

The Journal Of The Section Of Litigation

American Bar Association

Litigation

Vol.21 No.3 Spring 1995



Clients

The Client's Suffering

by Kenneth P. Nolan

Initially it's anger.

It's anger at the airline for running out of fuel, crashing onto a hill, tearing the four-month-old child from his mother's arms to his death. The mother, whose injured left arm was rendered useless, sadly survived, tormented by incessant demons and inexplicable guilt, unable to share these with anyone, including her husband.

Or it's anger at the drunk driver with the 24 previous license suspensions who runs a red light at 70 mph without headlights, dragging and mutilating a mother and her two teenage girls to horrific deaths. The perfect family is destroyed. The father, injured as well, talks of wishing to die except for the needs of his teenage son. In a home filled with family and graduation photos, he reminds you that his daughters were active in Students Against Drunk Driving. The house, and its cruel reminders of the once-bright future, must be sold. Between tears, he curses the driver to a slow death.

Sometimes it's not only anger: it also becomes depression, apathy, or a combination of emotions. It's always, however, tragedy—permanent, heart-searing tragedy. Death. Paralysis. Brain damage. Amputation. From plane crashes—car accidents—medical malpractice—defective products. The kind you read about, the kind you see paraded on *Geraldo*, the kind you pray you never experience. The crown of thorns that some must endure in this life, making it truly a vale of tears.

But you are a lawyer. You know that the damage can never be altered. You know that the client and family look to you for assistance, for guidance, and, occasionally, for unattainable revenge. Your job is to counsel, to explain, to litigate.

Emotionally, you empathize with their troubles. You yearn to make the person, the family, whole again. Legally, you want to right the wrong, eradicate the financial worry for this family, change their lives, allow them to move from the railroad-flat tenement in Brooklyn to the sunny respectability of a house and pool in Port St. Lucie, Florida.

But, truth be told, not all your thoughts are so noble. Late at night when you are alone, you even admit to yourself that there's some ego involved here. After all, this is the case that you have been seeking, the one you have deserved but that until now has eluded you. This is the case that will pay those college tuitions, purchase that summer home in Nantucket, put your mug on the six o'clock news, and prove to all what you already knew—that you are the equal (if not the better) of Gerry Spence, F. Lee Bailey and the rest of your colleagues whose names are household words. Once this case is won, your name will be added to that number. The bar lecture circuit will come begging, and your war stories will be the talk of cocktail parties. Then judges will seek your counsel, and those young trial lawyer wannabes will laugh at your jokes.

Internal Conflict

This case evokes the best and the worse of your personality: the sympathetic, caring side your mother (but no one else, especially your spouse and partners) sees, and the dark side—formed by the greed, the hubris, the cynicism that you have acquired in the years since law school. These two sides will compete through the litigation, as you decide whether to settle or to try, to value the case honestly or to allow your client to dream in a world of multimillion-dollar headlines reinforced by neighborhood gossips.

And your internal conflict isn't the only problem. The pressure is on. The family and the community expect Lotto results. "If a woman can recover \$2.9 million for spilling some McDonald's coffee on herself. . ." The courthouse regulars are already jealously critiquing your strategy. And your partners are busily spending your fee before the lawsuit has been filed.

Even worse, while the expectations of your client and your partners become more unrealistic, the opposition is gearing up. The experienced defendants do not panic. Instead, they retain top guns to represent them. And they are ready to fight, not only for the millions at risk, but also for the reputation of the defendant's product and perhaps the continued existence of the defendant corporation.

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And so, despite the fact that your client commands as much sympathy as any juror can give, you have your work cut out for you. In order to defeat these formidable adversaries, fulfill your dreams, justify your ego, satisfy your partners, and serve your client, you must do the following:

Litigate the Case. You will be tempted to rely on the client's catastrophic injuries or on the tears of the widow and her children, and convince yourself that the defendants will be paralyzed by fear of a runaway verdict. They will throw money at you to settle. No jury, you believe, can ever look at this wheelchair and mutter, "Defendants' verdict," or even "\$600,000." The sympathy is almost unbearable. Five million dollars, \$10 million maybe, but nothing less. It is incomprehensible, you think. It is impossible, you are told.

Do not believe it. Do not delude yourself. The defendants are cornered and their attorneys will battle to save their clients' assets and reputation. Instead of rolling over, the defendants will spend more, work harder, and explore every aspect of the case. You never know what that ten-year-old medical record will reveal, what the high school records will illuminate, what the co-worker will expose.

The defendants will use all their resources to prevent the \$25 million verdict, the punitive damages, the newspaper and TV headlines that will send their stock spiraling. Just as your reputation is at stake, so too is the defense attorney's. With a victory in a case perceived to be impossible to win, the professional and financial rewards garnered by defense counsel are immense—especially because the insurer or corporation always has more business to send his way, always has another huge case.

To get the handsome result your client deserves, your mind-set must be on work, not glory. Preparation must start immediately—preparation not for settlement, but for trial. Investigation must be commenced, legal research performed, documents obtained, experts hired. Money must be spent and clients counseled.

Some tasks can be delegated; the essential ones, however, you must do. You must know the facts, the clients, the witnesses, the law. Complete and thorough knowledge of all aspects of the case is paramount. Remember that the defense has more resources, and often more people—since there are usually numerous defendants and therefore several defense attorneys, each of whom has an insurance adjuster looking over her shoulder.

If the case is prepared with the false hope of settlement, maximum recovery will not be attained. Defendants and their principals are not nice guys. To pay as little as possible, every tactic will be utilized, and the ethical envelope will be pushed. Every weakness will be exploited. In the hardball world of million-dollar personal injury and death cases, most defendants respond to nothing less than a foot on the neck. Only the strength that comes from preparation for trial will enable you to effect such a maneuver.

Trust for the other side is a luxury that you cannot afford. Unless you are sure through experience that your opponent can be trusted, take no chances. Maintain a healthy amount of New York City paranoia—trust no one all the time. "You don't mind if I get that in writing, do you, Mom?"

Know Your Clients. In the ordinary personal injury case, you may meet the client when you are retained and once or twice after that—before depositions and then before trial. Younger partners and associates can fill in the gaps.

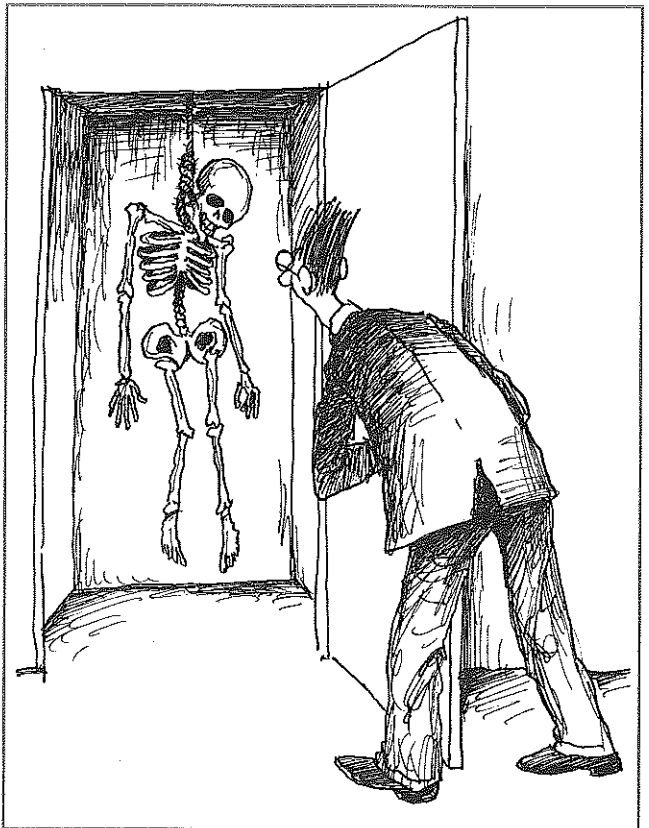
In a large case, this is inadequate. Since the emotional loss

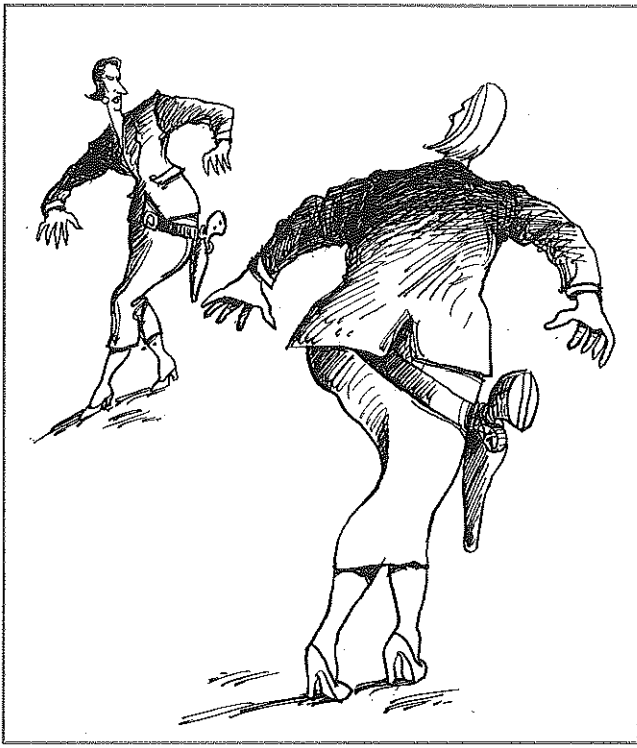
is much greater, you must meet with the client, her family, and close friends regularly to sustain your relationship and to understand their needs and desires. You must become involved in their lives and learn their fears, their hopes, their histories. Do this to nurture them emotionally, to gain their trust and to know them. After one of my partners settled a case involving the death of a teenager, the mother told him: "I want to thank you for your legal work, but more importantly, I want to thank you for saving my husband's life." Sometimes the emotional component of your representation outweighs the legal.

Any competent defendant will insist on obtaining all of the relevant documents, will interview dozens of co-workers, will perform extensive surveillance on an injured plaintiff. Because the defendants will read every record—medical, financial, school, work—you must learn more. Visit your clients' homes, talk with their friends and relatives. Learn the good and bad. Open those skeleton closets and take a long, hard look inside. Be skeptical of your client's answers. Ask probing questions about the marriage and the job. Ask even embarrassing questions about that arrest for DUI. In short, learn all you can from your clients.

Then investigate, if for no other reason than to rule out any problem before trial. The last thing you need at trial is a surprise. If there is something bad out there, you'll have to deal with it sooner or later. Learn about it sooner, not later. To pretend that it doesn't exist or won't be discovered is naive.

If there is a past problem with law enforcement, for example, learning about it early will enable you to find a way to minimize it. Having it thrust upon you at depositions or at trial, on the other hand, can be devastating. In one death action handled by our office, defense counsel sent a young associate to rummage through our client's hundreds of cancelled checks. Each unknown payee was tracked down; one





was traced to a marriage counselor. Although it turned out to be rather innocuous, the defense argued that the marriage was not the bed of roses we suggested. Diligence is an asset that can translate into savings for the defense. The only way to combat that is to be more thorough.

By the time of trial, you should know more about the client's family than they do. Spend time with them, even time you would rather spend on other matters, or on other issues in this case. You will find that prior problems, physical and emotional, will be mentioned either in discussions with the client or in interviews with others who are potential fact witnesses.

No one voluntarily reveals dirty little secrets. Ask about them. Forewarned is forearmed. And if none exist, then you can confidently provide the endless discovery that the defendants will demand.

Determine who pulls the strings. People who have suffered loss usually look to others for advice. In educated families, a parent, uncle or cousin might provide financial guidance. In uneducated families, someone outside the family, perhaps someone who has more education or a position of power in the community, might help make important decisions. Learn the motivation of these people. If their goals are selfish or corrupt, you may have to confront these influences. And, regardless, learning who is making the calls will give you insight into the goals and desires of your client.

A continual battle will be fought during the litigation between what is fact and what your client is told by "well-meaning" friends. The more you are with your client, the more you build rapport and the ability to help your client distinguish fact from fiction. And the more you learn.

Think About Venue. Where you bring the action often determines success—and if you win, by how much. Plaintiffs prefer state courts in urban areas. Juries and judges are more liberal there. Defendants prefer federal courts in conservative jurisdictions. There, discovery is usually broader, the judges—usually from large firms that represent corporate

America—are more sympathetic to the defense, and the jury pool will include the suburban or rural conservative juror.

The law is secondary. Generally, an Idaho jury with liberal wrongful death law will award less than a Bronx jury with conservative New York wrongful death law. A suburban Atlanta jury will award your client less than an urban Miami jury.

Of course, there are exceptions. In the Pan Am/Lockerbie trial, for example, a white juror from the suburbs assumed the role of Henry Fonda in *Twelve Angry Men* convincing a divided jury to decide in favor of the plaintiffs, while two black elderly women from the city, clutching their Bibles, were the last holdouts for the defense. Hey, you never know.

Research the law as to liability and damages. Is precedent favorable to a finding of fault on your theory? Enumerate the items of damages—particularly in death actions where some states allow recovery for grief and loss of affection, while others only permit recovery for pecuniary loss. Learn the law of all potential jurisdictions before venue is selected. If a plane crashes in Indiana and the defendants include a joint Italian/French manufacturer and an air carrier that is incorporated in Delaware, has a principal place of business in Virginia, and is a wholly owned subsidiary of a Delaware corporation with a principal place of business in Texas, where do you bring suit if your client is an English citizen with a green card, teaching in Montreal, whose wife is from California, teaching in Indiana, but thinks of New York as home?

And once you choose venue, what liability law will be applied? What damage law? Is it the law of Indiana on liability, and the law of Quebec on damages, determined by a Texas jury? Is the foreign manufacturer entitled to a nonjury trial pursuant to the Foreign Sovereign Immunities Act? Can the case be kept in state court? You need to know the answers to all these questions in order to practice the art of forum shopping.

Substantive law and jury history are not the only considerations; tort reform and its effects must be evaluated as well. Are there caps on noneconomic damages? In a case involving a victim without dependents, such as an infant, the loss of society, and the grief of the survivors, define the damages. There is little, if any, economic loss. Therefore, a jurisdiction with a cap on such items of damage will be disastrous.

Choosing the Law

Is there joint and several liability in any of the potential jurisdictions? If the primary defendant has limited insurance, then you want a jurisdiction where the deep pocket can be forced to pay the entire award, even if found only one percent at fault. Must future damages—loss of earnings, for instance—be structured? If so, then the value of the award will be less in that jurisdiction.

All procedural and substantive tort reform changes must be studied and applied to your facts. If you represent the estate of a wage-earner who is survived by a spouse and children, tort reform may have no effect. On the other hand, if you represent Mrs. Peets, a mother of three who doesn't receive a paycheck for her 110-hour week, then a cap on noneconomic damages will minimize the strongest part of the case—the loss of her presence and care of her children.

These issues must be evaluated and debated. Choice of law must be analyzed. The history of the jurisdiction must be investigated. The background and approach of the potential judges must be ascertained.

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Client's Suffering

(Continued from page 46)

Speak to the local clique. Absorb the courthouse gossip. Amass the jury verdict reports. Canvass the local bar for verdict history.

Discover. Learn everything you can about the case. Master the intricacies of the product or procedure that injured your client.

In an obstetrical medical malpractice case, learn how to read the fetal monitoring strips, when to use Pitocin, the differences between internal and external fetal monitors. Read the texts, purchase the forceps. Find all publications by government oversight agencies. Obtain any standards set by national associations, such as the American College of Obstetricians and Gynecologists. These standards are often changed periodically, so make sure that the edition

that you have was in effect on the date of the malpractice. Then mark the standards at the doctor's deposition and cross the defendant on whether they were followed during the labor and delivery of Mrs. Abel. If not, watch her squirm to justify her noncompliance.

Research the history of the product. Search for similar incidents. Interview current and former employees. A disgruntled former employee can be the gold you're looking for.

Begin your investigation as soon as you have been retained. I was once called by a friend who told me of a 55-year-old man who went to the emergency room with chest pains. Instead of being admitted or observed for a while, he was diagnosed as having heartburn, given Mylanta and discharged. That evening he died in bed from a heart attack. The family rightfully believed that he should have been admitted to the hospital. Because I feared that the emergency room EKG tracing would disappear, I immediately went to the hospital to secure the records. While there, a young resident—call her Dr. Ponciroli—pulled me aside and told me that she was the physician who had examined Mr. Newbower and discharged him. When I eventually obtained the hospital records, the name of the examining physician was illegible. The formal response to my demand for the names of all physicians in the emergency room did not include Dr. Ponciroli. And at depositions, no one knew who had treated Mr. Newbower in the hectic emergency room. Without my running to the hospital, I would have never been able to question the physician who was responsible for the treatment. Speed is essential.

Formal discovery must be extensive. Everyone involved must be deposed. When in doubt, take the deposition and request the document. At one damage trial, defendant's psychologist was innocently asked on direct "if there were anything else pertinent in the record of the family doctor?" The expert replied that there was a notation of "neurosis." There was no follow-up question and the direct ended a few minutes later. Only because I had scoured every line of the record was I able to locate the word. On cross, I demonstrated that the notation had been written eight years before the event at issue, had resulted in absolutely no treatment, was not even written clearly enough to read with certainty, and might actually have been a

totally different term.

Never rest. If you know the file and the law and have a sympathetic client, defendants will respect you. Sometimes they may even fear you.

Find the Best Experts. Hire them early and often. No one is as knowledgeable as the surgeon or the mechanic or the crane operator who devotes his life to a daily routine. If the plane crash involved ice on the wing, hire a meteorologist to analyze the weather pattern, warnings, and technology available to predict the problem. Hire a pilot who flies the particular type of plane to provide you with his experience, his training, and the "hanger talk" among similar pilots. Hire a former NTSB investigator to provide insight into the cause of the crash and to analyze any government findings. Hire an ex-air traffic controller to tell you whether the plane was properly held in the air and whether any procedures were disobeyed. The list goes on. Select those experts who will educate you. You need not use them at trial, but it's always better to have more than less.

The Good Old Days

In the good old Tammany Hall days of New York City, there was "honest graft." Initially, you need "honest experts" to advise you not only of the strengths, but the weaknesses of your case. Maybe the expert is not articulate and does not look like Sean Connery, but use him during discovery to educate you, prepare you for depositions, and interpret documents. If the expert is qualified and will devote time to your case, then he is valuable regardless of whether he will ultimately testify.

At trial, the appearance and jury appeal of the expert are important. Experts must teach, jurors must translate scientific lingo into everyday language. On cross, experts cannot afford to become angry or disconcerted under any circumstances. An experienced expert never becomes combative or flustered, no matter how heated the cross: "Doctor, isn't it true that you're a child molester, a mass-murderer and smoke smelly cigars?" Turning to the jury, he smiles sweetly and replies with a confident "Of course."

Pedigree and education are important, but real hands-on experience is paramount. The truck driver, the 747 pilot, the machine press operator are impressive—especially in uniform with lapels or in grease-stained over-

alls. Of course, star quality is a real plus. Try cross-examining an astronaut who walked on the moon about his testimony that the pilot of a 727 that crashed was not at fault. Even the judge was excited and had his photo taken with this hired gun.

Pursue Settlement. Be open to resolution at any time. Obtain client authority for a demand. But be patient if your client is unreasonable early-on. Any competent defense attorney or insurance adjuster will understand if you respond, "\$100 million." Let your client's anger subside during the litigation. Usually the demand will become more reasonable.

Examine your client's financial needs and find out whether a slightly smaller settlement early in the case might be financially advantageous. Consider structured settlements if your client is financially unsophisticated. Do not let your ego intrude on what should be a business decision in your client's best interest. Sure you would like to stick it to the arrogant slobs, but the client's needs are your priority. Your reputation is secondary. And your cash flow problem is no reason to settle cheaply. Communicate offers in writing and likewise confirm their rejection if you believe that the jury will award less. Be honest with your client and yourself.

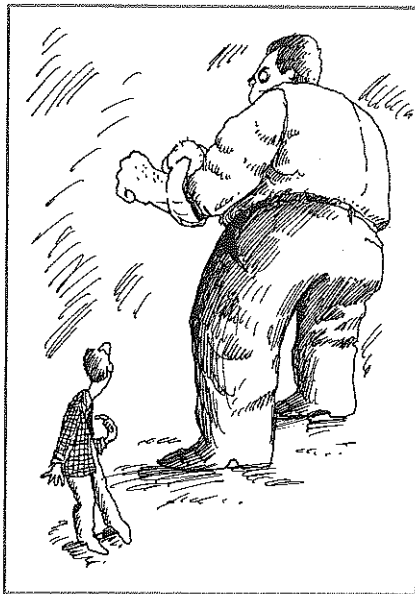
Try Your Case. This is the shoot-out, the championship fight, the clash of the titans. Like all battles, it begins with preparation. As you walk through the courthouse door, have your briefs ready on the legal issues and the scientific issues. Educate the judge and her law clerk. The first pages of your scientific brief should be a glossary. Is an aileron something from outer space? Define the technical terms, use illustrations or photos to make the difficult simple. Remember, the judge spends most of her time either on slip-and-fall cases or on drug cases. It is rewarding when the judge thumbs through your brief while the experts testify.

Prepare your jury instructions for the judge before trial begins. Although they may have to be amended as the trial unfolds, the law clerk may use these as a reference from which to draft the final jury charge. Their preparation will also force you again to examine what you must prove to win your case.

Make your motions in limine before jury selection so that you know what is

admissible. This is especially true for demonstrative evidence. Do not focus your case around a "Day-in-the-Life" film only to have the judge rule in the middle of trial that it is inadmissible. Have the judge rule before trial so you can adapt your strategy, your witnesses, your proof.

Consider presenting your case to a shadow or mock jury. You have engulfed your life in this action—you know more about myocardial biopsies than the chief of the cardiology department at Einstein Medical Center, your children call you the "heart doctor daddy," and your partners seek your advice on their cardiac problems. But your immersion in the case and its issues may skew your communica-



tion—and even your understanding—of the facts. A run-through of your evidence and argument before one or more mock juries may surprise you and may color your judgment about what is effective. Have professionals organize these mock trials. But be sure to have them select jurors from the area of the jury pool.

During trial, remember that jurors are suspicious of lawyers—especially plaintiff's lawyers. They believe you are a shyster. You must convince them otherwise. Either in jury selection or opening, establish rapport. It is always more effective to address the jurors during jury selection. But if not permitted, do it in opening. Admit weaknesses. Inform them of the warts—the messy divorce, the DUI, the history of heart

disease. Be honest. Discuss sympathy before the defendant uses it as a club. Tell them that justice—not sympathy—is your goal and their responsibility.

Always understate damages. A momentary view of a brain-damaged infant is infinitely more articulate and persuasive than your 15-minute description. A mother sitting with her children alone on a wooden bench shouts volumes. Let witnesses describe the 65 seconds of terror as the plane plunged to the earth, the lack of any appreciable remains, the nightmares, the loneliness, the fear of raising a family alone.

If your client is catastrophically injured, you do not want him present in the courtroom every day of a month-long trial. With familiarity comes callousness. A few appearances in court is sufficient.

Timing of witnesses is important. By establishing liability first, you will gain the jurors' trust. They will understand that you are not relying on the sympathy generated by your tragically injured or widowed or orphaned client to prove your case.

Then proceed to damages. Use the experts to establish the cost of medical and custodial care. Ask the doctor how many times a week Mr. Gutman must be treated by a therapist, and for how long. Have the doctor testify about the daily cost of such services. If necessary, bring in a therapist or a rehabilitation expert to discuss specific amounts.

Be conservative with your numbers. Do not destroy the economist's credibility by having him testify to projections without support or foundation. When you project lost earnings of a young executive or medical care of an invalid infant, the real numbers are astronomical enough to shock the juror scraping by on \$30,000 a year. Do not endanger your case by trying for that extra \$50,000.

Use demonstrative evidence: photos, graphs, blowups—whatever works for you. But, again, be a minimalist. Too much is a turnoff. Keep the "Day-in-the-Life" film to under 20 minutes. Let your experts use the demonstrative evidence to teach, to highlight, to convince. We are a visual generation, raised on film and television. The technology is there—use it.

Your client, whether the widowed or the orphaned or the injured, should testify. Keep it short and to the point.

Avoid dramatics. With any significant loss, tears flow without prompting. Have other relatives, friends, the boss confirm what a great mother, wife, teacher, worker she was. Again, keep their testimony short. But be sure to have a few individuals who have no interest in the outcome testify to emphasize the goodness, the beauty, the joy that has been lost forever.

In closing, be assured. Look the jurors in the eye and tell them what you want. Do not be apologetic if you ask for an amount that the jurors will collectively never earn in their lifetimes. If you are hesitant, it will be perceived as lack of conviction. If you do not believe in your case, why should the jury? If you are permitted to, write it down. Fill out the jury questionnaire with the jurors, but always remind them that the final determination is theirs. Speak in language that they can understand. Be positive.

And then wait for the jury's decision with the quiet confidence of someone who has done his job well. Because if you have worked hard in preparing and trying your case, the jury will want to ease the pain of your client's devastating loss. And more often than not, that will mean success for you both. □