



Preparing your witnesses for trial

WHETHER IT'S YOUR CLIENT, AN EXPERT OR A DAMAGES WITNESS, THEY MUST KNOW WHAT TO EXPECT AND WHAT'S EXPECTED OF THEM

Cases don't always settle, so you've got to start your trial preparation as soon as you get the case. Witness preparation is crucial. Those promises you make during opening statements about what you'll prove? Witness testimony is the bedrock upon which those promises are fulfilled.

Preparing your witnesses takes time and care, and it's important to plan early. Remember that – unlike you – speaking to 12 strangers on a jury is probably not something your clients or witnesses ever dreamed of doing. While you may find trial exhilarating, it may be nerve-racking for them. Taking the time to explain how court and trial work, what the experience will feel like, look like, the specifics of their particular role, and how their testimony fits into the overall story of the case will reduce that fear and help your clients and witnesses focus on what they need to do: give their best testimony.

Your client

It can be hard for an injured person to grasp that most people will not immediately understand how the crash, fall, or injury event occurred, or what her life was like before the injury – what “normal” meant to her. Preparing your client for trial starts the minute she walks in the door.

Liability

Your client needs to know her liability facts backwards and forwards. Have your client review her deposition and discovery responses and review all the available photographs and diagrams before she gets on the stand – go over these materials in detail with her. You don't want your client surprised at trial.

Review the defendant's deposition and discovery responses with your client, too. She doesn't necessarily have to read them, but she needs to know the information. Help your client understand what the defense's arguments will be so she is not caught off-guard during

cross. Explain the defense experts' opinions so the two of you, together, can formulate strategies to deal with a cross-examination trying to elicit answers from your client that support the defense.

Damages

CACI No. 3905A identifies the following possible noneconomic damages:

- Physical Pain
- Mental Suffering
- Loss of Enjoyment of Life
- Disfigurement
- Physical Impairment
- Inconvenience
- Grief
- Anxiety
- Humiliation
- Emotional Distress
- [Other]

You must discuss each of these categories with your client – right away and repeatedly throughout the case. Clients often have difficulty conveying the daily indignities, inconveniences, pain, and changes in their sense of self that the injury has caused. You'll hear: “I don't know,” or “It's just different, I'm not the same anymore.” Whether from embarrassment or a misassumption that people will simply understand when they see a physical injury or hear that someone died, you must help your client muster the communication skills to convey his suffering to the jury.

Explaining the jury to your client

Explaining what a jury trial is to your client is crucial. You need to explain what the courtroom is – or is supposed to be: a hermetically sealed environment, where the only things that exist are those that come to life inside. The jurors will only know what they hear in the courtroom. Your client cannot assume that the jury knows what your client's “normal” is – normal day, normal activities, normal feelings. All of this needs to be told.

And if the jury has to be told a lot of information, stories help keep their attention. Learn about your client's daily

life to help your client tell you stories for the 3905A categories.

For example, a time when a child looked away, scared, from a visible scar on your client's body (disfigurement, humiliation). A time when your client was filled with shame because they were unable to cut their food with their injured hand and a friend had to help (humiliation, physical impairment). The embarrassment of walking slower than everyone else in a group or skipping activities because they involve stairs (loss of enjoyment of life, physical impairment).

Stories will bring the 3905A categories to life. Know which stories you will tell at trial, and carefully review them with your client so they have the stories in mind and can recognize when it's time to tell them.

Preparing your client for cross-examination

You need to explain to your client that cross-examination at trial will be different and more intense than at deposition. A deposition is a fact-finding mission; cross-examination at trial is hunt-and-destroy. By the time trial comes around, you'll know the areas the defense intends to target. You must go over them with your client.

Rehearse cross-examination. Your client must feel comfortable enough with the process to stay calm and give forthright answers. If possible, get an experienced colleague to play the baddie, so your client doesn't associate you with negative feelings. Video record the rehearsal so your clients can see their performance: the words they use, the gestures they make, the nervous tics they have, and how they react under pressure. Work with your client on language that is truthful, but that will also resonate with the jury.

To bring or not to bring...your client to trial

In most cases, you want your client present for every minute of trial. There are times, though, when it's best for your

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client to be absent. In cases involving brain or psychological injury, it's often better for your client to not be present when experts testify – it can be disturbing for your client and embarrassing for the jury. You need to think about whether it's best if your client leaves the courtroom when close family and friends testify: Will these witnesses be too embarrassed to testify in front of your client about what changes the injury has wrought? Each case and each client are different. Think about these issues and make sure your client is aware and involved, so they're not insulted or at loose ends.

The little details matter

Last but not least: logistics. Do your clients have reliable transportation to court? Appropriate clothes and shoes? We had one client who had a serious neck injury, with severe radicular symptoms in her upper extremities. She was always in full make up, hair blown out, with knee-high boots. She told us her daughter helped with the make-up, she got her hair blown-out once a week, she had a special shoehorn for the boots. But first impressions count: The jurors would see her as they filed in for voir dire; the suspicion would be immediate. We worked with her on a more natural, self-reliant look.

Explain to your clients about staying away from jurors and keeping quiet in the courthouse hallways. Let them know when there will be breaks, show them where the bathroom is, and how lunch will work.

The more you can explain to your client about all of this, the less mysterious and intimidating it will be – and you and your client will have less to worry about.

Your damages witnesses

Finding a few needles in a haystack

Talk to your clients early about who knows them best and who can talk about their life before and after their injury. You want as many names as possible, because not everyone will make a good witness. Some people aren't good talkers. Others may have unfortunate backgrounds that the defense could use to distract the jury.

Get at least ten names from your client: three or four family members, three friends, three others (e.g., coworkers, teachers, fellow parishioners, etc.). Talk to each person, get a good sense of who they are, how they know your client, their level of insight into your client before and after the injury, how they talk, how well they remember, how they react to questioning. Ask them for photos or mementos from time spent with your client.

Run a background check on each person. You have plenty to deal with at trial; you don't need a surprise felony or past lawsuits.

Defense counsel are becoming savvier about identifying potential damages witnesses before trial. Written discovery now often includes questions demanding that the plaintiff identify everyone who is a witness to their damages or to various aspects of their damages. These questions can feel overly intrusive, like your trial strategy is on display, but they will prompt you to get an early start on your trial preparation.

Ultimately, you need to be prepared to whittle down your original ten witnesses. With very few exceptions, no judge will let you call that many at trial. Identify a core group of about three witnesses, with each one ready to testify to – and tell stories about – distinct parts of your client's life.

It's crucial that you review the same logistical matters with these witnesses as you did with your client. Do not forget to explain that they will not be able to sit in on others' testimony prior to their own; they must remain outside the courtroom until they are called. And you must explain that, once cross-examination has commenced, you will not be able to discuss their testimony with them during any breaks. (See, e.g., *Perry v. Leeke* (1989) 488 U.S. 272, 274; *Kadelbach v. Amaral* (1973) 31 Cal.App.3d 814, 823-824. Both of these cases involved specific trial court orders prohibiting communication between attorney and witness. Even without a specific order, avoid the appearance of impropriety.) Telling them the rules will help them concentrate on their testimony.

Telling your client's story through each witness

Just as with your client, you must explain the jury's perspective to these witnesses and emphasize the importance of telling the story of your client's life. For damages witnesses, that literally means telling stories. To tell a compelling story, you need to determine which aspects of your client's life each witness will represent at trial.

For example, if your client was athletic and, as a result of the injury, can no longer participate in her usual athletic activities like she once could, find someone who can bring that to life for the jury. If your client played team sports, talking about the importance of team often resonates with a jury. Is it the same for your client now, after the injury? Is she able to enjoy the camaraderie and fulfillment of being on a team, or is she stuck on the sidelines?

Your witnesses' stories should be grounded in sensory observations and memories. Every attorney should read Deborah Chang's article, "The Story of Their Lives," which discusses using the five senses to bring your witnesses' stories to life. (Deborah Chang, *The Story of Their Lives*, Advocate, April 2015.)

This tool will give you powerful results. I had a wrongful-death case in which all of the decedent's children were felons. Not paperwork felons, like tax evasion, but big-time felons – as in bank robberies, with the odd stabbing and carjacking.

Obviously, this family required a lot of prep – on so, so many levels – but I worked with them to give sincere, meaningful "slice of life" testimony about their deceased father: the smell of his cologne when he hugged them; how he would smile and run into the kitchen to help his wife take dinner out of the oven, so he could be the first to taste it; his soft, steady voice when he sang hymns and made his children feel as though they were not as far away from God as they thought. These would have been touchstones for the jury, even coming from indisputably hardened criminals.

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In another case, I worked with our client's mother – the last person to see him walk before a car crash that turned him into a quadriplegic. Many times, with a witness like this, the story starts with the phone call notifying them of their loved one's injury. But I discovered the story started about an hour earlier. At trial, we went through that hour: getting up while it was still dark, making her son breakfast to take with him to work, a strange compulsion to accompany him to the door and watch him while he walked to his vehicle. She had never done that before, watching him from the door, but, as she told the jury, "it was like God wanted me to see him walk for the last time. God wanted *me* to see that." She then went back to bed, where she tossed and turned, sweaty and nauseous, unable to go back to sleep.

The jury already knew the end of the story but telling it minute-by-minute filled the jury with tension, foreboding, and horror.

Your experts

For some attorneys, working with experts can be intimidating. For others, the necessary dependence on experts can lead to taking them for granted, to the point where we simply expect our experts to know what to do and when, without much preparation. After all, these are "experts" – they're supposed to know it all already.

They don't. Experts require as much prep work as your other witnesses – and sometimes more.

Deposition performance = trial performance

Depositions are their own beast and not necessarily indicative of how an expert will perform at trial – largely because, at deposition, you're not typically doing direct examination. Direct examination is the first and best opportunity for your expert to establish a trusting rapport with the jury and to establish him or herself as a reliable voice of authority. Deposition may give you a preview of your expert's ability to do this, but what you see at deposition is not necessarily what you're going to get at trial.

No matter how accomplished your expert is, how many letters follow their name, how many awards they've won or articles they've written, if you've never seen your expert in action at trial, then you need to be ready to prepare them from scratch – even if they are a well-known name in the legal community and have testified in other trials.

Covering all the bases

Cover all the bases with your experts, even basics like clothing. You're thinking, "Experts are professionals, they know how to dress." Don't count on it. Some wardrobe woes from trial:

- The expert who showed up with his shirt unbuttoned halfway and his chest hair on display. It was like Magnum, PI had shown up for trial! We buttoned him up before he took the stand.
- The expert whose trial suit was two sizes too big. There wasn't much we could do except pray his belt held up.
- The expert who showed up with talcum powder on her jacket sleeves, coffee on her blouse, and lipstick on her chin. Apparently, the drive to court involved hitting every pothole in San Bernardino County. We used up all the paper towels in the bathroom getting that fixed.

So, when you are preparing your expert for trial, talk to them about what they're going to wear. Do they have a suit? Have they worn it lately, does it fit, is it clean?

It can be a lifesaver to have a trusted second who can meet the expert outside the courtroom while trial is in session to make sure that everything is in order and working (computers, visuals, etc.), that the expert's shirt isn't on backwards, and that they have everything they need before getting on the stand (new info, water, etc.).

Being a good teacher

Experts don't always know how to act in trial, either. At trial, your expert needs to be a teacher – the best teacher your jury has ever had. So, what makes a good teacher?

Eye contact. It builds rapport, influence, and likability. It helps motivate students to learn and engage with the

material. When it comes to your expert and the jury, there's no difference between the courtroom and the classroom. Turning their head to the jury box and casting their eyes to various jurors during answers – naturally, like the expert is telling a good story to a group of people that the expert actually likes – will help jurors become emotionally and intellectually invested in scientific, medical, or technical concepts, and emphasize the part of your client's story that the expert is helping to convey.

Clear explanations. The ability to explain scientific/medical/technical concepts and how they apply to the facts of your case (i.e., their opinions) in a comprehensible, organized, and convincing manner is also critical. This means (if your judge allows) moving around, using visuals to back up their words, letting their hands do some of the talking too; again, as if they are telling a story to a group of friendly, receptive people. Practice this when you are preparing your expert. You need to see whether your expert can do it. If they can't, you want to know so you can work with them.

Your jury *wants* to understand. Your expert is an instrument of understanding, a bridge to knowledge. Your expert needs to understand that so they can communicate effectively – not just through words, but through tone and demeanor – with the jury. Your expert is there to contribute to and advance the overall story of the case.

Getting your expert's attention

Preparing your expert also means that, no matter how stellar their qualifications, you meet with them to make sure that they: (1) have reviewed all the materials; (2) understand where you're going with their direct examination; and (3) are ready for cross-examination.

For most experts, forensic legal work is a side gig – sometimes a very lucrative one that makes you wonder why you didn't follow your mother's advice and get over your fear of blood so that you, too, could charge \$1000/hour to read some blobs on an MRI, but...they have other business that takes up their time. You must get a foothold on their attention.

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If that means paying for the time to run through everything, from CV through opinions, do it.

Find out whether, how, and when the expert will be using models, visuals, computers, and how best to physically present this to the jury. Does the expert need any special equipment? For medical experts, you want them to have seen your client within 30 days of trial so they can give the most up-to-date information about your client's condition.

Check in with your expert a week before trial, to make sure that they're actually getting ready and that they haven't developed some new opinion that needs to be disclosed to the defense.

If at all possible, meet with your expert about 48 hours before you anticipate calling them at trial. This gives you and your expert a little wiggle room. Your expert must have read his or her own deposition, the opposing experts' depositions, and needs to re-review all of the materials that formed the basis of the opinions they gave at deposition. (If they were not deposed, make sure they've reviewed everything.)

Talk to your expert the afternoon or night before they appear, as well. There may be new information from other trial testimony that your expert needs to know.

During your preparation sessions, run through your direct examination questions so: (1) you know their answers; and (2) you can hear how they intend to talk to the jury. Going through the direct examination includes talking about your

expert's CV. Some people are embarrassed to talk about their accomplishments; others are too eager to talk themselves up. Find a few bits and pieces in your expert's CV and career that will establish them as credible and knowledgeable, but will also humanize them for the jury.

As for your direct examination: You and your expert have to be able to work well in tandem. Your expert needs to be able to read your visual and vocal cues – when to keep going, and when to stop and let you ask your next question – and you need to know the same.

Similarly, if there is a defense theory that needs to be defused in direct examination, you and your expert have to be solid on how and when that's going to occur. If you tee up a subject, you want your expert to recognize what you're doing so that they can give a sure, confident answer.

The videotaped expert deposition

More and more expert depositions are being videotaped with excerpts shown at trial. Assume this will happen with your experts and prepare them for it. If you get stuck in a situation in which your expert will be unavailable for trial and the deposition is all you will have, you need to conduct your direct examination during the videotaped deposition. That means you need to go through all of the above with them.

You also need to set the scene. If the deposition is at their office, work with

their assistant or do whatever is necessary to make sure that the room in which the deposition will take place is presentable. You don't want the jury to see a lot of mess or anything embarrassing in the video. The jury will get distracted looking at it.

Start your planning now

Every step of litigation is geared toward trial, and your trial will be built on the strength and believability of your witnesses – so, find out who your witnesses will be and start working with them as early as possible. Think hard about what you need to prove and the promises you intend to make to the jury, and then think about who you want on the stand to represent your client. Work with these witnesses to help them bring the jury into your client's life and to transform dry elements of proof into a story that evokes understanding, atmosphere, and feeling. Help these witnesses help you keep your promises to the jury.

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