Written Materials for CLE Presentation "Anxious Advocacy: Addressing Anxiety in the Courtroom for Women Lawyers"

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- **What Is Mental Wellness?**

Common Definitions:

Psychology Today: "The experience of health, happiness and prosperity." It includes having good mental health, high life satisfaction, a sense of meaning or purpose, and the ability to manage stress.

- **What is Lawyer Well-being?**

ABA Definition: "A continuous process whereby a lawyer will seek to thrive in the following areas: emotional health, occupational pursuits, creative endeavors, spirituality or greater purpose in life, physical health, and social connections with lawyers. Lawyer well-being is a part of a lawyer's ethical duty of competence."

- **What is our Duty as Lawyers?**

We are bound as lawyers to provide competent, diligent representation to or clients.

This ethical duty is codified in the AMERICAN Bar Association's Model Rules of Professional Conduct specifically:

Rule 1.1 Competence and Rule 1.3 Diligence

These rules require lawyers to maintain the mental emotional and physical health necessary to uphold the legal professions rigorous standards. AND

Rule 8.3

Lawyers have a duty to report professional misconduct if it raises a substantial question about another lawyer's fitness to practice. This extends to mental health issues that impair their ability to meet ethical standards.

Four Essential Approaches for Organizing Your Advocacy

When preparing for courtroom presentations or handling advocacy challenges, the way you organize your thoughts and materials can significantly impact your effectiveness and confidence. Here are four main approaches to consider:

1. **No Notes**
2. **A Minimal Outline**
3. **A Detailed Plan**
4. **A Full Script**

Each method has its supporters, and the "best" approach often depends on the lawyer, the case, and the audience. But whichever you choose, preparation is key. Let's dive into the pros and cons of each:

The Allure of "No Notes"

The argument for going without notes is often framed around spontaneity and connection. Advocates of this approach claim:

- You'll appear more engaging, natural, and in command of your material.
- Your focus stays on the jury, the judge, and the witness, avoiding distractions from papers or screens.

At first glance, this might sound ideal. However, in practice, it's often a recipe for stress and missteps. Why?

- **Memory Overload:** In complex cases, trying to recall every question, fact, or argument is nearly impossible.
- **Risk of Disorganization:** Without a clear roadmap, it's easy to meander, repeat yourself, or miss critical points.

Sure, some seasoned lawyers thrive on extemporaneous delivery, but for most, it's better to have at least a basic outline to avoid unnecessary risks.

The Minimal Outline

This approach strikes a balance between structure and flexibility. It provides:

- **A Safety Net:** Key points or questions are listed to keep you on track.
- **Room to Adapt:** You can adjust on the fly without losing the thread of your argument.

Think of it like a grocery list. You don't need to write down "milk" every time, but you'll want to note that obscure spice you'll otherwise forget. For many lawyers, this is the sweet spot: structured enough to reduce anxiety but open-ended enough to allow for real-time adjustments.

The Detailed Plan

A detailed outline is ideal for lawyers who want precision without fully scripting every word. Here's why it works:

- **Thorough Preparation:** It forces you to think through each phase of your case in advance.
- **Clarity:** You'll have all the key facts, quotes, and transitions at your fingertips.
- **Flexibility:** While detailed, it's not rigid. You can still pivot based on the flow of the trial.

This approach is especially helpful for openings, closings, or key witness examinations. It ensures you're well-prepared while leaving room to adjust to unexpected developments.

The Full Script

For those who prefer absolute certainty, scripting everything might seem like the safest choice. However, there are significant downsides to consider:

1. **Loss of Connection:** Reading from a script often diminishes eye contact and rapport with the jury or judge.
2. **Lack of Listening:** When focused on following your script, you may miss critical cues from witnesses or opposing counsel.
3. **Robotic Delivery:** Jurors want authenticity. Reading verbatim can make you seem stiff and disengaged.

That said, a script can be useful as a fallback. For example, having one on hand for high-pressure moments (like responding to anticipated objections) can be a confidence booster—just don't rely on it too heavily.

Crafting Your Own Approach

Ultimately, the best method is the one that aligns with your style and the case's demands. Here are some tips to calm your brain and organize effectively:

- **Prioritize Clarity:** Make your materials user-friendly. Whether it's an outline or a script, ensure you can easily find and follow your key points.

- **Practice Without Rigid Dependence:** Even if you use notes, rehearse as though you won't. This builds confidence and familiarity with your material.
- **Engage Actively:** Whether speaking from memory, notes, or a script, always focus on connecting with your audience. Listen, adapt, and be present.
- **Create Backups:** Have fallback notes or questions for unexpected twists. Preparation is your best ally against courtroom anxiety.

Brain Organization that will really make a difference: Objections Checklist

Make yourself a checklist of the most common objections and familiarize yourself with their short hand descriptions.

Once you do this once you can use this over and over again and develop it further.

If you don't have your own already here is a starting point…and depending on the type of law you practice and the type of trial or hearings you are conducting make your own edits, additions / takeaways.

CHECKLIST STARTER

Ambiguous – the question is capable of more than one interpretation. An objection for vagueness is similar
(Ex: an attorney asks the witness "Did you see that?" What is he asking?)

Argumentative – The question is NOT designed to elicit facts but rather just to argue the case. (For example in the last jury trial I had I got this from counsel :
(Ex: "So you want everyone to believe that these sexual encounters all happened with lots of people in the house, right outside the door with you never making a sound" - ok, this isn't a closing argument – ask a question)

Assumes fact not in evidence – This is a great anchor title to have in front of you because sometimes you need to remind your anxious / weary battle brain that certain evidence hasn't been elicited yet. *(Example : Where were you when you signed this document? And it's asked before it's been established that the witness actually signed the document)*

Calls for an expert opinion – The question asks a lay witness to give an opinion that properly may be given only by an expert. (*Example: Counsel asks "Why do you think your arm took so long to heal?")*

Calls for a narrative – That's when the question is open ended and general. Whether such a question is permissible depends on context. Such a question is normally permitted if the answer is likely to be relatively short like a sentence or two BUT not permitted if it invites the witness to talk at length.
(Example: "So what happened?" and then the deluge begins because it is too open ended)

Compound – The question has multiple parts or gives the witness a limited range of alternatives (usually two) They usually include OR and AND in them
(Example: Was the light green or were you driving over the speed limit?) Which one do you want answered?

Confusing- The question just does not make sense

Cumulative - Sufficient evidence has been heard on the subject, making further testimony unnecessary and repetitive

Lack of foundation - Counsel has not established that the witness is in a position to answer the question from personal knowledge . *(Example : counsel asks What did the inside of the house look like? Before asking "Were you present at the house?" or Where were you standing?*

Also the term LACK of FOUNDATION is also used to describe a failure to meet specific evidentiary requirements for admission of an exhibit for example that an exhibit is authentic.

Leading - the question improperly (for example on a direct exam of a friendly witness) suggests the desired answer in the question (*Example : Did you get scared when you saw the police officer in your rear view mirror? How did you react when you saw the police officer?*

Mischaracterizes the evidence- This is a frustration objection but if the question does not accurately quote testimony or reflect the evidence from the document, besides fixing this on re direct this may be appropriate *(Example: a Dr. witness testifies on direct exam that certain lesions <u>can</u> occur with a particular diagnoses but she didn't notice those symptoms on a particular person is asked "As you were examining Mr. X did you give him any cream for the lesions? "*

Repetitive/Asked and Answered- This is where essentially the same question has been asked over and over .

Speculative- The question invites the witness to guess, to speculate or to give conjecture (example: Isn't it possible that she didn't call you back because she didn't want to talk to you?)

Anxious Advocacy versus Ineffective Assistance

Of course, you want to do a good job. The stakes are high, and the pressure can feel overwhelming. But here's an important truth: the likelihood that you will commit malpractice or provide ineffective assistance of counsel is far lower than your anxious brain might lead you to believe. By taking the time to understand the law of ineffective assistance of counsel and recognizing that your anxiety stems from your deep commitment to your clients, you can redirect that energy into meaningful preparation. In fact, your anxious advocacy is often the best evidence that you will never let ineffective assistance occur.

You care deeply about doing a good job, and that's exactly why you're unlikely to fall into the realm of ineffective assistance. Your anxious advocacy—the late nights, the detailed preparation, the nervous double-checking—is proof of your commitment to meaningful representation.

So, take comfort in knowing the law. Understand that your efforts are far from the deficiencies courts describe in ineffective assistance cases.

Learn the rules, understand the standards, and see your concern for what it is—a sign that you are striving for excellence, not failure.

Let's explore the legal framework so you can replace your worry with confidence.

Legal Standard for Ineffective Assistance of Counsel in New York

The benchmark for determining ineffective assistance of counsel in New York draws from both federal and state precedents:

Federal Standard *(Strickland v. Washington,* 466 U.S. 668, 686 (1984))

A two-pronged test:

1. **Deficiency in Performance:** Counsel's actions fell below an objective standard of reasonableness.
2. **Prejudice to the Defense:** The deficient performance negatively impacted the outcome of the case.

New York's Approach: Meaningful Representation

New York applies the Strickland test through the lens of state case law, focusing on whether the attorney provided "meaningful representation." This holistic review looks at the totality of the circumstances, rather than isolating individual errors.

Key Cases:

- **People v. Baldi, 54 N.Y.2d 137 (1981):** Established the standard of "meaningful representation."
- **People v. Benevento, 91 N.Y.2d 708 (1998):** Emphasized that the fairness of the process is as important as the outcome.

Recognizing Deficiency in Performance

Deficient performance is assessed based on what a reasonably competent attorney would do under similar circumstances. Examples include:

- **Failure to Investigate or Present Crucial Evidence:** Ignoring key witnesses or evidence that could alter the case.
- **Inadequate Pre-Trial Preparation:** Failing to prepare motions, review discovery, or develop a coherent trial strategy.
- **Errors in Legal Strategy:** Misunderstanding the law or pursuing unreasonable tactics.
- **Failure to Call or Cross-Examine Witnesses:** Missing opportunities to challenge or bolster testimony.

Key Cases:

- **People v. Turner, 5 N.Y.3d 476 (2005):** Highlighted the need for thorough investigation and preparation.
- **People v. Oliveras, 21 N.Y.3d 339 (2013):** Found ineffective assistance where counsel failed to investigate a defendant’s mental health.

Understanding Prejudice to the Defense

To establish prejudice, defendants must show that, but for the attorney’s errors, there is a reasonable probability the outcome would have been different. However, New York courts focus more on the overall fairness of the process than on specific impacts on the verdict.

Key Cases:

- **People v. Caban, 5 N.Y.3d 143 (2005):** Reinforced the importance of fairness in evaluating claims.
- **People v. Honghirun, 29 N.Y.3d 284 (2017):** Clarified the "reasonable likelihood of a different outcome" standard.

Application of the Standard

New York courts evaluate ineffective assistance claims based on the "totality of circumstances" at the time of representation, rather than through hindsight.

Key Principles:

- **Strategic Decisions:** Even unsuccessful strategies are not necessarily deficient unless they lack a reasonable basis.
- **Fairness, Not Perfection:** The goal is meaningful representation, not flawless performance.

Key Cases:

- **People v. Ozuna, 7 N.Y.3d 913 (2006):** Addressed strategic decisions that were reasonable at the time.
- **People v. Berroa, 99 N.Y.2d 134 (2002):** Examined the impact of conflicts of interest.

Common Grounds for Ineffective Assistance Claims

1. **Failure to Investigate:** Ignoring critical evidence or witnesses.
2. **Failure to File Motions:** Missing pre-trial motions without strategic reasons.
3. **Inadequate Preparation:** Being unprepared for trial or sentencing.
4. **Conflict of Interest:** Allowing personal or professional conflicts to undermine representation.

Key Cases:

- **People v. Garcia, 73 N.Y.2d 651 (1989):** Found ineffective assistance due to failure to present mitigating evidence during sentencing.
- **People v. McDonald, 1 N.Y.3d 109 (2003):** Addressed incorrect advice regarding plea deals.

Procedural Aspects

Raising the Claim:

Ineffective assistance claims are typically raised on direct appeal or through a CPL 440.10 motion to vacate judgment. The trial record must clearly reflect the alleged deficiencies.

Preservation of Record:

Ensuring the record contains sufficient evidence of counsel’s actions (or inactions) is crucial for appellate review.

Please feel free to reach out with any questions, comments or if you need further assistance or resources for anxious advocacy. It is my pleasure to give back to this wonderful community of lawyers.

Thank you,

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