

MAY 2005 VTLA TORT LAW SEMINAR

Tort Law Play Book:
Setting Out Your Game Plan for a Winning Case

Top 10 Trick Plays by the Offense and the Defense

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Ten Trick Plays by the Offense & the Defense

The Offense – by Doug Landau

I. Introduction

There are plays that are standard in every sport and trade. They arise after years of usage. They are generally useful and predictable. Standards are adhered to as being “tried and true” and winning programs find it hard to change. However, every savvy coach knows that having a 100% predictable game plan may not continue to result in success. Putting “surprises” in the play book can keep the opposition guessing. By way of example, in American football, the “onside kick,” “fumble-roozie.,” “the double reverse pass to the QB,” the “fake punt,” and other plays can result in a breakthrough for the team that can execute such stratagems effectively. These “non-standard” plays can also cause chaos on the other side of the field. When an opponent is unsure about where you are headed, their greater size, levels of beauracracy and sheer weight become an impediment to successfully meeting your unorthodox gambit. The insurance industry exists on predictability, certainty and quantifying risk. Unpredictable risks, uncontainable costs, unavailability to inflict distractors and the inability to cause the plaintiff’s counsel to spend money unnecessarily are a few of the insurance industry’s least favorite things.

II. “First & 10”

Like an American football game, it is not enough to keep getting first downs. As Plaintiff’s counsel, you must take the ball over the goal line – in court terms, a favorable jury verdict (or settlement).

#1 The “nuclear option” (or “you dropped a bomb on me...”)

When, as is all too often the case, you reach an impasse with an insurance adjuster on the value of the case, consider “front loading” the case with an “onside kick.” An onside kick comes at the other side when then they are not expecting it; it comes to players that are not generally equipped to receive (but rather to block and provide interference) and it compresses time (as there is no “hang time”). By “front loading the case,” I mean sending EVERYTHING, in one package, to the adjuster, serving the insured by private process server (their employer if it is a Respondeat Superior case) and possibly the agent.

The usual case scenario has plaintiff’s procrastinating counsel and the stalling adjuster dancing a very slow, unproductive dance. Then, when time on the Statute of Limitations is short, counsel hurriedly files a Motion for Judgment or Complaint in Federal Court, and then receives boilerplate discovery from defense counsel after an extension to Answer, respond to discovery, etc. The plaintiff is then put upon to respond to Interrogatories, Requests for Production, a DME and then an EBT (even in those instances where the carrier already has a taped statement, perhaps a written statement, a police report as well as their own insured’s and other witnesses’ statements). The insurance company reserves are still working for the company (as opposed to your client), the defendant, defense counsel and the adjuster have yet to break a sweat, and counsel for the injured party is reacting and playing “catch up,” instead of acting and controlling the timing of the action. And, plaintiff’s counsel has to respond to the likely Motions to Compel when their client does not fully respond to the discovery sent, and waste a morning or afternoon at Motions Day.

The filing of a lawsuit, like the first serve in tennis, is a “free shot,” in that you get to give it everything you’ve got. You can decide when, where, how and why, and then your opponent has to react and play “catch up.” When it appears that a stalemate has been reached, do the work early, not “as needed.” Assemble well thought out discovery, package ALL of your exhibits and other records that will be needed as Requests for Production, in the order you will present them at trial, with the Court’s preferred exhibit numbers, so that once you and your “team” have done this preparatory work, you will not have to copy these documents again for the remainder of the case. Put in all the factual predicates you will need for your case. Unlike Interrogatories, there are usually no limits to the number of your Requests for Admission. Make every one a small “bite size piece” of your case. Consult the applicable jury instructions NOW, not the week of trial. Even consider filing a “Plaintiff’s preliminary Jury Instructions Submission.” You can amend it later, if necessary, but you will know what you have to prove, and it will provide more ammunition to your opening salvo. Filing the medical bills and other liquidated damages in this fashion will enable you to claim (and collect) pre-judgment interest. Such interest can be in excess of the policy limits.

Eliminate the other side's incentive to delay or extend the game. Penalties, attorney's fees for failure to admit, and excess defense attorney time and resources can be difficult to square with the reserves on a case.

Prepare your Interrogatories, Requests for Production, Notices of Deposition, Subpoena Duces Tecum and letter to the Defendant. Let the other side have to play catch up. While the time to respond may increase from 21 to 28 days in many courts when served with the initial suit papers, defense counsel does not get the file immediately. They may not have a chance to do all the work required and they are suddenly at your mercy, instead of the other way around. Suddenly, insurance defense counsel is not filing motions to compel, but instead on the receiving end, and the Court and anyone else associated with the file sees that you are serious about your case. Run an "off sides trap," by having your client answer the other side's *discovery in advance*. In other words, provide your client with your opponent's standard discovery, at least a month prior to filing suit, so that when they send their standard material, you can have it answered the next day ! Then, when defense counsel is in court asking for yet another extension, you can point out that: (1) the other side already had all the necessary information (sent to the adjuster); (2) because you have such a strong case, you sent everything, including pre-marked exhibits, with your initial filing, and had it served on them "officially," and (3) your client responded immediately to their discovery so as not to delay justice in this case. As they say in baseball, "three strikes, and you're out." Control the game's starting time, rhythm and be the initiator, not the reactor.

Make sure that the adjuster, defendant tortfeasor, and possibly the agent are all recipients of your "blitz." Your attachment letter to the defendant apologizing for having to take this step, which is required by law in the time limits prescribed, explains how this action was necessitated by their liability carrier's failure to accept responsibility for their part of the insurance contract. Insurance companies will write to injured victims in order to "control the game." They do this to dissuade potential plaintiffs from getting legal counsel and representation. Simply explaining to a defendant what is going on (and WHY !) during this one opportunity to communicate, can cause them to seek answers from their agent, and their agent to want to know why the case was not settled within their customer / good neighbor / friend's policy limits (especially if it involves a multi line policy, a long term customer or other relationship, such as a person who they will see on a regular basis). You want the carrier, the adjuster and defense counsel ducking shots from as many quarters as possible at the outset (i.e., from you, their insured, the court's scheduling order, the agent, motions to compel, the bean counters, their good neighbors, et alia). Some carriers have a flat fee defense contract. They may take the position that their money is spent once suit is filed, so they do not care what time is spent by their counsel. Your showing immediately that the case will be a "money loser" for defense counsel because the discovery "bomb" you threw (1) will eat

up their \$5,000.00 budget in the first 60-90 days of the litigation, (2) may cause a rift in the defense, and (3) will certainly work as a disincentive for them to put additional (unreimbursed) time into their side of the case. As the saying goes, “the best defense is a good offense.” Take the offensive, and never let go of it.

#2 The “Hail Mary Pass” or, Settling the case without the adjuster or defense counsel

This is a stratagem, developed by settlement strategist Richard Halpern (www.halperngroup.com), that I did not think would work, until we tried it. It worked ! (See also, Richard G. Halpern, “Opening a New Door to Negotiation Strategy,” TRIAL pp.22-29 (July, 1999).

Many of us have been to insurance company “settlement days.” These work very well for the carrier trying to settle a large number of cases in a short amount of time. They are akin to “sales days” some major department stores. When they hand a check to the plaintiff, it is very hard to hand it back, since it is a “sure thing.” They can settle cases for much less than they would otherwise spend. The liability carriers have seen how very hard it is for a plaintiff’s attorney to talk a client into giving money back to the insurance company (especially after such a nice breakfast or lunch and a face to face meeting).

In simplistic terms, the “Chaos Theory” takes the other side out of its element, and adds chaos. Adjusters have to close cases. If they do not, the number of files assigned would become overwhelming. Defense counsel very often does not get paid until there is a final Dismissal Order from the Court. Knowing these facts, the Chaos theory calls for “reverse settlements,” or in our football analogy, what I would say is akin to the “Hail Mary Pass.” Consider sending a Release and Dismissal Order. In other words, send a Release (we make copies of the various carriers’ Releases), signed by your client, for an amount the client has given you written authority to accept, together with a signed dismissal Order, to the adjuster (or defense counsel), open for a set period of time (14-21 days), certified, return receipt, restricted, etc. Then the adjuster and/or defense counsel have to “unsettle the case.” They have to do the equivalent of what your clients find so hard to do at Settlement Day; give back that thing which they want ! Tell them in the cover letter that “this is a settled case,” “you will be unsettling it... by not endorsing the Dismissal Order and tendering the check for the amount in the Release.” Like an offer of Judgment, put them to terms to push the case to settlement.

#3 Putting the Defendant's video de bene esse deposition on in your case in chief

Whenever you take a deposition, consider including in your Notices of Deposition the language "by stenographic means and/or videography for use in discovery and/or trial or any other purpose allowed by law." If you get some good admissions or visuals, consider using excerpts of the defendant's deposition in your case in chief. Horn v. Milgrim, 226 Va. 133 (1983) and Rule 4:7 allow for the use of part of the defendant's testimony by deposition. The court in that case accepted the interpretation of the rule by the federal courts. Where deposition testimony is offered, the deponent does not become the witness of the party offering the excerpts. Thus, the dangers that might otherwise arise in calling an adverse party are minimized. Also note that under Henning v. Thomas, 235 Va. 181 (1988) that the deposition of a treating doctor can be used for any purpose.

You can put the defendant's deposition transcripts anywhere in your case where you think it will fit (or do the most good). You can have your client immediately rebut them, or put them after your opening after you have set up with, "you will even hear from the Defendant, who will tell you this morning that he was going 53 miles per hour and never honked, flashed his lights or gave any warning whatsoever to Pauline Plaintiff before he smashed into her..." With this stratagem, you can "take the wind" out of their sails. When the Defendant takes the witness stand during the Defense case in chief, the jury will have already heard from the tortfeasor. They may think "oh no, not him again..." or "didn't we already hear from that darting eye, deviously looking defendant." See later sections for other ways to augment this offensive play. Think of it as having "a man in motion" before the other side has a chance to run a single play during their case in chief. Plus, you may be able to avoid the usual defense motions at the conclusion of the Plaintiff's case.

#4 Outwitting the opposition in depositions AND at trial –

Just as in sports competition, a good scouting trip can reveal much about your opponent. Even before formal discovery, do what the other side does to your client. They index plaintiffs, hire private investigators, and look in public records, etc. The use of depositions, recorded statements, and prior transcripts (i.e., from traffic court, general district court in a dog bite case, workers compensation Hearing, other litigation, etc.) can help you at the defendant's deposition and/or trial. How often do we subpoena the defendant's medical records, optometrists test results or family doctors' files? The Defendant's prior convictions can now be pulled off of the Internet in many instances. Sending a Court Reporter to the Traffic Court Hearing, if you are retained sufficiently in advance, can pay dividends later in the case if the Defendant attempts to change his story, the investigating police officer is no longer in the jurisdiction or other eye witnesses testify.

By investing early and intelligently in your case, just like a sports club that has a good farm team or developmental system in place, the likelihood of later success can be enhanced.

#5 Using actors or retired doctors to read depositions

Sometimes your treating doctor does not want to go to court, and will only do a deposition. Other times, your medical expert or technical expert is difficult to understand or has difficulty with the English language. And other times, your expert witness does not look the part or the videotape has been corrupted or deposition upon written questions was utilized. Fear not intrepid trial lawyers ! There are methods of making even these problems into advantages for the offensive team.

Consider the use of a professional actor or retired physician to “read the script.” Our office has used a retired South African physician who looked like he was right out of “central casting.” He know how to correctly pronounce the complex medical terminology, was less expensive than the real doctors in the cases, looked authoritative and genuinely enjoyed being involved, which the jury could pick up on right away. And he came dressed for the part, with the deposition placed inside a medical chart folder. A professional actor can also be found to match the person whose deposition was taken, and in cases where they were taken well in advance of trial, you can take out the “slow” parts or irrelevant material and keep the testimony clean and to the point.

Retired physicians and professional actors can be effective players in the presentation of the plaintiff’s case. They know the correct pronunciation, are perhaps easier to understand than a harried, foreign trained surgeon for whom English may be a second or third language. Getting someone who is handsome, who can sing your expert’s “aria’s” puts a good feeling into the case, like the inspiring singing of our National Anthem at the beginning of a sports event. Do not make the judge or jury struggle to understand already complex medical testimony. And do not spend a fortune on a doctor who may not want to be there and whose presentation and “game face” may not be ready for “prime time.”

#6 additional strategies with videotaped depositions,

First, since 9-11, it is almost unheard of for a judge to allow a jury to leave the courthouse and visit the scene of an accident. It is expensive, dangerous and time consuming. Second, nobody likes to visit the scene of their crimes or remember their mistakes. Thirdly, a Motion for Inspection (and photographing) is not an easy thing to get. So, to “kill three birds with one stone,” consider a scene deposition. Taking the deposition of the store manager at the premises where your client fell

will enable you to take the defendant out of their “zone” of comfort and will enable you to bring the scene to the jury. This will make the case much more interesting and will enable you to get exact measurements (even film the defendant walking it off or using your tape measure, just like the defense likes to have our clients draw scene diagrams). Consider having the investigating officer walk the jury through the scene and point out the roadway particulars. Depose the defendant at or near the scene outside, so that they have to “re-live” what they did. Go through what they saw, heard, felt, smelled, touched, tasted, etc. Bring your client so that the defendant has to relive the accident and eye ball your client, while their counsel is busy sweating through their good suit, chasing their papers that are flying away in the wind and thinking about the unreimbursed travel time on a set fee case.

#7 Using the expert witness DME report &/or use of the defense medical expert, the “friendly” medpay, PIP or “No-Fault” insurer’s medical examiner, the Employer/workers compensation carrier’s rehabilitation nurse, vocational expert or other agent, “poison pills,”

This section could also be called “using stuff you didn’t pay for in your case.” If you get helpful material in the DME report, USE IT. Give it to your expert. Blow it up and “read along with the bouncing ball,” during the cross examination of the defense doctor. If you get friendly material in an IME for the PIP, STD, medpay or other first party carrier, USE IT. Your doctor can testify that not only did she reach these favorable conclusions, but so did Dr. Medpay, LTD, workers compensation, etc. If your client passed a company physical, medical physical, DOT physical, or other examination, use that information to buttress your treating doctor’s testimony about the absence of pre-existing conditions or disability(s). If the other side is going to send a client to a DME, send a family member or friend of the same gender to observe. Have your client ask questions. Have your client bring impressive pictures of the wreckage along with the diagnostic films that are usually requested.

If the client has a concurrent workers compensation claim, co-opt the nurse case manager or rehabilitation consultant. Let them know that if they hurt the liability case they will impair the ability of the carrier to recover its lien, but if they help, then they can be paid for their court time (which can be higher than their professional time, travel and waiting time) for testifying in the liability case. In other words, let them know that they can get paid by two masters on the same file if they truly help the injured worker. Plus, they may turn out to be less expensive than anyone you hire, they may be able to state that they usually (or always) testify for the defense, and they may have been involved very early in the claim.

Practice tip: Remember that every letter you send to a doctor, the client's employer, vocational consultant, nurse case manager or other professional on the case is potentially discoverable. Always put in "poison pills" such that you would welcome the reading of such correspondence in court before the jury. Even such simple lines as, "because the defendant and his insurance company refuse to accept responsibility for smashing into your patient at 53 mph (see the attached official Police Accident Report and photographs), we must ask you to ..." and "we have offered to settle this case within the defendant's policy limits, but All Farmville Mutual Insurance Company refuses, and therefore many busy professionals such as yourself will be inconvenienced by having to be at trial July 29th, instead of helping people who need medical treatment here at VTLA Hospital..."

The defense is not shy about showing pictures of no property damage to our treating doctors. So send wreckage pictures to your treating physicians. Send them copies of the Police Reports, which are not admissible in and of themselves, but which cannot but help to impress a doctor who will see where you have highlighted the charges against the defendant, the speed of the vehicles, the amount of the property damages, etc. Send the treating doctors the company physical, military physical, life/health insurance physicals, etc., to show that your client (and their patient) was in excellent health prior to the crash, slip and fall, explosion, etc. These papers can become part of their file. Get the family doctors involved by getting causation opinions from these non-specialists as well and make sure the two doctors speak on the telephone or write to each other or copy each other on notes. That is an action that the DME doctor can never match and will be hard-pressed to eliminate. Remember that the family doctor usually knows the patient for the longest time and has a vested interest in keeping them healthy and happy over the long run.

#8 Tips to shorten and invigorate videotape depositions of treating doctors to keep judges and jurors awake, etc.

Similar to the above stratagem is using a local college professor, award winning high school teacher, course trainer or community college instructor to testify as to the foundational material in your high-priced expert witness's opinions. When you have a surgeon who does not want to go to court, or will take a long time to explain the anatomy and physiology, for example, of the shoulder joint, instead of deposing them or having them on the witness stand at trial for many thousands of dollars, have someone else do the foundation. Let the "high priced" expert be the equivalent of a "closer" from the bull pen. Have your medical illustrations on tripods next to the screen where the doctor's deposition is playing so that the jury is not just staring at the talking head.

Have, for example, the person who trains the local EMTs, firefighters and other rescue workers for their certifications, show your medical illustrations (and then leave them up during the playing of the edited treating doctor's videotape deposition) and models of and explain to the jury the workings of the shoulder joint. They will give no opinions testimony in the case, so they cannot be subject to the usual objections by defense counsel yet they will certainly help the jury to understand things outside their current understanding. Your voir dire should help lay this predicate (i.e., "How many of you have observed shoulder surgery, taught shoulder anatomy or had training in first aid for shoulder trauma...").

The local trainer or professor can inexpensively explain the anatomy and physiology. They can help to humanize your case, since the jury will like such a "shirtsleeves expert" who has a connection to a local school, firehouse, police station (and may come in uniform !) and have touched someone in their own lives. Then, after they are done, you can present a shortened version of the treating surgeon's videotape deposition, where the opinions are set forth, and the judge and jury already understands the underlying science. The videotape is thus made shorter, the costs are kept reasonable, and a real, live witness "helps" the jury understand the medical testimony.

#9 Subpoena the Defendant's doctors' records (why not, they do it to us)

Consider sending a subpoena for the Defendant's medical records (and those of their passengers in an automobile accident case). This discovery may reveal injuries sustained in the crash. You may also learn of eyesight problems, other senses (hearing, reaction times impaired by medications which often contain the warning labels that read: "do not operate machinery," "take with food," "may cause drowsiness," "do not consume with alcohol," etc. You will get good material for your doctor and even better material to use in cross examination of the defendant's doctor. Plus, the DME physician may not even know the name or characteristics of the defendant who ostensibly has hired him !

#10 Take it to THEIR house

Subpoena the Defendant to trial. If they do not show, you get a continuance. You also do not want a defendant "forfeiting coverage" by "no-showing." But more importantly, instead of the pressure being all on your client, the defendant gets a sheriff coming to their home or place of business and letting them know, in no uncertain terms, that they are "involved," regardless of what they have been told by their company assigned defense counsel or the adjuster. This tells them that

the case against them, that will take them away from work and their usual activities has not settled for within the policy limits that they have paid premiums for all these years.

Effect this service via the sheriff's office, well in advance of trial, perhaps as soon as you get a trial date. You want the Defendant asking the hard questions of the agent, defense counsel and adjuster. Frequently. Causing a distraction on the sidelines cause your opponent to "take their eye off the ball." By serving the defendant, you are saying through your actions, "Hello there, this is serious, get on your insurance defense counsel's case ('cause he ain't doing anything on yours !)" and get this case settled so that you do not have to go to court."

III. Conclusion

Don't just think outside the box. Think INSIDE the box – the jury box. Get out of your lawyer suit. Think like a juror, not a lawyer. Remember that the best defense is a good offense. Be "loaded for bear" and have your case ready to try when you file suit. Keep your presentation interesting and to the point. Use scene depositions to bring the court to the scene of the accident and have witnesses without Ph.D.s explain your case. Be creative, proactive and invest the time and resources early on in the game in order to ensure your superior position for the end game.