



# Do you want to prevail at trial? Here are 10 keys to effective testimony

➡ Your fate depends on whether you can win over the jury through education, demonstration, and friendly persuasion (*Key #4: No putting on airs!*)

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*Mr. Worek reports no financial relationships relevant to this article.*

**Y**ou survived the deposition: Your attorney advised you that it went well and that nothing you said was catastrophically harmful to the defense of your case. Now it's time to move on to trial.

A date has been set, and you're anticipating it with a fair dose of trepidation. You may find yourself pacing nervously along the marble corridors of the courthouse or staring with foreboding at the witness stand, with its solitary chair and microphone. Rest assured: There is much to be done to navigate your way through the trial process.

In this article—a follow-up to “Strategies for the hot seat: Giving a successful deposition” (February 2012)—I offer 10 tips for getting through a medical malpractice trial.

## **1** Preparation is critical

How do you get to Carnegie Hall?

You've heard the joke.

**Preparation is absolutely critical.** You are going to have six to 14 jurors, a judge, defense counsel, opposing counsel, the plaintiff, and a small audience watching your every move and hanging on every word, but there's no need to be nervous if you have prepared.

That said, be informed that hours upon hours of discussion and review of the care rendered with your attorney may be necessary to ensure that you understand medical and legal issues and can address both with confidence.

Any hesitation or poorly chosen phrase can have a detrimental effect on your case.

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Review every aspect of your testimony, the exhibits you plan to use, and the questions likely to be asked by your own attorney and opposing counsel—and do so repeatedly. You should expect to spend several days immediately before trial in your lawyer’s office going over every detail, so clear your schedule.

Don’t stop until you are familiar with every aspect of your testimony and the facts. Anything less may cause you to appear unprepared, confused, or, worse—incompetent.

## **2** Put on your educator’s cap

*Now is the time to teach.*

During your deposition, you concentrated on simply answering the question that was posed in the manner in which it was asked, and you tried to avoid educating opposing counsel. A trial is different—you have a panel of jurors who are eager to hear your side of the story. These are the people who will decide your fate. Now is the time to teach.

I was once told—and I truly believe—that most jurors understand science and medicine at the high school level. Of course, some jurors will have greater understanding, and some less. Teach the jury the reasons behind your medical decisions and explain why they were correct. A teaching approach—as opposed to monotone answers—will help hold the jury’s attention and address its inquisitiveness.

Work with your attorney to develop appropriate explanations of medical terms, diagnoses, and treatments at issue in the case.

## **3** Face the jury

We typically look at the person to whom we are speaking. In the courtroom, this tendency translates into a focus on the lawyer who is doing the questioning rather than the jury. In the big picture, however, you are testifying to the jury, not the attorney—so look at the jurors when you speak.

Your attorney may position himself (or herself) near the jury so that your gaze encompasses both him and the panel. However, even if the attorney asking questions is not near the jury, turn toward the jury when you answer.

It may help to turn your chair to angle slightly toward the jury when you take the witness stand to make yourself more comfortable and avoid appearing as though your head is on a swivel. Doing so will also help you face the jury more squarely and directly.

Look into the faces and eyes of the jury when you answer questions. Speak to them, not at them.

## **4** Be yourself

When you are preparing for trial with your attorney, review the answers you expect to give to various questions. Work on delivering those responses in your own words, the way you would present them to a patient or a peer. A jury can detect sincerity and its opposite—glibness.

You and your counsel may agree on the information or points to be disclosed in response to a certain question, but on the witness stand, you will have to respond with your own voice and vocabulary.

## **5** Prepare to be cross-examined

Most jurisdictions permit opposing counsel to call a defendant physician to the witness stand, “as if on cross-examination.” This means that the opposing attorney can ask you leading questions in an attempt to box you into “Yes” or “No” responses with little or no opportunity to explain. This is customary. You must be prepared to face heated examination.

A trial is an adversarial process, based on the general premise that, through heated exchanges and questioning, the truth will emerge. Opposing counsel will attempt to get you to answer questions based on the plaintiff’s view of the case. Most physicians find having their answers constrained in this manner to be very frustrating.

Work with your attorney until you are ready to answer even the toughest and narrowest of “Yes” or “No” questions. If a question cannot be answered reliably with a “Yes” or “No,” be prepared to point that fact out to the questioning attorney or the judge. Also be prepared to provide an explanation

### **FAST TRACK**

**You are testifying to the jury, not the attorney. Look at the jurors when you speak.**



beyond “Yes” or “No” when it may be appropriate. The judge will ultimately decide whether an explanation is warranted; many judges permit elaboration.

Your own attorney will later have the opportunity to question you, as well. If you are not permitted to give an explanation during questioning by opposing counsel, your own attorney can afford you that opportunity. An opposing attorney who insists that a physician not explain runs the risk of diverting the jury’s focus to the unstated explanation rather than to the actual “Yes” or “No” response. Indicate when you would like to explain an answer, and retain your composure if refused.

When opposing counsel has finished questioning you, your own skillful defense attorney can rise from his chair and ask, “Doctor, what is it that you wanted to explain to the ladies and gentlemen of the jury?” Then, like the late radio commentator Paul Harvey, you can provide “the rest of the story.”

As you did during your deposition, you have the right to ask for clarification of a confusing or unintelligible question. The same is true for a question in which a medical principle or condition is improperly characterized or defined. If a question doesn’t make sense, ask for clarification. If the question is inaccurate, advise the opposing attorney of the improper characterization, and ask that he rephrase the question. On occasion, it may be best to respond to a mischaracterization of a medical principle by answering: “That’s not how it works.” By declining to offer more information, you can create a moment of uncomfortable silence while opposing counsel collects his thoughts and regroups.

### **6** Emulate a weather forecaster

Work with your attorney to find aspects of your testimony that will permit you to get off the witness stand and present a chart or graph or other evidence from a standing position before the jury. Think of how much more interesting a weather forecaster is than an anchor who sits behind a desk reading news. Lengthy testimony from the witness stand is boring for

the jury and can be tiring for the witness. Get off the stand once or twice to illustrate a point or demonstrate, for example, how the McRoberts maneuver is accomplished. It will keep the jury focused and interested.

When you stand before the jury to illustrate a point, make sure every juror can see your presentation. Your attorney may also request that a photograph or other exhibit be “published” to the jury so that the panel members can pass it among themselves and examine it with their own hands.

### **7** Be on your best behavior

Jurors are curious. They are being asked to, quite literally, pass judgment on you, despite knowing next to nothing about you. Jurors typically take their duties very seriously and will naturally be motivated to analyze non-verbal as well as verbal cues in an effort to learn more about you. Be prepared: They will watch your every move and mannerism in the courtroom, so be conscious of your clothing, mannerisms, and behavior. This holds true in the hallways of the courthouse and any location within two or three blocks. It is not uncommon to encounter a juror a block or two away from a courthouse in a major city, or to see a juror in a nearby coffee shop.

### **8** Control your reactions to testimony

It may be difficult to sit and listen as opposing counsel presents his opening argument to the jury. It may be a challenge to listen to the plaintiff’s case during the first 2 or 3 days of the trial. The plaintiff goes first; you have to wait your turn.

Overt facial reactions to testimony are best avoided. Although it may be helpful for you to make notes during testimony, try not to pass or slide them across the table to your attorney, except for rare occasions. There will be periodic breaks in the testimony, during which you can discuss your notes with your attorney. Frantically jotting down notes and sliding them over to your attorney may cause the jury to conclude that you are

## **FAST TRACK**

**Avoid overt facial reactions to testimony**

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overly emotional or lack confidence in your attorney.

## 9 Test the gadgets

If you are going to present an exhibit, such as a chart or graph, make absolutely certain that it is accurate. Any error will be noted by opposing counsel and may impair your credibility. Also consider whether the chart or diagram could be reinterpreted to support your opponent's case. If it could, don't use it.

High-tech gizmos were once frowned upon by old-school defense attorneys. Now, we're well past the MTV generation, and high-tech illustrations and animations are common in courtrooms. Be careful to avoid any high-tech malfunctions, however, which can distract the jury during presentation of your evidence.

If you are planning to use a demonstrative exhibit such as a heart-rate monitor or portable pulse oximetry device, make sure

the batteries are charged and that it works. Practice any maneuver you plan to perform using the device or machine. You don't want to appear clumsy or unfamiliar with the device. If any demonstration involves a sharp or needle, use an abundance of caution! In a birth injury case, baby mannequins are sometimes used. Make sure they work as intended and don't permit anyone to "play" with them in the courtroom during breaks in the case. Trial is a serious matter; any levity observed by a juror could leave a detrimental impression.

Over my career, I have seen **1)** an orthopedic surgery expert drop several "easy to assemble" metal components, creating a cacophony of pings and clangs as they bounced across the marble floor; **2)** a surgeon staple his own palm with an "empty" laparoscopic staple gun; and **3)** a medical expert miss a step getting off the witness stand, causing him to tumble into the jury box, strike his head and render himself nearly unconscious.



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**LIABILITY**



This last incident led to the cancellation of the afternoon court session.

### **10** Take your time— and a little water

It's helpful to visit the courtroom with your attorney some time before the trial date to dispel the jitters that can arise in an unfamiliar place. Also take a moment to sit in the witness stand so that you can have some level of comfort when testifying and understand how well, or poorly, the jury will be able to see you (and vice versa).

During the trial, take your time when answering questions. You may want to speak slightly more slowly than normal so that all the jurors can hear and appreciate what you're saying. The tempo and volume of your testimony may also need to be adjusted,

depending on the acoustics of the courtroom, which can vary widely, particularly in some of the more majestic and ornate venues.

Most courtrooms offer water pitchers and cups. Take a half-cup of water with you to the stand. A full cup is easy to spill—and creates a mess when it does. Courtrooms are not known for having an ample supply of paper towels.

### Your confident presence can humanize the courtroom

The trial of a medical malpractice case is a difficult and emotional experience for any physician. Preparing to testify with confidence and precision is an important step toward a successful defense. The courtroom is an unfamiliar, uncomfortable, and adversarial environment. With appropriate preparation, however, the daunting specter of the witness stand can be conquered. 📌



You may want to  
speak slightly more  
slowly than normal  
so that all the jurors  
can hear and  
appreciate what  
you're saying