NYSBA WINTER 2009 | NO. 59

Trial Lawyers Section Digest

A publication of the Trial Lawyers Section
of the New York State Bar Association

Message from the Chair

I had the opportunity to go to the Appellate Division Library the other day to research the record on appeal in a very old, but key Appellate Division decision in a case I was handling. There was something very satisfying about handling the old texts and reading the handiwork of our brethren from generations past.

Our transactional lawyer colleagues sometimes have ceremonial plaques or bricks in their office to commemorate deals which they have done. However, we have something far more important.

Each case we handle, which results in a reported decision, stands not only on its own but also becomes a part of the vast fabric of the common law and contributes incrementally to the framework of our society and the rules which govern it. They are indeed the building blocks of our country of laws.

Heady stuff indeed; but my pride as a Trial Lawyer goes far beyond that. Our cases affect real people with real problems in fundamental aspects of their lives. All governments balance in one fashion or another the rights of the individual with that of society. At the extremes, Fascism or dictatorship on the right and communism on the left makes the needs of the State or Collective supreme over the rights of the individual. There is little need for lawyers in such societies other than as prosecuting attorneys.

Democracy and American Democracy in particular are based upon the inalienable rights of its individual citizens. And it is lawyers (and particularly trial lawyers) who are the sword and shield of those rights. That is the foundation of the American experience and it is the reason that there are more lawyers per capita in this country of individual rights and freedoms than in any other.

Are we an additional cost of doing business or an occasional nuisance? Of course. But it is a small price to pay for a society founded on individual rights. Such societies are never as perfectly economically efficient as societies with one supreme ruler and few individual rights.

By our vigorous advocacy of each side, we permit justice to be found after a full exploration of all sides by opposing advocates. Shakespeare's oft-repeated line "First thing let's kill all the lawyers" was actually meant as a compliment, since the character making the quote was advocating anarchy.

People may curse or make us the butt of jokes but they depend on us, particularly when they are in need. Studies show people may hate lawyers in general, but they love their own lawyer.

Inside

NYSBA

Our profession is a demanding one but we have much to be proud of as Trial Lawyers.

Our summer meeting at Newport Beach was a tremendous success. Peter Kopff put together another outstanding CLE program. It was an opportunity to network, learn new approaches and techniques, as well as the latest developments in New York statutory and common law. Moreover, there was time for golf, sailing, a lobster and clam bake, and mansion tours. Following polling of our Section and an executive committee vote, the Section decided to hold next year's summer meeting at the Equinox in Manchester, Vermont.

The Trial Section also again co-sponsored a Young Lawyers Membership Cruise around Manhattan. More than 37 lawyers (the highest among the Sections who sponsored the cruise other than the Young Lawyers Section itself) joined our Section as a result.

Our annual dinner will be on January 27, 2010 at Cipriani Wall Street again, with CLE program to be held the next day. Last year's dinner at Cipriani was a huge success with the Honorable Robert S. Smith as our speaker. This year's program is expected to be equally successful. Presiding Justice Luis A. Gonzalez of the Appellate Division, First Department, will be this year's speaker. We look forward to seeing you there!

Mark J. Moretti

Top 10 Pointers for Trial Lawyers

By Mark J. Moretti

A. Preparing to Take a Deposition

1. **Keep Your Goals in Mind.** You want to do three basic things in a deposition: (a) Find out what the witness knows; (b) Pin the witness's testimony down so he doesn't change it at trial; and (c) Gain useful admissions for use in summary judgment or trial impeachment. Whether you write specific questions down in narrative, do an outline or do it off the cuff, you need to keep these goals in mind as you do your deposition.

2. **Develop a Chronology of Events Tagged to Documents Which You Will Use at the Deposition.** This chronology of events/documents gives you an organized blueprint to cover the ground you need to cover. Try to pre-mark deposition exhibits. (**Note:** You can always supplement your exhibits list by adding on at the end, or if you want to keep the chronological order of the exhibits, add A or B or C to the preceding exhibit's number.)

3. **Listen to the Answers You Are Given and Follow Up Where Appropriate.** If you are simply going to read a list of prepared questions, you might as well do interrogatories. The dynamic of a deposition allows you to press the non-responsive or evasive witness and to follow up with questions to the witness who, in his eagerness to convince you of the merits of his cause, may volunteer additional information that you did not know about.

4. **Be Professional but Firm.** Depositions are not a place for theatrics. Other than the occasional benefit of letting the opposing party taste how uncomfortable testifying will be at trial, or for the presumed benefit of your client's enjoyment, you are really only there for the reasons listed in number one. You want to be professional and reasonable. On the other hand, there can be a battle of wills between lawyers and between lawyers and witnesses. Do not lose your cool and respond to theatrics with cool logic. Get an answer to the objected to question (unless the witness is directed not to answer). Ask the basis for the objection. Consider restating the question to clean up the objection if you have concerns. Consider calling the Judge or Judge's clerk on a speaker phone for a ruling if the problem continues. Make yourself familiar with Uniform Rules for the Conduct of Depositions; Fed. R. Civ. P. 30 and 22 N.Y.C.R.R. 221.

5. **Keep in Mind That Depositions Are Great Places to Try to Settle Cases.** It is one of the few times that you will have the opportunity to speak directly to the other side since his or her attorney will be there. To the extent that depositions are unpleasant processes for people being deposed, such breaks sometimes afford an opportunity to start a dialogue and settlement which may end the unpleasantness.

6. **Everyone Has His or Her Own Style—Whether It Be "Folksy" or Aggressive.** Bear in mind that if you are flexible, you should start with "folksy" and end with being more aggressive. You will get more bees with honey than with vinegar. If you insist on giving the other party a taste of how unpleasant cross examination can be, save it until the end or don't do it at all.

7. **When in the Gaining Admissions Mode, Develop a Rhythm of Obtaining a Series of Yes or "Correct" Answers to Your Questions and Insert a Few "Reaches" Only After You Have Done So.**

8. **Do Not Be Deterred by I Don't Know.** Get the person's best estimate or use ranges to pin the response down, e.g. more than five or less than five times. If they are still evading, deliberately, overstate, e.g., more than 1,000,000 times or less than 1,000,000 times, then work your way down to reality. Ask follow-up questions, such as who would know, or is there a document which would refresh your recollection.

9. **Ask the Witnesses What Documents They Have Reviewed Prior to the Deposition.** Ask if that helped them recall their testimony. If the answer is yes, you are probably entitled to review those documents.

10. **At the End, Ask the Witnesses If They Know Any Other Relevant Facts Regarding the Claim.**

B. Preparing a Motion for Summary Judgment

1. Boil the case down to the one or two defined issues which on the undisputed facts you can win on and write your brief on these points. You must take the most complicated case and boil it down and simplify it to a black and white, yes/no proposition.

2. Set forth your undisputed facts in an affidavit from your knowledgeable witness in a clear, straightforward story which is backed by sworn deposition testimony or documentary evidence whenever possible. Where you have no such admission or documentary evidence, the affiant's own personal knowledge can fill in the blanks.

3. The affidavit can sometimes fill in undisputed background facts which add flavor, i.e., may make the Court want to decide the case your way even if they are not ultimately relevant on the narrow issue of the motion, but it is probably advisable to keep them out of the brief.

4. Remember the party making the motion shoots with a .22, while the party opposing the motion shoots with a shotgun. Put another way, the moving party wants to adhere to the K.I.S.S. principle ("Keep It Simple Stupid") and the party opposing the motion wants to highlight every possible disputed fact.

5. The party who defines the issues is the party who should prevail. Summary judgment motions are opportunities to define the issues and to categorize the case. If you make a motion for summary judgment, you are choosing the field on which the battle will be fought and providing the lens through which the dispute will be viewed.

6. Remember to do a short, one page preliminary statement in your brief that makes the Judge want to decide the case your way on an instinctual level. The rest of your brief should be simply a justification for the Judge to do what the preliminary statement has already made him want to do in the first place.

7. Attorney affidavits are usually necessarily redundant and probably should be avoided. To the extent an attorney's affidavit contains argument, the content should be in a brief. To the extent it contains facts, it is probably inadmissible unless it is on personal knowledge and belief. To the extent it merely duplicates what another witness with personal knowledge says or can say you are simply going to bore the Judge by making her read it three times (presumably, it will also be referred to in the brief). Attorneys' affidavits can be used as a vehicle to present deposition and documentary evidence but consider introducing even those with one affidavit from the party.

8. Tell an interesting, compelling and truthful story in your Statement of Facts.

9. Be aware that pending motions for summary judgment are prime times to settle cases. A lot of cases settle on the courthouse steps. They do so in large part because the posturing is done and judgment day is at hand. Summary judgment motions are a way of speeding up the process and getting to the courthouse steps with the possibility of judgment day early.

10 Keep your focus in your written papers and on oral argument. Chasing down every red herring and responding to every tangent takes the focus away from your winning issue and embroils the court in hearing argument on multiple issues.

C. Opposing the Summary Judgment Motion

1. The party opposing summary judgment shoots with a shotgun while the party making the motion shoots with a rifle. You want to raise as many issues as you can and dispute as many different facts as you can so as to create doubt.

2. If you have any evidence relevant to the **issue,** include it, or perhaps forever hold your piece. Remember, you get all favorable inferences. I have seen counsel point to the sheer size of their opposing papers and successfully argue, "Judge, in a stack of papers this thick, there must be a question of fact."

3. Consider whether you can secure an expert opinion affidavit in opposition. Conflicting expert affidavits usually result in denial of the motion since there is a question of fact as to which controls.

4. Remember, the moving party must establish the evidentiary prima facie case first before the opposing party bears any burden at all.

5. It is well settled under New York law that the drastic remedy of summary judgment will not lie where there are triable issues of fact. *Sillman v. Twentieth Century Fox F. Corp*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Esteve v. Abad*, 271 A.D. 725, 68 N.Y.S.2d 322 (1st Dep't 1947); CPLR 3212, Practice Commentary C3213:2.

6. In *Sillman v. Twentieth Century Fox F. Corp*, *supra***,** the Court of Appeals stated:

> To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. (*DiMenna & Sons v. City of New York*, 301 N.Y. 118). This drastic remedy should not be granted where there is any doubt as to the existence of such issues**.** (*Braun v. Carey*, 280 App. Div. 1019), or where the issue is "arguable" (*Barett v. Jacobs*, 255 N.Y. 520, 522); "issue-finding rather than issue-determination is key to the procedure" (*Esteve v. Abad*, 271 App. Div. 725, 727).

7. The Court's duty is to determine whether an issue of fact exists, not to resolve it. *Barr v. County of Albany*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson***,** 147 A.D.2d 312, 317, 543 N.Y.S.2d 987 (2d Dep't 1989)**.**

8. When deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *See Russo*

v. YMCA of Greater Buffalo, 12 A.D.3d 1089, 784 N.Y.S.2d 782 (4th Dep't 2004).

9. The proponent of a summary judgment motion must make a prima facie showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the responsive papers. *Wingrad v. NYU Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985).

10. Get your client to sign an affidavit in opposition to the motion as a party with knowledge. Your attorney's affidavit is probably insufficient as a matter of law unless you have personal knowledge. *Venezia v. Coldwell Banker Sammis Realty et al.*, 270 A.D.2d 480, 704 N.Y.S.2d 663 (2d Dep't 2000).

D. Negotiating a Settlement

1. Establish a range and work toward a middle. Plaintiffs who ask more than twice what they reasonably expect to get may turn off further negotiations. The long dance to the middle gives psychological comfort that no money was left on the table and everyone did the best he or she could. Play the game.

2. Never bid against yourself. An offer needs a counteroffer before another offer should be made.

3. Make the plaintiffs make their demand first. Don't accept the number they have sued for in the complaint as the starting off point. If you get that, ask your adversary if he or she has guaranteed victory for their client.

4. Personal attacks on your adversary are generally not productive. Treat opposing counsel with respect and civility. Cases usually settle when you convince opposing attorneys to recommend settlement to their clients. Unless you plan on being successful by browbeating or intimidating an inexperienced opponent, those tactics will rarely be successful. Moreover, people remember.

5. Try to get all settlement offers in writing. If you can't, do a memo to the file to memorialize it. Make sure all offers are passed on to your clients.

6. Remember, once a settlement position is taken, it is difficult to withdraw from it and expect to settle. It may not be logical, but it is pragmatic and recognizes the psychology of your adversary, who will know they could have settled it for a different, better number earlier.

7. Be prepared to listen and understand the other side's point of view. It is always easier to convince them of your point of view if you understand where they are coming from. Knowledge is power. (Both of your client's business and that of his adversary.) It also sometimes allows creative settlements that make the pie larger to be split up.

8. Consider what recommendations you would make to your client in discussing the case with opposing counsel as a way to explore whether a gap could be bridged without having your client having to make the first move or formally commit. Ask your adversary to tell you what they would recommend to their client.

9. Establish trust and a solid, professional reputation with judges and opposing counsel. If you are going to recommend something, be pretty confident that you can deliver your client's agreement.

10. Be patient. There is a right time and a wrong time to settle the case. It is better to negotiate from strength or perceived strength. (Example: Losing an inconsequential motion may cause the opposing party to lose faith in their ultimate success). It is also wise to be aware of both external factors (many companies like to close cases out year end) as well as personal factors (does a party have the fortitude for litigation and have other things going on that may impact their case) when deciding timing.

E. Obtaining Insurance Coverage for Your Client

1. Remember the duty to defend is broader than the duty to indemnify and doubts as to the duty to defend are usually resolved in favor of the insured. *Kincaid v. Simmons*, 66 A.D.2d 428 (4th Dep't 1979); *Pow Well Plumbing & Heating v. Merchants Mutual*, 195 Misc. 251, 414 N.Y.S.2d 407 (Civil Ct., Bronx Co. 1949).

2. While the insurer generally has the right to select counsel (See *Utica Mutual Ins. Co. v. Cherry*, 45 A.D.2d 350, 358 N.Y.S.2d 519 (2d Dep't 1974) *aff'd*, 38 N.Y.2d 735, 381 N.Y.S.2d 40 (1975) the insurer usually gives up that right when they defend with a reservation of rights since the reservation creates a potential conflict of interest for the attorney defending the case. (i.e., is their loyalty to the insurance company or the insured?). *Public Service Mutual Insurance Co. v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 422 (1981). *Prashker v. United States Guarantee Co.*, 1 N.Y.2d 584, 154 N.Y.S.2d 910 (1956).

3. Insurance companies can estopp themselves into coverage by their own inaction**.** *State v. Fidelity & Cas. Co.*, 70 A.D.2d 687, 416 N.Y.S.2d 403 (3d Dep't 1979).

4. Put everything in writing from your first Notice of Claim letter to any follow-up letters confirming conversations.

5. When in any doubt as to coverage, make your claim as soon as possible, including notice to excess carriers.

6. Give notice directly to the insurance company as well as to the broker.

7. A Notice of Disclaimer must have specific grounds under Insurance Law Section 3420(d), formerly Section 167(8). To disclaim for late notice, the disclaimer letter must state the grounds or they are waived. *General Accident Ins. Group v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979).

8. Savvy plaintiffs' lawyers will plead multiple theories of relief so as to attempt to pick up insurance coverage. You may be able to claim one or more causes of actions are covered even if others are not.

9. Ambiguities, including exclusionary language, are construed in favor of the insured. The insurance company must establish that its construction or interpretation of the policy is the only construction that can be fairly placed on it. *Bronx Savings Bank v. Weigandt*, 1 N.Y.2d 545, 154 N.Y.S.2d 878 (1956).

10. Do not give extensions or sign tolling agreements without getting permission from your insurance company first.

F. Young Lawyers

1. Building a reputation for professionalism and integrity takes years but can be lost or irreparably damaged in minutes. Keep that in mind when evaluating the needs of the moment.

2. It is so often repeated as to be cliché but it remains true. The top three keys to success are preparation, preparation, and preparation. There is no substitution for hard work when it comes to success as a lawyer. Never become overconfident, intimidated or complacent. Preparation is a great equalizer.

3. You learn both by watching experienced lawyers ply our profession and by doing so yourself. Develop your own style from what you observe and admire in others. However, keep in mind there is no substitute for doing it yourself.

4. Providing legal services to the needy is part of your ethical obligations. Partnership with Volunteer Legal Services Program or volunteering for assigned cases is an efficient way to fulfill that ethical obligation.

5. We are a service profession. Keeping the client fully informed is both an ethical requirement as well as a practical need for fully consented decision making and will avoid misunderstandings and second guessing. Copy your client on all correspondence and documents coming in and going out. The rule used to be return all telephone calls within 24 hours. In the age of cell phone, e-mail and Blackberries, that benchmark is probably outdated and needs to be moved up.

6. Remember that we, as lawyers, wear two hats; one as advocate and one as advisor. You need to be able to advise your client objectively and without passion (but with empathy) regarding their options and the advantages and problems of each, as well as the realistic strength of their case. Once a course of action is decided on, you must, as advocate, vigorously advocate your client's position to the outside world within the full ethical bounds of the law. Make sure your client understands both distinct roles and does not mistake your prudent objective advice as not being enthusiastic for winning the case. You are paid to be a lawyer not a cheerleader.

7. There is an old saying that if you are strong on the law, pound the law, if you are strong on the facts, pound the facts. If you are strong on neither, pound the table. Don't become known as a lawyer who continually pounds the table.

8. Keep in mind that in a law firm, we are all clients of each other. Associates who are receiving a lot of work in a law firm are associates who are doing a good job. If you are not getting work, red flags should go up. You get work by putting out a high quality work product on time and by keeping your client (partner) fully informed.

9. Volunteer in your community and for your bar association. It builds contacts, clients, stature, knowledge and a network. Moreover, it is part of what it is to be a lawyer.

10. Always strive to put out a high quality work product. Check citations, proofread your work and don't take shortcuts. You owe it to your client, you owe it to your firm and you owe it to yourself.

G. Retaining a Lawyer

1. Go to reputable rating services such as Best Lawyers in America, Super Lawyers and Martindale Hubbell, which objectively rate lawyers.

2. Ask other lawyers for recommendations of lawyers who specialize in the field you need. Ask for two or three recommendations and see

where lists overlap. Discuss candidates with other lawyers you know.

3. Interview the lawyer. You need to be able to trust the lawyer you retain and determine whether the person is someone you can work closely with. Clients make the ultimate decision on whether to settle or take a case to the jury but your lawyer's opinion must be something that you value and give credence to. This is but one case for you. Your lawyer should have been down this road many times before. Ideally, there must be chemistry, and that chemistry is not necessarily related to the lawyer's sex, race or surname.
4. Ask the lawyer how many cases of this type they have handled before. Lawyers learn from their prior experiences just as we all do. Don't be the client that the learning curve takes place on.
5. Be cautious of lawyers who advertise on TV. Lawyers may have a constitutional right to advertise but that is no indicator of how good the lawyer is. Some firms who advertise are simply collection points for cases which are then turned over to someone else to handle.
6. Find out who will be actually handling the case. You don't want to go to a firm based on the reputation of one attorney and then have a different attorney primarily handling the case.
7. Find out who the other members of the team assigned to your case will be. Irrespective of how big a firm is, it is only certain individual lawyers, paralegals and administrative assistants who will handle your case and win it or lose it. Find out who they are and what their background is.
8. Insist on being copied in on everything coming into the firm and everything going out that is pertinent to your case. Don't accept a lawyer who is unwilling to do this.
9. Communicate with your lawyer regularly. If you have agreement on "8" above, you should remain in the loop automatically. However, communication should also be involved when cases are ripe for settlement and what a realistic resolution might be compared to the costs of going forward.
10. Be prepared to be honest with your lawyer. There is no sense hiding bad facts from your lawyer. Dirty linen will be aired out eventually and it is better to air it out with your lawyer earlier than having your lawyer surprised later.

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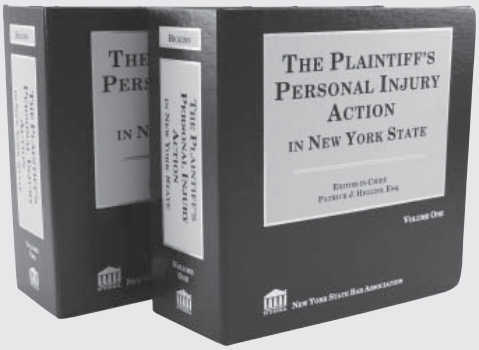

PRODUCT INFO AND PRICES
2009 / 1,734 pp., looseleaf,
two volumes
PN: 4181

NYSBA Members	**$175**
Non-members	$225

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The *Digest* is published for members of the Trial Lawyers Section of the New York State Bar Association. Members of the Section receive a subscription free of charge.

ISSN 1530-3985 (print) ISSN 1933-8457 (online)

TRIAL LAWYERS SECTION DIGEST