Fundamental Trial Techniques
For The Defense

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Trial Considerations

• The First and Foremost Trial Consideration: RISK
• Some Important Risk/Reward Factors:
  – Venue
  – Good Facts/Bad Facts
  – “Objective” Liability/Damages Analysis
  – How Will Witnesses/Parties Present?
  – Compelling/Sexy Trial Themes
  – Interesting/Compelling Trial Evidence

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Jury Trial or Bench Trial?

• Conventional Wisdom: Bench Trials = ↓ $ Award
• Better Know Your Judge . . . . Well
  – Plaintiff or Defense Oriented?
  – Will Likely Be Good Judge of Credibility
  – Generally Not Swayed By Theatrics
• With a Jury, Plaintiff Needs 9 To Win
  – A Big Burden; Makes Jury Selection Critical
• A Jury Trial Is A Horserace Every Time
The Use of Jury Consultants

• To Retain or Not Retain, That is The Question
  – Does The Case Justify The Expense?
  – What Issues Are Worthy of Exploration?
    – Comparative Fault Issues
    – Fault Among Various Defendants
    – Liability Theories
    – Defenses
    – Damages Issues

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The Smorgasbord of Jury Consultant Services

- Witness preparation – “Charm School”
- “Theme-development” Exercises
- Testing Various Themes
- Testing Alternative Evidence
- Assessing Damages
- Juror Questionnaire Preparation
- Voir Dire Assistance
- Shadow Juries
Jury Research As A Settlement Tool

• If It Is Worth Expense For Trial, Probably Worth It For Settlement Purposes Too

  – Demonstrates Commitment to Case
  – Sharing of Consultant Report(s)
  – Video Clips From Deliberations
  – Client Persuasion Tool
Jury Selection

- Call The Process What It Is – Jury *De*-selection
- Making The Best Of A Difficult Situation
  - Get ‘Em Talking
  - Establish Credibility
  - Be Efficient
  - Be Respectful
  - Give ‘Em An Out

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Jury Selection – The Use of Questionnaires

- Benefits of Questionnaires
  - Better Questions Can Be Asked
  - More Efficient Process
  - More Information Obtained
    - Including Clues As To Communication Skills and Comprehension Abilities
  - More Honest Responses Elicited
  - Less Likelihood of Contamination of The Venire
Jury Selection – Juror Questionnaire Logistics

- Statutory Support
- Agreement Among Counsel If Possible
- Written Request *In Limine*
- Copying and Distribution
- Review and Use During Voir Dire
Jury Selection – Juror Questionnaire Drafting

- **Standard Form**
  - Judicial Council Form MC-001

- **Counsel- Prepared Form – Considerations**
  - Questions With A High Correlation To Plaintiff or Defense Leanings
  - Pushing Jurors To The Extremes
  - Novel Questions To Gather More Personal Information
Jury Selection – Exercising Challenges

• Be the “All-Seeing Eye” During Voir Dire
  – Little Clues Add Up
• Acting on Gut Instincts
• Stereotypes Are Stereotypes For A Reason
  – Not Fool Proof, But Better Than Nothing
• Exercise Peremptories With The Utmost Respect
• Restrictions On The Exercise of Peremptories
  – Race
  – Gender
Presentation of Evidence – Initial Considerations

- Essential Evidence – Beginning and Ending With Evidence Supporting Essential Elements of Case
- Essential Evidence – Supporting Key Trial Themes
- Anticipating Evidentiary Objections
  - Having a Plan B or Plan C
Presentation of Evidence – Trial Presentation Software

- High-tech Capabilities For Everyone
  - Persuasiveness
  - Modest Cost
  - Logistical Issues
Presentation of Evidence – Trial Presentation Software

• Evidence Suitable For Electronic Delivery
  – Documents – Reports, Jury Instructions, Etc.
  – Videotaped Depositions
  – Videotaped Demonstrative Exhibits
  – PowerPoint Slides
PLAINTIFF’S RE-ENACTMENT PHOTOGRAPH
POSITION and ORIENTATION COMPARABLE TO EXHIBIT 5 PHOTO
GUN POSITION
AFTER TEST SHOT

Fired Shell
in the
Ejection Port
Fired Shell in the Ejection Port:
Gun Fired with the Right Side Ejection Port Obstructed

Live Shell Ready to be Chambered
Reenactment of Firing
Individual Reenactment

Sony DVD Player / Video Cassette Recorder
Opening Statements – Key Goals

• Three Key Principles: Credibility, Clarity and Conciseness
• Taking Control of the Courtroom
• Explain *How* Jurors Will Learn As They Resolve The Dispute
• Telling a Story in Opening
Opening Statements – Defining Moments

- The “Golden Moment” Of Opening Statements
  - The Most Critical 1 to 2 Minutes of The Trial
  - Committed to Memory And Delivered With Skill
  - Tied to The Key Themes

- Developing Motivating Themes Around Knowledge Of The Danger And Opportunity To Avoid It

- “Attack” The Plaintiff? Or “Explain” His Role in The Conflict
Effective Cross-Examination

- No Substitute For Thorough, Time-Consuming Preparation – Particularly With Opposing Experts
- Annotated Outlines – Synchronized With Trial Presentation Software
- Establishing Points of Agreement
- “Less is More” Approach to Cross-Examination
Effective Closing Arguments

- Three Key Goals: Organization, Efficiency and Brevity
- Giving Your “Leaders” The Tools They Need
- Tapping Into Juror “Duty” on Liability and Damages
- Defending Against Sympathy - “O.K. - Not O.K.” Argument
- Encouraging Examination of Admitted Evidence