



Insights from Trial Analysts:

## Preparing Witnesses for Effective Testimony

During the past two decades our work with literally hundreds of witnesses has led to several observations. Most fact witnesses express tremendous anxiety about their impending testimony and are concerned that they lack adequate preparation to effectively represent themselves and their company. These anxieties feed one another: Anxiety about testifying heightens concern about whether one is adequately prepared, while inadequate preparation heightens concern about performance.

While some anxiety serves to sharpen attention and concentration, too much anxiety is detrimental. Perhaps because they are occupied with their own concerns about discovery and development of legal arguments, trial lawyers sometimes fail to appreciate the extent of this anxiety and the debilitating effects that it can have on witness performance during deposition and trial testimony. Some witnesses will do anything to escape the uncomfortable situation, even if it means agreeing to every suggestion offered by opposing counsel. Others talk excessively. Still others become confrontational or defensive. Regardless of the specific manifestation, excessive anxiety interferes with information processing and undermines witness performance.

This paper describes ten recommendations for preparing witnesses for deposition and trial testimony. While we routinely employ a variety of approaches to preparing witnesses for testimony – including the use of videotape feedback and research projects that subject witnesses to direct and cross-examination testimony before a panel of mock jurors – it is essential to recognize that communication skills training

is only one component of effective witness preparation. Effective preparation requires attention to each of the issues described in this paper with an eye toward increasing witness confidence and reducing anxiety.

### Starting Early

The most significant change in witness testimony during the past 10 years has been the expanded use of video deposition testimony. Video depositions increase the cognitive demands placed on witnesses who must be prepared to provide clear and concise substantive responses while portraying a positive demeanor. Video depositions require witnesses to appear more cooperative and forthcoming than is required if the deposition is simply transcribed.

*“Video depositions increase the cognitive demands placed on witnesses...”*

In fact, the possibility that bad video testimony will be played in front of a jury has diminished the traditional distinction between deposition testimony and trial testimony. Indeed, the old adage that witnesses should say as little as possible during deposition testimony may create a video image of a witness who is evasive and reluctant to testify. With video depositions, witnesses no longer have the luxury of being recalcitrant during the deposition and cooperative at trial. The use of video depositions requires a more nuanced approach by witnesses. Given these challenges, many of our clients begin witness preparation activities before deposition testimony in order to

help witnesses manage the complexity of “trial testimony” in a deposition setting. Preparation sessions before deposition testimony can enhance the effectiveness of deposition testimony and maximize the consistency between the deposition and trial testimony.

### Gain Commitment and Build Confidence

Company witnesses often believe that nothing good comes from their personal involvement in a civil lawsuit. Witnesses whose performance reviews and bonuses are tied to volume of sales or completion of a major project may be reluctant to spend the time necessary to prepare for effective testimony. Moreover, fact witnesses often harbor concerns about being blamed for an adverse verdict. In addition to a lack of commitment, we often find that fact witnesses distrust their lawyers. In combination, this lack of commitment to the process and lack of trust in the lawyers can undermine the motivation and effort of company witnesses.

In one extreme case, a critical fact witness simply refused to testify at trial and waited until the night before his scheduled testimony to inform his supervisor that he would not be attending trial the next day. More common examples of dysfunctional behavior include witnesses who never seem to find the time to review their deposition testimony, fact check specific issues, or make themselves available for preparation sessions in advance of their testimony. One strategy for gaining the confidence of a witness is to spend time building rapport with each witness and discussing any personal concerns that the witness may have



about testifying and then addressing those concerns. Although these activities may seem peripheral, they are essential for building trust and commitment to the process.

In one case, we learned through this rapport building process that a witness was nervous about testifying because he was worried that he would be asked about a previous DUI conviction. Another witness had Tourette Syndrome and was concerned about his appearance at trial. Sometimes, witnesses have more mundane concerns such as not understanding the overall purpose of their testimony or whether they have the knowledge to respond to specific questions on cross-examination. Time spent early in the preparation process identifying and discussing personal concerns will help to build confidence and commitment to the process.

### Explain The Big Picture

Because lawyers are immersed in the development of facts and legal arguments in the case, they sometimes assume that witnesses have an understanding of the claims and theories that will be developed at trial. However, witnesses are often confused about their role and what is expected of them. One essential step in the witness preparation process is to provide each witness with an overview of the case and a specific description of his or her role in presenting the evidence at trial. When witnesses understand the big picture and their specific role in painting that picture for the jury, it helps to reduce uncertainty and anxiety. Moreover, providing witnesses with a specific understanding of their role and the role of other witnesses helps to establish boundaries for anticipated testimony. This is particularly important for witnesses who may be predisposed to assume too much responsibility for winning the case.

### Tell The Truth

Good trial lawyers often overcome bad facts, but they seldom overcome bad witnesses. In nearly two decades of work and across hundreds of cases, we have experienced three significant adverse verdicts that were not anticipated when trial began. In all three cases, a significant company witness was caught lying on the witness stand. In each of those cases, once jurors concluded that a critical company witness was lying, little else mattered.

There are countless temptations for evading the truth. Sometimes witnesses who are fiercely loyal to the company assume too much responsibility for the outcome of the case. Sometimes witnesses are concerned that they will be blamed for testimony that acknowledges a bad act or omission. Sometimes witnesses are motivated to insulate themselves from blame and are unwilling to assume responsibility for an error in judgment. Regardless of the motivation, once a witness concludes that the truth is more harmful to the case than the prospect of being caught in a lie, the possibility of false testimony increases.

***“Good trial lawyers often overcome bad facts, but they seldom overcome bad witnesses.”***

To combat this propensity, jurors must understand and believe that truthful testimony is essential for a favorable outcome. Bear in mind, however, that the effectiveness of this admonition depends in part on the confidence that the witness has in the lawyers and an understanding of the catastrophic effect of being caught in a lie.

### Vet Problem Issues

The most significant challenge for fact

witnesses is deciding how to address points of vulnerability. Consequently, the most important aspect of witness preparation is to carefully discuss problem issues and help witnesses understand how to respond to the issues in a clear, concise, and confident fashion.

***“Nothing undermines witness credibility more than a protracted exchange that ends with a concession.”***

It is important to identify, at a strategic level, which issues will be conceded and then convince witnesses to make the concession quickly and confidently when the opportunity presents itself. Nothing undermines witness credibility more than a protracted exchange that ends with a concession. The longer the exchange, the more importance jurors assign to the concession. Instinctively, many witnesses strive to defend every issue, including those which must eventually be conceded. Lawyers are responsible for setting the strategy, convincing witnesses that some points must be conceded, and teaching witnesses how to make concessions quickly and confidently.

It bears mentioning that witnesses must also understand which issues cannot be conceded. Once these issues have been identified, witnesses must be encouraged to hold their ground while presenting the facts in a clear and convincing fashion. Simulated cross-examination sessions give witnesses the opportunity to practice defending or conceding an issue in response to challenging questions.

### Communication Skills Training

Too many jury consultants attempt a “communication makeover” with every witness. This approach is almost always counter-productive.



It is unrealistic to assume that witnesses who have been communicating a particular way for their entire adult lives will completely change their style of communication as a result of one or two witness preparation sessions. No matter how experienced the jury consultant may be, a “communication makeover” is an unrealistic aspiration that places too much stress on the witness.

Instead of a “communication makeover,” communication skills training should focus on a few specific recommendations for improving nonverbal behavior and tools for responding effectively to challenging questions. After these recommendations are presented, witnesses should be led through a series of simulated direct and cross examination questions to practice the process of listening to questions and then responding in a clear, concise, and persuasive manner.

It is important to avoid creating the perception that the testimony has been rehearsed with scripted responses. Instead, the simulated direct and cross examination testimony should prepare witnesses to respond to unanticipated questions and questions that do not flow in any particular order. While practice improves confidence and performance, it is critical not to create scripted responses.

### **Acknowledge Shortcomings, Own Mistakes**

Jurors understand that mistakes occur and rarely hold a witness to a standard of perfection. However, jurors expect witnesses to acknowledge their mistakes and take responsibility for them. In most cases, it is not a defendant’s conduct, but the motivation behind the conduct that leads to excessive verdicts. Witnesses who are reluctant to

admit shortcomings or acknowledge that an error occurred often cause jurors to become skeptical or angry. In contrast, witnesses who can acknowledge mistakes and focus testimony on the actions that were taken to correct them gain the trust and respect of the jury.

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In a fraud case several years ago, a company witness refused to acknowledge that he had been reprimanded and placed on probation for using bad judgment and failing to follow company procedures. His refusal to acknowledge that the company took steps to correct his bad judgment created the impression that the company did not care enough about the problem to correct the problem once it was detected. In that case, the reluctance of the witness to acknowledge that he made a mistake was much more detrimental to the outcome of the case than the mistake itself.

In almost every case, there are significant questions about judgment and decisions that were made. Jurors need to be reassured that your client has shown good judgment, not only to make correct decisions, but also to correct decisions that were made in error or resulted in unanticipated consequences. Failure to acknowledge shortcomings and admit mistakes undermines the credibility of the entire case presentation. Consequently, it is important to work with witnesses to identify mistakes that will be acknowledged and then to reassure the witness that admitting the mistake will not be detrimental to his or her own career.

### **Train Witnesses to Answer the Question**

Witnesses who lack experience testifying have

a tendency to avoid answering the questions that are asked of them. Sometimes witnesses are inattentive and “hear a different question” than the one that was asked. Sometimes witnesses answer a different question in hopes of avoiding a difficult admission of a critical fact. Perhaps most frequent are responses that begin with a long preamble before the response.

Witnesses rarely succeed in providing a non-responsive answers and their attempts to do so significantly undermine their credibility. Jurors tend to be very critical of witnesses who are non-responsive and conclude that they are evasive and uncooperative. Moreover, witnesses who provide a preamble with every reply lose the attention of jurors who are looking for direct and concise responses to questions.

Consequently, one of the most important aspects of witness preparation is to train witnesses to listen to the specific question that is being asked and then to answer that question – nothing more, nothing less. Of course, this instruction is easier given than followed.

Simulated testimony during witness preparation provides specific examples of non-responsive and evasive answers. Constructive feedback can help witnesses recognize a non-responsive answer and help them correct the problem. Perhaps most important, witnesses need to understand that they are unlikely to effectively spar with or outmaneuver opposing counsel during their testimony.

### **Tell the Personal Story**

Jurors are interested in human interest stories. Indeed, some jurors place more importance on the character of the witness than they do on the substance of the testimony. While it is important to properly gauge the amount of personal



information that should be included in the presentation of a witness, a discussion the personal background and work activities of the witness are critically important to effective testimony.

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In one recent case, the CEO of a large corporation was quite reticent to provide any background information about himself. A test of his credibility during simulated direct and cross-examination in front of a panel of mock jurors underscored the significance of the personal story. Jurors in that study concluded that the witness was aloof, elitist, and born with a silver spoon in his mouth. The fact that he was a successful entrepreneur who built a large corporation was perceived negatively by most jurors.

A subsequent study involving simulated direct and cross-examination testimony and a separate panel of mock jurors produced a remarkably different result. After spending ample time discussing the CEO's modest upbringing, education at outstanding universities that was funded by scholarships and work study programs, and early work on the “ground floor” of a large technology company, jurors appreciated the hard work and determination that preceded the founding and development of the company. Mock jurors in the second study described the CEO as a great American success story, someone who worked his way up the corporate ladder from modest roots.

Although there were other improvements in the CEO's testimony from the first to the second communication assessment study, the remarkable improvement in credibility stemmed from a presentation of the human interest story.

Understanding the background of the witness led jurors to conclude “he is like one of us” rather than “he was born with a silver spoon in his mouth.”

Regardless of whether the witness is a CEO or a clerk working in the accounting department, jurors want to know something personal about each witness. The personal narrative creates a framework for evaluating the character of the witness. When jurors develop an affinity with a witness, they tend to give the witness the benefit of the doubt when confronted with conflicting testimony from opposing witnesses.

### Find the Witness' Comfort Zone

In an accounting fraud case several years ago, we had difficult time preparing an accountant for his testimony. Although he was highly qualified and meticulous in his work, the accountant had a difficult time explaining how he conducted an audit following generally accepted accounting principles. Every time we asked a question he wanted to reference his work papers. Realizing that his work papers created a comfort zone for him, we organized his trial testimony around the work papers. He led the jurors step-by-step through his work papers, stopping at key places to highlight important conclusions. Jurors were impressed with details like pencil check marks and math calculations in the margins. Although they did not understand the substance of his testimony, jurors concluded that the accountant worked the problem carefully and correctly.

During a hearing in an racial discrimination case, one manager had a very difficult time describing the process he used to evaluate employee performance and make recommendations for a reduction in force. Although he could not describe the process verbally, once he was provided with his work papers, he was able to show the judge how he developed a

matrix and assigned values to variables in the matrix. The judge quickly became convinced that the manager developed and followed an intricate evaluation process based on criteria that were unrelated to race.

In both of the above examples, the key to successful testimony was recognizing that otherwise nervous witnesses took comfort in their work papers. Although reliance on work papers may not always be the best approach, creating a comfort zone for witnesses enhances their confidence and provides a sense of normalcy during their trial testimony.

### Summary

Our experience working with witnesses including CEOs, middle managers, hourly employees, accountants, lawyers, doctors, inventors, engineers, entrepreneurs, salespeople, nuns, and convicted felons, has led us to the conclusion that despite their obvious differences, there is a common set of elements that affect the performance of most witnesses. Attention to these issues during the preparation process will help to improve the confidence and credibility of witness presentations.

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