



OAJ Destination CLE: Trial Tactics Seminar

March 24-26, 2014 – Park City, UT

The No Excuses Demand Package

Don Moore, Esq., Cincinnati, OH

NO EXCUSES DEMAND PACKAGE

Donald C. Moore, Jr.
1060 Nimitzview Drive, Ste. 200
Cincinnati, OH 45230
Phone: (513) 232-2000
E-Mail: dmoore@moorelaw.com

When I was an insurance adjuster, I received demand letters from lawyers almost daily. Very few included all the material necessary to evaluate the case. In some cases, it was ignorance on the part of the attorney; in others, just plain laziness. Occasionally, we would get a complete package that included all the information necessary to evaluate the case. That left claims personnel with “no excuses” for further delay in evaluation and engaging in an effort to settle the case.

The purpose of this paper is to remind the reader of all the elements necessary for evaluation of a case and, moreover, to offer suggestions to create a truly exceptional demand package, differentiating yours from all others, both in content and results.

A complete demand package accomplishes multiple goals:

1. It provides the decision makers with all of the information necessary for case evaluation.
2. Perhaps more important than number 1, it makes the reader empathize or at least sympathize with the true impact the injury has had on the victim and family.
3. It calls attention to this particular case because of its unique, complete, and excellent presentation.
4. It represents the work your office is capable of and demonstrates an early preparation for trial.

Perfect Package Preparation

Correspondence from Client

One should assemble a broad universe of information since one cannot predict the unique aspects of a particular client. Ask your client to write you a letter which includes, in their own words, every word and every activity taken from the time of their injury forward with greatest detail front loaded towards the events immediately before, during, and after the incident. Thereafter, the entries may become less in number, but no less in importance. The letter should include significant benchmarks, i.e., first time out of bed, first time out of the house, first time off crutches or out of wheelchair, released from therapy, etc. The letter should also include missed events, i.e., weddings, vacations, family events, graduations, etc. The letter should begin “Dear (attorney name)”, and

conclude with a closing, “Sincerely (client’s name),” or something to that effect, rendering it a communication to counsel and non-discoverable. We often share these letters, but we cannot be compelled to do so.

Client Interview

The initial client interview not only is important for case screening purposes, but is also important for a first impression of the client. Your first impression is likely the impression that a jury or other decision maker will receive. During the first meeting, you have not yet had an opportunity to become involved with the client and therefore are relatively objective. If the case is problematic or not attractive for some reason, this is the time to decline representation. If it’s a case you wish to accept, either conditionally, or otherwise, then this is the time to tell the client how you expect the case to progress and what you will expect out of them. In talking to the client, always be alert as to the client’s apparent cognition of the information you are imparting. Not only is this important for your further communications, but it’s also important in picking up subtle injuries or problems that may be accident related, of which the client and family may be unaware.

In later interviews with the client, we typically cross-examine the client, both as early preparation for discovery depositions, and also learn the strengths and weaknesses of our case. It is not unusual to find a client who is embarrassed to talk about the things that might make their case the strongest. For a twenty-year old recently married female to discuss sexual dysfunction with a middle aged male attorney, she will likely have to be questioned carefully. Similarly, sometimes forgotten indignities such as catheterizations, enemas, feminine hygiene, bedpans, bathing, or wound care, are all things that are very important for case evaluation and illustration.

Medical Records

Obviously, accumulate all the usual records. Don’t forget ambulance records, which should have Glasgow coma scale ratings, comments regarding pain, current medications, and very specific times. The time is important because it helps the attorney reconstruct how long the client was laying on the cold street, shivering and in pain, riding in the bumpy ambulance with a compound fracture, confined to a stiff backboard, stuck in torn, bloodied or soiled clothing, etc., until things are stabilized and/or somewhat normalized.

Photographs

Rod Stewart once sang “every picture tells a story.” No great revelation here, however, the importance of the pictures cannot be over-emphasized.

Pictures from the accident scene or place of injury are manifestly important. Be aware that sometimes ambulance or fire personnel take their own pictures. Be creative with the accident scene photos, not only the ones provided by the emergency personnel,

but also photos that you may have taken by professionals following the accident. Insurance companies target light impact cases, with pictures, as ones to try and get favorable defense verdicts. Conversely, insurance adjusters are moved by major crashes with mangled wreckage photos. Occasionally, the careful photographer will discover hair in a windshield, bits of flesh or blood in other places, a damaged or bloodstained child's carseat, etc. Photographs of the patient during various stages of recovery, their wounds, injuries, scars, the use of appliances, etc., are important as well.

Historical photos can be solid gold. Photos showing pre-accident activities and relationships can cause the viewer to identify with the victim. When I once asked a widow to give me all the pictures she had of her deceased husband, she responded with a paltry few photos. This was disappointing until I visited her home and she showed me a closet filled, top to bottom, with photos taken by the decedent. The photos showed an eye and an appreciation for beauty. His love of life, evidenced by his photographs, was every bit as effective as if the pictures depicted the decedent.

Other photos of the aftermath, post accident life, or death, would include memorials, flowers, crosses at an accident site, tombstones, ceremonies, etc.

Home Visit

Another source of great information regarding your client is a home visit. Home remodeling projects, yard care pictures, trophies, and memorabilia tell you something about the client. Do not neglect to visit their bedroom. As every burglar knows, people keep precious things close to where they sleep. The bedroom is often a location for collections, photos, or other keepsakes.

Videos

Videos can be used in a number of different ways to enhance the settlement package. In one respect, they are unwieldy because they require special equipment for the recipient to play. In other aspects they provide unique opportunities that can be legitimately edited to make a concise presentation that imparts a great deal of information, quickly, powerfully, and effectively. We include both DVD and Flash Drive versions with each package.

Similar to the still photos, families often have videos of family events, Christmas, and athletic events that they have taken throughout the victim's life, before the accident. Many hours can be edited down to a few minutes, imparting the appropriate message.

News video regarding spectacular accidents has obvious value as do security videos, and municipal videos of intersections. While these can be wonderful sources of evidence, they tend to disappear quickly, as most tapes are regularly recycled.

Professional videos, including "Day in the Life" ideas, or other videos designed only for settlement purposes, can be extremely effective. Deposition videos are terrific for bypassing the defense lawyer filtration process and getting the most accurate impression of a favorable witness to the decision maker.

Demand Letter

Every demand package should include:

1. All relevant records, important parts highlighted.
2. Police report, ambulance, etc.
3. Photos that contribute to the theme or themes of the case.
4. Drawings that show mechanism of injury and repair.
5. Lost wage, proof, future calculations, rehabilitation, evaluation, economist report
6. Medical reports, orthopaedic, neurological, psychological, etc.
7. Accident reconstruction report
8. Bills
9. Actuarial tables
10. Verdict reporter showing comparable case verdicts
11. Video in Flash Drive and DVD form
12. Settlement letter and offer
13. Summary of special damages*

Recognize your target decision maker. There are differences in the approach to the experienced claims representative, a claims supervisor, insurance house counsel, and the corporate decision maker. Tailor your themes, brochure sequence, and choice of material to your audience.

Experienced claims representatives and supervisors have definite criteria for claims evaluation. They are necessarily calloused to hardships commonly experienced by victims in accident cases. At the same time, they want to be respected and would like to get the file closed. One must consider that they don't want to see anyone get too much money, especially a plaintiff's lawyer.

An employee claims attorney will have a regular working relationship with claims personnel, will wish to affirm them and will have no specific motive to unnecessarily prolong the handling of a case. Further, a lawyer will not want to be "hit" by an excessively large judgment that would reflect on their evaluation and/or trial skills.

The corporate decision maker is often a plant manager or company officer who is not experienced in claims evaluation. They are commonly emotionally adverse to claims against their company. They hate to admit fault, but can be more sensitive to the humanitarian aspect of the claim. They often know the injured plaintiff, personally. They may also have considerations with respect to friends who may lose their job as a result of the negligence that gave rise to the case.

* See the attached checklist

The goal of the complete demand package is to have everything in one package provided to each and every decision maker simultaneously. The idea is that no decision maker will have to wait on another and no decision maker will have to look any further than their desk to get all the information they need to make a decision on the case. Hence, make original packages for every level of decision makers.

Organization

We like to use large, three-ring binders. We position the contents in order of importance and impact. We assume the decision maker will quickly lose interest, so we position background information, such as bills and medical records, in the back of the binder(s), we place the things with most impact in the front of the binder. There is always a table of contents for quick reference to tabbed locations. Part of the table of contents includes a summary of the specials. We also always include a summary of the specials in the demand letter.

The cover of the binder is important. We want the cover to be unforgettable. We want an image the decision maker will carry home that night and that will remain in his or her conscience for at least a few days. With desktop publishing, scanned photographs can be sprinkled throughout appropriate places in the demand package for effect, and to keep interest up.

Settlement Offer

Determine your themes before writing your demand letter. Never call a demand letter a demand letter, it's always an offer. Everyone resists demands.

We try to make our letter easy to read, using a "USA Today" style. We write our letters in the present tense. The use of captioned photographs, sidebars, and bullet points, all facilitate a reader-friendly letter.

We edit the letter within our office to make it the best quality writing we are capable of producing.

Strive to be pithy, succinct, stark. Anything but boring.

Never repetitious.

Skillfully include items that you believe will make the decision makers uncomfortable. If the facts are really egregious, emphasize them and develop their potential for punitive or bad faith damages. Insurance coverage issues make everyone uncomfortable. If it enhances your client's case, make it a theme.

Reason with the reader, using tools with which they are familiar. Jury verdict publications, local jury verdicts, multiples of specials, if favorable, and any other tangible or semi-tangible tool that provides a rationale is helpful.

Some insurance companies say that all demands and documentation are scanned in before the representatives see it. They can't scan large binders, DVDs and Flash Drives. These factors differentiate your case from the other cases.

The entire settlement brochure is an effort to convert your "case" or "file" from a pile of papers to a compelling story about a father, a mother, or a child.

CHECKLIST

- _____ Specials Summary
 - Medical _____ past _____ present _____ future
 - Wages _____ past _____ present _____ future
- _____ Photos
 - _____ pre-accident _____ accident _____ post accident _____ family
- _____ Drawings
 - _____ crash scene _____ medical _____ other
- _____ Medical Reports
 - _____ treating doctor _____ evaluating doctor
- _____ Vocational
 - _____ employer statements _____ tax returns _____ vocational evaluation
- _____ Economist Reports
- _____ Accident Reconstruction
- _____ Biomechanical Reports
- _____ Governmental Reports
 - _____ Police _____ Ambulance(s) _____ Air Care _____ OSHA _____ Other
- _____ Medical Records
 - _____ Accident Related _____ Pre-Accident _____ Post-Accident to Date
- _____ Bills
- _____ Actuarial Tables
- _____ Verdict Reports
- _____ Settlement Video
- _____ Settlement Offer Letter

Donald C. Moore, Jr.
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dmoore@moorelaw.com

The 'No Excuses' Demand Package

Donald C. Moore, Jr.
The Moore Law Firm
1060 Nimitzview Drive, Suite 200
Cincinnati, OH 45230
(513) 232-2000
dmoore@moorelaw.com

Know Your Enemy Know Yourself

Master Sun
The Art of War

Know Your Case Know your Client

Client Letters

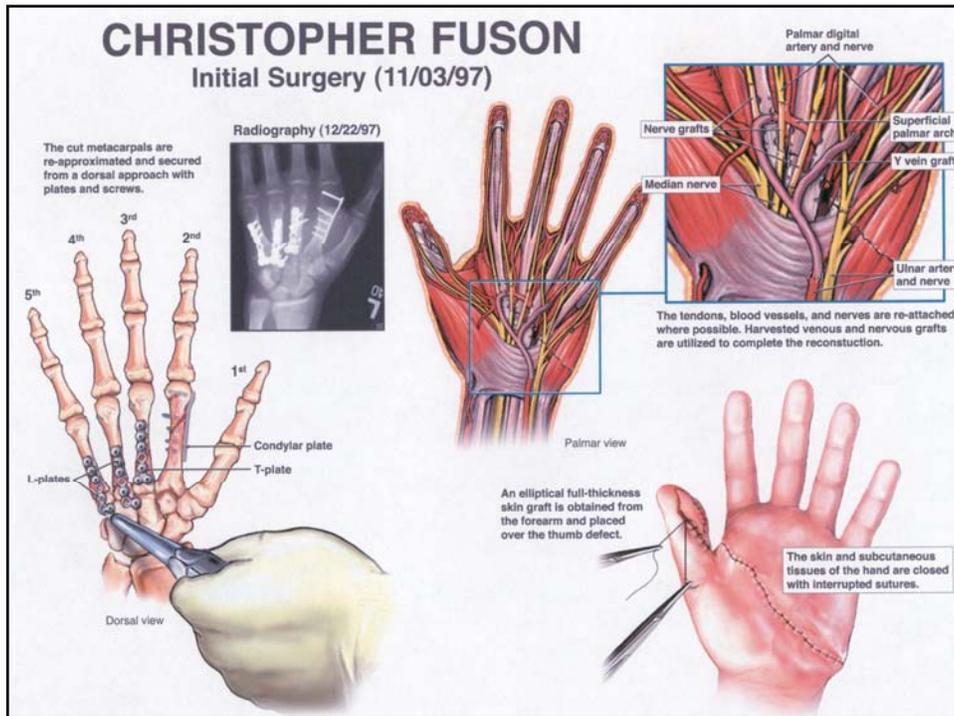
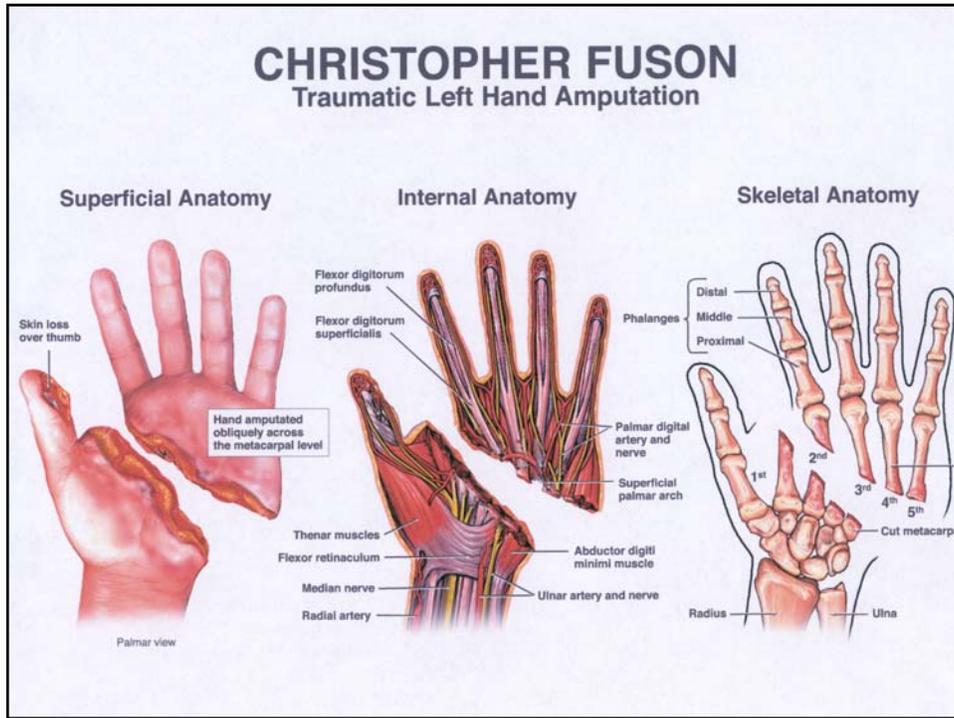
- Medical Treatment
- Medical Problems
- Medical Benchmarks
- Personal Problems
- Missed Events (wedding, vacation, graduation)

Client Cross Examination

- Probe the strengths and weaknesses of the case
- Explore likely medical problems whether or not your client recognizes them
- Ask client to do things in or out of the office that demonstrates level of recovery (range of motion, athletic activities, etc.)

Client Medical Records

- Current and historical
- Review completely, especially nursing notes
- Pain - debriding procedures, wound care, vomiting, administration of pain killers, tears, grimacing
- Embarrassment – catheterization, enema, feminine hygiene, use of bedpan, bathing



Other Records

- Ambulance – glasgow coma, indication of pain or patient condition
- Police Report
- Air Care
- Other
 - Company emergency personnel, facility emergency personnel or reporting, etc.
- Time of extremis

Photos

Contemporaneous Photos

- Security Video
- Municipal Videos
- Police, Fire or Ambulance Photos or Videos

Aftermath Photos/Videos

- Physical Damage
- Accident Scene
- Sequential Photos/Videos of Patient Recovery
- Family Activities
- Miscellaneous – memorials for client personally, at accident site, etc.

'Before' Photos/Videos

- Photos/Videos of Your Client
- Family Interaction
- Recreational
- Insightful

Home Visit

- Home Projects
- Housekeeping
- Photos, Trophies, Yard, Garage
- Don't Forget the Bedroom

Know Your Case

- Written or recorded statements from all witnesses
- Written or recorded statements from those who know about client's aftermath
- If in suit, consider video discovery depositions

Identify Themes

- What is your case about?
- One sentence summary

Know Your 'Enemy' / Audience

- Claims Adjuster
- Claims Supervisor
- Employee Claims Attorney
- Independent Defense Attorney
- Corporate Decision Maker

No Excuses

The Package

- Summary
- Photos
- Drawings
- Medical Reports
- Vocational
 - the usual
 - vocational evaluation
- Economist
- Accident Reconstruction
- Biomechanical
- Official Reports
- Medical Records
- Bills
- Actuarial Tables
- Verdict Reports
- Video
- Settlement Letter



Settlement Letter

- List and total specials in the first paragraph
- Beat the right drum
- Creative letter layout
- Consider using present tense
- Make it exciting, pithy, succinct, stark
- Anything but boring
- Short as possible, but complete

“Simply stated, I find that the actions of Officer Hill and the other Cincinnati officers involved in this incident were shocking and unconscionable. No prudent, well-trained law enforcement officer would have acted as these men did.”

Report of Dr. George Kirkham, Professor Emeritus, The Florida State University School of Criminology

“drive on,” encouraging him to continue his over aggressive and dangerous behavior.

Despite having 13 Injury to Prisoner Reports filed, 1 Use of Force Investigation, 11 Use of Chemical Irritant Reports filed, 7 Internal Investigation Section Investigations, and 4 Citizen Complaints filed against him in 3 years as a police officer, Officer Hill was never taken off the street and never ordered to be re-trained by his supervisors until after the Wittenberg incident. Lt. Carmichael confirmed, that had the City had monitoring policies in place to quantify the number of incidents, concerns regarding Officer Hill would have been raised.

The City of Cincinnati is also liable for this incident because it failed to train Officer Hill on how to deal with citizens who are afflicted with Alzheimer's. Dr. Kirkham will testify at trial that the Cincinnati Police Department's training program is inadequate because it failed to address this important issue.

Officer Hill, Lt. Carmichael, and Sgt. Vonhagel all testified during their depositions that they did not receive any training from the Cincinnati Police Department on how to deal with citizens who have Alzheimer's disease. We believe the jury will be appalled that the City of Cincinnati has still not adequately addressed this problem in light of the City's past experiences and incidents involving Thomas Bubenhofer and Lorenzo Collins.

DAMAGES

When Bob was brought home by Officer Hill on November 14, 1999, he immediately went to the couch where he stayed for the rest of the night. Bob was still on the couch the next morning, November 15, 1999, when Mary went to work. When she arrived home for lunch she found Bob laying on the floor next to the couch in a much deteriorated mental state and unable to walk or stand up. Mary called the life squad and Bob was taken to the emergency room at University Hospital.



At the hospital, Bob was diagnosed as having sustained a right pneumothorax (collapsed lung), right clavicle fracture, multiple right rib fractures, right iliac wing fracture, left L1 transverse process fracture, left sacral foramina fracture, and a liver laceration. As set forth in their reports, Drs. Lempert (trauma doctor), Miller (orthopaedic doctor), Brogdon (radiologist), and Hughes (neurologist) will all testify at trial that these injuries were caused by Officer Hill's takedown of Bob to the hard tile floor.

After approximately six months of intensive hand rehabilitation and occupational therapy, Dr. Yakuboff determined Steve needed radial nerve tendon transfer surgery. On August 31, 1998, surgery was performed at University Hospital in an effort to improve Steve's lack of wrist extension, finger extension, and thumb extension. Steve's hand was again put in a splint and he underwent extensive occupational therapy twice a week for over a year.

While the surgeries and therapy have improved Steve's range of motion in his right shoulder, arm, and hand, he has permanent decreases in strength, function, and dexterity. At the request of MSD, Steve submitted to a second Functional Capacities Evaluation (FCE) at the Drake Center on November 29, 1999. It was determined Steve had restrictions in the flexibility of his right wrist and elbow; restrictions in his ability to use his right shoulder; restrictions in his ability to use his right hand; and restrictions in his ability to lift objects over 50 lbs. **According to the FCE report, Steve Hawthorne has reached maximum medical improvement and his restrictions are permanent.**

Steve is no longer able to perform all the duties of a Plant II Operator at MSD. In January of 1999, Steve was temporarily assigned at MSD to work with an integrated geographic computer system and then later performed light duty work at the plant such as filing and clerical work. Steve is currently working at MSD as an operations trainer.

Steve's injuries have forced him to modify the way he performs even the simplest of tasks. He now has difficulty with lifting objects, using tools like screwdrivers and pliers, driving a car, and performing basic personal grooming and hygiene. Steve has been forced to perform many activities with his left hand because he lacks manual dexterity in his right hand.

His right arm and hand are very sensitive to heat and cold and he often feels numbness and tingling in his right palm. As he described in his deposition, Steve loved to fish, bowl, and work around the house, but his ability to participate in these activities has been seriously affected by his injuries.

The injuries to Steve from this accident are not all physical in nature. Steve often worries about re-injuring himself and avoids the type of machinery that caused his injuries. Dr. Kenneth Manges diagnosed Steve as having an adjustment disorder and recommended that Steve participate in outpatient psychotherapy for a period of six months.

This accident has also affected Steve Hawthorne's employment options. Steve's employment options in the future have been severely limited by his injuries. If he wants to



Steve Hawthorne has permanent scars and physical limitations that remind him daily of this tragic and preventable accident.

"Mr. Hawthorne has had a diminished ability to participate in household services. He is no longer able to physically perform at the same level he was before his injury and chores and errands are done by others."
Kenneth Manges, Ph.D., page 11 of report.

“Demand” v Offer

- Well-reasoned offer
- Supported by specials
- Supported by law
- Clients real loss
- Supported by other verdicts
- Defendant's really bad acts/exposure

IT'S A WRAP

- Packaging and cover are important
- Multiple copies
- Front photo – big deal

**The Skillful Strategist Defeats
the Enemy Without Doing Battle**

Master Sun
The Art of War