

## Arbitration Is Not the Only Way to Waive

### Goodbye to Juries: continued from page 2

- extent to which the language is express, clear, unambiguous and unmistakable;
- actual location and conspicuousness of the waiver clause within the agreement;
- ability of the parties to negotiate the terms;
- level of disparity in the parties' bargaining power; and
- business acumen of each party.

#### DRAFTING JURY WAIVER LANGUAGE

A party can draft clear and unambiguous language everyone understands and position the jury waiver provision in a conspicuous place. Within the agreement itself, certain statements should be bolded, made in all caps and/or typed in a larger font:

**"THIS CONTRACT CONTAINS A BINDING JURY TRIAL WAIVER PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."**

The waiver should clearly define what claims are subject to the waiver. This could include only claims arising directly from the contract itself or all claims stemming from the parties' ongoing relationship. Finally, the agreement should expressly cover claims by or against entities and individuals related to, or associated with, the parties including subsidiaries, divisions, successors, officers, directors, managers, agents, etc. Additionally, choice of law and forum selection provisions would commonly be included in contracts containing a jury waiver provision.

Parties entering into contractual and similar relationships should consider whether including a jury trial waiver provision would be beneficial. Language can usually be tailored for a specific purpose and contractual relationship.

Enforcement of jury waiver provisions remains a relatively new endeavor. A party contemplating a jury waiver should consult legal counsel so that a full analysis of the pros and cons of the procedure can be made and enforceable language drafted. If an arbitration requirement is being given up in lieu of a jury waiver provision, a party must realize the importance of enforcing the agreement so the dispute does not simply get thrown back into the jurors' laps.

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*Tim McNamara has extensive business litigation experience including jury, non-jury and appellate litigation. He has tried cases throughout the Midwest and in the United States Supreme Court. Tim practices business and complex commercial litigation, intellectual property, media, professional liability and trade secrets/covenants. He can be reached at (816) 460-5534 or [tmcnamara@lathropgage.com](mailto:tmcnamara@lathropgage.com).*

## Mock Juries:

### REFINING TRIAL PREPARATION AND STRATEGY

By Peter Daniel, Lathrop & Gage L.C.



Mock trials, virtual trials and focus panels are increasingly used to test themes and theories, assist in the assessment of risk, identify categories of jurors that might better identify with the issues presented by the case and assist the lawyers in the trial preparation process.

This process, collectively "mock trials," can use sophisticated, real-time computer measurements of emotional response to themes. They can take advantage of the Internet to present topics to virtual jurors selected from demographic

information closely matching those of the trial venue. But, in its simplest form, a mock trial is merely presenting a small sampling of a case – condensing the entire trial from opening to closing arguments into a 30-60 minute presentation to a group of unbiased listeners who are then asked to "render a verdict."

Participants answer written questions before and after the presentation designed to detect the differences between preconceived notions and the persuasive value of the advocacy. Post-trial interviews are conducted with the "jury panel" to determine whether other evidence or a different presentation style may have had an impact on their decision. The best mock trials closely imitate the entire process including the presentation of expected evidence, good, bad and ugly, to obtain as realistic a result as possible.

Preparing for mock trials has many benefits, helping attorneys:

**SIMPLIFY** – This is the process of reducing a one or two-week trial to TV-show-like time frame, pinpointing the most important questions to be decided. In many cases, the art of reducing complex issues to readily understood presentations for a lay jury is the key to successful advocacy.

**WEIGH EVIDENCE** – Tough decisions about whether, how or in what order to introduce a specific piece of evidence can be tested serially using presentations modified to isolate that question. Trial "themes," the overall approach to the presentation of a case, can be tested, measured and evaluated.

**SELECTION AND FOCUS OF WITNESSES AND JURORS** – Mock juries can view edited clips of videotaped testimony to assist in weighing the credibility of key witnesses. Lawyers can build lists of categories of jurors they may try to avoid during the jury selection process.

**RISK ASSESSMENT** – Lawyers and clients who are closely tied to their view of the evidence may have a hard time calculating the value lay jurors may place on a claim for damages. This is particularly true in cases involving damages that are not readily ascertainable by reference to accountants and economists. Asking demographic-matched jurors for an opinion can be informative – sometimes shocking.

The mock jury process can be expensive, but not nearly as expensive as grossly underestimating the emotional impact of a case.

Lathrop & Gage's 2007 renovations include a mock courtroom equipped with state-of-the-art technology so that we can continue our practice of using mock trials to better serve our clients.

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## Smoke, Mirrors and Holstein Heifers

A recent jury verdict in favor of Lathrop & Gage clients Shannon McCormick and McCormick Holstein, LLC, awarded McCormick damages of \$815,000 for breach of a cattle feed and care contract. Subsequent negotiation by Lathrop & Gage resulted in a total settlement of more than \$1 million to McCormick.

The win came after a week-long jury trial before Judge Michael Quint in the Kearney County District Court in Lakin, Kansas. The plaintiffs, previously represented by another law firm for the first two years of this litigation, commended the Lathrop & Gage team for its persistence. The initial litigation proceedings resulted in a settlement mediation through which the plaintiffs would have owed the defendant nearly \$200,000.

McCormick had placed Holstein heifers with Kearney County Feeders, Inc., a western Kansas feedlot, for the purpose of feeding, breeding and caring for the 600+ cows in their prime milk-producing years. In the fall of 2004, McCormick found his cattle were in poor health, improperly fed and treated and approximately 220 were unaccounted for or missing.

McCormick attempted to resolve the situation amicably with Kearney County Feeders, but his efforts were ignored. The situation was all the more troublesome because McCormick's cousins owned and operated the feedlot.

McCormick made a regular practice of checking on his cattle but was not directly involved in the day-to-day operation of the feedlot or in the formulation of feed for his cattle. The defendant argued, despite its agreement to feed and care for McCormick's cattle, that it was McCormick's responsibility to take a more hands-on approach to managing his cattle.

Proof of the inadequate care and handling of McCormick's dairy cattle was difficult due to the antiquated record-keeping systems used by this feedlot and by the beef cattle industry in general. Despite these evidentiary difficulties and the difficult family issues involved, the Lathrop & Gage trial team of Richard Rhyne, Tad Layton and Justin Nichols successfully proved to the jury that McCormick suffered significant damages as a result of Kearney County Feeders' actions and/or inactions.

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## On the Stand WITH BRIDGET SHORT – NEW YORK



### WHAT LED YOU TO LATHROP & GAGE AND AN INTELLECTUAL PROPERTY FOCUS?

I became involved in intellectual property through good fortune. I received a call from a law school classmate informing me of a litigation position with an IP boutique managed by Bill Hansen. Intrigued by my classmate's enthusiasm for her own work and hoping to share in it, I decided to change my practice area from criminal law and general litigation and join Bill's IP litigation team.

I have worked with Bill for seven years. When the opportunity presented itself to join Bill in opening the New York office of Lathrop & Gage in the Fall of 2004, it was an obvious decision.

### WHAT IS YOUR PROUDEST PROFESSIONAL ACHIEVEMENT?

One of my proudest professional achievements is serving as trademark counsel to my alma mater, Skidmore College.

### WHAT IS YOUR MOST MEMORABLE CASE/TRADEMARK ISSUE AND WHY?

My most memorable case was a three-week trademark infringement jury trial in the District of Colorado. It was my first jury trial and first exposure to the complete legal process – from inception of a case to trial by jury.

### WHAT IS ONE THING YOU ENJOY MOST ABOUT YOUR LEGAL PRACTICE AREA?

The creative aspect – I enjoy coming up with new and creative litigation strategies to protect a client's IP assets and working with clients to meet their business objectives. Intellectual property also affords me the opportunity to serve clients in a wide variety of industries, including footwear, jewelry, food products, pharmaceuticals and educational institutions.

### WHAT IS YOUR FAVORITE MOVIE/BOOK? WHY ARE THESE YOUR FAVORITES?

My favorite book is *To Kill A Mockingbird* and my favorite movie is *Legally Blonde*. Although using quite different approaches, each conveys clear and poignant messages – you should always stand up for what you believe in, never judge anyone by how they look, never underestimate anyone and always believe in yourself.

### WHAT IS YOUR FAVORITE PLACE/ACTIVITY OUTSIDE OF THE OFFICE?

My favorite place away from the office is home in Fairfield, Connecticut. My entire family resides in Fairfield, and I live three blocks from the beach.

### WHAT IS YOUR TV SHOW DU JOUR?

The Office

### Smoke, Mirrors and Holstein Heifers: continued from page 3

This is the second significant cattle fraud victory for Lathrop & Gage and Rhyme in particular. In August of 2004, a jury at the U.S. Court for the Western District of Missouri awarded \$4.2 million to clients Arky and Debbie Rogers. Mr. & Mrs. Rogers were investors in a large cattle operation that Rhyme successfully proved was a complex scheme in which nonexistent cattle were used to lure investors and lenders into providing funds to purchase more cattle. This Lathrop & Gage victory was the largest cattle fraud recovery in history.

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## Calendar:

### HOW TO IDENTIFY AND PROTECT YOUR IP ASSETS

**Date:** November 8, 2007 **Time:** 12:00 p.m. – 1:30 p.m.  
**Place:** Lathrop & Gage Overland Park office, 10851 Mastin Boulevard, Building 82, Suite 1000  
**RSVP:** (816) 460-5583 or reply@lathropgage.com  
Lunch will be provided.

### LABOR & EMPLOYMENT EXECUTIVE BRIEFING

**Date:** November 15, 2007 **Time:** 2:00 p.m.  
**Place:** The American Heartland Theatre

### KANSAS LEGISLATIVE FORECAST BREAKFAST

**Date:** December 4, 2007 **Time:** 7:30 a.m. – 9:00 a.m.  
**Place:** The Ritz Charles  
**RSVP:** (816) 460-5577 or rsvp@lathropgage.com

Information in this newsletter is for the general education and knowledge of our readers. It is not intended as legal advice. Readers should not act upon the information contained in it without consulting competent legal counsel. Past results do not guarantee future results. Every case is different and should be judged on its own merits.

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