

The Choreography of Trial Preparation

by
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Choreography is the art of making dances. The choreographer arranges movement, lights, and sound in a deliberate manner to convey a concept, set a mood, or tell a story.

Trial preparation is like a choreography in that it is a deliberate arrangement of elements to convey a concept and tell a story from a particular point of view. Both choreography and trial practice rely on the skill of a performer, either a dancer or litigator, to effectively communicate with an audience or a hearing officer.

Spontaneity and Simplicity

"(W)hen the dancer is at the peak of his power, he has two lovely, fragile, perishable things. One is spontaneity, . . . the other is simplicity . . ."

Martha Graham, *A Dancer's World*, a film produced by Nathan Kroll

Successful trial practice requires those same two attributes. The litigator's need for spontaneity is obvious to anyone who has participated in a hearing or trial. She must object to inadmissible evidence, change prepared cross and redirect examination based upon direct testimony given, and constantly revise plans based on what is happening in the proceeding. The litigator must live in the moment.

The litigator's need for simplicity is perhaps less obvious but equally important. She must keep the story simple, the facts coherent, and the issues specific in order to communicate clearly.

A college student once asked me to recommend a course that he should take to prepare for law school. My immediate reply was, "Choreography". He chortled, but I was serious.

As a former dancer/college dance professor/ choreographer turned attorney, I know that choreography and trial preparation are both creative endeavors and that the creative process is identical whether you choreograph a dance, paint a picture, compose music, sew a quilt, or prepare for a trial. Only the medium is different. The choreographer's chief medium is movement, the artist works with paint, the composer uses sound, the quilter works with fabric, and the litigator uses information derived from documents and the testimony of witnesses.

Request Documents and Policies

The first task is to obtain as many school documents and as much information as possible. You may decide not introduce every document into evidence, but you want to review all of them.

Be sure that you request all school-held documents. Obviously, get all special education files. The preschool special education file may be kept separately from the regular special education file so be sure to get them both. School nurses and principals keep their own files on each child. Get all discipline records. Get all evaluations, including raw data. Get notes and reports of related service providers. Be sure that you have all report cards.

Get documentation from activities outside school, such as progress reports from religious school, summer camp records, and documentation of sports or club participation. Get evaluations, letters, and insurance reports of all private therapists. A hospital discharge summary can be very useful.

Get school district documents related to any hearing issues. For example, if the hearing involves a paraprofessional, get a copy of the school district's contract with aides and teaching assistants.

Each school district has a huge notebook of their local policies covering every imaginable subject. Get a copy of the school district policy related to any relevant issue. For example, I had a client whose child had been left back twice. I reviewed the school district policy on leaving children back, and discovered that the school had violated its own policy. It was a dramatic piece of information.

Review Documents

Go through each document carefully. Compare IEPs from one year to the next. Note changes in placement and services, and the documents on which decisions were made.

Check the goals and objectives carefully. I had one case in which the goals and objectives had been duplicated from one IEP to the next for several years. One can easily infer a lack of educational progress. I had another case in which four IEPs provided essentially the same placement and related services, but the most current IEP included twenty-six new objectives in math without any additional services to address them in a mainstream class. The hearing officer agreed.

Consider "Negative Space"

An artist must consider "negative space", i.e., the area not occupied by the object being drawn. The choreographer considers the space around the dancer. So the litigator needs to be aware of what the documents do not reveal - the information that is not there.

For example, are there test results from state and districtwide exams that the student was supposed to take? Were all necessary members of the IEP team present at all meetings? Was an IEP generated at each meeting? Are there reports and records from all related service providers?

Missing records may indicate that an IEP meeting was not actually held or related services on the IEP were not really provided.

Does the district annually publish the name, address, and phone number of the Section 504 compliance officer as mandated?

Prepare to establish that each procedural error led directly to a denial of a substantive "free appropriate public education". For example, show that the lack of a regular education teacher at the IEP meeting influenced a decision of the committee. Establish that had the parents did not file their complaint earlier because they never saw a published Section 504 notice.

"Read Law"

My father was a personal injury attorney for over sixty years and my law partner. His advice to me was always, "Read law".

Years ago when I was assigned as guardian ad litem for children being adopted by gay couples, he directed me to "read law". Still a disobedient child, I informed him that there was no law on the subject. He admonished me to read whatever law I could find. I read law about adoption, paternity, and the licensing of sperm banks. Sure enough, what I needed was there. So my advice is to "read law".

Read not just special education law, but also education law, state rules concerning confidentiality, and the rights of teachers. You must know law thoroughly in order to look for procedural and substantive errors made by district. You can use a violation of state education law to establish that the child was denied a "free appropriate public education" pursuant to the IDEA.

For instance, if the school district violated state law involving school discipline, that violation may have an impact on the student's receipt of a "free appropriate public education" pursuant to the IDEA. Some errors will be facially obvious in the documents, but most errors will involve missing information, ie. the artist's negative space.

Organize Information Chronologically

The second task is to organize the information in chronological order to create a detailed timeline. Review the timeline and the documents carefully.

For example, school progress reports and report cards not only indicate grades but also provide teacher comments that can be helpful. You may even be able to use teacher comments on report cards to impeach the creditability of a district witness.

Discern patterns and trends. Are test scores improving? Is the child becoming more socially withdrawn? Have teachers reported behavior problems that were ignored over a period of years? Have the parents review the timeline and particular documents with you? Ask them about each suspected substantive and procedural violation of statute and regulations. Be sure that you have as much information as possible.

Select Your Witnesses

As the choreographer decides who will dance each role, so the litigator must decide which witness to question about each piece of information. Sometimes the choice is obvious. The psychologist who tested the child can be asked questions about his own evaluation.

But remember the artist's negative space. Remember to use what is not there. You may want to present the hearing officer with someone who knows nothing but should have known something. You may want an IEP team member to reveal his or her lack of understanding of the psychologist's testing. Ask the teacher about the nature of the child's disability if you are sure that the teacher does not understand it. You might ask a director of special education to explain the meaning of a relevant term or about a procedure that eludes him.

I had a case in which a school district had failed to conduct a triennial review for five years. I asked the director of special education how to calculate when a triennial review is due. She then proceeded to misquote the law for the hearing officer and miscalculated the date the student's triennial review had been due by two years.

Dancers always perform the roles they are assigned to the best of their ability. Unfortunately, some witnesses are reluctant performers. The litigator then must be sure that each one knows the part and does not have an opportunity to improvise during the proceeding.

Deal with Experts

Experts can be difficult performers. First, the expert is often someone your client chose to work with the child years ago. The private psychiatrist, psychologist, or tutor may be an experienced person in his field or may be a novice who has never testified before. They can be unreliable on the witness stand. Second, the expert may have already communicated with the school district in letters and reports prior to the parents retaining counsel. Those previous documents will be used by the school district in the hearing.

Recently, I had a case in which the child's psychiatrist was a very well-respected professional who had treated the student for ten years. Unfortunately, he had written a letter to the school district in which he stated, "The best program for him is a boarding school that will address his difficulties." In his decision, the hearing officer included the psychiatrist's entire letter and cited Second Circuit case law that "federal law does not secure . . . the best education money can buy . . ."

Yet expert testimony can be powerful. I use the standard text or manual in the field to question experts -- mine and theirs. For instance, I use the DSM-IV when I question a psychiatrist or psychologist ("*The Diagnostic and Statistical Manual of the American Psychiatric Association*" current fourth edition). I go over the diagnostic criteria for the disability with the expert and ask him to provide specific examples of how the child's behavior fits each criteria and how it relates to the child's education.

Q. I'd like to take a few minutes to go through the diagnostic criteria for Asperger's Disorder. In looking at A, the qualitative impairment, it suggests at least two of the four criteria. Can you relate those criteria to W.H.?

The psychiatrist then launched into two and a half pages of impressive detailed information that could only be provided by someone who had worked with this student for many years. Direct examination continued:

Q. Let's look at Part B, restrictive repetitive and stereotyped patterns.
. . Does W.H. exhibit any of these four criteria?

A. Yes.

Q. Tell us about it.

A. . . . When he was young I mentioned that he used to be interested
in . . .

The psychiatrist continued for another page of testimony. I had the doctor explain his treatment plans as provided to the family's insurance company. We reviewed a document that was five years old to establish a long-standing disability.

Q. In looking at the upper right corner of the first page, you have a
DSM-IV diagnosis?

A. Correct.

Q. Can you explain what the first axis is on a *DSM-IV* diagnosis?

A. Axis one is a psychiatric syndrome. That is the diagnosis of what is
the current difficulty the person has.

Q. Looking at that document, can you tell us what 314.01 is?

A. 314.01 stands for attention deficit disorder. 300.4 stands for
dysthymic disorder and 300.3 stands for social phobia.

I also have the expert review evaluations and relate test scores and other school information directly to the child's disability.

Develop Your Theme and Repeat

You now have your information and cast of dancers. You are ready for the true art of litigation. Like music, classical choreography is based on general principles of form, such as theme and variation. The choreographer develops a movement theme and repeats it again and again varying it according to dynamics, rhythm, and other elements. Yet, the dance progresses towards a conclusion. It may build in intensity or flow slowly towards but surely.

So the litigator develops a theme and repeats it in the testimony of witnesses. She finds it in documentary evidence. The litigator controls the flow of the legal proceeding towards the desired conclusion.

View Your Opening Statement as an Opportunity

In one of my first hearings, I made no opening statement. It was a strategy gone bad, but I learned my lesson. The opening statement is a terrific opportunity to tell the full story. From then on, the hearing officer will only hear fragments of it.

Focus on the child and keep the story simple. Be sure to maintain your humanity:

What are the magic words a parent must utter to obtain a special education evaluation? Must a parent be familiar enough with special education law to state: I want to convene the CSE to determine my child's eligibility under IDEA, classify him ED, and obtain a special education placement for him? Isn't it enough that the parent tells the school psychologist and the principal that he or she needs help with a child whose emotional and behavioral problems have been well documented over a long time?

R.W. v. Greenburgh Central No. 7 School District, impartial hearing

Do not lose your spontaneity. In New York, the school district puts its case on first as it carries the burden.

I had a hearing in which the school district's attorney began her opening statement with: "This is a case about LRE." I changed my beginning on the spot to start off: "Contrary to what you have heard, this hearing is not about LRE. This hearing is about a child and his name is D.P."

My opening statement is a "mini brief" and serves as an outline for the entire hearing. I list all suspected violations quoting statutes, regulations, and case law. I state that "each and every one of these, and other, violations of federal and state statutes and regulations have directly contributed to the denial of a free and appropriate public education to the child." I then respectfully request specific relief.

I use the list of suspected violations in my opening to prepare direct and cross examination of witnesses. The list of violations will change during the hearing as evidence proves and disproves facts. I use the final list as an outline for my brief.

Develop Your Theme

I choreograph a hearing. I develop a theme of the case based on the patterns I have discerned and the errors made by the district. I state the theme in a few brief sentences or phrases as part of my opening statement. I make sure that each of my witnesses is familiar with the exact wording of the theme.

Once your witnesses use the theme on direct, opposing counsel will have to use it on the cross examination of your witnesses. When you use the theme to question district witness, opposing counsel will have to use it on redirect. Once you name it, it is yours.

For instance, I had a hearing in which the school district had placed a severe time restriction on the parents' right to request a due process hearing. I referred to it as "a five day window". I named it in my opening statement, questioned witnesses using it, and soon it was a term used by opposing counsel and the hearing officer. As "a five day window" is blatantly illegal, the concept that there was a serious violation permeates the entire hearing.

Direct and Cross Examination of Witnesses

I let my own witness tell the story in their own words on direct examination. I don't over-prepare them for direct, but I spend most of my time preparing them for cross examination.

I focus on my cross examination of the school district's witnesses. As the school district presents their case first in New York, I have an opportunity to cross examine their witnesses before many of them have even guessed the true nature of the parent's case. I have often been offered a settlement after opening and the testimony of one or two district witnesses.

Preparation Leads to Settlement

Just as an experienced person can identify a Martha Graham dance, an impressionist painting, or an Amish quilt, so school attorneys and hearing officers should become familiar with a litigator's style. I like to think that I have my own hearing style.

A school attorney who had litigated against me on a previous case, recently walked into a hearing and asked me whether I had prepared an opening statement with "all of those violations." I responded that I had. She requested a copy of it, and we settled the case after she reviewed it. The best result you can obtain from excellent trial preparation is settlement:

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be enough business." - Abraham Lincoln, "*Notes on Lawyers*", ca. July 1, 1850

About Barbara J. Ebenstein

Barbara J. Ebenstein is a private attorney who represents families in special education matters in New York and Connecticut. She is an adjunct associate professor at New York University School of Education where she teaches a graduate course in education law.

Barbara has written a series of articles on special education law for ***Exceptional Parent Magazine***. She moderated an online newsgroup for advocates for LRP Educational Administration Online and has lectured on special education law to parent groups, physicians, teachers, psychologists, and attorneys.

The mother of three daughters, two of whom have disabilities, Barbara has an essay in ***You Will Dream New Dreams***, edited by Stan Klein and Kim Schive and published by Kensington Publications in 2001. Barbara served on the Board of Directors of NPPSIS ("National Parent to Parent Support and Information System") and now serves on the Board of Directors of the Children's Dream Foundation, which supports medical services for children in the Hudson Valley of New York State.

Barbara has a B.A. from Boston University, and M.A. from Teachers College of Columbia University, and a J.D. from Pace University School of Law.

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