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Present the most complete emotional-distress damages

BE AWARE OF THE COMMON TRAUMATIC CHANGES CAUSED BY SEXUAL HARASSMENT AND ASSAULT

We do not choose the moment in our client's life to meet them. That means we meet our clients after their life-altering assault or harassment, never before. They could have become a totally different person than before the harassment. You need to find the evidence and witnesses to put the pieces of their life puzzle together so that both you and the jury know who your client was both *before* and *after* their trauma. Only then, can you see the true life-altering impact the assault/harassment has had.

Learning the nature of the trauma

How do you learn all of the many facets of how the assault/harassment traumatized your client and changed them? Going to your client's home and spending time with your client, not hours in the office is a crucial step in learning the nature of the trauma and how it effects your client. If you are a male attorney, you should have a female attorney or paralegal accompany you to make your client feel more comfortable. Whoever is going to be the trial attorney should be the one to go to the client's house.

When you go to your client's house, make sure you are aware of how your client lives. I have had clients who were terminated who all lived in one room with their children that was in another family member's house. I have had a client who couldn't afford furniture in the apartment she was renting and she sat on a plastic storage bin, which was the only furniture she had in her living room. Some clients turn into hoarders; others become so depressed they stop keeping their house clean. Ask to look in their refrigerator; many of them are living without enough food. These images of how your client lives are extremely powerful. A few photographs can really assist you in presenting the extent of the trauma and damage.

Ask your client to show you their yearbook, or photographs from the past, including holidays, Christmas, and birthdays. This will help in two ways: (1) you are gathering evidence to show the "before" client and (2) you are identifying potential witnesses. Don't just look at a photograph of a birthday party, ask your client who these people are, how are they related, and get their contact information so you gather your fact witnesses to present a more complete picture of your client's trauma.

Do not leave your client's house empty-handed. Take a box with you to gather as many photo albums, photographs, and awards as you can. You can also take your own photographs of your client's hobbies or interests that you find while at their house.

In the safety of your client's home, go through the client's social media for digital traps and treasures. You will not only be looking for things that might be potentially embarrassing or harmful to the case; you are also looking for potential witnesses and a clearer picture of your client and what their interests were before and after the assault/harassment.

Your client may be hesitant to let you come to their house because they are embarrassed or ashamed. That's when you assure them that you want do the best possible job for them and you cannot do that without spending time with them.



Meet your client's neighbors, friends, and coworkers

Once you gather as much information as is available, go out and meet these potential witnesses. Learn who your client was before the injury. Was your client a happy person? Did your client show up to drive friends to the airport? Did your client go to church, or pray at home? Did your client volunteer? What were your client's dreams before the termination/assault? All these answers will help you learn how your client has changed.

If your client says they do not keep in touch with certain people or they had a falling out, ask them what happened. Many times, these are some of the best witnesses since the falling out usually happened because of a change in your client's behavior resulting from the trauma – a change your client may not even have been aware of. However, the person who was their friend before the attack/assault will be acutely aware of and able to describe that person and the changes they saw.

Becoming aware of dramatic changes that sexual assault has on its victims and recognizing it in your client

Once you become aware of some of the common trauma that victims of sexual assault suffer, you will be able to look for and recognize in your client what they are dealing with. This means you will be better able to present the entire nature and extent of their damages in mediation and trial.

Loss of trust

Your client does not trust you because your client does not trust anyone. Sexual assault and harassment have often happened when your client has been lulled into trusting the harasser and letting go of any sense of danger, which is how the harasser was able to victimize them. Your client feels that, because they trusted this person, they are in part to blame for not being on high alert, when in fact, the harasser knows exactly how to gain their trust, so they were not sensing any danger. Since the result of trusting someone was a horrific violation and assault, your client is now on high alert with everyone, including you and your staff. Recognizing this early on helps you be empathetic

towards your client and allow them to feel more comfortable around you.

A feeling that they are worthless which sometimes is translated into “they are too needy”

The loss of trust is compounded with the client’s feeling that they are worthless which, from the outside, is often interpreted as a “needy” client who constantly craves attention. In reality the client who has been sexually harassed or assaulted feels like they are damaged goods.

They feel like they are “less than” because they have been subjected to an assault or harassment. This feeling remains forever; it does not matter how long ago the assault or harassment was, it does not matter if the world perceives that your client is perfectly fine, in their mind and in their soul their self-worth is less because of what happened to them. This perception, which comes from within themselves, causes them to reach out to you on a frequent basis. You are the one, after all, who is going to help them try to regain some of their sense of self-worth. When the frequent calls or emails are happening, be patient and know that the person on the other side is feeling vulnerable, and unworthy and seeking some reassurance that they are worthy of your time and attention. Your client may not even realize that they are experiencing these feelings of loss of self-worth, so it’s something you should talk to them about as it is a very real and important part of the trauma they suffered, and you must be able to present it as part of their damages.

Isolation

Your client will stop talking to people, stay at home, sleep more, anything to escape talking about what happened because it is too painful and they feel they are no longer worthy of their friends and family. Make sure you talk to your client and their friends about how they were before the traumatic event: did they call, did they text, were they funny, did they want to go out, did they go get their nails done together? Compare that with how hard it is for them to get your client to call, or return calls, or to go out. When is

the last time they heard your client laugh? How much time does your client spend alone in their room now? How much time did they spend alone in their rooms before the attack/harassment?

The feeling that, “No one will believe me, and they will take the harasser’s word for what happened.”

There is usually a lot of turmoil, fright, and doubt that occurred before your client even felt comfortable reaching out to someone for help. One fear that everyone suffers from at some point is a fear that they will not be believed. The “Me Too” movement has done wonders to allow those traumatized to feel that yes, they will be believed. However, when it is just them and they are standing alone, they still fear they will not be believed. When you are preparing your client for their deposition, where they will face a defense counsel who does not believe your client or acts as if they do not believe your client, you have to prepare them to face this fear. You must assure them that you have no doubt that what they say happened did happen to them and what they are feeling is real.

During the deposition, protect your client from the disrespectful and degrading way the defense counsel will attack them, remind the defense counsel to tone down their voice, to show some respect for your client. Make sure you object pursuant to Code of Civil Procedure section 2025.460, subdivision (b) to the conduct of the attorney at the deposition and make a clear record that, if they do not tone down their voice or show some respect for your client, you will suspend the deposition and seek a protective order. Have your client voice to the defense counsel how their treatment of your client is making them feel: Is it interfering with their ability to give their “best testimony?” How something is said is as impactful as the words that are being said. Especially when the client is in a position of self-doubt and self-loathing because of the harassment and trauma.

Panic attacks in public

In speaking to my clients, almost all of them get panic attacks when they are in

public. If they see someone who looks like the harasser, if they smell the cologne, or someone’s voice sounds familiar, it triggers that now-heightened sense of danger while they are out in a public place, vulnerable, and often suffer panic attacks and fright. This also happens if they have to drive past the place they worked when it happened. It is especially damaging to clients who were traumatized in a hospital setting as they avoid returning to a doctor’s office or hospital at all costs; many times, suffering through physical problems by themselves because going near the place causes them extreme panic. They stay away from their friend’s childbirth because they don’t want to be in a hospital. These are damages that need to be presented when you are putting together your evidence to make your client whole.

A sense of shame and blaming themselves

At some point after a traumatic assault or harassment, when the clients relive the incident in their minds, which they often do, they will blame themselves or feel shame that they “let themselves” get into this position in the first place. Talk to your client about this. Let them know it is not an uncommon feeling, and they shouldn’t give more power to the harasser by blaming themselves.

Loss of joy

It is very important to build up the evidence of your client “before” the assault/harassment and “after.” You are dealing with the person who has been traumatized; they carry the trauma that we have been discussing. You never got to meet the person before the assault/harassment, but you need to know all about that person. As much as you are learning about the traumatized client that sits in front of you now, you need to know the person they were before the attack. You have to build up the evidence so that when you are providing the evidence in the case to make your client whole, you are providing the whole of the evidence necessary for the jury to see the change. On the outside, your client may still be doing things they did before, but on the

inside, they no longer are capable of feeling joy. They may go to birthday parties or celebrate Christmas, but they don't feel the joy inside. This is a tremendous loss. You are not going to get the full extent of this trauma without talking to friends, ex-friends, family members, both those with whom your client has had a falling out, and those who are still in their lives.

Anger

This response to the trauma they suffered might not be as evident to your client, as it is to those around them. Co-workers, in-laws, spouses, and kids have witnessed this change firsthand and maybe did not connect the two together. Let your client talk about their anger. They will most likely be angry that the person who did this is going on with their life, unchanged, while your client has to forever be branded and live with the consequences. Speak to their family and spouses about who they were before this happened. The jury needs to understand why a formerly happy person has morphed into an angry, agitated person.

Presenting your client's traumatic hidden-emotional injuries at trial

The above traits are not attractive or heartwarming. This is not the personality of someone we want to cheer for. That's why you have to discuss these feelings in depth with your client and have them talk about them at their deposition and at trial. Most importantly, show the difference in your client before they were assaulted/harassed with great detail. Don't just focus on the "after." The "before" picture makes the "after" so much more understandable and shows the true nature of the extent of the damage to your client.

Your client was not always a demanding, angry, negative person. They were once a laughing, carefree person who was robbed of that luxury when they were assaulted. Plan your presentation of your case with your photographs or short video snippets showing the likeable, happy client before the assault/harassment and the now-changed person.

Choose a photo or video snippet that includes the testifying witness and have them describe what was fun or memorable about your client at that time, and then contrast that to today if those same traits or behaviors are gone and what they have been replaced with. I ask both the client and the person testifying if they want each other in the room. There are positives and negatives to both.

These witnesses can be very powerful. You want the whole truth and it's not easy to talk in a negative manner about someone when they are in front of you. If your witness or client feels more comfortable if the client leaves the room, ask the witness about that: Is this hard to talk about? Are they afraid that they will hurt your client's feelings or drive more of a wedge between them?

Percipient damages witnesses

You should be permitted to present multiple witnesses to discuss the life-altering damages for your client and should not be limited to an arbitrary number of witnesses.

The defendants will often try to limit the evidence you present on your plaintiff's damages on a motion in limine trying to get the court to limit you to a certain "number" of witnesses. This is improper.

Unless the defendants stipulate that they will not try to challenge the damages after trial claiming there was not "substantial evidence," the plaintiff should not be precluded from putting on all the evidence needed on a matter that is directly at issue in this case. The traumatic life-altering damages your client has suffered is directly at issue in this case. It is not a "collateral issue," it is of great significance and probative value.

The nature and extent of the damages the plaintiff has suffered is directly relevant. (Evid. Code, § 210.) "[A] plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal." (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893.) The

plaintiff is also entitled to injury to reputation and humiliation. (Civ. Code, § 1431.2, subd. (b)(2).)

In *Monroy v City of Los Angeles* (2008) 164 Cal.App.4th 248, 267, our court of appeal stated: "Trial courts may not use their powers to control the orderly conduct of proceedings, to prevent cumulative evidence...if it destroys the plaintiff's evidentiary presentation...identical or virtually identical evidence may not be cumulative if there is a significance to the evidentiary weight to be given. (Citation). It is often invaluable to have evidence come from different sources."

These fact witnesses are usually the quickest witnesses in the case on a topic that is very hard to translate into words or value. Noneconomic harm is genuine and requires compensation even though the translation into monetary loss is very difficult. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 953, disapproved on another point in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 575, fn. 4.)

To use an expert or not to use an expert

Whether or not to use an expert is a complex topic. Don't be too quick to always retain an expensive expert without giving it thought and balancing the pros and cons. Expert testimony is not always required. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893.)

We trust the juries to use their judgment and common sense to determine whether or not they consider the assault/harassment to have contributed to the harm and whether it was more than a remote or trivial factor. (CACI 430.)

It is my belief in our jury system, that drives my decision on expert witnesses. I believe that jurors listen to the lay witnesses, the people who knew the plaintiff *before* and *after*, and decide whether the assault/harassment was a substantial factor in the traumatic damage to the client. Then they can determine the value of those damages based on their judgment and commonsense. (CACI 3905A.)

I am very protective of my clients as they have already been the victim of abuse. When experts get involved, the clients are then exposed from both your expert and the defense expert to questions that they would never be permitted to be asked during discovery. It's bad enough your own expert will scour through your client's entire life. Even worse, the Defense Psychiatric Examination is the most invasive discovery devise that exists. In a Defense Medical Examination, you are allowed to have a representative in the room. Not so in the Defense Psychiatric Examination, which is much more invasive than the physical examination.

The defense psych exam

Your client will be in a room with the defense psychiatrist, usually a male, alone, (something that in and of itself is harmful to their fragile emotional state), subjected to unlimited questioning from the time of their birth and probing into every aspect of their life. The only goal of this day-long questioning is to dig up as much dirt as they can on your client without anyone there to protect her. There is nothing done to protect the client with a sense of safety or security in this setting. The client is then forced to take the Minnesota Multiphasic Personality Inventory (MMPI-2), which is a multiple-choice test which is not used in treatment of patients and certainly is not used for treatment of the plaintiff. This test is misused instead as means for the defense expert to improperly give opinions on causation and credibility, both which are exclusively jury determinations.

You do not have to stipulate to a defense psychiatric examination, and you should not. Pursuant to Code of Civil Procedure section 2032.310, the defendants have to file a motion and you should do what you can to protect your client: insist on a woman psychiatrist, allow for breaks whenever your client needs to speak to you, go there in person even if you are

not allowed in the room to answer questions and be there for support. Make sure you object to the misuse of the examination and the testing for making statements about the client's credibility. You should then bring a motion in limine to preclude the expert from giving opinions on your client's credibility.

Life expectancy and future damages

Use the life expectancy tables to present your future economic damages. Look at CACI 3932 and Appendix A (located behind VF-3920 in the CACI). Your client is a different person than they were before the sexual assault/harassment. Their life has been forever altered. They will always doubt themselves; they will always blame themselves; they will always feel "less than" someone who was not subjected to assault; their trust has been shattered. Therefore, when presenting the future damages, make sure you use the Life Expectancy tables and request them in your standard list of jury instructions.

Jurors and damages to the psyche

Finally, it is important to recognize how our jurors are more aware and accepting of the idea of damages to the psyche that they cannot see and the value of these damages.

When I was growing up, people who cried were stereotyped as "weak." We were told that we should not complain. People made fun of anyone who spoke of "hurt feelings." We were taught to be "tough," which meant showing or even talking about emotions was bad. There was little value put on emotional trauma and the life-altering effects that it can have.

We have all become more aware of the traumatic damage that is caused by sexual assault/harassment. New generations have become more aware of the serious and life-altering effects that trauma causes. Our jurors are more aware that these damages are real, they are not something that we should be ashamed of

and they have value. In addition, the young adults who are the jurors of today and tomorrow, believe in life balance. They value the emotional side of the brain as much as the rational side. They value happiness as much as a paycheck. They don't make fun of people who complain their feelings are hurt. They don't tell them to "suck it up." They listen and they have empathy. They know that traumatic emotional damages have value because they value living a happy, peaceful life. So yes, "emotional distress" verdicts will reflect this awareness and value. I think a value that has been overlooked at times in the past.

One problem is that the defense refuses to acknowledge that traumatic emotional damage occurs and that it has value. The defense evaluation of the case is almost always written by a man, who has never experienced any type of sexual trauma. He is the one ordinarily in the position of power, not a victim of it. He usually evaluates the emotional-distress damages as follows: there was no psychiatric treatment, the plaintiff didn't take medication, therefore, there is no value to the claim for emotional-distress damages. Then they try to blame the jurors when they are simply people with open minds who listen to the evidence and the true value of the life-altering trauma is decided.

Learning who your client was before will help you understand who your client is now and why. It will help you be a better lawyer to your client because you will understand them better. It will help you teach the jurors about the life-altering trauma that results from sexual assault and harassment. Most importantly, it will help you do the best job you can of making your client whole and hopefully work towards a better life.

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