Chapter 19

PRE-TRIAL PREPARATION

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I: ANALYSIS

II: FORMS

I: ANALYSIS

§ 19.1 The Importance of Story Telling and Themes

"Once upon a time" is a phrase that has captured all of our attention since early childhood. Why? Everyone loves a story. And the more interesting the story, the more attentive we are. The ability to develop a case theme within the context of telling a story is the single best way to engage your audience – the jury – and it allows you to set up a paradigm through which the jury will filter the evidence and argument.

What do I mean by this? A sports analogy makes my point most effectively. If you turn on the TV and watch a contest between two teams, neither of whom you know, it is difficult for you to remain neutral for very long. Inevitably, we begin to identify with one team or the other and from that point forward we cheer favorable rulings from the referees or umpires in favor of the team we have chosen and are disappointed by referee calls against that team. A trial can create the same kind of paradigm in which a jury, early on, identifies with one side or the other and then proceeds to absorb and accept the evidence that favors that side and, however subconsciously, reject or discount evidence that is inconsistent with the side they favor. A story well told, that incorporates universal values, is a powerful means of creating this paradigm.

Juries want to do something. They want to feel as though they have accomplished something. In other words, they want to right a wrong. Whatever your story is, it should incorporate universal values that provide the tools for the jury to right a wrong. For example, in any kind of breach of contract claim the universal values that are being portrayed are honoring your word; integrity; and being truthful. So a breach of a contract involves someone who didn't honor their word. Someone who promised something and then refused to do it, which creates issues of dishonesty, and certainly implies a lie. Jurors don't understand words such as party

of the first part, party of the second part, breach of contract, conditions, recitals, and the like, but they do understand when somebody promises to do something and through their signature or otherwise figuratively shakes the hand of the other individual or company and figuratively looks them in the eye and says "I promise to do this" and then doesn't. Setting aside any legal issues, or any legal arguments, or any legal theories, everyone understands that such conduct shouldn't be rewarded.

Another universal value is fairness. Fairness covers a multitude of areas and a multitude of legal theories, but it resonates much more clearly than these theories with any jury or even, dare I say, with a judge when he or she is sitting as a trier of fact. Regardless of your legal theory, whether as a defendant or a plaintiff, your story has to have emotional resonance. Jurors don't like people who lie; who cheat; or who steal. They don't like situations that strike them as fundamentally unfair. They don't like situations that strike them as fundamentally unjust. To the extent your story incorporates these emotional resonators, you will get more attention from the jury and are likely to get a more favorable reaction from the jury.

To create any story that incorporates themes and has emotional resonance, the story has to be interesting. Don't start your case by wasting everybody's time with a complicated story that is hard to follow. You should have in mind a mini-version of your story, we can colloquially refer to as the cocktail party version of your story. What can you say in the first two to three minutes with either the judge or the jury to capture their attention and get the jury not just willing but eager to hear the full story.

For example, a cocktail party version of an investment fraud claim could be set out as follows: I represent John and Dorothy Walters, both retired schoolteachers who spent 30 years in the classroom accumulating a nest egg. They entrusted their money to a financial advisor who put that money in a scam investment that ended with them losing 80-percent of their life

savings. Now they face a future which has wiped out their 30 years of hard work and left them with nothing.

Your argument:

> My clients are here today making a claim against those investment advisors because they broke their promise to pay attention to the kinds of investments that they put my clients money into.

The case theme captures a number of universal values and immediately sets the stage for the jury to be interested in how this happened. It touches on universal values such as hard work; thrift; contributions to the community of a teacher; promises made; promises broken; and terrible losses.

Both sides need a theme. If you are a defendant, you do not want a theme that simply acts as a counterpoint to the theme that the plaintiff is putting on. You want your own independent theme. A simple example: In a products liability case, the plaintiff's theme may be that Company X has put on the market a product that was not just dangerous but unreasonably dangerous beyond what users of that product would expect or be able to anticipate. My client was injured permanently from this unreasonably dangerous product, and the defendants should have known and could have made this product safe.

As a defendant, you do not want your case theme to be "the plaintiff has failed to prove that our client's product was unreasonably dangerous." That really isn't a theme as much as a reaction. Your theme, as told in a story, is that your client is in the business of making safe products. The products have been used over hundreds of thousands of hours by hundreds of thousands of users and yes, there has been an injury here, but our product is safe, we are proud of it, and no product in the real world outside this courthouse is perfect.

When you are developing your story and your themes, keep in mind that you are going to tell this story to non-lawyers, so the

more you practice this story and these themes with non-lawyers, the more you will understand what resonates and what doesn't. This allows you in the course of discovery to find facts and evidence that support your desired case theme and your story. It allows you to discover the land mines that might invalidate your case theme and destroy your story. It allows you to focus depositions and discovery aimed at developing and furthering the desired case theme and story. To do this you need to continue to ask yourself every step of the way: What really happened here? What is my client's story, and what wrong does my client need a jury to right.

Your story, or – given the fact that we are talking about universal values – your morality play, should have a beginning, a middle, and an end. It should talk about universal values; it should talk about how those universal values have been respected or ignored; and it should end asking the jury to rectify the situation.

An effective opening statement sets the story out in a meaningful way that captures the jury's attention; creates the appropriate interest in your story; and creates an understanding of what each witness and piece of evidence will contribute to the story. Appropriate witness preparation, discussed in more detail later in this chapter, and the appropriate use of visual aids, create the visual or verbal pictures that help tell your story. Documents selectively used and timely introduced add to the compelling nature of the story.

If you start with the basic assumption that a jury has a limited attention span, knows nothing about the months and perhaps years you have spent preparing the case for trial, and is probably incapable of absorbing ten percent of what you know about the case, then you understand the value of giving jurors a hook that is a story to latch onto to filter the information you are providing them. The simpler a story is, the more powerful it has the opportunity to be. With that in mind, be selective in how you use documents. You may well have discovered tens of thousands of documents but regardless, you have to use discretion and

restraint in determining which select few documents best tell your story to keep it powerful and concise. Again by way of example, books that require 50 to 75 footnotes per chapter make it very difficult for even the disciplined reader to keep the book's theme in mind. Think of the jury as reading your story and being constantly side-tracked with the introduction of a myriad of footnotes (i.e. documents), which although they mean a lot to you since you spent all that time in discovery in the case, may not do anything but distract the jury from your fundamental themes.

In short, you are not selling your case to a jury, you are telling your story. Your story, with its themes and its implicit request for the jury to right a wrong, gives the jury an interest in listening to the case and a willingness to pay attention, and an understanding of the role they will play to help write the end of the story.

§ 19.2 Documentary Evidence – Organization and Presentation

Organizing and preparing documentary evidence for trial should start the moment the first piece of evidence is received. In a modern business tort case, much of the documentary evidence will consist of electronically stored information ("ESI"). In an age where e-mails, instant messaging and text messages have, in large measure, replaced more formal forms of business communication, it is not surprising that the volume of documentary evidence has increased dramatically.

To provide context as to the potential volume of electronically stored documentary evidence in a business tort case, consider the following. "The average personal computer hard drive today can easily store 60 gigabytes of data—or 60 stacks of paper 85 feet tall—and large organizations' computer networks

commonly store information in terabytes, each equivalent to 500 million typewritten pages."[1]

That translates into large volumes of discoverable ESI to organize and manage. To address concerns regarding discovery of ESI, the Federal Rules of Civil Procedure were amended in 2006.[2] Under the 2006 revisions, a party is required to either produce ESI in the form requested, or if no form is specified, "in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."[3] While there is no standard format for production of ESI, the Advisory Committee Notes instruct that,

> the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information *** to a different form that makes it more difficult or burdensome *** to use ***. If the responding party ordinarily maintains the information *** in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."

This means that nearly all ESI will be produced in electronic format.

One practical consequence of these changes is that traditional indexing and hard copy folder systems as a primary method of document management have become antiquated. And, although the rule of thumb had been to utilize electronic databases for cases with more than 5,000 documents,[4] it is the rare modern

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[1] The Third Branch: Newsletter of the Federal Courts (Administrative Office of the U.S. Courts) Vol. 38, Number 11 (November 2006).
[2] *Id.; See also* Fed. R. Civ. P. 16, 26, 33, 34, and 45.

[3] *See* Fed. R. Civ. P. 34 (B) (2) (E) (ii).

[4] 51 AMJUR TRIALS 1 § 333 (1993) ("The rule of thumb for going to an automated litigation support system is a case with 5,000 or more documents.)

business case that will *not* justify use of an electronic document management system, particularly given the requirement to produce ESI in electronic rather than print form.

That said, from time to time, budgetary constraints will militate against electronic document management. In those cases, it is critical to create a document index, starting with the first piece of documentary evidence. At a minimum, a document index should include the following fields: (1) assigned litigation number (commonly known as "Bates Number" for the stamping device formerly used in numbering litigation documents); (2) document date; (3) document type; (4) author; (6) recipients; (7) document description; and (8) a "hot doc" designation if the document helps to either (a) prove your case; (b) undermine your case; (c) rebut evidence that might undermine your case; or (d) impeach a witness.

In cases where no electronic database is being utilized, it is critical that one complete set of all documents is retained in the original "Bates" order. That way, no documents will be lost, and it will be easy to find specific documents by cross-referencing the document index.

Organizing documentary evidence does not stop with the document index. Documents should also be organized by issue, and by witness. Organizing documents by issue can be done by outlining, or creating a chart of, the elements for each claim in the case. (Helpful hint: obtaining the uniform jury instructions applicable to case claims, at the beginning of the case, is an easy way to identify the elements on each issue in your case.) Then, identify the evidence needed to prove each element of each claim. As the case progresses, put a copy of all documentary evidence tending to prove, or disprove, an element of any claim in an issues folder or notebook. As documents are identified, note any admissibility issues that need to be addressed prior to trial. (For example, while copies of public records are often used during

depositions, but certified copies should be offered at trial.)[5] These organization strategies will help you identify gaps in, or problems with, your evidence as the case unfolds, and will be invaluable to you in identifying trial exhibits.

In addition to organizing evidence by issue, it is equally important to organize documentary evidence by witness. A separate set of witness binders should be created. Initially, witness binders should include each declaration, deposition transcript, and document authored or received by each witness. Before each witness is deposed, the documentary evidence in each witness folder/binder should be whittled down to exclude extraneous or irrelevant material. That way, by the time trial exhibits are being identified, only the most crucial documents for each witness remain in the notebook/folder.

Organizing documentary evidence by issue and by witness is critical whether the case is organized in hard copy or electronic format. In an electronic database, documents can be organized utilizing pre-set or specially created electronic index fields. The database should include at least the same fields identified above for the hard copy index, and should include at least the following additional fields: (1) an issue field for each claim; (2) a witness field; (3) a deposition exhibit field; (4) a trial exhibit field to identify potential trial exhibits; and (4) an attorney note field.

One of the biggest advantages of using an electronic database is the ability to search both the document index fields and the document text (provided, of course, that documents are loaded into the database in a text searchable format). Another way to quickly identify documents in an electronic database is to sort by field. By populating critical fields, documents can be located quickly and easily.

As the case moves closer to trial, the critical task becomes narrowing the evidence to a critical subset of documents that will

[5] *See* Fed. R. Evid. 1005.

be used as trial exhibits. It is axiomatic that the complexity of this task is vastly different in a case with 5,000 documents than in a case with 500,000 documents. Not surprisingly, the more organized the documentary evidence is going into the pretrial phase, the easier it is to identify and prepare trial exhibits.

When identifying potential trial exhibits, it is important analyze whether each document is relevant,[6] falls within an exception to the hearsay rule,[7] is capable of being authenticated at trial,[8] and is either an original or a permitted copy.[9] If a document has an obvious challenge to admissibility, try to ascertain whether an alternate document can be used for the same purpose. Problem-solving admissibility issues in advance of trial can make or break a case.

Once trial exhibits have been identified, they must be organized for the court, and for your own use during trial. Each court has its own procedure for addressing exhibits before trial. By way of example, in the United States District Court, Central District of California, not "later than twenty-one (21) days before the Final Pretrial Conference, all parties shall file a joint list of exhibits containing the information required by F.R.Civ.P. 26(a)(3)(A)(iii)" with exhibits listed in numerical order.[10] In that district, trial exhibits previously marked for use in depositions must have the same exhibit number for trial.[11] Documents not marked during depositions are to be marked in sequential order, without regard to which party is introducing the exhibit.[12]

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[6] *See* Fed. R. Evid. 401 & 402.
[7] *See* Fed. R. Evid. 803 – 804.
[8] *See* Fed. R. Evid. 901 – 903.
[9] *See* Fed. R. Evid. 1001 – 1007.
[10] *See* U.S. District Court, Central Dist. Cal. L.R. 16-6.1.

[11] *Id.*

[12] *Id.*; *see also* U.S. District Court, Central Dist. Cal. L.R. 26 – 3.

By contrast, in the United States District Court, District of New Hampshire, one week before trial parties are required to submit to the clerk of the court an exhibit list, and a set of original, pre-marked exhibits.[13] In that jurisdiction, the exhibit stickers must be labeled by party, with plaintiffs marking their exhibits numerically, and defendants with fewer than 78 exhibits marking their exhibits alphabetically.[14]

As these examples demonstrate, it is important to consult the local rules in each jurisdiction well in advance of trial to ensure that exhibits are properly and timely marked. Regardless of the jurisdiction, you should ensure that the documentary evidence for your case at your fingertips during trial. As a rule of thumb, juries lose confidence in an attorney who hesitates or stumbles trying to locate documents or prior testimony during direct or cross-examination.[15]

To ensure quick and easy access during trial to each admitted and proposed exhibit, you should have an exhibit list identifying each exhibit. As each exhibit is admitted into evidence, the exhibit list should be updated.

You should also have either a series of notebooks containing a complete set of all trial exhibits, or a laptop computer onto which each exhibit is loaded in text searchable format. And, you should have readily accessible the witness binder for each witness (again, containing prior testimony, and a copy of each exhibit that may be offered at trial through that witness). In larger, more complex cases, you should consider assembling a trial team of either outside litigation support (vendors provide such services) or paralegals to assist you in the courtroom. That way, searching for evidence can be accomplished smoothly.

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[13] U.S. District Court, District of New Hampshire L.R. 83.13.

[14] U.S. District Court, District of New Hampshire, Procedure for Marking Exhibits, available at http://www.nhd.uscourts.gov/th/exhibits.asp

[15] 51 AMJUR TRIALS 1 § 209 (1993)

In sum, while a fumbling lawyer is not guaranteed to lose his or her case, and a well organized lawyer is not guaranteed to win, you can greatly increase the odds that you will present all of the best available evidence to the jury if you develop a comprehensive document management system early in the case.

§ 19.3 Testimony – Witness Preparation

Telling the story of your case is done through a series of witnesses who each provide their own piece of the puzzle. More often than not, your witnesses are not accustomed to the awkward exchange of questions and answers or the stress of cross examination. To assist the witness in finding the right presentation style and maintaining focus on the required testimony, preparation must be done early and often.

Once you've chosen the universal values that will drive the theme of your case, prepare your witnesses to assist in carrying that theme throughout your presentation. In addition to your trial themes, each witness you put on the stand must conduct themselves in manner that triggers two values; trust and reliability.

To build a perception of trust and reliability, work with your witness' strengths, learning style, and personality. Attempting to re-train your witness or forcing a witness to memorize a script will undermine your effort to present a trustworthy and reliable witness.

Before you and your witness dive into the facts, explore the witness' natural communication style. Is the witness more persuasive in writing or orally? Does the witness fear public speaking? Is there vulnerability to having a temper triggered, or on the other end of the scale, is the witness more likely to appear disinterested?

What is the witnesses learning style? Does the witness learn at a deeper level with drafting a written product, rehearsing answers verbally, or demonstrating thoughts with tangible props?

You will be asking your witness to teach the jury facts or opinions with the expectation that the jury will accept the presentation as accurate. The witness will be more persuasive and memorable if you ask your witness to teach in a manner consistent with the witness' learning style.

The personality type that the jury will observe is not always the personality you would like to see in your courtroom, yet your witnesses will each serve a different purpose in your case presentation. There will be witnesses who must face accusations of wrongdoing, some will be only historians, and some will offer opinions. First, determine what function your witness serves. Second, determine the witness' personality type. Finally, discuss with the witness where the two are in conflict. Many times, body language can be adjusted to resolve this conflict. Adjusting the introduction to each answer can also soften this conflict. For example, a witness who appears aggressive can overcome that appearance by sitting back slightly and answering questions after a slight pause suggesting the witness is a good listener and focused on giving thoughtful answers. Asking an aggressive witness to be warm and kind will be read by the jury as an unreliable witness who is acting a part.

To assist you and the witness with identifying conflicts in the witness' purpose and the witness' personality type, consider recording a practice examination by video. Replay the video first without sound and just observe the body language and facial expressions. These observations can be as valuable as the content of the testimony. Encourage your witness to watch the video as if he or she were sitting in a jury box judging trustworthiness and reliability. Behaviors that suggest reliability include a witness who has a strong, anchored stance (sitting up, leaning slightly forward, hands folded), direct eye contact demonstrating good listening skills, and pauses suggesting the answers are thoughtful and responsive.

Reliability of the content of the witness' answers during direct and cross examination can be enhanced by working with the

witness' learning style. During preparations, ask your witness to tell you what they would like the jury to understand about their contribution to the case. Observe how the witness teaches you their case involvement. Does the witness scratch down notes, draw diagrams, deliver a presentation, or engage you in debate? Follow this lead when determining how your witness will teach the jury during trial. If the witness must tackle a complicated fact pattern or jumbled time line, consider using visual aids. If the witness must explain or introduce a key document or difficult fact, determine how much background and context is required to deliver the right impact. When dates are critical to your case, does the witness tend to recall calendar dates or events more easily? Work with these witness traits to boost the witness' comfort and, therefore, indicators of reliability.

For the witness to be a valuable instructor to the jury, the witness needs to understand what piece or pieces of the puzzle you are asking him or her to contribute to the puzzle. Further, the witness needs to understand what the puzzle is supposed to look like when it is completed. If the witness understands the context of the testimony and the purpose for being called to the stand, the witness is more likely to feel comfortable teaching the jury the information he or she has to offer. It is important to step back and consider each of your witnesses to be sure you cover all of your required elements of proof. At the same time, be sure you are not asking your witness to provide more pieces of the puzzle than is appropriate.

Another method that can add credibility to your witness while on the stand is to educate your witness on the legal theories (at the juror comprehension level, not the attorney level) both for your case and for your opponent, and educate your witness on common objections made during trial. A witness that is not surprised by objections and has a fundamental understanding of each party's game plan will appear more relaxed and confident.

Guide your witness on how to effectively testify about historical facts. Maintaining perspective on past events is difficult.

Many witnesses want to refer to past events in terms of current knowledge. For example, a witness who suffered an injury several years ago will instinctively testify as if the injury happened just yesterday, with all the knowledge and experience they possess as they sit in the witness box. It is important to train your witness to distinguish between what they knew then as opposed to what they know now. Over time, perspectives change, facts develop, and contingencies play out. Stripping that away to testify from the point of view of the historical event will take practice.

Another common pitfall witnesses face is a desire to be perfect historians. No memory is perfect and a witness who has all the answers will cause the jury to question their reliability and honesty. Explore the limits of your witness' memory and work with the parts of the story that are missing from their memory. If a witness can't recall what the weather was like at the time of the accident that took place years earlier, work with what the witness does remember about the conditions. What time of day did the accident occur? What were you wearing? What was the season during which the accident occurred? These tangential facts help to paint a picture, despite the gap in memory. Admitting to a gap in the witness' memory can lend to the witness' credibility.

If time permits, work with your witness after the jury is empanelled and before he or she takes the witness stand. You will be asking your witness to teach the jury. To optimize the effectiveness of this learning process, the witness should understand who is on the jury and the best methods for getting the majority of the jurors to absorb the lesson. Is your jury young, more experienced, technically trained, experienced in legal matters, educated in specialized fields, or perhaps representative of a particular lifestyle? Knowing this background and sharing it with your witness can help the witness truly speak to the juror and increase the chance that the juror will identify with the theme of your case.

Cross examination can be terrifying for a witness who is not accustomed to courtroom procedures. Explain what objects

you are likely to make and what the objections should mean to the witness. Similar to a deposition, making objections should instruct the witness that the question posed is unacceptable in some way. Unlike during a deposition, however, the witness must look to the judge for guidance before answering the pending question. When practicing cross examination with your witness, experiment with pace and timing of the questions and answers. It is important that the witness learns to identify when the questioning becomes fast paced and can slow the speed by pausing before answering or asking for clarification when the questions appear to have an ulterior motive. Slowing the speed sends a signal to the jury that the witness is a careful listener and that lends to the witness' credibility.

Some jurors will decide whether to believe the witness before the witness even utters a word. The witness' demeanor, teaching style, personality, and understanding of the case play an important part in whether that witness will be viewed as trustworthy and reliable. As the trial attorney, you can stack the deck in your witness' favor by working with your witness' strengths and preparing your witness to deliver confident testimony.

§ 19.4 Audio-Visual Presentations – The Decisive Edge

Jurors today are well-trained television viewers. They have come to expect cutting edge technology, constant entertainment, and a dramatic performance in the courtroom. To feed these expectations and to bolster your trial theme, audio-visual presentations should be incorporated into your presentation.

While preparing for trial, look for documents that demonstrate your theme or fact patterns that could benefit from a timeline, a reenactment, or an interactive demonstration. Also, look for witnesses who can get out of the witness box to write on a board or handle a piece of evidence.

Once you have found the right document, a fact to highlight, or a witness that can interact with the jurors and the evidence, consider which tool best delivers the message. Today, experienced trial attorneys use a variety of audio and visual aids that range from paper flip charts to projected images and video clips. A mix of media will increase the likelihood that several of your jurors will be influenced by the presentation and remember the evidence you are demonstrating.

What "sticks" in a juror's memory will vary greatly. Will it be an image, a saying used by a witness, a theme conveyed by the trial attorney, a quote from a document, or a perception of a witness? Because you can't know the answer to this question, offer a variety of communication methods to capture the attention of as many jurors as possible. Watching television commercials provides a good example of this theory. Take a commercial advertising a new drug, for example. The commercial may start with a spokesperson talking directly to the viewer, then switch to a graphic demonstrating the way the drug works, then move to a clip of a happy customer engaging in everyday activities, and finish with the spokesperson talking again to the viewer. The skilled professionals who created this commercial are playing to multiple learning styles and adding in persuasion to increase the chance that a potential new customer will remember their product and give it a try.

A trial attorney can use the same tactics with their jury. If the litigation budget is tight, consider using a paper flip chart to demonstrate a math calculation, sketch a flow chart or timeline, or bullet point the key facts from a witness' testimony. Foam-core boards with enlargements of key documents, theories, or a critical legal concept can call attention to the matter and is easily displayed when needed.

Another inexpensive tool that incorporates visual learning is an overhead projector to project transparencies or a projector (called an ELMO) which uses a live video feed to projects an image. Transparencies can be prepared in advance to allow a juror

to read along with a document or deposition testimony. An ELMO projector allows the attorney or witness to interact with a paper document by highlighting a passage or projecting the image of a piece of physical evidence.

If there is more room in the budget for audio-visual equipment, a PowerPoint presentation or an interactive graphic can both teach and entertain. For lengthy trials, it is important to provide jurors with an opportunity to listen to live testimony, watch video clips of recorded sworn testimony or reenactments, and learn from demonstrations and illustrations.

A powerful use of videotaped deposition testimony is to immediately impeach a witness on the stand who has testified to the jury in a manner inconsistent with the prior deposition testimony. To prepare for this move at trial, you must study the video deposition and pre-mark the sections of testimony that you intend to re-ask in front of the jury. If your trial question closely tracks your deposition question and the answers don't match, the video will be ready to play to impeach the witness. Certainly this can be done by reading the transcript to the jury, but allowing the jury to watch the witness on the screen and in the jury box simultaneously can be a powerful moment.

Regardless of the media used to enforce your themes and teach your jury, it is important to always provide context to the testimony and evidence you are asking your jury to absorb. This can often be accomplished with a timeline of key events that is used in opening, during witness testimony, and closing. Also, a chart of key players that will be discussed during the trial can help jurors become comfortable with names that the attorneys and witnesses have known for months and years.

If you are lucky enough to have a "smoking gun" piece of evidence, be sure to use the evidence with several different witnesses and during argument so that the jury appreciates the importance of the evidence. Many times, you become attached to a piece of evidence that may not be as powerful to others as it is to

you, or its significance may change over the life of the case. Continually ask what purpose the evidence serves in completing the puzzle that will reveal the picture of the result you seek.

Incorporating multi-media into your presentation adds a dynamic to your case that respects the expectations of the jury. You need your jury to be entertained and motivated to follow your lead. Be sure your audio or visual elements work well in courtroom, that you are comfortable with the technology, and that you have a back-up plan if the technology fails. Using every tool available to you to teach your theme and persuade the jury will give you an edge in the courtroom.

§ 19.5 Organization of the Process

Jurors have high expectations for the judicial process, including for the attorney participants. An imperative of trial practice is to ensure that you live up to an ideal of humble professionalism, not so deferential as to indicate weakness but not so assertive as to suggest arrogance. You as counsel are the facilitator of your client's case. You are center-stage. Repeat instances of disorganization, fumbled presentations, uncertain document handling – all of these will contribute to an impression that you, and therefore your case, cannot be depended on for excellence.

In each of the foregoing sections, considerable attention was focused on organization: organizing evidence, organizing witnesses, and in the end, organizing your entire case. Because all case elements must – or should – fit within your storyline, it is therefore imperative that your storyline be apparent, and presented without significant distraction. This warning is relevant: disorganization distracts from your storyline and, derivatively, your case. Impeccable organization strengthens cases. Disorganization weakens them.

Excellent organization permeates every conceivable aspect of case preparation.

- Are your witness binders identically organized? They should be, or else you'll be fumbling every time you need to access it in the presence of the jury.
- Are your case binders the same color (at least by category) and size?
- Are they within your quick reach?
- Is your trial table-top neat and organized? Your notepads?
- If you are employing electronic aids in your presentation, are they "ready to run"?

In short, as one of the key focal points of the process, you are in position to either dazzle or distract.

There are tasks outside the view of the jury too. We have already determined the need for well-prepared witnesses. But have you let those same witnesses know what time to present at court? Have you advised that they may have to wait a significant time (hours even) before taking the stand? As to those witnesses who are client employees, have you made it part of your preparation to ensure that the employer is engaged, understands the process, and specifically understands when and how long the employer's witnesses may be engaged?

Trials are what the trial lawyer does, and while excellent preparation may consume time, it also gives the attorney and his or her client the best possible chance of prevailing.