Arash Homampour
THE HOMAMPOUR LAW FIRM

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2017 Issue

Framing key evidentiary issues before trial

THE IMPORTANCE OF FRAMING KEY EVIDENTIARY ISSUES AND THEN FRAMING THE OVERALL CASE AND EVIDENCE

Framing is the lens through which we interpret issues. All cases have one or more key evidentiary issues. Framing those issues before trial can either eliminate the potentially damaging "evidence" that is (or should be) inadmissible or it can permit the introduction of other evidence necessary to see the whole picture.

The first step is pretty simple. Outline the elements of your claims and defendant's defenses. Figure out where there will be evidentiary issues and start planning how to address them at the inception of your case. Determine who has the burden of proof on the issue and get ready to file the pertinent pre-trial motion (e.g., motion in limine to exclude certain evidence or motion for summary adjudication as to an affirmative defense using defendant's factually devoid discovery responses).

Serve focused discovery (especially form interrogatory 15.1 requiring defendant to state the facts and identify the witnesses and documents supporting its affirmative defenses). Make sure to get substantive responses, filing motions to compel where necessary. Defendant has the burden of proof on its affirmative defenses and Plaintiff is entitled to discover the basis for these affirmative defenses. (*Burke v. Sup. Ct.* (1969) 71 Cal.2d 276, 281-282; Evid. Code, § 500.) A defendant can be compelled to disclose the evidence supporting each such claim or contention, e.g., "State the facts on which you base your contention (or allegation) that . . ." (*Burke, supra*, 71 Cal.2d at 281-282.) "An interrogatory is not objectionable because an answer . . . would be based on information obtained or legal theories developed in anticipation of litigation or in preparation for trial." (Code Civ. Proc. § 2030.010, subd. (b).) A party may be compelled to state his or her contentions as to the manner in which the other party was "negligent"

See Homampour, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2017 Issue

and the facts supporting this contention. It makes no difference that the facts were obtained entirely through investigations by that party's attorney. (*Southern Pac. Co. v. Sup.Ct.* (*Fuller*) (1969) 3 Cal.App.3d 195, 197-199.)

Common evidentiary issues include (or arise from claims involving) admission of party statements, drug and/or alcohol test results, punitive damages, releases, assumption of risk, comparative fault of Plaintiff or decedent, opinions in medical records, improper expert opinions, third-party conduct, other similar incidents, unduly prejudicial evidence, subsequent remedial measures, sudden medical emergency, animations/reconstructions, etc. Whatever the issue is, outline the elements necessary for admission of the evidence and make sure you either secure it or, if an affirmative defense, show defendant cannot prove it or disprove it.

Approaches to some of the issues above are discussed below.

Unduly prejudicial evidence

Because the scope of discovery is broader than what is actually admissible at trial, "facts/allegations" may come up that are either totally irrelevant or unduly prejudicial. We keep a running track of these in the electronic case file and file a motion in limine to exclude reference to them. For example, in one dangerous condition of public property/motorcycle crash trial in 2015 we made a running list to move to exclude "evidence" such as: (1) decedents' prior moving violations/traffic tickets; (2) that decedent had done a wheelie before the subject location, (3) Facebook pages or other internet cites related to speeding and/or speed tests in the subject area; and (4) that decedent only had four months of riding experience.

The frame was easy. Keep a running list and file the necessary motion to have the court determine whether the evidence was admissible or not. The necessary motion sometimes requires educating/reminding or simply focusing the court on the law. We have all heard the common refrain that a party wants to introduce evidence to attack a party's credibility. But, the law limits how this can be done. First, the law is also clear that any alleged bad acts evidence is inadmissible to attack a person's credibility in a civil case. (Evid. Code, § 787; *Grudt v. Los Angeles* (1970) 2 Cal.3d 575, 592; *Springer v. Reimers* (1970) 4 Cal.App.3d 325, 339 [where no showing Plaintiff was intoxicated when accident occurred or during testimony, evidence of Plaintiff's long history of alcoholism irrelevant and inadmissible to attack his credibility]; *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 460-461 [although Evid. Code, § 787 "is no longer applicable in criminal cases, it is alive and well" in civil cases].) Second, the law is clear that, subject to inapplicable exceptions, character evidence is "inadmissible when offered to prove his or her conduct on a specified occasion." (Evid Code § 1101, subd. (a).) For example, a party could not prove the other party was negligent based on evidence that the party has a reputation for being a "careless" driver or "accident prone." (*Towle v. Pacific Improvement Co.* (1893) 98 Cal. 342, 343.)

Also (and this is an important concept that many defense attorneys ignore), a defendant may not impeach Plaintiff's credibility claiming the Plaintiff lied about a collateral issue having no relevance to the case. In *Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, the Plaintiff lied about having extra-marital affairs with other men at work. The defendant in a sexual harassment lawsuit sought to introduce evidence that Plaintiff had lied to impeach her credibility. The Court of Appeals held as follows:

> We have already determined that the line of inquiry has become inappropriate. Mendez's and County's position would imply that the existence of an inconsistent statement is admissible to attack credibility. However, there must be a statement to attack. If the statement to be impeached is not admissible then the impeachment of it is not permissible. . . Further, specific instances of conduct relevant only to prove "a trait of his character [are] inadmissible to attack or support the credibility of a witness.

(Evid. Code, § 787.). (*Id.* at p577.)

Finally, under Evidence Code section 352, the court in its discretion may also exclude otherwise relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evid. Code § 352 operates as a brake on the concept that "all relevant evidence is admissible" under Evid. Code, § 351. Otherwise, the court would be bound to admit every piece of relevant evidence presented, no matter how duplicative, confusing, time-consuming or offensive it might be. (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) To exclude relevant evidence under Evid. Code, § 352, its probative value must be substantially outweighed by any of the excluding factors above (risk of "undue consumption of time," "undue prejudice," "confusing the issues" or "misleading the jury"). A balancing test is thus required – i.e., the more substantial the probative value of the evidence, the greater the danger that must be shown of one of these excluding factors to justify exclusion under Evid. Code, § 352. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609*; People v. Castain* (1981) 122 Cal.App.3d 138, 142-144.) The court must balance the following factors: (1) the relationship between the evidence and the relevant inferences to be drawn from it; (2) whether the evidence is relevant to the main issue or only to a collateral issue; (3) the necessity of the evidence to the proponent's case; and (4) reasons for its grounds for exclusion under Evid. Code. §, 352. (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.) The policy basis of Evidence Code § 352 rests on the fact that the probative force of this kind of evidence is too slight to overbear the dangers of prejudice, distraction by side issues, and unfair surprise. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1592.)

Subsequent remedial measures

First, it's important to remember that the rule against subsequent admissible measures is one of admissibility, not discoverability. (*Bank of the Orient v. Superior Court* (1977) 67 Cal.App.3d 588,

See Homampour, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2017 Issue

599 ["...section [1151] is a prohibition on the admissibility of evidence at trial. It does not purport to limit the scope of discovery"].) Evidence Code section 1151 states:

"When, after an occurrence of an event, remedial or precautionary measures are taken, which, if previously taken, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

The exclusionary rule of Evid Code section 1151 precludes evidence of subsequent measures only when they are offered to prove negligent or culpable conduct in connection with the event. The extrinsic policy basis for this rule rests on the premise that admission of the evidence will discourage defendants from improving the dangerous conditions causing injury due to fear of the evidentiary use of such improvements to their disadvantage. (*Schelbauer v. Butler Mfg. Co.* (1984) 35 Cal.3d 442,450.) However, where the policy assumptions behind section 1151 do not support its application, courts have refrained from gratuitously extending the exclusionary rule of section 1151 to bar relevant evidence. (See *Schelbauer, supra*, 35 Cal.3d at 350; and *Ault v. Int'l Harverster Co.* (1974) 13 Cal.3d 113, 118-120.) In other words, evidence of subsequent remedial repairs can be independently relevant on an issue other than negligence, including
to show:

(1) defendant's ownership or control (if disputed);
(2) defendant's duty to repair (if disputed);
(3) the possibility or feasibility of preventive measures;
(4) that the condition at the time of the accident was unsafe, if the defendant disputes this;
(5) that the faulty condition later remedied was the cause of the injury; or
(6) contradicting facts testified to by the adversary's witness (impeachment).

(1 Witkin, Cal. Evidence, *supra*, Circumstantial Evidence, §§ 164-167, pp.514-517.)

Also, the California Supreme Court has held that the subsequent remedial measure statute, Evidence Code section 1151, only applies to "remedial or precautionary measures" and not to reports or investigative findings conducted after an accident resulting in injury. (*Fox v. Kramer* (2000) 22 Cal.4th 531, 544.)

Proper framing of evidence of subsequent remedial measure within one of the exceptions to the rule of inadmissibility is simple. Go through the exceptions and see if they are disputed by covering them in written discovery and depositions.

Hearsay relied upon by experts

A recent California Supreme Court opinion has highlighted an issue that has plagued many of us during trial – defense experts restating hearsay matter and opinions (including those of non-testifying non-designated experts) to a jury under the guise of expert testimony. This practice has always been improper but now we have *People v. Sanchez* (2016) 63 Cal.4th 665, which held that an expert on direct may not "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.)

But, there still remains a critical distinction between use (or the limitation) of hearsay on direct versus exploration of hearsay during cross. The allowable cross-examination is broad. (*People v. Townsel* (2016) 63 Cal.4th 25, 55.) A party may attack the expert's credibility by raising material relevant to the issue that the expert was unaware of or did not consider, including inadmissible hearsay, to determine "'whether the expert sufficiently took into account matters arguably inconsistent with the expert's conclusion.'" (*Id.*, at pp. 55-56.) An adverse party may ask the expert "questions about whether the expert sufficiently considered matters inconsistent with the opinion." (*People v. Doolin* (2009) 45 Cal.4th 390, 434-435.) When an expert relies on the report of another expert in forming an opinion, the opposing party may cross-examine on the contents of that report. (*People v. Coleman* (1989) 48 Cal.3d 112, 151.)

Framing the evidentiary issue of hearsay with experts requires identifying the hearsay facts an expert is relying upon or has considered.

Admissibility of evidence regarding marijuana usage

We are seeing more motor vehicle incidents where there is an allegation that a party used marijuana at some point before the incident. But, case law has confirmed the limited admissibility of said evidence because "[e]ven if respondent's urine contained active THC, it is speculative whether the amount was sufficient to impair his ability to drive a motor vehicle." (*David v. Hernandez* (2017) __ Cal.App.5th __, 2017 WL 3141173. Framing evidence regarding impairment and marijuana usage requires inquiry into both the validity of the testing and then, assuming the test results are valid, what they mean in terms of impairment (if anything.)

Framing case evidence

My firm specializes in tough (almost impossible) liability cases – most of which involve arguably multiple responsible parties, including the Plaintiff or decedent. These cases are settled/won or lost based on how they have been framed to the decision maker. Defendant(s) will have their own frame. Framing starts the minute you are retained by the client and continues through discovery and trial. Many times, trial is a battle over whose lens the decision maker should look at the evidence through, with the fight lasting all the way up until rebuttal.

Many arguments are won or lost based on how an issue is framed or the lens by which you show the jury that the defendant violated laws designed to protect us all. A crude example is the "Guns Kill People" versus "Guns Don't Kill People; People Kill People argument," with the latter being a better-framed argument. Remember, it's the defendant

See Homampour, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2017 Issue

who is on trial for violating a basic legal right that each of us has.

Defendant will try to micro-frame the case around your client or another wrongdoer and their personal responsibility. I use a much broader frame that engages the jurors' personal sense of safety or security and show how defendant did not know who, when or where there would be a victim but knew there would ultimately be a victim of their unreasonable conduct, unreasonable management of their premises, or unsafe product. In other words, the victim could have been any of us.

There are many articles and books on framing and one good example is Mark Mandell's "Case Framing" book at Trial Guides: http://www.trialguides.com/product/case-framing/. But, I will give you concrete examples of how I use framing in my cases.

Primacy and sequencing are key concepts that must be used with framing. Many speak of the concept of primacy which crudely means that jurors will find information provided first more valuable and meaningful. Too much information dilutes the power of primacy. Primacy means that information provided to an audience first is the most valuable and meaningful. So, it is critical that you structure your case such that jurors are hearing it up front but also engaged by the meaning of the information.

Who you start discussing first is also key. Generally, I don't start with discussing the plaintiff because jurors tend to assign blame to the first party they are introduced to when a story is told. Secondarily, most jurors really don't care how great your client was at this beginning stage of the trial and are not really invested in righting the wrong committed. So, I invariably start with the defendant and its role in causing the event.

As to apportionment, it is very simple. You must accept it where you must for credibility's sake. If your client or another actor was responsible, own it at the beginning of trial in voir dire and ask about the jurors' receptiveness to evaluating a case based on shared responsibility. This way you have the credibility to then minimize your client or the other actor's split second wrong decision versus the defendant's years- (or days-) long gamble.

A products-liability case

Let us assume a hypothetical products-liability case (actually, it's a successful recent trial.) A father purchases a Sunbeam Quartz Home Heater. On that heater is a warning that says:

> WARNING: Risk of Fire – Keep combustible material such as furniture, papers, clothes, and curtains at least 3 feet (0.9 meters) from the front of the heater and away from the sides of the heater.

The father uses the heater to heat the bedroom in which his wife, himself and his baby daughter are sleeping. The family has clothing piled up in the room and somehow that clothing falls in front of the heater, a fire starts, and the wife dies in the fire. Family brings lawsuit against Sunbeam alleging the heater was defective. At first, second or the hundredth blush, one would think this case was impossible to win as the manufacturer's express warning was violated. Through effective framing, the case was won.

This event was not about a family violating the warning on a product. Product manufacturers make a profit selling products to us humans. Before they put a product out for sale, every manufacturer must engage in a basic safety analysis of their product and its hazards. Sunbeam knew that (because it warned about it) the heater's primary hazard was the risk of fire. Under the safety analysis (or design hierarchy), a manufacturer must identify the hazards associated with their product and then undertake a step-by-step process designed to protect the user before that product is sold. After identifying the hazard, the manufacturer must attempt to design out the hazard. If the hazard cannot reasonably be designed out, it must guard against the hazard. Subsequently, if the hazard cannot be effectively guarded against, it must warn about the hazard.

In this case, the manufacturer developed an internal temperature sensor that was supposed to shut off the heater in an overheat situation before a fire started. The defendant marketed the heater as having this safety feature on the product box and in the manual.

Specifically, the manufacturer claimed:

> This heater is equipped with a patented, technologically advanced safety system that requires the user to reset the heater if there is a potential overheat situation. When a potential overheat temperature is reached, the system will automatically shut the heater off.

In other words, if clothing or other combustible materials inadvertently got in front of the heater the "Auto Safety Shut-Off" would shut off the heater before it started a fire.

The manufacturer knew that consumers had a wide choice of home heaters when shopping at a local Home Depot, for example. The manufacturer knew that consumers would more likely buy their heater because of the "Auto Safety Shut-Off" and "heat safe protection" touted on the heater box.

But, the manufacturer (or at least one person at the company) knew that this safety feature may not work with Quartz (or radiant type) heaters because of the technology of radiant heaters. Radiant heaters radiate heat outside of the heater such that an object three feet away can rise to temperatures much higher than necessary to start a fire. But, non-radiant heaters never produce high enough temperatures to start a fire. The Auto Safety shut off would not work with a radiant heater because the internal temperature of the heater is not the same as the external temperature of an object. With non-radiant heaters, the external temperature of an object in the path of the heater is never higher than the internal temperature of the heater. None of this is known to the consumer.

Even more outrageous was the fact that only one person at the company knew of these risks (risks that would be

See Homampour, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2017 Issue

apparent to even a non-engineer had the company done the proper risk analysis) and he did not share this information with others in charge of product safety.

So, here the frame is that Sunbeam sold a heater where the consumer had an expectation that the Auto Safety Shut off would shut the heater off before a fire would start but Sunbeam knew that safety feature may not work but never told the consumer. It was not about a father misusing a heater or violating warnings.

I weaved this frame throughout all the depositions by getting Sunbeam's engineers to either acknowledge the safety/design hierarchy or confirm they didn't know what it was or it was not done (I got all three inconsistent responses from Sunbeam's engineers.) I was then able to get Sunbeam's engineers to acknowledge the technological limitations of the safety feature when used on radiant heaters and, specifically, that consumers had an expectation that the heater would shut off before a fire would start. (We won and won big, mid-eight figures, in a case where D offered $5,000.)

A dangerous-condition-of-public-property case

Let us assume a hypothetical dangerous-condition case (actually, it's another recent successful trial that unfortunately has to be retried on the issue of apportionment only with liability, causation and damages upheld by the Court of Appeal.)

A 19-year-old inexperienced motorcycle rider goes on a 4-hour ride with his brother and friends, racing through various roads and curves. As he approaches one curve, he leans over and travels into the opposing lane, striking another group of motorcyclists and killing one of the riders. Family brings lawsuit against the State for a dangerous condition of public property alleging the curve was dangerous and needed a speed reduction curve ahead warning sign. Again, you ask yourself, "How can this case be won?"

It was won because of successful framing. The frame was not what defendant kept urging: a reckless, inexperienced speed demon endangering people's lives and killing our clients' father/husband. Rather, the State of California knew that certain curves needed "curve ahead" and speed reduction signs so that a user knows that they have to reduce their speed from 55mph to 30mph to safely navigate this curve and that critical information was not provided to the road user.

Again, this frame was woven throughout depositions and trial. It was established that there had been accident after accident, death after death at this one "Horseshoe Curve" on Route 33 and that a "curve ahead" warning sign should have been present but was not. The theme was weaved during the deposition of the driver's brother who confirmed he was the lead rider, he took the curve too fast because there were no signs and had the signs been present he (and his brother) would have taken the curve at the posted speed and stayed in their lane.

Arash Homampour is a trial attorney and owner of The Homampour Law Firm, *a five-lawyer firm in Sherman Oaks that represents individuals in catastrophic injury/wrongful death, employment and insurance bad-faith matters throughout the State. He was named CAALA's 2010 trial attorney of the year and has been nominated as trial attorney of the year every year since 2004. In 2007, he was named one of the Top 20 Attorneys under the Age of 40 by the* Los Angeles Daily Journal. *From 2005 through the present, he has earned the distinction of being a "Super Lawyer," with the additional recognition since 2010 as one of the top 100 Southern California Attorneys. He is also an accomplished appellate attorney who has successfully briefed and argued many appeals, including matters before the California Supreme Court.*