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The good shepherd

IDENTIFYING AND SHEPHERDING YOUR WITNESSES FOR TRIAL

Witness testimony will affect the outcome of your trial, for better or for worse. One of the most critical aspects of trial preparation is identifying and gathering your trial witnesses. Once you identify your trial witnesses, it is of the utmost importance to determine their willingness, or lack thereof, to be present and ready to testify at trial. There will be countless moving parts to trying your case and the last thing you want to do in the middle of a trial is to frantically dial witnesses in the hopes of filling a morning session or to draft a last-minute motion to augment your witness list. By planning and preparing for your witnesses' appearance at trial early on, you will set yourself up for a smoother trial.

Identifying trial witnesses

At least 70 days before trial, consider all the witnesses that you would like to have testify. At this point, ideally, you would have established all relevant liability witnesses through discovery. Use this time to determine which of these liability witnesses are essential to prove your case at trial. Make a list and identify who they are controlled by (i.e., defense, plaintiff, or neither).

Defense witnesses

Witnesses controlled by defense counsel cannot be contacted directly by you. If your necessary liability witnesses were identified in discovery as employees of the defendant at the time of the discovery exchange, confirm with defense counsel now as to whether these witnesses are still employed by the defendant and if defense counsel will produce them for trial. If defense counsel will not be representing the former employee witnesses for trial, request their last known address and phone number right away. If defense counsel does not provide their contact information the day you request it, propound special interrogatories requesting this information. If these former employees were listed in prior discovery responses, ensure that the defendant is providing their last known address and phone number in their verified supplemental discovery responses. Make a note to list any of these liability witnesses on your joint witness list, no matter how remote the possibility of you calling them is.

If these former employees are not being represented by the defense, they are independent liability witnesses that are not in either party's control. In that case, contact them directly to determine whether they are available and willing to testify at trial. If they confirm they will be unavailable for trial, serve them with a subpoena for their videotaped deposition as soon as possible. Be sure to notice the deposition pursuant to Code of Civil Procedure section 2025.620, subdivision

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2024

(b), which will be discussed in further detail below. This section will allow you to play their videotaped deposition at trial without objection.

Percipient witnesses

It is important to note that non-employee, percipient eyewitnesses to an incident will also be considered independent. Since they were never employed by the defendant, you can only play their videotaped depositions if you prove their unavailability pursuant to Code of Civil Procedure section 2025.620, subdivision (c). In this situation, the best practice is to subpoena their personal appearance for trial under Code of Civil Procedure section 1987, subdivision (a). Both of these provisions will be discussed in further detail below.

Damages witnesses – life changes

Many practitioners think that expert witnesses make or break a case. That may be true in some respects, however, to really tell the story of how your client's life has changed as a result of the incident, you need effective damages witnesses at trial. In cases where your client's credibility may be at issue or where the injury may be one that is not easily seen, like a disc injury or mild traumatic brain injuries, damages witnesses are crucial. Damages witnesses can come from any part of a person's life, so look for people who may be outside one's family or friend circle. Sometimes an ex-spouse or employee of a business your client frequents can provide the most credible testimony. These damages witnesses will often be the only witnesses within the plaintiff's control.

During this time, ask your client for a list of witnesses who can attest to the changes your client has experienced since their injuries. Ensure that these witnesses are available and willing to testify at trial by contacting them directly and obtaining their general schedule and availability. While you will need to prepare these damages witnesses closer to trial, it is also worth priming them during this first contact. Give the witness a rundown of what to expect when testifying at trial and emphasize the importance of being truthful. Highlight the importance of not overselling or underselling what they saw the plaintiff going through. By getting these witnesses comfortable with the trial process as early as possible, you will ensure natural testimony and secure a powerful tool for the jury to understand how your client has been affected by their injuries.

Make sure that you reserve the right to call your damages witnesses at trial by disclosing them in discovery. Beware that listing your damages witnesses on the joint witness list is not enough to avoid any argument from defense counsel that they are somehow prejudiced or surprised by your damages witnesses' prospective testimony. When your client is faced with an interrogatory requesting the names of these witnesses and fails to identify them, the opposing party is arguably subject to unfair surprise at trial. (See *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 274 ["Where the party served with an interrogatory asking the names of witnesses to an occurrence then known to him deprives his adversary of that information by a willfully false response, he subjects the adversary to unfair surprise at trial. He deprives his adversary of the opportunity of preparation which could disclose whether the witness will tell the truth and whether a claim based upon the witness' testimony is a sham, false, or fraudulent."]; see also *Reales Investment, LLC v. Johnson* (2020) 55 Cal.App.5th 463, 472 ["[T]he trial court need not expressly find that a party's conduct is willful before excluding that party's evidence at trial in order to ensure a fair trial"].)

As close to the 70-day pretrial mark as possible, but no later than the discovery cutoff (30 days before trial), be sure to provide supplemental responses that list all your intended damages witnesses in your responses to Form Interrogatory 12.1, subsection (d), which asked your client to state the name, address, and telephone number of each individual who they or anyone acting on their behalf claims has knowledge of the incident (except for expert witnesses covered by Code of Civil Procedure section 2034).

Be sure to also supplement any previously propounded special interrogatories that requested the names of damages witnesses. To take a belt-and-suspenders approach, offer these damages witnesses up for depositions on short notice to negate any further argument that the defense is prejudiced due to not being afforded enough opportunity to prepare for these witnesses' trial testimony.

Ensuring witness attendance through subpoena

While many witnesses will confirm their availability to testify during your first contact, delays in trial, changing work schedules, and second thoughts about participating in a trial may put a damper on your witness lineup. This is why it is important to issue subpoenas for liability and damages witnesses, even if they confirmed their appearance when you first contacted them.

If defense counsel has confirmed that they are representing any liability witnesses you intend to call, be sure to serve a notice to appear under Code of Civil Procedure section 1987, subdivision (b), at least *10 days* before trial. This requires the witness to appear in court on the first day of trial. Code of Civil Procedure section 1987, subdivision (b) states, in part, that "anyone who is an officer, director, or managing agent of any such party or person, the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend before a court, or at a trial of an issue therein, with the time and place thereof, is served upon the attorney of that party or person." Note that the code allows these notices to be issued for individual defendants as well as a defendant's employees and can be served solely on the party's counsel.

Documents request

If there are particular documents, including sub rosa, that you seek at trial, consider serving a request for documents within your notice to appear at least *20*

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2024

days before trial. Under Code of Civil Procedure section 1987, subdivision (c), the notice to appear may include "a request that the party or person bring with him or her books, documents, electronically stored information, or other things. The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control." A document request for sub rosa will flush out whether any sub rosa was taken between the discovery cut-off and trial and will give you ammunition to exclude any undisclosed sub rosa that defense counsel attempts to introduce later at trial.

Personal appearance

If your essential witness is not a party to the action or being represented by defense counsel, you must serve them with a subpoena for their personal appearance at trial pursuant to Code of Civil Procedure section 1987, subdivision (a). Service under section 1987, subdivision (a) needs to be made on the witness within a reasonable time that allows the witness to prepare and travel to the trial.

Often, you will find that a witness who does not have a vested interest in the outcome of the trial or who is not being paid their usual wage to wait around a courthouse to testify will not be the most flexible. The reality is your case-in-chief will not start the day you are assigned for trial. Voir dire can take days. Defense counsel will suddenly have a preplanned speaking engagement in the middle of the week. The court may present you with a schedule that includes dark days. The list of reasons for delay can go on and on. To avoid inconveniencing an independent witness, consider having your process server offer the witness the option to sign an "on-call agreement" pursuant to Code of Civil Procedure section 1985.1 when serving the witness with a subpoena for their appearance.

Under Code of Civil Procedure section 1985.1 a witness served with a subpoena for trial "may, in lieu of their appearance at the time specified in the subpoena, agree with the party at whose request the subpoena was issued to appear at another time or upon such notice as may be agreed upon." Typically, with an on-call agreement, a witness will sign an agreement that they will appear for their testimony so long as you give them enough notice – typically 24 hours. Be sure that the on-call agreement requires the witness to provide their best contact information and availability. With this agreement and a cooperating witness, you can coordinate your witness lineup more effectively and reduce the risk of losing a witness who would rather not wait at a courthouse for hours.

Enforcing trial subpoenas

As attorneys, we yield immense power with our ability to issue subpoenas. By drafting and serving these legal documents, we have the power to compel someone's appearance at a trial for our clients. While most witnesses take subpoenas seriously, some will accept service, but then disregard them. What happens if your witness defies a subpoena? Suppose this witness is absolutely essential for your case, and there are no other alternative means of putting on their testimony. In that case, you may have a remedy through a *body attachment order and warrant of arrest* under Code of Civil Procedure section 1993.

Pursuant to Code of Civil Procedure section 1993, the court, upon proof of the service of the subpoena, may issue a warrant to the sheriff of the county in which the witness may be located to arrest the witness and bring them before the court. To effectuate this order, you will need a physical description of the witness and their last known address. This information can be obtained from your process server, and the address to be listed on the order and warrant should ideally be the address where the subpoena was served. It is not preferable to have our witnesses arrested and brought to court against their will.

There is a more surefire way to enforce the subpoena and solidify a witness's attendance. Under Code of Civil Procedure section 1993.1, subdivision (a), the court may authorize the sheriff to release the person arrested upon his or her promise to appear at trial on the date and time listed on the order. Be sure to request this provision to be added to the warrant from your judge before the issuance of the warrant.

Using the next best thing for unavailable witnesses: Depositions

Invariably, at least one essential witness will become unavailable by the time trial comes around. In my most recent trial, my client was injured at a restaurant in an incident that occurred before the COVID-19 restaurant shutdowns. Due to COVID-19-era layoffs, our key liability witnesses were no longer employed by the defendant and were not being represented by defense counsel. Some of the witnesses had moved to other states, and some had simply made themselves unavailable before trial. Service of a trial subpoena under Code of Civil Procedure section 1987, subdivision (a) became impossible. Fortunately, their depositions had been taken and videotaped well before the trial. This allowed us to play their testimony at trial for the jury. If you find yourself in the same situation, you can still put on a witness through their videotaped deposition testimony.

Under Code of Civil Procedure section 2025.620, subdivision (b), "an adverse party may use, for any purpose, a deposition of a party to the action or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under section 2025.230 of a party. It is not ground for objection to the use of a deposition of a party under this subdivision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing."

Moreover, under Code of Civil Procedure section 2025.620, subdivision (c), "any party may use for any purpose the deposition of any person or

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2024

organization, including that of any party to the action, if the court finds any of the following:

(1) The deponent resides more than 150 miles from the place of the trial or other hearing.

(2) The deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in open court, is any of the following:

(A) Exempted or precluded on the ground of privilege from testifying concerning the matter to which the deponent's testimony is relevant.

(B) Disqualified from testifying.

(C) Dead or unable to attend or testify because of existing physical or mental illness or infirmity.

(D) Absent from the trial or other hearing and the court is unable to compel the deponent's attendance by its process.

(E) Absent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process.

If you have determined that a witness will be unavailable for trial, review your witness's deposition transcripts and decide on the specific page and lines (often stylized as page/line) from the transcript that you would want to play at trial. While a video of the deposition may not fully engage the jury, it will serve as the next best thing. These designations should fully illustrate the witness's background and highlight the defendant's liability. File and serve a notice of intent to play videotaped portions of your witness's deposition as close to the 70-day mark as possible. Submitting the notice of intent early on puts a swift end to any argument that defense counsel is prejudiced by your client playing a deposition video in her case-in-chief. Your notice of intent should include a chart with the specific page/line designations you intend to play. Meet and confer with defense counsel to see what designations can be stipulated to and which ones are subject to objections to and/or counter-designations.

Remember that while counter-designations are authorized under Code of Civil Procedure section 2025.620, subdivision (e), they are only intended to complete the initial designation and add context under the rule of completeness. If the defendant will play their own page/line designations at trial, use this as an opportunity to create a joint page/line designation document. Under Code of Civil Procedure section 2025.620, subdivision (b), the defendant will not be able to object to the playing of their former employee's deposition at trial. However, defense counsel will still be able to lodge evidentiary objection to page/line testimony. These evidentiary objections will be ruled on at a later time.

In the event that defense counsel objects to playing the deposition of a percipient witness who was never the defendant's employee, you will need to demonstrate the witness's unavailability for trial. Gather multiple copies of your process server's notes for their service attempts of the subpoena under Code of Civil Procedure section 1987, subdivision (a) as well as any documents reflecting attempts you have made to contact the witness. Ensure that you bring these documents with you to trial in order to demonstrate your due diligence in trying to produce the witness for trial.

Before finalizing your designation documents, check your assigned department's rules for how they want the page/line designation chart formatted, as these will vary from judge to judge. In general, the Los Angeles Superior Court requires that the designations are prepared in chart format with columns that list
(1) the line and page designations of the deposition or former testimony requested for use, (2) objections, (3) counter-designations, (4) any responses thereto, and (5) the Court's ruling. It is worth noting that your assigned trial judge may require you to alter your format before ruling on them, however, pinning down the page/line designations that are stipulated to and those that are in dispute well in advance will save you plenty of time if you need to adjust the structure of your designations.

Deadlines to submit final page/line designations vary from jurisdiction to jurisdiction. For example, in Los Angeles County, page/line designations must be submitted with your trial documents before the final status conference. Ideally, the page/line designations should be finalized with objections and counter-designations affixed in line with each corresponding page/line before the final status conference. If you cannot finalize joint designations with defense counsel, file your individual page/line designations and continue to meet and confer with them ahead of trial. It should be noted that your trial judge ultimately rules on page/line designations.

It is crucial to obtain deposition videos that are synced with the transcript as early as possible. If you are snipping the video clips for the corresponding page/lines yourself, make sure you obtain the specific files your software requires from your court reporter as soon as possible. If you are using a trial tech service, confirm what specific file types you will need to provide to your trial tech well in advance of trial. Make sure a final cut of your video clips for your corresponding intended page/lines exists before the judge makes their ruling. Often, the ruling will happen the same day that you will be playing the video. Suppose your judge rules against one of your page/line designations. In that case, you will undoubtedly find that removing one designation from your final video cut is easier to do on the fly than trying to cut all of your page/lines under the same circumstances.

It is important to note that the onus is on you to make sure that these page/lines are finalized and ruled on if you intend to play them in your case-in-chief. Nonetheless, playing page/line video clips can be an alternative way to put on an unavailable witness's testimony and can be a convenient way to fill time between witnesses. Moreover, these video clips can

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2024

also give you the downtime to sit back, relax, and enjoy how nasally your voice actually sounds to others when amplified throughout a courtroom.

Conclusion

This article has given you an overview of how to shepherd your essential witnesses to trial. While there may not be a foolproof way to ensure a seamless witness lineup every single time, the options outlined above will help your trial run a bit smoother and give you alternative means of testimony in the event you are faced with an uncooperative or unavailable witness.

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