

Presenting the Case at Trial

From Pretrial to Closing Argument

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1. Are you Ready . . . Are you Sure?

Any discussion of presenting the case at trial necessarily requires a discussion of whether you are really prepared to go to trial. We all get exasperated when a case is not moving the way we want. Our inclination is to “set it for trial” to get it moving. Before you just “set it for trial” you need to know a few things:

1. What are the elements of your case - what do you need to prove?
2. How are you going to prove it - who will your witnesses be? What exhibits will you use?
3. Do you have those witnesses and exhibits under control? Are the witnesses available? Do you have the exhibits, and, if you do, are they in a form that may be introduced into evidence? Do you need witnesses to get the documentary evidence admitted?

Make sure you take a close look and see if you have what you need before you tell the court that all discovery is complete and that you are ready for trial.

Don't wait until you are preparing the pretrial order to decide what you need to prove and how you are going to prove it.

2. The Pretrial Order

Prepare the pretrial order yourself.

You're much too busy. Preparing this pretrial order is time-consuming and menial. Let your law clerk or secretary peruse that file and whip up a pretrial order. It's no big deal. We'll worry about it later.

Just read the file and list everyone whose name you find and list all the exhibits you find. It's no big deal.

Well it **is** a big deal. **You** are going to have to try the case based upon the pretrial order that is submitted, not your law clerk or your secretary. You're going to put it in the filing cabinet until it bites you at trial.

Don't find out the weekend before trial who your law clerk or secretary chose to be your witnesses. Don't find out the weekend before trial who your law clerk or secretary subpoenaed to trial. **Don't read your pretrial order for the first time when your opponent says, "I object to the testimony of Mr. Jones. He's not listed on the pretrial order."**

Spend the time. You know the theory of your case (or you should). **You** need to decide who your witnesses will be and which exhibits you need and which witnesses you need to get the exhibits into evidence.

Do you have any pretrial motions or motions in limine you need to file?

Do you know if everything's been done to perfect the jury bond?

3. The Last 30 Days

Prepare a Written Order of Proof.

Ok, it's 30 days out. Time to get really ready. You need to make a checklist of what's necessary to prove your case, the witnesses you will use to do it and the exhibits that will be introduced through these witnesses. (It should be easy - you just did it when you asked for the case to be set for trial, remember?)

What are the elements of your cause of action? Do you know? Who's going to say that? Have they been subpoenaed?

Send a letter to all of your witnesses informing them that they are being subpoenaed to the trial and that you will get with them to arrange a time for their testimony. What exhibits are you going to use? Can you get them in? Through which witnesses?

Do you have the cite to the Code of Evidence (or a case) necessary to convince the judge to let it in?

Who are you going to have testify first? Last? You need to know so that you don't just have all of your witnesses show up on Monday morning and wait and get p.o.'d at you. The doctors are not going to just sit there.

Who's going to handle which witnesses?

Discussion of two lawyers on a case.

Show sample Order of Proof.

Go through your last minute Pretrial Checklist:

PRETRIAL CHECKLIST

1. ISSUE SUBPOENAS:

Date Filed: _____

Have they all been served? _____

2. ISSUE SUBPOENAS DUCES TECUM:

Date Filed: _____

Have they all been served? _____

3. SUBPOENA THE POLICY OF INSURANCE.

**4. ADD INSURER TO PRETRIAL ORDER.
ADD INSURER TO PLEADINGS. _____**

5. MOTIONS IN LIMINE:

6. X-RAYS, CT SCANS, MRIs, etc. _____

7. PHOTOGRAPHIC ENLARGEMENTS.

- 8. **MEDICAL RECORDS - BOUND AND LABELED.**
- 9. **HAS ALL DISCOVERY BEEN ANSWERED?**
- 10. **HAVE ALL PARTIES ANSWERED THE PETITION?**
- 11. **HAVE ALL EXHIBITS BEEN IDENTIFIED AND LABELED?** _____
- 12. **HAVE WE DETERMINED IF DEFENDANTS HAVE REBUTTAL AND/OR SURVEILLANCE EXHIBITS?** _____
- 13. **HAVE WE THOROUGHLY DISCUSSED PLAINTIFF'S TRIAL TESTIMONY WITH HIM? HAVE WE DETERMINED IF HE HAS A CRIMINAL RECORD?** _____
- 14. **HAVE WE TALKED TO ALL OF THE WITNESSES WE INTEND TO CALL? ARE THERE ANY PROBLEMS WHICH MAY ARISE DURING THEIR TESTIMONY?** _____
- 15. **HAVE WE MADE SURE WE HAVE ALL PAST LAWSUITS FILED BY PLAINTIFF?** _____
- 16. **HAVE WE DEPOSED/SPOKEN TO ALL OF PLAINTIFF'S TREATING PHYSICIANS?** _____
- 18. **HAVE WE THOROUGHLY EXAMINED OUR FILE? HAVE WE EXAMINED THE SUIT RECORD?** _____
- 19. **HAVE WE COMPLETED THE TRIAL CHECKLIST AND MADE SURE ALL MATERIALS ARE READY?** _____
- 20. **HAVE WE SCHEDULED ALL NECESSARY MEETINGS TO DISCUSS THE TRIAL, i.e., with the plaintiff, his family, his treating physicians, etc.?**
- 21. **DOES OUR CLIENT HAVE A CRIMINAL RECORD OR ANY OTHER SKELETONS WE DON'T KNOW ABOUT?** _____
- 22. **HAVE WE OBTAINED ALL STATEMENTS OUR CLIENT HAS MADE?** _____

4. The Last 10 Days

Ok, it's 10 days out. Time to get really really ready.

Let's check on how those subpoenas are going. . . and let's see who our opponent has subpoenaed - check his subpoena requests.

Let's see if everyone on this order of proof is doing what they're supposed to be doing.

We need to meet with our witnesses. They're not just going to get up there and testify. We need to prepare them. Set up meetings with them. Tell them what you are attempting to prove with their testimony and which exhibits will be introduced using their testimony.

If we are unfamiliar with the courtroom, we need to check out the courtroom to see if there are any problems. Some courtrooms are designed such that the jury can't see your larger exhibits. Some courthouses have no elevators. Are we using anything electrical? Some courthouses don't have grounded outlets.

5. The Friday Before

Your staff is leaving at 5:00. You will be on your own this weekend. Make sure that you can find everything on Monday morning. Get it all put in one spot.

How are we going to get this circus to the courtroom?

Where is that cart that you use to carry file boxes to the courtroom? You'd better find it because you haven't seen that deposition in Philadelphia, have you?

Pretrial Checklist

Use the following pretrial checklist (or something similar to it):

**CHECKLIST
MATERIALS NEEDED FOR TRIAL**

CLIENT'S NAME: _____ COURTROOM: _____

DATE OF TRIAL: _____ JUDGE: _____

Rolling Cart _____	Film _____
Screen _____	Photographs _____
Tripod Dry Erase Board _____	X-rays _____
Eraser _____	Stick-em pads _____
Marker _____	TV _____
Extension Cord/adaptors _____	VCR _____
Table _____	Pointer _____
Light Box _____	Easels (specify number/type) _____
Slide Projector _____	Jury Selection Folder _____
Pens (photos) _____	Transparencies _____
Trial Box _____	Pencils _____
Charts (specify) _____	Slides _____
Legal Pad _____	Film Projector _____
Models (specify - knee, skeleton, hip) _____	

Books:

_____ Code of Evidence	_____ Federal Courtroom Evidence
_____ Code of Civil Procedure	_____ Handbook Federal Evidence
_____ Court Rules	_____ Hearsay Handbook
_____ Federal Rules Pamphlet	_____ Other (specify) _____
_____ Trial Notebook	_____
_____ Civil Code	_____
_____ Federal Trial Handbook	_____

Miscellaneous: _____

Requested by: _____ Date: _____

6. The Weekend Before

It's all coming together.

Everyone knows his part.

But we need to be ready for a few contingencies. Don't assume that the judge will wait until the end of the trial to handle the proposed jury charges and verdict form. If the judge decides to deal with the jury charges and verdict forms at the close of business on Monday, are we ready to argue them? Who's in charge of that? Are they ready? Have we reviewed the opposition's charges and found the case authority addressing the charges about which we object? Are those cases in the folder with the jury charges? Do we have the case authority to support our charges? Are those cases in the folder with our charges?

We need to write our opening and closing and closing rebuttal arguments. (We'll discuss that more later.)

We need to be ready to pick the jury first thing Monday morning. Who do we want? Who do we want to get rid of? You need to know.

What questions are you going to ask? Do you have them written down?

Do you know how to get rid of a juror you don't want? Do you know how to rehabilitate a juror that you do want, but are about to lose?

We want to give a short "pre-opening opening" to the jury at the beginning of our voir dire to tell them what the case is about. Will the judge let you do it? Do you have it written? It's your first chance to talk to the jury. Prepare it well. First impressions are important. It won't do you any good to have a meticulously prepared opening and fumble around with this pre-opening.

Are you ready to argue challenges for cause?

Jury Selection Notebook

7. Being Organized

Trial Box

Trial Notebooks v. File folders

Picking Board

8. The Morning of

Rule 1 - Get There Early.

Snare that table closest to the jury.

Check out the courtroom.

Get all your boxes and exhibits placed where you want them for easy access. You don't want to look disorganized during the trial fumbling around looking for something.

Go talk to the judge. Every judge does things differently in a jury trial. You should ask the judge how he or she picks a jury. Does she allow back striking? Does he allow a short pre-opening at the beginning of *voir dire*? Even if you are familiar with the judge, it doesn't hurt to ask. Sometimes their procedures change.

9. JURY SELECTION

10. Opening, Closing and Rebuttal Arguments

The Theme

The Hook

Much has been said and written about opening statements and closing arguments. It's easy to look back at a successful trial and surmise that it was your eloquent closing argument that cinched the deal and brought the jury along to your way of thinking. In fact, there is no magic way nor any "cookbook" way to "teach" someone how to do it right. There are so many factors working on the jurors' minds when they decide the case, it is difficult to say what effect the opening or closing had on them. Most of the articles on the subject state that 80% of jurors decide the case in the opening statement. This was based on a University of Chicago study of jury trials. Suffice it to say, if you convince the jury of your position in the opening, and if they carry it throughout the trial, then you've got their minds set on your position. That is the goal of a proper opening statement. You can certainly foul it up by not coming across with the evidence you promised them in your opening. The same is true for the closing. In order to prepare this paper, I have gathered as much material as I could find and prepared a somewhat exhaustive "quick-read" list of ideas about openings and closings. One author suggested that before each trial you should read five or six articles on opening or closing by experienced trial lawyers. I reviewed many of these articles and tried to synthesize their ideas into small sections. They are listed below:

A. OPENING STATEMENTS:

1. Persuasion - The primary goal of the opening is to provide the jury with a preview of the trial so that they will have some idea of what the case is about and what they will be seeing and what they will be called upon to decide.

Another possibly more important goal of opening and closing is to capture the minds of the jury and fill them with your theory of the case. Pure and simple. From the first step into the courtroom, your job is to persuade. The persuasion process does not begin when you stand and say, "Ladies and gentlemen of the jury. ."; it begins when you walk into the room. The jury begins assessing you the first time they see you. They might even see you driving up to the courthouse in your Rolls Royce or your pickup truck with a Dukakis/Bentsen bumper sticker still on it. Think about it.

To persuade you need:

1. To be listened to;
2. To be understood; and
3. To be believed.

You are trying to make an impression on them from the beginning. Your impression on them may have begun when you forgot to get that haircut or when you got dressed the morning of trial.

2. Voir Dire - In many jurisdictions, the first time you get to address the jury is not the opening statement; it is in the voir dire. You may be permitted to stand before the jury and give them a thumbnail sketch of the case, introduce the parties, and tell them briefly what the case is about to see if anyone has any knowledge of the case. Many lawyers meticulously prepare their openings and closings and stumble through the first words they utter to the jury. Remember, you are trying to persuade them from the start. Prepare your comments on voir dire as persuasively as you can.

Psychological Concepts:

3. Primacy - We tend to believe what we hear first about any subject and tend to resist altering our opinion.
4. Recency - What we remember easiest is that which we just learned.
5. Repetition - The enforcement of a theme through multiple and repeated communication. Governor Roemer used this most effectively in his campaign, "The three most important issues in this campaign are

jobs, jobs and jobs."

6. Demonstration - We remember easier that which we both saw and heard. We tend to believe more intensely that which we have seen. If you have a particular piece of evidence or testimony of a witness which is particularly valuable to your case, the jury should hear about it in the opening. While you may not want to go into great detail explaining the evidence, point out the significance of the exhibit or testimony so that they will be paying very close attention when you get to that point of the trial.
7. Preparation - Master the facts. Read all of the depositions and witness statements again. Review all discovery materials. Outline the opening. Choose an order, i. e., chronological, reverse (from today back to the accident), flashback, or flash forward. Plan the closing when you plan the opening so that they will tie together.
8. Focus - Boil your case down to a few sentences which will tell "What this case is ABOUT."

"This case is about a bulldozer with a defective transmission that backed over Mr. Jones and killed him."

What do I need to prove? How am I going to do it? Tell it to the jury. Explain what the case is about, who are the parties, explain to them why this case is so important, explain their role, the incident, the fault, the injury and the damages.
9. Be Yourself - In giving the opening, if you are not Clarence Darrow, don't try to be. Don't try to give someone else's opening, as good as you thought it was. Everyone has their own style, and you will be more comfortable being yourself and not acting. The sort of person you are will inevitably make itself known, but you should put your best foot forward. Being comfortable in the jury's presence combined with an ability to explain to them what the case is about gives you credibility. There is no one way to learn this; it comes with practice, with experience, and with a sense of self.
10. Dress Correctly- If you don't dress like this is a serious matter, that will come across to the jury.
11. Rehearse - Try it out on family and other lawyers. Lay persons have a keen sense of right and wrong. They also will tell you if you are speaking above the level of an average person or if you are talking

down to them.

12. Be Brief - Don't lose the jury by a long speech about every aspect of the trial. The more organized you are, the shorter the opening and more effective. Know before you begin how much time your opening will take so you don't get cut off before you reach your primary points.

13. Take the Wind Out of Your Opponent's Sails - Expose your weaknesses first. You know where your case is weak. Tell the jury before your opponent does. He will if you don't. Turn your negatives into positives if you can.

14. Try Your Case, Not His - Do not summarize the defendant's case, but deal with the defenses in an affirmative way.

15. Develop a Theme - Use strong words, not weak words. Don't say, "I suggest to the jury that we intend to show that the transmission was defective." Tell them, "We will prove it was defective."

Another example from the defense standpoint would be instead of saying, "There are two sides to every story and let me explain what the evidence on behalf of the defendant is . . ."; say, "Sometimes things happen which are the fault of no one and sometimes the fault of the injured person. . ."

16. Look at the Jury - Maintain eye contact with them. Look at each individual member at least once. Watch their - body language. Many times you can tell if they are with you by looking at them.

17. Be Conversational - Don't give them a speech; talk to them.

18. Avoid Detailed Instructions on the Law - While it is generally proper, and often essential, to refer briefly to the legal principles which are vital to your case, avoid long, drawn-out explanations of the law. However, if you must explain certain legalities to them, try to do so in a simple, straightforward manner.

19. Notes - Put your opening in outline form on one or two large index cards. Don't get up with a transcript on 30 pages of legal pad and attempt to read it to them.

20. Artist's Distance - A painter is too close to his work to evaluate it. When a painter is looking at his painting, he has to back up and look at it from across the room, from where a viewer will see it. The same is

true for a trial. The jury knows nothing about the case and is looking at it from a different perspective. We have to try to look at it from their vantage point and see if we are being clear and logical.

21. What Do I have To Prove? - Explain to the jury the elements of your case. Give them enough information to understand the case without overwhelming them with details. By the end of the opening, they should have enough information to understand the case, recognize the critical events involved, identify the parties, and understand your client's position. However, do not confuse them with numerous details, such as dates, places, names, etc. You are likely to lose them with too much detail, and these facts will be brought out during the trial.

22. Language - Be clear, simple and uncomplicated. Translate technical language into words and common sense analogies. Select your words carefully. Use power words. Personalize your client, depersonalize theirs. Your client is "Billy", theirs is "International Valve Corporation", or their client is "the plaintiff" and your client is "Mr. Jones", the nice elderly gentleman with grandchildren who founded International Valve Corporation.

Explain legal terms. Don't throw around terms like "negligence", "proximate cause", "standard of care". People don't talk about things in these terms. Use "fault", "responsibility", "duty".

23. Planning - Plan a response to your adversary's opening. While preparing their opening statements, many inexperienced trial lawyers make the mistake of not giving adequate consideration to how they will respond to their adversary's opening. Try to guess what your opponent will bring up in his opening and be prepared to respond. (This is where your knowledge of the case becomes crucial.) This will eliminate your becoming flustered and the opposing counsel taking advantage of the situation.

24. Courtesy - Be courteous to your adversary, not friendly. Like most people, jurors do not like to deal with hostility or anger. Do not demean, insult, or bait your adversary. You are inviting the jury to dislike you and sympathize with the other side. Even in the most hostile of litigations, there is room for courtesy and basic decency before the jury. Your efforts to prevent hostility in front of the jury will normally be rewarded.

25. Discussing Damages - Get a commitment in voir dire that the juror has no problem in awarding monetary damages or awarding the plaintiff no money if he does not prove his case. From a practical

standpoint, there is little reason why damages should be down-played during the opening statement. The jury is in the most receptive frame of mind that they will ever be in. Therefore, there is no reason to limit the majority of your opening statement to the liability aspects of the case. Many plaintiff's attorneys wait until the last part of the opening to discuss this very important part of the case.

The attorney should take considerable time in actually laying out in detail how the injuries occurred, what the injuries are, how they were treated, and the resulting pain and disability. He should also discuss future problems and the very important element of special damages, such as past and future medical expenses, and past and future loss of earnings. If done correctly, the plaintiff's attorney can blend together the interesting narrative story with the emphatic visualization of damages.

26. "The Hook" - Get the jury's attention from the beginning. In show business, there is a device called a "hook". The hook is simply an attention grabber. It may be a title, a slogan, a word, a catchy phrase, a logo, a jingle, or whatever. It may be simply the description of an event, or a theme of the case. The hook is designed not only to get someone's attention, but to stick in the mind. It should be image-evoking, easily remembered, and symbolic. Examples of hooks used in advertising might be Coca-Cola's "the real thing", Pepsi-Cola's "The Pepsi Generation"; in literature, Dickens' "It was the best of times, it was the worst of times. . ."; in oratory, Lincoln's "Four score and seven years ago. . ."; etc.

The hook is an excellent device to pique the jurors' curiosity, arouse their interest, and bring focus to your case from the earliest moment.

In opening the opening, if you can use a hook, a direct approach, an attention grabber that will not only stimulate the jury's interest and curiosity, but will have a lasting effect, even possibly sloganize the case or its major theme, you will be off to a great start, possibly even insuring a great finish.

An example of a hook in a child death case would be as follows:

"On March 5, 1979, Johnny Jones was five years old. It was his last day on earth. How he died, and why he died, and why he never should have died is what this case is all about."

A hook in a child burn case might go as follows: "On April 6, 1979, Amy Jones was going to have her seventh birthday party. But she never had it, because on April 5th, her dress caught fire from the kitchen range, and almost burned her to death."

You can, by interpolation, devise your own hooks from any given set of facts. Other examples are as follows:

"This is the story of an uneven contest -- between a forty-five pound little boy and a two-ton truck. On August 8, 1980, Jimmy Jones, six-years-old, was playing ball with his friends. He went out in the street to get the ball and was run over by defendant's truck. He was crippled for life. But never should have happened, and I will tell you why."

"May 7, 1979 was the last day in the life of Johnny Brown. He was six years old. He was buried alive."

"June 8, 1979 started out like any other day for Mary Green. She got up early, watched a beautiful sunrise, and went to work. By the end of the day, she was blind. She would never see another sunrise. What happened to her on that terrible day, and why it never should have happened, is what this case is all about."

[Quoted from Matthew-Bender's Art of Advocacy, Section on "Opening Statements".]

27. Demonstrative Evidence - Demonstrative aids are a necessary part of your case in that a person is more apt to believe what he has seen and heard. However, you should tell opposing counsel and get the judge's approval for any exhibits, charts, pictures, etc., that you intend to use in your opening. Nothing is more likely to produce a mistrial than waiving documents or demonstrative evidence that will be excluded during the trial. It will also greatly discredit you with the jury if you said you would introduce certain evidence that the judge then excludes. In discussing damages in the opening statement, photographs of injuries, x-rays, medical illustrations of the injuries, and diagrams and charts showing pain and suffering, medical care costs, as well as lost income, can be used to emphasize to the jury the extent of the plaintiff's damages. The overall effect of visual aids utilized in conjunction with the verbal presentation in an opening statement will

allow plaintiff's counsel to demonstrate the seriousness of the injury, the assessment of damages, and the valid and proper early presentation of dollar recovery.

28. Policy - Juries want to feel that they are doing the right thing for the right reason. They feel that they are the policy makers for our society. We should therefore give them a good policy reason why they should decide the case in our favor - a reason that fosters societal interests. There are certain principles that Americans live by. Pick one as a theme - one with a broader social purpose than the facts of your case.
29. Explain Defenses - Don't let your opponent surprise the jury by telling them the defenses. Do it first and show why they are not applicable.
30. Why Do We Have Damages? - Explain our theory of reparations and why it is set up this way.
31. Explicit Evidence - Sensitize the jury to explicit or gory testimony or evidence. For instance, if you are introducing photographs of a plaintiff's gory injuries in a personal injury case, prepare the jury for what they are going to see so that they are not shocked. Also, explain to them why you are introducing this evidence.
32. Closing Argument - No discussion of an opening statement would be complete without a word about final argument. Final argument should be planned at the same time as opening statement with an eye on repeating the same themes at the end for emphasis.

B. CLOSING ARGUMENT:

1. Back to the Opening - Opening statements are usually recorded. It might be helpful to have the openings transcribed before closing. Then you can review what you said you would prove to the jury, explain how evidence and testimony introduced during the trial supports your opening, and tie it all together for them in the closing.

Adversely, if opposing counsel overstepped permissible bounds during his opening, you can use this transcription to point that out to the jury. Example: "In his opening statement, defense counsel told you he would introduce testimony and evidence to prove that the accident happened in this way . . . In fact, he stated exactly as follows. . . However, you will recall that Officer Smith testified that. . ., and the

eyewitness at the scene of the accident testified as follows. . ."

2. Closing is the last opportunity for you to testify. Use it to your best advantage.

It is a chance to sum everything up and persuade the jury of the reasonableness of your position.

3. The theme or "hook" that you chose in the opening should be carried forth in the closing, emphatically urging the jury to decide the case the right way, your way.

4. The closing should put the elements of the case together into a simple understandable theory of your case. It should be a fitting conclusion of the continuum that began with your opening statement.

5. Demonstrative Tools - Demonstrative evidence has been used throughout the trial to make your case. Use it in closing to reinforce the impact of the evidence and provide the juror with a mental "snapshot" to carry into the jury room. Prepare exhibits that you plan to use in the trial in chief and the closing.

6. Argue Your Case, Not His - Many times, an attorney will spend much of his allotted time arguing the negative points of his opponent's case and ignore the positive points of his case. It is best to take a positive approach. Stress your own strengths and attack your opponent on a few major points. An excessive argument of your opponent's weaknesses may lead the jury to believe that your own case is weak. Tell the jury why your client should win, not why your opponent should lose.

7. Address Your Major Weaknesses - Your case's weak points will not go away, and if left to be explained only by your opponent, it may be devastating. Address them in a way minimizing the potential harm to your case.

8. Challenge Your Opponent on His Weaknesses - Ask your opponent to give an explanation of the weaknesses in his case, i. e., "I ask Mr. Jones to stand before this jury and tell us why. . ." Just pick an indefensible point, challenge him to explain it, but don't spend too much time on it.

9. Jury Instructions - Before the closing, you should have access to the jury instructions. Tell the jury what the judge is going to tell them about certain key issues, i. e., comparative negligence, and when

the judge uses the very language that the jurors have heard you use in your summation, they are apt to remember it.

Simplify the Instructions - The judge is apt to hurriedly run through the instructions. Emphasize the important ones in common sense everyday language so that the jury will be able to understand them and remember them.

10. Quote from the Record - If cost effective, order daily transcripts. If this is not cost effective, order transcripts of the key witnesses. Argue the exact wording of key evidence to the jury in closing.

11. Arguing the Amount of Damages - The Hardest Part - No lawyer practicing today can tell you the proper way to ask a jury for money. There is no proper way. All ways are awkward and risky. You can try a great case, prove liability, prove devastating damages and lose the jury when you ask for an amount. The juror has listened to this whole trial and has come to a conclusion as to what he feels the case is worth - \$50,000.00. You stand up and ask for \$750,000.00. So much for the credibility you have built for a week. Now liability is in trouble.

Picking the right figure is a hit-and-miss proposition. You just have to look at the background of your jury, look at what you have proven, both as to liability and damages, and make an educated guess as to what figure to use.

We, of course, know what these type of cases are going for in the jurisprudence - the jury does not. You will just have to get a feel for a range that will be acceptable to this jury.

The defendant has a particularly difficult problem in arguing damages. Initially he argues that the jury should award no damages. The jury understands that. But then oftentimes he engages in a bit of alternative arguing - he argues "We don't owe the plaintiff anything. . . but if you think we do, then just give him \$5,000.00." We as lawyers can handle the concept of alternative pleading; we are trained to think that way. Juries are not. I have heard more than one jury tell me, "He spent the whole trial telling us they didn't owe anything - why did he recommend that we give the plaintiff \$5,000.00?"

I think that if the defendant feels that he doesn't owe anything he shouldn't argue alternatively that the jury should award the plaintiff a certain amount of money.

C. REBUTTAL:

If you have rebuttal, plan it also. Don't spend your last precious moments (recency) with the jury nitpicking your opponent's closing. Attack a few major points and go back to your case and again impress your theme (repetition) on the jury. Finish on a positive, high note.

D. STRATEGY

Prepare your closing rebuttal first, then your closing, then your opening.

If you represent the plaintiff, the **first** thing that you should prepare when you are organizing your trial is your closing rebuttal argument.

It's the sweetest part of a trial. The best.

Why? Your trial had a theme. You've developed that theme throughout the trial. The trial is over. You get a chance to close, sure. Your opponent then gets a chance to close.

But now you have rebuttal closing - **your chance to say whatever you want** and your opponent can't respond. It's a free shot. Plan that last free shot from the beginning.

Develop a good analogy to show the jury why your client's position is the correct one and slam it home in closing rebuttal argument where your opponent has to sit mute and can't respond.

Example: You are representing a person who was injured when he was tightening a leaking valve on a tank. Because the person who installed the valve installed it wrong and cross-threaded it, as soon as anyone put a wrench on it, it was going to explode. The issue then was whether it was the sole fault of the client for touching the valve with a wrench while the tank was still under pressure.

The closing rebuttal analogy was that this is no different than a person working on the brakes of your car, cross threading a bolt that makes the brakes inoperable and blaming the child who walks out in front of the car who gets hit because the brakes failed.

Now they can't say NOTHIN'

Most people write their opening and closing, but at the point of most impact - the sweetest spot - have a blank legal pad in front of them and spend these precious moments in a whiny tone picking at their opponent's case, not

punching home their message. He said this, but that's not true, she said that. . .

11. Dealing with the Jury

12. Impeachment

You know that during the trial that one of your opponent's witnesses is going to be impeached with a prior inconsistent statement. He will testify to one thing at trial and he testified to something else in his deposition. You even know what page and what line of his deposition contains the impeachment testimony. Prepare your attack ahead of time.

A properly executed impeachment is devastating.

Most of us either forgot (or never learned) how to properly impeach with a prior inconsistent statement.

We know it can be done, but how do we do it?

Unfortunately, as adept as most of us are at finding these little land mines, when it comes to **finishing off the witness** and showing that he is a liar before the jury - just at the moment of the kill - we cut him loose with something that sounds like this:

Q. What color was the light facing the cement truck?

A. The driver of the cement truck that hit the lady had a red light.

Q. A red light. A **red** light?! Are you sure?

A. Yes.

(Aha! He testified in his depo that it was green. I'm sure of it. Watch my brilliant impeachment with his depo.)

Q. Do you recall having your deposition taken at my office on June 3, 1994?

A. Yes.

Q. And you said at the deposition that it was green, didn't you?

A. I don't know. It was red.

Q. But you were asked in the deposition what color the light

was, weren't you?

A. I don't know.

Q. Read it right here (pointing).

A. OK. (Witness is reading, mumbling) "What color was the light?" Now I don't know **whose** light you was talking about here.

Q. And you said it was green, didn't you?

A. If you was asking about the **car** - that's for the **car**. Were you asking about the car? I thought you meant the **car**. I was all shook up and scared with all them lawyers and all - but the light was red, it matched the driver's red shirt and the cement truck was red and I thought that was pretty odd, all them's being red and all.

Q. Your testimony today is that the light was red, and your testimony at the deposition as that the light was green.

A. It was red, I told my wife when I got home - you can ask her - I says "This truck and the driver's shirt was the same color of red - like a uniform - and he runs a red light - go figure."

So what have you accomplished? You lost control of the witness and you lost the impact of your impeachment.

Let's try it a better way:

Q. Mr. Jones, you testified just now that the light for the cement truck was red, isn't that true?

A. Yes.

Q. And as you sit here today you recall that it was red at the time of the accident, is that correct?

A. Yes, Sir.

Q. Now, Mr. Jones, do you recall that on the 12th of June 1994 we took your deposition?

A. Somewhere around there, yes.

Q. Only a couple of weeks after the accident?

A. Yes.

Q. At my office?

A. Yes.

Q. And you were under oath and the court reporter took down everything you said?

A. Yes.

Q. And I asked you if you recalled the accident?

A. Yes, sir.

Q. And you said that it was fresh in your mind?

A. Yes, it was.

Q. Do you recall that I asked you about the color of the light that the cement truck had?

A. Yes, I guess so.

Q. And at that time I asked you this very question, and I'm going to read it to you and read you your answer and now I'm going to show you your testimony on page 147, please read along with me:

(read loudly and clearly)

Question: Were you able to see the traffic light for the cement truck?

Answer: Yes

Question: What was the color of the light for the cement truck?

Answer: His light was green.

Q. Mr. Jones, did I read the questions and answers

correctly?

A. Yes, sir.

Done. No room to weasel out of the answer. All leading questions. **All “yes” and “no” answers. He belongs to you. You own him.** You made your point. You also proved that the depo was close in proximity to the accident and that at that time he had a clear memory of the accident.

Don't fall into the trap of asking him, “Which one is correct, then or now?” or if he was lying then or lying now. You can cover that in your closing.