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Committee Leadership

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Committee Update

By Colette Magnetta, Guy Hughes, and Patrick Causey



Welcome to the Litigation Skills Committee!

We are very excited to officially announce a change to our committee's name. While we have enjoyed being known as the Trial Tactics Committee for many years, the breadth of our education and the scope of our members' practice expertise have continued to expand and we wanted our committee name to reflect that. Going forward, DRI's former Trial Tactics Committee will be known as . . . the **Litigation Skills Committee**.

The education provided by this wonderful committee, through a variety of media, covers every aspect of the litigation process and all the skills necessary to do them well. It is time that our name more accurately depicts all that we have to offer.

Coinciding with this exciting name change, we have an initiative to make even MORE use of our greatest resource: our trial attorney members. In the coming months, you will see add-on workshops for many of your favorite SLC seminars. These intensive four-hour workshops will be designed to provide hands-on active learning opportunities that will benefit attendees as soon as they get back to the office. Each workshop will be limited to 30 attendees in order to maximize the small group and one-on-one instruction that will provide the most benefit. The workshops will have a minimum of three seasoned trial attorneys as instructors, who will lead the attendees through subject matter and activities specific to their area of practice. We are extremely excited about providing these intensive training opportunities and look forward to working with the SLC's in designing and implementing the same.

In addition to the in-person workshops, we are also hard at work preparing a series of on-demand programs designed to assist in the training of new and newer attorneys in relation to the skills we all need to master to best serve our clients. More news on this initiative will be available soon and we will be reaching out to our membership to join our efforts.

As the Litigation Skills Committee, we will be looking for additional ways to add value to all DRI members and make sure we are training our attorneys in the best and most economical fashion possible. It's an exciting time and we hope you will help us with these new initiatives.

Interested members should contact Colette Magnetta or Guy Hughes to learn about how you can become more involved. Stay tuned for more exciting updates and we look forward to working with you.

Mark Your Calendars for the 2019 Trial Skills and Damages Seminar

The 2019 Trial Skills and Damages Seminar is March 20–22 at the newly renovated Park MGM Hotel in Las Vegas, Nevada. The skills-based seminar is focused on emerging trends and the future of litigation. The seminar includes many exciting presentations and interactive programs, such as mock examinations of expert witnesses, mock argument on in limine motions and ethically navigating public relations in mass casualty or large loss cases. The mock presentations will be presided over by the Honorable Johnni Rawlinson of the United States Court of Appeals for the Ninth Circuit. There is also a focus on a variety of ADR topics and the effective use of recent technological developments, such as virtual reality in the courtroom. The seminar will also feature several networking opportunities, including a golf tournament, Women in the Law networking lunch, a Young Lawyers event and networking dinners at some of Las Vegas' top restaurants. And, of course, the seminar is during the first week of the men's college basketball tournament! We hope that you can join us!

If you are interested in learning more, or assisting with seminar planning efforts, please contact Abigail Rossman or Patrick Causey.

Calling All Authors: We Need YOU!

The Litigation Skills Committee is looking for authors! We have a number of opportunities for authors to contribute content, across a wide range of trial and litigation-related topics. Our next issue of the *Trials and Tribulations* e-news-

letter will be published in November, with content due by November 5, 2018.

If you are interested in contributing an article, or if you have an idea for a topic, please reach out to us. We are also looking for authors and/or article topics for the Committee's next feature article for the November issue of *The Voice*, with content due on or before November 12, 2018. Lastly, we are always looking for ideas and authors for contributions to *For The Defense* and *In-House Defense Quarterly*.

In addition to articles, we are planning a number of future Defense Library Series publications, including a publication on **the use of analogies and storytelling at trial**. If you are interested in contributing, or if you would like to learn more, please let us know. Individuals who are interested in any publication opportunities with the Litigation Skills Committee should contact Megan Pizor, Chris Turney or Brian Rubin.

Colette R. Magnetta is a shareholder at Acker & Whipple APC in Los Angeles, CA. Her general tort defense litigation practice includes construction workplace accidents, premises liability, product liability, and transportation claims. Ms. Magnetta is the Chair of the DRI Litigation Skills Committee.

Guy E. Hughes is a partner with Casey, Bailey & Maines, PLLC in Lexington, KY, where he has a broad based litigation practice handling matters in the areas of products liability, fire loss, trucking law, premises liability as well as the defense of professional liability claims. Mr. Hughes currently serves as the Vice-Chair of the DRI Litigation Skills Committee.

Patrick M. Causey is a civil trial lawyer at Trenam Law in St. Petersburg, FL, where he represents clients in a variety of commercial matters including franchise disputes, non-competition and confidentiality agreements, breach of contract, class actions, fraud, commercial torts and trade secrets litigation. Patrick also dedicates a significant portion of his practice to defending lawyers in legal malpractice cases. Patrick is the Deposition Institute Chair for the DRI Litigation Skills Committee.

Feature Articles

A Modern Approach to Fact Sheets and Coordinated Discovery

By Megan L. Pizor

In complex litigation, one of the key benefits of consolidation – in federal or state court – is the ability to coordinate discovery efforts, saving countless time and expense. See Advantages of Coordination, Multijurisdiction Litigation.

Plaintiff Fact Sheets (PFSs) are standardized forms frequently used in multi-district litigation (MDL) (or other coordinated discovery proceedings) to obtain general information about plaintiffs' claims. See MDL Standards & Best Practices, Duke Law School Center for Judicial Studies. PFSs replace or simplify certain aspects of fact discovery (primarily interrogatories) and are tailored to provide all parties with information critical to claims or defenses, as well as ultimately narrow down the pool of cases for further discovery and initial trial selection.

Along with the PFS, plaintiffs are also frequently required to produce information verifying their basic factual allegations, such as witness statements or damages receipts. This documentation can help allay concerns that MDL or other coordinated proceedings "invite the filing of claims without adequate investigation." *Id.*

The PFS process requires a balanced approach to support streamlined discovery and early case assessment, without duplication of efforts later in the process should protracted litigation become necessary.

Early Case Assessment

Multi-party cases frequently utilize a bellwether approach to trial selection and, ultimately, matter resolution. This process allows the parties and the court to "test" a few cases early in

the process, leading to a better understanding of the global plaintiff population. Increasingly, the ultimate goal of this process is to support settlement. *See* Eldon E. Fallon *et al.*, Bellwether Trials in Multidistrict Litigation, 82 Tulane Law Review 2323 (2008). There are a variety of ways to select bellwethers, including random selection, or allowing counsel for each side to choose their own cases.

Another approach is to select cases by criteria that are both meaningful and representative of the population as a whole. *See* Paul D. Rheingold, Recent Methods Employed in Selecting Bellwether Cases in Mass Tort Litigation, Legal Solutions Blog: Practice of Law. The criteria should correspond to foreseeable issues in the case, such as injury type or severity, time of injury, or location of the claimant. In order to do this, however, it is critical to have an early understanding of the plaintiff population. *Id.*

Historical To Modern Approach

The standard PFS process is fairly simple. First, plaintiff completes the PFS. Next, plaintiff counsel reviews/approves and submits to defendant(s). Subsequent to this submission, defense counsel reviews the PFS for any deficiencies. If deficiencies are found, defense counsel then sends notice of critical deficiencies to plaintiff counsel, summarizing the deficiencies and the deadline for curing in order to avoid dismissal. (This process, including what information is considered to be critical, as well as timeframes for curing, is generally agreed to by the parties and/or clearly mandated within a Case Management Order.)

The PFS process has historically been managed via mail, fax, email or secure file transfer programs. However, this process can be time-consuming and arduous.

Innovations in legal technology have produced e-discovery, technology-assisted review, and other necessities to keep up with the ever-increasing volume of discovery data. Similarly, in multi-party matters, the use of online portals to complete, manage and exchange discovery is innovating the PFS process.

The PFS—and supporting documents—can be completed, reviewed and served upon opposing counsel through a secure, online portal. Advanced programming allows the technology to determine which questions are applicable to each individual claimant based upon real-time responses. There is a greatly reduced potential for deficiencies, as the system can "force" certain questions to be answered before the data can be saved, as well as recognize potential errors.

As information is entered, it can be tracked and analyzed by system users—all of whom have customized views that allow access only to approved data. Data is stored in a central location, where users can generate custom reports with case-specific inquiries. Should a global settlement ultimately be reached, online discovery exchange platforms can also be used for submission and review of enrollment packages.

Benefits

There are a number of benefits to utilizing online discovery exchange platforms. Centralization of PFSs and supporting discovery documents makes handling large case inventories more seamless and efficient. It allows for early access to claimant and/or population data and analytics, thus encouraging early settlement negotiations or bellwether selections through timely assessment of claims. In one particular matter, the judge even went so far as to "suggest" the use of an online fact sheet and discovery management platform. *See In Re: Abilify (Aripiprazole) Prods. Liab. Litig.*, Case No. 3:16-md-2734 (N.D.Fla.) (citing Case Management Order No. 1 at 3).

In general, key benefits include: better use of firm/attorney resources; reduced fees/expenses through better insight into necessary discovery; and more timely—and cost effective—matter resolution. Additionally, early access to organized data regarding the plaintiff population can be helpful in providing foundational information for the setting and tracking of budgets and reserves.

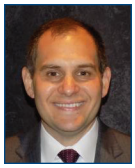
Conclusion

Online PFS and discovery exchange platforms can prove invaluable in the efficient management of complex litigation. Users can gain multiple advantages, such as at-a-glance visibility into discovery status and reduced costs through efficient data sharing. Analytics and dashboards can provide real-time insight into case trends, bellwether selections, and potential progress towards resolution. As technology continues to progress, the online PFS will inevitably become yet another standard component of the legal team's toolkit to successfully resolve complex matters.

Megan L. Pizor is an is an attorney with Litigation Management, Inc. (LMI), where she works closely with clients in the development and monitoring of comprehensive discovery strategies for the defense of complex litigation. Ms. Pizor is admitted to practice in Ohio and is the current publications chair for the DRI Litigation Skills Committee.

Building a Modern Team for a High Stakes, High Profile Trial

By Kathryn S. Lehman and Scott M. Edson

Imagine arriving to play a game at your opposition's stadium. The stadium is erected on a hillside. The teams will not rotate sides and, under the local ground rules, the visiting team is assigned the end that happens to be at the bottom so that your team will always be pushing uphill. The local ground rules are expressed in broad generalities that require referee interpretation *during* the game.

On the sports field, this would be absurd. In the courtroom, not so much. The rules of procedure and evidence often speak in broad, general terms that have to be applied during the trial, so that lawyers are constantly forced to call new plays and adjust to new circumstances in the moment. Layer over the complexities of trying to persuade a group of human beings with their own pre-conceived opinions, the intricacies of contemporary substantive law, and the limitations of procedural law, and you can have quite a pickle. Indeed, things can be so complex that a trial judge meaning to set a level playing field can unintentionally tilt the field against one side or the other, especially if counsel fail to provide the necessary perspective. If you find yourself facing a high-stakes trial in today's challenging environment, you need a team of veterans with several seasons under their belt, not a group of rookies who have never suited up before.

In past generations, a first chair trial attorney needing to staff a trial team would look around the office and staff his team with the junior partner and associate who had been working with him on the case. Add a paralegal and a secretary, and the trial team was complete. Not so anymore. Recent years have brought the demise of the low-stakes trial and catch-as-catch-can trial staffing. In its place are high-stakes cases tried by teams of specialists.

So Who Are These Specialists and What Do They Do?

The Trial Attorney

The most fundamental of these specialties is the experienced attorney who regularly tries high-exposure cases. These attorneys do not try cases once every few years. Rather, they regularly try significant cases. This specialist can help guide you through the trial process, starting with pre-trial motions, witness preparation, jury selection, opening statements, cross-examination of plaintiff's witnesses, persuasive presentation of your own case (including knowing when to stop), and closing argument. The trial attorney can serve as first or second chair. When serving as first chair, the trial attorney can free up the first chair to act as the coach, communicate with the client, coordinate with co-defendants, and focus on other tasks during trial. In short, they are the coach or assistant coach.

The Strategist

It is not enough to understand the strengths and weaknesses of your case; you must take the next step by developing a strategy for how to leverage your strengths and mitigate your weaknesses. If the first chair is not an experienced trial strategist, you need a coordinator to drive that process.

- The strategist can guide discovery to shape the trial if they are retained early enough. They will help you identify additional offensive depositions you need, help prepare your witnesses for depositions and generally help shape the pre-trial record.
- The strategist will work with the legal issues attorney to develop pre-trial motions strategy to try to exclude the most damaging evidence.
- Experienced in both developing and giving opening statements, the strategist will develop an opening statement that persuasively frames the issues and deploys the evidence to your greatest advantage.
- The strategist will refine witness outlines so that they are more persuasive to the jury and further your trial strategy.
- The strategist will create a persuasive closing argument and work with you on presentation – including the substantive content, the graphics you use, and everything else.

Attorneys who have developed strategies for dozens of high-risk trials are unicorns—they are rare and hard to find.

The Legal Issues and Appellate Specialist

The legal issues specialty has evolved significantly in recent years. The days of sitting in the gallery and advising

the attorneys at counsel table to "object" are long gone. Instead, skilled legal issues attorneys now fill a much broader role. They must know the law cold—both the cases that help and hurt their argument—but must also know the facts cold. They must be prepared to instantly call up either cases or record evidence that support their position—and also know how to weave them together to tell a persuasive story with the same skill one would expect from a seasoned lead trial lawyer.

- With a primary goal of increasing the odds at trial, this attorney focuses pretrial briefing and pretrial hearing time to the issues most important to the trial. These issues, in turn, are the best developed, so they end up making the best appellate issues.
- This attorney works with the trial attorneys to develop objection strategies for the plaintiff's opening statement, key cross examinations and plaintiff's closing argument.
- The modern legal issues attorney takes the lead on arguing the most significant legal issues at trial. The attorney learns the record and wields facts like a sword in order to convince the judge, rather than making ungrounded discussion of abstract legal rules.
- The legal issues attorney also drafts and argues the jury instructions and verdict form that best fit with the defense strategy.

A legal issues attorney should not be confused for a junior associate who is assigned these tasks. He or she is, instead, a well-prepared trial lawyer who will serve as your second coordinator.

How Do I Work with Them?

Like developing any new team, it is critical to clearly define roles and expectations from the start. An early trial team meeting, where everyone discusses the facts of the case, the applicable law, and brain storms about strategy, is a good first step. This is especially critical if you are creating a virtual law firm by staffing with attorneys and paraprofessionals from multiple law firms. The trial team meeting will allow new team members to meet existing team members and discuss their areas of expertise. Existing team members can, in turn, showcase their knowledge of the case and procedural history. The meeting should be in person—not on the phone and not by video conference. The team members need to start developing personal relationships and start rolling up their sleeves to collectively work out the challenges the case raises.

The critical second step is developing a written plan that delineates the different areas of final responsibility. It should both identify the attorney taking lead on an issue and the attorneys who are expected to contribute to a project. For example, the legal issues attorney may be ultimately responsible for developing the plan for pre-trial motions, with the second chair and strategist expected to give input and approval. By the same token, it should be stressed that these are points of primary responsibility, not silos. For a trial team to operate, everyone must buy into the common task of winning the case, and everyone must be ready to step into whatever role may be required in the moment.

The trial team should also start working out of the same work space at least a week before the trial. Just as football teams have summer camp, trial teams need time to adjust and get into the rhythm of a trial. A work week before trial—even if attorneys are not devoting all of their working time to the trial—helps acclimate everyone to each other and to their new environs.

Should I Be Concerned that They Will Take My Trial, My Client, and My Pride?

Just the opposite. Needless to say, a stratospheric jury verdict that receives national press coverage will not help your client-development efforts as a defense attorney. On the other hand, there is no faster way to impress your client and build your brand than to win a great victory that gains publicity. Showing that you have the confidence and humility to put the right people in the right roles to achieve the right results is the best way to impress any client.

So the next time you are staffing a high-stakes trial team, take a cue from the sports world, the consulting world, or the business world and, instead of finding who is available within your immediate wingspan, seek out the right specialists for the right roles and build your winning team.