

HOW TO TRY YOUR CAR WRECK CASE ON THE CHEAP

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I. You Have a Story to Tell at Trial That Can Be Engaging...and Either Cost Effective or Cost Prohibitive

All of us have seen that case with a minimal insurance policy limit, and had a minor impact with soft tissue damages. So, you're left with a choice: either try the case or take a terrible offer. Because you're reading this paper, and because you are a member of an organization called the Texas Trial Lawyers Association rather than the Texas Mediation Lawyers Association (or the like), I'm assuming you're going to at least consider trying the case and putting a jury in the box.

Now the fun part begins: how do you tell your client's story without breaking the bank on case costs and expenses? Importantly, this philosophy applies to cases with bigger insurance policies and ones with more serious injuries, as well. Hopefully this paper will give you some ideas on how to find sources and resources of potential demonstratives and exhibits that are useful and most importantly, cost effective...no matter the size of the case.

II. Do The Early and Simple Things in Discovery to Save Case Expenses Later at Trial

Anyone lawyer with a checkbook or a line of credit can spend money and hire expensive (e.g. accident reconstruction) experts right out of the gate. However, it isn't always necessary to spend a lot of money on a case and doing so doesn't guarantee you a larger verdict or even a better result. After all, former Florida Governor Jeb Bush reportedly spent \$150 million on his 2016 campaign for the presidency. He was out of the race after just three primary contests.

Consider propounding document requests served with your original petition or complaint and see what those requests turn up *before* you engage that expert you might not even need. Cameras are becoming increasingly more common on 18-wheeler trucks these days. There may be compelling footage of the collision scene or sequence at issue in real time that will eliminate or reduce the need for an expensive expert in your case.

Don't forget to include in your document requests discovery aimed at surveillance footage from intersection cameras, police dash cams, police hand held cameras, etc. Also, whether the case is large or small, nearly every collision scene will have cell phone photos or video as part of the discovery in the case. Get this evidence early,

look at it, and save yourself a lot of time and money in the process.

III. Google (and Google Maps) is Your Friend

It's simple but worth noting: you use Google practically every day in your personal and professional lives, so don't forget about Google when you need a quick and inexpensive demonstrative/exhibit. Every jurisdiction is different, and every judge is different, too, so I assume that you can prove up whatever you found to get it admitted into evidence or that your judge has granted your use of the demonstrative. As you begin the search process for compelling demonstrative exhibits, look at your Texas/Federal Rules of Evidence to begin forming your arguments as to why whatever you downloaded/printed should be shown to the jury, or why the demonstrative should be published to the jury (note—it is lost art publishing exhibits to the jury...having a juror hold something in their hands engages them and is a different sensory experience than looking at a screen or an overhead projector image. Check around with your colleagues and see how your particular trial judge is going to handle the issue of demonstrative exhibits. Do this early so you are prepared when

trial starts and can adjust in voir dire, opening statement or closing argument according to the particulars provided by the trial court.

As I meet with a new car wreck client, and far ahead of the defendant's deposition, I "Google" the location of the accident and discuss with the client the "Google Map" location and ask my client the following questions: (1) are you familiar with the area; (2) how they are familiar with the area; (3) if they recognize the area from Google Map; and (4) if the Google Map scene is a "fair, accurate, true, and correct" depiction of the scene at the relevant time of the accident. If it's the same then you're ready to use the same image when you're crossing the defendant. If your client says the image is not the same as it was at the relevant time of the accident, then you have to find out what is different and adjust from there. Are you focused on the speed limit? The number of lanes in the roadway? The weather conditions? What is the issue for establishing a reliability at trial?

If and when you're ready to depose the defendant (more on this later...), print out the map (in color) or download the image to a tablet device, or laptop as an .html link so you can interact with it on your laptop during the deposition. As

a practice tip, if there is a street view available for the particular street scene I try to use the street scene view as that gives you a more engaging and 360 degree view point of what the defendant/plaintiff would have seen at the time of the accident. This is especially helpful if the defendant says they couldn't or didn't see your client! Show the jury how that isn't a credible explanation/defense.

III. Sometimes You Have to Get Creative

Sometimes you have to work faster and smarter because you need more than just a Google Map to obtain the necessary compensation for your client. I have found that when you need an animation, a great source is of course our AAJ vendors, but if the cost is too high for a small car wreck, the next best resource for a basic but very helpful demonstrative, is the treating physician. Many of our treating physicians have websites, and in their website look for videos explaining the procedure that was done on your client, or that they propose should be done on your client, and if your expert doesn't have a video look to the defendant's experts and see if they have videos, most do. The videos are usually very instructional and informative since they are used to educate potential

patients, so why not use them to educate potential jurors.

IV. The Cost Effective Benefits of Affidavits in Your Cases

Depositions are expensive and sometimes difficult to schedule for a variety of reasons. What if you could write a statement for an eye witness that:

- 1) is truthful;
- 2) written by you;
- 3) tells their story in the way most beneficial to your client;
- 4) gets them on your side if you need them at trial (with a trial subpoena);
- 5) and is free?

You can! It's called an affidavit. Don't forget about these useful just because they are not *per se* admissible at trial—they are still sworn statements and great tools for your advocacy in trial.

Get these early and produce them in discovery to the opposing counsel. Bring them to mediation, and if the case doesn't settle, take the affidavit to trial and use it in your questioning of the defendant ("Are you aware multiple witnesses have provided sworn testimony that contradicts your

story today?") and eye-witnesses to show the jury how you've been on top of this case since the beginning. It builds credibility with the judge and jury alike.

V. Requests for Admissions

Admissions from a defendant are powerful and cheap weapons for you at trial. Remember to file them with the clerk before trial (in case you forget to use them in your case in chief for some reason). When you intend to use them, remember to file them with the clerk. Rule 191.4(c)(2). Admissions on file need not be introduced as evidence before either the trial or appellate courts. If trier of fact returns findings which contradict a judicial admission, the admission must be accepted as controlling. Beutel v. Dallas Cty. Flood Control Dist., 916 S.W.2d 685, 694 (Tex.App.—Waco, 1996).

For the best use of requests for admissions in trial, stand up in the court room and:

- Read them aloud to the jury
- Be strategic/dramatic about it when you read them. Before the first witness testifies in the case, right after a break, etc., are times when the jury is paying attention.

VI. 18.001 Affidavits

One of the greatest and most frequently used ways to save money in a car wreck case is the affidavit form set forth in TEX. CIV. PRAC. & REM. CODE 18.002. While these affidavits and the accompanying records are not evidence of causation, the benefit is that in most cases, your client or other fact witnesses can fill in the causation gap and thus, you don't have to bring an expensive medical expert live to trial.

Remember that unless a controverting affidavit is filed, an affidavit which meets the requirements of TEX. CIV. PRAC. & REM. CODE 18.001 & 18.002 is sufficient evidence (though not legally *conclusive* evidence) that the charge was reasonable or that the service was necessary.

- Serve them on opposing counsel 30 days before trial; file the 18.001 affidavits (but not the records) with the clerk's office.
- If there is no counter-affidavit from the defense, file a motion in limine & **object** when the defense lawyer starts challenging reasonableness or necessity of medical at trial.

For your motion in limine or objection at trial, remember that a defendant who fails to serve a responsive controverting or counteraffidavit is precluded from presenting evidence contesting or otherwise challenging the reasonableness and necessity of the expenses incurred by the claimant. *See, e.g., Hong v. Bennett*, 209 S.W.3d 795, 804 (Tex. App.—Fort Worth 2006, no pet.) (finding that controverting affidavit that failed to establish qualifications of affiant to challenge reasonableness and necessity of expenses meant such evidence was insufficient and properly excluded by trial court);

Beauchamp v. Hambrick, 901 S.W.2d 747, 749 (Tex. App.—Eastland 1995, no writ) (noting that §18.001 provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed counteraffidavit);

Ellen v. Carr, No. A14-92-00292-CV, 1992 WL 347783, at *3 (Tex. App.—Houston [14th Dist.] Nov. 25, 1992, writ denied) (not designated for publication) (“Failing to [file counteraffidavit] prevents one from introducing any evidence controverting the initial affidavit.”).

If counteraffidavits are filed, all hope is not lost. The counteraffidavit must give reasonable notice of the basis upon which the opposing party intends to controvert the “claim reflected by the affidavit,” it must be sworn to, and it must be made by a person who is qualified by knowledge, skill, experience, training, education, or other expertise, to testify against any or all of the matters addressed in the § 18.001 affidavit. *Id.* § 18.001(f). Finally, a party who intends to controvert a § 18.001 affidavit must serve a copy of the counteraffidavit on each other party no later than 30 days after the day the controverting party receives a copy of the § 18.001 affidavit and at least 14 days before the day on which evidence is first presented at the trial of the case or with leave of court at any time before the commencement of evidence at trial. *Id.* § 18.001(e).

Make the defense work and challenge the counteraffidavits. Consider sending a depo notice to the defense counteraffiant, particularly if the affiant is not qualified to render the opinions (e.g. defense lawyer is the affiant, or a chiropractor is challenging cost and necessity of medical services rendered by an M.D.). At bare minimum, it makes the defense spend

money (more than you are spending on the court reporter at least) and sends the right message to the trial judge.

Obtain a hearing and get a ruling from the trial court. If the judge denies your motion to strike counteraffidavits, then don't forget about depositions upon written questions in lieu of an oral and/or videotaped deposition! Send the medical providers (not the custodian of records) depositions on written questions proving up the cost & necessity of the services—this saves you the video depo fee at least and is cheaper than the traditional oral deposition b/c you typically don't have to pay the medical doctor's deposition fee and the court reporter fee is much cheaper, as well.

VII. There is an App for That

The Ipad is a great tool that can be used for more than just watching movies or getting your small children to stay quiet. The TrialPad app and 3D4Medical – Orthopedic Patient Education app are my two favorites to put it all together.

TrialPad is an easy and effective way to present your trial. It's a great app to present your smaller and simpler car wreck cases. It's also great for depositions (remember that Google

Map) because you can annotate pictures, digitally mark them as exhibits, and if you have a wireless printer, print them wirelessly and attach them to the deposition.

The medical app, created by 3D4Medical, is a medical teaching app, which has great digital models that many treating physician currently use in their private practices to explain injuries to their patients. If you can use the app in your expert's deposition then that is a powerful demonstrative to show the jury what happened to your client, just remember to disclose the app prior to their deposition so you can avoid early on any issues with these demonstratives. This app is easy to learn and use, and effective when paired with your doctor during their deposition. It costs \$24.99 on iTunes.

VIII. Do You Really Need to Depose the Defendant in Your Case?

Consider sending robust paper discovery to the Defendant instead of spending money on a deposition of the defendant. In nearly every case, the Defendant is going to attend trial whether you depose them or not.

If the police report is helpful and you have it proved up, then perhaps the report is all you really need to establish

liability. If the report is inadmissible for some reason, consider spending the money on the police officer's deposition before you take the Defendant's deposition. The police officer's deposition might be all you need for liability and the jury is typically going to believe the police officer over whatever denials are offered by the Defendant at trial.

IX. Interpreter/mediator fees

Make sure the court appoints your interpreter in a pre-trial hearing. Otherwise the interpreter is NOT a taxable court cost recoverable by the successful party at trial. TEX. CIV. PRAC. & REM. CODE § 31.007(b)(3) WILL SAVE YOU HUNDREDS OF DOLLARS in recovery of interpreter fees (if you win the case).

If mediator and mediation fee are court ordered...taxable court cost, too. (Western District of Texas local rule). Interestingly, court costs can be assessed against a successful party who mediates in bad faith. Texas DOT v. Pirtle, 977 S.W.2d 657, 658 (Tex.App.—Fort Worth 1998, pet. denied).

V. Final Thoughts

1.) Get creative on your demonstratives, in this age of

technology, your imagination is the only thing preventing you from a new demonstrative. Seriously try Googling what you would like to show...it's out there.

2.) Look for demonstratives that your jury can relate to which your jury can relate. You need demonstratives that the jury can relate to and experience.

3.) Work with opposing counsel to pre-mark and pre-admit your key evidence and demonstratives. If you can do this, then you can use the evidence whenever you want.

4.) Figure out a budget early on, and decide where you must spend a little more to get a great demonstrative and where you have to rely on your imagination.

5.) Keep your exhibits/demonstratives simple, as they are the easiest to understand.

Lastly, if the defense won't pay your client fair value, make them work and take the case to trial. Settlement always has a place in our practices, but remember that we are members of the Texas **Trial** Lawyers Association, not the Texas Mediation Lawyers Association or the Texas Settlement Lawyers Association. Prepare the case for trial and take it to trial if necessary!