A basic goal of discovery is to avoid surprise and ambush at trial. Nevertheless, there is much more that can be accomplished in a discovery plan. The pre-trial stages of a case are a proving ground where the factual bases and equities of a party’s position are revealed and road-tested. As a key component of such a plan, deposition discovery is used to explore (and expose) the strengths and weaknesses of the witnesses and, equally important, opposing counsel. Knowledge is power; thus, knowledge about the opposition’s case, its witnesses, and the skills of opposing counsel are important variables when evaluating any case.

All lawyers know that the claims in a lawsuit are first lodged in the initial lawsuit papers. The defenses are then lodged in the answer or responsive pleadings. Basic written discovery is then exchanged to ferret out the parties’ respective positions, and documents are typically produced and exchanged. After this initial written discovery is completed, the lawyers, armed with basic information, begin taking depositions.

Depositions provide defense lawyers with a chance to undercut the allegations against their clients; they are where the plaintiff’s lawyers advance their liability and damage claims. Thus, there are significant burdens placed on all lawyers to prepare their witnesses, as well as preparing themselves. All lawyers should appreciate that they must first understand their cases before this can be done. Clearly, a lawyer who does not understand the basic factual or legal issues in the case cannot prepare, much less perform, effectively in that case.

A lawyer’s skills are on stage during a deposition. Is the lawyer prepared? Does he or she exhibit an understanding of the issues? Is the lawyer organized? Does he or she accurately appreciate the strengths and weakness of the client’s case and the opposing party’s case? There should be no doubt that an opposing lawyer’s lack of preparation is an important factor in how cases are evaluated. A lawyer’s conduct in deposition can reveal an ignorance or mastery of the important issues.
Indeed, if a lawyer is perceived poorly, the case is negatively impacted and settlement scenarios are adversely influenced. If the lawyer is respected and perceived as a threat, however, the settlement scenarios are positively enhanced.

Depositions are also a proving ground for fact witnesses, who come in all shapes, sizes, demeanors, and degrees of likability. The jury always weighs whether a witness is “likable,” “jury friendly,” or believable. Trial lawyers evaluate witnesses for these same characteristics, striving to predict whether the jury will embrace or reject a witness’s testimony. Even if a witness is telling the truth and has important testimony to offer, the testimony may be disregarded if the witness is not likeable, lacks confidence, or appears untrustworthy. Thus, whether a witness appeals to or alienates jurors is an important factor in determining who a lawyer calls or does not call as a witness at trial. Performance in depositions will shed light on and inform these strategic decisions.

Witnesses are also evaluated for their sympathetic or empathetic appeal. Although courts typically instruct jurors to not consider bias or sympathy in reaching their verdicts, human nature is such that it is difficult for jurors to separate themselves fully from their likes, dislikes, and emotions. Jurors are naturally impacted by sadness, loss, and drama. Every lawyer should consider whether key witnesses will appeal to or alienate jurors, as well as whether the witnesses are sympathetic or aloof.

**Trial Themes**

An old, enduring adage is that a lawyer’s first act in every new case should be to prepare a jury charge. Of course, every jury charge evolves as the case develops; however, by taking this first step, the lawyer is forced to create a disciplined legal framework for a storyline. Clearly, a lawyer cannot advance a client’s case unless that lawyer has mastered the law and identified the factual goals of the case.

Once the lawyer understands the “law” of the case, the lawyer should begin to prepare a list of factual themes for ultimate use at trial. This practice is akin to a road map for where the lawyer wants (and legally needs) to go. These trial themes, which should be rooted in the law, help the lawyer frame questions for every deposition and prepare his or her client for deposition. Trial themes reflect what is important.

A typical case does not have numerous trial themes, and a simple case may have only a few. Indeed, a lawyer’s objective is to simplify even complex cases to simple, readily understood concepts. These concepts should guide the witnesses and the lawyers throughout the deposition process, and these concepts should be adjusted as the case proceeds.

Basic trial themes may be shared with party witnesses to help the witnesses see how they can help advance the case. By acquiring a simple understanding of
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the case, witnesses gain a perspective that will help them when the going gets tough during cross-examination. They understand where they need to go and, through practice, can incorporate these trial themes into their answers. It also helps them place their testimony into the context of the bigger picture. If the witness effectively advocates these themes even in the face of an aggressive examination, then these themes will resonate with a jury even more.

Pathos, Logos, and Ethos

The three cornerstones of effective advocacy are pathos, logos, and ethos. These words are Greek in origin and were first developed as advocacy concepts by Aristotle. Every advocate should know and understand these terms, and every discovery plan should be developed with these cornerstones in mind. Strategically planned depositions should be used to cultivate these basic elements of advocacy to advance the case.

Pathos, which literally means “suffering” or “experience,” represents the emotional or dramatic impact presented by the facts and the witnesses. The goal of every successful trial lawyer is to capture the jury’s attention with facts and testimony that are captivating and dramatic. The trial lawyer should endeavor to develop a deposition record that tells a story that is both moving and forceful.

Logos represents the logic of the lawyer’s reasoning or argument. The storyline presented by the lawyer should reflect internal consistency, be reasonable, and be coherent. It must make common sense. Also, this storyline should be supported by the facts developed during discovery; accordingly, the deposition record is used to accomplish this end.

Ethos is the third and equally important cornerstone. It represents the credibility of the witnesses and, therefore, the storyline. Every successful trial lawyer seeks to present a case that is believable and trustworthy. This is accomplished through the trial lawyer’s tone and style. It is also accomplished through the demeanor of important witnesses and the credibility of their testimony.

Thus, every discovery plan should include depositions as a key component, and every deposition should then be approached with the goal of advancing trial themes. The trial themes should reflect drama (pathos), reasonable and understandable consistency and common sense (logos), and trustworthiness (ethos). This is the menu for success.

First Steps

Trial themes are typically prepared after initial witness interviews are completed and initial written discovery is exchanged. Documents should be obtained from the client and from opposing parties, and a timeline (or chronology) should be
prepared that reflects all key events as supported by these documents and witness interviews. A chronology is an important tool in understanding how a series of interrelated events are factually interconnected. The relationship between events (and documents) help tell a story and provides the logic (logos) to the argument. A chronology also provides an index to key documents that should be used to support the trial themes and used with the witnesses.

Once basic document discovery is completed, the important documents should be gathered and arranged in chronological order. Preparing and using an EXCEL spreadsheet is an excellent way of organizing documents, and it allows sorting by a variety of categories. Documents can be sorted by date, topic, author, or recipient. This type of coding can then guide the trial lawyer as to which documents are important for which witnesses. The universe of relevant documents is then readily available on a witness-by-witness basis.

Here are two basic examples of how a document database is effectively used to facilitate deposition preparations:

- If the attorney is presenting the witness, the database can be used to sort documents by the witness’s name (either as author or as recipient). All relevant documents can be identified and assembled, then used with the witness during preparations for the deposition.

- If the attorney is presenting a corporate representative, the documents can be sorted by topic category. The key is to properly code the documents in the EXCEL spreadsheet by meaningful, relevant topics.

The sorting codes are important. Too many sorting codes may render the exercise less efficient because there is too much dilution. Too few codes may result in the inability to rapidly retrieve evidence. Accordingly, the trial lawyer (and the lawyer’s team) should identify the key issues in the case as a way of defining what codes matter and what codes do not. Every coding system, however, should employ some method of identifying important documents and “hot documents.” These are the documents that may be used on a recurring basis with many witnesses. Here are some specific examples tailored to specific types of cases:

- In a medical malpractice case, documents can be sorted by:
  - Admission records
  - Discharge records
  - Billing records
  - Diagnosis
  - Prognosis
  - Nurses’ notes
  - Medication
  - Hot documents
• In a breach of contract case, documents can be sorted by:
  • Draft agreements
  • Negotiations
  • Final agreements
  • Amendments
  • Course of dealing
  • Breach
  • Repudiation
  • Damages
  • Hot documents

• In a product liability case, documents can be sorted by:
  • Design
  • Failure analysis
  • Quality control standards
  • Testing
  • Prototype
  • Human factors
  • Warnings
  • Manufacturing
  • Other incidents
  • Statistics
  • Hot documents

• In a negligence case, documents can be sorted by:
  • Standard of care
  • Incident report
  • Accident investigation
  • Company policies
  • Injury
  • Hot documents

These are just a few examples. Some documents may have several codes because of topical overlap or due to their unique importance. However, the goal remains the same: to provide the attorney with ready access to any document by quick reference code.

As a practical matter, depositions should not be initiated until after document chronologies and trial themes are prepared. This is particularly important in complex cases involving many witnesses, voluminous documents, and other moving parts. If the trial themes are the blueprints for a trial, the chronologies of key events are the bricks and the documents are the mortar that holds the plan together. If the case is document-intensive, there must be some mechanism for quick retrieval and access.
Next Steps

Once document chronologies are prepared, documents are coded and organized, and initial trial themes are developed, the trial lawyer should begin to select which witnesses will be deposed and which witness will not be deposed. This exercise will result in an evolving list because many witnesses are identified during the course of discovery. However, the plan must always start somewhere.

The key witnesses will certainly include the parties and the parties’ representatives. The list also will include third-party witnesses who can add to the lawyer’s trial themes or detract from the opposing party’s case. All witnesses should be evaluated as to trustworthiness, jury “likeability,” and strength. Again, all witnesses do not need to be (and should not be) deposed—only those witnesses who the lawyer believes can advance the case. These witnesses are the foundation of the deposition list, and this list will ultimately be the foundation of a trial witness list.