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# Trial<sup>®</sup>

## THEME ARTICLE

# THE NARRATIVE WHEEL

January 2019 - Miranda L. Soucie

To get justice for clients harmed in trip-and-fall incidents, you must craft the story of how the injury occurred and what could have been done to prevent it. Having a clear plan for discovery is essential to this process.

Having a well-developed and flexible discovery road map with much more than boilerplate requests or deposition outlines makes a trip-and-fall case more manageable and increases your chances of success. Your goal is to create a complete narrative, which you can visualize as a bicycle wheel with the spokes representing your facts, all supporting your theme at the hub. Follow these steps to create a discovery plan that will enable you to build the story of what happened to your client—and how the defendant is at fault.



*Credit: DARWELSHOTS / Shutterstock*

## Initial Fact Finding

Start planning for discovery the moment you get the case because evidence will be lost quickly. Take inventory of what you know and what you need to find out. You won't know what to ask in discovery if you don't know what information is already available.

Learn as much as possible from your client about what happened. Take a few steps back, and don't just focus on the incident itself. Have your client start at the beginning of his or her day and walk you through what happened step by step. Often, our clients focus on the brief period when the incident occurred. But when you take a step back, you get a much broader view that can provide better details about the incident. Be aware that people communicate differently, and verbal communication does not always work best. Have your client draw the scene or find a Google Earth depiction of the area,<sup>1</sup> and use the illustration and aerial photo to help him or her tell the story.

Together, this information will help you visualize the incident and begin to develop theories for why it occurred. Gather incident reports, witness statements, photographs of the client's injuries and the scene of the incident, medical records, bills, statements, and receipts for treatment or medication. Other useful items include police reports, emergency medical services reports, and 911 recordings.

Determine who was at the scene at the time of the incident. Most clients only have a rudimentary understanding of what happened to them because they didn't anticipate it, were shocked, or were in pain. Ask your client and other known witnesses who else was present, and interview each witness as soon as possible, including any emergency personnel who treated your client. Witnesses' memories often fade when away from the scene so make sure to have photos or aerial maps of the location with you. If possible, you may try meeting the witness at the site itself, which can jog his or her memory.

**Visit the scene.** Even if your client provides photos, you should go to the scene. Look for visible defects such as changes in flooring levels, poorly maintained flooring or stairs, cracked sidewalks, narrow stairs, wet or icy conditions, or poor lighting. Walk the same path as your client, at the same time of day. Going to the scene immediately after the initial intake allows you to notice relevant details; for example, you could see that the site is now covered with a construction horse and that the adjacent area has been under construction for quite some time.

However, this shouldn't be your last visit—returning later can help you notice additional details. For example, revisiting the scene before the deposition of a key defense witness can help you realize that a similar unsafe condition exists throughout the store and that there is no way the employees are not aware of it. Take pictures, and then confront the defense witness with them. With every new piece of information that you gather, your perspective may change, and your plan can improve.

When you visit the scene, determine the location of possible surveillance cameras and document them. Immediately send a preservation of evidence letter to the potential defendants so they retain any and all evidence relating to the incident, including surveillance footage and communications. These could include an incident report, a note from an employee to a manager about the event, and other information that could easily disappear absent a request for preservation. Surveillance cameras may belong to an adjacent business rather than the owner of the property where your client was injured—this may make it easier to access them. When relevant, consider sending preservation letters to these entities as well.

This fact-finding process is the foundation of your discovery plan and will help you better understand what the defense should produce, such as the number of surveillance camera feeds.

## Develop a Preliminary Theme

A thorough pre-suit investigation allows you to develop a preliminary theme before the formal start of discovery. You likely will learn things during discovery that will further shape your theme, but for the most part, you will have enough information before filing the complaint to come up with strong theme options. In most trip-and-fall cases, your theme—which should be simple and fine-tuned—will likely revolve around public safety.

Your theme should remind the jury that someone else could be harmed in the future if the defendant is not held accountable. Building codes, internal policies and procedures, industry standards, engineering principles, and local codes and ordinances provide a great foundation for safety-based themes. If you can build your theme from an existing policy or code, your expert can agree with it, and you can often get key defense witnesses to agree to it—and if they do not, that is even better.

For example, in a case I handled against a well-known superstore, we obtained the store's policies and procedures, which included a rule that inventory must not be overstocked due to the risk that it could fall and injure customers.

After learning this, our theme became “don’t take the easy way out.” Both the rule and theme were easy for witnesses to adopt.

By brainstorming your theme early, you can tailor your discovery requests and deposition questions to uncover supporting evidence. This way, when trial or a dispositive motion approaches, your theme will be supported by a strong body of factual and legal authority.

If you file suit but are unsure of your theme or theory of liability, you will be put on the defensive. Stay on the offensive to have a strategic advantage.

## Capture Your Road Map

Once you develop the theme, put pen to paper and memorialize your discovery plan with one goal in mind: preparing for trial.

**Elements and facts.** Begin by writing out the necessary elements of your claims, and identify the most likely affirmative defenses, such as the “open and obvious”<sup>2</sup> defense and the de minimis rule.<sup>3</sup> Also note the elements of each possible defense.

Outline the facts that are already established and those that are in question, such as information that you are aware of but cannot yet verify or evidence necessary to winning the case that is not in your possession or control. Examine the facts that may defeat an element of your claim or may prove an element of an affirmative defense, such as the type of shoes your client was wearing or the measurements of the defect in question.

Even if the defendants haven’t pleaded affirmative defenses, know that they are likely to raise them, and make sure your discovery plan includes how to respond. If you can recognize these obstacles, then you’ll be able to plan an alternative route around them. For instance, you might position yourself to identify facts that could support a distraction exception, eliminating an affirmative defense.<sup>4</sup> As the lawyer, you are in the best position to know whether something is relevant or not. When you rely only on witness statements, you may miss a big piece of the puzzle.

**Fact sources.** Next, identify the sources of the facts—those you have and those you need for your client’s case to be successful. If the basis of a particular fact has not been determined, consider all of the possible sources, such as an expert. You want to be positioned to combat discovery abuses and compel information that may be helpful to you.

Once you have identified the source, determine the method by which to obtain the information, whether through written discovery, document production, requests for admissions, or deposition testimony.

**Damages.** These should also be part of the discovery plan. List all witnesses, documents, videos, photos, or any other tangible evidence that would help explain the injuries, as well as any experts who may be required to prove the different elements. Make the injuries or loss that your client suffered as vivid as possible.

Including damages in your discovery plan will ensure that you gather the facts you need to prove this element of your case and that you have disclosed this information well in advance of trial in compliance with Federal Rule of Civil Procedure 26 and any state rules that also establish disclosure obligations.<sup>5</sup>

## Review and Revise

After completing your discovery road map, circle back to your theme to ensure your plan and theme match and are fully developed. Make sure to relate each fact to the theme. Return to the bicycle wheel described earlier (the theme is the hub of the wheel and the spokes are the facts). If you can’t find the connection between the hub and spokes,

then your theme may need revising or the facts might not support it. If you have a lot of facts that don't support your theme, consider revising it as necessary.

## Execute

The final step is to execute your plan. Draft written discovery requests, Rule 30(b)(6) notices, and requests for admissions. If possible, consider serving these with the summons or complaint. Remember, any extra time you allow the defense is not to your client's advantage because the longer a case takes, the more likely it is that evidence will be lost, and memories will fade.

Help stay ahead by setting a case management conference as soon as the defendants answer the complaint. Prepare a draft scheduling order that sets deadlines and, if possible, a trial date. This will discourage defense stonewalling.

Executing your plan means ensuring that the elements of your case story are in place. As you go through discovery and get ready for trial by preparing witnesses, exhibits, and developing the proper foundation for issues such as damages and proximate cause, return to your road map as a reference point to ensure your story is coming together. A successful discovery plan means you can create the narrative of how the defendant's acts or omissions endangered your client and the community.

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## Notes

1. For more on Google Earth, see Alexandra Hamilton, *A New View With Google Earth*, Trial 56 (Jan. 2018).
2. Generally, when a condition that has caused an injury is found to be open and obvious, a premises owner is protected from liability. "Obvious" means that both the condition and risk are apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Restatement (Second of Torts) §343A cmt. b (1965).
3. The de minimis rule, which also protects a premises owner from liability, describes a condition where a "reasonably prudent person would not foresee some danger to persons walking on it." See, e.g., *Monson v. City of Danville*, 2018 WL 3650216, at \*9 (Ill. Aug. 2, 2018).
4. The distraction exception applies "where the possessor [of land] has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." Restatement §343A cmt. f.
5. Federal Rule of Civil Procedure 26 provides a very detailed outline of disclosure obligations, which most states follow to some extent. Be aware of your jurisdiction's rules to ensure that you are complying and supplementing as required.

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