THE LITIGATION NEWSLETTER

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Address correspondence and items for publication (hard copy and disk if possible) to:

Brad H. Sysol
Miller, Johnson, Snell & Cummiskey, P.L.C.
303 North Rose Street, Suite 600
Kalamazoo, Michigan 49007
Telephone: (616) 226-2974
Fax: (616) 226-2951
Email: sysolb@mjsc.com

CHAIR'S LETTER

by: David C. Sarnacki

Your Litigation Section is proud to provide you with an opportunity to improve your litigation management skills. *Breakthrough Strategies for Litigation Success* will provide you with real ideas to incorporate into your practice today.

This theme issue originated from a CLE program I developed for the Grand Rapids Bar Association. I thank the GRBA for authorizing this sharing of experience and expertise by some of our state's best:

CAROLE BOS is the co-founder and senior trial attorney of Bos & Glazier, P.L.C. Her areas of practice include personal injury and/or wrongful death; contract disputes; product liability; medial malpractice; general commercial litigation; employment litigation; and insurance coverage disputes. She also is trial counsel (working with patent attorneys) on significant intellectual property and patent infringement litigation. Bos is a Special Attorney to the United States Attorney General having had a special appointment to represent the United Stated on litigation matters pending in Michigan. Bos is also a frequent speaker and author on various legal and inspirational topics. She is the author/co-author of five books including How to Use Video in Litigation, Women Trial Lawyers: How They Succeed in Practice and in the Courtroom, Introducing Evidence, Life is a NonStop Event, and Marriage is a Balance Beam.

FREDERICK D. DILLEY is a member of the law firm of Boyden, Waddell, Timmons & Dilley of Grand Rapids specializing in plaintiff's personal injury litigation, medical malpractice, civil rights, domestic relations and environmental law. He has served as

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BREAKTHROUGH STRATEGIES FOR LITIGATION SUCCESS:
Lessons Learned by the Masters

Chair's Letter

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chairperson of the State Bar Environmental Law Section Council and is a Fellow of the State Bar of Michigan. Dilley has served as an adjunct professor of Environmental Law at Grand Valley State University and has been a faculty member in numerous ICLE programs and seminars. He is a past chairperson of the Hillman Advocacy Program and past president of the Federal Bar Association for the Western District of Michigan. He is presently President of the Grand Rapids Bar Association. He is a member of MTLA, ATLA and Trial Lawyers for Public Justice.

JON R. MUTH is a member of Miller, Johnson, Snell & Cummiskey, P.L.C., having joined the firm in 1971. His areas of practice include Civil/Commercial, Product Liability, Environmental and Securities Litigation. He is a graduate of Kalamazoo College (B.A., 1967) and Wayne State University (J.D., cum laude, 1971). Muth is a past President (1994-95) of the State Bar of Michigan and was awarded its Roberts P. Hudson Award in 1998. He has made CLE presentations to the Institute for Continuing Legal Education (ICLE), served on the faculty of ICLE's Advocacy Institute, Trial Advocacy Skills Workshop, and continues to serve as a certified facilitative mediator for the U.S. District Court for the Western District of Michigan. He also continues his efforts to highlight the need for attorney participation in pro bono programs and funding of legal services for the poor.

JOSEPH G. SCOVILLE was appointed as a United States Magistrate Judge for the Western District of Michigan in January of 1988. Before taking the bench, he was a partner in the firm of Warner, Norcross & Judd. He is a past president of the Federal Bar Association, Western Michigan Chapter, and has served as a faculty member for continuing legal education programs in West Michigan. Judge Scoville is a graduate of Michigan State University (1971) and University of Michigan Law School (1974).

Thank you all for providing us with access to the *Lessons Learned by the Masters*!

REALISTIC CASE ASSESSMENT

by: Frederick D. Dilley

"Should I take this case"? This is often the single most important – and difficult question a lawyer faces. The question should be answered only after a thorough evaluation of the case, which starts with information gleaned from the client interview. The cases a lawyer turns down are some times more determinative of financial and professional success than the cases he or she takes.

These are some of the factors that should be carefully evaluated before deciding whether to take a case.

1. **Liability: Does the theme "work"?**

   a. **Theme:** Make an effort to reduce the facts of the case to a simple statement of 25 words or less. The case must have a theme. There may be one obvious central theme and several sub-themes.

   Frame the themes so that if you prove the facts that support it, you will prevail at trial. You will refer to the theme throughout the litigation process. Through discovery, you will attempt to prove the elements of your theme. Demonstrative evidence will illustrate the theme. Opening and closing arguments will highlight it.

   b. **Causation:** The negligence or the breach of a contract must be causally related to the injury claimed. The defense may argue that a pre-existing condition, not the defendant's negligence, caused the injury. Consider superseding causes or a series of causes, such as in cases where the injury occurred over a prolonged period through exposure to numerous products manufactured by different entities.

   In medical negligence cases, the defense often presents the, "So what?" defense and argues that even if the plaintiff's condition had been timely diagnosed and treated, the poor outcome would have been the same.

   c. **Objective Severity:** Determine whether the client's injuries are severe enough to warrant further legal action. Can the injuries be seen on x-rays, EKGs, MRIs, CT scans or other electronic imaging? If not, presenting them to a jury and assigning a monetary value to them may prove more difficult. Cases in which the primary injuries are soft tissue injuries or mental distress pose special problems because these injuries cannot be "seen" by the jurors.

   Other factors to consider are whether or not the injury is permanent and impairs a person's ability to work or engage in routine daily activities. How easily will your proofs meet such "thresholds"? – legal and/or practical?

   The strength of liability is a big factor in determining the balance of factors that influence your decision to take the case.

2. **Costs**

   a. You must always weigh the "upside" of the potential recovery against the costs of obtaining it. For example, litigation costs in medical negligence, products liability and civil rights cases are often very high. Thus, the damages must be substantial, justifying the time and expense involved in preparing and trying the case.

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Realistic Case Assessment

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b. "Tort Reform" legislation in Michigan has limited the amount of damages available in many cases. Determining whether the client will have to reimburse health care providers and others out of a settlement or verdict proceeds is often a serious consideration.

c. Do not take cases unless you fully intend to handle it all the way through trial. If you plan to spend minimal time and money in the hope of obtaining a quick settlement, you are doing the client an extreme disservice. You will also do harm to your own reputation. Never take a case that you are not prepared to take all the way.

3. **Jury Appeal**

a. Make an assessment of your gut reaction to your client's story.

b. Will the case have jury appeal?

c. Was the defendant's conduct an accident, an innocent mistake, or an intentional tort?

d. Does the case cry out for justice?

e. Will the jury likely become incensed with the defendant's conduct?

f. Is there a punitive aspect to the case?

g. Where does your sympathy lie?

4. **The Client**

a. During the initial interview, you form impressions about your client. The jurors' response will likely be the same as yours. If you get a negative impression, a jury may also. But this does not mean the case is not worth prosecuting. The client is one aspect to evaluate, although a central one.

1. Do you like him or her?
2. Is he or she believable?
3. Articulate? Able to tell the story in a credible, persuasive way?
4. Does the client evoke sympathy?
5. What are his or her motives for bringing a lawsuit?

b. Certain telltale signs reveal various kinds of problem clients.

1. The **"grocery bag client."**
2. The **"untruthful client."** During the initial interview, everything seems just right and only minor inconsistencies emerge. But soon, you find that these multiply and your case becomes a minefield of falsehoods. These can be used dramatically against you and your client as the discovery process unfolds.
3. The **"unsavory background"** – prior felony convictions or prior employment difficulties often evokes suspicion from jurors. Can you overcome these credibility problems?
4. The **"greedy client"** – from the first contact he or she presses you to estimate how much the case is worth. This client is more interested in money than in justice. Jurors often sense greed easily. The greedy client will have little credibility.
5. The **"litigious client"** – files multiple claims and has credibility problems because of it. You stand

a good chance of being his or her next target.

6. The **"skunk client"** – has repeatedly been in trouble or involved in many legal scraps, scams and other nefarious activities. This client's checkered past will return to haunt you. Often, he or she has not revealed everything to you.

5. **The Defendant – your opponent**

a. You must assess the manner in which the opposite party will present itself to a jury. Is the defendant the proverbial "sweet little old lady" or a faceless entity with a large "target" on its broadside? When you face a sympathetic opponent, the jury may unconsciously reduce the damages and raise the bar for liability.

b. In professional negligence cases, determine whether the defendant is highly qualified and widely respected. If so, it may be difficult to locate experts willing to testify.

c. Your case may involve multiple defendants from different jurisdictions or foreign defendants. Difficulties arise in scheduling hearings and depositions and finding experts. Also consider the multiplication of costs with multiple defendant cases.

6. **Collectibility**

Determine whether the defendant has insurance or sufficient assets to satisfy a judgment. While justice may be its own reward, it makes little sense to pursue a case that puts you or your client at a financial loss.

Investigate the defendant's insurance coverage and financial viability early on. Asset checks and other forms of investigation are money well spent.

CONCLUSION

You may run into the rare case that qualifies as "perfect" – it is strong in all of the above categories. Most cases, however, are strong in some categories and weak in others. This is where your skill as a trial lawyer comes into play.

If you decide not to take a case, you should send the client a letter confirming your rejection of the case. Advise the client of all applicable filing deadlines and statutes of limitation. Encourage a second opinion if appropriate.

If you have not made a decision, do so immediately. Do not let the case "fester." Delay is not only a dis-service to your client, but can also be the basis for a legal malpractice claim against you.

If you decide to take the case, begin your plan of attack as soon as possible. Make a "To Do" list. Consider:

- What further investigation and legal research needs to be done?
- What physical evidence must be preserved?
- What letters need to be written?
- What medical records and reports must you obtain?
- What important dates need to be calendared?
- What witnesses need to be interviewed?

INITIAL CLIENT INTERVIEW

- Remember the client you are evaluating is also evaluating you. Nothing prevents the client from retaining another lawyer.
- Take the initial telephone call yourself. First impressions are lasting ones. Be courteous and professional.

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Realistic Case Assessment

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- On the day of the interview, do not keep the client waiting. Going to a lawyer is stressful for most laypersons, so make the client feel at ease. Extend a warm greeting and introduce the client to your staff.
- Personally escort the client to your office and close the door to insure privacy. During the interview, do not accept telephone calls or other interruptions.
- Emphasize that everything you and the client discuss is confidential so that the client will speak freely. Ask the client to tell you all the information pertaining to the case whether he or she thinks it is helpful or harmful. Explain that the information that you do not know about can be damaging if it comes as a surprise to you, but can be properly handled, if disclosed early.
- Let the client tell his or her story from beginning to end without interruption. Take notes. Do not record the interview, as doing so may intimidate a client. When the client finishes, review the facts so that you can fill in any blanks and correct any mis-statements.
- Establish a client profile, including basic facts and dates.
- Obtain the client's personal and family medical history.
- Never estimate the value of a case in the initial interview. You do not have enough information at this time to make an accurate assessment, and a decision made at this stage almost always comes back to haunt you.
- At the end of the interview, if you have listened attentively to the client's story and expressed concern for his or her cause, a relationship of confidence and trust will develop between the two of you. This rapport often keeps the client from becoming a problem later on, such as a plaintiff in a legal malpractice against you.

Your success will ultimately depend on how accurately you evaluate the case. You must analyze liability, costs, jury appeal and your client's and the defendant's appeal, and collectability of damages.

FINDING THE WINNING STRATEGY

by: Jon R. Muth

1. **Analyze Early**
   - ➢ gather information from client
   - ➢ question information from client
   - ➢ investigate
   - ➢ identify and research key issues
   - ➢ discuss case with other lawyers
   - ➢ **THINK**

At the end of this process, you should know 85% of what you will ever know about your case at about 15% of the cost of going through a trial. You should be able now to identify strengths and weaknesses, understand legal obstacles, select your best theory or defense, anticipate opposing positions, and intelligently plan discovery.

"If you don't know where you are going, any path will get you there."

2. **Understand the Targets of Your Strategy**

The targets of your strategy can be:

- the judge
- a jury
- mediators
- your client
- your opponent.

Since only a small percentage of cases go to trial and a somewhat larger percentage are decided on motion, a major part of your strategy should be directed toward your opponent. Cases settle favorably for your client when the opposition assesses *your* strengths and weakneses in a manner that is favorable to your position.

3. **Establish Your Credibility**

Your credibility will have a major impact upon the results you obtain.

All the people to whom your strategy is directed will start to judge you at their first contact with you or your work.

Always be:

- prepared
- professional
- courteous
- firm

Always know why you are doing what you are doing.

Competence demands respect.

Psychologists tell us that an element of respect is fear.

If your opponent respects you and your ability, you will resolve cases fairly and favorably.

If the judge respects you and your ability, your arguments will get the Court's attention.

4. **Develop Your Theme**

Write your closing argument in outline form after you have completed your initial analysis.

Use the Story Approach for development of your theme.

Relate your theme to life. Never forget basic emotions, community wisdom, and values.

Barry Commoner once gave a speech about good environmental practice that boiled down to three points:

1. Everything has to go somewhere.
2. Mother Nature knows best.
3. There's no such thing as a free lunch.

5. **KISS**

Keep It Short and Simple or (military version) Keep It Simple, Stupid.

Start the process with your pleadings. Over-pleading always causes headaches.

A rifle works better than a shotgun.

Plead only what you need to pursue your theme.

Focus your discovery. Know at all points in the preparation of the case what you are trying to prove and why.

In discovery recognize early what facts will be critical to summary disposition and focus on those facts.

Never present more than two or three legal theories to a jury. One is best if your case allows it.

Winnow and eliminate vigorously. If you throw into a trial all the fruits of your preparation and discovery, the result will look a lot like garbage.

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6. **Use Motion Practice to Help Keep It Simple**

You want a case to be decided on the issue or issues you select. Much as in warfare, the control of terrain can be critical. It can even overcome far greater resources as the Greeks at Thermopylae would certainly attest.

Use Summary Disposition Motions (partial or complete) and Motions in Limine aggressively to narrow the issues and simplify proofs. Although these tools are perhaps more often employed by defendants, they can be equally advantageous for plaintiffs.

7. **Never Do Anything That Is Inconsistent With Your Theme**

This is the cardinal rule of case preparation, opening, closing, direct examination, cross examination – indeed everything you do at trial. What you decide not to do is as important as what you decide to do.

8.-10. When you have nothing more to say, sit down and shut up. I will.

BUDGETING THE BIG CASE AND MANAGING YOUR DREAM TEAM

by: Carole D. Bos

BUDGETS FOR "BIG" PLAINTIFF CASES – FACING THE CRUEL REALITY

TIP #1 – EARLY COST ASSESSMENT: DO IT – THEN DOUBLE IT

TIP #2 – GET REAL: CAN YOUR FIRM AFFORD TO FRONT THESE COSTS?

TIP #3 – BE HONEST: DO YOU NEED HELP TO AVOID SHORTSETTLING?

BUDGETS FOR DEFENSE CASES – KEEPING YOUR CLIENT HAPPY

TIP #4 – KEY GUIDELINE: AVOID SURPRISES

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MANAGING THE TEAM – BE IN CHARGE WITHOUT BEING "THE DICTATOR"

TIP #6 – BASIC WISDOM: MANAGING LAWYERS IS LIKE MANAGING CATS

TIP #7 – GET DETAILED: YOU NEED A CASE PLAN

TIP #8 – BE SPECIFIC: ASSIGN WORK BASED ON AVAILABLE BEST TALENT

TIP #9 – FOLLOW UP: IF YOU DON'T, WHO WILL??

TIP #10 – USE DIPLOMACY: YOU'LL BE SURPRISED AT THE RESULTS

BUDGETS FOR "BIG" PLAINTIFF CASES – FACING THE CRUEL REALITY

Early Cost Assessment: Do It – Then Double It. Imagine this: You get the call on the "dream plaintiff case." All the elements are there: Great liability; catastrophic damages; collectible defendants. You feel a rush of excitement: The call came to me! Wow! But reality sets in pretty quickly: The defendants aren't going to write a check without a big fight. How much is the fight going to cost YOU? How long will the fight take? How many depositions later? How many experts will you need to prove your claims? How many flights to distant cities? Be mindful: The bigger the case, the more likely a defendant will try to wear you down. Be prepared for these words: "We can outwork you, outspend you, outlast you." Whether you actually HEAR those words from your adversaries is insignificant. They will be said. Remember: Handling a big case is like starting a business. It ALWAYS costs more than you think it will, and it ALWAYS takes longer to get there.

Do your preliminary case investigation as soon as possible. If the case is still as solid as you initially thought, start putting a case plan together. Factor in everything YOU need to do for your client. Be complete. Then factor in everything your ADVERSARIES are likely to do for their clients and estimate how much *that* work will impact YOUR checkbook. Be complete. Total all those costs – then double them. And be prepared not to shock yourself if, at the end of the case, the costs are triple what you initially estimated.

Get Real: Can Your Firm Afford to Front These Costs? After you have prepared your early cost assessment, you need to realistically ask yourself: "How am I going to front these costs?" If you have a client who *can* front the costs, ask the client whether he/she/it *will* front them. Don't be surprised if a well-heeled client declines to front the costs. Even though every plaintiff knows the costs are ultimately their costs, don't forget about the difference between fronting them and reimbursing them from a settlement. Even those who *can* often *won't.* People are people whether or not they are plaintiffs in a case – and "money makes people do funny things." Even good people. Even your clients.

If your client can't – or won't – fund the costs, you need to realistically ask yourself: "Can my firm afford to front the costs from start to finish?" If your answer to that question is "yes we can," you need to go further. Your next question is: "If the case is lost (and even great cases can be lost – like when a losing defendant files bankruptcy), and the client won't/can't reimburse the firm for costs (remember *The Rainmaker*??), can the firm afford to be stuck with the loss? Unlike Matt Damon in *The Rainmaker*, you are likely to keep practicing law. How will the loss of substantial costs affect the financial stability of your law firm?

Here's the ultimate question: If you think your firm can front the costs, and if you win the case after a long battle (including appeals), can you live with the consequences if the victory doesn't generate enough cash to pay the firm for its time and costs? Remember: John Travolta's character in *A Civil Action* is a real lawyer who handled a real case. **Here's the ultimate tip: Go into a big case with your eyes wide open, confident you can live with the worst if it happens.**

Be Honest: Do You Need Financial Help to Avoid Short-Settling the Big Case? If your "dream case" is as great as you think it is, and if the defendants are really worried about it, chances are good you may get an early settlement offer. Chances are that offer may be short but tempting to take. If that happens, and if your firm is really not able to commit the kind of financial resources that are needed to properly prepare and try the case, you need to ask yourself a critically important question: "Will my client's best interests be served if we accept this proposal?" Don't fudge

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on the answer. Ask the question as though you were the *client*, not the *lawyer*. Are you maximizing the client's potential recovery?

You also need to ask yourself a corollary question: "Could the client do better than this offer if we (the firm) joint-ventured the case with another law firm?" If the answer to that question seems to be "yes," you need to carefully consider that option. If the case is big enough, sometimes involving another firm is the right thing to do. Not only will you have help fronting the costs, thereby minimizing the financial strain on the law firm, frequently a joint-ventured case results in significantly greater fees because the result is bigger. **Here's the ultimate tip: Don't be afraid to consider working with another law firm – with the right case it can maximize the result for everyone.**

BUDGETS FOR DEFENSE CASES – KEEPING YOUR CLIENT HAPPY

Key Guideline: Avoid Surprises. Now you are representing the defendant. You get the call on a huge case with catastrophic injuries. Maybe it's a commercial case where there seems to have been a breach of contract. Maybe it's a products case where the client made a potentially dangerous device. Maybe it's a case that could take years to complete discovery.

After you have reviewed the preliminary investigation, here is the first question you must ask: "Can I win this one?" Some of the next questions are: "What is our percentage chance of losing?" "What is my best analysis of what it will take to win?" "How much will it cost my client to defend?" "How long is it likely to take?"

Lawyers are ALWAYS reluctant to address these issues early in the case. We don't want to be held to an analysis that turns out to be wrong or stuck with numbers that turn out to be unrealistic. But put yourself in the client's position: The client needs to know what it/she/he is up against. They also need to know how much it is likely to cost. The key to keeping the client happy on budget issues is constant analysis. Things change. Clients know that. What they don't like are last-minute changes of mind. What they cannot abide is a lawyer who constantly pushes an aggressive defense and then recommends settlement – for the first time – on the eve of trial.

If you critically assess the case as a first step – determining all the strengths and weaknesses – your client will understand why the dollars are being spent. And – if you continue to critically assess the case as discovery proceeds – and determine how discovery has helped or hurt your defense – your client will understand why more dollars are required.

If you think the case cannot be won, let your client know that right away. Perhaps a settlement can be negotiated early on. If you don't want to send a signal to the plaintiff's lawyer that you are worried about the case, tell your client. If that's an issue, consider suggesting early neutral evaluation. Just remember the ultimate points here: Spend the client's money as though it were your own and avoid last-minute surprises.

Cardinal Rule: Constant Client Communication. The best way to spend the client's money as though it were your own and to avoid last-minute surprises is constant, documented communication with your client. Even if you have a long-established relationship, and the client typically lets you "run with the case" in the way you see fit, handle the big case differently. If it is a case of national significance, or involving substantial dollars, you absolutely must be in touch with the client every step of the way. Even if you have a great relationship with the person who normally sends you files, that person is probably *not* the decision-maker on a big case. If you provide on-going, back-up details

in written form, *anyone* who looks at the file will understand the game plan and will understand what (and *why*) the budget is what it is. It is the single best way to help you maintain good client relationships. **The ultimate tip here: Update clients *before* you spend more of their money.**

MANAGING THE TEAM – BE IN CHARGE WITHOUT BEING "THE DICTATOR"

Basic Wisdom: Managing Lawyers is Like Managing Cats. Big cases always require a team of people to work them properly. If you think you can work a big case alone, you are wrong. Period. No exceptions. You will need help. The help will either be in your own firm (if you are part of a firm) or with another firm (if you practice by yourself). If you are handling a defense case that requires you to be part of a "joint defense group," the "help" will be lawyers from other firms who represent other defendants. Whichever scenario applies, you will learn early on that it is not easy to manage lawyers. Particularly not lawyers who are part of a "dream team."

"Dream team" lawyers will usually have good-sized egos. An ego is necessary for a lawyer to have the confidence required to properly represent clients. This fact, however, poses a significant challenge for the lead lawyer on a big case. It is not easy to manage the egos and still get the work done. That takes a special skill. If you are the "lead" lawyer you are, in fact, in charge of the case. You are the person to whom the client looks for answers – and results. You are the one who must make sure everything gets done. But HOW you do that with your team makes ALL the difference. Try to *be* the boss without constantly reminding everyone that you *are*. Listen to the opinions of people on your team. Don't take their ideas and make them your own without giving credit where it's due. **The ultimate tip here: Remember all the things that weren't effective when someone tried to manage you – and avoid making the same mistakes when you are managing your dream team.**

Get Detailed: You Need a Case Plan. No team will ever be successful without a plan. Everyone needs to know where the team is going – and why. It will take effort to analyze everything that must be done, but it is well worth the effort. Get the input you need from your team members and use them to draft the case plan. Do it as early as possible, with the understanding that the plan will be revised as the case moves forward.

Be Specific: Assign Work Based on Available Best Talent. If you have the luxury of actually picking your team members, you will know what talents each has at the start. If you are given a team by virtue of participating in a joint defense group, you will need to learn the talents of the lawyers as you go through the case. Try to get this information as early as possible so you can assign tasks to people who are best able to carry out those tasks. If you have a great cross examiner on your team, assign key depositions of key witnesses to that person. If you have outstanding document managers on your team, give those folks responsibility for organizing, maintaining and keeping track of exhibits. Be specific with your assignments and be sure you give them to the people who are most qualified to produce the best result for that particular job.

Follow Up: If You Don't, Who Will? Someone needs to make sure that all the jobs are getting done. In a big case it is especially critical and especially hard to do. If you assign the follow up responsibility to someone else, make sure you are in constant communication with that person. It is unbelievably easy for "things to fall through the cracks" in a big case because there is usually so much work to do. Because "the devil is in the details," follow up is essential to avoid preventable disasters.

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Use Diplomacy: You'll Be Surprised at the Results. Big cases are often the source of great frustration. Too much work. Too many details. Too much riding on the result. The manager of the dream team, handling the big case, can either make this a lot better or a lot worse.

The reason why diplomats can often negotiate reasonable settlements, when countries cannot do so on their own, is because of the diplomats' focus. The same is true when a lawyer manages a team of lawyers working on a huge case. The question must always be: "What is in the best interest of the case – and – are we all tracking together to get there?" When it becomes apparent that the team is not tracking together, it is up to the lead lawyer to figure out why and to fix the problem. Using diplomacy helps when a team member needs to be counseled. **The ultimate tip here: A diplomat's focus works better than a dictator's** (whose presence and status is usually resented by intelligent, educated people).

MAKING THE MOST OF JUDICIAL MANAGEMENT

by: Joseph G. Scoville, U.S. Magistrate Judge

1. **Know the rules**

Be familiar with the published rules and guidelines that govern case management. For the Western District of Michigan, this includes the Federal Rules of Civil Procedure (esp. Rules 16 and 26), the Local Civil Rules (esp. Rule 16), the Civil Justice Expense and Delay Reduction Plan, and Admin. Order 93-125.

2. **Get the lay of the land**

Unwritten attitudes and patterns are important, too. Even on the same court, judges have differing attitudes towards case management. As in all aspects of litigation, there is no substitute for knowing the judge.

3. **Talk to the opposing lawyer**

Modern case management presupposes a degree of cooperation and communication between counsel. An excessively adversarial relationship can hurt your prospects of getting an advantageous case management plan. If the lawyers are fighting about case management issues, the court may ignore both positions and fashion a plan that neither one likes.

4. **Anticipate problems early**

The early case management conference is not just an empty exercise. This is your chance to structure the progress of the case. Think ahead. Issues of staged discovery, bifurcated trials, early dispositive motions, and the best method of ADR should be raised now. Once the case management order is entered, it takes on a life of its own, and amendments are not easy to obtain. It is better to raise issues at the conference than to seek amendments later.

5. **Take the Joint Status Report seriously**

The joint status report is usually the court's first source of information about a case. Be thorough and clear. Your goal should be to present a unified front to the court on case management issues.

6. **Be realistic in your estimates**

Lawyers often underestimate the time necessary to get things done. Be realistic, keeping in mind special problems such as availability of expert witnesses, out-of-state deponents, etc. Again, it is easier to get accommodations early in the case.

7. **Consider the Court's schedule as well as your own**

Make sure that your proposed schedule builds in a reasonable time for the court to perform its functions, such as deciding dispositive motions.

8. **Attend the Case Management Conference yourself**

The conference is a critical stage of the case. It will be the court's first impression of the case. The court may ask probing questions about the merits, and the answers may have lasting repercussions. The case management order will govern the future proceedings. This is no place to send a junior associate, unfamiliar with the file.

9. **Pay attention to the Case Management Order**

The case management order can only be modified for good cause. *Fed. R. Civ. P 16(b)*. This means an inability to meet the deadline despite diligence. Don't throw the order in the file and forget about it. It is not easy to get deadlines extended. A stipulation is usually not enough.

10. **Ask for extensions before the deadline expires**

If you must ask for an extension, do so before the deadline expires. The worst position is to ask for an extension in response to your opponent's motion to strike your late filing. Also, keep in mind the effect of an adjournment on later deadlines.

KEYS TO AN EFFECTIVE DISCOVERY STRATEGY

by: Frederick D. Dilley

Your discovery should be conducted in four "waves".

First wave: Initial Interrogatories; Initial Request to Produce Documents; 30(b)(6) Deposition Notice.

Second wave: Fact witness depositions.

Third wave: Opponent's expert depositions.

Fourth wave: Requests for admissions of fact and genuineness of documents.

You can dictate the action by controlling the timing and the sequence of discovery, thereby placing your opponent in a defensive/reactive position throughout the lawsuit. If you do this, the prospects for a successful resolution – by verdict or settlement – are enhanced.

There are ten suggested steps for maintaining the tactical upper hand. To insure effective implementation of these steps, you should –

- Take the lead in propounding and scheduling discovery;
- Focus efforts, time, and energy on obtaining discovery from your opponent, not on resisting their unlawful discovery of your client; and

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- Insist on full and fair responses to "paper" discovery and in depositions.

The following ten steps are sequential in most cases and you should not move on to the next, until the preceding step has been satisfactorily completed.

1. **File your lawsuit when you are ready – and not until.**

   a. Absent a statute of limitations problem or a seriously ill client or key witness, you should not file the lawsuit until all preparatory pre-filing steps have been accomplished. These steps include the following:

      1. Fact investigation;
      2. Obtain statements from key fact witnesses;
      3. Securing the important physical evidence;
      4. Retaining necessary liability expert witnesses.

   b. All initial "first wave" discovery requests should be served with the Summons and Complaint. These include the following:

      1. A First Set of Interrogatories;
      2. A First Request for Production of Documents; and
      3. A Federal Rule of Civil Procedure 30(b)(6) Notice of Oral Depositions of the corporate opponent/party.

2. **Challenge the sufficiency of your opponent's first pleading.**

   a. When served with a standard Answer or Complaint, force your opponent to plead with sufficient particularity and move to strike any assertion or defense that is immaterial or insufficient as a matter of law. Under Federal Rule of Civil Procedure 12(f). A plaintiff may move to strike "any insufficient defense" within 20 days after the service of that Answer.

   b. Many times, an Affirmative Defense raised by the defendant will not apply as a matter of law to the theories set forth in the plaintiff's Complaint. Take the offensive by moving to strike or moving for summary disposition. Failing to take advantage of either Rule 12(e) or Rule 12(f), will only encourage the defendant to obfuscate throughout discovery. A streamlined approach to discovery always benefits the plaintiff. Use these rules to forcibly compel, if necessary, a clear framework of the issues to be litigated.

   c. Similarly, challenges to State Court pleading vagaries may be had pursuant to MCR 2.111(B)(6).

3. **Seek a firm discovery schedule and early trial date.**

   a. As soon as all defendants have answered, make effective use of the Scheduling Conference in State Court, or Rule 16 Conference in Federal Court. A conference with the Court and opposing counsel to prepare a discovery scheduling order, is a very important first step in your case. At a minimum, the Court should set deadlines for amendment of pleadings, joinder of additional parties, identification of expert witnesses, filing of dispositive motions and conclusion of discovery. A Court ordered discovery

schedule will discourage stonewalling by your opponents. Be prepared to "live" by the Scheduling Order and make others "die" by it.

By the time the lawsuit is filed, you should have already retained liability and other experts and have them available for identification. The earlier you identify yours; the earlier you can force identification of your opponent's experts. Early disclosure of your own team of liability experts is a powerful indication of readiness and thorough preparation.

At a minimum, the defendant should be required to identify its liability experts within 30 or 60 days after plaintiff's disclosure. (Ideally, of course, the deadline should be the same for both).

c. A firm deadline for amending the pleadings works to plaintiff's advantage as well; any Affirmative Defense not raised by this deadline should be deemed waived. Such a deadline also avoids the last minute third-party claim or cross-claim that your opponent may otherwise resort to.

d. You should seek to obtain a firm trial date at the earliest possible opportunity. This date "turns over the hour glass" and starts the flow of sand against your opponent. For reasons of efficiency and effectiveness, you should prepare for trial once and only once.

4. **Complete your "first wave" of discovery – interrogatories and document requests to your opponent.**

a. You should expect your opponent to respond to the initial set of interrogatories and requests to produce documents, which accompanied the Summons and Complaint, within 45 to 60 days. These responses should be reviewed immediately – primarily to assess their sufficiency, but also so that you can follow-up on any factual leads set forth in the answers with supplemental discovery requests.

b. Do not move on to the "second wave" of discovery (depositions of fact witnesses) – before receiving responsive answers to the "first wave" (paper discovery). If this material is not complete, insist that the defendant produce all relevant documents and Answers to Interrogatories – by Court compulsion, if necessary. You and your liability experts will need time to study these materials before deposing the fact witnesses, which may be under the control of the other party or its designated agents.

c. Resist a defense offer to produce its employees or designated agents while awaiting resolution of any ongoing "paper discovery" disputes. You should have the opportunity to carefully review all documents produced by the defendant and to consult with the plaintiff's liability experts about relevant points the documents contain.

d. During the first wave or "paper phase" of discovery, there is often a battle for determining what the standard will be for responding to discovery. Opposing counsel may object to your lawful discovery while insisting on absolute precision in your responses to its discovery. Respond to these tactics by promptly filing motions to compel adequate discovery and by refusing to be bogged down in discovery disputes

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propounded by your opponents. Respond forthrightly to your opponent's initial discovery requests for all information that is lawful and proper. This "clean hands" approach puts you in a favorable position should you need the Court to rule on any frivolous objections made by your opponent.

5. **Complete the "second wave" of discovery – depositions of fact witnesses, including defendant's officers, employees, and designated agents.**

   a. At this stage of discovery, you know the names of the officers and various employees who were involved in the facts giving rise to the lawsuit. You now need to decide whether the deposition schedule should go "bottom-up" or "top-down".

      1. The "bottom-up" approach begins with depositions of lower level employees and ends with division supervisors or officers.

      2. With a "top-down" approach, counsel proceeds down the chain of command.

   b. Most plaintiff's attorneys believe that the "bottom-up" approach more effectively maintains the plaintiff's litigation advantage.

HELPFUL HINT: Lower level employees are less prone to suggestion by aggressive defense counsel than those higher in the chain of command and may be more likely to stick to the facts. Ask these lower level employees not only what they know about the particular controversy, but whether they know of internal memoranda or documents that were not produced in discovery. Pay particular attention to what directions and instructions were given to the "hands-on" employees by their superiors and, particularly, what communications were relayed up the corporate ladder.

   c. There are four reasons to take a deposition:

      - To learn all you can about what the other side is going to say at trial;
      - To size up the witness to determine his or her potential impact on the jury;
      - To establish and corroborate your client's story through the opponent's own witnesses; and
      - To limit the negative impact that testimony is likely to have on your case-in-chief.

   d. Take depositions of the managing agents, officers and directors next. These witnesses are official spokespersons for the corporate defendant and may be regarded as binding the company by making admissions or statements against interest.

   e. Finally, schedule the depositions of the organization's designated agents. The purpose of FRCP 30(b)(6) depositions is to commit the corporate party to policy directives; obtain a clear picture of what the corporation knew and when; ascertain the existence of similar complaints and lawsuits; and fill in any holes concerning discovery not obtained from previously deposed employees or officers.

HELPFUL HINT: Carefully review documents produced by the opponent to pinpoint the names of any employees who would appear from the content of the document to know about certain

matters, but who were not identified in Answers to Interrogatories. Defense lawyers usually have good reason to keep these people out of view. Many are unfailingly honest. They may not have appreciated, or perhaps resisted, opposing counsel's coaching and, thus, rejected for use as witnesses. Or the company may simply have thought they would be unfavorable witnesses.

6. **Produce the plaintiff for deposition only after completing first and second discovery waves.**

   a. Most defense lawyers are anxious to "get at the plaintiff" especially where comparative fault is an issue. Agree to produce the plaintiff for deposition as soon as the defendant's corporate witnesses have been deposed – and not until. This procedure avoids the distraction of preparing and producing the client in the middle of the plaintiff's own second wave of discovery and it also induces the defendant to more quickly produce selected defense witnesses for their depositions.

   b. In the appropriate case, the overriding justification for waiting to produce the plaintiff for deposition until after completing the first and second discovery waves is that this is the period during which you are likely to find additional defendants against whom litigation may have to be commenced. Any defendant who is brought into the case after plaintiff's deposition has been taken, is entitled to re-depose the plaintiff. A second go-around gives the defense an opportunity to trap the plaintiff into minor inconsistencies that could undermine an otherwise meritorious case.

   c. The best preparation you can undertake for the deposition of your own client is to know everything about the case that your client knows. Know exactly what the client claims happened, so that no matter what subject happens to come up in the deposition, you will be able to follow-up on it immediately minimizing any damage by clever questioning of the opponent.

   d. In regard to depositions, because the transcript is crucial to encouraging a settlement or to impeach a witness at trial, be ever mindful of the record. Ask simple, straight forward questions. The more parts a question has, the less useful the answer is likely to be for cross-examination.

   e. Also, multiple-part questions can be dangerous. If the question contains many sub-parts, the witness' denial may apply to only one, but you may not necessarily know which. On the other hand, if the question is broken down, much useful information might be available in the transcript.

   f. In the end, remember that most cases are settled because of the depositions. The better the preparation and handling of the depositions, the greater the likelihood the case will be resolved favorably.

HELPFUL HINT: Always avoid a second deposition if at all possible; whether of a party, an expert, or a key fact witness in your favor.

7. **Produce your liability experts for deposition only after completing first and second discovery waves and the plaintiff's deposition.**

   a. It is imperative that plaintiff's liability experts have the benefit of reviewing the documents obtained from the defendant during discovery and the deposition transcripts of the lay witnesses and the defendant's employees and other agents before giving their final opinions on liability,

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causation or damages. All the information discovered during plaintiff's first and second discovery waves should be given to the liability experts before the deposition. If additional or different underlying facts reach experts after the deposition, the opinions given may be incomplete or even worse, erroneous. This leads to serious complications, not the least of which is having to offer-up the liability expert for deposition again to revise or bolster the earlier opinions.

b. The other sequential imperative is that the plaintiff's deposition must be completed before the deposition of plaintiff's liability expert. Otherwise, if the plaintiff's sworn version of the facts later differs materially from those assumed by the expert, the expert's opinion is compromised.

8. **Complete the "third wave" of discovery – depositions of defendant's expert witnesses.**

In addition to the thorough and probing depositions of defense experts, you should confirm that the defense experts have not received documents, testimony, or any other data not available to the plaintiff's own experts.

9. **Complete the "fourth wave" of discovery – requests for admissions of fact and genuineness of documents.**

a. At this stage of discovery, your opponents should be more inclined to admit the truth of undisputed matters of fact. Your requests should set out as many basic, undisputed facts as possible so as to compress your case-in-chief and eliminate unnecessary witnesses and evidence for the upcoming trial.

b. Serve a request for admission of genuineness for any and all documents you will seek to admit at trial.

10. **Prepare for trial throughout preparation of the entire case.**

a. The use of a trial notebook is an essential tool for preparing a case for trial. The trial notebook should be initiated when discovery is first undertaken and should be revised continuously throughout the discovery phase of the case.

b. Preparing the trial throughout the entire case also includes periodically testing your theory of the case. Do this informally with friends and colleagues or formally with focus groups and mock juries. Constant re-evaluation and frequent feedback permits you to fill in holes or revise the theme of the case well before trial and, indeed, at a point when you can conduct meaningful discovery or take other remedial steps.

THE RIGHT WAY TO USE EXPERTS

by: Jon R. Muth

1. Selection and Recruitment

- Hire the best. It won't cost much more and will be worth the difference.
- Traits desired:
  - professionalism
  - ability to translate experience
  - willingness to defend position
  - likeable demeanor
- Investigate
  - talk to others who have used
  - root out information that can be used to attack expert for self-interest, bias, lack of qualifications, conflicts of interest
  - eyeball the expert
- Expert must truly believe his or her opinion. Discuss case and opinions generally.

  Make certain expert is comfortable.
- If need to convince expert to testify:
  - acknowledge expertise and reputation
  - ask for help
  - put scientific issue in human context
  - provide relevant legal factor
  - handle fees candidly and professionally.

2. Preparation of Expert

Be very careful what you give an expert in writing: it will be discoverable.

Avoid any commentary of your own.

Advise expert to exercise extreme caution in any notes or markings he makes on exhibits.

Make certain the expert understands that all his notes are discoverable.

You generally do not want a written report from the expert, unless it is required. See Fed.R.Civ.P. 26(a)(2).

3. **Consider Use of a Consulting (Non-Testifying) Expert**

Uses of consulting expert:

- help with theory of recovery or defense
- assistance in analyzing discovery materials, as well as your own documents
- focus discovery efforts and assistance with discovery of opposing experts
- identify possible testifying experts
- help in identifying Daubert issues.

A consulting expert will generally not be subject to discovery. Fed.R.Civ.P. 26(b)(3); M.C.R. 2.302(B)(3).

Particularly in a case where technical or scientific information is key, a consulting expert can be indispensable. If your client is an entity which has in-house expertise, use an in-house expert, but not one who will be a significant fact witness.

4. **Select Your Testifying Expert Early**

It may seem overly simplistic to suggest the need to know what your expert is likely to say before you disclose her in accordance with the pre-trial order. However, I have seen time and again where an expert is named on the basis of assumptions made by counsel, only to be surprised at the expert's deposition.

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The Right Way to Use Experts

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It is not even that unusual to find an expert who didn't know he was listed as an expert, and had not even been contacted, until long after his identity was disclosed.

Even if the lawyer is right in his assumptions about the expert's expected testimony (and who wants to take that chance), a good cross-examination can make it look as if the lawyer named an expert without knowing anything about her opinions simply because the expert could be relied upon to state whatever opinions the lawyer desired.

5. **Uses of Expert Witness**

– Opinions
– Recitation of facts not in evidence
– Demonstration/teaching
– Condense voluminous material
– Organize facts
– Explain technically complex material
– Simplify – KISS

The expert should be a tool of persuasion. Her testimony should help advance your theme.

6. **Preparation of Expert for Testimony**

Plan out with the expert in detail. Make certain expert has information needed.

Alert the expert to expected attacks.

Plan to blunt opposition's arguments on direct examination.

Expert must know and understand your theme and how his testimony fits within that theme.

Make certain that the expert is well-prepared on the facts. Provide any needed assistance in organizing material for expert.

Work out demonstrative exhibits needed. Be creative in teaching the testimony.

Make absolutely certain the expert is comfortable with the opinions and the reasoning that supports them.

Make certain the expert is prepared to defend those opinions and reasons.

7. **Format of Expert Testimony**

– Qualifications
– Preparation
– Opinion
– Reasons

The reasons are the most important part, because they can be the most persuasive. The facts referenced and the reasons given must fit your theme.

The reasoning employed by the expert should be capable of being inserted directly into your closing argument.

8. **Tips on Experts' Direct Examination**

– Don't stipulate to qualifications. If you hired the best, you want the trier of the facts to know it.
– Take the expert through her qualifications carefully and in a tightly-controlled question and answer format. That way the witness will not appear to be bragging.
– Use common language.
– Use demonstrative exhibits.
– Teach – make it interesting.
– Showcase the witness.
– Expert should talk to the jury.
– Keep the testimony moving.
– Avoid occasions for interruption by objection.
– KISS.

9. **Generally, Avoid the Asking of Hypothetical Questions**

Not required under Fed.R.Evid. 705 or M.R.E. 705.

While the hypothetical question may give you a platform to sum up in the middle of the case, it will give your opponent the opportunity to attack the hypothetical in the same fashion by means of an objection:

– vague/uncertain
– ambiguous
– argumentative
– confusing
– pointless
– repetitive
– speculative
– conflicts with the evidence
– omits necessary facts
– states conclusions of lawyer rather than facts

The opposition ends up with two bites at the expert: on the objection and on cross-examination.

While you argue over the question, the expert, whom you are trying to highlight, is turned into a bystander. Your attempt to tightly control the hypothetical may be seen by the jury as an effort to hide other relevant material or an attempt to prevent your own expert from testifying candidly.

10. **Remember Who Is In Charge of Your Case**

The expert may be the horse you must ride, but keep the saddle on tight and work the reins.

TARGETING YOUR MOTION PRACTICE

by: Carole D. Bos

FIRST ISSUE: ESTABLISH YOUR REPUTATION WITH THE COURT

TIP #1 – TRY TO RESOLVE THE DISPUTE WITH YOUR OPPONENT

TIP #2 – FILE YOUR MOTION ONLY WHEN TALKING FAILS

TIP #3 – LIMIT YOUR NON-DISPOSITIVE MOTIONS TO KEY PROBLEMS

SECOND ISSUE: ENHANCE YOUR REPUTATION WITH THE COURT

TIP #4 – MAKE YOUR SUPPORTING BRIEF SHORT AND FOCUSED

TIP #5 – BE PREPARED AND GIVE SUCCINCT ARGUMENTS

TIP #6 – KNOW THE RELEVANT CASE LAW

TIP #7 – BE A LAWYER WHOSE WORD CAN ALWAYS BE TRUSTED

THIRD ISSUE: MINIMIZE DISPUTES WITH OPPONENTS

TIP #8 – IGNORE HOTHEADS!

TIP #9 – STAND YOUR GROUND WHEN IT COUNTS

TIP #10 – BE A LAWYER WHO IS RESPECTED BY ADVERSARIES

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Targeting Your Motion Practice
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FIRST ISSUE: ESTABLISH YOUR REPUTATION WITH THE COURT

Try to Resolve the Dispute with Your Opponent. Abraham Lincoln said that a lawyer's two essential assets are time and reputation. When it comes to targeting your motion practice, the most important asset you personally possess is your reputation with the Court. The next most important asset is the strength of your position on any particular day.

Although it takes time to establish a good reputation with the Court, young lawyers are in a unique position to quickly move ahead with that goal. Significant aspects of motion practice are assigned to young lawyers. That singular fact presents an opportunity to get known, and respected, by the bench. The tips in this section are directed toward that objective.

In order to get a motion heard in Federal Court, the moving lawyer must state that he/she has tried to resolve the dispute with opposing counsel before the motion was filed. Only then will the court consider the matter. Even though Michigan circuit courts do not have that same requirement, judges appreciate the efforts lawyers make to solve problems without running to the court for every little thing. During oral argument, it doesn't hurt to tell the court that you and your opponent have tried to work out the dispute between yourselves before you brought the matter to the Court's attention. Of course, such a representation presupposes that you have actually applied genuine effort to the process.

File Your Motion Only When Talking Fails. Even if there is a real difference of position between you and your opponent, talk about how the issue could potentially be resolved. If interrogatory answers are insufficient, tell your opponent why you think so. If a production of documents has not fully addressed all requested categories of materials, tell your adversary what appears to be missing. Save your motions for the issues that you can't work through yourself. The judges will recognize – and appreciate – that you only file the types of motions that actually *require* the Court's attention.

Limit Your Non-Dispositive Motions to Key Problems. If your opponent refuses to produce an expert for deposition, that's a key problem and it requires a motion hearing. If your adversary just won't properly respond to your discovery requests, thereby inhibiting your trial preparation, that's an issue for the Court. Lawyers are paid to exercise common sense and good judgment. Use those two assets when you decide what constitutes a key problem requiring the judge's involvement. Whatever you do, avoid filing motions "over every little anything" that bothers you. Think first: How is the judge likely to react to it?

ENHANCE YOUR REPUTATION WITH THE COURT

Make Your Supporting Brief Short and Focused. Anybody can dictate a long stream of consciousness, but don't burden the Court with unnecessary words and arguments. You can substantially enhance your reputation with the bench by preparing concise, focused, well-drafted briefs that clearly state the facts, the law, and your argument. Don't belabor the points. Succinctly state what must be said and then move on. If you end up filing a five-page brief that clearly makes your points, what else can you say? One thing is sure: The judge will know you spent more time drafting a five-page brief that actually says something than if you file a fifteen-page document that rambles.

Be Prepared and Give Succinct Arguments. Target your oral argument on the main issues the judge needs to understand. Don't belabor the points. Don't whine. Know the facts. Know precisely why your adversary is wrong. Tell the judge what is wrong about your opponent's position and

why you should win the motion. Don't expect judges to do what the statutes or the case law don't give them the power to do.

Know the Relevant Case Law. If you expect to win a difficult motion, make sure you know the relevant case law. That includes the cases cited in your opponent's brief as well as your own. If the judge asks you questions about the law, you need to make sure you know – and understand – what you are talking about. If there is a way to accurately distinguish cases that are not helpful for you, figure out how to do that before you show up for oral argument. Apply your logic to anticipate the types of questions you will get from the judge – and be ready to answer them. There is never a better time to be "over prepared" than on this point.

Be a Lawyer Whose Word Can *Always* Be Trusted. When you show up for oral argument, and the judge sees who is going to speak for the client, nothing is better than having a reputation that your word can be trusted. If you ever mislead the Court in any way, the judge will – and should – remember it. If you are consistently up-front with the judge – even on tough matters – your trustworthiness will become one of your most indispensable assets.

MINIMIZE DISPUTES WITH OPPONENTS

***Ignore* Hotheads!** Some lawyers believe they win cases by intimidation. The only way that happens, though, is when a hothead's opponent is negatively affected by the outbursts. If you are stuck with a hothead on the other side of your case, don't dignify his antics by paying attention to them. Hotheads don't intimidate the Court. If you don't get the cooperation you need to process pretrial preparation, bring your well-focused motions before the Court. That's why the judges are there. Don't put up with somebody else's nonsense.

Stand Your Ground When It Counts. Sometimes it is just not possible to agree with your opponent. Even after the judge has ruled, sometimes it is just not possible to get along. Some lawyers are difficult and try to be intimidating. Perhaps they can't help themselves. Perhaps that is part of their "winning" strategy. When you stand your ground, your client is well represented. If you need the Court's help to do that, file your motion. Chances are pretty good the judge already knows what you are up against. Don't whine, though. Be specific. Tell the Court precisely what the problems are and offer your proposed solutions.

For example, if you are taking a deposition and the opposing lawyer constantly interrupts, coaches his witness, or does/says other inappropriate things, stop the deposition and file your motion. Attach the transcript so the judge can see exactly what you are talking about. The only way to conclude the testimony may be to take it in the Courthouse where the judge is nearby to rule on your objections. If that's what you think, suggest it to the Court. The mere fact that the judge has ordered the deposition to be taken in the Courthouse may be enough to cause your adversary to start acting professionally.

Be a Lawyer Who is Respected by Adversaries. When you target a motion against your opponent, you want him or her to pay attention to the issue. If you are a lawyer who constantly files motions on all kinds of meaningless issues, your adversary will not take you – or your motion – seriously. However, if you reserve your motion practice for those issues that really need the Court's attention, and if you are well prepared to argue the points, your adversary has no choice but to take you seriously. That's true even if you do not have a personal relationship with your opponent. Strive to be a lawyer who is respected by adversaries as well as the Court. It's an achievable goal that gives your clients a better chance to get the best possible result.

ADR & SETTLEMENT STRATEGIES THAT WORK

by: Joseph G. Scoville, U.S. Magistrate Judge

1. **Think about ADR before you get to Court**

   The best ADR keeps your client out of court altogether. Consider facilitative mediation, binding arbitration or another method before the case gets to court, especially in commercial disputes between sophisticated parties. There are excellent organizations providing the whole range of "neutral services," such as CPR in Washington and Michigan Mediation & Arbitration Services (229 East Michigan, Kalamazoo, (616) 342-9016) and community dispute resolution centers.

2. **Talk to your client about settlement from the beginning**

   The vast majority of cases are resolved short of trial. Your client should know this at the outset and should be prepared to consider settlement seriously as early in the process as possible.

3. **Know your client's objectives**

   Open up communication with your clients about their real objectives. Beware the client who wants more from litigation than is realistic. A client whose main goal is vindication or "principle" is likely to be disappointed with the case (and you) at the end.

4. **Be realistic with your client (and yourself) about the costs of litigation**

   Make realistic estimates at the outset concerning the huge direct and indirect costs of discovery and other aspects of litigation. Do not ignore the significant opportunity costs, including lost executive time, distraction from more productive business, emotional upset at reliving bad experiences, and adverse impact on future relationships.

5. **Forget all the bad reasons for not trying to settle**

6. **Talk to your opponent about ADR early**

   It is not a sign of weakness to raise the issue of ADR with the opposing lawyer. Everyone knows that the court is going to raise it anyway. Be proactive. If the lawyers have discussed ADR, they are more likely to avoid having an unsuitable ADR method forced upon them by the court.

7. **Choose the right ADR method**

   Be aware of the strengths, weaknesses and success rates of each ADR method. Not all methods work for every case. Knowing your client's real objectives will help here.

8. **Be creative**

   Don't be afraid to suggest something different. The best ADR method is the one that settles the case. The greater the parties' confidence in the ADR process, the greater the chance of success. Consider ENE, blue ribbon mediation, consulting an oracle, cutting open an owl.

9. **Involve your client in the settlement/ADR process**

   This is crucial. Clients should be present at all ADR sessions, settlement conferences and related proceedings. If the client views the process as something happening to him, success is unlikely.

10. **If at first you don't succeed . . .**

    Timing is everything. If early efforts are not successful, try again later.

Litigation Section
State Bar of Michigan
306 Townsend Street
Lansing, MI 48933-2083

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