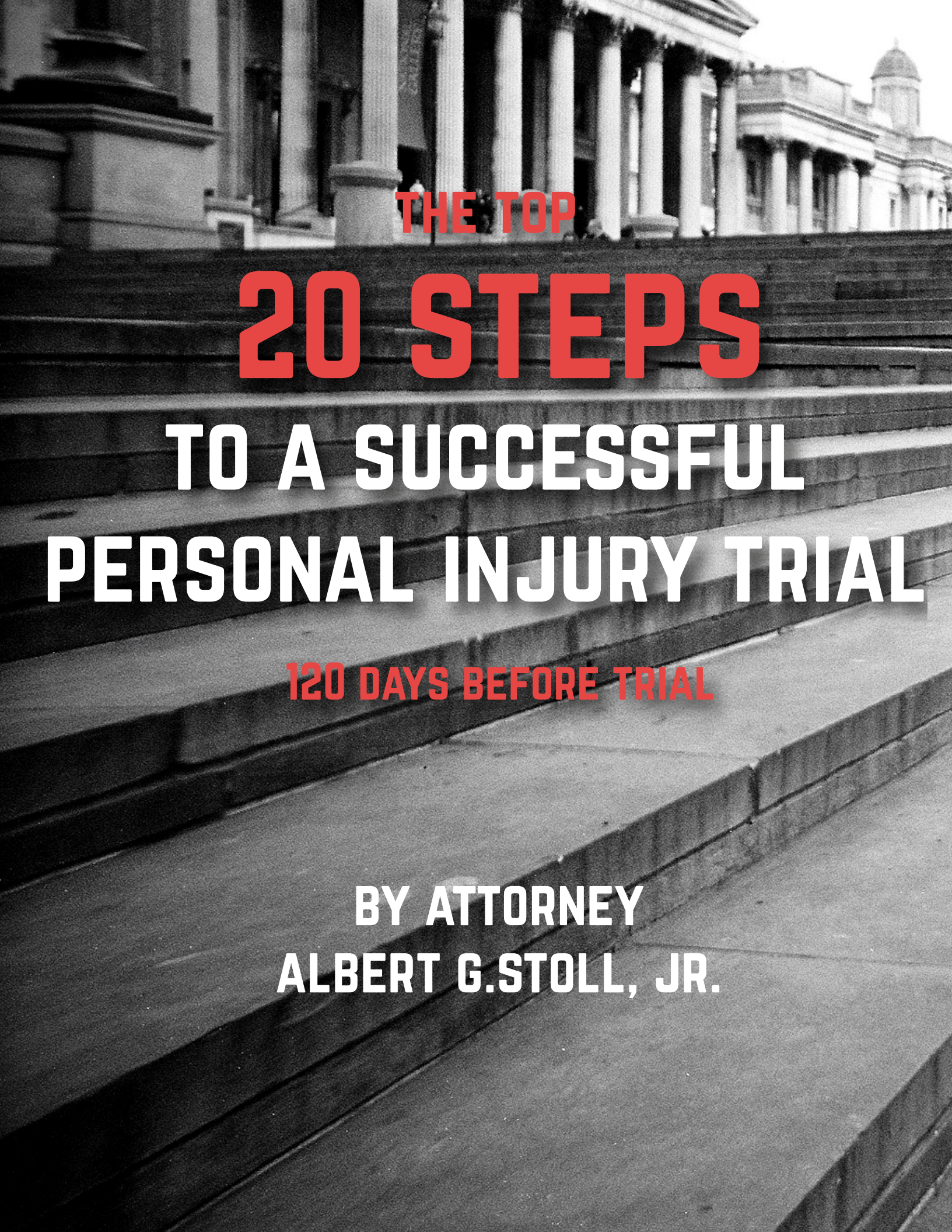

THE TOP

20 STEPS

TO A SUCCESSFUL PERSONAL INJURY TRIAL

120 DAYS BEFORE TRIAL

BY ATTORNEY
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Introduction

My first jury trial was in 1994, since that time I have completed over fifty civil jury trials. The mistakes, successes, trial and errors I have enjoyed has given me an understanding of the important work that is necessary in the final four months leading up to the jury trial of a personal injury case.

120 days before the trial of a personal injury case is a time to slow down and think about what's ahead. The consequences of not beginning the process at the 120 day mark, include wasted time, money, and loss of leverage in the settlement process. Demonstrating to the defendant that you are a capable, prepared and competent trial attorney is a significant reason cases settle in the months leading up to trial.

From the perspective of your trial date being 120 days away, here are the top twenty steps to the successful completion of a personal injury trial.

1 STEP

Questions to Ask 120 Days Before Trial

Ask yourself, am I willing to take this case to trial on a contingency fee and advance all the case costs? Just as important, is your client willing to go to trial? Some clients want nothing to do with the courtroom. Some clients are gung-ho and have no appreciation for the risk involved. After a plaintiff learns about the commitment needed to complete a successful jury trial, they may realize settlement is a good option to explore. Now is the time to figure out the answers to these important questions.

The answer to the trial question may be "Yes"; but only if the last offer from the defendant is below X amount of money. To flush out the answer to this question, you need to figure out what gross settlement amount will satisfy your client? This breaks down to what amount of money in your client's pocket, after attorney fees, case costs, and outstanding medical bills and liens, are deducted are they willing to accept in exchange for signing a release of all claims and dismissing the case with prejudice? To get to your client's net, you must think about what amount of money will reasonably satisfy the outstanding medical liens at various settlement levels. You must know the advanced litigation costs and what they will be after expert discovery. How much are you and your client willing to spend to get through expert discovery? How much are you, as the trial lawyer advancing the costs, willing to spend through verdict?

Next, you and your client need to assess the risks of a trial. What is the reasonable range of verdict amounts that a jury could reach? Look at your worst day, a decent day, and your best day at trial. Sit down with your client and consider where these three numbers end up. What is the lowest verdict that could result at trial? Break the numbers down by claim, what is the amount you can reasonably expect to recover for the past medical bills and or wage loss? What amount can you expect to recover for non-economic damages,

the pain and suffering? Is there a risk of a defense verdict on liability and or injury causation. Consider that a defense verdict exposes the plaintiff to a judgement for recoverable costs in most jurisdictions. What penalties are at stake if the verdict does not exceed a statutory offer to compromise?

Is there a policy limit that caps what you can recover from the insurance company at trial? If this is an issue determine if you have made a valid policy limits demand? See, The *Letter Perfect Policy Limits Demand Letter,* Plaintiff Magazine, March 2011, which lays out the requirements for a valid policy limits demand under California law.

Most cases have had enough discovery completed by the 120 day mark to engage in meaningful settlement negotiations. However, there are times when a key expert witness deposition will move a case into a better settlement posture. Is it time to open up a renewed dialog on the settlement front, or are you at the point where plaintiff and defendant, “agree to disagree” and march toward trial? Asking yourself these questions will help you and your client determine the direction the case is going over the next 120 days before trial.

2 STEP

Make Sure Your Client understands The Trial Process:

Most personal injury plaintiffs have little or no understanding about what is involved with a civil jury trial. It's our job to introduce them to the process. First off, a frustrating aspect of jury trials, is that they do not always start when they are scheduled. A trial date is like the due date for the birth of a child, you better be prepared for something big to happen, but who knows when. Trial continuances caused by the unavailability of courtrooms are common. Presiding judges do not assign courtrooms unless they know a case is not going to settle. The result is extended settlement conferences on the day of trial. The start of a trial may also be delayed due the unavailability of jurors and witnesses of a party.

Even when you are assigned out to a specific judge for trial, jury trials start slow. A day may be taken up meeting with the assigned trial judge, determining the trial schedule, factoring in days the court is not in session, and determining any necessary briefing and hearing schedule for motions in limine. This means that a trial, that may only need two court days to hear the evidence, may last a week or two on the calendar.

Clients need to be reminded that a civil jury is not allowed to hear anything about settlement offers, mediations, or non-binding arbitration results. They must also understand that the jury will not be told that the defendant is insured and that their lawyers fees and any judgment will be paid by the liability insurance company. This is disappointing news to most clients.

How your client dresses in the courtroom is an important topic to discuss. So is their behavior around the courthouse. A plaintiff needs to understand that they are not allowed to talk with the jury and witnesses while they are hanging out in the courthouse waiting for court to start. Conversations between you and your client in the bathroom are not advised. While at the courthouse it is best to simply assume that jurors are listening and watching you and your client at all times. Your client will be better prepared to cope with the trial process if these concepts are discussed well in advance of trial.

3 STEP

Prepare to Walk in Your Client's Shoes:

If you have not done so by now, the 120 day mark is a good time to get to know your client. To prepare to be an advocate, and truly get to know our clients, we must push ourselves away from the day to day grind of phone calls, emails and office work. Now is the time to spend some quality time with your client in their environment. Put away your cell phone, take a day and go hangout with your client. Meet with them in the place they live, spent time, or recovered from their injury.

A good place to meet is your client's home. Any place where they spent time, resting, recovering and recuperating in the days and months after their accident is good. Bring your listening ears, and prepare yourself to hear what your client went through. Unpack the days, weeks, months, and mental images frozen in your client's mind from the accident. Have your client and their family share with you what they went through. This time with your client should be done when people are relaxed, well rested and paying attention. Everyone involved needs to pause, reflect, connect and communicate. Let the information soak in as if you were a friend spending time with another friend.

Gerry Spence would say spending this kind of quality time with your client will allow you to walk in your client's moccasins, get inside of their skin and see the world from their perspective. This exercise will transform the way you see the case, it will allow you to communicate what your client has endured. After a series of peaceful meetings your client becomes a friend you can relate to and understand. Now you know what's at stake, and you are willing to fight for your client. You have discovered their value as a person, and understand what they have endured as a result of the conduct of the defendant.

4 STEP Prepare a Timeline of Plaintiff's Subjective Complaints

A person with significant injuries following a car accident will see and be evaluated by multiple doctors and healthcare providers. Each time a person sees a healthcare provider a history is taken. The practical effect is that a written record of your client's recovery is created. The medical records will show the ups and downs, setbacks, advances, and aggravations in great detail. Often time mistakes in translation occur when a patient's verbal history is interpreted and written down into a record in summary form. As a result the portion of each medical record setting forth the history and subjective complaints of the patient should be placed into a timeline. Such a timeline will allow you to see gaps in treatment, when symptoms began, ended, or returned. You will also be able to see exactly when your client thought they were improved, only to be greeted by a setback as they started to become active again.

The timeline should also include any prior or subsequent civil or workers compensation claims. Often times a plaintiff will have prior medical payment claims, workers compensation claims, or work disability claims that the defense will attempt to introduce at trial. Often times these ancillary claims can be excluded from evidence by making a California evidence code section 352 motion in limine. However, if a plaintiff denies prior claims, they may be offered as impeachment. Make sure your client is prepared to testify about any prior injury insurance claims prior to their deposition. Keep the door to impeachment closed!

Having a timeline organized by date that sets forth when each of your client's prior statements were made, along with the dates of treatment with the health care providers will help you prepare your client to take the stand and allow you to present a case that is consistent with the written record. This document will be a key tool to help you see the arguments you will need to make to win the case.

5 STEP Determine All the Ways Your Client is Potentially Impeached

Anticipating the challenges your client is going to face on cross examination is an important part of your trial preparation. How well your client does on the witness stand during direct and cross examination can determine the outcome of the trial. The trial preparation process starts with the creation of the binder described above.

This binder is devoted entirely to the plaintiff's testimony at trial. The binder should consist of the plaintiff's deposition testimony, interrogatory responses, and the long line of statements contained in any police report, ambulance record, emergency room record, and treating doctor records. Cull all the junk out and just include the documents with statements attributed to the plaintiff. The medical records are the most common source of defense lawyer cross-examination questions at trial.

Often times your client's health history questionnaires contained in the medical charts of a primary care doctor will have admissions about prior similar conditions. It is common for plaintiffs in personal injury cases to forget about their pre-accident aches and pains. It is your job to find those records and prevent your client from being impeached. Any and all health history questionnaires that pre or post date the accident should be included in the binder. You will see that there are inevitably variations in the statements given to first responders or healthcare providers. These statements, which could be characterized as admissions or impeachment may come into evidence and you will need to be ready to address them if necessary.

6 STEP Serve a Cost Shifting Statutory Offer to Compromise:

In the last 120 days before a jury verdict it is very easy to incur five to fifty thousand dollars in expert witness costs. As a result you will want to make sure you are confident in your ability to obtain a verdict in excess of your last formal statutory offer to compromise. In California we have code of civil procedure section 998, which allows a plaintiff to recover expert witness costs if the verdict amount exceeds the last written offer to compromise. In California without beating a statutory offer to compromise expert witness costs are not recoverable.

Here are three California cases to read to make sure your statutory offer to compromise is valid. *Chen v. Inter Insurance Exch. of Auto Club (2008)* 164 Cal. App. 4th 117, 122, an offer to settle must not dispose of any claims beyond those at issue in the pending lawsuit. *Gilman v. Beverly Calif. Corp.* (1991) 231 Cal. App. 3d 121, a joint offer tendered by several plaintiffs' is invalid when it is impossible to tell whether each plaintiffs' recovery exceeded the amount of the joint demand. But see *Johnson v. Pratt & Whitney Canada,*_Inc. (1994) 28 Cal. App. 4th 613, in a wrongful death action, three heirs whose joint 998 offer was refused were entitled to recover interest and expert fees since they obtained a more favorable judgment.

Make sure all defense offers to compromise served on your client are actually sent to your client with a cover letter that sets forth in plain language the effect of C.C.P. section 998. Provide an explanation and estimate of the potential amount of an adverse judgment. This is especially true for clients that own homes or have significant assets.

7 STEP Medical Experts: It's Time For a Face To Face Meeting:

Almost any plaintiff's personal injury case needs a medical expert who is going to testify about the cause of the injury, what injury the person has, and the prognosis for the person's injury. Lawyers sometimes refer to this as the "nature and extent of the injury." The plaintiff has the burden of proof of the nature and extent of the injury. A medical doctor is also needed to testify to the reasonableness of past medical care, reasonableness of past medical charges, the need for future treatment, the cost of future treatment and the reasonable period of time for the plaintiff to have been off work.

At the 120 day mark you need to have a good idea of which medical doctor is going to testify at trial. You may be able to rely on a treating doctor or you may need to specifically hire an expert who was not involved with the treatment of your client. There are pros and cons to each type of medical witness. Beware, some treating doctors do not like to get involved with injury litigation. Treating doctors come in a wide spectrum; meaning some are reasonable and easy to work with, others are not. Some treating doctors will not give you an opinion on injury causation, put up barriers to their testimony, and even hire their own lawyer to hold their hand through the deposition subpoena process and deposition itself.

Here are some basic do's and don'ts that will help you begin the process and ultimately determining whether or not a treating doctor can be relied upon to cooperate and give meaningful testimony at the trial.

- Do get to know the treating doctor's assistant who manages the doctor's schedule. Demonstrate that you are dependable, easy to communicate with, and able to promptly pay the doctor's expert witness fee.

- Do set up a face to face meeting with the treating doctor early on in the case.

- Do organize the medical records and bills for the doctor's review. Make sure unnecessary paperwork, such as authorizations, insurance correspondence, or duplicate records are removed.

- Do make sure relevant prior medical records are easily available for the doctor's review. A patient's primary care doctor records are an example of the records you will want to consider providing the treating doctor. Make sure your medical expert has a complete picture of any prior related medical conditions and or other claims of personal injury.

- Do send the treating doctor a letter setting forth the trial date, but make sure they know not to block off a date or cancel patients until you give them specific instructions on where and when to show up.

- Do have a thorough understanding of the cases in your state that discuss what opinions non-retained expert witnesses can testify to in your state. In California we have the cases of Schrieber and Kalaba. *Kalaba v. Gray,* 95 Cal. App. 4th 1416, 1423 (2d Dist. 2002), reminds us that treating physicians are not 'retained experts' within the meaning of C.C.P. section 2034, and no expert declaration is required when a party intends to call a treating physician for the purpose of eliciting expert testimony. With treating doctors it is sufficient if they are identified by name and address in the designation of expert witnesses. *Schreiber v. Estate of Kiser,* 22 Cal. App. 4th 31, 34–37 (1999) states C.C.P. section 2034 does not require a party to submit a declaration for a treating physician, but they must be listed by name on the designation of expert witnesses.

- Do consider videotaping the treating doctor's trial testimony: There are pros and cons to videotaping the treating doctor's trial testimony. Having a videotape of the doctor's trial testimony saves the appearance fee at trial, which for an orthopedic surgeon can run between $2,500 and $5,000 for a half day. A videotaped deposition helps scheduling, because you always have the videotape ready to play if there is a gap in your live witness availability. A potential con is that the doctor's testimony may have less of an impact presented on a television screen. However, some jurors may relate better to seeing a doctor on television.

- Do consider retaining a medical expert who is not also a treating doctor. A retained expert is an expert you hire and pay to do certain work. In a personal injury case a retained medical expert such as an orthopedic surgeon or neurologist would agree to review records, examine the plaintiff, provide opinions at deposition, show up to trial, all in exchange for payment of an hourly fee. These hourly

fees range from $250 to $1,000 an hour. You have much better access and cooperation from a well chosen retained medical expert than you would have from most busy treating doctors. A retained medical expert may cost more money, because of the need for a more extensive record view, however they are more willing to do the work that needs to be done to prepare for deposition, plus you have a commitment to cooperate with scheduling trial testimony.

- Don't talk to a treating doctor for the first time right before the trial date.

- Don't expect a treating doctor to read a huge stack of unorganized medical records.

- Try not to allow a treating doctor to be subpoenaed without first meeting with them and giving them an introduction to the issues in the case.

- Don't ask the treating doctor to block off a specific date for their trial testimony before you have been assigned a trial judge. In a master calendar system, like San Francisco, you will not have any reasonable basis for estimating when the treating doctor will actually be needed to show up and testify on the witness stand. Once you are assigned a trial judge, confirmed that jurors are available, and completed a discussion with the trial judge about scheduling, then you may safely start to target a date for the treating doctor's trial testimony.

8 STEP

Who Gets Served With a Trial Subpoena?

Take a look at your witness list. Even if a witness is cooperative it is still a good idea to serve them with a trial subpoena. At the time of trial a witness may fall ill or become unavailable. If a witness is not under subpoena it will be more difficult to obtain relief from the court. The best way to work with non-party witnesses is to use on call agreements. In California we have C.C.P. § 1985.1 which describes and on call agreement:

Any person who is subpoenaed to appear at a session of court, or at the trial of an issue therein, may, in lieu of appearance at the time specified in the subpoena, agree with the party at whose request the subpoena was issued to appear at another time or upon such notice as may be agreed upon. Any failure to appear pursuant to such agreement may be punished as a contempt by the court issuing the subpoena. The facts establishing or disproving such agreement and the failure to appear may be proved by an affidavit of any person having personal knowledge of the facts. [C.C.P. § 1985.1]

9 STEP

Understand The Law of Injury Causation

Prior to expert discovery review your state's law on injury causation. Jury instructions provide a plain English explanation for what you will have to prove at trial. In California read Judicial Council of California Civil Jury Instruction (CACI) 430 and 431, which define substantial factor. "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." To summarize, the accident or collision involved has to have been a substantial factor in bring about your client's injury and the need for the treatment or care.

Imagine that you are in trial and the treating doctor testifies that the collision was more likely than not the cause of the plaintiff's current complaints, but the treating doctor also identifies another cause of the plaintiff's current complaints, a car accident that happened one year before the car accident in question. On cross-examination the treating doctor admits that he is not able to apportion what percentage of harm the current defendant caused. At the end of the evidence the defendant moves for a directed verdict in the defendant's favor on causation.

In this scenario California plaintiffs can cite, *Espinosa v. Little Co. of Mary Hospital* (2nd Dist. 1995) 31 Cal. App. 4th 1304, at 1315. Espinosa held, "…to recover against a defendant whose negligence is a concurrent cause of harm, the plaintiff need not apportion what percentage of harm was caused by the defendant versus the other causes. *Espinosa, supra,* 31 Cal. App. 4th at 1318.

In Espinosa, the minor plaintiff sought to recover damages for brain injuries sustained during the prenatal period and or birth process. The plaintiff's expert on causation postulated that there were three possible causes of the brain damage. The first two were related to negligence of the defendant, the third to the plaintiff's mother's ingestion of Lithium during pregnancy. The plaintiff's expert admitted that he believed that the mother's Lithium did play a role in causing the brain damage, but he was unable to quantify or apportion the percentage of the damage caused by each factor. In fact, he could not even testify whether the Lithium ingestion caused only 10% versus as much as 80% of the damage. Defendant argued that the plaintiff had failed to establish causation because he could not apportion how much harm was caused by the defendant's

negligence versus the other concurring causes. The trial court agreed, and granted nonsuit in favor of the defendant. Division Three of the Second District Court of Appeal reversed, stating that:

"A plaintiff does not have the burden of apportioning damages. It is only necessary that a plaintiff demonstrate that the negligence of the defendant was a substantial factor in causing the claimed injury. This was the clear import of Dr. Gabriel's testimony. It was error to reject that testimony simply because Dr. Gabriel was unwilling to put an apportionment percentage on the contribution made by defendants' actions. 'One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured.'" Id. at 1321-1322."

10 STEP

How to Get the Medical Bills into Evidence:

Start by having a look at CACI 3903A which sets forth what plaintiff needs to prove. A qualified billing expert and or a medical doctor will need to testify that the medical charges were reasonable for the services provided, and that the services provided were reasonably necessary to help diagnose the plaintiff's condition or help them recover. In some cases the scope of the reasonably necessary treatment may not be in dispute and the defendant may stipulate to the amount of the past medical bills. The most recent case on the amount of medical bills that may be recovered in a personal injury case is *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541, 555. Howell addresses the situation where health insurance companies pay discounted amounts in full satisfaction of larger billed amounts. Howell held that only the lower discounted or paid amount was recoverable in a personal injury case.

A claim for future medical bills consists of the reasonable cost of reasonably necessary medical care that is reasonably certain to be needed in the future. (See CACI 3903A)

11 STEP

How to Get the Plaintiff's Wage Loss in Evidence:

The amount of time taken off work must be show to have been reasonable given the injury caused by the defendant's negligence. See CACI 3903C. Make sure your medical doctor understands the duties and responsibilities of the plaintiff so that they can apply what the doctor knows about the extent of plaintiff's injury to the amount of time reasonably needed to recover. Is your client a bellman who lifts luggage all day or are they an outside salesperson who may sit or stand as needed throughout the day?

12 STEP

Should You Take The Deposition of The Defense Medical Expert

To determine the answer to this question here are some questions to ask. Is this a case where there is not likely to be much difference between the opinions of the plaintiff's medical experts and the insurance company's doctor? If this is the case, taking the defense doctor's deposition may help settle the case. Do you believe that you can obtain some favorable admissions from the defense doctor on injury causation? If you get the defense doctor to admit there was an injury (it was just minor), then you eliminate the risk of a defense verdict on injury causation. Now the issue at trial is how much injury.

Another benefit when taking the deposition of the defense doctor is that you can confirm all of the facts about any prior similar injuries, complaints, or potential other causes of your client's injuries. At the doctor's deposition you will be able to find out if you have all of the medical records and bills that the defendant's expert is going to rely on at trial. This prevents surprises at trial. You can also accomplish the same result with written offensive discovery, as long as you make sure the discovery is answered by the defendant. Often written offensive discovery is objected to by the defendant and a meet and confer letter and or motion to compel is needed to force verified responsive answers.

Taking the deposition of the defense doctor allows you to prepare more meaningful motions in limine. For example if the defense doctor, wants to give an opinion that the plaintiff is a malinger; you can explore the basis for that opinion during the deposition. An orthopedist may give this opinion based on the sole fact that the plaintiff has chronic symptoms; that the doctor claims cannot be explained medically. If this is the only basis for the malingering opinion you should be able to prevail with a motion in limine excluding the malingerer opinion.

13 STEP

Police Reports: What is Admissible at Trial?

There are two distinctions regarding admissibility of police reports at trial. First is the admissibility of the report itself. The second issue is the admissibility of an officer's ultimate opinion or conclusion. These are both separate and distinct evidentiary issues.

California Vehicle Code section 20013 states, "No such accident report shall be used as evidence in any trial, civil or criminal, arising out of an accident. The rule against admitting police reports into evidence is well established, *Fernandez v. Di Salvo Appliance Co.* (1960), 179 Cal. App. 2d 240; *Summers v. Burdick* (1961) 191 Cal. App. 2d 464 at 470. The policy behind Vehicle Code section 20013 is to protect against the danger of the jury giving more weight to the police report's conclusion simply because of its "official" character. The concern is that an "official" police report alone may be used to determine the verdict. As a result the contents of a traffic collision report should be excluded. *Sherrell v. Kelso* (1981) 116 Cal. App. 3d Supp. 22 at 31.

Consider the fact that a police officer may qualify as an expert witness. A police officer witness disclosed in conformity with a California Evidence Code section 2034 demand, who also qualifies as an expert witness, with sufficient experience and training, may give an opinion on the factors involved in causing an accident. *Hart v. Wielt* (1970) 4 Cal. App. 3d 224. In Hart a 13 year veteran of the California Highway Patrol, with extensive training and schooling in accident investigation was allowed to give an opinion on proper speed given the conditions. The case involved a vehicle which slid out of control while maneuvering a sharp curve on State Highway 32 going towards Chester. Before the officer gave his opinion on speed the trial judge admonished the jury that it was up to them to make the final determination of a proper speed and also whether or not the CHP officer was qualified as an expert witness.

In the case of *Kastner v. Los Angeles Metro. Transit Auth.* (1965) 63 Cal. 2d 52, 58-59, a police officer deemed qualified by reason of his special knowledge, training and experience was allowed to give an opinion on the point of impact between a bus and a pedestrian. The opinion was based almost entirely on a statement given to the officer by the defendant bus driver at the scene. The bus driver testified at trial identical to the statement given to the police officer at the scene. This removed any argument that the officer's opinion was based on inadmissible hearsay. The

Supreme Court in *Kastner* acknowledged that the trial judge must first determine whether or not the jury is aided by the expert opinion or if the question is within the common experience of an ordinary person, hence an expert's opinion would not be necessary, see *Kastner* at page 57.

Generally, the police report itself stays out of evidence. However if the foundation is present for an expert opinion from the police officer, the ultimate opinion about the cause of the accident may potentially find its way into evidence. For this to happen the offering party must establish the subject of the opinion is sufficiently beyond common experience, the police officer has the appropriate qualifications, and the opinion is based on reliable evidence, see California Evidence Code sections 720 and 801.

Generally police reports contain statements of plaintiff, defendant, and non-party percipient witnesses. Whether or not these statements are admissible depends on whether or not they are hearsay. California Evidence code section 1200 states, "hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."

What is admissible? Most commonly statements in police reports made by the plaintiff or defendant will come into evidence via an established hearsay exception. Admissions from a plaintiff or defendant are the most commonly relied upon hearsay exceptions, Cal. Evidence Code Sections 1220-1227. Also statements of a non-party percipient witness may come into evidence as impeachment if the witnesses' statement at trial is shown to be inconsistent with a statement given to the police officer, California Evidence Code section 791.

14 STEP

Review Your Discovery Responses:

Make sure the evidence you intend to present at trial has been disclosed in your discovery responses. Include the before and after injury witnesses who will talk about the effect the injury has had on plaintiff's life. "Before and after" witnesses are friends of plaintiff who have first hand knowledge of what plaintiff has endured. See *Deeter v. Angus,* 179 Cal. App. 3d 241, 255, 224 Cal. Rptr. 801 (1st Dist. 1986), which held a court may exclude evidence concealed in response to discovery that would cause unfair surprise. *Castaline v. City of Los Angeles*, 47 Cal. App. 3d 580, 592, 121 Cal. Rptr. 786 (2d Dist. 1975), exclusion of expert testimony was proper where prior discovery responses and actions of counsel led counsel to believe certain issues would not be litigated. *Thoren v. Johnston & Washer*, 29 Cal. App. 3d 270, 275, 105 Cal. Rptr. 276 (2d Dist. 1972), a court may bar introduction of evidence not disclosed in response to discovery. *Campain v. Safeway Stores,* Inc., 29 Cal. App. 3d 362, 366, 104 Cal. Rptr. 752 (2d Dist. 1972), a defendant prejudiced where plaintiff presented evidence on loss of earnings claim not mentioned in discovery.

15 STEP

List out your motions in limine in order of their importance:

At the 120 day mark start to make a list of the misleading or unfairly prejudicial evidence you believe can be excluded with a motion in limine. The California Evidence code section 352 standard of probative value being outweighed by prejudicial effect and or unnecessary consumption of time is easy to apply. For example, prior workers compensation, car accident, medical payment claims, divorce information, and or evidence of recreational drug use are typically excluded with a short 352 motion in limine. If your judge feels it is premature to rule out certain evidence, get a ruling from the court, that requires the defendant to make an "offer of proof" outside the presence of the jury before questioning any witness on the subject.

Avoid submitting a big stack of "play by the rules" motions in limine. Examples of "play by the rules" motions in limine are, no mention of settlement negotiations, no mention of insurance, and witnesses to be excluded from the courtroom. All of these types of motions are routinely granted and do not require briefing. If a Judge sees a huge stack of boilerplate motions in limine they may be reluctant to read through each one; and simply ask you to state your important motions orally.

16 STEP Expert Witness Demand and Disclosure:

It is very important that you know and understand your state's rules, procedures and requirements for the demand, exchange and disclosure of expert witness names and information. The procedures set forth in California's C.C.P. section 2034 et seq are detailed. Failure to comply with an expert exchange statute can result in the exclusion of your expert's opinions and or testimony entirely. If you are new to personal injury law, I suggest that you consult with an experienced litigator before doing any work in this area. Much of the work that goes into disclosing experts properly needs to be done in advance of your expert witness disclosure date. Don't allow yourself to get into a situation where your expert witness disclosure is due, but you have not done the work to confirm that your chosen experts are prepared, ready for their deposition, and aware of the trial date.

In California the specified date of exchange shall be fifty days before the initial trial date, or twenty days after service of the demand, whichever is closer to the trial date. In California a demand for exchange of expert witness information is typically made seventy days before trial.

The case of *Daubert v. Merrill Dow Pharmaceuticals,* Inc. (1993) 509 U.S. 579, provides a discussion of the foundational facts necessary for the admissibility of an expert opinion under the federal rules. In disputed liability personal injury cases, it is common to have testimony from accident reconstruction experts. A good case to read to familiarize yourself with the foundational requirement for admissibility of an accident reconstruction expert opinion is *Solis v. Southern California Rapid Transit District,* (1980) 105 Cal. App. 3d 382. *Solis* provides a good outline of what facts to look for if you intend to make or oppose a motion to exclude an accident reconstruction expert witness at trial based on the lack of an adequate foundation. The lack of an adequate foundation for an experts opinion makes the opinion speculative and inadmissible at trial.

17 STEP

Calendar the Written Discovery Cut Off:

Sixty-five days before trial is the last day to mail serve written discovery. It is a good idea to serve a request for the defendant to supplement their discovery pursuant to C.C.P. sections 2030.070 (interrogatories) and 2031.050(a) (document demands). A party has a limited duty to update earlier answers to interrogatories, therefore the primary way to discover information after a responding party answer's were prepared is to serve a request to supplement prior written discovery responses before trial. The discovery cut under California law is 30 days before trial, the specifics are set forth in C.C.P. 2024.020.

18 STEP

Jury Fees:

In California C.C.P. section 631 provides that a party demanding a jury deposit a $150 non-refundable fee by the date of the initial case management conference. Review the court file and determine if jury fees were posted timely. In automobile accident litigation insurance companies rarely waive a jury trial. With auto cases valued under $100,000 plaintiffs can expect to do just as well with a bench trial, meaning a judge decides the factual issues in the case and the amount of damages. With cases under $100,000, if an insurance company is willing to waive a jury trial, that is generally a good thing for the plaintiff. A judge trial will be shorter and less expensive. An exception to this generalization would be with drunk driving or hit and run cases. In such egregious situations a plaintiff is better off with a jury trial.

19 STEP

Serve Notice to Attend Trial on Defendant:

Serve a C.C.P. section 1987 notice to attend trial twenty days before trial if you want the defendant to appear and bring documents to trial. The time limit is ten days before trial if you want a party to show up without documents. Be aware you may need the defendant's testimony to meet your burden of proof. Do not assume the defendant will show up to trial without a C.C.P. section 1987 notice.

20 STEP

Trial Call: What to Expect When You Meet Your Trial Judge:

Well before the trial make sure you are in compliance with any specific or standing pretrial orders related to the trial of a civil case. For example in Alameda County California we have Local Rule of Court 3.35 in San Francisco we Local Rule 6.1 through 6.4.

A good way to approach the first meeting with your trial judge is to put yourself in the shoes of the judge. If you were the judge what information would you be interested to know about the case when you first met with the attorneys. Here is a list of topics that you should be prepared to discuss.

On the first day of trial most judges require motions in limine, a witness list, exhibit list, statement of the case to be read to the jury, jury instruction index and proposed verdict form. If possible, some local rules require that these document be jointly agreed to in advance of trial. All of these documents give the judge an idea of the complexity of the trial and how long the case is going to last. You will be asked how many court days you need to present your part of the case. The defendant will be asked the same thing. The judge is trying to determine how long the prospective jurors are going to have to make themselves available to complete the trial. The

trial judge need this information when making decisions about juror hardship requests.

The judge will typically ask if there is anything that can be done to make one final attempt to settle the case.

Your judge will identify any days during the week when trial will not be held. These are called "dark days." You will learn the hours during the day the court will be in session and when the attorneys are to arrive each day.

Be ready to tell the judge which witnesses you really intend to call to the witness stand. The judge may go through each witness or category of witnesses and ask the substance of their testimony and the estimated length of their direct examinations.

If you are having scheduling problems with uncooperative witnesses or experts now is the time to alert the judge to these potential issues. The judge may issue an order to show cause to a non-cooperative witness, as long as you have a valid proof of service of a trial subpoena.

Motions in limine may be heard right away or the judge may want to first review the motions and set a time for oppositions to be filed, along with a hearing time to make the rulings. Some judges issue tentative rulings and allow the parties to prepare a formal opposition, with a final ruling at an appointed time.

Trial witnesses cannot blurt out evidence that has been ruled inadmissible by the court. If this occurs the attorney who called that witness may be subject to a monetary or issue sanction. Judges will often remind the parties to inform their witnesses and clients about any pre-trial rulings that limit what they may legally say while on the witness stand.

If you are presenting a jury questionnaire the court will want to discuss when the jurors are going to complete the form and how it will be copied. The judge will also explain how they conduct jury selection in their courtroom, and determine when the jurors will be arriving.

Summary: Of the 20 steps to a successful personal injury trial, I will boil it down to the three most important. Get to know and connect with your client in a comfortable working environment. This will build trust and provide a foundation for the two of you to make good decisions together. Early on in the case establish a good working relationship with your medical experts with face to face meetings and positive interaction with the doctor's calendaring clerk. Create a binder that is a combination of the subjective complaints in chronological order that reveals any and all potential ways your client may be impeached at trial. Remember to include and work to discover any similar symptoms that predated the accident in question. This type of binder will help you see your case as a whole and help you prepare your client to be cross-examined at trial.

About The Author:

Albert G. Stoll, Jr. began practicing as a plaintiffs personal injury trial lawyer in 1993. His first was with Al Brayton helping to represent plaintiffs injured by exposure to asbestos. In August of 1994 Al began a solo practice as a plaintiff personal injury attorney. By September of 1994 he had found his way into two jury trials. First as lead counsel in a misdemeanor DUI trial in Sacramento; followed by a second chair assignment in a Marin County Superior Court slip and fall case. At the time he was 26 years old.

The years that followed included an intensive personal injury trial practice focusing on disputed automobile injury cases. Since 1994 Al has taken over fifty civil cases through jury verdict, as well as participating in over a hundred arbitrations and mediations. He has settled hundreds of personal injury, product liability, insurance bad faith, civil rights, and employment law cases.

Currently Al is the managing partner and founding member of Albert G. Stoll, Jr. | A Law Corporation. He is passionate about educating and coaching law students, new lawyers, and experienced trial lawyers to advance their ability to stand up for the rights of injured plaintiff's.

Al is a co-founder of the Attorney Action Club, a diverse group of California attorneys who meet monthly to discuss how to practice law and maintain a positive work life balance at the same time.

If you have any questions about the trial of a personal injury case feel free to call Al at 415-762-0039 or get in touch at:

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The Top 20 Steps To A Successful Personal Injury Trial: 120 Days Before Trial

By Attorney Albert G. Stoll, Jr.