

*It's the End of the World as we know it...and I feel Fine.*¹
Handling Really Bad Documents in Commercial Litigation Cases

I. Introduction

Any significant business dispute comes with some bad documents. If this were not so, the client wouldn't be hiring you. In a sense, trial lawyers owe a debt to prolific e-mail or memo writers who make their employer's life more difficult. This article is not about the ordinary case in which one or two off color comments or concessions have been written. It is about the case a very large number of bad documents or extraordinarily painful documents exist in your client's file. This article describes a blow-by-blow decision making process to determine whether you can effectively try such a case and if you can try it, how. It is written from a defendant's perspective but the lessons are equally applicable to plaintiffs with crippling documents.

If you are short of time here are the basic rules:

- Make full production of all bad documents at the start so that you understand the full "lay of the land" from the beginning and do not have to continually peel back layers of the onion (and cry) again and again.
- Produce all the bad documents for which there is not an ironclad claim of privilege, understanding that the opposition (and perhaps the court) will review your privilege log with a fine-toothed comb.
- Determine whether an interpretation of the bad documents exists that is both honest and either neutral or positive.
- Determine whether the case has transcendent facts—facts that make the bad document(s) meaningless.
- If no neutral or positive explanation for the bad documents or transcendent facts exist, resolve the case on the best terms possible. Make the "redeemable" versus "unredeemable" decision as early as you can, obtain client buy-in and *don't equivocate*.
- Test your neutral to positive interpretations or transcendent facts early in the process to see if a fact finder agrees with your judgment either that the bad documents aren't so bad or ought to be ignored.

¹ Thanks to REM for permission to use their epic title.

- Orient your witnesses to state your case and your trial presentation to embrace and explain the bad documents.
- Don't lose faith.

II. Our hypothetical case.

To explain these principles, we will use a "Restatement of Law" style fact scenario involving a large real estate development that has issued a private placement offering.

Acco L.L.C. is a real estate developer specializing in mixed use retail and residential properties in recreational settings. In 2005, Acco, decided to develop a mixed use hotel, golf resort, condominium and apartment complex in a coastal inlet in Boca Raton Florida, and issued a private offering memorandum requiring a minimum investment of \$3 million per offeree. Thirty five offerees at \$3 million per investor bought in, creating a total investment pool of \$105,000,000. Ten percent of the project will be retained by Acco, which will also earn management fees from the construction and operation of the project. The offer closed on December 31, 2005, and is fully over-subscribed by investors from around the world, each of whom confirm a net worth in excess of \$10 million. The investors each sign off that they are aware that this is a high risk investment and that they can afford to lose all of their investment, if warranted.

The project suffered from a number of setbacks. In 2005, Acco was repeatedly denied environmental approvals and permitting, which put the initiation of the golf course and construction project behind by a full year. Although the project was scheduled to begin construction on January 1, 2006, it actually commenced construction on December 15, 2006. When construction started, the general contractor and several subcontractors were replaced. Each filed mechanic and materialmen's liens on the properties that must be bonded around for construction to continue. The project was scheduled for completion within one and one-half years after commencement—originally by July 1, 2007. Instead, permitting and construction delays push completion to December 31, 2008. In October 2008, the national liquidity crisis crushed sales of this vacation property. Of the 250 committed pre-sales out of 500 condominium units, over 100 canceled their investments, and either paid the required 20% penalty or just walked away from their contracts. Visits to the site by potential buyers drop from a high of 138 over the July 4, 2008 weekend to only 4 per week—all of whom are scavengers. The project is now late, over-budget and underfunded, causing Acco to borrow an additional \$25 million to complete the project. On its completion date, a fair market valuation of the project indicates that it is now worth about \$50 million after debt, rather than the originally projected \$185 million.

All original investors, including those who have also purchased part of the condos, sue Acco claiming negligence in the management of the project, breach of contract, and securities fraud. All of the investors ask for rescission of their contracts

and a return of their original investments, or in the alternative, for the difference in the value of the project as represented and the value of the project as it exists, which is \$130,000,000. The client calls you.

III. Bad to the Bone: the unfortunate documents.

You meet with the client and begin pulling e-mails, memoranda and public filings relating to the project. During this process, your associate walks into your office with the following six bad documents and asks whether we ought to settle the case right away.

Bad Document (“BD”) #1:

January 8, 2005 e-mail from Acco’s Director of Regulatory Compliance and Permitting, Mike Trout to Acco’s General Manager, Lars Anderson at 10:43 a.m.:

“There is absolutely no way we will get this permitted on time. I’ve talked with Rene Bauxalot at the City and he tells me that the permitting alone will take six months and complete licensing an additional three. Should we be advising the investors of potential delay?”

To which Anderson replies at 10:44 a.m.:

“No. Do the best you can, we can parallel track acquisition of contractors and bids with the permitting process and claw back as much as 3-4 months. Bauxalot is just a bitch guarding his territory—it won’t take that long.

BD #2:

On April 16, 2005, Trout writes Anderson at 11:45 p.m.

“I finally have Bauxalot’s word that the final permit will issue no later than June 1. Don’t ask me how I got the commitment, but it had to do with a party barge, white powder and some girls from The Men’s Club. Don’t look too closely at my expense voucher this month.”

There is no reply from Anderson. The expense voucher items are passed on to investors as part of overall project cost.

BD #3:

On January 13, 2007, at 12:02 p.m. Acco’s Construction Manager, Brandon Belt writes Anderson:

“I am getting very uncomfortable vibes from our Allbuild. I talked to both Jarrod Parker and Donovan Tate yesterday at the site and they appeared completely disorganized to me—nothing like they were in the original sales presentation. None of the subs appeared to have any of the plans specific to their requirements and the earth movers haven’t showed up at all and

we're a month post-permitting. I have given Jarrod until tomorrow afternoon to show progress and have also taken the precaution of reaching out to Carlos Santanna at Newbuild to find out if they can be in position to take over management of the project should the situation with Allbuild deteriorate."

Anderson writes in reply:

"Not good. Keep me updated on any slippage. You are authorized to do an if/then with Newbuild."

BD #4:

On Thursday, May 22, 2007, Belt writes Parker and Tate at 5:50 p.m.:

"I have absolutely had it with you guys—you're gone. Time after time I have set deadlines only to run into the same problem—a bunch of excuses why you can't even meet me then a bunch of excuses why the deadlines cannot be met. We selected you guys because we knew we'd be a big fish in your pond and that you were big enough (though barely) to do this project. If I had known you were doing the Halladay project in St. Augustine at the same time there is no way in hell you would have been on this project and you know it. You screwed us over to do Halladay.

Don't even think about filing an M&M on us. Our lawyers will have a field day with you guys. Have your stuff cleared out by tomorrow at 5:00. We have Newbuild set to take over."

BD #5:

On Saturday, August 8, 2007 at 3:02 p.m., Belt writes Anderson:

"Lars, Newbuild has done wonders but we're going to be late on this deal by at least a year. Should we go to the investors and give them an opt out?"

To which Anderson replies at 9:46 a.m. the following Monday:

"Brandon just take care of the build out, I'll handle the investors. We have a meet with them next week and the subject will inevitably come up. I'll have to develop a story line before then, but none of these guys are babes in the woods, they know stuff can go wrong and we've kept them up to date."

BD #6:

On Friday, December 4, 2007 at 11:07 a.m., General Manager Lars Anderson e-mails Acco Chief Executive Officer Aaron Hicks:

"We're still at least a year out on having customer access to the condos. At some point we're going to start losing our pre-pays and God forbid we have a downturn because if we do

we'll start dropping prepays like crazy. We're at 128% of budget and heading towards 150% or more and we're going to have to start borrowing externally or the subs will file M&Ms on the project and we won't be able to move title. What are we going to do?"

To which Hicks replies:

"All the documents cover us here. The partnership agreement allows us to borrow—so go borrow. Even with the delays we've got a backlog of at least 30 investors who want in the project. All of our current investment group that we've talked to tell us that they don't want to get diluted on the project, so let's sit down with First Commercial and figure out what the line of credit needs to be to finish this out and get it done."

With this template of bad news, let's see *if* the documents can be handled, and if so *how*.

IV. An application of basic rules to the practice.

- a. Rules 1. and 2., gather and produce *all* the non-privileged bad documents quickly.

The law relating to proper document review and production is not the focus of this article and has been dealt with repeatedly elsewhere. Modern electronic methods of transmitting and storing data make available to litigants far more information than had previously been available. Though this paper focuses on e-mails, voicemails can be just as damning because like e-mails, depositors of voicemail are typically seized of the moment (which may include panic, hatred, fear or any other number of unsavory emotions), and deliver their messages with virtually no expectation that they can ever be retrieved, much less used against the speaker at a later time.

The strong temptation by the client (and perhaps the in-house lawyer and you as well) is to withhold some or all of the bad documents under very aggressive claims of privilege or as "non-responsive." In some cases the client simply neglects to tell the attorney about the bad documents in hopes that the opposition will not recognize the potential for their existence.

If the requests for production call for the bad documents, it has been the author's experience that, so long as there is enough at stake in the litigation, production of the documents will be forced out. This is true for several reasons. First, modern document retention systems will likely cause part of the e-mail chains that involve bad documents to be produced, leaving the reader wondering who replied to those e-mails. Second, virtually all electronic document storage systems currently in use have back up tapes for disaster recovery purposes—making the choice by a reader or sender of an e-mail to delete it as irrelevant. Third, forensic examination of computers will consistently reveal some or all of the pertinent e-mails even if the writer or reader has deleted the e-mail chain. More practically, in most modern business disputes several individuals will be involved (including some who have been sent packing and are unhappy) and will be

required to give testimony, making it impossible for the client to effectively hide bad documents, if they still exist in the electronic filing system. Finally, as the parties take depositions it is routine they routinely recognize that they are missing documents—either because the documents that have been produced point to them or the witnesses acknowledge their existence.

So, rule one is ironclad—gather all the bad documents and understand them completely before you take the next step. Unless you have a lead pipe cinch privilege claim, produce them all immediately. If you have a toss-up question on privilege, I recommend leaning towards production under these circumstances for two reasons. First, if your trial court is required to conduct an *in camera* review of the documents and finds that you have been overly aggressive in asserting the privilege, it will not only influence that trial judge, but probably will negatively influence your reputation at the courthouse in the long haul. Second, your opposition may seek, and obtain in proper circumstances, a finding that the documents for which production are sought are subject to a crime and fraud exception to the attorney client or work product privilege. See, e.g. *In re Small*, ---S.W.3d. ---, 2009 WL 1620436 (Tex. App.—El Paso, June 10, 2009, no pet.); *n re General Agents Ins. Co. of America Inc.*, 224 S.W.3d 806 (Tex. App.—Houston [14th Dist.] 2007, no pet.). This is a finding that can be devastating to your relationship with in-house counsel and management of the case as a whole and can easily turn a case into the “third rail” that must be overpaid to be resolved.

Early recognition and production is critical for two more reasons—to avoid last minute momentum swings and to avoid sanctions.

As of this writing, 79 civil cases in Texas invoked the phrase “death penalty sanctions” in the preceding three years. 54 of the 79 reversed death penalty sanctions for failure of the party to meet one or more proof requirements set forth in *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991). But the results in those 24 cases affirming death penalty sanctions or the imposition of spoliation instructions are instructive. The primary listed reason for death penalty sanctions in 63% of the cases was either the failure to produce documents or destruction of documents or exhibits. See, *Tab A*. See, e.g. *Cire v. Cummings*, 134 S.W.3d 835, 841-2 (Tex. 2004) (death penalty upheld where destruction of audiotapes occurred after production was ordered); *Paradigm Oil Inc. v. Retamco Operating Inc.*, 330 S.W.3d 342 (Tex. App.—San Antonio, 2010).

When documents that are responsive to requests and for which no privilege applies are hidden or, worse destroyed, this conduct warrants an inference that the contumacious party believes his case or defense lacks merit. See *TransAmerican*, 811 S.W.2d at 917-8. The party that refuses to produce or destroys harmful documents runs the risk that the court will infer from the conduct that the client concluded he has no chance if the documents were revealed.

Aside from potential penalties, late or contentious production of bad documents often creates disastrous momentum swings against a party. If full production is made

early, the producing party can rightfully say “so what, look at all the good documents.” Late production of the documents, however, is rightfully viewed by opposing counsel as a concession that the documents are so harmful that the producer did not believe it could win with them. Worse, witnesses may in the interim have committed to propositions of fact that are mistaken or simply dishonest in light of the late production. Since over ninety percent of civil cases are resolved short of trial, laying your cards on the table early helps deprive the opposition of last minute momentum. Instead, the facts—good, bad and indifferent—are known from inception and become part of the calculus that both parties are required to make.

- b. Rules 3. through 5. Determine if neutral or positive explanations exist for the bad documents or if there are “transcendent” facts. If not, move towards resolution. Make this fundamental decision early and *do not equivocate*.

Certain documents, physical evidence or facts simply cannot be redeemed or explained away. As Justice Brister reminded in *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005), no evidence can establish the railroad’s negligence when the plaintiff slams into the 60th car on a slow moving train. *Citing, Texas & New Orleans Railroad Co. v. Compton*, 135 Tex. 7, 136 S.W.2d 1113, 1115 (1940). If your internal documents outright confess criminality or fraud, there is little you can do as a lawyer that will likely alter the outcome of the case. Get client buy in for early resolution of the the issue.

Fortunately, it is rare that a client presents you with documents that create an unredeemable situation. More commonly, bad documents arise from stresses that occur during project management in the workplace—an engineered solution isn’t working as projected—or, in our example, the project isn’t getting regulatory approval as quickly as originally envisioned. These stressors cause your clients’ employees to express their frustration and to explain (even shout) the likely impact from failure. The dichotomy in the criminal law--*malum in se* versus *malum prohibitum* comes to mind. *Malum in se* documents have no redemption— “sometimes bad is bad.”² Documents that are *malum prohibitum* are, in retrospect, ones you wish weren’t on the record, but are explainable in full context.

Whether documents have neutral or positive explanations is of course entirely dependent upon all the facts. Let’s use some of our examples. BD#1 is bad because the writer both expresses that the project will lag and the concern that perhaps the investors ought to be advised (but weren’t). BD #2, on the other hand implies, if not states, that our regulatory compliance officer has used drugs and prostitutes to secure regulatory approvals. BD#1 is *malum prohibitum*, BD #2 is *malum in se* and no redemption for the fact of criminality presented by that document is likely possible. That criminality may not drive the outcome of the entire case, but it must be considered and addressed.

² Huey Lewis & the News, *Sometimes Bad is Bad*. Sports, 1983.

- c. Rules 6-8: developing and testing neutral to positive explanations and transcendent facts. Follow the practices you establish in pretrial during your jury trial.

Presuming that you and your client have either decided to go forward or must go forward, the keys to handling bad documents throughout discovery and an ensuing jury trial are:

- Do not attempt to explain away the documents by disagreeing with their meaning on a blow-by-blow basis. You'll ruin your credibility and the client's by trying to claim the documents mean something other than what they mean.
- Limit the damage from the documents by developing clear departure points for your witnesses.
- Develop the positive explanations early and *test them*.
- Do not shy away from the bad documents in pretrial discovery, hearings voir dire or trial.
- Provide *context*.
- Develop *transcendent facts*.
 - i. Avoid the temptation to go "blow-by-blow" on the documents or quibble over their meaning.

Attempting to deal with bad documents on a blow-by-blow basis is the kiss of death. Telling the jury that the phrase "white powder and girls from the Men's Club" actually means cleaning powder and a cleaning crew from the Men's Club will condemn the witness (and you) before the jury. Worse, when you have many bad documents every attempt to "explain away" their meaning incrementally reduces your credibility. Save yourself and your client by admitting that the documents mean what they in fact say, but be crystal clear on preserving the departure points (what the documents don't say).

- ii. Develop clear departure points for your witnesses.

Making a decision to admit that a bad document means what it says should never be construed by your witness as license to agree that it means *more* than what it says. Bad documents require only that you admit the reality presented by the bad document, not more. For instance, a witness can agree that BD #1 shows delay and that BD #2 implies criminality, but is not required to concede that either document

requires him to agree that Acco acted dishonestly with respect to investors, that it owes investors their money back, and that it has “let investors down” by this sort of behavior, etc. Unfortunately, a failure to confront and develop a systematic explanation for bad documents causes precisely these sort of concessions because witnesses know they’re bad, but have no idea where to go from there.

If you are busy equivocating about whether or not to produce the documents or claiming that the documents mean something other than what they say, you will miss the obvious “jumping off” points at which a witness can legitimately say “No, I don’t agree with you when you go that far.” To make this process work, you must equip witnesses (and your jury ultimately) with a *reasonable and truthful* line of defense. The departure point that enables you to get to your fundamental message may be influenced by the presence of other documents or testimony in the case, so it is critical to develop the clearest, most understandable and truthful neutral or positive explanation early, and thus identify the point at which your witnesses will disagree with the opponents’ chain of logic.

iii. Develop the positive explanations early and *test them*.

A witness armed with a clear and positive message and an understanding of what he or she must concede is far superior to one waiting for his attorney to give advice about how bad documents ought to be handled. The latter is a deer in the headlights: he looks and feels guilty and his or her body language and testimony will show it.

Let’s look at the difference:

Deer in the Headlights:

Q: I am showing you now what is marked as Exhibit 2, an e-mail dated April 16, 2005 from you to Mr. Anderson, do you recognize it?

A: I think I may have seen this.

Q: What you were doing at the time was bribing Mr. Bauxalot with prostitutes weren’t you?

A: I don’t know what you mean by that.

Q: Well, it is a simple question; do you understand what a bribe is?

A: I’ve never been accused of bribery, so no, I don’t think I do.

Q: Well, I'll just use a simple explanation—paying or doing something for a governmental official to get something out of him. And let me repeat, were you bribing Mr. Bauxalot with prostitutes?

A: I don't know that they were prostitutes.

Q: Ok, so you admit you provided these "girls" to Bauxalot, right?

A: I don't know what you mean by provide.

.... Now, compare this with:

Q: Let me show you Exhibit 2, do you recognize it?

A: Yes.

Q: Were you bribing Mr. Bauxalot with prostitutes?

A: I certainly wouldn't characterize it that way.

Q: Isn't that exactly what the e-mail says?

A: Not exactly. We were doing everything within our power to get the project approved on time. We had begun the process 8 months before this e-mail. I won't deny that in retrospect, it was very bad judgment on my part to entertain Bauxalot in that way, but I desperately wanted to get this project going for the investors and for us. Would I do it again that way, no."

The two sets of answers ultimately deliver mea culpas but do so in dramatically different ways. In the first interlude, the witness' reaction to the document tells the jury all it needs to know about how bad it is. In the second, the witness acknowledges his wrong, but gives the counterbalancing explanation in a short understandable package.

In the engineering context, a document that refers to the likely failure of a product during development is, if accompanied by later documents showing improvement, a testament to the engineers dedication and concern for customers. By urging that the product be strengthened or re-engineered he is a customer advocate, not a screw-up. Similarly, a developer who is doing everything humanly possible to get his project permitted so that investors can benefit from the project is at least attempting to achieve a good outcome for his investors.

It is not enough to have neutral or positive explanations that satisfy *you* or *your client*. Remember the client may be desperate for absolution. The explanations must be strong enough to satisfy the *jury*. You should therefore aggressively test the alternative explanations that exist. The preferred test method would be to conduct jury research on the issue and see one or more mock jury panel's reactions to the explanations your client offers. This is true for privilege reasons and for accuracy of the sampling methods. But these presentations are often too expensive for the average case or just not feasible early in the proceeding. It is therefore critical that you remember the utility of talking to those around you. What do your friends or waitress at the countertop think about the situation (she is believe me bored to death and would welcome the conversation if you have the time)? What does she think would help your client? You'll be surprised. The more you ask, the more comfortable you feel talking about the issue and the more enlightened you will be about how your jury will handle them.

- iv. Don't shy away from the bad documents when you must use them, but don't dwell on them.

Obviously you don't want to focus on the bad documents—you want to focus on your positive explanations or transcendent facts. But your bad documents aren't going away, so you will have to deal with them. If in your body language, testimony or behavior at trial you treat the documents as land mines, the jury will do the same. Use the documents as you would any other.

On the other hand, do not dwell on the bad documents. If you have points to make out of them make them quickly and move on. One superb expert early in my career gave me good simple advice: "don't stir \$%#, it just smells up the place and makes you filthy." This is great advice. Do the absolute minimum you need to do with the bad documents, but don't flinch.

- v. Develop transcendent facts—and look to your opponent or third parties for validation that they are transcendent.

Developing the positive aspect of your bad documents and transcendent facts are the single most important work the trial attorney can do in a case of this kind. In the author's experience, jurors develop their own story of the events of a case primarily based upon who is "good" and who is "bad" and adjust the evidence they hear to wrap around that story. This method of decision making has been broadly confirmed in the scientific literature as well. See, e.g. ROBERT M. BRAY ET AL., *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 365-375 (Neil Brewer & Kipling D. Williams eds., 2005). The key to such explanation is that they must be honest and supportable. Remember that the jury already suspects your client because of the bad documents. Foolish exculpatory explanations wear out your welcome just as fast as a blow-by-blow dispute about the self-evident meaning of bad documents.

Transcendent facts are ones that make the bad documents irrelevant or meaningless. Let's use a few illustrations to show what I mean by a transcendent fact:

TF #1. Investors in this project were updated by a series of quarterly meetings and reports that contained slides showing the original schedule and each new schedule.

TF #2. Under the subscription agreements, investors had up to 180 days to opt out of their investments for a 10% penalty. No investor opted out within the first 180 days despite being advised that the delay might be as long as a year.

TF #3. Four of the named plaintiffs were on the boat with Bauxalot and the girls.

TF #4. As of March 31, 2008, 24 new investors wanted into the project despite the delays and were ready, willing and able to invest \$3 million a piece. Existing investors voted not to permit the investment, but to take on the additional \$25 million in debt needed to complete the project because they did not want to dilute their interests with new investors.

TF #5. Studies show that eighty five percent of major commercial projects suffered from delay during Bauxalot's administration. A substantially identical mixed use project in South Miami Beach had identical financial results due to the economic downturn even though it was not delayed. Many of the same investors are in both projects and no suit has been filed in conjunction with the South Beach project.

Transcendent facts are best developed from the opponent or third parties. If documents in your case are so bad that they call into question the fundamental organizational credibility of your client, you'll need to go elsewhere to support your claim or defense. Subpoena all the records from the South Beach project. Find the client's e-mails in the system in which they indicate that the delay isn't unexpected and doesn't change their position. Find the third party indicators that economic failure is due entirely to economic changes of the U.S. economy and has nothing to do with the way the project was designed, permitted or built.

V. Rules 6. and 7--trying the case with bad documents.

Much of the work you thought you had to do with bad documents should be done early in the case. The trial will simply be an extension of the strategy you developed during the pretrial phase. However, this being said, there are a number of practices you will want to follow in trial.

- Don't wait for your opponent to mention or characterize the documents.
- State your neutral or positive explanations and transcendent facts early in the case.
- Watch for opportunities created by your opponent's fascination with the bad documents.

- Continue to avoid the temptation of working through the bad documents on a blow-by-blow basis, whether in opening, witness examination or closing.
- A. Don't wait for the opponent to mention or characterize the bad documents and look for opportunities your opposition presents.

If you are the defendant, you will not have the opportunity to first expose the jury to the fact that you have bad documents. As the defendant, you must bide your time and wait for your opportunity. You should, however, be keenly aware that opposing counsel will likely attempt to use the bad documents to "sew up" the entire panel before it can be selected.

You have two tools in your arsenal for this approach by a plaintiff. You may object under rules 227 and 232 that obtaining indications of how a juror will vote in the event the evidence shows "BD-1" or "BD-2" as improper attempts to condition the jury. *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 94 (Tex. 2005) (citing Scott A. Brister, *Lonesome Docket: Using the Texas Rules to Shorten Trials and Delay*, 46 Baylor L. Rev. 525, 538 (1994)). Alternatively, let the plaintiff commit "his" jurors then disqualify them for bias because they are already committed to the plaintiff before hearing any of the evidence.

In addition, the plaintiff's early fascination with bad documents may lead him or her to omit his own weak points. Leading to something like the following:

Q: You will all recall that my opponent mentioned that this project was behind by a full one and one half years and that there are documents in April of 2005 in which we "secretly" told one another about this? Do you remember that?

Q: Do any of you recall opposing counsel telling you that in the very next monthly meeting of investors, we told them all there would be delay due to permitting?

Q: Do any of you recall opposing counsel telling you that in the next monthly meeting we also anticipated construction delays?

Q: Do any of you recall opposing counsel telling you that we offered to bring new investors in to bear all the additional costs, but that these plaintiffs refused to let us?

Q: Ms. Smith, you were particularly upset when you saw my clients' e-mail on the screen showing that they knew of these upcoming delays and were debating whether to disclose them? How do these additional facts make you feel about the situation?

[OR]

Q: What do you think it means when the plaintiffs tell you of certain things, but not these other items?

You can use the plaintiff's failure to disclose to accomplish several objectives: (1) announce your transcendent facts; (2) show that the plaintiff is concealing information and cannot be trusted; or that (3) at a minimum your jury should wait to get the entire story.

B. State your neutral or positive explanations or transcendent facts early in the case.

Since jury research indicates that jurors make their decisions about cases very quickly, it is critical that you get the explanations you have to offer out to the jury quickly. Let them know that while you have bad documents that there is a second side to the story and let them know what that second side will be.

C. Use the opposition's fascination with the bad documents.

It has been our experience that lawyers often cannot get past being satisfied with a cornucopia of bad documents. They feel that if they merely expose the jury to the bad documents that their job is finished and the case is won. This critical failure is often compounded by a: (1) failure to complete their story; or (2) fail to anticipate your explanations and the jury's willingness to accept a witness' "mea culpa".

In engineering or product safety or warranty disputes for example, it is rarely the case that a product development ends at the point at which engineers are carping at one another about product limitations. They go back to work the next day to improve the product and are probably improving it further during your trial.

D. Avoid getting down into the weeds and stick to the high points that will drive the jury's determination.

Bad documents make us antsy and tempt us to wallow in them. We as attorneys have the almost reflexive reaction to name the document, point it out and in some way "go after it" either with a direct contradictory explanation or some other direct follow up. If a direct follow is indicated make it brief, pointed and impactful: (Q: Mr. Smith, you were shown e-mails about leaks, what happened with this? A: We fixed it and advised the client how we fixed it two weeks later. They agreed."

If you have successfully identified your positive explanations for bad documents and your transcendent facts and tested them, then have faith and spend your time in this arena. Emphasize your transcendent facts and those facts that show your client in the best possible light. This is where your jury focus should be—during voir dire, opening, examinations and closing. This is the process most likely to render the verdict you want or minimize the verdict you don't want.

VI. Conclusion

Bad documents are not the end of the world. While you as a lawyer cannot remake the facts, you can provide your fact finder honest perspective and give the client high quality advice on whether to continue the defense or sue for peace. In the process, you will make the entire case and resolution less panicked and more likely to reach a satisfactory conclusion.