

---

# **STRATEGIES FOR MAXIMIZING DAMAGES IN CIVIL CASES**

---

**Presented by:**

**C. FREDERICK OVERBY  
August 22, 1997**

# STRATEGIES FOR MAXIMIZING DAMAGES IN CIVIL CASES

\* \* \* \* \*

**THEME:** A lawyer can often do more to mess up a good case, than improve it. The things "not to do" are just as important as "the things to do."

\* \* \* \* \*

## A POTPOURRI OF SUGGESTIONS:

These are some suggestions based on twelve years experience. Many of them were learned by the "2 x 4 method." However, not all of them are applicable to every situation and they vary with a lawyer's style and approach. Accept these for what they are offered -- as food for thought.

- I. Rule 1 for a Plaintiff's Lawyer: Never let your client or a witness exaggerate -- especially when discussing damages. Injury cases where the plaintiff is there in court present a special challenge.
  - A. The chronic exaggerator is death to the plaintiff. Understatement can be devastatingly effective.
  - B. Paint a realistic picture of the plaintiff as you find him -- not everyone is a movie star.
  - C. Explain to the client that the only thing she can really do to harm her case is to lie about something.
  - D. Don't pray for a huge sum in a complaint. Pray for such damages as are fair and just.
  
- II. Don't be afraid to be unconventional.
  - A. To call a doctor or not?
    1. Jurors' minds are a blank slate and they don't know conventional wisdom is to call a doctor.
    2. Use lay witnesses and non-medical witnesses to their maximum

potential. (See the attached article<sup>\*</sup>)

B. To call an economist or not?

1. Con -- Can set a ceiling on the verdict.
2. Pro -- May need a floor for a conservative jury.
3. Human nature -- jurors often light on to a set figure when you give them one.
4. A good approach is to give the jury a rang of options from the economist.
5. Be wary of the hedonic damages concept.
6. Make sure that life care plans contain elements of future care that are realistic and really needed.

C. Using reconstructionists and experts.

1. The best reconstructionist is the man/woman in blue.
2. If you need an expert, make sure the expert knows what you need and don't need. Be leery of the case that hinges on a paid expert.
3. Use lay witnesses liberally & successfully.
  - a. Careful election and preparation is essential.
  - b. There is a tremendous benefit for others to talk about the plaintiff's problems.
  - c. Don't embellish or let the witness embellish -- modesty, tact and understatement are important tools.
  - d. Use anecdotes as they paint a vivid picture.
  - e. Remember, a juror's imagination is more vivid than any gruesome photo.

III. Deal with the warts and blemishes up front and head on. The jury will appreciate your candor. They can excuse imperfections -- but not abject dishonesty.

A. Now I need to tell you some things may come up about the plaintiff in opening statement (or on direct examination):

1. Prior injuries.
2. Criminal background.
3. General bad things in work history or personal life that are going to come out.
4. Personality quirks.

B.

1. You can set up the plaintiff as a victim.
2. Candor -- takes steam out of it and gives you credibility.

IV. Give the Plaintiff some dignity.

Have the Plaintiff emphasize that he is doing the best he can under difficult circumstances. It is much better to present someone trying and doing the best he can under difficult circumstances than to have the chronic complainer and the quitter. People react positively to a sunny disposition -- remember Ronald Reagan.

V. Emphasize the social good that a verdict can do in closing arguments -- particularly when the product or omission can affect others.

In a personal injury case explain the theory behind the law which requires those who cause an injury have to be responsible. In a death claim, explain that the law allows those wrongful death actions to encourage safety to society generally and to require accountability from those who cause harm.

VI. Argue the compensable elements of pain and suffering separately and then collectively when arguing general damages. Jurors don't understand what "pain and suffering" means in the law -- and many lawyers' and judges' appreciation of that term of art is limited until fully articulated.

- VII. Explain to the jury that whatever damages they award are at their option. Easing into the amount of damages is always a challenge. Here's a suggestion:

"Ladies and gentlemen, I need to talk to you about damages, and for a lawyer representing an injured plaintiff, that's a Hobson's choice. If I ask for too much, you think we overreaching -- if I ask for too little then I've sold my own client short. I want to suggest some figures or a range of figures -- but they are my suggestions.

If they are too low, you have the power to up them. If they are too high, please don't hold it against my client, but do what is right to give full justice."

- VIII. When voir diring the jury panel in death cases and personal injury cases, introduce them to the concept of non-economic damages by asking:

- A. Is there any person on the panel who believes the main purpose of living is to work and that the amount of money somebody earns is the only way to value their life?
- B. Is there anyone here who believes you ought to just add up the paychecks and not allow anything for time spent with family or friends or doing things a person enjoys -- gardening, fishing, exercising?
- C. Is there anyone who disagrees with the notion that we work to live, rather than living to merely work?
- D. Is there anyone here who would not value the work of a person such as Billy Graham or Mother Teresa even though they don't make much money?

- IX. Choose words carefully. Words are currency of the courtroom.

- A. "Allure", an anecdote.
- B. "Shattered" vs. "Broken."
- C. "Crash", "collision", or "wreck" rather than "accident."
- D. When pleading always name the corporation first.

- X. Use demonstrative evidence to your client's advantage.
  - A. Medical illustrations can be highly effective if they have something to show, and the doctor has approved them.
  - B. Time lines can tell an important story and simplify complicated information for a jury.
  - C. Models are helpful, but they must be accurate.
- XI. Save the best for last.
  - A. Prepare for trial -- not settlement.
  - B. The defense can't immunize the jury if they are sitting there when they hear the anecdote.
  - C. Prepare witnesses for depositions. Tell them first and foremost to tell the truth. Tell them to answer the questions completely. But make them understand that the defense lawyer is neither the judge nor the jury and they should not volunteer information not requested.
  - D. Do not let your client be taken advantage of in a deposition. Do not let him give estimates of time, distance or speed the majority of the time unless he has a reasonable opportunity for forming an ACCURATE opinion.
- XII. Be organized -- everybody appreciates it. Move the trial along. Don't drag out testimony and bring in cumulative testimony except where you have to for some important reason. Be courteous and respond appropriately to humor.
- XIII. The most effective cross examination is often "I have no questions, your honor."
- XIV. Always be yourself -- you can't be something you are not.
- XV. Prepare thoroughly, then relax and enjoy the trial. If you're well prepared, well rested, and the jury senses you are at ease, they will react positively to your confidence.

- XVI. Use your imagination. Fine trial lawyers are artists, to an extent. Use history, movies, or even poetry to spice up the case presentation and give it a bit of flair for the jury. Emotion is not a bad thing if tastefully done and not overdone.
- XVII. Developing a central theme of the case and then structuring witness presentation and argument around that theme can enhance the damages awarded.

### CONCLUSION

Remember, nothing I've said applies to every situation. One must listen to and heed one's inner voice and sixth sense and adapt to the mood of the courtroom or the situation at hand.

Happy Hunting!  
C. Frederick Overby

\* The attached article concerning using lay witnesses was published in Trial Magazine, May 1990 issue.

## **APPENDIX "A"**