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ARTICLES

Developing Trial Lawyers in the Age of Shrinking Trial Dockets

By Margaret Lockhart

Ask law students what they want to do after law school and many will tell you they want to be trial lawyers. The bold emphasize that they are not interested in being mere litigators; they want to be on their feet in the courtroom, telling their client's story to a jury. They have aced trial advocacy, participated in mock trials and moot court, and assisted clients through legal clinics or pro bono projects. They have that "fire in the belly" that firms seek.

When these students become law firm associates, they want to hit the ground running. They know they will spend considerable time on research and writing and accept that they may be drafted for large, sometimes tedious, document projects. But they long to be questioning witnesses, cross-examining experts, and arguing evidentiary objections.

Unfortunately, fewer cases go to trial, and there are fewer opportunities for associates to learn and practice trial skills. And when opportunities arise, clients want experienced trial lawyers to try their cases. Although they recognize the value of training, clients do not want their trial to be a lawyer's first.

Paradoxically, six or seven years later when these associates are eligible to become partner or shareholder, many firms expect them to have had trial experience. Yet, many senior associates have not had the chance even to second-chair a bench or jury trial. Some have never even been in a courtroom.

The dilemma is troubling for everyone. Motivated associates are frustrated with the lack of opportunity and often disillusioned with their practice. Clients are concerned about young lawyers' lack of trial experience. And partners are trying to address the concerns of both while maintaining their own practices.

Trial Advocacy Training Programs

How do law firms develop trial lawyers when there are fewer and fewer trials? Many rely on training programs sponsored by outside providers. The National Institute for Trial Advocacy (NITA) and International Association of Defense Counsel are among the many groups that sponsor intensive trial advocacy programs. Participants work with a faculty of experienced trial attorneys on a fictional case, practicing witness exams, arguments, evidentiary objections, and

other trial skills. Sponsors create comprehensive case files for the training and often use real witnesses to make the experience more realistic.

Other firms develop their own in-house trial advocacy programs. Greenburg Traurig, LLP, has developed a comprehensive trial advocacy program for its mid-level associates. The firm has partnered with a litigation training consultant to develop and conduct this training. Working with the consultant, the firm creates a case file for the program, and 24 associates participate each year at an off-site location that permits the participants to focus on the training. Many of the firm's best trial lawyers serve as faculty, working with associates in small groups for three days on the variety of trial skills, and providing one-on-one feedback and video review of "on their feet" performances. On the fourth day, the associates conduct a mock trial in a real courtroom. Local actors serve as witnesses, community members serve as jurors, and former or retired judges preside. After the trial is complete, the associates watch the jury deliberate and have an opportunity to speak with the jurors. Then the presiding judge and a Greenburg Traurig faculty member critique the associates' trial performance. The associates also receive a videotape of the trial for later review.

Ruth Bahe-Jachna, a Greenberg Traurig shareholder who helped to develop and now teaches the trial advocacy program, says that the program has been instrumental in giving associates both the skills and the confidence they need to try cases. Clients familiar with the program are more comfortable having associates involved in trying their cases. As an added benefit, the participants develop professional and mentoring relationships that continue long after the program ends. According to Bahe-Jachna, this has boosted both associate retention and morale.

Providing Trial Opportunities Through Case Selection

Other firms develop trial advocacy skills by taking on specific types of cases. Many firms recognize that insurance-defense and subrogation cases provide opportunities for trial in smaller matters, which often can be delegated with supervision to associates. Other firms encourage associates to take criminal appointments or pro bono matters that will get them into the courtroom. Firms view the reduced rates on these matters as an investment in training. Partners must also invest time to supervise these cases, both to protect client interests and to ensure that associates do not develop bad habits.

Cooper & Walinski, LPA, an Ohio litigation firm, has volunteered to take all domestic-violence referrals from the local bar association's pro bono program. The firm's associates represent victims of domestic violence in civil-protection hearings and appeals. Those cases routinely give associates only a very limited time to complete their investigation, prepare witnesses and cross-examination of adverse witnesses, organize exhibits and evidentiary issues, and try the case. The firm also volunteers associates' assistance to the local public defenders' office. Associates each spend three months working part-time defending indigent clients in municipal court. Combined,



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these programs give associates an appreciable amount of courtroom experience as well as exposure to local judges and attorneys.

Jury Trials Are Not the Only Trials

Many law students—and even associates— aspiring to become trial lawyers believe that the only real trials are jury trials. They are wrong. Lawyers can develop important trial skills outside the courthouse.

As a young lawyer, I represented a healthcare provider who faced union-organizing campaigns. The campaigns spawned many representation and unfair labor practice hearings across the country. These hearings, at which an National Labor Relations Board administrative law judge presided, gave me the opportunity to examine and cross-examine witnesses, use and admit exhibits, argue evidentiary and other legal issues, and make opening and closing arguments. Labor and other arbitration proceedings provided similar experience. These experiences made my first jury trial far less daunting. And they occur far more often than jury trials.

Developing Trial Lawyers Requires Commitment

The common element among all training methods is commitment. The commitment is, in part, financial. The best outside training programs are expensive. Effective in-house programs necessarily require significant non-billable time from some of the firm's best and most productive lawyers. And the time that associates devote to criminal or other reduced-rate or non-billable cases can be a drain on firm resources.

But the more important commitment is lawyers' day-to-day time. Even the best and most rigorous classroom training program cannot teach trial strategy. To understand trial strategy, associates must be involved in a case from the very beginning. Associates learn how to structure a case with an eye toward trial only if they are included—at the firm's expense if necessary—in meetings with the client and in pretrial conferences. Associates who are involved in strategy discussions better understand how pleadings, discovery, experts, and pretrial motions shape the eventual trial. And by participating in or observing the eventual trial, they see how those strategy decisions influence the evidence and the trial's outcome.

Regularly involving associates in the development of cases gives them a bigger picture and better equips them to handle a trial when they have the chance. And the additional client contact will likely give the client confidence in the associates' ability to handle a trial when the opportunity arises.

The best trial lawyers will tell you that they learned most from their mentors by tagging along, watching, absorbing, and questioning and then being thrown into the courtroom where they were critiqued by their mentors. Today, there are fewer opportunities for courtroom observation, and seemingly fewer lawyers are available and willing to mentor associates. But there are far more

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opportunities for classroom and practical training. An effective program for developing trial lawyers should include both training and mentorship.

Keywords: trial lawyer training, trial dockets, trial advocacy

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Tips to Capture the Best Jury: A Defense Attorney Perspective

By Sharon F. Bridges

The right to a jury trial is embedded in the democratic culture in America. High-stakes litigation mandates that corporate defense attorneys prepare for trial as if preparing for war. Trials are often won or lost during voir dire. Depending on the venue and the judge, attorneys may have great latitude when conducting voir dire. The ability to question potential jurors and challenge their responses and/or qualifications is essential in the jury selection process. Researching the demographics of the community in which the case will be tried can be useful in creating themes that you can convey in voir dire to educate the venire on key facts beneficial to the defense of the case.

It is critical to illicit responses related to the potential juror's background, life experiences, and opinions. Attorneys analyze these responses to determine whether the potential juror can be fair and impartial. Trying to uncover the most sympathetic juror to support the corporation's position is the ultimate goal. Below are candid considerations by a corporate defense attorney that can assist you in the jury selection process.

Questioning

The experienced defense attorney recognizes that you have to ask the right question to obtain the best response from the potential juror. Phrasing questions properly can be an arduous task. Careful consideration should be given to the potential juror's culture, race, age, gender, economic status, educational background, and employment status. Many potential jurors who have never participated in the jury selection process may feel intimidated. The corporate defense attorney should endeavor to make the venire feel comfortable and to exude a perception of trustworthiness.

Potential jurors should be encouraged to express their thoughts and opinions. This is easily accomplished by asking open-ended, non-threatening questions. It is imperative to expose potential jurors with an inclination to award large sums of money. Questions should be phrased

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to prompt potential jurors with extreme views towards damages to respond. The questions below are examples that may identify jurors who may support high damage awards.

- Is it more important to compensate an injured party than to determine who caused the injury?
- Do you think that damage awards in civil cases are too high, too low, or about right?
- Do you believe that there should be a cap on damages?

The objective of the questioning process is not only to seek the most plaintiff-oriented juror that the defense will likely strike, but also to hide the potential juror that the defense will likely select.

A party may inquire into whether the prospective juror would support or be opposed to awarding punitive damages in a negligence action if the court instructed him or her that punitive damages may be considered. *Yazoo & M.V.R. Co. v. Roberts*, 88 Miss. 80, 40 So. 481 (1906).

The Mississippi Supreme Court has approved questions posed by a defense attorney to prospective jurors that provided information about the plaintiffs' "contacts, affiliations, and beliefs" since that type of information "might bear on the decision to exercise peremptory strikes of jurors." *Owens v. Mississippi Farm Bureau Cas. Ins. Co.*, 910 So. 2d 1065 (Miss. 2005).

A party may not construct hypothetical questions requiring a prospective juror to pledge a particular verdict. Rule 3.05, Uniform Rules of Circuit and County Court; *Harris v. State*, 532 So. 2d 602 (Miss. 1988). *Harris v. State* was cited in *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997). The *De La Beckwith* case was a high-profile case, which was moved to another county in an attempt to obtain an untainted jury pool. In *De La Beckwith*, *Harris v. State* is discussed regarding the prohibition of hypothetical questions to the jury in voir dire. The prosecutor asked whether or not the jurors would be influenced by the fact that 30 years had passed since the crime was committed. The Mississippi Supreme Court found the question was not a hypothetical question within the meaning of Uniform Circuit and County Court Rule 5.02 and *Harris v. State*, but rather was within the court's policy of allowing litigants to find out information regarding the jury. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997). Voir dire examination should be in the abstract as to the class of the case and should not ask what the prospective juror might do in the particular case. *Nicholson v. State*, 761 So. 2d 924 (Miss. Ct. App. 2000); *McCaskill v. State*, 227 So. 2d 847 (Miss. 1969). Courts have held that any voir dire procedure that effectively impairs the defendant's ability to exercise peremptory challenges intelligently is grounds for penalty reversal, irrespective of prejudice. *Knox v. Collins*, 928 F.2d 657 (5th Cir. 1991) cert. denied, 510 U.S. 1061 (1994); *Carter v. State*, 869 So. 2d 1083 (Miss. Ct. App. 2004).

Jury Questionnaires

The use of jury questionnaires during the jury selection process may be beneficial depending on the facts of the case. Jury questionnaires facilitate the process and help avoid potential tainting of the jury pool due to the responses by members of the venire to questions that may be deemed sensitive in nature. In Mississippi, the use of a jury questionnaire is clearly within the province of the Court. *Bennett v. State*, 2003-DP-00765-SCT (May 11, 2006). The questionnaires are completed and reviewed by counsel prior to beginning the voir dire process. The query will vary depending on the facts of the case. In product liability cases, questions should be phrased in a manner to elicit knowledge of products at issue and prior usage. For example,

- Have you or a member of your family ever purchased/used Product A?
- Have you or a member of your family ever been injured by using Product A?
- Have you read or heard anything about lawsuits related to Product A?

Affirmative responses to the above questions should support the judge granting your request for individual voir dire outside the purview of the venire.

In nursing-home cases, the questionnaire should include questions geared toward ascertaining prospective jurors' knowledge related to the defendant nursing home, including whether relatives or close friends have been residents of the facility, visits to the facility, and their opinions of the facility. Sample questions include

- Do you know anyone that has been a resident in Nursing Home A?
- Do you believe that nursing homes provide good care, average care, or poor care to residents?
- Do you believe that most nursing homes are adequately staffed?

Additional follow-up questions are necessary during individual voir dire, outside the presence of the venire, to obtain the substance of the prospective juror's response. It is imperative to explore the prospective juror biases regarding nursing homes to support excluding him or her for cause. The consequence of not doing so could result in the selection of a juror with strong negative opinions against the defendant nursing home.

In highly publicized cases, the questionnaire should include questions to determine the extent of the potential juror's knowledge regarding the facts of the case. In some jurisdictions, too much knowledge about the facts of the case will justify a challenge for cause. When used properly, jury questionnaires can make the jury selection process more effective and expeditious. *Id.*

Challenges for Cause

The corporate defense attorney should utilize challenges for cause to eliminate unwanted jurors. In Mississippi, the Uniform Rule for Circuit and County Court 4.05 adopts the traditional method

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for exercising challenges. Rule 4.05, Uniform Rules for Circuit and County Court; *see also Thorson v. State*, 895 So. 2d 85 (Miss. 2004) for correct procedure. When a potential juror has a bias that is so strong that he or she cannot overcome it, the juror should not be allowed to serve on the jury. On the other hand, when a prospective juror has voiced an opinion seemingly prejudicial to the defense, but, after further inquiry (frequently called "rehabilitation"), the juror demonstrates the ability and willingness to decide the case impartially according to the law and evidence, a challenge for cause is not warranted. *State v. Eugene*, 871 So. 2d 584 (5th Cir. 2004). The court considers all challenges for cause before the parties are required to exercise peremptory challenges.

The skillful corporate defense attorney's efforts to unclasp biases during voir dire will support challenges for cause. It is the judge's responsibility to ensure that the jury selected is fair and impartial. *Scott v. Ball*, 595 So. 2d 848 (Miss. 1992); *Davis v. Powell*, 781 So. 2d 912 (Miss. Ct. App. 2000). A juror may be removed for cause if a challenge against him or her exists that would likely affect his or her competency at trial. *Billiot v. State*, 454 So. 2d 445 (Miss. 1984). *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997) (citing *Billiot v. State*, 454 So. 2d 445 (Miss. 1984)). A juror's ability to be fair and impartial is considered impaired if, because of his or her relationship to one of the parties, occupation, past experiences, or any other reason, the juror would normally lean in favor of one party. *See Taylor v. State*, 656 So. 2d 104 (Miss. 1995) (court should have dismissed brother of assistant district attorney); *Scott v. Ball*, 595 So. 2d 848 (Miss. 1992) (articulating standard); *Ortman v. Cain*, 811 So. 2d 457 (Miss. Ct. App. 2002).

The defendant need not make the additional showing of injury resulting from the court's action by forcing him to accept the challenged juror. *Bernard v. Richoux*, 464 So. 2d 856 (5th Cir. 1985). It has been held that a party generally cannot obtain relief for the erroneous sustaining of a challenge to a juror for cause. *U.S. v. Gonzalez-Balderas*, 11 F.3d 1218 (5th Cir. 1994).

In *Heaney v. Hewes*, a patient in a medical malpractice case was not denied an impartial jury when, during voir dire, the trial court declined to dismiss for cause all potential jurors who had prior direct or indirect contact with defendant doctors. 8 So. 3d 221 (Miss. Ct. App. 2008). Sixteen members of the 53-person venire had prior professional contact with defendants. Both defendants were retired at the time of trial, preventing any risk that members of the venire would be influenced by the possibility of future treatment by defendants. The patient's attorney challenged only two specifically named members of venire for cause on the basis of prior contacts with defendants, and neither of the specifically challenged jurors sat on jury.

It is not uncommon in small town venues in Mississippi for members of the venire to have familial relationships with the parties or their attorneys. However, this relationship alone may not be sufficient to support a challenge for cause. In *Davis v. State*, the court discussed the rule regarding familial relationships between parties, key witnesses, and prospective jurors and held that the civil law rule governs the computation of relationships. 743 So. 2d 326 (Miss. 1999).

The court found that a fourth-degree kinship was outside the range where a strike for cause is mandated. To strike for cause, there must be a clear showing that a juror would not be able to follow the court's instruction. *West v. State*, 820 So. 2d 668 (Miss. 2001); *Martin v. State*, 592 So. 2d 987 (Miss. 1991); *Humphrey v. State*, 759 So. 2d 368 (Miss. 2000); *see also Davis v. State*, 660 So. 2d 1228 (Miss. 1995) (dismissed juror who could not set aside personal opinions and vote for death penalty); *Cribbs v. State*, 800 So. 2d 568 (Miss. Ct. App. 2001); *Venton v. Beckham*, 845 So. 2d 676 (Miss. 2003) (holding that court did not abuse its discretion in striking two jurors for cause where they failed to disclose the fact that they had problems with their bills at the clinic where the defendant worked since counsel had made an adequate inquiry of the jurors). This juror's promise to be impartial in this case was entitled to considerable deference. *Scott v. Ball*, 595 So. 2d 848 (Miss. 1992). *See also Lester v. State*, 692 So. 2d 755 (Miss. 1997) (overruled on other grounds by, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999)).

Conclusion

Effective jury selection techniques are imperative to eliminate jurors who have the propensity to vote against the corporate defendant on liability and to grant high damages awards, including punitive damages. It is important to understand the dynamics that drive high jury awards. Courts give broad discretion during the jury selection process. Voir dire should be given the same careful attention that is given to preparing for other aspects of trial. With adequate preparation and finesse, the corporate defense attorney can successfully impart themes in the jury selection process to uncover extreme biases, ultimately seating an impartial jury. Utilization of these tips has contributed to an undefeated trial record on behalf of my corporate defense clients during the past four years.

Keywords: jury selection, defense perspective, jury questionnaire

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The Five Cs of Effective E-Discovery Management

By Susan Burns

We all know that the ballooning scope of e-discovery poses a growing problem for trial attorneys. You are no doubt inundated on a daily basis with invitations to participate in webinars about the latest and greatest technological innovation to make the e-discovery nightmare go away. Although it is true that you should have technology that is appropriate to the scope of your case, focusing on other significant elements will also help you streamline the process, reduce costs of review and production, reduce stress, and free yourself to focus on your winning trial strategy. The five Cs of effective e-discovery management include cooperation with opposing

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counsel in defining the scope of discovery; culling data; creating a winning discovery team; communicating effectively with the entire trial team; and capturing and promoting best practices.

Cooperate

Streamlined focus and less interruption to your client's business make you look good.

We work in a profession in which we still earn about 76 cents to the dollar that our male counterparts earn, so it would not be surprising if many of us viewed toughness as a critical element of success. Granted, a certain amount of tenacity is in order in the world of trial lawyers, and toughness has its place. But what does that mean in the context of discovery negotiations? Toughness here means knowing your case, knowing the discovery rules, and, within that context, cooperating with opposing counsel to the greatest extent possible on discovery matters. There are plenty of things to fight about, and eliminating some of the fights at this stage allows you to get to the merits more efficiently and to save your battles for where they count.

Cooperation at this stage does not mean you should cede to unreasonable demands of opposing counsel or be a pushover, or that you are not a zealous advocate. It does mean you should work with opposing counsel to negotiate and define the scope of discovery. More is not always better. Be willing to cede scope for effective focus. You can zealously advocate for cooperation in discovery and save your energy (and expense) for summary judgment rather than motions to compel. Negotiating a tighter focus means less data to collect, process, review, or produce and, consequently, less expense. It is entirely possible to enter into an agreement with opposing counsel to stipulate to locations, custodians, search terms, and strategies.

However, to effectively negotiate, you do need to do your homework and thoroughly understand your case before you start. To identify the useful electronically stored information (ESI) at issue requires an early understanding of the case, including issues, players, time frames, and possible ESI sources involved. Define what you actually want from the other side so that your side doesn't have to sift through terabytes of irrelevant ESI. Remember that an over-aggressive refusal to cooperate drives up the cost of e-discovery for everyone. It also creates more confusion and can cloud the issues and slow down your prospects for early case assessment.

Your opposing counsel may not always be agreeable to cooperating in defining the scope of discovery, in which case you can only do your best, document your efforts, and move on. None of your efforts toward cooperation are wasted as they impact the rest of the process. There are additional steps you can take to manage your expenses and keep your eye on the winning strategy.

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Cull Your Data

Less data, fewer documents, and lower costs make you look good.

After defining the focus of your case, regardless whether you are able to reach agreement with opposing counsel, you want to fine-tune and test your search methodology and use it strategically. You should be strategic about maximizing the search capabilities of the document review or case management software you are employing. The groundwork you laid in the cooperation stage will be useful. Your thorough understanding of the case will help you to hone in on search terms and cull down the universe of documents. This will help you avoid the expense (and embarrassment) of missed documents.

Again, you can effectively maneuver through this stage only if you are very strategic about your search terms. And that is only possible if you understand the case first. Regardless of whether you are using a keyword search, Boolean search, fuzzy logic, conceptual searches, or a myriad of other not-yet-known search products, if you are not doing a straight-line review of all available documents, it is imperative that you spend time focusing on your search and come up with a really good set, stop and review initial searches (i.e., check your results by sampling), and continue to refine searches until you get the search right.

If you cull too much, you can miss key documents and suffer the consequences. And, of course, if you don't cull enough, you run up unnecessary expenses in processing, review, and production. Document your efforts here as well to avoid adverse inferences and other undesirable consequences such as *Zubulake*-sized verdicts.

Create and Nurture a Winning Discovery Team

Quicker access to information via a finely tuned review team make you look good.

In a case of any size, you will be delegating a lot of the behind-the-scenes discovery work. It is, therefore, important to pay attention to creation and management of this critical team, including a discovery leader and experienced document reviewers. Your first step (and this should be done at the time the case commences) is to appoint an experienced lawyer to manage the overall process, and the review in particular, and make sure that he or she is dedicated to your case. This can be someone internal, or you can affiliate with specialized discovery counsel. The review team is responsible for overall discovery management and acts as team liaison for all things discovery-related.

Don't be tempted to assign as review point person a junior associate so that person can get some experience. This is one job that is solely suited for seasoned veterans. The lawyer leading the review should meet with the trial team and the review team—ideally before search protocol and document collection has been determined. Make sure to include the review leader in all trial update and strategy meetings. The expense you incur here will be saved later in improved

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communication during review. It is important that this person also be dedicated to the case and not be juggling numerous other examples. Don't allow the review team to drift on without guidance for days (or weeks) while the review leader is pulled off to write briefs, handle depositions, or do other work. It is critical that the review team have a point of contact should emerging issues arise.

Another important cost-effective step is to use experienced contract lawyers. Their hourly rate is substantially lower than law-firm billing rates for comparable lawyers, and you avoid paying the salary, benefits, and other overhead of full-time employees. Contracting with review lawyers also gives you the flexibility to bring enough people on board on short notice and not be overstaffed when the project ends. Directly contracting saves the expense of the intermediary and rebilling. Using experienced review lawyers also gives you a better quality product. A higher-quality review makes you more effective and positively impacts your trial strategy.

A lot can be done to effectively utilize the talents of your review team. This will also save you time and money. Define clear roles and responsibilities for reviewers. Assign review responsibilities strategically by custodian, priority, topic, or concept; for example, keeping the reviewer's background and experience in mind will yield more effective results. If your collection contains information that requires specific knowledge or skills, improve the accuracy and efficiency of your review process by creating specialized review teams. While you may spend a little more upfront on tools and reviewers with specialized skills, you will likely save over the long term in reduced resource costs.

Finally, this point may seem elementary, but it is overlooked most of the time: Make sure your reviewers are sufficiently trained in the law at issue and review the software technology being used. The money you spend on training will be more than offset by greater efficiency and accuracy as well as potential for a more positive case outcome. After all, document review attorneys are the first (or only) attorneys to see factual information pertinent to the case. Their ability to review and decipher the relevance of the facts to the substantive law is critical to your success.

Combining technology's benefits with human expertise is the best way to design a large-scale document review. Every hour saved through effective use of technology allows you to focus time and money where it is most needed: responsive and privilege-protected documents that require a human's subjective expertise. Ineffective training can leave reviewers unable to find and review relevant document groupings, retrieve previously reviewed documents, and carry out other essential review work.

It is also very important to take the necessary time to present your attorneys with an overview of the case and follow up with regular (weekly) meetings to respond to their questions and provide feedback. Insufficient training in the law results in reviewers not having the background to assess

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the degree of document relevance, resulting in critical documents (both positive and negative) being missed. Do not underestimate or undervalue the intelligence of your attorneys. Their understanding of the bigger picture enables them to think about the documents instead of mindlessly coding and makes them feel part of a team. Imagine the quality of work you'd be able to provide if a partner asked you to write a memo but refused to tell you what the case is about or what you are trying to achieve.

If the case involves pharmaceuticals or another industry with highly technical terms, provide some background on the industry and its terminology. Depending on the case, consider having an industry expert on hand for the first couple of weeks and on call thereafter to answer reviewers' questions. Investing in upfront training is less expensive than having a team of reviewers spending time trying to each decipher complex technical jargon on their own.

Communicate with the Entire Team

Defined communication and processes make you look good.

Frequently missing in the discovery process is a method for effective communication between the trial team and document review team and ensuring that both the trial team and the review team get exactly the information they need when they need it. This two-way communication helps ensure (1) regular and consistent updates to the trial team on key factual findings to support early case assessment and incorporation into litigation strategy, as well as (2) timely communication about changes in case strategy to the reviewers, allowing them to better identify key facts, witnesses, and potential challenges to litigation strategy. Reviewers are often the first or only people to see a document and, if utilized properly, they can provide updates for keywords and additional searches that need to be conducted. Be sure that reviewers have a method of communicating emerging issues that can impact case strategy and be open to adding new tags if the situation warrants. If you have done your job correctly and have appointed discovery counsel to lead the team, these steps will all be taken care of, relieving much of the burden and confusion that sometimes goes along with the territory.

In addition to the communication flow, it is important at the outset to supply reviewers with a manual that provides easy-to-understand instructions for tagging email chains or families, duplicates, annotations and redactions, as well as other crucial information. Make sure that the review protocol is very clear: Identify review calls related to responsiveness, privilege, confidentiality, significance, and issues. Delegate and provide sufficient training for first-round privilege review so that review lawyers can make the cuts on their own. Attorneys tend to overanalyze, so stay a step ahead of them by crafting protocol that will answer as many potential questions as possible.

Failing to be clear and consistent in your instructions renders sometimes tedious—but important and expensive—tasks meaningless. Also, no team, no matter how brilliant, ever thinks of



everything in the beginning of the case. No matter how thorough you are, ambiguities will arise. Have a clear path for communication to resolve any ambiguities. Also define a protocol for resolving problems. A decision matrix provides a clear path for issue resolution and dramatically improves consistency in problem-solving and review, which can decrease downtime and alleviate bottlenecks. Finally, formalize a process for regularly disseminating information with the review team. For example, when a decision is made, update the team at the weekly Friday meeting. Don't wait weeks to get a decision and then send out a mass email that everyone ignores.

This is not rocket science, but very few attorneys actually make sure these steps are implemented and followed on their cases. Following these steps will make a world of difference in your ability to effectively handle your case and represent your client.

Capture and Promote Best Practices

There are no mistakes, just failures to learn. Implementing lessons learned make you look good.

Like anything else, effective discovery is a learning process, and the rules and technology are constantly changing. Nonetheless, tried, tested, and true procedures should be documented and incorporated as part of the process. If you have established an effective communications process, the easiest way to document and incorporate it is to encourage ongoing and continuous dialogue with your review attorneys and document the systems and processes that are effective as you go along. In addition, have a "lessons learned" review after project termination to identify practices for training, software selection, organization, and quality control that should be duplicated going forward. Take time to capture processes you want to repeat.

In spite of all the dramatic changes due to the information explosion, changes in technology and discovery rules, and their impact on your litigation practice and trial strategies, there are some basic rules that still and always apply. Use the five Cs to effectively manage discovery and reduce costs and stress so that you can focus on the merits of the case and your winning trial strategy.

Keywords: e-discovery, managing data, lower e-discovery costs

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Private Mediation: A Checklist

By Beatrice O'Donnell

With clients continually interested in controlling costs and resolving cases quickly and efficiently, private mediations continue to be a viable option in contrast with protracted and expensive litigation. In an era when so few disputes are actually tried, resolution through private mediations has an ever-growing presence in litigation. Unlike mediations in the federal and state courts, private mediations have both the advantage and challenges of flexibility. The following are issues to consider before you agree to private mediation as well as information on structuring the mediation in a way to create the best situation for a successful outcome for your client.

Agreeing to Mediation

Timing is not only the most important thing—it is the only thing. Many attorneys proceed to mediation to have someone else do the hard work of getting a case settled. In reality, the attorney needs to make a determination of whether the case is, in fact, "settleable." Critically, the parties should have realistic visions of both the positive and negative aspects of their individual cases. Are the parties within a dollar range where the case can settle? If the parties are not within a realistic range, it may be more helpful to the settlement of the case to engage in further discovery before moving to mediation prematurely.

Selecting the Mediator

To say that the selection of a mediator is critical is an understatement. The first place to start in the selection of a mediator is your client. Often clients have extensive experience with mediations and have a roster of attorneys or professional mediators with whom the client feels comfortable. Even if your client does not have a recommendation, discuss with him or her the type of mediator that he or she envisions for this mediation.

Vetting the Mediator

The usual way to vet a potential mediator is to contact partners and colleagues, usually via email. While this is a quick and easy method to gain valuable information about a potential mediator, make sure that the intelligence that you obtain is recent, reliable, and in the context of a mediation. Many wonderful attorneys may not make excellent mediators. Some mediators may work for some clients, while others have styles that may clash with your client's expectations of the process. Regardless of whether the case is resolved by the mediator, you need to ensure that your client will be satisfied with the process.

The Process

A mediator may have a one-style-fits-all approach to his or her mediations. Some mediators encourage presentations and interaction among the parties while others prefer that the parties

have little or no interaction during the process. In contrast, clients often view mediations as their opportunity to tell their story because the mediation is designed to take the place of the trial. Prior to agreeing to a mediator, verify that the style of the mediation suits your client's needs. You can call the mediator directly to discuss or, in the alternative, if you are thinking of using a professional mediator, the mediator's staff can assist you with the details of the mediator's style.

Ground Rules

Most mediators have a fair degree of flexibility in the structure of their mediations. Because mediations are often held because the parties are unable to reach agreement on their own, you may have a contentious relationship with your opponent. Regardless of the nature of the relationship with opposing counsel, to ensure the optimal experience for your client, you need to understand exactly how the mediation is going to be conducted.

Are the parties required to provide written memoranda in advance of the mediation? Will the memoranda be confidential, or will the other parties have the opportunity to see the memoranda as well? Is your client comfortable with a private memo going to the mediator, which you will never see or be able to counteract?

Will the parties make introductory presentations to the mediator? If so, will the attorneys make the presentations? If your client wants to address the mediator, will the mediator agree, and what effect will that have on your opponent's clients?

Will demonstrative evidence be used, e.g., a video presentation? If so, ensure that you have an opportunity to view the presentation of the opposing party well in advance. Review this presentation as if it was going to be used in the trial setting. If the presentation misrepresents the facts or the applicable law, find the best way to neutralize it. If the presentation is truly unfair, raise it with your opponent. If the opposing attorney refuses to make adjustments, raise the issue with the mediator, who will not want the mediation to be sabotaged before it begins.

Role of the Mediator

The parties need to have an understanding as to whether the mediator is to "put a number on the case" or whether their job is simply to move the parties to a mutually acceptable resolution if that is indeed possible. If the parties are going to permit the mediator to place a value on the case, you should consider whether the mediation should be entirely confidential so that your client will not be prejudiced in any way by agreeing to participate.

Drivers

As the attorney, it is critical to appreciate the drivers of the mediation both from your client's perspective as well as from your opponent's. Unfortunately, in a tough economy, some lawyers—whether consciously or unconsciously—simply do not want to dispose of a case. In contrast, with the pressure on in-house legal departments to cut costs, that same attorney's client

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may be much more motivated to settle. Understanding the motivation of the various constituencies will help you position your case as well as assist the mediator in moving the case towards settlement.

Strategy

Prior to the mediation, you and your client need to have a detailed discussion regarding strategy. Where does the client want to go in terms of dollars? Fully understanding the client's position in advance will help you move the parties to "yes." Critically, you should have an agreement with your client as to when it is time to walk from the mediation. If you and your client are not in sync, your client will send mixed messages to your opponents as well as to the mediator.

The Details

There are other questions to consider as well. Is there going to be a stay of litigation while the parties pursue the mediation option? Does that require court approval in your jurisdiction?

Are the parties going to share the cost of the mediation? Will there be preparation time charges? Will there be others billing to the mediation besides the mediator? If the case does not settle, will the mediator stay involved on a going-forward basis? Will there be an additional charge for that service? Some mediators will include follow-up services as a goodwill gesture if the mediation is unsuccessful while others work strictly on an hourly basis.

Have you documented the various informal agreements that you have entered into with your opposing counsel by a confirming letter? Having a written document that controls the format of the mediation can avoid any misunderstandings that might develop during the mediation.

The success or failure of mediation is often defined in terms of whether the case is resolved. However, mediation can also be worthwhile if the parties become more objective with respect to the strength and ultimate value of their case. Regardless of the success or failure of mediation, it is imperative that your client believe that you were fully prepared and structured the mediation to give the effort the greatest probability for success. Moreover, if both parties believe that the mediation assisted in moving the case toward resolution, there is a greater likelihood that the parties will eventually resolve the case on a mutually satisfactory basis.

Keywords: private mediation, mediator, mediation strategy

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Ten Tips for Making a Trial Court Record That Will Help Your Appeal

By Mary-Christine (M.C.) Sungaila

Savvy trial lawyers keep one eye on the trial court and another on the court of appeal. They want to win at trial, of course. But whether they win or lose at trial, they also know they need to create a record that will make the best case for the client before the appellate court. Here are 10 tips for enhancing the record on appeal.

Assert all applicable legal theories in the trial court. Consider motions in limine as avenues for doing so. Legal theories should be preserved through careful drafting, strategic planning, and filing of key documents throughout the life of the case. By consistently asserting legal theories throughout the case, you demonstrate that your client seriously believed in these theories even before there was an appeal—and that the appellate court should take them seriously too. By pursuing key issues at every possible turn, you also avoid claims of waiver. Consider whether any of the following vehicles would be appropriate to raise your issues: the complaint and answer, demurrer or motion to dismiss, motion for summary judgment, trial briefs, motions in limine, motions for judgment on the pleadings, non-suit or directed verdict, and jury instructions. Motions in limine are especially appropriate vehicles for seeking to restrict or preclude evidence.

Request jury instructions on key issues and object to others. If you want to assert a legal theory at trial, you generally must request jury instructions that fully and properly embody that theory. Make sure you get a clear, unmistakable ruling on your proposed instructions. In some jurisdictions, if you wish to challenge jury instructions requested by the other side, you must clearly state on the record both your objection and the reasons for it. In other jurisdictions, instructions given by the court are deemed objections.

Make an offer of proof concerning excluded evidence. An appellate court searches not only for error but also for prejudicial error, or error that would have made a difference in the outcome of the proceeding. Without an offer of proof, it can be difficult for an appellate court to know whether the exclusion of evidence impacted the outcome of the case. Make it clear for the appellate court, e.g., "If this witness had been allowed to testify, or if this evidence had been admitted, my client would have had evidence on a key issue, which was otherwise lacking." Consider submitting a written offer of proof, which details the substance, purpose, and relevance of the proffered but excluded evidence.

Obtain audible answers from witnesses and verbally record visual presentations. Remember that the appellate court will not receive a video of the trial. The record on appeal consists of written filed documents, exhibits, and the trial transcript. Therefore, if a witness points to an

exhibit and says "right there" in response to a question, ask the witness to clearly describe where "there" is on the exhibit, or provide a description of where the witness is pointing yourself.

Make sure depositions played or read at trial are adequately reflected in the record the court of appeal will see. Video depositions are more frequently used at trial. Often, these are not transcribed into the record; the trial transcript merely reads "Video deposition of Witness X played." Make sure the testimony the jury saw, and the designated lines and rulings on objections thereto, are adequately reflected in the record. Ask the court reporter to transcribe the lines of video deposition testimony that are played to the jury. Submit as court exhibits a marked paper copy of the deposition and a copy of the video deposition as played to the jury.

Properly identify evidence. This seems ministerial, but it is important. Make sure all of your exhibits are properly marked as to both identity and origin and are stamped for identification and/or admission. At the end of trial, make sure you know where the original exhibits are (i.e., with their respective trial counsel or with the trial court). Keep careful track of them and ensure that the original exhibits are available to be transmitted to the appellate court.

Make complete and timely objections and obtain rulings on them. Obtain a record of all sidebar or chambers conferences. To avoid any claim of waiver, objections should be made immediately and the specific nature and grounds for the objection should be stated, along with some description of the nature of any prejudice, if appropriate. Be alert to any improper arguments by counsel or improper conduct by the judge or jury; object to those immediately. As to improper argument by counsel, make the objections specific, move for a mistrial, and ask the judge to give the jury an admonition to cure the prejudicial effect of the objectionable argument. If any objections or rulings are made at an unreported sidebar or during a chambers conference, make sure what transpired appears on the record. Consider summarizing what transpired at sidebar or in chambers before the court reporter, or submitting a written summary of the sidebar or chambers proceedings, which will appear in the court's file.

Ask to clarify ambiguous trial court rulings. Sometimes the scope of a trial court's ruling is unclear. Ask the court to clarify it so that both you and the appellate court know the ground rules. Follow up, too, on conditional evidentiary rulings. Sometimes a trial court admits evidence subject to a later motion to strike. The objection to that evidence may be waived unless the motion to strike is actually made and ruled upon at trial.

Object to the form of the verdict or questions to be asked in a special verdict before deliberations begin. Objections to the form of the verdict should be made before the jury begins to use the verdict form in deliberations.

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Make post-trial motions. In some jurisdictions, post-trial motions are essential to preserve issues for appeal. In California, for example, issues concerning excessive damages or jury misconduct must be raised by post-trial motion. In other jurisdictions, such as the federal courts of appeals, motions for directed verdict or for judgment as a matter of law may be required during trial in addition to post-trial motions made.

Keywords: court of appeal, court record, record on appeal

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Cathy Lamboley's Five Keys to Success

By Haley Maple & Jacqueline Taylor

Cathy Lamboley, former general counsel of Shell Oil Company (Shell) and current member of the ABA Commission on Women, recently shared with us what she has learned during her legal career. Perhaps best known for overhauling Shell's legal department diversity initiatives and evaluation processes for retaining outside counsel, Lamboley's experiences and professional development provide valuable lessons for women attorneys practicing in-house, as well as those practicing as outside counsel or in government positions. Lamboley has translated her wisdom into a recipe for success for newly graduated and seasoned attorneys alike.

Lamboley began her legal career at Shell, where she created a lasting impact over her nearly three decades of service. Like many female attorneys, Lamboley began her career trying to fit in as "one of the guys" in the male-dominated business of oil. At the beginning of her career, Lamboley focused on generating top-notch work product in an effort to maintain job stability. As Lamboley progressed in her career, she realized that she was losing herself in the process by attempting to blend in.

After taking on a temporary position on the business side of Shell, Lamboley returned to the legal department with a different perspective. Lamboley decided she was not going to simply blend in and let her work speak for itself in an effort to maintain the status quo. Instead, she began to stand up for what she believed to be important for the future of Shell: diversity initiatives.

At that time, Shell was beginning to diversify internally. Nonetheless, Lamboley firmly believed that to obtain the best solutions for Shell, it was imperative for Shell to diversify internally and externally. Lamboley set about achieving that goal. Lamboley continues to pass on the lessons she learned and the professional passions she developed at Shell with the following five-part strategy for career success: (1) make a self-assessment; (2) take risks; (3) take credit; (4) take a

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hand; and (5) take a stand. This plan can help women practicing in various roles within the legal profession.

Make a Self-Assessment

To achieve career success and satisfaction, it is necessary to perform a self-assessment. Know your existing skill set and knowledge base, and evaluate your existing contact list. Then determine what skills and knowledge you want and need to develop and goals you would like to achieve to define yourself. Identify the relationships you want and need that will help you cultivate those skills and achieve those goals. Using this self-assessment, you will be able to generate an awareness of what is important to you in the cultivation of your career and develop a plan for achieving personal satisfaction in your career.

Take Risks

To advance in your career, you must take risks. You absolutely will not get ahead by only sitting in your office and working hard. Success takes more. You must seek out and take on challenging assignments and take risks in the product you generate. You are in charge of your own experiences. You must push yourself and seek out those experiences that will help you achieve your goals.

Similarly, you must take risks in the relationships you seek to cultivate; building relationships is key to career success. Extend yourself beyond your comfort zone. Reach out to other people and develop meaningful and lasting relationships.

Take Credit

As Lamboley pointed out, women tend to hesitate to take credit for a job well done. When a goal is achieved or a positive result is obtained for a client, a woman may be likely to say "it was a team effort" rather than take credit for her own role in achieving the goal. Do not be that woman. Do not minimize your achievements. Stand up and take credit. Doing so will get you noticed.

Take a Hand

Lamboley's recipe for success focuses on a double-sided approach to mentoring. Not only do women with experience need to seek out women with less experience, but also women with less experience need to seek more experienced colleagues. We all must be willing to reach out and take one another's hands. Senior women and younger women can learn from each other. After all, we have a lot to learn from one another. It is crucial for more senior attorneys to recognize their power and role in advancing, mentoring, and providing opportunities for young attorneys. Likewise, more junior women must recognize the value their more senior colleagues can and will offer and teach them much about the business and practice of law.

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Take a Stand

You must take a stand for what you think is right. Going along just to get along will not lead to a successful career. Take a stand for the things about which you are passionate; you will find that passion leads to success. One would be hard-pressed to find a better example of the positive outcome that flows from taking a stand than that of Lamboley's success after she took a hard stand on diversity—an issue she was passionate about.

In her position as general counsel for Shell, Lamboley took a stand in support of an issue she passionately believed was key to success for the company—diversification. She was right—it worked!

Lamboley recognizes everyone may not like or support the issue upon which you choose to take a stand. Nonetheless, she believes that fighting for what you are passionate about, if you believe in something strongly enough, is important. Doing so may very likely lead to positive results for your client or employer and will allow you to experience the career satisfaction and results you desire. Simply stated, if you believe in something strongly enough, you should fight for that belief.

Keywords: mentoring, career success, Commission on Women in the Profession

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NEWS & DEVELOPMENTS

A "First" Term for the United States Supreme Court

Despite hundreds of previous terms, the United States Supreme Court's [October 2010 term](#) is a first. It is the first in which there are more than two female justices. Justices [Ruth Bader Ginsberg](#), Sonia Sotomayor, and [Elena Kagan](#) now make up one-third of the bench.

Sandra Day O'Connor joined the bench in 1981 as the first female justice. Several years passed before Ginsberg became a Supreme Court Justice in 1993. O'Connor retired in 2006, leaving Ginsberg as the only female once again. Just four years later, however, three female justices are decision-makers in America's highest court. In 2009, Sotomayor joined the Supreme Court, and Kagan quickly followed this year.

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There is much discussion and debate about the effects these three women will have in the aggregate. Yet, any definitive conclusions may be tempered this year. Kagan already [recused](#) herself from numerous cases due to her prior position as U.S. Solicitor General. For several cases, therefore, only two females will weigh in on opinions.

Still, curiosity looms about what the future holds. Discussions focus on how the group will impact case outcomes, specific areas of the law, women in the legal profession, and the general image of leadership perceived by today's youth. Others [consider](#) potential impacts of three female justices compared to one or two, and whether the women justices' [dispositions](#) are representative of women in general. Contrastingly, while some assume that gender will play at least some role in this new era, others may also question whether [gender](#), as opposed to other factors, will be what shapes future Court dynamics.

Ultimately, whether three is a magic number that alters the Court's direction in one or more of these ways remains to be seen. Suffice it to say at this point that for many years to come, eyes and ears will be on the three justices who make this term a "first."

— *Maureen A. Redeker, Manhattan, Kansas*

WORDS OF WISDOM

How Should an Associate Prepare to Serve as Second Chair?

Be the Navigator

Second chair does not mean second fiddle. The second chair must be ready and able to assume all of the responsibilities of first chair if necessary to most effectively represent clients. Second chair must be able to complete the following:

- Make sure all exhibits are ready to go and applicable evidentiary issues are researched and/or briefed.
- Maintain witness files and all relevant contact information so that witnesses can be called when needed for preparation or testimony.
- Organize all discovery documents and depositions so that they can be located quickly in the midst of trial, if necessary.
- Ensure that all available and necessary technology issues are resolved in advance of trial, such as presentation equipment and Internet access.
- Track all deadlines and make sure they are met.



Woman Advocate

FROM THE SECTION OF LITIGATION WOMAN ADVOCATE COMMITTEE

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- Have on hand all necessary legal resources, such as a copy of the court rules and other appropriate references.
- Be an active listener and participant; help the first chair by pointing out things he or she may have missed or overlooked.

An effective second chair is an essential part of winning advocacy. A highly trained fighter pilot may know how to pilot the jet, but he won't get to the right destination without a competent navigator sitting right next to him.

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ABA Section of Litigation Woman Advocate Committee
<http://www.abanet.org/litigation/committees/womanadvocate/>

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