



By John F. Denove

Back to the basics: Trying a motor vehicle collision case

When the court asks, "Is the plaintiff ready for trial?", you want to be able to answer confidently, "Yes, your Honor." The following are a few suggestions that should make your next motor vehicle collision trial less stressful and more productive.

Before you answer, "Ready"

Start your case on a positive note. Have your documents prepared, served and filed:

- **Witness List** - List only the witnesses you may actually call. Do not list 30 names to try to intimidate your opponent. It will not work and the court will think you do not know what you are doing. Try to include family members, friends and co-workers on your list who can testify how the injury affected the plaintiff.

- **Exhibit List** - Some courts will preclude you from introducing exhibits that were not included on the Exhibit List. Take some time to prepare the list. Do not just slap it together. The time you spend preparing the Exhibit List will help you to identify both the strengths and weaknesses of your case.

- **Exhibit Books** - It is easier to deal with exhibits at trial if they are contained in a three-ring notebook. If you prepare an Exhibit Book, make four copies: One for the court, one for your opponent, one for the witness and one for you. For medical records, Bates stamp or hand number each page. This will prevent confusion during trial if the witness, the court and your opponent cannot locate the page in the medical records to which you are referring.

Statement of the case

The preliminary statement of the case should be neutral. It should identify the parties and include a short explanation of the case and the damages sought. The following is a typical example of a non-argumentative statement of the case:

"This is a motor vehicle collision case. The plaintiff is John Doe, and he is represented by his attorney, Jane Smith. The defendant is Bob Black, and he is represented by his attorney, Sharon White.

"The accident occurred on January 1, 2005, at the intersection of Barrington Avenue and Wilshire Boulevard in West Los Angeles. Mr. Doe contends that Mr. Black negligently ran a red light and struck his vehicle. Mr. Doe contends that as a result of the collision he suffered personal injuries and he seeks compensation for his medical expenses, loss of earnings and pain and suffering. Mr. Black denies that he was negligent and disputes the nature and extent of the injuries and damages claimed by Doe. Mr. Black contends that Mr. Doe was the person that was negligent.

"Mr. Doe denies that he was negligent."

Motions in limine

Motions in limine can be of vital importance in some cases. Without your motion in limine, opposing counsel may bring up a prejudicial topic during voir dire or opening statement. Without a motion in limine, your remedy is to object and to ask the court to strike the statement

and to admonish the jury to disregard it. The better approach is to prevent the jury from hearing it in the first place.

Before filing motions in limine you should contact the opposing attorney to see if a stipulation can be reached to exclude the information without the necessity of bringing a motion. If your opponent agrees, send a confirming letter and place the stipulation on the record before the jury is empaneled. If a stipulation cannot be reached, you need to prepare and notice a written motion in limine. If there is more than one motion in limine, identify the motion and give it a number. It will be easier for the court and the attorneys to locate the specific motion during oral argument. If you are trying the case in the Los Angeles Superior Court, be aware of Local Rule 8.92, which governs motions in limine. The following is a list of motions in limine you may consider in a motor vehicle accident case:

- Motion to exclude accident report. *Box v. California Date Growers Association* (1976) 57 Cal.App.3d 266 [129 Cal.Rptr. 146]

- Motion to exclude other claims or lawsuits. *Lowenthal v. Mortimer* (1954) 125 Cal.App.2d 636 [270 P2d 942]

- Motion to exclude other accidents. *Downing v. Barrett Mobile Home Transport, Inc.* (1976) 38 Cal.App.3d 519 [113 Cal.Rptr. 277]

- Motion to exclude tax returns. *Webb v. Standard Oil Company of California* (1957) 49 Cal.2d 509 [319 P2d 621]

- Motion to exclude collateral source payments. *Helfend v. Southern District California Rapid Transit District* (1970) 2 Cal.3d 1 [465 P2d 61]

- Motion to exclude that the driver was unlicensed. Vehicle Code section

40832; Hunton v. California Portland Cement Company (1942) 50 Cal.App.2d 684 [123 P2d 947]

- Motion to exclude evidence of failure to wear a seatbelt. Franklin v. Gibson (1982) 138 Cal.App.3d 340 [188 Cal.Rptr. 23]

- Motion to exclude alcohol or drug consumption. Pittman v. Boiven (1967) 249 Cal.App.2d 207 [57 Cal.Rptr. 319]

- Motion to exclude evidence of party's immigration status. Rodriguez v. Kline (1986) 186 Cal.App.3d 1145 [232 Cal.Rptr. 157]

- Motion to exclude remarriage of surviving spouse. Wood v. Alves Service Transportation, Inc. (1961) 191 Cal.App.2d 723 [13 Cal.Rptr. 114]

In order for the court to rule on a motion in limine, the moving party needs to make the motion as specific as possible. By way of example, a motion in limine that asks the court to exclude all expert opinions not raised at the time of deposition, which does not state what specific opinions are sought to be excluded, is too vague for the court to make a ruling.

Jury instructions and verdict forms

Preparing jury instructions and verdict forms before the trial may seem like a complete waste of time. You know that whatever you have prepared will have to be revised. Despite this, preparing jury instructions and the verdict form forces you to consider the law that will be given to the jury. It can help you focus your attention on the issues which are important to your case.

Voir dire

Before you can play the game, you need the rules. Ask the court the following questions:

- How will the jurors be seated?
- Does the court sit 12, 18 or more prospective jurors at a time?
- How many peremptory challenges will the plaintiff receive? (It should be six unless the court determines there are more than two sides, and then it is eight for the plaintiff and eight for the defendants to split among themselves.)

- What time limits, if any, will each side have to examine the first 12 or 18 prospective jurors?

Many courts will allow you less time to conduct voir dire than you think you need. If you have ever sat through jury selection as a potential juror, you know that potential jurors believe that the court has given the attorneys too much time. Unfortunately, some judges believe that 20 or 30 minutes is sufficient. Advise the judge that 30 minutes is not enough time to allow you to select a fair and impartial jury as required under Code of Civil Procedure section 222.5. Explain to the judge that many potential jurors are hostile toward personal injury cases.

If, after begging for more time, the judge will give you only 20 or 30 minutes to conduct your voir dire, identify the key areas of your case that are of concern to you and eliminate your other questions. These topics may include:

- How the jurors feel about compensating someone for their pain and suffering.
- Whether they think going to court over an automobile accident is a waste of time and money.
- Whether the jurors, if injured in an accident, would consider filing a lawsuit or going to trial.
- If the jurors will base their opinion of plaintiff's injuries solely on the extent of property damage.
- If the jurors believe everyone should be accountable for their own actions.

Be sure to follow up each response with, "Why do you feel that way?" This open-ended question will force a juror to expand on his or her answer.

Some attorneys are afraid that negative responses may taint the jury panel. Do not be afraid. It is better that these issues be addressed in open court, rather than having them first brought up in jury room deliberations. You want to encourage open and honest communication. Do not argue with a juror or try to change his mind. Thank him for his honesty; repeat his answer; and ask the other members of the jury panel if they agree with that statement.

Your job is to identify those jurors whose belief systems will prevent them from ruling in your client's favor.

Voir dire is the first and only time that you will interact with the jury. Some of the prospective jurors that you do not particularly want on your panel will remain, because you will not have enough peremptory challenges to excuse them. Be courteous, respectful, honest and credible when speaking with the jurors. Above all, do not waste the prospective jurors' time or they will hold it against your client.

After you have concluded your voir dire examination, you will be asked if you pass for cause. If you intend to challenge a prospective juror for cause, advise the court that you do not pass and ask to approach the bench. A challenge for cause should never be made in front of the jurors. After a party passes for cause the attorney is not allowed to question those jurors again.

After the challenges for cause, the first peremptory challenge is with plaintiff. If you do not wish to exercise a peremptory challenge at that time, advise the court that plaintiff accepts the jury as presently constituted. The peremptory challenge will then go to defendant. Once plaintiff and defendant consecutively pass, the jury has been selected.

After the first 12 jurors are selected, the attorneys select the alternate jurors. Ask the court how many peremptories you have. It should be one peremptory per alternate juror. Also ask the court, in advance, the order in which the alternates will be chosen to replace a sitting juror, if the need arises. Some courts randomly select the alternate juror. Other courts will automatically select the juror in alternate seat number one. It is important to note this before selecting your alternates.

Opening statement

The beginning of the statement in a personal injury case should place the focus on the defendant and how his or her bad choices caused the collision. Throughout the opening statement keep coming back to the fact that defendant

had a choice; that defendant chose to do ~r that; and that this bad choice ---cant objects that you are arguing, preface your statements with the phrase, "the evidence will show." If defendant does not object, do not use the phrase; it only dilutes the story you want to tell. Try to refrain from using the word "accident" because some jurors equate an "accident" with something that is inevitable or is no one's fault.

In discussing damages in opening statement, explain in lay language what the medical terms mean. Remember that opening statement is not a speech. It should be structured as a story that the jury can follow. If you wish to approach the board, ask permission. If you intend to use any evidence or demonstrative exhibit during opening, either obtain prior permission from opposing counsel or ask permission of the court. Some judges will not allow you to use demonstrative exhibits in opening statement. But these judges will have no objection to you using the board to diagram how the collision occurred if you say it is for illustrative purposes only. Take the opportunity to do so. If the jury sees your version of how the collision occurred before the defense gets to speak, you will have gained a tremendous advantage.

Direct examination

How you conduct direct examination depends upon the type of witness on the stand. You may examine a party differently than a lay witness, and certainly differently than an expert witness. It is important that your direct examination be thought out before you call your witnesses to the stand. Some attorneys write out each and every question they intend to ask the witness, but unfortunately that often limits the spontaneity that is necessary when reacting to a witness' answers. When you constantly read questions to a witness, you not only lose eye contact with the witness, but also with the jury. It is advisable, however, to write out the topics you need to -cover with each witness to ensure that all of them are covered before the witness is excused.

The rules of primacy and recency apply to direct examination. Sometimes it is best to begin with the most important elements of the case, rather than burying them in the middle. This can have a dramatic impact on the jury, and they will be sure to remember the testimony. On the other hand, the jury may need to establish a rapport with a witness before they are willing to accept the witness' testimony. In those instances, it is best to begin slowly and build up to the ultimate point you intend to make.

It is probably wise not to put the plaintiff on the stand as your first witness. That will cause the jury to focus on your client and the choices he made. Consider calling the defendant under Evidence Code section 776 as your first witness, or calling eyewitnesses to the collision. If there is any possibility that the jury may question why your client chose to do something, ask the client to explain the choices he made. If you do not, the jurors may engage in speculation during their deliberation, and their opinions as to why your client did or did not do things may be damaging.

It is important that your witnesses not be impeached on cross-examination. If your witness has been deposed, make sure that witness has read over his or her deposition. If your client has answered interrogatories or has made admissions in medical records or other documents, make sure the client is aware of those statements.

Remind your client and your witnesses that one of the jury's most important tasks is to determine whether or not a witness is believable. Advise the witnesses to be courteous; to wait until questions are completed before jumping in with answers; to look at the jury when responding to questions; to keep their hands away from the mouth or face; and not to appear to be an advocate, but appear to be truthfully reciting the facts.

When asking witnesses questions on direct examination, the attorney should be in the background. The focus should be on the witness and the witness's answers. This is not the time for the attorney to be the center of attention.

Direct examination of an expert witness usually begins with questions that establish the expert's qualifications. If your expert has taught or written on a subject that is of particular relevance to the issues in your case, spend considerable time establishing that expert's particular expertise. After going through the expert's qualifications and the materials upon which the expert has relied, ask the important questions that are necessary to prove your case. Expert testimony is often confusing, and visual aids frequently explain the point better than words alone. A simple drawing on the board by the expert can be quite effective. Before the witness is called to testify, advise the witness that you intend to have him or her draw on the board to make sure the witness is comfortable in doing that.

When asking expert opinion questions, ask the witness if he or she has "an opinion based upon reasonable medical (or engineering, etc.) probability?" The key word is probable. If the opinion is based only on a possibility, the question is objectionable and the answer may be stricken.

Cross-examination

Cross-examination has many goals, and some goals while applicable to one witness, may be contraindicated for another. Do not ask questions just because you can. Select the goal or goals you intend to achieve during cross-examination and stick to questions that achieve those goals. following is a list of potential goals for cross-examination:

- Have the witness modify or damaging testimony given on direct examination;
- Amplify the testimony that was favorable to your client;
- Attack the memory of the witness;
- Demonstrate that the witness's ability to perceive the event was impaired;
- Demonstrate the bias or prejudice of the witness;
- Demonstrate the implausibility of the witness' testimony;
- Allow the jury to conclude that the witness is unlikely; and

- Elicit information on cross-examination that supports your case or that is inconsistent with the opposing party's theme or evidence.

Before you ask a professional expert witness "why" on cross-examination, be sure you know what answer he or she will give. The only way to know this is to have asked the question at a deposition, or to have an article the witness has authored.

It is important to remember that jurors pay more attention to testimony given on cross-examination than direct examination. Jurors expect the witness on direct examination to give favorable testimony to the party who calls him. Therefore, be mindful not to allow the expert to use your cross-examination to reemphasize points made on direct examination. Sometimes the best cross-examination is the briefest.

Using depositions and interrogatory answers

If you decide to impeach a witness or a party with depositions or interrogatory answers, do it effectively. If the court has not previously explained to your jury what a deposition or an interrogatory is, ask the court to do so. When impeaching the witness, do not ask if he or she remembers testifying differently before the trial. What the witness remembers testifying to is irrelevant. What the witness actually said under oath is relevant.

Ask the following questions:

Q: Do you remember giving a deposition?

Q: Do you remember that at the beginning of the deposition you raised your hand and took an oath to tell the truth?

Q: It was the same oath you took in court in front of this jury?

Then say, "Your Honor, I would like to read from Mr. Jones' deposition taken under oath on October 1, 2005. Page 52, lines 12 through 23." Wait for your opponent to find and read the passage; then, if there is no objection, say, "Hearing no objection," and begin to read. Say, "question" before each question; and "answer" before each answer. Read the passage slowly. Don't rush. When you have completed the reading say, "end of deposition reading."

If the witness wants to explain his answers without your permission, remind him that, "there is no question pending."

If you want to read from the defendant's deposition or read answers to interrogatories and the defense attorney objects that it is not impeachment, advise the court that you are offering the deposition testimony or the interrogatory answers of a party as substantive evidence under Code of Civil Procedure sections 2025(u) and 2030(n).

Closing argument

Persuasive closing argument requires the attorney to communicate with the jury. It is not a mere regurgitation of the testimony of each witness. A closing argument cannot be persuasive if the jury is not interested in what you are saying. Few things are more boring to a jury than a closing argument that is read. Since you are communicating with the jury, it is important to make eye contact. This does not mean generally looking at the jury; rather, you should look into the eyes of a particular juror when making a point; and then move on to another juror as you

make another point. It is important to use one, two or three jury instructions during your closing argument. Rather than read the instruction verbatim, you can summarize the instruction on the board. Explain to the jury how the jury instruction, when applied to the evidence they heard, compels the jury to act in a certain way.

Studies have shown that people who either hear testimony or see evidence will not remember it as well as if they both hear and see it at the same time. When giving your closing argument, it is useful to select the key points you are trying to make and write them on the board. Not only will this allow the jury to both see and hear the points at the same time; but the writing on the board will remain there during your entire closing argument, and you can put it back up during your rebuttal argument.

Conclusion

As with each element of a trial, sincerity is crucial. Some people wonder why an inexperienced attorney can often win a case against a seasoned veteran. Many times it is because the inexperienced attorney truly believes and cares about his or her client. Caring is contagious. If you care for your client and your cause, the jury will as well.

John F. Denove has tried more than 100 civil jury cases in the areas of personal injury, products liability, insurance bad faith and professional negligence. He is a recipient of CAALA's Trial Lawyer of the Year Award and Ted Horn Memorial Award. He is a past president of both CAALA and the Cowboy Lawyers Association; a diplomate of ABOTA; and currently serves on the board of CAOC.