

## **13 ADVANCED TRIAL TIPS**

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- 1. The simpler and shorter case usually wins.** If you can't put your trial on quickly, figure out why. You are there for a specific purpose- either to win your client's case, win the motion or injunction, win a jury verdict, or defeat one. That is your sole purpose. Narrow and filter your evidence to that purpose. Every time you are talking, putting a document into evidence, examining a witness, or playing a video. Why are you doing that? Question the question. Any time you read or see about a long case, you can see that case is going to lose. (eg., St. Louis County Metro Link case and OJ Simpson criminal case). Under promise and over perform to the jury. Actions speak louder than words and the more you prove with your evidence and less with your voir dire, opening and close, the better.
- 2. A client has to be truthful about everything in a trial.** If the jury gets a whiff that they are not telling the truth they won't believe your case. This is more true with plaintiffs than defendants. Make sure a Plaintiff in a personal injury case is not malingering, whining or exaggerating their symptoms. It will be discovered, affect credibility, and their testimony will be severely undermined. A jury will not award much to a liar and it fits into the greedy plaintiff stereotype.
- 3. At trial, splice deposition parts to help your and jump around within the depo.** This does not mean you take things out of context or mislead. And take parts of the deposition to show inconsistencies or changes in stories. You just run it right down the screen and read it straight to the jury-but cite it. There is no reason if you are presenting evidence that you need to do in the page order within the deposition. Because depositions can be used for any purpose (Rule 57.07) the need to call hostile witnesses in your case in chief is ameliorated. It can be more effective and you exert more control reading portions of depositions.
- 4. Read important medical straight to the jury.** Plaintiffs go through and highlight the parts you want to read about complaints, consistency of them, the facts and circumstances of the incident, and causation, procedures, pain complained of, pain ratings, time period when this occurred, diagnosis and prognosis, and future medical relating to the incident. This can sometimes be duplicative of the videotape depositions you have already played, but that is ok. Defendant: prior symptoms/treatment, inconsistent pain, degenerative conditions, MRI radiologist saying degenerative conditions occurred, delays in treatment, or insurances of trauma following the incident.

5. **Use R.S.M § 494.470.1 for Voir Dire strikes for cause**, which provides in part: no person who has formed or expressed an opinion concerning the matter or any material fact in the controversy in any case that **may** influence the judgment of such person... shall be sworn as a juror in the same cause.... I file a Memorandum regarding Jury Selection in most cases I try – email me and I will send it to you.

6. On **cross examination, witnesses need to be prepared to admit clear principles in short answers**. Did you see the doctor on this day and not complain about back pain? Did you send this letter? Is that your signature? Did you say such and such and so and so? Do you note the difference between complaints about your back pain on this day to the doctor? So that means you did not have back pain during this time? (No that is not true I did but I just wasn't talking about that to my primary care doctor.) So they have to admit basic obvious things- but they need to stick to their guns on their story.

7. RULES: In any case **establish the legal obligations and breaches of them or the rules and violations of them**. Establish what the contract or the custom and practice required and show how the defendant or plaintiff violated it. Establish the rules of conduct the defendant should have complied with and how they violated them, eg., ran a red light. Establish the plaintiff's rules and how they violated them – but remember that plaintiffs have to mitigate their damages and cannot exaggerate your symptoms.

#### Rules for Insurance companies:

17 Q EMC puts out risk assessments and how to help your  
18 business reduce risk of slips, trips and falls. Have you ever  
19 seen any of that?  
20 A No.  
21 Q Have you ever inquired with anyone in the company  
22 whether they got any of that stuff?  
23 A No, I have not.

#### Rules for Hotels and Ice:

7 Q Okay. So does the, uh -- does the -- any of the  
8 branch standards from the Days Inn talk about, um, having a  
9 safe walking environment?

10 A Yes.

11 Q Okay. What do they say? What do they say?

12 A That it would be the responsibility of the company to  
13 keep the property safe for the arriving and departing guests.

**Rules in Auto crash:**

16 Q. So you looked away from in front of you and you  
17 knew there was a car in front of you. You moved the  
18 bucket of keys away from your foot, and you drove your  
19 van into the back of my client's car?

20 A. I thought I had enough time, yes, sir.  
21 Normally I would have if it wouldn't have stopped.

22 Q. Okay. So is the answer to my question yes?

23 A. Yes, sorry.

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22 Q. (By Mr. Burger) And you know that when you're  
23 traveling, vehicles in front of you can stop at any time?

24 A. Yes.

25 Q. Vehicles stop -- and you've driven in your

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1 life. Vehicles stop for stalled cars in the roadway?

2 A. Yes.

3 Q. Vehicles stop for pedestrians crossing the  
4 roadway?

5 A. Yes.

6 Q. Bicycles, right?

7 A. Yes.

8 Q. Aren't you counseled in driving for Hoppy's to  
9 be a very careful and prudent driver?

10 A. Absolutely.

11 Q. And that's what you try to do?

12 A. Yes, sir.

**Rules in Auto crash(2):**

16 Q. The only reason was the not looking in front  
17 of you, fair?

18 A. Right. Yes.

22 Q. You knew that as you were driving that you  
23 could encounter cars slower than you?

24 A. I think you can -- you know that anywhere.

25 Q. Right.

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1 A. Yes.

2 Q. So that's a yes?

3 A. Yes.

4 Q. You can encounter stopped cars?

5 A. Yes.

6 Q. You can encounter kids, right?

7 A. Yes.

8 Q. So is there anything that you could have  
9 done differently to avoid the car crash?

10 MR. LANDER: I'm going to object. It calls  
11 for her to speculate. You can answer it, if you can.  
12 If you can't, just tell him.

13 A. You can stare straight ahead at all times.

14 Q. (By Mr. Burger) Or certainly earlier than  
15 you did?

16 A. Right. But part of your driving is checking  
17 your rearview mirror, and checking things going on  
18 behind you as well.

19 Q. But you have no reason to think that that  
20 was what you were doing?

21 A. I very well could have.

22 Q. But you don't remember?

23 A. I don't remember. That's correct.

Rules in trip and fall:



**10. Double down on preposterous positions at any time.** So you didn't do anything wrong in this car crash is that correct? Yes. So you are going to drive this way when you go home from the trial/deposition today? You are always going to drive this way because that is the right way to do it and there is nothing wrong with driving like that?

So you haven't looked for work really since the accident, is that fair? And so you are probably not going to continue to do that in the future? Is that right? You didn't think you needed to look where you were going when you were walking through that store on that person's property is that right? So you are not going to look where you are going at any time and you just don't have to because it is everybody else's fault is that right? Do you have to look where you're going to make sure it's safe?

4 **this one. That's Exhibit 11. Now, if you don't have gutter**  
5 **problems, how come you have a bowl underneath the gutter in**  
6 **the bottom picture on Exhibit 11?**

7 A I don't know.

8 **Q Is that because water was coming out of the gutter**  
9 **into the bowl?**

10 A I don't know. I'm not aware.

11 **Q Any other reason to collect water with a bowl under a**  
12 **gutter other than a gutter problem?**

13 A I don't know.

16 **Q Okay. How often does it occur that water comes off**  
17 **the roof in the area near the pillar that I showed you in 13,**  
18 **collects at the base of the pillar as we see in Exhibit 6 and**  
19 **freezes?**

20 A I don't know about freezing, no. I don't -- I don't  
21 have the exact.

22 **Q Is it something that occurs a lot, maybe once or twice**  
23 **a year?**

24 A Probably once or twice a year.

25 **Q All right. And it happens -- and when does that tend**  
1 **to happen?**

2 A Um, after, you know, like after it collects and  
3 temperature goes down, it will refreeze in that area.

**11. DOCTOR:** Always talk about the money the other side makes if they testify a lot. See impeachment too.

11           You do this independent medical exam, this  
12 medical-legal type of work; is that right?

13           A. I do some of that, yes.

14           Q. It's 15 to 20 percent of your practice now?

15           A. Yes.

16           Q. And you do 75 to 80 percent of that for either the  
17 defense or an employer or insurance company; is that right?

18           A. 75, approximately 15 to 20 may be as high as 25  
19 percent of my practice involves doing independent medical  
20 evaluations . . .

5           **Q. Let me show you what I'm going to mark as Plaintiff's  
6 Exhibit 1.**

7           A. Okay.

8           **Q. All right. Doctor, can you please turn to page --  
9 this is a, you recognize this is a deposition I took of you in  
10 July of last year?**

11           A. Okay.

12           **Q. It's a deposition transcript?**

13           A. Okay.

14           **Q. And can you please turn to page 98?**

15           A. Okay.

16           **Q. You see line 10?**

17           A. Yes.

18           **Q. And I asked you, but it's 75 to 80 percent for the  
19 defense, is that correct, is that what you said, and your answer  
20 was, well yeah; is that correct?**

21           A. Page 99, yes, yes, that's taken out of context, but  
22 yes, go ahead.

23           **Q. And you testified to that, right?**

24           A. Yes.

11 **Q. Okay. And you have made from medical-legal work, IMEs**  
12 **and testifying, you've made \$550,000 in the three years prior to**  
13 **July of 2014; is that correct?**

14 A. Well, I don't know where you're getting that figure  
15 from, but maybe okay, I mean, I told you, we can go through the  
16 math, if I do three a week, the charge for an independent  
17 medical evaluation is \$900, if we do three a week, that's \$150 a  
18 year, so what was your figure again?

19 **Q. Let me ask you this.**

20 A. Okay.

21 **Q. In this case, how much -- you didn't mention this in**  
22 **direct exam, how much were you paid by defense counsel in this**  
23 **case?**

24 A. I was paid for this case, for a record review in  
25 total, the total bill was \$4,675.

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1 **Q. All right. So can you keep that Exhibit 1, can you**  
2 **please turn to page 106?**

3 A. Okay.

4 **Q. And 105 and I asked you on line 17 of page 105 and so**  
5 **that's right at \$550,000 in the last three years, do you see**  
6 **that on line 17?**

7 A. Yes.

8 **Q. And then, and then we were going back and forth, but**  
9 **then on page line, page 106 line 2 I say yeah, \$550,000 I was**  
10 **doing last the three years, and your answer was over three**  
11 **years, yes, I think that would add up, do you see that?**

12 A. Yes.

18 Q. Okay. Well let me get back to my question though, of  
19 the \$550,000 you made, and I say it here, I can quote it to you  
20 again.

21 A. Okay.

22 Q. In all that money, 75 to 80 percent of the time you're  
23 hired by defense, employer or insurance company; is that  
24 correct?

25 A. Yes.

4 Q. So, the way I did the math, that's an extra \$183,000  
5 if you take \$550 divided by three, that's \$183,000 and we're  
6 almost up to a year since I took that deposition, do you think  
7 you made that much again?

8 A. I haven't done the math, but yes, my practice has  
9 really not changed.

10 Q. So we're talking about the last four years, you're  
11 talking about over \$700,000 for medical-legal work like we're  
12 doing today; to is that fair?

13 A. Again, I'm not sitting down doing the math, but yes, I  
14 think if we're taking it by the chronology you're giving, yes.

13 Q. All right. And you've made \$3 million or so in your  
14 career doing this medical-legal testifying work; is that fair?

15 A. No, I wouldn't say that, because I don't know where  
16 you're getting the figure \$3 million.

17 Q. Turn to page 112 of the deposition transcript.

18 A. Okay.

19 Q. And do you see on line 9 where I ask you, add that to  
20 last year as we're talking \$3 million or so and your answer was,  
21 yes, yes; is that correct?

22 A. Well, that's what this says, but I'm not sure what the  
23 question was exactly, the reason whether I didn't understand  
24 you at that time or I'm not reading this whole transcript right  
25 now, but a figure of \$3 million as far as medical-legal, the

12 **Q. Doctor, is it correct that you testified under oath on**  
13 **July 3, 2013 you said yes twice, when I asked you about this \$3**  
14 **million figure; is that correct?**

15 A. Okay.

3 whole point, the figure you're using \$3 million I think isn't  
4 fair, is that the amount of income that I've generated over the  
5 past 30 years, certainly I've generated income over the past 30  
6 years.

7 **Q. In medical-legal matters or you want to change your**  
8 **testimony?**

9 MR. WICKER: Objection, form.

10 A. So what is your question exactly?

11 **Q. (By Mr. Burger) It is exactly that I asked you, would**  
12 **you agree that I asked you, when you were sworn under oath.**

13 A. Okay.

2 A. So you're saying have I generated \$3 million over 34  
3 years doing medical-legal activities?

4 **Q. Yes.**

5 A. I don't know, to be honest. I mean, I don't know,  
6 we've already been through what I've done the last three to four  
7 years as far as I don't know what I've done as far as  
8 medical-legal in the last 34 years.

9 **Q. Did you testify that you've done \$3 million in that**  
10 **type of work on page 112 of this deposition?**

11 A. Well, again I haven't re-read all this now, well, I'll  
12 read it now if you want me to.

13 **Q. I don't want you to, I'm just trying to get you to**  
14 **answer the question.**

15 MR. WICKER: Objection to form.

16 A. I'm trying to answer your question Mr. Burger, I've  
17 said yes, yes there, and I'm wondering if I really understood  
18 your question at that time, to be honest.

19 **Q. Are you changing your testimony today?**

20 A. No, I'm not changing my testimony, I'm trying to  
21 realize where this came from, let me read this.

6 Q. (By Mr. Burger) You've had a chance, is it fact, to  
7 review that deposition transcript, isn't it accurate that  
8 ballpark you've made \$3 million in your career from  
9 medical-legal work as -- the type of which we've been discussing  
10 here?

11 A. Yes, sir, I think that's correct.

12 Q. And we've had that number in the last four years of  
13 over \$700,000, we already did that math?

14 A. We went through that math, yes.

15 Q. All right. Now, and that's -- you do two or three  
16 IMEs a week?

17 A. Yes.

18 Q. And you do three or four depositions a month?

19 A. Yes.

20 Q. So in this case, and an IME is when you actually see  
21 someone; is that correct?

22 A. Yes.

23 Q. You did not see Mr. Thomason in this case?

24 A. No, I did not.

12. When deposing doctors in personal injury and medical malpractice cases **always establish before you go through any of the records what they recall apart from the records.** Often there is very little recollection. They don't know the level of informed consent, they don't know whether or not they did such and such, don't know anything in addition to what's in records or don't know whether or not they consulted with a partner or another doctor. Then they are boxed into the records.

13. **Did the lawyer provide the doctor his opinions?**

Q: Dr. Rahman, my name is Gary Burger. I represent the women that you were just talking about. I am going to mark Exhibit 1—for the last four or five questions when counsel was asking you questions, you were literally looking at this document and following along as he was reading it. Is that correct?

A: No.

Q: You-you didn't have this out in front of you and were following along on the way he was asking the questions? Did I miss that?

A: It's been in front of me, but I was actually thinking about something else.

**Q: What were you thinking about?**

A: Just the other parts of the case. I actually was thinking about Dr. Gormen's record here.

**Q: Gornet's?**

A: Gornet—Gornet's record here.

**Q: Weren't the last questions about what your opinions were weren't they exactly what is written in that documents that 'v just marked as Exhibit 1?**

A: Yes.

**Q: Word for word, right?**

A: Pretty close.

**Q: And that's a documents the Mr. Walsh wrote, not you; right?**

A: Yes.

**Q: All right. He wrote this document about what your opinions were; fair?**

A: Right.

**Q: All right. And when he's asking you what your opinions were, he was literally reading out of the document that he wrote?**

A: Yes.