LITIGATION AND HEARING PREPARATION AND STRATEGIES

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INTRODUCTION

I want to turn your attention now to litigation and hearing strategies. If you are preparing for hearing you should already have a solid legal and factual theory of your case. You should also have your sub theories solidified, i.e.: your theories of liability, proximate causation, damages and future damages, etc. Upon receipt of the hearing notice, make sure you have all the pertinent medical records of which you are aware. As I stated before, you will not necessarily have all the records if the opposing counsel discloses in his pretrial brief other records you and your client are unaware of that she's planning to introduce. Remember, as the claimant, your brief is due 15 days before the hearing well the defendant's is due 10 days before the hearing.

Because of this tight timeline, the extra expert and lay witnesses disclosed by opposing counsel may not be available for depositions before the hearing; therefore, you may have to request a continuance, enter into a consent agreement or withdraw your form 50 if you need more time.

Now, I will not say that all the defense witnesses need to be deposed, but as a rule of thumb, it is better to depose than not to depose.

As for your witnesses now is the time to bring them in for preparation. The old term for this is "woodshedding", but that sounds a bit harsh. I cannot overstress the importance of witness preparation. Chances are that your witnesses have never had to testify, so you've got your work cut out for you. Familiarize them with who will be at the hearing and the respective roles they will play. Caution them to tell the truth, more than that caution them to be ***accurate***. Every witness I have prepped seems to be supremely confident in their ability to tell the truth. But telling the truth is daunting business.

For instance, can anyone tell me what they have for dinner two Tuesdays ago. Now it wasn't that long ago, and you were an eyewitness. In order to deal with the plethora of information we are constantly bombarded with, our brains are memory selective. We're also affected by bias, physical infirmities, the need not to look foolish by stating I don't know, that's a big one, and a whole host of infirmities the recording device that is between our ears is heir to.

So humble your client, which is not to say humiliate him. Bring them down to earth. See what they can remember and help them correct, modify, add or delete testimony that is antithetical to your case theory, without, mind you, stepping over the line and actually telling her you what what to say regardless of whether it registers in their memory.

I repeat, the witness must be able to remember themselves or as Descartes wrote about the certainty of knowledge "have a clear and distinct idea", otherwise the witness must admit ignorance. Do not assume the witness or you for that matter know the basic facts of the case.

Review your elements. Ask who, what, where, how and why. Actually rehearse your direct examination. This is a twofold benefit of educating your client as well as yourself and helps you spot the weak and strong points of your witness's testimony. Such an exercise will also help develop your case theory. Remember, your case theory is your citadel. Build your strong points stronger and reinforce your weak points. This is part of your defense strategy. And in order to mount a proper defense, you must know the defense attorneys case theory. This helps to prepare your citadel for her attack and educates you as to the weak points in the defendants' case subject to attack by you.

Use the formula, Q times Q2 must be greater than or equal to the BOP, that is, the quality of your evidence times the quantity of your evidence must be greater than or at least be equal to the probability of the veracity of your case theory.

If a witness does not possess any credibility, do not use him unless he's crucial, and, if so, limit your direct to basic points. If the opposing counsel tries to exceed what came out in direct in his cross-examination, object, and argue that the opposing counsel is exceeding the limits of direct. Remember, one bad witness can sink your whole case, and damage your credibility as far as your good judgment goes, so consider very carefully the credibility of your witness before putting her on. Definitely run a sled report and compare later evidence she gives with what she told you in her intake, especially about pre or post existing conditions and the status of her health and claims history.

Once you're comfortable with your direct, make sure you write it down. This is important so as not to miss anything. Personally, I do not write down the question per se, I write down the point I want the witness to make and then at the hearing I frame my questions around that. This technique has the added benefit of being available for any arguments you may have to make

later on. I find this particularly useful in tort cases when you give a closing argument so as not to miss any vital points that have made their way into evidence.

Now, after your direct, prepare your client for cross examination. This should not be too difficult if you have developed a checklist with the "usual suspects". We will talk about this in a minute. When your client's deposition is taken, if it is taken, order a copy of it immediately and send it to your client to read immediately upon receipt. Stress the importance of her studying the document and bring to your attention any misstatements of fact, exaggerations, inconsistencies or omissions she may have made -- unwittingly or not. Review the deposition with your client and be sensitive to the areas of likely cross examination. This exercise provides you with an invaluable key as to your opponent's plan of attack, and a good defense attorney will try to disguise his plan during questioning.

Investigate her criminal background, damaging statements to healthcare providers and other witnesses, inconsistent actions, undisclosed pre-existing conditions, pre-existing accidents or injuries, post-accident accident or injuries, conflicting statements with other witnesses and so forth.

You should have a strong case theory in your mind as a basis for your plan of attack. Know the facts of your case and your opponent's case as well as your opponent's case theory and know the personal attack points available to you when crossing the defense witnesses, bias, criminal record, if admissible, bases of knowledge, is it firsthand testimony or hearsay, prior inconsistent statements and perhaps most importantly prior inconsistent acts. Remember the cliché actions speak louder than words. For an in-depth discussion of cross examination techniques you may refer to my white paper on the subject which you may find at my website: gagnelaw.com.

Get your other witnesses in your office for the same preparation. Make certain you have subpoenaed them for attendance at the hearing. If you fail to do this, then, if they fail to appear, you have a basis for continuance. Make sure the witnesses, as well as your client, understand that they must not discuss the case with anyone, even with amongst themselves, to block any future implication that they colluded in their testimony.

THE INTRANSIGENT CLIENT

Sometimes you will encounter a client who thinks she knows better than you how to handle her case. In those cases where its more prudent to settle than risk litigation she's determined to have her day in court, even if you have received a fair offer considering the strengths and weaknesses of your case. The client believes that she can just walk into the hearing, tell their very unique story about how they have been injured, and get $1 million or more, notwithstanding your patient legal counsel -- all the while claiming that “it is not about the money.”

It is enough to raise your ire, but remember, she is still your client and you decided to represent her, even if this behavior only manifests itself only later on. You have a duty to represent her to the best of your abilities, but that includes keeping her from running into a buzz saw. There was one case which particularly remember when I pleaded with the client to accept the offer, that the Commissioner was liable to ward her a lot less, and there was no guarantee that the opposing counsel would, post hearing, offer to clinch the case for more. She ended up leaving $30,000 on the table and the opposing counsel walked away from future clincher negotiations.

One particular type of intransigent client I'd like to discuss with you is the client tells you that the Supreme Deity will see to it she gets what she wants, bypassing you, the lawyer, altogether. Makes you wonder why she retained you in the first place. There's not much in the way of rebuttal here, except to ask the client: how do you know the Supreme Deity is not working through your lawyer to get what you want? This retort sometimes stops them in their tracks.

In a prehearing conference, the Commissioner, having read the file, may already have a good idea of it's value and may inquire why the case hasn't settled. Without divulging any figures, it is proper to tell the Commissioner that you and the opposing counsel have tried to settle the case but to no avail. The Commissioner then can at least hint to the client that he does not see much wiggle room in the case or doesn't know how creative he is willing to be, not foreclosing the client’s right to go forward of course but to seriously consider settlement. Sometimes the client sees the light of day, sometimes not. But at least you can feel good that the best interests of the client have been served.

A few more words about the pre-hearing conference. Make sure that there is a record should any dispute arise. Place on the record every damage you were seeking, and if you're seeking a lump sum payment and the Utica Mohawk language, include this as well. Do not depend upon your prehearing brief. If you leave something out at the prehearing conference, the Commissioner may not consider awarding it, perhaps believing that you have modified your position since drafting your prehearing brief.

Now, litigation is a contest between opposing counsel to determine who theory or version of the facts and law is the most compelling, the one better able to explain the facts and circumstances of a particular case and make sense of them. The picture puzzle that delivers the clearest picture. In this contest, avoid being on the defensive unless you have to. Once you're on the defensive, you're well on your way to losing. Stay on the offensive, make your opponent respond to your theory, answer your assertions. When you find a weak point in your opponent's case lay siege to it.

In my last talk, I referred to a case of mine, which I call "Ride the Bull." This is not the only case I have by way of illustration, but it is, perhaps the most uncluttered. You will recall that in this case my client complained of injuring his back at work. Unfortunately, he told the responding physician that he hurt it at home, a statement that the physician duly recorded in his notes.

Ordinarily, such an admission would prove fatal to the claimant's case, but I had the uncontested fact that his coworkers bullied my somewhat overweight client and would regularly jump on his back riding him piggyback style while shouting "ride the bull !" I used this as my plan of attack. Not only did explain the genesis his back problems, but it also explained why he may have felt too intimidated by his work environment to her truthfully reported how he hurt his back, fearing, of course reprisals by his coworkers. And the attack had the added benefit of making the employer look irresponsible in keeping order and discouraging potentially harmful horseplay. Egregious behavior by the employer and/or coworker is a powerful weapon in your arsenal.

I hammered away at this fact throughout my direct, cross examination and talking objections, forcing the opposing to try to defuse the damage I was causing her case while the Commissioner's demeanor became more and more critical of my opponent's case.

I believe my client received over $50,000 for that case significantly more than the nuisance value we were offered before the hearing.

As an aside, a talking objection is an objection followed by a basis for your objection which manages to broadcast your theory of the case to the factfinder.

I believe that the best defense is a good offense, certainly, but do not let that dissuade you from forming your own strategy. Some lawyers like to lay back and see what develops, waiting for an opening to strike. This can be very effective. It really depends on your personality, thinking style,

and what you are comfortable with. If you haven't tried a lot of cases experiment with different styles to see which strategy type fits your best.

PERMANENT DISABILITY BENEFITS

Permanent disability benefits to injured workers revolves around the idea of a decrease in the workers earning capacity, which can be described in dollars and cents or in percentage disability. Therefore, during your clients a direct examination make certain that she testifies to the actual physical dynamics of the job such as pushing, pulling, lifting, squatting, crawling and kneeling and how her injury has prevented her from doing these activities or has limited her ability to do them. The law also allows her to rate her own loss of use the body part under examination. Just make sure it is not exaggerated and falls within the reasonable paramneters of the doctor's opinions.

If your client is an office worker suffering from carpal tunnel syndrome, you may want her to testify to the fact that her hands ache after only a few minutes of typing or that she cannot process as many invoices as she formally could.

Do not forget to have the client testified to her daily activities and hobbies. Good Commissioners are interested in these. And again, be specific and simple: hygiene, cooking, cleaning, driving and loss of consortium are good examples of impaired daily activities.

Hobbies are self-explanatory but differentiate between what the client cannot do altogether, and what it is difficult for the client to do post-accident. And to reiterate what I mentioned in the previous module, you may want proceed upon a theory of loss of earning capacity which will require an vocational expert to testify to a decrease in her average weekly wage as a proximate result of the accident or in the alternative a medical doctor to testify in writing a percentage disability to a specific body part or parts.

WORKERS' COMPENSATION DEFENSE ATTORNEYS AND TACTICS

As far as defense litigation tactics are concerned, caution your client about surveillance. I mention this in my last talk, but many men are drawn to the lawnmower, despite the fact that he may have recently undergone a double discectomy. I advise my clients to assume they are under surveillance and not to engage in any activity that a third-party would consider unreasonably strenuous or incompatible with the claimed injury.

In the last decade, surveillance was much more prevalent. These days, insurance companies are much more circumspect about where they invest money, perhaps realizing that surveillance usually does not bear the fruit they are seeking and is easily defended by simply warning the client beforehand. Moreover, if you are confronted with a videotape, make sure that you raise a chain of custody objection if colorable. As far as my experience is concerned, I rarely had videotape surveillance damage my case.

Another, less controllable avenue of discovery for the defense is social media, Facebook, Twitter, Google Plus etc. We are witness to a generation that feels compelled to document their lives for all to see, often in excruciating detail. Put a gag order on your client at least until after the case is resolved and ask her if she has posted any remarks possibly detrimental to her case. Research these and prepare for them because a competent defense lawyer will surely do so.

The same principles of careful preparation of case theory and evidence outlined above apply to defense cases. But to understand the process from a defense perspective, you first have to understand the defense's interests and motives.

If you are dealing with a young defense attorney fresh out of law school hold onto your hats. These folks are the bottom of the firm's pyramid, A- type personalities, looking to please the partners and the clients through aggressive representation. They will usually concede little and want to get some trigger time in hearings. Their mission is to save the world from fraudulent claims, and tend to assume every claimant is a liar. Their caseload usually involves single-member claims, with little or moderate exposure for the carrier. If they are handling bigger, more complex cases, someone in their firm has likely made a mistake.

With maturity however defense attorneys realize that not all claimants are liars, and that it may be in the best interest of their clients to concede issues they know they probably cannot win at a hearing.

Now, the question remains as to how defense attorneys evaluate cases. Their number one concern is to limit exposure to the carrier, past and future. In fact, during negotiations, use the word "exposure". It often softens their position as in, "your client is facing some significant exposure here".

If the case has been denied, and the claimant's health carrier has picked up the bill for the treatment, and the claimant does not return to work, you, as claimants attorney, can leverage these facts into a higher clincher value perhaps 3 to 4 times the authorized impairment rating, compensating the claimant for any future liability she may face with her health insurance carrier.

On the other hand, if the client returns to work, the carrier will most likely want to settle on a form 16, which usually garners 1.5 times the impairment rating. The previous examples do not include serious medical follow-up, which can increase the value of a settlement or clincher significantly. In the previous return to work example, the case may clinch for twice or more the impairment rating depending on the equities in the case.

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And again if there are serious medical follow-up expenses make sure these are documented by a life care planner and included in your brief. If your theory includes lifetime benefits, you will need the services of an economist to determine present day value if you are trying to convert the benefits to a lump sum – the benefits being substitute income and medical expenses.

Some employers would rather the employees leave the company, especially if the employee has exceeded his allotted absence. This for the simple reason that it is an employee is more of a risk for the carrier. The greater the risk concern, the greater the premiums an employer has to pay. In these cases, the employer will usually seek a release and a clincher.

Now, this does not mean that an employer in South Carolina will not terminate an injured employee collecting or who has collected benefits under Worker's Compensation. Remember, employers are barred from terminating employees because they have asserted their rights under Worker's Compensation. If an employer does terminate employee under these conditions, the employer is liable for a retaliatory discharge claim. Unfortunately, the damages available for an employee under this cause of action are limited to the amount of wages he lost seeking other employment.

However, if company policy prohibits employers from being absent a certain amount of time, and the employee is absent that amount of time, then, Worker's Compensation law notwithstanding, the employer can, with relative impunity release the employee. South Carolina is, after all, at will employment state.

But this is not necessarily a negative outcome. I mentioned that the employee may be terminated on the above conditions with relative impunity meaning that the employee may have

another basis under state or federal law to contest termination. Therefore, as the claims attorney, you may be able to negotiate a favorable outcome for your client, not in consideration for a general release, as the carrier and employer usually pay only $100, but in increasing the value of the closure itself, especially if the employee has devoted a significant portion of her life serving the employer.

PRESENTING EVIDENCE IN THE WORKERS'COMPENSATIONS CASE

Recall from my last module that The South Carolina Rules of Evidence do not apply in Workers' Compensation cases. See my last module for the citation. However, that does mean you cannot make the standard objections on account of hearsay, relevance, authentication, privilege, best evidence and so forth. Include an explanation of your objection to help the Commissioner come around to your point of view.

The centerpiece of your evidentiary edifice in your workers compensation case is your brief. Every commissioner has his or her own way they prefer the brief to be organized. Research it on the Internet or, better yet, call the Commissioner's office, introduce yourself to her assistant and make an inquiry. Get to know these assistants because these fine folks can be of invalauble assistance to you especially when scheduling conflicts arise.

Make sure you include all the relevant medical records in your case. Review them with your client who can help you produce a complete set. Don't forget EMS and diagnostic reports. The rules of evidence for the admission of medical records are necessarily relaxed because of the logistical nightmare that would ensue if the parties were forced to call the doctor in person. On the other hand, nothing prevents you from calling or subpoenaing the doctor to the hearing if you have to.

In many cases there will exist unpaid unauthorized medical bills. Do not depend upon your client's testimony to get these into evidence. Procure the invoices and include them in your brief. The same goes for out-of-pocket expenses. Include a mileage sheet, etc. signed and attested to by the client.

We briefly touched on the medical questionnaire in the last module. I cannot stress the importance of this document, as it crystallizes, for legal purposes, the Independent Medical Examination. The medical questionnaire should include at a minimum opinions related to diagnosis, proximate causation, degree of permanent impairment, if any, future treatment,

residual work restrictions, and the probability of a worsening of condition. Do not depend on the physicians medical notes to touch on all these topics with the precise legal language that is required. Even if it does on some, the points are usually spread around, and you don't want the Commissioner having to expend energy and time searching for the information she needs to provide benefits to your client.

As for direct and cross examination, the same principles apply as if you were in the more formal court room setting. Your witnesses should be prepped on the facts of her case, have undergone a practice cross-examination, and ready to go. Remind her that the Commissioner may also question her. In direct examination, remember to ask open-ended questions – who, what, why, where, and how, or you'll draw a leading objection and look like an amateur. Keep your questions to a minimum. Your client's and the witnesses' testimonial impact is significantly increased if they testify in the form of a narrative, as long as the witness does not ramble. In such a case you may have to guide your witness more with short, precise questions.

Don't think direct examination is a breeze. It is far too easy to omit a point that is vital to your case, and you may not have a chance to correct your mistake later on. As I noted before, your notes you should not be a set of questions, but rather a set of points you want to bring out on the record. Build your questions around these points. If you have a set of notes to guide you, you will be far less likely to blunder in your direct.

On cross, you may only have a handful of truly devastating points. Again, arrange your notes around the point you want to make and craft your questions from the points. Concentrate the thrust of your cross on the truly devastating points. Focusing on marginal points on his service to dilate your cross. Do not allow the witnesses sidestep you. Do not allow the witness to answer you but let me answers. Remember you study the case. Chances are the witness has not. Sooner, rather than later, the squirmy witness will honor a statement completely at odds with other facts in the case which I disputed. When this happens you have achieved a technical knock out, then sit down. Don't get cocky and continue questioning as you may dilute or even lose the impact of your cross examination by unfavorable answer. The general rule of cross-examination is less is more.

WORKERS'S COMPENSATION LAW and the FMLA

The Family Medical Leave Act's purpose is to provide qualified employees up to 12 weeks of unpaid absence from work should they suffer a serious health condition. The conditions need

not be work related, unlike Worker's Compensation. Employees under FMLA are not entitled to temporary income, sponsored healthcare or permanent disability benefits.

In some cases the two laws overlap. An employee may injure himself on the job resulting in a serious condition which also entitles him to FMLA leave . If his absence from work is an FMLA absence, the amount of time he is completely absent may count against his time is allowed to be absent from work *in toto*, before his absence triggers an employment release.

Another point about Worker's Compensation FMLA. Remember, under worker's compensation, an employee who rejects modified duty without giving it a good faith effort is likely to lose his benefits. Under the FMLA, rejection of light duty has no effect on any of his other rights.

WORKERS' COMPENSATION LAW and the AMERICAN WITH DISABILITIES ACT

A few words about the Americans With Disabilities Act. The ADA only applies to employers with 15 or more employees. This law requires covered employers to offer reasonable accommodations to disabled employees in order for them to perform essential functions of their job.

Therefore, if an employee is injured on the job and the authorized doctor allows him to return to work in a modified capacity, if the ADA applies to the employer, the employer must make reasonable accommodations for the employee to return to work.

Arguments of course arise as to what a reasonable accommodation consists of and if it presents an undue hardship on the employer and the question of what that means.

But, in general, remember that the ADA is another weapon in your arsenal.

THE FORM 21

The employer's use of the form 21 arises in several contexts, the most common one being the case where there is a dispute as to whether the employee has reached maximum medical improvement. Note also that if the employee has not reached maximum medical improvement and cannot return to work, she remains entitled to receive temporary compensation.

After receiving temporary compensation for over 180 days, an employee may voluntarily terminate her payments by signing a form 17. If this does not occur, the employer may file a form 21 seeking a hearing to determine if the employee is still entitled to temporary income.

But be careful here. Remember, once the employee reaches maximum medical improvement or is determined to have reached maximum medical improvement the case is ripe for resolution.

Once you have received a form 21, begin full case preparation, including scheduling depositions and most importantly scheduling an independent medical examination as it can take some time to get an appointment. Do not take the chance that the Commission or opposing counsel will continue the case to allow you to prepare. And remember, hearings on the form 21 are usually scheduled faster than those requested on a form 50.

FINAL COMMENTS

In preparing for Worker's Compensation hearing or any litigation for that matter use the following principles to guide you:

File a Form 51 and request a hearing as soon after you have developed a theory, even if the claimant has not reached MMI, you can withdraw the 50 and refile once he has done so. Filing immediately “flushes out” the defense position. Even if the Form 51 states the case is denied for investigative purposes, the clock is ticking which prompts the defense to act faster than they other would, pushing the the claim along.

Develop of your legal and factual theory early and keep developing it as discovery allows.

Development of your tactical plan of attack.

Educate and communicate to your staff and your client your goals and procedures.

Make your case cohesive.

Identifying your opponent’s weakest points.

Always have a witness when you meet with your client to forestall any later claim by the client that you told or promised her this or that or acted in any way unprofessional towards her..

Concentrate your forces on your strongest point and the opposing counsel’s weakest point. Do not waste your strength and time on marginal issues.

Never get emotional. Many lawyers try to get a rise out of you to confuse you.

Their major ad hominum attack will attack your confidence as a lawyer.

Contextualize. Know your and their case inside and out – both leaglly and factually.

Prepare for evidence you want to get in and evidence you want to keep out.

Serve any process on the opposing counsel using investigator a better yet one of your assistants and include that assistant name in your list of witnesses.

Filing for hearing is one of the most effective ways of lighting a fire under your opponent. Remember, damages is a claimant’s attorney’s natural ground. Hit them hard.
Hearings usually boil down to one or two issues. Usually the credibility of a witnesses. Prepare hard for this.

Use affidavits of your key witnesses to move an intransigent adjuster or attorney.

Don't bite down on the defense tactic of threatening to appeal if she loses the case thus causing your client more financial stress. You can usually settle. Remember the insurance defense adage: a good case is a closed case.

Do not withdraw your form 50 until after your client has signed the settlement agreement or clincher.

Get other attorneys thoughts on your case. Create small think tanks. Two heads are better than one.

Have a method to capture write your ideas. I use a small Sony recorder.

Move fast in your case. Keep your opponent on his heels.

Use your subpoena power.

Get to where the fights going to be quickly. Do not fight issues you're likely to lose. Play to your strengths.

Make talking objections.

Know your Commissioner and your opposing counsel.

Include as many colorable damages i.e. body parts as you can. If they don't pan out, you can also always ratchet back. Ratcheting up is more difficult. That said don't modify your theories too much because this can negatively affect your credibility.

Anchor high in your negotiations and reduce your bids in small increments.

Stick to the fundamentals the details will suggest themselves to you. Cases are won in smart dogged discovery.

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