# Tackling Tough Issues at Trial

By **Alana Bassin**

Tough issues at trial—every case has them in one way or another. Whether it is a bad document, a sympathetic plaintiff, an adverse finding from a regulatory board, or a recall, every case has warts. The issue is how to deal with these warts in both pretrial and trial proceedings. Although the type of tough issues and bad evidence that could exist in a case is too expansive to cover in totality, here you will find suggestions about typical tough issues in a case and how to paint bad evidence in a good light.

## Bad Documents

One of the most effective ways for plaintiffs to make their case is to use a company's own bad documents to make the company seem like a wrongdoer. Everyone is familiar with these types of documents. They consist of such things as the internal memorandum from an engineer noting the problems with the testing, a budgetary cut that can be correlated to safety, an employee email complaining about an internal process or person, a post-accident modification to the specifications of the product, an advertisement that oversells the product, or maybe even an employee evaluation that reflects a history of poor performance or prior demerits. Even if these documents have no relevance to the allegations to the case, the bad documents will be highlighted in front of the jury over and over again to help create a bad company story.

Most litigators will suggest that the first step is to try to keep problematic documents out of evidence through motions in limine. Although you may not be in a jurisdiction that is likely to exclude the evidence, following a course of action to preclude the evidence is an option that should be seriously considered. Even if you lose, at the very least, you have preserved the issue for appeal.

Many of the rules of evidence can be effective in limiting bad documents. For example, often post-incident modifications that are performed on the product can be excluded as a subsequent remedial measure under Federal Rule of Evidence 407 (or similar state statute or rule). Other similar incidents (commonly referred to as OSIs) can often be excluded using Rules 401, 402, and 403 (as well as case law), arguing that because the incidents are not substantially similar to the subject incident, the other incidents are not relevant and the probative value is substantially outweighed by the unfairly prejudicial impact of the evidence.

In medical device cases, the Learned Intermediary Doctrine may be used to exclude advertisements or marketing materials when the material is designed for the doctor. Of course, one should always be on the lookout for documents that consist of hearsay or hearsay within hearsay under Rules 801 and 802. Similarly, don't be afraid to argue that any type of evidence is not admissible based on relevance under Rules 401 and 402, or unfairly prejudicial, confusing, misleading, or cumulative under Rule 403. For instance, Rules 401, 402, and 403 may come in handy to help exclude documents that pertain to recall notices or service bulletins regarding other products made by the defendant, defects in the product other than the defect at issue in the lawsuit, or changes to the design of the product prior to the date of the subject incident but after the date the subject product was manufactured.

In certain situations involving clients that have been charged with corporate malfeasance of some sort, it may even be necessary to seek to exclude improper character (Rule 404) or habit (Rule 406) evidence. Evidence of a corporation's wrongdoing in an unrelated context must be excluded in order to prevent plaintiffs from trying to persuade the jury that if the company was less than forthcoming in context A, it may also have been so in the instant lawsuit or in the design of the product at issue.

That being said, every good lawyer should have a backup plan. A good trial lawyer will tell you that even if you win the motion in limine up front, more often than not, motions in limine unravel throughout trial, and the bad evidence could very well come into play.

With this in mind, the questions one needs to ask are whether it is more likely than not that the evidence will come in (even if you initially win a motion), and how to handle plan B if the evidence is admitted. Although it is always a gamble, if you know that it is more likely than not that certain evidence is going to come up in trial, the best solution may be to deal with it head-on during opening statements rather than seeking to exclude it. Defendants have the advantage here because they typically give opening statements after plaintiffs and will at least be given a clue whether the bad evidence will play a role.

Of course, even if you decide not to deal with it at opening, you still need to have a strategy to deal with the evidence if it comes in during the case. Witnesses need to be prepared to answer the tough questions in cross-examinations or direct examinations, including the background of why it exists, what it means, and why it has no relevance to the case. Once this information is exposed, the next question that a lawyer needs to ask is how big the exposure is. For complicated or potentially serious injuries, demonstrative exhibits should be prepared well in advance to deal with these issues and offer alternative explanations. Opposing counsel will try to impale the defendant using the bad evidence, but may end up only creating a flesh wound that the jury will gloss over. If that is the case, the right solution may be to leave it alone. Regardless, if the matter is surely going to be discussed at closing argument, you want to make sure you have offered a clear, plausible, and believable explanation to the jury to also discuss at closing. Themes such as relevance, exaggeration, desperation, or refusal to talk about the real issues can be weaved into

closing arguments as you discuss these issues.

In addition to bad documents that exist, today's lawyers may also have to deal with the documents that do not exist. With e-discovery demands and juror's unrealistic expectations stemming from crime shows such as *CSI*, a lawyer must also be prepared to have answers for documents that don't exist. Modern trends suggest that jurors want forensic evidence, even in civil matters, and to make matters worse, they have little appreciation for the cost to produce these types of evidence. It doesn't matter if it could cost hundreds of thousands of dollars to search backup tapes; jurors will want the document or email in question. And, thus, if for some reason evidence is missing in your case, you should be prepared to present the appropriate witness who can give a believable and trustworthy explanation of why it doesn't exist.

## Media Coverage

One issue that has become a real problem for defendants is the easy accessibility of media and information due to the availability of the Internet. In the past, it was easier to find impartial jurors who had not been educated on the subject matter outside of the courtroom. It was also easier to keep information not discussed in the courtroom out of the courtroom. However, people's curiosity combined with access to the Internet can cause serious minefields for not only what are known problems in a case but also unknown problems. At the end of the day, unless sequestered, jurors can go home and google everything they want to know about the lawyers, witnesses, and parties involved in a case.

Accordingly, information and evidence that may have no real relevance to a case in any way could play a factor in influencing people's decisions. Some judges have attempted to address this issue by instructing jurors that under no circumstances are they allowed to read any information about the case or parties on the Internet. Some will go so far as to admonish jurors that if anyone does so or talks about doing so, every other member of the jury has a responsibility to report them. This may be a sufficient deterrent for many jurors, but a trial lawyer must anticipate that one of the jurors is going to use the Internet to gain his or her own personal information. Newspaper articles, editorials, financial statements, government investigations, and likely much more will be accessible to these people. Lawyers must have a game plan in place for this.

Plaintiffs' counsel might even alert the media to the lawsuit, and oftentimes the resulting investigation by the journalist is given short shrift due to budget or time constraints, thereby giving the readers the so-called "thousand-foot view" of a case, which is almost always better for plaintiff than the detailed, comprehensive view of the case presented by the defendant during trial. It may be wise to hire your own public relations firm to address the media onslaught and ensure that your company gets a fair trial with the press.

For many clients—especially those that get a lot of media attention—it may be impossible to disclose everything. But a good lawyer should take time to do his or her own electronic research. At the very least, google your client and key witnesses and see what comes up. If you find specific facts that are easily accessible and detrimental to the case, you need to consider the likelihood of this information becoming known and the impact it may have. In certain cases, you may want to address the bad evidence before the jury finds it out elsewhere.

Admittedly, this advice is easy to offer but much harder to implement. It is, after all, nothing more than an educated guess regarding what the jury may learn. There is a risk if you talk about it. Even if the evidence does not come in, you have talked about it in your opening statement, so it has become part of the case. Alternatively, by not addressing it and then having the jury learn about it, you risk the jury thinking that you were trying to hide information from them and that you cannot be trusted. Trust between the trial lawyer and the jury is perhaps the most important element in a case, and it is very difficult to be convincing if the jury does not trust you.

Although you may not always have the right answers, the best arsenal for a lawyer who has to deal with bad evidence is preparation. Know what the evidence is, know how to exclude it, and know how to deal with it if it is admitted as evidence.

## Sympathetic Plaintiff

Everybody dreams of the Matlock confession where after a rigorous cross-examination, the witness suddenly caves under pressure and admits that the fault lies with him or her and not your client. Not only is that result rarely, if ever, obtained, but an aggressive approach isn't always the correct method. What happens if there is a sympathetic plaintiff or a child witness?

A sympathetic witness is not necessarily going to gain sympathy only by testifying. A sympathetic witness—especially a sympathetic plaintiff—will permeate the entire case with photographs and their presence in the courtroom. Thus, this issue needs to be dealt with right from the beginning, even before you enter the courtroom. First and foremost, the courtroom should not be the first time that you see the witness. No matter what opposing counsel suggests, you want to take their deposition prior to trial. If opposing counsel attempts to block this, move to exclude them from testifying, as plaintiff should not get unfettered access to evidence that you do not have.

Once you are in the courtroom, do not hide from the fact that the witness will attract sympathy. On the contrary, the plaintiff's injury should be discussed right from the beginning, including at voir dire when allowed. Consider using demonstrative evidence, such as photographs or a video during jury selection if allowed. The goal is to respectfully desensitize the jurors from what they will inevitably hear during the case. It will further allow you to observe who will not be able to be impartial and will hopefully help you remove that juror for cause. Better to know the jurors' biases before you impanel them.

The next issue to address is how to handle the witness on the stand. There is much debate about whether a lawyer

should cross-examine this type of witness at all. Some lawyers advocate that if a severely injured or sympathetic witness is on the stand, the best cross-examination is to stand up and say "No questions Your Honor."

However, an analysis of your cross-examination of the witness should not rest solely on the sympathy factor. After all, most would agree that it is preferable to leave the jury thinking about what you asked during the cross-examination and not what came out in the direct examination. The first thing to do is to ask yourself, what, if anything, can be gained by cross-examining the witness? Do you have a theme and, if so, can you further develop that theme by asking certain questions? Whether the theme is safety, personal knowledge, reliability, memory, or any other concept, something can typically be gained by some limited questioning.

That being said, there are things to consider when cross-examining a sympathetic witness. Most importantly, be respectful. Sarcasm, eye rolling, belittling, and nit-picking inconsistencies that are not relevant to the issues are likely not the best approaches to take. The last thing you want to do is portray yourself as bullying the witness. Rather, you would prefer that the jury perceive you as professional. Impeaching a sympathetic witness should normally be avoided unless absolutely necessary. As an alternative, consider getting the impeachable testimony into the case through your expert by showing that your expert relied on that evidence to reach his or her conclusion.

Also, be mindful of time. Some advocate that a person should cross-examine a witness for twice as long as the direct examination. This is not the right approach with a sympathetic witness. If there isn't a lot that can be gained from the cross-examination, then do not waste the jury's time. Keep your questions to those that are relevant. Be direct and respectful and move on.

Keep in mind, a child witness requires a whole different technique. When cross-examining a child witness, proceed cautiously. It is more likely than not that the child will be instantly liked by the jury. Initiate your cross examination with a friendly tone and stick to topics with which children are familiar and find easy to discuss. Language is also important with a child witness. Children's vocabularies are limited. Keep words and concepts simple. Ask questions that are short and easy to understand. And, again, know the purpose behind the examination and keep your questions limited to those topics.

Sometimes a child inadvertently volunteers information about past practice, habits, or his or her loved ones that you may not have anticipated and could be helpful. However, it is more likely than not that by trial, the child has been thoroughly coached and will not break from what a parent has told him or her to say. If this is the case, one effective approach may be to subtly exploit the fact that the child's testimony sounds rehearsed. Rephrase the same question in a different manner a few times. Either the jury will catch on or you can remind them of the rehearsed nature of the testimony at closing argument. Of course, you still want to keep with the task at hand: Ask the questions that help develop your themes and move on.

One other issue to be mindful of is that the jury will likely want to find someone or something at fault. When faced with deciding whether an innocent, sympathetic plaintiff is at fault compared to a company to which you are arguing is equally innocent, the jury is likely going to tip the scale in favor of the innocent, sympathetic person. Accordingly, part of your message should be explaining how and why the incident happened. Whether it was product misuse, product alteration, failure to follow the safety instructions, or another person's fault, you need to serve facts to the jury that will enable them to find for the defendant from an emotional perspective. In some circumstances, especially when you are faulting another sympathetic party, such as an injured plaintiff's parents who have had their lives altered forever, you will want to frame your words carefully. Nonetheless, if responsibility lies elsewhere, you need to tell that story.

## Product Recall or Adverse Government Finding

Perhaps the toughest issue to deal with at trial is when there has been a recall on your product or an adverse governmental finding. The best advice to offer regarding a recall is that if you work with a client who is considering or executing a recall, you want to encourage him or her to handle the recall in a manner that assumes the information will be admissible so that the course of action that is chosen will tell a positive story to a jury. In the event of a safety issue, a jury wants to hear that the manufacturer was proactive, decisive, expeditious, and caring. They want to hear that the company acted swiftly to address any potential problems.

Of course, it goes without saying that much will come down to how the company characterized the recall or safety notification, so the notice should be drafted with care. For example, expressing the issue as a product improvement is preferable language if possible. Likewise, if product misuse has caused the problems as opposed to product defect, explain accordingly. And if you can address the matter through a safety bulletin, consider doing so.

Once the matter is post-recall and has landed in the litigation arena, the initial question, of course, is can you keep the recall or adverse event out of the trial? This analysis should be done early at the case evaluation stage. If there is an adverse event or finding, such as a recall or governmental tag, and you know it is admissible, thereby tipping the scale toward an unfavorable verdict, you need to evaluate this early on in litigation. Trial may not be your best option. It goes without saying that in addition to recalls, a similar analysis needs to be done for any adverse letters or findings from such entities as the Consumer Product Safety Commission, Department of Health and Human Services, Federal Drug Administration, or other government organizations. Some states will have particular laws or privileges that will direct whether this information is admissible. Learn whether these laws exist.

If for some reason, the case will not settle and it is going to be tried, you then need to prepare your strategy as to how you will address the recall. Courts are divided regarding the admissibility of recall information to prove negligence or product defect, but there is no reason not to consider a motion in limine to keep the information out. Admissibility arguments that can be made include possibly arguing that the recall is a subsequent remedial measure if it happened after the incident under Rule 407. Relevancy can also be an effective limine argument if the recall is for a different reason. If the court rules that the information is admissible, you can arguably request an instruction limiting the weight of the evidence under Rule 105.

That being said, if you are faced with going to trial, keeping in mind that you could lose the limine motions or that they will unravel, you need to prepare for addressing the recall at trial. If you are able to exclude the evidence, then you can selectively revise your opening statement and trial strategy, but you should be prepared to deal with the situation at any stage in an effective manner.

In doing so, there are numerous techniques you can use. One important technique will likely be to put the risk of injury into perspective. Contrast the number of accidents with the total use of the product to demonstrate minimal problems. For example, report on the total number of years the product has been in use, the total number of uses, and the total number of miles or hours of product use per year compared to the few number of times that the product was misused. A jury is less likely to find the product defective if there are thousands of widgets in the market for decades with no trouble.

The most effective way to combat a recall claim is to prove that the recall had nothing to do with the incident. However, sometimes we do not get such fortunate facts. If you cannot deflect the recall as being unrelated, tell a story of due care when referring to the product and recall. Highlight to the jury the degree of care, prudence, and concern that the company employed in relation to product safety. Emphasize the government regulations that the company met and the in-house testing that was performed. Emphasize the instruction and warnings that existed on the product to ensure product safety. If at all possible, try a comparative fault case by arguing that plaintiff ignored the recall and/or the instructions. Importantly, recalls and adverse findings by governmental entities that cannot be excluded need to be addressed. Tell the story of due care. And importantly, communicate the story behind the recall itself, including the swift and immediate action that the company took to address the situation.

All trials have tough issues. The key is to recognize these issues, prepare a strategy in how to address and hopefully minimize their impact, and deal with them as honestly and in the most forthcoming manner possible. ■

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