

Business Litigation

Mary R. Vasaly

Managing high-stakes business litigation, particularly in unfamiliar jurisdictions, can be daunting. In this issue of *TortSource*, we offer help to the beleaguered trial lawyer, courtesy of contributions from TIPS's Business Litigation Committee. Ginger Busby discusses management issues that confront firms with multistate offices and suggests that a homogeneous firm culture and regular communication are the keys to unite multioffice lawyers.

For lawyers who practice in states where no firm "satellite" offices exist, Susan Farina offers advice for arbitration appearances in states where the lawyer is not admitted to practice. Ethical rules addressing whether nonadmitted lawyers may appear in arbitrations vary, and Farina warns against appearing without reviewing the rules. Joe Epstein analyzes an alternative to trial—mediation. He offers practical advice for those who hope to resolve high-stakes litigation in mediation and provides several useful checklists and strategic considerations that can pave the way to a successful outcome. Heather Adams examines Rule 30(b)(6) depositions and observes that although the rule has existed for

many years, its requirements are not entirely clear. As Adams explains, a corporation must make sure that the witness it produces is sufficiently prepared to answer questions within the scope of the deposition notice.

David Becker and Douglas Albritton offer a Trial Tip about demonstrative exhibits, which can grab the jury's attention and communicate your themes. They suggest that "low tech" exhibits are often more flexible and effective than computer-generated models and advise lawyers to become familiar with their demonstrative exhibits before trial.

In other articles, Hervey Levin considers how the 110th Congress may deal with issues important to TIPS. Fran Semaya offers advice for new lawyers and shares her passion for mentoring Michael Orlando reports on activities both on and off the greens during TIPS's fall meeting in Pinehurst. Finally, David Cohen's "My Newport Beach" introduces us to the best part of Southern California—the site for the Section's spring meeting. We hope to see you there!

Mary R. Vasaly is a partner at Maslon Edelman Borman & Brand in Minneapolis, Minnesota, and is a member of the TortSource editorial board.

Out-of-State Arbitration Are You Engaged in the Unauthorized Practice of Law?

Susan H. Farina

Imagine yourself sitting with your client in opposing counsel's conference room about to begin a deposition of the president of Big Company, the entity with which your client is arbitrating a multimillion dollar dispute. Your deposition exhibits are stacked neatly beside you, piled in the order you intend to use them. Your deposition outline is marked with last-minute notes about important issues you want to explore. The witness has been sworn in, and your client is ready to see your legal prowess in action. Then, before you are able even to ask the deponent to state her name, opposing counsel objects to your presence at the deposition and states "for the record" that the deposition must end.

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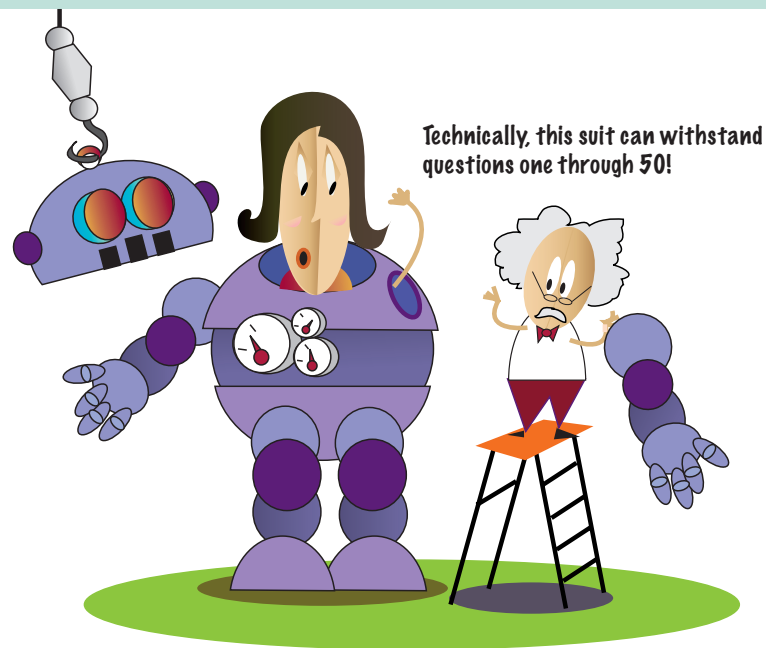


Illustration by Andrew O. Alcalá

A Practical Guide to Rule 30(b)(6) Depositions

Heather Adams

A corporation, partnership, association, or governmental agency may be deposed according to Rule 30(b)(6) of the Federal Rules of Civil Procedure. The rule requires that (1) the party taking the deposition describe with reasonable particularity the matters upon which the examination is requested, and (2) the recipient of the notice designate a person or persons to testify on its behalf "as to matters known or reasonably available to the organization." As one court has explained, Rule 30(b)(6) "was created in order to clarify the murky waters of corporate discovery. This effect is achieved through the cessation of finger-pointing and endless buck-passing; a 30(b)(6) deponent

Illustration by Andrew O. Alcalá

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Meeting Round-Up

Fall Meeting in Pinehurst

Michael A. Orlando

Traveling to Pinehurst, North Carolina, for the TIPS Fall Leadership Meeting, October 19–22, 2006, was a trip back in time to the best of Southern hospitality in the finest of peaceful settings. This was one of those cherished “get-away-from-the-hustle-and-bustle” meetings. Members who regularly attend TIPS leadership meetings have come to recognize that Section leaders and staff tend to choose venues that would generally be top-end destinations for any organization. Here, the organizers outdid themselves!

Although we could conduct TIPS business at any major airport hotel complex in any large city, meetings in such standard locales might be viewed as mere extensions of our work life. Pinehurst, on the other hand, was aglow with the genuine friendliness associated with the slow-paced, warm hospitality of the South. This meeting allowed TIPS members and guests to relax and enjoy the piney woods of the Sandhills, far away from the typical settings of our frenetic law practices. Meetings feel a lot less like work when held in such a pleasant setting.

The programs and social events at Pinehurst were all first-rate. The TIPS Leadership Academy held its kickoff, at which the 25 young lawyers in the academy's inaugural class were addressed by Robert Grey, former ABA president. Nationally renowned jury consultant David Ball, who is also an award-winning playwright and stage director, presented a dynamic day-long CLE seminar, “Theater Tips and Strategies for Jury Trials.” The inspiring remarks of Charles Becton, recipient of the Pursuit of Justice Award, highlighted the Welcome



Pursuit of Justice Award recipient Charles Becton is congratulated by former ABA President Robert Grey, TIPS Chair Peter Neeson, and TIPS Council member Dick Semerdjian.

Reception at the Donald Ross Grill, sponsored by ERS Group. The Saturday evening reception and dinner at the Fair Barn, sponsored for TIPS by JAMS, the Resolution Experts, included dancing, a hayride, and presentation of the 2006 Edmund Muskie Pro Bono Award to Larry Schiffer.

Many of us attending the fall meeting found ourselves in golf Mecca! Few places in the world offer a golfing paradise comparable to Pinehurst Resort. It is home to one of the most revered courses in all of golf, the famous No. 2 Course, the site of a number of golfing championships, including the U.S. Open (twice in the past seven years). In fact, for the golfing world, Pinehurst is synonymous with great golf, offering 8 courses to challenge the skills of players at every level. And WOW—did it live up to its reputation! We had tremendous weather for most of our visit, and the Resort courses were in phenomenal shape. One common trait golfers share is the desire to test oneself on the toughest courses—the ones on which the professionals play. We were able to do that at this year's Fall

Meeting, which was a bona fide treat.

I would be remiss if I did not mention that the atmosphere at the receptions and dinners—and the camaraderie of the meeting in general—was enough to make even the shyest first-timer feel welcome. We owe heartfelt thanks to Section Chair Peter Neeson, TIPS Staff Director, Susan Nolte, and all the event leaders and TIPS staff for producing a jewel of a meeting. ❖

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Practice Management

Ginger Busby

Managing a Multioffice Law Firm

Managing a multioffice law firm presents many challenges that must be addressed to ensure a successful practice. While our firm is not as global as some, we have found that when opening a new office it is important to address the need for a cohesive firm culture, a central management system, and an efficient communication system.

Maintaining a firm culture that creates a sense of fusion among attorneys who are physically located across several states can be a challenge. In any firm, attorney personalities will naturally vary, but attorneys must feel as though they are part of a collective group striving to attain common goals. One way we have found to help them feel as though they belong to one firm is to successfully “brand” the firm. This involves developing one logo and theme that the attorneys can believe in and then utilizing that theme both internally and externally to promote all offices. By doing this, we believe that each attorney is aware of the firm's target public perception, and, in turn, he or she will work to live up to this reputation. For instance, our motto is “results matter.” It is a simple way to express our collective goal. We also develop our firm culture by providing attorneys from all offices with opportunities to socialize with one another. Firm-wide events—holiday parties, golf tournaments, or even a trip to cheer on the firm's favorite major league baseball team—build cohesiveness. We do this in both small groups and large, and we come together every January to celebrate the entire firm and its successes of the previous year.

As far as our management style, although each office has the ability to function independently of the firm as a whole, we have found that preserving a centralized management system is imperative to the success of the entire firm. We function with an overall executive committee that makes decisions for all offices. However, some management functions are delegated to the office managing partner at each location. We believe that office managing partners are more attuned to the everyday concerns arising within their respective offices, and they can handle issues more promptly. If necessary, they can relay issues or messages to the centralized management system so that they can be addressed more uniformly. We also have section heads and practice area groups that manage specific practice areas across the firm. These heads and groups help each office more effectively and efficiently work with the other offices as a team to achieve the best results for our clients.

Most important to the success of any organization is communication. We use technology to make communication more efficient, including a document management system by which all the attorneys share documents and information, and we take advantage of all the tools necessary for electronic communication so that lawyers can stay in contact wherever they may be located. But most important, just as the practice area groups help us to manage the firm more cohesively, they also encourage and ensure a free flow of information among all offices. Our model allows an attorney in office A to work in the same group as an attorney in office B, thereby providing frequent opportunities to work together and cross-market. Additionally, although attorneys in different offices may be working on different matters, they are part of the same group and are encouraged to communicate to one another regarding recent developments in their respective practice area.

So, while there definitely are challenges to multioffice practice, regular communication and multilevel management has helped us to develop a culture where attorneys frequently interact across the miles. ❖

Ginger Busby is a partner in the Birmingham, Alabama, office of Burr & Forman, LLP, where she regularly handles products, business, and commercial litigation. She has served on the firm's executive committee, the management committee, and as head of the products liability group. She can be reached at gbusby@burr.com.

Effective Mediation of High-Value Cases

Joe Epstein

Parties who participate in complex, high-value and/or multiparty mediation invest an enormous amount of time, money, and emotion. Most parties are looking for closure at such mediations. The key ingredient to more effective and productive mediations is premediation design and preparation. The parties should make sure that each side has the data necessary for a comprehensive evaluation and that the necessary decision makers participate in the case evaluation. Likewise, these decision makers should be at the mediation.

Parties should prepare for mediation, employing the same forethought and planning as in preparing for trial. Since most cases settle, it behooves all parties to schedule the mediation date after they have gathered sufficient data for a comprehensive case evaluation but while there is still an opportunity for transactional cost savings.

In multiparty cases, parties may consider a premediation caucus with the mediator well in advance of the mediation. Parties might also discuss with the mediator whether they want a general session at the beginning of the mediation and, if so, how it would be conducted. Opening statements, which should focus on the case's key issues, can serve an important, positive purpose, but they can also be polarizing. On occasion, I have asked a party to argue his or her opponent's case. Similar to trial preparation, checklists are important for mediation preparation. The following checklists provide guidance on the issues parties must consider before the mediation commences.

Premediation Checklists

A checklist for all parties

1. Counsel should consider the usefulness of meeting with the mediator to specifically design the mediation process to fit the case.
2. Counsel should consider the usefulness of a premediation caucus or a premediation site visit with the mediator.
3. All parties should timely provide opposing parties and the mediator with all the information necessary to educate and to persuade them.
4. Counsel and the mediator should determine who needs to be present at the mediation to educate, to persuade, and to close the case.
5. All parties may consider creating a premediation settlement bracket.
6. Counsel should provide the mediator with significant motions, briefs, orders, photographic charts, graphs, etc.
7. Counsel should review with their clients before the mediation their best and worst case and the likely outcome range.
8. In commercial cases, all parties should assess the financial status of their opponents.

Plaintiffs counsel's checklist

1. Prepare clients for mediation in the same manner as in preparing clients for trial.
2. Provide the defendants and the mediator with any economic loss projections and life care plans well in advance.
3. Have complete and accurate subrogation and lien information and have subrogation and lien claimants at the mediation or available by telephone.
4. Consider making a demand before the mediation. As a general rule, the greater the demand, the earlier it should be made.
5. Depending on the value of the case, consider providing the defense team with a demand letter, a settlement brochure, a settlement DVD, or a PowerPoint settlement brochure.
6. Obtain insurance coverage information before the mediation and determine how it affects your negotiations strategy.
7. In multiparty cases, plaintiffs counsel may have to negotiate as a unit and devise a mechanism in advance of the mediation for dividing any settlement.

Defense counsel's checklist

1. Consider how acknowledgement and apology will be handled.
2. Give independent medical evaluations to the plaintiff and the mediator.
3. Put excess insurance carriers on notice before the mediation to allow for their meaningful participation in the process.
4. In multiparty cases, defense counsel and their clients may need to have a premediation caucus with the mediator to discuss the defense settlement strategy.

The Mediation

Parties to a mediation should keep in mind that, first and foremost, they must treat each other with dignity and respect. Parties should control anger and frustrations, and be gracious with one another. A fair mediation "process" is important for a positive outcome. Parties should be prepared to address underlying interests, needs, motivations, and emotions.

Although sometimes difficult to accomplish, a mediation process built on trust and respect is geared to achieve one ultimate goal—to reach closure—and the process must be respected even if it differs from the usual adversarial approach.

Opening presentations must focus on the key issues in the dispute and should be as objective and candid as possible. The opposing party (or parties) must be prepared to listen and shed its partisan perspectives during such presentations, just as it should throughout the entire process. Parties need to remain reasonably flexible, reconsider their positions, and reflect on new information and different perspectives as they wend their way through the mediation. Only if they show such traits and abilities will they be able to be creative and to connect with the opposing decision maker in order to break impasses.

A few tactical and practical considerations: All parties should consider how they can create credible fear in their opponent(s). They should measure their own and their opponent's risk tolerance and consider how they can create trust with the other party and with the mediator. Parties must find

a way to understand and appreciate the emotions in play on both sides of the mediation table. Finally, all participants to a mediation should be prepared to build a golden bridge over which their opponent(s) can retreat, allowing them to save face. Remember that the goal is closure, not vanquishing the enemy.

Mediation Checklists

Plaintiffs counsel's checklist

1. If possible, let the client "sell" the case.
2. Present oneself as prepared for trial and confident of the ability to produce at trial.
3. Focus on the opposing decision maker(s), but don't lose sight of the opposing gate keeper.
4. Determine what aspects of the client's case are best "sold."
5. Have a strategy for utilizing a punitive damage claim, if any, at mediation.

Defense counsel's checklist

1. Acknowledge the severity of the plaintiff's injury and, where appropriate, sincerely apologize.
2. In multiparty cases, be more concerned with each defendant's own risk assessment and the overall case evaluation than the percentage split among codefendants.
3. Consider the plaintiff's need to have a day in court, to be heard, and to have a sense that justice has been served via mediation.
4. Measure the plaintiff's desire for closure and finality and appeal to those feelings.

Mediation of high-value cases requires thoughtful preparation, exquisite patience, creativity, legal and emotional insight, energy, and even courage. Parties need to understand both interpersonal and intrapersonal issues that arise in mediation; don't shy away from using both intuition and imagination. Flexibility and awareness of partisan perception, when combined with effective persuasive techniques, are tools necessary for advocates to employ to be effective in high-value mediation. ♦

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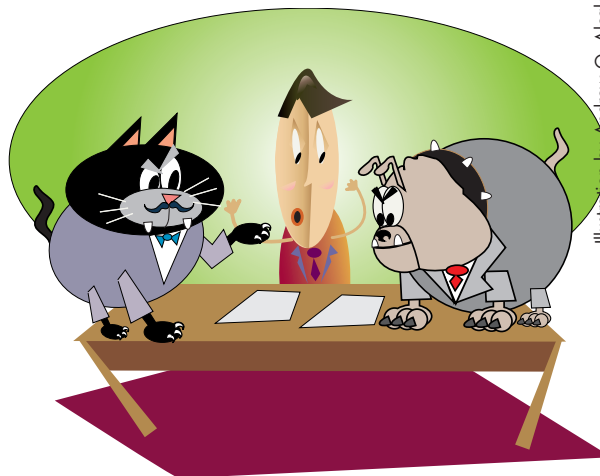


Illustration by Andrew O. Alcalá

Out-of-State Arbitration: Are You Engaged in the Unauthorized Practice of Law?

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"What?" you cry, "On what possible grounds?" With smug satisfaction, opposing counsel answers, "On the grounds that you are not authorized to practice law in this state."

This hypothetical may seem far-fetched, but recent case law proves that attacks on an attorney's presence at arbitral hearings taking place in a state in which the attorney is not licensed to practice law do happen. Therefore, always check a state's professional conduct rules and rules of court to determine whether any steps must be taken before appearing in that state.

Considering Model Rule 5.5

The appearance of out-of-state attorneys in arbitration is regulated by state law. Many states have no rules aimed at out-of-state attorneys representing clients in arbitration. Yet, many do have such rules, and a trend is building for those states that do not have them to adopt Rule 5.5 of the ABA Model Rules of Professional Conduct. Under Rule 5.5(c)(3), an attorney may provide "temporary legal services . . . in or reasonably related to a pending or potential arbitration" that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission." Therefore, checking a state's rules of professional conduct and/or court rules should be a prerequisite to appearing in that state for arbitration.

Though this step may seem like wasted time, it can prevent an attack on your presence at the arbitration or even one on the arbitration award, which happened in *Superadio Limited Partnership v. Walt "Baby" Love Productions, Inc.*, 62 Mass. App. Ct. 546 (2004), vacated on other grounds, 446 Mass. 330 (2006). Superadio argued that the

award should be vacated because the attorney who represented Baby Love at the hearing, which took place in Massachusetts, was not authorized to practice law there. *Id.* at 549. The appeals court found this basis for the attack on the award to be without merit, noting that "[n]othing in Massachusetts law requires that a party's representative in arbitration proceedings be admitted to practice in Massachusetts." *Id.* at 552 n.5. For other reasons, Baby Love appealed the court's decision to the Massachusetts Supreme Judicial Court. That court determined that it need not decide the issue because Massachusetts is in the process of considering Model Rule 5.5 and "prudence dictates" that it should wait for guidance. 446 Mass. at 337.

A Jump on Your State Review

The following survey of some states' relevant rules will provide you with a start to your research. Of course, you should independently confirm a state's current law when you intend to represent a party in arbitration taking place there. States that have adopted Rule 5.5 and require *pro hac vice* admission for court-ordered arbitration include Arkansas, Delaware, Georgia, Indiana, Iowa, Louisiana, Minnesota, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, and Utah. Many other states are considering adopting Rule 5.5. Some of them include Alabama, Illinois, Massachusetts, New York, Texas, and Wisconsin. California, Florida, North Dakota, and South Dakota have adopted a version of Rule 5.5 or other similar rule, but with differences worth noting.

California. California has no explicit *pro hac vice* requirement, yet the effect of its relevant rules is essentially the same. Pursuant to California Rules of Court § 966, an out-of-state attorney appearing in arbitration is subject to all applicable rules, regulations, and statutes. No surprise there. California

Rules of Court § 983.4 requires that an out-of-state attorney pay a \$50 fee and file a certificate pursuant to § 1282.4(c)(10), which requires that an out-of-state attorney identify on the certificate an active member of the California bar as "attorney of record." It sure sounds like *pro hac vice*, doesn't it?

Florida. Florida's governing rule, Rules Regulating the Florida Bar 4-5.5, is similar to Model Rule 5.5 and adds the requirement that the attorney's client must reside in or have an office in the attorney's home state, or the attorney's services must arise out of or be reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice. Another rule, however, Rule 1-3.11, requires an out-of-state attorney to file a verified statement and pay a \$250 fee. Additionally, such an attorney is limited to representing clients in no more than three "domestic arbitrations" in any one year. And a *pro hac vice* requirement exists for court-ordered arbitration.

North Dakota. North Dakota has two relevant rules. Under North Dakota Rules of Professional Conduct 5.5(b)(5), an out-of-state attorney appearing in arbitrations must register under Admission to Practice Rule 3. Under Rule 3, the attorney must file an affidavit requesting permission to appear, submit letters of good standing from the attorney's home state disciplinary authority, and pay a fee. What will greatly interest attorneys who regularly appear in arbitrations taking place in North Dakota is the mandate that the Rule 3 requirements are annual for a maximum of five years. After that, the out-of-state attorney must be admitted to practice in North Dakota to continue representing clients in arbitration there.

South Dakota. South Dakota Rules of Professional Conduct 5.5 follows Model Rule 5.5 and adds a subsection that may terrify some attorneys. Subsection (c)(5) provides: "In all cases, the lawyer obtains a South Dakota sales tax license and tenders the applicable taxes pursuant to Chapter 10-45." While this article is not intended to provide anyone with anything even remotely resembling tax advice, suffice it to say that Chapter 10-45 includes the provision of legal services as an item for which sales tax must be paid. So, remember, the next time you represent a client in arbitration taking place in South Dakota, if you are not licensed to practice law there, you will need to pay a sales tax on the fees you charge for the services provided in South Dakota. Caution: consult a tax attorney on the exact requirements of the law! ❖

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Mark Your Calendar

Insurance Coverage Litigation Committee Meeting

February 15–18, 2007, Tucson, AZ
(312-988-5597)

Transportation MegaConference VIII

March 8–9, 2007, New Orleans, LA
(312-988-5708)

Emerging Issues in Motor Vehicle Product Liability Litigation Meeting

March 28–30, 2007, Phoenix, AZ
(312-988-5708)

Toxic Torts & Environmental Law Committee Meeting

March 29–31, 2007, Phoenix, AZ
(312-988-5597)

TIPS National Trial Academy

April 14–18, 2007, Reno, NV
(312-988-5708)

Property Insurance Law Committee Meeting

April 18–22, 2007, Amelia Island, FL
(312-988-5597)

Corporate Governance Meeting

May 3–4, 2007, New York, NY
(312-988-5708)

Fidelity and Surety Law Committee Spring Meeting

May 9–12, 2007, Santa Fe, NM
(312-988-5708)

TIPS Section Spring Meeting

May 17–20, 2007, Newport Beach, CA
(312-988-5672)

Women in Transportation Law

June 6, 2007, Dearborn, MI
(312-988-5708)



Legislative Update

Hervey P. Levin

Democrats Take Control Predictions for the 110th Congress

As I write, having received the torch from Leo Jordan, immediate past chair of TIPS's Governmental Affairs Committee, the midterm congressional elections have given the Democrats control of both houses of Congress. By the time you read this, the results of the lame duck session will be known, as well as the truth of the many prognoses for the waning days of this Republican Congress.

Asbestos Litigation

With Democrats in the lead, it is unlikely that Congress will enact legislation to establish an asbestos trust fund. The changes in the state and federal court asbestos case loads should be noticed. The politicians will know that the pleural plaque or non-disabling asbestos cases have diminished to the point of "dropping off the map" in the words of one defense counsel. It seems that only the serious cancer cases are moving through the courts. State reforms have diminished the perception that an unmanageable crisis exists. ABA policies proposed by TIPS have provided the tools for managing the asbestos litigation and for reducing the number of new cases. Cancer cases, however, remain active and may continue to produce large verdicts that lead to bankruptcies. Unfortunately, mesothelioma cases are not declining.

Medical Malpractice Reform

Medical malpractice tort reform is unlikely to gain traction without substantial changes in the proposals. The critical committees are chaired by congressional veterans who have learned that the growth in insurance premiums has not slowed in states that have enacted caps on damages. Democrats may focus on reform of medical disciplinary processes as the key element of any medical malpractice claims reform plan. They also may address the volatility in insurance premiums by enlarging the geographic "database" to stabilize actuarial predictions among the categories and subcategories of doctors. It is probable that medical malpractice issues the American Medical Association was unwilling to address will be mandatory provisions in any congressional compromise, along with the enactment of a national database to prevent doctors from crossing state lines in order to avoid or escape discipline in the state where they practiced.

The introduction of health court legislation is anticipated to accelerate in the states, but congressional proposals on the subject are expected to languish. The proposals would move medical negligence litigation from the tort system to administrative tribunals whose members have expertise in health care. Benefits to injured claimants would be based on a standardized formula or one similar to that used for workers' compensation claims. ABA policy opposes the substitution of health courts for jury trials.

ABA Day

Each year, almost 300 ABA and state, local, and specialty bar leaders participate in ABA Day in Washington, D.C. ABA Day has been a key component of the organized bars' advocacy program, bringing ABA leaders and bar officers to Washington to meet with their congressional representatives. TIPS will finalize Section plans at the Midyear Meeting for significant participation in the 11th Annual ABA Day, April 18–19, 2007.

TIPS's participants will meet with their respective representatives and senators to discuss two of the ABA Day priorities and one other issue of concern to TIPS. Section members who have close personal or political relationships with members of Congress are asked to contact me so that we may obtain your assistance in setting appointments for TIPS members during ABA Day. All Section members are strongly encouraged to become actively involved with the TIPS ABA Day advocacy program. ABA issues to be discussed with members of Congress will be drawn from the following list:

- Access to legal services
- Access to legal education
- Anti-terrorism and preservation of due process
- Federal tort law
- Immigration
- Independence of the judiciary
- Independence of the legal profession
- Public safety and the preservation of civil liberties
- Rule of law
- Youth at risk

Other Legislative Issues of Interest to TIPS

TIPS will have a special interest in the Terrorism Risk Insurance Act extension and the effort to federalize the regulation of insurance. In addition, HR 5309, requesting reform of Medicare set asides for future medical expenses for workers' compensation claimants, may be refiled, seeking the reduction of disruptive impediments to the settlement of workers' compensation claims. Efforts to comprehensively reform the Longshore and Harbor Workers' Compensation Act may not be revisited, although attempts to amend related regulations promulgated by the Department of Labor are anticipated.

S 306, addressing genetic information nondiscrimination, passed the Senate by a vote of 98–0 but was "bottled up" in the House. It is likely to move forward in the 110th Congress. Other TIPS-related issues that Congress will address include attorney-client privilege, the division of the U.S. Court of Appeals for the Ninth Circuit, and the representation of veterans by attorneys.

Because Republicans still head the executive branch, the shift in the control of both houses of Congress is likely to accelerate the trend to use federal regulations to preempt state tort law.

TIPS will continue to work closely with the ABA Governmental Affairs Office to monitor legislation important to TIPS members. You are encouraged to contact me about any federal or state issue that you believe is relevant to your TIPS colleagues. ❖

Hervey P. Levin is chair of the TIPS Governmental Affairs Committee. He can be reached at hervey@airmail.net

New Tool for Lawyers Help in the Fight to End Domestic Violence

Laura Farber

Domestic Violence is an epidemic. One out of three women in the U.S. will be a victim of domestic violence at least once in her life. On a yearly basis, between three and 10 million children in the U.S. are exposed to domestic violence. Of the men who abuse women, 40 to 60 percent also abuse children.

Given the extent of domestic violence in our society, it is likely that one of your

clients has been or will be a victim of domestic violence. What can you do? Take the first step by incorporating screening for domestic violence as part of your client intake. The TIPS Law in Public Service Committee is working with the ABA Commission on Domestic Violence to distribute a tool for attorneys to screen for domestic violence. This screening tool is a practical resource designed for all attorneys who provide individual representation to enable them to identify clients who are victims of domestic violence. The tool contains suggested questions to integrate into client interviews, guidance on how an attorney can provide support for an abused client, and resources for clients who are victims of domestic violence. This excellent tool is available for download at <http://www.abanet.org/tips/publicservice/home.html>.

By helping one victim at a time, we can make an enormous difference. ❖

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A Practical Guide to Rule 30(b)(6) Depositions

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is required to know the answers, and the buck stops with him/her." *Bracco Diagnostics Inc. v. Amersham Health Inc.*, 2005 U.S. Dist. LEXIS 26854, at *4 (D.N.J. Nov. 7, 2005).

Adequacy of Notice

A Rule 30(b)(6) deposition notice must describe "with reasonable particularity" the subject matter on which testimony is sought. It should fairly allow the corporation to identify the person or persons available to provide the information and to prepare them to testify.

Although the number of categories that may be listed is not limited, the corporation may object that the notice is overly burdensome if it contains an excessive number of categories, or if the areas of inquiry are not specified with acceptable exactitude. For example, a notice that listed 19 categories of inquiry, each qualified by the phrase "including but not limited to," was overbroad because the witness could not be prepared to respond. *Tri-State Hospital Supply Corp. v. United States*, 226 F.R.D. 118 (D.D.C. 2005).

The rule is not limited to organizations that are parties to the lawsuit. If you seek to take a Rule 30(b)(6) deposition of a nonparty organization, you are required to send a subpoena along with the deposition notice, and the territorial limits of Rule 45 apply.

Ordinarily, such a deposition is taken at the corporation's principal place of business, but, if the corporation is the plaintiff, then it may be required to appear in the forum state. *Zuckert v. Berkliff Corp.*, 96 F.R.D. 161 (N.D. Ill. 1982); *Sugarhill Records, Ltd. v. Motown Record Corp.*, 105 F.R.D. 166 (S.D.N.Y. 1985).

Adequacy of Preparation

The corporation is not required to produce the person(s) "most knowledgeable" about the subject matter. Instead, the rule requires that the corporation designate one or more persons who "shall testify as to matters known or reasonably available to the organization." In other words, the designee need not have direct personal knowledge of the subject matter as long as he or she is adequately prepared by the corporation as to its institutional knowledge, which includes information that is reasonably available to the corporation. The designating party must "prepare the witness to testify on matters not only known by the deponent, but those that *should* be known by the designating party." *Alexander v. FBI*, 186 F.R.D. 137 (D.D.C. 1998) (emphasis added). One court has stated that the corporation is expected to "create a witness or witnesses with responsive knowledge." *Wilson v. Lakner*, 228 F.R.D. 524 (D. Md. 2005) (emphasis added).

Because the rule permits the corporation to designate "other persons who consent to testify on its behalf," the designee does not need to be a current employee. Sometimes a deposition notice may cover a past event or practice, and the corporation may no longer employ persons with knowledge about that event or practice. The corporation is nonetheless obligated to prepare a designee based upon material reasonably available to it, includ-

ing documents and former employees. The defending lawyer should notify the deposing lawyer about any potential limitations in the designee's testimony well before the deposition.

What happens if the deposing lawyer strays beyond the subjects listed in the notice? Some courts have held that the deponent may only be questioned about issues listed in the notice. See, e.g., *Bowoto v. Chevron Texaco Corp.*, 2006 U.S. Dist. LEXIS 36040 (N.D. Cal. Feb. 7, 2006); *Paparelli v. Prudential Insurance Co.*, 108 F.R.D. 727 (D. Mass. 1985). However, according to courts in most jurisdictions, one may question a Rule 30(b)(6) designee about any discoverable matter, even if the subject is not covered in the notice.

See, e.g., *Cabot Corp. v. Yamulla Enterprises, Inc.*, 194 F.R.D. 499 (M.D. Pa. 2000); *Detoy v. City and County of San Francisco*, 196 F.R.D. 362 (N.D. Cal. 2000).

If this situation arises, the defending lawyer should note on the record that (1) the questions are beyond the scope of the notice, and (2) the witness's answer is not intended to bind the corporation. *McMahon v. Presidential Airways, Inc.*, 2006 U.S. Dist. LEXIS 4909 (M.D. Fla. Jan. 18, 2006). Alternatively, if the designee is questioned about subjects outside the scope of the notice and he does not know the answer to the question, he may respond that he does not know.

Sanctions and Parameters

If the designee is not adequately prepared, then the corporation is required to proffer a substitute designee who is able to testify about the subjects set forth in the notice.

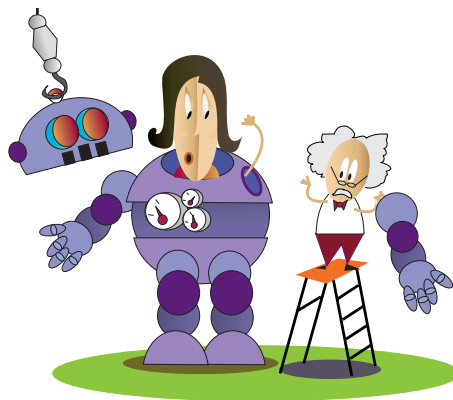
In extreme circumstances, the court may impose sanctions. For example, where a designee disavowed any knowledge of the terms of the contract that he had negotiated and signed, and claimed to be unaware that he was the designated corporate representative, Rule 37 sanctions were appropriate. See *Black Horse Lane Associates v. Dow Chemical Corp.*, 228 F.3d 275 (3d Cir. 2000).

Since the rule requires testimony only as to "matters known or reasonably available," if a corporation does not possess knowledge about the matters listed in the notice and is unable to prepare a designee, then it has no duty to make a designation. If the parties cannot reach an agreement, the best practice under these circumstances is to file a motion for protective order.

Generally, you must obtain leave of the court to depose a party who has already been deposed in the case. According to most courts, this rule also applies to a corporation that is deposed according to Rule 30(b)(6).

A Rule 30(b)(6) deponent may also be subject to deposition in his or her individual capacity, though parties often agree that the witness can be deposed in one sitting. In that case, the lawyer defending the deposition should specify on the record the capacity in which the witness is answering certain questions. ♦

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TortSource

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Using Creative Demonstrative Exhibits

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witnesses and will have their own, very good ideas about the kinds of demonstratives to use.

Once proposed demonstratives are created, give them a practice run. Try your opening with the exhibits and make sure they fit within the flow of your presentation. When preparing a witness, show him or her the demonstrative to prevent surprise or confusion in court. Consider asking your assistants and other office staff to give you their impressions of the demonstratives. And lastly, if a particular exhibit is not working at trial, do not be afraid to take it down. If you have prepared, you will have your butcher paper and can improvise with something else! ♦

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“When I Was a New Lawyer”

Francine L. Semaya (“Fran”)
Chair, Insurance Corporate and Regulatory Practice Group
Cozen O’Connor, New York, New York

What is your background, and what inspired you to become a lawyer?

From the time I was two years old, I wanted to be a teacher. In college, I became very interested in law but did not want to be diverted from my lifelong dream of being a teacher. I taught in the New York City school system for a number of years and then revisited my interest in the law, trying to balance it with my upcoming marriage and desire to have a family. To test the waters, I became a certified paralegal. My first job was as a law clerk in AIG’s state relations and compliance department. Realizing I wanted to become a lawyer, I enrolled in law school and took evening classes while continuing to work full-time.

Where did you go to law school, and what did you do right after that?

I attended New York Law School, Evening Division. When I became an attorney, I remained with AIG, continuing my work in the insurance regulatory field.

Do you have any young lawyer experiences that particularly stand out in your memory? If so, what have you learned from them/how have they helped you to become so successful?

Law school doesn’t prepare women for the challenges of being a young female lawyer and a young mom in a male-dominated environment. My ability to persevere and accept increased responsibility set the stage for my assumption of leadership roles—both in my practice and in TIPS. I was given the opportunity to establish a regulatory department within the company, and I succeeded. The ability to practice law, manage a department, and be a mom enabled me to continue to teach—which I do today as a faculty member on insurance regulatory programs and as a guest lecturer at law schools.

Whom do you most admire?

First, I admire my three children: Stefanie, David, and Scott have been and always will be my pride and joy. Having a mom who is a full-time working professional is not always easy, but they understand and respect my choice. Their support has allowed me to be both a successful lawyer and—as they describe me—a “super mom.”

Second, I admire my Aunt Faye. She was a very bright, accomplished writer and took her “favorite” niece under her wing, exposing me to cultural outlets, travel, and other experiences my parents could not afford. But, most important was her encouragement of my love for books. We often read together and would spend hours analyzing and challenging each other. She always told me I would succeed in any undertaking. Her last words of encouragement from her deathbed gave me the impetus to strive for the stars—which I still do.

What is your greatest source of professional pride?

This question is easy. I serve as a mentor at my law school, where I conduct mock job interviews, edit resumes, and provide guidance to law students. I hire students to work as law clerks or regulatory analysts, mentor and guide them “on the job,” and help them seek jobs as attorneys. I get such satisfaction from these endeavors. I also serve as an unofficial mentor in TIPS—as did my very dear friend and colleague, the late Kirsten Christophe—welcoming new or potential Section members to the TIPS family and nurturing our law student and young lawyer liaisons. Professionally, nothing is more rewarding to me than the alliances and friends I have made as a mentor.



Francine L. Semaya then and now.



What got you started with ABA involvement?

When I decided to practice law in the insurance regulatory field, I needed a home. My state bar association did not have the niche I was looking for, so I reached out to TIPS and never looked back.

What was the worst professional advice you ever received?

Many years ago, I was instructed to take a back seat to the “good ol’ boy” network. I was expected to perform the legal work and negotiations behind the scenes but allow the men to be prominent in dealing with certain Southern bureaucrats. I was told that the “good ol’ boys” would not welcome a “Yankee female, especially from New York.” To this day, I believe this was absolutely wrong.

What was the best professional advice you ever received?

“Trust your instincts.”

What personality trait has served you best over the years?

My ability to persevere, even in the face of adversity, coupled with my Type A personality. Ask anyone who knows me well and they will tell you: no matter what I am facing, the job will get done.

What challenges you the most?

This is difficult to answer. My best friends will tell you that finding the time to sleep is my biggest challenge.

Seriously though, one of my greatest challenges is dealing with attorneys who think they know and understand the insurance regulatory practice but in all honesty do not have a clue. I enjoy working with and guiding other attorneys, whether they are colleagues, clients, or adversaries, but I become frustrated when they believe they understand the nuances of insurance regulation and proceed to make serious mistakes. Clearly I don’t know it all—I’m not even close—but those “instincts” I mentioned earlier give me the ability to understand where we need to be. I welcome the opportunity to learn and also want others to be more open to learning.

What is the one thing you cannot stand (regarding the law/lawyers)?

I cannot tolerate the bad press our profession receives because of the actions of only a few lawyers. The cartoons, caricatures, and jokes demean the integrity of the practice of law—something I take to heart.

What is your favorite type of legal work?

Although I enjoy most of the regulatory areas in which I practice, my favorite is the area of insurance insolvency/reinsurance. Whether I am representing a receiver in legal issues or a policyholder or reinsurer in resolving disputes with a receiver, there is always a challenge to be met and often new law to be made.

What are your future ambitions?

I want to serve my clients to the best of my ability, to continue to learn and grow in my “specialties,” and to mentor law students and young lawyers.

What can the ABA do to be a good home to young lawyers?

The ABA, and especially TIPS, is a strong nurturing environment for young lawyers. The ABA must be the premier environment for the education of lawyers—both young and old. It also must be an organization that leads in public service, a vigilant voice on “the Hill,” and a home that encourages its “children” to grow. ❖

Fran Semaya’s Advice for New Lawyers:

- Don’t be afraid to ask questions.
- Never assume.
- Keep up your writing skills.
- Become involved in pro bono work and community service.
- Never lose sight of who you are. ❖



Trial Tips

David Becker and Douglas Albritton

Using Creative Demonstrative Exhibits

After slogging through discovery productions to select key trial exhibits, do not forget to make time to create your own, unique demonstrative exhibits. Demonstratives allow your personality and thematic approach to the trial to shine and are a very important tool to help avoid a monotonous witness or jury presentation. And since today's jurors expect the "CSI factor," you will lose a key chance to keep the jury's attention—and persuade them—if you leave demonstratives out of your trial.

Graphics and Images Help Convey Issues

Typically, a demonstrative exhibit serves solely as a visual aid to the fact finder for illustrating a point you are trying to make and does not have any probative value. A demonstrative can convey in one picture what 1,000 words cannot efficiently describe. You can use large, multicolor boards or, for small budget cases, PowerPoint graphics that can be displayed on video screens. If, for example, you want to show the rarity of a particular event, you might have a graphic depicting a large jar of jelly beans showing that only "one in a million" is different from all of the others. If you want to depict a negotiation, consider a graphic showing "the two sides" on opposite sides of a table, and perhaps an "excluded party" outside of the conference room trying to look in. The possibilities are endless. Courts have significant discretion to permit the use of demonstratives, and most look favorably upon them because they help convey simple or complex issues very efficiently.

The modern miracle of computer-aided graphic design can never completely replace traditional demonstrative exhibits such as an "old-fashioned" white board or

a map. As impressive as that accident reconstruction computer animation you paid \$30,000 for is, it cannot sit on an easel in front of the jury for days at a time as multiple witnesses refer to it. Also, keep in mind that an expert sitting and talking about some esoteric point of science can bore the jury into a coma. Use demonstratives to help your expert be dynamic. Many experts are very comfortable working on their feet and are extremely good at explaining their points with illustrations. Perhaps most important, if you plan to use a demonstrative with an expert or other witness, have him or her practice ahead of time to establish familiarity with the exhibit and the dynamics of the courtroom.

Simplicity and Spontaneity Still Work

We always bring an easel and 40" by 60" pad of blank paper (sometimes called "butcher paper") to the courtroom. When making your opening, closing, or working with a witness, do not be afraid to sketch notes on the pad. If, for example, your case involves a special interrogatory on a fact issue, consider writing that interrogatory on the pad and ask the witness to check the Yes, No, or I don't know "box." (Hopefully you know the answer ahead of time!) If you are trying to weigh two sides of an equitable matter to a judge, consider dividing the paper in half and lining up the competing pros and cons. Preprinted demonstratives can work very well, but be wary of using too many of them. For example, if you want to establish a list of admissions from a witness, you might be tempted to use a preprinted board listing those admissions. On the stand, however, the witness may offer conflicting testimony. You may then be left with a confusing list that does not serve its purpose. A better approach may be to write the admissions down on the butcher paper, one at a time, as the witness makes the admissions.

For cases warranting a higher budget, you might consider conducting a mock trial and polling the jurors afterward to develop ideas for demonstratives that would have assisted them. Also test some demonstratives on the mock jury. For all cases, take time to create themes for the case and develop demonstrative exhibits that communicate those themes. Additionally, consult your clients as they are likely to be central

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David S. Cohen is an attorney with Angels Baseball LP and is co-chair of TIPS's Spring Meeting Arrangements. He can be reached at David.Cohen@angelsbb.com.

Want to watch a ball game? Visit my office and see the Los Angeles Angels play. The Dodgers will suit up for a classic "Freeway Series" at Angel Stadium in Anaheim, for which TIPS will sponsor a "Night at the Ballpark" on Friday. Tickets are limited, so register soon. Looking for some good family fun? Mickey Mouse lives just to the north at Disneyland and at California Adventure Park. Both parks feature Disney hospitality, rides, food, and dazzling fireworks display. Also nearby, Knott's Berry Farm is a lesser-known treasure and local theme park favorite. Surf or turf? For beachgoers and surfers, Huntington Beach, just north of Newport Beach, is known as "SurfTown USA." And, there are plenty of golf courses nearby, so pack your sticks. Don't forget the Friday golf event—a TIPS Spring Conference experience would not be complete without hitting the links! We hope you will join us in my Newport Beach—by the end of the meeting, you will want to make it yours as well. ❖

ange County: it's the best part of Southern California and home to shows like "Laguna Beach," "The OC," and "The Real Housewives of Orange County." TIPS is making a triumphant return to OC for the 2007 TIPS Spring Meeting, which will be held in beautiful and luxurious Newport Beach. The meeting headquarters will be the newly renovated Newport Beach Marriott Hotel and Spa, a short drive from John Wayne Airport in Santa Ana. Enjoy your meetings in a room with a view while your family relaxes at the spa or by the pool. If you plan on shopping, leave plenty of room in your luggage: Fashion Island is across the street and South Coast Plaza is only a short drive from the hotel. From Bloomington and Neiman-Marcus to Tiffany & Company and Luis Vitton, the area offers dozens of first-rate destinations. Don't forget your credit card! Nothing beats watching the sunset over the Pacific. We will prove it during Thursday evenings Welcome Reception on the famous Balboa Island Pier. Join us for cocktails and snacks and afterward enjoy dinner on Balboa Island or at a great restaurant close by. No trip to California would be complete without a party on the beach. On Saturday evening, TIPS will host dinner on a private beach called The Dunes, complete with music, dancing, food, and one of those spectacular sunsets over the Pacific. What else is for dinner? There is no shortage of fine dining in the area. Fashion Island features several restaurants, and there are many more great menus not far from the Marriott. For steak and seafood with a view, my choice is Mastro's Ocean Club in Newport Beach. An informal local favorite is Wahoo's Fish Tacos. For more suggestions, send me an e-mail.

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David S. Cohen



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