GETTING THE SMALL CAR WRECK CASE TO TRIAL IN AN EFFICIENT MANNER
-OR-
JUST SAY NO TO SMALL OFFERS

I. INTRODUCTION

When the claims adjusters at Safeway, State Farm and the other devils of the insurance industry say to us: "I can pay you $1,500.00, take it or leave it," and we know the case is worth $5,000.00, our response as trial lawyers who are charged with representing the interests of innocent injury victims cannot be: "O.K." Instead we must say "No"; we must be ready to tell them that we will see them in court.

In the last few years the insurance industry has collectively, with some few exceptions, decided that small claims will not be paid fair value. The insurance industry wants to treat a small injury as if it were no injury. To accomplish this goal, the carriers have created in-house captive law firms and hired low cost outside counsel, so that it is prepared to force us to try small cases. We trial lawyers, instead of challenging this concerted effort by trying cases, have wimped out and either refused to aid injury victims or we have talked our clients into accepting the crumbs that have been offered. When we do this, our clients lose, we lose, and the American system of justice loses.

Small car wrecks will never be particularly profitable to try. The reality of practicing law is such that it is hard, from a straight economic analysis of a particular small case, to justify the time demanded by drafting a lawsuit and discovery, answering

discovery, appearing at depositions, preparing for trial, and trying the case. However, looking at the trial of a small car wreck case independent of its place in the total universe of our law practices is shortsighted. Instead, we must consider these cases as extraordinarily profitable in that the following good things are associated with the trial of a small car wreck case, which add immeasurably to the value of our personal law practices and the justice system in general. At a minimum, **we profit** by getting the insurance industry's attention so that it will know that it cannot continue to make victims take whatever it offers regardless of how ridiculous, **we profit** by becoming better trial lawyers, and **we profit** by maintaining integrity in a system that too often is little more than a mechanism for the application of numerical formulas to determine the value of human injury without regard to the individual's actual injury.

II. JUST SAY NO

Many of us have opportunities to handle nothing but large cases, and we expect all of our fees to be at least $100,000.00. Others rarely see any cases of real significant value and have never earned a fee over $25,000.00. Regardless of the economic nature our individual practices, we can all profit in many ways from trying small car wreck cases. By saying no to low offers we and trying small cases we improve our chances of getting a big verdict when we handle a big case.

A. Trial Advocacy Schools Are No Substitute for Real Trials.

By just saying no to low settlement offers we have the opportunity to try a case to a jury. Going to a C.L.E. program at which jury trial skills are taught by the use of mock trials and hands on practice costs several hundred dollars, and while these programs are indeed valuable, they are no substitute for the real thing. In trial advocacy schools there is never an opportunity to pick a real jury from a real venire made up of regular people. In trial advocacy schools there is never an opportunity to conduct an opening statement where it actually matters if the jury is impressed. In trial advocacy schools there is never

an opportunity to conduct a direct examination of a client who, though supposedly at the scene, is too nervous to testify about what caused his injuries. In trial advocacy schools we do not get to practice perfecting a record before a judge who has no patience. In trial advocacy schools the jury does not actually return a verdict, which represents real money. No fee is ever earned. No client is ever helped. In short, trial advocacy schools are just that - schools.

However, by just saying no to low settlement offers and actually trying the small case we, as trial lawyers, get to have the real world experience of trying a case. This is far better than any trial advocacy school and has a significant value in and of itself. There is no substitute for actual trial experience. For those of us who are genuine trial lawyers our idea of nirvana is to try the "big case" and get the headline verdict. But if we really think about it, what is the likelihood of getting the "big verdict" in the "big case" if we never try cases. If we never try cases the voir dire will be awkward and ineffective, the opening will be scary and boring, and the witnesses will have no experienced shepherd to guide them with focused questions. Our opponents, on the other hand, will be superbly experienced lawyers who try numerous big cases ever year. The insurers do not allow inexperienced trial lawyers to handle big cases. Our clients deserve no less. If we want to try big cases we have to get experience by trying small ones. If we want to remain sharp as trial lawyers, unless our practices allow us to get in the courtroom for big cases several times a year, we have to try little cases.

B. Damages Cannot be Computed with a Calculator.

Insurance company claim adjusters only want to hear about "special damages". They will aggravate the dickens out of us trying to get every medical bill and every penny of lost wages perfectly documented. The reason is simple. All they really care about is the mathematics they use in determining the paltry settlement offer they "can get authority" from some supervisor to make. How many times do they ask about what kind

of human being is involved? How often do they show any interest in talking about how even a fairly minor injury causes havoc in the life of our clients? The answer to these questions is never. We, on the other hand, must take seriously our responsibility of tailoring the damages to the individual. This is not workers' compensation. There is no statutorily imposed table that says we and our clients have to take 3X the medicals. There is no statutorily imposed requirement that mandates that only big cases can be tried. But there might as well be if we are not going to force the hands of the insurance companies by calling their bluffs and saying "no, my client will not accept half of what is fair." By insisting on real values, we can make the insurance companies accept the fact that "half justice is no justice". The world will be a better place if we do.

Additionally, by being reasonable in our insistence that our clients get fair value, the public will be made to have confidence in the system. This will help us on the big cases too.

III. JUST DO IT

Lots of papers have been written on opening a file, interviewing the client, and preparing settlement brochures[1]. This is not one of those papers. It is assumed that we all have wonderful systems for opening files with appropriate fee agreements, interview sheets, and questionnaires. It is assumed we know how to gather medical records, take photos of the scene and vehicles, and interview witnesses. It is assumed we know how to send a liquidated damages demand letter and a settlement demand. For purposes of this paper, settlement efforts have proven to be a waste of time[2]. Accordingly, this paper

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[1] E.g., Michael J. Warshauer, *Preparing for Trial*, I.C.L.E. Personal Injury Practice, (1995).

[2] If we really analyze it, settlement brochures in most small cases are a waste of time. The adjusters do not give extra points for pretty settlement materials in the very small case. All they care about is the specials so they can apply an arbitrary multiplier,

is about getting our clients' lawsuits filed, getting to the courthouse, and trying a small case in an *efficient* and *effective* manner. *Efficient* from an economic point of view so that we can minimize the time expended, and thus maximize our profits, and *effective* in actually obtaining a verdict, after expenses, that exceeds the settlement that was rejected.

We emphasize doing all of the work at the front end of these cases because this is simply more efficient than doing part of the work, then letting a couple of months go by and then doing some additional work. It is more efficient to do this work at the beginning because before the additional work can be done we have to re-learn the file. This is a waste of time and time is the real enemy on small cases. The key thing to keep in mind is to work these small files the right amount. On the one hand, it makes no sense to spend more money and time on the file than it can bear. On the other hand, if sufficient time and effort is not expended the case will be guaranteed to be a loser. The case must be prepared for trial - not for settlement. The best way to guarantee a trial is to not prepare for it. Once it is determined that suit is necessary, go ahead and prepare for trial as completely as possible and as soon and as early as possible.

A. Keep the Complaint Simple.

Getting a simple car wreck started is really no different than starting a big car wreck case. The complaint should be a short statement of the claim[3] but with enough

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that they alone get to pick, to the special damages. So, while it is not the subject of this paper, it seems to me that a simple letter enclosing the medical records, police report and demand is a more efficient use of our time than spending hours creating a brochure which will not be read and will not be given consideration even if it is read. Instead, make the demand simple and fast. If they pay an amount satisfactory to your client that is great, if they do not, use the time saved to prepare for trial.

[3] O.C.G.A. §9-11-8(a)(1)(A).

information so that, if it goes out with the jury, it will illustrate the plaintiff's position. Thus, instead of spending a lot of time re-inventing the wheel when drafting a lawsuit, keep the complaint as generic and plain and simple as possible. Resort to forms that require nothing more than the change of the caption! In this regard, we have prepared a simple complaint for a single victim, a simple complaint for a single victim with loss of consortium claim, a simple punitive count for use when the defendant driver was drunk, and a more complex complaint when multiple parties are injured in the same wreck and they have agreed to waive any potential conflicts so that their cases can be tried together. All of these forms are attached as Exhibit A to this paper. Be mindful that the complaint may be read to the jury by the other side, so it keep it clear and concise. If it is outrageous or has incorrect factual allegations, it can be more harmful than helpful.

B. Do As Much as Possible Every Time the File is Handled.

Because time is the single biggest cost in preparing a small car wreck case for trial, and as each time we touch the file the time expended goes up, we need to do as much with the file each time we handle it as we can. This will greatly reduce the total time expended and will increase the profitability of the file. It will also get the case to trial faster and this will please the client. Do as much in your first meeting with you client as possible: get medical releases (some signed in blank), all background information (DOB, SS#, etc.), releases for tax records (IRS Form) and all contact information (cell phones, home phones, emails, address, etc.).

Also, discovery should be served with the complaint.[4] Prepare simple discovery, which gets the information needed, and which will actually be answered. Sample

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[4] This rule of thumb does not apply in Federal Court where there is a 30 day waiting period before discovery can begin. *See* Local Rules of the Northern District of Georgia.

document requests, interrogatories, and request for admissions that should be served with the complaint are attached as Exhibit B to this paper.

C. Draft Efficient Discovery Requests.

Draft discovery that the other side will answer. Reading the discovery from the point of view of a total idiot can ensure the other side will answer the discovery. If a total idiot can understand the question and will not believe it so broad as to be unintelligible, then the question has at least a chance of being answered by defense counsel. In small car wreck cases the discovery should be prepared so that the defendant's answers will support a simple motion for summary judgment on liability. Good discovery requests may even allow us to avoid even having to take the defendant's deposition[5]. Of course, even if we are not sure about taking the defendant's deposition, we should nevertheless go ahead and notice the deposition of the defendant at the same time as filing the lawsuit so that we will not have to fiddle with that again as the case progresses. Notice it for a date certain 90 days out but put in the notice that you will work with defense counsel to reschedule at a mutually agreeable time if necessary.

D. Get the Charges and Pretrial Order Started.

Additionally, we need to get our jury charges and pretrial order started. This seems ambitious, but when you are already in the middle of a case preparing the complaint and discovery, it is much easier and efficient then waiting to do this on the back end. The jury charges can be put together at this time as part of the effort to prepare the motion for summary judgment. Again, since the file is already spread out, and we are thinking about it, working on the jury charges early at the time the lawsuit is drafted is an efficient use of time. In order for these files are to be successfully handled, we have to be efficient. Just as importantly, having the jury charges completed

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[5] Of course, if the case has been properly prepared the defendant was interviewed, on tape before suit was filed and everything he or she has to say is already known.

emotionally commits us to the trial process and frees us to prepare for the trial in the days before the trial instead of wasting time preparing jury charges.

While not all judges require pre-trial orders in small cases, it seems that defense lawyers like them (another way to increase the amount chargeable to the file perhaps?) and they are becoming the norm. While one way to look at a pretrial order is as a pain in the butt; a better view is that during the preparation of a properly prepared pretrial order we are forced to succinctly state our claim, identify our damages, identify our documentary evidence, and list our witnesses. At the beginning of the case is the time when this should be accomplished, as there is still time to get everything together before trial.

E. Draft a Simple Motion for Summary Judgment.

As we all know, the best defense is a good offense. With that in mind, the last item worth considering at the time the complaint is drafted, while everything is fresh in our minds, is the preparation of a motion for summary judgment. Again, the emphasis here is minimizing out investment in time in the case and keeping the trial simple and not taking any chances. There are indeed juries that will let a defendant driver off in a rear end collision - but there are very few judges who will do so. An additional advantage of filing a motion for summary judgment after written discovery is filed but before the defendant's deposition is taken, is to see the very best defense the defendant can come up with. The affidavit filed by the defendant can then be used in his deposition or at trial to impeach the defendant if it is contrary to what most likely happened. The defendant's affidavit is a free bite at the discovery apple and in a small case anything free should be taken advantage of. The defendant's affidavit might even replace the need for taking his deposition.

Most plaintiffs' attorneys look at motions for summary judgment as something to be responded to instead of as an affirmative tool to narrow issues and establish liability.

Use motions for summary judgment aggressively to get the defendant on the run and to flesh out the best defense that the defendant has to offer. Some trial courts are very reluctant to grant a plaintiff a partial motion for summary judgment as such orders do not prevent the trial. Do not let this intimidate you, because even if the motion is not granted you will have at least educated the trial court on that the issue so that it is more likely that a decision on it will go in your favor. This will also help at the directed verdict stage. Also, an order determining liability is a lot better than allowing the defendant to come forward, admit liability, and obtain some degree of capital because it has done the "right thing" by admitting liability[6].

F. Get the Suit Started Properly.

1. Perfect Service of Process

No suit can be started without service of process being properly perfected. Know the rules and follow them. Do not hesitate to have a special agent appointed for service of process. A sample motion and order appointing a special process server is attached as Exhibit D. If you have trouble finding the defendant, keep accurate notes which will support your argument that you diligently pursued him. This is especially important if you are close to the expiration of a statute of limitations.

2. Pay Attention to Affirmative Defenses

Read the Answer and figure out which affirmative defenses will cause trouble down the road. Failure to state a claim is rarely a big deal and is mostly pled with no

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6 If the defendant does admit liability it is important to touch on this topic during voir dire. Jurors who believe that the defendant's conduct in "doing the right thing" by admitting liability somehow reduces the damages suffered by the plaintiff should be struck or at least neutralized. If the plaintiff has suffered an injury which demands compensation, that compensation should not be reduced because the defendant accepts liability.

real intention to claim that an allegation that the defendant ran a red light is not a claim cognizable under the law. The big ones to look at are venue, jurisdiction, and service. If any of these defenses are raised, you should follow up on them immediately. Often a phone call to defense counsel will result in an easy cure; "are you really saying that we did not get proper service?", "why is jurisdiction not proper", and "why do you think venue is inappropriate" will generally solve most of your problems. Sometimes, discovery is necessary. Included in the sample of discovery are questions useful for determining the basis of affirmative defenses relating to service and jurisdiction. Regardless of whether the effort is formal or informal, correcting service defects must be done promptly as the serving party has an obligation to exercise due diligence to perfect service of process. Georgia caselaw, especially some more recent cases, have made it clear that it is essential to perfect discovery as soon as you learn of a possible defect.

IV. PREPARE FOR TRIAL EFFICIENTLY

After all of the initial work described above is completed, the next phase is discovery and trial preparation. In small car wreck cases, all of the written discovery requests will have been drafted and served along with the complaint. However, as we all know, the fact that discovery is served in no way guarantees that it will be answered. Accordingly, it is important to review the discovery responses as soon as you receive them back to ensure basic completeness. It is not necessary that the defendant answer everything perfectly. These cases are not product liability and malpractice cases. Avoid discovery fights if at all possible, but do not lay down on the essentials. We need to keep our goal in mind - to get to trial with as little work as possible while still being prepared to get a satisfactory verdict. Most of the time a satisfactory verdict is determined by what we do to prepare our client and our witnesses not whether the defendant answered discovery. So instead of worrying about whether the defendant has had multiple prior speeding tickets, or graduated from high school, we need to devote our energies to

proving our damages. As the liability facts cannot be improved upon – the defendant is either gong to admit he was at fault or he is not – our focus of trial preparation must be on damages.

A. Use Depositions Sparingly.

Assuming that the written discovery nets *adequate* answers; in most clear liability cases there is no need to depose the defendant. Why waste the money and time? Our focus should be on damages, not liability. Obviously there are times when the deposition of the defendant is necessary. On those occasions, we need to continue to keep in mind that time is money and money is tight on small car wreck cases. Do we really care to know the details of a speeding ticket the defendant got five years ago or where the defendant went to high school? Of course not - the information is not admissible or even relevant and certainly does not help our case. Instead, focus on the important information that relates to the case. This can usually be accomplished in less than forty minutes.

We must keep in mind that while it is important to keep the economics of the small case in mind when deciding which depositions to take, we should not allow these economic decisions to cause us to delay taking depositions. Instead, once we decide the case is going to trial we need to make the emotional and financial commitment to getting it ready. This includes taking necessary depositions. Delaying depositions to the week before trial displays a lack of commitment to going to trial and often results in unnecessary continuances. In all cases continuances cost extra time and money even if just in the time value of money. In small cases every penny and every minute counts.

It is amazing how many lawyers believe that the only way to talk to a witness after a case starts is by deposition. This is ridiculous! The use of a deposition to interview a witness guarantees that the other side will be there and learn what the noticing party learns. It will also guarantee that a free 15 minutes phone call turns into a hundred of

dollars and 2 hour investment. Instead, consider having the witness come to your office and take a detailed statement, before a court reporter or at least on tape, without even inviting the other side.

B. Depositions are Not Trial Testimony Until Used At Trial.

In you know a witness is going to be hostile or adverse, notice his or her deposition so that you can lead the witness and control the deposition. On too many occasions, it will be discovered that the deponent is going to be hostile or adverse only during the deposition, which may have been noticed by the deposer for use at trial[7]. Often this is not realized until well into the deposition when it is too late to simply cancel the deposition and go home. When this occurs, stop using direct, non-leading questions, which allow the hostile witness to harm your client and start leading! Of course the other side will begin objecting, but ignore him and just keep leading. You are not going to use the deposition in your case in chief, and thus, you are not required to use direct questions and are instead allowed to cross-examine. Just because a deposition is noticed for preservation of evidence and use at trial, particularly a doctor's deposition, does not mean that the party noticing the deposition is stuck with the witness. Until called at trial, a witness belongs to no one.[8] When the other side starts his examination, he will naturally begin using leading questions - object to all of them. Then, during the trial when you have not read the hostile witness's testimony in your case in chief, the opposition will attempt to do so in its case in chief. Unfortunately for him, you had been preparing for trial when you took the deposition and in anticipation of his reading the transcript in his case in chief and had made the appropriate

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7 We do not believe there is a difference between a "discovery" deposition and a deposition for use at trial. Either can be used at trial, and regardless of how the deposition is noticed, the witness can be called at trial.

8 O.C.G.A. §9-11-32(c).

objections. If you objected properly, he will have only a few direct questions and you will have a blistering cross-examination. All this is true because:

> A deponent's testimony obtained through discovery, does not belong to or bind either party until such testimony is introduced in evidence at the trial of the case, whereupon the party introducing it adopts the testimony and is bound by it.[9]
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> What constituted the direct examination of a witness whose testimony was initially taken for discovery, could not be determined until the trial, when one of the parties elected to use the testimony on his behalf. At that time, the rules governing direct and cross examination would apply.[10]

C. Get the Case Ready Fast.

Try to get the case ready for trial within six months. Again, keep in mind that time is money. The longer the case goes on the less valuable it gets, and the more likely the plaintiff will grow disappointed with the system and be willing to accept less than that which is fair. Additionally, as time heals all, the longer the time between the acute phase of the injury and trial, the weaker the testimony establishing damages may be. If two or three years has passed since the date of the wreck, the fact that the plaintiff was acutely injured and unable to enjoy life for six months will be overshadowed by the fact that he has played golf sixty times since then and now has a three handicap! To accomplish this goal of getting a case to trial rapidly, we need to get things like medical depositions scheduled early. In the small cases to which this papers is relevant, the plaintiff has usually reached maximum medical improvement before suit is filed. Thus,

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9 *Travis Meat Seafood Co., Inv. v. Ashworth*, 127 Ga. App. 284, 286 (1972).

10 Id. at 287.

there is no need to delay in scheduling the medical depositions. Do it right away - as soon as the defendant answers the complaint. Get certified medical records from hospitals and use depositions on written questions for simple opinion witnesses such as radiologists. Also, consider filing medical narratives. This is a good way to get in medical testimony without having to spend the $500-$1,000 per hour that some doctors will charge.

Additionally, we need to answer discovery fully and timely to avoid delays. This establishes credibility and moves the case along. Additionally, it prevents an unnecessary trip to the courthouse to answer why discovery was not answered. We must make sure that the plaintiff understands the interrogatory answers. Keep in mind that all answers can be read at trial by the other side, not as impeachment necessarily, but as materials in the defendant's case in chief. So answer carefully and completely.

D. Stipulate the Case to Trial Properly.

As soon as we have finished preparing our case we need to stipulate the case to trial. A stipulation should simply say that the plaintiff stipulates the case to the next available trial calendar. An example is attached to this paper as Exhibit D. Keep in mind that each court is slightly different. Accordingly, always call the court's calendar clerk to ensure compliance with that court's practice. The information you learn in this 5 minute conversation could prove invaluable.

V. BE READY FOR TRIAL

If we have followed the advice of preparing as much of the case as possible when the lawsuit is filed, the final preparation for trial will be fairly simple. By working the case efficiently, this last week before trial can focus on damages, polishing the trial theme, and witness preparation. Jury charges, exhibits, depositions, and the like will all have been taken.

As trial approaches, a meeting with the witnesses will be necessary. If possible meet all of the witnesses at one time as this is the most efficient use of time and also makes each witness better understand his role in the trial.

VI. HELPFUL TRIAL HINTS

A. Be Reasonable; These are Not Million Dollar Cases.

In voir dire and in the opening, keep the case focused on reasonableness. Overreaching in a small case is fatal. Instead, make the defendant the unreasonable one. Paint the defendant as the one who will not accept responsibility for causing an injury. Make the jury believe that you are only ask for what your client is owed.

Keep the trial short and focused. Use the right amount of witnesses. Get in and get out. At trial, an effective witness formula in a small case is one medical provider, two pain and suffering witnesses, and the plaintiff as the plaintiff's case. If liability is an issue, the investigating police officer can also be quite helpful. Additionally, reading the defendant's admissions and interrogatory answers into the record may be appropriate and may save a lot of time. Try to get at least one witness who is not related to the plaintiff as a pain and suffering witness. Keep the plaintiff from whining too much. Instead, have the pain and suffering witnesses to do the complaining for the plaintiff. Keep the trial focused and moving rapidly. The jury will have no tolerance if you try to take a case in which the plaintiff has $3,000.00 in medicals (most of which is physical therapy or chiropractic), no surgery, and no real lost time from work into too big of a deal. Spend the juries time appropriately, and they will likely reward you for this. If you appear reasonable and fair you will obtain a fair and reasonable verdict which will likely exceed the defendant's best offer.

B. Use an Effective Trial Theme.

A car crash is not a sterile legal event. Instead, a car wreck is an every day tragedy involving real people with real damages. Our task is to convince the jury that

the plaintiff we represent is a victim entitled to full compensation. This can only be accomplished through the effective presentation of the facts within the framework of the law which governs the case. This process requires us to develop a theme which will carry the case through, over, and sometimes around the many obstacles which make up the plaintiff's legal theory and that of the defendant.

The best way to present the facts of a case is to tell a story. The most memorable stories are those which both illustrate a moral and which can be summed up in a phrase or two. In the realm of trial practice, the moral to our stories is our legal theory and the phrase or two which captures the essence of our moral/legal theory is our trial theme.

> A trial theme is the single phrase which lends credibility, through human experience, to your version of the facts. An effective trial theme will leave a jury with no choice but to apply the facts, presented within the framework of the legal theory of recovery, and award you a verdict.

The trial theme is *not* the legal theory of recovery. The legal theory of recovery is the *why* of our case and the theme is the *how* of your case. For example, in a typical intersection case the legal theory, that is the reason *why* our client is entitled to recover, is almost always that the defendant failed to yield the right of way. The themes which are applicable to such a case are as broad as the imagination of the trial lawyer, who will tell the story of the crash through the voices of his or her witnesses illustrated by exhibits. *Negligence* is not a theme - it is a legal theory. *Careless failure to prevent injury* is a theme. Note the emotional difference. Talking about negligence does not establish emotional or psychological responses in the jurors. Talking about a defendant's careless failure to prevent injury evokes a variety of emotions and images which are likely to aid the plaintiff in obtaining a fair recovery.

The theme needs to be developed as early as possible. In fact, it is good practice to begin thinking about an effective way to tell the plaintiff's story even while we are being told it the first time. Write down everything that comes to mind with regard to the theme and put it in a file. Most importantly, we must think about the theme when we are thinking about the legal theory of recovery - the two, though separate, nevertheless go hand in hand. Sometimes they even share the same words. "The value of the trial theme is that it (1) personalizes case issues and (2) helps jurors form impressions - and impressions win [and lose!] lawsuits."[11]

We must be ready to refine or totally change the theme as trial approaches. A theme painting the defendant as the devil incarnate, which sounds wonderful when you hear your client's version of the story, may prove totally inappropriate when you meet the soft-spoken, frightened, gray haired elementary school teacher who ran into the back of your client on her way to church choir practice. It might even prove necessary to change the theme after we hear the defense counsel's ridiculous opening which makes even the judge look up and smile. Similarly, a sub-theme often arises from the defendant's opening.

An effective trial theme will fit the law, the facts, and the people involved in the trial. In order to develop a theme which will carry us to victory we must know the law which will govern our case. Not only must we understand the law supporting our cause of action, and right to recover damages, we must also consider and understand the rules of evidence which will govern what facts can be used to illustrate our theme. If our theme is best illustrated by inadmissible testimony it will not be very effective. Try to focus the theme - damages or liability. While focusing on one issue or the other is usually a good idea, in the rare case where it is possible, find a theme which covers both liability and damages. In many small car wreck cases, liability is not the major problem

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11 Amy Singer, Jury-Validated Trial Themes, *Trial*, October, 1994.

and the theme should focus on damages - this is particularly true in rear end collisions which leave our clients with soft tissue injuries.

As noted above, trial theme selection is limited only by the imagination of the trial lawyer. But the best and most effective themes are those with which the jury and the witnesses are familiar. A wonderful quote from an obscure poem, while perhaps a good theme is not usually going to be as effective as a quote from a well known source. A good theme should be as commonly understood as the easiest phrase used on *Wheel of Fortune*. When choosing a theme, insure that it can pass the *Wheel of Fortune* test - if Vanna White will have trouble understanding your theme you can be assured that the jury will be slow picking up on it. Every bright nine year old will understand and appreciate an effective trial theme. A great trial theme will naturally, almost magically, fill in the blank in a sentence which begins like this:

This is a case about _____.

A great trial theme will serve as the title of the book written about our verdict and will fit on movie marquees "at a theater near you". It will be consistent with human experience and common sense.

The plaintiff must *own* the words used in our trial theme. Noted trial consultant, Amy Singer of Trial Consultants, Inc. calls this concept "attribution theory"[12]. This theory provides that words "belong" to one side of the dispute or the other. We as plaintiffs' lawyers must insure that the words used in our theme, in the questions to and answers of witnesses, in our arguments, and even in the jury instructions belong to us and are consistent with our trial theme. The classic example in a car wreck case involves one word descriptions of the event. The defendant owns these words: accident, fender bender, soft tissue injury, and whiplash. All of these words give linguistic cues which are helpful to the defendant in minimizing the event and its consequences. On the other

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12 Id.

hand, the plaintiff owns these words: crash, violent wreck, and torn cervical tendons, ligaments and muscles. We must take the time to figure out which words we want to own and use them so that the jurors recognize the case in terms of words the plaintiff owns and gives to them.

No matter how great the theme, it will be of no benefit if not properly used. Themes need to be verbalized and told directly to the jury - as early as voir dire and again through every witness and argument. In fact, if the theme is discovered early enough, it should be used in depositions as much as possible. It is quite easy to incorporate a theme into the hypothetical question[13] during medical depositions.

In most car wreck cases the medical evidence comes into evidence through deposition testimony taken months before the actual trial date. Unless the theme has been considered prior to the deposition, it will obviously not be a part of the testimony, and a golden opportunity will have been lost. It is a fairly simple matter to include words "owned by the plaintiff" and the theme itself when questioning a physician.

It is imperative that our witnesses know the theme of our case. This will help them understand the importance of their testimony and they will often naturally tell their story as a chapter consistent with the theme of the trial story itself. We must meet with the witnesses, in a group, before trial, to educate them about the theme. Witnesses who are aware of the theme will usually assist in the presentation of that theme to the jury.

A word of caution is in order. If we choose a theme which is too clever or too cute, or which fails to fit the facts, it will be used against you with devastating effect. Remember, in small cases we must be reasonable.

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[13] By referring to "hypothetical question" this does not mean that such questions should be used. Instead, see if the medical provider will agree, to a reasonable degree of medical certainty that the initial history given by the plaintiff is the cause of the injuries.

The theme can be considered the "Mantra" of our trial. To be repeated, referenced, illustrated, and expanded upon at every turn. Sometimes an alliterative theme such as Death, Despair, and Destruction will prove effective. This continually repeated theme will, like an effective advertising jingle, "echo in the Jury's mind when they retire" to decide your client's fate.[14]

C. Be Physically and Emotionally Ready for Trial

Even a short trial is a physically demanding exercise. We must keep ourselves in good physical condition and ready for the stress. Exercise regularly and get plenty of rest. Do not come into a trial already exhausted. These small care wreck cases should be fun and educational. During the final preparation and during the trial itself, do not handle other matters. Focus on the trial.

D. Obtain and Serve Subpoenas

Witnesses must be served with subpoenas and appearance checks. We should not wait until the night before trial to do this. Instead, we should serve our subpoenas when our case first appears on a calendar. Keep the witnesses informed - the key witness is almost always on vacation during the first day of trial unless you have kept him informed. File the subpoenas in court as required.

A subpoena may be served by any sheriff, by his deputy, or by any other person not less than 18 years of age. Subpoenas may also be served by registered or certified mail.[15] When service is made by a person, proof of service is made either by filing a return of service to the court or by completing a certificate actually endorsed on a copy of the subpoena.[16] When service is made by registered or certified mail the return

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14 Lake Rumsey, *Master Advocates' Handbook*, p.4.

15 O.C.G.A. § 24-10-23.

16 Id.

receipt constitutes prima facie proof of service.[17] Subpoenas served at least ten days before trial is the best practice.[18]

A subpoena which is not served until the last twenty-four (24) hours before trial is not likely to be sufficient to support a motion for continuance if the witness does not show up for the trial.[19] After a subpoena is properly served, it is not necessary to reserve the witness just because the trial is continued to another date; the party who has served the subpoena can advise of the new date by less formal means.[20]

Of course, a party can be compelled to trial by service of the subpoena on his attorney of record.[21]

F. Keep the Court Informed

We must make sure conflict letters are timely and complete and suggest to the court the course of action we intend to take and where we intend to be. Surprise is what courts hate the most.

G. Be Familiar with the Court

While it is time consuming to do so, in keeping with the educational purposes of trying small cases, we need to go and watch the court try a case or at least part of case. We need to know how voir dire is conducted. Prior to trial we should introduce ourselves to the judge and ask him if there is anything we can do to assist him in getting ready. Know the bailiff and the court reporter. We must be ready, even in a small case to make the courtroom ours and fill it with our friends. Find out if the courtroom has

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17 Id.

18 *Frost v. Pennington*, 6 Ga. App. 298, 65 S.E. 41 (1909).

19 O.C.G.A. § 24-10-25(a); *Eubanks v. Brooks*, 139 Ga. App. 166, 227 S.E.2d 923 (1976).

20 *Mijajlovic v. Stat*e, 179 Ga. App. 506, 347 S.E.2d 325 (1986).

21 O.C.G.A. §24-10-23.

plaintiff and defendant tables. If not, we must be prepared to get to the courtroom early in order to get the table we want.

H. Make sure your Discovery Responses are Supplemented

When doing the final preparation, do not forget to supplement the discovery responses to include all of the witnesses who will be called (of course this should have been known in the beginning) and make sure the other side does the same thing. Discovery responses can be read at trial, and, if the parties have not supplemented, half-answered requests can be a powerful impeachment tool.

I. Be Careful With the Pre-Trial Order

We must make sure our pre-trial order is timely and complete. We must be in control of the pre-trial pleadings. We have to read everything in the file before, not after, the pre-trial order is submitted. This is preparation time o complete the trial notebook. The pre-trial order should be properly supplemented with witnesses and exhibits, if necessary, in accordance with our supplemental discovery responses.

J. Use Exhibits.

Using exhibits and photographs in a trial is a bit of a learned art. The time to learn to use trial gadgets is in a small case - not the biggest one of our careers. We should use these small cases as opportunities to practice different types of demonstrative evidence and techniques. Easels, overhead projectors, simple medical illustrations can be unwieldy. However, it is far better to get comfortable with such materials when the risk is low than it is with a client's future on the line with no room for error.

K. Polish the Opening Statement

If the trial notebook was properly prepared, it will have a sketch of an opening. In the days preceding the trial, the opening should be polished to the point where you know it cold. Practice openings without notes. After all, there are only gong to be three

or four witnesses. The case will only last a few hours. If we do not know such minimal facts well enough to recite them from memory the jury will punish us and our client.

L. Complete the Jury Charges

Jury charges are an essential aspect of trial preparation.[22] They serve as the outline for case preparation. The facts must be relevant in light of the instructions the court will give to the jury. Write good charges. Make them simple and short. When turning in requests, ask for both pattern charges and charges uniquely relevant to the case. In order to save trees and keep your stack of paper to a minimum, use a cover sheet in which the pattern charges are requested and then ask for additional charges in addition to those.

Jury charges are the legal framework within which the trial theme is placed. We must aware of the boundaries of this framework from the very beginning of his handling of the case. To be effective, jury charges must be understood by the jurors. "The purpose of an instruction is to aid and enlighten the jury, and this object is defeated by instructions which confuse the jury."[23]

Jury charges are the legal framework within which the trial theme is placed. A conscientious attorney will be aware of the boundaries of this framework from the very beginning of his handling of the case. To be effective, jury charges must be understood by the jurors. "The purpose of an instruction is to aid and enlighten the jury, and this object is defeated by instructions which confuse the jury."[24]

"A requested charge should be given only where it embraces a correct and complete principle of law which has not been included in the general instructions given

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22 Michael J. Warshauer, *Jury Charges - Writing, Using and Preserving, Plaintiff's Personal Injury Practice*, ICLE, (October 15, 1993).

23 *Reid's Branson Instructions to Juries* v. 1, p.293 §103 (1960 replacement).

24 Id.

and where the request is pertinent and adjusted to the facts of the case."[25] This legal principal is not enough to guide the preparation of good jury charges. When preparing jury charges, the words of Senior Judge James B. O'Connor, Oconee Judicial Circuit, should also be heeded: "This must be done in such a manner that no harmful error is committed in stating or failing to state the issues and the law, but more importantly, should be done in simple, straightforward, and understandable language for the layperson."[26] This goal, easily spoken, is rarely achieved.

"Research indicates that challenging the language and structure of instructions through improved organization, grammar, and vocabulary, can increase juror comprehension as much as two times over the original pattern instructions."[27] In fact, "an analysis of appellate cases confirms the intuition of lawyers and judges that juries often misunderstand instructions. In recent years social scientists have documented that misunderstanding. Social science experiments have shown a significant gap between what judges instruct and what jurors understand. A few empirical studies by psycholinguists have further shown that juror comprehension can be improved dramatically if jury instructions are rewritten to improve their vocabulary, syntax, and organization."[28] In short, we must strive to improve jury charges so that they are understandable and clear. There is no better to place to practice this than in small car wreck cases. certainly, if we cannot succeed in making the law governing a small car wreck clear then we will never have any success in the "big case".

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25 *Gates v. Southern Railway Company*, 118 Ga. App. 201, 204 (1968)

26 Preface to Pattern Jury Instructions of the Council of Superior Court Judges of Georgia

27 *The Psychology of the American Jury,* Jeffrey T. Frederick, P.271, 1987

28 Steele & Thorburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. Law Rev. 77, 83 (1988)

M. Prepare the Witnesses

By the time the case is on a trial calendar, all of the witnesses should have been interviewed and told their roles in the case. However, this is not the same as preparing them for trial. To prepare witnesses for trial, they should be brought together as a group and told what the trial is about and the procedures which will be followed. We should tell them that we have to ask direct questions and the other side can lead. We should practice asking them questions and going through the basics of what we want them to testify to. However, we must be careful to never over prepare a witness, especially the plaintiff! An over prepared witness looks like he is reading from a script; if there is any interruption, he loses his place on the script and can't figure out what he is supposed to say. Instead, we should emphasize to him that his role is to tell the truth and follow our lead. Direct examination is like a dance - it works well if one person leads and both partners are dancing to the same music.

N. Write a Motion in Limine

Motions in limine are not always necessary, but it is usually good practice to raise a few points, such as collateral sources and that unrelated DUI your client got in college. Some courts want to have these kinds of matters handled weeks ahead of the trial and others want to wait until the morning of trial. Find out the court's preference and follow it. Remember that motions in limine are treated differently in federal court and state court. In federal court, if the motion is denied, the objection must still be made at the time the evidence complained of is offered. In state court, the motion in limine obviates the need to make a contemporaneous objection. Make sure that the court does indeed rule.

O. Direct Examination

Direct examination is the most important part of the case. Use the small case to become an expert at it. "Direct examination is more important than cross examination,

the opening statement or closing argument."[29] Lawyers talk about a brilliant and scorching cross examination but it is the direct examination through which the plaintiff's case is won or lost. Most of the evidence in the plaintiff's case comes in through direct examination. Direct examination is often given too little attention and time by attorneys. Instead, the focus is on preparing for, and conducting, a blistering cross examination of the opposition's experts and lay witnesses. This is a mistake! Unless the jury has been convinced by the evidence, which comes in through the direct examination of the witnesses on whose testimony the case hinges, there is no amount of cross examination which will salvage the case.

Cross examination is merely damage control; direct examination establishes the prima facie case. In fact, if the case is not proven during the direct examination of the plaintiff's witnesses, it will fail by directed verdict. Simply put, for plaintiff's counsel, direct examination is the most important part of the trial and has the greatest impact on the result. "What happens during direct examination is a dynamic system of intercommunication. The lawyer asks a question of the witness and it is registered not only by the witness but also by the jury, the judge, and the opposing attorney. The witness's reply is registered not only by the asking lawyer, but also by all the above-mentioned participants in the process."[30] Direct examination is nurturing, nourishing, and supporting your witness, focusing the spotlight on him or her. (In direct, the witness is the star, the one who does all the telling.)[31]

An effective direct examination of witnesses will be achieved if there is good preparation, good pace and rhythm, and good luck. Small care wreck cases are where this skill can be learned with very little at risk.

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29 James W. McElhaney, *Trial Notebook*, p. 102.

30 Roberto Aron, et al., *Trial Communications Skills,* § 22.05, p. 258 (1986).

31 S. Hamlin, *What Makes Juries Listen*, (1995), p. 188.

P. Cross Examination

The most important part of preparation for cross examination is to be prepared to "just say no" to cross-examination. If nothing can be gained, let the jury know that the witness is nothing important - not even worth questioning. On the other hand, if the witness can be *hurt*, or the case *helped* by the agreement of the witness with certain aspects of the case, or if additional helpful evidence can come in through the witness, then cross examination is called for. In determining whether or not to cross examine, the following questions must be answered:

(A) Has the witness really hurt you?

(B) Is the witness impeachable?

(C) Is the witness' testimony consistent with your version of the facts?

(D) Has the witness inadvertently helped you?

(E) Can the witness help your case?

If a witness has not hurt you, and cannot help you, do not cross examine him. The Honorable Marion T. Pope once wrote that "no matter how many books you read, seminars you attend, or cases you try, you will never be an effective practitioner of the art of cross examination until you learn to cross examine with a purpose." No rule of cross examination could be truer. A cross examination without a purpose does three bad things - (1) it wastes the jury's time; (2) it presents the possibility for the witness to inflict additional damage; and (3) it allows the opponent who may have forgotten to ask some crucial question an opportunity to do so on re-direct.

In Georgia, the right to a thorough and sifting cross examination shall belong to every party as to witnesses called against him.[32] This right is considered a substantive

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[32] O.C.G.A. §24-9-64.

right and extends to all matters within the knowledge of the witness.[33] Of course, the subject of the cross examination must be relevant.[34]

When conducting a cross examination of a witness, it is not a waiver of any objection made during the direct examination of that witness if the objected to subject is covered. Georgia law provides that "if on direct examination of a witness objection is made to the admissibility of evidence, neither cross examination of the witness on the same subject matter doing the introduction of the evidence on the same subject matter shall constitute a waiver of the objection made on direct examination."[35]

VI. PROTECT THE JURY SYSTEM

In conclusion, it is our job as lawyers to protect the civil jury system. Otherwise there will be no trials to prepare for. Join and give funds to the Georgia and American Trial lawyers Association. Contribute to Law Pac. Be involved and support the Civil Justice Foundation.

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33 *The News Printing Co. v. Butler,* 95 Ga. 559, 22 S.E. 282 (1894).

34 *Palmer v. Taylor*, 215 Ga. App. 546, 451 S.E. 2d 486 (1994).

35 O.C.G.A. §24-9-70.