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## Supporting the non-economic damages claim in a wrongful-death case

TESTIMONY OF DECEDENT'S FAMILY AND FRIENDS IS CRUCIAL IN ESTABLISHING NON-ECONOMIC DAMAGES

Losing a loved one is never easy. Talking about the loss with family and friends can be difficult. Having to open up about the loss to complete strangers during a trial can be terrifying for anyone. Some treasure their privacy and do not feel comfortable sharing their struggles or emotions with people with whom they are not familiar. Others may feel so comfortable opening up to strangers that they have a tendency to talk too much. Knowing what information to offer a jury at trial about damages in a wrongful-death case and how that information should be presented is a lengthy process that begins with our clients.

### Road map

Having a good road map is essential. The CACI jury instructions provide a good road map because they identify the elements. Once the jury decides that plaintiffs have proven their claim against the defendants for the death of the decedent, the next step is for the jury to decide on the damages award. In wrongful-death cases of an adult, CACI 3921 outlines damages in two categories, economic and non-economic.

### Economic damages

The plaintiff in a wrongful-death action can claim the following economic damages:

1. The financial support, if any, that the decedent would have contributed to the family during either the life expectancy that the decedent had before their death or the life expectancy of the plaintiff, whichever is shorter;
2. The loss of gifts or benefits that the plaintiff would have expected to receive from the decedent;
3. Funeral and burial expenses; and
4. The reasonable value of household services that decedent would have provided.

### Non-economic damages

The plaintiff can claim the following non-economic damages:

1. The loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, and moral support;
2. The loss of the enjoyment of sexual relations (if applicable and claimed by the plaintiff); and
3. The loss of the decedent's training and guidance (if applicable and claimed by the plaintiff).



### What's not allowed

In determining the plaintiff's loss, the jury is not allowed to consider:

1. Plaintiff's grief, sorrow or mental anguish;
2. The decedent's pain and suffering; or
3. The poverty or wealth of the plaintiff.

### Discovering our client's story

Successful trial lawyers understand the importance of effectively telling their client's story to a jury. We have that opportunity during different parts of the trial, such as in opening statements, through examinations and in closing arguments.

However, it is crucial to remember our *clients* are telling their stories to a jury. Therefore, it is important for us to work with our clients so they are thoroughly prepared to effectively communicate their stories at trial. Questions abound. Will the

jury like our client? Will the jury feel a connection with our client? More importantly, will the jury believe our client? To discover our clients' stories, it is important for us to know them.

### Getting to know our clients – at home

Meeting with your clients at your office is a convenient way to obtain information from them. But, meetings at your office do not really provide an opportunity to get to know your clients.

At trial, our clients will need to tell their story. It is important for us to discover their story by learning about our clients before they can give their deposition or testify at trial. A great way for us to discover our clients' stories is to spend time with them at their home. Even if it's a two-hour drive from your office to your client's home or even a plane ride away, the time, effort and cost are worth it. We take a long drive or hop on a flight to meet with an expert because it's important. Taking the time to meet with our clients at their home is also very important.

We learn so much more about our clients by spending time with them at their home, in their own environment. Meeting on their turf, in comfortable surroundings, even with a meal, will reduce anxiety and stress. That will allow more intimate information to be exchanged, helping the attorney help the clients.

Remember, for many of our clients, it is the first time they are involved in a severe trauma or lawsuit. They have sought representation because something horrific happened. Many of them are nervous, scared, intimidated, and even overwhelmed. They have no idea what to expect and therefore expect the worst.

Some are afraid to ask questions. Some of our clients don't want to do or say anything which they think might jeopardize their case. They may not fully understand or appreciate what information we need from them. It can be difficult to get them to open up to us. The thought of opening up to a jury may be even harder for them to imagine.

Meeting with our clients in an informal setting at their home, in the kitchen, out on the porch or in the backyard can help elevate the mood and loosen tongues so we can see and learn for ourselves how they lived before the trauma occurred.

### Make observations

We can learn a lot by observing different parts of our clients' day. In a wrongful-death case, part of our clients' story includes talking about the loss of a loved one. By spending time with our clients and their family, we can observe firsthand, for example, what a surviving husband and father of minor children has been going through since the death of his wife. Arrive at the client's house during the week, on a weekend day or both, just before the kids wake-up. See for yourself what they go through on a daily basis during their morning routine or spend the afternoon or evening with them. Bring dinner. Observe how they interact with each other. Soon you will not be "company." All of these observations and interactions can tell us volumes about our clients.

While we are at their home, we can sit down with our clients and talk to them about life before their spouse died, look at pictures and even furniture to remind family members of stories and even the events that led to the death of their spouse or other loved one. These discussions can be broken into different sessions. We can go to their homes multiple times and select different parts of the weekday or weekends to visit with them.

Remember to take a tour, if permitted, of the house and grounds or neighborhood. Make observations in each room and note decorations, paintings, knick-knacks and other items on the walls, and elsewhere. You can learn a lot about your client and the family by this view of the *scene*.

### Learn about the decedent

Our best and most substantive knowledge of the person who died is

generally from family, friends and colleagues. Start your investigation with the surviving heirs. If your client is the surviving spouse, find out how they met, how long they dated, learn about the decedent's educational and employment history.

Find out about the decedent's hobbies, lifestyle, parenting skills, personality, any health issues she had when she was alive. Inquire about her temperament and her goals and ambitions in life. Have them show you photographs of the decedent and describe what the photographs represent. The clients actually practice telling their story by describing slides and photographs.

### Other family members, friends and colleagues

When it comes to presenting damages at trial in a wrongful-death case, it is our job to figure out the witnesses who will do the best job of bringing the decedent to life for the jury. It may be a number of people instead of only the surviving heirs. The best way to figure out which witnesses should testify at trial on damages is to get to know those individuals.

If the decedent was employed at the time of death, reach out to the supervisor, co-workers, clients or the human-resources person, to name a few, and talk to them about the decedent early on in the case. You can identify them as witnesses in written discovery and schedule their depositions, if necessary.

The decedent may have been very close with parents, siblings, extended family or best friends. Find out from the surviving spouse or heirs who the decedent was close to and whether they would agree to meet with you. You can learn a lot about the decedents and about their relationship with their spouse or children or the type of employee they were by reaching out and meeting with other family members, friends and colleagues.

By getting to know your clients, the decedent's family, friends and colleagues,

you will have a better understanding of which individuals will be the best to tell certain parts of the decedent's (and the heirs') story.

### Photographs, videos and memories

Look at photographs, videos and other items with the surviving heirs while visiting them at their home. Photographs, videos, letters, and birthday cards are great ways for our clients to tell their story. They bring back memories which can be shared with the jury when our clients testify at their depositions and at trial.

When you sign up clients, immediately provide them with a list of items you want them to gather and provide to you. The list may include photographs. Instead of providing a list, you might have your assistant contact the client and ask for photographs.

Although the clients may provide you with photographs, they may not be the best ones to get the story across. Your clients may have volumes of photographs saved in photo albums, boxes, on their computers or on their smart phones. They may not understand what we are looking for even if we put it on a list or call them.

By going to our clients' homes, we can have them show us photo albums or go through the boxes of photographs they have stored on a shelf in the closet. We can walk through their home and look at the photographs they have hanging on the walls or displayed in picture frames on the furniture. We can download videos or photographs they have stored on their home computers or laptops.

Our clients may also have intimate letters from the decedent or birthday cards stored in boxes at their homes. The decedent may have also left notes for their family. Find out the significance of the photographs or certain items they have displayed throughout their home.

### The Post-it Notes support a relationship

In one case I had the privilege of handling, the decedent was a 40-year-old man who recently married his

girlfriend of two years. The decedent would leave his wife Post-it Notes throughout their house telling her how much he loved her, telling her to enjoy her day, that he felt so lucky to be married to her, that he couldn't wait to see her at the end of the day after work, to wish her good luck on a project at work, and other kind notes.

The wife saved these notes and still had many of them displayed on the refrigerator. She also framed some of the notes and displayed them in her bedroom, living room and dining room. The other notes she saved were put into a storage box in the closet after she scanned them all onto her computer. She cherished each note and wanted to make sure she would never lose them.

These Post-it Notes were a great way to get across not only the loving relationship between this amazing couple, but they really showed how the decedent was a very thoughtful, considerate and supportive husband and person. The wife came to life when she showed me all of the Post-it Notes her husband left for her before she woke up. She explained each of the notes, which helped to give me a clear picture of her amazing relationship with the decedent.

There is a famous quote by Benjamin Franklin which sums up the importance of spending time with our clients as a means of bringing out damages at trial:

Tell me and I forget.

Teach me and I may remember.

Involve me and I learn.

Our clients will be able to effectively tell their stories at trial if we involve them in the process.

### Testimony relating to damages

After spending time with family, friends and colleagues, we can determine which lay witnesses we offer for testimony about economic and non-economic damages.

### Non-economic damages

The loss can be explained by our clients, other family members, friends and colleagues. Break down each element and find the stories and descriptions to

bring each element to life at trial. For purposes of this article, only some of the main elements will be discussed.

#### *Loss of love*

We need to thoroughly understand the relationship between our clients and the decedent. Whether the case involves the death of a spouse, parent, child or sibling, we need to really explore the relationship the decedent had with the heirs, both the good and the bad.

If the decedent was a spouse, find out about their marriage. When did the couple meet, when were they married, what was their relationship like? Were they an outwardly loving couple? Were they considerate to each other, how did they show each other affection? Did they have any special obstacles or serious marital problems? Were they ever separated for reasons of terminating the marriage? Were there any extramarital affairs, domestic violence issues or substance abuse? If there were marital problems, as there generally will be in long-term marriages, find out how they *overcame* those issues and if the marriage or relationship improved because of it.

Once we have a clear understanding of the marriage and its dynamics, counsel should decide on who will explain different facets of the couple's relationship and bring them to life for the jury.

#### *Companionship*

Learn about how the decedent and the heirs spent their time together. Did they enjoy hanging out at home, going on vacations, going on weekly outings, taking walks, going for a drive to the mountains or beach, did they have any hobbies that they enjoyed doing together? If the decedent was a parent, how did the mother or father spend time with the children? If the children are adults, did they have a close relationship with the parent, how often did they see each other or talk? How did they primarily communicate with each other – through phone calls, text messages, Facetime or emails? Were the parent and child estranged, and if so, for how long and what brought them back together? Overcoming obstacles is *part of life* and may show the depth of

devotion and improve the quality (read, quantity) of damages over the loss.

#### **Comfort**

Have the heirs explain how the decedent provided comfort to them. How would the decedent ease the distress for the heirs? In a recent trial, the husband was on the witness stand and he testified in front of the jury about how his job, at times, would require him to work on out-of-state projects. He testified that even though work was stressful and he didn't like to be away from his wife and daughter, he would always feel comforted whenever he spoke to his wife. Whenever he would talk to her or see her, his mind would be at ease. He said she was home to him.

If the surviving heir is a child, especially a minor child, that child will be deprived a lifetime of being held by their mother; of not having their mother to run to when the child is feeling sad or sick, or of wiping away their tears after falling down. These issues need to be fleshed out and exposed.

#### **Care**

In a case where the decedent was married with minor children, find out how the parent cared for their children. Did the parent help feed, bathe or change the baby's diapers, swaddle them, teach them to dress and tie their shoes, get the children ready for school, read the children stories, help with homework and other school functions like parent-teacher conferences? Did that parent take them to sports and the arts like baseball, soccer, ballet or music practice?

Go through the same process with clients and the other terms used in CACI instructions like, "assistance, protection, affection, society, and moral support." The same should be done for the loss of training and guidance. Just because the words are not included in the instruction does not mean the trial court will not permit testimony about these subjects. Examples are nearly infinite when the case involves the death of a parent and children of any age.

### **Economic damages**

#### **Loss of financial support**

Request a copy of the decedent's

employment file and carefully go through it. Figure out which lay witnesses at the decedent's employer can testify about his or her work performance, salary, benefits, promotions, raises, bonuses, retirement options such as a 401(k), and any other benefits. Remember that positive performance evaluations could increase the upward arc and mobility of the decedent.

There may be more than just one person who would need to testify about all aspects of the employment. Consider taking depositions of the decedent's supervisors or co-workers. Some of the information in the depositions will not only be helpful to your economist (working with or without a vocational expert), but the testimony will also give insight on whether the supervisor and/or other co-workers will make good witnesses at trial.

#### **Loss of household services**

When meeting with the surviving heirs, find out what role the decedent had in maintaining the household. Among them, you can decide whether the surviving spouse or other family members or friends are the best individuals to testify about the loss of household services.

### **Telling our client's story**

#### **Gather information**

Gather as much information as you can from multiple sources about your clients and the decedent. Fill in any blanks and clear up any discrepancies by meeting with the family, friends and colleagues. The last thing you want in the case is inconsistency between witnesses who testify on damages.

Leave nothing to chance when it comes to stories you relate to the trier of fact during the examination of one or more family members. These corroborating anecdotes about the qualities expressed in the CACI instruction generally deliver very powerful reactions – by the trier of fact.

On the other hand, inconsistencies in this area can affect credibility evaluations in a negative way, so counsel must be certain about getting the story *right*.

Just as importantly, it need not be *dramatic*, and watch out for (your) implicit bias of any kind, social or economic, in the stories your clients can tell. Joy is a universal language, but so is guile.

#### **Simulate a trial setting**

Our clients may have seen how Hollywood portrays what transpires during portions of a trial in movies and on television shows. However, many of our clients have never seen the inside of a courtroom. They haven't been questioned by their own attorney, let alone defense counsel in front of a jury. The process could be intimidating for anyone. Therefore, it is helpful to describe to our clients the layout of the courtroom, where the jury sits, where the client will sit on the witness stand, where everyone who is part of the trial will be in the courtroom including the jury, judge, bailiff, clerk, court reporter, all counsel and any audience members.

#### **Practice testimony with your clients**

When the trial date is getting closer, figure out a plan to meet with your clients at your office to practice the direct and cross-examination not only related to liability, but also to damages. When we meet with our clients to prepare them for their depositions, we generally get an idea about whether the clients will open up or not stop talking. We also get a glimpse of their demeanor and how they respond to questions from their deposition in the case.

However, getting a client prepared to testify at trial in front of a jury takes a whole other level of preparation. Therefore, practicing with your clients is extremely important.

Consider rearranging your conference room or another part of the office so it resembles a courtroom as best as you can. Have your client sit on the simulated witness stand and go through the direct examination.

Practice the direct examination in increments without anyone breaking their role. Critique your clients and answer questions they may have. Practice another section of the direct examination and go

through the same process. Rinse and repeat. It will never become rote, but practice improves the likelihood of successful performance when it counts.

When we prepare our clients for their depositions, we explain that the other side's attorney will be asking the questions. We tell our clients to keep their answers short, simple and to the point. If they are able to answer the question with a yes or no response, then do it. If they honestly don't remember or don't know something, our client needs to tell the defense attorney.

However, when it comes to the direct examination of our clients, we will be asking our clients a lot of open-ended questions. We want the focus to be on our clients (and the decedent), not on us.

We want our clients to talk to the jury and explain things to them. If we have them talk about the loss of a loved one, we do not want them to hold back.

Whether we keep our clients on the stand to discuss non-economic damages for five minutes, ten minutes or longer, we want to make sure our clients understand that this is their one and only opportunity to explain to the jury why their loved one was so special.

We can tell from our clients' answers to mock direct examination questions whether they are being genuine and forthright, whether they understand the question or whether they are struggling. The practice session will help them understand their boundaries as witnesses (non-expert testimony based on personal knowledge, *including* opinions), as well as honing their testimony.

If possible, get a colleague in your office, or even a colleague outside of your office to play the role of the defense attorney doing the cross-examination. It is important for our clients to understand that the form of questions is different on cross-examination and for them to understand why. If all else fails, role-play with clients; be the defense attorney. Take the client on cross-examination for ten or fifteen minutes, then discuss why those questions were asked and get an understanding of the client's answers.

When the time comes for our clients to testify at trial, we want to make sure they are completely familiar with and understand the process. That will inspire confidence and lessen insecurity or anxiety about the process and outcome.

### **Video-tape your clients**

When doing a practice session with our clients, it can be a good idea to record them. We want our clients to be able to see their demeanor, listen to their tone, see how they come across to the jury and listen to the way they answered the question. At trial, we need our clients to come across well and make a good impression. People are often blind to their own insecurities, mannerisms or biases, to wit, their, "aura."

If our clients come across as aloof or nonresponsive, abrasive, disconnected, or unduly annoyed, those behaviors will probably impact and hurt their case. Viewing the video of their testimony during deposition and/or a mock trial may educate the clients they are talking too much, not on point, closed off, and so on.

Clients and witnesses' nonverbal physical cues are also significant: Do they look up at the ceiling (or in different directions – but not the jury) when they are answering a question? Are they reticent about making eye contact, do they speak to loudly, too softly? Do they look irritated even if they sound calm? Recording clients and sitting them down to watch will help them understand why we coach just about everything except the *truth*.

### **Jury consultants and focus groups**

Jury consultants are great to help you get prepared for voir dire. The jury consultants are also helpful in getting the client ready to testify at trial. If you plan on using a jury consultant at trial to help pick the jury, then it would also be a good idea to have the consultant meet with the client about their testimony on direct and cross-examination. Even experienced trial lawyers would benefit from another set of eyes and ears.

If hiring a jury consultant is not feasible because of the type of case or if it is not cost-effective, then consider holding an informal focus group. Get members of your firm to serve as the jury. Do a mock direct or cross-examination and then get input from your colleagues and staff. Anyone and everyone can participate.

If you are a solo practitioner or have a small firm, then consider enlisting colleagues outside of your office, friends and family to play the role as jurors. They can provide invaluable input to the client about how he comes across under examination.

### **Clients should be themselves**

Although it is important to explain the whole trial process to our clients and to practice with them, we don't want to overboard so that their testimony comes across as rote or rehearsed. We still want the extemporaneous quality to their testimony that comes from a thorough and comprehensive understanding of the subject matter: courtroom conduct and testimony. That familiarity will promote the best day they can have in court.

### **Conclusion**

Our clients have only one opportunity to tell their stories at trial. Our tasking from day one is to prepare them to testify about damages. We accomplish that by putting in the time early and often to discover their story and bring it to life. Sad though it may be, our clients will benefit by being involved in the process of seeking redress for the death of a loved one.

*Elizabeth A. Hernandez was elected to the CAALA Executive Committee and she is currently serving as the 2021 CAALA Secretary. She is a trial attorney at Dordick Law Corporation in Los Angeles. Elizabeth was the Chair of CAALA's Education Committee in 2018 and 2019. She also served as the Chair of CAALA's Political Affairs Committee in 2020. Elizabeth is the 2021 MABA Vice-President and a 2021 CAOC Board Member.*