

Michael Cowen:

This is Michael Cowen. And welcome to Trial Lawyer Nation.

Speaker 1:

You are the leader in the courtroom. And you want the jury to be. Looking to you for the answers.

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When you figure out your theory, never deviate.

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

Speaker 6:

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

Speaker 7:

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

Speaker 8:

Whatever you've 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'm joined again by my partner, Malorie Peacock. We are going to talk about lay witnesses. These are the witnesses who aren't experts, who aren't your clients that help us make our cases. Before we jump in, though, I want to, as always, say thank you to LawPods. LawPods is our sponsor. They're also our producer. They make everything so easy. All we do is talk. They record, they edit, they put it out on YouTube, all the podcast apps, everything else, and even cut the ads that we do to market the podcast. So thank you to LawPods, and if you're considering doing your own podcast, I highly recommend them. Malorie, how are you doing today?

Malorie Peacock:

Good. It's just been a crazy week over here for me. I think probably for you, too, but I think it goes up and down for me. Sometimes it's crazy, sometimes it's pretty relaxed. But this week has just been chaotic.

Michael Cowen:

Well, I'm two weeks out from what I'm hoping to be a 16-day vacation out of the country without my cell phone, with coming back and having to have our boot camp all the way ready before I leave and having to have a trial ready to go that's going to start a week after I leave. So it's been wild, and it's going to be a pretty hectic two weeks. But it'll all be worth it when I go on the vacation and then come back and then get to jump in and do my boot camp and then have a trial, which I love. But, yeah, you got to do the work, have the fun.

Malorie Peacock:

Yeah. And like I said, it goes in waves. Some weeks aren't as crazy, and some weeks are just crazy. And you just keep telling yourself, maybe next week won't be so crazy.

Michael Cowen:

Yeah. These are good problems to have, though. We've got work. We've got fun cases to work on.

Malorie Peacock:

Right? Yeah. No, all of it is because we're blessed to have the work that we do.

Michael Cowen:

So let's talk a little bit about the work we do. So we spend a lot of time trying to find and develop stories from what we call lay witnesses. So I want to start with Malorie. What is a lay witness?

Malorie Peacock:

So a lay witness can mean anything. I mean, the way that it's any witness that's not an expert, right? But the way we use it in the context of a personal injury case is typically either an eyewitness or, as Sonia calls them, eyeball witnesses, or it's from people that can testify about the damages that your client has suffered that are not your client. And so we call them some people call them before and after witnesses. Some people call them moaners and groaners. There's a lot of code names for them, but they're really damages witnesses that are just ordinary people in the life of your plaintiff that have witnessed the impact that the injuries have had on your plaintiff.

Michael Cowen:

Yeah, and words are important, and labels are important because it affects our mindset and our staff's mindset and our clients mindset. And so I don't like moaners and groaners because we really don't want our clients moaning and groaning. Our clients are supposed to be survivors, not victims. And so I don't like using that term moaners and groaners. I used to use before and after witnesses, but then I found that it confused clients and it even confused our whole staff because they thought that it had to be someone that could talk about how the person was before and how they were afterwards. And they've known them for a long time. And sometimes we have to get one witness to talk about how they were before and another witness talks about how they were after. And it's a contrast between the two witnesses. And so just trying to open people's minds up to the broad array of people that may be potential witnesses to show what the effect of this harm was on our clients life. And to do that, of course, we have to show what they had before and then what they're left with after and how it's different.

Malorie Peacock:

Right. I think any kind of phrase that you use for a damages witness is confusing to both the witness and your client. They don't really understand how it's all going to come together. And so there's a lot of education on the front end about what you're trying to do, what you're trying to accomplish, who you're trying to identify with the client, because it takes a lot for us to get these people out of our clients. And then once the floodgates open, it's like, oh, well, I didn't know you wanted that. Here's 50 more names. And so I don't like using labels for it either because it is confusing.

Michael Cowen:

So let's talk a little bit about what type of people have you found to be these before and after our lay witnesses. I don't want to talk about eyewitnesses still crash or anything. I mean, that's

obvious. We're talking about people that can tell our clients damages story.

Malorie Peacock:

Yeah, so we found some of the craziest people in people's lives that have been just the greatest witnesses. I mean, there's obvious ones like the spouse or the children or family members of your plaintiff. But beyond that, there's coworkers, there's neighbors, there's the pastor, there's the guy that runs a corner store at the end of the block, their kid's teacher, or there's all kinds of people that you don't realize see the effect that some kind of injury might have on you. And it could be a whole universe of people out there. But we usually start I mean, I will say I usually start with family members because it helps me get a baseline for what the story is. Right. Who is this person? Who were they before, who are they now? And family members usually know the most. So that's a really good place to start when you're trying to explore who might be additional witnesses. But Michael, you give this really good talk about it's like a pyramid of credibility, I think you call it. So what is that?

Michael Cowen:

Yeah, actually, I've actually changed from a pyramid to, like, a bullseye if you think of, like, rings, because clients are like, why do I need to bother all these other people? I don't want these people getting involved in my case. I don't want them to know what's going on. I don't want to bother them. And so what I try to explain is I'll draw, like, the first circle, and I'll put like, a dollar sign or a bag of money, and I said, okay, and I'll write you or write the name. I said, when you testify in court, the juror's first reaction is to not believe anything you say because you're asking for money. And their first reaction is not believe anything I say because they know I want to get a piece of that money. And so if just you and I go to court, then our odds of winning and winning a lot are not very high. So what we need to do is we need to have other people back you up. Now, let's say we have your spouse, and I'll put the spouse's name like, a little further out from the money. Well, your spouse is not you not the person asking for the money, but you share a bank account, you share a house. Okay, well, let's go to your kids. They're a little further out, but they're important. They're going to know a lot. But you're also very likely if you get a lot of money to do nice things for your children. So let's go further out. How about your neighbors? How about your supervisor coworkers? How about your supervisor that you work for? And then, like, if there's an ex? How about your ex spouse? No one thinks your ex is going to lie for you. Do you go to church? Do you have a pastor or a priest that may have known what you've gone through or know something about you? So that's kind of how I explain to them why we need people and why we need to kind of go out beyond the obvious best friends and family members and go into the neighbors, the coworkers, supervisors. If we can get them, you can't always get them, but when you get them, it really can help.

Malorie Peacock:

So one of the questions I always get from clients is not even really a question, it's more like a

comment, which is, none of these people want to be involved in this. Nobody wants to testify. Nobody wants to have to go to court. Nobody's going to show up for me. What do you do with that?

Michael Cowen:

We just say, well, can you let me talk to them? The way I find that works best is, can we meet at your house? Not at a lawyer's office. Can we meet at your house, preferably? Can we have some food there for them? Either we barbecue. We bring in food if we can't. The clients aren't always down with that, but if you can make it, relax, make it in their environment. Just let me meet these people and learn from them. And usually once we get to talking to them, they're surprised. They don't think their friends really want to get involved, but they're willing to because if the person really loves them and they really are hurt and they've seen that there's something that's gone through there, and you explain to them, like, look, these people are they're saying this didn't happen. They're saying this person isn't hurt. They're saying that they're not changed. Well, that's not true. Well, we need your help. And I find that 90, 95% of people, once you talk to them and once they understand what it is and they're not going to get grilled and they don't have to know everything about the case, that it's going to be just fine and we don't have a problem with them.

Malorie Peacock:

Yeah, I find that once I actually get to talk to these people and explain what it is that I want them to do, it's not as intimidating to them in their mind, an individual person's mind. They don't have any experience with the legal system. That what they know is what they see on TV. And on TV, it's super dramatic. People yell at witnesses, bang on the table. People get taken into contempt and the stakes are really high and they're worried that they don't know enough or they're going to get yelled at or the court's going to get mad at them or they're going to get in trouble or something like that. So explaining what it is that we really need them to do, which is not what they've built it up at their head and why it's so important for the case and to this person that they do do it and that there's some flexibility in it, at least in Texas. If they really can't get off work to come to trial, we can do a deposition and play that at trial or something like that. I mean, there's a little more flexibility than they think that there is. Then most of the time, people are actually really willing to help. And if they're not willing to help, it's because you probably didn't want that witness anyways, right? Maybe they're not as good as the client thought that they were, or they have some cagey past that they're really worried about coming out, which you should be worried about, too. So if they end up not wanting to, we don't push them to do it because it's probably a bad call.

Michael Cowen:

And sometimes the ones we're most afraid of end up being really good. I had a case where they wanted to depose the ex wife. I'm like, oh, my gosh, that's not going to because the guy testified

that after he had a surgery, the ex wife helped take care of him some. And so I'm scared of death with the ex wife, but she testified, like, look, we didn't get along. We couldn't be married. But he was a great dad. And before the crash, he'd take my son to the park every Saturday. He'd do all these things, and now he still takes my son to the park, but he just sits there because it hurts him. And he tries, but then it hurts too much. He sits back down, and my son comes home crying, saying, daddy doesn't love anymore, and he's, no, Mahito, daddy still loves you. He just can't do it. And it was such compelling testimony, and nobody thought that the ex wife would lie. And so we ended up getting a seven figure settlement on a case with about \$300 in property. And I think the ex wife is what put it over the edge, because, again, she was so credible.

Malorie Peacock:

Yeah, and it's real. I mean, what the jury wants to hear is real stories, and they question whether your client's stories are real. And so hearing from people further removed that these are real stories, these are real things that they're going through. And while I don't know everything about their medical condition, maybe I don't even know anything about that they were in a car crash, this is just how I've seen that they're different in the past year or the past two years. So we even have witnesses sometimes that didn't even realize that someone was in a car crash. So this happens a lot with coworkers. They just know they're different or they're not themselves. They're not as great of a worker, but they don't know the extent of even they don't know about really what the injuries are. And maybe they didn't even know they were in a crash until I told them.

Michael Cowen:

And you and I tried a case where we couldn't find any coworkers that worked with them both before and after. And so Robert Disc, our associate, did the depositions because they were oil field workers and we weren't going to be able to get him to trial. And he did a great job, but the ones that worked for him before worked with them before. They talked about what a great job he was, how much energy he had, all the extra things he did, and the ones that worked with him afterwards talked about, well, we had to cover for the guy. He couldn't really do the job. He was really suffering while he's out there trying to work. If we weren't coming for him, there's no way he would have kept the job. And again, the ones that were the after couldn't talk about the before. The ones before could talk about the after. But the contrast was so great. It really worked.

Malorie Peacock:

Right?No, it did. And so explaining that to clients is important, too, that they don't really need to know even that you were in a car crash to have noticed something different about you. They don't need to know about your medical history. They don't need to know any of that stuff to have noticed something about you. Which is why I mentioned earlier, maybe their kid's teacher notices a difference or a difference in the kid because of it. So there's a lot more people that notice a difference and can be such compelling witnesses, even if it's 5-10 minutes worth of

testimony, can be the most compelling testimony that you have in your whole case.

Michael Cowen:

Yeah. These are short witnesses that tell one to three good stories and then stop, and they're really hard to cross.

Malorie Peacock:

Because the stories are just their own observations. It's the truth of what they've seen and what are the questions going to be about it. And I think rarely, too, does the defense ever call these people, even though you disclose them. I don't think that they actually ever call them to find out what they might say. So it's a surprise.

Michael Cowen:

Yeah. And they rarely depose them.

Malorie Peacock:

Right. And some people do. I mean, some people have, I guess, figured out what me and Michael do with these people. And so we're getting a lot more requests for depositions of these people.

Michael Cowen:

But, I mean, I've done it over 100 times. You think people would figure it out. It's nothing new or secret.

Malorie Peacock:

When you're asking the client for these people, how many do you tell them that you want?

Michael Cowen:

Well, usually I'm not the one asking at first. I get in a lot later. I want to get as many as we can, because I find if we have ten to 20 people to choose from, we will find two to four good ones, because some people just don't testify well.

Malorie Peacock:

Some people aren't good storytellers.

Michael Cowen:

Yeah. They're nervous. Some people will end up just not being available for legitimate scheduling problems. Some people will end up having something in their background. You can have the nicest person you want, but they have a felony child sex offense. It's going to come out. You don't want to put them on the stand in 99.99% of cases. So I think it takes a lot to go through and then go through and then start filtering through and finding the best ones.

Malorie Peacock:

Yeah.

Michael Cowen:

So we just try to kind of get more and more. And every time you go through the list and you think of anyone else. The other thing that I did yesterday, actually, I was meeting with lay witnesses, and this particular client said no one but my family would know, and everyone developed some paranoia. He thinks all the neighbors against him, all his former friends have turned against him. And so I finally got to go meet with his sons yesterday, and they're like, no. I mean, he thinks the neighbors have turned against him, but they really have it. Here's one. And so we got a witness from other witnesses that our client would not have given us.

Malorie Peacock:

Yeah. And why do you think it made such a difference that you went there to meet the sons in person to get that information?

Michael Cowen:

Because you're not going to get on the phone. There's a couple of things that are going on. One is that we're there. There's nothing else going on. There's no distractions, and we're just focused on that. I'm taking the time to be there with them. They're feeling very comfortable with me. And it's one thing I had to teach my partner that was there with me, is she was starting to talk like, well, what about this? What about things that she already knew about the case? And I had to tell her, stop. I said we need silence. We need to ask questions, and then we need to keep our mouth shut. And they will find the answers if we just tell them what we want to talk about, that's not good. What about this? What about about that? No, it's just like, well, how has he changed? Well, what else is different? Have you noticed anything else? And then you let it sit there and they start thinking, and you might say, well, you've talked a lot about the mental well, does his back hurt at all anymore? Well, how have you noticed that? How's that affect him? What else? And the what elses are so important? Because that's and then leaving it there and letting them sometimes they need a minute or two to think and just sitting there and being okay with the silence, because if you interrupt them, then they can't sit there and think and try to figure it out.

Who else could talk about this? And those things are just so important. And I just find that you got to make people comfortable. You have to meet them where they are. We prefer to meet them at the client's house if we can, or at their house so that they're in someplace that they think is safe and I guess they're in their territory and not ours so that they feel more in control, more comfortable at the same time. Yesterday we were told old like, well, we can't fit in my house. We can meet under a tree. And I'm like, south Texas is already pretty hot in May. We're not meeting under a tree for an hour and a half. We're going to go to an office. But generally I like to do it at houses. They don't have to be nice houses. I spent the first two years of my life in a trailer. I can be pretty much anywhere and be comfortable. But yeah, that's the kind of thing that I found works for me, is just getting there and talking to them. Well, who else would know?

Malorie Peacock:

Yeah, and I've met people at a coffee shop, met them in a parking lot. I've met them just over the phone because that's what they're first comfortable with. And you have to be comfortable where they're comfortable because that's what builds trust too. I mean, you can't be judgmental about people's houses. You need to go where they live and be comfortable there so that they're comfortable with you. And that's part of it. If you have to sit in their car in their front lawn with AC on just so that because their house doesn't have AC or something like that, then that's what you have to do. But you have to build trust with these witnesses too. It's not just building trust with your client, but with these witnesses, so that they feel like, one, they can tell you everything that you need to know, but then, two, that they feel like what you're telling them about. What they're going to have to do is real. And they'll show up for you because they have to trust that what you're saying is going to happen. Is what's going to happen if they think you're lying to them. Just to get them to court. And really, the judge is going to put them in jail or someone's going to yell at them and bang on the table or something like that. Then they're not going to show when you need them.

Michael Cowen:

I know other people are going to disagree with me on this, but I have found that meeting with them as a group is more fruitful than meeting with them individually. And I know some people say, well, I'm worried about cross. If you meet with them in the group, they're going to say you all met. Well, they're going to say you met anyway, right? And frankly, if the defense was sitting there and videotaping our meeting, what they would find is I'm telling people, like, I don't want to put words in your mouth. You need to tell the truth. I just want to find out what you know. But what I find is like, one person will tell us will tell a story, and that will trigger someone else's memory. Oh, yeah, I remember a time when something like that happened and it'll trigger another memory. And it's not that they're copying each other. It's that's the way memory works when you so when you hear one person say one thing, it triggers something else, which triggers something else. And also, people, once they get talking, they seem to be more comfortable in a group sitting than they are one on one with a lawyer, because, again, they're there with their peer group. And I think it really so for me, I prefer the group. Also, frankly, just a lot of our cases

are out of town, and to go have 20 individual meetings is just logistically difficult. And then I tell them it drives me nuts if a client says of a lay witnesses, they ask them, well, did you meet with the lawyer? Tell them the truth. Yes.

Malorie Peacock:

Who cares?

Michael Cowen:

What kind of a lawyer would I be if I didn't talk to a witness before I put the witness on the stand? My gosh.

Malorie Peacock:

Yeah, the jury expects you to meet with the witness. So I think there's a lot of people listening because I hear this all the time that have this fear, well, you don't have privilege with these people, right? They're not your client. What can you tell them? What do you say to them? I mean, how do you make sure that it doesn't come out on the stand? And my answer is exactly yours, which is they could say word for word what we had said in this conversation, and it wouldn't be anything bad, because all I'm asking for is the truth and what their stories are. It's nothing different than what they're going to say on the stand. So I'm never too worried about it.

Michael Cowen:

That's why they never get it, right? I mean, people don't get nervous and don't remember things. I always tell people like this, listen to the question, tell the truth. They ask you what I told you to do. Just say, Mr. Cowen told me to listen to your questions and tell you the truth. Right, and not to worry about whether it was good or bad for the case.

Malorie Peacock:

And you do have to reassure sure people that it's okay to say, I've met with of course I met with Ms. Peacock. Of course I met with Mr. Cowen. And if you own it, the jury expects it anyways. But if you're cagey about it or trying to play word games or something like that, then the jury thinks, oh, there's something wrong here. There's something going on. They told them what to say or something, but if you just straight up say, yeah, of course they did. I wanted to know what we were going to do today, and they had some questions for me about what I might say. Fine.

Voiceover:

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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:

So what do you do to find to identify these potential witnesses to get the client and maybe the other people to tell you about them?

Malorie Peacock:

So I first always start with I usually don't really start with I mean, I asked the client for a list of people that I could call, but usually it's going to sound sexist. But usually if I have a client that's a male and I call his wife, I could usually get a lot more than I can from the guy. I don't know why that is, but I think women just, I don't know, just keep track better who's in their life. But I always start with the family because, like I said, the family gives me some perspective of what I'm looking for. What is their life like, what are the things that are important to them? The client can tell me some of that, too, but with the client, especially if it's a client that will give me no one, right? If it's just a client that says, all I do is I go to work and then I stay home and no one at work will ever help me with this, and this is all I do, I have no life outside of work. That happens a lot. So we start to explore. Okay, well, what do you do on the weekends? And they say, well, nothing. I don't do anything. And I say, okay, have you ever been to a barbecue? And they'll say, well, yeah, I've been to a barbecue. Okay, well, who do you go to barbecues with? Oh, well, the neighbor down the street hosts these barbecues once a month, and we all go and I bring the potato salad or whatever. And so then that's how you start to get more people. Oh, and then you say, do you have any kids? Yeah, I do. Do they play any sports? Well, yeah, they play soccer. Do you ever go to their soccer games? Yeah, I go to the soccer games. Okay, well, there's a whole nother group of people that might have seen you outside of the house and outside of work that we can explore and find out who those people are. So you really have to drill down on what people love to do and what they do in their free time to find these people. And the worst question I always tell people this is the question I hate the most? I hate when people ask it to me. I never ask it to clients, which is, what are your hobbies? I hate the word hobbies. If someone asked me if I had any hobbies, I would say no, because I don't have what I think of as hobbies. Right. I don't build model airplanes, and I don't knit, and I don't garden.

Michael Cowen:

You don't knit?

Malorie Peacock:

I do not. And so those are in my mind, that's what a hobby is.

Michael Cowen:

You do bake?

Malorie Peacock:

I do bake. I do bake. But I wouldn't even consider that a hobby because I do it for my family. It's something that I enjoy to do. But if someone said, what do you like to do on the weekends? I would say, oh, well, on the weekends, I like to have people over and bake for them. Or I host barbecues, or I go to Breweries with my dad. Or I like to go see live music in the park, or I like to go to the zoo with my kid. Then I'm like, okay, well, what do I like to do? That's a different question than what are my hobbies?

Michael Cowen:

That's one thing I've been doing to try to get at people when I'm sensing some struggle, or I'm trying to get the non family members, like, what did you love to do before? And go through those activities and just get them to get them. You got to sometimes work a little bit to get past work. And so when you said, what do you I used to love to go play basketball on the weekend. I used to love to barbecue. Okay, when you barbecued, who came over? Well, my cousin. Well, my brother in law. Okay, let's get this list of people. And when you play basketball, who did you play basketball with? Where did you play basketball? Get that story. Okay, well, do you have any of their phone numbers? Can we talk to these people? And even the coworkers, they think no other coworkers are open like you at least let us talk to one or two. Like, who are your better friends at work? And you might think that you've hid everything really well, but you may not be hiding your injury as well as you think you do. Can we at least ask that we don't have to use them? Can we just talk to them for ten minutes, please? Now, we do find that the clients do need to call the witness and tell them we're going to call them, or they won't take our calls.

Malorie Peacock:

Right.

Michael Cowen:

But the clients do sometimes they catastrophize it. They make it sound to be bigger than it is. So we do need to find a way to talk to them.

Malorie Peacock:

Well, I was going to say, in the client's mind, it is a big ask, so we do have to appreciate that you're asking someone that may not know you that well. Right. Because we're looking for people outside of family. So they may not know you that well, and you're asking them to put

aside time to do something scary for no benefit to them except to just tell the truth and be part of the judicial process, but there's no benefit to them. And so it is a big ask for people. And I think the more that you can help the client figure out how to minimize the ask, then the more successful you'll be collecting these people. Because in their mind, it is a big deal. Testifying in a court of law is a big deal to your client. And so figuring out how to help them talk to people about it is also really critical.

Michael Cowen:

Absolutely. So what point in the case do you start gathering these before and after witnesses? Do you wait till after you try to settle it? I know you know for sure you're going to go to trial, so let's get started. Or do you start at a different time?

Malorie Peacock:

No. And my first client meeting, we talk about it because you have to start educating, like I had said earlier, you have to start educating early. Because if you just say, I need people to testify about your damages 30 days before trial, they're going to say, well, you have my doctors. What do you want? Right? So the education process is actually a long process. So usually we start the conversation at my initial client meeting, wherever that isn't the case. I mean, a lot of the podcast listeners know that we come in at different stages of different cases. So it's not always right when we file the case. Sometimes we're already pretty far into discovery, but right when I meet with the client, that's when we start having the conversation. And then we follow up with them every at least 30 days, if not more, until we have a good list of people. Then we call that list, see if they know anybody. And so by the time we're 90 or 180 days out from trial, we have our good list of people that we think are going to be the final list. Now, we still follow up with the client even after that to make sure they haven't thought of anybody else, that there's no one else that's coming. But you want to get this roster of people really early. The other thing that I've found is in almost every jurisdiction, you're supposed to disclose people when you know them, right? When you know who they are, you're supposed to disclose them. It is hard to explain to a judge, if you're disclosing these people 30 days before trial, why you didn't know who your kid was 30 days before trial. And so you risk not being able to call some of these witnesses if you wait. And I explain that to clients too, which is, okay, we already know who your wife and your kids are. Let's start there. And build out from there.

Michael Cowen:

But I think starting early is so important because, one, we need to explain the clients and get them on board. Explain the concept of clients and get them on board early. That's so important. The other thing is people do their best when they give you their first list, but the more time they have to think about it, the more times you ask them again, the more likely they are to think of that person that's not as obvious but might be that great witness. And then it also gives us time to start screening them and talking to them. And it's not as much of a scramble when we start

early. And again, it also takes away any you name another witness right before the discovery period. Then one, you risk possible exclusion, but you also risk a possible continuance. Although a lot of times, like, well, judge, they didn't oppose the other 20. What difference does this one make? So once we get our people, how do you get good stories from those people about what happened before or what changed after?

Malorie Peacock:

So you just got to sit down and talk to them. You have to talk to them about their relationship with this person first so you kind of understand where they fit into the puzzle. I mean, how do you know this person? How long have you known them? What is the context of when you see them? And then you just have to dive right in and just say, how have you noticed they've changed? If you've noticed, they've changed. And it does depend on who the witness is. So like Michael mentioned earlier, we had a case where the work life was very important to this person, but we didn't have coworkers that knew him before and after. So asking the question, how did they change? These people didn't know, right? So you have to tailor your questions to what you're trying to get. But really you just have to keep asking what else until you get something that's useful. So usually people start with, well, they're in pain all the time and you say, okay, well, how do you know they're in pain? Well, I could just tell. How can you tell, right? So you have to just keep asking follow up questions to get them to really describe what it is. And then sometimes I do give people examples of how to describe something or how to tell a story so that it makes sense to other people, because some people aren't natural storytellers. So we are the expert storytellers, not them. So explaining what it is that the jury would want to hear about the story is important too. The other thing that's so critical, and this is a reason that you have to identify these people early is we always are asking people, our clients, give us pictures, give us pictures, give us videos, give us something that's not just people talking. And the client always says, I'm never in pictures. I have no pictures of myself ever. In the history of time, no one's ever taken a picture of me. That was not true. But the client just doesn't maybe keep pictures of themselves. But once you start exploring the stories with their kids or their neighbors or their friends, and you say, hey, do you have any pictures of that time you're describing when you were at the beach? Oh, yeah, I think I do have some pictures that they might be in the background in. And you can get those pictures early and produce them and use them at trial.

Michael Cowen:

Yeah, yesterday I had everyone get their phones out and said, okay, you talked about things you did before. Can you find a picture of this? Can you find a picture of that? And afterwards, can you find any pictures where you can see something on his face or things look different and just mining people have so many pictures on their phones nowadays. Just minding the pictures. What's your social media? Let's go through your social media feed. Can we find any pictures of you doing things with them before? Can you find any pictures of after? That might be helpful. And not only those images, they're so important. One, they make it real. It's one thing to say, oh, we had barbecues, and the jurors may or may not believe it, but they have their own picture in

their mind of what it may have been. But then you have a picture of your client sitting there at the grill, a bunch of family around him, maybe a beer in his hand, smiling. And then you have, like, a picture of another barbecue afterwards, and your client just sitting there by himself while everyone else is up doing stuff. Those are real powerful, right? If you can get them, you don't always get them, but you don't have a chance of getting them if you don't ask. And we had another one, Malorie, that we almost tried, but then they thought better of it and settled with us. But the client, the night before the crash, he was actually at a wedding, and so he had a lot of problems moving around afterwards. And they're trying to say, well, a lot of things were degenerative. It wasn't the fact that we broke all these bones on him, but we had video of him dancing the night before. I think the video is even better because it just shows what all they're doing. I love finding video. Also, in a wrongful death case, when you find the video, you bring the dead person back, because we want to show what we lost, what we had before, and celebrate that life. And when we find those photos and those videos, it can make a huge difference. And then they don't have to be major things. They can be the little things that are the important things in our life.

Malorie Peacock:

Yeah. And that video that you're talking about. I had asked the client a thousand times for photos and videos me and sent me some, but we didn't have very many. And it was you meeting with, I think, the daughter that got you that video, right? It was not our client that got that video. It was someone else, one of these other witnesses that was like, you know what? I think I have a video where he's dancing from that wedding.

Michael Cowen:

But until I drove 3 hours away and got in someone's living room and spent 4 hours there talking to a bunch of people in Spanish, I didn't get that video. And we would never and the client didn't know it existed. It wasn't that the client was holding it back. Client didn't know that his daughter had shot. She didn't tell him she was taking video on her cell phone when he was dancing the night before. But his daughter said thought it was cute that his dad, her dad and mom were dancing. And we got it because we went to her house and met with her. So I think that's the thing. It's just you got to do the work.

Malorie Peacock:

I do also want to add, this was a trial. I don't know, Michael. It was probably eight years ago that we had this case, but we had the spouse of the plaintiff on the stand and she was just so nervous. So, so nervous.

Michael Cowen:

Oh, yeah.

Malorie Peacock:

Just nervous. She just didn't like me in the courtroom.

Michael Cowen:

She couldn't remember her kid's name. When I asked her her kid's name because I wanted to give her something easy, she forgot two of her kids names. I knew she was freezing.

Malorie Peacock:

So one of the really cool things that Michael did is just pulled out some of the pictures that we had for the case and just had her start explaining what was going on in the pictures. Okay, here's this picture. Who's in it? What's going on here? And then it made her more comfortable. She could turn to the jury and say, oh, this is so and so. We were at this barbecue. These are the kinds of things we did before. But it helped her just get a little more comfortable and helped open her up a little bit. So having something tangible for a very nervous witness is really critical too. So those pictures aren't just about bringing the person to life from who they were before, but also helping your witness feel more comfortable rather than just trying to come up with everything off the top of their head in trial when they're very nervous.

Michael Cowen:

Yeah, I think the last thing I would add on the witnesses is just we try to have our paralegals do this and our paralegals do ask them. And we have good paralegals and they're doing their best and we train them, but nobody gets the witnesses that we get. I don't know what it is, but when we meet with people ourselves versus having someone else do it, we get so many more witnesses and such better witnesses. So there's nothing wrong with getting your paralegal to get it started, but at some point, if you're going to try a case, you need to meet with your client, you need to find out who's in their lives, and then you have to take the time and meet with them. If you don't meet with the people and get a full picture of your client's life, you cannot learn their story and you cannot tell it a trial. It's even more important to think if you have a case where someone's in a wheelchair. Well, that's so obvious. Maybe you don't need it. But in most cases, you have what we call invisible injuries. You've got a back injury, you've got a traumatic brain injury, you can't see it from the outside and you really need that compelling proof, or even more if they say it's all degenerative. And you need that really compelling proof of what their life was like before and how it's changed after. Unless you do the work and talk to the people, you're not going to be able to tell that story.

Malorie Peacock:

And I just have to disagree with you, Michael. I don't think there's any injury that is so obvious

that you don't need before and after witnesses. Even if someone's dead, even if someone's in a wheelchair, even if someone's quadriplegic, even if they've lost limbs, you need those witness because the jury gets used to seeing them that way in the trial. And so you need someone to take the jury out of seeing that as normal for that person. And you have to have witnesses. There's not any case that I can think of where you don't need damages witnesses.

Michael Cowen:

Yeah, we're always looking for them. But if you have a quadriplegic case, you might want to have a couple of people with the before and some pictures, because you really want to talk about the life before, but they're even more important when you have, let's say, a back injury or neck injury case and the defense is preexisting. And so the biggest thing is not only show that our people are hurt, but you had a clear demarcation. We had the life before the crash, the life after the crash. Gee, what caused this? The crash. So I agree they're important in all cases, but I think they're really super duper critical in the 99% of cases that we have that are not obvious.

Malorie Peacock:

Yeah, I agree.

Michael Cowen:

All right, anything else on lay witnesses?

Malorie Peacock:

No. I mean, I could go on and on about it, but we've already talked a little bit about it and if anybody has any questions, feel free to reach out to us. We love talking about this topic because it's something that's really important to me, Michael and Sonya.

Michael Cowen:

Yeah, I am passionate. One of our requirements, our so called Ten Commandments of the firm is that we have to disclose lay witnesses the first time we list witnesses. So Texas, our federal court, it's with our initial disclosure. Other states, it's the first time we have an interrogatory that allows that requires us to list witnesses or persons with knowledge of relevant facts. We want to have them from the beginning, and there's more than one reason for that. One is, again, we're doing the work and we're getting ready for trial. But two, it shows the defense from the get go, these folks aren't just seeing what we're going to pay and figuring out later. They are getting ready to try this case. We can either pay them a lot of money or we can go try the case. And I think the more we are getting ready for trial and the more the other side knows we're getting ready for trial from the get go, the better our results are. All right, well, thank you, Malorie, so much. Always love talking to you. Most of the time we're not on camera, but it's great to talk to

you on this podcast, too. You bring a lot of joy to my life, and I wouldn't be able to go on these vacations without you running the firm for me while I'm gone. So thank you very much.

Malorie Peacock:

Well, I will not be contacting you on vacation. I haven't yet. So that this year should be the same, even if the building is burning down, you don't need to know.

Michael Cowen:

I don't need to know. It'll be just as burned when I get back.

Malorie Peacock:

Exactly.

Michael Cowen:

So everyone, I hope everyone else, your practices and your personal lives are going well. Hope everyone's having and please join us next time on Trial Laureation.

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Speaker C:

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