TRIAL STRATEGIES FROM THE PLAINTIFF'S PERSPECTIVE

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I. INTRODUCTION

It is both my personal view, as well as the view of my firm, that we have entered a "new age" in terms of how personal injury cases should be tried to juries on behalf of plaintiffs. Whether or not significant tort reform ever becomes a reality in Georgia, the truth is that juries have heard and been prejudiced by the tort reformers' relentless public relations campaign. You know the arguments: the civil justice system is nothing more than a lottery; plaintiffs are all manipulators of the system whose sole objective is to get rich; all plaintiff attorneys are scummy individuals preying on injured victims for a fee – the arguments go on and on. As a result of being bombarded with these "messages", it is our belief that juries are now inherently skeptical of not only the plaintiff, but also of his or her counsel. Because we feel the playing field has changed, we have analyzed the way we try cases and have made (or attempted to make) certain *real,* underlying changes in our trial methodology.

This paper will attempt to highlight some of the changes we have made in our approach to jury trials. While the information contained in this paper is certainly not scientific, I hope it will, at a minimum, cause you to at least think about your current approach to trial -- and whether or not you need to implement any changes yourself given this "new environment" we find ourselves in.

II. OVERALL CHANGE IN APPROACH

Years ago I was in a pre-trial conference before a judge in Fulton County when the judge said to all counsel: "I am very liberal with opening statement -- so argue your case. That's what you all want to do anyway." The truth is, until recently, we always looked for ways to argue our case in opening statement -- and throughout the trial as well. The conventional wisdom had always been that we, as plaintiffs, spoke first and last, and that we needed to take advantage of this and argue our points from the beginning of the trial to the end.

In today's environment, however, it is our belief that plaintiff's counsel needs to be much more careful about what we say, particularly at the outset of a trial. It is our feeling that we now need to do everything possible not to overreach, exaggerate, or puff in any respect. The reason we feel this way is that we believe juries in today's environment, because they are inherently skeptical, are looking for *any* argument or exaggeration from us. And, as soon as they hear, or even slightly detect, any such argument or exaggeration, they will immediately stereotype us as "typical" money hungry plaintiff's attorneys. Obviously, once we have been stereotyped as such, even by one juror, the prospect of obtaining true justice for our client, let alone a unanimous verdict, are significantly diminished. The bottom line here is that we now try to do everything possible not to be a "stereotypical plaintiff's attorney" and to avoid having any juror resist us – just because we represent the plaintiff.

III. PUTTING THE CHANGE INTO PRACTICE – THE COMPONENTS OF THE TRIAL

A. Voir Dire

Voir Dire is the jury's first opportunity to really see you, hear you, and get to know you. As you contemplate voir dire, bear in mind that, within the jury pool, there will be some people who are naturally inclined to be sympathetic toward your client, but that most of the pool will either be neutral or skeptical of you and your client. Therefore, it is critical that you always keep one rule in mind -- be respectful. No matter how strong you think your case is, start voir dire by showing respect to the Court, the process, the jurors, opposing counsel, and most importantly, your client. At the end of the trial you want the jury to "follow your lead" to a verdict for your client. Voir dire is your chance to establish yourself, by your conduct, as the leader in the courtroom and the attorney worth following.

As it pertains to the paradigm switch I am talking about in this paper, try to avoid too much talk during voir dire about topics that may have a tendency to negatively impact prospective jurors or even create resistance from prospective jurors. For example, we find it is much better to talk about the real and tangible injuries to your client than it is to talk about "money damages." As an example, if your client is a paraplegic, ask if anyone has any special knowledge, training, or experience in the daily struggles experienced by a paraplegic. Ask a series of questions regarding the types of therapy, medical procedures and ongoing needs that your client has to find out if anyone has experienced with similar problems. The point here is that by getting a discussion going with the jury pool about the struggles people experience with injuries similar to those sustained by your client, the jurors will appreciate the significance of your case

and be more inclined at the conclusion to render a significant verdict. Then, once you have discussed the damages with the pool, use those damages as a "bridge" to discuss the fact that you will be asking for money damages in the case. You might consider asking the question this way: "If, at the conclusion of the trial you find that the defendant was negligent and that the damages suffered by my client are indeed as significant as we have discussed, would you have any hesitancy rendering a substantial verdict?" By asking the questions this way, you minimize the likelihood that someone will take an offense to the verdict you ultimately be asking the jury to render.

B. Opening Statement

Opening statement is a critical aspect of any trial and it is a wonderful opportunity for a well prepared plaintiff's attorney to frame the issues for the jury's consideration. Remember, however, that when a jury is seated at the outset of a trial, the individuals have many questions bouncing around in their heads: What did your client do? What did the defendant do? What are they, the jury to do?

The key to opening, especially in today's environment, is to place the focus of your opening on the defendant's conduct -- and not on the conduct of your client or any third party. So, tell the jury from the outset what the defendant did. That way it is clear to the jury that it is the *defendant's* actions that are at issue in the case and not the actions of your client. Hopefully the following examples will help illustrate what I am talking about. If your case involves the failure to diagnose your client's cancer, do not start the story by telling the jury what your client did. Do not say: "Jane calls the doctor for an appointment… Jane goes to see the doctor on January 8… etc." Starting the story like this makes the jury think about Jane's actions -- Why did she choose the

doctor? Why did she not ask for a second opinion? Why did she wait until January 8th to see the doctor? By the time you get to the doctor's conduct, the jury has already subconsciously placed at least *some* blame on your client -- it is only natural, and it is the result of the manner in which you have told the story.

Instead, start the story by telling us what the doctor did: "Dr. Smith came into the office that morning. Dr. Smith made a decision to run certain tests. Dr. Smith had training and experience in this type of cancer. However, Dr. Smith chose to ignore certain signs and symptoms that were apparent on Jane's tests." This way, jurors begin thinking about what Dr. Smith did wrong and not what Jane did wrong.

C. Witnesses -- To Call or Not To Call?

In years past, both myself and members of my firm would almost universally, and without even the slightest thought, put the defendant on the stand on cross examination right out of the box. The theory was that we wanted to score points quickly and put the defense "on the defensive." In today's environment, however, we are much more thoughtful when it comes to this decision -- and we almost never put the defendant on the stand for purpose of cross examination first.

Why the change? Again it comes down to our perception of jurors' attitudes in today's environment. Putting the defendant up for purposes of cross examination can indeed allow you to score points, but it can also be seen as confrontational, and it may well turn off jurors who are not "ready" to believe you yet – jurors who may be inherently skeptical of you or any plaintiff. Moreover, we do not want to be seen as being "accusatory" until we have established credibility with the jury and we think they are comfortable with our position. Finally, if the defendant is put up early in the case

and does well, this can create a very difficult hole for the plaintiff to get out of in today's world.

Another change we have tried to incorporate into our trials has to do with using defense witnesses to help us establish damages. Indeed, this tactic can also be effectively employed by plaintiff counsel during the defendant's deposition as well. For example, in a catastrophic case, consider going through your client's life care plan with the defendant. Generally speaking, the defendant will be unprepared for this line of questioning, and moreover, he will probably agree with that most of the components of the plan are both reasonable and necessary given your client's current situation. The bottom line here is that by using defense witnesses to establish damages, you are letting the jury see that your position concerning your client's situation is not something you are simply making up for purposes of the trial -- but rather that it is <u>in fact</u> a reality that your client faces daily.

D. Closing Argument

Although book after book has been written on the principles of closing argument and how crucial closing argument can be to the trial of any case, it is my belief that most jurors have made up their mind about the case by the time closing starts. Moreover, most jurors do not want a complete recitation of the facts of the case again during closing. Rather, the key during closing argument from the plaintiff's prospective is to arm favorable jurors with arguments they can use to advance your case during deliberations. If, for example, your case involves the laceration of an artery during a surgical procedure, do not go through all of the details of the surgical procedure again -- the jury has already heard this information over and over throughout the trial. Rather,

convey this point during closing with a short, plain sentence such as: "Dr. Alexander cut without looking." You might even suggest to the jury if someone asks in the jury room what Dr. Alexander did wrong, tell them "Dr. Alexander cut without looking." The bottom line is that you want favorable jurors speaking up for you during deliberations and, by reducing your argument to concrete, simple points, you increase the likelihood that favorable jurors will speak up for your side of the case. Moreover, once a favorable juror advocates your point, other favorable jurors are more likely to voice their agreement with this principle -- and this is exactly what you want to happen with the group dynamic.

When it comes to asking for money damages during closing, everyone has a personal style. Often, we will use a life care plan as a starting point for the ultimate verdict and will leave the general damages to the discretion of the jury. However, we do try to articulate specific items of pain and suffering that the client will experience on a daily basis with the hope that favorable jurors will remember these items, remind the group of them, and consider them as they ponder the question of general damages.

Finally, we think it is vitally important for the jury to see the verdict form during closing argument and to have a clear understanding of how to fill it out. We try and take the jury through the verdict form, component by component, so that they are comfortable with the form and know exactly what to do when they get back in the jury room to deliberate.

Remember, you do not need to tell the jury emphatically what decision to make. Rather, your entire presentation should be designed for the jury to reach only one logical conclusion -- that a verdict is appropriate and mandatory for your client under the law.

IV. CONCLUSION

The trial of a personal injury lawsuit from the plaintiff's perspective is in many ways personal in nature. Nevertheless, our experiences has shown us that we must make certain changes in the way we approach jury trials given the current environment we find ourselves in. The simple fact is that juries have been tainted by advertising campaigns and other public relations campaigns that negatively attack trial lawyers and the civil justice system. As a result, we must be careful that we do everything possible not to play into these stereotypes. Focus your case on the conduct of the defendant; be careful to avoid any statements or arguments that in anyway plays into a juror's potential preconceived bias; provide jurors with simple, logical arguments for why your client should prevail; and ask the jury, at the conclusion, to be the representatives of the community and to award an appropriate verdict for your client.