



# Positioning the Win:

*From Intake to the Courthouse Steps*

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## Out of the Gate Essentials

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## OUT OF THE GATE ESSENTIALS – Ben Falkenberg

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## Strategy and Tactics

“Strategy without tactics is the slowest route to victory. Tactics without strategy is the noise before defeat.”

Sun Tzu, *The Art of War*

The terms tactic and strategy are often confused: tactics are the actual means used to gain an objective, while strategy is the overall campaign plan, which may involve complex operational patterns, activity, and decision-making that lead to tactical execution.

What this means is that we must have an overall strategy to win our cases, and we must implement our strategy using tactics along the way. If we employ tactics without a strategy, we are employing random acts without a view towards our ultimate goal. We must know what our end goal is at the beginning. Without knowing the end goal, we can have no effective strategy, and are tactics will be useless.

Without knowing where you want to end up, it’s hard to know where to start. You need a plan.

## The most important decision – someone wants to hire you

The decision whether or not to accept the client is the first step in winning your case. Do you take on every person who calls your office? If you’re just starting out your practice you might be tempted to take on everyone who phones you, however I would discourage you from that practice. It will be tempting if you are hungry for files, however one of the best things you can do for your practice and yourself is to pick good clients.

I’m not saying that you should only act for the pristine clients, but make sure you know who you are going to be acting for. Clients who are truthful with you right off the bat, who file their tax returns, don’t have long criminal records for fraud, theft and other offences of dishonesty, and who are not obviously entirely at fault for the collision are who you want.

Some may disagree with screening who you take; however the reality is that you can only do so many files each year so you may as well be doing good profitable files. Remember that it is not just your time, but also your financial resources that you are committing to that potential client. The reality is that we have to fund expensive disbursements for our clients, and we have to pay our staff and for our offices so we need to make sure that we are for the most part taking good clients and good files. The best thing you can do is to pick good clients.

This is of course keeping in mind that you have a professional obligation to help individuals the you might not normally take on as clients, but who are deserving of your assistance and without which they would be taken advantage of by insurance companies. I am guilty of perhaps taking too many of these files, and it is something that you must seriously think about so you do not end up with a cabinet full of

dog /pro bono files as opposed to a cabinet full of profitable good files. If the majority of your cases are not good files, you won't be in business very long.

## The interview process

You should not be interviewing the clients first (unless you don't have an assistant). In my office clients come to us either through our website, or referrals from previous clients. Everyone who phones the office is interviewed by one of my two female assistants. I think that women are very good, and often better than men, at judging people and are usually more perceptive than men when it comes to assessing people.

My two secretaries are very smart and perceptive women and I respect their opinions and their judgments about potential clients. That is not to say that I don't sometimes disagree with them, but they are very good judges of people. There is a checklist of information<sup>1</sup> that they are to get from the prospective client, but outside of that I leave it up to them to interview as they see fit and get a sense of what that person is all about, and whether or not it is a person who we would like to work with. I suggest that you listen to your secretary if they think someone is going to be a difficult or unreasonable client. Remember, that it is your secretary is going to be dealing with that person more than you. You want to keep your secretary happy, but you also want your secretary to be able to work on important work and good files, and not have her valuable time taken up by silly unreasonable and demanding clients.

You, as the lawyer, ultimately must make the decision whether or not you're going to act for that person. If they pass the first filter, then I usually interview people by phone, and then if I like them as a potential client, we set up an in person meeting. This process protects your valuable time and you are not spending hours on the phone talking with people who will never become clients.

## You Have a New File

You have decided to accept the caller as a client. What do you need to do, right away, to begin maximizing your client's chance of a fair recovery? There are some steps you must take.

### The first thing you need to know - what is my goal?

Once you have accepted the client, you must keep in mind what the goal is; as David Ball trial consultant says:

“The only goal of trial is to get money for your client”

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<sup>1</sup> See Phone Intake Sheet in Appendix

David says that you should cut that page out of his book, Damage 3, and put it on your wall. I would go further and say that, getting money for the clients is the only goal that we have when we take the case.

“The only goal of what we do is to get money for the client”

There is nothing else we can do to help our clients other than to get them fair compensation.

## How do I achieve this goal?

### With or Without Trial

“The supreme art of war is to subdue the enemy without fighting.”

Sun Tzu, The Art of War

Your goal is to get as much money for your client without trial, or be ready for trial. The only way that you will get as much money as possible for your client without trial is to plan to go to trial, and be ready for trial. In our office we treat every case as if it is going to go to trial. It is for that reason that most cases don't go to trial, but there is still the payment of a fair amount of money. By doing this you achieve the supreme art of war of subduing your enemy without fighting. If you plan that a case is going to settle, you won't take all the steps necessary and you won't be in a position to force the defence to pay reasonable money. Remember that insurers pay for risk. If they are not at risk (i.e. you have not built the case up) they won't pay. Remember, Witnesses, Expert Reports, Evidence, Counsel, are all factors that go into the analysis. You can't wait to see if it will settle, and then start preparing for trial. You will have wasted your advantage and be scrambling. You are going to war and then seeking to win, instead of winning first and then going to war.

### Don't Waste your Advantage

“Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win”

Sun Tzu, The Art of War

As long as you are retained relatively early on in the process, you have two years to prepare to win the war before you file your pleadings. We have a great advantage in that we can undertake many steps and build our case before we have to file, and we have a further year before we have to serve. Do not waste that advantage. Get your IME's booked soon after you are retained, get at least one expert report in hand before you file pleadings. We usually have the advantage of time, don't waste it.

## The Process - Out of the Gate Essentials

### Step 1 - The 1<sup>st</sup> client meeting

Once I've decided to accept the client, I schedule a 1 ½ to 2 hour meeting with them to get all the information I need. I make sure that I understand what their case is about and I get good sense of who they are and get as much background information from them as I can. It is then that I can decide what steps I need to take right away (Scene investigation, photographic preservation, witness statements, records gathering, IME's, Part 7 benefits, Disability Insurer issues). This will of course vary on whether the client has been dealing with the insurance company on their own for a period of time, or whether they have contacted you right after the collision.

We have a set of documents that we asked the client to complete, and ideally those are done before the first meeting.<sup>2</sup>

### Step 2 - Summary of the case – right away

Draft a one paragraph summary of what the case is about, how the collision happened, and any peculiar issues that might arise in that particular case. While we often remember many things about our case, this is a nice summary to have on page 1 of your file, paper or electronic, that you can look at in an instant to refresh your memory when needed. Many cases are similar in relation to what happened in this is a very good way to stay on top of each file. This is important when you get 100 or more files. This is a fairly recent step we've started to take and it has been very helpful. You will see that as you try to write a concise summary of your case, it focuses you on the issues and makes you think about the case critically when you force yourself to write it down. When you try this for the first time you understand what I mean. Here is an example:

#### Case Summary:

July 1, 2013 approximately 3 am Single Vehicle MVC

Joe was seat belted front seat passenger in friend's car, a Mazda 3. Travelling south on Highway 4 on the way to Port Alberni, BC. Joe doesn't know what happened but was told that the car left the road, rolled and hit a tree. There are photos showing trees cut off and the path of the vehicle. The trees are cut off at 20 feet from the ground.

911 called, took 1 hour to arrive. Car upside down. Joe hanging by seatbelt. Cut out of the passenger side of the vehicle by Fire Department. Went to WCGH spine board, x rays, cat scan - no memories of collision. Injuries to head, face, arms, hands, severe laceration that looked like burns on neck from hanging upside down from the seatbelt. Left hand not responding - arm tingling. Various physical injuries. Brain injury. Unconscious for more than 30 minutes, altered consciousness for more than 30 minutes.

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<sup>2</sup> See the client information form in the appendix

### Step 3 – Standardized task list

You need to have a system in place so that on each file the same basic steps are taken, and you get the information you need. If you don't have a system your files will be hit and miss as to what information each one contains.<sup>3</sup> Having a defined set of jobs that your staff must do will make your life easier, and they will appreciate having a concrete list of tasks.<sup>4</sup> When you go to work on a file, it will contain the essential information that you need and you can complete your tasks. It is frustrating when you go to work on a file and there are huge gaps in information.

### Step 4 - Rules that apply to what happened in the case – right away

If you have not read Rick Friedman's *Rules of the Road*, you need to do that. This is a fantastic book and can revolutionize how you practice plaintiff personal injury files. One of the things we do now is to sit down early on in the case and to come up with a list of Rules for that case.

Much like writing a summary of the case, writing out a set of rules will help you focus on the issues in that case and help you decide what type of evidence you are going to need both lay and expert. In the appendix is a set of rules which I created for a case involving the collision between a van and a commuter train at a level crossing with no gate. I was able to draft some of these early on and the list grew as we got past discovery and towards trial. You need to try and think of all what the safety rules might be for your case as it will help you focus on what you need to do going forward.<sup>5</sup> You must do this before discoveries so that you can get admissions from the defendant. Without these, you won't get crucial admissions that can win your case.

### Step 5 – Witnesses

#### Occurrence witnesses

Occurrence witnesses are important and if possible you should talk to them and get statements from them early on. Often you will be retained weeks or months after the collision happens so ICBC will have obtained witness statements. You should get copies of those; they are not privileged as they are in the investigation stage of the claim and need to be disclosed. Often ICBC will resist that until you start the action.

A problem with occurrence witnesses is that you will often be retained later on and ICBC will have spoken to these people. In some cases ICBC uses investigators who will go out and take statements and in doing so will poison the witnesses against the plaintiff by suggesting that the plaintiff is claiming millions of dollars for a relatively minor accident and other tactics such as this.

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<sup>3</sup> See Opening Worksheet

<sup>4</sup> See Task List in the appendix

<sup>5</sup> See rules of the road train case in the appendix

If you can get the witness to give you a written consent to obtain a copy of the statement that is helpful. Send that ICBC and if they resist you can use this later on when you have to make an application. If you can talk with the people who have given a statement try to find out what the ICBC investigator has told them about the case. Often it is a very slanted or even erroneous set of facts as to what happened. Get a statement from that person including details as to what the ICBC investigator told them about the case? You can keep that statement privileged until trial when you cross-examine them as defence witnesses, and you can effectively use this to cross examine the ICBC investigator when they become a witness if there issues arise when that witnesses testifies and there are conflicting statements;

### Quantum witnesses

Quantum witnesses are more important in the case than occurrence witnesses, and are often the hardest thing to get from the client. We put this in our opening checklist and we encourage the client to provide these names to us early on. We try to speak with the witnesses to see what they know about the collision and about what they say about the person's activities in life before the collision. Your early contact with these people will make them aware of what has happened to the client and they are primed to assist you with the case going forward and are also likely to pay more attention to what is happening to their friend with respect to their injuries, harms and losses over the time between the collision in the trial. Too often witnesses are a last minute thing we do just before a trial. Quantum witnesses often will give you important information and insights into the client which would otherwise not have; if you get this information early enough you can make use of it. Leave it too late and it may not be of much use at trial.

Too often not enough time is spent on quantum. Trial is about what you make it about. Make sure that your quantum case is at least as long as, and usually, longer than the liability part of your case. The jury will decide what is important in the case based on what you spend time on in the case. Do this in contentious liability cases, especially in contentious liability cases.

### Step 6 – Scene Preservation and Engineering Evidence

If you are retained early in the case, try and get some photographs of the area right away. If necessary also try to get measurements. In a couple of cases we have had engineers attend early, and in one case we had the BC land surveyor attend and survey the roadway. From that BCLS data, the drawings that were produced by the engineers were absolutely accurate and unquestionable. Municipalities often have very good mapping on their websites for free. That and Google Earth and Street view can provide you with excellent visual information.

Write a letter to ICBC about the blackbox data. Tell them you want preserved and if it's been downloaded you want a copy. Remember that the data is wiped out after about 160 ignition cycles, so if not downloaded, it will be gone in a month or so depending upon use of the vehicle. ICBC often downloads this data but doesn't tell anyone. In one case I had they had downloaded it and kept it hidden for 2.5 years, and just before the trial they produced an engineering report based upon this data.

At trial the engineer admitted he downloaded it at the request of ICBC within two week of the collision and he and they had it all this time. Ultimately it confirmed what our engineers calculated but you have to watch out for this tactic from ICBC. It is completely improper and not in accordance with the Supreme Court civil rules.

## Step 7 – Medical Chronology

We always obtain the client's pre-collision medical records for a period of between 2 to 5 years. We then prepare a medical chronology with that information in blue text, and everything post collision in black text. We can filter that document to show one health issue, or several health issues, such as headaches and you can see from the colors the pre-and post-collision pattern of reporting of that issue to the doctor both before and after the crash. Some people do not want to get these records and rely on the client to tell them about their previous medical history. I think this is dangerous and leads to trouble as clients often do not remember what they have said to their doctor or know what is in their medical history. When they see the chronology they will be able to tell you whether it was an individual simple matter or whether it was an ongoing problem. This is a fantastic tool for review for you and for the client. Often it is a single or couple of visits for a problem which they then forget about. Without this, at discovery they often go on to testify that they have never had a problem with headaches etc, prior to the collision. Once those records are disclosed the defense can use that to attack their credibility, and call them unworthy of belief, a liar in not so many words. The defense will be able to use this to say that your client is a poor historian, has a poor memory, and should not be believed when they tell us about the length and severity of all of their subjective symptoms because their memory can't be relied upon, they forgot about x,y and z after all.

The defence attacks the plaintiff's credibility in every case, and if you have not read Rick Friedman's *Polarizing the Case*, you need to do so. This book is another must-have in the plaintiff's arsenal. This book tells you how to deal with the defense calling your client and exaggerator, and malingerer, and that they are not worthy of belief.

## Step 8 – Hiring Co- Counsel

This is something that is underutilized in our profession. Whenever I have a large case I will co-counsel with another lawyer. There is such a huge advantage to having another skilled plaintiff counsel with you for the duration of the file, and through the trial, that it is in my view almost professional negligence not to do so in certain circumstances. The TLABC Plaintiff only list serve is a great resource, but having two plaintiffs' counsel review and work on a file is really what is needed. On big files, you can't do it alone effectively.

If you have senior personal injury lawyers in your firm that is one thing, but most of us doing plaintiff personal injury are in one or two lawyer operations. If you do not have somebody in your firm with the knowledge and experience than you must look outside your firm to get assistance, and you must do it early.

You should also do this early in the file and not wait until after discovery or until just before trial, thinking that you will be able to settle the file; and then when that does not happen panic sets in and it may be too late. If you don't have the experience and the resources to properly represent the client, things are not going to get done and it may be too late to correct matters and ensure that everything is ready for trial. You cannot count on getting an adjournment with the addition of new counsel.

You will have a much better experience, get a better result, the client will be better served, and you will learn a great deal working with another experienced lawyer. I have been doing plaintiff work for 20 years, and I still learn every day from working with other excellent plaintiff lawyers. Yes, it is sometimes hard to share the fee but this will be the best money you ever spent. Doing this will enhance your skills and your professional reputation.

### **Advice for dealing with difficult issues and difficult DC – respond (maybe), don't react.**

I have a low tolerance for stupidity, fools, defence bs, and other things of this nature. When dealing with defence silliness, my mantra has become, "will this step or action I am about to take, advance my case or help me get to my goal?" If yes, do it, if not, don't. I politely tell them, once, I won't be doing X, and I leave it at that, even when they send a letter 8 more times requesting the same thing.

If you are well prepared and the master of your file and your case, you will be ready to respond if necessary. If something does not need a response, or that flaming arrow of a letter you're about to send back to the latest ridiculous request letter from defense counsel, ask yourself will this action I am about to take advance my case or help me get to my goal? If you can't say a definitive yes put it aside or don't do it all. And remember, all those letters you write will no doubt end up in an affidavit. You want to be the one with the professional polite correspondence and the one with the responding affidavit full of the vitriolic condescending and rude letters from the defense.

## Appendices

### Phone intake information sheet

Start time of call	
Date	
Name	
Address	
Phone number	
Email	
How did you find us: <sup>6</sup> Website Referral from Other	
Date of incident	
Location of incident	
Other parties involved	
What happened - details <sup>7</sup>	
Your job	
Your doctor	
Adjuster	
Other information arising from the call	
End time of call	
Interviewer notes	
Impression of client	
Is this a client we would take on?	
Phone appointment with lawyer?	
If we are not taking, provide list of other lawyers appropriate to the file	

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<sup>6</sup> How someone came to you if very important for marketing. You need to know if you should thank someone. You need to know if the money you are spending on marketing is working or wasted.

<sup>7</sup> Get as much detail as possible about the who, what, when, where, how and why.

## Client Information Sheet

Number	Question	Answer
1.	Date of Collision	
2.	Date filling out this document	
3.	Name	
4.	Address	
5.	Home Phone	
6.	Cell Phone	
7.	Other Phone	
8.	Email Addresses	
9.	Age	
10.	Date of Birth	
11.	Guardian if under 19	
12.	MSP #	
13.	SIN #	
14.	Marital Status	
15.	Name of Spouse	
16.	Names and Birthdates of Dependents	
17.	Name of GP	
18.	Private Health Care Plan Provider and #	
19.	Private Disability Insurer Name	
20.	Driver's License #	
21.	ICBC Vehicle Insurance Coverage details	
22.	UMP coverage amount	
23.	Private Vehicle Insurance Cover – company name and policy #	
24.	Private Vehicle Insurance – coverage details and amount	
25.	Occupation	
26.	Employer Name	
27.	Supervisor Name	
28.	Self- Employed – if so business name	
29.	Do you have an incorporated Company	
30.	Company Name – as	

Number	Question	Answer
	registered. Director Names. Shareholder Names. Registered Office. Location of Minute Book.	
31.	Plaintiff Vehicle - Type	
32.	Plaintiff Vehicle – who is the owner	
33.	Plaintiff Vehicle – who was driving	
34.	Defendant Vehicle Type	
35.	Defendant Vehicle – who is the owner	
36.	Defendant Vehicle – who was driving	
37.	Place of Collision – nearest address or street intersection	
38.	Witness to Collision - Names and Contact info	
39.	Did you have any conversation with the Defendant Driver – what was said	
40.	Were you wearing your seatbelt	
41.	Was there a headrest? Was it adjustable? Was it adjusted? – to where	
42.	Describe the Collision in as much detail as possible	
43.	After the crash, how did you get out of the car?	
44.	Did the Police attend? Cst. Name and file number	
45.	Did the paramedics attend	
46.	Did the Fire Dept attend	
47.	Did you make any statements to any of the above persons – list, provide copies if you have them.	
48.	Had the Defendant or anyone else involved consumed alcohol or drugs?	
49.	Did you report this collision to ICBC? And if so, when?	

Number	Question	Answer
50.	What is your claim number?	
51.	Adjuster name	
52.	Injuries in the Collision – please start at the top of your head and go to your feet, listing all injuries, conditions or problems.	
53.	Which Doctors have you seen?	
54.	Which Hospitals have you attended?	
55.	Which Physio, Chiro's, Massage Therapist or other physical therapists have you seen	
56.	Are you taking any medications – please list all	
57.	Any X-Ray's, MRI's or CTs? When and Where?	
58.	Any surgery done, recommended or that you are waiting for?	
59.	Any previous MVC's – when, where, what injuries, any claims made?	
60.	Any previous injuries at all?	
61.	Any WCB Claims	
62.	When the collision occurred, were you at work, or working?	
63.	Have you applied for WCB?	
64.	Have you applied for Medical EI?	
65.	Have you applied for Regular EI?	
66.	Names of People who knew you before and after the collision who can talk about how you have changed, or how your injuries have affected you.	
67.	To Do List	



## Task List

	<b>File Worksheet - Opening</b>		
	<b>Client</b>	Joesph Bloe	
	<b>File No</b>	123456789	
	<b>MVC Date</b>	April 18, 2014	
	<b>Date we were retained -</b>	May 24, 2014	
	<b>Infant Claim - yes or no</b>	no	
	<b>Claim Number -</b>	A10101010	
<b>No.</b>	<b>Item</b>	<b>Date Completed</b>	<b>Notes</b>
1	Limitation dates - in Limitation Spreadsheet		
2	Letter to all doctors and therapists - we are retained		
3	Letter to Client		
4	Follow up with occurrence witness - office or hire investigator		
5	Scene Photos - Investigator		
6	Google Maps		
7	Engineer Required?		
8	Vehicle Inspection		
9	Write to ICBC, to retain SDM "black box" data from vehicles and preserve download copy		
10	Clinical Records 5 years Prev MVC		
11	Order Income Tax - 5 years prior to MVC		
12	Do FOI for Police File right away		
13	Order Police report - RCMP - and also ICBC Copy		
14	Initial Letter to ICBC		
15	Resume from Client		
16	Obtain Medical Imaging Now and Ongoing basis - MRI needed? Send to CMI		
17	Send Imaging to Meditech for Review		
18	Obtain School Records		
19	Client Apply for Medical EI		
20	Client Apply for Part 7 benefits, TTD's		
21	Client Apply for Short Term Benefits		
22	Client Apply for Long Term Benefits		

23	Client Applies for CPP Disability at 1 year mark if they are still unable to work		
24	Quantum Witnesses - Client List provided yet? Follow up with Client 2 weeks		
25	Order MSP - 7 Years		
26	Order Pharmanet		
27	Employment File		
28	Consent Order for Police File - as soon as Action is started		
29	<b>Set up now for 12 - 18 mo</b>		
30	GP Report - if a good GP		
31	IME - Psychiatrist		
32	IME - Other Medical Specialists		
33	Other Medical Experts		
34	Functional Capacity Assessment		
35	Vocational Assessment		
36	Cost of Care Report		
37	Economist Report - Cost of Care		
38	Economist Report - Income - full report or Multipliers		
39	Medi-tech Imaging, charts		
40	Focus Group		
41	MSP - Updated		
42	Pharmanet - Updated		

## Rules of the Road – Train Collision

1. A railway company must make sure that their trains proceed safely through urban areas
2. A railway company must ensure that trains go at a safe speed
3. A railway company must maintain safe track speeds in urban areas
4. A railway company must make sure that it's crossing signals are adequate and in working order, both visual and auditory
5. The safest option for railway crossings in urban areas are to install crossing gates
6. Crossing gates are the costliest option (\$125,000 for retrofit– “Witness D” Q 84; \$25,000 at time of crossing renovation – Engineer’s Report)
7. The railway company was concerned about costs so they decided not to use the safest option and they did not put in a gate
8. A train driver must obey the track speeds
9. Safe track speeds are important in urban areas
10. A train driver must not speed
11. A railway company must reprimand train drivers who speed
12. Trains weigh hundreds of tonnes and cannot stop quickly
13. A train driver must obey the COR
14. A train driver must obey Rule 14 and sound his whistle where there is a whistle board
15. A train driver must obey Rule 14 and sound his whistle continuously where crossings are less than .25 miles apart
16. A municipality must maintain railway crossings
17. A municipality must maintain visibility of railway crossings
18. A municipality would like to have gating at all crossings on major arterial roads – “it’s another tool for the safety of the travelling public” (Q 99 “Witness D”).
19. A municipality and a train company must communicate with each other to ensure that someone takes responsibility for installing the safest option, railway gates; and each entity knows who is responsible for safety.