Defending Your Clients in a "Judicial Hellhole"

Robert L. Guerra, Jr.

Royston, Rayzor, Vickery & Williams LLP

55 Cove Circle
Brownsville, TX 78521
(956) 542-4377
robert.guerra@roystonlaw.com

Robert L. Guerra, Jr., is a partner with Royston, Rayzor, Vickery & Williams LLP in Brownsville, Texas. Mr. Guerra's statewide practice covers a variety of areas—from personal injury to commercial litigation and professional liability. He has successfully obtained defense verdicts for his clients in venues throughout plaintiff-friendly South Texas. Prior to his joining Royston Rayzor, Mr. Guerra served as a Felony First Chair Prosecutor for the Cameron County District Attorney's Office in Brownsville.

Defending Your Clients in a "Judicial Hellhole"

Table of Contents

Defending Your Clients in a "Judicial Hellhole"

I. Introduction

You've gotten the call from your client. He's been sued. Not only has he been sued, but the case has been filed in a Plaintiff-friendly jurisdiction, one that has affectionately referred to as a "judicial hellhole." Any lawsuit being filed against your client is bad news, but staring down a possible multi-million dollar judgment in a judicial hellhole – where the makeup of the judiciary, jury pool and local politics are at play – is enough to give your clients significant anxiety. What can you do for your client to assist in preparing a defense for him which could help guard against a runaway verdict, prepare the record for appeal, and even win the case?

What constitutes a "Judicial Hellhole"? The American Tort Reform Foundation (ATRF) publishes an annual report which identifies and discusses areas which it calls "judicial hellholes", or places where laws, procedures and jury verdicts are allegedly applied against civil defendants in unbalanced ways. *Judicial Hellholes 2011-2012,* American Tort Reform Foundation, Washington, D.C.), 2011 at 2. In its most recent survey, the ATRF identified Philadelphia, PA; the states of California and West Virginia; South Florida; Madison and St. Clair Counties, Illinois; New York City and Albany, New York; Clark County, Nevada; and McLean County, Illinois as "Judicial Hellholes." Over the course of the past 10 years, the ATRF has also identified Alameda, Humboldt and Los Angeles Counties, California; the Rio Grande Valley, Gulf Coast region and Jefferson and Brazoria Counties of Texas; the 22nd Judicial District of Mississippi; Orleans Parish, Louisiana; Miami-Dade County, Florida; St. Louis, Missouri; Holmes and Hinds Counties, Mississippi; Hampton County, South Carolina; Cook County, Illinois; Atlantic County, New Jersey; Montgomery and Macon Counties, Alabama, with many other jurisdictions being identified as "Areas to Watch." *Judicial Hellholes 2002 through 2012,* American Tort Reform Foundation, Washington, D.C.), 2002 through 2011. If you represent a defendant in one of these jurisdictions, or any demographically similar jurisdiction, you know that you will be playing defense in every sense of the word, due to the probable actions of the Plaintiff's attorney, the judiciary and the prevailing local opinions and more. Without a doubt, Plaintiff's counsel will use everything related to the jurisdiction in order to apply the most pressure on you and your client. Plaintiff's counsel's ultimate goal is to obtain a high dollar recovery – be it through settlement or jury verdict – while expending a minimal amount of time, money and effort in the case. In what amounts to a sophisticated shakedown, Plaintiff will seek to cultivate fear that your client will be on the receiving end of a disastrous verdict in order to settle the case. From a defense perspective, preparing a defense for your client could seem like a daunting and no-win situation. While an outright defense verdict may not be expected, there are a number of things you can do in the defense of your client that will level the playing field, and mitigate against a possible runaway verdict.

This paper will present a number of tips for practicing and defending your clients in a judicial hellhole. The tips and suggestions listed in this paper, are just that, and should not be considered by any means exhaustive or definitive. However, they represent practices and procedures refined over years of defending clients in defense-hostile jurisdictions in multi-million dollar lawsuits based on causes of action for wrongful death, personal injury, construction defect, breach of contract and commercial litigation. By following these tips, you can put your clients in a position to limit their exposure to damages, if not completely succeed on the merits.

II. Hiring of Local Counsel

One of the most important tasks to be completed at the outset when defending a client in a judicial hellhole is retaining local counsel to appear on the pleadings and, as the case progresses, before the court for

hearings. Many of the areas commonly identified as judicial hellholes are tight-knit communities with strong, identifiable values, and a predilection for sympathizing with Plaintiffs. As the attorney representing the defendant in a case, you're already playing from behind. Not only are you most likely representing a large, out-of-town corporation accused of damaging a local entity, the Plaintiff and his attorneys are most likely extremely familiar with the judge, the court staff, and a number of potential jurors. In order to limit the damage that those relationships will inflict, you should retain local counsel to assist you throughout the pendency of the matter. The hiring of local counsel in these jurisdictions is a necessity recognized by the local attorneys in these jurisdictions. Numerous attorneys are able to sustain their practices by serving as local counsel for out-of-town attorneys brought into Plaintiff-friendly jurisdictions. While the amount of legal work the local counsel is expected to perform over the life of a case will depend on your comfort level with their skill set in the pending litigation, one area their services should absolutely be utilized is voir dire. Although the importance of voir dire will be covered later in this paper, the use of local counsel in jury selection, if permitted by the jurisdiction, gives your side a chance to develop a rapport with the venirepanel, which, in turn, will help in the seating of a favorable jury.

As discussed above, if your case is going to proceed to trial, you will need to have a local attorney on your team to assist with jury selection. If you practice in an area considered plaintiff-friendly, you may not need to hire local counsel. However, you owe it to your client and the long term viability of your defense to consider whether the hiring of local counsel is required. To paraphrase a famous saying, no two judicial hellholes are created equally. For example, while two counties in close proximity in a given region may be identified as judicial hellholes, there may be striking differences in the composition of the jury pool, the respective values and attitudes held by those individuals, and, most importantly, the history and connections your client may or may not have with one of those jurisdictions. Even if you've previously practiced in the area, and have some familiarity with the courts and jury pool, the specific nature of your case may necessitate the hiring of local counsel.

If you've never practiced in a particular judicial hellhole, or are unfamiliar with the lawyers practicing in the jurisdiction, one of the best ways to find a local counsel who could best assist you would be to contact fellow DRI members in the area. If they aren't able to directly serve as your local counsel, they may be able to put you in contact with someone attorneys who could assist you.

III. Managing Client Expectations

One of the tougher aspects of defending clients in a judicial hellhole is communicating to the client the reality of the jurisdiction where the pending lawsuit has been filed. In some instances, nothing that the client has done, or failed to do, gives rise to any liability, and in any regular jurisdiction, would be summarily thrown out. In others, while the client may possess some liability, it, and the actual damages sought by Plaintiff, come nowhere near the damage model being asserted by the Plaintiff by and through its lawsuit. Nonetheless, the granting of any dispositive motion on behalf of the client is highly unlikely in a judicial hellhole, thereby requiring the client to continue to face the possibility of proceeding to trial in a hostile jurisdiction. In order to prepare the client for the task ahead, as well as to bring its expectations in line with the reality of the situation, you must completely explain to the client the perils of defending it in the jurisdiction. For example, the fact that it is highly unlikely that a dispositive motion will be granted will not sit well with either you or the client. Clients will be aware that they possess little or no liability for the damages sought, or that they possess a solid legal or contractual defense. They will want to be extricated from the dangerous jurisdiction immediately, and the fact that their lawyer cannot get them out of the case, thereby keeping the possibility of an adverse jury verdict alive, as well and continuing to increase the attorney's fees, will not sit well with them. It will not be uncommon for you to receive an earful from the client wondering why they continue to be in a

case that they have nothing to do with. And while they may be right, there is only so much you, as a defense lawyer, can do in a judicial hellhole. From a legal perspective, you will have to come to terms with the fact that while you may have an ironclad factual or legal defense, the trial court will not do anything that would inhibit the Plaintiff's ability to obtain *something* for having filed the lawsuit.

While you won't be able to do anything about the ability, or lack thereof, of the trial court to follow applicable statutes or legal precedent, you can begin to prepare the client for what is about to take place. Document your file, so that it is clear that you have explained to the client the dangers of the jurisdiction, and your efforts to defend it to the best of your abilities. At the same time, explain to the client the strengths and weaknesses of the case. If the case is entirely defensible, make sure the client is aware that the ultimate determination of his lack of liability may not come until the case has progressed through the appellate courts. If the client is liable to some extent, make sure the client is aware of the possible "enhancement" of any jury finding of damages and liability given the jurisdiction, and, once again, the true measure of its damages may not be determined until the matter reaches the appellate courts. At the end of the day, your legal advice will inform the client as to the decisions it will make regarding how to proceed in the case. If the client believes that the matter should be tried, eschewing any possible settlement, then you can rest knowing that it was properly advised as to the dangers in proceeding to trial, and you have continually defended the case to the best of your abilities. If the client chooses to settle, it will have done so with full knowledge of the jurisdiction, as well as the strength and weaknesses of the case.

IV. Trial in a Judicial Hellhole

As trial lawyers, we are wired to win - going into court, championing your client's cause, battling with opposing counsel, arguing your case to the jury – it is an inherently competitive process. If a case proceeds to trial, it means that, for the most part, both sides believe that their side is completely correct, and there is no room for settlement or compromise. However, while defending your client in trial in a judicial hellhole requires the best effort possible in an attempt to prevail, there is also a counterintuitive aspect to trials in a judicial hellhole. When practicing in a judicial hellhole, the ultimate goal of a defense lawyer, apart from prevailing on the merits, is to preserve error committed by the trial court and position your case for appeal. Depending on the jurisdiction, the courts of appeal to which cases tried in judicial hellholes are brought could be just as "hellacious". In such a scenario, the goal is the same – preservation of error – but in this instance, it is done in order to posture the case for the highest available appellate court in the jurisdiction, which is typically the state supreme court. The preservation of error starts from the instant you become notified that your client has been sued in a judicial hellhole, and continues until such time as a final judgment has been entered in your case. Because the appellate process could be a lengthy, and costly endeavor, make sure you discuss this plan of attack with the client before beginning to posture your case accordingly.

A. Pretrial Activity

Once retained to represent a client in a judicial hellhole, take a careful look at the original petition. In their haste to file the matter in the favorable jurisdiction, there could be a number of errors and omissions in petition that must be addressed immediately, or which could be waived. One of the most significant areas of review when looking at the original petition is venue. If venue is improper in the filed jurisdiction, and there is a more proper venue, a legal challenge to the claimed venue must be made. Obviously, given the Plaintiff-friendly reputation of the judicial hellhole, Plaintiff's counsel will base jurisdiction on some rather tenuous reasoning. Depending on the laws of the jurisdiction you find yourself in, issues surrounding venue may have to be addressed immediately, or risk being waived. Remember, no two judicial hellholes are the same, and the

unique facts inherent in the suit may necessitate transferring the matter to another jurisdiction, that, while Plaintiff-friendly, may not be as Plaintiff-friendly as the jurisdiction you find yourself in. Also, challenging venue when appropriate, even if it is denied by the trial court, preserves the issue for appeal. In a commercial context, if the lawsuit arises out of a contractual relationship, review the contract for any agreed-upon mandatory venue provisions. While such provisions may not be given the requisite consideration and weight by the trial court in its denial of the venue challenge, the issue will be properly preserved for appeal. Moreover, the defending such a venue challenge through written motion or oral argument before the court could result Plaintiff's counsel making some possible admissions as to the validity of the contract, its formation and the provisions contained therein.

Also present in commercial contracts are enforceable arbitration clauses the enforcement of which should be raised at the outset, as the activities inherent to the preparation of a defense in a matter could be construed as waiver depending on the jurisdiction. To a Plaintiff's counsel prosecuting a civil action in a judicial hellhole, arbitration clauses represent a significant impediment to their overall scheme. Not only do Plaintiff's attorneys consider arbitrations costly and wholly unnecessary, the arbitration process undermines their ability to use the Plaintiff-friendly jurisdiction to their advantage. Arbitrations, by their very nature, remove the sympathetic judge and jury from the process, leveling the playing field. The filing of a motion to compel arbitration will be met with fierce resistance by Plaintiff's counsel, who would rather have the case tried in the judicial hellhole. In turn, the resistance generated by Plaintiff's counsel will, more often than not, result in the denial of the motion to compel arbitration. In the off-chance that a trial court in a judicial hellhole voluntarily agrees to relinquish jurisdiction over a case, then the client will be committed to pursuing the matter via arbitration. While sending the parties to arbitration would represent a significant upgrade in jurisdiction for the client, it will also result in a rapid change of perspective in Plaintiff's demands and outlook for the case. Of course, there is often a considerable expense involved with arbitrations, particularly those in commercial cases, where a panel of arbitrators is selected to preside. As such, you should consult with the client regarding arbitration and the attendant costs involved in pursuing same.

More importantly, in some jurisdictions, the denial of a venue challenge or motion to compel could give rise to the filing an interlocutory appeal or writ of mandamus. For a Plaintiff's counsel seeking a quick, inexpensive, effortless, and ultimately lucrative resolution to a lawsuit, the filing of an interlocutory appeal or writ of mandamus is anathema to their overall scheme. If you choose to file such an appeal, make sure that a companion motion to stay all proceedings in the lower trial court is included with your initial appellate filing, if required by the jurisdiction. Courts throughout the country, in both the federal and state levels, have been very aggressive in enforcing venue challenges and upholding the enforceability of arbitration provisions, and will stay all proceedings in the underlying matter while its sorts out the issues related to the denied venue challenge or arbitration motion. As a result, an immediate appeal to the denial of a venue challenge or motion to compel arbitration could bring the case to a grinding halt, and require Plaintiff's counsel to refocus its efforts from trial preparation to appellate defense. Often times, this may even require a Plaintiff's attorney to bring in outside appellate counsel. Depending on the manner in which the appellate court manages its docket, the resolution of the issues on appeal could take months or even years.

Additionally, any and all motions to dismiss for lack of personal jurisdiction, failure to state a claim upon which relief could be granted, or any other ground, should be made at this time. Doing so will remove Plaintiff's defense of waiver, and once again, should they be denied, properly preserve the issue for appeal. Depending on the jurisdiction, the denial of such a motion to dismiss, could give rise to some sort of interlocutory appeal. Make sure that you are familiar with the prevailing laws and rules in the jurisdiction to ensure that any and all deadlines are adhered to.

To the extent that it is not mandatory in the jurisdiction, to ensure that all filings are properly and timely received by the court clerk, you will want to engage in electronic filing of all pleadings and motions with the trial court. It may not be uncommon for some courts in judicial hellholes to be without electronic filing. Accordingly, consider having a courier personally file the documents with the clerk, or in the alternative, even have your local counsel personally conduct the filing. Many times, items to be filed with the court clerks in these jurisdictions that are to be delivered via mail often do not make it to their destination in a timely manner, if at all. Please note, some clients will take umbrage with the fees associated with the electronic filing of documents. As such, you must discuss this with them at the beginning of the case, instead of when they receive your first bill. By informing the client at the outset why the electronic filing is necessary, you will be able to avoid future disputes about the appropriateness of the fees later on.

When filing the answer on behalf of the client, make sure that it, along with any subsequent motions or discovery propounded, are so done conditionally, and subject to any pending venue challenges, motions to dismiss, or motions to compel arbitration. Doing so will allow for the timely filing of an answer while not waiving any of the rights or defenses presented in the motions. Moreover, try to ensure that all necessary affirmative defenses, as to the extent that said could be ascertained given the factual evidence developed at that time, are included and pled in your answer. By including a good number of affirmative defenses in your original answer, you can begin to fashion the client's defense in this case, and tailor your discovery and deposition examinations accordingly. Additionally, doing so will allow you to establish the predicate for a motion for summary judgment which could be filed at some later date in the litigation. From a practical standpoint, should you fail to include your affirmative defenses at the time of filing of your original answer, doing so at or near the time of the filing of your motion for summary judgment will give Plaintiff's counsel a roadmap to defeating your motion. In response to the motion, Plaintiff's counsel will specifically tailor discovery responses or elicit deposition testimony that would give Plaintiff enough of a basis upon which to defeat summary judgment. Should those affirmative defenses be included from the outset, Plaintiff's counsel, particularly one plying his trade almost exclusively in a judicial hellhole, may be less apt to recall said affirmative defenses, and less likely to tailor his discovery to defeating same should it be raised in a motion for summary judgment.

When engaging in discovery in a judicial hellhole, you should expect some level of chicanery on the part of Plaintiff's counsel in answering propounded discovery. You should also expect that any sort of violations or abuses of the discovery process by Plaintiff's counsel will not be met with much, if any, disciplinary or punitive actions by the trial court. However, the flipside is also very true – engaging in discovery conduct similar to that of Plaintiff's counsel could also be the grounds for you and your client to be sanctioned. While not fair in the least, it is a glaring example as to how the judicial system in a judicial hellhole operates, and tilts the scales in favor of Plaintiff's counsel. Should you find yourself filing a motion to sanction and/or compel Plaintiff's counsel for various abuses of the discovery process, do not expect to receive much relief from the trial court. A simple promise, on the record, by Plaintiff's counsel to "play nice" with discovery usually is enough for the trial court to deny any sort of motion for sanctions and/or compel. Additionally, the court may require the parties to "work it out" in the hopes that the parties could come to some agreement to resolve the problems with discovery. However, such promises or agreements are only valid provided that Plaintiff's counsel, who has been less than forthcoming in the discovery process, suddenly decides to change his ways and play nice.

Along these same lines, you should ensure that any oral agreement or relevant conversation engaged in with Plaintiff's counsel is reduced to writing, and sent to opposing counsel for his review and/or commentary. In the likely event that Plaintiff's counsel fails to honor the terms of the oral agreement or conversation, creating a written record of the conversation and/or agreement makes it difficult for Plaintiff's counsel to deny same at a later date. Creating a written record also makes it difficult, although not impossible, for the trial

court to rule in Plaintiff's favor in any related court proceeding seeking enforcement of the terms of the agreement.

Additionally, expert witnesses designated and produced by Plaintiff in a judicial hellhole should be properly challenged via written motion. If the lawsuit involves a given type of litigation, you may find that the expert witnesses designated by Plaintiff's counsel have given similar opinions in similar cases in the same or neighboring jurisdictions, and, may not even properly qualified to provide the opinions being offered by them in your lawsuit. For example, recently in South Texas, construction defect litigation brought by the various school districts against the architect, general contractor and subcontractors have seen the various Plaintiffs' attorneys handling these lawsuits use the same expert witnesses. These same expert witnesses have given the same opinions in every case – finding fault with the design of the school, its construction and subsequent remediation work – yet failing to fault in, and wholly disregarding, the school districts and their employees for their own lack of preventative maintenance, training and damage inflicted on the subject buildings. Clearly, these expert witnesses would be ripe for a challenge and possible exclusion from testimony. However, not one of these experts in any of these cases presented in South Texas has been stricken from testifying. Nonetheless, in order to preserve the appellate record, these experts must be challenged before trial through a written motion.

When appearing before the trial court for any sort of discovery dispute, make sure that any ruling of the court, or agreement by the parties, is reduced to writing and placed on the record. Often times, the presiding judges will call the parties into chambers in order to resolve the discovery issues, and, upon reaching an agreement amongst the parties, send them on their way. If the agreement is not reduced to writing or recited into the record, there would be little, if any, recourse to filing a subsequent motion for sanctions and/or compel should Plaintiff's counsel fail to live up to his side of the bargain. Additionally, the lack of a written or oral record provides the judge cover, both politically and on an appellate level, for failing to take action on discovery disputes and abuses. Thus, it is exceedingly critical that any ruling of the court be made on the record or reduced to writing filed with the court clerk.

Lastly, in preparing your motions in limine, once again, do so with an eye to the appellate courts. Make sure your motions in limine are as thorough and extensive as possible, and ensure that you receive a ruling from the court as to whether each of your motions is either sustained or overruled. In the event that such motions are granted, you will be keeping out an unwanted piece of evidence and testimony from your trial. If they are denied, as they most likely will be, you will have another point of error for the appellate court to review at the conclusion of trial.

B. Trial

The case has been prepared, discovery has been conducted, and settlement, while attempted, failed to resolve the case. Now comes one of the most intimidating prospects that a defense attorney can face – going to trial on behalf of a defendant in a judicial hellhole, before what can only be described as a Plaintiff-friendly jury. If the matter is proceeding to trial, chances are there are some factual and legal defenses that can be made on behalf of the client. As a result, when trying your case to the members of the jury, the most important task to be undertaken is to find those jurors in the venire panel who are not "in the tank" for Plaintiff, and, in fact, may be good jurors for the defense.

As noted previously, prior to picking your jury, you may want to give some consideration to having your local counsel pick the jury. Whomever is to pick the jury must not only be aware of the local customs, mores and "language" spoken by the local populace, but must be comfortable operating within that world, while continuing to possess a working knowledge of the case and all defenses to be presented. If the

jurisdiction allows for the attorneys to conduct jury selection, chances are the defense will proceed only after Plaintiff's counsel has had an opportunity to present his side of the story to the jury. Voir dire will be your only chance at a first impression before those individuals who will decide the case. Your goal for jury selection will be twofold: educate the jury on your story, defenses, etc., while weeding out those individuals who will be overly and unreasonably sympathetic to Plaintiff's story. In a judicial hellhole, the reputation afforded the region which gives rise to the name comes from the tendencies of the local populace to award high dollar judgments to the Plaintiffs. While you have no control over the jury pool, or how it is assembled, you should start in your jury selection by determining which veniremembers have absolutely no intention of being a fair and impartial juror.

Never be afraid to engage the veniremembers during voir dire, opting for individual questioning over group questions where people can hide amongst other, more participatory panelists. The most dangerous veniremember is one who is never heard from in voir dire. While she may raise her hand or give a generic response, if any, when posed a group-specific question, if she doesn't give a specific response to a direct question, you will run the risk of having that person seated on your jury. Try to ask every veniremember an individual and direct question, even if it is a follow-up question to a response given by another veniremember. Often in judicial hellholes, there will exist some veniremembers who believe that Plaintiff is automatically correct, and is automatically entitled to every single penny being sought, simply because a lawsuit was filed by Plaintiff. Some veniremembers will simply admit to having such a prejudice, while others may need to be cajoled into admitting same. If they refuse to volunteer that information when asked directly, the use of an exemplar individual, to whom the traits to be discovered are attributed, can make for an effective voir dire tool. For example, frame the trait as belonging to a parent, *i.e.*, "I love my mom to death, but she always says that she feels sorry for the Plaintiff in a lawsuit, because, poor guy, something must have happened to him that he deserves to get paid regardless." Not only does such a question allow you to build a rapport with the jury (he's not a corporate defense lawyer – he has a mother!), but it also gives those veniremembers who may not otherwise speak up coverage to do so.

If there is a veniremember who, by virtue of their juror information card, their previous responses, or general reactions to questions posed, that you believe could be problematic, ask them a direct question. The worst question in jury selection is one that is never asked. Don't be concerned about possibly poisoning the jury pool – if you are trying the case in a judicial hellhole, you may be playing from behind to begin with. However, if you can obtain information about a juror that can given you additional insight into their beliefs, and, as a result, into how they may be as a juror, then the question must be asked. Jurors who may have suffered a traumatic experience similar to that in the case may be extremely hesitant to share something like that before a room of complete strangers. Moreover, if you believe that a juror could be stricken for cause, make sure you ask sufficient questions to solidify his position which would give rise for him to be so stricken. Every challenge for cause that is granted in your favor means you can save your preemptory challenges for those veniremembers who have no business being on your jury.

Always try to find a veniremember who is somewhat sympathetic to the defense's theories in the case, or, at the very least, understands what they may be. That individual, if on your panel, can be a great tool to educate the rest of the panel members. Even if it may lead to that veniremember being stricken by Plaintiff, the comments made by that juror will be well-received by the rest of the panel members, as it is coming from one of their own, rather than the lawyer representing the Defendant. Additionally, you can take the comments made by that one individual and ask members of the panel if they agree with him, and, if they do not, why they disagree. Doing so will afford you the opportunity, once more, to determine whether or not a given individual will be an asset or liability on your jury.

Of course, along with determining the opinions of the individual veniremembers, you should present your theories and defenses of the case, to the extent that such is allowed by the jurisdiction. When presenting your theories and defenses of the case, you have to keep it simple. Attempting to engage in a dry and complicated recitation of contributory negligence, and determining whether or not the veniremembers agree that a Plaintiff can be contributorily negligent, will only serve to have them shut down and prevent you from finding out where they stand on that issue. Instead, similar to projecting certain traits on a fictional or non-party individual, develop hypothetical scenarios that the jury panel could relate to, while using knowledge of tastes and preferences of the area for maximum effect. For example, we recently had occasion to represent a trucking company in a wrongful death case in South Texas. One of the major issues in the case was that the deceased, who was operating a motorcycle, failed to properly yield the right of way to an oncoming tractor-trailer when merging onto the highway, resulting in the motorcyclists' death. When attempting to discuss contributory negligence before a South Texas jury, a hypothetical was developed using the Dallas Cowboys, an immensely popular team in the region. The hypothetical itself involved a fan leaving the seating bowl and running onto the field of play, interfering with the game-winning play for the Cowboys and ultimately costing the Cowboys a chance to go to the playoffs. At the end of the hypothetical, it was revealed to the veniremembers that the fan who ran onto the field (and cost the Cowboys the game) sustained injuries and, in turn, sued the Cowboys for his damages. The panel was then posed various questions regarding true liability, whether Plaintiff should be suing for his damages, and whether the Cowboys should pay Plaintiff any damages. The various veniremembers took the hypothetical Plaintiff to task for not being responsible for his own actions, for being careless, negligent, etc. Thus, in using a simple hypothetical that the majority of the venirepanel could relate to, they were educated regarding contributory negligence, and we were able to determine which prospective jurors were possibly valuable to our defense.

Additionally, you may want to create a simple hypothetical, and add layers to that hypothetical, when attempting to prove up your defense. In the same trucking case where the Cowboys hypothetical was used, one of the main areas of concentration for Plaintiff's counsel was the trucking company's apparent lack of proper record keeping of its drivers' documentation. Of course, nothing regarding the keeping of the driver's paperwork had anything to do with the accident – the driver involved had a clean record, and the driver of the motorcycle failed to yield the right of way when merging onto the highway. However, to Plaintiff's counsel, this area was critical area of examination, as it would be used to enflame the jury against the client trucking company. Given the lack of relevance of said issue to the questions in the case, motions in limine were filed and obviously denied by the trial court. In voir dire, we wanted to educate the jury that because someone may not have their paperwork in order, even though it is a violation of the law, it was not a cause of the subject accident. Thus, we created a hypothetical of a texting driver who got into an automobile accident. The venirepanel was then asked what caused the accident, and every person on the panel identified the texting driver as the culprit. A factual layer was added onto the hypothetical, in the form of the texting driver leaving her driver's license and insurance card at home. Once again, the venirepanel was asked what caused the accident, and every member identified the texting of the driver as the cause of the accident. Another factual layer was added onto the hypothetical, as this time, the individual who was hit by the texting driver did not have his driver's license or insurance card with him. When asked what caused the accident, the venirepanel identified the texting as the culprit. They were then asked whether the hit driver's lack of insurance information or driver's license had anything to do with the accident, and to a person, all of them identified the texting as the cause of the accident. By using a simple hypothetical, we were able to educate the jury on a theory of defense, and simply get them to use their common sense to assist them in deciding the case.

Once the jury is seated and evidence is to be presented, the attorney representing the defendant at trial must be aware of one indisputable fact – any judgment calls regarding the admissibility of evidence or

testimony will not go in his favor. Those types of rulings will almost always be made in Plaintiff's favor. It is crucial not to get discouraged when said calls are not going your way, and to stay the course in your defense. Also, judges in these jurisdictions may not issue a specific ruling as to your objection; rather, they may talk about the weaknesses of your position, pointing out the outcome by which the issue will be decided, while not actually making a ruling. Consequently, it is incumbent upon you to request that the judge issues a ruling on your objection on the record.

Similar to the reluctance to grant summary judgment, courts in judicial hellholes will be reluctant to grant a directed verdict or post judgment motion to vacate the jury verdict, despite it being legally and factually permitted. Nonetheless, make your motions, and ensure that the trial court makes a ruling, one way or another, on every motion for directed verdict made by you. The same goes for your objections to the jury charge as approved and distributed by the trial court. File your proposed charge with the clerk of the court, and offer it, in its entirety to the court for consideration on the record, outside of the presence of the jury. While the charge conference may typically take place in the judge's chambers, request that your proposed charge be presented on the record, and that the judge make a ruling, on the record, as to whether or not your questions will be presented to the jury. Once again, while the trial court is unlikely to grant your motions, the key is to preserve any and all error possibly committed by the trial court for the purposes of appeal.

Defending your client in a judicial hellhole can be a tricky and stressful proposition. However, by taking steps to properly position your client's defense, you can attempt to temper Plaintiff's expectations, and possibly even obtain a favorable verdict in the case.