LITIGATING THE AUTO PERSONAL INJURY CASE

"The Plaintiff's Perspective: From Beginning to End"

By:

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From the perspective of the plaintiff, the manner and process in which we prepare and try the typical auto collision case has significantly changed over the past year.

Gone are the days when you could merely collect a few records, send a demand letter, and then receive a satisfactory result for your client. Now, the lawyer who handles auto collision cases must meet a number of issues and obstacles such as liens, subrogation rights, ERISA, Medicare, Medicaid, jury attitudes and bias, and the onslaught of corporate and insurance influence, and at the same time maximize damages in an era of jury suspicion and distrust of auto cases and the lawyers who try them. If the case is tried, jurors are skeptical, and even if they believe someone is injured, they may fear a fair and reasonable verdict will somehow raise their own insurance. They are truly hard cases especially when little physical damage to the car exists and the injuries involve connective tissue. All of this has made handling a simple collision case cost more, take more time, and require more thought and preparation than it used to.

Pre-Trial, Discovery and **Trial** are three separate areas that each requires a separate approach to bring about a satisfactory result to the case.

I. Pre-Trial.

1. Client Interview. The initial client interview is the most important part of handling a car collision case. Because it is at this point that we meet the client and start to make the decision as to whether we will accept the case. Frequently trial lawyers are

optimists and idealists who generally see the best in people. We are likely to forgive people for their weaknesses. While these are great character traits, it is crucial to maintain an objective view of the client and see the clients as they are, and not as they might be in a perfect world. Potential problem clients tend to come to the surface from the outset. They are the ones who shop from lawyer to lawyer, those who think they have a great case, who demand to know how much they will get or what their case is worth, or are in need of immediate money. Beware of those that come in right before the statute of limitations runs and have been to several lawyers, and insist that their case is "not about money; it is about principle." Don't forget your initial feeling when meeting a prospective client. A juror may have the same impression that you do.

The initial meeting should be conducted by the attorney in the attorney's office, if possible, although sometimes that is not always possible. This is a confidence builder for the prospective client and a chance to develop rapport with the client from the outset. During the client interview you will need to develop the facts from the standpoint of liability and the extent of your client's damages. Be sure to find out how the collision occurred, who was there, what was seen, and what happened to their body during the collision. What parts of their body were hurt, what treatment was provided, and how this has affected their life. Go over with the client what a typical day is like for them.

2. Investigate. Haven't we all at some point looked back and said "Why did I ever take this case?" While there are no guarantees in accepting any case, one of the best ways to insure that doesn't happen is to diligently investigate the case before the matter is accepted and suit is filed. Early and thorough investigation is always worth the time, trouble and expense. You can discover weaknesses, flaws, and unreliable clients that you

should avoid. It is also critical in preserving evidence that would otherwise be lost or discarded. You should photograph and document the scene of the collision and the condition of the vehicle after the impact. A visit to the accident scene can help clarify the facts for you and provide an understanding of the physical layout of the collision scene without spending time guessing and chasing unsubstantiated theories.

Order and examine the police officer's report and any supplemental report(s). Obtain the driving record on your own client and on the defendant. Go to the scene on the same day and at the same time the collision occurred. Take the same route the client may have taken and take plenty of photographs. Talk to the witnesses listed on the report as soon as possible and take them to the scene if necessary. A good investigation should reveal the strengths and weaknesses of the case and of your client. Investigate the damages your client suffered. Go to their home, see how they conduct their daily activities, and how the injuries affect them. Obtain photographs of the client prior to the injury and after.

It is often said, it is the cases that are rejected that make a successful plaintiff's practice. Be sure through a thorough investigation that you know what kind of case you are taking.

3. Ethical Pitfalls. Ethical pitfalls involve reviewing the personal injury case, getting the case, signing up the case, declining the case, and clients who need money.

4. Develop a Theme. Every case, no matter how small (and remember there is no such thing as a small case), needs a theme. A theme is nothing more than a short and simple statement as to what your case is about, said in a simple way that is easily communicated to someone who knows nothing about your case. It must be easily

understood and related to a general life experience. Being able to reduce your case to 10 words or less is critical in developing a theme that is clear and simple and conveys the message of your case and the action you are undertaking. Develop the theme early in your case from the moment you first meet your client and continue it through the interview stage and continue it throughout the entire case presentation. The theme should be evident in your demand, discovery, and entire case presentation.

5. Obtain complete medical and insurance records of your client. In order to effectively pursue your case and your client's claim for damages you will need to know all there is about your client. Obtaining the complete medical records of your client is essential. It provides you the information on your client's injuries and also establishes your claim for damages. Recent changes in the law of obtaining medical records must be considered so that any authorizations you use to obtain your client's medical records must be in compliance with HIPAA requirements and be accepted by the medical provider. A list of all providers that your client has been to following the collision is essential and an examination of those records to see if there is prior medical care and treatment that had been provided to your client relating to the injuries complained of in this claim. It is important and crucial that you obtain the complete medical history of your client before you begin to negotiate and certainly before suit is filed. Nothing is more unnerving than to appear at a deposition and have a defense attorney read or refer to records on your client that relate to past medical care and treatment that you were not aware of. Have your client complete a client information form with a list of all prior medical care and treatment they have had. Any prior injuries to their neck or back or connective tissue, any prior

worker's compensation claims, any prior falls, or other accidents, are all essential to obtaining the complete medical history of your client.

When medical records are obtained, they need to be organized and then categorized by provider with dates of service. This is essential to outline the medical treatment and damages your client has sustained and should be organized so it can be presented in an organized manner to an adjuster and/or defense attorney.

Liens are very common in even the smallest collision case. Liens from medical providers, claims of subrogation by health care providers, ERISA claims, Medicare and Medicaid reimbursement are issues that ultimately will have to be addressed before your case is ready to be resolved. Knowing all those issues as early as possible is essential in being able to negotiate and know exactly what may have to be paid out of any settlement or judgment.

You need to know the full extent of your client's health insurance. Examine their benefit package. What does it say about the coverage provided? If it is an ERISA plan, request the plan documents from the provider and verify that it is an ERISA plan.

You also need to obtain information on your client's own auto insurance coverage. What type of coverage did they have on all the vehicles they owned at the time of the collision? Did they have medical pay coverage? Is there a potential underinsurance motorist claim? Complete information on your client's own heath and auto insurance is important. Don't wait until you start discussing settlement to address issues of ERISA, subrogation claims or whether Medicare or Medicaid was involved in payment of any medical bills relating to your client's care. Identifying if those sources did provide payment,

and if they did, then notifying those entities to see what amounts they claim were paid out, is essential before you can begin to settle the case.

II. Discovery.

In the discovery stage of your case, it is important to have a discovery plan. A discovery plan is nothing more than your plan for what facts you are trying to prove, how you are going to prove them, and what documents or witnesses you will need to prove those facts.

1. Depositions.

For the deposition of the defendant, gather as much information as possible about the collision and Defendant before the deposition. Then in the deposition, you need to set the tone and use your discovery plan to get from the Defendant what you need to help your case. For the deposition of the plaintiff – prepare, prepare and prepare. Both you and the client need to be fully prepared. Be sure the client knows what a deposition is and the reason for the deposition. Preparation of the lawyer and the plaintiff for the deposition is highly important and cannot be underestimated. The plaintiff's deposition is the most important aspect of the typical auto collision case. Prepare for it.

The first session should leave the client with a relieved sense of anxiety about what a deposition is and what their role is. Allowing them a day or two to consider those issues and thoughts then provides the setting for a second session, a final preparation session, before the deposition takes place.

The second or final session is more specific in terms of factual review and case theories. Discussing with the client areas of questions that will be asked and documents

that will be examined. Some general rules of questioning and answering should be gone over with the client for general suggestions and preparation.

1. Yes or no. If possible, always answer yes or no. It is unbelievable the number of responses at a deposition that can be answered with either a yes or a no response. If the question doesn't require more, don't say more.
2. I don't understand. Instill in your client that "I don't understand" is a proper answer. Never answer a question if you do not understand the question.
3. I don't know. Don't be afraid to say the words "I don't know." No one wants to appear ignorant, or that we do not know something, but a deposition is not the time to be saying things that you don't know or you are not absolutely sure of. If you do not know the answer, don't be afraid to say, "I don't know."
4. I don't remember. A deposition is not a memory test. It is not something in which at the end you are going to get a grade for the number of questions that you responded positively. If you don't remember, say you don't remember. It is better your memory is questioned rather than your credibility.
5. I need a break. Depositions also are not marathon sessions. Instill in the client that if they feel that they need a break or if the attorney says, "Would you like a break," probably a break should be taken.
6. Red light/green light – dry/wet. Instill in the client the importance of telling the truth, and telling it in as short and concise an answer as possible. Do not elaborate or give additional information. Answer the question truthfully in as short a version as possible. If the question is: What color was the intersection light? The answer is red, not a two-minute description of the surrounding circumstances of the intersection, how it looked, and when the light changed. Answer the question and let them move on to the next question.

Special areas that sometimes develop in depositions are ones that need a certain amount of preparation.

1. Pleadings. Many lawyers will attempt to inquire of witnesses their knowledge of the pleadings and why they said what they said in the pleadings. Clients need to be aware that lawyers prepare the pleadings. Their job is to answer questions at a deposition, not answer as a lawyer. So, having the clients mindful of that is important.
2. Damages. Many times attorneys will ask clients how much money they want, what are they seeking, what kind of damages they are asking for. These responses are better left to the lawyer, rather than a client at a deposition.
3. Money damages. How much money you are seeking, why are you seeking that amount of money, or how much you are claiming are also answers that are better left to the lawyer, rather than a client at a deposition.

4. Documents. It is important to review documents that may be a part of the deposition. Pleadings, medical records, interrogatory responses, accident reports, and pictures, are all documents that are best reviewed beforehand if it is believed that they will be presented at a deposition for questioning.
5. Beware of open-end/cutoff questions.

Some general suggestions that should be given to witnesses and clients are as follows:

1. Dress. Always go over dress with your client. You may not have control over a witness, but certainly your client you do, as to how they are going to dress. Knowing that a deposition is as important as testifying in trial should be drilled in your client. They may not need to wear a three-piece suit, but by the same token, they probably should not appear in a pair of shorts and tank top wearing sandals. Use common sense in how best to present your client as they really are and how their dress would best accent that.
2. Respect. Clients should always learn to treat everyone in a deposition with respect. Whether it's the court reporter or the lawyer on the other side who they may think is there to destroy them, and never give them any money, and to do whatever they can to make them lose their case, they should nonetheless be treated with respect.
3. Don't be bitter. Don't walk into a deposition with a chip on your shoulder, looking for a fight, just waiting to get at the other lawyer who is representing the insurance company that is denying your claim.
4. Listen to the question and think. Ninety-nine percent of all problems in a deposition could be avoided if the client would merely listen and think before talking. Probably the same principle all of us could use. Instill in the client to tell the truth and tell it in as short a version as possible and think, keeping focused and sharp.
5. Don't elaborate or volunteer. This is an extension of the green light/red light – wet/dry principle. Don't elaborate or volunteer any information.
6. Demeanor. How the client looks, acts, responds, is very important. Sometimes not only what is said, but how they act is equally as important. Always remember that the other side is evaluating your client and how they will appear in front of a jury. Therefore, the client's demeanor is of paramount importance in a deposition. Granted, sometimes people cannot be changed from what they are. So, we take clients as they are, but certainly with preparation and reducing levels of anxiety can help to enhance the demeanor of any person.
7. Don't exaggerate or underestimate. Bold statements should be avoided. Don't say anything unless you are absolutely certain of its truthfulness.
8. Don't argue with the lawyer. Most witnesses won't win arguments with lawyers. It is not that lawyers are more brilliant. It is just that the nature of a deposition where the lawyer is asking the questions and the witness is

giving the answer, leads to an unfair advantage for the lawyer. So, don't argue. Don't try to impress the other side with how smart you are or to sell your case to them. Most lawyers may not care how smart you are. Don't try to win the case in a deposition. Be yourself, sell yourself, and let the facts sell your case.

9. Don't be offended by personal questions. Depositions are broad and a lot of questions are asked that may seem unimportant, irrelevant, and personal. Understand that's part of the process. Don't be offended by it.
10. Don't explain. One should generally never try to explain an answer unless it is determined to be wrong, and then do explain your answer.
11. Avoid being boxed in. Many lawyers will ask questions such as: "Tell us everything you know. Tell us everything that was said." Always instill in clients a phrase, "That is all that I can recall at this time." It allows the client some leeway if their memory becomes refreshed and more facts are recalled.
12. Control of the deposition. Know where you are going to sit, where the court reporter sits, and where the witness will sit. If it is your client there for a deposition, don't always let the court reporter or the defense lawyer control where everybody sits. To maintain control of the deposition process instills in your client that you are in charge and, again, relieves their anxiety.

Establishing your client's damages and injuries through the treating physician is the next most important step in the discovery process. If your expert is able and willing to come to trial, fine. If not, their deposition must be secured. In preparing for your expert's deposition, preparation is the key.

1. Probably the single most crucial aspect in preparing the expert for his deposition is the quality of information that you are able to provide to him. Where the expert is a treating physician, be sure that the expert has all the information necessary to analyze the full extent of your client's injuries and reach an opinion that is helpful to the case and persuasive to the opposing side and to the jury. If your client has a past medical history that complicates the issue, presenting those medical records to the treating physician is essential to the case and necessary for the expert to be prepared in responding to not only your questions, but for any questions on cross-examination regarding your client's condition.
2. Remember that an expert can reasonably rely on the testimony of others in formulating an opinion. Other facts the expert can rely on include photographs, photographs of damage to the vehicle, witnesses' statements, diagrams, or other information can be helpful to the expert in analyzing the medical condition of the client from the standpoint of injuries and damages. While one would certainly not want to provide superfluous information to the

expert, it would probably be best to err on the side of caution and provide more information rather than less information.

3. Many experts, due to the constraints of their time, find it hard to provide or want to provide sufficient time for the attorney to prepare with before the actual deposition takes place. It is not uncommon to merely have the expert's staff allow the attorney to show up 30 minutes ahead of time to allow you to talk to the doctor.

   Certainly, any case that is worth pursuing and any case that is worth pursuing with a deposition is worth the effort of attempting to meet with the doctor well ahead of time to go over what a deposition is, what you are attempting to elicit, and what the extent of the testimony is going to be, all done well before the date of the deposition.
4. In preparing the expert, after you have reviewed all the material that the expert has reviewed and the chart, if feasible, be able to ask the expert all the questions that you anticipate that they would be asked at the deposition and review the expert's proposed responses. Remember that the use of a deposition, if that witness is not present in court, can be used by any party. If you are attempting to use this deposition at trial, you want to be well aware of what this doctor's opinions are well before the date of the deposition.
5. Attempt to try to humanize the expert and use plain language in your questions.

The most important areas that you would want to cover with the expert are as follows:

1. Background, including name, address, occupation, medical training, licenses, board certifications, hospital privileges, hospital committees, honors, and articles authored or co-authored.
2. Visits, including first visit, history – the importance of the history and treatment before seen by this doctor, treatment following the injury, nature of the injury, complaints, pain, and initial diagnosis.
3. Course of treatment, including physical therapy, radiology, MRI, EMG, surgery, plateau, referral for additional treatment, review of the subsequent treatment, i.e., physical therapy, and all of the above reasonable and necessary.
4. Mechanics of injury, including physical limitations, degenerative changes, future problems, and permanency.
5. Pre-existing conditions, including unrelated, aggravation, and laid dormant but triggered pain.
6. Loss of earnings capacity or wage loss, including obtain work history, opinion as to disability, and recommendation to return to work with or without limitations.
7. Medical expenses, including familiar with the costs of health care in the community, previous opportunity to review similar medical expenses, are

they reasonable and necessary, caused by the collision, and introduce the medical expenses.

All opinions of the physician should be based upon a reasonable degree of medical certainty as to the diagnosis, prognosis, future treatment, causation, etc. You could consider asking: Doctor, I would ask you to assume when I ask you to express an opinion, that I am asking you to express the opinion in terms of reasonable medical probabilities or reasonable medical certainty.

Other opinions. The doctor should explain the anatomy of the injured part. The doctor should explain why the part was injured. The doctor can explain the mechanics of pain and relate them to the injury. The doctor should explain why the injury is permanent and will have pain off and on. The doctor should explain the effect of the pain on the ability to perform work. The doctor should explain why at times, the client feels fairly well and other times, feels terrible. The doctor should explain exacerbation and remission. The doctor should explain how on one day of the examination there may be no muscle spasm, while another time, muscle spasms will exist. The doctor should show that the loss of work, if any, was a result of the injuries received, and the injuries received will affect his ability to work overtime in the future and perform his job. The doctor must prove the necessity of his hospital, medical, and pharmaceutical bills, and their reasonableness, and establish that the injury will affect the client's ability to labor and earn in the future. Some examples of suggested questions are as follows:

Doctor, do you have an opinion whether he had aggravated diabetes as a result of the accident? Do you have an opinion, yes or no?

Doctor, do you have an opinion based on a reasonable degree of medical certainty whether or not the injuries which you found are permanent?

Doctor, do you have an opinion based on a reasonable degree of medical certainty will he ever be able to return to work that requires stooping, bending, and twisting?

Doctor, have all of the opinions that you have expressed here today been based upon a reasonable degree of medical certainty?

The expert should understand the legal causation is established by a preponderance of the evidence, meaning that the opinion can be based upon a 51% probability, rather than a 75% or 90%.

Experts should be prepared to support opinions with specific entries in the plaintiff's medical and hospital records and diagnostic tests, results, and literature.

Use demonstrative exhibits, photographs, models, etc., for the doctor to explain the plaintiff's condition and the resulting injuries.

SHOULD THE DEPOSITION BE BY VIDEO OR NOT?

Rule 57.03(c), Missouri Rule of Civil Procedure.

> **"(c) Non-stenographic Recording – Video Tape.** Depositions may be recorded by the use of video tape or similar methods. The recording of the deposition by video tape shall be in addition to a usual recording and transcription method unless the parties otherwise agree.
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> (1) If the deposition is to be recorded by video tape, every notice or subpoena for the taking of the deposition shall state that it is to be video taped and shall state the name, address and employer of the recording technician. If a party upon whom notice for the taking of a deposition has been served desires to have the testimony additionally recorded by other than stenographic means, that party shall serve notice on the opposing party and the witness that the proceedings are to be video taped. Such notice must be served not less than three days prior to the date designated in the original notice for the taking of the depositions and shall state the name, address and employer of the recording technician.

(2) Where the deposition has been recorded only by video tape and if the witness and parties do not waive signature, a written transcription of the audio shall be prepared to be submitted to the witness for signature as provided in Rule 57.03(f).
(3) The witness being deposed shall be sworn as a witness on camera by an authorized person.
(4) More than one camera may be used, either in sequence or simultaneously.
(5) The attorney for the party requesting the video taping of the deposition shall take custody of and be responsible for the safeguarding of the video tape and shall, upon request, permit the viewing thereof by the opposing party and if requested, shall provide a copy of the video tape at the cost of the requesting party.
(6) Unless otherwise stipulated to by the parties, the expense of video taping is to be borne by the party utilizing it and shall not be taxed as costs."
Rule 57.03(c), Missouri Rule of Civil Procedure

The notice must contain a name, address, and employment of the technician. The witness must be sworn on the camera. The attorney requesting the video is charged with the custody of the tape. You can tape the depositions yourself or have a paralegal do it.

The expenses as to the taking of the deposition are not deemed to be court costs, therefore, they are born by the party taking the same. Consider strategies as for the use of the depositions, whether you want to use it for trial or mediation. Be sure the witness knows it is going to be video taped. You should consider the hiring of a video technician or use someone within your own staff. Be sure to tell your witness if they are going to be videotaped, especially ahead of time, to prepare for proper dress. You should consider the use of a back-drop, as opposed to a picture, bookcase, or a cluttered desk. Try to make the deposition flow as smoothly as possible and hopefully minimize objections.

There are many advantages of a video deposition.

1. Allows you to see the witness' demeanor. A stenographic deposition deprives the Judge or jury of this opportunity.
2. They are more entertaining and easier to follow. You get to watch and listen

as opposed to just listening.
3. You get to see the witness' condition.
4. Allows for better presentation of exhibits.
5. Can be used for impeachment purposes.
    a. Can highlight the witness' pauses, evasiveness, or fumbling, but by the same token, can highlight those as well, if they are your witness.
    b. Can be used to impeach with prior testimony.
6. Also a means to control the behavior of disruptive witnesses and counsel.
7. Once the deposition is taken, it can be used on VHS or DVD.

The disadvantages of a video deposition include:

1. More expensive, harder to arrange and edit, and more likely to have technical problems.
2. Special equipment is required to be used in court.
3. More cumbersome to use for impeachment purposes.
4. Some witnesses just do not look very good on film.
5. Problem with objections and editing.
6. Technical problems in playing the deposition at trial.
7. Most will not appear broadcast quality.
8. Does affect the behavior of adversaries.
9. Can affect the behavior of witnesses.
10. Record for motion for sanctions.
11. At the beginning of the deposition, be sure to clarify who is there, and then conclude at the end of the deposition.

Many times the defense will have your client examined by a defense medical examiner. It is not an independent medical exam; it is an exam requested by the defendant. If that occurs, the question becomes if and when you want to depose that medical expert.

Some main goals in deposing the adverse medical expert are:

1. Laying the ground work for your cross-examination at trial.
2. Showing the expert's bias.
3. Undermining the expert's credibility.
4. Showing the expert's interest in the case.
5. Showing that the expert only had one occasion to view and examine the plaintiff.
6. Getting as much information as possible regarding the expert's opinions and the basis for them.

7. Gaining concessions from the expert to help prove points you wish to make through the use of leading questions.
8. Attempting to get the expert to support even a small portion of your case.
9. Discover weaknesses in your client's case.
10. Judging the demeanor of the expert.

Some general areas to consider are whether the witness has prior experience with the attorney or company requesting the examination, the number of cases he/she has reviewed, the number in which he/she has given depositions, the number in which he/she has testified at trial, and the number of times he/she has provided expert opinion for the attorney representing the defendant in the case. Additionally, you might ask if the expert has ever been sued and what the circumstances were and whether they were similar to this case, and whether the expert has authored literature.

In deposing the defense expert, ask the expert what they reviewed, all the information that they considered, the amount of time they spent, each opinion they arrived at, each fact which you believe supported their opinion, and any treatise, article or medical evidence which supports their opinion. The deposition should thoroughly explore qualifications and professional background, education, board certification, area of specialty, and experience with the medical issue involved. Define the expert's relationship with the defendant or defendant's counsel and determine what steps the expert took in reviewing the case, what opinions the expert has reached, if they are final, the basis of each opinion, and define the expert's opinion on causation.

Be sure to serve a subpoena duces tecum asking to bring all preparatory materials, whole content of file, all records reviewed, curriculum vitae, and list of publications.

Other possible areas of inquiry include:

1. Only one occasion to examine the plaintiff.

2. Will you admit that a treating physician who has examined the plaintiff on many occasions is in a better position to give an opinion regarding the plaintiff's prognosis and diagnosis?
3. That the examiner often treats his own patients on the basis of subjective complaints.
4. That the absence of objective findings at the time of the examination does not establish that the plaintiff did not have an injury, but only at the time of the examination found no objective findings.
5. That the history is important, and he relies on the history in treating his own patients, and causes his own patients' complaints of pain, and then takes them as true.
6. Show financial interest.
7. Show bias.
8. Show no treatment would be given.
9. How long was the exam? How many exams? The results of such exam(s)? Meaning, did the exam take place in your office? Did you take a history? Did you take any diagnostic tests? Was that done by you or your staff?
10. Let's talk about the examination: What did you do? How long did that take? Did you then prepare a report? What was the cost of the report? Was the report made with the idea that there would be no treatment that would be provided to the plaintiff?
11. Go through each test. If a patient rests and takes their usual medication, he will feel much better than at another time. Did not know if the plaintiff's muscle relaxing medications that day could account for feeling better? You treat people based on subjective complaints. You prescribe medicine to patients when you can't find objective signs?
12. When you conducted the exam, you knew it was the purpose of writing this report? You knew that you were not going to be treating the patient?
13. Can't hit a home run every time, but enough line drives to make an effective cross-examination.
14. Goal is to show why expert is not believable, but your expert is.

2. Demand and Maximum the Damages You Can Recover.

Obtaining fair damages in a car collision case with connective tissue injuries in today's environment of jury bias and attitude requires great thought and preparation. The ability to dispel jury biases of frivolous lawsuits, runaway excessive verdicts, and no damage-no injury cases in a climate of distrust and speculation, is an ongoing process. It needs to be developed from the theme selection through the entire case presentation. The use of lay witnesses can be very effective in establishing your client's damages. As

no one likes a plaintiff who whines, use the lay witness to establish the pain and discomfort the client has endured. Explain to lay witnesses the trial process and answer questions they may have. Ask witnesses about the plaintiff's activities, hobbies, and dispositions before the car accident and after and the plaintiff's present complaints and disability. Assure lay witnesses that they generally will be on the witness stand fifteen minutes or less. These witnesses can be very effective in conveying the plaintiff's damages to the jury and keep the plaintiff from testifying to great length about their complaints.

Establishing the full measure of fair damages in today's climate is difficult. One must use many sources to give an adjuster or a juror a reason for paying money to the plaintiff. Tangible damages like medical bills and lost wages are easier for jurors to relate to and accept. It is the intangible damages such as pain and suffering and loss of life's enjoyment that require skill and thought to establish and to get the jury to award.

Making a demand for settlement is important whenever you make it. If you choose to make your demand at the beginning of the case and use the prejudgment interest statue, or make a demand for policy limits if it is a policy limits case, your demand has to fashion the result you are looking for. In using §408.020 RSMo., it is very specific in what you have to provide and the manner in which you make the demand. If your case is one with substantial damages or death and you want to make a demand for policy limits with potential bad faith claims, there is a way and specific wording that you need to use to effect that. If the case is to be mediated, a demand prior to the mediation with enough time for the defendant to review and consider the demand is important. A demand the day of the mediation is probably not too effective.

3. Prepare.

There is no substitute for hard work performed in a consistent manner. It is safe to say that 99% of the secret of all success with auto cases is through preparation and hard work. Taking the time to prepare each element of the case is essential to bringing about the best result for your client. Reading the police report, preparing for your client's deposition, preparing a discovery plan, and using it in the depositions of the defendant and witnesses are essential to the case presentation. Knowing the medical records and your client's medical history and injuries, thoroughly preparing your expert witness in the event a deposition is taken, and being thoroughly prepared when you cross-examine the defense expert, will provide successful results.

III. Alternative Dispute Resolutions/Trial.

Many cases are now referred to mediation or other types of alternative dispute resolution prior to trial. Your role as an advocate does not change if the case is mediated as opposed to the case going to trial. You have the same needs for theme presentation and preparation that you would have if the case would go to trial. In mediation, this is a chance to present your case to a mediator and/or adjuster the same way that one would present it if it went to trial. Being prepared and presenting a case with a simple theme in an organized manner will generally produce a good result.

1. Mediation: How to Prepare and What to Do.

Is mediation ordered and are the parties just complying with the order and going through the process? Is mediation an exchanging of number in hopes that someone accepts the last number given? Or is mediation a part of the advocacy process in bring about a good result for your client? These are questions you need to decide when

mediating the case. Knowing the value of the case and having your client understand the value and process as you go into the mediation is essential to the process.

2. Voir Dire.

If there is a trial, voir dire is the first hurdle you will encounter. The plaintiff will meet the panel which will come with many of the common perceptions and biases that people have with lawsuits and people who bring them in Court. Dealing with jury bias and juror feelings are tremendous battles for the weary plaintiff's counsel. Some issues to address are:

1. Minor impact / low damage
2. Delay in treatment
3. Delay in amount
4. Pain and suffering - intangible number
5. Number of lawsuits and people who bring them
6. Damage and what people do with any money

3. Opening Statement.

After voir dire the opening statement will set the tone for the plaintiffs case and result, good or bad. In thinking about your opening, make it with the following thoughts in mind.

1. Start strong. To accomplish this, consider beginning the opening with a short statement that gives the jury a capsule of the case and two or three dynamic statements.

2. Have a theme. Every case turns or is decided on a few fundamental concepts that are universal. Identifying those concepts and making it into your theme is the key to a successful verdict.

3. Don't give unconnected facts. Explaining and arguing, while great at showing our rhetorical skills, is not as persuasive as telling a story. A cold listing of facts that each witness will testify to fails to persuade. Facts stacked on facts is not effective in persuading.

4. Tell a story. Telling a story is one of the most persuasive means of communication. Storytelling is the most basic means of communication. It is how jurors convey and process information.

5. Use the tools of persuasion. How we deliver our story is important. Use of present tense, repetition, rules of three, voice inflection and anchoring are tools of persuasion that you can use to convey your story.

6. Use primacy. That which is heard first will generally be remembered best. If the juror accepts the belief in the beginning, their belief is more intense. People tend to believe more intensely what they hear first.

7. Use recency. Recency relates to the ability to remember. That which is said last is remembered best.

8. Avoid overstating and reveal any weaknesses. Never overstate what your case is or state something you will not be able to prove. Credibility is important. Revealing your weaknesses before your opponent does is effective.

9. Avoid legal talk. Use everyday language. Eleven words account for 25% of all spoken English and 50% of the most common words are one syllable. Jurors speak in everyday language, and so should the lawyer.

10. End strong. End as you began your opening, with a strong statement tying your entire case together and giving the jury a call for action.

Your case presentation of direct and cross-examination and finally closing should follow incorporating the theme of the case that one should have established in voir dire and the opening statement.

Successfully presenting an auto collision case involves hard work, thought and skill. You will have to overcome many obstacles and counter the ongoing bias and public suspicion of the typical auto collision case. Don't give up. These cases can be won and pursued successfully by the prepared and organized advocate.