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ARTICLES

Live Testimony from Rule 30(b)(6) Witnesses at Trial: What’s Fair Game?
By Bradford S. Babbitt

You defended a deposition of your client under Federal Rule of Civil Procedure 30(b)(6) months (or years) ago during discovery in a case that is now scheduled for trial in 60 days. You just learned that the deposing party intends to present live testimony at trial from the representative who testified on behalf of your client, rather than the recording of the deposition. Is that allowed? Are you required to produce that witness if the witness lives outside the reach of a Rule 45 subpoena? Does it make a difference if your client is a party in the litigation or merely a third-party witness? If your client’s representative testifies, is the questioner limited to the topics identified before the deposition, or can your client be asked about new and different topics? Is the questioner restricted to the same questions asked at the deposition? What is fair game with respect to testimony at trial from a client representative under Rule 30(b)(6)?

Corporations, partnerships, associations, and agencies have been found, controversially, to have rights similar to the rights of U.S. citizens, but they have not been found to have any of the physical attributes required to testify on their own behalf. Rule 30(b)(6) addresses this anatomical deficiency by allowing a representative chosen by the corporate entity to testify on its behalf. The party taking the deposition must identify “with reasonable particularity” the topics on which the corporate entity will be examined. The entity being deposed must designate a person to testify about information known or reasonably available to the organization regarding the identified topics. The representative’s testimony constitutes the testimony of the organization.

At trial, a party can use the testimony taken under Rule 30(b)(6) against a corporate entity that is a party in the case. Fed. R. Civ. P. 32(a)(3). Testimony of a corporate designee under Rule 30(b)(6) is not limited to impeachment and may be used against the corporate entity “for any purpose,” regardless of the unavailability of the designee. Such testimony is excluded from the definition of hearsay. Fed. R. Evid. 801(d)(2). Thus, a party may record the deposition testimony of an adverse corporate party and may introduce that testimony to the trier of fact at trial. Rule 30(b)(6) testimony of third-party organizations can also be used at trial, provided it is admissible under the Rules of Evidence.

Testimony taken under Rule 30(b)(6) may be presented at trial through a transcript read to the trier of fact or through a recording of the deposition. However, recorded testimony, in any
medium, is often less compelling than live testimony. Many will recall their amusement or horror, depending on their role at the time, as a juror nodded off to sleep while a transcript was read or a video deposition was played. To avoid that risk, a party may wish to offer live testimony of a corporate party. Is that allowed? Can a party compel the testimony at trial of an organization?

Rule 30(b)(6) does not apply to trial testimony. The rule is limited to depositions. Hence, a party cannot compel a corporate organization to testify at trial through a subpoena issued under Rule 30(b)(6). *Dopson-Troutt v. Novartis Pharms. Corp.*, 295 F.R.D. 536, 539–40 (M.D. Fla. 2013). No rule requires a corporate entity to designate a representative to testify “vicariously” and in person at trial. *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir. 2006). The ability to offer at trial the testimony of an organization taken under Rule 30(b)(6) makes such a rule unnecessary.

On the other hand, Rule 30(b)(6) does not prohibit live testimony from a representative of an organization. A party seeking to compel live trial testimony of an organization could issue a subpoena under Federal Rule of Civil Procedure 45 directed to the representative who testified at the 30(b)(6) deposition. A trial subpoena under Rule 45 extends to persons who reside, are employed, or regularly transact business within 100 miles of the trial. Such a subpoena would also encompass a party’s officer who resides, is employed, or regularly transacts business within the state in which the trial will occur. Hence, if an organization’s representative is within 100 miles of the trial or within the state, and the organization is a party, then the representative can be compelled to testify at trial.

The situation becomes more complex if the trial occurs outside the state in which the organization’s representative lives or works, and more than 100 miles away. Courts are split about whether an individual whose deposition was taken on behalf of an organization under Rule 30(b)(6) may be compelled to attend trial even beyond the geographic scope of Rule 45. Some courts hew strictly to the requirements of Rule 45, quashing subpoenas that seek in-person testimony on behalf of a corporate entity if the designee lives or works outside the state and more than 100 miles away from the trial. See, e.g., *Dopson-Troutt*, 295 F.R.D. at 539–40. Other courts apply Rule 45 more flexibly, opining that a corporate representative whose testimony on behalf of a corporate entity is sought at trial should be considered a “party,” even though the representative is merely a designee of the party, and should be produced regardless of the geographic limits of Rule 45. See, e.g., *Conyers v. Balboa Inc. Co.*, No. 8:12-cv-30-T-33EAJ, 2013 U.S. Dist. LEXIS 78999, at *2–5 (M.D. Fla. June 5, 2013); see also *Brazos River Authority*, 469 F.3d at 434 (requiring a corporate designee to testify as to corporate information “if the corporation makes the witness available at trial”). The courts that have adopted this more liberal reading of Rule 45 have done so where the organization is a party in the case and not merely a third-party witness.
Once the representative designated under Rule 30(b)(6) to testify for an organization appears at trial, the designee cannot refuse to testify on behalf of the corporate entity. In *Brazos River*, the 30(b)(6) designee of the corporate party attended trial and testified. The corporate party argued that Rule of Evidence 602 limited him to testifying only as to his personal knowledge and not as to information “known or reasonably available” to the corporate entity, as provided in Rule 30(b)(6). The Fifth Circuit rejected that argument. If “the corporation makes the witness available at trial he should not be able to refuse to testify as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge.” *Brazos River Authority*, 469 F.3d at 434. The court based its ruling on trial courts’ practical preference for live testimony rather than testimony by transcript or recording. The court also invoked the Rule 30(b)(6) “framework” to subordinate the limitation of Rule 602—that a witness testify only to personal knowledge—to the designee’s obligation to testify as to information reasonably known to the corporate entity. The Fifth Circuit extended the duty to testify on behalf of the organization beyond the 30(b)(6) deposition all the way to trial. If “a rule 30(b)(6) witness is made available at trial, he should be allowed to testify as to matters within corporate knowledge to which he testified in deposition.” *Id.*; see also *Univ. Healthsystem Consortium v. UnitedHealth Grp., Inc.*, 68 F. Supp. 3d 917, 921 (N.D. Ill. Sept. 19, 2014) (noting that a 30(b)(6) witness may testify at deposition and at trial as to information not within personal knowledge, as required by Rule 602). Another court has sanctioned a party for failing to prepare its 30(b)(6) witness to testify at “deposition and trial.” *Sciaretta v. Lincoln Nat’l Life Ins. Co.*, No. 9:11-cv-80427-DMM, 2013 U.S. Dist. LEXIS 190412, at *19–20 (S.D. Fla. May 6, 2013), aff’d, 778 F.3d 1205 (11th Cir. 2015).

The obligation to testify on behalf of the corporate party does not resolve the issue of the scope of the testimony required from the designee. Can a 30(b)(6) corporate representative be asked about new topics at trial, or is the scope of trial testimony limited by the topics identified before the deposition? The *Brazos River* decision required that the corporate designee testify “as to matters within corporate knowledge to which he testified in deposition.” *Brazos River Authority*, 469 F.3d at 434 (emphasis added). The last phrase arguably prevents the party seeking the testimony from asking the designee to testify at trial about topics not identified before the deposition in accordance with Rule 30(b)(6). Some courts have gone farther, in reliance on *Brazos River*, ruling that trial subpoenas on corporate designees are proper only to the degree that they seek testimony within the scope of the 30(b)(6) deposition. See, *e.g.*, *MC Asset Recovery, LLC v. Castex Energy, Inc.*, No. 4:07-cv-076-Y, 2013 U.S. Dist. LEXIS 197278, at *3 (N.D. Tex. Jan. 7, 2013). These courts have quashed trial subpoenas that extend beyond the topics identified for the 30(b)(6) deposition. It is important to note that none of these courts have limited the trial examination to the same questions asked at the 30(b)(6) deposition. Thus, careful examination of the topics of a 30(b)(6) deposition is required to prepare not only for the deposition but also for trial.
Rule 30(b)(6) does not directly authorize corporate testimony at trial. Used in conjunction with Rule 45, however, Rule 30(b)(6) is a powerful tool not only for discovery but also for trial. Depending on its geographic location and its status as a party or third party, an organization can be compelled to provide live testimony at trial. This can change the nature of a 30(b)(6) deposition from a trial deposition to a discovery deposition, freeing the examiner to explore uncertain areas, develop themes, and probe for weakness. The 30(b)(6) deposition becomes a way to set up testimony at trial, at which a revised, honed, and sharpened examination can be employed to great effect.

*Bradford S. Babbitt* is a partner with Robinson & Cole LLP in Hartford, Connecticut.
Eight Ways In-House Lawyers Can Make You a Better Trial Lawyer
By Alan D. Strasser

Imagine a member of your trial team has intimate knowledge of the inner workings of your corporate client. He has direct access to the highest-ranking corporate executives. He is an industry expert. He has handled multiple trials for the same client and on similar issues. He has an extensive network of other subject matter experts throughout the country. While this sounds like an ideal addition to any trial team, this person is often right there: the in-house lawyer. Many trial lawyers underutilize the in-house lawyer. They may feel vulnerable asking for help or may not want to cede control outside their firm. Whatever the reason, trial lawyers miss out on key strategy opportunities and information when they overlook an in-house counsel as a critical partner in their case. (Note that the word “expert” is used twice above.) This article identifies eight ways trial lawyers can incorporate in-house counsel for better results at trial.

1. Identifying and Preparing Key Witnesses
Most trials are won or lost by the witnesses. So the key to putting your client in the best position to win at trial is to identify the best witnesses and prepare them thoroughly. Your in-house counterpart can be invaluable in this process. The in-house attorney works with these witnesses every day and has worked with them on prior disputes. The in-house attorney sees them at holiday parties and company picnics and knows who can handle the pressure of cross-examination and who will fold. The in-house attorney knows the skeletons in the corporate closet. Outside counsel, hired to work on one or a few lawsuits, does not have that same knowledge. Therefore, outside counsel should work with in-house lawyers to identify the witnesses who will represent the company at trial. In-house lawyers can also assist in preparing those witnesses to testify. This is particularly true with high-ranking executives, where time and access can be severely limited.

2. Explaining the Documents
If the trial is not won or lost by the witnesses, then it is won or lost by the documents. In-house attorneys should be intimately familiar with many of the documents that will become trial exhibits. They work with these documents every day. Outside counsel, on the other hand, may be seeing these documents for the first time. Work closely with in-house counsel to understand the key documents and develop a way to simply and clearly explain the important aspects of the documents to the jury. In-house counsel can also assist in identifying unimportant documents that can be omitted from the trial for a more streamlined presentation.
3. Picking the Jury and Voir Dire
In their day-to-day business, corporations spend ridiculous amounts of money attempting to get into the minds of consumers. A jury is essentially just that: a panel of 14 consumers. You should tap into that in-house knowledge to understand what makes a company likable. What preconceptions will the average juror have about your corporate client? What the trial lawyer thinks the jurors know or will like about the company may be completely wrong. In-house counsel can tap into the internal corporate resources to develop voir dire questions that more effectively separate the good and bad jurors.

4. Preparing Jury Instructions
In-house counsel are experts in the laws and regulations that affect the client’s line of business. If it is a bank client, the in-house lawyer is usually an expert in banking and lending regulations. The general counsel of an energy company probably knows more about energy laws than anyone else on the trial team. If it is a patent case, the in-house lawyer probably has extensive experience with patent laws. The same is true for employment specialists. Whatever the industry or subject matter, the in-house lawyer may be able to identify nuanced legal issues and develop jury instructions addressing those issues that are specific to the industry or subject matter. In fact, having been through other trials for the same client, in-house counsel may have a library of jury instructions and special verdict forms that can be repurposed for your trial.

5. Tracking the Progress of the Trial
During trial, the trial lawyers are often caught up in the question-by-question, document-by-document aspect of the case, making it nearly impossible to step back and assess the bigger picture. Many in-house lawyers spent years in private practice before going in-house. If possible, in-house counsel should attend the trial. As knowledgeable observers, they can work with trial counsel to determine whether any in-game changes need to be made to the trial strategy. They can also assist with witness preparation while trial counsel is in court addressing evidentiary or legal issues.

6. Working with Experts
In-house lawyers should also have a role in working with outside expert witnesses. The in-house lawyer’s unique knowledge of the company may allow him or her to identify issues the outside counsel and outside expert overlooked because they do not have the same level of internal information as the in-house lawyer. The in-house lawyer can also assist in identifying preeminent experts, particularly in highly specialized fields.

7. Managing Expectations
Not every trial will be won. Thus, one of the key responsibilities of the trial lawyer is to keep the client apprised of the risks of going to trial. In-house counsel can be the essential link between
the trial lawyer and the corporate executives. In-house lawyers speak your language and can assist in communicating risks within the company.

8. Keeping Things Ethical
Non-lawyers do not always understand the complex and sometimes counterintuitive ethical rules governing the practice of law. They may not, for example, appreciate the ethical rules prohibiting contact with represented parties or the intricacies of conflict-of-interest rules. In-house attorneys, however, must comply with the same set of ethical principles as every other lawyer. Therefore, in-house counsel can be of great assistance in making sure everyone conforms to controlling ethical rules.

Conclusion
In short, the in-house lawyer should be treated as a key member of the trial team. In-house lawyers know things you do not. The end goal is to win at trial. To do that, you need to maximize all resources available, including in-house counsel.

Michael S. LeBoff, P.C., is a partner at Klein & Wilson in Newport Beach, California.
Guide for Young Lawyers Going to Trial in Civil Cases
By Mark A. Romance

You just received the order advising that your first civil trial will take place in a few months. Settlement in the case is impossible and this one is really going to trial. While the idea of going to trial seemed exciting and glamorous before, now that it is really going to happen, the fantasy quickly fades and reality sets in. Never fear, you can do a great job for your client as long as you work hard, stay organized, and prepare.

Reviewing Trial Techniques
There are many traditional “textbooks” that offer generic tips for trial preparation and can refresh your memory from law school on fundamental trial techniques, such as developing themes, opening statement, witness examination, and closing argument. Winning at Trial by D. Shane Read and Fundamentals of Trial Techniques by Thomas A. Mauet cover virtually all the technique and strategy issues you will need in an easy-to-read format. Take the time to read at least one trial technique book.

Practical Tips
In addition to general advice about sharpening your techniques, here are some tips to help you get organized and prepare your case for trial.

**Get organized.** Make a list of tasks to be done before trial to help you stay organized. Your list should include major things like court deadlines, a list of additional motions to be filed, witness outlines, and jury instructions, among others. You can use your trial order to guide you. But you should also include practical items that will make trial easier, such as creating a list of supplies you will need during trial, scheduling lunch ahead of time, and having courier services available. Identify the team member assigned to each task, include deadlines, and review the list regularly to make sure nothing is forgotten.

**Double-check everything.** In federal court, and in many state courts, the parties have certain disclosure requirements, and there are consequences for failing to meet them. You should double-check that you have met your obligations to disclose witnesses and trial exhibits. In federal court, parties have a continuing obligation to update their Rule 26 initial disclosures and discovery responses. Review your client’s written discovery responses once discovery is finalized and update them if necessary. Check your disclosures to make sure that all documents you intend to use at trial and all trial...
witnesses have been disclosed. Many courts will exclude exhibits or witnesses not properly and timely disclosed.

**Communicate with your client and your witnesses.** After you outline your trial preparation game plan, make sure you speak with your client to discuss what to expect at trial. Topics should include when and where the trial will take place and what you will need from the client before and at trial. Determine who your client representative will be at trial and speak with that person about what to expect. Likewise, let your witnesses know about the timing and location of trial and when they can be expected to testify, and schedule times to meet with them to help prepare them for their testimony. For witnesses who will not voluntarily appear to testify at trial, make sure you have your subpoenas properly issued and timely served.

**Visit the courtroom.** Visit the courtroom to identify practical or technical issues, and to get comfortable with the size and layout of the room. Some courtrooms have the latest technology, while others have none. Make sure that the equipment you intend to use is compatible with the court’s system; importantly, make sure you know how to use the technology available and have addressed any other practical issues. Determine whether permission is required to bring equipment into the courtroom — most federal courts require an order to be entered before trial. You will also want to determine which counsel table is yours for trial and ensure that you have enough space for your team, equipment, and documents. If possible, introduce yourself to the court staff and court reporter. The court staff members are an essential part of the trial process, and you should get to know them and allow them to know you. There may be points in time when they can provide critical help or avoid embarrassment. Most court personnel will know the judge’s preferences and procedures and will provide valuable insight into your courtroom.

**Talk to other attorneys.** Find lawyers who have conducted trials before your judge and ask them what you need to know about your judge’s preferences. This information can be invaluable to help you avoid pitfalls and allow you to impress the judge with your knowledge of the process.

**Master the facts.** Re read all depositions, pleadings, and exhibits. There is no substitute for mastering the facts. Keep in mind that the complaint and answer establish the burden of proof at trial. You need to master the allegations and know what evidence supports those allegations to know how the case will be proven at trial.
**Master the procedure.** Read the rules of civil procedure and the court’s local rules and standing orders pertaining to trial, and know them inside and out. Identify any potential issues and conduct research needed to interpret the procedural issues. Where necessary, prepare a trial brief to hand to the judge if an issue arises during trial. Take a copy of the rules to trial, and keep it handy.

**Anticipate evidentiary issues.** You should master the rules of evidence before trial. Read the rules again so they are fresh. Anticipate objections, and be prepared to address them. Motions in limine can address significant evidentiary issues, but sometimes you may not want to alert your opponent in advance that you have a concern. If the issue is significant, prepare a short memo in advance of trial that you can use as a road map for your oral argument when the issue arises during trial. This trial brief should include legal citations and be presented to the judge during argument on the issue.

**Master the substantive law on jury instructions.** It takes significant time and strategy to prepare jury instructions (or proposed findings of fact and conclusions of law in non-jury cases). Become a master of the law, and prepare jury instructions or proposed findings of fact and conclusions of law well in advance of trial to clarify what you have to prove at trial. While the deadline to submit jury instructions may be on the eve of trial, do not wait until the last minute. Instead, prepare the instructions early, and use them as a guide for your trial preparation.

**Anticipate appellate issues, and know how to preserve error for appeal.** In most jurisdictions, failure to raise an issue or an objection during trial constitutes a waiver of the issue on appeal. You should familiarize yourself with the appellate law in your jurisdiction so that if an issue arises, you will know how to preserve it in the event of an appeal. In significant cases, you may want to consider having the client hire an appellate attorney to sit with you during trial to guide you on preservation issues. The most common appellate preservation issues arise during voir dire, exhibit admission, motions for a directed verdict, and challenges to expert witnesses. Usually, you will need to object on the record and specifically ask for relief, such as a curative instruction, striking of testimony, or even a mistrial, in order to preserve the error. Look for a bar article in your jurisdiction to be your guide.

**Prepare witness outlines, not questions.** Experienced lawyers often prepare outlines of areas of questioning for witnesses, rather than a series of prepared questions. Remember, you are telling a story, which is most effectively presented through a conversation with your witnesses. Reading exact questions prevents you from
presenting a conversational tone with your witness. The same is true with cross-
examination. Your outline should identify the issues in reasonable detail but allow you
to be flexible and adjust your questions based on the witness’s answers. There are
certainly specific questions on direct that you must ask precisely to establish a fact or to
set up impeachment questions on cross-examination, but those are the exceptions and
not the rule.

**Prepare for impeachment.** Be prepared to impeach adverse witnesses with their prior
testimony. Ideally, you will have a trial consultant available to quickly present a video
clip to show the witness’s prior inconsistent testimony. In the absence of the video clip
option, be ready to confront the witness with the page and line from the witness’s prior
testimony for a proper impeachment.

**Use demonstrative aids.** Judges and jurors expect a visual presentation, even in
business cases. Your demonstrative aids should be used during opening, with witness
examinations, and during closing, to tell your story in a visual way that supports your
case. Your presentation must be flawless, though, because judges and jurors will not
forgive technical glitches. Know how to use the equipment, or have a consultant on your
team to handle that part of the presentation. You should rehearse your use of the
equipment. Ask the judge for permission to test your equipment in the courtroom for
best preparation.

**Prepare closing argument ahead of time.** Your closing argument should cite the
evidence and law that supports your theme and the merits of your case. Do not wait
until trial begins to prepare your closing argument. Before trial begins, prepare an
outline that cites exhibits and testimony you expect will be admitted at trial, and modify
your closing during trial as the evidence evolves. If you wait until you are at trial to
prepare your closing, it will look unprepared and patched together. Plan ahead for a
smooth and seamless closing by referring to the evidence you know will be admitted. It
is much easier to edit your closing during trial than it is to create it for the first time.

**Watch and listen.** Watch the jurors’ and judge’s facial expressions during trial, and listen
to the message being sent by judge and jury. Often times a judge will ask questions or
make rulings that indicate what he or she thinks is important and whether he or she
wants to hear more from the party who may be winning the argument. Listen to the
questions and comments to gauge what is important to the judge and when the judge
wants to hear from you. Often the judge does not need (or want) to hear from the
winner. Be alert and try to read what the judge is really asking before deciding whether
an argument or question is really necessary.
Conclusion
Learning from trial textbooks is critical to preparing for trial, but be practical in your approach and prepared for the unexpected. Ask for help from those who have been through trial. There is no substitute for experience.

Mark A. Romance is a shareholder in Richman Greer, P.A., in Miami, Florida.
The Trial Bible: An Outline of Proof
By Edward A. Marshall

My team and I prepared recently for a trial in a putative class action involving the allegedly flawed implementation of a payments program at a nationwide chain of convenience stores. The facts, involving the simultaneous application of two massive software updates on two sets of servers, were somewhat complex. But the legal claims were relatively straightforward: negligence, unjust enrichment, breach of implied contract, and violation of a state unfair and deceptive trade practices act. So too were the defenses. We had spent months thinking about them and months more briefing all manner of legal issues at various junctures throughout the case. The steps before us now, as I saw it, were moving forward with concrete aspects of trial preparation: assembling exhibits, drafting examination outlines, and sketching out opening statements.

However, as we were feverishly putting together task lists in advance of an upcoming trial date (all while awaiting a ruling on summary judgment and class certification), my local counsel suggested that we build in time for a project that I was reflexively inclined to dismiss as somewhat rudimentary: drafting an outline of proof.

The concept of an outline of proof is, of course, a simple one. It is a five-column chart for each claim or affirmative defense. Each row reflects each element of the claim (e.g., duty, breach, causation, damages). Moving from left to right, the columns are (1) a description of the element; (2) the anticipated proof (e.g., particular witness testimony, well-defined exhibits) that the party bearing the burden is likely to put up to establish that element; (3) potential objections to that proof; (4) the anticipated evidence that the other party will use to combat the existence of the element; and (5) potential objections to the same.

I could appreciate the value of such a chart in the abstract. In a lawsuit with especially complex claims (e.g., a Racketeer Influenced and Corrupt Organizations action or an antitrust case), preparing such an outline could be almost essential. The same could be said in a case that had seen minimal briefing, where parties had not spent countless hours organizing their thoughts to address claim elements at the motion to dismiss, summary judgment, and class-certification stages of the case. But in this case? Really? The claims were the staples of commercial litigation. Both sides had spilled vast quantities of ink laying out their anticipated proof in court filings. Did we truly need to invest our finite time before trial (not to mention the client’s resources) putting together a trial aid that seemed better suited to a law school mock trial exercise?
In a word, yes. Despite my initial skepticism, I raised my hand and volunteered to draft the outline. I pored over our jury instructions and the pleadings, briefs, and deposition transcripts we had amassed in the case. Then I started populating cells with the testimony and documents that we would need to establish our defenses, as well as the testimony and documents that I anticipated the class representative would proffer in support of her claims.

The exercise, as opposed to being a mindless slog, was surprisingly illuminating. It forced me to put myself in the shoes of opposing counsel and think through what portions of the record (and facts not yet reflected in the record) they would try to put before the jury. I then had to brainstorm ways to keep certain such evidence out of the courtroom. It also prompted me to identify the countervailing evidence we would want to present, while at the same time giving thought to how the plaintiff might seek to exclude that evidence.

At the end of that process, I had developed a much deeper appreciation of my opponent’s likely trial strategy than I had when I began. I also had identified facts that we likely would need to prove that might not otherwise have made it into our examination outlines, as well as motions in limine that we would need to file to keep certain unduly prejudicial evidence away from the jury (before it even could be alluded to in opening statements).

Creating the outline of proof was not just a journey of personal litigation enlightenment, however. Once I had drafted it, I circulated the outline to my team and solicited their feedback. They added to the document in profoundly helpful ways. Even more importantly, the exercise forced all of us—a trial team made up of four attorneys, all with active roles (and strong opinions)—to hash out potential disagreements about what proof would be beneficial at trial and how best to counter our adversary’s case.

What emerged at the end of that process was a well-documented meeting of the minds about how we would approach trial, consisting of all of our best thoughts and most deliberate attempts to put ourselves in the mind of our opponent. Far from being an inefficient use of our time or our client’s resources, it cemented a trial strategy in a central document that could serve as the launching point for examination outlines, deposition designations, and exhibit lists. Simply put, it transformed a team of trial lawyers who thought they were ready for trial into a trial team that was actually ready.

So what happened at trial? Sadly, we never got the chance to find out. Our team defeated class certification and managed, through summary judgment, to narrow down the case to an individual claim for negligence with miniscule damages exposure—prompting a quick and favorable settlement. Nevertheless, the lesson learned has been no less impactful. Outline of proof? Yes, please. Every time.
Edward A. Marshall is a partner with Arnall Golden Gregory in Atlanta, Georgia.
Social Media Content: What Is It and How Do I Use It at Trial?
By Marie V. Lim

Most lawyers are familiar with the concept of e-discovery: the preservation, collection, and production of electronically stored information (ESI). More often than not, when the term “ESI” arises, emails are the first items that come to mind. Other electronic documents, such as Word and Excel files, are often considered next. These types of documents do not constitute the entire ESI universe, however. As technology changes, so does the ESI universe. The use of social media for both personal and business reasons has grown in recent years. For that reason, requests for social media content, in addition to emails and other electronic documents, should be standard in any litigation. What follows is a brief overview of how to deal with social media content from preservation through trial.

What Are Social Media?
Social media platforms are electronic forms of communication in which users share information via websites and applications (e.g., Facebook, LinkedIn, Twitter, Instagram). Depending on the user’s privacy settings, this content can be made available to the general public or only to those individuals with whom the user wishes to share the information. Social media content may be used in litigation in a variety of ways—among them, supporting or disproving defamation claims; establishing physical, emotional, or mental state; or determining where a person may have been at a certain time.

Is Social Media Content Discoverable?

Also, Federal Rule 34 requires the production of ESI within a party's “possession, custody, or control.” It is important to determine where social media content resides and whether it is actually the user who has possession, custody, or control of this content. When it comes to paper documents, it is fairly easy to determine who “owns” the documents. With social media, that determination isn’t so simple. Arguably, the content resides on the network server of the
social media site. After all, the site itself is the one that is hosting the data. However, issuing subpoenas to social media sites is fruitless because they will not produce data without the user’s consent. See Crispin v. Christian Audigier Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010); Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (N.Y. Sup. Ct. Suffolk Cty. 2010).

An alternative approach is to seek production of the social media content directly from the user, given that he or she controls it. In Gatto v. United Air Lines, Inc., No. 10-CV-1090-ES-SCM (D.N.J. Mar. 25, 2013), the court held that “Plaintiff’s Facebook account was clearly within his control, as Plaintiff had authority to add, delete, or modify his account’s content.”

Furthermore, one must not circumvent procedural rules in order to obtain social media content. For example, an attorney (or legal support staff) may not try to gain access to a social media platform, such as Facebook, by setting up a fake account and attempting to “friend” the target. Several bar associations, such as New York (Social Media Ethics Guidelines (May 11, 2017)) and New Hampshire (Ethics Comm. Advisory Op. 2012-13/05), have issued guidelines and opinions stating that such actions are deceptive and unethical.

How Do I Preserve and Collect Social Media Content?
Preservation can be accomplished in a number of ways. First, avoid spoliation claims by ensuring that litigation hold notices specifically address the preservation of social media content. Parties should be instructed not to delete content from their social networking accounts. Doing so may result in sanctions. See Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013).

Some websites, such as Facebook and LinkedIn, allow users to download an archive of their account for free. If this feature is not available, you should consider using tools specifically designed for archiving and collecting social media, such as X1 Social Discovery or Nextpoint. Archiving tools are the best way to preserve social media because they preserve not only visible content but also the underlying associated metadata. Reaching for the print screen button may seem tempting, but think twice before doing so. Screenshots capture only images of the content, not metadata that may be important depending on your case and part of your production obligations.

In What Format Do I Produce Social Media Content?
Address production format with opposing counsel early on in your case. If the parties agree that metadata are not important, they may agree to produce screenshots only. If metadata will be an issue, the parties may agree to produce files in native format or as static images along with
How Do I Authenticate Social Media Content for Use at Trial?

Federal Rule of Evidence 901 requires a proponent to “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Generally, this requirement is satisfied with the testimony of a witness or forensic expert. However, such extrinsic evidence is unnecessary for the self-authenticating items specified in Federal Rule of Evidence 902, such as business records and public records, and now ESI, pursuant to amendments that took effect December 1, 2017. Rule 902 was amended to address the ever-changing ESI landscape and to streamline the authentication process. Under the new amendments, self-authenticating evidence now includes the following:

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Note that self-authentication for both of these items substitutes written certification for the live testimony that may have been required by Rule 901. Certification under Rule 902(13) should address the accuracy of the electronic process by which a record was generated (e.g., operating system registries and logs). Certification under Rule 902(14) relates to a file’s hash value, which is essentially a digital fingerprint (e.g., a unique sequence of numbers and letters generated by a computer algorithm) that will change if the original copy has been altered. In addition to these certifications, notice requirements under Rule 902(11) must be met in order to give the adverse party an opportunity to inspect and possibly challenge the records or data.

Of course, the parties may choose to bypass all of these steps by entering into stipulations regarding authenticity.

What about Hearsay Issues?

Authentication of social media content does not necessarily mean that it is admissible. When a
statement is made via social media, hearsay issues will arise when the one who made the statement is unavailable as a witness at trial. The court in *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. May 4, 2007), recognized admissibility issues relating to ESI and that

> to properly analyze hearsay issues there are five separate questions that must be answered: (1) does the evidence constitute a statement, as defined by Rule 801(a); (2) was the statement made by a “declarant,” as defined by Rule 801(b); (3) is the statement being offered to prove the truth of its contents, as provided by Rule 801(c); (4) is the statement excluded from the definition of hearsay by rule 801(d); and (5) if the statement is hearsay, is it covered by one of the exceptions identified at Rules 803, 804 or 807.

Id. at 562–63.

ESI, including social media content, is not treated differently under the Federal Rules of Evidence. See *United States v. Browne*, 834 F.3d 403 (3d. Cir. 2016).

**Conclusion**

Social media usage is ever-expanding. If such content has not already made an appearance in one of your cases, it is more likely than not that it will in the near future. Be prepared to deal with social media content by knowing how to preserve it, collect it, and use it at trial.

*Marie V. Lim* is an e-discovery attorney at Novack and Macey LLP in Chicago, Illinois.
Preparing the Corporate Client for Trial
By Clifton L. Brinson

There are important distinctions between preparing a corporation and an individual for trial. This article provides an overview of some of the special considerations to consider when preparing to represent a corporation at trial.

Selecting a Corporate Representative
When representing a corporation, unlike representing an individual, you have some discretion in deciding who sits next to you at counsel’s table. Use that discretion wisely.

The initial trial preparation issue is identifying the right corporate representative. This should be done well in advance of trial. The corporate representative will be the primary human face of the corporation at trial. That representative should be someone likable and, ideally, someone from the jurisdiction where the trial is taking place. You need not choose the general counsel or lead decision maker for the client; that person can be elsewhere in the courtroom if necessary. The corporate representative should, however, be someone who is testifying at some point in the case.

Once identified, the corporate representative needs to be prepared for his or her role at trial separate and apart from his or her testimonial preparation. The corporate representative should clear his or her schedule for the entirety of the trial, at least when court is in session, and stay at counsel table throughout the trial. The corporate representative needs to be fully engaged with the trial proceedings—if the corporate representative is uninterested in his or her own case, then why should the jury be interested? Similarly, the corporate representative should not be looking at his or her phone or doing other work during trial; after all, the jurors are being taken away from their regular work as well.

Identifying and Preparing Corporate Witnesses
While choosing and preparing the corporate representative is important, far more important is preparing the corporate representative and your other witnesses for their trial testimony.

In some instances, you will get to choose your trial witnesses much like you chose your corporate representative, because there are numerous witnesses within the company who potentially could provide the same evidence. In such cases, you obviously want to pick the witnesses who will put the best face on the corporation, even if that is just a function of their personality or background. Use low- or mid-level employees to the extent possible; these are more likely to relate to the average juror.
More often, however, you will have little control over which company employees are relevant to your case. Below are a few commonly encountered types of witnesses and some things to keep in mind when preparing them to testify at trial.

The technical expert. This witness has a vital understanding of the software, product design, or manufacturing process. However, the technical expert is not accustomed to explaining things to someone who does not share his or her expertise. Accordingly, in preparing this witness for trial, it is key to work with him or her—often at length—to ensure he or she can testify both on direct and cross-examination in a way the jury will understand.

The busy executive. This witness is focused on growing the company and views the litigation as a distraction. Such a witness often wants to give it as little attention as possible. That is a problem if the busy executive is a key decision maker, is directly involved in the conduct at issue at trial (e.g., signed the contract, participated in the negotiations), or otherwise is critical to the case. He or she requires some straight talk about the need to invest substantial personal time in trial preparation and the possible adverse consequences of failing to do so. Also, the busy executive can sometimes share the technical expert’s penchant for jargon. The busy executive needs to avoid “creating impactful synergies” and instead be prepared to speak plainly.

The eager-to-please employee. This witness genuinely wants to help the company and thinks the best way to do so is to answer every question in a way that puts the company in the best possible light. The problem arises when the witness’s “right” answers don’t match reality. It is therefore important to listen with a duly skeptical ear, even (or especially) when the witness is telling you exactly what you want to hear. Does what the witness is saying match what the documents say? Does it make sense? If not, the witness needs to be challenged during trial preparation and made to understand that, in the long run, the best answer for the company is the truthful one. Otherwise, the eager-to-please employee will sound great in the conference room but be destroyed on cross-examination.

The disgruntled employee. This witness is at the other end of the spectrum from the eager-to-please employee. The disgruntled employee is glad to tell you or anyone who will listen what is wrong at the company. If something bad happens to the company in litigation, this witness thinks it is well deserved. Your goal during trial preparation is not to change this witness’s view of the employer but to keep his or her testimony narrowly focused on the relevant facts within the witness’s personal knowledge. This is the type of witness for whom the traditional rules of deposition preparation apply with even greater force at trial—e.g., answer only the question that was asked, do not guess, do not volunteer information.
The former employee. This witness could fit any (or none) of the above descriptions. I flag this as a separate category because (a) there may be ethical considerations to keep in mind when contacting former employees, and (b) communications with former employees in the context of trial preparation may or may not be privileged, depending on the circumstances and the governing law. Be sure to think those issues through fully before engaging in trial preparation with former employees.

Managing Corporate Paperwork
Document management is important in any case, but corporate clients have a special ability to generate massive amounts of documents. In one case in which I was involved, our adversary was a large pharmaceutical company. By the end of the trial, I had become convinced that the company was not in fact in the business of manufacturing pharmaceuticals, but rather in the business of manufacturing PowerPoint presentations.

For trial preparation, the key is identifying the handful of exhibits on which you want to focus at trial and then developing a strategy to acquaint the jury with those exhibits. It is difficult for a jury, over the course of a trial, to become familiar with more than about 10 documents. Figure out which documents those should be, then show them to the jury early and often. Keep in mind that when a document is on the screen, particularly if it is a new document, the jury is looking at it, not listening to your witness. Prepare for trial accordingly.

Be especially thoughtful in preparing to deal with a contract. Contracts are written in advanced legalese, in which you as an attorney are fluent but your jury is not. Prepare your witnesses to walk through key provisions slowly and carefully. Furthermore, in developing your trial strategy, do not rely heavily on contractual technicalities. The jury expects your corporate client to act fairly and reasonably toward everyone and will not excuse opportunistic or unfair conduct simply because you can squeeze it into the language of a contract.

SPOTLIGHT ON PRO BONO

Volunteer Commercial Litigators Serve Columbus, Ohio, Residents Through Innovative Pro Bono Program

In Columbus, Ohio, one innovative pro bono program uses volunteer attorneys—including prominent commercial litigators—to combat the housing and eviction crisis.

As a result of the uniquely high number of evictions in Columbus, many tenants find themselves unrepresented in their cases. To combat this problem, the Legal Aid Society of Columbus (LASC) piloted the Pro Bono Tenant Advocacy Project, a pro bono program focused on eviction issues. The housing clinic successfully provided a variety of legal services to individuals facing eviction through volunteer attorneys and staff for several years.

Unfortunately, the program lost significant funding and the LASC was forced to discontinue the program in 2011 and consider other options to combat the housing crisis. The following year, with the assistance of the Columbus Bar Association’s Pro Bono Committee, the LASC created a Volunteer Resource Center (the “VRC”), which ultimately had over 140 volunteer lawyers from the Columbus legal community. Retired attorneys provided leadership to the VRC, and volunteer lawyers assisted with landlord/tenant issues as well as other important cases for those who had no access to justice. Even with the creation of the VRC, however, there were still hundreds of individuals whose needs could not be adequately served.

Recognizing that the housing clinic had been largely successful in helping combat the eviction crisis because of its unique ability to provide legal services and limited advice on the same day as an eviction hearing, the legal community rallied support for the reinstatement of a housing clinic that could provide same-day legal services. Before merging with Taft, Stettinius & Hollister LLP in 2012, Chester, Willcox & Saxbe played an integral role in the reinstatement and restructuring of the clinic. Partners of area law firms, including James D. Abrams, championed the restructuring, suggesting that area firms contribute to the housing crisis solution with volunteer attorneys. Abrams continued to push LASC to re-consider a clinic environment to meet the indigent tenants’ needs. The pledge to provide volunteer attorneys, along with funding from The Ohio Bar Foundation, The Columbus Foundation, and PNC Bank, resulted in the creation of the ground-breaking TAP clinic in March 2017.

During the American Bar Association’s first-ever weeklong celebration of the importance of pro bono work in 2009, Abrams received the LASC’s Excellence in Pro Bono Service Award. When
later asked about the original clinic and its revival, Abrams explained, “Taft and its Columbus office are committed to ensuring that those who cannot afford access to the legal system in central Ohio are served. Not only are we pleased to participate in this important LASC initiative; but participation permits our attorneys to have a real impact on this under-served population.”

Volunteer Columbus attorneys at the TAP clinic continue to make a difference in the lives of many individuals and families, by helping them navigate the eviction court process and ensuring that landlords are held accountable for any unfair and illegal practices. In the first nine months since its inception, the LASC reported that the TAP clinic has provided assistance in over 792 cases.
How the Judiciary Is Helping Younger Lawyers Close the Experience Gap

By Paula M. Bagger

A 2015 ABA Report confirmed what many women litigators know experientially: Women are less likely to appear in civil trials than men and substantially less likely to handle first-chair responsibilities. The ABA House of Delegates recently passed Resolution #10A to redress unequal opportunities for women to gain trial and courtroom experience. Many reasons for the disparity have been advanced, ranging from unequal mentoring opportunities in male-dominated litigation departments to a perception that young women attorneys are hesitant to “lean in.”

There are other systemic contributors to the problem, including fewer civil trials in general, with the result that older (predominantly male) lawyers are available to handle significant motions and try those fewer cases. Suggestions to young litigators, and, particularly, young women litigators, appear frequently: They include seeking out opportunities, no matter how small; accepting pro bono clients; developing one’s own client base, or taking a job (e.g., government or insurance defense) where trial opportunities are more plentiful.

Young litigators should also look for opportunities provided by the judiciary. Many trial judges have more often been offering, or proving themselves more receptive to, a variety of means to increase participation of newer lawyers in stand-up work and at trial. Motivated by a concern that young lawyers (of both sexes) in large law firms are not being allowed to develop their trial skills and, in many cases, the recognition that this bottleneck affects young women litigators disproportionately, these judges have officially expressed their concern and support and sometimes created policies designed to address the problem.

For instance, seven of the federal judges sitting in the District of Massachusetts adopted a standing order regarding “Courthouse Opportunities for Relatively Inexperienced Attorneys.” The order “as a matter of policy, strongly encourages the participation of relatively inexperienced attorneys in all court proceedings including but not limited to initial scheduling conferences, status conferences, hearings on discovery motions and dispositive motions, and examination of witnesses at trial,” while cautioning that such attorneys “will be held to the highest professional standards,” “should have a degree of authority commensurate with the proceeding,” and, in complex matters, “should be accompanied and supervised by a more experienced attorney.”
Judges in other jurisdictions offer similar inducements for the participation of less experienced attorneys. For instance, a number of federal judges and magistrates have standing orders in which they offer oral argument on a disputed motion if a junior attorney will be making all or most of the presentation. Several others have standing orders allowing for additional time for an oral argument made by an inexperienced attorney. Magistrate Judge Christopher J. Burke in the District of Delaware issued a “Standing Order Regarding Courtroom Opportunities for Newer Attorneys,” offering parties the opportunity to provide notice that a less experienced attorney will argue a motion, in which case the court will offer oral argument if practicable, “[s]trongly consider allocating additional time for oral argument beyond what [it] may otherwise allocate,” and permit a mentoring counsel of record to provide some assistance during oral argument, if necessary. Similarly, Judge Moskowitz of the Central District of California will hold oral argument on civil motions:

(1) where the motion will be argued by attorneys with less than 5 years of admission to the bar for at least two opposing sides; or (2) where the motion will be argued by an attorney with less than 5 years of admission to the bar on one side and the opposing attorney, irrespective of his or her experience, also requests oral argument. While the decision as to who should argue is for the lead attorney to make, the Court encourages the lead attorney to allow the junior attorney writing the motion papers to argue the matter. In those circumstances, the Court will allow the lead attorney to also participate in the argument.

A growing list of standing orders by federal judges across the country can be found at the website Next Generation Lawyers.

Young lawyers, and their mentors, should also keep in mind that, even in the absence of formal standing orders, a growing number of state and federal judges will be sympathetic to requests to increase the participation of newer lawyers, such as allowing counsel to split the argument of a complex motion or to split the examination of witnesses in the interests of giving less experienced lawyers an opportunity to participate in arguments or trials. Judge Allison D. Burroughs of the District of Massachusetts, concerned about the paucity of younger and women attorneys speaking in court, will offer associates the opportunity to argue a motion even after the lead attorneys have finished their presentations. She is quoted as saying that the goal is for parties to “see it as an opportunity to make their points one more time, rather than as a potential pitfall for the young and unwary.”

When staffed on a larger case, a less experienced litigator should keep herself apprised of any standing or procedural orders that may offer her the opportunity to participate more fully in the cases on which she works.
Paula M. Bagger is a principal in law Office of Paula M. Bagger LLC.