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Trials and Tribulations

The newsletter of the Litigation Skills Committee

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Committee Leadership

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Committee Update

By Guy Hughes

The Litigation Skills Committee (formerly "Trial Tactics") is designed to be the go-to source for all aspects of litigation, from initial investigation through trial. To better reflect the varied skill sets, talents and practice areas of our members, we not only decided to undertake a name change, but our members have been very hard at work to help us rebrand and revitalize our role and mission within DRI.

In December 2018, in conjunction with the Insurance and Professional Liability Committees, we put on the first Litigation Skills Workshop designed to provide attendees with a hands-on, interactive experience in a small group setting (30 attendees). The program provided the opportunity to practice and hone their skills in an area essential to success. The ICCP/PL program focused on prepping and taking a 30(b)(6) witness deposition and, due in large part to the work of committee member Daniel Arnett, was a tremendous success. We're now in the process of planning similar workshops in conjunction with the upcoming medical liability, employment, construction, bad-faith, and nursing home litigation seminars. These four-hour workshops, created and planned in conjunction with the substantive committees (and we appreciate their hard work and assistance), provide practical training for attendees who are beyond the basics and are looking to transition their practice to the next level. Each is designed to assist with a skill essential to the substantive committee's members. We are extremely excited about the opportunity to create and assist with these workshops and look forward to being able to provide these opportunities in the future. We hope you will take a look and consider attending. We promise you won't be disappointed.

I would be remiss if I didn't mention the tireless efforts of Abigail Rossman (program) and Patrick Causey (program vice chair), along with countless other committee members, in putting together this year's Trial Skills and Damages Seminar (Las Vegas, March 21–23). In addition to multiple networking opportunities with top attorneys from around the country, the educational sessions cover a broad array of topics, from cross-examination of experts, to the art of persuasion, to incorporating technology into numerous phases of litigation, to effective mediation strategies and beyond. The feedback we get year after year on our committee's annual seminar is astounding and is supported by the number of attendees who have been regulars for years. If you have not attended one of our programs in the past, or if it has been many years since you have attended, please consider the Trial Skills and Damages Seminar as best-in-class resource to help make you a more valuable, efficient lawyer for your clients.

I would also like to thank those of you who provide the timely and informative articles that make up the *Trials & Tribulations* committee newsletter, as well as our committee's contributions to publications such as *The Voice* and *For the Defense*. Our committee is currently working on a Defense Library Series publication on the effective use of analogies and storytelling throughout trial. If you are interested in learning more, or contributing to this publication, please contact Megan Pizor (Publications Chair) at megan.pizor@lmiweb.com or Chris Turney (Publications Vice Chair) at cturney@vanosdolkc.com.

We have a multitude of opportunities for those of you who would like to get involved, assist with a workshop, speak at our seminar or write an article. Our committee is here to give you that opportunity so that we can provide as much benefit to DRI members as possible. Please reach out to me at ghughes@cbmlaw.net or to my vice-chair, Kyle Lansberry, klansberry@lewiswagner.com, if there are ways that you would like to get involved. New faces, new input and new ideas are always welcomed and appreciated. We look forward to hearing from you and serving our members.

Guy E. Hughes is a partner with Casey Bailey & Maines PLLC in Lexington, Kentucky 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 work has also included representation of recreational product, automobile and motorcycle manufactures as well as work for a Class I Railroad with trials throughout the Commonwealth of Kentucky. Mr. Hughes is a member of DRI and currently serves as the chair of its Litigation Skills Committee.

The Importance of Telling a Story—Opening Statements

By Stacy L. Moon

Contrary to what professors teach in law school occasionally, the opening statement is not your first chance to tell the jury about your case. Frequently, in voir dire, lawyers are given the opportunity to say something about the case. "This case involves the design of a widget. Are any of you widget designers?" And it is not always the first time the jury will hear what each side's position about the case is. In some courts, particularly federal courts, judges read the parties' contentions to the jury before opening statements. So, what *is* an opening statement your first opportunity to do? It is the first opportunity to put the substance of the case in the light you want the jury to hear. In short, it is the opportunity to tell the jury your story.

Why is telling the story so important? Anyone who has ever listened to an unorganized description of a situation can answer that question. Telling the story helps a jury put the case in context. By telling the story, rather than simply reciting facts, an attorney can make the jury care about the case and about the client. And the story being told can begin to counteract the story plaintiff's counsel has already told in opening statement.

How does one tell a story? Not everyone is a good story-teller. Truly telling a story takes a thorough knowledge of the facts, but simply reciting the facts is not telling a story. Telling a story encompasses facts, theme, tone of voice, facial expression, and choreography. And it takes practice and flexibility.

The Facts

Keeping in mind that opening statements are not closing arguments, the facts must come in through opening statements. If you bear the burden for any portion of the case, your particular jurisdiction may require a party to include sufficient facts to support that burden or risk dismissal of that claim (or deem an affirmative defense waived). Using the proposed jury instructions while preparing an opening statement helps ensure that all of the facts a party needs are stated.

In other jurisdictions, each witness might need to be identified in opening statement or they cannot be called. Using a witness list while preparing an opening statement helps ensure that those witnesses that are essential are identified and not precluded.

A lawyer should never forget, though, that how the facts are presented is as important as the facts themselves.

The Theme

Every good story has a theme—not just opening statements. The theme in some ways is the moral of the story. "Place responsibility where it belongs—and that is not my client" can be an effective theme, particularly where an empty chair exists. The best themes somehow tend to originate from the case itself. It may be a phrase used in a deposition or a motion for summary judgment. It may present itself while colleagues discuss an issue in the case at lunch. The theme can even arise from a comment a judge makes during a status conference. But the theme should be as unforced as possible. If it is unforced, the theme is easier to incorporate into the story and into the rest of the case as it progresses.

Technically, a "theme" can be construed as argument, which is generally not permitted in opening statements. But most judges will allow *some* use of themes and other catch phrases in opening statements.

The Tone of Voice

Controlling tone of voice can prevent an objection for argument—or create an opportunity for the other side to make that objection. Changing the tone of voice also helps maintain the jury's attention.

Too often, lawyers believe that changing tone of voice means being bombastic one moment and soft another. And that is one aspect. But tone is also pitch and speed. If the case involves a runaway train, for example, then one tactic can be to speak faster and faster as if the speech pattern itself is the train. In a construction defect case, which can be a challenge to make exciting, changing your pitch slightly higher when speaking about a higher floor or roof helps the jury visualize the scene of the defect subconsciously.

The Facial Expressions

Jurors subconsciously watch facial expressions, and attorneys tend to consider and practice their facial expressions as they prepare for opening statements. Smiling at one point in the opening statement may actually be natural and appropriate. If a lawyer is too afraid to smile, though, the lawyer gives the impression of being stiff or wooden or simply out of touch.

Practicing an opening statement in front of a camera or mirror may seem awkward, but doing so helps to make people more conscious of their expressions and able to use them effectively.

Using a mirror also helps lawyers catch any distracting behaviors or "tells." Those behaviors can be distracting. And jurors will pick up on the "tells" and identify the weak part of a case. And by becoming aware of them, lawyers can change them.

The Choreography

Telling a story generally should not be done in a static manner. Careful, planned movement can engage the jury more in the story. Unplanned movement becomes a distraction. Obviously, some courts require counsel to remain at the podium for opening statements, but even in those situations, lawyers can move—even if slightly.

When restricted to a podium, planned use of the hands becomes more important than ever. Lawyers can consider leaning in on the podium when discussing the initial stages of negotiating a contract that is now being litigated. Likewise, standing upright from that leaned position can indicate the surprise the defendant company experienced when the plaintiff company failed to perform and is now suing to be paid. If the court will not allow an attorney to use words to express righteous indignation because it is too "argumentative," using choreographed gestures such as leaning or moving from leaning to standing upright can help a lawyer work around that restriction.

If the court does not restrict movement and allows attorneys to speak in front of the jury, attorneys should use that freedom. The danger, though, is that movement can become unplanned, repetitive, and ineffective. Knowing when to move—and when to become still—can enhance the story. If the case involves a supply chain, rather than pacing up and down in front of the jury, a lawyer can consider taking one step for each chain in the supply.

Using mirrors comes into play in choreography, as well. Knowing how it looks if a gesture is made in one such way or another makes it effective. The effect of a gesture cannot be gauged from the viewpoint of the person making the gesture.

The Practice and Flexibility

Some very good lawyers will say they don't really know what they are going to say in opening statement until the start of trial. That approach is probably not effective for most lawyers. Working in the theme, the facts, and the witnesses in an organized matter requires practice. How to approach a case—especially the weak points—needs to be reviewed, out loud, in practice, to know where and how they sound. Practice does not suggest memorization. Memorizing what to say leads to a "canned" sound. And, if an attorney loses the thought along the way, it becomes very difficult to recover.

Additionally, having practiced the opening statement sufficiently that the lawyer knows what and how to make that statement gives the lawyer the flexibility to include the other parties' own opening statements in his. The parties may actually dispute few facts regarding the construction project. They may only disagree on whose responsibility the defect is. Or they may agree on everything other than who had the red light. Lawyers should feel free to tell the jury that fact up front. But then describe what happened using their own theme and their own order. Lawyers lose that flexibility when they memorize.

The Conclusion

Opening statement creates the jury's expectation for the case. They get a sense of whether a lawyer is going to waste their time from the effectiveness of the storytelling in an opening statement. Lawyers should not underestimate the importance of telling their story well at their first opportunity.

Stacy Moon is an experienced litigator practicing in the areas of employment law, commercial litigation, government liability, insurance defense, construction law, and aviation. She is admitted to practice law in Alabama state courts, all federal courts within the State of Alabama, and the United States Circuit Court of Appeals for the Eleventh Circuit. She has extensive trial experience, and has written and presented on issues involving accommodations, trial practice and presentation, law practice management, and HIPAA compliance for law firms. She is Chair of the Law Practice Management Committee of DRI.

Avoiding Surprise and Trial by Ambush

By Lindsay Lorimer and Rachel Cooper


We all know this is true, but it still bears repeating. Planning and organization are essential to putting on an effective defense. Your client's case is built long before you step into the courtroom, yet you need to be able to respond to the unexpected—because no matter how prepared you are, you will inevitably encounter something that was not on your radar.

Know Your Case—The Roadmap

One way to really know your case is to prepare a "roadmap" of the documents and events significant to the case, which will guide you and co-counsel during trial for each and every examination and cross-examination in the case. Not only is the final product extremely useful during the trial, the process of preparing and revising the roadmap makes you intimately familiar with the documents and dates relevant to the action.

The roadmap can be structured chronologically or by issue. Excel spreadsheets are a useful tool for roadmaps as the program easily lends itself to manipulation and revision without significant input. As you become familiar with the program you can present the data you have collected in a variety of different ways using sorts and filters. The roadmap should contain, at least, and depending on the factual matrix, the (a) date of the event or document; (b) description of the event taking place on the date; (c) once a set of trial documents is complete, the bates numbers of document or documents relating to the event; (d) list of persons/witnesses involved in the event or document; (d) issues the event or document relates to; and (e) questions arising from the event. During trial, you can update the roadmap to contain the evidence obtained from the witnesses on each of the issues.

The roadmap should contain all events—those that will be emphasized by opposing counsel and those in support of your case. By being inclusive, you can identify whether there are any gaps or holes in your case so that you can address them well before trial. Without compiling the facts/persons involved with or related to documents in a roadmap, you may miss important opportunities to debunk the opposing party's case. It also provides the tools necessary to respond to the unexpected. For example, a witness may refer to a certain date or timeframe during her testimony which you had not previously considered relevant. By referring to the roadmap during that witness' testimony, you will be able to quickly orient yourself to the temporal context of the new evidence. Chronology is important because it often reveals connections between events that might otherwise appear to be unconnected.

There are discovery tools that can prepare your roadmap for you, but a word of caution—while these tools may reduce the time required to prepare the roadmap, they don't eliminate the need for you to think carefully about the case and to know it inside-out.

Experts—What to Do in Advance of Trial

Review the other side's expert reports, as well as your own, to determine whether there are any potential issues with the proposed scope of the expert testimony. Consider whether any expert has opined on matters beyond their expertise. For example, did your medical expert confine her opinion to the plaintiff's physical capacity to work, or did she go further and comment on the likelihood of the plaintiff to secure employment?

Determine whether there are any issues with the evidence you want tendered at trial – for example, if you intend to introduce demonstrative evidence, you may wish to ask counsel for their position on the evidence before the trial commences. If your expert wants to use a physical model, then provide counsel with photographs or access to the model prior to trial. If you intend to use video or surveillance evidence, then coordinate access to the courtroom in advance to conduct a run-through of the evidence to ensure there are no technological glitches that impact your presentation. It is virtually certain that connecting your computer to the courtroom A/V equipment will require some settings adjustments before everything works as required. Poor planning will impede your ability to be persuasive.

Summons to Witness at Trial—A Powerful Tool

In Ontario, as is the case in most common law provinces, there is no right to the pre-trial deposition of an expert. Serving a summons on the other side's experts shortly before trial can lead to very important discoveries during the trial. Don't use archaic template language in the summons, but rather carefully consider and list the types of documents you require the witness to bring to court. These

could include: instructing letters, draft reports, underlying tests or interview notes, and invoices. USE PLAIN LANGUAGE. At the same time, exercise restraint in the breadth of documentation sought as it is likely that the other side will also issue summonses to your experts, mimicking the language in your summons.

Some examples of the usefulness of summons on experts are as follows:

- Invoices: A plaintiff's expert testified to having watched surveillance of the plaintiff. The summons to that expert required him to bring his invoices for the work he had performed to trial. While it would take 5 hours to review all the surveillance video once, the expert had only spent one hour reviewing the surveillance video. The initial impression of his testimony was somewhat diminished by the fact he had not seen 80 percent of the video in the record.
- Underlying Testing Data: The plaintiff called two different experts, a psychologist and an occupational therapist. The plaintiff had seen the experts on two consecutive days. Each expert had the plaintiff complete a Beck Depression Index test but obtained entirely different results. While the tests formed part of the experts' files they were only brought to Court pursuant to the defendants' summons. The plaintiff was cross-examined on the differences in the information he had provided to the two experts to impeach the reliability of his self-reports.
- Drafts/Prior Reports: Reviewing the drafts of the expert's reports, brought to Court under defense summons, can damage expert credibility and the Court's confidence in the expert's impartiality. In one case, a summons to an occupational therapist ("A") revealed a report from another occupational therapist ("B"). B's report was not previously served but had been relied upon by the expert occupational therapist A, even though it had been drafted a year before occupational therapist A met the plaintiff. Occupational therapist A was left with the task of explaining in all the circumstances why the two reports came to significantly different conclusions as to the plaintiff's needs for future care.

Don't Take Anything for Granted

Do not assume that you and opposing counsel are on the same page. When you exchange witness lists with the other side, don't assume that the order in which they are listed reflects the intended order in which they are to be called. In one case, opposing counsel showed up on the first day of trial intending to call the last witness on their list as the first witness. Suggest to opposing counsel that you trade trial calendars in advance of trial, that specifically list the order of anticipated witnesses and the estimated length of examination in chief.

Testing Patience and Working with Difficult Counsel

In most cases counsel work cooperatively to ensure that a trial runs smoothly, because it keeps the case focused on the issues and minimizes the time spent in court. When confronted by an unorganized or abrasive opposing counsel, it is important to remain professional. Refrain from expressive mannerisms or "dancing eyebrows" when counsel is making unreasonable assertions or accusations – keep a poker face and keep your eye on the ball. Your credibility is essential to your ability to be a persuasive advocate and engaging in what is sometimes called "sandbox litigation" before the Court can impair your case.

Lindsay Lorimer is a partner in the Litigation and Dispute Resolution Group at McMillan LLP. Her practice is focused on product liability litigation, class actions, and complex commercial litigation. Lindsay assists a number of companies with national coordination and management of their litigation matters. Lindsay also regularly advises manufacturers, distributors, importers and retailers on regulatory requirements of various products, risk management issues and corrective actions including product warnings and recalls. She has extensive experience defending class actions and both individual and commercial product liability lawsuits involving a broad range of products including fire and security products, consumer products, food products, pharmaceuticals and medical devices, recreational products, construction and industrial machinery, motor vehicles, building materials and juvenile products.

Rachel Cooper is Counsel in the Litigation and Dispute Resolution Group at McMillan LLP. She practices entirely in product liability defense. She routinely represents and advises clients in the manufacturing, distribution, retail, and insurance industries, on products ranging from automobiles, recreational vehicles, and automotive accessories and parts, to plumbing parts, fire suppression systems, and various consumer goods. Rachel appears regularly before the Ontario Superior Court of Justice, and represents clients in all aspects of litigation including engaging in alternative dispute resolution.

Does Group Deposition Prep Waive the Attorney–Client Privilege?

By Meagan D. Woodall

Bringing in multiple witnesses for deposition preparation helps with efficiency and oftentimes with aggressive discovery schedules where multiple witnesses are expected to testify within a short amount of time. Attorneys can explain deposition instructions with multiple witnesses at once rather than holding separate sessions for each witness. While efficiency saves time and resources, preparing more than one witness for a deposition at a time can raise legal challenges. For example, does speaking with two witnesses waive attorney–client privilege? And perhaps more importantly, do the conversations that the witnesses have with each other waive the attorney–client privilege?

In *Pallies v. The Boeing Co.*, No. C16-01437RSL, 2017 WL 3895614 (W.D. Wash. Sept. 6, 2017), the U.S. District Court for the Western District of Washington at Seattle addressed such questions. In *Pallies*, the Plaintiff raised an employment discrimination claim, and the case proceeded to discovery. Boeing's attorney held group meetings to prepare for depositions.

During those meetings, Plaintiff alleged that the group prepared for depositions to "get their stories straight," and sought to compel discovery of the witness' communications with each other because they were not made to secure legal advice. Boeing argued that the attorney–client privilege attached to both the attorneys' communication with the witnesses and the witnesses' communications with each other.

Each of the witnesses involved in the deposition preparation signed declarations stating that they sought counsel from Boeing's attorney for the purpose of being represented by counsel and receiving legal advice regarding depositions, implying that the advice should thus be considered confidential. Boeing's attorney then signed a declaration stating she represented each of the employees to prepare them for deposition and extended the attorney–client privilege to them to the extent necessary to provide legal advice.

The attorney–client privilege applies to communications between corporate employees and the corporation's attorneys, no matter the employee's position, if "the communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). The Ninth Circuit has extended that standard to both current and former employees of a corporation, so long as the information is relevant and necessary to provide legal advice. *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1493 (9th Cir. 1989).

The Ninth Circuit applies an eight-factor test to determine whether the attorney–client privilege applies: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself of by the legal adviser, (8) unless the protection be waived." *Boeing*, * 3, quoting *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992).

The *Pallies* Court ultimately found that the eight-factor test to establish the attorney–client privilege was met because the witnesses all sought legal advice from Boeing's attorney and communicated with her for that purpose in confidence with an expectation of the attorney–client privilege and therefore were permanently protected from disclosure by anyone since they did not waive their protection. Accordingly, Plaintiff would not be able to obtain deposition testimony from each of the witnesses regarding their communications with the other witnesses.

Group deposition prep sessions are still an efficient and effective way to prepare multiple employee witnesses regarding the basics of the case and general deposition tips and tricks. The analysis by the Ninth Circuit in *Pallies* provides a strong basis for attorney–client privilege protection. However, jurisdictions across the country may differ in their application of the attorney–client privilege. Further, defense counsel should use caution when discussing each individual witnesses' knowledge in the presence of other witnesses, especially if one or more of the witnesses will testify in their individual capacity rather than as a corporate representative. Not only does a group discussion risk an allegation of collusion, such as in *Pallies*, but it also risks cross-contamination of your witnesses. Finally, it is always best practice to instruct employee witnesses not to have case-specific discussions outside of the presence

of counsel as there is a risk that those discussions will lack any privilege.

Meagan D. Woodall is an associate in the Product, Tort, and Insurance Litigation practice group at Frost Brown Todd LLC. Her practice focuses on litigation matters relating to product liability defense. Meagan earned her B.A. from Ohio State University in 2012, majoring in Political Science and Spanish, and her J.D. from Ohio State University Moritz College of Law in 2015. After law school, Meagan practiced as an assistant prosecutor for three years with the Montgomery County Prosecutor's Office.

Two Car Accidents, One Case: Tips and Argument for Bringing a Motion to Sever

By Nicholas A. Rauch

Peggy Peterson files a Complaint in State District Court arising from two different car accidents. Her Complaint alleges two state law negligence claims against two separate defendants. The first claim arises from of a car accident that occurred between Peggy and Donald in June 2015. Peggy alleges that Donald rear-ended her vehicle while traveling southbound on a two-lane highway in Pike City. As a result of the collision, Peggy allegedly sustained severe thoracic and lumbar spinal injuries. Peggy received physical therapy and chiropractic care for eight months following the accident, until she finally reached optimal recovery. Peggy was also off work for four months following the accident.

The second claim arises from a different car accident between Peggy and Chuck in August 2018. Similar to her first accident with Donald, Peggy was rear-ended by Chuck while traveling in a residential district of Pike City. Peggy alleges that her car accident with Chuck aggravated the thoracic and lumbar spinal injuries sustained in her previous car accident with Donald. As a result of the second accident, Peggy returned to physical therapy and chiropractic care for five months and was off work for two months. Donald and Chuck were unharmed. Peggy's Complaint includes the details from each accident and requests an award for damages and lost wages. Jurisdiction and venue are proper.

If this state follows the federal rule for permissive joinder, Fed. R. Civ. P. 20(a)(2)(A-B), Peggy may join Donald and Chuck as defendants if:

> Any right to relief is asserted against them jointly, severally, or in the alternative with respect to or *arising out of the same transaction, occurrence, or series of transactions or occurrences*; and
>
> *Any question of law or fact common to all defendants* will arise in the action.

Fed. R. Civ. P. 20(a)(2)(A-B)(West 2018) (emphasis added).

Donald's attorney, Anna, receives Peggy's Complaint and wishes to sever the two claims. Aside from the benefit of simplifying discovery, Anna is worried that a potential jury may be confused as to the apportionment of fault. Anna calls Peggy's attorney, Bob, to discuss severing the actions so that they may proceed independently.

Bob believes that the two car accidents are properly joined. First, Bob argues that the two car accidents arise from a "series of transactions or occurrences" due to the similarity between the accidents and the injuries. Specifically, Bob argues that the accidents were part of one ongoing transaction because the second accident aggravated Peggy's injuries from the first accident. Second, Bob argues that a common question of fact will apply to each defendant because a fact finder will be called upon to decide the percentage of fault attributable to each defendant. Lastly, Bob argues that litigating the cases together will promote judicial economy and efficiency in resolving these actions and will avoid the possibility of inconsistent verdicts for Peggy.

Anna wishes to sever the claims by filing a motion to sever the actions for impermissible joinder. Knowing Bob's opposition to severing the two claims, what arguments can Anna make that will aid her in severing the claims? Each state will have specific case law on point in regards to this issue. However, below are three common arguments Anna can make to support her motion:

Each Claim Arises from a Separate and Unrelated Car Accident

The obvious argument in this scenario is that the two car accidents are separate and unrelated. Both car accidents involve different drivers, owners, cars, witnesses, photos, videos, police reports, road conditions, and weather conditions. The accidents also involve different injuries, medical treatment, physicians, and experts. Additionally, time is an important factor in this analysis. The above accidents occurred more than two years apart. The farther away both accidents occur, the better the argument that each accident was not part of an "ongoing occurrence." To support this argument, Anna should compare and contrast each car accident. Anna should also review the crash reports from each accident, witness statements, and, if necessary, request crash reports and medical records from the co-defendant.

Plaintiff's Injuries Evidence Separate and Distinct Events

If Peggy reached optimal recovery from the injuries sustained during the first accident, she cannot claim that she sustained a single, indivisible injury from both accidents. Even if Peggy argues that her injuries were aggravated, Anna can argue that Peggy sustained separate injuries because she reached optimal recovery and was not receiving treatment thereafter. To support this argument, Anna should request the medical records from the first accident. The medical records may also show that Peggy sustained different types of injuries, which may also evidence that the accidents are not similar.

Both Defendants Will Be Unfairly Prejudiced if the Claims Proceed Together

If the claims proceed together to trial, both defendants will be unfairly prejudiced because the jury may confuse the issues. While Peggy maintains the burden of proving her claim against each defendant, the jury will be confused on apportioning fault to each Defendant. The case will create undue confusion for the jury, who will have to assess the testimony and evidence regarding both accidents and determine which defendant should be held more liable. Further, trying both cases separately will expedite the final determination of each accident and promote convenience to the court as each trial will provide the jury with clear issues. Anna should argue that the danger of unfair prejudice to each defendant outweighs the possibility of expedient resolution and promoting judicial economy.

Nick Rauch is an attorney at Lind, Jensen, Sullivan, & Peterson, P.A. in Minneapolis, Minnesota where he focuses his practice on professional liability defense, trucking law, personal injury, and wrongful death. Nick also currently serves on the steering committee for the DRI Trucking Law Committee. Nick can be reached at nicholas.rauch@lindjensen.com.