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Communicating damages in sexual-harassment cases

HELP THE JURY MAKE AN EMOTIONAL CONNECTION TO THE HARM AND LOSS SUFFERED BY YOUR CLIENT IN A SEXUAL-HARASSMENT CASE

Sexual-harassment cases are all about the emotional losses – the human losses – of the victims. However, the language of the law and lawyers does an injustice to communicating these harms to the jury. CACI 3902 simply calls these harms non-economic damages. CACI 3905/3905A simply lists out that non-economic damages are mental suffering,

loss of enjoyment of life, grief, anxiety, humiliation, and emotional distress. How do we translate these flat words into feelings, events, and descriptions, so that our jurors can understand the true extent of the harms? How do we create the emotional connection?

For the jury to understand how this harassment affected the plaintiff, they

need to see the heartache, or the anger, or the sadness that your client feels. In this article, we will help to discuss three effective methods for communicating these losses: (1) using the five senses, (2) maximizing treating doctors/therapists, and (3) using other witnesses to communicate the harms.

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Not just a “he” or “she” issue

Please note: Throughout this article we refer to the plaintiff as “she/her” for continuity and ease of reference because the recent case we often reference had two female plaintiffs. Men are also survivors of sexual harassment and assault, and the use of “she/her” is in no way meant to undermine or question the struggles or harms done to male survivors. We have also represented male plaintiffs in sexual-harassment cases, who have suffered a great deal in the aftermath of harassment or assault. Sexual violence is not a “women’s issue,” it is a human issue.

Getting the emotional connection using the five senses

The client – everything starts and ends with them. That means you must prepare them for trial. Women in the U.S. are often told how over-emotional they are, and to rein it in. Men are told how un-manly it is to share their deepest feelings. So, some clients need permission to be emotional. But just saying they are upset, angry, or humiliated doesn’t communicate the harm. The client needs to tell their *story*. To connect. It is through this *connection* that the jury can understand your client’s harms and losses and award the damages commensurate with those harms.

How then, can we communicate these harms? So often, we focus on what our client saw or heard – the actions. In so many sexual-harassment cases we hear testimony like: “He touched me on the thigh” or other body part, “he hugged me,” “he brushed up against me,” “he said sexual things to me – it made me uncomfortable,” or “he cornered me and kissed me.” While these things in and of themselves are harmful, they can have a larger impact by using the five senses. The plaintiff can communicate the different sights, smells, tastes, sounds, and feelings that everyone, including all members of the jury, can relate to.

As you listen to your client’s story, ask about the smells, tastes, and sensations. Is there any smell that brings you back to that moment? Why? Did he wear

a cologne that reminds you of everything that happened? After he hit you, could you taste blood in your mouth? When he touched you, how did that make you feel inside your body?

In preparation for a recent sexual-harassment trial, our clients mentioned how their supervisor would drink wine throughout the workday and have wine in-hand at times during his sexual harassment of them. How one client would feel as though she got punched in the gut when he touched her and would throw up after seeing him. They told us how and where he touched them, in as chaste and clinical terms as they could muster to hold their countenance. So, we dug deeper. And then we used their words to help the jury understand their pain.

Using the five senses can create a visceral connection to your story. Here are two examples of a brief damages statement for comparison using some information from that case. In the first, the information is recited in its basic form, and in the second we have incorporated the senses with our story.

(1) Jane Doe’s manager at the winery was relentless. He would drink at work and no one seemed to care. He would proposition her, make numerous sexual comments about the bodies of other workers and customers, tell her that he could make her a manager if she would have sex with him, grab her hips and touch her in her most private area when she was bending forward to pick up dishes. She felt overwhelmed; anxious; nauseated – like she was punched in the stomach. She had nowhere to go and two little girls to feed.

(2) Jane Doe told us all about the feeling of powerlessness, fear, and humiliation she felt when he touched her against her will. He penetrated her thoughts with his vulgar imagery as he described his sexual desires to her with the smell of stale wine on his breath. She described the sinking pit in her stomach that threatens to swallow her whole whenever she sees him and the taste of vomit that stays in her mouth even after he’s gone. We all saw how her breathing was shallow and her hands shook, just

looking at a picture of him. Heard how her breath stopped when he slid his hand in between her thighs from behind as she leaned forward to wash dishes. That she can still feel the pressure of his hands... on her knee, her hip, on all the places his fingertips pressed into her. Still remembers the feeling of that wooden wall of the shed against her back when he cornered her with glassy, blood-shot eyes and port on his breath just inches from her face as he told her to “fuck” him. The feeling of hot tears on a cold night as she lay in bed awake because he knew where she lived, and she didn’t know how she’d protect her two little girls if he came knocking on her door. And now, when she smells wine, she’s transported right back to those nights and those feelings of helplessness and panic and loss.

In one story, you have communicated to the jury the facts of what happened to Jane. In the second, you are telling (or re-capping) a story. As part of that story, you have included enough sights, sounds, smells, and sensations, to make it much easier for your listener to understand what was really felt and how everything caused the damages at issue in your case. If the jury can sympathize (or better yet, empathize) with Jane’s pain, they’re far more likely to agree with the amount of compensatory damages you ask for in closing.

Don’t be afraid to use treating therapists

Many victims of sexual harassment are afraid to get help. They don’t want to relive their experiences even when talking to a medical professional. Sometimes, they go to a single session and the pain of having to repeat their experiences drives them away from continuing therapy. Others don’t want to take prescription psychotropic medications – for a variety of personal or cultural reasons.

Too often, company lawyers sow doubt about the validity of the harms suffered when victims have not been in regular therapy and are not using prescription medications, and it can make the plaintiff’s lawyer wary of bringing those

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treating doctors in to testify. The company's lawyer hires defense mental health experts to run a battery of multiple-choice tests to claim that the harm "wasn't that bad." This couldn't be further from the truth.

If the client has never gone to see a mental health professional, either a licensed therapist, psychologist, or psychiatrist, then try to get them to go – even if just for one session. The treating therapist, even someone who was only seen on one occasion, can provide invaluable testimony to help communicate the harms to the jury. How?

In our recent sexual-harassment trial, we represented two clients who were victimized by the same manager. One of our clients did not go to therapy and the other went to two different treaters, both times on only one occasion. We wanted to utilize the therapist to help communicate the harms. We were only able to locate one of the therapists who examined one of the plaintiffs on one occasion and had a total of four pages of notes. Yet, her testimony was invaluable.

Structuring the testimony

We structured the examination in a way to maximize this one-session treating therapist. We started broadly and then focused it back down to the plaintiff, the examination and diagnosis of her patient.

First, we had the therapist talk about the variety of symptoms and complaints she looks for in terms of diagnosing anxiety, depression, and PTSD. Our client's one-time treater, as a trained therapist, was able to explain the variety of symptoms she looks for in diagnosing a client who comes in after experiencing harassment, assault, or sexual violence. Things like sleep loss, appetite disruption, hypervigilance, self-isolation, and difficulty concentrating. We had the therapist explain what happens to a person's body when they experience a panic attack, anxiety, and bouts of depression. The jury had just heard all the stories and the senses our client had shared.

Next, there was a medical professional who was looking out for our

client's best interests validating that these symptoms are real and cause serious harm. Then, we asked whether all these symptoms were present in the plaintiff, and to explain what she heard, saw, charted, and diagnosed. Having a treating therapist explain these symptoms lends credibility to the seriousness of these harms.

Second, we had the therapist explain what a trigger is and the variety of things that can trigger a reaction in survivors of harassment or assault. Things ranging from a familiar noise or smell, to seeing a similar-looking person. Smells, sights, and sounds can all be triggers that come about at any time and can be completely debilitating. They can trigger a panic attack, anxiety attack, or bout of depression. It is important for juries to know that these are not random occurrences but are caused by things out of the plaintiff's control.

Third, we also wanted our client's treating therapist to explain how long these symptoms can last. Many people ascribe to the "time heals all wounds" theory. This is simply not true for mental-health injuries. Mental-health injuries are not like broken bones – some never truly heal. We asked, "What are the long-term consequences and effects of being subjected to harassment in the workplace?" The treating therapist explained to the jury that these symptoms continue indefinitely. They may be able to fade away until something happens, a trigger, or they can last a lifetime and never truly go away. The therapist, even one who only saw your client one time, has the knowledge and experience to communicate to the jury that these fears are well-founded and won't simply vanish. That these symptoms and the triggers will likely stay with them for the rest of their lives.

Lastly, there are reasons people put off going to see mental-health professionals or choose not to use them at all – or, at least, at this time. Your treating mental-health professional can explain to the jury that it is very common for victims to not go to therapy for years, even decades after the abuse has occurred. They can explain to the jury why people only seek treatment one time – or a few

times – and how this does not mean that they are not harmed. Just the opposite sometimes.

When the therapist testifies is also important. In the sexual-harassment trial mentioned above, we had the therapist testify in between our two clients to validate the testimony that the jury just heard from one of our clients and the testimony we knew they were soon to hear from our second client. In a single-plaintiff case, you can organize your treating mental-health professional either before or after the client. If your client is not a strong storyteller or someone who doesn't emote well, then perhaps your mental-health professional goes first, explaining why the plaintiff struggles to communicate their emotions. They can set the stage for the jury's expectations. If they go after your client, then this can have the effect of recapping what they just heard in medical terms, symptoms, diagnoses, and plans. Either way, the mental-health professional is a useful tool in providing credibility for your client's harms and can help immensely in communicating the harms and the losses.

Have other witnesses paint the picture of your client's damages

"You can't know what someone has lost until you know what they had."

That theory applies equally to employment cases as it does to personal injury cases. As the lawyer, it is your job to find out what your client had and was like before all the bad stuff happened to them, and then to communicate how that changed. Talk to their friends; family; co-workers; spiritual leaders. Find the person or two who can tell a jury how this changed Jane.

"How did the two of you meet?" "What was she like when you first met Jane?" "What first drew you to her?" "How did you feel being around her?" "Is that different now?" "When did that happen?" "How has that affected your relationship?" "How would you describe her now?" "What do you miss most about who Jane was when you first met her?" Dig deep. Listen. Be patient. Be human.

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Just like when your client testifies, you want this person or two to be able to tell stories that paint the picture. “Jane was happy and outgoing before, and now she cries a lot,” isn’t going to communicate the harms as well as: “When I first met Jane? Well, she had this light. We met through mutual friends and she made me laugh more than any other girl I’d known. Now? We hardly leave the house. Sometimes I come home and she’s just sitting there, alone, crying. All I can do is sit next to her and hold her and wait until it passes. We don’t even talk about it because I know it won’t help. I just let her know I’m there for her.”

The goal of inviting these witnesses to come and testify is to have them paint a picture of your client through a different lens or from a different angle, and/or to confirm some of the things your client shared about her harms. Some jurors will be inherently distrustful of the plaintiff’s testimony and bringing in a witness with no stake in the outcome of the case is always beneficial.

Conclusion

Communicating the emotional injuries of sexual harassment/assault survivors can seem daunting to many attorneys, but that doesn’t make the harms themselves any less real. As with all aspects of litigation, practice, preparation, and patience will always be your greatest allies. Take the time to sit with your client and learn from her. It’s rare for survivors to open up after only one or two meetings. Be patient. Be accepting. Listen. Then help them tell their story and hold the bad actors accountable.

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