CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™
ADVANCING ETHICS, COOPERATION AND EDUCATION

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Hope for the Best, Plan for the Worst - Prepare for Trial So Your Case Doesn't Get There

I. The Importance of Preparing for Trial in an Era When Fewer Cases Go to Trial.

Invest Now to Save Later: Think Fram Filter Man

Does your client want the case settled? Most do. But there are those cases that just have the look and feel of a trial written all over them when they come in the door. What are the telltale signs of a case that is trial-bound? You need to look at some key factors to make this determination. Who is the opposing party and does he/she have the resources to fund and staff a trial? What do you know and what can you learn about this person or company? Who is your opposing counsel? Has he/she tried cases before and with what success? What is the value of the case? Are the damages fixed and certain? Is there potential exposure for damages beyond just the face value of the estimates, including attorneys' fees and punitive damages? What is the insurance situation and how will that affect the outcome and collectability? After you have answered these questions and your instincts tell you that this case has the potential to go all the way, you need to start thinking like the Fram Filter man in the old TV commercials: You can pay me now for a new oil filter, or you can pay the plaintiff attorney for a new engine later. In a case that has real potential for trial, you have to be prepared to invest some time up front if your client wants to settle the case.

Understand Your End Game from the Beginning

The next thing you should do is study your jury instructions to understand where you need to be at the close of the case to win. Envision an opening statement and closing argument in which you are explaining to the jury the elements of your case, one-by-one. Are there unique legal issues arising out of the pleadings that might be addressed in dispositive motions? Are there special affirmative defenses that might be waived if not plead in the answer? What discovery will you need to conduct that is not part of the standard discovery plan that might be found in Case Management Order (California)? Do you anticipate evidentiary issues due to the complexity of the facts? Will you need specialized experts to address unique issues in the case? In a large construction case with complex issues, selection of experts may be one of the most important decisions you make. Answering these questions at the beginning of your case will enable you to formulate a discovery plan and to develop overall handling strategies to get you to your end game.

Experiment with Story Lines and Themes During Discovery

Now that you have formulated a plan to take you all the way to verdict, you need to begin working on Story Lines or a Theme. Consider the personalities involved in the case. Consider the conduct of the parties and their attitude about what they are claiming was done to them or what they did to someone else. Even construction cases get personal. You are talking about someone's home or someone's workmanship and people take these things seriously. You need to think about how you will tell your clients' story to the jury in a way that carries a consistent theme from start to finish. But the theme is not always evident at the outset. Sometimes it presents itself in the way witnesses conduct themselves in depositions. Experiment with themes as you examine witnesses by fashioning questions that test a witness' credibility and the limits of their position—whether lay witness or expert. Does the witness have a solid foundation or does he/she fall apart under cross examination? What are the limits of this person's information: what is fact and what is fiction? Eventually ideas begin to take shape and you follow them to their logical conclusion. Juries want to hear a case with a human element to it. For example, integrity of a builder/developer is an important trait to portray. If you are trying a case for a design professional, thoughtfulness and care are important factors that must be brought to life.

Once you have satisfied yourself that you have a viable theme, start compiling an opening statement. Capture your ideas on paper as they come to you while you are working on the case. Speak them aloud and see if they sound right. Try them out on others in your office to see how they react. Add to the statement as you continue to work on the case and compare the statement to the jury instructions to identify gaps in your evidence that you need to fill in along the way. Use discovery to identify strengths and weakness in your opponents' case. Re-examine you draft statement to determine if you need to make any adjustments to the statement or your theme after identifying those strengths and weaknesses.

Depositions: the First Trial

An effective deposition is like a mini-trial. If your plan is to settle your case, do not hold back in depositions. A deposition is intended for information gathering, but it is also an opportunity for you to cross-examine the opposing party. This is the time and place to impress on your opponent that his/her case is flawed and will not stand up to scrutiny at trial. Try to elicit as many admissions as possible from lay witness and experts to prove your case. Admissions resonate with jurors and your opponent will be fighting an uphill battle trying to overcome the damage. You can win or lose a case in deposition, and if your intention is to drive the case to settlement, the deposition is your battleground.

II. Settlement Conferences and Mediations

Be Prepared to Deliver Your Opening Statement

You have invested a lot of time and effort into your case, and this is what you have been waiting for. Short of trial, mediations and settlement conferences are the best opportunity to utilize your oral advocacy skills. Be prepared to deliver a mini opening statement. Only this time you will be speaking directly to the opposing party, instead of a jury. That makes it all the more important to get it right. Use excerpts from depositions and highlight key documents to demonstrate your points in Power Point or similar presentation software. Identify important legal points and how they will affect the outcome of the case. Consider having your expert attend the mediation to respond to any questions from the mediator or opposing counsel. This is especially important if experts have not yet been deposed.

Large multi-party/multi-issue cases can be overwhelming to process. Many people come into mediations just praying the beast will go away. That can cause a decision by the carrier and/or attorney to over-pay on a case that if broken down into smaller parts could have ensured a good or proper result. So, the key here is to break down the case into smaller more manageable cases. Go to the mediation armed with discussion points on how you can win each of those smaller points. In most cases, you only need to hit one to have a major impact on the case. The other side will soon see that you have multiple arguments: this puts you on the offensive and in the driver's seat. It demonstrates how well you know your case and bolsters confidence in your position while having a demoralizing effect on your opponent. This will impact the "value" of your case in your favor.

The bottom line is that you need to make it clear that you are prepared to address all critical issues and that you are prepared to start trial tomorrow.

Financial Matters Must be Addressed Well in Advance

First and foremost, Plaintiff must be prepared to submit a demand, and back it up with facts and figures. The "dance" has to start somewhere, and it is up to Plaintiff to make the first move. On the defense, all insurance issues must be resolved before mediation. Nothing is more frustrating than to hear for the first time at mediation that coverage is under review, for whatever reason. This is easier said than done, but you need to pay as much attention to this aspect of a case as the underlying facts. It is not the obligation of counsel of record to resolve insurance issues, but it is their obligation to make sure these issues are addressed ahead of time. Along with insurance issues, the question of fees and costs must be considered. This is especially true in states where fees are recoverable as a matter of law, and where fees are at stake in a contract claim. You need to understand what your exposure is going to be on fees if Plaintiff prevails, and your client needs to understand what fees you are going to charge to take the case all the way to verdict. Most insurance companies require budgets from defense counsel, but your budget may not look that far ahead, depending on the timing of the mediation/settlement conference. When it comes to dollars and cents, information is the key to success.

III. Successful Trials

Decide Who Will Decide

Now the time has come to have someone else decide your fate. You have been in control of the process thus far, but now you have to give up control to someone else. That is never an easy decision, and in the case of high exposure and long duration case you have to carefully consider the variables before you decide on judge or jury. Is your case fact intensive or legally complex? Does your case have strong emotional issues that could influence a jury? On a long duration case, you are not always going to find jurors who will identify with your client. Does the case involve mixed causes of action, some that will be tried to a judge and some to a jury? Who is your trial judge and what is his/her background in practice before going onto the bench? Has that judge ever had to market for clients and make a payroll? Evaluate your trial judge as a trier of fact the same way you would a prospective juror.

Trial Preparation Begins at the Beginning

You cannot wait until the pretrial conference to start preparing for trial. If you take anything away from this program, understand that trial preparation for a complex, high exposure case starts long before trial. As noted earlier, it begins in the pleading stage and continues through the discovery phase. If everything has been going according to plan, you should know by now exactly which piece of evidence is going to satisfy which elements in your causes of action or your defenses. If you are just now reviewing jury instructions, it is probably too late to do anything about missing facts.

It is strongly recommended that you begin to compile your exhibit list during the discovery phase. Consider compiling a list of exhibits, for your use only that is organized by topic or by witness. This allows you to determine at a glance all the facts you need to demonstrate to the trier of fact on a particular topic or all the elements you need to draw out from a particular witness. This list then becomes your guide to your direct or cross-examination of that witness and serves as reminder of the facts that you need to satisfy all the essential elements in your case.

With hundreds of exhibits you also need to reach agreements among counsel to stipulate to the authenticity of documents over which there is no real dispute. The same applies to admissibility of certain records that everyone knows will be admitted one way or another. It saves time and money if you can agree to foundation and admissibility of uncontested records in a case with voluminous construction era records.

Motions in limine are way over used in construction cases. It is recommended that you meet and confer with opposing counsel to discuss what you intend to exclude and why, to attempt to eliminate needless work for you and the Court.

You should also consider the use of Trial Protocol Orders that delineate the order of proof on the complaint and cross-complaint or third party actions. You are about to start a process that could last months. Hundreds of thousands of dollars will be spent on fees and costs. Every effort should be made to find ways to streamline the process. Meet with opposing counsel and decide whether the case will be tried issue-by-issue or home-by-home and whether the cross-complaint or third party complaint will be tried at the same time as the complaint or in a separate proceeding.

Remember to review the Evidence Code to brush up on the basics. We do not get to try that many cases, and in depositions the Court is not ruling on objections. It never hurts to refresh your memory on the fundamentals. Where you anticipate issues that may not have been covered in motions in limine, do your research ahead of time and prepare a pocket brief to present to the Court when the issue arises.

Jury Management

Voir Dire is a topic unto itself and is not intended to be covered in depth in this presentation. Mock Trials should be considered in a long duration, high exposure case to identify the ideal jurors for your case. In addition, you should be prepared to tell the jury how long you expect your case to last so that they have an idea what is coming and when. Jurors do not like being kept in the dark. Setting time limits on a case also adds to the efficiency of the case and forces the trial attorneys to become better prepared.

Opening Statements and Closing Arguments can also be the subject of an entire presentation. In a long duration case with lots of complex issues, the important distinguishing factor to bear in mind when addressing the jury is that you will not be able to cover all the evidence. If you do, you have taken too long and you have probably "lost the jury at hello." Tell them at the outset of your opening and closing that you are not going to be able to cover everything in the case and then focus on the truly important and controversial topics. The jurors will appreciate your trust in their judgment.

Trial Techniques and Practices

One of the biggest challenges in a long construction trial is to keep the jurors' attention. The jurors need to understand that you are paying attention to their duty to follow the evidence. One of the simplest ways to keep the attention of any audience, especially a jury, is to mix media. In today's environment it is easy to assume that everything will be displayed to the jury using digital technology. To keep boredom from setting in, you should consider using good old-fashioned models to demonstrate your points. Models force the witness to get out of the witness box and move around in the courtroom. This gives the jury a chance to see the witness up close and personal and to see how he/she has thought about how to present the case to the jury. If you have been working closely with your expert throughout the case, the jury will see that and will sense that you have taken the time to make things clear to them. And do not forget to evidence that has been gathered through destructive testing. Samples of materials from the site may be one of the most effective ways to demonstrate your point.

The other biggest challenge in a construction case, long or short, is to simplify the evidence. You need to speak to jurors at their level. You have been living and breathing this case for months, if not years. You know the case backwards and forwards. Now you need to tell someone else everything you know about the case, but remember the people you are talking to have never heard or seen anything about this case. If you deliver the evidence to the jury as though you were speaking to your client, you will lose the jury. To overcome the temptation to use the jargon that you and your client or expert have been using, try explaining the facts and/or expert opinion to a friend or family member that knows nothing about the case. You will be surprised how difficult it is to make that transition, but you will be thankful you forced yourself out of your comfort zone.

After you have gone through this exercise, practice with your experts. Make sure he or she is prepared to teach a class to freshmen on this subject matter. Also on the subject of experts, tell them not to be combative. The worst thing an expert can do is to over-defend his position to the point of being combative. Every opinion has its weaknesses. If your case did not have any weaknesses, you would not be in trial. Jurors understand that reasonable minds will differ. It is their job to resolve those differences. If your expert takes things too far, the jury will lose respect for the expert and see him/her as a mere extension of you as the advocate of your client's case. Experts are supposed to objective and you are not going to win or lose the case because your expert concedes this or that point. Long complex cases are not decided on the basis of a single fact or opinion.

There is no such thing as too much preparation for examining a witness. Examining witnesses is one of the most important things you will do in the entire trial. The jurors will reward you in their verdict if you show respect for their time by taking your time to prepare yourself and your witnesses for examination. Keep the case moving with tight, crisp examination of all witnesses, both on direct and cross-examination. Remember, you have asked this jury to give up months of their time and to devote their attention to your case, so do not abuse the privilege by wasting their time while you fumble around trying to formulate a question on the spot or look for an exhibit that should be at your fingertips. Draft, rehearse, rewrite and rehearse again. It will pay dividends.