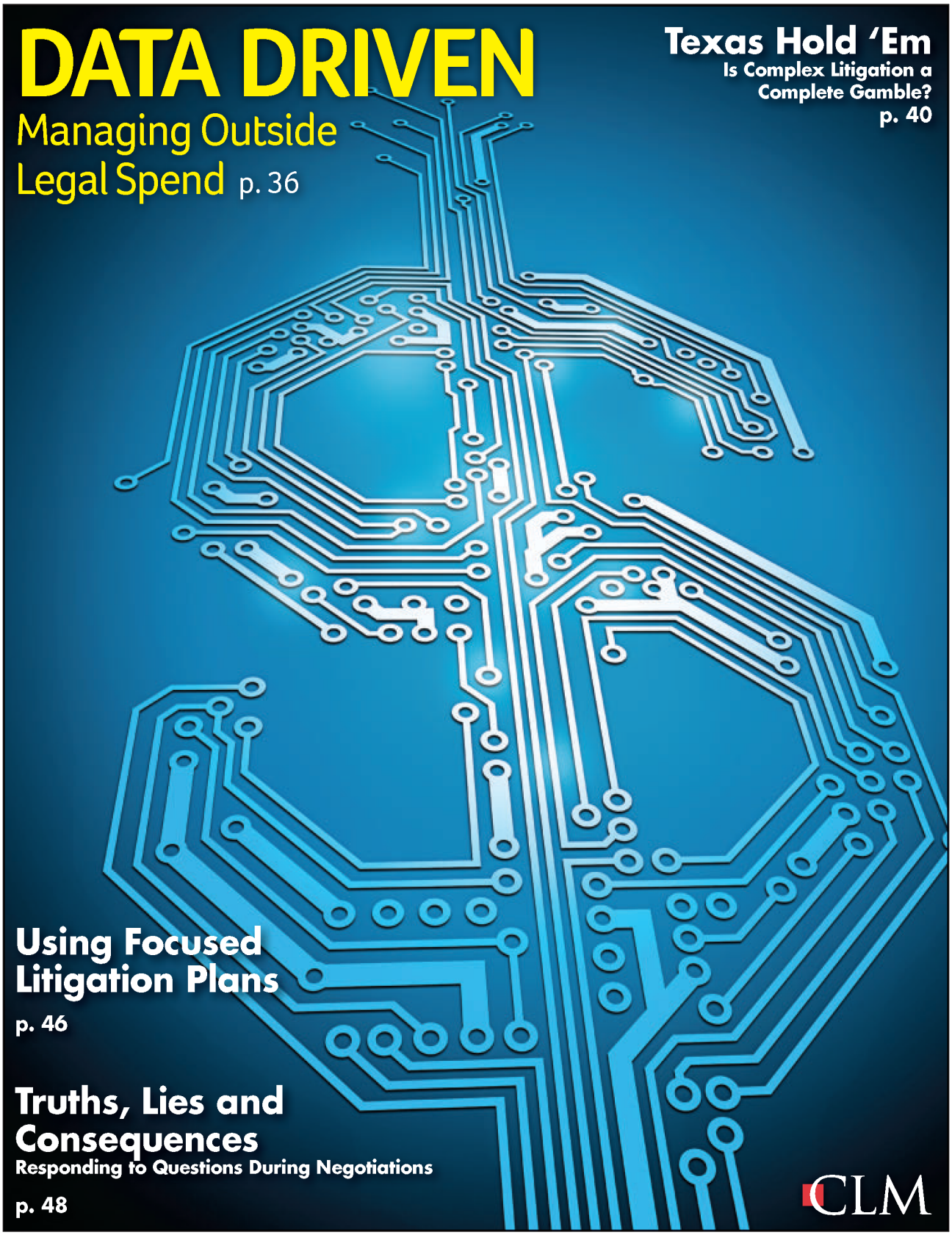
courtroomsciences.com

Texas Hold 'Em:

Is Complex Litigation a Complete Gamble?

Bill Kanasky, Ph.D.

Litigation Management
MAGAZINE
winter 2013



DATA DRIVEN

Managing Outside Legal Spend

p. 36

Texas Hold 'Em

Is Complex Litigation a Complete Gamble?

p. 40

Using Focused Litigation Plans

p. 46

Truths, Lies and Consequences

Responding to Questions During Negotiations

p. 48

CLM

Texas Hold 'Em

Is Complex Litigation a Complete Gamble?

By J. Thaddeus Eckenrode, Bill Kanasky, Jr. and Laura Cornish

To equate complex litigation with the poker game of Texas Hold 'Em is an analogy that many claims and litigation professionals would prefer not to make, but likely is one with which many agree. Although a case is often assessed based upon the cards (facts and law) initially dealt, as one gets additional cards, through discovery and investigation, the hand (the case) may get better or may suggest that one fold. It seems, as in poker, that if a case should be settled, the decision to fold should be made as early as possible, before incurring much of the expense of the litigation. However, sometimes it takes additional cards before that decision can be intelligently made. More importantly, for those cases that should or must be tried, when should the carrier go all in?

The biggest challenge facing clients is deciding how long to keep taking cards (allowing the case to be worked up) before making the decision to fold (settle) or to definitively conclude that the case will be defended all the way through trial. The expenses incurred in the case investigation, discovery and work-up always seem excessive and unnecessary to the carrier after they've decided that the case should be settled. But sometimes that decision would not have even been made but for drawing a bad card in the midst of the litigation. But is complex litigation a complete gamble, or can the carrier potentially influence some of the cards drawn?

The Defense Witness Card

A big factor in many cases is how the defendants and/or their corporate representatives perform in their depositions. To that extent, witness evaluation and preparation can be a costly expense, and yet an extremely important one. Defendants who are not accustomed to testifying can negatively affect an otherwise strong defense by making a weak presentation at deposition. Poor performance at deposition, particularly those that are videotaped, results in a loss of strategic and economic leverage over the plaintiff. Bottom

line: poor performance at deposition lengthens the litigation timeline, increases the case expenses, and most importantly increases the settlement value of the case. It is a bad card in the middle of a potentially decent hand.

Sophisticated witness preparation is an investment, not an expense. However, many claims staff confuse price vs. cost of such preparation. The cost to the client of a poor deposition is astronomically higher than the price of appropriate witness preparation. That upfront investment in making sure corporate witnesses are optimally prepared to testify can lead to enormous cost-savings as the case progresses. In the worst-case scenario, if the carrier invests in quality pre-deposition preparation of its key witnesses and they still perform poorly, the carrier can make an informed decision about whether or not it may be time to fold. Better to have invested to see that card than to keep moving on taking the risk (and incurring the expense) on a case that won't get any better, but not knowing it. The corollary, of course, is that when the defense witnesses do well, it is an encouraging factor that may support continuing to defend the case vigorously, as strategic and economic leverage is maintained, if not increased. That strong deposition performance often makes a good hand better, and may cause the plaintiff to consider folding (i.e., by making more reasonable settlement demands or potentially even dropping a case).

Witness preparation can be (and often is) as little as a short meeting right before a deposition, with the routine encouragement to listen carefully and tell the truth. While initially cheaper for the carrier, this witness preparation methodology also represents a major risk as a poor deposition can eventually cost hundreds of thousands of dollars in the long run. Instead, investing in a sophisticated, scientifically based witness preparation program often drastically decreases the overall economic risk to the carrier and allows them to make wise decisions on a file early in the case. Critical witnesses may benefit greatly from several sessions of

deposition preparation, videotaped and reviewed with the witness, focusing not only on his/her actual answers, but their behavior, attitude, demeanor, appearance and general presentation. Prevention indeed has a price attached to it, but the cost of poor witness testimony at deposition can be devastating to a carrier over the life of the case.

Defense counsel should assess how much personal preparation each relevant witness will need in order to discuss the possible use of equipment (video), specialized surroundings (mock deposition settings) and consultants (witness preparation specialists). Incurring these types of expenses for witness depositions might seem like an expensive card to take, but it may turn a low number card into an ace. If the carrier has already committed to seeing the case through, it is unquestionably worth the investment. Likewise, if the carrier has not yet reached the decision about whether the case should be aggressively defended or resolved quickly, it is definitely worth finding out just how good (or how bad) their case may be.

The Jury Card

As discovery proceeds and additional facts or circumstances become known or develop in the life of the case, the defense's hand takes clearer shape. Cards drawn as the game progresses can change a good case to a bad one and vice versa. The final card in the game is drawn at trial. It is not, however, the big bombshell surprise witness or revelation of a Perry Mason episode. Under the American rules, if defense counsel has done a proper and thorough job of pretrial discovery, he or she and his or her client should be well aware of what is coming at trial. That isn't to suggest there aren't occasional surprises (witnesses who unexpectedly stumble on the stand, evidence that is improperly excluded or admitted, and experts who have travel difficulties). So the trial evidence is not the last card. The last card dealt is the group of people who are assigned seats in the jury box. It is also one that you may be able to influence to the point that it may be the right card for your hand.

Jury selection is the most important part of a trial, as just one or two unfavorable jurors can wipe out millions in expenses and thousands of hours of trial preparation work. Despite this, the amount of time and resources dedicated to the jury selection process is often minimal and sometimes even non-existent.

Jury selection is often thought of as more art than science. In reality, it is both. The art is the communication style used during voir dire and the science is the key psychological variables that predict pro-plaintiff verdict orientation and high damages. Regarding communication style, it is best to develop a comfortable, non-threatening environment that will put jurors at ease. Jurors are often intimidated and discomforted by the court process, which can inhibit them from speaking freely during voir dire. Additionally, many defense attorneys inadvertently tend to use a cross-examine-like questioning style during voir dire, which leads to jurors becoming fearful and nervous, and thus less talkative. Creating a non-threatening, honest atmosphere will increase the odds of jurors openly sharing their beliefs and biases with defense counsel. This requires counsel to be less of an attorney and more of a warm, empathetic communicator during voir dire.

Decades of jury decision-making research have clearly shown that demographic variables (e.g., income, sex, race, education, etc.) do not reliably predict verdict and/or damages outcomes. Rather, the variables that accurately predict jury decision-making are deeply rooted in psychology and emotion. However, many defense attorneys heavily rely on demographic variables as the basis of their peremptory strikes, since most don't receive formal education and training in psychology or emotion. For example, defense attorneys are highly reluctant to strike educated, intelligent people in higher income brackets, incorrectly assuming that they aren't as biased as less educated people. They assume that "smart" people are rational and levelheaded, will be better able to understand their case arguments, and will therefore be more logical and fair in their decision making during deliberations. On the flip side, they assume jurors with less education and lower income status are not smart enough to understand their case, are more sympathetic to plaintiff themes, and tend to award high damages because they don't understand economics. In the end, this heavy reliance on demographic variables can be costly, as analysis of pro-plaintiff oriented juries who award high damages often have a significant percentage of educated, intelligent individuals in higher income brackets. To accurately identify pro-plaintiff jurors, counsel must dig deep into the jurors' belief systems, attitudes and emotions, as those factors best predict outcome at trial.

The question for claims personnel or litigation managers is whether, and how much, to invest in a professional jury consultant. While likely unnecessary in a small damages auto accident case, for cases with seven-figure (or greater) potential, the investment in an experienced, qualified jury consultant can mean the difference between a defense verdict and a multi-million dollar plaintiff's verdict. Not only can a jury consultant or service assist defense counsel in assessing potential peremptory or cause strikes, but he or she can likewise assist in evaluating which potential defense theme may be most effective before the ultimate panel selected. The team of a defense attorney and jury consultant working together on juror assessment and theme development represents the optimal level of defense preparation. While skipping this type of preparation will surely save money for the client, letting the dealer determine your final card can cost millions in the end. LM

J. Thaddeus Eckenrode, Esq. is the founder and managing officer of Eckenrode Maupin. Bill Kanasky, Jr., Ph.D., is the Director and Senior Litigation Consultant with Courtroom Sciences, Inc. Laura Cornish is a Director–Risk Management for Honeywell International Inc.