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 a firm 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:

Welcome to today's Trial Lawyer Nation. We're going to talk about a really important topic for every personal injury trial, and that is getting good effective testimony from your treating doctors. I'm here with my partner Malorie Peacock. Malorie, how you doing today?

Malorie Peacock:

I'm doing good. Hanging in there.

Michael Cowen:

Good. Before we get in here, I want to, as always, give a shout out to LawPods. Y'all may have noticed, I think one of the only low star reviews we have on the podcast app is complaining about our sound quality. Some of y'all may have noticed we've gotten better sound quality because we switched our production to LawPods. LawPods helps, they produce our podcast. It's easy. All they have to do is talk to someone twice a month and they do everything else, all the editing, all the putting it together, all the putting it out there in the world. And if you are thinking about doing a podcast, which is a really good way to get your name out there, I highly recommend Law Pods.

Malorie Peacock:

All right. Well before we get started, Michael, I did hear that you were going to be speaking at a couple of events coming up soon that maybe some of the listeners might be interested in.

Michael Cowen:

Yeah, there's a couple events coming up in October. The first one is really near and dear to my heart because I'm the education chair who put it together and that's the Academy of Truck Accident Attorney's Annual Symposium. That's going to be October 6th through October 8th in Austin, Texas. We have a fabulous program that we put together. I'm speaking you and Sonya are speaking as well, along with a lot of other people we've had on Trial Lawyer Nation, for example, Joe Fried, Michael Erman, Joe Lingo, Jay Vaughn, lots of other just great speakers, great content and it's going to be a really good time Trial Lawyer Nation will be there too with the booth at that event as well as at Trial Lawyers University. That's October 27th through 29th. I'll be speaking on the 27th and 28th on trucking, we have a trucking section.

The also two other fun things about the Trial Lawyers University event there at the end of the month in at the end of October in Vegas, is one on the afternoons of the 27th and 28th. We're going to have a bring your file workshop opportunity. So people can bring their cases and meet with myself and some of the other top trucking lawyers like Jay Vaughn, Joe Fried and no obligation. We'll sit there and we'll go and brainstorm your case with you and try to, you can walk away with a better game plan. Good anchors. And I love doing that kind of case strategy.

The other thing is we were going to be doing some on Saturday the 29th of October, some live recordings of trial lawyer nation. So if you ever want to see how all this works, you want to see an interview going live, it might be kind of fun. So we'll be doing that there as well.

Malorie Peacock:

That'll be really cool. I think I would get a kick out of watching you interview someone else. I've watched you interview other people and it's fun.

Michael Cowen:

It is. You got to be in the room with Randy McGann and some other people. It's been fun. So let's go on to the topic, Malorie. Why do we need to get testimony from our treating doctors?

Malorie Peacock:

Well, it's critical for a couple of purposes. The main one I think, other than for making sure you have a clear appellate record and proving all of the elements of your claim, which I think is the obvious one, it's a critical component of the story that you're trying to tell to the jury. It's a way to bridge the gap between what happened in this crash, and now what is your client's life like, how has it been affected? And it's that bridge that's necessary for the jury to move from one piece of the story to the other. So

from liability to damages, you need this bridge of expert testimony to tie it all together and move forward towards damages.

Michael Cowen:

And why do we always at our firm try whenever possible to use an actual treating doctor instead of just hiring a paid expert?

Malorie Peacock:

Well, I mean I think there's value in doing it both ways. So if you don't have a doctor that's a very good communicator, which some doctors aren't, then hiring someone to provide that bridge is important because it's such a critical piece of the case. You want the jury to understand how the injuries occurred, what they are and from a medical perspective what's been done. But the treating doctor just has so much more credibility than someone that you could hire, because it's someone that's followed your client from the very beginning, from when the crash occurred up until when you depose them. So they have a longer history and they're harder to cross-examine because they're testifying from a place of personal knowledge as well as expert testimony, as opposed to just a place of expert testimony that you've hired someone to give.

Michael Cowen:

I agree a hundred percent. I mean unless the doctor is just totally non cooperative or just a really, really bad testifier or has something that makes them very impeachable in their background, I think it's always better to have the treating doctor. What are some challenges you see in getting treating doctors to give coherent, clearer testimony?

Malorie Peacock:

So just like with any expert, any scientist, any engineer, any doctor, they speak their own language. And getting them to get out of doctor language into language that everyday people can understand is a big challenge because they take for granted what they know, their education, their training and their experience in the field makes them automatically know what some of these words mean and to them, they're elementary. Whereas if you're just a regular person off the street that has no experience with these injuries or this kind of doctor, all of it can sound very foreign. The other, I guess challenge too is that doctors aren't professional testifiers like an expert witness is. So they need a lot of help with how to tell a compelling story. They are not professional story tellers like we are. And just like with any witness, they don't know what makes a good compelling story and you have to tell them.

Michael Cowen:

I agree with that. I think your first point that they tend to use technical words, I think we have to remember that our role in the trial story is to be the jurors guides the jurors are the heroes. They're the ones that are going to do something heroic. Hopefully the defendant or someone on the defense team is the villain. But we're the guides. And so when doctors use technical terms, which they're going to, and it's appropriate that they should. But then it's our job to make sure that we're listening with the beginner's minds so that when there's a term that a juror might not have heard, we said, Wait a minute doctor, you said the word radiculopathy. What does radiculopathy mean? Or you said whatever it is, what is that? Can you explain that to us? Can you show that to us. So that we're making sure that jurors questions are answered and also showing that we care about them understanding it.

Malorie Peacock:

Yeah, I think that's so important and I think it's a real challenge for more experienced lawyers in personal injury. Because you start to speak the doctors, you become an expert in that field. And so some of these words that you take advantage of knowing, your jury's not going to know. And so it is hard to think about the testimony from the jurors perspective, especially when you're more experienced because you already know what the words mean. I think I had an easier time deposing doctors when I was less experienced in this regard, only because I didn't know what things meant. So I would just say, what does that mean? What is this? How does that work? What do we do here? And those are the kind of questions that you have to be comfortable asking because you are the voice of the jurors in this scenario.

Michael Cowen:

Yeah, I think that that whole beginner's mind concept, which I mentioned earlier is yes, you do need to become a technical expert, but you need to also keep that, the ear of the beginner. And when those concepts or words come in can't say, Well doctor, you and I know this but the jurors, they're kind of dumb asses that aren't very educated. Can you explain it for them? It's got to be, Doctor, what does that mean? Can you tell me more about this? Can you explain this to me? Can you explain this to even better, can you explain this to us? And that way you're their guide, you're bringing them through there, that's so important. Another thing about treating Dr testimony, do you think it's better to do it on video so you know you have it, or to do it live in the courtroom if video's an option in your jurisdiction?

Malorie Peacock:

So I always think that a live witness is better, unless they're very difficult to understand and need subtitles. And that is the case sometimes, especially with doctors because they use a lot of really big complicated words. Sometimes you really do need subtitles to understand them. And some people speak really quickly, they're hard to understand. So if you know that that's an issue ahead of time, then maybe video is better. But only if you have it really well planned out it's going to be short and it's going to be to the point, which I think you're going to talk about in a minute. But other than that, I would say live is best.

The problem with doctors is their schedule. They have typically really busy clinical practices that can often pull them away unexpectedly. And if you are banking on them being available at a certain point in your trial and you don't have a backup recording of their testimony, if they suddenly become unavailable, what are you going to do? I mean you need them typically, to prove your case or to establish at least a certain element of damages. So it's a big risk to take I think.

Michael Cowen:

I agree. I think the other thing we have to keep in mind is we have a lot of foreign educated doctors, they're brilliant people, but a lot of times their accent is so thick that it's hard to understand them. And having the ability to put the subtitles of what's being said in the testimony underneath can be helpful. So what of some points that you can think of that you've used that make for more compelling treating doctor direct examinations?

Malorie Peacock:

So one of the things that I learned from you early on is that with every witness, not just treating doctors, but with every witness, you find out immediately for the jury's sake, who are they? Why are they here? And why should we care about their testimony? And so you get that out in the first two or three minutes of a video or even live testimony, why should we care about what this person is saying? In order to move

the witness along and also to continue to tell a compelling story. So I think a lot of mistakes happen, especially in expert or treating doctors' depositions when people jump right in and say, We're here today to talk about engineering opinions, but first let's go through your 9,000 page CV. And talk about every single point in your CV before we move on to what the opinions are.

And you've lost the jury. The jury doesn't care about the 9,000 page CV. They want to know, okay, is this person a medical doctor and are they licensed? Okay, good, that's what we need to know. Now you do need the other testimony at some point, just for challenges to expert testimony. So if it's Daubert in your jurisdiction or Fry, you need to establish what you need to establish for them to be able to testify. But I don't know of any rule that says you need to do that right in the beginning.

Michael Cowen:

Yeah, I think the basic qualifications, what kind of doctor are you? Do you, let's say it's a back and neck injury, does your practice include treating the back of the neck? And that's that. I mean I think later on you can go into, if you need to, where did they go to medical school? Are they board certified? All that stuff. But I think just at the beginning, this is who they are. I especially if you're on video, you've got a five to 12 minute window of attention and then you're going to start losing jurors.

And so if you spend that five to 12 minutes on what publications they have, what fellowships they did, what their job experience is, they're not going to be paying attention when you get to the point. What of some things you do for trying to get the doctors to get to the point early, basically what's wrong with this person? What are you doing about it? What'd you do about it? How are they doing now? What's the future going to be? I mean those are kind of like the big points. How do you get them to do that and not going to every little finding on every little exam that they did?

Malorie Peacock:

It's hard. A lot of doctors feel compelled to do that because they want to, I guess, prove what they did, prove that it's coming from a good place and they're nervous just like anybody that testifies and so they just want to blurt everything out. It is hard to control any witness, including doctors. I think part of that comes with having a conversation in advance. Here's what we need to establish. Building some kind of trust between you and the doctor that says, I'm going to ask you the question and you need to answer the question I ask. We'll get to all the things you want to talk about, but we have to do it in a methodical way. We can't just let you go on and on and on, it has to be a question and answer format.

I don't have a lot of good techniques for it. And typically what ends up happening is we just edit out a lot of things. We get the piece that actually answers the question and then we edit out the rest of it. But I don't know, Michael, do you have any special tips for the listeners on that?

Michael Cowen:

If I can get the doctor to meet with me in advance, which is sometimes getting anything more than five or 10 minutes before the depo is hard, but we try. One thing that I have found helps is going through the jury charge the damage questions, will the doctor, because they don't get it. They're so defensive and when they're thinking of justifying their treatment, justifying their bill and showing that they did a good job, that sometimes that their aim is being more at talking about what a great job they did than talking about what was wrong with your client. And how that was caused by the crash. And the fact that there are going to be future problems even though the doctor did the best job any doctor in the world could do, medicine can't fully heal some of these people. And in getting them okay with that being okay. And going over what the standard is.

I mean in reasonable medical probability, are they going to be in pain for rest of life? Well I don't know. They might get better. No, you're talking about might, in reasonable medical probably 51% chance or more. Well no, they more likely than not, they're going to be in pain for the rest of their life. Well then don't say might get better. That's the defense point. You don't need to bring that up dude. It's hard. But when you can work with them and kind of get them to understand what the game plan is, what you're trying to do, it can make a big difference.

But again, and just trying to get them out of that defensiveness, cause that these doctors are so... There's something in doctor culture where they're all so scared of lawyers. They're so scared of the medical board, they're so scared of either there's either going to be a grievance or malpractice case. That they are more worried about many times just justifying what they did and documenting what they did and talking about how perfect what they did was, than they are about everything else. And it's more important that we're talking about the truth and when they realize that you're not on trial, no one's going to be asked, Did Dr so-and-so do a perfect job? They're going to be asked was someone hurt. What are the consequences of this injury.

Malorie Peacock:

There was a time even a couple years ago, where I was worried for the doctor about the question, Didn't you meet with Miss Peacock before this deposition? Didn't she tell you what to say? How long was your meeting? It was hours long. Oh my gosh. Basically making it sound like we're in some sort of collusion or some sort of cahoots. I mean how do you deal with that kind of line of questioning?

Michael Cowen:

Well I don't even worry about it. Because what juror doesn't expect us to meet with a witness to find out what they had to say. I mean you could if you want to, I think the more we make a big deal about it, the more it looks like we did something wrong. You can say, Doctor, did we meet? Did I tell you what to say or did I ask you what you were going to say? I mean there's a difference there. Maybe you consider jury selection. Now before I come to trial, does anyone think I ought to talk to the witnesses and find out what they have to say before I file a lawsuit and bring it to court?

I mean, of course that's your job. Of course, we should talk to the witnesses and find out what they're going to say. It's not supposed to be a surprise. So I mean I think as long as the doctor doesn't like look nervous or cagey when they're asking those questions and as long as we don't look nervous or cagey, I think it's not a big deal. I mean I don't think it's effective when I've seen it done at trial.

Malorie Peacock:

Well, and I think too, the biggest piece of it is that the witness has to be okay with it. If it seems like there's something nefarious going on, then the jury is going to be suspicious. I think when you're talking to the witness, reassuring them that it is absolutely acceptable that me and you were having this conversation, but before you testify. I mean there's nothing wrong with it. There's nothing in ethical rules that prevents it or something like that there. I mean, it's okay. And so telling the witness when you're asked, Did you meet with me? You just say, yes.

It's that simple. You just say, Yes, I spoke with Ms. Peacock. And they might say, What did you talk about? And then I might ask the witness, what did we talk about? And they'll say, Well you asked me some questions and then you told me to tell the truth. And well, I don't know. That's what we talked about. Which is a totally acceptable answer. So I think reassuring the witness that it is totally okay that we talk to each other before the deposition or before you testify, and nobody expects anything else, the better it will come off and the better it will play when that question is asked.

Michael Cowen:

The thing to remember is if the other side's going to call their own paid opinion witnesses, you can ask the same questions, but you have to do it in a different way. So if they make this big deal, well did you meet with so-and-so? How long did you meet? Did they tell you what to say? Did you rehearse your testimony? Well, if you go do the same thing, then you're just saying, Well you shouldn't listen to any of our people. Right? I mean I think a way to approach it. It's like, Hey, by the way, before you testified you met with this lawyer, didn't you? Y'all talked, there's nothing wrong with doing that. He didn't put words in your mouth or anything and that's normal. You wouldn't expect to ever go to trial without the lawyer talking to you about your testimony first to find out what you're going to say.

Right? Do you have any idea? And you're going to draw objection to this. You have any idea why he made such a big deal about it then? When we talk to our witnesses? And then they let them object, who cares? I mean, but you're making the point that they're just being hypocrites. And jurors don't like hypocrisy. So I think that that's the thing you can do with it. But it doesn't bother me. I think the more we have it in our mind that of course we're going to talk to witness before they go on the stand, what kind of lawyers would we be to put on testimony without doing our homework first? And when we don't feel like there's anything wrong, and as long as we're not telling people to lie, which we're not, it shouldn't be a big deal.

So how about the use of, let's say what I call magic words or magic phrases in a doctor's testimony to make sure that we just nail down causation, future problems. Some of the case law says that's not absolutely necessary. What do you think whether people should do that or not?

Malorie Peacock:

So I think you absolutely must do this in a deposition. And the reason, there's two reasons. One, I will admit that the reason that I know that you don't have to use magic words in Texas is because one time, I didn't use the magic words that someone tried to exclude my witness' testimony and it was horrible and it was stressful. And I had to do all this case law research while I was in trial. And it was a very stressful situation for me. And I learned that you don't need to use these magic words. So I would say, use them because you know what they are, but two, what does it hurt? And then three, you don't have that stressful moment at trial where you think, Oh, did I get what I needed to make my case? Right? Did I get enough from this witness to be able to play this witness's testimony at trial?

You never want to be in a position where you show up to trial not knowing if your witness's testimony is going to be admissible, that you don't want that up in the air. But then two, just as a more practical matter, having a question written out that includes magic words like reasonable medical probability and the causation stuff, just ties everything together that the witness just testified about in a neat bow. So from a storytelling perspective, it's important because remember the goal is to bridge the gap between liability and damages. And your doctor is just finished testifying about, well then they had this surgery and I saw them on this date and then they're still having pain and all of this kind of stuff. So you want to be able to wrap up that testimony in a nice little package that summarizes what was the purpose of this witness. And those kind of magic words questions, we call them those, they help you do that. They help you wrap it up so that the story is clear, has an end, moving on to the next witness.

Michael Cowen:

And make it easy for the jury. And the jury shouldn't have to guess from the gist of what was said. I make it clear as day, Doctor, do you have opinion based on reasonable medical probability as to whether the injuries you diagnosed were caused by the car crash on December 7th, 2022. Or maybe even better. Do you have an opinion based on reasonable medical probability as to whether or not defendant driver

caused injuries when he ran a stop sign on November 3rd, 2021 and crashed into Paul the plaintiff? Yes I do. What is that opinion? That the crash caused injuries. Why do you have that opinion? What is the basis for that opinion? And then same for it, doctor, do you have an opinion based on medical probability as to whether or not my client is going to have pain in the future? Yes. What is that opinion? What is the basis for that opinion?

Just make it crystal clear. That way when you get your, if it's a depo, your summary judgment motion, if it's at trial, your directed verdict, of course your appeal. You want to make it really easy to point there. And you also want to make it really easy for the jury. Yes, this is the answer. There is no, no one's going to be able to equivocate or argue that the doctor didn't quite get there. Clarity is our friend. Confusion always goes to the defense.

Malorie Peacock:

And I would tell you that you should not be afraid, especially if it's a deposition, to ask these questions in different ways because you don't know how you might be allowed to play them at trial. So Michael gave a couple of examples right now of different ways you could ask the question. I would ask it both ways, because I don't know how it's going to play, whether the judge will, let me say, did defendant driver rear ending the plaintiff in reasonable medical probability cause his herniated disc, that might be too argumentative for this judge. So you want to have asked it in another way so that if your question is objectionable to this judge, you have it in multiple ways. So I would not be afraid to ask it three or four different ways, just so that I have some options about how I could play it. Especially if it's a deposition that you're going to play.

Michael Cowen:

I agree with you 100%. Now I think it's important. Here's a line I want to talk a little bit. So it's important to get the doctors to upfront say what their opinions are. Say it clear. But it's also important that they show their work somehow. And don't just say, take my word for it. I've seen defense doctors do that. What are your opinions? And that's it. They don't give the basis, they don't explain how, they don't show how. But then on the other hand, you don't want to go through every single thing they did. Everything said, every exam finding whether it was positive or negative. Cause sometimes they just want to read through their whole darn chart and it's boring and it doesn't get to the point. So what are some things you found that help get the doctors to show the work without going overboard?

Malorie Peacock:

So one of my strategies is to go in detail through the first visit with the plaintiff. What did you do? What did you ask them? Why did they come to you? What were they complaining of? You've gone through detail through that first visit. What did you recommend? Okay, so then you say, did they go, let's say they said, Well I recommended an MRI. Okay, then your next question is, did they go get that MRI and then we're not going through the next visit where they went through the MRI results, we're saying, what were the MRI results? Show us the MRI, right? Tell us what it says. Those kind of things. And so from the first visit, you as the person leading the story, you as the questioner don't have to reference individual visits. Because when you do that, it's a prompt to the doctor to say, Okay, she wants me to go ahead and read my record here.

As opposed to just saying, what did the MRI say? They don't have to go into their individual record to tell you that, right? So, that's sort of the strategy I employ. And then once we say what the MRI said, we say, okay, so once you saw that MRI, what did you recommend next? And then they tell you, and then you go from there without going through each individual record, which can be tedious, boring, and totally

unnecessary. Now, I would say that if your treater saw your client very close in time to the deposition, maybe going through the specifics of the last visit would be important. It just all depends on what the treatment is that that provider gave to your client. But that's one of the strategies I use.

Michael Cowen:

Yeah. And when they'll meet with you is going through, let's say it's a back or neck injury case. They're going to have done an orthopedic and neurological exam. Find the findings and support the diagnosis. So let's say you have a herniated disc, you have a positive straight leg race, you have a positive, some kind of compression maneuver, whatever they happen to be, have them bring out those things and say, And what is that? Well that makes me suspect a possible herniated disc, that makes... And of course at some point you have to explain what the herniated disc is and all that stuff. But I think it's important to do that. So they're not just talking about the... I ran these tests and what that meant in isolation. You want to say, Well, he came in, he had pain in the back going down the right leg. What did that mean to you?

Well, lots of things can cause it. One of those things is something called a herniated disc. So I was on the lookout for that. Well, what else would you do? Well, I did the physical exam and I found when I've lifted his leg up, the pain shot down the leg, when I did this, when I did that, all those things were painting a picture of a potential herniated disc. What did you do to make sure? Well then I wanted to do an MRI. So I can go, what's an MRI? And well that way I can see, and I could see. Can you show us? And they put up the picture, they show you the herniated disc.

But before I did a surgery, I want to make darn sure that the herniated disc is what was causing that pain going to the leg. And then well what'd you do? I did something called an EMG. What's an EMG? What does that show? What did you find? And now you've got this picture. Well now I was convinced it was a herniated disc. I want to see what we can do to fix it. So what'd you do first? Well, we tried some injections. What kind of injections? Blah, blah, blah. Then we tried the surgery. What'd you do? And just have it all fit together into one... All the puzzle pieces are fitting together to make one big picture rather than just being scatter shot.

Malorie Peacock:

And a technique that I use that I get objections to, so it's one of these where you ask it different ways to make sure that you can play your testimony, but you're tagging your story as you're going through what everything the doctor did. So you'll say they came for an initial visit and then we went to the MRI. And so your next question is, after the initial visit you reviewed the MRI? Yes, I did. Right. What did the MRI show? Okay, it showed this and I recommended an EMG. So now we've done an MRI and an EMG. What was next? So you're building your story with your questions. So then your next question they said, Oh, I recommended surgery. Okay, so after you did the MRI, after you did the EMG, now the patient's ready for surgery. So you're showing their work for them through your questions. You have to be careful not to be leading or argumentative. So sometimes you need to ask it in an alternative, but tagging, especially with the doctor, tagging the key components in your question to move the story along is so critical to making their testimony understandable.

Michael Cowen:

Absolutely. That's a great point. And it's also a good time to take our commercial break, a little word from our law firm and then we'll be right back.

Voiceover:

Each year. The law firm of Cowen Rodriguez Peacock pays millions of dollars in co-counsel fees to attorneys nationwide on trucking and commercial vehicle cases. If you have an injury case involving death or catastrophic injuries and would like to partner with our firm, please contact us by calling 210 941 1301 to discuss the case in detail and see where we can add value in a partnership. And now, back to the show.

Michael Cowen:

Okay Malorie, now that we're back, I just want to ask you one thing that the defense always brings up in our cases is that dreaded word, degeneration. Do we have to run away from the concept of degeneration?

Malorie Peacock:

No, I don't think so. Especially not in Texas.

Michael Cowen:

Why not?

Malorie Peacock:

It's very dependent on your jurisdiction, I think. I don't know what the jury instructions are in every single jurisdiction, but in Texas there are some really, really great jury instructions about something that is preexisting but is made worse or complicated by a crash. And that's what the case is about. Nobody has, it's basically an eggshell skull instruction. You take the plaintiff as they find them, if they have a bunch of degeneration that exists, that doesn't mean that they can't get hurt in a car crash. Of course they can. Everyone will admit that just because someone had a broken arm before doesn't mean they can't break their other arm, right.

So there's accepting that and moving forward knowing that they had something preexisting, I think is just part of the story of this plaintiff. And the more you run away from it, the more it looks like you're trying to create something that out of thin air, it makes it look more to the jury like you're stretching the truth. Whereas if you accept that this is how they were before, they had this thing called degeneration, which we all have. And for over the age of 23, we all have some degeneration in our spine because we move around and our discs move as we move around. That doesn't mean you can't get hurt in a car crash.

Michael Cowen:

But it means it's easier to hurt you in a car crash. It's harder to heal up after a car crash and it really, they're not ready for... What they want do is they want to defend the case when we claim that someone's spine was perfectly pristine before and that everything on the MRI is due to the crash. And when we go back and say, Yeah, of course they had a degeneration, everyone does. But this made it painful when it wasn't painful before. All the treatments because... Then the defense doctors are really easy to cross because they're wanting to fight you on, well this is degeneration. The condition itself was there before, but they have to give up what the symptoms weren't there before. And so telling our doctors they don't have to be afraid of degeneration, explain to them what an aggravation is, really can help. Even if they had some problems before, as long as they become worse because of the crash. That's good.

Malorie Peacock:

And someone I'm sure will write in if I'm wrong about this, but I don't know any jurisdiction where you have to prove that a crash caused a disc herniation. I don't think that's a jury question anywhere. I think the question is, was this person injured as a result of the crash. And injured means, do they have pain, do they have a limitation? Do they have an impairment? The actual specific medical diagnosis does not have to be proved as part of the jury instructions that the jury's going to be asked. And reminding yourself that I don't have to win, that this disc was herniated because of this crash. I just have to win that he didn't have pain before. He has pain now. So changing your mindset about what the case is really about, I think makes a big difference. It's not about whether someone had a disc herniation because of a car crash. It's about whether someone was injured, whether they had pain, whether they had impairment because of the car crash.

Michael Cowen:

Absolutely. Now one thing that you do really effectively that in our cases is the use of visuals. So you can give us some tips about how to use visuals with treating doctors.

Malorie Peacock:

So visuals with treating doctors are critically, critically important. One because most of them, like I said before, are not good storytellers. They're dry, they're dull, you need to break it up. And they're unclear. Visuals with a treating doctor should help clarify and support their point. They shouldn't be throwaways, but they should be something that can help the jury visually connect to the story that they're telling. Visuals can be as simple as putting up the medical record to show the list of all the tests that this doctor performed. That's a visual. And it's part of their medical record. It's something that you can show to the jury. A visual could be a handwritten list that you make with the doctor, which is where are all the places that this person complained of pain, let's make a list together. What are all of the treatments that the doctor recommended? Let's make a handwritten list.

And then visuals can get more complex from there. You can get visuals that are a visual of a herniated disc. So you can find some image online that shows what a disc looks like and where it is in the spine and what it looks like if it's herniated. They have little models that are handheld that you can have the doctor hold to show model of the spine or a model of a herniated disc. And then there're animations, if you want to get even fancier, you can do animations of surgeries that were performed or injections that were done, or even animations of how discs are herniated in car crashes, for example. So there's lots of different options, but I do encourage everybody listening to think about whether the visual helps to clarify or simplify the doctor's testimony. If it doesn't, then it's not a good visual.

So some of these animations that can get really complicated are neither clarifying or simplifying anything. They're making it look more complex, more confusing, more... Where are we going with this? Pointing the finger at the wrong issue. So if you're talking about herniated discs in your animation, the jury thinks that's something that's really important in the case. And remember what I said earlier, you don't have to win that someone got a herniated disc because of the crash, but that makes it seem like you do. So if that's a really big issue, whether the herniated disc was caused by the crash, you're pointing the evidence and the jury's focus at the wrong thing. So be thinking about that whenever you're deciding what your visual should be for a doctor.

Michael Cowen:

And what you want to prove, and what you want the jury to focus on. I mean, I used to do in almost every surgery case, a customized animation of the surgery for the doctor to use and the customized animation of all the injections. And then I realized when we focus all our testimony in the medical

treatment, what do we get averted for? The medical bills. We need to somehow work with the doctors on yes, it was bad enough that the person had to have surgery. Exactly how they did surgery. I mean, our client's asleep for the surgery, they're not awake. So yes, I mean the doctors should describe the surgery and if it's one that left plates and screws, we should definitely put up those x-rays showing the plates and screws afterwards. But at the same time, I don't know that doing a custom illustration of showing step by step with the surgery really helps get the bald banded.

Instead, if we can spend more time working with a doctor to try to talk about what are the impairment, what are the limitations this person has because of that, what kind of things would cause pain? What kind of pain are they going to go through? Then hopefully they'll go... Most medicine, my understanding is if it's been more than six months to a year that you have pain, it's never going to go away. So the doctor will say that that's to me is more important that they're going to continue to have pain, they're going to continue to have limitations. But getting the doctor on board with that and just remembering that we're not here to show how much we know or how cool or gory the surgery was, we're here to prove our case and we want them to write in on those planks on the jury charge.

Malorie Peacock:

Michael, what are some other examples of demonstratives or visuals that you've used in doctor depositions?

Michael Cowen:

Sure. Well, I do a lot with MRI. If the MRI, if you can clearly see whatever there is, let's say it's a TBI case, you can see white spots in the brain or in decreased tracks in a DTI. Or if it's a spine, a lot of what I've done are spine cases and you can actually see the disc and it's clear that it's there, then I'll use it. If it's not clear that it's there, I may or may not use it. Now the defense is going to have someone that's going to put up the image, I want to put it up first and own it. If they're not, and it's not super duper clear, I might not use it. I might just use the report. I've done a lot of comparing before and after when there's been prior medical treatments and sometimes those are just words. So if I have two MRIs where they're clearly different, then I may put up the same image of the same disc from both to show how they're different.

If it's harder to tell, you have to be measuring things, then I may just have the two MRI reports to show that it was only a two millimeter herniation and now it's a five millimeter herniation. Before there was no recommendation for surgery. Now there's a recommendation for surgery. I mean those are the kind of things that we do. A lot of it's just a drawing of the body and have the doctor circle where it hurt. I think that's really, really important. Model spines. Model skulls. I like models. I like things that doctors can hold and be interactive with. Some of the pain management doctors are nice enough to bring the big needles and it looks really scary that you see this big needle and they show where in the spine and how far it goes to. And I think that stuff is also useful.

I sometimes, let's say it's a herniated disc case, I sometimes, let's say I have a herniated disc with good radiculopathy, I mean it's not all my cases aren't that clear, but let's say I have one. I may talk about before we get there so that the jury can make their own conclusion. Before the doctor was. Doctor, what kind of injury are we looking for in this case? A herniated disc. Well, let's talk about, what is it? Can you explain the spinal anatomy? We'll put up a picture. So these are the vertebrae, put up the model spine. Talk about what the disc looks like. Well, it's a herniated disc. How does someone get a herniated disc? What are the signs of a herniated disc? And we can write down, you're looking for this, you're looking for this, you're looking for this, you're looking for this. What are the tests that you would do?

Well, you do a straight leg brace test. You can do whatever the other, foraminal compression test. And you just list them out. And then when you're going through what the doctor did, well did you do this test? Yes. What did it show? That was positive. Is that a sign of herniated disc? Yes it is. And you go through it. So the jury's come to their own conclusion before you even get to the MRI. Boy, this person must have a herniated disc. They have all the signs and symptoms of it. So there's just some ideas. I've done everything from just handwritten notes all the way up to incredibly stupidly expensive custom animations and illustrations and they all have their place. It just depends on the case. But I don't know how many times we spent a bunch of money on something and then decided not to use it because it didn't serve our case as it was presented, as our trial strategy went.

Malorie Peacock:

Right. I think you just need to make sure that whatever visual you're using is moving your ball forward, moving the story forward in a coherent way. I mean, if you look at something and you can't immediately tell with a couple of sentences what it's supposed to mean or what it's supposed to tell you, then it's probably not a very good visual. And it's going to be more confusing than it is helpful.

One of the other things I would encourage people to do is, do physical demonstrations. So especially when car crash cases, if you have a C4, C5, C6 injury, whiplash injuries, have the doctor show how your neck moves in a whiplash injury. And on the video. Yeah, right. I mean that's your pivot point. Of course that's why, that's where the injury is, because that's where your neck is moving. So demonstrating that for the video is important. The same with your L4, L5 type injuries, which are pivot points in your waist. So if you're moving your waist, that's where it's moving. So having the doctor just demonstrate that just sitting in a chair can even be very powerful.

Michael Cowen:

Absolutely. And the more visual we can be to the extent that we, without going overboard and making, just like I said all about the treatment and all about the bills and not about the person. So I think we have to be very visual. It also keeps people awake and we have to do it in a video or even in live courtroom. I mean it breaks it up, makes it more interesting. But all just my thing is just really makes sure that we're advancing the ball with the visuals. We're not just doing pretty visuals to explain the treatment. And you got to be careful. Some of the visuals, think about why they were created. So let's say you have a minimally invasive disc decompression where they're basically putting a big thick needle through the skin into the disc and sucking some of it out. They make videos that show how that procedure's done.

The point of the video is to show the patient that this is not a big deal. That it's not a major invasive surgery. They're going to go home with just a bandaid on. Well, does that help us with the jury? Why bother? It's much better just to describe the procedure and move on than it is to go and show that it was what the defense calls a bandaid procedure and not a surgery. So we always have to rethink about what is the point, what are we trying to prove? And make sure that everything's moving towards that point.

So I think kind of wrapping it up, what is it you think that we should do at the end of doctor's testimony to go wrap it all back up again? Just in case people kind of nodded off while it was going on.

Malorie Peacock:

So you should definitely ask your magic word questions at the end. Even if you've asked them throughout, you should wrap them up at the end with that. And then leave the jury with what you really want to take away from this witness. This is a really painful injury. Or this is an injury that's going to be painful for the rest of their life. Or whatever the answer is that makes sense for your case, but wrap it up with your connection to the next piece of it. So it's typically going to be something non-economic, okay?

It's not going to be about your medical bills, it's not going to be about the treatment, it's going to be about something like, this will cause them to have a limp for the rest of their life. This will cause something. This is very painful because of the way the nerves are positioned. But you want to leave it in a place where you're tying it to your next piece of your case, which is your non-economic damages. It depends on the case.

Michael Cowen:

Malorie, thank you so much. I've enjoyed talking to you. This is such an important topic. It's actually stuff we're training on within our firm and we just thought it would be something that would be useful to people outside the firm as well. So I hope this is useful that you all go out and do great compelling direct examinations for your treating doctors and get fantastic results. And if you do come tell us about it, maybe we can have you on Trial Lawyer Nation and talk about how you won your next big case. In the meantime, I hope to see y'all either at the Academy of Truck Accident Attorneys October 6th through 8th in Austin or Trial University in Vegas. If you're there, please stop by. I love people coming up and talking to me. I'm actually very approachable and so please stop by and say hi. And if not, I hope you tune in next time on Trial Lawyer Nation.

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