Four rules for discovery

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Handled correctly, discovery can transform your case-how the defense sees it, how you present it, and how the jury reacts to it. Every case has hidden gems that only discovery can unearth, once you learn where-and how-to start digging.

Discovery. Some lawyers dread it; others see it as merely one more hurdle to clear on the way to settlement or trial. Yet we all agree that discovery can change a defendant's perception of their risk and of the case's value.

But getting the kind of proof that gets the defendant to realize this doesn't happen by chance or luck. It comes from planning and preparation.

We've learned that the hard way. In our work as both trial lawyers and trial consultants, we have discovered four basic rules for conducting exceptional discovery. They integrate what we have learned on our own and from colleagues about proof, jury bias,[1] strategic case planning,[2] and motivating jurors to seek justice.[3] Follow these rules, and convince your opponent—or the jury—that your client is entitled to full and fair compensation.

Rule 1: Put it in writing

Many attorneys resist the idea of putting a discovery plan in writing, perhaps because there is no approved format for such a plan. We suggest one here, but the key is not the format—it's thinking through the case and putting those thoughts in writing. If you try to organize the entire case in your head, it will be more difficult to focus on what you want to do and how you want the direction of the discovery to go.

Before you do any discovery—or even plead your case—analyze your case facts through the eyes of the defense attorney, and more important, the juror most likely to sympathize with your opponent's case. When analyzing your case in writing, list

- probable case-critical issues, including (but not limited to) the prima facie case
- defenses, both legal and factual
- negative juror attitudes and biases about your client—including those that may be based on his or her background and character—and the damages claimed
- the defendant and any positives on the defendant's side: for example, a highly rated safety program, community goodwill activities, or a significant role in the community as an employer
- any problems with the case—for example, the plaintiff or those receiving the funds have personal baggage that has nothing to do with the case, but everything to do with whether jurors want to return a verdict for substantial damages—that could come up in jury deliberations.

The result of this exercise should be a fairly extensive list of bad facts and difficult issues, what we'll call "land mines," that could cause you to lose at trial.

Next, you'll need to figure out how to defuse the land mines. You may think defense counsel is lame or that your opponent's arguments won't carry any weight, but it doesn't matter what you think. It matters what jurors think. So look for all the land mines you can. And don't worry if your list looks alarmingly long. With patience and diligence, you can build an answer for each one.

The second piece of your written discovery plan should be identifying who and what you will use to either prove your case or defuse the items on your list of land mines. The people and items on this list will include

- witnesses who should be deposed to cover each case-critical issue for both sides (including lay witnesses, experts, physicians, and corporate representatives)
- standards and rules that apply to the conduct of the defendant and also to the conduct of the plaintiff
- documents you know about and those you anticipate discovering that are related to case-critical issues, bad facts, defenses, standards, and rules.

Finally, write out a time frame for your discovery, noting which case-critical issues you will explore first and the order of witnesses you will depose.

Rule 2: Get the case in focus

There are two kinds of proof: lawyer proof and juror proof. Lawyer proof may get you past summary judgment, but juror proof is what gets you a verdict. Prediscovery focus groups can help you view the landscape of your case from the juror proof perspective.

We recently worked as consultants on a medical malpractice case. It involved a patient who sat in an urgent care clinic for five hours before a specialist was called in to see her. The patient died shortly after.
When we got involved, the patient's family was suing the specialist rather than the urgent care physician. We advised that the urgent care physician should have been joined in the lawsuit, since he allowed the patient to sit in urgent care for five hours. The plaintiffs' lawyers dismissed our reasoning as "lame." But a focus group immediately latched on to the five-hour delay and, in deliberations, named the urgent care physician as negligent, not the specialist.
Unfortunately, by then, it was too late to add the urgent care doctor to the case. At trial, the same pattern played out: The urgent care doctor, who was a nonparty to the suit, was found at fault; the specialist was not.
We tend to think that we alone know what resonates with a jury. Often, we are wrong. So use focus groups to develop themes and find out who jurors want to hear from and what they want to hear.
Jurors gravitate toward the norm. They use common sense in deciding whether particular conduct is reasonable and whether a particular rule applies to it. Jurors are constantly asking, "How do people normally react when in this situation?"
If you know—from your focus group research—which standards and rules are important to jurors, you can use discovery to establish those rules. Here's an example from a recent nursing home case that we handled. During the deposition of a nurse, we established the rule for handling a resident who falls and is injured:
Q. Are there policies and procedures in place as to when a physician is supposed to be notified when a resident falls and hits his or her head?
A. Yes, there are.
Q. Can you tell me about those?
A. We need to notify the supervisor or the charge nurse, and she needs to come over and assess the resident. And the physician needs to be called immediately. Then we do vital signs and neurological checks every 15 minutes for an hour, and then every hour for four hours. And then it's once a shift for the next three shifts.
Q. According to the policies and procedures, should the physician be notified if an individual falls and hits his head, his pupils become sluggish, he vomits, and he has a severe headache?
A. Yes.

Rule 3: Spring the trap

Your aim in discovery is to change your opponent's perceived risk of going to trial and estimated value of your case. Asking the right questions of your deposition witnesses will go a long way toward helping you achieve each one of these goals.
A model for questioning witnesses—which a colleague coined the "Miller Mousetrap" because one of us developed it—has been used successfully in almost every kind of case imaginable.[4] The mousetrap, as its name implies, will catch the defense unawares, so spring it and bait it with care.
Here are the basic elements of the mousetrap.
Identify commonsense rules using simple language. Complexity, confusion, and ambiguity are friends of the defense.[5] So strive for the opposite: simplicity, clarity, and directness. Rules must be easy to understand, nontechnical, nonlegal, simple, and short.
In a recent medical malpractice case, the defendant failed to diagnose a shoulder dislocation for about two and a half months. The dislocation was evident on films that he took in his office on multiple visits; yet, for some reason, he didn't see it. Ultimately, the patient—our client—ended up with a shoulder replacement. Although the case involved highly complex medicine, we avoided using either medical or legal terminology in establishing the rule that the defendant broke. We showed that the physician must

- use reasonable care
- correctly interpret an X-ray
- look at the joint above and below a fractured humerus
- order another X-ray if the first one isn't clear.

Talk about personal responsibility and accountability. These are still a top concern among jurors. And fortunately, they are not difficult to talk about. Jurors easily understand these concepts. They understand that a person who follows the rules and is accountable for his or her actions is acting responsibly. A person who breaks rules and tries to avoid accountability is not.
In depositions, we often ask the defendant, "Do you accept responsibility for the collision?" Framing the question this way turns it into a win-win situation. We've discovered that it really doesn't matter what the

answer is. If it's yes, the defendant concedes that he or she accepts responsibility and acknowledges that he or she broke the rule. If it's no, it shows a continued pattern of avoiding responsibility.

Choose the sequence of your questions carefully. Questioning "from the hip" is unlikely to have the same effect as writing down your key questions and sequencing them for maximum effect.

Following the Miller Mousetrap sequence, you would ask questions that would show that

- this is the rule
- this has been the rule for more than x number of years
- the rule is important because…
- you (the witness) are supposed to follow the rule
- you (the witness) would expect others to follow the rule as well
- it is wrong not to follow the rule
- not following the rule is unsafe
- if you break the rule, someone can get hurt
- if you break the rule, you are responsible for all the harms and losses that result
- it is reckless not to follow the rule.

Recently, we have run into instances where the defendants actually bring motions in limine to bar the use of the word "rule" at trial. There are several ways to deal with this. We have begun using the word "rule" in depositions, tying it into the standard of care or standard of conduct.

Show how the defendant broke the rule. In a trucking case that we handled, the company had hired a driver who had been convicted of driving under the influence (DUI). On its Web site, the trucking company indicated that it would not hire anybody who was convicted of a DUI within the previous five years. Unfortunately, they broke that rule when they hired the trucker who was at fault in this fatal collision.

In the deposition of the human resources director, we asked him about the rule and how the company violated it by ignoring the applicant's own admission that he had been convicted of a DUI within the previous five years. By doing that, we were able to compare the conduct—the hiring of the trucker—to the rule, and establish that the trucking company broke the rule.

Documents produced by the defendant, including memos and photos, along with statutes and regulations can help to establish the rules or standards that the defendant had to comply with. Whatever documents you use, they should be accepted, and they should make common sense. And you don't need a lot of them. Here's an example where only one was used. In a road construction case, a witness was shown a photograph of the entrance to the construction site used by the plaintiff and asked specifically about that photo only. The answers to just a couple of questions clearly established that safety rules had been broken:

Q. Are there any channelizing barrels in this picture?

A. No, I don't believe so.

Q. And is there any sign that says, "left lane closed"?

A. No.

Get concessions, establish lack of qualifications, but more important, establish the rules and the choices that the defendant made in breaking them. You can then use these in motions in limine and cross-examination-, and in establishing the themes of your case.

Rule 4: Make it bigger than one event

Jurors want to feel they are deciding something important. They want to feel that the case before them is bigger and more important than just one case. So your case should be about more than just liability, causation, and damages; it needs to answer the questions jurors ask themselves as they sit for days in the jury box: "What difference will any of this make?" and "Why should I care?"

There has been a lot of talk lately about appealing to the juror's "reptilian brain."[6] Put simply, this means connecting the concepts of safety and survival with the defendant's duty to follow the rule. What you want to get across is: This case isn't just about the plaintiff's safety. It's about the jury's safety and the community's safety.

Is the case about a missed diagnosis by an emergency room doctor, or is it about an emergency room doctor too uninterested in his job to give good care? Is it about a bad truck driver, or is it about a trucking company that will hire anyone? Is it about an aide in a nursing home who made a mistake, or is it about a nursing home chain that ignores regulations and won't hire enough staff to do the work that is needed?

In your depositions, you can ask questions that make the case bigger than just one case. Have the witnesses agree that the rules apply not only in the case at hand but also generally. For example, in the case involving the hire of a trucker with a prior DUI, we were able to make the case bigger than a single case by showing that the trucking company broke their own rules about screening drivers because they hired hundreds and hundreds of truckers a year who drive all over the country, using the same shoddy screening process.

In another trucking case that we handled recently, we deposed the company's owner. One of his drivers put an unsafe truck on the road, and when the brakes failed, the truck collided with our client, causing his death.

In deposition, we asked the driver about the rules, which involved making sure that the truck complied with all safety regulations. When the company owner agreed that putting an unsafe truck on the road was a violation, we asked if it was an intentional disregard of the rights of all users of that road to put an unsafe truck on it, and he conceded that point, too.

By doing that, we made the case bigger in two ways: We showed the jury that the rule violation affected all the users of the road, and we got the defendant to admit that his company's conduct was more than merely negligent—it was reckless.

If you ask a defendant if he or she broke the rules, you often will be rewarded with a positive answer. As in the trucking example above, we typically go one step further and ask the defendant if breaking the rules amounted to reckless behavior. Here's another example, from a case in which our client—a patient at a nursing home—was denied medication he needed: Q. If the plaintiff didn't get his needed medication, that would be a reckless disregard of his rights as a patient, wouldn't it?

A. Correct.

Punitive damages are now in play, straight from the mouth of the defendant, not any hired expert. Cicero wrote, "If the truth were self-evident, eloquence would be unnecessary." The truth will be self-evident in your cases only if you do the preparation needed during discovery. The rules we've given you here are powerful case preparation tools. If you take the time to think out your questions, establish the rules, establish how the rules were broken, show how the violation of these rules makes the case bigger than a single event, and confirm these principles through the defense witnesses, the truth will become evident.

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Notes:

1. For the purpose of this article, the term "jury bias" refers to Gregory Cusimano and David Wenner's Jury Bias Model. *See* www.jurybias.com.
2. *See e.g.* Rodney Jew & Thomas Jones, *Reverse Planning—Until You Make the Problem Clear, You're Never Going to Solve It*, AAJ Advanced Med. Trial Skills College (Oct. 1–4, 2009), www.justice.org/cps/rde/xchg/justice/hs.xsl/9547.htm.
3. *See* David Ball & Don C. Keenan, *Reptile: The 2009 Manual of the Plaintiffs' Revolution* (Trial Guides 2009); David Ball, *Damages and the Reptilian Brain*, TRIAL 24 (Sept. 2009), www.justice.org/cps/rde/xchg/justice/hs.xsl/10329.htm
4. That colleague is fellow AAJ member Tom Vesper of West Atlantic City, New Jersey.
5. Rick Friedman & Paul Malone, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability* (Trial Guides 2006).
6. *See* Ball & Keenan, *supra* n. 3.