

VERY BRIEF AND BASIC THOUGHTS ABOUT PREPARING YOUR EXAMINATION-IN-CHIEF OF AN EXPERT WITNESS

OBA ANATOMY OF A TRIAL

APRIL 29 AND 30, 2019

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In order to prepare an expert witness (or any witness) for trial, counsel must have a complete appreciation of the available facts and opinions necessary to satisfy the legal burden of proof. This basic proposition applies to both liability and damages.

At the beginning of every case, good counsel should ask:

- What is this case about?
- What is the legal test that must be met to establish liability?
- What facts are available to me to prove liability?
- Do I require expert opinion to assist the trier of fact?
- What is the legal test that must be met to establish damages²?
- What facts are available to me to prove damages?
- Do I require expert opinion to assist the trier of fact?

Once counsel has gone through this analysis, the question then becomes:

- What facts or opinion evidence can I elicit from this witness to help me prove liability and/or damages.

The schematic/flowchart described above should inform counsel's mindset when meeting with your clients, lay witnesses and experts; when engaging in examinations for discovery; when developing expert opinion/reports; and when preparing for trial.

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² More accurately, the damages question should be asked for each heading (or subheading) of damage.

What has been suggested may sound simple enough. But it requires tremendous effort and attention to detail. It involves an ever present command of the law and an ability to distinguish between fact and submission.

As trial counsel, you are the conductor of a symphony.

If trial is your symphony, your witnesses (including experts) are your musicians. Your witnesses must not only understand the theory of your case (the song), but also what facts/opinions are required to prove it (the notes). Only then can you ensure that your musicians are "playing the same tune" to the best of their abilities (all of which requires practice, briefing, more practice, more briefing – repeat if necessary).

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