CREATING A DISCOVERY PLAN FROM START TO FINISH

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WHERE AND WHEN TO START. Every discovery plan for a Plaintiff begins before suit and right after he or she gets the case. The advantage to being a Plaintiff is that we can choose when and sometimes where, to file suit. Before you file suit, investigate the case, the witnesses, your client, and the Defendants. Who are these people? What is the history and the business model of this company? What does Google, LinkedIn, Facebook, and other social media say about them? What do their own websites say? What do the public records say?

WHY INVESTIGATE. Why should I investigate if there is clear liability for the slip and fall, the car crash caused by a commercial truck, or the inadequate security at the mall which allowed the assault and injuries which followed? The answer is that this is your time to form the themes of the case before you get lost in the details and frenzy of discovery. And the themes will guide your discovery.

THEMES FOR THE CASE. There are 2 concepts we focus on in persuading a jury to award money. **First, the case has to be about something bigger than just the Plaintiff getting injured just that one time; it has to be about the safety of everyone including the jurors and their families.** It has been said that in essence every case becomes a punitive damage case. The

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facts and your theme have to appeal to the base, primordial instincts of survival of the people making the decision, the jury. That is, the theme has to appeal to each juror's unconscious urge and intent to protect themselves and their own family from the dangerous condition which it just so happens in this instance to have caused harm to the Plaintiff.

This leads to your investigation into the why, not just the what. Investigate why the Defendant did what they did, or failed to do what they failed to do, not just what actually happened here. Did the slip and fall happen because there was water on the floor for an hour in a busy commercial operation? Maybe so. But why was there water on the floor for so long? Did the Defendant announce months before that in an effort to get stock prices up, they were laying off employees? Maybe that is why this happened.

Second, even the most conservative jurors do not like rule breakers. That is the theme of the now famous book by Rick Friedman and Pat Malone, Rules of the Road. This book has been the topic of or woven into seminars at AAJ for many years now. Therefore, we establish in the case what the rules for safety and preventing accidents or assaults or whatever the injury causing condition is. Then we establish that if the Defendant breaks these rules, people get hurt. Finally, we establish that the Defendant here broke the rules and that resulted, as everyone knew would happen, in an injury. That means predictability and preventability.

A rule is not a rule unless the Defendant agrees that it is a rule. That is why in the initial investigation you should go online or turn to AAJ Connect and find what the Defendant says are the rules of safety. The Defendant has broken safety rules when they, for example, mopped but did not put out cones or block the area off. This is why it is good to ask the Defendant in the corporate representative depo after (or before) you establish what the rules or procedures are: "This is really a rule of safety, isn't it?"

<u>THE COMPLAINT AND THE DISCOVERY PLAN</u>. Use these 2 concepts as your guide to your pre suit investigation of the accident and of the Defendant. Then use the results of this investigation in creating the complaint which is a blueprint for the discovery plan.

The complaints created in our office are blueprints for the case and try to focus on at least the 2 concepts above. Our complaints contain or reference the themes for the case which I have thought about as well as the causes of action. The order in which I list the defendants is purposeful. I tend to name the most culpable Defendant, the one I want everyone to focus on, first.

<u>PRE SUIT INVESTIGATION</u>. Before I prepare a complaint in any case, I talk to the witnesses. We can and we do internet research and sometimes investigation on the background of each Defendant corporation and on the operation of the ship or building or business itself. I include in the complaint facts about that background in the complaints.

The pre suit investigation begins with my client. Call and grill the client about what happened. In a slip and fall for example, ask the client how the Defendant does business. Has the client ever been to that store or area of the store, to that cruise ship or that area of the cruise ship, or to that hotel or area of the hotel before? Were any employees in the area at the time of the fall or at any time before? What were they doing? What did the employees do after the fall happened? Did the employees ask your client how you are doing (and therefore they are concerned with your client's wellbeing) or if your client had been drinking (and therefore they are concerned with protecting the company)? Were there any cleaners ever in the area in the hour that your client was there before the fall? If not, maybe they have laid off workers in an attempt to save money and cut corners on safety.

The next step is to call or otherwise interview the fact witnesses. Do this first, not last. All jury research reveals that the jury tends to cancel out the testimony of the experts and decide the case based on the fact witnesses. They also will help you develop your themes. They were there. They saw what really happened and may have a sense for the why not just the what.

The next step in pre suit investigation is to go to the **internet**. Research the company by going to its own website and by using Google and read articles and press releases. These sources will provide you with background and may provide you with evidence to use for depositions of corporate representatives to establish elements of your claim. The **company's own website** especially of a retailer or manufacturer which creates its website for its stockholders not for the consumer may have information about the business model of the company. That model might be to hire as few people as possible for its stores.

Press releases for example can be a fruitful source of knowledge about what is happening with a company. Press releases are admissions if made by the corporation itself and can be admissible if you send out a request for admissions or use them in a corporate representative deposition. We have used them for example to establish ownership and control of a cruise line over property on which an accident happened.

Internet research should also include **Dunn and Bradstreet** (a subscription service but some basic information is free) and the **SEC filings** and **annual statement** of any publically traded corporation. The SEC filings are all online and are filed quarterly (called 10Q's) and annually (called 10K's) and the annual statement usually is on the corporation's website somewhere. These are fruitful sources of information and representations about how the company does business and whatever changes have occurred in the finances and therefore operations as well as connections to other prospective defendants. These can be authenticated by the corporate representative or by requests for admissions.

Other sources on the internet are **LinkedIn, Facebook,** and **Google Plus** for the company and for its key players. The print outs from the social media are a great source of deposition and trial exhibits as proof of the role and responsibilities of that individual.

OTHER PRE SUIT INVESTIGATION. The basic checklist of sources includes, depending on the case, as follows:

Police reports

EMT reports

Helicopter transport reports

Autopsy reports

911 recordings

911 logs of calls

State corporate records: Secretary of State: www.sunbiz.org

www.companiesonline.com

www.dos.state.fl.us/

Defendant's website

www.Bigbook.com

NOAA home page for weather that day

Farmer's Almanac for weather that day

State public records act request

Federal FOIA request

Go to the scene yourself

Google Earth for the scene or layout of the building or parking lot

THE COMPLAINT BECOMES A BLUEPRINT. An example of helpful internet research is a case we have against Family Dollar Stores. In this case, we found that on its website, Family Dollar Stores makes many representations about the way it does business. That way involves cutting its overhead to the bone which means fewer employees to make sure that the store is safe for its customers. In this case, an employee was on a ladder on the floor of the store stocking shelves 5 to 6 feet high with 2 liter bottles of soda. An 8 year old child was in the store with her mother. The child went near the base of the ladder used by the employee. The child was getting a bottle of water. When the child was down at the base of the ladder, the employee dropped a 2 liter bottle onto the neck of the child, who it just so happens had a congenital neck problem and a

prior neck surgery. The bottle caused a herniated disc and now permanent neck pain and limitations.

The **relevance of the corporation's background** is twofold. First, the background of any witness or party is always relevant. Second, if the Defendant has raised comparative negligence, the background and way in which the Defendant does business is relevant to compare the negligence of your client to the negligence of the Defendant. Your client may have been looking the other way at that split second when the accident happened. But if the Defendant has done business like this and been negligent for years, that is relevant for the jury's comparison.

In the Family Dollar Stores case, here are the allegations in the complaint:

> 1. **<u>DESCRIPTION OF INCIDENT.</u>** The Family Dollar Defendants owe a duty to act reasonably toward the invitees of their stores. The duty arises and is defined by the circumstances created by the Family Dollar Defendants. These circumstances are that the Family Dollar Defendants according to their own website operate 7,200 stores in 45 states. They employ more than 50,000 people. Their gross sales in fiscal year 2011 were $8.5 billion. According to the website of the Defendants, "Family Dollar Store is a small format convenience and value retailer serving the needs of families".
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> 2. The Family Dollar Defendants also represent on their website that their "core customer" is a "female head of household in her forties making less than $40,000 per year". **The Family Dollar Defendants also represent that they are serving the needs of families and that they have products for every home and apparel for men, women, and children. For this reason, the Family Dollar Defendants anticipate that their stores will have children accompanying the core customer that is families and female heads of household.**
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> 3. The Family Dollar Defendants' stores have all or most of the inventory on shelves in the customer area because they want to save money by not having a stock room.
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> 4. The in-store employees of the Family Dollar Defendants know that children often visit the store. Those same employees are expected to stock the shelves of the store.
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> 5. At the Family Dollar Store #2841 located at 612 Belvedere Blvd., West Palm Beach, FL 33405-1231 on the date of this incident, June 15, 2010, an employee of the store was stocking a shelf on a ladder. The employee was stocking up close to the top of the shelves with 2-liter bottles of soda. The employee saw that a child, 8 year old Plaintiff was close to the base of the ladder reaching for a bottle of water. The Plaintiff, mother of the minor child and her daughter at the time of this accident had been shopping in the subject Family Dollar Store and accordingly were invitees of the store.
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> 6. The manager or other employee of the Family Dollar Defendants breached her duty of reasonable care toward invitees of the

> store when that manager or employee chose to stock the shelves with heavy 2-liter bottles of soda without securing the area, without advising the customers in the area to stay away, without watching out for customers and specifically children who could get underneath or toward the base of the ladder, and without stopping the stocking process when children, specifically the injured Plaintiff herein, was at or near the base of the ladder, and being alert and careful not to drop a bottle when stocking the shelves.
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> 7. The manager or other employee when stocking the shelves then dropped a 2-liter bottle of soda onto the head and neck of the 8 year old minor child Plaintiff.

Further, the description of the way that the Defendant does business is to follow the rule of primacy. What you mention first is most remembered. And if you tell the story from the standpoint of what the defendant did or did not do, the focus will be on the actions of the Defendant.

Thus, make the case about the fact that the Defendant retailer, cruise line, or shopping mall has made a conscious decision to cut back on personnel and that is why that person that night did not get around to cleaning up the spill and putting out the signs. And because the Defendant is so big, and serves so many people, that is why rules for safety are so important.

The allegations in the complaint then are the blueprint for the discovery plan in the case. The complaint also forms a checklist or reference point for the exhibits you need at the deposition of the corporate representative of the Defendant to establish the allegations as fact.

THE DISCOVERY. In state court, serve the written discovery with the complaint. Serve with the complaint the **request to produce, interrogatories, requests for admissions, request for inspection of the premises, vehicle, or product, and notices of deposition of the Defendant.** In Federal Court, serve the written discovery immediately after the conference required to prepare the Joint Scheduling Report and Order.

Use **Corporate Representative, Rule 30(b)(6), depositions** to establish certain themes and elements of your causes of action. The deposition is noticed and taken pursuant to Fed.R.Civ.P. 30(b)(6). The deposition is used at trial for any reason and regardless of availability of the witness pursuant to Fed. R. Civ. P. 32 (a) 3. Therefore, this deposition can be played at trial as one of your witnesses.

The exhibits to any corporate representative deposition are the documents produced by the Defendant and the documents from the internet and investigation. For that reason, take this deposition only after you have obtained at least the initial documents from the Defendant.

Every initial corporate representative depo must establish the following:

1. **The Rules.** "A rule is not a rule unless the other side agrees that it is the rule". These are the "Do you agree" questions. The foundation for these questions is that the witness is a corporate representative assigned to speak for the corporation and whatever training at the company he/she has received in regard to the responsibilities of the company.
2. **The Basics**. The accident did happen, it happened on x date, it happened in x place, it happened the way the Plaintiff said it happened. Show the witness the statement of the Plaintiff or describe for him/her the accident. If they do not know, ask if they have any evidence, information, or knowledge that the accident did not happen the way the Plaintiff said.
3. **The Basis for Negligence**. In a slip and fall case, this is that the floor can be slippery when it is wet. (This also eliminates the requirement that we send an expensive and unnecessary expert to the place of the accident because the issue in the case is now only whether the floor was wet).
4. **Defendant's knowledge**. Ask what witness reviewed, who witness spoke with and who witness understands are the other witnesses to the accident. Always establish also that he/she spoke with the attorney for the Defendant. These questions are for 2 reasons: discovery and establishing that he/she has the background to testify that the D is responsible and that the P is not responsible for this.
5. **Defendant's responsibility**. Ask if they agree that if there was water on the floor for a time (or whatever the case is about) that the Defendant is responsible for causing the accident and the injuries in the case.
6. **Lack of comparative negligence**. "Do you have any evidence, knowledge or facts that the plaintiff caused or contributed to the cause of this accident?"
7. **Not the correct witness**. After you have gotten everything you need, use the designations on the Notice of Deposition and ask about that area. If he/she professes ignorance, ask: "You agree then that you are not the correct witness on that topic". (The defense attorney will object but the witnesses tend to agree to end it sooner).

The corporate representative deposition can be binding on the Defendant corporation. The District of Columbia in *Rainey v. American Forest & Paper Ass'n*, prevented the defendant corporation from presenting evidence which conflicted with the corporation's corporate representative's deposition testimony.[1] The court in *Rainey*, stated Rule 30(b)(6) obligates a corporate party to prepare its representative to be able to give binding answers on its behalf; unless it can be proven that the information was not known or was inaccessible.[2] A corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.[3]

In *Estate of Thompson v. Kawaski Heavy Indus., Ltd.*, a design defect case, an Iowa district court found the approach in *Rainey* to be the most consistent with the purpose of rule 30(b)(6), which is to permit the requesting party to discover the corporation's position.[4] It is also appropriate to

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[1] *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998).
[2] *Id.*
[3] *Id.*
[4] *Estate of Thompson v. Kawasaki Heavy Indus., Ltd.*, 291 F.R.D. 297, 304 (N.D. Iowa 2013).

bind the corporation to the corporate representative's testimony based on the fact that the corporation itself selects the corporate representative to speak for it and has the opportunity to prepare the representative.[5] The *Rainey* Court distinguishes Rule 30(b)(6) testimony from an individual deposed under rule 30(b)(1).[6]

Some courts believe that "the testimony given at a Rule 30(b)(6) deposition is evidence, which like any other deposition testimony, can be contradicted and used for impeachment purposes"[7] and that such testimony does not bind the designating entity "in the sense of a judicial admission."[8] Other courts suggest that a corporation is bound by the testimony of its Rule 30(b)(6) designee and cannot introduce evidence contradicting the testimony.[9]

One Court has said: "When the Court indicates that the Rule 30(b)(6) designee gives a statement or opinion binding on the corporation, this does not mean that said statement is tantamount to a judicial admission. Rather, just as in the deposition of individuals, it is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered. However, the designee can make admissions against interest under Fed.R.Evid. 804(b)(3) which are binding on the corporation."[10]

The Northern District of Illinois in two separate decisions hold that "the testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and of course used for impeachment purposes."[11] See also, A.I. Credit Corp. v. Legion Ins. Co.[12] and *Great Am. Ins. Co. of NY v. Summit Exterior Works*, LLC. [13]

Some Courts, including the Southern District of Florida, follow a "hybrid" approach.[14] These cases state that when the corporate representative legitimately lacks the ability (because of

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[5] *Id*.
[6] *Mitchell Eng'g v. City & Cnty. of San Francisco*, C 08-04022 SI, 2010 WL 455290 * at 1(N.D. Cal. Feb. 2, 2010)(citing *Sabre v. First Dominion Capital, LLC*, No. 01-2145, 2001 WL 1590544, at * 1 (S.D.N.Y. Dec.12, 2001).
[7] *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000).
[8] *Taylor*, 166 F.R.D. at fn7.
[9] I*erardi*, 1991 WL 158911 at *2; See *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82 (D.D.C. 1998).
[10] *Taylor*, 166 F.R.D. at fn7.
[11] *Indus. Hard Chrome, Ltd. v. Hetran, Inc*., 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000); *W.R. Grace & Co. v. Viskase Corp.*, No. 990 C 5383, 1991 WL 211647, at *2 (N.D.Ill. Oct.15, 1991).
[12] *A.I. Credit Corp. v. Legion Ins. Co.*,265 F.3d 630, 637 (7th Cir.2001).
[13] *Great Am. Ins. Co. of NY v. Summit Exterior Works*, LLC, 3:10 CV 1669 JGM, 2012 WL 459885 at *4 (D. Conn. Feb. 13, 2012).
[14] *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005); *QBE Ins. Corp. v. Jorda Enterprises*, Inc., 277 F.R.D. 676, 690 (S.D. Fla. 2012); *Ierardi v. Lorillard*, Inc., CIV. A. 90-7049, 1991 WL 66799 at *2,3 (E.D. Pa. Apr. 15, 1991).

lack of knowledge or failing memory) to answer relevant questions and the corporation fails to provide an adequate substitute the corporation will then be bound by the corporate representative's "I don't know" or "we don't know" response.[15] This precludes the corporation from offering evidence at trial on these points.[16] The practical purpose behind the hybrid theory is that it prevents trial by ambush.[17]

A gray area exists among the courts under the *Rainey* and "hybrid" approach. Both lines of cases preclude the corporation from offering new evidence pertaining to the corporate representative's testimony. The question then is whether the binding effect qualifies as a judicial admission.[18] Some Courts have interpreted the "binding" testimony as an evidentiary admissions rather than a judicial admission.[19] However, one decision from a Mississippi District Bankruptcy Court held that the corporate representative's Rule 30(b)(6) deposition did conclusively bind the corporation to the position that "collusive fraud" did occur.[20] As a result the court dismissed the corporation's libel count against the defendants.[21]

FOLLOW UPS. One of the most important things which lawyers can do is to pursue the "follow ups" which arise or are uncovered at every event in the case. Every event includes every response to discovery and every deposition, hearing, and mediation. In every event, make a note for the written discovery to send out, any depositions to take, or conference with your experts or your client regarding any fact to prove or disprove as a result of an argument made or a fact disclosed. The follow up. In the request to produce, ask for the item which was described in the deposition and say after the document or other materials are described: "This document was described for the first time in this case in the deposition of the Defendant's corporate representative taken on ______________". In a follow up notice of deposition of a corporate representative where the initial representative did not have the appropriate level of knowledge of a designated area, say: "Investigation of the accident. The witness produced by the Defendant for deposition on the area of inquiry for deposition on _______________ admitted that she was not the right person for this designated area".

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[15] *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012)
[16] *Id.*
[17] *Id.*
[18] See *Johnson v. Big Lots Stores, Inc.*, CIV.A. 04-3201, 2008 WL 6928161 (E.D. La. May 2, 2008).
[19] *Media Servs. Grp., Inc. v. Lesso, Inc.*, 45 F. Supp. 2d 1237, 1254 (D. Kan. 1999); *Johnson v. Big Lots Stores, Inc.*, CIV.A. 04-3201, 2008 WL 6928161 *6 (E.D. La. May 2, 2008).
[20] *In re River Oaks Furniture, Inc.*, 276 B.R. 507, 525 (Bankr. N.D. Miss. 2001).
[21] *Id.*