The Harmonie Group
Special Litigation Presentation

Legal Practice Tips Compendium

Case Handling Recommendations and Best Practices
Compiled and Presented by the Member Firms of The Harmonie Group
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WARNING: No list of possible issues, or summary of considerations, is sufficient to evaluate all of the possible factors in any specific case. This is an illustration only, a compilation of items that may affect your case. You need to review your case with your lawyer and obtain competent legal advice. Please also see the disclaimer on the website and below.

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I. SECTION ONE: DISCOVERY

1. ELECTRONIC DISCOVERY

A. Protecting Electronic Evidence

- **Privilege and Confidentiality Issues**: Privilege and confidentiality must be addressed early in the litigation through a thorough protective order. A strong clawback provision as well as clear and concise standards for confidentiality will avoid later disputes.
- **Predictive Coding**: The document review is typically the most expensive part of the discovery process. Technology assisted review -- also known as predictive coding -- automates a great deal of the process. Essentially, a group of attorneys reviews a sample set of documents and codes them based on their responsiveness. The software then studies those documents and their coding and can then use that baseline to review the remaining larger set of data. This approach has been approved in the appropriate set of circumstances. da Silva Moore v. Publicis Groupe, 2012 WL 2218729 (S.D.N.Y. June 15, 2012).
- **Implementing Proportionality to Attempt to Recover E-Discovery Costs**: Fed. R. Civ. P. 26(b)(2)(C) provides that a "court must limit the frequency or extent of discovery otherwise allowed by these rules" if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

B. Requesting Social Media Information

- Courts hold that social media is simply another source of ESI. EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430 (S.D. Ind. 2010) (social media might provide information inconsistent with Plaintiff's allegations). Discovery requests must be targeted to relevant information. Wholesale or indiscriminate review of a profile or social site is not permitted. Do not ask for the opposing party's entire account.

2. EXPERT WITNESSES

A. Taking an Expert's Deposition

- All expert depositions should have the following basic outline structure:
    - Opinions of the expert.
    - Bases of each opinion.
    - Assumptions behind each opinion.
    - Whether he or she is familiar with the other experts in the case.
    - Things left to be done in the case, including tasks that are not complete and whether he or she intends to complete them, e.g., review medical records, visit accident scene, etc.
    - What is his or her opinion of the opposing expert's work and/or credentials?
    - What texts, treatises, or reports does the expert deem authoritative in the field or useful for consultation.
    - His or her qualifications.
- Before the expert's deposition, a little basic research could yield some rewarding results. For example, see what he or she is saying on Facebook. Google his or her name and see whether any old PowerPoint presentations, papers, and slides pop up.

B. Defending Expert Depositions

- Be mindful that your conversations with the expert may not be privileged, including e-mail, text messages, etc. Make sure the expert understands this as well at the very beginning of the case. Thus, your "preparation time" for the deposition with the expert should be kept to a minimum.
- Maintain a list of materials reviewed by your expert and keep this list handy during the deposition. Also, later add to the list as you provide the expert with materials to review as the case progresses. You can stick this list into a trial exhibit notebook or list later.
- When you send materials to the expert, do not list every document being sent to him or her. This could come back to haunt you if the list was incomplete because you sent other documents separately. A simple sentence saying, "I'm enclosing materials for your review in regards to the above-referenced matter," will more than suffice (but, again, keep up with what you are sending in a separate list).

3. PLAINTIFF/OTHER PARTY DEPOSITIONS

A. Depose the Key Witness/es Before Other Witnesses

- Although it may be necessary to depose minor witnesses in order to get the requisite background information, when background information is unnecessary or is unavailable, the general rule is to depose key witnesses, such as the Plaintiff(s), before the minor ones. The reason for this rule is that deposing the key witnesses first affords less time for them to prepare to testify or be alerted to key issues or discrepancies.

B. Always Know Your Objective and Thoroughly Prepare to Meet It

- Always look at the model jury instructions before taking the deposition to know the burden of proof and exactly what you have to prove in the deposition.
- Use a separate page for each topic in your outline.
- Know the local rules of the Court.
- Always think about the record you are making.
- Prepare a set list of questions to ask if you receive the response, "I don't remember" or "I don't know," e.g., "Is there any document that would refresh your memory?" "Did you record the event in a diary or other record?"

C. Always Ask the Plaintiff Whether He or She Wishes to Change Any Testimony

- At the end of the deposition be sure to ask the Plaintiff whether he or she wishes to change *anything* to which he or she testified earlier. Likewise, ask whether there is any information that the plaintiff now remembers that he or she did not recall when the questions were originally asked. As a result, if you have to impeach the plaintiff at trial, you can show that you gave the plaintiff every chance to correct his or her testimony.

4. FACT WITNESS DEPOSITIONS

A. Identify Your Goals and Write Them Down

- Are you getting support for a motion, finding out what the witness knows, or trying to limit damage at trial?

B. Always Ask Whether Deponent Has Done Anything to Impair Their Recollection

- You may then ask specific questions about alcohol, drugs, or medications. At trial, the witness may try to claim he or she responded incorrectly at the deposition because he was under the influence of alcohol or drugs. This catchall phrase, however, will also prevent the witness from claiming he was tired, etc.

C. Serving Subpoenas

- If your case is pending in federal court, you can serve a subpoena anywhere within the federal judicial district in which your case is pending or you can serve it anywhere outside the district that is within 100 miles of the place of deposition named in the subpoena. Fed. R. Civ. P. 45(b)(2). As a practical matter, that means you can take anyone's deposition in the U.S. as long as you notice the deposition to take place within 100 miles of where the witness is served.
- In state court, the most helpful person to you will be the clerk of the court in the judicial district in which the deponent lives. After you determine what county the witness lives in, find the website for that county's court online. The web site will tell you the number for the clerk. (The National Center for State Courts website, available at http://www.ncsconline.org, lists all courts by state). The clerk can tell you the specific requirements of that state to issue a subpoena. Some courts even have a section of their website devoted to this issue.
- Some states require that you hire local counsel to open up a case in their state court. This route is not cheap. In addition to the costs of taking a deposition out-of-state, you will need to pay the filing fee to open a new case plus the local counsel's attorneys' fees.
- Be sure to ask the clerk what information the pleading for the new case has to include. Do you need a caption page with an affidavit, a caption page plus a motion asking the court to issue the subpoena, or some other set of pleadings? The clerk can guide you.
- You may need to get a commission or letters rogatory from your state court, depending on the witness's court's requirements. A letters rogatory is a request from your state court addressed to the deponent's state court, asking that court to issue a subpoena. A commission authorizes the person who receives it to conduct a deposition and take oaths in the foreign state.
- You can draft letters rogatory or a commission or and bring it to the court where your case is pending for your judge's signature. You may have to make a particular showing in your state's court. Ask the clerk in the witness's state how to get the commission to that court's judge; you may be able to do it by letter. A commission authorizes you to take the deposition but does not confer jurisdiction on the witness; therefore, you will still

need to invoke the process of the witness's court by opening a case or moving the court to issue the subpoena.

- In still other states, you can take a deposition by filing a notice of deposition in the court in which your case is pending and then filing a copy of that notice in the witness's state court. You may be able to do this by letter, or you may need to petition the court to issue the subpoena. Or you may need to submit a written agreement of the parties demonstrating that the parties agree to the deposition to both courts. Again, ***ask the clerk*** how this agreement should be filed.

5. CORPORATE DEPOSITIONS

A. Defending Corporate Depositions

- Practice, practice, practice. In deposition preparation, take on the role of the opposing attorney. Try to get the corporate representative as mad or confused as possible. If he or she does not want to eat dinner with you that night, you have done a good job. Anything the opposing attorney tries to do the next day should pale in comparison to your preparation of the corporate representative.
- Never have the corporate deposition at the corporation's offices. The other attorneys could ask for documents stored at the actual office, which leads to wasted time and effort. Instead, be clear from the very beginning where the deposition will take place, who will be produced, and how long each deposition will last.

B. Taking Corporate Depositions

- On the flip side, TRY to have the deposition taken at the actual company. That way, as mentioned above, if something comes up in the deposition, you can request and try to get the actual documentation.
- Always be prepared to call the judge during the deposition if there happens to be a dispute. Do not just take the other side's argument at face value.

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6. DEPOSITION PREPARATION PRIMER

"30 Things You Need To Know Before You Are Deposed"

1. Be Truthful

2. Listen to the Question

- Do not answer any question unless you hear it completely. If you did not hear and understand the question asked, ask the attorney to repeat it or ask the court reporter to read it back.

3. Understand the Question Before Answering

- Do not hesitate to ask the attorney to repeat or rephrase a question until you do understand it.

4. Pause After Each Question

- This gives you an opportunity to think and make an appropriate response. It also permits us to formulate an objection to the question if one is appropriate.
    - a. Explain objections that are allowed (objection form)

5. Do Not Guess at Any Answer

- "I don't know" or "I don't remember" is a fair answer.

6. Do Not Volunteer Information

- Answer the question that is asked of you, and only the question that is asked of you, and then stop.

7. Usually, No Explanations

- Never attempt to explain or justify your answer. You are there to give the facts as you know them and you are not supposed to apologize or attempt to justify those facts. Any attempt at such may make it appear that you doubt the accuracy or authenticity of your own testimony.

8. Be Verbal (for court reporter)

9. Remain Calm and Polite

- Do not lose your temper no matter how hard you are pressed. Counsel will likely test you to see if you will become angry or argumentative. Stay calm and counsel will likely stop attempting to make you look like a bad witness.

10. Beware Questions Involving Distances and Time

- If at any time you estimate distances or time in any of your answers, be careful and state that it is an estimate.

11. Quoting Others

- If you are testifying with regard to conversations, make clear whether you are paraphrasing comments made by you or other persons, whether you are quoting directly what was said and be clear on who said what.

12. Never Say Never

- Eliminate adjectives and superlatives such as "never," "always," and "had to be" from your vocabulary.

13. Do Not Testify About Things Not Specifically Asked

- Do not testify about documents, or about what other people know, or about your state of mind at a particular time, unless you are specifically asked.

14. Notes, Diaries, Etc.

- Do not plan to use any notes, diaries or any other documents to assist you during your deposition. Do not review any notes in preparation for your deposition unless counsel specifically approves what you review (as it may then become discoverable).

15. Documents Produced or Not Produced

- You may be asked about documents produced. If information is in a document which you need to see in order to testify truthfully and accurately, request the other attorney to provide you with a copy of the document. Do not answer a question about a document until you have reviewed it and understand the context of the question. Do not agree to supply documents that have not already been produced.
    - a. If you haven't seen a particular document before or did not prepare it, don't try to guess what it means. Do not vouch for the accuracy of a document. Also, be careful not to interpret a date shown on a document as being the true date of its writing, delivery, etc.

16. Mistakes

- If at any time during the deposition you realize you have given an erroneous answer or you have misspoken, correct your answer as soon as you recognize your error. Either tell the opposing lawyer that you misspoke, or tell your attorney at the first available opportunity.

17. Listen

- Do not let the opponent put words in your mouth. If necessary, restate or rephrase in your own words the attorney's question. Pay particular attention to introductory clauses preceding the question. Do not accept the other attorney's summary of your testimony or of another person's testimony unless it is completely accurate.

18. Relax

- You are not expected to know by memory all details of what was said, when, by whom, and where over a long period of time. Do not offer an answer requiring you to consult records not available at the deposition or requiring you to consult friends and associates for the answer.

19. Consulting With Your Attorney Prior to Deposition

- Don't be embarrassed about admitting that you have met and consulted with counsel prior to giving your deposition. If asked what you talked about, simply say your attorney merely instructed you to be truthful and honest. Anything else discussed with counsel is confidential and should not be revealed to the other side.

20. Consulting With Your Attorney During the Deposition

- What we discuss on breaks will be privileged unless we specifically take a break to discuss how you should answer a question posed by counsel during the deposition (unless we are discussing whether the question calls for privileged information).

21. Freezing Your Testimony

- Beware of questions by the other attorney beginning with the words similar to "Is that all?" THE OTHER SIDE IS ATTEMPTING TO FREEZE YOUR TESTIMONY. A good answer to such a question would include phrases such as "To the best of my recollection at the present time." Also, beware of compound questions.

22. No Jokes

- Never joke in a deposition. Try to avoid wisecracks and obscenities. The humor may not be apparent on the cold transcript and may backfire, or may look crude or untruthful.

23. Do Not Converse with Opponent

- After the deposition is over, do not chat with your opponents or their attorneys. Remember, the other attorney is your legal enemy. Do not let friendly manners cause you to drop your guard or become "chatty."

24. Do Not Speculate

- Do not try to figure out before the answer whether a truthful answer will help or hinder your case. Answer truthfully. Counsel can deal with the truth effectively, but are handicapped when you answer any other way.

25. Final Advice

- Your deposition is being taken to provide the opponent with information to be used AGAINST you. You cannot "win" a deposition. So please answer the questions truthfully, but concisely. Do not provide more information than asked for.

26. Reading and Signing of the Deposition

- After your deposition is concluded, the court reporter will transcribe the record into a typed written deposition. You will then be given an opportunity to read the deposition and make corrections, either in misspellings, mistaken dates, or other such changes. You will also need to give a reason for each such change. You will have a limited number of days in which to make corrections. After the time limit has passed, the court reporter will certify that the deposition is correct.

27. Video Deposition

- Should your deposition be scheduled as a video deposition, it will be necessary for you to dress appropriately. Try to avoid bright flashy clothes. Dress in a manner that does not draw attention to your clothing.

28. Who May Be Present at Deposition?

- Only the lawyers, the parties, and the court reporter may be present at the deposition, unless counsel has given advance notice of someone else in attendance. Occasionally, a legal assistant will be present at the deposition. This is permissible.

29. Multiple Depositions

- Occasionally, a party may be called upon to give more than one deposition. You will be given advance notice in the event that you will be deposed more than once. The same rules as above would apply.

30. A Deposition Is Sworn Testimony

- The deposition is sworn testimony taken under oath and should be treated as such and given exactly as you would give testimony in court.

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II. SECTION TWO: MOTION PRACTICE

1. GENERAL MOTION PRACTICE (NEW YORK)

A. Supreme and County Courts Follow State and Local Rules

- Motion practice in the Supreme Court and County Courts is governed by the CPLR, Uniform Rules 202.7 and 202.8 and individual judges rules. In the event no judge has been assigned to a case, before filing a motion a party must file a "Request for Judicial Intervention" with the $95 filing fee.
- A motion is made in one of three ways:
    - (1) by notice, as discussed below;
    - (2) by the court on its own motion (or *sua sponte);*
    - Or (3) *ex parte.*
- In Supreme Court, an *ex parte* motion is made without notice "at a motion term or to a justice out of court in any county in the state". However, this method is rarely used, and only in a few instances specified by statute. A motion by notice is considered made when the motion papers are served upon the opposing party or parties. A notice of motion should contain: "time and place of the hearing; the supporting papers upon which the motion is based; the relief demanded; and the grounds therefore." CPLR 2214(a). The notice should also contain the moving party's request for oral argument. CPLR 2212(c).

B. Counsel Can Submit an Affirmation Instead of an Affidavit

- The moving party's counsel can submit an affirmation instead of an affidavit – the difference being that an affidavit requires someone to notarize counsel's signature. CPLR 2106 provides that an attorney admitted in New York, or a physician, osteopath or dentist authorized to practice in New York, may execute an affirmation "…subscribed and affirmed by him (*sic*) to be true under the penalties of perjury" with the same force and effect as an affidavit. Be careful if you are representing one of these professions as a party to the lawsuit. A submission of an affirmation where the signer is a party to the action is not permitted under this rule.

C. Addressing Issues in the Lawsuit Without **Motions**

- Discovery issues in the lawsuit can often be addressed without motion. The party seeking discovery can file a Request for Judicial Intervention and request a preliminary court conference. Often the court will issue a scheduling order based on discussions at the preliminary conference. Should a party fail to comply with the scheduling order, then the discovery-seeking party may proceed to file a motion to compel.

D. Briefs or Memorandum Should be Submitted With the Notice of Motion

- This includes legal briefs, "memorandum of law" - statements of the law; and affidavits - statements of the facts.

- If a brief or memorandum of law is going to be used on a motion, it should be submitted with the notice of motion. However, in most cases a brief will not be part of the appellate record, should the motion go up on appeal.
- All papers served, filed, or both need the name, address, and telephone number of the attorney for the party serving or filing the paper.

E. Practice Tips

- In the notice of motion and affidavit's prayer for relief, always include a general prayer, for "…such other and further relief as the Court may deem just and proper". This provides room for the Court to craft a solution to the motion that was not anticipated by the movant and not included in their relief demand:
    - General relief clauses, for "such other, further, or different relief," are often included in notices of motion by practitioners to cover the possibility that the appropriate relief is not what the movant has specifically asked for, "but is close enough to enable the court to grant it" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:5). The presence of a general relief clause enables the court to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced (cit. om.)
- Service of motion papers is governed by CPLR 2103 Subsection (b) sets out the different methods of serving a party. If the party is represented by an attorney, then it is proper to serve the party's attorney. Direct service upon a party is only permitted when the party is not represented by an attorney. Service by first class mail is the most common form of service. Service by mail is complete upon depositing the papers, properly stamped and labeled in an envelope into the mailbox in New York State.
- Fax is another acceptable method of service; however, a copy of the papers must be mailed as well. The party's attorney is deemed to have consented to service by fax if the office's fax number is included in the address block on a paper served or filed in court. The attorney can, by notice, revoke any willingness to receive service via fax. Service by fax is complete when the receiving attorney receives a signal "indicating that the transmission was received." Service via email is not a regular method of service at this point. However, courts are permitting parties to serve papers via email.
- The method of service will impact the timing of your motion. CPLR 2214 provides that where the moving papers are served at least eight days before the return date, the opposing papers ("answering affidavits") shall be served at least two days before the return date. Where the moving papers are served at least sixteen days before the return date, the opposing papers and any notice of cross-motion shall be served at least seven days before the return date. Any reply by the moving party shall be served at least one day before such time.
- A party opposing a motion may attempt to respond via a "cross-motion" which by rule needs only to be served three days before the return date. This results in much last minute motion practice and adjournments. This can be avoided by including in the original motion papers a DEMAND that ALL answering papers and affidavits AND cross-motion papers be served seven days prior to the motion return date. This puts the

deadline to serve a cross-motion on par with all other motion response papers. CPLR 2214, 2215.

- CPLR 2103 does provide that, if the party serves by mail, then where a period of time prescribed by law is measured from the date of service, five days shall be added to the prescribed period. In terms of the above-referenced dates, that would mean serving by mail at least thirteen days (8+5) in advance of the return date so that the movant has opposing papers at least two days before. Likewise, it would mean serving by mail at least twenty-one days (16+5) in advance, in order to have opposing papers seven days before.
- A special proceeding "is also a plenary action, culminating in judgment, but is brought on with the ease, speed, and economy of a mere motion," and it must be authorized by law. The procedure for a special proceeding is governed by CPLR Article 4, and is similar to motion practice. In a special proceeding, the petitioner (analogous to plaintiff), serves a notice of petition (summons), petition (complaint), and affidavits- specified in the notice- upon the other party, the respondent, at least eight days before the time the petition is to be heard before the court.
- Service of a notice of petition is governed by CPLR 308. Because the notice must state a return date, a party filing a notice with the clerk should also file a Request for Judicial Intervention, that way a judge will be assigned right away and the return date can be set. On the return date, the parties turn over all the papers they have served in the matter to court. Then the court will either make a summary decision if there are no triable issues of fact, or the judge will hear a trial.
- As noted above, a party needs to make a request for oral argument. This can be accomplished simply by a request by the moving party in the notice of motion or order to show cause. The responding party can accomplish this by making a request on the first page of the answering papers. If all parties request oral argument, the judge usually grants it, unless (s)he thinks it is unnecessary.
- Extensions of time are guided by CPLR 2004, which states that: "Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act…." Further, the Court of Appeals has stated that courts enjoy a somewhat broader range of discretion when considering a motion for an extension of time under CPLR 2004." And the statute states that a motion for the extension of time can be made before or after a deadline expires, but it is far preferable to serve any such motions before the time deadline.

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III. SECTION THREE: THE TRIAL

1. TRIAL TIPS

A. In General

- Trials are probably the most dynamic and fluid activities in which litigation attorneys are involved. For that reason attorneys who are in trial need to have the capacity to adjust to the vagaries of the courtroom such as unanticipated testimony and unusual adverse rulings. The following is presented in outline form to suggest some guiding principles for handling trials, yet, at the same, allowing a trial attorney to react instinctively when necessary.

B. Get Inside Your Opponent's Head

- Identify the liability arguments of the Plaintiff and Co-defendants, and analyze how they affect your case.
- Identify and analyze the Plaintiff's damages claims:
    - Pain and Suffering
    - Economic losses
    - Medical & rehabilitation expenses
    - Life Care Plans

C. Have a Theme

- Develop a coherent strategy for presenting a defense on liability.
    - Identify your strengths and weaknesses
    - Preserve your credibility by contesting issues:
        - Where you have a legitimate dispute
        - That are germane to your defense
- Honestly assess the Plaintiff's damages and your defense:
    - Plaintiff:
        - What is the strongest element?
        - What is the weakest element?
        - Is there overreaching?
    - Defendant(s):
        - What is their strongest defense?
        - What is the weakest?

D. Jury Selection

- You should have the following goals in jury selection (in order of decreasing importance)
    - That the jury MUST keep an open mind until they have heard all of the evidence
    - That the Plaintiff has the burden of proof

- That the Plaintiff can call all of the witnesses necessary for the case and that you may not call, or recall, any (out of consideration for their time)
- That your client feels strongly about the defense (as opposed to an insurance company)
- That you are a credible advocate.
- That no juror has an obvious bias against you or your client
- To "preheat" the jury about your case

- Some techniques that you can use to accomplish these goals are:
  - Engage the jurors in conversation through open ended questions.
  - Mention parts of the Court's pretrial charge before the charge is given – it puts you and the Court as having the same thought process.
  - Mention you client by his or her first name (when one of your clients is an individual)
  - Discuss corporations as groups of people carrying out their jobs – not a faceless organization.

E. Opening Statement

- Educate the jury, NOT your opponent.
  - Give the jury a "road map" of the case.
    - Place the Plaintiff's case and your cross-examination of the Plaintiff's witness in context before you start your proof.
    - Engage their interest in waiting to hear the whole case if you give them something to expect (e.g. John Doe will testify about his theory …etc.)
  - Don't tip your hand to your opponent(s)
    - Don't educate your opponents on any twists or tricks in your case so they can address them during before you can raise the issue.
    - Don't try to "tie the case together" too soon – save that for your closing argument.
- Bring your client's interest to the forefront
  - Make sure the case is about your client, not about you.
  - Demonstrate that your client is engaged in the defense
- Engage the jury.
  - Let them know that they are "the most important" people in the room
  - Assure them that you know their time is valuable
  - Only ask for their attention during the trial
  - Promise them that you will endeavor to try your case efficiently.

F. The Trial

- **Generally**
  - Be yourself
  - Show respect for the Court
  - Show respect for your opponents
- **The Plaintiff's (opponent's) case**
  - Use objections wisely
    - Gauge how well you Judge knows the rules of evidence
    - Too many objections can make you look like an obstructionist and your opponent can often cure their error
    - Occasionally a well-timed objection can disrupt the flow of your opponent's case
    - Have strong and major legal objections well briefed.
  - Cross Examining Fact Witnesses
    - Consider a "fast start"
      - Establish bias
      - Establish inconsistencies
    - Make points with sharp, pointed questions
    - Don't give witnesses the chance to explain their way out of problems
    - Pace is more important that length
  - Cross Examining Experts
    - Seek to obtain concessions that your expert can exploit
    - Question in the areas you can control:
      - Foundation
      - Methodology
    - Avoid areas you cannot control:
      - Witness expertise
      - Science
- **Presenting your case in chief**
  - Consider revising/narrowing your theme
  - Recalling witnesses
    - Do a cost benefit analysis to determine if additional testimony advances your theory
    - Limit recalled witnesses testimony to limit cross examination
  - New Witnesses
    - Pace is important – be aware of juror fatigue
    - Fit your witnesses' testimony to your theme
      - Fact witnesses add necessary supplemental facts
      - Experts witnesses to establish the defense theory

G. Closing Argument

- Marshall the facts coherently to set up your argument
- Liability
    - Determine if you have a theory that your opponents have not consider.
    - Present a linear argument to support your theme
    - Be realistic, overreaching can backfire
- Damages:
    - Place the burden on the Plaintiff to be reasonable on damages
    - Emphasize the weaknesses in the Plaintiff's damage claim
- Plant the thought in the jurors' minds that they view the Plaintiff's contentions through the lens of your arguments.

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IV. SECTION FOUR: APPEALS

1. WRITING A WINNING APPELLATE BRIEF

A. Identifying Issues that Win on Appeal and Determining the Standard of Review

- For appellant's counsel, the goal is to search the record, including the order or judgment being appealed, the pleadings, transcripts, exhibits, jury instructions, jury verdict sheet, etc. in order to identify errors, or issues on appeal, and then set forth those issues concisely as "Questions Presented" at the beginning of the brief, followed immediately by the answers the appellant would like to see issue from the appellate court.
- For respondent's counsel, the sources for identifying issues on appeal are the same, but "Counter-Proposed Questions Presented" should be set forth to persuade the appellate court that the spectrum of issues raised below is minor or limited, and the answers to those questions should result in affirmance.
- **Standard of Review -** There are several standards, including the "arbitrary and capricious" standard of review applicable on appeal from a CPLR Article 78 proceeding, the substantial evidence standard of review applicable on appeal from a quasi-judicial determination of an administrative body or officer, the de novo standard of review applicable on appeal from a ruling on a summary judgment motion, and the abuse of discretion standard applicable on appeal from a ruling on discovery issues, since discovery issues are largely discretionary matters. Know which one you are writing for, and which one applies in your case.

B. A Concise Brief: Page Limits and Other Considerations

- Apart from concern that the brief might be rejected for exceeding page limitations, the appellate advocate should be worried about alienating judges by forcing them to read a brief that is too long. The advocate should strive for brevity, not only in page length but also in the number of issues raised on appeal.
- Judge Patricia M. Wald, former Chief Judge of the United States Court of Appeals for the D.C. Circuit, emphasized in Tip 2 in her article "19 Tips from 19 Years on the Appellate Bench" that, in order to have the appellate panel view your argument in a favorable light, you must write clearly and concisely:
    - The more paper you throw at us, the meaner we get, the more irritated and hostile we feel about verbosity, peripheral arguments and long footnotes. [W]e have by judicial fiat first shortened main briefs from 70 to 50….It's my view we can, should and will do more to stem the paper tidal wave. Repetition, extraneous facts, and over-long arguments (by the 20th page, we are muttering to ourselves, "I get it, I get it. No more for God's sake") still occur more often than capable counsel should tolerate. In our court, counsel gets extra points for briefs they bring in under the 50-page limits. Many judges look first to see how long a

document is before reading a word. If it is long, they automatically read fast; if short, they read slower.

- Judge Wald further emphasizes that the goal of brevity extends not only to the length of the brief, but also to the selection and number of issues raised on appeal.
- "Theme" is a traditional rhetorical device of persuasion that should be employed. In an appellate brief, use of the rhetorical device should take the form of highlighting aspects of the client's story that will evoke emotion in the court (such as sympathy for the client or disdain for the opposing party) and weaving the theme throughout the brief, beginning with the Questions Presented, continue into the Statement of Facts, and in the Argument itself.

C. Making the Most of the Table of Contents and Table of Cases

- **Table of Contents –** To the extent that the "Table of Contents" is required to duplicate the headings and subheadings within the brief itself, they will be persuasive if the headings and subheadings are written to be persuasive, including repeating the theme of the brief, identifying the issues on appeal, applying the law to the facts of the case, and suggesting the decisions and outcomes which should be favorable to your position.
- **Table of Cases –** The "Table of Cases" or "Table of Authorities", can also be persuasive to the extent that it demonstrates that the brief writer is aware of and has complied with the rules regarding citation of cases; but also that the cases relied upon are binding and guiding precedent, such as cases from the Court of Appeals and appellate division considering the appeal.

D. Statement of the Issues: Framing a Picture, Not a Puzzle

- The importance of properly framing the "Questions Presented" cannot be overstated. A properly framed issue provides the appellate court's first introduction and outlook to the case, the issues, and your theme.

E. Writing the Statement of Facts with Clarity, Relevance, and Purpose

- The "Statement of Facts" does not necessarily have to be chronological. The most effective order to present the facts may vary from case to case, depending on the issues on appeal, or the procedural stage of the case below. Whatever method you use to organize the facts, be consistent, be complete, and assist the court by using headings, subheadings, a chart, or timeline, where necessary.
- Judge Wald's Tip 4 for preparing the "Statement of Facts" is to make the facts tell a story:
    - [S]pend time amassing [the facts] in a compelling way for your side but do not omit the ones that go the other way. Tackle these uncooperative facts and put them in perspective. (Too many times the judge reading both briefs will not

recognize they are about the same case.) If you are appealing, make it seem like a close case, so any legal error will be pivotal. Above all, be accurate on the record; a mistaken citation or an overbroad reading can destroy your credibility vis-à-vis the entire brief.

- Always double check page references and citations to the Record for factual statements so the Record citation supports the statement and the Record reference is clear and unambiguous.
- Including facts that are favorable to your opponent in the "Statement of Facts" is a way to not only develop credibility with the court but also take the wind out of your opponent's sails by removing opportunity to point out to the court that you omitted relevant facts. If the court comes to doubt your candor, your ability to persuade is undermined.

F. Making Footnotes and Authority Citations Work for You

- Footnotes should never contain crucial parts of an argument to avoid being overlooked.
- Footnotes should also never be used as a thinly disguised means to fit within the appellate court's page limitation requirement.

G. Variations in Format: Finding the Best Way to Highlight Your Main Points

- Use the four major elements of document structure referred to by graphic designers by the acronym "CRAP" (Contrast, Repetition, Alignment, and Proximity). "Contrast" involves the use of contrasting typefaces. "Proximity" involves placing the text of the brief of a particular section closer to the heading at the beginning of the section. "Alignment" refers to aligning the text either against the left margin, the right margin, or centered. It also refers to whether the text is fully justified or not. Full justification aligns the text against both the left and right margins, creating "text blocks". "Repetition" means being consistent with the graphic set up and structure throughout the brief.

2. ORAL ARGUMENT

A. Never Waive or Forfeit Oral Argument

- It is your opportunity to present the grounds for the appeal, or uphold the lower court's decision. The court may have legitimate interest (or even support for) your position, which is lost if you do not appear.

B. Concisely State What the Lower Court Did and Why

- Then explain why it should be reversed or upheld. Be prepared to explain and defend the lower court's ruling if you are the respondent. Have parts of the Record ready to defend the lower court decision, and to show how the lower court reached or justified its decision.
- Appellants – be sure you are able to point out the error in the Record, where the alleged error occurred, and how it was preserved for appeal, i.e. objections, exceptions, motions, offers of proof.

C. Keep Your Main Argument to a Few Main Points

- Whittle your main argument down to one to three main points with one to three factual references, and one or two primary supportive cases - that's it. Have THREE points you want to make, and make them at the outset. Given shrinking time allotments for oral argument, there generally is only time for 1-3 points and answering questions from the court. Time your argument so that you are well UNDER TIME to allow for court interruptions.
- **Appellants** – be prepared to concisely tell the appellate court what you want it to do- reverse summary judgment, grant you a judgment, reverse an entire verdict, order a new trial on limited issues, etc.? What remedy do you want the court to apply?
- Outline your major points in **BOLD** print on separate pages or cards in **LARGE TYPE** so you can flip through your notes easily, and then come back to them upon questioning:
    - Outline your arguments.
    - Use parties' names.
    - Less is more.
    - Appendix a critical document, testimony or case into your Brief for emphasis and quick reference.

D. Assume the Court Has Read the Briefs

- Structure your argument to ***parallel*** and ***explain*** your brief. However, ***do not*** read your brief or argument.

- If there are multiple parties to the appeal, know how much time YOU have and focus on any point that uniquely affects your client.
- Appellants, let the court know at the outset how your client was "wronged" by the court below. Respondents, tell the court why the lower court's decision was reasoned and reasonable. If you are the appellant, argue that the lower court ruling is not only legally wrong or factually untenable, but results in an unfair or incongruous outcome. Give the court REASONS – not just technicalities – to reverse or affirm.

E. Never Interrupt a Judge

- Stop talking – listen and respond. Always answer the judges' questions immediately. Do not say "I'll cover that later" or "That falls later under point 2 of my argument". Listen to the questions, and if you are the respondent be prepared to address those points when it is your turn.

F. Rehearse

- Rehearse your projected questions and answers with another lawyer to practice how you will address questions, and how to blend them into your argument. Practice how best to phrase your arguments.
- Be confident and not defensive. If you are the appellant, you presumably took the appeal because there are one or two strong legal or factual points supporting the appeal. If you are the respondent, the lower court already agreed with you.

G. Update Key Cases

- Between the time briefs were filed and oral argument be sure to update key cases for new decisions. You can pick up a new case, get a sense of the court's direction, and avoid embarrassment if there has been a major new decision.
- Show conviction. Do not put the court to sleep. Show the court you believe in the strength of your case, but not denigrate opposing counsel or the lower court.

H. You Need a Brief and Well Thought Out Conclusion

- Do not let your argument wither away at the end. It is a sound bite, like a good conclusion to your written brief. Finish strong.
- Try to harmonize your three appellate arguments:
    - The one you outlined,
    - The one you actually give, and
    - The one you WISHED you gave thinking about it driving home.

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V. SECTION FIVE: ALTERNATIVE DISPUTE RESOLUTION

1. ALTERNATIVE DISPUTE RESOLUTION (ADR)

A. ADR Generally

- Takes parties out of public justice system by agreement or court order to resolve dispute before private tribunal

B. Common Types of ADR

- Mediation
- Moderated Settlement Conference
- Summary Jury Trial
- Arbitration

C. Mediation

- Impartial person (mediator) facilitates communication between parties to promote reconciliation
- Mediator should not impose their own judgment

D. Moderated Settlement Conference

- Nonbinding
- Case submitted to panel of three impartial persons
- Panel issues advisory opinion
- Use advisory opinion as basis for future negotiations

E. Summary Jury Trial

- Nonbinding
- Case submitted to panel of jurors drawn from county's jury pool
- Panel issues advisory opinion
- Use advisory opinion as basis for future negotiations

F. Arbitration

- May be binding due to contract or agreement between parties, or may be nonbinding
- If binding- case submitted to third party which renders award
- If nonbinding- award is advisory only and serves as basis for future settlement negotiations

G. Confidentiality

- Encourages frank, open discussion
- Enables mediator to assist in reaching a voluntary resolution of the dispute
- Consider withholding certain information despite confidentiality

H. Confidentiality Agreements

- No airtight protections
- Safest route- sign a confidentiality agreement
- All persons in attendance (parties, counsel, mediators, experts, insurance representatives) should sign confidentiality agreement

2. THE MEDIATION PROCESS

A. Opening Statement

- Preparation before arrival
    - Compilation of arguments
    - Compilation of settlement offer basis
- Sets the tone
- Level of preparation for statement
- Visual aides
- Like a trial
- Demonstrate empathy toward Plaintiff but what trial will be like
- Summation / visual aides
- Live presentation
- Possible opening statement by client
- Avoid posturing – Be able to back up what you say

B. Resolution and Post-Resolution

- Resolution may mean settlement
- Resolution may mean agreement for post-mediation settlement discussions
- Create a clear exit plan
- Considerations
    - Settlement documents may need to be revised and signed
    - Set forth meaningful time frames for compliance at mediation

C. The Obstinate Plaintiff

- When faced with an obstinate Plaintiff, there are a number of different issues defense counsel may openly suggest in joint session or the mediator may raise inside the caucus room
- Plaintiff's own liability (if counterclaims asserted)
- Plaintiff's burden- preponderance of the evidence
- Mitigation by Plaintiff
- Loss of privacy- trade secrets, embarrassing revelations
- No control in judicial process
- May have to pay Defendant's attorney's fees and litigation costs if statutory or contractual requirement
- Dirt blows both ways- Plaintiff may lose good reputation

D. Issues Common to the Legal System

- Changing loyalties of witnesses, contradicting discovery
- Complexity of case, the average juror
- Damage claims are speculative and difficult to prove

- Changes in law- such as caps on pain & suffering
- Nationwide mood swings- post 9/11
- Morality of jurors may be stricter than morality of Plaintiff
- Increased difficulty of proof (large companies may have insufficient recordkeeping, employee turnover)
- Hardworking jurors do not want to give more than they earn in a year or lifetime
- Litigation can take years, requires attorney time, discovery, experts, appeal- and possibly no payoff
- Emotional and personal stress
- Possible uncollectibility
- If litigation takes long enough- witnesses, judges and attorneys retire and die.
- Don't expect jumps of equal value in negotiations over money (Plaintiff moves in dollars, Defendant moves in pennies)

E. Issues Related to Defendant's Case

- Defendant may fight tooth and nail in this case to set a precedent and discourage future suits
- Consider time value of money
    - Plaintiff can take 1 million today or wait through five years of litigation for 2 million

3. PREPARING FOR MEDIATION

A. Why Mediate Early?

- Parties are flexible and oriented toward resolution
- Ideas and opinions harden over time
- "I've gone this far, why not go all the way to trial?"
- Trial seems far away
- Trial IS far away- court dockets are slow
- Possibly most effective before discovery
- Litigation process breeds distrust and it may be difficult to reach resolution with opposing counsel you no longer trust
- Cost containment
- Attorney fees

B. Try to avoid the following actions:

- Arriving late or on the cell phone
- Demeaning opposing counsel or party
- Expressing frustration about mediation process
- Not working during mediation

C. Attorney Preparation

- Objectively consider strengths and weaknesses of entire case and counsel client as to same
- Know mediator's style
- Determine what client wants out of mediation
- Develop a strategy beforehand
- Determine what kind of concessions your client is willing to make or will have to make to resolve the matter
- Prepare opening statement
- Determine your "walkaway point" by calculating the expected value of the case
    - Take most probable jury award and multiply it by the % of likelihood that the Plaintiff will win
    - Ex: if most likely jury award is $20,000 and Plaintiff has a 60% chance of winning at trial, multiply $20,000 by .60 and the result is $12,000
- Address any lien issues

D. Document Preparation

- Confidential mediation notebook
- Confidential mediation statement
- Effective demonstratives
- Questions for mediator to ask Plaintiff

- Draft settlement documents
    - Increases likelihood of getting terms you want in more efficient manner

4. MEDIATOR SELECTION

A. Mediator Selection

- Credentials (accredited by professional mediation organization)
- Training
- Reputation and prior personal experience
- References
- Experience
- Subject matter expertise
- Neutrality
- Personal traits

5. MEDIATION STRATEGIES

A. Adversarial Strategy

- a.k.a. "Positional" or "Competitive Approach"
- Start with opposite positions, make calibrated concession until negotiators are close enough to either split the difference or adopt one of last offers
- Make lofty demands, concede little
- View strategy as win or lose with no middle ground
- Consistently challenge opposing counsel's arguments
- Claim that there is one right solution- your client's solution
- Limit exchange of information
- Less involvement by client
- Decisions based on pressure

B. Comparisons

- Information management
    - Problem-solving negotiators share information
    - Adversarial negotiators withhold information
- More likely to reach an agreement
    - Problem-solving negotiators
- More likely to achieve a better result
    - Adversarial negotiators
- A survey of attorneys found that a greater percentage of problem-solving negotiators were deemed by their peers to be effective

C. Considerations

- Mediation is different from litigation
    - Perhaps try problem-solving approach at mediation and adversarial approach at trial
    - Primary audience at mediation is Plaintiff, not jury. Consider whether adversarial approach is self-defeating
- Approach may be impacted by whether parties are at the same stage of negotiations

6. HOW TO AVOID AN IMPASSE

A. Impasse

- Don't hurry- give it time and keep the process going
- Be creative in your solutions- consider non-financial solutions
- Don't worry about what the other side is doing

B. Use the Mediator

- Don't tell mediator too much up front
- Ask the mediator for suggestions
- Tell the mediator confidential information so that he can reveal the fact that you have damaging evidence in your back pocket
- If a representative doesn't have enough authority to settle, telephone the person with the authority and have them speak to the mediator

C. Additional Alternatives

- Attorneys meet without their clients
- Save information or arguments to be used at this time
- If you can't settle the whole case, take each issue separately
- Consider other ADR procedures- arbitration, private judge trial, mini-trial
- Consider the "what if" approach
    - "I will offer X if you will demand Y"
- Take a recess instead of an impasse

D. And Finally …

- Have mediator obtain everybody's final figure, this number remains confidential while mediator assesses the next step based on how close numbers are (or aren't)
- Reduce final offers to writing, make settlement contingent on offer being accepted by certain date
- It takes two to impasse- before leaving reflect that there is nothing you can do to make mediation work
- Agree to *something*- even if it relates to future discovery, production of documents, expert reports.

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VI. SECTION SIX: CLIENT DATA SECURITY

1. HARMONIE GROUP CLIENT DATA PROTECTION POLICIES

A. Harmonie Group Member Firms Ensure Client Data is Protected

- Harmonie Group member firms adopt technology and technology policies to ensure the security and privacy of client data. Member firms adhere to legal industry best practices that are well-established, practical and effective. The following security and privacy concerns are addressed either directly by member firm staff or by approved vendors used for outsourced or "cloud based" services.
- **Network Security** - Networks should be protected using advanced up-to-date firewalls that provide intrusion detection/prevention, content filtering, antivirus services, spam filtering and traffic monitoring/logging. Network accounts should be managed proactively and disabled or deleted completely as soon as a user leaves the firm. Passwords should adhere to standard "strong password" definitions.
- **Mobile Device Security** - Mobile devices such as laptop computers, tablets and smart phones are a significant source of data security breaches. Devices should be protected with data encryption, device password protection and remote wipe.
- **Remote Access Security** - Industry-standard products with proven security capabilities should be selected for remote access, such as Citrix, VMware View and VPN connections. Remote-access tools should always employ front-end security services that protect backend systems from unauthorized access.
- **Endpoint Security** - Securing desktop computers, laptops, servers and storage systems is a fundamental component of data security. Systems should be physically secured and protected from malware with locally installed, updated software.
- **Disaster Recovery and Business Continuity** - Data should be protected from loss due to technical failure or disasters. All data files should be backed up on a daily basis and a complete set of backup files should be stored at a secure location.
- **Document Management and Retention** - A structured document management system should be used in order to catalog and control the documents in the firm. One component of this system should be the ability to delete and purge obsolete or outdated client related data based on a regular retention policy.
- **E-Mail Security** - E-mail systems are significant source of security breaches. Outside services such as Mimecast or Postini can be used to block spam before it reaches the network. These services are commonly used, well-established and inexpensive.
- **Metadata and Redaction** - Firms should deploy software tools and use policies in order to eliminate the inadvertent disclosure of metadata as well as to appropriately redact personal identification information in documents that may be made public.
- **User Education** - Users should be informed and, from time to time, reminded about the potential for various security breaches, such as malware attacks and phishing

- **Cyber Security Insurance** - No data security measures can be 100% effective. Firms should maintain adequate Cyber Security Insurance to protect against direct loss, legal liability and consequential loss due to security breaches.