

Building a Better Witness

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Defense Comment

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Is there a trial lawyer alive who hasn't had a witness that, in one way or another, just didn't "get it?" Or who wanted to pull a floundering witness off the stand and testify for him? Every litigator has had the experience of watching a blundering witness drag down an otherwise winnable case. Unfortunately, no matter how effective their opening statement or closing argument may be, trial lawyers are completely dependent on their witnesses' credibility. In fact, studies show that the single greatest factor in juror decision-making is witness testimony. Having conducted thousands of focus groups and post-verdict interviews, jury consultants have learned a great deal about how jurors perceive, evaluate and react to witnesses. We've also learned exactly what jurors need from witnesses to respect, believe and identify with them. Witness performance can be tremendously enhanced if standard preparation^{3/4} the review of facts and answers to questions^{3/4} is combined with some simple psychology; and understanding of human nature. Trial attorneys are amazed by the transformation of ineffective witnesses when these principles are applied.

Most attorneys lack the necessary skills to work with witnesses because they lack the psychological training or the empirical knowledge of how jurors evaluate witnesses. They accept standard performances from their witnesses because they simply don't know how to successfully intervene. In our experience, nearly all witness problems can be resolved by providing witnesses with the insight and tools they need to improve performance at trial.

Understanding the Terrain

Witnesses perform better when they understand the terrain^{3/4} by learning the rules and culture of the courtroom, and by knowing what each side is attempting to achieve during direct and cross-examination. Like anyone else, witnesses need to have a sense of control in order to do their best work. Simply reviewing their testimony is not enough. Teach witnesses that testifying involves two separate and distinct crafts or skill sets^{3/4} one for direct and one for cross-examination.

Direct Examination: Using Teaching Techniques

The skills involved in testifying on direct differ from those needed in cross-examination. Witnesses need to understand that direct testimony requires them to explain their facts to the jurors. Research shows that witnesses who communicate as teachers are more positively received by jurors than witnesses who don't

To teach and communicate facts effectively, witnesses need to face jurors, speaking to them the same way they would explain something to a familiar group such as they sometimes do at work, home or in social situations. When working with witnesses, have them imagine they are sitting at their own kitchen table talking to a group of friends. If they can access the same communication skills they use in such a familiar environment, they will be much more comfortable on the stand. They need to employ their own language and vocabulary in presenting this information. Witnesses who are scripted or told exactly what to say by their lawyers often make mistakes or are perceived by jurors as rehearsed. When they use their own words to tell their story, they are more likely to answer with confidence and consistency. (Editor's Note: 'See "Trial Classics," by John Hourihan, on page 31 of this issue for an historic example of rehearsed testimony gone sour.'))

Research on the components of witness credibility has taught us that the major concern of jurors during direct testimony is whether the witness can look them in the eye when testifying. We have heard thousands of times that jurors did not like a particular witness because that person had little or no eye contact with them. This is a basic human reaction; all of us judge a person's credibility by noticing whether they can look us in the eye while speaking.

Jurors are also very sensitive to witness testimony that is perceived as manipulative. Bring to the witness' attention any behavior that involves selling or ingratiating themselves to the jury, as well as any attempts at acting. Jurors pick this up^{3/4} consciously or unconsciously^{3/4} and react negatively to it. The trial attorney is

the salesperson, not the witness. Anything that interferes with a clear, straight recitation of the facts negatively impacts a witness's credibility.

Cross-Examination: Understanding It's All Technique

Putting a lay person onto the stand with a skilled cross-examiner is analogous to putting him into a boxing match with a prizefighter. The hapless victim in the ring would have no idea of the feints, jabs, punches and combinations the boxer would throw at him. In essence, he would be a sitting duck. The same is true on the witness stand. Cross-examiners score points by using refined technique on unsuspecting witnesses. When witnesses are taught to be aware that EVERYTHING the cross-examiner does is simply technique, they are far more effective on the stand. It is important to explain to witnesses that the cross-examiner is attempting to control them at all times; that he or she has no intention of letting them tell their story, and that the cross-examiner's main purpose is to make the witness look like a liar, cheat, fool or someone who is mistaken or has memory problems. Witnesses must learn how to deal with hostile questions, interruptions, abrupt changes of subject, sarcasm and derogatory remarks. Prepare witnesses to respond to compound statements and questions, attempts at controlling the pace, traps, and "gotcha's."

Train witnesses to keep their eyes on the cross-examiner at all times and be aware of what he is attempting to do. Witnesses must learn that trial lawyers use techniques to command the interaction and use wordcraft to misconvey and mischaracterize facts to the jury.

The witness must be taught how to stand up for himself and respectfully defuse the cross-examiner's tactics. For example, in the William Kennedy Smith case, one of the first questions the prosecutor asked after Smith's direct testimony was whether Smith expected the jury to believe the story he had just told. Smith simply^{3/4} and very successfully^{3/4} replied: "It's not a story, it's the truth."

It's imperative to teach witnesses how to deal with the sub-textual messages built into the cross-examiner's statements and questions before dealing with substance, much like Smith did in the above example. It is also crucial that witnesses do not try to convince the cross-examiner of the facts or get drawn into a dispute with the attorney that appears competitive or immature. Jurors view such behaviors as defensive, which is damaging to witness credibility.

Teach Witnesses to Take Control

Witnesses often do not know they have the right to review documents or ask for clarification, and that they can control and slow the pace by taking a drink of water, or by asking for a restatement of the question. In short, the witness should be prepared so that he or she can sit poised in the witness stand without being unnerved by anything the cross-examiner says or does. It is a joy to watch witnesses who feel confident that they can successfully manage anything the cross-examiner throws at them. This confidence communicates to a jury.

The Hidden Rulebook

Witnesses invariably operate under an invisible set of rules when on the stand: "When I sit here, I will give up most, if not all, of my personal power and will relate and react as if placed in a mental straight jacket." They envision the judge as a domineering authority eager to suppress any self-assertion by the witness.

Witnesses need to know that there are no rules requiring them to be passive and that the judge is not concerned with how they respond to the cross-examiner or how they present their testimony. Teach them that the judge's purview is in making legal decisions and acting as a legal referee^{3/4} not in controlling how they answer on the witness stand.

Witnesses react to these inaccurate fantasies of courtroom rules and commandments as if they were written in stone. Point out the passive behavior that stems from following these imagined rules. The indications of this invisible rulebook is obvious during cross-examination practice.

If your witness is having trouble defending himself during the cross, ask him if he would be relating the same way if he was sitting at his kitchen table and someone was trying to verbally beat-up on him in front of others. How would he handle it?

Ask why he reacts so differently with the same dynamic when it occurs in a courtroom? Show him how the unconscious "rulebook" in his head prevented him from taking care of himself the way he would in a natural situation.

Once a witness realizes that these rules do not exist in reality, a sense of liberation occurs. It is wonderful to watch the metamorphosis when a witness realizes he doesn't have to hang his personal power at the door when he takes the stand. This knowledge and feeling of freedom increases a witness's confidence and, consequently, credibility.

Dealing With Unreachable, Unmanageable Witnesses

There is no such thing as a witness who can't be helped.

This concept is more a reflection of the lawyer's anxiety than of any particular witness. Everyone is reachable in some way; therefore it is always worth a try. The few witnesses who have been truly inaccessible fall into the category of severely disconnected or mentally impaired.

Putting It Into Practice

A recent witness preparation case in the Deep South provides a good example of the multiple problems that can occur with witnesses in trial.

In this case, the defense lawyers were convinced that their witness^{3/4} a local blue-collar sales agent^{3/4} was so bad that he reeked of guilt. They felt that nothing could be done with him. To the attorneys' surprise, however, it took only one two-hour prep session to turn this witness around.

Sitting around the conference table with two attorneys, the witness was quiet and inarticulate, answering cross examination questions with barely audible "Yes, sir's" and "No, sir's." Besides being passive, he was clearly not a verbal personality type. He consistently deferred to the attorneys and seemed overwhelmed by the legal environment. He appeared intimidated by highly educated professionals in a system that demands verbal proficiency, and the resulting anxiety interfered with his ability to communicate and defend himself in a courtroom situation.

This witness was also confused in that he never expected that cross-examiners would be so hostile and manipulative. He was operating under the assumption that the lawyers would all be considerate and that everyone involved was interested in justice prevailing. Once he realized that it was truly an adversarial system and that each lawyer was out to win for his respective clients, he began to understand the nature of the game.

This witness needed someone to recognize what was happening and educate him on the "rules of the game." Because the lawyers were unable to correctly diagnose the reason for his problematic behavior, they became exasperated, dismissing him as a "dumb cracker" who would make a poor witness.

After training, however, this witness realized how his anxiety and behavior stemmed from his unfamiliarity with courtroom procedures. It was then possible to build his confidence by helping him learn how to testify more effectively.

This was not accomplished all at once. The witness's sense of achievement was built up slowly; by addressing one problem at a time, letting each new insight influence how he would deal with successive questions. By educating him in this manner, his perspective was altered, which then changed how he dealt with the situation. The witness also learned how his deference to educated, professional people caused him to be intimidated by them. He then understood how this intimidation would be interpreted by jurors as a sign of guilt and how it also prevented him from defending his own version of events.

By the end of the two-hour session this individual was forceful when needed, dealt effectively with a variety of cross-examination techniques, and stood up for himself very well. The attorneys never thought this could be accomplished. They thought he was a lost cause.

Making the Time to Win Your Case

Trial attorneys are often too overloaded to take the added time to prepare witnesses the way each witness needs to be prepared. Yet the approach described above does not add much time to overall trial preparation. The issue is switching the perspective while working with witnesses, not necessarily adding additional time.

When you prepare a witness from a psychological standpoint as well as reviewing facts, it cuts directly to the source of problems and makes the process more gratifying to all involved. Approaching witness preparation from this perspective gives litigators a powerful trial preparation tool, as well as a better result in the court room.