>136</sup> They see the witness as one of their own and the attorney as an attacker, attempting to make the witness look inferior. In this vein, it has been said that jurors are subconsciously rooting for the witness to “win” the battle.<sup>137</sup> Even on hurtful points, the attorney should never outwardly convey that a witness has done damage to the case, especially during cross-examination. Jurors respond to visual cues, and it is important to always appear confident, in control, and like you expected every word that has come out of the witness’s mouth.<sup>138</sup>

## 2. Powerful and Powerless Speech

Jurors are extremely sensitive to word choice, speech patterns, and overall style of speech. These things can have a profound effect on a jury’s perception of credibility and are powerful tools to use during cross-examination.<sup>139</sup> Sociologists have found that attorneys can influence jurors’ perceptions by manipulating the “powerfulness” of speech and style.<sup>140</sup> Speakers convey powerlessness when they use hedge words, like “sort of” or “kind of”; intensifiers, like “very” or “definitely”; and filler words, like “um” or “you know.”<sup>141</sup> Avoiding these phrases increases the “powerfulness” of the speaker’s message. In another study, a speaker’s use of seemingly innocuous phrases like “to be honest with you” or “to tell the truth” was perceived as a marker of untruthfulness.<sup>142</sup>

Similarly, using an inquisitive intonation at the end of a sentence suggests that the speaker seeks the listener’s approval and conveys a lack of confidence.<sup>143</sup> Consider the difference between the following:

Q: So you pushed him down the stairs?

Q: So you pushed him down the stairs.

One is a question, the other is a statement. In the first example, the witness is presented with the option of answering the question of whether he pushed someone down the stairs. The tone of the question implies that the witness is free to admit or deny the accusation

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<sup>136</sup> FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 9–10 (2d ed. 1936).

<sup>137</sup> Kassin et al., *supra* note 123, at 373.

<sup>138</sup> Campbell, *supra* note 118, at 37.

<sup>139</sup> John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1399.

<sup>140</sup> *Id.* at 1395.

<sup>141</sup> *Id.* at 1380.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

without explaining anything. In the second example, the attorney is telling the witness that he pushed someone down the stairs. Here, the undertone is accusatory, and the witness is on the defensive. Research in communication suggests that when people hear a speaker offer a premise in conversation, they assume that the speaker has an evidentiary basis for that premise.<sup>144</sup> The difference, therefore, between asking the witness and telling the witness is key. In one, the emphasis is on the witness's response, and in the other, the emphasis is on the attorney's assertion.

### 3. No One Likes a Bully

Although commanding the courtroom is important during cross-examination, many studies have shown that juries tolerate aggressive behavior only to a point. Juries will often disregard the message if they do not like the messenger.

One 1987 study showed a strong correlation between an attorney's perceived aggressiveness and a jury's negative impression of that attorney's effectiveness.<sup>145</sup> The study was conducted to examine the effects of a lawyer's hostile versus non-hostile behavior toward a witness and a lawyer's use of leading versus non-leading questions.<sup>146</sup> The study involved a scripted negligence case where attorneys utilized each of four conditions, which varied by lawyer hostility and use of leading questions. One lawyer used a hostile style and only leading questions, one lawyer did neither, and the other two lawyers employed only a hostile style or only leading questions. The test subjects acted as jurors in the trial. The "jurors" rated their impressions of the lawyer, indicated a verdict, and gave a decision about the size of the award.<sup>147</sup>

The study found that the lawyers with the highest effectiveness rating employed either a hostile style *or* leading questions, but not both.<sup>148</sup> The lawyer who employed neither a hostile style nor leading questions was perceived as weak and ineffectual, and the lawyer who employed both was perceived as a bully.<sup>149</sup> The study's authors believed their findings supported the view that, although a powerful style produces a more effective attorney, there is a limit to a jury's indulgence of an attorney's aggressiveness.

In the same vein, other researchers have found that attorneys who engage in verbal clashes with witnesses are perceived as less effective.<sup>150</sup> One study showed that even when the attorney dominated a cross-examination, the attorney was perceived as having lost control

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<sup>144</sup> See Hopper, *supra* note 129.

<sup>145</sup> See Gibbs et al., *supra* note 107.

<sup>146</sup> *Id.* at 3.

<sup>147</sup> *Id.* at 3–4.

<sup>148</sup> *Id.* at 5.

<sup>149</sup> *Id.*

<sup>150</sup> Conley et al., *supra* note 139, at 1392.

of the witness.<sup>151</sup> Therefore, verbal clashes should be avoided to prevent a negative impact on the attorney's image. Moreover, an attorney should not interrupt witnesses because the jury perceives those interruptions as unfair and combative.<sup>152</sup> Juries respond to an attorney who commands the courtroom, but juries will not tolerate a bully.

## VI. CONCLUSION

One trial handbook teaches that trial advocacy “requires the lawyer to engage in a practical application of psychological knowledge, and it is the obligation of every lawyer to succeed in doing so.”<sup>153</sup> Even a basic understanding of the psychological underpinnings of cross-examination tactics can help every attorney achieve a more successful examination of a hostile witness. Effective cross-examination requires a balance between witness control and jury appeasement. Accomplishing dual goals is easy to espouse and difficult to implement, but understanding why people do what they do can help the experienced attorney walk this tightrope. Cross-examination is an art. If you consider the points discussed in this Article, you will be able to present the most interesting and challenging parts of a trial more effectively and successfully.

## APPENDIX

### GUIDELINES FOR LIVE VIDEO FEED TESTIMONY TO HEARING ROOMS OR COURTROOMS<sup>154</sup>

1. Must have either a written stipulation from all opposing counsel to proceed with video feed testimony or an Order from the Court, after hearing, authorizing this type of testimony.
2. Must have a notary public at site with witness to identify witness and possibly administer the oath to the witness.
3. Should have an attorney present with witness or other person in case problems arise.
4. Must have a technician available to operate the equipment at the remote site to make camera and/or audio adjustments as needed.

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> ROBERTO ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL § 3.17 (2d ed. 1998).

<sup>154</sup> Guidelines form provided by The Honorable John Marshall Kest, Circuit Judge, Ninth Judicial Court of Florida.

5. Have hard copies of any exhibits or demonstrative aides at the remote site if the items are to be referred to by the witness. If records are multiple pages, they should be “Bate” stamped to match the exhibits that are in evidence, or being offered into evidence, in the courtroom.
6. The video should be tested by the professionals no later than the last business day before the video feed to make sure the video can be connected and shown.
7. Notice, well in advance of trial, must be provided to the Court and all opposing counsel that the video testimony will be utilized. If all counsel are not stipulating to the use of live video feed testimony, a hearing must be held and an order obtained from the court. If counsel are in agreement a written stipulation should be filed with the Court no later than the start of the trial.
8. It is strongly recommended that a backup video or written depositions testimony be obtained to be used should the video link not be operable for some reason.
9. Any questions, or to arrange for live remote video feed testimony, please contact J.R. Denman, Manager of Systems & Technology, at (407-742-2488) or [help\\_osceola@ocnjcc.org](mailto:help_osceola@ocnjcc.org).
10. Osceola only supports video over IP and must originate the connection.
11. Other questions should be directed to the judge’s judicial assistant.

# Trial Use of Computer-Generated Animations and Simulations<sup>†</sup>

Thomas M. Goutman  
Guy A. Cellucci

## I. INTRODUCTION

Computer-generated animations and simulations are being used with greater frequency in courtrooms across the country. When used appropriately, they can assist jurors in understanding complex issues. When used inappropriately, however, computer-generated animations and simulations can be insidious, little more than slick and seductive tools of distortion. Recognizing the potential for abuse, courts have erected barriers to admission, some more steep than others, but all focusing on the need to ensure that such evidence assists the fact finder's search for the truth.

Courts must first determine whether the computer-generated evidence is an animation or a simulation, as the standards for admissibility differ for each. Since expert testimony frequently provides the vehicle for admitting animations and simulations, evidentiary challenges to this evidence often should be made in the context of *Daubert* motion practice. Because evidence of this sort is often created late in the game as part of last-minute trial preparation, timeliness objections are frequently made, but do not often succeed. Cautionary instructions are almost always used and can help blunt the force of effective animations and simulations.

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<sup>†</sup> Submitted by the authors on behalf of the FDCC Commercial Litigation section.



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## II. ANIMATION OR SIMULATION?

Although computer-generated animations and simulations appear alike, they have different standards of admissibility and are given different evidentiary weight. Thus, a court must first determine whether computer-generated evidence is an animation or a simulation before deciding whether to allow the evidence into trial.

Computer-generated animations can be thought of as visual aids used in support of witness testimony.<sup>1</sup> Animations can serve as illustrations of general principles or conclusions reached independently by witnesses.<sup>2</sup> The purpose of an animation at trial is to help the jury to understand a witness's testimony, not to purport to be a scientific re-creation of an actual event.<sup>3</sup> To the extent that animations do re-create events, they are admissible only

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<sup>1</sup> State v. Cauley, 32 P.3d 602, 606-07 (Colo. App. 2001).

<sup>2</sup> *Id.*

<sup>3</sup> Hinkle v. City of Clarksburg, 81 F.3d 416, 425 (4th Cir. 1996).



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to further visually represent a witness's belief about what transpired; they cannot purport to duplicate the actual event.<sup>4</sup> An animation has only secondary relevance and "must rely on other material testimony for [its own] relevance."<sup>5</sup>

Animations are often relatively simple visual aids used to explain a witness's testimony. Examples of animations that have been allowed into evidence at trial include the following: computer-generated images illustrating the positions of a shooting victim and perpetrator;<sup>6</sup> a videotape of a scale model of an accident illustrating the movement of a train and car;<sup>7</sup> and a computer-generated illustration of a two-car collision as envisioned by an expert witness.<sup>8</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *Clark v. Cantrell*, 529 S.E.2d 528, 535 (S.C. 2000).

<sup>6</sup> *State v. Harvey*, 649 So. 2d 783, 788 (La. Ct. App. 1995).

<sup>7</sup> *Robinson v. Mo. Pac. R.R. Co.*, 16 F.3d 1083, 1085-87 (10th Cir. 1994).

<sup>8</sup> *Clark*, 529 S.E.2d at 535.

By contrast, simulations are computer-generated models or reconstructions based on scientific principles.<sup>9</sup> Simulations are created by entering data into a program and engaging in computer-assisted analysis in accordance with widely accepted methodology.<sup>10</sup> In simulations a computer, not an expert witness, performs the re-creation based on relevant and appropriate data. Simulations reach conclusions that experts may in turn utilize in reaching conclusions themselves, while animations merely illustrate an expert's conclusions.<sup>11</sup> Because simulations draw conclusions based on scientific data, unlike animations, they may have independent evidentiary value.<sup>12</sup> Thus, as with most scientific evidence, simulations must possess the scientific rigor sufficient to ensure their reliability.<sup>13</sup>

Simulations are often more complex visual aids used to re-create a contradicted incident. The following are examples of simulations that have been permitted into evidence at trial: a computer-generated re-creation of a vehicular accident using a specialized computer program called the Engineering Dynamics Single Vehicle Simulator, designed to determine "vehicle behavior and the vehicle trajectory and compare those to the marks on the roadway, the road exit speed, [and] the angle at which the vehicle left the roadway";<sup>14</sup> a computer-generated re-creation of explosions of hexane gas based on "diagrams of the chemical plant, maps of the city sewer system, eyewitness accounts of the explosion, and expert testimony on gas chemistry";<sup>15</sup> and, a computer-generated re-creation of an airplane crash utilizing computations of the effects of "the physics associated with banks and turns" and the "known physical locations and times" of an airplane in order to determine "aircraft velocity, heading, and rate of climb or descent."<sup>16</sup>

A court's classification of computer-generated evidence as an animation or a simulation is important, as both the standards of admissibility and the evidentiary weight accorded to the evidence are determined by how the evidence is classified.

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<sup>9</sup> *Id.* at 535 n.2.

<sup>10</sup> *Harris v. State*, 13 P.3d 489, 494 n.6 (Okla. Crim. App. 2000), *cert. denied*, 532 U.S. 1025 (2001).

<sup>11</sup> *State v. Tollardo*, 77 P.3d 1023, 1028 (N.M. Ct. App. 2003).

<sup>12</sup> *Id.*

<sup>13</sup> *Commercial Union Ins. Co. v. Bos. Edison Co.*, 591 N.E.2d 165,168 (Mass. 1992).

<sup>14</sup> *Kudlacek v. Fiat S.p.A.*, 509 N.W.2d 603, 618 (Neb. 1994).

<sup>15</sup> Adam T. Berkoff, Comment, *Computer Simulations in Litigation: Are Television Generation Jurors Being Misled?*, 77 MARQ. L. REV. 829, 846 (1994) (quoting Sharon Panian, Comment, *Truth, Lies, and Videotape: Are Current Federal Rules of Evidence Adequate?*, 21 SW. U. L. REV. 1199, 1211 (1992)).

<sup>16</sup> *Id.* at 831 n.9 (quoting Mark A. Dombroff, *Demonstrative Evidence and its Effective Use in Aviation Litigation*, PLI Order No. H4-4999, available in Westlaw, TP-ALL database, at \*49 (1986)).

### III. FOUNDATIONAL REQUIREMENTS

The classification of a computer-generated exhibit as an animation or a simulation has practical implications, particularly on the evidentiary foundation required for its admission.<sup>17</sup> Generally, an animation is admissible if the usual foundational requirements applicable to other forms of demonstrative exhibits are met.<sup>18</sup> Thus, usually an animation must be relevant, its probative value must outweigh its potential for unfair prejudice or confusion, and it must be supported by testimony establishing that it accurately depicts what it purports to depict.<sup>19</sup> Understandably, courts express healthy skepticism of mere attempts to dazzle juries with fancy props. Thus, proponents of animation evidence should stress the essential role the animation plays in illustrating the testimony it supports.<sup>20</sup>

Simulations, on the other hand, are subject to the same scrutiny as more traditional scientific tests. Generally, a proponent of simulation evidence must establish that it is “based upon sufficient facts or data”; that it is “the product of reliable principles and methods”; and that the supporting expert witness “applied principles and methods reliably” when creating or using the simulation.<sup>21</sup> Further, the proponent must demonstrate that the facts and data upon which the simulation is based “are of a type reasonably relied upon by experts in the particular field.”<sup>22</sup> As the validity of the conclusions drawn by a simulation depends on proper application of scientific principles, a foundation must be laid establishing that proper methodology was applied to analyze appropriate data.<sup>23</sup> Thus, a proponent of a simulation must show that “(1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party, so that they may challenge them); and (3) the program is generally accepted by the appropri-

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<sup>17</sup> *State v. Sayles*, 662 N.W.2d 1, 9 (Iowa 2003).

<sup>18</sup> *See, e.g., Clark*, 529 S.E.2d at 536 (holding that a computer-generated animation is admissible as demonstrative evidence when the proponent meets the standard South Carolina foundational requirements that a demonstrative exhibit be authentic, relevant, fair and accurate, and not substantially prejudicial).

<sup>19</sup> *See* FED. R. EVID. 401 (Relevant evidence must have a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.”); FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”); FED. R. EVID. 901(a) (A demonstrative exhibit is authenticated by “evidence sufficient to support a finding that the matter in question is what its proponent claims.”).

<sup>20</sup> *See Sayles*, 662 N.W.2d at 9-11.

<sup>21</sup> FED. R. EVID. 702.

<sup>22</sup> *See* FED. R. EVID. 703. *See, e.g., Pierce v. State*, 718 So. 2d 806, 809 (Fla. Dist. Ct. App. 1997).

<sup>23</sup> *See Cauley*, 32 P.3d at 606-07; *Tollardo*, 77 P.3d at 1028.

ate community of scientists.”<sup>24</sup> It is also recommended that some showing be made that the computer model or reconstruction is not easily replicated by other evidence.<sup>25</sup>

Courts have recognized that computer-generated animations and simulations have the potential to mislead a jury by inaccurately portraying events and creating lasting impressions that override other testimony or evidence.<sup>26</sup> In a society enthralled by cutting-edge technology, there is a real danger that juries will give undue weight to computer-generated evidence over less-glamorous forms of evidence.<sup>27</sup> Therefore, objections to the accuracy of animations and simulations can be particularly effective because of the heightened risk that the jury will irrationally favor computer evidence.<sup>28</sup>

#### IV. OBJECTIONS BASED ON TIMELINESS

In addition to foundational challenges, a party opposing the admission of animation or simulation evidence may argue that the proponent of the evidence failed to disclose it (and its underlying data) within a reasonable time before trial.<sup>29</sup> A “reasonable time” has been defined as enough time to allow the opposing party to inspect the evidence and determine possible objections.<sup>30</sup> Although the last business day before trial would be unacceptable, two weeks prior to trial could be sufficient to meet the timeliness requirement.<sup>31</sup>

A party’s late production, by itself, is usually insufficient to warrant its preclusion.<sup>32</sup> When deciding a timeliness challenge to computer-generated evidence, courts focus primarily on the prejudice suffered by the moving party resulting from the delay.<sup>33</sup> A party must do more than simply claim to be prejudiced; it must demonstrate actual prejudice.<sup>34</sup> Other

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<sup>24</sup> *Commercial Union Ins. Co.*, 591 N.E.2d at 168.

<sup>25</sup> *Id.*

<sup>26</sup> *See Clark*, 529 S.E.2d at 536.

<sup>27</sup> *See*, Kristin L. Fulcher, Comment, *The Jury as Witness: Forensic Computer Animation Transports Jurors to the Scene of a Crime or Automobile Accident*, 22 U. DAYTON L. REV. 55, 58 (1996).

<sup>28</sup> *See Somervold v. Grevlos*, 518 N.W.2d 733 (S.D. 1994).

<sup>29</sup> *Clark*, 529 S.E.2d at 536.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Friend v. Time Mfg. Co.*, No. CIV 03-343-TUC-CKJ, 2006 U.S. Dist. LEXIS 52790, \*16-17 (D. Ariz. July 28, 2006).

<sup>34</sup> *Id.*

factors that a court considers when deciding a timeliness challenge to computer-generated evidence include judicial efficiency in the “expeditious resolution of litigation,” “the court’s need to manage its docket,” “the public policy favoring disposition of cases on their merits,” and “the availability of less drastic sanctions.”<sup>35</sup> Therefore, the production of animation evidence even eleven months late is not sufficient to warrant preclusion when there is no demonstration of actual prejudice and no impact on the trial schedule.<sup>36</sup>

## V. CAUTIONARY INSTRUCTIONS

To prevent unfair prejudice, courts have encouraged or required cautionary instructions regarding the nature of the animation or simulation and the weight that it should be afforded.<sup>37</sup> A request for a limiting or cautionary instruction is almost always granted, and in many jurisdictions they are recommended by appellate courts.<sup>38</sup>

A cautionary instruction will typically include the following elements: (1) an admonition that the jury is not to give the animation or simulation more weight just because it comes from a computer; (2) a statement clarifying that the exhibit is based on the supporting witness’s evaluation of the evidence; and (3) in the case of an animation, a statement that the evidence is not meant to be an exact re-creation of the event, but is instead a representation of the witness’s testimony.<sup>39</sup>

Because of concerns that juries can give undue weight to animations and simulations, a majority of courts have held that computer-generated animations used only as demonstrative exhibits should not be given to juries during deliberations.<sup>40</sup> Some courts, however, have allowed animation evidence to be viewed by the jury during deliberations.<sup>41</sup>

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<sup>35</sup> *Wendt v. Host Int’l., Inc.*, 125 F.3d 806, 814 (9th Cir. 1997).

<sup>36</sup> *See Friend*, 2006 U.S. Dist. LEXIS 52790, at \*16-17.

<sup>37</sup> *See, e.g., Clark*, 529 S.E.2d at 537 (encouraging the trial court to give a cautionary instruction that the animation at issue represents only a re-creation of the proponent’s version of the event and may be accepted or rejected in whole or in part); *Ramsey Cnty. v. Stewart*, 643 N.W.2d 281, 296 (Minn. 2002) (holding that a district court should issue a cautionary instruction relating to an animation both before playing it to the jury and in its final instructions).

<sup>38</sup> *See, e.g., Hinkle*, 81 F.3d at 425; *Cauley*, 32 P.3d at 607; *State v. Bulmer*, 662 N.W.2d 117, 119 (Mich. Ct. App. 2003).

<sup>39</sup> *See Hinkle*, 81 F.3d at 425; *Robinson*, 16 F.3d at 1088; *Cauley*, 32 P.3d at 607.

<sup>40</sup> *See, e.g., Harris*, 13 P.3d at 495 (holding that computer-generated animations should not have been made available to the jury during deliberations because they had no independent evidentiary value).

<sup>41</sup> *See Clark*, 529 S.E.2d at 535.

## VI. FEDERAL AND STATE SURVEY

While we do not purport to provide an exhaustive survey of case law on animation and simulation evidence used at trial, the following circuits and states have addressed at least some of the issues relating to the use of computer-generated animations and simulations in their jurisdictions. While requirements may marginally differ due to variations in applicable law, the general principles discussed above guide the analyses of all courts.

### **First Circuit**

In the First Circuit, to be admissible, computer animations must be authenticated by independent evidence or must be self-authenticating.<sup>42</sup> In *Insight Technology, Inc. v. SureFire, LLC*,<sup>43</sup> the court excluded an affidavit of the defendant's expert, which contained an explanation of computer animations proffered by the defendant, on the basis that the explanations constituted expert opinion that the defendant did not properly disclose.<sup>44</sup> The court also excluded the animations because without the expert's explanations, the animations were "unauthenticated drawings of unidentified devices."<sup>45</sup>

### **Second Circuit**

A party using a computer-generated animation to illustrate a witness's testimony in the Second Circuit must be careful to ensure that the jurors are informed that what they are seeing is an illustration of an *opinion* or *theory*, and not a "repeat of the actual event."<sup>46</sup> Computer-generated evidence that purports to actually re-create the event must "possess . . . a high degree of similarity" to the event.<sup>47</sup>

### **Third Circuit**

Courts in the Third Circuit have held that computer-generated simulations, reconstructions, and animations are "an appropriate means to communicate complex issues to a lay audience, so long as the expert's testimony indicates that the processes and calculations underlying the reconstruction or simulation are reliable."<sup>48</sup> Animations are acceptable for

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<sup>42</sup> *Insight Tech., Inc. v. SureFire, LLC*, No. 04-cv-74-JD, 2007 WL 3244092, at \*3 (D.N.H. Nov. 1, 2007).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Datskow v. Teledyne Cont'l Motors Aircraft Prods.*, 826 F. Supp. 677, 686 (W.D.N.Y. 1993).

<sup>47</sup> *Id.*

<sup>48</sup> *Ortiz v. Yale Materials Handling Corp.*, No. 03-3657 (FLW), 2005 U.S. Dist. LEXIS 18424, at \*29 (D.N.J. Aug. 24, 2005).

illustrative purposes if the proponent clears several hurdles.<sup>49</sup> First, the animation must be relevant under Federal Rule of Evidence 401. Next, the proponent of an animation illustrating an expert's opinions must show that it is "substantially similar" to the conditions it purports to represent.<sup>50</sup> Finally, the animation's probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.<sup>51</sup> A cautionary instruction reminding the jury that the animation is not a re-creation but a mere illustrative aid may serve to avoid possible unfair prejudice.<sup>52</sup>

In *Altman v. Bobcat Co.*,<sup>53</sup> the Third Circuit held that neither unfair prejudice nor juror confusion resulted when the district court permitted the jury to view the plaintiff's computer-generated animation depicting the alleged accident in a personal injury action. The Third Circuit reasoned that the animation was not "sufficiently close in appearance to the original accident to create the risk of misunderstanding by the jury."<sup>54</sup> Moreover, the district court instructed the jury that the animation was not a re-creation and highlighted differences between the animation and the facts as adduced at trial.

#### Fourth Circuit

The Fourth Circuit has approved of the use of computer-generated animations, provided that the animation is clearly presented as an illustration of an opinion and not as a re-creation. In *Hinkle v. City of Clarksburg*,<sup>55</sup> the Fourth Circuit upheld the district court's decision to allow the defendant to use an animation in support of its expert's testimony. The animation in *Hinkle* depicted a version of the police shooting supporting the defense expert's self-defense theory. Although the district court allowed the animation to be used, it instructed the jury that the animation "is not meant to be an exact re-creation of what happened during the shooting, but rather it represents [the defense expert's] evaluation of the evidence presented."<sup>56</sup> The Fourth Circuit held that the admission of the animation did not unduly prejudice the plaintiff because the district court's instruction prevented the jury from giving any undue weight to the animation.<sup>57</sup>

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<sup>49</sup> *Jones v. Kearfott Guidance & Navigation Corp.*, No. CIV. 93-64 (DRD), 1998 WL 1184107, at \*3-5 (D.N.J. Nov. 17, 1998).

<sup>50</sup> *St. Paul Fire & Marine Ins. Co. v. Nolen Group, Inc.*, No. 02-8601, 2005 U.S. Dist. LEXIS 9303, at \*24 (E.D. Pa. May 13, 2005).

<sup>51</sup> *Jones*, 1998 WL 1184107, at \*3-5.

<sup>52</sup> *Id.* at \*5.

<sup>53</sup> No. 08-3161, 2009 WL 3387957 (3d Cir. Oct. 22, 2009).

<sup>54</sup> *Id.* at \*5 (quoting *Fusco v. General Motors Corp.*, 11 F.3d 259, 264 (1st Cir. 1993)).

<sup>55</sup> *Hinkle*, 81 F.3d at 425.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

### **Fifth Circuit**

The District Court for the Southern District of Texas found that a computer-generated animation re-creating an accident on a docked ship was admissible in support of a liability expert's testimony.<sup>58</sup> The court found that the animation was admissible based on the expert's testimony that it was accurate and "to scale."<sup>59</sup> The court also found that the relevance of the animation outweighed its potential inflammatory effect on the jury.<sup>60</sup>

Conversely, in *Performance Aftermarket Parts Group, Ltd. v. TI Group Automotive Systems, Inc.*,<sup>61</sup> the Southern District of Texas excluded evidence of computer simulations, explaining that (1) the expert who prepared them did not rely on them in forming his opinions; (2) the expert explained that the simulations were merely illustrative; and (3) the evidence in the record showed that the computer simulations' accuracy and validity were highly questionable because the software used to generate the simulations sometimes produced inaccurate results.<sup>62</sup>

### **Seventh Circuit**

The Northern District of Illinois has found that untimeliness alone is a sufficient reason to exclude computer-generated evidence. In *Van Houten-Maynard v. ANR Pipeline Co.*,<sup>63</sup> the district court excluded the evidence, finding that the defendant had not received timely notice of the plaintiff's intention to use a computer-generated animation. The court observed that "this type of evidence can be highly influential upon a jury, well beyond its reliability and materiality, due to its documentary-type format presented in a 'television' like medium."<sup>64</sup> The animation therefore was excluded under Federal Rule of Evidence 403 because the late production of the evidence rendered the defendant unable "to respond to the credibility, reliability, accuracy and materiality of this evidence."<sup>65</sup>

### **Ninth Circuit**

In the Ninth Circuit, computer-generated animations are admissible subject to the usual standards for demonstrative evidence.<sup>66</sup> In *Tubar v. Clift*,<sup>67</sup> the District Court for the Western

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<sup>58</sup> Ponce v. M/V Altair, 493 F. Supp. 2d 880, 885 (S.D. Tex. 2007).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> No. H-05-4251, 2008 WL 169826 (S.D. Tex. Jan. 16, 2008).

<sup>62</sup> *Id.* at \*2-3.

<sup>63</sup> No. 89 C 0377, 1995 WL 317056 (N.D. Ill. May 23, 1995).

<sup>64</sup> *Id.* at \*12.

<sup>65</sup> *Id.*

<sup>66</sup> See, Byrd v. Guess, 137 F.3d 1126, 1134 (9th Cir. 1998), *superseded by statute on other grounds*, CAL. CIV. PROC. CODE § 377.60 (West 1997).

<sup>67</sup> No. C05-1154-JCC, 2009 WL 1325952 (W.D. Wash. May 12, 2009).

District of Washington held that a computer-generated animation depicting the movement of a vehicle was admissible in a civil rights suit arising from an alleged police shooting incident. The court explained that the animation was meant not to re-create the scene, but rather to illustrate the vehicle's travel. In addition, the animation was based on calculations performed by an expert that were "grounded in the physical facts and the application of mathematical principles."<sup>68</sup>

### **Tenth Circuit**

The Tenth Circuit has cautioned district courts to "scrutinize the foundation with great care as to detail" when confronted with animations that purport to be re-creations.<sup>69</sup> The court expressed concern that "not only is the danger that the jury may confuse art with reality particularly great, but the impressions generated by the evidence may prove particularly difficult to limit."<sup>70</sup> Thus, animations that are re-creations may be used to illustrate an expert's testimony, but a cautionary instruction should be given by the court to clarify the purpose of the exhibit and the fact that it is being used for demonstrative purposes only.<sup>71</sup>

### **Alabama**

In Alabama, an animation illustrating an expert's testimony is admissible.<sup>72</sup> Before the animation is admitted into evidence, however, a party must demonstrate that the expert is qualified and that the animation is based on admissible evidence.<sup>73</sup>

### **Arizona**

Arizona's appellate courts have also addressed the foundational requirements for computer-generated animations. In *Bledsoe v. Salt River Valley Water Users' Assoc.*,<sup>74</sup> the Arizona Court of Appeals held that computer animations are generally admissible if the usual foundational requirements for demonstrative exhibits are met.<sup>75</sup> The proponent of an animation must establish through the testimony of a computer expert, or other appropriate witness, that the animation fairly and accurately depicts what it represents.<sup>76</sup> Additionally,

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<sup>68</sup> *Id.* at \*7.

<sup>69</sup> *Harris v. Poppell*, 411 F.3d 1189, 1197-98 (10th Cir. 2005) (quoting *Sanchez v. Denver & Rio Grande W. R.R. Co.*, 538 F.2d 304, 306 n.1 (10th Cir. 1976)).

<sup>70</sup> *Id.* (quoting *Robinson*, 16 F.3d at 1088).

<sup>71</sup> *Robinson*, 16 F.3d at 1087.

<sup>72</sup> *Tillis Trucking Co. v. Moses*, 748 So. 2d 874, 881 (Ala. 1999).

<sup>73</sup> *Id.*

<sup>74</sup> 880 P.2d 689 (Ariz. Ct. App. 1994).

<sup>75</sup> *Id.* at 692.

<sup>76</sup> *Id.*

the opposing party must be afforded the opportunity for cross-examination.<sup>77</sup> The court in *Bledsoe* excluded the animation at issue because the expert whose opinion the animation illustrated never testified, and the defendant had no opportunity to cross-examine him.<sup>78</sup>

### California

The California Court of Appeals has held that computer-generated animations are generally admissible as demonstrative evidence. In *State v. Hood*,<sup>79</sup> the court of appeals held that an animation was properly admitted because it was introduced only to illustrate the testimony of various prosecution witnesses and, therefore, did not need to undergo an examination of its general scientific acceptance.<sup>80</sup> The *Hood* court held that use of the animation was “similar to an expert who draws on a board,” and no scientific procedures and techniques needed to be addressed.<sup>81</sup>

In *State v. Gruber*,<sup>82</sup> the court of appeals upheld the trial court’s exclusion of the criminal defendant’s computer-generated reconstruction of a vehicle accident. The trial court concluded that the animation was prepared by an expert based on assumptions and circumstances that rendered the animation “unduly unreliable and speculative.”<sup>83</sup>

### Colorado

Colorado’s appellate courts have specifically addressed the foundational requirements for computer-generated animations. An animation is admissible as demonstrative evidence if its proponent demonstrates the following: (1) the animation is authentic; (2) it is relevant; (3) it “is a fair and accurate representation of the evidence to which it relates; and, (4) [it] has a probative value that is not substantially outweighed by the danger of unfair prejudice.”<sup>84</sup> Under the standard foundational requirements for demonstrative exhibits, in *State v. Cauley*, the court held that an animation is authenticated if there is evidence to support a finding that the evidence is what the proponent claims it is.<sup>85</sup> Although it does not appear that a limiting instruction by the trial court is required, the Colorado Court of Appeals does encourage limiting instructions.<sup>86</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> 53 Cal. App. 4th 965 (1997).

<sup>80</sup> *Id.* at 968.

<sup>81</sup> *Id.* at 968-69.

<sup>82</sup> No. A116837, 2009 WL 206329 (Cal. Ct. App. Jan. 29, 2009).

<sup>83</sup> *Id.* at \*6.

<sup>84</sup> *Cauley*, 32 P.3d at 607.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 608.

### Florida

In *Pierce v. State*,<sup>87</sup> the Florida Court of Appeals held that to admit an animation illustrating an expert's opinion, the proponent must first establish the foundational requirements necessary to introduce an expert opinion.<sup>88</sup> Thus, it held that to admit an animation, a party must demonstrate the following:

(1) the opinion evidence [is] helpful to the trier of fact; (2) the witness [is] qualified as an expert; (3) the opinion evidence [is] applied to evidence offered at trial; and (4) . . . the evidence, although technically relevant, [does] not present a substantial danger of unfair prejudice that outweighs its probative value.<sup>89</sup>

In addition, the proponent must “establish that the facts or data on which the expert relied in forming the opinion expressed by the computer animation are of a type reasonably relied upon by experts in the subject area.”<sup>90</sup> Last, the animation must be a fair and accurate representation of what it purports to be.<sup>91</sup> Note, however, that even if the animation is admitted into evidence, it is not permitted in the jury room for deliberations.<sup>92</sup>

### Georgia

In Georgia, a computer-generated animation is admissible if it is a fair and accurate representation of what it purports to depict.<sup>93</sup> However, animations that are presented as re-creations must be “substantially similar” to the evidence introduced at trial.<sup>94</sup>

### Illinois

In *Hudson v. City of Chicago*,<sup>95</sup> the Illinois Appellate Court held that the trial court did not err in permitting the plaintiff's expert to show a computer simulation of the vehicle collision in question because the simulation was sufficiently based on data from the record.

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<sup>87</sup> 718 So. 2d 806, 809 (Fla. Dist. Ct. App. 1997).

<sup>88</sup> *Id.* at 809.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Campoamor v. Brandon Pest Control, Inc.*, 721 So.2d 333, 335 (Fla. Ct. App. 1998).

<sup>93</sup> *Cleveland v. Bryant*, 512 S.E.2d 360, 362 (Ga. Ct. App. 1999).

<sup>94</sup> *Id.*

<sup>95</sup> 881 N.E.2d 430 (Ill. App. Ct. 2007).

### **Indiana**

The Indiana Court of Appeals has addressed the use of computer-generated animations but has not set out the foundational requirements for admitting the animations into evidence. In *Stamper v. Hyundai Motor Co.*,<sup>96</sup> the court held that an animation prepared to illustrate the opinions of an expert witness who was not present at trial was inadmissible.<sup>97</sup> Without the foundation of expert testimony, and because the defendant had no opportunity to cross-examine the expert, the court held that the evidence was properly excluded.<sup>98</sup>

### **Iowa**

Computer-generated animations are admissible in Iowa if authenticated.<sup>99</sup> There is no particular methodology requirement.<sup>100</sup> However, proper foundation for an animation's admission into evidence requires that "the fidelity of the [animation's] portrayal be established."<sup>101</sup> This determination is to be made by the trial court and hinges upon findings of relevance and a lack of undue prejudice.<sup>102</sup>

### **Louisiana**

Louisiana has addressed the use of animations as both illustrative aids and re-creations. In *Constans v. Choctaw Transportation, Inc.*,<sup>103</sup> the Louisiana Court of Appeals found that an animation designed to merely illustrate an expert's opinion was no different than a series of drawn diagrams, and was therefore properly admitted under the usual foundational requirements. Similarly, the court in *Howell v. Union Pacific Railroad Co.*<sup>104</sup> held that an illustrative animation was properly admitted where the plaintiff had ample opportunity to cross-examine the expert whose opinion it depicted.

Regarding re-creations, in *State v. Harvey*, the court of appeals held that a computer-generated reenactment is admissible if it is identical or very similar to what it purports to be.<sup>105</sup> The court stated that the closer a reenactment resembles a scene as depicted by previous

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<sup>96</sup> 699 N.E.2d 678 (Ind. Ct. App. 1998).

<sup>97</sup> *Id.* at 684.

<sup>98</sup> *Id.*

<sup>99</sup> *Hutchinson v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 890 (Iowa 1994).

<sup>100</sup> *Id.* See also *Sayles*, 662 N.W.2d at 8 (accepting authentication of an animation through the testimony of a witness with knowledge of the facts represented).

<sup>101</sup> *Hutchinson*, 514 N.W.2d at 890.

<sup>102</sup> *Id.*

<sup>103</sup> 712 So. 2d 885, 900 (La. Ct. App. 1998).

<sup>104</sup> 980 So. 2d 854, 859 (La. Ct. App. 2008).

<sup>105</sup> 649 So.2d 783, 788 (La. Ct. App. 1995).

testimony, the greater its probative value and, thus, its likelihood of admissibility.<sup>106</sup> The Louisiana Court of Appeals has further held that slight variations between visual aids and actual video footage of an incident shown to a jury do not make the visual aids inadmissible.<sup>107</sup>

### Massachusetts

Massachusetts courts have addressed the foundational requirements for computer-generated simulations. In *Commercial Union Insurance Co. v. Boston Edison Co.*,<sup>108</sup> the Massachusetts Supreme Court held that computer-generated simulations are to be treated like other scientific tests. Therefore, their admissibility is conditioned “on a sufficient showing that (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate . . . ; and (3) the program is generally accepted by the appropriate community of scientists.”<sup>109</sup>

### Michigan

Computer-generated animations are admissible for illustrative purposes so long as they satisfy the foundational requirements for general demonstrative exhibits.<sup>110</sup> In *State v. Bulmer*,<sup>111</sup> the Michigan Court of Appeals also held that the defendant was not substantially prejudiced because the trial court properly instructed the jury that the animation was a demonstration and not a reenactment of what happened. The *Bulmer* court held that “when evidence is offered not in an effort to re-create an event, but as an aid to illustrate an expert’s testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event.”<sup>112</sup> Likewise, in *State v. Samphere*,<sup>113</sup> the Michigan Court of Appeals held that “[b]ecause the animation was not misleading or unfairly prejudicial, the trial court did not abuse its discretion in admitting it.”

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<sup>106</sup> *Id.*

<sup>107</sup> *State v. Robbins*, 986 So.2d 828, 832 (La Ct. App. 2008).

<sup>108</sup> *Commercial Union Ins.*, 591 N.E.2d at 168.

<sup>109</sup> *Id.*

<sup>110</sup> *Bulmer*, 662 N.W.2d at 119.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> No. 283711, 2009 WL 3757445, at \*6 (Mich. Ct. App. Nov. 10, 2009).

### **Minnesota**

The Minnesota Supreme Court has also addressed the foundational requirements for computer-generated animations and held that the same standard for admissibility of demonstrative exhibits applies to computer-generated animations.<sup>114</sup> Thus, an animation is admissible if it is “relevant and accurate and assists the jury in understanding the testimony of a witness.”<sup>115</sup> However, if the animation does not accurately reflect the witness’s testimony, then its admission will be deemed error.<sup>116</sup> The Minnesota Supreme Court has recommended that cautionary instructions always be given prior to the use of the animation.<sup>117</sup>

### **Mississippi**

In *Cox v. State*,<sup>118</sup> the Supreme Court of Mississippi held that any computer animation purporting to be a re-creation, but not based on actual, physical measurements, is mere speculation. Such an animation “*must* be based on scientific, identifiable, and objective facts.”<sup>119</sup> Additionally, the court held that an animation that is demonstrative evidence should not be given to a jury for its consideration during deliberations.<sup>120</sup>

### **New Hampshire**

In *State v. Dodds*,<sup>121</sup> the New Hampshire Supreme Court upheld a trial court’s ruling that defendant failed to offer evidence specifically substantiating the facts and figures used to create a computer-generated animation; therefore, the animation was inadmissible. The determination of evidence admissibility is within the discretion of the trial court and will not be disturbed “absent an unsustainable exercise of discretion.”<sup>122</sup> The New Hampshire Supreme Court further noted that because the animation would not have provided the jury with anything more than the testimony and diagrams presented at trial, the defendant failed to prove he was unfairly prejudiced by the exclusion of the animation.<sup>123</sup>

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<sup>114</sup> *Stewart*, 643 N.W.2d at 293.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 295.

<sup>117</sup> *Id.* at 296.

<sup>118</sup> 849 So.2d 1257 (Miss. 2003).

<sup>119</sup> *Id.* at 1273 (emphasis in original).

<sup>120</sup> *Id.* at 1274.

<sup>121</sup> 982 A.2d 377 (N.H. 2009).

<sup>122</sup> *Id.* at 387.

<sup>123</sup> *Id.*

### **New Mexico**

New Mexico has addressed the foundational requirements for using a computer-generated animation used to form an expert opinion. In *State v. Tollardo*,<sup>124</sup> the New Mexico Court of Appeals held that when an expert uses computer-generated evidence to *develop* an opinion, the proponent of that evidence must be prepared to show that the evidence was generated in a way that is scientifically valid.<sup>125</sup>

### **New York**

In New York, computer-generated animation evidence purporting to be a re-creation of an event is admissible if its proponent is qualified as an expert and offers foundational testimony establishing the accuracy of the re-creation.<sup>126</sup>

The question of whether a computer-generated animation should be viewed by a jury depends on the facts and circumstances of each case and lies within the sound discretion of the trial court.<sup>127</sup> In *Kane v. Triborough Bridge & Tunnel Authority*,<sup>128</sup> the court held that “[i]f there is ‘any tendency to exaggerate any of the true features which are sought to be proved’ the trial court may reject the [computer-generated animation].”<sup>129</sup> A computer-generated animation can be used to illustrate an expert’s opinion, but the jury must be instructed not to consider the computer-generated animation itself when determining what actually caused the accident.<sup>130</sup>

### **Oklahoma**

In *Harris v. State*,<sup>131</sup> the Oklahoma Court of Criminal Appeals held that a reenactment must (1) be authenticated (meaning that it is “a correct representation of the object portrayed or that it is a fair and accurate representation of the evidence to which it relates”); (2) be relevant; and, (3) possess a probative value that is not “‘substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay,

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<sup>124</sup> 77 P.3d 1023 (N.M. Ct. App. 2003).

<sup>125</sup> *Id.* at 1028.

<sup>126</sup> *New York v. McHugh*, 476 N.Y.S.2d 721, 722 (Sup. Ct. 1984) (finding that a re-creation of a car accident was admissible and noting that “[w]hether a [demonstrative exhibit] is hand drawn or mechanically drawn by means of a computer is of no importance”).

<sup>127</sup> *Kane v. Triborough Bridge & Tunnel Auth.*, 778 N.Y.S.2d 52, 54 (App. Div. 2004).

<sup>128</sup> *Id.* at 54.

<sup>129</sup> *Id.* (quoting *Boyarsky v. Zimmerman Corp.*, 270 N.Y.S. 134,140 (App. Div. 1934)).

<sup>130</sup> *Id.*

<sup>131</sup> *Harris*, 13 P.3d at 495.

needless presentation of cumulative evidence, or unfair and harmful surprise.”<sup>132</sup> The *Harris* court held that a trial court should instruct the jury that the evidence represents only a re-creation of the proponent’s version of the events.<sup>133</sup> Finally, the trial court must ensure that the opposing party has the opportunity to examine the reenactment.<sup>134</sup> The Oklahoma Court of Criminal Appeals has further held that “video and computer-generated reenactments ‘are properly categorized as illustrative or demonstrative aids used to explain the expert’s testimony’ and that they should not be made available for the jury during deliberations, as they have ‘no independent evidentiary value.’”<sup>135</sup>

The Oklahoma Court of Appeals has held that a computer-generated animation meant to be a mere illustrative aid was properly admitted where it was sufficiently accurate and its probative value exceeded its potential to mislead a jury.<sup>136</sup> The court of appeals has further held that a computer-generated animation can be used as a demonstrative aid to illustrate both expert and witness testimony.<sup>137</sup>

The Oklahoma Supreme Court has recommended that cautionary instructions always be given prior to the use of the animation.<sup>138</sup>

### **Pennsylvania**

The Pennsylvania Supreme Court has held that a computer-generated animation is admissible if it meets the same requirements as any other demonstrative evidence. Specifically, there must be a showing that the evidence “(1) is properly authenticated . . . as a fair and accurate representation of the evidence it purports to portray; (2) is relevant. . . ; and (3) has a probative value that is not outweighed by the danger of unfair prejudice.”<sup>139</sup> The court did note, however, that there are additional dangers inherent in the use of computer-generated evidence.<sup>140</sup> As such, it required that trial courts issue limiting instructions explaining the nature of the proposed animation.<sup>141</sup>

### **South Carolina**

A computer-generated animation is admissible as demonstrative evidence in South Carolina when the proponent shows that it (1) is authentic; (2) is relevant; (3) is “a fair and

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<sup>132</sup> *Id.* (quoting OKLA.STAT. tit.12, § 2403 (1991)).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Dunkle v. State*, 139 P.3d 228, 251 (Okla. Crim. App. 2006) (quoting *Harris*, 13 P.3d at 495).

<sup>136</sup> *Lawson v. Nat’l Steel Erectors Corp.*, 8 P.3d 171, 178 (Okla. Civ. App. 2000).

<sup>137</sup> *Tull v. Fed. Express Corp.*, 197 P.3d 495, 499 (Okla.Civ. App. 2008).

<sup>138</sup> *In Re Amending and Revising Okla. Unif. Jury Instructions*, 217 P.3d. 620 (Okla. 2009).

<sup>139</sup> *Commonwealth v. Serge*, 896 A.2d 1170, 1179 (Pa. 2006).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

accurate representation of the evidence to which it relates”<sup>142</sup>; and (4) has a probative value that substantially outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury.<sup>142</sup> South Carolina also requires timely production of any proposed animation to ensure that the opposing party is given sufficient time to analyze it and formulate any objections.<sup>143</sup> Finally, cautionary instructions are required where the animation purports to be a re-creation of an event.<sup>144</sup>

### **South Dakota**

In South Dakota, the proponent of a computer-generated animated re-creation must describe the system and show that the program produced an accurate result.<sup>145</sup> The proponent must also show that the animation fairly and accurately reflects the testimony of the witness whose testimony it supports.<sup>146</sup>

### **Tennessee**

The Tennessee Supreme Court has held that the proponent of an animation intended to be an illustrative aid must establish that it is a fair and accurate depiction of the event it purports to portray, a “particularly important” requirement because “the jury may be so persuaded by its life-like nature that it becomes unable to visualize an opposing or differing version of the event.”<sup>147</sup> The court held that a limiting instruction explaining that an animation is simply an illustration of a witness’s testimony is appropriate whenever computer-generated evidence is admitted.<sup>148</sup>

### **Washington**

Washington courts have addressed the foundational requirements for computer-generated simulations. In *State v. Sipin*,<sup>149</sup> a Washington Court of Appeals held that the admissibility of a computer-generated simulation as substantive proof or as the basis for expert testimony “is conditioned upon a showing that (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate. . . ; and (3) the program is generally accepted by the appropriate community of scientists for use in the particular situation at hand.”

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<sup>142</sup> *Clark*, 529 S.E.2d at 536.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* See also *Webb v. CSX Transp., Inc.*, 615 S.E.2d 440, 448 (S.C. 2005).

<sup>145</sup> *Sommervold*, 518 N.W.2d at 738.

<sup>146</sup> *Id.*

<sup>147</sup> *State v. Farner*, 66 S.W.3d 188, 209 (Tenn. 2001).

<sup>148</sup> *Id.* at 210.

<sup>149</sup> 123 P.3d 862, 868 (Wash. Ct. App. 2005).

### **Wisconsin**

In *Emmerich v. American Honda Motor Co., Inc.*,<sup>150</sup> the Wisconsin Court of Appeals held that a computer animation that was “nothing more than a visual depiction of [an expert’s] opinions” was admissible. Furthermore, the court found that no rule required the proponent of the animation to disclose its exhibits before trial.<sup>151</sup> In *State v. Denton*,<sup>152</sup> the Wisconsin Court of Appeals held that if the probative value of a computer-generated animation is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or the risk of misleading the jury, the evidence should not be admitted.

### **Wyoming**

The Wyoming Supreme Court has held that a computer-generated animation is generally admissible so long as it is authenticated, relevant, and not subject to an exclusionary rule.<sup>153</sup>

## VII. CONCLUSION

The use of computer-generated animations and simulations to supplement both lay and expert testimony is becoming increasingly common, for the simple reason that they can be enormously persuasive. Courts are generally receptive to evidentiary challenges given the heightened risk of undue prejudice that distinguishes animations and simulations from more pedestrian forms of evidence. Aggressive cross-examination of the proponent’s experts, *Daubert* challenges, timeliness objections, and cautionary instructions are all tools at the practitioner’s disposal to combat the effective use of this potentially case-defining evidence.

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<sup>150</sup> No. 96-3696, 1997 WL 428495, at \*2 (Wis. Ct. App. July 31, 1997).

<sup>151</sup> *Id.*

<sup>152</sup> 768 N.W.2d 250, 259 (Wis. Ct. App. 2009).

<sup>153</sup> *Minun v. State*, 966 P.2d 954, 959 (Wyo. 1998).

# The Presentation of Probability to the Jury<sup>†</sup>

Latha Raghavan  
Mark P. Donohue

Mark Twain noted that “[t]here are three kinds of lies: lies, damned lies, and statistics.”<sup>1</sup> In a trial, statistical evidence and concepts of probability can indeed be a lie if presented ineptly. Statistical evidence is often misunderstood by juries. Even if no statistical evidence is presented, the jury is always asked to informally evaluate probability when considering evidence. As the Seventh Circuit recognized, “[a]fter all, even eye-witnesses are testifying only to probabilities (though they obscure the methods by which they generate those probabilities)—often rather lower probabilities than statistical work insists on.”<sup>2</sup> Therefore, lawyers must be prepared to present statistical evidence, when appropriate, and to help members of the jury understand what statistics mean and how they are relevant.

The only way to assess uncertainty is with the consideration of probabilities. The jury, therefore, inevitably considers probabilities when assessing evidence—that is, the jury considers how probable it is that the events occurred as each side presents them. In more complex matters, such as cases where the plaintiff alleges medical malpractice or design defects, expert testimony showing the probable existence of negligence is presented as evidence because the lay jury cannot otherwise logically assess the likelihood or probability of negligence when it has no expertise in complex product designs, and common sense and experience do not provide an adequate grounding to consider the questions.<sup>3</sup> Additionally, attorneys introduce into evidence, when appropriate, actual numerical statistics to assist

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<sup>†</sup> Submitted by the author on behalf of the FDCC Trial Tactics, Practice and Procedures Section.

<sup>1</sup> Mark Twain, *Chapters From My Autobiography—XX*, 185 N. AM. REV. 466, 471 (1907).

<sup>2</sup> *Branion v. Gramly*, 855 F.2d 1256, 1264 (7th Cir. 1988).

<sup>3</sup> *Muniz v. Am. Red Cross*, 529 N.Y.S.2d 486, 488 (App. Div. 1988).



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the jury in understanding the probabilities involved. The attorneys also present likelihood ratios to describe the “strength of the evidence in distinguishing between proposition A and proposition B.”<sup>4</sup>

Often, what the jury must consider is the likelihood that an event occurred considering all the possible events that could have occurred. In more formal statistical terms, this mathematical connection between total probabilities (all possible events that could have occurred) and conditional probabilities (the likelihood that the event at issue occurred) is Bayes' Theorem of Probability.<sup>5</sup> While it seems inconceivable that the mathematical formula expressing Bayes' Theorem will ever be presented directly to the jury, statistics can be carefully presented to a jury to persuade the jury members and clarify issues for them. Statistical information must be presented to the jury in a logical way so that jurors can evaluate the statistical evidence along with other evidence as jury members draw inferences from the evidence and reach conclusions on probability. “Statistical methods, properly employed, have substantial value. Much of the evidence we think of as most valuable is just a compendium of statistical inferences.”<sup>6</sup>

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<sup>4</sup> Bernard Robertson & Tony Vignaux, Bayes' Theorem in the Court of Appeal (1997), [http://homepages.mcs.vuw.ac.nz/~vignaux/docs/Adams\\_NLJ.html](http://homepages.mcs.vuw.ac.nz/~vignaux/docs/Adams_NLJ.html).

<sup>5</sup> See *Brim v. State*, 779 So. 2d. 427, 445 (Fla. Dist. Ct. App. 2000).

<sup>6</sup> *Branion*, 855 F.2d at 1263—64.



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Some individuals who have considered the use and effect of statistical evidence at trial have concluded that evidence of probability is probative and increases verdict accuracy.<sup>7</sup> Others, however, who are wary of the confusion that numbers frequently cause, argue that statistical evidence violates the norms of burden of persuasion—thus decreasing the accuracy of the jury's findings.<sup>8</sup> Concerns arise primarily because statistics provide an appearance of precision and accuracy that may be misleading to the jury and overwhelm the inferences that may be drawn from the other pieces of evidence in a trial.<sup>9</sup>

Given the pitfalls caused when not only the jury, but the judge and the lawyers, misunderstand statistics, lawyers must ensure that when they present statistical evidence, the evidence does not distort the jury's understanding of the facts. Judges must ensure that insufficient or confusing statistical evidence of probability is not admitted. Courts properly reject mathematical probabilities alone as providing sufficient evidence that an event occurred solely because it is more mathematically likely that that event occurred as opposed to some other event. For example, evidence showing that defendant's bus was the only bus licensed to operate on the street and that the accident occurred near the scheduled time for the bus to be on the street was insufficient to show that defendant's bus caused plaintiff's

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<sup>7</sup> Jonathan J. Koehler & Daniel Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 248 (1990).

<sup>8</sup> Craig R. Callen, *Adjudication and the Appearance of Statistical Evidence*, 65 TUL. L. REV. 457, 485–98 (1991).

<sup>9</sup> Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048, 1049 (1985); Laurence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1329 (1971).

car to crash.<sup>10</sup> Similarly, in a case where the plaintiff was allegedly injured by a defective tire that was purchased from a particular store, the United States Court of Appeals for the Third Circuit held that the jury's verdict would be a mere guess if the jury relied solely on evidence that the defendant tire manufacturer provided 75-80% of tires sold by that store.<sup>11</sup> In these cases, the courts recognized the error of relying solely upon statistical evidence to prove that something happened.

In §1981 discrimination cases, however, statistical evidence is routinely permitted to show disparate treatment of a protected class; the Supreme Court has interpreted the statute as permitting such evidence in these claims.<sup>12</sup> The federal jury charge relating to statistical evidence in recognition of the potentially distorting nature of such evidence follows:

#### Instruction 87-14 Statistical Evidence

The plaintiff has presented statistical evidence to try to prove that the defendant was motivated by a racially discriminatory purpose. You should consider this evidence together with all of the evidence presented in the case and determine whether it establishes by a preponderance of the evidence that the defendant was so motivated.

As you consider the plaintiff's statistical evidence, remember that just because pure chance does not seem to account for a situation, this does not necessarily mean that *race* is the most likely explanation.<sup>13</sup>

When lawyers use statistical evidence, they have an opportunity to teach the jury how to make a rational and logical decision. However, if the lawyer does not understand the relevance of the numbers or cannot explain the logic simply, the opportunity is lost, and the jury is left to make rough decisions on probabilities either without the benefit of the statistics, or worse—the jury arrives at entirely distorted decisions based on a misunderstanding of the numbers. When presented with statistical information, the jury will tend to focus on the probability numbers that are immediately apparent, (for example, evidence of the number of times a certain circumstance occurs) while ignoring other relevant numbers that provide background and context in order to accurately assess the statistic in context. This phenomenon of juries misunderstanding the background information is termed as the Base Rate Fallacy or Prosecutor's Fallacy.<sup>14</sup> Judges, lawyers and juries are capable of committing

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<sup>10</sup> *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754, 755 (Mass. 1945).

<sup>11</sup> *Guenther v. Armstrong Rubber Co.*, 406 F.2d 1315, 1318 (3d Cir. 1969).

<sup>12</sup> *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429–33 (1971).

<sup>13</sup> 5 MODERN FEDERAL JURY INSTRUCTIONS (CIVIL) § 87-14 (Leonard B. Sand et al. eds., 2010).

<sup>14</sup> William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials*, 11 LAW HUM. BEHAV. 167, 168, 171, (1987).

this fallacy, which usually results when individuals assume that the given probability that a piece of evidence would implicate a randomly chosen member of the population is equal to the probability that it would implicate this particular defendant. It is therefore important that the attorneys be prepared to present the logic of the statistics in evidence without ignoring the base rate and falling prey to the Prosecutor's Fallacy.

A study published by Cornell Law Review indicates that even judges are prone to such fallacies when considering statistical evidence.<sup>15</sup> A group of federal magistrate judges were asked to consider the following facts:

The plaintiff was passing by a warehouse owned by the defendant when he was struck by a barrel, resulting in severe injuries. At the time, the barrel was in the final stages of being hoisted from the ground and loaded into the warehouse. The defendant's employees are not sure how the barrel broke loose and fell, but they agreed that either the barrel was negligently secured or the rope was faulty. Government safety inspectors conducted an investigation of the warehouse and determined that in this warehouse: (1) when barrels are negligently secured, there is a 90% chance that they will break loose; (2) when barrels are safely secured, they break loose only 1% of the time; (3) workers negligently secure barrels only 1 in 1,000 times.<sup>16</sup>

The judges were asked the following question: "Given these facts, how likely is it that the barrel that hit the plaintiff fell due to the negligence of one of the workers?" The judges were provided four probability ranges from which to choose: 0-25%; 26-50%; 51-75%; or 76-100%.<sup>17</sup> Can you calculate the correct answer?

While 159 federal magistrate judges responded to the question, only 40.9% selected the right answer by choosing 0-25%. The actual probability that the defendant was negligent is only 8.3%. While the remaining judges chose from among the wrong possibility ranges, a full 40.3% wrongly indicated that there was a 76-100% chance that the defendant was negligent, strongly suggesting that most of the judges ignored the background base rate information. Such errors are made easily because the correct answer seems counter-intuitive.<sup>18</sup>

Wherever possible, the lawyer must make an effort to ensure that the witness who has ignored the background information, the context, and base rate be led to admit that such factors were not taken into account and that when these factors are considered, the probability that an event occurred is drastically changed. Consider the following example:<sup>19</sup> assume that

<sup>15</sup> Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 808–09 (2001).

<sup>16</sup> *Id.* at 808.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 809.

<sup>19</sup> Cf. Thomas S. Ulen, *The Growing Pains of Behavioral Economics*, 51 VAND. L. REV. 1747, 1762–63 (1998).

the officer has taken the stand as a witness and testified that your client's test results show that she tested positive for cocaine use and such test results are 99% accurate. Presented with this statistical information, the jurors will be led to believe that there is a very high probability that your client used cocaine. However, consider the following hypothetical cross-examination of the officer:

Q: Officer Smith, you told the jury that the test results for my client were positive for cocaine, correct?

A: Yes, that's right.

Q: You only performed this one drug test, isn't that correct?

A: Yes, that's correct.

Q: And you accepted it because it's 99% accurate?

A: Yes. The numbers don't lie.

Q: Are you aware of the report of the U.S. Office of National Drug Control Policy which says that 0.7% of the population used cocaine within the last month?

A: That sounds about right. That's why we were concerned about the positive test result.

Q: 0.7% means 7 people out of 1,000, right?

A: Umm.

Q: Well 7% means 7 out of 100, correct?

A: Correct.

Q: So, 0.7% means 7 out of 1,000, correct?

A: Correct.

Q: 7 out of 1,000 is the same as 700 out of 100,000, correct?

A: I don't know.

Q: Here, let me write this on the board for you to see. The ratio remains the same. Add two 0's to the 7 and add two 0's to the 1,000 and you see that 7 out of 1,000 is the same as 700 out of 100,000.

A: Yes, I see that.

Q: So, out of 100,000 people, 700 of them used cocaine in the last month?

A: Right.

Q: Now you said your test is 99% accurate, isn't that true?

A: That's true.

Q: So, since your test is 99% accurate, you would expect 99% of the 700 to test positive?

A: Yes.

Q: Let's see, 99% of 700 is 693.

A: That sounds right.

Q: So, 693 of the 700 cocaine users out of a population of 100,000 will test positive on your test because the test is 99% accurate, correct?

A: Correct.

Q: Now, let's look at the people who do NOT use cocaine. So if there are 700 people out of 100,000 people that use cocaine, that means that there are 99,300 out of 100,000 who do not use cocaine, right?

A: That looks right.

Q: Your test is 99% accurate and 1% inaccurate?

A: Yes.

Q: So, for the 99,300 people who do not use cocaine, 1% of them, that is 993 of them, will test positive, but never used cocaine. Isn't that correct?

A: Okay, I think.

Q: Alright. 1% of the non-users will test positive, correct?

A: Correct.

Q: And 1% of 99,300 is 993. Isn't that correct?

A: Yes.

Q: So if 1% of the 99,300 people who do not use cocaine test positive for cocaine use, that means there are 993 people who did not use cocaine that will still test positive for cocaine. Is that correct?

A: That looks right.

Q: So the total number of people who tested positive on the test who actually used cocaine would be 693 and the total number of people who tested positive on the test but did not use cocaine would be 993. Correct?

A: Yes.

Q: Now, when you came in to testify earlier for my opponent you didn't factor in the percentage of the population which uses cocaine as opposed to the percentage which doesn't use cocaine, did you?

A: No.

Q: And you didn't factor in the number of people who tested positive, but did not use cocaine and compare that to the number of people who tested positive and did use cocaine, did you?

A: No.

Q: Well, let's do that now. If you add up all the people who tested positive, that is the 693 people who took cocaine and tested positive, and the 993 people who did not take cocaine but tested positive, you have a total of 1,686 positive test results for every 100,000 people tested, correct?

A: Correct.

Q: So of the total 1,686 positive tests, only 693 of them actually took cocaine, correct?

A: Correct.

Q: 993 never took cocaine, but tested positive, correct?

A: Yes.

Q: So more people tested positive that never used cocaine than people who tested positive and actually used cocaine, correct?

A: I suppose so.

Q: So your test result here cannot show one way or the other whether my client is one of the majority of people who tested positive for cocaine use and yet did not use cocaine? Isn't that correct?

A: Umm.

Q: So let's go back to the board. 693 people out of the 1,686 people that tested positive actually used cocaine, correct?

A: Yes.

Q: And according to the calculator that means only 41.1% of the people that tested positive actually used cocaine, right?

A: That's what the numbers say.

Q: And you said numbers don't lie?

A: Yes.

Q: No further questions.

Based on such testimony, the attorney can point out in closing arguments that, even though the test is 99% accurate, 58.9% of the people who tested positive (that is the majority) did not use cocaine and that, therefore, the test does not show that her client used cocaine (the test result is insufficient to meet the opponent's burden of proof). In this manner, without the jury knowing it, the jury has considered the logic of Bayes' Theorem without mathematical equations. When the statistical background and context become more complex than the illustration above, it may be necessary to retain an expert to explain the logic to a jury. Either way, the importance of simplicity and clarity in the presentation cannot be overstressed. Such a presentation requires much preparation before trial. However, if the statistical point is crucial to the case, it is worth making the effort to explain it.

An awareness that statistics relating to probability can be counterintuitive, misleading, and subject to manipulation requires that the lawyer take the time to thoroughly prepare and ensure that the numbers are presented in full context without misleading the jury. Lawyers must have the ethical grounding to avoid the Prosecutor's Fallacy, while also being able to clearly present relevant statistical evidence to juries in such a way that it helps them understand what happened. Lawyers must also be prepared to refute opponents when they enter misleading statistics into evidence. Thus, a mastery over statistics is a crucial skill for litigators to have.

# The Ten Commandments of Cross-examination<sup>†</sup>

Timothy A. Pratt

## I.

### INTRODUCTION

Much has been written about the “art” of cross-examination. Not all of it, though, involves art. Some of it involves natural talent, but most of it involves hard work. In truth, three factors combine to create this “artistic” success — personality, presence and persuasion. These traits are often manifest in the ability to think and react quickly. But something else is involved as well — something that trial lawyers often hold in short capacity. That something is humility, and the ability to know when to quit. The art of cross-examination involves all of these traits, and more than a little luck.

This article is intended to provide yet another iteration of the Ten Commandments of cross-examination.<sup>1</sup> Here is the caveat, however — one does not learn to be good at cross-examination by reading papers. The successful artist learns by doing it, or watching others do it well; by reading trial and deposition transcripts or, better yet, by conducting the examination personally. In this era, when there are too few trials to satisfy so many eager trial lawyers, cross-examination techniques can be practiced in depositions. The trial lawyer must learn to get the “feel” of a good cross-examination; to develop a personal cadence and style. The trial lawyer must learn as well to adapt to particular witnesses and different cases. But he or she learns by doing. In all this, of course, having some general rules in mind will not hurt. Hence, the “Ten Commandments.”

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<sup>†</sup> This article was originally published at 53 FED’N DEF. & CORP. COUNS. Q. 257 (2003).

<sup>1</sup> Perhaps the late Irving Younger prepared the best-known version of the Ten Commandments of Cross-examination. See Younger, *The Art of Cross-Examination*, ABA Monograph Series No. 1 (ABA Section on Litigation 1976). Younger’s Ten Commandments are: (1) be brief; (2) use plain words; (3) use only leading questions; (4) be prepared; (5) listen; (6) do not quarrel; (7) avoid repetition; (8) disallow witness explanation; (9) limit questioning; and (10) save the ultimate point for summation. These are good general rules, but this article makes an effort to supplement Younger’s commandments and build on them. Some overlap, though minimal, is inevitable.



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## II.

### THE COMMANDMENTS

#### A. *The First Commandment: Thou Shalt Prepare*

Of course, preparation is essential, but it would be surprising to learn how many trial lawyers fail to observe this basic principle. A lawyer must prepare in order to know what topics to cover. A lawyer must prepare because the jury will assess his or her depth of knowledge and commitment to the case by the demonstrated ability to handle the details of cross-examination. If the lawyer appears vague on the details, the jurors may conclude that they, too, should be unconcerned about the finer points of the case. Thorough preparation also will ensure that the witness appreciates the lawyer's competence. Under such circumstances, the witness will be less willing to take advantage of the lawyer's lack of first-hand knowledge. It takes hard work, but dividends flow.

For a plaintiff's cross-examination, preparation involves digging into every relevant background fact. This includes employment history, medical history, prior statements, and every other important detail. The cross-examination of the plaintiff can be a pivotal point at trial. Jurors tend to pay special attention to this encounter because they recognize that it focuses the essential controversy of the case — a battle between the plaintiff and the defen-

dant. A prepared and effectively accomplished cross-examination of the plaintiff, perhaps more than any other event at trial, can increase significantly the chances of a defense verdict. Unfortunately, an unprepared and poorly accomplished cross-examination can produce the opposite result.<sup>2</sup>

Because many cases are decided by expert testimony, an attorney should prepare thoroughly for the cross-examination of an opposing expert. Generally, significant amounts of information must be gathered in advance of cross-examination. As a starting point, it is important to master the deposition taken in the case at hand because that deposition represents the greatest opportunity for impeachment. However, one should review depositions of the expert taken in other cases and be prepared to use them as well. Experts sometimes forget what they say from deposition to deposition; this is particularly true for the professional witness. In addition, expert witness databases are available from which to gather background information on a particular expert. It is also a good idea to contact lawyers who have encountered the expert. This creates an opportunity to build upon the good efforts of others. Finally, it is important to obtain all of the expert's prior writings and to subpoena the expert's entire case file, including correspondence and other materials exchanged with opposing counsel or third parties. In this regard, check for advertisements or expert listings and carefully review all aspects of the expert's curriculum vitae to ensure that he or she has been accurate in every material respect.

One of the new and critical resources for information on an expert is the internet. Many experts maintain their own web pages. Several, for example, will list numerous areas of "expertise" to advertise their availability — a fact that may diminish their credibility before the jury. Several have questionnaires that can be completed by attorneys or potential plaintiffs to allow them to "evaluate" a case. If the expert is employed by an academic institution, the institution's web pages can be searched to learn what courses the expert may be teaching. Many experts also are listed in internet expert databases. Some even participate in newsgroup discussions.<sup>3</sup>

In the example cited below, use of the internet proved to be dispositive. The particular case involved a plaintiff who was suffering from a rare form of cancer (T-cell lymphoma). She argued that her cancer was caused by the defendant's product. Although there was virtually no science to support a causative link, the plaintiff was able to enlist an advocate from the M.D. Anderson Cancer Hospital in Houston. That physician was willing to state that, within a reasonable degree of medical probability, the defendant's product caused the plaintiff's cancer. In reality, however, T-cell lymphoma is a rare cancer whose cause remains

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<sup>2</sup> The risk of extensive preparation is the tendency to show the jury all that counsel knows. That can lead to a lengthy, tedious cross-examination which does not capture the attention of jurors. Preparation, therefore, includes not just learning all that one can, but distilling the key points and determining how to convey them.

<sup>3</sup> Internet search engines are becoming more sophisticated and far-reaching. Simply typing in the expert's name in a search engine may lead to a number of "hits" in various categories. These would include news reports, published cases, administrative agency submissions, and more.

unknown. On cross-examination, the exchange between the expert witness and defense counsel took the following course:

Q. You are on staff at M.D. Anderson Cancer Hospital?

A. Yes.

Q. Isn't it true that M.D. Anderson Cancer Hospital has a web page?

A. Yes.

Q. Have you ever had any articles published on the M.D. Anderson web page?

A. A few.

Q. Do you remember one of your articles that appeared on the web page just three months ago?

A. I think so.

Q. In that article, you talked about T-cell lymphoma, the very type of cancer involved in this case?

A. I believe so.

Q. Let's be sure. Is this the article that was published on the web page?

A. Yes, that's my article; it has my name on it.

Q. I assume you knew that physicians and others might read this article?

A. Yes, I assume so.

Q. And, therefore, you wanted to be as accurate as possible?

A. Of course.

Q. Turn to page four of the article.

A. Okay.

Q. In this article, which you published on the web page just three months ago, you talk about what is known regarding the cause of T-cell lymphoma, isn't that right?

A. Yes.

Q. Isn't it true that you said the following: "No one knows what causes T-cell lymphoma." Is that what you wrote just three months ago?

A. That's what it says.

This testimony not only discredited the witness, it also led the trial judge to conclude that the physician lacked reliable scientific support for her opinions. Judgment subsequently was entered for the defendant.<sup>4</sup> Preparation: the first and most important commandment.

*B. The Second Commandment: Thou Shalt Know Thy Objective*

Irving Younger, an advocate of short cross-examination, often stated that the lawyer should "make three points and sit down." Sometimes, that is the way to go. Often, however, one needs to spend time with the witness to develop several critical points to counter the impact of the direct examination. Before initiating a cross-examination of any witness, the lawyer should clearly bear in mind those points he or she wishes to make with that witness. And then, he or she should write them down. These points also should be discussed with those who are assisting at trial. Effective cross-examination cannot be accomplished without a clear understanding of which points are critical to the case, and which ones can be extracted most appropriately from each witness. Only when understanding how to make these points and how to package them for the jury can a lawyer effectively communicate with the jury. If the jurors are sitting in the box wondering where the cross-examination is headed, it is likely that the lawyer does not know where the cross-examination is headed. Therefore, it is critical to make a list of what should be accomplished on cross. Near the end of that cross-examination, it is a good idea to return to the list to ensure that all points were covered.

*C. The Third Commandment: Thou Shalt Take Baby Steps*

Patience is a virtue in cross-examination. Delivery of key points is not just a destination, it is a journey on which the jurors should accompany the lawyer. They must understand step-by-step where the cross-examination is headed. It is called pacing; it is called communication.

Here is an example. Assume the case is being tried with an expert who has developed opinions, but has never submitted those opinions for peer review. One way to handle the situation at trial is simply to ask the following question:

Q. Have your opinions ever been submitted for peer review?

A. No.

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<sup>4</sup> The case in question was *Anderson v. Bristol-Myers Squibb*, Civ. No. H-95-003 (S.D. Tex. 1998). The twenty-five-page opinion is not published, but it is available from the author or from Gene Williams, an FDCC member who was also involved in the *Daubert* hearing.

This exchange gets right to the point. However, if the jury is to journey with the lawyer and understand the point, the following series of questions might be posed, to which the witness will likely answer “yes”:

- Q. You have heard about the peer review process?
- Q. And, by peers, we are talking about people in your area of science?
- Q. So, the peer review process involves a review of one’s opinions by his/her scientific peers or colleagues?
- Q. It allows one to get valuable feedback from other scientists about what they think of your opinions?
- Q. It can provide a sense of whether your opinions are generally regarded as supportable and reliable by other experts in your field?
- Q. Can this be very valuable in the scientific process?
- Q. Does one form of peer review involve standing up at meetings and sharing your views with peers or fellow scientists?
- Q. You are letting them know your opinions?
- Q. And you are discussing with them the basis of those opinions?
- Q. This allows your peers to comment on the strengths or weaknesses of your opinions?
- Q. You have been involved in this litigation for five years?
- Q. You have, for the last five years, been expressing these opinions in courtrooms around the country?
- Q. Have you ever stood in front of a group of your fellow scientists to share with them the opinions you have just shared with this jury on direct examination?
- Q. Have you ever, at any scientific meetings, sought feedback from your fellow scientists on whether they think you are right or wrong?
- Q. Is another form of peer review the publication of articles?
- Q. When you submit an article to a good journal, the article is peer-reviewed before it is published?
- Q. By that, I mean that the editor of the journal circulates the article to various scientists for their comments?
- Q. By this process, can the editor be more comfortable that the opinions expressed in the article are valid and supported by the evidence?

- Q. This, too, can be a valuable part of the scientific process?
- Q. Can it be a way of weeding out bad science?
- Q. Have you ever submitted a manuscript stating your opinions to a journal for publication?
- Q. Have you even prepared a manuscript stating the opinions you have expressed to this jury?
- Q. Have you in any form ever sought feedback from the publication peer-review process concerning your opinions in this case?
- Q. So, sitting here today, after five years of involvement in litigation, you have never taken the time to prepare a manuscript and submit it to a journal so that your fellow scientists can determine whether it is even worthy of publication?

This journey takes time. That is not to suggest, however, that an enormous amount of time should be spent on every point. That will become ponderous and the jurors will become bored. The lawyer must gauge the importance of a particular point and assess what it will take to deliver that point effectively to the jury. Above all, don't hurry. Make the jury understand the point since a misunderstood point is no point at all.

D. *The Fourth Commandment: Thou Shalt Lead the Witness (Usually)*

Asking only leading questions is perhaps the oldest rule of cross-examination. It is an old rule because it is a good one. Leading questions are most effective because they essentially allow the cross-examiner to testify and the witness to ratify. The technique advances one of the important dynamics of the courtroom — control. Asking leading questions allows the cross-examiner to be forceful, fearless, knowledgeable and informative. Good things come from leading questions. So, when permitted, lead, lead, and lead. Usually.

Be aware that leading questions also can grow tiresome. No one likes to hear a hundred questions in a row that end with, “is that correct?” The staccato questioning of a witness can sometimes make the cross-examiner appear overbearing and cold. Thus, when implementing this ironclad rule of leading a witness on cross-examination, keep a few qualifying rules in mind as well.

First, learn *how* to lead the witness. Firing questions that begin with, “isn't it correct,” may remind the jurors of an FBI interrogation from an old movie. A trial lawyer must search for ways to vary the routine. For example, in an intersection collision case, a fact witness might be called by the plaintiff to testify on several key points that favor the plaintiff. Yet, the one point that favors the defendant is the witness's recollection that the stoplight was red. On cross-examination, therefore, defense counsel might do the following:

Q. Isn't it correct that you were in a position to see whether the light was red or green?

A. Yes.

Q. And the light was red, isn't that correct?

A. Yes.

In isolation, these questions could effectively make the point. To make the point more casually, however, and to bring the jury along for the ride, the cross-examiner might do the following:

Q. As you were driving down the road, I guess you were paying attention to the lights ahead?

A. Yes.

Q. I mean, as a careful driver, I assume one of the most important things you do is look to see whether the light ahead is red or green?

A. Yes.

Q. And, as you were heading down Grand Street that Friday afternoon, and I'm talking especially about that afternoon, weren't you paying attention as to whether the lights ahead were red or green?

A. Yes.

Q. And as you were driving down the road that day, was the light red or was it green?

A. It was red.

Q. Is there any doubt in your mind that the light was red on that day?

A. No.

Q. Pardon me?

A. No, there is no doubt in my mind.

These are all leading questions, but not a single one contained the phrase, "is that correct," or the lawyer-like introduction, "isn't it a fact . . ." Often, when questioning witnesses who are not experienced testifiers, a kinder and gentler style of asking leading questions is the most effective.

A second caution or qualifying rule requires judgment in knowing when not to ask leading questions. Sometimes a lawyer becomes so obsessed with controlling the witness that every question becomes a leading question. This may not be required. For example, when questioning a professional expert on the stand, leading questions in certain areas are absolutely unnecessary. Examples:

- Q. Why don't you just tell the jury how many times you have testified in a court of law?
- Q. How much money did you make last year testifying for plaintiffs' attorneys around the country?
- Q. Of the thousands of medical journals published around the world, tell the jury how many you have asked to publish the opinions you have expressed in this courtroom?
- Q. How long has it been since you last treated a patient?

And so on. Often, it is best to have the answer come from the mouth of the witness. A lawyer asks these non-leading questions because he or she knows the answer and, if the witness waffles, the witness can be impeached.<sup>5</sup> The point is not that every question must be leading, but that the expert is never afforded an opportunity to expound on a question of critical importance. When reaching this goal, look for the opportunity to use non-leading questions to break the monotony of repetitive leading questions.

E. *The Fifth Commandment: Thou Shalt Know Thy Style and Adapt It to the Occasion*

Good trial lawyers develop their own comfortable styles. In this regard, it is important to observe other trial lawyers; good trial lawyers are impressive. It is a mistake, however, to mimic them. Excellent trial lawyers come in many different packages. Some are funny; some are very serious. Some have booming voices; some speak softly. Some move around the courtroom; some never become detached from the podium. Each trial lawyer must do what is comfortable for him or her, following the old adage: Be true to thyself.

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<sup>5</sup> An ancillary advantage to having the witness provide the answer, rather than supplying a sterile "yes" or "no" response, is to increase the odds that the witness will appear evasive. If the question is buttressed with accurate information, and the witness simply concedes the point, the witness may appear candid and credible. Making the witness provide a more narrative response to points that must be conceded may cause the witness to omit or de-emphasize certain facts. The questioner then is placed in the position of identifying the incomplete nature of the witness's response, perhaps leaving the impression with the jury that the witness is not a reliable fact-giver. All of this must be keyed to the witness in question. There are some witnesses who should be granted little latitude on cross-examination.

Just as there are effective points of style, however, there are also the negative. It is effective to be aggressive on cross-examination; just don't be a jerk. Getting angry or losing one's temper sometimes will imply that the witness got the best of the cross-examination. Know the difference between tough and mean, between confidence and arrogance, and between control and dominance. The jury will know the difference if the lawyer does not.

F. *The Sixth Commandment: Thou Shalt Know When to Quit*

All lawyers have experienced situations where they realize, half way through a cross-examination outline, that the battle is over — either everything has been done with a particular witness, or there is little more that can be done. It is either recognition of victory or acknowledgement of defeat. One of the most difficult things for lawyers to do is to quit — to step away from the limelight. Yet, effective counsel will stay attuned to how the cross-examination is going as it is progressing. Adaptability is the key. Things may go better than hoped, or things may grow hopelessly worse. As the cross-examination proceeds, it is critical to stay attuned to the courtroom atmosphere. How is the jury responding to the performance? How is the judge responding? The best-laid plans of even the best cross-examination should be modified as circumstances dictate — even to the point of quitting.

Generally, there are two times to quit. The first occurs when the witness has been discredited or has made a monumental concession. There is no need for overkill, and the jury may resent counsel if he or she maintains the charge against the witness. Even worse, the witness may negotiate a remarkable comeback. The second time to quit is when the witness is killing the case or counsel. Trial lawyers generally are not steeped in humility, and defeat ill becomes them. The tendency is to keep fighting against all odds. Nevertheless, trial counsel should have the judgment to admit defeat at the hands of a witness. Occasionally, this result can be calculated before trial, if the reputation or deposition performance of the witness suggests that few points can be scored on cross-examination. Sometimes, unfortunately, one learns this lesson under the bright lights of the courtroom.

This does not mean, however, that the lawyer staggers to counsel table and sinks into the chair. Recall the scene in the movie, “My Cousin Vinnie,” when one of the defense counsel inartfully attempted to cross-examine a witness about his eyesight. Failing in the effort, counsel retired to counsel table only to proclaim: “Whew, he is a tough one.” Trial lawyers often engage illusion. Make it appear that this witness actually can support the case in some respect. Find some common ground with the witness so that the witness can conclude the examination by agreeing with counsel.

In this regard, imagine a case where a prescription drug is alleged to have caused injury to the plaintiff. An extraordinarily qualified medical expert has provided an opinion that the plaintiff's injury was caused by the medicine, and the expert cannot be moved from that causation opinion. Within the limits of whatever latitude a judge might allow on cross-examination, try to commit the expert to the following general points:

- You will agree that prescription drugs are important to the health of Americans
- All medicines have side effects
- Just because a medicine has side effects does not mean it should not be marketed
- The FDA balances the risks and benefits of every prescription medicine in determining whether it should be marketed
- Once the prescription medicine is marketed, the physician also balances the risks and benefits in determining whether to prescribe the medicine for a patient
- The [prescription medicine at issue in the case] continues to be available on the market
- The FDA has never ordered it to be removed from the market
- The FDA has never determined that this medicine should be unavailable to patients in America
- Indeed, physicians all over the country prescribe this medicine for patients who need it

In this fashion, the lawyer is driving home themes that support a defense of the pharmaceutical manufacturer and getting an effective witness to make these points. The cross-examination will conclude on a high note. Be careful, however, so as not to allow a good witness to further damage the case on re-direct by opening new avenues of inquiry on cross-examination.

*G. The Seventh Commandment: Thou Shalt Know What to Take to the Podium*

Preparation is a good thing, and developing a good cross-examination outline is very useful. Yet, in the heat of the battle, being organized, effective and quick to the point is critical. Some attorneys take volumes of materials to the podium for cross-examination. Some come armed with fifty-page cross-examination outlines. All of this is acceptable, if the volume of materials is manageable. No matter how hard the lawyer works on preparing cross-examination, however, surprise is inevitable. The lawyer may want or need to pursue a line of questioning that is out of order in the outline. An article, document or transcript may be needed unexpectedly for impeachment. All of these items must be accessible immediately. Fumbling around, shuffling papers or searching for one's place in an outline while the courtroom remains eerily silent does not convey a positive image.

There are many solutions to this problem, but the most important one is economy. Streamline the cross-examination outline in order to move around easily, making those points that are the most effective for the moment. Not every question need be written out. This is cross-examination, not an oratory contest. The jury will be able to tell the difference. Have the confidence to work from a shorter outline, knowing that additional points can be made to fill the gaps. If a lengthy cross-examination is anticipated, divide the outline

into discrete parts, using a three-ring binder and a tabbing system. This will allow for a focus on the details within single topics, minimizing the risk of getting lost.

Handling the impeachment material also requires preparation and organization. Again, economy is the key. Know the materials and have them readily available. Combining these key materials into a collection of “maybe” documents will interfere with the ability to find what is needed when it is needed. Key materials should be cross-referenced within the outline and organized in a series of folders to retrieve them quickly. Having an assistant who thinks two steps ahead and follows the outline may be the most efficient way to handle these materials.

Impeaching with prior testimony also can be tricky since this requires some knowledge that an impeachment opportunity exists. One must locate the impeaching material and lay the foundation for use of that material. Finally, the impeaching material must be used effectively. The paramount rule on impeachment is this: use impeachment sparingly and only for telling points. If an expert testifies at trial that he has been deposed sixty-one times, but in his deposition he acknowledged sixty-two times, the inconsistency usually is not worth the impeachment effort. With that rule in mind, preparation for cross-examination should focus on those concessions made by the witness in prior transcripts that are essential to the case. Include these points in the outline and be sure the outline tracks the precise question asked in the prior transcript. Then, have the transcripts marked in order to access the impeaching portion easily. Not every witness transcript needs to be at the podium, however — only those that will be used. The same rules apply for any other impeaching material — whether published articles, statements on a web site, letters or reports.

Now, a word about paperless trials. Most trial lawyers are heeding the trend to place materials in electronic form and eliminate paper in the courtroom. That trend is likely to continue. With judges forcing parties to use electronic media in the courtroom, defendants should be concerned no longer about presenting a “high tech” case in most venues. All parties will be required to do so. However, the use of electronic media can be a blessing and a curse. It is a blessing because it allows ready access to materials that are needed to cross-examine a witness. Pushing the right button or waving a wand over the right bar code produces what is needed. Yet the curse involves learning how to handle this technology. All the necessary software must be learned and loaded for every witness; the right materials must be available instantly for the witness and the jury. This requires practice. Once mastered, the presentation can be powerful and even intimidating to an opposing witness. Find the software that is “friendliest” and learn it. Use outside consultants if necessary. Once the process is familiar and its utility realized, lawyers will be inclined to use technology even if not required by the trial judge.

#### H. *The Eighth Commandment: Thou Shalt Know Thy Audience*

Consider a situation where the examiner is masterful, the witness is bested on technical points, and impeachment is accomplished with scientific journals. The entire direct examination is facing destruction with laser-like precision as the examiner bombards the witness with technical questions. The problem? The jury has no idea what is going on. This situation sometimes makes for a good appellate record, but it makes for a bad trial result.

A gifted trial attorney is able to reduce the technical to the simple without appearing to patronize the jury. This is important in all phases of the trial, but it is most important in cross-examination when counsel is attempting to undermine the case of an opponent through the testimony of the opponent's witnesses. If the jury does not understand that an opponent has been bested, time has been wasted. If counsel is moving laboriously through technical points and boring the jury in the process, both time and substance are lost. The jury will grow angry. There are few truisms in the business of trying cases, but there is one: if the jury is mad at counsel, the case is lost.

Effective trial lawyers remember that the important audience is seated in the jury box. The jury must understand the case. In particular, jurors must understand the points being made on cross-examination. Yet again, this starts with preparation. Decide beforehand what points are important to the cause and whether they can be made effectively during cross-examination. Sometimes it is simply not worth investing the time and energy or invoking the jury's tolerance to make technical points with an adverse witness. Some of these points can be deferred until a party's own witness is on the stand.

If a point is worth making on cross-examination, decide how best to make it. The jury must understand the context of a given point. Use simple words in simple sentences and reinforce points that are conceded by a witness: "You said that it is standard practice to perform x-rays under those circumstances. Is this something you learned in your medical training?"

Be sure that when the witness concedes a point, the jury understands the advantage. Perhaps that involves some dramatic flair, if that is counsel's style — a change in tone of voice, or movement from the podium. Perhaps counsel did not hear the answer, or fears that the jury did not, and asks the witness to repeat it. All of this involves style and judgment. Most of all, however, it involves telling the simple story to the jury.

Another effective way to make points is to highlight them for the jury. Some judges will allow counsel to enumerate key concessions on a flip chart or an Elmo. (Though keep in mind that some judges do not). This can be an important way for jurors to remember the points made. They hear the points, then they see the points. Any time a point can be visually made or recorded, do so. It allows counsel to relate back to this visual point during closing argument, and it creates a more enduring cross-examination memory for the jury. Demonstrative exhibits or other visual aids generally make cross-examination more interesting, and the more interesting the cross-examination, the more attention the jury will give it.

### I. *The Ninth Commandment: Thou Shalt Know the Rules of Evidence*

Much of cross-examination is style and technique, but that is only veneer. It is the substantive content that holds the case together. Counsel must introduce EVIDENCE during cross-examination. The admission of evidence requires a keen understanding of the rules of evidence and how to argue them. The best-planned cross-examination will be ineffective if counsel cannot navigate the rules of evidence.

The starting point is to know the rules of evidence. That does not involve reviewing law school notes from Evidence 101, or skimming through Wigmore's *LAW OF EVIDENCE*. It

means, however, that the rules of evidence must be read again. It means that cases and articles must be reviewed. Generally, lawyers who are not also law professors do not maintain encyclopedic recollection of the rules of evidence. Yet these rules must be refreshed so that they can be argued usefully.

In addition to this general re-acquaintance, be sure to identify those rules that hold particular importance to the trial. Different rules come into play in different trials. Know well the ones that count. Anticipate problems with the authenticity and admissibility of documents needed for cross-examination. Be sure to contemplate an argument supporting the admissibility of evidence important to every aspect of cross-examination. Prepare trial briefs or motions in limine, and raise problem areas in advance of cross-examination. Be sure the cross-examination moves as seamlessly as possible. All of this increases the chances of winning at trial. Failing that, it makes for a good appellate record.

#### J. *The Tenth Commandment: Thou Shalt Know Thy Judge*

Not all judges are created equal. Some know the rules of evidence, but some do not. Some are courteous and patient, and some are not. Some will impose restrictions on cross-examination; some will not. Before trying a case to an unfamiliar judge, find out about that judge. Better yet, if there is time, observe the judge during a jury trial. Talk to attorneys who have tried cases in front of the particular judge, and otherwise gather information from every conceivable source, seeking out detail.<sup>6</sup> Find out how the judge enforces the rules of evidence, how documents can be used during cross-examination, whether there are time restrictions, where counsel must stand during cross-examination, whether the judge requires the witness to answer specific questions with no elaboration, how documents are used with the witness, and so forth. Knowing the peccadilloes of a particular judge will provide a measure of comfort, allowing counsel to focus on important substantive issues. If one's cross-examination is disrupted by a judge who is critical of perceived infractions, the pace and content of the cross-examination will be disrupted. For defense lawyers, this is a lesson that must be learned early in trial since cross-examination is one of the more immediate events.

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<sup>6</sup> Increasingly, trial judges are creating their own rules of courtroom behavior to supplement the general provisions of court decorum in a particular jurisdiction. Some of these provisions can be onerous, imposing time limits on witness examination and otherwise restricting the courtroom latitude of trial attorneys who have become accustomed to a more generous approach. Some of these rules may affect what a trial attorney is allowed to do on cross-examination.

III.  
CONCLUSION

Reverting to lessons learned at the outset: Practice. Practice. Practice. Keep these commandments in mind until they become second nature. Once comfortable with the technique of cross-examination, it is easier to relax. Counsel will appear more confident, and the jury will sense this confidence. Such confidence will make counsel more effective in every phase of the trial and increase the chances of winning the case which, after all, is the reason for this business.

# Professionalism in Depositions: The Sound of Silence<sup>†</sup>

E. Phelps Gay

*People talking without speaking;  
People hearing without listening.*

—Paul Simon

*The Sound of Silence*

## I.

### INTRODUCTION

In recent years courts and commentators have decried the unprofessional behavior sometimes engaged in by attorneys during depositions.<sup>1</sup> Aggressive, obstructive, and even hostile conduct toward a deponent or opposing counsel, once considered by some to be good lawyering, are regarded as increasingly unacceptable. Judges, who at one time simply shook their heads while reading depositions in the privacy of their chambers, have become more outspoken in denouncing deposition misconduct and less hesitant to exercise their “inherent power” to control it.<sup>2</sup> Codes and creeds of professionalism now exhort attorneys

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<sup>†</sup> This article was originally published at 54 FED’N DEF. & CORP. COUNS. Q. 213 (2004).

<sup>1</sup> See, e.g., *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993); *In Re Anonymous Member of South Carolina Bar*, 552 S.E.2d 10 (S.C. 2001); Janeen Kerper & Gary L. Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, 22 J. LEGAL PROF. 103 (1997-98); Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996); Sandra F. Gavin, *Playing by the Rules: Strategies for Defending Depositions*, 1999 L. REV. M.S.U.-D.C.L. 645; A. Darby Dickerson, *The Law and Ethics of Civil Practice Depositions*, 57 MD. L. REV. 273 (1998); 7 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 30.43[3] (3d ed. 2003).

<sup>2</sup> The South Carolina Supreme Court has stated that judges must use their authority to prevent abusive deposition tactics. *In Re Anonymous Member of the South Carolina Bar*, 552 S.E.2d 10, 18 (S.C. 2001). One example of judicial intervention appears in *Freeman v. Schointuck*, 192 F.R.D. 187 (D. Md. 2000), where defense counsel’s insulting, sarcastic, antagonistic, and threatening comments are reproduced at length. The court characterized counsel’s conduct as “appallingly unprofessional” and ordered him to write a letter of apology and take a professionalism course approved by the court. *Id.* at 189.



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*Award in 2004 when this article was originally published in 2004.*

to conduct themselves with dignity when taking and defending depositions.<sup>3</sup> In 1993, the Federal Rules of Civil Procedure were amended to require that objections during a deposition be stated “concisely and in a non-argumentative and non-suggestive manner.”<sup>4</sup> In an effort to rein in obnoxious deposition conduct, many states have enacted stringent new procedural rules.<sup>5</sup> Most strikingly, one state has drawn the curtain on deposition misconduct by enacting a rule which specifies that only three brief objections are permissible, imposing sanctions or waivers for any further comment.<sup>6</sup>

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<sup>3</sup> See, e.g., The American Bar Association Lawyer’s Creed of Professionalism of the ABA Tort Trial and Insurance Practice Section. Section (B)(8), provides that “[i]n depositions . . . I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect.” See also ABA Guidelines for Litigation Conduct (1998), Lawyers’ Duties to Other Counsel, Sections 20-22; The Texas Lawyer’s Creed, Section III, No. 17 (“I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable.”); Rules for the Government of the Bar of Ohio, Appendix to Rule XV - Statement on Professionalism, A Lawyer’s Aspirational Ideals (“[a]void rudeness and other acts of disrespect in all meetings, including depositions and negotiations”); A Lawyer’s Creed of Professionalism of the State Bar of New Mexico, Section C (“[i]n depositions . . . I will conduct myself with dignity, avoid making groundless objections and refrain from disrespect.”).

<sup>4</sup> FED. R. CIV. P. 30(d)(1).

<sup>5</sup> See, e.g., ALASKA R. CIV. P. 30(d)(1); ARK. R. CIV. P. 30(d)(1); FLA. R. CIV. P. 1.310(c); IDAHO R. CIV. P. 30(d); KY. R. CIV. P. 30.03(3); ME. R. CIV. P. 30(d); MD. R. CIV. P. CIR. CT. 2-415(g); MASS. R. CIV. P. 30(c); MINN. R. CIV. P. 30.04(a); N.J. R. CT. 4:14-3(c); OKLA. STAT. ANN. tit. 12 § 3230(D), (E) (West Supp. 2003); R.I. R. CIV. P. 30(d)(1); TENN. R. CIV. P. 30.03; TEX. R. CIV. P. 199.5(d); UTAH R. CIV. P. 30(c), (d); VT. R. CIV. P. 30(d)(1); WASH. SUPER. CT. CIV. R. 30(h); WYO. R. CIV. P. 30(c), (d).

<sup>6</sup> TEX. R. CIV. P. 199.5(e).

This article offers a survey of judicial decisions and a discussion of legislative initiatives aimed at “cleaning up” inappropriate deposition conduct. It suggests that the recent trend toward less obstructive and more civil behavior during depositions represents a step forward for the legal profession. As such, these judicial and legislative efforts should be continued and encouraged. Civility and cooperation can coexist with vigorous, even “zealous” representation of clients.<sup>7</sup> Experience also suggests that when unnecessary objections and attorney colloquy are taken away, and a deposition focuses on the substance of the testimony, little is lost and much is gained.

## II. COMPETITIVE OBSTRUCTIONISM

During the litigation explosion of the 1980’s and 1990’s, many lawyers developed the notion that “anything goes” when taking a deposition. Representing a client, a litigator could and should do everything possible to protect that client’s interest. Then as now, most cases did not go to trial. Therefore, depositions provided the forum where evidence was fought for and obtained, the credibility and stamina of witnesses were tested, the fortitude of opposing counsel measured, and cases effectively won or lost. With no judge presiding, litigators felt emboldened (perhaps even obligated) to engage in obstructive or abusive conduct, displaying a level of rancor toward witnesses and opposing counsel that they would never exhibit in the presence of a judicial officer. A report by the Federal Bar Council Committee on Second Circuit Courts described the then-current method of taking and defending depositions as “too often an exercise in competitive obstructionism.”<sup>8</sup> It concluded that depositions had become “theaters for posturing and maneuvering rather than efficient vehicles for the discovery of relevant facts or the perpetuation of testimony.”<sup>9</sup>

From a practical standpoint, this obstructionism took the form of: (1) objecting frequently to harass opposing counsel or interrupt the flow of the examination; (2) lodging “speaking objections,” designed to re-characterize testimony or signal the desired answer to a witness; (3) interjecting comments or questions such as “if you know,” “don’t speculate,” or “did you understand the question?” ostensibly to “help” the witness; (4) orating at

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<sup>7</sup> Modern codes of ethics have deleted most references to “zealous advocacy.” See Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 10 (1987). The official comments to new ABA Rule 1.3 (Diligence) still state that a lawyer should act “with zeal in advocacy upon the client’s behalf,” but add that the “lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt.1 (2004).

<sup>8</sup> *A Report on the Conduct of Depositions*, 131 F.R.D. 613, 613 (1990). See also *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 388 (1991) (Committee reported that depositions “can be one of the most uncivil phases of trial practice.”).

<sup>9</sup> *A Report on the Conduct of Depositions*, 131 F.R.D. at 613.

length to “testify” for the witness; (5) staging off-the-record conferences with the witness to discuss a pending question and formulate an answer; (6) instructing the witness not to answer a question; or simply (7) rude, offensive behavior, designed to impress upon the client or opposing counsel that the attorney is a “hardball” litigator who cannot be intimidated and who stands ready to protect the client’s interests at any cost.

Examples abound. One of the most well known appears in *Paramount Communications Inc. v. QVC Network, Inc.*,<sup>10</sup> where the Delaware Supreme Court felt compelled to reproduce this exchange between counsel:

Q. . . . Do you have any idea why Mr. Oresman was calling that material to your attention?

MR. JAMAIL: Don’t answer that. How would he know what was going on in Mr. Oresman’s mind? Don’t answer it. Go on to your next question.

MR. JOHNSTON: No, Joe—

MR. JAMAIL: He’s not going to answer that. Certify it. I’m going to shut it down if you don’t go to your next question.

MR. JOHNSTON: No. Joe, Joe—

MR. JAMAIL: Don’t “Joe” me, asshole. You can ask some questions, but get off that. You could gag a maggot off a meat wagon. Now, we’ve helped you every way we can.<sup>11</sup>

Reviewing this transcript, the court found that counsel had directed the witness not to answer questions, coached the witness by objecting in a manner suggesting an answer, and otherwise behaved in an “extraordinarily rude, uncivil, and vulgar” manner.<sup>12</sup> Had the attorney been admitted to practice in Delaware, he would have been severely sanctioned.<sup>13</sup>

Other examples of egregious deposition conduct are not hard to find. In *Carroll v. Jacques*,<sup>14</sup> a legal malpractice case, the defendant attorney refused to answer questions and verbally abused plaintiff’s counsel, calling him an “idiot,”<sup>15</sup> an “ass,”<sup>16</sup> and a “slimy son-of-

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<sup>10</sup> 637 A.2d 34 (Del. 1994).

<sup>11</sup> *Id.* at 53-54.

<sup>12</sup> *Id.* at 53.

<sup>13</sup> *Id.* at 55. A year after this decision, Delaware amended its court rules to address deposition misconduct. Gavin, *supra* note 1, at 654-55 n.41.

<sup>14</sup> 926 F. Supp. 1282 (E.D. Tex. 1996), *aff’d sub nom.* Carroll v. The Jaques Admiralty Law Firm, 110 F.3d 290 (5th Cir. 1997).

<sup>15</sup> *Id.* at 1286.

<sup>16</sup> *Id.*

a-bitch,”<sup>17</sup> suggesting finally that he “ought to be punched in the goddamn nose.”<sup>18</sup> For disrupting the litigation process and acting in bad faith, the trial court imposed a sanction of \$7,000. The Fifth Circuit Court of Appeals affirmed, noting that counsel’s conduct “degrades the legal profession and mocks the search for truth that is at the heart of the litigation process.”<sup>19</sup>

Similarly, in a New York personal injury case, an attorney-plaintiff refused to answer relevant questions and launched the following personal attack on defense counsel:

You’re so scummy and so slimy and such a perversion of ethics or decency because you’re such a scared little man, you’re so insecure and so frightened and the only way you can impress your client is by being nasty, mean-spirited and ugly little man, and that’s what you are. That’s the kind of prostitution you are in.<sup>20</sup>

The court found it “difficult to find one among the 217 pages of the deposition which does not contain willful evasion, gratuitous insult, argumentative response, or patent rudeness from the plaintiff.”<sup>21</sup> The plaintiff’s behavior was “so lacking in professionalism and civility” that the ultimate sanction of dismissal proved to be the only appropriate remedy.<sup>22</sup>

Significantly, the court drew no distinction between deposition and courtroom conduct. “Although the deposition was not held in a courtroom, and there was no judge present, it was, nonetheless, part of a judicial proceeding in the Supreme Court.”<sup>23</sup> Thus, “[a] lawyer’s duty to refrain from uncivil and abusive behavior is not diminished because the site of the proceeding is a deposition room, or law office, rather than a courtroom.”<sup>24</sup>

Incivility and gender bias combined to justify sanctions in *Principe v. Assay Partners*.<sup>25</sup> During a deposition, counsel directed the following comments to an attorney for one of the defendants:

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Carroll v. The Jaques Admiralty Law Firm*, 110 F.3d 290, 294 (5th Cir. 1997). In contrast, the Third Circuit in *Saldana v. K-Mart Corp.*, 260 F.3d 228 (3d Cir. 2001) vacated sanctions imposed upon an attorney for repeated use of the “f” word, ruling that the quality and quantity of the transgressions “d[id] not support the invocation of the Court’s inherent powers.” *Id.* at 237. The language cited did not occur in the presence of the court, and it did not affect the affairs of the court or the orderly and expeditious disposition of cases before it. *Id.* at 238.

<sup>20</sup> *Corsini v. U-Haul Int’l, Inc.*, 630 N.Y.S.2d 45, 46 (App. Div. 1995).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 47.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 586 N.Y.S.2d 182 (Sup. Ct. 1992).

“I don’t have to talk to you, little lady;”

“Tell that little mouse over there to pipe down;”

“What do you know, young girl;”

“Be quiet, little girl;”

“Go away, little girl.”<sup>26</sup>

Characterizing such language as paradigmatic rudeness, the court observed that “[a]n attorney who exhibits a lack of civility, good manners and common courtesy tarnishes the image of the legal profession.”<sup>27</sup> Conduct projecting “‘offensive and invidious discriminatory distinctions . . . based on race . . . or gender . . . is especially offensive.’”<sup>28</sup> Where counsel engages in obstructionist tactics, uses insulting language, or otherwise fails to conform to accepted notions of conduct, sanctions are warranted. The offending attorney thus was ordered to make a contribution to the Client Security Fund.<sup>29</sup>

Depositions in *R.E. Linder Steel Erection Co. v. U.S. Fire Insurance Co.*<sup>30</sup> were “contaminated from start to finish with interrupted questions, *ad hominem* comments, and argumentative colloquy, sometimes running on for pages.”<sup>31</sup> One party’s request that a judicial officer preside at further depositions, although a good solution in theory, was “simply impractical, in view of the priorities and time pressures facing the judicial officers of this District.”<sup>32</sup> Fashioning what it hoped might be a workable alternative, the court ordered that counsel pay liquidated attorney’s fees of \$5.00 for each interrupted question. Counsel would pay another \$5.00 for each line of the transcript containing argument with counsel, *ad hominem* comments, or other extraneous remarks.<sup>33</sup>

Sanctions were imposed on plaintiff’s counsel in *Unique Concepts, Inc. v. Brown*<sup>34</sup> for similarly “contentious, abusive, obstructive, scurrilous, and insulting conduct in a Court ordered deposition.”<sup>35</sup> Reviewing the plaintiff’s deposition, the court found it “hard to find

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<sup>26</sup> *Id.* at 184.

<sup>27</sup> *Id.* (quoting *In re McAlevy*, 354 A.2d 289, 291 (N.J. 1976)).

<sup>28</sup> *Id.* at 184 (quoting *In re Vincenti*, 554 A.2d 470, 474 (N.J. 1989)).

<sup>29</sup> *Id.* at 190. Compare *United States v. Wunsch*, 84 F.3d 1110, 1117 (9th Cir. 1996) (court held that a “single incident involving an isolated expression of a privately communicated bias” was not shown to adversely affect the administration of justice).

<sup>30</sup> 102 F.R.D. 39 (D. Md. 1983).

<sup>31</sup> *Id.* at 40.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 41.

<sup>34</sup> 115 F.R.D. 292 (S.D.N.Y. 1987).

<sup>35</sup> *Id.* at 294.

a page on which Rosen does not intrude on the examination with a speech, a question to the examiner, or an attempt to engage in colloquy distracting to the examiner.”<sup>36</sup> Among the attorney’s remarks to opposing counsel were the following:

“You are being an obnoxious little twit. Keep your mouth shut.”

“You are a very rude and impertinent young man.”<sup>37</sup>

Under the circumstances the court characterized the deposition as “an exercise in futility.”<sup>38</sup> Pursuant to 28 U.S.C. §1927 and its inherent power to supervise and control its proceedings, the court ordered plaintiff to be re-deposed at the courthouse and imposed a fine on plaintiff’s counsel “without reimbursement from his client.”<sup>39</sup> Any repetition of the “pervasive misconduct” that plagued the proceedings would be treated as contempt of court.<sup>40</sup>

In an Illinois antitrust action, an attorney interposed constant objections during the deposition of his client with frequent instructions not to answer. After sanctions were imposed for “deliberate frustration”<sup>41</sup> of discovery efforts, the deposition was resumed, but counsel “contumaciously disobeyed the court’s order by interfering with the questions posed by defendants’ counsel, and by directing the doctor not to respond to certain questions already approved by the court.”<sup>42</sup> Relations between counsel degenerated to such a degree that the witness’s attorney refused to let opposing counsel use the office telephone to call the court in order to resolve the dispute, as shown in this exchange:

MR. WALKER: I would caution you not to use any telephones in this office unless you are invited to do so, counsel.

MR. STANKO: You’re telling me I can’t use your telephones?

MR. WALKER: You can write your threatening letters to me. But, you step outside this room and touch the telephone, and I’ll take care of that in the way one does who has possessory rights.<sup>43</sup>

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<sup>36</sup> *Id.* at 292.

<sup>37</sup> *Id.* at 293 (citation omitted).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 294.

<sup>40</sup> *Id.*

<sup>41</sup> *Castillo v. St. Paul Fire & Marine Ins. Co.*, 828 F. Supp. 594, 597 (C.D. Ill. 1992).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 597.

As a result of this vexatious conduct, plaintiff's case was dismissed with prejudice, and the attorney was cited for civil contempt. Disciplinary proceedings ensued, resulting in counsel's suspension from federal practice for a period of one year.<sup>44</sup>

It is important to recognize that these reported cases did not represent isolated or extreme instances of inappropriate deposition conduct. On the contrary, as noted by the Federal Bar Council Committee on Second Circuit Courts, obstructive behavior during depositions was fairly common. To many attorneys, this kind of behavior was a routine and expected part of the practice of law. However, concern about the effect of this "toxic advocacy"<sup>45</sup> on the profession and the public continued to grow. In 1993, the tide began to turn with two major developments: (1) an opinion rendered by a federal judge in Pennsylvania, and (2) the enactment of Rule 30 amendments to the Federal Rules of Civil Procedure.

### III.

#### THE JUDICIAL BACKLASH: *HALL V. CLIFTON PRECISION*

The most influential decision on deposition misconduct was written in 1993 by Judge Robert S. Gawthrop of the Eastern District of Pennsylvania. In *Hall v. Clifton Precision*,<sup>46</sup> he addressed two discreet questions: (1) to what extent may a lawyer confer with the client off the record during a deposition? and (2) prior to the deposition, does a lawyer have a right to inspect the documents opposing counsel intends to show the client during a deposition? Judge Gawthrop seized the opportunity to address other issues relating to deposition misconduct and incivility. He issued an order which, together with the 1993 amendments to Rule 30 of the Federal Rules of Civil Procedure, changed the "culture" of deposition conduct.

At the outset of a deposition in *Hall*, plaintiff's counsel had advised his client that "'at any time if you want to stop and talk to me, all you have to do is indicate that to me.'"<sup>47</sup> Defense counsel replied that, "[t]his witness is here to give testimony, to be answering my questions, and not to have conferences with counsel in order to aid him in developing his responses to my questions."<sup>48</sup>

Judge Gawthrop quickly disposed of the position taken by plaintiff's counsel. The purpose of a deposition "is to find out what a witness saw, heard, or did — what the witness thinks."<sup>49</sup> It is "a question-and-answer conversation between the deposing lawyer and the

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<sup>44</sup> *Id.* at 604.

<sup>45</sup> According to Gavin, *supra* note 1, at 656 n.46, "toxic advocacy consists of using the discovery process in a manner that results in harassment, annoyance, or imposition of undue burden or unnecessary expense."

<sup>46</sup> 150 F.R.D. 525 (E.D. Pa. 1993).

<sup>47</sup> *Id.* at 526 (citation omitted).

<sup>48</sup> *Id.* (citation omitted).

<sup>49</sup> *Id.* at 528.

witness.”<sup>50</sup> It is not the role of the witness’s lawyer “to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.”<sup>51</sup> The witness comes to testify, “not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness’s words to mold a legally convenient record. It is the witness — not the lawyer — who is the witness.”<sup>52</sup>

Although a lawyer might frame the facts in a manner favorable to the client, he or she may not be “creative” with the facts. The lawyer “must accept the facts as they develop.”<sup>53</sup> Therefore, the “lawyer and client do not have an absolute right to confer” during the course of a deposition.<sup>54</sup>

Judge Gawthrop noted that, according to Rule 30(c) of the Federal Rules of Civil Procedure, examination and cross-examination of witnesses during depositions “are to be conducted under the same testimonial rules as are trials.”<sup>55</sup> At trial the lawyer and witness are not permitted to “confer at their pleasure” once testimony is underway.<sup>56</sup> During a deposition, “the fact that there is no judge in the room to prevent private conferences does not mean that such conferences should or may occur.”<sup>57</sup> Private conferences “tend, at the very least, to give the appearance of obstructing the truth.”<sup>58</sup>

Judge Gawthrop also did not distinguish between conferences initiated by the witness and those initiated by the lawyer. “To allow private conferences initiated by the witness would be to allow the witness to listen to the question, ask his or her lawyer for the answer, and then parrot the lawyer’s response.”<sup>59</sup> If the witness does not understand the question, he or she should ask the *deposing* lawyer (not his own) to clarify or explain it.<sup>60</sup>

Venturing into more controversial territory, Judge Gawthrop extended his ruling against private conferences to deposition recesses. “Once the deposition has begun, the prepara-

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* W. Bradley Wendel maintains that the lawyer’s role as advocate “does not apply with full force to discovery.” See W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV 895, 895 (1996). Since the function of discovery is to assist the court by “disclosing the facts necessary for the court to make an informed decision . . . advocacy comes into play only after the facts are fully disclosed.” *Id.*

<sup>54</sup> 150 F.R.D. at 528.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 528-29.

tion period is over . . . .”<sup>61</sup> All private conferences are barred. The “fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules.”<sup>62</sup>

On the second issue, Judge Gawthrop employed the same reasoning. When a document is presented to a witness, the witness should answer questions about it. The witness’s lawyer should be shown a copy of the document, but “there is no valid reason” why the lawyer and witness should confer about it before the witness answers a question.<sup>63</sup>

Judge Gawthrop acknowledged an exception to the rule against private conferences when the purpose is to ascertain the propriety of a privilege. Assertion of a privilege is an important objection, justifying a conference. However, when a conference occurs, the attorney should note that fact on the record and disclose the subject of the conference, as well as the decision to assert the privilege or not.<sup>64</sup>

Judge Gawthrop then turned his attention to witness coaching through suggestive objections. He cited a then-proposed (and subsequently enacted) amendment to Rule 30(d) of the Federal Rules of Civil Procedure requiring that objections be “stated concisely and in a non-argumentative and non-suggestive manner.”<sup>65</sup> Most objections, such as those based on relevance or materiality, are preserved for trial and need not be made. Other objections, such as those made to disrupt testimonial rhythm or to offer “strategic interruptions, suggestions, statements, and arguments of counsel,” undermine the purpose of a deposition, which is to find the truth.<sup>66</sup>

Given the importance of depositions in modern litigation — “the factual battleground where the vast majority of litigation actually takes place”<sup>67</sup> — Judge Gawthrop recognized that this critical discovery device should not be abused. To that end he issued this admonition:

Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court . . . counsel

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<sup>61</sup> *Id.* at 529.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 529-30.

<sup>65</sup> *Id.* at 530.

<sup>66</sup> *Id.* at 531.

<sup>67</sup> *Id.*

are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.<sup>68</sup>

Judge Gawthrop concluded his opinion with an Order containing the following guidelines:

1. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness's own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition. The witness shall abide by these instructions.
2. All objections, except those which would be waived if not made at the deposition under Federal Rules of Civil Procedure 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Federal Rules of Civil Procedure 30(d), shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.
3. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.
4. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more.
5. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege.

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<sup>68</sup> *Id.* According to one commentator, the judiciary should have a "'judge on call' system similar to the medical profession's arrangement of emergency care for patients." Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 593 (1996). In *Higginbotham, III, DDS v. KCS International, Inc.*, 202 F.R.D. 444, 456 (D. Md. 2001), the court noted that "there are times when it is appropriate to place a conference telephone call to the Judge's chambers and seek an immediate ruling." See also *McDonough v. Keniston*, 188 F.R.D. 22, 25 (D.N.H. 1998) (court ordered that the continuation of plaintiff's deposition be taken at a time when the magistrate was available by telephone to rule on any disputes that might arise). Additionally, the rule governing deposition conduct in Washington provides that a judge or special master "may make telephone rulings on objections made during depositions." WASH. SUPER. CT. CIV. R. 30(c).

6. Any conferences which occur pursuant to, or in violation of, guideline (5) are proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.
7. Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.
8. Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.
9. Depositions shall otherwise be conducted in compliance with the Opinion which accompanies this Order.<sup>69</sup>

The three major limitations imposed by Judge Gawthrop — no consultation, no coaching, and (generally) no instruction not to answer — have drawn widespread comment and have generated substantial, though not unanimous, support. In some respects, particularly the prohibition on lawyer-witness conferences during recess, the *Hall* guidelines may be debatable. Several courts and commentators have criticized this aspect of *Hall* as going too

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<sup>69</sup> 150 F.R.D. at 531-32.

far.<sup>70</sup> But events have shown that in *Hall* Judge Gawthrop touched a nerve. He sparked a debate on appropriate deposition conduct which continues to this day. It is no exaggeration to suggest that the movement to reform deposition conduct, which has gathered steam over the past decade, owes much to the boldness of Judge Gawthrop's opinion.

#### IV. *HALL'S WAKE*

That *Hall* signaled a sea-change in judicial willingness to control deposition conduct became immediately apparent. Within a few months, an Iowa magistrate expressed his own exasperation with "Rambo litigation." In *Van Pilsum v. Iowa State University of Science & Technology*,<sup>71</sup> counsel for both parties disrupted plaintiff's deposition with extensive colloquy. Plaintiff's counsel repeatedly restated defense counsel's questions in order to "clarify" them. These objections were "thinly veiled instructions to the witness," who would then incorporate her attorney's language into her answer.<sup>72</sup> There were also *ad hominem* attacks on opposing counsel's experience and ethics. Over the 167 pages of transcript, the court could find only four segments where five or more pages occurred without attorney interruption. Much of the transcript involved "discussion, argument, bickering, haranguing, and general interference" by counsel.<sup>73</sup> The court reporter frequently had to re-read a question because of the lengthy interval between a question and the witness's opportunity to answer.

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<sup>70</sup> Establishing a protocol for depositions, a magistrate judge in Nevada agreed with *Hall's* "underlying concern and essential purpose," but said that in prohibiting all attorney-client conferences once a deposition starts it "goes too far." *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 620 (D. Nev. 1998). Attorneys and clients regularly confer during trial and during breaks in a client's testimony when the court is in recess. "To deny a client any right to confer with his or her counsel about anything, once the client has been sworn to testify, and further to subject such a person to unfettered inquiry into anything which may have been discussed with the client's attorney . . . is a position this Court declines to take." *Id.* at 621. Other cases declining to follow *Hall* in its entirety include: *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648 (D. Colo. 2001) (court declined to deny witness right to confer with counsel between sessions of his deposition); *Odone v. Croda Int'l PLC*, 170 F.R.D. 66 (D.D.C. 1997) (plaintiff and his attorney's consultation during five-minute recess did not warrant sanctions); *State ex rel. Means v. King*, 520 S.E.2d 875 (W. Va. 1999) (attorney may confer with client during recess or break in discovery as long as attorney does not request break for improper purpose).

By contrast, the South Carolina Supreme Court embraced the *Hall* prohibition on private conferences in *In re Anonymous Member of the South Carolina Bar*, 552 S.E.2d 10 (S.C. 2001). Also, in *United States v. Phillip Morris, Inc.*, 212 F.R.D. 418 (D.D.C. 2002), the court prohibited private conferences unless the deposition was recessed over non-consecutive days.

A spirited attack on *Hall* appears in David H. Taylor, *Rambo as Potted Plant: Local Rulemaking's Preemptive Strike Against Witness-Coaching during Depositions*, 40 VILL. L. REV. 1057 (1995).

<sup>71</sup> 152 F.R.D. 179 (S.D. Iowa 1993).

<sup>72</sup> *Id.* at 180.

<sup>73</sup> *Id.*

Although this conduct “may prove effective out of the presence of the court, and may be impressive to clients as well as ego-gratifying to those who practice it, [it] will not be tolerated by this court.”<sup>74</sup> The court ruled that all further depositions would take place in the federal courthouse in the presence of a discovery master. Acrimony between counsel “necessitates the provision of day care for counsel who, like small children, cannot get along and require adult supervision.”<sup>75</sup>

In a Missouri employment discrimination case, attorneys for plaintiff frequently interrupted the interrogation of their client, “interpreting” questions, making suggestive objections, and instructing the client not to answer. For such vexatious conduct carried out in bad faith, they were ordered to pay attorneys’ fees and to comply with deposition guidelines similar to those issued by Judge Gawthrop in *Hall*.<sup>76</sup>

Also of interest is *Damaj v. Farmers Insurance Co.*,<sup>77</sup> where an Oklahoma magistrate, ruling on a motion to order counsel to “cease obstructionist tactics,” largely adopted the *Hall* guidelines. Defense counsel interposed numerous speaking objections which either suggested the response to the witness or were unnecessarily disruptive. In a deposition consisting of 102 pages, objections were made on sixty-four of them. The court characterized the deposition as “primarily conversation and argument between counsel, as opposed to a question and answer session between the deposing attorney and the witness.”<sup>78</sup> Citing *Hall* with approval, the court expressed concern that frequent and suggestive objections would frustrate the objective of taking depositions. Such objections “tend to obscure or alter the facts of the case and consequently frustrate the entire civil justice system’s attempt to find the truth.”<sup>79</sup>

The court’s order in *Damaj* was interesting in two respects. First, it provided that since most objections, other than those waived if not made during the deposition, are specifically preserved by the Federal Rules, “those objections need not and shall not be made during the course of depositions.”<sup>80</sup> Second, the court ruled that “[i]f the form of the question is objectionable, counsel should say nothing other than ‘object to the form of the question.’”<sup>81</sup>

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<sup>74</sup> *Id.* at 181.

<sup>75</sup> *Id.*

<sup>76</sup> *Armstrong v. Hussmann Corp.*, 163 F.R.D. 299, 304 (E.D. Mo. 1995). *See also* *Phinney v. Paulshock*, 181 F.R.D. 185, 207 (D.N.H. 1998) (court-ordered payment of costs and letter of apology for deposition misconduct); *In re Amezaga*, 195 B.R. 221 (D.P.R. 1996) (obstructive conduct warranted sanctions against counsel personally).

<sup>77</sup> 164 F.R.D. 559, 559-60 (N.D. Okla. 1995).

<sup>78</sup> *Id.* at 560.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 561.

<sup>81</sup> *Id.* The court added that should deposing counsel want clarification of the basis for the objection, “that inquiry shall be made outside the presence of a witness.” *Id.* The court’s ruling on specific language to be used in making an objection prefigured the Texas adoption of Rule 199.5.

More recently, in a strongly worded “message” opinion, the South Carolina Supreme Court advised its Bar members that obstructive deposition conduct would no longer be tolerated.<sup>82</sup> Under a new rule modeled on the *Hall* guidelines, at the outset of a deposition, counsel “shall instruct the witness to ask deposing counsel, rather than the witness’ own counsel, for clarifications, definitions, or explanations of any words, questions or documents presented during the course of the deposition.”<sup>83</sup> Counsel “shall not make objections or statements which might suggest an answer to a witness.”<sup>84</sup> Furthermore, counsel and the witness “shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony . . . except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.”<sup>85</sup> Conferences that violate the rule are properly subject to inquiry by opposing counsel “to ascertain whether there has been any witness coaching.”<sup>86</sup>

In addition, conferences called to calm down a nervous client, interrupt the flow of a deposition, or help the witness frame an answer are improper and warrant sanctions. Interjections such as “if you remember” and “don’t speculate” are improper because they suggest how to answer the question.<sup>87</sup> Such admonitions should be made before the deposition begins. It is also inappropriate to instruct a witness not to answer a question on the basis that the question has been “asked and answered.”<sup>88</sup> If repetitive questioning becomes harassment, a motion may be filed with the court.<sup>89</sup>

The South Carolina court noted that in depositions attorneys “face great temptation to cross the limits of acceptable behavior in order to win the case at the expense of their ethical responsibilities to the court and their fellow attorneys.”<sup>90</sup> But the discovery is intended to “ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed.”<sup>91</sup> Claiming to be zealous advocates will provide no sanctuary for attorneys who abuse the discovery process. Judges must use their full authority to preclude attorneys

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<sup>82</sup> *In re* Anonymous Member of the South Carolina Bar, 552 S.E.2d 10 (S.C. 2001).

<sup>83</sup> *Id.* at 15.

<sup>84</sup> *Id.* at 16.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* The rule also provides that deposing counsel shall give to opposing counsel all documents shown to the witness either before the deposition begins or contemporaneously while showing the document to the witness. Retreating somewhat from *Hall*, the rule states that if the documents have not been provided or identified two days before the deposition, the witness and counsel “may have a reasonable amount of time to discuss the documents before the witness answers questions concerning the document.” *Id.*

<sup>87</sup> *Id.* at 17.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 18.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (citing *In re* Alford Chevrolet-Geo, 997 S.W.2d 173, 180 (Tex. 1999)).

from “achieving success through abuse of the discovery rules rather than by the rule of law.”<sup>92</sup> The court thus paid its respects to Judge Gawthrop’s “seminal opinion” in *Hall*: “Having adopted the *Hall* approach, our Court requires attorneys in South Carolina to operate under one of the most sweeping and comprehensive rules on deposition conduct in the nation.”<sup>93</sup>

The *Hall* guidelines recently were embraced in *Plaisted v. Geisinger Medical Center*.<sup>94</sup> In a medical malpractice action, plaintiffs sought permission to re-depose certain doctors. They complained that defense counsel had improperly entered “coaching” objections, instructed witnesses not to answer, and departed the room twice while a question was pending. At one point counsel instructed the plaintiffs’ attorney to “ask the question and I’ll consider whether I’ll let him answer it or not.”<sup>95</sup> At another point, after objecting repeatedly, defense counsel stated, “[t]hat [question] won’t be answered. I have an urgent call I have to make.”<sup>96</sup>

Observing that *Hall* had received “substantial attention in the legal literature,”<sup>97</sup> the *Plaisted* court adopted its “clear, workable guidelines.”<sup>98</sup> Those guidelines, articulated prior to the enactment of Rule 30(d) of the Federal Rules of Civil Procedure, are consistent with reducing the number of interruptions during depositions. Since defense counsel’s conduct violated both Rule 30(d) and the *Hall* guidelines, the court allowed plaintiffs to conduct “liberal re-questioning”<sup>99</sup> of the physicians in all areas where improper objections had been made. It also permitted the plaintiffs to explore discussions between defense counsel and the witness during two breaks which the court found were improperly taken.<sup>100</sup>

As these cases demonstrate, *Hall* resonated with the federal judiciary. Judges increasingly adopted a proactive approach to controlling the toxic advocacy infecting deposition conduct. In addition, shortly after *Hall* was decided, significant changes were enacted within the text of Rule 30 of the Federal Rules of Civil Procedure. These changes proved important in the overall movement to shift the paradigm for deposition conduct from competitive obstructionism to civil and cooperative advocacy.

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 16.

<sup>94</sup> 210 F.R.D. 527, 532 (M.D. Pa. 2002).

<sup>95</sup> *Id.* at 530 (citation omitted).

<sup>96</sup> *Id.* at 532.

<sup>97</sup> *Id.* (quoting WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 30.43[6] (3d ed. 2000)).

<sup>98</sup> *Id.* at 533.

<sup>99</sup> *Id.* at 535.

<sup>100</sup> *Id.* at 533-35. The court also ordered that witnesses whose testimony was obstructed be re-deposed in *O’Brien v. Amtrak*, 163 F.R.D. 232 (E.D. Pa. 1995) and *Frazier v. Southeastern Pennsylvania Transportation Authority*, 161 F.R.D. 309 (E.D. Pa. 1995).

V.  
FED. R. CIV. P. 30(d)(1)

Rule 30 of the Federal Rules of Civil Procedure was amended in 1993. The Advisory Committee Notes to the amended rule expressed the same concerns about obstructive deposition behavior articulated by Judge Gawthrop. The Committee noted that “[d]epositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objection and colloquy, often suggesting how the deponent should respond.”<sup>101</sup> Directions to a deponent not to answer a question “can be even more disruptive than objections.”<sup>102</sup> The Committee sought to address these concerns directly by changing the text of the rule.

According to Rule 30(d)(1), any objection interposed during a deposition “must be stated concisely and in a non-argumentative and non-suggestive manner.”<sup>103</sup> An attorney may instruct a deponent not to answer a question only when necessary to preserve a privilege, enforce a limitation directed by the court, or present a motion under Rule 30(d)(4). “If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon those responsible an appropriate sanction, including the reasonable costs and attorney’s fees incurred by any parties as a result thereof.”<sup>104</sup> “The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct . . . .”<sup>105</sup>

Although difficult to quantify, the 1993 amendments to Rule 30 have clearly had a significant impact.<sup>106</sup> Judge Gawthrop’s opinion in *Hall* proved to be influential, but it was still one case decided by one federal district judge in one Pennsylvania district. Enshrining the reform of deposition conduct within the text of a federal procedural rule was another matter. Therefore, the 1993 amendments marked an important turning point: they expressed the collective judgment of the legal profession that improving attorney conduct during depositions had become a matter of the highest priority.

Case law interpreting amended Rule 30 illustrates the point. In *McDonough v. Keniston*,<sup>107</sup> defendants charged that plaintiff’s counsel had improperly obstructed plaintiff’s

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<sup>101</sup> FED. R. CIV. P. 30(d) advisory committee’s note (1993).

<sup>102</sup> *Id.*

<sup>103</sup> The rule was amended in 2000 to remove reference to objections “to evidence” and limitations “on evidence,” making it clear that the rule applies to “any objection to a question or other issue arising during a deposition.” FED. R. CIV. P. 30(d) advisory committee’s note (2000).

<sup>104</sup> FED. R. CIV. P. 30(d)(3).

<sup>105</sup> FED. R. CIV. P. 30(d) advisory committee’s note (1993).

<sup>106</sup> This is demonstrated by the number of states that have adopted the federal rule’s language requiring that objections be stated concisely and in a non-argumentative and non-suggestive manner and which have placed restrictions on instructions not to answer. *See supra* note 5 and *infra* note 131.

<sup>107</sup> 188 F.R.D. 22 (D.N.H. 1998).

testimony with speaking objections and instructions not to answer. The deposition revealed that plaintiff's counsel repeatedly violated the amended version of Rule 30(d). At one point plaintiff was asked:

Q. . . . why don't you do your best to tell me what you say he did wrong?

Mr. Grabois: I think that's a very broad, broad question. I think it's too broad to be answered. It calls for legal characterization. He had no connection, he had no contact directly with Chuck Douglas . . . .<sup>108</sup>

The court noted that the effect of this coaching became apparent when plaintiff adopted his lawyer's suggested answers. Defense counsel told his colleague, "You're not supposed to suggest an answer, it's specifically prohibited by the Federal Rules of Civil Procedure."<sup>109</sup> However, plaintiff's counsel persisted with speaking objections and instructions not to answer. The court later characterized this conduct as "flagrantly improper and in direct contravention of Rule 30."<sup>110</sup>

Interpreting the new rule, the court said it was "intended to curtail lengthy objections and colloquy."<sup>111</sup> "[C]ounsel's statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more."<sup>112</sup> Speaking and coaching objections "are simply not permitted in depositions in federal cases."<sup>113</sup> Under the new rules the remedy for "oppressive, annoying, and improper deposition questioning" is not to instruct the deponent to refrain from answering, but to suspend the deposition and file a motion under Rule 30(d)(3).<sup>114</sup>

Similarly, confronted with a motion to compel and to impose sanctions for speaking objections and for instructing the witness not to answer, a Florida judge held that the "1993 amendments to Rule 30 were intended to combat just the sort of conduct that is complained of here."<sup>115</sup> Deposition testimony "is to be completely that of the deponent, not a version of the testimony which has been edited or glossed by the deponent's lawyer."<sup>116</sup> The witness

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<sup>108</sup> *Id.* at 24.

<sup>109</sup> *Id.* at 25.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 24.

<sup>112</sup> *Id.* (citing *Damaj v. Farmers Ins. Co.*, 164 F.R.D. 559, 561 (N.D. Okla. 1995)).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* See also *Boyd v. University of Maryland Medical System*, 173 F.R.D. 143, 145 (D. Md. 1997) (Court emphasized that Rule 32(d)(3) preserves an attorney's ability to "redress abusive deposition tactics by unilaterally terminating the deposition and filing a motion with the Court for an order to discontinue the objectionable questioning.").

<sup>115</sup> *Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697, 700 (S.D. Fla. 1999).

<sup>116</sup> *Id.*

must be allowed to answer a question, “free from any influence by his counsel.”<sup>117</sup> If the witness is confused about a question, the witness may ask the deposing counsel for clarification. If counsel feels that a deposition is being conducted in “bad faith or in such manner as to unreasonably annoy, embarrass, or oppress” the deponent, counsel may instruct the witness not to answer, but only if he or she intends to move for a protective order.<sup>118</sup>

Objections should be limited to those permitted by Rule 32(d)(3). An objection based on form might require a brief explanation, but only at the request of deposing counsel. Any explanation “should be succinctly and directly stated without suggesting an answer to the deponent.”<sup>119</sup> Instructions not to answer should be made only to preserve a privilege or to move for a protective order.

In *Fondren v. Republic American Life Insurance Co.*,<sup>120</sup> the court emphasized that the new federal rules provide clear guidance. They are understandable “without need of judicial gloss.”<sup>121</sup> Adherence to the rules should eliminate obstructionist tactics. Rule 30(d)(1) “does not permit an attorney to instruct a witness not to answer repetitious, harassing or argumentative deposition questions except to present a motion under Rule 30(d)(3).”<sup>122</sup> Since the attorney did not provide the instruction for that purpose, the instruction was improper. A refusal to answer, requiring the opposing party to seek a court order directing the deponent to answer, is “the exact opposite of what the Federal Rules of Civil Procedure clearly require.”<sup>123</sup>

Relying in part on the 1993 amendments to Rule 30, a New York district judge imposed sanctions on defense counsel in *Morales v. Zondo, Inc.*<sup>124</sup> Deposition excerpts revealed that counsel made detailed objections, held private consultations with the witness, instructed the witness not to answer, instructed him how to answer, and engaged in various colloquies, interruptions, and *ad hominem* attacks which frustrated the fair examination of the deponent and unnecessarily prolonged the proceedings — all in violation of Rule 30(d)(2).<sup>125</sup>

Although improved, the federal rules still send conflicting signals to attorneys regarding proper deposition conduct. Rule 30(c) provides that “[a]ll objections made at the time of the examination to . . . the evidence presented, the conduct of any party, or to any other

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 701 (quoting FED. R. CIV. P. 30(d)(3)).

<sup>119</sup> *Id.* at n.4.

<sup>120</sup> 190 F.R.D. 597 (N.D. Okla. 1999).

<sup>121</sup> *Id.* at 602.

<sup>122</sup> *Id.* at 600.

<sup>123</sup> *Id.*

<sup>124</sup> 204 F.R.D. 50 (S.D.N.Y. 2001).

<sup>125</sup> *Id.* at 54-58.

aspect of the proceedings shall be noted by the officer upon the record of the deposition.”<sup>126</sup> The examination “shall proceed with the testimony being taken subject to the objections.”<sup>127</sup> The rules also provide that objections to the “competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.”<sup>128</sup>

Given these provisions, the federal rules do not *require* that attorneys refrain from making objections during the course of a deposition.<sup>129</sup> Objections based upon relevancy and materiality may still be preserved even if not made, but there is no proscription against making them. When attorneys face the risk of waiving an objection because the ground is one “which might have been obviated or removed if presented at that time,” they will understandably err on the side of caution by making the objection and preserving the record.<sup>130</sup>

In practice, when defending or taking depositions, attorneys lodge objections for a variety of strategic or evidentiary reasons. For example, a defending lawyer may object to a question, even though an objection technically is not waived, to demonstrate defects in the opponent’s case, place the objection on the record as a reminder to re-enter it at trial, or to induce the examining lawyer to abandon a particular line of questioning.<sup>131</sup> Unless the rule specifies those objections which may be made and those which may not, attorneys are likely to continue making objections which they believe will enhance their client’s cause. In the process, the goals sought to be achieved by the 1993 amendments to Rule 30(d) will be undermined.

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<sup>126</sup> FED. R. CIV. P. 30(c).

<sup>127</sup> *Id.*

<sup>128</sup> FED. R. CIV. P. 32(d)(3)(A).

<sup>129</sup> *See, e.g.*, 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2113 at 97 (2d ed. 1994) (authors find it “noteworthy that the rule stops short of absolutely forbidding any objections whatsoever except those that would be waived unless raised”).

<sup>130</sup> *See* *Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697, 700 (S.D. Fla. 1999) (It is “arguable whether objections based on relevancy should even be made during the deposition.”).

One leading commentator has correctly observed that although objections grounded on relevance or materiality are preserved for trial and need not be made, “the caution and combativeness typically found in lawyers has made elimination of surplus objections a difficult task.” 7 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 30.43 [1] (3d ed. 2003).

<sup>131</sup> *See* 10 FEDERAL PROCEDURE, LAWYERS EDITION § 26:297 (George L. Bounds et al. eds. 1994).

## VI.

## RULE 199.5 OF THE TEXAS RULES OF CIVIL PROCEDURE

In response to *Hall* and the 1993 amendments to Rule 30(d) of the Federal Rules of Civil Procedure, many states have changed their rules governing deposition conduct. Some have adopted the language of the federal rule; others have taken a more aggressive approach.<sup>132</sup> A comprehensive review of the rules adopted by each state is beyond the scope of this article. However, Texas has enacted an interesting and innovative rule which marks a significant advance in the profession's ongoing effort to address the problem of deposition misconduct.

In 1999, the Texas Supreme Court promulgated a rule governing "Examination, Objection, and Conduct During Oral Depositions."<sup>133</sup> Resulting from years of study and debate, the rule incorporates important elements from *Hall*, professional codes and creeds, and the 1993 amendments to Rule 30(d) of the Federal Rules of Civil Procedure. The rule presents a model for other jurisdictions to consider in their efforts to ensure that depositions fulfill their purpose of facilitating the discovery of relevant facts.

The Texas rule provides in pertinent part:

(d) *Conduct During the Oral Deposition; Conferences.* The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay

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<sup>132</sup> For example, the Washington rule contains a section on Conduct of Depositions explicitly addressing objections, instructions not to answer, responsiveness of the witness, conduct of examining counsel, private consultations, and observance of standards required in the courtroom during trial. WASH. SUPER. CT. CIV. R. 30(h).

The New Jersey rule provides that "[n]o objections shall be made during the taking of a deposition except those addressed to the form of a question or to assert a privilege, a right to confidentiality, or a limitation pursuant to a previously entered court order." N.J. R. CT. 4:14-3(c). This is more restrictive than the federal rule which does not explicitly proscribe any objections.

In Alaska, "[n]o specification of the defect in the form of a question or the answer shall be stated unless requested by the party propounding the question." ALASKA R. CIV. P. 30(d)(1). In addition, the rule prohibits "[c]ontinual and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer." *Id.*

The Maryland rule provides that if an objection could have the effect of coaching the deponent, then "the deponent, at the request of any party, shall be excused from the deposition during the making of the objection." MD. R. CIV. P. CIR. CT. 2-415(g). Committee notes to the Maryland rule provide examples of concise and non-argumentative objections such as "objection, leading;" "objection, asked and answered;" and "objection, compound question." *Id.* This is similar to Texas Rules of Civil Procedure, Rule 199.5.

<sup>133</sup> The Texas Supreme Court has constitutional and statutory authority to promulgate rules of civil procedure. TEX. CONST. art. V, § 31; TEX. GOV'T. CODE § 22.004 (2004).

the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial of statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.

(e) *Objections.* Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, nonresponsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made.

(f) *Instructions Not to Answer.* An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested by the party who asked the question.

(g) *Suspending the Deposition.* If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling.

(h) *Good Faith Required.* An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.<sup>134</sup>

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<sup>134</sup> TEX. R. CIV. P. 199.

The Texas rule explicitly guides the practitioner in conducting depositions. Only three objections, each specified by two words, are permitted. The objections are waived if not stated as phrased. All other objections need not be made or recorded during the oral deposition to be raised later with the court. An argumentative or suggestive objection automatically waives the objection and may form the basis for terminating the deposition or imposing sanctions. As a result, Texas counsel cannot engage in unnecessary colloquy and cannot make unnecessary objections. They must allow the witness to testify virtually uninterrupted.

According to an authoritative source, the new Texas rules governing deposition conduct “have reduced time, expense, speaking objections, witness coaching, and arguments on the record, and generally have made the deposition process more economical and reasonable.”<sup>135</sup> Lawyers have recounted that the rule is helpful particularly in acrimonious cases where speaking objections and attorney colloquy formerly might have added hours or days to a deposition.<sup>136</sup>

One sign that the rule is accomplishing its mission is the paucity of case law interpreting it. The rule has the virtue of complete clarity: if counsel goes beyond the specified two-word objections, the enlarged objection is waived. Because of its self-enforcing mechanism, the rule has had the desired effect. In one reported case, counsel repeatedly interrupted an expert’s examination with long, argumentative objections.<sup>137</sup> Plaintiff’s counsel reminded him of the new rule: “You’re entitled to make the objection as to form — and then you are to stop.”<sup>138</sup> Opposing counsel did not comply. As a result, one of his expert witnesses was stricken. In so ruling, the court observed that the purpose of Rule 199.5(e) was “to prevent the kind of obstructive behavior that was exhibited here and to save substantive complaints for a later hearing before the trial court.”<sup>139</sup>

Prior to enactment of the Texas rule, some lawyers expressed concern that it would turn those defending a deposition into “potted plants.”<sup>140</sup> The deposing attorney might abuse the witness with misleading and harassing questions, leaving the defending attorney powerless to prevent such conduct. But experience so far indicates that these difficulties have not materialized.

It should be noted that the Texas rule does permit an attorney to instruct a witness not to answer a question under certain circumstances. Less draconian than Rule 30(d) of the Federal Rules of Civil Procedure in this respect, Rule 199.5(f) allows an instruction not to

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<sup>135</sup> Alexandra W. Albright et al., *The New Rules Governing Discovery*, HANDBOOK ON TEXAS DISCOVERY PRACTICE, at xiii (Texas Practice Series 2003 ed.).

<sup>136</sup> Robert H. Pemberton, *The First Year Under the New Discovery Rules*, THE BIG ISSUES THUS FAR (2000).

<sup>137</sup> *In re Harvest Cmty. of Houston, Inc.*, 88 S.W.3d 343 (Tex. App. 2002).

<sup>138</sup> *Id.* at 346.

<sup>139</sup> *Id.*

<sup>140</sup> David C. Kent, *The Lawyer as “Potted Plant,”* THE TEXAS LAWYER, Aug. 24, 1998, at 24.

answer in order to “protect a witness from an abusive question or one for which any answer would be misleading . . . .”<sup>141</sup> According to the comments to Rule 199, a witness should not be required to answer “whether he has yet ceased conduct he denies ever doing . . . because any answer would necessarily be misleading on account of the way in which the question is put.”<sup>142</sup> Abusive questions include those that “inquire into matters clearly beyond the scope of discovery or that are argumentative, repetitious, or harassing.”<sup>143</sup>

The Texas rule removes the “toxic advocacy” which has plagued the profession and facilitates a return to depositions which focus on the substance of witness testimony. The games and nastiness which have deformed this discovery device are now on the wane, if not entirely eliminated. The text of the rule is sufficiently clear, and the self-enforcing penalty for violating it sufficiently severe, that the troublesome and expensive “satellite litigation” which often attends discovery practice has been forestalled. This is no small accomplishment.

## VII. CONCLUSION

During the 1980’s and 1990’s, taking and defending depositions became an exercise in competitive obstructionism. Speaking objections, instructions not to answer, and uncivil conduct often combined to transform deposition proceedings into occasions for bickering and argument, as opposed to the discovery of relevant facts.

Judge Robert Gawthrop’s opinion in *Hall v. Clifton Precision* marked a turning point in judicial efforts to curb improper deposition conduct. The 1993 amendments to Rule 30(d)(1) of the Federal Rules of Civil Procedure also improved deposition “culture” by proscribing suggestive and argumentative objections and by limiting the occasions for which an attorney might instruct a deponent not to answer. The progeny of *Hall* and the 1993 amendments underscored the judiciary’s determination to restore civility, clarity, and cooperation to the taking of depositions.

In 1999, the Texas Supreme Court promulgated a new rule governing oral depositions, which appears to have registered a significant and salutary effect. The rule specifies three two-word objections that counsel are permitted to make and threatens waiver of objection

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<sup>141</sup> TEX. R. CIV. P. 199.5(f).

<sup>142</sup> TEX. R. CIV. P. 199 cmt.4.

<sup>143</sup> *Id.* “The attorney instructing the witness not to answer must give a concise, nonargumentative, [and] nonsuggestive explanation of the grounds” therefor, if the party who asked the question requests. TEX. R. CIV. P. 199.5(f).

if further comment or colloquy is offered. The apparent success of this new Texas rule suggests that it offers a model for other states in their efforts to improve the quality of depositions within their jurisdictions.

Effective advocacy in an adversarial system can survive and flourish without obstreperous and obstructive deposition conduct by counsel. As witnesses testify without unnecessary interruption, counsel can turn their professional skills to the evidence adduced and the legal issues that surround such evidence. In the process, depositions can return to their original function as efficient vehicles for the discovery of information relevant to the resolution of a dispute.

# Prospective Juror Questionnaires Made Easy<sup>†</sup>

John P. Daniels  
Annie L. Knafo

## I. INTRODUCTION

Traditionally, attorneys have relied upon oral voir dire to elicit information from potential jurors. Because these questions are asked in the presence of the judge, counsel and other potential jurors, potential jurors may be hesitant or embarrassed to answer the questions truthfully. As a result, questions about sensitive issues such as economic status, physical health, mental health and prejudices or biases are very hard for attorneys to address for fear of embarrassing the potential juror. However, some of this information can be invaluable to attorneys when selecting the best jurors for the case.

Consequently, in some cases, courts allow the use of Prospective Juror Questionnaires. The questionnaires are used to gather information about potential jurors for use in jury selection. In addition to background information, the questionnaires address a variety of aspects of the jurors' lives including, household income, political affiliations, membership in community organization, knowledge of the witnesses, attorneys or parties, knowledge of the case and pre-existing opinions. The questionnaires also address the juror's opinions relevant to the case (e.g., views on negligence, liability, oral contracts, punitive damages, victim compensation).

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## II. DESIGN OF QUESTIONS

The questions are designed to help the court and the attorneys learn about the jurors' background, their views, personal experiences and their family members' experiences on issues that may be related to the case or effect their opinion on the case. In short, the questionnaires are to make certain that the juror can be fair and impartial. Because many people are uncomfortable speaking publicly, when asked questions during oral voir dire they only provide cursory information. But, on a written questionnaire, jurors are more likely to provide more insightful information more accurately reflecting any prejudices, biases or pre-existing opinions than they would provide verbally in court. Additionally, the use of questionnaires also gives jurors time to provide more thoughtful answers.

The most effective juror questionnaires will identify the characteristics making a juror risky or favorable. In some cases, these characteristics are readily observable (e.g., employment-related variables, income levels and ethnicity). In other cases, these predictive variables are represented by deeper beliefs, values and attitudes held by the individual.

Most importantly, juror questionnaires save time in oral voir dire by eliminating the repetition of generic questions. The questionnaires identify the specific areas of potential bias, so that the voir dire process can be more focused and the follow-up questions more effective.

Typical juror questionnaires are approximately ten to fifteen pages, containing both yes/no answer questions and questions that require narrative answers. However, the length



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of the questionnaire varies depending on the complexity or publicity of the trial. In some cases the questionnaires can be as short as three to five pages. In the O.J. Simpson trial the questionnaire was approximately eighty pages. After the proposed questionnaires have been submitted to the judge, they can either be mailed out prior to jury selection or can be completed when jurors are assembled for trial. However, regardless of what approach is taken, there needs to be a sufficient amount of time between the completion of the questionnaire and the beginning of oral voir dire for the parties to have an opportunity to review the answers.

### III. SAMPLE QUESTIONNAIRE

The following is a sample of a jury questionnaire for a civil case. Notice that the first half of the questionnaire is generic background information, helpful in all cases: questions regarding education, work, economic status, affiliations, jury experience and involvement in lawsuits. The second half of the questionnaire is more case specific. In the particular instance, the questions are regarding the potential juror's opinions on contracts, investments, real estate and punitive damages. In examining what follows, be aware that the space for some answers has been limited for this article to less than would ordinarily be provided to a perspective juror.

Jury Questionnaire

1. Age: \_\_\_\_
2. Place of Birth: \_\_\_\_\_
3. Marital Status: \_\_\_Single, \_\_\_Currently Married, \_\_\_Divorced, \_\_\_Widowed, \_\_\_Live with non-marital partner, \_\_\_Other
4. Is English your first language? \_\_\_Yes, \_\_\_No. If NO, what is? \_\_\_\_\_
5. How long have you lived in the area? \_\_\_\_
6. Do you: \_\_\_Rent, \_\_\_Own, \_\_\_Live with others & do not pay rent
7. What is the highest level of education you completed? \_\_\_Some High School, \_\_\_High School Graduate, \_\_\_Technical/Vocational, \_\_\_Some College (Major)\_\_\_\_\_, \_\_\_College Graduate (Major) \_\_\_\_\_, \_\_\_Postgraduate study (Field) \_\_\_\_\_
8. If you plan to attend or are currently attending school, describe: \_\_\_\_\_
9. What is the highest level of education your spouse/significant other has completed? \_\_\_Some high school, \_\_\_High school graduate, \_\_\_Technical/Vocational, \_\_\_Some college (Major) \_\_\_\_\_, \_\_\_College graduate (Major) \_\_\_\_\_, \_\_\_Postgraduate degree (Field) \_\_\_\_\_, \_\_\_Other
10. Would you say that in the past few years your economic situation has: \_\_\_Gotten better, \_\_\_Stayed the Same, \_\_\_Gotten Worse
11. Your present employment status (check all that apply): \_\_\_Employed Full-time, \_\_\_Employed Part-time, \_\_\_Temporarily laid off, \_\_\_Unemployed & looking for work, \_\_\_Unemployed & not looking for work, \_\_\_Self-employed, \_\_\_Student, \_\_\_Part-time student, \_\_\_Working more than one job, \_\_\_Retired
12. Your current or most recent occupation: \_\_\_\_\_
13. Name of your current or most recent employer, or if a student your school: \_\_\_\_\_
14. Please list all other employment you have had in the past and for how long: \_\_\_\_\_
15. How many employers have you had over the past 10 years? \_\_\_\_\_. What are your specific duties and responsibilities on the job? \_\_\_\_\_
16. Have you or has any member of your family ever owned or run a business: \_\_\_Yes, \_\_\_No. If YES, please describe business: \_\_\_\_\_
17. Are you involved in the hiring and firing of other employees? \_\_\_Yes, \_\_\_No

18. Are you involved in evaluating the job performance of other employees?  
 Yes,  No
19. Please list all full-time employment of your spouse/former spouse (and for how long): \_\_\_\_\_
20. Please list employment of any other adult who lives in your home (and for how long): \_\_\_\_\_
21. In general, do you support the goals and activities of unions nowadays?  Yes,  No
22. If you or your current spouse or partner have ever served in the military please list for each the brand of service and the dates of service: \_\_\_\_\_
23. What is your main source of news?  Television,  Radio,  Internet,  Newspapers,  News Magazines,  Word of mouth, friends.
24. What social, civic, civil rights, trade, or other organizations are you affiliated with or do you give money to if any? \_\_\_\_\_
25. Describe any offices you have held in organization listed above: \_\_\_\_\_
26. What magazine or newspapers, if any do you read regularly? \_\_\_\_\_
27. How frequently have you been a group leader?  Very frequently,  Occasionally,  Sometimes,  Never
28. Have you or any of your family members ever sued or been sued by anyone?  Yes,  No. If YES, please explain.
29. If you or anyone close to you has ever filed a lawsuit or made any type of claim for damages, explain: \_\_\_\_\_
30. Have you ever considered suing someone but did not for any reason?  Yes,  No. If YES, please explain.
31. If a claim for money damages or a lawsuit has ever been brought against you or anyone close to you, explain the circumstances: \_\_\_\_\_
32. Do you know anyone on this jury panel?  Yes,  No. If YES, please explain \_\_\_\_\_.
33. On how many cases have you served on a jury?  0,  1,  2,  More than 2. Where did you serve on a jury? \_\_\_\_\_. What kinds of cases did you hear while serving:  Civil,  Criminal,  Both civil and criminal. In how many of those cases did the jury reach a verdict? \_\_\_\_\_. In how many of those cases did you serve as the jury foreperson? \_\_\_\_\_. Was your jury service a positive or negative experience?  Positive,  Negative. Explain: \_\_\_\_\_

34. If you have been to court for any other reason explain: \_\_\_\_\_
35. Have you, a member of your family, or close friend ever had any legal training or worked with lawyers? \_\_\_Yes, I have, \_\_\_Yes, someone close to me has, \_\_\_No. If YES, please explain what type of training or experience and when: \_\_\_\_\_
36. If you have relatives or close personal friends who are judges or attorneys or court personnel, what are their names, relationship to you, and their position?
37. An important function of juries in America is to send messages to corporations and individuals to improve their behavior: \_\_\_Strongly disagree, \_\_\_Disagree, \_\_\_Agree, \_\_\_Strongly agree.
38. People who file lawsuits are trying to place responsibility where it belongs: \_\_\_Strongly disagree, \_\_\_Disagree, \_\_\_Agree, \_\_\_Strongly agree.
39. What a contract says is more important than what the parties intend it to mean: \_\_\_Strongly disagree, \_\_\_Disagree, \_\_\_Agree, \_\_\_Strongly agree.
40. In a trial, I would believe what a document says over what a witness says: \_\_\_Strongly disagree, \_\_\_Disagree, \_\_\_Agree, \_\_\_Strongly agree.
41. Punitive damages are sometimes used to punish corporations and individuals for past behavior and to deter similar behavior in the future. What is your general attitude toward awarding punitive damages? \_\_\_\_\_
42. Have you ever been denied compensation that was owed to you? \_\_\_Yes, \_\_\_No. If YES, please explain.
43. Have you ever loaned a large amount of money to someone? \_\_\_Yes, \_\_\_No. If YES, please explain.
44. Have you ever signed a formal business agreement? \_\_\_Yes, \_\_\_No. If YES, please explain.
45. Have you ever been involved in a dispute over a contract or suffered negative consequences because of a contract? \_\_\_Yes, \_\_\_No. If YES, please explain.
46. Have you ever been an employee for a company that was involved in a contract dispute? \_\_\_Yes, \_\_\_No. If YES, please explain.
47. Do you have any special training or experience with contracts (administration, negotiation, writing, etc)? \_\_\_Yes, \_\_\_No. If YES, please explain.
48. Do you think that an oral contract is as binding or legal as a written contract? \_\_\_Yes, \_\_\_No, \_\_\_Unsure
49. Do you think that an oral agreement should be honored under any circumstances? \_\_\_Yes, \_\_\_No, \_\_\_Unsure

50. Have you, or has anyone close to you, ever been a party to an oral contract involving a large amount of money? \_\_\_Yes, \_\_\_No. If YES, please explain.
51. How would you rate your level of knowledge about the real estate market? \_\_\_Very Knowledgeable, \_\_\_Somewhat knowledgeable, \_\_\_No Knowledge
52. How would you rate your level of knowledge about investments or financial matters? \_\_\_Very Knowledgeable, \_\_\_Somewhat knowledgeable, \_\_\_No Knowledge
53. How would you describe your general investment strategy? \_\_\_Very risky, \_\_\_Somewhat risky, \_\_\_Very conservative, \_\_\_Somewhat conservative, \_\_\_I do not make investments.
54. Have you ever lost a significant amount of money in an investment? \_\_\_Yes, \_\_\_No. If YES, please explain.
55. Have you ever felt cheated in an investment, business situation or consumer transaction? \_\_\_Yes, \_\_\_No. If YES, please explain.
56. To what extent do you trust stockbrokers, real estate brokers and other people who invest money for others? \_\_\_Not at all, \_\_\_Not too much, \_\_\_Somewhat, \_\_\_Quite a bit
57. Have you or has anyone close to you, ever been involved in making investments for other people? \_\_\_Yes, \_\_\_No. If YES, please explain.
58. Have you or has anyone close to you had any training or work experience in any of the following: Accounting, Banking, Business Management, Construction, Insurance, Mental Health or Medicine, Real Estate Appraisal, Real Estate Lending or Borrowing. \_\_\_Yes I have, \_\_\_Yes, someone close to me has, \_\_\_No. If YES, please explain.
59. Which of the following attitude best describes how you feel about business nowadays? \_\_\_Buyer beware, \_\_\_Seller be fair
60. Have you or has anyone close to you ever been involved in purchasing or managing real estate as an investment? \_\_\_Yes, \_\_\_No. If YES, please explain.
61. Have you or has anyone close to you, ever worked or had any experience with partnerships or other business ventures or investments with other people? \_\_\_Yes, \_\_\_No. If YES, please explain.
62. Do you believe that people who lost money on an investment should be reimbursed? \_\_\_Yes, \_\_\_No. If YES, please explain.
63. Have you or a close family member ever filed for bankruptcy? \_\_\_Yes, \_\_\_No. If YES, please explain.

64. Have you, or has anyone close to you, ever suffered significant losses in the real estate market? \_\_\_Yes, \_\_\_No. If YES, please explain.
65. Do you have any ethical, religious, political or other beliefs that may prevent you from serving as a juror? \_\_\_Yes, \_\_\_No. If YES, please explain.
66. Describe any problems (vision, hearing, language difficulty or other medical problems) that may affect your jury service: \_\_\_\_\_
67. Describe any medication you are currently taking: \_\_\_\_\_
68. If there is any matter, not covered by this questionnaire that could affect your ability to be a fair and impartial juror, please explain: \_\_\_\_\_

#### IV. PROCEDURE FOR USE

The most common practice is that the questionnaires are to be distributed and filled out by the jurors on the first day of trial. After the questionnaires are collected, the attorneys have the afternoon and evening (if they are lucky) to assimilate the information into a usable form. It is extremely important for the attorney to have a group of attorneys help him assimilate the information. This involves establishing the most important factors/characteristics, determining what needs to be asked in oral voir dire and organizing the questionnaires into a usable form. A common method is using a highlighter or “post its” to tag questions or answers that the attorney wants to follow up on during oral voir dire. One of the biggest benefits of the questionnaire is that the attorney already has an abundance of information on each juror to prepare questions to ask and what issues to focus on during oral voir dire. For example, a follow up question could now be, “Mr. Jones, I see here that you have been involved in a contract dispute. Could you please tell us about it.” The jury questionnaire can be tremendously helpful, but if the attorney does not get the information into a workable form, the lawyer will have great difficulty trying to read through the questionnaires during voir dire.

The jury questionnaires provide attorneys with an abundance of information that can assist them in the selection process. However, because there is *so much* information, it is often unmanageable. Therefore the information in the questionnaires must be reduced into a manageable form. Fortunately, a ranking system of “jury codes” has been developed to assist attorneys with this very problem. The most efficient way to use jury questionnaires is to first establish which characteristics/factor are the most predictive and use questions that will gather information or the juror’s opinions relative to those factors. Then create a checklist that contains all of those factors and attach a copy of the checklist to each completed questionnaire. The following is a sample checklist with 67 factors/characteristics that can be taken into consideration when selecting a juror. Each factor on the list below correlates to a question in the sample questionnaire.

## V. JUROR SELECTION

Below is a list of all of the various factors/characteristics that can be taken into consideration when selecting a juror. A sample juror questionnaire has also been provided. Each factor on the list below correlates to a question in the sample questionnaire. Obviously not all of the factors below are relevant in every case and some cases may require additional factors to be taken into consideration.

### Potential Juror Characteristics

- 1) Age (A)
- 2) Marital Status (M)
- 3) Whether English is their first language (LANG)
- 4) How long they have been a resident in the area in which they live (R)
- 5) Ownership vs. rental of residence/property (OWN)
- 6) Satisfaction with living arrangement/area (SAT)
- 7) Highest level of education the juror has completed (ED)
- 8) Whether the juror currently attends school or plans to attend school (SCHOOL)
- 9) Highest level of education of juror's spouse or significant other has completed (HI-ED)
- 10) Juror's Economic Situation (improved or gotten worse over the past few years) (ECON)
- 11) Juror's current Employment Status (full-time/part-time/unemployed/student/working more than one job (EMP)
- 12) Juror's current or most recent occupation (JOB)
- 13) Name of current or most recent employer (EMPLYR)
- 14) Juror's past employment (EMPHIS)
- 15) Number of employers over the past 10 years (#EMP)
- 16) Experience in ownership or running of business (BUS)
- 17) Involvement in hiring and firing other employees (HIRE)
- 18) Involvement in evaluating the job performance of other employees (EVAL)
- 19) Spouse's and/or former spouse's employment history (SPSE EMPLYR)
- 20) Employment of other adults living in the juror's home (EMP CHILD)

PROSPECTIVE JUROR QUESTIONNAIRES MADE EASY

- 21) Juror's support of goals and activities of unions (UNION)
- 22) Juror or spouses service in the military (MIL)
- 23) Juror's main source of news (NEWS)
- 24) Juror's social, civic, civil rights, trade or other organizational affiliations (SOCIALIZE)
- 25) Juror's offices in any of the above mentioned organizations (OFF)
- 26) Magazines or newspapers regularly read by juror (MAGS)
- 27) Juror's frequency of being a group leader (LEADER)
- 28) Juror's or family member's previous experience being sued (SUED)
- 29) Juror or anyone close to juror's previous experience in filing a lawsuit or making a claim for damages (LAWSUIT)
- 30) Juror's consideration of suing someone, then deciding not to (CLAIM)
- 31) Claim for money damages or a lawsuit brought against juror or someone close to him/her (MONEY)
- 32) Knowledge of someone else on the jury panel (JURY)
- 33) Past experience as a juror (how many times, where, civil/criminal, positive/negative experience) (JD)
- 34) Any other reason the juror may have been to court (COURT)
- 35) Juror's or someone close to the juror's legal training or work with lawyers (LEGAL)
- 36) Relatives or friends that are judges, attorneys or court personnel (ATTY)
- 37) Juror's opinion about juries' function of sending messages to corporations and individuals to improve their behavior (agree/disagree) (JURY FUNC)
- 38) Juror's opinion regarding plaintiffs filing lawsuits to place responsibility where it belongs (agree/disagree) (RESP)
- 39) Juror's opinions about contracts: What's more important, what the contract says vs. what parties intended it to mean (K)
- 40) What the juror is more likely to believe, what a document says vs. what a witness says (K vs. O)
- 41) General attitude towards awarding punitive damages (PUNI)
- 42) Past denial of compensation that was owed to juror (DCOMP)

- 43) Previous loans the juror gave, were they repaid? (LOAN)
- 44) Juror's experience in signing a formal business agreement (SIGN-B)
- 45) Jurors involvement in a dispute over a contract (did juror suffer negative consequences of the contract) (DIS-K)
- 46) Juror's employment for a company that was involved in a contract dispute (EMP-K)
- 47) Special training or experience with contracts, administration or negotiation (TRAIN-K)
- 48) Opinions on oral contracts: Are they as binding as written contracts (OK vs. WK)
- 49) Juror's opinion whether oral agreements always be honored (ORAL)
- 50) Juror's involvement in an oral contract involving a large amount of money (ORAL-K-MON)
- 51) Juror's level of knowledge about the real estate market (very knowledgeable/ no knowledge) (RE)
- 52) Juror's level of knowledge about investments or financial matters (FIN)
- 53) Juror's general investment strategy (very risky/very conservative) (INVEST STRAT)
- 54) Juror's loss of significant amount of money in an investment (LOST)
- 55) Juror's feelings about being cheated in an investment, business situation or consumer transaction (CHEAT)
- 56) Juror's trust of stockbrokers, real estate brokers, and other people who invest money (BROKERS)
- 57) Juror's involvement in making investments for other people. (IN-OTHERS)
- 58) Juror's or someone close to the juror's experience or training in Accounting, Banking, Business Management, Construction, Insurance, Mental Health or Medicine, Real Estate Appraisal, Real Estate Lending or Borrowing (PROF)
- 59) Juror's attitudes towards business (Seller be fair vs. Buyer beware) (BUS-ATTID)
- 60) Juror's or someone close to the juror's involvement in purchasing or managing real estate as an investment (RE)
- 61) Juror's or someone close to the juror's experience in partnerships or other business ventures or investments (PTRSHIP)

- 62) Juror’s opinion on whether people who loose money on an investment should be reimbursed (REIMB)
- 63) Juror or someone close to the juror filing for bankruptcy (BK)
- 64) Juror’s or someone close to the juror’s significant losses in the real estate market (LOSS)
- 65) Juror’s ethical, religious, political or other beliefs that might prevent juror from serving on a jury (REL)
- 66) Juror’s vision, hearing, language difficulty, or other medical problems that may affect their jury service (MED)
- 67) Any medications the juror is currently taking (MEDS)

When reviewing the juror’s answers to each question, assign a number 0-5 (see below for coding system) to that factor and write the number of the checklist next to that factor. Obviously, the most favorable jurors will be the potential jurors with the highest numbers and the riskiest jurors will be the ones with the lower numbers.

Coding System

- 5 = Yes! Lets Roll
- 4 = Likely
- 3 = Less Likely
- 2 = Unlikely
- 1 = Desperate
- 0 = No way, Jose!

For example, a plaintiff is suing a defendant real estate broker for fraud in connection with a piece of investment property. The plaintiff is claiming that the defendant misrepresented that the property had the proper zoning for its intended use. Question 59 on the questionnaire says, “Which of the following attitudes best describes how you feel about business nowadays – Buyer beware or Seller be fair?” If potential juror #1 responds, “Seller be fair”, the plaintiff’s attorney is likely to put a “4” or “5” next to “59- Business attitudes” on the checklist, while the defendant’s attorney is more likely to put a “2” or “3.”

Another example might be a disgruntled investor suing a brokerage firm for fraud because the broker allegedly failed to meet his duty of due diligence and the investor subsequently lost all of his money. Questions 52 through 57 specifically address questions about the juror’s investment strategies and opinions about brokers. For example, Question 52 asks, “How would you rate your level of knowledge about investments or financial matters?” Juror #1 responds that he is “very knowledgeable” and Juror #2 responds that he has “no knowledge.” The plaintiff may give Juror #1 a “2” or “3” and give Juror #2 a “4.”

Juror #1 might be less sympathetic with the plaintiff because the plaintiff did not know about his own investments, while Juror #2 might be more sympathetic because he himself doesn't know about financial matters either.

The next question, 53, on the questionnaire says, "How would you describe your general investment strategy?" Juror #1 says, "very risky" while Juror #2 says, "very conservative." Once again, the plaintiff might give Juror #1 a lower score like a "2" or "3" because he is willing to take risks and may not sympathize with the plaintiff for losing all his money, while, Juror #2 might get a higher number because he might be more sympathetic. Question 55 asks, "Have you ever felt cheated in an investment, business situation or consumer transaction?" If Juror #2 answers "No," this doesn't necessarily mean that the plaintiff should give him a really low number like "0." However, if he answers "yes" the plaintiff would definitely give him a "4" or "5."

Obviously, one of the most helpful questions will be Question 56, "To what extent do you trust stockbrokers, real estate brokers, and other people who invest money for others?" The plaintiff would give Juror #1 who says, "Quite a bit" a lower number and give Juror #2 who says "Not at all" a higher number. Overall, potential juror #2's numbers were higher than potential juror #1 and would be a better choice for the plaintiff. Now that the attorney has a better idea of the juror's background views and opinions, the voir dire process will be more effective because the attorney can follow up on specific issues like how they lost their money in investments or why they have a low opinion of brokers.

## VI. CONCLUSION

There is no doubt that that juror questionnaires are an extremely helpful tool for trial attorneys. However, without a method of condensing the information into a manageable format, an attorney could get lost in the sea of information. This code system allows the attorney to reduce all of the information into numbers for each potential juror. Such a system is extremely beneficial and can maximize the effectiveness of the juror questionnaires.

# Partnering In Complex Litigation<sup>†</sup>

Glen M. Pilié

In today's legal market place, the concept of "partnering" has taken center stage when it comes to factors affecting the decision to retain the services of outside counsel. In preparing this article, dozens of other articles were reviewed covering the process whereby companies decide what legal resources to use and what factors drive those decisions. The articles analyzed were written from various perspectives including: general counsel, in-house corporate counsel, managing partners of law firms, marketing consultants to law firms, and business consultants to companies. Inevitably, each article touches upon some recurring themes. These include, but are not limited to: knowing the company's business and goals, understanding the company's expectations or the results desired from legal proceedings, efficiency and cost effectiveness, clear concise communications, and the minimization, if not prevention, of surprises.

The most simplistic definition of partnering involves an outside counsel who assists in-house counsel in order to achieve the performance goals of the company. From that point on, partnering grows more complex, culminating in the concept of "convergence" – incorporating a company's entire need for legal services into a small network of law firms that function with corporate counsel much like a combined virtual law firm.

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For purposes of this article, the discussion will focus on the simpler end of the spectrum, analyzing the critical importance of getting partnering “right” in the context of complex litigation, given the disastrous effects of getting it “wrong.” “Partnering” in the context of complex litigation is as challenging as it is important. The partnering challenge occurs in view of the multifaceted issues that can accompany complex litigation. The importance of partnering springs from the downside risk if those challenges are not properly addressed. The need for effective partnering becomes evident by listing some of the challenges encountered in complex cases. These challenges include:

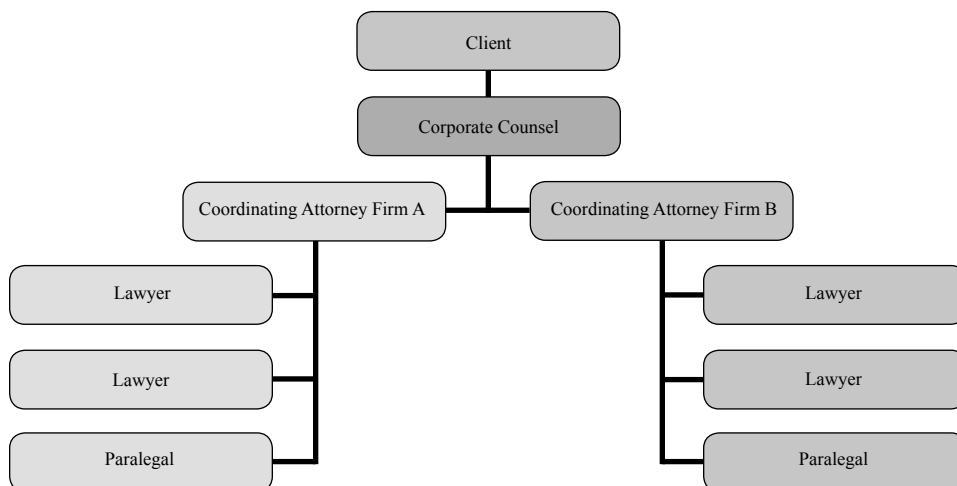
- the functioning of trial teams that often include more than one law firm, involving multiple lawyers with defined roles;
- understanding the risk of dealing with multiple experts on multiple issues, while controlling costs;
- marshalling documents and locating company/fact witnesses (this knowledge can span decades and the locations of documents and witnesses can vary greatly);
- understanding the complexities added by mergers or internal reorganizations that have occurred over the relevant time period;
- locating motivated and knowledgeable corporate representatives for corporate depositions;
- handling press inquires and, in some instances, dealing with ongoing press coverage of the case;
- handling legislative issues that can arise or become obvious from rulings obtained in the case;
- dealing with issues (including community perceptions) presented by unusual procedural complexities such as class actions and mass joinder;
- integrating an appellate team at an early stage of the proceedings;
- conducting focus group sessions and mock trials at appropriate stages of the proceedings; and
- an abiding awareness that the objective is to arrive at a resolution that is consistent with the goals of the client, which may include timing and precedential ramifications.

To meet these and other challenges that can and do present themselves in complex cases, it is essential that corporate and outside counsel build a relationship focused on partnering. And in that focus, communication becomes the crucial element.

In many situations, it has become the norm for clients to build virtual law firms to handle complex cases. Clients often hire lawyers from two or more firms because these lawyers can bring various levels of expertise to a single case. The phrase, “clients hire lawyers not law firms” is put to practice routinely in complex cases. In these cases, it is critically important that the virtual team is built upon partnering and that each member of the team recognizes the particular skills or assets of every other team member. Each lawyer and team member must understand the client’s expectations and work together to successfully resolve the case consistent with the client’s goals and objectives. Situations involving multiple lawyers can be risky. Unless there is a clear understanding of each function and the role that each member plays in filling that function, important information will fall through the cracks. At the other end of the spectrum, it is important to understand that multiple lawyers sometimes perform the same task, resulting in additional fees.

To deal with these complexities requires clear communication among the lawyers working on the case and clear direction from corporate counsel about the roles for each member of the team. Early on in the case, corporate counsel should establish these lines of communication and clearly delineate the roles of the lawyers involved. In the experience of this author, teams function more efficiently when each law firm has a coordinating attorney. This attorney serves as the primary point of communication with corporate counsel and the other law firms. Corporate counsel must be confident that it can direct the case and gather reports on the progress of the case using a minimum of contact points.

In diagram form, the organizational chart for communications may resemble the following:



The need for organized communications and decision making through partnering is heightened in complex cases involving difficult medical, scientific, and technical issues. These cases inevitably become battlegrounds for experts and require effective coordination in order to control costs while developing the information needed by experts who must render supportable opinions. Particularly in environmental or toxic tort situations, the plaintiffs often benefit from a lack of information or data, which allows the experts to develop opinions based on models and/or assumptions drawn only from what little historical information may be available. In that scenario, the defense team and corporate counsel usually will consider the reasoned input of their experts in deciding whether it makes strategic sense to conduct experiments and studies that will counter the plaintiff's advantage. Their decision also must account for the downside possibility that the data may not prove helpful. Often, the cost of obtaining such data is difficult to accurately predict. The best effort to predict

costs nonetheless must be made with the help of the experts. Corporate counsel must have a clear understanding of the undertaking to communicate accurately with the client about why additional studies are recommended, their upside and downside potential for resolving the case, and the likely cost for doing them. Equally important, ongoing communication is necessary once the effort is underway in order to decipher the data trend lest the data present any unnecessary surprises for corporate counsel.

In complex cases, it is not unusual for the duration to span from five to ten years or longer. Furthermore, in this climate of corporate mergers, it may be quite common for corporate counsel to change at least once over the litigation span. If the case can be structured to accommodate such transitions within the corporate counsel group, those transitions can occur without a major disruption in strategy. Often as not, more than one corporate counsel shares responsibility for large complex cases, thus providing an excellent mechanism to deal with the movement of such counsel.

The typically long duration of complex cases also presents unique challenges with regard to locating, motivating, and maintaining company witnesses who are important to the case. The task of locating witnesses can be particularly challenging if the underlying events occurred over the span of many years. The issue then becomes one of finding employees, or often former employees, who can recall events that occurred some ten or even twenty years past. The role of corporate counsel is key not only to finding these individuals; it is even more important to convincing them that the task is important and motivating them to become involved. Motivation is especially important if there is a potential for punitive damages. Current employees often fear that participating in litigation will hinder their chances of advancement within the company. Though such participation is commonplace to lawyers, the involvement of management employees in complex litigation can serve as a huge distraction that diverts their attention from those activities that are important to business operations. If the case carries a significant downside potential, e.g., punitive damages, any upside reward is likely to be overshadowed. And the challenges of locating former or retired employees who might serve as potential witnesses can prove even more difficult. Nevertheless, the trial team, working in close coordination with corporate counsel, must spend the time to locate knowledgeable witnesses who are willing to tell the company's side of the story. Though motivating these individuals to become involved can be difficult, it is sometimes facilitated by explaining that the attack on the company also calls into question the integrity, ability, and character of those individuals employed by the company. In short, it is as important to humanize the company with its own employees as it is to humanize the company before the jury if they would willingly serve as witnesses. And this goal can only be accomplished through the coordinated efforts of corporate counsel and the trial team.

Just as challenging in complex cases is the task of marshalling documents that span long periods of time and implicate several geographic locations. Opponents are keenly aware of this challenge and often exploit it early on through extensive discovery requests that are designed to support motions to compel and (ultimately) requests for sanctions.

This aspect of complex litigation has assumed new dimensions in recent years because standard discovery requests now seek not only paper documents but electronic information

stored on computers as well.<sup>1</sup> In that regard, e-mail communications have become a principal target in current discovery battles. As succinctly stated in a recent article published by the Defense Research Institute, “several rules were amended with the stated purpose of fully acknowledging the prevalence of electronically stored information and fully incorporating disclosure of electronically stored information into the overall scheme envisioned by the Federal Rules of Civil Procedure.”<sup>2</sup> Furthermore, as noted by litigation experts elsewhere, the new rules will present new challenges that must be managed by corporate counsel and the trial team.<sup>3</sup>

Beyond those challenges presented by discovery rule changes, corporate legal departments independently have become increasingly reliant upon electronic data management. It is thus becoming more common in complex cases for companies to marshal documents using an internal electronic database that is organized through the office of corporate counsel, often with the assistance of a third-party litigation support vendor. In order for such document databases to be helpful, efficient, and effective as possible in supporting the defense of the case, early and ongoing coordination is necessary between corporate counsel and the trial team. Such coordination should cover all aspects of building the database including: design of parameters to guide the search for documents; design of parameters for inputting documents into the database to assure efficient and effective recall capabilities when responding to discovery and preparing trial exhibits and witnesses; and design of an access system that assures security but also provides flexibility for effective use by the trial team.

In addition to the various challenges, these types of cases also attract the attention of external constituencies such as community groups, environmental groups, and the press. For those who have worked on complex cases that attract outside attention (especially the press), the lesson is that this area can be highly sensitive to the company. If not managed according to company policies and procedures, it can spell a quick demise for the trial team and enormous difficulties for corporate counsel. In these types of cases, it is important for corporate counsel and the trial team to recognize the potential for press inquiries and to maintain a clear understanding about how those inquiries should be handled. As a general response to that issue, directing press inquiries to a designated person within the company’s public relations department is the most effective and safest way to handle these inquiries. Thus, corporate counsel should communicate the inquiry to the designated public relations representative. Depending on the nature of the inquiry, the substance of the response then should be coordinated with corporate counsel and the trial team before it is publicly delivered by the responsible person from the public relations office.

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<sup>1</sup> See FED. R. CIV. P. 34(a) (2006).

<sup>2</sup> See Kathleen M. Bustraan, *Critical to Success: Navigating E-Discovery without Spoiling Your Case*, FOR THE DEF. 32 (JULY 2006).

<sup>3</sup> See, e.g., Allison O. Van Laningham, *Navigating in the Brave New World of E-Discovery: Ethics, Sanctions and Spoliation*, 57 FED’N DEF. & CORP. COUNS. Q. 346 (2007).

Where it is evident that the opponent is strategically involving the press, it may become necessary to respond in kind, having one or more members of the trial team deliver the message to the press. In those situations it becomes even more important for corporate counsel and the responsible trial team member(s) to be thinking as one, with a clear understanding about any message that the client intends.

At the outset of complex litigation, corporate counsel often is aware that a downside potential attends the trial stage; for that reason, an appellate team is integrated at the early stages of the case. Since the appellate lawyer(s) may or may not be a member of the same firm(s) that comprises the trial team, another layer of communication and coordination will be funneled through corporate counsel.

The decisions identifying those issues on which to seek a review or appeal, and when to do so, are important matters of strategy, especially in states such as Louisiana which allows for interlocutory review under certain conditions. It thus becomes important for the trial team to coordinate with appellate counsel in building and protecting a record for appellate review.

Even with an excellent appellate team, however, it is sometimes the case that judicial relief must await “the legislature and not the courts.” Judicial rulings that defer to the legislature can and do trigger the need to consider the prospect of seeking legislative enactments and the likelihood of their success. This is particularly apparent if a significant backlog of similar cases is pending and awaiting judicial review. In these situations, corporate counsel once again becomes the funnel for communication and coordination among the client’s government relations group and a legislative team, which often is comprised of government relations lawyers who may or may not be members of the same firm or firms that comprise the trial or appellate team. Working through corporate counsel, the trial team/appellate team must succinctly explain to the government relations team why legislative relief is not only necessary but just. They also must inform the government relations team of any expected attack from the opponent, which is usually very well organized and forceful. Moreover, if legislative redress becomes the solution of choice, the trial team, the government relations team, and corporate counsel must afford the client a sufficient basis for anticipating a reasonable outcome to persuade the client to pursue and prioritize this legislative issue over other legislative issues that may be important to the company.

Finally, through the entire life of the complex litigation, corporate counsel and the trial team must have a clear understanding of the client’s overall goals and objectives for getting the matter resolved. Resolution may be viewed differently at different stages in the life of the litigation. Early on, the client may feel that resolution necessarily means getting the case to trial in order to obtain a true measure of the issues at hand. In other instances, the matter may have assumed significance for the client only after a trial has concluded with an unexpectedly adverse result, leaving many additional unresolved cases in the pipeline. The message, however, remains consistent — there must be an ongoing dialogue with the client, focused through corporate counsel, to maintain the client’s overall goals and objectives for resolving the litigation. Even in these complex cases, where focus groups and mock trials are utilized to gauge the likelihood and optimum time for resolution, coordination

and communication between the client and corporate counsel is essential. The client should understand that these efforts are expensive and may require multiple sessions conducted over the course of the entire matter to determine if the themes upon which the defense is built will resonate with persons similar to those in a potential jury pool. The most difficult challenge in managing complex cases is to simplify the issues so as to focus on those that a jury can best understand and favorably consider. Thus, the ability (or inability) to simplify the case can have a major impact on the trial and resolution of the case. Focus groups and mock trials are effective tools in meeting this challenge. The trial team and corporate counsel must work collaboratively to develop the simplified themes and evaluate their effectiveness in achieving the client's ultimate goals and objectives.

### CONCLUSION

The need for effective partnering between corporate counsel and the lawyers comprising the trial team is crucial in complex cases that carry a significant downside potential. The keys to effective partnering in these situations involve early recognition of the downside potential, seamless communications, and coordinated decision-making between corporate counsel and the trial team.

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

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