

Strafford

Presenting a live 90-minute webinar with interactive Q&A

Cross-Examination of the Sympathetic Plaintiff in a Personal Injury Case: Plaintiff and Defense Strategies

THURSDAY, MAY 14, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Marc H. Perry, Principal, **Post & Schell**, Philadelphia

Brett Tarver, Attorney, **Troutman Sanders**, Atlanta

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

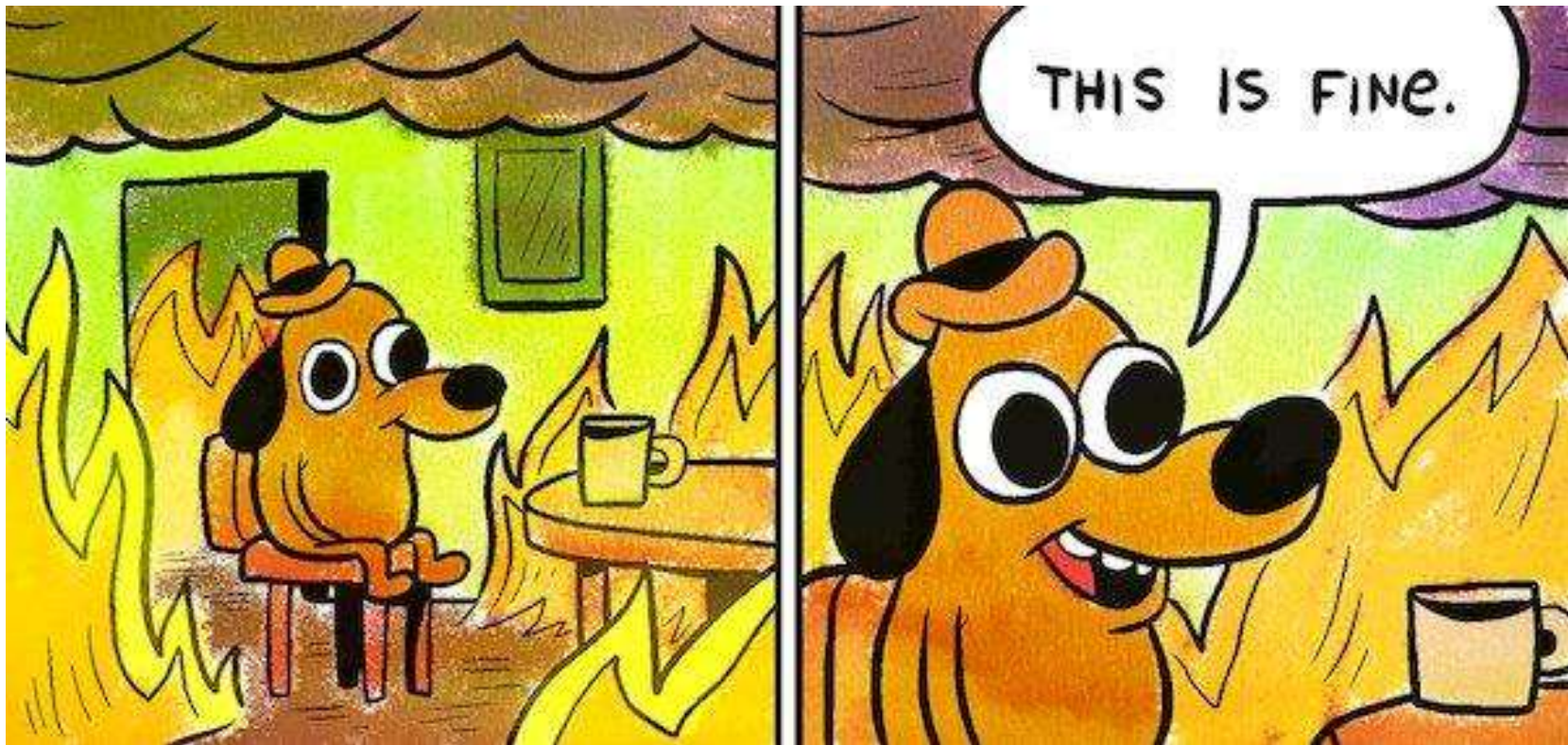
- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Cross-Examination of the Sympathetic Plaintiff in a Personal Injury Case: Plaintiff and Defense Strategies

Brett A. Tarver
Troutman Sanders
Atlanta, Georgia
brett.tarver@troutman.com

Mark H. Perry
Post & Schell
Philadelphia, Pennsylvania
mperry@postschell.com

Welcome To The Hot Seat



Deposition Cross v. Trial Cross

- **The deposition transcript is the foundation for the trial cross-examination.**
- **Determine which admissions you need directly from the plaintiff and which ones you can get through other means.**
- **Confrontation and surprise at trial can be dramatic, but be careful.**
- **Key consideration: to video or not?**

Deposition v. Trial Direct: Clean-Up of Plaintiff's Testimony

- **Should you redirect?**
- **Balancing Bolstering your client's credibility v. Opening your client to additional cross examination.**
- **Can you use a prior consistent statement to bolster your client's credibility Federal Rule 801 (d)(1)(b).**
- **Past recollection recorded – Federal Rule 803 (5).**

Deposition v. Trial Direct: Clean-Up of Plaintiff's Testimony

- **Writing can be used to refresh a witnesses memory – Federal Rule 612.**
- **Don't forget to humanize your client after a successful impeachment.**
- **Is there a possibility of rebuttal?**

Preparing for the Plaintiff's Deposition

- **Make it your goal to know as much as you can about the plaintiff.**
- **Information gathering: medical records, criminal or civil actions, bankruptcies, social media posts, pictures, videos, employment records, Google search.**
- **If there is doubt about an extensive injury, consider hiring a PI for surveillance in a public place.**

Learning Your Client's Case

- **Know the elements to meet your client's burden of proof.**
- **Anticipate defenses that will be made at trial.**
- **Investigate your client's social medial and litigation history.**
- **Investigate your client's financial background – bankruptcies, etc.**

Learning Your Client's Case

- **Interview all witnesses (good and bad) if possible.**
- **Obtain all documents, emails, statements, etc.**
- **Interview your client thoroughly.**
- **Be aware of current case law.**

Legal Research & Learning the Plaintiff's Case

- **Focus on the claims in the Complaint: what does the plaintiff need to prove, and how can you undermine it?**
- **Figure out the applicable legal buzzwords.**
- **Understand intimately the defenses and what you need to assert them successfully.**

Deposition Conduct: The Defense

- **Watch your tone, intonation, speed of questioning, and body language.**
- **Use kid gloves when needed, but read the room.**
- **Be fair when using documents.**
- **Be prepared for surprises and think through your strategy for each response.**

Deposition Conduct: The Plaintiff

- **One of the most significant events in any case is your client's deposition. Prepare accordingly.**
- **In Federal Court and in most jurisdictions, a party's deposition may be used at trial for "for any purpose" – Federal Rule 32(a)(3).**
- **Is it a video tape deposition? Inconsistent statements can have more of an impact on video.**
- **Make sure client is dressed appropriately.**
- **Deposition testimony is different than trial testimony.**

Deposition Conduct: The Plaintiff

- **Be professional.**
- **Short answers of yes and no can be beneficial.**
- **Do not be combative.**
- **Tell the truth.**
- **“Loose lips sinks ships.”**

Getting the Admissions: The Defense

- **Use the funnel method.**
- **Eliminate wiggle room by closing out each and every important topic.**
- **Strive for clean, crisp admissions.**

Messy Deposition Transcript = A Trial Lawyer's Nightmare

Lawyer: Did your doctor talk to you about the potential side effects of the new medication?

Deponent: Well, I had a lot of conversations with my doctor over about six months while he was trying to figure out what was wrong with me and what could help. So it's hard for me to remember exactly when I talked to him and when he talked to me about stuff. But, you know, I do think I remember the second time we talked about the medication, he mentioned some of the things that I should look out for when I went on the medication. Yeah, I do think I remember him telling me in May of 2009 that there could be some side effects. But he said that they weren't a big deal and unlikely to happen so I shouldn't stress too much about them. That's the only conversation I remember having with him about the side effects.

Clean It Up!

Lawyer: Thank you. I'd like to follow up on some of what you just said. You had two conversations about the medication with your doctor?

Deponent: Yes, I remember two conversations.

Lawyer: During the second conversation, your doctor told you about the side effects, right?

Deponent: Yes, he went over side effects.

Lawyer: That conversation happened in May of 2009?

Deponent: I remember it in May of 2009, yeah.

Preparing Your Plaintiff For Trial Testimony

- **Trial testimony is different than deposition testimony.**
- **Client should be prepared to be herself.**
- **Be authentic! Jurors can sense dishonesty.**
- **Listen to the questioner.**

Preparing Your Plaintiff For Trial Testimony

- **Witness should know her deposition testimony.**
- **Witness should be familiar with the theme of the case.**
- **Do not lie!**
- **“I don’t remember” can be your friend, if used properly.**
- **Be professional.**

Laying the Groundwork For Success: The Cross-Examination Outline

- **Start with a bang and end with a “walk-off.”**

Legally Wrong



Laying the Groundwork For Success: The Cross-Examination Outline

- **Start with a bang and end with a “walk-off.”**
- **Do not waste time regurgitating the direct examination.**
- **Do not be wed to the organization or flow of the deposition.**

Setting Up Impeachment

- Use short, one fact leading statements.
- Mirror the plaintiff's language from his or her deposition answers.
- Be creative, but cautious.

A Few Good Ideas



Trial Issues From the Plaintiff Perspective

- **Prepare plaintiff for trial testimony. Most likely she will be the star of the production.**
- **Make sure your client appears professional, but likeable and sympathetic.**
- **Make your trial a production. The jury is there to also be entertained.**
- **Use as much technology as possible – practice and become proficient with trial technology.**
- **Be organized.**

Trial Issues From the Defense Perspective

- **Get draft versions of the outline to your paralegals early – NOT the night before the cross.**
- **Make sure all exhibits are clearly identified and color-coded in the outline.**
- **Check the boxes, check the boxes, check the boxes.**

Preparing for Lines of Attack

- **Prepare for inconsistent statements.**
- **Is your client truly sympathetic or is she overplaying her hand? Opposing counsel can use this to hurt your client's credibility.**
- **Prior admissions.**

Discrediting the Plaintiff's Testimony

- **Know the facts of the record—and the plaintiff's testimony in particular—cold.**
- **Keep an eye on upcoming exhibits and demonstratives in the outline.**
- **Make sure the boxes you need are within your reach.**
- **Don't panic!**

Discrediting the Plaintiff's Testimony

- **Just like the deposition: watch your intonation, volume, and speed of delivery.**
- **You're being watched, too – careful with your facial expressions and hand gestures.**
- **Wait for the jury.**
- **Be yourself. Use your style to persuade.**

Rehabilitating the Plaintiff

- Can rehabilitate by introducing evidence of good character for truthfulness and honesty or by a prior consistent statement made by the witness usually only after credibility has been attacked.
- Humanize the plaintiff as many times as you can.
- Soft ball questions can be helpful.
- Leading questions on redirect if permitted by the judge.
- Don't be afraid to bring out sympathy.

Hostile Plaintiffs



Questions?