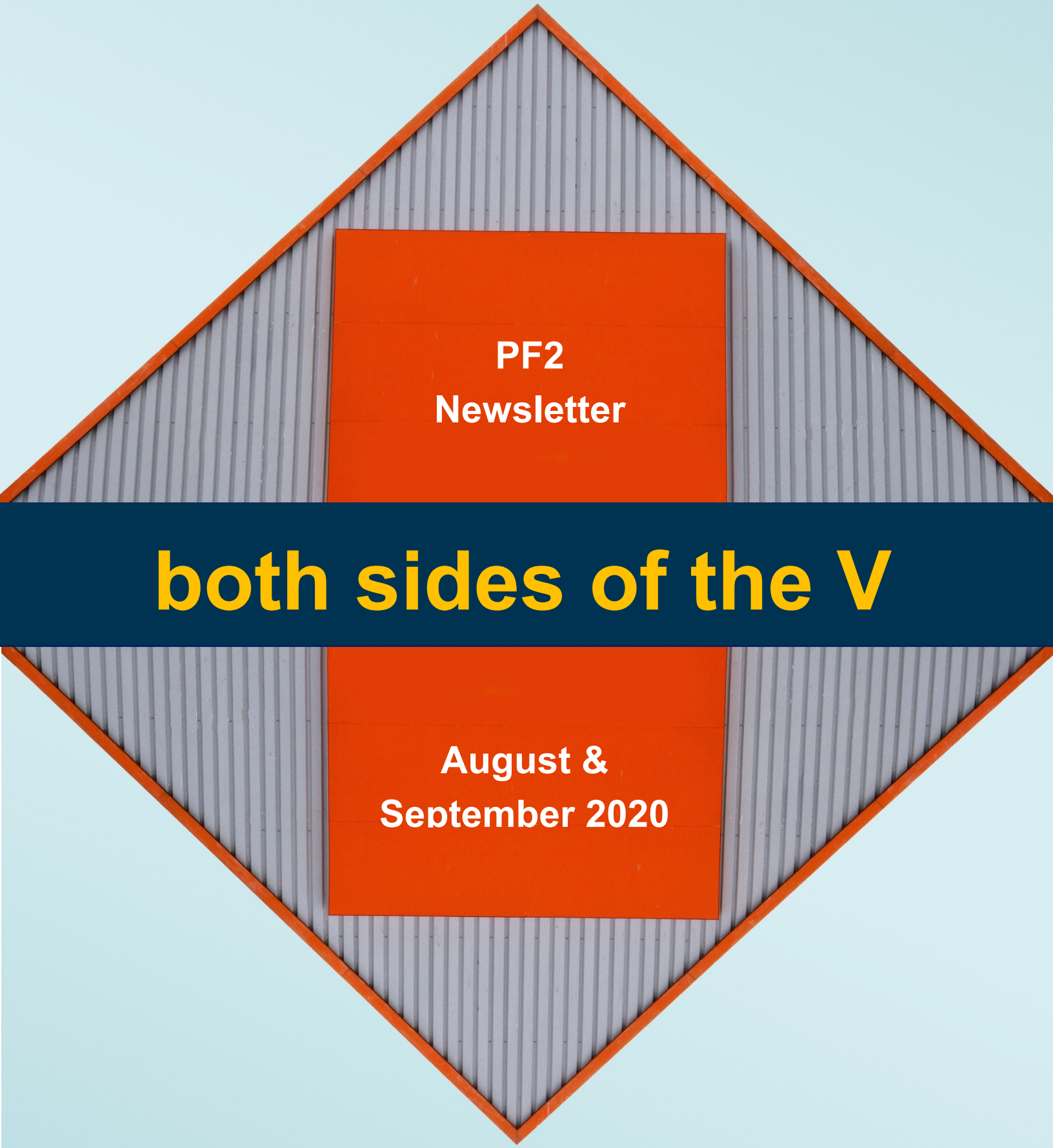


PF2
Newsletter

both sides of the V

August &
September 2020

Q&A

with Litigators

Q: *Litigators*, tell us about your most harrowing experience when preparing or cross-examining an expert.

DEAN ARMSTRONG QC

Joint Head of Chambers,
The 36 Group, London

"Expert witnesses are a special breed: intrinsically valuable to the success of a case but they also carry a significant health warning.

Early in my career I was defending an alleged member of a well-known motorcycle group. I was relatively junior and, in common with many members of my profession, bowed to pressure not to see my expert witness prior to the hearing but to sort it out at court, prior to the hearing. I spent time carefully going through the points that I hoped that he could assist me with. Due to inexperience I didn't spend nearly enough time testing the ambit of his proposed evidence.

All went well in court until it was time for the other side to cross examine my expert. I sank deeper and deeper into my chair in dismay and incredulity as every question was met with an answer that agreed with the prosecution's argument.

Result: a very unhappy client and a lot of future fun at my expense. Harrowing indeed, but also a salutary lesson so that in future I followed some simple rules:

- Always see the expert witness in conference – face to face, not over the phone – before giving evidence and put alternative scenarios and hypotheses to them that the other side will use.
- Never wait until the day of the trial. See the expert well in advance. Whilst they have a duty to the court, you are entitled to test their expertise, experience and basis of their conclusions.
- While you can use an expert, you don't have to call them. Focus on getting sufficient material from the other side's expert witness.
- It's often better to come to an agreed position with the other side's expert so that the limit of the expert evidence is clear and cannot change."

"On a hot day in Florida, I extricated an admission from plaintiffs' expert, on cross examination, that I was ultimately able to put before the US Supreme Court to knock back plaintiffs' case at class certification.

As an important lesson to younger litigators, once I had the key admission early in the examination, I quickly moved on to other matters to ensure that it remained part of the record without allowing the expert an opportunity to change his answer.

What the expert had admitted was that when crafting his "but-for" damages model he had assumed all four of plaintiffs' theories of liability would succeed. This concession meant that plaintiffs had no model – and certainly had admitted no model into evidence – that would support a class-wide damages assessment other than in the scenario in which all four of plaintiff's theories of liability were successful. If we, the defendants, could get any of the four theories dismissed, plaintiffs would be stuck without any showing of class-wide damages.

As it happened, the trial court landed up certifying the class on only one of the four theories advanced, and the Supreme Court then struck the final blow, ruling that the class could not be certified because plaintiffs' damages expert had failed to show that damages could be calculated on a class-wide basis, given the liability allegations."

SHERON KORPUS

Partner, Kasowitz Benson Torres LLP, New York

MICHAEL SWARTZ

Partner, Scheper Kim & Harris LLP, Los Angeles

"I am going to share a *war-story* about my first and briefest trial examination of the opposing side's expert witness.

During the deposition, I had established that the expert had no opinions on a broad array of potential trial topics. At the outset of opposing counsel's direct trial examination of the expert, we provided the judge a crib sheet identifying the many topics on which the expert had been unable to testify at deposition. In accordance with that crib sheet, I objected to the vast majority of the questions posed to the expert on direct. The examination was largely a parade of "Objection, your honor, Topic A. Sustained," and "Objection, your honor, Topic B. Sustained."

When I stood up to cut the expert to shreds on the minor topics he had addressed, my mentor Mike Hennigan said to me privately: "Say that you have no questions for this witness." I noted that I had not begun and that I was looking forward to my first trial cross-examination. Mike pointed to the table where opposing counsel were readying their re-direct and suggested that they looked rather excited that I might open the door to their failed line of questions.

I told the Court that I had no questions, and the witness was excused. Opposing counsel could not have looked more crestfallen. I had survived my first test of remaining mindful that winning is a lot more important than the fun of cross-examination."

Q: *Litigators*, tell us about some things you consider, pertaining to your experts, depending on whether your case is before a judge, jury or an arbitrator.

BOBBY SCHWARTZ

Partner, Quinn Emanuel Urquhart & Sullivan, LLP, Los Angeles

"My criteria for picking an expert rarely changes based on forum. Nor would I rather present an *especially strong expert* to a judge vs. a jury vs. an arbitrator.

All fact-finders are humans. Judges and arbitrators can be just as interested or uninterested in the case as jurors.

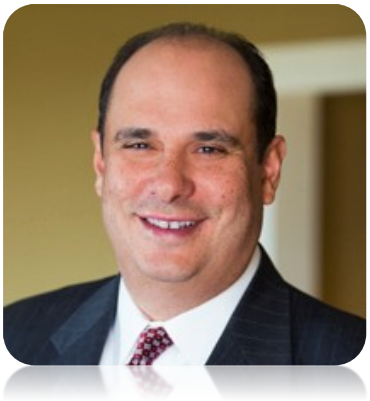
I pick an expert based on whether the fact-finder will be impressed by the expert's credentials and whether the expert is a good teacher. That requires good speaking skills, knowledge of the field, intellectual integrity (knowing when and how to concede a minor point and not be viewed as my advocate, even if the expert may be), and humility. If my client isn't a strong witness, the fair, simple, and articulate testimony of the expert can rub off on the client and make the jury feel better about giving our side its verdict.

We can work with an expert on the substance of the testimony. But we can't take someone who doesn't communicate well and who has an off-putting personality and turn them into the jury's best friend."

"I think that it is far more impactful when an expert makes a mistake in a jury trial – either on direct or on cross – as opposed to making one in an arbitration or a bench trial.

While it is always emotionally devastating and frustrating, to say the least, when your expert says the wrong thing while testifying, there is a much greater risk that the damage to your case cannot be repaired if it is in front of a jury as opposed to an arbitration panel or a judge. Jurors are relying almost exclusively on the expert's testimony, whereas arbitrators and judges are also able to rely on the written reports of the expert and briefs of counsel. Arbitrators and judges are therefore more likely to overlook mistakes by experts and focus more on the substance of the expert's opinions, especially if they are also set out more clearly (and any mistakes explained) in the written reports and post-trial briefs submitted by counsel.

Consequently, in a jury trial, it is even more important to hire experienced, savvy experts who will not "misspeak" or make mistakes when the heat is on at trial."



DAVID LEVY

Partner, Morgan, Lewis & Bockius LLP, Houston

Visit or subscribe to our newsletters online at www.pf2se.com/newsletters; or if you would like to participate in future newsletter Q&As, email us at info@pf2se.com.

Disclaimer. The answers shown above reflect solely the opinions of the individuals named and do not necessarily reflect the opinions of any firms or entities with which they may be associated or otherwise engaged.