Michael Cowen:

This is Michael Cowen and welcome to Trial Lawyer Nation.

Voiceover:

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When you figure out your theory, never deviate.

You want the facts to be consistent, complete, and credible.

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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.

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 by my partner Sonja Rodriguez. Sonja, how are you doing today?

Sonia Rodriguez:

I'm great, Michael. How are you?

Michael Cowen:

I'm doing well. And before we jump in, we're going to talk today about dealing with clients in cases where your client has a pre-existing condition, a prior accident, or something happens to them after the crash, that can create an issue in the case.

But before we dive in, we want to say thank you to our sponsor LawPods. You were just working with LawPods to try to make you sound better on this podcast, so Juliana really helped you. LawPods does our production. You and I just have to talk to each other, they make us sound good. They do all the editing, they cut up the video clips. So I highly recommend LawPods if you want to do your own podcast, they make it easy.

So Sonja, how are you doing? We're recording this two days before Thanksgiving.

Sonia Rodriguez:

Good, good. It's been a good year. Looking forward to a little bit of a respite from the office, enjoying family for a few days.

Michael Cowen:

So we're going to talk about clients who have had lives both before and after the incident that leads to the lawsuit. Have you ever had that happen? Have all your cases been, your clients have been just 100%

perfectly healthy, something bad happens to them and then nothing else bad ever happens to them again?

Sonia Rodriguez:

You know, I wish. We live in a world where people have lives before their crash and they have lives after their crash. And unfortunately, the reality of life is that most people we represent have had aches and pains and injuries and work injuries and complaints, and maybe they visited a chiropractor once or twice before they found a lawyer and were involved in a crash. So it's just the reality of life I think.

Michael Cowen:

So what do we do when that happens? We just quit, take whatever they offer us? I mean, what do you do?

Sonia Rodriguez:

So one of the things that I was thinking about when we decided we were going to talk about this topic was how terrifying it was 25 years ago or so when you and I first started practicing law, and we didn't know what we didn't know and no one knew. And you could have a client who told you they'd never had any back pain ever before, and the odds were that most insurance companies didn't have the data set to be able to go back and check the truth and to know about it. But times have changed so much since then and now the information is everywhere.

I think I remember back in the old days, they used to just simply do a Southwest Insurance Bureau research report they would pull and they might see some claims. And then you would have to argue about an insurance adjuster about whether that was a windchill damage claim or a bodily injury claim. And insurance companies had very little information about our clients' medical pasts back in the old days, but times have changed completely. And so now I think just going into a case and meeting a client for the first time, knowing that everything is going to be out in the open whether they like it or not, whether we like it or not.

Michael Cowen:

There are databases out there that are incredible. I mean, we use one. Now, we have to have a client's permission, but I have a feeling that the insurance companies get things without client permission. Plus, if you have your client just sign an open-ended medical authorization, they're definitely doing all this on you. But I think they do it anyway. And we can get for a period of years, every single prescription that was filled and every single diagnosis by every single doctor, that's at least in the database. Now, there may be some cash-pay doctor that's not in the database, but if there was an insurance claim filed, or I think even Medicare and Medicaid, they're showing up on these databases. So we see cases that we ask our clients, what doctors have you seen? And all of a sudden we see the defense ordering records from other providers that we'd never heard of. Well, that's how, because they're going through these databases.

And there's sometimes a database error, sometimes it's someone else with a same or similar name and a different birth date, but not always. And sometimes it is, our clients had things that either they didn't tell us about or honestly that they honestly forgot about, because sometimes it was something minor or something a long time ago. And people weren't necessarily liars just because they don't remember every single detail of what they told every single doctor in the last five or 10 years.

Sonia Rodriguez:

Right. And I think the unfortunate thing about our practices is that most insurance adjusters and defense lawyers are going to naturally assume that not only you're liar, your client is a liar and a scammer, but that you are a liar and a scammer that I'm a liar and a scammer. And so embracing the truth and knowing ahead of time what the facts are, are going to be critical, because I think it's important to lead with the truth and come with the truth and deal with it.

Michael Cowen:

You told me an interesting story about that yesterday at lunch, because you were mentioning there was a case where our client had had a cervical, it's a neck injury case, and our client had had a cervical fusion, what, 11 years before the crash or something like that?

Sonia Rodriguez:

Yeah, 15 years before.

Michael Cowen:

15 years before. And you actually told the defense lawyer about it up front and you were very adamant, like you put in your report that I told you about that, not that you discovered it and not that we're lying. Why was that so important to you that the insurance company knew that this came from us and not something that they found?

Sonia Rodriguez:

Well, I mean I think first of all, he was a younger lawyer. And so I knew when he found a remote cervical fusion, he's going to see the x-rays of my client's neck. And so when he saw that, he was going to have what he thought was an aha moment and he was going to run to his carrier with this aha moment. And between him and the adjuster, they were probably going to high five and jump up and down and be so excited that they caught us in a lie or a scam or a cheat.

And I wanted to make sure that this young lawyer knew that I knew about the fusion and I wanted him to put in his report to the carrier that I had told him about the fusion, because of two reasons. Number one, I wanted him to know that I wasn't a liar and a cheat and a scammer and neither was my client, but also I wanted him to appreciate that I'm trying to help him save money. I said, you can go through 15 years of looking at medical records and you're going to see this there. You're going to find this there. But whether he believes me or not, I told him I want to help you. I'm trying to help you narrow the focus and look at the case for what it is. It's an aggravation of a pre-existing condition and not a new injury.

Michael Cowen:

Yeah. But the fact is, if someone had, like in that case, had a neck surgery 15 years ago, the surgery was a success, I mean, I don't know, but I'm assuming maybe a little aching pain every now and then, but nothing major going on with your life, everything's fine, until some idiot rear ends you. And now your neck is even more susceptible to injury because it doesn't have all the movement it had before. Now you have extra stress on the joints and discs around where the fusion was. You've had accelerated deceleration, probably adjacent level disease, which makes you even more susceptible to injury. And so it's just showing the before and after.

And so instead of that being a weakness, it is a strength for a couple of reasons. I mean, one, it's a strength because it shows that your client was even more fragile, more susceptible to injury and makes it more believable your client got injured in that crash, which is sometimes really important when it's not

the most property damage in a case. But the other thing is that also shows that your client's a fighter, your client's a survivor. I mean your client had a prior injury, they battled back, they were doing fine. They did the work to get better, and now because some idiot wasn't paying attention, now they, they're back where they were. And that's really a tragedy and that's something that deserves compensation.

Sonia Rodriguez:

And I think that when we can get those medical records from the intervening time period and use those medical records to tell a story along with friends and family members and photos and videos of their lives, these folks leading their lives and having active lives and not impaired by the kind of pain that they're experiencing because of the crash I represent them for, I mean it kind of puts a picture together that a jury's going to believe that somebody did have a remote injury long ago and came back from it and was living a good life, but for the actions of this reckless trucking company.

Michael Cowen:

Yeah, I think one of the challenges, and I don't mean this to be pejorative, but I call it the pre-lit mentality, which is like if you have a pre-lit adjuster and they find any reason not to pay you, they're not going to pay you and you're going to have to file a suit. And so people that have what I call the pre-lit mentality is like, we need to make sure the insurance company doesn't find out about this. So have your client say there was nothing before, have them tell the doctor there was nothing before, try your best to keep the other side from getting any information from what happened before. And it really does set you up for failure when you do that, because they're going to find out. Everything's out there now.

And so then you set yourself up where your client looks like a liar, because you've said something, your client said something, maybe it's in their deposition. Even if you haven't filed suit yet, it's going to be in the medical records. Certain, not all medical providers, but also some medical providers think they need to not put it in the history, because they want to get paid, they're trying to help the case. So educating them like, hey, an aggravation case is a perfectly fine case and everyone's going to know. So if the client said, I had some problems before, then you need to take the time, doctor, or nurse or whoever's doing the history, and ask the questions like, well, what was it like before? What was it like after? What has changed? How has it changed? And maybe asking for some old records or old films and doing the work to find the aggravation and show what the difference is.

But really, when we embrace the truth, we win our cases. When we try to run away from the truth or just wish it away, we lose our cases.

Sonia Rodriguez:

Well, you we were brainstorming last week, Michael, you and I, about how to address this case where I have a crash with a tractor trailer, and we know the defense has these records from three months before where my client was visiting a chiropractor for low back pain, the same low back pain that he's complaining of with radiculopathy stemming from this crash. I thought it was really smart, you made sure we had all the records from that facility and we looked them closely. And what they showed was that our client saw a chiropractor for low back pain, and that resolved. He stopped going to the chiropractor for low back pain three months before our crash. So do I wish it wasn't three months before? Sure. But he stopped going back and his complaints had ceased and he didn't have an X-ray or an MRI or he didn't have any kind of injections for that pain.

So we were able to resolve that claim, but I came in with the truth, knowing about it and having a story and an explanation for it. And you don't lose credibility with your opponent, because you're going to see these people over and over again.

Michael Cowen:

And once you get litigating, when you think about the long-term, not just about their examination of your client, but how the whole case is going to play out, you know they're going to hire a doctor at some point. You know they're going to hire a doctor that says most injuries get better on their own in six to 12 weeks whether you treat them or not. And so at the end of the day, you say, well, this person had a prior injury, right? Most injuries get better in six to 12 weeks. They went to the doctor from 10 to 12 weeks, they stopped going to the doctor. Wouldn't you agree that more likely than not, this prior injury got better on its own like most of them do, and that prior injury is not the cause of any of the symptoms we have now?

And they have a lot of trouble arguing on one hand that any injury from our case should have got better in weeks, but yet any prior injury didn't. So either they have to admit that or they just look like they have no credibility, because they're arguing, well, the crash that I'm being paid to defend could never hurt anybody. But any other incident, no matter how minor in the past, never gets better no matter what the medical records say. Most of them won't go there, but if they do go there, it's a gift to you because it shows they're being deceptive.

But we really have to just change our mindsets about how we approach these things, and I think it starts with you know the defense is going to do their job. You know they're going to go ask your client, they're going to send you discovery, they're going to use databases, they're going to dig. Sometimes, like in smaller towns, they just order the medical records from every single hospital. There's only two hospitals or three hospitals in town. They just order them on every case, because if your client had problems, they went to one of those hospitals.

And so you just have to start thinking like a defense lawyer. We go first, we have the case before we filed it, we have the case before we answer discovery. And we started really pushing on from our first client meeting, educating our clients about, it's okay that you had a life before, but we have to tell the truth. And giving some examples like this is what's happened when clients who told the truth and we had everything here and they had some problems before, but it got worse and we had great recoveries. And here's what happened to some people that either didn't remember or didn't tell the truth and they look like liars and they either lost or they got almost nothing. So which one do you want to be?

So you ask them, but we also are doing the double checking. There is a great database called SettLiT, S-E-T-T-L-I-T, that we're starting to use now. I don't know how accurate it's, but to me it's scary because it gives you prior doctors, what the codes were that were used. It gives you prescriptions. And just by seeing what prescriptions they were filling, you can just Google them and see, okay, this is a painkiller. Like if someone has gabapentin, well maybe if you had gabapentin, you might have nerve pain, but it also is used for some other things.

Sonia Rodriguez:

Right. I mean, you pointed out not every database is perfect. There's always going to be glitches in them. But I think that if you're being proactive about it, we always trust our clients and we believe our clients, but we always double-check. Tell us a story about your elbow. I mean, you had your elbow checked out and nobody's calling you a liar.

Michael Cowen:

Yeah, well, people do call me a liar, but in this case, I had no reason to lie. So I broke my arm a couple of months ago. I was running, I tripped on the uneven piece of sidewalk. And when I fell, I tried to catch myself and it ended up fracturing a bone in my left arm near the elbow. I'm following up with the ortho and he goes, he looked at the x-rays, he goes, "Your arm's definitely broken," that's not what I wanted to

hear, "But have you broken that arm before?" And I said, I don't think so. Because in my mind, I knew I'd had an elbow fracture sitting there back in 1987 and I thought it was my right arm. And then when I was driving home from the doctor, actually I wasn't allowed to drive. I was Ubering home from the doctor. It sucked. But when I was heading home from the doctor's office, I realized, wait a minute, I kind of reconstructed the 1987 incident in my mind and realized I had broken my left arm, but in the, I got to do the math now, 37 years in between, I had forgotten some of the details.

And frankly, there's times when I just totally forgot things that have happened to me 3, 5, 10 years ago. Unless someone else brings them up, I honestly just don't remember. Maybe I went to the doctor two or three times for back pain or neck pain, but it went away in years past and it never bothered me again, so I just didn't remember. Or maybe I went to the doctor because I had the flu and does your back hurt, and that day it did, and I said, yes. It doesn't mean I was constantly treating for back pain, but I wouldn't remember what I told the doctor four years ago, especially if I was there for something else.

So yeah, I think it's really important not to assume that our clients are liars just because they have imperfect memory.

Sonia Rodriguez:

Well, I mean, I do think that there are cases where clients may have been warned or told by doctors or other lawyers or-

Michael Cowen:

Our friends and family.

Sonia Rodriguez:

... family members. Don't mention that to your lawyer, it'll hurt you.

So I think it's important that when we visit with our clients initially, our initial client meeting, that we kind of lay that out as this is coming, everything is going to be found out. You might as well tell me now. I can deal with what I know, I can't deal with what I don't know. And you start trying to lower the guard, get them to relax a little bit with the information. But I think it's also super important to make sure that the treating healthcare providers are on board and the minute we have information, we start sharing it with the treating doctors through the client.

But it's also a mindset thing in the office, because I've had some inexperienced paralegals who have seen in our file prior medical from a primary care provider that shows no treatment for a back or neck injury, and they don't want to produce it because they say, well, I don't want to produce it because it's unrelated to the crash and it doesn't say anything about the neck or back in the years before the crash. And I was like, that's exactly why I want it produced.

Michael Cowen:

Exactly.

Sonia Rodriguez:

I want the defense to see that there was no complaints of neck or back in the months, in years before the crash.

Michael Cowen:

Yeah, when they say it's all degenerative conditions, get their primary care physician, who's your family doctor? Who do you go to for check up some flu, and get those records for five years? What pharmacy do you go to and get those pharmacy records? And if they're not filling pain prescriptions and they're not telling their doctor their neck or back is hurting, they didn't have anything that significantly was impacting their life before. And you contrast that to all the treatment afterwards, you've got a pretty compelling story.

Sonia Rodriguez:

I always think it's great when we get clients who go to the doctor for every little thing, like a rash or a headache or an eye twitch or something like that, and you can see this person would have gone to the doctor if they had pain in the neck or back, they would've said something, and there's nothing there. I think that's pretty compelling.

Michael Cowen:

Absolutely. And the other thing is, especially if a doctor's going to write a report or if they're going to testify, we need to get them all this information. I've seen people complaining to me about a doctor like, well, he fell apart in deposition, and I send him the prior records. If you send someone 400 or 500 pages of records and you don't tell them what the big things are that are in there, it is not fair to expect a busy treating doctor to go through and do a full thorough review of 400 or 500 pages of prior records and find every little thing that's in there. What you need to do is send them the records and say, doctor, you're going to look at these records and I flag some dates for you. You need to look at these times. They went in, they had these problems. This is what the person said about them. You might want to call the client, the patient, or do a tele-visit, have them come in to further discuss this, so you've got a very detailed history so that you can give accurate testimony.

But you have to tell them, these are the issues that are in the records are not in the records. Especially the day before the depo, they do a big document dump on the doctor and then they want to blame the doctor. No, you got to do your job. You have to share with the doctor what is in those records when you do that. And if you say, well, the other side's going to worry that I told, yeah, I don't care that the jury knows that I told the doctor, hey, my client had some back pain before, because I want you to know the truth.

Sonia Rodriguez:

Right. I don't care that the jury knows that I'm coming with the truth that I wanted the doctor to know the truth. What are they going to accuse you of?

Michael Cowen:

Yeah. I think besides the SettLiT case, besides getting their PCP, their primary care physician records and pharmacy records, if they have health insurance, get a health insurance claims history, if they have Medicare, Medicaid, get a Medicare, Medicaid claims history. Again, pretend like you're the defense lawyer investigating your own client so that you can help your client tell the truth. And ideally you do this before you have to answer discovery, and so that way you can do that. And if the client's not cooperating with you, you have to have some serious talks a client about, look, the other side's going to get this whether you want them to or not, because they do have other people putting things in the ear. And I think a lot of times clients do what they think we want them to do and if they think we want them to hide it, though even if they're fairly honest people, they will go along with it. And so we have to really educate them.

Sonia Rodriguez:

Yeah, I mean I think that that's true. And the other reality of it is that the client's trying to maximize the value of their claim and they don't have the expertise that we do. And so trying to be helpful, I think early honest conversations with people, and then making sure that the staff is on the same page we are about needing to know, make sure that everybody keeps that on the up and up.

Michael Cowen:

And truly, I have seen things where someone had a surgical recommendation prior, the MRIs looked exactly the same prior, well then you need to move on. You can't wave a magic wand and make a bad case turn into a good case. It's not very often, most of the time you can show a difference, but every now and then you can't. I went and tried one where the MRI actually looked better after a crash than it did nine months before. That was a tough one and it didn't go well.

Sonia Rodriguez:

I mean, I think that our listeners are probably thinking, well, what if? What if I get my client's primary care physician records and they show that for three or four years leading up to this crash, she saw her primary care physician occasionally for low back pain and she was given medication? I don't think that's fatal to your claim, I really don't. You go in there and you find out what the client could do physically and how the medication was helping, and then you do kind of a before and after. And that's why it's critical to get collateral witnesses, friends, family members, coworkers, who are going to say, well, yeah, she didn't need help at work carrying things before, and she does now. It's not fatal to your case to find it, but I think can be fatal to your case to not look for it.

Voiceover:

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And now back to the show.

Michael Cowen:

I mean you and I are both, let me put this delicately, we're at an age where it's unrealistic to think we would never ever have any back pain in our lives. But it's not something that's constantly interfering with our lives. We're able to function, we're able to do things, but you have occasional aches and pains as you get older. But I do think it is so important, you can't put it all on the client and the medical records don't tell the whole story. So yeah, really when you have people that knew them, I mean the further out you have, I mean coworkers are better than family members, family are better than spouses, neighbors are better than family members, but family members are going to know things that other people don't know. I think it's good to have a mix. But the other thing is, if we can support them with stories or even better with videos.

Sonia Rodriguez:

Yeah, photos and videos. I always look, if I have a woman client and she's complaining of low back stemming from a crash, my favorite thing to do is look back at old family photos and videos and see if she's wearing heels. Because if you can wear heels, your back pain is not so bad. And so I think that

that's an easy way to help a jury understand she was able to dance in heels and she can't wear heels now or whatever that's going to be. But you're looking for details in the photos and the videos of what they're able to do, even if it's subtle.

Michael Cowen:

And it takes asking over and over again to get all the photos and videos, it takes getting a paralegal or associate to go get on their social media. But their friends' social media too, I mean you go look at their friends, and talking to their friends and family witnesses. If you look at my phone, you're not going to see very many photos of me or videos of me, because I'm not taking photos of myself all the time, but you're going to see photos of my wife, of my children, of my friends. And the same if you want to find photos of me doing things, you got to talk to my friends, you got to talk to my wife, you got to talk to my kids. They're the ones that are going to be taking pictures of me.

Sonia Rodriguez:

Tell us why it's so important to check the metadata on the photos that we get.

Michael Cowen:

Oh, the metadata too, yeah. So if you have a sophisticated opposing counsel, they will run the metadata which will have the date and sometimes the location where the photo was taken. And my client didn't, actually it was his wife, but we had asked for a before and after photos and there was an aggravation case and there was a photo of my client working on the roof. And it was told to us that this was a photo from before the crash, and the other side had run the metadata. And the wife actually told the truth on the stand, was this taken before or after the crash? Oh, after. Well, why do we have a picture of him working on the roof after the crash? That doesn't help. Yeah, very frustrating.

So a lot of times you can just click on the photo and you can look at the details, and includes the metadata when it was taken, but there's also programs that do it. But I think definitely try to figure out when those photos and videos were taken, because again, the defense is going to do it. And yes, it's a pain in the ass to do. It's one more thing we have to do. But again, sometimes people just aren't that sophisticated, so show us pictures and they find the picture and they don't even think about when it was taken. That was one of the moments in that trial that probably helped lead to a verdict that is not on my website.

Sonia Rodriguez:

Well, it's the importance of looking at what you've got. I think sometimes we're so excited to find a great photo that helps our story and helps our case and then it would've been nice to remember to look at the metadata to get the date.

Michael Cowen:

Yeah. But when you put it all together, it really can work. And the other thing is when you're working with the clients, they sometimes think they have to find this perfect witness that spent a lot of time with them before, spent time with them right afterwards, spent time with them since, and there aren't that many people.

But [inaudible 00:26:47] and I tried a case a couple of years ago and it was an oil field worker, and he worked with one crew of people before the crash and a different crew of people after the crash. And even our own doctor said, it was a pure aggravation of a preexisting condition. He had a preexisting hip

condition. He gets in a crash, he gets worse, he eventually has to have a hip replacement, and he had some other issues and was not able to go back to work in the oil field. Even though he kept working in the oil field for nine months after the crash, he just was struggling through it and eventually couldn't do it anymore and had to get surgery and couldn't go back.

We didn't have anyone that knew him both before and after, other than a couple of roommates and some family members. So we got coworkers from before that just talked about how before he was a high stepper and we had pictures of what it was like out there in the oil field. And even though we didn't have the actual drilling locations, we found pictures of the equipment that was used of the uneven dirt that would be there. And have them talk about, yeah, he could go from here to here, he would rush, he'd climb, he'd do all these things. We had that for the two years before, he was doing super active. And then we had people who worked with him during the nine months he was working after the injury, like yeah, he was sitting in the truck where he used to just walk across, no problem, he would get in the truck and drive. He would just supervise and point, he wouldn't do things. When he would try to do things, it would hurt him. He'd have to go back and lay down. He wasn't the same.

We got a multimillion-dollar recovery on that case, that they were before trial and before when they actually saw the effect of all of it on the jury, they were so cocky on that case. And then when they went and heard the whole story and the client being 100% honest about everything, it just changed their perspective.

Sonia Rodriguez:

When you get these witnesses that don't have a stake in the game, I mean they're not family members, they're not relatives, so one of the most powerful witnesses I interviewed was this woman who simply said that her neighbor used to go out with her and they'd walk their dogs together at sunset. And after the crash, she just stopped going. And she knew it was from the back injury, but what does she care about this lawsuit or this claim? And it was a remote neighbor who'd moved away, she'd moved away since the crash. I mean those little stories who add credibility and truth to your story are important.

Michael Cowen:

Or their yard was immaculate before and now it's overgrown and they don't mow the grass as much and the other plants are dying. And whatever it is, you can get those images.

Sonia Rodriguez:

Right.

Michael Cowen:

Okay. Well, our clients have had lives before, unfortunately sometimes things happen to them afterwards. So what do you do? You get a call from a client, your case is rocking along, they just had an MRI, they're about to get sent to pain management and then, oh no, I got in another crash.

Sonia Rodriguez:

Oh my gosh. I mean, I have to tell you, Mike, my heart sinks when I get that call. And it's frustrating, and I think it's again, a reminder of why we want to and need to move our cases quickly, because life happens and life goes on. And the longer you live with a case on a litigation docket, on a trial docket, the more chances there are of something going wrong. And my worry is always that my client's going to have another wreck.

Michael Cowen:

And it happens every year.

Sonia Rodriguez:

It does, it does. And it's frustrating, but we can't just abandon the claim immediately. That can't be your knee-jerk response, to abandon the claim.

The first thing I think of doing is making sure that we engage the treating doctors and that they know what's going on and that the client understands that the case may change complexity. We want to know every detail about that subsequent crash, having the photos and having an understanding of the photos. It's always nice when you have a subsequent crash and there's little to no property damage or anything like that. But you're going to have to tell a story of what that means, because again, the insurance company is going to find out about it. I frankly think that the insurance companies are looking more for prior injuries than they are for subsequent stuff, but no doubt if your client hasn't been deposed already, they're going to have to testify to it. So you might as well know every detail that you can about it.

And then frankly, the value of the claim changes based on all the details that you know about the crash. How severe the crash was it? Did the client's complaints of pain change after the crash? What are some of the other things that you like to look at?

Michael Cowen:

Yeah, I think the biggest thing is educating your client early, like bringing them in, talking to them like, look, here's the deal. You've got your first claim going on, if you want to open a second, if you want to make a claim for the second crash, that's your choice. If everything you say was caused by the second crash, you're losing that from your first crash. If you had hurt your back before and now it's your arm or now it's your neck, well that's not a problem. But if it's still going to be the back, if you tell the doctor when you go in, well my back had gotten all the way better from the first crash and now I have had the second crash, one, the people from the second crash, you're going to get your records from the first crash. And if you had been at the doctor two days before saying, my back was still hurting, it's not going to be very believable. But two, you're cutting off that first crash.

And so let's really explore how were you doing before? What if anything has changed? Do you need to go to the doctor for the second crash or not? Or if nothing has changed, you can go tell your doctor, hey, I've got another crash, but my pain level didn't change. If that's the truth. Now, whatever the truth is, but explore it. I've had people think, well, I've got a new claim now I've got to say everything's due to the new one. And sometimes that first one was a tractor trailer and the second one was someone with a minimum insurance. And I think they're trying to help, but you look at their medical records, look, you had this pain yesterday, you were at the doctor the day before. We're not asking you to lie.

Sonia Rodriguez:

You're on your way to physical therapy at the time of the crash.

Michael Cowen:

But my first seven figure verdict, my client was on her way home from physical therapy at the time of the crash. But it was all fully disclosed, it was not a problem, and that one, we were able to show clear difference between the two. So you can do it.

And the other thing is, you have to call the provider. I think calling the provider and telling them like, look, here's the deal. Especially when they see a different doctor for the second crash, which I prefer that

they don't, but even the same one like, hey, you're opening a new file. Remember what's in your records. Don't go say that they were better when you have office visits saying they weren't. You're just setting yourself up for failure.

Sonia Rodriguez:

Tell us why you prefer, Michael, and why we prefer that you don't just go see a brand new doctor? Because a lot of lawyers will refer their clients to somebody brand new.

Michael Cowen:

Well, for two reasons. I mean one, they're a lot more likely to put inaccurate things in the history. They're not going to be able to say firsthand like, look, I saw this person the day before. Either it was different or it wasn't, depending on what the truth is. But they saw them both before and after. But two, it looks bad. It looks like you're trying to get one set of records for one and one for the other, and then they got you.

And then if the client also, if they have a worker's comp claim or something else, be sure to get those records. I learned this the hard way, and this was a very bad, I mean, it's happened once in a hundred something trials, I think this was just a very bad actor doctor, because he was trying to defraud me, he was trying to defraud the client. But the client had a prior worker's comp injury and then gets in a car crash. We knew about it, we fully disclosed everything to the other side. We thought were the records from the doctor. I met with the doctor and the chiropractor, he told me they were almost done treating on the first one, everything after that was the crash. And he didn't refer out till pain management until after our crash, so he was the only doctor that was both before and after.

Well, the same doctor, because he wanted to get paid by comp, had written a report to comp saying the crash is very minor and only the two weeks after the crash related to the crash and everything else related to the prior. And he'd actually been paid by comp for all the visits that he was trying to collect the same freaking bills again from our lawsuit.

Sonia Rodriguez:

Oh goodness. Oh my.

Michael Cowen:

And I found out from the defense, they subpoenaed the records from comp, I didn't think to get the comp records to see what the same, I mean, I would've never imagined a doctor would do that.

Sonia Rodriguez:

Right.

Michael Cowen:

And that was just flat out insurance fraud. But my client had some psychological issues and decided to go to trial, and we got a verdict with a very little v. We got a verdict. And then I had the doctor actually threaten to sue me for my closing, because I just said, "When you see these medical bills, you notice there's nothing for Dr. X in here, because he's a liar, he is a cheat and a fraud, but he's trying to cheat her and she shouldn't be victimized twice for his thing."

It was a wild case, but really it was just hard to watch. Even though we totally embraced that he was a fraud, we had nothing to do with it. We've always been the tellers of the truth, it's just hard to wash that stink off.

Sonia Rodriguez:

I mean, but you have to come with the truth and you've got to know it going in to try to minimize the damage.

Michael Cowen:

And I did everything I could, and I did not get sued. I've been sued for defamation for things I've done in lawsuits before, but that was not one of them. He sent a lawyer over to my office and I sent him the transcript and the records and told him to F himself and he never came back.

But the good thing is when you do tell, so when the truth doesn't come out or someone, either the client or the doctor, in that case, like I said, the client had nothing to do with, doesn't tell the truth, it kills your case. But when you are honest and you do embrace the truth and you do the work, you get the prior records, you talk to the doctors, you talk to the friends and family members, you get the photos, you get the videos, you can have seven-figure recoveries on cases that have prior or subsequent issues.

Sonia Rodriguez:

And I think it's naive of us to think that we can go file lawsuits where we're alleging millions of dollars of damages against multi-million dollar corporations and they're not going to do background searches on our clients and on us. I mean, it's just the way litigation is played now.

Michael Cowen:

So all our listeners, don't be afraid. Just remember Gary Johnson's Judo Law where, take what the defense thinks is their strong point and turn it into your strong point. Embrace it. So if your client had some problems before, it's like, look, they had minor problems, but it made them so susceptible and that's how they got hurt in this crash. And they were fighting to get better, they're almost better, now this just set them back. They had another crash, but one thing to do when there's two crashes, file them both in the same lawsuit. Because I guarantee you that second crash is going to hire a doctor saying, everything is pre-existing. And yeah, it was, and let them fight with each other about who caused what.

Sonia Rodriguez:

Yeah, I've done that in one case before where you allege an indivisible injury and you say they're both. Let the jury decide which of the two crashes caused the injury.

Michael Cowen:

Yeah, exactly. And they'll fight you on it, but we usually win that battle. And that is one that's really helped, because when the second crash isn't that big of a deal and you have someone besides you, you have the other defense lawyer, you have their experts, they're basically helping you blame it on the first crash because they don't want to be liable for it. They're saying it's all pre-existing. We're like, yeah, it is. It's all pre-existing from the first crash.

Sonia Rodriguez:

Now to have a claim like that though, you've got to have the treating doctor with you on the issue of we can't tell which crash did what damage.

Michael Cowen:

You can have which crash did what. I mean, Kayla and I just, we've partially resolved it. Now we still have the second claim and it's not worth as much as it would be, but the first case was an 18-wheeler, the second case has a minimum limits policy, and we knew that the first case was going to blame anything on the second. The second was so minor. And so we filed them together and we totally embraced it. It was all the first, but in the alternative, the defense is going to claim it's the second. Or it's like 90% the first, and we embrace it and then we use the other defendant to help point back at the first.

Sonia Rodriguez:

So you didn't plead an indivisible injury, you plead two separate injuries in the same suit. Oh, there's no reason you can't.

Michael Cowen:

Well, I mean I think you sometimes have to plead indivisible in the alternative, because if not, you end up getting severed. And the last thing you want is two different lawsuits where each one gets to point at an empty chair.

Sonia Rodriguez:

Yeah, that's a great idea.

Michael Cowen:

But yeah, that way you get to use the car wreck lawyer and expert to help you make your trucking case. Now, they'll still try to say it's all pre-existing, but at least they'll go point at your other wreck saying these symptoms were already here and nothing changed and you can get that agreement. So I think it's just, again, be creative. If you do the work, you embrace the truth, you're creative, work with your clients, you can make these cases, but you got to do the work.

All right, well Sonja, thank you so much. I've enjoyed this. These are the kind of talks we have in the office all the time. It's nice to share them with our audience. And everyone listening, thank you so much and join us next time on Trial Lawyer Nation.

Voiceover:

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