FORTY WAYS THE TRIAL LAWYER CAN PERMIT THE CLIENT'S CREDIBILITY AND THE LAWYER'S OWN CREDIBILITY TO BE DESTROYED IN A MUSCULOSKELETAL INJURY CASE

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Plaintiffs lose too many "soft tissue" or musculoskeletal injury cases before juries. How many times to we hear judges saying, "ah, this is a soft tissue case right? Let's see, of the last 25 of these tried here, 23 were defense verdicts, one got the ER bills, and 1 got 5,000. Well, good luck!" It really bothers me to think that these kinds of comments are an accurate reflection of the results of these sorts of trials. It does not have to be that way. Not even close. Plaintiffs can win the vast majority of these cases if you just avoid the common problems and mistakes below. Of course, the best way to avoid losing a case is to not take a poor case to start with. My general rule for case selection is a "two strike" rule. Every case has a problem like slight property damage or a delay in treatment or whatever. You can almost always deal with a single problem. However, if a case has multiple problems (that are serious) then punt. The old saw about making money off the cases you reject is true. As a sage lawyer once said to me, "no matter how little money you have, you will always have more money than time." Don't waste it on a poor case just because you are having a slow month.

Another thing: don't take cases you don't intend to handle to conclusion and handle well. Yes, most cases settle. Yes, you won't make enough money on a soft tissue case to justify the time to try it. Still, it is imperative that if you take a case, unless you learn something new that makes the case untenable, be prepared to try it. This is only being professionally responsible and holding true to your oath to zealously represent your clients. A side benefit to your practice is that it will enhance

your credibility with insurers and defense counsel and will help you settle other cases. It will also keep your trial skills sharp on a relatively low stakes trial. A potential benefit for the Plaintiff's bar and their clients is that if more Plaintiff's lawyers try these cases and do a good job of trying them, then it might make insurers less likely to call the bluff and try the cases. Too many lawyers fold or fail in their handling of these cases. Don't be one of those lawyers.

The trial of a musculoskeletal ("soft tissue") injury case presents unique challenges to the Plaintiff's lawyer. It is rare in such cases that there is good objective evidence of injury that can be presented to a jury in "picture" form. Musculoskeletal injury cases do not have, by definition, displaced acute fractures, bad herniated disks, or surgery with metallic corrective devices that show up wonderfully on X-Rays and, blown up, make juries wince. Instead, the trial practitioner must present a case demonstrating injury and causation (and hopefully air tight liability) usually without the help of pretty pictures and in the face of an unhealthy dose of suspicion already present in the minds of prospective jurors. In short, the single pillar upon which rests the case of the Plaintiff in a musculoskeletal case is that of the credibility or believability of the Plaintiff. If the Plaintiff's credibility is damaged even slightly, the case may be sunk.

The burden is clearly on the Plaintiff in the trial of a musculoskeletal injury case. The jury must be convinced that the Plaintiff has a real injury and that the injury is serious and caused by the negligence of the Defendant. Occasionally, there may be factors that can help you and ease that burden some as when the Defendant is D.U.I., or flees the scene or does something else that leads to aggravated liability facts. Usually, these cases will settle, if you want them to. Alternatively, if the Defendant makes an aggressive liability defense in a case of patently clear liability, then you can use that fact to undermine their credibility. Most commonly, however, the burden in these kinds of cases rests squarely on the shoulders of the Plaintiff and that of the Plaintiff's attorney.

Perhaps the most important general rule is to do everything possible to maintain credibility. This usually involves "underselling" your case. Juries today respond much better to a lawyer who immediately distances herself from the jury's expectation that she will ask for a mountain of money for a molehill of a case. I frequently tell the jury in opening that my client does NOT want a bunch of money and that all he wants is to be put in the same position he would have been in had the collision (not "accident") not occurred. Pretty reasonable, eh? Sometimes I even go further and say "all my client wants is to be compensated for his medical bills and lost wages and that's all. Now if you feel it is appropriate to award something for pain and suffering, great, you should do what you think is fair and reasonable, but if not, that's fine too. All my client wants is whatever you think is fair under the circumstances of this case." This sort of introduction takes the wind out of the prepared defense tactic of calling the Plaintiff greedy and "looking for something for nothing". I call this seizing the moral high ground. It works. I like it when the jury is wondering after opening, "why on earth are we here?" Still, the pitfalls in handling and trying a soft tissue case are legion. What follows is an attempt to list some of them, in no particular order, along with a few thoughts as to how some of the pitfalls might be avoided or, at least, softened a bit.

1) Minor or No Property Damage. This is a difficulty every Plaintiff's practitioner, no matter how inexperienced, has encountered. The adjustor will point it out to you right at the start. This is a real problem. The argument, of course, is that the injuries can't be real or serious given that the only thing wrong with the car is the tiny scratch on the bumper's paint. Defense lawyers will take great delight in blowing up the photographs of the car showing the showroom appearance to the jury and the jury will often be convinced. Of course, we all know that the amount of property damage does not demonstrate the amount of injury sustained by the occupants but this is not an easy argument. It tests the credibility of the plaintiff as much as perhaps any other factor. If it is a

bumper to bumper rear end collision involving tank like vehicles, or if the Plaintiff is an elderly professor of theology with no claims history, then your job is much easier. Likewise, if your client has had six prior back operations, then it will be easy to argue aggravation (though you will have other issues to worry about). However, if your case involves a "T-Bone" impact, your client's vehicle was hit in the side, there was no damage done, and your clients are robust, you may want to pass on that one.... Be sure to deal with the issue right up front in voir dire. I always ask jurors whether any believe that a person cannot be hurt in a collision with little or no property damage. Most will usually agree that a person can be hurt. Get it out front and lessen the impact of this. Creative arguments help too (Ever look in a carton of eggs to see if any are broken? Why not judge from the outside of the carton??).

2) Delay in Treatment. This is also a common problem. The wreck happened on January 1 and the Plaintiff first appeared at the chiropractor's office March 15. This can be disastrous. It all depends upon the amount of delay and the reasons for the delay. The most common (and pretty good) explanation is that "I thought I would get better and didn't want to go the doctor unnecessarily". This frequently holds water, and is usually followed with "I soaked my back at home and took aspirin and went to the Doctor once I realized it wasn't getting any better." This presents little trouble if the delay is two weeks or less and even less trouble if the delay is between the initial emergency room visit and the subsequent treatment (depending upon the notes of the ER doctor) rather than before <u>any</u> treatment. The longer the delay, however, the more problematic and the more weight you add to the burden the Plaintiff carries to convince the jury of the reality and seriousness of her injuries. It is imperative that you go over this problem with the Plaintiff as soon as possible--preferably before the insurance company has obtained a recorded statement and certainly before deposition.

3) X-Rays or other tests reflect Degenerative Changes. This is a potential problem but can be a two-edged sword. If you have medical testimony in your case that you will use (see below), it will be easy to elicit testimony that degenerative changes are normal in persons of a certain age, that they are frequently present without any pain or other symptoms associated with the degenerative change, and that they occur as people get older in the absence of specific trauma to that area. Defense counsel will probably try to show that the degenerative changes are the "real" cause of the injury or are indicative of some earlier traumatic event that is the culprit, not the wreck, fall, etc. However, degenerative changes may also make a person more susceptible to injury in that area and help to demonstrate why the Plaintiff is suffering so badly from a relatively minor (property damage wise) wreck.

4) Prior Similar Complaints of Pain. It is imperative that you get your client's prior medical records. Defense counsel will always do so. [Note that the discovery rules have recently changed making clear that you can obtain copies of the nonparty document requests obtained by opposing counsel and all you have to do is pay reasonable copying charges–see O.C.G.A. § 9-11-34(c)(1), as amended July 1, 2006]. If you are taken by surprise with cross examination about previous complaints of similar pain or injuries (especially if Plaintiff already testified that he had none), then serious doubt as to what caused this injury will be planted in the minds of the jurors. Do not trust your client's memory on this. No matter how honest a client, memory is never perfect and if they say the prior chiropractic care was "only for the back, not the neck" I bet the records will say otherwise. You must know early in case preparation whether this injury is an aggravation of a prior injury or whether this is a new injury. If the latter, it is best to come clean right from the start about the prior complaint and show the lapse of time between the old and new injuries and the degree to which the old injuries were resolved.

5) Plaintiff Complains of more symptoms than he told his Doctor(s) about. This can also be an issue if there are more symptoms presented to, say, a subsequent doctor than to an ER doctor. The problem is that Defense counsel will argue that the additional symptoms are due to some new injury or, worse, subtly undermining the Plaintiff's credibility because of inconsistency. Usually this is not a "real" issue. You don't complain about your neck symptoms when seeing a foot doctor. Or, "at the ER on the day of the collision, I was bleeding from my temple and that was all I was focused on. The next morning when I woke up, I could not move because my back was stiff. No, I did not complain to the ER doctor about my back because it wasn't bothering me yet." Still, it is important to get all of the Plaintiff's medical records and prepare your client about these issues.

6) The pain described does not follow any known pattern of nerve distribution with which the medical practitioner is familiar. If this occurs, both of the problems discussed in number 5, above, become serious problems. This is not that common a problem, however, in these cases because to make hay with this usually requires medical testimony which neither side usually gets due to the expense. Still, if the defense can use a narrative that states that Plaintiff's complaints of pain in a given area make no medical sense, it will potentially be very damaging.

7) All Objective Tests are Negative. This commonly is true in Musculoskeletal Injury cases. X-Rays <u>may</u> show a straightening of the lordotic curve evidencing muscle spasm. Frequently, however, X-Rays are "normal", MRI scans are "normal", etc. This will be used to imply that Plaintiff is not injured or is faking. If you use medical testimony, care must be taken to explain what each of these tests reveal and why one can have a serious injury even in the face of negative findings on all these tests. Another problem, however, if there are many diagnostic tests that amount to most of the Plaintiff's bills and they are all negative is that Defense counsel will argue that they were not

"reasonable and necessary". Since they were all negative, why should Defendant have to pay? Again, if you have medical testimony such as the neurologist who ordered the tests, have him explain his reasoning for ordering each test. If not, and you know that the defense wants to put in narratives that reveal negative test findings, then put this issue on your list of things to deal with in voir dire and opening statement.

8) Defense has pictures post injury of your client doing strenuous physical activity. If activity is inconsistent with the complaints of injury, then this can be deadly. The nature of the pain (good days and bad days), the medication and the masking effects thereof, or the subsequent problems caused by engaging in the activity are potential ways of trying to deal with the problem but must be done up front--before the Defense has raised it (and rubbing rosary beads might not hurt either).

9) Lawyer referred Plaintiff to Doctor. It has been held proper for the defense to talk about Plaintiff's contact with his attorney and the referral by the attorney to a doctor. See, *Waits, et.al., v. Hardy*, 214 Ga. 41 (1958). This is a common and troublesome issue in our profession. If lawyer sends client to Doctor, then Defense will argue that Doctor is suspect and lacks credibility. If lawyer who is approached by client who asks for a recommendation does not do anything to help client, client may go elsewhere or may find a terrible doctor (or one who advertises heavily, see below) on his own. One potential solution is to discuss this problem with the client, tell him to go get some recommendations from others and check with you before going to the doctor. Recommending the emergency room may not pose a problem, either, especially as they will frequently give a recommendation. The biggest problem comes from the clients who do not have med-pay or health insurance and cannot afford to pay for medical treatment. How can they know what doctors will work on a lien basis? One solution is to send client to the charitable institution

hospital. There are other creative solutions to this problem, but the best way is to not refer to a doctor or, if you do, make it a doctor that is beyond reproach (hard to do sometimes with no insurance). Then, during trial, be up front about this fact, and truthfully say you wanted client to get the best medical care so you recommended XYZ.

10) Doctor refers case to Lawyer. This has some of the same problems as number 9, above. This is especially true in cases where the doctor is working on a lien. The defense lawyer may cross the Plaintiff about signing an assignment of benefits form. This can serve to make the doctor look like an interested party who wants his money since he will then have a direct economic interest in the outcome of the case. However, it also opens the pandora's box for the Defense because it will allow you to argue to the jury that the bills are unpaid.

11) Plaintiff's doctor advertises heavily. If the doctor is a heavy advertiser and most of the jurors will be familiar with the doctor or the doctor's clinic, this will erode credibility right from the start. You will need to deal with this in voir dire and explain that many folks are not that sophisticated about their choice of doctor. Should you punish the victim because they respond to an advertisement and don't know any better?

12) Plaintiff's lawyer advertises heavily. This presents the same problems as 11, above. Be careful accepting cases that were previously handled by heavy advertisers. I had a defense counsel spend the entire closing talking about the implications of "one call, that's all" and due to the weakness of the rest of the case, it was effective and the verdict smaller than it perhaps should have been. This taught me a lesson. At the least, understand that this may happen and prepare for it and deal with the issue in voir dire.

13) Plaintiff has made statements on liability at odds with the police report. This may or may not be significant. If Plaintiff is a passenger, it is less significant. Unless the police

officer has obviously bungled it, however, it is preferable to try to avoid that kind of problem as the police officer is generally seen by the jury as an unbiased reporter of information. It does the Plaintiff's fragile credibility no good to quarrel with the police officer's version unless necessary. It is wise to meet with the police officer as soon as possible to determine what, if anything, he remembers independent of the report and to be sure that the officer does not affirmatively contradict your client's version of what happened. If the officer says he was told something different by Plaintiff at the scene, then the jury will almost always believe the police officer and think the Plaintiff's story has changed.

14) Plaintiff made inconsistent statement about liability facts to his doctor. This is something you need to be on guard about as the defense can introduce into evidence excerpts from medical history where the Plaintiff was the historian (See *Barone v Law*, 242 Ga.App. 102, 527 S.E.2d 898 (2000)). Thus, any inconsistency between a Plaintiff's testimony and what is in the medical records is also fair game. Depending upon the degree of conflict, this can be no big deal. Still, as long as you are explaining, you are losing. Thus, get the records before your client is deposed and make sure his testimony is consistent, if possible. If all else fails, you can argue that medical facilities are haphazard at best in recording liability facts as they are only really interested in the facts that relate to diagnosis or treatment.

15) The Only treatment is by a Chiropractor. This is rather commonly seen. In my view, it is less of a problem now than it used to be as more and more jurors have or do treat with chiropractors. Still, some jurors are suspicious of chiropractors. I will usually not call a chiropractor live in one of these cases and just use the Plaintiff and lay witnesses and introduce the bills only. However, I will not hesitate to use a narrative. The medical narrative rule is a great blessing for the lawyer handling these types of cases as the expense of using live medical testimony

is almost never justified in a typical musculoskeletal injury case. Most of the time, defense counsel will not spend the time and money to depose the chiropractor thus avoiding the largest problem with chiropractic testimony (ability to cross them effectively). Also, if defense counsel does not depose the chiropractor or have other medical testimony for the defense, this means you have unrebutted medical testimony and that can be extremely helpful. It is less problematic for the only treating doctor to be a chiropractor when you are not alleging permanent impairment or disability. If you are, I highly recommend speaking with the chiropractor, and seeing if a referral out to a neurologist or other medical doctor for an impairment or disability evaluation is possible. Preferably have the chiropractor make the referral. Lastly, it is imperative to carefully voir dire the jury regarding chiropractic if your case is one with a chiropractor playing an important role in the treatment of your client.

16) Plaintiff has been to several doctors and they have found no objective findings of injury. Nothing is more persuasive to a jury that the Plaintiff is malingering than trips to many doctors with no objective findings consistent with injury. This may, of course, be an inadequacy of the medical provider to be able to diagnose the cause of the pain. Absent an ability to provide a logical explanation for this that holds water, this can be a serious problem as the defense can use the medical narrative rule too for treating doctors, and if some docs say there is nothing wrong and they are treating docs, then expect all of them to be read to the jury.

17) Plaintiff received treatment for only a few weeks following injury but returns for treatment just before trial. Defense counsel in such an instance will be able to argue that the subsequent visit was for solely legal reasons and unrelated to any medical necessity. In cases of serious injury with permanent components, a visit to the doctor to see what the status of the patient is does not pose a problem. Where the injury was minor, such a visit does more harm than good and

should be avoided.

18) Plaintiff has little or no loss of time from work but complains of pain or disability inconsistent with his job duties. This can be a problem. Sometimes, clients do work through enormous pain and self sacrifice because they need the money to support their family. In such cases, it is very desirable to have testimony of co-workers or employers who can talk about the noble qualities of client. Unfortunately, absent good testimony on this point, Defense counsel will argue that client is exaggerating the degree of injury. If the jury thinks the Plaintiff is exaggerating or, worse still, telling an affirmative falsehood, you can kiss a musculoskeletal injury case good bye.

19) Plaintiff has been in another reported event or wreck since the incident that forms the basis for the lawsuit. This, of course, allows the Defense lawyer to argue that the subsequent event caused the injuries to the Plaintiff. This is particularly problematic if the subsequent incident is either near in time to the first injury or if the property damage (if a subsequent car wreck) is substantial (or more than the first wreck). Careful analysis of the medical records will often be necessary to see if there is any worsening of symptoms or, worse still, any new symptoms. If the subsequent incident produced no injury, then this is much less of a problem. Still, it will be imperative to present the issue of the subsequent injury to the jury up front. Do not let the jury find out about it for the first time from the Defense lawyer's mouth. If the second incident was a car wreck with property damage much less serious than the first one, then use the pictures of the vehicles to your advantage. Assuming you can establish the nature of the injury from the first incident from records and treatment dating from before the second incident, then the second incident, in and of itself, is not a case killer. It does complicate matters, however.

20) The Plaintiff was in treatment for other medical problems at the time of the injury you are litigating. Depending upon the condition, Defense lawyers will attempt to argue that

the pain your client is suffering stems not from the wreck, but from the other medical problem. Alternatively, if the medical condition is terminal, they could attempt to use the loss of life expectancy to argue against future pain and suffering awards (though they had sure better be careful in this latter argument). Again, a careful analysis of the medical records will be necessary. What symptoms can you reasonably expect to be associated with the medical condition as opposed to this new injury? When did the particular symptoms begin? Lay witness testimony detailing the additional or new difficulties faced by the Plaintiff following the new injury will be very beneficial. In the event the illness is serious and the injury from the car wreck small in the scheme of things, remember the argument of Moe Levine that the measure of damages is not always what you take from someone, but what you leave them with. Lastly, with respect to the bills and records, be careful to separate unrelated charges out as you will detract from your credibility by presenting bills that the Defense lawyer can hold up and show are even partly unrelated. This will only aid the Defense's argument that all of the treatment of a given doctor is really for the underlying medical problem rather than the new injury.

21) Plaintiff was self employed at the time of the injury. This presents a host of potential pitfalls mostly concerning tax records. The tax records for the time subsequent to the injury might show the same income as before injury or might show more income. Both of these scenarios must be handled carefully since if the Plaintiff is alleging a decrease in income, then the Defense will attempt to show that there has not been any loss of income by tax records. If not well documented, you face the danger of the jury believing your client is exaggerating or trying to get something for nothing. If asking for too much on income, why should the jury believe the claims about pain and suffering?

Be sure you get your client's tax returns and pore over them before committing to an amount

of lost income for your client. You need to know if the income loss is supportable by the documents. Half a loaf is better than no loaf. I have had clients who were self employed adult entertainers say they made around $1,000.00 per day. Tax records said about $50.00 per day. Hmmmmmm. I told them not to even bother with the lost income claim....

Another problem is if prior to the year of the injury, there is a distinct lack of income. Is the jury to believe that the Plaintiff had small income for years prior to the injury but at precisely the time the injury happened, his income was going to increase dramatically and he should therefore be paid for it? Very good documentation will be necessary to overcome the suspicion of overreaching that can occur in this scenario.

While there is some law supporting the proposition that the Defendant cannot put into evidence the fact that Plaintiff had failed to file income tax returns (as its prejudicial value of being a tax evader outweighs any probative value. See, e.g., *Williams v. Knight,* 211 Ga. 420, (1993)), there is nothing to prevent the defense from arguing to the jury that their absence calls into question the income loss allegedly suffered by the self employed Plaintiff.

Finally, what if the general business in which the Plaintiff was engaged was depressed during the time of the injury and after? Wouldn't this call into question the validity of even relying upon past earnings? In sum, proving the loss of income of the self employed Plaintiff must be handled delicately and with as much documentation as possible so as to avoid any potential loss of credibility by seeming to ask for more than is supported by the documentary evidence.

22) Plaintiff has not followed through with the recommendations of his treating physicians. If Plaintiff has missed several appointments, or has broken off treatment before being released, then the Defense will argue that Plaintiff could not have been hurt too badly. If so, surely he would not have missed those appointments or discontinued treatments or would have followed

his doctor's advice and recommendations to ease his suffering. While it can seem trivial, even something like a doctor saying Plaintiff should walk a mile per day can be damaging if the Plaintiff does not do so. The argument will be that had Plaintiff simply followed his doctor's instructions, he would be fine or much better. It is imperative to advise the client from the get go to make all appointments and follow the doctor's instructions as much as possible. If not, be sure to tell the doctor why not so the medical notes will reflect the difficulty appropriately. As in most things, an ounce of prevention is worth a pound of cure.

23) The Plaintiff has gone to a chiropractor with no recommendation for such from his treating physician. Of course, in cases where the Plaintiff is treated by a chiropractor, it will be in the absence of a medical doctor recommendation. This is not too big of a problem with an appropriate explanation for why the chiropractor was chosen. I frequently hear people say "the medical doctor was just giving me pills which I did not want" or some such. This is not, by itself too significant. It still has some of the hallmarks of not complying with the recommendations of your doctor, though. It is better to explain the desire to see a chiropractor (if the client really wants to) to the medical doctor and see if you can at least get acquiescence. However, if the Plaintiff says that the nice fellow in the pink Cadillac came by and told him about the wonderful doctor who would guarantee he would get lots of money in settlement, and then drove him to every appointment, then there is a problem of a whole different magnitude....

24) Plaintiff has been to a number of different doctors but they are unaware of each other's treatment. Most people understand the concept of following through on a treatment "plan" to get better. It is easy to draw a negative picture of a Plaintiff who is treating with multiple providers without telling them about the others. This kind of situation will tend to make the medical providers very suspicious of the Plaintiff. How can they appropriately evaluate the Plaintiff's

condition and progress while being kept in the dark about the different treatments Plaintiff is getting? Defense counsel can easily exploit this by painting a picture of a Plaintiff running up the medical to fuel the lawsuit rather than from any need to get better. This problem is another example of why it is always desirable to have your client communicate with their doctors fully. This makes the written documentation better and, correspondingly, the doctor's testimony better as they almost always rely heavily upon their written documentation for deposition or trial testimony.

25) Doctor's report indicates that Plaintiff's condition may be "psychogenic" in nature. This problem is obvious. The defense will use any hint of a comment by one of Plaintiff's medical providers that the pain may not have a physical origin as proof of exaggeration, malingering, or simply that the problems are the product of the Plaintiff's imagination and not, therefore, the Defendant's responsibility. Depending upon the circumstances and other medical documentation, this kind of notation can be problematic. If there really is a legitimate injury but it has a psychological component, this will need to be carefully explained and documented.

26) Plaintiff testifies about all of the things he used to be able to do but can no longer do as a result of the injury. Nobody likes a whiner. It is far better to introduce this kind of testimony by lay witnesses. Nothing is more helpful to the Plaintiff in a musculoskeletal injury case than good lay witness testimony. These witnesses can talk about the Plaintiff and all of the Plaintiff's problems without a negative impression being formed in the jury's mind because they are not talking about themselves. These kinds of witnesses can "make" a case and are rarely, if ever, subject to an effective cross examination. It is rare that a defense lawyer will depose these witnesses and even if they were deposed, what is there to cross them on other than the closeness of the relationship to the Plaintiff? I recently tried a case in Henry County with an all white jury. My client was an African American nurse. My best witness was the white nursing supervisor who talked all

about the client and the help they had to give her when she came back after the wreck and how she never ever needed or wanted help before, etc. Despite less than $400 in PD, the jury came back with a reasonable verdict of almost 4X the pretrial offer. The best witnesses are co-workers as they have an opportunity to observe Plaintiff but are usually not as subject to an argument regarding bias. Next best are friends. Finally, family members can be very helpful. Family members frequently know the most but are most suspect given their close relation to Plaintiff. Frequently, some combination of family and friends or co-workers works best. Do not bring 73 lay witnesses. Two or three carefully chosen witnesses is best. Do not, if at all possible, allow the Plaintiff to testify about all of his or her hedonic damages without lay witnesses. If you have a Plaintiff that can produce no lay witnesses to help, that may say a great deal about whether you want to try that case.

27) During voir dire, Plaintiff's lawyer asks whether the jury would have any problem returning a six figure verdict. Qualifying the jury as to a substantial sum of money is almost always a bad idea in musculoskeletal injury cases. You do not want to do it. In a "soft tissue" case, the Plaintiff starts with several handicaps in that the jury is immediately suspicious of the Plaintiff's injury and motivations. To qualify the jury as to a substantial sum of money will only add to these initial suspicions. Opinions on this will differ, but to me it is best in these kinds of cases to let the jury be educated about the nature and seriousness of injury before talking to them about monetary figures. These kinds of cases, because of the inherent skepticism of the jury, require a different approach on this point in voir dire than cases with surgery or other, obvious indices of injury (in which I think it is a good idea to qualify jury about a large number to get them used to the idea).

28) The Plaintiff brings "heavy artillery" in the form of thermograms, skeletons, and live chiropractic testimony. The potential pitfalls in this strategy are simple. The "window of

credibility" in musculoskeletal injury cases is narrow. If you bring testimony that allows the Defense avenues to criticize effectively (or make fun of), then your whole case can unravel. It can also give the impression of "gilding the lily". Perhaps most important, however, is that is just not necessary and not cost effective. Why do it? It won't help and the expense will make your client get much less than she should. Just put up your client, put in her medical bills, read narratives, and call lay witnesses. Do it all in one day. KISS. (Keep it simple, stupid!).

29) Oversell your case in opening statement. This is perhaps the fastest and easiest way to hurt your credibility. If you promise more than you can deliver, even if it is as to a point that you do not need to prove to prevail, it will still hurt you as the defense will call it to the jury's attention and point out that you failed to prove that which you said you would. You always want to be sure you will have testimony to back up your claims in opening. You need to have the jury be able to trust what you say and they won't if you fail to deliver on your promises. Remember: undersell don't oversell.

30) Fail to address the weaknesses of your case in opening. This is another sure fire way to hurt your credibility. If you have problems (and virtually all cases do), then be sure to tell them to the jury in opening (if not in voir dire!). If the jury hears about them from opposing counsel after you have sat down, then the jury will think you are trying to hide something from them. This can cost you big. Defense counsel will thank you and begin her opening, "What the Plaintiff's attorney failed to tell you...."

31) Fail to get a complete background of your client. You need to deal with your weaknesses directly and up front, but you need to be aware of them to be able to do this. If you have not grilled your client about his past, then you may pay the price during cross examination when the Defense tenders the certified copies of your client's convictions for bad check into evidence. Know

about every past injury or claim or criminal violation, no matter how seemingly innocuous. It is best to deal with irrelevant matters in a motion in limine rather than objecting once the cat is out of the bag. A thorough pre-suit exploration of your client's past is essential.

32) Allow your client to exaggerate or misstate his injuries. Even a little exaggeration that can be "corrected" by Defense counsel can hurt your client's fragile credibility substantially. Prepare your client carefully not to overstate anything. It is better to be conservative than to say anything that will look to the jury like your client is "telling a story" even a little.

33) Allow a doctor to testify, especially live, without allowing you to go over the testimony in advance. This may seem obvious, but doctors are so difficult to schedule meetings with, that it is sometimes tempting to just put up the doctor and hope for the best. Do not do this. I once called a medical doctor to testify in a binding arbitration and met him for the first time at a quick lunch before the arbitration. I explained what I wanted and what was important to my client's case, especially the impairment rating. He said he understood and later testified that he had indeed given an impairment rating of 10% to my client. He then added that, "of course, those things are terribly subjective and really don't mean anything." It only got worse from there. If you are going to spend the money to get medical testimony, it is imperative to spend the extra money for the time it will take to carefully prepare the witness. Nothing is worse for your credibility than being hurt by your own expert. And just to repeat, usually calling medical testimony live is unnecessary on these cases. Don't waste money. Take advantage of the medical narrative rule.

34) The Independent Medical Examination (I.M.E.). This is something that can hurt, but in my experience is rarely used these days. The defense wants an expert that will say your client is not injured or that there are no "objective" indicia of injury. This is a relatively dangerous tactic for the defense, however, as anything positive for your client in the I.M.E. will have enormous

credibility. There are several things you can do to prepare for an I.M.E. assuming you cannot avoid it altogether (it is completely discretionary with the trial judge). First, have someone go with your client to the I.M.E. This will accomplish two things: That person can time how long your client is in the doctor's office (if only a few minutes, provides good ammo for cross) and also that person can talk with others in the waiting room and see if everyone is there for an I.M.E. and, if so, for which company. (More good ammo for cross). Next, be sure that your client does not exaggerate anything to the doctor. Be sure to talk to your fellow trial lawyers about the doctor and, if you are lucky, maybe you can get a hold of some old depositions. If you find out that the doctor does a million "IME's" for a particular company, then subpoena his financial records. Then, if the doctor hurts you on direct, you have some good ammunition for cross. If the doctor doesn't hurt you too much, try to elicit as much favorable testimony as possible and get him to agree that the treating doctors are in the best position to evaluate the injury and that your client appeared truthful and consistent in his relation of symptoms. The defense is unlikely to use the doctor's testimony if it is even a little bit unfavorable to them as he is "their" witness and thus very credible.

Sometimes, you just get lucky. I once had a case involving herniated disks in the neck where the insurance company had a radiologist review my client's MRI films. He gave them a report that indicated my client probably needed surgery (which she eventually had done) as there was compression of the spinal cord at two levels. I called up the doctor and took him to lunch. He agreed to testify live at trial on my client's behalf (incidentally, the insurance company "forgot" to pay his bill for the review!). At trial, he was completely credible, as we didn't hire him initially ("persons acting on behalf of the defendant" had). The jury told me after the verdict that he was the most important witness and they awarded just over $1M. Yes, I know this combination of circumstances was very lucky but you can't get luck like that if you fail to talk with opposing experts

who can give your client favorable testimony.

35) Fail to prepare and understand exactly what work functions client cannot do in a case involving lost income. Your client may have a doctor's disability, but she needs to be able to articulate specifically why she cannot or could not work at her job. What aspects of her job was she unable to do? If she does not know or cannot tell the jury (or worse just says that the chiropractor told her not to work though she doesn't know why), then the defense can argue that she really isn't disabled and that the "disability" is for more legal than physical reasons. You have the burden of demonstrating the causal link between the injury and the inability to work. Be sure to prepare your client on this point and that it is consistent with the medical evidence or suffer an erosion of credibility.

36) Fail to counsel your client regarding proper dress and conduct for court. This is simple and elementary, but can hurt you greatly if you ignore it. Do not allow your female clients who complain of back injury to wear high heels. Do not allow your male clients to help opposing counsel move the lectern (an old trick!). Do not let your male client come in with earrings or otherwise have an appearance like a refugee from the drug courier profile. Have them dress conservatively, neatly, and comfortably (for them). Little or no jewelry, no athletic clothes, don't chew gum (especially in TMJ cases;). In short, pay attention lest you provide more ammunition for the defense's attack on your client's credibility.

37) Fail to prepare your client for the question, "how much money do you want?" This is a favorite ploy by some defense lawyers. If the client is not prepared, it can have the same drawback as asking for a sum certain in the initial complaint. Ask for too much and you appear greedy, not enough, and you limit yourself. The Defense is hoping for a response like, "as much as I can get", or "a million dollars", or "just my medical bills paid", or "I don't know, my lawyer hasn't

told me." Either discuss an amount certain with your client in preparation for this question, or, better still, come up with something that indicates that whatever the jury, in its wisdom decides, will be okay. The reason some defense lawyers ask this question is that there is really no good answer for the Plaintiff. Be sure to avoid the bad ones.

38) Allow your client to assert poverty as reason for not continuing with medical treatment when collateral sources are available to pay for same. If your client says that the reason she stopped treating with doctor so and so was because she could not afford to and would be treating now if she could afford to, your client may have just opened the door to admission of collateral source evidence for impeachment purposes. If your client has med pay or other health insurance with limits that have not been exhausted, it will be permissible for the Defense to cross on this point. This not only hurts your client's credibility, but enables the defense to get in the fact that your client has insurance to pay her medical bills. An unusual problem, but be prepared.

39) Fail to prepare your witnesses about seat belt issue. In general, witnesses, including expert witnesses, do not know the rules of evidence. While it is generally not permitted for the defense to elicit testimony regarding the Plaintiff's failure to wear seat belts, if your live medical expert gives history that includes the fact that Plaintiff was an unrestrained passenger, or some such, then you may have just opened the door to allowing the defense to comment upon this. While you can limit the effect of this through a Motion in Limine to prevent them arguing that your client was contributorily negligent for failing to wear a seatbelt, if you don't know the issue may come up, it could be too late to undo the damage. Once again, an ounce of preparation....

40) Take multiple days trying the case when one will do. I now always try to get a musculoskeletal case done in one day. There is no reason why it cannot be done. Often, liability is not in issue simplifying the case. Use six person juries. The Defense is not entitled to a twelve

person jury if you will cap your damages at $25,000. Why not do it? Unless you have a pretty sexy case, there is little chance of getting a verdict of more than $25,000. All you need to do is put your client up (don't forget to put the medical bills into evidence!), put up two or three (max) lay witnesses, read a narrative or two, cross the Defendant if you need to and rest. All this can be done in one day. Tell the jury that you will not be bringing every conceivable witness to trial and asking every possible question. Tell them in opening you will only be putting before them those facts that are absolutely necessary. The jury will appreciate it as they don't want to be there any longer than necessary. It is an uncomplicated case and you should treat it like it is and don't guild the lily. Defense lawyers love complications, Plaintiff's lawyers should strive for simplicity and clarity. KISS! Do not put up witnesses you don't need! Also, if they jury has to come back for a second day, any passion that they may have felt will likely be gone. I had a case with a five hour deliberation. They came back with a verdict of over $100,000. The defense counsel asked to poll the jury. One juror did not agree with the verdict. They went back into the jury room with lots of shouting going on. They came back the next day. After five more hours of quiet deliberation, they came back the second time with $27,000. All the passion had gone out of the jurors fighting for my client. I suppose it could have worked the other way, but I have become a big believer in getting the case done and to the jury and the verdict coming back the same day as when closing is delivered. Do NOT agree to deliver closing argument and then have the jury deliberate in the morning. Never ever agree to that!

In conclusion, the trial of a musculoskeletal injury case is fraught with potential disaster. Maintaining the fragile credibility of the Plaintiff is challenging but essential. Carefully preparing the witnesses, doing one's homework, and avoiding trying those cases that have too many hurdles to overcome will enable the practitioner to have more success and get more satisfaction in this

difficult area. These cases can be won by Plaintiffs. If Plaintiffs will just try a “clean case” without overreaching or giving the defense attorney a lot of ammunition, then Plaintiff’s “should” win most of these cases. It may not be the most glamorous kind of case to try, but they are important–to your client, to your developing and maintaining your skills as a trial lawyer, and to your practice and reputation. Do a good job on these cases and you will reap the benefits.