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**PRE-TRIAL CASE PREPARATION IN COMPLEX GROUNDWATER
LITIGATION: THE LAWYER'S ROLE**

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**Uncovering the Hidden Resource: Groundwater Law,
Hydrology, and Policy in the 1990s**

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I. INTRODUCTION

To a large extent, the structure of preparing any complex ground water case is basically the same. Whether the case involves a judicial setting or an administrative hearing, and whether the substantive issues in a case center on quantity or quality, there are certain guidelines for pretrial preparation which will be generally helpful to the attorney who is responsible for the case.

The basic focus of these guidelines centers around organizing a strategic plan for pretrial preparation which will become the roadmap for planning, preparing, and presenting an effective case which the legal decisionmaker will be able to understand, both legally, and factually. In the complex worlds of ground water law and science, the technical details can sometimes overwhelm the ability of legal decisionmakers to digest them. A critically important task for the lawyer in any such case is to make sure that this does not happen. Any lawyer should be readily able to realize that a case which is not understood will not be very persuasive. When a strategic pretrial plan is carefully organized and followed, it can help overcome this pitfall and lead to the effective communication of otherwise highly technical and complex principles and data.

The goal of this presentation is to identify important elements of such a strategic plan and discuss some of the important issues which can be encountered in formulating such a plan. Obviously, in the time available for this presentation, this will not be an exhaustive discussion of every possibility to be faced in every case. However, the guidelines presented should provide a solid groundwork for many of the circumstances and cases commonly faced by ground water practitioners in today's world.

II. BASIC ELEMENTS OF A PRETRIAL PREPARATION PLAN

A good starting point is to identify several of the key elements that will need to be addressed in any pretrial plan. I will try to present them in what I believe to be a logical order, from the initial step to the final stages of trial preparation, based upon my experience. Individual cases or preferences of the attorney may necessitate

them being addressed in a different order. In any event, the plan should be logical to those working with it so that it can be understood and carried out effectively. It should be easy to conclude that if those preparing the case do not understand how it fits together, it will be difficult to communicate it to the legal decisionmaker.

A. Issue Identification

The first step in formulating any strategic plan is to carefully outline the issues presented by the case. Generally, it is a good idea to try to break them down into legal and factual issues, realizing that the distinction is not always clear, and sometimes the two are mixed together by the courts. Also, you should recognize at the outset that it is not always possible to know, or perhaps to fully understand, all of the issues at the beginning of the case, and subsequent refinement is permissible and frequently a wise practice.

1. Legal Issues.
 - What is the law?
 - How does it apply to this case?
2. Factual Issues
 - What facts do you need to fit the law?
 - How will you get those facts?

B. Expert Witness Selection

In a ground water case, the factual issues will almost always necessitate the use of an expert. Therefore, the next step in planning the case will be the selection of an expert who can effectively assist the attorney in fleshing out the technical issues, do the analytical work necessary to provide evidence on the technical issues, and present that work to the legal decisionmaker in the form of admissible evidence, both written (reports and exhibits) and oral (testimony). The selection of the expert is a very important part of pretrial planning and should never be taken lightly by the attorney. Like it or not, all experts are not equal when it comes to trial work, and selection of one that

is not capable of delivering a full range of skill and experience can make trial preparation and evidence presentation a difficult task for the attorney. Several important criteria in making this selection are listed below.

1. Technical expertise.
2. Testimony experience.
3. Communication ability.
4. Cost and client budget.
5. Who hires the expert.

C. Issue Coordination with the Expert

After an expert has been selected and hired, an essential step is for the lawyer and the expert to sit down and thoroughly discuss the issues at stake in the case, so that both can understand how the work done by each will fit together. Some lawyers may be reluctant to do this, because they think that it could compromise the secrecy or confidentiality of their trial strategies. While care must be taken to deal with this risk, this fear should not be allowed to stand in the way of effective communication. The attorney should understand that the expert cannot provide the most effective assistance possible if he does not understand how his work fits with the legal issues, and the expert must be sensitive to the fact that all thoughts and theories about the case shared with him by the attorney must be held in strict confidence. With this mutual understanding, coordination between lawyer and expert should be possible and productive.

1. Interface of legal and technical issues.

It is fundamentally important for the expert to understand the legal structure of the case, and how the legal issues fit together with the technical work to be performed. Communicating these legal issues to the expert is actually a helpful first step to the lawyer in being able to communicate those issues to the legal decisionmaker. If the expert does not understand the legal issues and how they fit together, it may

be difficult to get the technical work to match up with those issues as the work progresses. Likewise, it is fundamentally important for the expert to communicate the parameters and limitations of the existing tools and technologies available so that the lawyer can be realistic about the strengths and weaknesses in developing the necessary evidence for the case. In today's world, especially with the advent of computer models, it is easy to over-estimate the effectiveness of highly complex technical work.

2. **Focusing the scope of technical work to match the legal issues.**

It is also fundamentally important that the lawyer have a clear grasp that the technical work to be performed by the expert will indeed provide the proof needed to match up with the legal issues. If this is not done, the available budget from the client can be potentially wasted on technical work that basically misses the point, from a legal perspective. In my opinion, it is primarily the lawyer's responsibility to work with the expert to the extent necessary to make sure that all work done is properly focused within the legal framework of the case, and that resources are not wasted going in the wrong direction.

3. **Planning for discovery and document management.**

In today's world where pretrial discovery is increasingly prevalent, planning ahead of time for the probability of discovery and organizing a system of document management can be very advantageous. Advance planning can help make responding to discovery much more organized and less time consuming, and also can make decisionmaking about what should be produced and what may not need to be produced an easier task. Some issues which should be kept in mind are listed below.

- a. What is kept in the expert's file and what is not.
- b. Privilege and attorney work product.

- c. Computer models -- are they confidential, proprietary, or trade secrets?

In some respects, the concepts involved in dealing with sensitive information can be fairly simple and straightforward, but their application in the context of pretrial preparation can be rather involved. Generally speaking, privileged information involves communications between the attorney and the client, but does not apply to communications between the attorney and experts. The latter communications typically fall within the category of attorney work product, which is generally divided into two types -- factual or opinion. Factual work product concerns information about facts, events, and other hard information. Opinion work product, on the other hand, is said to concern an attorney's mental impressions, conclusions, opinions, or legal theories concerning the litigation. See generally, 4. J. Moore, *Federal Practice*, ¶ 26.64(3.-1).

Factual work product may generally be discovered upon a showing that the party seeking it has:

substantial need of the materials in the preparation of this case and an inability without undue hardship to obtain the substantial equivalent of the requested information by other means.

Hawkins v. Dist. Court, 638 P.2d 1380 (Colo. 1982). See also National Farmer's Union Property and Casualty Co. v. Dist. Court, 718 P.2d 1044, 1047 (Colo. 1986).

Opinion work product is generally afforded more protection from discovery than factual work product. Some courts have held that opinion work product is absolutely protected from discovery. See In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973). However, others have carved out exceptions permitting disclosure of attorney's thoughts and

mental impressions. See Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983).

When sorting out what is discoverable and what is not, the specific provisions of Rule 26 must be examined carefully. Generally speaking, the knowledge of an expert is not privileged or part of attorney work product. See generally, United States v. Mayer, 398 F.2d 66, 73 (C.A. 9th 1968), and United States v. McKay, 372 F.2d 174, 176 (C.A. 5th 1967). The specific context within which an expert is hired and used for trial preparation is important under Rule 26. For a good general discussion of this area of the law, see Note, A New Look at an Old Concern -- Protecting Expert Information from Discovery under the Federal Rules, 18 Duq.L.Rev. 271, 272-277 (1979). The following suggestions are given to help attorneys preserve the integrity and confidentiality of information flowing to and work generated by experts.

1. If at all possible, the expert should be an outside expert, not an in-house expert, and should understand that he is being retained specifically in preparation for litigation.

2. Counsel, rather than client, should retain the expert so as to emphasize the point that the expert is assisting in the rendition of legal services.

3. Work done by the expert should be in response to specific questions represented by counsel.

4. Information received by the expert should be maintained in separate, confidential files, and not be intermingled with the expert's ordinary business files.

5. Reports or other materials generated by the expert should be sent directly to counsel and appropriately

marked "For Information of Counsel" or something to that effect.

Obviously, the extent to which these formalities are observed will vary, depending upon the procedural context of the litigation, and the anticipated formality and ferocity with which formal discovery may be pursued. Experience and wise judgment should guide the attorney at the outset, but advance planning can only help avoid problems later on.

D. Paying Attention to the Ongoing Technical Work

Even though the initial planning has focused the scope of work to meet the legal focus of the case, it will be essential for the attorney to monitor and understand the technical work as it progresses. There are almost always important questions regarding the interface of factual and legal issues which emerge as the technical work is done which will require input from and tactical decisions by the attorney. When the attorney is closely following the progress of the technical work, these decisions can be made quickly and intelligently, without delaying the timetable for completion of the work. Additionally, quick responses will help the expert avoid doing work which later turns out to miss the point the lawyer had hoped to address, or which could have been avoided if closer supervision had occurred. When monitoring this work, a couple of guiding principles should be kept in mind.

1. The lawyer should understand what the expert is doing.
2. The lawyer should guide the work without telling the expert what conclusions to reach.

E. Assembling the Technical Case for Presentation

As the results of the technical investigations begin to emerge, the focus should turn to the question of how this information should be organized and presented to the legal decisionmaker. Exhibits will need to be prepared and

testimony will need to be outlined. These activities are absolutely critical steps in the effort to put together a presentation which will effectively communicate the important facts of the case to the decisionmaker. In carrying out this part of the plan, several important goals should be constantly kept in mind.

1. Simplification of what appears to be complex is critical. Remember, you have spent months or years working on the case and understand it, but the legal decisionmaker will only have a few hours or days to grasp the point.
 - a. Identify concepts and how to communicate them.
 - b. Tie the numbers into the concepts.
2. Create exhibits which communicate effectively.
 - a. Common problems to avoid.
 - (1) Too technical for decisionmaker to grasp.
 - (2) Too busy to visually grasp.
 - (3) Too many numbers, not enough concepts.
 - (4) Inconsistency and inaccuracy in titles, text, references.
 - (5) Too many exhibits.
 - b. Goals to strive for.
 - (1) Simplify and summarize complexities.
 - (2) Condense and summarize large volumes of numbers.
 - (3) Clearly explain the technical work without bogging down in details.
3. Organize the presentation into a logical order which can be readily followed and understood.
 - a. Build the technical case from the ground up.
 - b. Explain the concepts behind the models in plain English.
 - c. Tie the numbers into these concepts.
 - d. Tie these concepts into the legal issues.

4. Prepare direct testimony in detail and in advance, so that both lawyer and expert know what to expect and how various pieces of evidence fit together.

III. STRATEGIC PLANNING FOR DIFFERENT PURPOSES

The realities of ground water litigation may actually require more than one strategic plan to be formulated and implemented simultaneously, or sequentially. Whether multiple strategies are required will depend upon the context and issues in the case. However, each such plan may well have a different goal and be organized accordingly. Examples of such different goals are listed below.

- A. Building your case.
- B. Attacking their case.
- C. Doing both at the same time.

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