

Advanced Workers' Compensation



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Advanced Workers' Compensation

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February 11 - Greenville

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Case Law Update

Submitted by Benjamin T. Cruse and Erroll Anne Y. Hodges

Case Law Update

Ben Cruse and Eroll Anne Hodges

Rhame v. Charleston County Sch. Dist., 412 S.C. 273 (2015)

Claimant was employed as a heating and air conditioning technician with the Charleston County School District (the District) from 1987 to 2009. Claimant began experiencing back pain in 1994, and developed a problem with his neck requiring cervical fusion surgery in 2006. Claimant filed a Form 50 in September 2009, alleging that on May 4, 2009, he sustained a back injury from repetitively lifting heavy air conditioning units. In February 2010 the single commissioner found that Claimant's claim was not barred by the statute of limitations and awarded benefits for temporary and total disability and medical treatment. The Appellate Panel reversed the single commissioner's decision on August 6, 2010. Claimant's appeal to the South Carolina Court of Appeals was denied as not filed within 30 days after the Appellate Panel denied his claim. The Supreme Court granted Claimant's petition for a writ of certiorari, and held that motions for hearing to the Appellate Panel and permitted and a motion for rehearing stays the deadline for appeal. The Supreme Court remanded the case to the South Carolina Court of Appeals.

The Court of Appeals held that the statute of limitations in a repetitive injury case involving the lower back did not begin to run until the Claimant was so injured that he could no longer perform his job. The Court overturned the Commission's finding that the statute of limitations began running when Claimant first experienced back pain in 1994, and found that the statute of limitations period did not begin until Claimant suffered a back injury that left him unable to work. This ruling is conflicting with King v. Int'l Knife & Saw, which outlines the statute of limitations test as: (1) Claimant is experiencing pain, (2) Claimant knew the pain came from his job, and (3) Claimant sought out medical treatment.

Significance:

- Workers' Compensation Commission will not entertain a motion on the merits.
- Motions for rehearing to Appellate Panel are permitted.
- Motion for rehearing stays the deadline for appeal.
- The Appellate Panel may hear a motion on the merits.
- The statute of limitations does not begin to run until Claimant suffers an injury that leaves him unable to work.

Wofford v. City of Spartanburg, 2015 S.C. App. LEXIS 250 (2015)

Brian Wofford was the Superintendent of the Parks and Recreation Department for the City of Spartanburg (the City). He died in a motorcycle accident while on his way from his mother's house to

one of the City's recreational centers. His mother's home was in the opposite direction of his office, and he went there to pick up his motorcycle. His mother testified that he received at least two work-related phone calls while at her home, and told her that he was leaving to go to work. Wofford's wife, Bonisha, and child, Kaelyn (Claimants) brought this claim. The Single Commissioner concluded that Wofford did not suffer a compensable injury because Claimants failed to show his accident arose out of and in the course of his employment as he was not working at the time of the accident. The Commissioner found that Wofford's decision to drive to his mother's home to visit her for three hours and pick up his motorcycle resulted in a substantial deviation from his employment. The Commissioner further found that there were no applicable exceptions to the going and coming rule. The Appellate Panel of the Commission affirmed the single commissioner in full.

The Court of Appeals upheld the Commission's denial of benefits based on the going and coming rule. The Court found that the fact that Claimant had a couple of brief work-related conversations/texts while at his mother's house, including one to pick up a key from one of the Parks and Recreation facilities and take it to another, did not make the accident compensable. Specifically the Court found that the accident did not fall under the duty or errand exception, or the special task or mission exception to the going and coming rule.

Significance:

- Fully upheld the going and coming rule.
- More than brief work communications are needed to bring an accident within the scope of the going and coming rule exceptions.

Lewis v. L.B. Dynasty, 411 S.C. 637 (2015)

Claimant was injured by an errant bullet at Studio 54 Boom Boom Room (the Club) while she was working as an exotic dancer. The question presented to the Court of Appeals is whether Claimant is an employee of the Club and thus eligible for workers' compensation benefits. Claimant worked as an exotic dancer performing five to seven days a week and traveled throughout North and South Carolina to dance at different establishments, she had danced at the Club on three separate occasions. Claimant was shot and injured while dancing at the Club. Claimant filed a Workers' Compensation claim asserting the Club was her employer. The South Carolina Uninsured Employer's Fund argued Claimant was an independent contractor and not an employee.

The test of determining whether someone is an employee or an independent contractor turns on the level of control the employer has over the person. The factors the Court looks to are (1) the right of control, (2) the furnishing of equipment, (3) the method of payment, and (4) the right to fire. The Court of Appeals found that Claimant's artistic vision controlled the dance, she brought her own equipment, the customers paid her and she paid the club, and that violations would result in not being offered a return engagement. As a result, the Court of Appeals concluded that Claimant was an

independent contractor, and not an employee, therefore she was not entitled to benefits. The Supreme Court granted certiorari and held that the club controlled the rules of the engagement, provided the performance space, the club did not pay her directly, and that the club could end its contract with her at any time. As a result, the Supreme Court held that the factors of control should be used as a balancing test, without one factor being determinative. The Supreme Court found that claimant was an employee, and as such she was entitled to workers' compensation benefits.

Significance:

- The exercise of control is what to look for when determining whether someone is an employee or an independent contractor.
- The factors of control should be looked at in their totality, and used as a balance test. No one factor is determinative.

Barnes v. Charter 1 Realty, 411 S.C. 391 (2015)

Claimant worked as an administrative assistant at Charter 1 Realty. She was injured when she fell while walking down the hall to check the email of one of the realtors. The Single Commissioner denied her claim, finding there was no explanation for the fall and it was not caused by some hazard at work or a deficiency in the carpet. The Commissioner concluded that Claimant's fall was idiopathic, and therefore she was not entitled to Workers' Compensation benefits. The Appellate Panel affirmed, adopting the order of the Single Commissioner in its entirety. The Court of Appeals affirmed. The Supreme Court granted certiorari.

The Supreme Court held that the idiopathic doctrine should be strictly construed. An idiopathic fall is one that is brought on by a purely personal condition unrelated to the employment, such as a heart attack or seizure. A finding that a fall is idiopathic is not warranted simply because the claimant is unable to point to a specific cause of her fall. The Supreme Court reached the conclusion that the claim was compensable by reasoning that there was no evidence that Claimant's leg gave out or that she suffered an internal breakdown or failure.

The Court relied on Nicholson v. S.C. Dep't of Social Servs. to find that Claimant's injury did arise out of her employment. The Court reached this decision by finding that Claimant was performing a work task when she tripped and fell. Claimant clearly established she was performing her job when she sustained the accidental injury.

Nicholson v. S.C. Dep't of Social Servs., 411 S.C. 381 (2015)

Claimant was a supervisor in the investigations area of child protective services for the South Carolina Department of Social Services. She was on her way to a meeting when her foot got caught on

the hall carpet and she fell. Her Worker's compensation claim was denied by the Single Commissioner, who held that there was nothing specific about DSS which contributed to Nicholson's fall and that she could have fallen anywhere. The Appellate Panel reversed the Single Commissioner. The Court of Appeals reversed, holding that although the fall was not unexplained or idiopathic, the carpet was not a hazard or special condition peculiar to her employment that contributed to or caused Claimant's injuries. The Supreme Court granted certiorari.

The Supreme Court found Claimant's injury was compensable as it did arise out of the course and scope of her employment. For an injury to "arise out of and in the course and scope of employment" it must be apparent to the rational mind, considering all the circumstances, that a causal relationship exists between the conditions under which the work is performed and the resulting injury. The Supreme Court reasoned that "arising out of" simply establishes that an injury is not compensable absent some causal connection to the workplace. It does not require claimant to prove her injury is entirely unique to her employment, or any other interpretation would seriously undermine the law of workers' compensation.

Collins v. Seko Charlotte, 412 S.C. 283 (2015):

Claimant worked for West Expedited & Delivery Service, Incorporated (West Expedited) and was killed in an automobile collision while returning to South Carolina after making a delivery in Wisconsin for Seko Charlotte. West Expedited, as a subcontractor, contracted with Seko Charlotte to make interstate delivery of parts. Although there was no written contract, Seko Charlotte engaged in business with West Expedited roughly two to three times per month. In this case, as was customary, Seko Charlotte paid West Expedited for mileage one way, however, West Expedited included the cost of the return trip in the mileage rate charged Seko Charlotte.

As a result of Claimant's death, his dependents filed a workers' compensation claim against West Expedited, Seko Worldwide, Federal Insurance Company, Seko Charlotte, and Nationwide Mutual Insurance Company (Nationwide). The Single Commissioner determined that Claimant was Seko Charlotte's statutory employee at the time of his fatal accident pursuant to section 42-1-410 of the South Carolina Code. The Appellate Panel of the Commission reversed the Single Commissioner, finding that Claimant was not an employee of Seko Charlotte on the return trip because West Expedited had "the exclusive right of control over Claimant" after the deliveries were made in Wisconsin. The Uninsured Employers Fund (Fund) appealed to the Court of Appeals. The Court of Appeals concluded that Claimant was Seko Charlotte's statutory employee, and reinstated the Single Commissioner's order. The Supreme Court granted certiorari to determine whether Claimant was a statutory employee of Seko Charlotte at the time of his fatal accident.

The Supreme Court determined that there are three tests to determine whether a statutory employment relationship exists:

To determine whether the work performed by a subcontractor is a part of the owner's business, this Court *must* consider whether (1) the activity of the subcontractor is an *important* part of the owner's trade or business; (2) the activity performed by the subcontractor is a *necessary, essential, and integral* part of the owner's business; or (3) the *identical activity* performed by the subcontractor has been performed by employees of the owner.

If any of these tests is satisfied, the injured worker is considered the statutory employee of the owner. Petitioners argued that the Court of Appeals erred in finding Claimant was Seko Charlotte's statutory employee at the time of the accident because the contract had terminated once Claimant began his return trip to South Carolina. The Fund argued that Claimant was Seko Charlotte's statutory employee because the return trip was "necessary and essential to Claimant's statutory employment with Seko."

The Supreme Court found that Seko Charlotte: (1) is in the cargo delivery business; (2) interstate deliveries are a necessary and integral part of its business; and (3) its drivers make similar deliveries as Claimant did if it is within 100 miles of Charlotte. The nature of the work for Seko Charlotte's direct employees is the same as the work performed by Claimant. This fits squarely within the requirements of *Voss*. The Supreme Court further held that section 42-1-400 does not allow for partial or conditional statutory employees. Seko Charlotte concedes that its drivers are covered on their return trips, therefore Claimant is entitled to the same coverage as their direct employees. The Supreme Court affirmed the Court of Appeals.

Thomas v. 5 Star Transp., 412 S.C. 1 (2015):

George was employed by 5 Star as a tour bus driver. He died on November 19, 2007, in an accident when a bus he was driving left the road and collided with a tree.

George married Cynthia on February 9, 1995. He met Emily in 1999 and they lived together for eight years prior to his death. On September 20, 2006, George and Emily had a marriage ceremony. George had told Emily that he and Cynthia were divorced. However, George and Cynthia's divorce was not final until February 9, 2007. On June 26, 2008, Emily filed a claim for workers' compensation benefits for George's Death. 5 Star filed a Form 53, denying George sustained an injury, and denying that Emily was entitled to benefits because her marriage was void. The South Carolina Uninsured Employers Fund (the Fund) also filed a Form 53, denying George sustained an injury. There was debate as to whether George died from injuries sustained in the accident or from a brain aneurysm.

The Single Commissioner found the marriage did not "ripen into a common law marriage" after George's divorce from Cynthia. Accordingly, the Single Commissioner granted 5 Star and the Fund's motion to dismiss. The Appellate Panel reversed finding the Single Commissioner violated Regulation 67-215(B)(1) by addressing a motion involving the merits of the claim, including, but not limited to, a motion for dismissal. The Appellate Panel vacated the Single Commissioner's order and returned the claim to the Single Commissioner for a de novo hearing. At the second hearing, the Single Commissioner found George's injuries were compensable, and that Emily was the common-law wife of George at the

time of his death and because of that and the putative spouse doctrine, she was entitled to all rights, benefits, and privileges of a surviving spouse. On appeal, the Appellate Panel affirmed the Single Commissioner. The Court of Appeals affirmed the Appellate Panel by finding that George's death arose out of and in the course of employment because he was placed in an increased danger by driving a bus at a high rate of speed on an interstate. The Court of Appeals ruled that George and Emily were not in a common law marriage. The Court of Appeals relied on well settled law that the removal of an impediment to marriage does not convert an illegal bigamous marriage into a common law legal marriage. After the barrier has been removed, there must be a new mutual agreement to enter into a common law marriage arrangement. However, the Court of Appeals did ultimately find Emily to be George's wife under the good faith exception.

Sparks v. Palmetto Hardwood, Inc. , 738 S.E.2d 831 (S.C. 2013)

Claimant was employed by Palmetto Hardwood, Inc. as a saw operator. Claimant suffered three work-related injuries during his employment, the first two injuring his lower back, and the third his head. In this case, the Commissioner found that Claimant had suffered a compensable head injury, but that he did not carry his burden of proof to establish brain damage under section 42-9-10. On appeal, the Appellate Court affirmed, finding that Claimant did not sustain any severe, or permanent impairment of normal brain function under section 42-9-10(c). The Court of Appeals found that the General Assembly meant to require severe damage to constitute a brain injury. They reached this conclusion by reasoning that Supp. 2011 awards lifetime benefits for totally disabled claimants suffering "physical brain damage" as an exception to the five-hundred-week limitation. This context clearly means that the general assembly meant to require severe, permanent impairment of brain function in order for an injured worker to be deemed physically brain damaged. The Court further found that brain damage should contribute to disability, not just accompany disability. Of note, the Court stopped short of requiring objective evidence of physical brain injury (i.e., MRI, CT scan, PET scan, etc.)

**Winning Strategies and Tips in Workers'
Compensation Practice/Selected Issues**

Submitted by Thomas M. Gagne

TITLE

Winning Strategies and Tips in Workers' Compensation Practice/Selected Issues

INTRODUCTION

Thomas Gagne has practiced workers compensation and personal injury law in Greenville and Spartanburg South Carolina for seventeen years. He holds a B.A. from Cornell having studied literature and philosophy and is an alumnus of SUNY Buffalo Law School and Harvard Business School. He is a former JAG prosecutor and Special Assistant United States Attorney attached to Fort Jackson South Carolina. He also served as an assistant solicitor for Richland and York Counties. Tom was recently selected as a Top 100 Trial Attorney by the National Trial Lawyers as well as a Premier 100 attorney by the American Academy of Trial Lawyers.

OPENING

This section of the program concerns selected issues in worker's compensation law. I have attempted to touch on all these topics but within the framework of the life, if you will, of a typical workers' compensation claim, from intake to settlement. I have omitted for the sake of concision and time tips and strategies on hearings and appeals.

WHAT DO YOU GET OUT OF THIS?

I hope you take away from this little talk a few of the lessons I have learned in my twenty plus years of litigation and workers' compensation practice and spare you the headaches I have had to contend with. I have also included on my website at gagnelaw.com several forms that I have developed over the years to streamline the process and aid you in spotting issues before they blow up in your face. This lecture will also be posted on my website should you be interested.

Your duty as advocates begins and ends with what is in the best interests of the client, as positive law as well as common sense requires. However, I have included some strategies that will not only help you avoid problems with the opposing party but also problems with your client that could result in ethical violations or professional negligence claims. If you do not take care of yourself you will do no one any good. Forewarned is forearmed.

I do not believe in reductive formulas for the practice of law, but if forced to choose I would say successful litigation is founded on four columns. Develop good legal and factual theories. From this develop a plan of attack. Communicate your strategy to your client and staff. Educate yourself and your

client on the legal issues involved. Make certain your evidence in alignment. Anticipate where the fight will be and attack your opponent by exploiting your points of leverage. These themes will become apparent as I proceed and will hopefully help guide you through litigation's labyrinths.

BODY

The intake questionnaire is your first opportunity to determine your client's needs and interests. It should also reveal to you the problems with your case as well if you have a case at all. Intake is a good time to explain to your client her basic rights: i.e., That she has a right to seek and receive the medical attention; that she has a right to have all her related medical bills paid, past and future; that she has the right, if warranted, to receive temporary compensation (TTD) and that she has the right to compensation for any permanent disability she may have suffered (indemnity).

Don't rely on a date of accident that states the accident occurred on a certain date or "thereabout". Your first inquiry should be exactly when did the accident happen? Getting the wrong accident date by taking your clients word for it can lead to many unpleasant consequences. What comes to mind immediately is that the client had experienced a preexisting or post accident injury around the time of the alleged worker's compensation injury. This as you're well aware can severely impact your causation theory as some clients will not volunteer any accidents or injuries they may have suffered around the time of the putative worker's compensation accident.

Perhaps most embarrassing is the event in which the employee was not even working on the date in question. I learned the hard way in one case when it turned out the employer was not even open for business on the date the employee claim to have been injured as it was Labor Day. If the claim has not already been accepted by the workers' compensation carrier, verify the date of accident with personnel attendance records you have subpoenaed or by deposing the employer or one of his representatives. **Use your subpoena power to discover information.** Don't be shy. It's one of the most powerful tools you have in your legal arsenal.

Another important piece of information you will receive is of course **the reporting requirement**. Don't leave it with "I told my coworker" or more frequently "my boss was there when I hurt myself". Spell it out for the client that she needed to report the injury verbally or in writing to her supervisor. Clients tend not to understand this. If she has not reported it by the time she sees you, tell her to report it as soon as possible. Do not depend on your filing to constitute notice. Stress the fact that notice must have been given to someone in a supervisory position. Make sure you get a name. It amazes me how many clients do not know their supervisors name just a nickname. Also get a complete schedule of eyewitnesses or other

witnesses to the accident and educate your client as to the difference. You may have to subpoena them later on so make certain you get a proper name and address and phone number is possible. Subpoena the witness's records if you have to get the information. If all else fails hire a private investigator.

Determine if the employee has sought medical attention -- usually she has, if not on her own then by referral from the employer to an emergency room or a low-level medical aid practice. The diagnoses you receive from such places should be held suspect until you have received a definitive diagnosis by specialist, if the case warrants it. First responder medical professionals tend to treat via the triage method -- that is, identify the major pathology or pathologies and stabilize it or them.

If the client has not received medical care and it otherwise looks like a good case, by all means refer her to a doctor pending appointment of an authorized doctor or a demurrer in the employer's Form 51 which is the defendant's answer. **Exhibit 1.** But be careful to send the carrier a two-week demand for treatment. If no authorized treatment is forthcoming during that time and your client is still being treated by your, unauthorized doctor, you stand a better chance of getting your unauthorized doctor paid at a hearing.

Remember that if the client has been receiving treatment, this does not necessarily mean that the employer has accepted liability. On many occasions a carrier will conduct an investigation, issue a demurrer, and cease providing medical care. In that case of course you may have a fight on your hands. Therefore, file for hearing on the issue of **compensability**.

If the client is seeing a doctor, make certain that the doctor has issued a work status note -- light-duty, full duty, or modified duty. Very likely the client will be in financial distress, thinking erroneously that her "boss" will take care of her she may not be receiving any temporary compensation because the employer has failed to report the injury, or less egregiously, the employee has neglected to give her medical note to her employer. Remember that if the client does not have a note from an **authorized** doctor she cannot receive temporary compensation. So get the demand for an authorized MD out immediately, for the sake of both the client's treatment and source of income.

Critically, at this stage you will determine what body parts the client claims are injured. I insist the client circle a diagram of the human body because some clients will "snowball" their body parts once they figure out the basics of the damages game. **EXHIBIT 2.** Adding body parts later on can be a clear sign that your client is malingering or misleading you and everyone else.

On the other hand, some injuries take time to blossom, and the addition of symptoms and body parts is not at all atypical of the nature of the injury. For instance, I had a case involving a bilateral subdural hematoma -- a serious bruising of the brain beneath the dense sheet of tissue surrounding the brain called

the dura. It can take days or even weeks for the slow bleeding in the brain to manifest symptoms. In my case, my client blacked out while driving his car weeks post-incident . He also suffered headaches and vertigo even collapsing a few times weeks after the accident.

What was even more puzzling was the fact that the radiologist in the emergency room, after conducting a CT scan, failed to spot the hematoma. Lesson learned: diagnoses can be tricky business, depending on the health of the client, her constitution, the nature of the injury and the evolution of the symptoms. So just because a client appears to be “snowballing”, does not mean she is necessarily malingering. Careful analysis and investigation of the nature of the injury is required.

Having the client specify in the intake the body parts and symptoms involved also protects you later on if the client claims that you failed to address a specific injury. The intake also serves as a source of the client’s prior statements concerning her medical history, pre existing injuries, post existing injuries and any criminal record that will protect you later on should the client make inconsistent statements later in your case.

A few more words about the intake before I move on. As I touched on before briefly, doctors are usually concerned about the clients’ chief symptoms, especially at his stage of the case, and especially considering the “triage” mentality of emergency room and initial care doctors who want to treat and stabilize the low hanging fruit – say, setting a fracture but failing to note that the patient may also be exhibiting or complaining about a symptom or symptoms in an entirely unrelated body part. So be sure to claim all the body parts your client claims on your Form 50, and let the client review for her approval. Also, remind the client to tell her doctor what ails her, not just the attorney. For some reason the client rarely speaks up at the doctor’s examination, but let’s you, the attorney, know her full spectrum of complaints and symptoms.

Note this down in the log to protect yourself. If the body part claimed comes to nought then you can always ratchet back, but it is difficult to ratchet up. The intake will also tell you what stage the case is in: is the client at the beginning of the claim, i.e., closer in time to the actual date of accident? Or is she nearing maximum medical improvement? Has she already been released by the authorized doctor once she sees you and is only lacking her indemnity?

The intake should also give you a good picture of the overall health of the client including any past surgeries or treatment for the body parts involved, prior existing conditions, post existing accidents, and her history of workers compensation claims, motor vehicle accidents, and slip and falls. Any prior impairment ratings of the same body part will also affect your theory of damages.

Your intake should also disclose if any multiple claims exist. For example, if the client was involved in a motor vehicle accident you may be able to make a claim against the tortfeasor's insurance. A couple of caveats. If the employee is a direct employee or a statutory employee of the employer, then she will be barred from making a claim against the employer in tort or contract pursuant to the statutory employer and exclusivity rule. **See S.C. Code Ann. Sec. 42-1-540**; *Carter vs. Florentine Corp.*, 423 S.E.2d 112.13 (1992). If however, the tortfeasor is a subcontractor, your client may be able to recover from that subcontractor. **See S.C. Code Ann. Sec. 42-1-560**. If you do proceed against a third party at law, remember to give the worker's compensation carrier notice of your action. This requirement, I would argue, includes any claim including commencing litigation, although some may disagree. Notice is required because the workers compensation carrier has a right of subrogation for any damages you may recover from the third-party tortfeasor.

In general, the best practice is for you to proceed yourself against the third party.

Also, if your client is an employee of a subcontractor, which is often the case, and is injured by another subcontractor working for a different company, then you may have a claim in tort against that subcontractor, if the employee/tortfeasor is not deemed a statutory employee. You can see how the various fact patterns can make this analysis quite complex rather quickly, so carefully analyze the legal status of all the players involved so as not miss a cause of action.

Be careful if the third-party claim involves another jurisdiction and/ or type of defendant. For example, an out-of-state defendant within the scope of his employment as a governmental or quasi - governmental entity should raise a red flag. These raise a host of sovereign immunity issues not the least of which notice provisions and/or statutes of limitations in other states maybe shorter. Tip: refer the case to a lawyer in that jurisdiction and sign the retainer agreement **"For Investigative Purposes Only."**

Spotting these and other issues upfront using a detailed intake is achieved through a thorough and systematic process of inquiry, which follows up and through itself , catching the significant issue or issues. This is why I never let the client fill out the intake herself. Because of his lay status, he will not understand the significance of some of the questions and may provide you with incomplete or even false information or perhaps no information at all regarding a particular issue.

Your first meeting with the client during intake is perhaps the most important one in the evolution of your discovery. This is where communication and education are paramount concerns. It is at this stage where the client learns of her rights, and where you plan the preliminarily theory and direction of the case. This is your chance to determine the body parts and diagnoses involved if possible, her current treatment

history as well as medical and accident history, including any psychiatric history or drug and alcohol abuse, her family structure, criminal background if any, hobbies as well as her employability and what the client needs as soon as possible. It also establishes the client's story and will protect you later from claims of negligence or oversight.

Take this opportunity to get with your client on these and other issues from the very beginning so the both of you are "on the same sheet of music". Warn your client not to talk about the case facts to anyone especially the doctors, case management workers, or adjusters as these statements re-interpreted by professionals essentially in the employ of the opposing party can torpedo a case. I have included an intake form, an FAQ as well as a flash analysis on my website at gagnelaw.com for your use so you don't miss the major issues. **EXHIBIT 3**. But don't think it is perfectly exhaustive. Create your own checklist and use it, modify it as you learn more. It can prove an invaluable aid to you and your staff and catch you up to date on a case very quickly.

AVERAGE WEEKLY WAGE

The average weekly wage determines the compensation rate. **See S.C. Code Ann. 42-9-10**. The parties calculate the total paid to the client within the last four quarters of the client's employment and then divide that number by the number of weeks the client worked during the four quarters. This figure is calculated before taxes and other deductions. If the client has not worked four quarters, then go back as far as possible in the client's history with the employer. Once this figure is determined divide by three and multiply by two, in other words, multiply by two thirds and you have your compensation rate.

This number is key because it will ultimately be used in calculating the amount of compensation your client is owed. The higher the average weekly wage the higher the compensation rate. The higher the compensation rate, the higher the compensation your client, both temporary total as well as disability she should receive.

Caveat: if the client is working more than one job you have a couple of problems. The problem with having more than one job is that the defense may claim that the client hurt himself or aggravated the injury at that job. This can severely impact the value of your case. If the defense is claiming that the client hurt himself on his "moonlighting job" then subpoena all medical records from the moonlighting job. This should tell you whether he has claimed injury to the specific body part in the recent past. The medical records themselves that you have already collected should also reveal this. Use your deposition power if necessary and if the facts fairly bear it out, include the other job as a defendant.

If your client has more than one job at the time of the injury, the law allows for inclusion of his compensation in determining the compensation rate. I had a case where the client had over \$14,000.00 of unclaimed compensation from a second job which, after I claimed it, boosted his compensation rate considerably. The kick was that the client had reached maximum medical improvement and had been overpaid approximately \$14,000.00 TTD, and therefore it was a wash. The form that reflects the computation of your client's average weekly wage is the form 20. **EXHIBIT 4**. Demand this form as soon as possible from the opposing counsel or the adjuster as it can sometimes take some time receiving this. Sometimes opposing counsel cannot even get a copy of the form 20. This form is critical when you make your demand. Depending on the type of injury and the significance of the injury a few dollars difference in the compensation rate can result in a significant loss or gain in the ultimate compensation your client receives.

The right to temporary compensation is predicated on her receiving a note from the authorized physician stating that she cannot work. One common problem you'll find at this stage, the pre-MMI stage, is when the authorized doctor will write a note stating that the client can return to work either full-time or modified light-duty. The client usually calls you in a frantic mood claiming that she cannot fulfill the duties the note requires. In this scenario, tell your client that the law demands she return to work in the modified status and that she needs to make a good faith effort to perform her duties. If she cannot perform these modified duties she should present herself to her employer and states she cannot perform the modified duty or full duty and that she needs to see the authorize physician again who, hopefully, will revert her status to temporary total disability.

DIAGNOSES

After you have made sure that your preliminary claim is accurate and exhaustive, your temporary compensation figure is accurate, and your client is receiving it, or, you have filed for compensability if the carrier has denied your claim, you have all the medical work excuses in order, and your client is receiving the proper medical care, your next pre-MMI task will help direct you to your proper case theory and theory of damages. Remember, differentiate between preliminary and definitive diagnoses.

Understand that in some cases you may not receive a definite diagnosis, with the doctors disagreeing, but this is usually not the case. The doctor's usually disagree about the amount of permanent impairment a client has suffered.

From your definitive diagnosis you will be able to hone your theory of the case. If multiple body parts are involved, you may also have a claim for permanent and total disability. If only one body part is involved then your options include settling on a form 16, clinching the case, or proceeding to hearing. The

diagnosis itself will determine your theory and damages sought. A sprain and strain usually gets a lot less than say a herniated disc or a torn rotator cuff. A form 16 settles the disability portion of your claim only leaving future medicals open as well as your client's right to claim a worsening of condition within one year of the commissioner's signing the order.

An award from a Commissioner essentially works the same way as a form 16. Whereas a clincher, as the name implies, settles not only the disability portion of the case, i.e. the indemnity portion of the case, but also all future medicals including a claim for worsening of condition.

The gravity of your case vis-à-vis the diagnosis will also be reflected by the amount of medical bills she has sustained. Demand a schedule of authorized medical bills, or subpoena them from opposing party. This will help you determine the value of your case and alert you to any authorized bills that the carrier has failed to pay. While you're at it, marshal a schedule of unpaid unauthorized medical bills to serve with your demand or present at a hearing.

The length of time a client is in primary treatment and therapy will also give you a clue as to the seriousness of the injury. The longer client stays pre-MMI in general the more serious the injury the greater chance is a worsening condition as well as future residuals.

Commissioners in general will initially tend to look at these elements to determine the value of your case – the number of body parts involved, the duration of treatment, the type of diagnosis, and the amount of medical bills. But the main indicator is the diagnosis. A fracture may not result in a slew of medicals as it's just set, depending on the complexity of the fracture, with perhaps some physical therapy follow-up, yet it may result in serious permanent impairment. **When evaluating a worker's compensation case, I always go to the putative diagnosis to orient my case theory. It follows that you have to be familiar with the various diagnoses a human is prone to, which means you have to take the study of medicine seriously if you want to be a successful worker's compensation attorney.**

So, at this stage we have a definitive diagnosis, and accurate knowledge of the body parts involved which are in alignment with the diagnoses and medical records of the authorized medical doctor, and the client is getting the type of treatment necessary to treat the condition or cure it altogether – although there is usually some residual impairment even for mild soft tissue injury. Therefore the remaining issue in the case is damages.

Problems arise if the cases been denied. **EXHIBIT 5.** You may have received a form 51 in the form of a demurrer. Don't let a demurrer throw you off. Eight or nine times out of 10 it just means that the carrier has not finished its investigation. It will in all likelihood admit the case at a later point. On the other hand,

don't be fooled into thinking the case is accepted just because the client is receiving medical care or even temporary total. If the case is still within the proper time limit, it is easy for the carrier to suspend temporary compensation as well as medical treatment. Remember, if the carrier has been paying temporary total for more than 150 days it must, by law, seek a commissioner's order to terminate temporary total. **See S.C. Code Ann. Sec. 42-9-260; S.C. Code Regs. 67-504, 67-505 and 67-506 (Supp. 2008).**

In the case of an actual demurrer, you are in a bit of a quandary. The client needs both income and correct treatment. This can be solved if the client has third-party health insurance. Refer him to the appropriate doctor, send the denial to his health insurance carrier to get her treatment. Be prepared for a lien from a third-party carrier against whatever proceeds you may obtain later on in the case. Make sure you have sent the two-week demand letter we previously touched on. If you do receive a lien from a third party carrier, you can usually negotiate less than a dollar for dollar compensation. During negotiations, stress the expenses and time your client spent obtaining compensation from the worker's compensation carrier.

Weekly income is trickier. Demand, in writing, that the client receive temporary total. If absolutely necessary, there exist companies which will loan your client bridge money. And although they cannot charge the outrageous fees they once did it is still very expensive money, and I therefore try to steer the client away from this option. If the client has a family, I suggest the client lean on them for support until the case is resolved.

If the client does not have insurance but is in need of treatment, you'll have to find a doctor willing to work on a risky case, hopefully on a contingency basis. This should not be a problem if you have cultivated your relationship with the various primary care doctors and specialists in your area and you have developed your "stable" of physicians, if you forgive the analogy.

If the case is truly contested, then you are up against the clock. Find the evidence which will resolve the issue or issues in your favor. Speed is of the essence. Sometimes, just the act of aggressive discovery by you will prompt the insurance carrier to initiate benefits, or even settle the case, even if it falls short of an ideal settlement, given the case's infirmities.

A couple more pre-MMI problems you may face. Delinquent payment of temporary total by the carrier. This will happen to your client and suddenly you have a scared and or irate client on your phone. Late TTD is usually a result of noncompliance or when the adjuster fails to renew "repetitive pay" or there is a lack of a work excuse.

Noncompliance is a serious issue. The carrier has the right to manage your client's health care. **See S.C. Code 42-15-60.** If the client fails to make his medical appointments, fails to follow the authorized doctor's orders, or is treated by a non-authorized doctor without the consent of the carrier or its representative, he's leaving himself open to a claim of noncompliance, which could result in the carrier suspending the client's benefits for good.

To avoid this, read your client the riot act up front. Impress upon him that medical care is singularly in the province of the workers' compensation carrier.

Repetitive pay problems arise when the adjuster simply fails to renew the payment of the client's temporary total. It's essentially a computer glitch. This is easily remedied by phone call. What is most common, however, is lack of an authorized work excuse either because the doctor has failed to provide one or the client has failed to remit the excuse to his employer or the carrier has failed to receive it from the employer. This is why I take the responsibility for the excuses, taking responsibility for them out of the client's hands. All she needs to do is provide us with the excuses. We will make certain that the carrier has the appropriate excuses ourselves, including making a demand from the authorized physician.

A few more words about pre-MMI problems before we move on to the MMI stage. I want to discuss filing the form 50. **EXHIBIT 5.** This is the initial claim form. Understand upfront it is a process, but even the form 50 can serve as evidence, especially if any statement you, as the attorney make in it contradicts or is inconsistent with later claims. If anything needs be modified, added or subtracted from the 50 you have the right to reform it, but remember, too many modifications will make it look like you're not certain of your case theory, casting doubt on the credibility of you and your client.

Developing a strong case theory from the beginning is therefore essential. But do not stick to a theory contradicted by facts if you cannot otherwise reconcile the facts to the theory. Discovery often turns up new, even contradictory facts which negatively impact your initial theory. Better to modify your 50 rather than proceed with a broken one. And, if you estimate it will take longer than 60 days for your client to reach maximum medical improvement do not file for hearing. Unless you're able to persuade the opposing counsel to continue the case in a consent order you will have to withdraw your 50 if your client has not reached MMI by the hearing date. The good news is that most attorneys are willing to continue the case.

MMI

When your client has plateaued in her treatment, she has reached MMI. She is cured, or, she has reached the point in her treatment where she is as cured and she will be for the foreseeable future. For evidentiary purposes only a qualified doctor can determine her MMI.

Determining MMI can be tricky. If the client says she has not reached MMI, but is visiting the doctor on a sporadic basis just for a follow-up, in my opinion she has reached MMI and you can refer her to an IME doctor for verification she has reached MMI. Some clients, however, will refute the contention that she has reached MMI. This may be a function of their dependence on temporary total. They simply do not want to rock the boat. Explain to client that receiving TTD benefits after she has reached MMI, knowing she or should have known that she has reached MMI can leave a bad taste in the commissioner's mouth and prompt him to look negatively on the rest of the case.

You should have educated your client by this point to know that the law states she is not entitled to receive any more temporary total once she has reached MMI. Explain to her that any payments post MMI will be deducted from her final award at the hearing. Practice tip: if your client has received excess temporary total, try to negotiate a waiver during the settlement phase of the case. I find you stand a good chance of getting one.

As noted, a carrier cannot terminate temporary total after 150 days of the employee's receipt of temporary total without a commission order. The only way to stop temporary total at this point is to have the client consent to termination by signing a form 17. **EXHIBIT 6.**

If the authorized doctor has not placed the client at MMI, it does not necessarily mean she is not at MMI. The opposing counsel or adjuster may have dropped the ball, or even the authorized doctor himself. In this case, proceed and refer your client to your doctor for an independent medical evaluation (IME). Make certain you refer her to the correct doctor, one who is a specialist in particular pathology, and, if possible, board-certified. I have seen cases where one party wins because his doctor was board certified in the opposing party's doctor was not.

Include a cover letter to your doctor explaining and educating him as to your legal and medical theory and what body parts you would like to have examined. Include a detailed medical questionnaire. Exhibit. Remember, doctors are not attorneys and will not necessarily include in the report language vital to your case. For example, doctors do not tend to talk in terms of "proximate" causation, or, to a "reasonable degree of medical certainty".

Moreover, depending on the number and type of injuries you may have to refer your client to several doctors. Do not expect an ophthalmologist to rate a back injury. Another caveat pertaining to brain injury cases. For years attorneys have been able to refer brain injury clients to clinical psychologist. But caselaw regarding this issue is controversial now. See *Potter vs. Spartanburg School District 7*, 716 S.E. 2d 123. The best practice is to retain a neurologist or neurosurgeon for your IME doctor.

One other point about brain injuries and causation. If you're seeking permanent and total disability and a brain injury and is involved you must establish proximate causation between the brain injury and the disability. The brain injury does not have to be the proximate cause of the client's permanent and total disability. However, it must at least be a cause of the disability.

Also, latest case law requires brain injury cases to be severe in origin in order to prevail on a permanent and total theory. See *Michael D. Crisp, Jr. vs. Southco., Inc.*, 738 S.E.2d 835. Therefore in your medical questionnaire ask your doctor if the brain injury can be classified as severe, moderate or mild.

Besides medical doctors, you may need other experts to prove your case depending on your legal and medical theories. The foregoing admonitions apply to other experts, for instance in a permanent and total disability case you'll need the services of a vocational expert as well as a life care planner. Again, educate your experts as to your specific needs, the date of accident, your legal theory and the language she needs to use in her report. Always include a questionnaire to distill the legal pre-requisites and the necessary legal language.

Now is a good time to review the status of your medical records. If you send an incomplete set of medical records to your IME doctor, you're leaving yourself open to attack by the defense with the single argument that, pursuant to the doctor's deposition, his opinion is flawed because he based it on an incomplete set of medical records, especially if the missing record would have had a serious impact on his opinion. Procuring a complete set of medical records is not as easy as it sounds.

Here's a tip. Send a subpoena for all authorized medical records pertaining to your client's case to the OC or the carrier. This must be done prior to referring your client for an IME so the doctor has a complete set of records upon which to base his opinions. If the OC argues that the IME MD had an incomplete set of records, you have your subpoena as evidence that you attempted to secure all the records, and the burden of production has shifted to the employer. I say authorized MDs assuming you should not have any problems with any of your own referrals. But even that is not always the case. It is very difficult to work with a provider who is delinquent in sending you records.

Additionally, do not depend on your client giving you an accurate medical history. Nevertheless, prior to ordering the records meet with your client and review all the doctors he has seen. Have him sign a statement attesting to the completeness of the records in order to protect yourself later on. I refer to this as a verification letter. **EXHIBIT 6.**

With all the records and experts and statements and theories floating around, now it is a good time to start talking about alignment. Take a hard look at your case at this point. Do the client's symptoms and complaints synchronize with the body parts claimed? Do they synchronize with the diagnoses? Do diagnoses synchronize with the treatment? Do diagnoses synchronize with the degree of impairment and the mechanism of injury – for instance a high rating accompanying low impact MVA may not make sense. Does the pain level you client claims synchronize with the prescriptions?

A claimed pain level of eight accompanied by prescription for Tylenol may not hold water. Is the client's injury an aggravation of a pre-existing condition, a new traumatic injury, a repetitive injury, or is it an occupational disease? And if so does the client's medical history bear this out? Combing inconsistencies from all the various elements including the client's statements as well as his adopted ones (i.e. from statements made in the pleadings) is a defense attorney's bread-and-butter. Inconsistencies in statement, but even more compelling, inconsistencies in action. Pay close attention to your client's *actus reus*.

Rarely will you have a perfectly aligned case, especially when you factor in the complexity of medicine any atypicality of symptoms. Not to mention disagreements among the experts.

Allow me to illustrate. I had a recent case where my medical theory was straightforward. My client had tripped and fallen at work injuring his cervical spine. A year before we had clinched a different case, same client, involving injury to his lumbar spine with complaints regarding his cervical spine. However, despite his cervical complaints from before no doctor diagnosed him with a cervical pathology. Rather, the cervical pain resulted from *referred* pain from the thoracic injury. Was his new cervical injury new or an aggravation of his previous thoracic pathology? And would a doctor necessarily make the distinction in his examination? Would the law make the distinction considering the spine is listed as only one body part? It is incumbent upon you the lawyer to ask these and related questions in your medical questionnaire and elsewhere.

Questioning. Questioning. Questioning. This is the essence of good legal practice.

In another, unrelated case, a former client of mine complained of cervical pain and upon examination it was discovered this cervical pain was a product of a lumbar pathology. Therefore, you can understand the

necessity of developing your preliminary case theory early and having an open and flexible mind to modify your legal and medical theories upon discovery of new evidence.

You can see how quickly the process can become complex. And the more evidence you have, in the form of a witnesses and expert witnesses the more complex it becomes-- the more likely you will have to face inconsistencies, contradictions and omissions.

EVIDENCE

Evidence in Worker's Compensation cases is not governed by the South Carolina Rules of Evidence. See *Hamilton vs, Bob Bennett Ford 518 S,E,2d 599*. In fact, the Commissioner may accept or ignore evidence, give it whatever weight she sees fit, as long as no abuse of discretion exists, a catch all term which legally bars the admissability of some evidence; in other words, she is given wide discretion. If you find yourself in a hearing place your objections on record nevertheless. Most Commissioners are reasonable and will give due weight to your evidentiary arguments, and you always want to preserve your objections on record. Just make sure your objection is for the correct reason. As far as medical experts are concerned, the law requires medical opinions from licensed medical doctors. However the doctors do not need to be specialists the field or board certified. Nevertheless, it still is a good practice for your IME doctor to bear board certified credentials to counter any credibility attacks by opposing counsel. By the same token, argue that the authorized doctor is neither a specialist nor board certified in the area of medicine under consideration if that is the case.

Procedurally, file a for hearing as soon as your client has reached maximum medical improvement. The prospect of a hearing is one of your great leverage points in this process. The deadline gets lawyers and adjusters moving to make their case and hopefully begin negotiations in earnest to spare the expense and potential exposure of a hearing.

Get your medical ducks in a row. Hearing dates usually take from 60 to 120 days to get scheduled depending on how backed up the docket is. As far as your witnesses are concerned, get them into your office to review their testimony and prepare them for depositions by opposing counsel if you have not already done so. **EXHIBIT 7**. Unfortunately, you will not necessarily know all the witnesses opposing counsel will use until she files her brief. By that time the hearing is imminent and you may not have time to depose all opposing witnesses, especially the doctors. In that case, you must either withdraw your 50, or better, enter a consent agreement with opposing counsel to continue the case. But take care, you can only withdraw your form 50 once.

One note about previous existing ratings to the same body part. If an employee receives an impairment rating in a previous accident with the same employer, and injures in a subsequent accident, then the rating you receive will be reduced by the rating he received in the previous case. **See S.C. Code Ann. Sec. 42-9-170.** The same credit appears to exist if the employee has a previous impairment to a body part that did not result from an on-the-job accident. *See Schwartz v. Vernon-Woodbury Mills, 33 S.E. 2d 517 and Hopper v. Firestone Stores, 72 S.E.2d 71.* Different rules apply if the employer is different.

LEGAL THEORIES

Now to get to the specific legal theories.

By this point your legal, medical, and factual theory should be well-developed. Remember, begin working on your theory as soon as the client retains you. As we have seen, some theories are apparent some not so much.

Permanent partial disability benefits for scheduled members are governed by **S.C.Code Ann. 42-9-30.** In a nutshell, it states that, unless another statute applies, or you apply a loss of earning capacity theory, if an employee injures himself out of and in the course of his employment, he may receive benefits based on a schedule of body parts delineating the number of weeks of compensation total loss of that body part engenders. For instance, total loss of use of the shoulder garners 300 weeks of compensation. If only one body part is involved, the law requires a scheduled analysis. *See Singleton v. Young Lumber Company, 114 S.E. 2d 145.*

Typically, when an injured employee reaches maximum medical improvement after the claim is admitted, the authorized physician rates the injured body part according to the AMA Guide to Permanent Impairment Ratings. These days, this is noted on a form 14 B along with an opinion from the authorized doctor as to whether the employee can return to work, modified duty, or full duty, and what future medications and or treatment the employee may need. **EXHIBIT 8.**

As noted, claimant's counsel should refer his client to an independent medical examiner who should document her opinion about the aforesaid issues.

If the client has suffered injury to two or more body parts, including psychological injury, she may be entitled to benefits under the permanent and total disability statute. *See Lee v. Harborside Caf , 564 S.E.2d 354.* In addition to the two body parts, you must present evidence that the client is unable to return to work, via a doctor's note or opinion, or answer to a medical query, along with the vocational report stating he is permanently and totally disabled and that "no reasonable market for her services exist". *See*

Colvin v. E.I Dupont Denemours Companyy, 88 S.E.2d 581. In this case the client is entitled to 500 weeks of compensation plus future medical care. You should also have evidence of what kind and the cost of the future medical care your client will need through the services of a life care planner and her written opinion.

The 500 weeks will be reduced by the number of weeks your client received temporary total. If your client wishes to be paid in a lump sum note it on your form 58 which accompanies your hearing brief. The remaining weeks will be discounted to present value using a 2% discount rate.

If the client has a large compensation rate you may want to consider benefits under the loss of earning capacity statute found at **S.C. Code Ann. Sec. 42-9-20.**

Here, the client may receive 300 weeks of a portion of his reduced average weekly wage based on vocational and medical evidence of a loss of earning capacity due to his work related injury.

Moreover your client may receive lifetime benefits for brain damage, both arms or legs at **S.C. Code Ann. Sec. 42-9-10 (C).**

The best legal theory for your case maximizes damages – past and future. It is of course case specific. Consider all your options and run all the numbers before deciding.

NEGOTIATIONS

I have always found it helpful to have filed for a hearing before beginning negotiations. Hearings are a natural point of leverage. Carriers do not want the added expenses or exposure of a hearing and defense attorneys, by and large would rather settle than face a big loss. So get those claimed filed for a hearing as soon as your client has reached MMI.

Now, whatever legal theory you choose to proceed with, when you're demanding an initial figure to settle the case anchor high. That is, make your initial offer high, but still within the realm of reason. If you begin negotiations with too high a figure, your opponent will not take you seriously at best and will not engage in serious negotiations with you at worst.

Know what your “scream point” is, that is, the least amount your client is willing to settle for her case short of litigation, either on a form 16 or clincher. Consider whether or not you're closing just the indemnity portion of your claim i.e. disability only, or disability plus residuals, i.e., future medical care included.

If you reduce your position, reduce it by small increments. Remember it's easy to go down, but it's difficult to go back up. Also, studies have shown that, psychologically, people do not differ in their feeling an obligation to reciprocate an effort to compromise whether that effort is a small or a large departure from the previous position. The very act of compromise creates in your opponent the need to reciprocate.

And have your arguments at hand as to why your client should receive what you're demanding, especially your points of leverage. Attack the weakest points of the OC's case. Lay siege to these to keep your price up. Put the other side's feet to the fire as to why the price should be reduced. Moreover, the longer you're involved in negotiation the more likely you will settle as both parties feel that they have invested a significant amount of time and energy to get to where they are. Most people will sit through a bad movie instead of bailing out because they do not want to have wasted their time. Another psychological point -- people fear loss more than they desire gain. I have found this a powerful and reliable tool, especially in negotiation with your own client who is proving unreasonably intractable and is in danger of harming their own interests. You are there to protect the client, even from the client himself. To use a paternalistic metaphor – you would not let your child play in traffic.

A word about medicine. Worker's compensation is a branch of personal injury law. And personal injury law necessarily concerns itself with medical issues. As a personal injury lawyer you must familiarize yourself with the gross structures of the human body as well as the nature of the various pathologies which can afflict it. Each case you have is a potential learning opportunity regarding medicine. Take advantage of this. Keep a medical folder containing your research about the various maladies you encounter, its symptoms, the nature the malady, and the treatment protocols involved. Especially the rare cases. I felt guilty about using Wikipedia to research diagnoses I was unfamiliar with, until I read an article claiming that 90%of doctors use Wikipedia and their practice for just the same purpose.

Wikipedia is one option. Of course there are many others and many fine publications that are legally oriented that help the lawyer understand medical issues. Understanding medical issues is paramount ***because diagnosis is the lens through which you develop the other theories of your case legal, medical, and factual.***

For example, is the mechanism of the injury in line with the diagnosis. I worked with the attorney at one point who insisted that one his female clients suffered from a cervix strain. I was puzzled never having heard that condition before until I looked at the records myself and discovered she was suffering from a cervical strain. Your credibility as lawyers will depend largely on your understanding medical issues, especially when it comes to steering your client's towards the correct medical attention, treatment and

tests for your client. Without supplanting the doctor's role, ask hard questions of all the doctor's concerning their management of the case. Doctors err as we all do.

DEFENSES

I have touched on a few defenses thus far, especially about maintaining the cohesion of your case. I would like to say a few words about intoxication and fraud in the application before I leave you.

In an intoxication defense, the opposing party will claim that your client was under the influence of drugs and alcohol which constituted the proximate cause of his injury. In the years I have been in practice I have never seen this defense prevail. The defense must prove that the employee was intoxicated at the time of the injury. It will largely depend on a toxicology report where the employee registers "hot" for one or more drugs or alcohol. But unless they can show the employee was intoxicated ***at the time of the accident***, the defense will fail. Specifically, toxicology tests for metabolite -- chemicals in a person's blood as a byproduct of the drug. Because marijuana is fat soluble, it can stay in the body for up to a month after exposure. Cocaine and cocaine derivatives are not fat soluble and leave the body sooner through urine, say 24-48 hours.

Fraud in the application exists when the employee lies in his application for employment about his health, medical conditions and any prior injuries. *See Cooper v. McDevitt & Street Company, 196 S.E.2d. 833 (1973)*. However, this defense requires that the employee lie about the health of the particular body part involved before it prevails. Again, I have seen very few of the defenses actually work, much less than the instances where the employee has failed to comply with the employer's managed health care provisions.

In conclusion, Develop of good case theory, build a plan of attack, align your evidence if possible, concede points you will lose, communicate and educate your client and staff on your legal and factual theories, attack your opponent's weakest points, be smart in negotiations and you will have served your client well.

**Litigation Techniques for the
Difficult Workers' Compensation Case**

Submitted by Matthew W. Jackson

Litigation Techniques for the Difficult Workers' Compensation Case

Matt Jackson, Esq.

Preparation of the Injured Employee's Case

Most of the preparation is in the ground work that is done prior to any litigation taking place. The main driver of a workers' compensation claim is the medical treatment and the records that are generated as a result of the same. Once you have gathered the initial medical records, set up a meeting with your client to go over the same. Ask your client what problems he or she is having as a result of their work accident. There can be physical and psychological issues.

Often the focus is on the main injury, but there may be other injuries that need to be addressed. Be diligent in pushing treatment for injuries and issues that are not getting the proper attention. If the carrier refuses to address an issue that your client believes is related to the work accident, have the issue addressed by utilizing the client's health insurance. Make sure that the client knows to have the issue documented as being related to the work accident. If the client has no health insurance (and most should under the ACA), then consider an IME.

Educate yourself on medical issues. Meetings with treating physicians are vital to case development. When you find that an issue is seemingly being ignored or you have a medical issue that is complex, set up a meeting with the authorized treating physician to

discuss the same. Often, if you have a credible client, they will be helpful to developing the medical aspect of the claim. When you have these conferences, let the doctor educate you to the fullest extent they can on the issue. This will translate in not only helping you with the case at hand, but will help with future cases where you may encounter the same issues.

Prepare your client for their deposition. Have the client review the medical records that have been produced during the investigation/discovery phase of the case. They should have familiarity with their records. You have to help them with this. You must go through the records and identify issues that could cause problems with their case and help them understand the same so that they can give truthful answers in a deposition. They may have had treatment in the past for body parts that were injured in your work accident claim. They should be able to speak about the same and explain the treatment they had and how they recovered from the same, as well as, how their current problems may differ from problems they have treated for in the past. Run a SLED check. This will allow you and your client to know if they have any criminal record, as this will inevitably be asked in a deposition. It doesn't matter except for impeachment purposes, so let your client know the same.

Consider taking a 30(b)(6) employer representative deposition. This will help you discover what type of employee your client was (at least how the employer perceived them to be). It may also lead to other useful information at a hearing.

The hearing phase can be divided up into presentation of evidence, preparation of the client for testimony, and preparation of any witnesses you may use. In presenting evidence, it is

best to only submit things to the Commissioner that are pertinent to making your case. Do not use a kitchen sink approach to submission of APAs. There are times when only a few pages are needed. If you are pleading wage loss or permanent disability you must have a vocational evaluation. If you are pleading a medical issue, you must have the opinion of a qualified physician, stated to a reasonable degree of medical certainty. If you have been diligent in laying the ground work, you will have these ready when the time comes for them. Consider writing an addendum to your Form 58. Use this to point to the theory of your case as it is found in the APAs.

When preparing your client, make sure they are familiar with their deposition testimony. Go over any discrepancies in their deposition testimony and the APAs. Cross-examine them in your office so that they are familiar with the issues and are not experiencing cross-examination techniques for the first time. Do not over prepare your client. Their testimony must be natural. It must be honest. Giving them an idea of what they will encounter without making it scripted is ideal. Let your client tell his or her story in their own words.

Witness preparation should involve educating a witness on why they are being called. Let them tell their story in their own words.

Preparation of the Employer's Case

I don't prepare employer's cases and never have. However, it is a good idea to attempt to prepare the employer's case first in an effort to better prepare your case. Think about how you would defend the case. This will help you spot weaknesses in your client's case and be prepared to deal with them.

All defense attorneys are going to get an ISO claims check on your client. Explain what that is to your client before a deposition or a hearing. All defense attorneys are going to do a criminal background check on your client. Explain this to your client and its importance to establishing their credibility. Assume the defense knows everything about your client and go from there in preparing your case.

Presenting Evidence in the Workers' Compensation Case

Do not play hide the ball with the other side. As you get IMEs, Voc Evals, and other expert opinions in, share them with the other side as soon as possible. There should be no smoking guns. This will allow counsel for the defense to prepare their client appropriately to try to resolve the claim short of litigation.

Keep your APAs concise and to the point. Everything in your APAs should speak to your theory of the case. Make sure they are in the order the Commissioner you are appearing in front of wants. Use an addendum to your Form 58.

Settlement Strategies

In any complex workers' compensation case, the mandatory mediation regulations are typically applicable. You will be mediating. This is the best settlement strategy you can have, get the case to mediation. Have your case prepared to go to trial before you mediate. Have all of your expert opinions in the hands of both defense counsel and the mediator in advance of the mediation. This will allow everyone to be prepared to mediate.

Prepare your client for mediation. Set aside at least one hour to meet with your client the day before mediation to go over the strengths and weaknesses in their case. Show them how cases are valued under the Workers' Compensation Act. Use a dry erase board to show the value of the ratings, the value of permanent and total disability or wage loss, and the value of a lifetime benefits case, if appropriate. Tell them where the weaknesses are and how they might affect the outcome. Explain MSAs if appropriate. Explain future medical rights and potential ways that they can be resolved. Educate your client on all aspects of the settlement process and the potential types of settlements they might reach. The more the mediator reiterates things you have said to your client while preparing them, the more likely you will have a successful mediation. It's all in the preparation.

ADA and the Injured Worker

At times when clinching a claim, the employer may ask your client to resign and release any claim they may have under the Americans with Disabilities Act. This decision must be made on a case by case basis. This topic is extremely complex. For an overview visit - <http://www.eeoc.gov/policy/docs/workcomp.html>.

Family and Medical Leave Act

This Act allows an employee 12 weeks per year of unpaid leave. The employer must maintain the employee's job, or a similar job for similar pay. It doesn't have to be used in consecutive days. It originated during the Clinton administration as a tool for pregnant women to keep their jobs while they were out on maternity leave. It is not unwise to use it in certain workers' compensation claims. It is a case by case decision. There usually are no

“cookie cutter” answers in workers’ compensation cases. Time and experience are the best teachers.

Medicare Set-Asides in Workers' Compensation

Submitted by Matthew S. Brown

MEDICARE SET-ASIDES IN WORKERS' COMPENSATION

A. The Medicare Secondary Payer Statute

Medicare was established in 1965 to pay medical expenses for certain qualified individuals. In order to qualify for Medicare benefits, the individual must be:

- a) 65 years or older; or
- b) On Social Security Disability for at least 24 months; or
- c) Suffering from End Stage Renal Disease.

The Medicare Secondary Payer Act (MSP), codified at 42 U.S.C. §1395y(b), is a collection of statutory provisions created by the Omnibus Reconciliation Act (ORA) of 1980 that amended the Social Security Act to make Medicare the “secondary” payer where a “primary” plan exists. There have been several amendments to the MSP over the years (1982, 1984, 1985, 1986, 1989, 2003). The goal of the MSP, was to mitigate increasing healthcare costs imposed on the Medicare system and to prevent the shifting of financial responsibility from the primary payer (carrier) to Medicare.

The MSP essentially inverted the system, shifting responsibility onto private insurers, requiring Medicare beneficiaries to exhaust all available private insurance coverage before resorting to their Medicare coverage.¹ As such, private insurers covering the same treatment have become “primary” payers, leaving Medicare as the “secondary” payer.²

According to the MSP, Medicare will not pay for services to the extent that payment has been made or can reasonably be expected to be made by:

- a) Workers' compensation
- b) Liability carrier
- c) No-Fault carrier
- d) Automobile
- e) Self-insureds³

MSP has a dual role in WC settlements: past and future medicals. For past medicals, there is a subrogation interest to recover conditional payments or payments made in error. Additionally, future medicals need to be identified for workers' compensation-related, Medicare-covered services. If the Centers for Medicare and Medicaid Services (CMS) determines that a party has failed to make primary payment for medical services, or has failed to submit reimbursement to CMS for Medicare's payment, CMS has the authority to recoup payment from the rightful primary payer and pursue double damages against the WC carrier.⁴ Further, CMS may (1) Ignore the terms of a workers' compensation settlement, (2) Revoke a Claimant's right

¹ Bio-Medical Applications of Tenn., Inc. v. Cent. States Southeast, 656 F.3d 277, 278 (6th Cir. 2011).

² Id.

³ 42 U.S.C. 1395y(b)(2)(A)(ii).

⁴ 42 U.S.C. 1395y(b)(2)(A)(ii).

to Medicare coverage, or (3) the Office of General Counsel may make a demand or sue the attorneys involved in the settlement.⁵

However, the MSP was not particularly enforced initially and Medicare continued to pay expenses that were the responsibility of the primary plan. A study by the Government Accounting Office showed that between 1991 and 1998, the federal government paid almost \$40 Billion dollars for medical care in WC cases where Medicare was the secondary payer.⁶ As a result, CMS published multiple policy memoranda regarding: enforcement of the MSP; claims MSP impacts; types of claims CMS must review; the creation of the WCMSA; and penalties for failure to comply.

Compliance with MSP in WC requires dealing with two major issues: 1) Conditional Payment discovery and mitigation; and 2) Medicare Set-Aside's.

Conditional payments must be accounted for prior to any claim resolution. A "conditional payment" allows a Medicare beneficiary to receive timely medical treatment while awaiting payment from the primary payer. It further allows a medical provider to receive payments in a timely manner for services provided to a Medicare beneficiary. Medicare is entitled to recovery pursuant to 42 CFR 411.47. This "super lien" takes precedent over all other liens and anyone else involved.

It is important to determine if the Claimant is a Medicare beneficiary. If the claimant is a beneficiary, you should identify any conditional payments and then negotiate those claims. Medicare's Secondary Payer Recovery will indicate whether there are claims or provide a summary of claims paid which are subject to reimbursement. Additionally, the right to seek reimbursement does not require a finding of liability. According to 42 U.S.C. 1395y(b)(2)(B)(ii), the responsibility of the primary plan can be evidenced by Judgment or payment conditioned upon compromise, waiver, or release, even if there has not been a determination of liability.

B. When is Approval Required – CMS Published Thresholds

There are no statutory or regulatory provisions requiring a Medicare Set-Aside Agreement be submitted to CMS for review or approval. But, it is good practice to submit them anyway.

Should you submit the MSA to CMS for review, please note that CMS will only review MSA's when the following criteria are met:

- A) Claimant is currently a Medicare beneficiary and total settlement value is greater than \$25,000.
- B) Claimant has a "reasonable expectation" of Medicare enrollment within 30 months of settlement date and the anticipated total settlement amount is expected to be greater than \$250,000.00

⁵ U.S. v. Harris, No. 5:08CV102, 2009 U.S. Dist. LEXIS 23956 (N.D. W. Va. March 26, 2009), aff'd U.S. v. Harris, No. 09-1485, 2009 U.S. App. LEXIS 23394 (4th Cir. W. Va., Oct. 23, 2009).

⁶ 166 N.J.L.J. 501 (Nov. 5, 2001).

When determining whether threshold criteria are met for CMS review, you must first determine Claimant's status as a qualified individual. Claimant is a Class I qualified person if Claimant is (1) a Medicare beneficiary; (2) is aged 65 or older and is therefore eligible to receive Medicare, (3) has been receiving Social Security Disability benefits for 24 months or longer, or (4) meets the Medicare eligibility requirements for End Stage Renal Disease.⁷

Claimant is a Class II qualified individual if he has a "reasonable expectation" of becoming a Medicare beneficiary within 30 months of the settlement date, where a Claimant has a "reasonable expectation" if (1) aged 62.5 or older; (2) has applied for SSDI; (3) is denied SSDI but is anticipating appeal; (4) is appealing an SSDI denial; (5) has been diagnosed with End Stage Renal Disease but does not yet qualify for Medicare.⁸ If the Claimant meets any of the above criteria, you should put Medicare on notice. If the Claimant does not meet any of the above criteria, then simply make a note in your case file with the reasons why the Claimant does not qualify.

However, if the Claimant meets the above criteria, you are required to protect Medicare's interests. As to CMS review and approval of the MSA's (for Class I qualified individuals with total settlement values greater than \$25,000.00, or \$250,000.00 for Class II qualified individuals,⁹) the total settlement amount can include, but is not limited to, wages, attorneys' fees, all future medical expenses, repayment of any conditional payments, and any previously settled portion of the WC claim.

If a settlement closes or limits future medicals and the conditions for 1 or 2 above are met, the MSP must be considered and the case should be submitted to CMS for approval. However, if a settlement closes or limits future medicals and does not meet 1 or 2, above, the MSP must still be considered but the case need not be submitted to CMS for approval.

Future medical exposure can be addressed in 2 ways when the CMS review thresholds are met: 1) "Zero Allocation" MSA approved by CMS or 2) Medicare Set-Aside arrangement approved by CMS.

A "Zero Allocation" MSA does not mean the parties allocate no money and settle the claim without CMS approval. The theory here is that the WC carrier is not the primary payer, and, as such, is not responsible for any future medical treatment. For example, there are some pure legal arguments that can be made to CMS, including statute of limitations defenses, apportionment, causal relationship, notice, course and scope of employment, jurisdiction and third-party subrogation. Essentially, the argument is that there is no shifting of responsibility to Medicare and no money should be allocated to Medicare. However, these disputed claims still must be approved by CMS (i.e. submission package must be prepared and submitted to the CMS regional office and the submission package must comply with all CMS requirements). Only upon receipt of written approval from CMS may the case be resolved.

⁷ Centers for Medicare and Medicaid Services, <http://www.cms.gov/medicare/Coordination-of-Benefits/WorkersCompAgencyServices/wcsetaside.html>.

⁸ Id.

⁹ Id.

Medicare Set-Aside arrangements should be used for compensable claims that close future medicals for either Class 1, or Class 2 (above) or specified Class 3 cases. These MSA's have 3 components: I) Allocation amount; II) Method of Funding; and (III) Method of Administration.

Allocation amount consists of the amount of settlement proceeds to be set aside at the time of settlement for future injury-related expenses and future injury-related prescription drug costs. Unfortunately, there is not much guidance as to how CMS wants the prescription drug expenses calculated. Considerations for "Method of Funding" include whether the settlement funds are paid in a lump sum or in an annuity. If lump sum, the entire amount of the MSA allocation is paid into an account at the time of settlement. Medicare will not pay for injury-related medical care until the entire sum is exhausted. Any unused portion of the MSA falls to the estate of the Claimant. Once that lump sum is depleted, Medicare becomes the primary payer from then on. Under the annuity method, the initial, annual and/or periodic payments are made into the Claimant's account. The annuity structure needs CMS approval. Medicare will become primary payer during any year in which the MSA account becomes properly exhausted until such time the next annual payment is made. If an annuity is utilized, Medicare is only the primary payer until more funds are put into the annuity account at each designated time.

The regulations do not set forth what type of administration method should be utilized. The annuity can either be self-administered or professionally administered. However, professional administration is mandatory with legally incompetent Claimants and provides an opportunity for recovery of MSA expenses if not exhausted. Additionally, professional administration cannot be paid out of the MSA funds.

C. Why Obtain Approval from CMS

Simple answer: To protect yourself. The law only requires that you "consider Medicare's interest. There is no requirement to obtain CMS approval.

But, the law allows Medicare to come after the claimant/attorneys/employers/carriers. So, if you want to insulate yourself as fully as possible against the federal government coming after you, submit the MSA to CMS for approval.

D. What if a Case Doesn't Meet Medicare's Threshold Amounts

Even if the case does not meet the threshold amounts for CMS review of the MSA, you still have to protect Medicare's interest. Why? Because the law says so.

So, consider still preparing an MSA. You can:

- 1) Get MSA
- 2) Look at what has been paid in medical treatment/prescriptions thus far.

- 3) Look at what additional medical treatment the physician recommends
- 4) Claimant's life expectancy

Even if a case does not meet the above threshold requirements for CMS review, Medicare's interests must always be considered in WC cases and ensure Medicare pays secondary in such cases.

If a WC settlement does not meet the review thresholds, there is no "verification letter" indicating the review criteria have not been met, or indicating that an MSA is unnecessary. CMS will honor the threshold in effect at the time of settlement.

E. Allocating Settlement Funds When a Settlement Does Not Meet the Threshold Amounts

Even when a carrier believes it is not the primary payer, Medicare's interests still must be considered. You can have a \$0.00 MSA. It is always a good idea, and it is strongly suggested, to seek CMS approval with disputed cases that settle if the Claimant is Class I or Class II and the settlement amount is over the thresholds.

F. Use of Rated Age in an MSA

A rated age (RA) is an actuarial estimate of the effects of medical issues of a potential annuity recipient combined with financial market information. All medical issues should be considered; not just WC-related. RA's are usually provided by a life insurance company. It is more of an art than an exact science. The median rated age is used when there are more than one RA submitted. A claimant's underlying medical conditions that do not respond to therapy (pain, depression) are not included in the analysis.

Rated ages are a function of calculating life expectancy and their use in MSA's is optional. For all cases after 10/1/08, the submitter must supply a statement that all rated ages obtained on the Claimant have been included. ("Our organization certifies that all rated ages we have obtained/and or have knowledge of regarding this claimant, and generated at any time on or after the Date of Incident for the alleged accident/illness/injury/incident at issue, have been included as part of this submission of a proposed amount for a Workers' Compensation Medicare Set Aside Arrangement to the Centers for Medicare and Medicaid Services.") If this statement is missing, the WCRC will use actual age in estimating Claimant's life expectancy.

If an RA is used, there must be acceptable proof of the RA. The RA must name the Claimant, must be by an insurance company on insurance company (or settlement broker) letterhead, must be independent, and must give a specific rated age or life expectancy. If there is not at least one RA that meets these criteria, the actual age will be used in processing the submission.

G. Use of Annuity for MSA Funding

MSA annuities are tax free. Most are life contingent and payment stops when the claimant dies. The payee in an MSA is either the MSA account or the custodian/trustee. Upon the Claimant's death, the estate is the beneficiary of any remaining payments. But, those payments are first payable to the MSA. CMS has subrogation rights to all assets of the MSA, including guaranteed payments.

There are 2 types of annuities: 1) Lifetime annuities, commonly called "life only" and payments cease at Claimant's death. 2) Temporary Life: Payments terminate at death or pre-determined date (years specified by CMS). In order to determine which one to use, look for the lowest cost to the carrier and highest benefit to the claimant. Additionally, there are no requirements for cost-of-living adjustments.

H. Terms of the MSA Account

I. Administration of an MSA Account

Professional Administration: A professional administrator is responsible for ensuring ongoing compliance with the MSA Allocation, the Settlement Agreement and CMS guidelines relating to the MSA after the settlement process is complete. The most common is the MSCA-custodial account.

Basic Duties: Process and pay medical bills for life of Claimant or until funds are depleted; follow applicable settlement, MSA, State WC, and CMS guidelines; provide reporting and filing's required for maintaining settlement's compliance with CMS and MSA guidelines; handle disbursement of funds to beneficiary of account upon Claimant's death.

Professional administration is required when there is a designated representative payee, appointed guardian/conservator, or the payee is declared incompetent by a court, or a reversionary interest back to the carrier.

Professional administration is recommended where Claimant's education level/functional level/social support level is low; large future medical settlement, settlement includes medical treatment NOT covered by Medicare (chiropractor).

Funds for an MSA must be in a separate account from all other funds. The account must be interest-bearing. Fees for administration cannot come from that account. However, banking fees, postage and copy fees can come from the account.

Make sure you settle by the WC fee schedule because costs will be cheaper.

Self-Administration: There are support services available to assist a Claimant to remain in compliance when there is not a Professional Administrator involved.

J. Medicare's Enforcement Rights

Penalties can be imposed on any entity responsible for primary payment.¹⁰ The government can file suit against any or all entities responsible for payment with respect to the same item or service under a primary policy or plan.¹¹ Any of these entities are subject to a multitude of penalties, including interest charged to the responsible party on the amount of the reimbursement from the date of notice of payments made by Medicare until reimbursement is made.¹²

Additionally, CMS may also seek damages against any entity that received payment from a primary plan or from the proceeds of a primary plan's payment to any entity.¹³ These "entities" can include a beneficiary, provider, supplier, physician, attorney, state agency, or private insurer that has received a primary payment.¹⁴

The MSP provides for a cause of action to collect double damages against a primary payer.¹⁵ The double damages statute serves two purposes, theoretically: deterring and punishing the disfavored conduct of shifting costs from private insurers to Medicare and incentivizing healthcare providers to support and defend Medicare's interests.¹⁶

The government also has a right to recovery against an attorney handling a claim. If a beneficiary and his attorney receive a third party settlement payment, the government has an independent right of recovery for reimbursement within 60 days of receipt of the settlement proceeds. Moreover, there have been several instances where the courts have held attorneys individually liable to Medicare for reimbursement, plus interest on the total amount of reimbursement in cases where the attorney has settled a third party claim and failed to reimburse Medicare. In these cases, the attorney is deemed a "recipient" of payment owed to the Government and, therefore, must reimburse Medicare.

¹⁰ 42 U.S.C. § 1395(y)(b)(2)(B)(iii); Cox v. Shalala, 112 F.3d 151, 154 (4th Cir. 1997).

¹¹ *Id.*

¹² 42 U.S.C. § 1395(y)(b)(2)(B)(ii).

¹³ 42 U.S.C. § 1395(y)(b)(2)(B)(iii).

¹⁴ 42 C.F.R. § 411.24(g) (2012).

¹⁵ 42 U.S.C. § 1395(y)(b)(2)(B)(iii).

¹⁶ Bio-medical Applications of Tenn., Inc., 656 F.3d at 279.

**Medical Issues and Their Role in the Complex
Workers' Compensation Claim**

Submitted by Brian P. McElreath and Vincent C. Northcutt

Medical Issues and Their Role in the Complex Workers' Compensation Claim

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Types of Medical Issues

1. Physical Brain Damage/Traumatic Brain Injury
2. Psychiatric and Mental Injuries
3. Occupational Stress Claims
 - a) Establishing Stress Claims
 - b) Proving Compensability
 - c) Benefits Available for Stress Claims
4. Work-Related Aggravations of Pre-Existing Conditions
5. Repetitive Trauma, Occupational Disease and Related Injuries
6. Vocational Rehabilitation
 - a) Impact of Injury Upon the Worker and “Suitable Gainful Employment”
 - b) Effective Tools for Dealing with Injured Workers
 - c) Cost-Effective Rehabilitation
 - d) The Role of Physical Therapy

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Physical Brain Damage / Traumatic Brain Injury

- In the 1997 case of *Pearson v. J.P.S. Converter & Indus. Corp.*, the Court of Appeals held that an injured worker did not have to show serious brain injury to qualify for lifetime benefits.
- In the two important 2013 cases that we are about to discuss the Supreme Court provided clarification as to what "physical brain damage" under § 42-9-10(C) encompasses. The Court noted that the intent of the General Assembly was to require a "severe, permanent impairment of normal brain function in order for an injured worker to be deemed physically brain damaged..." The Court acknowledged that objective testing may not always prove or disprove "physical brain damage." Importantly, the Court clarified that a concussion, by itself, suffered during a compensable injury is not enough to rise to the level of physical brain damage under § 42-9-10(C).

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Crisp v. SouthCo., Inc. (S.C. 2013) & Sparks v. Palmetto Hardwood, Inc. (S.C. 2013)

- Issued on the same date by the Supreme Court of South Carolina.
- Significantly clarified (and arguably increased) the burden of proof a Claimant must satisfy in order to establish his/her entitlement to lifetime disability benefits secondary to an alleged physical brain injury.
- The Court emphasized the distinction between an injury to the brain and (presumably permanent) physical brain damage.
- In order for lifetime disability benefits to be awarded, the Commission must find the Claimant sustained "severe and permanent physical brain damage."

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Psychiatric and Mental Injuries

- S.C. Code Ann. §42-1-160(B) provides that: "[s]tress, mental injuries, and mental illness arising out of and in the course of employment unaccompanied by physical injury and resulting in mental illness or injury are not considered a personal injury unless the employee establishes, by a preponderance of the evidence [the] employee's employment conditions causing the [mental injury] were extraordinary and unusual in comparison to the normal conditions of the particular employment."

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Psychiatric and Mental Injuries (cont'd)

- No matter where the case may arise, a general consideration in these instances is whether there is a causal relationship between the work-related stressor and the employee's claimed injuries.
- In cases in which pre-existing psychiatric disorders are present, establishing a causal relationship may be particularly difficult.
- *Doe v. South Carolina Dept. of Disabilities*, however, makes it clear that the presence of pre-existing psychiatric conditions and concurrent social stressors is not necessarily fatal to workers' compensation claims, but that expert testimony establishing a causal nexus between the employment stressor and the claimed mental injuries is essential for a claimant to prevail.

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Jane Doe v. South Carolina Department of Disabilities and Special Needs(S.C. 2008)

- Jane doe, a licensed practical nurse for SC Dept. of Disabilities and Special Needs, was working with a unit that previously treated a passive patient population, but then changed to treating a mixed group of passive and aggressive patients.
- The number of incidents in the unit increased from 11 to 128 and Jane Doe suffered numerous physical injuries including having feces smeared in her face.
- She began to complain of depression the following spring.
- The Supreme Court noted that mental and nervous disorders are compensable if the related stressors arise from unusual or extraordinary conditions of employment.
- Supreme Court reversed the denial of benefits after pointing out that pre-existing depression does not preclude workers' compensation benefits for mental injury.

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Psychiatric and Mental Injuries (cont'd)

- South Carolina is aligned with the majority of the 24 states that require a *heightened scrutiny* mental stress injuries.
- Despite the fact that South Carolina has a heightened standard for mental stress injuries, the South Carolina Workers' Compensation system clearly acknowledges and provides for the fact that "mental/mental" injuries exist and can be compensable.
- However, not only a mental injury, but also an aggravation of a mental illness or condition can also become compensable work injuries as well.
 - **Examples:** Anxiety, depression, PTSD, and aggravations could include ADD, phobias, alcoholism, etc.
 - *S.C. Code Ann. §42-1-160 and §42-9-35*

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Martinez v. Spartanburg County (S.C. 2014)

- Claimant was a forensic investigator with the county sheriff's office. After doing a forensic investigation involving a former coworker from the sheriff's department who accidentally ran over and killed his own child, the claimant filed a claim for mental injuries as a result of having to investigate the child's death.
- Under the WCA, mental or nervous disorders are compensable only if the stressors are incident to or arise from "unusual or extraordinary" circumstances of employment.
- Both the Single Commissioner and the Appellate Panel of the WCC found claim not to be compensable.
- Claimant appealed to circuit court which reversed and remanded the case. Respondents appealed to the Court of Appeals which then reversed the Circuit Court, finding the injury noncompensable.
- Supreme Court, under Bone, held that the Circuit Court's order which reversed a decision of the Worker's Compensation Commission and remanded the case for further proceedings was not a final judgment for purposes of appeal.

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Bentley v. Spartanburg County, (S.C. 2012)

- Deputy sheriff filed for workers' compensation benefits based on PTSD diagnosis after he fatally shot a suspect.
- PTSD disorder following job-related shooting did not arise from extraordinary and unusual condition of employment, as required to be compensable mental injury.
 - Use of deadly force is within normal scope and duties of sheriff.
 - This case has had a political effect in South Carolina and may result in a legislative change to the "mental-mental" injury provisions of the Act.

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Martinez v. Spartanburg County (S.C. 2014)

- Claimant was a forensic investigator with the county sheriff's office. After doing a forensic investigation involving a former coworker from the sheriff's department who accidentally ran over and killed his own child, the claimant filed a claim for mental injuries as a result of having to investigate the child's death.
- Under the WCA, mental or nervous disorders are compensable only if the stressors are incident to or arise from "unusual or extraordinary" circumstances of employment.
- Both the Single Commissioner and the Appellate Panel of the WCC found claim not to be compensable.
- Claimant appealed to circuit court which reversed and remanded the case. Respondents appealed to the Court of Appeals which then reversed the Circuit Court, finding the injury noncompensable.
- Supreme Court, under Bone, held that the Circuit Court's order which reversed a decision of the Worker's Compensation Commission and remanded the case for further proceedings was not a final judgment for purposes of appeal.

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Occupational Stress Claims

1. Establishing Stress Claims
2. Proving Compensability
3. Benefits Available for Stress Claims

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Establishing Stress Claims

- In the SC Workers' Compensation Act, it states that when an employee suffers a mental injury that occurs as a result of "*emotional stimuli or stressors*" that are in the workplace, then the injury may be covered in addition to a physical injury.

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Proving Compensability

- Mental injuries are compensable if they are "*induced by physical injury...or by unusual or extraordinary conditions of employment.*"
- *Unusual or extraordinary conditions of employment* is a standard that is widely used in other examples of injuries that occur at work.
 - **Examples:** Strokes, heart attacks, etc.
- If stress is caused from one situation, or a group of situations that are commonplace for that particular employment, the injury will not be recoverable.
 - **Examples:** Position transfers, demotions, terminations, etc.
- Thus, stress that results from the everyday, normal work conditions are not covered.

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Benefits Available for Stress Claims

- The South Carolina General Assembly is now considering legislation that would change that by providing an exception for law enforcement officers.
- The bill being debated amends the “*extraordinary and unusual*” provision, which is the exception to the general rule that psychological trauma alone is not compensable unless it arises out of unusual circumstances.

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Work-Related Aggravations of Pre-Existing Conditions

- S.C. Code Ann. §42-9-35 states that:
 - (A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:
 - (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or
 - (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.
- A carrier must cover the claim if the work accident aggravates and/or makes worse a condition like arthritis.
- However, an opinion from the treating physician that “*to a reasonable degree of medical certainty,*” that it is more probable than not that this particular work accident aggravated the pre-existing condition.

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Landry v. Carolinas Healthcare Systems (S.C. Ct. App. 2011)

- Claimant had suffered chronic foot pain due to bunions since she was 13 years old.
- After nearly 24 years as an x-ray technician, her podiatrist in 2001 that her foot pain would only get worse if she continued to stand on her feet for long periods of time. A year later she started work for the employer hospital.
- In upholding the Commission's denial of the claim, the court found that the claimant "was aware of her physical condition and knew which activities would worsen her symptoms."
- Accordingly, the worsening of the claimant's preexisting bunions was not unexpected and unintended, and therefore, was not a compensable "accident."

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Repetitive Trauma, Occupational Disease and Related Injuries

- Repetitive trauma:
 - Defined as injuries that are "gradual in onset and caused by the cumulative effects of repetitive traumatic events."
 - **Examples:** Back injuries, neck injuries, carpal tunnel syndrome, etc.
- An employee must prove by a preponderance of the evidence that there is a "causal connection between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury."

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Repetitive Trauma, Occupational Disease and Related Injuries (cont'd)

- Occupational Disease:
 - Defined as “a disease arising out of and in the course of employment that is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged in.”
 - **Example:** Mesothelioma (caused by asbestos)
- Each individual case is reliant on the facts around the situation and the particular circumstances.
- Occupational diseases are treated as injuries by accident in South Carolina.

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Michau v. Georgetown County ex rel. South Carolina Counties Workers' Compensation Trust (S.C. 2012)

- Addresses the heightened standard for repetitive trauma injury cases, which require “medical evidence” in the form of “expert opinion or testimony [to be] stated to a reasonable degree of medical certainty.”
- Heightened standard does not apply to other medical evidence in the form of documents, records, and other material.
- Court found that physician’s statement, stating “opinion” regarding Claimant’s shoulder problems, was expert opinion or testimony that had to be stated to reasonable degree of medical certainty. Because opinion was not to a reasonable degree of medical certainty, it was not admissible.

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King v. International Knife and Saw (S.C. Ct. App. 2011)

- Claimant's job required him to sling a heavy hammer all day. He began experiencing shoulder pain.
- Claimant admitted that his right arm had ached for the past couple of years and that he suspected it was connected to work slinging a hammer because "after slinging a hammer all day your arms are going to be tired..."
- Based on this testimony, the employer alleged the claimant had failed to give timely notice.
- However, the court found that mere pain does not equate to a compensable condition so as to trigger the statutory notice period.
- The court held that "an employee's obligation to report a work-related repetitive trauma injury is not triggered by the onset of pain but, rather, by the employee's diligent discovery that his condition is compensable."

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Brunson v. American Koyo Bearings (S.C. Ct. App. 2011)

- This case is an occupational disease claim, but contains exhaustive case law applicable in all claims regarding the Commission's discretion to weigh the evidence.
- The Supreme Court in this matter upheld the commission's denial of a claimant's occupational disease claim where the medical evidence in support of causation was based entirely on the claimant's subjective complaints that were otherwise inconsistent with the rest of the medical record, and where other competent medical evidence was presented to the contrary.

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Vocational Rehabilitation

1. Impact of Injury Upon the Worker and “Suitable Gainful Employment”
2. Effective Tools for Dealing with Injured Workers
3. Cost-Effective Rehabilitation
4. The Role of Physical Therapy

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Vocational Rehabilitation (cont'd)

- Vocational rehabilitation is intended to return an employee back to work.
- Vocational rehabilitation aims to help employees obtain the necessary skills to return to *suitable gainful/ alternative employment* when they are unable to return to work in their prior employment and their employer is unable to make a reasonable accommodation.

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Impact of Injury Upon the Worker and “Suitable Gainful Employment”

- An injury that completely prevents you from seeking any kind of gainful employment makes you eligible for PTD benefits for 500 weeks at 2/3 of your pre-injury average weekly wage.
- If an injured employee refuses employment procured for him that is suitable to his capacity and approved by the commission he shall not be entitled to any compensation at any time during the continuance of such refusal.
– §42-9-190

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Johnson v. Rent-A-Center (S.C. 2012)

- Claimant sustained injuries to her neck, shoulders, and chest and was awarded TTD. Employer argued Claimant was not disabled because she could still work as a phlebotomist.
- The Court emphasized that the test is:
 1. whether the Employee *failed to obtain employment* as a result of injuries, (not that she could work as a phlebotomist in theory); and
 2. Whether the Employee made reasonable efforts to obtain employment.

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Davis v. UniHealth Post Acute Care (S.C. Ct. App. 2013)

- Court affirmed the Commission's determination that Davis did not constructively refuse suitable employment.
- Davis, a nursing home employee, was injured on the job and provided light duty accommodations and paid TPD during this time.
- Davis was caught sleeping during her shift and terminated for cause.
- Employer stopped TPD and argued that by sleeping, she constructively refused employment.
- The Court affirmed the Commission's finding that sleeping did not amount to a refusal of work.

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Cranford v. Hutchinson Construction (S.C. Ct. App. 2012)

- Court of Appeals affirmed the Workers' Compensation Commission Appellate Panel's denial of temporary disability benefits.
- Court found that Cranford was not entitled to benefits because his employer had provided him with acceptable substitute work when he returned and employed him for the required amount of time the statute dictated.

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Hutson v. SC Ports Authority (S.C. 2012)

- In this appeal, the Supreme Court reversed and remanded the circuit court, holding that under § 42-9-20, the claimant's failure to put a dollar value on his possible future earnings in the restaurant business may not be the sole factor for the Commission's denial of an award for loss of wages.
- The Court remanded the case to the circuit court for further determination of the claimant's future earnings.

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Effective Tools for Dealing with Injured Workers

- Light/Modified Duty Return to Work Program
- Reasonable Accommodations
- Job or vocational training
- Physical therapy
- Job counseling
- General education
- Assistance in job placement

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Cost-Effective Rehabilitation

- The ultimate goal is to get the employee back to working world in a suitable position.
- Rehabilitation is used to help the employee improve their functional capacity and their bodily abilities, in order to achieve that goal.
- Rehabilitation speeds up the employee's return to work journey, and in turn, minimizes the amount of future payments needed to the employee.

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The Role of Physical Therapy

- Many employees who suffered an on the job injury will likely require some degree of physical therapy.
- Physical therapists have expertise in movement science, and their primary objective is to get the employee to their highest level of physical capability.
- Physical therapists are also very valuable sources of information since they typically are with the employee much more than the employee's physician.
- They can properly assess pain levels before and after the completion of the physical therapy, and will keep a higher amount of detailed records of the employee's pain levels, overall progress, and their ability/lack of ability to perform certain actions.

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Conclusion

- Medical issues have a very dynamic role when involved in a Workers' Compensation claim.
- These issues can vastly alter the complexity of a claim.

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 - Charleston School of Law, J.D.
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 - U.S. Court of Appeals for the Fourth Circuit
 - South Carolina Court of Appeals
 - U.S. Court of Appeals for the Eleventh Circuit
 - All Georgia state courts
 - Supreme Court of Georgia
 - U.S. District Court for the District of South Carolina
- **Practices**
 - South Carolina Workers' Compensation Defense
 - Georgia Workers' Compensation Defense
 - Longshore and Harbor Workers' Compensation Defense
 - Defense Base Act Defense
- **Biography**
 - Brian is a Partner in the Charleston office of Lueder, Larkin & Hunter. His practice primarily focuses on Longshore, Defense Base Act and workers' compensation and subrogation claims throughout Georgia and South Carolina. Brian handles workers' compensation and subrogation claims throughout South Carolina and Georgia. Additionally, Brian handles Longshore, and Defense Base Act claims nationwide with recent Longshore claims from South Carolina, North Carolina, Georgia, Florida, Virginia, Louisiana, Maryland, Delaware, Pennsylvania, New York, New Jersey, Texas, Michigan, and Oregon. Brian litigates claims nationwide and enjoys an A.V. Preeminent peer review rating from Martindale-Hubbell. In its 2016 edition, *Best Lawyers®* recognized Brian McElreath as among the leading attorneys in the country. The results were published in the 22nd Edition edition of *The Best Lawyers in America™* in the field of Workers' Compensation Law – Employers.

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- All South Carolina state courts
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- South Carolina Defense Trial Attorneys Association
- South Carolina Workers' Compensation Education Association
- Propeller Club of Charleston
- **Biography**
- Mr. Northcutt is a Partner in the Charleston office of Lueder, Larkin & Hunter. His practice is concentrated on representing employers, insurance carriers, third-party administrators, mutual indemnity associations, self-insured funds, captive insurance programs, and uninsured employers on workers' compensation claims arising under the South Carolina Workers' Compensation Act and/or the Longshore and Harbor Workers' Compensation Act. Mr. Northcutt is also a Certified Mediator.
- Born in Charleston, South Carolina, he is a 1999 graduate of Clemson University (B.A. History, *magna cum laude*). While at Clemson University, Mr. Northcutt was a member of Omicron Delta Kappa, Phi Kappa Phi, and Sigma Nu. He received his law degree from the University of South Carolina School of Law (J.D. 2003). Vince served as a law clerk for the Judiciary Committee of the South Carolina House of Representatives during law school.
- He is a member of the South Carolina Bar, the Charleston County Bar Association, the South Carolina Workers' Compensation Education Association, the South Carolina Defense Trial Attorneys Association, the Propeller Club of Charleston, and the Palmetto Professional Society of Charleston.

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Ethical Obligations and Professional Conduct

Submitted by Lola S. Richey

Ethical Obligations and Professional Conduct

Mr. Injured's supervisor saw Mr. Injured lying on the concrete floor after the fall. Many co-workers witnessed Mr. Injured's work accident. The supervisor said, "Another lost time claim." Not My Fault immediately called their lawyer with Win All Law Firm, Mr. Joseph Denial. The supervisor asked Mr. Denial, "How can we deny this claim? We have had no lost time and must keep our insurance premiums low." Mr. Denial said, "Well, make sure you get a drug test and we will deny the claim." The supervisor told Mr. Denial, "The accident is our company's "fault." Then, the supervisor told Mr. Denial "the scaffolding was faulty, and Mr. Injured is a good worker." Mr. Denial said, "I am going to pretend we never had this conversation" and he hung up the phone with the supervisor.

Next, Mr. Denial began denying the claim. To help with the case, Mr. Denial called Susan Nogood, a nurse case manager for the insured. Mr. Denial told Ms. Nogood, "Do whatever it takes to deny the claim, including kissing up to the doctors and nurses." Ms. Nogood rarely followed the rules, and even would talk to the doctors without the workers' consent.

Mr. Injured was transported via ambulance to Killer General Hospital. At Killer General, the emergency room physician examined Mr. Injured and gave Mr. Injured a drug test. Mr. Injured passed the drug given at the hospital and was diagnosed with a lumbar compression fracture, neck strain, and knee pain. Subsequently, Not My Fault Electrical Company denied Mr. Injured's claim.

What did Attorney Denial do wrong?

Ethical Obligations and Professional Conduct

HYPOTHETICAL TWO

Carol Facebook loves posting all her comments, videos, and co-worker gossip on social media. Ms. Facebook checks her Instagram, Twitter, Snapchat, and Facebook accounts constantly while at work as a Social Worker with Small Town, South Carolina.

One day, Ms. Facebook found Mr. Kevin Toobusy's website while surfing the web, www.E-ZMoneyLawsuits.com. Mr. Toobusy is a personal injury lawyer. Ms. Facebook "allegedly" injured her low back lifting files at work, and she asked Mr. Toobusy to represent her on a pending workers' compensation case. Mr. Toobusy offered Ms. Facebook some legal advice in a five-minute telephone conversation and told Ms. Facebook, "You have a good case." Unfortunately, Mr. Toobusy was also too busy checking his Twitter account and was not paying close attention to Ms. Facebook's explanation of her work injuries. In fact, Ms. Facebook told Mr. Toobusy that she injured her back wind surfing. Mr. Toobusy said, "Do not tell anyone and we will stick it to the insurance company for some E-Z Money!"

That evening, Ms. Facebook posted her conversation with Mr. Toobusy on all her social media accounts along with pictures from Mr. Toobusy's website with the title "E-Z Money Lawsuits." Eventually, Mr. Toobusy's paralegal met with Ms. Facebook and signed her up as a client of Mr. Toobusy. Other than a five minute, Mr. Toobusy never talked to Ms. Facebook about her case and Mr. Toobusy's paralegals did all the legal work while Mr. Toobusy also posted his many testimonials of his clients getting "E-Z Money!" Yet, Mr. Toobusy always took his generous one-third attorney's fees, plus costs!

Ethical Obligations and Professional Conduct

The City of Small Town hired Kick Butt Law Firm from Big City, South Carolina. Kick Butt Law Firm assigned Mr. Tom Diligent to Ms. Facebook's workers' compensation file. Ms. Facebook recently started receiving temporary indemnity checks after Dr. David Sayanything wrote Ms. Facebook out of work due to her "severe chronic pain." Ms. Facebook was now receiving workers' compensation checks for her back injuries. Ms. Facebook's claim was less than 150 days old.

Mr. Diligent reviewed Ms. Facebook's file. Also, Mr. Diligent talked with Small Town's adjuster and Ms. Facebook's supervisor. Then, Mr. Diligent "Googled" Carol Facebook and instantly pages of videos and pictures came up with Ms. Facebook wind surfing, line dancing, and re-tiling her kitchen floor among other pictures. Immediately, Mr. Diligent called Small Town's adjuster to file a Form 15 stopping payment and sent a letter to Mr. Toobusy denying the claim.

What did Mr. Toobusy do wrong and what did Mr. Diligent do right?

Ethical Obligations and Professional Conduct

HYPOTHETICAL THREE

Attorney Stephen Hardluck has had a difficult few years as a workers' compensation attorney. Mr. Hardluck has been practicing workers' compensation law for over 25 years in Midtown, South Carolina. As an experienced workers' compensation lawyer, he has had some good years. Recently, Big City Personal Injury Law Firm has been advertising on all the local television and radio stations in Midtown, and Mr. Hardluck's business has dropped over 50% since Big City Personal Injury arrived in Midtown.

To help his struggling law practice, Mr. Hardluck redesigned and updated his website, yellow page advertisements, and tried to advertise on the local television stations. Mr. Hardluck even paid some old clients to give "testimonials" with "money in hand" to show the people of Midtown all the cases he had won in previous years. Despite Mr. Hardluck's new advertising campaign, Big City Personal Injury was taking most of the workers' compensation clientele in Midtown.

Next, Mr. Hardluck asked a few of his friends to start passing out his business cards at the local hospital in Midtown, and he promised to pay a "small fee" for each new client his friends referred to his office. Many of Hardluck's friends went to work passing out Mr. Hardluck's business cards at the local hospital, construction sites, and other accidents that they heard about in Midtown. Moreover, Mr. Hardluck started going to Midtown Hospital and other doctor offices to pass out his business cards to anyone with a cast or cane. Before

Ethical Obligations and Professional Conduct

long, the cases were rolling in again, and Mr. Hardluck was back on track with new clients and increasing business.

Soon, Big City Personal Injury and other lawyers in Midtown heard about Mr. Hardluck's advertising and his "small fee" paid to his friends. Mr. Hardluck's "small fee" program made Big City Personal Injury and other lawyers in Midtown angry and they decided to report Mr. Hardluck to the SC Bar for ethical violations. However, Mr. Hardluck learned of this "friend referral program" from Big City Personal Injury's former paralegal, Lucy Bigmouth.

What did Mr. Hardluck do wrong and what did Mr. Diligent do right?

Supplemental Materials

Submitted by Thomas Gagne

TITLE

Winning Strategies and Tips in Workers' Compensation Practice/Selected Issues

Written by Thomas M. Gagne, Esq. for The National Business Institute

INTRODUCTION

Thomas Gagne has practiced workers's compensation and personal injury law in Greenville and Spartanburg South Carolina for seventeen years. He holds a B.A. from Cornell having studied literature and philosophy and is an alumnus of SUNY Buffalo Law School and Harvard Business School. He is a former JAG prosecutor and Special Assistant United States Attorney attached to Fort Jackson South Carolina. He also served as an assistant solicitor for Richland and York Counties. Tom was recently selected as a Top 100 Trial Attorney by the National Trial Lawyers as well as a Premier 100 attorney by the American Academy of Trial Lawyers.

OPENING

This section of the program concerns selected issues in worker's compensation law. I have attempted to touch on all these topics but within the framework of the life, if you will, of a typical workers' compensation claim, from intake to settlement. I have omitted for the sake of concision and time tips and strategies on hearings and appeals.

WHAT DO YOU GET OUT OF THIS?

I hope you take away from this little talk a few of the lessons I have learned in my twenty plus years of litigation and workers' compensation practice and spare you the headaches I have had to contend with. I have also included on my website at *gagnelaw.com* several forms that I have developed over the years to streamline the process and aid you in spotting issues before they blow up in your face. This lecture will also be posted on my website should you be interested.

Your duty as advocates begins and ends with what is in the best interests of the client, as positive law as well as common sense requires. However, I have included some strategies that will not only help you avoids problems with the opposing party but also problems with your client that could result in ethical violations or professional negligence claims. If you do not take care of yourself, you will do no one any good. Forewarned is forearmed.

I do not believe in reductive formulas for the practice of law, but if forced to choose I would say successful litigation is founded on four columns. Develop good legal and factual theories. From this

develop a plan of attack. Communicate your strategy to your client and staff. Educate yourself and your client on the legal issues involved. Make certain your evidence is in alignment. Anticipate where the fight will be and attack your opponent by exploiting your points of leverage. These themes will become apparent as I proceed and will hopefully help guide you through litigation's labyrinths.

BODY

The intake questionnaire is your first opportunity to determine your client's needs and interests. It should also reveal to you the problems with your case as well if you have a case at all. Intake is a good time to explain to your client her basic rights: i.e., That she has a right to seek and receive the medical attention; that she has a right to have all her related medical bills paid, past and future, that she has the right, if warranted, to receive temporary compensation (TTD) and that she has the right to compensation for any permanent disability she may have suffered (indemnity).

Don't rely on a date of accident that states the accident occurred on a certain date or "thereabout". Your first inquiry should be exactly when did the accident happen? Getting the wrong accident date by taking your clients word for it can lead to many unpleasant consequences. What comes to mind immediately is that the client had experienced a preexisting or post - accident injury around the time of the alleged worker's compensation injury. This as you're well aware can severely impact your causation theory as some clients will not volunteer any accidents or injuries they may have suffered around the time of the putative worker's compensation accident.

Perhaps most embarrassing is the event in which the employee was not even working on the date in question. I learned the hard way in one case when it turned out the employer was not even open for business on the date the employee claimed to have been injured as it was Labor Day. If the claim has not already been accepted by the workers' compensation carrier, verify the date of accident with personnel attendance records you have subpoenaed or by deposing the employer or one of his representatives. **Use your subpoena power to discover information.** Don't be shy. It's one of the most powerful tools you have in your legal arsenal.

Another important piece of information you will receive is of course **the reporting requirement**. Don't leave it with "I told my coworker" or more frequently "my boss was there when I hurt myself". Spell it out for the client that she needed to report the injury verbally or in writing to her supervisor. Clients tend not to understand this. If she has not reported it by the time she sees you, tell her to report it as soon as possible. Do not depend on your filing to constitute notice. Stress the fact that notice must have been given to someone in a supervisory position. Make sure you get a name. It amazes me how many clients do

not know their supervisors name just a nickname. Also get a complete schedule of eyewitnesses or other witnesses to the accident and educate your client as to the difference. You may have to subpoena them later on so make certain you get a proper name and address and phone number is possible. Subpoena the witness's records if you have to get the information. If all else fails hire an private investigator.

Determine if the employee has sought medical attention -- usually she has, if not on her own then by referral from the employer to an emergency room or a low-level medical aid practice. The diagnoses you receive from such places should be held suspect until you have received a definitive diagnosis by specialist, if the case warrants it. First responder medical professionals tend to treat via the triage method – that is, identify the major pathology or pathologies and stabilize it or them.

If the client has not received medical care and it otherwise looks like a good case, by all means refer her to a doctor pending appointment of an authorized doctor or a demurrer in the employer's Form 51 which is the defendants answer. **Exhibit 1.** But be careful to send the carrier a two-week demand for treatment. If no authorize treatment is forthcoming during that time and your client is still being treated by your, unauthorized doctor, you stand a better chance of getting your unauthorized doctor paid at a hearing.

Remember that if the client has been receiving treatment, this does not necessarily mean that the employer has accepted liability. On many occasions a carrier will conduct an investigation, issue a demurrer, and cease providing medical care. In that case of course you may have a fight on your hands. Therefore, file for hearing on the issue of **compensability**.

If the client is seeing a doctor, make certain that the doctor has issued a work status note – light-duty, full duty, or modified duty. Very likely the client will be in financial distress, thinking erroneously that her “boss” will take care of her she may not receiving any temporary compensation because the employer has failed to report the injury, or less egregiously, the employee has neglected to give her medical note to her employer. Remember that if the client does not have a note from an **authorized** doctor she cannot receive temporary compensation. So get the demand for an authorized MD out immediately, for the sake of both the client's treatment and source of income.

Critically, at this stage you will determine what body parts the client claims is injured. I insist the client circle a diagram of the human body because some clients will “snowball” their body parts once they figure out the basics of the damages game. **EXHIBIT 2.** Adding body parts later on can be a clear sign that your client is malingering or misleading you and everyone else.

On the other hand, some injuries take time to blossom, and the addition of symptoms and body parts is not at all atypical of the nature of the injury. For instance, I had a case involving a bilateral subdural

hematoma – a serious bruising of the brain beneath the dense sheet of tissue surrounding the brain called the dura. It can take days or even weeks for the slow bleeding in the brain to manifest symptoms. In my case, my client blacked out while driving his car weeks post-incident. He also suffered headaches and vertigo even collapsing a few times weeks after the accident.

What was even more puzzling was the fact that the radiologist in the emergency room, after conducting a CT scan, failed to spot the hematoma. Lesson learned: diagnoses can be tricky business, depending on the health of the client, her constitution, the nature of the injury and the evolution of the symptoms. So just because a client appears to be “snowballing”, does not mean she is necessarily malingering. Careful analysis and investigation of the nature of the injury is required.

Having the client specify in the intake the body parts and symptoms involved also protects you later on if the client claims that you failed to address a specific injury. The intake also serves as a source of the client’s prior statements concerning her medical history, pre- existing injuries, post existing injuries and any criminal record that will protect you later on should the client make inconsistent statements later in your case.

A few more words about the intake before I move on. As I touched on before briefly, doctors are usually concerned about the clients’ chief symptoms, especially at his stage of the case, and especially considering the “triage” mentality of emergency room and initial care doctors who want to treat and stabilize the low hanging fruit – say, setting a fracture but failing to note that the patient may also be exhibiting or complaining about a symptom or symptoms in an entirely unrelated body part. So be sure to claim all the body parts your client claims on your Form 50, and let the client review for her approval. Also, remind the client to tell her doctor what ails her, not just the attorney. For some reason the client rarely speaks up at the doctor’s examination, but let’s you, the attorney, know her full spectrum of complaints and symptoms.

Note this down in the log to protect yourself. If the body part claimed comes to nought then you can always ratchet back, but it is difficult to ratchet up. The intake will also tell you what stage the case is in: is the client at the beginning of the claim, i.e., closer in time to the actual date of accident? Or is she nearing maximum medical improvement? Has she already been released by the authorized doctor once she sees you and is only lacking her indemnity?

The intake should also give you a good picture of the overall health of the client including any past surgeries or treatment for the body parts involved, prior existing conditions, post existing accidents, and

her history of workers' compensation claims, motor vehicle accidents, and slip and falls. Any prior impairment ratings of the same body part will also affect your theory of damages.

Your intake should also disclose if any multiple claims exist. For example, if the client was involved in a motor vehicle accident you may be able to make a claim against the tortfeasor's insurance. A couple of caveats. If the employee is a direct employee or a statutory employee of the employer, then she will be barred from making a claim against the employer in tort or contract pursuant to the statutory employer and exclusivity rule. **See S.C. Code Ann. Sec. 42-1-540**; *Carter vs. Florentine Corp.*, 423 S.E.2d 112.13 (1992). If, however, the tortfeasor is a subcontractor, your client may be able to recover from that subcontractor. **See S.C. Code Ann. Sec. 42-1-560**. If you do proceed against a third party at law, remember to give the worker's compensation carrier notice of your action. This requirement, I would argue, includes any claim including commencing litigation, although some may disagree. Notice is required because the workers' compensation carrier has a right of subrogation for any damages you may recover from the third-party tortfeasor.

In general, the best practice is for you to proceed yourself against the third party.

Also, if your client is an employee of a subcontractor, which is often the case, and is injured by another subcontractor working for a different company, then you may have a claim in tort against that subcontractor, if the employee/tortfeasor is not deemed a statutory employee. You can see how the various fact patterns can make this analysis quite complex rather quickly, so carefully analyze the legal status of all the players involved so as not miss a cause of action.

Be careful if the third-party claim involves another jurisdiction and/ or type of defendant. For example, an out-of-state defendant within the scope of his employment as a governmental or quasi - governmental entity should raise a red flag. These raise a host of sovereign immunity issues not the least of which notice provisions and/or statutes of limitations in other states maybe shorter. Tip: refer the case to a lawyer in that jurisdiction and sign the retainer agreement "**For Investigative Purposes Only.**"

Spotting these and other issues upfront using a detailed intake is achieved through a thorough and systematic process of inquiry, which follows up and through itself, catching the significant issue or issues. This is why I never let the client fill out the intake herself. Because of his lay status, he will not understand the significance of some of the questions and may provide you with incomplete or even false information or perhaps no information at all regarding a particular issue.

Your first meeting with the client during intake is perhaps the most important one in the evolution of your discovery. This is where communication and education are paramount concerns. It is at this stage where

the client learns of her rights, and where you plan the preliminary theory and direction of the case. This is your chance to determine the body parts and diagnoses involved if possible, her current treatment history as well as medical and accident history, including any psychiatric history or drug and alcohol abuse, her family structure, criminal background if any, hobbies as well as her employability and what the client needs as soon as possible. It also establishes the client's story and will protect you later from claims of negligence or oversight.

Take this opportunity to get with your client on these and other issues from the very beginning so the both of you are "on the same sheet of music". Warn your client not to talk about the case facts to anyone especially the doctors, case management workers, or adjusters as these statements re-interpreted by professionals essentially in the employ of the opposing party can torpedo a case. I have included an intake form, an FAQ as well as a flash analysis on my website at gagnelaw.com for your use so you don't miss the major issues. **EXHIBIT 3**. But don't think it is perfectly exhaustive. Create your own checklist and use it, modify it as you learn more. It can prove an invaluable aid to you and your staff and catch you up to date on a case very quickly.

AVERAGE WEEKLY WAGE

The average weekly wage determines the compensation rate. **See S.C. Code Ann. 42-9-10**. The parties calculate the total paid to the client within the last four quarters of the client's employment and then divide that number by the number of weeks the client worked during the four quarters. This figure is calculated before taxes and other deductions. If the client has not worked four quarters, then go back as far as possible in the client's history with the employer. Once this figure is determined divide by three and multiply by two, in other words, multiply by two thirds and you have your compensation rate.

This number is key because it will ultimately be used in calculating the amount of compensation your client is owed. The higher the average weekly wage the higher the compensation rate. The higher the compensation rate, the higher the compensation your client, both temporary total as well as disability she should receive.

Caveat: if the client is working more than one job you have a couple of problems. The problem with having more than one job is that the defense may claim that the client hurt himself or aggravated the injury at that job. This can severely impact the value of your case. If the defense is claiming that the client hurt himself on his "moonlighting job" then subpoena all medical records from the moonlighting job. This should tell you whether he has claimed injury to the specific body part in the recent past. The medical

records themselves that you have already collected should also reveal this. Use your deposition power if necessary and if the facts fairly bear it out, include the other job as a defendant.

If your client has more than one job at the time of the injury, the law allows for inclusion of his compensation in determining the compensation rate. I had a case where the client had over \$14,000.00 of unclaimed compensation from a second job which, after I claimed it, boosted his compensation rate considerably. The kick was that the client had reached maximum medical improvement and had been overpaid approximately \$14,000.00 TTD, and therefore it was a wash. The form that reflects the computation of your client's average weekly wage is the form 20. **EXHIBIT 4**. Demand this form as soon as possible from the opposing counsel or the adjuster as it can sometimes take some time receiving this. Sometimes opposing counsel cannot even get a copy of the form 20. This form is critical when you make your demand. Depending on the type of injury and the significance of the injury a few dollars' difference in the compensation rate can result in a significant loss or gain in the ultimate compensation your client receives.

The right to temporary compensation is predicated on her receiving a note from the authorized physician stating that she cannot work. One common problem you'll find at this stage, the pre-MMI stage, is when the authorized doctor will write a note stating that the client can return to work either full-time or modified light-duty. The client usually calls you in a frantic mood claiming that she cannot fulfill the duties the note requires. In this scenario, tell your client that the law demands she return to work in the modified status and that she needs to make a good faith effort to perform her duties. If she cannot perform these modified duties she should present herself to her employer and state she cannot perform the modified duty or full duty and that she needs to see the authorize physician again who, hopefully, will revert her status to temporary total disability.

DIAGNOSES

After you have made sure that your preliminary claim is accurate and exhaustive, your temporary compensation figure is accurate, and your client is receiving it, or, you have filed for compensability if the carrier has denied your claim, you have all the medical work excuses in order, and your client is receiving the proper medical care, your next pre-MMI task will help direct you to your proper case theory and theory of damages. Remember, differentiate between preliminary and definitive diagnoses. Understand that in some cases you may not receive a definite diagnosis, with the doctors disagreeing, but this is usually not the case. The doctor's usually disagree about the amount of permanent impairment a client has suffered.

From your definitive diagnosis you will be able to hone your theory of the case. If multiple body parts are involved, you may also have a claim for permanent and total disability. If only one body part is involved then your options include settling on a form 16, clinching the case, or proceeding to hearing. The diagnosis itself will determine your theory and damages sought. A sprain and strain usually gets a lot less than say a herniated disc or a torn rotator cuff. A form 16 settles the disability portion of your claim only leaving future medicals open as well as your client's right to claim a worsening of condition within one year of the commissioner's signing the order.

An award from a Commissioner essentially works the same way as a form 16. Whereas a clincher, as the name implies, settles not only the disability portion of the case, i.e. the indemnity portion of the case, but also all future medicals including a claim for worsening of condition.

The gravity of your case vis-à-vis the diagnosis will also be reflected by the amount of medical bills she has sustained. Demand a schedule of authorize medical bills, or subpoena them from opposing party. This will help you determine the value of your case and alert you to any authorized bills that the carrier has failed to pay. While you're at it, marshal a schedule of unpaid unauthorized medical bills to serve with your demand or present at a hearing.

The length of time a client is in primary treatment and therapy will also give you a clue as to the seriousness of the injury. The longer client stays pre-MMI in general the more serious the injury the greater chance is a worsening condition as well as future residuals.

Commissioners in general will initially tend to look at these elements to determine the value of your case – the number of body parts involved, the duration of treatment, the type of diagnosis, and the amount of medical bills. But the main indicator is the diagnosis. A fracture may not result in a slew of medicals as it's just set, depending on the complexity of the fracture, with perhaps some physical therapy follow-up, yet it may result in serious permanent impairment. **When evaluating a worker's compensation case, I always go to the putative diagnosis to orient my case theory. It follows that you have to be familiar with the various diagnoses a human is prone to, which means you have to take the study of medicine seriously if you want to be a successful worker's compensation attorney.**

So, at this stage we have a definitive diagnosis, and accurate knowledge of the body parts involved which are in alignment with the diagnoses and medical records of the authorized medical doctor, and the client is getting the type of treatment necessary to treat the condition or cure it altogether – – although there is usually some residual impairment even for mild soft tissue injury. Therefore, the remaining issue in the case is damages.

Problems arise if the cases been denied. **EXHIBIT 5.** You may have received a form 51 in the form of a demurrer. Don't let a demurrer throw you off. Eight or nine times out of 10 it just means that the carrier has not finished its investigation. It will in all likelihood admit the case at a later point. On the other hand, don't be fooled into thinking the case is accepted just because the client is receiving medical care or even temporary total. If the case is still within the proper time limit, it is easy for the carrier to suspend temporary compensation as well as medical treatment. Remember, if the carrier has been paying temporary total for more than 150 days it must, by law, seek a commissioners' order to terminate temporary total. **See S.C. Code Ann. Sec. 42-9-260; S.C. Code Regs. 67-504, 67-505 and 67-506 (Supp. 2008).**

In the case of an actual demurrer, you are in a bit of a quandary. The client needs both income and correct treatment. This can be solved if the client has third-party health insurance. Refer him to the appropriate doctor, send the denial to his health insurance carrier to get her treatment. Be prepared for a lien from a third-party carrier against whatever proceeds you may obtain later on in the case. Make sure you have sent the two-week demand letter we previously touched on. If you do receive a lien from a third party carrier, you can usually negotiate less than a dollar for dollar compensation. During negotiations, stress the expenses and time your client spent obtaining compensation from the worker's compensation carrier.

Weekly income is trickier. Demand, in writing, that the client receive temporary total. If absolutely necessary, there exist companies which will loan your client bridge money. And although they cannot charge the outrageous fees they once did it is still very expensive money, and I therefore try to steer the client away from this option. If the client has a family, I suggest the client lean on them for support until the case is resolved.

If the client does not have insurance but is in need of treatment, you'll have to find a doctor willing to work on a risky case, hopefully on a contingency basis. This should not be a problem if you have cultivated your relationship with the various primary care doctors and specialists in your area and you have developed your "stable" of physicians, if you forgive the analogy.

If the case is truly contested, then you are up against the clock. Find the evidence which will resolve the issue or issues in your favor. Speed is of the essence. Sometimes, just the act of aggressive discovery by you will prompt the insurance carrier to initiate benefits, or even settle the case, even if it falls short of an ideal settlement, given the case's infirmities.

A couple more pre-MMI problems you may face. Delinquent payment of temporary total by the carrier. This will happen to your client and suddenly you have a scared and or irate client on your phone. Late

TTD is usually a result of noncompliance or when the adjuster fails to renew "repetitive pay" or there is a lack of a work excuse.

Noncompliance is a serious issue. The carrier has the right to manage your client's health care. **See S.C. Code 42-15-60.** If the client fails to make his medical appointments, fails to follow the authorized doctor's orders, or is treated by a non-authorized doctor without the consent of the carrier or its representative, he's leaving himself open to a claim of noncompliance, which could result in the carrier suspending the client's benefits for good.

To avoid this, read your client the riot act up front. Impress upon him that medical care is singularly in the province of the workers' compensation carrier.

Repetitive pay problems arise when the adjuster simply fails to renew the payment of the client's temporary total. It's essentially a computer glitch. This is easily remedied by phone call. What is most common, however, is lack of an authorized work excuse either because the doctor has failed to provide one or the client has failed to remit the excuse to his employer or the carrier has failed to receive it from the employer. This is why I take the responsibility for the excuses, taking responsibility for them out of the client's hands. All she needs to do is provide us with the excuses. We will make certain that the carrier has the appropriate excuses ourselves, including making a demand from the authorized physician.

A few more words about pre-MMI problems before we move on to the MMI stage. I want to discuss filing the form 50. **EXHIBIT 5.** This is the initial claim form. Understand upfront it is a process, but even the form 50 can serve as evidence, especially if any statement you, as the attorney make in it contradicts or is inconsistent with later claims. If anything needs be modified, added or subtracted from the 50 you have the right to reform it, but remember, too many modifications will make it look like you're not certain of your case theory, casting doubt on the credibility of you and your client.

Developing a strong case theory from the beginning is therefore essential. But do not stick to a theory contradicted by facts if you cannot otherwise reconcile the facts to the theory. Discovery often turns up new, even contradictory facts which negatively impact your initial theory. Better to modify your 50 rather than proceed with a broken one. And, if you estimate it will take longer than 60 days for your client to reach maximum medical improvement do not file for hearing. Unless you're able to persuade the opposing counsel to continue the case in a consent order you will have to withdraw your 50 if your client has not reached MMI by the hearing date. The good news is that most attorneys are willing to continue the case.

MMI

When your client has plateaued in her treatment, she has reached MMI. She is cured, or, she has reached the point in her treatment where she is as cured and she will be for the foreseeable future. For evidentiary purposes only a qualified doctor can determine her MMI.

Determining MMI can be tricky. If the client says she has not reached MMI, but is visiting the doctor on a sporadic basis just for a follow-up, in my opinion she has reached MMI and you can refer her to an IME doctor for verification she has reached MMI. Some clients, however, will refute the contention that she has reached MMI. This may be a function of their dependence on temporary total. They simply do not want to rock the boat. Explain to client that receiving TTD benefits after she has reached MMI, knowing that she or should have known that she has reached MMI can leave a bad taste in the commissioner's mouth and prompt him to look negatively on the rest of the case.

You should have educated your client by this point to know that the law states she is not entitled to receive any more temporary total once she has reached MMI. Explain to her that any payments post MMI will be deducted from her final award at the hearing. Practice tip: if your client has received excess temporary total, try to negotiate a waiver during the settlement phase of the case. I find you stand a good chance of getting one.

As noted, a carrier cannot terminate temporary total after 150 days of the employee's receipt of temporary total without a commission order. The only way to stop temporary total at this point is to have the client consent to termination by signing a form 17. **EXHIBIT 6.**

If the authorized doctor has not placed the client at MMI, it does not necessarily mean she is not at MMI. The opposing counsel or adjuster may have dropped the ball, or even the authorized doctor himself. In this case, proceed and refer your client to your doctor for an independent medical evaluation (IME). Make certain you refer her to the correct doctor, one who is a specialist in particular pathology, and, if possible, board-certified. I have seen cases where one party wins because his doctor was board certified in the opposing party's doctor was not.

Include a cover letter to your doctor explaining and educating him as to your legal and medical theory and what body parts you would like to have examined. Include a detailed medical questionnaire. Exhibit. Remember, doctors are not attorneys and will not necessarily include in the report language vital to your

case. For example, doctors do not tend to talk in terms of "proximate" causation, or, to a "reasonable degree of medical certainty".

Moreover, depending on the number and type of injuries you may have to refer your client to several doctors. Do not expect an ophthalmologist to rate a back injury. Another caveat pertaining to brain injury cases. For years attorneys have been able to refer brain injury clients to clinical psychologist. But caselaw regarding this issue is controversial now. See *Potter vs. Spartanburg School District 7*, 716 S.E. 2d 123. The best practice is to retain a neurologist or neurosurgeon for your IME doctor.

One other point about brain injuries and causation. If you're seeking permanent and total disability and a brain injury and is involved you must establish proximate causation between the brain injury and the disability. The brain injury does not have to be the proximate cause of the client's permanent and total disability. However, it must at least be a cause of the disability.

Also, latest case law requires brain injury cases to be severe in origin in order to prevail on a permanent and total theory. See *Michael D. Crisp, Jr. vs. Southco., Inc.*, 738 S.E.2d 835. Therefore, in your medical questionnaire ask your doctor if the brain injury can be classified as severe, moderate or mild.

Besides medical doctors, you may need other experts to prove your case depending on your legal and medical theories. The foregoing admonitions apply to other experts, for instance in a permanent and total disability case you'll need the services of a vocational expert as well as a life care planner. Again, educate your experts as to your specific needs, the date of accident, your legal theory and the language she needs to use in her report. Always include a questionnaire to distill the legal pre-requisites and the necessary legal language.

Now is a good time to review the status of your medical records. If you send an incomplete set of medical records to your IME doctor, you're leaving yourself open to attack by the defense with the single argument that, pursuant to the doctor's deposition, his opinion is flawed because he based it on an incomplete set of medical records, especially if the missing record would have had a serious impact on his opinion. Procuring a complete set of medical records is not as easy as it sounds.

Here's a tip. Send a subpoena for all authorized medical records pertaining to your client's case to the OC or the carrier. This must be done prior to referring your client for an IME so the doctor has a complete set of records upon which to base his opinions. If the OC argues that the IME MD had an incomplete set of records, you have your subpoena as evidence that you attempted to secure all the records, and the burden of production has shifted to the employer. I say authorized MDs assuming you should not have any

problems with any of your own referrals. But even that is not always the case. It is very difficult to work with a provider who is delinquent in sending you records.

Additionally, do not depend on your client giving you an accurate medical history. Nevertheless, prior to ordering the records meet with your client and review all the doctors he has seen. Have him sign a statement attesting to the completeness of the records in order to protect yourself later on. I refer to this as a verification letter. **EXHIBIT 6.**

With all the records and experts and statements and theories floating around, now it is a good time to start talking about alignment. Take a hard look at your case at this point. Do the client's symptoms and complaints synchronize with the body parts claimed? Do they synchronize with the diagnoses? Do diagnoses synchronize with the treatment? Do diagnoses synchronize with the degree of impairment and the mechanism of injury – for instance a high rating accompanying low impact MVA may not make sense. Does the pain level your client claims synchronize with the prescriptions?

A claimed pain level of eight accompanied by prescription for Tylenol may not hold water. Is the client's injury an aggravation of a pre-existing condition, a new traumatic injury, a repetitive injury, or is it an occupational disease? And if so does the client's medical history bear this out? Combing inconsistencies from all the various elements including the client's statements as well as his adopted ones (i.e. from statements made in the pleadings) is a defense attorney's bread-and-butter. Inconsistencies in statement, but even more compelling, inconsistencies in action. Pay close attention to your client's *actus reus*.

Rarely will you have a perfectly aligned case, especially when you factor in the complexity of medicine any atypicality of symptoms. Not to mention disagreements among the experts.

Allow me to illustrate. I had a recent case where my medical theory was straightforward. My client had tripped and fallen at work injuring his cervical spine. A year before we had clinched a different case, same client, involving injury to his lumbar spine with complaints regarding his cervical spine. However, despite his cervical complaints from before no doctor diagnosed him with a cervical pathology. Rather, the cervical pain resulted from *referred* pain from the thoracic injury. Was his new cervical injury new or an aggravation of his previous thoracic pathology? And would a doctor necessarily make the distinction in his examination? Would the law make the distinction considering the spine is listed as only one body part? It is incumbent upon you the lawyer to ask these and related questions in your medical questionnaire and elsewhere.

Questioning. Questioning. Questioning. This is the essence of good legal practice.

In another, unrelated case, a former client of mine complained of cervical pain and upon examination it was discovered this cervical pain was a product of a lumbar pathology. Therefore, you can understand the necessity of developing your preliminary case theory early and having an open and flexible mind to modify your legal and medical theories upon discovery of new evidence.

You can see how quickly the process can become complex. And the more evidence you have, in the form of a witnesses and expert witnesses the more complex it becomes-- the more likely you will have to face inconsistencies, contradictions and omissions.

EVIDENCE

Evidence in Worker's Compensation cases is not governed by the South Carolina Rules of Evidence. See *Hamilton vs, Bob Bennett Ford 518 S,E,2d 599*. In fact, the Commissioner may accept or ignore evidence, give it whatever weight she sees fit, as long as no abuse of discretion exists, a catch all term which legally bars the admissability of some evidence; in other words, she is given wide discretion. If you find yourself in a hearing place your objections on record nevertheless. Most Commissioners are reasonable and will give due weight to your evidentiary arguments, and you always want to preserve your objections on record. Just make sure your objection is for the correct reason. As far as medical experts are concerned, the law requires medical opinions from licensed medical doctors. However, the doctors do not need to be specialists the field or board certified. Nevertheless, it still is a good practice for your IME doctor to bear board certified credentials to counter any credibility attacks by opposing counsel. By the same token, argue that the authorized doctor is neither a specialist nor board certified in the area of medicine under consideration if that is the case.

Procedurally, file a for hearing as soon as your client has reached maximum medical improvement. The prospect of a hearing is one of your great leverage points in this process. The deadline gets lawyers and adjusters moving to make their case and hopefully begin negotiations in earnest to spare the expense and potential exposure of a hearing.

Get your medical ducks in a row. Hearing dates usually take from 60 to 120 days to get scheduled depending on how backed up the docket is. As far as your witnesses are concerned, get them into your office to review their testimony and prepare them for depositions by opposing counsel if you have not already done so. **EXHIBIT 7**. Unfortunately, you will not necessarily know all the witnesses opposing counsel will use until she files her brief. By that time the hearing is imminent and you may not have time to depose all opposing witnesses, especially the doctors. In that case, you must either withdraw your 50, or better, enter a consent agreement with opposing counsel to continue the case. But take care, you can only withdraw your form 50 once.

One note about previous existing ratings to the same body part. If an employee receives an impairment rating in a previous accident with the same employer, and injures in a subsequent accident, then the rating you receive will be reduced by the rating he received in the previous case. **See S.C. Code Ann. Sec. 42-9-170.** The same credit appears to exist if the employee has a previous impairment to a body part that did not result from an on-the-job accident. *See Schwartz v. Vernon-Woodbury Mills, 33 S.E. 2d 517 and Hopper v. Firestone Stores, 72 S.E.2d 71.* Different rules apply if the employer is different.

LEGAL THEORIES

Now to get to the specific legal theories.

By this point your legal, medical, and factual theory should be well-developed. Remember, begin working on your theory as soon as the client retains you. As we have seen, some theories are apparent some not so much.

Permanent partial disability benefits for scheduled members are governed by **S.C.Code Ann. 42-9-30.** In a nutshell, it states that, unless another statute applies, or you apply a loss of earning capacity theory, if an employee injures himself out of and in the course of his employment, he may receive benefits based on a schedule of body parts delineating the number of weeks of compensation total loss of that body part engenders. For instance, total loss of use of the shoulder garners 300 weeks of compensation. If only one body part is involved, the law requires a scheduled analysis. *See Singleton v. Young Lumber Company, 114 S.E. 2d 145.*

Typically, when an injured employee reaches maximum medical improvement after the claim is admitted, the authorized physician rates the injured body part according to the AMA Guide to Permanent Impairment Ratings. These days, this is noted on a form 14 B along with an opinion from the authorized doctor as to whether the employee can return to work, modified duty, or full duty, and what future medications and or treatment the employee may need. **EXHIBIT 8.**

As noted, claimant's counsel should refer his client to an independent medical examiner who should document her opinion about the aforesaid issues.

If the client has suffered injury to two or more body parts, including psychological injury, she may be entitled to benefits under the permanent and total disability statute. *See Lee v. Harborside Café, 564 S.E.2d 354.* In addition to the two body parts, you must present evidence that the client is unable to return to work, via a doctor's note or opinion, or answer to a medical query, along with the vocational report stating he is permanently and totally disabled and that "no reasonable market for her services exist". *See*

Colvin v. E.I Dupont Denemours Company, 88 S.E.2d 581. In this case the client is entitled to 500 weeks of compensation plus future medical care. You should also have evidence of what kind and the cost of the future medical care your client will need through the services of a life care planner and her written opinion.

The 500 weeks will be reduced by the number of weeks your client received temporary total. If your client wishes to be paid in a lump sum note it on your form 58 which accompanies your hearing brief. The remaining weeks will be discounted to present value using a 2% discount rate.

If the client has a large compensation rate you may want to consider benefits under the loss of earning capacity statute found at **S.C. Code Ann. Sec. 42-9-20**.

Here, the client may receive 300 weeks of a portion of his reduced average weekly wage based on vocational and medical evidence of a loss of earning capacity due to his work related injury.

Moreover your client may receive lifetime benefits for brain damage, both arms or legs at **S.C. Code Ann. Sec. 42-9-10 (C)**.

The best legal theory for your case maximizes damages – past and future. It is of course case specific. Consider all your options and run all the numbers before deciding.

NEGOTIATIONS

I have always found it helpful to have filed for a hearing before beginning negotiations. Hearings are a natural point of leverage. Carriers do not want the added expenses or exposure of a hearing and defense attorneys, by and large would rather settle than face a big loss. So get those claimed filed for a hearing as soon as your client has reached MMI.

Now, whatever legal theory you choose to proceed with, when you're demanding an initial figure to settle the case anchor high. That is, make your initial offer high, but still within the realm of reason. If you begin negotiations with too high a figure, your opponent will not take you seriously at best and will not engage in serious negotiations with you at worst.

Know what your “scream point” is, that is, the least amount your client is willing to settle for her case short of litigation, either on a form 16 or clincher. Consider whether or not you're closing just the indemnity portion of your claim i.e. disability only, or disability plus residuals, i.e., future medical care included.

If you reduce your position, reduce it by small increments. Remember it's easy to go down, but it's difficult to go back up. Also, studies have shown that, psychologically, people do not differ in their feeling an obligation to reciprocate an effort to compromise whether that effort is a small or a large departure from the previous position. The very act of compromise creates in your opponent the need to reciprocate.

And have your arguments at hand as to why your client should receive what you're demanding, especially your points of leverage. Attack the weakest points of the OC's case. Lay siege to these to keep your price up. Put the other side's feet to the fire as to why the price should be reduced. Moreover, the longer you're involved in negotiation the more likely you will settle as both parties feel that they have invested a significant amount of time and energy to get to where they are. Most people will sit through a bad movie instead of bailing out because they do not want to have wasted their time. Another psychological point -- people fear loss more than they desire gain. I have found this a powerful and reliable tool, especially in negotiation with your own client who is proving unreasonably intractable and is in danger of harming their own interests. You are there to protect the client, even from the client himself. To use a paternalistic metaphor – you would not let your child play in traffic.

A word about medicine. Worker's compensation is a branch of personal injury law. And personal injury law necessarily concerns itself with medical issues. As a personal injury lawyer you must familiarize yourself with the gross structures of the human body as well as the nature of the various pathologies which can afflict it. Each case you have is a potential learning opportunity regarding medicine. Take advantage of this. Keep a medical folder containing your research about the various maladies you encounter, its symptoms, the nature the malady, and the treatment protocols involved. Especially the rare cases. I felt guilty about using Wikipedia to research diagnoses I was unfamiliar with, until I read an article claiming that 90% of doctors use Wikipedia and their practice for just the same purpose.

Wikipedia is one option. Of course there are many others and many fine publications that are legally oriented that help the lawyer understand medical issues. Understanding medical issues is paramount ***because diagnosis is the lens through which you develop the other theories of your case legal, medical, and factual.***

For example, is the mechanism of the injury in line with the diagnosis. I worked with the attorney at one point who insisted that one his female clients suffered from a cervix strain. I was puzzled never having heard that condition before until I looked at the records myself and discovered she was suffering from a cervical strain. Your credibility as lawyers will depend largely on your understanding medical issues, especially when it comes to steering your client's towards the correct medical attention, treatment and

tests for your client. Without supplanting the doctor's role, ask hard questions of all the doctor's concerning their management of the case. Doctors err as we all do.

DEFENSES

I have touched on a few defenses thus far, especially about maintaining the cohesion of your case. I would like to say a few words about intoxication and fraud in the application before I leave you.

In an intoxication defense, the opposing party will claim that your client was under the influence of drugs and alcohol which constituted the proximate cause of his injury. In the years I have been in practice I have never seen this defense prevail. The defense must prove that the employee was intoxicated at the time of the injury. It will largely depend on a toxicology report where the employee registers "hot" for one or more drugs or alcohol. But unless they can show the employee was intoxicated *at the time of the accident*, the defense will fail. Specifically, toxicology tests for metabolite -- chemicals in a person's blood as a byproduct of the drug. Because marijuana is fat soluble, it can stay in the body for up to a month after exposure. Cocaine and cocaine derivatives are not fat soluble and leave the body sooner through urine, say 24-48 hours.

Fraud in the application exists when the employee lies in his application for employment about his health, medical conditions and any prior injuries. *See Cooper v. McDevitt & Street Company, 196 S.E.2d. 833 (1973)*. However, this defense requires that the employee lie about the health of the particular body part involved before it prevails. Again, I have seen very few of the defenses actually work, much less than the instances where the employee has failed to comply with the employer's managed health care provisions.

In conclusion, develop of good case theory, build a plan of attack, align your evidence if possible, concede points you will lose, communicate and educate your client and staff on your legal and factual theories, attack your opponent's weakest points, be smart in negotiations and you will have served your client well.

Greenville, South Carolina

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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 parameters 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.

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 invaluable 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 legally 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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CROSS EXAMINATION TECHNIQUES

Written by Thomas M. Gagne, Esq. for The National Business Institute

Introduction

Cross-examination is a weapon, an effective weapon if handled correctly and a dangerous weapon if not. It can be your best friend or your worst enemy if handled incorrectly. Like a weapon, it must be treated with respect and understanding.

In this lecture, I will be discussing the uses and abuses of cross-examination in the context of civil litigation, specifically, personal injury litigation and criminal defense, which represents my main areas of expertise. For the sake of efficiency, I will assume in this lecture that the participants have had some courtroom experience and are familiar with the main elements and features of a trial.

We will begin with a discussion of the purposes of cross examination and cross examination in relation to other elements of the trial. I will then discuss the relationship between cross examination and case theory examining exactly what case theory is. I'll then go into specific techniques of cross examination and some of their foundational elements under the Federal Rules of Evidence. We will discuss motions *in limine* regarding the infirmities of evidence *per se*, the jury's response to cross- examination, building your witness' credibility and protecting her from effective cross-examination by your opponent, as well as special cases in the field of cross-examination including the talkative and angry witness.

Cross-examination, like any other element of litigation, does not exist in a vacuum. Cross-examination impacts and influences client preparation, case theory development, opening and final argument, pretrial motions and when relevant I will explore how these areas overlap.

Now, as we no doubt learned in law school cross-examination is probably the best tool we have to ferret out the truth in a trial. "Truth", meaning at least in terms of how far we can give credence to a person and her testimony as well as the credibility of other types of

evidence. Understand that any piece of evidence could be subject to cross-examination. Have no fear of that. The question of the art of cross-examination arises when we decide how we will apply the paint to the canvas, in what quantity, and what proportion, and if at all.

2. What are the purposes of cross examination?

Cross-examination has five basic aims: to discredit the witness and thereby his theory, to discredit the witness's theory and thereby the witness, to enhance your theory of the case, to attack the credibility of the evidence *per se* and fifth, to broadcast your theory of the case to the fact finder. I will go into the details of these goals later on. Remember that *ultimately* you're aiming for a compelling closing statement, a reiteration of your theory which explains the facts better than your opponents'. In this vein, I'll be talking about one key point throughout this lecture, what is called "saving it for closing". I'll discuss some special cases related to cross as well as some dos and don'ts.

As far as attacking evidence *per se*, this does not strictly fall into the category of cross examination. But be on the lookout for hearsay, privilege, chain of custody issues, relevance, authentication, best evidence issues and the like and try to dispose of it or get it admitted in a motion *in limine* or in a suppression hearing.

Cross-examination is scrutiny, a close scrutiny of the reliability of the witness, and the reliability of the evidence to which he is testifying. It is at the heart of a trial and functions to test the reliability and quality of evidence, much as a scientist tests his theories in a lab by trying to falsify his results. A trial is not unlike a scientific experiment testing a scientist's theory.

Scientific method gathers as much evidence as it can in order to prove, or disprove, a proposition. It does this through experimentation designed to falsify the theory. At trial, attorneys are doing essentially the same thing, except we are testing opposing case theories, subjecting them to methods of falsification called cross examination and opposing argument. If the theory survives this process, we can at least hold the theory as provisionally true, depending on the burden of proof, and take appropriate action in the name of equity and fairness. Of course, the burden of proof is lower in law than in science,

for better or worse.

Now, you cannot divorce cross-examination from the other aspects of the case. A case is a holistic enterprise. Each part depends upon the other part, symbiotically dependent on the other constituent parts.

Because of its centrality, learning to effectively cross-examine witnesses will help your overall trial technique immensely. For instance, a poor cross examination may strengthen your opponent's closing argument. A strong cross examination may enhance the credibility of another witness. And so on.

Done right, cross-examination should fit in neatly and bolster your theory of the case. Information elicited during cross always must have as its objective the strengthening of your case, not information for information's sake – another key difference between legal aims and scientific aims.

Moreover, dismiss from your mind reaching any *a ha* moments during cross, where you "make your case" by having a key witness breakdown on the stand. Surprisingly, that does happen, but rarely, as does the fact that a strong witness in your case in chief can simply annihilate your opponent's case.

In general, it is the small points you make during trial, an accretion of equities in your favor that helps you convince a jury to see evidence in your and your client's interpretation.

3. The Personal Case and Case Theory

Let's dive right in to a personal injury case for the moment to begin illustrating the development of a coherent case theory and some points about preparing for cross and protecting your witness from cross.

Assume you have a client injured in a car wreck. Proximate causation is a common issue. The plaintiffs' attorney must have a thorough medical history of his client. During the intake make sure you get the names of all the claimants' prior physicians going back at least 20 years if possible. Use your power of subpoena to procure as many records as you can.

When ordering the records make sure you limit the subject matter of your demand to your theory of injury, otherwise, you will receive a mountain of records regarding your clients' conditions unrelated to your case. On the other hand, you must be cognizant of chronic conditions which could have caused or aggravated your client's injury. And remember these records are expensive to order.

When you have a thorough and exhaustive medical history of your claimant meet with her to review it. Do not assume your client knows her own medical history. For that matter don't assume your client knows for a certainty the facts of her own case. Never take on face value anything your client says. It's always wise to corroborate it. This sounds harsh. But believe me it's necessary.

After you have received the records create a medical record digest. Employ the following fields and formatted in a spreadsheet form. The digest should flow as follows: date of visit, providers name, symptoms presented, tests conducted and the results, diagnosis, plan of treatment, medications prescribed along with dosage, and impairment ratings, if available.

After creating the medical digest give your client a copy and ask her to study it. Refresh her memory on points in her medical history that she's forgotten. Especially focus on the body part that is at issue, its symptoms, and whatever treatment she has undergone in the past and present. During the deposition opposing counsel will ask your client to enumerate her visits and her having a good idea of her medical history will be an important key toward establishing her credibility. A strong, well-prepared client reflects well on her and her attorney and provides you with leverage early in the game.

In personal injury law, or any other type practice for that matter, unless the claimant or plaintiff is prepared properly by his or her attorney prior to her deposition she can be a rich source of cross examination material for opposing counsel.

As noted, never assume that your client knows her own medical history. The number one tactic of defense attorneys is to ferret out **prior existing conditions**. A prior existing condition challenges your theory of causation as well as your etiological theory. After your investigation, if you discover a prior injury to the body part you are claiming was injured by

the negligence of the defendant you may have to change your etiological theory from traumatic to aggravated.

Always have a viable and integrated theory before you begin your process. Each time you modify your theory as a result of discovered evidence, you weaken your case and your credibility. Proper and thorough investigation before you file is the key to the game.

Now let's take a moment to discuss case theory and a little more depth. You can define case theory ***as a constellation of facts and circumstances, established by evidence, which taken in toto fits a legal framework that in a civil context provides a remedy for the plaintiff or extinguishes or ameliorates the liability of the defendant.*** The lawyer's job is to provide evidence to establish those facts and circumstances favorable to the aims of his case and ultimately for the welfare of his client. Remember, evidence does not equal facts. Only a fact finder after sifting the quantity and quality evidence can determine a fact.

The glue that holds your case together is your theory of the case. This can be divided into three constituent parts. One, your legal theory, two, your factual theory, and three your theme. Working without a case theory is like an architect who begins to build a structure without plans. Each part needs to be constructed so as to fit neatly into the overall design and aim of the structure.

The legal theory of the case may be further subdivided. For instance, in a negligence case, you must have a theory of liability, proximate causation and damages. This is in turn divisible. For instance, damages may be further divided into property damages, permanent impairment, pain-and-suffering, out of pocket expenses and so forth. Causation may be divided into proximate causation and but for causation. Liability may be divided into the liability of the tortfeasor as well as any contributory negligence of the plaintiff or joint tortfeasor.

So, when I talk about case theory I am referring to a multitude of things --legal theory and all that encompasses as well as factual theory which supports the elements of your legal theory. Cross examination is preceded by a careful development of your case theory. Once your case theory in all its parts is firmly implanted in your mind cross-examination will flow easily. You will know what points you want to bring out.

Reverse engineer your evidentiary presentation. What does this mean? Obtain a copy of the complaint and next to each element of the legal theory jot down the evidence you plan to introduce to prove the element. For each element I may have multiple witnesses or other types of evidence. For instance, on the issue of vocational impairment I may have the plaintiff testify as well as a doctor and a vocational expert.

Afterwards I gather the evidence and chart what will be testified to and who will shepherd in the evidence, e.g., who will testify. I rate each witness on a scale of one to ten for credibility, and if I absolutely have to have the witness this shows me if I need to work more with the witness during preparation.

Then I sit down and actually draft a closing argument including every piece of evidence that supports my theory of the case, why my witnesses are credible and why the defense theory does not make sense. It is important to write it out so as not to miss critical details. And of course all of this presupposes that you and your staff have conducted a thorough investigation before any of this.

And of course, during trial your closing will be modified. But drafting a closing argument will go a long way in establishing a case theory and exhaust consideration of positive and negative evidence as well as helping you plot the introduction of your evidence and the structure of your cross examination.

It is then an easy matter to construct a direct examination and then prepare you witnesses for cross-examination. I do the same thing with the defense case theory obviously focusing in on the weaknesses of their evidence and witnesses creating the points I want to make during cross.

Once you have established these the points you wish to elicit from an adverse witness cross should fall easily line. Before cross-examination, write down your points you want to make off each adverse witness. Prior to trial try memorize them. You don't want to be reading off a check list as you conduct your cross. Moreover, if you're just reading a list you're not really listening to the witness, and you may miss a rich vein of material for cross that the witnesses just uttered. Moreover, no cross goes exactly as expected. New information at trial always

crops up. Knowing your case, and knowing your opponent's case will help you deal with these little surprises and help you decide whether to ignore an attack or use the "surprise evidence. "

At its core, cross-examination is a contest between your credibility and the witness's. The key is to control the witness and know the context of your case and your opponent's case better than the witness does, hopefully better than your opponent does.

Some lawyers say they never prepare for cross because it is so unpredictable. This is foolhardy. Always prepare for cross. Anticipate what the adverse witness will testify to. Plot the points you want to make on cross-examination consistent with your theory of the case and how you will make them. Again, do not list a set of questions. List a *set of points* you wish to elicit through questioning. You'll be surprised how prescient you actually were. Moreover you can easily prepare for sensible crosses such as a prior criminal record if you prepare ahead of time. Do not forget to jot down the foundational requirements for what you're trying to do.

Now, back to illustrations. The adverse witness has just finished testifying in court. All eyes turn to you as the judge says "counsel your witness". Your adrenaline is flowing. And you feel you must do something. Many lawyers at this juncture will cross-examine the adverse witness in order to appear *to do something*. This is a mistake. **The cardinal rule here to remember is: if an adverse witness has not harmed your theory of the case then waive cross examination.** Questioning a witness any further runs the grave risk of eliciting information detrimental to your case. You must have the fortitude to waive cross-examination if the situation calls for it.

Before I begin with the techniques of cross-examination a word about **enhancing your case**. Many times the witness will testify to facts that are helpful to your theory of the case. Do not miss the opportunity to have the witness commit himself to this evidence during cross. Eliciting favorable facts up front in your cross also has the added advantage of putting the witness at ease before you "go on the attack". Moreover, your image to the jury is enhanced when you begin your cross-examination in a nonthreatening manner. The jury is put at ease and you come off more likable.

When you close, reiterate those facts which are not in dispute. Having an adverse witness enhance your case is very effective. Remember, every witness is a two edged sword; just as your own witness can say something that hurts your theory of the case an adverse witness can say something that helps.

Now, the techniques I will be discussing are just that – techniques. There is no one magic bullet, no one formula to a successful cross-examination. No rule is absolute. Moreover, there is no one way to cross.

With enough practice you will begin to develop your own style. Instinct and being able to think on your feet will help you win the credibility contest between you and the adverse witnesses and between you and opposing counsel.

4. Cross-Examination Techniques

Concentrate your attack on the weakest points. The weakest points of what? Remember, most evidence is a story told by a person. Therefore, there exists two points of attack. Attack the credibility of the witness and attack the credibility of the story. Don't forget to lay the proper foundation for your questioning beforehand. Because of limited space and time I will not be able to going to all these foundations. However, you will find a treatise on foundations in *Imwinkleried Evidentiary Foundations*.

Attacking the credibility of the witness. This is what can be called a **direct attack**. You are attacking the witness's status as a truth teller. You are in essence attacking the witness himself. This type of attack can itself be divided into two parts. Attacking the witness' motive to lie and attacking the witness' reputation.

In a **direct attack** you are not attacking the story but the person. The theory behind this tactic is that the witness is either intentionally or unintentionally lying or putting a false or misleading spin on their story -- usually out of personal gain or habit. Many people grow up lying. They know no other way even lying when telling the truth would benefit them. Of course the extreme manifestation of this condition is the pathological liar. These type of witnesses are easy to spot because their stories are usually very elaborate and the stories keep changing.

As far as attacking motive is concerned, this includes challenging a witness' bias, prejudice, interest, greed, love, hate or jealousy. Get in touch with your understanding of human nature to touch the nerve why would this might be lying.

The reputation attack. Attacking reputation means that you introduce extrinsic evidence of a person's reputation. The proper foundation for introducing the witness' criminal record, bad acts, and bad reputation for truth. You might be able to save yourself an embarrassing objection if you can get the judge in a motion in limine to include the evidence pretrial. However it has been my experience that judges would rather see how the trial is going and reserve their judgment on admissibility until the proper point.

Bad acts. These may bear on a person's credibility. An example may be lying on a job application. The act must be one of untruthfulness and it's probative value must outweigh its prejudicial value. In some jurisdictions you have to take the answer as given. If the witness denies the act, you're stuck with it. It is for this reason that I have rarely if ever use this technique.

Prior convictions. This is an old chestnut. Well before trial run a fresh rap sheet. If the rap sheet is a lengthy one, it may take weeks before you receive it. Make sure you get a certified copy so that it is self - authenticating. Prior convictions are limited by time usually 10 years, and by whether the crime reflects on the witness' credibility. Moreover, it may be excluded if it's prejudicial effect outweighs its probative value.

Untruthfulness. This is when you ask a witness to testify to the truthful or untruthful reputation of another witness. The witness may also testify to his or her opinion as to the truthfulness or untruthfulness of the person. Make sure your witness is clear . Remember the adage though that every witness is a two edged sword.

Perception. We get our knowledge through our senses -- at least the type of personal knowledge record is interested in. Witnesses testify to what they see and hear, so obviously find out if the witness wears glasses or hearing aid, What type of glasses? For myopia? Astigmatism? Farsightedness? Some other pathology? If so, was he wearing

the glasses at the time of the identification? Was it anything impeding their view? And so on.

Memory. I like to think of a witness as an imperfect tape recorder or video recorder. Very imperfect. Think about it: for instance, what did you have for dinner two Wednesdays ago? I bet none of you can recall, but you were there.

But you retort is: people usually remember particulars which make an impression on them at the time. This is true. But as time goes on, our minds tend to fabricate missing parts of the memory. We only view an object from our perspective and of course our memories are charged with bias. Psychological studies have shown that the human mind is not a blank slate. Rather we bring our biases and prejudices that what we see and hear. We filter reality in order to deal with it. We see what we want to see and hear what we want to hear in order to satisfy various psychological needs.

Combine this action with physical infirmities and first-hand information becomes very suspect. This is why identification has come under so much attack in recent years. What began as probably the best evidence we had -- first-hand information -- has devolved into possibly the worst. All this supplies a trial attorney with fertile soil for cross-examination and great material for closing.

Coherence. This means the witness possesses good narrative ability and is a good historian. To make compelling testimony, a witness has to relate a series of observations and ideas in a logical concise and coherent fashion. If the opposing counsel has done his homework the witness will follow these precepts.

But even the best prepared witness can fall short of this and make a hash of his testimony. Point this opposing witness's failure to narrate a coherent theory at closing. Argue that the witness' dates are wrong, the who what where and why of his facts are muddled or nonexistent. . How can you believe a thing he says?

This cuts both ways. Review the facts with your witness. Especially dates and distances. These tend to give witnesses the most trouble. Teach your witness to be a good historian

and to tell a story in straightforward, logical and coherent way. Most importantly, aim for concision. This will probably be your biggest challenge.

I cannot overstate the importance of witness preparation. Even so witness's even well prepped witnesses say the weirdest thing sometimes. There is nothing quite as unpredictable as human beings.

Now I move on prior inconsistent statements and prior inconsistent acts. These are the bread and butter of cross-examination.

Prior and Post Inconsistent Acts. Allow me the cliché "actions speak louder than words". Study the witness's acts. If you speak volumes in the beauty of this technique lies in the fact that the witness usually has not reviewed his past actions. Let's go back to the shoulder injury case I mentioned before. Remember John Doe was complaining of a shoulder injury incurred after lifting a patient. The objective evidence of the MRI was largely negative except for some arthritis. The claimant was in his late 40s and is not uncommon for people to suffer arthritis of this stage of life. His clinical picture was consistent. He complained over course of about six months to the providers of pain in the range of 5 to 6. He took his medications per prescriptions and appeared as an articulate witness who presented himself well.

Remember the glitch however. It came out during deposition that John had vacationed shortly after the date of the alleged injury and went parasailing. This act was inconsistent with his theory of the case that he hurt that shoulder. Inconsistent statements are easy to wiggle out of. It is much harder to wiggle out of inconsistent acts. A person with a 5 to 6 pain scale certainly would not have parasailed.

Coming from personal experience, parasailing puts a lot of strain on your arms and shoulders. Look at his latest medical records, employment records, and any other you can find where the witness's acts differ with the theory of the case.

Prior and post inconsistent statements. This is truly the most often used technique and cross-examination. It is fairly self-explanatory but because of the centrality of I will review the elements. The lawyer seeking to cross-examine the witness about a prior inconsistent statement should lay the following foundation: one the lawyer should get the witness

committed to the testimony he gave on direct examination. Two: the witness made an earlier statement at a certain place. Three: the witness made a statement at a certain time : certain persons were present. Five: statement was of a certain tenor. Six: the statement is more likely to be reliable than the present testimony. And then sit-down. There is no need to rub it in to the client with further examination. Further examination also risks eliciting information negative to your case. Bring up the prior inconsistent statement in your closing argument. I.e. saving for closing.

Basis of knowledge. This is often overlooked. But it is basic. A witness can only testify from personal knowledge. How does the witness know what is talking about? Did he see it? Is it hearsay? Is it admissible hearsay? This tactic is closely related to perception.

Attacking the story. The second major avenue of attacking the witness's credibility is when you attack his story. Discrediting the witness's story is tantamount to discrediting the witness. In this tactic, you're not trying to attack the witness per se. Instead you're attacking the story. This is a favorite attack of mine. Why? Because if you attack a person's credibility directly there's always a danger that the jury will resent you. The jury is initially sympathetic to a witness. It's your job to overcome the big bad lawyer image.

By attacking the story you are saying to the jury let's be fair. I am not slinging mud here, it's just that his story does not make sense. The idea is to be a lady and gentleman with the witness. Control your emotions at all times. Show yourself to be the knowledgeable, the polite, the credible one in this contest between lawyer and witness. If the witness gives you an answer that particularly hurts your case act like it actually helps your case. Never bleed in front of a jury.

Internal inconsistencies. This tactic is fairly self explanatory. Does the story hang together in and of itself. Have the witness commit himself to the inconsistency and then save it for closing. Also, there may be multiple inconsistencies. That is why the attorney must carefully listen to the witness and "live in the moment" instead of anticipating what you will do after the witness testifies.

External inconsistencies. This tactic pits what the witness is testifying to and common sense notions of what we know about the world. For instance, if the witness claims that the incident happened at 8:30 p.m. and that it was still light, you can easily argue that it could not be light because at that time of year and that particular day the sun set at 7:30 p.m. Or that it took 39 minutes for the ambulance to get to the hospital from the accident scene when you can argue that even without traffic or lights, the ambulance would have to be travelling 130 miles per hour to make it in that time.

You may have to call a witness or introduce extrinsic or documentary evidence to verify your point, but remember, you are not admitting the extrinsic evidence into the record, merely using it for cross.

Improbable theory. I have mentioned this elsewhere but it's important. The tactic here is to keep in mind the big picture of the case. A lay witness usually will not do this. He won't automatically think: does this jibe with other things that I have said or done or other witness' testimony or actions?

This gives you a built-in advantage because unlike most witnesses you do or should have an overall picture of the case. If the inconsistencies are glaring you can even ask the ultimate question. There's nothing like a witness understand simply unable to answer you because his story violates the rules of simple logic.

Reductio ad absurdum. Basically you are arguing that if what witness says is the truth, the consequences of the assertion are absurd. Get the witness to commit the propositional fact and then argue in closing that if the testimony is true it leads to ridiculous consequences and therefore the propositional statement cannot be true.

Omissions. Use this technique when the witness has left out several important details. Make sure the details help your case or at least does no harm to your case. When a witness omits a fact which helps your case you're bringing it up on cross will make the witness look like he's hiding something. Make sure the details are firmly established through prior especially adverse witness testimony. Set the stage for the answer by corralling the witness.

5. The Angry Witness.

The angry witness may present a lawyer with an opportunity. First of all, an angry witness will tell you something about the competency of opposing counsel. Anger rarely helps witness' ability to think clearly. It cloud of witness's judgment and counsel should have warned to curb his anger during cross-examination.

If you have successfully set the stage of your attitude with the jury, that the trial process is not about vendettas, humiliation or wanton assassination of character. Rather that it is a process of discovering the truth or least probability of truth. If you have kept your emotions check the angry witness rather than you will come off badly to the jury.

On the other hand, an angry witness may not be as pliable as other witnesses. He may have more of a tendency to stonewall you. If you generate a nonthreatening even friendly attitude toward the witness and put him at ease this will go a long way to alleviating his anger. The witness should mirror your relaxed friendly attitude and let down his guard. The old cliché a soft answer turns away wrath is applicable in the situation. And if I may be permitted another chestnut at this point: you can catch more flies with honey than with vinegar.

One thing you must not do is fall prey to the witness's anger. That is instead of his mirroring your attitude you mirror his hostile attitude. You're breaking one of the cardinal rules – a trial is not personal but a dispassionate disinterest to search for the truth. Your credibility will be damaged if you become angry and your judgment will be adversely affected.

Sun Tzu in the *Art of War* advises that if your opponent is of choleric temper irritating him is probably not good advice in the context of a trial. Irritating a witness in order to make him angry or will in all likelihood rebound to your disadvantage. The jury will feel as if you're badgering the witness and sympathy will flow to the witness.

6. The Talkative Witness

The talkative witness can be a two edge sword. The old adage give him enough room and he will hang himself certainly applies in this instance. Chances are that the witness has not thought through a consistent theory of her case and may blurt out something that

damages her credibility and the opponent's case as well. In some instances, it may behoove you to let the witness ramble.

On the other hand, you don't want to lose control of the witness and risk your credibility with the jury. Or risk confusing the jury. Here's what I mean. The witness may throw up all sorts of irrelevant information designed to cloud the issues of the case. You do not want your points being lost in a miasma of testimony that functions merely as a cover-up. Remember the truth is very simple whereas a liar will introduce all sorts of information in the hope of derailing you to a non-issue.

Again the attorney must use his own good judgment to decide whether or not to allow the witness to ramble. Context is everything. What I am setting forth are guidelines, not absolute rules.

One particular instance of a witness who is out of control is the one who starts to ask you questions. Unless it is a question asking you to clarify or rephrase your question gently remind the witness that it is not his role to ask questions but rather to answer them. If the witness persists, seek an instruction from the judge that the witness cease asking counsel questions.

7. Jury Response to Cross

I believe that most jurors want to do a good job and take the role seriously. They want to hear all the information they can and will get angered if they are asked to leave the court or are not privy to judge and lawyer conferences. Cross-examination is an excellent opportunity to include the jury in the process and get the judge on your side in the case which usually results in the jury being on your side. But like anything else it is not what you do but how you do it.

Realize that the lawyer is usually at the disadvantage at the beginning of cross-examination. Most jurors' image of lawyers derives from media portrayal which if we are frank about it is not positive or perhaps a bad experience with their own lawyer. Lawyers have to overcome for lack of a better word the big bad lawyer image.

Jurors sense when a witness is uncomfortable. The courtroom is *terra incognita* for most witnesses while the attorney has a home field advantage. Jurors sense there is an uneven distribution of bargaining power between the witnesses and the attorney. Moreover jurors empathize with and feel compassion for her -- all other things being equal. Jurors can feel embarrassed for the witness who are made to look bad by what they considered to be verbal trickery of the lawyer.

This is where the attorney needs tread carefully. Always be polite to the witness without lapsing into obsequence. If the jury feels you are merely trying to get to the bottom of things this will dispel their initial negative feelings toward you. Be businesslike. But don't be afraid to get to the heart of the matter. Keep it simple. Each question should be discreet and small building to the question which finally cast doubt on the credibility of the witness or his story.

Don't display any anger or vindictiveness or become argumentative with the witness. This will only result in the loss of your credibility with the jury and judge. Don't talk over the witness. You'll notice sometimes as you cross you start to get your dander up, especially if the witness is evasive or being intentionally obtuse. This is a normal reaction to the adrenaline that is coursing through your body. You are experiencing the fight or flight instinct.

One of the most difficult challenges attorneys face in trials is keeping your cool. When I feel threatened during trial I tend to turn white. Some attorneys get angry. Some attorneys turn red. Sometimes a physiological response you have is beyond your control.

The ability to control your emotions during cross or any stage of the trial process is the mark of a good attorney. Breathing deeply and regularly will even out the effect. Pause a moment. Take a sip of water is another. Breathe deeply and slowly. The bottom line is to remain cool and businesslike and the jury will most likely follow you.

And remember most jurors want to know the truth or what is probably the truth catching a witness in a blatant lie will help you with your case. Jurors need to be lied to like most people. So feel confident in yourself if you're prepared and you know that you can discredit

the witness. Preparation leads to confidence and confidence is a great antidote to the fear that you may feel at trial.

Now in a lot of cases you won't have a smoking gun or a big lie. You might have some prior convictions you are able to impeach the witness with but if they are old you may not be able to get them in and they may not have too much impact with the jury if the convictions are relatively inconsequential they may even be seen as a cheap shot.

In most instances cross-examination is a gradual process that results in an incremental gain. We are all sophisticated enough at this point to know that very rarely is the witness devastated by cross-examination as we see in movies and television. But this incrementalism usually adds up to significant gains by the end of the trial and your closing argument. So the watchword is patience.

Now a word about the last word. It is sometimes beneficial to lead the jury to the water and let them drink it. That is, say ask enough questions to make your point without explicitly bringing it out. Let the jury make the final conclusion at trial and then you yourself at the point during closing. The jury will feel as if it came to this conclusion independently and that you are corroborating their thinking. You are now on the same page of music as your jury without arguing them there. Cross-examination is a great chance to do this.

8. When Not to Cross-Examine

The central purpose of cross-examination is to cast doubt on the personal credibility of the witness or his version of the facts and thereby his personal credibility.

It is always essential that the attorney knows the elements in the theory of its case as noted. Inexperienced attorneys of a fuzzy idea the case may not recognize the witness's testimony is helpful, harmful, or neutral to the credibility and persuasiveness of their theory. Therefore, such attorney we usually feel compelled across a witness after she's testify because that's what attorneys are supposed to do and from a fear that the jury will not respect her as a fighter. What the lawyer is usually doing you know we thought is just reiterating what the witnesses testify to. While this may not harm you case asserted is no good it may serve to merely confuse the jury.

In the witness has not harmed your case where cross-examination. This will not affect the credibility with the judge or jury. This is especially true of the witness who is helped your case and corroborating a theory. Crossing the witness may only give her the chance to retract the favorable information or equivocate. The basic rule of thumb applies – **quit while you're ahead.**

9. Protecting Your Client From Cross Examination

Usually, the first recorded statement a claimant or plaintiff makes is a deposition. In the hands of a skilled attorney, a deposition can be devastating to your case and to your client's credibility. Inform your client that the opposing counsel is not your client's friend even though a good opposing counsel will initially disarm the deponent with pleasant manners and insure that he is not there to embarrass or trick him and that the entire process is routine.

Ninety five percent of my clients are ramblers. Why is this? First the deponent is under the impression that the deposition is a trial and that when he testifies he must say everything he can in his imagination to prove his case. He will talk and talk without the opposing counsel uttering a word. The opposing counsel is more than willing to let the claimant talk. After all, this is more grist for his mill. Remember the old adage, give a person enough rope and sooner or later he will hang himself.

Moreover, in injury cases the claimant has undergone physical and mental trauma and pain for weeks, if not months. Medical providers, the first authority figures they encounter, are obliged to see dozens of patients a day and usually limit their direct contact with the client to 5 to 10 minutes at the most and usually address chief medical problems exclusively. Spouses and friends are an outlet, but they're not in a position of authority.

At the beginning of the case, claimants feel ignored and have a great need to verbalize their problems to those they feel capable of eliminating or alleviating them. The bottom line is to impress upon your client not to volunteer information. Keep answers short, sweet and to the point. Do not try to anticipate opposing counsel's line of questioning. Make the opposing counsel work for it.

Now, deponents lie for a variety of reasons. One of the most common occurrences happens when a claimant knowingly tells an untruth because "it will help his case". I refer to this as a client "practicing law". Chances are the truth would not have injured his case at all, but now the horse is out of the barn and the case has just become more difficult for you.

The second reason a claimant lies is because she is simply making a mistake. People have a natural aversion to admitting that they do not know an answer. She would rather stretch or guess an answer rather than saying "I don't know". This aversion to feeling foolish is magnified when facing persons in authority. I tell my clients that if she does not have a clear and distinct idea as to what an answer to a question is simply admit she does not know. Admitting ignorance is an important step toward knowledge. It's crucial to be truthful in your testimony; however, it is even more critical to be accurate in your answers.

If the deponent cannot remember or does not know an answer to a question tell him or her to admit it. This is especially true if the opposing counsel asks your client to list any convictions she may have. Chances are if your client has several convictions she has many. And chances are if she has many convictions he will admit to or remember all of them.

Tell your client that when opposing counsel asks about former convictions to list the ones she can remember and then say that's all I can remember. Otherwise you run the risk of opposing counsel cross examining her on omissions during trial.

Another pitfall deponent's encounter is testifying to the level of their pain. Everyone has a different threshold for pain. In personal injury cases, claimants think it strengthens their case if they claim great pain. "Excruciating" is a favorite phrase. Rather than describe the quality of the pain ask the claimant to rate the intensity of the pain from a scale of 0 to 10 with 10 being the highest pain imaginable i.e. being on fire.

This usually puts it in perspective for them. The problem with overrating pain lies in the fact that the claimant may not have been prescribed strong pain medication by a physician, setting the client up for an inconsistency later during cross.

Now if we designate Q1 as a quantity of pain – on a scale of 0-10 and use Q2 as a quality. Q2 pain scale is as follows: sharp pain, dull, burning pain, needles, tingling, tingling and numbness

-- use your common sense and your own experience. Do not forget radiculopathy, that is, pain radiating to the upper or lower spine to the upper or lower extremities.

Another twist to the pain equation is "antalgic" pain. For instance, if the claimant suffers a foot injury she will favor that foot when she walks placing strain on the opposite foot often creating its own pathology. In those cases you may find it necessary to add the other limb as a body part to your complaint. The claimant should discuss all of her pain. Testifying to only chief complaints and then trying to add a pain symptom will set the client up for cross on an omission or a charge of "snowballing" her pain.

When preparing a deponent for a deposition you're essentially preparing her for cross examination. She needs to be familiar with her own case and her own medical history as much as possible. She should be familiar with your medical digest post-accident as well as her medical history especially as it relates to the body parts or body parts under consideration. She needs to be familiar with "post accident" accident accidents or injuries which could sever the chain of causation. When she answers a question ask her to add "as far as I can remember" to leave herself an out.

Run your client's criminal history. You'd be amazed at how much your client has forgotten about her criminal history. Give her a copy before the deposition to study. Have her testify to charges as well as convictions, not just her convictions. Include DUI and other traffic offenses. Make it clear to the client that most of these convictions are irrelevant except for crimes of dishonesty or moral turpitude. They only become relevant if she lies about it. Also, check your intake. I would wager that she denied any criminal history at all. This will tell you what kind of client you are dealing with.

If your client has made any prior recorded statements order them as soon as possible. Sometimes it takes a while to procure these items. Give a copy to the deponent several days before the deposition so she will be familiar with them and will not contradict herself. On the topic of pre deposition recorded statements, I usually advise my clients not to make them as they will usually just cause trouble and create one more statement the client needs to be synchronized with.

Surveillance. Damning surveillance leads to cross of inconsistent actions. I have found that men especially are susceptible to surveillance due to the fact that they love to mow the yard even though the doctor has proscribed such exertions. Men out of work and collecting temporary disability also moonlight. Warn the deponent in no uncertain terms to refrain from this and all other activities. Women also like to work in the yard. During their period of convalescence ask them to stay indoors avoid physical activity unless prescribed by the doctor.

As far as doctors' orders, impress upon your clients the importance of taking their medication as prescribed, no more, no less. This includes work restrictions, modified or not. If she lies that she has complied with doctors' orders she has opened herself up to impeachment. If she tells the truth that she has not complied with doctors' orders she has opened herself up to a charge of noncompliance.

Advise your client not to get angry with opposing counsel. He is just there to do his job. Besides an angry man is quick to anger more and angry people tend to make mistakes.

Remind your client that the reporter is taking down everything she says so do not nod or shake your head or shrug your shoulders. The reporter is not trained to interpret body language. Tell her she has to speak clearly and verbalize her responses.

Find out if the client has been on any vacations since the accident. Many clients find post accident as a perfect time to vacation. In workers' compensation cases money's coming in from temporary disability and they have no place to go for work.

A brief a war story will suffice to illustrate this point. A former client of mine damaged his shoulder lifting a patient – quite severely – requiring shoulder arthroplasty. He worked as a male nurse for a doctor and authorized physician placed him completely out of work until he reached maximum medical improvement.

During the deposition the opposing counsel asked my client if he had gone on any vacations since his accident. A relatively honest man, he stated in the affirmative. The attorney asked for details, and it came out that my client had gone parasailing while on break. Now, if anyone has ever gone parasailing, as I have, I can attest it's hard on your shoulders.

Needless to say this admission severely compromised the value of his case. It not only showed that my client was not as harmed as he claimed, but that any impairment post vacation was exacerbated causing or at least increasing his impairment and need for complete shoulder replacement.

As this anecdote illustrates, when my client admitted under cross at the hearing that he had been parasailing, his credibility was not challenged he was not revealed as a liar per se but charged with noncompliance with his doctor's orders. Therefore, tell your clients not to take vacations until after the case is closed and to always follow doctor's directions. If the client is not happy with those directions the remedy is to seek a second opinion, not to modify them himself.

Another problem area which can be solved pre-deposition is ability to perform lifestyle activities. Many clients believe their case is stronger if they testify they can no longer perform everyday activities which, unless you're totally simple, a fact finder finds it difficult to believe and seeking pity or simply exaggerating.

It is much more effective if the claimant states that she can perform her daily routines, hobbies, husband and wife the duties but that is much more difficult to perform these. This has the added effect of vividly portraying in the jury's minds to quality and quantity of claimant's pain and disability. And remember, unless the injured party is a championship level basketball player or fisherman the plaintiff's lifestyle loss will not be as well compensated as his loss of every day earning capacity. Focusing on the dynamics of his job and how it is difficult for him or her to perform those dynamics.

As for my asking questions during the deposition of my claimant, I assiduously try to avoid it unless absolutely necessary and I try never to ask a question unless I am sure of the answer. This also applies during cross- examination. I will repeat never ask a question unless you're sure of the answer. Client sometimes complain that I do not ask questions as if I'm not doing my job.

Resist the impulse ask questions unless you know the answer and that you have a very good reason to ask them. But after I explained my tactics for not answering questions the client usually understands.

When I do ask a question it generally involves the body parts involved in the injury. Often times we will spend 45 minutes or so reviewing the body parts affected only to have the claimant forget half of them at the deposition. In some cases clients try to "snowball" their injuries i.e. they think if they have more body parts injured then they'll be compensated more. This is a fallacy and of the body part is not legitimately injured claiming so can severely weaken your case. To rehabilitate the record, I will gently remind my client through questioning the body parts involved.

Make it a point in your checklist to not forget psychological overlay, that is, if the client has a history of depression anxiety or sleeplessness and because of the accident the client's dosage has changed to a more powerful prescription or his dosage has increased or both or he has increased his meetings with his therapist.

If you have tried to rehabilitate the record and utilize still not as thoroughly enumerated all the body parts affected primarily and secondarily at least you have tried. Remember the remedy to this and all similar problems is a thorough preparation for deposition as to the facts before the deposition.

10. Dos and Don'ts

A. Never let them see you bleed. The jury is looking at you all the time for signals. You will greatly reduce the impact of unfavorable testimony if you act like it's no big thing if you suffer a setback.

B. Never rehash the direct. This is the mistaken last resort of an underprepared litigator. If you must do this keep it short and have a purpose at the end was will pay off for your case.

C. Never ask a question you don't know the answer to. Cross is a very controlled exercise. This is not a time to be a cowboy. With cross, less is usually more.

D. Never belittle your witness. Remember you are the big bad lawyer. You need to walk a thin line this twain seemly unsure of your position and browbeating the witness. You don't want the jury to resent you... Just be polite and cordial in your demeanor but be confident. The content of your questions will get through. Besides you will have a chance at closing to reiterate the point you made on cross. Reiteration, cogent argument, and memorable presentation are the keys to making an impact on the jury not bravado or unbridled aggression.

E. Never ask a witness a why question unless you have cut off all avenues of escape. Asking why would this does or says something is giving him a license to testify again. The witness is your mouthpiece not your opponents.

F. In general, never asked the ultimate question -- save it for your closing. The beauty of cross is that you can always stop before you ask a question that will harm you. Ask every question to make your point except for the direct one. Never say never but an average witness will never give you the ultimate answer you want on the ultimate question and unless absolutely has no choice.

G. Never conduct across totally extemporaneously. Know what point you're trying to make with the cross. You need to know the evidence opposing counsel will attempt to introduce will and imagine a cross of his witnesses based on the information you do have. The more information or intelligence you have about your adversaries case the better you will prepare. Therefore, intelligence is key. And intelligence is based on investigation – the foundation of all legal cases. Know where the other guy is going before he does. Know when the fight is going to be. And get there first with the most evidence. As Nathan Bedord Forrest remarked on how to win battles: “Get there firstest with the mostest.”

H. Listen to the witness's answer. Don't get so worked up in getting through your cross-examination that you fail the hear a response that may be fertile ground cross-examination. A witness will sometimes say something incredibly stupid because he is not fully cognizant of the legal and factual theory of his case. Always be prepared for cross. But also remember that cross is an art form. If you're inflexible and rigid you won't be open to new ideas. I once

worked with a lawyer who had his cross written out *verbatim*. As he crossed the witness he would follow a prepared script to the letter, missing golden opportunities which presented themselves.

I. Don't necessarily accept the answer. If your case is solid, then sooner or later they will look unreasonable. Don't feel that because you get a bad answer you should give up. Dig. You'd be surprised how many times a witness finally realized you know your stuff and you're not going to put up with any of their BS.

J. Don't always feel like you need to cross a witness.

K. Clear implication can be effective. I am of the opinion that you pretty much have to spell everything out for jury. The best place to do this is on opening and closing statements. Cross is a not good place to be perfectly direct.

L. Imply a point. You do this by not asking the ultimate question and saving it for closing. You can also do this by what I call the technique of not caring what the witnesses answer is. It happens when you really don't have any more left to attack with but you feel like you have an opportunity to get your theory before the fact finder to questions.

The technique is simple. Just ask a short series of questions telegraphing to the jury your theory of the case. You know already for the witness will disagree with you but you don't care. Basically you are arguing to the jury with questions.

M. Assume what the witness is saying is true. This sounds strange but here's how it works. An adverse witness will have his version of the facts which is different from yours. However, if your theory is solid, your version will hang together well.

The analysis is as follows: facts ABCD have been established. There is no dispute. Witness gets up and testifies to E. Now as noted the witness will not have considered the whole picture. It is up to you to get the witness commit himself to ABCD and then in your closing argue that if ABCD are true, as opposing witness has corroborated, then E logically cannot be true. Do not argue with the witness his assertion that E is true.

The key to this tactic is to keep the big picture of the case in mind at all times and remember the facts that are not in dispute. Seen from another perspective, by assuming what the witnesses saying is true your assuming that e is true and therefore ABCD are not true, but you have established that ABCD have to be true therefore E cannot be true. The jury will not believe the witness's story.

N. Do not assume that the witness is intentionally lying. The witness is often lying unintentionally. But many times the witness is mistaken or he or she wants to believe the story. Score points with the jury by arguing the witness is just mistaken.

O. Let the witness tell his lie. Again the old saying: give him enough rope and he will hang himself applies across. Don't feel that every adverse witness's word is just one more nail in your coffin and you have to cut him off as soon as possible. As mentioned sometimes a witness gets going and will say all sorts of stuff that is fertile ground for cross. Let him go. You understand that less is more cross. But some witnesses don't. I like talkative witnesses who suddenly find themselves the center of attention. Foster that feeling. They eventually put their foot in their mouth. But never let the witness control of the cross.

There is something that happens to a person when he or she takes a stand. What was once an average urban dull-witted person in metamorphic eyes into a formidable intellectual combatant? They get a surge of adrenaline or something. So you have to be careful with every witness. Treat them as your intellectual equals.

P. Have an objective to your questioning. Remember jot down five points you want to make with your cross-examination. These points I later pick up in my closing argument. Again you are aiming for good closing argument based on the evidence and there is nothing better than an adverse witness that you have destroyed in the stand as evidence. I try to keep my points to a minimum. Five rather than 10 points. Remember the attention span of juries is short. If you had 10 points pick out the best 5 to 7 points to concentrate on.

Q. Develop a series of questions that will get you to that point. Once you know what point you have to make the next challenge facing you is getting the witness to make your point to the answers to a series of carefully laid questions. This is where the nest comes in. First do

not telegraph where you're going with your questioning. Figure out a style that is best for you to a competent this. Build the corral. What does this mean? It means sealing off all avenues of escape to the witness. Ask questions where they can only be one answer, your answer, or the witness loses credibility.

Begin by asking innocent questions in order to get the witness to let his guard down. As your questions become more pointed I physically get closer and closer to the witness.

This helps you because what you are doing is slowly invading the witnesses personal space gradually intimidating him into giving me the answers I want without his really knowing it because I'm so gradual and because I've made it a point to put the witness at ease in the first crucial seconds of the examination so his guard is down.

Finally keep the question short sweet and simple.

R. Ask questions that are anchored to other established evidence in your case. Do not ask generalized questions that allows the witness to pontificate. Do not ask why unless you are certain the answer will fit into your strategy and theory.

S. Finally, have fun. A trial is a serious thing. But is no sin to have fun at trial. And cross to be the best part. Trial work is your job. You should enjoy it. I used to get tense about trial especially cross because it really is a hard thing to do, even for the most experienced trial lawyer. You have to keep a lot of balls in the air. I would end up psyching myself out about it. But the tension lessons with good preparation and experience. With time, you will create your own techniques, style and checklists.

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