ALABAMA WORKERS' COMPENSATION
TRIAL STRATEGY

When David Nomberg asked me to speak on trial strategy, I was not sure how to respond. I joked I really have no strategy other than lowering my head and running straight at the defense. In perfect Nomberg sports style, David responded that "Earl Campbell had a successful NFL career with that very strategy."

Truthfully, I do not believe a magic trial success strategy exists. If you are here today to learn a nugget of wisdom from me, you will be disappointed. For me, good trial lawyering starts with genuine caring for your clients and the courts. If that is missing, you should consider another career. On that foundation, you prepare. Always prepare. Never quit preparing.

Preparation is my only real strategy. I've spoken at prior CLEs but always on a technical topic lending itself to a lengthy paper. Caselaw updates. Product recalls. You can really write about those topics. This topic is different. All my trial strategy is tied to preparing the client's story for the court. With that in mind, I'll briefly address five (5) preparation issues.

I. Pre-Trial Litigation – Focusing on Trial

Where is your focus? In television commercials, Huntsville "attorney" Charles Pitman often promises car accident victims he will "keep them out of court." The message from Pitman (and so many other television and billboard lawyers) is clear – The insurance company can settle claims for a fraction of their real value. That's wrong for individual clients as well as the entirety of our justice system.

My strategy is the opposite. **Better preparation leads to better trials as well as better settlements.** It's a phrase I use often. It's even on my website. From the moment I first meet with a client, my mind focuses almost entirely on trial presentation and planning.

A. The First Meeting

Are you assessing your prospective client's credibility as a witness? Are you gathering their story so you can begin thinking about the best way to present it at trial? This is where your strategy of preparation starts. At the outset, I spend substantial time simply learning about my client, assessing them, conditioning them for the hard work I will expect on their part and gaining the rapport necessary to have my later advice trusted by them.

Some lawyers rush through the initial meeting in their haste to make the next appointment. Other lawyers focus on one primary item – getting the attorney contract signed. In either case, you are missing the key opportunity to develop rapport, investigate facts and prepare your trial strategy. All lawsuits are personal. The initial meeting is your opportunity to begin understanding the person so you can help tell their story later.

B. The Thought Process

Have you suddenly been struck by a brilliant trial idea while outside the office? Maybe it came to you in a dream? For me, it's usually during church which leads me to scribbling furiously on the front of our church bulletin. Has your client ever told you something important during a short conversation? Have you received information during these times only to forget it later? If you are preparing each trial from the moment you first meet the client, you need to remember these valuable nuggets of information.

One thing I do – keep an electronic diary solely on my clients. It's personal and kept on my iPad. It's separate and unrelated to the law firm caselist. When my client suddenly tells me something important, I make a note. When I suddenly have an idea for a theme or argument, I make a note. (When I'm at church, I scribble the idea on the bulletin and transfer it to my electronic file the moment I return home.). My electronic file is password protected and automatically uploaded to the cloud. For jury trials, this system is especially valuable in formulating voir dire and arguments.

C. The Leverage of Position and Preparation.

What do I mean by this phrase? Many lawyers in workers' compensation cases will readily cede a valuable trial position for the uncertain hope of a quick settlement. That's wrong.

What are some examples of this? Think of the lawyers who will repeatedly acquiesce to insurance adjuster demands for more and more information. I understand the reasonable needs of an adjuster to evaluate the claim. But, why allow any adjuster to dig unreasonably through your client's background? Why continue meeting an adjuster's increasing demands? Too many lawyers cede their position and allow the insurance company to prepare an early defense.

Other lawyers acquiesce when a defense lawyer requests to depose your client without providing their client for deposition (or full stipulations). Why let the defense lawyer prepare for trial while you are not? One thing my firm **never** does – Absent a court order, we do not attend a deposition unless the defense is also being deposed or agrees to solid stipulations.

Some lawyers acquiesce to unnecessary medical examination requests in the hope of a settlement. We do not. Many years ago, I met with a prospective client who suffered a severe lower back injury with restrictions that placed him in the sedentary level of work. He had little education but held a very high paying job in a local plant. Because of his high wage, he reached the maximum benefits for a permanent partial disability at a very low percentage of disability. His case was either a PT or a Max Out PPD. Period. He had fired his lawyer. Normally, that is a huge red flag. After talking with him, I completely understood why. In his case, the defense attorney sent correspondence to his lawyer indicating the insurance company would only mediate if the injured client attended a number of "IME" evaluations with new doctors. After receiving this letter, the injured person's then lawyer demanded he attend so they could mediate the case. Why weaken a great trial position for the hope of an uncertain mediation offer? Yet, that is exactly what his former lawyer intended to do.

In many ways, workers' compensation attorneys weaken their trial positions unnecessarily in the hope of an uncertain settlement. It's wrong. Your

focus should be on trial from the beginning. The defendant can choose, at any time, to stop your progress with an acceptable offer.

D. The Opportunity to Educate your Court

Some defense lawyers regularly file (or threaten to file) burdensome motions. Despite the frivolity or harassing nature of these motions, many plaintiff lawyers concede. Maybe it's laziness on the part of some plaintiff lawyers. Maybe it's a time issue for others. Yet, these plaintiff lawyers lose valuable opportunities to champion their client and case. I rarely cede an opportunity for court.

Other lawyers (on both sides) simply like to argue and fight. These lawyers will spar over every point regardless of the final impact at trial. Why?

Court appearances offer a huge opportunity. I value them. You have a ready audience which should be an important part of your trial strategy. Every hearing is an opportunity to establish your knowledge and credibility with the court. And, every hearing is an opportunity to begin educating the court about your client and his/her case. George Washington lost most battles of the Revolutionary War. Yet, he kept progressing. The lead-up is only important in determining how the last battle is shaped. The only battle that counts is the last one.

Trial strategy does not begin at trial. It begins on day one. Every action in a case should advance that strategy.

II. Preliminary Trial Matters – Establishing Transparency

Early in my career, a well-respected trial lawyer told me, "If you cannot fight it, then feature it." That is great jury trial advice. If you cannot keep the evidence out of the trial, then address the matter yourself before the defense does.

In bench trials, the wall between evidence admission decider and ultimate judgment decider, disappears. You must consider the practical impact of fighting over a piece of evidence.

Even if you ultimately keep the evidence from admission, will it bias the court? We all claim to think rationally without bias. The science proves otherwise. In truth, we all suffer the delusion of thinking we are fair.

I believe in establishing credibility and transparency at the beginning. So, in many workers' compensation cases, I will start the trial with an offer of all my exhibits. All my exhibits will typically include every single medical record, good or bad, related or not. Sometimes, I go ahead and offer other evidence I expect the defense to offer.

Although I always appear in court with my necessary medical evidence in admissible form (whether by deposition, stipulation or certification with sealing), I will still offer every single uncertified medical record.

Why do I preemptively offer everything? I want to establish that the plaintiff is trying to present the whole picture to the court. And, if I'm fortunate, the defense counsel reacts by objecting and sounding like a lawyer trying to hide facts or make the case more difficult.

Years ago, I had a severe back injury case set for trial in Madison County. I had the deposition of a treating doctor who covered all the bases and put my client at less than full sedentary ability. My client had seen several other physicians as well. We had all those records. They contained nothing bad for my client. But, I had an objectionable lawyer. When the case was called for trial, I first offered the deposition. It was admitted. Then, I offered all the records exactly as received from defense counsel. (I did not get them certified from the doctors). The defense counsel objected that they were not properly certified. The objection was sustained. The defense lawyer then proceeded to start offering the exact same records of certain providers (I could tell by looking at the defense's stack of records that not all providers were going to be offered). When the defense lawyer offered the first set of records, I pointedly asked in front of the court whether the lawyer intended to offer the records of all providers so the court could have the full picture. The defense responded, no. They would be selective. The judge raised an eyebrow. I then objected. While the defense lawyer's records had a certification form on top, they were not properly certified or sealed. They did not meet the requirements of the statute. Frankly, anyone could have attached anything to the supposed certification forms. My objection was sustained. We

were now left with just my very good deposition. And, I also had an opportunity to state before the court my preference for full disclosure and transparency.

I always presume that courts want to make a fair and just decision based on all the facts. I don't believe I have ever won or lost a workers' compensation case based on a nitpicky fight over a single piece of evidence. I'm always prepared with the evidence I need. However, you will win or lose cases based on credibility (the client's and yours) and knowledge (of the facts and law). Let the defense lawyers look like objectionable attorneys trying to obstruct justice.

III. Trial Brief – Mapping the Route

Do you prepare a trial brief? In my opinion, they are an essential part of every workers' compensation trial.

Clearly, a good trial brief helps the court understand the essential issues, necessary law and the evidence. This is the primary purpose of a good brief. It is a map for the court to make its decision. Beyond the court, a good trial brief also helps the trial lawyer organize his/her thoughts and summarize the case.

By trial brief, I mean "brief." You should not overburden the court with too much information. Your brief should introduce your client, summarize his medical treatment and discuss his disability. If I'm worried about a defense, I will usually address the matter. However, in the interest of primacy and the mental bias it creates, I do not dwell on defenses longer than necessary.

As with every case, I favor the storytelling approach. While many lawyers submit trial briefs containing numbered paragraphs, I write those briefs narratively. It is very important to me that the brief tell a concise and tight story for my client. I work on my brief throughout the case. The final product must be consistent with the primary evidence in the case, including the medical records and vocational report.

In writing the brief, also consider the level of workers' compensation knowledge held by the court. Are you writing for a judge who understands our workers' compensation laws? Are you writing for a judge who practiced in

another legal specialty and is new to the bench? These are factors that determine the level of legal detail you present.

IV. Client Preparation – Preparing the Main Player

In a past life, I practiced with a lawyer who rarely met with his clients. His deposition preparation consisted of meeting with the client for a few minutes before the main event. Trial preparation consisted of picking up the file on Thursday or Friday when hope of a settlement had ended. I joked with him that he followed the "spaghetti approach." By that, I meant he threw everything against the wall to see what stuck. Because he thought very quickly on his feet, he was surprisingly successful with that approach. The spaghetti approach has never been a workable strategy for me.

As noted earlier, I begin to counsel and shape my client in the initial interview. Throughout the medical process, I routinely call and speak with my client. Indeed, my office instructs clients to call us with all medical and employment updates. It may seem harsh but I have fired a client for not following this instruction. While dealing with medical issues and updates, I never lose focus of any opportunity to prepare the client for trial.

At the deposition phase, I meet extensively with the client. We spend significant time preparing the client days ahead of the deposition.

By the time of mediation, we often have the client's deposition transcript. While I meet with the client prior to mediation to discuss benefit calculations and negotiation expectations, I also use the downtime during mediation. If we have a deposition transcript, I often use this private downtime to talk with the client about his/her testimony.

How do I prepare the client once trial is set? My paralegal calls each client to schedule a trial preparation session. During this call, my paralegal explains the client will receive a copy of his/her deposition and a new questionnaire. The client is instructed that our questionnaire must be completed prior to the meeting and returned at the time of the meeting. **No exceptions**. (We accommodate some TBI or functionally illiterate clients who genuinely cannot read or write by asking them to sit down with a loved one and go through the questionnaire.) I realize

this is harsh. However, by this point, I have typically involved the client in significant work. So, the client understands and expects to participate.

My client preparation meeting will last several hours. Sometimes, it will last much of the day. We accommodate physical-injury issues by taking breaks or scheduling the meeting in parts.

At the meeting, we discuss the trial and how it will proceed. We discuss, in detail, the client's deposition testimony. Most importantly, we discuss every single client questionnaire answer. We compare the answers to all other evidence including, all medical records, prior testimony, personnel records, vocational reports, etc.. We discuss each and every instance of perceived difference, inconsistency or incompleteness. Typically, I have all this evidence spread out on my conference table. I want my clients prepared to answer any question. I want my clients comfortable with being questioned. And, I want my clients invested in the time needed to prepare for trial.

By the time of the client preparation meeting, I typically already have a rough draft of my trial brief complete. Following the meeting, I update my brief with key testimony or facts.

V. Vocational Testimony – Becoming an Expert

Have you mastered the science and art of vocational issues? If not, why are you handling workers' compensation cases?

I learned in my first workers' compensation trial, that success requires the lawyer to possess vocational expertise. Bernard Nomberg and I practiced law together at the same firm in Birmingham over two decades ago. Bernard began working for the firm six months before me. He handled all the firm's workers' compensation cases. So, when I started, I was assigned different work. I handled a mix of the firm's appellate work, general liability work and some hourly work. It is safe to say – **I knew absolutely nothing about workers' compensation**.

When planning my move home to Huntsville, I received a call about two weeks before my new job started. It was Ralph Hornsby, Sr.. He had two workers' compensation cases set for trial the same day in different courts. He assumed

(wrongly) that I knew workers' compensation law. He asked me which case I wanted to try? Neither – That was how I felt. That was my real answer but I could not say it. So, I picked one. Thankfully, Ralph had the file prepared. I went to court. I remember arguing with the defense vocational expert on the witness stand. Sadly, many lawyers spend their careers simply arguing with defense experts.

After that early (and traumatic) experience, I decided a good workers' compensation lawyer should be an expert in vocational issues. How do vocational experts reach their conclusions? What are the physical, educational, age, and other, issues that impact vocational conclusions? What types of work fall broadly within each category of labor? How do small changes or restrictions impact a person's ability to perform the full range of work in any category? What are the characteristics and criteria for various jobs? How do most vocational experts utilize their computer to generate opinions? You should understand the vocational issues sufficiently so that you can pick up **any** expert's report and quickly see how he/she reached their conclusions as well as the weaknesses in those conclusions. In short, **you should have expertise in the field as well.**

How do you utilize your expertise in vocational issues? First, I do not depose vocational experts prior to trial. I think it is a mistake in workers' compensation cases to do so. Beyond the cost, it gives the expert an opportunity to correct any exposed weaknesses prior to trial.

Second, I learned in my initial cross-examination of a vocational expert not to argue with the witness. It is not productive. Instead, I spend considerable time prior to trial reviewing the expert's report and the underlying evidence. I prepare an examination that methodically takes the expert through the errors in his/her report. It's not unusual for me to bring job-related or physical capacity-related information from the Department of Labor to trial. And, I love bringing a calculator to trial for use when the expert's numbers prove wrong.

Preparation and expertise. Not argument and not emotion. Those are my strategies for vocational experts. Of course, it also helps to keep a little file on the defense experts you've cross-examined in the past. Sometimes, this "rock pile" produces good material for you. Last year, I tried a workers' compensation case in Marshall County where the defense expert proudly testified on direct

examination that NO judge had ever questioned his credibility. That was a serious mistake. I had my "rock pile" ready.[1] In my "rock pile" I had an Order from another county where the court specifically found this expert lacked credibility. The cross-examination moment was especially sweet as the defense attorney in my case had also been the defense lawyer in the other case. **Preparation is key**.

CONCLUSION

As I stated in the beginning, I really have no special strategy or formula. Preparation. Credibility. Those ideas are all I have. I want each client (win or lose) to leave court believing we gave it all for them. If the client feels that way, then I've done my job.

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[1] What is a "rock pile?" Years ago while working a file with an old trial lawyer, I kept noticing folders labeled "Rock Pile." I asked about the title. The old lawyer replied these were folders where he gathered his best impeaching documents. "They are my rocks. I throw them at the witness in trial." I stole the term.