

PERSONAL INJURY TRIAL HANDBOOK

JOHN A. TARANTINO

DAVID J. OLIVEIRA

**Adler Pollock & Sheehan Incorporated
Providence, Rhode Island**



**Wiley Law Publications
JOHN WILEY & SONS**

New York • Chichester • Brisbane • Toronto • Singapore

Copyright © 1989 by John Wiley & Sons, Inc.

All rights reserved. Published simultaneously in Canada.

Reproduction or translation of any part of this work beyond that permitted by Section 107 or 108 of the 1976 United States Copyright Act without the permission of the copyright owner is unlawful. Requests for permission or further information should be addressed to the Permissions Department, John Wiley & Sons, Inc.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. *From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers.*

Library of Congress Cataloging-in-Publication Data:

Tarantino, John A.

Personal injury trial handbook / by John A. Tarantino and David J. Oliveira.

p. cm.—(Trial practice library series)

Bibliography: p.

ISBN 0-471-61655-9

1. Personal injuries—United States—Trial practice. 2. Trial practice—United States. I. Oliveira, David J. II. Title.
III. Series: Trial practice library.

KF8925.P4T374 1989
346.7303'23'0269—dc19
[347.3063230269]

88-35183
CIP

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

PREFACE

This trial handbook is designed to respond to the many requests from the trial bar for a guide that would be practical and, thus, useful in conducting modern day personal injury cases. To achieve this goal, we have included chapters pertinent to all personal injury trials: preparation for trial, jury selection, opening statements, presentation of evidence, witnesses, closing arguments, jury instructions and trial and post-trial motions. In addition, we have provided information on specific forms of personal injury litigation, including automobile accident cases, medical malpractice cases, premises liability cases, bad faith litigation and products liability and toxic tort cases.

Throughout this handbook, we have provided as many practice-oriented materials as possible, including examples, checklists, forms and outlines. We have emphasized practical suggestions that will help the personal injury attorney identify the information that he or she needs to prepare and try a personal injury case competently and confidently.

The materials and information contained in this handbook are those that we use in our practices. They are designed for and used by trial attorneys. Our goal is to have this handbook be a portable trial guide that will be frequently used and easily accessible. Therefore, the design is that of a practice aid rather than a reference work. We hope that it becomes an often used and dependable friend to the personal injury attorney.

JOHN A. TARANTINO
DAVID J. OLIVEIRA

*Providence, Rhode Island
April 1989*

ACKNOWLEDGMENTS

We would like to give special thanks to our secretaries, Kristine M. Carter and Susan D. Kerins, for their patience, encouragement and cooperation in typing and helping to organize the manuscript. We would also like to thank our librarians, Paul R. Dumaine and Eileen F. Paolino, for their research assistance. Finally, we would like to thank the members of our firm, Adler Pollock & Sheehan Incorporated, for their support.

J.A.T.
D.J.O.

THE AUTHORS

John A. Tarantino is a partner with the firm of Adler Pollock & Sheehan Incorporated in Providence, Rhode Island. He is the author of several legal books and many articles on trial practice. He is a member of the Rhode Island, Massachusetts, and United States Supreme Court Bars; the American Bar Association; the Association of Trial Lawyers of America; the Rhode Island Trial Lawyers Association; the American Judicature Society and the National Association of Criminal Defense Lawyers. He is also a provisional member of the American Academy of Forensic Sciences and is currently chairman of public relations for the Rhode Island Bar Association.

David J. Oliveira is a partner with Adler Pollock & Sheehan Incorporated and has written legal books and articles in the personal injury area. He is a member of the Rhode Island and Massachusetts Bars, the American Society of Law and Medicine, the Association of Trial Lawyers of America and the ATLA Tort and Workers Compensation Sections.

SUMMARY CONTENTS

Chapter 1	Preparation for Trial	1
Chapter 2	Jury Selection	29
Chapter 3	Opening Statements	49
Chapter 4	Presentation of Evidence	63
Chapter 5	Witnesses	83
Chapter 6	Closing Arguments	111
Chapter 7	Jury Instructions	129
Chapter 8	Trial and Post-Trial Motions	155
Chapter 9	Automobile Accident Cases	179
Chapter 10	Medical Malpractice Cases	193
Chapter 11	Premises Liability Cases	215
Chapter 12	Bad Faith Litigation	241
Chapter 13	Products Liability and Toxic Tort Cases	259
Index		289

DETAILED CONTENTS

Chapter 1 Preparation for Trial

- § 1.1 Trial Planning
- § 1.2 The Plaintiff's Perspective: An Overview
- § 1.3 —Checklist for Plaintiff's Trial Preparation
- § 1.4 The Defense Perspective: An Overview
- § 1.5 —Checklist for Defendant's Trial Preparation
- § 1.6 Trial Preparation: Folders, Notebooks, Files,
Exhibits and Demonstrative Evidence
- § 1.7 —Checklist for Trial Notebook
- § 1.8 Witnesses (Lay and Expert)
- § 1.9 —Checklist for Lay Witnesses
- § 1.10 —Checklist for Expert Witnesses
- § 1.11 Pretrial Motions
- § 1.12 Pretrial Evidentiary Rulings and Motions in Limine
- § 1.13 Trial Briefs
- § 1.14 Pretrial Stipulations
- § 1.15 Admissions
- § 1.16 Effect of Admission
- § 1.17 Sanctions and Requests for Admissions
- § 1.18 Pretrial Orders and Conferences
- § 1.19 The Pretrial Conference
- § 1.20 The Final Pretrial Conference
- § 1.21 Subpoenas
- § 1.22 Service of Subpoena
- § 1.23 Specific Cases: Deposition Subpoenas
and Trial Subpoenas
- § 1.24 The Contempt Procedure
- § 1.25 Chamber Conferences and Side Bar Conferences

Chapter 2 Jury Selection

- § 2.1 Voir Dire: The Role of Court and Counsel
- § 2.2 The Jury Selection Process
- § 2.3 Checklist for Voir Dire
- § 2.4 Jury Questionnaires

§ 2.5	Federal Statutes and Rules
§ 2.6	Challenges to the Jury Panel
§ 2.7	—Challenges for Cause
§ 2.8	—Peremptory Challenges
§ 2.9	Motion to Increase the Number of Peremptory Challenges
§ 2.10	Jury Charts
§ 2.11	Making and Meeting Objections
§ 2.12	Checklist for Jury Selection
Chapter 3	Opening Statements
§ 3.1	The Purpose of Opening Statements
§ 3.2	The Order of Presentation
§ 3.3	Goals: Setting a Theme
§ 3.4	Waiver of Opening
§ 3.5	Reservation of Opening
§ 3.6	Special Concerns: Opening for the Plaintiff
§ 3.7	Special Concerns: Opening for the Defendant
§ 3.8	Objections to Opening Statements
§ 3.9	Checklist for Opening Statements
Chapter 4	Presentation of Evidence
§ 4.1	Direct Examination Techniques
§ 4.2	Foundations
§ 4.3	Objections
§ 4.4	Exhibits
§ 4.5	Demonstrative Evidence
§ 4.6	Making a Record
§ 4.7	Cross-Examination Techniques
Chapter 5	Witnesses
§ 5.1	The Plaintiff
§ 5.2	—Direct Examination
§ 5.3	—Cross-Examination
§ 5.4	Lay Witnesses
§ 5.5	Spouses and Children
§ 5.6	Expert Witnesses
§ 5.7	—Medical Witnesses
§ 5.8	—Economists
§ 5.9	—Engineers
§ 5.10	—Ergonomists
§ 5.11	The Defendant

Chapter 6 Closing Arguments

- § 6.1 General Considerations
- § 6.2 The Central Theme
- § 6.3 Relation Back to Opening Statement
- § 6.4 Preparation for the Closing Argument
- § 6.5 Presentation of the Closing Argument
- § 6.6 —Use of Humor
- § 6.7 —Use of Anecdotes, Metaphors, Analogies and Quotations
- § 6.8 —Inferences in the Closing Argument
- § 6.9 —Arguing the Law
- § 6.10 —Addressing the Jury
- § 6.11 The Plaintiff's Perspective: Establishing Liability and Maximizing the Verdict
- § 6.12 —Maximizing Damages Awards
- § 6.13 —The Per Diem Argument
- § 6.14 —Discrete Damages Method
- § 6.15 —Demonstrative Evidence in the Closing Argument
- § 6.16 The Defense Perspective: Avoiding Liability and Diminishing Damages
- § 6.17 Objections to Closing Arguments
- § 6.18 Checklist for Closing Arguments

Chapter 7 Jury Instructions

- § 7.1 Preparation
- § 7.2 Request to Submit Proposed Instructions
- § 7.3 Basic Charges
- § 7.4 —Cross Actions
- § 7.5 —Corporate Plaintiff or Defendant
- § 7.6 —Imputation of Negligence
- § 7.7 Basic Negligence Charges
- § 7.8 —When Liability Is Disputed
- § 7.9 —When Liability Is Admitted
- § 7.10 —Preliminary Definitions
- § 7.11 —Burden of Proof: General
- § 7.12 —Preponderance of the Evidence
- § 7.13 —Meaning of Burden of Proof
- § 7.14 —Objections to and Rulings on Admission of Evidence
- § 7.15 —Expert Opinion
- § 7.16 —Hypothetical Questions
- § 7.17 —Scope of Employment

- § 7.18 —Res Ipsa Loquitur
- § 7.19 —Exclusive Control
- § 7.20 —Rule of Circumstantial Evidence
- § 7.21 Malpractice
- § 7.22 —Degree of Care
- § 7.23 —Informed Consent
- § 7.24 Strict Products Liability
- § 7.25 Damages
- § 7.26 —Personal Injury—Pain and Suffering
- § 7.27 —Measure of Damages—Physical Disability
- § 7.28 —Measure of Damages—Aggravation of Preexisting Ailment or Condition
- § 7.29 —Mitigation of Damages
- § 7.30 —Housekeeper Expenses
- § 7.31 —Expense of Care and Treatment—Loss of Earnings
- § 7.32 —Collateral Source Rule
- § 7.33 —Future Damages
- § 7.34 —Measure of Damages—Personal Property
- § 7.35 —Intersection Collision—Duty to Look
- § 7.36 —Bias and Prejudice
- § 7.37 —Joint Defendants
- § 7.38 —Loss of Earning Capacity—Defendant Takes Plaintiff as He Finds Him
- § 7.39 —Loss of Earning Capacity—Plaintiff Laid Off at Time of Accident
- § 7.40 Premises Liability
- § 7.41 —Landlord Duty to Tenant or Invitee
- § 7.42 —Notice of Dangerous Condition
- § 7.43 —Sidewalk Case
- § 7.44 —Duty to a Trespasser
- § 7.45 —Common Carrier Liability
- § 7.46 Proposed Instructions on Defenses
- § 7.47 Assumption of the Risk
- § 7.48 Comparative Negligence
- § 7.49 Statute of Limitations—Affirmative Defense
- § 7.50 Objections to Instructions
- § 7.51 Special Interrogatories

Chapter 8 Trial and Post-Trial Motions

- § 8.1 Motion for Directed Verdict
- § 8.2 Obtaining a Directed Verdict

- § 8.3 Avoiding a Directed Verdict
- § 8.4 Motions for Judgment Non Obstante Verdicto (J.N.O.V.) and for a New Trial
- § 8.5 —Judgment Notwithstanding the Verdict
- § 8.6 —New Trial
- § 8.7 —Appellate Review
- § 8.8 Motion for a New Trial
- § 8.9 —Weight of the Evidence
- § 8.10 —Size of the Award
- § 8.11 —Conduct of Counsel and Court
- § 8.12 —Misconduct Affecting the Jury
- § 8.13 —Newly Discovered Evidence
- § 8.14 —New Trial on Court's Initiative
- § 8.15 Motion for Relief from Judgment or Order
- § 8.16 —Mistake, Inadvertence, Surprise and Excusable Neglect
- § 8.17 —Newly Discovered Evidence
- § 8.18 —Fraud, Misrepresentation or Misconduct
- § 8.19 —Void Judgment
- § 8.20 —Judgment Satisfied or No Longer Equitable
- § 8.21 —Other Reasons

Chapter 9 Automobile Accident Cases

- § 9.1 Preparation for Trial
- § 9.2 Planning Proof
- § 9.3 Presentation of Witnesses
- § 9.4 Expert Witnesses
- § 9.5 —Police Officers
- § 9.6 —Accident Reconstruction Specialists
- § 9.7 —Physicians
- § 9.8 —Ergonomists

Chapter 10 Medical Malpractice Cases

- § 10.1 Preparation for Trial
- § 10.2 Planning Proof
- § 10.3 The Subsequent Treating Physician
- § 10.4 The Reviewing Physician
- § 10.5 Deposing the Defendant
- § 10.6 Experts for the Plaintiff
- § 10.7 —Direct Examination
- § 10.8 —Cross-Examination

- § 10.9 Experts for the Defense
- § 10.10 Special Concerns in Opening
- § 10.11 —The Plaintiff
- § 10.12 —The Defendant
- § 10.13 Special Concerns in Closing
- § 10.14 —The Plaintiff
- § 10.15 —The Defendant

Chapter 11 Premises Liability Cases

- § 11.1 Preparation for Trial
- § 11.2 Planning Proof
- § 11.3 Duty of Care
- § 11.4 Invitees
- § 11.5 Licensees
- § 11.6 Trespassers
- § 11.7 Landlord and Tenant
- § 11.8 Subsequent Remedial Measures
- § 11.9 Defenses
- § 11.10 Premises Liability Experts
- § 11.11 —Architects
- § 11.12 —Engineers
- § 11.13 —Safety Engineers
- § 11.14 —Contractors/Builders
- § 11.15 Checklist for Applicable Codes
- § 11.16 Dram Shop Cases
- § 11.17 —Potential Plaintiffs
- § 11.18 —Potential Defendants
- § 11.19 The Expert in the Dram Shop Case
- § 11.20 Checklist for Dram Shop Cases
- § 11.21 Security-Based Premises Liability
- § 11.22 Checklist for Premises Liability Cases

Chapter 12 Bad Faith Litigation

- § 12.1 General Principles
- § 12.2 The Duty to Defend
- § 12.3 The Duty to Settle
- § 12.4 The Accrual of the Cause of Action
- § 12.5 The Appeal and Bad Faith
- § 12.6 The Insured's Right to Settlement
- § 12.7 Liability Based on Acts of Attorneys,
Claims Personnel or Other Agents
- § 12.8 Statute of Limitations Concerns

- § 12.9 Checklist for Conduct Evidencing Bad Faith
- § 12.10 Assignment of the Insured's Cause of Action
- § 12.11 Policy Provisions and Assignments
- § 12.12 Payment Prerequisites
- § 12.13 The Insured's Insolvency
- § 12.14 Checklist for Damages in Bad Faith Litigation
- § 12.15 Proof of the Bad Faith Claim
- § 12.16 Applicable Defenses
- § 12.17 Checklist for Bad Faith Litigation

Chapter 13 Products Liability and Toxic Tort Cases

- § 13.1 In General
- § 13.2 Preliminary Matters
- § 13.3 The Client Interview
- § 13.4 Potential Defendants
- § 13.5 Potential Causes of Action
- § 13.6 The Initial Investigation
- § 13.7 Discovery
- § 13.8 Requests for Admissions
- § 13.9 Selection, Retention and Preparation of Experts
- § 13.10 Selecting the Expert
- § 13.11 Sources of Experts
- § 13.12 Retaining the Expert
- § 13.13 The Transmittal Package
- § 13.14 Preparing the Expert for Trial
- § 13.15 Lay Witnesses
- § 13.16 Trial Considerations
- § 13.17 Voir Dire
- § 13.18 Opening Statement
- § 13.19 Presentation of Evidence: The Plaintiff's Testimony
- § 13.20 Expert Testimony
- § 13.21 Closing Argument
- § 13.22 Instructions in Products Liability Cases
- § 13.23 Special Cases: Toxic Tort Litigation
- § 13.24 Superfund Legislation
- § 13.25 Statute of Limitations Problems
- § 13.26 Medical Surveillance Damages
- § 13.27 The Defense and CERCLA Litigation
- § 13.28 Checklist for Products Liability Cases

Index

CHAPTER 1

PREPARATION FOR TRIAL

- § 1.1 Trial Planning
- § 1.2 The Plaintiff's Perspective: An Overview
- § 1.3 —Checklist for Plaintiff's Trial Preparation
- § 1.4 The Defense Perspective: An Overview
- § 1.5 —Checklist for Defendant's Trial Preparation
- § 1.6 Trial Preparation: Folders, Notebooks, Files, Exhibits and Demonstrative Evidence
- § 1.7 —Checklist for Trial Notebook
- § 1.8 Witnesses (Lay and Expert)
- § 1.9 —Checklist for Lay Witnesses
- § 1.10 —Checklist for Expert Witnesses
- § 1.11 Pretrial Motions
- § 1.12 Pretrial Evidentiary Rulings and Motions in Limine
- § 1.13 Trial Briefs
- § 1.14 Pretrial Stipulations
- § 1.15 Admissions
- § 1.16 Effect of Admission
- § 1.17 Sanctions and Requests for Admissions
- § 1.18 Pretrial Orders and Conferences
- § 1.19 The Pretrial Conference
- § 1.20 The Final Pretrial Conference
- § 1.21 Subpoenas
- § 1.22 Service of Subpoena
- § 1.23 Specific Cases: Deposition Subpoenas and Trial Subpoenas
- § 1.24 The Contempt Procedure
- § 1.25 Chamber Conferences and Side Bar Conferences

§ 1.1 Trial Planning

Success in the trial of any personal injury case begins with, and depends primarily on, the amount of pretrial planning devoted to ensuring a systematic, organized and creative approach to the trial.¹ Any experienced trial lawyer knows that, regardless of how well prepared a case is, certain surprises, twists and difficulties can, and often do, arise. A systematic and organized pretrial plan will allow you to adapt to any deviations from what you anticipate; it will provide for the flexibility you need to alter your approach, depending on the circumstances arising at, or caused by the dynamics of, trial.

§ 1.2 The Plaintiff's Perspective: An Overview

The plaintiff should begin the final steps for trial preparation at least 60 days prior to trial. By this time, counsel should have completed most, if not all, discovery, filed any necessary amendments to pleadings and developed a strong, cohesive theory as to liability and damages which is supported factually and legally. All fact witnesses should have been interviewed and preferably deposed. Any experts needed to analyze or testify on liability or damage issues should have been retained, and counsel should have become familiar with and knowledgeable about the experts' opinions.

Plaintiff's counsel should at this time focus on the defense theory and be prepared to deal with those issues likely to arise during trial, including cross-examination and impeachment.

§ 1.3 —Checklist for Plaintiff's Trial Preparation

1. Do the pleadings require any amendment as to
 - a. Parties,
 - b. Factual assertions or
 - c. Legal theories?
2. Has a proposed pretrial order been submitted and accepted by the court regarding
 - a. Dates to amend pleadings,
 - b. Dates to add parties,

¹See generally J. Tarantino & D. Oliveira, *Personal Injury Forms: Discovery and Settlement* (1985 & Supp. 1988).

- c. Discovery closure,
 - d. Lists of witnesses (lay and expert),
 - e. Records of deposition transcripts intended to be read at trial,
 - f. List of exhibits,
 - g. Proposed voir dire questions and
 - h. Proposed jury instructions?
3. Have all depositions been reviewed, digested and analyzed to
 - a. Prepare for impeachment (prior inconsistent statements),
 - b. Prepare for rehabilitation (prior consistent statements) and
 - c. Be offered substantively at trial (either prior inconsistent statement of party or admission of party opponent)?
 4. Have all answers to interrogatories been reviewed to determine
 - a. Whether any interrogatory answers are inconsistent with other discovery responses (requests for admissions, deposition transcripts, production requests),
 - b. Whether any interrogatory answers are not fully responsive, necessitating either a meet-and-confer session with opposing counsel or a motion to compel more responsive answers,
 - c. Whether any objections to interrogatories have been dealt with, through either agreement with opposing counsel or court intervention, and
 - d. Whether any additional interrogatories need to be filed to follow up on or clarify prior interrogatory answers, deposition responses, responses to requests for admissions, responses to requests for production, etc?
 5. Have all responses to requests for production been reviewed?
 - a. Have those documents that may be used as trial exhibits, to impeach a witness, to refresh a witness's recollection or to serve as past recollection recorded been identified and cataloged?

Note: A party responding to a request for production of documents should use a date stamp numbering system. Each individual page produced should be numbered consecutively, beginning with page 1. In this way, there is a record of each individual page that has been produced, and the specific page numbers that are being produced can be referenced in the production response. Counsel can thus avoid disputes with opposing counsel as to whether a particular document was produced during discovery.

- b. Have any objections to production requests been resolved, through either agreement with opposing counsel or court intervention?
- c. Is it necessary to have any meet-and-confer sessions with opposing counsel or to file a motion to compel compliance with discovery?