



Take Nothing for Granted

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Preparation is the sun of the universe that is the jury trial.

Preparing Your Driver for Direct and Cross-Examination at Trial

Your driver generally will have answered written discovery and provided his or her deposition testimony before you begin to prepare for trial. The information that your driver disclosed during written discovery and during his or her

deposition must now be mastered by the driver. Such information will relate to liability facts, the driver's inspections of equipment, hours of service, and regulatory compliance, just to name a few categories. Your driver may feel overwhelmed with the amount of information that must be reviewed, and to a certain extent, committed to memory, but trial preparation must be taken seriously and substantial amounts of time committed to prepare a driver properly.

Trial preparation requires your driver to stop working and commit to spending substantial amounts of time with you in preparation for his or her cross-examination. The driver not only must learn the information that he or she disclosed during discovery inside and out, the driver also needs to know how the information interplays with the broader liability and damages themes driving the overall defense.

Many motor carriers have learned the hard way, after receiving a bad trial outcome, the importance of taking trial preparation seriously. If a driver does not invest the necessary time to prepare for cross-examination, that driver will be easy prey for a skilled and prepared plaintiff's counsel, and the result will not be good. A driver should be ready to spend two to three days at defense counsel's office preparing for his or her trial cross-examination. Only by mastering the deposition testimony, written discovery, and the overall defense trial themes and knowing the case danger zones will a driver be able to handle opposing counsel's vigorous and unforgiving cross-examination properly.

Do Not Take for Granted the Importance of Basic Accident Facts

There is no doubt that your driver needs to be able to defend his or her actions to



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the jury from a credible and common-sense standpoint. This includes effectively describing what was done and why the driver took the actions that he or she did at the time of the accident. To master the accident sequence facts successfully, the driver must memorize the roadway or intersection, the movement of vehicles, and the entire accident sequence to be able to recall important accident facts immediately during cross-examination. It is extremely important that the driver have a keen grasp of the accident facts and the interplay of the plaintiff's vehicle and other key vehicles. The driver benefits tremendously from visiting the accident scene with defense counsel to discuss liability facts and related issues extensively. Defense counsel also needs to educate the driver on any factual pitfalls that the driver could miss or overlook during cross-examination that could result in costly factual concessions. Essential goals for the driver during cross-examination are to hold steadfast to his or her version of the events and to avoid demonstrating a weakness in the driver's version of events to the jury or to flip-flop about those events.

Concede What Must Be Conceded but Defend What You Have to Defend

The driver's credibility is paramount, and your driver needs to understand that if he or she loses credibility with the jury, it could result in losing the trial. To avoid having a driver lose credibility, the driver needs to concede "the sky is blue" questions. "The sky is blue" questions are specific factual questions that are true and must be conceded regardless of the negative effect. They are about facts that have been established (without doubt) relative to the accident. For example, when it is indisputable, a driver should concede that he or she did not have the right of way at an intersection and yielding the right of way to the claimant was required. Or if the physical evidence showed that the commercial vehicle jack-knifed during the accident sequence, a driver should admit it. A driver may also have to concede that photographs taken post-accident at the accident scene show retroreflective tape covered with mud. A driver who attempts to evade "the sky is blue" questions and who attempts to avoid conceding such facts will lose cred-

ibility with a jury. And losing credibility needs to be avoided at all costs. On the other hand, a driver who admits such facts gains credibility with the jury despite the adverse effect of conceding an important factual point.

Another important outcome from conceding that "the sky is blue" is that once the factual concession is made by the driver, the cross-examiner is forced to move on to other questions and cannot focus or belabor the specific factual concession made by the driver. Less emphasis is placed on the factual point conceded by the driver, and the cross-examiner does not get the benefit of highlighting the adverse factual point over and over again during questioning. If a driver does not straightforwardly answer "the sky is blue" questions, the cross-examiner will continue to focus on an adverse factual point in the jury's presence. Such a dynamic, which will injure a driver's credibility, should be avoided by preparing a driver properly before trial.

The driver, however, needs to be trained only to concede what is necessary and nothing else beyond that specific factual point. Any other liability facts that are in dispute need to be strongly defended, as discussed in the preceding section.

Driver's Testimony Needs to Corroborate Defense Liability Experts' Factual Basis

The driver also needs to be educated regarding the contested expert liability issues and the physical evidence and science related to the disputed expert liability issues. The driver must understand the defense liability expert's opinions and the key factual basis supporting those expert opinions to avoid having the driver, during cross-examination, undermine a defense liability expert's opinions. A driver's version of the facts must be consistent with and support a defense liability expert's factual findings so that the defense can present a unified defense against the liability allegations.

Terminology Pitfalls

The term "accident" in the general meaning of the word does not have the same meaning as a U.S. Department of Transportation (DOT) reportable accident under the federal regulations. The term "citation" in its general sense also does not mean a DOT

reportable citation. A driver's preparation for his or her cross-examination requires that he or she understand specific terminology as defined under the federal regulations to avoid confusion and misstatements during trial. If a driver is asked whether he or she has any "accidents" in the three years preceding to the subject accident, the driver needs to answer with caution. The driver may think that the cross-examiner has asked only about DOT reportable accidents, when in reality, the question is about any accident whatsoever, not just DOT reportable accidents under the federal regulations. A driver who denies having previous accidents because his or her record is clear of DOT reportable accidents can be surprised when the cross-examiner takes out an accident report from the driver's qualification file showing that the driver was involved in a minor rear-end collision that was not DOT reportable. The cross-examiner would then impeach the driver for having denied having previous accidents. To avoid these types of common terminology mistakes, drivers need to be educated regarding the specific, germane terminology that may mean something different under the federal regulations from the term's common meaning.

What Does Your Driver Really Need to Communicate to the Jury?

After all is said and done, when preparing a driver for cross-examination, one of the most important goals is for him or her to come across well and generate an appeal to the jury. The driver needs to come across as genuine and credible and leave the impression with the jury that the driver is a hard-working person who does his or her best with life's challenges just like everyone else. A driver's humanity and personality need to be apparent during cross-examination to impress upon the jury that the driver is a person who tries his or her best to do a good job out on the road and that the driver genuinely cares about the safety of the motorist public.

Do not overlook or undervalue creating such an impression because if the jury has a bad impression of the driver's character or personality, it will be reflected in the outcome of the trial. A driver who leaves the impression that that he or she is callous and unconcerned about the effect of

an accident is one of the driving building blocks for a jury returning a nuclear verdict. Determining the type of witness that your driver will make before a jury is one of the most important factors in evaluating your case for purposes of settlement or trying the case before a jury to verdict.

Prepare Your Driver for the Courtroom Experience

Your driver has probably never seen the inside of a courtroom before, and many courtrooms look very different than they do on television. If your driver is not physically comfortable with his or her presence in the courtroom, then you can expect that the driver will appear overwhelmed and confused to the jury—not the look you want to present after days of trial preparation.

Plan on spending a day at the courthouse with your driver in the days before the trial so that he or she can become comfortable with the courtroom where the trial will take place, and hopefully, this will also help him or her feel relaxed appearing before the judge. You would be surprised how much of a difference it will make to your driver's physical appearance if he or she is comfortable in the courtroom, and simply seeing it beforehand can make a difference.

During your courthouse visit, try and get your driver to sit in on another trial. Have your driver watch how a jury reacts to testimony and what it looks like with all those people in the courtroom staring at the witness. If you, the trained trial lawyer, feel nervous before trial, think about how much more nervous your driver is! Seeing this happen to another person and in another courtroom in real life will provide invaluable experience to your driver. Ask your driver if he or she wants to see something specific during the preparation day at the courthouse. Sometimes, things as simple as knowing where to park, or where to get a cup of coffee, can make a big difference to your driver. Do everything that you can to make your driver's first time at trial feel like a rote process and one that your driver has mastered.

Prepare Your Driver for the Belittling and Aggressive Cross-Examination

Some of the best plaintiffs' lawyers in the nation are highly effective during deposi-

tions because they develop a friendly relationship with a witness, only to change tone completely, out of nowhere, and throw the witness off balance. At trial, your driver should be prepared for an aggressive and even demeaning examination by the opposing counsel, regardless of previous deposition pleasantries.

As with most people, your driver will not appreciate being minimized as a person. Regardless, your driver needs to understand that the plaintiff's lawyer will challenge the driver's core values, oath, recollection, manner of communication, and ultimately, reputation and veracity. Your driver will have a negative, and perhaps visceral, reaction to such challenges to his or her core values. The only way to control such a reaction in front of the jury is for you to elicit that reaction from the driver in your preparation efforts and then work to correct that reaction.

To prepare your driver for trial, you may need to involve a third party in your office who has no relationship to the case but who can put your driver through the kind of aggravations and elicit the emotions that the driver will feel on the witness stand. Having someone other than the lead defense attorney step in as the "plaintiff's lawyer" will preserve your relationship with the driver, while also testing his or her ability to withstand what will be a brutal cross-examination.

Brace for Re-direct

In many circumstances, you will have a chance to rehabilitate your driver through re-direct examination. Keep in mind that if a re-direct is necessary, your driver has probably taken some heavy hits—at least hits serious enough that you need to rehabilitate or try and salvage your driver in front of the jury. Prepare for this moment by going through the re-direct process after your driver undergoes the piercing cross-examination by your colleague, suggested above.

The re-direct process is difficult to prepare for, simply because you do not know exactly where or how your driver will need to be rehabilitated. To this end, you need to make sure that your driver understands the fundamentals of providing trial testimony: be honest, be clear, be direct, and be concise. *Your driver should see the re-*

direct process as his or her chance to settle down after a grueling cross-examination, so make sure that he or she understands the re-direct process is a critical opportunity to rebut the points just scored in cross-examination.

Practice one or two areas where you may need to rehabilitate your driver. For example, cross-examination may elicit testimony that your driver called his or her dispatch before calling 911 and that issue may be one intended to stoke the jury. Your driver should be prepared to explain the reason for that decision in way that is easily understood and accepted by the jury. Consider your case and *where* your driver may need some TLC after a rough cross-examination.

No Surprises

While it may seem inconceivable, surprises can happen during direct or cross-examination. By the time of trial, you should know everything about your driver to such an extent that the likelihood of a testimony surprise would be nearly impossible.

One of best-known examples of a trial surprise came in a multiple fatality case in which the driver had a very strong liability defense. However, unbeknownst to defense counsel, the driver had received compensation from the decedents' insurance carrier for damages that the driver claimed to have sustained in the accident. This information was never discovered in the litigation, but it came out during the cross-examination by the plaintiffs' counsel. The driver's testimony—that he had done nothing wrong and he had received money after the accident—came across as insensitive and demeaning to the family of the decedents. The jury returned a verdict in excess of \$100 million dollars.

While your driver should be humble and respectful in presenting his or her trial testimony, you should test that humility through your preparation to make certain that your driver does not have anything that has been kept in the shadows. And, going forward, be sure to ask whether your driver received any money after the accident, whether through worker's compensation or otherwise, just in case.

