

LITIGATION: BACK TO BASICS

Part 3: Introducing Evidence
and Impeaching Witnesses

PRESENTED BY
Andrew Smiley

==New York State==
ACADEMY
OF TRIAL LAWYERS

PRESENTED LIVE
DECEMBER 6, 2023
1PM VIA ZOOM

NEW YORK'S GRIEVING FAMILIES ACT

HOW YOU CAN HELP

The Academy worked tirelessly with our coalition partners, advocates, and Academy members to achieve passage of the Grieving Families Act by the Senate and Assembly last legislative session. While Gov. Hochul ultimately vetoed the bill, we have never been closer to updating NY's 175 year-old Wrongful Death Law. Act now to help us pass the Grieving Families Act this legislative session!

SPREAD THE WORD

Tell your friends & colleagues to join over 5,000 Academy members in amplifying our message to the Governor to take action to support Grieving Families.



EMAIL THE GOVERNOR

Visit [HopeForNYFamilies.org](https://www.HopeForNYFamilies.org) to email Gov. Hochul and voice your support for the GFA.



DONATE

We need your support to protect, preserve and enhance the civil justice system. Make a donation to our [Access to Justice Campaign](#) or [Political Action Committee](#).



Donate Now
[trialacademy.org/donate](https://www.trialacademy.org/donate)



more info visit
[HopeForNYFamilies.org](https://www.HopeForNYFamilies.org)



JOIN THE ACADEMY FOR FREE CLE

**Academy members now get FREE access to
all live AND on-demand CLE courses!**

- ▶ The Academy presents CLE webinars providing CLE credits in all categories, including Diversity, Inclusion and Elimination of Bias.
- ▶ All of our courses are video recorded and made available to view on-demand on our website.

Interested in joining? Contact us for more information



518-364-4044



info@trialacademy.org



**SUPERIOR EXPERTISE
FOR SERIOUS INJURIES**



WE'RE THE WORLD'S HIGHEST QUALITY PROVIDER OF DAMAGES VALUATION SERVICES.

WE ARE **PHYSICIAN LIFE CARE PLANNERS**

Uniquely qualified to provide a strong
medical foundation for damages valuation.



Future
Medical
Expenses



Loss of
Earnings



Loss of
Household
Services



CALL TODAY FOR A
FREE CONSULTATION
(866) 888-7352



Physician Life Care Planning™

PhysicianLCP.com

New York & New Jersey's #1 Case Tracking System

100,000+

Legal Professionals Or
Firms Using eLaw®

10+

Case Management
System Integrations

12

Years In A Row Voted #1
By New York Law Journal

eLaw® Case Tracking

NEVER MISS AN APPEARANCE

- ✓ The most robust case information available from New York, New Jersey, and Federal courts
- ✓ Save time on docket searching
- ✓ Track case outcomes and recover the fees owed to you
- ✓ Get up to the minute alerts and info on all your cases

VIEW AND ORDER SUBPOENAED RECORDS FOR NEW YORK CASES

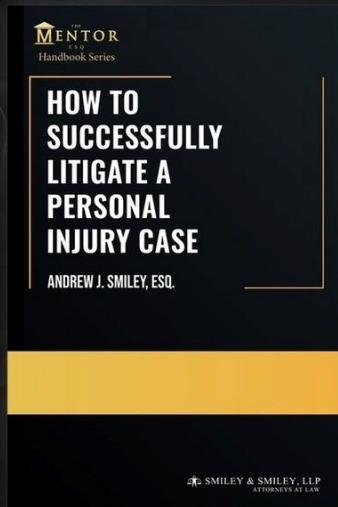
eLaw® is the only provider offering up-to-date subpoenaed record monitoring and ordering for New York cases.



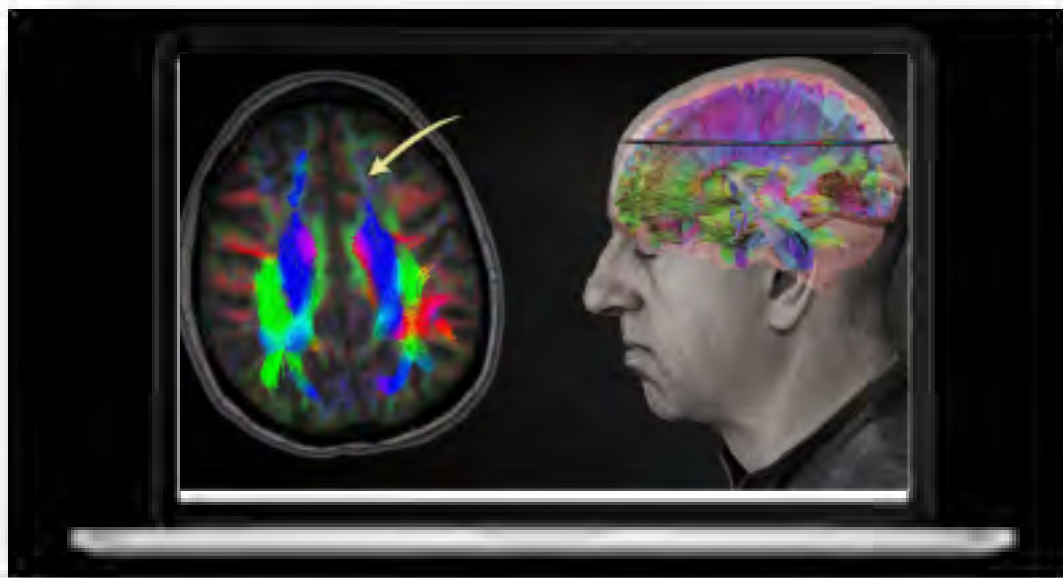
OUT NOW!

A book made
for lawyers.

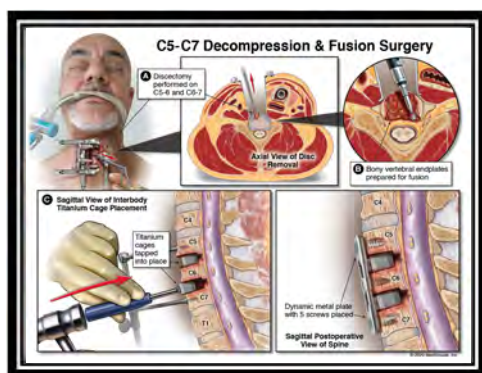
ONLY ON AMAZON



WORK SMARTER. NOT HARDER.



Gain the winning edge by showing the extent of your client's injuries and surgeries through accurate illustrations, detailed animations and dynamic interactive exhibits from MediVisuals®. The leader in medical illustrations for more than 40 years, MediVisuals® has helped thousands of attorneys secure billions in positive outcomes. Our experts will help you make your best argument at every stage of litigation.



MediVisuals®

Powerful visuals for every phase of litigation.

Contact Lori Bricking today (513) 908-2016
lbricking@medivisuals.com

Personal Injury | Medical Malpractice | [Traumatic Brain Injury](#) | Crash Reconstruction | Product Liability



**CALL NOW:
(212) 406-2864**

**TRIAL1.COM HAS MARKETING PACKAGES TO FIT YOUR NEEDS.
SEO WITH RESEARCHED KEYWORDS TO MAXIMIZE REACH.
EXPERIENCE WITH ALL MODERN WEB DESIGN PLATFORMS.
SOCIAL MEDIA AND/OR BLOG POSTING - NEWS REPORTING**

- **WEBSITE DESIGN**
- **VIDEO PRODUCTION**
- **SEARCH ENGINE OPTIMIZATION - SEO**
- **PAY-PER-CLICK ADVERTISING**
- **SOCIAL MEDIA POSTING**
- **INSTANT CHAT WITH LIVE AGENTS 24/7/365**
- **CHAT TO CALL TRANSFERS**
- **VISITOR AND BOT FRIENDLY**

**CALL, EMAIL OR CALENDAR A FREE
CONSULTATION TODAY**

(212) 406-2864
richard@trial1.com

<https://calendly.com/rgurfein>





Andrew J. Smiley, Esq.
Smiley & Smiley, LLP
122 East 42nd Street, NYC 10168
212.986.2022
asmiley@smileylaw.com
www.smileylaw.com
www.thementoresq.com

CURRICULUM VITAE

Education:

· Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)
Moot Court Honor Society - Competitor - National Appellate Trademark Competition
Moot Court Honor Society – Coach, National Trial Team – Regional Champions
CALI Excellence For The Future Award - Advanced Legal Research
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

· Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

Professional:

· *Smiley & Smiley, LLP*

Managing Partner & Senior Trial Attorney, January 2001 - present

Associate, June 1996 - December 2000

Law Clerk, September 1993 - June 1996

Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation

Andrew J. Smiley, Esq. Curriculum Vitae, Page 2

· *Adjunct Clinical Instructor of Law - Brooklyn Law School, Trial Advocacy Program (1998-2004)*

· *The Mentor Esq. Podcast – A Podcast for Lawyers*

- Founder & Host (2019 – Present)

· *New York “Super Lawyer”*

2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023

Bar Admissions:

- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United State District Court of Vermont

Organizations/Affiliations:

· New York State Academy of Trial Lawyers

- Immediate Past President (May 2018- May 2019)
- President (May 2017 – May 2018)
- President-Elect – (April 2016- May 2017)
- Vice President – 1st Dept. (July 2013-May 2016)
- Executive Committee (May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)
- Master CLE Instructor (2020 – present)
- CLE Instructor (2013 – present)

· New York City Trial Lawyers Alliance

- Chairman of Board of Governors (July 2017 – July 2019)
- President (July 2015 – July 2017)
- Vice President (June 2013 – July 2015)
- Treasurer (June 2011 – June 2013)
- Secretary (June 2009- June 2011)
- Board of Directors (2000-present)

- Judicial Screening Committee, Kings County Democratic Party (2013)
- New York State Bar Association
- Brooklyn Bar Association
 - Medical Malpractice Committee
 - Supreme Courts Committee
- American Bar Association
- The American Association for Justice

Andrew J. Smiley, Esq. Curriculum Vitae, Page 3

- Brooklyn Law School Alumni Association
- National Order of Barristers
- Lime Rock Drivers Club
- Porsche Club of America (Connecticut Valley Region)
- Porsche Sim Racing League
- Sports Car Driving Association (SCDA)
- Just Hands Racing Foundation – Board of Directors

Publications

Smiley, Andrew J. *How to Successfully Litigate a Personal Injury Case – A Practical Guide* 2022, The Mentor Esq. Handbook Series – Available on Amazon

Continuing Legal Education (CLE) Presentations:

(68) *Litigation Back to Basics – Part 2: Working With Experts*, New York State Academy of Trial Lawyers, November 1, 2023

(67) *Construction Site Injury Litigation: Pursuing or Defending Claims Against Site Owners, Contractors, and Other Third Parties*, Strafford CLE/BarBri, October 17, 2023

(66) *Litigation Back to Basics – Part 1: Preparing and Conducting Depositions*, New York State Academy of Trial Lawyers, October 4, 2023

(65) *Depositions*, Office of The New York State Attorney General – Legal Education and Professional Development, September 28, 2023

(64) *How to Litigate a Medical Malpractice Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, June 7, 2023

(63) *How to Litigate a Medical Malpractice Case – Part 5: Pre-Trial Preparation*, New York State Academy of Trial Lawyers, May 3, 2023

(62) *How to Litigate a Medical Malpractice Case – Part 4: Discovery & Depositions*, New York State Academy of Trial Lawyers, April 4, 2023

(61) *How to Litigate a Medical Malpractice Case – Part 3: Commencing the Action*, New York State Academy of Trial Lawyers, February 28, 2023

(60) *How to Litigate a Medical Malpractice Case – Part 2: Expert Selection*, New York State Academy of Trial Lawyers, February 1, 2023

(59) *How to Litigate a Medical Malpractice Case – Part 1: The Initial Screening*, New York State Academy of Trial Lawyers, January 4, 2023

(58) *How to Litigate a Construction Accident Case – Part 4: Motion Practice*, New York State Academy of Trial Lawyers, December 7, 2022

Andrew J. Smiley, Esq. Curriculum Vitae, Page 4

Continuing Legal Education (CLE) Presentations Continued:

(57) *Preparing for Depositions: Best Practices for Asking and Answering Questions*, Office of The New York State Attorney General, 2022 Legislature Program, December 6, 2022

(56) *How to Litigate a Construction Accident Case – Part 3: Depositions*, New York State Academy of Trial Lawyers, November 2, 2022

(55) *How to Litigate a Construction Accident Case – Part 2: Commencing The Action*, New York State Academy of Trial Lawyers, October 3, 2022

(54) *Trial Series: Part 2 - Opening Statement Webinar*, Queens County Bar Association, September 22, 2022

(53) *How to Litigate a Construction Accident Case – Part 1: An Overview of New York Labor Law*, New York State Academy of Trial Lawyers, September 7, 2022

(52) *How to Litigate a Catastrophic Automobile Accident Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, July 6, 2022

(51) *How to Litigate a Catastrophic Automobile Accident Case – Part 5: Mediation and Settlement*, New York State Academy of Trial Lawyers, June 2, 2022

(50) *How to Litigate a Catastrophic Automobile Accident Case – Part 4: Expert Depositions*, New York State Academy of Trial Lawyers, May 4, 2022

(49) *How to Litigate a Catastrophic Automobile Accident Case – Part 3: Liability and Damages Experts*, New York State Academy of Trial Lawyers, April 6, 2022

(48) *How to Litigate a Catastrophic Automobile Accident Case – Part 2: Commencing the Action*, New York State Academy of Trial Lawyers, March 2, 2022

(47) *How to Litigate a Catastrophic Automobile Accident Case – Part 1: The Investigation*, New York State Academy of Trial Lawyers, February 4, 2022

(46) *Anatomy of a Trial, a Trial Skills Series – Part 5: Summations*, New York State Academy of Trial Lawyers, January 5, 2022

(45) *Anatomy of a Trial, a Trial Skills Series – Part 4: Cross-Examination*, New York State Academy of Trial Lawyers, December 1, 2021

(44) *Anatomy of a Trial, a Trial Skills Series – Part 3: Direct Examination*, New York State Academy of Trial Lawyers, November 3, 2021

(43) *Anatomy of a Trial, a Trial Skills Series – Part 2: Opening Statements*, New York State Academy of Trial Lawyers, October 6, 2021

(42) *Anatomy of a Trial, a Trial Skills Series – Part 1: Jury Selection*, New York State Academy of Trial Lawyers, September 10, 2021

Andrew J. Smiley, Esq. Curriculum Vitae, Page 5

Continuing Legal Education (CLE) Presentations Continued:

- (41) *How to Successfully Litigate a Personal Injury Case Series - Part 7: It's a Wrap!*, New York State Academy of Trial Lawyers, July 7, 2021
- (40) *How to Successfully Litigate a Personal Injury Case Series - Part 6: The Trial*, New York State Academy of Trial Lawyers, June 2, 2021
- (39) *How to Successfully Litigate a Personal Injury Case Series - Part 5: Pre-Trial Disclosures and Gearing up for Trial*, New York State Academy of Trial Lawyers, May 5, 2021
- (38) *How to Successfully Litigate a Personal Injury Case Series - Part 4: Depositions*, New York State Academy of Trial Lawyers, April 7, 2021
- (37) *How to Successfully Litigate a Personal Injury Case Series - Part 3: Your Adversary, the Preliminary Conference and Initial Discovery*, New York State Academy of Trial Lawyers, March 3, 2021
- (36) *How to Successfully Litigate a Personal Injury Case Series - Part 2: Early Settlement, Jurisdiction, Venue & Commencing The Lawsuit*, New York State Academy of Trial Lawyers, February 3, 2021
- (35) *How to Successfully Litigate a Personal Injury Case Series - Part 1: Getting the Case, Investigation and Ready to File*, New York State Academy of Trial Lawyers, January 6, 2021
- (34) *Brick by Brick: Building a Personal Injury Practice*, New York State Academy of Trial Lawyers, December 10, 2020
- (33) *Working with Experts to Build Your Case*, New York State Academy of Trial Lawyers, October 8, 2020
- (32) *Fitness Industry Liability: Gyms, Trainers and Waivers*, The Mentor Esq. Podcast, September 8, 2020
- (31) *Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court*, New York State Academy of Trial Lawyers, June 9, 2020
- (30) *Crisis Management - The Corona Virus Pandemic*, The Mentor Esq. Podcast, April 9, 2020
- (29) *Do You Have a Federal Tort Claims Act Case in Your Office*, New York State Academy of Trial Lawyers, December 10, 2019
- (28) *Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts*, New York State Bar Association, September 9, 2019
- (27) *Thoughts and Strategies in the Ever-Evolving Product Liability Litigation – The Plaintiff's Perspective*, The Defense Association of New York, March 12, 2019
- (26) *Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions*, The Defense Association of New York, January 31, 2019

Andrew J. Smiley, Esq. Curriculum Vitae, Page 6

Continuing Legal Education (CLE) Presentations Continued:

- (25) *Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives*, The Defense Association of New York, September 17, 2018
- (24) *Punitive Damages – What to Plead, What to Prove: Medical Malpractice*, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017
- (23) *Presenter on Evidence, 2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016
- (22) *Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA*, New York State Bar Association, October 11, 2015
- (21) *Effectively Using Experts in Personal Injury Cases*, Lawline, October 8, 2015
- (20) *Killer Cross Examination Strategies*, Clear Law Institute, April 21, 2015
- (19) *Powerful Opening Statements*, Clear Law Institute, January 13, 2015
- (18) *The Dram Shop Law: New York Liquor Liability*, Lawline.com, November 20, 2014
- (17) *Killer Cross Examination Strategies*, Lawline.com, November 20, 2014
- (16) *Trial Techniques: Tricks of the Trade Update*, Lawline.com, October 14, 2014
- (15) *Personal Trainer Negligence Update*, Lawline.com, October 14, 2014
- (14) *Trial Techniques – Part 2: Cross- Examination & Closing Arguments*, Brooklyn Bar Association, May 15, 2014
- (13) *Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination*, Brooklyn Bar Association, May 7, 2014
- (12) *Health, Fitness & Adventure Sports Liability*, New York State Bar Association, August 1, 2013
- (11) *Direct Exams: How To Make Your Witnesses Shine*, New York State Academy of Trial Lawyers, May 6, 2013
- (10) *Opening Statements: A Recipe for Success*, Lawline.com, August 7, 2012
- (9) *“You Had Me at Hello”: Delivering an Effective and Powerful Opening Statement*, New York State Academy of Trial Lawyers, April 1, 2012
- (8) *Preparing the Construction Accident Case*, New York County Lawyers Association, March 26, 2012
- (7) *The Nuts and Bolts of a Trial*, New York State Academy of Trial Lawyers, October 24, 2011

Andrew J. Smiley, Esq. Curriculum Vitae, Page 7

Continuing Legal Education (CLE) Presentations Continued:

- (6) *Personal Trainer Negligence*, Lawline.com, March 22, 2011
- (5) *Trial Effectively Using Experts in Personal Injury Cases*, Lawline.com, May 4, 2011
- Techniques: The Tricks of the Trade*, Lawline.com, February 16, 2011
- (4) *Practice Makes Perfect: Learn to Practice Like a Pro*, Lawline.com, January 18, 2011
- (3) *Jury Selection 101*, New York State Academy of Trial Lawyers, December 14, 2010
- (2) *Practical Guidelines for Getting Items into Evidence*, Lawline.com, March, 2010
- (1) *Winning Your Case: Trial Skills that Count*, Lawline.com, August 21, 2009

Television Appearances

Fox News Channel

- The O'Reilly Factor
- What's Happening Now with Martha McCallum
- America's News Room
- Fox & Friends
- Fox Business Channel
- Neil Cavuto
- Money with Melissa Francis

CNN -Anderson Cooper 360

ET – Entertainment Tonight

Bloomberg TV

Headline News

Tru TV

Court TV

The Morning Show with Mike and Juliet

Interests, Hobbies:

High Performance Driving Events, Sim Racing, Tennis, Lego, Cooking



How to Enter Photographs and Documents into Evidence

It's crucial that you know how to properly enter an item into evidence. There was a time when my father was trying a case. I was observing while still in law school. The defense wanted to put a surveillance video of our client into evidence. He was a partner at a well-known firm, but he couldn't lay the proper foundation questions through his witness. My father would stand up, say, "Objection!" and look at the judge. The judge said, "Sustained. Ask another question." And this went on 10 or 15 times. All my father had to do was stand up and say, "Objection," and the judge said, "Sustained."

The lawyer was flailing around, and we were all sitting there, and the jury was looking at him. It was awful. And it was because he missed one of the foundation questions of how to put something into evidence. Everything went downhill for him from there. So, asking the questions properly is important as part of the seamless presentation you're putting on for the jury. It needs to be smooth and choreographed.

The template for entering items into evidence. When I enter something into evidence, the sequence goes like this:

"Your Honor, may I approach to have this item marked for identification?"

Usually, the judge will say, "Yes, but please show it to your adversary first."

I'll say, "Yes, Your Honor" and show it to my adversary, saying, "Let the record reflect that I'm showing this document to my adversary."

The judge then says, "You may approach."

I approach in a deliberate manner, buttoned up, looking professional, and hand it to the court officer or the court clerk and say, "Your Honor, may we please have this marked as Plaintiff



Exhibit 1 for identification.” And the judge will say something like, “ So marked as Plaintiff 1 for Identification.”

Sometimes you can combine your questions and ask to have it marked at the beginning:

“Your Honor, may I approach with what I’d like to have marked as Plaintiff Exhibit 1 for identification?”

The judge will say, “Show it to your adversary.”

I’ll say, “Let the record reflect I’m showing what has been marked as Plaintiff Exhibit 1 for identification to counsel. May I approach?”

“Yes.”

You approach and say, “And may I please approach the witness?”

“Yes.”

You approach the witness and hand them the document or show it to them. If it’s a blow-up, or something large, you position yourself with your back to the jury. The jury is not permitted to see an item until it is in evidence. So, there’s a little cloak-and-dagger here. You’re showing it, but until it’s in evidence, they can’t see it. Don’t start waving something around on your walk up for a jury to look at it—that will get you into trouble, so keep it away from the jury. You show it to the witness while you ask the foundation questions.

Pre-marked exhibits. In Federal Court, though not in many state courts, you might be using pre-marked exhibits. With pre-marked exhibits, you sit down with your adversary and agree on all the exhibits you both plan on introducing, and you mark them. If I have 15 photographs and other documents, I label them 1 through 15. The defense could label theirs A through G. Then you have a document that has been pre-marked—it’s typed up, and everybody knows what it is. You can give the court a sheet of the pre-marking, and you don’t have to mark it at the time. If it gets into evidence, you can leave it as that marking. You skip the whole routine of approaching to have something marked.



Laying the foundation through your witness. Either way, you get to the point where you're approaching the witness with it and asking the judge if you may show it to the witness. And you wait for permission. You show it to the witness, and the jury cannot see it then.

Here's where I would say to my client, "Oscar, I'm handing you what has been marked as Plaintiff Exhibit 1 for identification. Do you recognize it?" I prepared him, so he says, "Yes, I do."

The next question is, "What do you recognize it to be?" And he says, "I recognize it to be a photograph of my motorcycle." Again, I have prepared him for that answer. The next question is, "And does this exhibit that I've just handed you fairly and accurately depict the motorcycle you were operating at the time of your accident?" This is the step the lawyer was missing in the case where he couldn't get the video into evidence. He didn't say, "Does this video fairly and accurately depict the video surveillance footage that you took of the plaintiff on March 10, 2009?" He kept missing this part, so he wasn't laying the proper foundation.

You need to prepare your client. If it's a photograph, a letter, or another document, you have to ask, "Does it fairly and accurately depict it?" You've prepared your client to say yes to all of your foundation questions.

Sometimes it may be a business record you're getting in through a witness. So, you may want to say, "Was this document prepared by the police department in the ordinary course of business?" "Yes, it was." You can establish the foundation that way.

For your last question, you ask, "Will this photo (or document, record, or Plaintiff Exhibit 1 for identification) aid and assist you in your testimony to this jury today?" "Yes." At that point, you stop. You turn to the judge and say, "Your Honor, we now offer what has been marked as Plaintiff 1 for identification into evidence as Plaintiff 1 (or just into evidence)." Then the judge will turn to your adversary and say, "Mr. Adversary, any objection to this?"

Potential objections. If your adversary has an objection, this is when it comes in, and you address it. If you've done it right, given notice to your adversary, and disclosed this photograph as part of your pre-trial disclosure, you won't get that objection saying, "Your Honor, I've never seen this photograph before." If you do, the judge will say, "Mr. Smiley, did you give this photograph



to defense counsel prior to just now?” You’ll reply, “Yes, Your Honor. In fact, here is my pre-trial disclosure. I gave it to him, and I have an affidavit of service from six months ago.”

Once you get through any objection, the judge will say, “We will now receive that into evidence as Plaintiff 1. Please proceed and let the court reporter put a sticker on it.” The court reporter puts a sticker on it, dates it, and identifies it as Plaintiff 1. Now it’s Plaintiff 1 in evidence, and you are free to show it to the jury. You can say, “Your Honor, may I now publish this to the jury?” The judge will say something like, “Yes, of course, Mr. Smiley.”

But you’re showing a smooth process of how to get something into evidence. The jury, your adversary, and the judge see you and respect you as a competent attorney. That’s what you want. It’s the good acting part. Bad acting is when someone doesn’t know how to do this, doesn’t ask the proper foundation questions, and can’t get a surveillance video into evidence. The jury is sitting there rolling their eyes, and the plaintiff’s counsel is enjoying every minute of it. You don’t want that to happen.

You don’t have to use the exact words I have stated to lay a foundation, but those steps should be the gist of it. Identify it, depict it, and make sure the witness says it is fair and accurate. You use the same foundation questions to get in photographs, documents, and videos. It is essential that you do that. Practice it with your client in preparation, so that when it happens, they’re not sitting there wondering why you’re handing them something and what they should say.



Knowing How to Impeach

You don't argue with the witness. But you make it clear that if they don't answer appropriately, you're going to impeach them. That's the ultimate smackdown, and it's a lot of fun. If you set it up right and you're prepared, it can be very effective. And the digesting and the outlines are all set up for an impeachment.

To impeach a witness, first, you need to lock them into an answer. In my case, I wanted the train operator to agree that he was three car lengths away when he first saw something on the tracks. I might say to the witness, "You were three car lengths away when you saw something on the tracks, isn't that right?" If the witness says, "No, that's not right, sir." I'll say, "You're saying you were not three car lengths away?"

I'm not going to say, "How far?" yet. I'm going to lock them in, because I want to highlight the difference between what they're saying now and the prior testimony they gave (which I have digested). So the witness might say, "Well, I'm not so sure. It could have been one or two car lengths away." And I'll say, "So you're saying you're not sure? It could have been one or two car lengths away? Is that your testimony today?" You lock them down. They say, "Yes, that's my testimony. It could have been one or two car lengths away."

Now, I know that this witness testified under oath a year before trial that he was three car lengths away. That's important, because the further away you are, the more time you have to brake the train before it hits somebody. The further away the train is, the stronger my case is. So then I locked the witness down with the inconsistent answer at trial. The jury hears it. It's locked in. I'm making it very clear to the jury. I said, "That's your testimony today?" He said, "Yes, it is." I said, "Your testimony, you are maybe one or two car lengths?" He said, "That's right." Then you get into impeachment.

When you're impeaching a witness, you don't have to use specific, exact language, but the gist of the language has to be there. First, you need to establish through the witness that the witness testified previously in a pre-trial deposition. After you lock them down, you take a deep breath.



They've given their answer. You look at your digest, which notes that their answer is on page three, line five. You open the transcript to page three, line five, and hold it up.

You say, "You testified at a deposition in this case previously, right? Last year, June 20th, right? Do you recall that?" The witness says, "Yes, I do." If the witness says no to this question, you stand up and say, "I'd ask defense counsel to stipulate that the witness did testify on June 20th at a deposition." And then your adversary has to acknowledge it. If they don't, you show it to the judge.

So you start by locking them into acknowledging they took that deposition. Then you say, "And you were asked questions, like you're being asked questions in this courtroom today. And you gave answers, right?" Sometimes you're the person who did that deposition. You can say, "You remember? I asked you questions, and you gave answers." And they say, "Yes." Then you say, "And your answers were truthful, right? You took an oath to tell the truth at the start of that deposition, the same oath you took today, isn't that true?"

"Yes."

"And you did tell the truth."

"Yes."

"Under oath."

"Yes, I did."

"And there was an attorney there representing you, right? You were there along with lawyers sitting next to you?"

"Yes."

"And after the deposition, you had a chance to review that transcript and make any changes, right?"

"Yes." (When you're doing your digesting, you want to check that they didn't make any changes, and if they did, it wasn't for this question.)



Then you say, “And you didn’t make any changes, did you?”

“No, I didn’t.”

“Do you recall being asked the following questions and giving the following answers at that deposition?”

And then, you have to identify the questions for the court, the court reporter, and your adversary. You can say, “Your Honor, counsel, I’m now referring to the witness’s deposition transcript from June 20th of last year, page three, line 15.” This way, the jury sees what’s going on, again, because you’ve laid the groundwork.

Then you read the question, and you read it clearly, loudly, and slowly, so the witness, the jury, and everyone else hears it. “Question: How far away were you when you first saw something on the train tracks? And this was your answer. Answer: I was three...” Then I turn and look at a jury. “I was three car lengths away. Do you recall being asked that question and giving that answer?” The witness often says something like, “Oh, I may have...” or “I don’t recall that.” And if they don’t recall it, you say, “Your Honor, I’d ask counsel to stipulate that that was a fair and accurate reading of the witness’s answer under oath.” And then, the judge says, “Counsel, any objection?” “No, that was it.”

Next you say, “So a year ago, under oath, closer to the time of the accident, you didn’t hesitate, you didn’t approximate, you said three car lengths away. But now, for the first time, when I’m cross-examining you in front of this jury, you’re now hedging and saying maybe one or two car lengths away. That’s what you just said, isn’t that right, sir?”

That’s how you do it. That’s how to impeach a witness.

You don’t have to do it with precisely those words, but you do have to get the gist of it. They testified previously, under oath, with a lawyer there, answered truthfully, and now it’s inconsistent.

When to impeach. If you’re going to impeach, make sure you have something that’s a direct contradiction. Many attorneys try to impeach my witnesses or other witnesses in other trials



where there's really not an inconsistent statement. My witness will say, "Yeah, I walked to work that day." They'll say, "Do you recall giving a deposition on this date?" And they'll go through all the foundation questions to set up the impeachment. And I'll be thinking, "I don't know where they're going. I've looked through this transcript, and I know everything my client said." And then the answer will be, "And your answer was, I walked to work, but it was later that day," or something like that. There's nothing inconsistent. It just looks weak, and the jury has no idea why they're doing it.

If you want to impeach, make sure it's on something important, it's strongly inconsistent, and you've locked them down. That way, you're keeping them in control. As you continue, if you get to a point where a witness is giving you a hard time, you can hold up the transcript and say, "Do we need to look back at your transcript? Remember what you said..." "Oh no, no, I remember." You're sort of waving the transcript at them.

You can use a similar strategy during your adversary's cross-examination, when you are choosing when to object. My recommendation is to object only when it's important. I once was in a trial with a seasoned defense attorney. His name was on the door of his law firm. He was the senior partner overseeing the case that the associate handled up until the time of trial. At the trial, while I was just doing background of my client on direct, I said something like, "Can you tell the jury where you live?" He said, "Objection, leading." And I said, "First of all, it wasn't leading. And second, why are you objecting to that?" And the judge, who wasn't a very skilled trial judge at the time, brought us into chambers to discuss what a leading question was. Don't object unless it's important and you have a legitimate basis for doing so.

SPECIAL THANKS TO ACADEMY SPONSORS



NAM (National Arbitration and Mediation) is consistently recognized by the legal community for its superb customer service and exceptional panel of arbitrators and mediators.



Attorney operated Medicare, Medicaid, ERISA and other healthcare lien resolution, and MSA allocation firm. Precision resolves liens so that trial attorneys can focus on the task at hand: winning the case.



A podcast for lawyers and aspiring lawyers hosted by Andrew J. Smiley, Esq.



A fully-integrated case management system designed exclusively for personal injury and mass tort litigation practice.



Your comprehensive plaintiff-loyal settlement planning firm. Negotiation and mediation support, lien resolution and structured settlement plans.



Physician life care planners, vocational assessment specialists, professional economists, Medicare secondary payer compliance experts, and neuropsychologists.



A full service lien resolution company that comes at no cost to law firms and is reducing liens for clients by an average of over 50%.



A team of award-winning economists and analysts that provides high-quality economic consulting services in a wide variety of litigated matters.

SPECIAL THANKS TO ACADEMY SPONSORS



The attorney's comprehensive resource for structured settlement annuities, consulting and negotiation services.



Assists attorneys in all 50 states with expert assistance in preparing, filing, and serving appeals in any state or federal appellate court nationwide and several international tribunals.



A highly credentialed group of engineers, architects, scientists and fire investigators who assist in disputes and litigation through investigations, reports and testimony.



Providing busy lawyers with fast, easy, professional, court appearance and deposition coverage services throughout NY, NJ, and PA.



America's leading medical exhibit specialist offering products such as Animations, Interactive Presentations and Timelines, 3-D Models and Exhibit Boards.



Provides managed IT services to customers, including proactive support, live monitoring, management and maintenance for their systems.



Offers an array of services including local and national court reporting, medical record retrieval, process service, registered agent services and legal talent outsourcing.



Professional liability insurance that helps protect law firms with 1-9 attorneys, including attorneys billing less than 26 hours per week.

SPECIAL THANKS TO ACADEMY SPONSORS



The leading expert witness service offering custom expert recruiting and high-touch consulting in every specialty.



Providing medical experts; medical record retrieval; summaries, chronologies and demands by physicians; and medical cost reports by testifying life care planners.



Nota is M&T Bank's trust accounting and banking solution for law firms. It is designed with attorney insights - for lawyers, by lawyers - and is a no-cost, cloud-based platform for those of you managing solo and small law firms.



Full-service deposition centers plus interpreters, videographers, video conferencing, an online transcript repository, and more.



Flagstar Bank offers a wide range of financial products and services while striving to create a one-of-a-kind banking experience grounded in relationships, nurtured through service, and measured by results.



Providing physician assistance in reducing, organizing and reviewing digital files.



Helping New York attorneys recover on judgments for their clients against uninsured and defaulted defendants by using innovative investigative and legal strategies and dogged persistence.



Hart Settlement Group's focus centers around assisting attorneys as well as individuals and their families with the evaluation design and negotiation of structured settlements.

SPECIAL THANKS TO ACADEMY SPONSORS



The leader in personal injury technology, CloudLex® is more than just a case management system. Designed exclusively for plaintiff personal injury law firms, it allows you to take control of your practice from intake to closure and beyond.



Appointment reminders, scheduled texts, and more. Easy-to-use software for automated reminders & text messages, confirmations & online scheduling, and 2-way texting—saves you time, makes you money.



Trial1 has over 25 years of law firm internet marketing experience. Helping you target the type of case you're looking for through website design, video and educational content production, and targeted design of your web presence.



Court reporting and videography services since 1989, as well as litigation support, online document management and protected file storage.



LexisNexis Legal & Professional is a prominent provider of information and analytics solutions tailored for legal, regulatory, and business experts. Through an expansive array of offerings, including legal research databases, insights, and news, LexisNexis empowers professionals across law firms, governmental bodies, and diverse organizations.



Earn CLE credits around the world. In addition to customized CLE programming, programs offer cultural immersion and local community engagement, creating memorable experiences for lawyers and non-lawyers alike.

SPECIAL THANKS TO ACADEMY SPONSORS



Providing concise summaries of all torts decisions from the 1st and 2nd Departments and Court of Appeal every week by email, their website, or the NYTW ANYWHERE app.



The nation's largest online deposition bank, exclusively for plaintiff lawyers.



As a provider of payroll, human resource solutions, and tax service, Reliable Payroll offers a wide range of services.