SILENT ADVOCACY

A Practical Primer for the Trial Attorney

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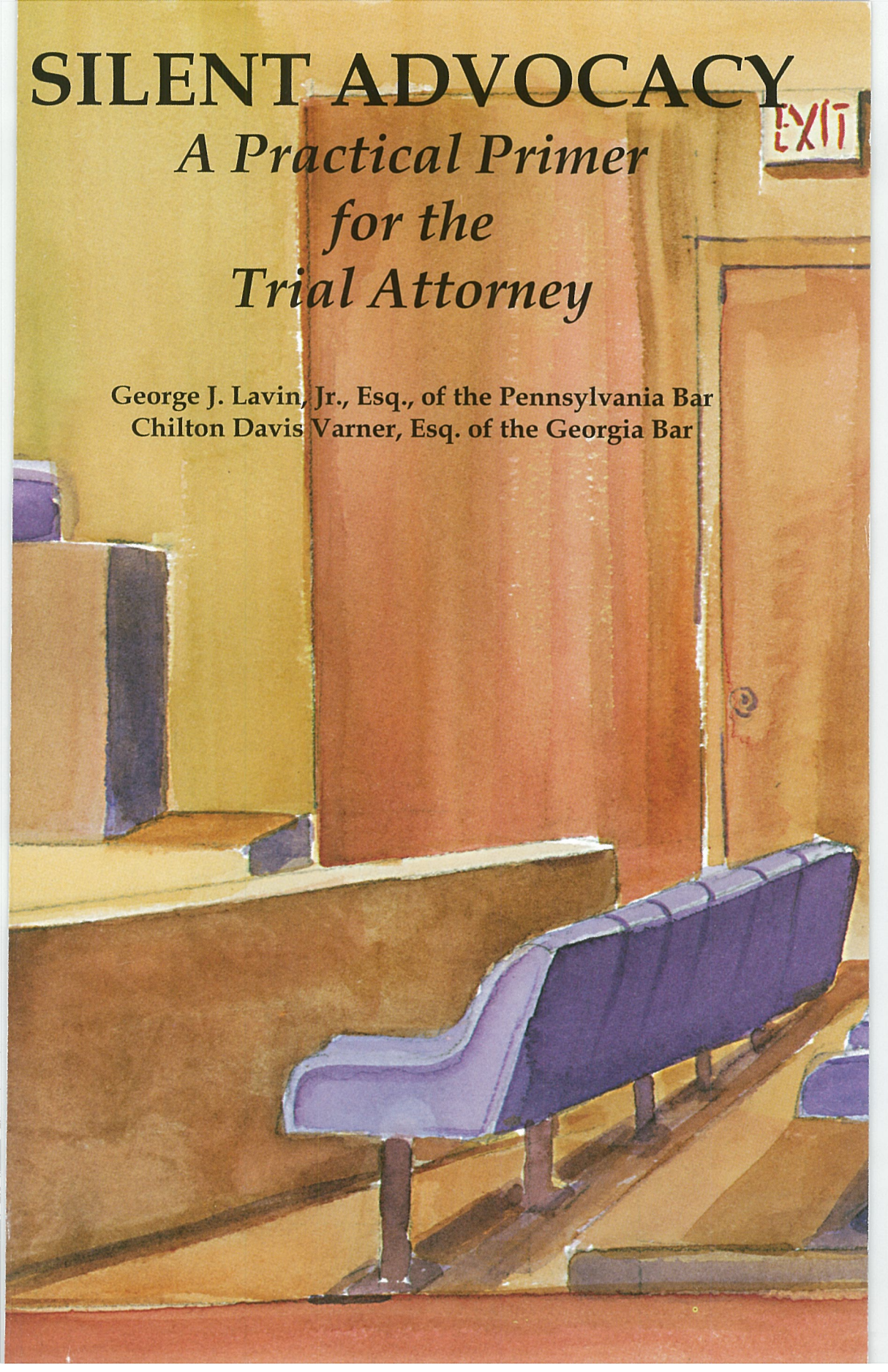

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FOREWORD

Each of us has had a long career as a trial attorney in civil cases. Each of us began with opportunities to appear in the courtroom, and thus to participate actively in that greatest learning environment for a trial attorney. Times are changing, however, and today few beginning lawyers who aspire to become trial attorneys have the opportunity to appear regularly in actual trials. We have written this book, in part, to summarize some of our learning and experience for the benefit of those lawyers new to the profession, or new to civil trial work.

Over the years, each of us has admired the work of the other. On three occasions a client asked us to try a major case together, but each case was resolved before trial. So we have chosen another path of professional collaboration – this book – and have enjoyed the process of preparing it.

Both of us have made presentations at professional seminars, trial advocacy workshops, trial academies, and other professional gatherings of interest to the civil trial attorney. This book includes some of that work and a substantial amount of new material.

We hope you find this book useful. Perhaps our most fundamental purpose in offering it is to encourage continued resort to the jury trial, which we believe is the best system yet devised to resolve civil disputes fairly and well.

George J. Lavin, Jr.
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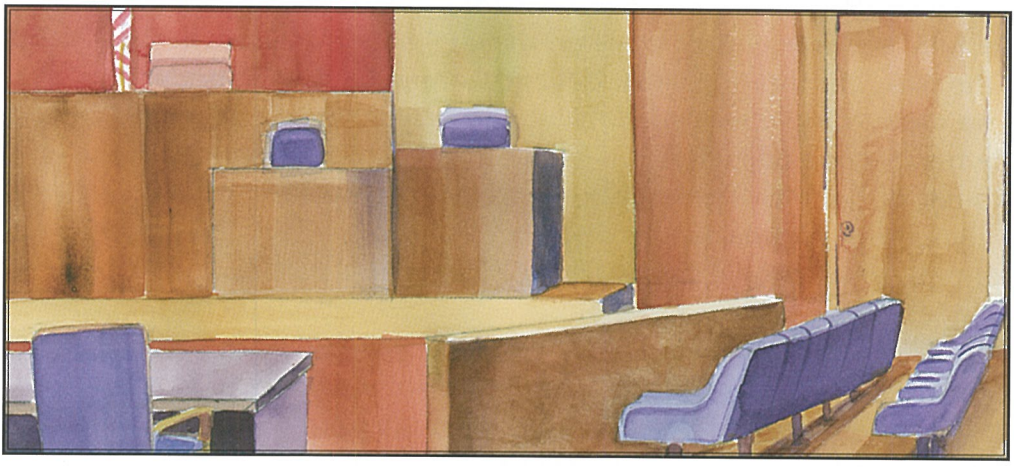
Chapter I
WHY BOTHER?

> ***Every new tribunal, erected for the decision of facts, without the intervention of a jury... is a step towards establishing aristocracy, the most oppressive of absolute governments.***
> William Blackstone
> *Commentaries on the Laws of England*, 1765-1769

No matter how long you have been in practice, you have probably heard lawyers and judges speak with nostalgia about "the good old days," when civil cases routinely proceeded to trial by jury. The early years of the 21st century increasingly have featured class actions, mass torts, multidistrict litigation, billion-dollar verdicts, and attendant media coverage undesirable for most defendant corporations. The predictable result? Frequent settlements.

A number of recent observers have verified the trend toward fewer jury trials in both federal and state courts.



A seminal study by a committee of the American College of Trial Lawyers states that:

> Over the past four decades, the civil justice system in the United States has witnessed, simultaneously, a litigation explosion

> and trial implosion. The number of civil actions over the past four decades has skyrocketed, yet the number of trials has proportionately (and, in federal courts, absolutely) declined. [1]

In August 2005, the Bureau of Justice Statistics, part of the U. S. Department of Justice, reported that "from 1985 to 2003, the number of tort trials terminated in U.S. district courts declined 79%." The Bureau found that only 2% of tort cases filed in these courts proceeded to a completed trial. It attributed the 79% decline to the growth of alternative dispute resolution systems as well as the expense and complexity involved in trials.[2]

Must one conclude that the civil trial by jury will have virtually disappeared from U.S. jurisprudence by, say, the middle of the 21st century, having been fully replaced by various alternative dispute resolution methods? Will the skills of the civil trial attorney become as obsolete as those of the buggy whip designer?

Are newer lawyers increasingly unlikely ever to be able to try actual civil jury cases and thus learn and master the best trial techniques? Is it possible that, just as the number of practicing women trial attorneys in the United States is increasing, the days of the civil jury trial are increasingly numbered?

The total number of jury trials on the civil side may remain smaller than in the past, but the American College Committee report finds that "There is no clear, simple explanation for the 'Vanishing Trial' phenomenon." The report concludes that it is by no means "clear that the decline in the number of trials is irreversible. It would appear largely to be reflective of changes in approaches to dispute resolution, judicial perspective, and economic and political forces. None of these is static."[3]

Some today actually would applaud the decline of the civil jury trial in favor of various alternative dispute resolution methods. Those who support jury trials counter that alternative dispute resolution, conducted as it is privately, outside the civil justice system, generates no body of decisional law that lawyers can consider before advising a client on the

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1 The "Vanishing Trial:" The College, The Profession, The Civil Justice System, Ad-Hoc Committee on the Future of Civil Trial, Gregory P. Joseph, Chairperson, American College of Trial Lawyers, Irvine, CA, 2004, at 1. The study is reprinted at 226 F.R.D. 414 (2005).

2 Federal Tort Trials and Verdicts, 2002-03, Bureau of Justice Statistics Bulletin, U.S. Department of Justice, August 2005, at 1. *See also* Neal Ellis, Saving the Jury Trial, in The Brief, Tort Trial & Insurance Practice Section, American Bar Association, Summer 2005, at 14.

3 The Vanishing Trial, id., at 2, 23.

legal propriety of a proposed course of action, or on the likely outcome of a threatened or existing civil controversy. Another disadvantage is that private dispute resolution tends to focus upon "what it will take to get the deal done," ignoring the fundamental concepts of justice that so often lie at the heart of a dispute, and thus of a civil jury trial.

The virtues of the Anglo-American civil jury trial have been developed, observed and praised by countless observers for nearly a millennium. Indeed, the jury trial is constitutionally recognized and protected in our country. Our view is that the institution is too strong to be swept away by short-term forces.[4] If we fully abandon the civil jury trial, we will confess to the world that ours is a society that "just can't say no." We will telegraph the message that no complaint -- even the plainly frivolous -- should ever have to be examined in the crucible of the public forum.

We should practice and master the best professional trial techniques because our clients need and deserve that expertise. Each of us in the practice of law in the 21st century should be capable of answering the client's plea for justice when a civil dispute, for whatever reason, cannot, or should not, be compromised, but should instead proceed to justice, by means of a jury trial on the merits.

In our profession, there are mere litigators of widely varying descriptions. And, there is the trial attorney, the lawyer in the number-one seat, the lawyer of competence who is in charge of a civil trial. This book is designed to help you become a trial attorney.

Believe no one who tries to tell you that there is such a thing as a "natural-born" trial attorney. We have yet to see one. Civil trial attorneys are made, not born. The requisite skills must be learned: by observation, education, and - most importantly - by actual preparation and experience.

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4 Cf. the recent observation of Chief Judge William G. Young of the U.S. District Court for the District of Massachusetts:

> History will not look kindly on that generation of jurists who acquiesced in the eclipse of our greatest bulwark of personal liberty - the American jury.

In Re Relafen Antitrust Litigation, 231 F.R.D. 52, at 93 (D. Mass., 2005)

Chapter II

SHOULD YOU AND YOUR CLIENT GAMBLE ON THE OUTCOME OF A CIVIL JURY TRIAL?

The most common reason lawyers and their clients may want to settle or mediate a civil dispute rather than see it go to a jury is because, down deep, whether they admit it or not, they are risk-averse. Of course, it is true that no jury trial is without risk. Among the reasons for risk aversion, however, can be the lawyer's lack of trial experience and, perhaps, the lawyer's desire to avoid being stigmatized as "a loser." Something can be done about these concerns. Indeed, it is why we have written this book.

Armed with the requisite knowledge and confidence, you will be able fully to consider the fundamental question - should this case go to trial? - and then advise your client properly.

Even though your client may want the case to go to trial, you may be professionally obligated to advise against it. Conversely, you may be obligated to point out to a skittish client that a case *should* go to trial. How should you make your assessment?

Long before trial, as soon as enough facts have been gathered to permit you to address them, evaluate your case with a simple test. Remove your advocate's cap for a moment. Try to stand off to one side as a third-party observer. To do this properly means that you will have to follow one of the classic maxims of the civil trial advocate: "Make your case fit the evidence. Do not try to make the evidence fit into your case." From the time of this earliest case evaluation, be realistic about the evidence and what it can, and cannot, support.

In this test, a plus means your case seems stronger than your adversary's. A minus suggests otherwise. Give yourself the same test again and again as more facts come to light. We have used this technique successfully to evaluate candidates for trial. We believe lawyers of any level of trial experience will find it helpful.

	PLUS	MINUS
A. The Basic Facts		
B. The Forum		
C. The Experts		
D. The Exhibits		
E. The Injuries *(in a case involving personal injury)*		
F. The Attorneys		
G. Likely Discovery		
H. "Get Mad" Facts		

A. ***The Basic Facts.*** Evaluate the dispute from the viewpoint of simple, lay justice. Is there anything in the basic facts that would, to a reasonable person in the jurisdiction where the case would be tried, intuitively cry out for justice - either for the plaintiff or for the defendant?

To the extent that there is, your assessment will increasingly favor, or oppose, trial. Do the basic facts require that you be able to convince the jury of some things in particular? If so, what are they, and how likely is it that you can do it? Some experienced trial attorneys consider this first factor the most important of all eight we will discuss.

B. ***The Forum.*** What is there about the forum - the judge who will likely try the case, the jurisdiction itself, the makeup of the jury pool, and other factors peculiar to the jurisdiction - that would make trial more, or less, desirable for your client?

C. ***The Experts.*** Who will be more likely to win the "Battle of the Experts" at a trial? With the sound, thorough trial preparation discussed in this book, and especially when you represent a client with genuine technical expertise and knowledge among its employees and consultants, you should never lose the "Battle of the Experts".

> ***I hear and I forget. I see and I remember.***
> *-- Confucius*

D. ***The Exhibits.*** Who will be more likely to win the next trial battle, the "Battle of the Exhibits"? This is another contest of persuasion.

People generally tend to be persuaded much more strongly by things they both see and hear, rather than by things they merely hear.[5] This is one reason why courtroom exhibits are so important at a trial. Again, with the sound, thorough preparation discussed in detail later in this book, and especially when you represent a client with genuine technical expertise and knowledge among its employees and consultants, your exhibits should be the more persuasive.

E. ***The Injuries.*** If the civil dispute involves personal injury, as so many do, is there anything about the way the injuries occurred that intuitively cries out for compensation? Can it be said that the plaintiff did nothing to deserve the injuries? Are the injuries in question so horrifying that they may overwhelm jurors? If some or all of the answers to these questions are yes, you may be inclined to advise against trial. However, at least with careful case preparation, we believe comparatively few matters actually fall into this category.

F. ***The Attorneys.*** Especially if the case is to be tried to a jury, who will win the "Battle of the Lawyers?" **You should never lose this battle**. At worst, it should end in a tie. Chapter VI, "Silent Advocacy," explains in detail this perhaps surprising contention.

G. ***Likely Discovery.*** Are there reasons to anticipate the required production of a large number of documents, whether electronic or on paper? If so, consider how anticipated expense, time, and other factors may affect your recommendation about trial. Can you anticipate the production of particular documents that could create difficulty for your client's cause?

H. ***"Get Mad" Facts.*** Are there facts in the case, on either side, that seem likely to cause a factfinder to become angry with one of the parties? If there are, then this last factor can be the most outcome-determinative of all. If such facts favor your client, your case probably should go to trial.

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5 We are not communications scientists, but Dr. C. K. Rowland, of the jury research firm Litigation Insights, Inc., advises that studies conducted by those who are reflect that retention is maximized when people can both see and hear, since some people are more visual and others more verbal. Dr. Rowland also advises that there is emerging research suggesting that the best visuals are those that make the subject feel more active and involved, rather than passive and uninvolved. Communication to us dated February 21, 2006, from Dr. C. K. Rowland of Litigation Insights, Inc., Overland Park, Kansas. For those interested in pursuing this subject further, Dr. Debra Worthington of Auburn University has graciously provided the following suggested readings: C. Hamilton, *Communicating For Results, 7th ed.* (Thomson Wadsworth, Belmont, CA, 2005); and F. I. Wolff, et al., *Perceptive Listening* (Holt, Rinehart & Winston, New York, 1983).

Chapter III
THE PRE-TRIAL PHASE: WHEN YOU ARE STILL FAR FROM TRIAL

> *Preparation "is the be-all of good trial work. Everything else-felicity of expression, improvisational brilliance-is a satellite around the sun. Thorough preparation is that sun."*
>
> *-- Louis Nizer (1973)*

There are some lawyers who regard even the possibility of trial as a panic-inducing emergency. If you use the techniques discussed in this book, this will not be your experience. A house fire is no emergency for a competent fireman, just as a toothache is no emergency for a competent dentist. Their training has taught them the proper steps to take. The competent civil trial attorney is no different. With a proper understanding of what must be done, a trial is no emergency.

Are there effective things you can do when trial is still far off - that is, during all of the time from case filing to the final pre-trial conference? There are, but most of them are time-sensitive. If you wait until the eve of trial, you will not be able to do some of them at all, and you certainly will not be able to do many of the other ones effectively. In short, you will not be fully prepared for trial.

Work done effectively from the beginning of the pre-trial phase can help your trial team achieve its goal of being prepared, professional advocates when the case comes before the court and jury.

If you are the trial attorney, be certain that everyone on your team knows exactly what he or she is to do during the pre-trial phase. This not only promotes team morale, but it can significantly reduce or eliminate valuable time that otherwise can be wasted on unnecessary or redundant work.

Is your role to assist the trial attorney in charge of the case? If so, then early in the pre-trial phase, ask that lawyer how he or she wants the case prepared. Although this seems obvious, many assistants fail to do it, resulting in wasted effort or, even worse, things not done which the trial attorney will need at trial.

Some suggestions follow for the pre-trial phase. Before we begin this discussion, however, we acknowledge that an increasing number of lawyers seek to create "paperless" compendia of data for use before and during trial. If you are among them, substitute your chosen technology for the "old fashioned" paper file references we make below. But just be sure your technology works, both in and out of the courtroom, and that the courtroom can accommodate it. (One of us recently had to have an early twentieth century courtroom rewired for a trial, at the client's expense, so that it would have more than one electrical outlet.)

Despite all the advances of modern science, "Murphy's Law" still is alive and well, especially in more remote locations. Be sure all of your good work is adequately backed up, so that it will not mysteriously vanish on the eve of trial.

Organization of the File

Although the need for effective file organization seems obvious enough, too many lawyers fail to do it successfully, or even at all. If your role is to assist, and if the trial attorney has particular ways to prepare a case for trial, follow the established protocol. The "end game," the goal at the end of the pre-trial phase, is for your case to be highly organized. Suppose that at the final pre-trial conference, or during trial itself, the judge asks your opponent for a particular document. If your opponent fumbles around looking for it while you quickly produce it, you will convey two messages: that you are trying to help the court; and that you are highly organized and prepared. Your team's performance in this regard will not be lost on your opponents or on the court. If something like this should occur during trial, your team's performance will not be lost on the jury, either.

If you are the trial attorney, you must have at least one other professional, such as an associate or a paralegal, on whom you will rely. In a trial of any complexity, you simply will not be able to do everything yourself. The quixotic concept of the "lone warrior" may have some romantic appeal, but we do not recommend it. Trial work is far too complex.

Logistical Considerations

Think carefully about the practical problems that may arise before or during the trial of your case. Will you have an unusually large exhibit, such as an industrial machine, or a section of a motor vehicle? If so, exactly how will you get the exhibit from the street into the courtroom? What are the courthouse rules in this regard? Must a particular freight elevator be used? If so, how is permission to use it obtained? Measure your exhibit. Will it fit? Some courthouses have rules so restrictive that getting anything into the courtroom requires extraordinary measures, preparations that must be made long before trial. Asking the court's permission well in advance signals respect and good manners.

Will there be a jury view somewhere outside the courtroom, such as a view of the scene where a relevant event occurred? Make sure any such trip is planned carefully and in detail. You will find more thoughts on this subject in the chapter, "The Final Pre-Trial Meeting With The Court."

Planning for an Effective "War Room"

Civil trials come in all sizes. For the trial of a major case, should your team plan to work from a hotel room or another dedicated, remote site? Many trial attorneys prefer this, rather than trying to work in the office during a trial, where there will be distractions. They find that they can concentrate on trial strategies and tactics much better by working in an off-site "war room."

If this is your team's decision, remember that the arrangements must be made long before trial. For example, consider security in your war room. You may want to have land telephone lines installed, as well as computer and facsimile lines. Should you also plan to use cellular telephones? The increasing popularity of cellular telephones has caused some courthouses to remove pay telephones. Will you need additional cellular telephones for use by your messengers, legal assistants, and others?

What should you plan to have in your off-site war room? After all, in a major trial you will spend much time there. Here are some ideas:

1. Post a schedule for the following trial day on a board in your war room. Also, post a list of lawyers, witnesses, and consultants, with telephone numbers and E mail addresses, as well as any scheduling conflicts affecting any of your witnesses.

2. Establish and post in the war room regulations and procedures for your trial team members; that is, make it clear who is supposed to do what, and when.

3. Know when you must leave for court, so your team can arrive in time to carry out assigned tasks. The time necessary to go from your war room to the courtroom can vary dramatically from city to city.

4. Team members must know exactly what will be needed for the next trial day and have a plan to insure that each of those items will be available at the appointed time. This will help you be, and appear to be, thoroughly prepared every trial day.

5. In your war room, consider the use of "the four easels." For this technique, which will last for the entire trial, you will need tablets or newsprint paper sheets set up on each of four easels, somewhere within clear view in the war room. The easels should have these headings:

> ***Must Be Answered***
>
> Here, team members should write anything that occurs to them from trial day to trial day regarding points made by opponents, facts adduced, opinions given, suggestions made - anything for which the proper advocacy of your client's position requires a response.

Things To Say In Closing Argument

You and other team members should write suggestions for points to be included during closing. Especially in a long, complex trial, no one can remember all such points over time, so the contents of this easel likely will be valuable.

Agrees

Team members should list facts on which the parties seem to agree. Was there opposition testimony given today with which your side agrees? These items, of course, can be useful later, during closing, if you can list for the jury "facts on which we all agree."

Assignments

Assignments for particular team members are listed here. This should be a constant, up-to-date list showing who is supposed to be doing what.

Team members should be reminded to write these things down on the easels daily, and quickly, lest items be forgotten.

At the end of each trial day, bring your entire trial team together back in the war room. Discuss your overall situation. Discuss who will be called to testify the next day and ask your trial team members what each of them would like to ask that witness. You may receive some valuable suggestions this way. Include in this post-trial-day meeting some time studying the four easels. In most trials significant enough for a war room, it is also a good idea and considerably more efficient to have dinner brought in for the team.

The next two items should be completed at least three months prior to the trial date.

Review of the Pleadings

All pleadings should be indexed and appropriate chronologies created. This work creates an excellent opportunity to check for open ends, that is, for procedural steps inadvertently not taken. Has some pleading been forgotten? Should amendments be made?

If you represent the defense, should affirmative defenses now be amended to be more effectively presented? Should some affirmative defenses, pled

at an early time when the case was less well focused, now be eliminated? Remember that any affirmative defense can be read to the jury by your opponent. If an early-filed affirmative defense now can be read to suggest that your client literally alleges nonsense, such as the negligence of a three-year-old child, then that defense is a strong candidate for elimination. This review is easy to do, but it can be of critical importance.

Review of Discovery

Are there open ends in discovery? Were particular items promised during a deposition but later forgotten and not provided? Imagine having to respond to this at trial: "Your Honor, they promised long ago they would give that document to us, but they never have. And now they want to offer it into evidence. Well, we object...." Similarly, are there unfulfilled promises made by your adversaries?

If you represent a defendant corporation, should you provide an expert report for a corporate employee whose opinion testimony you plan to present at trial, even though she is not a "retained expert" under applicable practice rules?

Are there documents you have successfully objected to producing that you now think you might want to introduce into evidence at trial? If so, withdraw your objection and produce the documents forthwith.

As you review discovery, remember that in many courts not only responses to requests for admission but other discovery responses can be read to the jury. The practitioner who has experienced the pain of hearing an opponent sarcastically read some needlessly pedantic or excessively technical discovery response to a jury has learned a valuable lesson. Amend or otherwise seek to eliminate any such language in your responses well before trial. Remember that discovery responses are tools, not ends in themselves.

It can be helpful to reduce interrogatories and their responses to a single page for each subject or topic. This enables you to say at trial, "Your Honor, we want the jury to hear all of our responses on that subject instead of only the one that counsel has chosen to read to them."

Should You Depose The Opponent's Expert?

In some jurisdictions, the deposition of an expert is not permitted at all, at least not as a matter of course. If your case is in such a jurisdiction, you must do enough homework to prepare adequately for a motion to take an expert deposition. Your goal will be to show the court the fundamental unfairness to your client if the motion is denied. In other jurisdictions, expert depositions are routinely permitted. Even where you can do so, at whatever cost and difficulty, should you take an opposing expert's deposition?

Some experienced practitioners prefer not to depose opposing experts, especially if that expert is of dubious qualification, such as a "jack of all trades" professional witness. They believe that during such a deposition, this kind of witness is likely to learn more about the subject matter and weaknesses in his or her existing views without offering much of value in return.

Other experienced practitioners routinely seek expert depositions. Of course, even if your general inclination is not to depose, it may be necessary in a particular case for a number of reasons: to establish facts supporting your subsequent motion to exclude the expert from testifying at all, on *Daubert* or other available grounds; because a client insists upon the deposition; or for a number of good tactical reasons.

Who, after all, are "opposing experts"? The category obviously includes experts retained by any party in the case. As a practical matter, this category also can include proposed witnesses not formally listed as experts, but whose testimony likely will be accorded enough deference by the court that they may be permitted to state conclusions and inferences. Such witnesses can include treating physicians, accountants, product technicians, coroners, law enforcement officers, and fire department personnel.

Preparation for the Expert Deposition

If you are considering deposing an expert, begin by reviewing the jurisdiction's procedural rules on pre-trial expert testimony. Read also the cases in which courts have interpreted these rules. These decisions may show you a number of mistaken paths taken by your professional predecessors that you will want to avoid.

When required expert reports become available, analyze them carefully. Set aside plenty of time to prepare for the expert deposition. You may

discover important things that have not been done. At least two weeks, but preferably a month, before the deposition, go through the file and see what you still need to do.

You must know the case factually. You must know what witnesses have said and what your client has produced in discovery. Know the case technically, as well. Mastery of these facts will permit you to decide during the deposition just where you want to go next.

Define your goals for the expert deposition you will be taking. Only rarely should your goal be the destruction of the expert. It may not be possible to do this in a deposition in any event. Even if you were actually to accomplish it, the opposing party would simply retain a new expert or at least actively undertake efforts to rehabilitate the existing one. The kind of drama that can occur at trial is unlikely to be helpful to you, in the long run, if it occurs during an expert's deposition.

Before the deposition itself, you can do much to prevent or minimize tactics that are regrettable professionally but do occur from time to time. Can the expert deposition you want to take be completed in one day? How many hours shall be considered to comprise that "day"? What will be the effect upon this plan if the expert and opposing attorneys arrive late for the deposition?

Where will the deposition be taken? Do not settle for a small space, such as a small room with a small desk. This setting is not conducive to proper examination, especially if a number of counsel are to be present. Your client typically will be paying the expert, so ensure that the deposition will be taken in a room of sufficient size.

Will the expert deposition occur somewhere that requires you or other attorneys to travel? If so, airline schedules can become important. They can curtail the time necessary for a proper deposition. An intended, and agreed-upon, seven-hour deposition may be difficult or impossible to complete if any or all of the attorneys, or others, must "leave to catch a plane."

Will there be scheduled breaks during the expert deposition? Some interruptions cannot be avoided, but you should make appropriate inquiries during your planning for the deposition.

Particularly in jurisdictions where expert reports are not required, plan for and issue timely subpoenas *duces tecum*. In them, demand that the

expert bring to the deposition any reports (draft and final), a resume, a list of previous testimony in other cases, the expert's file for this engagement, all relevant computer-stored as well as paper information, documents showing corroboration of the expert's methodology and conclusions, and all exhibits, tests, and illustrations.

Ensure that copy machines are readily available to you before and during the deposition. When the expert arrives with the information you have subpoenaed, you do not want to waste valuable time trying to locate a functioning copy machine, nor do you want to have to do the copying yourself. Bring someone else who can do this for you as you continue the deposition.

Obtain in advance any exhibits you will use during the deposition. Examples might include a small model of the relevant product, or of the machine at which plaintiff was injured, or in a medical case, an anatomical exhibit.

Should you apply to the court for rulings on disputed issues before the deposition? Be cautious about this. Application to the court at this point should be the rare exception. Many judges do not want to rule on a potential dispute that has not yet occurred and indeed may never transpire. The most likely result is that the court will tell the attorneys to return when they have a transcript that reflects an actual dispute.

If you have a good working relationship with opposing counsel, you may be able to resolve a number of questions without resorting to the court. Well-considered agreements, or, in appropriate circumstances, court rulings in advance of the expert deposition, can resolve many potential issues.

Before the deposition, gather the materials you will want to bring with you. These can include your notice and subpoenas *duces tecum*, your own expert's report(s), and demonstrative materials, including pre-marked exhibits, so that you do not have to waste time handing exhibits to the court reporter for marking at that time.

In summary, thinking ahead is the key to success.

Taking the Expert Deposition

When the expert arrives for the deposition and has been sworn, go through your subpoena(s) and ask the expert whether everything requested has

been brought. If not, exactly what has been withheld? Has counsel advised the expert not to produce something, on privilege or other grounds? What information demanded in your subpoena once existed but has been discarded?

When was the expert retained? By whom? Is there an engagement letter? If so, is it in the file? If not, why not? What was the expert retained to do? If there is nothing in the file that says so, then how did the expert know he or she was supposed to be sitting before you at this moment? Was the date and place of the deposition communicated by electronic mail? If so, then where are printed copies of such messages?

Are there billing records in the expert's file? If not, where are they? Does the expert possess Forms 1099 showing money received for testimony during the past several years? If so, where are they? Make a list of missing items as you go. Do not wait for the transcript, because typically you will need the items on your list before the transcript is ready.

Use a prepared outline for the deposition. It will help focus your thinking, utilize the available time most effectively, and avoid a strictly intuitive, "seat of the pants" approach.

There is no "one size fits all" outline, but here are some ideas to consider:

1. ***Identify the witness.*** Credentials can be misleading: for example, the witness' doctorate degree might be from a diploma mill. What does the witness really know about the issues in this case? If the witness has a doctorate, has he or she ever performed actual work relevant to the issues in the case? What is the witness' litigation experience? Does the expert only testify in court cases? What percentage of the witness' income is derived from litigation work? On what subjects has the expert testified? Has the expert had a difficult time holding a job? Is the expert charging a different hourly rate for this deposition than the rate at which the expert is billing the retaining party in this case?

2. ***Obtain the expert's opinions.*** Begin by asking the expert to identify those opinions he or she intends to offer at trial. Thereafter, you can work backward to get details, but you at least will have a list of all of the expert's opinions in one place.

Ask whether these opinions are preliminary or final. Would the expert be willing to appear at trial today with these opinions? Many experts will testify in deposition that the answers are "preliminary." If you get such an

answer, ask what the expert is going to do next. What is missing? What else does the expert need to do to complete the work? What else has counsel asked the expert to do? Has the expert made suggestions to counsel about things that might be done, either in the past or for the future?

Ask the expert to describe all testing the expert has already performed for "real-world" validation of the expert's theory, so that you can both evaluate its adequacy and consider performing refutational testing. What, if any, further work does the expert plan to undertake independently? This might include investigation, analysis, testing, creation of exhibits, or work on the rebuttal of opposing experts.

3. ***Develop a time line.*** What has happened in this case and when? Who was involved? Follow a logic train: how did the expert get from X to Y to Z?

4. ***Fence in the expert.*** Doing this successfully can reduce the risk of surprise at trial. As a practical matter, at least with experienced expert witnesses, you are unlikely to be able to reduce the risk of surprise to zero, but "fencing" questions certainly can reduce the surprise to manageable proportions.

What is the intended role of the witness in this case? What subjects has the expert been retained to address? Has the expert relied upon the work of others, and if so, how?

The process of "fencing in" also includes questions designed to compel the expert to describe areas of agreement and disagreement with your client's positions. If reports have been exchanged, have the expert analyze your experts' reports. Do not hesitate to ask a question because you think you may get an answer that hurts your cause. The expert deposition is the right time to elicit everything negative the opposing expert is prepared to offer about your expert and your positions, as well as about other experts in the case.

Now read your list of findings and opinions back to the expert. Is it complete? Take each opinion, one at a time. Ask for every basis for the opinion: "where are the data you used to arrive at that conclusion?" Then follow up with questions eliciting the source of those data; whether the expert reviewed the data; and whether there will be any further data.

5. ***Ask the expert what would have "solved the problem."*** That is, what would have avoided the incident giving rise to the litigation? Would this, for example, have been some alternate design? If so, have the expert describe

it. Would this alternate design have prevented the injuries of which the plaintiffs complain, or perhaps lessened some of those injuries? If so, exactly how?

6. Throughout the deposition, seek to have the expert *quantify*. You want numbers. Scientists count and measure. Have the expert tell you those numbers or concede that he or she is unable to do so.

7. If you use exhibits during the expert's deposition, be sure to place on the record enough information about the exhibit to permit its ready identification later, such as in an appellate context. ("Now, Doctor, I am handing you an exhibit that the reporter has marked number [XX]. Do you recognize this?")

8. Ask whether the expert will supplement the deposition, or the existing expert report(s), as further work is completed. If so, will opposing counsel be notified?

9. Seek to have the expert read and sign the transcript. This does involve payment for additional expert time, so you may want to ensure in advance that your client agrees with this request. If the expert has read (and corrected) the transcript, he or she will be deprived of the "easy out" during an impeachment cross-examination by saying "Well, the court reporter must have gotten it wrong."

10. If you intend to seek exclusion of the expert later, on a *Daubert, Frye* or other available legal theory, your questions should be carefully designed to support your motion to exclude.[6]

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6 The U.S. Supreme Court stated in *Daubert* that "the trial judge must determine at the outset... whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow*, 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), at L Ed 2d 482. So, depending upon your analysis of the case and the proposed expert's testimony, your questions could explore these two basic prerequisites for the admissibility of expert testimony, *i.e.*, scientific knowledge and relevance.

On scientific knowledge, your questions might explore whether the alleged knowledge "can be (and has been) tested;" whether the expert's "theory or technique has been subjected to peer review and publication;" what, in the case of a scientific technique, is "the known or potential rate of error;" whether the proposed expert testimony has "a reliable basis in the knowledge and experience of" the expert's discipline; and whether it is widely accepted. *Id.*, at L Ed 2d 482-483.

On relevance, your questions might explore whether, even if the proffered expert testimony were admitted, it would be relevant to any issue in the case; whether there is a "valid scientific connection" between the proposed expert testimony and "the pertinent inquiry" that the jury will be asked to undertake; and whether the proposed expert's "reasoning or methodology properly can be applied to the facts in issue." *Id.*

In a *Frye* jurisdiction, your questions could follow a somewhat similar path, but you would be sure to include in your exploration whether the basis for the proposed expert testimony is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 54 App DC 46, 293 F. 1013 (1923), at 293 F. 1014.

11. Your questions also can seek responses that may show that the expert proposes simply to explain the obvious, or otherwise to offer testimony not likely to be helpful or necessary to a lay jury. These responses, of course, also can serve as part of the necessary groundwork for a motion to exclude the expert's testimony.

12. Does the expert expect his or her opinions to be accepted solely because he or she is, after all, an expert? Centuries ago, the Romans correctly identified this as a rhetorical fallacy and even gave it a name. It is the classic *argumentum ad verecundiam* fallacy.

Ideal Exhibits

As the case is being developed, create a list of ideal trial exhibits. As items come in (*e.g.*, a police report; a final report on a clinical trial; or an internally-generated graph of price changes), place a copy in your trial exhibit file. Later, someone on the trial team can take the ideal list and quickly create a trial exhibit list for the court, noting at the same time which desirable exhibits still are missing.

Witness Files

Create a separate folder for each witness who may be called. This can prove enormously helpful at trial. Each witness file can include pointers for direct or cross-examination, culled from depositions or other sources, exhibits for use with the witness, and impeachment excerpts from prior testimony.

Do not forget to create and have immediately available several copies of documents to be used with the particular witness. For example, suppose you want to use a past deposition for impeachment. You will need a highlighted copy for your use, an unmarked copy for the witness, another for your adversary, and another for the judge, in case the judge wants one. Court reporters also frequently request copies of depositions if parts of them are read into the record.

If you find it helpful, place these documents in brightly-colored folders. The jury will notice this and soon get the idea that something interesting is coming when you pull out a folder of yet another bright color.

Legal Issues File

Create a Legal Issues file during your pre-trial preparation. This should include not only actual but also potential legal issues that may arise. When you think of some such issue, make a note of it and place it in the Legal Issues folder. This can give your team a welcome head start later, if you must prepare a trial brief or a motion.

The Trial Court

When you know who the trial judge will be, and where the courtroom is, go there. Learn that court's rules and guidelines. Are they published? If so, get a copy for your trial team. Does the court have unusual rules? For example, a few courts require that all exhibits be removed from the courthouse each evening during a trial. Knowing early about such idiosyncrasies will make it much easier to plan for and deal with them when trial comes. The judge and court personnel will appreciate your diligence and preparation, and this can only help you.

Learn who the court personnel are, including the court reporter(s), the bailiffs or courtroom deputies, and the law clerk(s). As we will note at greater length in the Chapter entitled "Court Officials," respect and befriend court personnel, within the bounds of professional decorum.

Read the trial judge's prior decisions. It is always helpful to be able to cite the judge's own language on a point of law.

Create a file in which you place every idea you think of during the pre-trial phase that involves something you intend to bring up with the judge, perhaps at the final pre-trial conference. If you do, you will be much less likely to forget something during that conference or in the heat of battle, during trial.

Witness Alerts

A common courtesy often overlooked is to notify a likely witness that a case has been scheduled for trial (or that it has been settled or otherwise resolved). It is not uncommon for a fact witness to have been deposed months previously but then to have heard nothing further about the progress of the case. A simple notification that the trial is likely to occur at a particular time is a courtesy to the witness, far preferable to a subpoena suddenly served on the eve of trial.

This practice can work to your benefit in another way. Through your attempted courtesy, you might learn that a week before the scheduled trial date the witness is to leave for two months on his long-scheduled world tour. You can deal with surprises like this if you know about them sufficiently far in advance.

This common courtesy will virtually always be to your benefit. After all, you would rather have a happy witness. Only rarely is an unhappy witness a good one.

As for subpoenas, it is almost never necessary to wait until the last minute to issue them. A paralegal on your trial team can prepare subpoenas well in advance of the final pre-trial conference. When documents are needed, such as medical reports or employment records, you can telephone the subpoenaed witness to ask that, if called, the witness bring the records. Depending upon the applicable rules, you may be able to tell such a witness that the subpoena can be satisfied by signing a certificate of authentication and mailing the records to you.

Your Pre-Trial Checklist

For greatest effectiveness, prepare your checklist early in the pre-trial phase. Here are some suggestions for items you may want to include.

1. Procedural history

2. Product history

3. Description(s) of relevant event(s)

4. Chronologies and timelines for significant events

   These are almost always necessary. They can help the trial attorney as much or more than the judge and jury. Chronologies can greatly assist in clarifying issues, such as in a discovery dispute. Judges appreciate and will use an accurate chronology. Today, there are excellent software programs that can create timeline displays.

5. Subpoenas and subpoenas *duces tecum*

   Fact witnesses
   Expert witnesses
   Document custodians

6. Depositions

   There are software programs available today that can create deposition digests. We do note in passing, however, that neither of us has ever cross-examined a previously-deposed witness at trial without first studying the full deposition carefully and completely.

7. Should you present the case informally to a group of lawyers within your own firm?

   Doing this sufficiently close to trial permits colleagues not familiar with the case to think it over and then give you ideas to consider. If your firm has appellate specialists, or if in the event of an appeal you will refer the case to an appellate specialty firm, invite them to the informal case evaluation. They can offer suggestions regarding the presentation of evidence likely to increase the chance for success in the event of any subsequent appeal.

   There are, of course, more elaborate services available, including full-fledged jury research, featuring mock trials and monitored mock jury deliberations. For a major case, you might consider this. If you do it, we think you will find that, among other things, the questions jurors ask during the mock deliberations can be of considerable interest to you and your trial team. You can structure your proofs to answer these questions before they are asked in the jury room. You sometimes can learn what prejudices, suspicions, and predispositions (from television programs about the law, for example) jurors might bring to the jury room.

8. Determine the trial court's own rules and procedures.

9. Conduct all necessary demonstrations and tests.

   The trial attorney, if possible, should attend these. One reason is that questions and other issues seem inevitably to arise as a demonstration or test is being set up.

10. Organize your expert witness files for use at trial.

11. Organize opposing expert witness files for use at trial.

    Resume
    Potential cross-examination questions for the experts
    Summaries of prior deposition and trial testimony, with an adequate number of certified copies of each, as appropriate

12. Conceive and create exhibits, including any necessary enlargements.

13. Organize, label, and mark exhibits in keeping with local practice. These can include:

    Photographs, slides, videos or stills from videos

    Hardware, models, exemplars of the product at issue, as well as competitive products. Remember to have photographs of large physical exhibits. Some courts require that large exhibits be for demonstrative use only, and that the photographs must be actually admitted into the official record in lieu of oversized exhibits.

    Charts, boards, summaries, diagrams, trial graphics

    Documents, X-rays, other medical records

    Pleadings, interrogatories, admissions

    Scientific and/or technical literature relevant to the case

    Learn whether you will need a separate set of exhibits for the judge. Judges can become impatient if they do not have exhibits when they want them, and they also can become irritated by storage problems caused by a number of boxes of exhibits they do *not* want.

14. Determine time details for any videotapes you are considering for use at trial. Know exactly how many minutes of the video you want to show the jury. Remember that the longer the video, the less likely a judge is to let you show it in its entirety.

15. No matter which party you represent, be prepared for a thorough discussion of the case with your client. If yours is a corporate client, ask whether the client wants or requires a final evaluation letter. If so, create at least the draft of this letter well in advance of the trial. This not only keeps the client advised and helps prevent second-guessing, but the preparation of any evaluation forces you to step back and assess the strengths and weaknesses of your case and otherwise organize your thoughts.

A thorough client discussion of a case should include a summary of the facts; the expected order of your adversary's proof, with a brief summary of each witness' expected testimony; your expected order of proof, with a brief summary of the testimony of each witness; a concise discussion of applicable law; a description of the judge, the venire, and previous comparable verdicts in the jurisdiction; the pros and cons of your case; an estimate of the likely verdict range; and any settlement recommendation.

16. Have at least someone on your trial team (the best person is you) visit relevant scenes. In an automotive case, have someone on your team drive the actual routes taken. For example, the team member might begin at the seemingly inevitable tavern and drive to the accident site, noting how many times brakes had to be applied and how much steering was necessary, especially in a case where these systems are claimed to have been defective. In an industrial accident case, visit the plant and inspect the place where the incident occurred. If a relevant site is outdoors, determine the weather and the natural light at the time of the relevant event.

17. Create a witness directory. It should include the name, address, home, business, and facsimile telephone numbers, e-mail address and scheduling constraints of each witness.

18. Make accommodations for out-of-area witnesses.

19. Establish and organize a trial conference room.

20. Obtain and have available stationery items, such as tablets, pens, pencils, and exhibit stickers.

21. Decide upon arrangements for the daily transport of witnesses and exhibits.

22. Make appropriate dinner arrangements.

23. Obtain appropriate video or projection equipment for the courtroom and determine what the court's rules are in this regard. Determine exactly how this equipment can be moved into, and out of, the courtroom. You may also want a second set of equipment for use in your war room. This is especially helpful in working at night with your experts.

24. Obtain easels, easel pads, markers, and transparencies, and see that they are moved to the place where they will be needed.

25. Obtain wax pencils for photographs and transparencies.

26. Obtain artist's paper for the creation of on-the-spot exhibits, depending upon whether you have an overhead projector or other equipment that can project images. You may be able to use or have introduced into evidence graphics created in this way, even if they were not included in the pre-trial order and exhibit exchanges.

27. Obtain extra trial bags and storage boxes.

28. Make necessary arrangements for overnight administrative assistance as needed.

29. Make arrangements for legal research facilities as needed.

30. Arrange for daily copy, if your client can afford it. It is an enormous help in preparing cross-examination and closing argument. If you want it, however, you must make arrangements well in advance.

31. Arrange for the daily storage of exhibits. Must you bring them back to your office or war room daily, or is there space at the courthouse where you can leave them? Determine the court's rules in this regard and then follow them.

32. Create and store indices that you can use at a moment's notice. These might include a chronological index to interrogatories, requests to admit, pleadings, and court orders; an index of documents produced and received; and an index of exhibits.

33. Draft a trial brief for the court. Ordinarily, you should prepare and submit such a brief, if the rules permit. Again, you should ask the court's permission. A trial brief may provide your first opportunity to make a good impression with the court. Start preparing the brief early, because it can be valuable in trial preparation. In it, you can identify potential legal and evidentiary issues and argue your side of them. You can outline the expected order of proof for both sides. Your final evaluation notes, letters, or other materials can provide a head start. Most judges appreciate this preview of the case. But remember that your brief must be short and well-organized. Your trial brief can be presented to the court at the final pre-trial conference or, if the court does not hold such conferences, on the first day of trial.

34. Prepare motions *in limine*, and do so early. Some are standard, but do your best to limit your motions to genuine, real issues. Judges dislike standard, boilerplate motions offered with little thought, and they dislike being swamped with paper. Some lawyers are effective in preparing a so-called "omnibus" motion *in limine*, where issues are raised in short and precise order, with each issue addressed in a single paragraph.

If the court rules against your motion *in limine*, be prepared to correctly preserve the issue for appeal. As we have noted elsewhere, jurisdictions

have widely differing requirements regarding appellate issue preservation. It is not uncommon for a judge to decide that he or she cannot (or will not) rule without first understanding the context of the contested evidence. Consider whether you might obtain a better result by waiting to make your objection at trial. If the issue is complex, you can have a one- or two-page evidentiary brief ready to submit to the court at the time you make your objection.

35. Prepare your portion of the pre-trial order. Never underestimate the importance of this order. You should be prepared to spend a good deal of time drafting your portion of it. The pretrial order is a document you know the judge will read. It can speak volumes about your attention to the case and to the court's own rules. And, in most courts, it is the last word: it supersedes all other pleadings and orders. To put this most simply, "if it isn't in the pre-trial order, it won't be in the trial."

Using The Latest Technology

Instead of or in addition to paper deposition and trial transcripts, today's technology permits the attorney to get a diskette or CD from the court reporter each day, or even obtain a live feed of the transcript as it is being created. With such assistance, your team can easily perform word searches on both depositions and daily trial copy. Documents can be previously scanned and available to you right in the courtroom. But if you want these services, be sure to make the necessary arrangements early, not at the last minute.

As we have warned earlier, be sure all this wonderful technology actually works. If it "crashes," for whatever mysterious technical reason, you may be in serious trouble unless you have some sort of backup system in place.

Chapter IV
THE FINAL PRE-TRIAL MEETING WITH THE COURT

When the trial date is near, you probably will attend a final pre-trial meeting with the trial judge. This is an especially important opportunity for you to practice Silent Advocacy, a concept we discuss in Chapter VI.

In some jurisdictions, the final pre-trial meeting may be your first opportunity even to know the identity of the trial judge. In any event, it presents an excellent opportunity to impress the trial judge with the seriousness with which you have prepared the case and with your trustworthiness and credibility. One of your goals should be to assure the judge that you intend to help him or her run an efficient trial.

At the meeting with the judge, you may want to bring up a number of things. However, if you are appearing *pro hac vice*, with the assistance of local counsel, be sure to discuss these matters first with that attorney. If you do not, you can be easily embarrassed. For example, imagine having to respond to this question from the trial judge: "Why are you raising that now? Your local counsel is well aware of our rule on [that subject]. Why didn't you first ask [him/her] about it?"

As you approach the conference, keep in mind that most judges welcome a discussion of their own procedural rules. The judge wants to be assured that counsel will not violate them during trial and also will appreciate your effort to make the trial a more efficient process.

Here, then, are some matters you may want to address at the final pre-trial meeting with the court:

1. Are there potential legal issues?

Here is where you can make use of the legal issues thoughts you have been collecting since early in the pre-trial process.

2. How will the jury be selected?

The answer varies dramatically among various jurisdictions and sometimes even from judge to judge within a single jurisdiction. Is it the custom to use jury questionnaires? Even if not, is the judge willing to

permit them? If you want questionnaires, see whether your opponent(s) will consent. If so, then counsel can jointly present a copy of the proposed questionnaire to the court. An example appears in the Appendix to this book. We discuss this entire subject more thoroughly in Chapter VII, "Jury Selection."

Will the judge be involved in the jury selection process? If not, will the judge nevertheless sit in on that process? If the judge will be present, what will the judge say to the panel? What will the panel be told about the expected length of the trial? What is the judge's practice with regard to panel members who express some reluctance to serve? Does the judge address such panel members, and if so, how does the judge typically handle this? What can be said during *voir dire* about the plaintiff's injuries? Does this judge impose *voir dire* time limitations? How much time will you be given to select a jury?

3. How many jurors will be seated?

Find out in advance what the judge's practice is, either from the judge, your local counsel, if you have one, or from a knowledgeable courthouse official. You do not want to be surprised on this subject at the pre-trial conference.

4. What are the court's strike rules in a case with multiple parties?

For example, will plaintiff get 16 peremptory strikes but each of the four defendants only 4 strikes?

5. In a case with multiple parties, what will be the presentation order? Will this be dictated by the order in which the parties appear in the case caption, or does the judge have another rule?

6. Will the judge permit jurors to take notes during the trial?

7. What is the court's practice regarding offers of proof? Are they required?

When you want to introduce evidence but the court excludes it, you must make a proper record for appeal. Jurisdictions have widely differing requirements in this regard. Some require you to read into the record (outside the presence of the jury) the disputed deposition testimony. Others require you actually to put the witness on the stand (outside the presence of the jury) and elicit the excluded testimony. Some courts will accept affidavits, and others will accept the representation of counsel ("Your Honor, if permitted to testify, the witness would have said...").

The important point is that the record on appeal must reflect what the evidence *would have been*. Otherwise, the appellate court will be unable to determine whether its exclusion was erroneous.

You should create an offer of proof for each witness and place it in your file for that witness. Even if you never have to submit it, the act of creating it will compel you to focus on that aspect of your case.

8. What is the judge's practice regarding mistrials?

Definitely plan to address this at the pre-trial conference. For example, if ten jurors are to be seated but two have to withdraw during the trial because of illness or for some other reason, will the remaining eight be enough for a verdict? In this example, if your intention is to move for a mistrial if fewer than eight remain on the jury, let the judge know your intention and consider suggesting that the judge seat alternate jurors as well.

9. How is the foreperson of the jury to be designated - by election, appointment, mere seating order, or in some other way?

10. At the end of the case, who will go into the deliberation room? Will alternate jurors be sent home at that point? Or, will they be permitted to deliberate along with the regular jurors? The latter is true in federal courts but not in many state courts. If you think you may be able to reach some agreement with the court and opposing counsel about this, be sure you first obtain the consent of your client.

11. In this court, what percentage vote results in a verdict? Must a verdict be unanimous? Or, can a verdict result from something less than a unanimous vote? If so, by exactly what percentage? Be sure you know in advance whether the answers to these questions are controlled by applicable law, and, if so, whether you must object to any departure from that law at, or before, the time the jury renders its verdict in order to preserve the issue for appeal.

12. How is the judge's personal schedule likely to affect the trial? In addition to knowing when the trial will begin and when it is expected to end, find out whether the judge plans holidays, motion days, or other time off during the course of the trial. The answers will make it much easier to plan your case, including the arrival and anticipated departure of your witnesses.

13. What are the judge's preferences or rules regarding the place where the attorneys sit? What are your permissible "territorial boundaries"

during the trial? For example, must each attorney stand behind a lectern at all times? Or, will the judge permit you to approach a witness during your examination, and if so, what are the judge's rules regarding this? Whatever these boundaries are, scrupulously observe them during the trial, for Silent Advocacy reasons alone.

14. At the pre-trial conference, ask about the courthouse rules and the judge's own rules, if any, regarding any large, heavy, or unusual equipment you want to use during the trial.

15. Will there be a jury view? Most judges do not like jury views, but if you think one is important to your case, make detailed arrangements for it before you go to the pre-trial conference. If you do, then at the conference you can assure the judge and other counsel that, for example, the jury will be transported to the scene efficiently, quickly, and with minimum disruption to the court's day. Do you intend to have expert testimony offered at the jury view? If so, take this up with the court, because it raises a host of other questions.

16. How does the judge want exhibits to be handled? Must exhibits that are to be used in each party's case in chief be marked in advance? Does the judge want a copy of each such exhibit? If you find out what the answers are before the conference, you can bring an example to show the judge. It might be a book of exhibits that you will use in direct examination of a particular witness, with a bench copy for the judge, and a copy for the court reporter, for opposing counsel, and for the judge's law clerk.

17. When does the judge want exhibits to be introduced? When should you move to admit exhibits -- during the witness' examination, or at the end of your case? What about new exhibits you might want to use during your cross-examination of an opposing witness? At that time, should, or must, you move to admit those exhibits? Be careful about this. In some jurisdictions, if you succeed in having such exhibits not only marked but introduced into evidence, you may waive the right to make a subsequent motion for compulsory dismissal: your evidence will have closed a gap in your opponent's case.

18. Has the judge specifically requested a trial brief? If not, will the judge accept one? Or, does the judge not permit the filing of trial briefs?

19. Does the judge want counsel to submit proposed jury instructions? If so, when: before trial, or at the close of the evidence, just before the charge conference? Whenever they are submitted, if you object to an opponent's

proposed jury instruction but your objection is not sustained, be sure to make an adequate record of the reason for your objection for use later if the case is appealed.

20. Will the judge impose time limitations? These might include limitations on jury selection, opening statements, closing arguments, direct and cross examinations, and so forth. In some cases, such limitations may help you. Merely by raising the question, you may cause the judge to consider whether it would be a good idea to impose them.

21. When there is a jury verdict form, what will be its format? If you think a particular format might help you, suggest it.

22. Are there *Daubert/Frye* issues in the case? If so, how does the court wish to resolve them? Will the court hold an evidentiary hearing, or decide these issues on briefs? If there is to be a hearing, will it be held before trial, or during the trial itself, outside the jury's presence?

23. What about sidebar conferences? Does the judge permit them? There is a wide variance in this regard among different jurisdictions and even different judges in the same jurisdiction. Do you want sidebar conferences transcribed? You should, since critical rulings can be made at sidebar. If they are not on the record, they cannot be appealed. If sidebar conferences are to be transcribed, what arrangements will be necessary with the court reporter?

24. How does the judge want objections to be made? If you have a chance to visit the same judge's courtroom during another trial, even for a short time, you may quickly learn the answer to this question. Some judges, for example, want objections to reference an appropriate evidence rule, by number. Will the judge permit "speaking objections," that is, argumentative objections, in front of the jury?

25. Will the judge rule that, during the trial, the parties must tell each other whom they are going to call the following day? This makes the trial more efficient, and for that reason alone most judges will so direct. Ideally, the ruling also should specify that counsel must identify the exhibits and discovery (including depositions) that will be used in each party's case in chief. It may help if you bring to the conference a prepared order for the judge to sign. In some courts, it may even be preferable to make a written motion in advance of the conference.

26. How much argumentation will the judge permit during opening statements? This can be a good question to ask, since most judges frown upon objections during opening in the absence of something truly egregious. A pre-trial ruling or directive can be helpful later if opposing counsel begins to stray from it.

Will the judge rule that an opening statement is not argument but merely a description of what the party intends to prove? Of course, if the judge sees nothing wrong with a little argument here and there, you will make no friends - and get no relief - by objecting.

27. What, if anything, will the judge permit to be said about the possibility of bifurcation or trifurcation?

Chapter V
COURT OFFICIALS

I was fortunate enough to be able to learn how to be a trial attorney by trying actual cases. But when I first walked into a courtroom, the day after my bar admission, I did not feel fortunate at all. The truth is that I was scared to death. It was May 1960, and I was to try my very first case.

Somehow, I knew I should arrive early. The trial was to be at the old Municipal Court in Philadelphia, where, unbelievable as it seems today, jury trials were held to resolve disputes involving between fifty and two thousand dollars. I arrived about 8:00 a.m. and took the elevator up to the courtroom floor, filled with foreboding.

That early in the morning, the only other person there turned out to be a court officer. I introduced myself to him and described my plight. His name was John Bonnewell. As we talked, we discovered that he had known an uncle of mine during the 1930's, when both had attended a Philadelphia school. John was not a lawyer, but as a court official he had been a keen observer of the courtroom scene. Following his cheerful advice that morning, advice based upon his many years of service, turned out to be enormously helpful to me.

Then and there, I learned a most valuable lesson: get to know the court officials, and see if you can get them to like you.

– George J. Lavin, Jr.

Why should you be concerned about court officials, such as clerks, secretaries, and other assistants; the bailiff, court crier, and other court officers; the judge's law clerks; court reporters; and others? After all, are they not functionaries, paid by the public to do their jobs?

If you possess anything even close to this attitude, you must correct it now. Why? What difference could it make for your client whether these people like you? Our answer to this question can scarcely be overstated. The difference can be, and frequently is, profound. We have seen the positive and negative results many times.

Befriend court officials. Seek to determine whether you can help them do their jobs. Ask about the judge's likes and dislikes, as well as those of the court reporter and the often-overlooked law clerk to the judge.

Will unfamiliar terms come up during the trial? If so, hand the court reporter, in advance, a glossary that spells and defines each such term. Give the reporter a list showing the name and address of each witness.

Jurors notice whether courtroom personnel seem to like you. If they do, this can never hurt you with the jury. Helpfulness in the courtroom can extend even to opposing counsel, as when you might assist an adversary struggling or fumbling with an exhibit, an easel, or the like.

Contrary to what some might think, increasing professional experience will demonstrate to you that there is no easy court appointment, no "pushover job," inside American courthouses today. There is simply too much pressure, too much complexity in the law and its practice, too little compensation, too little genuine security, and too much general unpleasantness from the many people with whom court officials must deal.

Performing any of these positions well takes considerable patience and competence. (If you ever have a chance to perform a court official's job for a week, accept the opportunity and you will need no further argument from us.) Too often, court officials are ignored, treated with condescension, or even spoken to with outright rudeness. When judges observe this kind of treatment, or hear about it from their staff, you can be certain that they will be offended.

This is not to say that we recommend insincerity. Fawning, pandering, or obsequious attention toward any court official is not only offensive but ineffective as well. Simple decency and courtesy, however, especially given the environment in which court employees must work, can go a long way to make a trial in which you participate a more pleasant and less abrasive experience for everyone involved.

Yes, the simple practice of good manners can reap great benefits. In a most difficult trial, one involving a plaintiff with catastrophic injuries, the jury had deliberated for several days. At long last, the parties and attorneys returned to receive the jury's verdict. Before the jury had fully assembled to announce their verdict, the federal marshal turned to me and asked, "How are you holding up?" I said, "I'm not sure. It depends on this jury." The marshal gave me a discreet wink. With that wink, the pressure-filled wait for the jury's verdict eased. I learned later that the marshal had been assigned to retrieve the jury from its deliberation room and had overheard a telling comment as the jurors proceeded down the hall.

– Chilton D. Varner

Chapter VI
SILENT ADVOCACY

Silent Advocacy may be the single most effective tool you have in a court room. Both of us have spent years practicing it. What is Silent Advocacy, and why should you care about it?

Silent Advocacy is a persuasive technique recognized centuries ago. It can help you persuade a factfinder, especially a civil jury, even when you utter no sound at all. Silent Advocacy is powerful subliminal persuasion. It influences how you are perceived by the court, the jury, and the courtroom personnel. Silent Advocacy involves the continued, steady, unabated combination of your *appearance*, your *demeanor*, your professional *preparation*, and your *helpfulness*—to every court official, to your opponents, and to the jury itself.

There are, of course, limitations on what you can do about your physical appearance, but certainly you can determine to work with whatever nature has provided. Your conscious effort in this regard can profoundly affect the remaining three aspects of Silent Advocacy: your demeanor, your preparation, and your helpfulness. All four aspects of Silent Advocacy can help jurors, who typically come to a courthouse prejudiced against lawyers and prepared not to like them, decide whether they can trust you and your team.

Silent Advocacy can help jurors decide they like you; that you are prepared and knowledgeable; that you are helpful in teaching them what they need to know; and in short, that you are determined to help them do their jobs. Jurors who perceive you as trustworthy, sincere, and decent—and thus quite unlike many of the stereotypes of lawyers presented to them by the media—will be inclined to consider your arguments more carefully.

The successful Silent Advocate does not object unless it is quite necessary. That attorney does not make faces or otherwise demonstrate unhappiness, exasperation, or disdain when a ruling is adverse.

A civil jury trial involves the several issues we discussed in Chapter 2:

A. The Basic Facts
B. The Forum
C. The Experts
D. The Exhibits

E. The Injuries (in a personal injury case)
F. The Attorneys
G. Likely Discovery
H. "Get Mad" Facts

A number of these issues obviously are driven by the facts in the particular case. But one of them, "The Attorneys," is especially important in Silent Advocacy.

> ***A jury consists of twelve persons chosen to decide who has the better lawyer.***
>
> ***-- Robert Frost***

The famous American poet presumably intended this to be humorous, and the barb should not be taken literally. There is, however, more than a grain of truth in it. In fact, in every case, the jury inevitably decides who wins the "Battle of the Attorneys." The whole tenor of the trial changes once the jury has made this decision. The attorney who wins this battle has won the trust and credibility contest that lies at the heart of persuasion. *You should never lose the Battle of the Attorneys; at worst, the outcome should be a tie.*

The jury will be watching you throughout the trial, for you will be a messenger. In fact, you probably will never be watched and observed so closely in your life as you are during a civil jury trial. The number of jurors does not matter: whether there are six, nine, or twelve, assume that *someone* watches *everything*. Assume this even when you are not in the courtroom. For example, if the trial is held in a smaller city, and if you and your team go out to dinner during the trial, jurors, or those who know them (a member of the restaurant wait staff, for example) may be there, watching you and your team. Act accordingly.

Although jurors possess a wide range of attitudes as they first enter the courtroom to hear your client's case, they have nearly universal questions as well:

Do we trust these people before us?

Do we even like these people?

Are these people prepared and do they seem knowledgeable?

Are these people helping us do our jobs?

Are these people trying to see that justice is done?

Do not dismiss these questions as foolish or trite. They matter. You can offer strong, positive answers to these natural questions by what you say, and by how you act, even when you say nothing. How can you do this?

First and foremost, in the courtroom you must be yourself. In a trial, it is crucial to be comfortable with who you are. Jurors want to know what you really are like. Artificial or "phony" behavior rarely endears one person to another. You learned this lesson long before you decided to go to law school. Your own experience has taught you that even in a social setting, artificial behavior can be offensive. In a civil trial, if this kind of behavior offends a judge and jury, it can harm or even destroy a client's cause. It is therefore critically important that the lawyer at trial be himself or herself at all times. But exactly what does this mean?

In 46 B.C., the great Roman orator Cicero formally identified three goals of advocacy. The first is to *teach*, since otherwise no one will understand. The second is to *charm*, since otherwise no one will listen. The third (pursued by every successful trial lawyer) is to *move*. [7] The first two goals must be achieved if there is ever to be hope of achieving the third.

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7 *Optimus est enim orator qui dicendo animos audientium et docet et delectate et permovet.*

The supreme orator, then, is the one whose speech instructs, delights and moves the minds of his audience.

Marcus Tullius Cicero, De Optimo Genere Oratorum (The Best Kind of Orator) § 3, H. M. Hubbell, trans., Harvard University Press, Cambridge, Massachusetts, 1949, at 356-357.

Necesse est tamen oratori quem quaerimus controversias explicare forensis dicendi genere apto ad docendum, ad delectandum, ad permovendum.

For the orator whom we are seeking must treat cases in court in a style suitable to instruct, to delight, and to move.

Id., §16, at 366-367.

Cicero was not the first to understand the principles of successful advocacy. The scholar George Kennedy has argued that Aristotle, some three centuries before Cicero, may have been the first person to recognize that persuasion

> depends on three things: the truth and logical validity of what is being argued; the speaker's success in conveying to the audience the perception that he or she can be trusted; and the emotions that a speaker is able to awaken in an audience to accept the views advanced and act in accordance with them. Modern rhetoricians use terms derived from Aristotle to refer to these three means of persuasion, though they have somewhat broadened his definitions....logical argument is called logos; the projection of the speaker's character is called ethos; awakening the emotions of the audience is called pathos.[8]

Aristotle believed that perhaps the most important of the three elements of persuasion is ethos.[9] He wrote that persuasion occurs

> through character whenever the speech is spoken in such a way as to make the speaker worthy of credence; for we believe fair-minded people to a greater extent and more quickly....*character is almost, so to speak, the controlling factor in persuasion.*[10]

What does this legacy of well over two millennia mean for you? It means that you should take great care to understand your personal *ethos*. How can you be yourself while using your personal character effectively to persuade others?

Factors that can strongly contribute to your own *ethos* include your integrity, your knowledge, your sincerity, and the extent to which you are simply likeable. Your body language and tone of voice play important parts, as well. This is not limited to you alone. It should be similarly reflected in every member of your trial team.

8 Aristotle, *On Rhetoric*: A Theory of Civil Discourse, George A. Kennedy, tr., New York: Oxford University Press, 1991, at ix.

9 In classical Greek, *ethos* (ἐθος) described a person's custom or manner, and in particular the custom or manner of someone who sought to persuade others. The word *ethos* also is used in modern English, generally to refer to one's disposition or character.

10 Aristotle, *On Rhetoric, id.* at 1.2.4 (emphasis supplied).

An obvious implication of this discussion is that you must be and remain in control of yourself at every moment during a trial. When you are the presenter, you will be in control of the content you present. Who are the receivers? The members of the jury? Yes, of course, but also the judge and court officials. Even spectators in the courtroom audience, whatever the reason for their presence, are subject to your *ethos*, and their views and reactions, for various reasons, can be helpful to your cause.

During your practice as a civil trial advocate, you surely will see the lawyer who has no acquaintance with Silent Advocacy. This is the lawyer who is unsure of himself or herself, who tends to be looked upon with disfavor by court and its personnel, and who appears to be unprepared. The contrast between this kind of lawyer and the Silent Advocate is easy to see.

Remain in control. Once you reach that victorious moment in a trial when your Silent Advocacy has firmly established your trust and credibility, what you then can achieve for your client can be astonishing.

Chapter VII
JURY SELECTION

The comments in this Chapter are in addition to those on jury selection in Chapter IV, paragraph 2. You may want to review that paragraph along with this chapter.

In American federal and state practice today, there is a remarkably wide range of rules relating to the selection of jurors. In some jurisdictions, virtually no *voir dire* is permitted. In others, lawyers may ask at least some limited questions. In yet others -- an example as of the publication of this book is Texas -- the lawyers may be permitted to address the jury to such an extent that *voir dire* may be more lengthy and argumentative than opening statements. The participation of the judge in the jury selection process varies dramatically among jurisdictions.

It is therefore critical that you know, as soon as possible, the jury selection process that will be followed at your trial. Do not rely solely upon someone else (such as local counsel) to give you this information. Determine the answer for yourself. As we suggested in Chapter IV, paragraph 2, explore the issue at the pre-trial conference.

In a jurisdiction where at least some *voir dire* is permitted, consider your options. Think carefully about which lawyer on your team should conduct it. Should this be the lead trial attorney? Where you have local counsel, should local counsel do it? After all, they are "home folks." Remember, however, that the lawyer who conducts *voir dire* is the first attorney from your side that the jury will see. Their first impressions can be crucial. The jurors may conclude that the first lawyer from your side who appears before them is in charge of your case. If this later proves to be untrue, confusion or even resentment may result.

Depending upon the process followed in the particular court, *voir dire* gives jurors their first impression of you, your case, and your client, just as a judge may get a first impression of you at the pre-trial conference. The techniques of Silent Advocacy must be practiced from the beginning of this process. First impressions can be hard to change later.

In courts where you are able to participate in *voir dire*, be wary of asking inane questions, such as the open-ended "Can you be fair?" You will rarely achieve anything of value with such inquiries. Some judges believe

questions that require a jury to "commit" to a position before hearing the evidence (*e.g.*, "If the evidence shows [X], could you [or will you] return a verdict in favor of my client?") are improper. Determine whether yours is such a judge before you use this technique.

If you are able to speak to the jury at some length, prime the pump. Challenge jurors to be fair, and show them how to do it. For example, if you represent a plaintiff, can you give jurors the impression that in this case not only are the injuries serious but liability also leans your way? If you represent a defendant, challenge the jurors not to let the plaintiff's injuries influence their liability decision. Can you give jurors the impression that although in this case liability leans your way, plaintiff is going to try to use injuries to sway them?

Watch the jurors' body language during the selection process. Is there a group that seems to stay together? If so, they may vote alike, should all be selected to serve.

During *voir dire*, always call potential jurors by name, not number. (When actually selecting or striking jurors at the end of the questioning, the opposite rule applies). Thank them for their service to the legal system in helping to resolve a dispute.

In a court where the lawyers participate extensively in *voir dire*, there is always the threat of overreaching. In the great majority of jurisdictions, *voir dire* is not the time for an extensive, passionate opening statement. A simple way to deal with this is to ask your opponents what they plan to tell the panel about the case during *voir dire*. If their answers are unsatisfactory, or if they will not tell you, see the judge.

Can you create a dispassionate statement that counsel can agree upon or that the judge will approve, one that the judge either will agree to read to the panel or permit counsel to read to them? If not, you may be forced into objecting during *voir dire*, an undesirable but occasionally necessary obligation that should be handled carefully and with politeness, since the jury will not yet know you or have a basis to determine your skill and trustworthiness.

Most experienced trial lawyers agree that during the selection process you may be able to eliminate the worst candidates, but you will never get a jury with which you are completely satisfied. Limited strikes can strip from the jury the few candidates most likely to be intransigently opposed to your cause, but you will almost never be able to select your most favorite candidates, because they will be eliminated by your opponent(s).

Experienced trial attorneys differ on whether to seek jurors who have technical backgrounds, such as engineers or scientists. In a medical case, they may differ on whether to seek jurors in the healing professions, such as a nurse. A typical concern is that such a juror may exert too much influence on the other jurors, perhaps bringing extraneous information into the deliberation room.

Even as early as *voir dire,* practice Silent Advocacy. Be organized and appear as though you are. Will jurors perceive that you are respected by court personnel? At the end of the selection process, your goal should be for the selected jurors to think thoughts such as "This is a decent person who seems to be trustworthy. She is someone I want to be able to trust. This lawyer speaks clearly and seems to know what to do." If you can achieve this, you will have succeeded in *voir dire.*

Employing a jury consultant. The controversy that once raged about the value of jury consultants has become more muted in recent years. Experienced trial lawyers once thought they knew more about jury selection than any non-lawyer could. Now, with the increasing complexity of trials and the mounting exposure they can present, many experienced trial attorneys concede that the right jury consultant can be useful in assessing the viewpoints, concerns, and questions of the lay people who will constitute a jury. The determinative questions now are: (a) does the case justify the cost and trouble; (b) if so, is the research affordable; and, if so, (c) who is the right consultant?

Should you decide to engage a consultant, ask professional friends and colleagues whom they have retained, how cost-effective the consultants were, and whether the consultants were cooperative members of the trial team, willing to accept suggestions. Do not be reluctant to ask candidates to visit you to discuss their capabilities and plans. Ask the candidates for an example of their work product, properly redacted to protect client confidentiality. There remains a wide variety in quality among jury consultants. You will want to choose a "work horse," not a "show horse." The best jury consultant is the one your opponents never knew was there.

Perhaps the most significant caution in working with a jury consultant is to manage the expectations of both you and your client. *Jury research cannot predict the ultimate outcome of a trial.* When a mock jury returns its verdict, neither you nor your client should assume that the actual jury would do the same thing. There are important distinctions between even the most elaborate mock trial and the courtroom. Among other things, the jurors are different, with different backgrounds; the advocates are different; and the time in which the case is presented is much shorter.

Jury exercises are merely a preview of how the evidence will go in, what questions may emerge in jurors' minds, and what difficulties they may encounter in wrestling with the evidence. This information can be extremely valuable in planning your case, but it cannot guarantee a particular outcome. In short, do not give up your basic instincts; no jury consultant provides an acceptable substitute for them.

Jury questionnaires. Make use of these if the court permits. See if you can get the other side to agree to their use. Agreement sometimes may be easy to obtain, because the information helps all parties and their counsel. Jury questionnaires can be especially helpful in jurisdictions where little *voir dire* is permitted, or where time limits are imposed.

A surprising amount of information can be found in these questionnaire responses. Because the potential juror is not required to state the information in public, important facts may be revealed. The cases that are perhaps the most obvious candidates for jury questionnaires are those involving issues of personal health, such as addiction, end-of-life care, or cosmetic surgery, where jurors may be reluctant to reveal in open court their own potentially prejudicial experiences. We believe, however, that the jury questionnaire is valuable in a much broader range of cases.

We have two cautions. First, if you use jury questionnaires, be prepared to move quickly in reviewing them and assessing the results. Judges sometimes dislike the time taken in this review process. Make a commitment to the judge that you will use only a specific period of time, and then keep that commitment.

Second, contemplate in advance whether you want the questionnaire responses to be part of the trial record. Some judges believe, primarily because of privacy concerns, that the responses should be discarded upon the completion of jury selection. However, if a juror's untruthful response later becomes known to you, your challenge to it will be more difficult if the responses are not part of the record.

An example of a jury questionnaire appears in the Appendix to this book.

Chapter VIII

WHAT WILL THE JURY BE DOING AND THINKING WHILE YOU WORK?

What do you suppose jurors do while the trial team works? One might hope that jurors are constantly, if silently, assessing what is happening in the courtroom. To a great extent, this is doubtlessly so, and our experience is that most jurors endeavor to serve fairly and well. However, most experienced trial attorneys also are convinced (though they cannot prove it) that jurors can daydream, perhaps for some significant part of the time, and there seems to be unanimous agreement among experienced trial attorneys that jurors, at least some of the time, tend to focus on peripheral matters. Certainly one peripheral matter is a lawyer's clothing, and this one can be exacerbated for the female trial attorney.

> Immediately after the successful conclusion of a three-week trial, I was able to interview the jury, as a group, for insights into trial strategy. The first response I received was that, on each morning of trial, when the jury gathered in the jury room, they tried to predict which suit I would be wearing that day. Fortunately, they approved of my wardrobe, but the point is that they noticed and remembered.
>
> -- Chilton D. Varner

Unfortunately, jurors in most trials do not spend as much time as the lawyers might hope in focusing upon the substantive points brought before them. In our experience, there is no question that jurors notice body language and tone of voice as well as substantive content. Since jurors can find peripheral matters important, successful Silent Advocacy must take this into account.

For example, during a trial the jurors will quickly figure out which people are associated with your client's cause. Those seated behind the bar enjoy no immunity from this scrutiny. Be sure everyone on your trial team is respectful of the jury and court officials. For example, let no one on your team push ahead of a juror who is entering a courthouse elevator. The juror must be politely permitted to go in first.

Be sure that everyone on your trial team who dines anywhere near the courthouse is aware that jurors may be present in the area and acts accordingly. Anyone who delivers something to anyone on your trial

team in the courtroom must be properly dressed and follow basic rules of decorum. Never publicly show dissatisfaction or anger toward anyone who is a member of, or who can be identified with, your trial team, whether this occurs inside the courtroom or somewhere else.

Keep your counsel table clean. Do not let it become messy, because that signals disorganization. On your counsel table, have only a note pad and perhaps a folder for each witness. Develop methods that visibly demonstrate your meticulous preparation. A clean, well-organized counsel table delivers the message of quiet competence.

The trial attorney and the second-chair lawyer should sit at your counsel table. Experienced trial attorneys disagree on whether the client, or a representative of the client, also should sit there. Some believe this is of value and others do not. If you do elect to seat this third person at your counsel table, be aware that he or she may be called as an adverse witness.

Other members of your trial team, such as a legal assistant, can sit behind you, inside the bar.

Chapter IX
OPENING STATEMENT

I. Before You Begin Your Opening Statement

Perhaps more than at any other point in a trial, the opening statement gives the trial attorney the opportunity to teach. It is likely to be the first time you appear before the jury in a persuasive mode. This necessarily means that the opening statement must be carefully thought out and organized. Anything you can do to organize your opening more effectively will be time well spent.

Before trial begins, learn the court's rules that govern opening statements. What can you cover? The contentions of the parties? Evidence that will be offered by an opponent? (One of the authors was once politely reprimanded by a court for the usually-routine practice of discussing the expected testimony of the opponent's expert).

Will there be time limitations? Can you use exhibits? Most judges will let you do so if the exhibits are not argumentative, and if you seek permission in advance. Will your opponent use exhibits? If you see problems in this regard, seek a ruling from the judge, in advance, that, for example, exhibits can or cannot be used in opening statements. Do you want to use an easel? If so, ask the judge for permission in advance.

Where will you be permitted to stand during your opening statement? Must you remain in one place, or could you literally walk all over the courtroom if you desire? It is of the utmost importance to resolve these and similar issues in advance, before opening statements begin, to avoid being interrupted.

II. The "Golden Moment:" Do Not Throw It Away

The time when you rise to give your opening statement is, and should be, rather dramatic. One experienced trial attorney even calls it "a moment that brings me to life." Those first few seconds when you first appear before the jury in a persuasive mode truly are a "golden moment."

Never throw your "golden moment" away. Never waste those precious first few seconds with greetings or other platitudes. You would do this by

saying, "Now, what I am about to say is not evidence," or "Now, my view of the evidence actually differs from that of the, uh, lawyers who represent the other parties," or "Well, uh, my name is XXX and I, uh, represent YYY and here at our table is ZZZ who also, uh, represents YYY, and we are from the, uh, law firm of AAA, in the city of BBB, and we are very pleased to be here, uh, to....." Those are guaranteed ways to throw away the "golden moment," one that will never return.

Instead, get into your case instantly. Show the jury why your side should prevail. First impressions of you and your case can be made in mere seconds, so prepare the first words of your opening statement with great care. As one distinguished trial lawyer used to say, "Dare to be eloquent." Many experienced trial lawyers actually memorize the first 90 seconds or so of their opening statements. Consider practicing at least the first few moments of your opening statement alone, and also before others who can offer constructive comments.

III. Other Opening Statement Considerations

Begin with a theme. Indeed, you should have a theme for every case you try. For example, is there a single determinable issue in the case? The opening statement should embody your theory of the case. Cases can be won in opening statement, more frequently than some might think.

In your opening statement, and throughout the remainder of the trial, do not be afraid to use "the power of the pause." Silence can be a powerful communications tool. One reason for this is that it can permit a powerful point to "sink in" before the jury hears another, and it can help make the jury comfortable with the courtroom and the seemingly strange proceedings that are unfolding before them.

The opening statement is a time when promises are made to, and by, the jury. For example, you may ask the jury to keep an open mind about the dispute until they hear your side of the controversy. You may promise to present your case as concisely as you can, with exhibits that are helpful, efficient and well-planned.

But we must follow this with a strong word of caution. In opening statement, *never* make a promise to the jury that you may not be able to keep. Never state anything as fact unless you are absolutely certain you will be able to prove it for the jury during the course of trial. Never mention a witness in your opening statement if there is any chance that you may

later decide not to call that witness. Any one of these mistakes can easily come back to haunt you during an opponent's closing statement.

I had an unfortunate experience in this regard, although the case ended satisfactorily. I had made an unusual and difficult determination to call an expert psychiatrist as a defense expert, to testify about the psychological basis for the plaintiff's physical symptoms. I made the decision based upon the extraordinary fit between the psychiatrist's elegant credentials, experience, and presentation skills and the facts of the case. After extensive work and preparation, we presented the psychiatrist (who had never before testified) for deposition, during the trial, on the weekend before he was to testify in court. The reason for this was that the plaintiff's attorney did not want to incur the cost of traveling the considerable distance to the expert's home to depose him, so we deferred the deposition until the witness arrived in our trial city. During the deposition, the plaintiff's attorney succeeded in diverting the expert to a peripheral and irrelevant area, where he elicited a flip answer that could have been used repeatedly at trial to our great embarrassment and disadvantage. I promptly pulled the witness. In closing argument I had to respond to accusations about the unfulfilled promise I had made in my opening. Fortunately, the withdrawn witness' evidence had been successfully transferred to another effective medical witness, but the episode caused more than one uncomfortable moment.

-- Chilton D. Varner

Even in the age of high technology, an old-fashioned easel with newsprint and a marker can be a powerful tool in your opening statement. For one thing, jurors have to watch you as you write. If you can draw well, the easel technique is even better. You can return to what you put on that easel during your closing statement, as a reminder to the jury of your successful prediction of what the evidence would be.

Can you tell the jury a story during your opening statement? Many experienced trial attorneys believe that jurors grasp evidence more easily if it is laid out in the format of a story. This makes the evidence more interesting and therefore makes your presentation more effective.

Courts maintain and enforce various restrictions on the content of the opening statement, especially ones that seek to keep it free from argument. This restriction can often be handled by prefacing arguably argumentative comments with the phrase "The evidence will be..." This is, of course, what the opening statement is supposed to be about in any event. Some other phrases you may want to use in an opening statement to move from one subject to another include:

We will hear
You will learn
I expect you will find
You will come to know
You will soon realize
The evidence will show
You will not hear
They may want you to believe ----------, but the evidence will show
They may not want you to know
Make sure you pay careful attention to this
Now don't miss this

In addition to being argumentative or violating some pre-trial ruling by the court, there are other notorious opening statement pitfalls: overgeneralization; overstatement; wasting time; poor organization; expression of personal opinion; and overuse of particular expressions.

What if an opponent objects during your opening statement? Most such objections are overruled. Particular circumstances then might permit you to say to the jury, "Now, where were we before we were interrupted?"

Excerpts from some of our own opening statements appear in the Appendix.

IV. Your Behavior During An Opponent's Opening Statement

Should you object during an opponent's opening statement? Experienced trial attorneys differ. We believe that any objections should be made only when they are absolutely necessary. This certainly includes objections during an opponent's opening statement. For one thing, as we have just noted, most such objections are overruled. An exception can occur during a particularly inflammatory or improper opening statement by an opponent. In this situation, watch the judge. If the judge keeps looking at you, then if and when you do object, you are more likely to be sustained.

Silent Advocacy principles firmly rule out any reactive body language by you as an opponent is making an opening statement. Such antics should be unnecessary in any event. With effective pre-trial motion practice, you can deal in advance with much potentially objectionable rhetoric during opening statements.

Chapter X
PREPARING FOR THE TRIAL EXAMINATION OF ANY WITNESS

As we noted in Chapter III, you should have a prepared file folder for each witness, or a computerized version of one. There is no substitute for this. In the folder should be a checklist or outline of your examination, copies of the exhibits you plan to use and prior statements of the witness, including depositions, with topical breakdowns.

Will you need prepared legal memoranda? A legal memorandum can be helpful to support an argument regarding the admissibility of particular testimony, or the exclusion of a witness; in offers of proof (for example, the memorandum can include a written statement showing what you intend to prove with that witness); or in foundation issues. As we mentioned in an earlier chapter, you may improve your chances of success on some evidentiary motions if you make them in the context of the evidence at trial instead of *in limine*. By thinking ahead, you can predict when these disputes are likely to occur and be prepared for them. It is a good demonstration of Silent Advocacy to be able to pull out a short, concise evidentiary memorandum of law (no more than two pages) and hand it to the judge.

Are there exhibits that might be used effectively during direct or cross-examination of this witness? If so, and if you anticipate objection to your use of those exhibits, have prepared legal memoranda in the folder, ready for submission to the judge.

Treat witnesses with courtesy and consideration. Decent, courteous treatment of witnesses is a significant part of Silent Advocacy, especially when your behavior stands in contrast to that of an opponent. Cross-examination occasionally provides a carefully-limited exception, as we discuss in Chapter XII, Cross Examination.

Some lawyers seem to think that every witness should be aggressively examined. In a civil trial this can be a serious mistake. As we will explain in Chapter XII, you must first have the tacit permission of the judge and jury before you attack any witness. In some areas of the country, aggressive examination can invoke a gender issue as well. Where a child is permitted to testify, great care may be necessary to avoid the appearance of abuse and unfairness during the course of your examination.

Chapter XI
DIRECT EXAMINATION

In direct examination, the focus is on the witness. Experienced trial attorneys often say that a civil case can be won on direct. The witnesses you present to the jury reflect your judgment of the case. You vouch for them when you offer them in support of the cause you have asked the jury to support. Each witness has his or her own *ethos;* each seeks to persuade in his or her own way. This means that the appearance, body language, content, delivery, demeanor, and conduct of each of your witnesses in the presence of the jury can be strongly important to your case.

Direct examination is your best opportunity to show the jury what the facts are. On direct, we have the most control over pace, content, and the questions and answers to be given. When you present an expert witness, you may be at the point where many cases are won or lost.

So why can direct examination seem so difficult and even boring to a jury? We tend to think of cross-examination as more exciting. It seems to involve brute competition and warfare, and it may seem much more interesting than direct. Excitement may be one thing, but effectiveness is quite another. A slashing cross-examination can add excitement during a trial, but the truth is that few cases ever are won in that way, especially if the attorney has not effectively presented the basic facts during direct.

Trial is a battle for the respect of the jury. The best ways to win their regard are, first, to practice Silent Advocacy by being a good, likeable person and a good lawyer, and second, to present witnesses who can help them understand how to do the right thing at the end of the trial.

In spite of what television productions may seek to portray, lawyer oratory alone does not win cases. The credibility of witnesses does. In our experience, jurors take seriously the instructions of the court to base their decision upon the evidence.

Direct examination is not easy. Notwithstanding conscientious preparation, the lawyer is never quite in total control. She cannot put in her case all by herself as if she were giving a speech or teaching a class; rather, the case must go in through questions to and answers from witnesses.

There are many challenges. We may not have much choice with many fact witnesses, but instead will be limited to presenting those who, for example, saw the event in question, or who work at a particular company. Evidence rules are complex and occasionally can even impede the elucidation of truth. Direct examination is frequently interrupted by hostile objections and other disruptions of an adversary. This can distract, divert, and confuse the jury.

Finally, remember what some call the "COIK rule." COIK is an acronym for "Clear Only If Known." The goal in direct examination is not to make the evidence clear to *you*. The goal is to make the evidence clear to the *jury*. You may need to employ, carefully and wisely, techniques such as repetition and alternate methods of exposition to clarify a witness' testimonial evidence.

As we noted earlier, even if you veritably own the jury at the end of a brilliant opening statement, you can then lose the case by failing to bring them the testimony you promised.

Our role as effective trial attorneys is to take the witnesses we are dealt and then teach them to listen and communicate effectively, to be Silent Advocates themselves. Direct examination demands our best.

Initial Planning for Direct Examination

The theme. First, identify your theme, or themes. Then decide upon the best order for your witnesses to appear and the substance of their testimony. It is important to note that in this you *are* alone, unaffected by others. This work will be as good as your preparation and thought make it. We tend to concentrate well on the case theme(s) in opening and closing, but we often forget that direct examination actually provides the best opportunity to develop a case theme.

Witness order. People have busy schedules (especially expert witnesses), and it may not be possible to present witnesses in the ideal order you prefer. But you should always decide what that ideal order is. You want to present your witnesses in an order that will permit the jury to understand the case facts most easily. Studies have shown that jurors best remember the first and last witness called by each side, so do not waste these slots on weak or uncertain witnesses.

For the defense, particularly, it is imperative to lead with a strong witness, since the jury may have heard nothing for weeks except the plaintiff's case. In like measure, the last witness is important because she can leave a strong impression on the jury and her testimony can provide a bridge directly into closing argument.

Substance. You (but preferably the witness and you) should write an offer of proof for each witness you will call. Because this can be very helpful to you at trial, discuss it with each witness in advance.

Consider courtroom and local practices when you think about your witness lineup and what your witnesses will say. For example, will the trial judge let the expert leave the witness chair and work with a computer, a whiteboard or an easel?

Preparing Your Witnesses

Will each witness say what you expect? Time spent in preparation is at least as important as the time the witness actually spends on the stand. During witness preparation, you can learn what the problematic areas are. The recipe here is prepare, prepare, prepare.

Prior testimony. Did the witness give a deposition in this case? If so, study it and have the witness do so as well. What kinds of questions were asked? What was the opposing attorney trying to do? What themes did that attorney pursue?

Ask your witness if he or she is even slightly uncomfortable with any prior response. Discuss these with your witness to determine how to handle any differences at trial. Be sure an expert witness understands that the expert's role in a deposition (simply responding truthfully to questions asked) may be quite different from the expert's role at trial (helping to make out the party's case). Ask the expert to read his or her deposition, keeping this crucial difference in mind.

Daily transcript. Should an expert read daily transcript during trial? Lawyers differ on this. When judges get involved, they can give different answers as well. For example, what if witnesses are sequestered during the trial? Some judges agree that even where the rule of sequestration has been invoked, an expert witness is entitled to know how other experts have testified. Otherwise, the expert will be unable to render an opinion regarding their views. This is another subject where there is no substitute for your awareness of the local practice and the judge's own rules, if any. Inquire of the judge before you act. The last thing you want is to have your expert stricken for violating a rule of sequestration.

Outlines. Should you create a written outline of the expected testimony of each witness during direct? Lawyers disagree on this, too. Some write out every question, so as to cover everything and, equally as important, to avoid asking leading questions. This can help achieve the goal of creating short questions to which short answers can be given. Jurors appreciate brevity and focus. We both have been in trials where the jury has sent notes to the judge asking that the lawyers "hurry up." Of course, even if you have written out each question, you must remain flexible and listen for any unexpected answer. You almost certainly will have to deviate from your outline occasionally.

If you do decide to use an outline, it should be for your benefit, not that of the witness. If you give a copy to the witness, two things can happen, neither of them good. First, the witness may be asked what he or she has received in preparation, and thus have to disclose the existence of the outline. Or, worse, the witness may show up with the outline at trial. One of us once had a very enjoyable afternoon cross-examining a witness who brought his "script" to the witness box, where it was observed by the cross-examiner.

Interaction with judge and jury. What should you tell your witness in the preparation sessions? First, listen like a layperson to what your witness has to say. Be sure to tell an expert that in making his or her presentation, he or she should use terminology that would be understood by a high school class. Do not let your witness sound apologetic or uncertain. Try to assure that each witness will be positive and direct.

Should you advise a witness to look at the jury, at least occasionally? The jury is the audience, not the lawyer. You do not want the jury to be excluded, as though they were watching a television program showing a conversation between the witness and you. On the other hand, you do not want your witness to seem to pander to the jury. This problem can be

solved, in large part, in a court where you are permitted to move around. You can place yourself strategically, so that the witness - while looking at you - necessarily will include the jury in the sphere of conversation. A phrase from you beginning, "Tell the jury why..." also can be helpful in explaining why the witness has turned to the jury.

Before the witness actually appears, take him or her to the courtroom. Explain the court's sound system; show the witness where he or she will be sworn in and describe the process. Show the witness where the judge and the jury will be.

Refreshing recollection. Should you refresh your witness' recollection by showing documents to the witness? There are dangers here. Anything you show to your witness may be subject to disclosure to your opponents. It is especially risky to show privileged documents to your witness, especially if your witness was not a participant in the communication recorded in the document. If you do this, you may refresh recollection, but only at the risk of waiving the privilege and having a formerly protected document admitted into evidence.

Preparation for cross-examination. Your witness must be told about cross-examination and its rigors. Do all you can to avoid a "Jekyll and Hyde" witness -- one who is pleasant, direct and likeable on direct but testy, angry, defensive, hostile or evasive on cross-examination. Let the witness know it is perfectly acceptable to give up harmless or uncontroversial points on cross.

Presenting Your Fact Witnesses

The goal is simply stated -- you want your witnesses to make the facts clear and understandable for the jury. Organize your direct, working with each witness. Have each witness tell the jury why he or she is there. This can help jurors understand the kinds of things for which they should be listening.

Use a bridge or signal statement to let the jury know you are moving from one subject area to another one. "Now, [Mr./Ms. Witness], let's move to another area -- what the clinical trials showed about this drug." You also can use a bridge statement like this to keep a witness focused on an area before moving to a new one too hastily: "Now, [Mr./Ms. Witness], before we discuss what the clinical trials showed, let me ask you another question about the drug's chemistry."

With all this complexity, it is no wonder that lawyers sometimes find themselves trapped into leading questions on direct. Sometimes your witness can become confused and need some help from you. The inability to lead your own witness can cause real trouble when a witness wanders off the planned trail, for whatever reason. What are the remedies?

In some circumstances, if an opponent objects to your question as leading, you may be able to explain to the judge that your technically leading question is merely designed to lay a foundation, as though it were simply a preliminary question. If this does not work, you may be able to rephrase your leading question without argument to the bench, simply by beginning the question with a word like who, what, where, when, or how. Or you can preface an otherwise leading question by saying "Tell the jury whether or not...." Or you can contrast opposites: "When the accident occurred, was the street brightly lit or was it dark?" Keep asking short questions until your witness recovers.

Presenting Your Expert Witnesses

There is no substitute for spending time with your experts. Each is different. You must know what each can do for you, and for the jury. You want each of your expert witnesses to be interesting, persuasive, and educational. Unlike most fact witnesses, you can choose your experts. You know the theme(s) of your case, so you know what each expert will have to offer.

The more complicated the testimony, the more likely it is that jurors will retreat to simple assessments of whether they *believe* a witness probably is right and is "telling it straight." The credibility of an expert, therefore, may be even more important than that of a fact witness. Once again, we see that in persuasion, character (ethos) may be the most important factor.

Go behind your expert's *curriculum vitae*. Review your expert's prior publications. These can be an important credential for credibility but also, of course, can provide important fuel for cross-examination should those writings contain themes or statements that stand in contrast to your expert's testimony in the case at hand. Collect all of your expert's prior utterances and review them with these points in mind.

When your expert testifies at trial, you will not be the "star" or the focus of attention; your expert will. As we noted earlier, if it is permissible, you may want to stand behind the jury, the better to help them focus on your expert, as you examine.

During your examination of your expert witness, there are four tools of persuasion you should consider. These are: primacy (what the jury hears first); redundancy; vividness (what the jury can see as well as hear); and recency (the last thing the jury hears from the witness).

Consider whether you can introduce your expert to the jury. "Your Honor, we call Dr. James Jones, an expert in biomechanics, who will testify as to.....". You could draw an objection in doing this, but if you introduce the expert in a fair way obviously designed to assist the judge and jury in understanding just who this person is, probably you will not.

In direct examination, you will want to cover the introduction; the expert's qualifications; the opinions; the tutorial (this can be the most important part of the testimony); what the expert has done; the expert's basis for each opinion; and then responses to specific questions.

As we noted earlier in the context of the fact witness, with an expert witness you also may be able to help the jury understand the organization of the testimony by "bridging" from one area of testimony to the next: "Now, Dr. X, let's talk about the reasons why you concluded that this product is defective. Let's first discuss its intended purpose."

With regard to establishing your expert's qualifications, be wary of trying to fully, or completely, qualify your expert. Do not try to include every aspect of your expert's qualification at the beginning of your examination. If you do, you can quickly find yourself immersed in an hour of boring testimony. You might simply have the expert put together the most important points from his or her *curriculum vitae* and put this on a chart that can be placed before the jury.

Another way to describe this might be a "plateauing" qualification. Ask enough questions to get your expert beyond an opponent's objection, but save at least some of your most telling qualification points until the time when they can be most effectively used. For example, during the examination of your expert you might innocuously ask, "These tire marks you have described -- how qualified are you to tell speed from automotive tire marks?" Now your expert can respond, "Well, I worked for 18 years at the XXX Automotive Proving Grounds doing just that."

When you come to testimony regarding the opinions your expert has reached, use an easel if you can, or have a prepared chart to show the jury. You can get each opinion before the jury in this way. Once you have listed

the opinions, say nothing further about them. Instead, go directly to the tutorial your expert will conduct, with your assistance.

When you use exhibits during the expert's testimony, be sure to place on the record enough information about the exhibit to permit its ready identification later, such as by an appellate court. ("Now, Doctor, I am handing you Exhibit YY. Do you recognize this.....")

The single most overlooked area in the presentation of an expert witness is the tutorial. During the testimony of your expert, you *must* take enough time to educate the jury. In a tutorial, you and your expert are helping the jury understand fundamental points, ones they can use later to resolve the issues in the case. If the tutorial is helpful and interesting, you may start to see jurors nodding in agreement. Jurors will come to like and want to believe this expert. Then, when you do return to the opinions and begin to explore them, the tutorial will have helped immensely.

When you go over the basis for each opinion, have your expert tell the jury just what he or she did to arrive at the opinion. Did the expert conduct testing? Then have the expert explain each basis for the opinion.

Specific responses might include colloquies like this: "Were you here when Dr. B said X?" "Yes." "What did you think about that?"

Direct examination indeed is important, for both the fact and the expert witness. Because it provides the best opportunity at trial for the lawyer to be a teacher, it deserves great time, care, and attention. It matters.

Chapter XII
CROSS-EXAMINATION

In direct examination the focus is on the witness. In cross-examination the focus is on the lawyer. There are three keys to success in cross-examination: *preparation, control* and *permission.*

With no *preparation,* simply "winging it" during cross-examination almost certainly will result in failure and consequent negative reactions from both judge and jury. This behavior, of course, flatly violates the principles of Silent Advocacy.

Successful cross-examination requires that you establish *control* at once and maintain it throughout. In this chapter, we discuss a number of ways to do this.

The third key, *permission,* arises in particular circumstances we will discuss.

Cross-Examination: How Not To Do It

Unfortunately, there are more ineffective cross-examiners than capable ones. The three most familiar unsuccessful stereotypes are The Barger, The Borer, and The Buffoon.

The Barger

The Barger lurches into the cross-examination of each witness without thought either for the testimony itself or the trial judge's courtroom rules. With regard to the former, the Barger may typically begin by questioning the witness in highly questionable or dangerous areas (*e.g.,* the remarriage of a widow).

The Barger can get into big trouble. His "bull in a china shop" antics may even produce a mistrial, but at a minimum he can expect to earn the visible and spoken wrath of the trial judge, who typically proceeds to censure the Barger before the jury.

The Barger typically gets into courtroom protocol trouble as the result of ignorance and lack of forethought. How does the trial judge like to deal with sidebar conferences? Can the attorney approach the witness without permission? Must all exhibits be marked in advance? Will the judge

impose time limitations? Does the judge have written courtroom rules, copies of which are readily available from his clerk or another court official?

The Barger never even bothers to find out. These problems can be avoided easily by learning what the rules are and by appropriate additional measures, such as seeking rulings from the court prior to cross-examination.

As we have urged before, try to find the time to visit the judge's courtroom and watch a trial for a day. See how the judge runs the courtroom. Ask other lawyers familiar with the judge about the court's practices.

The Borer (Or, The Boring Repeater)

The Borer frequently can be observed among lawyers who lack courtroom confidence and experience. An unmistakable sign of a Borer is a lawyer who takes copious notes during direct examination, scribbling furiously but totally failing to sense the dynamics of the courtroom. During cross-examination, the Borer, armed with these voluminous notes, can be depended upon to go over every single point, unwittingly driving the nails in deeper by boring and offending the judge and jury.

It is a well-recognized rule of cross-examination that, when you get a response that serves the purpose of your trial theme, even if the response is less than perfect, you should go on to something else. The Borer never follows this rule. Instead, the Borer insensitively plods on, asking more and more questions, frequently until he or she finally gets into serious trouble by asking the inevitable "one question too many."

The Buffoon

The unmistakable sign of the Buffoon is vain pomposity. The egocentric Buffoon struts and puffs, apparently thoroughly impressed with his or her contributions to the law and legal institutions. The Buffoon, like the Barger, usually thinks it a good idea to "wing it" in cross-examination, to forge ahead with no apparent preparation or thought, moving aimlessly from one subject to another until finally winding down. The Buffoon may please himself but is most unlikely to please anyone else in the courtroom, all to the detriment of the Buffoon's client.

Now, let us turn to proper cross-examination techniques and considerations.

Cross-Examination: Should You Do It At All?

Perhaps surprisingly, the first consideration is whether you should cross-examine at all.

After all of your preparation, decide whether you have enough to conduct an effective cross-examination. What do you want to accomplish by cross-examining the witness? The obvious answer is that you want to get responses favorable to your client's position. These responses can be nonverbal (*e.g.*, shifty eyes or other apparent manifestations of evasiveness) as well as verbal. Then ask yourself whether your goals seem reasonably achievable. If not, you may decide not to cross-examine at all or, if you do, to sharply limit your questions.

Cross-Examination of an Opposing Expert

Many of the considerations involved in the cross-examination of an expert at trial are similar to those we discussed in Chapter III on the subject of deposing an opposing expert.

Who is an opposing expert? The category obviously includes expert witnesses offered by any party, but experts also can be trial witnesses

not formally listed as experts but whose testimony likely will be accorded enough deference by the court that they may be permitted to state conclusions and inferences. These can include treating physicians, accountants, product technicians, coroners, law enforcement officers and fire department personnel. Your preparation may well differ to some extent, depending upon the kind of expert you will cross-examine, but what follows are suggestions generally applicable to all expert cross-examination in the civil case.

Preparation. Include in your folder for each expert witness a checklist or outline of your anticipated cross-examination. This folder should include every significant prior statement given by the expert: depositions, topically organized; exhibits you may be able to use with this witness; impeachment excerpts from prior testimony; and memoranda with brief outlines prepared in anticipation of any possible evidentiary problems. In addition, the folder should contain all discovery responses in the case related to this expert.

Do not forget to make and have immediately available several copies of documents to be used with the particular witness. For example, suppose you want to use a past deposition for impeachment. You may need a highlighted copy for your use; an unmarked copy of the deposition for the witness; copies for the court reporter and each of your adversaries; another for the judge, in case the judge wants one; and perhaps even one for the judge's law clerk.

What exhibits will you use during your cross-examination of the expert? These could include photographs, slides, videos or stills from videos; hardware, models, and exemplars; charts, boards, diagrams, or other documents, including X-rays; and pleadings, interrogatories, admissions, and other discovery responses in the case. Include in your outline the ways in which you can most effectively use each exhibit.

Consider how the judge has indicated exhibits are to be handled during the trial. Exactly what does the court seem to have ordered in this regard? It is one thing for a court to require you to list in advance the exhibits you will use in direct examination, during the presentation of your case in chief, but it would be quite another to force you to identify in advance the exhibits you plan to use during your cross-examination of an expert. The latter requirement would severely affect one of the primary purposes of cross-examination -- the use of the element of surprise to help elicit testimonial truth -- and you should therefore confront and endeavor to avoid any such interpretation of the court's orders well before cross-examination.

Where exhibits are to be identified, are they to be marked in advance? Does the judge want a copy of each exhibit? Will you need a book of exhibits to use during your cross-examination, with a bench copy for the judge, a copy for the court reporter, another for each opposing counsel, and another copy for the judge's law clerk?

Do you want to use an easel, perhaps with newsprint paper and a marker, during your cross-examination of the expert? If so, be sure the judge will permit this. In some courts, a preliminary motion may be necessary. The use of an easel in this way provides one of the best ways for you to establish and maintain control during your cross-examination of the expert.

Has the judge imposed time limitations for the trial? In particular, will the time for your cross-examination of the expert be limited? If so, in preparing your outline, plan to comply precisely with those limitations.

Instead of or in addition to paper deposition and trial transcripts, today's technology permits the attorney to obtain a diskette or CD from the court reporter each day. With it, your team easily can perform word searches on both depositions and daily trial copy. Documents can be previously scanned and available to you right in the courtroom. In trial, it is even possible with today's technology to obtain real-time ("live feed") from the court reporter, so you (and also others, even those at remote locations far from the courtroom) can follow testimony as it is being given. But if you want any of this, be sure to make the necessary arrangements early -- not at the last minute. In addition, as we have noted before in other contexts, be sure all this technology actually works. Have a backup plan if it does not.

Conducting your cross-examination. Effective cross-examination techniques for any witness, but especially for an opposing expert, can include some or all of the following five categories.

1. Peripheral

This is cross-examination that does not involve substantive areas of the case. For example, can you show that the expert has bias or prejudice, or is being highly compensated for this testimony? In your preparation, check the witness' background, publications, and advertisements. Review the *curriculum vitae* and compare the claims made there with actual academic achievement, including courses actually completed in college or graduate school. Check prior testimony, in other cases. For example, has the expert claimed expertise in some impossibly broad number of subjects?

Credentials can be misleading. For example, the witness' doctorate degree might be from a diploma mill. Even if not, does the academic expertise translate into relevant "expert" analysis of the issues in the case at hand? What does the witness really know about the issues in the case? Does the expert have practical knowledge and competence?

> *One of us once had the pleasure of cross-examining a faculty member at a local university. He had a doctoral degree from a prestigious Ivy League school but had blown up a portion of the engineering building on the campus where he was then employed by mixing the wrong chemicals in the wrong container.*

What is the witness' litigation experience? Does the expert have a "real" job, or does she only testify in court cases? What percentage of the witness' income is derived from litigation work? Has the expert had a difficult time holding a job? And, of course, there is this important question in today's legal environment: has the witness ever been excluded on *Daubert/Frye* grounds?

2. Fence

As we noted earlier, this term contemplates the creation of a fence, or fixed boundary, around an expert's testimony. Precisely what are the expert's contentions? You can use an easel for this. (There are more modern, high-technology choices, but do not underestimate the effectiveness of a simple easel with paper and a marker). "Let's find out what you are saying. Let's list everything now."

Fencing permits the jury to know precisely what the dispute involves. Have the expert list each of his or her findings and opinions, in rank order. Write the list on the easel. Close it off when the expert tells the jury that he or she has no more allegations to make.

Then go back. Ask what the expert has done to arrive at each opinion. Ask the expert to describe all data he or she used to arrive at that opinion or conclusion. Ask the expert to describe the source of all these data. This, too, can be effective with the use of an easel.

After all of this, have the expert tell the jury what he or she did *not* do to arrive at each opinion. Perhaps the expert has not even conducted testing. Based upon the expert's pretrial deposition, you may want to prepare in advance a "scorecard" exhibit. Such an exhibit has a column showing particular kinds of work, with "Yes" and "No" columns to be checked off before the jury as your cross-examination proceeds.

Done effectively, the Fence technique will clarify for the jury the actual issues in the case. You also can use the sheets you created on the easel and the scorecard exhibit, if you used one, at a later time in the trial, such as during your closing argument.

The Fence phase is an excellent time to set something up with the witness. Most expert witnesses try to see where you are heading in cross-examination. If you plan a surprise later, set it up innocuously during the Fence. For example, you may need the witness to agree that a certain formula is correct in order to spring your later surprise. Get the witness to agree to that formula early in the Fence or Agree phase and then drop it immediately, going on to something else.

3. Agree

The Agree phase can be the most fertile area of expert cross-examination, the one that offers the greatest potential. It provides one of the best ways to maintain the key element of control during your cross-examination.

Are there answers that the expert must give you, things with which the expert must agree or look foolish in failing to do so? If these answers will help you in your case, ask questions designed to obtain them. These can include the laws of physics, formulas, scorecard exhibits, statutes, regulations, and the like. In your preparation, learn what this witness has said or written in the past. Are there prior statements contrary to what the witness is saying in this trial?

The Agree phase can be an excellent time to conduct a tutorial for the jury, especially if your opponent has not taken the time to do it. After all, there are certain things the jury must understand in order to reach an intelligent verdict. Jurors know this, and they both want and appreciate a lawyer's help in presenting such information.

For example, in an automotive crashworthiness case, you might say to the expert, "Let's start with the simple stuff. What is the First Law of Motion?" Or, you might write a basic formula on the board, ask the expert what that formula means, and then move on to greater complexity, as necessary. Simply lead the expert through an explanation for the jury. (Of course, if the expert in such a case does not know the answers to your questions, you will be able to make something of that!) If yours is a medical case, have the expert explain basic anatomical principles the jury will need to know.

Also, in the Agree phase, you can carefully plan in advance, and then use, leading questions that "tell your story" to the jury. Develop and ask questions to which the expert should reply simply "yes" or "no". The expert who seeks to avoid doing so may demonstrate evasiveness that the jury will notice.

4. Attack

The Attack phase of cross-examination narrows and refines the issues in the case. Seek to be innovative. No witness ever will literally surrender before you, but there are good reasons to attack if you are able to do so effectively. Be imaginative, because there are many ways to present facts. Try to get the jury interested as you do it. Before you enter the Attack phase, however, there is the all-important subject of "permission." This is the third key to success in cross-examination.

Juries are intuitively suspicious of lawyers. They may be frightened, as well, of what they imagine that lawyers and the legal system can do to them or to other citizens. They may expect, yet still be offended by, a lawyer who seems aggressive, sharp, and unfair.

You *must* have the jury's permission before you become aggressive with any witness, especially a witness hostile to your client. You must *always* ask yourself first whether you have this "permission." For example, has the trial proceeded to the point where the jurors, and the judge, seem to like you? Have they become sufficiently "fed up" with this witness that they will grant you permission to attack? The permission bar may be somewhat lower in the case of an opposing expert than for a fact witness such as a mere bystander, but it definitely exists.

Consider this example. Suppose an expert witness at trial at least appears to be highly qualified and seems to be listening carefully to your questions, apparently trying earnestly and honestly to respond to them. Suppose further that this witness is a local person of some standing, such as a respected professor at a local university. If you were suddenly to attack under these conditions, you might well stir up resentment and anger from both judge and jury and lose much of your credibility in the process. You would not, at least at that time, have the jury's "permission" to launch such an attack.

On the other hand, especially when an expert seems evasive, or of dubious qualification, permission to attack may be readily granted by the jury. Finally, remember that the conduct of an expert as your cross-examination proceeds may cause previously unavailable permission to be granted.

As you begin your cross-examination, you might try to set up "ground rules" with the expert witness. You can then use an apparent violation of these agreed-upon ground rules as permission to launch an attack. But be careful, because some judges may not like an effort to set up "ground rules."

In the Fence phase, you might simply ask the expert what would have solved the problem. For example, if you represent a defendant manufacturer in a product liability case, you could ask the expert whether an alternative design would have eliminated the risk that allegedly caused injury to the plaintiff.

Then, in the Attack phase, you can pursue the alternative design contentions. Exactly how would the alternative have solved the problem? What other problems or risks would the alternative design have introduced? Can you show the expert's solution to be nonsense, or at least completely impractical? If you represent a defendant manufacturer, can you show that it actually would have been unlawful for your client to have offered the expert's proposed alternative design for sale, because such a design would not have complied with government regulations? Can you demonstrate that the alternative would be impractical or undesirable because it would have violated established industry standards, guidelines, or practices?

You can attack any testing the expert did or claims to have done. Did it show "real world" validation of the expert's proposed alternative design or formulation?

Here are some rather classic examples of questions you can use during the Attack phase for a witness who will not respond directly to your questions. All of these questions can help demonstrate the evasiveness and bias of the expert witness.

1. True or false?

2. This is one of those simple questions.

3. Then your answer to my question is [yes][no]?

4. Is that another way of saying yes?

5. Does that answer mean yes?

6. Are you having trouble understanding my questions?

7. Didn't that question call for a 'yes' or 'no'?

8. [TO THE COURT REPORTER:] Would you kindly read that question to the witness; maybe he doesn't understand me.

9. I didn't ask why you didn't do it; I asked you whether you did it.

10. Do you understand the difference between 'why' and 'whether'?

11. Are you refusing to answer my question?

12. That does not answer my question. Let me try it again.

13. "Your Honor, I move to strike everything after [yes][no] as non-responsive." Again, you must have full and repeated permission before saying this.

14. That's a long way of saying 'yes'?

15. I understand what you're saying, but I would prefer that you answer my question.

16. With all due respect, you have not answered my question. Will you please answer my question.

17. I appreciate your [opinion][answer], but that was not my question.

18. I understand that, [sir], but all I was asking you was [.....

19. I understand all that, but can you answer my question?

20. Here. I'll write YES and NO on this board. [Do so]. Now, which one should I circle? (Remember that you will need the jury's permission for this one)

5. The Home Run

The "gotcha" moment during cross-examination, so often featured in theatrical settings of a courtroom conflict, the so-called "Home Run," is rarely seen in actual trials. This is because the opportunity for it does not often present itself. However, be assured that it will *never* present itself in the absence of careful preparation. If in your preparatory work you do see a potential opportunity for a Home Run, set the expert witness up for it during the Fence or Agree phase of your cross-examination.

During our years in the courtroom, each of us has had an occasional opportunity to employ this rare fifth aspect of cross-examination. In the Appendix to this book you will find descriptions of two of those occasions.

Chapter XIII
EXHIBITS

Psychological research confirms that "seeing is believing." Effective exhibits are increasingly important, not just for use with witnesses, but also in openings and closings. Jury consultants can be helpful here. Lawyers are increasingly testing how mock jurors react to given graphics.

A number of helpful publications on the subject of trial exhibits are available.[11] Exhibits of proven effectiveness include timelines, scorecards, pie charts, and ways of demonstrating the magnitude of exposure and the *de minimis* nature of risk.

Simple remains good. Mix and match more sophisticated graphics with the old-fashioned easel. The latter offers a singular advantage: jurors and judge have to stop and concentrate while you write.

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11 *See*, for example, G. Christopher Ritter, *Creating Winning Trial Strategies and Graphics*, Tort Trial and Insurance Practice Section, American Bar Association (2004).

Chapter XIV
MAINTAINING JURY INTEREST

A civil trial may well include periods of considerable interest to the judge and jury -- even dramatic, intense interest -- but it is also virtually inevitable that the trial will include periods of lesser interest. Occasionally these can threaten to create genuine boredom for the jury. One example can occur when you are presenting a witness on direct, one whose testimony is necessary but whose style is perhaps pedantic and somewhat dull. Are such periods inevitable and beyond your control, or are there techniques you can use to reduce them?

We strongly believe that the answer is the latter. You are limited here only by your creativity. The key is to develop ways to help the jury *refocus*. These techniques can help maintain the pace of your presentation and also rekindle the jury's interest in your case.

Consider the example of direct examination. As you examine a witness, you really are part of a communications triangle consisting of the witness, the jury, and you, with the judge and others looking on. If you begin to sense, in the dynamic of the courtroom, that the jury's attention might be wandering, you can help the jury *refocus* by, in effect, moving out of the triangle momentarily.

Here are several techniques you can use to create a momentary diversion from the communications triangle:

Pause
A moment of silence during your presentation can create such a diversion. Silence also can be a powerful communicator and a very effective manifestation of Silent Advocacy.

Pace
An intentional change of speed in your presentation (whether it is an increase or a decrease) can help the jury appreciate that something new and different is occurring.

Position
In a courtroom where you are permitted to do so, changing your position from one place to another can clearly signal a change of subject or approach.

Breaks
A courtroom break, even if it is for only ten minutes or so, can help the jury refocus. If you try to be as attentive to the courtroom atmosphere as we have urged at several previous points in this book, you should be able to sense when the jury particularly could benefit from a break, and so request one.

Tone
The tone of your voice can help the jury refocus on something new or different.

Topic changes
It is a good idea to signal to the jury that you are moving from one topic to another. This not only permits you to move away from the triangle for a moment, but it also can help the jury follow your path of persuasion. The most obvious way to do this is for you simply to announce to the court and jury that you are about to change topics, but you can also accomplish this more subtly. Even a word like "Now...," followed by a moment of silence, can effectively signal that you are moving to something new or different.

Words
Words chosen carefully can help both judge and jury refocus. It is worthwhile to consider this as you plan your overall presentation.

Judicial asides
Addressing a request to the judge, within the hearing of the jury, instantly moves everyone out of the triangle: "Your Honor, at this point, may we now...."

Chapter XV
CLOSING, OR SUMMATION

If you have read this book from its beginning, you will be able to predict much of what we say in this Chapter. If you practice the principles we have discussed, the preparation and delivery of your closing comments to the jury should be relatively simple. But make no mistake: any case can be lost during closing.

By the end of the trial, if you have won (or tied) the Battle of the Attorneys; if the jury therefore has found you likeable; if you have been visibly, highly organized; and if you have followed the other steps we have outlined, the jury will be searching for reasons to favor your client. The jury therefore will expect from you an organized, logical, and interesting closing.

Jurors will not anticipate, and may very well be surprised and offended by, a disorganized or rambling monologue. Any such change in your demeanor is a mistake that must be avoided at any time during trial, but particularly during closing, because it can cause you to lose your case. High emotion, anger, or other such behaviors during your closing are not only unlikable but would be unprecedented, for the jurors would not have seen you behave in this way before. For example, during closing never attack opposing counsel personally, especially when you have carefully avoided doing so all through the trial.

As you prepare for your closing, make a list of the items you will need. Will you use exhibits? Will you now use an easel on which you have been writing all during the trial? If so, assign someone on your trial team the responsibility of gathering the needed items and placing them in order, so that your closing can proceed logically and smoothly. Be certain that you will be in compliance with any court orders or procedures regarding your use of exhibits during closing.

Your client will not be fairly served if you are forced to deliver your carefully-prepared closing to a fatigued jury. Before any closing speeches begin, ask the trial judge to rule that there will be a break after an opponent's closing is completed but before you begin yours. This break need not be long. Even if it is for as little as ten minutes, it will permit the jury to "stretch" and otherwise help to refresh the atmosphere before you begin. In requesting this, you can point out that, first, the jury should be entitled to a break at that point, and second, you can be better organized

for your closing if you are permitted to complete your final preparations during the break -- by, for example, placing any exhibits opposing counsel has used during closing back in their proper order.

As we suggested in Chapter IX, in opening statement there is a one-time "golden moment" of which you definitely should take advantage. In closing, there is no similar "golden moment," but there is the opportunity to state your view or theory of the case in your own words. One way to lose a case in closing is to throw away this opportunity.

An opponent who has closed before you typically will have made a considerable number of points to the jury. You may be tempted to respond to each of them. If so, resist the temptation. If you use your time to do this, not only will you appear thoroughly defensive, but the jury may never get to hear your view or theory of the case, presented in your own words.

Limit yourself only to a few rebuttal points - no more than five - and then present your own arguments, giving the jury logical reasons to find for your client.

Remind the jury of any unfulfilled promises opposing counsel made in opening statement. "They said they would present a witness who would tell us about XXX....Well, we're still waiting for that witness - the witness who never came."

Consider asking the jury rhetorically, "Why are we here? What are the contentions? What is each party saying, and how are you, the jury, supposed to resolve all these issues?"

Then proceed to "The Agrees." For example, you could say, "Let's begin with the easy job, with the issues you don't have to resolve because all the parties agree on them." You may find that going over these points of agreement will occupy much of your closing. Put them in a logical order, and use exhibits as appropriate to make the points.

Now move to the disputed facts. Typically, the number of disputed facts will be small. By this time, the jury should understand these issues. Show the jury why the comparatively few disputed facts should be resolved in your client's favor because of the truth that results from a correct understanding of the evidence, natural laws, and common sense.

Finally, you can move to the legal issues, carefully following the instructions that the judge will give to the jury. Here, the concept of balance can help

you. What did opposing counsel present on a particular legal issue? What did you present? If you presented much more, the balance properly should tip in your direction.

Your closing should not take much time. To quote the old aphorism, "Be brief and be seated." A good closing should take no more than one hour, or occasionally one hour and a half, at the most.

Chapter XVI
WHEN SCOUT GROWS UP TO BE ATTICUS FINCH[12]

Chilton Davis Varner

"I'm a woman lawyer."

One is tempted to respond, "So what?" But, although we have intended virtually everything heretofore in this book to apply to lawyers of both genders, this chapter perhaps is necessary, even in our enlightened age.

As the 21st century proceeds, it is possible that women, as is already true in law schools, may constitute at least half of the practicing bar. In other words, women in the practice of law are increasingly likely to represent their approximate half of the general population. Indeed, some believe women are the emerging majority in the legal profession.

Ancient entry-level barriers for women are lower or non-existent, in many areas. The percentages of women lawyers in the ranks of government, the judiciary, and corporations have steadily increased. It is hardly novel today for a lead trial lawyer to be a woman, or indeed for an entire trial team to be all female. Women lawyers are especially sought after in litigation involving so-called "women's issues," such as women's health (breast implant and hormone therapy cases are examples). All legal associations are committed to diversity in the profession, which necessarily implies greater opportunities for women and minority lawyers.

Yet "glass-ceiling" issues certainly remain for woman trial lawyers. Chief among these are the elusive balance of family obligations and trial practice, the acquisition of attentive mentors, and the development of necessary professional networks. Repeated surveys have shown that these issues have caused female lawyers to be less happy than their male counterparts with their professional advancement opportunities.[13]

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12 The allusions in the title are to two fictional characters -- Maycomb, Alabama attorney Atticus Finch and his tomboyish, six-year-old daughter Jean Louise "Scout" Finch -- in the 1960 novel *To Kill A Mockingbird*, by Harper Lee (New York: Popular Library, 1960), and the award-winning 1962 motion picture of the same name.

13 See, e.g., Balanced Lives: Changing the Culture of the Legal Practice, ABA Commission on Women, 2001; Fact Sheet, Women in Law: Making the Case, <http://www.catalystwomen.org/press/factsheets/fac-slaw.html>

This is especially regrettable, since surveys and studies show that women naturally have as many (and sometimes more) of the skills for success in trial practice, perhaps the most stressful specialty in the legal profession. These skills include teamwork, motivation of co-workers, the fostering of communication, performance of high-quality work, and focus upon attention and listening.[14]

There are other obstacles to overcome. Empirical studies by jury research specialists and psychologists, as well as our own experience, show that gender does affect credibility in the courtroom. As noted years ago by gender psychologist Kay Deaux of the City University of New York, both men and women tend to rate a man's performance more favorably than a woman's, even when they say exactly the same things and make exactly the same arguments.[15]

Fairly or not, jurors of both genders may regard men as more professional and more competent. Does this eternally consign women trial lawyers to the second chair? Of course not. It just means that certain aspects of Silent Advocacy may be more important for women and therefore may be even more deserving of special attention from female trial lawyers.

There are two keys to unlocking these hard-to-dislodge prejudices. The first key is *competence*. It is even more important for women trial lawyers than men to appear absolutely knowledgeable about a case and to remain in control of it. This is particularly critical when the subject matter of the dispute is technical. For there, psychologists tell us, women can reap great rewards from what is called the "contrast effect." When people experience something outside their expectations, the actual result tends to be magnified. In other words, when a woman performs well in an area where only men are expected to excel, she may be *rewarded*, not penalized, disproportionately to her actual performance.

How can women trial lawyers achieve this? How do we change jurors' attribution of "just good luck" to "skill?" The best way is to have someone

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14 *See, e.g.*, R. Sharpe, "Special Report: As Leaders, Women Rule," *Business Week*, November 20, 2000.

15 K. Deaux, *The Behavior of Women and Men*, Brooks-Cole Publishing Co., 1976; at 25 (citing study in which a cohort of women judged identical articles, with authorship attributed half the time to a male and the other half to a female; in every case, the male-authored article was rated more favorably); *see also* D. Hechler, "Women Progress, But Few Queens of Torts," *National Law Journal*, August 9, 2004 (jurors hold women lawyers to higher standards).

else point out and underline our competence. In courtrooms, there are two obvious sources of authority who can do this -- expert witnesses and judges. We are able to choose our expert witnesses, so we should seek good synergy during the hiring process. Select witnesses who work well with you, who are not afraid to show respect for your knowledge and skill. Strive to be rock-solid in your cross-examination of opposing experts.

We do not choose judges, of course, but we should strive to show any judge our bedrock competence in briefing and pleadings long before we enter the courtroom. An opening statement, if well done and ably delivered, can teach the judge as well as the jury about the case. As Cicero pointed out long ago, those we help to understand are more likely to respect us.

The second key to unlocking gender misconceptions and prejudices is *trustworthiness*. In this, women may have an initial edge. Ironically, typically feminine stereotypes may cause women initially to be regarded as more honest than men. Some jurors may have experienced women primarily as teachers, mothers, wives, and assistants. Women are much less likely than men to be regarded as cynical and manipulative. This can be enormously helpful to the woman trial lawyer *if* she lives up to this preconception. If she does not, of course, the "contrast effect" is likely to operate strongly against her and damage her client's cause.

Trial work is adversarial. Sadly, in recent years it has increasingly included *ad hominem*, personal attacks. This may not present much difficulty for some lawyers -- men and women -- who are naturally inclined to be adversarial and combative. For others, it may drive them from the specialty.

We believe that the tactics and advice in this book will equip women, as well as men, to deal effectively with the contentious nature of modern trial practice and, in fact, to improve upon it. The trial lawyer who is liked, respected, and effective is not a vulnerable target for sharp elbows and abusive tactics. In other words, good lawyering counts.

Trial excellence involves a changing mix of talents: mastery of the subject matter; control; and respect, or authority. Trial lawyers assuredly are made, not born. Women bring to the table the necessary attributes of presence, stamina, discrimination (recognizing what matters and what does not), mastery of detail, and listening skills. We know of no trial lawyer, of either gender, who sprang forth with all of these characteristics in perfect balance. Instead, that balance must be developed through training and experience. There is no reason why women cannot do this -- and many reasons why they should excel.

> ***The truth is, a great mind must be androgynous.***
> *-- Samuel Taylor Coleridge*

Finally, humor still has its place. Let me leave you with a story.

Three trial attorneys die and go to Heaven. When they get there, they discover that one more trial awaits them. Moses and St. Peter take each one aside.

"You must do one more thing to get into heaven," Moses whispers to the first candidate, a man. "Spell 'God.'" With alacrity, the male lawyer spells "G-O-D" and the Heavenly Gates open wide.

St. Peter then takes aside the second lawyer, also a man, and the same test is repeated. He, too, spells "G-O-D" and instantly becomes part of the Heavenly Multitudes.

Then Moses and St. Peter together address the woman trial attorney. "To enter Heaven, you must do just one more thing." "What?!" she answers. "One more thing?! I *knew* it! They always wanted 'just one more thing' from me, 'just one more thing' to reach the same level of success as my male colleagues! I can't believe it's the same up here!"

"Calm down, now," they say. "All you have to do is spell a word."

"Okay. Well, maybe I *am* overreacting, but I'm sure that, up here, you'd understand that. So what's the word?"

"Floccinaucinihilipilification," says Moses.

She got in.[16]

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16 The interested reader will find the word floccinaucinihilipilification in THE OXFORD ENGLISH DICTIONARY 1073 (2nd ed. 1989)

APPENDIX

A SAMPLE JURY QUESTIONNAIRE

IN THE CIRCUIT COURT OF ALPHA COUNTY

PLAINTIFFS,	)	
	)	
v.	)	Civil Action No. 01-C-46
	)	
DEFENDANTS.	)	

MOTION FOR DISTRIBUTION OF JURY QUESTIONNAIRE

Defendants respectfully request that the Court, in the excise of its inherent right to manage its docket and in order to expedite the jury process in this matter, submit the attached "Jury Questionnaire" to all prospective jurors who may be called to serve in this case.

This case involves issues about which there has been much publicity within the community and about which many prospective jurors hold strong, preconceived notions. It also has imbedded within it issues relating to health coverage provided to certain individuals within the state that can create a conflict of interest on the part of prospective jurors who might be called upon to sit in the case. Use of a jury questionnaire allows the parties and the Court to determine quickly which prospective jurors have a conflict of interest or such strongly held preconceived notions about the issues in that case as to render them unsuitable to sit as jurors.

Defendants' pharmaceutical product has been widely prescribed in this county as an analgesic in the treatment of chronic moderate to severe pain. That product is an opioid and a controlled substance. Used properly, it is a legal product. But like all narcotics, it can be misused. There has also been substantial publicity surrounding the abuse and diversion of

this product in this county and this region of the state. As such, it is to be expected that many prospective jurors called to sit in this matter will have strongly held views about the product that will impact their ability to sit as impartial members of the jury. Beyond that, this case implicates certain insurance coverages and benefits provided to government employees and others within the county, all of whom may be impacted by the outcome of this case. As such, beneficiaries under those policies and programs may not be appropriate to sit in judgment of the claims being asserted here.

Beyond this, many of the issues surrounding the legitimate use of defendants' product, as well as the abuse and diversion of that product are highly personal. Prospective jurors will naturally be reticent to discuss such personal issues as addiction in open court before others. A confidential questionnaire of the type proposed here allows prospective jurors to respond freely to questions appropriate to their jury service without fear of disclosure of personal information regarding their health or the health of members of their family.

Accordingly, for the reasons heretofore set forth, defendants request that the attached questionnaire be distributed to prospective jurors for completion at the scheduled jury orientation set for later in the month of October.

IN THE CIRCUIT COURT OF ALPHA COUNTY

PLAINTIFFS,	)	
	)	
v.	)	Civil Action No. 01-C-46
	)	
DEFENDANTS.	)	

DEFENDANTS' PROPOSED JUROR QUESTIONNAIRE

TO: Prospective Jurors

The purpose of this questionnaire is not to intrude into your lives, but to give the parties in this lawsuit a chance to obtain information about you, your background, and your opinions on certain issues. By having each of you fill out this questionnaire, we hope to shorten the amount of time it would take in the courtroom to get to know you as individuals. The questionnaire also allows you to respond privately to questions that might make you uncomfortable if you had to answer them in open court before other jurors.

Because this questionnaire is part of the jury selection process, you must fill out by yourself without consulting any other person. The information contained within the questionnaire will become part of the Court's permanent record, but it will not be distributed to anyone except the attorneys in the case and the Judge.

If you wish to make further comments regarding any of your answers, please use the Explanation Sheet at the back of your questionnaire to do so.

Please recognize that there are no right or wrong answers -- just honest ones. You are under oath and must answer truthfully.

Juror Number:_____

PLEASE PRINT all answers legibly. If you are asked to explain any answers and a space is not provided for your explanation; please explain the answer on the "Explanation Sheet" near the end of this questionnaire. Please write the number of the question you are explaining at the beginning of each of your explanations.

IF YOU ARE AGE 65 OR OVER, you are qualified for jury service and are encouraged to serve; however, you will be excused from service upon request. Place an "X" in the YES box if you wish to be excused. □ YES

1. Full name:_____
   Address:_____
   Telephone Numbers: Home:_____
   Business:_____

2. a. Where were you born? (Please list city, state, country)
   _____
   b. Where did you grow up?_____
   c. How long have you lived in this State?_____
   d. Are you a resident of Alpha County? _____ Yes _____ No

3. Do you pay real estate property taxes in Alpha County?
   _____ Yes _____ No

4. Number of miles round trip from your residence to the courthouse is
   _____

5. Age:_____

6. Sex:_____

7. Which of the following best describes your race?
   _____ Black _____ Hispanic _____ White _____Asian _____Other (_____)

   Note: State law requires you to identify yourself by race to ensure there will be no discrimination in jury selection and that it will be conducted entirely at random. This item is included only to satisfy legal requirements.

8. Are you able to speak, read, and understand the English language?
   __ Yes __ No
   Note: This requirement is met by the ability to communicate in American sign language, signed English, or by oral interpretation.

EMPLOYMENT HISTORY:

9. What is your current job status?

_____ Employed full-time
_____ Employed part-time
_____ Homemaker
_____ Retired
_____ Disabled
    _____ Workers Comp.
    _____ SSI Disability
    _____ Veterans
    _____ Other
        (Specify)_____
_____ Student
_____ Unemployed, looking for work
_____ Unemployed, not looking for work

10. If you are currently employed, please state:

a. Employer:_____
b. Job title or occupation:_____
c. Place of employment:_____
d. Length of employment:_____
e. Explain your duties or responsibilities, including any supervisory duties:_____
_____
f. Do you need a work slip for your employer regarding jury duty?
__ Yes __ No

11. How satisfied are you with your current work situation?
_____ very satisfied
_____ somewhat satisfied
_____ not at all satisfied
_____ not working

12. Please list your past occupations, including any periods of self-employment (for example: you owned a business). If retired or disabled, indicate occupations prior to retirement or disability. If currently unemployed, please list prior occupations.

Name of Employer	Dates	Job Description

EDUCATION/TRAINING

13. Please check the highest level of education you completed:

_____ Less than High School
_____ High School Graduate
_____ GED/High School Equivalency
_____ Trade/Technical School
_____ Some College (Major_____)
_____ College Graduate (Major_____)
_____ Graduate/Advanced Work (Major_____)

Other (Please explain):_____

14. Please describe the educational background of your spouse/former spouse/partner and any other adult who lives in your home, including any degrees or certificates earned:_____

_____

_____

15. Did any of your jobs or training, or the jobs or training of your spouse involve:

	You	Spouse
a. adjusting claims or disputes between people?	_____	_____
b. working for lawyers, law enforcement personnel or with other participants in the justice system?	_____	_____
c. working in the area of substance abuse counseling?	_____	_____
d. exposure to toxic substances?	_____	_____
e. planning/enforcing workplace health and safety standards?	_____	_____

f. working in advertising or promoting a product or service? _____ _____

g. mathematics, statistics or economics? _____ _____

h. working for religious or civic organizations? _____ _____

i. farming? _____ _____

j. mining? _____ _____

k. Bureau of Employment Programs? _____ _____

l. Department of Health and Human Resources? _____ _____

m. Public Employees Insurance Agency? _____ _____

n. Any other state agencies? _____ _____

If you answered "yes" to any of the above, please explain:

_____

_____

_____

16. Circle all of the areas in which you have taken a course or had training after high school:

Accounting	Biology/Economics	Engineering	Ethics
Finance Law	Statistics	Psychology	Medicine
Nursing	Social Work	Marketing	Labor
Manufacturing	Advertising	Political Science	
Timbering	Heavy Metal	Business/Management	

FAMILY

17. What is your marital status:

___ Single, never married
___ Married for ___ years
___ Divorced, but married ___ times in the past for a total of ___ years
___ Separated, but married ___ times in the past for a total of ___ years
___ Single, but living with partner for ___ years
___ Spouse deceased, but married for ___ years

18. Please list the name, age, occupation (within the last 10 years) and employer of your spouse or significant other.

_____

_____

_____

19. If you have children, please list (including any children who do not actually live with you):

Sex	Age	Does child live with you?	Education	Occupation

20. What are the jobs of the other adults who live with you? _____

_____

_____

21. What are your parents' occupations? (If your parents are retired or deceased, please list their final occupation.)_____

_____

_____

_____

ORGANIZATION / LIFE EXPERIENCE / HOBBIES

22. What religious, social, civic, professional, trade or other organizations have you been or are you affiliated with now or in the past 10 years?

_____

_____

_____

23. Describe any offices you have held in any organizations._____

_____

_____

24. Have you ever been a member of a union? ___ Yes ___ No

If yes:

a. Identify the union(s):_____
b. Are (were) you an active member? ___ Yes ___ No
c. Have you ever held an office in a union? ___ Yes ___ No
d. Has the union ever filed a claim on your behalf?
___ Yes ___ No

25. If you, your current spouse or person with whom you currently live have ever served in the military, please list the branch and date of service for each individual._____
_____

26. What are your favorite hobbies, recreations and pastimes?
_____
_____

27. What magazines and newspapers do you read regularly?
_____
_____

28. What TV programs (including but not limited to local or national news programs) do you regularly watch?_____
_____
_____

29. What radio programs (including but not limited to local or national news programs) do you regularly listen to?_____
_____
_____

30. Have you read any books or seen any movies about prescription medication, prescription medication companies, prescription medication company lawyers, or trials involving prescription medications? _____ Yes _____ No
If yes, which ones?_____
_____

31. Do you use a computer for any of the following?
_____ Send e-mail _____ Receive e-mail _____ Internet
_____ Obtain prescription medications

32. Compared with three years ago, do you believe your family's financial condition this year has:
    _____ Improved
    _____ Stayed the same
    _____ Declined

33. Please circle the phrase that best describes your feelings about the following statement: On the whole, those in authority (teachers, police officers, employers, government, etc.) have treated me fairly.

    a. Strongly agree
    b. Somewhat agree
    c. Somewhat disagree
    d. Strongly disagree
    e. Don't know/no opinion

34. Compared with five years ago, how would you rate the quality of your life today?
    _____ Much better than five years ago
    _____ Somewhat better than five years ago
    _____ About the same as five years ago
    _____ Somewhat worse than five years ago
    _____ Much worse than five years ago

35. Within the past five years, have you experienced any of the following events:
    (circle and explain)
    A. Loss of employment
    B. Major hospitalization/surgery
    C. Serious financial hardship
    D. Serious illness/injury
    E. Death of spouse/partner/child
    F. Victimization due to crime

HEALTH EXPERIENCE / ATTITUDES

36. a. Have you ever taken any of the following pain medications?
    (circle all that apply)
    [List of medications, with "yes/no" columns to be checked]
    b. Are you currently taking any of these pain medications?
    ___ Yes ___ No
    If yes, which ones?_____

c. What condition(s) led you to take any of the above medications?

_____

d. How was your experience with any of these medications?
(Circle one)

GOOD BAD
(Please explain answer)

e. Did your doctor advise you of the risks and benefits of any of these medicines? _____ Yes _____ No

f. How carefully did you follow the doctor's directions when taking the medications?
___ Very carefully ___ Somewhat carefully ___ Not carefully at all

37. a. Has anyone close to you (e.g., family member or friend) ever taken any of the following pain medications? *(circle all that apply)*
[Same list]

b. For each medication circled, please list who took each of these medications (for example, father, sister, friend).

_____

_____

_____

c. Are they currently taking any of these pain medications?
___ Yes ___ No
If yes, which ones?_____

d. What condition(s) led these individuals to take any of the above medications?

_____

_____

_____

e. How was their experience with any of these medications?
(circle one)

GOOD BAD (Please explain answer)

f. Did their doctor advise them of the risks and benefits of any of these medicines? _____ Yes _____ No _____ Don't know

g. How carefully did they follow the doctor's directions when taking the medications?
___ Very carefully ___ Somewhat carefully ___ Not carefully at all
___ Don't know

38. Have you ever received health care which was paid for or reimbursed directly or indirectly by the state (including but not limited to Workers' Compensation, Medicaid, Medicare, and/or PEIA benefits)?
_____ Yes _____ No
If "yes," please list the applicable agency(ies)
_____

39. How would you describe the current state of your health?
_____ Excellent _____ Good _____ Fair _____ Poor

40. Do you have any medical condition that requires routine medical screenings? _____ Yes _____ No
If yes, please explain:_____
_____
_____
_____

41. How often do you read publications on health, fitness or nutrition?
____ Frequently ____ Occasionally ____ Seldom ____ Never

42. How often have you sought medical advice or treatment from a doctor, clinic or hospital?
_____ Not in the past several years
_____ Not in the past
_____ Once or twice in the past year
_____ Six to ten times in the past year
_____ More than ten times in the past year.

43. Does your employer provide free medical screening (e.g., cholesterol screening, blood pressure screening, pap smears, mammograms, etc.)?
_____ Yes _____ No _____ Not sure
If yes, how often do you use this free medical screening?
____ Frequently ____ Occasionally ____ Seldom ____ Never

44. To what extent is your health a cause of stress in your life?
_____ Major cause _____ Minor cause _____ Not a cause

45. Do you drink any alcoholic beverages, including beer or wine?
_____ Yes _____ No

46. Have you ever written a letter to complain about a product that you purchased?
_____ Yes _____ No

47. Please circle the phrase that best describes your feelings about the following statement: Big pharmaceutical companies are more concerned with profits than patient health.
a. Strongly agree
b. Somewhat agree
c. Somewhat disagree
d. Strongly disagree
e. Don't know/no opinion

48. Please circle the phrase that best describes your feelings about the following statement: Prescription medications can improve the quality of life for those people who need the medication.
a. Strongly agree
b. Somewhat agree
c. Somewhat disagree
d. Strongly disagree
e. Don't know/no opinion

49. Please circle the phrase that best describes your feelings about the following statement: There should be less government regulation.
a. Strongly agree
b. Somewhat agree
c. Somewhat disagree
d. Strongly disagree
e. Don't know/no opinion

50. How has your opinion of pharmaceutical companies changed during the last year?
_____ Much more positive
_____ More positive
_____ No change
_____ More negative
_____ Much more negative

51. Have you or any family member or close friend ever participated in a lawsuit involving a consumer product (for e.g., medications)?
_____Yes _____ No
If yes, please explain:_____
_____

52. Have you read or heard anything about lawsuits against prescription medication companies, and/or statements or testimony by current or former executives or employees of prescription medication companies? _____Yes _____ No
If yes, please explain:_____
_____
_____

53. Do you believe that prescription medication companies overcharge for their products? _____Yes _____ No

54. a. Do you feel that abuse of prescription medication is a problem in our country? _____Yes _____ No

b. If you answered Yes, how serious do you consider this problem to be?
___ Very serious ___ Moderately serious ___ Not very serious

55. a. Do you feel that abuse of prescription medication is a problem in this county? _____Yes _____ No

b. If you answered Yes, how serious do you consider this problem to be?
____ Very serious ____ Moderately serious ____ Not very serious

56. If you answered Yes to questions 54 and 55 above, please circle any listed below that have led you to form this/these opinion(s).

Television/News Stories Newspaper/Magazine Articles Books
Personal experience Other_____

57. Have you or anyone close to you ever been treated for a chronic pain condition (e.g., low back pain)? _____Yes _____ No

If yes, who?_____
Condition?_____
Treatment received?_____
Medications prescribed?_____
Experience positive or negative? (please explain)_____

58. Do you have any special knowledge, education or interest in any of the following *(circle all that apply):*

Prescription medication Nursing/medicine Product testing
Mental health issues Holistic medicine

Please explain any circled:

_____

_____

59. In general, do you read warning labels on medicine bottles and packages?
_____Yes _____ No

60. Have you ever developed an addiction to any prescription medications?
_____Yes _____ No
If YES, whom do you hold responsible for the addiction? (Circle one)
Doctor Self Prescription Medication Company
Please explain:_____

_____

61. Has anyone in your family or anyone close to you ever developed an addiction to any prescription medications?
_____Yes _____ No
If YES, whom do they hold responsible for the addiction?
(Circle One)
Doctor Patient Prescription Medication Company
Please explain:_____

_____

62. Have you, or anyone close to you, ever had a negative experience with a prescription medication manufacturer?
_____Yes _____ No
If YES, who?_____
If YES, which medication(s)?_____
If YES, which manufacturer(s)?_____
Explain:_____

_____

_____

_____

63. Did you/they seek legal action as a result of this experience?
___ Yes ___ No
Was anyone injured from this experience? _____ Yes _____ No
Was the experience resolved to your/their satisfaction?
_____ Yes _____ No
(Please explain answers if you answered YES to the first question listed.)

JURY SERVICE/LEGAL SYSTEM

64. a. Have you ever previously served on a jury including petit, grand or magistrate court?
_____Yes _____ No

b. If yes, please describe the case(s):

_____
_____
_____

c. Was/were the case(s) criminal or civil?

_____
_____
_____

d. Was/were the verdict(s) unanimous?

_____
_____
_____

e. Were you ever the jury foreperson? If yes, which case(s)?

_____
_____
_____

65. Please describe whether your jury experience was positive or negative:

_____
_____
_____

66. Have you or any members of your immediate family (spouse, parents, children, brothers or sisters) or close friends ever been a party to a lawsuit?
_____Yes _____ No

If yes, describe the lawsuit (what was it about, who were the parties, etc.)

_____

_____

_____

67. Do you have relatives or close personal friends who are or were judges or attorneys or court personnel?

_____Yes _____ No

If yes, what are their names, their positions and relationships to you?

_____

_____

_____

68. Have you heard or had any involvement with any of the parties listed on Attachment A?

_____Yes _____ No

If so, please write the name(s) here and explain:

_____

_____

_____

69. Do you own any stock of the companies listed on Attachment A?

_____Yes _____ No

70. Have you heard of or had any involvement with any of the attorneys or law firms who are representing these parties and who are listed on Attachment B?

_____Yes _____ No

If yes, please write the name(s) here and explain:

_____

_____

_____

71. Do you recognize or think you might know any of the potential witnesses listed on Attachment C?

_____Yes _____ No

If so, please write the name(s) here and explain:

_____

_____

_____

ABILITY TO SERVE AS JUROR

72. This trial is expected to last _____ weeks. Do you have any hardship that will present you from serving as a juror in this trial?
_____Yes _____ No
If you answered yes, please explain:
_____
_____
_____

73. Do you have any physical or mental disability which would seriously impair your ability to serve as a juror?
_____Yes _____ No
If yes, please attach a physician's statement or explain:
_____
_____
Note: If you are disabled but can render competent service with reasonable accommodation, you are not disqualified from jury service. If you wish to serve, but require an accommodation, please describe:
_____
_____

74. Do you know of any reason, no matter how small, why you could not be a fair juror in a lawsuit involving _____, the company that manufactures _____?
_____Yes _____ No
If yes, it is your duty to explain the reason(s).
_____
_____

75. Is there any information you have not been asked that you feel the Court should know about or that might be relevant in any way to this trial or to your possible jury service?
_____Yes _____ No
If so, please explain:
_____
_____

76. Will you be paid by your employer during jury service?
_____ Yes _____ No _____ Don't know

I hereby declare that all responses I have made on this form are true to the best of my knowledge. I hereby acknowledge that I understand that a false statement or any willful misrepresentation of a material fact made on this form may be punished by a fine of not more than five hundred ($500) or imprisonment for not more than thirty (30) *days* or both fine and imprisonment. (Code Section _____)

Date:_____ Signature:_____

EXPLANATION SHEET

	Hotel and War Room. Negotiate the contract with hotel for a room block (trial team, corporate rep., experts) and war room. Finalize in advance of the window required by your technology support staff. Arrange direct itemized billing for all rooms, including experts. Confirm available parking for all trial team vehicles. Travel to trial city, if possible, to review hotels and vacant office space. Work with local counsel to obtain recommendations. Sketch the war room space, noting dimensions, electrical and telephone outlets, etc. Investigate access to building loading docks, any special requirements or permits necessary and building security procedures. View hotel rooms. Request that rooms not be located near elevators, staircases, service entrances or vending machines. Reserve large conference room or suite to accommodate all boxes, supplies, equipment and personnel. If it is a suite, ask the hotel to remove bedroom and/or unnecessary furniture. Obtain several extra keys to the war room. Request sufficient tables (long folding), refrigerator, coffee maker, two to three secretarial chairs, 4 or 5 large trash cans, TV/VCR. Draft a letter of confirmation to the hotel. Secure rooms for partners and corporate reps that are continuous throughout the trial block, including weekends.	
	Discovery/Pleadings/Pretrial Submissions Notebook. If the attorneys prefer, create a notebook containing relevant pleadings/discovery for easy reference in courtroom and war room.	

	More on Defense Trial Exhibits. Create two sets of exhibits. One set (originals) for the war room and one for the courtroom. Place each exhibit in a manila folder or gusset, labeled with the exhibit number and description as listed on exhibit list, *i.e.,* Exhibit 1, Accident Report. The courtroom exhibit folders will contain the exhibit followed by copies of the exhibit (one for defense, one for plaintiff's counsel, one for co-defendant's counsel and one for the witness). The original will be admitted in the Court record and given to the judge. The war room set will only need one copy of each exhibit in each folder. Be sure to have the correct document in the courtroom (certified copy, if necessary, original, etc.). Work with local counsel early on the exhibit list. Know the local rules regarding how to label, how many copies are necessary, etc. At least eight weeks before the exhibit list is due, contact local counsel and national counsel regarding updating the exhibit list. Contact the person maintaining the master set of demonstratives and foundation materials for additions to the list. Track changes back to the Master Exhibit List. Carefully quality check the exhibits each time a set is made and/or copied. Look for missing pages, illegible pages, or incorrect documents that don't match the description. Check video and audio tapes.	
	More on Plaintiff Exhibits. Prepare a complete set of folders for plaintiff's exhibits (for courtroom and war room).	
	Exhibit Charts. Prepare a chart for plaintiff's exhibits and a chart for defense exhibits.	
	Exhibit Exchange. Prepare exhibits in advance of exchange. Arrange for video camera/camera for use in photographing plaintiff's exhibits. Plan to accompany attorneys to plaintiff's counsel's office for review/copying of plaintiff's exhibits.	

	Contact Information. Create a phone/address list for your trial prep notebook. The list needs to contain the following: individuals' cell phone, office and home telephone numbers, as well as hotel room telephone numbers, copier repair number (preferably beeper), hotel contact numbers, local counsel phone/fax, experts' phone/fax, copy vendor phone number, graphics/photo vendor number, court reporter number, clerk number, investigator number, fact witnesses subpoenaed numbers. ***Have a back-up person at the office to assist with logistics and other matters while the paralegal is at the trial site.***	
	Expert Disclosures. Check plaintiff's and defense expert disclosures as they come in to verify that all testimony that experts will rely upon has been collected.	
	Experts. Keep a chart of material sent to the experts in each case. ***Carefully log the expert's reliance materials that are produced by either side. Label and process for the file pursuant to the team's protocol.***	
	Experts. Keep a chart of the experts' availability for trial.	
	WAR ROOM SET-UP	
	If your war room is located inside the hotel, ask the sales manager and catering manager to refrain from posting any welcome messages or signs on the public marquees, in the lobby or outside the war room space, or in published meeting schedules available to other hotel guests.	
	Contact Information Charts. Use easel pad to create charts of contact numbers to post by telephone. The charts need to list the following: individuals' room numbers, copier repair number (preferably beeper). Hotel contact numbers, local counsel phone/fax, experts' phone/fax, copy vendor phone number, graphics/photo vendor number, court reporter number, clerk number.	

	File Organization. Organize exhibit boxes, witness files and other files on tables or shelving units. Put exhibit boxes in numerical order and witness boxes in alphabetical order.	
	Supply Organization. Organize supplies in a central area similar to the manner in which they are organized in the firm's service centers. Use box lids to create in/out boxes for each team member and expert as they arrive.	
	COURTROOM SET-UP	
	AV Equipment. As mentioned above, arrange with clerk/ audiovisual vendor to set up and test all equipment the day prior to trial. Make sure you know how to hook up and operate all equipment.	
	Exhibit Files in Courtroom. If possible, set up exhibits in numerical order by box in an area beside the defense side of the gallery or in the gallery. You may want to consider having the following notebooks on hand: Pretrial Submissions (including Exhibit Lists, Witness Lists and Jury Instructions), Motions in Limine, Motions for Summary Judgment, Hearing Transcripts, Key Documents, Daily Copy (3 copies, see above). Take witness files for witnesses called each day. Prepare a supply box with pens, pencils, markers (various colors), flags, post-it notes, tape, stapler/staples, highlighters.	
	Easel. Place an easel in a convenient location near defense counsel's table. Place markers of various colors on the easel. Make sure the easel is securely fastened and will not slide up, down or close during frequent use.	

	TRIAL ASSISTANCE	
	Professional Conduct. At all times when coordinating with court and hotel personnel—and when traveling to and from the trial city, or when in the trial city—conduct yourself in a professional manner. Do not discuss the case with anyone outside of the defense team. It is likely that you will come in contact with people who know opposing counsel, the plaintiff, jurors or court personnel. You must be professional at all times, whether at the grocery store, in a restaurant, or in the airport. The walls have eyes and ears.	
	Witness Files. Pull materials from witness files as needed to correspond to witness outlines. If you know in advance the materials to be used, pull them.	
	Witnesses. Call witnesses as needed.	
	Copies. Locate a credit card or coin-operated copy machine in the courthouse, usually in the law library. Many librarians have copy cards available for advance purchase.	
	Cross / Direct-Examination. Review prior testimony to find cross-examination excerpts and prepare witness files materials /exhibits in order of appearance on cross/direct outline. Know the trial line-up and responsible attorney. Obtain outline and highlight exhibits that are referenced. Make an index of exhibits in outline and pull copies. Update from final outline (may be in written form). Add to trial notebook when done. Don't wait to be asked. If exhibits/demonstratives will be presented through a software program, keep hard copy of the demonstrative in attorney's prep file and have a hard copy for the court in the event that the computer doesn't work. Have four copies of exhibits ready for court. Highlight and flag two copies (attorney and witness) and keep two copies clean (plaintiff's counsel and court/evidence.	

	Drafts. Ask the attorneys how they want to be given drafts of materials.	
	Travel / Hotel Arrangements. Coordinate travel transportation / hotel arrangements for experts.	
	Organization. Pull, refile and organize all materials in the war room. **Reorganize every night so that the war room is in order each morning.**	
	Copies / Blowups. Coordinate all copies/blowups needed.	
	Supplies. Notify firm support personnel of the trial and need for copier, fax, telephones, moving truck, easels, service center dolly and office supplies eight weeks in advance of trial. Be aware of equipment, such as easels, microwave and coffee maker, that may already be the property of the team and obtain from storage.	

Clerk. Contact the Court Clerk to obtain information on the following:

- Does the judge allow AV equipment?
- Do we need an order for AV equipment and/or oversized exhibits?
- Does the Court use a specific court reporter or do we need to retain one? If we prefer to hire our own court reporter, will the court allow it? If we can and do so, is a room available for him/her to use to prepare the daily copy?
- Do we need to meet with security and scan boxes prior to entering courtroom?
- Where can we unload? Loading dock or freight elevator?
- Is there a room we can use for storage or can we leave boxes of exhibits in the courtroom?
- Can we prenumber exhibits? Obtain any specifics about numbering.
- Is there a room for meeting during the lunch break?
- Obtain copy of prospective juror list as soon as it is available.
- Arrange date immediately before the start of trial to set up AV equipment and large exhibits.
- Arrange for filing of any necessary original discovery and deposition transcripts.

	AV Equipment. Arrange to meet audiovisual vendor at the courtroom to measure courtroom dimensions, entrances/ exits, etc. for setup. Consider at least 1-2 large screens for the jury; 1 small screen for the judge, and 1 screen for each counsel table (depending on size of the courtroom). Place audiovisual service "on Call' for the first few days of the trial. **Double-check in advance with the AV company to be sure they can provide all the equipment required.** Contact firm personnel to provide a visualizer and screen, TV, DVD player, etc., as needed.	
	Juror Checklist. When prospective juror list in received, create juror chart for *voir dire.*	
	Demonstratives. Check with trial attorneys for their preference for the format for the demonstratives (boards, visualizer, computer?). Work with trial team person responsible for demonstratives, if appropriate, or make arrangements with national demonstratives vendor and local vendor for poster board graphics. Allow time to update the Master and Trial Exhibit lists with new demonstratives and foundation materials. Contact experts to obtain list of exhibits they intend to use. Ask whether they plan to prepare demonstratives, or do we need to prepare. Double-check foundation materials to be sure the exhibit list is current for each demonstrative exhibit. Arrange for prompt service from the graphics vendor during evenings and weekends. Consider placing vendors "on call" for first few days of trial.	

	Court Reporting. Coordinate with court reporters for pretrial hearings, daily copy, ASCII and transcript. Prior to trial, discuss payment options with the court reporter. Prepayment will require a letter from the court reporter identifying his/her name, address, telephone number, tax identification number, fees and amount of deposit requested. Arrange for time and location for drop off or pick up of daily copy. Have double-sided copies made of daily copy for war room and courtroom (multiple copies for attorney, associate, judge). Load transcripts into software each night.	
	Copies. Locate a local copy vendor who will be able to pick up, work late in the evening and have the job back in the morning. Get pager numbers of local reps.	
	Local Counsel. Contact local counsel's legal assistant for the following: • Key to their office for emergency overnight access. • Dimensions of courtroom doors/elevators for oversized exhibits. • Location and number of outlets in the courtroom. • Recommendations and contact numbers for AV equipment vendors, copy vendors and trial graphic vendors. • Coordinate preparation of subpoenas/service of subpoenas for fact witnesses. Ask him/her to contact fact witnesses to keep them apprised of trial schedule.	

	Other Counsel. Discuss with attorneys whether someone should contact other counsel to inquire whether they will share the cost of the court reporter and AV equipment.	
	Truck. Determine the number of vans required based on number of people and number of boxes being transported to court. Remove rear seats from van to allow room for boxes. Inquire as to insurance coverage, authorized drivers and limitations such as age requirements of drivers.	
	General Materials. At least four weeks in advance of trial, coordinate with a responsible attorney to identify materials needed from the general client files. Allow ample time.	
	Witness Files. Make sure there are additional clean copies of each witness deposition and CV (one for us, one for court and one for opposing counsel/codefendant's counsel). Consider copying the first (cover page of each of these in red card stock for easy identification of the clean copies. The witness file should also include their disclosures, expert reports, trial outline, list of reliance materials, and copy of reliance materials. Consider creating an index of witness files and index of deposition exhibits. Organize the expert witness files in one set of boxes and fact witness files separately. Place them in alphabetic order.	
	Plaintiff's and Defense Experts. Collect previous testimony by plaintiff's experts from various databases. Review for helpful cross-examination information.	
	Witness Lists. Review lists when filed to insure we know all witnesses identified on plaintiff's list. Keep list of witness names, contact address/phone information handy.	

	Witness Notebook. Prepare a witness notebook with examination outline, deposition manuscript, deposition summary, list of exhibits to be used with each witness.	
	Trial Notebooks. Create a trial prep notebook for your use before and during trial. Prepare trial notebooks for attorneys—contents may differ and you can check with them on their preference of materials to be included. Also know the attorney's preference for set-up of notebook: type of tabs (name or number), double-sided copies or single page copies, notebook or spiral bound, etc.	
	In Limine / Summary Judgment Notebooks. Create a separate notebook with each motion, brief and cases cited. For the attorney, have one notebook for each motion, followed by the case law for that motion. In a box, place each motion followed by separate file folders containing two copies of the case law cited in the motion. Create a composite notebook with motions, brief and orders only. Consider a duplicate set for the courtroom and war room.	

EXCERPTS FROM OPENING STATEMENTS

General Motors was sued in a product liability case by the estate of Jerome Brown, a Philadelphia Eagles football player killed in a single-vehicle accident while he was driving his new Chevrolet Corvette. The question was whether an alleged defect in the vehicle caused his death.

The case went to trial in the spring of 1999. One of the co-authors, George J. Lavin, Jr., represented General Motors. His opening statement to the jury went on for more than an hour, but this is how it began.

Jerome Brown was a magnificent football player. On the football field, he was big, fast, aggressive, and powerful. Unfortunately, the evidence will show that on June 25, 1992, he drove like that when he got into his Corvette, at Brooksville, Florida. He became aggressive, powerful, and fast as he drove his Corvette uphill against traffic on the wrong side of Hale Avenue.

On the football field, ignoring the rules and making bad choices can result in a big play for the opposition. The evidence will show that on the highway, ignoring the rules and/or making bad choices, mistakes, or errors can result in a catastrophe. On June 25, 1992, it did.

Today we are starting the process to determine whether the fatal accident of June 25, 1992 was because Jerome Brown made choices which became fatal, or Jim Karlow, a GM engineer, made decisions which caused Jerome Brown's death when he approved the air bag system utilized by the 1991 Corvette ZR-1....

General Motors was sued in a product liability case by a young wife and mother who suffered a catastrophic brain injury that required around-the-clock care. One of the co-authors, Chilton Davis Varner, represented General Motors. This is how her opening statement to the jury began.

It was a cold, overcast morning that Monday in December when Thomas Jones and Andrea Haines – each previously unaware that the other existed – came together on Newtown Pike in a disastrous crash that changed a lot of lives. Thomas Jones, a University of Kentucky student, was driving his 1989 Mercury Cougar south on Newtown Pike at a speed estimated to be 50 miles per hour. Speed limit: 35. He was on his way to the University to turn in a paper due later that day. As Mr. Jones crossed the railroad tracks [going around a curve], he lost it. His car first rocketed off the right hand side of the road, actually riding up onto the sidewalk. Fighting to regain control, Mr. Jones obeyed his instincts and yanked the steering wheel as hard as he could back to the left [gesture]. He overcorrected, and his leftward yank now sent the Cougar racing in the opposite direction toward the concrete median, six inches high and four feet wide, that separated the two southbound lanes from the two northbound lanes.

Still out of control, the wheels of the Cougar began to slide, laying down rubber marks that you can see in the photos taken at the accident scene. Still going at a high rate of speed, the Cougar's front wheels slammed into the median, which acted as a ramp, causing the Cougar to become airborne. With wheels off the ground, the 3,700-pound Cougar crashed into the side of the smaller 1988 Pontiac Grand Prix driven by Andrea Haines, on her way to an early lunch. The Cougar struck the Pontiac in the area of the A-pillar [explain].

The Haines Pontiac slowed but did not stop the Cougar. The Cougar's bumper was actually split by the A-pillar. The Cougar then rotated counterclockwise, its bumper ripped off, and tore down the driver's side of the Pontiac. The A-pillar, a strong structural member, directly in the Cougar's path, was crushed, and moved inward. [Quietly]. Andrea Haines was also in the path of the Cougar. In harm's way.

The Cougar – white in color – left its fingerprints all over the inside of Mrs. Haines' Pontiac. So you will have evidence that the Cougar in fact got inside the passenger compartment. You will hear evidence that white paint from the Cougar marked the Cougar's trail through the Pontiac:

- There are transfers of white paint not only on the outside but the inside of the Grand Prix's A-pillar (inside the passenger compartment);

- White paint is on the instrument panel of the Pontiac (inside the passenger compartment)

- White paint is on the driver's window sill (inside the passenger compartment); and

- White paint is on the driver's side shoulder belt worn by Mrs. Haines (inside the passenger compartment)

Little white fingerprints of where the Cougar bumper was. Such marks are, for good reason, called "witness" marks, because they testify as to what was where.

Following the collision, both the Cougar and the Grand Prix rotated away from each other in a counterclockwise direction. The Grand Prix ended up 80 feet away, facing in the opposite direction from that in which it had been traveling. The Cougar traveled some 60 feet going the wrong way in the northbound lanes before sideswiping a second car, Chad Buckner's 1984 Dodge Daytona. Mr. Jones' Cougar finally came to rest near the Daytona.

Mrs. Haines received a severe head injury. You will learn a fair amount about head injuries in this case. You will learn that - contrary to what a lot of us grew up believing - you don't have to have a skull fracture to be badly hurt. Indeed, sometimes the most crippling head injuries leave no outside marks, either in the form of fractures or contusions. You will hear that accelerations and decelerations of the head can cause massive injury to the brain inside. When the head is accelerated, as in a crash - and then stopped suddenly by impacting something - as in a crash, the brain operates as the laws of physics say it must. In my sixth grade general science class, I was taught the definition of inertia, and you will hear it in this trial: the tendency of a body in motion to continue in motion until stopped by something. The brain is suspended in the skull - and when the skull stops, the brain continues until it strikes the inside of the skull. This can tear the axons in the brain. It can cause bleeding, clots and swelling of the brain. All of that happened here. Mrs. Haines, found slumped, unconscious, unresponsive, in her car after the accident, suffered both what is called a subdural hematoma (a large bleed) and what is called a diffuse injury (or tearing of the axons), affecting both sides of her brain. She has suffered permanent brain injury.

Mrs. Haines also suffered other injuries which healed satisfactorily:

- A deep puncture wound to the back of her left shoulder.

- A fracture of the first and third ribs on the left.
- A left-side fracture to the T-1 vertebra in her spine [explain].
- Cuts and lacerations to her left ear and left side of her face.

These secondary injuries are important, not because they still disable or impair Mrs. Haines, but because they all indicate the left-sided nature of this accident.

This case is about who should be responsible for Mrs. Haines' undeniable injuries. Let's get something straight here. You won't hear any evidence at this trial that Mrs. Haines did anything to cause this accident or her injuries. Andrea Haines, loving wife, mother of two, simply had the tragic misfortune to be in the wrong place at the wrong time. Bad things can happen to good people. You will also hear undisputed evidence that Thomas Jones lost control of his Mercury Cougar, so that his car was aimed like a battering ram, right at the left side of the Pontiac, right at Andrea Haines, causing the accident.

In contrast to those undisputed facts - Mrs. Haines was not responsible for the accident, Mr. Jones was - the remainder of the evidence in this phase of the trial will go to whether GM bears some liability, whether GM did something wrong in the design of this car which *enhanced* - that's a critical word - or made worse the injuries Andrea Haines would have received anyway in this violent accident.

General Motors will bring you evidence that the Pontiac was well and safely designed. This was a good car. General Motors will bring you evidence that the Pontiac Grand Prix fully complied with or exceeded all federal safety standards for cars. General Motors will bring you evidence that once Thomas Jones launched his Mercury Cougar airborne right at the driver's position of the Pontiac, there is nothing GM or anyone else could have done to prevent the tragic injuries Mrs. Haines suffered. GM will bring you evidence that - given this accident - there is no car or truck which could have protected Andrea Haines from her injuries; that had Mrs. Haines been riding in a Ford, a Chrysler, a Toyota, a Cadillac, a Honda - when a two-ton battering ram comes right at you at 35 miles per hour, separated only by the three or four inches of side structure, that battering ram wreaks havoc beyond the ability of any A-pillar or any seatbelt to prevent.

It may be helpful here at the outset to organize the evidence by reference to the factual disputes you will be asked to decide. This is what I call a

classic jury case. What I mean by that is there will be conflicting versions of the facts which come to you from the different parties, and it is up to you, the jury, to weigh that conflicting evidence, sift it, compare its credibility and decide the truth of what happened that Monday on Newtown Pike. That's not my job, that's not Mr. _____'s job, that's not even Judge Paisley's job. That's your job as the jury – to resolve the factual conflicts.

Well, what are they? There are four primary ones, I think. **[Overhead]** Each of these questions is related to the others; how you answer one affects how you answer the others. Let's talk about each individually. **[Overhead]**

1. How did the Cougar strike the Pontiac?

[DISCUSSION OF EVIDENCE TO BE COMPARED IN CLOSING]

2. How did Mrs. Haines receive her head injury?

[DISCUSSION OF EVIDENCE TO BE COMPARED IN CLOSING]

3. Would additional padding on the A-pillar have prevented Mrs. Haines' head injury?

[DISCUSSION OF EVIDENCE TO BE COMPARED IN CLOSING]

4. Would a differently designed seatbelt have prevented Mrs. Haines' head injury?

[DISCUSSION OF EVIDENCE TO BE COMPARED IN CLOSING]

Here is how Ms. Varner began her opening statement in another case.

You have an important job these next days: you will be asked to be the judges of the right and wrong in a violent and tragic wreck. You'll be asked to decide whether ABC Motors did a good or a bad job in designing its 1995 pick-up truck in which Jody Hayes, Jeremy Pearson and Emily Stevenson were riding that Saturday night in February 1996 -- just about four years ago -- when things went terribly wrong.

We are here today because two young people died in a wreck that never should have happened. The story is all too sadly familiar:

- teenagers feeling their oats;
- experimental cocktails with borrowed liquor;
- a Saturday night party with still more alcohol; and under-age drinking;
- a long drive home;
- failure to buckle up;
- failure to make a curve;
- an extraordinarily violent accident;
- the phone call every parent of a teenager fears.

According to plaintiff's lawyer...the reason for these deaths is clear. It's all ABC's fault. He says the plaintiffs will prove that ABC knew the fuel system in its 1995 pick-up truck was dangerous, that ABC deliberately ignored problems for years, and that these two young men burned to death in an otherwise survivable accident, all because ABC was more concerned about profits than safety.

Ladies and gentlemen, the real facts of this case are quite different, and I want to tell you about them.

Although ABC believes firmly that plaintiffs' charges are unfair, we also understand that these are questions you as the jury must decide for yourselves. And I will tell you candidly, here at the outset, this is a case fraught with puzzles. This is what I call a classic jury case -- a case where there will be directly conflicting accounts of the same event. It will be up to you to sift that conflicting evidence to arrive at the truth -- that is your job, as a jury. It's not the lawyers', it's not even Judge Bryan's. It's yours. Our job as lawyers is only to present the evidence -- as clearly and understandably and fairly as possible - - to help you do your job. You are going to have to hear the evidence, weigh it, and make up your own minds about those puzzles.

On February 17, Jody Hayes and Emily Stevenson had their first -- and, sadly, their last -- date together. They spent the better part of that Saturday in each other's company:

- Shopping;

- Emily meeting Jody's parents at their farm;

- Their first bona fide date: supper at Burger King and then a party at the trailer of an acquaintance.

[Use timeline] But somebody else went on that first date with Emily and Jody -- and that somebody was ALCOHOL. Jody's and Emily's first stop was the Winn-Dixie parking lot, where Buffy Hayes (the elder sister who was of legal age) gave them a bottle of bourbon.

Jody and Emily then drove to a second parking lot, the Food Fair -- where they met two other teenagers, Alicia Benson and J. J. Trimbleton. They all piled into Jody's truck, headed for Burger King. After supper, they stopped for cups, soft drinks and gum at the Amoco Quick Mart across the street -- the purpose of that purchase is not hard to figure out -- and headed off to Jackson's Gap where there was a party going on.

There will be evidence that there was drinking in transit, and that the pace picked up considerably when they got to Jeff Walker's trailer. There were wall-to-wall people there. There was also a keg. For $4.00, you got a beer cup and a black "x" on the back of your hand.

Temperance was apparently in short supply that night. There will be evidence, we believe, that those who saw Emily also saw her 32-ounce cup, and there will be evidence that Jody was visibly intoxicated. While the evidence may vary from person to person, there were reports from some that Jody was staggering, from others that he was sick to his stomach.

Around 10:00, the quartet of Emily, Jody, Alicia and J. J. left the party. J. J. drove, presumably because, as Emily Stevenson will testify, he had had the least to drink. The four returned to the Food Fair parking lot, where Alicia and J. J.. picked up their cars to go home. Emily and Jody still had a long drive ahead to deliver Emily to her home in New Site, after which Jody would need to drive back to Phenix City. **[map]** A long road. Particularly given that alcohol had been a companion all night long.

A Good Samaritan came along. Jeremy Pearson, whom Emily describes as "her best friend," was also in the parking lot and offered to ride with Emily and Jody to make sure they got home safely. As best we know, no one will testify they had seen Jeremy drink alcoholic beverages that evening. He had not been at the party. A blood test done after the accident

did not show for Jeremy any blood alcohol content. In one of the puzzles of the case, however, Jeremy did not drive. Instead, as everyone --including Emily -- will testify, Emily was behind the steering wheel as the truck left the Food Fair parking lot.

Puzzle Number 1:

Who was driving at the time of the accident? The last people to see the threesome say this **[DIAGRAM]** was the seating arrangement. No one disagrees. This is undisputed. But Emily -- the only person who can tell us from personal knowledge -- says things didn't stay this way. She will tell you the truck stopped at the old Gamble store so she could go to the bathroom at the back of the store. When she came back to the truck, Jody wanted to drive and took the wheel, so now, according to Emily, the seating arrangement changed to this **[DIAGRAM]**.

Five or six miles later, things went terribly, horribly wrong. The truck was coming around a curve, was almost to the end of it, when disaster struck. **[Photo]** At a speed estimated by both plaintiffs and ABC to be 55 miles per hour (speed limit speed), the truck didn't make the curve. It roared across the right shoulder and up the red clay embankment which bordered the drainage ditch which ran alongside the road. **[Photo]** It tore along the embankment at a slant, roughly parallel to the road, scrubbing off a little speed but still going like a bat out of Hades. The truck then slid toward the bottom of the embankment, tipping even farther over toward the driver's side. Still going at a terrifying clip, and only about 15 percent shy of being rolled all the way on the driver's side, the truck slammed into a concrete culvert which carried the drainage ditch underneath a driveway. **[Photo]** The force of the collision was so severe, it crumbled and actually broke the circumference of the concrete culvert. **[Photo]** The force of the collision was so severe it crumpled and broke the truck, too. You will see and hear evidence that this collision, with all of the energy directed down one frame rail, literally buckled that left frame rail, which was without question the heaviest, sturdiest, thickest structural member of the entire vehicle. **[Photo]**

The frame rails of the truck anchor almost everything else underneath, so when the left frame rail corkscrewed, lots of other things had to move and shift, too. This collision was severe enough to violate some of the containers mounted on the truck which contained fluids which burn. (You'll learn that gasoline is not the only such fluid carried by a motor vehicle -- brake fluid, transmission fluid, and a bunch of other fluids are fully capable of being ignited if they are released onto a hot manifold, or other parts of a hot exhaust system, for example.) Indeed, they will auto-ignite more quickly than gas on a hot surface.

But the terrifying, out-of-control rollercoaster ride wasn't over yet. Despite the brutal punishment the truck and its unbelted occupants had already been subjected to, enough wasn't yet "enough." Another final insult was still ahead. When the truck whammed into the culvert, its nose dug in and the rear of the truck (the pick-up box) was vaulted end-over-end so that the truck slammed down on the driveway on its roof, more on the passenger side this time, pointing back the way it had come.

Make no mistake about it, ladies and gentlemen. the evidence will be this was no fender bender, no run-off-the-road and-into-a-ditch accident. This was a horrifyingly violent accident of a severity fully capable -- as you will hear -- of killing people whether or not there was a fire. This was a horrifyingly violent accident which overwhelmed the truck, bending and breaking it and its various parts. That bending and breaking occurred NOT because the truck was defective, but because no vehicle could have experienced this accident without something -- no, lots of things -- breaking. [Undoubtedly, this truck with its heft and off-road structure, did better than most.] Unless we learn something different in this trial from what we learned in preparing for it, you will not hear any witness who sits in that chair state with reasonable engineering certainty that there is another pick-up Mr. Hayes could have bought instead of this one that would have done better, which would have survived this accident intact. Not one. And that includes the witnesses and experts the plaintiff will bring to testify. No one.

With the truck on its roof and the occupants still inside, a fire began. As I will talk about in a minute, the evidence will be that there are various candidates for the source of the fire, only one of them gasoline. Folks who lived in nearby houses heard the crash and came down to look, but none of them attempted any rescue. Enter two more Good Samaritans -- Ronny Sharpe and Stephanie Williams. And these are true, courageous Good Samaritans. They were driving toward Phenix City when they came upon the accident. Both will testify that when they got to the scene, there was no raging conflagration. Both will testify that when they got to the scene, a small fire was burning at the back of the truck and that there was no fire inside the occupant compartment.

They parked, then ran to the overturned truck. They checked out the driver's door, which was closest to the highway, found it shut. They couldn't open it. Ronny then ran around to the passenger side, only to find it even less accessible. He then ran back to the driver's side, where he and Stephanie grabbed hold of the top part of the window frame and managed to twist it away from the cab, enough to allow them to reach

inside. Still no fire inside the cab. They found a person -- didn't -know if it was male or female, dead or alive -- and pulled out someone who turned out to be Emily Stevenson. She was unconscious. Ronny carried her to the front of the truck and put her down on the driveway. He then returned to the cab. Ronny crawled halfway inside and found a second person whom he tried to haul out of the truck. This time he was unsuccessful. Though he tugged and pulled at the person any number of times the person wouldn't move. You'll hear that J. Pearson weighed 200 pounds. As the fire began to enter the cab, Ronny was driven out. He and Stephanie carried Emily down the road from the burning truck. Though they heard one or two pops, you will see that the gas tank never exploded. The pops could have been the tires. But the tank remains virtually intact today. No seam split open, no explosion.

Folks called the fire department and the sheriff and the EMTs. When the fire department got there, they were able to quickly extinguish the fire with just water -- no firefighting foam or anything else needed.

This, then was what the firefighters found. **[Photo]** This was what was left of the truck that had started out from Jeff Walker's trailer. This was the tragic end of a first date gone awry and then gone deadly with alcohol. You'll hear that post-accident blood examinations of Emily and Jody showed BACs of .083 for Jody and .163 for Emily. Zero for J. Pearson.

Make no mistake about it. This was a tragedy. Children shouldn't die before their parents. But we believe the evidence will be that <u>these</u> children died not because ABC did something wrong in designing this fuel system but because alcohol once again got in the way.

I told you that you hold the outcome of this trial in your hands and that you must decide -- as best anyone ever can after the fact -- the truth of what happened in this accident.

To help you decide, I think we can organize the evidence you'll hear into two major categories. When you have heard these categories, you can decide for yourselves whether ABC Motors was responsible for the deaths of Jody Hayes and Jeremy Pearson, or whether instead this was a bizarre, freak <u>accident</u> -- caused by the familiar but dangerous marriage of drinking and driving -- which happened despite all the experience and technology ABC brought to the 1995 {XX} pick-up truck. I promise to lay out the evidence on both sides of the story. The categories are these:

[Graphic A]

1. <u>Exactly how did this accident happen?</u>

[Discussion of evidence - to be compared in closing]

2. <u>The safety of this fuel system.</u>

[Discussion of evidence - to be compared in closing]

1. Exactly how did this accident happen?
    - Who was driving?
    - How severe was this accident?
    - How did the fire start?
    - What was the cause of death?
    - Was there conscious pain and suffering?
2. Was this fuel system defective?
    - How was this fuel system designed?
    - How was this fuel system tested?
    - What was the fate of the fuel system in this wreck?

[Graphic B]

EXAMPLES OF "HOME RUN" CROSS-EXAMINATION

George J. Lavin, Jr.

This is how a "home run" opportunity presented itself to me in an automotive product liability case.

A plaintiff expert's testimony turned upon his assertion that the rear-end crash in question occurred at a closing speed of no more than 35 miles per hour. We knew that the expert would testify at trial that he could closely estimate the closing speed in any such crash simply by studying photographs showing the post-crash structural deformities in the two vehicles.

Before trial, we asked our automotive manufacturer client for photographs of about 40 rear-end vehicle crashes conducted at its Proving Grounds under the very exacting, carefully measured, photographed, and recorded conditions typical in the modern automotive industry. During cross-examination, I took the expert through these photographs, asking him to demonstrate his prowess by telling the jury what the closing speed was in each crash. Most of his estimated closing speeds turned out to be badly inaccurate, as we would have predicted, and as we later showed through our own experts, who had the Proving Ground records.

But there was one photograph in the collection - the next to last -- that did not show a carefully conducted Proving Ground crash. Instead, it showed the struck vehicle in the case at bar, but from a different angle than the expert had seen previously. When we came to that photograph, he confidently told the jury that that vehicle had been struck at a speed of "probably more than seventy miles an hour."

Nothing further was said until our case in chief, when I enjoyed the opportunity, through one of our experts, to let the judge and jury know what had happened.

For more details regarding this particular example, *see* Litvin & McHugh, *Pennsylvania Torts*, Volume 4, Law and Advocacy, Cross Examination, Section 24.9 (West Publishing Company, 1996)

Chilton D. Varner

The following excerpts are from the cross-examination of an expert witness called by plaintiffs, a group of Coca-Cola bottlers who were suing The Coca-Cola Company for damages related to the composition and pricing of Coca-Cola bottle syrup. The contract between The Coca-Cola Company and its bottlers allowed the price of syrup to be adjusted according to quarterly changes in the "market price" of sugar, a major ingredient. The Coca-Cola Company for years had used the published list prices of sugar in calculating the price of bottle syrup. A large group of bottlers challenged this practice, arguing that the "list" price of sugar was an artificial and even fictitious price, *i.e.*, that virtually all sales of sugar in the highly competitive sugar industry occurred at discounted or "off-list" (also referred to as "competitive") prices. The bottlers argued that The Coca-Cola Company should have used these lower prices in calculating the price for bottle syrup.

At trial, plaintiffs presented a sugar broker of 30 years experience as an expert witness. On direct examination, he testified that, except for temporary, brief periods during sugar shortages, no sugar had sold at list price for years. He further testified that virtually every sale brokered by his own brokerage company had been at discounted or off-list prices. This witness was a mainstay of the bottlers' case in chief.

In our pretrial investigation, we found a prior lawsuit that this witness had filed against the country's largest refiner, which had terminated him as an approved broker. Our review of an archived court file revealed that he had taken an affidavit in that lawsuit, one that provided an opportunity for a rare cross-examination Home Run.

EXCERPTS FROM CROSS-EXAMINATION OF EXPERT WITNESS SPENCER FUCHS, A SUGAR BROKER

Q. I would like to talk now about list price, Mr. Fuchs.

As I understand it, you have not had very much experience with list price in the past few years. That is your testimony, correct?

A. That's right.

Q. In fact, you have told us that you have not had much experience with list price since the very early days of your career?

A. That's right.

Q. I think you told the plaintiffs' attorney that your company, Fuchs Sugars and Syrups, has not sold <u>any</u> sugar at list certainly for the last 13 or 14 years, and you sold very little at list even before that?

A. I would say yes. On industrial products, we sold very, very little at list.

Q. Now, as I understand it, it is your testimony that the only time since the late 1960's when Fuchs sold any appreciable amount of sugar at list price was a temporary period during 1973-74 when there was a world shortage of sugar? Is that a fair summary of what your testimony has been?

A. I think that's correct.

Q. So except for the `73/74 runup, Fuchs has not sold any appreciable amount of sugar at list from the late 1960's forward?

A. That is correct.

THE COURT: Till today.

A. Till today.

Q. But in terms of the regular course of business, if you take out the sugar runup that we have just talked about, it's your testimony that Fuchs has not sold any appreciable amount of sugar at list prices from the late 1960's through today?

A. That's correct.

Q. Now, let me explore that with you, Mr. Fuchs, if I can. Isn't it the case that there actually was a good bit of sugar being sold at list prices in the early `70's, for example, in '72-'73, prior to the run-up, even by Fuchs Sugars and Syrups?

A. My recollection is that we sold at competitive, discounted prices, that we didn't sell at list prices. And I would say that during that time frame we sold most of the sugars at competitive prices, not at list.

Q. Let me explore with you some programs that I want to find out about. Is it not indeed the case that in the early 1970's refiners in the Northeast instituted formal programs to insure and support adherence to list prices?

A. I don't recall any major program that we were involved with to insure sales at list price.

Q. Now, Amstar was the biggest refiner out there, was it not?

A. Yes.

Q. It was the biggest refiner in the country, not just the Northeast?

A. That's correct.

Q. It was an industrial leader, was it not?

A. Yes, they were.

Q. And Amstar had, I would imagine, some substantial influence on the pricing practices in the Northeast; is that correct?

A. That's correct.

Q. And Amstar represented a major part of your own business—I think you said this morning [on direct] about 40 percent?

A. Yes, 40 percent of the gross business in 1974.

Q. Mr. Fuchs, do you have a recollection that in the early 1970's Amstar started a formal program in an attempt to assure that Amstar's sugar was sold by brokers and everybody else at list prices rather than at discounted or off-list prices?

A. I don't have a recollection of any such program.

Q. Let me see if I can refresh your recollection. Does the term "bonus incentive plan" mean anything to you?

A. Only in that I heard something about an incentive brokerage plan where sugar refiners discussed paying brokers a higher brokerage commission for sales made at list price than at competitive prices. I remember something like that. It never was implemented, and as far as I recall it never was done with anyone.

Q. Mr. Fuchs, you filed a lawsuit against Amstar, did you not?

A. We surely did.

Q. As a result of being terminated as a general broker for Amstar in 1974?

A. We surely did.

Q. Let me hand you a collection that I put together, and really the only one we need is the first one -- this is a series of published opinions that came out of your lawsuit against Amstar Corporation, and I just copied these out of the law books. You and another broker named Mr. Prael filed suit against Amstar objecting to your termination, did you not?

A. Yes, we did.

Q. You filed that lawsuit about 1974, shortly after you were both terminated?

A Yes.

Q. The first decision in this collection, Mr. Fuchs, is a decision by the judge on something called a motion for JNOV. Would you look at Page 871, please, and I am particularly interested in Footnote No. 5, down at the bottom of the page. Do you see that footnote?

A. Yes.

Q. That footnote reads:

"In 1972 Amstar attempted to alter these incentives by offering the general brokers *a bonus incentive plan.*"

A. Do you see that term?

Yes, I do.

Q. To continue: "Under which those brokers who effected sales at list price - " Do you see the use of the term list?

A. Yes.

Q. To continue: " — received an additional three cents per hundredweight commission while those who sold at off-list received the usual commission of nine and one-half cents per hundredweight." Do you see that, Mr. Fuchs?

A. Yes, I do.

Q. Does that refresh your recollection as to whether or not Amstar in fact implemented a bonus incentive plan whereby it paid brokers more if they sold at list prices than they would pay if at off-list?

A. The bonus incentive plan was never implemented.

Q. It is your recollection that that plan was talked about, but it never went into place?

A. That's correct.

Q. So as far as you are concerned, the bonus incentive plan had no impact at all on Fuchs' business?

A. None.

Q. You don't remember participating in the plan?

A. I know we didn't.

Q. In any event, it had no impact on the way that you sold sugar?

A. That's correct.

Q. In terms of the statements that appear in this opinion, you think they are simply incorrect?

A. Yes, I think they are incorrect.

Q. Mr. Fuchs, do you remember that as part of your lawsuit against Amstar you sought to obtain a preliminary injunction at the beginning of that lawsuit which would prevent, I assume, your termination as a broker?

A. That's correct.

Q. Do you remember that as part of that preliminary injunction proceeding you filed an affidavit describing how Amstar's activities had adversely affected competition in the refined sugar industry and how Amstar's policies threatened irrevocable harm to Fuchs' business?

A. Yes.

Q. Now, you understand what an affidavit is, don't you, Mr. Fuchs?

A. Yes, I believe so.

Q. It is sworn testimony just as the testimony that you are giving from the stand is sworn testimony?

A. Yes, I understand that.

Q. I'd like to show you your affidavit, Mr. Fuchs, from that proceeding and let me mark this for purposes of identification -- I believe the next number is 1201. If you would look at Page 23, please, Mr. Fuchs, of this affidavit, the first page is a certificate from the archives where the records of the lawsuit were filed. This is one of the affidavits that you filed in that lawsuit; is it not?

A. Yes.

Q. That is your signature on page 23?

A. Yes, it is.

Q. Now, would it surprise you to learn that in this affidavit that you spent a lot of time talking about Amstar's bonus incentive plan?

A. Yes, it would.

Q. Would it surprise you to learn that you testified how effective that plan had been in allowing refiners to sell almost all their sugar at list prices?

A. Yes, it would.

Q. Would it surprise you to learn that you said that refiners had been effective in selling a great deal of sugar at list by means of these kinds of bonus incentive plans?

A. That would surprise me.

Q. Would it surprise you to be reminded that you testified under oath in this affidavit that even before Amstar's plan Fuchs had sold about 30 percent of its industrial sugar at list?

A. That would surprise me.

Q. And that you testified in this affidavit under oath that after implementation of the bonus incentive plan, Fuchs sold 90 percent of its sugar to industrial customers at list?

A. That would surprise me.

Q. Well, let's look at it, Mr. Fuchs. Let's look, begin at page 10. I will be happy to give you whatever time you need to read the entire affidavit. But the section in which I'm particularly interested is that which deals with industrial sales. It begins on Page 10.

Do you see where I'm talking about?

A. Yes.

PLAINTIFFS' COUNSEL: Your Honor, may I suggest that the witness be given an opportunity to just read the affidavit, then answer any questions that may be pertinent to it?

THE COURT: I think that is fair. Why don't we take a recess and counsel can alert me when they are ready to proceed.

MS. VARNER: I will be happy to do that, Your Honor.

BY MS. VARNER:

Q. Mr. Fuchs, you have had about a half an hour now to read the affidavit that I gave you just before we broke. I understand you have now completed reading everything except the attachments; is that correct?

A. Yes, that's correct.

Q. Now, in the next paragraph, which is Subparagraph (6), also on Page 12, you go on to say, in a section that I have highlighted in your copy of this affidavit as well, to say that:

"The three cents per hundredweight penalty system produced substantial results."

Do you see that?

A. Yes.

Q. To continue: "Prior to the October 1972 meeting, deponent -- and the "deponent" is you, Spencer Fuchs; is that correct?

A. Yes.

Q. --"deponent estimates that about 70 percent of Fuchs' sales to the industrial markets were below list price, whereas thereafter more than 90 percent of said sales were at the list."

A. Yes.

Q. "Shortly thereafter," you go on, " these percentages related not only to prices of defendant's product, but to prices of the other refiners as well, because the raising of defendant's prices was followed by a rise in the price of all refiners."

Do you see that, Mr. Fuchs?

A. Yes, I do.

Q. Does this language refresh your recollection, this affidavit refresh your recollection as to the fact that before Amstar's bonus incentive plan, Fuchs Sugars and Syrups sold about 30 percent of its industrial sugar at list prices?

A. Yes. I would stand on the information in this document.

Q. All right, sir.

And after Amstar implemented that plan, Fuchs sold about 90 percent of its industrial sugar at list price, did it not?

A. That's what it says here.

Q. And you will stand on that testimony as correct?

A. Yes.

Q. So is it now your testimony, Mr. Fuchs, that indeed Fuchs' Sugars and Syrups did sell a substantial amount of its sugar at Amstar's list prices?

A. Yes.

Q. And it also sold, according to your affidavit, a substantial amount of other refiners' sugars at list price, as well, after that plan was implemented?

A. According to the affidavit it would be true.

Q. And you will stand on that affidavit today?

A. Yes.

EXAMPLES OF CLOSING STATEMENTS

Chilton Davis Varner

During the 1990's, thousands of women filed claims arising from cosmetic surgery involving breast implants. They claimed that silicone leaked from, or bled through, the outer shell of the implants, causing various systemic diseases, ranging from lupus to scleroderma to fibromyalgia. A quickly-formed cadre of plaintiffs' experts moved from jurisdiction to jurisdiction, earning their living from litigation-related activities. Notwithstanding their efforts, by the end of the decade the scientific proof was overwhelming: repeated epidemiological studies found no link between silicon breast implants and systemic diseases. The following excerpt from a closing argument concentrated on how jurors should assess expert testimony.

After all the witnesses, all the endless depositions, all the "may we approach" sidebar conferences, all the breaks for the morning calendars, and all the lawyer oratory and objections, the REAL work now passes to you. We thank you for your time and for your patience. The length of this trial has wearied all of us. My husband says that I am the least patient person he has ever met, and I am certain you have seen my own impatience reflect itself in this trial. But at least doing this is my profession; you are taking time away from your work and your families and your private life to sit as jurors here. The fall season is half gone. You have paid a price to fulfill your responsibility as a citizen, and we are grateful.

Ladies and gentlemen of the jury, you now begin your work. And it will be hard work. First, because as I told you in my opening statement, there are a number of factual disputes in this case: witnesses who don't remember what doctors wrote down, experts who disagree about what tissue slides show. You are going to have to resolve those disputes, measuring them by the credibility of the witnesses and against your own common sense and experience.

Another reason your work is going to be hard is that you are being asked to decide, based on your four and a half weeks in this courtroom, complex issues of science and medicine. I hope we have brought you witnesses who can help you understand those issues.

Finally, your work will be hard because this is a case which pits one lady who is sick against a big corporation. You would not be human if the scales of sympathy didn't tip a bit in favor of Sandra Taylor. Surely, we all feel sympathy for her. I am sorry we've had to be on opposite sides,

in an adversarial posture. I wish we hadn't had to present some of the evidence of her past history. I wish Sandra Taylor had had some way to avoid the harshness she's experienced in her life. I wish Sandra Taylor could be healthy. If I feel this way, I know how you must feel. You'd like to help Sandra Taylor. But trials are not a matter of sympathy. They are not a matter of "helping out." They are, as we shall discuss, a matter of whether Alpha Medical Systems violated a legal duty to Sandra Taylor and her husband. You are the ones who will decide that, and you must do it on the law and the facts -- not on oratory, not on what might make you feel good, not on emotion. The law -- and the facts.

You are well-equipped to do that. We have watched you as the time has rolled by, and you have struggled to stay alert and interested and attentive, no matter how long the trial has lasted.

Let's start with the law, as Judge Hatfield will instruct you, because I think it provides a road map, a framework by which you may order your discussions so that you can arrive at a just result in the shortest amount of time.

The Taylors have essentially two claims against Alpha Medical Systems. First, Sandra Taylor has a product liability claim -- that is, she claims Alpha Medical Systems' double lumen breast implants were defective and unreasonably dangerous. Those are strong, harsh words. Listen to them. DEFECTIVE. UNREASONABLY DANGEROUS.

Well, how do you tell if Ms. Taylor's implants were DEFECTIVE or UNREASONABLY DANGEROUS? Judge Hatfield will tell you a product is unreasonably dangerous if, given the state of scientific and technical knowledge at the time of meeting, a reasonably prudent manufacturer would not have placed the product on the market. Three things:

(a) Alpha made these implants in 1983 and they were sold in 1984, so that is the time you should focus on -- not 1989, not today.

(b) It is scientific and technical knowledge that is the benchmark, not speculation or hindsight;

(c) Standard: one of ordinary, reasonable care.

But your analysis doesn't stop here. Even if you could somehow find that Mrs. Taylor's breast implants were unreasonably dangerous or defective, that -- standing alone -- still wouldn't justify your returning a verdict

against Alpha Medical Systems. You have to go a step farther and find that the defect caused Mrs. Taylor's physical complaints.

Only if you find both prongs -- defect and causation -- may the Taylors recover. Only if you find both prongs -- defect and causation -- may you even consider Mrs. Taylor's injuries and damages.

I told you in my opening statement that the key question in this case would be CAUSATION -- and I hope you have listened to all the evidence with that in the back of your mind. Do breast implants cause systemic disease? And was it Mrs. Taylor's implants that caused her physical complaints?

So that's the law. Let's look now at the facts.

I told you in opening that Alpha Medical Systems' evidence would fall into four categories, and I think it has.

[Overhead.]

1. Silicone is safe.
2. Alpha Medical Systems was a good company which sold a good product.
3. Breast implants do not cause disease.
4. Sandra Taylor's physical complaints have other causes.

In short, the evidence here has been that:

(a) there is neither a defect NOR

(b) causation,

and if that is so, you must return a verdict for Alpha Medical Systems. Let's look at what the evidence has been.

As we start, let's consider for a moment the experts you've heard. As Judge Hatfield will tell you, the law permits and indeed encourages the use of "expert" witnesses in a scientific, technical case like this: professionals trained in the fields at issue who come and give you their opinions on the disputed questions. Plaintiffs called three such witnesses: Pierre Baker, the former Canadian health agency employee; Saul Pearson, the pathologist from New York City; and Arthur Brannon, the rheumatologist from Long Branch, New Jersey.

The defendant Alpha Medical Systems called four experts: toxicologist Joe Reardon, formerly of the FDA; Howard Orr, the epidemiologist who used to work for CDC; Mark Wickstrom, the pathologist from St. Louis, board-certified in 5 specialties; and Bob Tremaine, the rheumatologist from Vanderbilt.

We'll be talking in more detail about these folks, but I think there is an important distinction between the two groups of experts. Plaintiffs will tell you should believe their witnesses because they are the real "silicone specialists." Dr. Brannon has seen 470 women with implants; Saul Pearson has seen implants from 2,000 women with silicone breast implants; Pierre Baker, a chemist, says he has seen over 4,000 implants. Plaintiffs argue this means you should give greater weight to the opinions of these three.

Not so fast. Think for a minute about how these three earn their living: each is dependent on the continued existence of breast implant litigation. Were this litigation to vanish tomorrow, the Bakers, the Pearsons, the Brannons would be out of a job (or at least the lion's share of their jobs). Arthur Brannon, isolated up there in Long Branch, N.J., a tiny beach town of 27,000, has made at least $675,000, he told us, in the last two years, seeing women on a one-shot basis and telling them they have silicone-induced disease. Dr. Pearson, who left Mt. Sinai Hospital in New York City only to be censured thereafter for academic misconduct, is still waiting for the phone to ring, for someone to ask him to give some kind of lecture to somebody at Columbia in what appears to be a phantom lectureship -- an unpaid position, if you please. But Dr. Pearson has kept himself busy -- and paid -- while waiting by photographing hundreds of tissue slides with equipment bought and paid for by plaintiffs' attorneys. He, too, has earned hundreds of thousands of dollars for his services. And Pierre Baker has traveled the country, testifying hither and yon in silicone breast implant cases, which form the bulk of his work load as a consultant.

Just how objective do you think these fellows can be? Were breast implant litigation to vanish tomorrow, Alpha Medical Systems' witnesses would not miss a beat: Dr. Joe Reardon would continue to work for the other clients who make up more than 90% of his practice; Dr. Howard Orr would continue to report to his full-time job managing Prudential's HMO; Dr. Wickstrom would continue to teach -- really teach -- pathology at Washington University in St. Louis; and Dr. Bob Tremaine would continue to teach and cure and practice rheumatology at Vanderbilt. Alpha's witnesses are not financially dependent on these lawsuits: plaintiffs' experts are. What would you expect someone to say who has developed a practice and been paid more than a half-million dollars -- almost $700,000 --

to say women are sick from a disease no medical school has recognized?

Think about this, and what it means for the credibility of the witnesses.

Okay. Let's go to our four categories of evidence.

1. Silicone is safe.

You heard Dr. Reardon tell and show you the real track record for silicone: for more than 50 years -- a half century: silicone has been eaten, drunk, rubbed on, implanted and inserted in our bodies. Plaintiff's attorney, Mr. Hayes, says he doesn't want it in his blood or lungs -- well, it's there, even in people who have never had implants. It surrounds all of us, and there is no one on this jury who doesn't regularly come into contact with it. **[Slide: uses of silicone.]**

If silicone is that pervasive, if it's all around us, it better be safe. It is.

Alpha Medical Systems became a manufacturer of breast implants in 1977. By that time, silicone had been tested again and again, by research institutions all over the country. The results of those tests were striking in their uniformity: silicone is safe, silicone is biocompatible, silicone is not toxic. **[Timeline.]** These were not tests done for litigation; these were tests done for science. . . .

In a product liability case involving the deaths of two occupants of a motor vehicle, this is how Mr. Lavin's closing statement began.

Ladies and gentlemen of the jury, it has been a long and arduous two and one-half weeks. On behalf of my client, Toyota, I want to thank each of you for your obvious attention, courtesy and much tested patience.

You have all taken a piece of time out of your individual lives to help resolve this dispute. This sacrifice has been important and you should be proud, as we are proud of you and your contribution to the American judicial system.

At times, this may have seemed to be a skirmish rather than a trial. Patience became frayed. At times there was a lot of tension in the courtroom. Tempers were tested and displayed. But if during this time any of the attorneys have done anything to offend any of you, we apologize and ask that you not hold it against our respective clients. Because, we want this case resolved on the basis of the evidence, not the personalities or non-evidentiary related incidents.

You have a tough task ahead of you. I have mine now. In approximately one and one-half hours, I must sum up two and one-half weeks of testimony relating to several years of work.

But your job is much tougher. You have to decide on what evidence the parties produced, not speeches and/or matters which are not evidence.

We can just skim the surface of what you have heard, but it is my job to focus your attention on the areas of dispute and evidence produced in those areas.

Let's go back to where we started. When I spoke to you on Thursday, May 11, I asked each of you to keep an open mind until you heard all of the evidence. It is obvious that you have done that, and I thank you. Tomorrow morning you will retire to commence deliberations and eventually you will return a verdict in this matter.

As I collected my thoughts for my talk with you, I wondered how many of you were aware of the derivation of the word "verdict." For those of you who may not know or may have forgotten, it is derived from a phrase from an ancient language, and according to many translators it means "to speak the truth."

When you took your individual and collective oaths as jurors on May 11, you pledged the verdict you would render would be a "true verdict according to the evidence." That oath will not be upheld if your verdict is based in any respect on

Conjecture
Speculation
Emotion
Prejudice, or
Sympathy.

In the jury selection process, when you took an oath, you told the court, the parties, and our system of justice that you would return a verdict for Toyota if the evidence you have heard from the witness stand calls for such a verdict under the law of Illinois.

Believe me, I am a compassionate and sympathetic individual, as you are. But, as jurors, you are not permitted to take those virtues into the jury room or into consideration during your deliberations in this matter.

If you resolve the factual disputes between the parties exercising your everyday common sense, logic, and collective experience, and apply those resolved disputes to the law as given to you by Judge [XX], the evidence presented to you in this courtroom during the past several weeks, clearly establishes Toyota is NOT legally liable for the deaths of Dr. and Mrs. [YY].

Before I discuss the evidence and what it establishes, there are several comments I would like to make and several favors I would ask of you.

First, I am only entitled to address you once, while Mr. [ZZ] will have the opportunity to speak twice. The reason for this is that the law, in its wisdom, says that the plaintiff has the "burden of proof." There are many things I feel I must discuss with you that are important. If I forget to respond to something Mr. [ZZ] may bring up, it is not intentional.

Second, please remember that what the lawyers say in closing speeches is not evidence. This has been a long trial. We are advocates, and as attorneys our memories may be colored by our respective positions. However, I do have the transcript to keep recollections straight.

Closing speeches are our attempts to analyze the evidence as we see it, but it is your recollection of what the evidence was and what the witnesses said that is determinative. .....

Before we discuss the evidence, I ask each of you once again to extend to my client the courtesy of certain favors. Please consider my arguments. Weigh and test them. If they are logical based on common sense, please accept them. If not, reject them. That's all we can ask. My client is not only a corporation, but a foreign corporation.

[On to: plaintiff's contentions; defendant's contentions; agrees; disputed facts.]

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George J. Lavin, Jr., of Philadelphia, is a nationally-known trial attorney. After serving as an FBI Special Agent for several years, he began a private legal career in Philadelphia with a prominent law firm, where he quickly developed a national reputation as a defense lawyer in civil litigation. Since the 1970's, he has defended national corporations at trials in many parts of the country. In 1985, he founded his own Philadelphia law firm, which has developed into a group of more than 65 lawyers who engage in a multi-faceted general practice while remaining strong in the defense of civil litigation. Mr. Lavin, who has successfully tried hundreds of cases, is a Fellow of the American College of Trial Lawyers, a committee member of the National Judicial College, a lecturer and adjunct professor at several law schools, and an honored member of a number of other national legal organizations.

Chilton Varner has more than 25 years of courtroom experience as a trial lawyer defending corporations in product liability, business torts, and contract and other commercial disputes. She was identified by the *National Law Journal* as one of the country's top ten women litigators in December 2001. She is the senior partner in a product liability practice that was selected by The American Lawyer in January 2004 as one of the top three in the country and by Chambers in 2005 as one of the top five. The 2005 *International Who's Who in Product Liability* judged her the leading product liability practitioner in Georgia. She has served as trial and appellate counsel for a number of the country's largest automotive, pharmaceutical, and medical device manufacturers. She is a Fellow of the American College of Trial Lawyers and a member of its Board. In 2004, she was appointed by Chief Justice Rehnquist to the Federal Civil Rules Advisory Committee.