

TRIAL 9.14(C):

Todd Wearl v. Dan Kinger

Instructions for the Person Playing the Role of Plaintiff's Liability Expert

Thank you for agreeing to play the role of a witness in our upcoming trial. Without volunteers like you, we could not conduct these trials and give the law students a realistic courtroom experience. We are very grateful for your participation.

You will be playing the role of the expert witness testifying on behalf of Mr. Wearl in support of his claim that Officer Kinger used excessive force in pepper spraying him. It is your opinion that Officer Kinger did use excessive force. Please follow these instructions:

1. You will be testifying as an expert witness on behalf of the student attorney who asked you to volunteer. The area of your expertise is the use of force by law enforcement officials.
2. Each side will have an expert to testify about liability issues. Thus, the plaintiff will call an expert to say that Officer Kinger violated Mr. Wearl's civil rights. The defendant will call an expert who will say that Officer Kinger did not violate Mr. Wearl's civil rights.
3. Each side will be allowed to "create" an expert who will testify in support of that side's position in the case. To state the matter more precisely, we will allow each side to adopt "shadow" expert, under the following procedure:
 - a. First, you and the student attorney who asked you to volunteer should find a "learned treatise" that supports the client's litigation position in this case. This should be a real

learned treatise that would qualify for use under Rule 803(18) of the Federal Rules of Evidence, such as a book or a published article.

- b. Your background will be based upon the person who wrote this learned treatise. You will use your own name in your work on this case, but you will assume the background of the person who wrote the article or book.
- c. You should work with the student who asked you to volunteer write a resume for yourself that is based, at least to some extent, on the background of the person who wrote the learned treatise. Remember, though, to put your own name at the top of the resume.
- d. Under no circumstances are you allowed to actually contact the person who wrote the learned treatise. No phone calls. No e-mails. No letters. Nothing. We do not want to bother these persons.
- e. At a time designated in advance of the your deposition, the student attorney who asked you to volunteer will be required to tell opposing counsel the name of the "shadow" expert who wrote the learned treatise and give opposing counsel a copy of the learned treatise.
- f. Opposing counsel is permitted to impeach you with any item that would be allowed for impeachment of the shadow expert. [For example, if there is a prior inconsistent statement by the person who wrote the learned treatise, opposing counsel can assume that this was a statement by you.]
- g. Just like the attorney who hired you, opposing counsel is not permitted to make any contact whatsoever with the person who wrote the learned treatise (i.e., the shadow expert). No phone calls. No e-mails. No letters. Nothing.
- h. Summary: Assume that the key learned treatise you find was written by Sam Baranza.

That person will become the “shadow expert.” Instead of using the shadow expert’s name, you will use your name. But you must adopt the background of the shadow expert. In other words, if your name is Mary Johnson, we will call you “Mary Johnson” in this case. But you have done everything Sam Baranza has done, have said everything that Sam Baranza has said, have written everything that Sam Baranza has written, etc.

- i. If you will refer to any other learned treatises (in addition to the key learned treatise) during direct examination at trial, you must provide copies to the attorneys opposing the student who asked you to volunteer. These other learned treatises might be written by persons other than the shadow expert.
 - j. If you will use or refer to any other exhibit during direct examination at trial, you must provide a copy of the exhibit to opposing counsel (or, if it is too large or bulky to copy, show it to opposing counsel).
4. The depositions of the fact witnesses will have to occur well in advance of your deposition, because you will want to review the deposition transcripts, as well as the applicable learned treatises, before being deposed. Therefore, there will be a deposition deadline for all fact witnesses and a separate, later, deadline for the depositions of the experts. The deposition of the plaintiff’s expert should occur before the deposition of the defendant’s expert.
5. Although the experts will want to review the fact witness deposition transcripts, neither you nor the attorneys can afford to wait until after these depositions are taken to start working on this case. Do your research as soon as possible to identify your key learned treatise, based upon what the witnesses tell the attorney who hired you about what they observed.
6. You are expected to come up with something helpful to say in the particular set of facts in this case. You

are expected to consult with the attorneys who retained you to craft this testimony. Remember, though, that you are the witness, not the attorney, and you will be testifying under oath.

7. Each attorney who “retains” an expert can work with the expert to determine the appropriate hourly rate for the expert’s work. This should be done before the deposition. You should keep track (approximately) of how many hours you spend working on the case. If asked at a deposition or trial, you should give an accurate statement of the number of hours worked on the case. [Of course, you will not actually be paid for your work on this case, but you should pretend that you will be paid.]