

Mock Trial:
The Trials of an Expert: Preparation
and Direct Examination

Patricia Iyer MSN RN LNCC

www.medleague.com

908-788-8227

Definitions of a trial



What is a trial?

What is a trial? According to Merriam-Webster's online dictionary, a trial is, among other things:

the action or process of trying or putting to the proof or a TEST

the formal examination before a competent tribunal of the matter in issue in a civil or criminal cause in order to determine such issue

“Simply, a trial is a search for the truth.”

Definitions of a trial



From the standpoint of the expert witness, this definition may ring true:

A trial is a test of faith, patience, or stamina through subjection to suffering or temptation; broadly : a source of vexation or annoyance

In a ritual setting like a trial, people's attention is heightened and special rules of conduct, both explicit and implicit, come into play. The official participants—in the case of a trial, the judge, attorneys, witnesses, jurors and parties—have special, formal roles that are unique to that ritual. Part of your job as an expert is to understand what your role is in the larger ritual and to behave appropriately to your role.

Getting ready for trial



As the expert, ask about the probabilities of the trial actually taking place on the scheduled day. Inexperienced experts may take the first day of the trial off from work and sit by the phone waiting to be called to testify, having spent preparation time for which the attorney will be billed. Ask if the courts are backed up, and it is the norm for a trial to be rescheduled several times before it begins. Ask the law firm staff to keep you informed of postponements. Many experts prefer a phone call rather than waiting for a letter to appear in the mail several days after the date the trial was supposed to have begun. Lack of communication with the expert at this stage contributes to the expert's frustration.

Work out your own practices regarding cancellation fees to be required by nursing midwives, nurse practitioners and other nurses in independent practice. Nurses who are employees of a healthcare agency may have great difficulty scheduling a day off without adequate notice. It is a good practice to provide your fees to the attorney who is retaining you at the very beginning of the case. You should develop a fee schedule document which can be provided to a party who inquires about retaining you. Do not make your cancellation fees outlandish because it could result in costing you the opportunity to act as an expert in any given case or to not be asked to act as an expert in a future case.

It is becoming increasingly common for experts to ask to be paid in advance for testifying in the trial. Payment of the fee before the witness gets on the stand is a safeguard for the attorney. If the opposing attorney elicits testimony that the expert has not been paid for coming to court, the jury is able to infer that the payment is contingent upon the expert's performance in court. Receiving a check before getting on the stand promotes peace of mind for the expert.

Getting ready for trial



Offer to the attorney a home and cellular phone number and e-mail address in addition to a work number. A discussion the night before court is useful for covering any last minute changes in the shape of the case. This is also a good opportunity to thoroughly review your curriculum vitae so that the attorney is aware of any experience that is particularly related to the nursing issues in the case so that it may be brought out in voir dire.

Some attorneys prefer to work out the direct examination questions and review them with the expert prior to the expert appearing in court. This is a good opportunity to add questions to the list. Be sure to arrange a preparation session prior to the time that you testify. Some attorneys will need your assistance in being organized at the time of trial and you want to be sure that you were prepared by the attorney who will be conducting the direct examination of you. At that time you will also gather her/his ideas of what you may expect on cross-examination.

Getting ready for trial



Prepare, prepare, prepare. Thoroughly review the file so the facts are clear. Review the medical records. Review your report, if one was written. The opposing counsel has probably read your report dozens of times and will catch discrepancies between your testimony and your report. You must review your deposition before trial. Any inconsistency can be used to impeach your credibility by opposing counsel.

Assemble the medical records in a binder including all material received. Have an index that enables you to quickly locate any document. Review your c.v. and bring three copies with you – one for yourself, one for the client, and one extra. Be prepared. Examine the relevant evidence, prepare your reports and any demonstrative graphics, and know what role your testimony will play in the trial. Prepare your own materials for presentation, or closely supervise their preparation. Do not let counsel take charge of this. (If counsel has a professional graphics company involved, work directly with the graphics consultants yourself.) Talk with counsel to understand what decisions—that is, what verdict questions—jurors will have to answer relying on your testimony. Experts are people who know how to figure out what is important in a situation. The more tight, focused and relevant your testimony, the more you show jurors the substance of your expertise. Your expertise at trial is about giving jurors what they need, not showing off everything that you know.

Getting ready for trial



Expect your client to cover these points with you, particularly if you are an inexperienced expert:

What to wear to court (navy blue, grey or black conservative suit)

To avoid any insignias or jewelry that identifies the expert as a member of a group to avoid antagonizing anyone who dislikes that group

The security at the entrance to the court house may include searching belongings

The exhibits that will be used

The importance of emphasizing the expert's experience and credentials related to the issue at hand

The questions planned for direct examination, and whether the attorney prefers a brief answers or wishes the expert to give narrative answers

The need to refer to the medical records, exhibits and other documents to strengthen the expert's position

The importance of looking at the jury while answering questions posed by the attorney

Be clean and well groomed but do not dress expensively. For example do not wear flashy rings or other jewelry, any designer pocketbook, or wear a fur coat.

Courtroom Demeanor



Arrive early. Don't keep others waiting, particularly the judge.

Be polite to everyone you come in contact with at the courthouse.

Treat everyone as if they are jurors on your case. Do not communicate with them. Realize that you occupy your ritual role as an expert for the entire time you are in the Courthouse, not just when you are on the stand. Behave with decorum from the moment that you exit your car or taxi at the Courthouse until you leave the Courthouse after your testimony is over. Jurors are everywhere and they watch, and they talk with each other about what they see and overhear.

Do not discuss private aspects of your life where you might be overheard. Do not discuss controversial subjects where you might be overheard.

Do not speak to other people in the courtroom within earshot of the jurors.

Recognize that you are always being watched.

If you have the opportunity and are present in the courtroom while someone else is testifying, do not respond to the testimony with your body language, facial expressions or verbal comments.

Courtroom Demeanor



Additionally, be aware of the importance of not answering a question that has raised an objection until the judge has made a ruling

Use good analogies and demonstrative evidence to make points

Avoid referring to the fact that the defendant nurse is likely covered by an insurance policy

Avoid testimony on any areas that the judge has ruled as "off limits"

Do not use a cell phone in the courtroom- even during breaks.

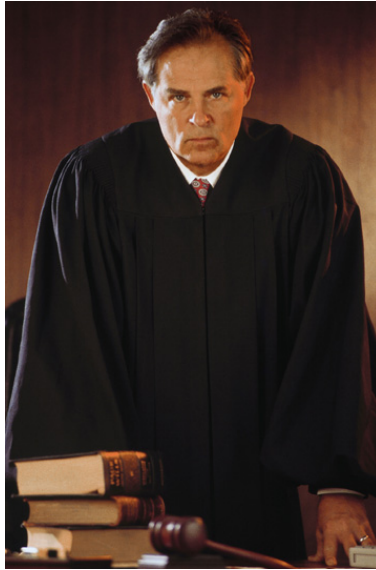
Leave as soon as you get off the stand.

Emphasis on persuasion



Recognize that the expert's role is that of persuasion. Our jury trial is a modern development out of medieval practices of oral combat designed to arrive at the truth, and it retains many features of earlier oral contests. A trial is essentially a truth contest, where each side is allowed to present testimony and related physical evidence on its behalf. Each side is then allowed to argue the meaning of the evidence, in an effort to persuade the jury that its version of the truth is the most believable. Hopefully, you are fully versed in your client's case and have received direction from the attorney as to her/his feeling of the case. Your answers should be in keeping with the theme and attempt to reinforce the theme of the case whenever the opportunity presents

YOU are on trial



Note one attorney's description of how the nursing expert witness may feel:

If you are like most everyone else, you lose your comfortable coolness when you take your seat on the witness stand, with the eyes and ears of one judge, two lawyers, twelve jurors, and a room full of spectators trained on YOU. Because, suddenly, you are not in control. You are not directing the scene. You are on somebody else's turf. This is the realm of lawyers, and now they are going to put YOU through some kind of interrogation like you are used to seeing on TV. Everything that you do is being assessed by the jury. Accordingly, be selective in what you say and how you act at all times while in the courtroom and/or on the witness stand.

Recognize your stress and keep yourself calm.

The expert as an advocate of truth



The role of the expert in our modern U.S. adversarial system is one that is both critical and paradoxical: The expert is an advocate hired by one party in an adversarial dispute, one side of an oral combat for the truth. Yet, you will only be persuasive if jurors believe that you are a neutral and objective expert, like a scientist is supposed to be, with an opinion that has been uninfluenced by the adversarial structure of the proceedings. This is the heart of the challenge you face to develop yourself into an effective expert at trial. This is the heart of “the expert paradox.” Given that the jury is making an assessment as to your trustworthiness, be well prepared for the experience of being on the stand and giving testimony. Prior to beginning your testimony, if you need a glass of water, request it in advance of beginning your testimony. Or, if you are going to rely on medical record documents that you have brought with you, make sure that you have pre-marked them so that you can readily turn to the particular page to which you will be referring. Do not fumble or appear flustered while giving testimony.

How can we know whose version of the truth is best?



Consider a question posed to mock jurors asking them to what extent they agree with the statement, "Most expert witnesses in a lawsuit will say whatever their lawyer wants them to say." Responses to this question were gathered from two very disparate locales: Jackson, Mississippi and San Diego, California. Jackson is a venue with one of the lowest levels of educational achievement in the country, while San Diego has one of the highest. Jackson is a very liberal area known for high plaintiff jury verdicts in civil cases, while San Diego is a more conservative venue that only occasionally returns very high civil damage awards. Fifty percent of the San Diego jurors and 55% of the Jackson, Mississippi jurors agreed somewhat with that statement.

In fact, you may be even asked a question as to whether or not you have been instructed to give certain opinions. You should have prepared responses to this or similar questions. The best response is "The thoughts and opinions which I have expressed today are my own based on my education, training and experience."

How can we know whose version of the truth is best?



Jurors are looking for an expert who gives them a clear answer to the question: “How can we know whose version of the truth is the best?” The way you can win jurors and influence outcomes is to be an effective teacher. Do not just deliver your opinions. Explain your thought process and the methods you used to reach your opinions. Give jurors some basic tools for sifting through the evidence themselves. Review your counterpart’s opinions and explain why his or her methods and/or conclusions are simply not as sound as yours.

If you are a successful teacher, jurors will not need to fall back on their default position of cynicism. They will be able to make a reasoned and informed decision. Jurors will feel grateful to you for truly helping them with their task and relieving their anxiety—and for showing them that cynicism is not always the best explanation of how the world works. Furthermore, jurors will judge you to be a witness who has risen above the advocacy situation to be a witness for the truth.

Making eye contact and delivering your testimony with sincerity is exceedingly helpful. The jury is assessing not only what you are saying to them but whether or not you believe what you are saying. Deliver your testimony with conviction.

Dealing with fees



Jurors frequently tell us that they assume experts are well paid and dislike it when attorneys dwell on how much experts are paid. Just as with negative political ads, which voters say they hate but clearly have an impact on voting behavior, jurors may say that they hate this kind of testimony but still be influenced by it. The way in which you and counsel handle such questions is the key determinant of how influential facts about your fees will be in jurors' minds.

Start by just matter-of-factly acknowledging the fact that you are paid and then move on. Do not make a big deal out of it. Make clear that you are paid for your *time* and not your *opinion*.

If your fees are higher than the norm, be prepared to justify them based on your experience and expertise. If you have been paid high fees, your performance in court also better justify your pay. Because your performance is inconsistent with your high pay, many jurors will conclude that you have been paid a large sum to buy your support for your party's position.

If you can get counsel to agree, it is best to bring out the details of your fees in your direct exam, rather than leaving it for cross. Speaking about your fees on direct steals opposing counsel's thunder and makes his or her attack on your credibility seem petty and weak. It also establishes you as someone who has no fears about this information coming out.

Negative expert behavior



The first step towards becoming a successful expert witness is to understand what turns jurors off and inclines them to ignore or dismiss your testimony. All of the behaviors that turn jurors off reinforce a sense that the expert is choosing to be an advocate rather than a witness for the truth.

Over-rehearsed testimony



Despite what you may think, the most experienced and polished expert witness does not necessarily make the best witness. Jurors respond better to experts who come across as unrehearsed. They also like experts who spend more time practicing their profession than testifying in court, or who have become full-time experts after a long career in their field.

Failure to examine all relevant evidence



You are hired to help jurors evaluate the evidence in the case. Your opinions are helpful only if jurors perceive them to relate to the evidence they have to evaluate and the decisions they have to make in the jury room. If you have not directly examined key evidence they will have that is clearly relevant to your area of expertise, you will lose credibility with jurors and reveal yourself to be a biased advocate, not a witness for the truth.

Counsel may deliberately withhold evidence that they fear may be bad for their client and spoon feed you only that evidence which they believe will help you arrive at the conclusion they want. If you allow yourself to be spoon fed, you leave yourself in a vulnerable position. Jurors will readily conclude that rather than being true to the standards and methods of your profession, you have chosen to shape your opinions to the needs of your side—you have been bought. It is part of your job to expressly ask counsel for the records and other documents that will help you support the opinion you are being asked to render. Explain to the attorney why you need them.

Ask counsel if he or she is worried about anything in the records, or if there are bad facts that your testimony may need to address. Discuss any bad facts frankly with counsel before examining the evidence you will rely on to render your opinion, to explore if you might effectively address them through your testimony. If your counterpart for the other side will have access to those records, insist on seeing them. If counsel chooses not to give you access to relevant evidence, you must be prepared to explain why you did not see this evidence and why it does not matter to your opinion.

Rambling



Your job is to support your attorney's case. Be clear about what topics she or he wants you to cover. Cover only those topics and keep your answers concise. Rambling and irrelevant testimony suggests the worst—that you are an advocate for yourself and your own importance rather than meeting the needs of either advocacy or the truth.

Unenthusiastic



Jurors can tell when you are not engaged by your subject. Part of your job as an expert is to get jurors to listen to and remember what you say. If you are not interested in your own testimony, why should the jury be interested?

Biased testimony



It should be obvious by now to be an effective expert, you must persuade jurors that your opinions are based on the evidence and commonly accepted methods of analysis, not on the needs of your attorney. Jurors feel upset and often dismiss testimony when they are being manipulated or told what to do.

TELL THE TRUTH – This may sound obvious, but it is paramount. Telling the truth, however, means more than refraining from telling a deliberate falsehood. Telling the truth requires that a witness testify accurately about what he knows. If you tell the truth and tell it accurately, nobody can cross you up!

Overly technical



Your job as an expert, in most cases, is not to baffle them with your brilliance (although occasionally, counsel may want to follow this strategy). Sprinkling in a few big words that jurors will not understand is okay, as that establishes you as an expert with access to specialized knowledge. However, your primary job is usually to walk jurors through relevant evidence to help them understand why they should accept your opinion on behalf of your client. You need to be a translator of your technical subject to your lay audience of jurors. Explain things clearly in everyday English, using metaphors, analogies, visual examples, and demonstrative graphics that help them to understand your testimony in their own terms.

Remember, before you are an expert, you are a nurse. One thing that nurses do well is good patient teaching. So, be sure, when you can to provide a basic explanation of complex medical issues. When explaining or providing information to the jury, you should address them at the educational level of a high school freshman.

Example: A stage 2 pressure sore is like a blister that develops at the back of your foot when you wear a new pair of shoes. The top layer may be intact or removed.

Evasiveness



Evasiveness and combativeness—which are two sides of the same coin—are sure signs to jurors that you are unsure of your opinions, have reached conclusions that are bad for your side, and/or you are insecure in your own expertise. A long pause before answering may weaken credibility.

BEWARE OF ESTIMATES – If you make an estimate, make sure that everyone understands that you are estimating. If you are asked how many cases you have reviewed, or how many cases you have open, be sure your estimates are reasonable. If you do not know, don't guess.

Arrogance



Arrogance is a sign to jurors that you do not listen to others, and someone who does not listen to others cannot be objective because s/he is cut off from external sources of insight and information. Arrogance suggests that you do not listen to or value others ideas and opinions and put yourself above others. Don't dismiss the expert who is your counterpart. Treat his or her opinions respectfully, even if the expert's work does not deserve your respect. Reserve your criticism for the expert's work and conclusions, rather than criticizing the expert as a professional or a person. If you can, show some humility for your own achievements and expertise.

Other behavior to avoid



Avoid:

- Appearing ill at ease or nervous
- Using indirect eye contact
- Crossing your arms defensively across chest
- Quibbling over common terms
- Drinking a lot of water
- Looking to your attorney for assistance in cross
- Using a defensive tone of voice
- Using a lots of “ahs” or “uhs”

The expert witness should not:

- Act in a condescending manner
- Be sharp
- Act pompous
- Be verbose
- Confuse the jury
- Praise herself/himself
- Patronize
- Engage in nervous habits
- Fumble for papers or documents
- Be cute
- Look or act nervous, anxious, or worried
- Overwhelm the jury
- Turn her/his back on the jury

The demeanor of testifying physicians, as well as that of other medical personnel, is critical for determining a trial's outcome. Post-trial interviews with jurors in medical malpractice cases point out that a common problem in testifying physicians is nervousness. Nervous mannerisms detract from the witness' credibility.

Qualities of a successful expert



The qualities of a successful witness can be summed up in three words:

Dynamism

Trustworthiness

Expertise

Dynamism



If you are bored by your own testimony, it's only natural that the jurors would be as well. There are simple, concrete ways you can convey your enthusiasm for your subject and your testimony:

Be active in your presentation. Write on a flip chart, get up and interact with a hardboard exhibit, use hand gestures, or other demonstrative evidence.

For most of us, it is helpful if we rehearse and practice these techniques so that we can integrate them smoothly in to the flow of our talk and presentation.

Dynamism



Don't speak in a monotone or too softly. Many older jurors have hearing problems and will miss your testimony. Speak with tonal variety and loudly enough so that all jurors can hear. If you are by nature soft-voiced, a good technique to help increase your speaking volume in testimony is to practice doing it at a pitch you feel is a shout or a yell for at least 4 or 5 minutes. Then, go back to using a more normal voice. You will find it easier and more natural to increase the volume of your speaking voice. If you aren't sure how your voice comes across, tape yourself on video or audio and listen to yourself.

Don't forget your audience. Make eye contact with the jurors. Get them involved with your testimony by using your eyes to draw them in. In the U.S., it is hard for us to resist someone who looks at us directly. However, don't stare—that may make jurors feel intimidated by you. Also be aware that jurors reared in other cultural traditions may not feel comfortable looking you directly in the eye. Move your eyes back and forth between the questioning attorney and the jurors as appropriate.

Avoid prefacing sentences with "In my opinion...I think..." This weakens your testimony by making you sound hesitant.

Credibility: nonverbal body language



Expert witnesses should focus not only on what to say but how to say it. Here are some suggestions for using nonverbal body language to effectively communicate a verbal message.

Show an open posture to the jurors. Keep your torso open and not covered with arms, books, or any barriers that close you off to the jurors. Keep your hands visible and your palms open to show that you are open and cooperative. Face the jurors when appropriate. When we feel uncomfortable, we tend to pull away, offering only a partial view of ourselves. Recognize how you show tension (frowning, hunching your shoulder) and attempt to show a relaxed demeanor.

Credibility: nonverbal body language



Maintain a balanced stance. Keep your feet steady- they often express nervous tension that is not getting out through the mouth and hands. Foot tapping, leg swinging, and toe thumping are common ways to release nervous energy. Lean forward when presenting, talk at a steady, sure pace, and use gestures to communicate your message. Claim the physical space around you. Broaden your gestures and avoid holding your arms close to your torso when you gesture.

Use gestures to anchor your message. Every time you raise your finger to illustrate Point Number One, the jurors will remember the verbal message that accompanies that gesture. With permission, leave the witness stand and use demonstrative evidence to expand your space and increase your importance and territory. Avoid self-touching- stroking your chin and face, holding your hands, folding your arms, touching your hair, scratching your head, drumming your fingers- this keeps your energy internalized and imprisoned. Your goal is to project your energy outward.

Trustworthiness



Trust is a complex social feeling generated by a variety of verbal and non-verbal behaviors. In your role as expert at trial, some aspects of building trust relate specifically to dealing effectively with the expert paradox, that is, the fulfilling your role as a witness to the truth in a situation of advocacy. Consistency is one of the most important common sense cues that indicate trustworthiness. People look to see if what you say matches how you say it and how you behave when you are saying nothing at all.

Trustworthiness



People who are trustworthy show respect to others. Jurors will not trust you if they feel that you are not respectful of them or of the court process. You need to show that you are not above the ritual process of the trial. Be polite and respectful to the Judge, the attorneys and the jurors at all times. If you are sitting in the audience, listen respectfully to other witnesses on the stand.

In America, equality is a strong value. We trust those who treat us as their equal. That's why you should not talk down to jurors in your testimony. Teach them what they need to know. Treat them like intelligent adults who can understand, if given the right tools and explanations. Someone who recognizes that we don't know something and teaches us in a non-threatening and supportive way is someone we will trust.

To use the expert paradox to your advantage, your testimony needs to come across as unbiased to jurors. If you come across as unbiased, rising above the pressures put on you in an advocacy situation, jurors will perceive your opinions to be trustworthy. Here are some basics for conveying that you are unbiased:

If you testify for both sides, make sure that comes out during your direct testimony.

Demonstrate to jurors that you considered a variety of scenarios or conclusions as you went about forming your opinion. An opinion that results from a complex process is more trustworthy than is a firmly held opinion that seems to have been pre-ordained.

Expertise



To be a successful expert witness, it is not enough that you actually are an expert in your field. You must start to understand how to behave in ways that convey your expertise to others.

You convey expertise first through your credentials, experience, and publication and presentation history. Don't overdo it, however. Discourage counsel from having you testify about credentials or experience that is not relevant to the issues at hand. Jurors will realize that you are just padding your resume, so to speak, and you will lose credibility.

Teach effectively. Communicating in clear, everyday language is part of conveying your expertise. This demonstrates that your understanding is deep and that you can relate it to everyday experience.

Other tips for connecting with the jury



A vivid example is more persuasive and memorable than a general summary statement.

If you are using visual metaphors and analogies to explain things, consider working with a graphics consultant to design demonstratives that will show while you tell.

Explain what is explainable to the jury and do not explain what will be over their heads.

Smile and look like you are enjoying it!

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