

YOUR FIRST TRIAL

How to Prepare & Try Your First Case

2011 CHARLESTON COUNTY FAMILY LAW ASSOCIATION
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CHARLESTON COUNTY JURY ROOM

Melissa F. Brown
Fellow, American Academy of Matrimonial Lawyers
Melissa F. Brown, LLC
145 King Street, Suite 405
Charleston, SC 29401
843.722.8900 (O)
melissa@melissa-brown.com
www.melissa-brown.com

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HOW TO TRY YOUR FIRST FAMILY COURT TRIAL

SPEECH NOTES

Friday, June 3, 2011

Melissa F. Brown

Charleston County Family Law Section CLE

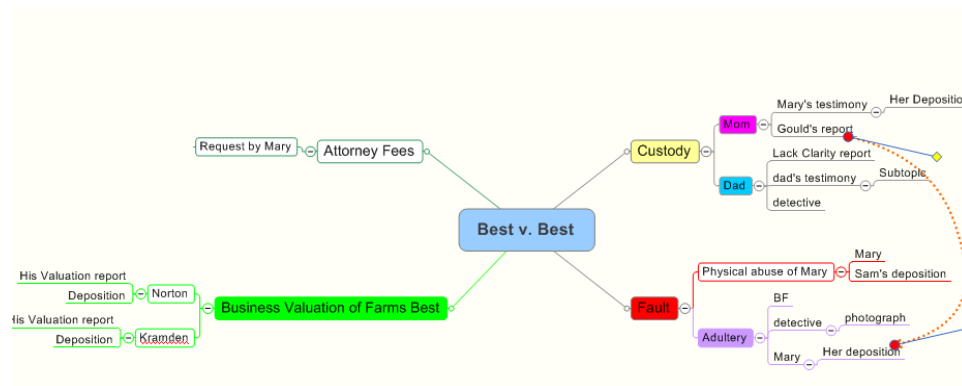
(For attorneys who just started practicing law.)

From the moment you meet a potential client, you are, *in theory*, preparing to try **their case**.

In the initial consultation, you are already identifying the **issues** in the case & the **relief** the potential client hopes to obtain.

I use software in my initial consultations to help the **potential clients** and **me** visually organize their issues.

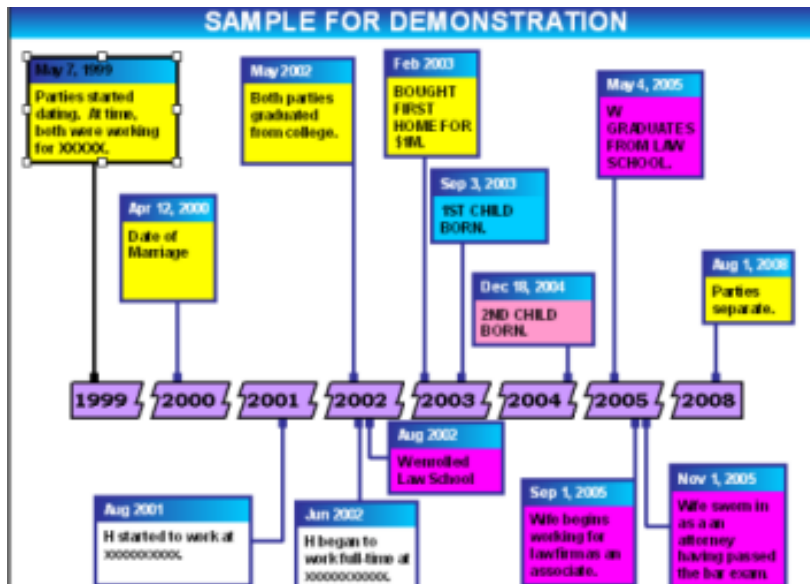
The **MindMap** visual helps explain the issues in an understandable format.



If the potential client hires my firm, this MindMap outline becomes **the foundation** that we use **to build** the client's case & prepare for trial.

If you are interested in using any of the software programs I mention today, **My Appendix** includes other similar programs to use on PC's, Mac's, iPads and iPhones & the weditrd & Apps to purchase these programs are listed in the materials.

Another useful tool that we use at the initial consult & often at trial is a Timeline visual.



A timeline visual simplifies & organizes volumes of information into an easy to read format.

This particular program is called TimeMap by CaseSoft. It is now sold by LexisNexis. The Appendix includes a slide that demonstrates how the visual converts to a Word document for clients and judges who are not visual learners and find the written format more useful.

Early on in your trial preparation, there are two useful tasks to begin preparing an organized method to efficiently settle your case or TRY IT.

1. The 1st is to prepare an Evidence/Proof Chart.

Evidence/Proof Chart

<u>Issue</u>	<u>Facts to Support</u>	<u>Witness</u>	<u>Evidence</u>	<u>Objection</u>	<u>Response</u>	<u>A/D</u>

As you address each issue, **identify the facts, witnesses & evidence to support your client's position.**

The anticipate any objections your opponent might make to oppose your submission of important information into evidence.

Then, prepare your response to their objection.

I often even create **mini Evidentiary Trial Briefs** to support why a certain piece of evidence is **relevant, authentic and admissible**. In fact, for those of you who were present for Liz Stringer's Temporary Hearing talk earlier this morning, we sometimes submit **short one-page mini briefs** at Temporary Hearings to show why hearsay in an affidavit meets an exception to the hearsay rule and is: ADMISSIBLE.

The **last column** is useful at trial to note whether you were successful in admitting the evidence or not!

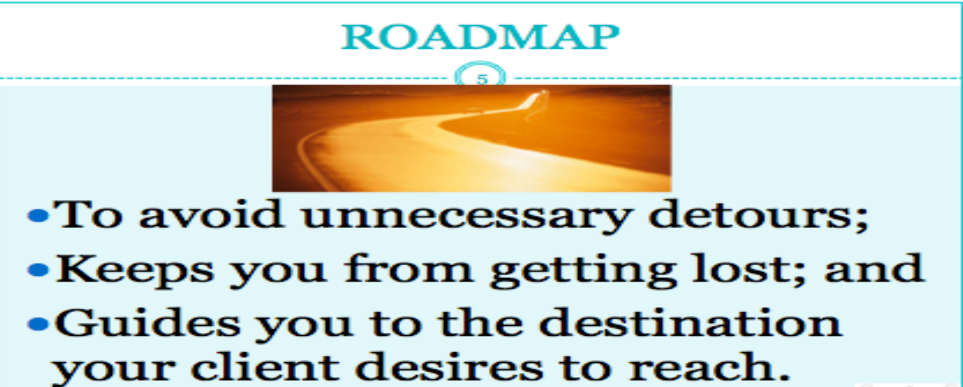
It is amazing how easy it is to forget to offer a document or photo into evidence after making it for identification. Don't get caught forgetting to move an important piece of information into evidence or such information is NOT admitted and your record is incomplete & unprotected.

2. **Another useful task early in your case preparation is to write your closing argument** at the beginning of your case-

NEXT SLIDE

Mapping out the direction your client and you want the case to go on insures that you create a **ROADMAP** to drive your efforts in the RIGHT DIRECTION!! Creating a Roadmap also assists you to help the client redefine their expectations so their expectations ARE REALISTIC & NOT UNATTAINABLE. As you probably have already learned, many clients expectations are much greater or unrealistic & no attorney could achieve them.

So help the client understand the basis to modify their expectations so they are not disappointed even when you achieved a GREAT RESULT.



ROADMAP

- To avoid unnecessary detours;
- Keeps you from getting lost; and
- Guides you to the destination your client desires to reach.

While Closing Arguments are ***not typically allowed in SC's Family Court Bench Trials,***

Some judges might let you make a brief Opening statements to set forth the nature of your case as a courtesy to the Court-
- all you have to do is ask.

You can also use your “Closing Argument” as a *toned down version* of your **Trial Brief’s Summary of Facts**.

Attorneys who prepare Trial Briefs **understand the importance** of **weaving** their client’s case theory with supporting **facts and law** to make it easier for the Judge **to recall & look more favorably** upon your client and the relief your client desires.

As you prepare Your Closing Argument and even an Opening Statement, begin a Trial Brief file to store important information to help prepare the final Trial Brief you will hand up at court.

Wise Trial Attorneys ALWAYS PREPARE A **Trial Brief, no matter the size of the case that is ready and organized to hand to your** Judge at the beginning of yr trial.

So between the initial Trial Preparation steps & the day Trial begins, what happens?

From the beginning, think about an effective “Theory of your Case” that you can summarize in one short paragraph or even one sentence.

HOW DO YOU IDENTIFY YOUR CASE THEORY?

Ask:

1. What does the Judge need to know about my client in order for my client to achieve the result he desires?
2. What are the most important issues & supporting facts to enable the Judge to grant the client the relief, she requests?

3. How can I can convey **my theory** to the Judge in a memorable way?

HOW TO IDENTIFY YOUR CASE THEORY

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3. How can I can convey my theory to the Judge in a memorable way?

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ANSWER:

1. Tell the **STORY** of your case.
2. Use the Story to **TEACH** the Judge the rationale to rule in your client's favor; &
3. **PAINT** a memorable picture with the facts using the law as the **Frame“work”**.

ANSWER

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1. Tell the **STORY** of your case.
2. **TEACH** the Judge the rationale to rule in your client's favor; &
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Your **THEORY** = your client's **POSITION** summarized in a *snapshot*.

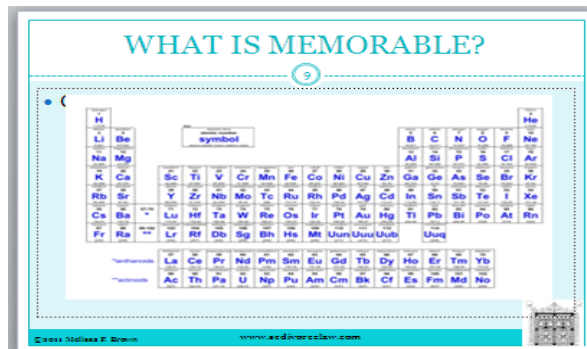
This image helps the judge

SEE,

REMEMBER &

RENDER the **relief** your client requests.

Roger Dodd, a well-known lawyer, lecturer and co-author of one of the best selling trial preparation books, Cross-Examination, Science and Techniques, has lectured about the reality that people do not remember facts that they have to memorize, such as the Periodic Table.



Instead,

People remember **good stories**.

The **characters** in these stories, &

The **moral** of these stories.

EVERYONE here remembers the story of Goldilocks and The Three Bears?



I bet you can tell me the moral of the story even if you read this book decades ago or read to you!

The moral is to “Respect the property and privacy of others.”

Use this same technique with your Judge:

Moral = Theory → Requested Relief

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TELL Your Client's STORY

STORY TEACHES A LESSON

LESSON = MORAL OF YOUR STORY

MORAL = THEORY OF YOUR CASE

THEORY with LAW & FACTS → REQUESTED RELIEF

Make your client's story

understandable;

interesting &

compelling

Use **descriptive language** to bring the story **alive**

Even use **rhetorical questions** to involve your judge to keep their attention & interest.

Asking **Rhetorical Questions** that have no right answer also help make your point.

1. Remember to try your OWN case.
2. **DISTINGUISH your facts** from your **opponent's facts**.
3. **AND, REFRAIN FROM** Attacking the other side unless absolutely necessary.



As Alex Cash spoke about earlier, it is unwise to attack the other sides case because it makes it look as if your case is not strong enough to win on its own merits.

Your facts should win your case without focusing solely on the other sides' negatives.

Attacking the other side does not endear you to the judge nor does it strengthen the facts of your own case.

How do you put on a memorable case?

Our country's greatest orators have understood this concept and their **speeches** and **word pictures** have stood the test of time.

<p>MEMORABLE QUOTES</p> <p>11</p> <p>"I Have a Dream" Martin Luther King</p>  <p>©2011 Melissa F. Brown www.acdivorceclaw.com</p>	<p>MEMORABLE QUOTES</p> <p>12</p> <p>"And so, my fellow Americans: ask not what your country can do for you - ask what you can do for your country." President John F. Kennedy</p>  <p>©2011 Melissa F. Brown www.acdivorceclaw.com</p>
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Video and audio clips of speeches and music clips were played at the CLE.

In 1961, President John F. Kennedy's inaugural speech inspired an entire nation.

Country Music song writers know how to capture life's **joys**, **sorrows**, and **pain** in words **all** can comprehend.

COUNTRY MUSIC SONGS

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"Because you're mine, I walk the line."
Johnny Cash



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"Walk the Line" by Johnny Cash is so famous that it was the title of the movie about his life.

He wrote the line as a promise to remain faithful to his first wife.

"Walk the Line" could be used as the Theory of an Adultery case:

So Johnny Cash could not keep this promise to his 1st wife.

Just like Johnny, Mr. X could not keep his promise to his wife.

All parrot heads know Jimmy Buffet's song: "***It's five o'clock somewhere***." But some of you youngsters may recognize it as sung more recently by Alan Jackson.



Alan Jackson's song "**It's 5 o'clock somewhere**" could be used as the Theory of an Habitual Alcohol Abuse Divorce Case.

You could argue the Wife often acted as if was 5:00 o'clock somewhere to justify drinking alcohol at any time of the day.

Why tell your case as a story? B/c

Stories teach.
We are teachers.
We teach the judge.

WHY TELL A STORY?

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Good Stories leave a
lasting impression.

***Lasting impressions are
remembered.***

IN LIGHT OF THE RECENT SC SUPREME COURT CASE, LEWIS V. LEWIS

It is critical to protect your record.

Make sure the Law Supports your FACTS

As retired Family Court Judge Barry Knobel recently opined in an e-mail shared with many lawyers across the state, the ***Lewis*** opinion

LEWIS v. LEWIS

“For attorneys who are skilled both inside the family courtroom and inside the appellate courts, the decision in this case will give them an emboldened new sword-and-shield. Finally, and unfortunately, for those family law attorneys who have never known “how to protect your trial record”, this opinion will either force you to learn how, or it will force you to call your malpractice insurance carrier to up your policy limits.”

Judge Barry Knobel

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So while we have all long complained that the Rules of Evidence do not apply in South Carolina’s Family Court Trials.

Our Supreme Court has made it clear that this assumption is wrong.

Lesson from Wilson v. McDonald. The general lesson is that the appellate courts are interpreting Lewis as requiring detailed factual findings as part of their *de novo* review of family court orders.

Use OBJECTIONS to effectively to protect your record:

“Through the effective use of evidentiary objections, you may be able to control the flow of and introduction of evidence and eliminate evidence that is harmful” to your client’s position.

**Steve Kolodny, Co-Chair Houston
Family Law Trial Institute**

Objections, used appropriately, can throw the opponent **off balance**.

Objections can cause the witness &/or the opposing attorney to **become nervous & unsettled, even losing their train of thought**.

Objections can give your witnesses **time to compose** themselves.

Objections **preserve your record** in the event the judge mistakenly allows improper evidence to come in.

Objections can **alert your witness to potential problems with a Q** so witness can answer the Q more effectively.

HOWEVER, do not Object for the sake of Objecting---Only object when you truly believe it is appropriate.

Otherwise, your objections will backfire & annoy the court.

How do you properly present your case?

Give the judge a “**hook**” supported by the law.

Make it easy for the judge to rule in your favor.

GIVE THE JUDGE A HOOK



REMEMBER,

The Trial is not about you.

The Trial is about your client's life & future;

So refrain from trying to put on a **dazzling performance** and instead, leave a **lasting positive impression** about your client upon the judge.

On Direct,

Let your witnesses tell your client's story.

DIRECT EXAMINATION

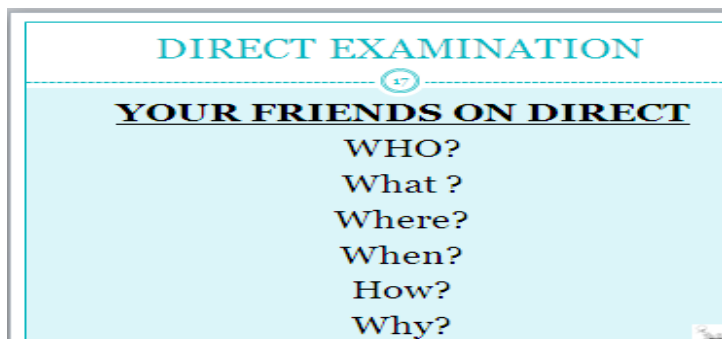
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**LET YOUR WITNESS
TELL THE STORY!**

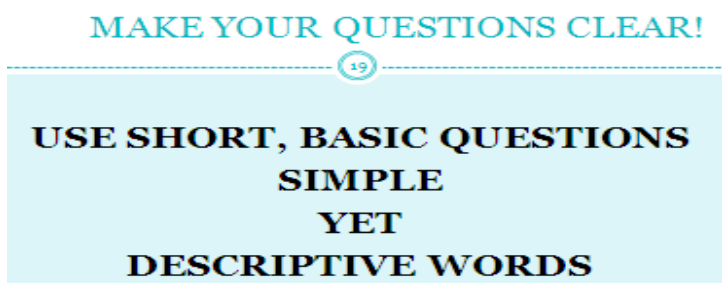
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A small, square image of a classical building facade with columns and a pediment, located in the bottom right corner of the slide.

Begin your questions on Direct with **these words**:



Combined with



Use descriptive words to add color to the case.

Consider leaving your client as your last witness so your client has heard all the other witnesses and can tie up loose ends that a witness may have left open.

Do not ask a leading question on Direct **unless** under SCRE 611, you decide to call the Defendant in your case-in-chief.

Under these circumstances, SCRE 611, Plaintiff's attorney can call the Defendant as a hostile witness & use leading questions.

Used properly, SCRE 611 is of great advantage to a Family Court Plaintiff.

Discussing this use, SCRE 611 is an entire topic unto itself—

With **Greg Forman's permission**, I attached his excellent blog titled,

“Making the defendant testify in the plaintiff's case in chief” that he posted on Saturday, Feb 12, 2011, to my appendix,

I highly recommend that you read his blog & utilize this strategy when appropriate.

Harvey Golden, the godfather of family law in this state, once wrote,

“If your first fifty questions at the trial are all answered with ‘yes**,’ you may be able to prove most if not all of your case with [the opposing party called as a hostile witness in your case in chief] because **an ounce of admissions from the opposing party is worth a pound of separate proof on the same issues from one of your witnesses.**”**

DIRECT EXAMINATION is actually much harder than it seems.

Witnesses get nervous & despite preparation, they often struggle to tell the story on the stand as they did in your office.

While some may disagree, **Cross-Examination is truly a performing art &**

if properly “acted out,” cross-examination can be the key to winning your case.

Why? As Harvey Golden said, getting 50 “yes’s” in a row from the opposing party **is worth a pound of separate proof on the same issues from one of your clients.”**

In addition, with leading Q’s, the attorney is now telling the story and controlling the facts & flow of information to the judge.

CROSS-EXAMINATION

On Cross-Examination, use leading questions.

An **effective** leading question is structured as a short Q containing one fact at a time.

Unlike the format of asking questions on Direct where YOUR WITNESS tells your client’s story, **on Cross-Examination, YOU the attorney tell the story through your leading questions.**

How?

1st remember that cross examination does not mean being cross with your witness

CROSS EXAMINATION

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- **Do not be Cross** with your witness on cross-examination.
- **Remain calm**
- Ask one question with one fact at a time.

Keep your questions short.

Frame the questions so that the appropriate response is “Yes” or “No.”

For example, If the ground for the divorce action is habitual alcohol abuse by Husband, do not ask the husband the following question on cross:

GOOD CROSS QUESTION?

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Isn't it true that you love to drink and often passed out at night after consuming a 12 pack of beer, chased down with a shot of bourbon, correct?

There are about 11 facts in that one question.

Instead, try these questions:

GOOD CROSS QUESTIONS?

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- You drink?
- You like to drink?
- You drink beer?
- You like to drink beer?
- You drink bourbon?
- You like to drink bourbon?

GOOD CROSS QUESTIONS?

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- You like to drink shots of bourbon and chase it with beer?
- During the marriage, you frequently consumed these drinks?
- In fact, you consumed large amounts of these drinks?
- When you consumed these drinks, you sometimes passed out?

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GOOD CROSS QUESTIONS?

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- You often forgot the events of the night before?
- You forgot conversations?
- You forgot your behavior?
- You refused to stop drinking at your wife's request?
- That's why we are here today?

Recognize the Power of Repetition.

Use **trilogies**:

For example, if the theory of your case for a divorce is on the ground of habitual alcohol abuse using is **“It's 5 o'clock somewhere”**

Weave this theme into your case, and find word analogies that **hammer** down the point so it is **nailed** in the judge's memory!

POWER OF REPETITION

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- *No matter the time, he had a drink in his hand*
- *No matter the time, he was ready to unwind*
- *No matter the time, he drank b/c it was 5 o'clock somewhere.*

Loop your QUESTIONS

LOOP YOUR QUESTIONS

22

- You drink beer?
- You like to drink beer?
- You drink bourbon?
- You like to drink bourbon?
- You *like to drink shots of bourbon chased with a can of beer?* [looping]

If your witness uses a powerful word in his or her response, repeat THEIR WORD in your questions:

USE WITNESS' OWN WORDS

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- **Q:** You like to drink when you get home from work?
○ **A:** *Yes. I need to unwind.*
- **Q:** You like to unwind by drinking a beer?
- **Q:** You like to unwind by drinking a beer after work?

Other important considerations:

1. There is **no time to waste** in family court.

2. Get your winning facts before the judge right away. Do not let mediocre facts **distract** from the imp facts you want the judge to hear.

Many judges, whether they will admit to it or not, find themselves deciding certain issues **well before** both sides rest

3. Watch your judge. Recognize body language that tells you to stop and let an issue go.

4. Rather than attack the other side's case, remember **try your case on your Facts & approach the law so the judge can rule in your favor.**

5. At the conclusion of the trial, submit a checklist of the relief your client requests. I have never had a judge turn down my submission. It makes their job easier & the judge appreciates the help as long as you do not insult the judge's intelligence.

IMPORTANT CONSIDERATIONS

1. No time to waste in family court.
2. Put winning facts before judge right away.
3. Watch your judge.
4. Try your own case.
5. Submit checklist of the relief your client desires to Judge.

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CONCLUSION

1. Above all, **your reputation & your credibility** are key factors to winning any trial or motion.

2. **Always Be honest** in your dealings with the court, clients, and other attorneys!

3. Your reputation follows you wherever you go.

“Credibility lost” is hard to ever regain.

4. **Whether you realize it now or not,**

If your peers cannot trust you,

few judges will either!!!


5. Never sacrifice your ethics for any client or self-serving reason!

CONCLUSION

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1. Your reputation & your credibility are key factors to winning any trial or motion.
2. Always Be HONEST.
3. “Credibility lost” is hard to ever regain.
4. If your peers cannot trust you, few judges will either.
5. Never sacrifice your ethics for any client or self-serving reason.

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My Appendix contains a number of useful tips including a Trial Safety Kit, references to useful books, charts, software, apps and other materials to help you prepare for your first trial.

FIRST AID TRIAL KIT

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MALES	FEMALES
	

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Thank you for the opportunity to speak today and please call upon me any time if you need help.

Finally, consider attending the **Family Law Trial Institute Program** in Houston, TX. It is a **9 day, intense trial preparation program** for family law attorneys.

I attended this program 10 years ago and this was the best investment, other than going to law school, that I have made in my own career. Now, I serve on the faculty and each year the program helps hone my skills.