III. JURY SELECTION

A. Using Jury Questionnaires

One of the most important tools in shaping your jury is the questionnaires which the prospective jurors fill out. While Cook County and most collar counties will provide you these in advance of picking your jury, you should check with the jurisdiction that you are in to see what the local practice is. Some jurisdictions may not provide the questionnaires at the time of trial, but may be made available in advance.

Jury questionnaires will ask prospective jurors basic questions such as:

- Whether he or she is a citizen of the United States
- whether the prospective juror is at least 18 years of age
- their home address
- if they are a resident of (Cook) County
- if they have a disability which would preclude them from serving as a juror
- whether the juror has served as a juror within the past year
- their job or profession
- whether they are married, and have children
- whether they have been the victim of a crime
- whether they know any lawyers, judges, or police officers

By using these questionnaires in combination with your questions during voir dire, you should gain a good sense of who your jury pool is.

The questionnaires should be used as a springboard for your voir dire. A sharp attorney can use information in the questionnaire and subsequent voir dire to excuse an unfavorable juror for cause, thus preserving your five (5) preemptory challenges. Generally, counsel may exercise a preemptory challenge for any reason whatsoever, however, counsel, may not engage in a pattern of excusing potential jurors on the basis of race.

Generally, a juror in Illinois can be excused for cause for the following reasons:

- being under 18 years of age
- failure to be free from all legal exceptions
- failure to be of fair character
- failure to be of approved integrity
- failure to have sound judgment
- failure to be well informed
- inability to understand the English language
- having served as a juror within the previous year
- being a party to a pending lawsuit in that county

B. Making the Most of Voir Dire

1. Generally

There are a number of ways to permit voir dire and counsel should inquire in advance what the court's particular practice is. Some courts allow the attorneys to conduct all of the questioning after the judge makes his initial remarks. The court then simply rules on objections when they arise.

Alternatively, a court may conduct all of the jury questioning. The court may request that counsel submit proposed voir dire questions in advance, and the court will rule on what questions it will ask. Make sure that your proposed questions and the court's ruling are made a part of the record.

Another approach is that the court will conduct the initial voir dire, and allow counsel to supplement it with non-redundant questioning. The court may ask about the jurors' backgrounds and about any preconceptions that they may have. Generally, the court will not permit counsel to question jurors which would indoctrinate them as to the law or the theory of your case.

2. Voir Dire Strategies

Even before being sent out to trial, counsel should determine the ideal jury for his or her case. Counsel should consider the following characteristics: age, gender, profession, ethnicity, family status, and socioeconomic background.

Further, once at trial and as a preliminary matter, counsel should be watching the jurors as they take their respective seats. Body language may provide compelling information which may not be revealed in the questionnaires.

It is also important to track the number of preemptory challenges which you and your opposing counsel use. Record each number in a separate diagram. In exercising preemptory challenges, the court may require that it be done outside the presence of the jury. If not, counsel should state simply, "With thanks, the Plaintiff would excuse Mrs. Jones." The request to excuse a juror should always be made to the court and not to the juror.

Voir dire can often be a tedious task. During questioning, vary the questioning between the jurors. You may be able to ask the entire panel, such as "Have any of you been on a snowmobile before?" Try to get them to open up, like at a deposition. Odds are, you will get much more information.

Try to use the juror's name as often as possible. It is important that you establish a rapport with the jurors. When referring to your client, always refer to them by name as opposed to Plaintiff or Defendant. If you represent a corporation, try to refer to them as "we" or "us." You should always have a corporate representative present at counsel table.

If you are trying a personal injury case, be sure to explore any accidents which the juror or his family members have been involved in. Was there a claim made? Was suit filed? Did the case go to trial? Was the accident victim satisfied with the outcome? All of these are key questions to find the answer to.

Among certain strategies which counsel may be able to engage in are revealing some of the stronger points of the case. Are there key liability issues which counsel can alert the venire? In an auto accident case, it may be possible to reveal that the Plaintiff was completely stopped and rear ended.

Similarly, counsel may wish to "front" certain weaknesses in her case. Perhaps your client has a felony conviction, which you know will be admitted into evidence. How will the jurors react to this evidence? It is best to find out during voir dire. Further, if your client suffers from any handicaps or has speech difficulties, make the jury aware of these know. Ask the juror, "Mr. Jones, my client stutters. You will not hold that against him in this case, will you?"

Explain key terms such as medical language. Repeat these terms or legal concepts such as preponderance of the evidence so that the jury is conditioned to the concepts. One example is the burden of proof. Counsel may ask a potential juror, especially if the juror has served on a criminal case, if he understands that there is a difference between the burden of proof in a criminal case which requires proof beyond a reasonable doubt, and a civil case, which only requires a preponderance of the evidence. It may also be possible to explain the concept of negligence to the venire.

Needless to say, picking a jury is not an exact science. Confer with your client as to who to keep and who you should exercise a preemptory challenge on. Your client may have picked up on something which you have missed, and in the event of an adverse verdict, they will feel like they were part of the process, and will less likely criticize you for any judgment calls.

If representing the Plaintiff, counsel should plan on addressing damages during voir dire. A common type of question is "Mr. Smith, you do not have any quarrel with the law which permits you to sue for legitimate compensation, known as damages, due to the negligence of another?"

3. Jury Panels

Juries are often questioned in a group of 12, or more commonly, in panels of 4. For more general questions, the court may question the entire venire at once. Where questioning takes place with panels of 4, that panel will be questioned and selected before moving on to another panel. When 12 jurors are seated and two alternates are selected, the remaining jurors are excused.

It is often helpful to use diagrams to sketch out jury information. Some lawyers use Post-It Notes to record jury information, and remove the note from the panel if the juror is not selected. A sample diagram can be found below:

First Panel Second Panel Third Panel

If the court uses selecting jurors using the panel method, Plaintiff's counsel will first be required to question all jurors on the panel, and exercise any challenges. Once Plaintiff's counsel is satisfied with the panel, he or she will accept it and tender it to defense counsel. Defense counsel will then question the panel. If new jurors are added to the panel, Plaintiff's counsel may question the new jurors on the panel. Counsel should be aware that most courts do not permit backstriking, excusing jurors whom they previously accepted.

The following is an example of Plaintiff's counsel's voir dire examination in a premises liability case:

VOIR DIRE

1. **Family/Friends – Health Care Field Including Insurance**

Q. What is your occupation or business? What are your spouses?

Q. What was your business or occupation before that?

Q. Have you or any member of your family ever been associated with a claims department of any company?

2. **Business/Background**

Q. What is your business or occupation?

Q. What was your business or occupation before that?

Q. May I have your full name please?

Q. Are you married or single?

Q. Where do you live?

Q. What are your spare time activities, hobbies and vacation interests?

Q. What are your spouses?

3. **Relations/Interest in Case or Parties**

Q. Has anyone heard anything about what is purported to be the facts concerning the occurrence in question or the claims advanced by the parties?

Q. Does anyone have any interest in this case?

Q. Has anyone expressed or formed any opinion on the merits of this case?

Q. Does anyone have any feelings or is anyone aware of any bias or prejudice for or against either side in this case or for or against any party in this case?

Q. Does anyone have any action for trial by jury pending in this court?

Q. Is anyone related by blood or marriage to any of the parties in this case or to any of the attorneys I have named?

Q. Does anyone know any of the parties to this case or any of the attorneys appearing for them?

Q. Does anyone have any business or has anyone had any business in the past with any of the law firms I have named or any of the members or associates of those firms?

4. **Prior Experience as Juror**

Q. Have you ever had prior juror experience? If so, was it civil or criminal? If civil what was the nature of the case and what was the outcome?

Q. Did anything occur during the trial of that case that would tend to prejudice you in this matter?

Q. If served in a criminal case as juror, note that the standard in the criminal case is different than this case?

Q. Would you hold us to a higher duty or a higher burden than the law requires?

5. **Prior Experience in Lawsuits**

Q. Have you, your family or close friends ever been involved in a lawsuit?

Q. Do you have any quarrel with the law, which permits a person to sue for legitimate compensation and damages for injuries sustained due to the negligence of another?

Q. Have you ever been involved in a similar lawsuit, either as a party or a witness? If so, please explain.

Q. Is there anything about the nature of this case or about the parties involved that would make you hesitate to sit on this jury?

Q. Were you ever sued as a result of an accident?

Q. Can we be sure that you will decide the case on the basis of the evidence present in this case?

Q. Have you or any member of your family or a close friend ever been sued? If so, please explain.

Q. Please tell us briefly what the circumstances of your accident were?

6. **Prejudice Toward This Type of Case – Be Fair**

Q. Is there anything about the nature of this case or about the parties involved that would make you hesitate to sit on this jury?

Q. Do you have any prejudices against this particular type of case?

Q. Do you have any quarrel with the law, which permits a person to sue for fair compensation for loss, occasioned by the negligence of another?

Q. Suppose I leave the decision to you, do you know of any reason that I have not asked you about why you could not be a fair and impartial juror for both sides in this case?

Q. Do you understand that what both counsel for the defendants and I are seeking is twelve fair and impartial jurors to decide this case?

Q. And you feel that you can be one of those jurors, do you not?

7. **Apply Law**

Q. Do you understand that each case must be decided on its own facts according to the law?

Q. Will you listen carefully and apply the judge's instructions in this case?

Q. You may hear something said about the burden of proof and the preponderance of evidence. As you know, the plaintiff must prove his case by a probability, which really means that we must prove our case by a greater weight of the evidence. If we do not carry this burden, your duty is clear.

Q. You understand of course that in the criminal court the requirements as to the degree is entirely different that it is in a civil case. In the criminal case the State must prove its case beyond a reasonable doubt. In a civil case, such as we have here, all that we are required to do is to prove our case by a greater weight of evidence. You will only require us to prove our case by a greater weight of the evidence, is that correct?

Q. Will you consider all of the elements the court instructs you to consider in rendering a verdict and give serious consideration to the intangible elements as well as the financial ones?

Q. You are aware that the burden of proof in this case is on the plaintiff. Should the plaintiff carry this burden you will not hesitate to find for the plaintiff and against the defendants?

8. **Render Fair Verdict – Could be Substantial**

Q. Are you aware that you will be asked to determine what is fair compensation?

Q. There are several elements that you will be asked to consider pain, suffering and disability. Will you consider all of the elements the court instructs you to consider and give serious consideration to the intangible elements as well as financial ones?

9. **Easy to File the Suit/Easy to Deny**

Q. Counsel has told you how easy it is to file a lawsuit and it is true that it is easy. It wouldn't be fair to just make charges and collect. However, you know that denial is also easy. Do you agree that if one were able to just deny something and then be considered not liable that would not be fair either?

Q. Can we be sure that if the plaintiff proves his case that you will find the defendants liable?

10. **Sympathy**

Q. Will you follow the law in spite of any feeling of sympathy you might feel for either of the parties?

Q. Do you understand that sympathy has no place in the trial of a case?

Q. Do you understand that the plaintiff is not here to seek sympathy? The plaintiff is here only to obtain what the law provides: Fair, which means full compensation for injuries caused by the defendant's negligence. Do you understand that?

Q. Do you understand that plaintiff is here seeking fair compensation for the injuries he suffered? You understand that sympathy should play no part and that a determination based upon sympathy is not fair and not what the plaintiff has come here for and you believe that you will be able to make fair, honest and intellectual determination on the basis of the evidence?

11. **Case Tried by Rules**

Q. Do you understand of course that cases are tried and governed by rules just as everything else in life?

Q. Now if it should become necessary for either attorney to make objections to certain evidence offered, do you understand that we, by objecting, feel that the evidence that is being offered is not fair and proper according to the rules and that it is our duty to object?

Q. From time to time attorneys on both sides will make objections to the court. Those objections are designed to raise to the court legal questions and controversies for the court to resolve. You will not hold it against either side for making those objections, will you?

Q. Do you realize that neither side is attempting to trick you or hide anything from you by making such objections?

Q You will not hold it against either side will you merely because the court either sustains or denies such objections?

Q. You will not hold it against either party for requesting a side bar, will you?

12. **Excuse Certain Jurors**

Q. Do you realize that when either party excuses you or one of the other potential jurors from jury service it is not meant as anything personal and that both parties are merely trying to select a jury whose background will not make it difficult for them to be fair?

13. **Medical Background**

Q. Are there any people in your family or friends who have medical backgrounds?

Q. Ever employed in any medical field?

14. **Case involves Sprained Ankle and Cervical Strain**

Q. This case involves torn a sprained ankle and cervical strain. Is there anything that you think may make you feel uncomfortable about listening to evidence and testimony concerning this medical conditions?

15. **Listen to Other Jurors**

Q. Can we be sure that you will listen to the other jurors and consider their views?

C. Jury Instructions

For any civil case tried to a jury, counsel will need to submit jury instructions to the court for consideration. Counsel should have a good idea which instructions she intends to use even before making her opening statement. For most standard personal injury cases and simple breach of contract cases, the Illinois Pattern Jury Instruction book should be used. Prepare two sets of instructions, one marked and the other unmarked. On the marked set, there should be a legend on the bottom as follows:

Given _____

Given over objection _____

Refused _____

Withdrawn _____

The marked set should also have the IPI instruction number. The clean set should not have the above legend or citations to any reference to an instruction number.

Even though the IPI provides standard instructions, invariably, counsel must modify them either for gender or the number of parties involved.

For any case or claim which is not covered by the IPI, you may wish to consult other resources at the Daley Center library. For non-IPI instructions, counsel should have authority cited on the bottom of the instruction.

Counsel will attend a jury instruction with the court, likely at the close of the trial. The court reporter should be present. Be sure to have your arguments and legal authorities at hand to so that if a key instruction is refused, the actual instruction and your argument for its inclusion is made a part of the record. Similarly, counsel should be ready to object to her opponent's instructions, ideally with case law at hand.

Use key instructions when making your closing argument. I generally find it advisable to select two or three key instructions, and either paraphrase them, or read them verbatim to the jury. Counsel, may wish to start this part of their closing as follows: "As I believe Judge Jones will instruct you, you should take into consideration your ordinary experiences in the affairs of life when considering this case…"

IV. LITIGATION TECHIQUES AND STRATEGIES

A. Deliver A Compelling Opening Statement

It is often said that 80% of cases are won on opening statements. This is your opportunity to present the jury with your theory of the case, key themes, and the key evidence that you anticipate will be presented. While opening statements can vary in terms of content and order, generally, the following elements should be included:

- Introduction
- The Parties
- The Scene
- The Instrumentality
- Date, time and weather
- Creating the Issue
- Describing how the incident happened
- Basis of liability/nonliability
- Anticipating or refuting defenses
- Damages
- Conclusion

In presenting your introduction, you should first re-introduce yourself. Then, in one or two sentences, present your case. You may be able to do this with a rhetorical question, such as, “Ladies and gentlemen of the jury, why are we here today? We are here because the defendant was negligent when he failed to keep a proper lookout and slammed into the rear of my client’s vehicle causing permanent and disabling injuries.” Some attorneys feel compelled to tell the jury of the purpose of an opening statement, and

say things like, “The opening statement is like a bird’s eye view of the case, and is not evidence…” I feel that saying something like this tells the jury, ignore what I will tell you during the next thirty minutes. Get right into the facts and what happened. The court will tell the jury what to consider.

Remind the jurors of who the parties are. If you represent an individual, tell the jury about the person’s activities at work, home and play. If a corporation, tell the jury a little about the corporate history, what the company does, and attempt to relate it to the jury. For example, “Ladies and gentlemen, I represent the Acme Corporation, and Acme makes specialty food packaging such for products like a salad which you might buy at a restaurant…”

Next, describe the scene for the jury. It is often helpful to use diagrams or photos to explain the scene. Keep it simple, and use hand motions to describe how a car was proceeding through an intersection, for example.

After you have described the scene for the jury, tell the jury about the instrumentalities involved. If it is a product liability case, describe the machinery and how it was intended to work. If an automobile case, describe the cars involved.

If it is important and has not been already mentioned, advise the jury of the date, time and weather.

Next, create the issue for the jury. Use a rhetorical question. “What is the issue that you will have to decide in this case?” You will have to decide whether the defendant was negligent by failing to keep the workplace safe for its business invitees.” If a defendant, you may want to provide the following transition. “The Plaintiff has told you

how my client was allegedly negligent when he entered the intersection, however, that is not what the evidence will show…"

Finally, provide the jury with your version of how it happened. Provide a simple chronological timeline of the sequence of events. You may even wish to describe it in present tense to maximize the impact: "As the Plaintiff is driving through the intersection, the Defendant does not stop, and violently collides into the Plaintiff's car…"

After you have told the jury the story of how the incident occurred, you must address liability. Use another rhetorical question here. If a Plaintiff, "Why should you award my client money damages? What is it that the defendant did that was negligent? Let me tell you…"

Plaintiff's counsel should next address the jury as to what the defendant's defenses will be, and how to appropriately refute them. Plaintiff's counsel may start by saying, "We expect that the defendant will argue that the Plaintiff was contributorily negligent for his conduct. Let me tell you why the Plaintiff did nothing wrong…" Keep in mind that defense counsel may object on the basis that this part of the opening is argumentative in nature. If such an objection is sustained, keep using the mantra, "We expect the evidence to prove that…"

Prior to the conclusion, both Plaintiff and Defendant will wish to discuss damages. For the Plaintiff, you should discuss the Plaintiff's symptoms, diagnosis, treatment, prognosis/permanency, medical bills, disfigurement, and pain and suffering, past and future. Again, during opening, you may wish to use an anatomically correct model, medical illustration, or laminated chart of a body part showing what part of the body was injured, and what medical procedures were performed. If Defendant, you

should express regret at the Plaintiff's injuries, and cautiously make the argument that either your client is not responsible for the injuries as he was not negligent, or that Plaintiff cannot establish causation, and/or in the alternative, the Plaintiff's damages are not as great to the extent claimed by the Plaintiff.

Last, in conclusion, thank the jury in advance for listening to the evidence that will be presented, and state that the evidence that will be presented will support your version of the case. Tell the jury that at the conclusion of the case that you will return to them and ask them to return a verdict in your client's favor.

B. Presentation of the Evidence

1. Introduction

Now that you have your witnesses lined up, how do you effectively present your case to the jury? Should you call every witness, and what order should you present your evidence? This section will address some of these concerns. Prior to trial, counsel should thoroughly prepare his direct and cross examinations. I recommend using Mauet, Trial Techniques for template examinations.

2. Basic Considerations

While counsel may realize that she must call certain witnesses to prove her prima facie case, occasionally she may a choice to call more than one witness to prove the same point. Avoid overkill. Counsel would be wise to pick her strongest witness to testify and provide some corroboration. Oftentimes, attorneys call too many witnesses and simply bore the jury. Weak witnesses may subject to intense cross examination. Only call witnesses to prove a point. Do not wait to call a strong witness in your rebuttal case.

First, it is imperative to win the jury as soon as possible. Second, depending upon your opponent's trial strategy, you may be precluded from calling the witness at a later time.

3. Themes

It is crucial for the advocate to develop a theme or themes to his or her case. Keep it simple. Plan on developing no more than three concrete themes throughout your case. With more than that, the jury will either not remember the points you will be trying to make, or will be confused. Keep the language consistent. If a witness refers to a technical term, repeat it during examinations of other witnesses and during closing argument. Some themes which Plaintiffs may wish to use during the following types of cases include the following:

Accountability
- The buck stops here

Brain Injury
- A mind is a terrible thing to waste
- You can break a watch without breaking the crystal. My client doesn't have a fractured skull, but she doesn't "tick" anymore.

Contracts
- Let's put honor back in the handshake

Defamation
- When you throw a rock into a pond, ripples go out.

Negligence
- The defendant was asleep at the switch
- The left no one to mind the store

Products liability
- The defendant created an illusion of safety

4. Adverse Witnesses

Either side may call the opposing party as an adverse witness in accordance with 735 ILCS 5/2-1102. Supreme Court Rule 238 (b) permits counsel to question the witness as if under cross examination. It is the status of the witness at the time that he is called as opposed to at the time the cause of action accrued that determines the witness' adversity. Kuhn v. General Parking Corp., 98 Ill. App. 3d 570, 424 N.E.2d 941, 948 (1st Dist. 1981). Plaintiff may wish to call the Defendant as an adverse witness in her case-in-chief. In a personal injury case, this is often Plaintiff's first or second witness. Calling the Defendant as an adverse witness to elicit admissions is surely one way to grab the jury's attention. In turn, the adverse witness may then testify in his or its respective case to rebut any testimony elicited as an adverse witness.

5. Demonstrative Evidence

In addition to calling witnesses and introducing substantive evidence, the parties may wish to rely upon demonstrative evidence. Demonstrative evidence differs from substantive evidence in that the former has no evidentiary value in and of itself. The compelling nature of this evidence, however, has been described as the "most convincing and satisfactory class of proof." Virgil v. New York, C. & St. L.R. Co., 347 Ill. App. 281 (1952). Among the types of demonstrative evidence that counsel may wish to consider are illustrations, models, maps, or still photographs. The use of video and computer simulations is discussed in Section C, below.

The trial court will admit the demonstrative evidence when it is relevant, explanatory, and not misleading. Pappas v. Fronczak, 249 Ill. App. 3d 42, 618 N.E.2d 878 (1993). The use of demonstrative evidence is favored when it is used to help the jury better understand the issues in a case, Burke v. Toledo, Peoria & Western Railway, 148

Ill. App. 3d 208 (1st Dist. 1986), but will be excluded when it is solely used for dramatic impact and to emotionally appeal to the jury. Bugno v. Mt. Sinai Medical Center, 201 Ill. App. 3d 245, 250 (1st Dist. 1990).

At trial, the proponent should use the demonstrative evidence during opening statements. A party is allowed to show the jury exhibits which will later be admitted into evidence. Decker v. St. Mary's Hospital, 249 Ill. App. 3d 802 (5th Dist. 1993). Once admitted, counsel should use the exhibits during closing argument as well.

a. Illustrations, Maps, Models and Drawings

Maps, drawings and models may be helpful in depicting the scene to the jury. Medical illustrations may be useful in depicting Plaintiff's injuries in a personal injury case. As long as the party properly authenticates the evidence, it will almost always be admitted. Burke v. Toledo, Peoria & Western Railway, 148 Ill. App. 3d 208 (1st Dist. 1986). In the case of a model or map, however, a further requirement may be that the map or model was prepared to scale. Thus, if the map or model is inaccurate or misleading or does not aid the jury in understanding the evidence, it will not be admitted. Peterson v. Lou Bachrodt Chevrolet Co., 76 Ill.2d 353, 392 N.E.2d 1 (1979). Thus, it was proper for the trial court to exclude a cardboard model of a forklift where it prejudicially implied instability. Little v. Tuscola Stone Co., 234 Ill. App. 3d 726, 600 N.E.2d 1270 (1992). Counsel, of course, must lay the proper foundation for the evidence. Cunningham v. Cent. & S. Truck Lines, 104 Ill. App. 2d 247, 244 N.E.2d 412 (1968).

b. Plaintiff's Injuries

Illinois law holds that it is proper for a Plaintiff to show his injuries to the jury. Duffy v. Midlothian Country Club, 135 Ill. App. 3d 429 (1st Dist. 1985). This includes

the removal of prosthetics to show the jury. Burnett v. Caho, 7 Ill. App. 3d 266, (3rd Dist. 1972) (removal of artificial eye). *See also*, Hehir v. Bowers, 85 Ill. App. 3d 625, 407 N.E.2d 149 (2d Dist. 1980). Plaintiff's counsel should show these injuries to the jury discretely. Further, counsel should also describe on the record what part of the body was burned, the length of the scar, etc. so to maintain a solid record on appeal.

c. Still Photographs

Counsel can use still photographs to show the jury what the scene looked like on the date of the occurrence, or show the jury what the Plaintiff's injuries looked like shortly after the accident. The proponent must lay the proper foundation that the photograph is a fair and accurate representation of the scene or object at the time of the occurrence. Gaunt & Haynes, Inc. v. Moritz Corp., 138 Ill. App. 3d 356 (5th Dist. 1985). The proponent, however, need not demonstrate complete similarity of what is depicted in the photograph to what the scene looked like. *See*, Reid v. Sledge, 224 Ill. App. 3d 817 (5th Dist. 1992). If changes to the scene are explained to the jury, and the jury can comprehend the correct portrayal, the photograph will not be rendered inadmissible. Id. However, the trial court properly excluded a picture of a rail crossing in summer with the trees in bloom and where construction was under way since it did not depict the crossing on the winter morning in question. Tedrowe v. Burlington Northern Inc., 158 Ill. App. 3d 438, 511 N.E.2d 798 (1st Dist. 1987).

C. Direct Examination of Witnesses

1. Lay Witnesses

For either side, making the witness comfortable in the courtroom is paramount. For lay witnesses who have never testified, counsel should take the witness to court and

show them the jury box, where you will be examining the witness. Take the podium behind the last juror's seat and run through your examination with the witness. If you cannot hear the testimony, not only will the witness' testimony fall upon deaf ears, but too soft-spoken a witness may negatively impact upon his credibility.

The jury will clearly assess the credibility of the witness in her ability to recall the particular events of the situation. It is imperative that the attorney prepare the witness in advance of trial. Prior to witness preparation, send the witness her deposition transcript, if applicable, Answers to Interrogatories, and any relevant documents. Review all of these documents with the witness during your trial preparation. During preparation, it is not enough for the advocate to discuss the subject matter of what the witness is expected to testify to. Rather, the attorney should run through the direct examination as many times as necessary before taking the stand. The lawyer should not, however, provide the "script" to the witness as the testimony will appear to be rehearsed. Maintaining a conversational tone with the witness will make the examination appear "live." Explain what documents that you intend to introduce into evidence through the witness. Advise the witness what a foundation is, and what questions will be asked to lay the proper foundation. Counsel should also prepare a mock cross-examination, anticipating what the opponent will test your witness on.

Appearances of the witness are important and can have a profound impact on credibility. Have the witness dress comfortably, but appropriately in light of his station in life and role in the case. A blue collar worker need not wear a suit, but a police officer or fireman, especially since 9-11, should be in uniform. Plaintiffs in personal injury

cases should avoid wearing expensive clothes and wear minimal jewelry. Advise the witnesses to be circumspect about their conduct, even when they are not testifying.

The witness should be given the following standard instructions when testifying, similar to that of providing deposition testimony:

- Take your time when responding to questions;
- Advise opposing counsel if you do not understand the question;
- Use simple words and your own vocabulary unless explaining something technical;
- Do not speculate as to an answer;
- Do not fight with opposing counsel;
- Do not talk over opposing counsel when an objection is made;
- Testify only as what you personally observed or heard;
- Do not volunteer information;
- Always tell the truth, even when it appears to be a damaging admission.

2. Expert Witnesses

Experts are often used to help the trier of fact to understand complex issues. In certain cases, they are required to prove Plaintiff's prima facie case, such as in medical malpractice cases or product liability actions. Other times, they may be useful to establish liability issues (safety expert), or matters that are germane to damages, such as psychiatrists, vocational rehabilitation experts or economists.

What affects the credibility of an expert witness? In addition to the same factors as a lay witness, a number of other issues come into play. If the witness lacks the requisite qualifications, the expert's testimony may be barred by the trial court.

Alternatively, the trial court may allow the testimony but bar the expert from proferring one or more opinions. The advocate should explore the following areas which directly bear upon credibility before having direct or cross-examination:

- Educational background. While it is impressive for the expert to possess stellar academic qualifications, it may not be required for the expert to make a strong impression.
- Real world experience. A juror may make a much stronger connection with the expert if the witness has had substantial hands on experience.
- Bias. Does the expert physician always testify for the Plaintiff? No matter what the expert's academic credentials, and real world experience, if the expert's testimony appears to be biased in favor of one side, it is likely that the jury will entirely disregard the expert's testimony. Always check the Jury Verdict Reporter before your witness takes the stand, or conversely check your opponent's witness history.
- Professional expert. Perhaps more devastating than an apparent bias for one side or the other, is the appearance that the expert will testify as to anything, as long as he gets his fee. During the expert's deposition, explore what percentage of his income is derived from expert testimony work. If the expert cannot recall the percentage, the expert may appear to be dodging the issue.

Testing the expert's familiarity with the case. In certain circumstances, the expert may have excellent academic credentials and substantial work-like experience. He does not appear to be biased, so how does the advocate test the expert's credibility? Cross-examine the expert as to his knowledge of the case. Has the expert reviewed all of the

depositions in the case? Is the expert familiar with all of the witnesses' testimony? Ask the expert if he thinks it would have been important to review a particular deposition. You will probably get a winning response regardless of the answer.

D. Cross-Examination of Witnesses

1. Plaintiff Strategies When Impeaching the Defense Witness

Plaintiff should obtain all documents where the defense witness may have made an inconsistent statement. At deposition or trial, ask the defense witness the critical question. If it is inconsistent with a prior written statement, ask the defense witness if he made the prior statement. Ask the defense witness to identify his signature if there is one on the document. Plaintiff's counsel should determine that the statements are inconsistent and are material, i.e., relate to a significant issue in case.

Set the foundation for the impeachment, and make sure that the defense witness has authenticated the impeaching document. At trial, Plaintiff may wish to call the defense witness in his case-in-chief to immediately show the jury that the defendant is lying. To prepare for this impeachment, have a large blow-up made of the impeaching document.

The following sources may provide for valuable information to impeach the defense witness:

- Internal memoranda
- E-mail
- Letters
- Letters to third parties, such as vendors
- Responses to grievances
- Website pages

- Transcripts from administrative hearings
- Answers to Interrogatories
- Answer to the Complaint
- Depositions
- For an expert, learned treatises

2. Defense Strategies When Cross Examining the Plaintiff

Before confronting Plaintiff's witness on the stand, defense counsel should obtain any statement made by the Plaintiff, whether a deposition, sworn or unsworn statement made to a third party such as a police officer, or documents prepared or made by the witness such as letters or employment applications.

At trial, it is imperative that Defendant impeach the Plaintiff on a key issue in the case. Otherwise, Plaintiff may have a successful objection on relevance/collateral impeachment. Further, Defendant's tactics may backfire in front of the jury who may perceive defense counsel as berating the Plaintiff. It is also essential that the impeaching testimony track the prior inconsistent statement.

The following sources may provide valuable information to impeach Plaintiff:

- Previous employers' job applications
- Employer's job application
- Resume
- Applications for short term or long term disability benefits
- Social Security disability applications
- Transcripts from worker's compensation hearings
- Applications for unemployment compensation

- Transcripts from unemployment compensation hearings
- Tax returns
- Subsequent employment applications
- Answers to Interrogatories
- Depositions
- The Complaint

E. Deliver A Powerful Closing Argument

Your closing argument will incorporate many of the same elements that were present in the opening, and will not be repeated here. Rather, certain practice tips will be presented.

First, construct your closing to argue your theories/theme(s) of the case. If your argument is that the defendant was negligent by dropping the ball, craft your argument around that. Keep in mind that to maximize the effectiveness of your argument, your theories or themes generally should be limited to a maximum of three or four. Otherwise, the impact of your closing will be lost.

Be sure to argue the facts of your case. In doing so, you should attempt to touch upon all of the witnesses. Use specific remarks made by the witnesses. If the court will allow it, and if there is crucial testimony, consider ordering a transcript of a particular witnesses' testimony, to argue the testimony to the jury. This can be very compelling.

Use exhibits during closing. If representing the Plaintiff, you may have exhibits that address damages and liability. Use as many as you can with the testimony of the witnesses. For example, if using a medical illustration to argue a particular injury and surgical procedure, you may wish to argue, as you point to the exhibit, "Remember what

Dr. Smith said? Dr. Smith told you that to repair the anterior cruciate ligament, he had to cut through muscles and tissues…" Other exhibits which you may wish to use during closing include blow-ups of documents, videos of the scene, enlargements of photographs, and computer animations to prove liability issues.

Use favorable instructions during your closing. As mentioned earlier, pick three or four key instructions to use here. Either paraphrase them or read them verbatim. Link the instructions to the evidence.

Rhetorical questions can be a powerful tool to heighten the impact of closing. Depending on the question, you may wish to answer the question or leave it hanging for defense counsel/the jury. If defense counsel does not answer it, you can hammer the point home in rebuttal.

Use stories and analogies which will bring the case home for the jury. In a snowmobile accident case, where the issue is whether signage was visible at night, you might state, "Ladies and gentlemen, the defendant has argued that he could not see the sign on the night of the occurrence. However, as I was driving home from the trial last night, I could see the reflective markers alongside the highway from a quarter mile away, and those reflectors are one third the size of the sign involved in this occurrence!"

Of course, it is important to argue the strengths of your case. Use different witnesses' testimony to hit these points. Similarly, you should also volunteer any weaknesses. Not only will this raise your credibility, but it will take the winds out of your opponent's sails.

If you represent the Plaintiff, you will have the opportunity to make an opening close and rebuttal. As a rule of thumb, your opening close will be twice as long as your

rebuttal. Do not save your great arguments for rebuttal – make them all in your opening close. Be sure you stick to the court's guidelines to avoid running out of time. Your rebuttal is key because it is the last opportunity where you will get to address the jury.

F. The Verdict

Carefully draft the verdict form to avoid jury confusion and post-trial issues. Obviously, your opponent will have reviewed the verdict form, as well as the court, and this may seem obvious, but in complicated cases, confusion over reading the verdict can happen.

If you are representing the Plaintiff, you will want to have as many lines for damages on the itemized verdict form. Research has shown higher jury awards in this instance. Break out past pain and suffering from pain and suffering reasonably certain to experienced in the future. It is not uncommon to have eight or more itemized lines of damages for the jury to complete. Keep in mind that you will only be allowed an itemized line of damages if there was evidence on the issue. Thus, if you are seeking future pain and suffering, be sure to ask your doctor at trial if he expects that the Plaintiff will continue to suffer pain in the future. Otherwise, this will not be submitted to the jury. Consider using a blow-up of the itemized verdict lines which tracks the verdict which you can fill in as you go along in your closing.

In the event of an adverse verdict, have the court poll the jury to insure that this is their verdict.

G. Post-Trial Issues

In the event of an adverse verdict, the losing party may wish to bring a Motion For A New Trial, or a Motion for Judgment Notwithstanding the Verdict. In state court,

this Motion must be filed within thirty (30) days of the jury verdict. In federal court, the Motion must be filed within ten (10) days. If bringing a Motion for a New Trial, point out the specific errors which the court made, ideally supported by case law. If possible, provide the relevant passages from the trial transcript with citations. Keep in mind that the only issues that will be properly preserved will be those which a timely objection was made at trial. While a party need not file a post-trial motion to preserve an issue on appeal, the losing party should nevertheless bring it before the trial court. First, the movant may get relief, and if not, it will impress the appellate court that you tried to immediately correct the error. If bringing a Motion for Judgment Notwithstanding the Verdict, make your legal arguments that your client was entitled to prevail.

VI. TROUBLESHOOTING OR HOW TO BE READY FOR ANYTHING

A. How To Handle Surprises When They Come Your Way

There is an old adage that says, anything can happen at trial. To avoid surprises, prepare, prepare, and prepare more. If you are trying the case with someone else, have them review every exhibit, direct examination and cross-examination. Do a rehearsal for your opening and closing. If you are trying the case by yourself, have another attorney in your office review these things. If that person is unavailable, show your spouse/significant other/friend your exhibits and get their opinions. Perform your opening and closing in front of them, and have them critique you.

Carefully organize all of your exhibits, motions in limine, key orders, direct examinations, cross-examinations, and key case law in a trial notebook. Have all depositions abstracted and flagged for possible impeachment. Have all exhibits pre-marked, and if the court will allow it, binders with tabbed exhibits for all jurors, defense counsel, the court, and for the witness. Make sure that you have properly served all of your subpoenas in a timely fashion. Serve a notice to produce at trial upon your opponent asking him to provide key original documents, updated records, and adverse witnesses for cross-examination.

Make sure that all audio visual equipment is in working order and have a back-up of all media. Little things can be equally important – have extra pens, legal pads, tape flags on hand.

Nevertheless, there is always something that may arise which you have not anticipated. A witness may have thrown a surprise answer your way, the court may have excluded a key piece of evidence, or perhaps a witness failed to show. The important

thing is to never act surprised or flustered. In the event that a witness has thrown you a curve, and he is your witness, see if you can refresh his memory or rehabilitate him with a follow-up question or with his deposition. If the witness is adverse, have your impeachment material ready to go. If the court deals you a blow by excluding evidence or barring a witness, make sure that you have made an adequate record. Consider asking the court to reconsider its ruling before you rest. If the case does not go your way, be sure to include this point in your post-trial motion. If a witness does not show, be sure to have another witness ready to go. Advise the court of your situation and be prepared to serve a rule to show cause upon the witness.

B. How To Make Modifications During Trial

As noted above, even careful preparation can not prevent unanticipated events from occurring. Have your contingency plans ready. Have a plan ready if you expect that the court will bar a certain witness or exclude some evidence. Plan on using a static exhibit if your VCR fails and you cannot show video.

C. How To Project Confidence When Things Go Awry

Your own witness on direct has just dropped the ball – what do you do? You steamroll ahead without missing a beat. Do not alert the jury that you have been taken by surprise. Do not alter the tone of your voice or shake your head. Stroll confidently through the courtroom and project your voice louder and look to the jury as if you expected this all along.