

Michael Cowen:

This is Michael Cowen and welcome to Trial Lawyer Nation.

Speaker 2:

You are the leader in the courtroom, and you want the jury to be looking to you for the answers.

Speaker 3:

When you figure out your theory, never deviate.

Speaker 4:

You want the facts to be consistent, complete, incredible.

Speaker 5:

The defense has no problem running out the clock. Delay is the friend of the defense.

Speaker 6:

It's tough to grow from by trying to hold on and micromanage.

Speaker 7:

You've got to front load a simple structure for jurors to be able to hold onto.

Speaker 8:

What types of creative things can we do as lawyers, even though we don't have a trial setting?

Speaker 9:

Whatever you got to do to make it real, you've got to do to make it real. But the person who needs convincing is you.

Voiceover:

Welcome to the award-winning podcast, Trial Lawyer Nation, your source to win bigger verdicts, get more cases and manage your law firm. And now here's your host, noteworthy author, sought-after speaker and renowned trial lawyer, Michael Cowen.

Michael Cowen:

Today on Trial Lawyer Nation I have my partner, Malorie Peacock. Malorie and I were in trial last week. And we want to talk to you about how it went, what we learned in the hope that it will help you on your next trial. But before we get started, I just wanted to give a shout out to LawPods. LawPods has come in and taken over the production of our podcast and they make it so easy. All I have to do is sit here and talk to people. They do all the recording. They do all the editing. They even cut the promo reels for our marketing of the podcast. So if you have your own podcast or want to start your own podcast, and if you want to get referrals in this day and age, it's something you should think about. I highly recommend LawPods. So Malorie we were in trial last week. Tell us a little bit about the case.

Malorie Peacock:

So we were trying a commercial vehicle case. It was an oilfield truck rear ended our client on the highway and it was a pretty bad crash. Our client had some pretty significant injuries as a result. We ended up trying the case in a really small town in Texas, which was a little bit different than I think what me and you were used to doing.

Michael Cowen:

Yeah, absolutely. So I want to start talking about some of the challenges that we had to overcome in the case. I want to start with some of the facts and then I want to get into some of the venue if that's all right.

Malorie Peacock:

Sure.

Michael Cowen:

So the facts, we had some issues with the... The truth was our client was not hurt before. He's badly hurt afterwards and will never be the same. That being said, the medical records said he had degenerative disc disease in his low back, that he had a degenerative hip from some childhood things where it wasn't quite formed right. And of course the defense was, "Well, everything that was wrong with him was already wrong with him. And it had nothing to do with the wreck," that the crash just caused some bruising. He did go to the hospital eventually that day by ambulance, but got seen, x-rayed, said "You got degeneration" and released.

And then a week later went to a chiropractor, went back to work on the oil field. So we had a big fight about whether the injury caused this. After working back in the oil field for about a year, he ended up getting a hip replacement and a back surgery and a bunch of other... He was getting a bunch of injections and other therapies throughout the treatment, but he'd also have months where he wouldn't go get treatment while he was working, doing the same job he had done before. So there were some challenges there. One showing that the guy was able to do the job for over a year after the crash, but we're saying he could never do it again.

Another is that he clearly had degeneration. It was on his doctor's record. Degeneration, degeneration, degeneration. How do we show that the wreck had anything to do with any of this stuff? And then he brilliantly got himself arrested while the early treatment was going on. Despite the fact that would normally be inadmissible, in his deposition said, "And they asked me 'You ever been arrested?' 'Yeah. I went to go try to buy cocaine because I was in pain.'"

And the judge ruled that the cocaine use was going to come in. So not only do we have a bunch of degeneration, preexisting issues, and then someone that was able to work for a long time until he got the medical treatment, then after surgery couldn't do the same work. And then we also had the fact that the judge was going to let in the fact that he had used drugs and we're in a very deep red conservative venue. So what did you do? You in your team did most of the work of the case. I helped with some of the focus groups. I helped you with the trial, but this was really your baby. What did you do to overcome some of these issues?

Malorie Peacock:

In this case, it was interesting I think, because most of the issue... Well, all of the issues that we had to overcome were related to damages. Liability was always pretty clear in this case. We'll talk about how that played out at trial. But ultimately they ended up accepting responsibility at trial because it was a

rear end collision on a highway in a construction zone. Liability was the easy part. The damages were the hard part in this case. And so there were a couple of really big things that we focused on in the case.

The first one was our guy worked in the oil fields before and was a very high wage earner. So for people that aren't in Texas or aren't in places where people do oil fields work, you can make a lot of money doing oil field work. One, because of the hours, but two, because it just pays well without much of an education. So our client graduated high school, went straight into the oil fields, got all of his experience and education in the oil field and ended up making over a hundred thousand dollars a year, every year, working in the oil field with almost no formal education.

And so we really wanted to focus on the lost earnings component of the case. Also, because that was something that was really important to our client and part of his identity. And then we focused on the actual medical treatment that our client would need in the future. We didn't focus as much on the treatment in the past because there was issues with degeneration. There was issues with when you got the treatment, how much it should have cost, when you should have gotten it, all that kind of stuff. And so the strategy was focusing on the future.

Michael Cowen:

We actually dismissed our claim, with our client's permission, for past medical bills.

Malorie Peacock:

That's right.

Michael Cowen:

And when we talk about degeneration, the treating surgeon, while he said, "I did a hip replacement because of this crash," he also said, "But he would've needed it fairly soon anyway because of the degeneration, even without the crash." So it was a challenge.

Malorie Peacock:

So we had to tell a clear medical story, but we also had to tell a clear non-economic damage story too, because that... Economics were a big, big part of our case because our client was a highway journeyer, couldn't go back to work. But for the jury to understand why he couldn't go back to work, the non-economic story was a really, really critical component of it. And so we dug a lot through our client's history to find people that might not be in his life anymore but were in his life before, that could talk about how he was before the crash. And I think ultimately that made the biggest difference in the case.

Michael Cowen:

I think one of the most important things that you did in this case is y'all found former coworkers, people that had worked with him in the oil field before the crash. They even seen him since the crash, but they worked with him before the crash. They're not his best friends. They don't have a dog in the fight. They're not going to... No one's going to think they're going to get any of the money if we win because they're not, like I said, close to them. But Robert Disque, your associate, did just really... And I didn't realize it till I watched the videos, how well he did it, didn't come out in the transcript. But really got those former coworkers just to talk about and describe in very vivid detail about how he was working.

Not only did they never know he was in pain, but he was a high stepper. He's going from place to place, moving all over the thing. You see him all over the pad, pitching in, helping pick up these a hundred pound bags, helping do all these things, which was really important because we had another

thing that the defense and their paid opinion wouldn't have said, "Well, this particular job he has, you don't have to do any manually. This particular job, according to the book is just you're there, you're taking readings, you're telling other people to do things." And when we got the reality of the oil field is like, "Well, that might be how is on paper, but when you're out there, everybody pitches in, everybody carries things. It's not a light duty job in real life." And I think that's something that really resonated with our conservative jurors is what the government says in a book versus reality. I think that was a theme that did well for us.

But I think that getting the coworker... Because a coworker doesn't have the same bias as a good friend or a family member has on the... And they're still important. And we still called a friend and we called some family members. But I think those coworkers before... The other thing I think you did really well was the... You took the deposition, for trial purposes, of his supervisor for the period of time after the crash where he was working, to show that even though yes, he was making a living, he was not able to fully do the job. Tell us a little bit about that.

Malorie Peacock:

I have to give props to Robert Disque. He did just brilliant work with our witnesses in this case. One of the challenges we had is our client was actually from Louisiana. And most of the work he did was in the Texas Panhandle. Our venue was near East Texas, in the middle of nowhere, very difficult to get to. And so a lot of our witnesses could not come live to trial. That just was not going to be an option for us. So we had to do a lot of them by video. Robert did a really great job of making the videos as dynamic as they could possibly be. But also thinking about what are the key points that we need from this witness and getting those key points and that's all that we need. We don't need to go on and on for a million years.

So Robert's actually the one that did the deposition of the supervisor. After the crash, I did the deposition of the supervisor for the crash. And what was great about the supervisor after the crash is he said, "Well, while we didn't fire him, he was not doing that great of a job out there. We were giving him a chance. I liked the guy. We were letting him do the best that he could, but he was limping around. He was really struggling. He was doing things that were weird for that position, like driving around the oil rig, which people would usually walk. He was asking for too much help from other people. So he wasn't really able to get the job done as quickly as he should have." There was a lot of really good testimony about that, which was great because the defense's position was "Look, he did this job and he did it just fine and he didn't get fired. So what are we even talking about?"

But we had someone that said, "Look, I felt bad for him. We were trying to help him out, but he really was not doing that good of a job." So it helped. And like you said, one of the good things about these witnesses is they weren't best friends with our client. They knew him from the oil field, they were supervisors and coworkers, but they didn't continue to keep in touch with him. Most of them for years, which I actually think made them more powerful. I think there's a misconception for people when they're thinking about damages witnesses that a damages witness has to know everything about the person's life or they have to know them before the crash and after the crash and they have to be able to do a comparison or it really has to be someone very involved. And these people had very small tidbits of information that we were able to string together into a coherent story. Everybody didn't know everything, but when it all played out together, it painted a full picture.

Michael Cowen:

And I think one good thing about that is we were able to do shorter video clips than we would've had to do had we try to get everything through one witness because... We talked to the jurors afterwards and,

while they worked really hard and I was proud of when they paid attention, they said it was painful to watch a trial that had more video than live witnesses. They did not enjoy that aspect of the trial. And so I think when we do have to do video, if everyone is going to have a job that we can do in 10 to 15 minutes at most, if not shorter, for our part of the case. And then the defense wants to drone on forever and that's on them, make sure they're playing it separately and it's clear who's playing what. But I think that actually worked out in our favor. And also the fact that the people just weren't that close to them. I think that makes... And just increases their credibility.

Malorie Peacock:

I think too, what was great about these witnesses is, if anybody out there is familiar with oil field guys, they're a specific type of person and they tell you how it is. And they don't... They're pretty rough around the edges, but they don't try to add any fluff. They don't try to say something they don't know. All of them were fine saying, "Well, I have no idea about that." And it came off as really credible, which was good, but we didn't try to push them for stuff that they didn't know, which I think a lot of attorneys feel tempted to do. Like "I need to get everything out of this witness." And you don't need to prove your whole case with one witness. You just don't.

Michael Cowen:

And I think a lot of it just comes to trusting the jurors, that these people are taking time out of the day. They're smart enough to put all this together. I can give them one piece at a time. They're going to figure this out. I don't have to go spoonfeed them the whole case and every single witness.

Malorie Peacock:

Now we did use those witnesses and have an expert tie their testimony together to relate it back to the case. And I think that was still critical. So if we had just played the witnesses without an expert piecing the story together live for the jury. I don't know if it would've played as well. I think that was still a critical component of it, that we had the individual testimony and then we had a vocational expert come and tie it all together. And the same with the medical physical damages, we had doctor testimony and lay witness testimony, and then we had a life care planner come and tie it all together. How does this whole story play out? And I think that was still necessary.

Michael Cowen:

And I think it worked out really well because when the... You did a really good job working up the lost earnings component, personal earning capacity. So not only did we have a vocational person that looked at all his education records, all his work history, gave a different examinations. We also had two functional capacity examinations done that were two days long each and then had the therapist, they did the functional capacity exams, testify, and it really helped with our reality versus paper theme.

So when the defense would say, "Well, according to this book, this is a light duty job, and he can do a light duty job." And he says, "Well, but I can't just consider what's in the book, I have to consider the real world." And as the Jury heard Mr. So-and-so and Mr. So-and-so and Mr. So-and-so all testify that these are things you have to do in the real world. And then the functional capacity examiner says, "Yeah, I also get hired by Halliburton to do some of their return to work stuff. And I know what they require in the real world. It's not this book that hasn't been updated since 1977. And this is what it's really like in the oil field."

Especially with, like I said, I think any jurors, but I think especially with the deep red jurors that are a little skeptical, the government more blue collar, the real world versus what someone behind a desk thinks the world is really was helping us in that case.

Malorie Peacock:

I did want to mention about the videos, none of our videos, except one was more than 25 minutes long, even doctors. So I just want to put that out there for people wondering "When you say a short video, what do you mean?" Most of our videos were about 10 minutes. We had two treating doctors. Each of theirs lasted 20 and 25 minutes. And then we had one expert that was a little bit longer, but these videos are short. When we say short, even treating doctors are only about 20 minutes. Really getting to the point that you want to make with each of the witnesses is really critical and not beating around the bush.

Now, we cut a lot out of the depositions. I'm not saying the deposition lasted 20 minutes. We probably took a two or three hour deposition, at least of the doctors, to get that 20 minutes, but being very critical of what we were putting in and making sure that every single piece that they said had some relevance to the case and were not just putting in fluff, made a difference, especially when we had to play so many videos.

Michael Cowen:

Some of the things I think we learned on video is, when you're doing... A lot of these videos were taken during COVID. We used the Zoom share screen to show exhibits to witnesses and the judge, without anyone bringing it up, said, "If you're going to have a video deposition, you cannot display anything on the screen, unless you've laid the proper predicate. It's been authenticated and I've ruled that it can be shown." And so when people just have something up there, you have to find a way to edit it out, block it out, redact it. It was a real pain. And luckily, for most of them, we had laid our predicates. One or two things we ended up editing out. I used a PowerPoint with our economist, because economics is boring and you need to make it somewhat entertaining or the jury's going to fall asleep. He had to go through both the earnings and the life care plan. It was our longest video.

And luckily I had... When the other side is screaming, yelling, trying to keep me from playing it, we had laid the predicate. "Did you prepare these? Do they fairly and accurately depict your opinion? Would they be helpful to the jury?" And laid that predicate, so the judge let me use them. The thing that was really fun is they gave us such a hard time about all of our stuff to the point that we were having multiple versions of videos edited during trial. So that depending on what the judge's ruling was, we'd be ready, not have the jury ready.

So after we rest... And we knew. I had known I was going to do this since the night before, but I figured "They'd been objecting to ours. I wonder if they did anything to theirs." Because when they had chosen to just play the depositions of both their experts instead of bringing them live. When they deposed their experts, they put the report on the screen, which the judge had already ruled "Reports are hearsay and should not be shown to the jury." And scrolled through the whole report. And of course the reports also contained things the judge had ruled were inadmissible about some of our clients, other alleged bad conduct, that was not admissible under the rules of evidence.

After we rest, we go have a lunch break. There's some settlement discussions going on at that point. And we come back and say, "By the way, Judge, before we play those videos, I just want to make sure they've edited out the report because from this line to this line" and I had the pages lined, "The report's showing in the video and I want to make sure that they've edited that out." And they're like, "Oh, Judge."

And the judge's like, "Y'all haven't thought of this? You've been objecting to this for three days now and you haven't thought of it." Now she was going to let them... She gave them an hour to try to figure it out. She was going to let them come back the next day. So she wasn't going to just not let them present their case, but it sure threw them into a panic. And when we talked about settlement negotiations at the perfect time, because we were fairly close to getting the case resolved at that point. And so I think the thing they came up was that they were going to blur the screen. When their opinion witnesses were giving all their opinions, their face was going to be blurry because they couldn't just blur the document. They had to blow the whole screen.

But I think it's something we need to remember when we're doing Zoom depositions. If we use the share screen, two things. One, don't just leave the document up there forever. Because I've sat in a trial before where the deposition notices up someone start off going through the deposition, notice they forgot to turn off share screen. And there's 12 minutes of... This deposition note is sitting there in a little bitty square of your own witness up at the top. But also if you're going to show it and you want to play it at trial, if you're in a jurisdiction, unless you do that, you need to lay your predicate. You need to prove up the document as a demonstrative, as a business record, whatever it is. Or if it's not in evidence and it's not properly authenticated as a document. If there's an objection or sometimes if you have the wrong judge, you're not going to get to play that part of your video.

And we did... We've got a great video editor we work with and he did go and, just in case we weren't able to use our screen, just edit out, just take the little square in the upper right hand corner video from Zoom and make that the whole screen. And we could have played that. Again, it would've been really poor resolution because you're really blowing it up boy too big. And luckily the judge held that we laid the proper predicate, but I think that's going to be really important for those of us that... You get sloppy. You're taking deposition after deposition, after deposition, you're just sharing your screen and you're not thinking about, "Well, if I want to use this at trial, what are my predicate questions? Have I asked them? Have I established this?"

Malorie Peacock:

Like Michael said, in this case, the defense jumped on it after the judge mentioned it, but nobody had planned on objecting to anything like that in the deposition videos and the judge said, "I'm not going to allow this. Don't be throwing stuff up on the screen that I have not ruled on ahead of time." And then the defense took it because they know we showed a lot of stuff during our depositions. And so everyone, we had to have a fight over, but was it worth it to show a bunch of stuff during the depositions? Yes. You cannot just have a video with nothing, no breakup, no anything because it's just too boring. It does not mean, and I want to be clear, that you should not use demonstratives or other admissible evidence during your deposition.

Michael Cowen:

You just have to have a plan. And if that witness you're deposing won't prove it up, then before you play that deposition, you need to get another witness to prove it up at trial. Either a live witness or one of your other depositions. So you need to... It's just proof that... Even when you're doing your deposition two years back, you need to be thinking about your trial. You always need to be thinking about trial, even though 90 something percent of cases settle, they settle because you're ready for trial and you're doing what you... And just get in the habit of, if you're going to use an exhibit... In your jurisdiction, what are the predicate questions you have to do to lay the foundation to use that either as a demonstrative or to get it admitted into evidence? Because it makes a giant difference.

One of the things that I was really happy with that you did in this case... So we had a physician life care planner. We always want to use a physician life care planner because then that doctor can, one, they're a doctor. And so when we have a doctor and they have someone with a master's degree, I think the MD wins, but the doctor can also talk about what's in all the medical records, give his own diagnosis, give his own opinion on causation, make his own independent recommendations for future treatment that aren't dependent on what the treating doctors are only thinking about right now. They're not thinking about what's going to happen in 20 years. For example, one of our treating doctors said, "Oh, he shouldn't need another hip replacement. This thing is going to last for 20 years." Well, he wasn't thinking the guy's got a life expectancy of another 35 years. But he wasn't thinking of that. Even by his own testimony, the hip is going to wear out and he is going to need another one.

But the treating surgeon wasn't thinking of that. He wasn't thinking of life expectancy. He's just thinking of "I'm treating someone now. And if they need a hip replacement 20 years, I worry about that in 20 years, which is appropriate." But one of the things our physician life care planner said is that our guy could not do all the things around the house. And so therefore a big part of the life care plan was basically a helper to help do chores around the house, mow the lawn, go grocery shopping, take him to... Help him go grocery shopping and carrying things around. And of course the defense always poo poos that "Well, the guy's been living and surviving for three years, four years. Why does he need that now? That's just trying to pump up the life care plan. What did you do to show that that was a real need?"

Malorie Peacock:

So this has come up before so I've thought about it ahead of time. This isn't something that just happened at trial. I mean, we had planned it, but our client had been living with a friend of, one of his friends had moved in. And when I found out about that, I called the friend and I said, "Hey, what's going on? Why are you living with him?" And he said, "Frankly, he needs help. I've been going to his house and whenever I go over, I end up having to clean it. I end up having to mow his lawn. It's a mess. It's really sad the way he's living. I have to take him to doctor's appointments all the time, especially when he is getting injections, because he can't drive himself home afterwards. I just feel like I'm doing a lot for him and moving in, just made the most sense."

When we got to trial, what we did with this witness was, live in court we made a list of all of the things that his friend helped him with at home. All of the little things. On the list it said doing dishes, doing laundry, driving to medical appointments. It was a long list of things that he did. And then we left it at that. So that witness was, I think Tuesday mid afternoon and we just left it. "Here's the list of the things that he does for him. What happens if you don't do them?" "Well, his house is a mess. He lives in filth, not a good situation. He needs me to do this." And then that was it.

So then the next day we had made the list there live in court and we had the life care planner come on. And when we got to the section of the life care plan about needing an assistant, needing someone to help drive to appointments, things like that, the doctor testified about it, the life care planner testified about it. And then I said, "And by the way, Doctor, you weren't here for this testimony. But we have this list that I want to go back to that we made with our clients' roommate of the things he does around the house. And it happened to be all of the stuff that we had an assistant for."

So we went through that and then the jury got a call back. They got a call back to another witness, was reminded of it because we wrote it down. We didn't just testify about it, we wrote it down so we could refer back to it later. And then it all came together and it all made sense. And it took the wind out of the sails of the cross on that. They didn't really cross-examine him on that at all. And I think part of it was because I don't think it was expected that we would have that testimony or how it was all going to fit together.

Voiceover:

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Michael Cowen:

Yeah, I think the defense had no idea how all these lay witnesses were going to put all the pieces together for the case. Because they didn't depose all of them. Even the ones they did depose, I just don't think they quite saw how all the puzzle pieces... They were believing their own story so much, I don't think they understood. They just thought the jury was going to hate our client.

Malorie Peacock:

I think we'll talk about that in a few minutes, about how we dealt with that. But that goes back to what I said earlier, which is you don't have to tell the whole story through every single witness. You tell the piece that you need to tell without witness add move on and tie it up later. And so it was like a puzzle to the defense because we knew how it was going to play out. It was strategic. It was a plan. We didn't just go in and see what happened. We had a plan for it all, but without witness and the stuff that he did at home, I didn't try to get into it with him. What if you're not here anymore? Who's going to do this for him? I didn't go on and on about that because I knew that our life care planner would address that for us.

Michael Cowen:

Exactly. We've gone back and forth on this. We've had other cases where we've made all these beautiful, expensive graphics and posters and fancy slides. This one we didn't do much of that. We have what's called a KING Flipchart, which is a double-size gigantic flip chart, which is easier to write on. And we just did a lot of... Instead of having an exhibit already made, making the exhibit as we went and just taking notes. I think that worked better. It was more interactive. It kept the juror's attention. When they got bored to look at the witness, they can look at your flip chart, you have it there to call back to. You don't have all the problems that you.... When you want to use a... With this judge, especially a demonstrative, we would've had to lay a predicate every time, which then takes away the spontaneously coming from the witness.

The other thing is it's... We're not using it to lead the witness. It's all coming from the witness and we're writing it down and we use it when we cross people. We used it for our own witnesses. I don't know how you felt about that. I thought that was a more effective way to do it. At least for this trial on this venue.

Malorie Peacock:

For this trial. I think it was very, very effective because we weren't putting words in anybody's mouth. Just so that the audience knows, we didn't only do it in the courtroom. We did it with our video witnesses too. So it was consistent across the way that we presented the case. We didn't have some big fancy exhibit with a lay witness in a video. And then at trial we're just writing on a flip chart. We were actually writing out notes the same way with lay witnesses. And I thought it was very effective and it was very interactive. So we used a combination of the flip chart, writing stuff as the witness said it. And then also the court's ELMO. The court didn't want us to bring our own TV, which also played a role in this. We

had limited technology. And so we were putting medical records up on the ELMO so the court could see, or the jury could see the entire medical record.

On the other hand, the defense did bring tech people to help them with their exhibits. And when they showed a medical record, they were showing just a really limited part of the medical record. And often we were able to put up the whole medical record and show that there was more to it than the defense was saying that there was.

Michael Cowen:

And that was so fun when they tried to impeach our client with his medical records. And like you said, they would just show one little sentence. And I didn't object, I waited. Because at that point at least, I trusted... Our client trusted me enough to not fight, and let us fight and let the jury fight for him. And so I just kept the notes. And so "Remember they said this in the record? Let me put this record. What's the rest of the point that I'm highlighting?" And then you put it into context. "When they cherry-picked this line out of the record, what does this say here?" That was maybe cutting it a little close.

But it was so fun because they just couldn't help themselves. They'd have the one line of context, but they'd like the line. And so they use it. And then even if there's something in the same paragraph or the next page that contradicted it, I don't know, they just didn't expect us to know the records or to fight back. I think that's why they didn't bring their... Because they told us they were going to bring their surgeon live and then they decided to bring them by-

Malorie Peacock:

Video.

Michael Cowen:

Video. I think that they didn't want the cross. So let's do a little bit of truth telling here. We did not want to try this case.

Malorie Peacock:

No.

Michael Cowen:

Why not?

Malorie Peacock:

We've already talked about some of the issues with the case that made it a challenge. Just because the case is a challenge doesn't mean we necessarily don't want to try it. But if someone offers the right amount of money, then if there's issues in the case, you should take it.

But the bigger issue that we had is our feelings about the client. I've worked with the client for years before the crash happened in 2018. So I'd known him for a long time and me and him had a rocky relationship. I would say I did not like him very much. Now by the end of the trial, that changed, which is important. I think it is hard to go to trial if you don't love your client. And one of the reasons I needed Michael's help with this case, trying it is because when we were about to start the trial, I still didn't like the client. He was tough to love. He did a lot of things in the case and made decisions in the case that made it even harder to love. I don't know else to put it without giving away client confidences, but.

Michael Cowen:

Until trial, surprisingly, he was a very difficult person to represent. And it wasn't just us. He had turned out way a lot of people in his own life, a lot of his family members weren't speaking to him, he'd lost a lot of his friends. When we talked to people, we thought, "Well maybe it's because of the injury." And we had, "No, he was like this before. And so we thought the case was going to settle. And we really wanted the case to settle. And so the mediator reengaged us without us calling first. And so we thought, "I guess the defense is trying to get it settled but we got closer." And so we were excited. We thought it was going to settle. We can't say numbers because everything's confidential. But there was a mediator's proposal the week before. And it took a lot of work, but we got the client to accept it.

And so we thought it was going to be, "It's going to expire on Thursday at five. Is this going to go?" In fact, we were getting ready for back to back trials. So the second one didn't go. Then they said, "Well, the wheels are in motion. I need till the next day at noon." And like, "Okay, you got it." We heard some scuttlebutt. Local counsels were talking to each other and we heard some scuttlebutt that they may have had something real close, but not quite enough money. You and I were talking about, "Well, let's not be stupid. If we have to cut our feed to get the client what he would've gotten out of the mediator's proposal, we'll do that." This hasn't happened for a long time. I actually had physical manifestations. I was up in Colorado getting an expert ready for another trial that we were going to have the week afterwards. And I actually had some tightness in my chest. I felt physical tension, wanting to know if it was going to settle or not.

And then what we found out was the mediator's proposal was rejected by the defense. And the weird thing is they had a primary policy and they had an excess policy. The excess was willing to pay their part, but the primary wouldn't pitch the limit of the first layer, which meant there's no way it could settle. And the funniest, weirdest thing is as soon as I found that out, that the problem wasn't the excess, the problem wasn't us, the problem was the primary wouldn't pitch and the client should not have taken what the primary... What the primary offered would not have put any significant amount of money in the client's pocket at all, between all the liens and everything else. All my stress went away. As soon as I knew that we didn't have any way to settle it, someone else was being unreasonable, it's not us. I don't need to talk anyone into anything. I don't need to make the decision. All of a sudden, all my stress went away. It was so weird. I felt it flow out of me. It's just like, "Okay, now we can have fun.

Because if we had gone to trial when the client wouldn't take the mediator's proposal that we had recommended, that would've been different. But because he did the right thing, we did the right thing and one of the two insurance companies did the right thing. I'm like, "At the end of the case, whether he's a lovable likable person or not, he still got hurt and he wasn't hurt before and they hurt him bad and they needed to pay something." I was at such peace with it. You were with me. I was not stressed out at this trial at all.

Malorie Peacock:

No, you weren't, but you're usually not stressed out about trials. That's your zen place.

Michael Cowen:

That's my happy place.

Malorie Peacock:

Yeah. Usually by the time we get down there, you don't have a lot of stress. And actually usually leading up to the trial, you don't usually have a lot of stress.

Michael Cowen:

No, I don't show a lot of stress. I usually don't want to do the work. I'm lazy. I'm not scared, I'm lazy.

Malorie Peacock:

In this case, it was a little different because there was a possibility of getting it resolved. There was anxiety about that. It was a little bit of a different kind of stress. And we didn't find out till the Friday before trial, that it was not going to be resolved and there was no way. But we were ready. We got ready anyway and always, you never want to rely on settling. Even if there's a mediator's proposal, they didn't accept it. It is what it is. We can reject it, they can reject it.

Michael Cowen:

The full truth is-

Malorie Peacock:

We showed up to trial

Michael Cowen:

Is you were ready and you're good at getting me ready quickly, we want to be honest. But it worked out really well. It would not have worked out so well if you and your team, Robert and everyone else on your team had not done all the great work you did working it up. We also focus grouped it, which is one of the reasons we knew that we could win the case. But we also knew that a lot of the jurors there were... Given the way we predicted our client was going to testify and the way he testified his deposition, weren't going to like him. And as a result, weren't necessarily going to allow a lot of damages of the case. And that it was going to be a challenge. That the drug use for some jurors was going to be a big challenge. I don't know if I've tried a case with a trial consultant.

We actually had a jury consultant. Has been more than decades since I've actually had a consultant there. And so we actually had advice on jury selection. I did a different type of jury selection than I've been doing, but I'm going to tell you, it was so nice to have... We had Kelly Raymond and Stefanie Bradshaw was working with her, and it was so awesome because all I had to do was talk to people. We have a list of things we want to talk to jurors about, and I'm just talking to them. I'm not worried about judging them. I'm not worried about taking notes. I'm not worried about evaluating who's going to be good, who's going to be bad. Not when I heard certain things I would go... Someone's like "I just think that personal injury cases are horrible. And if I knew this person in your case, I would've tried to get out of jury duty."

I would ask the cause questions there, but to have someone else to keep track of who to challenge for cause, who's going to be good, who's going to be bad. I didn't even participate in, other than writing down the strikes and signing the paper, on who we're going to strike. It was so awesome. I loved it.

Malorie Peacock:

Kelly and Stephanie were so helpful. We've not had that before. I don't know. Kelly has not been on the podcast yet, I don't think?

Michael Cowen:

No. She needs to be because she was-

Malorie Peacock:

It would be great if she could talk about what she did for this case, because she did a lot of work for this case to help us. She really, really helped us focus jury selection. And gave us some interesting strategies that I think paid off in this case. So Michael, I've seen you do a bunch of different kinds of work over the years, years, and years. This is one I hadn't seen you do yet. I think it's what... Doesn't Gerry Spence call it brutal honesty. Is it Gerry Spence? Who calls it brutal-

Michael Cowen:

That's Nick Rowley-

Malorie Peacock:

That's Nick Rowley, calls it brutal honesty.

Michael Cowen:

Gerry Spence is I'll show you mine if you show me yours or some like of that.

Malorie Peacock:

Well, you did that too. I think our listeners would really like to hear how this Voir dire was different than anything I've ever seen you do before.

Michael Cowen:

Well, there's a few things. One, I was trying to get some people off for cost because I knew that... And there was some issues in this case that... There were some people that once they heard that our client had used cocaine and that they were not going to allow very much in money because they thought he would use it on drugs. And we knew that was an issue with some people. We also knew there were other people that thought, "Well, it's one oil field company, another oil field company, other oil field work, who are they complaining about? Their own workers are probably doing the same thing." That was also a sentiment in the community.

And then we were thinking at the time that our client was going to be unlikeable, because Kelly had actually worked with him eight or 10 times actually over a couple years and just threw her hands up and said, "This client is just not going to testify well. He does well on these two or three areas, but he would always try to make an excuse for anything. He'd always want sympathy. He'd never admit to any responsibility on anything else in his life, at the time." She said, "You have to really set the bar low. Not only do we try to worry about identifying the people that just would not allow money if the client had certain things."

And so my favorite question in Voir dire was "Have you ever loved somebody that you didn't like?" And I gave an example for my own life of someone that... A family member, I really loved the person, but I just couldn't be around them that much. And that was pretty universal. And so I'm like "Is it okay to hurt somebody if they're not likable? If my client is a jerk, should they get a..." Now I didn't have them there for Voir dire. That was, I think important because I don't think we could have this conversation.

I think I said, "If a company hurt somebody, should they get a discount because the person they hurt isn't likable?" I said, "When I have a grandmother who's coming home from church and she gets hit and everybody loves her, it's really easy, but I've got a guy that's not always... You're going to meet him he's not always easy to love. Can we just consider the evidence?" And I was doing a little bit of... Without

purposely bringing politics in it because I would not bring politics into it because then you could divide the jury... Even in a deep red county, a deep red county's like 60, 65% red, not a hundred percent. But I make a point to go read left and right wing media and commentary couple times a week just to get a feel for how people think and how people talk. And I know one of the big things on Trump is, "Well, he may be an a-hole, but he's our a-hole." It's not whether you like him or not, but it's what he does. He did what he... Have been a jerk about it, but he did what he promised.

And so I got a little bit of that. "Can we just base it on the evidence? Can we forget about all this bias and prejudice? And it's not whether you like someone or you hate someone, it's whether they're hurt or not and what they went through." I think that resonated pretty well. And then I had to go as... And then the other one was really tough because I didn't want to say he used cocaine in those words because I didn't want to wave air. I wanted to object. Because I thought that if it didn't go well... It's a tough thing evidentiary, but I thought we had a shot on it. Because I mean, I respect our judge, I like our judge, but I respectfully disagree with her ruling on the admitting the drug use. I don't think she was correct.

So alright to ask that, "Well, what if..." I didn't say he did, I said, "What if someone had used drugs, say cocaine, for example?" And I talked about that. I told a little bit of some personal stories of some failings in my own life when I was younger, which I don't know, I wasn't planning on doing that, that just happened. But I think that was important because it also opened the door, which we didn't even know we were going to have it yet at that point, to redemption and to that people can do something stupid one or two times. And it doesn't mean that you should be branded for life. And I think we got really good discussion with the jury because of that.

Malorie Peacock:

We did, we had a great discussion on both of those issues. The first one of someone not always being likable. We had people say in the panel, "If I don't like them, then no, they don't make me money." That happened. And we were able to identify those people. So it was an important conversation to have. I was surprised by how many people said "No, if he's a whiner, forget it. I hate whiners." But we needed to identify those people. And then the same with the cocaine use issue. We had people that said, "Absolutely not. If you're breaking the law." We had a police officer on the jury, for example. On the panel, not on the jury, he didn't end up on the jury, but on the veneer who said, "No, if you're breaking the law, don't be coming into this court and asking for something." They were important, critical conversations to have. And if we didn't have them, I think we could have ended up with people on our jury that could have done a lot of damage.

Michael Cowen:

And I think we ended up getting what? 12 off for cause or something-

Malorie Peacock:

Something like that. It was a lot.

Michael Cowen:

And it was interesting because when we looked at our panel at first, it was predominantly white people over 60. And our actual panel was more than half white people over 60, but it was a lot more diverse than what we expected from the community. And I don't know that's necessarily a predictor of anything, but it is nice to have not all the same people. Although our client probably felt very comfortable. He was wearing a Trump 2024 hat when we went and prepped him.

Malorie Peacock:

Who we met with him the night before.

Michael Cowen:

They were his people, he was fine with it. Another shocking thing that happened in this trial is your client became a nice person.

Malorie Peacock:

He did, he did. Like I said, I didn't like him for a long time. And not for lack of trying. If anybody knows me, I really try to connect with clients. It's something that's important to me, especially if we're going to be going to trial or something like that. We spend a lot of time together at their house, talking on the phone. We just spend a lot of time together. So it was not for lack of trying on my part. We just didn't get along. So in Voir dire Michael set the bar really, really low for this client. So low that I think we probably looked like the assholes by the end of it, which is fine. I think that that was going to work out for us, but I think it was shocking to the defense, how low we set the bar for our guy. So we made him seem very unlikeable. And we, as in Michael, made him seem very unlikable that no redeeming qualities, nothing. And then what happened, Michael?

Michael Cowen:

I think a lot of it is he was so afraid that no one was going to believe him and no one was going to fight for him that he felt like he always had to make us feel sorry for him. That was the communication style I think he had learned growing up. I think when he actually saw us go down there and... When the offer didn't go up, they wouldn't pay the mediator's offer, we didn't... We said, "Okay, we're going to go trial, we don't care." And when he saw that we did that and we were not trying to talk him into settling for less. And we're in there trying the case and working hard. I think he just learned to trust us. I don't know. And he'd have some epiphany in his life. Some of the therapy he was going through, I think helped him. I think he finally went and gave in and started participating in the therapy more.

I asked him this on the stand, so I don't think I'm breaching confidential. I didn't want to talk about it. So we're talking, we're going through all this stuff. And a lot of it's like "Let other people, whine for you basically. You're going to talk about how you loved oil field. And we're going to go through pictures and explain all the work you did in the oil field. We're going to talk about how the crash happened. We're going to try about how you tried to go back to work and why it didn't work out and just what your symptoms are. And that's it. We're not going to go into any of the big details."

And at the end he said... Actually some good stuff, is "I hate to say this, but some good things have actually come out of this experience." "Really? What?" "Well, I realized I'd really been driving a lot of people out of my life, the way I was acting and treating people. I'd really hurt my own family relationships and driven people away. I was really angry with God. And because of this and the therapy and going through this, I'm reconnecting with family, trying to be a better person, listening to gospel and going for walks, trying to reconnect with God." I'm like, "Wow." So that was my last question I asked him when I put him on.

Malorie Peacock:

It was really powerful and it's not something that we planned. It's not something that we knew he would say, or that we knew that... We didn't know he had changed so much or grew so much. And part of the growing was happening right there. Part of it had happened in the weeks before. Even our client would

admit it just started happening in these last few weeks. He knew how he was and he admitted it on the stand and it was shocking, but powerful.

Michael Cowen:

And then the defense comes back after that. And you're talking about how you're trying to change. You've realized what a bad person you had been. And you're trying to be a better person and you've reconnected with family and you've turned back to God and they come and say, "And four years ago you tried to buy cocaine, right?" It's like, "Yes. I just told you I was an a-hole." It just took all the wind out of their sails. But I think that only worked because it was real, it only worked because... I mean, if I tried to get him to say that, it would never would've... If he hadn't said it on his own the night before, and it hadn't felt real, it wouldn't have worked. Now once he said it the night before, I'm like "Okay. That's going to be the last question." I knew we had it. And so he went through and he testified beautifully.

One of the things I did because we were really getting along is, before he went on the stand that morning, I put my arm around him, right by the witness stand. And I just showed him. "Here is the jurors, they're going to be sitting here. I need you to trust them. I need you to trust them to fight for you. So when the defense attacks you, if you fight back, there's nothing for them to do. I need you to sit there. I need you to take it like a man and let them hit you so that they have something... So they can go fight back for you. Trust them and trust me. If they try to twist something out of context, trust me, I will put it back in context for you. I get to go next. And if they attack you unfairly, trust these 12 people they're going to come and make it right for you." And he did. It was amazing.

Malorie Peacock:

It was.

Michael Cowen:

But I can't really take credit for it. Other than going with it, but really our client gets the credit for growing up. Although I will say this is at least the second time in our recent trials that you and I have had together where I've just seen... And I'd never thought that this would be there, but a healing power through the trial. We had the wrongful death case with the widow who really finally felt valued. And now him having people actually fight for him. I think the jury would've cared about him. We didn't get to find out, but it looked like they did. They were so friendly afterwards. I didn't ask him but they were so friendly afterwards. I think regardless of the money and the money is going to really help this guy too. But I think that just going through this process and seeing other people care about him and realizing this journey he went through, I think this trial has done good for him in other ways.

Malorie Peacock:

I will say there's no credit that we can take for how he did on the stand. He did great, but all of the growth was his hard work. He put the work in, he made a conscious decision to try to move forward and try to view the trial as a healing process. And that perspective was great. We couldn't have asked for it to go any better, but not... I would say, I don't know that it's anything that you or I did, except listen and be there for him and show him that we were willing to fight, even if we didn't like him, but it played well.

Michael Cowen:

And it not only moved us, but evidently... There were two people, one from the primary insurance company and one from the excess insurance company sitting in the back of the room through the entire

trial. And evidently you got a phone call that following morning. Day four of trial where evidently maybe it played well with someone else, without saying numbers tell me what happened there.

Malorie Peacock:

Out of the blue, I got a call oddly from the mediator that we had mediated with months and months before. Say mediator that had called us the week before about a proposal that didn't work out. And he said, "Hey, they're interested."

Michael Cowen:

Well, now he said, "They'll pay the proposal now."

Malorie Peacock:

Right. Then we said, "No, thank you."

Michael Cowen:

Wasn't that fun?

Malorie Peacock:

Yeah. Part of the issue was the mediator wanted to get on the phone with me and negotiate, but we are walking into court. We were about to put more witnesses on. I said, "We can't talk to you right now. We're trying a case. It is what it is. Please talk to our local counsel, Greg Koons, who was invaluable in the case. And he deserves some credit for this too."

Michael Cowen:

Yeah, he was great.

Malorie Peacock:

Yeah. He's a fantastic lawyer. He's from the area. Burleson is where he lives, but it's the same county. Anyway, so I was like, "You could talk to him and you can... But we're trying to case. Leave him alone. So that's how it happened. And then at lunchtime that's when it all started coming together. Michael, you got to play the bad cop, which I think you got some joy out of. If we're being honest, I think you got some joy out of being the bad cop.

Michael Cowen:

If we're being honest... I'm not proud of this, but there were discussions and I can't say numbers, but the numbers were significantly above what the mediator's proposal was and numbers that would create some risk for our client. But at the same time, I thought we were doing really well, that even if we wanted to settle the case... And I wasn't sure I wanted to settle the case at that point, but even if we wanted to settle case, the money wasn't going to go away. We were going to finish the evidence that day. We're going to argue the next morning. Until the jury comes back, you can keep negotiating. And I think we needed to show him that we were serious. And I think we also needed him to think that I was crazy and didn't care about the money I'd invested in it, didn't care whether we won or lost and I'm not proud of this, not something I normally would do.

And so he's saying, "I don't think they have that much more money. I think they're going to go up to X and that's going to be it. And they're going to run out of money." And excuse my language but I

think I said, "Well, I don't give a fuck." And he goes, "Well, you could lose this trial. You could lose all that." I said, "I don't care. You know what's going to happen when I lose this trial?" "What?" "I'm going to get on my jet airplane, and I'm going to fly to the next one, make another million dollars. It's going to be like it never happened," which I don't normally talk like that. But it was a lot of fun. And it worked because then he's calling the local council like "I don't like the way he talked to me." And the local council, like "I don't like the way he talked to you either, but he's crazy. He told you." "Well, do you think if I could get them to do X?" "I don't know. I'd have to see if I can talk them into it."

And then the mediator made another proposal and then it resolved about three o'clock in the afternoon. Interesting that the defense lawyers did not need to know anything with negotiations either. The adjusters kept their trial team out of the negotiations, which I thought was... They were struggling with their video editing problem. And I said, "Oh, by the way, there's a mediators proposal. If it gets accepted, you don't have to worry about this And I think they were a little upset about how much it was too, but that's another story. They didn't seem happy with the amount. Because I think they really weren't true believers. I don't think they... I really think they thought our client was just scumbag and don't deserve any money and would use it on drugs. And I don't think any of that's true.

Malorie Peacock:

I don't think that's true either.

Michael Cowen:

But I think that's what they believed. One last thing. Like I said, the trial was a lot of fun. A big part of me wishes that we could have finished it and seen what the jury would've done, but at the same time, economically, the risk did not make sense for our client. And we also had to remember that we were willing to settle for one number the Friday before. I can't say how much more, but it was a lot more, six days later. Don't be a pig either, that's... Hubris can also lead to fall. Glad we got it done. One other thing I want to talk about, this trial was your first trial as a young mother.

Malorie Peacock:

Yes, it was. So it was the first time... Not the first time I've been out of town, but it was the first extended period out of town. And my baby is now... He's seven months old on Saturday. It was tough. I'm not going to pretend it wasn't hard, but everybody figured it out without me. So my husband figured it out. He is a great dad and he was happy to do it, very supportive, happy to do it and knows that this is important and it's part of my job. But it was hard for me. I think it was one of those things that it was harder for me than it was for anybody else. I felt more bad about it, I think, than anybody else felt about it.

Michael Cowen:

And we did actually go home the Wednesday night of trial again, because it was my son's birthday and I haven't missed either one of my kids' birthdays since 17 years and I wasn't about to start. We flew home, which was nice and you got to see your baby and I got to see my son and then we get back so we can go get back at a decent hour and get a good night's sleep and go back to trial the next day. And then the plane had a mechanical problem. And so we drove and got in at about 1:45 in the morning, didn't get a lot of sleep. And I will tell you it was absolutely worth it.

Malorie Peacock:

Definitely worth it. It was definitely worth it. I got to rock my baby to sleep and get back out there. San Antonio is not close just for people that don't know the geography of Texas, San Antonio is not close to Cleburne. hours away.

Michael Cowen:

Yeah, about four-hour drive. No, but it was worth it. It was worth it because I didn't tell my son I was going to be at the birthday party. He thought I was going to be out of town. And so when I show up, he's turning 11, so he is still on the sweet stage and he's hugging me and he's all excited. And one day when I'm dead and gone, my son will remember that he's more important than my trial. And that's part of the challenge of trial lawyers is to be complete human beings. We want to do everything we can for our clients, but then we got to keep our relationships to not be the unlikable a-holes that we have to a trial, with our own families. But I think I'm real proud of the way you did that. Anything else you think that's significant on this trial? I think we-

Malorie Peacock:

No, this is a little bit of a longer episode than usual, but I think that those are the key things that I think that people would like. If they have more questions about it, of course me and you can come back on and do another episode about it probably. Or they can talk to you. I think you have some speaking engagements coming up, so maybe they could talk to you in person.

Michael Cowen:

We both do. The Academy of Truck Accident Attorneys Annual Symposium is an Austin, Texas from October 6th through October 8th. You and I are both speaking as our partner, Sonia Rodriguez. Now I sound like a real nepotism person because I am the education chair this year. I worked really hard along with Tim Withing, Pete Kestner, Michael Leizerman and Joe Fried and Lori Tepper, the executive director, to put together a great program. It's three days. Incredible speakers sharing real knowledge. And Trial Lawyer Nation will also have a booth there. If you want to come by and say hi, we'd love to see you.

Joe Fried invited me to speak at something called Trial Lawyers University. It's in Las Vegas from October 27th and 28th. They have lots of different tracks, but there is a trucking track. It'll be Joe Fried, Joe Camerlengo, Jay Vaughn and myself. There'll be both lectures and actual people bringing their cases so we can help you brainstorm your case. That should be another great program. I'm very grateful to Joe Fried and Dan Ambrose for letting me take part in that.

I'm trying to get on the road a little bit more now that I've got... You're back full-time. Natalie's back full-time. As long as no one else has a baby this year, I can get back on the road and go speak more and hustle for cases more by meeting with, referring lawyers and stuff. If someone has another baby, they'll have another baby. I'm not saying not to I'm just... It is nice to be back at full force and I can get out there and get on the road more so I'm enjoying it.

Well, thank you everyone for listening. I hope this was useful to you and I hope that you can use some of the things that we did in your next trial. And join us next episode on Trial Lawyer Nation.

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Voiceover:

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