



Dressing your client for success at deposition and trial

“You never get a second chance to make a first impression”

BY DEBRA F. BOGAARDS

The New York Times published an article recently with the provocative title: “No One Tells Megyn Kelly What to Wear.” Megyn Kelly says she is “not going to be defined by what someone else deemed appropriate.” The genesis of the hot topic is Megyn Kelly got slammed online as a serious news anchor after wearing spaghetti straps. In response, Megyn Kelly said: “I can be smart and challenging while I wear spaghetti straps and everyone is just going to have to get their heads around that.”



Megyn Kelly

PHOTO: FOX NEWS

While Megyn Kelly may be bucking Fox News as a fashion maverick on the air, her choice of attire wouldn't fly in the courtroom. In trial, your client's appearance matters. Every time you introduce plaintiff to defense counsel, whether in

deposition, mediation, or trial, plaintiff reflects an image that tells others how to treat him or her. Defense counsel, the mediator, and the jury are sizing up your client and making an assumption about your client's credibility, likeability, and honesty.

Impression of witness

As a trial attorney, there are so many aspects of your case that you have to focus on throughout litigation: Preparing for the defendant's deposition, meeting experts, creating exhibits, preparing a searing cross-examination, and otherwise



getting ready for trial. The most important person, though, is your client...the plaintiff.

During your initial client meeting, assess your client's credibility, likeability, and presence. The first time your opposing counsel meets your client is at plaintiff's deposition. The defense counsel summarizes his or her deposition for the carrier in a report with the header "Impression of Witness" preceding the actual deposition summary. "Impression of Witness" includes a physical description of plaintiff followed by whether plaintiff appears "honest and sympathetic." The last line under "Impression of Witness" is a rating of plaintiff as "below average," "average," or "above average."

A critical component of trial preparation is effective witness preparation, including your plaintiff, and clothing is an important part of such preparation. Most trials depend heavily on the strength of witness testimony. You want your client to testify with confidence, credibility, and clarity in deposition as well as while on the stand. You spend time helping prepare your client to listen to the question, communicate his or her truth effectively, and give his or her best testimony. Accordingly, how your client appears – with body language, facial reactions, pacing, and dress – is important to the positive presentation of your case.

How to dress

Instruct your client how to dress, to sit forward with both feet planted firmly on the floor and their hands on the table, taking time to breathe and think before answering the question, to speak clearly, and to maintain good eye contact during his or her deposition. During deposition preparation, with the ease of iPhone video, you can videotape your client during practice direct and cross examination. You can provide feedback about dress, eye contact, facial expressions, attitude, slowing his or her speech down, and more. Most attorneys know all of this. There are seminars on "effective witness preparation," "the art of direct examination," and

"killer cross examination." But does anyone other than a jury consultant focus on what your client should wear?

Definitely *not* spaghetti straps! The general thinking is to dress your client conservatively so no one will be distracted by his or her attire. The last thing you want your defense counsel, mediator, or jury to do is comment on your client's appearance. You want the other side to listen to what your client has to say, not wonder whether the diamond engagement ring is 6 karats, or what the tattoo peeking through her dress means. Or his lime green dyed hair in a bun (*really happened*).

"The Queen of Mean"

Years ago, you could simply tell your client at the end of depo prep to come dressed to his or her deposition in a suit or dress like he or she would wear to church or to temple. No more. The dress code is so relaxed at my temple that the occasional congregant comes in khakis or even shorts. So I've learned to be more specific.

Remember Leona Helmsley? This cutthroat hotel magnate was known for her flamboyant personality and tyrannical behavior. She was bestowed the title "The Queen of Mean." "She has so much money that she literally doesn't care what people think about her, and probably her lawyers don't have much control over her." She lost.

Same for Martha Stewart. Her son-in-law, who was her trial attorney, obviously forgot to tell the socialite to leave her mink stole and beige Hermes handbag at home. Oprah fared much better because she listened to the advice of her jury consultant, Dr. Phil. Wearing expensive jewelry, a mink stole, or carrying a waitlisted designer handbag risks creating a perception to the jury that your client is very rich – the "one percent."

Clothes make the plaintiffs

Tell your plaintiff to dress appropriately for his or her profession. Lawyers, doctors, engineers, and teachers should

wear a suit. Stay-at-home parents who are not professionals can wear slacks and a sport coat or button down shirt with a V-neck sweater. The object is to look professional. Neutral. Appropriate.

Here is a quick list for men:

- Business suit or sport coat, slacks, white shirt, and tie
- Neutral tie (*i.e., not one with a pattern that hurts your eyes, like a bull's eye!*)
- Wedding band (if married)
- Hair should be trim and neat
- Discreet watch (*not Rolex or big tank watch*)

Your male client should *not* wear shorts, baggy jeans, short sleeved shirt or Aloha/Tommy Bahama shirt (*yep, in my last trial, the witness wore an Aloha shirt every day*), or sneakers. No cufflinks...too fancy schmancy. Take out ear piercings, cut the long beard or hair, and cover tattoos.

Here is a quick list for women:

- Suit or dress with a cardigan (*Yes, arms should be covered*)
- No large patterns
- No low cut blouse/cleavage
- No tight fitting or short skirts
- Lose the flashy diamonds or distracting jewelry (*no large hoops, bling, or multiple rings*)
- No stilettos
- No open-toed shoes

The "don'ts" for women are longer than those for men. That's simply because women have far more options on what to wear: suit, skirt, pants, long, short, etc. I prefer my clients wear grey, navy, or brown which are colors that make them appear more honest. Steer clear of black as it's too severe and cold for female plaintiffs. Usually, I ask my plaintiff to send me iPhone photos of three possible outfits or bring some options to our pre-deposition meeting.

So, some real life examples:

[1.] "Uh Oh" moment

My client was the victim in a *pedestrian v. auto* incident. The case settled pre-litigation for over the policy limits. Then, my client had another incident



while she was waiting for her car at the carwash. She was reading her emails on her iPhone when suddenly a car rammed into her bench, knocked her over, and ran her over. Turns out, the car was her *own* car. By the time of her deposition prep meeting, we had worked together on both cases for over a year and had become friends.

During our day of depo prep, I looked up and suddenly realized that I was too familiar with my client. Her shabby worn-out jeans, drab t-shirt, no makeup, and frizzy hair may make her appear homeless to the defense counsel and court reporter. Because I knew her so well and liked her so much, I almost overlooked her appearance. I explained to my client that she has only a couple of hours at her deposition to make a good impression. Her credibility is comprised of two parts: her physical appearance and her testimony. Our goal is to make her appearance more neutral so counsel (or the jury) listens to her story.

A jury consultant can assist with a client makeover but not every case justifies the retention of a jury consultant. After learning that my client is comfortable at Nordstrom, we met that evening to look for a suitable outfit for her deposition. A simple dress, sweater, necklace, and flat shoes. She went to the hair salon to get her long unruly hair trimmed. The result was that she looked conservative and nicely attired at her deposition the next day.

At her deposition, my client was approachable. The court reporter chatted with her during the breaks and sympathized with her mild traumatic brain injury. The defense counsel was vicious and rude during his cross examination but tried to get her to like him during breaks. I always tell my clients that my goal is to have the court reporter and defense counsel want to get a cup of coffee with them. That they are “normal.”

The case proceeded to mediation. Unfortunately, my client got a chocolate stain on the front of that dress on the way home from her deposition. So, we

returned to Nordstrom right before the mediation. First dress of ten that she tried on worked like a charm. The next day at mediation, my client felt confident when she arrived in her new outfit. The mediator liked her immediately. And the mediation was a success.

[2.] “The sex kitten”

My husband, Pieter Bogaards, asked me to co-try an employment case in Marin. His client, a former medical assistant, was wrongfully terminated from her job by her employer, a doctor. The doctor and my client had consensual sexual relations in the past. When their sexual relationship ended, the doctor drafted a written contract promising not to terminate her based on their having had an intimate relationship. When a new girlfriend felt threatened by their work relationship, the doctor fired my client.

When I met our client, she seemed worn out and tired. My client also looked rather hard and liked to wear tight clothing. She was very cooperative when I explained why we needed to get clothing more appropriate for court. I did consult with Dr. Noelle Nelson, a fabulous jury consultant, about appropriate attire for court for this particular plaintiff. We agreed that a loose fitting, soft baby blue sweater set and small print floral skirt would make her seem sweet and vulnerable.

This was a bench trial. The judge appeared very sympathetic to my client. He couldn’t understand how she got herself into this situation. She was attractive but her clothing made her more approachable and downplayed her sexuality. (She was the victim of sexual abuse in her childhood, which explained a lot of her clothing choices and her employment.) By carefully choosing her clothing for trial, the judge’s focus was on the doctor’s breach of contract rather than on plaintiff’s “assets.”

[3.] “The grieving mother”

The grieving mother who lost her beautiful 20-year-old daughter in the

pipeline explosion came to my office to prepare for mediation. She had a diamond or gemstone ring on each finger, a dozen dangly bracelets, seven pierced earrings in each ear, bright blue eye-shadow, heavy eyeliner, and holes in her sweater. We went shopping together for her makeover of a simple neutral dress, flat shoes, and natural makeup.

I explained to her that the mediators at J.A.M.S. would spend less than five minutes with her but that quick impression was critical. Without her appearance distracting the mediators, the gentlemen would notice her profound loss and listen to her story of how her family has been turned upside down. She is a grieving mother no matter how she looks but in a formal legal setting, with a half dozen defense lawyers and two well-known retired justices, her image and relatability matters for that quick snapshot.

[4.] “The beard”

Giants pitcher Brian Wilson could get away with his full, quirky beard because he was once a spectacular closer: “Fear the Beard.” Fans loved his crazy beard. He was known for his talent as a pitcher but also for that beard.

Your client, however, shouldn’t be known mainly for his beard. One day, my potential client from a little town near Fairfield came into my office on a disputed-liability bicycle case. He had an exceedingly long, straggly beard and thinning frizzy long hair. He looked so thin and frail. Meth head? Already I was judging him. Once he started talking, however, I thought he was somewhat believable. Knowing that this was the type of case that could go to trial, I asked him whether he would cut off his beard for trial. He looked at me, raised his index finger, and said: “Ma’am, if G-d wanted me to be clean shaven, he would have put a razor in my finger.” I didn’t take the case.

Summary

Over the years, I have helped experts and clients dress for deposition,



mediation, and court. A forestry expert in a creekside remediation case came in his denim workshirt and passed around tree root fibers to the jury. A psychologist needed to upgrade an 80's suit with the skirt hemmed too short. A prostitute borrowed one of my suits and starched button down blouses and threw her disheveled hair into a bun. It works. A trial lawyer's keen attention to detail should include focusing on how his or her client, witness, or expert is to deliver their content, including appropriate courtroom attire.

The take-away from this article is that plaintiff needs to be well prepared and dressed appropriately. Both matter. While Megyn Kelly's spaghetti straps may declare her strident nature or independence, in trial we need a professional and neutral tone for our client. First impressions matter.

Debra Bogaards is a partner in Bogaards Davis LLP, practicing both plaintiff and defense personal injury, employment and elder abuse. She was named to "2016 The Top Women Attorneys in Northern California" list



Bogaards

in Super Lawyers magazine. She regularly teaches trial advocacy, having won 37 jury trials. She is a vice-president on the Board of Trustees at U.C. Hastings. Her husband, Pieter Bogaards, has a solo plaintiff's employment practice in Mill Valley. Their daughter,

Jamie (age 28) is a marketing manager at Sephora and their daughter, Danielle (age 27) graduated in 2016 from Debra's alma mater, U.C. Hastings, passed the bar and started working at Ropes & Gray in S.F.