STARTING STRONG, WORKING SMART:

Using Expanded Initial Disclosure Statements As Trial Templates and Powerful Settlement Tools

By Sondra Williamson

British composer Benjamin Britten said, "Composing is like driving down a foggy road toward a house. Slowly, you see more details of the house – the color of the slates and bricks, the shapes of the windows. The notes are the bricks and the mortar of the house."

In the same way, details are the bricks and mortar of your case. And as every lawyer knows, the devil is in the details. The details can cause you or your case to falter at any point in the litigation process. Less than thorough attention to detail can produce many negative results, ranging from manageable to catastrophic – excessive hours answering demanding interrogatories, red-faced embarrassment in the courtroom, sanctioning of undisclosed evidence, or the discovery of a fatal flaw in your understanding or presentation of the evidence at the eleventh hour.

The best way to avoid those kinds of pitfalls is meticulous attention to detail from the very inception of your case. It is the most effective method of gaining a complete understanding of what occurred, identifying strengths and weaknesses in the evidence, and constructing a case story that will resonate with jurors. Perhaps most importantly, it is the surest path to an early, favorable settlement.

And it starts with preparation of a document to which many attorneys give short shrift – the Initial Disclosure Statement. Starting strong and working smart means expanding the information provided in the initial disclosure far beyond the mandates of state or federal rules of civil procedure, which call for the factual basis for each claim, a description of the damages, the legal theory on which each claim is based, copies of exhibits to be presented, the names and contact information for all witnesses, and summaries of their expected testimony.

Depending on the nature of the case, and where appropriate, an expanded disclosure may include cradle-to-grave biographies for each plaintiff; a detailed, vivid description of events leading up to the injuries and how the injuries occurred; a compelling account of the injured

parties' transport and hospitalization; gripping detail about the their struggles during recovery or rehabilitation; an intimate account of how and when family members learned of and reacted to news of their loved ones' injuries or death; a medical narrative for each plaintiff; a life care plan; autopsy results; a moving narrative describing the funerals or memorial services; and personal, forceful statements describing in intricate detail the damages suffered by each plaintiff.

The details that comprise the expanded initial disclosure are drawn from hours of interviewing the injured parties, their family members and lay witnesses; reviewing accident reports and medical records; and studying in-depth expert analysis. They are the bricks and mortar that give form, texture and color to your trial story, making it cohesive, persuasive and able to withstand scrutiny. Without them, like the house at the end of the foggy road, your story will remain dull, shapeless and vague to opposing counsel, the court and jurors. One critical missing brick can become an insurmountable flaw, causing your entire story to collapse.

Although the process of preparing these exhaustive disclosures entails a significant investment in time and resources in the earliest stages of litigation, in fact, it is an economic use of time and resources. The resulting product can be used as a trial template and often facilitates early settlement, saving time and money in the long term.

The Benefits of Expanded Initial Disclosures

Overwhelming the court and opposing counsel with detail is not the point. When properly developed, the expanded Initial Disclosure Statement becomes a template for your case, from inception to settlement or trial. It is an invitation to opposing counsel to respond accordingly and inform you if you have omitted any case specifics or gotten any points wrong. It is a powerful pleading that can be used effectively to educate the court about the case, to respond to pre-trial or in-trial motions claiming failure to disclose and calling for exclusion or sanction, and to preempt written discovery. It can be converted to a mediation brief or trial memo with very little effort. Once the expanded initial disclosure is complete, your work is easier from that point forward. That's starting strong and working smart.

There are other, less quantifiable benefits to this unconventional technique that enhance your professional reputation and standing with your clients. The expanded initial disclosure conveys an attitude of forthrightness and transparency regarding your case, clearly demonstrating

you have nothing to hide. It reflects an ethic of diligent, exacting trial preparation and a deep respect for your clients, the court and opposing counsel. By providing the court with intricate case details upfront, you help your clients avoid the anxiety and stress of the deposition process. And being given the opportunity to tell their stories completely, to some degree, helps ease their emotional pain.

Perhaps most importantly, the expanded initial disclosure gives defense counsel great insight into the strength of your case, demonstrating why a jury will identify with both your clients and the case facts. It is hard to overstate the power of the Initial Disclosure Statement as a settlement tool.

Trailblazing This Singular Strategy

Phoenix attorney Patrick J. McGroder III, of Gallagher & Kennedy P.A., pioneered this distinctive approach to disclosure statements decades ago, when Rule 26.1 of the Arizona Rules of Civil Procedure became effective. Although some of his colleagues, if not most, viewed the expansive new requirements of 26.1 as an imposition, McGroder regarded them as an opportunity. He began constructing disclosure statements that presented evidence and witness testimony extending far beyond the requirements of Rule 26.1 and certainly beyond the disclosures normally prepared by other counsel.

"I felt strongly that 26.1 was enacted for a purpose, so everyone knew where everyone else stood," McGroder says. "Maybe I have taken it to an extreme, but I don't think so. I want to know the problems with my case upfront – the cracks and theories that won't stand up to scrutiny or criticism, the facts I don't know about. I think the lawyers on the other side appreciate the work we put into our disclosures and the insights they give them into our cases."

McGroder is well known in the legal community for his distinctive approach to Initial Disclosure Statements. Any attorney who is litigating against him knows he will receive a disclosure of two to three hundred pages at the beginning of the case, before discovery.

Shannon L. Clark, McGroder's colleague at Gallagher & Kennedy, recognized the value of the expanded disclosure strategy and adopted it in 2001, when McGroder joined the firm. For 10 years, he has used it successfully in his practice at G&K. The disclosure statements produced by most attorneys average dozens of pages; McGroder's and Clark's average hundreds.

Clark has handled virtually every kind of personal injury case, including product liability, motor vehicle accidents, premises liability, medical malpractice, elder abuse, commercial trucking, police misconduct, construction site accidents and insurance bad faith. He has successfully represented dozens of tread separation/rollover accident victims in product liability cases against various automobiles and tire manufacturers, and was a member of the team representing victims of fuel-fed fires caused by rear-end collisions in Ford Crown Victoria Police Interceptors. He has obtained more than $150 million in jury awards and settlements for his clients thus far in his career.

"Using expanded disclosures has benefited virtually every case in which we have used them," says Clark. "It is one of our most effective tools in preparing for trial and securing early, favorable settlements."

The Art of Developing Expanded Initial Disclosure Statements

Effectively interviewing the injured party and/or his family members is crucial. Some law firms may not have staff available to conduct such lengthy interactions; others may choose not to use staff for this area of specialty. Perhaps more importantly, clients are often more comfortable, relaxed and candid when talking with an outsider. They may find a consultant less intimidating than a lawyer and perceive them to be more "like me." Without question, as with attorney-client exchanges, all the precepts of confidentiality apply when using a consultant for this purpose.

To get the most out of client interviews, they must be conducted by a person who possesses a natural ability to connect with the individuals on a personal level, establish rapport and gain their confidence. The trust that goes along with such relationships makes it possible to extract vital, intimate details that add power to your Initial Disclosure Statements.

As a consultant for McGroder and Clark on nearly two dozen cases, I have developed an interview style and methodology that puts the firm's clients at ease and makes them receptive to my questions. This process involves a series of conversations, the number and length of which depends on the clients' emotional and physical states, their availability and any other relevant factors. The clients are in control, and the interviews are conducted entirely at their discretion and convenience. If they need to talk at 6:00 a.m. or 9:00 o'clock at night, that's when we talk.

The logical progression starts with encouraging the individuals to talk about their lives, from childhood to present, drawing out fine details and anecdotes that add drama and humor to their stories. This technique has several purposes. First, it provides clients a welcome distraction from the trauma they have experienced. Second, it provides fodder for writing colorful, descriptive biographies that present the individuals as quality persons who are respectable and likeable. Third, even those who have suffered a grave injury or the loss of a loved one seem to enjoy the process of talking about themselves and reliving childhood experiences, first loves, old glories and the like. By the time we get through this shared experience, we have established a rhythm, connection and trust that helps the individuals open up when questioned about the more painful, intimate details of their damages.

In a few of McGroder's and Clark's more high-profile cases, I have traveled to Phoenix or other destinations to meet with them and their clients. However, in most instances, the interviews have been conducted exclusively by telephone, which makes the bonds I have formed with the individuals even more surprising. My sense is they not only feel less anxious talking in the secure, familiar environs of their own homes, but may also prefer the sense of anonymity a telephone conversation provides, as opposed to an in-person interview.

Regardless of the circumstances, I use a respectful, informal style that quickly transforms what the clients may have perceived as a dreaded interrogation into a conversation they often enjoy. I inform them in advance of the types of questions I will be asking, so they will be emotionally prepared for the interviews. But even when we shift to difficult, painful topics, their experience seems to be cathartic. Often through tears and long, silent pauses, they share with me astonishingly private details, physical and emotional, that add power – sometimes subtle, often heartrending – to the damages statements I write.

Clients seem to perceive me as they might view their psychologist, adviser or close friend. Although I offer no advice, I am a compassionate, attentive listener. I am someone who is interested and to whom they can open up without reservation, someone they know is there to help them. I am a safe harbor.

In all sincerity, these conversations are as positive for me as they are for the individuals with whom I connect. They are tremendously rewarding personal connections with people who

have suffered devastating harms. They keep me grounded and keenly aware of the fragility of life. They afford me an opportunity to give back.

A Word About Writing

Although bricks and mortar can be used to craft a fine house, if they are not put together logically and solidly, the result will be a shapeless, treacherous shamble.

Let me just put it out there: *A good lawyer doesn't necessarily equal a good writer.*

Working smart means knowing your strengths and your weaknesses. In many instances, it means giving over the writing to someone who knows how to construct a strong, beautiful house. Almost every attorney is detail-oriented, but not every lawyer is good at combining those details into a compelling narrative.

Like a juror, I receive and process information about a person or case from a layperson's perspective. I am not trained in the nuances of the law; my value lies in connecting with the plaintiffs and relating to their travails. This, and my writing expertise, enables me to present the case story using straight talk and simple, understandable language. Even in writing complex medical narratives and setting forth details of expert testimony, I can cut through overly mechanical phrasing and present the information in a form that is simple, comprehensible and interesting to the audience.

It is not an excess of details that turns audiences off; it is the jumbled, convoluted, nonsensical way they are presented. If the reader or the juror has to navigate a labyrinth of intricate, seemingly unconnected details, he will lose interest and revert to his own biased conclusions. The skillful writer gives his audience the tools they need to reach the desired conclusions themselves.

The point is: *Some things can – and should – be hired out.*

Final Words from the Master

If done right and exhaustively, expanded disclosures ultimately save time and money in litigation. They are a factorial tool that help you solve problems and seek resolution, and they are a valuable template for preparing the rest of your case. More often than not, an expanded

disclosure will open the door to settlement discussions and help avoid the additional expense of taking your case to trial.

Pat McGroder lectures frequently on the advantages of comprehensive Initial Disclosure Statements. Over the years, he has observed an increasing number of his colleagues in the Plaintiffs Bar begin to emulate the practice he so strongly endorses. The disclosures he receives from defense counsel are often lengthier and more developed than in years past.

Although he declined for privacy reasons to name specific cases, McGroder says his use of expanded disclosure statements has helped him with virtually every case he has litigated. By any measure, his successes point to the wisdom of his approach. In his 40-year career, McGroder has been lead counsel in more than 90 cases in which there was a verdict or settlement in excess of one million dollars. He has recovered more than $400 million for clients.

"If I can understand a case, I can win it," says McGroder. "And comprehension is found in the details."

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