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Putting The Horse Back In Front of the Cart: Lessons from a Decade of Breast Implant Litigation

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Caveat: I was a member of the national trial team for Baxter Healthcare Corporation in the breast implant litigation. The views, however, expressed in this paper are my own and not those of Baxter or my colleagues representing Baxter.

Introduction

I do not think that I will be able to sustain the title metaphor too long, or that I should try. However, this much is true: before an industry is besieged with tens of thousands of copycat lawsuits alleging that a non-existent disease has been caused by a non-defective product, that industry is well advised to have at the ready blue-ribbon scientific evidence, and to school its trial lawyers in that science. Otherwise it may find that it is already too late to turn back the attackers. Obtaining definitive epidemiological studies after the multimillion-dollar verdicts start to roll in is like closing the barn door after the horses are gone. Hobson, the infamous stable master in London, offered his customers the choice of any steed in the livery, as long as it was the one closest to the door. Our clients are presented with a Hobson's Choice of their own: being first out of the gate in the race to the courthouse, or risking it all on a hurriedly prepared "bet the company" trial strategy. Enough with the equine references. What can be learned from the highs and lows of silicone breast implant cases; what can other industries plan to do differently when it is their turn?

The last 25 years has witnessed an explosion of industry-wide litigation. One consequence of the explosion has been the bankruptcy of some prominent corporations. Examples include Johns Manville (asbestos), A.H. Robbins (Dalkon Shield) and most recently, Dow Corning Corporation (breast implants). Each was a dominant leader in the industry under attack. This history begs the question: was bankruptcy in each of these cases a forgone conclusion caused by a weak liability defense and the economic drain of industry-wide litigation or were lessons not learned by industry and defense counsel from prior litigation? For a comprehensive answer to this question, one would have to study the conduct of each defendant and the scientific evidence available that was relevant to issues of product defect and causation. Such an analysis is beyond the scope of this article. The goal of this piece is far less ambitious. Proceeding from the belief that industry and its counsel have lessons to learn from previous industry-wide

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litigation, this piece will attempt to begin a dialogue by looking at what worked well and what (with the wisdom of perfect hindsight) could have been done differently in the silicone breast implant ("SBI") litigation.

Product liability litigation involving SBIs existed in the early 1970s. However, the modern era of industry-wide litigation characterized by plaintiffs seeking damages for systemic autoimmune disease and punitive damages began approximately 10 years ago. A quick journey through the history of the SBI litigation will help set the stage for a discussion of lessons learned.

Chronology of the SBI Litigation Events

For decades, medical scientists experimented with a variety of materials for augmenting women's breasts. None worked particularly well. The situation changed dramatically with the development of a silicone breast implant by two Houston plastic surgeons in the early 1960s. This device featured a silicone elastomer shell that encased varying amounts of silicone gel. In the late 1960s, the first saline breast implant was produced. The saline implant featured, like a SBI, a silicone elastomer shell; but unlike the SBI, the saline implant was filled with saline. Due largely to its more "natural" feel, the SBI remained the clear favorite among patients and physicians until the FDA moratorium in 1992.

Before 1976, the FDA had limited regulatory control over medical devices. In 1976, Congress passed the Medical Devices Amendments ("MDA") to the Federal Food, Drug and Cosmetic Act. This legislation vastly expanded the FDA's regulatory authority over medical devices. Under this legislation medical device manufacturers were required, for certain devices, to obtain from the FDA, pre-market approval ("PMA") before marketing a new product. Since SBI's and many other devices had been on the market before the 1976 MDA, such devices were "approved" for sale by being "grandfathered" by the FDA. The "grandfathered" approval remained in effect unless and until the FDA issued a regulation calling for a PMA for each such device.

In 1982, approximately six years after the passage of the MDA, the FDA published a notice of intent to re-classify SBI from a Class II to a Class III medical device. The effect of such a reclassification would mean that all SBIs would need PMA approval to stay on the market. PMA approval was conditioned upon, among other factors, satisfying the FDA that adequate data demonstrated the devices were reasonably safe and efficacious.

Twelve years after the enactment of the MDA and six years after first suggesting that breast implants be reclassified as a class III device, the FDA took action and, in 1988, reclassified breast implants as a class III device. Pursuant to regulations, the manufacturers were not permitted to continue selling SBIs beyond July 1991 unless they received PMA approval.

Although the 1991 FDA hearings on the PMAs provided the spark for the litigation explosion, product liability litigation over breast implants had existed for years. The litigation began in the mid 1970s primarily resulting from implants that had ruptured. The first reported successful verdict against an implant manufacturer occurred in 1977 against Dow Corning.

The first verdict for a plaintiff who had alleged that her implants had caused a systemic autoimmune disease was in 1984 in *Stern v. Dow Corning*. Despite receiving compensatory and punitive damages, widespread publicity of the verdict was minimized by the trial court's sealing the file.

Despite the *Stern* verdict and the FDA's call for SBI PMAs, implants did not receive widespread attention from plaintiffs' lawyers before December 1990. For the most part, the cases were not seen as having significant value. This situation changed dramatically after the sensational, and arguably irresponsible broadcast by Connie Chung of a program on breast implants in December 1990. Not coincidentally, in the same month Congressional hearings were conducted on breast implant.

In the midst of the media barrage on SBIs, three manufacturers submitted SBI PMA applications to the FDA in 1991. In the same year, Baxter Healthcare Corporation lost its first SBI trial (*Toole v. Baxter*) for $5.4 million. The plaintiff alleged that a ruptured breast implant had caused her to develop a new "lupus-like" autoimmune disease.

The manufacturers' PMAs were reviewed by the FDA's General and Plastic Surgical Devices Panel at a public hearing in November 1991. The FDA's objectivity in selecting panel members was fairly questioned by its decision to place members on the panel who had testified for the plaintiffs in the SBI litigation. The panel concluded that the data were insufficient to prove affirmatively SBIs were safe. More data were requested. Importantly, the panel did not find any evidence suggesting that SBIs caused disease, and consequently, it recommended that SBIs be kept on the market pending review of new data.

One month later, another multimillion-dollar verdict (*Hopkins v. Dow*) was rendered against Dow Corning in favor of a woman who claimed that her SBI had caused a new, or "atypical," type of autoimmune disease. This verdict sparked renewed media frenzy in the alleged, but unproven danger of SBIs. One moth later, the FDA Commissioner (Dr. Kessler), acting without credible scientific evidence that proved a danger existed with SBIs and despite the fact that silicone had been thought to be the "gold standard" of biocompatibility for close to 20 years, asked the manufacturers to voluntarily stop selling SBIs.

In February 1992, the General and Plastic Surgical Devices Panel reconvened. The bias of some of the Panel members was evident from questions posed to the presenters. Not surprisingly, the panel voted not to accept the PMAs. The Panel nevertheless recommended that women seeking breast reconstruction—as distin-

guished from cosmetic augmentation—be permitted to receive the implants as part of a controlled clinical trial. The Panel concluded that no scientific data existed that proved that a causal link existed between SBIs and autoimmune disease. In a period when the media did not understand or care to investigate junk science, no attention was paid to the fact that a panel of experts had not found evidence that SBIs cause disease. Yet it was this type of scientifically suspect evidence that resulted in three separate multimillion dollar verdicts against prominent corporations in the SBI industry.

In April 1992, Dr. Kessler lifted the voluntary moratorium. He required, however, that reconstruction and cosmetic patients be required to participate in a rigidly controlled clinical trial as a condition of receiving SBIs. Despite their silicone shell, saline implants were not subject to the same restrictions.

As a result of constant negative and often erroneous media coverage on the SBI debate, Dow's caseload grew from slightly more than 100 in December 1991 to approximately 3,500 one year later. The adverse publicity intensified after a Houston jury, in December 1992, awarded Pamela Jean Johnson $25 million (of which $20 million was punitive damages) against Bristol-Meyers. The jury agreed with Johnson's "experts" that her SBIs had caused her to develop a new or "atypical" autoimmune disease.

The filing of a class action lawsuit and rapidly increased numbers of filing led to Multi-District Litigation ("MDL") which was assigned to Judge Sam Pointer, United States District Court for the Northern District of Alabama in June 1992.

By December 1993, another 8,000 lawsuits had been filed against just Dow Corning (for a total of 12,000). Also in 1993, the Supreme Court issued its decision in *Daubert v. Merrill_Dow Pharmaceutical*, 509 U.S. 579 (1993). Three years later, *Daubert* would change the tide of the litigation by giving the defendants procedural and evidentiary weapons to fight the junk science that had dominated the public debate on SBIs. In the intervening period, however, the manufacturing would suffer more costly defeats. In March 1994, a Houston jury awarded $27 million against the Minnesota Mining and Manufacturing Corporation on behalf of three women (*Doss v. McGhan Medical Corp., et al.*). All of the women claimed to have developed a new autoimmune disease. Not surprisingly, each expert had his/her own diagnostic criteria for the new disease. Diagnostic flexibility was imperative in order to ensure that all plaintiffs who had gone to the trouble of hiring a lawyer and expert could benefit from yet another wave of junk science. The only hard and fast criterion was that a plaintiff actually had either a silicone or saline prosthesis implanted for some period of time.

Despite the absence of any credible scientific evidence to prove a causal relationship between SBIs and disease, and sobered by the realization that no "gatekeepers" would suddenly develop the resolve to slam the doors of their courtrooms on junk science, the industry moved reasonably quickly to reach agreement with the Plaintiffs Steering Committee ("PSC") for a "global settlement." The settlement was preliminarily approved by Judge Pointer in April 1994. At the time it was the largest class action settlement in history with an anticipated value exceeding $4 billion. Claimants were not required to prove causation to get paid for a variety of vague, non-specific complaints.

Under *Daubert*, trial courts had the authority to bar the systemic disease claims from going to trial. In practice, however, courts were reluctant to bar expert testimony concerning systemic disease claims in the absence of data contradicting plaintiffs' allegations. These data became available in June 1994, when the internationally respected New England Journal of Medicine published a article on the results of a large epidemiological study on SBIs performed by the equally renowned Mayo Clinic. The study found that among 749 women with SBIs, no evidence of an increased risk of autoimmune disease (real or "atypical") was found when compared to 1498 women who had not had implants.

In October 1994, researchers from the prestigious Harvard School of Medicine reported orally at the annual meeting of the American College of Rheumatology (the subspecialty for autoimmune illnesses) on a second large study of women with SBI. These investigators announced that their epidemiological study of SBI recipients had also failed to validate an increased risk of autoimmune disease from SBIs. Armed with a developing body of "negative" epidemiological data, Baxter went to trial with two plaintiffs in Houston in the fall of 1994. The presiding judge was closely aligned with the plaintiffs and had presided over the second (*Doss*) of the two Houston multimillion dollar verdict cases. Despite these obstacles, this case marked the beginning of a turn in the litigation. After three months of trial and 11 days of jury deliberation, the trial judge suddenly and unexpectedly declared a mistrial on the eve of the jury returning a verdict for Baxter (as later reported by the jurors). The judge's decision sparked such outrage on the part of the jury that jury members issued a press statement rebuking what the judge had done. This case served notice that SBI cases could be won even in unfriendly jurisdictions.

Despite the growing body of epidemiological data and favorable trial results, the sheer volume of cases that Dow Corning faced by May 1995 (estimated to be approximately 20,000) caused it to seek protection from the Bankruptcy Court in Michigan.

By mid-1996, the industry had won far more cases than it had lost. For example, Baxter had won 20 defense verdicts compared to 4 losses and 3 mistrials. More importantly, more than 10 epidemiological studies had been published in the peer reviewed literature, all of which had failed to find an association between SBIs and autoimmune diseases. The weight of the negative epidemiological studies finally persuaded the

courts to give more attention to the defendants' *Daubert* challenges. In July 1996, Judge Jones, United States District Court Judge for the District of Oregon, decided to conduct an evidentiary hearing on the defendants' *Daubert* challenges. He appointed four members to a scientific panel to assist him in reviewing the evidence under Rule 104. Moving quickly to derail Judge Jones' efforts, the PSC asked Judge Pointer to preempt Judge Jones and conduct his own scientific inquiry under Rule 706.[1] Judge Pointer agreed to create what was later referred to as the "National Science Panel." Judge Jones, however, continued his efforts with the panel that he had selected pursuant to Rule 104.

In December 1996, after receiving reports from his panel of experts, Judge Jones ordered that the plaintiffs' experts could not testify that SBIs caused autoimmune disease. Almost two years later, Judge Pointer's National Science Panel similarly concluded that the weight of the scientific evidence did not support the plaintiffs' claim that SBIs caused "classic" or new autoimmune disease. Six months after the National Science Panel's report, the National Academy of Sciences', Institute of Medicine, released a 400 page report prepared by 13 scientists that also concluded that SBIs did not cause autoimmune disease.

Unfortunately, the uncontraverted scientific conclusions of several panels of experts, many of which enjoyed international reputations, still was unable to fully close the door on plaintiffs using silicone junk science in the court room. In January 1999, despite the conclusions of four scientific panels refuting her claims, a plaintiff successfully convinced a senior federal judge into allowing her to introduce expert testimony that her SBIs had caused her to develop an autoimmune disease. The result was a plaintiff's verdict for $10 million against Bristol-Meyers. Once again, the disconnect between real science and courtroom science was demonstrated.

After three years in bankruptcy court, Dow Corning filed its reorganization plan. One feature of the plan included a $3.2 billion offer to settle claims based, in large part, upon a non-existing disease.

Lessons Learned

The implant manufacturers and their counsel are deservedly proud of their trial record and their success with the scientific expert panels. Despite these successes, however, the stark reality remains that plaintiffs' baseless disease allegations pushed a major corporation into bankruptcy, produced numerous individual settlements and a "global" settlement that will eventually pay out billions of dollars to plaintiffs' lawyers and their clients. If this is the result where no credible scientific evidence of causation has been found, what can another industry–any industry in America–expect where minimal credible evidence supports causation? As difficult as the process may be for those who toiled in this litigation for years, both in-house and trial counsel have a responsibility to their mutual clients to learn from the experience, both the good and the not so good. The old axiom, that those who choose not to learn from history are doomed to repeat it, clearly applies.

With the wisdom gained only by perfect hindsight, several aspects of the SBI litigation offer guidance for future litigation. These examples are grouped into areas of scientific data, media, litigation management, expert discovery and defense expert witnesses.

Scientific Data

It is not uncommon to participate in conferences of defense counsel and hear lawyers, who have never tried a case to verdict, pronounce how defensible a case is because the plaintiff lacks credible evidence on a key issue in his or her case. In such conferences the question is always asked how strong the defendant's evidence is on the same point. The response is, all too often, to dismiss the question as irrelevant as the plaintiff, who bears the burden of proof, cannot possibly survive a motion for judgment at the close of plaintiff's case-in-chief. Would that the typical trial judge would be so intrepid! Usually it only takes one trial for such learned litigators to understand that judges do not take cases from juries at half-time and cases are not won by trying to convince the jury that the sympathetic plaintiff has not tipped the scales of justice ever so slightly to meet her burden. The defendant who hangs its hat on the absence of a burden to proof is the defendant who had better start figuring out how to afford the supercedeas bond necessary to perfect the appeal. Experienced trial lawyers know that defendants bear a *de facto* burden, imposed by the jury, to prove why it is not their fault that the product malfunctioned or that the plaintiff got sick. The defendant who does not have a persuasive answer to these questions has a diminished chance of winning the case. Put simply, to win cases defendants need strong credible scientific evidence to support their positions.

A lesson painfully learned in the SBI litigation was the tremendous cost of not having the epidemiological studies published and available for use in trials by 1991-92 when the litigation exploded. Compared to the large number of SBI surgeries performed, the relatively few local injury and sporadic systemic disease claims that had been reported before case filings blossomed out of control, explain why the studies had not been done earlier. Doctors and other scientists do not get to study conditions alleged by only a handful of patients especially when the most biologically plausible results point to the dreaded "negative association" which is of lesser interest to medical publishers than big breakthroughs. Scientific recognition is usually not given for "zero effect" studies. The irony, however, is that the SBI epidemiological studies that were published in the mid and late 1990s relied upon implant exposure data that pre-dated the litigation explosion. This was deliberate because, had the studies included exposure data after

the litigation exploded, they would have been criticized as being biased. Thus, the exposure data that eventually undermined the plaintiffs' allegations were available long before the litigation exploded. The harsh lesson of industry-wide litigation is that industry is already behind if the epidemiological studies are not begun long before their cost can be justified by the size of the litigation.

The necessity of such studies is not obviated by *Daubert*, whose prohibition against junk science is not conditioned on the counterbalance of negative epidemiological data. Nevertheless, judges remain reluctant to retake command of their courtrooms from unscrupulous lawyers and to exclude causation testimony when the defendants have not generated strong data refuting plaintiffs' suspect theories of causation. It is sobering to reflect on how many billions of indemnity dollars and defense costs could have been saved had the SBI manufacturers and their insurers commissioned appropriate epidemiological studies a decade earlier. Or better still, had the mainstream medical community done a better job of screening the junk science offered by a few fringe mavericks peddling conclusions about imaginary diseases, much like their snake oil counterparts of yore, courtroom experts would not have had a peer reviewed basis on which to offer their opinions.

Media

The lesson from almost every industry-wide litigation in recent years, including the SBI litigation, is that manufacturers can not ignore the power of the media to shape—and distort—public opinion on key issues of defect, causation and industry's conduct. With distressing regularity, manufacturers learn too late that the mantra of "no comment" is among the worst responses that industry representatives can give to the media as the litigation is about to explode. The plaintiffs' bar has long been more effective in manipulating the media to predispose prospective venire panels against "big corporations" long before the summons for jury duty arrives and to poison the well of public opinion before the first defense witness raises his or her hand to testify to the facts. In fairness, broadcast and print media often will not objectively present the defense viewpoint because it does not sell as well as the plaintiffs' story. The goal is to find the hook that makes the defense story more compelling to the public than the fictional exposé scripted by plaintiffs' counsel and spoon-fed to journalists eager to fill their allotted minutes or inches.

One example from the SBI litigation is instructive. In the early years of the litigation, it was fairly predictable that a week or two prior to jury selection in the Texas cases, the local newspapers would run stories on the allegedly devastated lives of the SBI "victims." Such stories tainted the perception of the jury pool. Defendants stood no chance of rectifying such subtly ingrained prejudices during voir dire. The tables were turned and the power of adverse media attention was felt by plaintiffs' counsel in 1994-95, when billboards started going up in Texas addressing tort reforms and the effect plaintiffs' lawyers' greed had on the civil justice system. Soon broadcast and print media shifted from the plaintiffs' oriented stories they had run for three years and began investigating and profiling plaintiffs' counsel and their experts and the millions of dollars both were earning from the litigation and the questionable medical therapy being administered to the plaintiffs. Dow helped promote a change in the public mood when, in May 1995, it printed a full page statement in several national newspapers describing the scientific weakness of the plaintiffs claims and other facts that plaintiffs' attorneys and their experts did not want the public to know about the litigation. Arguably, Dow's effort to educate the public did more to level the playing field with the public than any number of defense verdicts could have accomplished. It is interesting to speculate whether the course of the litigation would have been different had industry, from the outset of the litigation, regularly educated the public on the development of the relevant scientific data.

Litigation Management

The SBI litigation offers important lessons in litigation management. Like other industry-wide litigation, the SBI litigation exploded overnight. As is often the case, the timing of that explosion was manipulated by plaintiffs' counsel for their strategic advantage. When the explosion occurred, the plaintiffs had their experts and theories in place. Proponents of junk science do not need much time to prepare. Although the industry eventually committed massive resources to the litigation, those resources were not marshaled until a year or two after Connie Chung's December 1990 broadcast. A lesson learned is that anticipating the potential of emerging industry-wide litigation and committing resources proactively rather than waiting for the case load to justify a significant commitment of resources may prevent a defendant from experiencing the perpetual game of catch-up that the front line defense attorneys endured in the SBI litigation. Many critical activities including collecting relevant documents, creating databases, locating and interviewing key fact witnesses and learning the relevant science are all tasks that ideally should be completed before the litigation explodes. While it may appear self-serving, the corporate decision to invest in preparing good lawyers for the fight just over the horizon may be just as sound and frugal a fiscal policy as upping the budget of the R&D department. As good as we think we are, we cannot win a 100 yard dash with our shoestrings tied together and spotting plaintiffs' counsel a 50 yard head start.

Getting the jump on informal discovery by completing the tasks previously described positions the defendants for conducting effective early depositions of fact and expert witnesses. Not uncommonly, early depositions of industry employees are one sided with plain-

tiffs' counsel pounding for days on unfortunate current and former industry employees about studies done, memoranda written, and things said years earlier. Only rarely in the SBI litigation did defense counsel question industry employee witnesses at their deposition in order to put matters into perspective. While the tactic undoubtedly reflects conventional wisdom, in retrospect, one has to ask whether it is the best way to build a record for trials that will be held years later that will be centered around the early depositions. At the trial of one of the SBI cases in which I participated, the first three days of the plaintiff's case were spent watching and listening to plaintiff's counsel play and read one-sided depositions. Although the presentations were not exciting, the cumulative effect of hearing the plaintiff's view of evidence elicited through the concessions of the defendant's employees was effective.

An analogous opportunity exists with the early depositions of plaintiffs' experts. Whether due to a philosophical belief about not aggressively cross-examining experts at their deposition or the inability to do so because of a need to play catch up in learning the science, in many of the early SBI depositions defense counsel did not challenge the experts but sought only to document the basis for each opinion. This became a problem when defendants were later precluded from re-deposing experts because they had had their "shot" at the experts. Additional depositions of experts previously deposed were limited to new areas.

Many defense counsel strongly believe that depositions of experts should be limited to seeking the basis for the experts' opinions. The argument is often made that attacking an expert should be "saved for trial." Although undoubtedly true for some depositions, when the vast majority of cases do not go to trial and experts are protected from multiple depositions, what exactly is being saved and for what? In the *Daubert* era, it is much more difficult to develop a record that demonstrates the inadmissibility of an expert's testimony without getting the type of concessions obtained only by aggressively examining the expert in his deposition.

One remarkably positive management lesson that was reinforced by the SBI litigation is the value of cohesion and cooperation among defense counsel. The success achieved by the industry before the scientific panels would not have been possible had it not been for close cooperation among in-house managing counsel and trial counsel responsible for conducting the hearings and writing the briefs that were jointly submitted to the scientific panels. In days when civility and cooperation are often confused with being passive or ineffective, it was a pleasure to participate in a process in which lawyers left their egos at the door and worked together towards achieving a common goal.

One final management observation drawn from several examples of industry-wide litigation bears mentioning. This observation pertains to selection of counsel. Defendants who survive industry-wide litigation appear to be those that have, in addition to good evidence and witnesses, a strong sense of how they want the litigation conducted and hire firms that can implement that philosophy. Some defendants do not appear to have a philosophy in place before they hire their law firms. This leads to the defendants surrounding themselves with law firms that spend more time trying to increase their role in the litigation (i.e., "lateral expansion") at the expense of their co-counsel then acting decisively and effectively to move the litigation forward. Law firms favor lateral expansion since it increases revenues and avoids accountability. It, however, does not win lawsuits.

Experienced plaintiffs' lawyers know which defendants are serious about trying cases by the lawyers they hire. They will instinctively target the weak and the unprepared. Defendants who anticipate having to try cases and who have their litigation strategy devised at the outset (rather than on the eve of trial) by lawyers with real trial experience can expect to stay on the offensive, move their litigation forward and avoid years of ineffective expenditure of their client's resources. Defendants whose evidence or philosophy does not favor going to trial are well-served by hiring litigators proficient at overwhelming plaintiffs' counsel with paper. However, while that tactic may have worked in the past, the plaintiffs' lawyers who now control most of the industry-wide litigation have great wealth and will not be deterred by such tactics. The lesson is to know where you want to end up and hire the law firms that have demonstrated the ability to realistically assess whether you can get there and, if so, obtain the goal at a reasonable cost. In-house counsel who have the courage to demand value for their litigation dollars tend to get it. Those that do not just get lateral expansion, high legal bills and poor results.

Scientific Panels and Professional Association

Although the results of the SBI litigation certainly support, at first blush, the wisdom of seeking scientific panels, there are circumstances in which such panels, especially those authorized under Rule 706, are not advisable. In most instances in which a scientific panel is tactically advantageous, the preferred procedural route is under Rule 104. For a more complete discussion of these issues, *see* B. Parker, M. Wells, "How to Find the Junk Science: Are Rule 706 Panels the Answer?", 41 *For The Defense*, 40, 12/99.

Another lesson learned in the SBI litigation is the benefit of getting professional associations on the record early in the litigation to support your causation position. The admissibility of an association's position statements refuting plaintiffs' causation theories is a hotly contested evidentiary issue. In those cases in which the statements are admitted, they are powerful evidence to undermine the plaintiffs allegations of causation. Conversely, when an association issues a posi-

tion statement adverse to a defendant's position, counsel must, through their experts, work with the association to bring new and better data to their attention.

Defense Experts

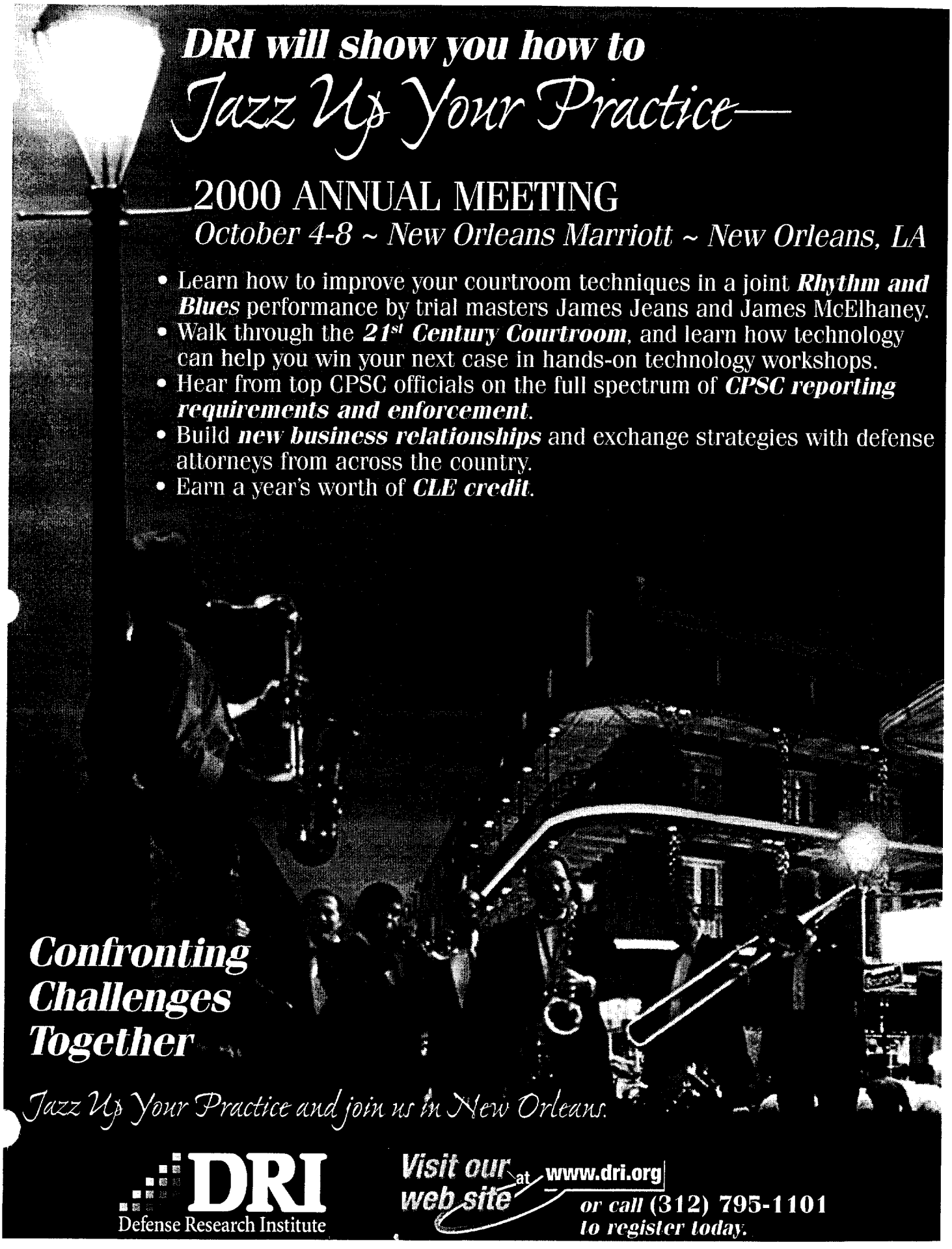
The SBI litigation validated the conventional wisdom of having leading scientists get involved in the litigation. Although the SBI litigation featured some defense experts who had testified in other litigation, a surprising number of leading scientists with no significant prior litigation experience agreed to participate. Some did so out of a sense of scientific outrage as to what was being said by second rate scientists and physicians. Some agreed to get involved when they began to realize the harmful treatment being rendered by some of the plaintiffs' experts. Defense counsel who worked on educating the SBI scientific panels saw firsthand the benefit obtained by having highly reputable scientists present their opinions to the panels. Reputations, however, do not always correlate with the length of an expert's C.V. The qualities that trial counsel look for in an expert who will testify to a jury are not always the same as those you seek in an expert who will testify to a "jury" of scientists. When presenting experts before scientific panels, it is important to know how the quality of your experts' scientific work is perceived by his/her peers. That generally requires going beyond the C.V. It is not always easy to determine whether an expert who appears, "gold plated" will enjoy the same luster with a jury of his or her peers.

Conclusion

The SBI litigation is a good example of what can happen when public hysteria is created by sensational and misleading media reporting, a governmental agency that reaches decisions based on politics rather than science and courts that freely permit junk science to invade the courtroom. Much of what the SBI industry did post-1994 worked very well and ought be to emulated by others. However, hard lessons were also learned in the SBI litigation. If other defendants on the verge of industry-wide litigation take heed, they may avoid the pitfalls encountered by defendants in the SBI litigation. ❖

Endnote

1 For a fuller discussion of the separate histories and a comparison of Judge Jones' approach under Rule 104 and Judge Pointer's approach, *see* Parker, B., Wells, M., "How to Find the Junk Science: Are Rule 706 Panels the Answer?", 41 *For The Defense*, 40, 12/99.



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