NEW JERSEY LAWYER

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DEPARTMENTS

DOMENICK CARMAGNOLA

Focusing on Judicial Vacancies, Pandemic Fall-Out and Recovery, and Lawyer Wellness in the Year Ahead

Editor's note: This is an excerpt of the speech Domenick Carmagnola gave at his installation during the Annual Meeting in May.

I am humbled and honored to serve as the 123rd president of the New Jersey State Bar Association. Thank you to all of you for the confidence you have placed in me to lead this terrific organization as we continue to face unprecedented challenges and times.

As I stand here tonight, reflecting on what the year ahead will bring for our world, our nation, and our profession, I am prepared to make a singular promise to you. In the days ahead, no one will work harder than me, my Executive Committee, our Board of Trustees, our terrific Leadership Team at the Bar Association led by Angela Scheck, and our dedicated and committed staff who together make up an incredible organization. On that, I give you my word.

The New Jersey State Bar Association has been an extraordinary leader this year. But our work is not over.

Chief among our goals to address right now is to focus our energies on the issue of judicial vacancies. Our courts are currently facing record numbers of judicial vacancies. That means too few judges at a critically vital chapter in our history. It is truly becoming a crisis.

The need is real right now. I say that as someone who is involved in court matters every day and who speaks to judges and lawyers every day. The court is at its limit in terms of what can be handled by the current complement of judges. There is a deluge of landlord/tenant cases coming—with some estimating that there will be upwards of 100,000 cases by the time the moratorium lifts. And there are thousands of people languishing in jail, waiting for their day in court to resolve criminal charges. And to make the situation more dire, it will become imperative to reassign existing judges to address those cases, which will absolutely affect the way justice is meted out in every single other area of the court.

Let me be clear about one thing: the existing bench is working hard, but that alone is not enough, and the answer is not to have them work harder. Our courts are regarded as the finest in the nation. It is a strong, independent, co-equal branch of government. It cannot be allowed to enter the upcoming rollout and face the impending situation without sufficient resources.

It will not be just the judges who lose; these vacancies directly affect the citizens of New Jersey who rely on the courts to resolve their disputes and to address significant issues that affect their everyday lives. A bench working at full strength is the only solution and we will not stop until the Senate and Governor make that a reality.

After this past year, I know we will need to focus on rolling out of the lockdown and getting back to full speed. Hard work, unity and the strength of the NJSBA's members are what helped the profession persevere this past year and as we emerge from a once-in-a-century public health crisis, those qualities are what is going to bring us back—and bring us an improved, more resilient profession.

Know this: The NJSBA's mission in the year ahead will be to help you build back not just to where we were, but better than we were. And the NJSBA will be there every step of the way to support you.

Our Pandemic Task Force is still hard at work. Our Sections and Committees are, likewise, hard at work examining the fall-out of this pandemic and how it affects lawyers and their clients.

With the number of people being vaccinated on the rise and a semblance of normalcy returning, it would be easy to let our thoughts turn to other things. But we will not do that. We are clear-eyed about the challenges that remain ahead. And we are going to lean in harder to help our members get back to work and determine how to adapt to the changes wrought by this pandemic.

We are also continuing to develop resources to help the public navigate the myriad legal issues that have come out of the pandemic, including a guide that aims to position the NJSBA as a clearinghouse of information for individuals seeking legal assistance; we are also discussing ways to address the overwhelming landlord/tenant backlog; providing resources

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FROM THE SPECIAL EDITORS

Trial Advocacy and Preparedness in an Ever-Changing Environment

Trial attorneys are constant students of the ideas and techniques that form the art and science of trial advocacy. Trial preparation requires knowledge of substantive law and procedure and the development of a skillset that can adapt to an evolving society. The COVID-19 pandemic magnified the need for attorneys to remain informed and to adjust their tactics. This health crisis created new challenges for trial attorneys eager to tell their clients' stories to juries.

Access to the courtroom, however, was merely one of the many issues lawyers faced when determining how best to prepare their cases while abiding by the new restrictions being imposed. The existing technology used and the flexibility displayed by attorneys confirm that trial advocacy is never stagnant. In that light, this issue of *New Jersey Lawyer* seeks to apprise our readers of recent rule changes, strategies, and tips related to trial preparation and advocacy in general while addressing the unique circumstances created by the COVID-19 pandemic.

Karen A. Confoy summarizes the standing orders issued by the District Court of New Jersey in response to the COVID-19 pandemic, including safety measures taken when accessing courthouses, the suspension of in-person proceedings, and continuing operations in a remote environment. She further discusses the amendment to Federal Rule of Civil Procedure 30(b)(6), which took effect on December 1, 2020, and outlines proposed amendments to several of the District of New Jersey Local Rules. Dominic V. Caruso provides a brief history of *in limine* motions in New Jersey prior to the adoption of Rule 4:25-8, which became effective on September 1, 2020, and explains the impact this new rule will have on litigation.

Diana C. Manning examines effective methods for preserving the record for appeal when dealing with remote depositions and virtual jury trials, and Victor A. Affandor advises of the technology available to attorneys for conducting such trials.

John L. Slimm and Jeremy Zacharias provide guidance on opening statements and closing arguments, Edward T. Kole explores methods for cross-examining expert witnesses, and Roy Alan Cohen and Rahil Darbar provide tips on presenting deposition testimony at trial.

The process and standards for sealing documents or testimony prior, during, or after trials are reviewed by Dennis Gleason. His examination includes both New Jersey state and federal procedures. Finally, Rich Lomurro argues that attorneys need to embrace the new virtual world and use social media to present their clients' stories at trial.

We hope this issue will assist not only young lawyers, but all lawyers that continue to study and engage in the practice of trial advocacy. ⚖

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MICHAEL JAY PLATA *is the founder of Plata Law Group LLC. His practice is focused on complex business and commercial litigation in federal and state courts. He also provides general counsel services to businesses, corporations, and nonprofits on various legal and corporate matters, including human resource and regulatory compliance, privacy and data protection, intellectual property, and corporate transactions. Michael previously served as a Practitioner-in-Residence at Rutgers Law School with the Community and Transactional Lawyering Clinic and is a former President of the Hispanic Bar Association of New Jersey.*

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President's Message

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available through the NJSBA, including Free Legal Answers, the NJSBA's online resource tool for individuals who have legal questions relating to the pandemic, the Military Legal Assistance Program, and LegalEdge, a program that will be able match those in need of legal assistance with attorneys willing to provide assistance at reduced fees.

Another issue this pandemic has laid bare is the fragile grasp our profession has on our well-being. A few years ago, the American Bar Association and Hazelden Betty Ford Foundation released a study that put cold hard statistics into the struggles our colleagues were having with depression, problematic drinking and even suicidal thoughts.

Too many of us have heard stories, known friends, or experienced these challenges ourselves. And this past year has only exacerbated feelings of stress, burnout and uncertainty

We are today at a crossroads and I am here to say that the NJSBA will take an active role in helping the legal community come to terms with this challenge and set out a better path ahead. Wellness must be something we all focus on.

Research has proven out that when our workplaces foster and support well-being, we are better able to make the choices that allow us to thrive and serve our clients. And supportive workplaces are not just more productive, but also able to attract and retain attorneys and other employees.

In the year ahead, we will seek to address the stigma associated with asking for assistance; we will emphasize that well-being is an essential part of being a competent attorney; and we will expand our educational outreach on these important issues all in the name of changing the tone and improving the culture of the profession around every aspect of an attorney's health.

One thing I know to be true—and has been reaffirmed over and over again during these months in conversations with lawmakers, jurists, and bar leaders around the country—and that is the NJSBA has gone to new heights to help its members navigate a successful path ahead—and has ascended to new heights.

We have gone to work for our clients, for our colleagues, for our courts, and for the residents of this great state. We are able to achieve these goals because we worked—and will continue to work—together. Because together we are greater than any single one of us.

Today, possibly more than ever before, the organized bar is strong and relevant; it is a resource and voice for every lawyer. The NJSBA has been and will continue to be here for you.

None of what we are looking to do will be easy to achieve. It will take resources, time, and effort. We are prepared to do that for you, our colleagues, and to support this great profession.

As the legendary Vince Lombardi once said: "The price of success is hard work, dedication to the job at hand, and the determination that whether we win or lose, we have applied the best of ourselves to the task at hand."

And tonight, I promise this: the NJSBA is dedicated to serving you and determined to apply our very best to the task at hand.

Thank you to all of you who have reached out already and offered to help and those who have already agreed to help. It is truly appreciated. We will get through this next phase together. Stay safe and be well. And thank you for the faith you have shown to me and our team. We will not let you down. ⚖

PRACTICE PERFECT

Make Your Meetings Meaningful

By PracticeHQ

We are increasingly emailed-out and meetinged-out.

Now, more than ever, it is critical to make the most of your time and that earns a coveted spot on the calendar. Read on to get important tips and suggestions from the NJSBA's PracticeHQ, a practice management benefit exclusive to members, about how to make the very most of every meeting.

Meaningful Meeting Building Blocks

1. Right Size and Right Participants: At Affinity we have four types of formal, as opposed to impromptu, meetings. I've applied our model to examples for a legal organization:

a. Staff meetings everyone attends, which happen once a month and at which management and team leads give business updates;
b. Team meetings attended by members of a team, such as corporate, litigation, or estate planning, where all team members give updates, share challenges and good news, and address team-wide issues;
c. One-on-one meetings, usually 15-30 minutes long, between a team lead and an individual team member for discussions that don't affect the whole team; and
d. Client or project meetings, which are external between firm members and the client as part of a case or matter. These meetings vary in length from between 15 minutes to an hour.

The right size and right participants principle means that you address the question with the smallest number of meeting participants necessary. You don't address an individual or team issue at a company-wide meeting. Team meetings and one-on-ones are the venue for that. A project team wants to have its ducks in a row and fix miscommunications outside of the client's view when possible. Don't take time out of five people's day when two people can handle the question. Our exception to these guidelines is that good news can always flow upstream. Who doesn't like more good news? Good news aside, the best way I've found to summarize this principle is that most meetings should have participants and few to no mere attendees.

2. Meetings are for Making Decisions: Whatever "background information" is a necessary basis for the meeting's topic should be distributed in advance so participants come to the meeting ready to discuss and decide. The volume of what's distributed could vary greatly depending on the subject. Maybe you want to hold a meeting about recruiting more clients. I suggest that the pre-reading available should include what the firm does now to recruit clients, what those efforts cost, and how successful they've been. People do the pre-reading and come to the meeting prepared to decide on a strategy for the months ahead.

The objection I hear to this approach is that people don't make time to do the pre-reading. No doubt! My response to that is to suggest Amazon's Jeff Bezos' **approach to meetings.** The first 30 minutes of each meeting is "study hall" time for participants to complete the pre-reading. That way no one tries to bluff his way through or asks questions preparation would answer.

Even if you invite folks to a "blue sky" brainstorming session, don't just book a calendar appointment for "brainstorming;" give participants context. I had a college professor who, when handing out the weekly essay prompts said, "Even if you're not going to begin writing until the night before it's due, read the prompts immediately because your mind works on questions without you being aware of it." I did as he said, it seemed to work, and have continued to do so ever since. So, not a "brainstorming" meeting, but a "brainstorming meeting on estate planning services to offer

people transitioning from homes or independent living to congregant or assisted living."

3. Everyone has Something Else to Do: This is true even of the meeting host or organizer. Run a tight ship. Be respectful of everyone and start your meeting on time. And, more importantly, end the meeting on time come hell or high water. We're all busy, often booked back-to-back. One or more people has given you the gift of their time. Make good use of it.

4. What Shall We Talk About: A meeting without an agenda is like cooking without a recipe or driving without a destination. Serendipity may bless your endeavor, but the odds makers bet against you. There's no need for a detailed plan but telling folks in advance what's going to be discussed and what questions or problems you expect to resolve helps participants frame their own thinking.

5. Who Said That: A corollary to points 2 and 4 above is that a meaningful meeting should have a scribe or secretary whose responsibility is to record what the group discussed, what decisions the group made, and who agreed to do something and date by which that person updates the group or relevant people. Shortly after the meeting, the scribe sends around notes of the meeting. Remember that a meetings purpose isn't a gripe session or happy hour; it's to produce a concrete positive effect.

Possible Perilous Pitfalls

Few meetings will be perfect and many might not satisfy all Meaningful Meeting Building Blocks above. The goal is to make each meeting you can influence at least a little bit better than the previous one with same participants.

Getting off the starting line is the biggest challenge, but you will encounter hiccups along the way:

1. Tech Roulette: You're most likely to encounter this issue with clients or other external participants. Many comparable digital meeting platforms exist: Zoom, Teams, GoToMeeting, Webex, and so forth. If you don't have a platform, check **MOBar's LPM Web Meeting** for top vendors in this field.

Irrespective of your platform choice, clients, colleagues, and courts will be using one or more of the alternatives. If your client base tends toward individuals and families, they're probably most comfortable with Zoom. With businesses it could be Teams, Webex, or Zoom. With courts, I've seen Zoom and WebEx. In any event, we're unlikely to return to plain, vanilla conference calls. The less technologically sophisticated your client is, the more time you'll lose to tech issues at a meeting's start. Take that into account when planning and scheduling meetings.

2. Practice Makes Perfect: I think it was Jack Newton, Clio's CEO, who commented that COVID compressed five to ten years of legal tech changes into a few weeks of 2020. If you were a technophobe or tech-naive attorney, you had to figure out webcams, audio, screen sharing and all the rest. You're better at it today than you were months ago. If you have team members who conduct virtual meetings with clients, make sure they are equipped with the necessary web meeting technology and know how to use it effectively. I encounter many paralegals and legal assistants who meet with clients but lack the audio and video tech to easily participate in web meetings. Make sure people representing your firm to the world do so professionally, just as you would want for in-person meetings.

Quick Tips

Finally, here are some quick tips to encourage everyone's involvement and best ideas:

- Offer feedback with respect and the intention to help;
- Receive feedback without debate;
- Choose clarifying questions over defensive statements;
- No redundant comments: "I agree with..." or "Like Sally said...";
- Respect one another;
- Pay attention and engage; and
- One person speaks at a time. ⚖

WHAT I WISH I KNEW

How Networking is a Game-Changer

By Ayesha Hamilton
Hamilton Law Firm PC

What's the one thing that you are *not* taught in law school? The importance of networking. In fact, as young lawyers, you dive into your first job, swamped by the grunt work that no one else wants to do, barely keeping your head above water as you draft discovery and pleadings surrounded by mounds of paper. Wait,

that was in 1998 in my first job, and while everything is now housed in a neat little laptop or iPad, you get the idea.

I realize now that business development and bar association involvement is essential to any attorney's success, whether in a firm or in your own practice. The bottom line is that no one will share a piece of the pie with you if you aren't helping make the pie larger.

As a woman of color and an immigrant and a new lawyer, I also realize that there were certain networking techniques, events, associations etc. that simply weren't known to me. I didn't realize that networking at bar association events put me in close proximity to judges and other lawyers which might lead to my next position.

Here is what I have learned along the way:

1. Bar association involvement is essential to your success. The more committed your involvement, the better. This allows attorneys across your county or the state to get to know you on a personal level, which invariably leads to referrals.
2. If you claim that your firm is committed to diversity and inclusion initiatives, then that commitment should stretch to action items like taking a young associate to networking events, i.e. showing them how it is done.
3. The only way to get good at networking is to practice. I used to sign-up for lots of business networking events. I would walk into the room, look at all of the people I didn't know and walk back out to my car. Once I realized that everyone there was there to meet each other and that absolutely no one was ever mean to me, I felt more comfortable about joining into a conversation. Before you know it, you are walking into a room where you know others and networking is much easier.
4. Take charge of developing a mentoring relationship. Take the initiative to identify a good mentor for you, buy them lunch and pick their brains. Have more than one mentor to add diversity of perspective.

These are all lessons I learned the hard way and hope you can benefit from my experience. ⚖

WORKING WELL

Cultivate a State of Awareness

Anthony Murgatroyd
Murgatroyd Law Group, L.L.C.

When you invest some time in being mindful of your thoughts, in time you may come to realize that your feelings are in a constant state of flux. This is particularly true in a high stakes situation like a trial. At trial, delivering a good direct examination can bring satisfaction and happiness, which moments later turn to anger and frustration when your adversary responds with a devastating cross-examination.

Being mindful doesn't prevent negative feelings. You may still feel a wave of frustration and anger at times. But it does allow you to catch the rise of frustration and anger within you and more quickly defuse it by identifying those feelings and understanding they are fleeting.

As a lawyer in an adversarial practice, your feelings can be triggered by things that would seem mundane to most lay people, for example, the mail. When you receive mail, is it wise to become absorbed in reading, re-reading, and worrying about motions or letters you don't have the time to address at the moment? While you have to know what's in the mail, it's more

mindful to simply make a mental note of the content of the mail and plan a time review it more extensively and respond. Worrying about the content of a motion you don't have the time to address will eat into your time with family and friends and deplete your resources.

In fact, being mindful also includes being aware of fatigue. I try never to dictate important letters or send important emails near the close of business, as my response may be negatively influenced by my current state of mind, which may be tired or agitated.

The practice of taking a moment to pause, reflect, and notice your breath, the sounds in your environment, or the physical sensations in your body, can help you develop the ability to notice what's happening in the here and now, and not judge it. Cultivating a state of awareness allows you to craft your response to professional and personal matters thoughtfully, rather than through force of habit. ⚖

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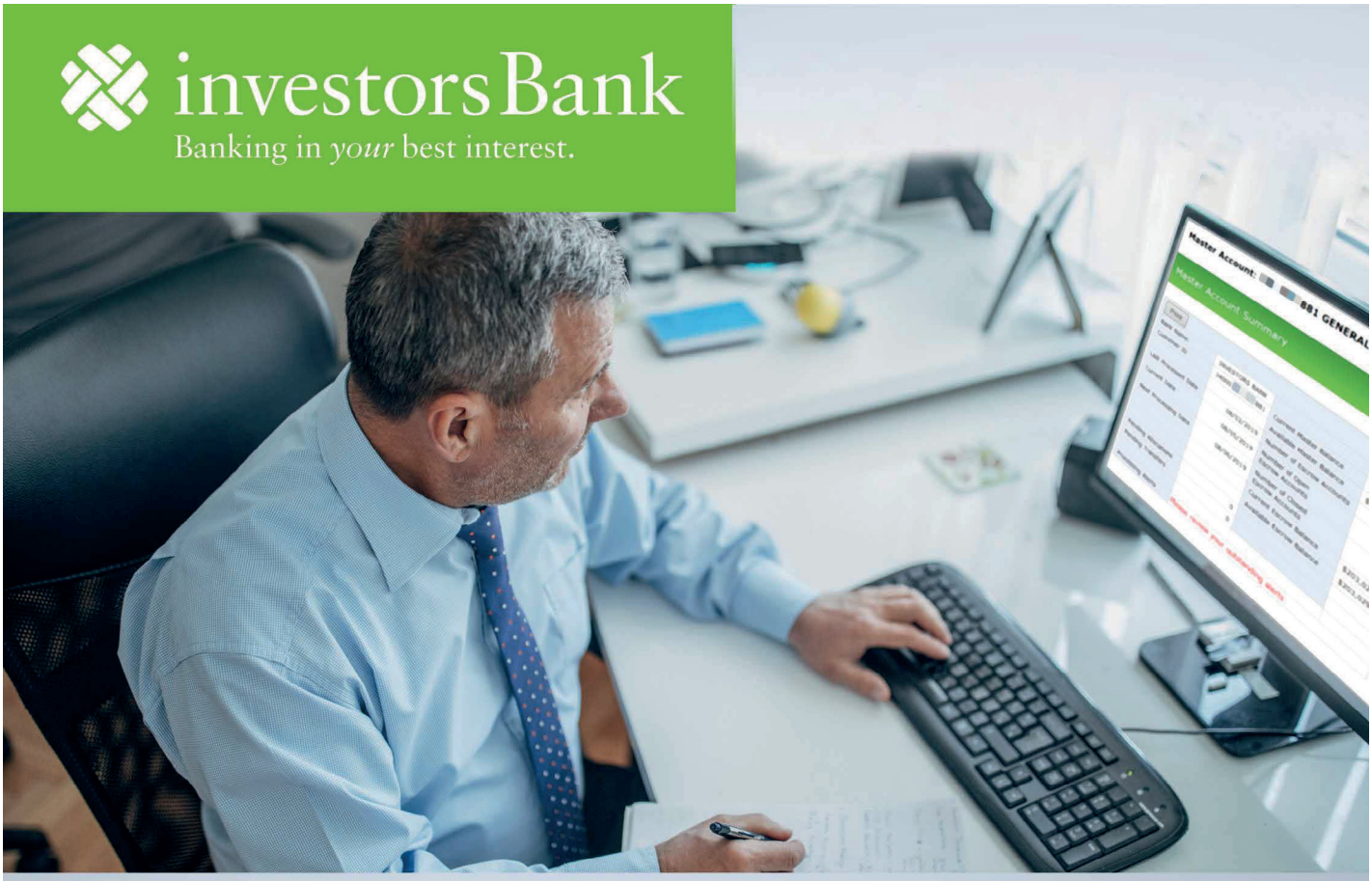

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Amending the Rules Amid a Health Crisis

Developments in Federal Rules of Civil Procedure and the Local Rules and Procedures of the District of New Jersey

By Karen A. Confoy

KAREN A. CONFOY *is a partner in the Litigation Department of Fox Rothschild LLP. She has a diverse practice and regularly represents clients in federal and state court in complex litigations, and before administrative agencies in connection with regulatory and licensing issues. Karen serves on the District of New Jersey Lawyers Advisory Committee.*

Federal practice and procedure changed dramatically over the course of 2020 as the District of New Jersey met the challenge to continue operations and move cases during the surges of the COVID-19 pandemic. The year began without any official changes to the Federal Rules of Civil Procedure or the Local Rules for the District of New Jersey. But in March 2020, following the declarations of a National Emergency and a New Jersey State of Emergency, Chief Judge Freda Wolfson issued the first of several standing orders to be entered over the next many months,[1] imposing emergency safety measures required of all court personnel, attorneys and the public accessing the courthouses.

Keeping step with the directives included in executive orders issued by the New Jersey governor, and following the guidance of the Centers for Disease Control and Prevention, Chief Judge Wolfson issued orders, *inter alia*, limiting access to the district courthouses, mandating compliance with the recommendations of the CDC to reduce the spread of COVID-19, including mandating that all persons wear face

coverings and social distance when in a district courthouse, postponing all in-person trials, suspending all in-person judicial proceedings and extending all deadlines. A series of subsequent standing orders issued throughout the year and into 2021 allowed the Court to continue with some operations, including discovery, pretrial matters, non-jury trials and hearings and emergency operations in a remote environment.

Amendment to Federal Rule of Civil Procedure 30(b)(6)

Despite the impact of the pandemic on court operations, the year ended with the long-discussed amendment to Federal Rule of Civil Procedure 30(b)(6) taking effect on Dec. 1, 2020. This amendment dramatically changes the Rule 30(b)(6) deposition process by imposing a meet-and-confer obligation on the parties. The new process is intended not only to get the parties to work together on narrowing disputes about the scope of the 30(b)(6) deposition, but also to get that process started even before the deposition is noticed.

Rule 30(b)(6) allows a party to notice or subpoena an organization for deposition by identifying the topics upon which testimony will be sought on behalf of the organization, rather than by identifying a particular witness. Historically, the organization noticed or subpoenaed for deposition had the right to object to the deposition or the deposition topics, but had to raise those objections either by motion to quash or for a protective order if it wanted the disputes resolved before providing a witness for the deposition.

Alternatively, the organization could object to the breadth or ambiguity of topics, but then provide a witness who might not be properly prepared to address the topics the serving party intended to be covered by the deposition. As a result, disputes about the topics and the adequacy of the witness would frequently be raised with the Court only after the deposition had commenced or had been completed. Now, with the amendment to Rule 30(b)(6), the party seeking the deposition and the organization to be deposed must engage in a meaningful conference about the topics to be covered during the deposition before the deposition takes place to minimize disputes arising during the deposition testimony.

The amended Rule 30(b)(6) reads as follows (with new language in bold):

> Rule 30. Depositions by Oral Examination
> (b) Notice of the Deposition; Other Formal Requirements.
> (6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. **Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify.** The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

These changes in procedure impact both the approach of the party seeking the 30(b)(6) deposition and the response of the organization being deposed. The rule now requires that the party serving notice or issuing a subpoena for a Rule 30(b)(6) deposition, and the named organization, whether party or nonparty, confer about the topics for the deposition. The rule allows for the discussion to be initiated, if possible, before the notice or subpoena is served. If not commenced before service, the meet and confer must commence promptly after service, before the deposition takes place. Although there is no obligation that the parties resolve all issues, they must participate in the process in good faith, and must continue as long as necessary to eliminate as many issues about the deposition as possible.

The amendment also requires counsel issuing a 30(b)(6) subpoena to a nonparty organization to notify the nonparty of its duty to confer and to designate each person who will testify. In this regard, the Administrative Office of the U.S. Courts has issued a new AO Form 88A, the form Subpoena to Testify at a Deposition in a Civil Action. The form subpoena has been revised to conform to the new requirements of Federal Rule 30(b)(6), and now includes the following new language (in bold):

> "YOU ARE COMMANDED to appear at the time, date and place set forth below to testify at a deposition to be taken in this civil action. **If you are an organization, you must promptly confer in good faith with the party serving the subpoena about the following matters, or those set forth in the attachment**...."[2]

Purposes of the Rule 30(b)(6) Amendment

The new Rule 30(b)(6) procedure is designed to address three areas of concern about deposition practice under this rule.

First, as explained in the Committee Note,[3] the amendment addresses long-expressed concerns about "overlong or ambiguously worded lists of matters for examination" that frequently lead to protracted proceedings to resolve objec-

tions about both the scope of the topics and whether a witness is, or could possibly be, prepared to testify. Although the rule has always required particularity in describing the topics for the deposition, the use of broadly-defined terms and catch-all phrases such as "referring or relating to" and "including, but not limited to" has become a more standard practice. Such use however, will no longer be acceptable. The serving party's discretion to describe the deposition topics is now limited by the meet-and-confer process as the serving party must be responsive to requests from the entity being deposed for more specifically tailored topics.

Given that the testifying organization now has input into the deposition topics, the party seeking the deposition should consider the value of spending time up front, before serving the notice or subpoena or before notifying the organization of the deposition, to carefully draft the descriptions of topics they want to cover during the deposition. Clarity and specificity in the descriptions will help frame the meet and confer, and minimize objections the organization might raise.[4]

Second, the new procedure is designed to address the common objection that the individual designated for the testimony was not adequately prepared to serve as a witness on the designated topic. Presumably, a productive meet and confer held before the deposition will narrow or clarify the scope of each deposition topic. This will make it more likely that the witness being deposed is adequately prepared, and will reduce the opportunity for the noticed organization to attempt to avoid providing direct testimony on a designated topic on the grounds that the topic was not covered by an ambiguously or broadly worded topic. Discussing topics in advance will also make it less likely that the party taking the deposition will attempt to question a witness on subject areas not discussed during the meet and confer.

Third, the new meet-and-confer requirement was also designed to advance the overall and continuing interest in making discovery a collaborative and meaningful process consistent with the 2015 amendments to Rules 1 and 26(b)(1). As emphasized in Rule 26, counsel should focus on whether the discovery sought is proportional when considering the needs of the case, including the importance of the information sought in resolving the issues raised in the case, and whether, on balance, the benefit of the discovery sought outweighs the burden on the party or non-party organization being deposed.[5]

Impact of the Rule 30(b)(6) Amendment on DNJ Practice

As many practitioners are aware, District of New Jersey Local Rule 37.1 has long required that counsel engage in a meaningful meet-and-confer process before raising any discovery dispute with the Court. As matter of practice, counsel are encouraged to identify potential disputes concerning all discovery related issues as early as possible in the litigation, including those related to deposition practice. Counsel must demonstrate that a good faith effort has been made to resolve an issue before presenting it to the Court.[6]

Although not specifically included in any Local Rule, the judges in this District have consistently ruled that when an organization produces a witness for a Rule 30(b)(6) deposition who is unprepared to testify on designated topics, the organization may be subject to sanctions.[7] Notably, the amendment to Rule 30(b)(6), as initially proposed, required the parties to meet and confer about the identity of designated witnesses as well as about topics. That proposal was rejected, and it remains within the sole discretion of the party receiving the deposition notice or subpoena to designate the individual who will testify in response to each topic. However, nothing in the rule precludes the parties from agreeing to discuss the identity of witnesses in advance of the deposition. Given that, as a matter of practice in this district, if counsel has a well-founded concern about a designated witness, they should raise that concern with counsel for the testifying entity as part of the meet and confer.

Neither the Rule 30(b)(6) amendment nor the Local Rules require that the meet-and-confer process resolve all disputes between the parties, but instead require only that the issues be narrowed to the extent possible before raising a dispute with the Court. Thus, in cases in which counsel knows at the outset of the case that they will be seeking a deposition from an organization, counsel should consider including a proposal in the joint discovery plan to address the "matters for the [Rule 30(b)(6)] examination"[8] and for bringing unresolved disputes to the magistrate judge before the deposition is held.

2021 Amendments to Local Civil Rules 5.3, 9.3, 67.1 and 104.1, Appendix S and Local Patent Rule 2.2

Local Rule 5.3 (Confidentiality Orders and Restricting Public under CM/ECF Access) has been amended to clarify deadlines and procedures for sealing confidential materials. Subparagraph (c)(1) now provides that when filing a motion that relies on designated confidential materials, only the portion of the materials actually cited, or as are necessary for context, should be included in the filing.[9] The deadlines for filing a motion to seal confidential material referenced in a motion, a letter application and a transcript have been clarified in subparagraph (c)(2),[10] and, deadlines and procedures for filing redacted and unredacted versions of documents containing confidential and non-confidential information are included in sub-

paragraph (c)(4).[11] Of note, as well, is the inclusion of an explanatory comment to subparagraph (b)(6) to remind parties that, except in extraordinary circumstances such as an initial filing on order to show cause, materials cannot be filed under seal unless there is an existing confidentiality order with an express provision for filing under seal, or other applicable court order.[12]

The Appendix S form Discovery Confidentiality Order is revised to state specifically that any document designated by a party or non-party and included in any court filing, shall be filed under seal in accordance with Local Rule 5.3.[13]

Local Rule 9.3/ Local Patent Rule 2.2 (Confidentiality) is updated to eliminate the requirement that the parties support a request for entry of a consent confidentiality order with a separate supporting sworn statement.[14] This change simply conforms the practice in patent cases to the requirements of Local Rule 5.3.[15]

Local Rule 67.1(a) (Deposit in Court and Disbursement of Court Funds) is clarified to explain that the prohibition on sending money for deposit into the Court's registry does not apply if such deposit is required by statute.[16]

Local Rule 104.1 (Discipline of Attorneys) is amended in several significant respects. The Local Rule now specifies that the standard of proof previously referred to as "sufficient" evidence is clear and convincing evidence.[17] The Local Rule also now provides that the district court has the authority, on notice, to impose additional or harsher discipline than that imposed by another jurisdiction considering the same conduct,[18] and it enumerates the types of discipline that are available to the court.[19] Amendments also address: confidentiality restrictions on the investigation file and other papers filed in connection with the disciplinary action;[20] the handling of depositions;[21] rights of representation;[22] the hourly rate used to calculate fees for an attorney appointed to investigate, prosecute or defend a disciplinary action,[23] and public disclosure[24] and inter-jurisdictional reporting of disciplinary actions.[25] ⚖

Endnotes

1. All COVID-19 related orders, procedures and changes in the court's operations are compiled and updated on the District of New Jersey website at https://www.njd.uscourts.gov/covid-19-orders-procedures-and-changes.
2. AO Form 88A can be accessed through the District of New Jersey website at uscourts.gov/services-forms/forms.
3. See Fed. R. Civ. P. 30(b)(6) Committee- Notes on Rules-2020 Amendment
4. The amendment to Rule 30(b)(6) does not preclude a party from objecting to the notice or subpoena in writing, as otherwise permitted by the Federal Rules and applicable Local Rules.
5. Fed. R. Civ. P. 26(b)(1)
6. L.Civ. R. 37.1(b)(1)
7. See In re Neurontin Antitrust Litig., 2011 U.S. Dist. LEXIS 6977 (D.N.J. Jan. 25, 2011), aff'd 2011 U.S. LEXIS 62032 (D.N.J. June 9, 2011)(corporate party assessed fees and costs for failure to produce a witness properly prepared to testify).
8. Fed. R. Civ. P. 30(b)(6)
9. L.Civ.R. 5.3(c)(1)
10. L.Civ.R. 5.3(c)(2)(ii)(a)
11. L.Civ.R. 5.3(c)(4)
12. *Comment* to L.Civ. R. 5.3(b)(6)
13. L.Civ. R., Appendix S, paragraph 9
14. L.Civ. R. 9.3/L.Pat.R. 2.2
15. L. Civ. R. 5.3(b)(1), (2)
16. L.Civ. R. 67.1(a)(1)(A).
17. See L.Civ. R. 104(e)(5), (6) and (7)
18. L.Civ. R. 104(b)(4)
19. L.Civ. R. 104(d)(1)
20. L.Civ. R. 104(e)(3)
21. L.Civ. R. 104(e)(4)(B)(i),(ii)
22. L.Civ. R. 104(e)(12)
23. L. Civ.R. 104(k)
24. L.Civ. R. 104(e)(15)
25. L.Civ. R. 104(l)

The Motion *In Limine*

New Rule Provides More Evidentiary Parameters

by Dominic V. Caruso

Like much of the legal lexicon, '*in limine*' is a Latin phrase. The literal translation is: "on or at the threshold."[1] Customarily presented at the onset of a trial, a motion *in limine* is in reality "a pretrial request that certain inadmissible evidence not be referred to or offered at trial."[2] It has been suggested that the term is a misnomer because it describes the timing of the motion rather than its objective.[3] Subscribers to that notion might find '*ut excludere*' to be a more descriptive term. Be that as it may, we continue to use the commonly accepted chronocentric nomenclature.

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Background to *in limine* Motions

Prior to 2015, there was no specific rule governing *in limine* motions. It was quite common for attorneys to make motions *in limine* on the day of trial and, in many cases, those motions sought to dispose of any remaining issues and avoid a trial altogether. That practice was virtually eliminated with the publication of *Seoung Ouk Cho v. Trinitas Regional*, 443 *N.J. Super.* 461 (*App. Div.* 2015), cert. den., 224 N.J. 529 (2016). This medical malpractice action was brought by an estate administrator alleging that the defendants' failure to follow accepted standards of care caused the patient to suffer cardiac arrest which resulted in his death. By the time the matter came to trial, the claims against all defendants other than the primary care cardiologist had been dismissed by way of summary judgment motions.[4] On the day before

According to the Supreme Court's Civil Practice Committee, the new rule is intended to foster uniformity, discourage last-minute filing of motions and provide a prompt and efficient method of resolving evidentiary issues.

trial, defense counsel filed a 260-page motion *in limine*. Plaintiff responded with a five-page submission in opposition. After oral argument, and despite expressing initial reluctance, the trial court granted defendant's motion and dismissed the case.[5]

In reversing the granting of the defendant's motion *in limine* and dismissing all claims, the appellate tribunal concluded that defendant Park's *in limine* motion was actually a summary judgment motion in disguise. Thus, because the defendant did not comply with the notice requirements of Rule 4:46-1, the due process rights of the plaintiff were violated and it was an abuse of discretion for the trial court to dismiss the suit.[6]

The *Cho* decision informs us that a motion *in limine* "…is not a summary judgment motion that happens to be filed on the eve of trial."[7] The appellate court went on to rule that a motion which, if granted, would result in the dismissal of the cause of action or suppression of the defenses, must be heard at least 30 day prior to the first scheduled trial date.[8]

Following the publication of *Cho*, it became virtually impossible to successfully argue the merits of an *in limine* motion at the start of, or during a trial.[9]

It was long felt that a rule to establish uniform procedures for submitting, serving and responding to motions *in limine* was needed. Such a rule was proposed 16 years before *Cho*, but was not incorporated in the so-called 'Best Practices' rule amendments.[10] At that time, the bar argued against it, contending that the restriction would strip litigators of their ability to determine the timing of crucial motions to best suit their clients' needs.

As a result of the holding in *Cho,* a new rule was created. Rule 4:25-8, which came into effect on Sept. 1, 2020, codifies various deadlines, limits on briefing, and other requirements for *in limine* motions going forward.[11]

New *in limine* Rule

According to the Supreme Court's Civil Practice Committee, the new rule is intended to foster uniformity, discourage last-minute filing of motions and provide a prompt and efficient method of resolving evidentiary issues. [12]

Rule 4:25-8 clearly defines a motion *in limine* as:

> …an application returnable at trial for a ruling regarding the conduct of the trial, including admissibility of evidence, which motion, if granted, would *not* have a dispositive impact on a litigant's case.[13]

By limiting its application to non-dispositive requests for relief, the rule effectively negates any attempts to disguise an application to bar an expert's testimony where that testimony is essential to the prosecution (or defense) of the case as a trial motion in order to circumvent the notice requirements of Rule 4:46-1.

Under the new *in limine* rule, a motion addressed to the conduct of a trial, including admissibility of evidence must be incorporated into the litigant's pretrial exchange.[14] As a result, the deadlines for filing, responding to and deciding *in limine* motion are prescribed by Rule 4:25-7(b).[15] In cases that have not been pre-tried, the time frame is seven days prior to trial.[16] The rule is silent on the timing of the motion in cases where pretrial conferences have been conducted, presumably because the pretrial order would dictate the timing of any pretrial motions.[17]

A separate *in limine* motion must be presented for each substantive issue.[18] There are also restrictions on the format and length of the briefs, i.e., maximum of five pages, which must also comply with line, spacing and font-size requirements.[19]

The rule also compels a "timely" ruling on the motion(s) by the court.[20] While the rule does not require the court to make a ruling prior to the commencement of the trial, it does direct the court to provide instructions to counsel. Specifically, the court must provide guidance to counsel regarding what, if anything, they are allowed to say to a jury concerning the issues raised in the pending motion in the event that a ruling cannot be made prior to the start of trial.[21]

Impact on Litigation

Fortunately, litigators are afforded some flexibility and discretion in the conduct of a trial. For example, a party is still able to either move into evidence, or object to the admission of evidence, as the case might be, despite not making a motion *in limine* prior to trial. Section (c) of the rule states that "[t]he failure to submit a motion *in limine* under this rule shall not preclude a party from seeking to admit, or objecting to the admission of evidence during trial."[22] One might wonder how this section can

be reconciled with the underlying intent of the rule. Indeed, since a litigant has the right to object to the introduction of evidence at trial, why take the trouble to make a motion *in limine* prior to trial? The comment to section (c) of the rule gives us one possible reason: To avoid uncertainty by resolving the question prior to commencement of the trial.[23] It is important to remember that section (c) of the rule merely *allows* a party to request inclusion or exclusion, it does not guarantee the relief sought. But the best reason not to wait is this: By definition, a motion *in limine* is not a *dispositive* motion, thus Rule 4:25-8 (c) does not apply to any motion that would result in a dismissal or suppression of all defenses. Under the holding in *Cho* dispositive motions are, for all intents and purposes, motions for summary judgment and are, therefore, require to comply with the 30-day notice requirement in Rule 4:46-1.

Rule 4:25-8 (d) provides flexibility to the trial judge in determining evidentiary issues that may be raised before or during the conduct of the trial. Section (d) states: "A trial court's ruling on a motion in limine shall not preclude the court from reconsidering or modifying that ruling, *sua sponte* or at the request of a party, based on later developments at trial."[24] This seems to suggest that a litigant may renew an *in limine* motion at any time prior to verdict.

Similarly, the denial of a motion *in limine* should not discourage or preclude defense counsel from making a motion following the close of the plaintiff's case, i.e., moving for dismissal pursuant to Rule 4:37-2(b) or Rule 4:40-1.

Conclusion

Will a litigator ever be confronted with circumstances which compel the granting of a motion *in limine* on the threshold of, or even during, a trial? Probably. One can envision circumstance in which a witness testifying at trial unexpectedly discloses facts that would alter the admissibility of certain evidence; or an expert might volunteer, for the first time while on the stand, heretofore undisclosed opinions. Under these conditions and in the event that something like that happens during the trial, it is crucial to move for appropriate relief, including dismissal or suppression if necessary.

When the above example occurs and preclusion of certain evidence or testimony rendering continuation of trial unnecessary is likely, it is important to remember that Rule 4:25-8 is not applicable. If the movant *could* have reasonably foreseen the need to exclude evidence but nevertheless failed to follow the procedure set forth in Rule. 4:46-1, it would not be considered an abuse of discretion for the trial judge to deny such motion as untimely. ⚖

Endnotes

1. *Black's Law Dictionary*, 806 (4th ed. 1968)
2. *Black's Law Dictionary* 1109 (9th ed. 2009)
3. *Seoung Ouk Cho v. Trinitas Regional* , 443 *N.J. Super.* 461, 470 (*App. Div.* 2015), cert. den., 224 N.J. 529 (2016)
4. *Id.* at 466.
5. *Id.* at 468.
6. *Id.* at 471-472. Rule 4:46-1 provides, *inter alia,* that motions for summary judgment must be returnable no less than 30 days prior to trial.
7. *Id.* at 471.
8. *Id.*, citing Rule 4:46-1.
9. *See, e.g., L.C. v. M.A.J.*, 451 *N.J. Super.* 408 (*App. Div*. 2017); *Moody v. The Voorhees Care and Rehabilitation Center, et als.*, A-5561-18 (*App. Div.* 2021) (Unpublished); *Schwartz v. Cooper Levenson,* A-3187-18 (*App. Div.* 2020) (Unpublished); *Yoon v. Effah*, A-5908-17 (*App. Div.* 2019) (Unpublished).
10. 1999 Report of the Conference of Civil Presiding Judges on Standardization and Best Practices, Recommendation 5.3.
11. Pressler & Verniero, Current N.J. Court Rules (GANN 2020 ed). Comment to R. 4:25-8 at 1339.
12. *Id.*
13. *R.* 4:25-8 (3) *(emphasis added).*
14. *Id.* - Exchange of Information.
15. *See, R.* 4:25-7(b) and Appendix XXIII "Pretrial Information Exchange." Paragraph 4.
16. *Id.*
17. *See, R.* 4:25-1(b) (11).
18. *R.* 4:25-8 (3).
19. *Id.* Citing *R.* 1:6-5.
20. R. 4:25-8 (a) (4).
21. *Id.*
22. R. 4:25-8 (c)
23. Pressler & Verniero, Current N.J. Court Rules (GANN 2020 ed). Comment to R. 4:25- 8(c) at 1339.
24. *R.* 4:25-8 (d).

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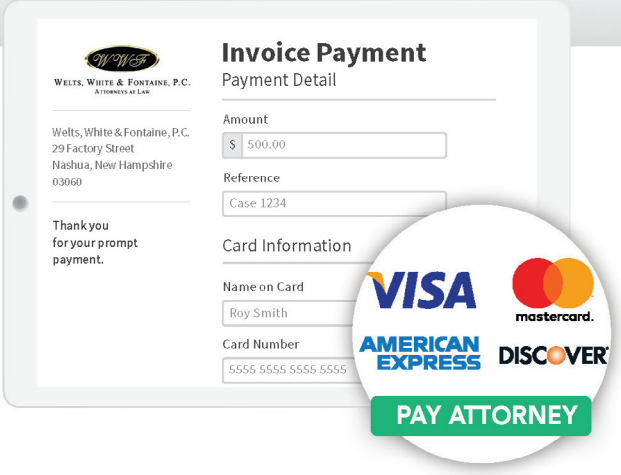

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TRIAL ADVOCACY in the Age of COVID-19

A Roadmap to the Effective Creation and Preservation of the Record for Appeal

By Diana C. Manning and Kyle A. Valente

Within the last year, courts, litigants and members of the bar were compelled to adapt to an ever-evolving legal landscape in the wake of COVID-19. The practice of law itself soon acclimated to include remote depositions, virtual hearings, and Zoom video conferences. In the context of trial advocacy, the pandemic has amplified existing challenges of creating and preserving an effective record for trial lawyers.

In response to the challenges presented to the judiciary, the New Jersey Supreme Court directed "the implementation of a two-phase approach to virtual civil jury trials during the pandemic" in its Jan. 7, 2021, Notice and Order.[1] The Court's order authorizes civil jury trials to be held by virtual format across the state with no consent requirement as of April 5, 2021.[2]

It is against this backdrop that discussion is warranted for trial lawyers navigating the new normal. A roadmap to effectively bolstering the record for appeal necessarily involves anticipating issues during discovery, pretrial proceedings and through trial. The introduction of remote technology platforms and the absence of in-person proceedings do not obviate the basic principles underlying record preservation. Trial lawyers must keep abreast of rule changes and amendments while taking care to adequately develop the factual record.

Depositions in a Remote World

While remote depositions have now become commonplace, lawyers continue to struggle with effective use of remote deposition technologies. Depositions provide parties with the opportunity to elicit significant admissions and to confront witnesses with critical documents. It is this well-developed record that provides a party with the best opportunity to establish a lack of disputed material fact in order to obtain summary judgment., or admissions for use at trial.[3] In practice, however, the use of exhibits has been greatly reduced given the challenges of remotely presenting documents to witnesses. This lack of formality, not likely present if the deposition were held in person, can easily lead to confusion or open the door to the creation of disputed facts if there is not a clear record of which document a witness was reviewing during the course of a remote deposition.

As lawyers have adapted, so too have court reporters responsible for transcribing depositions. Most court reporters offer tutorials for attorneys in presenting exhibits and effectively using their remote technologies. Most will also assist in pre-marking and presenting exhibits that a lawyer intends to use at a deposition. The extra layer of preparation necessary to effectively use remote video technology is just as integral to a successful deposition as the attorney's familiarity with the facts of a case.

The Record and Scope of Appellate Review

Given that virtual civil jury trials will be replacing traditional in-person courtroom trials and hearings—at least for a time—lawyers must be aware of the applicable rules of evidence and the development of the trial court record.[4] Lawyers may be traversing a new technological landscape for purposes of remote proceedings, but must still raise objections and legal arguments as if in a pre-pandemic, physical courtroom. Although the setting is remote, the record remains limited by the contents set forth in Rule 2:5-4(a). Lawyers must ensure that any objections, discussions, and agreements are placed on the record by the court reporter or appropriate recording platform. A failure to do so runs the risk of the issue being waived on appeal. An appellate court cannot appropriately review that which is not recorded in the trial record.[5]

Similarly, those issues not properly raised below are precluded from being raised on appeal.[6] The practice point to remember is that an objection must be explicit, on the record, and made in a timely fashion to be preserved.[7] Likewise, where a party does not object to evidence at trial, any objections to the admissibility of the evidence on appeal will result in the application of a plain error standard of review.[8] Generally, the Appellate Division will not consider points not preserved below as required by the Rules of Court.[9] Indeed, the Appellate Rules now require the party raising an issue to expressly identify where each point raised on appeal was raised and ruled upon in the trial court.[10]

Maintaining the Virtual Record

Remote proceedings present challenges in adhering to principles common to trial advocacy. The remote nature of the proceeding should not take away from the formalities of the proceeding, and counsel should strive to maintain a level of attention to detail as if present in court. For example, while it may be cumbersome to request a "virtual sidebar," counsel should not avoid this virtual walk to the bench or else risk losing the ability to raise the issue on

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appeal. Unfortunately, moments of "lag" or frozen screens are common; but, when this occurs, counsel must ensure that the record reflects what occurred, and that any rulings by the Court are heard and reflected on the record. Although expensive, obtaining a daily transcript of remote proceedings may assist in ensuring that testimony is being accurately preserved, or to ensure that critical rulings are reflected in the record.

All practitioners recognize that significant colloquy may occur with the Court while formally "off-the-record" in chambers. When in court, it is critical that any arguments and rulings made in this context are placed on the record once counsel return to the courtroom. The same is true of virtual proceedings. Whether counsel may engage in telephone conferences with the Court, or even engage in remote discussions that are not necessarily part of the formal record, it is imperative that these discussions and any rulings arising from them be memorialized on the record to preserve them for appeal. The same is true of arguments raised in pretrial filings or *in limine* motions. The remote nature of the proceeding should not truncate the parties' ability to fully develop the arguments raised in written submissions to ensure they are fully part of the record.

The failure to raise or argue an issue at trial will likely subject the appealing party to a plain error standard of review.[11] This high standard requires the appellate court to disregard any error or omission "unless it is of such a nature as to have been clearly capable of producing an unjust result."[12] The failure to object "suggests that trial counsel perceived no error or prejudice, and, in any event, prevented the trial judge from remedying any possible confusion in a timely manner."[13]

Counsel should also be mindful that preserving even minor issues is crucial to preserving any appellate arguments premised on cumulative error. The cumulative error doctrine recognizes that "the cumulative effect of small errors may be so great as to work prejudice."[14] While appellate courts will not simply "count mistakes,"[15] the failure to adequately preserve such issues will preclude consideration of a cumulative error argument.

Motions *in Limine* and Pretrial Exchange

Practitioners should be aware of the Court's recent adoption of Rule 4:25-8 governing *in limine* motions and pretrial exchange procedures. The rule defines a motion *in limine* "as an application returnable at trial for a ruling regarding the conduct of the trial, including admissibility of evidence, which motion, if granted, would not have a dispositive impact on a litigant's case."[16] Its adoption comes in the wake of much needed clarification around the function of *in limine* motions and to articulate concrete procedural standards for civil practitioners moving forward.

Rule 4:25-8 is a codification of the general proscription set out in *Cho v. Trinitas Regional Medical Center*, which held that a party may not file a dispositive motion in the form of an *in limine* motion shortly before trial.[17] The new rule authorizes the practice of filing such motions and "defines and sets forth procedures for submitting, serving and responding to motions *in limine*, including various deadlines, page limits for briefs, a requirement for timely rulings by the trial court, the consequences of noncompliance, and preservation of rights."[18]

Notably, Rule 4:25-8(a)(1) makes clear that a dispositive motion shall be filed in a timely manner in accordance with the rules governing summary judgment motions.[19] Lawyers wishing to file *in limine* motions are also required to submit them as "part of the pretrial exchange subject to the timeframes of *R.* 4:25-7(b)."[20] Given the significance of the pretrial conference under the Court's Jan. 7, 2021 order authorizing virtual civil jury trials, the Court's ruling on how the trial should proceed should be clearly detailed in the pretrial order and any discussion of the issues should be done on the record for preservation purposes.[21]

Ethics in a Virtual World

While few could have foreseen the breadth and duration of the COVID-19 pandemic, the use of remote technology has become the rule, and most courts will no longer tolerate a reluctance to use these technologies moving forward. Nor has the "informality" of remote proceedings allowed for the relaxation of the ethical requirements that guide each lawyer's practice.[22] Given the prevalence of remote technologies during the pandemic, one must reasonably assume that use of these technologies will likely fall under the general ethical duty of competence imposed on all lawyers.[23] Further, lawyers should conduct themselves no differently in a remote proceeding than they would if personally appearing in court. Unfortunately, anecdotes about attorneys appearing in court from bed, or without professional attire, have become commonplace, as some have improperly equated the perceived informality of a remote proceeding with the informality of daily life.[24]

Conclusion

Until our nation sees relief from COVID-19, the business of the courts and the lawyers who appear before them will live online. Courts and lawyers have performed admirably in adapting to unprecedented circumstances, but all must be mindful of the unique challenges presented by the use of remote proceedings. The practices that have led to success in the courtroom must be adapted to the virtual courtroom or conference room to ensure that a case's record is competently created and preserved. The professional obligations of lawyers to the justice system and the clients they serve require adaptation of trial practice to a remote world. ⚖

Endnotes

1. *New Jersey Supreme Court Notice and Order to the Bar*, "COVID-19 – Virtual Civil Jury Trials" (Jan. 7, 2021).
2. *Supra*, at Note 1.
3. *R.* 4:46-2(c).
4. *Supra*, at Note 1.
5. *See Yoon v. Effah*, 2019 N.J. Super. Unpub. LEXIS 1583, at *8-9 (App. Div. July 10, 2019)("We do not know what was discussed or agreed on in chambers because no record of that conference was made thereafter by the trial court. Without any of this, we cannot know with certainty what the court considered and relied on in making its decision.")).
6. *R.* 1:7-2. *State v. Hernandez*, 334 N.J. Super. 264, 268, n.1 (App. Div. 2000), *aff'd as mod.*, 170 N.J. 106 (2001)(objection to proposed evidence raised and overruled at pretrial hearing preserves question for appeal); *cf. Kurak v. A.P. Green Refactories Co.*, 298 N.J. Super. 304 (App. Div.), *certif. denied*, 152 N.J. 10 (1997)(failure to articulate objection that jury instruction was inconsistent with prior stipulation precluded argument of point on appeal)).
7. *R.* 1:7-2. *State v. T.J.M.*, 220 N.J. 220, 231 (2015)(objection not clearly raised when counsel made only a "tepid complaint" before dropping the issue).
8. *R.* 2:10-2.
9. *State v. Hernandez*, 334 N.J. Super. 264, 268, n.1 (App. Div. 2000), *aff'd as modified*, 170 N.J. 106 (2001)(objection to proposed evidence raised and overruled at pretrial hearing preserves question for appeal).
10. *R.* 2:6-2(a)(1)("It is mandatory that for every point, the appellant shall include in parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located or if the issue was not raised below a statement indicating that the issue was not raised below.").
11. *State v. Scherzer*, 301 N.J. Super. 363, 421 (App. Div. 1997)(applying plain error standard of review where defendant never raised objection at trial).
12. *R.* 2:10-2.
13. *Bradford v. Kupper Assocs.*, 283 N.J. Super. 556, 573-74 (App. Div. 1995).
14. *Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22, 53 (2007).
15. *Id.*
16. *R.* 4:25-8(a)(1).
17. 443 N.J. Super. 461 (App. Div. 2015), *certif. denied*, 224 N.J. 529 (2016).
18. Pressler & Verniero, *Current N.J. Court Rules*, Comment *R.* 4:25-8 (GANN 2021).
19. *R.* 4:25-8(a)(1); *R.* 4:46.
20. Pressler & Verniero, *Current N.J. Court Rules*, Comment *R.* 4:25-8 (GANN 2021).
21. *Supra*, at Note 1.
22. *See* Pennsylvania Bar Association, *Ethical Obligations for Lawyers Working Remotely*, Formal Opinion 2020-300 (April 10, 2020).
23. *See* Comment 8 to Model Rule of Professional Conduct 1.1 (To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.).

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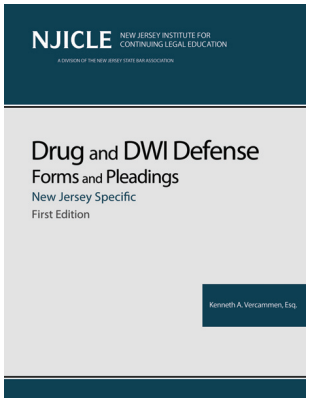

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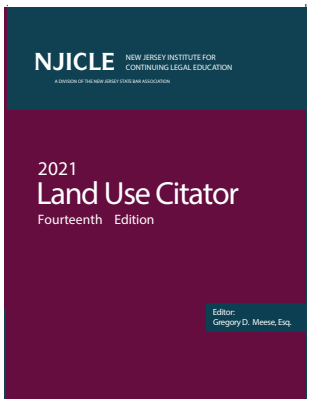

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Technology for Trial Attorneys During the Advent of Hybrid and Virtual Trials

By Victor A. Afanador

Lawyers litigate cases for an extensive period of time prior to entering a courtroom to present their evidence before an in-person judge and jury. The current COVID world has taught us that not everything can be in person and trial attorneys must now focus on ways to use technology to succeed in their presentations. Most courthouses, like the United States District Court for the District of New Jersey, highlight their capability to support courtroom technology.[1] Gone are the days, however, of using a lowly ELMO document projector that was introduced in 1988 to publish materials to the jury.[2] Technology and this pandemic have transformed our workplaces and forced the most conservative of industries to adapt in order to continue business.[3]

As a result of the pandemic and the Coronavirus Aid Relief and Economic Security Act, previously underused video-conversation platforms such as Zoom, FaceTime, Skype, WebEx, and Microsoft Teams have now become office mainstays in our legal industry,[4] and they have essentially replaced all in-person meetings and legal proceedings.[5] Standing orders have been issued to outline the parameters of how proceedings can be conducted in these formats.[6] The COVID-19 Pandemic has created a challenge in our industry with how to operate jury trials. We are now forced to confront our fears and adopt the technology to adapt the way we present our cases before a jury.

Many of our Superior Court of New Jersey Vicinages have commenced training on virtual trials as evidenced by several Continuing Legal Education classes being offered within the last year to prepare trial practitioners for the commencement of virtual jury trials. The training was a foreshadowing of things to come. On January 7, 2021, in a notice to the New Jersey State Bar Association, our Chief Justice of the

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New Jersey Supreme Court, Stuart Rabner, issued an order commencing virtual jury trials by Feb. 1, 2021, in five vicinages with consent of all parties.[7] On April 5, 2021, that order was extended to all counties in New Jersey.[8] The Court, with the assistance of the Administrative Office of the Courts, has even issued a memo to the Assignment Judges and Civil Presiding Judges outlining best practices on electronic evidence in virtual civil jury trials.[9]

If there was ever a time to focus on the technology behind electronic discovery and electronic evidentiary presentations, it is now. The memo circulated to the bar by Glen A. Grant, Acting Administrative Officer of the New Jersey Courts, details the electronic formats that should be used in the presentation of evidence for documents, images, video and audio recordings.[10] Thus, now is the time to grapple with our fears as trial attorneys and try something new in presenting your case to a virtual jury since everyone will be learning the new system. The Judiciary itself is aware that it makes little sense to start trials if the trial attorneys and litigants are not familiar with the new virtual or hybrid virtual system. The key is familiarity and a comfort level with the new jury trial system for the practitioners and judiciary.

The Virtual Tech Available

Depending on your budget, you can enlist the services of many technologically advanced litigation/trial support and court reporting companies to facilitate your presentation. The virtual deposition should be your first step in outlining your needs for trial preparation. Some of these companies can assist you in evaluating what new presentation avenues are available for you beyond the ELMO. Mike Bruzgis, Director of Business Development at TransPerfect, a litigation support company, stated in an interview, "We did not have to change a lot from how we were already set up."[11] Prior to the pandemic, TransPerfect was already doing virtual depositions and providing document review support, and kept staffing contract lawyers to help reviewing documents through document review platforms.[12] Thus, "[w]hen COVID hit last year we converted reviews to an entirely virtual environment."[13]

TransPerfect's main concern was setting up everyone to work remotely and still provide their clients with expected security protections.[14] Their professionals and IT department set up ways to ensure there are no security breaches of client information.[15] They even created their own live time document sharing platform called TransCend that provides an attorney in a video deposition with "more robust control" over the exchange of exhibits with the witness in a virtual setting.[16] This is less cumbersome than the screen sharing function on other video platforms, and it allows a witness to flip through the documents once they have been released just like in a live deposition or trial setting.[17] This may be the type of technology that can assist the virtual jury trial setting once we are up and running.

Companies like TransPerfect have been assisting in Electronically Stored Information (ESI) discovery and deposition support services during the pandemic. In the past year, they have educated even more lawyers on practicing law remotely.[18]

Virtual and Socially Distant Courtrooms

The advent of the hybrid or virtual jury trial is yet another journey many of us have just started to embark upon as a result of COVID-19. Paul Null, II, partner of Precise, another litigation support services company, has found a way during the pandemic to help state Courts develop their virtual and socially distant courtrooms.[19] In a conversation with Null, I learned that there are various ways to set up a courtroom that respects social distance requirements, yet facilitate an in-person proceeding with a live jury.[20] However, this all depends on space and your courthouse real estate.

Precise has conducted a wide range of proceedings, including fully remote trials and arbitrations, socially distanced in-person jury trials, and hybrid remote courtrooms where the judge may be physically on the bench, but the witnesses and experts are remote.[21] As expected, the technology is not free, with some permanent arrangements ranging from $9,000–$13,000 per courtroom.[22]

Attorney Preparation

Despite these projects, many of us are wondering when the full online jury trials will really start and how do we, as trial lawyers, prepare for and present them. There are outlets available to foster dialogue on the subject, such as the Online Courtroom project. [23] This is a non-profit task force consisting of litigation support companies, trial consultants, and trial research individuals. [24] During the last year they have delivered free materials and presentations on how to navigate through a virtual trial process.[25] In fact, last November they hosted a free online summit.[26] Even some Vicinages, like Passaic County and its local Bar Association, have been on the forefront of the hybrid and virtual jury trial for over a year by educating their local trial attorneys on the available technology.[27] They have even prepared mock direct and cross-examination to take the sting out of a remote formal setting and provide confidence in practitioners. The result is that the technology was embraced by the judiciary and the bar.[28]

The reality of the virtual jury trial is here, but we must recognize its limitations in keeping a jury's attention and remaining persuasive in the process because "Zoom fatigue" is a real thing.[29] Trial attorneys need to be prepared and trained to present over video so as to avoid juries going into the…zzzzzzzzz. ⚖

Endnotes

1. https://www.njd.uscourts.gov/courtroom-technology
2. elmousa.com/about/
3. forbes.com/sites/williamarruda/2020/05/07/6-ways-covid-19-will-change-the-workplace-forever
4. *Id.*
5. The United States District Court for the District of New Jersey Third Extension of Amended Standing Order 2020-06 Honorable Chief Judge Freda L. Wolfson found at https://www.njd.uscourts.gov/sites/njd/files/3d_Ext_Amended_SO_20-06%28CARES%20Act%29_Stamped.pdf ; *see also* H.R. 748, CARES Act, Public Law 116-136
6. *Id.*
7. njcourts.gov/notices/2021/n210107a.pdf
8. *Id.*
9. *Id.*
10. *Id.*
11. Telephone interview with Mike Bruzgis, Director, Business Development Transperfect (January 12, 2021)
12. *Id.*
13. Telephone interview with Mike Bruzgis, Transperfect (January 12, 2021)
14. *Id.*
15. WebEx interview with Dan Meyers, President, Consulting & Information Governance for Transperfect (January 20, 2021).
16. *Id.*
17. *Id.*
18. Telephone interview with Mike Bruzgis, Transperfect (January 12, 2021).
19. Temporary install of complimentary projection screens to assist the socially distanced jury in viewing all exhibits, documents, photos, and video. Courtesy of Precise, Inc. (Eric Matlock)
20. Semi-permanent install in the Luzerne County Courthouse to facilitate socially distanced, in-person jury trial. Courtesy of Precise, Inc. (Paul Null)
21. *Id.*
22. *Id.*
23. onlinecourtroom.org/summit.
24. *Id.*
25. *Id.*
26. onlinecourtroom.org/summit
27. Telephone interview with the Honorable Sohail Mohammed, J.S.C., Presiding Judge of the Criminal Division Passaic County Vicinage (February 10, 2021); *See also* Passaic County Bar Association website of upcoming events found at passaicbar.org/Pages/Upcoming_Events/HYBRID%20JURY%20AND%20NON-JURY%20TRIALS%20AND%20VIRTUAL%20COURT%20PROCEEDINGS%2010-13-20%20FLYER.pdf.
28. Telephone interview with the Honorable Sohail Mohammed, J.S.C., Presiding Judge of the Criminal Division Passaic County Vicinage (February 10, 2021).
29. nationalgeographic.com/science/2020/04/coronavirus-zoom-fatigue-is-taxing-the-brain-here-is-why-that-happens.

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Strategy is Key for Opening Statements and Closing Arguments

Attorneys Must Take Care to Remain Inbounds

By John L. Slimm and Jeremy J. Zacharias

During trial, strategic and tactical judgments are made by attorneys on behalf of their clients. This is fully apparent during opening statements and closing arguments, which are used to provide a roadmap for the jury to understand and comprehend the case at hand. This article addresses the importance of forming a sound litigation strategy in preparing opening statements and closing arguments; explains what can and cannot be said; and discusses objections that can be made.

Strategy for Opening Statements

On a basic level, opening statements offer an opportunity for trial attorneys to set the scene for jurors, introduce key disputes in the case, and provide the important road map on how the trial is expected to unfold over the next few hours, days, or weeks. During an opening, counsel should lay out for the jurors the proposed witnesses for their case in chief, how they relate to the parties in dispute, and what they are expected to say.[1]

The fundamental purpose of opening statements is to do no more than inform the jury of the nature of the action and the basic factual hypothesis projected, so the jury may be better prepared to understand the evidence.[2] Counsel must be succinct and nothing must be said during the opening which counsel knows cannot in fact be proved or is legally inadmissible.[3]

Litigation strategy is fully present during counsel's opening statements.[4] Opening statements offer a preliminary chance to frame your client's case in a way you want the jury to hear it.[5] The opening plays a vital role as to what impression is left with the jury, so various considerations should be remembered.

Credibility of your client and counsel's advocacy is also key during opening statements. This is counsel's first opportunity to demonstrate a mastery of the facts of the case and is counsel's opportunity to demonstrate confidence in the client's position. Therefore, the key strategy is to overprepare for this first impression.[6]

In addition, as is inevitable in litigation, bad facts exist. Good litigation practice is to address bad facts early.[7] The same is true when delivering an opening statement. With opening statements, it is best to address bad facts early to lessen the effect of your adversary's arrow in their quiver. If the jury hears about damaging facts or circumstances prior to those facts being used against your client, the strength is lessened and the damage is alleviated.[8]

The opening statement also provides needed organization for the jury to follow a road map of your case in chief.[9] Commentators have noted that with even the most straight forward cases, the jury can get lost in the minutia of the facts.[10] Presenting an effective road map, starting with the opening statement, will keep the jury engaged because they will understand how certain facts control the case.

In sum, an effective opening argument is a key to aid jurors in understanding the evidence.[11] With complex cases, such as a complicated professional malpractice trial, evidence can seem daunting for the average juror. Helping the jury understand what evidence they will be presented with during the case can convince the jury early on of the merits of your argument and may ultimately decide the case in your client's favor.

Strategy for Closing Argument

During closing arguments, trial counsel has an opportunity to further advocate on behalf of the client by reminding the jurors how certain witnesses testified and how certain key evidence should be interpreted in favor of your client. Counsel is afforded more liberties during closing arguments, including using inferences to further a point and comment on the credibility of the adverse party as well as both fact and expert witnesses.[12] The liberties that are granted to counsel, however, are certainly not absolute.

The closing argument presents an opportunity for a litigator to be creative with the established evidence and to emphasize certain facts favorable to your client's position.[13] Closings are only as good as the preparation afforded to it. It must draw on certain inferences elicited from the evidence, it should capitalize of the strengths of your client's case, and it should downplay the weaknesses that are inevitably present and which were brought out during trial testimony.[14] The closing should also appeal to the common sense of the jury to reach a verdict in favor of your client.[15]

During the closing argument, favorable evidence should be front and center. Without providing a complete recitation of the trial testimony, counsel should present the testimony in a way that the jury will clearly see how beneficial certain facts are for your client.[16] As important as highlighting favorable evidence is, however, the closing argument also provides an opportunity for

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counsel to highlight the weaknesses in your opponent's case.[17]

By the time the case goes to trial, discovery is complete, depositions of the parties and witnesses are taken and liability and damages expert reports are exchanged. A prepared litigator can forecast the testimony that will be given during trial by the witnesses.[18] Therefore, prepare a draft closing by using the evidence that will be presented at trial and the testimony already elicited from the witnesses. This draft closing, of course, will be edited and tailored as the trial proceeds, but this will solidify your client's theory of the case presentation before the case enters trial.[19]

An effective closing argument is concise. Counsel should focus on the most important evidence to fully engage the jury. An effective closing should begin strong and end strong as primacy and recency is key .[20]

What Cannot Be Said During Opening Statements and Closing Arguments

Shifting from what can be said during opening statements and closing arguments, we must now address what cannot be said. During opening statements, counsel should not argue the case in chief.[21] This should be saved for closing argument. If counsel attempts to present argument during the opening statement, this should be met with a swift objection from your adversary that will be sustained by the trial judge. Counsel will lose the credibility of the jury early, and the panel will see this as counsel's attempt to gain an unfair advantage before the crux of the trial even begins.[22]

During opening and closing statements, counsel should refrain from attacking opposing counsel.[23] Not only is this highly objectionable, but counsel will immediately lose credibility with the jury for this tactic.[24] For example, counsel should not comment on an adversary's motive or character and should not comment on an adversary's litigation tactics.[25] To this end, New Jersey Courts have repeatedly held that trial counsel is not free to indulge in unjustified aspersions of opposing counsel and shall not accuse opposing counsel of "poisoning the minds of the jurors."[26]

Counsel's arguments during closing arguments are expected to be passionate. At the same time, however, arguments should be fair and courteous, grounded in the evidence, and free from any potential to cause injustice, such as unfair and prejudicial appeals to emotion.[27]

During closing arguments, counsel also should not focus on a party's financial or insurance status.[28] For example, counsel should refrain from suggesting to the jury that an adverse verdict may lead to financial ruin of your client or would adversely affect your client's reputation.[29] Doing so would be prejudicial to the other party, and even if successful, would likely constitute reversible error before the Appellate Division.[30]

In claims for punitive damages, counsel should not argue to the jury that a punitive damages award presents an opportunity to send a message to deter the defendant and others from this type of conduct.[31] Counsel cannot urge a jury to increase a punitive damages award in order to enhance the general deterrence of others.[32]

Counsel's failure to observe the rules of the road pertaining to openings and closings can make an otherwise winnable case fodder for a mistrial, a successful motion for a new trial, or lead to an appellate reversal. For openings and closings, counsel should keep it simple: address any potential weaknesses and present a roadmap for the jury to easily follow. Do not risk weakening your client's case by saying something that is clearly objectionable or will result in a mistrial, appeal or curative instruction.

Objections Made During Opening Statements and Closing Arguments

Litigation strategy is fully in play with regards to objections made during opening statements and closing arguments.[33] The timeliness of an objection is crucial to a case, and if trial counsel waits until their adversary is finished with an objectionable statement to lodge an objection, the judge may determine that the objection is too little, too late. Therefore, for strategic purposes, if there are potential violations of the rules of opening statements or closing arguments, such as deliberate character assassinations of the parties or fact witnesses or arguing facts clearly not in evidence, it is best to object and allow the trial judge to determine whether a curative instruction or a mistrial will be necessary.[34]

With regard to comments made by counsel during summation, questions have arisen regarding whether objections must be made every time an adversary makes a statement about the evidence. The Appellate Division has recently held that if a party does not object to the challenged statements at trial, the Appellate Division had to review for plain error the trial court's decision allowing the statement to be

made to the jury.[35] In reviewing a challenge to counsel's summations, the Appellate Division will presume that opposing counsel will object to summation comments which unfairly characterize the evidence, and consider the failure to do so "as 'speaking volumes about the accuracy of what was said.'"[36]

The Appellate Division has held that the "[f]ailure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made," and it "also deprives the court of the opportunity to take curative action."[37] Thus, where defense counsel has not objected to an adversary's summation comments, the Appellate Division will not reverse unless plain error is shown.[38]

The Supreme Court has recently reviewed the well-settled parameters of permissible comments that can be made during a summation.[39] The Supreme Court stated the following:

[C]ounsel is allowed broad latitude in summation. That latitude is not without its limits, and counsel's comments must be confined to the facts shown or reasonably suggested by the evidence introduced during the course of the trial. Further, counsel should not misstate the evidence nor distort the factual picture. Within those limits, however, [c]ounsel may argue from the evidence any conclusion which a jury is free to reach. Indeed, counsel may draw conclusions even if the inferences that the jury is asked to make are improbable....[40]

Accordingly, although attorneys are given broad latitude in summation, they may not use disparaging language to discredit the opposing party or witness, or accuse an opposing party's attorney of wanting the jury to evaluate the evidence unfairly, trying to deceive the jury, or deliberately distorting the evidence.[41] If counsel deviates from the parameters of permissible content during summation, this will be met with an appropriate objection.

Last, it must be kept in mind that an attorney's remarks, made in closing, can constitute binding admissions against a party they represent.[42] The admissions of counsel at trial may limit the demand made or the setoff claim.[43]

Conclusion

Opening statements and closing arguments are a part of the attorney's legal strategy which should be carefully developed in order to achieve the client's objectives. [44] Care should be taken to stay within the bounds of zealous advocacy when making an opening statement or closing argument. Attorneys can argue their client's position, staying within the bounds of what is permissible in opening statements and summation. An attorney needs a good understanding of what is permissible and appreciate the necessity to form a sound ligation strategy in preparation for openings and closings. ⚖

Endnotes

1. Pastor, Sherilyn, "Tips for Developing an Effective Opening Statement", AMERICAN BAR ASSOCIATION, April 20, 2020.
2. *Amaru v. Stratton*, 209 N.J. Super. 1, 15 (App. Div. 1985) (*see also Passaic Valley Sewerage Comm'rs v. Geo. M. Brewster & Son, Inc.*, 32 N.J. 595, 605 (1960) (quoting *Farkas v. Middlesex County Bd. of Chosen Freeholders*, 49 N.J. Super. 363, 367–68 (App. Div. 1958))).
3. *Passaic Valley, supra*, 32 N.J. at 605 (*citing Paxton v. Misiuk*, 54 N.J. Super. 15, 20 (App. Div. 1959), *aff'd*, 34 N.J. 453 (1961); *Shafer v. H.B. Thomas Co.*, 53 N.J. Super. 19, 26 (App. Div. 1958)).
4. Champagne, Farrah, "Five Tips for Engaging Opening Statements", AMERICAN BAR ASSOCIATION, October 30, 2015.
5. *Id.*
6. Pastor, Sherilyn, "Tips for Developing an Effective Opening Statement", AMERICAN BAR ASSOCIATION, April 20, 2020.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. HUGHES, EVIDENCE § 43, at 66 (Supp. 1989) (an inference is properly described as "that relationship which exists between the facts such that proof of a basic fact permits the jury, but does not require it, to find the dependent fact").
13. "10 Tips for Effective Openings and Closing Arguments." AMERICAN BAR ASSOCIATION, July 2017.
14. *Id.*
15. *Id.*
16. *Id.*
17. Seckinger, James H., "Closing Argument", 19 Am. J. Trial Advoc. 51 (1995-1996). Available at: scholarship.law.nd.edu/law_faculty_scholarship/11
18. *Id.*
19. *Id.*
20. "10 Tips for Effective Openings and Closing Arguments." AMERICAN BAR ASSOCIATION, July 2017.
21. Pastor, Sherilyn, "Tips for Developing an Effective Opening Statement", AMERICAN BAR ASSOCIATION, April 20, 2020.
22. *See generally, Geler v. Akawie*, 358 N.J. Super. 437 (App. Div.) *certif. denied*, 177 N.J. 223 (2003).
23. *See, Henker v. Preybylowski*, 216 N.J. Super. 513 (App. Div. 1987); *citing to Tabor v. O'Grady*, 59 N.J. Super. 330 (App. Div. 1960).
24. *Id.*
25. *Tabor v. O'Grady*, 59 N.J. Super. 330 (App. Div. 1960).
26. *Id.*; *see also, Henker v. Preybylowski*, 216 N.J. Super. 513 (App. Div. 1987).

Continued on page 36

Essential Tips to Effectively Cross-Examine an Expert Witness at Trial

by Edward T. Kole

Since the advent of story-telling—be it through books, television, theater or cinema—everyone loves a good cross-examination. Who can forget Humphrey Bogart on the stand breaking down over strawberries in The Caine Mutiny? While I may be dating myself and could have opted for a more recent example, you get the point. However, not every cross (or many crosses) end in the emotional breakdown of the witness—and that is not only OK, but normal. The goal is to be effective, and to do that it comes down to preparation—there is no substitute. Here are some tips to make your next cross of an expert more effective.

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1. Know Your Subject

While this topic may seem obvious, like everything, it comes down to your level of dedication to the cause. Years ago, we were left with what we sought in discovery, as permitted by the applicable court rules. Today, the sky is the limit (or in other words, the internet is your ally).

Step one, seek all materials the court rules permit through interrogatories and document demands (check for differences depending upon federal versus state court, and which district you are in, if in federal court).

Step two, use the internet. Check the expert's website. Find matters the expert has worked, legal and otherwise. Look at court dockets in other matters; pull motions involving the expert's testimony. Contact attorneys who were involved in cases the expert was involved—try to get deposition/ trial transcripts and/ or reports either filed with a court or through such attorneys.

And then of course find out the expert's predilections, if any, and their relationship with present counsel, their prior positions on the same topic and tendency to be on one side or the other.

2. Educate Yourself on the Subject Matter

You may not be a financial guru or have an advanced degree in physics, but you need to have a grasp of the subject matter. Sit down with the documents and your expert to understand the subject matter. If you do not understand what you will be asking your opponent's expert, your chances for success drop precipitously.

3. Expert Deposition

Taking of an expert's deposition is often like playing poker—one does not

show their hand until necessary. Given that this article is directed to cross examination at trial, the traditional game plan for the deposition should be to lock the expert in to their qualifications and report.

Go through the qualifications exhaustively and particularly the expert's experience with respect to the subject matter at hand. Just because that person has expertise in an area does not mean that person is an expert in the matter at issue.

Go through the expert's writings—make sure you identify all such writings (for further review by you). In addition, go through the expert's prior engagements—name of the matter, nature of the matter, what was the opinion, which side did the expert take, was the opinion accepted or rejected, were there any reports, deposition and/or trial testimony, did the expert submit any certifications in the matter and who won the matter. Also, check to see if any courts have stricken the expert's opinion because the expert was not sufficiently qualified or the opinion was a net opinion. If so, consider whether the expert's opinion at issue has the same deficiencies.

Next lock the expert into their opinion. Confirm that the opinion is solely the issue stated in the report. Often parties seek to extend an expert's opinion—the opinion however is limited to what was provided in the report. Lock down the opinion.

Confirm what the expert reviewed and did not review in preparation of the report, with whom did they speak, and the substance of such conversation. Also, confirm the information and documents the expert typically reviews in rendering the type of report at issue and determine whether he was missing any of that information or documents for that particular report. Furthermore, inquire as to whether there were any facts of which the expert had no knowledge and whether such knowledge would have impacted his opinion. Similarly, confirm whether the expert received everything requested from the attorney or party that retained them.

Next, confirm the analysis or reasoning used by the expert as stated in the report. And, feel free to use hypotheticals (i.e., how would the opinion change if this or that happened?). However, do so from all aspects—try not to tip your hand.

4. Analyze the Data and Consider Motions *in Limine*

Motions *in limine* can be an extremely effective way of attacking or limiting your opponent's case. Such motions are not limited to the traditional "net opinion" application which has been well documented in many a case, article and treatise. Rather, by way of example, consider whether your adversary provided an expert report for every issue for which an expert is needed. If not, you may have a basis to strike those claims or the entry of any evidence related to such claims.

5. Prepare Your Cross Outline

Everyone loves the thought of a Perry Mason moment. However, not everyone is Perry Mason, and preparation eliminates risk. Therefore, write out your cross outline. Here are some general thoughts:

A. digest the deposition transcript (using excerpts from the deposition) by page and line, and then organize by subject matter;
B. outline the report and all data, by page, and then organize by subject matter;
C. outline your approach/theme—what do you want to accomplish and how do you plan on laying it out? Tell your story as you want to tell it, in the order you want to tell it;
D. write out the questions based on your approach using the expert's deposition testimony and expert report;
E. use leading questions.

6. Showtime

A. Voir Dire

Everyone has the right to question the expert about their qualifications. Do not go over all the questions previously asked by your opponent. It gets you nowhere, annoys the Court, and adds gravitas to the expert. There is no shame in asking no questions, if none is to be asked. That said, if you have questions, ask only the questions that count—showing the expert is not qualified on the issue at hand and/or limiting the scope of the expert's testimony.

B. The Cross

All of your preparation is now done and it is your time to complete the job. Here are some tips for you to consider:

i. Brevity is essential. You want the judge or jury to retain the core points. The longer you take and more extraneous information you go over, the less likely you will be effective;
ii. Hit the issues you need to hit. Pick out the major points you want to make and make sure they are built into your outline and cross to effectively make those points. You do not want your three main points to get lost in six other less-important ones;
iii. Pace yourself. While you need to be brief, cross-examination is not a sprint. You control the pacing of the questions—allow time for your audience to comprehend the question and answer;
iv. Control your witness. You should only ask leading questions (for style points, the answers should be all yes or all no). Explanations are not for cross. If the witness looks to explain, attempt to address it yourself in the first instance (Sir, please just answer my question. Your attorney will be able to ask you any follow up

they want in a few minutes). If that fails, ask the judge for assistance. If the judge allows the expert to amplify his answer (which happens on occasion, usually in bench trials), do not argue with the judge—sometimes you just need to roll with the situation;

v. Do not restate his direct testimony. Unless you are stating a point and then immediately contradicting that point, do not reaffirm the expert's testimony. You will only bolster that testimony by allowing the judge or jury to hear it twice;

vi. Use demonstratives, if applicable. Technology, video and graphics are great. Often though, the economics may not allow it. If they do, consult with a specialist early to explore options and tech support. But, whether the economics permit it or not, you still may want to go old-school. By way of example, take the giant pad on the easel and your marker and enjoy the moment. Break down the expert's damage claim piece by piece, and then reconstruct it. It can be very powerful to use the expert's own numbers and then their testimony on cross to modify or eliminate their position on paper in front of the judge and/or jury. Also, remember to mark the fruits of your labor into evidence;

vii. Use of deposition testimony or documents to cross-examine are effective tools at attacking the expert's credibility if done right. Remember your witness can only say yes or no—this is not a time for the witness to explain their testimony or a document. Rather, it's your time to besmirch their testimony. This is how you do it:

Q. Madam, let me show you the transcript of your deposition from March 1, 2021. You understand that you were under oath when you gave such testimony, correct?

Q. Let me refer you to page 59, lines 3 through 16. [Make sure the witness and judge have that testimony in front of them and then you read the question and answer to the witness]

Q. That's what it says, correct?

By doing this, you effectively cross the witness with their prior testimony without allowing an explanation. You would do the same thing with documents; and

viii. Grand finales can be overrated, but you do not want to end on a "who cares" moment. Therefore, try to end on a significant point you want the judge or jury to take away from the cross.

In sum, cross-examination can be fun and more importantly effective—the devil however is in the detail—preparation, preparation, preparation. ⚖

Strategy is Key

Continued from page 33

27. *Jackowitz v. Lang*, 408 N.J. Super. 496 (App. Div. 2009); *citing to Geler v. Akawie*, 358 N.J. Super. 437 (App. Div.) *certif. denied*, 177 N.J. 223 (2003).
28. *Purpura v. Public Service Elec. & Gas Co.*, 53 N.J. Super. 475 (App. Div. 1959), *certif. denied*, 29 N.J. 278.
29. *See generally, Flynn v. Steams*, 52 N.J. Super. 115 (App. Div. 1967).
30. See *Brandimarte v. Green*, 37 N.J. 557, 562–65 (1962); *Krohn v. New Jersey Full Ins. Underwriters Ass'n*, 316 N.J. Super. 477, 481–83, (App. Div. 1998), *certif. denied*, 158 N.J. 74 (1999); *Pickett v. Bevacqua*, 273 N.J. Super. 1, 3–5, (App. Div. 1994); *Amaru v. Stratton*, 209 N.J. Super. 1, 16 (App. Div. 1985).
31. *Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.*, 390 N.J. Super. 557, 569 n. 3 (App. Div. 2007), *aff'd*, 194 N.J. 212 (2008); see also, N.J.S.A. 2A:15–5.9 to –5.17
32. *Id.*
33. Alison, John, "Developing a Litigation Strategy for Your Case", NATIONAL JURIST: SMART LAWYER, September 14, 2018.
34. *Maya Jane Stevens v. 48 Branford Place Associates, LLC*, A-4858-16T2 (App. Div. January 16, 2019).
35. *Id.* (Under the plain error standard, "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result." *Willner v. Vertical Reality, Inc.*, 235 N.J. 65, 79 (2018) (quoting R. 2:10-2). "Relief under the plain error rule... at least in civil cases, is discretionary and should be sparingly employed." *Baker v. Nat'l State Bank*, 161 N.J. 220, 226 (1999) (citation omitted).
36. *Tartaglia v. UBS PaineWebber, Inc.*, 197 N.J. 81, 128 (2008) (quoting *Fertile v. St. Michael's Med. Ctr.*, 169 N.J. 481, 495 (2001)).
37. *State v. Timmendequas*, 161 N.J. 515, 576 (1999).
38. *R.* 2:10–2.
39. *Hayes v. Delamotte*, 231 N.J. 373 (2018).
40. *Hayes*, 231 N.J. at 387-88 (alterations in original) (citations omitted).
41. *Henker v. Preybylowski*, 216 N.J. Super. 513, 518–19 (App. Div. 1987); *Geler v. Akawie*, 358 N.J. Super. 437, 470–71 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).
42. *Dillon v. Wal-Mart Stores, Inc.,* No. 97-20613, 161 F.3d 8 (5th Cir. 1998), 1998 WL 723835, at *2. See also, *King v. Armstrong World, Indus.,* 906 F.2d 1022, 1024-25 (5th Cir. 1990).
43. *Dillon*, 1998 WL 723835 at *2, quoting, *Oscanyan v. Arms, Co.,* 103 U.S. 261, 263 (1880); *Saucier v. Plummer,* 611 F.3d 286 (5th Cir. 2010).
44. Alison, John, "Developing a Litigation Strategy for Your Case", NATIONAL JURIST: SMART LAWYER, September 14, 2018.

Practical Considerations for Presenting Deposition Testimony at Trial

By Roy Alan Cohen and Rahil Darbar

The French Philosopher Voltaire once said that "the secret of being boring is to say everything." Often, lawyers spend years on discovery and trial preparation, and then must decide how best to present the evidence, make their case, and keep jurors interested and engaged. Trial lawyers who fail to heed Voltaire's advice do so at their peril. The practical tips in this article will assist trial lawyers in making strategic decisions on how best to present deposition testimony to a jury.

Jurors' expectations of a trial are often molded by what they see in movies and on television. Many picture compelling arguments and opening statements, dramatic cross-examinations, courtroom theatrics, and impressive witness testimony. Many jurors are then surprised and disappointed when forced to sit through a cumbersome and lengthy selection process, and substantial down time that comes with either *in limine* motions, early evidence challenges, and delays associated with witness presentations.

Those who deal with trial practice know full well that much of what happens can be tedious and uninteresting. Aside from lawyer commentary in opening statements or closing arguments, the civil trial is all about the presentation of facts for the jury's consumption. Those facts are presented through live fact and expert witness testimony, recorded video testimony, reading deposition transcripts, or introducing documentary evidence. Unfortunately, anything other than live testimony lacks the magic that jurors expect from their favorite Netflix legal drama.

This dose of reality can be disconcerting and result in juror disengagement, particularly when deposition testimony is presented either by way of video record or read-in testimony. Juror disinterestedness is even more a risk during the pandemic as courts mull virtual trials and remote testimony. Keeping jurors invested is an art form and the development and presentation of engaging deposition testimony will play a critical role in a trial lawyer's success. This article explores practical tips for litigators and trial lawyers.

It is essential that trial lawyers consider and follow a strategy for conducting depositions as if that testimony will be the only opportunity to obtain and present certain essential facts to prove that part of the case.

1. Strategy for Taking Depositions—Think Trial at the Outset

Most lawyers view deposition testimony as simply one small part of the search for facts in the discovery process rather than the actual testimony presented to the jury. A deposition may be the only evidence a jury will hear from a witness during trial. Testimony taken from out-of-state witnesses are essentially trial depositions because most are not within the subpoena power of New Jersey courts and cannot be compelled to appear.[1] Under the New Jersey Court Rules, the deposition of a witness may be used by any party for any purpose if the court finds that the appearance of the witness cannot be obtained because of death or other inability to attend or testify. The inability to testify includes such factors as age, illness, infirmity, imprisonment, or if the witness is out-of-state and the party attempting to introduce the testimony cannot subpoena the individual.[2] Whichever way this happens, the trial lawyer must rely on deposition testimony, the authentication of documents at the deposition, and, perhaps equally important, the reliability and admissibility of those documents by the court.

It is essential that trial lawyers consider and follow a strategy for conducting depositions as if that testimony will be the only opportunity to obtain and present certain essential facts to prove that part of the case. Failing to conduct a direct or cross examination the same way one would for trial can be fatal to admissibility at the time of trial. Perhaps more important, not planning out how the substance will come across may just make the testimony so dull and uninteresting as to actually negate its value. Good trial lawyers never make this mistake.

2. Live or Video–That is the Question

Most lawyers agree that live in-person testimony is preferred over canned testimony, and the video recorded testimony is better than a paper transcript. Why? Because reading testimony is just plain dull. Any trial lawyer who has suffered through page-line designations and then had to read the testimony themselves or with a partner, and any juror who has stayed awake long enough to listen, will confirm just how deathly boring it is. Video testimony is more engaging. However, every rule has an exception, and here it depends on the witness. If the person to be deposed provides necessary testimony, but will make a poor witness, then the paper

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transcript may be the best way to go.

If the witness is conducive to visual presentation, then there should be no debate over the decision to preserve testimony using video record, which has become so much more popular and accepted over the last year. Lawyers can review the transcript and video and decide whether the testimony is compelling enough to present to the jury on tape or simply read into the record. Either way, whether testimony is presented live or by way of video testimony through direct or cross-examination, the same preparation is essential to success.

Even more care needs to be taken with the remote use of documents as exhibits during these depositions. The only thing less interesting than remote witness testimony is remote witness testimony about documents. Using split screen computer graphics that matches testimony to highlighted portions of a document, and pointedly examining the witness on key phrases can be extraordinarily effective. Jurors will hang on the words of witnesses who tell the story using visual confirmation of that testimony, and the planning and associated expense will pay dividends.

3. Deposition Readings–Less is More

Two rules—when reading testimony, keep it simple, and less is more. No one loves a lawyer or a client who talks too much or is repetitive. Planning witness questions and answers with the ultimate trial in mind will make transcript readings most useful to jurors. If concise questions and answers are not possible in the first round of deposition testimony, then practitioners should think about a summary set of questions at the end of the deposition during cross-examination. Much like television interviews, the objective should always be to obtain relevant soundbites that make the point in a meaningful way.

Streamlining deposition readings in this way will also make trial preparation easier. Remember that trial counsel must confer and exchange relevant pre-trial information with adversaries seven days before trial, including a list of witnesses and the proposed deposition readings by page and line number.[3] By the time that both parties have designated testimony, and the judge has ruled on the admissibility of that testimony, the transcript process can be cumbersome. Avoiding this long, drawn out, exhausting process for the judge and jurors by capturing the testimony in short, concise questions and answers is critical. With testimony provided in this way, trial judges will likely grant a motion to strike the longer duplicative testimony often offered by an adversary to distract from the critical evidence.

Knowledgeable, charismatic and engaging witnesses usually come across well in person, can command the room when speaking, and likely tip the scale, particularly where a battle of the experts makes the difference between a win and a loss.

4. Presenting Experts by Video Deposition at Trial–The Good, the Bad, and the Ugly

Often, experts are essential to proving and defending many aspects of technical, scientific, or medical-related claims. The New Jersey Rules of Evidence permit a witness to testify as an expert where scientific, technical, or other specialized knowledge possessed by the expert will assist the trier of fact to understand the evidence or to determine a fact in issue.[4] Of course, to be admitted, the subject matter of the expert must be qualified and the expert's testimony must be outside the knowledge of the average juror and be reliable.[5]

For many years, the challenge for trial lawyers has been whether to bring experts to testify live or offer preserved testimony by way of deposition. Most times, availability, scheduling, sequencing, and expense are the determinative factors. Often, testimony must be taken out of logical sequence because of the expert's schedule, and at other times, the expert's testimony is delayed because of courtroom issues or other witnesses' schedules. Live testimony is occasionally aborted and expert depositions need to be taken at the last minute during trial and presented the following day. This adds complexity to the presentation of a case by both sides.

Having an expert witness testify at trial has definite advantages. There is no question that a live witness has a better opportunity to bond with the jury, be interactive in terms of questioning, and addressing substantive challenges as they arise. There are more effective teaching moments, and, perhaps most important, opportunities to correct course with the inevitable changes that come with the dynamics of a trial and responding to opinions expressed by other experts. Knowledgeable, charismatic and engaging witnesses usually come across well in person, can command the room when speaking, and likely tip the scale, particularly where a battle of the experts makes the difference between a win and a loss.

Those same experts can also carry the day and command the room during video depositions, but an equal if not greater amount of time must be spent in preparation, both before and at the deposition. Since the deposition will be the only testimony that the jury will hear and there is no opportunity to correct that testimony, it must anticipate all

objections and be cleanly taken to avoid any motions to strike based on qualifications and substance. First, the expert's report must be comprehensive, factually supported, and reach adequately founded conclusions to avoid any challenges. Second, the testimony must be structured to anticipate all possible permutations associated with how the expert evidence will come out from the other side. Third, demonstrative evidence must be carefully considered with objections resolved before the testimony, to avoid evidentiary objections that can either limit or gut the transcript. Fourth, developing a defined plan for testimony is essential to make sure that all points are covered, but be careful about creating an obvious script.

New Jersey Court Rules do allow parties to preserve the testimony of an expert by way of deposition, and then the use of that expert live at trial. Courts deem it unfair to preclude the preferable live testimony if the expert is available.[6] This provides an opportunity to review and assess whether the expert's testimony would be more effective in-person or as it appears on video, and to flush out an adversary's cross-examination and objections. Where such a deposition is taken for use in lieu of live testimony, all evidentiary objections must be made during the deposition, and the parties must move on those objections within 45 days of the deposition's completion.[7] Likewise, the audio and video must be edited under the court's rulings. If the lawyer then has the expert testify live, direct cross-examination will need to be retooled, particularly if there are questions about keeping the expert testimony limited to the subject matter and the four corners of the expert report. This can be a very effective strategy and there is a significant expense associated with presenting the expert twice, but may be worthwhile in the right case.

5. Closing Thoughts

Most successful trial lawyers are storytellers who use witness testimony to bring jurors along for the ride. In the end, it is those witnesses who tell the story, who allow jurors to match facts with law, and who convince jurors that one side is more compelling than the other. Those conclusions are compelled by the impact of the key fact and expert witnesses presented by each side. Whether those witnesses are presented live or by way of deposition testimony, there are certain essentials required to keep the jury engaged in the story and pave the way to a successful result. ⚖

Endnotes

1. New Jersey Court Rule 4:16-1(c). This rule requires that the party against whom the deposition testimony is being used had notice of the deposition and that the absence of the witness was not procured or caused by the offering party.
2. *Id.*
3. New Jersey Court Rule 4:25-7(b).
4. New Jersey Rules of Evidence 702.
5. *Hisenaj v. Kuehner*, 194 N.J. 6, 15 (2008).
6. Pressler & Verniero, Current N.J. Court Rules, cmt. 6 on R. 4:14-9 (2021).
7. New Jersey Court Rule 4:14-9(f).

DO YOU WANT TO KEEP IT SECRET?

Things to Consider When Applying to Have Court Records Sealed

By Dennis Gleason

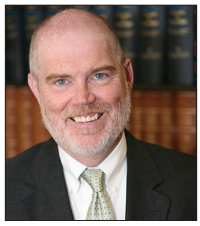
In the course of a litigation, parties often agree that as part of discovery certain sensitive documents and testimony should be treated as confidential, and not disclosed beyond those associated with the case.

Especially in commercial litigation, the parties may ask the court to enter a confidentiality or protective order, to restrict the disclosure of such things as a party's financial information, trade secrets, confidential research, business plans or other commercially sensitive information.[1] Because discovery and discovery-related matters are not subject to public access, they are ordinarily protected from disclosure to the public.[2]

And while the parties can agree or be ordered not to disclose confidential information obtained in discovery, a confidentiality order does not guarantee that the same material designated "confidential" in discovery will be protected from disclosure if used in connection with or as part of a trial.[3]

By contrast, a trial is a public proceeding.[4] Accordingly, the public, under the First Amendment[5] and common law,[6] has a right of access to civil trials and trial-related court filings. Stated differently, where it comes to restricting access to court proceedings, the thumb is on the scale favoring disclosure of trial-related documents and testimony based on the right of public access.[7]

In the face of the presumption that the public is entitled to access to court proceedings, both New Jersey state and federal courts recognize that there may be a legitimate need to restrict the public from access to certain materials, including those



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While there is no specific guidance as what should be included in a State Court motion to seal, it is clear that the trial judge "must review each document individually and make findings with regard to why the presumption of public access has been overcome."

related to a trial. However, it is up to the party who seeks to protect the disclosure of confidential information to ask a court to seal that information. The moving party "must show that the 'material is the kind of information that courts will protect and that the disclosure will work a clearly defined and serious injury to the party seeking closure.'"[8]

In determining whether to restrict public access, the courts engage in a flexible balancing test, depending on the circumstances of the case, to determine if the nondisclosure sought outweighs the public's presumptive right to access.[9]

Against that background, courts look to seal only that specific passage of a document, or portion of testimony that may warrant protection from disclosure.

The party seeking to prevent disclosure must demonstrate why each document or other trial evidence overcomes the presumption of openness at trial. It is then up to the court to issue detailed findings granting or denying the application to seal.

In the context of trial-related matters, all applications to seal take advance planning and cooperation between counsel. It is a tedious and time-consuming activity, to say the least. Planning includes early identification of what specific evidence a party seeks to protect from disclosure at trial, timely raising the issue with the court.

As discussed below, there are some similarities and some differences in the procedures of state and district Courts regarding sealing.

New Jersey State Courts

State Courts address the sealing of court records by way of Court Rule 1:38-11. The state rule allows for the sealing of court records upon a showing of good cause.[10]

As to what constitutes good cause, that is a two-part analysis. First, the sealing party must demonstrate that the disclosure will likely cause a clearly-defined and serious injury to a person or entity. Second, that affected person or entity's interest in privacy must substantially outweigh the presumption that court records are open to public inspection.[11] In the end, the party seeking to seal bears the burden demonstrating by a preponderance of the evidence why the records should be shielded.[12]

While there is no specific guidance as what should be included in a State Court motion to seal, it is clear that the trial judge "must review each document individually and make findings with regard to why the presumption of public access has been overcome."[13]

To assist in that effort, the motion should include at the very least the documents to be protected from disclosure and an affidavit by one or more persons wherein they describe, among other things, the efforts to keep information protected and detail what specific injury would likely befall the party should the confidential information be disclosed.

Where a party believes there is a need to seal particular pretrial and trial materials or trial testimony, an early pretrial conference should be requested. At that time, the parties can discuss with the trial judge the need to seal and suggest a plan and procedure for doing so.

It is important to note that notwithstanding a sealing order, it is not necessarily permanent. Any person or entity may move to unseal.[14] In such a circumstance, although not the moving party, it remains the burden of the party who seeks to prevent the disclosure to prove by a preponderance of the evidence that good cause continues to exist for the sealing.[15]

New Jersey District Court

The District Court employs a more robust and detailed procedure for the sealing of judicial proceedings and records under Local Civil Rule 5.3.

And like the State Court, the District Court has an obligation to ensure the balance between the presumption of public accessibility and protection of legitimate confidential information of a party.[16]

An advantage in the District Court is each civil action is assigned to a magistrate judge with whom the parties periodically meet. This, in turn, enhances the opportunity to alert the court of a forthcoming motion to seal materials as part of the mandatory final pretrial conference under Fed. R. Civ. P. 16 and as part of the joint final pretrial order.[17]

In contrast to the State Court process, the local rule sets out in great detail the procedures for sealing.

To begin with, no documents may be filed under seal unless a confidentiality order has been entered.[18] Thus, in the absence of a confidentiality order, the District Court may reject the temporary sealing of documents or any applications to seal.

Next, the underlying document or documents that a party seeks to file under seal, *i.e.*, brief, exhibit, or affidavit, is filed via the District Court's Case Management/Electronic Case Filings system, in unredacted form.[19]

Keep in mind that the motion to seal and supporting papers will be publicly available and specially posted in court's Public Access to Court Electronic Records system. Consequently, references to the confidential material which are sought be protected should be carefully stated in general terms.

As part of the ECF filing, there will be a prompt asking if the materials are being filed under seal. When this prompt is checked, the filed materials, in unredacted form, will be temporarily sealed and not publicly available, pending a decision on the motion to seal. Importantly, if the prompt is not checked, the filing will become available for immediate public review. Later efforts to claw back the public filing and re-file may not be successful as it ordinarily requires a court order.

Once those papers are electronically filed, it triggers the obligation to file a separate motion to seal.[20]

Unlike other motions in the District Court, no supporting brief is necessary, unless a party believes that it would assist the court.[21]

While the motion to seal does not require a brief, it does require other filings. The first is an affidavit or its equivalent, based on personal knowledge that sets out for each document (or group of similar documents) the nature of the materials; the legitimate private or public interest which warrants the relief sought; the clearly-defined and serious injury that would result if the relief sought is not granted; why a less restrictive alternative to the relief sought is not available; any prior order sealing the same materials in the pending action; and the identity of any party or nonparty known to be objecting to the sealing request.[22]

What is more, the index must include for each objection to seal, materials to which there is an objection, the basis for the objection, and if the material or information was previously sealed by the court in the pending action, why the materials should not be maintained under seal.[23] Appendix U to the Local Rules provides a template index.[24]

The detailed affidavit and index serve as the foundation for the court's acceptance, denial or modification of the application to seal. This facilitates the court's review, as the Third Circuit has instructed District Courts that they must conduct a document-by-document review to determine if material should be sealed.[25]

The motion to seal must include proposed findings of fact and conclusions of law in a proposed order to seal.[26] This proposed order serves to further assist the court who is required to articulate specific findings which serve to overcome the presumption of disclosure.[27]

Additionally, the motion to seal is not filed until 14 days after the completion of briefing of the underlying motion. The timing of the motion to seal is intended to allow the parties to marshal all references to the same confidential information by all parties. By way of illustration, where one party moves *in limine* to bar an expert and the *in limine* motion references "trade secrets," the motion to seal is filed not later than 14 days after the last motion papers for the *in limine* motion, *e.g.* reply brief.[28] Moreover, the application to seal is a single consolidated motion by all the parties.[29] Again, all references to same confidential information are culled for consideration regardless of which party referenced the confidential information.

Keep in mind that the motion to seal and supporting papers will be publicly available and specially posted in court's Public Access to Court Electronic Records system.[30] Consequently, references to the confidential material which are sought be protected should be carefully stated in general terms.

Should a motion to seal not be filed within the 14-day deadline, the court, without notice, may direct that the temporarily sealed filing in unredacted form be publicly available.[31] Thus, attention to timely filing the motion to seal should be of paramount concern.

Not later than 14 days after the court issues its order and renders its findings and conclusions on the motion to seal, an amended redacted copy of underlying papers conforming to the order must be filed.[32] The public then has access, albeit limited, to the unprivileged portion of the judicial record.

Like State Court, the local rule further provides that a litigant who is not an original party to an action may challenge the motion to seal at the time it is filed, or later.[33] The burden of proof remains on the party who seeks to protect from disclosure to demonstrate why the materials should be restricted from public disclosure.

Conclusion

In sum, there are several takeaways regarding the sealing of court records in the context of trial.

First, the mere fact that a discovery confidentiality order is in place restricting the disclosure of confidential information does not ensure that a court will agree to seal that same material when used at trial. The court applies a more rigorous standard to sealing confidential materials, *i.e.*, a presumption of disclosure. This is so because the public has a well-settled right to access to the court-

room and related judicial records.

Second, a party who seeks to restrict access to documents or testimony at trial always bears the burden of demonstrating, by competent evidence, that the protection of legitimate confidential information of a party outweighs the public's right to access.

Third, after a document-by-document review, a court in ruling to seal materials must detail, usually as findings of fact and conclusions of law, the reasons for sealing.

Lastly, a litigant or non-party—before, during or after trial—has the right to challenge the sealing of documents or testimony. And the burden remains on the party who looks to seal to show why sealing is warranted. ⚖

Endnotes

1 *See*, N.J. Ct. R. 4:10-3; District of New Jersey Local Civil Rule ("Local Rule") 5.3(a)(2) and Appendix S to Local Rules https://www.njd.uscourts.gov/sites/njd/files/APPS.pdf (last visited April 26, 2021).

2 N.J. Ct. R. 1:38-2(b)(2); *See also Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984); *Hammock v. Hoffman-LaRoche*, 142 N.J. 356, 379 (1995).

3 The scope of this article is limited to the sealing of items in the context of a trial. It does not address the sealing of materials required by law, or redactions of information required by law, or court rule. For instance, both New Jersey State Court and New Jersey District Court require that certain personal identifiers be masked, such as names of minors, bank accounts. See *e.g.*, N.J. Ct. R. 1:38-7. Likewise, sealing of a complaint is required in state and federal *qui tam* actions. N.J.S.A. 2A:32C-5(c) and 2A:32C-5(f); 31 U.S.C. section 3729, *et seq.*

4 *See* N.J. Ct. R. 1:2-1; *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780-81 (3d Cir. 1994).

5 *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984).

6 *In re Cendant*, 260 F.3d 183, 192 (3d Cir. 2001).

7 *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 676 (3d Cir. 2019).

8 *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 677-78 (3d Cir. 2019).

9 *Hammock v. Hoffman-LaRoche*, 142 N.J. 356, 381 (1995).

10 N.J. Ct. R. 1:38-11.

11 N.J. Ct R. 1:38-11(b).

12 N.J. Ct R. 1:38-11(a).

13 *Hammock v. Hoffman-LaRoche*, 142 N.J. 356, 382 (1995); see also *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 677 (3d Cir. 2019) *citing Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994).

14 N.J. Ct. R. 1:38-12.

15 N.J. Ct. R. 1:38-12.

16 *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 677 (3d Cir. 2019).

17 *See* Fed. R. Civ. P. 16 and L. Civ. R. 16.1.

18 L. Civ. R. 5.3(b)(6).

19 L. Civ. R. 5.3(c)(4).

20 L. Civ. R. 5.3(c)(1).

21 L. Civ. R. 5.3(c)(1).

22 L. Civ. R. 5.3(c)(3)(a).

23 L. Civ. R. 5.3(c)(3)(a).

24 *See* https://www.njd.uscourts.govsites/njd/files/APPU.pdf (last visited April 26, 2021).

25 *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 167 (3d Cir. 1993).

26 L. Civ. R. 5.3(c)(3).

27 *In re Cendant Corp.*, 260 F.3d 183,194 (3d Cir. 2001).

28 L. Civ. R. 5.3(c)(2)(ii).

29 L. Civ. R. 5.3(c)(1).

30 L. Civ. R. 5.3(c)(1).

31 L. Civ. R. 5.3(c)(10).

32 L. Civ. R. 5.3(c)(7).

33 L. Civ. R. 5.3 (c)(5).

INNOVATE OR DIE

Adapting to the Virtual World and Using It to Tell Your Client's Story at Trial

By Rich Lomurro

"Innovate or die, and there's no innovation if you operate out of fear of the new or untested."

Robert Iger, *The Ride of a Lifetime: Lessons Learned from 15 years as CEO of the Walt Disney Company*

The recent pandemic has forced us to think differently. The way we developed our cases for trial was often in person and intimate. Now, it is possible some clients have gone a year without being in their lawyer's office. Discovery has been largely conducted from a computer screen. This includes depositions, mediations, arbitrations, settlement conferences, and even jury trials. It is likely things may never return to the way they were.

How then do we tell our client's story in this new virtual world and bring that experience to trial? Thankfully, a virtual world brings opportunity along with its

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challenges. Figuring out how to use those opportunities is key. A great trial lawyer can use the tools within the new virtual world to maximize their client's chances for a good outcome.

Former Disney CEO Bob Iger's autobiography, "The Ride of a Lifetime," details his taking a struggling Disney company and revolutionizing it back to the top of the entertainment industry. In his time, Disney acquired Pixar, Marvel, ESPN, Star Wars, a portion of 21st Century Fox, created Disney+ and opened new parks in Asia and Europe. The company's value skyrocketed and remains one of the most profitable companies in the world.

The main theme of Iger's book is "Innovate or Die." He stressed that the continuation of success is driven by forward thinking. Those who stand still are left behind. With the COVID-19 crisis putting the practice of law into a standstill in many areas, Iger's theme is more relevant than ever.

Being innovative and thinking "outside the box" is crucial to achieving this task. These tools can help personalize cases for presentation to juries or mediators as we move further into a "virtual" world.

Social Media: Become Fluent in Speaking the Universal Language of Our Time

Over 82% of Americans have some type of social media profile according to the data collection specialists Statista.com.[1] This is an increase from 44% in 2010.[2] The overwhelming odds are every member of your next jury will be active in social media. Even if they are not, their family and friends have it and they are familiar with it. The same is true of a mediator, adjuster, opposing counsel and even the judge. Anyone who hears your client's case will speak and understand the language of social media.

Your client's social media profile can be filled with memories, emotions, relationships and much more. A client's past posts, comments, pictures and videos may yield a massive amount of personal information. Telling their story at trial, combined with these references from the client's social media profile, can create a more lasting memory in the jurors' memory.

As trial lawyers, we must master the language of social media. That way, when presenting to our audience, we can speak in a language they understand and can follow.

How exactly is this done?

Your client's social media profile can be filled with memories, emotions, relationships and much more. A client's past posts, comments, pictures and videos may yield a massive amount of personal information. Telling their story at trial, combined with these references from the client's social media profile, can create a more lasting memory in the jurors' memory.

For example, a lawyer may pull up a picture from a client's Facebook page and ask them to explain the picture. The client may then testify about the experience, why they posted the picture or why they wrote the caption the way they did. This may help the jury to follow their story in a format they recognize and understand.

A University of Iowa study found that our memory for sounds is significantly worse than our memory for visual or tactile things.[3] When a jury goes to deliberate after a three-week trial, they will likely remember the testimony that was tied to the Facebook post more than testimony that has no visual connection.

This also builds a new kind of credibility with your client and jurors. They also use social media in their lives. It will not matter if they are rich or poor, have advanced degrees or did not graduate high school, if they are artists or athletes, if their hobbies are knitting or racing corvettes. They all have social media. They have different visions of the world but they all speak the language of social media. What better way to connect with them than through their common language?

Mining for gold

Explore your client's social media with curiosity and imagination. You may just find the diamond in the rough that could boost damages to a new level.

It is not always easy to get a relatable story from your client to tell a jury, especially sitting in your office conference room or reading through discovery. Sometimes it is best to walk in their shoes and see their life from the inside.

In the old days, it may have been a trip to your client's house or to their job. You may have seen pictures of the walls that gave you a story. Maybe you saw a piano in the living room that your client has not been able to play since the accident. Many times a client will not tell you about that part of their life. They may simply think it is not that important. The lawyer, however, may believe a jury could relate to that loss and highlight it at trial.

In the new virtual world, you can mine the same type of information scrolling though your client's profile and past posts. You may go back to 2018 and see your client posted a video of them singing karaoke at the local Knights of

Columbus. They are dancing and smiling, looking like they are having the time of their life. This would be the type of "before the accident" footage a lawyer would want in a jury trial, but your client may not know that. It is up to us to mine through the client's social media to find that diamond in the rough.

Similarly, in the old days you may have asked a client to dig through photo albums for memories to talk about. Maybe in a client's basement they find that perfect shot of them at Disney World on a rollercoaster with their arms in the air. The pictures show your client with no pain enjoying life with their family. Maybe on the back it says, "Disney World 2015."

Now, social media profiles are the picture albums, and they come with even greater details. We can get the location and time attached to a photo and sometimes much more. There may be a companion caption that your client wrote in real time on that vacation describing the happiness they were experiencing on that day. On top of that, comments and other features may lead to witnesses your client did not mention to you. The possibilities can be endless.

Even after an injury, social media is useful. Think of it as a modern-day diary. Your client can fill their news feed with video and pictures to support the challenges they are experiencing. Their posts may emphasize pain, suffering and loss of enjoyment of life with accuracy and time stamps.

For example, a client may write how frustrated they are going to a third day of physical therapy this week. Or maybe a client posts a video of them after having a surgery, showing the fresh staples and dried blood while noting how much pain they are in. It is one thing for a client to testify on the stand about their memory of how they felt after a surgery, but to have the video and their real time reaction is far more compelling.

Lawyers can take those posts, comments, pictures and videos and present them on a screen to the jury. The jury will understand because they do the same thing on their social media. It is a relatable way of explaining how they felt with more emotion than bare testimony.

The New Commandment–Thou Shall Not Fear Facebook

Personal injury lawyers have long been terrified of social media. A bad comment or picture can be devastating to a plaintiff's case. But courts have made clear you cannot hide from it. New Jersey has been put on notice that erasing or deactivating a social media account may come with large consequences.

In 2013, a federal magistrate judge ruled that plaintiffs could be sanctioned for deactivating their Facebook accounts as it was considered evidence spoliating.[4] The Court also advised that a jury may receive an adverse inference instruction against the plaintiff. [5].

The odds are that if social media exists, it is in the case. So why not use it to your advantage?

Facebook, Instagram, LinkedIn and other social media can be a treasure trove for storytelling. Lawyers can mine valuable pictures and stories from their client's past posts. They can provide a different viewpoint to a jury who has never met your client before.

Of course there is risk. But if you discuss the risks with your client at the start of the case, hopefully they have been wise about their social media activity. But even if they have not, you cannot avoid it. Better to know the challenges of your case before the jury hears them.

By thoroughly investigating your client's social media history you can identify the good and the bad. This is comparable to prior medical records. Lawyers need to review the old medical records with scrutiny. Similarly, review of a client's social media history is an important part of the new world of law practice.

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The Smartphone: A Production Company in Your Client's Pocket.

Lawyers no longer need to hire a production company to do a "day-in-the-life" video. Smartphones have the ability to document your client's story in clear high-quality videos and pictures taken by your client and their family.

Two hundred sixty million Americans, about 80% of the country, have smartphones.[6]

The odds are, therefore, your client has the ultimate machine for documenting their injuries and telling their story right in their pocket. They can take crystal clear pictures and video in real time and get it to their legal team for the ultimate storytelling experience at trial. There is simply no reason a jury should not see visual evidence of your client's hardships and history at trial.

Take for example a client who had a recent back fusion. His family has a pre-paid vacation planned. Flying was not an option. They had to drive, 24 hours, to Orlando. Throughout the trip, the client's wife took pictures of the things they did on their ride. They

stopped at south of the border and the amusement park rides where the husband had to stand and watch while the kids rode the merry go round and Ferris wheel with Mom.

They went swimming in the Gulf of Mexico and built sandcastles. The client stayed at the hotel in bed as he was in pain from the ride. The client's wife had pictures and videos of everything, including the client waiving from the hotel room at the rest of the family before they went to the beach.

She also had pictures of the client in the car in pain as he suffered through the long ride. These are the little things that go a very long way with jurors and adjusters. And it was not just on vacation. The wife was able to record the same compelling footage when they returned home and took the kids to soccer practice, the bus stop, playing in the backyard, etc.

Lawyers should encourage their clients to be active with their smartphones.

Defense counsel used to try to use this against plaintiffs. They would make them seem like fakers out to get money by carrying around a camera to take pictures for their lawsuit. Thankfully those days are over. Your next jurors most likely have cameras in their phones and use them on a daily basis.

Being able to present pictures and videos from your client is extremely valuable at trial. Those visuals will guide the jury in their understanding of your client's damages. After all, a picture is worth a thousand words.

Innovate and Elevate

The new tools of the virtual world can be used to our advantage. If we innovate, there are better opportunities to tell our client's stories than ever before. It is up to us to learn those new opportunities and take advantage of them. ⚖

Endnotes

1. "Percentage of U.S. Population who currently use any social media from 2008 to 2021." Published by H. Tankovska on April 14, 2021. statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/
2. *Id.*
3. "Our memory for sounds is significantly worse than our memory for visual or tactile things" University of Iowa. Published February 26, 2014. sciencedaily.com/releases/2014/02/140226174439.htm#:~:text=2-,Our%20memory%20for%20sounds%20is%20significantly%20worse%20than,for%20visual%20or%20tactile%20things&text=Researchers%20at%20the%20University%20of,things%20we%20see%20or%20touch.
4. Gatto v. United Air Lines, Inc., No. 10-CV-1090-ES-SCM, 2013 WL 1285285, at *5 (D.N.J. Mar. 25, 2013)
5. *Id.* At 4.
6. Newzoo Global Mobile Market Report 2019; Light Version. Published September 17, 2019. newzoo.com/insights/trend-reports/newzoo-global-mobile-market-report-2019-light-version/

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