For The Defense™

dri™

The magazine for defense, insurance and corporate counsel

January 2024

Litigation Skills

Including . . .

The Hidden Forces of Litigation Success: How the Unseen Determines the Outcome

Also in This Issue . . .

Preparing the Physician-Client for a Deposition: Not to Be Confused with a Walk in the Park

Trial Tactics: Use Of Depositions to Control Witness Testimony

And More!

A New Era in Partnerships

For over 60 years DRI has been the leader in providing resources and thought leadership to the civil defense community.

Today, we look to further advance the profession by creating Partnerships with organizations that are ready to work in concert to shape the future.

DRI welcomes LawyerGuard as our inaugural Premier Corporate Partner—we look forward to collaborating on a number of exciting new initiatives in support of the interests of business and individuals in civil litigation.

LawyerGuard®
An Insurance Program for Lawyers

Learn more about DRI and our Premier Corporate Partners at dri.org/partners.

dri PREMIER CORPORATE PARTNER

Networking Alchemy:
Turning Connections into Career Gold at DRI

Patrick J. Sweeney of Sweeney & Sheehan is the president of DRI..

As we bid farewell to the vibrant city of San Antonio in this issue of *For The Defense*, I am filled with gratitude for the tremendous success of the ***2023 DRI Annual Meeting***. During our time together, we witnessed the power of connection, education, and celebration within our legal community—proving without a doubt that at DRI, *It's All About Connections*.

First and foremost, I want to express my sincere appreciation to each of you who joined us in San Antonio. Your presence contributed to the dynamic energy that showed through every aspect of the meeting. At DRI, we believe in the strength of our community, and it was truly heartening to see so many of the most influential civil defense attorneys and in-house counsel from across the country come together to share insights, experiences, and camaraderie.

As we celebrate 2023 and welcome 2024, I'm energized by the sense of unity and purpose in the DRI community.

One of the hallmarks of the DRI Annual Meeting is the opportunity to expand our collective knowledge base with cutting-edge education. The diverse range of topics covered in our sessions, panels, and keynotes showcased the depth and breadth of expertise within our community. I hope you all left San Antonio feeling intellectually invigorated and ready to implement newfound knowledge in your practice.

Beyond education, the meeting also provided a platform for engagement and collaboration. The DRI community truly came together to exchange ideas, share best practices, and forge new connections. I hope you took advantage of all the networking opportunities offered throughout the meeting, and I encourage you to continue building on these connections in the months ahead at ***DRI seminars***, through any of our ***29 substantive law committees***, and more.

As we celebrate 2023 and welcome 2024, I'm energized by the sense of unity and purpose in the DRI community. DRI is not merely an organization; it is a community of dedicated professionals committed to advancing the practice of civil defense law. ***Your membership*** reflects your dedication to this shared mission, and I am inspired by the greater impact we can make when we join forces.

I also want to thank those who helped us make the 2023 DRI Annual Meeting possible, especially those who served on the ***Steering Committee***. The meeting would not have been possible without your leadership and energy. I am grateful to have had you by my side from day one.

Looking ahead, I am excited to invite you to the ***2024 DRI Annual Meeting***, which will take place in the iconic city of Seattle. As we continue our journey of professional growth and collaboration, I am confident that the 2024 meeting will be another milestone in the legacy of DRI.

Thank you once again for your commitment to DRI. I look forward to seeing the great things you and the DRI community will accomplish in 2024.

For The Defense
Vol. 66, No. 1 January 2024

For The Defense, January 2024, Vol. 66 Issue 1 (ISSN 0015-6884).

Published ten times per year by DRI, 222 South Riverside Plaza ~ Suite 1870, Chicago, Illinois 60606. Telephone: (312) 795-1101. Fax: (312) 795-0747.

Correspondence and manuscripts should be sent to the Managing Editor, *For The Defense.*

ON THE RECORD

2023 ANNUAL MEETING FEATURE

INSURANCE LAW

LITIGATION SKILLS

It's All About Connections at the 2023 DRI Annual Meeting

THE DRI COMMUNITY PROVED THAT EVERYTHING IS BIGGER IN TEXAS with the massive success of the 2023 DRI Annual Meeting in San Antonio! The home of the Alamo welcomed DRI members on October 25-27, serving as the backdrop for a meeting filled with first-class networking opportunities, blockbuster education, and unforgettable relationship building. With its iconic history and status as one of two North American UNESCO cities of gastronomy, San Antonio offered members countless attractions to enjoy—and the world-class programming available throughout the meeting served as a perfect complement for the civil defense bar leaders, defense lawyers, and in-house counsel who attended the event.

We've compiled some of the highlights in this issue of *For The Defense* to commemorate the meeting and share our favorite moments with you—our DRI community.

DRI would like to extend a special thank you to the Annual Meeting Steering Committee, led by 2023-2024 President Patrick J. Sweeney of *Sweeney & Sheehan* and Annual Meeting Chair Sara M. Turner of *Baker Donelson Bearman Caldwell & Berkowitz PC*. We would also like to thank all the exhibitors and sponsors who contributed to the meeting's success, as well as all the attendees who participated in the networking and educational opportunities for which DRI's Annual Meeting is best known.

Through it all, our community made it clear that It's All About Connections.

WEDNESDAY

Building Relationships from Day One!

The first day of the meeting offered numerous networking opportunities for attendees. The annual First and Second Timers Program gave new faces the chance to connect with peers from the get-go, and those relationships continued to grow throughout the course of the meeting.

In the evening, all were invited to DRI's popular Welcome Reception. Whether members were reconnecting with peers they've known for decades, meeting friends for the first time in person after months of virtual connection, or building brand new relationships, the room was abuzz with excitement.

THURSDAY

DRI for Life Run/Walk

Before the day's programming began, attendees joined the DRI for Life committee for the Pony Up! Walk/Run. The morning birds broke into various pace groups to run or walk for the Western-themed event that took place along the iconic San Antonio River Walk. Among other historic sites, the Thursday run included views of nearby HemisFair Park—the site of the 1968 World's Fair.

Welcome and Opening General Session, Featuring Award-Winning Author Connie Podesta and Hon. Jeffrey S. Sutton, *Sponsored by Baker Tilly*

Thursday's opening session saw some of the most memorable moments of the meeting, with introductory remarks from DRI leadership transitioning into an unforgettable keynote from award-winning author Connie Podesta on how "Life Would be Easy if it Weren't for Other People."

Are you a circle, square, triangle, or squiggle? Podesta shared her theories on personality types, assigning attendees to a certain profile after asking them a few questions. She then took the audience right inside the minds and personalities of those they connect with every day both at work and home—bosses, colleagues, partners, customers, significant others, friends, and family—to teach everybody how they could ACT, rather than REACT, to whatever situations are thrown their way. The interactive session energized the room—and exposed everybody to a new perspective on thriving with others.

Following Podesta's keynote, Chief Judge of the United States Court of Appeals for the Sixth Circuit Hon. Jeffrey S. Sutton joined attendees virtually to ask a question that's dominated every other in American history: What should be national and what should be local? Sutton reviewed the history of American constitutional law and the impact the Great Depression, Jim Crow, and more have had on debates over the division of power. Even as Americans consider all the reasons not to forget these chapters in the nation's history—and continue to contend with chapters still unfolding—Sutton invited the audience to consider whether we should pay more attention to the localism side of federalism and be more patient when it comes to the nationalism side of federalism. Following a prerecorded keynote, Sutton joined the session virtually for a Q&A, sparking a lively debate that continued in conversations beyond the general session.

The general session concluded with a powerful conversation between Blessings in a Backpack Chief Development Officer Christin Kruse and 2023-2024 DRI President Patrick J. Sweeney, who discussed DRI's two-year partnership with Blessings in a Backpack. Blessings in a Backpack mobilizes communities, individuals, and resources to provide food on the weekends to school-aged children across America who might otherwise go hungry. During the conversation, the audience learned more about the organization's history, mission, and collaboration with DRI. DRI Cares Event | Blessings in a Backpack

DRI Cares Event | Blessings in a Backpack

Immediately following the session, attendees fed a child before they fed themselves at the networking lunch by participating in a DRI Cares event with Blessings in a Backpack. Attendees, volunteers, and DRI staff came together to pack 1,000 weekend meals for children in only 24 minutes! Thank you to everybody who made our DRI Cares event with Blessings in a Backpack at the DRI Annual Meeting such a resounding success.

How to Use Generative AI to Transform Your Practice (Without Getting Sanctioned)

The afternoon's educational programming began with a session from Bennett Borden of DLA Piper on the benefits and dangers of generative artificial intelligence for lawyers. While tools like Open AI's ChatGPT, Anthropic's Claude 2, or Casetext's Cocounsel can quickly elevate your practice, they carry inherent limitations and risks. Attendees took a deep dive into what these GenAI platforms can do to help their practice right now. Borden demonstrated several use cases live, including legal research, memo drafting, drafting deposition questions, requests for documents, and interrogatories. Members also discussed how to control for the inherent weaknesses of GenAI.

Showcase Theater Returns!

DRI's Showcase Theater returned for the second year, featuring short educational sessions on hot topics like crisis management, reality capture for litigation, social inflation, and more. Leaders from the DRI Center for Law and Public Policy took the stage to share information on the amazing work being done within the advocacy arm of our organization. From filing amicus briefs to tackling AI and testifying on proposed federal legislation and rule changes, the Center truly is the voice of the defense bar.

Attendees also got the chance to engage with DRI leadership during the DRI Town Hall, featuring 2022-2023 President Lana A. Olson, 2023-2024 President Patrick J. Sweeney, President-Elect Anne M. Talcott, and DRI CEO Dean Martinez. In conversation with the audience, leadership discussed recent wins and changes at DRI, taking questions and feedback throughout the session. DRI would like to thank all audience members who participated in this Town Hall.

FRIDAY

A Night at the Alamo, Sponsored by *LawyerGuard*

DRI's Premier Networking Event returned with A Night at the Alamo, where attendees explored the Alamo's Ralston Family Collections Center and checked visiting the UNESCO World Heritage site off their bucket lists. Members learned about this gem of Texas history through interactive exhibits while enjoying some of San Antonio's finest food and drink.

DRI would like to thank LawyerGuard for sponsoring this incredible event.

General Session, Featuring Mara Liasson and a Discussion on Public Opinion, Elections and The Supreme Court

Mara Liasson, one of the most trusted voices in journalism, joined the DRI community for a discussion on "Politics 2024: Public Opinion, Elections and The Supreme Court" during Friday's general session. Drawing from her experiences as a contributor for Fox News and National Political Correspondent for NPR, Liasson taught the audience about giving diverse audiences a deep understanding of key political issues. During her keynote, Liasson offered a candid perspective on how the media will impact the politics and policy issues facing the country leading into the 2024 elections, how the COVID-19 pandemic has reshaped politics, and how recent events have impacted the public's confidence in our public institution. She spoke about how these issues impact state and federal legislative bodies and the Supreme Court during an engaging session that left attendees with a lot to consider for their practice in 2024.

Following her keynote, Liasson participated in a Q&A led by Annual Meeting Steering Committee Member Jennifer Snyder Heis of Ulmer & Berne LLP.

Legal System Abuse: An In-House Perspective | The Center for Law and Public Policy

The afternoon's educational sessions included a discussion from the DRI Center for Law and Public Policy centered on how legal system abuses have dramatically increased both costs and verdicts in civil litigation that outpace general economic inflation without significant changes in legal or factual bases to support the increase. The in-house panel discussion, moderated by 2023–2024 President Patrick J. Sweeney of *Sweeney & Sheehan*, highlighted some of the most rampant abuses, their impact on the legal industry, and how the defense bar can respond. Panelists included Lisa Bellino Apelian of Zurich North America, Andrew Pauley of the National Association of Mutual Insurance Companies, Konrad Pilatowicz of U-Haul International, Inc., and Stef Zielezienski of the American Property Casualty Insurance Association.

The Man in The Ditch: A Redemption Story for Today

Later that afternoon, Mike Bassett of The Bassett Firm took the audience through a powerful discussion on undeserved privilege, unlimited potential, hard work, and hustle. Bassett discussed how, at some point as we journey through life, we will find ourselves buried by our own baggage, stripped bare at the mucky bottom of what he calls "The Ditch." But what do we do when we find ourselves enveloped in this darkness? And once we overcome it, how do we emerge? For Bassett, the choice is ours.Closing Celebration and All-Star Band Bash, sponsored by Sweeney & Sheehan

Civil defense bar leaders, defense lawyers, and in-house counsel celebrated a successful week of events on Friday night with the Closing Celebration and All-Star Band Bash, sponsored by Sweeney & Sheehan. DRI leadership and members in attendance celebrated incoming and outgoing board members and recognized the winners of DRI's Annual Professional Achievement and Service Awards. Thank you to everybody who participated in the election and award processes, and thank you to the Nominating Committee, chaired this year by DRI Past President Toyja E. Kelley, for its work during the 2023 DRI Elections.

Closing Celebration and All-Star Band Bash, sponsored by Sweeney & Sheehan

Civil defense bar leaders, defense lawyers, and in-house counsel celebrated a successful week of events on Friday night with the Closing Celebration and All-Star Band Bash, sponsored by Sweeney & Sheehan. DRI leadership and members in attendance celebrated incoming and outgoing board members and recognized the winners of DRI's Annual Professional Achievement and Service Awards. Thank you to everybody who participated in the election and award processes, and thank you to the Nominating Committee, chaired this year by DRI Past President Toyja E. Kelley, for its work during the 2023 DRI Elections.

CONGRATULATIONS TO THE FOLLOWING ANNUAL PROFESSIONAL ACHIEVEMENT AND SERVICE AWARDS WINNERS

ALBERT H. PARNELL OUTSTANDING PROGRAM CHAIR AWARD
Atoyia Scott Harris, 2023 Diversity for Success Seminar

DAVIS CARR OUTSTANDING COMMITTEE CHAIR AWARD
Gretchen N. Miller, Product Liability Committee

DRI FOUNDATION COMMUNITY SERVICE AWARD
Matthew P. Keris, Pennsylvania

DRI LAW FIRM/CORPORATE LEGAL DEPARTMENT DIVERSITY AWARD
Quintairos, Prieto, Wood & Boyer, P.A.

DRI SLDO EXECUTIVE DIRECTOR AWARD
Jennifer W. Hayes,
Alabama Defense Lawyers Association

FRED H. SIEVERT AWARD
Matthew G. Moffett,
Georgia Defense Lawyers Association

G. DUFFIELD SMITH OUTSTANDING PUBLICATION AWARD
Susan E. Gunter, Thomas J. Hurney Jr., and Marta-Ann Schnabel
"Nonlawyer Investment in the Legal Economy"

TOM SEGALLA EXCELLENCE IN EDUCATION AWARD
Sergio E. Chavez, Texas

RICHARD H. KROCHOCK AWARD
Mark R. Beebe, IADC Past President
Evelyn Fletcher Davis, ADTA Past President
Howard A. Merten, FDCC Past President

KEVIN DRISKILL OUTSTANDING STATE REPRESENTATIVE AWARD
Allen C. Smith, North Carolina

LOUIS B. POTTER LIFETIME PROFESSIONAL SERVICE AWARD
Amy L. Miletich, Colorado

RICHARD H. KROCHOCK AWARD
J. Richard Moore, Indiana

RUDOLPH A. JANATA AWARD
South Carolina Defense Trial Attorneys' Association

SLDO DIVERSITY AWARD
Wisconsin Defense Counsel

DRI LAW FIRM/CORPORATE LEGAL DEPARTMENT DIVERSITY AWARD
DRI's ADR Diversity, Equity, & Inclusion Initiative

VETERANS NETWORK MERITORIOUS SERVICE AWARD
Lee C. Schmeer, Pennsylvania

CONGRATULATIONS TO THE INDIVIDUALS BELOW FOR THEIR APPOINTMENTS

SECOND VICE PRESIDENT
Jill Cranston Rice, *Dinsmore & Shohl LLP,* Morgantown, West Virginia

SECRETARY-TREASURER
Sara M. Turner, *Baker, Donelson, Bearman, Caldwell & Berkowitz, PC,* Birmingham, Alabama

NATIONAL DIRECTORS
Jody C. Corbett, *City of Phoenix Law Department,* Phoenix, Arizona
Mario J. Delano, *Campbell, Foley, Delano & Adams, LLC,* Wall, New Jersey
Stacy L. Douglas, *Everett Dorey LLP,* Irvine, California
Danielle M. Waltz, *Dinsmore & Shohl LLP,* Charleston, West Virginia

REGIONAL DIRECTORS
Matthew J. Lavisky, *Butler Weihmuller Katz Craig LLP,* Florida | Southeast Region
Matthew T. Nelson, *Warner Norcross + Judd LLP,* Michigan | Central Region
Rachel Tallon Reynolds, *Wilson Elser,* Washington | Northwest Region
Aleksandra (Aleks) Zivanovic, *SGI Canada,* Toronto, Canada | Canadian Region

Not to Be Confused with a Walk in the Park

Preparing the Physician-Client for a Deposition

By David D. Ernst

In defending a physician in a medical malpractice lawsuit, nothing is more important—and few things are less joyful—than preparing your client for his or her deposition.

In defending a physician in a medical malpractice lawsuit, nothing is more important—and few things are less joyful—than preparing your client for his or her deposition. Whether it is their first deposition or their tenth, nothing seems to create more fear, loathing and anxiety in the hearts and minds of a physician than the prospect of being deposed—and the painful preparations they must endure in getting ready for it. In this author's experience, physicians look at deposition preparation in about the same way as the average attorney looks at preparing for a colonoscopy: a necessary evil which will doubtlessly be unpleasant and distasteful.

David D. Ernst is a partner at Pansing Hogan Ernst & Buser and is based in Omaha, Nebraska. His practice areas include health care. He is an active member of DRI of many years and is a member of the American Board of Trial Advocates. He is also a fellow in the American College of Trial Lawyers and the International Academy of Trial Attorneys. David has been representing physicians and other health care providers in malpractice litigation for nearly 40 years and has lectured and presented frequently on the importance of thorough deposition preparation. For a complimentary copy of the current version of his deposition preparation manifesto, he may be contacted at dernst@pheblaw.com.

And on that cheery note, this article will endeavor to not only emphasize and explain the importance of thorough witness preparation when representing a physician, but also provide some suggestions and some insight into the ways and means of effective witness preparation.

The starting point for physician deposition preparation should be a thorough explanation about why the physician's deposition is being taken by plaintiff's counsel

Virtually every defense lawyer who has represented a physician in a malpractice case has uttered the expression, "*You can't win your case in a deposition, but you can certainly lose it.*" A tired cliché, to be sure, but as true today as it ever was. This statement to your physician-client is not the worst way to communicate with him or her about the importance of being well-prepared for his or her deposition, but it is only the beginning of the conversation. Because it is so vitally important to get a client's buy-in to assure their full cooperation and assistance in preparing them for their deposition, it is suggested that during defense counsel's very first meeting with the physician-client, a discussion be had about the critical importance of deposition preparation. The client should know early on that he or she will be expected to meet with defense counsel at least twice prior to the day of their deposition, and to expect to devote eight to ten hours or more of their time in meeting with defense counsel for their deposition preparations.

Educating the Client on Why Their Deposition Is Being Taken

Particularly with a physician who has never before been sued or given a deposition on their own behalf, but even with experienced deponents who have not previously been thoroughly prepared, it is important to help the physician-client understand why his or her deposition is being taken by plaintiff's counsel. In the author's experience, there is a great deal of misunderstanding or misinformation or "urban legend"— whatever you want to call it—about *why* a physician is even giving a deposition in the lawsuit. Many physicians start out with the concept that this deposition is their opportunity to show the uninformed opposing attorney exactly why this lawsuit is a crock of manure, or worse. Many are under the impression that if they can just educate opposing counsel about the medicine in question and about how their care of the plaintiff could not have been more perfect, the lawsuit will likely just go away. It is important to explain to the physician-client that even if they give an absolutely bravura performance at their deposition, the odds of the lawsuit being dismissed by opposing counsel *just* because of their deposition performance is roughly the same as winning the Powerball lottery.

Repetition, Repetition, Repetition

Because most physicians are so unacquainted with the legal process and speak an entirely different language than attorneys, the use of repetition in preparing the physician-client for a deposition is paramount. In this author's practice, the preparation begins with the physician-client being sent a roughly ten-page "manifesto" on how to give a good deposition, and they are requested to read it thoroughly before the first in-person session. Experience has taught that some people learn best through reading, some through verbal discussion, and others through a combination of the two methods. As such, the material is presented both in the form of the written manifesto and by discussing the content in detail during the first person-to-person preparation session. This meeting is almost always held at defense counsel's law offices because a session at the physician's office or at the hospital is likely to be filled with potential interruptions. Getting the physician away from his or her busy practice, nursing staff, laptop and/or phone is essential to a productive preparation session.

As referenced above, the starting point for physician deposition preparation should be a thorough explanation about why the physician's deposition is being taken by plaintiff's counsel, usually a combination of several of the following objectives:

1. To find out what they know about the case that is not in the chart;
2. To pin them down on their knowledge of the facts and their position about what happened and why;
3. To educate plaintiff's counsel about the medicine in the case;
4. To seek admissions and concessions for cross-examination at trial;
5. To seek helpful testimony against one or more co-defendants;
6. To find out if they have any "hot buttons" that can be pushed at trial; and
7. To assess them as a witness, and to gauge whether a jury will like them and believe them.

It is always pointed out to the physician-client that if opposing counsel is successful in pursuing these objectives, these are all for the benefit of opposing counsel and not in any way beneficial to the defense. This discussion helps to underscore why in most cases, the overarching approach to giving a deposition—in this author's opinion–should be "less is more." Many a physician-client has been told that his or her deposition is nothing more than an exercise in "damage control," and that if the opposing attorney were only to ask the physician to state their name and address and occupation and then said, "No further questions," this would be considered an unqualified victory—the grandest of grand slams—because *no* harm had been done to our defense. This seems to help get the point across.

The Use of Self-Discipline

After the above soliloquy about the reasons for the physician's deposition to be taken, counsel should next explore with the client the concept of "self-discipline." The physician-client may be advised that there is no question that they have the gift of

self-discipline, because they would not have been successful in college, in taking the MCAT, in completing medical school, in fulfilling their residency requirements, and in passing their medical boards, if they did not possess an impressive degree of self-discipline. The physician-client is then advised that if they use this talent of self-discipline to provide guard rails for themselves during the deposition, this will give them a big advantage over opposing counsel, who typically are possessed of significantly less self-disciplinary acumen. This notion seems to strike a resonant chord in the mind of the physician-client, who now understands that they have one very important tool in their tool kit for giving a good deposition.

Keeping the Power

It is important to explain to a physician-client that in the giving of a deposition, they and they alone have the power to control what they say in response to opposing counsel's questions. They should be warned that opposing counsel will employ any number of trial attorney techniques and tricks to try to take this power away from the deponent, such as:

- Chatting them up prior to the start of the deposition to try to get their guard down;
- Buttering them up during the deposition to try to get their guard down;
- Flattering them by asking for their help in understanding difficult medical concepts;
- Beginning their questioning with open ended, friendly inquiries before turning on a dime and utilizing clever, paralyzing, "difficult to say 'no' to" leading questions;
- Using intonation to try to influence a witness to answer differently;
- Using gestures and histrionics to try to badger a witness for a better answer;
- Misstating the facts of the case;
- Misstating an earlier answer by the deponent as the precept for another question;
- Using awkward silence after a deponent's answer to try to prompt additional response.

To cope with all of these techniques in the arsenal of opposing counsel, your physician-client who is about to be deposed should be trained on how to watch for these types of behaviors, and given suggestions on how to deal with them. The physician-client should be advised that the "pacing" of the deposition is important for them to control, and that no witness can be forced to testify more quickly than they want to in answering a question—although if it is a video deposition, the witness needs to be reminded that certain types of questions should be answered without any prolonged pauses, like "Did you meet the standard of care?"

A physician-client should also be advised that they are not expected to have an answer to every single question being posed to them at the deposition, and that it is okay to say, "I don't know," if that is the accurate and truthful answer. They also need to know that if they don't understand the question, or need a little more time to think about it, it is perfectly acceptable, and in fact advisable, to ask for a question to be repeated or rephrased.

Appropriate Responses

A physician-client who is about to be deposed should be advised that each of the following *may* be appropriate responses to a deposition question, depending on the question and circumstance:

- *Not necessarily.*
- *Not always.*
- *Sometimes.*
- *It depends.*
- *I don't know.*
- *I don't remember.*
- *I don't understand your question.*
- *Could you please rephrase your question?*
- *Could you please repeat the question?*
- *I would have to speculate.*
- *I can't answer that question.*
- *There is no single answer to that question.*
- *I don't have an opinion on that.*
- *No, I disagree.*

Practice Makes, Well, Less *Imperfect*

It is important to advise a physician-client that they should not panic if they give a response in their deposition that is less than perfect, because nobody yet has given a "perfect" deposition, and that the important thing is that they be able to say that they gave a "thoughtful" response to every question. It is also important to alert them that after opposing counsel has finished his questions, there will be time for a discussion between deponent and defense counsel about whether anything was said in the deposition that needs to be "cleared up" through questioning by defense counsel; but that in most cases there will be no questions from defense counsel at the physician's discovery deposition unless there was a glaring mistake of fact or opinion which needs to be squared away sooner rather than later.

Particularly with a first-time deponent, it is crucial to lead the client through mock deposition questioning, preferably by a partner or associate who has been prompted on the facts of the case and given some soft spots in the defense to explore through this mock deposition questioning. In certain cases with certain clients, it may be necessary to have several different mock deposition sessions, to give the physician-client deponent the confidence to undertake their deposition. Seldom has a physician-client complained afterwards that they were "overprepared" for their deposition. In most cases, they are simply thankful and relieved.

Time to Shut the Pie Hole

It is important to advise the physician-client that their deposition responses are, in general, to be short and sweet, and that in all but the most unusual circumstance, their responses should not be a series of run-on paragraphs. However, it is also important to help them understand that their nervousness at the deposition may lead them to running off at the mouth, but that they should use their self-discipline to try to avoid this, and to recognize it when it occurs. You may want to give them a couple of examples on how to end a particular piece of deposition testimony:

1. Have them think of the scene in the movie *Fargo*, when Mr. Mohra is being interviewed by Officer Olson, and after answering the question, he curtly utters the simple phrase, *"End of story."* At any point during your client's rambling, they should be encouraged to use their ability of self-discipline to simply bring an

"end" to the "story," even by using those very words, if need be.
2. In a similar vein, feel free to employ the crystal-clear words of the simple-minded *Forrest Gump* to bring a conclusion to one of his soliloquies: *"And that's all I have to say about that."*

In other words, *do not let your client ramble*!

Final Words of Wisdom

In observation of the above pronouncement about "repetition," at every deposition preparation session with your client, make sure they are reminded of the most important themes of and particular advice for giving a good deposition:

1. BE DISCIPLINED. *Use the extraordinary self-discipline that you possess to your full advantage in giving your deposition.*

2. REMEMBER PACING. *Listen to the **entire** question, pause, make sure you understand the question, and then give a short, thoughtful answer.*

3. USE YOUR WORDS. *Do not let the plaintiff's lawyer put his/her words in your mouth. If the lawyer plainly wants you to say yes to any of his questions, do not say just "yes." Put **your** answer in your words.*

4. STICK TO YOUR GUNS. *If the lawyer does not like your answer to a question, he/she will ask it again, in a slightly different way, and then again, in a slightly different way once more. Repeated questions, slightly reworded, simply mean that the lawyer did not like your first answer and is trying to get you to change it. Do not allow this to happen.*

5. HOLD ON TO POWER. *The lawyer will use leading questions, voice inflection, facial expressions, body language, words expressing incredulity, and any other technique or trick of the trade that he or she knows to try to get you to say what **they** want you to say. The lawyer wants to have the **power** of the questioning attorney over you. Say what **you** want to say, in the way that you want to say it, and take the power away from the attorney.*

And in Conclusion

Physician-client deposition preparation undeniably falls far down the list of favorite trial lawyer activities such as expert cross-examination and closing arguments, but it is as important, if not more important, to the outcome of the case than our favorite components of the case. Even with good facts, it will be hard to win a case if your client has coughed up all over himself in his discovery deposition, and even if the case is still winnable, it will cause you a great deal of dyspepsia at trial when your client is on the witness stand. By taking the time necessary to do a thorough and rigorous preparation of your client for his or her discovery deposition, you can help ensure that this is not one of those cases in which the physician "lost" his case in the deposition.

ENJOYING THIS CONTENT?

Confirm your DRI membership is up to date to continue accessing For The Defense.

CONFIRM NOW!

Trial Tactics

Use of Depositions To Control Witness Testimony

By Robert Meyers and Greer Bryant

This article will explore how to read a party's deposition-admission into evidence, the advantages of doing so, and the best response to common objections.

From the very beginning of litigation, an effective attorney's goal is to maintain control of the outcome by employing tactics that provide predictability. At trial, a witness's testimony is often the opposite of predictable. However, a deposition can be used to combat the whims of the party opponent witness. While most attorneys know how to use a deposition to impeach a witness's testimony (Fed. R. Civ. P. 32; Ten. R. Civ. P. 32; Fed. R. Evid. 801(d)(1)(A); Tenn. R. Evid. 613(b), 803(26)), fewer know to read into evidence a party opponent's deposition, which can be used **for any purpose**. Fed. R. Civ. P. 32(a)(3). This article will explore how to read a party's deposition-admission into evidence, the advantages of doing so, and the best response to common objections.

During a well-planned deposition, the opposing party often makes some admissions. Consider this hypothetical deposition testimony by a party opponent in a motor vehicle incident:

Defendant's Counsel: What color was the light facing you?
Plaintiff: It was red in my direction.
Defendant's Counsel: Are you certain?
Plaintiff: Yes, sir, I ran a red light.

Here, the testimony provides the Defendant with a significant admission to show the plaintiff is primarily at fault for the incident.

Now, how can this perfectly packaged testimony be used at trial?

The use of a deposition to impeach a present witness's testimony is a familiar exercise, though not always successful. Consider the parties go to trial following the above hypothetical deposition, and this is the resulting cross-examination:

Defendant's Counsel: Are you claiming that the light was green in your direction?
Plaintiff: Yes.
Defendant's Counsel: Do you remember testifying at your deposition that your light was red?
Plaintiff: Yes, but I thought you meant what color was the light for the Defendant.

The contrast between these two testimonies is stark. At the deposition, the party clearly admitted the light was red. Whereas at trial he contradicted himself, justifying his change of testimony on his misunderstanding of the questions at the deposition. (If your jurisdiction recognizes the Doctrine of Cancellation by Contradiction or a similar doctrine, defense counsel may have an argument that the testimony at deposition and trial cancel each other out so that there is no proof by the plaintiff as to what color the light was at the time of the accident. Thus, negating an essential element of plaintiff's case.)

Clearly, after the deposition was taken, the plaintiff changed his testimony, hoping to prevent liability being assessed against him. This contradiction is no cause for worry to an astute attorney. Defendant-attorney can still stick to less-contentious topics during the cross-exam because she can use the deposition later in her case-in-chief *for any purpose*, as described below. To the jury, the lack of contention and the attorney's cool-headed questions make her look like she *won* the cross.

As hinted above, during Defendant's case-in chief, the defendant's attorney may read excerpts from the party opponent's deposition or read the party opponent's

Robert Meyers and **Greer Bryant** are lawyers with Glankler Brown in Memphis, Tennessee. Robert and Greer defend public and private employers from claims of discrimination, wrongful termination, and associated claims. In addition, they defend local governments from claims of constitutional violations. Robert is a past Chair of the Civil Rights Committee and a member of the Employment and Labor Committee. He has been a member of DRI since 1999, and Greer recently joined DRI. This article was written in response to Robert (successfully) introducing excerpts of the plaintiff's deposition during trial in federal court.

deposition in its entirety. The best way to read the party opponents deposition into evidence is to call the party opponent as a witness by deposition, have the attorney's co-counsel take the stand, and – like actors in a play – both attorneys read the deposition out loud in question-and-answer form for the jury. If the deposition is available on video, attorneys can play portions of the deposition that they want the jury to hear.

Now, you may wonder: what's the difference between impeaching a witness and reading a deposition into the record?

First, reading the deposition into the record gives an attorney control over exactly what testimony the jury hears from the party opponent. There are no surprises: the questions and answers are fixed by the deposition transcript or videotape. Thus, there is no waffling by the witness, no attempt to explain his answer away, and no interruption by opposing counsel. Certainly, the predictability of using the already-stated deposition testimony overrides the same, often messy testimony from a witness at trial.

Second, the judge typically instructs newly empaneled jurors that a lawyer's statements are not evidence. *United States v. Ahmed, et al., 2013 WL 12068991* (M.D.Tenn. 2013)(United States' Proposed Jury Instructions: "Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence."). It follows that the information seated in the question, "Do you remember testifying at you deposition that *your light was red?*" is not in evidence until the witness re-states the admission on the stand. Therefore, if the party opponent will not re-testify to a statement made in his deposition, the only way to make the admission a part of the record is to read the deposition into evidence or play the video of the testimony.

Of course, reading a present witness's deposition at trial—other than for impeachment or in lieu of an unavailable witness's testimony under Fed. R. Evid.

804—is often met with dismay from opposing counsel. Opposing counsel's first objections are often to point out the presence of the party or that counsel has already cross-examined the party. The best response to each of those objections is to cite to Civil Procedure Rule 32, which covers the use of depositions in court proceedings:

A party opponent's deposition provides an attorney with the unique opportunity to control the party opponent's witness's testimony with predictable results

> An adverse party may use **for any purpose** the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or Rule 31(a)(4).

Fed. R. Civ. Pro 32(a)(3) (emphasis added). Tennessee's Rule 32.01(2) has similar language. Yes, Rule 32 really does mean **any** purpose. In fact, Tennessee case law interprets "any purpose" to mean that an adverse party is permitted to present all or part of the other party's deposition regardless of their availability at trial, and to opposing counsel's surprise, "to read any or all of the deposition to the jury". *Nelms v. Tennessee Farmers Mut. Ins. Co.*,613 S.W.2d 481, 483-4 (Tenn. Ct. App. 1978) ("[Rule 32.01] of the Tennessee Rules of Civil Procedure clearly permits the deposition of a party to be admissible in evidence for any purpose. Under the rule defendant's attorney has the right to read any or all of the deposition to the jury...."); Also See *Dargi v. Terminix Inter. Co., L.P.,* 23 S.W.3d 342, 345 (Tenn. Ct. App. 2000) ("it is especially significant that the deposition of a party is admissible for any purpose.")

In fact, even a video deposition can be used at trial **for any purpose**. For example, in *Estate of Thompson v. Kawasaki Heavy Industries, Ltd.*, United States District Judge Mark Bennett was faced with the question of whether Rule 32's "for any purpose" language could be applied to video depositions as well. In this case, the Defendant-Manufacturer motioned in limine for the court to prevent the plaintiff-deceased from playing the videotaped deposition of Defendant-Manufacturer's research and development officer, who testified as Defendant-Manufacturer's designee, even where this witness was available to provide live testimony. See 291 F.R.D. 297, 85 Fed. R. Serv. 3d 219, 90 Fed. R. Evid. Serv. 1257 (2013). Defendant argued that the deposition notice was for "discovery" and not to perpetuate testimony, rendering the video deposition unusable at trial. Judge Bennett found against Defendant's argument, stating "[n]either the Rules of Civil Procedure nor the Rules of Evidence make any distinction between discovery depositions and depositions for use at trial." *Id.* at 302-03 (citations omitted). Further, Judge Bennett found that "an adverse party may use their [opponent's] deposition testimony for any purpose, regardless of their availability." *Id.* at 306. Although Judge Bennett ruled in favor of the plaintiff presenting *portions* of the witness's videotaped deposition to the jury, the judge cautioned plaintiff's counsel from playing the entire deposition at trial. *Id.* at 309 ("The court strongly urges [the plaintiff] to carefully think through its strategy. In the court's experience, the use of a deposition, even a videotaped deposition, tends to take a good deal of the 'punch' out of the presentation of evidence, even with regard to an adverse witness, and risks boring the jury.").

Opposing Counsel's next objection is usually to invoke the Rule Against Hearsay. Fed. R. Evid. 802; Tenn. R. Evid. 802. While a deposition is an out of court statement and it would typically be offered for the truth of the matter asserted, this objection may be overcome by citing Rule 801: an opposing party's admission is excluded from the hearsay definition altogether. See Fed. R. Evid. 801(d)(2); Tenn. R. Evid 803(1.2).

In conclusion, a party opponent's deposition provides an attorney with the unique opportunity to control the party opponent's witness's testimony with predictable results, limiting any surprises on the day of trial and submitting client-favorable evidence in the record and to the jury.

The Hidden Forces of Litigation Success

How the Unseen Determines the Outcome

By William H. McKenzie, IV

Have you considered whether there are unseen forces at play during a trial?

You've read countless legal articles on how to tactically improve your approach to litigation- like defeating Nuclear Verdicts and the Reptile theory. These topics address *objective* criterion without much consideration of the *subjective*. They tackle the *tangible* without considering the intangible. While relevant, most legal "hot topics" only emphasize hard skills while ignoring soft skills.

Have you considered whether there are unseen forces at play during a trial? I will make the case in this article that it is often the unexpected, intangible forces that determine the outcome of trials. Specifically, we will discuss three game-changing strategies to help you get better results:

I. First, we will discuss how creating **Powerful Moments** at trial can determine the outcome.

II. Second, we will explain the force of **Momentum** and how to get it on your side.

III. Finally, we will learn how to **Ease Tension** to take the nuclear out of the verdict.

The defense industry cannot address of what it is not aware. So this article aims to unveil some powerful truths that are hiding in plain sight. You will take away tailored action items for better defense outcomes through our discussion of these three strategies.

Powerful Moments

One powerful moment at a trial can determine the outcome. If you have read ***Inside the Juror: The Psychology of Juror Decision Making***, (Cambridge Series on Judgment and Decision Making) one thing is clear: Jurors make decisions based on information that they remember in the deliberation room. So that begs the question: *how can we make the defense's case more memorable?*

If you have been in a serious relationship, you understand that your significant other can make or break a special occasion based on the amount of effort they put into it. Their effort determines whether the occasion was *memorable* and thus whether it was deposited into your emotional memory bank (prefrontal cortex of the brain). This same principle applies to a jury trial. With a little extra effort, your defense theme will become memorable and deposited into the jury's memory bank. This strategy, of course, is designed to steer the jury's decision making in your client's favor.

I changed the way I lead my family and practice law after I read Chip and Dan Heath's book ***The Power of Moments: Why Certain Experiences Have Extraordinary Impact***. This book describes how being intentional in creating powerful moments can result in a deep impact on those you are trying to influence. An example from the book explains how an ordinary hotel put itself in high demand despite being very bland in comparison to other nearby hotel properties.

The Magic Castle Hotel in Los Angeles is, by any measure, average. It was a 1950's apartment complex converted into a hotel. It has completely average rooms and a completely average swimming pool.

However, there is a red telephone by the pool labeled "Popsicle Hotline." When you pick up the phone it rings the hotel staff who answer, "Popsicle Hotline!" Immediately a staff member wearing white gloves brings out a popsicle on a silver platter! This inexpensive moment has a deep impact on the hotel guests' experience. And this

William H. McKenzie, IV (based in Alabama) is a nationally sought-after trial attorney and an industry thought leader for results-based communication. He has litigated matters in 29 different states (over 50 cases in Federal Court alone), 100s of cases in state courts, multiple arbitrations, and won in the Alabama Supreme Court. He is valued as a confident problem-solver and personable tactician. He serves as lead trial counsel for several Fortune 100 and 500 companies.

drives the patrons' future decision making (to return to the hotel, rate it highly online, and recommend it others).

A lightbulb went off for me both personally and professionally as I digested the story above. I decided I would make extra effort to make ordinary moments *extraordinary* for the people I am trying to influence. For example, I don't just buy my wife flowers and leave them in a vase until she finds them -so they won't dry out- (like I used to). Instead, I hide them in a vase somewhere until I see her. And then I say kind words while revealing them from behind my back. No added expense- just a little added effort. And the impact is exponentially greater!

I applied this same principle when my son, Henry, turned 13. I felt this occasion called for more than just a birthday party. So, I hosted a coming-of-age dinner for him and invited several men who had invested in him. My goal was to impact him in a way that would persuade him to see himself as a man from that day forward.

To create this powerful moment, I had every man in attendance speak positive words over him and affirm his positive traits. And then I presented him with a Samurai sword from World War II that had been passed down from his great-grandfather to my father, then to me, and now to him. I charged him that McKenzie men "fight the good fight" and the sword was to remind him of this. I mounted the sword above the door of his room. He left that dinner with a different perception of himself! You see, I had always been an *influence* on him. But I needed to create an *impact* through a powerful moment.

It didn't take me long to realize that this principle correlated well to jurors in the courtroom. Here are a few ways you can create powerful moments for the defense at trial:

1) Through well-coached witnesses who tell the defense story;
2) Through dynamic evidence (from expert recreations or otherwise);
3) Through powerful cross-examinations; and
4) Through an impactful closing argument.

I had a high-exposure trucking trial where our driver was making a left-hand turn onto a two-lane highway at night. He had to cross the Plaintiff's oncoming lane and clear it with his trailer. But the Plaintiff impacted our trailer with almost no braking before he could clear her lane. She was seriously injured and claimed that the headlights of our tractor (which had already cleared her lane) kept her from seeing our trailer (which was still in her lane upon impact). Our respective accident reconstructionist experts battled to a draw over speed, lighting, and lack of braking.

But I knew after I met with my driver to prepare him that I could create a powerful moment at trial with him. He was (what we call here in the American South) a "salt-of-the-earth" gentleman with a sincere demeanor and kind eyes. He was keenly articulate about how the accident occurred. He was adamant that the Plaintiff was holding her iPhone in front of her face at the time of the accident.

We built our trial theme around this to set up a powerful moment. We planted and consistently emphasized this idea to the jury that the sole reason Plaintiff failed to brake was because she was on her iPhone and never saw our well-lit trailer. When it was time for my driver to testify, he changed the whole case when he got emotional and hammered his fist on the witness box declaring: "I swear to God that I saw her face lit up by her phone as I watched in horror out of my driver's window! She was only 5 feet from me as she passed me!" I knew that powerful moment of sincerity and emotion (his tone of voice coupled with his choice of words and body language) would impact the jury when they went to the deliberation room.

The beautiful thing is that this trial moment was planned but not forced. Sure, I had helped my driver develop his testimony -and I worked to create this very moment- but I didn't "coach" him on exactly how to say it. Instead, I led him into his strengths by asking him the right questions, focusing on our stronger talking points, and planting an adamant mindset in our preparation time. When he took the witness stand, he was playing offense- not defense!

Jurors make decisions based on the evidence they most vividly remember. The takeaway is that, when persuading people, *impact* always trumps *influence*. And creating powerful moments is one of the best ways to impact people.

Momentum

Momentum is a hidden force that is unexplainable yet undeniable. If you have ever watched a sporting event, you can sense when the momentum changes in the game. And your instincts tell you that the team with the new-found momentum is about to score. Even if you can't articulate it, you can still "feel" it coming.

Seasoned gamblers try to harness this phenomenon. There is a familiar saying in casinos that "if something happens twice, bet it will happen a third time (or don't bet at all)." This is beyond superstition. It is a force to be reckoned with when you have chips on the table.

Like an athlete or gambler, we are also trying to win. So, what if we could actually *create* momentum through an intentional process?

We know that confirmation bias can have a snowball effect on positive outcomes. When momentum is with you, the Judge and Jury employ confirmation bias against Plaintiff's evidence and testimony which filters out its impact. In other words, because they are leaning in your favor, the Judge and Jurors subconsciously discount the information that is contrary to their cognitive biases in your favor. The first party to gain momentum has the early advantage at trial.

So, what *is* momentum? It's hard to explain. But Michael McQueen in his book ***Momentum: Build it, Keep it, or Get it Back*** says that momentum is not a fleeting or transient feeling. "It's a skill that can be fostered, encouraged, and nurtured, and it's the biggest success tool in the box." His book walks you through the principles, practices, and ideas that help you build and maintain a positive trajectory. He reduces momentum to a formula: **A + F x C = Momentum.**

The "A" is for activity. This means we must work on our files and push them forward from the beginning of the assignment. Momentum spins out of activity. So, your company's claims department must adopt the mindset of making consistent forward progress at the start of every claim. A dormant claim has no momentum.

Ask yourself: *Are we taking the fight to the other side?* Are we the ones noticing depositions, taking surveillance, issuing

subpoenas, and running down fact witnesses? Are we being proactive or reactive?

We must become the initiators if we want momentum to be on our side. I've found that if I come out swinging with the right actions, the other side will stay on its heels for most of discovery and be looking for a chance to mediate before dispositive-motion time.

What if we could actually *create* momentum through an intentional process?

The "F" is for focus. Where I grew up, we had a saying that "if you chase two rabbits you won't catch either one." This is a great way to illustrate focus. Focus requires you to choose a singular trial theme. It is much more effective to establish this focus at the *beginning* of the claim. If you establish the correct focus early on, you can develop the surrounding narrative through fact discovery and witness testimony.

One law of focus says that *whatever you focus on you will see more of.* This is just another way to illustrate the psychological principle of Availability Bias. Availability Bias refers to people making decisions by drawing from a portion of the brain that stores the most recent, repeated, and emotional information to which it is exposed. This means they are not making decisions based on all information in their brain- just the information stored in their prefrontal cortex. The more focused a message is, the more likely it is to be stored in this portion of a juror's brain to be "available" come deliberation time.

We use this to our favor by planting one major defense theme into the jury's mind consistently throughout the trial (beginning in *voir dire!*) When it's time for the jury to deliberate, their brains apply Availability Bias to access the most recent and impactful information they learned from us at trial. By applying *focus* to our defense strategy, we win the battle for the jury's perception. Focus creates momentum in our favor.

"C" is for consistency. Consistency is the only multiple in McQueen's formula for Momentum. It's the most important because it has an exponential impact. Small actions compounded over time are what truly produce results in life. This truth applies to building wealth, staying healthy, and winning consistently in litigation.

Being consistent is a *behavioral* issue not a knowledge issue. So, we must ask: *how can we ensure that every case is handled with consistency from start to finish?* You have two polarized options: trust your defense counsel or control your defense counsel.

In other words, you can get your lawyers to run *your* system, or you can trust them to run their own. This is where relationships are important. Trust is the currency of your company's relationship with its defense counsel. But having an external system of checks and balances to ensure each case theme is developed early will be paramount in quality control and in producing consistent wins.

A helpful suggestion is to ask for your attorney's closing argument early in the case. Schedule it as a Teams meeting or Zoom call with your claims manager and C-Suite. This exercise forces attorneys (and your claims team) to "begin with the end in mind" (one of Steven Covey's *7 Habits of Highly Successful People*). And it serves as a catalyst for success by initiating the formula of **A + F x C** = Momentum. Momentum in the claims process and case work-up will translate to momentum in your favor both at mediation and at trial. While you may not always be able to articulate what gave you momentum, there is no doubt that you want it in your favor and can sense it when it arrives. This intangible force will produce tangible metrics that show you are more successful than your peers in handling your cases.

Easing Tension

As a Defendant, the last thing you want in a courtroom is tension. Plaintiffs' lawyers work tirelessly to create an atmosphere of fear, anger, and heaviness. We must counter this atmosphere with a creative infusion of elements that reduce tension.

Psychologists refer to this endeavor as "cognitive reframing." We want to "reframe" the lens through which jurors view evidence and testimony by introducing subtle things like our tone of voice, the power of suggestion, energy level, and by simply being personable and likeable.

In the book, ***The Science of Likability***, author Patrick King unpacks psychological studies to give helpful strategies on what makes a person likeable. These same strategies can be projected onto a corporate Defendant or an important witness. For example, one of the strategies for becoming likeable is to be quick-witted in responding to off-topic comments. Researchers have found a correlation between the quickness of response time and the likeability of the person responding. The quicker the response, the more likeable the person is. Pausing too long can do the opposite.

This is a challenge to your courtroom attorneys and witnesses to be aware and tuned-in emotionally to the dialogue transpiring in real time. This can be a big ask of lead counsel when they are locked in on the trial tasks at hand. But he or she can change the entire atmosphere of a room with a well-timed, on-point response.

The other helpful takeaway from *The Science of Likeability* is to "show your belly." When your dog "shows his belly" to you he presents an irresistible posture of vulnerability. This is what we want to portray as a defense trial lawyer or Corporate Representative. We want to appear human and humble. It is a given that you must exude competence, credibility, and persuasiveness. But isn't likeability the silver bullet in whether you want to agree with someone or not? Of course it is!

We play favorites all the time. And so do jurors. So we must look for opportunities to "show our belly" and gain favor with the jury and judge. It has a direct correlation to being persuasive.

George Washington understood this principle when he faced a dilemma after winning the Revolutionary War: the new American Congress did not have the money to pay the promised backpay and pensions to his soldiers. His soldiers were revolting against the new Congress by sending letters

of treasonous plans (known as the Newburgh Conspiracy).

In short, since there had never been a president, the revolting soldiers wanted to make George Washington their King and scrap our young nation's plans of becoming a democratic government. During a crucial meeting with his officers, historians reflect that Washington addressed the conspiracy head on. But it was not his prepared speech that changed history. He stood at the podium and pulled a written speech from his pocket (*7 Men* by Eric Metaxes). As he did so, he pulled out his spectacles and said "**Gentleman, you must pardon me, I have grown gray in your service and now find myself going blind.**" This vulnerable statement- this showing of his humanness- is said to have changed the atmosphere of the entire room and moved the conspirators to tears. They *loved* George Washington who had led them into battle. His humility changed the selfish atmosphere. They left after his speech without a word. In sum, this one vulnerable moment changed the course of history. And it laid the foundation for our current Democracy by quelling a revolt that would have undone the very freedom that we fought a war over.

In the same way, a trial attorney and witness with high emotional intelligence can ease the tension of a courtroom by showing vulnerability to the jurors. Our goal is to humanize our clients at trial and make our companies seem less institutional. Jurors are much less reluctant to award nuclear verdicts against Defendants and attorneys they like, relate to, and empathize with. A loose jury is not as dangerous as a tense jury. So, we must apply basic likeability principles to reduce the tension in the courtroom.

Conclusion

There are exhaustive resources on the hard skills of trial advocacy and claims handling. I've given many talks and written many articles on these myself. But the defense bar overlooks the valuable soft skills and intangible factors that influence trial outcomes. In this season of high-exposure verdicts, it is imperative that your company and attorneys leverage the principles of Powerful Moments, Momentum, and Easing Tension to influence a juror's decision making in our favor. Applying these tailored strategies will translate into better results for you both personally and professionally.

Well, That's Settled . . . Or Is It?

Key Issues Every Litigator Should Remember about Settlement Agreements

By Moheeb Murray

No one wants to have to make the "Houston-we-have-a-problem" call to their client because the other side claims you agreed to a settlement when you didn't.

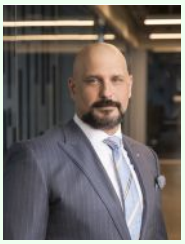
Finally settling a hard-fought case can be one of the great pressure release valves that a trial lawyer can experience, ranking only behind a favorable verdict or winning on a dispositive motion. But if not undertaken with sufficient planning and attention to detail, a settlement agreement can quickly become an excruciating pressure point if things go awry. No one wants to have to make the "Houston-we-have-a-problem" call to their client because the other side claims you agreed to a settlement when you didn't (or vice versa) or after the parties went through a full-day mediation capped with a term sheet, only to fight about whether all the material terms were captured. This article discusses key points every litigator should keep in mind when approaching settlement, including how a settlement agreement is formed, the issues that often cause parties to stumble when finalizing an agreement (and how to avoid them), and the mechanisms to invalidate a settlement, if necessary.

When Does an Enforceable Settlement Agreement Arise?

Oral Settlement Agreements Outside of Mediation

In general, an agreement to settle a claim or lawsuit is considered like any other contract. Therefore, absent any rules or statutes in a jurisdiction, an oral agreement by the parties or their counsel that addresses material terms can be binding if it complies with the statute of frauds. Recall, a statute of frauds typically requires the following to be in writing: an agreement that cannot be performed within one year (e.g., a settlement payout schedule exceeding a year); a promise to answer for another's debt; a promise in consideration of marriage; a promise by a personal representative to answer for damages out of her own estate; an agreement to pay a commission for the sale of real estate; a contract involving the sale of goods over $500; and certain other types of agreements. See e.g., MCL 566.132; UCC §2-201. Of course, the scope of the statute of frauds can vary by state, so be sure to check your jurisdiction.

Even if an oral settlement agreement satisfies an applicable statute of frauds, enforceability of that agreement can vary by jurisdiction. Federal common law does not necessarily require that a settlement be reduced to writing. *See, e.g., Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207, 1209 (5th Cir. 1981) ("Federal law does not require, however, that the settlement be reduced to writing. Absent a factual basis rendering it invalid, an oral agreement to settle a Title VII claim is enforceable against a plaintiff who knowingly and voluntarily agreed to the terms of the settlement or authorized his attorney to settle the dispute.") But irrespective of the statute of frauds, several states (e.g., CA, MI, etc.) expressly prohibit oral agreements settling lawsuits, unless (1) the agreement is put on the record in court, (2) the judge has an opportunity to question the parties about whether they understand the agreement's terms, and (3) the parties expressly acknowledge the terms of the agreement



Moheeb Murray is a member at Bush Seyferth PLLC and represents clients in complex commercial disputes, tort defense cases, insurance coverage matters, and construction litigation. He leads BSP's insurance coverage and construction litigation practice groups. In commercial litigation matters, his extensive experience includes complex breach of contract and breach of warranty claims, shareholder actions, and cases involving misappropriation of trade secrets and covenants not to compete. In his insurance coverage practice, Moheeb represents leading insurers in life, health, disability, ERISA, long-term care, annuity, P&C, commercial general liability, and auto-insurance no-fault matters.

to which they will be bound. See, e.g., Cal. Code Civ. Proc. §664.6; MCR 2.507(G) ("Agreements to be in Writing. An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.") Therefore, if, for example, attorneys agree to a settlement number and certain terms over the phone on September 1 but the agreement later falters on September 5, jurisdiction-specific rules and statutes will likely determine if the parties can be forced to settle for the number and terms accepted during the September 1 call.

Settlement Agreements Established by Letters, Emails, or Even Text Messages

Can a party be bound to a settlement just by sending a letter, email, or text? The answer is yes, if the necessary conditions exist. The two sides to a dispute often have settlement negotiations that morph into written exchanges culminating in a settlement when an offer is made and accepted. Under the Uniform Electronic Transactions Act, electronic communications satisfy any statute requiring a contract to be in writing if the required elements of contract formation exist. What it means to "sign" can surprise clients, or sometimes some lawyers; even if there is no "ink" signature on a single settlement agreement document, an enforceable written agreement can be established if the parties' counsel (or the parties themselves) have simply "subscribed" to the written communications establishing the offer and acceptance of the material terms of settlement. This is true even if the parties' communications might state that they plan to enter into a formal settlement agreement later. See., e.g., *Scheinmann v. Dykstra*, No. 16-cv-5446, 2017 WL 1422972 at *6 (S.D.N.Y. Apr. 21, 2017); *Kloian v. Domino's Pizza L.L.C.*, 273 Mich. App. 449; 733 N.W.2d 766 (2006). Generally, a sender of a communication "subscribes" by typing or signing his or her name at the end of the communication. *Kloian*, 273 Mich. App. at 459 (holding one communication was subscribed because the attorney "typed, or appended, his name at the end of the e-mail message" but another was not because the email only had the "attorney's name *at the top* in the email heading.") But specifically typing one's name at the bottom isn't required in some jurisdictions. Some courts have held a sender can subscribe to or authenticate intent in an email by including a pre-affixed email signature block or by virtue of the sender's name appearing in an email "from" box. *See, e.g., Khoury v. Tomlinson*, 518 S.W.3d 568, 576 (2017) ("The 'from' field in the email authenticated the writing in the email to be Tomlinson's. [The] UETA expressly allows for automated transactions to satisfy the requirements of contract formation."); but see *Cunningham v.*

Zurich Am. Ins. Co., 352 S.W.3d 519, 529-30 (2011) (holding automatic signature block insufficient to show intent to be bound). These cases, of course, don't preclude a party from contesting whether the written communication is authentic or legitimately sent by the person who purportedly subscribed to it. But those would likely be very rare circumstances to challenge a settlement agreement.

As communication becomes increasingly informal, an emerging issue is whether text messages or direct messages (DM or instant message) can create a settlement agreement. So far, in some jurisdictions, the answer seems to be yes, if the prerequisites noted above are met. For instance, in *St. John's Holdings, LLC v. Two Electronics, LLC,* 2016 WL 1460477 (Mass. Land Ct. 2016), the court held that text messages incorporating various other correspondence were enough to create an enforceable agreement when the texts indicated an agreement and the parties' agents concluded the texts with their names as the senders. *Id.* *6-10. The court noted that the parties did not include their names at the end of later text messages about the agreement, but nonetheless held that the texts to which the parties specifically subscribed showed their intent to be bound. *Id.* As noted above, however, some courts take a broader view than others about what indicates a party's "subscription" to an electronic communication, so the mere absence of names at the end of text messages might not defeat an argument that the texts created a binding contract.

Mediated Settlement Agreements

Mediated settlements often result after hours-long shuttle diplomacy between the parties conveying oral offers and counteroffers, and, eventually, an oral acceptance. In practice, most sophisticated parties will then memorialize that settlement through a term sheet before leaving the mediator's office or very shortly thereafter, with contemplation of executing a more formal settlement agreement later. But there are times when the settlement process falls apart between the end of mediation and execution of a final, formal settlement agreement. This breakdown can leave the parties arguing about whether an oral agreement at the mediation or the term sheet (if one exists) is an enforceable settlement agreement.

Consider first whether the Uniform Mediation Act ("UMA") applies; many states have adopted or are in the process of adopting it. (New Jersey, Iowa, Illinois, Nebraska, Hawaii, Idaho, Vermont, Utah, South Dakota, Ohio, Washington, Georgia, and the District of Columbia.) The UMA prohibits disclosing to a court confidential communications during or in furtherance of a mediation, making them inadmissible as evidence in any legal proceeding. UMA §4. It does, however, allow the parties to agree in advance that certain mediation-related communications can be admissible if a disagreement arises later. *Id.* §6. Effectively then, under the UMA, unless the parties have agreed otherwise in writing, a party seeking to enforce a settlement agreement must rely only on the written agreement. But states that have not adopted the UMA, and federal courts presiding over federal-question cases, may have different standards in their court rules or rules of evidence for enforcing oral settlement agreements at mediation or allowing evidence of mediation communications. For instance, Michigan Court Rule 2.412 specifically addresses the issue. First, it defines "mediation communications" to include statements, whether oral or in a record, verbal or nonverbal, that occur during the mediation process or are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation. Second, it states that "[m]ediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants" subject to exceptions stated in a subrule, one of which is if the parties agree in writing to allow the disclosure. MCR 2.412. And for those jurisdictions that haven't adopted the UMA or don't have other similar rules, the admissibility of mediation communications may be less clear.

Considering it's probable that the parties' oral or written communications during or leading up to mediation won't be usable as evidence, a term sheet could play a bigger role than merely being a placeholder until the parties enter a formal settlement agreement. In fact, it could end up being *the* settlement agreement, because the parties won't be able to submit evidence beyond what the signed term sheet says. Therefore, it is critical to have a term sheet in hand, signed by the attorneys *and* clients, containing all the material terms you absolutely must have to settle the case. If you want finality from the mediation, your term sheet should expressly state entering a subsequent formal settlement agreement is not a precondition of settlement. But if you believe there are material terms still to be considered, you should expressly indicate in the term sheet that settlement is not final until there is a fully executed, formal settlement agreement yet to be completed.

Common Stumbling Blocks That Arise after "Agreeing" to Settle

The terms of settlement agreements are as varied as the cases from which they arise. Lawyers and parties can also have widely varying degrees of experience and sophistication in settling cases. And even among those with relatively equal sophistication and experience, there can be a strategic game of "gotcha" over certain terms by one side to try to gain additional leverage for concessions from the other. Consequently, the parties could have conflicting views on what constitutes a material settlement term. And that could leave one party with an agreement different than the one it thought it had, or both sides without an agreement at all. It is therefore important to expressly raise and memorialize in writing all of the material terms in a term sheet (keeping in mind, too, the points above).

Failure to Negotiate Confidentiality, Nondisparagement, or Similar Terms

Some attorneys consider confidentiality, nondisparagement, or other similar terms to be "standard" agreement terms. Accordingly, they may not expressly negotiate for these terms and not include them in a settlement term sheet, merely expecting them to be included in the "formal" settlement agreement. But this could be problematic for a few reasons. For example, if a plaintiff agreed to a settlement number, but confidentiality and nondisparagement were never raised beforehand in a written offer or a term sheet, he might argue the settlement agreement did not include consider-

ation for those terms. He might then take the position that if the defendant wants confidentiality, it has to pay more than the already-agreed-upon payment.

A term sheet could play a bigger role than merely being a placeholder until the parties enter a formal settlement agreement.

Plaintiffs' lawyers are increasingly raising this issue based on the 2003 "Dennis Rodman case," which is a tax court case captioned *Amos v. Commissioner*, T.C. Memo. 2003-329. The case arose after Dennis Rodman allegedly kicked Amos, a sideline photographer, in the groin during a 1997 NBA game. Amos sought medical care, but doctors found no serious injury. Nonetheless, within a week, he pursued a claim against Rodman. Rodman quickly paid Amos $200,000 to settle, but a substantial motivation for the agreement was confidentiality, which the agreement addressed in detail including stating confidentiality was part of the consideration for settling. Amos did not report any portion of the $200,000 as income. He was later audited, and after an appeal to the tax court, ordered to pay tax on $80,000 of the settlement. The tribunal ruled that under I.R.C. §104, only damages for physical injury are non-taxable, so it had to examine the "dominant reason" for the agreement to determine what portion was taxable. It concluded that, since the agreement did not apportion how much of the settlement was for physical injuries, it had to make its own determination of what the apportionment should be. It concluded that, based on the record, 60% was for physical injury and 40% was for confidentiality.

Because of their fear of tax consequences to their clients, plaintiffs' attorneys, even in cases outside of the personal-injury context, are taking various positions: categorically not agreeing to confidentiality or nondisparagement provisions; demanding that the agreement expressly state that none of the settlement proceeds are for confidentiality; demanding that the agreement set a nominal amount as consideration for those terms; or seeking to enter into an entirely separate agreement for confidentiality. If a litigant does not address these issues in settlement negotiations, it runs the risk of confidentiality being excluded from the agreement or, perhaps, a court finding there was no agreement at all.

Release Terms

Sometimes parties exchange correspondence or execute a term sheet memorializing their settlement without specifically addressing release terms. Again, a party might assume a release is a standard term both sides will address later in a "formal" agreement. But in cases with, for example, multiple parties asserting claims, counterclaims, and crossclaims, or if there are non-party indemnitors of a defendant, the release terms might be critically important. If these terms aren't expressly negotiated before the parties indicate their assent to settlement, they could end up fighting about it later. And at least some courts take the view that a release is not necessarily a material settlement term. *See e.g., In re Deepwater Horizon*, 786 F.3d 344, 357 (5th Cir. 2015) ("Release provisions are generally—though not always—material terms of settlement agreements. However, even where the *existence* of a release is material, the *precise terms and specific language* of the release are not necessarily material. Consequently, 'even where the scope of the release is disputed,... courts routinely enforce settlement agreements even where the precise wording of a release has not been finalized.' This remains true even when one of the parties ultimately fails to sign the finalized release.") (internal citations omitted).

Indemnity Terms and Liability for Breaches of Warranties in the Agreement

Though indemnity clauses appear in many settlement agreements and might be thought of as "boilerplate," they are often quite the opposite. It is usually important to have precise language about the scope and limits of an indemnity obligation. Waiting to negotiate the specifics until after one or both parties believes there is a settlement agreement either through written correspondence or a mediation term sheet can be a significant stumbling block to finally concluding a case.

Medicare Set-Asides and Other Liens

For injury cases involving plaintiffs who are Medicare beneficiaries or will become eligible within 30 months of settlement, failing to address Medicare's interests in the settlement can substantially delay, or even scuttle, a settlement. Under the Medicare Secondary Payer Act, Medicare is entitled to reimbursement for injury-related medical expenses it paid for the plaintiff or will pay in the future. This may require making a portion of the settlement proceeds payable to Medicare, and might even necessitate creating a "set-aside" for future payments. Obtaining the necessary information from conditional-payment-information letters or a final demand letter from Medicare can take months, and there are stiff penalties for both sides for not complying with the Medicare Secondary Payer Act. So, a failure to address this issue before coming to an agreement on a payment can leave the parties scrambling and might cause them to abandon settlement altogether.

Similarly, parties should be careful to negotiate expressly about the resolution of any other liens, such as attorney liens from plaintiff's prior counsel, tax liens on any property at issue in the settlement, insurance provider liens, and any mechanics liens or construction liens. Again, having negotiated a "settlement" amount without accounting for these issues could leave a party with unexpected liability, causing them to try to renegotiate an agreement or claim there never was a binding agreement in the first place.

Undoing the Terms of a Final Settlement

Bases for Voiding a Settlement Agreement

The general bases for voiding all or part of a settlement agreement are similar to those for other contracts. Broadly, those bases are fraud (or fraud in the inducement), mutual mistake of fact, illegality,

duress, and undue influence. *See e.g., Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1163 (Del. 2010) (release will be set aside where there is fraud, duress, coercion, or mutual mistake concerning the existence of a party's injuries).

Fraud in the Inducement

Fraud in the inducement is an affirmative defense to enforcement of a settlement agreement that can entitle the party asserting it to rescission. *See Jordan v. Knafel*, 378 Ill. App. 3d 219, 229; 880 N.E.2d 1061 (2007). To establish the defense, a party must show: (1) a representation of a material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false by the maker, or not actually believed by him on reasonable grounds to be true, but reasonably believed to be true by the other party; and (4) relied upon by the other party to his detriment. *See e.g., Id.*

In the *Jordan* case, NBA star Michael Jordan brought a declaratory-judgment action against Karla Knafel seeking to, among other things, invalidate an alleged oral agreement to pay Knafel $5 million per year to not file a paternity suit against Jordan. Jordan denied he had made the agreement at all, but argued that even if there had been an agreement, it was induced by Knafel's fraudulent representation that Jordan was her child's father, which was eventually established through DNA testing. The court agreed. It held that the paternity issue was material to Jordan's decision to enter into the agreement, such that it was at least a significant factor in his decision to act. *See id.*at 229-30. It also held that Knafel knew or should have known that her representation to Jordan with certainty that he was the child's father was false because she also had unprotected sex with another man during the relevant timeframe. *Id.* And "when a party claims to know a material fact with certainty, yet knows that she does not have that certainty, the assertion constitutes a fraudulent misrepresentation." *Id.* at 231 (citation omitted). Her "fail[ure] to disclose material information in the process of contract formation" rendered the agreement voidable. *Id.* at 232. Finally, the court noted that, because Knafel did not provide contrary evidence, Jordan's reliance would be presumed because "representations [were] made in regard to a material matter and action [by Jordan] has been taken." *Id.*at 232-33 (citations omitted).

The *Jordan* case did not include a written agreement and therefore did not address the effects of a merger/integration clause or a "no-reliance" provision on Jordan's fraud theory about Knafel's pre-settlement representations. Had there been a written agreement with such clauses, it would be necessary to understand whether and to what extent Jordan could have affected the fraud argument. As an initial matter for discussion, the distinction between integration/merger clauses and no-reliance clauses is often overlooked. Judge Posner, in the Seventh Circuit, has provided one of the better explanations of the important difference:

> By virtue of the parol evidence rule, an integration clause prevents a party to a contract from basing a claim of breach of contract on agreements or understandings, whether oral or written, that the parties had reached during the negotiations that eventuated in the signing of a contract but that they had not written into the contract itself. But fraud is a tort, and the parol evidence rule is not a doctrine of tort law and so an integration clause does not bar a claim of fraud based on statements not contained in the contract. Doctrine aside, all an integration clause does is limit the evidence available to the parties should a dispute arise over the meaning of the contract. It has nothing to do with whether the contract was induced, or its price jacked up, by fraud.

Vigortone AG Prod., Inc. v. PM AG Prod., Inc., 316 F.3d 641, 644 (7th Cir. 2002). After noting "the majority rule is that an integration clause does not bar a fraud claim," he observed that "[o]ne consequence of the rule is that parties to contracts who do want to head off the possibility of a fraud suit will sometimes insert a 'no-reliance' clause into their contract, stating that neither party has relied on any representations made by the other." *Id.* And "[s]ince reliance is an element of fraud, the clause, if upheld—and why should it not be upheld, at least when the contract is between sophisticated commercial enterprises—precludes a fraud suit." *Id.* at 645. In sum, the general rule is that an integration/merger clause does not bar seeking to rescind a settlement based on fraud, but a no-reliance provision will bar fraud-based rescission.

Some courts, however, take a different view, holding that even a "no-reliance" clause may not preclude a fraud claim. For example, one panel of the Florida Court of Appeals held that the only way to preclude rescission based on fraud is to explicitly say so:

> [Defendant] cites numerous authorities from other jurisdictions in an attempt to persuade us there is a distinction between a "merger and integration" clause and a "no-reliance" clause, and we should follow the precedents of other jurisdictions that a "no-reliance" clause precludes rescission based on fraud in the inducement. However, we conclude our supreme court has spoken clearly that no contract provision can preclude rescission on the basis of fraud in the inducement unless the contract provision explicitly states that fraud is not a ground for rescission.

Lower Fees, Inc. v. Bankrate, Inc., 74 So. 3d 517, 520 (Fla. Dist. Ct. App. 2011). But even Florida courts disagree on this point. *See, Billington v. Ginn-La Pine Island, Ltd.,* 192 So.3d 77, 84 (Fla. Dist. Ct. App. 2016) ("[W]e hold that the 'non-reliance' clauses in this case negate a claim for fraud in the inducement because Appellant cannot recant his contractual promises that he did not rely upon extrinsic representations.")

The distinction between a merger/integration clause and a no-reliance clause is important, because if a party wants to avoid the effect of a merger clause to bring in evidence of the parties' obligations based on agreements or terms not included in the settlement, it must have the ability to viably assert fraud. "[W]hen a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause." *LIAC, Inc. v. Founders Ins. Co.*, 222 F. App'x 488, 493 (6th Cir. 2007) (quoting, *UAW-GM Human Resource center v. KSL Recreation Corp.,* 228 Mich. App. 486, 503; 579 N.W.2d 411 (1998)). If the agreement does not include a no-reliance clause, a party might be able

to overcome the merger/integration provision. But if the agreement has no-reliance language, a party's attempts to overcome the merger/integration clause will not be successful, at least in most jurisdictions.

Mutual Mistake of Fact

The *Jordan* case discussed above also addresses when a mutual mistake of fact renders a settlement agreement voidable. If a mistake by both parties "as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake." *See e.g., Jordan v. Knafel,* 378 Ill. App. 3d 219, 234, 880 N.E.2d 1061 (2007) (quoting, Restatement (Second) of Contracts § 152, at 385 (1981)). As an alternative to Jordan's fraud-in-the-inducement argument, the court also determined the contract would be voidable because, at minimum, Jordan and Knafel were mutually mistaken about the fact of the child's true paternity. *Id*. It found the issue of paternity went to a basic assumption on which the contract was made because it was consideration for Jordan to settle and Jordan did not bear the risk of mistake regarding the child's paternity, because he "had no duty to attempt independent verification of the information especially where... ascertainment of the true fact was more readily available to Knafel than it was to Jordan." *Id*. at 234-35.

Impossibility of Performance, Duress, Illegality, and Undue Influence

There are other, though less frequently litigated, legal principles that a party might rely on to escape a settlement agreement, including impossibility, duress, illegality, and undue influence. For instance, after coming to a settlement agreement, a party might assert a right to rescind the agreement because certain unanticipated or changed circumstances make it impossible for that party to perform the settlement agreement. But impossibility arises only when a party is unable to perform because of unanticipated and unforeseeable circumstances beyond that party's control. *See Freedman v. Hason,* 155 A.D.3d 831, 833; 65 N.Y.S.3d 59 (2017) (rejecting claim of impossibility to performing settlement agreement where bank seized escrow funds to be used for settlement when the bank's seizure of those particular funds was foreseeable.)

A party might also try to argue that it entered into the settlement agreement only because it had no other choice. But the standard for proving duress is extremely high. Duress cannot vitiate a contract absent extreme conditions such as threats of physical or economic harm, criminal prosecution, or unjustified civil proceedings. The party asserting duress must also establish the other party acted with intent to cause it to act to its own detriment by taking a certain action or refraining from action. Mere fear is insufficient. The acts or threats must have been to a degree that the party claiming duress was deprived of its freewill by agreeing to settle. And, in some jurisdictions, a party claiming duress must prove that the other party was doing an act it "had no legal right to do" and "some illegal exaction or some fraud or deception." *See e.g., Lockwood Int'l, Inc. v. Wells Fargo Bank, N.A*., 459 F. Supp. 3d 827 (S.D. Tex. 2020).

To set aside a settlement agreement based on undue influence, a party asserting it must show by clear and convincing evidence it "was subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence for an improper purpose, and that the result was... the effect of such undue influence." *Pawnee Cty. Bank v. Droge*, 226 Neb. 314, 321; 411 N.W.2d 324 (1987).

If a party can demonstrate that performance of a settlement agreement or parts of it will constitute an illegal act, it could have the agreement voided in whole or in part. "A contract to do a thing which cannot be performed without violation of the law" violates public policy and is void. *In re Kasschau*, 11 S.W.3d 305, 312 (Tex. App. 1999) (voiding a settlement agreement where a provision "illegally required the parties to destroy evidence in a potential criminal proceeding brought at the instance of non-parties to the settlement agreement.") "As a general rule, where part of the consideration for an agreement is illegal, the entire agreement is void if the contract is entire and indivisible." *Id*. "The doctrine of severability is an exception that applies in circumstances in which the original consideration for the contract is legal, but incidental promises within the contract are found to be illegal." *Id*. "In such a case, the court may sever the invalid provision and uphold the valid portion, provided the invalid provision does not constitute the main or essential purpose of the agreement." *Id*.

Practical Tips for an Effective Settlement Agreement

Whether parties have an enforceable settlement agreement can, at times, be uncertain. It's often not so simple as pointing to an agreement with "signatures on the dotted lines." Depending on the circumstances, an agreement could also arise, sometimes unexpectedly, from a conversation, email, text message, term sheet. To alleviate some of the uncertainty, counsel should keep in mind the following tips:

- Written negotiation communications (including emails and text messages) that are not intended to create an agreement should state that they are subject to further discussion, subject to agreement, or similar terms.
- Have a draft term sheet or a template with you at the mediation to ease the process.
  - Have a preplanned list of all desired material terms before the mediation, and add or subtract from it as the mediation progresses.
  - The term sheet should state that it contains all of the material terms.
- A term sheet should state that a formal written settlement agreement is not a precondition to settlement, unless that's what you want.
- Don't rely on any oral statements. Include a comprehensive integration clause and no-reliance language preferably including a specific waiver of any claims that the agreement was induced by fraud.
- Consider making the mediator the arbitrator of disputes over settlement agreement and make that decision unappealable. In the alternative, include a provision stating that the same court will retain jurisdiction to enforce the agreement, and include that language in an order.