ARE YOU THE STEAM ROLLER OR THE PAVEMENT?
FIVE THINGS THAT MAKE A DIFFERENCE

BY: MICHAEL J.WARSHAUER

The image of being steam rolled is not a pleasant one. However, all too often we plaintiffs' lawyers allow ourselves to be pavement-like in our passive control of our cases. We too often allow aggressive defendants and indifferent or biased courts to mold us like so much smoldering black asphalt on a hot August day. We lie lazily in the sun waiting for our cases to come to their natural conclusions. We sit without compensation while the minute hand on the defense lawyers' time clock swings round at nearly the speed of light. And all the while, our clients starve and the defendant is using our money to invest in another high-rise office building. It doesn't have to be that way. We can take control and keep it with good planning and dogged follow through.

We can move a case to conclusion by taking control of the case. There is no excuse for playing catch-up when usually it is we who decide when and even where to file suit. If a reasonable pre-suit investigation has been conducted, when suit is filed we are in control. Keeping the control is the tricky part. This paper will discuss some "things" that make a difference. Keep in mind, however, that the commandment to be in control is not a direction to be a "Rambo" trial lawyer. Indeed, sometimes control can be established so subtly that the defense almost thinks that it is actually calling the shots. Further, remember that an obvious effort to dominate the case will only serve to invigorate the natural tendencies of defense counsel to overwork the case and become stubborn and litigious.

Effective control will impose a steady, but not overbearing, pressure which guides the case towards its resolution in a time frame of your choosing. While every case is different and requires individual customized thought as to the best way to control it, the thoughts outlined below can be used in many cases to get into the driver's seat of the steam roller instead of being the steaming mass of malleable asphalt being shaped by the whims of our opponents.

1. TAKE CONTROL OF THE MOTION PRACTICE. -OR- BE THE PEN NOT THE PAPER.

The person who yields the pen controls what goes on the paper just as the steam roller controls the shape of the pavement. In other words, we plaintiffs' lawyers should be the ones filing motions instead of having motions filed against us. If we are the movants we are in control - we get to write first and last and we get to argue first and last.

A. FILE MOTIONS FOR SUMMARY JUDGMENT

Motions for summary judgment can be used to strike affirmative defenses and to establish liability. When liability has been established as a matter of law there is little chance of a defense verdict. A sample motion for summary judgment of liability is attached as Exhibit 1.

B. INSIST ON COMPLETE DISCOVERY RESPONSES

Too often the defense provides little or no answers to our discovery requests. Review the responses when they arrive and write a letter demanding a complete answer. Put that letter in a tickler system so that it comes back in ten days or so and write them again. Do not allow discovery responses to lie unchallenged. Without putting the pen to the paper with numerous letters we will be unable to convince a judge that the defense is causing the problem as opposed to our being too quick to file the motion to compel. Additionally, the better the paper trail the better the chance for sanctions. A typical letter to defense counsel is attached as Exhibit 2.

C. FILE MOTIONS TO COMPEL

After the letters have failed, we must follow up with a short motion to compel. Attach the questions and answers. Make it easy for the judge. Long briefs are rarely necessary as there are few instances when the materials sought present complex issues. Most of the time the defense is just being lazy. A simple motion to compel with attachments is attached as Exhibit 3

D. PREPARE MOTIONS IN LIMINE

We must take control of the case by filing motions in limine. This allows us to be the first to talk to the court the day of the trial and allows us to tell the judge our version of the facts. Also consider filing a motion to prevent a particularly obnoxious opponent from doing his particularly obnoxious things. This will usually throw him off balance and put us firmly in the driver's seat of the steam roller. A motion in limine which includes reference to defense counsel's conduct is attached as Exhibit 4.

E. FILE JURY CHARGES EARLY

Some lawyers think that filing the jury charges early somehow gives the other side a window into our case. If the charges are correct statements of law that is not a risk. Additionally, sometimes charges are tendered for positions that will be abandoned and the defense will waste hours preparing for that which does not occur. Control of the defendant's resources is control of the case. Additionally, every judge agrees that the way to a judge's heart is paved with timely filings of jury charges, with case law attached where necessary.

2. HAVE A STRATEGIC PLAN OF ACTION -OR- BE THE ROADRUNNER NOT THE COYOTE.

In the popular Roadrunner cartoon, Wile E. Coyote is perpetually chasing the Roadrunner without catching him. The poor coyote is like lots of plaintiffs' lawyers - tons of wasted effort without reward. Remember, we don't get paid by the hour. We get paid by obtaining compensation for our clients. We do that by getting to the courthouse -

not by chasing the defense lawyer around the waterless desert that is pre-trial shenanigans.

A. CONDUCT PRE-SUIT DISCOVERY

It is truly amazing how many lawyers think that the only time we can do "discovery" is after the suit is filed. After suit is filed we can only be the coyote and must chase the defense for access to many witnesses. In fact, the best and most effective discovery is conducted before the suit is filed. Fed. R. Civ. P. Rule 11 requires us to investigate our claims before suit and imposes potentially severe sanctions on us if we do not have a good faith basis for the claims in our lawsuits. Similarly, our rules of ethics require us to pursue only those actions which have a legitimate basis in fact and law. In this process, when conducted pre-suit, we can interview witnesses freely, including the actual defendant. Take advantage of this opportunity to discover the witness' view without the contamination of the defense counsel's comments and objections at deposition.

B. CONTROL DISCOVERY

It is imperative that we know what we need to prove our cases and how best to get it. We must have a plan that includes the who, the what, the how, and the when. Our plan needs to be accomplished in a reasonable time frame. In this regard there are two traps that if fallen into are like being squished by a steamroller. On the one hand is the defendant who will provide nothing and then insist that the discovery period has expired and that it is ready for trial even though we have no discovery accomplished. On the other hand is the defendant who never wants discovery to end and sees it like an annuity from which he can draw income for several decades or at least until his kids are out of college and his first wife remarries.

We need to make a list of what needs to be done and let the defense lawyer know who and when we want it done. Do not hesitate to file a motion to compel or for a scheduling order if the defense will not participate in a timely fashion.

C. TAKE *OUR* CLIENT'S DEPOSITION

Defense lawyers like to work cases in an orderly fashion. For example, they will scream bloody murder if we try to take any real discovery depositions or medical testimony before the plaintiff is deposed. Yet, they are in no rush to depose the plaintiff or otherwise start working on the case. Like the roadrunner they want to set the pace while we chase them. Be the roadrunner and make them chase us by scheduling the plaintiff's deposition and inviting them to attend. Ask the plaintiff some leading questions about how bad the defendant is and how bad he is injured and then invite the defendant to ask questions too. Now the defense can no longer complain that the plaintiff has not been deposed. Now we can begin to take the medicl despositions so we can stipulate the case to trial.

D. AVOID TAKING DEPOSITIONS

Depositions are the only way that some defense lawyers interview witnesses. We really can't blame them. They get paid for taking depositions and the adjusters apparently like attending and reading depositions. But it takes two to depose and that means that both sides get to participate. Instead, consider taking statements at which the defense lawyer is not present. Formal statements aren't necessary. Remember, we need the information so we can prepare for trial. We are not obligated to help the defense prepare at the same time.

E. FOCUS ON THE ISSUES

Avoid side fights. Avoid getting is discovery fights for information which will not help us get to the end of the case. Defense lawyers love side fights and side issues. Fights take time and time equals money. To us, on the other hand, time is the enemy and side fights waste our time without helping us get to the end of the case.

3. BE COMPETENT - OR- BE THE SOLUTION NOT THE PROBLEM.

Our clients come to us to help them. We are supposed to know more about how to help them than they know. They trust our expertise as lawyers that we have the

solutions to their problems and that we will not become part of their problems ourselves. Yet, all too often we become the problem instead of the solution by not knowing how to work the case, by not working hard, or by not being able to afford the case.

A. WANT TO TAKE THE CASE

We will not do a good job if we do not believe in the case. Its really quite simple, the cases we dislike are the ones we do not work. The cases we do not work become huge problems. Our huge problems are not solutions for our clients.

B. HAVE ENOUGH TIME FOR THE CASE

We cannot stay in control, or be the steam roller, if we are so busy we can't focus on our cases. Some cases take more time than others. We must be very careful about accepting a case which we will not be able to devote adequate attention to. Defense lawyers with their legions of associates and paralegal and investigators and law clerks will devote adequate time to a case and will steam roll us into the shape they desire if we are not able to keep up with them.

C. UNDERSTAND THE LAW

When accepting a case make sure to understand the law which governs the case. It is fairly easy to stay in control of a case which is similar to other cases with which we are experienced. However, when we tackle a case in a new area of law, or which has new damage elements, or proof problem we have not faced before, it is not quite so easy to remain in control. If we cannot allocate the time to learn and truly understand the law then we will always be part of the problem for our clients and never part of the solution.

C. BE ABLE TO AFFORD TO WIN THE CASE

Some cases are expensive to prosecute. Multiple experts, out of state travel, and demonstrative evidence is not cheap. When we accept a case we cannot afford to finance we do not control the case - it controls us. More importantly, our clients suffer by getting less than they are entitled to.

D. BE ABLE TO AFFORD TO LOSE THE CASE

Even if we can afford to finance the costs of a particular case we must also be able to afford to lose the case. If we cannot afford to lose the case and eat the costs we cannot give our clients fair advice about whether to go to trial or settle. Without being

able to afford to lose the case, the case controls us and we become part of our client's problem and not a true source of a solution.

E. DO NOT BE AFRAID TO ASK FOR HELP

No plaintiff's lawyer is good at everything. No plaintiff's lawyer understands the facts or law in every case. In many cases experts are required. Certainly, we want to hire the best when the expert carries the day. Similarly, don't be afraid to retain experts simply to provide advise on the facts and issues involved. Additionally, none of use can afford to put our client's future at risk so that we will have the glory of the big verdict. One of the best ways to stay in control is to associate other lawyers who have the experience and/or finances necessary to solve the client's problems.

4. BE A DEVOTED LAWYER -OR- BE THE DOCTOR NOT THE PATIENT.

Representing plaintiffs is intellectually, emotionally and physically demanding. We must work to stay sharp as lawyers, be able to mentally focus on our work, and be healthy enough to stay sharp for the rigors of a jury trial.

A. STAY ABREAST OF THE LAW

The law is constantly changing and evolving. New ideas for proving damages and obtaining compensation arise almost daily. Often, however, we are too busy working our files to read the law. That is a huge mistake. Being steam rolled by an opponent who knows the law that we should know is inexcusable. Failing to capitalize on new theories is similarly inexcusable. We must attend CLE programs and actually read the materials. We must listen to tapes and read books. To stay in control of the road work we have to know how to build every aspect of that road - from liability to damages and back.

B. SUPPORT THE JURY SYSTEM

All of us are being flattened by the steam roller called tort reform. If we are to have any control we must be members of ATLA and GTLA and other organizations like Trial Lawyers for Public Justice. We must contribute to LawPac and to candidates who

value the rights of individuals to have their day in court. This is mandatory. Representing the injured is a privilege not a right. Without supporting the system that provides for compensation for individuals who have been harmed, the system will not be there for them, or for us.

C. BE PROFESSIONAL AND ETHICAL

While it may appear that dirty tricks and lies and misleading the court will garner control - any control obtained this way is surely short lived. While a dirty trick or a lie might help one client on one day the rest of our clients will pay the price down the road. "What ever comes around goes around" is not in the vernacular for nothing. Defense lawyers and judges have long memories and if we fool them once the next time they will be extra-diligent and the price will be high indeed. Furthermore, misleading a trial court might get a particular jury charge which is an incorrect statement of the law but any victory so obtained will be short lived when the Court of Aappeals takes the verdict away.

D. BE EMOTIONALLY FIT

Representing plaintiffs is best done by true believers. Lawyers who do not like being lawyers are lousy plaintiff's lawyers. In short, our hearts must believe in what we do if we are to be good at it.

E. BE PHYSICALLY FIT

A multi-day or multi-week trial is a physical ordeal. The last one standing is often the winner. A lawyer who is out of shape, without adequate rest, or sick cannot give his client the representation necessary to control the case to its successful conclusion. Lose weight, don't drink too much, and get plenty of rest. Its actually easy to sleep during a trial as all the hard work should have been done long before the trial starts.

5. HAVE THE SKILLS TO KICK ASS -OR- BE THE TOE NOT THE JAM.

Being the toe connects you to the foot that can kick ass and take names. The jam is without value or worth. The toe controls a case and the jam is along for the ride. Controlling a case in the courtroom demands a combination of pretrial preparation and courtroom presence that comes from experience, confidence, and determination.

A. CONTROL THE COURTROOM

When we are in a courtroom we must make sure everyone there knows we are in charge. This requires that we get there early and get the counsel table we want. This requires that we meet and befriend the clerks and bailiffs. This requires that we look and act organized.

B. CONTROL THE TOYS

Courtroom toys include easels, televisions, and exhibits. To be in control these toys must be our own. Never use the defendant's or the court's easel. Always have adequate markers. Always know where the plug is for the TV. The jury does not want to be sitting around while we try to figure out how to turn on a video or look for a plug.

C. KEEP THE COURT INFORMED

Make sure the judge knows how many witnesses we have and when we plan to call experts who have special scheduling problems. This information will insure that the court works with us in scheduling and allows us to control the presentation of evidence in an orderly fashion.

D. USE THE COURTROOM

Think about where we are in the courtroom. Normally direct examination should be from behind the jury box so that the witness is the star whereas in cross-examination we should stand so that we are the stars.

E. DO NOT BE BULLIED

Always protect the record. Insist on adequate time to proffer evidence. Insist on adequate time to object to the charge. File all written materials with the court and the clerk. Never trust the defense lawyer that he will not complain about our failure to

properly perfect the record when the case is on appeal. We must stay in the driver's seat and not allow oursevles to be walked on by a bullying judge who wants to shorten our evidence or make us take shortcuts. We must be careful in our consideration of the judge's feeling that the jury has heard enough on a point - with few exceptions if the judge was such a great reader of juries he would still be a trial lawyer.