FROM LAW SCHOOL TO LITIGATOR

By: Frank Ramos

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From Law School to Litigator
Part One
FINDING YOUR PLACE
Francisco Ramos, Jr., J.D.
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PART ONE:

FINDING YOUR PLACE

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NOTE The author's use of "he," "him," and "his" throughout this text is simply for the sake of convenience and to avoid burdensome verbiage such as "he or she," "him or her," or "his or hers." Under no circumstances does the author mean to infer that women are not equally considered in all aspects of this manual: as judges, partners, counsel, clients, expert witnesses, investigators, or in any other capacity referenced herein.

[FNa]. Francisco Ramos, Jr., J.D. with honors, 1997, University of Miami, is a certified circuit and county court mediator, and practices in the areas of product liability, medical malpractice, personal injury, employment law, and commercial litigation. He is a member of The Florida Bar and the Miami-Dade County Bar Association, and is also admitted to practice in the U.S. District Court for the Northern, Middle, and Southern Districts of Florida. Mr. Ramos is a partner with Clarke, Silverglate & Campbell, P.A. in Miami. Mr. Ramos wishes to dedicate this manual to the attorneys with whom he works, particularly Spencer H. Silverglate and Mercer "Bud" Clarke, from whom he learned much of what he shares in this book.

I. DECIDING TO BE A LITIGATOR

A. IN GENERAL

If you are reading this manual, you must be interested in becoming a trial lawyer. Beware, though, that many new lawyers have preconceived ideas of what trial lawyers do. Perhaps you think other areas of the law that involve negotiation and document preparation, such as estate planning, probate matters, or real estate law, will be boring compared to litigation. Perhaps you are drawn to the challenge of outwitting an opponent in discovery, in motion practice, and at trial. Or maybe you have been attracted by television programs and novels that glamorize trial lawyers. All are motivating factors that may have propelled you this far but, upon closer examination, may prove to be false perceptions. To dispel any misconceptions about what litigation entails and to prepare you to better gauge whether you really want to become a trial lawyer, consider the following disadvantages and advantages to litigating. Then, taking each into account, if the idea of litigating for the rest of your legal career makes you somewhat uncomfortable, you may want to reconsider your options. Otherwise, reality will likely disappoint you.

B. DISADVANTAGES

1. POSSIBLE STAGE FRIGHT

You need to be able to enjoy all aspects of a litigator's job. Public speaking is difficult for many. If you have serious stage fright, you will need to overcome it in order to conduct a deposition, argue a motion before a judge, or present a case to a jury. If you do not think you will be able to overcome your fear of speaking or, at least, use it to your advantage, reconsider litigating.

2. NEED FOR RAPID DECISIONS

As a litigator, you will be called on to not only speak persuasively, but make rapid decisions in response to a deponent's answer or an expert's report, and provide instant answers to unanticipated questions from the judge. You need to be able to "think on your feet." There often is no time for thoughtful deliberation and, certainly, paralysis is not an option.

3. NEED FOR GREATER SELF ESTEEM

Because decisions must be made so quickly in litigation, you need to be forgiving of yourself if it turns out that your decision was not the best one. Mistakes come with the job and you will need to be self-respecting to recover from them. Litigators have made, and will continue to make, mistakes — but rather than dwelling on yours and letting them color your perspective or define you, you will simply need to learn from them and move on.

4. NEED FOR FLEXIBILITY

You need to be able to shift your strategies to respond to a lawsuit that is constantly in flux. If you are the type to make a plan and then be bound by it without the flexibility to change, your personality may not be suited for litigation.

5. REQUIRED OFFICE TIME

You need to be prepared to spend a large amount of time in the office. Litigating involves a great deal more than presentations before a judge and jury. You have to write letters, memoranda, and motions. In fact, this is

NOTE Because 95% of all civil cases settle before trial, it may be that you try only one case a year or, perhaps, none at all. Do not be disillusioned into thinking that you will start your career by strolling into a courtroom and trying case after case.

6. NEED FOR COLLABORATIVE EFFORT

Litigation requires collaboration with the many people involved in the case other than your client. To varying degrees, you will need to work with other attorneys, your staff, experts, and witnesses, to name a few. If you are not much of a group coordinator or "team player," but prefer instead to work alone, litigation will likely be difficult for you.

7. HIGH STRESSOR

You need to be able to handle stress well. A litigator's job is quite stressful because litigation is driven by deadlines. Answers to interrogatories, requests for production, requests for admissions, experts' reports, experts' depositions, motion-filing, and disclosures all must be performed within deadlines. Some lawyers find these deadlines to be all-consuming and they cannot function under the weight of them.

Additionally, unexpected events are common. For example, the key witness may have left the state, your expert's opinion may favor the opposition, or your client may tell you a formerly undisclosed fact that changes everything about your case strategy.

Consider the stress involved in one case and then multiply that by 30 cases or more. If you are obsessive about being in control, the surprises and constant flux of litigation will not suit you.

8. NEED FOR MULTI-TASKING

When you multiply discovery cutoffs, looming trial dates, and litigation uncertainties to account for all of your ongoing cases, it may seem that you have only enough time to extinguish the next fire. Attorneys who lack case management skills may find this overwhelming.

9. HIGH DEGREE OF RESPONSIBILITY

The challenge of being in a job in which you are called on to make important decisions every day can be overwhelming, exhausting, and sometimes truly frightening. Rather than letting the burden get the best of you, you need to learn to remain calm while juggling several responsibilities.

10. ADVERSARIAL NATURE OF WORK

You must be able to handle conflict. Litigation is adversarial and your client will often expect you to act aggressively. Although The Florida Bar discourages over-zealous behavior, your opposing

counsel may be uncooperative, combative, and aggressive. If you dislike contentiousness and conflict, you will not enjoy litigation.

11. ALL-CONSUMING WORK

If you are conscientious, you will want to take your work home with you. However, you will need to try to leave it at the office. Otherwise, you may find that, while at home or on your personal time, you are wondering if you should have asked that particular question at the deposition, or worrying whether a motion was timely filed, or having personal conversations as if you were conducting a cross-examination.

12. LENGTHY LEARNING PROCESS

Becoming a litigator is a long process — it will not happen overnight. You need to be patient in the learning curve because it may take you five or ten years before you are comfortable with litigating. As a new litigator, you will continue to second-guess yourself until you gain the required

NOTE You need to be able to say at the end of your legal career that what you chose to do was worth it. Therefore, reflect on where you might want to be 30 or 40 years from now rather than focusing on just a 5-year perspective.

C. ADVANTAGES

1. GREAT CHALLENGE

On the positive side, litigation is exciting, requiring that you use all of your wits, heart, and energy in planning for and succeeding at trial. Surprises and challenges await you in this fast-paced arena. Litigation can be likened to a good chess match in which you are simultaneously attacking and defending. For every move there seems to be a counter-move. It can be a bit terrifying and very consuming, but it is certainly not boring.

2. GREAT REWARDS

Success is very gratifying. The longer you practice, the more your skills improve, the more law you learn, and the more comfortable you become with the practice of law. The hours at the office or computer are weighed against the occasional thrill of cleverly undermining the opponent's expert during deposition, solidly convincing the judge that your motion should be granted, or best of all, winning a case at trial. If you can get past the fear and uncertainty of the first few years while enjoying the positive aspects and not lingering on the negative, you will enjoy the fruits of your hard work.

3. LEARNING TO THINK ON YOUR FEET

As a litigator, you will learn to think on your feet. On a daily basis, you will be confronted with situations that will force you to make quick decisions. This daily decision-making process will hone your instincts, which will serve you well both in and out of the courtroom.

4. GIVING OTHERS A VOICE

You give others a voice to resolve their disputes. Litigants who want their problems solved look to you to help them achieve their ends. Without you, they would be lost in the legal system, representing themselves. The fact is that pro se litigants are at a distinct disadvantage. Your skills help level the playing field.

5. MAKING A DIFFERENCE

Litigators have the skills and resources to tackle important social and community issues and make a difference. For example, litigators were at the forefront of the Civil Rights Movement.

6. DEVELOPING FRIENDSHIPS

The victories and defeats you will experience as a litigator will serve to forge close bonds with the other attorneys at your firm. You will share the ups and downs that come with any trial practice and, in doing so, you will develop close, lasting friendships.

7. LEAVING A LEGACY

The work you do and the skills you develop will enable you to leave a legacy — something bigger than yourself. Perhaps you will create new law. Perhaps you will lend a voice to those who cannot speak for themselves. Perhaps you will make a difference in the life of a client. Being a litigator will give you the tools to do the things that transcend the daily monotony and make an impact for years and, possibly, generations to come.

8. TRANSFERABLE SKILLS

The skills you learn as a litigator will help you in every aspect of your life and they will serve you well if you decide to stop practicing law and pursue other career options. The skills to write well, communicate effectively, and think on your feet are the same skills every company is seeking.

9. GOING BEYOND THE LAW

Opportunities abound to make a difference outside the law, and those opportunities will present themselves in your practice. As your skills improve and your reputation precedes you, you will be sought out to assist and possibly serve on the boards of civic and charitable organizations where you can and will make a difference. These opportunities will remind you of the rippling effects one litigator can have.

10. BUILDING SELF-CONFIDENCE

Though overwhelming at first, taking deposition after deposition and arguing motion after motion will help you develop self-assurance and self-confidence.

II. SEEKING A JOB

A. STARTING YOUR OWN FIRM VERSUS JOINING A FIRM

1. IN GENERAL

You may think that you are better suited for solo practice where you can be your own boss, rather than being a member of a small or large firm where you work for someone else. However, running your own firm can be both an amazing and terrifying experience. Before you tender your resignation from a legal position or hang your own shingle upon graduation from law school, consider the following pointers to successfully starting and running your own firm.

2. YOUR BUSINESS PLAN

When you start your own firm you are starting your own business. This means you will have to stop thinking solely as a lawyer and start thinking like a business person. Therefore, before you resign or decide to go it alone out of law school, take the time to draft a three-month, six-month, one-year, and five-year business plan. Set up benchmarks for yourself and spell out how you plan to meet those benchmarks. Consider whom you will hire and how you will pay for their services and their insurance. Detail how you will pay for your own insurance and office space, be it leased or owned. If you know a law office manager, discuss with him aspects of firm manage-ment that you may have taken for granted or never appreciated. Think through all aspects of a law firm practice and plan for every contingency.

3. LEGAL MALPRACTICE INSURANCE

However tempting it may be, do not practice law without legal malpractice insurance. When cutting costs, do not leave yourself exposed to a malpractice claim which, without coverage, may ruin your practice.

4. OTHER INSURANCE

In addition to legal malpractice insurance, you will need to look into health, workers' compensation, and liability insurance. Discuss with your insurance agent the types of insurance available to small businesses and decide which ones are important for you and your fledgling firm's viability.

5. JOINING OTHER SOLO PRACTITIONERS

To save costs and create a referral system, consider sharing space and facilities with other solo practitioners. For example, if you handle personal injury claims, consider sharing space with an immigration lawyer and a bankruptcy lawyer. Each of you will represent clients with needs the other lawyers can meet. You will also save money by sharing a receptionist, office space, utilities, and a printer, scanner, copier, and fax machine.

6. ADVICE FROM BAR ASSOCIATIONS

The Florida Bar, the American Bar Association, and other bar associations (local or practice-specific) have a wealth of resources for lawyers who want to start their own practices. In addition to providing written materials, they host seminars and networking events where solo practitioners can get

NOTE The Florida Bar's Law Office Management Assistance Service (LOMAS) is especially well-equipped to advise solo practitioners. Call and ask about its services.

7. ADVICE FROM SOLO PRACTITIONERS

If you are thinking of starting your own firm, attempt to locate and talk to law school classmates who have already done so. Ask them what they did before venturing out, what mistakes they have made, and what they consider to be the pros and cons of solo practice.

8. NETWORKING

When you work for yourself, you absolutely must develop and nourish referral sources that will bring you a stream of business. It is also important to get involved in your local bar associations and in your community to meet people who may one day refer cases to you. You must network constantly.

9. YOUR MARKETING PLAN

In addition to networking, you need to develop a larger marketing plan. Just as you need a business plan, you need a plan to publicize your name and your firm's name and lay the groundwork for obtaining new clients and fostering relationships to keep them.

10. SPECIALIZING

When you start out, it is tempting to accept all viable clients who contact your firm — this is, after all, how you pay your bills. However, you accept all clients at the risk of being "a jack of all trades and a master of none" and, far worse, at the risk of committing malpractice. Instead of being all things to all people, find a niche, maybe two, and focus your efforts there.

11. LEARNING THE PRACTICE

Running your own business takes a certain amount of experience as a lawyer. You need to have learned how to draft motions, argue hearings, and try cases. These are things that are best learned under the tutelage of others. Therefore, no matter how enthusiastic or eager you are about starting your own firm, do not do it until you have sufficient experience as a lawyer. A premature departure from a steady job is a recipe for disaster.

12. BUILDING AN EMERGENCY ACCOUNT

Before starting on your own, put aside an emergency account that will support you and your family while you get your practice off the ground. Have enough money set aside to pay your ordinary family expenses for at least six months — preferably, for one year.

13. PROVIDING QUALITY SERVICE

Distinguish yourself from the multitudes of other lawyers by always providing top-quality service. Set yourself apart by going above-and-beyond the call of duty. Treat your clients in the same manner as your favorite restaurants and hotels treat you. Do this consistently and your reputation will spread — and your clientele will increase.

B. RESUME PREPARATION — EFECTIVE WRITING SAMPLES

1. IN GENERAL

If you have decided to seek work at a law firm, you will, of course, need to submit a résumé and, likely, a writing sample. To advance yourself to the short list for consideration for the job, you must submit a strong writing sample that reflects your best effort and impresses the hiring partner. The person reviewing your writing sample often assumes that you are only as good as what you write, and may select or reject your application based on that impression. For example, if your writing sample has mistakes, you will likely be perceived as someone who is prone to making mistakes at work. Therefore, it is very important that you put your best foot forward by putting your best writing forward. Consider the following suggestions when submitting a writing sample.

2. SUBMIT A PUBLISHED ARTICLE

To get a work published, write something for a bar association or trade newsletter, a journal, or a magazine. The topic can be a recent landmark case or issue of interest to the community. Numerous publications seek authors to write for them. By including a published clip with your résumé, you show a hiring partner not only that your writing is good enough to be published, but that you have the initiative to get published. See IV.H. at page 42 for further information about getting your work published.

3. SUBMIT A CURRENT WORK

If you are going to submit a motion you prepared in the past, ensure that the cases you cited are still good law. If the law has changed, revise your writing sample. Otherwise, you may find yourself in the embarrassing situation of trying to explain why your writing sample is out-of-date and fails to reflect the current law.

4. SUBMIT A RELEVANT WORK

Prospective employers are interested in reading material that affects their daily practice. For example, if you are applying to an insurance defense firm, consider submitting a memorandum on the new medical malpractice statute. If you are applying to a commercial litigation boutique firm, submit a motion to dismiss that addresses the economic loss rule.

5. SUBMIT MULTIPLE SAMPLES

It may be prudent to submit more than one document to display your ability to address different audiences. For example, you may want to submit a motion, a memo, and a letter to a client, so that your prospective employer can see your skill at drafting each. See IX.D and E. at pages 74 and 78

regarding improving your writing skills and correspondence. Also, *FASTRAIN*™: LEGAL WRITING MANUAL (Fla. Bar CLE 2004) addresses how to write to different audiences.

NOTE When submitting letters, memos, or motions, make sure you redact any confidential or personal client information.

6. SUBMIT AUTHENTIC MATERIAL

If you submit a sample that was heavily edited by a senior associate or partner, you may be doing everyone a disservice. Your submission needs to truly reflect your level of proficiency. Otherwise, you will create expectations about your writing that you will not be able to meet.

7. SIMPLIFY

Make sure your writing sample is in plain English. Avoid legalese, big words, and convoluted sentences. Write in the active voice, use simple, plain language creating short paragraphs and short sentences, and remember that you are writing for a particular audience. See *FASTRAIN*™: LEGAL WRITING MANUAL and IX.D. at page 74 of this manual for further instruction on improved writing.

8. EDIT AND PROOFREAD

Always edit and proofread your writing sample several times before submitting it, paying careful attention to the details. Make sure the margins, the font, the line spacing, and the page numbering all look right, that headings are not dangling at the bottom of pages, that all proper names are spelled correctly, and that terms are used consistently. Have a friend or associate proofread it as well. Just as with the résumé cover letter, your writing sample must not be sloppy and must not contain typographical errors or poor use of grammar that will result in a rejection of your job application.

NOTE Work on your writing constantly. Good writing takes time and constant practice. Refer to Section IX. of this manual and *FASTRAIN*™: LEGAL WRITING MANUAL for further lessons on writing. Additionally, read other books on grammar, style, and plain English. (See IV.K. at page 48 for a possible reading list.) Read others' writings carefully and learn from their successes and their mistakes. Look at every writing assignment, whether it be a 20-page motion for summary judgment or a one-page letter to the client, as an opportunity to improve your writing. With practice, your writing will improve.

C. ADDITIONAL WAYS TO IMPROVE YOUR RESUME

1. IN GENERAL

Whether you want to impress a client, your boss, or a prospective employer, there are different ways to build a strong résumé that gets noticed. Consider the following things you can do to improve your résumé and wholeheartedly pursue those that best align with your interests and suit you.

2. WRITE AN ARTICLE

As mentioned above, there are numerous publications looking for individuals like you to write for them. Whether pitching an idea for an article to a trade journal, a business magazine, or a newsletter, a plethora of opportunities to get published exist. See IV.H. at page 42 for further information about getting your work published.

3. GIVE A PRESENTATION

Just as there are many opportunities to publish, there are numerous opportunities to lecture. Whether you serve on the panel of a continuing legal education course or speak to your local Kiwanis or Rotary Club, look for opportunities to address legal issues that are relevant and topical.

4. GET INVOLVED IN AN ORGANIZATION

Join a local, state, or national bar association or civic organization and volunteer to be on a committee. With some effort, you can increase your exposure and your influence within the organization (see paragraph 5. below).

5. SEEK LEADERSHIP ROLES

Once you have joined an organization and volunteered your time and services, consider running for office. If you put in time and effort, you can eventually rise to the top of the organization and fill a vacancy on the board of directors or run to be an officer or, perhaps, even president.

6. DO PRO BONO WORK

The biggest complaint among aspiring or new litigators is that they rarely see the inside of the courtroom. To acquire the trial experience you need, consider doing pro bono work for a local legal aid or lawyer assistance program that affords inexperienced attorneys the opportunity to represent indigent clients in court and, possibly, at trial. (See also IV.G. at page 41.)

7. BECOME AN EXPERT

Clients want to employ attorneys who are experts in their field. If they have an employment discrimination case, they want an attorney who has handled hundreds of discrimination cases, not someone who just occasionally represents a client in that area. Consider specializing in a practice area. If you already work with a firm, consider working with just one practice group in the firm that specializes in one area of the law. Additionally, consider writing articles and speaking to groups about that area of the law.

8. LEARN A NEW SKILL

Do not limit yourself to the traditional skills lawyers must master. For example, develop computer skills so you can prepare your own power point presentations or your own exhibits. See IV.F. at page 39 regarding mastering technology.

9. LEARN A SECOND LANGUAGE

As our economy becomes more intertwined with the economies of other countries, it is becoming more important to know a second language. In Miami, for example, most law firms and most clients seek attorneys who are fluent in Spanish. Take time to learn a second language and put it to use.

10. ACCRUE EXTRA CLE HOURS

All Florida attorneys are obligated to take Continuing Legal Education courses. Although some attorneys consider this a burden, it should be deemed an opportunity. Take more than the mandatory number of courses. If possible, obtain CLE courses on tape or CD. If you are working with a some. firm, check to see if it has tapes or CDs available and, if not, suggest that it purchase some.

NOTE Listen to the tapes or CDs while in your car. If you spend an hour per day driving to and from work, you can learn 20 hours of law per month, just while sitting in your car.

11. IMPROVE YOUR COMMUNICATION SKILLS

No matter how good a writer or a speaker you may be, you should constantly work on your communication skills. As noted above, you should study books on grammar and style, such as *FASTRAIN*™: LEGAL WRITING MANUAL (Fla. Bar CLE 2004). Also consider joining Toastmasters to work on your public speaking. You may know the law better than anyone, but if you cannot communicate your knowledge to others, you will not be an effective advocate.

D. GETTING A JOB INTERVIEW

1. IN GENERAL

If you want to get that ever-elusive job interview, you will need more than the right fiber, color, and font for your résumé cover letter. You will need to research your prospects. You have to convince a firm that it should take a chance on you. Before you send out your next résumé and cover letter to a prospective firm, consider the following.

2. PURSUE FIRMS OF INTEREST

First, you need to determine the type of firm you want to work with. Visit the firm's web page, do an Internet search under the firm's name, and read everything you can find about it and its members. Choose firms that do what you want to do and that participate in the organizations and activities you want to participate in. (See II.F. at page 14 for more information on how to choose the right law firm.) Firms want associates who are excited about and eager to join their team. If you are excited about a firm, that excitement will be contagious.

3. FOCUS YOUR COVER LETTER ON THE FIRM

Rather than sending form cover letters with your résumé, tailor each letter by learning as much as you can about the recipient firm — then incorporate what you learn into your cover letter. Instead

of writing all about your qualifications and work history in the cover letter, address what you can do for the firm you are applying to. You can do this by first discovering what the firm does, what its mission statement is, and what its goals are. Then, let the firm know what you can do to help it accomplish its mission and achieve these goals.

4. PERFECT YOUR COVER LETTER

The cover letter must be as near to perfect as possible. Any misspelled word or slip in grammar may ruin your chance for an interview. Write in plain English, in the active voice, and use short, strong paragraphs, sentences, and words. (See IX.D. at page 74 for writing tips.) Because your cover letter is the first writing sample the firm sees, you need to show the firm's partners how clearly and plainly you communicate your message — that they should hire you. As with the writing sample, proofread your letter, have someone else proofread it, then do it twice more.

5. USE DIRECT CONTACTS

If you know an attorney at the firm, consider directing your letter to that attorney to increase the chances of its being seriously considered. If you do not know an attorney at the firm, work to find attorneys there with whom you share interests. People like to work with others who are like them — those who went to the same schools and have similar backgrounds and interests. Address your cover letter to the particular attorneys who can most identify with you via these similarities, and weave into the letter this "common ground."

6. MENTION MUTUAL ACQUAINTANCES

If possible, mention in the cover letter the name of a friend or colleague who suggested you write and ask for a job. To do this, of course, you need to develop contacts and relationships with lawyers who, if they cannot offer you a job, can at least suggest the name of a friend or two who can. Take advantage of memberships at local bar associations, volunteer at their functions, and write for their newsletters. By doing so, you will develop relationships with those who may one day help you find a job. (See IV.J. at page 46 regarding how to improve your networking capabilities.)

E. PREPARING FOR THE JOB INTERVIEW

1. IN GENERAL

If a firm invites you in for an interview, it means they have seen your cover letter, résumé, and writing sample, and want to see more. It is now up to you to make the most of the job interview and close the deal. To do so requires careful preparation. This must occur long before you find yourself in the firm's lobby, flipping through a magazine and waiting for your name to be called. With the right preparation and an enthusiastic attitude, you can distinguish yourself from the other candidates and, possibly, land that job. Here are some pointers for your next interview.

2. FAMILIARIZE YOURSELF WITH THE LOCALE

If you are even slightly unfamiliar with where the law firm is located, drive by it the day or week before the interview so you know exactly where it is, how to get there, and what the parking

situation is. You simply cannot afford to get lost and show up late for the interview or, worse, not show up at all.

3. LEARN WHO WILL INTERVIEW YOU

When setting up the time for the interview, ask which of the firm's attorneys will conduct it. Then go to the firm's website and find out everything you can about those attorneys. Also, search their names on the Internet and see what else you can find out about them. If the firm cannot tell you with any certainty who will conduct the interview, see if you can at least narrow it down to the practice group that will be speaking to you.

NOTE These attorneys should appreciate that you care enough to learn about them and where they practice. The information will also assist you in finding things to talk about during the interview.

4. PREPARE FOR TOUGH QUESTIONS

Interviews are all about questions — sometimes tough ones. The more interviews you do, the more you will hear the same questions asked. Learn what the common questions are and practice answering them before the interview starts. Some of the common questions you will likely be asked include:

· What do you know about this firm?

· Why are you interested in this firm?

· What do you believe this firm has to offer that others do not?

· What are your strengths?

· What are your weaknesses?

· Whom can I contact to discuss your work product?

· Where do you see yourself in 10 years?

· What can you bring to this firm?

· What are your core values?

NOTE If you are leaving a firm, add to this: Why are you leaving your firm? When answering this, be careful not to criticize your current employer or staff members, even if they may deserve it. Criticism will make your interviewer not only question your loyalty but wonder if you are a complainer by nature. Although an interviewer might goad you to "take shots at" your current boss, resist the temptation.

5. BE RESPECTFUL TO ALL ENCOUNTERED

Whether you are interacting with the receptionist, the mail room clerk, or a secretary, you should treat everyone like the name partner. Not only does everyone deserve to be treated with respect, but if they are not, word is likely to get back to the hiring attorney. Simply put, the firm will not want to hire you if you behave badly.

6. FOCUS ON THE FIRM

Focus on what you can do for the firm, not on what the firm can do for you. As noted above, most job applicants talk about themselves. Instead, learn what the firm does and tell the interviewers how you can help them achieve those goals.

7. BE ENTHUSIASTIC

Show that you are excited about the interview and the opportunity to be considered for the job. A positive, upbeat attitude does a lot to convince others that you deserve the job.

8. GET REFERENCES AND REFERRALS

When you interview, you may be asked for the names of attorneys who can vouch for your character and the quality of your work product. Be prepared to offer the names of two or three attorneys who know you and your work. Likewise, you have to do your own due diligence and ask friends and friends of friends what they think of your prospective employer (see II.F.5. at page 19).

9. PREPARE QUESTIONS OF YOUR OWN

Be prepared to ask some tough questions of your own. Find out about the firm's turnover. One of the best indicators of whether associates are happy at a firm is whether they stay. The higher a firm's turnover rate among its associates, the greater your concern should be. If possible, reserve the question for a senior associate who may be more open to answering it honestly. Ask about what the firm does for its associates. For example, does it have an associate training program? Does it support associates in their efforts to market to clients? You want to look for a firm that will invest in you. Find out how late the associates stay. What is the billable hour requirement? You want to know how much is expected of the associates before you start your job.

NOTE If you are concerned that you will sound lazy by trying to find out when people leave and how hard they work, weigh that risk against the one of not knowing — and therefore not being able to make an informed decision.

10. FOLLOW UP WITH A NOTE

Let the firm know you are interested, and ask when they will get back to you. Then, when you return home, send everyone you interviewed a personalized letter thanking them for the interview. Mention one thing that came up during your conversation with the recipient so as not to make it a form letter. Although this takes time and work, it will give you the advantage over most of your peers who will not do this. Also, firms realize that if you take the time to learn about them and

write personalized thank you letters, you are likely willing to go the extra mile for them and their clients.

F. ACCEPTING A JOB OFFER

1. IN GENERAL

The most important decision a new lawyer will make is deciding where to work. When you accept a job at a firm, you are likely doing so with the hope that you will be there for a very long time. Furthermore, considering that you will spend more time at work than with your family, you owe it to yourself to take the time needed to make an informed decision and to find the firm that is right for you. Consider doing the following before settling on a firm and accepting a job offer.

2. ANALYZE DESIRED GOALS

If you have not already done so before sending out your résumé, determine now what it is that you are looking for in a firm. This must be an honest assessment. List all the qualities you are looking for, including the less important ones. For example, if you want to be home by 7:00 p.m. and not work on weekends, list working hours as an important factor. If working at a "silk stocking" firm is not as important at this stage of your career, list that as a lesser factor. Taking the time to write down what you want and what you do not will help you narrow your list of potential employers.
After completing your qualities/factors list, compare it with lists from friends. Discover what they are looking for in a firm and why. They may raise factors that you did not think about, such as an interest in a strong associate training program. You may also discover that your priorities are out of sync with those of your friends, causing you to analyze your list more closely.
Next, compile a list of firms that appear to have the qualities you are seeking. Search Martindale-Hubble (available on the Internet) for firms, and be willing to cast a broad net to compile a large pool of potential employers.

3. UNDERSTAND PROS AND CONS OF LARGE AND SMALL FIRMS

a. In General

Big firms and small firms each have their own benefits and shortcomings. You need to ask yourself what you are looking for and then decide on the type of firm that meets your criteria. The following points will help you weigh the pros and cons before making the decision to join a large or small firm.

NOTE When reading the following, keep in mind that they are generalities. Some large firms do not have the shortcomings listed below and some share the benefits of small firms, and vice versa. You will have to do your own firm research to determine what applies to the firms you are considering and what best suits you.

b. Benefits Of Large Firms

The following are a few advantages to working with larger firms:

· Bigger salaries. Larger firms can afford to pay their associates more because they tend to represent larger clients with greater financial means.

· Better resources. Larger firms have associate training programs, mentoring programs, and CLE programs, to name a few. Because they have so many attorneys and such large staffs, they can provide seminars, instruction, and supervision that many small firms cannot.

· Varied practice areas. Larger firms have attorneys in all types of practice areas, providing greater exposure to young associates and giving them the opportunity to experience working in different areas of the law.

· Sophisticated work. Larger firms tend to handle more complex, intricate legal work, often involving "cutting-edge" issues that are the current subjects of journal articles and newspapers.

· Instant credibility. Employment with a larger firm will give you greater credibility with judges and opposing counsel. You will gain quicker notice with a well established, reputable firm.

c. Shortcomings Of Large Firms

Some of the disadvantages to working with larger firms are:

· Less valuable experience. The bigger the firm, the greater the likelihood that you will not get the experience you want as fast as you want. You may spend more time looking through a roomful of documents or drafting at your desk than your friends do at smaller firms. While you review cases from Westlaw on your screen, your peers at smaller firms may be taking depositions or arguing motions. The larger the firm, the better able it is to take advantage of a division of labor, leaving the least exciting, least desirable jobs to those at the bottom of the hierarchy.

· Long hours. Large firm's associates have the reputation of working long hours. Although some firms have moved away from this in recent years and focus more on quality-of-life issues, many big firms still expect a great deal of work-time from their associates, particularly in light of the large salaries they pay them.

· "Pigeonhole" possibilities. Another by-product of their size is that big firms can dedicate specific attorneys to specific types of cases. Moreover, they may dedicate specific attorneys to specific tasks in specific cases. For example, you may become a liaison for experts in a specific type of product liability matter, knowing all the medicine and science in that area but knowing or learning little else. It is important to specialize, but this type of specialization may hamper your career.

· Decreased input. The larger the firm, the harder it is for you to get your perspective, views, or opinions heard and acted on. Because a large firm may have committees and subcommittees to consider actions, and may receive any number of opposing opinions, it is difficult for you to have a direct impact on any firm-wide decisions being made.

· Greater bureaucracy. At a large firm, any request you have may go through several committees and several layers of approval, and an answer, particularly a favorable one, may be a long time in coming.

d. Benefits Of Small Firms

There are several advantages to working for a small versus a large firm. Among them are:

· Greater sense of family. The smaller the firm, the greater sense of family you will have. Everybody pitches in to make the firm work. If someone is not pulling his work load, the firm can be put into an unstable position. When you work with the same few attorneys on a month-to-month basis, year after year, you develop a close relationship with them and the job becomes something more than just work.

· Greater flexibility. Smaller firms tend to have fewer rules and protocols for everything — including which books they order for their libraries, which associations they belong to, which seminars the attorneys can attend, which direction the firm is headed, and how to get on the partnership track. In fact, smaller firms tend to have shorter partnership tracks than larger firms.

· More experience. Smaller firms do not have the manpower to staff a case with four or five attorneys. Often cases are staffed with only one partner and one associate, and often the associate is given real responsibility in the case, including arguing motions and taking depositions. You may find that your first trial experience is months, sometimes years, earlier than that of your friends at larger firms.

· Increased clout. The smaller the firm, the greater your importance to the organization. If a large firm loses an associate, it is a loss that can be absorbed. If a small firm loses an associate, it can seriously impact its operations. Your value is likely to be greater at a small firm and the treatment you receive will likely reflect that. Also, in a small firm, your views will be more readily heard and may completely change the direction of the firm.

· Decreased bureaucracy. The smaller the firm, the easier it is for you to get your position across. Because of the decreased bureaucracy, your requests may be addressed more quickly.

· Earlier partnership. As noted above, the path to partnership with a small firm may be shorter than with a large firm. At a big firm, the chances of your name ever appearing on the letterhead is remote. At a small firm, though, you are not only likely to get your name on the door, it may take less time than you think. In fact, one day the firm may actually be yours.

e. Shortcomings Of Small Firms

The following are some of the disadvantages to working with a small firm:

· Downturns can be traumatic. If a big firm loses a client or two, it can survive the downturn. If a small firm loses a client or two, particularly a significant client, the firm may have to close its doors or lay you off. Either way, you are out of a job.

· Limited practice areas. The smaller the firm, the fewer the practice areas the firm is likely involved with, which, of course, limits the areas of practice you will be exposed to. Smaller firms tend to be boutique firms that specialize in a given practice area. If you join a firm and realize you do not like the one or two areas of law the firm attorneys practice, you may find yourself with the wrong firm.

· Lack of notoriety. Everybody recognizes the names of the big firms but the smaller firms sometimes go unrecognized. The judge you are appearing before or the opposing counsel on the phone may never have heard of your firm, much less you.

· Due diligence restraints. The smaller the firm and the lower its visibility, the harder it is for you to find out about the inner workings of the firm before accepting a job offer. With big firms, the resources are plentiful for investigating what it is like to work there. With small firms, you may have no more to rely on than a 20-minute interview with the managing partner, which may not provide enough information to make an informed decision.

· Relationship traps. At a large firm, if a relationship sours with one partner, you may have the opportunity to continue working with a different partner. At a small firm, there is no way to disappear from the irritated or irritating partner's or associate's view. There are few, if any, avoidance techniques that can be employed. Because there may be no second chances, your long-term viability in a small firm depends on getting along with everyone, not just a select few.

4. RESEARCH THE SELECTED FIRMS

Once you have a list of firms, be they large or small, study each firm's web page, if available. A firm's web page can be very revealing. A poorly designed or inadequate, inexpensive web page may be a reflection of the quality of the law firm. A firm that has no web page at all speaks volumes. Review not only the look of the web page, but its content, which should tell you about the firm's history, its values, and its practice areas. Closely look at the attorney profiles, especially the associate profiles. Have attorneys been with the firm eight or nine years and still not been made partner? If so, the firm clearly has a long partnership track, if any. Are the associates involved in civic activities? Have they been published? Do they have leadership roles in bar associations? If yes, that may be a sign that the firm encourages and supports such behavior. Web pages are designed to convey a message. Determine what message you are receiving and whether you like the message.

Search the Internet. After viewing the firm's web page, do a Google or Yahoo search for the firm and read every article written about it. Has the firm won any big cases? Has it won any awards? Conversely, has it been the subject of any investigations? Have any of its attorneys been disciplined?

In addition to doing an Internet search, call The Florida Bar (Membership Records) or other state bar associations listed and ask whether the attorneys you want to work for have been disciplined. If you are looking at a large firm, consider inquiring about the attorneys in the department you will be working for.

5. SEEK INPUT FROM OTHERS

To make the best decision about the firm, you need to get honest opinions about it. When you interview at a firm, everyone is trying to put the best face on the firm, whether it is deserved or not. It is your job to find out if all the nice things they say are deserved. The ideal situation is to speak to a friend who currently works there or someone you know who used to work there.

III. LIFE AT THE FIRM

A. NATURE OF THE FIRM

1. IN GENERAL

A law firm is a microcosm — a miniature universe, with its own inhabitants, its own rules, and its own social construct. To survive in this microcosm, you must first study it from the viewpoint of an anthropologist and learn to understand its social order and behavior, its laws and politics, and its values and beliefs. To not only survive but thrive in this microcosm, you must progress beyond the mere study of it — you must adapt to it, embracing it and making it your own. If you are unable to do so, you may remain only an observer — an outsider who never becomes part of the clan or tribe. Outsiders generally do not last long in this environment; they either leave voluntarily or are asked to do so. So, life at the firm begins with learning about life at the firm. The following are some of the things you will discover.

2. HIERARCHY

Like any society, a firm has a hierarchy and, as a new member of it, you start at the bottom. If you ignore this "pecking order" and presume your stature is greater than it is, you will upset others — particularly those above you whom you perceive as beneath you. Those above you have the power to make things either easy or difficult for you. What they do is largely a reaction to what you do.

3. FIRM CODE

Each firm has its own rules, a code if you will. Some rules are written down, such as those found in an employee handbook. Most, however, are not. You likely were introduced to some of these unwritten rules during your interview or via lunch conversations with other attorneys. Some of these rules are obvious and universal to every firm. Your challenge is to learn the not-so-obvious ones — the ones that define your firm and make it different from others. For example, you need to know when you are expected to be in the office and when you should leave; whether interoffice emails are encouraged; what the inter-office memorandum should look like; how you are expected to interact with the staff; and what actions and behavior are encouraged or discouraged. To learn the code, seek a mentor — a senior associate or junior partner who can teach you the code in its entirety (see IV.L. at page 50 regarding mentors).

4. INDIVIDUAL CODE

In addition to the firm's code, every attorney abides by his own code or set of rules. These may be viewed as the attorney's eccentricities or pet peeves by which he lives. Some are reasonable and make sense — others do not. When working with individual attorneys, your job is to do things their way, regardless. Learn each attorney's writing style, research methods, and drafting techniques. Learn how they interact with clients, with other attorneys in the office, and with staff. Then abide by their personal codes — not necessarily because it is right, but because they believe it is. If you want them to perceive you as doing things the right way, you must emulate them rather than questioning why they insist on doing something differently. Learn their pet peeves and avoid them.

5. FIRM VALUES

Each firm has a set of values — some of which are explicit and can be found in the firm's mission statement, and others that are less obvious. These values guide the firm, and you will be expected to learn them and live by them. If you do not share the firm's values or vision, you will not thrive there.

6. FIRM DRESS CODE

The dress code may require that you wear a suit each day or it may allow casual attire year-round — most likely, it will impose a number of rules along this continuum. Learn what is considered dressing up and what is considered casual. Once you have determined (mainly through observing) the appropriate firm attire, wear it, even if it requires adjustments in your wardrobe. Shopping to obtain the proper dress will be money well spent.

B. JOB DUTIES AT THE FIRM

1. SUMMER ASSOCIATE

If you have been given a summer associate position with a firm that you are interested in getting a permanent job with later, you need to work every minute, hour, and day to prove your worth to the firm. To make the most of your time, pay attention to the following pointers:

· Understand your assignments. When you get an assignment, you may hesitate to ask questions for fear of looking foolish. However, by not asking, you run the risk of misunderstanding the assignment. You may get back to your office and not know exactly what to do. Rather than "spinning your wheels" by researching issues never asked about and producing a memo that is off the mark, make sure you understand what you have been asked to do. Take the time to ask a question or two before wasting valuable time researching the wrong issue.

· Do not turn in rough drafts of your work. You should never give an attorney at your office a draft of your work product. You must consider your work a reflection of you, and strive for perfection.

· Volunteer. If you want to get noticed, do the "grunt" work. For example, if an attorney needs someone to stay after hours or through the weekend, cancel your plans and volunteer to stay. If a secretary needs help moving a file cabinet or if there is a paper jam in the copier, lend a hand. People remember the little things you do.

· Get your priorities in order. If you are juggling several assignments from different attorneys in the firm, determine which is to be done first and which takes the lowest priority. The firm might purposely give you a number of things to do at once to see how you will handle the situation. If this happens, find out who wants what when, let the attorneys know what deadlines you are working under, and if you simply cannot get to an assignment when asked, let the attorneys know that as well. If, by the end of the summer, you are still "swamped," that usually means the attorneys in the office are happy with your work.

· Put in enough time. You should not leave the office earlier than the associates at the firm. Stay as late as they stay and come in on the weekends if they do. If you feel they are simply working too hard and this place is not for you, keep that to yourself. While you are there for those 10-to-12 weeks, you need to put in the time, make the sacrifices, and get the job offer. That offer is worth it.

· Get a mentor. When you join a new firm, you will need help learning the firm's particular culture and rules. A mentor can help you figure out the "rules of the game" and avoid the traps that unsuspecting summer associates often fall into. (See IV.L. at page 50 regarding mentors.) Find out if a partner wants memoranda submitted just a certain way or an associate has a particular pet peeve (see III.A.4. at page 20 above).

· Adopt a good attitude. A bad attitude can destroy your chances of getting a permanent job at the firm. Attorneys may forgive a mistake amicably, but they will be much less forgiving of your arrogance, even if you performed your assignment well. If you let your ego, sarcasm, or anger get the best of you, you can forget the job offer.

· Do not mistreat staff. Never take advantage of the office staff and do not belittle, upset, or antagonize them. (See III.C.2. at page 28 below, regarding staff relations.) They are there for the lawyers, not for you. If they help you, be grateful but do not come to expect it. Remember that the members of the office team have their lawyers' ears. You do not want them whispering anything negative about you.

· Socialize when appropriate. When a firm is deciding whether to hire you, the lawyers ask themselves a very important question: "Do we like you?" Attorneys are not just interested in whether you research or write well, they want to know if they can get along with you; if you are someone they would like to have lunch or cocktails with; if being around you will be a pleasant experience. To offer them a chance to get to know you and for you to get to know them, be friendly around the office. If invited to join them for lunch or some other occasion, seriously consider doing so.

· Create solutions rather than more problems. When you are given an assignment, you are being asked to solve a problem, not create new ones. Therefore, if you get stuck on a project or issue, think through it, figure out several courses of action, and present them to the assigning attorney. The attorney will appreciate this approach and it will make his or her job easier rather than more difficult.

· Do not speak out of turn. Although it may be tempting to discuss a legal issue or strategy with the client, recognize that this could be a dangerous move. Even if you have a question and even if the client calls you after reviewing a memorandum you wrote, consult with the supervising attorney before speaking personally with the client. In all likelihood, the supervising attorney will want to be the one talking to the client.

· Do not ignore the firm culture. As noted above, every law firm has a personality of its own — its own set of values, its own unwritten rules, and its own way of being. To fit into the law firm culture, you must learn what that culture is and then adapt to it. Visit the firm's website, read its brochures, find out about its mission statement, and ask the attorneys who work there about it. You may learn that you do not share these values and do not want to work at the firm after all.

2. JUNIOR ASSOCIATE

Once law school and the bar exam are behind you and you have obtained a job as a junior associate, you will need to know what the hiring firm expects of you. Your job is to integrate yourself into the firm life and do your best job for the firm. The following pointers will help you meet the firm's goals:

· Submit exemplary work. Whether you are asked to research an issue, draft an internal memo, or write a motion to the court, your job is to make sure it is perfect. Although you may be concerned that being as close to perfect as possible will require too much time and make you appear slow and inefficient, you need to "go the extra mile." Find that extra case and pursue issues and rulings until you are sure you have researched everything on point (see IX.A. at page 69 for some practical research tips). Then spend the time required to edit and proofread what you have written — not just once, but three times (see IX.D.3. at page 75 for editing pointers). Partners remember associates who do quality work and they know that quality takes time. They will be more inclined to forgive inefficiency than poor quality.

NOTE Do not worry about the time spent, even if you are billing by the hour. Simply warn the partner about the amount of time you spent on the project. Partners will recognize your effort and will cut your time if need be (junior associates' billable time is often cut on the client's invoice). If time is an issue, you may have to spend some late nights or early mornings to keep up with your workload — but whatever you do, make sure your work is the best it can be.

· Do the "dirty" work with a positive attitude. The odds are that you will not get many exciting assignments but, rather, will be assigned mundane, detail-oriented tasks, like going through boxes of documents, answering interrogatories, or tracking down hard-to-find witnesses. Although a good attitude may be difficult to muster when a large part of your job is tedious and boring, you will get to your goal of acquiring the experience you want much sooner if you can do this unpleasant work with a pleasant attitude. If you do what is expected, do it with a smile, and even volunteer for tasks that no one wants to do, you will get noticed and your time to do more glamorous work will come.

· Learn a particular area of practice as thoroughly as you can. This is the time to learn everything you can about what you want to do — whether it be litigating personal injury claims, employment disputes, intellectual property, or any other particular field of law. Read bar journal articles, attend local CLE seminars, research issues online, and find and read everything you can that is relevant to that specialized practice area. The greater your mastery of an area of the law, the more you will be relied on by the members of the firm for those types of cases.

· Get involved early in your career. As previously noted, it is advantageous to get involved in local county or local specialty bar associations. Most bar associations have young lawyer divisions that are eager to have new members join. As it is with your firm, it is with these associations — they are looking for help with the "grunt" work. Again, if you volunteer to do that work, do it well, and do it with a smile, you will rise in the organization and do so much sooner than your peers.

· Strive to get along with the staff. Even though you are an attorney, you may be regarded as junior to your very own secretary in that the secretary may know more about your job than you

do. The same is true of many paralegals and possibly even file clerks. They can help you handle most of the practical aspects of your job, such as setting hearings or depositions or sending a proposed order to the court. Do not let your ego alienate these potential sources of help. (See III.C.2. at page 28 regarding how best to get along with staff.)

· Learn the rules. As a junior associate, your most important job is to learn the rules of the firm, of the partners, of other associates, and of staff. If you want to get along and fit in, figure out what the rules are — including what the partners like and what their "pet peeves" are — and adapt accordingly (see III.A. at page 19 above).

3. MIDLEVEL ASSOCIATE

After you have been with the firm for a couple of years and mastered the tasks and duties of a junior associate, you will find yourself enveloped in the new and unfamiliar challenges of a midlevel associate. As soon as you have conquered the typical fears and uncertainty of a new attorney, you will be faced with new tasks and responsibilities. You will no longer be simply drafting outlines for depositions or preparing someone else for hearings — you will be conducting the depositions and arguing the issues yourself. The following tips will help you get through this next level:

· Start focusing on the "big picture." As a junior associate, you were often asked to work on a sliver of a case — research a narrow point or draft a motion tailored to an issue or two. As a midlevel associate, you will be handling assignments that may affect the entire case. You will need to understand how your actions affect the case in the immediate future as well as months or possibly years from now when the case goes to trial and the jury weighs all the evidence. You will begin to understand what the more experienced associates and partners may have told you a year or two earlier — that, like a stone thrown in a pond, your every action will ripple through the entire case.

· Start thinking about partnership. If you have not begun doing so already, now is the time to start thinking about your long-term career. Do you want to become a partner at your firm in a few years? If so, you need to start laying the groundwork now. Investigate what it takes to become a partner at the firm and what you need to be doing now to get on the partnership track. What types of cases should you be working on? What extra-curricular activities should you be involved in? What marketing efforts should you be engaged in on behalf of the firm? If you wait to start doing these things when you become a senior associate, you may find it is too late. (See III.E. at page 32 regarding partnerships.)

· Seek and accept greater challenges. As a midlevel associate, you need to progress from simply researching and writing, handling motion calendar hearings, and conducting depositions of records custodians. If you are not getting more important assignments, ask for them. If you still do not get them, the partners likely think you are not ready for them. Find out why and rectify whatever shortcomings the partners believe you have. Until you start handling the big motions, hearings, and depositions, your growth as a lawyer will be stunted.

· Start managing your own files. With the goal of handling more than just a hearing or a deposition, move away from piecemeal projects and start working on entire files. Study how the partners handle their cases, and read everything you can about how others do so — from start to

finish. (See, for example *FASTRAIN*™: FLORIDA CIVIL TRIAL PREPARATION (Fla. Bar CLE 3d ed. 2007), to learn how the highly successful trial lawyer Ervin Gonzalez manages a case file.) Apply what you learn to the files you are working on and ask to manage them yourself. The partners will be hesitant to hand over the most important or high-profile cases, but should be willing to part with control of the smaller and, perhaps, even the medium-level matters.

· Start managing your own caseload. Do not settle with managing a case or two. Your goal (which you may not achieve until you are a senior associate) is to handle your entire caseload. This may mean handling two, three, or four dozen cases with minimal supervision. The more self-reliant you are, the more free time you afford to the partners at the firm to dedicate themselves to other matters. Seek more responsibility and tackle it with a positive attitude. As you assume more and more of the partners' problems and make them your own, you will become more integrated into the firm and lay the foundation for becoming a partner in a few short years. The fact is, a firm will never make you a partner until you can handle your own caseload.

· Focus on a specialty. If you have not done so already, you now need to choose a practice area of law and begin specializing in it. By becoming an expert in a particular field, you will become the "go to" person at your firm when the firm gets cases involving those issues.

4. SENIOR ASSOCIATE

As a midlevel associate, you were arguing motions, taking depositions, and handling your own caseload. You may have even second-chaired a trial or more. Partnership status is within reach. As a senior associate, your main goal is to lay the final groundwork for becoming a partner. Here is what you need to do to receive your firm's blessing for partnership:

· Market on the firm's behalf. The life-blood of a firm is its clients, without which there are no files to work on. It is your job as a senior associate to keep the firm's current clients happy and to help the firm attract new ones. Firm marketing is not just the marketing department's or senior partners' job — it is everybody's job, particularly yours. One of the things a firm is looking for when deciding to make one of its associates a partner is whether the associate already has clients seeking his services or has the potential to attract them.

· Get involved. To show your firm you have the characteristics it is looking for, get involved in bar associations and business organizations and market your firm to the people you meet at the meetings, conferences, and cocktail gatherings. If you see yourself only as someone who is at the firm to bill hours, that is how the firm will perceive you and you will be viewed as expendable. They will appreciate all the hours you bill but they will never see you as a potential rainmaker who deserves to be named and treated as a partner.

· Seek leadership positions in your organizations. As a junior associate, you should have become involved in local and regional bar associations. If you did this, you should now, as a senior associate, be able to reap the benefits of years of hard work. Seek leadership positions in these organizations. Try to get on their boards and rise in the ranks to become an officer and, ultimately, the president of the organization. It is also time to go beyond a limited, local perspective and start getting involved in national organizations, whether it be the American Bar Association or another national organization. Start laying the foundation in those national organizations to advance to their leadership within 10 years.

· Master your files. You must now advance beyond simply managing your files — you must now start mastering them. Not only do you need to think of the "big picture" or long-term implications of your actions within a case, you need to start devising clever, creative ways to win them. You need to develop and implement strategies that get your clients the best results possible. To do this, study how the partners at your firm win difficult cases, and read everything you can about the success stories of other attorneys. These "war stories" can reveal lessons that will enable you to elevate your skill to the next level.

· Act like a partner. If you want to leap from senior associate to partner, start acting like a partner by working to fulfill the firm's goals. Live the firm's mission statement in everything you do. Start mentoring the younger attorneys at your firm — just as you have been mentored over the last several years. Think like a partner when it comes to firm resources, handling files, dealing with clients, and working with staff. The more you act like a partner, the more you will be perceived as someone with partnership qualities — your title will catch up with your attitude.

NOTE Acting like a partner does not mean you "throw your weight around" or take advantage of others at the firm. It means leading by serving others, tackling tough issues, and not shrinking from responsibility.

C. RELATIONSHIPS AT THE FIRM

1. GETTING ALONG WITH OTHER ASSOCIATES

Your peers at the firm are a great asset. They can help you work through problematic issues, find case law, and provide emotional support when needed. These are the people from the firm with whom you will be having lunch, staying late at the office, and spending most of your waking day. They are the ones with whom you will mature at your firm and who, possibly, will be your partners one day. It is important that you be able to get along with these associates because their loyalty could be a big part of the reason you succeed at the firm. As with any relationship, certain rules come into play.

· Be a supportive ally. Do not treat the other associates as competitors and work against them. Instead, work with them and look out for them, just as you would want them to look out for you. You are all on the same team, which means that a win for them is a win for you.

· Do not undermine them or take credit for their work. Do not build yourself up by tearing down your peers or climbing over them. Do not blame them for your mistakes or gossip about them to partners. Treat other associates the way you want them to treat you. It may be tempting to assume credit for yourself or allow a partner to continue with the mistaken impression that you did something brilliant when you did not, but you should resist the temptation and correct any misconceptions, giving credit where credit is due.

· Praise them to their supervisors. Good jobs often go unnoticed. When you see another associate do a good job, let others know. If someone had a great idea or a new approach to a difficult case, give them the recognition. It is important for the partners to see that your peers are doing well, and they will appreciate your maturity in pointing this out. The other associates will appreciate your looking out for them.

· Do not be petty. Do not let minor disagreements escalate into full-scale arguments that result in fractured relationships. People act childish or irascible sometimes, especially when weary or stressed. Instead of defining someone by their occasional poor choice of words or actions, ignore the indiscretion and reflect on the others' true qualities. If you are willing to forgive, you can build on your friendships instead of tearing them down.

· Appreciate the firm hierarchy. The separation between partners and associates is not the only social division at a firm. As described previously, there are also levels of associates — junior, midlevel, and senior. In large firms there may even be divisions among these three levels. When dealing with other associates, you need to appreciate this "pecking order." This is particularly true for a more senior associate who is very conscious of his position in the hierarchy. If you fail to show the proper respect to another associate higher in the order, you will quickly undermine your relationship with that associate.

· Lend a hand. When you see another associate struggling with a project, lend a hand. Perhaps you have already researched the issue or drafted a similar motion. Your help may eliminate a late night or a skipped meal. Make it a point to talk to the other associates about their cases over lunch or after hours. That way, if you come across an article or case that may be crucial to the work of another or, at least of interest, you can bring this to the associate's attention.

2. WORKING WITH STAFF

Your most important ally at your firm is not the associate next to you or the partner down the hall — it is your secretary who not only makes you look good but frees up your time to handle more important tasks. If you want to succeed at your firm, you need to foster a respectful, caring relationship with your secretary and with the rest of the staff. Be good to them and they will be good to you. Here are some tips about dealing with staff:

· Be considerate. Your secretary is, first and foremost, a person who wants and deserves to be treated with respect, consideration, and appreciation. Just as you would not be willing to exert extra effort for a superior in your firm who treats you poorly, as if you were a dispensable lowly associate, your secretary and staff members will not want to "go the extra mile" for you if you treat them badly. If you want your staff to be responsive to your needs, you must treat them the way you would want them to treat you.

NOTE If you want to know a lawyer's true character, see how he treats his secretary when he thinks no one else is looking. Better yet, see how he treats the runner. Professionalism is treating everyone including the cleaning staff that comes after hours the same way you treat the judge during motion calendar.

· Limit emergencies. Do not let poor planning on your part become a self-made "emergency" that must be handled by staffers, forcing them to work overtime. When you work on a project that will require your secretary's help, let the secretary know about it early in the process so the secretary can get involved and do the job timely without having to stay afterhours. Manage your calendar to avoid frequent last-minute drafting, dictating, or assembling of document exhibits. You do not want to complete your end of a time-sensitive project late, and then dump it in the lap of a staff member to finish when there is barely any time left before it is due.

· Show you care. Keep in mind that your staff members have their own lives, friends, family, and interests outside of work. Take the time to learn a little about your staff. If a member of your staff is involved in charities or organizations and you care about the cause, offer to help. For example, you could bring canned goods for a food drive your staff member is active in, or lend a hand to someone on staff who is helping revitalize a youth center. The staff will appreciate your interest and offers of help, and it will foster a stronger bond. The more you sacrifice for what your staff considers important, the more they will sacrifice for what you consider important, such as the cases you are working on.

· Respect personal time. During the eight hours your staff is at work, spouses may call, family emergencies may arise, and non-work issues will have to be dealt with. Give your staff time and space to deal with them. Attempts to prohibit these interruptions in the work-day will only serve to alienate your staff and, likely, make them less able to concentrate on their work, which, in turn, will make them less productive rather than more productive.

· Be clear and precise. When asking for help from your staff, give clear and precise direction and ensure that the assignment is understood. Take the extra time to write a detailed email about what you want accomplished. This extra few minutes spent at the beginning of an assignment will be recouped when you get back exactly what you asked for. Although you want to give clear direction to achieve your end, try to avoid micro-managing your staff. Depending on their experience and relationship with you, they will need sufficient guidance to get the project done, but not so much that they resent being told exactly what to do. Give direction, check later to see if there are any questions or problems with accomplishing the assignment, and redirect only as needed.

D. AVOIDING TYPICAL MISTAKES

1. IN GENERAL

Beginning attorneys have neither the experience nor the instinct to know where the "land mines" are, much less know how to avoid them. "If I only knew then what I know now," is a common refrain of senior associates and junior partners alike. Take stock of yourself, figure out what mistakes you are making, and address them in your daily practice. Although many of the following points are covered elsewhere in this manual (see, for example, V.B. at page 60 regarding how to keep your clients happy), the most common mistakes to avoid, and the way to avoid them, merit repeating.

2. COMMUNICATE WITH CLIENT

Nothing upsets a client more than being ignored. The client wants to know what is going on with the case and wants to help make the big decisions — and sometimes the small ones. A sure way to upset clients is to simply not call, write, or email them. You will quickly hear from a client who gets billed every month but is not otherwise contacted about what you are doing or charging for.

3. COMMUNICATE WITH PARTNER

Even before you communicate with the client, speak with the partner who is working with you on the case to make sure you see eye to eye and can speak to the client with one voice. Otherwise,

you risk undermining a client's confidence by presenting two different and, possibly, contradictory "game plans" from the same firm.

4. GET CLIENT APPROVAL

Before spending the client's money, get the client's approval. For example, you should get the client's consent to employ an expert, depose a witness, or videotape a deposition. The client should never be surprised by your bill.

5. DO NOT "SUGAR-COAT"

Although clients naturally like good news, it is often scarce in litigation. Nevertheless, resist the urge to tell a client that things are going well when they are not, or that the client has a strong case when he does not. When asked what the case is worth, give the client an honest evaluation. (See XI., beginning on page 88, regarding case valuation.) Research what juries have awarded in similar cases (see XI.E. at page 88 for how to do this). If the client balks at your valuation, show him the verdicts that support your educated guess.

6. RESEARCH BEFORE RESPONDING

When the client calls with a question, although you may be tempted to respond with the first thing that comes to mind, refrain from doing so. Instead, tell the client that you will research the question and get back with him as soon as possible. Then speak with the partner who is working on the case with you and research the issue if necessary. Only after you have done so should you attempt to answer the client's question with an intelligent discussion of the issue.

7. SEE THE FULL PICTURE

It is easy to get involved in a research assignment or a deposition or a hearing and treat it as a self-contained project, without looking beyond to the entire case. Avoid this short-sightedness by getting in the habit of seeing the big picture and how the little things fit into that picture.

8. SUBMIT A FINISHED PRODUCT

Do not submit rough drafts of your work to other attorneys in the office. You may think that it will not matter since it is not the final product — but you will be mistaken. Do not give anything to another lawyer in your office that you would not give to the firm's client.

9. DO NOT SACRIFICE QUALITY FOR QUANTITY

Defense attorneys are under constant pressure to bill and not spend too much time on any particular assignment. This raises the temptation to sacrifice quality to increase output. Resist the temptation or you will end up sacrificing your reputation along with the quality.

10. TACKLE HARD ASSIGNMENTS

Although difficult assignments can be overwhelming, you need to embrace them if you want to succeed. Otherwise, you cannot grow as a lawyer. The partners who see how hard you work will

likely foresee your successful career path.

11. GET INVOLVED

With all the hours you need to put in at the firm and bill to clients, you will find it difficult to find the time to attend state and local bar or civic functions. But you need be socially active and participate in these functions if you want to develop relationships that will help you grow and develop as a lawyer. Therefore, make the time to get involved in bar associations, make presentations, and write articles. These activities will make you a better lawyer and a better person.

12. DO NOT IGNORE MISTAKES

If a mistake happens, act immediately to rectify it. If you ignore it and hope it goes away, there is a good chance it will become a bigger problem. Never try to "sweep a mistake under the rug" or hide it from a partner. This is not only dishonest but it could result in a much bigger mistake that could infect the entire project or case, or possibly grow into something that cannot be rectified. Acknowledge the mistake, discuss it with a partner if need be, and determine how best to handle it. Start by analyzing the problem. Was a mistake really made or do you simply think you made one? How big a mistake was it? Try to stay calm and gauge its importance. Most mistakes can be rectified or, at least, ameliorated. Think through the options available to contain any damage caused, and do research, if necessary, to find possible solutions. Speak to your mentor and seek guidance on how to make things right.

Once you know the scope of your mistake and have devised a plan or two for rectifying it, report it to the partner in charge of the file and explain your planned approach to resolve the newly created problem. Even though the partner may be rightfully angered by your handling of things, a confession and proposed solution(s) will be appreciated. See if the partner agrees with the seriousness of the matter and can propose other alternatives. Discuss all options until a course of action is determined. Then, act immediately to ameliorate the problem.

NOTE Rather than berating yourself endlessly, try to learn from your mistake, be it to take more time in your research or explore more thoroughly when deposing a witness to obtain information. Facing mistakes maturely will help you grow.

13. PROVIDE SERVICE

Lawyers sometimes forget that they are in a service industry (albeit professional), providing a service just as a sales representative or waiter does. Therefore, you must do everything you can to make the experience a pleasant one. You must be polite and prompt, and anticipate and meet the customers' needs.

E. EARNING A PARTNERSHIP

1. IN GENERAL

Partnership is not something that comes simply with longevity at a firm. In fact, fewer and fewer associates become partners these days. What once was yours to lose is now yours to win. Making

partner is part science, part art. There are certain benchmarks every firm is going to expect — strong work ethic, quality work, positive attitude, and control of your caseload. But you also need to learn what criteria your firm has for becoming a partner, whether formal or informal, and work daily to meet those criteria. That perseverance is what will lead you toward partnership. Although several of these points have been previously mentioned, the most important ones for laying a foundation for a partnership bid are set forth below.

2. OFFER SOLUTIONS

Partners want associates who are problem solvers. Therefore, when dealing with partners, offer solutions to their problems. Do not simply leave their problems unresolved or, worse, create new ones. Your job is to make the partner's job easier. If you are given a problem to resolve, be it a legal research issue or a file to handle, think it through, do the research, and present your intended approach to the partner. Even if your proposed solution is not the best, the initiative will be appreciated. The more work you take from the partner and handle efficiently and effectively, the more the partner will come to rely on you. You want to become someone who is necessary to the firm, not expendable. Fungible lawyers are treated that way.

3. BE UPBEAT

Assume a positive attitude. It may seem trite, but people with great attitudes usually have great futures at their firms. Even if the partner overwhelms you with work, you need to accept it with an upbeat attitude. If necessary, speak to the partner about excess work or unrealistic deadlines and attempt to resolve the problem, but do so without anger or contempt. Your positive approach is contagious and will attract others to you. One who sees others make the best of circumstances will be inclined to do the same. The firm will see this and want to keep you because of it.

4. BE COMMITTED

Firms are looking for attorneys who are committed, eager, and willing to sacrifice. Partners may expect you to work long hours — coming in early, staying late, and working on weekends when necessary to get your issues handled timely. They will expect you to have mastered the basic skills of research and writing, and will not be pleased if they have to spend their time revising your work product. Therefore, you will need to learn writing skills and apply them (see IX., beginning on page 69), and you will need to submit to the partners final drafts of your work product, not rough drafts. If you are committed to making the firm the best it can be, the firm will be committed to your success as well. People give back what they receive, and partners at firms are no different. Your sacrifices will not go unnoticed.

5. ATTRACT CLIENTS

Some firms will not consider you for a partnership until you are able to attract clients to the firm. Because clients are the lifeblood of the firm, your ability to keep the blood flowing will increase your value to the firm. To become a "rainmaker," get involved in associations and organizations where you can make contacts, and attempt to become a leader in these entities. People will want to give their business to those they know and trust. Stay in touch with old friends and classmates by attending reunions and joining alumni associations. Give these organizations some of your time and talent, showing your motivation to serve and help others. People will remember those

who have gone out of their way and they may want to repay the favor by giving you a future referral. Your credibility can be enhanced by publishing articles on subjects relevant to the clients you want to attract. (See IV.H. at page 42 regarding how to get your work published.) Someone who reads and circulates your articles will see you as capable of handling their problems. Finally, devise a long-term plan (see IV.O. at page 57), knowing that developing a client base will take years.

6. MANAGE YOUR CASELOAD

As previously noted, the firm is not likely to entrust you with a partnership if it cannot entrust you with your own caseload. During your years as an associate, learn how to handle every aspect of a case — from pretrial investigation, to discovery, to trial. Accept pro bono cases if need be to get trial experience. The firm will appreciate your initiative, so long as your billable hours do not suffer in the process.

7. DISCOVER EXPECTATIONS

Find out what the firm expects. Partnership means different things to different people, and there are as many ways to become partner as there are law firms. In fact, each law firm has its own unique partnership track. With some firms, it is an official, step-by-step track. For most, it is less formal. Whatever it may be, you need to learn what you are aiming for by speaking to one or more of the partners about partnership criteria. You may learn of traits, requirements, or benchmarks that you had not already heard about and that had not occurred to you before.

8. STRIVE FOR LEADERSHIP

Partners not only lead the firm, they take the lead in their cases, and their clients expect them to take the lead in handling their problems. To become a partner, you need to assume leadership roles in your firm when possible, and take the lead in your cases and in issues facing the firm. Be a leader in the community as well, by rising up the ranks in associations and organizations. The firm's partners will notice your willingness and ability to lead and you likely will be seen as one who can be entrusted with a partnership.

9. EMBRACE THE FIRM'S VALUES

Every organization has values. Review those of your firm by looking at its website or brochure. If you want to thrive at your firm, you need to embrace and live by the firm's values, making them your own.

F. SWITCHING FROM ONE FIRM TO ANOTHER

1. IN GENERAL

At some point, you may decide that the firm you are working for is not everything you expected it to be and that you should join another. Before turning in your resignation, weigh the benefits of staying and the risks of leaving. Carefully think through your options, taking into account the following.

2. REASONS TO LEAVE

Quitting one job for another is not a decision to be made lightly. Do not leave your firm for the wrong reasons. Making a little more money is a wrong reason but making a lot more may be a right one. Leaving the firm because you have had a challenging case or two is the wrong reason but leaving because you are buried in work and overwhelmed may be a right one. Your motivation should be more than a vague unhappiness or an emotionally driven, temporary discontent or knee-jerk reaction. Reflect on the situation until you truly understand the real reason you want to leave the firm. Discover what it is that you do not like about your firm — what is bothering you enough to walk away from the seniority and relationships you have built and assume the risk of joining a new firm?

Once you know your reason, evaluate it and make sure it is a legitimate reason for leaving. Consider whether the problem you are having at the firm will be present at the next firm. Perhaps the problem or obstacle that is compelling you to leave is something you could work out or work around. For example, if you are not getting the experience you want, you could push harder by repeatedly asking to take that deposition or argue that motion. If you use your best effort, employing all your energy and strength, you may be able to overcome the problem or resolve the issues. If you do not, you can tell the managing partner that you did everything you could to make it work, and can then leave with a clear conscience.

NOTE If the problem is endemic to the practice of law, joining another firm is not going to resolve it. You are likely better off staying put and confronting those problems at your current job. When you can honestly tell yourself that your problems are a product of your firm and not your practice, a change may be exactly what you need.

3. REASONS TO STAY

There are several reasons not to move to another firm. Among them are that you have developed relationships where you are. Sometimes it may feel like the firm family is a dysfunctional one, but your efforts and sacrifices over the next months and years could change that for the better. Devotion to the old and the familiar may be better than starting all over again and "laying new roots" in unfamiliar ground. With the old and familiar, you know what to expect and you know the personalities, likes, and dislikes of the firm members. The goodwill you have engendered could help you through difficult times for the firm and for you, personally. You may be leaving behind your greatest mentor and supporters — those who are vested in your success and will help you weather downturns. The longer you stay at the firm, the greater your seniority and the more likely it is that the firm will want to keep you on and make you partner. You would have to start this "ladder-climbing" process anew at a new firm.

Keep in mind that loyalty matters. Even though it has become more common for attorneys to jump from firm to firm, each move sends a message to prospective employers to be cautious — that you are not likely to stay for very long. You do not want to gain a reputation as one who is in constant search for a better opportunity. A managing partner who sees on your résumé that you have changed firms often will likely dump your résumé in the trash. Therefore, do not leave a firm unless you are absolutely sure it is the right thing to do. Otherwise, you may eventually find yourself at your third or fourth firm and unable to move to another because no other firm will take a chance on you.

4. ASSESSING YOUR DESTINATION

If you have determined that it is time to change firms, you need to make sure you choose the right destination. Find firms you think you would be interested in. Seek out lawyer friends (those you met in law school or at bar associations or organizations) or friends of friends who really enjoy what they are doing, and find out if their enthusiasm is based partly on where they work. If so, it may be a firm that you could enjoy working for as well. Maybe there is a particular firm that more than one person can vouch for. You are seeking references for a firm, just as the firm will seek references from you. Make a list of these desirable firms where someone you know enjoys working. Testimony from a working employee who will give you true insight is much more revealing than reviewing an advertisement or talking to a recruiter who will simply give you the "company pitch."

Often, it is not so much that you are dying to leave your firm but rather that another opportunity has come along that has sparked your interest. Before you seize it, compare it to your present set of circumstances and evaluate whether it truly is a better opportunity.

5. CONVINCING THE DESIRED FIRM TO HIRE YOU

Once you have narrowed your list and gathered your personal references, see if your firm contact will hand-deliver a résumé from you to the managing partner and encourage the partner to seriously consider it. You are seeking an enthusiastic endorsement. If it appears that your contact will recommend you but only begrudgingly so, pass him by. You are better off having no reference and no praise than having half-hearted support. If your contact is willing to walk your résumé through and encourage the managing partner to give you an interview, it likely will happen — that is, if your résumé is sufficiently impressive (good grades, perfect writing sample, solid firm experience, and a great reference or two). (See II.B. and C. at pages 7 and 9, respectively, regarding your writing sample and résumé.)

With the help of a friend who is embedded in the firm, your name could quickly rise up the list of potential hires. The firm will have in you a candidate who has already been vetted by someone at the firm and who comes highly recommended.

NOTE Although whom you know helps tremendously when seeking a job, if you do not have connections, do not be too discouraged. Find the firms you think you would be interested in because of their size, reputation, practice areas, or firm members, and mail your résumé to them.

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IV. BECOMING A BETTER LAWYER

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You owe it to yourself to become a better lawyer by constantly improving your skills, whether it be your writing, your research, taking a deposition, or arguing a motion. With an ever more competitive work force, you cannot afford to be complacent and just get by. To keep from falling behind others who are arriving with fresh skills and knowledge, you must strive for more. Consider the following self-improvement suggestions.

B. EVALUATE YOUR STRENGTHS AND WEAKNESSES

Write down a list of your strengths and weaknesses, being completely honest with yourself, yet neither too hard nor too lenient. Pick one or two of the weaknesses listed and set realistic goals on how you can overcome them. Then commit to working on your weaknesses and attaining your goals over the next year. For example, if your writing is just average, work on improving it by reading grammar and style books, taking a writing course, or getting an article published (see IV.H. at page 42). As you overcome your weaknesses, build on your strengths. Pick one or two of your strengths, and commit to making them even better. If you want to set yourself apart from other lawyers, do not be merely a strong writer, be a great writer. Do not be just good at taking depositions, be great at taking them. Consider taking CLE classes or reading books (see IV.K. at page 48), and think "outside the box" for other opportunities.

C. OVERCOME YOUR FEAR

1. IN GENERAL

Fear is natural. Being at a new job, dealing with new people, and tackling new situations can be unnerving. Get ahead of the fear. Do not settle with tackling problems as they come. Take the time to read, study, and learn how more experienced attorneys deal with the problems you will be dealing with so when those problems come, you will be prepared and can react with knowledge, not with fear.

2. ACCEPT FAILURE

Mistakes come with the job. Every associate makes them and you will be no exception. Failure does not mean your life will end, you will lose your job, or you will be seen as an idiot. Those before you have made mistakes too, and you and they will continue to do so. Rather than dwelling on the mistakes and letting them color your perspective or define you, you should simply learn from them and move on.

3. ACCEPT YOUR LIMITATIONS

Fear often arises when you are in "over your head." Although it is important to always challenge yourself and to strive beyond what other attorneys at your level are doing, you need to make sure you do not take it too far. Never stray too far from the supervising attorney or you may find yourself in unfamiliar territory, making decisions without having a frame of reference to competently do so. Your supervising attorney's direction will ensure that you stay on the right

track, and the proximity will give you peace of mind and ease your fears.

4. GET AHEAD OF THE CURVE

Although you learned the law in law school, that, alone, will not make you a successful practitioner. You have to learn how to get things done. Not knowing how things work — the process — can be disabling. The faster you can learn how things work, the faster you will overcome the uncertainty of wondering whether you are making the right decision or doing the right thing in the right way. To quickly learn how things work, attend CLE seminars, read The Florida Bar's CLE *FASTRAIN*™ publications and practice manuals, or listen to CLE tapes that address the mechanics of being a lawyer. Additionally, you can find several practice articles in bar association newsletters, magazines, and peer-reviewed journals. Almost everything you did not learn in law school has been reduced to writing by some attorney who does not want you to make the mistakes he did. Find the articles and study them.

5. RESEARCH OUTCOMES OF YOUR DECISIONS

Not knowing how things will turn out is unsettling. How can you know what will happen if you choose option X when you have never chosen option X before? If you are unfamiliar with possible outcomes, ask others in your firm what their experience has been. They may have "been in your shoes," and can advise on what they did, why they did it, and how it turned out. If your decision may turn on what the law says, research the issue. When you first get a case, research the elements and defenses of the case so that you will know what the plaintiff needs to prove and what the defendant needs to disprove. This information will serve as a roadmap to where the case should go, and knowing this will greatly alleviate your uncertainty.

D. LEARN FROM OTHER ATTORNEYS

1. EMULATE A ROLE MODEL

To improve as a lawyer, you need to associate with better attorneys who can serve as role models (see IV.L. at page 50 regarding mentors), then do as they do. For example, find attorneys at your firm whom you admire for their great deposition skills or rainmaking ability. Study them to determine what it is they do that you are not doing or, equally important, what it is they do not do that you are doing. When you discover what it is that they are doing right, copy it.

2. STUDY OTHERS' TRANSCRIPTS, WRITINGS, AND RÉSUMÉS

You can improve your oral advocacy skills by reading how others advocate. Read the hearing and deposition transcripts of other attorneys to find out what they are saying to the judge, how they argue their clients' cases, what questions they ask witnesses at depositions, and what questions they do not ask. You can take better depositions by reading how others take theirs. Rather than limiting yourself to reading the transcripts of just the top partners, read those of as many attorneys as you can so you can study the different styles. This way, you can learn something from every attorney in your office, even if it is how not to do things and what approaches are not particularly effective.

In addition to reading others' transcripts, read their briefs, memos, motions, letters to clients, and

other documents. Study the attorneys' style, word choice, the arguments they make, and how they make them. Ask yourself if the writing convinces you, moves you, or changes you. See what works and what does not, and strive to emulate what you feel works and avoid what does not.

Visit the websites of other firms, pull up the profiles of their attorneys, and study their résumés to see what they have accomplished, what organizations they belong to, what they have written, or where they have spoken. Attorneys' résumés show you what goals they have achieved and make you think about what goals you want to set for yourself, and they may give you some ideas for how to achieve them. Perhaps you can create a list of publications that accept articles from attorneys, or seminars that you would like to speak at, or organizations you would be interested in joining.

E. KEEP ABREAST OF LEGAL DEVELOPMENTS

You are never too old to learn something new. Instead of taking the minimum number of CLE credits required, consider attending an extra seminar or two during the year. If you do not have the time to attend more seminars, consider listening to CLE tapes or CDs in your car.

F. MASTER TECHNOLOGY

Although seemingly overwhelming at times, technology has the potential to make your job much easier. It is particularly advantageous in managing large amounts of information and documents. If you want to succeed and thrive in the modern law firm, you need to master technology. To do so, consider the following:

· Learn Microsoft Word. The majority of law firms in Florida have switched from using WordPerfect as a word processor to using Word. It will be to your advantage to learn both, but certainly you need to become very familiar with all of Word's features. Rather than butting your head against the computer monitor in frustration, take classes in word processing. Also take the time to go through the help functions that accompany the program as well as whichever instruction manual best suits you.

NOTE The Florida Supreme Court requires that all electronic versions of documents filed with the clerk be submitted in Word. See AOSC04-84.

· Learn Excel. Excel is a leading spreadsheet program that will allow you to prepare charts and keep track of a multitude of information.

· Learn Power Point. Power Point presentations are becoming common in motion hearings, at trial, and as a teaching aid, such as in continuing legal education courses, and in counseling clients. Instruction guides are available to teach you the skill of preparing a Power Point presentation.

· Learn Westlaw. Law libraries are changing dramatically due to the popularity of online research. Westlaw contains not only case, statute, and court rule databases, but numerous others that will prove beneficial to the attorney. It is a very effective research tool that all attorneys should take advantage of. The more adept you become with research through Westlaw, the more time and money you will be able to save for your firm and clients.

· Learn to use the Internet. You can find a wealth of information on Google, Yahoo, Dogpile, and other search engines. For example, you can find articles about scientific issues or people, such as the plaintiff or expert witness in a case. These search engines will lead you to other websites that may be very informative. (See the Note at V.B.2. at page 60 for further information regarding Google searches.)

· Learn to scan documents. By scanning a document and storing it in electronic form on your computer, you can save space as well as search and retrieval time. Law firms are embracing this technology in their goal to be near-paperless. For example, many firms are scanning all discovery documents, then organizing them in the computer system so they can be retrieved with just a few keystrokes.

· Learn to use a personal digital assistant (PDA). A PDA is a hand-held device with organizing and basic computing functions that is capable of syncing with a computer. (Examples are the Blackberry and Palm Trio.) Among other things, these will allow you to maintain your calendar and contacts, to access your email when away from the office, and to send emails, thereby staying in constant touch with clients and co-workers.

· Learn to access your firm's computer system externally. This will allow you to obtain your files while away from the office. With a home or laptop computer, you can retrieve and work with all of the documents stored on your office system. If your firm does not have the technology for external access, discuss it with the partners and investigate whether security concerns can be addressed. If securely provided, external access could be a great advantage to all firm workers who may need to work from home or while traveling.

· Learn trial technology. Because using technology to present certain aspects of a case is increasingly effective, it is important that you stay abreast of what is available. Attend seminars and read articles to familiarize yourself with the latest trends and gadgets. You may discover something that will work well in your next case or in that of a partner.

· Learn how to use the postage machine. It is only a matter of time until you have to mail a letter after hours. While you are at it, also learn how to send an overnight package.

· Learn how to make two-sided copies.

G. GET TRIAL EXPERIENCE

1. IN GENERAL

The biggest complaint among recently graduated associates is that they do not get to go to trial. Some associates spend years with a firm before ever trying a case. If you find yourself in this position, consider some of the following alternative avenues to acquire the trial experience you desire.

2. VOLUNTEER

One of the best opportunities to acquire trial experience is through pro bono work. There are several programs to consider:

NOTE The following programs are available in South Florida. Review your own district for programs available within your region of the state.

· Volunteer Lawyers Project for the Southern District of Florida reviews hundreds of cases filed by unrepresented litigants in the Federal District Court for the Southern District of Florida, and assigns to volunteer attorneys cases deemed to have merit. Many of these cases do not settle and end up going to trial. Because there are a limited number of pro bono attorneys, inexperienced lawyers who volunteer to represent pro se litigants in the project often get the opportunity to present cases in federal court.

· Legal Services of Greater Miami handles a wide array of cases, some of which result in a trial or evidentiary hearing. Specifically consider volunteering to accept a special education case. Every year, hundreds of students in Miami-Dade public schools go without the special education services to which they are entitled under federal law. They have the right to a due process hearing where they can argue for additional special education services. These due process hearings are akin to trials, where parties present evidence, put on witnesses, and make opening and closing remarks. Representing students in due process hearings before hearing officers is very similar to trying a civil case before a judge.

· Put Something Back, a program operated by the Dade County Bar Association, is replete with opportunities to pursue trial experience. Whether it is representing a spouse in a divorce, an immigrant in an asylum hearing, a tenant in a housing dispute, or a child in a dependency case, Put Something Back gives you a chance to get into the courtroom and present your case to a judge or hearing officer.

· Lawyers for Children America gives the novice litigator an opportunity to represent children in family court in abuse, neglect, delinquency, and dependency matters, some of which require the presentation of evidence and the cross-examination of witnesses.

3. ATTEND A TRIAL CLINIC

Participate in a mock trial program sponsored by The Florida Bar or other association. For example, The Florida Bar sponsors The Advanced Trial Advocacy Seminar, a hands-on, learn-by-doing trial skills program. National organizations such as the National Institute of Trial Advocacy (NITA) and the International Association of Defense Counsel (IADC) sponsor week-long mock trials.

4. ASSIST WITH TRIAL PREPARATION

Offer to help other attorneys in your office who are preparing for trial. They will appreciate the help and you will get a firsthand look at what it takes to prepare a case for trial. Furthermore, you may get so involved in the case that you will be asked to help at trial, perhaps even conduct a direct or cross-examination.

5. ATTEND FIRM-SPONSORED TRIAL ADVOCACY PROGRAMS

Larger firms put on their own trial advocacy programs. If your firm does not have one, discuss with the managing partner whether such a program would be right for your firm.

6. WORK ON SMALL CASES

Volunteer to handle county court cases. Although most of these settle, some are tried and, due to the limited amount of money at stake, clients are willing to have associates who have lower billable rates handle these cases.

7. PARTICIPATE IN MOCK TRIALS

Sometimes clients ask firms to conduct mock trials to evaluate the strengths and weaknesses of their cases. Because the actual outcome and monetary damages are at stake, ask to get involved and present one side's case to the mock jury.

8. OBSERVE OTHER TRIALS

Watch other attorneys in your office try their civil cases and notice what works and does not work in presenting a case to a jury.

H. WRITE LEGAL ARTICLES AND GET THEM PUBLISHED

1. IN GENERAL

If you want others to see you as an expert in a given practice area, consider getting published. Published articles indicate to others that what you have to say is important enough and authoritative enough to be in print. Writing an article is only half the work. To get your article published and read by hundreds of others, consider taking the following steps.

2. BRAINSTORM

Determine what you want to write about by brainstorming different ideas worthy of being transformed into articles. Your source of inspiration may be a landmark United States or Florida Supreme Court decision that can serve as the basis of an article. Alternatively, you may want to write about a recent legal trend or craft a "how to" piece such as "how to take a deposition" or "how to retain an expert." Or you may want to explore an issue a client has asked you to look into. If you are going to be a writer, always be on the lookout for ideas, and ask yourself, "Would this make a good article?" Once you start thinking like a writer, you will never be short of ideas to turn into publishable pieces.

3. COMPILE LIST OF POTENTIAL PUBLISHERS AND READ THEIR ARTICLES

Before you sit down to write, decide where you want to get your article published. Compile a list of publishers and publications, including trade journals, newspapers, magazines, and newsletters that might be interested in your idea. Most bar and trade associations have their own magazines and newsletters, and their editors are always looking for articles to fill the pages of those publications. If you cannot think of any publishers or publications to write for, look at the web pages of these associations to see what publications are out there.

NOTE Do not pitch a story to a publisher without first knowing what types of articles appear in the publisher's pages. If you are going to write something a magazine publisher will be interested in

printing, you first need to know what the publisher might want, which you discover by reading the magazine.

4. READ THE WRITER'S GUIDELINES

Many publishers provide guidelines about what articles they are looking for, how they want articles pitched, and to whom. Read them carefully and follow the recommendations.

5. WRITE A QUERY LETTER

Once you know for whom you want to write, send a persuasive, convincing letter pitching your idea (known as a query letter). Most magazines and journals have a masthead that contains the names of their various editors and staff writers. The list is important because it will reveal who the different editors are and which ones you should address your query to. To save money on postage and speed up the process, determine whether the publisher accepts email queries.

In the letter, provide a brief summary of your proposed article, a proposed title, a statement explaining why the piece is relevant to the publisher or a particular publication's readers, your qualifications to write the article, and a brief history of your writing experience.

6. START SMALL

If you want to eventually see your article in a national magazine or trade journal, start small and work your way up. Generally, the bigger the pub-lisher, the more likely it is that it does not work with novice writers. Those big publications are looking for authors who have written articles elsewhere and have a proven track record. Generally, the smaller publications are open to working with new writers. Start small, get some experience, and "climb the ladder" to the bigger magazines and trade journals.

7. UPDATE YOUR RÉSUMÉ

The editor you are pitching your idea to will likely ask to see your résumé. Therefore, make sure it is updated and includes any writing and editing experience you have — whether as an editor on law review, a writer for the school newspaper, or a contributor to a firm newsletter.

8. GATHER CLIPS

Make sure to save any articles or clips you publish. Editors will want to see them to get a flavor of your talent and style.

9. AVOID EDITORS' PET PEEVES

If you want to increase the odds that your article will be accepted for publication, avoid the pet peeves of the decision makers. Make sure your query is flawless, with no typos or grammatical errors. If an editor does not want you calling to pitch an idea, do not. If you are given a deadline, meet it. If you are asked to make revisions, make them. Trust that the editor knows best about what the final piece should look like.

I. MANAGE YOUR TIME WISELY

1. IN GENERAL

Sometimes it seems that being a lawyer means "playing catch up" — trying to find the time to do the research you wanted to do yesterday, or returning phone calls that you should have returned last week, or sending out that already-late letter. It never seems as though you have enough time to do everything you want to do. You blink and another day has gone by and your "to do" pile gets higher. It does not have to be that way though. The following suggestions will allow you to take control of your schedule rather than having it control you. If you take the time to plan ahead, making sure that every step you take gets you closer to reaching your objectives, you can squeeze more time out of your day, whether you need it for work, for family, or for leisure.

2. START THE DAY EARLY

Get a jump on the day. Many attorneys start their day at 9:00 a.m. However, by starting at 8:30 or even 8:00, you can get a jump on the day and get things accomplished before the phone starts ringing and others start strolling into the office. Getting into the office early is a great way to tackle projects without interruption, which improves your odds of getting out early.

3. KEEP LISTS

To avoid wasting time figuring out what to do next, prepare a list that tells you what to do next. In fact, prepare two lists — a case list and a "to do" list. The case list should contain all of all your active cases. Scan it every day to determine if you need to do anything new on your cases. The "to do" list sets forth all the projects you have to work on. Delete items as you complete them and add new ones as you think of them. The list lets you see everything you have to do all at once, helping you prioritize what to tackle first.

4. DEVELOP ACTION PLANS

When you start working on a new file, develop an action plan. Plan a strategy to win the case and plot out what you need to do to get there. If you develop an action plan and know what you need to do to implement it, you will not waste time constantly trying to figure out what to do next. (See XII.F. at page 93 for a discussion of how to prepare a trial notebook and calendar your deadlines.)

5. THINK BEFORE YOU ACT

Do not underestimate the power of thinking over doing. If you want to really save time, whether you are writing a motion, doing research, or handling a new case, spend some time thinking through what you want to accomplish.

NOTE My high school English teacher used to tell me that the real writing occurs when the pen is down. What she meant is that before you start, you need to know where you want to end up.

6. ACT, DO NOT REACT

As a follow-up to thinking things through, learn to make things happen in your cases rather than

reacting to what others do. Whether you are the plaintiff or the defendant, you can set the course of your case and, by doing so, create timetables that fit your schedule. You can ask the court to enter a scheduling order that suits you (see XII.G. at page 95). You can be the one who sets the key witnesses when you want them set. If you want to be in charge of your calendar, do not let opposing counsel set the agenda.

7. REVIEW CALENDAR OFTEN

Become intimately familiar with your calendar. Look at it daily and scan through the next month's appointments and deadlines. This way, you can plan ahead and avoid any surprises.

8. ADOPT A SCHEDULE

Put yourself on a schedule. Create deadlines for yourself and stick to them. When you give yourself an assignment, give yourself a due date to ensure that you are not rushing at the last minute. However, when you set deadlines for yourself, set reasonable ones. You are not going to be able to finish that motion for summary judgment in two days, especially if you have a deposition to take and interrogatories to answer. When setting deadlines, set them far enough in advance to allow yourself enough time to do what you need to do.

9. KEEP A CLEAN DESK

So much of time management is organization. If the research you want is under a huge pile and the phone number you want is under another huge pile, then expect to waste a lot of time. Avoid this by keeping a neat office and a neat desk.

10. DELEGATE DUTIES

Determine what you can do and what can be competently done by someone else, be it a junior associate, a paralegal, or your secretary. Making the most of your time sometimes means assigning tasks to make the most of others' time.

11. DO NOT FORGET ABOUT FAMILY AND FRIENDS

Do not let your relationships suffer because of your job. Remember to schedule time for your family and friends. If necessary, write the time into your calendar as if it were an important hearing or deposition, and do not cancel it. Take the time to listen to your loved ones' concerns and show that you care about the things they care about. Make a commitment to them the same way you make a commitment to a case. If you deal with the little issues, the little problems, and the little headaches in your relationships, you may be able to avoid the big ones.

J. GENERATE BUSINESS BY GETTING INVOLVED IN ORGANIZATIONS

1. IN GENERAL

To get referrals from other attorneys, in-house corporate counsel, businesses, or insurance adjusters, you need to get to know the people in charge. People give cases to people they know, like, and have relationships with. Gain access to these decision makers and build relationships that

will last by joining organizations they belong to. Unsolicited phone calls and mass mailings are much less effective than joining committees, spearheading a subcommittee, volunteering for projects, and actively participating in meetings.

2. CHOOSE THE RIGHT ORGANIZATIONS

Rather than joining just any organization with the hope that you will get business out of it, search for organizations you want to support, even if you may never get a single referral from your efforts. Ask yourself what you care about, find organizations aligned with your interests, then attend a couple of meetings. By attending a meeting or two, you can see what the organization does, what the personalities are like, what the commitments are, and what the expectations are before you decide if this is something you want to do.

3. ACTIVELY PARTICIPATE

Joining the organization is just the start. Get involved and volunteer to do the group's "dirty work." For example, if the association's newsletter has stalled because no one wants to be its editor, or there is a fundraiser but nobody wants to head it up, be the one who volunteers to do it. Do the necessary jobs that others avoid and see how quickly your "stock" goes up in the association.

Set your sights on getting a leadership role, possibly even the presidency. It will not happen overnight and it will not happen without a lot of hard work, but those positions of power will attract others to you, will increase your prestige in the organization, and will add to the perception that you are someone that other members of the organization should do business with or refer their acquaintances to.

The following are organizations you might want to consider joining:

· Bar associations. Consider joining national, regional, statewide, or local bar associations. The larger the organization, the more attorneys you will come into contact with and the larger the pool of potential referral sources. However, the bigger the organization, the longer it will take to climb the organization's ladder. With any organization, you want to secure a leadership role — and, generally, the smaller the organization, the less the competition will be for those prized positions.

· Business associations. Most cities have a chamber of commerce with innumerable committees you can join and in which you can set the groundwork for a position of leadership. Chambers of commerce exist for different geographic areas, for different ethnic groups, and for different professions. Look at the different groups, attend their meetings, and see which ones are the right fit for you.

· Trade associations. Accountants, doctors, and most trade groups have trade associations. If your practice area involves representing individuals in a given trade, such as doctors in medical malpractice cases, find out if that group has a trade association and if you can join it. There is no better association to get involved with than an organization comprising predominantly those whom you want to represent.

· Civic organizations. Consider joining the local opera, theater group, or museum. Get involved

with their fundraisers, get on their boards, and do their hard work. Many corporations have representatives on the boards of these organizations. They are a great place to develop relationships with the real power brokers.

· Charitable organizations. Charities are often looking for talented people to help them raise money. This does not mean you have to write a big check to get in their good graces; you just need to get others to write the checks. If you can learn how to fund-raise, you will increase your influence in the organization by leaps and bounds.

· Athletic league. Consider joining a corporate league where you play against other lawyers or other professionals. Or consider starting your own league. By setting up a league, you develop relationships with a wide variety of business professionals who may want you to represent them and their interests.

K. READ TO STAY WELL ROUNDED AND EDUCATED

Lawyers read constantly in their everyday work routine. It is difficult for most of them to find the additional time or energy to do even more reading when not handling clients. But additional reading is nonetheless recommended — general reading of legal materials as well as reading of materials other than cases, statutes, pleadings, and briefs. The additional reading is needed to ensure that the lawyer is well-rounded. The Florida Bar publishes several books written by experienced trial attorneys who share what it is that they do right and advise how to avoid mistakes. Learning from your mistakes is great but learning from others' mistakes is even better. The new litigator will find the following books quite valuable:

· *FASTRAIN*™: FLORIDA CIVIL TRIAL PREPARATION (Fla. Bar CLE 3d ed. 2007). This "how to" guide provides great practical advice on organizing a case, motion practice, discovery, evidence, and settlement and alternative dispute resolution. The author who shares this advice is a highly successful trial lawyer who has spent years litigating cases and honing his skills.

· *FASTRAIN*™: LEGAL WRITING MANUAL (Fla. Bar CLE 2004). This guide helps you improve legal writing to make it more succinct, clear, and persuasive. It provides numerous examples of good writing that you can adopt in your daily practice, including the proper style for drafting letters, memos, briefs, contracts, and other legal documents.

· *FASTRAIN*™: HOW TO WRITE AND USE JURY INSTRUCTIONS (Fla. Bar CLE 3d ed. 2005). Many attorneys do not worry about jury instructions until weeks, sometimes days, before trial. However, the best advice with regard to jury instructions is to look at them when you first receive a case. The instructions will show you what you must prove to win, and will direct your efforts to do so. The jury instructions manual provides sources of standard and specialized instructions and teaches you how to prepare case-specific instructions to form a seamless fit with the standard instructions to be given in a case.

· EVIDENCE IN FLORIDA (Fla. Bar CLE 6th ed. 2002). This book provides a detailed analysis of Florida evidence and practical advice for using the evidence rules at trial.

· FLORIDA CIVIL PRACTICE BEFORE TRIAL (Fla. Bar CLE 7th ed. 2004). What the evidence book does for the evidence code, this book does for the Florida Rules of Civil Procedure.

It gives you a rule-by-rule, common-sense explanation of what to do and what to expect before trial.

The following items are also suggested reading.

· Evidence and civil procedure rules. All attorneys should read federal and state rules of evidence and federal and state rules of civil procedure. Although the material is dry, familiarity with it can make the difference between winning and losing a case.

· Style books. THE ELEMENTS OF STYLE (Penguin Press 4th ed. 2005) is a pocket-sized grammar and style book by Strunk and White. It is a "must read" to learn how to write in plain, proper English. Additionally, every lawyer should read Good, WHO'S (OOPS WHOSE) GRAMMAR BOOK IS THIS ANYWAY? (Barnes & Noble Books 2002). It is a modern-day ELEMENTS OF STYLE, written by a lawyer who travels from firm to firm teaching lawyers how to write. It covers all the grammar and style rules you will ever need to know.

· HANDBOOK ON DISCOVERY PRACTICE, drafted by the Trial Lawyers Section of The Florida Bar and the Conferences of the Circuit and County Courts Judges, is a great reference tool to assist the attorney when dealing with discovery disputes. You can download the handbook from the Trial Lawyers Section's website. See www.flatls.org/handbook.asp.

· Wellman, THE ART OF CROSS-EXAMINATION (Touchstone 4th Rep. ed. 1997), should be read to learn how to cross-examine a witness. Although written by Francis Wellman at the turn of the century, the advice remains as fresh and practical as if it were written yesterday.

· THE ART OF WAR (Running Press Book Pub. Miniatures ed. 2003), written by Sun Tzu, will help you develop winning strategy. Although it may be a cliché, litigation is war, and this advice from ancient battlefields may prove to be just what you are looking for in developing your approach to it.

· THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE (Free Press 15th ed. 2004), written by Stephen Covey, spells out the habits you need to develop at work, with your friends, and with your family. Being proactive, setting goals, putting first things first, and seeking to understand are some of the habits that can drastically improve your practice.

· TO KILL A MOCKINGBIRD (Warner Books Reissue ed. 1988). You may have read Harper Lee's classic in past literature classes, but you should read it again as a lawyer. The novel will inspire you to think about why you became a lawyer, and we all need to be reminded of that now and then.

L. FIND A MENTOR

1. ADVANTAGES OF MENTORSHIP

As previously noted, you should find a role model or mentor to emulate. Mentoring has become a popular topic. Firms have mentoring programs, bar associations have them, and there is even electronic or e-mentoring.

NOTE The Florida Bar's President Hank Coxe recently stated that he believes mentoring will soon be mandatory for Florida's lawyers. (See Vol. 34, The Florida Bar News, page 30 (March 1, 2007).)

Mentoring is such a hot topic because it works well, helping new attorneys "cut through red tape" and end self-doubt. The question is not "Why do you need a mentor?"; it is "How have you survived without one?" You should take the time to find a mentor and work on a relationship that will affect you for the better, for the rest of your career. The following are a few of the benefits of having a mentor:

· You get to learn from others' mistakes. Although the fear of making a mistake can be paralyzing, as a new litigator, you will make mistakes. To lessen the impact and reduce the number of mistakes made, you need to have a mentor to talk to. The mentor will have traveled the path you are taking, and made the mistakes potentially facing you. You can learn from those mistakes and thereby avoid many of the snares ahead of you.

· Mentors can point you in the right direction. Countless times each day you will be called on to make decisions. Sometimes, you will know what to do — many times, you will not. Usually, your mentor will. Mentors can tell you what they did when confronted with the same problem. They have tested their theories and they can take the mystery out of what to do and what not to do by telling you first hand, from their own experiences, what works and what does not.

· Mentors can comfort and take care of you. Being a lawyer can be lonely. Sometimes you feel it is you against the world, against the opposing party, against opposing counsel, and sometimes against your own client. It is good to have someone looking out for you, "watching your back."

· You learn the unwritten rules of being a lawyer. It is best to learn these rules and how to play by them from someone who already knows them. A mentor can teach you the rules regarding such things as how to argue a motion or how to deal with opposing counsel, and can help you comply with these rules rather than accidentally trip over them.

· You have a "sounding board." As a new litigator you will have several questions that need to be answered, conflicts to resolve, problems to face, and issues to address. Some of your ideas on how to face these issues and conflicts are based on fact; others are based purely on instinct. Instead of simply trying out hypotheses to see if they are right or wrong, you will find it worthwhile to talk to someone who has confronted the same or similar issues and can listen to your proposed approaches, help you weigh the pros and cons, and assist you in making thoughtful, rational decisions.

· You get a "backstage pass." Mentors can take you where the action is: to meetings with clients, conference calls to discuss strategy, and access to their own thinking and reasoning. You are given access to the mentor's legal worlds where the big decision makers make the im-portant decisions and you can witness it, experience it, and learn from it.

· You learn how to network. To obtain clients, you must meet them and develop relationships with them. To do so, you can go to a trade group or bar meeting and simply walk around, introducing yourself to whomever you see. However, a much better approach is to go with a mentor who knows the organization and the people involved. The mentor can introduce you to contacts and help you get connected with the more powerful people in bar and trade associations. Mentors can

get you involved in committees and assist you in your ascendancy to power.

· You learn about the firm. Your mentor, who has been at the firm for some time, can help you understand how your firm really works: who does what, who expects what, what makes the partners happy, and what their "pet peeves" are. Your mentor has seen first hand what kinds of lawyers stay and which ones go — and of those who stay, which ones prosper. This knowledge can provide you with great insight into how to get along in the firm.

2. SELECTING THE RIGHT MENTOR

As noted above, you can rarely learn how to be a truly good lawyer on your own. To become a great lawyer, you need to study one, watch what they do, listen to what they say, and emulate them. You need a mentor or role model who can teach you the forks and bends in the road and walk down that road with you until it is time for you to walk on your own. A good mentor is a marvelous influence who can teach you how to be the best you can be. Consider the following when seeking a mentor:

· Choose someone like you. Your mentor is going to pursue his goals and values. If yours are the same, you will learn how to pursue yours by watching the mentor pursue his. Therefore, you should select someone with whom you are compatible and who shares your interests, goals, and values.

· Choose someone you like. Select as a mentor someone you can call a friend — someone you can laugh with and whose company you enjoy. If your mentor is the greatest lawyer in the world but is also a bit of a jerk, you are not going to want to be around him, much less learn from him.

· Choose someone who specializes in your practice area. If you want to become a great real estate lawyer, you are not going to learn how to do that from a great personal injury litigator. To learn the ins and outs of a given practice area, to know who the players are, what to say, what to read, and what to do, you need to know the person who has the answers to these questions — someone who practices in the area.

· Choose someone who has time and who is committed. Ensure that you pick someone who will make time for you and who will not see you as an imposition on his time and resources. Also make sure your mentor will have time for you tomorrow, the next day, the month after that, and the year after that. Being a mentor is a long-term commitment rather than a passing fancy.

· Choose someone who is senior and wants to leave a legacy. A truly good mentor is one who has been tested — who has already gone through what you are going through now and can advise you on how best to confront those challenges. A good mentor is someone who wants to leave a legacy — who wants to reach for immortality by passing a part of himself on to others.

· Choose someone with a sense of humor. Being a lawyer is a difficult job and requires a tough skin and a good sense of humor. You have to be able to laugh at yourself and at your mistakes, and a good mentor should be able to do the same.

· Choose a good teacher. A mentor is someone who is going to teach you how to be a good lawyer — how to be like him. Therefore, he must be able to explain things to you. He must be able to

teach.

· Choose the best. Given the choice between the best salary and the best mentor, always pick the best mentor. Find the attorney with the best reputation, the best skills, and the best character, and beg him to hire you. You want to learn from the best there is.

3. MAKING THE MOST OF YOUR MENTOR

As noted above, you must develop a long, lasting relationship with your mentor if you want the mentorship to be meaningful and beneficial. One who is a mentor in name only will do you no good. It takes time and commitment from both of you to build a strong, advantageous relationship. The following suggestions will help you form a valuable bond with your mentor:

· Meet regularly. Make the effort to meet with your mentor on a regular basis. Because both of you can readily use the excuse that you are too busy to meet, you need to actually schedule regular meetings, perhaps over breakfast or lunch, to discuss the cases you are handling and the issues you are tackling. Prod your mentor to get together with you and talk at least once a month.

· Communicate regularly. Aside from pursuing face-to-face meetings, call and email your mentor on a regular basis. Email is a great way to get much-needed advice. You can send your question when you find the time and your mentor can answer it when he finds the time.

· Network together. Ask your mentor to accompany you to local bar functions where, due to his years of practice, he likely will know several attendees to whom he can introduce you. With your mentor at your side, you will be more relaxed at the bar function and not feel like you do not know a single person in the room. Also, your mentor can give you access to corporate and bar functions, committees and boards, and to people you want to meet. For example, if you want to get involved in an organization and possibly pursue a leadership position, your mentor can help you "get your foot in the door."

· Ask your mentor difficult questions. Your mentor's experience makes him a valuable source for answering "the hard questions" — those about ethical dilemmas, case strategies, and office politics. Do not hesitate to turn to that source and seek his perspective, beliefs, and wisdom. Your mentor can teach you vast amounts about the law and how to practice it, as well as about family, right and wrong, and the choices life presents us. Take full advantage of the opportunity to learn something more important than how to take a deposition.

· Find out his life story. We are a composite of our experiences. Explore those of your mentor — the life he has lived, the challenges he has faced, and what he has done to get where he is. Learning what challenges he faced and how he faced them can give you insight on how to face your own.

· Trade favors. If you find yourself in a tight spot at times, your mentor may be able to help you out. For example, you may find that you are unhappy at your job and discover that your mentor can recommend you to a friend who is looking for an associate. Remember that the relationship should be a two-way street — just as you have needs, so does your mentor. Repay the favor and help your mentor with his needs, whether it is writing an article he needs to submit, assisting with a fundraiser his firm is sponsoring, or researching a legal issue he is struggling with. Your mentor

will appreciate your help and will be more willing to help you the next time you ask.

· Start mentoring others. As a young attorney, you may think you have not amassed enough experience to mentor someone else. You are wrong. If you are a midlevel associate, mentor an entry level associate. If you are an entry level associate, mentor a law school, college, or even high school student who has a whole host of questions. (See M. below.)

M. BE A MENTOR OR LEND A HAND TO OTHERS

A few years ago a novel came out titled "Pay It Forward," followed by a movie adaptation. The protagonist was a 12-year-old whose teacher challenged him and his classmates to come up with an idea that would change the world and to implement it. The boy's idea? "Pay it forward." He does something really good for three people. When they offer to repay the favor, he tells them to "pay it forward." He asks each of them to do really good things for three others, and when those others ask how they can repay the favor, they are asked to do something really good for three others, and so on. The idea is that from three acts of kindness, thousands more will be born. Now it is your turn to "pay it forward."

As young attorneys, we may not view ourselves in a position to help others. We may think we do not have sufficient experience, know-how, or influence to be a positive influence on others. You may wonder how you can help others when you are still figuring things out yourself. But the fact is, you know more than you think. You have been blessed with a career in law. There are millions of people in this world who, because of their financial and social circumstances, are barely getting by each day. Reflect on that, take it to heart, remember it, and when you come to terms with the fact that so little of your success has anything to do with you, pay what you have been given in this world forward.

It starts with finding a need and meeting it. Perhaps another attorney in the office struggles with his writing, or your firm needs help with the staff. Perhaps a charitable organization needs the analytical skills of an attorney — even an inexperienced one. Find what those needs are and fill them. Some of the things you can do to share your blessings with others are:

· Volunteering. There are countless opportunities to volunteer. The obvious for you as a lawyer is to do pro bono. Most voluntary bar associations have an arm that pairs attorneys like you with needy clients who, because of their lack of financial wherewithal, cannot afford the legal services they need. Without your help, they may lose their homes, get evicted from their apartments, get arrested and thrown in jail, lose government benefits, or even get deported. You can make a real difference in these people's lives. In addition to pro bono work, consider doing volunteer work for organizations that help children, such as Big Brother, Big Sister, The Boys Club, or your local YMCA. These kids need role models and what better role model than someone who has made it through law school, passed the bar exam, become a member in good standing with The Florida Bar, and spends every day fighting on behalf of others?

· Leading. If you want to make a difference in the lives of others, become a leader in your law firm, in your local bar association, or in your community. Understand the organization's values, its mission, and its projects, and direct your efforts to advance them.

NOTE You do not need a title to be a leader. Even if you are not the managing partner, the president of an organization, or have a title at a charitable organization, you can lead.

· Bringing others with you. In your pursuit of making a difference, do not settle with impacting others. Help build up others so that they, too, can impact others. As noted, the concept of paying it forward is that each person who benefits, in turn, benefits others. As you help out in your firm, at your bar association, and in your community, identify others who have the same desire, partner with them, and help them affect the lives of others for the better. Alone, you can do a lot — with others, you can do so much more.

· Expecting nothing in return. Go out of your way to help others. If someone asks for help, give it. When someone seems to need help, offer it. If no one needs or asks for it, offer it anyway. Never do any of it expecting to get anything in return. The payback is in the doing. You will "reap what you sow." Motive is everything — and it is better to do less for the right reasons than more for the wrong ones.

When it comes to being a lawyer, a good one that makes a difference, you owe it to yourself to do more than produce good work product. You owe it to yourself to look beyond yourself and your needs to the needs of those around you. If you find out what those needs are and work toward meeting them, you can affect the lives of others for the better and be a greater lawyer and person for it.

N. LEARN TO BE A SAVVY TRAVELER

1. IN GENERAL

Myriad things can go wrong when you travel for work. You can avoid most problems by wisely planning ahead. The next time you have to travel for a deposition, hearing, or a meeting with a client or expert witness, keep the following in mind to ensure that your trip is trouble-free.

2. FLIGHT ARRANGEMENTS

Make flight arrangements early, perhaps as soon as you learn you have to travel. The sooner you reserve a seat on the plane, the better your fare will be. Also, because hearings and depositions are often canceled or rescheduled at the last minute, purchase refundable tickets.

3. CAR RENTAL

Make sure your car rental agency has its vehicles on the airport's premises. Taking a shuttle to an offsite facility can be very time-consuming — and time is money.

4. ACCOMMODATIONS

Find convenient accommodations. Instead of staying at a hotel near the airport, find a place close to the deposition or hearing site to ensure that you arrive there on time.

5. DIRECTIONS

Before you leave the office, get detailed directions from the airport to your hotel and from your hotel to the deposition or hearing site. Call ahead and obtain these directions directly from the hotel or the court reporter's office.

NOTE Do not rely on Mapquest or another online map source. Online map sites can be wrong and confusing.

6. ITINERARY

Have your secretary prepare an itinerary that contains your travel arrangements, directions, and all other relevant information. This concise, all-in-one reference will prove to be very useful. In fact, you may want to take an extra copy with you.

7. TRAVEL TIME

Allow yourself extra time to get where you are going. Assume that there will be excess traffic, airport security clogs, bad weather, and flight delays — and plan accordingly. Because you will be giving yourself sufficient travel time for potential complications, you may end up with extra time if all goes smoothly. Plan to take advantage of these minutes or hours by taking along extra work so you do not lose valuable billable hours.

NOTE Consider that you might be better off driving for a few hours and listening to CLE tapes in your car along the way, or just clearing your mind, than you would be going to the airport, waiting in line through security checks, taking a chance on the flight being timely, and hassling with transportation on the other end.

8. PROTEIN

Occasionally, such as when hurrying from the airport to a deposition, you will not have time to eat lunch. Always pack some protein such as peanuts or snack bars in your briefcase to delay hunger and maintain energy in case of such an emergency. If possible, at least eat breakfast first (even if its only instant oatmeal in a Styrofoam cup).

9. WEATHER AND ATTIRE

Get a weather report to ensure that you will be dressed appropriately. For example, traveling from Miami to New York in January requires a change in wardrobe.

NOTE Think in terms of layered clothing and comfortable shoes. Also, remember that hanging crumpled clothes in a steamy hotel bathroom will get most of the wrinkles out.

10. CONFIRMATION

Confirm everything. Have your secretary call the court reporter, the witness, opposing counsel, co-counsel, and all other relevant people, and confirm that they will be at the meeting or hearing. You do not want to discover that a key party cannot attend after you have already boarded the

plane.

11. CONTACT NUMBERS

Make sure you have with you everyone's phone numbers — from the court reporter's to opposing counsel's — in case you need to reach them for any reason.

O. SET LONG-TERM GOALS AND STRIVE FOR THEM

Attorneys are often obsessed with the short term — be it answers to interrogatories that are due tomorrow, the deposition scheduled for the end of the week, or the hearing on next Tuesday's calendar. Yet, to lead a fulfilling life as a lawyer requires that you have long-term goals as well. You must retain control of your life instead of letting circumstances and deadlines rule, and you must have dreams that propel you beyond the next month or year.

Ask yourself where you want to be five years from now. Do you want to be at the same firm? Do you want to be a partner at the firm? Do you want to be considered an expert in a particular field of law? Think about what you hope to have accomplished when you retire. Think also about how you would like to be remembered after you die. You might want to be remembered for how you touched people's lives, or for how you gave back to the community, or for your commitment to pro bono. Maybe you would like to be remembered for winning a big case or being a mentor to others or writing a novel. Do not focus on where you are likely to be — instead, think about where you would *like* to be — what would constitute for you a *life* worth living and being remembered for. Dare to dream big, taking charge of your life and directing it toward something bigger than you. Reflect on what truly matters — the things you will do and the values you will live by that will cause you to have an impact well beyond your own lifetime. Whatever you decide on, devise a plan for getting there, and execute it.

Start by making a list of your life goals — perhaps keeping them in a journal. Next, write down the steps that might be necessary to achieve the goals you have listed. Then, set benchmarks for the plan, noting how far along the path you would like to be when you are at certain stages in your life or career, such as in 5 years or when you are 30, then in 15 years or when you are 40, then in 25 years, etc.

You then must decide how to reach each benchmark by focusing on the tasks you must perform. For example, if you want to leave a legacy as a leader, your tasks need to be related to how you will assume leadership positions in bar and civic organizations. Your short-term goals to achieve the benchmarks must be realistic, well thought out, and manageable. You do not want to "set the bar too high" and guarantee failure. List all tasks in your journal.

Maintain your traction and forward movement by keeping sight of the short-term plan and working toward the benchmarks daily, even if it is only making a few phone calls or reading a couple of articles. As you progress along the path to your lifetime goals, keep a record of your accomplishments. If you were the lead attorney in a major trial, write it down in the journal. If you were elected to the board of a bar association, make note of it. Check off the benchmarks as you reach them. Periodically review your accomplishments, compare them to your goals, and make adjustments as necessary. You may find that you need to reevaluate the whole plan. If so, simply start again and remap your achievement plan.

You can propound probing discovery, cleverly draft motions, brilliantly argue issues, or bill the most hours, but you probably want to be remembered for something larger than that. If you want to participate in making the world a better place, change things or shake them up, touch hearts and minds, and leave a lasting legacy, figure out what you want in life and then relentlessly pursue it.

V. DEALING WITH CLIENTS

A. INTERVIEWING THE CLIENT

1. IN GENERAL

Your client is the best source of information about the case and, with your guidance, can tell you the strengths and weaknesses of the case — and, possibly, how to win it. To obtain this wealth of information, keep the following in mind.

2. VISIT THE CLIENT ON "HOME GROUND"

Conduct a face-to-face client interview as soon as you can possibly schedule it. Rather than setting this meeting at your office, meet the client where he lives or works so that you can see what his surroundings are like and how he behaves in familiar territory. The client should appreciate this "house call" and you should appreciate the insight it provides.

3. TAKE YOUR TIME

Take time with the interview. You will need to review all pertinent documents and discuss details of the case with the client, so set aside a few hours as necessary to discover the truth.

4. GET CLIENT'S PERSPECTIVE

Although you may be inclined to ask questions and probe, you need to let the client explain things in his own way. You need to hear the whole story as told by the client, letting him talk without excessive interruption. That means you must listen carefully and refrain from assuming what the client is going to say, then cutting him off and finishing the sentence yourself. If you ask the client for documents, take note of where the records are kept. It may be beneficial to review these records with the client so that you can see for yourself what the client has and does not have.

5. ENSURE YOU UNDERSTAND ALL FACTS

Do not end the interview until you fully understand everything your client told you, every document that was shown to you, every comment made, and every story told. Do not be embarrassed to ask basic questions, to repeat questions, and to ask questions you think you should know the answers to. It is better to speak up and run the risk of looking foolish than to keep quiet and run the risk of misunderstanding an important fact or issue. Ask difficult questions to explore the weaknesses in your client's case.

NOTE Play the devil's advocate and ask the questions you would expect opposing counsel to ask your client at deposition. Every client has "skeletons" or weaknesses. You need to find out what and how big those are to avoid being surprised by them at your client's deposition.

6. EXPLAIN PLAN

During the interview, explain to your client what is likely to happen in the case and also explain, if necessary, how discovery works — what interrogatories are, what requests to produce records mean, and what to expect at deposition. Discuss the discovery you plan to conduct and the depositions you intend to take. If you anticipate hiring an expert, explain who, why, and how much it will cost.

Explain the possible outcomes — what will happen if the client wins and what will happen if the client loses. For example, if the case is a breach of contract case with an attorney's fee clause, the client needs to appreciate that he may not only lose the case but also have to pay the other side's fees. Be honest and forthright, resisting any urge to "sugar-coat" the process. You need to discuss what is and is not a reasonable expectation and what you intend to do to win the case. (See B.6. below.)

B. KEEPING CLIENTS SATISFIED

1. IN GENERAL

As a lawyer, your first duty is to your client and your most important job is to keep the client satisfied. A satisfied client will continue to come to you for counseling. Dissatisfied clients go elsewhere. Learn what your clients want and determine what you can to do to fulfill those needs. To accomplish this, do the following.

2. INVESTIGATE THE CLIENT

Learn as much as you can about your clients. For example, go to their web pages and review the contents. Type their names into Google and read what you find there. Read the business section of newspapers to stay informed about them

.

NOTE For a how-to article regarding Google searches, see Hopkins, "Googling Your Client and Your Case," Florida Bar News (Aug. 15, 2003).

3. LISTEN TO YOUR CLIENT

Take time to listen to your clients and understand their wants. Ask questions and probe to make sure you and your client are "on the same page." To best serve the client's interests, you must know what those interests are.

4. RESEARCH BEFORE ANSWERING

The client deserves the best information you can give under the time restraints imposed. The best policy when a client asks for legal advice is to render that advice only after you yourself are well informed. Rather than "shooting from the hip" by saying the first thing that comes to mind, tell the client that you will look into the matter and get back to him as soon as you can. Do the research, find the correct answer, then call the client back as soon as possible.

NOTE Make sure others in your firm who are also working with the client agree with the advice or opinion you intend to give so that there will be no conflicts among representing counsel. An agreed-upon, well-informed response that takes a little time is better than a quick response that is ill-informed, conflicting, or wrong.

5. ADVISE HONESTLY AND WISELY

Give a thoughtful answer to all questions the client asks, even if you must touch on sensitive or difficult issues in doing so. Rather than skirting issues, take a stand when you must and do not "sugar-coat" information, even if you know the client will not like your position, and even if your advice will make the client unhappy. However, be open to the client's response and do not lose sight of other available options or potential shortfalls of your view. If you cannot give a straight answer or assert something as a certainty, state the probabilities or provide the pros and cons of a particular course of action so that your client can make an informed decision. For example, you may have an opinion as to what a reasonable jury would do, but never tell the client that you *know* what a jury will do — you simply do not. You can never guarantee good results but you can and should always remain honest.

6. DEVISE AND DISCUSS THE OVERALL PLAN

Develop a winning plan of attack at the onset of a case. Clients like lawyers who know where they are going and how to get there, so start with the end in mind and draft a plan that achieves that end (see XII., beginning on page 90, regarding preparing the case). Then discuss the plan with the client before implementing it. Listen attentively to the client's input and adjust your plan accordingly. Be flexible, remembering that you are working for the client and your role is to fulfill the client's goals, not your own.

7. EXCEED EXPECTATIONS

If you want to impress, do not settle with meeting your clients' expectations. Find that extra case to support your motion, track down that witness everyone assumed would never be found, or win the hearing no one thought you could. Challenge yourself to do the best you can and more.

8. OBTAIN EXPENSE CONSENT

Obtain your client's approval before spending his money. For example, if you are going to hire an expert, first consult with the client about the advantages and costs. Otherwise, you may find yourself in the awkward position of having the client disapprove of the expense.

9. COMMUNICATE AS THE CLIENT WISHES

How you communicate with your client is just as important as what you communicate. Take into account the following when making this determination:

· Determine the client's preference. Find out how the client wants to receive information from you — be it via letters, phone calls, emails, or a combination of them all. It likely will differ depending on the importance of the subject matter to be communicated. Whatever method of communication you choose, you must ensure that it is not intercepted by an unintended audience.

Take steps to protect the confidential nature of the communication.

NOTE Although email is immediate and probably convenient for you, it cannot impart the author's tone and may therefore be misunderstood by the client. Its ease can result in quick, thoughtless typing that does not properly or fully communicate all that needs to be considered. (See IX.E.3. at page 80 regarding proper use of email.) Furthermore, the client may not be comfortable with email communications, either because of the security risk or because the client does not have ready access to a computer or is not computer-savvy.

· Copy all necessary recipients. If people other than the client need to receive the same communication, make sure you choose a method whereby others can be readily copied with the message. Always double-check the "cc" line on letters or emails for completeness and accuracy.

· Always keep the client informed. Throughout the course of litigation, keep the client "in the loop." For example, when you take a deposition, send the client a summary. If you prepare a motion, send the client a copy. Call or write to communicate all significant developments without delay, such as settlement demands or court orders on dispositive motions. Find out how often the client expects to hear from you and try to abide by these wishes. At a minimum, send your client a monthly status report of everything that is happening. A client you communicate with frequently will often be more forgiving of any mistake you make than one who is ignored.

· Respond promptly to the client's emails, phone calls, and letters — preferably, within 24 hours. If you will be out of town on business or vacation, make arrangements to stay in touch with the client while away, or notify the client of your expected return date. Respond to the client on the client's timetable when possible.

NOTE If you need to impart significant advice to the client or communicate important matters about the case or other issues, you should always put the communication in written form. You may share the information with the client in person or by phone first, but afterward you should reduce it to writing.

· Be polite and positive. Your client can be rude but you cannot. No matter what clients do or say, whether they raise their voices or insult or criticize, do not behave in kind. As a professional, you must remain reserved and polite at all times. Strive for a positive attitude in all that you do, remaining upbeat and pleasant.

· Deliver on promises. Make promises wisely, and when you make a promise to the client, deliver. For example, if you promise to draft a motion by a certain date, do it. If you do not fulfill your promises, you lose credibility. Never promise that you will win a motion or win a case, because, in the end, you have no control over what a judge or jury will do.

· Edit your work. Whether you are writing a letter, report, motion, or brief, aim for perfection, revising it until it is flawless. (See IX.D. and E. at pages 74 and 78, respectively, regarding improving your writing.) Always remember that every word you write is a reflection on you and your law firm. Clunky grammar, typos, and mistakes make you look careless at best and unprofessional at worst. All written communications should be brief and to the point, giving the answer or opinion in one short paragraph and the rationale in another. Be thorough but do not waste the client's time with unnecessary verbiage.

VI. DEALING WITH OPPOSING COUNSEL

A. LEARN WHO YOUR OPPONENT IS

1. IN GENERAL

When you first get a case, you need to research not only the facts and the law — you need to investigate opposing counsel. What you find about your opponent may be more useful than what you find in your legal research.

NOTE When you first get a file, you may want to call opposing counsel and introduce yourself. It may be harder for your opponent to be contentious or unprofessional if you have had a pleasant conversation with him.

Your legal strategy, resources, and goals for the case may very well depend on who your opposing counsel is. You will want to find out whether he is practicing outside of his field of expertise, whether he has won or lost his last few trials, or whether he has a "top flight" reputation and accepts only those cases that he believes he can win. To get an accurate picture of what you are facing, consider the following suggestions.

2. SEARCH MARTINDALE-HUBBELL

A free, easy-to-use version of Martindale-Hubbell can be accessed online. This resource lets you know whether opposing counsel is rated and provides general background information, including what law school he attended, the year he was admitted to The Florida Bar, and his academic and bar accomplishments. It also provides a link to the attorney's web page, if any.

NOTE You can access Martindale-Hubbell at martindale.com. Enter the individual's name, then when you retrieve the initial information, click on the name again for expanded background information.

3. SEARCH THE ATTORNEY'S WEB PAGE

After looking in Martindale-Hubbell, visit the attorney's web page if one is available. The appearance of the web page alone will tell you something about the firm. Is the web page professional looking — does it look like the firm invested some time and money developing it? Does the firm even have a web page?

Look up the attorney's profile on the web page to discover his years of experience, areas of practice and expertise, and any other information that will reveal potential strengths and weaknesses. Determine whether he has published any articles and, if so, if they are available as links. If you find articles, you may want to print and review them. Does the web page indicate that opposing counsel has received any awards?

4. SEARCH THE INTERNET

Do a Google search for the attorney on the Internet and see what you find. (See the Note at V.B.2. at page 60 for further information regarding Google searches.) Perhaps you will find one or more

of the articles he has written that were not otherwise revealed. Or maybe you will discover an article about him and his practice, or an article in which he is quoted on a given legal issue.

5. PERFORM A JURY VERDICT SEARCH

On Westlaw, perform a search of all of opposing counsel's jury verdicts. How many cases has he taken to trial? What types of cases does he take to trial and what types of cases does he win once he gets there? How often has he won and how often has he lost? When he wins, how big does he win — when he loses, how badly does he lose?

NOTE To perform a jury verdict search, go to FL-JV (Florida Jury Verdicts) and do a search for his name. All of his reported jury verdicts will then appear on the screen.

6. DO A CASE LAW SEARCH

Do a search on Westlaw of any appellate opinions for which opposing counsel wrote a brief, whether for the appellant or the appellee. Westlaw has specific databases for such documents. See if his arguments convinced the appellate court to find in his favor.

7. INTERVIEW FRIENDS

Ask attorneys you know and respect what they think of opposing counsel. Is he good at what he does? Can he be trusted? Is he aggressive? Overly so? Or is he mild-mannered and easy to get along with? Is he the type to conceive and implement long-term strategies or does he "shoot from the hip"?

8. CONSULT THE FLORIDA BAR

Call The Florida Bar (Membership Records) and ask if opposing counsel is an attorney in good standing. Has he been suspended or reprimanded?

NOTE An attorney with a history of ethical problems may prove to be problematic.

9. KEEP ABREAST OF NEWS

Read "News and Notes" and "On the Move" in The Florida Bar News, as well as similar columns in your local business newspapers, to keep abreast of what the attorneys in your community are doing — whether they have been appointed to a board, given a lecture, or recently switched firms. Even if your opponent is not mentioned in the current news, the other attorneys you read about today may be your opponents tomorrow.

NOTE It may be helpful to remember the following quote from Sun Tzu: "If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle."

B. DEFUSE CONTENTIOUS OR OVERBEARING COUNSEL

1. IN GENERAL

Occasionally you may encounter a "Rambo-style" litigator — one who is overly aggressive and bullying with a "take-no-prisoners," "win-at-any-cost" attitude. This type of attorney behaves as if the rules of professional conduct are a hindrance to his practice. He may be offensive every chance he gets, object to your discovery requests, misquote you in letters to the judge, or use speaking objections as a matter of course. Here are some suggestions on how to deal with such a person.

2. REMAIN IN CONTROL

Do not succumb to his level, regardless of what he says or does. You must not allow his attitude to affect yours. Although you cannot control how others behave, you can certainly control your own behavior and remain professional despite others' actions.

3. QUOTE THE RULES

Rely on the rules, quoting them to opposing counsel who steps out of line. The Trial Lawyers Section of The Florida Bar has two great publications on how litigators should conduct themselves. The first is the section's GUIDELINES FOR PROFESSIONAL CONDUCT, which spells out how attorneys should behave — from setting a hearing, to conducting a deposition, to communicating with adversaries. The second book is the section's DISCOVERY HANDBOOK, which is updated yearly and addresses how attorneys should behave during the discovery process. Both books can be found on The Florida Bar's website, under the Trial Lawyers Section link (or go to www.flatls.org). Keep these texts handy and if your opponent strays from professional behavior, read the applicable rules to him and point out that he is acting contrary to them. Often, pulling out the rule book is sufficient to get the other side to play by the rules. However, even if it does not stop the behavior, you have put him on notice that it is unacceptable.

4. DOCUMENT THE MISBEHAVIOR

Make a record of the misbehavior. If opposing counsel insists on acting inappropriately after you have attempted to highlight the rules of engagement, write a letter to him pointing out his misdeeds, stating what he did and why it was inappropriate. Ask that he refrain from misbehaving in the future. If he does not get the message, you can seek judicial intervention, showing the judge the letter you sent in your effort to get opposing counsel's cooperation.

5. FACILITATE IMPOSITION OF SANCTIONS

Use his behavior to your advantage. Sometimes a "Rambo" litigator will so greatly offend the judge with his behavior that it will warrant judicial sanctions. Judges have become less patient with overbearing and unprofessional attorneys, and when made aware of inappropriate behavior, they may intervene and impose sanctions — possibly severe, such as striking pleadings. Therefore, an obnoxious counsel whose position may be much stronger than yours can be your best ally, whittling away his advantage with his behavior.

Although you should never encourage antics from your opposing counsel, you may be able to turn this behavior to your advantage if you can bring it to the attention of a judge who does not tolerate unprofessional conduct. Once chastised by the court, a belligerent attorney is likely to reconsider his approach to litigation and start behaving as he should have all along.

VII. WHAT JUDGES EXPECT FROM LAWYERS

A. IN GENERAL

Judges have the same expectations as the rest of us — they want good service delivered with a positive attitude. Lawyers who appear before them should be prepared, act professionally, and abide by the following rules.

B. BE RESPECTFUL TO THE COURT

Although you may note that other lawyers interrupt or speak at the same time as the judge, you should never do so.

NOTE Remember to always direct your comments to the court, not to opposing counsel.

C. BE RESPECTFUL TO OPPOSING COUNSEL

As noted above, you should never address opposing counsel directly, and never interrupt, belittle, or berate opposing counsel.

D. DO NOT MISLEAD THE COURT

If the court misunderstands the facts or misconstrues the law, set the record straight. The misunderstanding may benefit your client but it is an underhanded way to succeed. Furthermore, you will likely lose respect with a judge who later discovers that you took advantage of a misrepresentation or misunderstanding.

E. TRY TO RESOLVE ISSUES BEFORE APPEARING BEFORE THE JUDGE

A large number of motions that come before judges, particularly those regarding discovery disputes, should and could have been worked out without the need for a hearing. Judges' dockets are full and you must not waste their time with needless motions. Judges will respect your attempt to resolve issues with opposing counsel on your own, and your request for judicial intervention only as a last resort after you have failed at your best effort to work things out.

NOTE If you must seek judicial resolution of a matter, make every effort to get to the point quickly. (See XXI., beginning on page 166, regarding motion hearings.)

F. OTHER POINTERS

1. DO NOT ALIENATE THE JUDGE

Judges talk to each other about the lawyers who appear before them. Everything you do before a

given judge may affect how every other judge perceives you. A lawyer's reputation will precede him and if he was rude and obnoxious when appearing before one judge, that rumored conduct will be noted by others on the bench.

2. REMEMBER THAT WHAT YOU DO REFLECTS ON YOUR FIRM

You are a representative of your firm every time you step before a judge and your conduct before that judge will leave him with an impression about your whole firm. Your reputation is inextricably tied with your firm's, and everything you say and do either improves that reputation or diminishes it.

3. BE SELF-DEPRECATING

Although you do not want to come across as a comedian, and you never want to joke at the expense of opposing counsel or the court, otherwise injecting a bit of humor into the proceedings can reduce tension and stress, particularly if it is self-deprecating in nature.

VIII. HANDLING ETHICAL ISSUES

A. IN GENERAL

Litigation is inherently adversarial and presents an array of ethical issues. You are likely to face these issues on a weekly basis. Some ethical issues are easy to resolve while others will take personal analysis and outside advice.

NOTE Although it may be easy to get carried away with the contested issues and assume a zealous, winner-takes-all mentality, you do this at the risk of compromising your principles. Do not start rationalizing the little ethical breaches away or you may end up with much more serious ethical violations to answer for.

When confronted with an ethical dilemma, take the following steps to resolve it.

B. CONSIDER YOUR INSTINCTS

You have undergone a lifetime of ethical training — from your parents, teachers, or priests, ministers, and rabbis, and from your law school. Because you have been instilled with knowing right from wrong, you have developed certain instincts, referred to as a moral compass. Refer to that compass and if you are considering doing something that is not quite in line with it, reconsider your proposed action.

DPA11 NOTE Each of us has someone who respects us — be it a family member or friend. We want that person to be proud of us, and it is in striving to accomplish this that we can attain a truly ethical and professional approach to all we do.

C. CONSIDER OPTIONS AND POTENTIAL CONSEQUENCES

Think through your options for responding to the ethical dilemma and determine the consequences of each. Creatively analyze the possible outcomes of every reasonable course of

action, determining the positive and negative aspects of each. Are opposing counsel and the court likely to believe you did the right or wrong thing? If you can think ahead to the likely outcome of your actions, you are likely to settle on the most ethical course of action.

D. REVIEW THE LAW

When faced with a moral dilemma, review the Florida Rules of Professional Conduct and the cases and ethics opinions interpreting those rules. It is possible that the dilemma you are facing or one very similar to it has been faced by others and is the subject of a written opinion.

E. CONSULT ETHICS HOTLINE

Call The Florida Bar ethics hotline for its opinion on how to resolve the ethical dilemma. The rule may be black and white and you may receive clear direction on what to do. However, when the issue is less clear and there are no cases providing any direction, The Florida Bar ethics hotline may be able to point you to rules, cases, or opinions you have overlooked, and should be able to provide some direction on what to do.

F. SEEK ADVICE FROM PEERS

Ask your peers or associates in your firm what they would do. If the consensus is in line with what you think is the right thing to do, you are probably leaning toward the right action. If everyone has a different approach to the same ethical dilemma, you need to rethink the matter.

G. ANALYZE INPUT

After you have consulted your moral compass, reviewed any rules, cases, and opinions, and talked to others about what they think you should do, you need to come to a decision based on the law and facts. Whether right or wrong, at least it is one that was thought through.

H. CONSULT WITH SUPERVISOR

Once you have defined the ethical dilemma and come up with a course of action to deal with that dilemma, discuss your proposed solution with your boss. Because what you are about to do may affect not only you but the case you are working on and, possibly, the entire firm, it is crucial to bring your supervisor into the analysis. Spell out the problem as you understand it, your proposed solution, and everything that went into reaching that solution. Then, together, reach a decision and proceed.

IX. IMPROVING YOUR RESEARCH AND WRITING SKILLS

A. RESEARCH TIPS

1. IN GENERAL

Lawyers often complain that law school taught them how to research and write but not how to practice law. The fact is, however, that most law students do not actually learn how to thoroughly research an issue until they have a case. Researching for law school briefs and moot court

competitions is not the same as researching when the outcome of an issue depends on the cases you find, and the client's success depends on you. Consider the following practical tips to improve your research skills and find the right cases to support your points.

2. UNDERSTAND THE ISSUE

Before going to the library or researching online, make sure you know the issue you are researching so you can avoid pursuing the wrong path. When researching an issue for a partner, for example, clarify the assignment by repeating back to the partner your understanding of what it is you have been asked to do. Then you can be corrected or the partner can restate as need be. This repeat-the-assignment tactic may be intimidating, but it is more prudent to risk sounding foolish by asking questions when you first get the assignment than to actually be foolish by wasting several hours researching the wrong issue and answering the wrong question.

3. KNOW THE FACTS

You must know the issue you are researching in the context of the facts of the case. Knowing the facts will enable you to know what fact patterns to look for in the cases you read.

4. CHECK WITH OTHERS

Before going to the library or conducting online research, ask other attorneys in the firm if they have studied the issue and retained research files, or explore your firm's research database for previously conducted research on point. (See IX.C. at page 73.) Some firms have document management systems such as Imanage that will allow you to search all office memos for key words. A preliminary investigation may reveal a memo containing significant cases on the same issue.

5. CONDUCT GENERAL RESEARCH FIRST

Conduct general research before specific research. Before researching cases and statutes, read through treatises such as Florida Jurisprudence or articles in law reviews or The Florida Bar Journal to obtain an overview of the issue. (See IX.B. below regarding access to Journal articles.) This overview will help put into context the cases you find that address your issue.

6. USE PRIMARY RESOURCES

Amid the plethora of treatises and reference books, read the ones most often relied on and quoted on the given subject. For example, read Ehrhardt for Florida evidence issues; Ramirez, Berman, or Padovano for Florida civil procedure; and Siegel for Florida trial objections. If you have any sway in what books your law firm buys, ask for the leading reference books that apply to your field. Review Florida Bar continuing legal education publications as well. A list and description of all available Bar CLE books is located at www.lexisnexis.com/flabar/.

7. USE WEST KEY NUMBERS

Once you have read through the relevant legal articles and treatises, start reviewing cases and statutes. If you do the majority of your research on Westlaw, familiarize yourself with key number

searches. Westlaw has assigned a key number to every legal issue imaginable. Click on the key number that references your issue and you can retrieve every head note in every case addressing that issue.

8. FIND CASES IN YOUR JURISDICTION

Make sure you have read each of the relevant cases in your jurisdiction. When drafting a motion to be filed in a particular county, you may cite cases from other circuits but you should include along with them any cases on point in the circuit encompassing the county you are filing in.

9. FIND CASES INVOLVING YOUR JUDGE

It is very important to research any cases on point that were decided by the judge you will be appearing before. Review all opinions on point by the judge and determine if they have been upheld or overturned.

NOTE To find cases involving your judge, you will need to conduct a word search on Westlaw for your judge's name. Simply type in your judge's full name in quotation marks in the search field and you will find all of the opinions involving that judge.

10. FOLLOW RESEARCH TRAILS

If you find cases that address your issue and these cases cite others, read the others as well. Also, shepardize each case by head note and read the subsequent cases that cite them on point. By pursuing all paths to the end, you can be satisfied that you have found all cases addressing the issue, even an elusive one you may have heard about that appeared in the advance sheets months ago.

11. USE WESTLAW REPRESENTA-TIVES

Westlaw employs hundreds of research attorneys whose main job is to help you find the cases you want. When your research is not fruitful, seek help from one of these representatives.

12. DO NOT RUSH

Although it takes a great deal of time to read treatises and law review articles and to read the cases, shepardize them by key cite, and follow each research trail, by doing so you can feel confident that you have found the majority of cases on point. This investment of time will ensure good research and can make the difference between winning and losing.

B. FREE ONLINE RESEARCH SOURCES

Depending on the research project you are facing, you may need to rely on sources available over the Internet. Yet, some of these sources, such as Westlaw and Lexis, charge for access to their legal research databases. The challenge is to reduce the firm's research costs without sacrificing the quality of your results. You can do so by taking advantage of the following free alternatives:

· www.floridabar.org is The Florida Bar's website. It offers free legal research to its members through Fastcase, which provides Florida Supreme Court and District Court of Appeal decisions as well as the Florida Constitution, Florida Statutes, and the Florida Administrative Code. Articles in The Florida Bar Journal can also be accessed at this site. At a still deeper level of the website, at www.floridabar.org/tfb/TFBETOpin.nsf, you will find Florida Bar ethics opinions. Numerous other bar associations, both local and state, offer research opportunities on their websites as well.

· www.leg.state.fl.us takes you to Online Sunshine, the official site of the Florida Legislature. This site offers not only the text of statutes but also the text of bills and the revisions they have undergone in becoming a law. This information is valuable when researching legislative intent.

· www.flrules.org provides access to the Florida Administrative Code and Florida Administrative Weekly.

· www.myfloridalegal.com is the official site of the Florida Attorney General, and contains Attorney General Opinions.

· www.law.fsu.edu/library/flsupct/index.html contains opinions issued in Florida Supreme Court cases decided since October 1989, as well as the briefs filed in those cases. You can also find opinions, rules, and other Supreme Court documents and district court opinions at www.floridasupremecourt.org/decisions/index.shtml.

· www.municode.com provides links to county and municipal codes throughout the country, including throughout Florida.

· www.findlaw.com provides links to federal statutes, regulations, and cases.

· www.newslink.org provides links to newspapers, television stations, and magazines throughout the country.

· www.romingerlegal.com purports to be "where legal research begins on the web." It contains numerous links to sites where you can find federal and state laws, regulations, and cases.

· www.hg.org provides links to legal sites including numerous law review articles throughout the country.

· www.washlaw.edu offers links to legal resources from every state.

· www.law.cornell.edu offers access to the United States Code, the Code of Federal Regulations, and United States Supreme Court opinions.

· www.access.gpo.gov provides links to federal agencies including the Federal Drug Administration and the National Labor Relations Board.

· www.floridalawonline.net provides numerous legal links including periodicals, directories, and documents from the three branches of government, and refers to its service as "the source for Florida law on the Web."

· www.llrx.com/columns/litigat.htm provides federal and state court rules, forms, and dockets — over 1,400 links.

If any of these free websites can be of help, you can avoid incurring research charges that either you or the client will have to pay.

C. CREATING A RESEARCH DATABASE

1. IN GENERAL

A tremendous amount of your time may be spent researching various legal issues, gathering articles and cases on point, and drafting letters or memoranda containing your findings. Instead of merely filing this away under a case or client name, you should seriously consider creating a research database organized around legal issues. It is likely that the researched issue will come up again, and if you have saved past notes, you can have the answer to the current question at your fingertips (or be much closer to an answer), and can please your client with immediate service.

2. OBTAIN THE FIRM'S HELP

Share your interest in starting a research database with your firm's office manager or managing partner. Point out that a research database will provide a wealth of information in one place and prove to be a most valuable resource. The firm may embrace the idea and encourage a firm-wide database rather than just a personal one. Either way, explore the possibility of getting firm funding for the filing cabinets that will be needed to contain the collection of memos, articles, cases, and statutes that will be gathered.

3. DEVELOP A ROUTINE

Solicit the help of others to assemble this research database and properly store it. Consider developing a routine in which you forward research to your secretary or assistant who then scans or copies it and files it into the properly labeled folder or computer directory. Whenever you research an issue and reduce your work to a memo, follow your routine so that the memo containing the cited cases is stored in the research database. Do the same with motions you have drafted, as it is likely that they can serve as a model for future motions. If the database is to be a firm-wide project, coordinate with the other attorneys in the office and have them do the same with their work product.

4. COLLECT MATERIALS

Collect motions and memos filed by opposing counsel and acquaintances as well. If another attorney talks to you about a recent legal issue he struggled with or a motion he wrote and it is a topic you will likely deal with in the future in your area of practice, ask for a copy of the research, motion, or memo, and store it in your database. Additionally, have all members of the firm collect and store materials received at CLE courses, luncheons, or presentations. Skim through as much legal material in your area of practice as you can — legal journals, magazines, newspapers, newsletters, e-zines, etc. — and copy or scan and store the ones that are most informative. Ask the other attorneys at your firm to circulate articles of interest or to flag for storage valuable articles that they have read.

D. IMPROVING YOUR WRITING

1. IN GENERAL

To write successfully, you must seize and hold the reader's attention. You must make your point and not waiver from it. In effect, you must "land the first punch right between the eyes" and not let up. If you wander from your message or confuse or obfuscate it, you risk losing the reader. Every paragraph, every sentence, and every word must push the reader to your conclusion, getting the reader to embrace it like it was his own. The following tips will help you achieve this goal, whether the writing is addressed to a judge, a client, or opposing counsel. Review these suggestions as well as those contained in *FASTRAIN*™: LEGAL WRITING MANUAL (Fla. Bar CLE 2004).

2. SPECIFIC POINTERS

· Brainstorm and prepare an outline. Before you write, brainstorm your ideas by jotting them down. Write down lists and thoughts of what you will write about. Put down whatever idea comes to mind, however foolish it may sound. Then organize your ideas into an outline, dropping those that do not work and developing those that do. Rushing into the writing with little thought can result in hours wasted drafting and redrafting. The outline will serve as a blueprint for your writing and will keep you from wasting time.

· Read. When you are not writing, spend time reading newspapers, magazines, fiction and non-fiction books, and other examples of writing styles. Study each as if it were a writing tutorial. How does the writer start, build on the lead, and conclude? What words does the writer use and how are they used? Observant reading can greatly improve your writing skills.

· Know your audience. Remember that you are not writing for you but, rather, for your audience. If you forget this point, you risk alienating and boring the reader. Realize that how you write a motion for a judge is different than how you write a letter to a client. The above-referenced LEGAL WRITING MANUAL addresses these different approaches. For a discussion of how to write for a partner, see IX.E.1. at page 78.

· Serve the reader. Keep the reader's needs in the forefront when you write, and serve those needs to a fault. You write to inform, persuade, and even entertain the reader. You will risk losing the reader's interest if you serve your needs instead.

· Start strong and make your point quickly. Rather than trying to work up to a crescendo in your writing, you should start strong and state your message directly. The first sentence or two must grab the reader's attention. In those first sentences, you must let the reader know that what you have to say is important, and that the reader should keep reading. Do not mince words or hem and haw. Be bold, state your point quickly and clearly, and move through it. If the reader has to read three pages of your six-page motion to figure out what you are trying to say, you have failed as a writer.

· Stick to your point and support it. Do not wander off the path. Digressions distract. If you make assertions, support them. State why your position makes sense or why the reader should agree with you. Use facts, anecdotes, examples, cases — whatever you need to bolster your position.

· Keep it plain and concise. Limit what you have to say and do not use flowery prose to get your point across. In the context of legal writing, less can be more. Say as much as you need to with the fewest words and pages possible. People have less time and shorter attention spans. Say too much or try to prove how smart you are and you will sound arrogant and lose the reader. If you can make two or three points that stick with the reader, you are better off than making ten points that do not stick and merely incur the reader's contempt.

· Be precise and confident. Avoid ambiguity in your writing. Make sure that what you intend to say is expressed correctly and without shyness. If you are not confident about your position, do not expect the reader to be.

· Make the writing interesting. If possible, tell a story to make your points stand out. Judges and clients read their share of letters and motions, and appreciate those that captivate, hold the reader's attention, and end strongly.

3. EDIT

Do not be happy with your first draft, your second, or perhaps even your third. Edit out the excess sentences, phrases, and words. Make sure your argument "holds water," the transitions are smooth, and the word choice is proper. The following are editing goals:

· Keep your paragraphs short, using from three to five sentences to express one idea. Your sentences should be between 10 and 20 words. Use words that have fewer syllables (i.e., avoid "ten dollar words").

· Eliminate "throat clearing" words and phrases, such as "clearly," and "as you know." These add nothing to your writing and can actually detract from it.

· Avoid redundancies by pruning words, phrases, and multiple modifiers that say the same thing.

· Remove filler words and unnecessary prepositional phrases that do not contribute to what you are trying to say. Extra words are the enemy. Eradicate them.

· Eliminate adjectives and adverbs that serve merely as a crutch for weak nouns and verbs. Instead, use the active voice and choose strong nouns and verbs.

NOTE Using the active voice means that the subject of your sentence does not have things happen to it — instead, it makes things happen. See the LEGAL WRITING MANUAL (referenced above) for a further discussion of active versus passive voice.

· Start sentences with the subject so that the reader knows right away who is performing the action. Then quickly follow the subject with the verb and object. Keeping the subject, verb, and object of the sentence close together will improve the strength, clarity, and brevity of the point.

· Make the verbs in your sentences carry weight, choosing strong, active words carefully. Good writing is very much about the verbs you choose. Avoid turning verbs into nouns (*e.g.*, "utilization," "personification") — it weakens words and makes the text assume a more stilted, bureaucratic tone. If possible, avoid using the past perfect tense (*e.g.*, "I had run the marathon

...”), the present perfect tense (*e.g.*, “Lawyers have known ...”), and the future perfect tense (*e.g.*, “I will have finished ...”). Instead, use the past tense (“I ran the marathon ...”), the present tense (“Lawyers know ...”), and the future tense (“I will finish ...”). The perfect tense is longer and less direct.

· Avoid abstract nouns. Instead, use concrete, precise nouns that create a visual image and paint a picture. A badly chosen noun will not convey the message you want to send.

· Avoid misplaced modifiers and pronouns by keeping them close to the words they modify. A misplaced pronoun or modifier may actually confuse the reader.

· Maintain parallel construction when using a series of words or phrases that are related.

NOTE Parallel construction means that the words or phrases should be stated in a similar form. This is addressed further in the LEGAL WRITING MANUAL (referenced above).

· Ensure that the verbs agree with their subjects.

· Avoid legalese and trade or technical words. Nothing alienates your reader more than words that only lawyers use. If you must use legal terms, make sure you adequately define them in layman’s terms. A list of words to be avoided is contained in the LEGAL WRITING MANUAL (referenced above).

· Avoid commonplace phrasing (*i.e.*, hackneyed, trite, or clichéd language) and contractions that are better suited for informal writing.

· Avoid using bold and italic fonts to compensate for poor writing. If you use strong writing to begin with, you will not need a special font to emphasize your points.

· Use familiar words and terms to keep your reader from having to seek a dictionary.

· Use your terms consistently. Do not call an item one thing on page two and give it a different name on page three. Stick to the same term to avoid confusion.

· Start each paragraph with a topic sentence, making your point up front and spending the rest of the paragraph supporting it.

· Use transition words and phrases to smoothly move between sentences and paragraphs.

· Vary sentence structure while generally keeping sentences short. Otherwise, your writing will sound choppy.

· Do not risk losing credibility by exaggerating or misstating your position.

· Remain professional and avoid personal attacks on your opponents and their counsel.

· Use headings to guide the reader when writing letters or motions that are several pages long.

· Consider whether the use of a list in your writing will help make a point. For example, you could create a bulleted list of your arguments to rapidly convey to the judge why your motion should be granted.

· Read your work aloud and listen to how it sounds, making changes as necessary to improve the rhythm and flow.

· After you have edited out the unnecessary adverbs, adjectives, prepositional phrases, and needless words, take a break — then after a day or so, review your writing again to see what else can be eliminated. A fresh look often reveals errors or lapses of judgment you overlooked before.

E. IMPROVING YOUR CORRESPONDENCE

1. CORRESPONDING WITH PARTNERS

a. In General

As an associate, you will receive your share of research and writing assignments from the partners at your firm. If you consistently take the time to learn the assignment, tailor your research, answer the right questions, and answer them in a style and manner the partner wants, your writing will get noticed. Before turning in your next assignment, consider the following advice.

b. Know The Assignment

Although mentioned before (at IX.A.2. above), it is worth repeating — make sure you know what the assignment is.

c. Do Not "Reinvent The Wheel"

Another attorney in the firm may have addressed the very issue you were asked to research or may have written a letter to a client very similar to the one you were asked to draft. It is worthwhile to try to determine if there is already research existing on point. If your firm has a research database, peruse it (see IX.C. above). If not, ask around to see if other attorneys have tackled the issue (see IX.A.4. above).

d. Draft An Outline

As previously noted (at IX.D.2. above), you will save time and money if you think through what you are going to write before you start writing.

e. Discover What The Partner Prefers

As noted in IX.D.2. above, you need to adjust your writing style to fit your audience. Ask other associates to share memos they have written that were well-received by the partner and study these to determine the amount of detail, organization of text, or presentation style. A partner who cares about these things will be grateful if you can emulate the successful writing style of others.

f. Submit Only Finished Work Product

Never submit a rough draft to a partner. Assume that the partner will send your writing directly to the client, and draft it accordingly, striving for perfection. As emphasized above (at IX.D.), you must use plain English, get to the point, and support the point in as few words as possible. Consider using bullet points or charts to state the facts or make your arguments (see IX.D.3. above). Proofread the document you intend to submit to the partner and then proofread it again, aloud. Respect that partners are busy and that the less time and effort it takes to read your document, the more time and effort they will have for everything else.

g. Follow Up

After you turn in your assignment, follow up with the partner to see if anything else is needed, such as additional research or revisions. Make sure everything was done to the partner's satisfaction.

2. CORRESPONDING WITH OPPOSING COUNSEL

a. In General

Attorneys are sometimes accused of wasting time by writing too many letters instead of working things out over the phone. If you are able to establish a cordial relationship with opposing counsel by talking things over, it will be easier to reach common ground and settle cases. However, even though a telephone conversation may be a better tactic for dealing with a particular matter as opposed to sending letters or emails back and forth, you should always reduce oral discussions with opposing counsel to writing later. This is so whether the conversation involves working out objections to discovery, confirming an extension of time, or negotiating a settlement. The following are a few pointers in dealing with opposing counsel.

b. Confirm All Agreements

It is said in legal fields that if it is not in writing, it did not happen. Therefore, if opposing counsel orally grants your request for an extension of time or agrees to the language of a proposed order, send a letter confirming it. In the letter, state what your understanding of the agreement is and let your opponent know that if you do not hear from him, you will assume that your understanding of the agreement is correct.

c. Correct Errors

You must correct misunderstandings or misstatements made in letters by opposing counsel. Just as you need to confirm agreements in writing, you need to always correct misstatements made by opposing counsel in their letters to you. Otherwise, these uncorrected misstatements may become reality.

d. Avoid Indiscretion

Never write anything to your opponent that you would not want a judge to read. Opposing counsel may be inclined to attach something you have written to a document he intends to file with the

court — as an exhibit to his motion, for instance. If your writing contains an insult, personal attack, or combative or argumentative language, this indiscretion on your part may be displayed to the judge, and result in your loss of credibility. Avoid writing angry letters by waiting a sufficient period of time before recording your thoughts. Then, after expressing yourself, take a few minutes to review your writing to ensure that it presents the right tone.

e. Avoid MisRepresentations

Never misrepresent opposing counsel's words. When confirming an agreement or understanding, make sure you express opposing counsel's words verbatim. Do not exaggerate, misconstrue, twist, or bend the opponent's words, and never seek an advantage by ascribing to opposing counsel a position that is not his.

f. Write Clearly And Succinctly

As with all professional correspondence, your letters or memoranda to opposing counsel should be written well (see IX.D. above). A letter to opposing counsel should rarely be longer than a single page. If necessary, draft an outline before beginning the document. Think about what you are going to say, say it, and end the letter. Do not enter into long explanations, digress, or rehash the opponent's shortcomings. Strive for letters that get to the point and do not subject you to a Florida Bar complaint.

3. EMAIL ETIQUETTE

a. In General

Email has brought a revolution in communication. Whether writing to a client, an opposing counsel, or someone in your office, email has increasingly become the choice form of communication, replacing letters in many instances. Just as there are certain rules to be followed when writing letters, there are rules or etiquette that should apply when writing email. It is important to learn this email etiquette and employ it for all occasions.

b. Treat Email With Professionalism

Treat email with the same professionalism you would use for a standard letter. An email, regardless of what it is called, is still a letter, and you should not allow it to become too informal. The more casual you are with your email, the more likely you are to use slang, abbreviations, and poor grammar, and to make typographical errors. If you always treat email as if it were a short letter and strive for the highest professionalism when drafting it, you can avoid many of these mistakes.

NOTE Always remember when drafting your email that it may end up being passed around by your clients, up the chain to the CEO, or into your opponent's hands. There is no private email. An email you think is sent in private may be read by dozens or hundreds of people. Never write something in an email that would embarrass you.

c. Respond Promptly And Be Brief

One of the advantages of email is that it is so fast. Press "enter," and within seconds the recipient is reading it. The speed of email has created in the sender the expectation of a quick response that is short and can be read quickly. Brevity is something you should always strive for in your writing, but especially in email.

d. Use A Relevant Subject Line

Make sure to include a brief description of the email in the subject line so that the recipient knows the purpose of the email. For example, if it is related to a case, put the case name as the subject.

e. Do Not Send Email When You Are Upset

The ease and speed of email makes it easy to write in the heat of the moment. Take a break, go for a walk around the office, or get a drink of water before sending an email that you drafted while angry or tense.

f. Make The Tone Obvious

Fill in the "body language" so that your intent is known and the reader is not left to assume your tone The reader may readily jump to conclusions about the meaning behind your words. It is therefore important to sometimes write more, saying outright what you mean, to avoid any misunderstanding.

NOTE Do not write your email in capital letters. When you write in caps, it is viewed as shouting at the recipient.

g. Consider Whom You Copy

Email programs such as Groupwise make it easy to "carbon copy (cc)" and "blind carbon copy (bcc)" several people. Before you send the email, review the list of those who will be copied and carefully ensure that everybody on that list would really want or need to see it. Also determine whether the recipient would want others to be copied.

h. Include A Disclaimer

Add disclaimers to your email in the event it is intercepted and read by someone who has no business reading it. A standard disclaimer that can be attached to your email notifying third parties that the information being transmitted is subject to the attorney-client privilege and is work product follows.

Confidentiality Notice: The information contained in this transmittal, including any attachment, is privileged and confidential and is intended only for the person or entity to whom it is addressed. If you are neither the intended recipient nor the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any disclosure, copying, or distribution, or the taking of any action in reliance on the contents of this transmittal, is strictly prohibited. If you have received this transmittal in error, please contact the sender immediately

and delete this transmittal from any computer or other data bank.

F. DEVISING AN IN-HOUSE WRITING PROGRAM

1. IN GENERAL

Every motion, letter, memo, and even email your firm sends out reflects not only upon the author but upon the firm. To make a good impression on judges, opposing counsel, and clients, every lawyer in the firm must strive to deliver clear, concise writing. Grammatical gaffes and muddled, confused, or simplistic presentation not only reflect shortcomings in your writing but may lead the reader to suspect a more systemic problem.

Although many think that writing is an innate talent — that you are born either with or without the "gift" — this is not the case. Every lawyer's writing can be improved, whether they think they have no talent or whether they think they are great writers. At the risk of bruising egos, the writing skills of every lawyer at the firm should be polished. This can be done by having the firm adopt a mandatory writing improvement program to ensure that each lawyer learns good writing skills and applies them daily.

2. CONVINCING THE FIRM

To encourage your firm to implement such a writing program and impose mandatory attendance for every firm member (including partners, senior attorneys, midlevel attorneys, and junior attorneys), present the following favorable points:

· A firm is constantly being compared with others and a firm's written documents are one of the major measures of the firm's competence.

· Lawyers need to be able to take pride in their writing, and improved writing translates into a better work product, earning the firm the client's gratitude, referrals, and repeat business.

· Clear writing promotes organized, clear thinking, which leads to a better ability to express yourself in a direct manner, making you a more effective advocate.

· Improved writing leads to efficiency, avoiding the need for document revisions by senior associates and partners. More time spent revising a document during its creation will result in less time spent attempting to clarify it later.

· A writing program in which each lawyer is taught to adhere to an agreed-upon style guide when writing or revising a document will result in a more uniform, standardized firm work product and prevent individual style eccentricities.

· A mandatory program will benefit all lawyers without singling out any one poor writer.

3. IMPLEMENTING THE PROGRAM

Once you have convinced the firm that a mandatory writing program is essential to improve the image of the firm and each individual within the firm, you need to devise and implement the

program.

A successful writing program should develop a style guide that will give the firm a single "voice." The guide will set goals and incorporate a list of writing rules that the attorneys have agreed on. The goals should include, at a minimum, writing in plain English, using fewer and better chosen words to express oneself, and writing in the active rather than the passive voice. Rules for accomplishing these goals must be specifically listed and can be borrowed from style guides (such as Strunk & White's THE ELEMENTS OF STYLE, referenced at IV.K. on page 48); from grammar textbooks (such as WHO'S (OOPS WHOSE) GRAMMAR BOOK IS THIS ANYWAY, referenced at IV.K.), and from legal writing manuals (such as The Florida Bar's *FASTRAIN*™: LEGAL WRITING MANUAL (Fla. Bar CLE 2004)). A list of preferred terms to avoid legalese can likewise be found in the LEGAL WRITING MANUAL.

The program should provide to each attorney a desk copy of this style guide along with other reference texts (including the three referenced above).

Additionally, consider including a reading list and requiring each lawyer to read a book every month or two about improving writing and editing skills. See, for example, Plotnik, THE ELEMENTS OF EDITING (MacMillan Pub. 1996); Cheney, GETTING THE WORDS RIGHT: HOW TO REVISE, EDIT, AND REWRITE (F & W PUB. 2D ED. 2005); Bernstein, THE CAREFUL WRITER (FREE PRESS 1995); THE CHICAGO MANUAL OF STYLE: THE ESSENTIAL GUIDE FOR WRITERS, EDITORS, AND PUBLISHERS (Univ. Chicago Press 14th ed. 1993); Elbow, WRITING WITH POWER: TECHNIQUES FOR MASTERING THE WRITING PROCESS (Oxford Univ. Press 2d ed. 1998); Venolia, REWRITE RIGHT!: YOUR GUIDE TO PERFECTLY POLISHED PROSE (Ten Speed Press 2d ed. 2000), and Freeman, GRAMMATICAL LAWYER (Ali-Aba CPE 1979). To ensure compliance with this mandate, the attorneys should be required to meet once a month to discuss the current month's book and its most beneficial lessons.

The program should encourage the firm lawyers to submit articles to newsletters, newspapers, and magazines. This is a very effective way to develop writing skills and promote the firm. In fact, one of the writing program's goals could be to have each attorney publish one article a year.
Although writing improvement is a life-long process that requires hours of skill training and additional hours of careful application of lessons to text, the firm's profile and success will greatly benefit from the attention each individual devotes to a mandatory writing program and firm style guide.

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As a plaintiff's attorney, one of your initial and most important decisions will come before you accept the case. When a client comes into your office with a potential case, you have three very important jobs. First, you need to determine whether he has a case. A potential client who is not versed in the law may have unrealistic expectations and think he has a great case when, in fact, he has no case at all. Second, you have to decide whether you are going to take the case. You may not have the expertise to handle the case or there may be other reasons you cannot take it (such as financial or time constraints). Third, if there is a case and you are willing to accept it, you need to discuss the case with your client.

2. DECIDING WHETHER THE CLIENT HAS A CASE

a. In General

As plaintiff's counsel, your job is to figure out whether your prospective client has a case and whether you want to make the prospective client an actual client and struggle on his behalf, handling his case for the months (and possibly years) ahead. This task may be easy for some cases but, often, will take a great deal of analysis and some soul searching.

b. Analyze Facts And Law

Meet with the client and gather as many facts and documents as you can, then let the client know that you will soon get back to him with your thoughts. Usually, you cannot determine the viability of a possible case without doing some initial research. However, do not take too long with the review and research or you may contribute to a potential statute of limitations problem.

c. Give Honest Assessment

When you report back to the potential client, you must be brutally honest. If the outcome of a lawsuit would be questionable, say so. If there is a chance he will lose and have to pay the other side's attorneys' fees (for example, if the case involves a contract that awards fees or involves a statute that contemplates fees), explain the risks. It is better to be cautious and underestimate the

possible outcome of a lawsuit for your client than to overestimate it.

NOTE One of the quickest ways to get sued for malpractice or get reported to The Florida Bar is to not meet expectations. Besides, numerous things could go wrong with the litigation. For example, that great witness may move away or die, or the documents may not say what your client insisted they would, or the physical evidence you need may simply not be there.

Explain to the client the results of your review and research, but do not assume that your conclusion is flawless. If you do not believe he has a case, encourage him to see other lawyers to get a second or third opinion. Then follow this up with a letter that contains your conclusion and advises the client to seek other counsel. This will preclude the client from later accusing you of dissuading him from pursuing an allegedly valid claim.

3. DECIDING WHETHER YOU WANT TO TAKE THE CASE

a. Assess Your Capabilities

First you must determine whether the case is within your capabilities. Taking on a new case is an exciting challenge, but beware of accepting a case for which you are not suited. For example, if you handle personal injury matters but the potential client wants you to handle a Chapter 11 bankruptcy, you will need to refuse the case. You must be honest with yourself and know what you are qualified to do or can get "up to speed" on as opposed to what you cannot do or learn in a timely fashion. If you cannot handle a case, let the prospective client know.

b. Assess Case Affordability

Determine whether you can afford to take the case. You will need to do an informal cost-benefit analysis. Determine what costs you will incur and how much time you will need to spend to handle the case properly and bring it to a meaningful and successful resolution. Take into account how much travel time and expense may be involved for both you and possible witnesses and experts.

NOTE Attorneys working on a contingency fee basis in personal injury actions often have to spend thousands of dollars out-of-pocket before concluding the matter.

c. Assess The Defendant

Determine whether you have a viable defendant. Review not only the facts and documents but also the possible defendant's financial status. You may find that you have a great case against a defunct company without insurance. If the defendant has no resources to pay a settlement or judgment, accepting the case will do little for your client.

4. MOVING TO THE NEXT STEP

After you have decided to accept the client's case, you will have to conduct an in-depth interview with the client (see V.A. at page 58 regarding the client interview), and additional investigations before you file suit (see XIV., beginning on page 104, regarding investigating the case). You will also need to explain to the client what you can and cannot do for him, what work it will entail,

what you will charge, what costs will be incurred (such as deposition transcripts), what to expect during the course of litigation, and, again, what the likely and possible outcomes may be.

NOTE Before filing suit, make sure you have a solid legal theory against the defendant(s) you plan on suing. In addition, consider whether you want to discuss settlement with your opponent before filing suit (see XXIII., beginning on page 174, regarding settlement negotiations).

B. RESPONDING AS DEFENSE COUNSEL

1. IN GENERAL

When a complaint is filed against your client, opposing counsel has likely already spent countless hours investigating, locating and interviewing witnesses, obtaining needed records, taking photographs or videos, developing a theme for the case, and doing whatever else is necessary to prepare the case for trial — all before you even get started. Needless to say, the plaintiff has a tremendous advantage in the case at this point, and you must work diligently to "get up to speed." Although plaintiff's counsel had weeks, months, and perhaps years to prepare and deliver the complaint, you need to get as informed as plaintiff's counsel and do so in a limited amount of time. You should treat the complaint as if it were a ticking time bomb that must be immediately defused. You must act immediately to eliminate or at least limit the collateral damage. Delay could be very damaging. To gain rapid ground on plaintiff's counsel, do the following.

2. ANALYZE CASE WITH CLIENT

Immediately set up an appointment to meet with your client to discuss the allegations in the complaint. If plaintiff's counsel has included a discovery request with the complaint, go over it with your client, obtaining answers and acquiring needed information. Plaintiff's counsel will likely schedule your client's deposition in a matter of weeks or even days, so find out what the client has to say while at this first meeting. Review possible interrogatory questions and answers with the client, along with any requests to admit and requests for production — both those you anticipate being served on your client and those you anticipate serving on the opposing party. (Following sections of this manual address discovery in greater detail.)

3. CONDUCT DISCOVERY

Immediately after the client meeting, serve written discovery. Do not delay. In fact, serve it within days of receiving the complaint and do it by facsimile to eliminate the additional mailing days. (See the discovery sections of this manual as well as *FASTRAIN*™: FLORIDA CIVIL TRIAL PREPARATION (Fla. Bar CLE 3d ed. 2007).) The sooner you get the plaintiff's information, the sooner you can subpoena records (such as medical and employment records) and witnesses.

4. RESEARCH PLAINTIFF

Find out everything you can about the plaintiff. Conduct a background search including a search of the public records to determine if the plaintiff has filed a previous lawsuit, declared bankruptcy, or filed for divorce. If so, obtain copies of those records. Conduct an Internet search for the plaintiff's name or business to discover any articles and other information regarding him. (Section XIV.A., beginning on page 104, provides greater detail on how to perform these tasks.)

5. RESEARCH FACTS

Find out everything you can about the incident, tracking down and interviewing anyone who may have knowledge of it. Consider obtaining sworn statements from these witnesses. For example, if the complaint involves an automobile accident, find and interview all witnesses who appear on the police report and speak to the investigating officer (see XIV.B.2. at page 107 regarding how to conduct an investigation of an automobile accident case). If the complaint involves a slip and fall, see if your client prepared an incident report and speak to everyone listed on the report (see XIV.B.3. at page 111 regarding how to conduct an investigation of a premises liability case).

6. CONSIDER HIRING AN EXPERT

Immediately consider whether an expert should be hired to assist. Think about what kind of expert might be able to help and how they can help. An expert hired early in the case development can help you propound discovery, assist with depositions, and lend a hand with your investigation. (Section XV. of this manual, beginning on page 120, addresses hiring and use of expert witnesses.)

7. SEEK CASE MANAGEMENT CONFERENCE

Do not let plaintiff's counsel strong-arm you into a trial six months after the case was filed unless you are ready to proceed. If you feel you are being pushed too rapidly to trial, draft and file a motion requesting that the court set a case management conference or pretrial hearing. At this conference or hearing, ask the court to enter a scheduling order that sets a reasonable timeline for discovery, establishes the scope of discovery, and schedules the trial at least 12 months away. Also ask the court to require the plaintiff to disclose his experts well before trial. (See XII.G. at page 95.)

NOTE By being the first to set depositions and seek a pretrial conference for scheduling purposes, you can decrease the plaintiff's advantage and "bridge the gap." If you are the first to seek discovery (*e.g.*, setting the plaintiff's deposition immediately after the complaint is served and your client interview is complete), you may even surpass plaintiff's counsel, leaving him to wonder how he lost so much ground so fast.

XI. DETERMINING THE VALUE OF THE CASE

A. IN GENERAL

Clients often want to know what the case is worth — that is, what the award for damages will likely be. Although you may be tempted to guess based on your knowledge or experience, do not do so. It is better to give a well-reasoned answer based on serious research and reflection than to give the client a number that will create both an expectation and a resistance to modification. In calculating what the case is worth, consider the following.

B. EVALUATE LIABILITY

You must determine whether the plaintiff has a viable claim before you can determine the issue of damages. Strong liability defenses will drastically reduce the value of the case.

C. EXPLORE TYPES OF DAMAGES AVAILABLE

List all of the various categories of damages (such as lost wages or profits, medical expenses, loss of consortium damages, or punitive damages) and determine which ones might apply in this particular case. Separate these possible damages into "hard" damages — those you can readily prove through records — and "soft" or intangible damages, such as a person's pain and suffering. This list will help you keep track of all possible damages.

D. DETERMINE WHAT DAMAGES ARE RECOVERABLE

Once you know which types of damages may be sought in your case, review the facts carefully to determine if the plaintiff is entitled to recover those specific types of damages (such as lost profits or loss of consortium damages). Never assume that a plaintiff will be entitled to certain types of damages (for example, lost profits may be too speculative, or the plaintiff may have married after an injury, thereby precluding a loss of consortium claim). Also, find out if there is a cap on specific damages such as those for medical malpractice. Reduce your list of possible damages by those that the plaintiff will not be entitled to under the facts or law of the case.

E. ASSIGN VALUES TO TYPES OF DAMAGES

Assign a dollar value to each category of damages that remains on your list of possible recoveries. For hard damages, base the value on the records. For soft damages, determine possible ranges of value by considering the following:

· How likeable is the plaintiff? A credible, pleasant plaintiff (one with impressive demeanor, personality, intelligence, and attractiveness) can garner much more value from the case than a shifty, obnoxious plaintiff.

· How likeable are the defendant and witnesses? As with the plaintiff, a sympathetic defendant or witness who makes a favorable presentation at trial will diminish the damages award.

· How formidable is opposing counsel? A really good plaintiff's attorney can add value to the case, turning an average case into a great one, whereas poor counsel can detract from the value. By the same token, a really good defense attorney can reduce the value of a case.

· Will any award of damages actually be collectible? The best case in the world is not worth much if the party who has to pay is insolvent. Conduct a thorough investigation to discover if the party has insurance and if the insurance will cover the claim.

· Conduct a jury verdict search on Westlaw to see what juries have awarded to similarly situated plaintiffs with similar damages. Verdicts are particularly helpful to see what juries will award for soft damages such as pain and suffering. Review Florida verdicts for the last five years.

NOTE To conduct this search, go to the Florida jury verdict database on Westlaw and type in the injuries that are the subject of your case. You will then pull up cases with similar injuries.

· Consider your own experience as well as that of other members of your firm and your peers. If you or they have settled similar cases in the past, determine the settlement amount. If jurors

awarded damages in past similar cases handled by you or your firm, review the jury award. Ask the other attorneys in your office what they think the case is worth.

· Consult an economist. Seek professional help to calculate possible damages. For example, an accountant can help you determine the amount and present value of lost wages, as well as address issues such as the impact of future taxes, fringe benefits, and other such factors.

Once you have considered all of these factors, write down ranges for each of the categories of damages. In fact, consider coming up with three sets of ranges — a low, middle, and high range. Add the numbers in the various categories to get a range for the total damages. This range will then become your reference tool when negotiating a settlement. (See XXIII., beginning on page 174, regarding settlement negotiations.)

F. DISCUSS THE RANGE WITH THE CLIENT

Once you have a range (and only then), discuss the possible value of the case with the client. Make sure the client understands how you arrived at your range of values, and listen for additional information from the client that may better inform your calculations and result in revisions. Remind the client that your range of values is merely an educated guess — no one knows what a given jury will award on a given day. Guaranteeing an outcome is a recipe for disaster.

XII. PREPARING A CASE FOR TRIAL

A. IN GENERAL

Success at trial is not an accident. It takes time and preparation. That commitment of time and effort starts at the very inception of the case and continues throughout the trial. There are no shortcuts. Every case should be started with the end in mind — the verdict you want — and that end must be pursued during every step in the litigation. Do not assume that the case will settle, and therefore limit your preparation to settlement negotiations (see XXIII.A. at page 174). Instead, prepare to try the case. Think through your case, come up with a "game plan," and commit all your energy to seeing your goals fulfilled. That way, if you do settle the case, it will be due in part to your trial preparation. If you do not settle, you will be prepared to try the case and win.

The following are some suggestions to keep in mind to help you achieve the results you seek at trial.

B. DEVELOP AND USE A TRIAL THEME

1. IN GENERAL

At trial, you should have a theme around which you will present your case. The theme serves as the foundation of your case. Everything you do during the course of litigation should build on that theme. To win at trial, you need a case theme that leaves an impression — a few words that encapsulate the entire case and define it. One of the more famous themes of our time was that used by Johnnie Cochran when defending O.J. Simpson: "If it doesn't fit, you must acquit." Themes are very powerful tools that should never be overlooked when preparing a case for trial. Ask yourself, "Why should I win?" Once you have an answer, you have the makings of a theme.

Find a catchy way of saying it, reduce it to as few words as possible, and convince the jury with it. To develop your theme, consider the following.

2. DEVELOP THEME EARLY

Start thinking of possible themes as soon as you get a new case. This theme can then help direct your investigation and discovery. If you wait too long to develop a theme, you may be stuck with discovery responses and deposition transcripts that do not fit your theme, forcing you to abandon it.

3. USE AN ALL-ENCOMPASSING THEME

Develop a theme that embraces the entire case, not just a fraction of it. If you choose a theme that ignores the weaknesses of your case, opposing counsel may use it against you at trial.

4. USE A FAMILIAR THEME

Use clichés when applicable, thereby keeping your theme simple and memorable. For example, a song lyric, a line from a movie, or other phrases that the jurors will be familiar with will serve well as the "mantra" for your case.

5. SEEK REACTIONS

Discuss the possible themes with other attorneys in your office to gauge their reaction to them. Find out which ones resonate and what others' suggestions are. Ask about themes the others have relied on in similar cases.

6. SIMPLIFY THEME

Reduce the theme to a single sentence, if possible. It is very helpful to be able to convey your theme — tell the jury what your case is about — in just one sentence. Then, once you have reduced your theme to a sentence, reduce it to a word. Write that word on a note card and keep it on your desk.

7. BUILD CASE ON THEME

Build your case around the theme, making sure that everything you do advances the theme. Use your theme note card to guide you in deciding what motions to file, what witnesses to interview, what interrogatories to propound, whom to depose, and what to ask the witnesses and parties in order to advance your theme. *FASTRAIN*™: FLORIDA CIVIL TRIAL PREPARATION (Fla. Bar CLE 3d ed. 2007), is an excellent guide on how to build your case.

8. REVISE THEME

As the case develops, your theme will develop and you may realize that it needs some tweaking. In fact, you may discover that your theme becomes so unwieldy that you have to altogether abandon it for an entirely different one. Do not be so "married" to your theme that you refuse to discard it when you have to do just that. It is better to discover early in the case that your theme

does not work — when you have enough time to change it. It will be too late for improvisation on the eve of trial.

9. USE THEME DURING VOIR DIRE

Rather than waiting to introduce your theme to the empanelled jury, introduce it to them during voir dire. To the extent permitted by the court and the rules, inject your theme into the questions you ask the jurors so that they can start seeing the case through the prism of your theme.

10. USE THEME REPEATEDLY DURING TRIAL

Construct your opening and closing arguments around the theme, making it the focus of your dialogue. Remember the word which encapsulated it (on the note card on your desk), and repeat it like a drumbeat throughout your opening and closing arguments.

Use the theme in your pleadings and motions, exposing the judge to it and directing his attention to it as often as possible so that he will begin thinking in terms of the theme.

NOTE If your case garners publicity, use your theme in the media so that the general public sees your case on your terms.

Weave the theme into the questions you ask every witness at trial. You want every witness on the stand to speak in your terms.

NOTE Once you have committed to a theme and started using it in the trial, stay with it unless it absolutely has to be abandoned in favor of another. If you give up on your theme once the trial has begun, the jury may give up on your view of the case. Stay on message and convince the jury it is the right one.

C. QUICKLY DEVELOP YOUR CASE

Set the course of litigation. You want to be proactive and always stay a step ahead of opposing counsel. Being first to interview witnesses, serve written discovery, subpoena records from third parties, and take depositions, often affects the outcome of litigation. For example, the first attorney to interview witnesses can take their sworn statements and lock them into their testimony. The first to serve discovery gets a jump on obtaining records and facts to support the case. Also, by pushing your case ahead, you show the other side that you and your client are in control.

Get your experts lined up early. (See XV., beginning on page 120, regarding the hiring and use of experts.) Many clients prefer to delay the hiring of experts due to the expense. However, being penny wise may prove to be pound foolish. Experts can help you evaluate the strengths and weaknesses of your case and that of your opponent, and can help you develop your case strategy and determine what discovery to propound and what questions to ask at deposition.

D. BE CREATIVE

Think “out of the box.” Study your case to determine what you can do differently. Be creative in

exploring whether there are other causes of action you can plead, other defenses to raise, or other witnesses or documents that may support your case. Although you may have checklists to guide you in case preparation (see, for example, XII.K. at page 97, and XIV., beginning on page 107), do not fall into the common trap of following the same protocol when dealing with a certain type of case. Whether it is a slip and fall or breach of contract action, look at the case from different perspectives and try to discover new ways to approach it.

E. DO YOUR RESEARCH

Spend some quality time researching the elements of the causes of action in your case and the affirmative defenses. Otherwise, you will not know what each side must prove to win the case, what discovery to pursue, what to ask witnesses in deposition, and what motions to file.

Read the jury instructions. If you are plaintiff's counsel, the jury instructions set forth what elements you must prove to win at trial. If you are defense counsel, the instructions give you a road map to finding the weak links in your opponent's case. From the very beginning of the case, you need to know what the jury instructions require you to present to a jury in order to properly prove your case, so that during every step in the litigation, you are gathering those facts in the interrogatories and requests for production you propound, in the subpoena for records you issue, and in the questions you ask in depositions. *FASTRAIN*™: HOW TO WRITE AND USE JURY INSTRUCTIONS (Fla. Bar CLE 3d ed. 2005), is an excellent resource that explains this process in greater detail.

Having the facts you need to win should not be an accident. Know the jury instructions so that you will know what you need to prove at trial. Then take the needed steps to elicit that information. Otherwise, the information you elicit that supports your case will be nothing more than coincidental.

F. DEVELOP TRIAL STRATEGY AND PREPARE A TRIAL NOTEBOOK

1. IN GENERAL

When you first start a case, think it through and develop a case strategy, focusing on what you need to do to win at trial. Then prepare a step-by-step plan to achieve your goal. Developing a plan ensures that everything you do has a purpose. Without a detailed plan, you are likely to pursue avenues and do things that do not advance your case or, worse, that undermine it.

Prepare a trial notebook to guide you through your plan. (*FASTRAIN* ™: FLORIDA CIVIL TRIAL PREPARATION (Fla. Bar CLE 3d ed. 2007), explains the use of this notebook in greater detail.) The process of putting a trial notebook together, arranging everything into a single binder, will help you understand and grasp your entire case. Not only will the binder be a great resource, but the effort it takes to assemble it is invaluable to case preparation. The following are suggested sections to include when putting together your trial notebook.

2. TRIAL NOTEBOOK SECTIONS

a. Case Theme

As noted above, the case rises and falls on your trial theme. Include a section in your trial notebook for all the themes you have come up with and the one that you have settled on for now. Also, think through what the plaintiff's themes are likely to be and make note of these so that you will remember not to let your case play into those themes.

b. Closing Argument

Start your notebook where the trial will end. Think through and prepare an outline for your closing argument. Plan it out first to see how everything fits into this ending. As with your case theme, you need to reflect on your closing early in your case because everything you do at trial will build up to it.

c. Legal Research

Anticipate the legal issues that will come into play during trial and have a section for cases, statutes, and regulations that cover issues likely to arise. If you have already spent a great deal of time on the case, you will likely have already addressed many of the legal issues in motions in limine. Those not addressed need to be addressed in the notebook.

d. Voir Dire

Many lawyers view jury selection as the process of choosing the jurors you want to keep. Others view it as a de-selection process whereby you are dismissing problem jurors you want to keep off the jury panel. If you adopt the latter view, you will need to think through the characteristics of the jurors you do not want to retain on the jury and reduce your thoughts to writing in your trial notebook. Then, at voir dire, you will need to find who these problem jurors are and build a case to have them stricken for cause.

e. Opening Statement

When preparing your opening statement, think about what the evidence will show. You are going to be telling the jurors what to expect during the trial and if you do not live up to your word, you will lose credibility with them. Go through the depositions, the discovery responses, and the exhibits, and decide what evidence you want to share with the jury — evidence that, when pieced together, breathes life into your themes. Do not say anything in opening that is not supported by an answer in a deposition, an interrogatory response, or some other document that is admissible. When preparing the opening, annotate it so that every fact you assert in the opening can be supported by the record, and put the annotations in the trial notebook.

f. Cross-Examination Outlines

Prepare a detailed cross-examination for each of the plaintiff's witnesses. Do not wait for trial to do this. Knowing before trial what you will ask the other side's experts, for example, will help you evaluate how much or how little you can use those experts to your advantage and how much they can hurt you. A detailed discussion regarding cross-examinations is contained at XXII., beginning on page 171.

g. Direct Examination Outlines

As with the cross-examination outlines, prepare all of the direct examinations before your trial date. You want to have met with your witnesses, know what they have to say, and craft direct questions that make the most of their testimony. Also, going through their testimony before the first juror is selected will help you develop the case theme that you will introduce during jury selection.

h. Exhibits

Make a list of all the exhibits you intend to use at trial and keep the most important ones in your notebook.

G. REQUEST A SCHEDULING ORDER

Some courts enter detailed scheduling orders that spell out each phase of discovery and provide pretrial deadlines. Others provide less guidance. Whether you are representing the plaintiff or the defendant, take steps to ensure that a detailed scheduling order is entered, spelling out deadlines for expert disclosure, who discloses first, physical examinations of the plaintiff, depositions, etc.

H. FILE DISPOSITIVE MOTIONS EARLY

If you can win on summary judgment, start building your case early and file your motion as soon as it is appropriate to do so. (See *FASTRAIN*™: FLORIDA CIVIL TRIAL PREPARATION (Fla. Bar CLE 3d ed. 2007).) Early analysis can help you isolate the weaknesses in your opponent's case — one or more of which may be fatal.

I. LET THE CLIENT KNOW WHAT TO EXPECT

Whether it is the cost associated with trial or what the outcome may be, make sure your client knows what to expect if the case goes to trial.

J. DEFENDING THE CASE YOU CANNOT WIN

1. IN GENERAL

If you serve as a plaintiff's attorney, you will have the luxury of choosing the cases you want to take. If you serve as a civil defense attorney, however, you will likely have cases assigned to you — both the good ones and the bad ones — by others in the firm or by adjusters or in-house counsel. In fact, the better your reputation, the more likely it is that you will be called on to handle the bad cases where liability is clear and damages are high. Even though you may not be able to control the cases that land on your desk, do not despair. No matter how dire the situation looks, there are things you can do to limit your client's exposure and, at times, even win the case.

2. THE GREEDY PLAINTIFF

Set the plaintiff up for a "fraud on the court" motion. There is a common saying among defense attorneys that "pigs get fat, hogs get slaughtered," meaning that a greedy plaintiff who is seeking

two million dollars for a one-million-dollar case may exaggerate the facts or, perhaps, outright lie. For example, the plaintiff may be dishonest about a prior accident or a history of back pain and medical treatment.

If you can establish through investigative work that the plaintiff has misrepresented the facts, you can get the upper hand. For instance, the plaintiff may testify at deposition that he has never seen a doctor for back pain, or never had a car accident, or never previously sued for back injuries or had a doctor previously ascribe him a permanent impairment rating. If you have contrary factual evidence in hand, you can file a motion for fraud on the court, spelling out all the inconsistencies between the plaintiff's deposition and the prior medical history, including any prior depositions or recorded statements.

No matter how clear the liability or how high the damages claim, the value of the plaintiff's case is inextricably tied to the jurors' perception of how credible he is. If you can chip away at his credibility, you can chip away at the value of the case. If you can establish that the plaintiff misrepresented facts to advance the case, you may get the jury riled enough to rule in the defendant's favor.

Investigative work to establish fraud on the court should include surveillance to evaluate the scope of the plaintiff's injuries. The worse the alleged injuries, the more seriously you should consider surveillance. A plaintiff who claims in deposition that he never leaves the house will be hard-pressed to explain away a video of him shopping, carrying groceries to and from his car, and eating out with friends.

3. UNDERMINE THE DAMAGES CLAIM

Use credit card bills to evaluate damages. As with surveillance film, credit card bills are a great source to undermine the plaintiff's allegations of damages and, with them, his credibility. For example, in deposition, the plaintiff may claim he cannot go out, but his credit card bills may show repeated charges to restaurants around town. Or, in deposition, the plaintiff may claim he cannot play sports anymore, but his credit cards may show repeated charges at a sports retail store.

4. CHALLENGE PLAINTIFF'S EXPERTS

Sometimes a plaintiff's attorney will entrust his great case to the wrong expert. Be prepared to challenge the expert's credentials and establish that the expert is not qualified to render an opinion on the issues of the case. Instead of making a good case better, a poor expert can undermine it.

5. BE PROACTIVE AND AGGRESSIVE

Initiate written discovery, procure third-party records, interview witnesses first, and set depositions. Set the tone of the litigation and indicate that you are ready for anything, good case or bad. If plaintiff's attorney has to employ experts in specialties he had not anticipated, or spend time out of the office preparing for and attending depositions he had not expected to occur, he may have to re-evaluate the case. If you push hard enough, you may force plaintiff's attorney to discount the value of the case to be rid of you. In other words, if you can set the tone, you may be able to procure the best possible outcome for your client.

6. DEPOSE PLAINTIFF'S TREATERS

You may be locking in favorable testimony or you may have an ally or more who will support your contention that the plaintiff is doing better than he claims. The plaintiff's treaters may give you what you need — evidence you can put together to show the jury that the plaintiff is not doing so badly despite his protestations to the contrary.

K. LITIGATION CHECKLIST

1. IN GENERAL

Whether you are handling a slip-and-fall case, a contract dispute, or a will contest, if you are litigating a case, there are certain actions that you will undertake. You will conduct discovery, draft motions, and possibly go to trial. Because similarities will exist among the cases you litigate, consider drafting a to-do list that will apply to the majority of your cases. This will then serve as a reference tool that you can use constantly and revise as needed so that it evolves with your experience. The following is a sample checklist you may find useful.

2. SAMPLE CHECKLIST

1. Initial Steps:

a. Review the file.
b. Investigate the facts.
c. Research the law (this includes studying jury instructions to determine the elements of the causes of action and the defenses to those causes of action).
d. Evaluate liability.
e. Evaluate damages.
f. Develop a preliminary "game plan."
g. Meet the client.
i. Discuss your case strategy with the client.
ii. Get the client's approval to proceed before spending any money.
iii. Keep the client advised throughout the course of the litigation.
h. Determine who the relevant witnesses are.
i. If the witnesses are not represented, interview them.
ii. Consider taking the witness's sworn statements.
i. Determine what the relevant documents are (initially, gather the relevant documents through informal means).

2. Pleadings:

a. Complaint:
i. If you represent the plaintiff,
· evaluate what causes of action will survive a defense motion;
· gather the statutes, caselaw, and facts that support your allegations.
ii. If you represent the defendant,
· determine whether you can dismiss the complaint for:
• lack of subject matter jurisdiction;

• lack of personal jurisdiction;
• insufficiency of process;
• insufficiency of service of process;
• failure to state a claim;
• failure to join a party;
· determine whether to move for more definite statement;
· determine whether to remove the case to federal court (if you represent the plaintiff, determine whether you can object to the removal).

b. Answer:

i. Assert affirmative defenses.
ii. Consider a counterclaim, crossclaim, or third party claim (if you represent the plaintiff, consider moving to dismiss the counterclaim).

3. Obtain Scheduling Order: Early in the case, ask the court to enter a scheduling order addressing:

a. expert disclosure;
b. who discloses first;
c. what information should be disclosed;
d. scope of discovery;
e. discovery cutoff dates; and f. trial date.

4. Retain Experts.

a. Compile a list of potential experts.
b. Interview the experts.
c. Obtain and check the experts' credentials.
d. Obtain the experts' opinions (do not disclose an expert until you know what the expert's opinions are).

5. Conduct Discovery and Investigation.

a. Investigate opposing attorney's skills and reputation.
b. Investigate the judge's skills and reputation.
c. Investigate the background of the opposing party.
d. Determine whether the case warrants a site inspection.
e. Determine whether the case warrants a medical examination of the plaintiff.
f. Determine whether the case warrants surveillance.
g. Conduct written discovery:
i. serve interrogatories;
ii. serve requests for production;
iii. consider serving requests for admissions;
iv. if necessary, move to compel.
h. Respond to written discovery.

6. Third Party Records.

a. Determine who has relevant records.
b. Subpoena third-party records (in a personal injury matter, obtain all medical records and employment and income records).
c. Obtain signed releases for records that cannot be procured via subpoena.
d. Prepare a chronology of all relevant records.

7. Depositions.

a. Ensure that all relevant documents have been gathered.
b. Prepare your client for deposition.
c. Depose the opposing party.
d. Depose witnesses.
e. Depose the other side's experts after investigating the expert's background.
i. Obtain the expert's prior depositions.
ii. Obtain the expert's writings.

8. Dispositive Motions.

a. Determine whether you can you move for summary judgment.
i. Lay the foundation for written discovery and depositions.
ii. Prepare affidavits.

9. Mediation.

a. Discuss settlement possibilities and settlement ranges with the client.
b. Conduct sufficient discovery to make mediation meaningful.
c. Prepare a mediation report for the mediator.

10. Pretrial Motions.

a. Draft motions in limine.
b. Draft pretrial stipulation.

11. Trial.

a. Summarize depositions.
b. Send out update subpoenas for records.
c. Send out witness subpoenas.
d. Prepare jury instructions (you should have researched the applicable jury instructions early in the case).
e. Prepare voir dire questions.
f. Prepare opening statement and closing argument.
g. Prepare direct and cross-examinations.
i. Prepare client for trial testimony.
ii. Prepare favorable witnesses for their trial testimony.
h. Prepare trial exhibits.
i. Exchange trial exhibits.

12. Post Trial.

a. Draft posttrial motions.
b. Draft appeal.

L. DETAILS TO ENSURE A SMOOTHER TRIAL

As an associate and likely second chair at trial, it is your job to ensure that the trial runs smoothly and "without a hitch." To do so, you must take charge of the details and ensure that all things needed to try the case are at your fingertips. Make sure the following are not overlooked:

· Necessary motions to strike frivolous or unsubstantiated allegations have been filed.

· All listed witnesses have been deposed.

· Video depositions you intend to play at trial have been edited.

· Objections to depositions you intend to read at trial have been resolved.

· Everyone who needs to be subpoenaed for trial has been subpoenaed.

· The courtroom can accommodate the audio-visual equipment you plan to use.

· The exhibits that need to be enlarged have been enlarged.

· The demonstrative aids that you intend to use to help get your theme across to the jury have been well thought-out and prepared.

· The other side's exhibits have been examined.

· Necessary motions in limine have been filed.

· Similar cases you have handled in the past have been reviewed to see what motions in limine you filed in those cases.

· The court reporter has been employed and is on notice of the trial date.

· The verdict form you intend to use in your closing accurately reflects the verdict form approved by the court.

· All jury instructions you intend to refer to during the presentation of your case have been approved by the court.

· The juror questionnaire has been discussed with opposing counsel and approved by the court.
Also, do not forget to prepare a list of those things you will want to bring to trial with you. The following may prove helpful:

· Trial notebook.

· Hard copies of all deposition transcripts (originals, copies, summaries) with all of the exhibits.

· All of your exhibits.

· All charts and enlargements of demonstrative aids.

· A key pleadings binder.

· A deposition binder with mini-transcripts of all of the depositions.

· CDs or electronic copies of all depositions, exhibits, key pleadings, outstanding motions, and relevant orders.

· A list of names of the client, corporate representatives, witnesses, members of the trial team, etc., with their office and cell phone numbers.

· The rules of procedure, code of evidence, and all relevant local rules.

· Paper, pens, clips, bands, stickies, and other supplies.

· An index showing what is in each banker box.

XIII. FINDING AND INTERVIEWING WITNESSES

A. FIND POTENTIAL WITNESSES

1. IN GENERAL

Cases are more than documents, facts, and dates. They are ultimately about people. Whether your case involves a car accident, a supervisor's sexual advances, or a slip and fall, witnesses can make or break your case. Generally, documents do not sway juries — witnesses do. They have a direct bearing on the merits of the case. It is therefore extremely important that you find the knowing witness (for example, the person who saw the accident or the employee who has first-hand knowledge of the contract negotiations).

2. RESEARCH

To find the relevant witnesses, ask your client for the names of everyone he knows who has or may have information about the case. Review all of the documents to see whom they reference as potential witnesses. Think of categories of witnesses who should have relevant information — eyewitnesses, investigators, foremen, supervisors, family, friends, neighbors — and determine whether any witnesses exist in any of these categories. Compile a list of every potential available witness, determine which ones you can and should locate, and figure out how you are going to find them. Possible ways to locate them are:

· Internet search. Do a white pages search on the Internet for witnesses. You can possibly find their phone numbers and addresses with just a few keyboard entries. If the white pages do not produce the needed information, do a direct Google search for the witnesses' names. You may

find a witness's Myspace page or blog, or an article about him, or his high school reunion site — something containing his contact information.

NOTE You can conduct a white pages search by typing the phrase "white pages" on the Google website: www.google.com. This will take you to a national directory. See the Note at V.B.2. at page 60 for further information regarding Google searches.

· Ask the other witnesses. One witness may very likely know the names of other witnesses you would be interested in interviewing, and how to reach them.

· Review the documents for potential contact information for other witnesses.

· Knock on some doors. If phone calls are going unanswered, drive to the last known address of a witness and knock on doors in the neighborhood in search of someone who knows where the witness is now.

· Hire an investigator. If all else fails, consider hiring an investigator to find the elusive witness. If the witness is important enough and the case may hinge on the witness's testimony, your client should be willing to pay the cost of the investigator's services.

B. INTERVIEW THE POTENTIAL WITNESSES

1. IN GENERAL

Once you have found possible witnesses, your job as an advocate is to determine which witnesses will sway a jury in your client's favor and which in your opponent's favor. To accomplish this, you must discover what a prospective witness will say to a jury and how the witness will say it. Being prepared will help you learn as much as possible about what witnesses saw, what they heard, and how they will affect your client's case.

The following are tips for preparing and conducting interviews.

2. INTERVIEW TIPS

a. Identify Relevant Witnesses

Before you start interviewing witnesses, you need to know whom you want to interview. Learn everything you can about the case and identify everyone who may be a witness.

b. Avoid Ethics Violations

Determine if the witness is represented by counsel. If so, you cannot interview the witness without the consent of the witness's attorney. Determine if the witness works for the opposing party's corporation or business. Florida ethics opinion 78-4 prohibits direct communications with a corporation's officers, directors, managing agents, or any employee "directly involved in the incident or matter giving rise to the investigation or litigation." Alternatively, Florida ethics opinion 88-14 allows an attorney to communicate with ex-employees if: (1) the ex-employee is not represented by his former employer's counsel; and (2) the lawyer does not inquire into matters

that are within the corporation's attorney-client privilege. See also *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So.2d 541 (Fla. 1997); Dempsey, *New Developments in the Law: Ex Parte Communications with Current and Former Employees of a Corporate Defendant*, 71 Fla. Bar J. 10 (Dec. 1997). Therefore, you must find out if the witness has worked for or currently works for the opposing party's corporation or business and, if so, to what extent either of the cited ethics opinions precludes an interview with the witness.

c. Act Quickly

Prepare to conduct the interviews as soon as possible. Not only do witnesses' memories fade but you will want to interview the witness before your opponent does so. This is because opposing counsel, whether inadvertently or not, may influence a witness's memory. Therefore, rather than waiting a few weeks or months, you should conduct the interview as soon as you have found a relevant witness. This must be done without rushing into the interview. In other words, you should not delay, yet, you must take time to wisely prepare. Learn as much as you can about the case and determine the witness's role in the case. For example, is the individual a liability witness or a damages witness — favorable or unfavorable? Understand the importance of the witness and prepare a detailed questionnaire for use during the interview.

d. Arrange Meeting

Phone calls are fine for the initial contacts but you should interview the witness in person, preferably at that person's place of business or home.

e. Obtain Documents For Review

Determine what the relevant documents are and bring those documents to the interview. For example, in a breach of contract case, bring a copy of the contract. In an auto accident case, bring photos of the accident scene.

f. Identify Yourself And Confirm Authority To Interview

When interviewing witnesses, tell them who you are and whom you represent. When dealing with a witness, a lawyer cannot state or imply that he is disinterested. Before beginning the interview, confirm that the witness is not represented by counsel. The first question you should ask the witness is "Are you represented by an attorney in this matter?" If the answer is yes, the interview is over. Also, confirm your earlier determination regarding the status of the witness as an employee of the opposing party. If the witness is an employee, review the previously mentioned ethics opinions.

g. Put Witness At Ease

Being interviewed by a lawyer can be fairly stressful. If you are able to put the witness at ease, you will likely receive more expressive, revealing information.

h. Obtain Prior Statements

Ask if this is the witness's first interview. If not, find out who else has interviewed the witness and if the witness gave a recorded or sworn statement. If so, ask the witness for a copy of the statement. If the witness does not have a copy of it, advise him that he is entitled to one — then, request that he obtain a copy and forward one to you as well.

i. Obtain Names Of Other Possible Witnesses

Find out what other witnesses may exist and ask for their names, numbers, and addresses.

j. Ask Open-Ended Questions

To keep the discussion going and to gather as much information as possible, ask open-ended questions. In this manner, you are more likely to learn everything the witness knows about your case.

k. Clarify Answers

Ensure that you correctly understand any significant statements the witness has made by repeating his own words to him. Otherwise, you risk advising the client whether to settle or litigate the case based on a misunderstood statement by a witness.

l. Explore Bias

Try to uncover any biases that may exist. For example, is the witness related to anyone in the case, or a friend or a co-worker of anyone involved?

XIV. INVESTIGATING THE CASE

A. CONDUCTING YOUR OWN INVESTIGATION

1. IN GENERAL

When you litigate a case, you need to learn all the facts. That entails learning everything you can about your client, about the opposing party, and about the companies and products involved. You could spend a great deal of money on a private investigator to find this information, or you can attempt to find it yourself. An enormous amount of information you may be seeking is available just a few computer keystrokes away, on the Internet. Thanks to technology, you can be your own investigator without ever having to leave your office. The following are some databases you can access to acquire the information you need.

2. RECORDS

a. In General

The following records can be procured by going to the websites listed below and following the step-by-step instructions on those sites or simply clicking on the appropriate links on those sites.

b. Driving Records

You can obtain a person's Florida driving record at the Florida Department of Highway Safety and Motor Vehicles website, located at www.hsmv.state.fl.us.

c. Criminal Records

The Florida Department of Law Enforcement (FDLE), Division of Criminal Justice Information Services (CJIS), is the central repository for criminal history information for the state of Florida. Obtain a person's criminal history at the Florida Department of Law Enforcement web page, located at www.fdle.state.fl.us/index.html.

d. Corporate Records

The Florida Department of State, Division of Corporations, has created Sunbiz, a database that provides information regarding corporations, trademarks, limited partnerships, limited liability companies, federal lien registrations, fictitious names, judgment liens, limited liability and general partnerships, and UCC information. You can access it at www.sunbiz.org.

e. Court Records

You can track down court records including a party's prior lawsuits, criminal records, probate records, and vital records, including birth and death certificates, at the county clerks' web pages. For Miami-Dade county records, go to http://jud11.flcourts.org, and for Broward County records, go to www.17th.flcourts.org. To find the clerk's website for your county, simply use a search engine such as Google and enter the county's name along with the phrase "clerk's office."

f. Bankruptcy Records

You can obtain information regarding corporate and personal bankruptcy information for residents of South Florida at the website for the U.S. Bankruptcy Court for the Southern District of Florida, www.flsb.uscourts.gov. You can find the Bankruptcy Courts for the Middle and Northern Districts by simply typing their names into an Internet search engine such as Google.

g. Malpractice Records

You can obtain background and malpractice information of medical providers and vital statistics at Florida's Department of Health at www.doh.state.fl.us.

h. All Public Records

You can search all public records throughout the United States at www.autotrackxp.com.

i. Employment And Earnings Records

To obtain detailed records of a plaintiff's employment and earnings history, have the plaintiff sign releases for social security, tax, employment compensation, and workers' compensation records, and submit the releases to the appropriate federal and state agencies. These records will provide a

complete job and earnings history.

NOTE You can enter the agency's name in an Internet search engine such as Google, and request that they send to you an authorization form. Once you have the form, make copies of it to keep on file for use in future cases.

3. COMPLAINTS

a. Customer Complaints

The Better Business Bureau (BBB) provides information on over 2 million businesses and charities. The BBB keeps track of customer complaints and helps you evaluate whether you are dealing with a reputable company. Its website is www.bbb.org.

b. Occupational Complaints

The U.S. Occupational Safety and Health Administration (OSHA) maintains a database of its accident investigations. You can search it at www.osha.gov/cgi-bin/inv/inv1, to determine if a party involved in your case was subject to such an investigation.

4. PRODUCT RECALLS

If you are suing or defending a product manufacturer, see if the product has been recalled by searching the U.S. Consumer Product Safety Commission's web page at www.cpsc.gov/prsrch.html.

5. AUTO DEFECTS

If dealing with an auto manufacturer, check out the National Highway Traffic Safety Administration to see crash results, recalls, and defect investigations. Its website is www.nhtsa.dot.gov.

6. ARTICLE SEARCHES

a. Magazine Search

Search over 3.5 million articles from over 700 magazine publications at Look Smart at www.findarticles.com/PI/index.jhtml. One or more of these articles may feature one of the parties in your lawsuit.

b. Newspaper Search

Search through newspapers throughout the United States at The Internet Public Library at www.ipl.org/div/news/browse/US.

7. INTERNET SEARCHES

If you want to find out more about someone, simply do a Google or Yahoo People search. You may be surprised at what you find. The person may have an independent web page or may be the

subject of an online discussion or an article. (See the Note at V.B.2. at page 60 for further information regarding Google searches.)

B. INVESTIGATING A PERSONAL INJURY CASE

1. IN GENERAL

When accepting a new personal injury case, the most important question to ask yourself is "How did the accident happen?" Determining exactly what happened will help you evaluate your client's exposure and determine whether there are strong liability defenses, weak ones, or none at all. In order to advise your client whether to settle or fight through trial, you need to know whether the client was negligent. Getting an answer to that question will help you provide informed answers to your client's question about his liability. In order to figure out how the accident happened, you need to perform a thorough investigation of the facts.
What follows is a series of checklists — things to do, information and documents to gather, and witnesses to interview when investigating motor vehicle, premises, products liability, and medical malpractice cases. Review these lists the next time you investigate a personal injury case.

2. MOTOR VEHICLE ACCIDENT CASES

a. In General

Your client swears he had the green light. The other party swears he did. Who ran the red light? A thorough investigation can support your client's position and result in a more favorable settlement or verdict. Alternatively, it can show that your client is mistaken or being untruthful and that you need to settle. Your investigation starts with gathering as much information as possible about the accident.

b. Gather Information

When you investigate a motor vehicle accident, obtain the following:

· police report;
· claims file;
· traffic ticket;
· traffic court records (have a criminal defense or traffic court attorney accompany the insured to traffic court);
· investigative report prepared by the police;
· police field notes;
· witness statements;
· measurements taken by the police;
· police photos;
· vehicle registrations;
· EMT report (if emergency personnel were involved);
· drivers' insurance information;
· copy of Breathalyzer report (if test was administered);
· copy of autopsy report and death certificate (if there was a fatality);
· photos of the vehicles, including photos of the:

• exterior of the vehicles;
• interior of the vehicles;
• deployed airbags;
• seatbelts;
• food items, such as spilled coffee;
• scuff or paint marks on the vehicles.
· photos of the accident scene including:
• the roadway;
• surrounding property;
• skid marks;
• crash debris;
• traffic signals;
• items that may obstruct a driver's field of vision.
· diagram of the accident scene to use at depositions;
· the drivers' cellular phone records for the day of the accident;
· traffic signal records for the day of the accident;
· maintenance records for the vehicles;
· repair estimates and bills for the vehicles;
· auto repair invoices showing that the vehicles had problems such as:
• defective brakes;
• broken headlights;
• broken directional signals;
• broken windshield wipers;
• worn tires.
· the drivers' DMV records;
· criminal background checks for the drivers;
· the drivers' eyeglass prescription;
· all newspaper articles about the accident;
· all television news footage about the accident;
· the vehicles' data recorders, assuming the vehicles came equipped with them (the removal and testing of the recorders should be done with the written approval of opposing counsel to avoid any potential spoliation claim);
· the drivers' employment files (the employment files may show a history of negligent driving that may play a role in a negligent hiring, retention, or punitive damages claim);
· weather report, including a precipitation report;
· traffic report;
· the plaintiff's medical records, which may indicate health problems that may have contributed to the accident, including:
• poor eyesight;
• history of seizures or fainting spells;
• vertigo;
• history of intoxication or drug use;
• mobility problems, such as faulty knees or a bad hip.
· the plaintiff's medical records reflecting what injuries the plaintiff sustained; and
· any admissions of liability (e.g., "I cannot believe I ran that red light.").

c. Interview Witnesses

In addition to gathering information, interview and consider deposing the following individuals:

· the police officer who prepared the police report;
· any other officer listed on the police report;
· the EMTs;
· any witness listed on the police report;
· passengers in the vehicles; and
· residents who live near the site of the accident.

d. Perform Other Tasks

Finally, consider doing the following:

· sending a letter to opposing counsel, requesting that the opposing party preserve his vehicle as evidence;
· sending a letter to your client, requesting that he preserve his vehicle;
· getting aerial photographs of the accident scene;
· canvassing the neighborhood to locate witnesses to the accident;
· conducting surveillance of the plaintiff; and
· retaining an accident reconstruction expert and visiting the accident scene with the expert.

NOTE When working with an accident reconstruction expert, remember the following. When viewing the accident scene, do it under similar lighting and weather conditions. Do not visit the accident scene on a sunny afternoon if the accident occurred on a rainy night. If the accident occurred at night, have your expert determine the quantum of light emitted by the vehicle's headlights and the light emitted by nearby street lights. Evaluate what would be the reasonable reaction time for stopping and braking at the time of the accident. Evaluate whether there were any defects in the vehicles that may have contributed to the accident.

3. PREMISES LIABILITY CASES

a. In General

One party claims he slipped and fell in a puddle of water. Another claims he tripped over a step. Often there are no witnesses. Did the party really fall? If he did, did he fall due to a hazard or due to his own clumsiness? With a thorough investigation, you can get closer to learning what really happened. To start, you need to gather as much information as possible about the circumstances leading up to and causing the alleged fall.

b. Gather Information

When you investigate a premises liability case, obtain the following:

· incident report (prepared by the premises owner);
· incident reports for other accidents (maintained by the premises owner);
· witness statements and interviews;
· maintenance records for the area where the accident occurred;

· inspection records;
· records reflecting repairs or alterations to the area where the accident occurred;
· cleaning and maintenance contracts;
· schedules for maintenance employees;
· lease (pay close attention to any indemnification and "additional insured" clauses);
· floor plans;
· insurance covering the premises;
· surveillance video of the accident or the premises immediately before the accident;
· written protocols for maintaining the premises, including all training videos;
· training protocols for the maintenance crew;
· photographs of the accident scene including photos of the:
· area where the accident occurred;
• surface of floor or ground where the plaintiff slipped or tripped;
• light sources in the area;
• photos of all warning signs;
• wet floor signs or other signs used to warn of potential hazards.
· relevant building code provisions;
· industry regulations;
· the plaintiff's shoes;
· the plaintiff's cane or walker, if plaintiff was using one;
· the plaintiff's clothing that may have contributed to the accident, such as a long skirt or pants;
· any item the plaintiff was carrying at the time of the fall;
· the plaintiff's eyeglass prescription;
· products used to clean the floor;
· instructions for the use of these products;
· the plaintiff's medical records, which may indicate health problems that may have contributed to the accident, including:
• poor eyesight;
• history of seizures or fainting spells;
• vertigo;
• history of intoxication or drug use;
• mobility problems, such as faulty knees or a bad hip.
· the plaintiff's medical records reflecting what injuries the plaintiff sustained; and
· any admissions of liability (e.g., "I cannot believe I tripped over my own feet," or "I'm so clumsy.").

c. Interview Witnesses

In addition to gathering this information, interview, and consider deposing, the following individuals:

· maintenance crew;
· janitor;
· owner of premises;
· rental agent; and
· anyone who used the premises, including other customers, tenants, and visitors.

d. Perform Other Tasks

Finally, considering doing the following:

· conducting surveillance of the plaintiff;
· in a slip and fall case caused by water, determining all the potential sources of water, which may include:
• condensation from an air conditioning unit or a soda machine;
• melted ice from a nearby ice machine;
• water spilled or leaking from a water fountain;
• water left over from the cleaning crew; or
• leaky roof.
· in a slip and fall case caused by water, looking for any signs of mildew or water marks that may show that water was spilled on the floors;
· retaining an accident reconstruction expert to evaluate how the accident occurred.

NOTE When using an expert, keep in mind the following. When inspecting the premises, make sure you are inspecting the premises as they existed at the time of the accident. For example, if the landlord placed carpet down after the plaintiff fell on the linoleum floor, make sure to inspect the underlying linoleum. Measure the lighting conditions as they existed at the time of the accident. Measure the coefficient of friction of the floor's surface. Secure samples of the flooring where the accident occurred. Compare the specifications of the area of the accident to relevant building and industry codes. In a trip and fall case, the culprit stair may not meet industry standards.

4. PRODUCT LIABILITY CASES

a. In General

In product liability cases, it all comes down to the product. Was it defective? Did it fail? Was it misused? To get to the bottom of a product liability case, consider doing the following.

b. Gather Information

Start with gathering information. To that end, obtain the following documents and information about the product from the retailer, manufacturer, and relevant industry associations:

· tags, labels, or emblems on the product;
· packaging material;
· sales invoice;
· repair invoices;
· warranties;
· warranty registration;
· operator's manual;
· assembly manual;
· parts manual;
· repair manual;
· recall notices;
· safety notices;

· patents;
· product modifications;
· advertisements (newspaper, magazine, TV);
· package inserts;
· product brochures;
· instructional pamphlets and videos on product use;
· customer complaints;
· customer questionnaires regarding the product;
· customer accolades;
· repair and maintenance records for the product;
· information about upgrades and later models;
· warning labels;
· testing done on the product;
· changes made to the design;
· changes to the design of the product that were considered but rejected;
· blueprints;
· documents the manufacturer provided to the retailer about the product;
· advertising material the retailer gave to the consumer;
· information regarding optional ad-ons;
· federal, state, and local standards for the product;
· industry standards for the product;
· governmental and industry recall notices;
· media coverage relating to accidents involving the product;
· quality control measures implemented by the manufacturer;
· results of any tests on the product, whether performed by the manufacturer, a consumer group, or the government; and
· prior lawsuits involving the product. In addition, gather the following: · the actual product in the same condition it was in at the time of the accident;
· exemplar of the product;
· photographs of the product, taking particular care to photograph the following:
• warning labels on the product;
• serial number;
• product logo;
• inspection dates.
· identity of the manufacturers of the component parts;
· the names of all experts who have testified in the past that the product in question is defective;
· the plaintiff's medical records, which may indicate health problems that may have contributed to the accident, including:
• poor eyesight;
• history of seizures or fainting spells;
• vertigo;
• history of intoxication or drug use;
• mobility problems, such as faulty knees or a bad hip.
· the plaintiff's medical records reflecting what injuries he sustained; and
· any admissions of liability (*e.g.*, "I should've tucked in my shirt before working on that machine.").

c. Interview Witnesses

In addition to gathering this information, interview and consider deposing the following individuals:

· the designer of the product;
· the salesperson who sold the product to the plaintiff;
· the person who assembled the product;
· witnesses who observed the accident;
· customers of the product; and
· family members, friends, or neighbors who observed the plaintiff use the product.

d. Perform Other Tasks

Finally, consider doing the following:

· sending a letter to the person who possesses the product requesting that it be preserved;
· hiring an expert to test the product, but doing so with the written agreement of, and under the supervision of, opposing counsel.

NOTE Ideally, get the court's blessing in the form of an order. This way, you can avoid a potential spoliation claim.

· creating a chain of custody for the product from the manufacturer to the ultimate user, and determining whether anyone along the line did something to alter the product;

· investigating whether the plaintiff was trained on how to use the product and whether he was ever observed using it incorrectly;

· investigating whether similar products on the market have more, the same, or fewer safety features.

5. MEDICAL MALPRACTICE CASES

a. In General

With the advances of modern medicine, the popular notion is that bad outcomes do not occur absent a medical provider's negligence. Medical treatment, particularly surgery, carries with it a certain amount of risk. Sometimes bad things happen to good people and no one is to blame. In any medical malpractice case, you need to investigate whether any medical provider contributed to the bad outcome. To do so, you need to learn everything about the plaintiff's medical treatment and his adverse outcome.

b. Gather Information

When you investigate a medical malpractice case, obtain the following from the parties or providers:

· original medical records;
· a transcription of all handwritten doctors' and nurses' notes;
· signed consents;
· patient referrals;
· correspondence between the plaintiff's doctors;
· hospital and physician charts;
· x-rays and MRI films;
· itemized bills;
· instructions to patient;
· laboratory reports;
· in a wrongful death case, the autopsy report and death certificate;
· curriculum vitae of the defendant providers;
· relevant publications written by the defendant providers;
· records from the Florida Agency for Health Care Administration related to the defendant providers;
· records reflecting the termination, suspension, or curtailment of any defendant provider's license and hospital privileges; and
· medical texts and periodicals discussing the care and treatment provided to the plaintiff.

c. Interview Witnesses

In addition to gathering this information, consider deposing the following individuals:

· doctors who gave the plaintiff a "second opinion";
· anyone present when the alleged negligence occurred, (e.g., a scrub nurse); and
· the plaintiff's friends and neighbors.

d. Perform Other Tasks

Finally, do the following:

· obtain all of the plaintiff's medical records, dating back as far as possible;
· have a trained paralegal or nurse consultant review and summarize the plaintiff's medical records, highlighting any instances of alleged malpractice;
· obtain all relevant medical journal articles and medical texts that thoroughly describe the medicine and medical procedures involved in the case (these publications will teach you what is the standard of care in your case and whether it was breached);
· retain an expert early in the case to explain the medicine to you and help you develop a defense to the plaintiff's claim.

C. HIRING A PRIVATE INVESTIGATOR

1. IN GENERAL

Choosing the right private investigator for the case is an important task. You want to find someone who can devote the time to track the subject and surreptitiously gather needed information, take pictures, or record audios or videos of the subject. An investigator who can give you photographs or a videotape of the allegedly injured plaintiff doing things he should not be

capable of doing, such as wrestling or playing football with his children, or carrying sacks of potting soil to his garden, can win you a verdict for the defense. To find the best investigator for the job, do not simply choose one from the phone directory or a saved business card. Instead, consider the following.

2. LICENSE AND INSURANCE

You need someone who is licensed and insured.

3. EXPERIENCE

Consider employing a former law enforcement officer, especially a detective who has been professionally trained and likely has connections with the former employer that may help in the investigation. Ask about previous experience or past successful surveillance that may have assisted in winning a verdict. Also, you need to ensure that the investigator you choose is the one who will be doing the actual surveillance. Otherwise, you may end up with a less experienced member of the investigative agency.

4. EQUIPMENT

Discover what equipment the investigator has and whether it incorporates the latest technology. For example, ask about hidden cameras, camera resolution, and the quality of videos recently produced. Because you may want to show to the jury any video or photographs taken, the clarity will be important.

5. AVAILABILITY

The investigator must be accessible when you need him and must be able to promptly return your phone calls or emails. An investigator who has family obligations or matters that may interfere with a thorough, on-call investigation will be of little help to you.

6. APPEARANCE AND DEMEANOR

The investigator may need to be called as a witness at trial to authenticate the surveillance video. Therefore, you need to consider how the investigator will be viewed by the judge and jurors. The investigator needs to appear professional and be articulate. The jurors may be somewhat uncomfortable with an investigator's "spying" techniques from the start, and you do not want to add to their discomfort by presenting someone whom they may consider to be a sleazy stalker.

7. EXPENSE

Make sure you understand how the investigator charges — be it by the hour, day, or task — and if travel expenses are included. Neither you nor the client wants to be surprised by unanticipated costs associated with a two-day job resulting in a five-minute video.

8. CONTINUING RELIABILITY

If you find an investigator you can rely on for professional work, continue to do business with

him. Repeat business generally results in greater effort and product.

XV. FINDING AND EMPLOYING THE RIGHT EXPERT

A. IN GENERAL

Hiring experts is a difficult task. You must exercise due diligence to ensure that the best expert affordable is hired — one who is exceptionally qualified and will help you win the case. The following suggestions will help you choose wisely and obtain the right expert.

B. DETERMINE THE TYPE OF EXPERT NEEDED

Before you start searching for an expert, you have to decide what type of expert to hire. For example, if you are looking for a doctor to perform a medical examination, determine whether he should have a specialty or subspecialty in order to be qualified to do the assigned task. (See XVI., beginning on page 124, regarding medical examinations.) Hiring the wrong type of expert can result in a favorable opinion but from someone not qualified to render it.

C. GET LEADS AND REFERRALS

For a fee, expert referral services will give you the names and contact information of several people with the expertise you are looking for. Additionally, your local bar association may have expert databases. Generally, these lists are free to members. Some associations will send an email to its membership on your behalf, asking for the names of potential experts. Also consider compiling an email list of your own — a list of friends who practice in the same field. When you need an expert, you can email everyone on the list, requesting names of experts in a given field.
Another source for leads is the Internet. Go online and do a Google search for the type of expert you are looking for. (See the Note at V.B.2. at page 60 for further information regarding Google searches.) You will likely find plenty of websites dedicated to experts in your chosen field.

D. SCREEN LIST OF POSSIBLE EXPERTS

1. IN GENERAL

Once you have the names of some potential experts, you need to narrow the field to the one or two experts who will best serve your client's interests. To do so, consider what others think about the candidate by performing the following tasks.

2. CONTACT OTHER LAWYERS

Contact legal organizations and ask what their members have to say about your prospective expert. Some bar organizations have email services that allow you to ask their members what they know about a given expert.

3. CONDUCT INTERNET SEARCH

Type in the expert's name on an Internet search engine such as Google, and see what you find. (See the Note at V.B.2. at page 60 for further information regarding Google searches.) For

example, you may find an article about the expert's vast accomplishments. Conversely, you may find an article about how he was arrested for Medicare fraud.

4. CONDUCT A WESTLAW SEARCH

Do a national search for your expert on Westlaw to see if he has ever been mentioned in an appellate court opinion. You may find a case limiting or striking the expert's opinions.

NOTE To conduct a Westlaw search for cases in which he is mentioned, simply go to the "all cases" database and search for the expert's name.

Type in the expert's name in the Westlaw database for Florida jury verdicts and see what his track record has been. (See the Note at VI.A.5. on page 64 for directions on how to do this.) When the expert testifies for the plaintiff, does the plaintiff generally receive a large verdict? When he testifies for the defense, does he generally contribute to a defense verdict? The jury verdicts you pull will also have the names of the attorneys who retained the expert. Contact these attorneys to obtain additional information about the expert.

5. REVIEW CURRICULUM VITAE

Carefully review the candidate's curriculum vitae to discover where he went to school and what advance degrees he has. Also, different services provide deposition transcripts of experts. Obtain one or two of these previous depos-ition transcripts to see how the expert performs under cross-examination.

6. CONDUCT BACKGROUND SEARCH

Perform an inexpensive background search on the expert to determine if he has ever been arrested or convicted, the names of companies he has been affiliated with, and lawsuits in which he has been involved. It is extremely disquieting to hear your expert, at deposition and under cross-examination, admit that he is a convicted felon, his professional license was suspended, his opinions contradict those he has given in other cases, or his credentials are bogus. To avoid such a destructive surprise, you must thoroughly investigate the background of all prospective experts.

E. INTERVIEW THE EXPERT

1. QUESTION CREDENTIALS

Do not hire an expert until you speak to him. Tell him about your case and listen to how he can help you. Be mindful that the expert who wants your client's money may exaggerate his credentials or expertise to get it. Therefore, you have to ask the tough questions about his qualifications to testify in your case and any "skeletons" he may have in his closet. For example, have the expert's opinions ever been limited or rejected by a court, has his professional license ever been suspended or revoked, or has he ever been sued for malpractice?

2. OBTAIN ARTICLES

Ask the expert for copies of articles he has written on the subject area about which you have asked

him to testify. Review these to ensure that the expert has no written opinions contradicting the opinions you hope he will provide in your case.

3. OBTAIN REFERENCES

Ask the expert for the names of attorneys who have retained him in the past. If he does not provide any, find another candidate. Once you have references, call them and see what they have to say. Find out if the expert made a good witness at deposition or at trial, was cooperative, and was accessible.

4. OBTAIN OTHER CANDIDATES' NAMES

When deciding on an expert, ask the prospects you interview who they think the leaders in their field are — the expert's experts.

F. USING YOUR EXPERT TO WIN YOUR CASE

1. IN GENERAL

Although experts are often not hired until an expert disclosure deadline is near, it is much wiser to hire your expert at the onset of the case. There are several reasons for obtaining an expert early. The expert can be your biggest ally if your case goes to trial. He can tell you where the "land mines" are and can help you lay some of your own. He can help you develop your theme, prepare and implement a litigation plan, and possibly destroy the other side's expert. In short, he can help you win. But he cannot do that until you hire him and get him involved. Early on, tell your client about the benefits of hiring and using an expert and how those benefits outweigh the expense.
Your expert can help with the tasks addressed below.

2. ANALYZING THE CASE

The attorney can often benefit from an expert's perspective. Sometimes the attorney simply may not have the technical acumen to understand all aspects of the evidence. Your expert can help you evaluate your case and may be able to tell you from the beginning whether the case is worth pursuing or whether it should be abandoned. Have the expert list the strengths and weaknesses of your case as well as the strengths and weaknesses of your opponent's case. This list can then guide you in determining whether you should proceed to trial.

NOTE If you will be using your expert as a witness at trial, never put anything in writing to him that you do not want opposing counsel to see. The expert witness's file is discoverable.

3. DEVELOPING A CASE THEME

As previously noted, developing a successful theme for the case is very important. Because your expert likely has testified at trial on the same or similar issues and may have first-hand experience watching juries, he may be able to advise you about which themes will likely resonate with a jury and which ones will not. He can advise on what themes to emphasize in voir dire, in opening statement, and through the trial. When you have a theme and a favorable outcome in mind, you need to prepare a plan to get there. Again, an expert can help you develop a plan to make the most

of your case and exploit the holes in your opponent's case.

4. DEVELOPING DISCOVERY

Drafting interrogatories and requests for production can be difficult. In a case involving technical issues or numerous documents, your expert can help you determine what to ask for and how to ask for it, thereby avoiding interrogatories and requests that miss the mark.

5. FINDING RELEVANT SCIENTIFIC LITERATURE

If your case turns on what the relevant scientific community has to say about the issue in dispute, your expert can help you determine who the relevant scientific community is and discover which literature this community deems authoritative. Once you have the authoritative literature in hand, the expert can review it and discern the relevant standard of care and the industry standards that apply in your case. You will need these to evaluate whether a party met or did not meet the relevant standard of care.

6. CROSS-EXAMINING OTHER EXPERTS

Cross-examining the other side's expert, whether at deposition or at trial, is a daunting task in that the expert has spent years learning the topics and issues you now must delve into. Your expert can give you advice on the weaknesses of the other expert's opinions and how best to exploit them, as well as the points the other expert should concede and how to undermine the expert's credibility when he refuses to do so.

7. CONVINCING YOUR CLIENT

It may turn out that you should never have filed the case for the plaintiff to begin with, or that your defendant client needs to settle before the jury awards a huge verdict against him. If you have tried to explain this to the client but the client has ignored your advice, the expert may be able to more easily persuade the client to drop the case or settle it, thereby cutting his losses. The truth is, that the extra cost of hiring an expert may result in a net savings by putting the case in a posture to settle early.

8. SETTLING THE CASE

A strong expert can be the biggest asset you have in settling your case. An expert with strong credentials and a well-based, well-reasoned opinion can make opposing counsel more seriously consider your offer.

XVI. HANDLING DEFENSE MEDICAL EXAMINATIONS

A. IN GENERAL

In cases in which the physical or mental condition of the plaintiff is at issue, defense counsel often asks the plaintiff to submit to a defense medical examination. It is sometimes called a compulsory or independent medical examination or IME, and is used when the defense wants the plaintiff's condition evaluated by an expert. The procedure seems straightforward and simple enough —

defense counsel selects an expert who then examines the plaintiff. Its apparent simplicity, however, can be a trap for the unwary practitioner. The following pointers will help both plaintiff and defense counsel anticipate pitfalls and properly prepare for the IME to avoid missteps.

B. WHEN REPRESENTING THE DEFENDANT

1. DETERMINE TYPE OF DOCTOR NEEDED

First, decide what your expert's specialty should be. Should a neurologist examine the plaintiff, or an orthopedist, or another specialist altogether? Do not settle for an expert in the general field related to the plaintiff's condition. Instead, find an expert in the subspecialty related to that condition. For example, if you want to evaluate whether a prescription drug caused a plaintiff's stroke, instead of searching for a board-certified neurologist, find a board-certified vascular neurologist. If you want to examine whether a fall caused the plaintiff's knee injury, seek not just a general orthopedic surgeon, but a knee specialist — preferably a sports medicine physician who specializes in knees.

NOTE Rather than finding an expert who might give you the opinion you want, always try to find the expert who is best suited to evaluate the condition. Otherwise, the expert might not be convincing for purposes of either a jury trial or settlement negotiations.

Sometimes, more than one doctor is needed to evaluate the plaintiff's physical injuries and cognitive condition. For example, a plaintiff who has suffered a closed-head injury and a fractured hip should be examined by both a neurophysiologist and an orthopedist. Sometimes a third or fourth exam may be in order (for example, an ophthalmologist for an injury to the eye, or a vocational rehabilitation counselor to evaluate earning capacity).

NOTE If you intend to subject the plaintiff to multiple exams, try to get the plaintiff's permission first. You want to resolve the number of medical exams before setting the first one — otherwise, the court may determine that you have subjected the plaintiff to enough testing and that one or more of the exams (possibly your most beneficial one(s)) should be thrown out. If the plaintiff refuses to cooperate once you have revealed your planned exam schedule, you can seek court intervention.

To find the appropriate expert physician, search websites of Florida medical schools and search for the chair of the department or for doctors who went to Ivy League schools, who were chief residents, who have a long list of publications, who frequently lecture, or who have been repeatedly named one of the Best of America's Doctors. Then obtain the résumé of your candidate and study it carefully. Ask for references — attorneys who have previously retained the doctor — and follow-up with them to determine if the doctor performed satisfactorily at the testing and testifying stages. If the doctor does not perform medical exams for litigation, continue down the list of tenured professors until you find someone who fits your needs, has an impressive résumé, and will likely make a convincing witness.

2. HIRE A NEUTRAL DOCTOR

Avoid hiring a doctor who appears to cater to insurance companies and defense attorneys. This apparent bias will undermine his findings.

3. AVOID COMMUNICATION PROBLEMS

Ask plaintiff's counsel whether his client needs a translator. In Miami-Dade County, it is not unusual for a plaintiff to speak only Spanish or Creole. If this situation exists, either retain a bilingual doctor or confirm that your doctor has a bilingual assistant who will be present for the examination.

4. DETERMINE DOCTOR'S FEE

Ask how much the doctor charges for reviewing records, for telephone conferences, for the IME, and for preparing his report. The doctor may quote you a price of $500 for the IME, but may charge you over $3,000 before it is all over.

5. SEND PLAINTIFF'S RECORDS TO DOCTOR

Before scheduling the IME, send the doctor all of the plaintiff's records and seek his preliminary opinion. To avoid surprise, you should never proceed with an IME until you have a strong sense of what the outcome of the IME will be. The doctor's preliminary opinion may convince you not to proceed with the IME.

6. ENSURE DOCTOR'S AVAILABILITY

Make sure the doctor is accessible to discuss the plaintiff's injuries and is available to testify during the trial. Chairs and co-chairs of departments are frequently quite busy, and the exam may need to be scheduled months in advance to accommodate the doctor's schedule.

7. COORDINATE SCHEDULING, SUBJECT, AND FORMAT OF IME

Coordinate the time and date of the IME with plaintiff's counsel. Ideally, the IME should be in the county where the plaintiff resides or another convenient place, and should be held at a reasonable time. If a qualified doctor cannot be present to conduct the IME in the plaintiff's county, ask opposing counsel for permission to schedule the IME elsewhere.

Let plaintiff's counsel know what to expect at the examination and how long it should take so he can advise his client. For example, reveal what will be done during the examination and whether any diagnostic tests will be performed, such as an x-ray. Sometimes an examination can take a day or more, such as in the case of a neuropsychological examination. Plaintiff's counsel and his client should be made aware of this.

Determine whether the doctor imposes any limitations on the IME. For example, some doctors refuse to have third parties in the room, such as plaintiff's counsel or a court reporter. If that is the case, you need to know beforehand and let plaintiff's counsel know as well. If your doctor is obstinate about not letting third parties into the exam room, you may have to retain another expert. Most doctors have a cancellation policy. For example, if the plaintiff cannot attend the IME, he might have to cancel his appointment within 24 or 48 hours ahead of time, or be assessed a disruption fee. Notify plaintiff's counsel in writing of the doctor's policy.

C. WHEN REPRESENTING THE PLAINTIFF

1. PREPARE CLIENT FOR IME

Tell your client that he will be examined by a doctor who has been hired as an expert for the defense. Tell him what will happen, what to expect, what tests will be administered, and how long it will take.

Ensure that your client has been given the correct date, time, and address and location of the exam (with directions, if needed), and emphasize that he must be there on time.

Advise the client not to exaggerate his pain or condition. Doctors who perform IMEs will be mindful of attempts to exaggerate symptoms. Tell your client to be honest during the examination.

2. DECIDE WHETHER TO PERSONALLY ATTEND IME

Consider attending the IME and advise your opponent if you intend to do so. If you do not attend, make sure you debrief your client after the IME. Find out what questions the doctor asked, what exactly the doctor did, and how long the exam took. The answers to these questions will help you prepare for the doctor's deposition.

3. DECIDE WHETHER IME SHOULD BE RECORDED

Determine whether you should send a videographer to the IME to record the examination. If you decide to do so, notify defense counsel in writing to avoid any problems.

4. REQUEST COPY OF IME REPORT

After the examination, request a copy of the doctor's report from defense counsel.

XVII. DRAFTING INTERROGATORIES

A. IN GENERAL

Interrogatories are an inexpensive way to obtain basic facts from your opponent, including the names of his witnesses and experts and the identity of relevant documents. However, interrogatories are effective only if properly drafted. Do not let the apparent simplicity of the act fool you. Poorly written interrogatories generate little, if any, valuable information, whereas well-drafted questions garner the information needed to help you win your case. When drafting interrogatories, consider the following suggestions to obtain what you are seeking.

B. COURT-APPROVED INTERROGATORIES

Use court-approved interrogatories for specified state court cases. When drafting interrogatories in a personal injury, medical malpractice, or automobile negligence case filed in state court, you must use the form interrogatories approved by the Florida Supreme Court. Because the court has approved these interrogatories, you can confidently serve them, knowing that opposing counsel will be hard-pressed to object to them.

NOTE Among these court-approved interrogatories are some that can be used in cases other than those types listed. Because these mandated interrogatories are in a form approved by the court, and therefore presumably "objection-proof," consider using some of the more generic ones in other than personal injury types of cases.

C. FORM INTERROGATORIES

1. IN GENERAL

Use form interrogatories for other than specified cases when generic court-approved forms are not appropriate. Civil procedure treatises by Ramirez, LaCoe, and others contain numerous form interrogatories that may be appropriate for your case. There are also entire volumes of interrogatory forms likely available at the local law library that serve as a valuable resource. Instead of drafting interrogatories from scratch, you should incorporate these forms from well-regarded treatises when possible. Not only do they save you time and effort, use of well-established forms provide a basis for asserting that they, like those approved by the Florida Supreme Court, are universally accepted by the courts and are virtually objection-proof.

2. IN FEDERAL COURT

When serving interrogatories in federal court, consider using any form interrogatories found in the appendix to the court's local rules. These form interrogatories may also provide a proposed set of definitions and instructions you can incorporate into your interrogatories.

D. CASE-SPECIFIC INTERROGATORIES

Carefully review the complaint, the answer, and all relevant documents, and if case-specific interrogatories are in order, draft them rather than relying exclusively on court-approved or form interrogatories. When case-specific interrogatories are appropriate, determine whether any associates have handled a similar case and, if so, whether they have a copy of the interrogatories they served in that case. Some firms keep a research file with "recyclable" interrogatories. Consider doing this if the practice is not already in place. (See IX.F. at page 82.) Include as a resource in this research file of recyclable interrogatories those well-drafted interrogatories served by other attorneys that have come to your attention. The interrogatories you have to answer today may be the ones you serve tomorrow.

E. CONTENTION INTERROGATORIES

One of the best interrogatories to propound is a contention interrogatory, which basically restates an allegation asserted by the other side and asks the opponent to provide the facts that support the allegation. For example, a plaintiff would ask the defendant to "state the facts on which you rely for each affirmative defense in your answer." Because the Florida Supreme Court has approved this type of interrogatory, opposing counsel must answer it or risk having one of his allegations or affirmative defenses stricken by the court.

F. SUPPLEMENTAL AND TRIAL INTERROGATORIES

In state court, answers to interrogatories are complete when filed. There is no continuing duty to

supplement the answers. Accordingly, you should serve supplemental interrogatories periodically during the course of litigation, asking that your opponent update the prior answers. When trial approaches, consider serving trial interrogatories asking for the names and addresses of all witnesses and experts the other side intends to call at trial and a list of all exhibits he intends to use at trial.

G. DRAFTING STYLE

Keep all interrogatories brief, simple, and particularized. Anticipate that an interrogatory may be read to the jury along with its answer, and ensure that the interrogatory itself is capable of being understood by the jurors — otherwise a good answer to the interrogatory may be of little use.

NOTE Appreciate the limitations of interrogatories — they can do only so much. Remember that you are limited to 30 of them (25 in federal court) and the party answering them has 30 days to craft a careful answer, revealing as little as possible. Therefore, use them primarily for acquiring the names of witnesses and experts and the identity of documents that may support your case or undermine the other side's case. Then, interview or depose the witnesses to obtain further information.

XVIII. DRAFTING REQUESTS FOR PRODUCTION

A. GENERAL TIPS

1. IN GENERAL

When litigating, it is crucial to obtain all necessary documents to help you win the case. To do so and possibly find a "smoking gun," you must make the most of the requests for production you serve on the other side. To draft meaningful and effective requests for production, consider the following.

2. BE SPECIFIC

Broad requests for production are weak and may result in little else than objections from your opponent. They also could invite boxes of paper containing little useful information. Therefore, you must take the time necessary to tailor your requests so that they are as specific as possible and will get you the documents you really need.

3. USE FORM REQUESTS FOR PRODUCTION

As noted at XVII.C.1. above with regard to interrogatories, civil procedure treatises by Ramirez, LaCoe, and others contain numerous form requests that may be appropriate for your case. There are also entire volumes of requests for production forms likely available at the local law library that serve as a valuable resource. Instead of drafting requests for production from scratch, you should incorporate these forms from well-regarded treatises when possible. Not only do they save you time and effort, use of well-established forms provides a basis for asserting that they are virtually objection-proof.

4. USE REQUESTS DRAFTED BY OTHERS IN YOUR FIRM

Again, as with interrogatories, determine whether any associates have handled a similar case and, if so, whether they have a copy of the requests for production they served in that case. Check the firm's research file if it has one. Consider establishing a research file to include "recyclable" requests to produce if the practice is not already in place. (See IX.C. at page 73.) Include as a resource in this research file those well-drafted requests for production served by other attorneys that have come to your attention. The requests for production you have to respond to today may be the ones you serve tomorrow.

5. PROPOUND DIFFERENT VERSIONS OF THE SAME REQUEST

If you know the category of documents you want the other side to produce but you want to avoid drafting an overly broad or narrow request, draft several versions of the same request, phrasing some of them broadly and some narrowly. In this manner, the request for production will seek the same material in several different paragraphs but each paragraph will word the request differently to increase the odds of getting what you are looking for.

6. USE CONTENTION REQUESTS FOR PRODUCTION ON PLAINTIFFS

As you can do with interrogatories, propound contention requests for production. A contention request asks the plaintiff to produce all documents that support an allegation stated in the complaint. You can thereby acquire all documents that your opponent claims support the case.

7. REQUEST A PRIVILEGE LOG

If opposing counsel objects to some of your requests, claiming that you have asked for privileged documents, request that he produce a privilege log describing the nature of the allegedly privileged documents. Parties who claim a privilege must produce privilege logs or run the risk of waiving that privilege. By forcing opposing counsel to produce a privilege log, you may force him to take a hard look at the privilege objections, realize some of them are unfounded, and produce additional documents.

8. INCLUDE A DEFINITION SECTION

Your opponent may attempt to interpret what your requests for production mean, construing them as narrowly as possible to avoid producing certain documents. To avoid this, include in the request a definition section defining all terms used in your request so that opposing counsel knows exactly what you are asking for.

9. AGREE WITH OPPOSING COUNSEL TO DATE-STAMP ALL DOCUMENTS

In some cases, the number of documents produced is inconsequential, making date-stamping an unnecessary procedure. However, in most cases, many documents will exchange hands. To facilitate the use of these docu-ments during the course of litigation, secure an agreement with opposing counsel that whenever anyone produces a document, he will date-stamp it.

B. REQUESTS PROPOUNDED TO PLAINTIFF

1. IN GENERAL

Sometimes, the best records for the defense are in the hands of the plaintiff. Plaintiffs may have records reflecting prior accidents, pre-existing injuries, or names of favorable witnesses. It is important to go beyond the standard requests and tailor your requests for production to seek the documents containing this helpful information.

Think about what documents, if produced, would strengthen your case and weaken the plaintiff's. The next time you serve a plaintiff a request for production, consider asking for documents that will result in the plaintiff revealing information that will defeat his own case. Here is a hypothetical and suggested requests based thereon.

2. EXAMPLE

a. Hypothetical

The plaintiff is suing your client for a personal injury suffered in a car accident that was allegedly caused by your client. In this case, seek the following items.

b. Cell Phone Records

Cell phone records may reveal that the plaintiff was on the phone at the time of the accident and, perhaps, caused it or at least contributed to it by being distracted and inattentive to the road or traffic. Find out whom the plaintiff called immediately before the accident and immediately after the accident. Perhaps the plaintiff was having a very stressful phone conversation at the time of the collision. Or, maybe in the aftermath of the accident, the plaintiff confessed over the phone to a friend or loved one that he was the cause.

c. Credit Card And Bank Records

The plaintiff may claim that he has not left the house since the accident because of severe pain. See if the plaintiff's credit card statements and canceled checks bear this out. These records may reflect that, since the accident, the plaintiff has made frequent purchases at restaurants and movies and has taken regular trips and vacations.

d. Vacation Photos And Home Videos

The plaintiff may claim he cannot turn his head and is in debilitating pain. Yet, the plaintiff may have post-accident vacation photos depicting him swimming at the beach, hiking, or riding a roller coaster with his hands in the air.

e. Passport Records

The plaintiff may claim that he hasn't been on any vacations since the accident. His passport, however, may tell a different story if it contains stamps to various destinations.

f. Pharmacy Records

The plaintiff's pharmacy records will reflect all the providers that have written his prescriptions and may show that pain medications were given for pre-existing injuries. If the plaintiff does not have these records, you can subpoena them from the pharmacy.

g. Health Insurance Records

The plaintiff's health insurance records provide the names of all of his providers, how often he saw them, and what they were paid.

h. Releases

Get the plaintiff to execute releases for workers' compensation, unemployment compensation, tax returns, and social security records. Social security records will contain a list of the plaintiff's former employers and his earnings from those employers. These and the other documents will reveal the extent that the plaintiff worked after the accident.

i. Plaintiff's Day Planner And Diary

The plaintiff may keep records reflecting appointments with his doctors and the names of potential witnesses.

j. Plaintiff's Emails

The plaintiff may have emails reflecting how he is doing, how his recovery is going, or what caused his accident.

C. REQUESTS PROPOUNDED TO DEFENDANT

1. IN GENERAL

It is your job to properly evaluate your case by tailoring your requests to produce to seek the documents that will help as well as hurt your cause. If you never ask for them, you may be overlooking a crucial piece of evidence in the case.

2. EXAMPLE

a. Hypothetical

The following addresses a hypothetical in which you are suing an incorporated defendant. As with requests to produce served on a plaintiff, you need to consider documents other than standard company files when drafting your request for production to defense counsel. The following are examples of helpful documents.

b. Original Documents

Ask for the opportunity to view and evaluate original documents — whether they be contracts,

medical records, or something else. Determining who wrote what, when, and in what type of ink may make a difference in your case.

c. Source Documents

When asking for documents, find out if they are based on source documents that are still in existence and, if so, ask for them. For example, a contract may be based on a series of negotiations that were recorded in writing and that reveal more than the typed contract. Similarly, a typed medical record may be based on more revealing handwritten notes.

d. Corporate Chart

Ask for any documents that show the various positions in the defendant's company and who holds which position in the company. A company may have a corporate chart reflecting who does what. This chart will help you decide whom to depose.

e. Personnel Files

Your case may warrant the opportunity to view the defendant's employee files, such as in employment cases or cases involving alleged negligent hiring or training.

f. E-Documents

Individuals and companies are moving from paper to electronic documents. Cases are being built or destroyed on what attorneys are finding on hard drives and back-up tapes. Emails and metadata are increasingly important in everyday litigation. When asking for documents, ask for more than hard documents — seek e-documents and data found on computers.

g. Depositions Of Witnesses

Perhaps the defendant's employees have already been deposed in another case. If so, obtain those depositions to determine if what they said in those earlier actions may be relevant to your case.

h. News Coverage

The events that form the basis of the lawsuit may have been the subject of a news report. Ask for any news clippings related to the case that may be in the defendant's possession.

XIX. TAKING AND DEFENDING DEPOSITIONS

A. IN GENERAL

Taking a deposition can be an intimidating experience for a new litigator. Opposing counsel may object to your questions, the witness may evade them, and the court reporter will record each question, word for word. Every question you ask, including any blundering and clumsy ones, become part of the transcript for all to see — your boss, your client, the judge, and possibly the jury. The thought can be paralyzing. Preparation, however, can help you remain in control and conduct an effective deposition. Following are some useful tips to make the deposition experience

a positive one.

B. UNDERSTAND WHAT DEPOSITIONS CAN BE USED FOR

1. IN GENERAL

Depositions are a very good tool to help you advance and win your case. They can be used to support a motion for summary judgment, to strengthen your position at mediation, or to help you prevail at trial. The following are effective uses for a deposition.

2. AS FOUNDATION FOR SUMMARY JUDGMENT MOTION

Summary judgments are won or lost on the facts. Look at the relevant jury instructions, statutes, and cases, and determine what facts you need to elicit to lay the groundwork for a successful motion for summary judgment. Sometimes you will come across a case similar to yours, where certain facts led the appellate court to affirm a motion for summary judgment. Use that case as a guide. If you can elicit the same facts in your depositions as the facts referenced in that case, you can then reference the facts you elicit and the case you found as the foundation for a successful motion for summary judgment.

3. TO IMPROVE SETTLEMENT POSTURE

If you can dismantle the other side's key witness in deposition, you can advance your client's position when it comes to settlement talks. Contemplate why the other side thinks this witness makes his case and breaks yours, and ask the types of questions that undermine the witness.

4. TO ADVANCE CASE THEME

What are the admissions you would want to hear at trial? What are the statements you want the jury to hear? Think through the case themes you will be repeating at trial and the facts and statements that play into and support those themes. Working backwards from there, use the depositions to build a foundation for those themes so that you can prevail at trial.

NOTE Remember, you never want to ask a question of the witness at trial to which you do not already know the answer. If you did not ask the question at deposition, you run a huge risk asking it for the first time at trial. Therefore, you want to use the depositions to get the admissions you need.

C. ENSURE THAT DEPOSITIONS ARE NECESSARY AND APPROPRIATE

1. STUDY ELEMENTS OF CASE

Understand the law involved in your case. Learn the legal elements of every claim in the complaint and of every defense asserted in the answer. Once you know what the elements are, you can determine if it will be necessary to have a deponent establish those elements or disprove them. (See *FASTRAIN*™: HOW TO WRITE AND USE JURY INSTRUCTIONS (Fla. Bar CLE 3d ed. 2005), and *FASTRAIN*™: FLORIDA CIVIL TRIAL PREPARATION (Fla. Bar CLE 3d ed. 2007), for further information regarding use of instructions to determine elements of the case.)

2. EXAMINE REASONS

Make sure you understand why you will be deposing a witness before setting the deposition. For example, do you expect the deponent to advance your case or undermine your opponent's case? If no solid reason exists to depose the witness, do not do so.

3. INTERVIEW POTENTIAL DEPONENTS

Unless the witness is represented by counsel or is someone you should not be talking to such as the plaintiff's doctor, take the time to interview the witness before deciding to depose him. (See XIII., beginning on page 101.)

D. PREPARE FOR DEPOSITION — IN GENERAL

1. REVIEW DOCUMENTS

Review all relevant documents including all written statements and interviews.

2. PREPARE DOCUMENT BINDER

Prepare a document binder containing all of the documents you will refer to during the deposition. This binder will allow you to progress smoothly through the deposition and you will appear impressively prepared — to both the witness and opposing counsel.

3. EXPLORE NEED FOR DUCES TECUM NOTICE

If you want the deponent to bring any documents to the deposition, prepare a notice of deposition duces tecum and give the witness sufficient time to gather those documents. Remember, if you are deposing the opposing party, you have to set the deposition 30 days or more in advance.

4. RESEARCH DEPONENT

Investigate and learn as much as you can about the deponent before the deposition. Perform an online background search and Internet search to learn such things as the deponent's criminal history. (See the Note at V.B.2. at page 60 for further information regarding Google searches.) A Google search may reveal a website or blog or you may find a chat room discussion or article by or about your deponent. Conduct a litigation search to see if the deponent has been previously sued or has filed a lawsuit and, if so, try to find any depositions previously given or interrogatories answered by the deponent in connection with the previous lawsuit. Search the bankruptcy records to determine if the deponent is a past or present debtor. If appropriate, obtain medical, employment, Medicare, social security, military, and IRS records. Once you have collected relevant contracts, handwritten notes, and records of interest, arrange them in chronological order and summarize them. Put the summary and the records in a binder for easy reference. This will help you gain an appreciation for all that has occurred and the significance of the events and documents.

5. PREPARE OUTLINE

Prepare a detailed deposition outline containing questions on all the subject areas you want to cover at the deposition. Study the jury instructions to see exactly what must be proved and what the other side must prove, then form your questions to elicit the answers or information that will be favorable to your case and harmful to your opponent's. For example, when deposing your opponent, try to get him to admit facts that defeat an element of his cause of action or facts that support yours.

The outline should be divided into sections with each section containing questions on a specific point or issue. For example, if it is the party's third personal injury lawsuit, you could have a section on prior litigation containing the questions you want the deponent to answer about those lawsuits. For each section, start with general questions and progress to more specific ones until you have focused on the precise issue you want the deponent to discuss.

Remember to ask short, single-fact questions so that the transcript will be clear and concise. Your questions should be as penetrating as they would be at trial. If the deponent is the opposing party, you are allowed to ask leading questions during deposition and it is advisable to do so in an attempt to suggest the answer and get the deponent to agree with you. Refer to this outline during the deposition so that you remain on track.

6. CONSIDER VIDEOTAPE

Explore the need for a videotape of the deposition. You may want to do so if the physical appearance of a witness is important.

7. PREPARE FOR OBJECTIONS

Be prepared to handle the "pit bull" litigator. If you expect that opposing counsel will make oral objections at the deposition, bring a copy of the DISCOVERY HANDBOOK and the GUIDELINES FOR PROFESSIONAL CONDUCT published by The Florida Bar. (See VI.B.3. at page 65 regarding how to obtain these texts.) Then, if opposing counsel starts making speaking objections, inform counsel that such objections are inappropriate, and read from the guidelines into the record. If counsel's conduct continues or worsens, you may need to adjourn the deposition and seek a protective order. However, before doing so, consider placing a telephone call to the judge and seeking an immediate ruling. (See VI.B. at page 65 regarding how to deal with contentious counsel.)

NOTE If your opposing counsel is not generally an aggressive litigator but, nonetheless, begins making inappropriate speaking objections during deposition, you may have uncovered something important. Press on.

E. DETERMINE ORDER OF DEPOSITIONS

Decide in what order you want to depose the witnesses, keeping in mind that you may want to use one witness's deposition in preparing for that of a later witness.

F. SET THE DEPOSITION

1. IN GENERAL

There is more to setting a deposition than just asking your secretary to do so. To avoid any problems with your next deposition, take an active role in setting it to make sure things go smoothly.

2. COORDINATE WITH THE WITNESS

Have your office call the witness and ask him to choose a few days that are convenient for him. This is especially necessary when setting a doctor's deposition.

3. COORDINATE WITH OPPOSING COUNSEL

After getting several dates from the witness, have your office get dates from the other counsel of record. Setting depositions without clearing dates will quickly undermine your relationship with opposing counsel. If opposing counsel will not cooperate by giving you a list of available dates, or claims to be continually booked, or is otherwise uncooperative, set the deposition on a date that you and the witness are available. Then, prepare a notice of deposition and send it to opposing counsel with a cover letter advising that you unsuccessfully attempted to coordinate with his office, and that you are amenable to changing the date if a more convenient alternative is provided.

4. PROVIDE SPECIAL ACCOMMODATION

Find out if the witness needs any special accommodation, such as an interpreter or wheel-chair accessibility.

5. PAY WITNESS FEES

Arrange to pay the witness for his time, if necessary. If your witness is a doctor or expert, find out what his fee is for the deposition and make sure the deposition is set well enough in advance to give your client time to procure the funds and write a check for you to deliver to the deponent at the time of the deposition.

6. CHOOSE VENUE

Find an appropriate venue for the deposition, choosing a locale that is close to the witness and that is easily accessible to everyone. Also make sure that the venue has the proper accommodations. For example, if one of the parties is appearing by phone, make sure the site has a speaker phone. If you are going to show the witness a video, make sure the site has the equipment needed to show it.

7. REVIEW THE NOTICE

Make sure the notice is complete. If you want the deponent to bring documents, make sure the subpoena clearly states what documents you want the witness to bring. Also ensure that the

certificate of service is complete. It should contain the names of all the other counsel including any substitution of counsel, if applicable. Make sure everyone who needs to be at the deposition is notified of it, including any new parties that may have been added.

G. SERVE WITNESS SUBPOENAS

Serve the witness with a subpoena, even if he agrees to appear at the deposition voluntarily. Then, if the witness is a "no-show," you will be blameless and can have the court reporter give you a certificate of non-appearance.

H. CONFIRM ATTENDANCE OF ALL

Before the deposition is to begin, confirm that everyone will be available to attend, especially if you have sent out renotices changing the location or time. Have your office call to remind the court reporter, the interpreter or videographer, if any, and the opposing attorney of the scheduled meeting time and place. Also remind the witness about the deposition, especially if you have served the subpoena weeks before. Make sure the witness has all documents needed and, if requested, provide to the witness, beforehand, any documents you plan to bring and ask about. Try to accommodate the witness as much as possible.

I. PRE-MARK EXHIBITS

Try to reach an agreement with opposing counsel to have all exhibits consecutively marked throughout the case. Thus, Exhibit 8 as referenced in the first deposition will remain Exhibit 8 when referenced in the 15th deposition.

J. TAKE ALL NECESSARY DOCUMENTS

Finally, make sure you have what you need, including the notice of deposition, the witness fee, the documents you are going to ask the witness about, and anything else that comes to mind.

K. PREPARING YOUR CLIENT FOR DEPOSITION

1. IN GENERAL

The most important deposition in your case is not one you will take. Rather, it is one you will defend — namely, the deposition of your client. What the client says in deposition can either win or lose the case. Accordingly, one of the most important things you can do in litigation is to carefully and patiently prepare your client for his deposition. Absent this preparation, your client's deposition and his case have the potential of going very badly. Even though your client may appear calm over the aspect of being deposed, depositions are unnerving experiences and the client is likely apprehensive about it. The following preparation tips will help you ease the client's anxiety.

2. REVIEW DOCUMENTS

You need to locate and carefully review with your client all documents that are relevant to the case, especially those that your client prepared or signed. Also review with your client the

complaint, all written discovery, and the deposition transcripts of other witnesses in the case.

3. ESTABLISH GROUND RULES

In preparing your client for the deposition, make sure he understands the ground rules. Instruct him as follows:

· Tell the truth. Do not exaggerate and do not mislead.
· Carefully listen to each question. Make sure to answer the question that was asked and not the one you think was asked. Do not answer a question you do not understand. Ask that it be rephrased.
· Do not volunteer information. Simply answer the question. If the question calls for a yes or no answer, limit it to that. By volunteering information, you are only inviting more questions and possibly revealing information you would prefer not to disclose.
· Take your time. Pause when needed to formulate the answers to the questions. Do not blurt out answers without thinking them through first.
· Do not let the other attorney testify for you. The attorney deposing you is going to try to put words in your mouth. Do not let him.
· Do not let your guard down. The attorney deposing you will try to come across as your friend. Do not fall for it. He is only there for one reason — to get you to say something harmful about your case in order to strengthen his case.
· Take breaks. From time to time, ask for a break— go to the restroom, drink some water, and stretch your legs. Your deposition can last all day. Without breaks, you are likely to make a mistake.
· If you are asked about a document, ask to see it first, then read it carefully. Do not answer any questions about it until you have read it thoroughly and understood its contents.
· If you do not know the answer to a question, say "I don't know" rather than taking a guess. "I don't know" is a perfectly acceptable answer to a question. A deposition is not a memory game. You are going to be asked a lot of questions you do not know the answer to. If you do not know, say so. Never guess — you may guess wrong.
· Stick to your answers. The attorney may not be happy with the answer you give. He may ask the question again, perhaps several times, slightly rephrasing it each time, in hopes you will change your answer. Remain steadfast.
· Everything you say is recorded by the court reporter and becomes part of the transcript. Therefore, think before you speak. Errant comments will be recorded forever for all to see. Avoid using slang and never resort to profanity.
· The deposing lawyer may remain silent after you answer a question in hopes that you will feel like you have to say something more and continue testifying. Ignore the silence. Once you have answered the question, stop. Do not feel pressured to keep talking.

NOTE Take time to prepare your client. Although preparing your client for the deposition is time consuming, the more time you spend doing so, the more smoothly the deposition will go.

4. CONDUCT A PRACTICE RUN

Take a couple of hours or more as needed to get your client ready for the deposition by asking the client every conceivable question you expect him to be asked at the deposition. Carefully listen to the client's responses to those questions. You do not want your client to be surprised by any question at deposition, and you do not want to be surprised by any of his answers.

5. GIVE CLIENT BASIC INFORMATION

Do not overlook the obvious when preparing your client. Make sure your client knows where to go, when to go, how to get there, where to park, what to bring, what not to bring, what to wear, who will attend, what the court reporter will do, what a transcript is, what objections you will make, what they mean, and so on.

L. DEFENDING YOUR CLIENT DURING DEPOSITION

1. IN GENERAL

It is your job to defend your client's deposition, although your role in doing so is quite limited. The following explains what you should and should not do in this defense.

2. THINGS TO AVOID

You should not coach your client, argue with or interrupt opposing counsel, or make speeches.

3. OBJECTIONS

Any objections you make must be limited to the form of the question. Any other objections other than those based on an assertion of privilege must be preserved until the trial. If you believe a question is compound, lacks a foundation, is ambiguous, or has been asked and answered, or if there is something else bothersome about the form of the question, then you simply say, "Object to the form." You need not give the basis for your objection unless you are asked for it. For example, you do not need to say, "Objection, asked and answered." However, if asked, you must give the basis or run the risk of waiving the objection.

NOTE Never use your objection as a means of coaching your witness. Such speaking objections are simply inappropriate.

4. REVIEW ALL DOCUMENTS

Make sure your client sees the documents he is asked about. If your opposing counsel asks your client about a document (for example, about its content, its significance, or its wording), ask that your client be allowed to see the document. Your client should not be required to answer questions about a document without first seeing it.

5. MEET CLIENT'S NEEDS

Make sure your client's needs are met. Depositions can be a nerve-racking experience for a witness. They can also be very long. Your client may be embarrassed to ask for breaks, or for water or lunch. It is up to you to keep an eye on your client and be his spokesperson when it looks like he needs a break.

6. CLARIFY MISSTATEMENTS

If a witness misspeaks during the deposition, any attempt to correct him will likely be construed

as trying to coach him. However, rather than leaving the errors on the record, you can question your own client and clear up any misstatements.

7. PROVIDE INSTRUCTION

Let your client answer the questions, instructing him not to answer only when you need to preserve a privilege, enforce a limitation directed by the court, or prevent the client from being harassed or questioned in bad faith.

8. PROTECT CLIENT'S PRIVILEGES

You have the right to instruct your client not to answer a question if it invades a privilege. Some of the privileges that may come into play are the attorney-client privilege, accountant-client privilege, trade secret privilege, and spousal privilege. Before the deposition, identify all the privileges that apply to your case. A good source of applicable privileges is the Florida Evidence manual written by Professor Charles Ehrhardt. Pull the cases that apply to the appropriate privileges so that if you have to assert one or more of them during the deposition, you will have the supporting cases handy. If you do not assert the privileges during the deposition, they will be waived.

9. PROTECT CLIENT FROM HARASSMENT

If counsel is harassing your client, you may need to speak up and instruct your client not to answer the question. For example, if counsel asks the same question over and over in hopes that your client will change his mind, asks inappropriate and personal questions that have nothing to do with the case, screams or yells questions, or gestures in a menacing way, you may need to intervene. Be ever-vigilant and make sure your client is treated with the respect he deserves.

NOTE If opposing counsel refuses to behave, you may need to ask the judge to act as a referee. Have the number to the judge's chambers handy in case you need it, but call only as a last resort.

M. PREPARING YOUR EXPERT FOR DEPOSITION

1. IN GENERAL

Just because your witness is an expert does not guarantee that he will do well at his deposition. You need to ensure that your expert is prepared, even though the time spent may be expensive. By doing the following, you will have taken all necessary steps to ensure that the expert's deposition goes as planned.

2. PROVIDE AND REVIEW ALL DOCUMENTS

Give the expert everything needed to prepare his opinion, and review all of the relevant documents with the expert. Do not hide facts and documents in an attempt to elicit a favorable opinion. That tactic could be disastrous if your opponent presents to the expert a formerly unrevealed document or fact that could change the expert's opinion or result in an incomplete opinion. Discuss each fact and document, including medical records, tests, depositions, and handwritten notes, and determine how each influences the expert's opinion.

3. DISCUSS EXPERT'S OPINIONS

Meticulously work through each of the expert's opinions with him and find what the basis of each is. Discover if his opinions are based on sound scientific literature or tests. Obtain and discuss not only the writings relied on by the expert but all relevant literature on the issue. Ensure that the expert has reviewed everything. Obtain any additional documents or information the expert asks for. Encourage the expert to cite to favorable literature and to be prepared to distinguish the writings that do not agree with his opinion.

4. PRACTICE CROSS-EXAMINATION

Cross-examine the expert as if you were the deposing counsel, asking questions in an attempt to discredit his opinions. The expert should not be faced with any unexpected questions at deposition. Ask all questions that you expect deposing counsel to ask so that your expert is prepared to answer each and every one of them. If weak ground for an opinion is discovered, strengthen it, if possible, with additional documents or tests. If issues or facts need to be worked through, address them now, before the deposition.

5. ADDRESS CONCERNS

Find out if the expert has any particular concerns about the deposition and discuss them.

6. REVIEW CASE THEMES

Go through the case themes with the expert so that he is familiar with them and can work your themes and perspective into his answers.

7. INSTRUCT EXPERT

Instruct the expert to tell the truth at all times and not to contort his opinions to fit your case.

N. PREPARING TO TAKE THE EXPERT'S DEPOSITION

1. IN GENERAL

The most challenging deposition you can take is that of an expert. More than likely, as a lawyer, you are not trained in the expert's field and know little about the subject of his expertise. The expert will have studied for years, obtained advanced degrees, and have received specialized training in the field. It presents quite a challenge to "go toe-to-toe" with a board-certified neurologist or civil engineer. Only extensive preparation will ready you for the task.

Although no amount of preparation will make you as knowledgeable as the expert about his field of expertise, through preparation, you will be able to confront the expert's opinions, expose flaws in his analysis, and possibly get him to agree with your position in the case. Consider the following steps before deposing an expert.

2. INVESTIGATE THE EXPERT

a. Study Expert's Background

Review the expert's background to learn all you can about his education, training, experience, and area of expertise. Carefully review the material to see whether the expert is actually qualified to render an opinion. Also, search the Internet to see if the expert has a website. If so, information about his specialty and practice may be contained there. Additionally, the Internet may reveal magazine or newspaper articles concerning the individual.

Conduct a background search to determine if the expert is a convicted felon, has had a license revoked or suspended, or has other "skeletons" that would aid a challenge to his qualifications. Go through the expert's résumé and make sure the expert wrote the article he claimed to write or graduated from the university he claims to have a degree from.

b. Study Expert's Writings

Obtain and study previous writings by the expert. Painstakingly review the expert's curriculum vitae to discover articles he has published, then get copies of those writings that relate to the subject of your case. Again, search the Internet to see if the expert has posted articles on a website or if magazines or newspapers have published articles written by the expert.

c. Review Prior Testimony

Obtain and study previous testimony of the expert. For example, get any copies of the expert's prior depositions or transcripts of his trial testimony. Several services catalog expert depositions and sell copies for a fee. Also, contact other attorneys and ask them for expert transcripts. These depositions may serve as potential impeachment tools. A nationwide search via Westlaw may reveal state or federal cases in which the expert has testified. Possibly, you will find a case in which an appellate court concluded that the expert was not qualified to render an opinion.

d. Ask Other Lawyers And Professionals

Ask lawyers or professionals what they have heard about the expert — whether he is cooperative or argumentative in deposition, makes a good witness or a bad one, and what works and does not work with the expert at deposition. Find out whether the expert has certain biases, whether he regularly testifies for plaintiffs or defendants, and whether the expert has a history of working with your opponent.

3. LEARN THE AREA OF EXPERTISE

Learn everything you can about the expert's field. For example, if you are deposing a doctor, learn the medicine. If you are deposing an engineer, learn the mechanics. You cannot expect to take an effective deposition if you do not know the science behind the expert's opinions. Your own expert can help tremendously in this endeavor. See paragraph 5. below.

4. CONDUCT DISCOVERY BEFORE THE DEPOSITION

Learn the expert's opinions before taking the deposition by propounding expert interrogatories and requests for production, seeking the expert's opinions. Additionally, seek a copy of the expert's report and a copy of the documents on which he is relying. If the responses to your discovery requests come back saying "undetermined at this time," file a motion requesting that the court compel the disclosure of experts and their opinions before their depositions. Gather copies of all relevant documents on which the expert is relying, along with copies of all of the expert's source materials, including any studies or journal articles.

5. RECRUIT YOUR OWN EXPERT

To help you prepare for the deposition, you may want to obtain your own expert to review the other's report and tell you what its strengths and weaknesses are. Find out what questions to ask and how to ask them. Some of the best questions you can ask an expert in deposition may come from your own expert.

6. PREPARE TO CHALLENGE OPINIONS AND METHODS

Review relevant treatises, industry standards, and journal articles you would expect the expert to read. If the expert's opinions contradict those publications, be prepared to confront the expert with them. Learn everything you can about the expert's methodology, and explore ways of exploiting and undermining that methodology. If you can bring into question the expert's methodology, you may have a basis to move to strike the expert because his opinions lack an adequate and sound scientific basis.

NOTE In Florida, expert opinion based on a scientific technique is inadmissible unless the technique is generally accepted in the relevant scientific community. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), 34 A.L.R. 145. Federal standards in the area of novel scientific evidence are not the same as Florida standards. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

O. TAKING THE EXPERT'S DEPOSITION

1. MARK AND REVIEW ALL DOCUMENTS

After the expert is sworn in by the court reporter, go through the expert's file and identify and mark as an exhibit each document the expert will be relying on to form his opinion. (See XIX.I. at page 139.) Have the expert describe each document and explain its contents. Ask the expert why he reviewed each particular document and whether he is relying on it in his analysis or in forming his opinion. Also ask about other documents that were not provided to the expert by opposing counsel. Determine if the expert wanted to review any of the other documents and how they might have affected his analysis or opinion.

2. EXAMINE EXPERT'S QUALIFICATIONS

If you have any doubts about the expert's qualifications, confront him about them. If the expert is

a convicted felon, ask about the conviction. If the expert's license has ever been suspended, ask the expert when and why.

3. EXPLORE BIAS

Explore any bias the expert may have. For example, ask him about his ties to opposing counsel. Has he worked with or testified for counsel or counsel's client before? How many times? Has a large part of his income been paid by opposing counsel's firm? Does he work or testify predominantly for plaintiffs or defendants? Does he speak to lawyer groups? Has he written articles about his or other experts' roles in litigation? Try, through questioning, to establish that the expert is little more than a "hired gun." This information can then be used to discredit him before the jury.

4. DEFINE EXPERTISE NARROWLY

Limit the scope of the expert's opinion by forcing him to define his area of expertise as narrowly as possible. By narrowing the area of expertise, you can prevent him from testifying at trial on issues beyond his limited area of knowledge.

5. REVIEW CONFLICTING LITERATURE

Confront the expert with relevant literature that supports your case or undermines the expert's opinion (see XIX.N.6. above). Question the expert on whether he considers a particular writing to be authoritative on the subject, then read verbatim a specific sentence or paragraph that bolsters your case or damages your opponent's case or the expert's opinion. Ask the expert if he agrees with that sentence or paragraph. If he does, you have succeeded. If he does not, move on. If the expert continues to disagree with your authority, he may realize the weakness of his own analysis and alter his opinion. If he continues to disagree with most leading authorities on the issue, he may appear to be out of the mainstream and will likely lose credibility with a judge and jury.

6. EXPLORE ALL OPINIONS

Make sure you explore all of the expert's opinions and get them all on record. Ask him if he has any other opinions on the matter and inquire about each. By doing so, you will know the full scope of what he will be testifying to at trial, and you can prevent him from expressing a contradictory or new opinion later. If he tries to alter his opinion at trial, you can claim unfair surprise and possibly get the judge to exclude the new opinion.

Determine the basis of each of the expert's opinions. Find out exactly what tests or experiments were performed, what literature he is relying on, and what facts support his opinions. If he has no basis for his opinions or an inadequate basis, you may be able to get the opinions stricken. If the expert based his opinion on purported scientific literature or tests he or others performed, you may be able to challenge the expert on the ground that his opinions lack a reasonable scientific basis.

P. TAKING THE CORPORATE REPRESENTATIVE'S DEPOSITION

1. IN GENERAL

It takes a great deal of preparation to effectively depose a corporate representative. To get the best deposition possible, take the following steps.

2. OBTAIN CLIENT INPUT

Get the client's input on which corporate employee to depose, which corporate documents to ask for, and what questions to ask. This obviously needs to be done before sending the notice of deposition and request to produce.

3. OBTAIN RECORDS

Get all of the records you will need in advance of the deposition. That means you will need to send out the request for production of corporate records early in the case so that you will have time to thoroughly review the records before the deposition. Do not find yourself in the position of looking at corporate records for the first time when or after deposing the representative.

4. SEEK SPECIFIC DEPONENT

When drafting the notice of deposition, seek to depose the person with the greatest knowledge of the issues to be addressed. To do this, you need to be specific about the areas to be addressed at the deposition, such as particular documents, protocols, or issues. Ensure that the person being deposed can address all questions to be asked and can bind the corporation with his answers.

5. RESEARCH DEPONENT

Once you know whom you will be deposing, conduct a background search of the deponent. You can perform an online search by paying a nominal amount for information, and you can additionally "Google" the deponent's name or otherwise conduct an Internet search. (See the Note at V.B.2. at page 60 for further information regarding Google searches.) You may also want to perform a name search in Westlaw for published opinions involving the deponent. Do the same for the corporation. If the corporation has a website, thoroughly review it, along with any articles you can find that involve the company.

6. PREPARE DEPOSITION NOTEBOOK

Prepare a deposition notebook that includes:
· the notice of deposition;
· the opposing party's answers to interrogatories;
· the opposing party's complaint, answer, or other pleading;
· the background research on the deponent and corporation, including any materials you found on either; and
· three copies of any document you intend to show to the deponent (one copy for you, one for the deponent, and one for opposing counsel).
The notebook materials should be organized in chronological order unless some other method is

better suited for the materials.

7. CONFIRM DEPONENT'S KNOWLEDGE

Begin the deposition by reviewing the notice of deposition with the deponent, confirming that he is the person with the most knowledge regard-ing the areas designated in the notice and is the one who knows the most about any documents or protocols referenced in the notice of deposition. Because the corporation has offered the deponent as the one with the most knowledge about the subject areas outlined in your notice of deposition, you must find out exactly what this person really knows. If it appears that the deponent knows nothing about the areas referenced in the notice, the company, bound by its representative's testimony, will be deemed to know nothing as well. This apparent lack of knowledge may work to your advantage.

8. ASK TOUGH QUESTIONS

Corporate representative depositions are often contentious as there is much at stake (*i.e.*, what the corporate representative says will be binding on the company). The corporate deponent is not likely to volunteer information. Therefore, you must ask questions the deponent does not want to answer in order to discover relevant but hidden facts.

By prying here and probing there, you may force the deponent to reveal something that will hurt the company and help your case tremendously. In doing so, however, you can expect objections from opposing counsel. Be prepared for these by reviewing and having on hand the DISCOVERY HANDBOOK (referenced at VI.B.3. at page 65).

NOTE If necessary, remind counsel that speaking objections are not allowed and that other interruptive actions and behavior (such as numerous breaks to coach the witness, or gestures, nods, or facial expressions) are inappropriate.

9. SEEK OTHER POTENTIAL WITNESSES

When deposing the representative, ask about the corporate structure — from the bottom up. Find out who works for the company, their titles, and their responsibilities. Find out about former employees who held these positions and when and why they left the corporation. In this way, you may discover a witness that your opponent preferred you not know about.

Likewise, review with the deponent company records, and have the deponent identify them, name the author or creator of the document, and describe their content and significance. Find out whom the document was sent to or reviewed by, who knew about it, whether it was discussed with anyone, what other documents might exist, and where (and by whom) all such documents are maintained. This exercise can reveal a great deal of information.

Q. TAKING THE TREATING PHYSICIAN'S DEPOSITION

1. GOAL OF DEPOSITION

The goal in deposing a treating physician is to obtain the doctor's admission that:

· the plaintiff is not really injured or, if he is, his injuries are not as serious as claimed;
· the injuries existed before your client's alleged negligence occurred and thus were not caused by it; or
· the scope and cost of future medical treatment is not as extensive as the plaintiff claims.

The plaintiff's doctor will likely be loyal to the patient and not make this an easy task. However, preparation can better enable you to successfully depose the doctor despite this loyalty and the large medical-knowledge gap between the two of you.

To properly prepare for deposition, you must learn the facts surrounding the plaintiff's accident, the plaintiff's medical and treatment history, the medicine behind that history and treatment, and certain things about the treating physician. However, before preparing for the doctor's deposition, you must first decide whether he should be deposed in the first place.

2. WHEN TO DEPOSE THE TREATING PHYSICIAN

a. In General

When you depose the plaintiff's treating physician, you preserve the doctor's testimony for trial. If the doctor is on vacation, at a medical conference, in surgery, or otherwise not available to testify at trial, plaintiff's counsel could read this deposition transcript into the record. Absent the transcript or the doctor, the plaintiff may not have sufficient evidence to prove his damages. Therefore, when deciding whether to depose a doctor, you must weigh the potential benefit of avoiding any surprises against the risk of perpetuating the doctor's testimony for trial.

The doctor's medical records may assist in this determination. Subpoena and review the doctor's records. If they reflect one or more of the following, you should seriously consider deposing him.

b. Doctor's Opinions Support Your Case

In his records, the doctor may opine that the plaintiff's injuries are minor, suggesting that the patient is malingering. If the injuries are serious, the doctor may opine that they are pre-existing and not caused by the plaintiff's accident.

c. Plaintiff's Statements Undermine His Case

Study the medical records to see whether the plaintiff made any recorded statements. The plaintiff may admit to prior accidents, pre-existing injuries, or responsibility for the accident and his injuries. In an automobile accident case, see if there is any reference to the plaintiff not wearing a seatbelt.

d. Doctor's Handwritten Notes Are Illegible

Some doctors' charts are filled with pages of inscrutable handwritten notes, intelligible only to the doctor. When you cannot decipher a doctor's treatment, diagnosis, or prognosis, it may be better to find them out at deposition rather than be surprised at trial.

e. Doctor Did Not Know Of Plaintiff's Pre-Existing Injuries

When a plaintiff tells his doctor that the defendant caused his injuries, the doctor will tend to

believe him because he has no evidence to the contrary. The doctor may be unaware of pre-existing injuries or other accidents. If the doctor did not know about records from other physicians showing pre-existing conditions and long-standing symptoms, confront the doctor with these records to see whether they change his opinion.

3. OBTAIN BACKGROUND ON PLAINTIFF'S INJURIES

a. In General

If the doctor's records support going forward with his deposition, you then must learn everything you can about the plaintiff's accident and his medical history and treatment. To do this, obtain all of the plaintiff's medical records.

b. Discovery, Subpoenas, And Authorizations

You can discover the identity of most of the plaintiff's treating physicians through standard personal injury interrogatories and the plaintiff's deposition. Invariably, however, the plaintiff will forget or hide the identity of one or more of these treaters. You can discover their identity by obtaining, via a subpoena, the plaintiff's health insurance and pharmacy records. HMO and PPO records will reveal a list of all doctors who have ever billed the insurer for medical services. A subpoena of pharmacy records will reveal a list of the doctors who have prescribed medications for the plaintiff.

In addition to these records, have the plaintiff execute authorizations to obtain his social security, workers' compensation, unemployment compensation, and employment records. If he refuses, you can move to compel. These records may reflect the names of additional providers who gave care for a work-related accident.

Once you have discovered the identity of others who have treated the plaintiff, subpoena their records as well.

NOTE Often, in response to the subpoena, you will receive only a fraction of a doctor's file. This may be apparent if the file does not contain a completed patient questionnaire, basic insurance information, the doctor's notes including opinions regarding diagnosis and prognosis, and copies of films if any were ordered. Have your legal assistant follow up with the doctor's assistant to ensure that you received the complete file. Otherwise, you may find yourself sifting through voluminous records for the first time at deposition. Discussions with the doctor's office must be limited to requesting documents — the legal assistant may not engage in conversations regarding the plaintiff's treatment.

Once you have sent out subpoenas, create a tickler system to ensure that the doctors are responding to them and are doing so fully. Also, make sure that all of the plaintiff's treaters, no matter how unrelated they may appear to your case, have been subpoenaed. Subpoena records from the plaintiff's primary care physicians, dentists, optometrists, and mental health providers. A plaintiff may admit being negligent to a psychiatrist or may have extraordinarily poor eyesight detected by his optometrist, which contributed to the accident.

4. CREATE A MEDICAL CHRONOLOGY

As doctors respond to your subpoenas, create a medical chronology. Due to time or cost restraints, it may be best to have a trained legal assistant prepare it — preferably one who has a medical background. Include in this chronology any references to:

· other accidents or injuries;
· pre-existing conditions;
· statements by the plaintiff regarding the cause of the accident;
· statements by the plaintiff that contradict his prior statements made in answers to interrogatories or at deposition;
· the plaintiff's admission to drug or alcohol use;
· impairment ratings and the basis for those ratings;
· diagnosis and prognosis; and
· job restrictions or limitations placed on the type or level of activities the plaintiff can perform.

Once you have obtained and organized all of the plaintiff's medical records, you need to interpret them. To do so, you have to learn something about medical treatment.

5. LEARN THE MEDICINE

a. Review Books And Articles

In order for the medical records and chronology to be useful, you have to learn the medicine behind them. Here are the tools you will need to do that:

· a color-illustrated medical dictionary;
· a medical abbreviations dictionary;
· the Merck Manual (a plain-English treatise covering all of the body systems and the diseases and injuries that affect them);
· a Physician's Desk Reference (PDR) (which describes various drugs, what they do, and their potential side effects); and
· the DSM-IV (which provides the diagnosis and symptoms of numerous mental health disorders and is an indispensable tool when your case involves a claim for a psychological injury).

These materials will give you a basic understanding of the medical issues involved in your case. Additionally, you will find a wealth of information on the Internet.

The following are specific medical websites that may prove helpful:

· www.medscape.com — an exhaustive medical website geared toward the medical professional. It contains numerous medical journal articles that may be searched and printed for free.
· www.webmd.com — a layman's guide to medicine that reduces medical concepts to plain English.
· www.medline.com — a fee-based website that provides access to countless medical journals.

b. Learn About Neck And Back Injuries

Many personal injury cases, particularly automobile and slip-and-fall cases, involve injuries to the neck and back. Therefore, you should take the time to learn about the anatomy and physiology of the muscles, cartilage, and nerves in the neck and back.

Trauma caused by an accident is only one of many causes of back pain. Obesity, lack of exercise,

smoking, heavy exercise, and heavy lifting may all cause back pain. Learn about degenerative disc disease, and review the x-rays and MRI films for signs of desiccation, osteophytes, disc bulges, and multi-level disc narrowing.

NOTE When reviewing films, remember that MRIs are best for looking at soft tissue such as intervertebral discs, whereas x-rays are best for looking at bones.

c. Rely On Your Own Expert

In addition to learning about the plaintiff's injuries from texts and the Internet, learn what you can from your own expert. You likely have retained a doctor to review the plaintiff's medical records and conduct an independent medical examination. (See XV., beginning on page 120, and XIX.N.5. at page 146.) Use this expert as a resource in preparing for the depositions of the plaintiff's treaters.

6. APPLY WHAT YOU LEARN TO PLAINTIFF'S CASE

Once you have researched all of the potential causes for the plaintiff's condition, try to determine if any of those causes are reflected in the medical records. As you learn more about the plaintiff's condition, see whether the medical literature suggests that it may be pre-existing or caused by something other than the defendant's alleged negligence.

Your goal is to try to get the doctor to admit that other causes exist for the injuries or pain. For example, if the medical files reflect that the plaintiff is overweight, a smoker, or an athlete, you should get the doctor to state at the deposition that obesity, smoking, heavy exercise, and heavy lifting are all contributing factors to back pain, and that he cannot exclude their role in the plaintiff's complaints of pain. Or you can ask the plaintiff (during his deposition) to pinpoint as close as possible the location of his pain, then at the doctor's deposition, ask whether there are any objective signs of nerve impingement to justify the plaintiff's location-specific complaints. Complaints of pain not supported by objective signs on the MRI films may suggest exaggeration and malingering.

7. GATHER IMPEACHING SCIENCE OR INFORMATION

Once you have distilled the doctor's opinions about the cause and severity of the plaintiff's injuries, review the medical literature to find articles contradicting those opinions. The doctor's own journal articles may contradict the opinions he holds in your case. Also, articles by other physicians may contradict some of the doctor's premises or conclusions. If the doctor acknowledges that either the article or the author is authoritative, the material can be used to impeach the doctor at trial. (See XIX.N.6 at page 146.)

8. LEARN ABOUT PLAINTIFF'S DOCTOR

a. In General

In addition to learning all you can about the plaintiff's medical history, you must learn all you can about the plaintiff's doctor. When you subpoena the doctor's records, request that he produce a copy of his curriculum vitae, publications, and all of his advertising materials, including the brochures he leaves in his waiting room.

b. Review Curriculum Vitae And Background

Painstakingly study the doctor's curriculum vitae. Take note whether the doctor left the country to attend medical school, where he interned, and whether he is board-certified. See which articles he has published and obtain copies of the ones that relate to the plaintiff's conditions and treatment. In addition to this review, perform a background search of the doctor. The Florida Department of Health provides information about the doctor's license, training, and history of medical malpractice lawsuits. (See www.doh.state.fl.us.) If the doctor or his practice group has a website, go to it and find out about the doctor's specialty and practice. Finally, conduct a general Internet search on the doctor. You might even find out that the doctor is being investigated for Medicare fraud or something equally damaging to his credentials.

c. Obtain Prior Transcripts

Obtain copies of transcripts from prior depositions and trial testimony given by the doctor. Local attorneys may be willing to provide copies they have (and you, of course, should reciprocate when asked to do the same). Some voluntary bar associations maintain expert deposition databases that they share with their members. Look for depositions in which the doctor has testified about an injury or condition similar to the one involved in your case. These depositions serve as potential impeachment tools whereby you can confront the doctor with his own prior testimony regarding the cause and severity of a given injury.

9. PREPARE A DEPOSITION OUTLINE

a. In General

After you have gathered information regarding the plaintiff's medical history and the doctor's qualifications, prepare an outline for the deposition. The following are areas of inquiry that you should consider including.

b. Doctor's Bias

i. In General

You can attack a doctor's credibility by establishing that he is biased toward the plaintiff. There are several ways to establish the doctor's bias. The following are among them.

ii. Doctor's Showing Of Favoritism

You can suggest that the doctor has a reason to show favoritism to plaintiff's counsel by revealing that plaintiff's counsel refers patients to the doctor. If this is the case, establish the number of referrals the doctor gets and the amount of income generated by these referrals. Explore whether the doctor is friends with plaintiff's counsel and whether they engage in social activities such as golf or travel. If the plaintiff's lawyer has previously retained the doctor as an expert, find out the number of cases the doctor has been retained for and the types of cases the attorney uses the doctor in. Explore whether the plaintiff's attorney has ever represented the doctor.

iii. Doctor Is A Plaintiff's Doctor Or Expert

Another way to establish bias is to show that the doctor is a "plaintiff's doctor." Determine whether the doctor runs an "injury clinic," or directs his television or radio or yellow-page advertisements specifically to people injured in accidents. Find out if other plaintiffs' attorneys refer cases to him and, if so, discover which attorneys and how many cases. You may find that the doctor is a "plaintiff's expert" (see paragraph 3. below). See how often plaintiffs' attorneys as opposed to defendant's attorneys have retained the doctor as an expert, or how often he has testified on behalf of plaintiffs as opposed to defendants.

iv. Doctor's Opinion Was Bought

Attempt to portray the doctor as a "hired gun" by exposing the amount of money the doctor charges for being deposed, for reviewing records, or for attending trial.

v. Doctor Is Paid From Damages Award

You may be able to establish that the doctor's bills will not be paid until the plaintiff recovers a damages award in the case. Check to see if the plaintiff has already paid the doctor for his services or if there are bills outstanding. See if the doctor had the patient sign a letter of protection, whereby the plaintiff must pay the doctor from any money he recovers. If you can establish that the doctor's recovery is tied to the plaintiff's recovery, you can suggest to the jury that the doctor has an incentive to color his opinions to ensure that his bills get paid.

c. Doctor's Experience As An Expert

Use the deposition as an opportunity to find out everything you can about the doctor's history as an expert. How often has he testified as an expert? What cases? Find out the names of the plaintiff, plaintiff's counsel, defense counsel, style of the case, type of injury involved, whether the doctor was deposed, whether he testified at trial, how much he charged for his services, and how the case was resolved. Some doctors keep copies of their deposition and trial testimony. Ask for a copy of these.

Determine whether you are dealing with a defense or plaintiff's expert. What percentage of his time is he retained by plaintiffs? How much by defendants? Has this percentage changed in the last 10 years? When was the last time he testified at trial for the defendant? How often has the plaintiff's attorney retained him? What percentage of his salary is derived from his work as an expert? The answers to these questions will help you determine whether you are dealing with a genuine doctor or an expert for hire.

Also ask whether the doctor's testimony has ever been disqualified at trial. A judge may have ruled that an orthopedist, though having relied on MRI films in rendering care, may not be qualified to interpret an MRI film for a jury. If a doctor was previously disqualified from testifying, the judge in your case may be predisposed to disqualify him again.

d. Doctor's Qualifications

Consider waiting until the end of the deposition to ask the doctor about his qualifications. That

way, if the doctor's foregoing testimony strongly supported the plaintiff's claim, you can altogether avoid qualifying the doctor as an expert at the deposition. Then, if plaintiff's counsel forgets or fails to qualify the doctor, he will be precluded from using the doctor's deposition at trial (see XIX.Q.2.a. at page 150).

NOTE Remember that an expert cannot testify at trial unless the expert is qualified to express an opinion. If his qualifications were not addressed at deposition and the doctor is unavailable to be qualified from the witness chair at trial, his opinions will be inadmissible at trial.

Conversely, if the doctor's testimony supports your client's position, before you conclude the deposition, make sure to go over the doctor's qualifications and do so in detail so that it is all recorded and available to qualify him as an expert.

Even if you do not intend to qualify the doctor as an expert, there are items on the doctor's curriculum vitae or in his background that you may wish to exploit. For example, you may find that the doctor:

· attended medical school outside the country. College students who have a poor academic record often have to attend medical school outside of the United States.
· is not board-certified. If the doctor is not board-certified, it may indicate that he did not pass the written and oral certification tests. Find out if he failed both parts of the exam and how many times he has taken and failed it.
· has "skeletons" in his closet. Has the doctor's license ever been suspended, revoked, or curtailed in any way? How about his hospital privileges? Has he ever been sued for medical malpractice? Has the doctor ever been the subject of an investigation by the Agency for Health Care Administration, Medicaid, or Medicare? Has he ever been the subject of a disciplinary proceeding by the board of medicine?
· is not a scholar. Confirm that the doctor has not written any journal articles, has not spoken at conferences, and does not hold any teaching positions.

By exposing the doctor's shortcomings, you may convince the judge to disqualify him as an expert. If not, you will at least expose these shortcomings to the jury, and can then contrast them with the superior qualifications of your own expert.

e. Authentication Of Medical Records

If you intend to use the doctor's records at trial, you must authenticate them at deposition. You must establish that:

· the records were made at or near the time of the event recorded;
· the records were kept in the regular course of a regularly conducted business activity;
· it was the regular practice of the business to keep the records; and
· the information in the records was supplied by a person acting within the course of a regularly conducted business activity.

Of course, if you do not want the records used at trial, do not authenticate them. As trial approaches, many attorneys will simply agree to the authenticity of records without agreeing to their admissibility. If you do authenticate the records, remember to attach them as an exhibit to the deposition.

f. Admissibility Of Medical Records

Under *F.S.* 90.803(6), medical records are admissible at trial if you lay the foundation outlined above. Entries in the records indicating a patient's vital signs, symptoms, behavior, laboratory test results, and physical examination findings are admissible. Also, the opinions and diagnoses contained in those records are admissible if the doctor is qualified as an expert to render such opinions.

Note that not everything contained in the medical records becomes admissible under *F.S.* 90.803(6). For example, if the doctor records in the medical records a statement by the plaintiff describing how he was injured, this statement will not be admissible under *F.S.* 90.803(6). It is, however, admissible under *F.S.* 90.803(18) as a statement made by a party-opponent. Therefore, at the doctor's deposition, ask him "Did the plaintiff tell you he was not paying attention when he fell?" If the doctor remembers the statement, it will be admitted through *F.S.* 90.803(18). If the doctor does not recall hearing the statement but recalls making the report, the report may be admitted as a recorded recollection under *F.S.* 90.803(5). If the doctor cannot remember the statement, have him admit that he would not have written it down unless the plaintiff said it.

g. Patient History And Admissions

i. In General

The patient's medical history is significant for both what it contains and what it does not contain. The plaintiff may have admitted a prior car accident or a history of back problems. Conversely, the plaintiff's current complaints of back pain may be unsupported by medical records. For example, the records may be silent when it comes to any references to back pain or discomfort. Therefore, you will want to look carefully at the records and consider emphasizing during the deposition not only what the plaintiff said, but what he did not say. While doing so, keep the following tips in mind.

ii. Look For Omissions From Record

Confirm with the doctor that he recorded a thorough patient history including all of the plaintiff's complaints. Confirm that the doctor does not make note of "negatives" — that is, if a patient does not complain of back pain, the doctor does not write down "patient does not complain of back pain." Have the doctor testify that he simply does not put anything down on his notes if the patient does not mention it. Having established this, review with the doctor all of the complaints that the patient did not make, thereby establishing that the plaintiff never mentioned it.

iii. Review Plaintiff's Patient Questionnaire

Typically, patients fill out, date, and sign patient questionnaires when they first see a doctor. The questionnaire has an exhaustive list of questions about the patient's history. On a questionnaire, a patient may admit prior accidents, pre-existing health conditions, and even drug and alcohol use. Also, questionnaires ask the patient the reason for his visit. Some questionnaires make it very easy for the patient to inform the doctor about his complaints by providing a list of symptoms the

patient can check off. If the plaintiff did not mark off the boxes labeled "headaches" and "dizziness" on the form, he likely did not suffer these symptoms when he went to see the doctor.

iv. Review Plaintiff's Accident Description

Review the plaintiff's description of the accident to see if the plaintiff admits, for instance, not wearing a seatbelt, not paying attention, or running the red light. You may find that what the plaintiff told his doctor contradicts what he said at deposition.

v. Note Subjectivity Of Pain

Have the doctor admit that pain is subjective and that it cannot be measured. The doctor cannot verify the plaintiff's complaints of pain and must rely on the patient's truthfulness. The plaintiff could be exaggerating about his level of pain and the doctor would never know it.

h. Examination And Treatment

Ask the doctor how he examined and treated the plaintiff. Determine the following:

· Did the doctor perform a complete examination? Although a patient sees a doctor for a specific complaint, most doctors will nonetheless perform a full evaluation. The examination may reveal that there is little wrong with the plaintiff other than the specific injuries or complaints related to the fall or car accident. If this is so, emphasize what the doctor found normal with the plaintiff. Then, if the plaintiff attempts to exaggerate his symptoms at trial, you can confront him with the doctor's findings.
· Did the doctor test for malingering? If he tested the plaintiff for malingering, what tests did he perform and what were the results? If not, ask what tests can be used to evaluate malingering, how these tests are performed, and how they measure malingering.
· What tests did the doctor order and what medications did he prescribe? Review what diagnostic tests the doctor ordered. Also ask what drugs the doctor prescribed to the plaintiff, the reason for the medicine, and the potential side effects.
· Did the doctor's treatment alleviate the plaintiff's pain? If so, emphasize that the doctor's treatment alleviated the plaintiff's symptoms and improved his conditions.

i. Diagnosis And Prognosis

Ask the doctor about the following regarding the patient's diagnosis:

· The basis for his diagnosis. For example, why does the doctor conclude that the patient has suffered a herniated disc? Get the doctor to state the facts that support his diagnosis. If the doctor is relying on an MRI film, review it with the doctor.
· The cause of the plaintiff's injuries. Find out what the doctor thinks caused the plaintiff's injuries. Confront the doctor with other medical records that show pre-existing injuries and conditions. If he believes that the fall rather than a prior car accident caused the plaintiff's injuries, have him explain the relation between the two. Can he say within a reasonable degree of medical probability that the one factor caused the injury? By using prior medical records showing pre-existing injuries, you may be able to change the doctor's mind regarding the origin of the plaintiff's complaints.

· In addition to the diagnosis, ask the doctor about the plaintiff's prognosis. Is his condition likely to improve or worsen? Is it likely that he will have a full recovery? If not, what residual impairment will he have? Ask the doctor about the plaintiff's maximum medical improvement and impairment rating. Has the plaintiff reached maximum medical improvement (MMI)? If not, how much more will the plaintiff's condition improve? If the plaintiff will improve completely, what impairment rating did the doctor ascribe and how did he calculate the impairment rating? Did the doctor properly calculate the impairment ratings pursuant to the guidelines?

NOTE Sometimes doctors misuse the guidelines and ascribe a higher impairment rating than the plaintiff deserves.

j. Need For Future Medical Care

Inquire about the plaintiff's need for future medical care and the cost of that care. Will he need future surgery? What is the likelihood that he will? Will he need future physical therapy? Medications? Other treatment?

NOTE Sometimes, plaintiff's attorneys hire vocational rehabilitation counselors to render opinions regarding the plaintiff's future medical treatment, even though these counselors are not doctors. Some counselors are notorious for exaggerating the need for future medical care. By asking the plaintiff's doctor the appropriate scope of future medical care, you can move to strike the rehabilitation counselor's opinions at trial if those opinions exceed and are not based on the doctor's opinions.

k. Physical Limitations

Determine whether the doctor has placed any limitations on the plaintiff's activities. Can the plaintiff work? If work restrictions are in order, what are they? Can he bend over? Reach up? Drive? Run? Walk? Do household chores? When finding out what the plaintiff can and cannot do, be as specific as possible in terms of type of activity and length of time participating in the activity. The plaintiff will lose credibility at trial if he claims he cannot perform an activity that his doctor says he can.

l. Use Of Authoritative Treatises

Ask the doctor which treatises and journal articles he considers authoritative. If he hesitates in citing any, refer him to the journals and texts behind his desk. Obtain a copy of any article or text the doctor agrees is authoritative. Confront him with the journal articles you found while preparing for his deposition and ask him to admit that they are authoritative. At trial, you will be allowed to cross-examine the doctor with any treatise or article he admitted was authoritative.

10. Conclude The Deposition

Review your outline and make sure you have covered all the areas you wanted to cover. If the doctor provided favorable opinions, qualify him and authenticate his records. If not, neither qualify him nor authenticate his records.

XX. RESPONSES TO DISCOVERY REQUESTS

A. CLIENT'S RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION

1. IN GENERAL

Responding to discovery takes time and thought. You must ensure that responses are thorough and complete while protecting the legitimate interests of your client. Responses sometimes require numerous drafts and repeated discussions with the client to get them just right. With that in mind, start working on the responses as soon as possible to ensure that you serve them in a timely manner. Here is a step-by-step approach to responding to these discovery requests.

2. FILTER OUT OBJECTIONABLE REQUESTS

You must study the discovery requests and make an initial determination as to which requests should be answered and which should be objected to. This should be done before you send the requests to your client. Some requests will be objectionable on their face — for others you may need to do some research. Weeding out the objectionable requests may save your client hours of time he would otherwise have spent tracking down information, only to find out later that you intend to object to the request because it is overly broad and burdensome.

NOTE Even though you intend to object to a request, if there is any doubt as to whether your objection will prevail, you might advise the client to start gathering the requested information or documents. That way, if the court orders compliance with the request and gives your client only a short time to respond, the client will not have to rush to avoid violating a court order.

3. PROMPTLY DELIVER REQUESTS TO CLIENT

Get the written discovery to your client as soon as possible. Interrogatories and requests to produce can be long and tedious in that they often seek information and documents that can take a lot of time to amass and analyze. Therefore, once you have initially reviewed the interrogatories and requests for production and marked the objectionable ones for your client, you need to promptly deliver them to the client. Ideally, your initial review and delivery to the client should be done the day you receive the discovery requests. Send them by fax or email, if possible, and include an explanation of what they are, along with a notation regarding the ones you have marked.

4. REVIEW REQUESTS WITH CLIENT

After your client has had a chance to read through them, review each question or request with your client. Find out what information and docu-ments the client has and how difficult it will be to gather everything needed. Make the client understand the importance of getting everything requested, and advise that failure to do so may result in sanctions from the court.

5. PREPARE A PRIVILEGE LOG

If you decide that a requested document is subject to a privilege, such as the attorney

work-product privilege or the attorney-client privilege, you need to prepare a privilege log to put the other side on notice that you will not be turning over the subject document. If you fail to advise opposing counsel of the privileged material, you run the risk of waiving the privilege and being compelled by court order to turn the material over.

6. STATE OBJECTIONS

If you choose to object to a discovery request, state your objection clearly, simply, and directly. Do not compose a laundry list of boilerplate objections or make general objections that apply to all of the discovery requests. If you claim that all of the interrogatories are too broad or that all of the requests for documents are too burdensome, the judge may not believe that any of them are, and may overrule all of your objections. Instead of broadly objecting, tailor each objection to the request to which it is directed and ensure that you have a basis for each.

Do not object simply because you feel that a request is inappropriate — know that it is. Research the rules of discovery and the cases interpreting those rules and see what law you can find that supports your instinct to object. Then, file your research where you can find it if needed when responding to a motion to compel.

7. REVIEW FINAL RESPONSES WITH CLIENT

Carefully discuss the requests with your client — both those that were answered and those that were objected to, and recheck all of the documents you intend to turn over and those you intend to withhold.

Go over the responses one by one, ensuring that the admissions being made, facts being disclosed, and documents being delivered are the ones your client is aware of and willing to share. You do not want to discover after-the-fact that you have disclosed something you should not have.

NOTE Make sure your client understands that whoever gathered the information, prepared the responses, or signs the interrogatories, and whoever is listed in the responses as having knowledge of materials or information produced, is likely to be deposed by opposing counsel. Advise your client before serving the responses so that a notice of deposition for him or someone listed in the responses will not come as a surprise.

B. OPPONENT'S OBJECTIONS TO YOUR DISCOVERY REQUESTS

1. IN GENERAL

Occasionally, you will receive a response to your interrogatories or requests for production that you find to be woefully inadequate. The responses may contain numerous objections, or the few answers actually given may not provide the information you asked for.

NOTE If opposing counsel vigorously objects to a request for production and the document or information sought appears to be perfectly within your right to request, you may have unearthed something very important that is worth pursing despite your opponent's objections.

If the opponent is not responsive to your discovery requests, take the following steps.

2. REVIEW YOUR REQUESTS

Take a close look at your requests. If your requests are overly broad, they will result in objections. Make sure you really need the information or documents requested and that you are entitled to them. Be willing to make concessions if appropriate. Usually, the other side will reciprocate with his own concessions.

3. OBTAIN LEGAL SUPPORT

If you want to press forward on a request or interrogatory, research whether there is a case that supports your entitlement to the requested material.

If your request is a standard or form one, you may find support for it in the Florida or federal rules of procedure or in a well-respected practice book. If not, you may nonetheless be able to find a journal or bar association article supporting your position.

If you cannot find a case or a form book that supports your request, explain in common-sense terms why you should get the information or documents you are requesting. For example, it could be that what you are seeking is directly relevant to one of the elements of the cause of action, or is inextricably intertwined with one of the affirmative defenses.

4. SEEK A RESOLUTION

Try to resolve opposing counsel's objections over the phone. Once you have your research or well-articulated support for your request, call opposing counsel and explain your position to him. If it is backed by case law and common sense, he may drop his objections. If he does not, call again and try to convince him that you should get what you asked for. Follow this call with a letter explaining your position and providing any support, whether it be case law or otherwise.

If opposing counsel still does not drop his objection, you may file a motion to compel and represent to the judge that you tried unsuccessfully to work the matter out with your opponent.

5. MOVE TO COMPEL

File a motion to compel, if necessary. Motions seeking court intervention in discovery matters should be used only as a last resort. You should seek this relief only after making an extra effort to bring opposing counsel around to your point of view.

C. RESPONDING TO DISSATISFIED OPPONENT

1. IN GENERAL

Occasionally, opposing counsel may contend that certain of your client's discovery responses are insufficient or incomplete, or that your objections are unfounded. The following are suggestions on how to work with opposing counsel if he is dissatisfied with your discovery responses.

2. DETERMINE MERIT OF REQUEST

Evaluate whether your opponent deserves more. Research the matter to obtain guidance regarding the appropriate scope of written discovery. You may find applicable cases supporting his request as entirely appropriate or cases holding that he is not entitled to those documents.

3. WEIGH COST OF BATTLE

Even if you find that your opponent is not entitled to the requested documents (or at least you do not believe he is), decide whether it is worth disputing. Consider whether your client will want to invest his money and your time fighting over the issue, or whether it would be better to build good will with opposing counsel by conceding it.

4. REASON WITH OPPONENT

If it is in the client's best interest to continue to oppose the discovery request, call opposing counsel and explain your position. After speaking with you and hearing the support for your position, he may appreciate that he really does not deserve the information or documents he is seeking after all. Alternatively, he may convince you that he does deserve them. Either way, a call may benefit both parties if court intervention on the issue is thereby avoided.

5. DOCUMENT YOUR POSITION

If need be, reduce your views to writing. If an informal telephone conversation with opposing counsel does not resolve your differences, consider writing a letter explaining your position, citing any cases or other precedent supporting that position, and detailing the efforts you made to resolve the issues without a hearing. This way, if your opponent files a motion to compel and seeks fees for his motion, you will have a letter you can show the judge that describes your efforts to resolve the matter. If the judge grants the motion to compel, he may nonetheless consider your letter and, based thereon, may deny opposing counsel's request for attorneys' fees related to the motion.

6. RESPOND TO MOTION TO COMPEL

When served with a motion to compel, always file a written response. Even if the motion does nothing more than request a hearing, prepare a written response detailing your ground for objecting to the discovery requests and your support for your position, be it case law, rules, or common sense. Explain to the judge why you have the right not to turn over the information or documents the other side is seeking.

XXI. DRAFTING AND PRESENTING MOTIONS

A. IN STATE COURT

1. JUSTIFY THE FILING

Before you draft your motion, ensure that it is the proper course of action. You must pick your fights wisely. Is the law on your side? What are the odds the judge will grant the motion? Does the motion really serve the client's interests? In order to develop a successful record at arguing

motions, the novice litigator must know which battles to fight and which to walk away from.
To put yourself in the best position possible, learn everything you can about opposing counsel (see section VI., beginning on page 63). Then, before drafting a motion, contact your opponent and try to work the issues out. The time and expense of the motion may very well be saved by agreement but, if not, you can now include in the motion a statement that it is being brought before the court only after failing, despite diligent effort, to reach agreement with opposing counsel.

2. DRAFT THE MOTION

a. In General

Imagine you have only 30 seconds to convince someone of your position. What would you say? This is the proper perspective to adopt when drafting a motion for state court. You need to be able to convince the judge in only one or two pages that your position is the right one. This means that you must get the court's attention immediately. Any remaining time should be spent justifying your point.

It is helpful to put yourself in the shoes of the judge who will be reading the motion and to anticipate and address opposing counsel's likely arguments against the motion. Deliver the essentials — what your position is, why the judge should agree with it, and the precise relief that should be granted. This will increase the likelihood of success on the motion. The following explains how to do that.

b. Introduce The Issue

Start with a strong introduction that makes your case. In a sentence or two, tell the court why you are seeking relief and why your position is the right one. Get to the point rather than making the court guess why you filed your motion.

c. Provide Authority And Stay On Point

Thorough research of the issue should enable you to support your point with proper legal authorities. Do not limit your research to cases and statutes. Rather, search for law review articles or Florida Bar Journal articles. Cite Florida Bar publications such as the DISCOVERY HANDBOOK (see VI.B.3. at page 65).

NOTE If there are cases that hurt your position, confront them. Do not ignore your weaknesses and the other side's strengths. Point them out to the judge and show why you should win despite them.

When supporting your point, keep the motion brief, stating as much as you can with as few words as possible. Stick to the point throughout the discussion of the motion. Do not wander or be drawn from the main content of the motion. Not only do digressions distract, but judges are busy and will be annoyed by a rambling 10-page motion that makes no point.

d. Use Effective Style

Make it a good read. You may not be a novelist, but you should nonetheless be able to write in a

strong, persuasive, and interesting style. To do so:

· Use the active voice. Active sentences are clearer than passive ones and they get to the point faster. Remember that the subject of your sentence should make things happen rather than having things happen to it. (See IX.D. at page 74 and *FASTRAIN*™: LEGAL WRITING MANUAL (Fla. Bar CLE 2004), for writing tips.)
· Do not overstate or misstate. You must persuade without misrepresenting. If a case does not support your position, do not say that it does.
· Clearly state the relief sought. Do not simply ask the judge for relief — be specific about the relief you are seeking.
· Use the proper citation format. Ensure that all citations comply with the Florida Appellate Rules and the Blue Book. Florida State University publishes a citation book that will serve as a useful guide.

e. Attach Relevant Documents

Any reference to a document or affidavit should be accompanied by a copy of that document or affidavit for the judge to review.

f. Edit The Writing

Always edit your writing. Review your first draft, your second, or perhaps even your third, and remove the excess sentences, phrases, and words. Make sure your argument is seamless, the transitions are smooth, and the word choice is appropriate. This means that legalese should be avoided along with "ten dollar words." Use short words, direct sentences, and avoid "heretofore" and "said." See IX.D. and the LEGAL WRITING MANUAL referenced above for further writing tips.

3. OBTAIN A COURT REPORTER, IF NEEDED

Consider whether a court reporter should be present and, if so, obtain one. Occasionally, the judge or opposing counsel will address unanticipated issues. A transcript will serve as a record of these digressions. Also, parties sometimes disagree about the judge's exact ruling on the motion and, hence, the language to include in the order. The court reporter's transcript of the hearing may resolve any such dispute.

4. SET THE MOTION FOR HEARING

Be courteous to both opposing counsel and the judge when setting the motion for hearing. Clear the date with opposing counsel first. Also, keep in mind that the motion calendar will likely be completely full and the judge will be swamped with pending motions. With that in mind, do not set motions on the motion calendar that will take longer than five minutes to argue. A day or two before the hearing, confirm that the motion is actually on the judge's calendar.

NOTE Some judges refuse to include certain types of motions on the motion calendar.
Draft a cover letter to the judge, stating the date and time of the motion, and attach a courtesy copy of the motion along with all cases cited in the motion. Ensure that opposing counsel and the court reporter, if one is obtained, will be in attendance at the hearing.

5. STUDY THE JUDGE'S PRIOR RULINGS

Learn everything you can about the judge who will be hearing the motion. Ask the associates, office staff, and other colleagues about the judge in an effort to discover if he is plaintiff-or defense-oriented, or is slow or quick to impose sanctions. Obtain a copy of the judge's protocol for setting and arguing motions. Search Westlaw for cases in which the judge has been upheld or overturned. One of these cases may address the same issue you raise in your motion.

6. PREPARE FOR THE HEARING

Hearings can be stressful experiences for new litigators. A novice lawyer often feels like the underdog, especially when it comes to arguing motions in state court. This is because, more often than not, the opposing counsel is more experienced and appears more polished and in control. Opposing counsel may know everyone in the courthouse, including other attorneys, judicial assistants, and bailiffs, by their first names. Even the judges may appear to be on a friendly basis with your opponent. The novice litigator may wonder how to possibly compete with this scenario. The answer is preparation. Preparation can go a long way toward quieting the butterflies, leveling the playing field, and increasing the chances of success.

To prepare, put together a hearing file containing:

· the notice of hearing;
· two copies of the motion (the second copy for the judge if the courtesy copy you previously sent is not at hand);
· three copies of all cited cases, with the relevant portions highlighted; and
· a blank order (most judges prefer the form orders with the carbon paper).
Review your motion and supporting documentation and ensure that you are familiar enough with them to present the motion without having to read extensively from the documents.

7. PRESENT THE MOTION AND PRESERVE THE RECORD

When the hearing begins, state your name, your client's name, and the title of your motion. Briefly describe the facts of the case and present your argument clearly and succinctly. Speak confidently. Do not be bashful when presenting your motion. If you are not confident about your position, you cannot expect the judge to be.

Remain professional. Do not interrupt opposing counsel or the judge, raise your voice or become upset, allow yourself to be baited by opposing counsel, or argue after the court has ruled. Attacking opposing counsel is not professional. Being a good advocate does not mean employing aggressive tactics.

Preserve the record. Try to have the judge address all the issues you raised in your motion and state the ruling on the record. For example, if you filed a motion to compel and for sanctions, have the judge address both issues.

NOTE If the judge rules against you, do your best to get the ruling limited. For example, if your motion is denied, ask that it be denied without prejudice.

8. PREPARE THE ORDER

Prepare the order at the conclusion of the hearing — before leaving the courthouse, if possible. That way, if a dispute arises over the language, you can return to the judge and seek a resolution of the dispute. Also, if possible, have the judge sign the order as soon as you have prepared it.

B. IN FEDERAL COURT

1. IN GENERAL

Preparing for a hearing and presenting a motion in federal court are slightly different than doing so in state court. In state court, judges generally rule on the motion at a hearing. In federal court, hearings are the exception rather than the rule. If you want a hearing on your motion, you generally must ask for one. Depending on the motion and issues involved, the judge may deny the request, believing the filed paperwork is adequate.

2. PREPARE FOR THE HEARING

If you do get a hearing, prepare for it by outlining your argument, arranging your supporting documents and cases, and practicing your argument. Stating aloud a few times the points you intend to make will alert you to parts of your argument that work and parts that do not, and will give you time to make the necessary adjustments. Your job at the hearing will be to pick out the theme you emphasized in the motion and make that the centerpiece of your argument. You want to prepare so that you will not waste the judge's time. If you cannot reduce your argument to a simple theme that explains why you should win, recouch your argument until you can.

Be prepared to argue the merits of the motion but do not reread it. The judge and law clerk will have already read the motion, responses, and replies, and will have dissected the cases cited in them. They may additionally have done their own research and uncovered other cases. The judge may have granted you the hearing only because he has questions he would like answered. Therefore, you need to be prepared to be interrupted as you would be in an appellate courtroom. Think about the questions you would ask about the facts and the law if you were the judge, and have short, direct answers prepared for those questions.

The federal courtroom setting, with clerks and staff looking on as the judge questions you, can be quite intimidating. To relieve possible anxiety, accompany another attorney from your office to a hearing he is having in federal court, preferably a hearing in front of the same judge before whom you will be arguing. Watch how the attorney presents himself, the arguments he makes, and how he answers questions. After the hearing is over, quiz the attorney about how he prepared, why he said what he said, and why he made the arguments he made. This reconnaissance will take the edge off the anxiety and help you maintain your composure when you appear in federal court.

3. PRESENT YOUR MOTION

All judges expect the attorneys who appear before them to be professional, courteous, and prepared. This is particularly true of federal court judges. To meet these expectations, have your hearing binder prepared. It should contain an outline of your arguments, exhibits and cases that support those arguments, and copies of those exhibits and cases. Having everything in one place, organized and well thought out, will prevent you from having to work through a messy file, and will show that you are prepared. Follow the steps suggested for presenting a motion in state court

(see paragraphs 6. and 7. under XXI.A. above).

XXII. PREPARING AND CONDUCTING CROSS-EXAMINATIONS

A. IN GENERAL

Real trials are rarely as exciting as L.A. Law where the firm's hotshot trial lawyer would stand up, button his jacket, and destroy the witness along with the opponent's case. Nevertheless, by following the few simple preparation rules presented here, you can obtain the desired answers from your witnesses and make your cross-examination just as devastating as the scripted television versions.

B. "PREVIEWING" THE QUESTIONS AND ANSWERS

1. ASK QUESTIONS AT DEPOSITION

An effective cross-examination starts at deposition. Waiting until trial to prepare cross-examination questions is a mistake. Instead, you should ask every question that you intend to ask at trial during the prior depositions of the witnesses. This way, you know what answer the witness will give for the jurors to consider, and you can omit the question if it is not one that will result in a beneficial answer for your case.

2. KNOW ANSWERS AHEAD OF TIME

Something you have possibly heard over and over is that you do not ask a question at trial unless you already know the answer. You can afford to be surprised by a witness's answer during the investigation of your case, when you receive responses to interrogatories, or at deposition. But do not be surprised at trial by asking a previously unanswered question. Take all guesswork out of the trial by asking all questions during discovery and reviewing the interrogatory answers and deposition transcripts before trial.

C. PREPARE A DETAILED OUTLINE

1. ORGANIZE INTO TOPICS

Prepare a detailed cross-examination outline by, first, brainstorming the topics you want to address during your cross-examination. Then organize these topics in the order you want to present them. When you are organizing your outline into topic areas, start with a topic that makes a strong point and end the same way. For example, consider starting with the witness's bias. By doing so, you color all of the witness's subsequent answers.

2. USE A TWO-COLUMN CHART

For each topic area, prepare a two-column chart. In the left column, include all the questions you intend to ask the witness.

NOTE Instead of writing the questions in the left column, you may want to write out the answers you expect to elicit from the witness. At trial, when you look at your outline and see the answers,

you will know what questions to ask.

In the right column, across from each question or the answer you intend to elicit, cite the source of that answer, whether it is page 12 from the witness's deposition, the ER admission note, or some other document. Then, if the witness does not give you the answer you want, you can impeach him with the source answer.

NOTE If you cannot find a source for the desired answer, do not ask the question. This is because if the witness does not give you the answer you want — the one you have written down on your outline — you will not have anything with which to impeach him.

D. PREPARE A BINDER FOR EACH WITNESS

Prepare a cross-examination binder for every witness you will cross-examine at trial. The binder will contain your cross-examination outline. Behind your outline, keep all of your source documents — your de facto impeachment materials. The document you will be relying on the most will be the witness's own deposition, in which months or perhaps years before, you first introduced all of your cross-examination questions.

E. STYLE QUESTIONS TO MANAGE WITNESS

1. ASK LEADING QUESTIONS

Ask only leading questions during cross-examination — those that suggest the answer. In this way you can direct the witness to give you the answers you have in your outline. Open-ended questions will allow the witness to tell his story in his own words and to say something you would otherwise not choose to elicit.

2. ELICIT ANSWERS WITHOUT QUESTIONING

Do not end your leading questions with such words as "correct" or "isn't that so." Rather than asking questions in this style, make statements and get the witness to agree to them. For example, instead of saying, "You treated the plaintiff on January 23, 2006, correct?", simply make the statement, "You treated the plaintiff on January 23, 2006." You will get the same answer whether you ask the question or put it in the form of a statement. Such words as "correct" detract from the power of your cross-examination and, if used at the end of every question, become annoying and distracting.

3. SEEK "YES" ANSWERS

Ask leading questions that will elicit only a "yes" answer. You want the witness to say "yes" to your questions as often as possible so that the jury will see and hear the witness agreeing with you time and time again. For example, "You are an orthopedist?" "Yes." "You treated Mr. Smith?" "Yes." "At the request of his attorney?" "Yes." "And you charged his attorney $600 for that examination?" "Yes." "An examination that took twenty minutes?" "Yes." The more the jurors hear the witness saying "yes" to your questioning, the more they will perceive that the witness is agreeing with you and with your position.

4. INCLUDE ONE FACT PER QUESTION

Avoid asking long-winded questions that are overburdened with facts. Keep your questions simple. By including only one fact per question, you keep your cross-examination clear and crisp. Also, it is easier to impeach a witness over a single fact as opposed to a whole host of them. Additionally, single fact questions increase the number of questions you can ask the witness to which you will get a "yes" answer. You would rather have the witness say "yes" to you fifty times than five times.

5. GENERALLY AVOID ULTIMATE QUESTIONS

It is tempting, after getting the witness to agree with you again and again, to ask the ultimate question. However, you do so at your own peril, in that you will very rarely get the answer you want. For example, if you cross-examine the plaintiff's physical therapist and ask 30 or more questions detailing every time the plaintiff did not show up for physical therapy, the jury will likely get the impression that the plaintiff did not comply with doctors' orders and may have compromised his condition. If, however, you ask the therapist "By not going to physical therapy, you agree, doctor, that the plaintiff compromised his outcome?", the doctor likely will not agree with you but, instead, find some way to explain how the plaintiff's repeated noncompliance had absolutely no effect on the plaintiff's outcome. Resist the temptation to ask the ultimate question of the witness and, instead, assert the point in your closing argument.

NOTE If you insist on asking the ultimate question, make sure you did so previously, at the deposition of the witness. In fact, it is strongly recommended that you ask ultimate questions in deposition. Every once in a while you will get a witness to agree with you on that ultimate question. If the witness does agree, ask the ultimate question again at trial. If the witness refuses to agree with you this time, you can impeach him with his deposition testimony.

6. DO NOT ARGUE WITH THE WITNESS

Sometimes cross-examination does not go as planned. A witness trips you up and, despite your best efforts, you do not get that "yes" answer you expected. Although some attorneys would argue with the witness at this point, it is wiser to resist. Instead, move on to the next question on your outline.

PART FOUR:

LESSONS IN SETTLEMENT NEGOTIATIONS AND MEDIATION

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XXIII. SETTLEMENT NEGOTIATION TIPS

A. PREPARE EVERY CASE FOR TRIAL

Although litigation is increasing, the percentage of cases that go to trial is actually decreasing. In fact, only about 2% of cases go to trial, so there is only a one-in-fifty chance that the complaint you just received will end up before a jury. The worst thing you can do, though, is to rely on this statistic and assume that your latest case will settle. Instead, you should assume that every case that comes across your desk is that "one-in-fifty" case that goes to trial. By doing so, you are prepared to not only go to trial but to take better depositions, write and argue more effective motions, and negotiate a better result for your client if the case ends up settling. To prepare the case for trial, start with the end in mind, develop a case theme with that end in mind, and conduct discovery with that end in mind (see section XII., beginning on page 90).

Sometimes a "trial lawyer" will go months, even years, without trying a case. Under these circumstances, it is easy to see why attorneys would be reluctant to prepare all of their cases as if they were going to trial. However, by not doing so, you run the risk of not being ready if that "one-in-fifty" case comes along. You may end up being the attorney who is trying to convince his client to accept less than favorable settlement terms to conceal your lack of preparation, direction, and vision. To negotiate from a position of strength, start preparing for trial the day the file arrives on your desk so that you can be ready if the specter of trial ever becomes a reality.

B. SEND THE MESSAGE THAT YOU ARE PREPARING FOR TRIAL

Through the discovery requests you serve, the depositions you take, and the motions you file, you can send a message to the other side that you are not preparing for a settlement but, rather, that you are preparing for trial. By doing so, you are sending the message that you are not afraid of trial, that you and your client are willing to go the distance, and that you are not going to be pressured into settling the case on unfavorable terms.

NOTE In all likelihood, the attorney on the other side does not assume he is going to trial, is not preparing to go to trial, and may be concerned at the prospect of going to trial. The more self-assured you are, the less self-assured he is and the more favorable the settlement terms become.

C. IMPROVE YOUR NEGOTIATION SKILLS

1. IN GENERAL

Lawyers who have mastered effective negotiation skills can broker a favorable settlement on behalf of their clients that rival the highly publicized million-dollar verdicts. Although not as glamorous, these million-dollar settlements require no less skill to achieve. The following techniques will better enable you to attain that elusive deal.

2. INVESTIGATE YOUR OPPONENT

Learn everything you can about the other side — their expectations, motivations, needs, desires, and tactics. For example, do they have a "take-no-prisoners" attitude toward negotiation or are they friendly and cooperative? Are they the type to lose their temper and walk away from the

table, or are they dedicated to solving problems and reaching resolutions? You can get this information from other executives and attorneys who have dealt with them, from news articles, or, possibly, from the Internet.

3. DEVISE INNOVATIVE, WIN-WIN SOLUTIONS

a. Think Of Unique Solutions

Be flexible and creative in proposing new, innovative alternatives to simply paying the other side more money in order to reach a deal. Keep in mind that your opponent does not have to lose for you to win. With a little effort, you can think of solutions that benefit both parties rather than thinking in terms of all or nothing. To the extent you can help others reach their goals, they will be more open to helping you reach yours.

b. Know End Goal

Decide what you want to accomplish at the negotiation and how you intend to reach that goal. Understand your parameters and go into a negotiation knowing what your "bottom line" is. (See section XI., beginning on page 88, regarding what the case is worth.)

c. Develop A Contingency Plan

Be prepared for the unexpected and have a contingency plan. Also be prepared to walk away if negotiations do not go as planned or if your minimum needs are not being met. Otherwise you may reach a deal on terms you cannot live with.

d. Learn Opponent's End Goal

Just as you need to know your "bottom line," you need to discover what the other side's bottom line is. That way, you do not force the other side into a deal that it cannot live with. A deal does not mean anything if it is only on paper. To learn the other side's needs, try to understand what motivates your opponent and what he seeks to get out of the negotiation. That way, you will be able to devise solutions that will satisfy those needs and, in turn, will encourage your opponent to meet your needs.

e. Develop Trust

Although you may be inclined to bluff or make certain representations during negotiations, you must resist the temptation to misrepresent matters. A successful negotiation is built, first, on trust. An opponent who cannot trust you will not be willing to settle on your terms. Therefore, when you say something, you must mean it. For example, if it is your last offer, be prepared to walk away if it is rejected. Otherwise, you will lose credibility. On the other hand, just because you are honest does not mean the other side will be. Take everything you hear "with a grain of salt."

XXIV. MEDIATION TIPS

A. IN GENERAL

Many of the approximately 98% of lawsuits that settle do so at mediation. Even if mediation does not resolve the case, it can put it in a posture to settle in the near future. However, an improperly handled mediation can drive a wedge between the parties. Therefore, it is important for attorneys to understand how to prepare for mediation and to take the time to do it correctly. This timely preparation is what makes the difference between hitting an impasse or pushing the parties apart, and brokering a fruitful settlement by bringing the parties together.

To prevent the mediation from deteriorating into a "slugfest," you must always keep calm and act professionally. To successfully negotiate a favorable settlement at mediation, consider the following pointers.

B. AVOID PREMATURE MEDIATION

It is ill-advised to proceed with mediation thinking that the other party has been unreasonable and that the mediator will show your opponent the error of his ways. Likewise it is not prudent to quickly proceed to mediation hoping to learn your opponent's strategy and seize upon divulged information and documents. Instead, you should avoid rushing into mediation until both parties have done their due diligence. This means the parties must have thoroughly investigated their cases, researched the law, and conducted sufficient discovery (see G.1. below). If they have not done so, they may go into mediation with unreasonable expectations. For a mediation to be fruitful, the parties need to approach it in a sincere attempt to resolve the matter on reasonable terms. Otherwise, it may be doomed to failure, and spoil any future settlement attempts as well.

C. SELECT AN EXPERIENCED MEDIATOR

Each mediator has his or her own style. Some are aggressive and push the parties to settle. Most are smart and clever facilitators who can think "outside the box." Try to discover how a mediator approaches parties and the case, then seek the client's input and choose a mediator whom both parties respect and trust — preferably one who has handled cases similar to yours. If you can learn the mediator's style and adapt your approach, you can take advantage of the mediator's strengths and downplay his weaknesses, thereby advancing your cause.

D. KNOW YOUR OPPONENT

In addition to learning how the mediator is likely to behave, learn how the opposing party and opposing counsel will likely act during mediation. If you have never mediated with opposing counsel, ask colleagues for information so that you can tailor your strategy to your opponent's likely approach. Learn about the opposing party through interrogatories, document production, or other sources. Because mediation is directed to the opposing party, your aim is to find what types of arguments will resonate with the party and which will fall flat. In this way, you can convince the party that the facts, law, and circumstances of the case demand serious consideration of your proposed settlement offer.

E. DEVISE A MEDIATION STRATEGY

Devising a mediation strategy is the same as devising a negotiation strategy (see XXIII.C.3. above). That is, you need to have a "game plan" for mediation. Determine what you hope to achieve at mediation, what outcome would be good for your client, and what arguments you will advance to achieve your goal. Think of ways to settle the case so that both sides win. As with other negotiated settlements, you must understand that money may be only one of the issues. Along with the mediator, you need to be able to think outside the box, offering unique approaches and proposed settlement terms in an attempt to reach a mutual settlement.

NOTE If you try to force a one-sided settlement, you will find that settlement will be difficult to achieve. Go beyond having the mediator simply shuffle offers back and forth. Explore ways to bridge the gap.

F. PREPARE YOUR CLIENT

Before the mediation, explain to your client the purpose of mediation — how it works, what to expect, and what you need to do to properly prepare the case for mediation. Let the client know the strengths and weaknesses of the case and the potential result and expense of a trial. This will give the client a realistic expectation rather than an inflated view of what the case is worth. Discuss with the client what your bottom line is, based on a thoughtful analysis of the facts, issues, strengths, weaknesses, and potential expense of the case, and advise the client that you must be prepared to walk away if the other side considers your bottom line unreasonable and is not willing to meet it.

G. PREPARE THE CASE FOR MEDIATION

1. GATHER FACTS AND LAW

After devising a mediation strategy and mapping out your arguments, gather the relevant information or conduct the necessary discovery that will support those arguments. Learn everything you can about your case and everything about your opponent's case as well, so that you will not be surprised by your opponent at mediation.

Because mediation has taken the place of trial in so many cases, you must prepare for it as if you were going to trial. Before you go to mediation, make sure you have gathered all the necessary documents that support your case. For example, if you are a plaintiff in a personal injury case, make sure you have all of the relevant medical records and medical bills. Go through the entire file, including all the discovery responses, relevant documents, witness statements, and depositions. Then, compile the documents and testimony that bolster your case and be prepared to discuss them at mediation. Also, find weaknesses in your opponent's case and be prepared to confront him with these.

2. PREPARE A CASE BINDER

Prepare a binder with a table of contents that includes all the relevant documents in your case — the ones you intend to address at mediation. Include in the binder excerpts from deposition transcripts, photos, relevant trial orders, etc. You will use this binder as a reference tool during the

mediation.

3. PREPARE A REPORT FOR THE MEDIATOR

Take the time to prepare a mediation report for the mediator, attaching any relevant documents and copies of any exhibits you intend to use at the mediation.

4. PREPARE A STRONG ARGUMENT

Generally, each side makes an opening statement at mediation, then the parties break to caucus. Instead of making a generic opening statement, consider making the closing argument you intend to present at trial, including using any exhibits you planned to use. Also consider preparing a multimedia presentation for use at the mediation, such as a surveillance video, portions of video depositions, or a power point presentation. This shows your opponent that you are prepared to try the case if need be, and to put on a show for the jury.

NOTE Your presentation must be forceful and persuasive, and you may have to say things your opponent does not want to hear. If this is so, consider as a strategy the "good cop/bad cop" approach. Rather than telling the opponent that his case is bad, that the evidence is weak, or that you can prove he has lied, plan to discuss how a judge and jury are likely to view the facts and evidence. For example, instead of saying "You lied when you said ....," say, "What you say may be entirely true, but wouldn't a jury likely wonder why you said it and likely conclude that it's a lie?" Creating this artificial third person to play the role of the "bad cop" to your "good cop" during mediation can be very effective in getting your point across without alienating the opponent.

5. PREPARE A DRAFT CLAIM RELEASE

Bring a draft release of claims to the mediation so that if the parties settle, the terms of the release can be resolved then and there. A good sample release can be found on the web page for the Trial Lawyers Section of The Florida Bar at www.flatls.org/forms/release.doc.