



# The Associate's Handbook

A Resource  
for Aspiring  
Trial Lawyers

*By Frank Ramos*



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*To Ana  
My love*

*To David and Michael  
Never stop pursuing your music and art*

*To Spencer and Bud  
For all your advice captured in this book*

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## About the Author



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## Foreword

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In my 19 years of practice I've learned a lot about the practice from the attorneys at Clarke Silverglate and from the organizations to which I have belonged. I share that knowledge with you on being a better lawyer, marketing yourself and handling every case as if it is going to trial. Many of the thoughts I share are ones I wish I knew when I first started out and have come to me through experience, the patience of mentors and trial and error. Also organizations such as DRI, FDLA and FDCC have taught me a great deal about the practice. Hopefully, you find them helpful and you can incorporate them into your practice so you can learn from the collective wisdom of those who shaped me.

### Self-Improvement

You owe it to yourself to become a better lawyer by constantly improving your skills, whether it is your writing, your research, taking a deposition, or arguing a motion. With an increasingly competitive work force, you cannot afford to be complacent and just get by. To keep from falling behind others who are arriving with fresh skills and knowledge, you must strive for more. Consider the following self-improvement suggestions.

**Evaluate your strengths and weaknesses.** Write down a list of your strengths and weaknesses, being completely honest with yourself, yet neither too hard nor too lenient. Pick one or two of the weaknesses listed and set realistic goals on how you can overcome them. Then commit to working on your weaknesses and attaining your goals over the next year. For example, if your writing is just average, work on improving it by reading grammar and style books, taking a writing course, or getting an article published. As you overcome your weaknesses, build on your strengths. Pick one or two of your strengths, and commit to making them even better. If you want to set yourself apart from other lawyers, don't settle for being a strong writer, be a great writer. Don't settle for being good at taking depositions, be great at taking them. Consider taking CLE classes or reading books, and think "outside the box" for other opportunities.

**Overcome your fear.** Fear is natural. Being at a new job, dealing with new people, and tackling new situations can be unnerving. Get ahead of the fear. Do not settle with tackling problems as they come. Take the time to read, study, and learn how more experienced attorneys deal with the problems you will be dealing with so when those problems come, you will be prepared and can react with knowledge, not with fear.

**Accept failure.** Mistakes come with the job. Every associate makes them and you will be no exception. Failure does not mean your life will end, you will lose your job, or you will be seen as an idiot. Those before you have made mistakes too, and you and they will continue to do so. Rather than dwelling on the mistakes and letting them color your perspective or define you, you should simply learn from them and move on.

**Accept your limitations.** Fear often arises when you are "in over your head." Although it is important to always challenge yourself and to strive beyond what other attorneys at your level are doing, you need to make sure you do not take it too far. Never stray too far from the supervising attorney or you may find yourself in unfamiliar

territory, making decisions without having a frame of reference to competently do so. Your supervising attorney’s direction will ensure that you stay on the right track, and the proximity will give you peace of mind and ease your fears.

**Get ahead of the curve.** Although you learned the law in law school, that, alone, will not make you a successful practitioner. You have to learn how to get things done. Not knowing how things work—the process—can be disabling. The faster you can learn how things work, the faster you will overcome the uncertainty of wondering whether you are making the right decision or doing the right thing in the right way. To quickly learn how things work, attend CLE seminars, read publications and practice manuals, or listen to CLE CDs that address the mechanics of being a lawyer. Additionally, you can find several practice articles in bar association newsletters, magazines, and peer-reviewed journals. Almost everything you did not learn in law school has been reduced to writing by some attorney who does not want you to make the mistakes he did. Find the articles and study them.





**Research outcomes of your decisions.** Not knowing how things will turn out is unsettling. How can you know what will happen if you choose option X when you have never chosen option X before? If you are unfamiliar with possible outcomes, ask others in your firm what their experience has been. They may have “been in your shoes,” and can advise on what they did, why they did it, and how it turned out. If your decision may turn on what the law says, research the issue. When you first get a case, research the elements and defenses of the case so that you will know what the plaintiff needs to prove and what the defendant needs to disprove. This information will serve as a roadmap to where the case should go, and knowing this will greatly alleviate your uncertainty.

**Emulate a role model.** To improve as a lawyer, you need to associate with better attorneys who can serve as role models, then do as they do. For example, find attorneys at your firm whom you admire for their great deposition skills or rainmaking ability. Study them to determine what it is they do that you are not doing or, equally important, what it is they do not do that you are doing. When you discover what it is that they are doing right, copy it.

**Study others’ transcripts, writings, and résumés.** You can improve your oral advocacy skills by reading how others advocate. Read the hearing and deposition transcripts of other attorneys to find out what they are saying to the judge, how they argue their clients’ cases, what questions they ask witnesses at depositions, and what questions they do not ask. You can take better depositions by reading how others take theirs. Rather than limiting yourself to reading the transcripts of just the top partners, read those of as many attorneys as you can so you can study the different styles. This way, you can learn something from every attorney in your office, even if it is how not to do things and what approaches are not particularly effective.

In addition to reading others’ transcripts, read their briefs, memos, motions, letters to clients, and other documents. Study the attorneys’ style, word choice, the arguments they make, and how they make them. Ask yourself if the writing convinces you, moves you, or changes you. See what works and what does not, and strive to emulate what you feel works and avoid what does not.

**Know what’s in your control.** In our practice, there are things we control and things we don’t. We control when we send discovery to the client. We don’t control when they’ll provide their responses. We control when we remind the client when the discovery responses are due. We don’t control whether the client will heed a



deadline. We control what we'll tell a witness. We don't control how he'll react. We control what information we provide an expert and control how we prep him for a deposition. We don't control what words he may blurt out just because. There is a lot we can do to control a situation—shift an outcome in one direction or another. However, often we simply don't control the outcome itself. There are uncertainties in what we do. We can't control how a judge will rule, what a jury will decide or what a client may think. We can influence others, but we don't control others. We don't control our staff, nor our bosses, nor our clients nor anyone but ourselves. Learning the difference between what you can and can't control and the difference between making something happen and letting something go is a big part of being a lawyer.

## Become Your Own CEO

Consider your career your business and you the CEO. As a CEO, keep the following in mind.

**Mission statement.** Most companies have mission statements. They proudly display them on their websites, engrave them in granite at their headquarters and tout them in their marketing materials. They are a company's heart and soul reduced to a few sentences, sometimes a few words. This mission statement directs the company and helps it stay focused.

You too should have your own mission statement. Take some time with a pad and a pen and brainstorm what your mission statement should be. What are your goals? What are your values? Who are you and what do you want to become? Think through your personal mission for your life and reduce it to writing. It shouldn't be more than a sentence or two, maybe a couple of phrases, possibly even just a few words. Keep it brief and keep it handy. Tape it to your monitor or stick it on your refrigerator door. Your mission statement will help you keep your actions and thoughts directed toward achieving what is most important to you and what is most aligned with your true self.

**Tagline.** After you have crafted your mission statement, start thinking about your tagline. What are the words that you want to define you? How about "Just Do It" like Nike? Or "Impossible Is Nothing" by Adidas? Or "Think Different," by Apple? Our firm's tagline is "A Firm of Leaders." As you did with the mission statement, sit down and figure out what your personal tag line is. Maybe it's a permutation of "Play. Laugh. Grow." by Fischer-

Price or a take on Google's "You Can Make Money Without Doing Evil." Research taglines online. See what companies and law firms have used as tag lines. Write down your favorite. Why do you like them? Why do they speak to you? Do they reflect your mission statement? Your personal philosophy? Drafting your mission statement made you focus on what you wanted out of life, who you are and what you wanted to be. The tagline makes you focus even more.

**Logo.** After the tagline, consider designing your own personal logo. Now, most of us are not graphic artists and most of us are not particularly good at sketching or drawing. But take a little time with a pencil and some white paper and doodle a bit. What image or design or visual represents your vision? Perhaps instead of a logo, you want to prepare a crest, similar to what colleges have. Take a look at logos of companies and crests of colleges and universities. Think about what they say to you, what they say about those companies and schools. And then take some time to draft your own. It doesn't matter how it looks. The exercise is to make you think about what image or images represent you and where you want to go. It will help focus what you want to do with your life.

**Strategic plan.** Now you have a mission statement, tagline and possibly even a logo. Now you need to develop a long term plan for you for your family, for your career, and for everything else going on in your life. Companies pour over their strategic plans. They evaluate, they brainstorm, they analyze and they develop a long term plan for the growth and success of the company. The plan lists all of the company's goals and a plan on how to accomplish them. Companies do this because they want to ensure that everything they do is directed to accomplishing one or more of these goals. Otherwise, success becomes nothing more than a coincidence.

**Concrete tasks.** Once you are done with a strategic plan, concrete goals and a course of action on how to accomplish them, sit down and write out the specific tasks you need to perform next year, next month and next week. You want to craft a list of specific tasks that will help you implement the strategic plan.

**Benchmarks.** Plans are great, but how do you know if you are getting any closer to achieving them? You need to set out a series benchmarks against which you can measure your progress. Are you moving forward? If so, how much? If part of your plan is to lead a voluntary bar association, what have you done to advance that goal? What committee have you joined? What responsibilities

have you undertaken? Keep a notebook handy, with a calendar, noting on a weekly basis your progress.

**Accountability.** If you worked at a corporation, you would have a supervisor you would have to report to. At your firm, you have a partner or partners to report to. When it comes to your own personal plan, have someone to hold you accountable, whether a spouse, family member or friend. They will keep you honest and on track.

**Rewards.** And as you draw nearer to accomplishing your goals, and as you reach one benchmark and the next, reward yourself for your accomplishments. Treat yourself to a short vacation, or a good book or a nice meal, whatever you consider an appropriate reward. Celebrate your latest accomplishment and work toward your next one.

## Better Writing

The key to writing is grabbing the reader's attention and not letting go. Wham! Right between the eyes. Once you have landed that first punch, do not let up. Make your point and stick to it. Wander from your message, confuse or obfuscate it, and you run the risk of losing the reader. Make every paragraph, every sentence, every word, every syllable count, pushing the reader to your conclusion, getting him to embrace it like it was his own. What follows are some tips on how to improve your writing, whether it is addressed to a judge, a client or opposing counsel.

**Reading.** Improve your writing by reading what others have written. Get in the habit of reading motions written by others at your firm. Study their:

- sentence structure
- paragraph structure
- argument structure
- word choice
- transitions
- themes

Study their motions. How do they argue their positions? How do they persuade? How do they say what they want to say? How do they get their message across? Reading what others wrote will help you improve your own writing.

*“If you want to be a writer, you must do two things above all others: read a lot and write a lot.”—Stephen King*

**Read Plain English.** When writing plain English, read plain English. Most newspapers are written in plain English. So are the weekly magazines. They say a lot in a tiny bit of space. Get in the habit of reading newspapers to study their paragraph and sentence structure. Learn how they communicate complex thoughts in a simple, direct manner. They have a way of turning complex ideas into bite-sized pieces and feeding them to you. That’s what we should be doing in our writing.

**Capture the reader.** Sol Stein in *Stein on Writing* says that if a writer cannot capture a reader’s attention right away, the writer has lost the reader. First sentences and first paragraphs are crucial in capturing and keeping the reader’s attention. Stein states, “Your entire story or novel may depend on that first sentence arresting the reader’s attention. A terrific sentence on page two won’t help if the reader never gets there.” The first sentence and the first paragraph must hook the reader. As lawyers, the initial paragraph of a letter or the introduction of a motion should capture the reader and draw him into the story you’re telling—typically your client’s story. Delay in getting to the point and risk losing your reader.

**Be yourself.** *“Nobody becomes Tom Wolfe overnight, not even Tom Wolfe.”—William Zinsser*

Zinsser, in his book *On Writing Well*, says a fundamental rule of writing is to be yourself. In order to be yourself, you must relax and you must have confidence. “Believe in your own identity and your own opinions,” says Zinsser. “Writing is an act of ego, and you might as well admit it. Writing is a creative process. It is an expression of you. Relax and say what you want to say. Style is who you are.” With time, you will develop your own style, your own “voice.” Don’t rush it. It’ll take time, but it will evolve and will emerge.

**Developing a voice.** In *The Elements of Style*, Strunk and White provide a list of reminders in developing one’s writing style. Among their tips:

1. “To achieve style, begin by affecting none.” Don’t put yourself in front of your writing. Put yourself in the background.
2. Write in a way that comes naturally. Use “words and phrases that come readily to hand.” And practice imitating good writing. “The use of language begins with imitation.” Find

good writers in your firm, study their letters, memos and motions, analyze what they do and imitate it. In college, my fiction teacher told us to take a story or poem we liked, and rewrite it in our words, line by line. She suggested we take “Hills Like White Elephants” by Ernest Hemingway, and rewrite each descriptive phrase, each line of dialogue, each give and take between the two characters. We would end up with a different story built around a strong design. Imitation would lead to good writing.

**Your reader has a 30 second attention span.** Zinsser, in his book *On Writing Well*, reflects on the modern day reader and everything vying for his attention. He says that your reader has a thirty second attention span. If you make the reader work too hard you will lose him and his limited attention span. Learn to rewrite to make your writing “tighter, stronger and more precise, eliminating every element that’s not doing useful work.” After you do this, read your work out loud and remove additional clutter. There is always more clutter to remove. “Fighting clutter is like fighting weeds—the writer is always slightly behind.”

He instructs us to examine every word we have written. Many serve no purpose. If they don’t, eliminate them. But how does one identify the clutter? Zinsser recommends “putting brackets around every component in a piece of writing that wasn’t doing useful work.” Read your writing without the bracketed portions and listen to how it sounds. By applying his technique he says that most first drafts can be reduced by 50 percent without losing a single percent of meaning. Remember, “simplify, simplify.”

**Delete “glue words.”** Richard C. Wydick, in *Plain English for Lawyers*, notes that “We lawyers cannot write plain English. We use eight words to say what could be said in two.” His advice begins, “omit surplus words.” He breaks down words into two categories—“working words” and “glue words.” The “working words” are the ones with meaning. They carry the sentence. The “glue words” just hold the “working words” together. Use too many “glue words,” and you have a poor sentence. Wydick recommends isolating all the working words and rewriting a sentence, focusing on those words and reducing the number of glue words. Ask yourself, “How can we say the same thing in a tighter sentence with less glue?”

**Brainstorm.** Before you write, take a pen and a piece of paper and brainstorm your ideas. At this stage, leave the computer off. Just you and a piece of paper, making lists, jotting down ideas,

doodling perhaps, figuring out what you are going to write about. Put down whatever idea comes into your head, however foolish it may strike you. You can discard the foolish ideas later. Who knows. That foolish idea may not be so foolish after all.

**Prepare an outline.** After you have put your thoughts on paper, organize them in the form of an outline. Sort through your ideas, keeping some and discarding others. The outline will serve as a blueprint for your writing.

**Know your audience.** Remember, you are not writing for you, you are writing for your audience. Forget this and risk alienating and boring the reader. How you write a motion for a judge is different from how you write a letter to a client.

**Serve the reader.** Keep the reader's needs in the forefront when you write and serve those needs to a fault. You write to inform the reader, to persuade him, and yes, to entertain him. Serve your selfish needs over the reader's at the risk of losing the reader's.

**Bam!** Hit the reader between the eyes. Hit the ground running with a strong start. You are not working up to a crescendo. You start at the crescendo. The first sentence or two must grab the reader's attention. In those first sentences, you must let the reader know why he should keep reading.



**Just say it.** Be direct. If what you have to say is important enough to reduce to writing, just say it. Do not mince words, do not hem or haw. Be bold, blurt the words out and keep moving.

**Get to your point.** Right away, let the reader know the point of your writing. If the reader has to read three pages of your six page motion to figure out what you are trying to say, then you have failed as a writer.

**Stick to the point.** Once you make your point, stick to it. Do not wander off the path. Digressions distract.

**Support your point.** If you make assertions, support them. Why does your position make sense? Why should the reader agree with you? Use facts, anecdotes, examples, cases, whatever you need to bolster your position.

**Keep it simple.** Limit what you have to say. Say too much and you will lose the reader. If you can make two or three points that stick with the reader, you are better off than making ten points that do not.

**Speak plainly.** Do not use flowery prose to get your point across. You do not have to show the reader how smart you are. Readers hate arrogance.

**Be precise.** Avoid ambiguity in your writing. Make sure what you intend to say is expressed correctly.

**Speak confidently.** Do not be shy or bashful about what you have to say. If you are not confident about your position do not expect the reader to be.

**Tell a story.** Make it a good read. Judges and clients read their share of letters and motions. If you want yours to stand out, tell a story. The beginning must captivate, the middle must hold the reader's attention and the ending must be strong.

**Less is more.** Say as much as you can with the fewest words possible. People have less time and shorter attention spans. Certainly I do. Make your point in the fewest words and fewest pages possible.

**Edit, edit, edit.** Do not be happy with your first draft, your second, or perhaps even your third. Edit out the excess sentences, phrases and words. Make sure your argument holds water, the transitions are smooth and the word choice is proper.

**Keep your paragraphs short.** Keep your paragraphs to three to five sentences. Longer paragraphs tend to lose the reader.



**Keep your sentences short.** Keep your sentences to 10 to 20 words.

**Keep your words short.** Use words that have fewer syllables.

**Eliminate throat clearing phrases.** Don't clear your throat on the page. Words and phrases like "clearly," and "as you know" add nothing to your writing. They simply detract from it.

**Avoid redundancies.** Avoid words and phrases that say the same thing. Multiple modifiers should be eliminated or at least pruned.

**Avoid filler language.** Remove any words that do not contribute to what you are trying to say. Any words that are simply hanging around, not pulling their weight, must go.

**Eliminate unnecessary prepositional phrases.** Go through your writing and remove unnecessary prepositional phrases, or reduce them to a single word if possible.

**Eliminate adjectives and adverbs.** Adjectives are a crutch for weak nouns, and adverbs are a crutch for weak verbs. Use strong nouns and verbs and eliminate their supporting cast.

**Eliminate words.** After you have scratched out the unnecessary adverbs, adjectives, prepositional phrases and needless words, review your writing again to see what else can be eliminated.

**Limit each sentence to one idea.** Do not overburden your sentences. Make a single point and put a period down.

**Limit each paragraph to one idea.** As with sentences, pick an idea and support it throughout the paragraph. If you have another idea that you need to address, start another paragraph.

**Use the active voice.** The subjects of your sentences should not be victims. Things do not happen to them. They make things happen. Speak in the active voice. Avoid passive verbs such as "is" or "was." Active sentences are clearer and get to the point faster.

**Keep the subject, verb and object close together.** Keep the subject of the sentence, the verb and the object close together. By keeping them close together you make your sentences clear, direct and short.

**Start sentences with the subject.** By starting your sentences with the subject, the reader knows right away who is performing the action. Follow the subject with the verb and object, and you can make strong sentences with very few words.

**Avoid the perfect tense.** When possible, avoid using the past perfect tense ("I had written the brief.."), present perfect tense

(“Many have known...”) and the future perfect tense (“I will have finished...”). In their place, use the past tense (“I wrote the brief...”), present tense (“Many know...”) and the future tense (“I will finish...”). The perfect tense is longer and less direct.

**Make the verbs do the heavy lifting.** The most important word in the sentence is the verb. Use strong, active verbs and make them do the heavy lifting in your sentences. You do not need adjectives and adverbs to make a sentence. But without a verb all you have is a group of words with nothing to do.

**Do not turn verbs into nouns.** Do not convert verbs into nouns (“utilization,” “personification”). By doing so, you weaken words and you tend to speak in a more stilted, bureaucratic tone.

**Use concrete nouns.** Where verbs create actions, nouns create visuals. Use nouns that create a visual image and paint a picture. Avoid abstract nouns.

**Use precise nouns.** Use the right noun for the job. Use the wrong one and you may not convey the message you want.

**Avoid misplaced modifiers.** Keep your modifiers close to the words they are modifying. Misplacing the modifier may cause the reader to take away a different message than the one you are trying to convey.

**Place pronouns close to the nouns they modify.** Keep pronouns close to the nouns they modify so the reader knows which nouns you are referring to.

**Maintain parallel construction.** Whenever you are going to use a series of words or phrases that are related, they should be stated in a similar form.

**Check subject/verb agreement.** Make sure that your verbs agree with their subjects.

**Avoid legalese.** Avoid using legalese. Nothing alienates your reader more than words that only lawyers use. By the way, strike the word “said” from your vocabulary.

**Avoid clichés.** Avoid trifling language like clichés. They are hackneyed, and you are not a hackneyed writer.

**Avoid contractions.** For the most part, avoid contractions. They are better for informal speaking, not formal writing.

**Avoid bold and italics.** Avoid sprinkling your writing with bold and italics. Often they are used to compensate for poor writing. Use strong writing to emphasize your points.

**Avoid technical words.** Avoid using trade or technical words. If you must use them, define them in layman's terms.

**Avoid big words.** Avoid using ten-dollar words. If your reader has to put down your writing to grab a dictionary, you are serving your interests over the interests of your reader.

**Use familiar words.** Use terms with which your readers are familiar. Comfort foods, like meatloaf, have become popular in restaurants, because consumers feel comfortable with them. Think of words the same way. Make your reader feel comfortable with your writing by choosing words they are comfortable with.

**Use your terms consistently.** Do not call an item one thing on page two and give it a different name on page three. Stick to the same term to avoid confusion.

**Start each paragraph with a topic sentence.** Start each paragraph with a topic sentence. Make your point up front and spend the rest of the paragraph supporting it.

**Use transitions.** Make sure you use words and phrases to transition from sentence to sentence and paragraph to paragraph. Transitions make your writing smoother.

**Vary sentence structure.** Even though the rule of thumb is to keep your sentences short, try to vary their length. Otherwise, your writing will sound choppy.

**Do not overstate or misstate.** Do not exaggerate or misstate your position. You lose credibility by doing so.

**Do not take personal shots.** Keep it professional. Do not attack the other side or opposing counsel. Do not confuse being an advocate with being a jerk.

**Use headings.** Whenever you are writing a letter or motion that is several pages or more, use headings to guide the reader.

**Use lists.** Consider using lists in your writing to make a point. Perhaps you can create a list of all your arguments to show the judge why he should grant your motion. Visually, lists get your points across to the reader.

**End Strong.** Just as you start strong, finish strong. You started by punching the reader between the eyes. Finish him off.

**Read it out loud.** Read your writing out loud. Listen to how it sounds. Likely, you will make additional changes after doing so.

**Take a break.** After you have written a draft and revised it, take a break and pick it up at a later time. With a fresh look, you may see errors or lapses of judgment you overlooked before.

**Know when to stop.** Once you have said everything you need to say, whether it in a motion, a letter, or an article for a publication, know when to stop.

## The Importance of Mentors

Mentoring has become a popular topic. Firms have mentoring programs, bar associations have them, and there is even electronic or e-mentoring.

Mentoring is such a hot topic because it works well, helping new attorneys “cut through red tape” and end self-doubt. The question is not “Why do you need a mentor?” Rather, it is “How have you survived without one?” You should take the time to find a mentor and work on a relationship that will affect you for the better, for the rest of your career. The following are a few of the benefits of having a mentor:

- **You get to learn from others’ mistakes.** Although the fear of making a mistake can be paralyzing, as a new litigator, you will make mistakes. To lessen the impact and reduce the number of mistakes made, you need to have a mentor to talk to. The mentor will have traveled the path you are taking, and made the mistakes potentially facing you. You can learn from those mistakes and thereby avoid many of the snares ahead of you.
- **Mentors can point you in the right direction.** Countless times each day you will be called on to make decisions. Sometimes, you will know what to do—many times, you will not. Usually, your mentor will. Mentors can tell you what they did when confronted with the same problem. They have tested their theories, and they can take the mystery out of what to do and what not to do by telling you first hand, from their own experiences, what works and what does not.
- **Mentors can comfort and take care of you.** Being a lawyer can be lonely. Sometimes you feel it is you against the world, against the opposing party, against opposing counsel, and sometimes against your own client. It is good to have someone looking out for you, “watching your back.”

- **You learn the unwritten rules of being a lawyer.** It is best to learn these rules and how to play by them from someone who already knows them. A mentor can teach you the rules regarding such things as how to argue a motion or how to deal with opposing counsel, and can help you comply with these rules rather than accidentally trip over them.
- **You have a “sounding board.”** As a new litigator you will have several questions that need to be answered, conflicts to resolve, problems to face, and issues to address. Some of your ideas on how to face these issues and conflicts are based on fact; others are based purely on instinct. Instead of simply trying out hypotheses to see if they are right or wrong, you will find it worthwhile to talk to someone who has confronted the same or similar issues and can listen to your proposed approaches, help you weigh the pros and cons, and assist you in making thoughtful, rational decisions.
- **You get a “backstage pass.”** Mentors can take you where the action is: meetings with clients, conference calls to discuss strategy, and access to their own thinking and reasoning. You are given access to the mentor’s legal worlds where the big decision makers make the important decisions and you can witness it, experience it, and learn from it.
- **You learn how to network.** To obtain clients, you must meet them and develop relationships with them. To do so, you can go to a trade group or bar meeting and simply walk around, introducing yourself to whomever you see. However, a much better approach is to go with a mentor who knows the organization and the people involved. The mentor can introduce you to contacts and help you get connected with the more powerful people in bar and trade associations. Mentors can get you involved in committees and assist you in your ascendancy to power.
- **You learn about the firm.** Your mentor, who has been at the firm for some time, can help you understand how your firm really works: who does what, who expects what, what makes the partners happy, and what their “pet peeves” are. Your mentor has seen firsthand what kinds of lawyers stay and which ones go—and of those who stay, which ones prosper. This knowledge can provide you with great insight into how to get along in the firm.

## Selecting the Right Mentor

As noted above, you can rarely learn how to be a truly good lawyer on your own. To become a great lawyer, you need to study one, watch what they do, listen to what they say, and emulate them. You need a mentor or role model who can teach you the forks and bends in the road and walk down that road with you until it is time for you to walk on your own. A good mentor is a marvelous influence who can teach you how to be the best you can be. Consider the following when seeking a mentor:

- **Choose someone like you.** Your mentor is going to pursue his goals and values. If yours are the same, you will learn how to pursue yours by watching the mentor pursue his. Therefore, you should select someone with whom you are compatible and who shares your interests, goals, and values.
- **Choose someone you like.** Select as a mentor someone you can call a friend—someone you can laugh with and whose company you enjoy. If your mentor is the greatest lawyer in the world but is also a bit of a jerk, you are not going to want to be around him, much less learn from him.
- **Choose someone who specializes in your practice area.** If you want to become a great real estate lawyer, you are not going to learn how to do that from a great personal injury litigator. To learn the ins and outs of a given practice area, to know who the players are, what to say, what to read, and what to do, you need to know the person who has the answers to these questions—someone who practices in the area.
- **Choose someone who has time and who is committed.** Ensure that you pick someone who will make time for you and who will not see you as an imposition on his time and resources. Also make sure your mentor will have time for you tomorrow, the next day, the month after that, and the year after that. Being a mentor is a long-term commitment rather than a passing fancy.
- **Choose someone who is senior and wants to leave a legacy.** A truly good mentor is one who has been tested—who has already gone through what you are going through now and can advise you on how best to confront those challenges. A good mentor is someone who wants to leave a legacy—who wants to reach for immortality by passing a part of himself on to others.

- **Choose someone with a sense of humor.** Being a lawyer is a difficult job and requires a tough skin and a good sense of humor. You have to be able to laugh at yourself and at your mistakes, and a good mentor should be able to do the same.
- **Choose a good teacher.** A mentor is someone who is going to teach you how to be a good lawyer—how to be like him. Therefore, he must be able to explain things to you. He must be able to teach.
- **Choose the best.** Given the choice between the best salary and the best mentor, always pick the best mentor. Find the attorney with the best reputation, the best skills, and the best character, and beg him to hire you. You want to learn from the best there is.

### **Making the Most of Your Mentor**

As noted above, you must develop a long, lasting relationship with your mentor if you want the mentorship to be meaningful and beneficial. One who is a mentor in name only will do you no good. It takes time and commitment from both of you to build a strong, advantageous relationship. The following suggestions will help you form a valuable bond with your mentor:

- **Meet regularly.** Make the effort to meet with your mentor on a regular basis. Because both of you can readily use the excuse that you are too busy to meet, you need to actually schedule regular meetings, perhaps over breakfast or lunch, to discuss the cases you are handling and the issues you are tackling. Prod your mentor to get together with you and talk at least once a month.
- **Communicate regularly.** Aside from pursuing face-to-face meetings, call and email your mentor on a regular basis. Email is a great way to get much-needed advice. You can send your question when you find the time and your mentor can answer it when he finds the time.
- **Network together.** Ask your mentor to accompany you to local bar functions where, due to his years of practice, he likely will know several attendees to whom he can introduce you. With your mentor at your side, you will be more relaxed at the bar function and not feel like you do not know a single person in the room. Also, your mentor can give you access to corporate and bar functions, committees and boards, and to people you want to meet. For example, if you want



to get involved in an organization and possibly pursue a leadership position, your mentor can help you get your foot in the door.

- **Ask your mentor difficult questions.** Your mentor's experience makes him a valuable source for answering the hard questions—those about ethical dilemmas, case strategies, and office politics. Do not hesitate to turn to that source and seek his perspective, beliefs, and wisdom. Your mentor can teach you vast amounts about the law and how to practice it, as well as about family, right and wrong, and the choices life presents us. Take full advantage of the opportunity to learn something more important than how to take a deposition.
- **Find out his life story.** We are a composite of our experiences. Explore those of your mentor—the life he has lived, the challenges he has faced, and what he has done to get where he is. Learning what challenges he faced and how he faced them can give you insight on how to face your own.
- **Trade favors.** If you find yourself in a tight spot at times, your mentor may be able to help you out. For example, you may find that you are unhappy at your job and discover



that your mentor can recommend you to a friend who is looking for an associate. Remember that the relationship should be a two-way street—just as you have needs, so does your mentor. Repay the favor and help your mentor with his needs, whether it is writing an article he needs to submit, assisting with a fundraiser his firm is sponsoring, or researching a legal issue he is struggling with. Your mentor will appreciate your help and will be more willing to help you the next time you ask.

- **Start mentoring others.** As a young attorney, you may think you have not amassed enough experience to mentor someone else. You are wrong. If you are a midlevel associate, mentor an entry level associate. If you are an entry level associate, mentor a law school, college, or even high school student who has a whole host of questions.

### **Be a Mentor**

A number of years ago a novel came out titled *Pay It Forward*, followed by a movie adaptation. The protagonist was a 12-year-old whose teacher challenged him and his classmates to come up with an idea that would change the world and to implement it. The boy's idea? "Pay it forward." He does something really good for three people. When they offer to repay the favor, he tells them to "pay it forward." He asks each of them to do really good things for three others, and when those others ask how they can repay the favor, they are asked to do something really good for three others, and so on. The idea is that from three acts of kindness, thousands more will be born. Now it is your turn to "pay it forward."

As young attorneys, we may not view ourselves in a position to help others. We may think we do not have sufficient experience, know-how, or influence to be a positive influence on others. You may wonder how you can help others when you are still figuring things out yourself. But the fact is, you know more than you think. You have been blessed with a career in law. There are millions of people in this world who, because of their financial and social circumstances, are barely getting by each day. Reflect on that, take it to heart, remember it, and when you come to terms with the fact that others help shape you, pay what you have been given in this world forward.

It starts with finding a need and meeting it. Perhaps another attorney in the office struggles with his writing, or your firm needs

help with the staff. Perhaps a charitable organization needs the analytical skills of an attorney—even an inexperienced one. Find what those needs are and fill them. Some of the things you can do to share your blessings with others are:

- **Volunteering.** There are countless opportunities to volunteer. The obvious for you as a lawyer is to do pro bono. Most voluntary bar associations have an arm that pairs attorneys like you with needy clients who, because of their lack of financial wherewithal, cannot afford the legal services they need. Without your help, they may lose their homes, get evicted from their apartments, get arrested and thrown in jail, lose government benefits, or even get deported. You can make a real difference in these people's lives. In addition to pro bono work, consider doing volunteer work for organizations that help children, such as Big Brother, Big Sister, The Boys Club, or your local YMCA. These kids need role models and what better role model than someone who has made it through law school, passed the bar exam, become a member in good standing with the state bar, and spends every day fighting on behalf of others?
- **Leading.** If you want to make a difference in the lives of others, become a leader in your law firm, in your local bar association, or in your community. Understand the organization's values, its mission, and its projects, and direct your efforts to advance them.

You do not need a title to be a leader. Even if you are not the managing partner, the president of an organization, or have a title at a charitable organization, you can lead.

- **Bringing others with you.** In your pursuit of making a difference, do not settle with impacting others. Help build up others so that they, too, can impact others. As noted, the concept of paying it forward is that each person who benefits, in turn, benefits others. As you help out in your firm, at your bar association, and in your community, identify others who have the same desire, partner with them, and help them affect the lives of others for the better. Alone, you can do a lot—with others, you can do so much more.
- **Expecting nothing in return.** Go out of your way to help others. If someone asks for help, give it. When someone seems to need help, offer it. If no one needs or asks for it, offer it anyway. Never do any of it expecting to get anything

in return. The payback is in the doing. You will “reap what you sow.” Motive is everything—and it is better to do less for the right reasons than more for the wrong ones.



## Marketing Tips

If you want to move from associate to partner, you need to learn to be a rainmaker, and learn so early on. Rainmaking happens when you meet people, develop relationships with them and remain in contact with them so the day they need help with a case, they naturally think of referring the matter to you. John Remsen, an attorney marketing guru, says that building a book of business is based on building relationships. It's all about relationships, he likes to say. You build relationships by getting to know people and having them get to know you. The following are tips on how to do just that.

### The Basics

**Learn to love networking.** In their article in the Harvard Business Review titled “Learn to Love Networking,” Tiziana Casciaro, Francesca Gino and Maryam Kouchaki state that networking is a necessity. They cite research where networking not only leads to more business opportunities, it also improves the quality of one's work and job satisfaction. To change one's attitude toward networking, the authors recommend that we (1) shift our focus from it being a chore to it being an opportunity for learning and discovery; (2) identify common interests with those we meet, and work on common tasks with them through organizations; (3) think about what you have to offer to others, including your gratitude; and (4) find a higher purposes, whether it's supporting your firm or helping your clients. By changing our attitude toward networking, we can find it not only palatable, but truly enjoyable.

**Seek out your audience.** When it comes to marketing, you want to seek out your audience—those who are in a position to refer you a case. They could be in-house counsel. They could be outside counsel looking for local counsel or who have a conflict. They could be HR personnel with employment issues. Where do you find them? What organizations do they belong to? What are they involved with? Seek out client rich environments, such as national defense organizations like DRI, trade associations or chambers of commerce, and join. But don't simply join. Get involved. Start with doing those tasks no one else wants to do—like editing the newsletter, writing an article or marketing an event. Do the little things, and soon you'll be doing the big things, and meeting and getting to know clients along the way. Showing your competence in organizations suggests to others your competence in handling their matters. It all starts with seeking your audience.

**Develop a personal marketing plan.** Devise a strategy to market yourself, your practice and your firm and then implement it. Have a six-month, one-year and five-year plan.

**Develop a firm marketing plan.** If your firm does not have a firmwide marketing plan, encourage them to develop one and assist in the development.

**Interview a rainmaker.** Take a successful lawyer out to lunch. Let her know that you want to develop your marketing skills and want to learn how she became so successful. You'd be surprised how candid lawyers will be in sharing their approach to marketing and business development.

**Work the room.** Plan ahead before your next cocktail party or seminar. Determine who the attendees are. Once you are there, work your way around the room, making a point to reconnect with old friends while making new contacts.

**Smile.** Make the effort to smile more. We all have bad days and we all have problems. Try not to wear them on your sleeve. The more you smile the more approachable you are.

**Expand your curriculum vitae.** Be active about getting involved, writing and speaking to augment your profile. Every year, you should try to do certain things worthy enough to add to your CV.

**Become a subject matter expert** to distinguish yourself from other attorneys.

**Read marketing books.** A lot of the marketing we do as attorneys is similar to the marketing sales professionals do. Read the marketing books you see in the business section of the bookstore.

**Volunteer.** Volunteering is a great way to meet more people and expand your network.

**Business cards.** Make the most of your business card by giving it a different look or feel and by including such things as your blog site or twitter account.

**Develop relationships.** Business referrals are all about relationships. Folks aren't going to refer you cases if they don't know and trust you. Take the time to develop relationships with those in a position to refer you matters. This is done through spending time with them working on projects for committees, such as for DRI, to get to know them and earn their trust.

**Follow the news.** If you want to connect with folks, follow the news. Not just the national headlines. Follow the local news.

Also follow sports, even if you don't watch them. And yes, follow entertainment news. It never ceases to surprise me how much folks love to talk about celebrity gossip.

**Join Toastmasters.** To develop your public speaking skills and make new friends, consider joining your local Toastmasters group.

**Pocket-sized journal.** Marketing ideas will come to you when you least expect them (the same is true for epiphanies regarding your cases). Keep a notebook handy to jot them down, or the e-savvy can use an app or keep a note open for marketing ideas.

**Look outside the law.** Look at marketing blogs and websites that are not geared toward law firms. See what they are recommending. To the extent they are directing their advice to service-oriented businesses, some of their tips may translate well into your practice.

**E-mail lists.** Create various targeted e-mail lists for various purposes (firm newsletter, blog updates, trial victories, articles you've written or come across, etc.) and add to those lists as needed.

**Build your brand.** Develop a personal brand and make sure all your marketing efforts are geared toward building that brand. Keeping your brand in mind will help you focus your marketing efforts.

**Sponsorships.** Be wise about how your firm spends money on sponsorships for events, organizations, bar associations and the like. Create a firm policy about sponsorships, always asking whether those marketing dollars can be better spent elsewhere.

**Brainstorm.** Have a monthly firm marketing meeting where attorneys go around the table presenting a new marketing activity in which the firm can participate.

**Create accountability.** To ensure everyone is doing their part to market the firm, have regular meetings where the attorneys state what progress they have made on their individual marketing plans.

## Your Online Presence

**Update your profile.** Regularly update your profile on your firm's website. Also, don't let your profile photo grow stale.

**Leverage your IT Department.** Whether your firm is large enough to have its own IT department or whether you have a guy named Fred come in once a week to troubleshoot, ask your IT person what you can do to direct more traffic to your firm's website and improve the look and content of the website. Your IT person may have some thoughts.



**Start a blog.** Start a blog reflecting your area of expertise and let your clients and prospective clients know about it. Make sure to include the blog address on your e-mail signature and on your business cards.

**Put on a webinar.** Create a power point, set up a call-in through GoToMeeting or another site, secure one hour of CLE credit from your state's bar association and provide one free hour of CLE. Everyone needs CLE.

**Create a podcast.** Create material folks can download, such as a podcast. You may go so far as creating an app, something more firms are doing.

**Don't rely solely on your website.** Some clients will ask for written materials about your firm. Firms should have printed materials to supplement what prospective clients can find online. Also, firms should have a database in their computer systems where favorable opinions and orders, articles by its attorneys and other materials can be easily printed and included in a packet to a prospective client.

### **Cultivating and Nurturing Your Contacts**

**Attend networking events.** Find a newspaper, website or blog that tells you about upcoming legal and business networking events, and check it daily. Attend at least two events a month. Search the DRI website and your state and local defense (SLDO) bar website for upcoming events. Get to know other DRI and SLDO members in your city.

**Do some reconnaissance.** Before going to a networking event or seminar, see if you can get a list of attendees. Review it and make your own list of individuals you want to meet during the event. Of all the materials you receive before a seminar, the attendee list is the most important.

**Business cards.** We exchange them at networking events, cocktails, conferences, you name it. But what do you do with the ones you bring back to the office? While at the event or shortly thereafter, jot something on the card to remind you who the person is behind the card. Perhaps an area of practice, community involvement or a hobby. That way the card will mean something to you when you look at it later. After the event, send an e-mail or hand written note to follow-up and possibly suggest getting together for coffee, breakfast or lunch and suggest a connection on LinkedIn or Facebook. Import the information about the new contact into

your list, including not only the information on the card but any information you remember about the person from your meeting with her. Again, keep in mind that three months from now that card probably won't mean anything to you and you'll need something to remind you about who the person is, where you met them, how you were introduced, what you have in common and so forth. Remembering these details will facilitate developing relationships that may blossom into mutually beneficial business relationships.

**Contact list.** If you don't already have one, create an Excel spreadsheet of your contacts. Include their names, addresses, phone numbers, e-mails, company or firm names and a general information column where you'll include personal and business information. If you're more tech savvy, use your phone contact list. Create a group for business contacts and take advantage of all the fields available, recording emails, addresses, birthdays, and writing notes in the "notes" field. As your list grows, there will be individuals on this list that you will forget. The information column, or notes field, will act as a quick reference guide to refresh your recollection of who they are and how you know them. Once you've started your contact list, grow it. Make an effort to add to it each week and make an effort to reach out to those on the list. Send them an e-mail saying hello, catching up and renewing old friendships. These relationships you are nurturing will help you grow personally and professionally.

**Handwritten Notes.** In a *Simple Act of Gratitude*, John Kralik, an attorney, found his life in shambles. His practice was failing. He was struggling through a second divorce. He was living in a tiny apartment, becoming more and more isolated from his friends and family. One day, he decided to hand write a thank you note every day to a different person, and to do it for a year. The experience transformed his life for the better. Get in the habit of hand writing notes to family, friends and colleagues. Thank them for what they have done in your life. These simple acts of gratitude help us better appreciate those around us and help us focus on what we have and not on what we believe is missing.

No one writes letters any more. So when someone receives a written letter in the mail, they cherish it. Those letters are often kept, read again, put away, only to be pulled out and read again. If you want to make an impression, buy yourself stationery—professional looking stationery with your name and address across the top of the page and on the corner of the envelope—and commit to writing at least one letter a week. Pick an old acquaintance or

an executive you met at a networking event. Sit down at your desk, with your stationery and your letter writing pen (I would suggest to make the experience complete, go out and splurge on a nice pen that you only use to write letters), and draft a letter. The first few letters are difficult. With e-mails and word processing, it is hard not to second guess every word you put down on paper. It will take some time to learn to write letters. Some of you will find the experience too bothersome to even pick up. Others will throw down your pen in frustration and your stationary will collect dust in the bottom drawer of your desk. But for those of you who stick with it, writing letters will become a natural and regular part of your life. You will find that these letters will forge closer relationships with family and friends. You will also find that those letters will forge closer relationships with business prospects and clients. In short, the forgotten art of letter writing is good for you and good for business.

**Holiday cards.** Take your lead from Walgreens as to when to send them out. If when I go in to buy toothpaste and mouthwash I start seeing displays of candy canes and sugar cookie mixes, then it's time to start thinking about office holiday cards. A few thoughts.

- **Send them out early.** I do my best to mail them out the Monday before Thanksgiving. Folks take time with the first few holiday cards they receive. After a week of them, they become like junk mail.
- **Avoid e-cards.** Often they get stuck in the recipient's spam filter and many feel impersonal. Yes, we all want to save the planet, but a few cards aren't going to prevent global warming. And let's be honest. You're trying to save a few bucks and it comes across that way.
- **Consider writing a personal note.** Instead of sending a card, consider sending a handwritten note on your personal stationary. Remember, letters are rare today. They're special. I know when I receive one, I keep it. Somehow, it seems wrong throwing it out.
- **Do something memorable.** Yes, you should sign your cards. And ideally you should write a personal note. But how about something different? E-books, music downloads and blogs provide a wealth of ideas. As an insert in your card, include a red or green business card with a link to a free e-book you wrote, or a free downloadable song you performed, or a link to a free webinar you did (with information on how the person can get free CLE credit for it), or a non-law

related blog to provide some holiday reading. Remember it's a holiday card and holidays are a time to give. And what better gift than something that you made (or wrote, or performed, or whatever). It's different, it's fun, and it will get noticed.

- **Holiday gifts.** In addition to holiday cards, create a list of clients and referral sources that you send gifts to, such as goodie baskets. Instead of baskets, however, consider sending a magazine subscription (such as the Economist), a bottle of wine or a book. A magazine subscription has the effect of reminding your client of you every month.

## Generating Referrals

**Develop a network.** Cases come through referrals. Referrals come through friends and colleagues who like you, trust you, respect you and perceive you do good work. Take the time to reconnect with old high school, college and law school friends. Connect with the parents of the kids at your child's school. Meet folks at cocktail hours sponsored by the local bar associations. Grow and develop your network one person at a time. Organizations such as DRI, IADC, FDCC and ADTA provide you a readymade network that you can plug into.

**Develop a network that goes beyond lawyers.** How often are you asked about a reliable mechanic? An accountant? A painter? A mover? A florist? A restaurant? As with lawyers, develop a list of professionals from different backgrounds. Let them know you will be referring them work when appropriate and inquire whether they can let others know about your services when they are asked if they know of any lawyers who practice in your area.

**Stay in touch with your former classmates,** whether from law school, college or high school. Become involved in alumni associations, attend their functions and reconnect with old friends. These are the folks you grew up with, went to school with and had fun with. When they look for attorneys to handle their legal work, they are more likely to entrust it to an old friend than to a stranger.

**Connectors** are those individuals who work with your prospective clients. Think insurance agents, accountants and financial planners—individuals who work with the principals of companies who from time to time need legal help. These connectors have trade associations they belong to. Consider joining one. They have publications they read. Consider writing for one. What's great

about connectors is that they connect you with multiple potential clients, several or more who may need you. So when networking, consider going beyond other lawyers as referral sources.

**Take the time to educate your potential referral sources** about what you do, and just as importantly, what you don't do. Folks who may refer you cases should know what cases they should refer to you. Having them refer you anything and everything may sound like a boon but it results in phone calls with prospective clients you cannot help. Also, educate them about what your firm does. Perhaps you don't do employment law, but your partner is a leading FLSA lawyer. Help your referral sources help you. Likewise, get to know what business they're looking for and refer them only that business. They'll appreciate you for it.

**Refer cases.** To get referrals, give referrals. Help others market their practices through word of mouth and often they will repay the favor. Therefore, keep your eyes open for cases not just for yourself but for others. Develop a list of lawyers in different specialties and in different geographic regions to whom you regularly refer cases. They will repay the favor. If you're active in DRI, FDCC, IADC or ADTA, develop a list from your contacts there.

**Start a breakfast club.** Call up colleagues, each specializing in a different area of the law, and start a local attorney referral service where everyone meets once a month for breakfast or coffee and discusses referring cases to one another.

**Coffee, lunch, or dinner.** Get in the habit of at least once a week taking a potential referral source out for a meal or drinks. Getting coffee in the morning is an inexpensive networking opportunity. Follow the advice of the book and Never Eat Alone.

**Maintain relationships with those who leave your firm.** They are a great source of referrals. In fact, consider creating an outreach program for your "alumni."

### Customer Service

**Talk to your clients.** Ask your clients what they like about the services your firm provides and what they don't. Consider retaining a third-party to conduct client surveys.

**If you want your clients to be happy, act like the waiter at your favorite restaurant.** At my favorite restaurant, the waiter sits us at "our" table, makes sure we have plenty of bread, and keeps our soda glasses filled. He knows our needs, meets them and does it

all with a smile. Provide that quality of service to your clients, and they'll keep coming back.

**Host a networking event.** Consider hosting a networking event in the lobby of your office. Hosting your own event allows you to choose the guests and the dynamics of the event. Consider hosting a wine tasting where you invite your clients and potential referral sources to visit your office, have some food and drinks and learn more about you, your firm and your firm's practice areas. It does not have to be a large event. An intimate setting where you have 10-20 guests opine on wine and mingle is the perfect size to get to know folks better and learn more about them as they learn more about you and your firm. Perhaps you turn it into a regular event where your clients or referral sources can try new wines each month and make it a part of their routine. They will enjoy the night out and you will have an opportunity to stay at the forefront of their minds.

**Put on a client seminar.** Work with others at your firm to put on a seminar addressing legal and business issues relevant to the firm's clients.

**Create a firm newsletter.** Start and edit a firm newsletter with case-law updates relevant to your firm's client base.

**Prepare client alerts.** Better than newsletters are targeted e-mails to clients discussing recent legal developments and explaining how they impact their businesses.

## **Becoming an Expert**

**Pick an industry and a topic in that industry.** Become the best in your state, in your region, and in the country. We all learn from experience—10 cases in an industry may differentiate you from others.

**Be part of the conversation.** Activities like blogging, writing articles, getting involved with voluntary bar associations and speaking at conferences may not directly translate into new business or new clients, but it does make you part of the conversation. When prospective clients look for counsel, your activities put you on their radar. They remember hearing you speak at a seminar, reading an article you wrote for a newsletter or following your blog, and because they remember you, they may consider hiring you. Also, such activities facilitate introductions at events and may serve as a jumping-off point for a long-standing business relationship. And of course such activities are valuable in their own right.

**Give a presentation.** Again, bar associations have a difficult time finding someone other than the same old speakers to address their members. Prepare a power point, share it with those in charge of securing speakers (they're often committee heads or vice-chairs) and get yourself on a panel. Remember that planning for conferences, especially the larger ones, happens months in advance, so reach out early. As with writing, if you speak enough on a given topic, others will come to see you as an expert on that topic.

**Develop a relationship with your local business reporter.** Call your local paper, develop a relationship with the business reporters and make yourself available to answer questions about legal issues that are relevant to articles they are writing. Sooner or later, you will be quoted in those articles.

**Appear as a guest on a radio or TV show.** The more of an expert you become, the greater the authority you will have to speak on that topic to a radio or television audience.

## Writing

**Write an article.** Most voluntary bar association newsletters are begging for copy. DRI's substantive law committees have committee newsletters you can write for. Find a topic you enjoy and write about it. In fact, find an area of the law and write on it regularly. With your name being associated with the topic in one newsletter after the next, eventually others will view you as an expert in that area of the law.

**Write for business magazines.** These days, magazines are struggling. Offer to write a legal column for free. The magazine benefits because it doesn't have to pay for the copy and you benefit because your audience has suddenly grown exponentially.

**Post your articles on your firm's website.** Have your IT guy create a link to your articles on your firm profile, so when someone looks at the profile they can easily see what you've written.

**Write a book.** Legal and business publications are constantly looking for copy, especially free copy, to fill their pages. Find an area of the law that you specialize in (or want to specialize in) and start writing articles on the topic. Reserve your republishing rights so you can run the same piece in different publications. Write enough on a given topic and eventually you'll have enough for a book (this is another reason to reserve the rights to what you write). DRI, your state bar or a business publishing house may



be interested in your book. And of course, you can always self-publish. By having published a book in an area of the law, you will be perceived by many as an expert in an area, facilitating referrals. So start with an article on a topic, write as much as you can on the topic, accumulate your writings, turn them into a book and become an expert. It's not a daunting task if you just look at it as one article at a time.

## Getting Involved

To get referrals from other attorneys, in-house corporate counsel, businesses, or insurance adjusters, you need to get to know the people in charge. People give cases to people they know, like, and have relationships with. Gain access to these decision makers and build relationships that will last by joining organizations to which they belong, doing the work no one else wants to do in the organization, and slowly climb up through the ranks to a leadership position. As young lawyers, consider joining the DRI Young Lawyer Committee or a group for young lawyers with your state bar. Unsolicited phone calls and mass mailings are much less effective than joining committees, spearheading a subcommittee, volunteering for projects, and actively participating in meetings.



The following are organizations you might want to consider joining:

- **Bar associations.** Consider joining national (DRI, FDCC, IADC, ADTA), regional, statewide (your state bar association, your SLDO), or local bar associations. The larger the organization, the more attorneys you will come into contact with and the larger the pool of potential referral sources. However, the bigger the organization, the longer it will take to climb the organization's ladder. With any organization, you want to secure a leadership role—and, generally, the smaller the organization, the less the competition will be for those prized positions.
- **Business associations.** Most cities have a chamber of commerce with innumerable committees you can join and in which you can set the groundwork for a position of leadership. Chambers of Commerce exist for different geographic areas, for different ethnic groups, and for different professions. Look at the different groups, attend their meetings, and see which ones are the right fit for you.
- **Trade associations.** Accountants, doctors, and most trade groups have trade associations. If your practice area involves representing individuals in a given trade, such as doctors in administrative proceedings, find out if that group has a trade association and if you can join it. There is no better association to get involved with than an organization comprising predominantly those whom you want to represent.
- **Civic organizations.** Consider joining the local opera, theater group, or museum. Get involved with their fundraisers, get on their boards, and do their hard work. Many corporations have representatives on the boards of these organizations. They are a great place to develop relationships with the real power brokers.
- **Charitable organizations.** Charities are often looking for talented people to help them raise money. This does not mean you have to write a big check to get in their good graces; you just need to get others to write the checks. If you can learn how to fund-raise, you will increase your influence in the organization by leaps and bounds.
- **Athletic league.** Consider joining a corporate league where you play against other lawyers or other professionals. Or consider starting your own league. By setting up a league, you develop relationships with a wide variety of business

professionals who may want you to represent them and their interests.

- **Join a listserv.** Not only do you get the latest information on new case law and legal trends, folks on the listserv are often looking for attorneys for their clients. DRI's employment listserv is one of the most active listservs I've seen. Attorneys discuss legal issues and trends and refer matters to one another.

Also consider the following:

**Attend seminars.** More and more, you see seminars, webinars and presentations on law firm marketing, often presented by law firm marketers. If the time, place and price are right, consider attending one. DRI's Law Practice Management puts on programming on marketing.

**Attend a substantive law committee seminar.** DRI's substantive law committees hold annual conferences where you can network and receive CLE.

**Volunteer.** Volunteering is a great way to meet more people and expand your network. Working on a cleanup or revitalization project is a great way to meet prospective clients.

**Choose the right organizations.** Rather than joining just any organization with the hope that you will get business out of it, search for organizations you want to support. Ask yourself what you care about, find organizations aligned with your interests, then attend a couple of meetings. By attending a meeting or two, you can see what the organization does, what the personalities are like, what the commitments are, and what the expectations are before you decide if this is something you want to do. DRI, FDCC, IADC and ADTA are organizations you should consider.

**Actively participate.** Joining the organization is just the start. Get involved and volunteer to do the group's "dirty work." For example, if the association's newsletter has stalled because no one wants to be its editor, or there is a fundraiser nobody wants to head up, be the one who volunteers to do it. Do the necessary jobs that others avoid and see how quickly your "stock" goes up in the association. National organizations, such as DRI, FDCC, IADC and ADTA have numerous opportunities to volunteer and assume leadership roles on various projects to advance the organization's goals.

**Read committee newsletters.** Short accessible articles keep you informed about issues arising in your field.

**Participate in committee activities** and gain valuable leadership experience and skills that will distinguish you from others.

**Follow online communities.** Daily digests of the online community discussion groups keep you updated on committee activities and important issues in your practice area.

**Contribute to the online community** to help others in your field with their questions, or by sharing information on recent cases and decisions.

**Set your sights on getting a leadership role**, possibly even the presidency. It will not happen overnight and it will not happen without a lot of hard work, but those positions of power will attract others to you, will increase your prestige in the organization, and will add to the perception that you are someone that other members of the organization should do business with or refer their acquaintances to. Start at the bottom, do the hard work and work your way up.

**Write for the organization.** For DRI, write for your committee's newsletter, DRI's Monthly flagship magazine *For The Defense*, or *In-House Defense Quarterly*, with a readership of over 1,000 in-house lawyers.

**Have a strategy.** When getting involved in organizations, develop a local, state and national strategy where you get involved in an organization that caters to the local community, one which has a state-wide reach and one with a national membership. For example, you may want to get involved with your county bar association, your state bar association and DRI. A local organization will help you develop ties and relationships with local attorneys, judges and community leaders. The state and national organizations will allow you to expand your spheres of influence that go beyond your backyard. Developing a presence among different groups of attorneys and business leaders will help you become better known in more circles, making referrals more likely and increasing your exposure.

### **Being a Leader**

Joining organizations, becoming involved and staying involved often lead to meaningful, long-term relationships with others, some of whom one day may refer you business. I'm not suggesting you join organizations simply to secure business. You need a desire and a passion to serve the mission of the organization you're joining. But a by-product of your efforts are relationships with those who

are in a position to refer business. Now relationships take time. You don't join an organization today and have a case referred to you tomorrow. Building relationships take time. Building friendships take time. Building confidence takes time. But with time and effort, you can develop a list of individuals who can become potential referral sources for you, not only referring their cases but acting as your ambassador, having others refer cases to you too. Find an organization you're passionate about, join it, work hard, get to know others and build relationships that last.

And it's just not about joining. It's about leading. If you want to succeed at work, in your family and in your community then you need to become a leader. In any organization, there are the followers—the ones who do as others tell them, who choose not to think for themselves and are content to take orders. Then there are the managers, who direct others on how to implement someone else's idea. And then there are the leaders, the ones who as Stephen Covey puts it, "start with the end in mind" and devise a plan on how to get there. They have the "vision thing," as some call it—they think big picture, they see what others don't and aren't afraid of the expanse of their dreams. They are the ones who help organizations take huge leaps forward. Most organizations lack the leadership that they crave and need. Fill that void, and you will transform your organization.

But how do you become a leader? You say you are not the managing partner of your firm or the president of your voluntary bar organization. How can you lead from the middle of the organization or even the bottom? A title is not a prerequisite to be a leader. You don't wait until you've advanced the ranks before becoming a leader. As John Maxwell says, leadership has nothing to do with your position—it has everything to do with your attitude and your perception of who you are. Start thinking like a leader. Start thinking about the bigger picture, and the "end in mind" and develop the "vision thing." And then have the nerve to present your ideas to your firm or organization and put your back into it and put forth the effort to make those ideas into reality. No one is going to make you a leader. You can't wait until you get a title to become one. You need to create the opportunities, think big and be willing to implement your dreams. Your position may not be a lofty one, but others will soon start seeing you as a leader. And with time, your firm or organization will reward you and your title will soon match your efforts. Your title will come to reflect your leadership.

## Getting Published

If you want others to see you as an expert in a given practice area, consider getting published. Published articles indicate to others that what you have to say is important enough and authoritative enough to be in print. Writing an article is only half the work. To get your article published and read by hundreds of others, consider taking the following steps.

**Brainstorm.** Determine what you want to write about by brainstorming different ideas worthy of being transformed into articles. Your source of inspiration may be a landmark United States or Florida Supreme Court decision that can serve as the basis of an article. Alternatively, you may want to write about a recent legal trend or craft a “how to” piece such as “how to take a deposition” or “how to retain an expert.” Or you may want to explore an issue a client has asked you to look into. If you are going to be a writer, always be on the lookout for ideas, and ask yourself, “Would this make a good article?” Once you start thinking like a writer, you will never be short of ideas to turn into publishable pieces.

**Compile a list of potential publishers and read their articles.** Before you sit down to write, decide where you want to get your article published. Compile a list of publishers and publications, including trade journals, newspapers, magazines, and newsletters that might be interested in your idea. Most bar and trade associations have their own magazines and newsletters, and their editors are always looking for articles to fill the pages of those publications. If you cannot think of any publishers or publications to write for, look at the web pages of these associations to see what publications are out there.

**Do not pitch a story to a publisher without first** knowing what types of articles appear in the publisher’s pages. If you are going to write something a magazine publisher will be interested in printing, you first need to know what the publisher might want, which you discover by reading the magazine.

**Read the writer’s guidelines.** Many publishers provide guidelines about what articles they are looking for, how they want articles pitched, and to whom. Read them carefully and follow the recommendations.

**Write a query letter.** Once you know for whom you want to write, send a persuasive, convincing letter pitching your idea (known as a query letter). Most magazines and journals have a masthead that

contains the names of their various editors and staff writers. The list is important because it will reveal who the different editors are and which ones you should address your query to. To save money on postage and speed up the process, determine whether the publisher accepts email queries.

In the letter, provide a brief summary of your proposed article, a proposed title, a statement explaining why the piece is relevant to the publisher or a particular publication's readers, your qualifications to write the article, and a brief history of your writing experience.

**Start small.** If you want to eventually see your article in a national magazine or trade journal, start small and work your way up. Generally, the bigger the publisher, the more likely it is that it does not work with novice writers. Those big publications are looking for authors who have written articles elsewhere and have a proven track record. Generally, the smaller publications are open to working with new writers. Start small, get some experience, and “climb the ladder” to the bigger magazines and trade journals.

**Update your résumé.** The editor you are pitching your idea to will likely ask to see your résumé. Therefore, make sure it is updated and includes any writing and editing experience you have—whether as an editor on law review, a writer for the school newspaper, or a contributor to a firm newsletter.

**Gather clips.** Make sure to save any articles or clips you publish. Editors will want to see them to get a flavor of your talent and style.

**Avoid editors' pet peeves.** If you want to increase the odds that your article will be accepted for publication, avoid the pet peeves of the decision makers. Make sure your query is flawless, with no typos or grammatical errors. If an editor does not want you calling to pitch an idea, do not. If you are given a deadline, meet it. If you are asked to make revisions, make them. Trust that the editor knows best about what the final piece should look like.

## Social Networking

As social networking becomes interwoven into the fabric of our lives, it is becoming more than just a means to reconnect with old high school friends or post photos of our last vacation. More and more, lawyers are using online tools to market their practices. By now, most of us have become familiar with Facebook. Many of us use it to stay abreast of what's going on in the lives of our family



and friends. Many of us follow one or more blogs, where we get our news, entertainment or legal updates. Many of us have signed onto LinkedIn, have updated our profiles and have connected with a few or more colleagues. And some of us have even signed up with Twitter, and follow colleagues, friends and possibly comedians, politicians or celebrities. We have a sense that these tools could not only help us pass the time, but could also help us develop our practices, and market our firms. But how?

The following are some tips to keep in mind.

### **Blogging**

1. **Pick a niche topic.** Choose a topic that strikes a balance between appealing to the largest possible audience and focusing on a niche area that you are knowledgeable about and that will draw traffic.
2. **Keep the blog name simple.** Simple and direct are the best when naming your blog and selecting a web address.
3. **Content.** Professional, well-written blog posts will help you build your name as an expert in your niche area.
4. **Include your bio.** Create a section to highlight your skills and background and promote your law practice.





5. **Post regularly.** Regular posts will keep your content fresh and draw more readers to your blog. Daily posts are ideal but hard to maintain when you are busy. As a general rule, one to three blog posts a week will keep your blog fresh.
6. **Write posts on the weekend and publish during the week.** There is no reason to write blog posts when you are most busy. You can relax on the weekend and come up with several posts and publish them later.
7. **Break down complex topics into multiple posts.** A great way to blog about a complex subject is to write a series of blog posts on the same topic.
8. **Promote your blog via social media.** In LinkedIn, update your status every time you post something to your blog. In Twitter, tweet the headline and shortened URL of your latest blog post.
9. **Use analytics.** To make sure that your blog continues to grow, keep track of statistics through an analytics package. Some blog software comes with built-in stats, but you can also install programs such as Google Analytics. These stats will tell you how many visitors frequent your site, as well as insight on the search terms that are bringing traffic.
10. **Steer clear of giving legal advice.** Stay away from giving legal advice or from giving readers the impression that an attorney-client relationship was formed and consider including a disclaimer.
11. **Become a resource for journalists.** A successful law blog can even transform lawyers into the go-to experts for journalists.
12. **Gain prominence on Google.** Blogs with well-written content tend to rank high for relevant search terms on Google, thus increasing your visibility.
13. **Make it personable.** Personality and a strong voice is a cornerstone of every successful blog.
14. **Keep it short.** There are no fixed rules on how long or short a blog posting should be, though they should generally skew toward shorter.
15. **Use headlines that entice and summarize.** Blog headlines should be treated like newspaper article headlines, attracting the reader's attention.
16. **Writing guest articles for other blogs** is also a great way to make your blog popular within days.

## LinkedIn

1. **There are over 433 million users of LinkedIn** and thousands are joining every day.
2. **Facebook is geared for general social communication**, while LinkedIn is intended for business networking.
3. **LinkedIn allows you to find out who knows whom** and then use those connections to reach out to people.
4. **Optimize your online presence.** Joining sites like LinkedIn optimizes your online presence. For instance, when someone googles your name, your LinkedIn profile will pop up in the search engine results.
5. **If you just use LinkedIn alone, it will do nothing for you.** You must follow-up on connections you make electronically with personal connections, either by telephone or preferably in person.
6. **Clients and potential clients are increasingly using LinkedIn.** For this reason, whether you like it or not, you must compete on LinkedIn.
7. **The first step is to create a solid and appealing user profile.** People you don't know, who can give you work, may look at your LinkedIn profile and may never look at your biographical section on your firm's website. For this reason, your LinkedIn profile must be thorough and inviting. It must describe you and what you do in a way that will attract the type of clients that you want to attract. When picking a tone for your profile, remember that this is your first "virtual" impression. At a minimum, add your photo, resume, relevant experience, objective statement, and contact information to your profile.
8. **One of the appealing aspects of LinkedIn** is that its software figures out, based on your current contacts, who else you may know or may want to know and suggests that you invite them to connect. You can expand your network by following-up on this by inviting those people to connect with you.
9. **Build your connections.** Use LinkedIn to build a network by creating connections with registered users. There are second degree connections (a connection from a direct connection) and third degree connections (a connection of a connection from a direct connection). Use connections to gain an introduction to someone you wish to know through

a mutual trusted contact. LinkedIn's gated access approach ensures trust, so that contact with any registered user requires either a preexisting relationship or the intervention of a contact.

10. **Whom to connect with.** Start by making connections with coworkers, friends, family, other attorneys, etc.
11. **When you are invited to connect, consider whether the connection is a viable and helpful one to you.** If so, personalize your acceptance and try to follow-up with a telephone call, lunch, a cup of coffee, etc.
12. **If you are working on a big case or a big issue, tell people that by sharing an update.** Make your profile interesting and constantly refresh it.
13. **Join LinkedIn groups.** Examples of useful groups on LinkedIn: DRI; your college and/or law school alumni group; local bar associations.
14. **Start a group.** Any LinkedIn member can start a group. If you start a group, you can target and assemble the specific type of people you would like to gather in one place. As the creator, you are the center of the group, and you will be able to send all members email messages about upcoming events, moderate group discussions, and select key news sources for the group to review.
15. **Consider writing a blog on LinkedIn.**
16. **Save time.** Once you get set up on multiple social media sites, link your accounts. If you do this, there is no need to post multiple updates on multiple social media sites.
17. **Edit your website links.** You can add up to three links to your law firm's web site, bio page, blog, Twitter page, or any other web link you deem important to add to your profile.
18. **Create a company page for your firm.** All employees of your firm who have a profile on LinkedIn will automatically be attached to your Company Profile page. Your page can not only give a brief summary of your firm, but in the "products and services" area, you can list and describe your practice areas and create links to your website for more information.
19. **Observe ethical practices.** Although LinkedIn can be a powerful tool, you must be observant of ethical considerations that can arise through your use of it. For instance, do not state "specializing in BLANK law" because it may violate ethics rules.

## Twitter

1. **Pick a handle.** The best options are your full name or a variation of it, a combination of your name and your company, or a combination of your name and your industry. This will help brand your social media presence.
2. **Who to follow.** Start with colleagues, friends, family, affiliations, and places around your community that you like. The more people, businesses, and organizations that you follow, the more follow requests you are going to get.
3. **Use Twitter Search.** Twitter Search is similar to Google search. Type in your search request and the Twitter Search engine will find conversations on that topic. Use this tool to find more leads on who to follow.
4. **When to tweet.** Posting in the morning or early afternoon increases your chances of attracting traffic.
5. **How often to tweet.** Tweet daily, 3-6 times a day. Of course, you should aim to strike a happy medium so as not to inundate your followers.
6. **What to tweet.** You may have recently signed up for Twitter and are wondering “What in the world should I tweet?” Here are some suggestions: Share a link to your blog post; share news stories relevant to your practice area and comment on them; share recent cases and opine on their impact; retweet another’s tweet with your own thoughts on the subject; share a link to an article you’ve written or a presentation you’ve given; share a book or movie review with your thoughts; share a press release; share motivational quotes; share about your hobby, whether it’s golf, jazz or wine.
7. **If you’re going to start tweeting,** make it part of your routine so that you tweet regularly and build a following.
8. **Engage.** Engage in two-way conversation by direct messaging, mentioning others and retweeting information of value to your target audiences. Have conversations via tweet and search for trending hashtags to find conversations with which you can participate.
9. **Show your area of expertise.** Post links to articles and cases that are pertinent to your area of expertise and that you think your followers would find interesting. Comment on these to start a dialogue. Part of using Twitter is to market yourself by showcasing your area of expertise. Moreover, when



others are searching for that topic, your conversation will come up which will increase your online presence. However, be cautious not to dole out legal advice and inadvertently create an attorney-client relationship. Stick to the facts and point people to where they can find more information.

10. **Tweet when you upload a new blog post or update your website.** Many of us use multiple social media platforms. If so, be sure to notify your Twitter followers when you update your blog or website. Not only will you increase traffic to your blog or website, but you will give your followers an opportunity to retweet your post to their followers.
11. **Ask for help.** Twitter is a great way to ask for referrals and recommendations. Use it to ask for recommendations on products, services, people, and expert witnesses. If you don't want the question that you are asking to be public knowledge, then you can privately message another Twitter user and ask a question that way.
12. **Be helpful.** Answer questions, respond to other's remarks, and be involved in helping others and creating relationships. However, as mentioned before avoid doling out legal advice as you do not want to inadvertently create an attorney-client relationship.
13. **Invite followers to an event.** Is your firm or local bar association hosting an event or seminar? Use Twitter to invite your followers to it to increase your audience.

## Facebook

I attended a talk by Brian Tannebaum, author of *The Practice*, who referred to Facebook as the forum for small talk for lawyers. I have many attorney friends, and their personalities come through on their posts. For example, if you're my friend, you know I brag about my boys (too much), comment on jazz (not enough) and critique movies (usually spot on). When you see me at an event, you feel like you already know me because we have already had the small talk online, even though we may never have had an actual conversation about my interests. Those self-revelations go a long way in bringing us lawyers closer together, building relationships and having the "conversations" that we may only have a few times a year at cocktail receptions and conferences. As lawyers, I encourage you to reveal yourself a bit on Facebook and avoid the law firm posts about recent victories and just be the person you are. If you're looking to monetize Facebook, appreciate it for what it is. A place

to share a little about yourself, have a conversation (always polite and respectful) and share in your friends' adventures, triumphs and grief. It's only through personal relationships that we build ties that may turn into business. The relationship always comes first, though.

1. **Facebook above all else.** Facebook provides the best value for your time. It has over 1.65 billion active users, with 1.09 billion of them logging onto Facebook daily.
2. **Control your output.** Regardless of the tool you use on Facebook, it is important to not bombard your "fans" or "subscribers" or connections with information. It is recommended to keep your posts at no more than 1 to 2 per day. On the other hand, it is also important to stay active and visible—attempt to provide at least one update every day.
3. **Provide value to your followers.** You can share a variety of content through Facebook, as long as it offers value. Post articles written by your firm or by others pertaining to new developments in the law or recent influential cases—content that has some utility or interest for the user.
4. **Show other facets of you and your firm.** A Facebook page should not be a more concise version of your firm's website. Use the opportunity to show a different perspective of your firm, one that we would not see from the website. Post photos or videos from firm staff functions, charity events, or television appearances. Showcase the firm's involvement in the community or advertise upcoming events. This helps humanize the firm and give users more incentive and opportunity to interact online.
5. **Engage.** Get your followers to interact with you. Ask questions. Respond to answers, comments or posts, and reply in a timely manner.
6. **Promote events.** Use Facebook to promote your firm or bar association's next event by creating an event page. Invite your friends, and let them invite their friends. This is a great way to increase turnout.
7. **Share your stories.** Add links to your blogs, web pages, and articles so that readers can read them and share them with their friends.
8. **Interact with others.** Socializing is the key to Facebook—you can initiate conversations by referencing a friend by name on one of your posts. If you see it's a friend's birthday from their profile, send them a quick "happy birthday" message to break the ice and reconnect.

9. **Investigate.** Use Facebook to investigate opposing counsel and Plaintiffs' behavior and whereabouts. But remember, don't friend a Plaintiff
10. **Mix it up.** To cultivate relationships on Facebook, you must provide a value, and not merely use it for self-promotion. Your updates should include a solid mix of links to relevant content, responses to friend's questions and conversations, new conversations, and your news and updates. This is the key to making and keeping relationships on social media.
11. **Extend relationships outside Facebook.** Once you begin communicating with other members, see if you can't find opportunities to build the relationships outside of Facebook—maybe a lunch if you are in the same city. The key is to be consistent and patient, instead of expecting immediate results.
12. **Ethics.** Use of Facebook can present ethical dilemmas for attorneys. Avoid friending people who might be potential conflicts of interest and soliciting clients on Facebook.



## Trying Every Case

### Starting at the Finish Line

You have heard it said so many times that you have become immune to the following statistic—about 98 percent of cases settle. For every 100 cases that land on your desk, perhaps two will go to trial, maybe less if you represent risk adverse clients. So what do most lawyers do? They look through the “98 percent Prism.” They assume that, in all likelihood, the case they are litigating will settle, and they act accordingly. They are not preparing to try a case. They are preparing to settle a case. And in so doing, they are overlooking the power and grandeur of the “2 percent Prism.” They stop being trial lawyers and they start being litigators.

I would suggest to you that you live life and practice law through the “two percent Prism.” Assume every case will go to trial. Consider a paradigm shift. Consider shifting from the “98 percent Prism” to the “two percent Prism,” from playing it safe to playing for keeps, from trudging through your cases to sucking out their marrow. If you take nothing else from this book, take away from this section’s title—Trying Every Case. It will change your practice and will change your perspective on everything.

But why would “you try every case,” you ask. How does expending all that time and exerting all that effort make sense? It makes sense for several reasons.

**You don’t know which two percent of cases will go to trial.** How often were you sure a case would settle and it ended up going to trial? How often were you sure you would try a case, and it ended up settling? The fact is, we don’t know which cases settle and which ones get tried. We can’t tell whether mediation will prove successful. We don’t have a crystal ball and can’t see whether opposing counsel will accept our settlement offer. Just like you can’t pick the winning numbers in the lottery or say who will be in the Final Four, play in the Super Bowl or win the Kentucky Derby, we don’t know which cases go to trial and which ones don’t. And since we don’t know which cases will go to trial, is it better to assume none of them will, and work them up as if they won’t, or assume they all will, and work them up as if they will? If you don’t want to get caught with your pants down at trial, I would suggest the latter.

**Trying every case gives your actions a purpose.** If the moment a case hits your desk you believe wholeheartedly that it will go to trial, every action you pursue, every decision you weigh and every choice you make will be directed toward the purpose of winning at trial. You will depose witnesses who will help you win at trial and



you will ask them questions the answers to which you will want the jury to hear. You will seek documents you will publish to the jury as exhibits and file motions to limit the other's side exhibits and evidence. Everything you do will have the purpose of "starting with the end in mind," namely trial.

**Trying every case saves time.** You will quickly discover the paradox that if you try every case you will work less, not more. That is because you will only do that which is necessary. If an activity helps at trial, you will do it. If not, you won't. If a course of action helps at trial, you will pursue it. If it does not, you will ignore it. Like a fighter pilot locked on his target, you will lock in on yours—winning at trial—and everything else will become a distraction to be avoided. We lawyers can waste a lot of time chasing rabbits down holes if we let a case direct us as opposed to directing the case. Before you send out an interrogatory, make a request for documents or ask a question at deposition, you will ask, does this help me win at trial? By doing so, you will save time and the client's money.

**Trying every case allows you to develop themes early.** Trial themes do not happen by accident, and it is difficult to superimpose trial themes on a case after the discovery is closed. To ensure you present your desired themes to the jury you need to frame your themes early and conduct discovery directed at supporting them. That way, you will have one or more coherent themes that are supported by the evidence, themes that you developed by choice rather than by luck or by accident.

**By trying each case you will try fewer cases.** Our first paradox was that trying every case results in less work, not more. The second paradox is that by trying each case you will try fewer of them, because the better prepared you are for trial, the better prepared you are to settle a case on your terms. Opposing counsel will see that you have aligned the facts and the issues to favor your client. He will sense that he has been outmatched, and he will negotiate from a position of weakness. By trying every case, you will focus on the other side's Achilles' heel and be more suited to prevail on dispositive motions.

By trying every case, you will see your own side's weaknesses and better advise your client about them. Because sometimes by starting at the end you can see defeat well before it occurs and prepare accordingly. You may be able to broker a quick settlement on favorable terms when you see the weaknesses the other side has yet to discover because they are months, perhaps even years

away from thinking about trial. The irony is that most cases that go to trial end up there because the attorneys involved thought about trial too little too late.

**Trying every case is fun.** I went to law school because of shows like L.A. Law and others that showed the glamorous side of the law. What was glamorous was seeing all these attorney/actors trying case after case. These shows never had scenes of attorneys preparing interrogatories or spending hours drafting motions. They were always getting ready for trial or they were in the courtroom trying cases. The fact remains that most cases we handle will never see the inside of a courtroom; they will never be presented to a jury. However, if you treat every case as if it were, it makes what we do so much more fun and enjoyable. Viewing every case through the prism of trial gives us a sense of purpose and it makes the daily grind less of a job and more of a profession.

Hopefully, I have convinced you to try all your cases. If so, you have agreed to change your point of view. You may not yet appreciate what that entails, but you have committed to seeing things differently. A paradigm shift is already occurring. You will start seeing the world through a new prism.

First, let us consider our audience. If you try every case then your audience is not your client, or opposing counsel or even the judge. The true audience is the future jury that will preside as the fact finder. I am not suggesting you ignore everyone else. You still have a client to serve, a judge to convince and an opposing counsel with whom to debate, combat and negotiate. But it is that jury that becomes the true audience. And if the jury is the audience, then you need to learn what affects them and what convinces them, what entertains them and what bores them. You will have to accept that you cannot change them, but that if you deal with them on their terms you can win on your terms.

So what do juries want? What do they like? What do they expect? Keep in mind that your average juror did not go to law school. They do not read statutes or debate the holdings of cases. They do not see the world as you do. They see the world as they do. They go to the movies on the weekends. They watch their share of television, which includes a healthy dose of reality shows, and they discuss their favorite episodes with their co-workers the following morning. They download their share of songs from I-Tunes. They read *Sports Illustrated* and *Entertainment Weekly* and *People*.

And let's not forget that their attention spans are diminishing. They are e-mailing and texting and tweeting and using abbreviations and emoticons to express their ideas and their emotions. They are accustomed to watching a trial in less than two hours at the movie theater or less than an hour on their favorite drama. Their reading has gone from novels to short stories to flash fiction. Have you noticed how much shorter articles in magazines are these days?

And yes they want to be entertained. They are, as Thoreau said, living lives of quiet desperation. They are overworked, their finances are over-stretched and they are looking for an escape. And that is where a good story comes into play. Stories make a good escape and make for good entertainment. Jurors are looking for characters that capture their imagination, suspenseful plots and happy endings. And it is this search for good stories in movies, in television, in novels and anywhere else they can be found that provides you the opportunity to speak with jurors on their own terms. Because stories can do more than simply entertain. They can teach, and they can persuade. They have served as the basis for the oral history of countless ancient civilizations. Leaders use them to inspire, preachers use them to share spiritual truths and teachers use them to educate. And you can use them to win at trial.

So when I talk about changing your perspective, I am talking about you looking at life through the lens of jurors. That requires you to be an amateur anthropologist and watch and read and listen to what your jurors are watching, reading and listening to. You have to learn what moves and touches them. You need to be armed with this knowledge so you develop themes that will resonate with these jurors. If your themes resonate with you, and with your client and with the judge but they don't resonate with jurors, you have failed. Never forget your audience.

Now I have given you one prism to look through. The prism of your average juror. But by looking through that prism you soon discover you have to look through a second prism. Because when you slip on the shoes of the juror, pull on their pants and walk into their world, you realize how they relish and crave a good story. And that's where you come in. The second prism is that of a storyteller. You need to learn how to construct stories and tell them well.

And this may be the hardest thing for you to do. This is where you may put this book down; perhaps even dismissively toss it away. You say you are a lawyer, not a storyteller. You earned a juris

doctor, not a masters in fine arts. You write motions, not stories. But this brings us back to our audience. They could care less about your motions or your string cites or your legal arguments. Let us never forget whom we are trying to convince.

So you will need to learn the elements of a story. Characters, plot, symbolism and let us not forget the most important element—theme. Curious, isn't it, that we always come back to theme? You will need to learn the tools of storytellers—the use of metaphors and dialogue, development of characters and the construction of a tight, engaging plot. You will exercise your imagination like never before and in so doing you will see the world like never before.

To become an effective storyteller you have to read others' stories. Start taking the time to read novels and watch hour-long dramas and go to the movies more. All these activities, which our profession considers to be a waste of time, will hone your story telling skills. You will read and hear and see how others tell stories and adopt and borrow their methods when developing your own stories in your cases. You will learn not only to develop themes in your case, but you will develop them in the context of a story, one of your own telling, where your client serves as the protagonist, and the evidence shapes the plot and you give the jury the opportunity to write the happy ending with their verdict, a happy ending where your client wins.

What I am suggesting may appear radical. I certainly was not taught to read *People* magazine or tell stories in law school. Reading a John Grisham novel in the student union was considered a waste of time. But to start with the end in mind is to start with the only audience that truly matters—the jury, and to start with them means that from day one everything you do is directed toward convincing them of your themes on their terms, which requires you to tell them a good story.

You may think you do not have what it takes to tell a good story. You may even contend that your lack of creativity led you to law school in the first place, as opposed to pursuing a career as a novelist or an artist or a musician. However, you may be surprised to hear that you have more of an imagination than you give yourself credit for and that anyone, and I do mean anyone, can learn how to be an effective storyteller and anyone can learn to speak to juries on their own terms. Let's start with your audience.

## Your Audience

As litigators, we are hired to persuade, and as trial lawyer we are hired to persuade jurors. But who exactly are these jurors, our prospective audience? They are male and female. They are old and young. White collar and blue collar. Conservative and liberal. Mothers and fathers. Athletes and book worms. Engaged and apathetic. Caring and selfish. In short, they are everyone, and getting to know everyone is a very daunting task.

So how do you learn to communicate with everyone? You start by acknowledging that your interests and desires, your vantage point and worldview, are not the only ones that matter and that you must actively seek out others' interests and perspectives. You say you don't like sports? Many jurors have a favorite team they follow. You've never used Facebook? Most jurors use it every day. You could care less who the finalists are on *Dancing with the Stars* or on *The Voice*? Your jurors talk about these things at lunch and around the water cooler. These things matter to them, and if you're going to communicate to them you'll need to speak to them on their terms and to do that, you first need to discover what those terms are.

I am not suggesting you change who you are or suddenly pursue interests you could care less about. What I am saying is you need to learn more about your audience. And that means stepping out of your comfort zone.

Let's start with television. The average American home has more televisions than family members. Televisions are in restaurants, airports, doctors' offices—you name it. In fact, I am hard pressed to think of places that don't have televisions. You can watch your favorite programs on your DVR, on your laptop or your iPad. The average American watches over 150 hours of television each month, and each year that average increases.

I can relate. I love television. I watch it all the time. Often I just have it on in the background while I do something else, such as writing this book. I confess. I am writing this chapter and I am watching *The Invasion of the Body Snatchers*. Not the classic 1958 version, or even the 1978 version (who can forget Donald Sutherland scream at the end?), but the 2007 version with Nicole Kidman, which was panned by critics and movie goers alike. I'm watching it because even bad television is better than no television. Because it is an escape for me, just as it is an escape for so many of your jurors.

I could discuss how television can make you a better communicator. You have comedy or drama, reduced to 30 minutes or an hour, with captivating characters, moving dialogue and strong visuals. These are the very characteristics I will address later in the book when I tackle story telling. Jurors crave good stories and they crave them because they're short, to the point and they wrap up all the loose ends with a happy ending. Yes, television has a lot to teach us when it comes to communicating to jurors. If you can write a script for *Law & Order* you can tell your client's story at trial. But let's put that aside for now. Enough of the medium. Let's discuss its content.

What's on television these days? Well, as always, there are sports, dramas, sitcoms and movies. But things are changing. First, there are the reality shows. Folks competing to be the best dancer or best singer or top model. The one who can outlast the others on the island, in the boardroom, in the guesthouse or in the race. These are popular shows. Week after week, they are the top ratings grabbers. Take some time and follow some of these shows. Just a few episodes here and a few there. Jurors watch these shows. See for yourself what all the fuss is about. It will give you some insight into what jurors care about, what interests them. Isn't it curious that the average juror is interested in watching folks just like themselves compete against each other on national television? What makes such programming so alluring? What does that tell us about jurors? How can we use that information to relate to jurors at our next trial? You can only answer these questions if you walk a mile in their shoes, or better said, sit an hour on their couch.

There are two types of reality shows. The type where we root for the participants—hope they lose weight, dance well, design well, bake well, sing well. These shows inspire us. Average folks chasing their dreams and reaching them. Is your client someone the average juror can support and cheer for? If you represent a corporation, can you humanize the company, emphasize qualities a juror can relate to, possibly even cheer for? And then there are the voyeuristic shows—the ones we watch because they are a train wreck, because their participants beg us to watch them, and they get our attention even if it means we are laughing at them instead of with them. Will the jurors look upon your client the way they watch the cast of *Keeping Up with the Kardashians* or *The Real Housewives of Wherever* or *Mob Wives*?

And what effect are reality shows having on, well, reality? In a society where every job has become the subject of a reality show (plastic surgeons, lumberjacks, chefs, bounty hunters, cops, interior designers, real estate agents, judges, pawn shop owners, fishermen, etc., etc.), how do jurors perceive us? How do they perceive the trial we are putting on for them? Is it another reality show? Are we watched the way they watch Mike Rowe on *Dirty Jobs* or Andrew Zimmern on *Strange Foods*? Have we become just another television program? I'm not here to debate whether that is good or bad. Either we have or have not. But if we have, then we better learn to put on a good show. Because television has a way of coloring the way we see things, even after we turn it off.

And how about the broad selection available on television? When I was boy, I had a 13-inch black-and-white television in my bedroom that picked up a total of seven channels. I had the three networks (Fox and the Simpsons were years away), PBS (with only six channels, I watched my share of *This Old House*, Julia Child, and Bob Ross with his curly hair, who's willowy, reassuring voice convinced me I could paint, too), and three local channels (including WGN, where I watched the Cubs and the Bulls). We all watched the same shows because there were not many to pick from. A Charlie Brown special was a big deal because there was no DVD (or for that matter, a VHS) to record it. Saturday morning cartoons meant something. All that has changed.

Today, I have over 150 channels. My sons, now 18 and 15, grew up with 7 cartoon channels to choose from. If they missed a show, it would be replayed. If they couldn't wait, they could watch them at their leisure by pressing the On Demand button on the remote. And of course, we could buy any show at Best Buy or Target or Wal-Mart or order it online. In fact, we can now buy the entire season of a show, or for that matter, the entire series. And not just shows currently on television. But shows I watched as a kid. I remember anticipating every week watching Bill Bixby turn into Lou Ferrigno who played the Incredible Hulk. I own it now. Every episode. Just like that.

Because today choice is everything, and what we want we get. No need to wait. Just drive to Redbox, order it online or view it on sites such as Netflix. There is the blessing of infinite choice. And then, there is its curse. Because by getting everything you want, you lose the virtues of patience and self-control. And sadly, you miss out on the gift of anticipation and the excitement that comes with it.



And those are your jurors. They want what they want when they want it. Again, it's not up to you to judge. It's up to you to deliver.

Let's move from television to the internet. When I was kid, I had a television, even if I had a paltry number of channels. But the internet? That was not part of my, or anyone's, reality. And today? I can't imagine not having it. Going online is one of the first things I do in the morning and one of the last things I do at night. And that is likely true for you and for those prospective jurors out there. We use the internet to get our news, our music, our television programs and our movies. We order our books, our kids' toys and our anniversary gifts. And perhaps most importantly, it has redefined how we communicate with others.

E-mails, instant messages and posts on social networking sites largely have supplanted in-person communications. Your typical juror is more likely to send a text message than make a phone call. He dates through E-Harmony. She reconnects with high school friends through Facebook. Speaking of which, Facebook boasts of more than 1.65 billion users. More than 1.65 million users checking in each day and more than 300 thousand status updates are posted each minute. And how about this. More than 5 billion pieces of content are shared each week. Twitter boasts 1.3 billion registered users, 310 million active users, and 120 million monthly





visits. And let's not even get started on Snapchat. This is how your typical juror is communicating, how they are connecting and how they are relating to the world around them. What does that mean for you?

First, we are communicating more. We are meeting new people and reconnecting with old friends with an ease and frequency never before imagined. And as we invite more and more people into our lives, we have less and less time for each of them. So, ironically, we are in fact communicating less. How do you possibly keep in touch with 200 Facebook friends, 300 LinkedIn Connections and update your Twitter account? You post brief comments about your day or your feelings or opinions and share them with everyone. You text instead of call. You post instead of text. You try to say as much as possible while saying as little as possible. This brings us to our second point—we have redefined how we communicate with each other. The old methods have become an anachronism. And if you are communicating with jurors using the old paradigm, then you're not really communicating at all.

If you don't have a Facebook account, create one. While you're at it, create Twitter and LinkedIn accounts too. Create a profile on these social networking sites and give them a whirl. Upload photos from your last vacation, comment on the last book you read and comment on others' posts. See for yourself firsthand how folks are communicating with one another. It's a different way of getting your point across, and if you want to communicate to jurors on their own terms, you first need to learn what those terms are.

And what does social networking say about us? What's happened to the traditional notion of privacy? We share everything. We post photos from Friday night's happy hour. We tweet about the ice cream we had at Cold Stone. We include all sorts of private information on public sites. Your jurors' notion of privacy and discretion would shock their grandparents. This dovetails into the television shows we watch, where voyeurism translates into ratings. With privacy being redefined on a daily basis, how will jurors perceive you, your client and your case? What do they expect to see, what do they expect to be told? You have an audience who expects complete transparency, because they have it in their own lives. Hiding the ball and running the clock at trial won't do. If your case has weaknesses, you will have to deal with them because your jurors will expect to hear about everything, the good and the bad, especially the bad.

So we have tackled television and the internet. How about what your jurors listen to and what they read? Again, it's a varied selection. iTunes allows you to download most songs ever recorded. If you want it, you can have it and have it inexpensively and have it whenever you want. With the emergence of e-readers—Kindle, iPad—you can download most books ever published. Your selection is no longer limited to what you find at your local Barnes & Noble. As a matter of fact, bookstores are on the verge of extinction because people can't be bothered to drive there. You want a book? You go online and download it immediately. Done. So your jurors are accustomed to having all their interests and wants satisfied on demand. And just as importantly, due to the limitless selection, you have the most diverse jury population imaginable. They are listening to different music, reading different books and watching different programs. When communicating to jurors, remember that one size does not fit all. And yes, they have become accustomed to getting what they want.

So, how do we learn what folks are watching, listening to and reading, so we can pursue the same interests and learn what is influencing and affecting them and what is getting their attention? Here are suggestions to become an amateur anthropologist of the American juror:

**Subscribe to magazines.** Go to Amazon, Barnes & Noble or a discount magazine website, and order a news weekly, a sports magazine, a men's magazine, a women's magazine and an entertainment magazine. Perhaps throw in a personal finance and a video gaming magazine too. These magazines will discuss what folks are listening to, reading and watching. Because news is instantaneous, and because no one wants to read a magazine article about something they read on Google news days earlier, magazines have moved from reporting the news to addressing new trends and interests. If you want to know not only what jurors are doing now but also what they will be doing in the future, magazines are a great source of information.

I read online *Time*, *GQ*, *Esquire*, *Men's Health*, *Sports Illustrated*, *Good Housekeeping*, *Vanity Fair*, *Redbook* and *Entertainment Weekly*, among others. Of all the magazines I read, I think *Entertainment Weekly* is the best resource for keeping your finger on the pulse of the average juror. Each week, the magazine tells you what songs folks are downloading, what books they are purchasing, what television shows they are watching and what movies they are going out to see. All of this, along with a generous helping of celebrity

gossip, because your jurors talk about Kanye and Kim more than they do about Obama and Netanyahu.

**Watch more TV.** As I suggested earlier, spend more time in front of the television. Learn what shows are popular and watch them. Just a few episodes here and there. And unlike most viewers, don't watch television passively. Study the shows. Why do they have a following? What is the attraction? Is it the story? The characters? The tension? The suspense? The humor? What topics are being addressed? How are they being tackled? How are they influencing your emotions? Your intellect? Look at shows both for their content and their style. Both for what they say about your prospective jurors' beliefs and interests and how to communicate with them. If someone visited us from another country or another planet, they would learn more about us from television than from any other source. And don't skip the commercials. They speak volumes about what marketers think work when it comes to influencing the decisions their customers (and your jurors) make.

**Download songs.** Just as with favorite programming, download the most popular songs onto your phone. Listen to the lyrics and study the beat. Why are so many folks downloading the song? What are the lyrics about? How does the music make you feel? What visceral reaction do you have? Again, analyze songs both in terms of what they have to say about your jurors and about how best to communicate with them.

**Snoop on Facebook.** Snoop around on Facebook. See what friends and friends of friends are posting on their pages. What are they talking about and how are talking about it? What are they looking forward to? What are they laughing about and what are they wringing their hands over?

**Read books for marketers.** Up until now, I have recommended you spend time in the jurors' shoes to see the world from their perspective. Just as importantly, you need to see how others perceive them and what others think can influence them. That's why I suggest you read marketing books. Whenever I travel, I find myself in the airports' bookstores, which invariably have an overstuffed business section. Among the books I peruse are those that discuss how to connect with customers, how to influence them, how to win them over and how to advertise to them. Business types know they have to take customers as they find them, and adapt their marketing to the customers' wants and needs. Reading such books will help you learn what works when communicating to your customer (namely, the juror) and what doesn't.

The purpose of all these efforts is to learn more about your audience and in so doing, moving beyond the traditional role of lawyer. So often, we box ourselves into categories—we're lawyers and as such we draft motions, attend hearings and try cases. But to be effective lawyers, we also need to be anthropologists. Much of this chapter has been dedicated to this—learning more about our subjects. Likewise, we must learn to be jury consultants. We need to see our cases much as jury consultants would. They see everything in a case through the prism of the jurors, always asking themselves how would a jury react to this witness or to that fact.

When most lawyers think of jury consultants, they think of someone they call, if at all, on the eve of trial. The consultant dutifully sits in during a day or two of jury selection, provides her input and then leaves. In short, most of us think of jury consultants as those folks who help us pick a jury. But more and more, they are being called in at the beginning of a case to help lawyers tailor their cases to their audience. Consultants are asked to arrange focus groups for lawyers to try out their trial themes or see how jurors will respond to their client or the facts of the case. They are called upon to prepare witnesses so that they can effectively communicate at deposition and later at trial. And of course, they help pick those jurors who are most aligned with your themes and your message.

Jury consultants know that everything that happens in a case either draws jurors into your corner or pushes them away. It is that mentality you need to adopt. Everything you do, everything your client does, every fact you develop, every issue you tackle—everything draws the prospective juror or repels him. Therefore, be forever vigilant when pressing your case forward. Always keep at the forefront of your mind how a jury will react to what you are doing.

And while we are on the topic of jury consultants, nothing prevents you from becoming an amateur consultant. Most have never gone to law school. Many rely on their psychology or marketing backgrounds. Others simply rely on experience. I don't mean to disparage them. I rely on them myself. But I simply point out that you too can become a jury consultant, and in becoming one, transform into a much better lawyer.

So, how can you become an amateur jury consultant? For beginners, studying your audience is a great start. Taking the time to study prospective jurors, as discussed earlier, helps you understand what to aim for—what will resonate with jurors and

what won't. The next step is to get a copy of the jury consultant's playbook. Most consultants have websites and most consultants give away a lot of information and advice on those websites. Visit them. View their content. Read the white papers and the articles. Soak up the free advice. Simply go to Google, type in the phrase "jury consultant," and you will find hundreds of sites, everything from the behemoth national operations, to the local consultants who specialize in knowing jurors from a narrow geographic region.

What you will find is a plethora of advice on what jurors want, what they expect, who they are, how they think, how they perceive, how you can get them to like you and how to spot the ones who don't. Much of the information you will find is directed toward picking a jury, but there is also a fair amount about how to communicate to them, not just at trial, but also from the inception of the case. Spend a couple of hours sifting through several dozen sites, pick your favorite ones, and place yourself on their e-newsletter mailings. Follow their blogs and read their materials. Each of you will find your favorite sites, and even though there may be some overlap, I suspect your list of favorites will be different from mine. Find sites you enjoy, that provide quality content, and follow them. The more you do this, the greater the insight you will gain.

So sit down with a T.V. Guide, a few magazines, your iPad and the remote control. Watch some popular shows, listen to some popular music and thumb through some popular magazines. What do they tell you about those jurors who will one day be sitting in judgment of your client and of your case? Go online and explore the world of social networking. Visit news and magazine websites for even more information and insight. And when your spouse or loved one asks you why you're goofing off so much, just look at them, smile and tell them you're working.

## Developing Your Imagination

Eureka moments are not accidental. Though they seem to flutter down on gossamer wings, delivered by angels of inspiration, they are in fact the byproduct of robust and vibrant imaginations. Great thoughts come to great thinkers. Epiphanies seek out those who seek them. This chapter is about developing your imagination so that you can learn to tell the stories that will capture the imaginations of your jurors.

Let's start with first principles. You want to communicate to jurors. Jurors love compelling stories. Thus, to communicate to jurors, you must be a compelling storyteller. We will talk about how to tell stories—plot, characters, thematic elements—in the next chapter. Before we learn how to tell stories we need to develop the imagination that will give birth to the stories. The big ideas from which stories flow—such as a teenage girl forced to become a gladiator in a dystopian future (“Hunger Games”) or the struggles of plane crash survivors on a mysterious dessert island (“Lost”)—come from those who experience life more deeply, whose prisms allow them to see things differently and whose senses merge effortlessly into one another in a beautiful synesthetic symphony. These traits can be learned and can be nourished. To start, though, let's define these traits.

According to Webster's, “imagination” means “the act or power of forming a mental image of something not present to the senses or never before wholly perceived in reality.” “Creativity” means “the power to bring into existence something new.” To be “imaginative” or “creative” is to bring forth something from nothing, to give life to a new creature. This act of creation empowers us, elevates us and intoxicates us. It can transform your case and transform juries. It is the most useful skill a trial attorney can have. It gives birth to case themes and strategies, it fortifies our defenses and emboldens our attacks. It is that extra something that differentiates the good lawyers from the great ones. In the vernacular, it is a game changer.

My seventh grade science teacher, Ms. Anne, started the school year not with beakers and test tubes, nor with microscopes and slides. For a whole month we did not discuss Galileo, nor the orbit of the planets, nor how plants turn light into food. We did not even crack open our textbook. All we did was learn how to draw. We learned how to hold the pencil, how to look at a subject, how to capture its essence on paper, how to shade, when to erase and when to accept imperfections. We were tapping into our right brains, as she would say. Seeing things differently. Thinking about things differently. And by the end of the month, we could draw and draw well. But the point of the exercise was not so we could become fledging artists. The point of the exercise was to see the world as artists do—with a glint of imagination—to discover and bring into existence something new.

So much of science is born of looking at the world differently. Mold on bread becomes penicillin. The pus from a milkmaid's blisters

becomes a vaccine for smallpox. A falling apple proves gravity. That's the right brain at work. That's imagination and creativity at work. That's what gave birth to astrophysics and calculus, subjects traditionally viewed to be the province of the left brain. Ms. Anne did not want us simply to study science; she wanted us to be scientists. She did not want us to simply read about others' discoveries. She wanted us to understand how they made their discoveries and wanted us to make our own. She taught us that the foundation of science is imagination. In fact, she taught us that the foundation of just about everything—politics, law, civilization—was imagination.

Fast forward from seventh grade to the present day and I am here to tell you that the foundation for being a trial lawyer is your imagination. Themes have to come from somewhere. Strategies have to come from somewhere. They come from developing your right brain, from seeing things differently. They come from adjusting your prism so that light hits it at a different angle, sending forth bursts of every imaginable color. And I am also here to tell you that every one of us is imaginative and each one of us can learn how to become even more so.

So, how do we develop our imaginations? Ms. Anne developed ours by teaching us how to draw. She was onto something. If you want to develop yours, pursue an artistic hobby. The leading thinkers during the renaissance were not only philosophers; they were also painters and sculptors. Leonardo De Vinci, the quintessential Renaissance man, was a philosopher, inventor, architect, engineer, mathematician and a painter. His interests ranged far and wide and fed off of one another. He was a better mathematician because of his painting. He was a better military engineer because of his drawing and sculpting. Likewise, you can be a better trial lawyer by pursuing other interests, by becoming a contemporary Renaissance man or woman.

Think back to when you were a kid, before you chose to become a lawyer. What did you want to be when you grew up? At some point, you wanted to paint or draw or write or act. You wanted to be a movie star or a novelist or a photographer. Imagination was king. You pretended to be a super hero or a cowboy or an astronaut. As Saint Paul said, you were a child and you thought as a child and spoke as a child and understood as a child. And when you grew up, you put all of that away. You grew weary of it, like a teenager embarrassed by a teddy bear he slept with years before. You hid it back in the closet, turned off the light, turned your back



and squelched your imagination in the process. Well, it's time to bring back that wide-eyed, childhood imagination. It served you then, and it will serve you now.

Have you ever thought why so many children's shows focus on imagination? When I was growing up, I watched Mr. Rogers' Neighborhood and the trolley, which took me to the Land of Make Believe to meet King Friday, Queen Sara, Prince Tuesday and others (not until I was an adult did I learn he voiced all the characters). My kids grew up watching Barney and his travels to Imagination Island. And, even to this day, we all enjoy SpongeBob Squarepants, who says you can be anything you want to be through the power of imagination (simple-minded Patrick, a starfish on the animated show, says he wants to use his imagination to be a starfish. When he's told he's already a starfish, he exclaims, "See, it really works!").

These shows give kids the license to be creative, and they give them the tools to develop their imaginations. They understand that being creative is integral in a child's development. Didn't you ever wonder why they teach children to finger paint before they teach them their ABCs? To think, to reason, to lead, to learn, to develop—to do all of this and more requires a vibrant, powerful imagination.

So, just as you did as a child, give yourself permission to use your imagination and pursue some of the same interests you pursued then. You liked to doodle? Register for a drawing class at your local community college. You liked to pretend to be someone else? Register for an acting class at your local community theater. You enjoyed writing? Purchase several books on fiction writing. These activities develop your right brain, the source of big ideas. Following rules—drafting interrogatories, noticing a deposition, researching an issue—are left brain activities. Taking these fundamentals and turning them into something more, that's the right brain's domain. Thus, to do the traditional lawyer tasks better, you need to let yourself pursue some non-traditional lawyer tasks.

Let's start with your weekly routine. What are your hobbies? What do you do after you get home and have dinner? How about during the weekends? Consider injecting activities into your routine that stroke your imagination. If you work in downtown, I suspect the art district is not far away. Visit the art museum at lunch. After work, attend a reading at your local bookstore or watch an artsy movie with subtitles. Stop thinking like a lawyer. Leave the left brain at the office. You exercise it 8-10 hours a day. By comparison, the



blood is barely circulating through your right brain. It's akin to a body builder doing curls only with his left arm. The imbalance soon becomes obvious. Develop a "full brain" work out. By doing so, your imagination will be there for you when you most need it.

Those moments of insight, those "aha moments," come naturally for those who have developed their imagination. Folks assume that epiphanies are the province of geniuses. But coming up with a big idea is no different than being able to research an issue or take a deposition. They are all skills that can be learned. You can't control when or where an idea will come from, but if you learn to see the world through different vantage points, I promise you those ideas will come.

Think of Sherlock Holmes, or a modern day counterpart, such as Dr. Gregory House on the Fox television show *House*, which ended in 2012 after 8 seasons. Here are two men—a detective solving crimes and a diagnostician solving medical mysteries—who are defined by their flashes of brilliance. One second they are having a mundane conversation, and suddenly something someone says triggers a connection between the present conversation and the mystery they have struggled to unravel. On the surface, one should have nothing to do with the other. Yet, because of their varied hobbies, their eclectic interests and their unique perspectives, they see connections and relationships where others don't. Those moments of convergence they have, and have frequently, are all but predetermined because of who they are. You can reproduce who they are. You can become a modern day Sherlock Holmes, unraveling the mysteries of your case and learning how to plug into the hearts and minds of your jurors.

To do so, to become the next Holmes or House, begins with your imagination. We've discussed some ways to develop it. Here are another 25 tips geared toward enhancing yours.

1. **Tell your kids stories.** If you have kids, don't read them a story from a book. Rather, create your own. Make them the protagonists, place them in peril and show how their wits and their courage get them out of harrowing situations—they slay the dragon, escape the black hole in a spaceship, blast the robot or travel through time. They do anything and everything, and every moment is born of your imagination. You will exercise and expand your imagination while developing memories to last a lifetime, both for you and for your kids.

2. **Keep a pocket-sized journal.** Thoughts will come to you at inconvenient times and in unusual places. Those random thoughts may hold a yet-to-be-discovered nugget for one of your cases. Always have a small journal (and a pen) on you. Simply the habit of writing down creative thoughts leads you to have more creative thoughts. Some of you will use your phone, and that's fine. For me, though, there's something about pen and paper.
3. **Journal your dreams.** Ever wake up and say to yourself, "Wow, what a weird dream? Wonder what it meant?" Vivid images, strange circumstances, odd characters. Write down as much as you remember. Dreams are the product of our subconscious telling us stories. Tap into that sleep-induced reservoir to enhance your daytime storytelling.
4. **Doodle.** Buy a sketchpad and doodle while watching television, waiting for a plane or sitting in a coffee shop. Drawing circles, stick figures or cartoon characters is to the right brain what weight training is to your muscles.
5. **Trigger your senses.** Burn incense. If you don't wear cologne or perfume, try a scent you like. Drink aromatic tea. Taste new fruits and vegetables. Listen to songs in other languages. Stimulating your senses stimulates your right brain. Great writers don't say—they show. They don't tell you a character licked a lemon—they make you feel what it is like to lick a lemon. Stimulating your senses not only triggers your creative juices but it also enables you to speak to others, namely jurors, in such a manner to stimulate their senses.
6. **Have a game night.** Get together with friends and play charades, Win Lose or Draw, Taboo, or another game that requires you to think on your feet.
7. **Invite a motley crew over for dinner.** Have a wine tasting and invite friends who don't know one another, who have different careers and come from different backgrounds. This hodgepodge of guests will ensure stimulating conversations and will open your eyes to new ways of looking at issues.
8. **Strike up conversations with strangers.** Talk to those sitting next to you on the plane or train. Be friendly with the barista serving you a latte at Starbucks. Engage the security guard and cleaning crew in your office building. These are different folks from different walks of life. These are the type of individuals who will sit on your jury. By communicating with

them, you'll gain valuable insight into how they think, what they value and what opinions they hold and by doing so, you'll learn how to communicate with jurors. More importantly, you will learn more about yourself and about your own values as you delve into the lives of others.

9. **Watch a new genre of movie.** You like action adventure? Try a rom-com. Into suspense thrillers? Check out a moody foreign film. The key to creativity is new experiences. Enjoy movies, or for that matter restaurants or books, that are outside your comfort zone. That chicken curry you tried or that horror novel you read may fire up your right brain.
10. **Search out creative individuals.** Creativity begets creativity. You want to develop your creativity, associate with creative people. Seek out artists and writers, dancers and musicians. Let some of their creativity rub off on you.
11. **Search out diverse individuals.** Meet people of different races, ethnicities, backgrounds and religions. Learn about their cultures and beliefs and share your background with them.
12. **Combine old things to create something new.** Ground-breaking ideas often are the product of combining two old ideas. Teenage romance novels had been around forever. So had vampire novels. But Stephanie Meyer came along, combined the two and viola, you have the breakout novel *Twilight*. Combine a classic—*Pride and Prejudice*—and zombies, and you have of course the breakout novel *Pride and Prejudice and Zombies*. Combine peanut butter and chocolate and you have Reese's Cups. Musicians mix rock and rap, artists combine classical and abstract, and television execs mix reality shows with drama. From something old comes something new, as long as you look at the old through a different looking glass. In your practice, combine old ideas into new ones to develop new approaches to your cases.
13. **Take up a new hobby.** Do something you haven't done—take a French cooking class, learn ballroom dancing, play on an intramural sports team. New experiences stroke the imagination.
14. **Get published.** Go online, review the writer's guidelines of magazines, e-zines and newsletters, pick a couple that peak your curiosity, submit an inquiry about a proposed topic that interests you and write an article. The effort that goes into

getting published gives you a fresh perspective on writing and storytelling.

15. **Learn magic.** Go online and order an amateur magic kit and learn some sleight of hand tricks. Learning how to fool another's senses has a way of sharpening yours.
16. **Keep a treasure box.** If you have children, buy each of them a tackle box with plenty of storage space and collect rocks, leaves, trinkets and knick-knacks from family trips and vacations. Each item has the potential of becoming the subject of a bedtime story you create for them.
17. **Read about the lives of creative people.** Go to Amazon or Barnes & Noble, look up the biographies and order a couple of books about artists, singers or actors. Read about what inspired them, what stirred inside of them and what made them get out of bed in the morning.
18. **Change your look.** Buy your clothes at a different store and shop for a different style. If you feel uncomfortable changing your look at work, consider changing your weekend wear, perhaps something bolder or edgier. Looking at yourself differently helps you look at others and at problems differently.
19. **Do word and number games.** Keep your brain limber by doing crossword or Sudoku puzzles. Keep a puzzle book in your briefcase, and work on one when you're waiting at the airport.
20. **Exercise.** If you don't currently work out, start an exercise program. An aerobic or weight training regime will ensure your endorphins kick in and kick start your brain.
21. **Expand your network of friends.** Whether it's at work, or through social clubs or online, expand the number and types of friends you have. These new social interactions will expose you to new points of view.
22. **Learn a new language.** In our multi-cultural society, learn another language. Learning a new way to communicate will enable you to communicate better with others.
23. **Sing.** Sing in the car, sing in the shower, heck, even try karaoke at your local hangout.
24. **Volunteer.** Work on a social project with your local voluntary bar association. Working in a different neighborhood on a different project with different people is good for the creative juices.

25. **Never stop dreaming.** When I was in elementary school, my teachers always chastised me for daydreaming. You may have been chastised too. I am giving you permission to daydream. Exercise your imagination and let it open whole new worlds to you.

Consider employing these tips to expand your view of the world, your view of others and your view of human emotions and human motivation, and in the process expand your view of your cases.

## Telling Stories

We are all storytellers. We tell our kids stories when we tuck them in bed, we tell our colleagues stories around the brewing coffee pot; we tell our friends stories at dinner parties. We hear stories everyday—our favorite series on television, the late night movie, the radio serial. Stories and storytelling are ingrained in us and ingrained in jurors. That’s why you need to convey your case in the form of a story. The story is already there to be told. You just need to learn how.

How did I learn to tell stories? From watching the *Twilight Zone* series. Not the various reboots. The original series. Rod Serling, its creator, was a master storyteller, and he was able to convey all the elements of a story in twenty-some minutes.<sup>1</sup> I watched the series in syndication on WGN growing up in Chicago. By the time my family moved to Miami, I was fourteen and had seen each episode at least three times. Without knowing it, the series taught me the elements of a good story and how to tell it briefly, succinctly and powerfully.

When my two boys were in elementary school, I bought the series and sat down and watched it with them. During each episode, I commented about Serling’s story-telling techniques, and after each episode I would discuss with them why the story worked. Why did we empathize with a given character? How was mood created and maintained? How was conflict fostered and resolved? And how was all this done in a half-hour episode, which, minus commercials, had a running time of twenty-some minutes? The boys would go on to appreciate the series and would write stories

<sup>1</sup> Toward the end of the series, the series moved to an hour-long format. The stories were not as crisp or engaging, and they would switch back to the shorter format. The iconic episodes, such as “Kick the Can,” “Eye of the Beholder,” and “The Dummy,” were half-hour episodes.

of their own. Sometimes we crafted stories together. The process brought us together, and the stories served as a common bond.

Just as I taught my boys how to tell stories through the *Twilight Zone*, I'm going to do the same with you. Now, you don't order the series online or pull it up on Netflix or Amazon Prime (although, I won't stop you if you feel compelled to do so). Even if you've never seen a single episode, you'll learn from the summaries I'll provide. And please remember, I'm not suggesting I'm a master storyteller. I'm saying Rod Serling is.<sup>2</sup> I learned from him, and you will too.

First, a bit about the series. Rod Serling created the science fiction series, which aired on CBS in 1959 and would run for five seasons. Many dismissed the series because of its science fiction bent. However, the stories transcended pulp science fiction to social commentary on everything from nuclear war, to totalitarian government, to the nature of man. Serling had something to say, but the story never served the point he wanted to make, rather his point served the story. By doing this, his stories never came across as preachy or stilted. On a limited budget with limited time, he spun stories that haunt us even today.

*Twilight Zone* teaches us that each story has certain elements. They include:

1. Character
2. Plot
3. Setting
4. Conflict
5. Resolution
6. Theme
7. Metaphors

First and foremost, stories are about the characters that inhabit them. How they are portrayed makes us either empathize with them, perhaps even root for them, or dislike them, possibly even hate them. You're telling the story of your client, and you want to cast him in the role of protagonist and cast the opposing party in the role of the antagonist (no doubt, opposing counsel will attempt to do the same). You must "cast" all the characters in your story, the lead, the villain, the supporting characters, including

<sup>2</sup> Rod Serling was so dedicated to the art of storytelling, that he started his own fiction-writing course to help new and established writers develop their craft.

any characters from central casting that play a role in advancing the narrative.

So how do you cast your client as the protagonist? Keep in mind that the jurors have been programmed to see your client through the prism of the countless television shows, movies and radio programs they have seen and heard. They will, consciously or not, label your client as a “good guy” or “bad guy” in the story that underlies the case. You can portray your client as the protagonist by using his back story, his attire, his words, his expressions and behavior on the stand, his motivation and his goals, depicting him as the one the jury wants to root for and find in favor of. His story has to be compelling and credible. If the jury likes him and believes him, you’re well on your way to winning the case.

Molding your client into the protagonist begins early in the case. The answers he gives to interrogatories and deposition questions will lock in his character’s attributes, and will be difficult to escape from at trial. In fact, any efforts to do so, to recast him that late in the game, will create the very credibility issues you are so desperately trying to avoid. So, early in the case decide what story you plan on telling and your client’s role in that story, and ensure that whatever discovery you conduct or respond to serves your story.

When you mold your client, understand that the jury is looking for cues to label him. Serling understood that the viewer was looking for signs on how to categorize his characters, and he did not disappoint in sending multiple and clear indicators early in his stories to show whether we should like or dislike a given person. Within the first five minutes, the audience knew who the players were and whose side to be on. Likewise, within the first few minutes he’s on the stand, the jury is going to start developing an impression of your client that will carry through the entire trial.

During your initial meeting with your client, when you discuss the end game and define what a victory looks like, explain how if the case goes to trial, you’ll have to tell a story, his story, and that now is the time to decide that he will be the protagonist and now is the time to discuss what being the protagonist entails—the hero of the story, the character with whom the jury will identify and relate. Everything he says and everything he does from now on in the case will direct him either down the path of being the hero or being the villain, and remind him that in Hollywood stories, the villain always gets his just desserts.

Getting back to the *Twilight Zone*, Serling set the tone of his characters from the first scene. In the second episode of the series, “One for the Angels,” Death tells Lew Bookman, a sidewalk salesman, that he is going to die at midnight. Before Death tells Bookman, we see Bookman in his natural environment. What’s curious is not that Serling focuses on Bookman pushing knick-knacks upon total strangers, but rather his care and concern for the children in his apartment building and on his block. We see someone who loves children and whom was loved by children, and was “therefore,” as Serling put it in his introduction, “a most important man.” A salesman, often seen as pushy and disagreeable, comes across as someone you want to cheat Death by giving him a “pitch for the angels.”<sup>3</sup>

Likewise, even if you have a client whose default role in society’s eyes isn’t to be the protagonist, or worse, to be the antagonist, you need from the very start to recast him. This is his story, he is the hero, and in this story, he conquers the villain and walks off into the sunset as the credits roll. And what does that translate into? A verdict in his favor from jurors who are watching his story unfold before their eyes and want his story to be told and are looking for that happy ending. In fact, they are responsible for giving him the happy ending he craves. You write everything but the conclusion, but if you tell the story properly, the jury can only write one ending on that verdict form. You Win. Fade to black.

The best stories are character-driven. Think of the movies that win the Oscars for Best Picture—*The Artist*, *12 Years a Slave*, *Birdman*, *Slumdog Millionaire*, even *Titanic*.<sup>4</sup> This is the most important aspect of your story—the protagonist—your client. His answers to interrogatories are not after thoughts. They are carefully crafted. His deposition is the most important deposition in the case. Every word out of his mouth, every discovery response, every act he performs in the case, molds his character that you will be presenting to the jury. Be sure he is judicious with his mouth and with his behavior so that he can move ever more along the spectrum of being the hero of the story.

<sup>3</sup> Of course cheating death comes at a price, but how Bookman deals with the consequences of his manipulations only makes the audience like him even more.

<sup>4</sup> The *Titanic* itself is the third most important character after the two lovers, and some would argue that it trumps them too.





In addition to developing your characters, you need to develop your plot. The plot provides the pulse of the story. It drives the story forward. When we say a story is plot-driven, we're saying it's full of action—car crashes, things blowing up, bare-knuckled brawls—think of any and every apocalyptic-the-world-is-coming-to-an-end movie (whether by aliens, ancient Mayan prophecy, meteor, exploding sun, cars that turn into robots, or any other cataclysmic event). We're on the edge of our seats, being thrust from one scene to the next as if on a roller coaster. These stories entertain, grab your attention and push you forward toward a happy ending.

Likewise, you need to learn to tell stories that catch and keep the jurors' attention. Through argument and testimony that paints pictures and exhibits that capture the imagination, you will seize your viewers' attention and have them listen to your story, not your opponents', follow you to your happy ending, not opposing counsel's.

So what constitutes a strong plot? Well, you need a beginning, where you set up the conflict, a middle, where the conflict builds,

and an ending, where you resolve the conflict. In the beginning of the story, you set the stage, with your client as the protagonist and the opposing party as the antagonist. Good versus evil. Hero versus villain. Perhaps the contrast is not so stark. Perhaps it's much more subtle. Whatever the difference, draw a contrast and cast your client as the character that the jury wants to win. In the middle, let the conflict play out, showing through verbal and visual images why your client deserves to be the protagonist. And in the end, resolve the conflict in your client's favor, finishing the story in a satisfactory and meaningful way, where the only possible outcome is for the jury to find in favor of your client.

Once you have a story with characters to inhabit it and a plot to drive it, you need a setting. You need to paint scenes for the jury to visualize the case. If it's a car accident, the jury should be able to see, hear and smell what happened. If it's a medical malpractice case, you have to place the jury in that operating room. You have to create a scene, whether it's a personal injury or commercial or employment matter, which the characters inhabit and the jurors can inhabit too right alongside of them.

One of the first things you learn in an introductory fiction course is "Show. Don't tell." The phrase makes a movie come to mind. *Super 8* from 2011 does a great job in showing us, not simply telling us. The opening scene is a mill worker removing the numbers 784 from a sign, which reads "784 days since our last accident", and replacing it with the number "1." The audience knows an accident has occurred, likely a tragic one (since it's hard to believe that no one has suffered any scrapes or bruises or pulled muscles throughout the entire plant for over 2 years). "Something happened," you're thinking to yourself, "and it was bad." The movie then cuts to a scene of a boy dressed in his Sunday's best, sitting in the swing in his yard, ankle-deep in snow. And then you're like, "poor kid. He lost someone." The makers of the film could have started with a narrative—"hey audience, there's been a bad accident at the mill and it affects this boy." Yawn. Instead, they show us, they don't tell us. And by showing us, their message is so much more effective.

When trying to persuade jurors, try to paint pictures with your words. Create images to show your audience your point. Don't be satisfied by simply telling them. Show them. You could tell the jury that a witness was not at a good vantage point to see the accident. Or you can create an image of how little he could see what was going on, showing the jury that he couldn't have possibly seen

what happened. Think about how and when you can show more, versus simply telling, to make your advocacy more compelling, more dynamic and make yourself more of a storyteller.

As you paint pictures with words and mold your client into the protagonist, understand that every protagonist has a foe, obstacle or challenge to overcome. This is the conflict of the story. He is not simply sitting at Starbucks avoiding his problems, wallowing in fear, doing nothing. Doing nothing does not create conflict. Running away does not create conflict. And that's what the jury wants to see. That's what they've been programmed to see through countless lawyer-drama serials. A protagonist faces his problems head on and overcomes them.

In the *Twilight Zone* episode "The Obsolete Man," set in the not too distant future, Romney Wordsworth is sentenced to death for being obsolete—his crime—being a librarian. He is allowed to choose the manner of his death. The way he confronts death while simultaneously getting the upper hand on the State, which sentenced him, is both clever and heroic. A small, bespectacled man, outwardly he does not fit the typecast of protagonist. But his words and behavior—his calm and controlled manner while knowing death is imminent—tell us, the audience, to root for him, and against the State, the antagonist of the story. The tension of two diametrically opposed parties sets up winners and losers, and Serling does a superb job painting Wordsworth as a winner even as he is about to lose his life.

Litigation naturally creates conflict. Two parties, each trying to beat the other to win the case. Litigation and conflict go hand in hand. No wonder why so many television shows and movies take place in the courtroom. Juries sit down as if they've tuned into a new lawyer show and your client and the opposing party are the protagonist and antagonist and you and opposing counsel are the latest two lawyer stars. Reality television at its finest. And it is up to you to resolve the conflict in your client's favor, by depicting him as the hero, the one who deserves to win. The foreperson reads the verdict form, they find in favor of your client, and then fade to black. It's like interactive television. Of course, I am not suggesting jurors don't take their vow and their job seriously. But if you ignore the power of storytelling, and the impact lawyer dramas have had on them, you do so at your own peril.

So you have characters in conflict, and you are moving them toward a resolution that favors your client. To provide the story depth and texture, consider weaving into the story a theme that is

introduced at the beginning during voir dire and is worked through the entire story until the very end of closing argument. In fact, start developing your theme when you first get the case, and weave your theme through all of discovery. If you can't reduce your case to a simple theme that explains why you should win, then recouch your case until you can.

In addition to using trial themes, consider the power of a metaphor. A metaphor is a figure of speech that describes a subject by stating that it is the same as another otherwise unrelated object. Literary metaphors include Shakespeare comparing the world to a stage, Steinbeck's use of dust in *The Grapes of Wrath* or Hemmingway's use of water in *The Old Man and the Sea*. Current storytellers regularly rely upon metaphors.

Metaphors make another movie come to mind. *Warrior* is a movie about two brothers competing in a mixed-martial arts winner-takes-all competition where the purse is five million dollars. The movie makes an exceptional use of metaphor, highlighting each of the main character's demons and motivations. The use of metaphor threads together the entire story and adds a texture lacking in most films. The movie serves as a model of what we can do in our cases, looking for metaphors that bring all the elements of our case together to serve as a unifying theme to present to a jury.

The movie starts out with the father of the brothers listening to *Moby Dick* on tape. The white whale will serve as a metaphor throughout the movie (which of course serves as a metaphor in the book itself) about each man's (the two brothers' and the father's) battle with themselves and unresolved issues that have defined who they are and have made them what they are. Ahab's efforts to defeat the white whale, which took his ship and his leg, consumed him, as each of the main character's pasts consume them. Whether you follow MMA or not, you cannot help but be moved by these characters. There is a lesson to be learned about choosing a metaphor, whether from classic literature, a song or a movie, and using it as the thread to sew together all the parts of your case. Metaphor is a powerful tool, and if used properly, can be effective to show a jury the case through your client's perspective and have them appreciate and come to agree with that perspective.

And the best part is that metaphors are all around us. Use your journal to jot them down when you come across them. Your client, the opposing party, a piece of evidence—all of these can be compared or contrasted to a multitude of things. Hold up the

witnesses and documents in your case and compare them to everything and anything you come across. Because the fact is metaphors are all around, waiting to be discovered. They are in the articles you read, they are in the lyrics you listen to and they are in the movies and television shows you watch. Train yourself to look out for them.

So these are the primary elements of any story. You may be thinking, that's all well and good, but I've never created my own story much less turned one of my cases into one. In response, I say that you have told stories your entire life and that your case is another story you will add to the countless stories you have told in the past. Telling your kids a bedtime story. Summarizing last night's late movie. Sharing a joke. Stating your case in a dispositive motion. You've told lots of stories. This is no different.

Still skeptical? If so, develop your fiction skills outside of the law office. Take an introductory writing course at your local college or online. Buy a book or two on how to write fiction. There are hundreds of books that will tell you what the elements of a story are and how to make your characters three dimensional, provide depth to their dialogue, and how to build and resolve conflict in a satisfying manner for the reader. And yes, I am suggesting you take time to read books on writing fiction and take a swing at it. Buy a journal, brainstorm ideas for short stories and then write them down. Are your characters credible? Does each step in the plot naturally flow from the prior one and gently flow into the next one? When you construct and then deconstruct your stories, you learn what works and what doesn't. What resonates and what falls flat. And the skills you learn to write short stories will translate into turning your case into a compelling story.

For those of you who don't want to take a class or order another book, consider the following exercises. For the first exercise, we'll need a character, the protagonist of course. If this is your first time writing fiction, you may find yourself slipping into casting yourself as the protagonist, but only a better, smarter, more comely version of yourself. That's fine. With practice, you'll be able to see things from others' perspectives and develop characters that go beyond what you do and how you feel on a given day. But for now, if you want to be the main character, so be it.

Write a two-page character sketch of your protagonist. His likes and dislikes, his strengths and his weaknesses. His appearance, his habits, his pet peeves, his interests, his hobbies, his career and his educational background. Write about what motivates him

and what challenges him. Then think about an obstacle he needs to overcome and describe how he would overcome it (keeping in mind that your character, because he is your unique creation, may not necessarily react to a problem in a conventional matter).

Don't take too long on this writing exercise. Don't think too long on it. Just write as you brainstorm and rely on your instincts and imagination. Once you're done, read it through. It's probably not half-bad. Probably not good either, but not bad. You'll return to this exercise again, and each time you do, your characters will become more three dimensional, more full, more dynamic, until one day they will all but jump off the page and lead their own lives, lives you created.

Now let's leave characters for a moment and focus on plot. Come up with a convoluted spy thriller. Make it as outrageous and implausible as possible. Just jot down a two-to-three page rough summary of the story's beginning, middle and end. Again, let brainstorming take over and write whatever comes to mind. Maybe it's about a double, or even a triple, agent. Maybe the country is on the verge of a nuclear war. Or maybe it involves aliens, or robots, or mutated animals. Let your imagination loose. Once you're done, look it over. No matter how bad it is, you can say you wrote a story. And the reason I asked you to make it convoluted and implausible is because you have to learn to recognize those traits so you don't use them when "writing stories" for your juries. Rewrite the story two to three times, each time, trying to make the story more plausible and easier to follow, remembering that this is what you need to do when converting your cases into stories.

Another exercise I recommend is for you to go to a Starbucks, order a latte, take a seat, pull out your journal and pen (never go anywhere without them) and describe the scene inside the coffee house using only one sense. First, let's start with the easy one. What do you see? After you have jotted that down, close your eyes? What do you hear? Write it down? What do you smell? Write it down. How about what you feel? How does the pen feel in your hand? How does the lounge chair you're sitting in feel? Then compare the four entries. See how different they are? Notice how our senses pick up different points of emphasis? Also, do you notice how your descriptions of how things smelled and sounded were deeper and had more dimension than simply writing down what you saw?

Now write a fifth entry using all your senses. Feel free to borrow from your earlier entries. You see how when you use all your

senses, you layer your story telling? You show more than simply telling? In your cases, learn to bring all your senses to bear when sharing your client’s story with the jury.

One last exercise. This is one you can do with your spouse, friends or colleagues. Instead of playing Pictionary or Yahtzee, give everyone an opening sentence to a story (or the concluding sentence). Then put fifteen minutes on the clock and have everyone write the rest of the story. The group can vote on the winner. The exercise is fun, develops the imagination and exposes you to other potential storytellers. Make sure to ask each person how they conceived their story and where their inspiration came from. The opening sentence can be as simple as “It was a dark and stormy night.”<sup>5</sup> And the closing sentence can be as hackneyed as “And everyone lived happily ever after.” The first or last sentence isn’t important. What you and the others do with it is what’s important. Critique each other’s work and work together on maturing your respective imaginations.

There are many more exercises you can do to hone your story telling skills. And of course, get in the habit of making up stories for your kids (they’ll love them more than ones you read from a book) and writing them in your journal or on the computer. Simply write short stories that have all the elements we’ve discussed in this chapter. The better you get at writing fictional stories the better you’ll get at telling the nonfictional stories of your clients.

Since I started with discussing *Twilight Zone*, it seems apropos that I end with it. Those short stories have stayed with me, making me pop them back into the DVD player every now and again. The boy who wished others into the cornfield, the old man who kicked a can until he became young again, a society that offered plastic surgery to beautiful people because they were considered ugly—all these stories impacted me. Each had a point to make, which could have been made absent the story. But I wouldn’t have remembered the wisdom they were trying to impart if that wisdom had been shared in a manner other than through a story. Likewise, when those jurors

<sup>5</sup> The Bulwer-Lytton Contest is a writing contest where contestants write the opening sentence to the worst of all possible novels. A prior winner in the detective novel genre, wrote the following: I’d been tailing this guy for over an hour while he tried every trick in the book to lose me: going down side streets, doubling back, suddenly veering into shop doorways, jumping out again, crossing the street, looking for somewhere to make the drop, and I was going to be there when he did it because his disguise as a postman didn’t have me fooled for a minute.



are deliberating after a week or more listening to the lawyers, the judge and the witnesses, you want to ensure that the points you are trying to make have the depth and resonance that comes with telling a story, because stories will follow then into the jury room and germinate in their minds.

## Living the Writer's Life

*The most successful trial lawyers are often master storytellers, making their cases come to life for their jurors. The reason is that stories matter ... stories are the deepest and most obvious way that humans organize, communicate, receive, and digest facts.*  
—G. Christopher Ritter, *Powerful Deliberations*

What does it mean to live the writer's life? It means you are always writing. You are observing, listening, even at times eavesdropping to see and hear how real people interact and react. You are capturing snippets of dialogue and glimpses of body language much like an anthropologist would, storing it away to feast upon later. A writer, no matter where she is or what she is doing, understands that she is in the eye of a storm of inspiration, which if she allows it to affect her, will give her an idea for a story, a notion about a character or a thought about a scene. When my wife sees me with a vacant look on my face at a cocktail party, she tells me, "Stop writing." But I can't help myself, because a story is unfolding in front of me. A story is happening right there and then. And like AMC Channel's former tagline, stories matter.

If you can live like a writer, you will learn how to tell stories that matter. And you will move from the world of fiction where you craft make-believe stories to the world of non-fiction where you tell your clients' stories in a compelling and moving way. You're embarking on this road to live the writer's life so that you can learn along the way how to live the lawyer's life more fully. Because much of what we do as lawyers is tell stories, so we better learn how to tell them effectively.

So let's give what we're trying to accomplish a name. We want to live the writer's life and we want to live the lawyer's life, and we see that the two have many points of intersection. In effect, our desire is to become lawyer-writers—an advocate who applies the skills he learns from writing fiction stories to writing his client's nonfiction stories. First you create make believe. Then you use make believe to enhance reality. That's what writers are—reality enhancers.



But does being a writer really make you a better lawyer? If you can learn how to tell stories, you will learn how to move jurors, how to affect them viscerally and intellectually. What you say will carry deeper meaning, greater depth, and more resonance. The most powerful truths can be conveyed with the simplest of stories. That's what parables are. Speaking truths through fiction. Learning to be a storyteller enables you to connect better than by reciting a bunch of facts strung together. But what makes a writer? What makes them different from the rest of us? Here are some characteristics.

1. **Writers are storytellers.** It's elementary, but writers tell stories. They breathe life into characters, conceive of plot twists and create and resolve conflict. Out of nothing, they create a world and the people who inhabit it. They understand beginnings, middles and ends and how to weave plotlines and use all the elements and tools of storytelling at their disposal. Likewise, lawyers tell stories. Our clients' stories. We tell them in our motions, in our discovery responses, in our correspondence with opposing counsel and to judges and to juries. To deny this aspect of ourselves, to deny that the ability to tell stories is integral to our jobs, is to place ourselves at a distinct disadvantage, particularly if opposing counsel embraces the power of stories.
2. **Writers use themes and symbolism.** Writers often weave thematic elements and symbolism throughout their stories to transform a means of escape into a vehicle that resonates with depth and thought. They understand that everything a character says and does, every plot vehicle, every scene description adds or detracts from those themes, and helps develop themes or tears them down. Lawyers can learn how to use themes and use them effectively from writers.
3. **Writers show. They don't tell.** Writers don't say a character is tall. They describe him in such a manner that we can't help but see him as tall. Writers don't describe a protagonist as trustworthy. They show us he is trustworthy through what he says and does. We can't simply tell jurors that our client is right and the other guy is wrong. We have to show it. We have our client and the supporting actors of our case say and do things that show the jury that we should win. We use all the elements of storytelling to help juries reach the conclusion we want them to reach. If jurors can figure out on their own and conclude that your client is credible based on what he says and does, they will more likely take that

impression into the deliberation room than if you simply tell them to believe your client.

4. **Writers have vivid imaginations.** Writers see things that aren't there. They conjure things up from whole cloth. They understand that their imagination is like a muscle—the more they use it, the more they develop it. And they see life through a different prism, one that lets them transform the mundane and obvious and the everyday into something that touches and moves and affects the reader. They transcend reality and in doing so make make-believe more real than the reality we inhabit. The connections they make, the conclusions they draw, the images they paint, are ones we need to make, draw and paint as lawyers.
5. **Writers understand writing is messy.** Writers know that the first draft is junk. It may be nothing more than a collection of ramblings, pieced together from notes jotted on pages torn from a journal, old napkins, and the back of receipts. They understand that inspiration can come at any moment, even in a dream or while taking a shower. And they embrace the messiness of writing to transform bits and pieces into something more than its component parts. Creating the story of your case is also messy. There are plot lines that are developed, to be later abandoned. There are character traits that are emphasized, which are later downplayed. It's an organic process, and the outcome often looks very different than what you expected.
6. **Writers connect.** Writers know they have an audience and they desire to connect with them. They don't simply write for themselves. They write for others too. They want to make others think, make them feel, make them reflect on the messages and themes they are conveying. We as lawyers desire the same and attempt to accomplish the same. We try to connect with jurors and form a bond with them. Not only do we want to convey our client's credibility, but we also try to convey our own credibility. We want them to listen to our story, believe in it and wish for the ending we're directing our narrative toward.
7. **Writers make connections.** Writers take disparate ideas, concepts and notions and force them to collide against one another to see what comes of it. Like Legos from different sets snapped together to create an unexpected model, writers blur the lines between genres, mix character traits, try new plot twists, and along the way, create lasting

images and enduring stories. Making connections where others don't see them allow us to create lasting stories for our juries.

8. **Writers use fiction to convey truths.** Many perceive fiction as make believe, an escape from reality. But there is no better way to control the conveyance of truth than through a story. Jesus did it through parables. We often remember His stories first and then the truths they conveyed. By telling the juries our clients' stories, they'll remember the story and through it, appreciate the message we're trying to convey through those stories.
9. **Writers see the world differently.** Writers have a different prism through which they see the world. Everything they come across, or witness or overhear, every interaction, every observation, every perception is filtered through a prism that captures reality and culls out any material that may serve a story they are working on or serve as inspiration for a future story. We lawyers need to put on similar glasses and start seeing the world differently. There is so much we miss that can serve our clients and their cases. There is so much material readily available within our grasps that can serve to develop our clients' stories. Everything is fodder for storytellers, whether they are writers or lawyers.
10. **Writers are writers.** For writers, writing isn't something they do, it is who they are. It isn't a 9 to 5 job. They don't hang it up on the cloak rack when they get home. They're writers 24/7. They are always open to inspiration and they are always prepared to put pencil to paper. As lawyers, we can't turn things off outside the office. I'm not suggesting drafting motions or writing memos at all hours of the night. What I am saying is that inspiration can hit you at any time. Be receptive to it. Be open to developing themes, and ideas and dialogue for your witnesses at cocktail parties, at lunch with your colleagues or while watching television (television shows often are the source of infinite epiphanies).

These are some of the characteristics that set writers apart. In many respects, you are already halfway to being a writer. You write all the time. It is a different type of writing of course. But you have the basic skills of a writer. You know how to communicate and communicate effectively. You have the grammar, you have the content and you have the efficiency of language. In fact, you may even fancy yourself a wordsmith. Now all you need is to add

the imagination and shift the paradigm through which you see the world to how a storyteller does. Story tellers weren't born. They were nurtured, and you can grow into being one too.

Last chapter I spoke about the elements of a story and provided some exercises to assist you in becoming a story teller. In many respects this chapter is a natural progression from the last. Where the last chapter started us on the road to becoming a writer, this chapter expands upon it. The emphasis remains on characters. Watch how others speak, what they have to say, how they move their bodies and the expressions they make. What comes across as credible? As compelling? As something you can relate to? Write it down. Molding and crafting three dimensional characters may be the most important skill you can develop as a lawyer-writer. If you don't believe it, consider a mini-series shot entirely in a booth in a diner.

*The Booth at the End*, a mini-series that was available on Hulu, had a simple premise —you meet with a mystery man and make a deal. You tell him what you want and he tells you what you need to do to get it. It's very basic scenery—the whole show takes place in a small diner. In so many respects—the premise, the setting, the lighting, the camera shots—come across as so simple. Yet, it was an incredibly engrossing show, and it was because of the characters. You want to get to know the mystery man and you want to get to know the folks who come to him with their desires. You want to know what they're thinking, what motivates them and what they're feeling. They matter, they all matter.

When we present a case to a jury, we are, much like the creators of this show, telling a story, and all the witnesses are the characters and what they did is the plot and what they say is the dialogue. And our job is to make our client (whether an individual or a company) the protagonist, to make her say things that touch the jury, that cause them to relate to her. We want to create a character that the jury will wonder about, think about and worry about, and at the end of the day, side with and want her to get what she is asking for her in her lawsuit. That's masterful storytelling.

In *Booth at the End*, the characters who come asking the mystery man for what they want are three-dimensional. The way they talk, the way they dress, how they say things, what they say, when they pause, when they don't, when they frown and when they laugh—all these aspects come together to create characters—ones we like or ones we don't, ones we can relate to or ones we cannot, ones we can empathize with or ones we want to see lose. The show, with

nothing more than dialogue, body language and basic wardrobe creates these characters that make us feel something, good or bad. Study the dialogue in the show (you can download it from Amazon), study how these characters communicate. What makes you like them? What makes you dislike them? What is heroic about them and what is not? Remember this exercise when constructing the “characters” that will inhabit your case and that will convey the story to the jury. Making a connection often starts with characters that matter, and to put a finer point on it, characters that matter to the jury who will deliberate on your case.

We have observed that writers are different, and we have discussed how they are different. Writers are different from the rest of us. They see the world differently. They experience it differently. They filter their surroundings and their experiences differently. For them writing is more than a hobby, or even a career. It’s who they are. They couldn’t imagine not writing, like we couldn’t imagine not breathing. Their single mindedness is a trait we lawyers could learn from. The things they do to improve their craft are things we can do as lawyers to improve ours.

To emulate them, we have to observe what they do that makes them different. Here are some of the things they do that separates them from us.

1. **Writers are always writing.** Writers view the world through the prism of writing. Everywhere they go and everything they do and every person they meet (or spy upon), serve as sources of inspiration. They jot it all down and sort it out later with all the other notes and wrinkled napkins and filled journals and reflect upon all their ramblings and turn them into something more. You need to write all the time too. Buy journals and keep them everywhere. One or two for the office, one in the car, a few at home (keep them strategically throughout the house—next to the bed, next to where you keep the remote control, maybe even in the bathroom). Whenever inspiration hits, reduce it to writing and then take it to work, scan it and save it under a file for the case it serves. The mere sight of the journals will put you in the mind frame to brainstorm.
2. **Writers see inspiration where others don’t.** Start looking at life differently. Inspiration isn’t limited to what you come up with while sitting at your desk. Inspiration is all around you. Inspiration is something you prepare for. Inspiration is something you nurture. Inspiration isn’t much different



than a skill you develop. Work at it regularly, commit time and perspiration to it, and with time, it is easier and easier to find inspiration. You seek it out and it will seek you. You pursue it and it will pursue you. Inspiration is truly anywhere and everywhere and you need to understand that and chase it accordingly.

3. **Writers are nosy.** Writers want to know what others are saying, how they're saying it and what they're thinking. To create realistic characters, they often eavesdrop and observe others in their natural environments, much as we watch animals in a zoo. They study everything from tone of voice, to body language to the topics of conversation. And they go beyond individuals to study their environments—how they act at work, at home, at church, and at play. To better understand jurors, we can afford to be a little nosy and study how others interact with themselves, others and their environment. The more we learn about them the better we'll be at picking a jury who shares our client's vantage point and who will empathize with his story.
4. **Writers ask "What if?" a whole lot.** What if we mesh two different genres? What if the protagonist contracts a terminal illness? Why not give him an idiosyncrasy? A tragic flaw? A skeleton from his past? Writers are constantly

asking “what if” I tweak my story this way or that, move it in this direction or another, focus the emphasis on x versus y? Asking “what if” allows you to look at your case from a different perspective. You shift your vantage point, perhaps by a degree or two, perhaps by much more. Each additional “what if” question molds your case further into something else. Maybe the something else doesn’t work. Maybe the something else is exactly what you’re looking for.

5. **Writers rewrite.** Writers know the first draft is trash. They get their ideas on paper and then the real work begins—rewriting and rewriting until they have a finished draft. We lawyers don’t enjoy imperfection. We don’t like the notion of writing several pages of gibberish. But it is during this free writing - where you don’t check yourself and you allow your ideas and creativity to flow freely onto the paper—where your best motions, best directs and best cross-exams come to life.
6. **Writers give way to their compulsions.** Writers are compulsive folks. Their drive to write often compels them to sacrifice much to pursue their imagination and inspiration. Sometimes I wonder whether writers are wired differently and whether inherent compulsions drive them to write or whether their pursuit of writing causes them to behave compulsively. Whether it is the chicken or the egg, writers’ endless pursuit to write stories that engage and envelop you deserves our respect and admiration. We lawyers could benefit from a touch of OCD.
7. **Writers expect their words to affect others.** Writers understand that what they write not only affects them but it affects their readers. In fact, if it didn’t, they probably wouldn’t write. They want to move others—sometimes intellectually, sometimes emotionally, sometimes both. They want to latch on to the audience and do more than simply write words that bounce off of an ambivalent reader. Likewise, we lawyers should expect that everything we do in a case, and everything leading up to trial will affect the jurors’ perception of us and our clients.
8. **Writers read.** Writers know that after writing, the most important thing they can be doing is reading. They learn how others present their stories, develop their characters and craft their plots. Likewise, we lawyers should read legal fiction as well as read about others’ trials. Prospective jurors are reading these stories and are developing their



impression of what to expect at trials based on them. Accordingly, it is worthwhile to familiarize oneself with them and appreciate that juries are expecting lawyers to behave in the same manner as they are portrayed in these legal thrillers. Knowing their expectations will help us convey our case to them on their terms.

9. **Writers brainstorm.** Writers don't let things get in the way of their writing. Whatever comes to mind is reduced to writing. They write down one topic after another, one idea after another. After they've poured out the contents of their mind onto paper, they sort through the mess and start organizing their ideas into groups and decide which ones to keep and which ones to discard. We can brainstorm and reduce to writing all our ideas for trial themes, how to present our client and case, and what exhibits to use and how to rely upon them.
10. **Writers focus on their characters.** Writers focus their energies on developing their characters, transforming them from two dimensional objects to three dimensional living beings. They understand that if the reader doesn't care about the characters they won't care for the story either. So they focus their energies on developing what matters—the hero and the villain. We attorneys must learn that our case rises or falls on our client, the one we are casting as the protagonist of the story. From the inception of the case, we need to think about everything we can do to develop our client as the hero of the case. What has he said, done or thought that compels us to categorize him as a hero? And while we're at it, let's be honest with ourselves, and evaluate what places him in the category of villain.

So those are ten things you can be doing right now to become a storyteller. And let's not forget the exercises. In the last chapter, I mentioned some exercises you can use to help develop your writing skills. I'm going to conclude this chapter with a few more exercises. Writing may not come naturally, but if you work at it, with time, it will. You'll find yourself finding inspiration and experiencing epiphanies and seeing things through a new lens.

Let's revisit the *Twilight Zone*. Watch an episode, any episode, or any other self-contained show which tells a complete story either within a half hour or an hour. Not a show that goes on from one episode to the next, like *Gray's Anatomy*. Go to Hulu and watch an old Alfred Hitchcock episode, or *Outer Limits* (whether



the original or remake) or another show which tells a complete story—characters, plot, scenery, symbolism, conflict, dialogue, resolution—all in a finite period of time. Don't just watch the episode. Study it. Watch it again and then consider watching it a third time. Study how the writer makes you feel and how you react each step along the way. The writer is making things happen, putting words in the characters' mouths and creating conflict to get a reaction from you. Study how he is affecting you, and how much he is doing so. These observations are important because you can apply what you learn when communicating with jurors. The same way the writer of the show is affecting you, you can affect a juror. How do you create a sympathetic character? An unsympathetic one? How do you move the story forward? How do you resolve conflict? By figuring out how the writers of these episodes accomplish these things you can apply that to the stories you create for juries.

You can do the same exercise with short fiction stories. Barnes & Nobles and online stores have compendiums of short stories. They have collections of science fiction, horror, fantasy, adventure, western, romance, etc. Find a collection of stories in your favorite genre, grab a highlighter and a pen, and make a note in the text each time the author does something that affects or moves you. Mark anything that makes you feel something about a character or situation. Think about that moment in the story. Why did it affect you? How did it affect you? What did the writer do to move you? Jot it down. That insight may prove helpful and may translate into an important lesson for your next jury case.

Now take one of these short stories and use it as a template for your own story. Take a very short, powerful story and rewrite it using your own words. Use different characters, emphasize different elements, and change some of the dialogue, but keep other aspects intact. Consider going through several drafts, where in each draft you move further away from the original story and more toward the story you're creating. As you consciously change one element of the story and then the next, you can see what elements of storytelling the author incorporates, and incorporates successfully. You realize that dropping a certain character, changing his motivation, or altering his dialogue turns him into something else—either more or less sympathetic. You realize that changing the plot moves the story along the continuum toward a more tragic story or perhaps toward a more humorous one. Every piece you move, or delete altogether, changes the story, sometimes for the better, and sometimes for the worse.

Now take one of your cases. Label characters in your case. Define the type of story the case presents. Define the various conflicts. In other words, look at your case through the prism of a writer and approach it like a story you're going to tell the jury. Create character sheets for your client, opposing party and the third party witnesses. Draft a plot summary of what occurred and each person's role in the plot. Define the tension between the characters and how you plan on resolving it. In other words, you're crafting a screen play, where all the witnesses are actors, and if you laid the proper foundation in discovery, you're going to get them to say what you want to advance your story.

Become accustomed to telling stories—at home, at work, with family, with friends. And become accustomed to telling your client's stories. They have something to say, and it is up to you to help them say it. It is up to you to transform their thoughts and fears, their feelings and concerns, into a story where they overcome and prevail. Everybody is looking for a hero, and if you couch it properly, your client can become that hero.

Stories transcend. They stay in the audience's minds and hearts and the truths they convey remain long after others' efforts to make similar points through less effective means. Stories move us. They change us. We're not the same after we hear them. If stories are this powerful, then why not learn how to tell them? They move us; they'll move jurors too. Jurors crave stories. They crave entertainment. And if you deliver, they'll deliver too. Give them what they crave and receive in return their attention and loyalty, and possibly a favorable verdict.

## Developing Case Themes

Your case theme is the lens you craft for the jury through which they will see the trial. The stronger the theme, the sharper the image the lens brings into focus. This lens sharpens and brings into focus the facts that help your case. It also blurs those facts that hamper or hurt your case. Without such a lens, everything becomes indistinct and fuzzy, and the jury is left stumbling about grasping at whichever facts they can seize upon.

But what exactly is a "case theme"? Webster defines it as "a specific and distinctive quality, characteristic or concern." It's a point of view you offer others through which they view your case, which is generally encapsulated by a catch phrase, tagline, slogan, motto or even cliché. It serves as a hook to lure in the audience,

and once hooked, it serves as a filter through which they will examine and weigh all the evidence. And it enables you to define your case rather than leave it to the other side to do so. It also helps keep you focused on what is important and what is not. In that sense, it is as much of a lens for you as it is for the jury. When used effectively, a trial theme can make the difference between staying on message and losing sight of it, the difference between winning and losing.

When creating a theme, appreciate you need to find or discover a phrase that will have resonance with the jurors as they hear the evidence and later deliberate. So you look for something catchy in the same places where jurors seek out entertainment—in magazines, movies, television shows and songs. You also search out phrases that reflect their daily experiences. Mottos, quotes and hackneyed clichés may prove useful in this endeavor in your search for memorable sound bites to persuade a jury.

In fact, if you want to master the art of persuasion, you must master the art of the sound bite. Politicians do it. Advertisers do it. Motivational speakers do it. They understand to boil down their ideas into catchy phrases and use them as a form of shorthand to catch and keep their audiences' attention. Speak all you want, but most of what you say will be forgotten. To say something that will be remembered and that will influence, find a way to reduce it to a sound bite. Think about the printed ads, movies, shows, television commercials and speeches that have stuck with you. I bet what you remember are the catch phrases. They hook you and reel you in. So when you are preparing for trial, devise case themes and then reduce those themes to sound bites.

Let's start with movies. Think about the taglines for movies sprawled over the movie posters you see while waiting in line to plunk down your money for a ticket, popcorn and soda (and possibly some Raisinets).

How about:

"One Man's Struggle to Take it Easy"	<i>Ferris Bueller's Day Off</i>
"The Mission Is a Man"	<i>Saving Private Ryan</i>
"The Last Man on Earth Is Not Alone"	<i>I Am Legend</i>
"In Space No One Can Hear You Scream"	<i>Alien</i>

These taglines reflect the heart of the story, help you remember the story, create a mood, and set expectations these movies,

presumably, will meet. Granted it's unlikely you can adapt any of these taglines to your case. However, they set the standard for articulating a case theme. If you can craft a theme that (1) tells your client's story; (2) helps the jury remember his story; (3) creates a mood that casts him as the protagonist; and (4) sets the expectation that he should win (and meets that expectation by relying on the facts and the law), then you have developed a winning case theme.

Let's not stop with movie taglines. How about music lyrics? We all listen to music, and with our multiple devices on hand, we have our favorites downloaded or linked to YouTube, listening to them whenever we desire. We've heard our favorite standards so often, that when we hear lyrics from those songs, in whatever context, we immediately are reminded of them and all the significance and meaning that we attribute to them. Jurors share the same attachment to their favorite songs. So if you can find a lyric from a classic song (think Beatles, Sinatra, U2) or a current popular song (think Ed Sheeran, Adele, Beyoncé) that reflects the heart of your case, you may be able to rely upon that as your case theme. Hooks in song lyrics can translate into themes for a case. Here a few lyrics that could encapsulate the right case:

"And it's true we are immune. When fact is fiction, and TV is reality." U2, *Sunday Bloody Sunday*

"I don't know why a man sees the truth, but believes the lies." U2, *Slow Dancing*

"Doesn't have a point of view, knows not where he is going to, isn't he a bit like you and me?" The Beatles, *Nowhere Man*

"His brain has been mismanaged with great skill, all he believes are his eyes." Bob Dylan, *License To Kill*

Many cases come down to credibility, and lyrics addressing what is the truth and what is a lie can be effective to drive home the point that the jury should believe your client and ignore contrary testimony. Skim through the selection on your library. Which songs are the ones you listen to most often? What separates them from the rest of your playlist? Is it simply the beat, or is it the lyrics? If it is the latter, which lyrics affect you the most? How do the lyrics affect you? Start listening to music as a source of themes for your case, and jot down lyrics that capture the essence of your case. As you will find from studying lyrics, they can capture the truth you are trying to convey in a memorable manner that will linger in the jurors' minds.

In addition to movies and songs, magazines serve as a ready-made resource for themes. Instead of looking at the articles, though, study the print ads that we generally overlook. As with movie posters, the print ads will have taglines and memorable quotes that you can adapt to your case. Some popular print taglines from over the years include:

“Just Do It.”	Nike
“Where’s the Beef?”	Wendy’s
“Fair and Balanced”	Fox News

Sometimes, simply an image or a photo in the ad will capture your imagination. Rip out the ads that catch your attention and keep them filed away for future reference.

In addition to all various media and entertainment outlets that provide ready and plentiful sources for themes, consider the use of clichés. Yes, they are just that—clichés—hackneyed phrases we throw around lazily. However, they have secured that moniker because they are used so often and we are so familiar with them. Avoid them in your writing, but rely on them when communicating to a jury. Some clichés, which may prove useful, include:

- Time is money.
- Misery loves company.
- We are known by the company we keep.
- One bad apple spoils the barrel.
- There’s no such thing as a free lunch.
- You can run, but you can’t hide.

These and others like them are common throw-away phrases that a jury will immediately recognize, appreciate the significance of and apply to the facts of your case. Spend a day trying to spot all the clichés you hear. You’ll be surprised how often others use them (and how often you use them too).

In addition to clichés, you can mine themes from children’s stories, fairy tales, parables, slogans, jingles, and all forms of entertainment, stories and manners of expression (including figurative language). You become accustomed to seeing trial themes all around you, and you become equipped at culling them out. But what do you do with all these potential trial themes? How do you save them for when you need them? How do you organize them?

Whenever you see a tagline or expression that catches your attention, type it up, give it a title and sort it in a category on

your computer. Do the same for print ads, magazine articles and advertisements that show promise, and in addition, scan and save them. Let's say you come across a trailer for a movie with a David & Goliath theme. You can title it "David & Goliath" and save it under the type of case you think you can use it for, such as breach of contract or products liability. With time, you'll develop an extensive database of prospective trial themes garnered from every source imaginable. You'll be able to hold up the facts and law of your case against your multitude of themes, and find one or more useful ones.

In addition to searching out themes one at a time—a trailer here, a commercial there, a magazine here—consider searching sources with hundreds of ready-made themes.

When it comes to movies, you can find taglines at Tagline Guru—Movie Taglines, [http://www.taglineguru.com/movie\\_taglines.html](http://www.taglineguru.com/movie_taglines.html). Some favorites from the site include:

<i>Braveheart</i>	Every man dies. Not every man truly lives.
<i>Gattaca</i>	There is no gene for the human spirit.
<i>Rocky</i>	His whole life was a million to one shot.

If you want to search slogans and taglines, you can find them at Tagline Gurus—Slogan and Jingle List, <http://www.taglineguru.com/sloganlist.html>. The site provides classic slogans such as:

Avis	We try harder.
Audi	Never follow.
Burger King	Have it your way.
Calvin Klein	Between love and madness lies obsession.
Ford	Quality is job one.
Hallmark	When you care enough to send the very best.
Honda	The power of dreams.

If you're interested in searching through famous lyrics, you can search through 13,000 of them at Rock Wisdom, <http://www.rockwisdom.com/mainpage.htm>. The site has over 70 categories to search for lyrics, including such topics as "adages and proverbs," "law and order," and "philosophy." It is where I located the quotes I referenced earlier in the chapter.

If you're in search of clichés, you can find hundreds at Cliché Site, [http://clichésite.com/alpha\\_list.asp?which=lett+1](http://clichésite.com/alpha_list.asp?which=lett+1) or Cliché Finder, <http://www.westegg.com/cliche/>.

Cliché Finder is great because it allows you to search clichés by doing a word search. For example, if you do the search for truth, some of the clichés you find are: “Truth is stranger than fiction” and “The truth will set you free.”

There are multiple websites available with slogans, clichés, taglines, lyrics, catch phrases and figures of speech that you can employ in your next case. In fact, there are multiple sites where lawyers list commonly used themes. For example, *The Civil Litigation Blog* by James Publishing has a post on common trial themes. You can find it at <http://jamescivil litigation.wordpress.com/2009/06/29/ideas-for-case-themes/>. The list includes such themes as: responsibility, good versus evil and it was just an accident.<sup>6</sup>

Spend some time on these sites and save in your database those that catch your attention. And remember that themes are all around, and sometimes they are the product of different ideas mashed together. Think of Salvador Dali for a moment. He drew from different areas outside of art, including physics, math and psychology for his inspirations. When developing case themes, don't limit yourself to the same old themes you've used in the past. Draw from different cases, even if they are not similar to one another, and look outside the traditional sources of inspiration to more unique sources, including pop culture, mathematics, sciences and other fields to find new ways to convince juries of your position.

With all these resources at your fingertips, you may be thinking, “Sure I can find plenty of themes. But how do I find the right one?” Finding the right theme for your case starts when you first start working on the matter. During the initial stages of litigation, start thinking about what themes best represent your client and his case. And don't just rely on one theme. Think of several. And then use every phase of litigation to try out the theme, develop it, and perhaps, if necessary, abandon it. You'll be developing several themes at once, so you'll have at least one to fall back on.

So starting with the initial client interview and case investigation, view the case through the paradigm of a theme rather than a mere collection of facts and law. Spend some time with your client.

<sup>6</sup> Interestingly, a disproportionate number of attorney blogs which discuss the usefulness of themes are written by plaintiff personal injury attorneys. It seems the plaintiff bar may be ahead of the defense bar when appreciating the effectiveness of trial themes.

Discuss the case from his vantage point and his perspective. See what he considers important, what he views as relevant. Explain to him that if the case were to go to trial, you plan on using a theme (or themes) as a lens through which the jury will see and evaluate the case. That one of the purposes of the initial meeting is to start brainstorming potential themes and that his input will play a role in your development of trial themes. You may go so far as to ask him what he believes a convincing trial theme may be.

As the client meeting progresses, one or more trial themes will come to mind. Start to brainstorm, developing whatever themes flood into your brain. One or more may be worth pursuing. Most, no doubt, should be discarded. This is the same process that writers use. They put it all on paper, revise and revise, and often ignore most of that initial draft. Take some time to think through potential themes early, because that initial investment will pay off dividends when you apply that theme throughout the course of discovery and later at trial. If you wait to start thinking about themes days, or even weeks before trial, it may be too late to fit the square-sized discovery you conducted into the circle-sized theme you're trying to create.

In addition to doing your own brainstorming, discuss possible themes with others in your office. Knock around some ideas over lunch or around the water cooler (or coffee pot). And don't limit your conversations to other attorneys. Discuss it with your paralegal and legal assistants, your runners and receptionist. Get a lay person's perspective on the themes you have in mind and be receptive to any themes they volunteer. Remember, you're trying to convince a lay jury about your case via a theme that will need to resonate with them. If your proposed theme doesn't resonate with your staff, odds are it won't resonate with your jury.

As you develop your themes during the course of litigation, keep in mind not only does it have to be memorable and powerful, it needs to be consistent with the facts of your case. Just because you come across a great theme in a movie you watched or a magazine you read, it may not be the right theme for your case. A jury will pick up on any inconsistencies between your theme and the facts you present (and more importantly the facts the other side presents). Therefore, when creating the lens for your case, see which facts fall within the lens and which ones do not. If most of the facts fall outside the paradigm you are attempting to create, you're probably looking through the wrong lens and pursuing the wrong theme.



Also, just as the theme must fit the facts of your case, it must be a good fit for you too. You're the one who will be selling the theme to the jury, so if it doesn't fit your character and personality, the clunkiness and clumsiness of it will come through and taint your message. You know who you are and what you can sell and what you can't. Keep that in mind when preparing trial themes. And of course, the "perfect trial" theme may not be a great fit for you, but it may be a perfect fit for someone else from your firm, who can assist at trial and help present the theme to the jury.

As you think of a theme fitting you and your personality, appreciate that a theme will also help in getting a case ready for trial. We've discussed how the theme serves as a lens for the jury, to help them focus on the facts you want them focusing on. But it also serves as a lens for you, so you can focus on the facts that need focusing upon when you draft written discovery, conduct depositions and attend mediation. Does a given interrogatory advance your theme? Before you even set a deposition ask yourself: How can I use this witness to bolster my case themes? How can I use him to undermine my opponent's case themes? By asking these questions each time you prepare written discovery or prepare for a deposition, you will ensure that what you seek and what you ask will garner the evidence and information that buoys your theme instead of sinking it.

For example, it's typical to prepare a deposition outline with the questions you intend on asking a deponent. Before you do that, though, I would suggest you devise a list of themes you want to emphasize during the deposition. What are the reasons you are deposing this person? What do you hope he will say? What admissions do you seek to procure? What facts do you intend to ferret out? Think about what you want to accomplish with this witness and how he helps your case and how he hurts it. After thinking about the role of this witness and the purpose of this deposition, sit down and write down several themes for this witness. Big picture ideas that this witness will help you convey. And then build your deposition outline around these themes. And make sure you take your list of themes along with your outline to the deposition. As the deponent answers the questions, glance back at the list and think about what other questions you can ask that support and play up your themes.

Depositions work both ways. Just as you use the opposing party and third party witnesses to serve as a conduit for your themes, you need to train your client to express those themes too. Share

your case themes with your client and tell him you expect him to fall back on those themes and use them as a filter during his deposition. If he finds himself confused, or nervous, or agitated, take a deep breath and reflect on the cases themes. This will help focus him and his answers.

As the case progresses, don't be afraid to discard a theme and pursue a new one. Ideally, since the inception of the case, you have been brewing two or more themes for this very contingency. But whether you have a backup theme ready to go or not, if a theme simply does not work, do your best to review the evidence through the lens of the new theme, and secure the best evidence you can to support such a theme. Of course a theme developed from day one is better than a theme developed at or near the conclusion of discovery. But what's important to remember is a late developing theme is better than no theme at all.

Once discovery is completed and trial is in view, cull through all the evidence you gathered and sift out anything that supports your theme(s). Whatever evidence, whatever statements, whatever admissions, whatever exhibits. Bring them all together, and start developing your trial presentation around your theme, using everything you have to support and bolster your theme.

Once you have your theme and how you plan on supporting it mapped out, take some time to consider what opposing counsel will likely use as his themes. What catch phrases and sound bites will he likely rely upon? What lens will he try to convince the jury to look through? For every punch, there is a counter punch, and for every theme there is a counter theme. Consider what themes you can develop to counter opposing counsel's, and be prepared for how they plan on countering your themes. If a theme is easily undermined because either the facts or law don't support it or perhaps it is too simplistic or too trite, then that should be an indication to abandon it.

Once you have your themes and have anticipated the other side's, try out your themes in front of an audience. Gather some lay persons—your spouse, you staff, some friends—and try out your themes on them. Try out the other side's themes. Try your secondary themes. Try anything and everything and see what resonates and what falls flat. You may need to tweak your theme(s). You may need to revamp them. You may need to change them altogether. But whatever the result, it's better to learn that your theme doesn't work before trial than at trial.

Once at trial, incorporate your theme at every stage—voir dire, opening, direct, cross, closing. Repeat those catch phrases, use your witnesses to parrot them and, if your depositions went according to plan, have the opposing party and hostile witnesses parrot them too (if they refuse, you'll be able to impeach them with their depositions). Repetition, repetition, repetition. The more the jury hears the facts alongside your theme, the better. You want them repeating the theme in the jury room. When they're deliberating, and a jury raises a question about your case, the others can retort using your theme. Long after they render a verdict in your client's favor, they will still remember your theme.

You can see why themes are important, and how the difference between having one and not having one makes the difference between winning and losing. And the sources for prospective themes are endless. Just about anything can serve as inspiration for your next case theme. Any movie you watch, any song you hear, any billboard you catch a glimpse of on the way to work can trigger a spark for a theme. It's all a matter of a paradigm shift from seeing your office as the only place where themes come to mind to seeing all human interactions and all sources of entertainment and all forms of media as a spark for a theme. It's as if the scales were removed from your eyes, and all you see are the possibilities. Venture out with your new perspective and make sure to always be armed with a journal and pen, because the ideas will come flooding in.

## Starting at the End

*The most effective way I know to begin with the end in mind is to develop a personal mission statement or philosophy or creed. It focuses on what you want to be (character) and to do (contributions and achievements) and on the values or principles upon which being and doing are based.—Stephen Covey from *The 7 Habits of Highly Effective People**

*"If you do not know where you are going, any road will take you there."—Cheshire Cat, *Alice in Wonderland**

In his best-selling book, *The Seven Habits of Highly Effective People*, Stephen Covey recommends that we "begin with the end in mind." You start with an image of where you want to end up and devise a plan on how to get there. When you first get a case, you need to envision its resolution. Do you prevail at summary judgment? Does it settle at mediation? If so, how much do you hope to settle for? Does it go to trial? If so, what verdict are you hoping for?

Start by thinking how you and your client define a “win.” Of course you’ll plan and prepare as if the case will go to trial, but generally winning isn’t defined as a favorable jury verdict because 98 percent of cases never get that far. Thus, you probably will not define a win as delivering a closing argument worthy of Clarence Darrow. In fact, the best “win” you can muster may be quite modest. You have to take stock of the law and the facts and based on what you have to work with, decide what your goal is. If you are plaintiff’s counsel, the best you may be able to hope for is to escape summary judgment and hobble to mediation, getting something for your client. If you are defense counsel, the best you may be able to muster is settling the case for \$5 million instead of \$7 million.

Once you “have the end in mind,” devise a plan that details how to get there. What law do you have to research? What facts do you need to develop? What records do you need to get your hands on? What depositions do you need to take? What questions do you ask at those depositions? Think about every step you need to take and plot it all out on a yellow pad. Anything missing? Anything out of order? Add to, subtract from and rearrange the items on your to do list. Once you are satisfied with it, prepare a letter to the client outlining your plan of attack. This way, your client has your blueprint for the case, and knows exactly where you are going and how you plan on getting there, and just as importantly, has a sense about how much it will all cost. Keep this letter close to you. You will refer to it regularly throughout the case and modify it as your case evolves. This letter will keep you focused on attaining your desired goals.

This chapter will focus on this macro “to do list,” with later chapters focusing on the micro “to do lists” that support it. This chapter will get you into the habit that whenever you start working on a new case, you create a Word document where you list all the tasks you want to perform in the case. Next to each task, you will note whether you, another attorney or a paralegal will be handling it. As the case progresses, check off items as they are completed and add new items as necessary. By keeping such a list in each of your cases, you will be able to keep track of what’s been done and what remains to be done, and will ensure that items don’t slip through the cracks. Also, a “to do list” serves as a source of inspiration, helping you brainstorm what else to do to advance your case. And of course, one “to do list” may help you add to another case’s “to do list.”

The idea of “to do lists,” may strike you as an oversimplification of what we do as trial attorneys. Surely, it cannot be reduced to such a cookie cutter approach. However, having “to do lists” is anything but. Whenever we are faced with a new project, obstacle or challenge, whether at work or in our personal lives, the odds are that we have addressed most, if not all of the problem before. Instead of constantly reinventing the wheel, this chapter will assist you in developing checklists that you can reference when addressing similar issues. For example, each expert deposition is unique, but 20 percent to 60 percent of that deposition will consist of questions you have asked every expert you have ever deposed. Your preparation for that deposition will be similar to your preparation for other expert depositions. To increase efficiency, you can develop a macro “to do” list for “how to prepare the case for trial,” and create micro lists for smaller projects such as “how to conduct a witness interview,” “how to prepare for a hearing,” or “how to prepare for mediation.” You can allow these documents to be organic and fluid, modifying them as needed. They will serve you well and ensure you don’t allow “to do” items to slip through the cracks. And just as importantly, they will allow you to focus on the unique aspects of the task at hand as opposed to the rote items you have dealt with so many times in the past.

So how do you create these lists? Before you prepare a list of “to do” items, you need to ask yourself a list of questions. Based on the answers to those questions, you can generate a working to do list. First, there will be questions on the macro issue to generate a macro to do list and then questions on the micro issues to generate micro lists. Let’s start with the big question—what is the end in mind? Or, in other words, where do we want to take this case? To answer this question, we must first answer the following questions, which will assist us to evaluate the terrain, set parameters, and define our expectations:

1. Who is opposing counsel? What is his/her reputation/expertise? How often has he/she handled similar cases? How often has he tried similar matters?
2. Who is the judge? What is his/her reputation/expertise/manner of ruling on issues? What is his/her temperament?
3. What will the jury pool be like?
4. Who are the parties? What is their litigation history?
5. Are there potential third parties?
6. What are your clients’ goals?
7. What are the opposing party’s goals?

8. What do you hope to accomplish?
9. What do you consider a “win?”
10. What does the opposing party likely consider a “win?”
11. What’s the best possible outcome?
12. What’s the worst possible outcome?
13. What will the case cost?
14. What experts do you need?
15. What will the experts cost?
16. What evidence do you need? What evidence is unavailable?  
What evidence is no longer available?
17. What evidence does the other side need?
18. What do the jury instructions say about your case?
19. What do the jury verdicts say about your case?
20. What do similarly litigated matters tell about how this matter will likely be resolved?
21. Is the case a candidate for early settlement?
22. What can you do to position the case for an early settlement?
23. What concerns you about the case?
24. What concerns your client about the case?
25. What surprises you about the case?

Answering these questions enables you to evaluate the case and prepare a macro to do list, starting with the case investigation and ending with trial. The following is a generic macro “to do list” that you can modify to your case depending on the answers to the questions above:

### **Litigation Checklist**

When preparing a litigation checklist, keep in mind that many clients have reporting forms for their initial evaluation, budget, and periodic reporting. So when working with the client, find out what and how they want you to report to them on their matter.

#### **I. Getting Started**

##### **A. Fees**

1. Discuss fee with client.
2. Provide range of fees.<sup>7</sup>

<sup>7</sup> Though a discussion of fees and a retainer agreement should be one of the first things discussed, an educated guess of what the fees and costs will be likely won’t materialize until you have prepared your initial evaluation and “to do” letter for the client.

3. Provide range of costs.
4. Enter retainer agreement.
- B. Review the case
  1. Investigate the facts.
    - a. List the prospective witnesses.
    - b. List the key documents.
    - c. List witnesses to interview.
    - d. List documents and locations to inspect.
  2. Conduct due diligence.
    - a. Research the judge.
    - b. Research opposing counsel.
    - c. Research the forum.
    - d. Research alternative forums.
    - e. Research the client.
    - f. Research opposing party.
    - g. Research Google regarding the legal issues.<sup>8</sup>
  3. Search similar cases.
    - a. Find similar cases on Westlaw.
    - b. Find similar cases on Pacer.
    - c. Pull docket sheets for these cases.
    - d. Pull key pleadings and motions.<sup>9</sup>
  4. Evaluate case.
    - a. Evaluate liability.

<sup>8</sup> When asked to do legal research, Westlaw is generally the first and only stop. However, at times you may want to jump on Google and search there. When faced with a new area of the law or an arcane issue, I often do a Google search of the topic to see what's out there. There may be blogs explaining and debating the issues. There may be well-written, well-researched articles with the answers I am looking for. There may be an attorney with a website dedicated to the issue. Generally Westlaw will do just fine. But sometimes Google is better.

<sup>9</sup> There is nothing new under the sun. Whatever case you are trying has likely been tried before, and perhaps even before the same judge as your case. Westlaw has databases for state and federal cases, where you can pull the pleadings and motions for cases similar to yours, preferably before the same judge so you can see her orders on discovery issues and dispositive motions. If your Westlaw plan does not include state or federal pleadings, rely on Pacer. Start your search on Westlaw, finding appellate rulings addressing the same issues in your case. Then pull the docket sheet from the district court case from Pacer. Review the docket sheet and print off those documents on which you can rely in preparing a complaint, or a motion to dismiss or a motion for summary judgment, to name a few examples. Also, pay close attention to the orders on the docket sheet to see what judges have found persuasive and what they have not.

- b. Evaluate damages.
- c. Read the jury instructions.<sup>10</sup>
- d. Speak with an expert.<sup>11</sup>
- e. Define a win.
- f. Define a win for the opposing party.
- g. Define a loss.
- h. Draft a “to do list.”
- i. Prepare a budget.
- j. Develop a preliminary action plan.
- k. Reduce the action plan to writing. It should address:<sup>12</sup>
  - (i) The known facts.** Outline the facts in chronological order and note which ones are in dispute.
  - (ii) The unknown facts.** Based on what is known, outline what are the missing facts. No matter how much information you have gathered, there always will be missing facts. You should list which facts should be gathered and how to procure them. Which witnesses need to be interviewed? Which documents need to be obtained? What other steps should be taken? Outstanding investigation is a team effort, and this affords opportunity for the counsel and the client to forge a common, unified theme. Details of who will do what in what time frame should be documented.
  - (iii) The legal issues.** Based on the facts and the type of case, you should outline the relevant legal issues. What are the liability issues? What duty is owed? To

<sup>10</sup> The jury instructions give you a road map on how to win your case. As soon as you get a new case, pull and read them. They will spell out the entire case—opposing party’s case and yours. To win, plaintiff needs to present evidence that meets every element of his prima facie case as spelled out by the jury instructions. Defense counsel must show that the evidence does not support one or more of those elements, or show that the facts support your affirmative defenses, which are also spelled out by the jury instructions.

<sup>11</sup> Consider consulting with an expert early on. Experts can help you evaluate the strengths and weaknesses of your case and that of your opponent. An expert can help you develop your case strategy and determine what discovery to propound and what questions to ask at deposition. Experts are also a great source for trial themes.

<sup>12</sup> The action plan will serve as the rudder for your case, keeping you on course throughout litigation. This letter will serve as a blueprint for the case. It is a living document that will evolve as new facts are discovered, written discovery is exchanged and depositions are taken.



whom and under what circumstances? Any causation issues? What damages are recoverable?

Often, you will have to research these issues. Sometimes it will require a little research. Sometimes it will require a lot. Despite the cost, it is best to research all the legal issues up front to fully understand the client's legal strengths and weaknesses. Many times, the research has provided a road map to develop the necessary facts to lay the groundwork for a successful dispositive motion. It is important that counsel seek authority from the client before research is conducted.

**(iv) Strengths and weaknesses of liability case.**

Discuss the strengths and weakness of your case and the strengths and weaknesses of the opposing party's case. What arguments have resonance? Which ones will likely fall flat on the ears of the judge or jury? What is the likely outcome and why?

**(v) Damages.** Discuss the damages. There should be a chart that includes a line item for every category of damages recoverable at trial and a range for that line item (as the facts are developed, those numbers will likely change). As with legal research, jury verdict research should be conducted from the onset. Sometimes, the results can be surprising and can affect the value one places on the case, either upward or downward. Again, authority for verdict research should be obtained.

**(vi) Opposing counsel, opposing party and the judge.**

Research should be conducted on opposing counsel, his client and the judge. You need to know whom you are going up against and who will be ruling on your motions. Do Google searches for each. Search social media including LinkedIn, Facebook, and Twitter for the opposing party and opposing counsel and search published opinions and jury verdicts for the judge and opposing counsel.

**(vii) Course of Action.** The letter should discuss what needs to be done to flesh out the facts, develop the legal issues and place the case in a posture to win by motion, settle favorably at mediation (or before) or to win at trial. Document the negative as well. Not all cases can be won, or reasonably so.

**(viii) Trial themes.** Discuss a plan through trial and discuss which trial themes should be developed through discovery.

**(ix) Verdict.** Discuss what the likely verdict will be.

**(x) Define a win.** The litigation plan should define what a win is in this specific case.

**(xi) Budget.** A detailed budget should be included discussing what it will cost to carry out the litigation plan. The budget should address special costs associated with the given jurisdiction (such as requiring the parties participate in non-binding arbitration) and the given opposing counsel (such as ones who depose every conceivable witness and turn every discovery issue into a battle). Also, include a section on costs, including costs for experts, deposition transcripts, trial exhibits, etc.

## II. Case Investigation

### A. Initial client meeting

1. Discuss your case strategy and action plan.
2. Discuss outcomes, themes, case strengths and weaknesses.
3. Provide honest case assessment.<sup>13</sup>
4. Secure client approval for fees and costs
5. Regularly update action plan and keep client informed.<sup>14</sup>

### B. Relevant witnesses

1. If they are not represented, interview them.

<sup>13</sup> It is your job when you first get a case to dissect it, to go beyond the gilded surface your client has created and dig into the anatomy of the matter. Hold the facts up to the light, place the legal issues under the microscope, weigh the witnesses' credibility on a scale. And after doing your initial case analysis, share it with the client, warts and all. Because if you simply agree with the client that "he can't lose" so as to curry favor with him, so as to ensure he stays as a client, what you will find is that if you indeed win, you did nothing more than what the client expected, and if you lose, the client will berate you for not meeting his great expectations, expectations that were never based on the facts or the law. An honest assessment of a case, particularly one done early in litigation, is one of the best services you can offer the client.

<sup>14</sup> As the case proceeds, update your action plan every 45 to 60 days (or as your client dictates) and inform your client on your progress. How much have you advanced the litigation plan? Also, what adjustments need to be made to the plan and why? The plan will help you and the client to focus on the end in mind.

2. Consider taking their sworn statement.<sup>15</sup>
3. Devise schedule, deciding whom to depose in what order.

C. Relevant documents

1. Gather documents through informal means.
2. Conduct Freedom of Information requests (FOIA requests).
3. Secure records from federal, state and local agencies.
4. Perform public records search.
5. Perform docket searches.
6. Perform online searches.
7. Secure client's records.
8. Secure client's insurance policy.<sup>16</sup>
9. Secure opposing party's insurance policy.
10. Secure all contracts with indemnity/insurance provisions.<sup>17</sup>

### III. Pleadings

A. Complaint

1. Is it subject to dismissal?
  - a. Lack of subject matter jurisdiction
  - b. Lack of personal jurisdiction
  - c. Insufficiency of process
  - d. Insufficiency of service of process
  - e. Failure to state a claim
  - f. Failure to join a party

<sup>15</sup> Be the first to interview witnesses. Being first often affects the outcome of litigation. The first attorney to interview witnesses can take their sworn statements and lock them into their testimony.

<sup>16</sup> When defending a matter, your client's insurance may provide him a defense for the matter. Due to notice requirements under the policy, don't delay in notifying his insurer of the lawsuit.

<sup>17</sup> If you are defending a premises liability matter, take a look at your client's lease. It may contain an insurance clause obligating another party to procure insurance and name your client as an additional insured. Even if the evidence shows that your client is liable for the plaintiff's injuries, your client may be entitled to demand a defense and indemnity from another entity's insurer. And if the lease entitled your client to be named as an additional insured and it wasn't, you may have a breach of contract claim against this other entity, whose breach may require it to now act as your client's de facto insurer. In any premises case, always secure the lease and see what it says about insurance. It may turn out that your client is entitled to a defense and indemnity. Conversely, it may be your client who agreed to provide a co-defendant coverage. If so, it is better to know this up front than be surprised by this fact down the road.

2. Is it subject to a motion for more definite statement?
3. Is it removable?
  - a. Investigate state court forum
  - b. Investigate federal court forum

B. Answer

1. Affirmative defenses.
2. Counterclaim (compulsory/permissive).
3. Cross claim or third party claim.

#### IV. Scheduling Order

A. Request the Court enter a scheduling order<sup>18</sup>

B. Have the order address:

1. Expert disclosure.
  - a. Who discloses first?
  - b. Who offers experts for deposition first?
  - c. What information should be disclosed?
2. Scope of discovery.
3. Limits on discovery (length and number of depositions).
4. Discovery cutoff.
5. Mediation deadline.
6. Trial date.

#### V. Retain Experts

- A. Compile list of potential experts
- B. Interview prospective experts
- C. Obtain and check expert's credentials
- D. Read expert's writings
- E. Obtain expert's opinions
  1. Don't disclose expert until you know what his opinions are.

<sup>18</sup> In federal court, the parties are expected to submit a proposed schedule of deadlines to the court, who then uses those suggested deadlines as a guide for entering a scheduling order. Many state court judges generally do not require the parties to hash out discovery and related deadlines in the form of a scheduling order. Whether a state court imposes such an obligation or not, you and your client are well served by requesting a status conference and submitting a proposed scheduling order to the court. To control the timing and pace of litigation, it behooves all counsel to sit down, discuss deadlines for expert disclosure, mediation, depositions of witnesses, amendment of pleadings, filing of dispositive motions, discovery cutoff, a trial date and so forth. By doing this, you control your own destiny and set the pace of the case on your own terms. It also prevents being surprised by a trial order where the deadlines may cause you to engage in a hellish discovery schedule just to get everything done in time.

## **VI. Discovery**

- A. Does case warrant site inspection?
- B. Does case warrant a medical examination?
- C. Does case warrant surveillance?
- D. Written Discovery
  - 1. Serve interrogatories.
  - 2. Serve requests for production.
  - 3. Serve requests for admissions.
  - 4. If necessary, move to compel.
  - 5. Respond to written discovery.<sup>19</sup>
- E. Third-Party Records
  - 1. Determine who has relevant records.
  - 2. Subpoena third party records, which may include:
    - a. Medical records.
    - b. Employment and income records.
    - c. Bank records.
    - d. Investigative agency records.
  - 3. Obtain signed releases for records that cannot be procured via subpoena.
  - 4. Prepare chronology of all relevant records.
- F. Depositions
  - 1. Ensure you have gathered all the relevant documents.
  - 2. Prepare your client for deposition.
  - 3. Depose the opposing party.
  - 4. Depose witnesses.
  - 5. Depose the other side's experts.
    - a. Investigate expert's background.
    - b. Obtain expert's prior depositions.
    - c. Obtain expert's writings.
    - d. Obtain documents expert is relying upon.

## **VII. Dispositive Motions**

- A. Can you move for summary judgment?
  - 1. Lay the foundation in:
    - a. Written discovery
    - b. Depositions
    - c. Prepare affidavits

<sup>19</sup> It is a good practice to notify the client immediately upon receiving discovery requests, and send the client's proposed draft responses, and seek the client's help in responding to them to make the client part of the process.

**VIII. Mediation**

- A. Discuss settlement with client
- B. Discuss settlement ranges with client
- C. Conduct sufficient discovery to make mediation meaningful
- D. Research jury verdicts
- E. Prepare mediation report for the mediator

**IX. Pretrial Motions**

- A. Draft motions in limine
- B. Draft pretrial stipulation

**X. Trial**

- A. Summarize depositions
- B. Send out update subpoenas for records
- C. Send out witness subpoenas
- D. Prepare jury instructions
- E. Prepare voir dire questions
- F. Prepare opening statement and closing instructions
- G. Prepare direct and cross-examinations
- H. Prepare client for trial testimony
  - I. Prepare favorable witnesses for their trial testimony
- J. Prepare trial exhibits
- K. Exchange trial exhibits

**XI. Post-Trial**

- A. Draft post-trial motions
- B. Draft appeal

This “to do” list provides you a roadmap of your case from beginning to end. Turn it into a chart where you have the “to do” item in the first column, the person tasked with the item in the second column and a place to check off the items in a third column. It will look like this:

<b>TASK</b>	<b>RESPONSIBLE PARTY</b>	<b>DONE</b>
Conduct due diligence	Attorney A	X
Search similar cases	Attorney A	X

A “to do” list converted into a chart enables you to keep track of what has been accomplished in a case and what remains to be done. It also helps you focus on the end-game. By reviewing the list, you not only focus on the next task at hand, but you are reminded of the long term projects and overall case theme and

strategy. Review your to do list in each case at least once a month. This will facilitate a proactive approach to your cases.

This chapter has been focused on keeping the end in mind as to the big picture—what is a win and how do you get there. The big picture is comprised of several smaller pictures—what written discovery to propound, how to prep your client for deposition, how to prepare for an expert deposition and so forth. The smaller pictures (written discovery, depositions, client prep) and how they fit into the larger picture will be addressed in several later chapters. They too will have questions you should answer and their own to do lists to emulate. As you will see, everything you do in a case will advance your theme, undermine it, or leave it static. It is up to you to focus your efforts on using your “to do lists” to support and bolster your themes and your plan for winning the case.

## Trying Cases from the Start

I joined my present firm after a short stint at another defense firm. My approach to my cases was to conduct discovery until it's time to settle. I didn't worry about trial until a trial order was entered, and then all I did was conduct more discovery at a quicker pace. I figured the case would settle or the trial date would be postponed. In short, I had no end game; I had no “end” in mind. I thought I was doing my job because of how diligent I was when it came to investigating the claims and pursuing discovery. But I rarely thought of the bigger picture, and had no idea about the use and development of themes. I was outworking my opponents, but I wasn't out thinking them.

Until the day I had an “aha moment” thanks to our Managing Partner, Spencer Silverglate. I still remember it all these years later—the conversation that forever changed my trajectory, forever changed how I approached cases—and that serves as the spark and foundation for this book. In a 15 minute conversation, Spencer taught me the value in trying every case, something he practiced every day and an approach I was about to start applying to my cases.

I had inherited a slip and fall case that was set for trial in less than two months. Key witnesses remained to be deposed. Little discovery had been done. Plaintiff's case remained intact, and he was prepared to take the case to trial. Spencer called me into his office to discuss case strategy. The conversation went something like this:



“You’ve read the file,” he asked.

“Yes.”

“You’ve thought about the case.”

“Yes.”

“So what’s our trial theme?”

Blank stare.

“How do we win?”

Blank stare.

“How do we get a defense verdict?”

Blank stare.

“So you haven’t thought about this case?”

“I have. I just haven’t thought about those questions.” I tried smiling. You know, it just wasn’t the right time for smiling.

“We have trial in two months. Everything we do from here on out will be geared for trial. In fact, from now on,



everything you do on any of your cases will be geared toward trial, whether the case is set for trial or not.”

Spencer went on to explain that good lawyers try every case from its inception and explained the benefits of doing so.<sup>20</sup> It was during this conversation that he recommended I read *Seven Habits*. He discussed starting with the end in mind and being proactive to accomplish that end. And then he showed me the outline he prepared for all of his cross-examinations at trial. It was something he had learned from reading texts on cross-examination and his years of practice. It was so simple and its brilliance was in that simplicity. The first page of his cross-exam of the slip-and-fall Plaintiff’s mother looked like this:

**BIAS<sup>21</sup>**

Source	Examination	Notes
	You’re Plaintiff’s mother	
	You love your daughter	
	You would like to see her win her lawsuit	
	Not lose	
	She’s seeking \$	
	Win \$	
	Hope your testimony helps her	
	Win \$	

In the middle column was the testimony he would attempt to solicit from the witness. On the left hand column would be the page from the deposition transcript he would reference if he needed to

<sup>20</sup> My conversation with Spencer changed my view of cases. Viewing every case as if it were going to trial changed how I investigated my cases, pro-pounded written discovery and how I deposed others. From then on, everything I said or did was seen through the prism of a trial theme.

<sup>21</sup> Whenever cross-examining an adverse witness, Spencer’s first page of his outline was always bias. He wanted the jury to see that everything the witness said was colored by her bias toward the opposing party (of course the opposing party was biased—she wanted a favorable verdict). In one case involving a seriously injured plaintiff, he wanted to start by showing the bias of plaintiff’s witnesses and end with showing that despite her injuries, she still had some quality of life. As Spencer often said in that case, start with bias and end with hope.

impeach the witness if she didn't provide the testimony from the middle column. The right hand column was for notes—possible additional questions to ask. Spencer emphasized that if you didn't treat depositions as if you were in trial you wouldn't secure the testimony you needed for cross-examination at trial. Because the trick to trial was what we've all heard so many times—never ask a question you don't know the answer to. You may think you know the answer, but until you ask, you won't know for certain. So you test out all the trial questions in deposition. Of course, you can't do that if you haven't already thought through your case themes, opening and closing, and the like. Therefore, he concluded, you start with the end—the trial themes and closing argument—and you use discovery as the building blocks to help you achieve that end.

Spencer and I would return to this conversation over the years. He often asked me those pivotal questions whenever I started a new matter—What are your trial themes? How do you define a win? What case investigation and discovery support your themes and help you win? His first questions were directed to the end game and the follow up questions fleshed out how to reach the end in mind. And with time, these questions became central in how I handled my matters. So much so, that I felt compelled to write a book about it. A few questions can alter how you litigate. They can ensure you remain focused on what's important and ignore what is not. I smile every time he asks a new associate those exact same questions and they have the same quizzical look on their faces as I did.

So you're convinced of the value in trying every case. But how do you go about it? It requires some visualization. Envision the courtroom. Look around. There's opposing counsel, the opposing party, your client, the judge, the prospective jurors. They're all there, waiting. What are you going to say? What questions are you going to ask the jury during jury selection? What themes are you going to begin to emphasize? What issues will you shine a light on? Which ones will you keep in the shadows? What's your opening going to sound like? How about truly starting with the end in mind—what will your closing sound like? Even though that day before the jury may be years away, it's important to visualize that day now. Because everything you do will be directed toward that day.

Let's take the trial in order. First, there's jury selection. What jurors will help you? Which ones will hurt you? Which themes will resonate with them? How do you plan on communicating your themes to

them? A good place is to read jury verdicts from similar cases to see how jurors responded to the attorneys' presentations. You can also do Google searches of articles addressing those cases. At times legal reporters will interview jurors and secure their sentiments about why they ruled a certain way and what captured their minds and hearts. The more you get into the habit of researching jury verdicts, the better you'll be at evaluating the types of jurors you'll likely face at trial.

And don't forget that your prospective jurors are all around you. You work with them, you bump into them each day, you're even married to them. The folks around you are the types of persons who will sit on your jury. They are the folks you need to bounce off your prospective trial themes, your proposed examination of your client, your scathing cross-examination of the opposing party. Let them listen to how you plan on presenting your case. They'll help you shape the themes you will be presenting to others just like them. And in speaking with them, you'll learn the types of persons who will be sympathetic to your client and the ones who will not. You'll learn who will label your client the protagonist and who will label him the antagonist. And with that understanding, you'll be better equipped to pick a jury open to accepting and embracing your trial themes.

When you open a new case, create file folders on your computer under that case, one for each of the different elements of a trial—themes, jury selection, opening, direct examinations, exhibits, cross-examinations and closing argument. Under each file folder, keep notes and scan items that help you with that aspect of the case. We have already discussed keeping a file folder for your trial themes. Your case is going to be based upon and wrapped around your trial themes. So keep a file folder where you track potential themes. If you brainstorm in a journal or on a yellow pad, rip out the pages and scan them into your computer. Keep all your themes, even ones you choose to discard. You may return to them later. Your trial theme folder is the most important folder in any case (whether you keep a digital one on your computer or an old fashioned hard copy version). Without a theme, you don't have a case. You just have a bunch of facts and legal issues thrown together.

The trial theme folder is organic. As you think through your case, brainstorm potential themes and bounce them off friends and loved ones. You will start to see which themes resonate and which ones fall flat. What's important is to reduce the process to

writing and save it to your computer. These themes will affect all your other trial folders. Let's take, for example, your jury selection folder. It will have notes about your prospective jurors—which ones to pick and which ones to avoid. It will also contain which themes work with these prospective jurors and which ones don't. You'll be making a connection between your trial themes and jurors who will identify with those themes. Conversely, you'll be linking your prospective jurors with the themes they buy into. It's a reciprocal process—matching the right theme with the right juror and the right juror with the right theme. And you'll be reducing all of this to writing and saving it to review later.

Themes also bleed into your opening statement and by extension your opening statement folder. When you present your opening statement, you will be wrapping it around your themes. What facts are central to your case? Which ones play into your theme? Which ones undermine it? It is your opening statement where you will weave the facts into your themes and bolster them. You present your side of the story through the prism of your themes, where if you're successful, the jury will identify with your client and buy into your story.

See yourself standing before the jury. You're presenting your opening statement. What facts will you recite? Will you use exhibits? Demonstrative aids? Which ones? What tone will you use? How will you relate to the jury? Will they empathize with you? With your client? Visualize your presentation. What are you going to say? What are you going to emphasize? Reduce your thoughts to writing and store it away in your opening statement folder. It will be the repository of all your thoughts and machinations regarding how you will present the facts of your case. Don't wait to think about your opening statement. Start thinking about it when you first get a case. Thinking about it will help you develop your trial themes (just as thinking about your trial themes will help you develop your opening statement).

Moving from your opening statement, have a virtual folder for your direct examinations. Here you will keep notes on how you plan on examining your client, your experts and favorable witnesses. How do you depict your client as the hero, as the lead of your story? How do your other witnesses serve as supporting actors? How can your client channel your trial themes? How can your other witnesses convey those themes? Your client will be the embodiment of your trial themes. Start thinking about how he can serve those trial themes and how they will serve him. As with

every other aspect of trial, your direct examinations feed into your trial themes and they in turn feed into your direct examinations.

In your direct examination folder, write out the questions you plan on asking your client and supporting witnesses and the responses you're hoping they'll provide. Are your questions supported by the facts of the case? If not, what questions can you ask? When you discuss the case with your client, envision him sitting in the witness chair at trial. What do you want him saying? How does he advance his case? And what happens when you offer up the witness to opposing counsel? What can he be asked that will hurt his case? What questions can undermine your trial themes? Think through these unsettling issues and discuss them with your client. Remind your client that everything he says or does will potentially be exposed when he takes the witness stand. By starting with the end in mind, your client can start the case thinking about what he'll say at trial. And by doing so, he'll give a much better deposition.

From your direct examination file, move to your exhibit file. Here you will keep track of the exhibits you plan on using at trial and how you will get them admitted into evidence. You will also keep track of the demonstrative exhibits you plan on using. How do you plan on bringing your client's testimony alive through exhibits or demonstrative aids? Which exhibits support your case? Which ones undermine it? Which exhibits support your opponent's case? Which ones undermine it? Remember, we're dealing with jurors who have become accustomed to visual media and entertainment. So you need to start thinking early how you're going to present your case visually.

Explain to your client the use of exhibits and demonstrative aids at trial. Have him understand how you plan on presenting your case if it goes to trial. Describe how you will use exhibits with him and other witnesses, and how those exhibits will play into your trial themes and how his testimony will be channeled through those exhibits. Tell him that most every case has key documents, and they will either support his case or undermine it. In fact, there may be smoking gun documents, and when it comes to those documents, he may either be squeezing the trigger or facing down the barrel. The sooner you discover these documents and appreciate their impact on your case, the sooner you can develop themes that incorporate these documents or minimize their impact.

From the exhibit file folder we move to the cross-examination file folder. Remember, that for every question we anticipate asking the opposing party or his experts at trial we will ask the same question

at deposition. By starting backwards from the opposing party's cross-examination, you can compose a more effective cross-examination for deposition. You will have thought through how you want your cross-examination to go at trial, and you will be prepared to ask all those questions at deposition. That way, you will have a cross reference for every question you plan on asking at trial from the deposition. You will be able to cite it page and line from the deposition, and insert it into your outline.

The cross-examination of a hostile witness (whether the opposing party or an expert or other witness) is the most difficult part of any trial. It can easily go awry when the witness does not provide the answers you were expecting. You can avoid these surprises by asking him the same questions you asked him at deposition. If he gives a different answer, you'll be able to impeach him with his deposition. However, if you hadn't started with the end in mind, and hadn't asked the witness all the questions you were planning on asking him at trial, you'll either have to curtail your questioning at trial or run the risk of having a witness you can't control with his own prior testimony.

Let's go back to the outline Spencer recommends. The central column has the answers you want to elicit and the left hand column has the source from which those answers flow. Generally, it's the witness's prior testimony. It can also be answers to interrogatories, a prior sworn statement or a document signed by the witness. Whatever it is, for every answer, there is a source document from which that answer flows (which you can pull out to impeach the witness). Envisioning the cross-examination at trial will help you hone your cross-examination at deposition. It will also encourage you to secure all the relevant documents early on so that you secure the answers you want in deposition.

As you can see, an effective cross-examination at trial happens when you plan in reverse order. You start with the questions you plan on asking at trial (and in which order), which makes you think of every question you need to ask in deposition, which in turn makes you think of the due diligence you need to conduct for the deposition (including what documents to secure and which witnesses to interview). By working backwards, you secure the answers at trial that best serve your trial themes.

From the cross-examination file you then finish with your closing argument file folder. As with your opening, you're thinking about what themes you will want to emphasize. Again, visualize yourself standing before the jury. You've rested. The other side has rested.

In a little while the jury will retire to the jury room and begin deliberations. This is your last chance to drive home your themes and convince the jury to see the case through the paradigm of your client's story. What themes will you emphasize? How will you respond to your opponent's themes? What facts will you remind the jury of? What exhibits or demonstrative aids will you trot out? Think about these things at the inception and during the duration of your case. By thinking about the closing throughout discovery, you will focus on developing your trial themes and your story with every interrogatory you propound and with every question you ask in deposition.

And with your closing argument folder, you have a folder for every aspect of trial. You will begin filling and populating these file folders from the inception of your case. When a thought comes to mind about opening, include it your opening file folder. When you have an epiphany about closing, include it in your closing argument folder. Think about every aspect of trial early and often, and it will focus your attention throughout the course of litigation on what's important, on what's relevant and on what will help you win your case.

By taking this approach, you can draw a line that goes from the end of trial to the inception of a case back to the end of the trial. By starting with the end in mind, everything you do is directed toward that end. You start and remain focused on trial, which forces you to focus on developing trial themes early, and focuses all your energies on developing those themes. Everything else—everything that is extraneous and irrelevant—falls by the wayside, as you focus with laser intensity on the end game.

## Case Investigation

Each of us leaves a sizeable digital footprint, available to anyone who wants to learn more about us—about our background, our activities, our hobbies, our habits.<sup>22</sup> And unlike a paper trail, the digital trail can follow you forever. Think for a moment about the trail you leave behind:

<sup>22</sup> More and more, we have online reputations based upon our digital footprint. What images of us are found online? What have we said or written that appears online? Start with the assumption that anything you post, even if designated private, may become public one day, and that it will affect your online reputation, which in turn, will affect your overall reputation.

1. Posts on Facebook<sup>23</sup>
2. Background information on LinkedIn
3. Tweets on Twitter
4. Family videos on YouTube
5. Vacation photos on Flickr
6. Comments on a blog
7. Purchases made on Amazon
8. Your location from your cell phone
9. Searches you made and sites you visited on Google<sup>24</sup>
10. Text messages on your cell phone
11. Movies you've downloaded on Netflix
12. Professional information on employer's website
13. Conversations through Skyping
14. Purchases on your credit card
15. Appointments made on Outlook

A little scary, huh? All of that information being stored somewhere, available for retrieval.<sup>25</sup> The upside is that it is much easier to learn about others in our cases, with plentiful information at our fingertips. Before you delve into formal discovery, take the time to learn more about those involved in your case by simply going online.

Let's start with opposing counsel. Yes, opposing counsel. He's the one recommending to his client whether to settle and for how much. He's the one making the decisions or, at the very least, executing them. You need to learn more about him, his habits, his proclivities and his background. Start by asking yourself a series of questions about him:

1. What is his employment history?
2. What is his educational background?
3. What does his website look like?
4. What are his areas of specialty? Is he board certified?

<sup>23</sup> Even if you intend for a comment or a picture you post to remain private, a friend could share your comment or tag a photo, making it public.

<sup>24</sup> We treat Google like our closest confidant. We ask it questions (in the form of searches) that we wouldn't ask our closest friend, spouse or physician. Imagine Google revealing to the world everything you've searched for?

<sup>25</sup> Get in the habit of Googling yourself every three months to see if others have posted/said anything about you which may besmirch your reputation.



5. Has he published?
6. Has he written on the issues involved in your case?
7. Has he made presentations?
8. Has he presented on the issues involved in your case?
9. How many cases has he taken to trial?
10. What cases has he taken to trial?
11. What have been his results at trial?
12. What social media information is available on him? LinkedIn? Facebook?
13. Does he have a blog? Has he commented on others' blogs?
14. Has he ever been the subject of a blog post?
15. Has he or his firm been the subject of any articles?
16. Has he ever been the subject of an ethics violation? Has he ever been reprimanded? His license suspended?
17. What's his reputation among your colleagues?
18. Is he easy to work with? Does he have a reputation for being difficult?
19. Have others at your firm dealt with him before?
20. Is he handling a case outside his area of specialty?
21. Does he have any appellate decisions to his name?

You can answer most of these questions online by visiting the following sites:

- Google
- Google Scholar
- Google Images
- Google +
- Flickr
- Facebook
- LinkedIn
- Twitter
- YouTube
- Blogs
- Westlaw
- Clerk's Office
- Pacer
- Corporate search
- State Bar website

In addition to investigating opposing counsel, you should investigate the background of the opposing party. Ultimately, he is the decision maker, and you want to learn as much as possible as to what motivates his decisions. Again, start with a series of questions to focus your investigation (most of the answers to which you can find online):

1. Has he filed lawsuits before? When? Where? For What? For Social Security? For Workers' Comp?
2. Has he been sued before?
3. Did he give a deposition in a prior lawsuit? A sworn statement?<sup>26</sup>
4. Has he filed for bankruptcy?
5. Has he been convicted of a felony?
6. Has he ever filed for foreclosure?
7. Does he have a concealed weapons permit?<sup>27</sup>
8. Does he have a social media presence? Facebook? LinkedIn?
9. Does he have a website? A blog?
10. Has he been the subject of any media attention or coverage?
11. Does he have any businesses? Has he filed any corporate filings?
12. Does he have any affiliated businesses?
13. Has he written any articles?
14. Given any presentations?
15. Has he hired other counsel in the past?
16. What are his goals?
17. How does he define a win?
18. What's his motivation behind the litigation?
19. How hard will he press his case?

Just as you will inquire of your client as to what motivates her and what her goals are, you want to learn the same about the opposing party. Pose to opposing counsel some of these questions—what does his client want, what does he hope to accomplish, what motivates him? Seeing where each side stands enables you to start working toward common ground and a favorable resolution to both sides.

<sup>26</sup> You can review docket sheets from prior cases, isolate notices of deposition of the opposing party, and requests those depositions from counsel in that matter or directly from the court reporter.

<sup>27</sup> This is good to know for personal security reasons.

As you investigate the opposing party, bring your investigation closer to home and investigate your own client. You want to understand her motivations and goals. Start with the following questions:

1. What type of business does she have?
2. What does the business do?
3. Does she have a website? Blog?
4. Has she been the subject of any media coverage?
5. Why did she hire you?
6. Did she interview other attorneys before hiring you? Why did she pass on them?
7. What does she hope to accomplish?
8. What are her goals?
9. What's her budget?
10. What perceptions does she have about litigation? What misperceptions does she have?
11. What timetable does she have in mind?
12. How does she define a win?
13. What does she consider to be the strengths of her case?
14. What does she consider to be the weaknesses of her case?
15. With whom has she discussed her case?

After you understand where she's coming from, you need to provide her a reality check. Whether you represent the plaintiff or the defendant in a civil case, you often face a clients' unreasonable expectations. Often they think they have a great case "they can't lose" and overlook the shortcomings and pitfalls. It is tempting to blindly agree with the client, parrot her praise. Don't. You do the client and yourself a disservice if you do. Yes, there are great cases, and yes there are ones that in the parlance are "in the bag." However, when you look at all your cases on a bell curve, most fall somewhere in the middle. Sure enough, many cases have their strengths, have the potential of being winners. But buried in them are also the seeds of destruction, facts and issues and legal precedent that can rot them from the inside out. It is your job to go beyond the gilded surface your client has created and dig into the anatomy of the matter. Hold the facts up to the light, place the legal issues under the microscope, weigh the witnesses' credibility on a scale. And after doing your initial case analysis, share it with the client, warts and all. Because if you simply agree with the client that she "can't lose" so as to curry favor with her, so as to ensure

she stays as a client, what you will find is that if you indeed win, you did nothing more than what the client expected, and if you lose, the client will berate you for not meeting her great expectations, expectations that were never based on the facts or the law. An honest conversation about the case done early in litigation is one of the best services you can offer the client.

In addition to investigating your client, peer into the presiding judge's background. Judges are human like the rest of us, and have biases, opinions and perspectives, like the rest of us. Learning about the judge will help you evaluate your chances of winning (however you may define it). Start by asking:

1. Has she presided over similar cases?
2. How has she ruled on similar cases?<sup>28</sup>
  - a. Did she rule on discovery issues? Was she upheld?
  - b. Did she rule on dispositive motions? Was she upheld?
  - c. Did she rule on evidentiary issues? Was she upheld?
3. Has opposing counsel appeared before her?
4. Has your firm appeared before her? What was your firm's experience?
5. What administrative/local rules does she follow?
6. Has she presided over any high profile matters? What did the media say about her?
7. Has she appeared on any lawyer blogs?<sup>29</sup>
8. What do colleagues say about her?
9. What do others at your firm say about her?
10. Has she ever been the subject of an ethical violation?

<sup>28</sup> Do a Westlaw search for your judge to see how appellate courts have addressed her rulings. Look for cases with similar issues as your case. Find a case where your judge has ruled on the same issue and an appellate court has either upheld or overturned her ruling. Judges remember how appellate courts have viewed their rulings, especially when they have overturned them. Go to Westlaw, type in the judge's name, and skim through the opinions which were appeals from her rulings. What types of cases were they? What were the rulings? What was her reasoning behind them? What arguments were made to her, which ones did she agree with and which ones did she disregard? When was she upheld? This information will be helpful when drafting motions for the judge.

<sup>29</sup> More and more, websites and blogs are popping up which contain open, and at times blunt, comments about judges, their judicial demeanor and their proclivities. Though they should be taken with a grain of salt, they often reveal the temperament of a judge.

11. What's her background before reaching the bench?
12. What does a social media search disclose?
13. Has she spoken at any bar associations or delivered any speeches?
14. Has she published?
15. Does she have any ties to any of the parties or counsel?
16. What is her judicial temperament?
17. Does she tend to favor plaintiffs or defendants?
18. How often does she grant dispositive motions?
19. How long has she served as a judge?
20. How is she perceived by the defense bar? Plaintiff's bar? If she is elected, which organizations have supported her?

After you've researched the parties, counsel and the presiding judge, make an assessment of the facts of the case. When you first get a case, you should make a list of the "knowns" and the "unknowns." What facts do you know and which ones do you need to uncover to better evaluate the issues of liability and damages? The more "x" factors, or unknown variables, the less of a grasp you will have on the case and the more your recommendations to your client will seem like guess-work. Therefore, early on, you should isolate the unknown facts, list them and develop a strategy on which facts are discoverable and how best to discover them. The early part of your case should be focused on investigating and searching out these "x" factors. Documents secured from the client or witness interviews may go a long way in answering the unanswered questions. Often, a number of questions won't be answered until well into discovery and some may never be definitively answered. But knowing what you don't know is essential to tackling any case. It's what you don't know which will help you or hurt you, and the sooner you know what you are dealing with, the better you can advise the client on a case strategy.

Evaluate what you know and what you don't by asking yourself the following questions:

1. Who are the key witnesses?
2. Which are the key documents?
3. What are the key pieces of evidence?
4. What facts do you know?
5. What facts don't you know?
6. Which facts can you discover informally?

7. Which facts can you discover through formal discovery?
8. Which facts will you likely not discover?
9. Which facts are simply opinions?
10. How much of the case is based on the credibility of witnesses?
11. Which witnesses will likely be credible? Which ones won't?

After developing a grasp of the facts of the case, make a list of the relevant witnesses and take the time to interview them. Make sure to ask them the following questions.

1. Are you represented by counsel? (If they are, that is the end of the interview.)
2. Have you provided any one a statement?
3. If so, do you have a copy of the statement?
4. If not, would you mind requesting a copy and providing it to me?
5. Are you aware of any surveillance video, photos or recorded messages related to this case?
6. Are you aware of any insurance policies?
7. Are you aware of any contracts between any of the parties?
8. Have you spoken to anyone about this case?



9. Who else has any information about this case?
10. What documents do you have?
11. Can you provide me a timeline of the events?
12. Is there an incident report?
13. Has any third party (such as OSHA) investigated this case?
14. What would help to refresh your recollection?
15. Has anyone tried to influence your recollection or testimony?
16. Have any documents or items been lost, misplaced or destroyed?
17. Where are relevant documents being stored? What electronic information is available?
18. Do you agree (disagree) with the factual allegations in the Complaint? Which ones?
19. What haven't we covered?
20. If you remember anything else, will you call me and let me know?

If their testimony is helpful, consider having them sign a declaration or take their sworn statement. This will serve you well later, if they decide to change their testimony. In addition to the key witnesses, take the time to track down the key documents. Sometimes they can be secured through informal means. Often, they'll need to be secured through discovery.

Learning as much as you can about your case as soon as you can will enable you to start developing your trial themes early. Often, the lack of information causes us to make assumptions about our cases, and these assumptions affect how we develop our case and our trial themes. By gathering as much information as possible as early as possible, we can start exploring themes earlier in the case and test them out during motion practice and discovery. Thus, the legwork we do early on will strengthen the themes we use at the end.

In their book *Cross-Examination: Science and Techniques*, Larry Pozner and Roger Dodd define the phrase "facts beyond change." "Facts beyond change" are "facts that will be believed by the jury as fair, accurate, and highly relevant regardless of best efforts to dispute or modify them." They are "the givens of a lawsuit." Your theory of the case must either adopt these facts or, at the very least, not oppose them. Your theory cannot "contradict a fact beyond change." When your theory contradicts such a fact, the fact finder will choose the fact over your theory. Therefore,

learn to categorize your facts between those that are beyond change and those that are not and plan your case theory and themes accordingly.

## Written Discovery

Written discovery often takes a back seat to depositions as a means to win your case. However, written discovery can be as effective as depositions in developing your case themes. It all depends on how you use written discovery. If you're only interested in gathering facts, that is all you will accomplish. However, if you think through how an interrogatory here or a request for production there buoys your themes, then you'll hone them to do just that.

Write down your themes and think about the information and the documents you need to enhance them. Write down what you anticipate your opponent's themes will be and think about the information that will undermine them. In fact, there are a number of questions you should ask yourself to take full advantage of the written discovery you plan on propounding:

1. Who are the key witnesses?
2. What are the key documents?
3. What information do you need to prove your case?
4. What information do they need to prove his case?
5. What information supports your themes?
6. What information undermines them?
7. What information supports their themes?
8. What information undermines them?
9. What information supports the allegations in the complaint?
10. What information supports the affirmative defenses?
11. What admissions would support your case?
12. What admissions would bolster your themes?
13. What facts do you need to learn?
14. What questions do you have about the other side's case?
15. What facts/witnesses has opposing counsel alluded to?
16. What factual issues need narrowing?
17. What legal issues need narrowing?
18. What do you believe may be a "smoking gun" document?
19. What information do the jury instructions suggest you secure?
20. Are the questions you're asking better suited for deposition?



21. What secrets is the other side likely trying to keep from you?
22. What secrets are you trying to keep from the other side?
23. Does your written discovery reveal your case strategy?
24. Will your requests draw legitimate objections? How do you plan on responding?
25. What information will you fight for despite objections?
26. What information are you hoping to secure to use at trial?
27. What response are you seeking to turn into an exhibit at trial?
28. What responses could help support a motion for summary judgment?
29. What responses could be used for impeachment at trial?
30. What words are you hoping to put in the other side's mouth?

As you can see, many of the questions above are meant to make you think about trial, and how your requests will help you win at trial. Yes, written discovery requests are a tool to secure the names of all the relevant witnesses and a copy of all the relevant documents. You need to learn as much as you can about what the other side already knows so you're not surprised down the road. Surprises pull the rug out from underneath the themes you have been developing since the inception of the case, and may require you to rethink them. But written discovery should go beyond learning facts. It should be directed toward developing your themes and undermining their themes. It should be aimed at building the pieces and components for trial, so you have the tools you need when you sit down and start preparing for trial in earnest. So, yes, discovery is concerned with the minutia, but it is also central to the big picture—winning.

With these questions in mind, consider the following tips when drafting written discovery.

### **Tips for Drafting Discovery Requests**

The following are tips that apply equally to interrogatories, requests for production and requests for admission.

1. **Draft them early.** Prepare written discovery early in the case. If you represent the Plaintiff, serve it with the complaint. If you represent the Defendant, serve it sooner than later. In order to develop your themes early, you need to know who the other side's witnesses are and upon which documents he plans to rely.

2. **Rely on the pleadings.** If you're defense counsel, carefully review the Complaint for ideas for written discovery. If you're the Plaintiff, review the Answer and Affirmative Defenses. You want to secure the information that forms the basis of the opposing party's pleadings.
3. **Rely on the local rules.** Your local rules may have sample discovery requests for you to propound. Being that they are approved requests, opposing counsel will have a difficult time objecting to them.
4. **Define key terms.** For all the terms you will be using repeatedly throughout your discovery requests, define them in your definition section.
5. **Anticipate objections.** When you draft discovery ask yourself how you would respond to the requests. Would you object to them? On what grounds? Try redrafting them until you would no longer object to them.
6. **Review jury instructions.** Review jury instructions to see what needs to be proven to establish prima facie case. Then draft discovery requests that help prove (or disprove, if you represent the defendant) the prima facie case.
7. **Use sample forms.** You can find anything on Google. Type in "interrogatories" or "request for production" and the type of case you're handling, and you'll likely find various versions of discovery you can pattern yours after.
8. **Check Pacer.** Check for written discovery in similar cases on Pacer. Generally discovery is only filed when they are the subject of a motion to compel. You can see how the judge rules on objections to evaluate whether your requests are overzealous. If not, you may have an order to rely upon when seeking to overrule objections to your requests.
9. **Envision the responses as an exhibit at trial.** What responses would you blow up nice and large on an oversized board to show the jury at trial? What requests do you have to make to secure those responses? An interrogatory you ask early in a case may prove to be a pivotal exhibit at trial. Also, remember the caveat that the answers you provide to written discovery may be used against your client as an admission at trial.
10. **Remember—Theme, theme, theme.** You start and end preparing written discovery with your themes in mind. How does the information or documents you seek build up your themes? What can you get the plaintiff to say that plays into

your paradigm and undermines theirs? Search out the pieces that you can weave together to fashion your theme.

### Tips for Drafting Interrogatories

The following are tips when drafting interrogatories:

1. **Use contention interrogatories.** Ask for all the facts that support the opposing party's allegations in their pleadings. For example, "Please state all facts which support your allegation that the Defendant driver was negligent."
2. **Don't telegraph your case themes.** Yes, use interrogatories to build your case themes. Yes, be specific enough to increase the likelihood that you secure the response you're pursuing. However, if you make it obvious to the other side what your case themes are early on, they'll do everything they can to ensure their discovery responses and their witnesses undermine your trial themes. Conversely, try to extract from the other side's discovery requests what themes they are attempting to develop so that you can do your best to undermine theirs.
3. **Interrogatories are not a deposition.** A deposition is a deposition. Interrogatories are something else. Don't turn them into a deposition. And just as you don't telegraph your case themes, don't telegraph the questions you plan on asking at deposition. Interrogatories aren't a dry run for deposition. Remember, an attorney is answering the questions, and he will answer them in a manner that least hurts his client and will use them to train his client for his deposition.
4. **Secure information for depositions.** Interrogatories can help you procure the foundational information you will need to conduct a better deposition.
5. **Identify witnesses and documents.** Interrogatories are a useful tool to have the other side identify relevant witnesses and documents. Interrogatories that begin "Identify all witnesses that..." or "Identify all documents that..." or "Identify all persons who have custody of..." are a direct approach to securing the names of witnesses to interview and depose and documents to review.
6. **Conform to prior interrogatories your client has answered.** Before responding to interrogatories, check with your client to see if he has answered interrogatories in other lawsuits. If so, secure those responses, review them and determine whether

any of the questions he is going to answer are ones he has answered before. Make sure his current responses conform to his prior ones. When dealing with large corporations, the odds are it has answered similar, if not the exact same interrogatories in the past.

7. **Seek all communications with clients.** Ask the other side to provide details about all communications they've had with your client.
8. **Paint the other side into a corner.** Use interrogatories to start closing doors and to start forcing the other side into a corner. If served early and if done without telegraphing your intent, you can often manipulate your opponent to offer up information and admissions that he may not have otherwise provided.
9. **Secure a narrative.** You want to tell a story. They want to tell a story. As with your themes, you want to start putting together the elements of your story early without telling your entire story prematurely (and by extension, enabling the other side to distort, change and undermine your story). Just as the other side wants to corrupt your story, you want to corrupt theirs. But to do so, you must first learn what their story is. Surprisingly, often the other side is willing to volunteer their story in full. Propound interrogatories that invite them to do just that.
10. **Secure a timeline.** Just as you want the other side to tell their story, you want them to offer their version of the timeline of relevant events.

### Tips for Drafting Requests for Production

The following are tips when drafting requests for production:

1. **Strike a nerve.** Some cases have a smoking gun document. It could be an internal memo, a Facebook post or an e-mail that changes the complexion of a case. What would you anticipate the smoking gun would be in your case? Seek it out. When the other side vigorously objects to such a request for production, there's a good chance you're about to unearth the proverbial smoking gun. It may take a motion or two to get it, but it will be worth the effort.
2. **Go from general to specific.** Start with general, broad requests, and tailor them down, to more specific requests. This way, if the broader requests are objected to, you'll still secure many documents through the more narrow requests.

3. **Ask for different versions of contracts.** When you ask for contracts, ask for all the versions, drafts and changes it went through. The changes will often go a long way in explaining the parties' intent.
4. **Use contention requests.** Ask for all the documents that support a given allegation. For example, "Provide all the documents that supports paragraph 6 of the Complaint."
5. **Request industry relevant documents.** Research the types of documents used in the industry that is the subject of litigation. For example, in a product liability case, there will be documents associated with the industry that manufactured the product.
6. **Draft different versions of the same requests.** If the opposing party is trying to hide documents, he is going to read your requests narrowly. If there is a specific document or type of document you're looking for, draft different versions of the same request to decrease the opportunity of opposing counsel to thread the needle and avoid producing the sought after documents.
7. **Secure deposition documents.** Think about all the documents you need for the opposing party's deposition and ask for them.
8. **Secure their expert's file.** Ask for the expert's complete file, including all their notes, source documents and report.
9. **Track the interrogatories.** Ask for documents that relate to the information sought in your interrogatories.
10. **Search out the key documents.** No matter how complex, no matter how many witnesses, no matter how many bankers boxes, any given case will rise or fall on only a handful of documents. Your job at the onset of each case is to identify them, locate them and use them to build your case and support your trial themes. In fact, these few documents often serve as a barometer as to whether you win or lose at trial or whether you can reach a favorable settlement.

### Tips for Drafting Requests for Admission

The following are tips when drafting requests for admission:

1. **Authenticate documents.** Requests for admissions are a useful tool to ask the other side to authenticate such documents as contracts, employment and medical records and other such documents.

2. **Admit elements of prima facie case.** If you're the plaintiff, ask the other side to admit the elements of your prima facie case. If you're the defendant, ask the other side to admit the elements of your affirmative defenses. If the other side refuses, and you prove up the elements at trial, depending on the jurisdiction, you may be able to recover the costs of proving up those elements.
3. **Anticipate loopholes.** Requests for admissions are dangerous and opposing counsel knows that and will do everything he can to provide an evasive response. Anticipate the loopholes in your question and modify them to limit and possibly eliminate any means of avoiding the question.
4. **Silence is golden.** Sometimes you get lucky and the other side forgets to respond to the requests. When they do, a court may deem them admitted. The longer it takes the other side to remember to respond, the greater the argument you have that the court should deem them admitted.
5. **Secure admissions regarding other parties.** If you're the defendant, ask the Plaintiff to admit that the co-defendants are liable and are responsible for a portion of her damages. This way, you can use requests to reduce your share of liability.
6. **Close doors (and simplify issues).** Requests enable you to limit and simplify issues. An admission can eliminate the need to prove a fact or establish a legal issue. Keep the elements that you need to prove at trial in mind, and use admissions to reduce the number of facts you have to prove.
7. **Use them in every case.** I'm surprised how rarely I see parties use requests for admission, as if they are only suited for a small subset of all litigation. Get into the habit of using them in every case. Yes, you may provoke the other side to serve some too, but well-crafted requests are worth the price.
8. **Lay foundation for deposition.** Use requests to bolster your position at deposition by securing admissions you can build upon with an effective deposition.
9. **You're not seeking information, you're seeking concessions.** Understand the intent behind requests for admissions. They're not used to get information. That's the purpose of interrogatories and requests for production. They're used to secure concessions from the other side. When drafting a

request, ask yourself whether you're attempting to secure a concession? What type? How big of a concession?

10. **Interrogatories are pick axes. Requests for admissions are swords.** Again, appreciate the distinction between interrogatories and requests for admission. Interrogatories chip away at the other side, in search of information. In the process of doing that, you may secure admissions and cause damage to the other side much as a pick axe may do. But a request for admission is like a sword. It's not in search of information. Its purpose is to inflict damage to the other side's case. If you're not intending to cause damage to the other side's case, or to build up your own, take a closer look at your requests before serving them.

### **Objections to Discovery Requests**

Just as you are propounding discovery to develop your themes and undermine theirs, the other side is propounding discovery to support their themes and undermine yours. Just as you're hoping to catch them unawares, disguise your themes, and procure a response you can turn into a bigger-than-life exhibit at trial, they want to do the same. So when responding to discovery requests, think through what the other side is trying to get you to admit, agree to or produce that will help their cause and hurt yours. Be careful what you admit, and where appropriate, raise the necessary objections. Common objections to consider include:

1. Attorney-Client privilege
2. Work product privilege
3. Confidential
4. Proprietary
5. Harassing
6. Overly burdensome
7. Overbroad
8. Irrelevant
9. Not reasonably calculated to lead to admissible evidence
10. Trade secrets
11. Calls for legal conclusion
12. Vague
13. Ambiguous
14. In excess of allowed requests

Remember, before answering any request, think about this—how will I feel with having this response blown up for the jury to see? Everything we do is for that hypothetical jury who one day may sit back and reflect on discovery responses we prepared months, perhaps years, earlier. Write to convince them of your themes, your perspective and your case.

Start looking at discovery as a way of buttressing and developing your case themes. It's more than seeking information or documents. It's a means to build your case and tear down theirs. It's an opportunity to change the trajectory of a case in your favor. Spend a tad more time when drafting discovery requests to think through your themes, and use those requests to foster those themes, while playing the delicate balancing act of not telegraphing your themes to the other side. The additional time spent will increase the odds that you will have responses ready made for your jury.

## Defending Your Client's Deposition

The most important deposition in any case is your client's deposition. An aberrant admission can serve up a summary judgment to the other side or cost you dearly at trial. Therefore the most important thing you can do in any case is properly prepare your client for deposition. Over preparation is the key. I suggest three meetings, which I will call (1) Reconnaissance; (2) Preparation and Indoctrination; and (3) Cross-Examination. The first meeting is a get-to-know-you meeting with the client, where you learn everything she knows and secure all relevant documents. The second meeting is the initial preparation for the deposition, a how-to for depositions, and a review of all the relevant materials with the client. The third meeting is a dry run of the cross-examination she will endure. If after her deposition your client tells you that the opposing party's cross-examination was a cake walk compared to your mock cross-examination, then you've done your job. The most important part of preparing your client is appreciating that it will take time and should begin well before her deposition date.

Your first meeting, which I refer to as the Reconnaissance meeting, affords you the opportunity to learn everything your client knows about the case and identify and secure all the relevant documents. This initial meeting can be done over the phone. After the introductions and general description of what to expect at deposition, take some time to learn everything your client knows



about the case, the parties involved, the documents and any thoughts and opinions she may have about the proceedings. Also, determine the identity and location of all relevant documents and make arrangements to secure copies (originals where appropriate). This initial meeting affords you the opportunity to learn everything your client knows about the case, determine what information is helpful and what information is damaging and helps you begin to evaluate what type of witness your client will make at deposition. Let her know you plan on two additional meetings, the next a few weeks before her deposition and the third a few days before her deposition, both in person.

During your initial meeting, you'll explain generally what a deposition is and what to expect, but the focus of the meeting is learning everything your client knows about the case. During that meeting, consider asking her the following questions.

1. What do you know about the allegations in the complaint?
2. What do you know about the facts of the case?
3. How were you involved with this case?
4. Who are the potential witnesses?
5. Who was responsible for what occurred and why?
6. What documents do you possess relevant to this case?
7. What documents have you signed that are relevant to this case?
8. Who have you talked to about this case?
9. What statements, if any, have you given about this case?
10. What investigation have you conducted?
11. Are you aware of any incident reports?
12. Are you aware of any standards or protocols applicable to this case?
13. Was there a formal inquiry made by a local, state or federal agency?
14. Was there any media coverage?
15. Are there any relevant policy manuals, contracts or agreements?
16. Have you received or sent any correspondence or e-mails about this case?
17. Are there any relevant records we need to preserve for litigation?
18. Have you had similar cases or incidents in the past?

19. Have you given a deposition before?
20. Do you have any additional information about this case, the parties or relevant documents?

After the initial meeting to go over the facts of the case and secure all relevant documents, have a follow up meeting, which I refer to as Preparation and Indoctrination. During this meeting, you review with your client all the documents she has signed or initialed and all documents she had a part creating and ones with which she should be familiar. You want to avoid her being handed a document at deposition that she has never seen before. Ask her questions about all the relevant documents as well as the key pleadings and discovery (the complaint, the answer, answers to interrogatories) and ensure she is comfortable with them. You also want to go through the types of questions she will be asked and how she will be asked them. And what may be the most important part of this second meeting is the indoctrination part—where you teach her what opposing counsel will try to do and how she cannot be a willing participant in her own self-destruction. You need to indoctrinate her so she understands opposing counsel is not her friend. Opposing counsel is there simply to secure admissions helpful to his case and harmful to hers. Opposing counsel is a wolf in sheep's clothing, who has an agenda and will try to use her to satisfy that agenda. The better she understands what opposing counsel is up to and how to answer his questions (and just as importantly, how not to answer them), the more effective she will be in deposition.

Also, spend some time with your client reviewing your case themes and what you suspect the other side's case themes are. She needs to be a conduit for your case themes and not allow herself to become a conduit for the other side's case themes. When she gets stuck, or is faced with a difficult or challenging question, she is to retreat to her case themes and make sure her responses are in line with those themes. Relying on case themes will ensure that her testimony is consistent and powerful.

During this second meeting, it is important you review with her any document she may be confronted with at deposition. It is very rattling for a deponent to be confronted with a never-before-seen document. So, gather all the relevant documents and create two sets of binders—one for you and one for your client—to review them with her in a face-to-face meeting. The binders should include:

1. the complaint
2. the answer and affirmative defenses
3. any interrogatory answers the client, or a client's representative, has signed
4. incident reports
5. governmental investigative reports
6. company policies and manuals
7. applicable federal and state regulations
8. applicable county and city ordinances
9. correspondence and e-mails between the parties
10. agreements, contracts and related documents between the parties
11. the notice of deposition
12. prior statements
13. media reports
14. client's company's website
15. client's social media posts



There's little more unnerving than watching a client being asked about a regulation, rule or procedure with which he should be familiar but that he has never seen before. It's your job to ensure that your client is aware of the relevant regulations and understands them. First, ask yourself does the case involve any rules or regulations that dictate the behavior or actions of the parties? In a products case, there may be relevant federal regulations or ANSI standards. In a premises case, there may be a relevant building code ordinance or industry standard. In an employment case, there may be an applicable protocol in a policy manual. In a medical malpractice case, there may be a leading medical text, journal article or standard put forth by one of the voluntary medical associations. Figure out all the applicable rules that serve as the prism through which to evaluate the facts of the case. You can start with simply typing "rules, regulations or protocols applying to X," inserting the search (and whatever "X" may be) in Google. Ask your client about applicable standards. Look at industry groups your client belongs to, and see if they reference any standards. Also, if you have retained an expert, ask her too. You don't want to be surprised at deposition (and you certainly don't want your client to be surprised) with a never before seen protocol, especially if it may be determinative of the standard of care.

Also, ask yourself, if I were opposing counsel, what documents would I confront the client with? Is there something on her website that undermines her position? Is there something on her Facebook site that can be used as an admission against interest? Review those documents you expect your client to be cross-examined with so as to avoid surprise. This second meeting will likely be a long meeting and you may send your witness home with a binder of the relevant documents you reviewed with her so she reviews them again. You want this meeting at least two weeks before deposition so that if any issues come up or if you need to secure additional documents, you have the time to do so.

Many of us are visual learners. When preparing your client for deposition, consider writing out the main facts, theories, themes and so forth on a dry erase board or large pad. It will be a running list that you will add to and refer to throughout your meeting and that will facilitate the learning process.

During your last and final meeting with your client, go through a mock cross-examination with her. Ask the questions you expect the other side to ask. Ask the questions in the manner you expect

the other side to ask them. This is an opportunity for your client to experience a deposition and appreciate what to expect. It is an opportunity for you to identify questions that cause your client to stumble so that you can help her navigate those questions. Tell the client that you will be acting as opposing counsel and that you will be asking the same questions you expect opposing counsel to ask. If you know your case well, odds are that you can think of every question the other side will ask. In fact, because you probably know facts about your case and your client that the opposing counsel does not, your mock examination will likely be much tougher than the actual deposition.

Though you should never be rude or insensitive during the mock cross, don't pull any punches. You and your client need to see firsthand how she's going to respond to the tough questions. As you go through the exam, stop at certain times and critique her answers and her manner of answering them so that she can make the necessary adjustments. You want to do your best to ensure your client knows what the tough questions will be and will be prepared to answer them.

When preparing your client for deposition, it's tempting to gloss over the mundane, but covering the basics will help settle your client's jitters. You have handled plenty of depositions. This is likely your client's first. With that in mind, in addition to covering the finer points of deposition techniques, make sure you cover the following basics with her regarding the deposition:

1. Location
2. Directions
3. Parking
4. Attire
5. When to arrive at the deposition
6. What documents to bring
7. What documents not to bring
8. Who will be in attendance
9. Court reporter's role
10. Your role (what you, as counsel, can and can't say and do)
11. Opposing counsel's role
12. Client's role
13. What is a transcript
14. Significance of oath (perjury implications)

15. Any quirks of opposing counsel
16. Where everyone sits at deposition
17. What objections are
18. How long will it take
19. Breaks
20. Lunch
21. Reading the transcript
22. Making changes to the transcript

In addition to the basics, make sure she understands the “rules of the road.” We all have rules for our clients for their depositions—a list of what-to-dos and what-not-to-dos. Consider reducing your list to writing and have it handy to ensure you cover all the basics during your next depo prep. Here is a proposed list.

1. Listen to the questions. Pause before answering them.
2. Tell the truth.
3. Don’t answer a question you don’t understand. Ask that the question be rephrased.
4. Answer audibly.
5. Answer verbally. Court reporters can’t take down nods of the head.
6. Be polite.
7. Don’t argue with opposing counsel. Don’t lose your temper.
8. Avoid sarcasm, jokes and rude behavior.
9. Opposing counsel is not your friend. Don’t fall for opposing counsel’s friendly overtures.
10. You can take a break if you want one. Feel free to ask for one.
11. Don’t guess. If you don’t know, say so.
12. If you don’t remember, say so.
13. Often, the best answers are the shortest ones.
14. Don’t volunteer information.
15. Answer only the question asked. If you’re asked, “Do you have the time?” The answer is “yes.” It’s not “2.30 p.m.”
16. When asked about a document, ask for it and take the time to read it before answering any questions about it.
17. Don’t exaggerate.
18. Don’t think out loud.
19. Many questions you will be asked can be answered with: (1) yes; (2) no; (3) I don’t know; (4) I don’t recall at this time.

20. However, don't be forced to answer "yes" or "no." Sometimes qualifications are necessary.
21. Be wary of leading questions.
22. Be wary of compound questions. Understand if you answer "yes," you are answering yes to the entire question.
23. Be wary of summaries of your testimony. If the summary is incorrect, say so.
24. Sometimes, the less you say the better.
25. This is not a friendly conversation. It is an interrogation. Treat it that way.
26. Listen to the objections your counsel makes.
27. If you're instructed not to answer by your counsel, don't answer.
28. If you don't know what a word means in a question, don't be embarrassed to say so.
29. Don't assume you know what a question is and start answering it before it is completed.
30. Dress appropriately but comfortably.
31. Don't take notes during your deposition. The interrogator will ask you about them.
32. Be careful of questions that use absolutes, like "never" and "always."
33. Don't assume anything you say is "off the record."
34. Don't object to questions. That's what your lawyer is there for.
35. Only bring those documents to a deposition your lawyer asked you to bring. Before the deposition, show your lawyer what you brought.
36. Don't discuss the deposition in the bathroom, hallway or on the phone. You never know who may be listening.
37. Be yourself.
38. Don't let the attorney's pregnant pauses or silence compel you to keep talking. Once you're done with your answer, stop. Don't continue explaining it.
39. If the interrogator is confused or lost, don't help him.
40. Your conversations with your lawyer are privileged. Don't offer them up in deposition.
41. Avoid superlatives.

42. Whatever you say to opposing counsel will find its way into the record. Do not fraternize with opposing counsel during breaks.
43. Ask to read the deposition at the end. Do not waive the reading of the deposition.
44. If you made a mistake or misspoke during the deposition, let your attorney know before the deposition is over.
45. Try to remain relaxed while remaining vigilant.

Before her deposition, your client should understand the legal underpinnings of her case. You should explain to her what is needed for her to win the case and what the other side needs for them to win their case. Go through the causes of action alleged in the complaint and explain the elements of each and the defenses to each. If there is a counter or cross claim, explain the significance of those too. For her to perform optimally, she needs to understand her role in the case and for her to do that, she needs to understand what each side needs to prove (or disprove). You went to law school and your client didn't, so don't get bogged down on every legal nuance. However, explaining the legal side of the case to her will help her understand how the facts she will be testifying about either advance or hurt her case. And explaining the law to your client will help you become adept at explaining it to the jury. Therefore, during one of your depo preps, have a list of the causes of action, the elements and defenses (pulling the jury instructions can serve this purpose), and run down the list with her. This legal outline will serve as a framework for the facts of the case, and as an outline for your depo prep.

Finally, a few thoughts about video depositions. When an attorney notices your client for video deposition, he is planning on making your client look bad and showing it to the jury. Your job is to make her look good on video. To do that:

1. Ensure your client dresses appropriately.
2. Consider videotaping a segment of your deposition prep. You don't need all the equipment a videographer would use. Just use the recording feature on your phone and record your client as you ask her a couple of dozen questions. Then watch the video with her and critique her mannerisms and delivery. Too many "umms" perhaps? Maybe she plays with the sleeve of her jacket. Do another dry run or two on video until you are both satisfied with how she looks.



3. Be prepared for the “aha” document. The reason you video tape someone is because you want to catch them “in the act.” Chances are there is a smoking gun document, or possibly a surveillance video, that the other side wants to spring on your client so as to capture her reaction on video. Therefore, when you see a notice of video tape deposition come across your desk, work doubly hard to ensure you have all the relevant documents and videos at your disposal.
4. Be prepared to be asked “to draw” something. In an auto accident, it’s not uncommon for a witness to be given the police report diagram (minus the cars, which have been whited-out), and be asked to draw what happened. Generally, caselaw will dictate whether a party may be asked to do such a thing. Have those cases ready and have a plan as to whether your client will or will not draw a diagram of the accident.
5. Remember that some of the traditional “deposition rules” don’t apply. For example, you would generally tell your clients to take as much time as she needs to think about a question before answering it. On a transcript, you can’t see how long a witness took to answer a question. However,



on video, frequent and long pauses may come across as if the witness is trying to hide something. Therefore, when teaching your client the rules of the road for a deposition, modify them for purposes of a video deposition.

Your client's deposition is the most important deposition in the case. Help her help her case by channeling your case themes while fending off questions that hurt her case and support the opposing party's trial themes. An effective deposition that does little or no damage to your case while bolstering your case themes ensures that your focus remains on winning at trial.

After your client's deposition, take the time to debrief her. What did she think about the deposition? The questions asked? The lines of questioning? How they were asked? How did the prep sessions help her? What did she find most useful about the prep sessions? Were the prep sessions lacking in any way? Find out your client's impressions about her deposition so you can learn how you can improve your prep sessions for your next deposition.

## Using Experts to Win Your Case

To use or not use an expert, that is the question. Whenever you have a case with complex technical, financial, medical or scientific issues, consider retaining a consulting expert to explain those issues to you. Researching the issue yourself by going online, reading up on the topic and searching out and digesting scientific journal articles is helpful, but you'll never know whether you truly understand the topic until you speak with an expert who has already mastered it.

Because of the expense, hiring experts is often postponed. Don't fall into that trap. An expert can tell you what the issues are, explain to you how everything works, what documents to search out, what articles to read, what questions to ask in deposition and what themes to develop in your case. Let's unpack some of these benefits and explore why early retention is preferable.

**Experts develop trial themes.** Experts can help you identify and develop trial themes. They understand the technical issues and know how to translate them into everyday language, and in so doing they can help you focus on what's important and what's relevant. An expert's process of transforming the complex into the simple often has the byproduct of creating concepts and ideas that blossom into themes. By truly understanding how something works (a depth of understanding only an expert can

provide), you can look at it from different angles and in so doing, develop themes.

**Experts put facts in context.** When looking at technical issues, we often make assumptions and jump to conclusions based upon our incomplete understanding of the facts. The prism through which we see the case is fractured, and what we see is not the way things are. Experts provide us the right prism through which to see the facts of our case. Cases often go astray based upon inaccurate assumptions. Experts help us put the facts in their proper context.

**They provide the proper protocols.** Experts tell you which are the applicable standards of care—which rules, which regulations, which protocols—apply to your case. You’re going to have to define to the jury what rules the parties had to abide by. Often they are technical rules or standards that an expert will need to explain to you and explain how they should be applied.

So, as you can see, an expert can help shape your case, and set it on the proper trajectory. But if you do choose to hire an expert, you have to know where to find one. There are many places to look. Before embarking on your search, ask yourself what type of expert you are looking for:

Should the expert have a national reputation?

Should he or she be published?

Should he or she be a professor or instructor?

Should he or she have led a relevant professional association?

How many years of experience should he or she have?

What educational background are you looking for?

Do you need a professional expert?

Do you prefer someone with little testifying experience?

How much experience should he or she have in handling depositions?

How experienced should he or she be at testifying at trial?

How aggressive do you expect opposing counsel will be cross-examining him or her?

What skeletons in his or her closet are you willing to work with?

How much is your client willing to pay?

What technical issues will the expert need to tackle?

How broad a range of expertise are you looking for?

When looking for an expert, consider the following sources to mine for one:

1. **Google Search.** Go online and search for the topic that you will need the expert to testify upon.
2. **Google Scholar.** Look up experts who have written on your topics.
3. **DRI Expert Witness Database.** You'll find CVs and depositions there.
4. **Local Universities.** Look up the faculty lists for local universities.
5. **The Ivies.** Look up the faculty lists for the premier universities.
6. **Expert Referral Services.** Study the lists of experts available on expert referral services.
7. **Bar Association Lists.** Plaintiff and Defense Bar associations often provide lists of experts used and approved by their members.
8. **Colleagues.** Send an e-mail to colleagues requesting recommendations. Create a circle of other attorneys who ask one another for expert referrals. Make sure to make recommendations when you can, just as you will be asking for recommendations.
9. **Professional Associations.** Look for the professional associations that cater to the type of expert you are looking for. See who is heading or has previously led those organizations. The ones who have held leadership positions generally are more active in their field.
10. **Verdicts.** Do a search of jury verdicts to see which experts' names come up, particularly experts who appear repeatedly. What are the verdicts associated with their testimony? In the cases they testified, were the results generally favorable for their clients?

When searching for an expert, remember that your goal is to find one that will resonate with the jury (even though most cases settle long before trial). Since your jurors are local, consider a local expert. Search through the faculty list at the local university, and search for someone who is published (demonstrates he's an expert), who teaches (shows that he is comfortable in front of others, teaching them about his expertise, as he will need to do with a jury) and has real world experience relevant to the issue central to your case. Being from Miami, an expert from the University of Miami or Florida International University may have a greater influence on

a jury than someone from the Ivy Leagues. Often the expert you are looking for is in your own backyard.

When you have crafted your list of potential experts, take the time to pick up the phone and call them. Yes, you call them. Not a paralegal or a legal secretary. You. Who you hire as an expert can make or break your case, so take the time to become acquainted and comfortable with your choice. Before speaking with him, though, ask his office for a copy of his curriculum vitae. Review his CV closely, looking for the following:

1. Is he published? Are any of his texts or articles relevant to the issues in your case? If so, you need to review them. You can't have your expert taking a position in your case contrary to his prior writings. If his publications undermine your case theme, consider another expert.
2. If you're retaining a doctor, did he have to leave the country for medical school?
3. Has he ever held any leadership positions where he was elevated by his peers?
4. Has he received any honors or awards?
5. Does he hold any teaching positions? Is he still active in academia? Professors are accustomed to teaching and your expert will have to teach the jury about your case.
6. When's the last activity on his CV? If it's been years since he's written or spoken on a panel, he may not be up on the latest trends.
7. Does anything in the CV not feel right? Intuition is powerful. Ask the expert about your concerns. More and more, we read about heads of companies, coaches, and experts fibbing on their resumes, assuming no one will ever find out. Assume your opposing counsel will find out. Even if no one ever has, assume your opposing counsel will be the first. If anything causes you to raise an eyebrow—a degree from a certain university, a speaking engagement, an award—take the time to independently verify it.

In addition to reviewing his curriculum vitae, find everything you can about the expert online. Do a search of the following:

- Google
- Google Scholar
- Westlaw
- Expert's website

- Expert's blog
- LinkedIn
- Facebook
- Online articles
- Online comments on blogs or message boards
- Prior appellate opinions
- Prior affidavits filed by expert
- How often has the expert worked for plaintiff's side versus defense side?
- Online versions of CV (compare to current CV)
- Licensing boards
- Professional associations
- Pacer
- Prior depositions

Conduct the same investigation you would conduct on the other side's expert. Be assured, that once you disclose your expert, opposing counsel will do everything within his power to find the dirt on your expert. Find it first. Investigate any chinks in the expert's armor. You want to learn about them now, before you retain him, rather than hearing it for the first time at his deposition, or worse, at trial.

After you have reviewed the CV and done your online research, you are ready to interview the expert. There are two types of questions—the ones about his expertise and the ones about the skeletons in his closet. The ones about his expertise include:

1. How long have you practiced in \_\_\_\_\_ field?
2. What are your general opinions about topic \_\_\_\_\_.
3. So far, our case is based on \_\_\_\_\_ themes? What do you think about those themes?
4. We anticipate the other side will rely on \_\_\_\_\_ themes? What do you think about those themes?
5. The facts of the case are \_\_\_\_\_. Based on those facts, what was our client's responsibilities? What were the opposing party's responsibilities?
6. What are the applicable standards?
7. How familiar are you with the issues involved in our case?
8. How much do you charge?
9. How much do you anticipate charging in this case?

These questions are directed to gain an appreciation about the expert's expertise—how broad and deep it is and how applicable it is to your case—and to gain an appreciation regarding what his role will be in your case.

If you're comfortable with his expertise, then ask him the tough questions. You owe yourself and your client the duty to ask your prospective expert these questions. Be upfront with him. Let him know that you ask all your prospective experts some tough questions. You do not mean to offend him and he should not be offended. Let him know that you, someone you know or someone you read about had a bad experience with a seemingly qualified expert and because of that experience, you go through a thorough list of questions just to avoid any surprises. Your questions will help you find out the following that the expert neglected to tell you:

**“I am a convicted felon.”** Yes, your expert may have a criminal past. He may have been guilty of crimes that undermine his credibility. Ask him if he's ever been convicted, arraigned or arrested. And then do your online background search to confirm his answers.

**“I am a person of interest in a federal investigation.”** It is easy enough to find out if an expert is a convicted felon. But what if he is a yet-to-be-convicted-felon? Just ask him. And by the way, do Google searches for your experts, and check the websites for the local papers where they reside to see if they have received any negative press.

**“I had a substance abuse issue.”** Experts are human like the rest of us. They too can succumb to the temptations of alcohol and drugs. If it has affected their professional life, such concerns may have been flagged by their licensing board.

**“I lied on my curriculum vitae.”** Yes, sometimes experts fudge their resumes. And yes, they are naïve, or arrogant or just plain dumb enough to think no one will find out. If your expert lied on his resume, his credibility is shot. Who is going to believe what he says about whether a given product is defective, when he lied about what degrees he earned or what course work he took? If there is anything that raises any red flags on his CV, ask him about it. And ask him the ultimate question, “Are there any issues on your CV I should be concerned about?”

**“My professional license was suspended.”** “So Mr. X, has your license ever been suspended, revoked, curtailed or been the subject of an investigation?” Just ask. Also, he may belong to

a board, organization or association that keeps track of such suspensions and makes them available to the public. Take the time to look and confront the expert with what you find.

**“I collapse like a deck of cards at trial.”** There are experts, and then there are experts. There are those experts who look great on paper, but when they take the stand they wilt like a dandelion. You need to ask them how often they have testified at trial and the verdicts in those cases. Then ask for the attorneys who retained them in those cases and ask them how the expert performed on the stand.

**“I have a bit of a temper.”** Some experts are prima donnas. Some have short fuses. Some are temperamental. Some are impossible to get a hold of. You need to spend some time with your expert and gauge his personality. Is he going to be easy to work with or does he have an ego, personality or character flaw with which you will have to contend. Ask for references of other lawyers who have retained him and ask them how easy (or difficult) this expert was to work with.

**“My opinions have changed.”** Your expert may have already addressed the very issue central to your case in a prior case. In fact, he may have once held an opinion that is just the opposite of his opinion in your case. You need to ask him whether his opinions have changed or evolved and ask for the names of the cases where he tackled the same issue and get his report or deposition from that matter. Odds are opposing counsel is going to get his hands on that report or deposition.

**“My opinions have been disqualified.”** Find out if he has ever been the subject of a *Daubert* challenge, and if so, whether the challenge proved successful. Has a court ever limited or struck his opinions? Has a court ever stated he was unqualified? Has his opinions ever been the subject of a written opinion? Make sure to do a Westlaw search to see if any appellate decisions have criticized the expert.

**“I don’t think you’re going to like that article I wrote.”** You hire experts because they are leaders in their fields. As experts, they often have been published and have taken positions in the articles they have written. You need to ensure those positions are not contrary to yours. Ask him what articles he has written on your topic, review them and make sure they support, not undermine, your case.

**“I cost a fortune.”** On the front end, find out what the expert is going to cost. In fact, ask what he generally charges for cases such as yours. Be up front regarding what records you want him



to review, what testing you want him to perform, whether you need a report and when you need it. After you're honest with him about what you want, press him to be honest with you about what his final bill will be. Clients hate big expert bills, and juries are suspicious of them.

This is not an exhaustive list of tough topics. Some other tough questions to ask include:

1. Have you filed for foreclosure?
2. Have you filed for bankruptcy?
3. Have you ever been sued by a client?
4. Have you ever sued a client?
5. Have you ever been accused of sexual harassment? Discrimination?
6. Have you ever been fired?

Your expert is there to help your case, not undermine it, and nothing undermines your case more than an expert with a secret that affects his credentials or credibility. Take the time to ask the hard questions. You will be surprised how often you will come across an expert who is not what he seems to be and who can hurt your case with who he really is. A little legwork can help you avoid retaining such an expert and retain the right one for you, your client and your case.

After you speak with the expert and are prepared to take the next step, ask for two to four references, other attorneys (both plaintiff and defense) who have retained his services. Call them, and ask them:

1. Is he easy to work with?
2. Is he arrogant?
3. Does he have any pet peeves?
4. How responsive is he? How responsive is his office?
5. How good of a witness is he at deposition? At trial?
6. How much was his total charge to you in your case?
7. Does he have any skeletons in his closet?
8. Where is he subject to impeachment?
9. Any issues with any of his licenses or certifications?
10. What did you like about him? What didn't you like about him?
11. Would you use him again?
12. Anything else you remember about him?

Track down prior depositions the expert has given, as well as prior trial testimony, and review it. How does he come across? What skeletons came out? What flaws were exposed? How did his opinions hold up under cross-examination? If your expert is hesitant to direct you to prior testimony, that may be a red flag.

If you are satisfied with your due diligence, your next step is to retain the expert. More and more, experts have retainer agreements they expect you to sign, and more and more these agreements have their share of onerous clauses. Before signing a contract with an expert, read it carefully keeping an eye out for late fee provisions, extra charges, cancellation fees and hidden costs. Even though you will be working with an expert don't assume his form contract has your best interests at heart. If you come across provisions you can't live with, ask them to be revised or removed. If the expert is not willing to negotiate, take that as a sign that you should move onto the next expert on your list.

Once you begin your relationship with a new expert, assume everything you write or e-mail an expert will be discoverable. Even if you can somehow keep it from being discovered, you will probably spend your time and the client's money to keep it confidential. With that in mind, before you send anything to an expert ask yourself whether you would have a problem with the other side seeing it. If so, think long and hard before sending it. Also, folks have become too casual in what they include in e-mails, and I've found this true with experts, particularly their staff. So try to avoid e-mailing experts and their offices whenever possible, sticking to phone calls and faxes when possible. And ask them not to e-mail you. Yes, it is less convenient, but it will help ensure that the experts don't make errant comments that become part of their permanent file (which at some point will likely have to be produced to the other side).

Remember, you now have a powerful ally. Once you have retained an expert, start relying upon him to help you develop your case. Your expert is instrumental in helping you develop your case themes. Share with your expert your trial themes and encourage him to share his thoughts on trial themes. Consider having a brainstorm session with him about potential themes and what may be done to attack the other side's prospective themes.

Also, use the expert to help you prepare for the depositions of the opposing party and opposing expert. He can assist you with which lines of questioning to pursue and how to pursue them. It's difficult to go toe to toe with an expert when you don't share even

a fraction of his expertise. Your expert will help you ask the other expert the tough questions and how to follow up when he tries to use his expertise to confuse, mislead or hide the weaknesses of his opinions.

By conducting your due diligence, you can find the right expert for your case. Once you do, use him to win your case.

## Taking Depositions to Prepare for Trial

The purpose of depositions is to advance your themes, support your case and win at trial. But before you prepare to accomplish these goals you must first choose whom to depose. Evaluate how a witness fits into your overall case strategy and how he helps advance your case or possibly undermines it. Before scheduling your first deposition, ask yourself:

1. What relevant information may this witness have?
2. Is he a hostile witness?
3. How cooperative will he be?
4. Is he represented by counsel?
5. May I take his declaration or sworn statement?
6. What admissions can I secure from him?
7. How can I use this witness to bolster my case themes?
8. How can I use this witness to undermine my opponent's case themes?
9. Will this witness be available at trial?
10. Will I be preserving bad testimony?
11. Can I use this witness to show the other side how weak his case is and possibly force an early settlement on my terms?
12. Can this witness provide evidence to support a motion for summary judgment?
13. Does this witness help me win?
14. Even if he hurts my case, do I need to limit the damage he may cause?
15. Can I undermine his unfavorable testimony?

If it is ethical and permissible, interview witnesses before deposing them. Often, you will discover information that will greatly impact how to depose them (and at times, whether to depose them at all). You can avoid surprises at deposition by knowing beforehand what the deponent plans on saying.

And remember, to avoid surprises at trial you will be asking him all the questions you would ask him at trial. You want your trial cross-examination completed at deposition so as to lock in the witness. Knowing that you're going to treat the deposition as if it were a trial examination may affect when you depose a witness and whether you depose him at all. You may not want to preserve a given witness's deposition or you may not want to show your hand when it comes to your themes in earlier depositions.

Answering these questions will help you decide whom to depose. But before you schedule your first deposition in a case, plan out which witnesses (or categories of witnesses) you wish to depose and determine in what order you will be deposing them. This will ensure that early on you secure the testimony you need that may prove useful in later depositions (perhaps to box in later witnesses or favorably affect their testimony). As defense counsel in a product liability matter, for example, I generally depose witnesses in the following order: (1) plaintiff; (2) liability witnesses; (3) damages witnesses (including treating physicians); and (4) experts. Once I have decided upon the order of the categories of witnesses, I then decide the order of witnesses in each category. For example, if there are five relevant treating physicians I want to depose, and one physician's testimony may favorably affect how the other physicians perceive the issue of causation, I'll depose him first. Also, since pre-existing conditions are generally important issues, I may first depose a family care doctor who regularly saw the plaintiff years before the incident. The more complex the case, the greater the number of potential deponents and the greater the need to ensure you have a plan for a "deposition line up" where each witness builds on the testimony of the prior ones.

Also, keep in mind that limits will be placed on the number of depositions you take. These limits are either imposed by the civil procedure rules you're going under, by a case management order, by local practice or by your client. Don't assume you can take an endless number of depositions. Sometimes less is more. These external limitations will affect whom you choose to depose.

Once you decide whom you are going to depose, conduct your due diligence on those witnesses. Ask yourself the following questions:

1. Was he previously deposed? If so, secure deposition.
2. Did he give a sworn statement? Sign a declaration or affidavit? Secure them.
3. Prior lawsuits? Secure docket sheet.

4. Prior personal bankruptcy? Corporate bankruptcy? Divorce? Foreclosure? Secure docket sheets.
5. Social media presence? Print whatever is public, whether from Facebook, LinkedIn, or other.
6. Does he have a Google footprint? Search Google, Google Scholar, Google blogs, Google +, and Google images.
7. Criminal record?
8. Corporate records?
9. Public filings?
10. Does he have a CV?
11. Does he have any online profiles?
12. Does he have a website? Does his company? Does he have a blog?

Often, a deponent's website (or his company's website) has a treasure trove of admissions you can use to advance your case. His company's website or personal blog may state his opinion about the standard of care, may discuss what's appropriate behavior (and what is not) and may address issues relevant to your case. For example, you are deposing an expert in a product liability case whose company's website discusses (1) the appropriate protocol in evaluating a product; and (2) what is considered to be a product defect and what is not. Those representations may serve your interests in your case. And of course, websites often contain a witness's articles, which may contain additional helpful admissions. In a mold case, for example, an expert's website may discuss appropriate standards for evaluating mold and the proper mechanisms to eradicate it. It may turn out his opinions don't fit with his own company's recommendations (the very same recommendations that may help your case). So before your next deposition, study your deponent's website for everything from mission statements (what values does the deponent consider important), to protocols (standard of care) to opinions about how things should be done and how they shouldn't (which you can compare to the expert's opinions in your case). And if the website serves your interests at deposition, use it again at mediation and at trial.

Go beyond websites and secure whatever publicly available information there is about the witness. When it comes to experts, conduct the same due diligence I recommended you conduct on your own expert witnesses. You want to find anything and everything there is about the witnesses you plan on deposing,

especially prior testimony. Prior sworn testimony has locked the witness into certain positions and perspectives, certain facts and admissions. You can use this testimony to impeach the witness at deposition (much as you would use a deposition to impeach a witness at trial).

Especially with experts, a good place to start is his prior deposition transcripts. You can secure them from online services that warehouse and catalog them and sell them for a fee. Perhaps a voluntary bar association you belong to has an expert deposition bank, most likely online, where you can download PDFs of transcripts. DRI has a great expert database. Every now and again, you may come across a deposition online. And even Westlaw has gotten into the act and will provide them—for a fee. In addition to these resources, I would strongly recommend starting and maintaining an expert deposition bank of your own (your firm may already have one). And after doing so, coordinate with other law firms throughout your state, and provide one another a list of expert depositions each of you have and update it periodically. This way, you can call upon one another to secure copies of much-needed transcripts.<sup>30</sup>

Once you have an expert's prior deposition or trial testimony, these are some of the things you want to look for:

1. Any discrepancies between the credentials he offered in testimony and those in his CV.
2. Has he offered opinions that contradict those in your case?
3. Has he taken any position favorable to your case?
4. How pliable a witness is he? Does he answer “yes” and “no” to questions, or does he turn everything into a three-page answer that will prove useless for cross-examination at trial?
5. Does he reference your expert in the current case, and if so, in what context?

<sup>30</sup> When it comes to lay witnesses, tracking down prior deposition testimony will prove more difficult. However, a little legwork may do the trick. If the witness is a corporate representative, start with a litigation search of any lawsuits involving his company. Pull the docket sheets and see if a Notice of Deposition for the witness was ever filed. If so, his deposition may have been filed in support of or in opposition to a dispositive or evidentiary motion. Short of a deposition, his declaration or affidavit may have been filed. These depositions, affidavits and declarations may be available online through Pacer, Westlaw or the local clerk's office. Alternatively, you could hire a copying service to secure them for you.

6. What basic principles or axioms does he agree with that you can build upon in your deposition?
7. What skeletons were unearthed in his prior testimony?

Prior depositions often prove to be the most important tool when preparing for an expert deposit on. Take the time to track them down and read them.

And yes, most of what you find will likely not be relevant to your case. But it will paint a picture of the witness. It will offer you clues as to the type of witness he is—how he will testify, how cooperative he will be, how obstinate he will be, how agreeable he will be. You are going to treat a malleable witness differently from a stubborn witness. If you know going into the deposition which type of witness you can expect, you can gear your outline toward the right type of witness.

One last word about due diligence. We've discussed how we all leave in our wake our digital footprint. But we also leave behind our deposition footprint. Our personal information, our statements, our opinions scattered online and elsewhere forms a footprint of the type of witness we will make at deposition. The more of the deposition footprint you capture, the greater in focus will be your image of the type of deponent your witness will make. It'll be more than a blob of information. It'll have contours. It'll take shape. And you'll know what you're up against.

Once you conduct your due diligence, it's time to start thinking about the questions you're going to ask the witness. To create an effective outline, you need to understand what you hope to accomplish through your deposition. Yes, depositions serve as a means to gather facts. But that's only the first level of depositions. You're going to try to make the deponent a conduit for your testimony, not his own. The ideal result is where you are the ventriloquist and the deponent is the "dummy," and you are speaking but he is saying the words. Putting your words in the deponent's mouth is the ideal result, because that guarantees that he talks in terms of your themes, makes admissions and says things to help you win. We'll discuss this a bit later, but it's important to note that you are directing both the questions and the answers, you're not simply asking questions and hoping the answers are the ones you want.

And remember, you are taking a deposition to advance your case themes. To accomplish that goal, I would suggest you take a few minutes and devise a list of themes you want to emphasize

during the deposition. What are the reasons you are deposing this person? What do you hope he will say? What admissions do you seek to procure? What facts do you intend to ferret out? Think about what you want to accomplish with this witness and how he helps your case and how he hurts it. After thinking about the role of this witness and the purpose of this deposition, sit down and write down several themes for this witness. Big picture ideas that this witness will help you convey. And then build your deposition outline around these themes.

And make sure you take your list of themes along with your outline to the deposition. As the deponent answers the questions, glance back at the list and think about what other questions you can ask that support and play up your themes. This cheat sheet will help you stay focused.<sup>31</sup>

In addition to your case themes, reflect on the prima facie case that forms the foundation of your case. When taking a deposition, ask yourself how the deponent plays into the prima facie case of the cause of action(s) which form the complaint. Let's take, for example, a tort case. Whether it's premises, auto, negligent security, toxic tort or another negligence case, the case boils down to duty, breach, causation and damages. Plaintiff needs all four elements to win, defendant needs to topple just one to win. So, how does a given deponent address these elements of negligence? Does his testimony show who had a duty? What that duty was? What the standard of care may be? Whether there was a breach of that standard of care? If you're the plaintiff, you want to see how the deponent may help establish each element of negligence. If you're the defendant, you want to see how the deponent may undermine each element (Perhaps he can show your client didn't owe the plaintiff a duty, or can point a finger at a co-defendant as the one owing plaintiff a duty). Always write out the elements on your deposition outline and refer to them throughout the deposition to ensure that you develop the evidence you need to convince the jury, who will be read those very same elements by the judge.

In addition to relying on your themes and your prima facie case when preparing your deposition outline, remember that the focus

<sup>31</sup> When it comes to your witnesses, they should have a similar cheat sheet they study before their deposition which contains a list of your trial themes. They should memorize the list and fall back on it when stuck on a question.



of your deposition should be on trial. There is an old adage that you never ask a witness at trial a question you don't already know the answer to. One of the reasons you take a deposition is to find out the answers to all the questions you intend to ask in trial. Not only should you know how a witness will answer your questions, you should know how he will answer your specific questions and answer your specific lines of questioning. Prepare for your depositions as if you are preparing your examination for trial. Ask the same questions (and then some). Go through different lines of questioning. See what works and what doesn't. See what questions result in favorable responses and which ones don't. Everything you ask a witness at trial should already be contained in the deposition transcript. In fact the transcript will serve as a trial testimony transcript. All you will have to do is cut and paste the questions you asked in deposition that resulted in favorable testimony. With the deposition in hand, you can represent to the jury in opening what a witness will say and use it to impeach the witness if he tries to change his answers (and tries to contradict your representations to the jury).

When deposing the opposing party, keep in mind that he has been trained by his attorney not to make admissions. His attorney has drilled into his head the importance of not making admissions that hurt his case and that help you. Your job is to secure admissions. You want him to agree with you. Of course, he doesn't want to agree with you. So there is this inherent tension between what you want and what the deponent plans on doing. When drafting your deposition outline and deposition questions, appreciate this tension and be prepared for it. Put yourself in the deponent's shoes and see how you try to wiggle out of answering your tough questions and make the necessary adjustments to the questions you plan on asking and the order you plan on asking them.

In addition to the rules we discussed, there are additional thoughts to keep in mind when it comes to preparing a deposition outline for experts. When cross-examining an expert in deposition, get him to agree with basic assumptions, principles and facts that are generally accepted by others in that expert's field. Search out federal regulations, national and industry standards, generally recognized studies and reports, peer-reviewed articles and related publications and pull from them statements with which any reasonable expert should agree. Confront the expert with the statement and ask him if he agrees. If he agrees, then you have secured an admission that may serve you well later in deposition

and at trial. If the expert does not agree, he will show himself to be unreasonable. The more he disagrees with generally accepted statements, the more credibility he loses.

An important part of any expert deposition is to confront the expert with questions where if he agrees with you, you win, and if disagrees with you, you win. Find sources that provide you ready-made questions that will pin down an expert and pin down his opinions. Once you've secured the admissions you're looking for, you can use them later in the deposition to limit or undermine his opinions.

Once you've thought through everything you plan on asking and how to ask it, take the time to prepare a detailed outline to use at the deposition. Divide the outline into sections, with each section being a similar section you intend to use at trial. In fact, when preparing a deposition outline, pretend that it isn't a deposition at all that you are preparing for. Instead, you are preparing for the trial examination of the witness. When you examine a witness at trial, you keep it short and sweet. And when you cross-examine a witness, you ask short, direct questions that only allow a yes or no answer. You keep the witness on a tight leash and you keep it interesting for the jury. Do the same at deposition. Besides, you never know when that deposition you took thinking it was merely a discovery deposition will be read to the jury at trial.

When preparing your outline, keep in mind there is a difference between deposing a favorable witness who will provide favorable testimony, and a hostile witness, such as the opposing party and opposing expert. With hostile witnesses, you can lead their testimony. It's a different approach you take, and your outline should reflect that. When cross-examining a hostile witness, here are some pointers:

1. Keep your questions short.
2. One fact per question.
3. Ask questions whose answer is "yes."
4. Ask common sense questions that require a "yes" response. If she answers "no," she'll look foolish.
5. The next best thing to "yes" questions are "no" questions.
6. Start your examination with your second strongest point.
7. Consider always starting with bias.
8. End with your strongest point.
9. End with questions with which the witness must agree.

10. Don't ask open ended questions.
11. Don't ask questions you cannot control the answers to.

And remember, the jury is expecting to see what they see in the movies. For example, think of the Lincoln Lawyer. In the Lincoln Lawyer, Mickey Haller (Matthew McConaughey) cross-examines a prostitute who accuses his client of violently beating her. Haller performs a blistering cross-examination to discredit her. He does four things you should keep in mind when cross-examining a witness at deposition or trial.

1. **Undermine the witness's credibility.** Haller repeatedly reminds the jury that the witness is a prostitute, as if to say prostitutes cannot be believed and thus this witness should not be believed. Question the witness about something he has said or done that goes to the heart of his credibility. Generally, fleshing out a witness's bias is a good way of doing just that.
2. **Give the witness a motive.** Haller provides a motive why the prostitute may be lying—she wants to make money to get out of that lifestyle. When questioning a witness, appreciate a jury will want to know why he behaved a certain way. If you want to show he did or said a certain thing, you have to explain, through his testimony, why he would have said or done what you are alleging he said or did.
3. **Testify for the witness.** Haller doesn't let the witness speak. He does the talking for her. When cross-examining a witness, you are telling the witness what to say and he is simply agreeing with you. You are speaking to the jury, and the witness is either a willing or unwilling accomplice, but let there be no doubt about it—you are the one who is testifying.
4. **Don't be a jerk.** Haller, despite reminding the jury that the witness is a prostitute, and despite accusing her of lying, manages not to come across as a jerk (well, not a complete jerk). He manages to do this by empathizing with the witness, and in so doing humanizes himself to the jury while simultaneously tearing the witness down. He “understands” why she would lie, why she would “wrongfully” accuse his client. In the process, he does not alienate himself from the jurors.

As a final word on deposition outlines, no two depositions are the same, so it is difficult to provide you guidance on what specific questions to ask. I've provided you some overarching concepts

to apply when drafting your outline. However, there are some questions to keep in mind for any deponent. They include:

1. Have you ever been arrested?
2. Convicted?
3. Have you ever testified in court?
4. Have you ever given a deposition?
5. Sworn statement?
6. What documents did you review to prepare for this deposition?
7. Other than your attorney, did you discuss with anyone that you were giving a deposition?
8. Was anyone else present when you met with your lawyer?
9. What else did you do to prepare for this deposition?
10. Have you signed any written statements or given any recorded statements about this case?
11. Who has any knowledge or information about this case?
12. Have you ever been a party to a lawsuit?
13. Have you ever made an insurance claim?
14. Did any of the parties make any statements?
15. Have you ever filed for bankruptcy?
16. What social networking sites do you belong to?
17. What type of information do you post/share on these sites?
18. What do you know about this case?
19. What have you been told about this case?
20. Do you know any of the parties? What do you know about them?
21. Have you spoken to any of the parties about this case?
22. Do you have any documents related to this case?
23. (If witness is having difficult time recalling facts) What would help refresh your recollection?
24. What have we not covered in this deposition?

These questions are directed to learn more about the witness and his involvement in the case. Remember, when preparing your deposition outline, think about theme, prima facie case and cross-exam techniques. These broad concepts will help you frame your outline. As to the specific questions, review deposition outlines prepared by others at your firm in similar cases. That will provide you with insight as to the types of questions being asked and in the order they're being asked.

## Preparing for the Trial Before the Trial: Mediation

With 98 percent of cases settling, mediation has become the de facto trial. Treat it as such. Prepare for mediation much as you would prepare for trial and approach it much as you would approach trial. Define a win, have a theme, prepare exhibits, craft an opening and present your case to the opposing side as you would to a jury. You're sending the message that if you don't settle, you're prepared to try the case. You can transform your next mediation into a trial by doing the following:

**Prepare a trial notebook.** When you go to trial, you have a notebook with your opening, directs, crosses, closing, exhibits, and so forth. Prepare a mediation notebook with (1) your opening statement annotated with all the relevant exhibits; (2) a summary of your directs; and (3) deposition excerpts that will serve the basis of your cross-examinations at trial. A trial notebook shows the other side you're ready to try the case.

**Share the story you're going to tell the jury.** When you present your case to a jury, you present it on their terms, communicating in stories and imagery jurors can relate to. When you present your case at mediation, convey to opposing counsel the story you plan on telling the jury and convey it in the terms you plan on using. You will show the other side that you know your audience, and if mediation proves unsuccessful, you are prepared to deliver your client's story in a convincing and compelling way.

**Rely on the jury, the imaginary fact finder.** When presenting your case to the opposing party at mediation, couch it in terms of what a jury will do. You have been preparing your case as if you were going to trial, so you've been thinking about what a jury will do with your facts and how it will apply the jury instructions to those facts. Consider sharing your thought process with the other side, and inform them how you expect a jury to buy into your trial themes and why.

**Focus on your themes.** What themes have you been developing since the inception of the case? Which ones have you crafted in your written discovery and depositions? Focus on those themes, discuss how the discovery bolsters them, and use them to explain why you win at trial and by extension why you should receive a favorable result at mediation. Themes hold your case together. They put your best foot forward. And when you have

themes, and those themes resonate, they send a message to the other side just how strong your case is.

**Use exhibits.** Encapsulate your case in a few documents or images and rely on those exhibits at mediation. Exhibits should capture the essence of your case, or in other words, should be the embodiment of your case themes. Emphasize how these exhibits will impact the jury. Paint a picture of how the jury will take these exhibits back into the jury room and will have them right in front of them as they deliberate.

**Use a timeline.** An effective demonstrative aid is a timeline. Every case lends itself to having one. It allows you to reduce a set of complex facts into a simple-to-understand summary of important events. It shows the jury the “when,” as well as the “who” and the “what.”

**This is the trial your client has been paying for.** From the inception of the case you have been telling your client how you’re preparing his case for trial. Yes, most cases settle, but you told him that you secure an advantage by preparing as if you’re going to trial. It is at mediation when you can seize that advantage by showing how much better prepared you are than the other side to try the case, and by doing so, secure concessions during settlement negotiations.

Now preparing for mediation as if it were trial has its advantages, but there are ways that mediation is not like trial, and in those respects, it is best not to treat it like trial.

**Avoid surprises. Avoid “gotcha” moments.** At trial, you may try to surprise your opponent with a certain line of cross-examination or use of a certain demonstrative aid. However, surprises rarely work at mediation. Each side spends considerable time weighing what their bottom lines are and they aren’t prepared to make a seismic shift in their evaluation of the case based on new information sprung on them during mediation. If there is new evidence or a secret witness or a smoking gun exhibit, it’s best to share those before mediation to allow the other side to digest it and reevaluate their valuation.

**Less visceral, more contemplative.** Even though at mediation you will often couch much of what you say in terms of what a jury will or won’t do, the fact remains that you’re not trying to convince a jury, you’re trying to convince the other side, who is less visceral and more contemplative than your average jury. They’ll appreciate the stories and themes you plan on sharing

with the jury, but will also rely on their own instincts and reasoning when deciding what to settle for.

**You decide the bottom line, not the jury.** One of the first things out of a mediator's mouth during his opening presentation is to tell the parties that they decide what to settle for, not a jury they've never seen. You and your opponent control the outcome of mediation, not a jury. Even if you play up what a jury will do, always keep in mind what your opponent is likely to do.

**Redefine a win.** You can't get it all. This isn't a zero sum game played before a jury. The other side has a voice. You have a voice. The mediator will encourage each of you to see the other's side of things. Your focus isn't on what the best possible outcome could be at trial but rather what is the best possible outcome at mediation.

Once you have the proper perspective on mediation, you need to prepare for it. It starts with communicating with the other side. Sometimes mediations stall before they start. Misunderstandings, miscommunications and time spent trying to resolve seemingly minor issues can derail a mediation. One party does not like another. One attorney has issues with another. Multiple defendants cannot agree who is responsible for what. The bigger the case and the more the parties, the greater the likelihood that the first few hours of mediation may become a morass.

To make mediation more fruitful, consider having "a mediation" before the mediation. For example, in a case involving multiple defendants, a week before mediation the defendants could meet to discuss what each thinks their role at mediation should be and who should bear the bigger (or lesser) burden at mediation. In a case involving complex issues, there is value to ensure everyone has exchanged the necessary information before hand for their respective clients to make reasoned and rational decisions. Some attorneys think it's a good idea to surprise other parties at mediation. I've never found that fruitful, especially when my client is on the receiving end of the surprise. Use the weeks and days leading up to mediation as an opportunity to discuss with counsel each party's expectations, share information and resolve any minor conflicts that may turn into major stumbling blocks at mediation.

As you work to resolve these issues, do your part to prepare for mediation. This includes:

**Don't rush into mediation.** For a mediation to be fruitful, the parties must have thoroughly investigated their case and have

conducted sufficient discovery. If they have not, they may go into mediation with unreasonable expectations. It is ill-advised to proceed with mediation until the parties have done their due diligence.

**Explain the mediation process to your client.** Explain to your client how mediation works, what to expect at mediation and what you need to do to properly prepare the case for mediation.

**Choose the right mediator.** Choose a mediator that both parties respect and trust. Seek input from your client when choosing a mediator. Also, select a mediator who has handled cases similar to yours.

**Have a game plan.** Develop a game plan for mediation. What do you hope to achieve at mediation? What would be a good result for your client? Decide what arguments you will make at mediation and gather the relevant information or conduct the necessary discovery that will support those arguments.

**Inform your client of the pros and cons of his case.** Before going to mediation, explain to your client the strengths and weaknesses of his case. Mediations are successful when each side has realistic expectations of what the potential outcome at trial could be. You are not doing your client any favors by giving him an inflated view of what his case is worth. Also, let him know what the legal costs will be through trial and the potential result at trial if the case does not settle at mediation.

**Do your homework.** Learn everything you can about your case and everything about the other side's case. Try your best not to be surprised by your opponent at mediation.

**Prepare a closing argument.** Generally, at mediation, each side makes an opening statement before the parties break to caucus. Instead of making a generic opening statement, I recommend making the closing argument you intend to present at trial, including using any exhibits you intend to use at trial. This way, the other side sees you are prepared to try the case if need be.

**Gather all the necessary documents that support your case.** Before you go to mediation, make sure you have gathered all the necessary documents that support your case. For example, if you are a plaintiff in a personal injury case, make sure you have all the relevant medical records and medical bills.



**Think multimedia.** Consider preparing a multimedia presentation at the mediation. To some, this may mean playing a surveillance video or portions of video depositions. To others, it may mean preparing a power point presentation. This shows that you are ready to put on a show for the jury if need be.

**Prepare a mediation report for the mediator.** Before mediation, consider providing the mediator a mediation statement providing her your client's perspective. Before doing so, check with the mediator whether she accepts such statements, and if so, if she keeps them confidential. If so, provide a summary of the facts of the case, attach relevant documents, photos and deposition excerpts, and explain the strength of your case. By providing such a statement, you educate the mediator about the case, you ensure the mediation will go more smoothly, and you set the tone. Also, preparing a statement forces you to think through the facts, both good and bad, and think through your arguments, which empowers you to make a more convincing and persuasive opening statement at mediation. Also, you set the agenda by deciding which documents are important and what facts deserve emphasizing. But remember, don't overburden the mediator. Keep the statement and the attachments short and to the point. By the time the mediator finishes reading it, she should understand the case and understand why you think your client wins at trial.

**Prepare a mediation binder.** Prepare a binder with a table of contents, that includes all the relevant documents in your case that you intend to address at mediation. Include in the binder excerpts from deposition transcripts, photos, relevant trial orders, etc. you will use this binder as a reference tool during the mediation.

**Know your bottom line.** Before the mediation, know what your bottom line is and be prepared to walk away if the other side doesn't want to meet it.

**Be professional.** Don't let the mediation deteriorate into a slugfest. Always keep your cool and act professionally.

**Bring a draft release to the mediation.** Bring a draft release to the mediation, so if the parties settle, the terms of the release can be resolved right there and then.

To make your next mediation a fruitful one, take the time to prepare. Often preparation makes the difference between hitting an impasse and brokering a settlement.

Also, take the time to avoid surprises. Find out what extra charges, if any, the mediator may have. Does he charge for travel? For reading the mediation statements? For researching legal issues? For pre-mediation conference calls? You don't want to be surprised by the mediator's bill at the end of the mediation. Also, review the logistics. Do any of the parties need a translator? Is anyone appearing by phone? If so, does the mediation site have a suitable speakerphone? Is the mediation going to take all day? If so, will the parties agree to order in? Did the mediator receive your mediation statement? Does he need any additional documentation before mediation? If insurance is involved, have all the relevant insurers been placed on noticed? Are their representatives attending? Was enough time reserved with the mediator? Does everyone know how long the mediation is scheduled for? Do the corporate representatives have authority to negotiate in good faith? Do the clients have what they need going into mediation? To make mediation fruitful, you need to anticipate any logistical issues and address them beforehand so they don't become a stumbling block at mediation.

Opening statement at mediation is the only opportunity you have to speak directly to the opposing party and tell him why you win and he loses. Your opening statement is not so much for the mediator's benefit, nor, in many respects, for opposing counsel. It is meant for the opposing party. It is your chance, in the presence of the mediator and opposing counsel, to sit across the opposing party, look him in the eye, and tell him why he should settle with you on your terms. Why what he thinks are the strengths in his case really aren't that compelling, and how facts and issues he may have dismissed or perhaps not even thought of are ones that will bring the walls down around him.

This is your chance to make him understand that what he thought was a great case, wasn't and what he thought was a reasonable settlement is either too high or too low (depending on whether he's the plaintiff or defendant). View your opening statement as if it were your closing at trial. You lay out your case, in a persuasive manner, but instead of convincing a jury, you're convincing the opposing party and his attorney. Perhaps you use blow ups, perhaps a power point, maybe a diagram or a three-dimensional model or animation recreation. Some take the approach that you don't want to show your hand during mediation. That's a decision you will have to make. However, if settlement is within reach, you may want to consider showing all your cards to convince the other side to settle for your number instead of theirs.

After the mediator and the parties make their statements, the parties break into their respective groups and negotiations begin in earnest. Each side is trying to guess the other's bottom line and trying to secure the best deal for their clients. When making offers during mediation, keep in mind that the other side is trying to figure out what authority you have and what you will settle for and what you won't. Therefore, every bit of information you convey to the other side is sending a message, whether you mean to send a message or not, about what your bottom line is. Understand that what you say may be creating certain expectations in the other side, and so you have to choose your words carefully with the mediator and make sure he chooses his words carefully with opposing counsel.

All the mediators I have worked with have been great at keeping information confidential, however I often wonder whether their body language in a given case may give something away. In fact, some mediators have told me they don't want to know what my bottom line is for fear they may give something away with a facial expression in response to a direct question from opposing counsel. Remember that every bit of information you disclose, and every move you make is being seen through a microscope for clues as to where your final move is. Keep that in mind when conveying demands or offers and when sharing information with the other side during the course of a mediation.

As the offers go back and forth, and the numbers on each side come closer together, remember to negotiate any special terms, whether it be confidentiality, payment terms, or resolution of third party liens, so as to ensure you receive what you had bargained for.

Once the case settles, take the time to draft a settlement agreement that spells out the key terms of the agreement right there and then. Choosing to wait can lead to an irreconcilable difference in the terms of the agreement, a difference that could have been hammered out at mediation with the assistance of a mediator.

Mediation has supplanted trial in most cases. Most folks don't prepare for trial anymore, they prepare for mediation. A better approach is to prepare for mediation as if it were trial. Treat every case as if it were going to trial and you'll find you'll settle more of them at mediation.

## Exhibits

A picture is worth a thousand words. That's what an exhibit is worth, if not more. It tells a story using images. It captures the imagination, and burns visuals into the jurors' collective memories, visuals that are inextricably tied into your themes, and when those images are remembered in the jury room, your themes are remembered along with them.

We've discussed showing, not telling. Painting pictures, not spouting words. Nothing does that better than exhibits. A photograph. A blow up of an e-mail, a letter or a contract. A demonstrative aid. Exhibits are the epitome of showing. A picture, an image, a visual. Something you see, not hear. Something that gets your attention and keeps it. Something that tells a story. We've been trained to tell stories through words. It's time to learn to become legal graphic designers and tell stories through images.

But where do these images come from? What is their inspiration? What gives them birth? Look around. They are everywhere. Just as you searched for themes in movie posters and in magazines, on television shows and commercials, you can search for images there as well. Images that sell sodas and cereals, that promote comedies and romances, those same images can encapsulate and convey your themes. They can go beyond their intended use and be used by you in your case. Just as you should have a filing system for your themes, create one for your images. Print them off, file them away by topic and have them available as needed.

It's difficult to imagine our cases in terms of images. We're accustomed to oral and written advocacy. Image-based advocacy is foreign to us. We don't include images in our motions or rarely bring exhibits to our hearings. Yet images serve as a shorthand version of advocacy. We often view themes in terms of catch phrases—our cases reduced to a few words. Exhibits can help us reduce our cases to a few images. As you search for your themes in the media around you, search out the images that convey those themes.

You're looking for images that tell a story. Images that transcend what they say on the surface and have resonance. It could be a photo from the accident scene. An image of a vehicle with little or no damage undermines Plaintiff's claims of serious injuries. Conversely, images of a wreck, bent and torn metal and broken glass, can show the accident was indeed serious. Instead of a photo, it could be an image you find online. Once you have a topic

or an image in mind, do a Google image search to locate relevant images and print off those that fit what you are looking for.

Develop a photographer's eye to the world around you. Develop a graphic designer's perspective to creating images. It requires a shift in paradigm from verbal to visual, from oral advocacy to image-based advocacy. Ask yourself, if you had to reduce your case to images, a picture book of your case let's say, what images would you include? What documents would make the cut? How would you tell your story if the volume was muted? What images would you want to go back to the jury room? What images encapsulate your themes? Answering these questions will help you find the images that best represent your case.

In addition to keeping these questions in mind, when preparing exhibits, keep certain ground rules in mind:

**Start preparing them early.** Once you start your case investigation, start thinking about your exhibits. Don't wait until thirty days out from when your exhibit list is due. Just as you'll start developing your trial themes early, do the same about developing and choosing the documents and images that will represent your case.

**Always be on the lookout for them.** The images that represent your themes are all around you. Every time you watch a commercial, flip through a magazine, read the paper, surf the internet, or catch a movie, you are bombarded by images. View these images through the prism of your cases. How does this commercial relate to my case? How does this trailer tie into my themes?

**Search out images.** Go on Google images. Go online. Read magazines with an eye toward finding images for your case. Search out connections between images and your case.

**Study other's exhibits.** Search through your prior exhibits and exhibits of colleagues. Also, go online and type in trial exhibits and the type of case you're handling and see what you find. You will see proposed exhibits and articles suggesting which documents to enlarge and which demonstrative aids to rely upon. For example, type "trial exhibits in product liability cases" and you'll find a number of articles suggesting the various exhibits to rely upon. Also, you can find articles about what exhibits other lawyers used in cases similar to yours.

**Keep your exhibits simple.** Don't overload them with information. Just like your themes are simple and to the point, so should be



your exhibits. Don't burden them with too much detail, causing the jurors to strain to absorb it all.

**Use blow ups.** Sometimes the best exhibits are simply blow ups of key documents. A clause from a contract. A snide remark in an e-mail. A photo from the accident scene. Find the key documents, decide whether they bolster your theme, and if so, simply enlarge them for the jury.

**Use timelines.** Every case, no matter how simple or how complex, benefits from a timeline. Create a demonstrative aid showing the key events. This will encapsulate and arrange in an orderly fashion the facts of the case for the jury.

**Use exhibits you can use with multiple witnesses.** Find exhibits that you can show multiple witnesses. The repetition will etch the image in the jurors' minds.

**Use your exhibits to convey your themes.** Your exhibits should reflect the essence of your case. Write down your case themes and think through what images best portray those themes.

**Create lasting images.** When creating images that capture your case themes, look for images that will stick, that will remain after the exhibit is taken down and the witness takes his seat.

**Consider designing your own demonstrative aids.** When preparing demonstrative aids, instead of turning creative over to a trial graphics company, consider sketching out what you want it to look like. You have an image in your head of what you want. Often, something is lost in translation when you verbally share your ideas for exhibits or demonstrative aids. Consider drawing it yourself and send your sketch to the graphic design company to turn your rough draft into a completed product. Before you go to the expense, though, try it out with others in your office and see how it comes across. Usually graphic companies will give you an example of the exhibit they're going to create before doing so. Share this image and see if it gets you the reaction you had hoped for.

**Test your exhibits on a focus group.** Show your exhibits to a focus group of family and friends and see how they respond to them. Do they respond positively? Do they understand the message you're trying to convey? Do they discuss your exhibits in terms of your case themes?

**Test your exhibits on the opposing experts.** If you have an effective exhibit, expect the opposing party's experts to attack

them. Instead of being surprised at their attacks at trial, cross-examine the experts about them at their depositions. Ask them about your exhibits, see what they have to say about them, what attacks they make, what supportive statements they make. If it turns out their attacks are ineffective, you'll be in a stronger position to use them at trial.

**Take the other side's themes into consideration.** Just as your themes should take into consideration the other side's themes, your exhibits should take them into consideration too. If your exhibits ignore the other side's themes, you may find that the other side develops counter exhibits that neutralize yours.

**Don't test them in the courtroom.** Test your exhibits before focus groups, your firm, the other side's experts, other witnesses, in deposition—anywhere and everywhere before trial. Trial is not the place to test them out.

**Make sure they are accurate.** If they are inaccurate, the other side will call you out on it and you will lose the opportunity to use it. Even if the exhibit survives, you'll lose credibility in the process. Check and double check the content of your exhibits.

**How will the judge perceive them?** Will you have any issues regarding admissibility? To avoid the surprise of having one or more exhibits being stricken, and to ensure certainty, moving in limine in advance to have the court rule on the admissibility of the exhibits.

**Have a backup plan.** The court may prohibit you from relying upon one or more of your exhibits. Make sure you have backup exhibits that can withstand any objections fired by the opposing party.

Exhibits should be more than an afterthought. Just as you revolve your case around your themes, your exhibits should reflect and embody those themes. If you can create lasting images, those will remain with the jury as they deliberate and hopefully find for your client.

## Checklist for Trial

We have discussed trying every case, and the wisdom of beginning trial preparations at the inception of a case. It is true that you should be developing your themes and your client's story from the very beginning. Having said that, earnest trial preparations generally don't begin until about three months shy of trial. The

following is a checklist of things you should be doing when there are 90, 60, 30, 15 and 7 days left before trial.

### **Ninety Days Before Trial**

Three months out, the shift should be away from discovery mode to trial mode. If you've been treating the case as if you were going to trial, you'll find that many of the things I recommend during this period are items you've already handled and problems you've already resolved. But make no mistake. The barbarians are nearing the gate. It is time to prepare for war.

**Pick your trial team.** Decide who's trying the case and who will be handling what. Who's in charge? Who answers to whom? Who's responsible for what?

**Check conflicts with other trials.** Check to see if anyone on the trial team, your experts, your client or your lay witnesses have any conflict with the trial period. If so, move to move the trial date.

**Draft a "to do" list.** Write a list of all the things that should be done to prepare the case for trial and then discuss the list with the trial team, who will have their own additions and changes. Address everything from what exhibits to use, to what motions in limine to file, to which witnesses to call to testify. (You can model your list after the suggestions in this chapter). This is an organic document, which will grow, and change and develop over the next three months.

**Review the pleadings.** Read the pleadings and see who has pled what and who has to prove what. You may find your opponent has made a glaring omission. Or you may find that you have.

**Review the written discovery.** Is follow up written discovery necessary? Have you followed up on the answers? Secured third party documents? Summarized the records? Do you have everything you need?

**Prepare the client.** Getting ready for trial is time consuming and expensive. Prepare the client for the demands on his time and on his pocketbook. There is a lot of activity during the three months leading up to trial. Discovery has to be completed, settlement discussed, case investigation wrapped up, and everything that goes into preparing the case for trial. It's worthwhile to prepare a budget for the client so he understands how much it will cost.

**Prepare your lay witnesses.** Confirm your witnesses are available for trial, schedule meetings to discuss their direct examinations, ensure they have everything they need for those examinations



(their depositions, exhibits and demonstrative aids you plan on using with them, impeachment materials you anticipate the other side using) and explain what they should expect at trial.

**Prepare your expert witnesses.** Make sure yours are available for trial. If they are unavailable during any portion of the trial period, bring it to the opposing party's and court's attention immediately. Go over with your experts the exhibits and demonstrative aids you plan on reviewing with them. Run through your directs with them, and have them become familiar and comfortable with your exhibits and demonstrative aids. Perform a mock cross-examination with any impeachment materials you expect the other side to use. Also, provide your experts updated records (depositions of the other side's experts, recently received third party records, etc.).

**Prepare for their expert witnesses.** Consider whether you're going to move to strike or limit their testimony. Secure all impeachment materials. Secure prior depositions. Secure authoritative articles. Conduct your due diligence. (You would have done most of this prior to deposing them. If so, update your materials). Prepare a binder, with tabs of all the materials you plan on impeaching them with, including their prior depositions, learned treatises, social media information, etc.

**Study the trial order.** Make sure you're familiar with all deadlines of the trial order.

**Study the jury instructions.** Become familiar with what you have to prove (and disprove) and what the other side's burden is too.

**Review the elements of proof.** Prepare a checklist on how to prove each element of your case. Start with the jury instructions and isolate each element you must prove from the instructions. Perform the same evaluation when it comes to the other side's burden.

**Determine who supports the elements of proof.** Determine which witnesses support your prima facie case and which ones support your opponent's. Match up which witness supports which elements of the case.

**Tweak your themes.** Review your file to refocus your themes. Perhaps you have to abandon some. Maybe others come more into focus. With most of your discovery completed, make whatever adjustments to your themes so they encapsulate the heart and the truth of your case.

**Tweak your story.** As with your themes, tweak the story you're going to tell the jury. Have you fully developed your client as the

protagonist and the opposing party as the antagonist? Have you fleshed out the plot, the themes and the symbolism? Finish writing the story you plan on telling.

**Complete case investigation.** Any witnesses to interview? Any statements to secure? Any documents to retrieve? The time to tie up any loose ends is now.

**Complete discovery.** Are there any update depositions to take? Trial interrogatories and trial request for production? Any witnesses on the other's witness list left to depose? Have all the experts been deposed? While there is still time, complete the remaining discovery necessary for trial.

**Prepare dispositive motions.** With discovery mostly done, turn your attention to Motions for Summary Judgment.

**Update the chronology.** Whether it's medical records, contracts, or other documents, most every case lends itself to having a chronology. Make sure yours is updated.

**Prepare a timeline.** Pare down the chronology into a timeline you can share with the jury.

**Consider a mock jury.** Does the case warrant having a mock jury to test out some trial themes? A cheap alternative is to have staff or family members of lawyers in the firm sit through a mock jury selection or opening statement.

**Prepare for their lay witnesses.** Read and summarize the witness depositions and prepare a cross-examination outline based upon the questions you asked them in deposition.

**Your lay witnesses.** Prepare an outline for their direct examination and go over it with them while using any exhibits or demonstrative aids you want them to rely upon during their testimony.

**Mediate.** If you haven't already, mediate the case. If you have mediated, determine whether a second mediation is in order or whether settlement talks are appropriate.

**Prepare your witness and exhibit list.** Include all the potential witnesses and exhibits you expect to call and use at trial.

### **Sixty Days Before Trial**

As you head into the last two months, you start focusing on more of the technical aspects of trial and address some troubleshooting. By now, you should be done with discovery and you start focusing on how you're going to present your case to the jury.

**Plan your PowerPoint presentations.** Is there going to be a PowerPoint presentation during opening? Closing? During any of the direct examinations? Are you going to assist in preparing them? Do you have the documents and information to help prepare them?

**Consider new technology.** Going beyond PowerPoint, is there any new technology you want to introduce into the courtroom? Won't be long before we're using holograms as demonstrative aids.

**Plan the accommodations.** Is the client flying in? Is the trial team flying out? How about experts and witnesses? Assist your staff to coordinate the travel and hotel arrangements for trial. The longer you wait, the more expensive it will be. Keep in mind the logistics that accompany accommodations, including:

**The hotel.** Ensure that the hotel has enough space for you and all your materials. Make sure it has Wi-Fi, a business center and is near the courthouse.

**Conference room.** Arrange a place to meet with witnesses to prepare them for their direct examinations and to discuss case strategy with the trial theme.

**Gather office supplies.** Make sure you bring everything you need or have access to it, including a printer, copier, fax, internet access and tech support.

**Consider a jury consultant.** Consider whether to hire a jury consultant to assist with preparing your witnesses to testify at trial and assist with picking a jury.

**Trial graphics consultant.** Do you need someone at trial to assist with the technical aspects of showing off your exhibits and demonstrative aids? Do you need someone to display documents on a screen while you examine a witness? Have you compared prices and services? Secure quotes, compare apples to apples and get client approval. Then again, you may want to handle the technology yourself.

**Blow ups and exhibits.** Are any records being "blown up" and highlighted? Are there any charts or graphs to prepare? Timelines? Demonstrative aids to assist a witness or expert? Diagrams or illustrations to reduce your theme to an image? Come up with a list of exhibits and secure quotes from different trial exhibit companies.

**Their exhibits.** Inspect their exhibits, and file motions in limine regarding any exhibits you desire to keep out of evidence.

**Your exhibits.** Make your exhibits available for inspection. Make sure they are labeled per the court's instructions.

**Edit video depositions.** Edit down whatever video depositions you plan on using at trial. If you have surveillance video, be prepared with whatever clips you plan on showing.

**Prepare jury instructions.** Prepare them early to provide you a better understanding of what you need to prove at trial, so that you can modify your case presentation and your trial themes accordingly.

**Prepare subpoenas for witnesses.** Prepare witness subpoenas and get them to your process server with plenty of time to get them served. Check the returns of service to ensure proper service.

**Reading depositions.** If you plan on reading a deposition at trial, prepare line and page designations of the testimony and have the court rule on any objections.

**Authenticate records.** Consult with the other side whether they'll stipulate to the authenticity (not to be confused with the admissibility) of records or whether they're going to make you depose one or more record custodians.

### **Thirty Days Before Trial**

The last thirty days is full blown trial mode. You are preparing the very words you'll be speaking to the jury, whether in voir dire, opening, directs, crosses, or closings.

**Prepare research binder.** Legal issues will arise at trial. You probably already know what some, if not most of them, will be. Have a research binder ready with an index to address the likely evidentiary and procedural issues you anticipate arising at trial.

**Learn how your judge conducts her trials.** Secure any protocols your judge makes available about her trial procedures and make sure everyone on the trial team is familiar with them. Speak with colleagues who have tried cases before her and learn how she runs her courtroom and any pet peeves she may have that you'll want to avoid.

**Learn how your opposing counsel tries cases.** Do a jury verdict search to see how many cases and the types of cases opposing counsel has tried (and his results in those cases). Also ask around regarding his courtroom style and demeanor and whether he's known to pull any stunts or act unprofessionally at trial.

**Learn the technology.** If you're going to handle technology at trial on your own (Trial Director, for example), learn it from someone who knows how to use it well and practice with the exhibits your team plans on using at trial. Knowing how to use court technology makes your presentations crisper and saves costs by not requiring you to hire a third-party vendor to provide your client those services.

**Get court approval to use technology.** Secure the court's consent (via an order) allowing you to use technology, including whatever equipment you want to bring into the courtroom.

**Have a backup for the technology.** Sometimes things go wrong. Computers don't work. Software freezes. Make sure you have blow-ups of your key exhibits and demonstrative aids.

**Know how you're getting your exhibits admitted.** Are the parties agreeing to the authenticity of records? Are you going to face any foundational challenges to your exhibits? Challenges due to relevancy or prejudice? Be prepared to argue why your exhibits are coming in, and consider preparing pre-emptive motions in limine seeking their admission into evidence.

**Prepare your exhibits.** You've been evaluating and re-evaluating which exhibits you plan on using at trial. It's time to stop thinking about them and have them ready to go. It's also time to prepare your demonstrative aids, especially your timeline.

**Prepare trial brief.** Prepare a trial brief that address the facts and issues of the case.

**Prepare deposition summaries.** Prepare page and line summaries of the depositions.

**Prepare witness files.** Each witness file should contain the witness's deposition, exhibits to deposition, summary of deposition, trial examination outline and any exhibits you plan on using with the witness (or impeaching him with).

**Prepare a key pleadings and motion binder.** Print off the key pleadings and motions (the last iteration of the complaint and answer, dispositive motions, motions in limine) and have a binder available to have them at the ready if the need arises.

**Prepare a trial notebook.** A trial notebook should contain your trial themes, jury selection questions, outline for the opening, directs and crosses of all the witnesses, the key exhibits and your closing. Having it all in one place will help the trial team focus

on the big picture and develop the overarching themes that will thread the entire trial.

**Prepare voir dire.** Draft the questions you plan on asking the jury. Look at voir dices from prior lawsuits as well voir dire books that have sample questions for different types of cases.

**Prepare a juror profile.** Come up with a profile of the ideal juror, something to aim at during jury selection. Also, decide which type of juror to avoid. Most of jury selection is actually deselection, so knowing whom to avoid can go a long way in picking a favorable jury.

**Jury questionnaire.** Decide whether you plan on using a jury questionnaire, and if so, what to include.

**Prepare opening.** Prepare your opening, wrapping it around your themes, and telling the story of your client. But before you draft your opening, or even your voir dire, draft your closing. That is your final argument, and everything you do is directed toward that, so start with the end in mind.

**Prepare directs.** Prepare the direct examinations of your witnesses. Annotate them with the exhibits you plan on using. Review your notes from your meeting with your witnesses when you prepped them for their direct examinations. Tweak the examinations and review it with them again.

**Prepare crosses.** Prepare cross-examination charts, with the answers you want to prompt in one column and the page and line from the witness's deposition containing the exact same answer in another column. Remember, never ask a question you don't already know the answer to.

**Prepare closing.** Even though it comes at the end, prepare the closing before preparing any other part of trial. Everything else emanates from the closing.

**Conduct focus groups.** Gather some of your staff, family and friends and test out your themes, your story and your exhibits.

**Narrow the witness list.** Narrow down that long list of witnesses into something more manageable for trial.

**Copy exhibits.** Secure a copy of your opponent's exhibits and, if any are objectionable, file the necessary motions in limine.

**Court reporter.** Who is responsible for the court reporter? What will the cost be? How will the parties split the cost?

## **Fifteen Days Before Trial**

Trial is two weeks away. Nothing should distract you from the task at hand.

**Visit the courtroom.** Walk around, rehearse your opening, get a feel for the place.

**Be prepared for likely trial objections.** Have cases ready in your research binder for any anticipated evidentiary objections from the other side. Also, be prepared to back up your likely objections with caselaw.

**Tweak, tweak, tweak.** Tweak your opening, closing, voir dire, directs and crosses.

## **Seven Days Before Trial**

With trial a week away, it's time to do the final tweaks.

**Study the judge.** When you first started the case, you did your due diligence with all those involved. Pull the dossier you have on the judge and study her preferences and pet peeves when it comes to trial.

**Study your opponent.** Do the same for your opponent and for the opposing party too.

**Revisit settlement.** An impending trial often causes one side, or both, to blink. If you've been preparing for trial all along, and you sent that message during mediation, opposing counsel and his client may be having second thoughts about trial. Keep your mind and options open when it comes to settlement discussions late in the game. Yes, cases can, and often do, settle on the courthouse steps.

**Transport equipment.** Start gathering all your multimedia equipment, your files, and anything else you need and start getting it to the courthouse.

**Be prepared for your absence from the office.** When you're in trial, nothing else matters. Make sure you have made arrangements for someone to address emergencies while you're out.

Trial has a lot of moving parts. In order to keep everything moving along while ensuring nothing falls through the cracks, prepare a to do list that can be modeled on the one here. This way, you work toward the goal of telling your story on your terms without any unexpected surprises due to lack of preparation.

## Trial

It's finally here. Trial. You have assumed all along you were going to try this case. Yes, most every case settles. But you never assumed that. You assumed this was the one case in fifty that went to trial. Where has your preparation brought you?

**You are ready for trial.** If you have been “trying your case” from the inception, then you are ready for trial. No hand wringing. No last minute preparations. No worries. You're ready to go.

**You know what to expect from the other side.** You have performed your due diligence; you have investigated opposing counsel, opposing party and their experts; you have deposed them and secured all their testimony. In the process, you have unmasked their themes, learned their approach to trial (if any), and appreciate what to expect from them.

**You have a theme around which to build your case.** From the case's inception, you have developed one or more themes. You have developed those themes through your written discovery, tested them on the opposing party's witnesses, used your witnesses to convey them, and have created exhibits to extol them. They have become ingrained in your case and will be the vehicle through which you share your case to the jury.

**You have a story to tell.** You have developed a story to share with the jury. You appreciate that each of us enjoys a good story, and that the jury will enjoy one too. You have a plot, characters, dialogue, conflict, a resolution and of course a theme that brings it all together.

**Your client is the protagonist of the story.** In this story, you have depicted your client as the protagonist, the central character of the story for whom the jury will root during the trial and in deliberations.

**You know what questions to ask your witnesses.** You have spent time preparing your witnesses, having them learn and share your themes through their deposition testimony, and having them fend off treacherous cross-examination questions. They are equipped to tell your story and not allow opposing counsel to use them to tell the opposing party's story.

**You know the answers to expect from hostile witnesses.** You have investigated the background and admissions and writings of adverse witnesses and you conducted a thorough cross-examination of them at deposition. You know what they're going



to say at trial and you have locked in their testimony for when you cross-examine them at trial.

**Your exhibits are ready to go.** You started working on your exhibits early, developing images and visuals that tell your story and convey your themes. No need to scramble at the last minute deciding which documents to blow up, which exhibits to rely upon or what demonstrative aids to use.

**You're going to tell your story through words and images.** You have catch phrases and slogans to encapsulate your themes and you have images that convey those themes visually to the jury.

**You have a juror profile of the jurors who will embrace your themes.** You have thought about your trial themes and you have thought about the type of jurors who will embrace those themes. You have reflected on the types of answers to voir dire questions you want to elicit from prospective jurors and you have your jury selection questions ready to go.

**You have a plan on how to win.** You have thought through the case with the end in mind, and you have a game plan on how to win the case. You have devised a plan wherein you convince the jury to buy into your themes and secure a favorable verdict.

Having prepared the case all along as if you were going to trial, you are prepared to tackle the various aspects of trial. Keep in mind the following advice when preparing for jury selection, opening, direct examinations, cross-examinations and closing argument. You will notice several tips are woven through each aspect of trial, including reinforcing your theme and relying on focus groups.

## **Jury Selection**

Jury selection will be the means by which you identify and deselect those prospective jurors least likely to embrace your case themes while identifying those jurors most likely to embrace them. When conducting jury selection, keep the following in mind.

**Know your case.** The better you know your case, the better you know your themes, and the better you know your themes the better you know the types of jurors who will accept those themes as their own.

**Prepare a questionnaire.** Take the time to prepare a juror questionnaire to secure the preliminary information, such as employment, education, and other background information, from the jury.

**Prepare a juror profile.** Create a juror profile of the type of juror who will more likely embrace your case and your themes. Likewise, create a juror profile of the type of juror who is likely to embrace your opponent's themes.

**Measure jurors against your juror profile.** Which type of juror will react favorably to your themes? What are jurors' attitudes toward your themes? How do jurors measure up against the profile you created? Compare and contrast those on the venire to the ideal standard you created.

**Share your theme.** You want to tell the prospective jurors why you win. Share with them your trial themes and gauge their reaction to those themes.

**Find out what jurors think and believe about your themes.** Inquire about what jurors' feelings and attitudes are about your themes.

**Find out what jurors think and believe about your opponent's themes.** Inquire about what jurors' feelings and attitudes are about your opponent's themes.

**Elicit answers that match your themes.** As you conduct your questioning and discover what jurors think about your themes, elicit answers from some who echo your themes and repeat them in the form of follow up questions. Not only do you want to discuss your themes and determine if the prospective jurors buy into them, you want them talking about them in their own words.

**Commit jurors to say things that strike them for cause.** You want to know what jurors are thinking, particularly if they are bad for your case. You want them to be open and honest, and you want to commit them to their unfavorable, prejudicial opinions so you can strike them for cause.

**Deselect bad jurors.** Seek to remove jurors that have rejected your themes and have embraced your opponent's themes.

## Opening Statement

Opening statement is your opportunity to tell your client's story. The jury is waiting to hear why you win, so tell them. Tell them what evidence you plan on introducing to prove and win your case. You will be creating a paradigm, a filter if you will, through which they view and analyze the evidence. Certain things to keep in mind when preparing your opening statement:

**Be Yourself.** Juries can see through phonies. Don't put on the lawyer persona. You know the case. Just be yourself and you'll be more natural.

**Focus on your themes.** Organize the facts and summarize the evidence you're going to present in a manner that highlights your trial themes. Your first few sentences should spell out your theme and the remainder of your opening should weave your theme through all the facts. Your themes will provide a prism through which to view the evidence.

**Use catch phrases to deliver your themes.** Reduce your themes to catch phrases. You've been reflecting upon potential catch phrases since the inception of the case. You've thought about print ads and commercials, lyrics from songs and taglines for movies, and you've held them up to the light and reflected upon which ones work best for your case. Time to trot them out in your opening.

**Repeat your themes.** Use your themes early and often throughout your opening.

**Anticipate the other side's themes.** If the other side has been developing their themes throughout the case as you have, you know what they are and can rebut them in your opening.

**Tell a story.** Cast your client as the protagonist, and tell a story in which the jury will want to cheer for and ultimately find for your client.

**Characterize the characters.** As you tell the story, label the players for the audience, the jury. Your client is the protagonist, the opposing party is the antagonist, and the others are various characters that support you and your plot line and are to be viewed favorably by the jurors or that hamper or oppose you and should be viewed unfavorably by the jurors.

**Share the favorable facts.** Provide the jury with the favorable facts that you will be sharing during the course of the trial.

**Don't ignore the bad facts.** Ignore the bad facts and you'll come across as if you're hiding something. Address them in opening but don't dwell on them.

**Rely on exhibits.** Consider using exhibits during opening.

**Be brief.** Don't take too long in opening. Be brief and be persuasive.

**Speak in plain English.** Refrain from using big words or convoluted phraseology. You're speaking to non-lawyers. Speak non-lawyer.

**Any evidence you refer to better come into evidence.** If you say "the evidence will show," the evidence better show it. If you have any concerns about any evidence coming in, have it be the subject

of a motion in limine prior to opening statement. It's best to know what evidence is coming in and what isn't as early as possible.

**Don't oversell.** Just as you don't rely on evidence that you're not certain will come into evidence, don't oversell your case. If you do, opposing counsel will point this out during his closing.

**Practice, practice, practice.** You need to have your opening memorized but it cannot come across as if you memorized it. This takes practice. Lots of it.

**Test your opening before a focus group.** Test out your opening before a group of co-workers and family members and gauge their response to it. Tweak it as necessary.

### Direct Examinations

You will be conducting the direct examination of your client, your experts and supporting witnesses. They will serve as the messengers and the embodiment of your themes. Through them, you will tell your story. When preparing for their examinations, Keep the following in mind.

**Know what you have to prove.** Study the jury instructions to determine what you have to prove. It is through your witnesses that you prove your case, so make sure you know what to ask them to elicit the information to meet your burden.

**Know what the other side has to prove.** Likewise, know what the other side needs to prove and use your witnesses to undermine their case.

**Know the role of the witness in proving your case.** Why are you calling this witness? How does he help your case? Hurt the other side's case? Does he advance your case? Have a plan for every witness you place on the stand.

**Prepare a detailed direct examination.** Don't wait to the last minute to prepare a direct examination and don't prepare a bare bones, general outline. Prepare a detailed examination with all the questions you plan on asking the witnesses.

**Prepare the witnesses.** Take the time to explain to your witness his role in the case. How does he advance the themes? What is his role in the story? What are the type of questions you will be asking him? What are the type of questions the other side will be asking him?

**Make sure he knows the trial themes.** As you prepare your witnesses, tell them your case themes. In fact, have them study them and commit them to memory. When they're not sure how

to answer a question, they can fall back on the themes to offer them guidance.

**Make sure he knows the other side's themes.** Teach your witnesses what you anticipate the other side's themes are. Explain that you don't want the witness to play into, support or say something in favor of the other side's themes.

**Have the witness read his deposition.** The witness needs to take the time to carefully read his deposition. Twice.

**Have the witness understand he cannot stray from his deposition.** The witness must know his deposition because he cannot stray from it. If he says something that contradicts his testimony, he will be impeached.

**Explain to the witness how impeachment works.** Nothing strikes at the credibility of a witness like being caught in a lie and then having his own words read to him pointing out the lie to the jury. If he tries to finesse deposition testimony months later at trial, he will find that opposing counsel will impeach him with his deposition. Being impeached should be avoided at all costs.

**Test every question you plan on asking.** Having prepared a detailed outline for the cross-examination of your witness, go through the outline question by question with your witness. Don't ask a question at trial you didn't rehearse beforehand.

**Test every question in the order you plan on asking.** Not only go through the questions, but go through them in the order you plan on asking them. You want to get into a rhythm with a witness.

**However, don't have witness memorize answers.** Go through the questions until the witness feels comfortable responding to them, but not so much until he has memorized the answers.

**Practice with the exhibits.** If you're going to have the witness use exhibits during his direct examination, make sure to practice with him using the exhibit.

**Respond to the witnesses' needs.** Listen to the witness. Is there a question he's just not getting? Tripping over? A line of questioning he's making a mess of? Make the necessary adjustments and ask questions he'll be comfortable answering at trial.

**Build up the witness.** Encourage the witness, build him up and encourage him. Testifying at trial is a challenging, frightening and potentially overwhelming experience. You're going to put him

through the ringer to prep him, so take the time to build him up as you tear him down during your prep cross-examination.

**Personalize the witness.** Your witnesses need to relate to the jury. You need to develop them as characters jurors can empathize with.

**Tell a story.** Tell your client's story through your witnesses.

**Channel your themes.** Share, reiterate and emphasize your themes through your witnesses.

**Anticipate cross-examination questions.** Do a mock cross-examination with your witnesses, asking them the questions you expect the other side will ask.

**Anticipate attacks.** As to the mock cross-examination, discuss with the witness the areas of attack to expect from the other side.

**Many of the rules of deposition apply to answering cross-examination questions.** Go through the rules of deposition with your witness to assist in their preparation for cross-examination. Many of the rules are the same. Tell the truth. Answer only the question. Channel your case's themes. Listen to the question.

**Perform mock re-direct.** If you can anticipate the cross-examination, you can likely anticipate redirect too. Take the time to rehearse the likely redirect.

**Prepare with a jury consultant.** Consider retaining a jury consultant to assist with preparing your client for his trial testimony. A consultant can assist with the intangibles the jury will be looking for.

**Video tape your client.** Video tape a portion of your mock direct and mock cross of your client and then watch it with him. Discuss what works and what doesn't.

**The witness testifies, not you.** Ask open ended questions.

**Listen to the answers.** Just because you rehearsed the questions three times, and the witness answered them the same each time doesn't mean he will at trial. Listen to the answers and don't be a slave to your outline.

**Discuss logistics of trial.** Everything from where to meet, to where to go, to what to wear to how to carry himself. The jury will be watching. The witness needs to know that and needs to know how to behave.

## Cross-examinations

In *Cross-Examination: Science and Techniques*, Pozner and Dodd emphasize the advantage of cross-examination-centered trial preparation. Focusing on cross-examination helps develop the theory of the case and trial themes. Focusing on cross-examination “exposes the indisputable facts that the trial lawyer must address.” And focusing on cross-examinations helps one craft a resonant closing argument. Prepare your cross-examinations first, and the rest of the case will follow.

Cross-examination is the hardest part of trial. The skill to have an adverse witness agree with you over and over is a skill that takes time and effort to perfect. When cross-examining a witness keep the following in mind.

**It starts with the deposition.** Every question you plan on asking at trial you must first ask in deposition. You need to know how the witness will answer your questions and you need to lock in his answers so as to impeach him later if necessary.

**The problems you had with the witness in deposition will be the problems you have with the witness at trial.** Folks don’t change. The witness who was cantankerous and obnoxious at deposition may well behave the same way at trial. The witness who played coy and dodged your questions at deposition will likely do the same at trial.

**Focus on the themes.** Have your questions focus your themes and have the witness parrot them early and often.

**Attack the other side’s themes.** If successful at deposition in attacking the other side’s themes, revisit that at trial.

**Understand the witness’s role in developing your theme and attacking your opponent’s theme.** Before preparing your cross, think about the witness’s role and how he helps your case and hurts the opponent’s case. Focus on those aspects of his testimony and build your cross around them.

**Get only what you can get.** Understand what admissions you can secure and which ones you can’t, and only get what you can get. Don’t be greedy.

**Prepare your cross-examination outline.** Prepare a detailed outline, listing all the topics you want to tackle, and organize them, starting with your second strongest topic and ending with your strongest.

**Prepare your cross-examination notebook.** Start by brainstorming the topics you want to address during your cross-examination. Such a topic could include witness bias. For each topic area, prepare a chart. On one column, include all the questions you intend to ask the witness. I suggest, however, that instead of writing out the questions, that you write out the answers you expect to elicit from the witness. At trial, when you look at your outline and see the answers, you'll know what question to ask.

In another column, across from each answer you intend to elicit, cite the source of that answer, whether it's page 12 from the witness's deposition, the ER admission note or some other document. If you can't find a source for the answer, don't ask the question. Why? Because if the witness does not give you the answer you want, the one you have written down on your outline, you won't have anything with which to impeach him.

**Prepare your cross-examination exhibits.** Behind your outline, keep all your source documents, your de facto impeachment materials. The document you'll be relying on the most will be the witness's own deposition, where months, or perhaps years before, you tried out all your cross-examination questions.

**Prepare your impeachment materials.** Your most important impeachment item is your deposition of the witness. But that is not your only source of impeachment. Articles written by the witness, the witness's Facebook timeline, e-mails written by the witness, and anything authored, prepared by, or approved by the witness may serve as impeachment fodder.

**Practice the cross-examination.** Have someone play the role of the witness and practice your questions. Instruct the "witness" to avoid answering your questions, and be as obstructionist and disagreeable as possible. You want to be prepared to deal with the problem witness on the stand.

**Ask only leading questions.** Cross-examination is not the time to ask the witness to tell his story. Don't ask open ended questions. Ask only leading questions that suggest the answer. You want to direct the witness to give you the answers you have in your outline. Don't give him the opportunity to say something else by asking open-ended questions.

**Make statements with which the witness will agree.** Instead of asking questions, make statements with which the witness must agree. Instead of asking, "weren't you paid \$600 an hour by Plaintiff's counsel?" simply make the statement, "Plaintiff paid you



\$600 an hour,” and make the statement with such an intonation that requires an answer. You’ll get the same answer whether you ask the question or put it in the form of a statement.

**Don’t use the word “correct” at the end of your questions.**

If you do ask some actual leading questions, don’t end them with such words as “correct” or “isn’t that so.” Words such as “correct” detract from the power of your cross-examination, and if used at the end of every question, become distracting and downright annoying.

**Ask simple questions.** Ask simple, short question.

**Use simple words.** Use words the witness and the jury can understand.

**Ask questions that require a “yes” answer.** When you ask leading questions, you want to ask questions that require only a “yes” answer. You want the witness to agree with you and say “yes” to your questions as often as possible. You want the jury to see and hear the witness agreeing with you time and time again. “You’re an orthopedist.” “Yes.” “You treated Mr. Smith.” “Yes.” “At the request of his attorney.” “Yes.” “And you charged his attorney \$600 for that examination.” “Yes.” “An examination which took twenty minutes.” “Yes.” The more the jurors hear the witness saying “yes” to your questions, the more the jurors will perceive that the witness is agreeing with you and with your position.

**Ask preliminary questions that require a “yes” answer.** Start with a few questions with which the witness cannot disagree to get him into the habit of saying “yes.” An adverse witness’s instinct will be to disagree with you. Get him into the habit of agreeing with you, or run the risk of looking foolish for not doing so.

**Split up questions to result in more “yes” answers.** Try to ask as many questions as you can that require a “yes” answer. Split compound questions into single questions. Split questions that contain two facts into two questions each containing a single fact. For example, instead of asking “Isn’t it true that Plaintiff’s counsel retained you as an expert and is paying you \$600 for your time,” ask the following:

“Plaintiff’s counsel retained you.”

“As an expert in this case.”

“And is paying you \$600 an hour.”

**Ask questions to which the jury expects a “yes” answer.**

Sometimes to avoid agreeing with you, a witness will argue with

basic premises and irrefutable facts just to be, well, disagreeable. Test these questions in deposition, and if the witness provides outlandish answers to simply avoid answering “yes” to a reasonable question, you may consider asking the same questions to elicit the same silly answers at trial.

**Avoid questions that require an explanation.** Ask questions that require a yes or no answer, or a basic fact. Avoid questions that allow the witness to provide a long explanation and hijack the cross-examination.

**Be prepared for impeachment when witness doesn’t say “yes.”** When the witness doesn’t say “yes” when he should, be prepared to impeach him with his own testimony.

**Train witnesses to say “yes.”** Train witnesses to say “yes,” and say “yes” often. Ask many basic questions where the witness must say “yes.”

**The second best answer after “yes” is “no.”** If you can’t ask a “yes” question, consider asking a question that requires a “no” answer.

**Don’t go off script.** It’ll be tempting to go off script and try to get more than what you can based on the deposition you took. You do so at your own risk.

**Don’t ask a question you don’t know the answer to.** Something you have heard over and over is that you don’t ask a question at trial unless you already know the answer. Trial is not the time to be surprised. Be surprised when you investigate your case, when



you receive responses to interrogatories or at deposition. But don't be surprised at trial. But how do you find out the answers to the questions you intend on asking? Simple. You find out the answers in deposition. Do your work in deposition to take the guess work out of trial. When you're at trial you will know what the answers are because they will be in black and white in the deposition transcript.

**Don't argue.** Don't argue with the witness. If he's being uncooperative, considering moving onto the next question or securing the court's assistance.

**Secure the court's assistance sparingly.** However, don't make it a practice to secure the court's assistance.

**Don't raise your voice.** No matter how much the witness frustrates you, don't raise your voice or yell.

**Don't always impeach.** Just because a witness strays from his deposition testimony doesn't require you to impeach him. If it's a minor point, let it go.

**Remember, you are testifying.** The reason you're having the witness say so little is that you're testifying, not the witness. He's agreeing with you by repeatedly saying "yes" to your questions.

**Start with bias.** Start your questioning with the witness's bias. That will color the rest of his testimony.

**Follow with your second strongest line of questioning.** Follow bias with your second strongest line of questioning.

**Finish with your strongest line of questioning.** Conclude strong with your strongest line of questioning.

**You don't have to ask the ultimate question.** Don't ask the ultimate question. Ask all the lead up questions that take you to the brink of the ultimate question and save the ultimate question for argument in closing.

**Ask the ultimate question at deposition.** Every once in a while you'll get a witness to agree with you on that ultimate question. If they do, ask it again at trial. If the witness refuses to agree with you, impeach him with his deposition testimony.

## Closing

Though closing argument is different from opening statement, much of the advice below will be reminiscent of the advice I suggested for your opening. You are making your final argument

and you are telling a persuasive story that encapsulates and captures your case themes to convince the jury of your perspective.

**Start with your themes.** Any closing starts and ends with strong themes that you weaved throughout the course of the trial, and that have culminated in closing.

**Repeat your themes throughout the closing.** You don't simply pay lip service to your themes. You reference and rely upon them throughout closing.

**Reiterate your catch phrases.** The catch phrases you employed during trial should be used during closing. It's the hook you've been using with the jury and you're hoping the jurors will reiterate them over and over in deliberation.

**Have a response to the other side's themes and catch phrases.** Don't allow the other side's themes and catch phrases to go unanswered.

**Have catch phrases that counter the other side's catch phrases.** In order to respond to the other side, develop counter themes and counter catch phrases.

**Tell a story.** You told a story in your opening. If your case went according to plan you should be able to tell the same story in your closing.

**Personalize your client.** You're telling a story. Make sure to develop your client's story and make him three dimensional and make him someone you can root for.

**Refresh the jury's recollection about the positive evidence.** Remind the jury of the positive evidence you discussed in opening.

**Don't exaggerate the evidence.** Don't say the evidence showed something when it didn't.

**Tackle the negative evidence.** Don't ignore the other side's evidence. They likely scored some shots and some points. Tackle them head on as opposed to ignoring them.

**Explain how you've proven your case.** Go through your burden and show how you've proven your case.

**Explain how the other side has not proven their case.** Go through the other side's burden and show how they have not proven their case.

**Explain the effect of your directs and crosses.** Without providing a blow by blow, or reiterating and retrying the entire case, explain

to the jury what you accomplished through your examinations. This is the time to tell the jury the conclusions to reach based upon the questions you asked. And remember how you didn't ask the adverse witness the ultimate question, saving the explanation for closing? Don't forget to explain the answer to the ultimate question you refrained from asking.

**Remind the jury you fulfilled your promises to introduce the evidence you said you would.** You made a covenant with the jury during your opening. Show how you kept that covenant by introducing the evidence you said you would.

**Exploit Plaintiff's failure to introduce evidence he referenced in opening.** Point out how Plaintiff did not meet his burden by addressing the various pieces of evidence that he claimed he was going to introduce but did not.

**Provide an outline for the jury to take into the deliberation room about the evidence.** Tell the jury why you win and create a blueprint for the jury to follow so that it finds you should win.

**Rely on the jury instructions.** Reference the jury instructions and consider blowing some of them up, particularly ones addressing common sense, credibility and other generic ones that you can use to remind the jury of the credibility and content of your witnesses and the lack of credibility of your opponent's witnesses.

**Use exhibits.** Rely on the exhibits you used during trial in your closing.

**Use a timeline.** In addition to exhibits, use a timeline to capture all the main events of your case in an easy to understand demonstrative aid.

**Show the jury how to complete the verdict form.** Take the time to complete the verdict form in the manner you want the jury to complete it.

Trial is the culmination of all your preparation. When you "try every case" by preparing as if every case will go to trial, you are prepared to actually try every case. In this age, when trials are becoming more and more rare, you don't have to be ill prepared for that one in fifty case that does not settle. The irony, of course, is that the more prepared you are to try a case, the more likely the other side will cave and settle on favorable terms.



## Closing Thoughts

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### What I've Learned

After practicing a few years, we all develop “What I’ve Learned” lists, nuggets of wisdom to pass on to others. I strongly recommend you jot down your own list. You’ll surprise yourself how much you’ve picked up along the way. The following is my list.

**If you want to know a lawyer’s true character**, see how he treats his secretary when he thinks no one else is looking. Better yet, how he treats the runner.

**Professionalism** is treating the cleaning staff that comes after hours the same way you treat the judge during motion calendar.

**You don’t need a pen and pad to write.** Take advantage of the quiet times—the first few minutes after you wake up, when you’re in the shower, when you’re driving to work—to think through that memo or brief you’re stuck on or that legal argument that doesn’t quite work.

**I would rather drive three and a half hours** than go through airport security to catch a 45-minute flight.

**I do my best writing** while I’m driving.

**Don’t let your standard of living increase** every time your salary does. There’s nothing wrong with driving a car with over 100,000 miles or living in a working class neighborhood. Frugality gives you options in life.

**But don’t be frugal when it comes to your shoes.** You have to wear them 10 to 14 hours a day.

**Learning from your mistakes is experience.** Learning from others’ mistakes is wisdom.

**Mentors are great.** You get to learn from their mistakes.

**Cross-examination isn’t just for depositions or trial.** You can learn a lot about what’s going on in your kids’ lives if you keep asking them questions.

**I assume I don’t have much time on this earth.** I live life like I won’t see my 50th birthday. I’m 44. It’s amazing the perspective you get when you think you have six years to live.

**When you get to the hotel room**, run the hot water and let the steam fill the bathroom. Hang the suits and shirts from your garment bag nearby. You’ll be surprised how many of the wrinkles will vanish.

**The key to the practice of law is preparation.** I would rather go up against an experienced lawyer who is lazy than an inexperienced one who works his butt off.

**Always visit the accident site** in a personal injury case. And always meet your client at his place of business. There's no substitute to seeing something with your own eyes.

**Never let another's behavior dictate yours.** No matter how obnoxious or insulting that other lawyer is, don't respond in kind.

**When I'm lying on my death bed,** I'm not going to be thinking, "I should have billed more hours."

**Take a long term view of things.** It helps keep everything in perspective.

**Always keep the client informed.** Make sure the client knows what is happening in his case, what the problems are and what you are doing to address them. Listen to the client and seek his input when formulating a case strategy. Clients hate surprises. One surprise too many, and that client will look elsewhere for legal advice.

**Before you spend the client's money,** whether it is to do research, draft a motion or hire the expert, make sure the client knows of the expense and approves it. It's their money.

**A client you speak with, write to and e-mail frequently** is often very forgiving of the mistakes you make.

**Your kids are always watching you.** Live accordingly.

**Work as if your kids are watching you.**

**Return messages promptly.** In this age of iPhones and other technology, the 24-hour-rule is an anachronism. Try 1 hour.

**The attorney who was disbarred** for misappropriating client funds started years ago by fudging on the little things. Don't start down that path.

**Banging on the monitor** won't make the computer work better.

**Learn how to use the postage machine.** It's only a matter of time until you'll have to mail a letter after hours. While you're at it, learn how to make two-sided copies, how to scan documents and how to send an overnight package.

**Show me a lawyer who works hard** and I will show you a lawyer, who sooner or later, is going to make it.

**Instead of reading your kids bedtime stories**, make them up yourself. Make your kids the protagonists. Have them fight ogres, slay dragons and seek buried treasure. They'll ask for more.

**Most emergencies** are self-made.

**Before sending anything out**, proofread it at least twice. Three times is preferable. **And proofread out loud.**

**When you first get a case**, call opposing counsel and introduce yourself. It's harder for an attorney to be unprofessional if he's had a pleasant conversation with opposing counsel.

**When the other side starts objecting** during a deposition, you've tripped over something. When he starts making speaking objections, you've hit pay dirt. Keep digging.

**When the other side vigorously objects to a request for production**, there's a good chance you're about to unearth the proverbial smoking gun. It may take a motion or two to get it, but it will be worth the effort.

**Instant oatmeal is great.** Pour a pack into a styrofoam cup, fill with hot water, and voila, breakfast at the office.

**If you're going to have breakfast at the office**, make it a point to have breakfast with your kids on the weekend.

**The first thing you do—read the jury instructions.** They will be your road map for the entire case. They tell you what the parties have to prove, what the defenses are and whether you stand a chance of winning or not.

**You can't win without a theme.** Start developing the theme of your case early. Every interrogatory you propound, every motion you file and every deposition you take should be done to advance that theme. If you wait until two weeks before trial to develop your theme, it's too late.

**However, don't be married to a theme.** As your case develops, your theme must develop. During the course of litigation, you may pick up and drop a half a dozen themes on the way to finding one that is worth holding onto.

**Have a theme for your life.** What are you trying to accomplish? When it's all said and done, and your career is over, what do you hope to have done with your life? Don't settle for figuring out what your cases are really about. Figure out what you are really about.



**Writing is all about nouns and verbs.** Adverbs, adjectives and prepositions are overrated. **Actually, writing is all about verbs.**

**Extra words** are the enemy. Eradicate them.

**We all have short attention spans.** When you write a motion, memo or letter, make your point up front, hit the highlights and stop writing.

**Argue your motion out loud** before a hearing. It's one thing to see your arguments written down on paper. It's quite another to listen to how they sound.

**Put yourself in the shoes** of the judge and opposing counsel. Anticipate the other side's arguments and the judge's likely questions. Thinking this way avoids surprises at hearings.

**There are no rough drafts.** Whether you are sending a motion, memo, letter or e-mail to a client, partner or someone junior to you, treat it as if it is going to the CEO of your biggest client.

**Get involved.** Being a good lawyer entails so much more than working on your cases. If you want to grow and develop, join a voluntary bar association or two and volunteer your time. The relationships you will develop in these organizations will be priceless.

**Jury selection** isn't so much about picking the good jurors as it is about excluding the bad ones.

**Everyone has his own way of doing things.** When serving the needs of a client, partner or judge, serve *his* needs, not some generic recipient of your services. To do that, get to know your recipient—what he likes and what he doesn't.

**Make a list of your strengths and weaknesses** as a lawyer. Pick one of your weaknesses and work on it this year. If you write poorly, read some books on writing, maybe take a class. If you are a poor public speaker, consider joining Toastmasters. Tackle the weaknesses, one at a time.

**Also make a list of your goals** for the next year. So many of us have a strategy when it comes to our cases, but many of us do not have one when it comes to our lives.

**Know your opposing counsel.** Look at his website, his jury verdicts and published opinions. Ask around about the type of lawyer he is.

**Know your judge.** Read the appellate opinions that have upheld his rulings and those that have overturned them. Know what

his judicial philosophy is and most importantly, what his pet peeves are.

**Jury verdicts** are a great way to calculate what the non-economic damages claims are worth.

**Prepare every case** as if it's going to trial, not as if it's going to settle, even though most do.

**Always keep a clean desk.** You look like you are in control when you do, even if secretly, you are not.

**A complaint is a ticking time bomb.** A good plaintiff's attorney has investigated his case, has lined up his witnesses, has procured his documents and has developed his case theme before he has filed suit. He is waiting for you to answer to set the case for trial. It's up to you to diffuse that bomb and you don't have much time to do so.

**Even if the other guy filed the complaint,** you direct the litigation. Be proactive.

**Send the judge a courtesy copy of your motion** and a copy of the cases you cited and bring an extra copy to the hearing. Bring a blank order and don't leave the judge's chambers until you have hashed out the language of the order and the judge has signed it.

**If it wasn't reduced to writing, it didn't happen.** Remember that when dealing with opposing counsel and with your own client.

**When preparing your client for deposition,** make sure to review with him every document you expect opposing counsel will show him at his deposition. Deposition is not the place where your client should see documents for the first time.

**Do a mock cross-examination of your client.** Ask your client the questions the other side will ask—tough questions, asked in an aggressive manner. Don't pull any punches. You're not doing the client any favors by doing anything less than opposing counsel will. After you're through with him, the deposition will be a cake walk. He won't thank you during the prep session. He will, though, after the deposition is over.

**Don't write anything to an expert** that you would not want the other side to see. It may end up in opposing counsel's hands.

**Do you want to get the goods on a party** who claims he is permanently disabled because of your client's negligence? Get his credit card records. What expenses might you find? Charges for a gym membership, repeated outings to restaurants, plane tickets to exotic locations and sports equipment, to name a few.

**Write your own obituary.** Write out how you want others to remember you. Now spend a lifetime trying to live up to that description.

**Your clients have their problems.** You have yours. Keep them separate.

**Your firm has a mission statement.** You should have one too. So should your family.

**Explain your case to a non-lawyer.** A spouse, a friend, a family member. If they don't understand it or don't agree with it, the jury likely won't either.

**Boring gets a bad rap.** Boring is playing by the rules, sticking to the fundamentals and working hard. If you're called "boring," take it as a complement. "Boring" is a term often tossed around by those whom "boring" folks would call "irresponsible."

**A handwritten note** can make a person's day. Invest in some stationary.

**Three things tell a lot about a person**—(1) how they react to a canceled flight; (2) how they react to losing a motion; and (3) how they react to an empty coffee pot.

**Find a hotel chain that meets your needs** and stick with it whenever you travel on business. For me, it's Hampton Inn. It's reasonably-priced, clean, comfortable bed, exercise amenities, free coffee 24/7, and free breakfast. Stay enough times and you earn free nights when you're traveling for pleasure.

**Why you do something is more important** than what you're doing.

**Ignoring facts won't change them.** A bad case is a bad case.

**You can't change the facts.** Often, your most important job is to uncover all the facts, good and bad and advise the client of the possible outcomes.

**Our childhood shapes us as adults.** When I was a kid, my parents couldn't afford to take me to the movies. Now I go every chance I can. Things we missed out on as kids often motivates us as adults. Learn about others' childhoods and you'll learn what motivates them.

**Yelling never helped.**

**Good posture is a huge confidence booster.** Add a smile.

**My kids understand me better when I keep it brief and simple.**

You can learn a lot about how to communicate as a lawyer by thinking about how you to talk to your kids.

**I don't always live by these rules.** That doesn't make them less valid.

**Before joining the board of anything,** keep in mind that a large part of your job will be asking others for money. Not to dissuade you, but just saying.

**If you want autonomy,** develop a client base.

**When thinking of New Years' resolutions, start the year with a list of goals.** Goals regarding work, family and personal aspirations. Write them down. Check how you are coming at the beginning of each month.

**Who your five best friends are** says a lot about who you are.

**Food is not the answer** to stress.

**If you don't have a hobby that is yours,** that you truly enjoy, that you engage in not because it is good for marketing or because your boss does it, then find one. Reading the advance sheets is not a hobby. Rock climbing or reading pulp fiction are.

**There are no coincidences.** People come into our lives and we into theirs for a reason. Always search out that reason.

**Avoid spaghetti and linguini** when lunching with clients.

**I've learned more from the associates** I've mentored than I've taught them.

**You can cut your budget \$3 to \$5 a day without noticing.** Cut out the trip to Starbucks in the morning and settle for the office coffee, drink water instead of a soda at the restaurant at lunch, and bring healthy snacks from home. With the savings, you don't have to wonder how you are going to afford the family vacation.

**My wife enjoys receiving supermarket flowers from me on a regular basis more** than receiving a huge assortment of roses from a florist on Valentine's day. Don't just remember the holidays.

**Don't skip** funerals, weddings, hospital visits, yearly check-ups, dental cleanings, birthday parties, award ceremonies, band concerts or little league games. That pain in your side or that nagging headache may be nothing or it could be something.

**Get into the office early.** That will give you a jump on the rest of the day.

**Half of all meetings are unnecessary.** Often a call or an e-mail will do.

**Each of us are good at something.** Each of us have a passion for something. Look where your skills overlap your dreams. That's where you are supposed to be.

**Dress like you. Act like you. Talk like you.** Don't dress, act or talk like others. You can't live someone else's life. In a profession where credibility is everything, you are setting yourself up for failure by pretending to be someone you're not.

**My dad likes telling his friends his son is a lawyer.** He's proud I'm a lawyer. Knowing he's proud makes me act in a way to earn that pride.

**It still is a noble profession.**

**Pro bono cases are the ones where you make the most difference.** They are the ones you remember, tell stories about and that define you.

**Don't take yourself too seriously.**

**To improve your public speaking skills,** take an introductory acting or improv class. A lot of public speaking is getting over the fear of looking foolish. Look foolish once a week in a class and you'll get over looking foolish before a judge or jury.

**Get to know the folks with whom you work.** You work with them every day. Tackle cases and projects together, work late, sometimes work weekends together. Get to know the attorneys and staff. Learn their likes and dislikes, their pet peeves and what motivates them.

**Others' hobbies aren't odd, or weird or boring.** They just may be odd, weird or boring to you.

**Each firm has its own culture.** You either fit in it or you don't.

**Don't take it personally if you don't fit into a firm's culture.** It just means you haven't found the right firm yet. It's out there.

**Technology is constantly changing. Keep up with it.** Remain vigilant for new trends, gadgets and applications, learn to use them and try to stay ahead of the curve. Sometimes those bells and whistles prove to be quite useful.

**Treat others' time as it if were your own.** That includes your staff's time.

**You want to know the best way to learn what's happened in a case you've inherited from another attorney?** Read the firm's bills to the client. Every attorney's and paralegal's actions have been summarized in a daily log for your review.

**You never know where your next case will come from.** Treat everyone as if it will come from them.

**When wrestling with an issue or concern,** approach your boss with solutions, not more problems.

**Never throw a fellow associate under the bus.** Don't trust those who throw others under the bus.

**90 percent of communication is body language.** Whether at work or at home, see what people are really saying.

**Unless you're a sociopath, people have "tells" when they lie,** and invariably they have the same "tells" each time they lie. It may be they look down, they clasp their hands, they take a pregnant pause, stutter slightly, fold their arms, take a step back, etc. When you know a person is lying (and yes, we have all caught others in bold-faced lies), study their cadence and body language. The next time they say something and use the same cadence and body language as they did when you caught them in a lie, odds are they are lying again.

**When you find a good court reporter,** stick with him or her. Same holds true for a translator.

**Show me a lawyer who keeps his head in an emergency situation** and I'll show you someone worthy of emulating.

**Don't hide your mistakes.** It only makes matters worse. Problems you avoid only become bigger ones. Fess up, confront them and devise a plan on dealing with them.

**Other attorneys who care where you went to law school,** or what your law school is ranked (or worse, already know what your law school is ranked) aren't ones you will enjoy having a beer with at happy hour.

**Fear is a great motivator.** It's also a great paralyzer. Use it, don't be used by it.

**Does this witness advance my case?** If not, why am I deposing him?

**Humor is often the answer** when dealing with difficult opposing counsel. A self-deprecating comment generally dissipates the tension in the room.

**Don't answer a client's question unless you know the answer.** There's nothing wrong with telling a client you'll look into it and get back to them shortly.

**Problems are never as big as they seem.** Many folks before you have faced the same problems and have figured out how to resolve them.

**Almost all mistakes can be fixed.** Yours likely falls in the 99 percent category of fixable mistakes.



