LITIGATION PSYCHOLOGY

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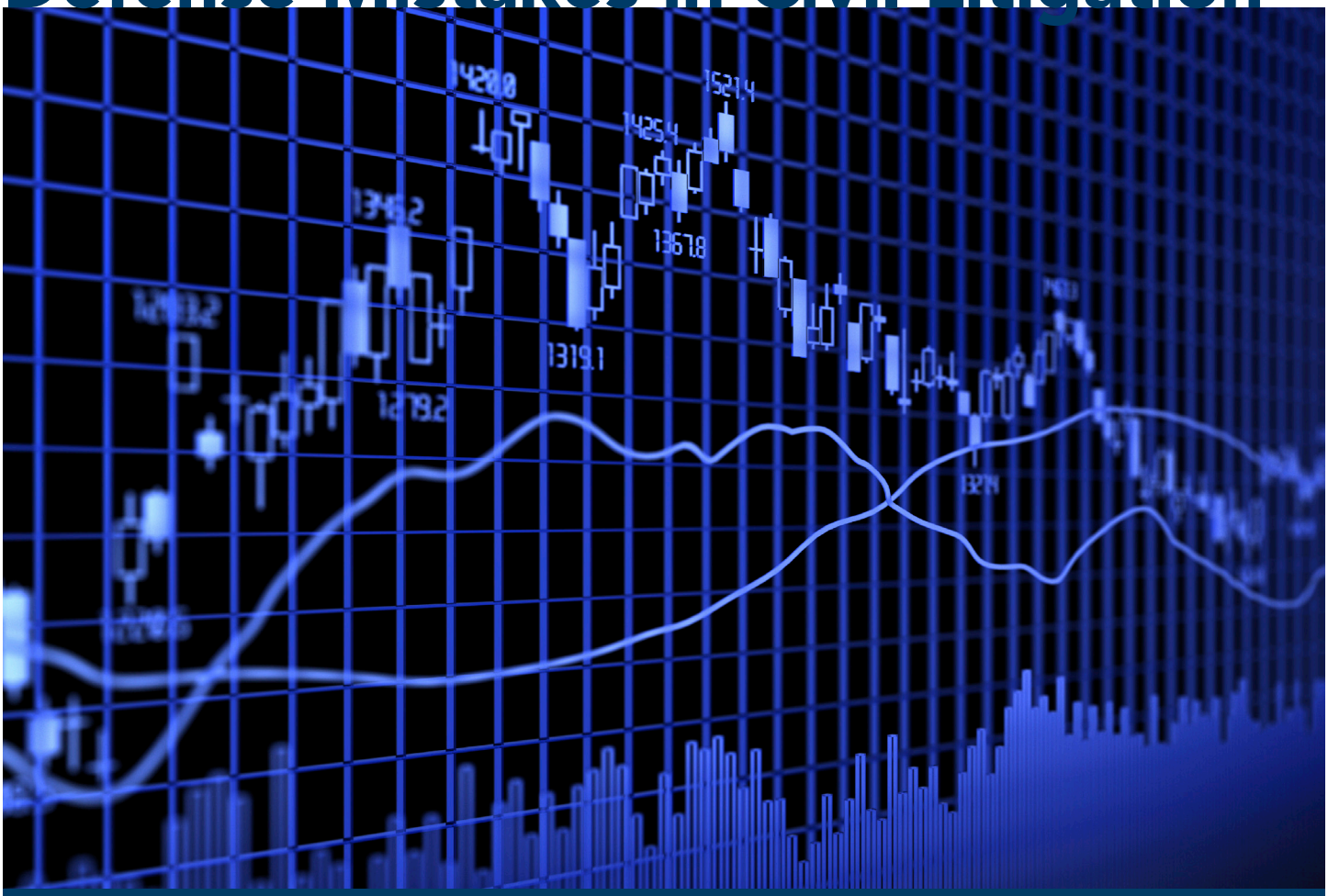
Four Lethal, and *Preventable*, Defense Mistakes in Civil Litigation



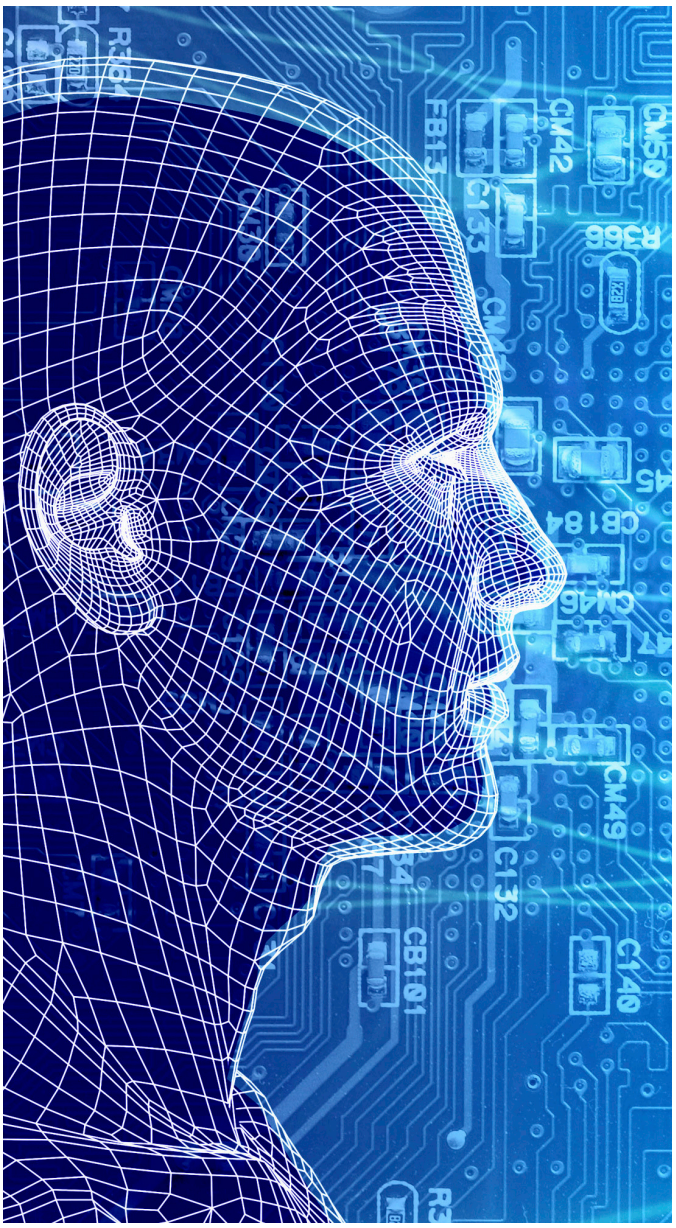
Bill Kanasky, Ph.D.

AN INCREASING NUMBER OF CASES are now being resolved based upon their perceptual value at the jury level, rather than their realistic economic worth. Plaintiff attorneys have become experts at taking small, relatively benign cases and turning them into expensive "run-a-way trains." This often results in a defendant corporation having to pay significantly higher settlement figures and damage awards, as they are hamstrung by poor depositions, bad documents, and a sympathetic plaintiff. Fortunately, attorneys can utilize many techniques to identify each case's unique perceptual challenges and increase the odds of an optimal settlement or trial outcome. Savvy litigators know that early and accurate evaluations of jury-level perceptions play a key role when opportunities to "out-trade" the other side arise.

Claims managers, corporate attorneys, and high-level executives routinely ask the following questions regarding litigation:

- Why does the plaintiff's demand keep rising as costs mount?
- How will our key witnesses perform when the lights come on?
- How do I make a better cost/benefit analysis for moving forward with litigation?
- What if we settle and are off by $50,000, $100,000, or $1,000,000?
- Why am I just now learning that this case is a big problem?

These difficult questions CAN be answered with different types of preparation **early in the case.** This preparation starts with the very first place that jurors, and plaintiffs attorneys, look to make case assessments: the witnesses. Evaluating the communication abilities (or lack thereof) of your witnesses in a challenging litigation setting is a fast, cost-effective way to begin to assess the perceptual value of your case. Properly prepared witnesses combined with early jury research can transform the entire focus of the litigation and streamline the efforts of all involved. Unfortunately, the challenges that defense attorneys face continue to increase, as jurors' attitudes towards large, profitable corporations continue to become more pessimistic.



As a result, jurors can become easily enraged and will not hesitate to punish a defendant corporation.

Avoiding key mistakes and focusing on how to fend off juror perceptual challenges early can drain the energy that leads to juror enragement and high damage awards. Two decades of jury decision-making research reveals four fundamental issues that continually lead to trouble for the defense and greatly increase the probability of a plaintiff victory with substantial damage awards. Making the following four mistakes can result in defendant corporations reaching for their checkbooks on a regular basis.

1. Making Witness Preparation Your Last Priority

Unprepared witnesses can cause more damage to the defense's case than any other single factor. Poor witness performance during depositions can fuel a plaintiff attorney's case and increase their leverage during settlement negotiations. A bad deposition, especially one that is videotaped, results in a plaintiff's attorney "smelling blood in the water." On the witness stand, poor witness performance can "sink the ship" for defense counsel, regardless of the strength of the case facts. Why? Jurors give more credence to witness testimony than attorney presentation. Therefore, mistakes made by unprepared witnesses tend to be illuminated to the jury.

Post-trial interviews and focus groups after mock trials consistently reveal the critical importance of witness performance. While witness testimony is arguably the most important part of a trial at the jury level, it seems to get the least attention during the trial preparation process. This usually occurs for two reasons. First, because of the misconception that opening statements, closing arguments, the experts, and "my documents" will surely heavily impact jurors and win the case. Through years of jury research, we know this is not the case. Compared to all other factors, jurors place more emphasis in their decision-making on how witnesses "show" than to any other aspect of trials today. Second, attorneys typically do not prepare witnesses based on psychological principles, persuasion, or communication science, because they don't receive training in those disciplines. Attorneys often say "I don't understand how this witness bombed so badly; I personally prepped them for hours/days/weeks, etc." The problem is that "preparation" goes well beyond content. Jurors are never experts on content issues, but they are always experts on the three C's: character, conduct, and communication. Therefore, it is vitally important for witness preparation to first focus on persona, tone, and communication style, since that is what jurors value the most. Prior to appreciating testimony content, jurors need to accept and like the witness's persona and communication style. If they don't, they will spend their time in deliberations debating the credibility of the witness, rather than their role in the case.

Furthermore, corporate executives and employees typically make poor witnesses because the communication skills required of them to excel in their industry are precisely what get them into trouble during testimony. In other words, they don't do well during testimony because they apply their work communication skills to a legal playing field.

For optimal witness performance, it is essential to have a litigation consultant teach witnesses the nuts and bolts of deposition and trial testimony and train them how to be effective communicators at the jury level.

2. Weak Visual Presentation of Your Case

A weak or non-existent visual presentation sends a message to jurors that the defense is disorganized, unprepared, and unprofessional. Some attorneys say "Hey, I'm old school. I don't need fancy blow ups or highlighting of documents to win over the jury. I don't want to overwhelm the jurors with technology." Jurors are exposed to CNN, MTV, and the Internet at every waking moment in today's society. Since 1989, Courtroom Sciences, Inc. ("CSI") has been interviewing thousands of jurors annually and NOT ONE TIME has a juror EVER said a party presented too many visuals or "overdid it" visually – a major departure from common "wisdom." Not only do jurors respect a presentation heavy in media and technology, they now expect it and demand it. Numerous scientific studies have shown that these kinds of presentations drastically improve jurors' learning and memory recall. A strong visual presentation will give pro-defense jurors plenty of ammunition to fight off pro-plaintiff jurors during deliberations. In contrast, a weak visual presentation will make it difficult for jurors to grasp key issues and fight for the defense in the jury room.

Clear presentation of documents, contracts, and/or correspondence is critical to the defense's case. After plaintiff's counsel has "smeared mud all over

the wall," defense counsel must come in and do damage control. Presenting jurors with difficult to read documents is a challenge, especially since many jurors are wary of only seeing bits and pieces of documents. Therefore, to gain jurors trust, it is important to show them the entire document first, and then isolate and illuminate the most relevant parts of the document for their review. Plaintiff-oriented jurors greatly dislike receiving "half the story," and will not respond positively to defense counsel immediately jumping to the most salient parts of the document, without first earning their trust.

Additionally, cases often heavily rely on alternative causation theories that can effectively extinguish the plaintiff's main causation claims. These usually involve having to teach jurors about complex topics like chemistry, physics, anatomy and physiology, pharmacology, or statistics. This is a difficult

task, considering that most jurors have a hard time comprehending science in the courtroom. However, jurors welcome illustrative graphics and animations that effectively explain complex issues. The development of compelling demonstratives is often achieved by utilizing graphics professionals trained in the design of visuals embraced by jurors. The key here is for defense counsel to prepare to teach science to middle school students, not doctoral students. As a result, it is very wise to expose graphics, animations, and exhibits to mock jurors of varying socio-economic background in an effort to determine if they are comprehensible prior to heading to a settlement discussion, much less the courthouse. If jurors don't understand what they see, they will simply discard it.

Finally, often jurors do not understand the information presented, regardless of which side it comes from. Jurors lean heavily towards the side whose presentation is the most organized, professional and understandable. Post-trial interviews and focus groups following mock trials routinely reveal the fact that many jurors are attracted to the side that puts on the most professional-looking presentation, regardless of content. In other words, the defense can put itself at an optimal advantage by preparing a powerful, persuasive visual presentation of their case. In contrast, the defense can place themselves "behind the 8-ball" by failing to meet the jurors' visual needs and expectations.

3. Over-relying on Expert Witnesses

In trial, expert witnesses don't win the case for the defense; fact witnesses do. To jurors, fact witnesses are the face and "heartbeat" of the business or corporation. In post-trial interviews, actual jurors have said: "I need to touch, feel, smell and experience the [fact] witnesses and make my own judgment of their character and credibility." These witnesses define the defendant's character, values, and image. Both mock and actual jurors have consistently reported over the years that a) they understand experts are well-paid and are "professional" witnesses and b) they highly value hearing testimony from fact witnesses. Despite this, many defense mistakes center around overemphasis on expert witness testimony. On the surface, this makes sense, as some expert witnesses are capable of persuasive communication. Expert witnesses make defense attorneys feel comfortable, as their trial experience makes them "low maintenance" compared to fact witnesses. In other words, expert witnesses are intelligent, articulate, easy to work with, and will tell jurors exactly what you desire. What more could a defense attorney ask for, right?

Unfortunately, jurors have evolved and have figured out the role of expert witnesses. Jurors know that plaintiff and defense experts will usually cancel out each other's testimony and vehemently disagree with each other. Jurors give more credence to the testimony of a fact witness with intimate knowledge of what happened, compared to the opinions of a "hired gun." The main problem that defense counsel faces is that fact witnesses are typically poor to average witnesses, since they tend to have little to no deposition experience, much less trial testimony experience. Remember, the expert witness feels right at home in the courtroom, while fact witnesses feel like they are lost in a foreign country. What can

you do to get the most out of your witnesses? First, empathize with the fact witnesses involved in the case. They are often scared, anxious, and highly intimidated of the legal system. Second, invest the time and energy into optimal witness preparation activities (as described above). Poor and average witnesses can be transformed into good or even extraordinary witnesses with the right training program. Third, remind them that they are part of a line up of witnesses and they are not required to "hit a home run" and win the case by themselves. Corporate witnesses often feel that they are the "star" witness, and that the outcome of the case is directly on their shoulders.

4. Going on the Defensive Early: The Availability Bias

The top strategic mistake made by defense counsel in litigation is to immediately go on the defensive and address the plaintiff's allegations. After plaintiff's counsel has bludgeoned the defendant in their opening statement, there is a great temptation to stand up, address and deny each allegation one-by-one. This strategy makes perfect sense, because jurors want to immediately hear the defendant's response to each of the claims, right? Wrong. Addressing each claim immediately is a potentially deadly mistake because it sends the following message to jurors: the plaintiff's claims are valid because this case made it all the way to the courthouse. By merely reacting to the plaintiff's story, the defense plays right into the plaintiff's hands. It is foolish to play "follow the leader" with the plaintiff, when the defense has a wonderful opportunity to come out of their corner swinging, rather than dancing and dodging. Remember, plaintiff's counsel wants to put all of the (negative) attention on the defendant and its actions. By systematically denying each claim, the defense can inadvertently reinforce the plaintiff's claims and make the case all about itself, rather than the plaintiff.

Therefore, manipulating the "Availability Bias" is essential in any type of litigation. This relates to the fact that jurors have a strong tendency to blame the party that is most "available" to blame. In other words, if the case focuses on one party/topic more than another, the odds of jurors blaming the party with the most exposure are higher. For example, if a corporation and all of its employee's actions are in the spotlight for the majority of the time during trial, potential pro-defense jurors will never have an opportunity to stockpile ammunition to use against pro-plaintiff jurors during deliberations. The way to win in the deliberation room is to arm pro-defense jurors with weapons, which can only be done by the defense attacking early and often. Rather than reacting and responding to the plaintiff's story, the defense needs to simply, quickly and visually arm jurors with the "real" story and immediately put the plaintiff on trial. The only way to accurately assess your position is to practice, practice, practice in a formal research setting. This strategy accomplishes three critical jury-level goals: a) it arouses jurors' attention, b) it halts the plaintiff's momentum, and c) it makes the trial about the plaintiff, not the defendant.

Think about this: what do you want jurors arguing about during deliberations? Do you want them talking about the plaintiff or defendant? If the majority of time in trial is spent on the defendant's conduct, then the majority of deliberations will be

spent arguing about the defendant's conduct. In contrast, if the majority of time in trial is spent on the plaintiff's characteristics or motivation, or alternative causation, then deliberation discussions will follow that same path. While the defense naturally has to acknowledge and deny the plaintiff's claims, it shouldn't be the first order of business. It is well-known that the "recency and primacy" effects are powerful influences on juror's memory recall (i.e., the first and last things said by attorneys tend to be most influential). Therefore, focus on the plaintiff and/or alternative causation, not the defendant. To take full advantage of the availability bias, and the recency/primacy effects, defense counsel should: a) start and end openings and closings focusing on the plaintiff, b) place information about the defendant's conduct in the middle of presentations (where it is less influential), and c) make the largest proportion of the presented information about the plaintiff, not the defendant.

Years of research proves that the best defense is usually a strong offense. The defense must attack early and tell their story, rather than instinctively reacting to the plaintiff's story. The main fear that defense attorneys have about this strategy is the risk of appearing insensitive to jurors. While this is a valid concern, jurors will accept and respect a solid assault on the plaintiff's case, provided that defense counsel remain professional, and avoid personally attacking the plaintiff or their family.

In summary, avoiding these four serious mistakes can greatly increase your odds of a defense verdict or a favorable settlement. The key to achieving this goal is simple: you must out-prepare the opposition. There are several cost-effective ways to optimally prepare to settle and/or defend your case. In our experience, the economic impact of early jury research and pre-deposition witness training is astounding. Knowing your witnesses' true strengths and weaknesses, as well as the case issues that can infuriate jurors can greatly increase your leverage during settlement negotiations and in the trial setting.

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