Fall 2012, Vol. 18, No. 1

TABLE OF CONTENTS

Articles »
Keeping Discovery Bullies at Bay
By Joan K. Archer and Jennifer E. Hoekel
Ten tips for remaining calm, cool, and collected while dealing with aggressive opponents during these often-heated disputes.

Nailing Your Direct Examination
By Marsha Hunter
Successfully pulling off a compelling witness examination may require turning conventional wisdom on its head.

When a Client’s Mental Health Is at Issue
By Andrea Lance
Universal tactics for securing a favorable outcome in high-stakes cases where the psychological stability of a client is questioned.

The Fine Art of Litigation Involving Non-English-Speaking Witnesses
By Erika Ronquillo
In the great performance that is a trial, calling a witness that does not speak English demands a carefully choreographed dance between lawyer, witness, and interpreter.

Accurately Predicting the Outcome of Your Case
By Jessica Hoffman Brylo
A lawyer’s judgment about the outcome of a case is crucial in knowing how much to settle for, and how to persuade a jury.

Staying Healthy (and Sane) During Trial
By Nicole Hooper
We make the case for why prioritizing your own physical, mental, and emotional health during a stressful trial pays off.

News & Developments »
New York Sees Slight Rise in Bench Representation
Despite lingering disparities, a recent study finds that women comprise 31 percent of all federal and state judges in the Big Apple, up from 25 percent in 2002.

"Undeterred" and Other Traits of Successful Women Business Leaders
Forbes guest columnist Elissa Sangster breaks down key qualities of women trailblazers who beat the odds.

Words of Wisdom »
What Do You Wish You Had Known Before Your First Trial?
Two of your peers reflect on their first trial experience and the surprising lessons they learned.
Keeping Discovery Bullies at Bay
By Joan K. Archer and Jennifer E. Hoekel

Bullying in discovery comes in a variety of forms. Sometimes it's abusive requests for production, at other times it's the behavior of opposing counsel in a deposition. No matter the format or opponent, one can always turn an intolerable situation into one in which you have the strategic advantage by following 10 simple rules for dealing with discovery bullies.

1. Abide by the Golden Rule
The most important rule for dealing with bullies is "Do unto others as you would have others do unto you." All other rules flow naturally from this one tenet of behavior. If you simply ask yourself how you would like to be treated, most choices become obvious (once you follow rule number two and calm down). Even though your opponent may be acting like a jerk, should you give him or her the extension to respond to discovery? Ask yourself what you would want in that situation. Or, opposing counsel may have done a poor job answering interrogatories. Should you follow suit—or rise above and do what you believe is professionally necessary? A motion to compel is filed against your client without that one last call from opposing counsel that could have resolved the issue. Would this excuse you from being obligated to make that last attempt to resolve your own discovery dispute? One can think of many other similar scenarios in which abiding by the Golden Rule makes the most sense. You not only will ultimately create a better impression when in front of your judge, but also will provide the most professional representation possible.

2. “Take Five”
As angry as you may be, resist the temptation to respond immediately while in the heat of battle. Always assume that your emails and potentially even voice mails will be attached to a court pleading in the future. Instantaneous communication that is quick and easy (e.g., email), is a recipe for speaking before thinking about how the communication may be perceived. Do judges like things written with a harsh accusatory tone, or do they prefer a more professional approach? Do clients want you to be brash or calm, cool, and collected? Many times a good night’s sleep can change one’s attitude about a dispute and ultimately lead to a responsive communication that is infinitely more productive in the long run.

Between the need to document for the court, your client, and your supervising attorney, it is important to keep good records documenting all phases of your discovery efforts. You may need to demonstrate to the court or your client the steps taken in looking for documents, communicating with witnesses, and most importantly, dealing with opposing counsel. Have you been diligent, thorough, and cooperative? Great, now prove it!

4. Don’t Be Afraid to Give a Little
Not every battle is going to cost you the war. So much discovery time, money, and effort is wasted on trivial points. Think about the small things that you can compromise on and save your energy for the disputes that matter. What matters? Discovery that leads to evidence you actually would use in connection with a summary judgment motion or present at trial. Compromise saves
time, money, and possibly most importantly, your energy for the disputes that really matter to the case and the client.

5. Preparation Is Key
Knowing your facts and the file inside and out will always give you an advantage. When you are prepared and armed with the facts, you will be better able to decide whether any given dispute really matters or whether it might be one on which you can give.

6. Have Confidence in Your Abilities
It is so easy to develop a bunker mentality and think that every opposing counsel hates you, thinks you are not smart, thinks they are better than you, etc. Many opponents fuel one’s paranoia through constant bullying. Do not fall into this attitude trap! Discovery practice is a lot like being back on the elementary school playground. The kids who bully often do so because they are insecure, not because they truly are better. If you let them believe you are inferior, they win—and you will undoubtedly act in ways that may not be strategic and in your client’s best interest. Have faith and confidence in your abilities. You are smart and highly competent or you would not have graduated from law school and passed the bar. Believe in yourself and you will have the confidence to turn the other cheek in your client’s best interest.

7. Don’t Let Them See You Sweat
Discovery can, at times, be a bit like a game of chess or Battleship. Strategic choices must be made. A good soldier in a time of war does not show weakness. Bullies can develop a feeling of empowerment in the face of others who exhibit a lack of confidence. Calm, cool, and confident behavior can be intimidating and can cause bullies to back off because they no longer believe they have the upper hand. The playing field will be leveled, permitting the facts of the case to be what matters again.

8. Stand Your Ground
Confidence is important if one is to keep a bully at bay. Do not be left with the impression that steps one through seven mean you should be passive and avoid conflict at all costs. To the contrary, you still have an ethical obligation to zealously represent your client. It is important to stand your ground when needed. Bullies often test the waters early in a case to see if you will cave in to their demands. Your behavior at the outset will set the tone for the whole case. Early on in the case, present yourself in a manner that is firm and well-reasoned. Appear confident and calm. If the issue at hand is important to your client’s position and the ultimate outcome of the case, stand your ground. The tone for discovery will be set by your behavior at the outset. Bullies often become much more reasonable once they figure out that bullying will not get them the result they desire.

Even if the discovery bully is generally kept at bay by your conduct early on in the case, there may be times later on in discovery during which you must be sure you stand your ground. In other words, do not let your guard down even if you have become friends with opposing counsel. One of the authors had a case in which she had a fairly good relationship with opposing counsel. Nonetheless, when his back was against the wall in an expert deposition, he resorted to his old bullying tactics to try to get her to stop a particular line of questioning. In fact, he threatened to walk out of the deposition and seek sanctions. Rather than being rattled, she calmly reminded him of his ethical obligations and suggested that walking out would be inconsistent with those obligations. He nonetheless left the deposition. She remained calm and concluded her line of
questioning, which left her opponent in a very bad position at the conclusion of expert discovery. So, do not let your guard down. Bullying can resurface at any time.

9. The Best Defense Is a Good Offense
Sometimes the best way to avoid bullying is to remain on top of discovery and control the timing of what occurs. We all face time pressures in the practice of law. Your opponent is no different than you in that regard. If you are well prepared (rule five), the pace and content of discovery can be controlled by you. Some bullies will permit you to take control because they are too busy to do anything else. Or, in other situations, they resist this control but they have little choice but to follow your lead because of the schedule imposed by the court. Also, if you keep discovery moving, opposing counsel may not have time to stir up more unnecessary discovery disputes. Moving discovery along ultimately makes clients happy as well because they save money. So, keep the case moving.

10. Be Strategic with Objections and Motions
We have all seen situations in which discovery bullies add substantially to the cost of the case. It is so easy to get pulled into a pattern of responding, arguing, and launching counterattacks. Yet, this behavior often times only benefits the lawyers’ billable hours. Do not simply provide a laundry list of form objections to interrogatories. Judges tend to disfavor mindless objections anyway. Make your objections count.

The same thing is true for a deposition. Preserve objections for the record, but do not do so in a harassing manner and only object to questions that concern points that relate to the ultimate case. Objecting to nearly every question only prolongs the deposition and adds greatly to the overall cost of the process. Make your objections count by focusing on important testimony that can change the ultimate case outcome.

Discovery bullies at times make the practice of law unpleasant. Some lawyers ultimately leave the profession because the conflict is so distasteful. Great legal talent may be lost when that occurs. And, discovery bullies can cost clients a great deal of time and money. Following these simple rules can improve your mental health and lead to better, more effective, and efficient representation.

Keywords: litigation, woman advocate, discovery, opposing counsel, deposition, bullying

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Nailing Your Direct Examination
By Marsha Hunter

Direct examination is pivotal to the outcome of your trial. Your client’s story unfolds on direct [examination], at the pace you desire, and with the characters you gather to tell it. Your witnesses get the chance to testify about the facts of your case. The substance of their answers, the relationship they develop with the fact finder, their credibility and demeanor—all can make or break a case. There is no shortage of war stories confirming it, no scarcity of articles and textbooks dissecting it.

Direct examination is also deceptively difficult. Far from being a natural activity, it is counterintuitive to ask questions to which you already know the answer, and only questions to which you already know the answer. Asking questions that hold no mystery can be dull for the examiner and sound boring to a jury. Instinct leads to formulating questions in an arbitrary fashion. Reading a scripted list of questions might seem like the safest path to a successful direct, but it leads to serious pitfalls: falling into an monotonous rut, asking every question with the “singsongy” (and boring) tone, and the most hazardous—failing to listen to the answers being given by your witness.

Teaching courtroom communication skills to practitioners, I have observed that direct examination poses a surprising number of challenges. At National Institute for Trial Advocacy (NITA) programs, the Department of Justice’s National Advocacy Center, and other learn-by-doing advocacy programs in the United States and overseas, I review hundreds of hours of performance video with lawyers every year. Judging from the errors I see, we do not have a systematic way of teaching the fundamentals of direct. We can improve the way we teach it.

In this article, I’ll focus on two overarching demands of direct examinations: exuding the right attitude and asking the best questions. How do you bring the proper energy, authority, and confidence to the task, particularly as a woman commanding the courtroom? And how do you bypass the instincts of everyday speech in order to formulate the best questions? Having answers to these two questions will solve many of the difficulties of direct.

Bucking Protocol
Let’s turn to the first challenge. What is your role on direct examination? Who are you during that phase of trial? The oft-repeated clichés are not very helpful. Chances are that you have heard advice to “Become wallpaper—disappear,” and “Make the witness the star.” On its face this advice seems logical. If the trial lawyer becomes less prominent, the focus will be on the witness, allowing him or her to be in the spotlight. To make the witness more important, the examiner fades away. The focus should be on the witness and the factual story she has to tell. But let’s think more closely about this concept of a disappearing act. Instructions to become wallpaper and disappear convey exactly the wrong instruction. How should a lawyer flatten out and vanish? What does she do with her body and voice to accomplish such a feat?

The only good answer is that she could stand out of view of the jury, at the end of the jury box, if the judge allows it. This can work well. Practically speaking, though, lawyers tend to take the advice at face value, leaning on the lectern, speaking too softly, reverting to the body language of a wallflower, and generally dialing back energy. Having faded into the woodwork as instructed,
it becomes more difficult to make the witness a star. Listless delivery has drained the life out of the examination. How could asking questions with no energy make your witness a star?

In real life, what happens to people in the presence of a movie star or sports celebrity? They go wild. They wait hours in long lines for autographs. Fans have energy, focus, and attention. Stars create their own electricity. If you had Scarlett Johansson or Prince Harry on the stand, you’d be home free in the excitement department. You would have no trouble paying attention to them, and neither would the fact finder.

Of course, you don’t have celebrities on the stand. Most witnesses do not come close to having charismatic star quality, and I’m not suggesting that you manufacture fake energy to compensate. But it is up to you to make your witnesses shine like stars, to ask them the questions which make them at least a plausible featured actor. Watch them, listen intently, and move their story forward by using subtle commands. Actively throw your focus and energy on them. Be fully present and in control. Look and act curious, and help them through the experience.

Here’s my suggestion for revised advice about direct: Be a combination of a gracious, sophisticated hostess (instead of wallpaper) and a first-rate film director (instead of an invisible zombie). During her years on the Supreme Court, Sandra Day O’Connor was a famous hostess who threw parties for the entire Court, creating and cementing relationships through socializing. In her retirement in Arizona, she is a champion of the National Institute for Civil Discourse, again highlighting opportunities for communication among adversaries. For adroit command of a courtroom, she is a great role model.

The first woman to be awarded an Academy Award for Best Director was Kathryn Bigelow, who won for the Iraq war thriller The Hurt Locker. Movie directors, besides being star makers, understand that featured actors are also important, helping to advance the plot during short, important scenes. Film directors like Bigelow know how to light a face, a room, or a street scene; where the dramatic pauses belong; and which memorable details put facts into focus. They hover over each scene, advancing the story moment by moment, or in film language, frame by frame. Thinking in stop-action baby steps, they meticulously compose their film as they capture the meaning of important details. Directors carefully control how the story advances—in what order and from which point of view. They are the big boss in charge on a movie set. They do not disappear or become wallpaper directing a star, and neither should you directing your witness. Your role, then, is to be in charge of the scene, guiding the story as it unfolds. When you think of the best of Justice O’Connor and Kathryn Bigelow, you combine precision and control, social poise and authority. You usher each new guest into the party, each new actor in the movie.

Use your body, brain, and voice to accomplish your goals. Set the tone by standing in a befriending posture with open arms, asking questions with smooth, relaxed gestures. Pay close attention to the witness as you help him or her fill in details. Among the attitudes you might choose for this job are reassuring, helpful, protective, encouraging, and professionally gracious. Each witness calls for something different, sometimes a softball question or occasionally even a skeptical tone. Make the same judgment Justice O’Connor or Kathryn Bigelow would make by asking what type of intervention each witness needs. Because you will be constantly throwing the focus back to the witness with each question or instruction, you won’t be inappropriately obtrusive. Never ask yourself how you could become invisible.
Moving on to our second challenge, how do Justice O’Connor and Bigelow create the perfect conversations and scripts? By using exactly the right words. The best hostesses know what to say because they have practiced the words of welcome and comfort, relationship and connection. Experienced directors know that a great script highlights details. There are, indeed, precise words to use on direct examination.

Come with me briefly, now, into the linguistic weeds. Direct is tricky because our language instinct leads us down the path of sloppy questions on the one hand and objectionable wording on the other. The improvisational (not reading!) approach I’m advocating requires you to be aware of your precise words at all times. Parsing the language of direct has a payoff, but it requires us to slow down while we analyze it.

Because there isn’t a universally accepted taxonomy (or classification into ordered categories) of direct examination questions, it isn’t obvious or easy to choose the right words. My personal survey of articles, textbooks, and lectures at a variety of trial-skills programs finds references to open-ended, closed-ended, leading, and nonleading questions; to the “good words” versus the “bad words” one should use; the problem of falling into the “did you” trap (called by one creative colleague “did-u-it is”); level one, two, and three questions; and the “W” or journalists’ words. While these ideas may be good rules of thumb, they are by no means universal, and several lack helpful descriptive labels.

**Asking the Right Questions**

Questions—comprised of certain words—are the tools you need as a direct examiner. Different tools have different purposes. To take full advantage of all the tools at your disposal, each one needs an appropriate name. You cannot go rummaging around in a carpenter’s toolbox, looking for a “whatchamacallit” or a “doohickey” or that “thingamajig.” It is not enough to hunt for that pointed versus that nonpointed tool—just as it is not enough to think of questions as merely leading versus nonleading. If you need that pointed tool, meaning a screwdriver, you still need to specify if it is a Phillips or a flat-head end. Knowing the name of the tool and its specific use is essential, just as you need to know the names and the uses of your questions during direct.

In my proposed taxonomy of direct questions below, classifications are based on the answers they will elicit, not on the questions themselves. Assigning descriptive, self-evident names to each type of question makes them easier to remember and use.

1. **Open-ended questions** begin with one of seven interrogative words: “who,” “what,” “when,” “where,” “why,” “which,” and “how.” These are words that begin the classic journalist questions, opening up the widest possibilities for an answer. Hostess Justice O’Connor would be adept at asking questions that begin with these words. They draw people out. You may have favorites on this list, or hold an opinion that some are more useful than others. All have a place in your toolbox. Use them in questions such as:

- Who attended the meeting?
- What was the first sign you saw on the road that day?
- When did you arrive?
- Where was the red car in relationship to the white one?
- Why did you keep the canisters in that room?
- Which post office do you usually patronize?
How did the investigation begin?

2. *Leading questions* often begin with a noun or pronoun, especially with “you.” Leading questions are permissible and desirable, of course, in preliminary matters, in laying foundations, and in referring to facts not in dispute and developing the testimony of a witness. On direct, ask them with curious intonation that generally has an upward-ending inflection. They should sound different from leading questions on cross examination, which are usually spoken with the downward-ending prosody of a statement (and often more aggressively). Some examples:

- Sir, you arrived at 3:45 p.m.?
- Ms. Rodriguez, you usually shop at that grocery store, don’t you?
- The weather was unusually cool for August?
- You had forgotten to bring your phone?

3. *Verb-start leading questions* usually begin with simple past tense or past participles such as “did,” “could,” “would,” and “have.” These questions suggest the answer. They share the verbal music of curiosity with number two. They differ because they begin with verbs, and verbs can get you into trouble on direct. In everyday speech, we frequently ask questions that begin with verbs: “Did you eat breakfast?” or “Did you go to that movie?” or “Didn't you think it was funny?” Casual questions may seek an exchange or not—it depends on the moment. On direct examination, use these words with precision to avoid falling into the trap of using them because they trip easily off your tongue. The answers expected from verb-start leading questions are usually short, simply “yes” or “no.” Here are examples of leading questions that start with verbs:

- Do you remember April 13, 2011?
- Had the sun come up yet?
- Did you arrive at 3:45?
- Were you standing near the corner?
- Could you see over the fence?

Verb-start leading questions advance testimony and are then often followed immediately by an open-ended question or a command.

4. *Verb-start nonleading questions* begin (similar to number three) with simple past tense or past participles such as “did,” “could,” “would,” and “have.” Again, do not begin a question with a verb unless you are paying attention to the reason for doing so! Verb-start nonleading questions are more open than number three, and allow a witness more latitude to elaborate:

- Did you have a driver's license on November 4th, 2011?
- Were you sure the master switch had been turned off?
- Could you see anything through the smoke?
- Had you ever been tubing on the Salt River before that day?
- Was the body cold when you arrived?

5. *Commands* are words of instruction (verbs used with an object), most commonly describe, explain, and tell. Commands may also include words such as show, analyze, clarify, go back, and focus. Film director Kathryn Bigelow would be adept at issuing commands such as “Pause
before you say the next line,” or “Stare out the window a few seconds longer.” On direct they control the pace of the examination, preventing a witness from telling too much of the story in one answer. Commands keep the testimony focused on one frame, one moment, at a time. In your role as the director who moves the camera, you may well use these more than any other type of question:

- Describe the intersection in more detail, please.
- Tell us what you mean by “shoved.”
- Explain that formula for us.
- Staying in the moment right before you heard the scream, which way were you facing?
- Focusing on the moment the red car came around the corner, tell us exactly what you saw.
- Let me stop you for just a moment. (Insert open-ended question or command.)
- Let me slow you down here. (Insert open-ended question or command.)

Open-ended questions and commands will be your best tools on direct. Leading, verb-start leading, and verb-start nonleading questions will move your examination along smoothly, efficiently, and keep the focus on your witness. Channel the genuine curiosity of the jury, add directorial control, and you are free to think about the substance of your case. You now have the tools to nail your direct examination.

**Keywords**: litigation, woman advocate, direct examination, witness, trial, questioning

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When a Client’s Mental Health Is at Issue
By Andrea Lance

Your client, the respondent in a petition for her involuntary commitment to a locked inpatient psychiatric facility, was admitted to the hospital after walking into the emergency room in a rage, yelling that she had been suffering from a headache for days because the government implanted listening devices in her ears. Since her admission, she has insisted upon wearing a winter coat although it’s the middle of summer and refuses to shower, speak with hospital staff, or accept antipsychotic medication. Where do you begin in preparing your case to prevent the judge from committing your client?

Prevailing on the merits in this hypothetical may not be as unlikely as it sounds. There are two major keys to success: focusing the judge’s attention on the statutory standard before the court and preventing the admission of illegal hearsay evidence. In addition, these two overall strategies—combined with the rest of the tactics discussed in this article—are not limited to commitment hearings. Rather, these strategies are helpful whenever your client’s mental health is at issue, which may occur in a variety of settings including child-custody disputes, hearings to determine parental rights, guardianships of incapacitated individuals, estate litigation, criminal defense, and immigration proceedings.

Focus on the Statutory Standard
No matter how entertaining it may be to hear stories of your client’s implausible claims of government surveillance, the issue is not your client’s atypical or antisocial behavior; it is whether the government has sufficient reason to curtail her physical liberty. “… [F]reedom from physical restraint ‘has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” Kansas v. Hendricks, 521 U.S. 346, 356 (1997) citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992). The state statutory standard must balance the government’s parens patriae purposes against the individual liberty interests at stake. In recognition of the gravity of the potential deprivation of liberty facing respondents, the Supreme Court held that due process requires “clear and convincing” evidence that the commitment statute has been met, although each state may articulate the precise burden to apply. Addington v. Texas, 441 U.S. 418 (1979). Each player has a different role in the proceedings: the hospital’s expert is a treating clinician, the defense attorney represents the respondent’s interests and ensures a fair hearing, and the judge determines whether the petitioner’s evidence meets the statutory standard. Constitutional requirements notwithstanding, the judge will be reluctant to throw open the doors of the hospital and set your client free, for fear of “what could happen.” It is your job to not only emphasize how the petitioner failed to meet its burden, but also to provide the judge with assurance as to what resources await your client in the community and provide specific justifications for denial of the petition.

Look first to the statute cited in the petition and confirm everything the petitioner is able to prove. A typical involuntary commitment statute will require the petitioner to prove that the respondent currently (1) suffers from a major mental illness as defined in applicable regulations, and that (2) as a result of that illness, the respondent is a danger to him or herself or others as evinced by violent acts or placing others in reasonable fear, or his or her judgment is so affected by the illness that he/she is unable to care for himself/herself in the community, and (3) there are no less restrictive alternatives to commitment. Also note any elements that receive extra emphasis in the statute—for instance, in Massachusetts the statute requires in an inability to care...
for self situation that there is a very serious risk of physical harm to self as a result of impaired judgment. It is your job to keep the judge focused on how each fact in the above hypothetical relates to the standard before the court.

**Keep Inappropriate or Illegal Evidence from Being Admitted**
Familiarity with your state’s exceptions to the prohibition of hearsay is essential in mental health cases. A major source of evidence in your case will come from your client’s medical record, which will contain documentation by scores of hospital staff. Much of the medical record will be admissible under a business record or medical records exception—if the individual record sought to be admitted is of the type routinely recorded in such records. However, where the record contains totem pole hearsay unrelated to the business purpose, such as where hospital staff records statements by your client’s family members or police officers, the evidence should be excluded. Your client’s statements made in the course of medical treatment may be admissible as an admission of a party opponent; however, because such statements are usually privileged, your client should have received a warning as to the limits of confidentiality, which should be documented in the medical record.

**Preparing Your Case**
With the keys to success in mind, you are ready to analyze the facts and formulate your theory of the case. The medical record will be the hospital’s expert’s guidebook to the case and put you on notice as to the petitioner’s evidence. While you may require a consultant to assist you in understanding the clinical aspects of the record, admission documents and progress notes will allow you to follow daily occurrences since admission.

By analyzing the medical record in conjunction with speaking with your client (if the client is willing), you will see where your client’s version of events differs from the hospital. While hopefully you will be able to retain an independent medical expert (IME) to assist you in understanding the clinical aspects of your case, you should have an understanding of the issues in order to choose an expert with the necessary areas of expertise and discuss the focus of the issues you would like him or her to evaluate.

*How did your client arrive at the hospital and why?* If she responded on her own, that shows ability to seek lifesaving medical care. Was she dressed appropriately, and did she have identification and money with her, which would support your position that she is able to care for herself in the community? If she was brought by ambulance/police/family, what were the circumstances? Often, there are alternative explanations such as substance abuse, a domestic dispute, or concerned family members, which have little if any connection to mental illness or dangerousness.

*Did the hospital accept your client’s signature consenting to admission?* This evinces the staff’s belief that your client was competent. If they accepted the signature and now maintain that she was incompetent, it decreases their credibility.

*Did the hospital accept your client’s signature regarding warnings as to the limits of confidentiality?* In order to waive any applicable psychotherapist-patient privilege, your client must acknowledge understanding that her statements are not confidential and can be disclosed in court. If your client was not provided with such a warning, or if the hospital’s expert testifies that your client did not understand, you can move for her
statements to be inadmissible. If the hospital’s expert testifies that your client did understand and consent, you can highlight the complicated nature of the warning to bolster evidence of your client’s sound mental state.

*What has happened since admission?* The petitioner must prove that the requirements of the statute are met at the time of the hearing. Even if your client was committable at the time of admission, if he or she has recompensated during hospitalization, the petition should be denied. Also, every progress note written by staff during the hospitalization can provide evidence in the case. Some questions to consider:

- Has your client been eating meals, attending groups, and/or making plans for after discharge?
- Has your client had incidents of violence or has staff employed chemical or mechanical restraint? How much time has passed since the last incident occurred?
- What alternative explanations could account for alleged incidents of violence (e.g., frustration at being held against his or her will or conflict with another individual on the unit)?
- Has staff documented your client threatening anyone? If so, has he or she acted on these threats?
- Has staff notated that your client expresses a desire to leave? This could account for rational anger that the hospital’s expert will likely attribute to mental illness.
- What entries in the record support or contradict staff’s conclusions regarding your client?

*Are there alternative explanations for any antisocial behavior?* Once your client is on the psychiatric unit, staff has a tendency to interpret any atypical behavior as a product of mental illness. The chart will often contain documentation that your client is irritable, keeps to herself in her room, refuses to attend group therapy, or lacks insight regarding her illness (i.e., denies being mentally ill). This may be entirely reasonable, as your client may feel unsafe in common areas and the hospital’s diagnosis may be incorrect.

*What resources has your client sought outside the hospital?* Even if the petitioner can show that your client meets statutory elements, you should argue that there are less-restrictive alternatives to hospitalization. What was your client’s living arrangement prior to hospitalization? Is she welcome to return? Does she have the support of family or friends in the area? Was she receiving government services through the Department of Mental Health or Social Security? Her successful navigation of complicated processes necessary to receive government benefits supports your contention that she can care for herself in the community.

**Working with an Independent Medical Expert**

The IME has two roles: assisting you in understanding your case and testifying at the hearing if his or her opinion would help your client. The information provided by the IME is not discoverable by the petitioner until you decide to call the IME as a witness. Even if you decide not to use the IME’s testimony, be proactive in seeking his/her assistance in understanding the clinical aspects of your case. These include:

- **Clinical jargon.** One of the greatest obstacles for attorneys in medical litigation is understanding the shorthand medical terms clinicians use to convey complex concepts.
Terms such as “psychosis,” “hallucination,” “delusion,” and “obsession” have specific clinical definitions and should not be used arbitrarily. Ask the IME to highlight places where staff has used terms without the proper foundation.

- **Diagnosis.** Does the IME agree with the hospital’s expert’s diagnosis? Psychiatry is a behavioral science, and as such, psychiatrists evaluate data regarding an individual’s symptoms and behaviors to reach a diagnosis, rather than in biological sciences where a more definitive test such as a blood test can confirm the existence of an illness. It is quite common for clinicians to change an individual’s diagnosis or to disagree. This is particularly true where the purported diagnosis presents in combination with another condition such as substance addiction or other impairments.

- **Symptoms of mental illness.** By working with mental-health clinicians, you will begin to understand the symptoms that make up the overall presentation of individuals diagnosed with given mental illnesses. For instance, certain illnesses inhibit sensory perception—hence the insistence of the client in the hypothetical to wear a winter coat and refusal to take a shower. This is where you must focus the judge’s attention on the standard—how does the fact that your client wears a winter coat in the summer and refuses to shower affect her ability to care for herself?

- **Health concerns.** Health conditions unrelated to a mental illness diagnosis may impact your arguments regarding your client’s ability to care for herself in the community. The IME can evaluate the medical record, particularly as to vital signs and blood levels, to inform you of any continuing health risks or those that your client may have been facing upon admission. Where the hospital’s expert hypothesizes that a behavior such as your client’s insistence upon wearing a winter coat in the summer could cause a health concern such as dehydration, elicit testimony that your client was not in medical danger upon arrival at the hospital.

- **Treatment plans.** The petitioner is likely to file a proposed treatment plan in anticipation of the judge granting the petition for commitment, which will include a list of antipsychotics and dosage ranges the hospital’s doctor would like the court’s authority to administer. In Massachusetts, the judge would first make a finding that your client is incompetent to make decisions about treatment and then hear evidence to determine whether your client would approve the treatment plan if competent. Evidence regarding your client’s expressed preferences and religious beliefs are relevant, as well as the accepted therapeutic dosage range for each drug, potential side effects, and any need for monitoring. The IME should apprise you of any concerns and recommendations he or she has regarding the hospital’s proposed treatment plan, and potentially testify at the hearing regarding his/her opinion.

- **Facilitating negotiation.** One of the great advantages of involving an IME is that he or she can negotiate with the hospital’s expert regarding the petition to commit as well as the proposed treatment plan. The hospital’s expert may be much more motivated to modify the proposed treatment plan if the IME is prepared to counter the recommendations in court. Modifications to the treatment plan may constitute a less-restrictive alternative to hospitalization. For instance, if your client can take an antipsychotic by injection once every three months to ensure medication compliance
rather than taking a pill much more frequently, it may prevent the need for confinement in a residential facility.

Cross-Examination
Your cross-examination of the hospital’s expert should be designed to elicit the facts that support your theory of the case. You have the advantage of notice as to what testimony to expect, in that you’ve read the medical record. If the witness testifies to anything significant that was not documented, point out that it should have been recorded.

- Undermine the expert’s credentials. Is he or she board certified in psychiatry? How many times did he or she take the boards before passing?
- Does the expert have sufficient experience in evaluating patients, specifically as to this particular illness?
- Does the expert have experience with evaluating possible alternative explanations such as substance abuse? Does the expert have experience with proposed alternative diagnoses?
- Has the expert brought out positive, or only negative, aspects in the record?
- Expose the witness’s bias. How many times has he or she testified in support of a petition to commit? What courts has he or she testified in, and does he or she always testify for the petitioner? What are his or her liability concerns if your client is discharged?
- Discredit the basis of the witness’s opinion. How many times has the witness examined the patient? Has he or she spoken with your client’s family or social workers? What less restrictive alternatives to hospitalization have been explored?
- Be specific about notes in the record in cross-examination. Inquire if the witness has read an individual entry on a specific date if it counters the testimony.

In Closing
When concluding your case, follow the outline of the statute to impress upon the judge that the petitioner failed to meet its burden. Using the introductory hypothetical, the evidence may support a closing statement as follows:

Your Honor, the petitioner failed to show that Ms. Client meets the standard for commitment in this case. Ms. Client does not have current symptoms of a serious mental illness as defined in the applicable regulations. When Ms. Client arrived at the hospital, her behavior was due to the influence of narcotics, not mental illness. The hospital’s expert testified that although he has experience in diagnosing bipolar disorder, he is not certified as a drug recognition expert or otherwise experienced in evaluations to determine whether someone is under the influence of narcotics. Ms. Client has been homeless for over five years and has remained in the same neighborhood for all of that time. She is a regular at the neighborhood shelter, which provides her not only meals and shelter, but also assistance with applying for government benefits and job placement. Ms. Client does not have a history of violence, and the anger she expressed upon admission is a defense mechanism that assists her in caring for herself in the community, as it repels
people who might harm her. Any irritability she has expressed on the unit is a result of her frustration at being detained against her will. Her refusal to shower is another defense mechanism to keep others at a distance. The fact that Ms. Client insists upon wearing a winter coat has not caused any health concerns—the independent medical expert testified that her vitals have remained in proper ranges at all times. Ms. Client’s refusal to speak with hospital staff since her admission three weeks ago renders stale all testimony presented regarding her mental status. Ms. Client refused the antipsychotic medications due to the side effects testified to by the independent medical expert. The court must decide this case on the basis of Ms. Client’s current mental condition, and there has been little if any evidence that comes anywhere near the standard the petitioner must prove. While Ms. Client’s choices may be different from ours would be, she has the right to live her life as she chooses. The petitioner has failed to show that the requisite reasons for government intervention are present, and I respectfully submit to Your Honor that the petition in this case should be denied.

**Keywords:** litigation, woman advocate, mental health, independent medical expert, cross-examination, hearsay, statutory standard, medical record

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The Fine Art of Litigation Involving Non-English-Speaking Witnesses
By Erika Ronquillo

A trial is often analogized to a performance. Naturally then, the courtroom becomes the stage and we are cast as both actor and director. If lawyering is a theatrical performance and our audience is the jury, how do we handle actors unable to speak or understand English? As the ever-growing melting pot of international flavors that is our great country makes its way to the witness stand, we must adapt and adjust the script accordingly.

The very tenets of the art of lawyering are called into question the moment a non-English-speaking (NES) witness steps onto the stage. Avoiding a jury’s “two thumbs down” verdict boils down to your ability to adapt in foreign scenarios. In the following article, we will examine three of the most challenging aspects of litigation involving a NES witness: the deposition preparation session, taking the deposition, and cross-examination. Keep in mind that when I discuss the NES witness throughout this article, I am talking implicitly about Spanish-speaking witnesses. Primarily, to keep it simple, but also because I have the most experience dealing with Spanish-speaking witnesses. Nonetheless, my advice is transferable to your encounters with most any NES witness.

Act One: Deposition Preparation Session
The most important aspect of witness preparation for deposition is rehearsing the testimony with both the witness and the interpreter. Both you and the NES witness need to understand what the interpreter can offer and how to use him or her. And what better practice grounds than the deposition preparation session?

First, invite the same interpreter scheduled to appear at the deposition to your preparation session with the NES witness. Almost every jurisdiction acknowledges that communications between the interpreter and your client are privileged if the interpreter is acting as your agent. However, the privilege is not conferred automatically, so confirm with the laws of your jurisdiction.

Second, be selective or forever hold your peace (and hope you never actually have to refer to the deposition transcript). Nowadays, anyone with an iPad and Google Translate app calls himself an interpreter. If you ask just one question of your interpreter, ask this one simple question: “What specific language do you plan on interpreting into English for me?” There are many different types of Spanish, in the form of Spanish dialects. There is a world of a difference between Mexican Spanish, Castilian Spanish, and Argentinean Spanish, to name only a few. If you think this piece of advice is mundane, flip to the BBC channel on your television and interpret from British English to American English any given segment. How accurate is your interpretation?

With the right interpreter by your side, it is time to observe and direct! Does your witness seem comfortable with the interpreter? Is their conversation flowing smoothly? Or is your witness constantly repeating herself, in an effort to correct the interpreter? If your NES witness understands some English, do not forget to instruct her to only answer the question asked by the interpreter, not the attorney, even if she recognizes the two questions are different. Instruct the interpreter to convey tone and emotion, not in an overly dramatic fashion, but precisely in the same manner shown by the witness. This ensures the court reporter will transcribe your witness’s
testimony more accurately; for example, responses that convey doubt and may actually be questions, as opposed to statements, become recognizable to the court reporter. If you are a proactive director at the deposition preparation session, you will ensure your witness is equipped to comfortably handle the deposition with more confidence.

**Act Two: Taking the Deposition**

The backdrop has drastically changed; the NES witness is foreign to you. Controlling the compatibility between the NES witness and the interpreter becomes less important. Your primary focus is on creating a comfortable environment for the witness to divulge as much information as possible, amid the interpreter. This is a task that is both tiring and frustrating. Multiply the time allotted for the deposition by two and a half; that is how long it will take you to complete it. Bring a snack and extra patience.

The key to making the NES witness comfortable lies in your ability to deliver bite-sized questions. This technique not only increases the likelihood the interpreter will get the translation right, but also, more importantly, demonstrates to the NES witness you recognize and respect that she does not speak English. Why is that important? Try to imagine what it would be like to give sworn testimony in a foreign country where the attorney across the table is asking convoluted, technical questions in a language you do not understand. The NES witness is already at a disadvantage before she walks into the room, and she knows it. You are facing a witness that is insecure; she will be disengaged and respond with brief answers, unless you put her at ease early on in the deposition.

To achieve honest and lengthy answers from the NES witness, you have to start by asking very short, concise questions. A general statement such as “Mrs. Suarez, as you already know, we are here today to discuss the slip and fall incident you observed at your store in March of last year, involving an elderly lady, my client, Ms. Lang, which occurred in the produce aisle,” is confusing to the NES witness and may even cause her to think that you are taking advantage of her. You can close the gap between you and her by saying it differently: “My client is Mrs. Lang” (stop for interpretation); “she slipped and fell at your store last year” (stop for interpretation); “you observed the fall, which occurred in the produce aisle” (stop for interpretation); “and we’re here today to discuss what you saw.” Do not underestimate the power of bite-sized questions. It keeps the interpreter engaged, gains the trust of the witness, and is the difference between a transcript that is 12 pages long versus 55 pages long.

Here are some great points to establish during the deposition:

- Does the witness feel the use of an interpreter will aid her testimony?
- How much English does she speak?
- How long has she lived in the United States?
- Determine the nature of her past and current employment. Is English required?
- Has she ever provided sworn testimony in English, without the aid of an interpreter?
- Is the interpreter familiar with her dialect of Spanish and able to complete the interpretation?
- Was an interpreter present during her deposition preparation session?
Act Three: Cross-examination
Jurors may or may not perceive the trial as a performance, but there is no doubt that cross-examination is a dance. During cross-examination, every step matters, and rhythm, tempo, and delivery rule above all else (on some occasions, even above knowing the key facts of your own case). We are taught early on that during direct-examination the jurors’ focus should be entirely on the witness, and that cross-examination is when the attorney takes center stage. However, when you cross-examine a NES witness, a different approach is necessary because what is normally a two-person dance is now a three-person dance. Truth be told, the interpreter does not fit into the style of cross-examination that jurors expect to see and we have been molded to perform. When was the last time you saw an interpreter on an episode of Law & Order? Therefore, you must be conscious of the additional dance partner and lead the dance accordingly; otherwise, the interpreter will steal your spotlight.

We already know the most effective cross-examinations are brief, concise, and to the point. When you cross-examine an NES witness, being brief, concise, and to the point is not an option, it is mandatory. Remember that tempo and rhythm are far gone from the courtroom in this scenario. Your new reality is this: you deliver a poignant, leading question; the interpreter repeats it to the witness; the witness may provide a response or not understand your question and instead say, “que?” (huh?); the interpreter may turn to the jury and complete the interpretation or may repeat the question to the witness. The delay is unbelievably awkward. So choose your most important points, keep them short and simple, and sit down.

Exude confidence but be wary of being perceived by the jury as insensitive and disrespectful to the NES witness. Jurors are often sympathetic toward witnesses that are aided by an interpreter. They recognize the examination process is more difficult on the NES witness, which will in turn affect how they view your treatment of the NES witness (regardless of what they promised they would disregard when you spoke with them at voir dire). By the same token, you are still leading this dance. If you notice the NES witness’s response was not fully translated (either because your freshman Spanish kicked into gear or because the NES witness just spoke for three minutes and the interpreter’s translation was one word), do not be afraid to ask the interpreter to attempt the translation again. Understand that interpreters go into autopilot mode and may make mistakes; either you correct the obvious error or risk appearing weak and creating an inaccurate record.

You have accepted the principle that the interpreter is an integral part of your case when dealing with a NES witness; it is the mechanism delivering your evidence to the jury. To master the art of lawyering when a NES witness is involved, the interpreter is just that, a part of the case, barely noticed by the jury.

**Keywords:** litigation, woman advocate, non-English-speaking witnesses, deposition, cross-examination, interpreter, trial

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Accurately Predicting the Outcome of Your Case

By Jessica Hoffman Brylo

This article focuses on your ability (or inability) to predict the outcome of your case and where you may be going wrong. Your ability to predict the outcome of the case is important in informing your judgment on when to settle and what amount to settle for, what amount to ask for in trial, as well as whether to take on a case to begin with. If your judgment is off, you may be doing yourself and your client a great disservice.

There is such a thing as too much information. Attorneys know their cases so extremely well that it hampers their ability to predict the case outcome, which ironically is precisely the reason that they study the case so intently in the first place. Attorneys work countless hours to know their cases inside and out, but in becoming so familiar with the case, they become dissociated from the people who are hearing the facts for the first time and ultimately deciding the outcome—the decision-makers. Facts and legal issues that became, over time, significant to the attorney’s understanding of the case—even things that he or she thinks are the cornerstones to the case—can be completely irrelevant to decision-makers such as mediators, jurors, or judges, who have much less familiarity with the case. If the purpose is to persuade these decision-makers, attorneys need to learn to rely on strategies for preparation other than their own intuition.

Let me give you some examples from real cases. What follows are very brief synopses of cases followed by quotes from jurors in focus groups. Although you may find these quotes surprising, does it mean you would have inaccurately predicted the outcome of trial (or value of the case)? Not necessarily, but the more points your decision-makers find important that you do not address or foresee, the less likely you are to have a reliable measure of the outcome.

**Case Background 1:** Medical malpractice case against a hospital. Plaintiff lost large amounts of blood during a 5-6 hour surgery. Surgeon and nurses did not find or fix the leak for a while. Plaintiff died a month later still at the hospital from kidney failure related to the blood loss. Plaintiff had pre-existing conditions and was overweight.

**Juror:** “I think she had a death wish because she was in bad health anyway and she brought in a living will when she entered the hospital. If you have a living will and you bring it to the hospital, you’re giving up on life.” [Note that this issue showed up in both focus groups with one or two jurors in each group believing the plaintiff wanted to die and therefore awarding no damages]

**Case Background 2:** Brain injury from car accident case. Plaintiff still holds a job as a professor at a community college. All doctors and all neurological testing shows brain injury. Pre-existing anxiety which was controlled by taking Xanax.

**Juror:** “I think he had a drug problem. Taking Xanax that long over time could cause a brain injury or his symptoms.”
**Juror:** “I think he had a drinking problem. My father was an alcoholic and he died from the alcohol use. He often forgot things too, so I think the plaintiff’s issues are from drinking.” [No evidence was presented of any drinking.]

**Case Background 3**: Car accident case with back and neck injuries. Plaintiff is on morphine multiple times a day to control the pain.

**Juror**: “I think she wants money to be hopped up on morphine her whole life...she’s on morphine for dramatic effect and will probably quit when the lawsuit is over.”

Would you have foreseen these issues? Without knowing that a living will was important to Case Background 1, you may have thought you had a strong case which could easily have yielded a zero verdict at trial. Remember this Case 3 next time you assume that jurors will believe your client is severely injured because of the amounts of pain medication they are on.

Would you have accepted the right settlement offer on these cases?

To become better counselors and better serve their clients, attorneys need to become more accurate predictors. One way of doing so is learning whether previous predictions were correct. Mock trials can test these predictions as can post-trial juror interviews.

People as a whole often overestimate their abilities on tasks. This is not specific to attorneys. Many attorneys are overly confident in their ability to predict outcomes. This is due to many factors. Attorneys are supposed to be advocates for their clients. In doing so, attorneys display a confidence about their position. This confidence can, over time, skew the attorney’s reasoning and make him/her overly confident about the likelihood of success. It is human nature to become more confident in a goal when expressing confidence to others. The more one espouses one’s beliefs, the stronger those beliefs become. Further, attorneys wish for a good outcome. In wishing for something, they convince themselves that it is true. This is a strength for zealous advocacy but a weakness when it skews the attorney’s ability to predict and therefore make sound decisions. Attorneys may also exhibit overconfidence due to a failure to recognize that they are not fully in control of the outcome. Judges, mediators, and jurors make up their own minds. To the extent that attorneys do not incorporate those individuals’ control over the outcome into their analysis of a case’s strengths and weaknesses, they disillusion themselves in making decisions or forming strategies.

A study done by Goodman-Delhunty, Granhag, et. al. (2010), tested attorneys’ abilities to predict case outcomes. (Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes. *Psychology, Public Policy, and Law, 16*(2), 133-157). Participants consisted of 481 litigating attorneys, the great majority of whom were civil litigation attorneys. The attorneys were asked what they would consider a “win” in terms of a minimum goal for the outcome of the case. They were also asked what their degree of certainty was for achieving that minimum goal or better. In 32% of the cases, the final outcome matched the minimum goal set by attorneys. In 24% of the cases, the outcomes exceeded the attorneys’ minimum goals. In by far the majority, 44% of the outcomes were less satisfactory than the minimum goals. In a large proportion of the cases where the
minimum outcomes were not met, the attorneys erred on the side of being over confident. Further, the higher the confidence level, the farther off the attorney’s prediction was from the outcome. The study also found that experience had no effect on the ability to predict case outcomes: Experienced attorneys were no better at predictions than were inexperienced attorneys.

If you accept that you may not be the most reliable predictor of case outcomes, how can you better serve yourself and your clients? Get input from people who are not handling the case—someone who can see the case with fresh eyes and without any stake in the outcome. When at all possible, run focus groups and mock trials. The only way to find out what jurors are likely to think is to ask people who match your juror demographics. If done before mediation, focus groups and mock trials can direct you as to whether to settle and what range of settlement figures are acceptable for that case based on what jurors would do at trial. Without the input from outside sources, you may feel confident in the decisions you make concerning your case, but chances are that you may not be accurate.

**Keywords:** litigation, jury, mock jury, case outcome, case prediction, focus group

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Staying Healthy (and Sane) During Trial
By Nicole Hooper

You may be familiar with the quote “When you have your health, you have your everything. When you do not have your health, nothing else matters at all.” It is, of course, easy to relate to this in times of illness. But think how often you sacrifice your physical, mental, and emotional health or well-being to prepare for a hearing, draft multiple briefs and pleadings, or juggle the demands of various clients and competing deadlines. I work with many attorneys who have reached the highest levels of success but who readily acknowledge that on many occasions they had to sacrifice their own health to obtain their goals. It is no surprise that the stress of long hours, time away from family and friends, and isolation from typical life routines often lead attorneys to ignore their health. And this is especially true during trial. Without a strategy for managing your physical, mental, and emotional health during trial, the pressures of that demanding process can wield a toll on your long-term physical health, mental effectiveness, emotional stability, and overall engagement in the legal profession.

Thus, as you prepare your case for trial, it is important to formulate one additional strategy: a strategy for managing your health during that process. A health strategy will allow you to optimize your physical and mental energy during a severely stressful period, to manage your emotions, and to ensure that your body is properly fueled for battle. Without a targeted strategy, it is easy to permit the demands of trial to completely take over what sustains you. If you follow a few proactive steps, you should be in a great position to sustain and protect your health throughout trial.

Set Personal Goals
For any anticipated period of stress, including trial, you should first set personal goals for yourself. Ask yourself, what do you want to personally accomplish through the trial process? This goal should include what you will accomplish, such as improving your trial skills, mastering a certain subject matter, or obtaining a substantive expertise. This goal should also include how you will achieve your goals. Setting your own goals helps you to have a center to turn toward when the stress, frustration, and depletion of the trial process impact you.

Evaluate Existing Strategies and Triggers
Next, you should identify what you usually do to empower your own mental, emotional, and physical health, and also identify what challenges you usually encounter in that process. For example, what do you do that boosts your physical strength to get through the day, and what do you do to mentally unwind during downtime? Simply becoming aware of your typical routines and how they affect you will help you to devise a plan to maintain peak mental, emotional, and physical health during trial. Ask yourself:

- When I am most healthy, what do I do physically? At times of stress, what do I tend to overlook physically? For many people, exercise and stretching make them feel most
healthy, but if they eat junk food, drink alcohol, or reduce workouts during times of stress, they feel physically weaker and less healthy.

- When I am most healthy, what do I do mentally? At times of stress, what do I tend to overlook mentally? Many people find that leisure activities like reading a book or listening to music help them to rejuvenate, but many forget to invest in these activities to relax their minds during times of stress.

- When I am most healthy, what do I do emotionally? At times of stress, what do I tend to overlook emotionally? Simple things like spending time with friends or family usually lift emotions, but many people tend to isolate themselves and communicate less with loved ones when stressed.

Create a Plan for Optimizing Health
Once you identify what typically works for you when you are prioritizing health and identify what activities you tend to neglect when stressed, you can begin to plan your trial-health strategy. Trial creates severe limitations on your time, location, and energy, so you really need to plan your strategy before you are in the trial setting. A few things to consider:

For physical health, devise a plan that includes a time and place for exercise, rest, and proper nutrition. With the long hours of trial, you will undoubtedly find that you have limitations on when, where, and how you can exercise, sleep, and eat. It is therefore important to plan how you will maintain your physical health during trial. Ask yourself:

- Do you exercise to manage stress? Some people need intense workouts to manage heavy stress. Other people find that they manage their stress better with flexibility exercises rather than intense cardio or weight workouts. And some people would rather skip exercise altogether and just relax. Commit to doing what helps you manage stress best. If you don’t have easy access to the typical exercise routine you follow (for example, your favorite yoga class or heavy weights), consider travel-friendly substitutes, like bringing a small piece of exercise equipment or a resistance band that you can easily pack and use in your hotel room, or perhaps downloading yoga segments on your laptop to follow. One resource to consider is travel-size workout cards produced by the Human Performance Institute, which offer simple resistance and circuit workouts that can be completed in your hotel room.

- When will you exercise or take time to relax? Will this be in the morning or the evening? You should consider how long you typically need to unwind—whether through exercise or relaxation—and then consider how much time you can realistically commit to exercise or relaxation breaks during the trial period. Setting realistic, manageable goals (even if 15–20 minutes of workout intensity or relaxation) can make a big difference for managing stress.
• Keep in mind that deep breathing can really help you to manage stress from a physical standpoint. Deep breathing takes only a few minutes and can be completed anywhere (even while sitting in your seat in the courtroom during a break). All you need to do is breathe in slowly to the count of four to five seconds, slowly exhale, and repeat five to 10 times. This will slow your heart rate, respiration rate, and perceived sense of stress in a brief period of time. It will also transport more oxygen to your brain, which is what you need to effectively process information and to manage stress.

• While it may be difficult to control how much sleep you obtain during trial, you can maximize how restfully you sleep during those limited hours. You can achieve higher-quality sleep if you commit to practicing good “sleep hygiene,” which includes avoiding alcohol, caffeine, and exercise within two hours of bedtime; setting a similar wake-up and sleep time daily; and engaging in relaxing behavior (bath, shower, dimmed lighting, or quiet music before bedtime) to create signals to your body that it is time for sleep. If you go to bed and are unable to fall asleep within 15 minutes, you should get out of bed and do something relaxing until you fatigue. Be aware that the light from many phones has a spectrum that promotes wake, not sleep, so avoid turning attention to your phone in the dark when you can’t sleep.

• When managing your nutrition daily, and especially during periods of stress, many standard nutritional guidelines, and the Human Performance Institute, suggest the following:

  • You should eat within one hour of waking to stabilize blood glucose levels and provide energy, and eat within two hours of exercise (both before and after).
  • You should ensure that you eat three regular meals and three smaller snacks in between meals daily. Snacks containing 100–150 calories will provide greater energy and improved mood and mental functioning between meals. Ideally, these snacks should be a complex carbohydrate (e.g., fruit or health bar) or protein (e.g., jerky or protein bar), rather than simple carbohydrates such as candy bars, chips, crackers, or many standard snack foods.
  • You should try to minimize your caffeine intake because it can suppress appetite and keep you from eating when your body naturally needs food to recharge. Instead, drink plenty of water to maintain your body hydration. This simple task will help to ensure the proper functioning of all of your various mental, physical, and emotional health body processes.
  • Finally, when eating meals, you should attempt to choose proportions of 40 percent grain (two handfuls), 40 percent fruit/vegetables (two handfuls), and 20% protein-rich foods (one handful). If you eat your meals in the recommended portions, you are more likely to maintain a consistent and sustained blood glucose level (and, therefore, energy level) throughout trial.
For mental health, your plan should include a way to sustain optimal mental functioning throughout the day, as well as provide a balance of left-brain functions (i.e., analytical and logical activities) and right-brain functions (i.e., your creative and thoughtful activities). This is especially important during trial given that trial work involves intense periods of left-brain usage. Some things to consider:

- If you provide your mind with contrasting mental activities, you will actually stimulate mental renewal. For example, after a long day of document review, attention to detail, and pressured decision-making, it is helpful to shift to activities that involve more creative use of the brain. This may include puzzles (sudoku, crosswords), listening to or creating music, going for a walk outside, or watching movies.

- You should provide your mind with the opportunity to rest from multi-tasking. Research has shown that our minds work less efficiently over time when multi-tasking versus sustaining singular task focus. If you can finish one task before completing another, or at least transition to a singular task after sustained periods of multi-tasking, this will help you to sustain your mental energy over time.

- Try to schedule at least some time alone to just be still. Ensuring some time for mental rest allows for greater creative thought and mental flexibility. This quiet time should include “disconnecting” from your phone and all other electronic communication so that you are removed from external stimulations and demands. While this may be a brief window of time during the trial setting, allowing your mind to rest in this fashion will help to sustain your mental energy and efficiency for the duration of the proceeding.

- You may also want to consider meditating to allow your mind to release from actively processing information and to let go of all stimuli that surrounds you. And by learning meditation, you can enhance your own ability when stressed to let go of thoughts or worries with greater ease.

For emotional health, devise a plan for managing the triggers you have identified that lead to frustration, pressure, anger, and stress. Reduced exercise, increased physical tension, or inconsistent nutrition can lead to fluctuating blood glucose and create mood variability. A lack of restorative sleep can also impact our emotional expression. Negative thoughts can trigger counterproductive emotions and behavior. Cognitive behavioral theory suggests that when we have a thought, we generate a feeling about that thought, and that feeling leads to behavior. Therefore, if we can modify our thinking, or adjust the behaviors that we know occur in response to certain emotions, we can better manage ourselves through periods of stress. A few considerations:

- Plan for how you will find sources for positive emotions when you are faced with stress. For example, when stressed about the trial pressures, set-backs in the progress of a case,
or challenges from your client, seek out friends or family for connection unrelated to your stressors, laughter, and encouragement—even if for only a brief moment.

- You may want to seek help from a resource, such as a coach or consultant, who can help you navigate through the trial stress. Whether onsite or by phone, the attorneys I work with who utilize this level of support have a built-in resource to help proactively manage their own attitudes and choices toward how they manage stress. Having someone as a resource who is trained to help you manage your thinking and behavior can really help you to adhere to your trial-health strategy.

**Ensure Accountability to Plan**

Finally, it’s important to remain accountable to your trial-health strategy. You can ensure your accountability by taking the following steps:

Accept that you will inevitably deviate from your goals to some extent. You should therefore have a backup plan of alternatives—for example, an alternative workout or break time. Allow others to hold you accountable to your plans. Enlist a colleague, a family member, or a friend to check in with you about your adherence to those goals. You may want to ask them to remind you of what you planned; to encourage you to switch to your predetermined alternatives; or to provide you with some other relevant feedback that you think may motivate you to return to your plan.

In conclusion, as you prepare your witness outlines, opening statement, and motions in limine, you should also take some time to plan your own personal, trial-health strategy. Not only is it just plain good for you, but it will also help ensure that you will be in the best position possible to sustain your physical, mental, and emotional stamina throughout the grueling trial process.

**Keywords:** litigation, woman advocate, trial, strategy, health

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NEWS & DEVELOPMENTS

New York Sees Slight Rise in Bench Representation

The number of women judges in New York has increased 6 percent over the last 10 years, according to a Law360 article on a study conducted at the Albany Law School. The decade-long study, titled Women in Federal and State-Level Judgeships, found that women currently comprise 31 percent of all federal and state judges in New York, up from 25 percent in 2002. New York, which ranks 11th out of 50 states for percentage of women judges, beat the national average of 24 percent for women judges at the federal level and saw larger gains at the state level.

The study reveals striking geographic disparities amongst the number of women judges in New York, with larger female representation in the southern part of the state, especially in and around New York City. For example, women make up over 40 percent of judges in the southerly United States District Court for the Eastern District of New York, while there are only two female judges in the upstate Northern District.

Additionally, the type of court and selection process both seem to affect how many women hold a judgeship in a particular court, according to the study. Family courts and civil courts, where judges are elected, have seen the largest increases in women judges. But in county-level courts and courts where judgeships are appointed, progress has lagged, the study shows.

Dina Refki, the study’s author and the executive director of the law school’s Center for Women in Government & Civil Society, expects women will have more opportunities in the coming years as many current male judges retire and create vacancies. Another indicator of the likelihood of increased numbers of women judges comes from law schools, where 50 percent of recent graduates are female.

Keywords: litigation, woman advocate, woman judges, federal and state-level judgeships, bench representation

—Allison Kernisky, Holland & Knight

“Undeterred” and Other Traits of Successful Women Business Leaders

Only four percent of Fortune 500 CEOs are women, reports Forbes guest columnist Elissa Sangster, but with one-third of MBA spots now occupied by women, “the pipeline is improving.” This next generation of women business leaders might be well advised to take a few cues from the four percent who beat the odds. Ms. Sangster, who is the executive director of the
Forté Foundation, an organization that promotes and advises women in business, has a top 10 list.

Successful women will not be deterred, Ms. Sangster reports, despite “the persistent underrepresentation of women” in the business world. They adopt a “know thyself” mantra to identify career opportunities and ways to improve performance. “[W]omen leaders tell us that insight and self-knowledge are key,” Ms. Sangster writes. “[F]ind a mentor, and learn to ask for and accept honest feedback.”

Success in business and family life are not mutually exclusive. Women leaders find ways to make it all work. If they “take a career off-ramp,” they learn the way back and get the domestic help they need to “save their sanity” (whether a full-time nanny or someone to clean the house). Finding an organization in line with their values and passion is also key and trumps the trappings of job title and salary.

Successful women learn how to negotiate and don’t wait to be recognized. They “find appropriate ways to summarize their achievements and take credit for their performance,” Ms. Sangster explains. They build relationships with colleagues, cultivate their networks, remain flexible, and don’t plan their career moves too far in advance. Continuing education may also be key. Many have found that obtaining an MBA was “a game changer.”

Keywords: litigation, woman advocate, gender, income, career, women, leader

—Joanne Geha Swanson, Kerr, Russell and Weber, PLC, Detroit, Michigan
WORDS OF WISDOM

Follow the Witness's Lead—Not a Script
Before my first trial that I first chaired, I was determined to script out in advance not only every question, but also every response. I prepared each witness according to those scripts, and I was completely committed to following each script verbatim. Looking at those scripts gave me a sense of confidence that I was prepared. Of course, as any experienced trial lawyer will tell you, it's just not possible to script out an entire trial. Inevitably, despite how well you prepare your witnesses for direct examination, they are going to go off script. They will testify about facts in a different order than what you want or will skip certain facts entirely. One of the first witnesses that I put on in direct examination at trial was a lawyer himself. He completely understood the facts and legal theories of the case. Indeed, he even helped prepare the outline for his own testimony. He was appealing, articulate, and charismatic. He (and our client) assured me that he was going to be the best witness for our side during the whole trial. Nothing to worry about, right? Very, very wrong.

The lawyer witness (who was not a litigator) had a severe case of stage fright that translated to amnesia once he took the stand. He gave monosyllabic responses to the questions that we had agreed he would expound on, and went on at length about things that were irrelevant or inconsequential. The more that I tried to force him back to the script, the more he kept veering off. His testimony was disjointed and not persuasive, as if I was trying to force testimony that he did not want to say. After the first few harrowing moments while I struggled with him to get him back on script, I realized that I needed to follow his testimony wherever it led, and meet him where he landed, with a question that would naturally trigger the testimony that we needed. Once I stopped trying to control exactly how the testimony would come in, he relaxed and his testimony became much more compelling. In every trial that I have handled since then, I prepare an outline, and hone it down to the key facts that I absolutely need to establish. Once the witness is on the stand, I follow the lead of the witness, not my script, and check off each fact as it comes in. Definitely more nerve-racking for the trial lawyer, but the result is more natural and inherently more persuasive testimony.

Lucia Coyoca is a partner at Mitchell Silberberg & Knupp LLP in Los Angeles.

A Trend Toward Settlement
I wish I had known how long it would be until my next trial! Since my last trial several years ago, the trend has been to resolve cases without trial. This strategy may be changing again, and we may be seeing more trials in the post-recession decade (that remains to be seen), but I have learned that so much of what we do as litigators is about litigating cases to settle. On the other hand, we always have to be prepared to go to trial, because you never know when a case will actually defy the odds and really go to trial. In retrospect though, I might have been more assertive about offering to help lead counsel on cases headed for trial, even when I had not worked up the cases, in order to continue getting trial experience in an atmosphere that favored settlement over trial.

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