June 2022

LAWYER ALERT

Stopping Medical Injustice

The Insider's View of a Plaintiff's Verdict

As the jury announces its verdict in the courtroom, the lawyer and his client embrace. Tears flow as the client releases pent up emotions. This moment is the culmination of years of hard work, setbacks and struggles during the discovery process and at trial and finally, a verdict that signals one thing: justice has been served.

To the casual observer, a courtroom victory is a glamorous moment, but trial lawyers see a different reality. The trial lawyer works late into the night during trial, stresses over every last detail of witness preparation and courtroom exhibits and struggles with the ups and downs of trial. But in the end, there is nowhere the trial lawyer would rather be, and a plaintiff's verdict is more than victory—it is vindication.

Jury Selection

The goal of jury selection is simple: bond with the jury. As soon as possible, you want to get the jury talking during jury selection. Tell the jury about the flaws in your case; don't cover up weaknesses, expose them.

By sharing the danger points of your case, you build instant credibility with the jury. Why? Because the jury quickly discovers that you are just like them, a flawed human being with weaknesses and vulnerabilities.

- "If you were injured through the negligence of another, would you sue?"
- "Other than your family and your faith, what is most important to you?"
- "What type of evidence would you like to see in this case?"

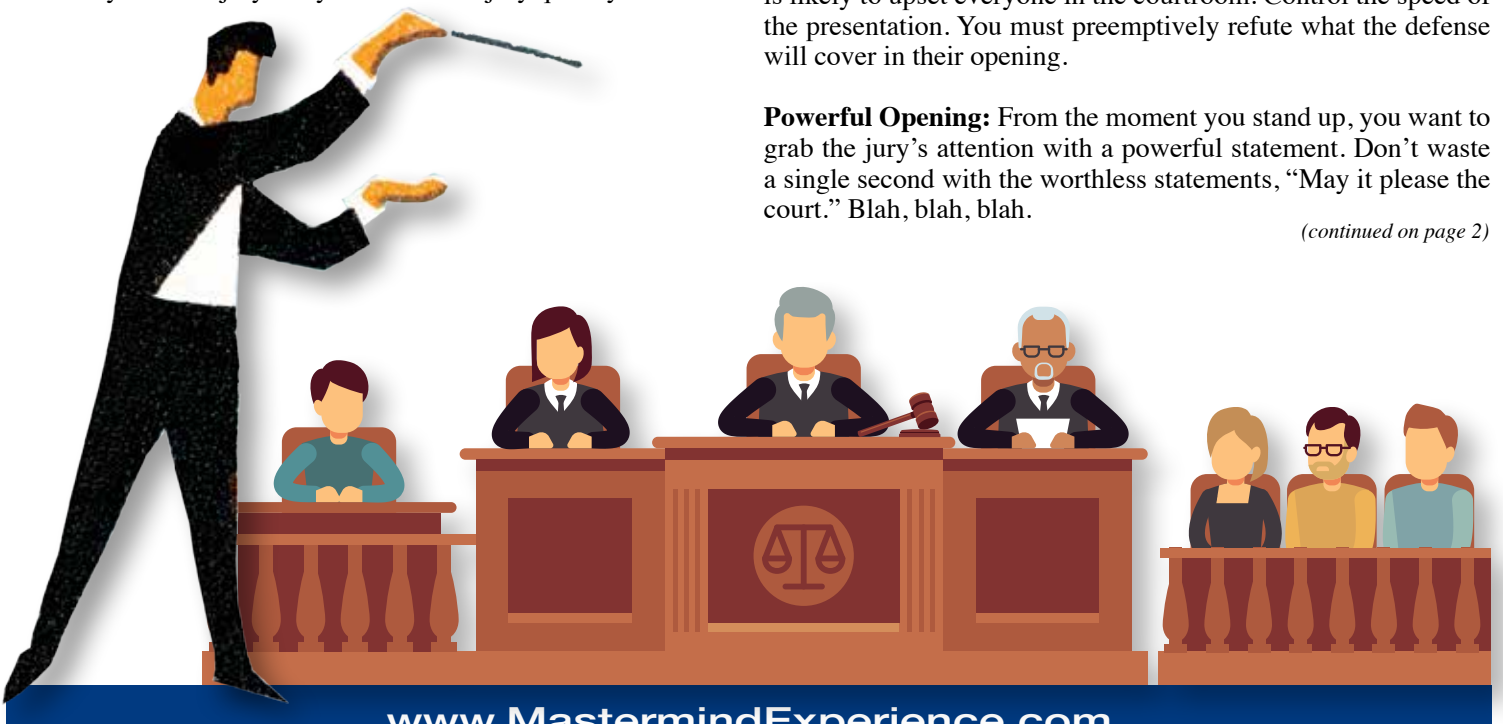
Ask questions that are specific to the facts of the case. In a case involving the failure to timely treat cardiac arrest, you might ask about the jurors' experience with cardiac arrest, whether they've ever seen a defibrillator in use and whether they've seen lives saved by the use of a defibrillator. You might ask whether the jurors are familiar with the treatment protocols for a heart attack, e.g., aspirin, nitroglycerin, heart monitor, etc.

Opening Statement

The opening statement is your opportunity to tell a powerful story. Do not be too impassioned during opening statement. Talking fast is likely to upset everyone in the courtroom. Control the speed of the presentation. You must preemptively refute what the defense will cover in their opening.

Powerful Opening: From the moment you stand up, you want to grab the jury's attention with a powerful statement. Don't waste a single second with the worthless statements, "May it please the court." Blah, blah, blah.

(continued on page 2)



(continued from cover)

"Where would you think is the best place to have a heart attack? The Emergency Room. You'd think! But not for Judge Melkonian.

This was not complicated. All he needed was someone to watch over him. What did Judge Melkonian get? **He got left alone in a room to die.**"

Story Telling: Tell a story that will capture the jurors' imagination. Use props to grab the jurors' attention.

"The nurse closes the door [physically demonstrate the closing of the door]. Now they [doctors and nurses] are blind. They can't hear and they can't see. They don't know anything.

[Turn a sand clock over]. And he's running out of time.

[Later, when the sand clock runs out], "He's run out of time. Judge Melkonian is gone."

Damages: Show no emotion when discussing the economic losses.

"The defendants' failure to take responsibility prevented Caroline from obtaining these fixes and helps [loss of earnings]. This money goes to other people for what Caroline needs.

None of the money for the fixes and helps make up for the greatest part of the harm: what the Judge's death did to his children.

The greatest harm in this case are the HUMAN LOSSES of his children."

Power Ending: Weave the theme of your case into a powerful end to opening statement, e.g., "Give his family justice".

"The hospital has refused to accept responsibility for the harms and losses it has caused.

We cannot bring back the Judge back from the dead, but what you can do, is **GIVE HIS FAMILY JUSTICE.**"

Direct Examination of Plaintiff's Experts

Get to the expert's opinions RIGHT AWAY (in less than 90 seconds). Do not waste time with the expert's education and experience. This is boring. The jurors don't care that your expert graduated from Harvard or is a professor at Yale. The expert should provide their qualifications at the end of their direct examination.

- What is your name?
- Are you a doctor?
- Are you licensed to practice medicine?
- Do you practice in a hospital?
- We came to ask you some questions. Do you have opinions in this case?
- Do you have a basis for your opinions?
- I will ask your opinion and then I will ask your basis.

Similarly, with an economist, you want to get the big number of economic loss in front of the jury ASAP.

- Do you have opinion?
- Is there a basis for your opinion?
- Let's get to your opinion first and then I will ask for the basis. [Loss of $5.1 M]
- What are the categories of loss?
- Would it be helpful to use an exhibit to explain your opinion?
- What are the losses?

Demonstrative Exhibits: Use demonstrative exhibits to show the jury. In a trial involving cardiac arrest, the expert should bring a heart monitor and demonstrate on a live person (you) how it works.

Cross Examination of Defense Experts

The goal of cross examination is to push the defense experts to take an extreme position. Regardless of whether you get the answer you want, act like you're getting somewhere. Never let the expert talk and go for the BIG ISSUE.

Don't debate the expert about the medicine. Focus on the things that the expert has to admit, such as inconsistencies in the medical records.

The medical records indicate that Judge Melkonian was left alone, unmonitored, in a private room between 4:13 p.m. and 4:36 p.m. Hence, cross-examination of the defense experts focused on the absence of any treatment or interventions during that time period.

- Can you tell us how Judge Melkonian was doing at 4:15 p.m.? [Defense Expert's Response: "No."]
- Can you tell us how Judge Melkonian was doing at 4:20 p.m.? [Defense Expert's Response: "No."]
- Can you tell us how Judge Melkonian was doing at 4:25 p.m.? [Defense Expert's Response: "No."]
- Can you tell us how Judge Melkonian was doing at 4:30 p.m.? [Defense Expert's Response: "No."]
- Can you tell us how Judge Melkonian was doing at 4:35 p.m.? [Defense Expert's Response: "No."]

Build one concession upon the next. The surveillance video of the triage assessment

(continued on page 3)

(continued from page 2)

showed that a physical examination was not performed, even though an examination was documented in the medical records. Cross examination of the defense experts focused on the importance of a physical examination and the absence of a physical exam during the triage assessment.

- "History and a physical examination are an important part of the evaluation?" [Defense Expert's Response: "Yes."]
- "Is it appropriate to document a chest and lung examination without putting a stethoscope on the patient?" [Defense Expert's Response: "No."]
- "Is that something you would do?" [Defense Expert's Response: "No."]
- "With active chest pain, Judge Melkonian was **not even touched by the physician?**" [Defense Expert's Response: "That's right."]

Closing Argument

Do not repeat the testimony of witnesses. This is boring and the jury will stop paying attention. Rehearsal is extremely important. Don't start slowly, capture the jurors' attention quickly. Do not talk at jurors; rather, reason with them.

Eye contact is crucial. SLOW DOWN. Use a blow up of the verdict sheet and explain how the jurors should answer each question. Show how the family is striving to survive the loss. Don't show your anger; show the facts that got you angry.

Explain the themes of your case, e.g., the defendant's betrayal of trust, defendant's sidestepping their responsibility, and address the defendant's excuses (a/k/a defenses)

Violation of Trust: Betrayal of trust is a powerful theme. Weave in the theme that the hospital betrayed the trust of their patient.

> "There's trust that's part of this. Judge Melkonian trusted that the hospital was the safest place to go. Judge Melkonian trusted that the providers would do their job. Judge Melkonian trusted the hospital with his life.
>
> **The hospital BETRAYED THAT TRUST."**

Time is Not Equal: Explain why time is of the essence for patients with emergency medical conditions.

> "All time is not equal." [importance of time with cardiac arrest]
>
> When a patient presents with a sprained ankle, time is not of great value. This patient can wait.
>
> This is **completely different** with a patient presenting with severe chest pain. Time becomes precious. Every moment matters. When a patient says he has the sudden onset of severe chest pain, that is **DEADLY SERIOUS.**
>
> Let's recognize how important time is. Let's honor it. But for Judge Melkonian, TIME WAS RUNNING OUT."

Loss of a Chance: Embrace the jury instructions and weave the jury instructions into closing argument. If the jury instructions require proof that the delay in treatment resulted in a diminished chance of survival, explain the measure of proof to the jury.

> "This is not a question of **absolute certainty**. And it would be wrong to use the wrong measure of proof. You've got to use the right measure of proof.
>
> No Judge will tell you that you have to prove your case with **absolute certainty**. That's like measuring distance with a thermometer. This is not the same as 1 plus 2 equals 3.
>
> Substantial possibility of surviving a heart attack does not have to be more likely than not, does not have to be more than 50%, just more than slightly.
>
> What is more likely than not? That's the only way we can prove certain things. The only way you can prove things is by the preponderance of the evidence."

Defendant's Excuses: A common defense is that the hospital/doctor did their best in a short amount of time. Tackle this issue head-on; doing their best is not what the law requires.

Excuse: The Hospital Did Their Best

> "When you go back to the jury room for deliberations, someone might ask you: 'But didn't the hospital do their best? Why should we hold them responsible if they did their best?'
>
> To that person, you should say that the case is not about the hospital doing their best. It is about meeting the standard of care. **The instructions given to you by the court say nothing about doing their best as an excuse for poor care.**"

Sidestepping Responsibility: Explain that the defense is continuing to ignore their responsibility, even during trial, and that the jurors have the power to hold the defendant accountable.

> "The defendant denies responsibility even to this day. This is our society's only way of making the hospital meet its responsibility.
>
> It's fine to defend yourself when you've done nothing wrong. But when you're wrong, you're supposed to stand up and take responsibility, not sidestep responsibility, **at the further expense of the family that you hurt in the first place**.
>
> And now you've seen the defendant spend 7 days trying to evade their responsibility right here in front of you. That's why you have to make the hospital pay to fix what can be fixed, to help what can be helped,

(continued on page 4)

(continued from page 3)

and to **fully make up for everything that cannot be fixed or helped**.

Anything less, and the hospital will permanently escape its responsibility."

Damages: Spend time on damages in closing, don't gloss over it. Fill in the blank for each line on the verdict sheet.

Job of the Jury:

"Your job is to fix, help and make up for the harms and losses. You are here to figure out how much it will take to make up for the harms and losses. What can be fixed and helped?"

Economic Damages (Loss of Earnings): "If a painting worth a million dollars was destroyed by someone's fault, you'd include a million dollars in your verdict, wouldn't you? Well, **we're here for a human being**."

Loss of Parental Guidance: "One more visit, one more phone call, one more hug-would be worth its **WEIGHT IN GOLD**."

Power Ending: End closing argument with power and emotion. Go nice and slow.

"You have the power to hold this hospital responsible. If you do not, the defendant will escape all responsibility.

The defendant ignored their responsibility then, the defendant ignored their responsibility during this trial, and they want you to ignore your responsibility now."

The Melkonian family will never get another chance to recover for the death of Judge Melkonian. You are their only chance for justice. Only you can give justice to the family.

Only you can bring back a verdict that says **THE TRUTH MATTERS**."

What a Leader Does

Always remember that your success is contingent on the work of your team. Success would not be possible without your paralegals, associate and co-counsel. When you win, give credit to your team. They deserve it.

And just maybe, you can go home knowing that you had a profound impact upon the lives of your clients. There is no better feeling in the world.

Want to see the transcripts of the direct and cross-examination of the experts witnesses in Melkonian v. Albany Medical Center? Send an email to jfisherlawyer@gmail.com with the subject line, "I want the transcripts", and you'll get the full transcripts.

$7,600,000 Jury Verdict for the Death of Prominent Judge


NEWS

Jury awards judge's widow, children $7.6M from Albany Med in wrongful death lawsuit

Attorney for Michael Melkonian's widow said his death from a heart attack could have been prevented but hospital attorney argued it was an unavoidable tragedy

On June 1, 2022, following a 7-day trial, a jury in the Supreme Court, Albany County, returned a verdict in the sum of $7,600,000 for the Estate of Michael H. Melkonian, an acting Supreme Court Justice in New York, against the Albany Medical Center. Justice Melkonian was 55 years old at the time of his death on October 17, 2019 and was survived by his wife and two children.

The verdict included $5,100,000 for loss of earnings, loss of pension benefits and loss of household services and $2,500,000 for the loss of paternal guidance, nurturing and advice of the surviving children, ages 13 and 16 at the time of their father's death.

The claim against Albany Medical Center was based upon the failure of the hospital to recognize and treat acute coronary syndrome. Prior to arriving at the emergency department, Justice Melkonian reported that, "I think I'm having a heart attack."

Upon his arrival at the emergency department, Justice Melkonian complained of the sudden onset of severe chest pain radiating to his back, bilateral hand pain, pallor and diaphoresis (cold, clammy sweat). Justice Melkonian was brought to a private room in the emergency department, where he was left alone for 23 minutes.

23 minutes later, Justice Melkonian was discovered unresponsive with no signs of life. An autopsy later revealed that the cause of Justice Melkonian's death was cardiac arrhythmia (an irregular heart rhythm) that was caused by a single blockage in a coronary artery.

The claim in the lawsuit was that Justice Melkonian had the classic symptoms of a heart attack upon his presentation to the emergency department at the Albany Medical Center. The contention in the lawsuit was that Justice Melkonian should have been placed on a heart monitor and observed for changes in his clinical presentation and heart activity. Time is of the essence in treating sudden cardiac arrest.

Additionally, the plaintiff claimed that Justice Melkonian should have been given aspirin and nitroglycerin to improve the flow of blood to his heart. Such treatment would have diminished the likelihood of cardiac arrest and given time for a cardiac procedure, known as a cardiac catheterization, to place a stent in the coronary artery. The cardiac catheterization would have restored blood flow in the blocked coronary artery.

Outside of the courtroom following the verdict, Caroline Melkonian told the Albany Times-Union:

I'm pleased that Albany Med has been held accountable for the lack of care they provided to my husband. If this could happen to us, it could happen to anyone going to the emergency room believing they are going to be cared for and treated and healed.

I felt like justice was served with those jurors.

Our Paralegal's Top 5 Priorities for Trial Preparation

In preparing for trial, these are the top 5 priorities of our paralegal. Each priority is essential for our success at trial. Think of the trial as if it is a Broadway play. Every moment of the trial should be carefully scripted and planned.

If any of these steps are not performed, the trial will be much more difficult for our trial attorney and this can result in an adverse outcome for our client.

PRIORITY #1: Subpoenas for Medical and Employment Records

Your job is to ensure that our client's medical and employment records have been subpoenaed at least 2-3 weeks prior to trial. A subpoena for a municipal entity (e.g., school district, fire department, county, town or state) requires a "So-Ordered" Subpoena (a Subpoena that is signed by a Judge). All other subpoenas, e.g., a subpoena to a doctor or hospital, should be signed by an attorney.

Release Authorizations for Subpoenas: The subpoena for medical and employment records must be accompanied by a release authorization. Employment and pension records require a release authorization that is different from an authorization for medical records. If you attach the incorrect release authorization to a subpoena, the provider will not provide the records to the Court.

Review Subpoenaed Records: On the Friday before the first day of trial, you should go to the courthouse to review the subpoenaed records at the clerk's office, e.g., the Supreme Court Clerk's office. You should determine which subpoenaed records have been produced and confirm that the subpoenaed records have a certification. You should keep a list on an Excel spreadsheet that confirms the records that have been produced at the Clerk's office and whether they contain a certification.

Certification of the Records: A certification is a document signed by the medical records custodian of the hospital/doctor/employer that verifies that the copy of the records is complete and accurate. If the records are not accompanied by a certification, you should call the provider (hospital/doctor) and ask them to send a certification for the records immediately. In the absence of a certification, the records will not be admissible as a business record, pursuant to CPLR section 4518.

Why This is Important: The certified records provide a foundation for our experts' opinions. If a certified copy of the subpoenaed records is not in Court, there will be no foundation for our experts' opinions. If this occurs, our experts may not be permitted to testify.

PRIORITY #2: Schedule the Testimony of Witnesses & Experts

As soon as a trial date is scheduled, you should contact our expert witnesses, lay witnesses and clients to confirm that they are available to testify at trial during the first week of the trial. You should focus first on confirming the availability of our expert witnesses to testify at trial.

Our expert witnesses will typically be scheduled to testify on the 3rd, 4th and 5th days of the first week of trial.

Confirm Trial Testimony with a Letter: Once you confirm the availability of our experts to testify during the first week of the trial, you should confirm the date and time via email and a letter sent via 1st class mail. You should offer to make the travel and hotel arrangements for the expert witnesses.

Why This is Important: If you do not confirm a date for the experts' trial testimony ONCE A TRIAL DATE HAS BEEN GIVEN BY THE COURT, their schedule will become full and they may not be available for trial testimony. If our experts are not available to testify at trial, our clients will lose their case.

PRIORITY #3: Premark Exhibits with the Court Reporter

The medical and employment records should be pre-marked as exhibits prior to the day of the trial.

Call the Supreme Court Clerk to inquire about name and contact information of the court reporter for the trial and then, call the court reporter to schedule a time to pre-mark exhibits for trial. You should inform the Judge and defendants' counsel that you will be pre-marking exhibits for trial.

Keep an Inventory of Exhibits: The plaintiff's trial exhibits should be marked as exhibits by the court reporter beginning with "Plaintiff's Exhibit 1" and continuing numerically. You should keep an inventory of the trial exhibits, e.g., "Exhibit 1: Certified medical records from Albany Medical Center; Exhibit 2: Autopsy report", etc.

Before the trial begins, you should ask the defendants' attorneys to stipulate the subpoenaed records into evidence. On the first day of the trial, our trial attorney will place a statement on the record in court that the records have been stipulated into evidence by counsel.

Why This is Important: By pre-marking exhibits prior to trial, we are sending a message to opposing counsel and the Judge that we are organized, ready for trial and we won't waste a minute of the court's time.

(continued on back page)

JOHN H. FISHER, P.C.

278 Wall Street • Kingston, New York 12401
Phone 845-802-0047 • Cell Phone 518-265-9131
Fax 845-802-0052 • Toll Free 866-889-6882

Email address:
jfisher@fishermalpracticelaw.com

FROM JOHN'S CASE BOOK

$1.5 Million Recovered for Failing to Diagnose Prostate Cancer

62-year old male recovered $1,500,000 for the failure to timely diagnose prostate cancer in Ulster County, New York.

In April, 2018, the patient, a former nuclear power technician, was diagnosed with metastatic, widespread stage IV prostate cancer. The basis for the lawsuit was the urology group's failure to conduct prostate specific antigen (PSA) blood testing between March, 2015 and April, 2018.

The goal of screening for prostate cancer is to find cancer that may spread if not treated and to remove the cancer before it spreads. Detecting prostate cancer early can be critical. PSA is a blood test that is used to screen for prostate cancer. Elevated PSA results (above 4) may reveal prostate cancer that's likely to spread to other parts of the body (metastasize).

The standard of care requires that primary care physicians and urologists offer PSA testing for male patients beginning at the age of 50, and the physician should explain the benefits and risks of PSA testing with their patients. However, the patient was not advised about the risks and benefits of PSA testing, and the urology group failed to order PSA testing for 3 years.

The delay in diagnosis of prostate cancer led to stage IV prostate cancer, urinary incontinence, sexual dysfunction and a substantially diminished life expectancy.

(continued from page 5)

PRIORITY #4:
Be Alert for Legal Memoranda from the Defendants' Attorneys

During trial, defendants' attorneys will frequently submit a trial memorandum or email to the Judge about evidentiary issues that arise during the trial. You need to be ready to respond IMMEDIATELY.

As soon as you become aware of an email from defendants' attorneys to the Judge, notify our attorney ASAP, and forward the email to our attorney. If the defendants' attorneys cite a case in their email to the Court, retrieve a copy of the case, review it and make your own evaluation of the merit of the defendants' legal position.

Your response to our attorney might read:

(above) Grateful for the dedication and hard work of our team!

> "I was just notified that defendants' attorneys sent an email to Judge Smith seeking to limit the trial testimony our expert. Defendants' attorneys cited Smith v. Baker in support of their position. Click this link for a copy of this decision. I don't believe this case applies based upon my legal research."

We should be ready to respond to the defendants' legal arguments ASAP in writing.

Why This is Important: If our attorney is not familiar with the email sent by defendants' attorneys to the Judge, he/she will not be prepared to respond and as a result, the defendants' attorneys will likely prevail in their claim.

PRIORITY #5:
Keep a Schedule for Every Day of Trial

Write down on paper what you feel is needed to be done for each day. Itemize what each day will look like. There is no such thing as over-preparation for trial.

You should keep an Excel spreadsheet that lists the schedule for the trial testimony of our witnesses, e.g., Wednesday, June 8th: 9 a.m.: Dr. John Smith (cardiologist), 11 a.m.: Dr. Jane Doe (pathologist).

Why This is Important: When you are prepared for each day of trial, your stress and anxiety levels will go down.