Basics Of Civil Practice And Procedure

Submitted by William M. Quin II

III. BASICS OF CIVIL PRACTICE AND PROCEDURE

A. ASSESSMENT OF PARTICULAR CASE TYPES – INTERVIEWS AND INVESTIGATION

This portion of the materials is devoted case assessment and investigation, and provides considerations which should apply in a variety of cases.

1. Who is the Plaintiff?

Screening and selection of a new case cannot be adequately performed without conducting an in-depth interview of the potential plaintiff and family members and others who are crucial to a successful resolution. The following are some issues which should be covered:

a. History of Prior Lawsuits

You must inquire in your intake interview whether your potential client has been a plaintiff in prior lawsuits, and investigate the facts and circumstances surrounding each prior lawsuit in order to determine whether some or all of the injuries suffered by your client were the subject of previous claims. It is often the case that allegations made as to prior claims were so general as to potentially encompass some of the same injuries your potential client contends arose from the current incident.

b. Detailed Health History

Obtaining medical records can be extremely costly. I recommend dealing with this issue on a cost/benefit analysis. If I am considering a case and gain information that the client has alleged the same or similar injuries in previous litigation, I always have *the client* obtain those records. I do not usually have the client obtain records concerning health problems not related to the injuries at issue in the potential litigation, except:

- If the potential client was partially or totally disabled prior to the incident in question, I ask the client to obtain the medical records associated with the claimed disability, including workers' compensation documents, social security disability records and any depositions or other sworn testimony.

- If the potential client had an underlying medical condition prior to the incident I am evaluating which arguably limited his or her work and/or life expectancy, it is important to obtain these records in order to evaluate whether the damages you can claim as a result of this limitation justifies bringing the action.
- If the potential case you are evaluating involves a decedent, I like to obtain a summary of the health history of the survivors who will recover if the lawsuit is successful. This issue is particularly important when representing the elderly in situations where the surviving spouse may not be in good health and unavailable for trial, which can have a substantial impact on damages.

c. Family Support

Rarely do I accept a case without interviewing key family members who would likely be potential witnesses. I want to know whether there are family members or friends who can verify the recollection of the potential client. If what occurred at a medical appointment is crucial to the success of the case, then I recommend that you absolutely interview all persons who accompanied the potential plaintiff to the visit, including those with whom the potential plaintiff may have spoke shortly after the visit.

d. Why are you here?

I always try to ask the potential client why he or she is considering hiring an attorney. The answer may be obvious in some situations, but in others the answer is less obvious. You may learn that the client was told by a subsequent medical provider that the former provider committed malpractice. You may learn that family members in the medical field have an opinion with respect to medical care provided. The potential information you may gain from this question is wide and varied, and in many cases may not otherwise come to light until much later in the case.

e. Provide Informed Consent

Most potential clients have never filed a lawsuit and have little to no exposure the legal system beyond what they have seen on television and read in the newspapers. How many of us have heard this phrase uttered from a potential client: "I'm not the suing type of person, but …."

I find that if you take the time to explain to the client the time parameters of a lawsuit (can take 18 months to 2 years even in federal cases) and provide a rough outline of the life of a lawsuit (complaint, answer, discovery, motion practice and time delays associated with each), you can go a long way toward insulating yourself from unfair criticism down the road.

f. How much is my case worth?

The question that most clients seem to think is easily answered is many times the most difficult to answer. Most clients ask this question; and when a potential client does not ask this question, I bring the issue up and use the opportunity to explain all of the factors and unknowns that come into play. I discuss the elements of damage, issues of credibility, non-economic damage caps (and the likelihood at that time that the case is a "cap case") and medical issues that seem apparent at the time.

g. Avoid Overestimating/Underestimating the Injury

It is extremely important for the potential client to understand that the jury's evaluation of the level of injury is normally influenced by the degree to which the potential client has recovered from his injuries. In fact, in many cases, the level of injury is normally influenced by the degree to which the potential client *appears to have recovered* from his injury. The latter is particularly important to consider and address in traumatic brain injury cases, and other cases in which the injuries are not readily apparent.

When addressing this issue, I find that two pieces of advice are extremely important:

1. Always follow the advice of your doctors. If they say you should attempt a return to work, then attempt a return to work. The client should know that you are rooting for them to get better far more than you are rooting for increased medical expense recovery in their suit.
2. Do not do anything that may make you appear less injured than you are. For example, if a potential client is claiming psychological damage, he or she should avoid going to bars or parties which could give the impression that they are not being honest. Also, an absolute line I have learned to draw in the sand is this: Stay away from Facebook, MySpace and other social media. If they have an account, delete it.

2. What are the Facts?

At a certain level, we are all investors. We invest significant sums of money and amounts of time into this thing; and, we leverage our assessment of a case and our ability as trial lawyers to obtain a significant return on our money. Who among would ever undertake such an investment without obtaining as much information as we can about our investment? Who would invest in a stock or a bond or a piece of real estate without doing the same? There is no substitute for investigating the facts.

In the age of tort reform, the one advantage that remains in our favor as plaintiff attorneys is that we can know and build our case thoroughly in advance of litigation. In many, but not all instances, we can interview witnesses and obtain signed statements, explore theories of liability, consult experts and plot a litigation strategy all in advance of filing suit. This is an opportunity we should not squander.

a. Personal Interview of Witnesses

In many cases we consider, the initial documentation we obtain includes a police report or private investigator narrative from potential witnesses. Do not make the mistake of relying solely on the narratives of others. Credibility is often the turning point in litigation; and, if I am investing my money, I want to be the one who makes the final call on a witness' credibility. Moreover, the relationship you may forge with the potential witnesses by personal interviews may pay significant dividends down the road.

b. Consult an Expert

Consulting an expert in early stages of case evaluation, in my experience, is extremely important in certain auto accident cases, product liability cases and certainly medical malpractice actions. I firmly believe that it is much better to spend money on an expert early and learn that you have no case, than to wait until you have spent much more down the road.

c. Don't forget OSHA and the Workers' Compensation Carrier

When an accident has occurred in a workplace setting, there is typically an OSHA file and the workers' compensation carrier may have performed an investigation. The content of these files will in many instances be made available to you and can prove invaluable in narrowing the issues and important witnesses.

3. Venue

Serious consideration of the appropriate venue to file suit, when options exist, must be at the forefront of the mind of every plaintiff's attorney. Issues such as jury venire, how quickly a trial can be had, the potential judges and magistrates and simple home-town politics must be given strong consideration. Do not always believe that state court is the best venue. Many times the speediness of a federal case and other factors can dictate that federal court is a better option, despite (and in some cases because of) the necessity of a unanimous verdict.

B. The Discovery Process

I am a big believer in Rick Friedman's methods outlined in *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability*[39] and *Polarizing the Case: Exposing & Defeating the Malingering Myth.*[40] In my own practice, I also rely at times on *Full Disclosure: Combating Stonewalling and Other Discovery Abuses.*[41] I recommend each of these books to you, and suggest that you keep them within an arm's reach to assist you in your day-to-day practice. I rely heavily on these materials in my discussion of the discovery process.

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[39] Friedman, Rick, and Malone, Patrick, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability*, 2nd Printing (Trial Guides, 2007) (referred to hereinafter as "Rules" for brevity).
[40] Friedman, Rick, *Polarizing the Case: Exposing & Defeating the Malingering Myth* (Trial Guides, 2007).
[41] Hare, Jr., Francis and Gilbert, James and Ollanik, Stuart, *Full Disclosure: Combatting Stonewalling and Other Discovery Abuses*, 2nd Printing (ATLA Press, 1995).

1. Written Discovery

The general negligence duty is to do what a reasonable and prudent person would do under the same circumstances that are present in your case.[42] One the most significant challenges we face is giving life to these vague terms – "reasonable" and "prudent." It is our job to establish for the jury in a personal injury action that "reasonable" refers to "established standards or rules," and we must then provide content for these rules.[43] Written discovery is an opportunity for you to accomplish this task.

You should look for four things: 1) Rules to add to your list; 2) Support for Rules you have already drafted; 3) Clear agreement or disagreement from defense witnesses regarding your Rules; and, 4) Violations of any Rules.[44]

a. Requests for Production

Rules can be found in policy and procedure manuals, training materials, personnel policies and other internal company documents that describe how the company should conduct its business. Also consider contracts with third parties which might describe certain standards that should be met by the contracting parties.

b. Interrogatories/ Requests for Admission

It is my experience that interrogatories seldom reap valuable information. For this reason, I tend to use interrogatories to gather very basic information: Who are the individuals that may possess discoverable information? What are the documents that may contain discoverable information?

An exception to my general experience is in circumstances which lend themselves to the mixed use of requests for admission which are then followed by a pointed interrogatory which calls

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[42] Weems & Weems, *Mississippi Law of Torts*, § 3-2.
[43] *Rules*, ppgs. 8-9.
[44] *Id.* at 73.

for a full explanation of the denial. This tactic can work particularly well when malingering or extent of injury is an issue in the case. In these sorts of cases, I recommend sending the medical records along with your requests for admissions/interrogatories and ask pointed questions are calculated to show: 1) the plaintiff reported symptoms or medical conditions, 2) she was actually experiencing these symptoms or conditions, 3) the doctor made a specific diagnosis that was based on the plaintiff's complaints (and, objective evidence such as diagnostic imaging if applicable),[45] and 4) the doctor's diagnosis was correct.

The goal of these sorts of interrogatories/requests for admission is force the defendant to make a choice: Either admit the plaintiff is experience what she says she is experiencing, or call her a liar. Once the defendant is pegged as calling the plaintiff a liar, you have polarized the case and hopefully pushed the defendant into an extreme position. The more extreme the position, the better for your case. With your lay witnesses to talk about the plaintiff's character and the effects of her injuries on her life, you should be able to defeat the malingering defense.

Requests for admissions can also be used to support the rules you are attempting to establish in your case. For example, many companies have detailed, written company policies which set forth standards that employees are expected to follow. Consider sending detailed requests for production which simply ask the defendant to admit that its policies are reasonable and that the defendant expects its employees to follow its policies. This places the defendant in the position of either attacking its own standards (which substantially harms its credibility) or admitting fault. Once again, the goal is always seek clarity between their case and yours.

[45] In those cases lacking diagnostic imaging, you may want to follow up with even more pointed requests for admissions/interrogatories such as, "Please admit a person's neck can be injured, without the injury showing up on objective medical tests or findings."

2. Informal Discovery, Including Public Sources of Information

The Freedom of Information Act (FOIA), [46] which was enacted in 1966 with the goal of "pierce[ing] the veil of administrative secrecy and open[ing] agency action to the light of public scrutiny,"[47] has evolved into a powerful tool used by private civil litigants to supplement discovery in litigation.

Although some courts have looked askance at the use of FOIA to supplement or duplicate discovery,[48] there is nothing in the statute that prohibits the practice.[49] Indeed, records submitted to or generated by the Food and Drug Administration (FDA) have become key documentary evidence in litigation surrounding FDA-regulated companies and products, such as product liability and personal injury litigation.[50] The same can be said for documents generated by the Occupational Safety and Health Administration. (OSHA).[51]

These documents can be used to demonstrate prior notice or knowledge, causation, and failure to meet an industry standard on the part of private companies or individuals. Often these documents are obtained through requests made by private parties to an administrative agency under FOIAQ either before or during the course of litigation. We will briefly explore FOIA and its limitations.

a. FOIA and Amendments

FOIA is best known for its mandate that federal agencies disclose "reasonably described records" upon request by private individuals. Litigants can use FOIA to gain access to records

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[46] Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified at 5 U.S.C. § 552).
[47] *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).
[48] See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975); *U.S. v. Weber Aircraft*, 456 U.S. 792, 801 (1984).
[49] See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n.23 (1978) ("This is not to suggest that respondent's rights are in any way diminished by its being a private litigant, but neither are they enhanced by respondent's particular litigation-generated need for these materials.").
[50] See, e.g., *Anderon v. Dep't of Health & Human Servs.*, 907 F.2d 936, 941 (10th Cir. 1990); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, MDL No. 1203, 2000 WL 1545028 (E.D. Pa. Oct. 12, 2000).
[51] Such was the author's own experience in the recently settled cases of *Townsend, et al. v. International Paper Co., et al.* and *Yellott, et al. v. International Paper Co., et al.*, Civil Action Nos. 5:08-cv-220 and 5:08-cv-265 (S.D. Miss. 2009).

submitted to administrative agencies by the opposing party and records generated by administrative agencies in their review or investigation of the opposing party or its products.

Moreover, the passage of the Electronic Freedom of Information Act (E-FOIA) in 1996[52] required agencies to proactively make available, via "electronic reading rooms," a significant amount of information, including opinions, policy statements, other records routinely disclosed to the public, as well as responses to FOIA request that the agency believes will become subject to additional FOIA requests.[53] All of this information is available to anyone, without filing a FOIA request. A perusal of FDA's "electronic reading room" on its website reveals many useful documents focused on specific FDA-regulated companies and products, such as select establishment inspection reports, warning letters, and drug approval information.[54]

FOIA is not unlimited. Administrative agencies are not required to create new records in order to provide a response to a FOIA request, nor does FOIA require administrative agency employees to provide testimony in litigation.[55] Most importantly, disclosure is limited by nine exemptions which protect much of the information submitted by industry to governmental agencies, as well as documents generated by administrative agency employees in the course of their review of these submissions and/or during investigation and enforcement actions. Of particular relevance in many litigated matters are the records withheld under:

- Exemption 4, which protects from disclosure "trade secrets and confidential commercial or financial information;"
- Exemption 5, which protects from disclosure inter- or intra-agency memoranda and letters that would be privileged in litigation;

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[52] Pub. L. No. 104-231, 100 Stat. 3048 (1996).
[53] 5 U.S.C. § 552(a)(2).
[54] See, FDA, Index of Categories of Documents, Electronic Reading Room, available at http://www.fda.gov/foi/electrr.htm.
[55] 21 C.F.R. §20.1; *Giza v. Sec. of Health, Educ. & Welfare*, 628 F.2d 748 (1st Cir. 1980).

- Exemption 6, which protects from disclosure information the disclosure of which would cause a clearly unwarranted invasion of personal privacy; and,
- Exemption 7, which protects from disclosure certain records compiled for law enforcement purposes.[56]

It is important to remember that while FOIA provides only for the *discretionary* withholding of the documents that fall under these and other exemptions, many administrative agencies, such as the FDA, have their own regulations which affirmatively prohibit the disclosure of certain information that may fall within these exemptions. For instance, the FDA has regulations which prohibit the disclosure of confidential commercial information and trade secrets under Exemption 4, as well as information that, if disclosed, would cause clearly unwarranted invasion of personal privacy under Exemption 6.[57] Further, FDA regulations set forth various categories of documents that the agency routinely withholds under these exemptions, as well as categories of documents it routinely discloses.[58]

b. Timing Considerations

Private litigants (or potential litigants) choosing to file FOIA requests to supplement discovery efforts should carefully consider when they are likely to receive a response to their requests. The timing of FDA's responses to FOIA requests can work to their advantage and, in some significant ways, to their disadvantage.

One of the key advantages to obtaining information from FDA through a FOIA request, in lieu of using discovery or a subpoena, is that a potential plaintiff can use the information obtained through FOIA, prior to filing a claim and commencing discovery, to help define or build its case.

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[56] 5 U.S.C. §§ 552(b)(4), (5), (6) and (7).
[57] 21 C.F.R. § 20.61 (c) (trade secrets and commercial or financial information which is privileged or confidential are not available for public disclosure); 21 C.F.R. §20.63 (personnel, medical or similar files, disclosure of which constitutes a clearly unwarranted invasion of personal privacy shall be withheld).
[58] 21 C.F.R. § 20.100 (cross-referencing FDA regulations governing the withholding of information submitted to the agency).

Correspondingly, although a defendant can determine whether a plaintiff has obtained information under FOIA through the discovery process after litigation has commenced,[59] it may be to the company's advantage to try to anticipate lawsuits based on information obtained through its own FOIA requests and any predisclosure notifications received from the agency, under the procedures as outlines above.

However, one of the most limiting factors in using FOIA to obtain information to support litigation claims is the amount of time it can take to receive a complete response to a request. The statute and FDA regulations provide that the agency must respond within 20 business days of receipt of the request, and produce the requested documents within a reasonable time thereafter.[60] However, this time frame is largely theoretical. FDA has a significant backlog of FOIA requests[61] and handles each request, unless it qualifies for expedited treatment, on a "first in first out basis".[62] It is not uncommon for a FOIA requester to wait well over a year to receive documents, at which pint the information they contain may no longer be relevant. Further, if a legal challenge is filed over FDA's failure to produce documents in accordance with the statutory time limit, FDA may obtain a stay of proceedings if the agency is able to demonstrate that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request".[63] As such, the use of FOIA to obtain large amounts of documents to prepare for, or to supplement, discovery not only often fails to provide private litigants with the access they desire in a timely manner, but also seriously undermines the underlying purpose of FOIA, which is to open agency action to public scrutiny.

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[59] *See* note 12, *supra*.
[60] 5 U.S.C. § 552(a)(6)(A)(i); 21 C.F.R. § 20.41.
[61] In 2005, while the median time for responding to a "simple" FOIA request was 26 days, it took FDA a median of 390 days to respond to a "complex" FOIA request. FDA, Annual Freedom of Information Act (FOIA) Report Fiscal Year (FY) 2005, *available* at http://www.fda.gov/foi/annual2005.html (last visited Sept. 1, 2006).
[62] 21 C.F.R. § 20.43(d).
[63] 5 U.S.C. § 552(a)(6)(C)(i)-(iii).

Although requests for documents under FOIA and through subpoenas are subject to the same procedural requirements and standards for disclosure,[64] they are not necessarily subject to the same time limitations. At least one court has recently ordered FDA to place a request for documents under a subpoena *duces tecum* ahead of the queue of requests made under FOIA.[65] Furthermore, while a court may stay private litigation to allow for discovery to occur, it is unlikely to do the same pending resolution of a separate lawsuit concerning the resolution of a FOIA request.

c. Additional Considerations

Although there is a close correlation between the exemptions under FOIA and those under the rules of discovery, the two standards are not identical.[66] This is something that should be considered by a private litigant in deciding which method to use in obtaining information submitted to FDA. Depending on a litigant's intentions, another advantage of requesting documents under FOIA is that once they are disclosed by the agency, a litigant can use them in any way her or she sees fit. In contrast, if the same documents are through discovery, they might be subject to a protective order that prohibits their use outside of litigation.[67] In addition, unlike the rules of discovery, FOIA does not require consideration of relevancy or materiality;[68] the requestor's purpose for the information is irrelevant.[69] Moreover, because FDA is not subject to the authority of

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[64] 21 C.F.R. § 20.2(a). *See also* Center for Drug Evaluation and Research (CDER). Manual of Policies and Procedures 4170.2, Submitting Non-FOIA Requests for Document Collection and Redaction to CDER's Division of Information Disclosure Policy (May 9, 2002), available at http://www.fda.gov/cder/mapp/4170.2.PDF (last visited Sept. 1, 2006)(non-FOIA requests are handled by same office that processes FOIA requests for CDER, and subject to the same procedures and standards established under 21 C.F.R. Part 20).

[65] In re Subpoenas in *Securities & Exchange Comm'n v. Selden*, 2006 WL 2374796, *3 n.7, No. 05-0476 (RMU) (D.D.C. Aug. 16, 2006).

[66] *See, e.g.*, *Jupiter Painting Contracting Co., Inc. v. U.S.*, 87 F.R.D. 593, 597 (D.C. Pa. 1980).

[67] *See, e.g.*, *Anderson v. Department of Health & Human Servs.*, 907 F.2d 936, 941 (10th Cir. 1990) (plaintiff filed FOIA request for documents she had already received under discovery that were subject to a protective order, in order to be able to make the documents publicly available and thereby alert the public to the dangers of silicone injections).

[68] FED. R. CIV. PRO. 26(b)(1).

[69] *See e.g.*, *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (as a general matter, an individual's reason for making a request under FOIA is irrelevant in determining whether disclosure of the requested records is appropriate.) *See also* 21 C.F.R. § 20.2(c).

subpoena or discovery order by a state court, FOIA may be the only means for plaintiffs in state court to obtain access to the documents.[70]

Once a document is released under FOIA, it is arguably not privileged, and may be obtained through discovery.[71] In contrast, FOIA cannot be used to obtain information that is otherwise privileged.[72] In addition, some information not available under FOIA may be available, subject to a protective order, from a private litigant.

Plaintiffs (and potential plaintiffs) may routinely request the following types of documents, for example, in preparation for litigation or to supplement their discovery efforts:

- Postmarking safety data collected by FDA through the submission of MedWatch forms (FDA Form 3500), including forms submitted by the manufacturer and those submitted by healthcare providers and patients.[73]
- Establishment inspection reports (EIRs).
- Correspondence between the company and FDA on specific issues.
- Investigational product and marketing application submissions.[74]
- Evidence of FDA's internal dialogue related to such documents, such as reviews related to a drug's approval.

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[70] *See generally* David P. Graham & Jacqueline M. Moen, *Discovery of Regulatory Information for use in Private Products Liability Litigation: Getting Past the Road Blocks*, 27 WM. MITCHELL L. REV. 653, 663 (2000).
[71] *See* Jupiter Painting, 87 F.R.D. at 597.
[72] *U.S. v. Weber Aircraft*, 465 U.S. 792, 801 (1984).
[73] FDA will not disclose the identity of a voluntary reporter, such as a healthcare provider or patient, identified in an adverse event report unless the individual consents to such disclosure. 21 C.F.R. § 20.63(f)(l)(i). FDA's MedWatch form, form FDA 3500, provides that the reporter's identity will be disclosed to the manufacturer unless the reporter affirmatively designates that it should not be so disclosed. *See* Instructions for Completing the MedWatch Form 3500, available at http://www.fda.gov/medwatch/REPORT/CONSUMER/INSTRUCT.HTM (last visited Aug. 31, 2006).
[74] *Anderson v. Department of Health & Human Servs.*, 907 F.2d 936 (10th Cir. 1990) (in connection with her state lawsuit, plaintiff filed a FOIA request to obtain over 16,000 pages of documents submitted by Dow, concerning liquid silicone product, as part of its IND, NDA and IDE.)

3. Taking and Defending Depositions

a. Obstructive or Difficult Lawyer

Deposition abuse is a popular topic lately because it is becoming more rampant than ever. It seems that during depositions many civil trial lawyers are anything but civil. The case law is replete with examples of "Rambo" litigation tactics during depositions.[75] Some of the more colorful examples include an attorney telling another attorney to "stick it in your ear",[76] another attorney told his opponent that he "ought to be punched in the goddamn nose"[77] and finally a Texas attorney told his counterpart that "[y]ou could gag a maggot off a meat wagon".[78] Displays like these prompted one writer to state that "[d]iscovery is the theater of incivility."[79]

There are many obstructive and abusive tactics used by obstreperous litigators. This discussion will point out the more prevalent tactics and several ways to deal with them.

i. Deposition Abuses

Speaking Objections

One commentator has recently ranked speaking objections as the number one discovery abuse.[80] These are objections that really serve no purpose other than to indicate the correct way to answer to the deponent, such as interjecting an "if you know" after a question but before the deponent can answer. The only purpose of this so-called objection is to tell the deponent that he or she should not know the answer to the question posed.

Another example is when the opposing attorney objects because he or she does not "understand the question". This is another suggestion to the witness that he or she should not

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[75] *See* A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273 fn. 484 (1998).
[76] *Mercer v. Gerry Baby Prods. Co.*, 160 F.R.D. 576, 577 (S.D. Iowa 1995).
[77] *Carroll v. Jacques*, 926 F. Supp. 1282, 1286 (E.D. Tex. 1996).
[78] *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 54 (Del. 1994).
[79] Cornelia Wallis Honchar, *'Rambo' Litigators Can Be Disarmed with Sanctions*, CHI. DAILY L. BULL., Nov. 4, 1994, at 5, available in LEXIS, Regnws Library, Ilnws File.
[80] John R. Woodward, III, *Discovery Abuse: "I know It When I See It"*, A.B.A., 26 WTR Brief 32, 33 (Winter, 1997).

understand the question either.[81] These objections serve to extend the deposition and the litigation unnecessarily, and to disrupt the flow of the examining attorney.[82] Furthermore, it is only important that the deponent understand the nature of the inquiry, the capacity of opposing counsel to grasp the question's intent is not important.

These suggestive objections violate the Federal Rules of Civil Procedure. The rules state that "[a]ny objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner."[83] The Advisory Committee Notes to Rule 30(d)(1) state the clear reasoning behind this rule: "Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond."[84] Furthermore, the Committee pointed out the type of objections that are allowed at a deposition:

> While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objections on grounds that might be immediately obviated, removed, or cured, such as to form of a question or the responsiveness of an answer.[85]

If an opposing attorney uses these antics in a deposition, the examining attorney must clearly state on the record his or her disapproval and objection to the tactics. If the antics do not cease the examining attorney may find it necessary to file a motion to compel under F.R.C.P. 37(a)(2)(B) and to seek sanctions under F.R.C.P. 37(a)(4)(A). Furthermore, "the court may…allow additional time [for the deposition] consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination".[86] Also,

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[81] Elaine McArdle, *Disarming Ram, Neutralize Abusive Deposition Objections: Get a Standing Order*, 99 LAWYERS WEEKLY USA 328, 330 (Apr. 5, 1999), interviewing Robert Sykes.
[82] *Id.*
[83] FED. R. CIV. PRO. 30(d)(1).
[84] FED. R. CIV. PRO. 30(d)(1) advisory committee's note.
[85] *Id.*
[86] FED R. CIV. PRO. 30(D)(2).

> [i]f the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any party as a result thereof.[87]

The examining attorney should make it clear that he or she will not hesitate to use these remedies if the opposing attorney does not cease the abusive tactics.

Instructions Not to Answer

One of the more common tactics is to object to a question combined with an instruction not to answer. Many attorneys who use this tactic also give a suggestive objection to guide the deponent to the correct answer.[88] These instructions not to answer are almost always inappropriate.

The Federal Rules of Civil Procedure note three situations in which a defending attorney is allowed to instruct the deponent not to answer: "A party may instruct a deponent not to answer only when necessary to preserve privilege, to enforce a limitation on evidence directed by the court, or to present a motion under [F.R.C.P. 30(d)(3)]".[89] In the reasoning for this Rule the advisory committee states "[d]irections to a deponent not to answer a question can be even more disruptive than objections."[90] The underlying goal of the discovery rules is to allow the court to get "to the truth".[91] Instructions not to answer flout the very basic ideals of discovery.

When an attorney confronts an examiner with an instruction not to answer there are several options for the examiner before filing motions to compel or motions for sanctions under F.R.C.P. 30 and 37. First, the examiner should never assume that the opposing attorney has instructed the deponent not to answer if he or she has not specifically given the direction. A defender may make a very aggressive interruption but not instruct his or her client in any way. The examiner should stay

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[87] *Id.*
[88] Dickerson, *supra* n. 1, at 345.
[89] FED. R. CIV. PRO. 30(d)(1).
[90] FED. R. CIV. PRO. 30(d)(1) advisory committee notes.
[91] *Hall v. Clifton Precision*, a Division of Litton Systems, Inc., 150 F.R.D. 525, 528 (E.D. Pa. 1993)(a copy of this opinion has been attached.)

focused on the deponent and say: "You can answer the question."[92] If the defender does instruct the deponent not to answer, the examiner should force the defender to state the basis for the instruction.[93] Another technique is to instruct the stenographer to make or index the questions. This tells the defender that the examiner intends to come back to the question.[94] If these techniques fail then the examiner may need to proceed to the court with a motion.

Breaking the Deposition to
Privately Confer with the Deponent

There are two different situations that may arise in this context. A defender or a deponent might try to break the deposition to confer with the deponent while a question is pending or while no question is pending. Many defenders take these breaks to coach the deponent on how to answer the question at hand or questions to come.

Generally, courts will not allow a private conference to be held during a deposition except to determine whether a privilege should raised.[95] In *Hall v. Clifton Precision*, Judge Gawthorp stated:

> A lawyer, of course, has the right, if not the duty, to prepare a client for a deposition. But once a deposition begins the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth. Under Rule 30(c), depositions generally are to be conducted under the same testimonial rules as are trials. During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been prepared and has taken the stand, the witness is on his or her own.[96]

Judge Gawthorp also held that a defender should not confer with the deponent during a scheduled recess.[97] Other courts have not followed his lead on this issue.[98] However, it is clear that

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[92] William J. Snipes, et al., *Taking and Defending Depositions in Commercial Cases: Successful Techniques for Dealing with the Difficult Adversary*, 19 PRAC. L. INST./N.Y. 167, 20 (on WestLaw) (June 1998).
[93] *Id.*
[94] *Id.*
[95] *See Hall*, 150 F.R.D. 525 (holding that a witness and his or her attorney should not hold private conferences during a deposition unless the conference is for the purpose of determining whether a privilege should be asserted; and holding that a witness and his or her attorney are not entitled to confer about documents shown to the witness during deposition before the witness answers questions about the documents).
[96] *Id.* at 528.
[97] *Id.*
[98] Dickerson, *supra* n. 1, at 338.

private conferences during a deposition violate the spirit of discovery rules and should not be tolerated by the examining attorney.

When confronted with a defender or deponent that wants to break the deposition in order to have a private conference, the examining attorney should object and clearly state it on the record. The examining attorney should also instruct the stenographer to record the time that the defending attorney stops the deposition and the time that it is resumed. The defending attorney should be forced to state whether a privilege will be asserted and should articulate a reason. If no privilege is asserted, the examining attorney may be able to ask questions regarding the conference. The examining attorney may always go to the court under F.R.C.P. 30 and 37 to get assistance if the private conferences get out of hand.

In order to avoid a deponent that wants to stop the deposition to discuss an unclear term or question with his or her attorney, an examining attorney should state at the beginning of the deposition that the deponent should ask him or her, the examining attorney, if the deponent is not clear on a question. An examining attorney may also want to save a tough line of questioning for after a scheduled break. It will seem awkward if the defender or deponent want to interrupt the deposition soon after the scheduled break.[99]

Other Abuses

There are many other deposition abuses that should be noted. A few examples include: producing a witness under F.R.C.P. 30(b)(6) who is unfamiliar with the facts of the claim; multiple objections to minor questions; rephrasing the examiner's question; threats to terminate the deposition unilaterally; and an examining attorney who is insulting and abusive to your client.[100]

[99] Snipes, *supra* n. 18, at 29 (on WestLaw).
[100] For a more in depth discussion of these and other deposition abuses, *see* Dickerson, *supra* n. 1; and Snipes, *supra* n. 18.

General Tips for Dealing with Deposition Abuses

An examining attorney may be able to limit the abusive antics during a deposition by following a few simple guidelines. First, the examining attorney should be cordial with the defending attorney. This may help when difficult issues are reached in a deposition. Second, the examining attorney should set out clear ground rules at the beginning of the deposition, for example: the examining attorney should state that if the deponent does not understand a question he or she should ask the examiner to clarification (previously discussed on page 6); the examiner should tell the deponent to answer verbally; and the examiner should tell the deponent to wait until each question is finished before answering.[101] Third, the examining attorney may want to videotape the deposition to help keep the antics down. Fourth and finally, some have tried getting a standing order issued from the court to layout how depositions would be handled.[102]

Abusive tactics in depositions discourage the very basis of discovery and the trial advocacy system. The first rule of Federal Civil Procedure states that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action".[103] One federal judge stated that "[t]he underlying purpose of a deposition is to find out what a witness saw, heard, or did-what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness".[104] The antics described above increase expense, prolong litigation, and prevent justice. A lawyer has the right and the duty to end these practices.

When an examining attorney becomes abusive or acts in bad faith F.R.C.P. 30(d)(3) allows the court to order the examining attorney to cease or limit the deposition. The defender may move for sanctions and expenses. FED. R. CIV. PRO. 30(d)(3).

[101] For other examples, *see* Snipes, *supra* n. 18, at 18-19 (on WestLaw).
[102] *See* McArdle, *supra* n. 7.
[103] FED. R. CIV. PRO. 1.
[104] *Hall v. Clifton Precision*, a Division of Litton Systems, Inc., 150 F.R.D. 525, 528 (E.D. Pa. 1993).

b. Taking and Defending Expert Witness Depositions in Light of *Kumho Tire*[105]

Depositions of expert witnesses always pose special problems that the attorney has to consider in preparing to either take or defend an expert deposition. In federal court, the latest case on expert testimony has brought in new considerations that must be taken into account when preparing for an expert deposition.

In *Kumho Tire Company, Ltd. ("Kumho") v. Carmichael*, a tire blew out on a minivan, driven by Patrick Carmichael, causing the van to overturn.[106] One passenger was killed while several others were severely injured.[107] Carmichael and the others filed suit against Kumho, the tire manufacturer, and based their claim, of manufacturing defect, largely on the testimony of Dennis Carlson, Jr., a tire failure expert.[108]

The District Court found Carlson's testimony inadmissible after applying the relevance and reliability test under F.R.E. 702 and the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[109] four-factor reliability test.[110] (*Daubert's* test considers (1) whether the methodology of the expert can be and has been tested, (2) whether the methodology has been subjected to peer review and publication, (3) the error rate of the method used, and (4) the general acceptance by the relevant community).[111] Carmichael appealed and the Eleventh Circuit held that *Daubert's* reliability test did not apply to Carlson's testimony since it was not scientific in nature.[112] *Kumho* was then granted certiorari to the Supreme Court.

Justice Breyer, writing for a unanimous court, held that the F.R.E. 702's relevance and reliability test applies to all expert testimony regardless of whether the testimony is scientific or

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[105] *Kumho Tire Company, Ltd. v. Carmichael*, 119 S. Ct. 1167 (1999).
[106] *Id.* at 1171.
[107] *Id.*
[108] *Id.*
[109] 113 S. Ct. 2786 (1993).
[110] *Kumho Tire*, 119 S. Ct. at 1173.
[111] *Daubert*, 113 S. Ct. at 2796-97.
[112] *Kumho Tire*, 119 S. Ct. at 1173.

technical in nature.[113] The Court suggested that the four factors of *Daubert* may not always be applicable to the reliability of an expert's testimony, such as the case where the expertise is based on experience.[114] However, the trial judge in his function as "gatekeeper" has broad latitude to decide which factors should be considered and which should not.[115] Therefore, the trial judge decides how to determine reliability, "as well as whether the testimony itself is reliable and, ultimately, admissible".[116] The trial judge's decision will only be reversed upon a showing of abuse of discretion.[117]

The judge's broad discretion in deciding the applicability of the *Daubert* reliability test means that trial lawyers must be especially prepared for expert depositions. Trial lawyers should be prepared to "argue both the satisfaction of the each *Daubert* factor, as well as its possible irrelevancy to the reliability of [his] expert's testimony".[118] In preparing for an expert deposition, the attorney must be sure to prepare his or her own experts to meet the *Daubert* four-factor reliability test and must test opposing experts on the same factors. Since, the *Daubert* factors will likely apply to all expert testimony, it may be advisable to have the expert's research "rely on relevant studies, treatises or other such documents" to increase the credibility of the expert's testimony.[119] New and untested theories will be suspect and likely will be found unreliable.[120]

After *Kumho*, it is increasingly important that an expert be able to satisfy the four factors of the *Daubert* reliability test regardless of the jurisdiction in which the case is venued. An expert may be haunted by the ghost of a careless or sloppy report prepared in a non-*Daubert/Kumho* jurisdiction, as is more likely, if the expert is surprised by an oral inquiry and subsequently responds in a manner

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[113] *Id.* at 1174.
[114] *Id.* at 1175.
[115] *Id.* at 1174-77.
[116] Mark Lewis & Mark Kitrick, *Kumho Tire Company, Ltd. v. Carmichael: Blowout From the Overinflation of Daubert*, OHIO TRIAL 29, 33 (Spring 1999).
[117] *Kumho Tire*, 119 S. Ct. at 1176.
[118] Lewis & Kitrick, *supra* n. 42, at 34.
[119] *Id.* at 35.
[120] *Id.*

which will not withstand a *Daubert*-imposed scrutiny. It is hardly believable that an expert's methodology, which did not satisfy the *Daubert* reliability test in the past, suddenly will pass muster once in a *Daubert/Kumho* jurisdiction. Mistakes and careless responses to deposition questions regarding methodology will all be brought up in the future when that expert is testifying in a federal court or in any jurisdiction that adopts the *Daubert/Kumho* analysis. Trial attorneys must take great bare to properly prepare their experts for testimony in any case in any court.

All types of expertise, whether experienced-based, engineering, accident reconstructionist, handwriting analysis, and many others, will be subject to a *Daubert* based attack.[121] Judges have so much discretion that a finding of abuse of discretion on appeal will be unlikely. Therefore, it is extremely important that the lawyer chooses his or her experts wisely and thoroughly prepares them for deposition and trial.

C. Initial Court Filings

We all know that "a civil action is commenced by filing a complaint with the court,"[122] that contains a "short and plain statement of the claim showing that the plaintiff is entitled to relief and a demand for judgment for the relief to which he deems himself entitled."[123] The purpose of Rule 8 "is to give notice, not to state facts and narrow the issues…."[124] Consequently, many of us prepare and file generalized statements of facts within our complaints and move on to discovery. There are, however, a handful of potential pitfalls to remember when filing a personal injury suit:

- **Capacity**: Injured parties sometimes lack capacity to bring a lawsuit due to infancy or infirmity. Remember these things in those instances: 1) The capacity in which one sues or is sued must be stated in one's initial pleading.[125] 2) It is not necessary at the outset of a lawsuit

[121] *Id.*
[122] Miss. R. Civ. P. 3; Fed. R. Civ. P. 3.
[123] Miss. R. Civ. P. 8(a)(1) and (2); *see also,* Fed. R. Civ. P. 8(a)(2) and (3).
[124] Miss. R. Civ. P. (8), *Comment.*
[125] Miss. R. Civ. P. 9(a); Fed. R. Civ. P. 9(a)(1).

to have a legal guardian appointed or have to conservatorship established. Suit may be filed by the adult "next friend" of the injured party.[126] The complaint should clearly set forth this capacity.

- **Special Damage**: Special damage items must be specifically stated in the complaint.[127] "In personal injury suits, the following are usually treated as matters to be specially pleaded: loss of time and earnings; impairment of future earning capacity; aggravation of the injury of a pre-existing disease; and insanity resulting from the injury."[128] If you have any question as to whether an item of damage is special or general, be safe and list the item specifically.
- **Exhibits**: A copy of any written instrument that is an exhibit to a complaint is considered a part of the complaint for all purposes.[129] Be careful to avoid nonessential exhibits. A court may strike the complaint if it has too many extraneous exhibits. The better practice is to plead the substance of the documents rather than attaching them as exhibits.[130]

D. Preparing Evidence Prior to Trial

1. Understanding the Rules of Evidence

Because it seems rather silly to engage in an esoteric discussion of the rules of evidence, I will utilize this section to provide a miniature how-to guide on the two areas of practice in which the Rules of Evidence seem to apply most predominantly: 1) motions in limine and 2) trial objections.

a. The Motion in Limine

Effective trial lawyers engage in extensive pre-trial preparation that includes anticipating their opponent's next move and preparing to counter those moves; and in many instances, even

126 Miss. R. Civ. P. (17)(c); Fed. R. Civ. P. 17.
127 Miss. R. Civ. P. 9(g).
128 Miss. R. Civ. P. 9(g), *Comment.*
129 Miss. R. Civ. P. 10(c); Fed. R. Civ. P. 10(c).
130 *Johns-Mansville Sales Corp. v. Chicago Title & Trust Co.,* 261 F.Supp. 905, 908 (N.D. Ill. 1966).

mounting preemptive strikes against their opponents. When it comes to preemptive strikes, pretrial motions are one of the most effective weapons against your opponent.

At the heart of every case, at the core of every trial, at the center of every dispute, is evidence. Trials are about evidence. Outcomes are determined by weighing the evidence that you present to the jury versus the evidence that your opponent presents to the jury. Accordingly, the goal is to provide the jury with stronger evidence to support your case than your opponent provides to support their case. Pretrial motions are one of the most effective means of bolstering the presentation of your evidence while limiting your opponent's ability to do the same.

i. Scope, Application & Authority

A motion in limine is made before trial. "In limine" literally means "at the threshold, at the very beginning, preliminarily."[131] Typically, motions in limine are made to prevent the introduction of prejudicial evidence and limit the alternatives available to your opponent. The scope of a motion in limine is often much broader. Motions in limine may be used to limit or preclude evidence, determine trial strategy, avoid delay during trial, avoid exposing the jury to objectionable evidence and introducing and educating the court to your case.

The Federal Rules of Evidence and most state codes do not specifically refer to motions in limine, but case law in virtually every jurisdiction permits the court through its inherent power to hear motions in limine and make decisions on the admissibility of evidence.[132] Authority for the court's exercise of this inherent power, however, can be gleaned from Rules 103(a), 102, 104 and 401 of the Federal Rules of Evidence.

ii. Effective Use of Motions in Limine

Other than objecting at trial, motions in limine are arguably the best means of employing effective evidence advocacy. Motions can be tailored to exclude or admit evidence and present an

[131] Black's Law Dictionary 787 (6th ed. 1990).
[132] Laurence M. Rose, *Effective Motions in Limine*, Trial 50 (Apr. 1999).

opportunity to educate the judge on your theory of the case prior to the trial. Furthermore, evidentiary issues that normally would cause concern at trial can be avoided by using motions in limine to obtain rulings on these issues prior to trial.

The following are various uses of motions in limine. Note, any one of these motions may also require you to provide an offer of proof under Rule 103(a)(2) or the taking of evidence as a preliminary matter under Rule 104(b):[133]

Exclusion of Evidence

The most common form of motion in limine is the motion to preclude or exclude the ese of evidence or testimony. These motions can be as complex as attempting to exclude the use of scientific evidence pursuant to *Daubert* or as simply as precluding the defendant from referring to his or her medical examination of the plaintiff as an independent medical examination. The latter motion would be premised on the grounds that permitting the defendant to state that his or her hired experts are independent or court appointed would have unfairly prejudiced the plaintiff by creating an impression in the jury's mind that the hired experts were wholly neutral and that their opinions should carry more weight as they have been appointed by the court to conduct a neutral examination of the plaintiff. In Mississippi, due to the relative youth of Miss. R. Civ. P. 35, we have been successful in this motion by pointing to case law from other states and scholarly articles recognizing that the defendant's experts who have performed "independent" examination pursuant to Fed. R. Civ. P. 35 are not to be considered independent and shall not be identified as being appointed by the court at trial.

Admission of Evidence

On the flip side of the coin, you may want to consider a motion in limine to admit evidence that you know will draw an objection at trial. By doing so, you can prevent yourself from being

[133] John Hardin Young, *Mastering Written Discovery: Procedures and Tactics* § 8.10 (LEXIS, Charlottesville, VA, ca. 1998).

placed in a position at trial where your key piece of evidence has been excluded. As important, you may be able to "smoke out" the defense's argument for the exclusion of such evidence when it is not prepared to make it.

Even if the evidence is initially excluded during the motion, you may have laid the groundwork with the judge so that come trial, after the judge has heard additional evidence, he or she may reconsider the admission of the previously excluded evidence.

Firm Versus Conditional Rulings

Firm, as opposed to conditional, rulings are becoming more commonplace because trial courts want to inform litigants of their need to object at trial to preserve any error for appeal. Conditional rulings are generally those rulings in which the court rules based upon a certain set of information or representations, but reserves the right to reconsider upon hearing further evidence at trial.

Educating the Court

Motions in limine can be used to inform the judge about the nature of the parties, the exact circumstances surrounding the dispute, and any highly prejudicial pieces of evidence that may be floating around. At this point, the judge is striving to be impartial and will be open to having the "real" facts brought to the attention of the court. Therefore, any efforts to include or exclude testimony should be designed to illustrate the case in your favor.

Although the judge may not rule in your favor, the motion in limine will lodge a noteworthy event in the judge's mind. During trial, certain facts may be flushed out that cause the judge to consider his or her ruling on your motion in limine. This is because motions in limine are ruled upon using hypothetical facts and are not final rulings on the admissibility of evidence. Therefore, in light of the new evidence, the judge will at the very least, be forced to remember your pretrial motion. Immediately, the judge's mind will be brought back to his or her ruling on the motion and

the reasons why the motion was denied. If the "real" facts developed at trial warrant a reversal of the ruling, then the judge will grant your motion.

Motions in Limine in Practice

Motions in limine are unique in that the ruling is not necessarily final. Perhaps the best way to envision a motion in limine is as an advisory opinion subject to change as the trial unfolds. This is because a ruling on a motion in limine is not a final ruling on the admissibility of evidence that is the subject of the motion.[134] In practice, counsel should renew its motion at the appropriate time during the trial so that the trial court may reconsider the grounds of the motion in light of the actual--not hypothetical--circumstances at trial.[135] This is also true where a ruling has been deferred or withheld. Furthermore, the denial of a motion in limine is not immediately appealable.

Generally, however, evidence excluded through a motion in limine cannot be mentioned at trial and this ruling is recorded in a court order. Violating this court order may lead to a contempt charge or a new trial, although it may be reversed on appeal. However, in order for a violation of an order granting a motion in limine to serve as the basis for a new trial, the order must be specific in its prohibition and the violation must be clear.[136] Furthermore, a new trial may follow only where the direct violation of the motion in limine has prejudiced the parties or denied them a fair trial.[137]

Prejudicial error has been defined as "error which in all probability produced some effect on the jury's verdict and is harmful to the substantial rights of the party assigning it".[138] Plain error is an error that is "both obvious and substantial".[139] The plain error rule has also been described as "not a

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[134] *Moore v. General Motors Corp., Delco Remy Div.*, 684 F. Supp. 220 (S.D. Ind. 1988); *Cline v. U.S.*, 999 F.2d 539 (6th Cir. 1993).
[135] *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1985).
[136] *Pullman v. Land O'Lakes, Inc.*, 262 F.3d 759, 762-763 (8th Cir. 2001).
[137] *Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1579 (10th Cir. 1984).
[138] *Pullman*, 262 F.3d at 762 (citing Fed. R. Civ. P. 61 and *Illinois Terminal R.R. v. Friedman*, 208 F.2d 675, 680 (8th Cir. 1953)).
[139] *Rojas v. Richardson*, 703 F.2d 186, 190 (5th Cir. 1983) (citing *United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir. 1980)).

run-of-the-mill remedy",[140] to be "invoked only in exceptional circumstances to avoid a miscarriage of justice".[141] The best formulation, however, is contained in *United States v. Olano*[142] where plain error is defined as an error that not only is clear in retrospect, but also causes a miscarriage of justice.

One way courts avoid granting a new trial is to immediately admonish the jury with an instruction to disregard the direct violation of the motion in limine. For instance, in *Pullman*, the court prohibited the use of the word "insurance" whatsoever at trial; but, you guessed it, counsel said "insurance" at trial. The court immediately gave an instruction to the jury to disregard the statement. Furthermore, the court stated that although "Pullman clearly violated the in limine order…Pullman's testimony about insurance was made in the context of a conversation and was not specifically a response to a question for appellees' counsel about insurance".[143] As a result, the court found that the appellant was not prejudiced or denied a fair trial by the single mention of insurance.[144]

Appellate Issues

Failing to object at trial may also have a great effect on any possible appeals that you may have. Generally, you should object if your opponent disobeys the court's order by violating a motion in limine at trial in order to preserve the issue for appeal.[145] An important exception to this general rule exists, however, in the Fifth Circuit. In *Reyes v. Missouri Pac. R.R. Co.*,[146] the plaintiff

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[140] *Id.*
[141] *Id.* (citing *Eaton v. United States*, 398 F.2d 485, 486 (5th Cir.), *cert. denied*, 393 U.S. 937 (1968)).
[142] 507 U.S. 725, 736 (1993).
[143] *Pullman*, 262 F.3d at 762.
[144] *Id.* at 763.
[145] *Littlefield v. McGuffey*, 954 F.2d 1337, 1342-43 (7th Cir. 1992) (a pretrial motion does not preserve the issue for appeal without the requisite objection at trial); *Collins v. Wayne Corp.*, 62 F.2d 777 (5th Cir. 1980) (motion in limine denial did not preserve objection in products liability case when evidence was not objected to at trial); compare, *Sheehy v. South Pac. Transp. Co.*, 631 F.2d 649 (9th Cir. 1980) (motion in limine that as denied preserved evidence in FELA case) and *Amercian Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324-25 (3rd Cir. 1985) (no formal objection needed where pretrial motion adequately resolves admissibility and there is no suggestion that the trial court would reconsider the motion at trial).
[146] 589 F.2d 791, 793 (5th Cir. 1979).

attempted to minimize the damaging effects of his prior convictions by eliciting testimony on subject during a direct examination. The Fifth Circuit stated:

> After the trial court refused to grant Reyes' motion in limine to exclude the evidence, he had no choice but to elicit this information on direct examination in an effort to ameliorate its prejudicial effect. Error was sufficiently preserved by making this motion in limine.[147]

It is my recommendation that counsel should be safe and object to any violations of a motion in limine at trial.

b. Trial Objections

During, or before trial, "the purpose of objecting is to prevent the introduction of consideration of inadmissible information."[148] An additional purpose is to allow the trial judge to instruct the jury to disregard any information it received prior to the court's ruling on the sustaining of the objection.[149] Further, as we are all aware, a proper objection preserves the admissibility issue for appeal; conversely, the failure to object waives the right to appeal.[150]

Equally as important in determining whether it is advantageous to object is determining whether it is advantageous not to object. There are many recognized legal reasons not to object, such as whether the objection is viable or whether the information will eventually be admitted.[151]

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147 *Id.*

148 Steven Lubet, *Modern Trial Advocacy* 262 (2nd ed. 2000).

149 *Shelton v. State*, 445 So.2d 844, 846 (Miss. 1984) (stating that it is incumbent on counsel to object contemporaneously when objectionable statements are given during trial so the trial judge can correct any error with a limiting instruction).

150 75 Am. Jr. 2d Trial § 412 (2004) ("If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object with the requisite degree of specificity, or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question as to its admissibility, as by a motion to strike, such party waives any objection thereto, and the evidence is in the record for consideration the same as other evidence. Failure to make a timely objection to evidence in federal court, in civil and criminal actions, also results in a waiver of the issue on appeal, even though the improper question was propounded by the trial court, and further, failure to timely object or move to strike prevents such party from later moving for a mistrial on the grounds that the evidence was prejudicial.").

151 Stephen B. Nebeker, *Trial Objections*, 8 Utah B.J. 25 (1995) ("Good reasons for not objecting are: Danger of alienating the trier of fact; danger of highlighting harmful evidence; where the harm threatened by the evidence is negligible; and, where reversal on appeal is unlikely.")

For example, technical objections to the foundation of a question can prove to be counterproductive, for they can make the objecting party appear to be obstructionist[152] or appear to be hiding the truth.[153]

The main point is that an attorney should always "look before he leaps" to ensure that the making of a well-founded objection is advantageous to his case. It is seldom, if ever, worth losing the war for the sake of winning a small battle. With this in mind, what follows are a handful of common trial objections with citations from various jurisdictions to support each:

i. Objections During Opening Statements

Statements Ultimately Unsupported by the Evidence

Courts generally agree that it cannot be error in opening statement to outline the case that counsel anticipates proving through the evidence, even though counsel ultimately fails to have the evidence admitted before the conclusion of the trial.[154]

Statements that are Argumentative

A proper opening statement informs the jury of the evidence they expect to be presented during the trial. Accordingly, "it is improper to make the opening statement argumentative, such as arguing the credibility of witnesses … or arguing inferences and deductions from that evidence. These are appropriate only during closing arguments."[155]

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[152] Roger C. Park, *Trial Objections Handbook* 20 (1991); see also, Fred W. Bennett, *Preserving Issues for Appeal; How to Make a Record at Trial*, 18 Am. J. Trial Advoc. 87 (1994) (observing that the "opponent's evidence may turn out to be more persuasive if an objection based on 'lack of foundation' is sustained and the opponent then proceeds to lay a more complete foundation…. Often the rephrased question, after the sustained objection, will elicit testimony that is more persuasive than what the witness would have given after the original question.").

[153] Mauet, *Trial Techniques* 465 (2000) ("Jurors see lawyers who make constant objections as lawyers who are trying to keep the real truth from them.")

[154] Michale J. Ahlen, *Opening Statements in Jury Trials: What are the Legal Limits?*, 71 N.D.L.Rev. 701, 709 (1995).

[155] Mauet, supra note 144, at 494.

Improper Personal Beliefs

Comments which inject the personal beliefs of the arguing attorney are improper because they are not evidence, and directly inject the credibility of the trial attorney into the trial.[156]

ii. Objections to the Presentation of the Case

Questions Beyond the Scope of Direct Examination

While in state court an attorney may go beyond the scope of the direct examination in his cross-examination of a witness,[157] one may not do so in federal court.[158] This same rule applies on re-direct. It is appropriate to ask questions which address subject matters that arose during direct or cross examinations, but one may not exceed that scope.[159]

Leading Questions

The prohibition of interrogating a party's own witness by the use of leading questions is probably one of the most misunderstood objections during a trial. Although leading questions are ordinarily not permitted on direct, most lawyers embrace the belief that because a question asks for a "yes" or "no" response, the question is conclusively leading.[160] This is not correct. Leading questions are those questions which may be answered in the positive or negative, and suggest the correct answer.[161]

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156 Mauet, supra note 144, at 494; see also, *United States v. Young*, 470 U.S. 1 (1985).
157 Miss. R. Evid. 611(b).
158 Fed. R. Evid. 611(b).
159 Mauet, supra note 144, at 490 (observing that when redirect examination "attempts to pursue matters not covered by the preceding examination, an objection is proper.")
160 3 Wigmore Evidence § 772.
161 *Porter v. State*, 386 So.2d 1209, 1210-11 (Fla. Dist. Ct. Ap[p. 1980); *United States v. Durham*, 319 F.2d 590 (4th Cir. 1963); *Urbani v. Razza*, 238 A.2d 383, 385 (R.I. 1968).

Compound Questions

A compound question is one that brings up two separate facts within a single question. It is objectionable because any simple answer to the question will be unclear.[162]

Argumentative Questions

A question that is argumentative "asks the witness to accept the examiner's summary, inference, or conclusion rather than to agree with the existence … of a fact."[163] One court has observed the following with regard to argumentative questions:

> An argumentative question is a faulty form of examination of [a] witness by propounding a question which suggests [the] answer in a manner favorable to the party who advances the question or which contains a statement in place of a question. A question is argumentative if its purpose, rather than to seek relevant fact, is to argue with the witness or to persuade the trier of fact to accept the examiner's inferences. The argumentative question … employs the witness as a springboard for assertions that are more appropriate in summation. There is a good deal of discretion here because the line between argumentativeness and legitimate cross-examination is not a bright one.[164]

Attorney Speaking Objections

When objecting, counsel need only briefly state their objection and the grounds that support it. A speaking objection is one which goes beyond "the simple state-the-grounds formula" for objections.[165] Opposing counsel should object to speaking objections in order to preserve the appellate record,[166] although speaking objections may not always warrant reversal.[167]

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[162] Mauet, supra note 144, at 487.
[163] Lubet, supra note 139, at 300.
[164] *Smith v. Sanchez*, 923 P.2d 934, 948 (Haw. Ct. App. 1996).
[165] Lubet, supra note 139, at 273.
[166] Charles E. Joern, Jr. & Robert W. Vyverberg, *Protecting the Record and Perfecting the Appeal* 96 (2000) ("[In] order to preserve the record, trial counsel should object … if speaking objections are made while objecting to counsel's proffer of evidence….").
[167] *Tanner v. State*, 764 So.2d 385, 404 (Miss. 2000).

iii. Objections During Closing Argument

The most common reason for an objection during closing argument is an attorney argues matters outside the evidence of the case. Such remarks amount to unsworn testimony by counsel, which is not subject to cross-examination.[168] Another common objection is made to the golden rule argument. A golden rule argument "suggests to jurors that they put themselves in the shoes of one of the parties, and is impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias rather than on the evidence."[169]

2. Documentary and Testamentary Evidence: Using Technology

Trials are about persuasion. Over the course of the usual trial, the parties ask the jury to believe diametrically opposed stories about what happened at some point in the past. In order to convince the jury and win, a party must present its story in a clear, concise, and understandable way to the diverse group that makes up the jury. By now the primacy of the story is widely accepted in trial practice,[170] and an integral part of this storytelling process--especially in contemporary society--is the use of demonstrative evidence and other visual aids. Images, photographs, enlarged reproductions of documents, computer animation, videotaped depositions, and recorded sounds all may be used to enhance both the lawyer's ability to explain complicated concepts and the presentation of the case.

When developing a storyline to present at trial, a lawyer must consider early in the process the types of visual aids (if any) that will be used. A lawyer should consider a variety of factors, including the type of case, the sophistication and cultural background of the jury pool, the resources of the client, the layout of the courtroom, and the preferences of the judge. A lawyer must decide

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[168] Marc R. Kantrowitz, Kevin Connelly & Jennifer Bush, *Closing Arguments: What Can and Cannot be Said*, 81 Mass. L. Rev. 95 (1996).
[169] *Simmonds v. Lowery*, 563 So.2d 183, 184 (Fla. Dist. Ct. App. 1990).
[170] Michael E. Tigar, *Persuasion: The Litigator's Art* 6-8 (1999).

how technologically complex the visual aids should be. A lawyer could decide to use low-tech but battle-tested presentation forms such as blown-up documents, graphics on poster boards, flip charts or videotapes. Alternatively, a lawyer could use somewhat more high-tech equipment, such as document cameras that can reproduce documents or objects through a video projector or monitor. Finally, a lawyer could use very high-tech presentations, such as scanned and bar-coded documents and exhibits, flat-screen computer monitors at each jury chair and counsel table, and digitally recorded deposition videos with synchronized text and pop-up documents. We will briefly explore these options:

i. Digital Storage Media

Digital storage technology enables attorneys to access documents for immediate use in the courtroom. Documents, once admitted into evidence, can be displayed on monitors at trial. Relevant portions of the documents can be highlighted, underlined, and enlarged. Witnesses on the stand and lawyers presenting opening or closing arguments can circle or underline important parts of documents using a light pen. Lawyers can display these images for the jury on screen and print a copy of the images on a color printer so that it can be used as an exhibit and taken with the jury into the deliberation room.

ii. *Types of Visual Exhibits*

Videotaped Images or Testimony

Videos may be used to demonstrate complex data or to show a "day in the life" of one of the parties. Lawyers may use videos as a tutorial whereby an expert can provide an overview of an industry, the subject matter of the expert's testimony, a virtual tour of a plant, the scene of an accident, or other type of presentation. These tutorials can be much more effective than simply having an expert testify at length regarding a subject that is very complicated or unfamiliar to the jury. Attorneys can also use this process to streamline direct testimony to its most persuasive

elements. Videotaped depositions are an efficient means of presenting the same testimony of witnesses--such as an expert or corporate official--in different trials involving the same issue.[171]

The use of video technology to present either live testimony or deposition testimony is an effective means of introducing testimonial evidence. Video testimony avoids both the dull, tedious reading of deposition testimony into the record and the accompanying diminished attention the jury accords read-in testimony. The power of video testimony can be substantial. Indeed, if an important witness under the opposing side's control is not made available at trial, it may be because that person would make a poor trial witness. If there were substantial pauses in the witness's speech or if the witness appears to be fidgeting and uncertain, the jury will be able to see the witness, observe the witness's demeanor, and form an opinion regarding the witness's credibility.

Counsel may also wish to have a copy of the relevant portion of the transcript superimposed below the witness so that it scrolls across the bottom of the screen. In this way, a jury not only can see the witness's demeanor but also can read the testimony that the attorney thinks is important. There are off-the-shelf programs, such as LiveNote, that allow attorneys or trial consultants to synchronize a digital version of the deposition transcript to digitized video. n8 These programs are used to display a split screen, which shows the video testimony and relevant document simultaneously.

Another important benefit of digitized deposition testimony is that it permits easy editing to account for fairness designations and objections. Although fairness or completeness designations should ideally be made well before a trial begins, they are, in practice, usually made at the last minute. In addition, a judge may strike some or all of a particular portion of testimony. Because it can be easily edited, digitized testimony makes dealing with these last-minute problems less frustrating during the course of trial.

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[171] Robert M. Parker, *Streamlining Complex Cases*, 10 Rev. Litig. 547, 551-53 (1991).

With digitized deposition testimony, a lawyer may create a video reply file line number by line number, allowing for quick deletion of video testimony. For example, if the judge sustains an objection with respect to two lines of a deposition transcript, the lawyer can delete those lines within seconds from the computerized playback of the audio and video of the deposition simply by requesting the software program to skip over the relevant line numbers when playing the deposition for the jury. During the resulting playback of the testimony in court, the program will simply jump to the next relevant portion of the testimony with only a "blip" of a second or less in the replay. Similarly, if scrolling text is used in conjunction with video during the replay of testimony, the computer program will delete the reference to the text.

Video depositions can significantly affect the outcome of a case. The most widely publicized use of digitally stored video depositions with scrolling text has been the government's trial against Microsoft. In that case the government used its video deposition of Bill Gates to depict the world's richest man as halting, forgetful, and evasive.[172] The video showed Gates slumping in his chair and rocking back and forth. The government also used video technology to contrast images of e-mail messages written by Gates with his contradictory recollections during his deposition about Microsoft's dealings with Netscape and the perceived threat of Internet browser technology.[173]

The *Manual for Complex Litigation* supports the use of this split-screen technique:

> Split-screen techniques can be effective in depositions relating to, or in which the witness refers to, documents or other exhibits. The witness may be presented on one side and the document or exhibit on the other, with portions referred to highlighted for emphasis and clarity. This allows the jury to observe the witness's testimony in context without the distraction of having to look away from the monitor.[174]

In some situations, depending upon the witness's performance during a videotaped deposition, trial counsel may wish to replay the deposition with a document or other graphic on the

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[172] Steve Lohr, *Gates Serves Up Playful Scorn for Prosecutors*, N.Y. Times, Dec. 3, 1998, at C4.
[173] Joel Brinkley, *As Microsoft Trial Gets Started, Gates's Credibility is Questioned*, N.Y. Times, Oct. 20, 1998, at A1.
[174] MANUAL FOR COMPLEX LITIGATION § 22.333 (3d ed. 1995).

monitor instead of the witness's image. This tactic is especially effective when the witness may have come across as hesitant or nervous or when the contents of a document about which the witness is testifying are more important than the witness's testimony.

Lawyers must also explain (or request the judge to explain) to the jury any anomalies in a witness's performance, attire, or appearance that may be due to the quality of the recording, the fact that the witness did not know the testimony would be videotaped, or other problem with the recording. At the outset of the trial, counsel will need to choose whether to call a particular witness live or by video. If a witness is within the court's jurisdiction, a court may require that a witness testify in person, if possible. Furthermore, most courts also require attorneys to present testimony in the same form on both direct and cross.[175]

Finally, these video presentations present several evidentiary issues. If the trial attorneys intend to play videotaped depositions at trial, they should consider addressing the admissibility of videotaped testimony early in the litigation before they expend substantial resources. Lawyers should exercise care because "the persuasive power of [video] carries with it the potential for prejudice, a risk heightened by the opportunities for manipulation provided by technology, making rulings on objections critical."[176] If the parties cannot agree on the form and content of the videotaped or digitized testimony or images that will be shown to the jury, the process of ruling on objections will be very time-consuming and burdensome.[177] To avoid these problems as much as possible, counsel should provide other parties access to recordings in their entirety before trial.[178] This will allow opposing counsel to make fairness designations of omitted portions that they believe should be played for the jury pursuant to *Rule 32(a)(4) of the Federal Rules of Civil Procedure.*

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[175] The *Manual for Complex Litigation* states that "to avoid an unfair difference in emphasis … the court should not allow testimony to be presented by different means on direct and cross-examination." *Id.* § 22.333 n. 384 (citing *Traylor v. Husquarna Motor*, 988 F.2d 729, 734 (7th Cir. 1993) (disapproving presentation of live direct testimony and videotaped cross)).

[176] *Id.* § 22.333.

[177] *Id.*

[178] *Id.*

Electronic or Digitized Photographs, Documents, or Other Exhibits

One of the most common uses of technology during trial is to reproduce documents in a form that is easily reviewable by the judge, jury, and witnesses. Instead of passing single copies of exhibits to jurors, computer monitors and overhead projection screens allow jurors to view documents and other exhibits as witnesses are testifying about them. Documents may be digitally scanned and stored on CD-ROMs, DVD-ROMs, or other digital storage media for easy retrieval during trial by a bar-code reader or other system.

Digital images also may be manipulated easily during the course of an examination. Relevant portions of documents may be highlighted, enlarged, underlined, or compared in a split-screen format with other documents. A variety of trial presentation software is available for this purpose. Two of the most common programs are Trial Link and Trial Director. These programs interact well with the widely used document database software, such as Concordance and Summation, thereby making it relatively easy to transfer information from a discovery-oriented system to a trial-oriented system. Many of the large litigation consulting companies like Trial Graphix/Trial Logix and DecisionQuest have their own proprietary trial presentation software which their customers may use.

When creating demonstrative exhibits and charts for use in opening and closing statements, many lawyers also use relatively inexpensive presentation programs like Microsoft PowerPoint and Freelance Graphics, which usually come bundled with most office suite software packages. These programs allow attorneys to prepare a set of easily changeable slides that may be accessed at trial from a laptop computer. This presentation software also has several built-in animation and graphics functions that can add some movement to otherwise static graphics. Attorneys can also add sound, digital reproductions of important documents, and other types of graphics to the slides. The playback of the slides may be automatically timed or attorneys can hold a wireless mouse that allows

them to move to the next slide or image simply by pointing the remote at the computer, wherever it is located in the courtroom.

Attorneys must exercise caution when designing slides or other exhibits. A wide variety of backgrounds and colors are available in most types of presentation software; therefore, some attorneys may be tempted to use as many of these bells and whistles as possible. Despite the temptation to use these features, trial lawyers must never forget that the trial presentation software is merely a means to an end. Exhibits do not win cases; they merely assist lawyers in telling the client's story to the jury. Exhibits can, however, hurt cases.

For example, Professor Fred Lederer, one of the nation's foremost scholars in the area of trial technology and the director of the Courtroom 21 Project at the William & Mary School of Law relates how electronically presented evidence can be so biased that is counterproductive to the proponent's case:

> Electronic slides permit the creative use of electronic text points, often enriched by clip art images, charts, or photographs. Such slides raise the possibility of intentional insertion of "visual bias," the equivalent of semantically "loading" the spoken or written message with words carefully chosen to create a specific psychological reaction. In one early Courtroom 21 Project experiment, the plaintiff's counsel used a slide show that was designed to bias jurors against the defense. In a civil wrongful death case in which the plaintiff had died in a hotel fire, the plaintiff's attorneys set the plaintiff's slides against an angry crimson backdrop and designed, among other matters, to suggest subtly a tombstone inscription. The presiding judge . . . quickly sustained the defense objection. Of greater interest, however, was the jury's reaction. When surveyed after the laboratory trial, the jury reported easy recognition of counsel's intent and a significant degree of anger at the effort.[179]

The moral of this story is that when designing slides or other exhibits, counsel can be too clever by half. Lawyers should not forget that a jury can often see through a transparent attempt create a bias against the other side. Unless attorneys have generated sufficient credibility with the jury during the course of a trial, this technique poses a substantial risk of backfiring.

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[179] Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's - - and Tomorrow's - - High Technology Courtrooms*, 50 S.C. L. Rev. 799, 817-18 (1999).

Presenting Digitally Stored Images Through Computer Monitors Versus Overhead Projectors

Lawyers who choose to present exhibits or other images electronically will need to consider whether to use video monitors or an overhead projector. They will also need to determine whether to use a "document camera," such as an Elmo video presenter or computer-based document presentation technology.

In most trials, it is best to have both types of technologies available. Digitally scanned and stored documents displayed over video monitors throughout the courtroom enable the lawyers to manipulate, enlarge and highlight images. Video monitors have a greater degree of resolution than overhead video projectors. The images are generally easier for jurors to read, particularly in courtrooms where a projection screen may be many feet away from the jurors. Counsel can also position video monitors for the jury in different configurations to maximize the jury's attention. Using a single video projection screen at the far end of a courtroom limits attorneys' ability to focus the attention of jurors.

Similarly, attorneys do not want to be limited at trial by the unexpected. What if a document was not scanned correctly? What if the computer crashes? What if the bar-code reader does not work properly? Due to all the unexpected events that happen at trials--particularly trials involving presentation technology--attorneys should consider using a video camera as well as digitally stored documents and images. A document camera converts "documents, other physical images, and objects into television or computer images."[180] Because it is easy to use, a document camera is probably the most common form of presentation technology currently used in trials.[181] A document camera allows counsel to manually zoom in on documents or even three-dimensional objects. The

[180] *Id.* at 814.
[181] *Id.* at 813.

image is then transferred to a video camera mounted on the device and sent to the video monitors throughout the courtroom.

However, document cameras do not provide resolution that is as crisp as digitally stored images. Some document cameras, such as a DOAR Illustrator, permit the use of a light pen attached to a computer monitor to highlight a particular portion of a document. Additionally, document cameras are generally much less expensive to use than programs that require documents to be scanned and bar-coded. Their use also requires much less preparation. However, in cases where documents are routinely scanned into discovery databases, lawyers may find that trial presentation software that accesses digitally stored documents and images provides superior clarity and ease of manipulation over video cameras alone.

3. Demonstrative Evidence[182]

a. Introduction

A trial lawyer's ability to persuade depends first and foremost on the jury listening to his or her evidence. Anyone who has sat through the reading of a long deposition can attest to the difficulties of maintaining focus and paying attention to evidence. Demonstrative aids are critical to achieving courtroom success because they bring life to otherwise dry evidence.

Our society has become dependent on visual information because of increased use of the Internet and television. We are conditioned to expect short bursts of substantive programming broken up by frequent intermissions. As a result, the average person's attention span lasts no longer than a few minutes. The average television news program takes one and a half minutes to cover a story-30 seconds to set the stage, 30 seconds to provide the details and 30 seconds to wrap it up.[183] Conversely, lawyers often consume great lengths of time and use very few visuals to convey points

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[182] This paper, slightly modified, was first presented at ATLA's *Workhorse 2000: Fresh Ideas, New Theories, and Creative Ideas*, Miami, FL, April 2000.

[183] *See* William S. Bailey, *Lessons from 'L.A. Law' Winning Through Cinematic Techniques*, TRIAL 98 (Aug. 1991).

of importance to the jury. It does not take many posttrial interviews with jurors to understand that not only is this practice boring, but jurors retain little of the information.

Unfortunately, ways to make the trial of a lawsuit fun and interesting are not concepts included in our law school training. It is through trial and error that most of us learn our most effective communication techniques. As this paper will illustrate, demonstrative aids create an atmosphere which makes it exciting and easy for a jury to learn the important issues in a case and increase the ability of the lawyer to achieve success at trial.

b. Technology and the Law

As early as the 1850s, demonstrative evidence was being used as a tool of communication in the courtroom.[184] Experts used diagrams, maps and charts to illustrate how events occurred.[185] Attorneys soon discovered that demonstrative aids were an inexpensive and effective means of explaining complex issues to a jury. As science and technology have advanced, new types of demonstrative evidence have been developed. Lawyers can now explain theories, ideas and complex issues in ways never before thought imaginable. However, the underlying objectives of simplification and clarification remain the same.

The term "demonstrative evidence" has no fixed definition. The phrase describes virtually any visual medium which conveys points of importance in the courtroom. Literally thousands of visual presentations are capable of serving some evidentiary function. Because technology is constantly evolving, lawyers are presented with new ways of conveying information on a daily basis.

Unfortunately, courts have been unable to keep up with the rate at which technology has advanced. Very few courts have taken the opportunity to address the admissibility of demonstrative evidence in their opinions. In addition, the laws which do exist tend to be inconsistent.

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[184] *See State v. Knight*, 43 Me. 11, 19 (1857).
[185] *See* David W. Muir, *Debunking the Myths About Computer Animation*, 444 PLI LIT. 591, 593 (1992).

Consequently, some trial judges tend to err on the side of keeping novel forms of evidence out and lawyers often find themselves without an important piece of their case.

Courts have determined that demonstrative evidence is admissible in which it can be shown to be relevant, to be of assistance to a witness in explaining his or her testimony, and that its probative value outweighs it prejudicial effect.[186] A trial court is given broad discretion to determine whether to admit or reject demonstrative evidence and will only be overturned when there is a clear abuse of discretion.[187]

Most trial courts use a commonsense approach in determining the admissibility of demonstrative evidence. If an illustration or recreation is grossly misleading, the court will refuse its admission. However, the court has discretion to determine whether the evidence is so misleading as to be unfair or if there are simply subtle differences or minor discrepancies that can be clarified or explained.[188] Moreover, minor flaws or discrepancies will usually go to weight and not admissibility.[189]

c. Purpose

Demonstrative evidence should not be used as a substitute or in lieu of testimonial, real or direct evidence. Instead, demonstrative evidence should be used in situations where the spoken word cannot clearly convey the point to be made. While we use demonstrative evidence for a variety of reasons, it has been suggested that there are five broad purposes for its use: (1) it summarizes testimony; (2) it explains scientific or technical information; (3) it helps jurors retain more information; (4) it reinforces information crucial to the case; and (5) it refreshes jurors' memories in long trials.

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[186] *See* FED. R. EVID. 403; TEX. R. EVID. 403; *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 389 (Tex. 1998).
[187] *See Goff v. Continental Oil Co.*, 678 F.2d 593, 596 (5th Cir. 1982); *Gaspard v. Diamond M. Drilling Co.*, 593 F.2d 605, 607 (5th Cir. 1979).
[188] *See Hartford Fire Ins. Co. v. Christianson*, 395 S.W.2d 53, 64 (Tex. Civ. App. 1965, writ ref. n.r.e.).
[189] *See Fagiola v. National Gypsum Co. AC & S., Inc.*, 906 F.2d 53, 57-58 (2d Cir. 1990).

Modern jurors not only want to hear about the accident or event, they want to feel, smeel and see how the accident or event occurred. Surveys on juror behavior indicate that jurors "retention levels" are greatly increased when information is presented visually.[190] One recent study showed that jurors are often overwhelmed by the amount of information that is presented to them. As a result, they become bored, confused and frustrated when highly technical and complex issues are presented at trial.[191] Demonstrative aids combat juror apathy by introducing visual stimuli into an environment usually dominated by sound. The typical juror is more likely to sit up and pay attention when testimony is accompanied by an illustration or diagram. This true because the visual presentation makes it easier to comprehend what the lawyers are saying. Ultimately, however, jurors pay attention to what they like.[192]

d. Stages of Trial

Demonstrative evidence should be used as early as practical throughout the entire trial process. Beginning with settlement negotiations, demonstrative evidence can be an extremely powerful tool of persuasion.

The use of demonstrative exhibits during settlement negotiations has several advantages. By presenting demonstrative evidence in the form of medical illustrations, "day-in-the-life" films and accident recreations early in the litigation process, other parties are alerted to the fact that both time and money are being spent preparing for trial in the event settlement talks are unsuccessful. Another advantage of using these aids during settlement is that they provide excess carriers and their counsel with the information they need to evaluate the claim. Because these individuals often have the power to settle the suit on behalf of their client, showing them demonstrative aids that will be used at trial can be just as important as showing them to the court or jury.

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[190] Ory Krieger, *Now Showing at a Courtroom Near You…Sophisticated Computer Graphics Come of Age-And Evidence Will Never Be the Same*, 78 A.B.A. J. 92 (Dec. 1992).
[191] *See id.*
[192] *See* Robert F. Seltzer, *Preparation and Trial of a Toxic Tort Case*, 1990: *Evidence and Exhibits at Trial*, 387 PLI LIT. 371, 384 (1990).

In practice, "day-in-the-life" videos are helpful in both the trial and settlement of lawsuits. For example, a few years back, we represented a young man who was valedictorian of his high school class and who had received academic scholarships to several prestigious schools. During the last semester before graduation, the young man was involved in a relatively minor traffic accident in which he fractured a bone in his lower leg. The young man was taken to the local emergency room and placed under anesthesia so that surgeons could repair his leg. While unconscious, the medical personnel lost control of his airway causing severe hypoxia and anoxia, resulting in severe brain damage. The firm sent videographer's to the client's graduation and captured his presentation to his fellow students. The video was extremely moving, showing a popular and bright young man brought down during the prime of life. Consequently, after presenting this video to the defendants during settlement talks, the case settled.

During trial, it is important to introduce evidence when it will have its greatest impact. Demonstrative exhibits are no exception. Just before a recess or at the beginning or end of a day are good times for introducing key evidence in terms of impact. This is especially true in a long trial before a weekend or after an extended break.

Demonstrative evidence can also be effectively used during opening and closing arguments. A chart, model or diagram used in conjunction with an opening statement can be very beneficial to the jury in understanding the "theme" of the case. The use of charts, models and diagrams in closing statements can help summarize important testimony and refresh jurors' memories. Thus, when they retire to deliberate, the desired verdict will be fresh in their minds.

e. Strategy, Organization and Preparation

The first step is to decide what you need to prove to the jury and think through the best format or combination of formats to make your proof both understandable and persuasive. Before trial, it is important to visit the courtroom where the case will be heard. Factors such as the size of

the courtroom, the distance between jury and witness stand and lighting will ultimately determine what types of demonstrative aids will be effective. In addition, by surveying the logistics of the courtroom prior to trial, potentially embarrassing or unworkable scenarios are eliminated. Creating the perfect accident reconstruction scene and determining it will not fit in the elevator can be avoided by making a brief visit to the court before the model is made.

It is also a good idea to discuss with the judge and other courtroom personnel where videos players, overhead projectors and other displays should be stored during trial. Simply going to the courtroom and setting up the equipment can irritate the judge and make the start of trial very unpleasant. An assistant who is capable of operating the equipment can be used to organize the exhibits and make sure the court's requirements are met.

Some lawyers use a method called "anchoring" to organize demonstrative aids. Anchoring involves the placement of demonstrative evidence into different categories. For example, exhibits dealing with liability should be placed in one area of the jury's visual field while damages are presented in another. When questioning a witness on a particular subject, the lawyer will stand in that area of the courtroom where the corresponding aids are presented. When dealing with complex litigation involving hundreds of charts, graphs and models, these lawyers feel this system is helpful in keeping a logical flow of evidence.

Even with sufficient planning and preparation, problems with demonstrative aids are inevitably encountered. The problems faced during presentation do not determine the outcome of the case as much as the presenting lawyer's reaction to such problems. To alleviate potential pitfalls, it is recommended that an alternative approach be formulated in the event a video recreation is denied admission at trial. The sponsoring attorney needs to have a backup plan such as an eye witness who, using photos or drawings, puts into evidence the needed facts.

In situations where a problem with an exhibit or equipment arises in front of the jury, a brief recess should be requested so that the problem can be fixed. The recess presents the opportunity to eliminate the problem without distracting the jury or the court. If the judge does not allow the recess, be prepared to move forward and, if feasible, introduce that piece of demonstrative evidence at a later time. When dealing with highly technical demonstrative evidence or equipment, consider offering the evidence first thing in the morning, soon after lunch, or after a brief recess. By using highly technical evidence at these times, the equipment can be properly prepared and tested thereby reducing the possibility of an equipment malfunction in front of the jury.

f. Admissibility

Prior to trial is the best time to decide whether to mark and introduce a piece of evidence (such as a medical illustration, computer-generated graphic, or model) or whether to merely use it as a demonstrative aid or prop. Evidence is divided into two classes-substantive and demonstrative. Substantive evidence consists of three types-testimonial, documentary and real. Demonstrative evidence is defined by its purpose, i.e., to explain or illustrate substantive evidence.

For substantive evidence to be admissible it must make a fact or consequence more or less probable than it would be without the evidence.[193] Demonstrative evidence, however, functions to make the underlying substantive evidence more understandable. As a result, the primary foundational elements for the use of demonstrative proof should be: 1) that the demonstrative exhibit relates to a piece of admissible substantive proof and that it fairly accurately reflects that substantive proof; and 2) that the demonstrative proof aids the trier of facts in understanding or in evaluating the related substantive evidence.[194] In other words, the demonstrative aid must be relevant and the witness must say it will help her or her explanation to the jury. Whether a particular exhibit is to be used as an aid or marked and introduced into evidence may well depend on the

[193] *See* FED. R. EVID. 401.
[194] *See* Robert D. Brain & Daniel J. Broderick, *Demonstrative Evidence: Clarifying Its Role At Trial*, TRIAL 74 (Sept. 1994).

difficulty in laying the predicate for admissibility and the trial lawyer's knowledge of the trial judge's attitude toward admissibility of demonstrative evidence.

The proponents of demonstrative evidence may also need to respond to a Rule 403 objection. The balancing approach of Rule 403 states that evidence, even though otherwise admissible, "may be excluded if its probative value is substantially outweighed be the risk of: (a) undue prejudice, confusion of issues, or misleading the jury; or (b) undue delay, waste of time or needless presentation of cumulative evidence". This "catchall" objection is used frequently as a last resort by those attempting to exclude demonstrative evidence.

g. Types of Demonstrative Evidence

Sometimes, a case may have more than adequate evidence on the record to support a verdict and you may decide not to offer your demonstrative evidence. However, you may want a piece of demonstrative evidence to be taken into the jury room and become a part of the record. The following are different types of demonstrative evidence and their predicates for admissibility into evidence.

Photography

The most traditional of all demonstrative tools is the still photograph. In 1859, the United States Supreme Court first considered the admissibility of this type of evidence in the case of *Luco v. United States*[195] which involved the use of a daguerreotype, a photograph produced on a silver plate and mixed with iodine. The photographic evidence was allowed-and photographs continue to be a vital weapon in the trial lawyer's arsenal.

The challenge often involved with offering photographs as substantive or demonstrative evidence is locating the photographs best suited to relay accurate information about your case. When catastrophic events occur, many agencies document their investigations with photographs.

[195] 64 U.S. (23 How.) 515, 529; 16 L. Ed. 545, 560 (1854).

Photographs can sometimes be acquired from the police department, the fire department, the newspaper, television stations and the county medical examiner's office. Treating physicians and family members are also valuable sources and oftentimes provide photographs used in the damages phase of the trial.

Before a photograph can be admitted into evidence, the proper foundation must first be laid. The sponsoring witness must be familiar with the object or scene depicted. The witness need not have been present when the photograph was taken, but he or she must be familiar with the scene or object depicted in the photograph.[196] The witness must explain the basis of his or her familiarity and testify that the photograph is a "fair" or "accurate" representation of the scene or item in question.

It is often difficult to adequately portray the condition your client was in prior to the accident or injury. We regularly use family members, friends and neighbors of the victim to sponsor pre-accident photos of the plaintiff. Before-and-after photographs are also an effective tool in settlement conferences. For example, we represented a man who broke his lower leg while playing in a "pickup" soccer game. After surgery, the doctors in charge failed to diagnose the obvious signs of "compartment syndrome". As a result of this failed diagnosis, our client's lower leg was amputated. Our client had been a fighter pilot in the military and his wife provided our office with pictures of his active military career. We created a poster which included a photograph of him standing in front of his jet alongside a photograph of him standing on his crutches with his prosthesis beside him. The contrast truly highlighted the tragic change in his life.

- **Digital Photography**

Digital photography has become a popular medium with sales currently exceeding those of traditional cameras. They are easy to use, provide immediate results and are versatile. An image can be transferred to a computer monitor within minutes after taking the picture and then used in many

[196] *See Donfer v. Branard*, 235 S.W.2d 544 (Tex. Civ. App. 1951, writ ref. n.r.e.).

different ways. For example, a digital image can be sent via e-mail, printed or incorporated into one of many different computer programs and used in digital "slide" presentations. For courtroom use, the image can be presented with an LCD projector in a size observable to everyone in the room. Photographs can be scanned using a flatbed scanner, shot with a digital camera, or sent to a photography lab which has the ability to digitize 35 millimeter negatives or slides and then store the mages on a compact disc.

- **Stock Photography**

Stock photography is a great resource when an image is not available or the budget does not justify the cost to reproduce it. Companies collect photographs of everything imaginable and make them available for purchase. These are called stock photographs. They can be purchased at local software stores on CD-ROMS, through specialty catalogues or from the Internet. The Internet allows you to search images using keyboards and can be purchased online for immediate use.

Stock photography companies provide a variety of images. There are many companies offering this service, including 20th Century Fox, NASA, MGM and the major television networks. A specific example is Index Stock Photography, Inc., which offers the use of approximately 750,000 still photographs. The image is provided as a transparency on a per usage basis. Other stock photography companies deal with more specific areas, e.g., medical images.

- **Aerial Photographs**

Aerial photographs have a number of uses. They can be used in vehicular accident cases to show terrain or road conditions. We also use them as perspective for animations, drawings and stand-alone pieces. In premises liability cases, they can be used to designate crime areas and show the frequency of crimes committed in the area in question. The aerial view is helpful to establish distance and to see the layout of a crime scene. For instance, they can highlight for the jury the

dangerous conditions your client experiences-the isolation of a location or the exposure to dangerous elements.

In a case involving injury because of inadequate security, a security expert will often sponsor the aerial photograph. Frequently, we go through crime reports of the surrounding areas and/or apartment complexes and have the witness place red flags on each area where a crime had occurred in the year leading up to the assault or injury-causing event. Showing the jury the proximity of similar crimes in an area can project a frightening portrait of a crime-infested neighborhood which the defendant knew or should have known when putting their security in place.

In summary, photographs can convey to the jury a real person who was involved in a real accident and who has sustained real injuries. Americans have grown up in a world in which they get their news through photographs. Jurors relate well to all kinds of photography including family vacation photographs and wedding pictures. Using photographs in the courtroom helps the jurors visualize the accident or crime, relate to the victim and also sympathize with the victim. While demonstrative evidence has been enhanced through technology over the years, the photograph may still be the most powerful weapon for a trial lawyer in his or her arsenal. Furthermore, if the subject matter of the photograph is relevant, the predicate for admissibility is simply whether the photograph accurately represents the matters or scenery depicted in the photograph.

Medical Models and Illustrations

Medical illustrations are useful tools for presenting medical concepts or procedures that may be difficult for a jury to understand. For instance, you might want to demonstrate the body as it was prior to the accident or event, the injured body parts and the permanent disabilities resulting from the injury. Technical data can be simplified or photographs enhanced to highlight certain information.

There are hundreds of catalogs published by medical model companies, some of whom manufacture anatomically accurate body parts for use in medical schools. At most trial lawyer conventions, booths are set up by companies who retain the services of medical illustrators and model makers. Alternatively, illustrators and graphic artists can be employed "in-house" depending on the needs of a particular firm.

Once a model or illustration is created, the trial lawyer must determine whether to mark the exhibit, lay the predicate and offer the exhibit into evidence or allow an expert to use an illustration or model as a demonstrative aid. The predicate for use as a demonstrative aid is that the model or illustration will assist the witness' explanation and that the model or illustration accurately reflects the anatomy or procedure in question. The predicate to offer a model or illustration as an exhibit is as follows: (1) the chart depicts a certain part(s) of the human body; (2) the witness is familiar with that body part(s) and explains the basis for his or her familiarity; and (3) in the witness' opinion, the chart illustration is an accurate depiction of the body part(s).

Some companies create three-dimensional synthetic models from CT or MRI views. It is an interesting technique produced by a machine that processes information from each CT or MRI image to "build" the three-dimensional model. The quality of the model is dependent on the quantity and quality of the films and the nature of the injury depicted.

Medical illustrations can also be used to show the nature of injuries. In a recent automobile products liability case, a woman sustained spinal cord injuries while wearing a "lap belt" in a low-speed, head-on collision. Medical illustrations were helpful in showing the impact on the internal organs from both an exterior and interior view.

A full body illustration labeling the victim's injuries can be helpful to summarize multiple injuries sustained in an accident.

The cost of medical illustrations is most dependent on the number of illustrations per board, the method of rendering (traditional versus digital), and the complexity of the illustration. For example, one full frontal view of simple anatomy in a line outline is the least expensive. Numerous views of a complex subject requiring extensive research realistically rendered in full color, would be significantly more expensive.

Medical illustrations can be very demonstrative of the nature and extent of a client's injuries. Artist's illustrations can be used to show everything from the charred wreckage of an aircraft, to the mechanism of injury itself.

Sometimes the injuries in a case are so catastrophic that a photograph might be horrifying to the jury. In these situations, the use of a medical illustrator to produce illustrations or models depicting the injuries fairly and accurately may be more palatable for the judge or jury. Sometimes you may feel that the introduction of the gruesome photographs is essential to your case and you want the jury to see the severity of the injuries for themselves. In this instance, it may be helpful to offer the photographs through a medical examiner or state trooper who was present at the scene, then have the photographs sealed in an envelope, request that only the foreperson of the jury examine the contents and then describe them to the rest of the jury. By offering photographs in this manner, you are not only showing that you are sensitive to the subject, but you may also spark the interest of the jurors.

Charts and Graphs

Charts and graphs are staples in the courtroom which may be computer generated or drawn on a large blackboard or paper tablet. They can be used for any number of reasons-to display projected lifetime earnings, to calendar events or to indicate past and future medical care costs. Utilizing large pre-prepared charts to display jury questions and key legal definitions can be particularly helpful in presenting your theory of the case. Also keep in mind that the presentation

and appearance of the graph or chart is as important as the contents. If the information is not presented in a clear, concise and coherent manner, it may well be lost on the audience. It is also better not to put too many points on a single chart.

Report cards are also effective when multiple defendants are "pointing fingers" at each other. We may create a report card for each defendant and have the codefendants fill in each other's grades. This can be an effective method for turning the defendant's against each other.

Video

The strategic application of a video during discovery and trial has become increasingly important as society becomes more reliant on television and other visuals for information.

The potential uses of video for trial are varied and numerous. When using video for settlement, lawyers, in essence, act as field producers by conducting interviews, videotaping depositions and inspecting accident sites. The footage is then edited and incorporated into a "minidocumentary" for out-of-court settlement purposes.

Reasonably priced nonlinear editing systems are on the market today that limit the program outcome only to the attorney's imagination. A little bit of Hollywood's technology assists us in the real world in winning our case for our clients.

- **"Day-in-the-Life Films"**

A common use of videotape is "day-in-the-life" footage. A "day-in-the-life" film needs to be carefully organized with a lot of thought put into the preparation. It is useful for demonstrating the client's capabilities as well as his or her disabilities. It also demonstrates that the cost of custodial care is mandatory and why the medical needs are so great. Just as important, it conveys to the jury that the plaintiff is a real person perhaps with different daily requirements, but with many of the same desires and needs as everyone else.

The foundational elements of a "day-in-the-life" video are fairly simple and straightforward. First, the witness must be familiar with the scene portrayed on the videotape and must explain his or her basis for the familiarity. Second, the witness must testify that the video is a "fair" or "accurate" representation of the life of the victim and the daily struggles he or she encounters. The predicate for the admission of video in the Federal rules is the same as a photograph.[197]

The most common objection to a "day-in-the-life" video is the Rule 403 "catchall" objection. Numerous courts have held that "day-in-the-life" videos are admissible even though they show the graphic nature of a person's injuries and their daily struggles.[198] However, if the video is extremely graphic and is viewed only as an attempt to arouse sympathy and prejudice, the court may exclude the video. Some courts have determined that videos showing close up shots of screams, groans, or grimaces are too graphic. However, such a determination is made on a case-by-case basis.[199]

A proponent of a "day-in-the-life" video should also be prepared to respond to hearsay objections. Numerous courts have concluded that although these films might contain some elements of hearsay, they are admissible under Rule 803(24) of the Federal Rules of Evidence.[200] In *Grimes*,[201] the court permitted the jury to see the video because it was "more authoritative" on the issues of pain and suffering and because it was trustworthy due to the fact that the plaintiff and other witnesses could be cross-examined at trial about the video.

Part of the beauty of videotape lies in its ability to present the client and/or witness in a familiar, comfortable setting. Some psychologists take the position that a witness' confidence level

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[197] *See Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 609 (1977).
[198] *See Air Shields, Inc. v. Spears*, 590 S.W.2d 574, 580 (Tex. Civ. App. 1979, writ ref. n.r.e.); *see also Apache Ready Mix Co. v. Creed*, 653 S.W.2d 79, 84 (Tex. App. 1983, writ dismissed.)
[199] *See Thomas v. C.G. Tate Constr. Co., Inc.*, 465 F. Supp. 566, 570-71 (D.S.C. 1979).
[200] *See Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. at 611.
[201] *See id.*

is the single most important factor in determining credibility.[202] Confidence is communicated primarily through appearance and tone of voice. Portraying the client on his or her home turf can have obvious advantages because it is important to convey a positive and credible visual image.

- **Property Inspections**

Video equipment can also be used to inspect land and other property. Non-static conditions may be encountered that cannot be appreciated without video footage because there may not be a second opportunity to return to the premises. Videotaped depositions noticed at the scene of the accident can be of great value. The witness can be questioned at the accident site. Factual statements about landmarks, a rise in the road, and lighting may have more impact when visually supported. By committing the witness on the spot, there is less room for dispute.

- **Depositions**

Many trial lawyers routinely videotape depositions of key witnesses in a lawsuit. This guarantees that the jury will be able to observe a witness at trial if he or she is unavailable. Unlike the written page, videotape captures the gestures, mannerisms, tone, attitude, demeanor and other factors which make up the credibility of a deponent. The presentation of an actual person via video empowers the jury with visual insight which aids in determining whether to believe a witness. A pregnant pause otherwise uncaptured on the written page can seriously undermine a struggling deponent. On the other hand, a direct and responsive witness can favor and impress the jury.

Another method of taking depositions is video teleconferencing. There are now teleconferencing centers in most major cities. Teleconferencing, accomplished by satellite, allows individuals at two or more locations to communicate both verbally and visually. Camera at each location allow the parties to observe one another while audio lines permit verbal communication, and video players at each location record the interaction. It is expensive, but effective. An average

[202] *See* James W. McElhaney, *Seeing the Facts: Tapping the Power of Seeing as Well as Hearing*, 78 A.B.A.J. 102, 103 (Dec. 1992).

sessions runs about $250 per hour plus scheduling, technical and transmission fees, but is sometimes worth the expense.

Even if a deposition is not videotaped, video can still be used at trial to impeach a witness who is being untruthful. A camera, connected to monitor, should be placed above and behind the witness, focused on the witness's reading material. Once the witness controverts his or her deposition testimony, he or she can he handed a copy of the deposition and asked to read the relevant excerpts. As the witness reads, the videographer can focus the camera on the lines being read. This permits the jurors to actually view the inconsistent testimony as the hear it, leading to more powerful impeachment.

Under Federal Rule of Civil Procedure 32(a)(1), a videotape deposition may be used to impeach any witness. Similarly, Rule 32(a)(2) provides that a videotape deposition may be used against an adverse party for any purpose. The availability of the witness is immaterial under this rule.[203] Conversely, Rule 32(a)(3) allows the use of a videotape deposition of a witness, whether or not a party, only if the witness is unavailable. A witness is said to be unavailable if the court finds that: (a) the witness is dead; (b) the witness is at a distance greater than 100 miles from the courthouse; (c) the witness is unable to attend because of age, illness, infirmity or imprisonment; (d) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e) exceptional circumstances exist such that the court finds it necessary.

A party may object to the proffer of an edited videotaped deposition by alleging that the edited testimony is prejudicial and misleading pursuant to Rule 403 of the Federal Rules of Evidence. A party may also object to edited deposition testimony under the rule of optional completeness pursuant to Rule 106 of the Federal Rules of Evidence. Admissibility may also be challenged on grounds of relevance, hearsay, speculation or legal conclusion.

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[203] *See Aetna Cas. & Sur. Co. v. Guynes*, 713 F.2d 1187, 1194 (5th Cir. 1983).

Excerpts from previously admitted video testimony can be helpful in jury arguments. A collage of testimony can be created demonstrating both liability and damages. This may enable the jurors to see and hear the evidence one last time before retiring to deliberate. It should be noted, however, that any videotaped testimony used in this manner must have been previously admitted into evidence.

Ordinarily, a party taking a deposition must bear the cost of recording the deponent's testimony.[204] However, Federal Rule of Civil Procedure 54(d)(1) permits the prevailing party in a lawsuit to recover its expenses from the losing party unless the court directs otherwise. In addition, 28 U.S.C.A. § 1920 of the United States Code specifically provides that a judge or clerk of any federal court may tax the fees of a court reporter for a stenographic transcript "necessarily obtained for use in the case".[205] While the code does not expressly state that videotaped depositions are a taxable cost, several district courts and at least three circuit courts have concluded that video depositions fall within the scope of this section. A district court has broad discretion in taxing litigation costs, and a court of appeals will reverse the district court's decision only upon a clear showing of abuse of discretion.[206]

In *Morrison v. Reichhold Chemicals*,[207] the Eleventh Circuit Court of Appeals concluded that although § 1920 does not explicitly include video depositions as a taxable cost, when read in conjunction with Rule 30(b)(2) and (3), which permits depositions to be taken by "sound, sound-and-visual, or stenographic means",[208] it is clear that videotaped depositions may be taxed as any other deposition expense. Similarly, the Kansas District Court determined that videotaped depositions are a superior means of presenting testimony because the jury can better assess the

[204] *See* FED. R. CIV. P. 30(b)(2).
[205] 28 U.S.C.A. § 1920(2) (1994) (emphasis added).
[206] *See Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1049 (5th Cir. 1998).
[207] 97 F.3d 460 (11th Cir. 1996).
[208] FED. R. CIV. P. 30(b)(2).

credibility of the witness.[209] As long as the videotaped deposition's use in the case was "reasonably necessary", it is proper to tax the cost of the deposition to the losing party.[210]

While most courts agree that videotaped depositions are the functional equivalent of testimony taken by stenographic means, not all agree that video depositions are "necessarily obtained for use in the case" as required by § 1920 of the United States Code.[211] In *Barber v. Ruth*,[212] the Seventh Circuit Court of Appeals determined that the cost of a video deposition given by the plaintiff prior to trial was taxable to the defendants because at the time the deposition was taken, it appeared the plaintiff would be unavailable to testify at trial due to a scheduling conflict, and therefore, the deposition was reasonably necessary. The videotaped deposition must appear reasonably necessary in light of facts known at the time of the deposition to tax the videotaped deposition costs.[213] However, the Seventh Circuit in *Barber* also concluded that the transcription taken simultaneously with the videotape was not taxable to the defendant because it believed that a proper reading of Rule 30(b)(4) only authorized the cost of the deposition *in lieu* of the stenographic recording.[214] The plaintiff could recover the costs of only one form of recording, not both. Likewise, in *Cherry v. Champion Int'l Corp.*,[215] the Fourth Circuit Court of Appeals held that while taxing the costs of both a transcription and a videotaped recording is not prohibited, the prevailing party must demonstrate that both forms were "necessarily obtained for use in the case".[216]

The fifth circuit takes the position that fees for video depositions are not recoverable without prior court approval.[217] In *Migis v. Pearle*,[218] the Fifth Circuit Court of Appeals did not

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[209] *See Davis v. Puritan-Bennett Corp.*, 923 F. Supp. 179, 180 (D. Kan. 1996).
[210] *Id.* at 181.
[211] 28 U.S.C.A. § 1920(2) (1994).
[212] 7 F.3d 636 (7th Cir. 1993).
[213] *See International Oil, Chemical & Atomic Workers, Local 7-517 v. Uno-Ven Co.*, No. 97-C2663, 1998 U.S. Dist. LEXIS 19855, at *9 (N.D. III. Dec. 10, 1998).
[214] *See Barber v. Ruth*, 7 F.3d at 645.
[215] 186 F.3d 442 (4th Cir. 1999).
[216] *Id.* at 449.
[217] *See Datapoint Corp. v. Picturetel Corp.*, No. 3:93-CV-2381-D, 1998 U.S. Dist. LEXIS 10897, at *13 (N.D. Tex. July 9, 1998)(Citing *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1049 (5th Cir. 1998)).

interpret § 1920 which allows recovery of "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case",[219] to include videotapes of depositions.[220] Unless prior court approval has been given, video expenses may not be recovered in any fifth circuit court.

Other Methods of Presentation

The ELMO (also known as a DOAR) is a projector which transmits images of documents and small three-dimensional objects to a monitor screen. It is popular because of its flexibility and ease of use.

Slide presentations can also be effective tools. Traditional 35 millimeter slides can be projected to display photographic images and to emphasize bullet points or important lines of text. Digital slide presentations are easily created and transferred from a laptop computer to a monitor or projected onto a screen. Presentation software packages continue to evolve giving the creator options of incorporating photographs, documents, charts, graphs, sound, video or animation clips.

Jury Books

In conjunction with reuse of other types of demonstrative evidence, it is recommended that you compile individual jury books to be given to each of the jurors. While it is not necessary to provide the jurors with a hard copy of each piece of demonstrative evidence that you introduce at trial, it is a wise practice to have 8½ x 11 copies of important exhibits made and given to each juror. By using jury books, jurors are given the availability to look back and reference earlier exhibits that have been presented at trial and compare them with evidence offered later.

While there is no Mississippi rule that specifically deals with jury books, oftentimes agreements between the parties help to alleviate the need to argue over whether jury books should

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[218] 135 F.3d 1041 (5th Cir. 1998).
[219] 28 U.S.C.A. § 1920(2)(1994).
[220] *See Migis v. Pearle Vision, Inc.*, 135 F.3d at 1049.

be used in a certain trial. It would be a wise practice to make sure that an extra jury book is prepared and given to the presiding judge. Our firm has found that the use of jury books is helpful to the judge and the jury in that the judge and the jury do actually study, review and use the books.

Settlement Brochures

Written and video settlement brochures are an effective vehicle for supplying the opposing counsel and insurance carriers with information needed to properly evaluate and settle a case. Any settlement brochure should be presented in an orderly and attractive format (gold embossed, leather-bound notebooks are our preference) and presented to opposing counsel, representatives of the various levels of insurance, and personal counsel for the defendants. An effective settlement brochure may contain the following sections:

1. Demand

   If included, it can be placed at the very beginning of the brochure. Remember, however, not all cases warrant a demand.

2. Introduction

   The introduction to the brochure may begin with photographs of the victim before the accident in question. In this section, it is helpful to include family photographs and family quotes as to how life has changed since the accident. Further, you may want to prepare a written profile of the victim describing his or her personality, goals, ambitions and a personal account of how his or her life has changed.

3. Liability

   In this section, you may want to show how the accident or negligence occurred and who is responsible for the resulting injuries. This section may also begin with pictures of the accident scene or hospital in question. Copies of relevant reports may also be placed in the liability section. Pertinent parts of company manuals and policies may be highlighted and included in this section. Quotes from liability experts should also be incorporated.

4. Damages

   The damages section is the area where it is hoped the other side is shown the extent of the damages suffered by the victim. This section may include pertinent medical records and graphic photographs, such as that of a deceased client, the client in the burn unit, or the client going through the process of recovery and rehabilitation. If the client is

deceased, you may want to include a copy of the coroner's report. Life care plans, itemization of future medical care and economists' reports may be included.

5. Experts

   Include a section on experts so that the opposing counsel can see what expert opinions will be offered at trial. This section may include the curriculum vitae of the experts, as well as certain portions of reports the experts intend to use at trial and perhaps photographs of demonstrative aids the expert intends to use.

6. Demonstrative Evidence

   The last section of the settlement brochure may include photographs of additional demonstrative evidence that will be used at trial. For example, if a model or large illustration is to be used, take a photograph of it and include it in this section. Frequently, our firm will create a video settlement brochure which amounts to an hour-long synopsis of what will be presented to the jury if the case does not settle. Following the video, the written brochure may be presented. If the adverse party receives the written material before the video, they often look only at the written material and not the video.

   In composing a settlement brochure, attempt to create very strong images. Insurance adjusters and opposing counsel, like jurors, can be persuaded by truly moving images. Since many lawsuits settle before trial, the effective use of settlement brochures can assist in best positioning the case for mediation and/or settlement conferences.

h. Final Thoughts on Demonstrative Evidence

With abundant creative thoughts flowing as you work through the best ways to visually present a case, a note of caution is in order. While demonstrative evidence is certainly a valuable courtroom tool, to serve its purpose and make it worth the investment, it must be done right. The following thoughts are offered for consideration:

1. Keep graphics simple, but respect the jury's intelligence.

2. Videotaped excerpts from depositions should be as concise as allowed by the point to be made.

3. Any visual shown should be easy to see by the jury and the judge and, if possible, opposing counsel.

4. Mark the exhibits ahead of time.

5. When possible, allow opposing counsel to preview the demonstrative evidence prior to the time you are ready to offer it.

6. Attempt to get permission from the court to use the demonstrative evidence bfore it is revealed in the presence of the jury.

7. If you are not technologically adept, have an assistant who can work the overheard projector, the video, the laser disc, and so forth. It is very disruptive and can be counterproductive, to have a klutzy presentation.

8. Do not overdo the demonstrative evidence.