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DEPOSING THE DOCTORS AND THE TESTIFIERS

*A car crash lawyer's guide to questioning the
treating doctors and the defense
paid medical opinion witness.*

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I.
“In the beginning....”

God created Texas streets and highways. Then God said, “Let there be cars.” And then people wrecked them.

If you are handling car wreck cases in Texas and want full and fair value for your client, in most venues the odds are you will fully litigate the case and you may get to try it. But even if you don’t try the case to the jury, you better work it up as if you will. The best way to guarantee a sub-fair settlement offer (which often leads to a trial) is to work the case up for settlement. Work the case up for trial, and you increase your odds of settlement for your client. Either way, you will be ready for trial.

If you do get to try the car wreck case, there is more than a fair chance the first person to talk to the potential jurors - - the judge - - may say to your jurors with a growl, “Good morning folks. This is a car *accident* case.” Watching the panel at this moment (as we should), we see more than half of them grunt, groan, shift, and/or sneer. The other half just hide it better. Most of them, however, will assure both sides that they can be “fair” and will “follow the law.” But the truth is, in car wreck cases in most Texas counties, there are no balanced scales. Our job is to jump up and down (in the most respectful and polite way) on the raised scale until it does not just tip but slam down on our side of the room.

Oftentimes there is no better way to slam the scales than to take an effective deposition of the doctors: the treater and the testifier. Jurors inevitably will start off by trusting a doctor. That is why the treater is paramount to your success, and the defense paid opinion witness – once he/she violates the jury’s trust – is paramount to the defense’s defeat.

This paper (and the corresponding speech) is an effort to encourage thought and conversation about ways to increase a plaintiff’s chances for success at trial and to increase case value in so doing. It is not the gospel. Not even close. This is one lawyer’s view of things and there are no doubt many competing thoughts and papers.

But no matter the strategy for increasing value, consider this: whether you are a plaintiff’s trial lawyer or an insurance defense lawyer, you have a family. And because you have a family, you should in your heart believe in accountability for the actions of negligent drivers. Increased value only increases accountability.

When it comes to increasing the value of your car crash cases, there is no “magic pill,” “silver bullet,” or panacea. There is only a concerted effort in every aspect of your case to change hearts and minds. Everything you do either adds value to the case or takes value away.

Everything matters. The doctors’ depositions are no exception.

II.
Words Matter (Especially the First Ones).

Malcolm Gladwell writes in his book *Blink: The Power of Thinking Without Thinking*, “[t]here can be as much value in the blink of an eye as in months of rational analysis.” That is, first impressions are important. And for lawyers who handle car crash cases, they are vital.

Whether it be with our clients, our staff, the judge, the jury, or the doctors, the way we talk about or present our case matters. How we describe the crash and the injuries makes a difference. From the moment you speak to the defense lawyer (or adjuster -- if you still speak with them), do you want your case dispatched to the land of unworkable offers and intransigent positions? If not, you must set the tone of the case from the moment you open your mouth and make sure to maintain that tone throughout -- even with the doctors.

For example, when dealing with crashes that produce injuries which many have become accustomed to referring to as “soft tissue” injuries, you must first ask yourself, what are “soft tissue” injuries anyway? Why do we call them that? We don’t call a shattered femur a “hard tissue¹” injury. It is a “shattered femur.” Differentiating “major” and “minor” injuries diminishes what injured people go through. No matter the number of cases a lawyer might have, it is important to remember that we don’t represent categories of cases. We represent individuals who were hurt and have their very own case. And we must apply this same thought process when preparing for and then deposing the doctors.

Words matter.

We don’t represent people for “accidents.” “Accidents” are “event(s) that happens by chance or that is without apparent or deliberate cause” or “events that occur by chance.” We represent people who have been in “crashes.” Crashes caused by choices made by a bad driver. Jurors will give a pass to a defendant who “accidentally” hurt someone. They will more often hold them accountable for a *choice* that caused harm.

Words matter.

If a lawyer chooses to accept, work up, and spend money on a car crash case, the likelihood is the client was hurt in a way that affected what some call “Activities of Daily Living.” So, **these are “car crash cases with life-altering injuries.”** These are “injury-producing car crashes.” Even in your low to moderate speed rear-end impact cases with unimpressive damage to the car, and no broken bones, we represent “people who were seriously hurt (by the choice of another) and whose lives are impacted daily.” Make this obvious in a way that your treating doctor supports it and the defense paid medical opinion witness must either support it or look foolish.

Returning to the matter of “soft tissue” injuries: The reason our clients lives are impacted daily is not because of an injury to “soft tissue.” It is because the life-altering crash caused a “stretching or tearing of ligaments” (sprain) or a “stretching or tearing of muscle or tendon” (strain). That’s how the Mayo Clinic defines it so why should we characterize it differently.

Words matter.

If we don’t set the tone of the case throughout (even with the doctors), someone else will. If we don’t define the crash and the injuries, someone else will. Words matter because words set the tone. Start thinking about your cases differently from the beginning and you will add value before you even start.

Then, once you set the tone, be relentless in protecting it – especially with the doctors.

III.

The Depositions.

It is worth mentioning that deposing the doctors takes work. Lots of it. Outside of trial (and trial prep), the most intensive work likely will be preparing for the doctors’ depositions. It requires absorbing your client’s medical records (from *before* and after the crash), absorbing the medical literature and concepts applicable to your case, meeting with the treating doctor, or studying up on the defense paid opinion witness. Going in cold, or even lukewarm, is a recipe for disaster.

¹ Google it. I did. Bone tissue is a type of connective tissue that contains lots of calcium and phosphorous salts. About 25% of bone tissue is water, another 25% is made up of protein fibers like collagen. The other 50% of bone tissue is a mixture of mineral salts, primarily calcium and phosphorous.

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