A CIVIL TRIAL
FROM BEGINNING TO END

By:

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1. The Beginning

The initial client interview is the most important part of handling a 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.

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 of your own client and of 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.

2. 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 throughout the entire case presentation. The theme should be evident in your demand, discovery, and entire case presentation.

3. 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.

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, so prepare for it.

The first session to prepare your client 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. 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.
4. Beware of open-end/cutoff questions.

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 with the attorney to prepare 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.

The doctor should explain the anatomy of the injured part and explain how 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, was a result of the injuries received, and the injuries received will affect their ability to work and perform their job. The doctor must establish the necessity of the hospital, medical, and pharmaceutical bills, their reasonableness, and that they were caused by the negligent act. 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.

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, their entire file, all records reviewed, curriculum vitae, and a list of publications they have authored.

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 with 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.

4. 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 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.

5. Jury Instructions

Don't wait until right before trial to begin preparing your jury instructions. When it appears the case is going to trial, even at its earliest stage, consider what your jury

instructions are going to be like for the trial of this case. It will help you in drafting your pleadings, preparing your evidence and giving you an overall structure of what you will need to prove or disprove in the case. Particularly look at the verdict director instruction that you would use in the case. If it's a simple car collision case, rear-end, or failure to keep a careful lookout, look at those MAI instructions and go through what you would need to prove in your verdict director. Also look at what damage instruction you might be able to give and keep your pleadings and your proof with that in mind.

I think it is a good practice to prepare an instruction outline with a list of all instructions that you would give in the event the case would go to trial, starting with the 2.01 general instruction and list all the instructions, have them all prepared well before the case is ready to go to trial.

6. Organize the Case

It is important when trying a case that your case be organized. There are many different methods that may work depending on what you're most comfortable with. Separate file folders for each witness, a list of all witnesses with the correct spelling of their names to be given to the court reporter. An exhibit list prepared for the court reporter, the court and the opposing counsel. Any trial briefs that you have prepared, any particular legal terms or medical items or items that may be important during the trial should be typed and given to the reporter.

1. Have a trial checklist.

    a. Two months before trial checklist:

        i. Review Pleading

        ii. Review Discovery

iii. Check with critical witnesses

b. One month before trial checklist:

i. Review Pleading again

ii. Update any discovery, jury instructions, witnesses

c. Two weeks before trial checklist:

i. Jury instructions

ii. Trial briefs

iii. Witnesses

iv. Outlines

d. One week before trial checklist:

i. Outlines of voire dire

ii. Opening, witnesses

iii. Closing

2. Plan the trial.

You should be formulating a trial plan for your case from the time the client first comes into the office. In planning a trial, be sure that you have developed a trial theme that includes the central story or principal of your case.

3. Organize for trial.

Whether you use trial folders or trial notebooks, some areas to consider:

a. Things to do before trial

b. Things to do during trial

c. Trial outline

d. Jury instructions

e. Voir dire

f. Opening statement

g. Witnesses

h. Exhibits

i. Motions in Limine

j. Instructions

k. Closing argument

l. Law / Research

m. Witness notes

n. Trial notes

o. Trial issues

4. Outline proof of your case.

a. Proof of damages - How will I prove my damages?

i. Hospital records

ii. Medical bills

iii. Wage loss

iv. Auto repair bill

v. Injury exhibits

vi. Expert witness

vii. Non-expert witness

viii. Damage witnesses

b. Liability evidence - How will I prove liability?

i. Photographs of scene

ii. Diagram

iii. Officer's report

iv. Models

v. Video

vi. Expert witnesses

vii. Police officers/reports

viii. Accident reconstructionist

c. Non-expert witnesses

i. Eyewitnesses

ii. Clients

5. Things to do for trial.

a. Witness list - make sure witnesses know where to be and when

b. Issuance of subpoenas - get them out early

c. Motions in Limine

d. Deposition summaries

e. Jury instructions

f. Panel investigated: Case.Net

g. Legal briefs

h. Opening statement

i. Outlines of witnesses and proof

j. Theme goals

k. Closing argument

6. Outline witness testimony.

a. You should have an outline for each witness to be called at trial.

b. You should identify the witness and indicate whether the subpoena has been issued, whether a deposition has been taken, what questions should be asked and what exhibits need to be discussed with the witness.

c. Do it in a form to make notes to one side of the outline.

7. Scheduling and setting the order of the witness.

The order of calling a witness differs in all cases. A basic rule is try to begin and end strong. The same applies to each day of trial. The first and last witnesses should be as strong as possible. Scheduling can be important and things can occur. An approach might be:

a. The investigative officer

b. Eyewitnesses

c. Expert liability witnesses such as accident reconstructionist

d. Medical records witnesses, if necessary

e. Treating health witnesses

f. Damage witnesses

g. Lay witnesses

h. Spouse

i. Plaintiff

8. Prepare your demonstrative evidence.

a. Drawings

b. Illustrations

c. Blowups

d. Maps

e. Photographs

f. PowerPoint

g. Elmo

9. Prepare your trial documents and foundation.

a. Certificate of service of Business Records

b. Medical Bills and records

c. Foundation for business records

d. Tape Recordings

e. Photographs

7. Voir Dire

As the case moves to 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 brought to Court. Dealing with jury bias and juror feelings are tremendous battles for the weary plaintiff's counsel. Some issues to consider are:

1. Minor impact / low damage

2. Delay in treatment

3. Pain and suffering - intangible number

4. Number of lawsuits and people who bring them

5. Damage and what people do with any money

Voir dire is important because it is the first opportunity where you get to speak one on one with the jurors. Lawyers don't get a second chance to make a good first

impression, so how a lawyer does in voir dire may very well dictate the outcome of the case. In conducting voir dire, consider:

1. Have a voir dire brief which can outline the present state of the law regarding challenges for cause, what is permissible types of questions that are deemed permissible, what it takes to strike a juror for cause. It's important to have read those cases and have them in front of the trial judge with a thorough and effective voir dire brief.

2. Continue developing your case theme, which is delivered in simple, sound byte form, which can be repeated often during voir dire can be a key to the near persons attention and allegiance. It can be the best way to impart support for your client's position and also admiration for the general underlying themes of the American judicial system. It's also a means by which you can get jurors to commit that they are capable of delivering a fair verdict.

3. Voir dire can be an optimal time to disclose information that may be detrimental to your case. Simple items might be, a client has tattoos, a client didn't file an income tax return, a client had consumed alcohol, a client has a criminal conviction, a client is overweight. By broaching the subject early on, it may minimize the negative impact of it.

4. Allow the jurors to talk. Encourage them to **tell me more**, getting them to talk and trying to engage every juror in some way.

5. Develop a voir dire outline. This may depend on your individual style and what you're comfortable with, but should include the following:

   a. Statement and development of your case theme

   b. Introduction of Plaintiff and Defendant

c. Purpose of Voir Dire

d. Facts

e. Witnesses

f. Validate case themes

g. Discuss weaknesses

h. Burden of Proof. Preponderance of the evidence.

i. Damages

j. Conclusion

6. Know the law on challenges for cause and the number of preparatory challenges you have.

7. CaseNet research. See *Fielder v. Gittings*, 311 S.W.3rd 280 (Mo.App.W.D. 2010), and *McCullough v. Johnson*, 306 S.W.3rd. 551 (Mo. 2010). And Supreme Court Rule and Local Rule.

8. Opening Statement

After voir dire the opening statement will set the tone for the 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.

9. Direct Examination

Direct examination is an important part of the Plaintiff's case. The focus should be on the witness. No leading questions, no narrative, and no cumulative questions should be used. Some things to consider:

1. Be prepared. Know your case and what each witness has to offer to prove your case.
2. Make witnesses part of the story.
3. Bring witnesses into your theme.
4. Start strong and end strong with your witnesses at trial and each day of trial.
5. Decide what facts you need to prove and what exhibits each witness can testify to.
6. If the witness is able to tell a story, the best form is chronological.
7. Accrediting the witness is establishing how the witness fits into the big picture. Are they an eye witness, a treating doctor, relative, spouse? That is important.
8. Try to avoid leading questions and avoid objections of leading questions with the 5 W's an H and a D. **Who? What? When? Where? Why? How? Describe.**
9. Use sign posts when you want to move from a different subject area. Be sure and indicate that to the witness. Say, "now I'd like to talk to you about your observations of the Defendant or what you saw..." "First I'd like to talk

to you a little bit about your background". That's a way of putting up a sign post as to where you're going.

10. Have outlines for each witness, with notes you have prepared, and what proof and exhibits are to be introduced with each witness.

11. Jury's focus on direct examination should be on the witness not on you.

10. Cross Examination

The key to effective cross examination is preparation. Knowing your case and the areas where the witnesses can be challenged. Cross examination can make or break your case being prepared is essential.

The qualities of a good cross examination include:

1. Seek facts not conclusions.
2. Use plain English.
3. Use only leading questions.
4. Do not use cross to repeat the direct examination.
5. Don't allow the witness to explain.
6. Don't ask one question too many.
7. Don't ask a question unless you already know the answer.
8. Keep your ultimate points for argument.
9. One fact per question: control the interview with multiple uncontradicted facts.
10. Ask very short questions and use simple language, like "before" instead of "prior" or "previously", "after" instead of "subsequent", "talk" or "see" rather than "contact with", "tell us" rather than "state", "see or hear" other than "observe", "car or truck" rather than vehicle".

11. Keep it short. 2 to 3 points and sit down. Focus is on you the examiner, not the witness.

12. Impeachment through prior inconsistent statements. Use these three steps to impeach:

    a. Recommit the witness' current statement.

    b. Verify (deposition, prior trial statement).

    c. Confront.

13. Once you get a favorable response or concession, stop and move on. Know when to quit.

14. Use sign posts or announce a change in subject area so the jury will understand where you are going.

15. **Never** ask **why** or **how** or allow the witness to **explain**.

11. Closing Argument

This can be the most exciting part of the trial. This the opportunity to show your advocacy you oratory. Planning for your closing argument should begin well before your time for argument and should encompass all your themes that your developed early on. One of the first folder you should have in your file is argument thoughts that you have from the time you first accepted the case.

Consider in your closing argument these five points:

1. Engage and connect with the jury.

2. Collect voir dire promises.

3. Review the evidence and show how it applies to the instructions.

4. Connect the case theme.

5. Damages. Show how your client was harmed.

Some things to do: Remind the jurors of the promises they made during voir dire to listen to the evidence and then apply the law, utilize and use the verdict director instruction as an outline for the case. Point out to the jury what you have to prove and what you have proved under the evidence and then how all the evidence relates to the jury instruction. Anticipate the defense arguments concerning liability and damages and address them. If it's a comparative fault, be sure and talk to the jury about comparative fault and how it's determined and how it is reflected in the instructions. Always suggest a dollar figure in the first phase of your argument that you'll be able to use additional time in your second stage to address damages. Know the law relating to closing arguments. Some of the most important areas under the law include reasonable inferences, send a message arguments, the per diem argument, the golden rule argument and adverse inferences from not calling a witness. Always explain how the verdict form should be filled out. Use a Elmo or PowerPoint to explain. Use basic value concepts like accountability and responsibility, biblical references, books, quotes, the rules of three - like faith, hope and charity, blood, sweat and tears, government of the people, by the people and for the people, see no evil, hear no evil, speak no evil, I came, I saw, I conquered. Use universal concepts like responsibility, correcting a wrong, finality, people should be treated fairly and equally, hard work deserves compensation. And rehearse your argument in front of a mirror, to your spouse, a focus group or someone , even video tape it to see how you and the argument appears.

Some things not to do: don't use the golden rule argument, don't you the per diem argument, don't forget to mention damages in the first part of your closing, don't use the

send-a-message argument if punitive damages aren't an issue, don't misstate the law, don't ignore the instructions, don't short change yourself on rebuttal, don't sound stiff or legal, don't make useless objections and don't try to talk to fast or make too many points And don't misstated the evidence.

12. 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 or arbitrated 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.

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.

Use exhibits, consider a PowerPoint presentation, document camera, and blow ups as a means of communicating your theme and ideas to the mediator or arbitrator. So while fewer cases are tried, more and more are mediated. Don't forget your advocacy skills here and use them as if a trial.

13. The End

Cases seldom end with the jury's verdict. One side will win, and one will lose. Know the time limits for filing after trial motions, such as Motion for New Trial, Motion for Judgment Notwithstanding the Verdict, Additur or Remitter, and Know the Civil Rules 72, 74, 75, and 78.

SUGGESTIONS FOR WITNESSES AND CLIENTS

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.

OPENING STATEMENTS
THINGS TO DO

Have a theme.

Be yourself.

Be sincere.

Be prepared.

Keep it simple and short.

Disclose weaknesses.

Dress the part.

Weave the theme into the opening and throughout the trial.

Draw the audience into the story.

Reach their heart.

Use common language.

Morality is on your side.

Motive is important.

Be credible.

Start strong.

End strong.

OPENING STATEMENTS
THINGS NOT TO DO

Don’t give the jury a rack of facts.

Don’t say what the evidence will be, or at least don’t be repetitious.

Don’t say it is a roadmap.

Don’t say a jigsaw puzzle.

Don’t say bird’s eye view.

Don’t waste time on re-introductions.

Don’t talk like a lawyer.

Don’t patronize.

Don’t say a simple case.

Don’t say I want you to listen.

Don’t read your opening.

Don’t say what I say doesn’t matter.

CLOSING ARGUMENTS
THINGS TO DO

1. Know your time limits. Know how much time you have and how you need to divide it between liability and damages. Be sure to mention damages in the first part of your argument and be sure you allow yourself plenty of opportunity to rebut any arguments in the last half.
2. Review and use the jury instructions. Use an Elmo, overhead projector, PowerPoint, whatever, but take the jury instructions on burden of proof, the verdict director, damages, and verdict forms and use those and relate them to your argument.
3. Use simple, common language – avoid legalese. Simple, common language, rather than complex words will have a greater impact with the jury. Remember that the jury is looking to you for guidance. If you are not convinced of your case, you cannot use convincing language.
4. Use lyrics, analogies, proverbs, maximums, quotes, rhetorical devices.
5. Rehearse. Rehearse on videotape. Rehearse in front of the mirror. Rehearse in front of mock jurors. Give it to your family and friends. You need to be able to be flexible, adapt the closing argument to the evidence at trial. Remember to work shop and address your weaknesses and use demonstrative evidence.
6. Be courteous. The more outrageous your adversary may be, the more courteous you should be.

7. Be sure to review notes. Review client notes and trial notes throughout the handling of the case. What was said in opening statement, use repetition and analogy in order to address the client's position.

8. Appeal to the jury's sense of righteousness and duty by empowering the jury.

9. Appeal to reason and goodness.

10. Be sure you explore the Defendant's motives for ill conduct.

11. Maintain eye contact with each juror throughout the closing. Leave enough time to talk about damages.

12. Be yourself. Connect to your theme that began in voir dire.

13. Be organized.

CLOSING ARGUMENTS
THINGS TO NOT DO

1. Don't cause the jury to be fatigued or bored.
2. Don't make a mistake or exaggerate or misstate any evidence.
3. Don't state your personal beliefs.
4. Don't personalize the Defendant.
5. Don't read long passages.
6. Don't write out your closing argument.
7. Don't memorize your closing argument.
8. Don't give a speech. Closing argument is not a speech. It is the telling of the story.
9. Don't use legalese.
10. Don't refer to too many exhibits.
11. Don't get in the jury box with the jury. Give them some space.
12. Don't talk down or use condescending language.
13. Don't waive or shout.
14. Don't use long or difficult words.
15. Don't forget to thank the jury.

JURY INSTRUCTION GUIDE

2.01 (with notetaking and juror questions)
2.03
2.02
3.01
2.04

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2.05	MMPA
2.05	MMPA

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Not in MAI	Verdict Director – MMPA
Not in MAI	Verdict Director – MMPA

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4.03	damages
4.01	unlawful
10.01	punitive
10.01	punitive

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Verdict A	36.11 - MMPA (with and without punitives)
Verdict B	36.11 - MMPA (with and without punitives)

JURY INSTRUCTION GUIDE

2.01 (Explanatory Instruction for all Cases - Paragraphs 1 through 11);

2.01 (Paragraphs 12 and 13 Included - Notetaking and Juror Questions);

2.03 (Explanatory – Order of Instructions);

11.03 (Definitions - Negligence and Highest Degree of Care Combined);

3.01 (Burden of Proof – General);

2.02 (Facts Not Assumed);

2.04 (Explanatory – Return of Verdict)**;**

17.02 (Verdict Directing - Multiple Negligent Acts Submitted);

4.01 (Damages – Personal and Property);

36.01 (Form of Verdict - Plaintiff vs. Defendant - Personal Injuries Only).

FOUNDATION REQUIREMENTS

Business Records

1. Record is relevant
2. Are you the custodian of these records
3. Records kept in the regular course of business
4. Records made at or near the time of the act event or occurrence
5. Records are exact duplicates of the originals

Tape Recordings

1. Have you had the opportunity to hear the voice of Mr. X
2. How many times have you heard his voice
3. Tell us how you are familiar with Mr. X's voice
4. Have you heard the recording marked as Exhibit B for identification
5. Do you recognize the voice
6. To whom does the voice belong

Photographs

1. Is the photograph relevant
2. I'm showing you what's been marked as Exhibit for identification
3. Do you recognize what is shown in the photograph
4. Are you familiar with the scene
5. Does it fairly and accurately represent the intersection as it appeared on the date mentioned

Copies

1. Copy is relevant
2. Copy was executed, original once existed
3. Copy of original was made for the original is not available

Summaries

1. Summary of evidence provided at trial
2. Summary of voluminous records
3. Have witness who can testify as to the underlying facts

Letters

1. Letter is relevant
2. Witness received the letter
3. Witness recognized the signature as the other party
4. Letter is in the same condition today as when first received