WHAT WE WISH WE KNEW TEN YEARS AGO

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“It is fun to be in the same decade with you.”

-Franklin D. Roosevelt

As we reminisce over the last ten years, a lot has changed in our chosen profession. We look back at the way we practiced law a decade ago with both wistfulness and incredulity. But time inevitably marches on without ceasing. If we are lucky, we pick up a few things along the way, and this article encapsulates what we have learned (and are still learning) about our practice this past decade. All ideas do not work in all situations, but all probably are worthy of some consideration.

From Kari’s Perspective:

THE EXPERIENCE OF BEING A JUROR

While I have tried pharmaceutical cases, I also had the unusual gift of being selected to serve as a juror in a significant criminal trial relatively recently. The things learned from this experience are invaluable. While trial lawyers learn a lot by doing, this peek behind the curtain put things in a whole different light.

A View of Voir Dire from the Box

The morning began a bit more leisurely than normal. Our courthouse is located right in the middle of the town square and there is a very convenient coffee shop nearby. I indulged in a white chocolate mocha and looked forward to visiting with the other members of the community who had not been able to avoid showing up for jury duty.

- *Most venire members do not want to be there*

I was sure neither side would want me for the trial, and I intended to help the decision-makers reach this correct conclusion however I could. Unfortunately, 90 percent of the panel was thinking the same thing, and I was a novice compared to some of the more practiced duty-dodgers. The process actually went very smoothly and those statutorily-excused lucky ones soon were culled and the real work began. The judge gave a concise statement of the case and then we were ready for the lawyers.

- *The statement of the case really can be concise*

We were not swayed yet by any spoken words; everything uttered up to this point had been boringly neutral. But the non-verbal language was at times cacophonous. What do I mean by that? I mean the confidence that can be portrayed just by the way you walk. I mean the gravitas displayed in the stillness with which you sit. But it also can mean the awkwardness displayed by your client because she is sitting by herself at the counsel table facing the courtroom, and we are all looking at her (and she is looking at us) like a bug on a petri dish, because we have nowhere else to look.

The case for which we had been called was a very serious criminal case. I gradually began to understand why the judge had been reluctant to excuse potential jurors, but I was even more optimistic of my chances for not serving. In addition to being a defense lawyer, I am a former law enforcement officer. Neither side would ever want to seat me! But sitting through voir dire was fascinating. I found myself drawn in and wanting to participate, making friends with my neighbors, and placing bets on who would get picked.

I learned how quickly a bond can be formed between potential jurors just because they sit next to each other in voir dire. My new-found friends and I also found ourselves unduly put out by Mr. Know-It-All venire member. You know him. He’s the one who raises his hand to answer every question because he knows everything about everything. NOTE: Don’t pick

Mr. Know-It-All to be on your jury. The other jurors will hold a grudge. Trust me.

- *Tips for voir dire from the other side*

If you google how to conduct an effective voir dire, the interweb provides a ton of options. There's "Ten Tips For an Effective Voir Dire," "Eight Tips for Better Voir Dire," and "Five Voir Dire Tips." You get the picture. I read the one for five tips because … well, it was only five. But they lost me when they suggested using a PowerPoint for jury selection. Having sat through this process, I can tell you that you do not want to do this. You will be dealing primarily with folks who do not want to be there and are desperately searching for ways to get out. Subjecting this type of crowd to "Death by PowerPoint" – even if allowed by your judge – is a recipe for danger and disaster. I will, however, make these suggestions for voir dire:

1. Questionnaires

If you are lucky enough to get to use a questionnaire, read it! Please do not ask your venire the same questions that we already answered in the questionnaire. It will frustrate us. We took the time to fill out your doggone questionnaire; you should take the time to review it. Caveat: If you do want to confirm an answer from the questionnaire, tell us that is what you're doing and refer to the questionnaire so we know you read it. Also, don't do this too often.

2. Pressure

We can tell if there is a particular juror that you want to retain, but who has claimed a legitimate hardship. Putting too much pressure on that potential juror as to whether it really will be an undue economic hardship if he has to close his sole proprietorship for the week will not make us like you. In fact, it will evoke strong protective feelings for that guy. And if he is selected, grudges will be held. Again. Similarly, if there is a particular juror you want to strike for cause, we can tell that, too. Once you have established cause, let it lie.

3. The Senses

- *Eyes.* Persuasion works best with eye contact. Please look at us. All of us.
- *Ears.* Persuasion works best when we can hear you. While shouting probably won't engender endearment, whispering won't, either. And if someone on the front row asks a question, please repeat it when you are answering so those of us on the back row can catch the gist.
- *Touch.* Please be cognizant of the fact that we may be sitting on hard wooden benches while we see you lounging in comfortable padded chairs. You also are getting to stand up and walk around, stretching out your legs … while we remain sitting for long periods of dull time on hard wooden benches. After long intervals, it may be appropriate to ask the judge for a break on our behalf or even ask the court if we might want to stand for 5 minutes.

4. We are Always Watching

Keep in mind that we are always watching you. And your client(s). We have nothing better to do at the moment. You are the entertainment, and we are your captive audience. We are studying your facial expressions, your mannerisms, how you treat the other side, how the other side treats you and your reaction to that, how you treat the judge, whether your client is sitting there paying attention or whether she is busily working on her computer (but we were not allowed to bring ours!), whether you are asking your co-counsel or your client for advice or whether you are the solo star.

Persuasion works best when we can hear you. While shouting probably won't engender endearment, whispering won't, either.

We also are watching you and your client outside the courtroom during breaks. It sounds like another verse of Sting's "Every Breath You Take," but it's true:

> Every question you ask
> Every uncompleted task
> Every sip from that flask
> Every rip to your mask
> We'll be watching you

This advice gem should be considered throughout the trial.

B A Juror's Perspective on the Trial

While I thought it unfortunate at the time, I was picked for the trial. Unbelievable. But it turned out to be a fabulous learning experience and a sobering community experience. The facts were graphic. What was interesting, however, was what was not said in opening statements – by either side. Imagination will fill in a lot of blanks. While the story needs to be sketched out, it does not need to be fully fleshed out.

- *The gory details are not needed in opening*

Listening to a story is easy to do. And a roadmap of what evidence is going to come in is very helpful. Weaving the two together is a skill worth developing, and doing so in 30 minutes or less is even more valuable. We heard two different stories in our trial, told by two very different narrators. One was stoic and calm; the other more dramatic. Both seemed to work because they both were genuine. I will offer one word of caution for those doing opening statements: don't stray too close to us. While we have developed somewhat of a relationship through the voir dire process, we aren't that close yet.

- *Eye contact and earnestness are needed*

I cannot stop with just one, so I'll offer another word of caution. We actually do listen to opening statements. And if we are allowed to take notes, we will note specifically what you say is important. If your story does not play out like you said it would, grudges will be held. Where you have some holes in your narrative or some bad facts, go ahead and let us know that. We're going to find out anyway, so why not take the sting out early? Hearing something the second time is never as shocking.

The trial progressed as trials do … with multiple delays and bench conferences. Now the bench conferences were not too bad because we had some entertainment in that we could watch the lawyers, look at the client, and glance at the audience. Before folks figured out that there was a separate microphone picking up the conversation, we could even hear the bench conferences. That was quickly rectified, unfortunately, when one of our number reported it. But we also were frequently ushered out so important things could really be discussed outside our hearing. This was very

frustrating! First of all, there is literally nothing to do in the jury waiting room (except eat; we had great snacks!). And if one of your jurors is the school hall monitor (i.e., the same guy who tattled about the open microphone), you can't even talk about the trial. This seemed like a lot of wasted time, and it interrupted the flow of the trial.

- *Limit as best you can the number of bench conferences and other interruptions.*
- *Consider jointly providing the jury waiting room with cards and/or dominoes.*
- *Ensure your "private" arguments are actually kept private.*

The witnesses were especially interesting. In this particular case, most of the witnesses were law enforcement personnel, but a family member also testified. While no Perry Mason moments occurred, their stories were riveting. I found myself wanting to hear what they had to say and getting put out when a lawyer – even the lawyer directing them – interrupted their testimony. While control must be kept of witnesses, how that control is exercised (especially over your own witnesses!) is absolutely crucial. And until a witness has shown us, the jury, that he's earned it, attacking or berating him will cause a grudge to be held.

I wish I could provide insight on juror deliberations; but, alas, our case did not proceed to closing arguments. I tried to drink in as much of it as I could. A few last thoughts:

1. *Say what you mean and mean what you say. We really can tell the difference.*
2. *Saying things once … maybe twice … is sufficient. We really are listening.*
3. *How you treat others matters to us (whether it's venire members, co-counsels, clients, adversaries, or the judge, deputy clerk, court security officer, or others).*
4. *Number 3 is especially important with witnesses.*
5. *Pay attention to us (but not too closely or we'll get uncomfortable).*
6. *Please be prepared.*

I expect this experience to be foremost in my mind the next time I try a case. And I also will never seek to get out of jury service again.

But, I reserve the right to hold a grudge.

From Michael's Perspective:

THE NECESSITY OF TEAMWORK

Not every case leads to a trial. In fact, as I have learned over the last decade, they rarely do. But, with few exceptions, I also have learned that every case must be worked up as if it will go to trial. How do you accomplish that to the best benefit of the client (substantively and economically) when everyone has a different gift? Not all want to be a trial lawyer; some people write better than others; and then there are the gifted ones who can see the forest and not just each individual tree. The intrinsic value of esprit de corps has become obvious now that I am older, more experienced, and hopefully a better arborist.

A Supporting Synergy

In 2008, having just made partner, I was grappling with the mantle of responsibility that came with such a designation. Thus far, my work had been interesting, rewarding, and very hands-on – especially for a junior lawyer. As a JAG Officer in the Army, I had defended Colonels in trials and had served as a Judicial Advisor in hearings. On the civilian side, I did a little bit of everything at Butler Snow, from taking a plaintiff's deposition over a back table in a laundromat in the middle of the summer to cross-examining a well-heeled surgeon from one of the most prolific teaching hospitals in the United States. Some worked out better than others, and each experience was a fantastic learning opportunity that made me a better lawyer. I attended and spoke at drug and device conferences, staffed complex trials that stretched for weeks and months, and found myself making contacts and lifelong friends both with in-house counsel and with lawyers from other defense firms. It was a great time. I actually thought I knew what I was doing. I had not yet grasped the concept that none of us is as smart as all of us.

It was not until a few short years later, when I was given management responsibilities for a newly filed, soon-to-be mass tort, that I realized I didn't know what I didn't know. Now, having worked on the litigation from the first filing through trial, and ultimately through the conclusion of the MDL, my eyes have been opened. I now have a new perspective and appreciation for the one intangible that serves the client more than any other, and it does so by fostering an environment of efficiency, productivity, and success. That intangible is teamwork.

B Scouting Talent

It is important to recognize that every person on the team brings to the table a different background, a different perspective, and a different skillset. All opinions are valuable – and many are invaluable. For a lawyer to ignore the deep bench of expertise around him or her would be a disservice to all involved. Put the ego away. Step out of the spotlight. Sharing, collaborating, and using the talent available are the most effective and efficient means to get a positive result. Harry Truman said it best: "It is amazing what you can accomplish if you do not care who gets the credit."

That said, litigation is no panacea. There are days, nights, and weeks that are extremely stressful. A deposition goes off the rails; a judge repeatedly rules against you; counsel opposite's behavior is a continuous thorn in your side; nerves get frazzled and tempers grow short after multiple 18-hour days away from home. All of those stressors will be present in any litigation; to think otherwise would be imprudent. However, when you have a team that shares the same focus and philosophy – own your work, accept blame, share praise, step up – the noise of the process can be collectively reduced to a hum, allowing the opportunity for clarity and judgment to shine through.

Not to mention the fact that maximizing the team model saves money. Skillsets should be identified and jobs assigned accordingly. An effective brief writer can do in a matter of days what it may take the corporate witness handlers weeks to do – and, without a doubt, the work product of those taking and defending the depositions would not be nearly as on point, measured, or persuasive as those people who draft briefs and motions day in and day out. The same can be said for almost any of the tasks necessary for an effective outcome – electronic discovery, document production, expert research, etc. Let the right people do the right job, and everyone wins.

Put the ego away. Step out of the spotlight. Sharing, collaborating, and using the talent available are the most effective and efficient means to get a positive result.

C And the Inevitable Football Analogy (After all, most of us are football fans)

It is good to be the quarterback. But a quarterback without a strong front line cannot execute the plays. A quarterback without receivers, running backs, and blockers cannot advance the ball. If a quarterback does not have a great defense, a quarterback will spend little time, if any, on the field. If your team is not on the field, you can't win. And when the quarterback, who happens to be blessed with top shelf talent all around, doesn't care who spikes the ball when the team crosses the end zone, the players, the coaches, the team – and the owners – share in the victory.

Butler Snow has the privilege of working with clients who understand our philosophy and who partner with us in embracing the team dynamic. Our team could not – and would not – function without the input and guidance we receive from our clients. We do not take this responsibility lightly. Every case – no matter how big or how small – is important. We will never forget this.

So, looking back ten years, I have personally experienced how the team model plays out in our firm philosophy of client first, firm second, and individual third. Both in theory and in practice.

Having now seen it, I cannot imagine doing it any other way.

THE VALUE OF CIVILITY

> "Never give way, and never give offense."
>
> *-Barbara Tuchman*

It has been said that the internet is the best invention ever and the worst invention ever, and in the past ten years, we have seen a sea change in the way social media has shaped the collective personality of our citizens. The anonymity that comes with posts, blogs, and online comments has been at the expense of courtesy, respect, and reverence. Respect for others' opinions, measured debate, and consideration in general has been tossed out the window. Attacks, counterattacks, and caustic behavior have become commonplace. Civility, as a word, as a pretext, and as an integral element of relationships, now seems antiquated; the word itself echoes as some remnant of a bygone era where people, at one time, treated each other with respect and engaged in substantive debate as opposed to creative name-calling. Ah, the good old days.

Unfortunately, as a litigator, I have seen the lack of civility carried over into our practice. It surfaces in emails, in correspondence, at depositions, and on the phone. Many lawyers pride themselves on their inability to play well with others, and they advance their cases with a pen in one hand and a torch in another, burning bridges as they cross them. Litigating a case is not easy in the best of environments. It can become downright fatiguing when dealing with a table-flipper at every turn. While it may be intuitive to respond with an equally spiteful demeanor, to do so clouds judgment, takes away from the focus of our defense, and it could lead a judge or another lawyer to question our motives and, even more importantly, our integrity. It should never happen on our side. We should be better than that.

As defense lawyers, we do not have to get in the ditch to be effective. Instead, we must be ambassadors – for our profession, for our clients, and for our firm. The word "lawyer" is sullied enough in the public's collective conscience. We should do everything in our power to right the ship. The impact of taking the high road can be felt on all levels – in the way we work with others, in the way we make our decisions, and, as a practical point, in how effective we ultimately are in the courtroom. How do I know? I learned from the best.

For reasons that I cannot explain, the stars have lined up for me in this, the most noble of professions. I am

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working for a firm I love with people I am proud to call friends. On top of that, I have had the privilege of being mentored by one of the best pharmaceutical and device trial lawyers ever to grace a courtroom. While she has left many impressions (and a couple of scars) on me as I have grown in my practice, the one thread that has run through almost every lesson is the importance of civility and the importance of your word. Whether dealing with an irate plaintiffs' lawyer, a curt court clerk, a young associate, a seasoned partner, or a learned judge, I have come to appreciate that it is always best to keep out of the fray to the extent possible, to be honest, to remain calm, and not to take things personally, no matter how personal the attack may seem.

Over the past decade, I had the opportunity to observe the effect of civility in trial practice by watching, listening, and observing as our consolidated cases worked their way through discovery, motion practice, and trial. Opposing counsel was not afraid to take the scorched earth approach, and they were not selective as to who observed their behavior – co-counsel, opposing counsel, witnesses, judge, and jury all got a taste. We took the high road. We said what we were going to say and what we were going to prove, and we did just that. When we did lose our cool at a deposition or during a telephone conference early on, we learned from our mistakes and did our best to stay within the lines going forward. And as the days stretched into months and the months, years, it paid off. We stood on the goodwill inherent in the integrity and good name we built time and time again. We had no trouble sleeping at night because of a prior misplaced action or word. We never had to second guess the claims and arguments we made in our pleadings. We had the confidence to tell the story truthfully and without the need for half-statements or innuendo. We were persuasive on the merits.

We got a defense verdict.

Civility in our profession should carry over to civility in our life, in our families and in our relationships. At the end of the day, we need each other. While a short-term gain – via a contentious argument or one-upsmanship – may feel good at the moment, in the long term, it affects our judgment, potentially nudges our case in the wrong direction, and makes what should be an exercise in strategy, tactics, and reasoned arguments, turn into a quagmire that serves no one.

So yes, I consider myself extremely fortunate to have worked under someone who not only preaches – but practices – the need for civility and integrity in our lives. Her word is golden; and when she speaks, she speaks the truth without insult, without hyperbole, and without hesitation. I know it. My partners know it. Plaintiff lawyers know it. Judges know it.

I believe our jury knew it too.

THE IMPORTANCE OF DEPOSITIONS

This lofty idea of civility has every day applications, and this lesson cannot be learned too soon. Below are a few more tips learned over the years when taking and defending depositions.

From Kari's Perspective:

A Taking Plaintiffs

1. Setting the Tone

The plaintiff is not your enemy. Not really. In my experience, the vast majority of the time she is uncomfortable if not downright frightened. This is particularly true in MDL or class litigation where she

actually never expected to have to testify. Part of the job entails allaying at least some of that concern so that rapport can be built and facts eventually uncovered (or admitted). Once some trust exists, truth can as well. On the other hand, she may not be frightened; she may just be mad. If that is the case, I have found that allowing a bit of venting goes a long way. Once it is out and she has had her say, a plaintiff generally will be more amenable to answering the question before her.

2. Using Some Sense

Actually, use all your senses. When you shook the plaintiff's hand, did he have a strong grip with callouses? Did she have an interesting piece of jewelry? Did you see any scars? If you notice something like that, and assuming his lifestyle is germane to the case in some way (as it always will be in a personal injury case), it will hurt nothing to ask a couple of questions in follow up. I have done this a number of ways, including the direct approach: what caused those callouses? Does he lift weights (or did he before he ostensibly hurt his back on your client's premises)? Does he garden or farm? Where did she get that necklace? Was it a memorable piece purchased on a dream vacation (that occurred after your client's supposedly egregious and life-changing negligence)? Be curious about this person and follow up on your instincts. Not to mention that talking about things the plaintiff perceives as conversation and not litigation can help them relax and, potentially, let their guard down. A relaxed plaintiff is a sharing plaintiff.

Use your eyes to look at more than your outline – actually observe things. Did the plaintiff walk in with a limp? What caused that? Who came with the plaintiff to the deposition? What does the plaintiff do during the deposition breaks? (i.e., did he take any medication during the break? Did he forget to walk with a limp?) I am not suggesting stalking, but the point is: look up from your outline and your phone! At one deposition, the plaintiff came in with beautifully manicured fingernails. In following up on that observation, I learned that she drove herself every other week to the salon and not only had her fingernails done, but also her toenails and her hair, all while sitting in the salon chair. While this discovery might not sound very dramatic, it could make a difference in a case where one of the allegations is that the plaintiff cannot sit comfortably for any longer than 30 minutes at a time. Also, never forget to look for (or ask about) what the plaintiff brought with her to the deposition, including any relevant documents contained in her very large purse.

Use your ears to actually hear the answers. This means that you should not be reading your next question from the outline while the plaintiff is answering your last question. Listen. This will come with experience, but straying from the outline to follow a relevant rabbit trail more times than not yields rewards. Just be familiar enough with the topics you need to cover – and the admissions you need to get – to do this comfortably and get back on track when the trail ends. After all, as noted below, the purpose of a deposition is not to make it through the outline.

Lastly, smell the roses. Or the cigarette smoke. Smoking is a risk factor for just about every malady known to man. Obtaining a vague admission that the plaintiff smokes "sometimes" is vastly different than getting an admission that the plaintiff smoked two cigarettes during every break … and you took five breaks before 3:00 p.m. … not counting lunch.

3. Seal the Deal

Depositions are two-pronged tools: (1) find out facts and (2) get clean admissions. By "clean," I do not mean a rambling back-and-forth session that eventually winds its way down to this:

Q: So, the answer to my question is "yes"?

A: I suppose so.

By that time, we all have already forgotten what the question even was, and its great impact is certainly diluted. Strive to have the admission consist of either

"yes" or "no." Even more difficult for some, have your question be no more than two lines at most out of your 25-line deposition page. This is the "Three Line Rule for Impeachment". If the road to get to that admission has been long and hard fought, try something akin to this:

Q: I understand what you've told me, and I appreciate it; but in fairness, you did take opioids for back pain before you had this surgery, right?

A: Yes.

This hopefully conveys that you listened to all the caveats and justifications. Having acknowledged all the excuses, you now just want (and are entitled to) a straight answer to a very straightforward question. The onus is on us, however, to craft those straightforward questions.

Finally, once you have sealed the deal and your clean admissions are memorialized in black and white, do not revisit the subject. Resist the temptation to get the same admission again – even if it's a really good one. Let it lie. Change subjects so that the plaintiff cannot undo what you just got done, and move on.

4. Remember All of the Potential Uses for the Deposition

Always keep in mind how the deposition will be used for pre-trial practice and at trial. A good snippet about when the plaintiff knew of her injuries can be all that's needed for a summary judgment motion on the statute of limitations. And information from the plaintiff may even tie into motions related to her experts and the reliability of their opinions. Assuming the motions are unfairly denied, trial counsel, whether you or someone else, will be standing up in front of jurors attempting to conduct a smooth and as-short-as-it-can-be cross examination. Sometimes impeachment is needed right at the beginning to lay out the ground rules: Yes, I have your deposition. Yes, I read it. Yes, I know how to use it quickly and efficiently, so going forward, you should just answer me truthfully. And

sometimes impeachment is needed right at the height of the cross examination to get that one piece of crucial evidence to support a motion for JNOV or a critical aspect of closing argument. Either way, this needs to be a seamless and fast process.

From Michael's Perspective:

B Defending Clients in the MDL and Reptile Era

Defending clients in this age of the ever-present MDL has become quite the stressful and very important endeavor. Multidistrict litigation is a creature of the 1960s. Like many ideas born in that decade, some were better than others (i.e., landing on the moon versus, say, bell-bottoms). The ostensible goals of this particular bright idea include avoiding duplicative discovery, lowering costs, and reducing the burdens on witnesses and parties.

One way that these goals were to be accomplished was with the advent of the videotaped deposition of the corporate witness. At first blush, it sounds fantastic. Instead of putting up your company witness in multiple actions across the nation, preserve her testimony for all upcoming cases in a single deposition. The downside is that her testimony – the good, bad, and ugly – is indeed preserved for all upcoming cases. That one unfortunate sound bite, accompanied by that one ugly facial expression, will get played in every subsequent trial.

Now, add a reptile.

In 2009, jury consultant David Ball and trial attorney Don Keenan published a book on trial strategy entitled *Reptile: The 2009 Manual of the Plaintiff's Revolution.* It was a watershed event in terms of how plaintiff lawyers prepared for their cases during discovery and how they presented their cases at trial. In a nutshell, plaintiff lawyers shifted the jury's focus away from the damage done to their individual client and toward the jurors themselves, making the jurors feel like they, personally, could be impacted by the asserted dangerous behavior of defendant. Plaintiffs' lawyers started to use this "Reptile" approach to sell danger – make the jurors believe that the dangers identified in the lawsuit go well beyond the courtroom and into their cities, neighborhoods, and homes.

It has been quite effective. Ten years ago, verdicts in excess of fifty million dollars for a pharmaceutical or device case were almost unheard of. Now, it is not uncommon for juries to return verdicts in that range or higher, due in part to effective use of the Reptile theory – especially in jurisdictions that have been known to be plaintiff-friendly.

Since 2009, the Reptile theory has been discussed and debated in every context possible – journal articles, presentations, workshops, and even in some motion practice, and will not be repeated here.[1] What is worth discussing is what we have learned during these years as to how to address and minimize the impact of Reptilian behavior on our witnesses and on our cases. A brief summary of counter-Reptilian strategies is itemized below.

1. Prepare Your Witnesses

There are not many worse feelings than defending a deposition and watching your witness go slack-jawed when faced with what seems like an unanswerable Reptile question. "What do you consider safe?" "If your company could have made this product safer, shouldn't they have acted?" "Don't you think the public would have wanted to know what we are reading in this [bad document]?" "Shouldn't your client warn of known and reported risks?" The list of potentially problematic questions goes on and on. When these are presented to an unprepared witness, you can almost see the gears spin out of control and panic set in as the witness struggles to find an answer that he/she believes to be reasonable (or that he/she believes will be best to get them out of the room quickest – which is never good).

There is no substitute for adequate witness preparation.

There is no substitute for adequate witness preparation. Of course, preparing a witness involves covering substantive issues: case history, case facts, timelines, relevant documents, etc. Prior to getting into those issues, however, the persons responsible for preparing the witness should consider addressing the Reptile questions first. Using a Reptilian exercise at the outset lets the witness know that the questions are serious and dangerous. Reptilian questions also provide the witness with a good mental workout up front, and they provide a proper context for discussing the substantive deposition materials later in the prep session.

2. Ensure the Witness Understands the Process

We get it. We do it every day. It makes us a bit anxious at times, but taking and defending depositions is part of our job. Most of us like it; after all, we do not get to try as many cases as we used to and this is as close as it gets. Not so for the person who is being deposed. They need to understand that while the litigation will not likely rise or fall on their testimony, their time under oath is nevertheless extremely important. Whether they are a file clerk or a CEO, they need to understand that plaintiff lawyers are not necessarily looking for good, substantive testimony, but rather an effective sound bite. It does not matter whether they work in a cubicle or manage out of a penthouse corner office, to the jury, the witness is the face of the company – no matter their title.

The witness should also understand that whether the deposition takes one hour, seven hours, or three days, in all likelihood only a fraction of the deposition will be played, so the witness has to be on at all times because that ten-minute excerpt where he is frowning at the camera or snaps out an ill-tempered or improper response without thinking could be played over and over again during the next 15 trials. Also, the witness should have an understanding as to how and where their testimony may be played at trial. We don't know when it is going to be played, or if it is going to be played at all. Regardless, we must treat every question – and every answer – as if it will be front and center. It could be played at the end of three days of video testimony when the jury is sleepy, hungry, and ready to go home for the weekend. It could also be played on the heels of the live testimony of a very emotional, grievously injured party, when many in the courtroom – including members of the jury – are crying, sad, upset, and/or angry. Treat every question like it is the most important question and answer accordingly.

3. Identify Reptile Questions

Depending on time considerations, the preparation session should cover as many Reptile questions and answers as time permits. The more questions are covered, the better equipped the witness will be not only to answer Reptile-type inquiries, but to recognize Reptile questions when they are shuffled into the case-specific substantive areas of inquiry.

4. Develop and Cover Themes

By the time the corporate depositions begin, you, as counsel, should have a decent understanding of the general themes of the case. These themes should be addressed during prep, and the witness should understand how to use these themes to advance the truth during a Reptile deposition. These themes are generally product-specific, and include:1) the witness having an understanding of his/her role and responsibilities – and to not stray from that no matter the questioning; 2) the witness understanding the risks and benefits inherent in the product at issue; 3) a review and understanding of hot documents – and whether they may or may not apply to that witness; and 4) a general understanding of the regulatory and marketing history of the product.

5. Conduct a Mock Examination

After the witness has been prepped, conduct an effective mock cross-examination. This is no longer just a suggestion, but a must. To be effective, it must stretch the witness. Bring in a colleague that the witness has not met before to conduct the examination. Have the questioning attorney blend Reptile questions with key documents of the case. Be fairly aggressive to see how far the witness can be pushed. Know when to call time out and know when to keep going, no matter how uncomfortable everyone may feel. Perhaps most importantly, at the end of the day, conduct a thorough afteraction review. Walk the witness through the highs and lows so that he or she understands where to pivot and/or deflect and where to stand firm. Then assess the witness. If he or she needs more work on a particular point, or issue(s), make it happen.

6. Prepare and Conduct a Thorough and Targeted Redirect

The corporate witness should be reminded that when the plaintiffs' counsel completes his questioning, the deposition is not over. In today's drug and device litigation, plaintiffs' lawyers are trending towards marathon depositions, trying every possible angle and tactic to exhaust the witness, and in so doing, get the sound bites and admissions they seek for purposes of settlement or jury consideration. There is rarely a situation in the current environment where defense counsel should forego the opportunity to conduct a thorough redirect.

A redirect serves a number of purposes: 1) it can rehabilitate any questionable or unclear testimony from the corporate witness; 2) it provides an opportunity to place the themes developed by the plaintiff's lawyer into context and to show the jury the flip side of the proverbial coin; 3) it gives the witness a venue to discuss those topics where he or she has expertise and by so doing provides an opportunity to build the witnesses' credibility with the jury. Finally, and perhaps most importantly, if the testimony of the witness is played via video at trial, it creates a bookend to counter the points made by plaintiffs and doesn't leave unfinished or unrealized issues dangling in front of the jury during the critical days or weeks before plaintiff rests and you are able to put on your case.

As with all things, this redirect too will require prep. First, prepare your schedule. Do not plan to catch a flight home the night of the deposition. You will have either gone late in order to get your part done, or you will be starting the next morning fresh with your part, the latter being preferable.

Second, prepare your witness. Walk through a planned outline of topics to get the client's story out. This is not just the time to bring some perspective to the less than fortunate documents displayed during the plaintiff's part, but it's a great time to tell "the rest of the story." Also, assuming the deposition consumes more than one day, consider having your witness wear the same clothes so that the video itself appears more fluid.

Third, prepare your documents. This is the chance to get the client's good documents into evidence during

the plaintiff's case. Keep in mind that video testimony can be more engaging and more persuasive when a document is put up that corroborates the testimony.

Fourth, prepare with your team. There may be aspects of the litigation with which you just are not familiar, but that your witness may be perfectly capable of addressing. Discuss with your team where the holes are and what you and your witness can do to fill them.

Lastly, be prepared for the plaintiff lawyer (assuming time permits) to want the last word. The demeanor of your witness should not change from when he or she was answering your questions to the now most-likely-more-aggressive tone of the plaintiff lawyer. That the plaintiff gets the last word is of no moment if that last word is not memorable.

We know that we've learned much over the last ten years, and we look forward to the opportunities that lie ahead.

[1] *See* M. Hewes, *Cutting the Head off the Snake: Blunting the Effect of the Reptile Approach During Corporate Depositions, Pro Te: Solutio,* Spring 2015, available at https://www.butlersnow.com/2015/05/pro-te-solutio-march-2015.

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