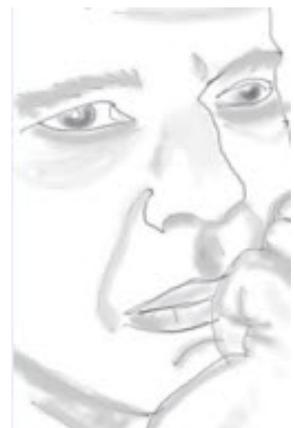




Preparing a Challenging Witness for Deposition or Trial

Alan J. Cohen, Ph.D.

The strength of key witness testimony at deposition can make a significant difference in attorney confidence as he or she approaches settlement negotiation or mediation. At trial, the abilities of the key witness to communicate effectively to jurors can determine how the evidence of the case will be interpreted and can seriously impact the ultimate outcome.



Every trial attorney has at one time or another faced the dilemma of having an excellent case with just one problem-- the key witness does not come across as a very likable, credible or effective presenter.

The key witnesses in a civil case are typically the plaintiffs and the defendants, and their stories are the most important ones that will be told. However, giving testimony during deposition or trial draws the non-expert witness into territory that is foreign and probably intimidating. The witness is commonly naive to the workings and strategies of the litigation process and to the implications of his or her responses within the legal framework. The effective witness must do more than just tell the truth. Honesty and integrity form only the foundation level of witness communication, and the communication structure that is built upon it must have strong walls, with doors

and windows that do not leak. The key witness must communicate in a way that is credible, likable, understandable, and has the power to impact and influence.

The dilemma that develops between actual witness honesty and perceived witness credibility stems from the complexities of human communication, which always involves potential differences in meaning drawn between the content of the words spoken and the context in which the words are arranged and nonverbally delivered. When in doubt as to the meaning of any communication, the listener will favor his interpretation of the contextual or nonverbal cues received.

As a communications psychologist who consults for attorneys in key witness preparation, I think of three distinctly different areas of the context of testimony that require attention. The first area I call fundamental presentation issues, the second emotional-behavioral issues, and the third strategic issues. A witness who is weak in any one of these three areas of communication context can significantly damage a case even while telling the truth in the best way he or she knows how. In performing this work, I assist the attorney as part of a work-product protected process, sometimes using a video-camcorder to provide audio-visual playback for the witness. An attorney is always present during my work and more than one attorney may help in role playing as the interviewer for deposition, direct, cross- and adverse testimony as the situation demands.

Fundamental Presentation Issues

The key witness faces a problem similar to the job applicant trying to make a favorable first impression at an interview. The juror will expect the witness to look a certain way appropriate to the claims in his or her case, daily life, as well as courtroom decorum. Unfortunately, the witness may not have self-awareness of these aspects of presentation. The basic concept is to have the witness avoid anything that diverts the

attention of the listener from hearing the essence of his communication, and enhance everything that will get his meaning across effectively. The witness should visually present in a non-distracting and congruent manner. The juror will consciously or unconsciously judge the witness from nonverbal implications of attire, make-up, jewelry, perfume, hair style, eyeglasses, and facial hair. It is important that the witness does not unwittingly feed into negative associations that the juror may bring to the context of the case.

Posture, gestures, and eye contact as well as unusual mannerisms may trigger prejudicial responses in the juror. Rate of speech, use of language, and length of response all affect comprehensibility. Vocal quality, pitch, and volume can attract the listener or turn the listener off.

If the juror cannot identify with or like the witness, the testimony will be problematic. While all the fundamental presentation issues are important in how they affect the juror, they become much more serious difficulties when they imply negative personality qualities or character quirks. These personally issues may turn into attorney nightmares at deposition or in the courtroom, where the experience of giving testimony is fraught with stressors and anxieties that commonly evoke the most glaring witness problematic behaviors.

Emotional-Behavioral Issues

The most important and often most difficult behaviors to change in the witness are those emotional-behavioral problems triggered by conscious or unconscious anxiety. The attorney may not know exactly what is wrong, but is clear that a witness presentation problem exists. The challenging witness by definition will always present at least one such problem. The witness may appear fearful or nervous, or come off as angry, arrogant, defensive and argumentative. He or she may seem bored, shy, or

detached, or appear to be avoidant, embarrassed, guilty, or pained. The witness may communicate a hysterical quality, or seem overdramatically grievous. Other individuals may laugh, make inappropriate satirical jokes, argue, try to question the interviewer, or engage in other question the interviewer, or engage in other odd, unpredictable or seemingly inexplicable response patterns.

More commonly, the witness may lapse into other tactical or defensive postures. He or she may ramble on excessively, or to the contrary say too little, change the subject without answering the question, answer unasked questions often with horrible implications, over-intellectualize, change voice tone, use counterproductive mannerisms or look fearful, hopeless and confused.

It is important to understand that the difficult witness is neither bad nor wrong. The witness is doing the best he or she can do. The challenging behaviors may be frustrating to the attorney, but the witness does not have the capacity to know there is a problem, and even when pointed out, will probably not know what to do to change it. The process of change is much more than saying, “don’t do that” or “relax” or “say that more assertively.”

Challenging behaviors do not imply lack of intelligence. At times, the most challenging witness may be the one with an extensive educational and highly honored background, who is articulate, clever, witty and ‘damn angry about being the defendant in litigation.’

It is necessary to understand the psychological and emotional basis for the communication problem in order to change it. Problem behaviors must be pointed out in a positive way that does not shame the witness, but encourages the creation of more effective behaviors. No one likes to be criticized. The communications psychologist initially builds rapport and trust with the witness, acknowledges what he or she does well and explains why it works for testimony. Then the consultant helps the witness identify non-beneficial behavior patterns, and educates the witness regarding the cause

and effect relationship between anxiety and the resultant problematic responses. Consequently, the witness learns to decrease anxiety in the face “triggers” so that his or her mind can be free to examine suggestions for change. In the next stage, the communications psychologist, using a supportive context, models and coaches the witness toward improved alternatives.

For example, I worked with a witness manifesting a type of manic defense, who would laugh reflexively, ramble unnecessarily and then change the subject each time memories of his excruciatingly painful injuries were alluded to in the questioning. This was extremely problematic, since it made the witness appear not credible and not genuine, as well as somewhat strange and unlikeable. By using the training process, the witness learned to recognize the feeling that triggered the undesired response and generate a different and more effective response instead.

Strategic Issues

The key witness needs to understand case theory both from his own and from the opposition point of view. My observation is that most attorneys do not spend enough time mapping the strategic territory with the key witness. The witness often has no idea how to recognize the green go lights, the yellow caution lights and the red stop lights signaled by the interviewer’s questions. When the witness is naive to the theories of the case, he or she is ill-prepared for the “land mines” that lie out there. Preparation for deposition or cross-examination must include making the witness knowledgeable of land mines, and provide training to take a response in the direction of thematic case landmarks. This type of mapping creates a GPS compass of confidence and readiness for the witness.

As a result of this training, the witness does not need to memorize or rehearse responses because the witness has internalized the case sufficiently to generate appropriate responses automatically and naturally.

Time Required for Witness Preparation

How much time should be allocated for key witness preparation? Preparation time obviously will vary according to the experiences of the witness, and the fundamental presentation, emotional-behavioral and strategic issues. A key witness with significant behavior change issues should be allocated at least a full day of training. Challenging behaviors take time to identify, coach and change. It is also important to be able to assess the effectiveness of the training after a designated time-out period, whether after a lunch break, or even better several days later.

Key witness preparation compels the attorney to examine the case in ways he or she may not have considered. It presses the attorney to imagine and clarify the other side's strategy and tactics and look at the key witness in a different light. The attorney should assume that every witness requires training to point out strengths and improve weaknesses. It would be a mistake to believe that your witness will perform well under deposition or courtroom fire on the basis of casual office interviewing or case review. Actual role play rehearsal is necessary and always beneficial, for the attorney as well as the witness.

When to seek the help of a communications psychologist as a consultant...

The best times to prepare your key witness are before the deposition and again before the trial. If depositions have already been given, then a good time to prepare the witness is within two weeks of trial. The learning curve is going to rise sharply, but unless reinforced, may fall back over time. If the training is to be a one-shot event, then conducting the training closer to the trial testimony date is better. If there will be an opportunity for two sessions, then the sessions should be separated for maximum learning opportunity.

A communication psychologist will always give you a vital edge in training the witness for testimony. Expert assistance in key witness preparation should be considered as

part of the prudent preparation for each case. Of course, the investment considered should reflect the value of the case, the complexities of the case and the challenges you face with that particular witness.

The preparation of a key witness by an attorney is similar to the preparation of a key athlete by a coach. The athlete needs to understand the game plan and his or her role in the overall picture. Well before game day, even the exceptional athlete must know how to maximize his given skills and identify and overcome as many of his weaknesses as possible. The coach creates useful drills anticipating the needs of the game and helps the athlete practice to achieve success.

Alan J. Cohen Ph.D. LLC

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