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SOLE PRACTITIONER AND SMALL FIRM NEWSLETTER

SOLE PRACTITIONER & SMALL FIRM: FALL 2019

Preparing Damages Witnesses for Trial

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SHARE:

Our client's wife, Fany, entered the courtroom on the morning of March 18, 2019, in a downtown San Diego courtroom. She was scared and nervous, but ready—ready to explain to the jury just how much the injuries our client suffered in the motor vehicle collision had changed his life. She stepped up into the witness stand, leaned forward, and we began her direct examination. The pivotal moment was when she testified:

Q: How would you see the pain getting worse?

A: I would just see him struggle every morning to get out of bed. It was the main thing, to get out of bed in the morning. He would, you know, get up like an old man. You know? It's hard to watch your 35-year-old husband, you know, be like an old man.

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What the reader cannot see from the words on the page is that this testimony was raw, emotional, and—as several jurors noted to us after the verdict was delivered—some of the most powerful in the whole trial. What the reader also cannot see is that while this question was a simple one, the work of getting Fany, our key damages witness, to a place where she could give this testimony was weeks in the making.

Damages Testimony and Damages Witnesses

Damages witnesses, like Fany, are essential to every plaintiff's case at trial. In essence, damages witnesses provide testimony to the jury about the repercussions the subject incident has had and will have on Plaintiff. But damages witnesses are different from expert witnesses because damages witnesses often testify about very personal things: Plaintiff's pain getting out of bed in the morning, Plaintiff's embarrassment about scars after surgery, how Plaintiff can no longer play soccer with his sons, or how Plaintiff's injury sapped her self-confidence.

Because of the personal nature of the testimony, the best damages witnesses are those who knew Plaintiff both *before* and *after* the subject incident. This perspective is unique among those people in the courtroom—lawyers, jurors, judge, experts—and gives damage witnesses the power to deliver the Plaintiff's story to the jurors more effectively than anyone else.

Damages testimony was particularly important in this trial in which Fany testified. Our client, Geno, was a 35-year-old tile-setter who worked on residential construction projects in San Diego, CA. He injured his spine when Defendant ran a red light and hit his car as it crossed an intersection. He ultimately had a spinal fusion. Prior to trial, Defendant admitted liability but contested the nature and extent of Geno's injuries. Defendant's main contentions were this: Geno's continued work in construction after the collision exacerbated his injuries and a 15-month complete gap in treatment made it impossible to know what caused the spine injury that eventually required surgery to correct. To counter this, we relied on damages witnesses who could testify to how the collision (and not his work as a tile-setter) changed

Geno and why he did not see a single doctor for 15 months before ultimately getting the surgery.

Our damages witnesses were Plaintiff's wife, boss and son. Each had known Plaintiff for at least 10 years before the collision. Plaintiff's son, Daniel, testified about how his dad could not go on runs with him anymore and that he was always sad in a way he never was before. Plaintiff's boss, Mike, testified about how Geno was one of the hardest working guys he knew. He told the jury about how Geno was so dedicated to his job that he would run from one task to the other and how some customers would specifically ask for Geno to work on their homes. Never had he seen Geno injure his back at work. In a very matter of fact way, Mike testified to Geno's complete change in attitude and ability at work. And then Plaintiff's wife, Fany, testified about why Geno had a 15-month gap in treatment: Geno was absolutely terrified of spine surgery. Fany testified that Geno feared spine surgery would kill him and that he spent months trying to tough out the pain. It was not until that one day—where he struggled even to get out of bed—that he decided to go forward with spine surgery.

Effectively Preparing Damages Witnesses for Trial

How did we get Fany to a point where she could deliver this critical testimony to the jury? As with all damages witnesses, the key to Fany's success at trial was preparation. It is widely accepted that lawyers have an obligation to prepare witnesses for testimony at trial.^[i]

Obviously, a lawyer must not prepare a witness in an unethical manner. A lawyer must not instruct a witness to lie, must not instruct a witness to hide the truth, and must not feed a witness answers.

However, there are many ways in which a lawyer can ethically prepare a witness.

According to the Restatement (Third) of the Law Governing Lawyers § 116 (2000), lawyers may ethically:

- Discuss the witness's recollection and probable testimony;
- Reveal to the witness other testimony or evidence that will be presented and ask the witness to reconsider the

witness's recollection or recounting of events in that light;

- Discuss probable lines of hostile cross-examination that the witness should be prepared to meet;
- Rehearse testimony with the witness;
- Suggest a choice of words that might be employed to make the witness's meaning clear.

Based on that guidance, we relied on four techniques for preparing Fany: 1) getting to know the witness, 2) making the witness comfortable with the courtroom, 3) previewing questions and answers, and 4) giving lots of positive encouragement.

1. Get to know the witness.

A key element to preparing a witness is getting to know the witness. This has two benefits. First, getting to know the witness on a personal level will make her more comfortable opening up. After a half dozen phone conversations, two meals, and a trip to her home, Fany told me in detail about the doctor's appointment where Geno learned he would need surgery. Her story provided the basis for our theory that Geno's fear of surgery explained his 15-month gap in treatment.

Second, getting to know the witness will make the witness more comfortable on the day of trial. In such a stressful environment, feeling comfortable and secure with the examiner goes a long way.

Here are some tips for getting to know the witness:

- Go to the witness's house
- Share a meal with the witness
- Call regularly just to check-in

2. Make the witness comfortable with the courtroom.

Again, trial testimony is stressful. But it is not just the examination that makes it stressful. Where to park, how to find the right room, what the courtroom will look like, how the

judge behaves, the temperature in the courtroom are all additional stressors.

We tried to eliminate those stresses prior to the witness's testimony. Several days before the witness' testimony, when we were there for a trial readiness conference, we had Fany come to court. We met her at the courthouse steps and walked her through security to the courtroom where she would be testifying. We showed her where she would sit, where the jurors would sit, and where we would be standing when questioning her. We also had her stay to see how the judge and clerk behaved while going through the morning calendar. She told us after how much more comfortable that made her the day of her testimony.

Here are some tips for making the witness comfortable with the courtroom:

- Have witness come to the courtroom before the day of testimony
- Show witness the configuration of the courtroom, including where the witness will sit, etc.
- Have the witness observe the judge and clerk to get a sense for his/her style

3. Preview questions and answers.

Needless to say, the witness stand should not be where the witness first hears the questions asked of them. Tell the witness the questions you intend to ask beforehand! Then, have the witness practice answering those questions.

Fany is not a native English-speaker and had never testified in court. Our hours of practice going over questions and answers were critical.

4. Give positive encouragement.

Lastly, throughout the process, make sure to give the witness positive encouragement. At the end of the day, a trial may be as stressful or more for the witness than it is for the attorney.

With this preparation, you can ensure your damage witness is ready to give the best possible testimony at trial.

About the Author

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[i] John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 287 (1989) (stating that the “obligation to prepare” witnesses for testimony at trial derives from a lawyer’s duty to provide competent representation).

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