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PRESENTING DAMAGES AND EXPERT TESTIMONY AT TRIAL

I confess that I had some difficulty with these materials. The topic title indicates that we are to discuss damages and expert testimony at trial. Yet, the outline in the brochure then lists voir dire, opening statements, direct expert examinations, and the cross-examination of experts, as topics. The topic list covers every area of trial. It is far beyond the limits of this paper and the time for our discussion at the conference.

The breadth of this outline would require a complete trial manual. So, I have confined my comments to several general areas. I will assume that you have heard an in-depth discussion concerning both experts and the calculation of damages, today, since those topics precede our discussion in the seminar outline. I will also assume that you have a working knowledge of the technical aspects of trial. With that in mind, I will confine my comments to ideas and opinions on approaching voir dire, opening statements, and expert examinations. Since the following represents some general thoughts and opinions on the assigned topics, I hope that we can engage in additional conversation during our time together.

I. JURY DESELECTION

A. BACKGROUND

Jury selection is a topic that many lawyers fear and rightly so. For years, I counted myself as one of those attorneys. Most of the skills we learn in law school and value as lawyers do not serve us well in jury selection. As lawyers, we want to persuade others to our position with the brilliance of our advocacy and logic of our arguments. Yet,

trying to convince a potential juror that his expressed opinion is wrong will not work. A hard sell at this stage can be the wrong approach.

As lawyers, we like control. Control your clients. Control the witnesses at trial. Yet, closed questions and a lack of openness to the expressions of others will prevent you from success in jury selection.

I understand the fear of this aspect of trial. After all, these strangers get to talk back. Who knows what they will say (and you may not like what you hear). Having a true conversation with potential jurors requires you to listen without fear of what might be said. Encouraging open communication is exactly what you need to do at this stage of your trial.

B. PICKING A JURY – WHAT IT IS NOT

1. IT IS NOT A SELECTION PROCESS

At some point in law school, every student is introduced to the basic phases of trial, including jury “selection.” Yet, we all know this name is not really accurate.

When you speak to your potential jurors, you will identify some you hope ultimately to serve on your jury. But, when the time arrives for choices, the Judge does not ask you to select people to keep. No. You name people to strike. What you are really doing is ridding the panel of potential jurors – deselecting those who will ultimately sit on your jury. So, the question becomes, how do you identify the people you will deselect.

I have watched many lawyers deselect potential jurors based simply on rough stereotypes. This can be a huge mistake. People are complex. They hold biases that often defy traditional stereotypes. As the saying goes, you cannot judge a book by its cover. You have to dig deeper to discuss the real biases and motivations that move people. To do that, you have to truly engage your potential jurors. You must begin a flowing conversation. Only then, will strangers supply the information you need to make the difficult decisions required to deselect potential members of your panel.

2. IT IS NOT A FORUM TO CONVINCING PEOPLE THROUGH ARGUMENT OR LOGICAL DEBATE

Like most attorneys, I have heard countless people express outrage over the McDonald's hot coffee verdict. In their mind, it was a frivolous lawsuit. To them, it is simply outrageous that a person spills their own coffee on themselves and then collects a big lawsuit judgment. Talk to people and you will hear words and phrases like – frivolous suit, lottery, jackpot justice, etc..

If you are a lawyer who studied this case, you know that the facts are very different than popular, public perception. I have watched many trials where the plaintiff's attorney will start asking questions about lawsuit beliefs and perceptions. Inevitably, someone on the panel will mention the McDonald's case as an example of a frivolous lawsuit. On these occasions, I have seen plaintiff's attorneys immediately go into debate mode. They begin talking about the "true" facts of the case, trying to persuade the potential juror that their belief is wrong. You may be brilliant as an attorney. Your logic on this issue may be perfect. Yet, you will rarely, if ever, convince potential jurors that their feelings and biases are wrong.

If you doubt me, then pick a few random football fans off the street and try to convince them that your team is better. Don't try to do it during jury selection. It will only hurt your credibility with the jurors. Moreover, it will close the gates of communication. Your later questions will not generate the discussion you need to understand the personal biases and beliefs of your jurors.

C. PICKING A JURY – WHAT IT IS

Jury deselection is an essential part of the trial process. It serves several necessary purposes. I'm going to outline a few broad topics that I believe are paramount.

1. IT IS AN OPPORTUNITY TO UNVEIL FEELINGS/BIASES THAT WILL IMPACT DECISION MAKING IN YOUR CASE

As every attorney knows (or should know), the primary purpose of voir dire is to reveal biases in potential jurors so that they may be struck. The problem is that many attorneys appear not to understand the depth or extent of personal biases.

If more attorneys understood how deeply biases impact decision making, they would know that arguing or debating with a potential juror will virtually never convince that person to change his mind. Yet, attorneys continue to make this mistake. In recent years, a wealth of research has been published that clearly reveals most people have deeply held feelings that govern how they see and approach everything in the world. I don't mean to burst anyone's bubble but humans rarely approach decision making in the pure, logical format we would like to believe.

Second, if more attorneys understood how biases are very personal to individuals, they would communicate with potential jurors on a more open level as opposed to making stereotypical assumptions. An example of this is the often asked question in civil cases as to whether any panel members have ever filed a lawsuit as a plaintiff in the past. I have watched lawyers ask this question, write down the names of the potential jurors who answered affirmatively, and then move to the next topic without follow-up. The questioning lawyer has gained almost nothing from that information. Instead of engagement on the issue, the attorney often makes the wrong assumption that a potential juror is simply pro-plaintiff because he/she filed a prior suit. Really? I've had hundreds of clients over the years who did not want to file a lawsuit and, even when events necessitated it, still felt that they were not like other "litigious" people. Without follow-up the attorney in trial would never identify those people. Perhaps one of these potential jurors had a bad experience in their prior lawsuit. Perhaps he/she felt they had not received justice in their case, had dealt with a dishonest attorney, experienced problems with the judicial process, etc.. The questioning attorney who moves to the next topic without follow-up will miss all this potential information and will fail to identify important biases. A potential juror who identified themselves as a prior plaintiff could

have little or no bias. However, the same person could also have strong biases, in either direction, that could ultimately impact the final decision in your case. Moreover, engaging the potential jurors who answered affirmatively might draw other panel members into the discussion as well.

A few years ago, I served on jury duty. While I did not actually serve on a jury, I had to participate in the deselection process in two cases that week. One of those cases will be forever etched in my memory. It was a retaliatory discharge case in Madison County. The plaintiff's attorney was from another city. I did not know that attorney and had never even heard of him previously. The defendant's attorney was Claude Hundley, who is now a Judge but then practiced at the local firm of Lanier, Ford, Shaver & Payne. If you know Judge Hundley, then you know he was an excellent attorney. He was an expert in the fields of workers' compensation and retaliatory discharge.

When the plaintiff's attorney began questioning us, he asked the inevitable question as to whether anyone on the panel knew any of the lawyers at Lanier Ford. I raised my hand. The plaintiff's attorney asked me NO questions. Instead, he looked at his sheet that identified the panel members by name and profession. He then told me that since I was an attorney, he assumed I could not be fair in the case. The truth is, I did have a high degree of respect for the defense attorney Claude Hundley. We had worked together on cases and I knew him to be both an ethical attorney and good advocate for his client. Yet, at the same time, a significant portion of my practice involves representing people who have suffered injuries on jobs and job sites. Many of these people have difficulty continuing to work. Often, they discuss with me events at work which they believe involve unfair treatment after their injury. Many of these clients are not treated fairly by their employers after an injury.

When does an employer fire someone and then admit it was due to an injury or partial disability? Never! An employer is not going to confess an improper motive. Instead, retaliatory discharge cases usually turn on common circumstantial evidence. I have seen and heard these circumstances many times in the past. So, the truth is that I was probably biased a little in favor of the defense attorney simply because I knew his

high level of ethics. At the same time, I was probably biased a little against the defendant itself. And, my biases would have increased had I heard any of the circumstantial evidence frequently seen in these cases. Regardless of whether my biases ultimately prevented me from serving on that jury, I could have been the catalyst for an open discussion among the panel that ultimately revealed the biases in others. At a minimum, such a discussion would have been valuable to plaintiff's counsel as it would have begun the thought process concerning circumstantial evidence supporting a claim of retaliation. By not engaging me, the plaintiff's attorney missed an opportunity.

2. IT IS AN OPPORTUNITY TO BEGIN THE THOUGHT PROCESS THAT WILL LEAD TO JUSTICE

Justice. Isn't that what we are seeking? If so, let's start thinking about the issues as soon as possible. While jury selection is not a good opportunity to vocally and openly advocate for your conclusion, you do need to begin the thinking process.

Potential jurors arrive at the courthouse with deeply held beliefs on some issues. Those beliefs don't change. After all, you will not convince an Alabama or Auburn fan to change their loyalties by exhibiting your logical skills as an attorney. But, if you need those fans to decide the best quarterback for each team, then you can get them thinking about the issues that go into such a decision.

Two important concepts are often at play in directing the thought process that will lead to the justice you seek. These are "primacy" and "persistence." Primacy, in this sense, means that people tend to continue believing what they already believe. As stated earlier, because of this concept your logical and fact-based arguments will almost never change a person's strongest beliefs. Generally, the stronger the belief, the stronger the resistance to change. Moreover, once a person believes something, his belief will color how he hears everything that follows. The second concept is persistence. This is the mind's tendency to process new information in ways that support what we already believe. (These concepts certainly explain a lot when applied to subjects involving both politics and sports).

These two concepts are vital for a couple reasons. First, recall in the prior section of this paper we discussed uncovering biases. Discovering these deeply held biases and realizing that you are not likely to change them, allows you to eliminate (or deselect) potential jurors.

Beyond deselection, the concepts also remain important. Here's why. Potential jurors arrive at trial knowing nothing about your case. They are in a new environment, around new people, and often unsure as to their role in the process. By the end of voir dire, jurors will have started forming beliefs as to what your case is about. Your questions will lead the jurors to these early beliefs. For example, if your questions revolve just around liability, then the potential jurors will focus on that issue as the primary one in the case. They will then process the information at trial as if this is the key issue.

As an example of these concepts, I previously tried a case involving a terrible industrial accident that resulted in a disabling injury. The defense in the case alleged that my client was contributorily negligent. They felt so strongly about their defense that they offered nothing to settle the case despite the disabling injuries and substantial damages. Frankly, their defense was strong and it worried me significantly.

Despite my client's own actions that resulted in the injury, I had arguments that, if accepted, would have negated the defense. The defendant placed the plaintiff on a large worksite, with lots of equipment, and yet did practically no safety planning. I knew the contributory negligence defense was coming and I felt it was strong. So, I decided to try the case on the over-arching issue of safety planning and safety supervision for the worksite itself. I wanted to focus the inquiry away from my client's immediate choice and onto the defendant's larger choices that placed him in a dangerous position. My theory was that if my client made choices that resulted in his injury, it was because he had been placed into a bad position with no planning or supervision.

So, during voir dire, I planned a number of questions designed to make people think about overall safety planning. The panel and I discussed site safety at length. We even discussed Ford's production of the Pinto (the car with the exploding gas tank). That topic led to some great discussion about whether it is acceptable to do a cost-benefit

analysis that allows for safety deficiencies as well as whether the negligence of a driver in causing an accident should relieve Ford of its larger duty to design a safe car. Of course, it helped me that the case was in Madison County and my panel actually had several engineers on it. At one point, I was able to step back as several of these members debated safety among themselves. As you can imagine, this debate clearly revealed important biases. In addition, it also led the entire panel into thinking that the real issue in this case was the defendant's overall site safety planning.

Now, back to my earlier paragraph where I mentioned that if your questions revolve just around liability, then the jurors will believe this to be the primary issue and process information accordingly. With that in mind, as a plaintiff's attorney, you want to spend considerable time in voir dire talking about harms and losses. Even in the industrial case discussed above, I was mindful of this concept. Although I had to discuss the liability issue at length in that case, I constructed my voir dire so that a substantial portion also involved a discussion of harms and losses.

While NBI uses the word "damages" in the title of our talk, the concept in voir dire should be broader. Only if harms and losses are a proper focus can the jury begin the process that will lead to full justice for your client. I spend considerable time in voir dire discussing harms and losses. That topic should not be seen as less important than liability. If you allow it to be seen as less important, then you will not be focusing the jury on this primary issue.

3. IT IS AN OPPORTUNITY TO ESTABLISH YOUR POSITION AS MENTOR

I started to title this section as an opportunity to establish your "credibility" with the jurors. Credibility is key. Your jurors are strangers so you don't have credibility with them when you start. If anything, they might think you are just another "shifty" lawyer who cannot be trusted. You don't win credibility by debating with potential jurors, talking over them, or being disrespectful in any way. In fact, there are a lot of things you can do that negatively impact credibility.

While I have always thought of this issue as “credibility,” well-known trial attorney Carl Bettinger writes of it differently. If you want to be a better lawyer, I urge you to read Bettinger’s books. He describes the relationship as a mentor relationship and I believe his description is much better.

Most potential jurors have little or no connection to the court/trial process. They are “normal” people summoned from their families and jobs. Normal people generally don’t trust lawyers. If you don’t believe me, then listen again to Clint Eastwood’s empty chair speech at the Republican convention where he says we don’t need a lawyer President. While you and I may have found his speech rambling and confusing, the appeal to regular people from such a line is obvious. Your potential jurors arrive at the courthouse and are herded like cattle from room to room by strangers until finally appearing in your courtroom.

Put yourself in their shoes. When I was summoned for jury duty, the process was eye-opening. You arrive at court. You know nothing about the process. You are suddenly herded into a room full of serious-looking people in nice suits. These “suits” are sitting at big tables, sometimes talking with other lawyers as if they are all in some special fraternity, and looking pretty smug.

You don’t know what is expected of you. To top it off, you took an oath to serve which you take seriously. Perhaps you have also been instructed not to talk to others outside the panel. It’s just you and a bunch of people who were strangers until this morning. You and these strangers are all trying to figure this out together. Now, the Judge and a bunch of lawyers are asking you questions, staring at you, and writing it all down.

Lawyers have big egos. We like to win. And, we like to look good. However, trials are not about us. They are about the story of what has happened to our clients. Early in the process, the jurors will begin to form beliefs about the issues that are important in the case and who to trust as they move forward. We need them to get through the story and deliver justice. As Bettinger has described, a mentor is the person you trust to show you the way. That is such a good description of the credibility you should strive to establish.

C. JURY SELECTION – A FEW SIMPLE RULES

If I were to advise someone on simple rules of jury selection, I would focus on the following: take every opportunity to do it, learn to speak openly as a normal person, plan questions on topics that will get people to talk openly about their biases important to your case, discuss harms/losses early and often, and most of all, let the potential jurors do 90% of the speaking instead of you. Those are the simple rules I have tried to follow (sometimes successfully and sometimes not successfully). They have helped me become a little better with much time, much practice, and much failure.

A couple years ago, I read a blog from a criminal defense attorney in Texas named Mark Bennett who wrote a catchy list of simple, and sometimes humorous, rules. (His blog is at www.blog.bennetandbennett.com). I don't know Mark but I found his blog very interesting. Giving him full credit, I'll repeat his list of rules here, giving a very brief explanation for each:

1. **The Nike Rule** – Just Do It. You will never learn how to pick a jury unless you start picking juries.
2. **The Blind Date Rule** – Treat jury selection like a first date with everyone on the panel. You want to learn about each juror while persuading them that you are likable as well.
3. **The Shrek Rule** – The lawyer should listen to the people who have unhelpful views, draw them out, and encourage them to share and expand upon their views.
4. **The 90/10 Rule** – Let the jurors talk 90% of the time or more in voir dire.
5. **MacCarthy's Bar Rule** – This rule was taken from a Chicago attorney who said "talk in the courtroom like you would in a barroom." Personally, I don't go that far based on some of the barrooms I've seen. But, I do say that you need to stop speaking like a lawyer and start speaking like a normal guy.

6. **Improv Rule I** – No scripts. I think some carefully worded questions are good. But, when the discussion starts, I've seen too many lawyers just go to the next (and often unrelated) question on their script rather than follow the discussion to its conclusion.
7. **Improv Rule II** – Don't block. If a juror says something that makes you feel uncomfortable don't ignore him or argue with him. You don't want to look bad and cut off the flow of information. As an example, I once tried a will contest case where competency was an issue and we needed the person to be found competent. Unfortunately, the person's family physician had conducted a brief mental exam and concluded she was not competent just days after the execution of the will – a very significant hurdle. Early in voir dire, a potential juror told me she knew someone on the other side and basically stated that she could not fairly consider my client's position (It was obvious to all she favored the other party). I could have cut her off and not involved her in additional discussions. However, that is the wrong approach. I expressed appreciation that she had been open with her feelings. I made her feel comfortable. Later in the discussion, she revealed that she worked for a family doctor and proceeded to explain to the whole panel why the particular mental test in our case was not reliable. She made every point to the panel members that I had prepared to make through experts at trial. I think we can all agree that her opinions supporting me on this test carried huge credibility in this situation. Had I blocked her, I would have never obtained this information.
8. **The Shrink Rule** – How do you feel about that?
9. **The Beer Pong Rule** – The ball is always in play. I must confess that I don't know this game. I believe it began after my days in

college. However, I understand the rule which I have always stated as – keep the conversation going back to the potential jurors.

10. **The Marathon Rule** – Save something for the end.
11. **The Playing Doctor Rule** – I'll show you mine if you show me yours.
12. **The Field Trip Rule** – Stay with the group.
13. **The Undertow Rule** – Never swim alone.
14. **The Atticus Finch Rule** – Be the lawyer they want to stand up for.
15. **The Bat Rule** – Ping, then listen. Or fail.
16. **The Herd Rule** – Remember that you are dealing with herd animals.

To these, I would add the following:

17. **Know What's Important Rule** – Each case is unique. That means it is impacted by different biases. It also has different harms and losses to discuss. You will only get the information you need if you understand what is important to your unique case. You will only reach this understanding after long hours of study and preparation.

II. OPENING STATEMENTS

A. INTRODUCTION

How do you give an opening statement? And, how do you deal with the issue of damages in your opening? A poll of 10 lawyers would probably result in 10 different opinions concerning openings.

What are my opinions? First, too many lawyers come to Court without a proper theme for their case. This lack of theme results in a disjointed opening that fails to point the jurors in the right direction. After all, if you don't know what the story is about then

how can you expect the jurors to figure it out? If you have no theme, the jurors will ultimately supply one for you. You may not like the theme they supply.

Second, too many attorneys view openings as an opportunity simply to stand up and regurgitate all the information about their case. The result is information overload, no structure, and no cohesive story.

With no theme, structure, or story, you are failing to do your job in bringing justice to your client. I call this approach the “spaghetti” approach. Throw it up and see what sticks. Perhaps you will get lucky with this approach and win some. However, you will have failed in trying to give meaning and justice to the important events that led everyone to court in the first place. As far as I am concerned, the “spaghetti” approach is the method for lawyers who are either lazy or simply unconcerned about their clients.

B. THEME & STRUCTURE – WHY ARE WE HERE?

When you approach a case, do you ask yourself in the simplest terms possible – Why are we here? Is it simply because a client hired you and you may get paid? Is it simply because your client said he wanted to get up and tell “his side” in the courtroom? Personally, when someone comes in my office “wanting” to tell their side in the full glare of trial, red warning lights immediately start flashing in my mind. They should in yours as well. Instead, I like those clients who have a compelling story that must be told because it is necessary and not because they just want to tell it. These clients aren’t looking for court. They come to you because it is the only way some measure of justice can be achieved.

Hopefully, your reason is different than those above. Hopefully, you took the case because the defendant did something wrong. The defendant broke a rule (maybe more than one). Otherwise, liability would not exist. And, by breaking the rules, your client was hurt and needs help.

This is where I often like to start my openings. Why not tell us the rule that was broken so we can all understand why we are here. Since the beginning of time, people

have operated by simple rules. The 10 commandments were given to Moses for the people of Israel. When our founding fathers started our nation, they established a Bill of Rights -- 10 simple rules limiting the government. While we all have a tendency to complicate matters over time, I like to start with the basics. What is the most basic, and best understood, rule that was broken by the defendant?

As an example, go back to the industrial accident case I discussed earlier in the voir dire section of this paper. During the trial, we discussed a number of rules, both specific and general. However, we started and ended with a simple rule (under which all others were categorized). That rule was simple, undisputed by all, and applicable to our case. It was the general duty rule used on construction sites and by OSHA that if you are in charge, then you have to evaluate and plan for safety. Otherwise, everyone is at risk.

In a simple car wreck case, you can easily state a rule. Alabama law has a number of them – called the Rules of the Road. Perhaps the defendant was speeding, following too closely, ran a red light, or did not maintain control of his vehicle. I like simple rules that we all understand, we all know result in injury if not followed, and we will all agree were broken when we hear the evidence.

C. THEME & STRUCTURE – A COMPELLING STORY

I recently read an interesting article from a successful appellate lawyer in Alabama, Mike Skotnicki (it is in his blog at www.brieflywriting.wordpress.com). Mike discussed storytelling in appellate briefs. When we think of appellate arguments we often picture a panel of scholarly judges dispassionately discussing the finer nuances of precedent. At least, that's how I used to think. Appellate courts hearing gripping factual stories that engross the listener just don't fit that mental picture.

Mike presented an interesting study concerning the impact of storytelling in appellate briefs. In the cited study, a panel of appellate judges was provided two briefs. One presented solely logical arguments. The other incorporated a strong storytelling element. Most of the readers found the briefs incorporating storytelling to be much more persuasive. I started my career writing appellate briefs. I can say that I probably spent

90% of my brief writing time trying to construct the facts into a compelling story and only about 10% of my time making the legal arguments. It is the story that compels one to justice.

The study cited by Mike considered the impact of storytelling on appellate judges. If the incorporation of storytelling elements has such a great impact on a group of scholarly judges, just think of the impact it has on “normal” individuals in society. Humans are hardwired for stories.

Don’t use the spaghetti approach. On the day you first meet with your client, you should begin thinking of the compelling story that is their case. Compelling stories all involve some event that places the main characters in a different or difficult situation, that leads to the struggles of these characters, and ends not by supplying you the answer but by compelling you (the reader or juror) to reach that conclusion yourself.

D. THEME & STRUCTURE – FOCUS ON THE REAL VILLAIN (THE DEFENDANT)

In watching trials, I have seen countless stories structured around the plaintiff. Traditionally, many lawyers put their client on first as a witness so they can “tell” their story. Sometimes that’s the best story you can tell. Most of the time, it’s not.

In the beginning of the story, the plaintiff is often simply minding their own business. That’s not compelling.

If cases are about broken rules that lead to harm, the story needs to focus first on the bad guy who caused us all to be here. As lawyers, we want to tell our client’s story. Yet, it is the defendant’s conduct that put us all at risk and harmed our client. Wherever possible, this is where I largely like to structure my story.

E. THEME & STRUCTURE – TALK ABOUT HARMS AND LOSSES

Every good story has a villain. That villain did something wrong. Bad things resulted. (When I speak of villain, please understand that, sometimes, decent people break a rule and cause harm. While you can’t vilify such a person unnecessarily, that

should not stop you from constructing your story around the rule(s) and the choices which led to them being broken.)

I have often heard attorneys give an opening statement where almost the entire statement concerned the issue of liability. Those attorneys barely touch on damages. They certainly do not discuss the extent of harms and losses in the case. While I like to begin my stories with the rules and a focus on the defendant's conduct that caused the injury, I also like to spend much of my time (at least half) talking about the harms and losses in the case.

Just as in voir dire, primacy and persistency are big concepts. If you spend the vast bulk of your opening discussing only liability, then the jurors will naturally think primarily about this issue throughout the trial and their deliberations. You will turn your case solely into a case of liability. Then, even if you win, you will not receive the full measure of damages.

Talk about losses. The defendant broke rules. He made bad choices. He caused some bad things to happen. Now, let's talk about the results as much as possible. If you begin introducing the concept of harms in your voir dire, then the jury will already be thinking the case involves them. Then, in your opening, you should weave these harms into a compelling story. Real harms and real losses are personal and compelling. People understand that. They also understand that the bad choices of the defendant could have harmed them and their families. So, a bland discussion in which you simply recite numbers (such as medical bills) of "damages" is not compelling storytelling. If you construct the story properly, then the jury will pick the ending that results in justice to your client.

III. EXPERT WITNESSES

Earlier, Tony Graffeo spoke on the topic of "Working With Expert Witnesses." As I write these materials, I have not yet seen Tony's paper. However, his assigned topic covers much of the possible discussion concerning expert witnesses.

Moreover, Tony and I have previously worked together as co-counsel on a large environmental / business tort case with multiple and highly technical expert witnesses. We are currently working together on cases in two different MDL proceedings involving defective medical products. When we worked together on the previous environmental case, we largely divided the work. I spent significant time handling the clients, damage issues, and local regulatory authorities. Tony handled the complicated environmental experts needed to prove liability and rebut the defenses we faced. In working the case, Tony really prepared these highly technical experts and their reports to a level I have not previously seen. Clearly, I consider Tony to be excellent at dealing with experts in complex litigation.

With that in mind, I could probably quit writing right now. I won't quit because I need the CLE credits. However, bearing in mind that Tony has probably discussed most of the technical aspects of working with experts in his topic, I will confine my paper to more general advice and some specific strategies in cases.

A. STRATEGIES FOR DIRECT EXPERT EXAMINATION

Earlier, when I discussed opening statements, I noted the frequency at which lawyers stand up and simply regurgitate all the facts and all the characters of the case. I don't know about you but I find this boring.

Those same lawyers tend to also follow that path with witnesses. Typically, they do not have a set order for witnesses. Each witness simply takes the stand and the attorney solicits bland facts or opinions. The jury can just hear everything randomly and figure it out. At best, the lawyer taking this approach can try and present a roadmap in closing. By then, it is too late for your theme. The jurors will have reached their own conclusions because you failed to guide them.

The approach of just throwing it all out to the jury fails to captivate, or even interest, most listeners. It fails to give meaning to your client's story. It is simply confusing and disjointed. Instead of telling the story, you are asking your jurors to figure

out your case and supply their own story to it. Let's hope they stay interested and engaged enough to even hear all the information with such an approach.

Trial should not be a narration of various characters. It is a story that needs to be told. That means spending long hours developing a theme and ordering the entire presentation around that theme. When you think of the trial as a story rather than a narration of various witnesses, your expectations for your expert will change. He is no longer a hired gun providing an opinion that simply fills a necessary element of your claim. He now serves as a guide in the story for the involved characters.

I'll use as an example the environmental case that Tony and I worked together previously. Here was the case in a very condensed nutshell: Our client operated a wastewater treatment facility that treated only non-hazardous waste (Think water with small amounts of oils, ammonia, or metals in it.). Our client entered into a contract with a production facility in another state to accept and treat excess ammonia water. Our client then accepted multiple truckloads of the wastewater, pumped it into their facility, treated it for ammonia, and discharged some of it into a local water source. Unknown to our client, this water also contained significant levels of two toxic organic substances (acrylonitrile and styrene). Regulatory authorities discovered the substances in the discharges and shut our client down so that the substances could be cleaned. Sounds like a simple case. Right? Well, nothing is ever as easy as it sounds. We had to answer an important defense – Why didn't you guys who specialized in treating waste discover the contamination before accepting, treating, or discharging it? Additionally, the defendants denied that the waste even came from them and claimed it must have come from one of our client's other customers.

We needed experts to show that (1) the toxic chemicals came from the defendant; and, (2) it was reasonable and foreseeable that we would not have discovered the toxic contaminants by exercising the appropriate standard of care. To establish these issues, we could have simply hired an expert or experts to testify as to each. That would have met the legal necessities for our case. It would not have provided the jury the truly compelling story of this case as we saw it.

To us, this case was not one of a defendant that simply made a mistake in shipping the wrong chemicals. The story was much better. The defendant had an old manufacturing facility with its own wastewater treatment plant. The toxic organics at issue were a by-product of the defendant's production process. We believed the real story was that the defendant made a business decision to increase production dramatically to levels beyond the treatment capacity of its own wastewater facility. Then, we believed the defendant chose not to upgrade that facility. The defendant also chose not to pay the high cost of having these toxic substances appropriately treated or stored by someone else. We had evidence from truckers who said they were directed to pump the water from the production facility and not the downstream treatment facility. And, it appeared to us the defendant was not reporting the discharge of these substances as required by law. Our case was that the defendant chose to ship the toxic chemicals without telling anyone, figuring that the substances would be discharged into a water source somewhere else without discovery. Nobody would ever know. Now, that's a story.

We did not retain boring experts to simply state the various source of the chemicals and standard of applicable conduct. We retained experts that could explain a complex story in simple terms. The result (had we gone to trial) would have hopefully been an expert who gave reason and consistency to our story of the big company choosing profits over safety while attempting to hide their misconduct. In our case, we will never know how the story would have ended because we settled the case.

In simpler terms, think of your typical vocational expert in an injury or workers' compensation case. A vocational expert will usually review the medical information, interview the client, get an education and job history, and perform some academic testing. Then, the expert will provide an opinion of job loss or wage loss in terms of percentages and perhaps wages. That may technically be all you need for your case. Information goes in to the program and a number comes out. However, a vocational expert should also advance the story. Each injured person presents a unique story. Each injured person struggles with unique hurdles to continue functioning as a normal human. As an example,

if your client suffers hand/wrist injuries with limitations, the expert can paint a vivid picture of how this would affect one's ability to write and use tools.

In addition to the general role of a guide and explainer in your client's story, here are some helpful hints for your experts:

1. Have your expert help you define the rules as simply as possible. This should begin long before trial and should be reinforced at trial.
2. At trial, your expert should not only restate the rule but also should explain the reasons for the rule and its well-settled recognition.
3. As with all other witnesses, remember sequencing. The witness should appear at the proper place in your story.
4. If possible, show instead of tell. People remember demonstrations and visuals better than the spoken word alone.
5. When testifying, teach rather than lecture.
6. Make complex matters as simple as possible.
7. Discuss not just the actual harms in your case but also potential harms. Where the potential harm is great, your jurors need to understand its full reach. After all, it could impact the entire community.

B. STRATEGIES FOR CROSS-EXAMINATION OF THE DEFENDANT'S EXPERTS

How to handle the expert witnesses for the defense is a frequent topic of discussion among my partners. This is probably because there is no one formula that leads you to the same conclusion in every case. Each case is unique. I believe that you must know your case as completely as possible. For each case, you must carefully craft a complete theme and strategy. That means you will employ different courses of action for the opposition experts in different cases.

No matter what the case, the standard for all opposition experts must include two concepts: Investigation and Preparation. You should investigate opposition experts completely and prepare thoroughly. I have never understood attorneys who face an

opposing expert without hours of background investigation, without hours of study, and without some prior understanding of the technical field at issue. This is especially true in our current age of information access where you can easily check everything in the expert's curriculum vitae, quickly obtain any prior writings of the expert, and routinely study the subject at issue from your computer. Choosing simply to learn about the expert for the first time in deposition is not an acceptable strategy to me. Yet, it is a strategy too often followed by attorneys.

When deposing defense experts, make sure you "close the smallest circle possible." That is, I always picture the opinions in my mind and draw the smallest circle I can around them so that the witness will have no room to change their opinions at trial.

Beyond these standards, different cases absolutely need different approaches. What are some ways to handle an opposing expert? Please keep in mind that I often refer to the other expert as the defense expert out of habit since I primarily handle plaintiff's cases. However, the rules can be applied to the opposing experts on either side. The following are seven general approaches that can be considered in various cases depending upon the circumstances. Again, they do not represent all the possible approaches that can be considered for each unique case.

1. CATCH A FREE RIDE WITH THE OPPOSITION

This is sometimes referred to as "hitchhiking." What is hitchhiking? It is catching a free ride in someone else's car. What does this have to do with a trial and the defense experts? It means that you may be able to use the other party's experts to bolster parts of your own case.

Too often, attorneys approach the opposition experts as if they must be attacked immediately in a full frontal assault. Such a policy ignores that often you can use the other expert, for free, for other parts of your own case.

A typical use of this approach involves a defense medical expert. For example, your client suffers a cervical injury. The defense designates an expert expected to testify as to a lack of causation or the existence of a pre-existing condition. Before you attack

the expert's offered opinions, you may be able to hitchhike on him for your damages case. Although this opposition expert is not expected simply to agree with you as to causation of the neck injury, he will most likely to agree with you on a whole list of other issues, including pain problems, limitations, and treatment needs. Use him for your damages claim.

As a second example, consider a safety expert offered on the issue of liability in a case. If you represent the plaintiff, it is highly unlikely you will get this expert suddenly to change his mind and say the defendant failed in its safety obligations. But, you may be able to "hitchhike" on this witness and get him to testify as to all the possible harms or damages that can occur where defendants employ the particular equipment or process at issue in your case. You may even get him to admit that these dangers are known within the industry. Likewise, if you represent the defendant, it is highly unlikely that you will get the opposing expert suddenly to admit you did everything correctly. However, you may be able to use that expert to elicit opinions concerning the plaintiff's separate conduct in the case. That could be valuable testimony if contributory negligence is an issue.

Since you are using the other party's expert to help in a different aspect of your case, a couple simple rules apply. First, you should probably hitch your free ride before you attack the expert. Second, this whole process works better if you are nice to the expert.

2. CALL THE EXPERT'S BLUFF – DON'T LET THE EXPERT SPECULATE

This is one of the most common strategies employed by defense experts, especially medical experts. Instead of giving a solid opinion, the expert will simply speculate. He won't say your client is a faker. He'll reference certain issues or tests that imply the client may be a faker or could lead to that conclusion. Speculation is always dangerous. It's like a politician who won't take a stand on any issue. And, when it comes

to trials, this is very dangerous for plaintiffs. When the issues are grey, it is very easy for the jury to do nothing. Clear and contrasting stories that provide a choice are much better.

Let me go back to the construction site fall case I discussed earlier. In that case, I wanted to show that the defendant had violated clear and simple rules that required it to plan for site safety. To rebut my claim, the defense hired a safety expert with extensive credentials. He had a long and successful work history in the field of construction safety. I found nothing in my research of his past that I could attack.

In addition, the defendant's expert had a great speaking voice and accent. He had been born of British parents in colonial Africa. He had moved to the southern U.S. after college. He had this great accent that was a combination of the two areas where he had spent his life. Moreover, he presented himself as a teacher rather than a boring lecturer or technical person. I liked him. I knew the jury would like him.

When I deposed the expert, he testified concerning the defendant's actions and how they met the appropriate standards established by the rules. In the deposition, I did get him to talk extensively about the potential harms from the equipment and building processes at issue. My initial thought was that I would get nowhere if I argued or debated with him on the rules or standard of care at trial. Instead, I had planned to use him to talk about the huge harms that could result. However, in deposition, I could tell by the way he prefaced many of his responses that he did not really feel comfortable with the defendant's conduct. He set a low bar for what constituted acceptable safety so that the defendant's conduct in that grey zone was acceptable. He clearly would have acted much better had he been in charge on this particular site.

At trial, I asked my co-counsel to cross-examine him. I told her to just ask him if he would have done it better had he been in charge. What followed was something like this:

Q: Mr. Expert, we've listened to your testimony and I'll try to be brief. You were asked by the defendants to come to court and help them avoid liability for this injury. But, you will agree with me that safety is important on construction sites?

A: Yes.

Q: And you'll agree with me that when you are in charge, like this defendant, you have to plan to do the work safely so that workers are not injured?

A: Yes.

Q: And you've been in charge of sites over the years, haven't you?

A: Yes.

Q: And, knowing the importance of safety, you would have done better had you been in charge on this site, wouldn't you?

A: Yes.

The expert agreed. Now, let me say again that I had prepared some additional examination designed to elicit testimony concerning the devastating harms and injuries that can result from the particular equipment and processes on this site, just in case. When the expert actually admitted to my co-counsel that he would have done better, I could hear a couple jurors snicker to themselves.

Experts will speculate. In an effort to defend the people who hired them, they will live in the grey areas of opinion. This is especially true with medical experts who will frequently speculate concerning issues of causation and malingering.

How many times have you faced a medical expert who testified to some general proposition of malingering? Maybe the expert testified that litigants generally are more likely to malingering; that the plaintiff could be motivated by secondary gain; that some validity tests were inconclusive, etc.. It's pretty easy for an expert to make guesses as to validity. Those guesses unfairly sow the seeds of doubt into the trial. I believe you should call that bluff. If the expert does not have the evidence to reach an actual conclusion of malingering and is unwilling to put himself out on that limb, then you will elicit testimony that is favorable to your position. You will eliminate speculation that can destroy your case. If the expert does move forward and reach a conclusion that is negative to your client, then you are still better off than you would be with grey speculation. You can now give the jury a real choice and not the easy out taken by the expert of saying we're just not sure who is right here.

You can frequently use scientific methods to call the expert's bluff. Again consider the medical expert who speculates as to some negative condition. If faced with such speculation, question whether he/she has followed proper methodology in ruling in or out the possible diagnoses. In many cases where the expert is speculating as to issues, you can use the appropriate scientific methods against them. In the end, they have to take a position favorable to you or lose credibility when they choose otherwise.

3. PUSH THE EXPERT TO THE EXTREME

Have you ever had a case where the opposition's expert took a position that he would never take outside the case? I have seen this plenty of times.

This concept is very similar to calling the expert's bluff. The bluff provided by many experts is a speculative opinion that does not actually make a negative conclusion but simply hints that the bad conclusion could be true. Don't let the expert play the safe middle ground. Many experts want to give speculative opinions but will not provide a firm answer when you call their bluff. However, if the expert does assume the far-fetched conclusion, then you can consider pushing their opinions even more to the extreme.

Many attorneys fear the negative opinions of experts. They simply don't want to hear them. I say that sometimes you can push the opinions to such a negative extreme that they will be easy to rebut at trial.

This is a technique I have employed on occasions, particularly with expert medical opinions. A number of years ago, I had a workers' compensation client who suffered a devastating lower back injury. Eventually, he underwent lumbar surgery for his injury. When he still did not improve, he finally had a permanent pain pump installed. Both the back surgeon and the pain management specialist who treated my client had provided very favorable opinions as to causation and the impact of his injury.

However, the company had sent my client to its then general physician the day after his injury. This company doctor concluded after a one-time, 10-minute visit, that my client was a malingerer and out for secondary gain. That company doctor did not take a history of my client. Yet, he also concluded in his report that the client had a "history" of

“delayed healing” simply because the client had suffered a prior back injury.

Additionally, the doctor did not follow my client’s progress after that one visit. He had no knowledge of the later examinations or treatment from the surgeon or pain specialist. He really had no knowledge of the client at all. It was outrageous that he would reach such opinions. I honestly did not believe he would be adamant about these conclusions in his deposition. But, when the defense attorney took his deposition and asked the questions on direct examination, the doctor was “certain” that my client was a malingerer who was out for secondary gain. He was also “certain” that he had a past of trying to delay his own healing for gain based on the single 10-minute examination.

So, I guided the doctor into making his opinions as extreme as possible. We talked about the meaning of “delayed healing” and how it would have clearly manifested itself in the past (and how my client would have had this bad past). We talked about how a patient who was a malingerer would have failed to progress and all the bad things he would expect. We talked about how this patient faked everything, including any past injuries as well as the current injury. We talked about “secondary gain” and the doctor’s absolute conviction that the patient stood to gain from the injury and planned to do so. As the doctor spoke, he grew more certain and more extreme in his positions. I revealed none of the true facts while pushing him into this extreme position.

What the “company” doctor did not know is the truth about my client’s prior back injury. My client had returned so quickly to his full duties at work following the earlier injury, that the company gave him an actual award. He did not know that the doctor who actually treated him for the prior injury wrote into the records how impressed he was with the client’s desire and motivation to recover. He did not know that my client had near perfect attendance at work for years after returning from his prior injury.

Similarly, the “company” doctor did not know that the surgeon and pain doctor treating my client for the current injury had conducted multiple validity tests on my client. They all showed he was severely and validly hurt. The doctor did not know that the surgical report and radiographic studies showed a very real and very severe injury. He did not know that the client had to receive counseling for depression after being informed

there would be no way to return to the job he loved. The company doctor had taken an extreme position far different than the real facts I could prove.

Separate from the client's actual medical condition, the doctor had taken an extreme position on secondary gain. So, I spent considerable time asking him to identify the patient's actual losses and actual gains from his injury, regardless of whether the injury was real or faked. Unfortunately for the doctor, when he took his position, he really did not know what gains or losses existed. I suspected that he did not know the true gains and losses. Because of that, I brought my workers' compensation formulas and we calculated together the gains in benefits versus the losses from not returning to work.

Another example involves a case several years ago in south Alabama where a boiler at a mill exploded, exposing our client to a dangerous gas. The client suffered devastating lung damage, which diminished his capacity to function in all aspects of life. However, in interviewing the client on several different occasions, we also suspected that the problems with oxygen deprivation may have resulted in brain damage. We had him examined and tested by a medical doctor and then a neuropsychologist who both concluded that he had suffered such injury. The defense successfully moved the court to order the client to submit to their neuropsychologist for testing as well. Their expert conducted testing and then speculated in his report that the client's score on one test scale could be indicative of a pre-existing mental problem like schizophrenia instead of brain damage from trauma.

The particular test scale cited by the defense expert can be indicative of several different conditions, including certain pre-existing mental illnesses or a brain injury like we alleged. We do not believe that scale was intended to be used in isolation. When we prepared for the deposition, we were not sure whether the neuropsychologist was claiming that our client actually had a pre-existing mental condition or was simply sowing some seeds of doubt by speculating. Was he just speculating? His report was unclear. We called his bluff. When we did, the expert would not take the extreme opinion of alleging a prior mental illness, like schizophrenia. If he had, we were prepared to push his opinion to the extreme with questions concerning all the impacts this condition would

have had on the client throughout his life. We would have forced the expert to take extreme positions concerning the client which we could have then shown at trial to have been contrary to the evidence.

A final example of pushing an expert to the extreme occurred in a nursing home trial that I watched a few years ago. The case involved an elderly patient who was attacked by fire ants in the nursing home. The defense expert tried to justify the existence of some fire ants in the nursing home as well as the defendant's efforts to repel them prior to the attack. In doing so, the defense expert took the position that a certain level of pests in a nursing facility was both acceptable and expected. This was contrary to the regulations that require nursing homes to be free of all pests and rodents. I wish that I had kept a transcript of this examination. This witness was systematically forced by plaintiff's counsel into an extreme position of trying to justify his opinion that some level of pests would be allowed to exist in the facility. I watched and listened (and cringed along with the jurors) as the witness, in order to defend his initial opinions, had to testify that it was acceptable for rats, roaches, fleas, ants, various bugs, and a whole host of other creatures to be present around helpless, elderly patients (in their rooms, the nursing home pantries, etc.).

4. GET THE EXPERT TO AGREE OR DISAGREE WITH YOUR RULES

I am a big proponent of simple rules. Most of us clearly understand the simple rules that apply to our everyday actions. We also understand that rules serve a purpose and that damage can result when they are broken. That's easy. I usually discuss the rules, early and often, as I prepare the case and conduct the trial.

Does the defendant's expert agree with the rules? That's an important question. In many cases, the competing experts give long and confusing opinions that are never tested. These offsetting experts can lead to even greater confusion among the jurors. To simplify matters in many cases, you may want to first find out whether the opposing experts agree with your rules. If you have chosen your rules well, the answer to these questions should not be in doubt among reasonable people.

If the opposing experts do agree with the rules, then you can go to trial on the facts and performance at issue. You can compare the facts to the agreed-upon standard and present a clear picture for trial. Your job just became easier.

If, however, the witness does not agree with your simple rules, then you have a real opportunity to test the witness. What rules does the witness propose? Is his position one that simply seeks to justify the client's conduct contrary to established regulations (like the nursing home case discussed previously) or one that places people in danger? Does his position on the rules actually negate the client's duties? From what source does he get his rules? Is his position extreme? If you have chosen clear, simple, and well-accepted rules, then it can be very fun to have an opposing expert take a contrary position as to what the rules actually are.

5. COMPARE AND CONTRAST THE STORY

Presumably, you have fully investigated the facts of your client's story and prepared the necessary witnesses prior to trial. In the mill case mentioned earlier where our client was suffering lung and brain damage, we had excellent witnesses who were prepared to discuss his mental abilities prior to the event. Our client's mother was a school principal. His wife was a medical professional. Both knew his pre-injury abilities well. Both knew that he had never exhibited any sign of mental illness prior to his injury as the defense expert's opinion implied. Our client was a straight "A" student in school and a skilled boilermaker who had excelled in his apprenticeship. In short, we had excellent lay witnesses and excellent facts. We were prepared to contrast the defense expert's speculation concerning prior mental problems with the truth concerning his previous condition.

Do the facts of your case paint a picture different than the one presented by the opposing expert? In many cases, you can easily compare and contrast the erroneous opinions of the opposing expert to the actual facts of the case. Consider a defense medical expert who asserts your client is malingering. Often, the actual records of the physical therapist will show considerable effort on the client's part to improve. Likewise, you

might have testimony from his/her employer that the person quickly returned to work or made good efforts to do so. Pointing out these facts establishes a clear contrast between your story and a paid expert short on the facts. The flip side of this is also true for the defense where the hired expert is trying to establish a case for the plaintiff despite other evidence that does indicate malingering.

In cases involving safety issues, you can often paint a vivid contrast between the stories at issue. In many of these cases, the defense expert is forced to take a position that justifies a level of conduct not truly safe. (See, the construction fall case and nursing home case previously discussed). Those opinions would allow an unacceptable level of danger and injury. Use your facts to compare the two stories and contrast the differences in outcome between them.

6. UNDERMINE THE EXPERT'S METHODOLOGY

In many cases, the questioning attorney skips the methodology and goes straight to the ultimate opinions of the expert. What results is often an argument between attorney and opposing expert over opinion. In skipping to the end, the attorney may ignore glaring flaws in methodology.

To question methodology, you must first understand your case. You must prepare, research the issues, and engage your own experts. Unless you have some understanding of the procedures, tests, and methods yourself, a skilled expert will talk circles around you.

If you don't believe me, just go watch a simple workers' compensation trial with competing vocational experts. Most vocational experts utilize computer programs that require them to input very generalized information. The program then spits out labor market loss numbers. If the expert only relies on the computer, then their methodology is largely flawed because it often does not consider important physical limitations or cognitive abilities. It has been my experience that many vocational experts do simply rely on their computer. Yet, the opposing attorney will rarely question their methodology at trial.

How do you reveal the flaws in this methodology and get to the correct analysis? You won't without preparation. In the case of the vocational expert you must have some understanding of the labor market and the impact of restrictions upon job access. It also helps to understand the programs utilized by many of these experts.

The great thing about the practice of the law is that it truly is a field where you are always learning something new. When I handle an important case, I set out to learn the technical field in which the events occurred. This requires time and study. However, it is much more rewarding when you can grasp the methodology that goes into an expert's opinions.

If you know that you can undermine the opposing expert's methodology at trial, then you may also want to consider an examination approach that first has the opposing expert affirm the ethics and integrity of their methodology. Consider getting him to affirm that his methodology underpins all the opinions. Have him bolster the importance of methodology. This approach works even better if you nudge the expert to the point of being upset that you might be questioning the integrity of their methods.

7. EXPOSE THE BIAS OF THE EXPERT

Bias is an obvious issue to explore with the opposing expert. However, attorneys frequently frame bias solely as an issue of how often the expert works for one side as opposed to the other, or how often the witness has been hired by a particular lawyer, or by how much money the witness is making on the case. Those are all important questions to ask the witness when you depose him. The answers may present testimony that is useful.

Yet, bias can be much broader than which lawyer the witness knows and how much this one case pays. Bias is much more complex and nuanced.

What job does the witness understand he was hired to complete? The witness could be biased simply due to the terms of his engagement. I once faced a vocational expert that the defense initially claimed to have retained for purposes of helping my client return to work. The defendant claimed that their expert found 25 legitimate jobs for my

client. The defendant presented a form for each possible job which had the potential employer's name and other information neatly typed on it.

It turned out that this particular "expert" had been in business for many years representing to workers' compensation carriers that he would help them lower the value of their claims. He did not represent himself to be any type of employment service. He had zero knowledge of any worker (in all those years) successfully obtaining or performing any of these so-called jobs. He had never even followed-up in the past to see if any jobs were legitimate (that's because they were not). He simply provided forms indicating available jobs solely for claim and trial purposes. He advertised his business solely to workers' compensation carriers for that purpose. During discovery, we obtained information revealing that the carrier really did not care if my client actually returned to work. Instead, the carrier hired this expert solely for purposes of preparing a defense. Was the expert biased? The scope of his actual work would indicate so. Clearly, he had been hired simply to generate job forms instead of actually helping my client return to work.

Experts can be just as biased in their opinions as potential jurors. A medical expert who does not believe someone can develop carpal tunnel syndrome from repetitive motion is not going to suddenly agree to causation in your case alleging carpal tunnel from typing all day. That expert is inherently biased by their pre-existing opinions (whether or not those opinions are correct or justified). It is not a bias unique to your client but it is still a bias. So, you have to explore the past of the witness as well.

I could spend much more time discussing expert witnesses and never even scratch the surface. While there are many approaches to cross-examining an opposing expert, there is no substitute for the fundamentals. Those fundamentals involve preparation, preparation, and more preparation for the unique facts of each case.