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Advocacy Track: The Trial of Damages in a Muscle Sprain Case

Direct-Examination of Plaintiff's Lay Witness(es)
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INTRODUCTION

In the preparation of a trial, often the lay witnesses get short shrift. Typically, we spend a great deal of time with the plaintiff, but little or none with the lay witnesses. They are sometimes plopped on the stand with no preparation, as shorn sheep exposed to the North winds.

Careful attention to the content and manner of presentation of lay witness testimony is essential to the ultimate success of your case. As you prepare for trial, do not discount the impact of lay witness testimony. There are various reasons to employ lay witness testimony. Although this list is not exhaustive, some primary purposes are as follows.

1. Lay witnesses may be needed to actually tell the story.

Perhaps your client is a minor, was not conscious, or did not witness the events leading up to his or her injury. In such cases, the lay witness is required to relate the facts of the case to the jury. In this instance, your lay witness can be one of the main persons the jury needs to look to in bringing truth in the courtroom.

For that reason, a good bit of time should be spent to insure that they are credible and sincere. This is especially important when lay witnesses are liability witnesses since you typically will not have as much control over who these persons are as you may in lay witnesses you use to provide damages testimony. Preparation in this situation would be much like preparing your client for direct testimony. If the jury does not find the lay witnesses' presentation of the facts to be credible, then it really does not matter how good your presentation of damages is because the jury will have rejected the lay witnesses' testimony on liability.

2. A lay witness more often than not can relate and illustrate damages issues that are better said by, or more easily accepted from, someone other than the plaintiff.

In other words, someone other than the plaintiff can oftentimes beautifully illustrate or flesh out details concerning the impact of an injury on the plaintiff's life. They can really bring home to the jury the changes in the plaintiff's lifestyle as a result of the defendant's conduct. Lay witnesses are oft best used as "before and after" witnesses to demonstrate the significant impact of the injury on your client's life.

For example, lay witnesses can bring a wealth of information to the jury concerning hobbies, activities, community involvement, etc., in which the plaintiff partook prior to the injury but now is no longer able to do so. Vivid pictures can be painted by close friends and acquaintances of the plaintiff as to the enthusiasm and vigor with which the plaintiff undertook tasks and/or diversions that are now only a memory.

One time I had a lay witness convey effective word imagery to the jury, explaining that his close friend and fishing buddy could "hear the fish calling them." This really drove home a sense of loss concerning a quality of life issue for my client who had sustained a brain injury. It certainly came across much better than simply saying my client used to fish, now he cannot.

3. Lay witnesses are excellent to corroborate things related by your client.

A lay witness can corroborate your client's version of the facts and/or testimony concerning damages, greatly enhancing the credibility of your plaintiff. A lay witness can expound on some details and spare the plaintiff the risk of sounding boastful. An example would be a plaintiff's pre-injury accomplishments. A lay witness can also provide details on an important issue that a plaintiff may find humiliating, degrading, or just simply too emotionally difficult to express. Good examples of this are where the plaintiff financially could not make ends meet, or was unable to take care of his or her own personal hygiene following an injury. Through the lay witness' observations, a jury can get a sense of how humiliating and embarrassing the ordeal was or is still.

Loss of control of one's life is a significant part of damages in a personal injury case. A friend or relative relating the loss of control the plaintiff is experiencing allows the jury to visualize the plaintiff struggle through the healing process.

4. Finally, lay witnesses simply bring more humanity to your case.

They very aptly demonstrate to the jury that your client once had a very active and enjoyable life outside of the courtroom, outside of the hospital room, out of the sick bed, out of the nursing home, assisted living facility, or whatever the situation may be. They are the very best persons to portray your client as a real human being that the jury can relate to, a person with the same interests, hopes, dreams, aspirations as the jury

members. Also, a lay witness can be very effective in illustrating to the jury how those hopes, dreams and aspirations have been damaged or dashed entirely.

In short, the importance of lay witnesses cannot be underestimated. For those reasons, I would make the following suggestions concerning direct examinations of lay witnesses.

A. Prepare:

Every person a lawyer puts on the stand should be a known quantity. You want to be seen as the agent in the courtroom the jury can look to for reliable and trustworthy information. For that reason, you must evaluate your lay witnesses' personal characteristics while sitting down with them and preparing them for their role. What is their sincerity? Their conviction? Their appearance? Listen, talk and watch the lay witness. Do you like the person? Is he/she irritating? The jury will probably share whatever was your initial impression. Determine how you can present your lay witness in ways that create kinship with the jury.

Sometimes, it may be beneficial to take the lay witness to the courtroom before the trial. Let them get the feel of sitting in the witness stand. This is particularly important where your witness may not have any previous experience in court or giving testimony, as is often the situation. Remember, the lay witness did not sign on for this case as your client did and probably will not be prepared for the tension, fear and emotion that exists in the courtroom.

Be sure and let your lay witness know what role they have in this trial and why their testimony is vital. Take the time to carefully probe the lay witnesses' knowledge of your client. Gather biographical information, anecdotes, favorite life stories from each lay witness and determine which ones to use and how best to convey such gems. Remember, every lie is a human-interest story. Go over everything you want to cover with the lay witness and have a list of same, but do not write out your questions to the point it looks like the both of you are following a script. Keep it loose and flexible enough that the story flows and appears as spontaneous as possible.

B. Relax your lay witness:

Remember that these are indeed lay witnesses. As indicated earlier, these people are not professionals. They are your client's friends, co-workers, neighbors or family. By and large they want to help but usually are not quite sure how. When they take the stand, you may sense fear. If you can feel it, the jury can feel it. If you have a client or critical witness who appears nervous, consider just coming right out and asking the witness if he or she can take a second to relax and have a deep breathe. The jury will then understand that they should have no fear of this witness and in fact the witness is really afraid of them. This will make the jury more likely to feel like they should reach out and embrace the witness and make him or her feel more comfortable and protected.

Use this approach sparingly as it certainly would lose effect if done in situations other than where it appears to the jury to be essential to make the witness feel more at ease.

C. Let the witness tell the story:

Remember to keep your questions simple, plain, and couched in a way that will allow the witness to do the talking. Pay careful attention to your position in the courtroom. Determine ahead of time what position would be best for you to take where the witnesses' testimony will be focused toward the jury. Let the lay witness shine and be the focus on direct examination. If the witness can do it without looking too automatic or coached, have the witness testify while making eye contact with the jurors.

A caveat would be to caution the witness to be inclusive, not leaving any jury member out, but looking at each of them over the course of the examination. Important psychological factors are at play here. If jurors are left out, they are more likely to feel slighted and discount or reject the testimony.

If you are going to apply this technique, please work with the witness to the point that their engaging in eye contact appears natural and not contrived and rehearsed. You, of course, would need to evaluate this witness ahead of time to determine if he or she would be a good candidate for this approach.

D. Use the loop back method:

During the course of testimony, you obviously will want to emphasize certain points. This can be accomplished by looping back with such questions as "Are you saying..." or "wait a minute now..." or "say that again." If the flow is sufficiently natural, the opposing lawyer will hesitate to object to the questioning being leading since it appears and sounds conversational.

E. At all costs, AVOID LEAGLESE:

Remember the jury has no idea what you are doing under the guise of "protecting the record." Do not fall into the trap of using the language of lawyers and judges to ensure that your record on appeal is preserved. Use common everyday language.

Our communities already think that we unduly complicate things and twist the meaning of words. They already believe that we are trained to beat the system with "technicalities" and that we are the reason they do not understand the law very well. Jurors expect us to be respectful and intelligent, but we are getting nowhere if the jury admires our intelligence but did not understand a thing we said. Speak simply and clearly.

A good example of this is showing a lay witness a photograph. Instead of your approach being, "Mr. Jones, I am going to show you what as been marked as plaintiff's exhibit number one, can you identify that exhibit? Does it fairly and accurately depict the

scene that it purports to portray at the time of the event in question?” It would be far better to simply say – “Mr. Jones, take a look at this picture for me. Is it where the wreck happened? Does it look pretty much like it looked at the time of the wreck or have there been any changes?”

These two approaches elicit the same information, but is fairly evident which approach would make more sense to the jury and the lay witness.

If the lay witness is already nervous, the formal approach is only going to make him or her uneasy. Keeping it simple will make things less difficult for both you and the witness and make the presentation flow much more sensibly. Your witness and the jury will appreciate it.

F. Listen, Listen, LISTEN:

Sometimes we get greedy. Stop on a high point. If it sufficiently high, stop at it even if you are not through. Watch the judge, and particularly watch the jury. You should not be so wrapped up in your questions that you lose the spontaneity and flow of the conversation and a loss of an awareness of where the jury might be intellectually and emotionally. If you have gleaned from this witness what you need to get across to the jury and you have them at a point that is a good place for you to be, then consider letting the interrogation end there, even if you may have more questions on your list.

G. Be sure to review appropriate exhibits with your lay witness ahead of time:

In a topic related to avoiding legalese, if you are going to use a lay witness to introduce an exhibit, be sure that you have familiarized them with the document and/or photograph you intend to use and what your procedure is going to be.

Remember, to a lay witness, this is probably all new. Nothing would be more embarrassing or possibly even damaging to your case than for lay witnesses you are using to put a critical piece of evidence into the record be so unfamiliar with the process that they are unable to help you. If they are not aware of what you are trying to do, they may even say something that might prevent you from getting the evidence in at all. So, be sure they know where you are going with a document or exhibit. In short, do not surprise your own direct lay witnesses.

H. Use only the witnesses you need:

Be careful that you do not use lay witnesses to the point that they begin to sound repetitious. Nothing can be more damaging to the emotional impact of testimony than for three or four lay witnesses to take the stand and say the same thing. If you have numerous family members or friends that want to testify, be sure to explain in pairing down that you are attempting not to overdo it or wear out your welcome with the jury. Perhaps you can use multiple family members or friends to tell dissimilar stories,

bringing different aspects of the plaintiff's life and activities to the jury so that the testimony of each lay witness is not repetitious.

Remember, if you do not need a witness, do not use the witness. With everyone you place on the stand, you run the risk of the jury not liking or rejecting that person, and there is always the very real possibility that any one witness can hurt you on cross examination. Therefore, you have to be very judicious in your use of lay witness testimony. Do not ignore it or do without it, but then do not overdo it either.

I. Prepare the witness for cross examination:

Defense lawyers often will not attack lay witnesses because they do not want to appear to be a bully; however, they can often elicit damaging testimony even in a friendly and conversational manner from lay witnesses. Do not let a sterling performance on direct be pitted, marred and destroyed by an effective cross-examination. Try to anticipate what areas the lay witnesses maybe knows about the plaintiff's life that may make them vulnerable on cross-examination. Also, know their particular biases that a defense lawyer may use to impact their credibility and/or effectiveness. Be sure and review those with the lay witness so he or she will be prepared for being questioned about such.

CONCLUSION

Direct examination, particularly of lay witnesses, is often taken for granted. A good direct examination appears effortless and spontaneous. It should look to the jury to be smooth, easy and natural. However, lots of preparation is required on your part to get to that point. Think about a major league outfielder. He usually appears to be just in the right place to catch a fly ball. However, we can only imagine the training and preparation required to know the proclivities of the batter well enough to position himself in an optimal location to begin with, or the agility and speed required to reach the point where he can gather the fly ball, by all appearances, effortlessly into his glove.

A good presentation of lay testimony is much the same. Effort needs to go into an examination before it will appear as spontaneous and natural as you would like. The subtleties of a well-prepared direct examination can only be appreciated in the result. The devil is always in the details.

Think of your direct examination of a lay witness as a journey. You know where you are going, you have the elements of information that will be your supplies, and you have a general plan to get from point A to point B. You then have to think that journey through in your mind to know, anticipate, and educate your lay witness on what can be expected to be encountered along the way. The direct examination of lay witnesses is an opportunity to get critical information to the jury in the way you want it to come in. So, do not shortchange yourself.

Juries decide cases based on impressions. You and each of your witnesses will be creating those impressions. Carefully planning lay witness testimony will assist in creating the total image that will result in victory.

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