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The Devil in the Details:
Hidden Costs in "Traditional" Witness Preparation

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The scenario of "nervous hoping" that a witness will perform well at deposition or trial has become all too familiar in litigation, with the pervasive sentiment that a certain degree of feeling helpless is an inevitable part of witness testimony. Jokes connected with kicking the deponent under the table or resorting to other surreptitious means to send messages are often humorous on the surface, but in reality are terrifying at the core.

As a result of thirty years of refinement in witness preparation techniques, this scenario is unnecessary – and unnecessarily costly. Ironically, the expense involved in preventing poor witness performance is dwarfed by the cost of its consequences, and it's not as though litigation managers are *unwilling* to take measures to ameliorate the problem – it seems more that, even after thirty years, many are still not quite sure *how*.

A general counsel of a major bank was recently sweating a multi-million dollar exposure that was entirely the result of a disastrous deposition by the key player in the dispute. When asked how the deposition was prepared, he sighed and pointed to the fact that one of the largest law firms in the country had prepared the witness, and, tossing a stapled bundle of about twelve pages onto the table, stated, "They gave him this to read." Upon perusal, the document contained standard admonishments such as "Do not volunteer information" and "Answer only the question that was asked." Reasonable enough, but obviously woefully inadequate – yet no one objected to this training as inadequate before the deposition was taken.

This is not to suggest that lawyers typically prepare witnesses like this, but the fact is that most lawyers are not trained in the subtle nuances of nonverbal communication that govern how impressions of people are made. Moreover, assumptions are made by legal teams in today's "trial by hurry" atmosphere that do not comport with the realities of how witnesses must be trained in order to ensure a credible demeanor at critical junctures when the rubber hits the road in litigation. In particular, while it appears that most trial teams assume that witness training requires a transfer of *knowledge* or *awareness* to the witness, to a greater extent the witness requires an accumulation of *skill* that can only be instilled by adequate instruction and *practice*. It is assumed that "sitting down and talking" is enough when usually it is not, any more than "sitting down and talking" would help a mediocre golfer become a good one, or transform a naïve student into a good, safe driver on the road.

Hidden Messages

Jurors often start with a "presumption of validity" in a case ("If the defendant is here, testifying in court, he/she probably did something wrong") and when under pressure in a deposition, mannerisms that would otherwise be construed as shyness, nervousness, impatience or simple annoyance are instead interpreted as signs of "guilt." These mannerisms take on significance as a function of various principles of nonverbal communication and are ultimately connected to deeply engrained, stable temperament characteristics of the witness that require concentrated efforts in order to

accomplish effective remediation.

For example, in a 1989 antitrust case in federal court, the plaintiff case opened up with successive videotaped depositions portraying some of the most smug, arrogant witness demeanor one could imagine. The corporate representatives acted hostile, condescending, and generally insouciant while being charged with conspiring to impede the construction of an interstate pipeline. There was nothing the defense could do – as lead defense counsel explained later, "I nearly fell out of my seat." (The lead defense counsel was watching witnesses of co-defendants that had settled out and over which he had had no control). The jury went on to award $340 million with treble damages, bringing the total award to over $1 billion.

The entire realm of communication is comprised of the totality of means in which a message is conveyed, much of it relating to subjective reactions; affect; tone; mannerisms; and other aspects of nonverbal channels that transmit "hidden messages" (in *Nonverbal Communication*, [Mehrabian, 1972], the author notes that 93% of communication is nonverbal, with only 7% relegated to verbal content). And while most counsel seem to be good judges of when these nonverbal messages are connoting a favorable versus unfavorable image of a witness, the more elusive key is *inducing* beneficial behavior by a witness, and in particular, making it "*stick*."

Moreover, with regard to verbal content – which can be of greater importance in depositions that are not videotaped – there are often psychological barriers in a witness that impede the process of conveying the desired information. Some witnesses "freeze up" and look like a deer in the headlights; others start agreeing with just about anything; some are unable to control their emotions (anger, fear, anxiety, apathy, etc) and still others speculate, concoct phony scenarios, or just seem unable to carry a coherent thematic position. Many of these problems are rooted in adverse psychological reactions to the testimony setting, and can be remedied with the proper training. Others are linked to personality traits or stable temperament characteristics, as noted previously, requiring more intensive efforts for amelioration.

The Cost

In a large class action race discrimination case, in which one of North America's largest employers was being sued for systematic oppression of African Americans, a White senior manager stated in his deposition that "the 'N' word could be considered as a term of endearment." While one could argue whether this was a central factor in the case settling for over $100 million, more rigorous research frameworks have proven the *economic* importance of witness credibility to bottom-line dollar results in a much more incontrovertible fashion.

For example, we recently conducted tandem mock trial projects under tightly controlled conditions, in which two different samples of research participants were recruited and constrained to strict equivalence in terms of demographic and attitudinal parameters. However, it had not been planned this way from the start; in fact what had happened was that, in the first project, the testimony of two insurance claims

adjusters was found to be so horrendous that it was decided the actual trial could (and likely should) be run without them, since they were outside of subpoena range. This prompted the decision to test the effects of leaving their "images" out entirely – in other words, include the same verbal content in the testimony (the identical deposition text, or "Q&A") but leave out the video, with the faces, voice, tone, and other nonverbal information thereby omitted. The new project created for the second day thus utilized a new but equivalent sample of test respondents, subjected to the *exact same claims, responses, evidence, issues and arguments*, but the persona of the witness testimony of these two claims adjusters was summarily deleted; that is, the "Q&A" from the depositions was read, but jurors did not get to see the faces, or hear the voices of the witnesses. The damages rendered by juries averaged $190 million on the first day; on the second day, juries of the matched group awarded $2 million with the witnesses' personas deleted from the equation. In other words, the nonverbal behavior of the claims adjusters accounted for $188 million in differences between the damages awards across the two days.

While the prior case exemplars have involved sums in the hundred million dollar ranges, for the more typical case, the dollar value of exposure in litigation generally moves up and down with each deposition on a somewhat smaller scale. Each deposition has some non-zero dollar value impacting the expected damages, or exposure connected with the case. Typically, these amounts are in the tens of thousands or hundreds of thousands as each witness provides his or her individual input into the totality of exposure. Examples cited up to this point have been somewhat extreme, but the principles hold on a scale commensurate with the magnitude or dimensions of each case and the severity of its claims.

As experienced by litigation managers – e.g., in-house counsel – the net effect is often a persistent feeling of helplessness from being "nickel and dimed" to death by one substandard deposition after another, case after case, month after month. As just one example, consider the quote from a frustrated General Counsel of a large Southeastern health system:

> I am sick and tired of opposing attorneys using bad depositions against me during mediation and settlement discussions; I end up paying out more on that case than I should, which needs to stop. I hate surprises. I hate being told that a witness will do 'just fine' and then they go bomb the deposition. These 'bombs' end up costing an extraordinary amount of money.

If this scenario is familiar to the reader, no additional explanation is necessary. If it is not, then it should be considered as a warning as to what can easily occur when deposition training is not given the proper attention as a standard means of preparing for a case.

Most in-house counsel expect their lawyers to be able to train witnesses adequately, but persuasive qualities of witnesses are a complex mixture of psychological variables predicated on nonverbal behavior – areas in which lawyers are simply not qualified to produce optimal results. Even a few minutes of casual observation in court yields the

obvious conclusion that what is happening between the witness and the jury during the day's events is primarily psychological, not legal in nature.

Witness credibility is a *psychological* issue, and the entire case exposure depends on it. Expecting lawyers to produce maximally effective witness training on their own is not much different than expecting a psychologist to write a convincing Motion for Summary Judgment. However, in the long run, even the need to go outside the trial team for help from an experienced psychologist in this area does not mean that more money will be spent. Ironically, it means *less* will be spent – if the decision-maker is willing to look past short-term costs and consider the entire picture.

Examination of short term versus long term costs in this domain reveals that the cost of remediating witness credibility problems does not operate on the same dollar scale as case exposure. The costs of effective witness training typically amount to a percentage of a percentage, a minute fraction, of the dollar value that each deposition adds to – or subtracts from – the exposure total.

The Missing Ingredient

While in the early days of trial consulting clients were told that "jurors make up their minds after opening statements," post-trial juror interviews over the last few decades have proven that this is a gross oversimplification. In fact, if one generalization is to be made, the most accurate one would appear to be that *jurors make up their minds during the fact witness testimony*. Our compilation of actual juror interviews points to the existence of the "cognitive map" of jury psychology: Jurors start every case in the same way – with basic questions on the human level: *Who are these people?* (who are the litigants themselves, not the attorneys). Are they trustworthy? Do I like them? Do they seem honest? Are they good people? This is a primitive decision that is made very quickly by jurors using subjective means incorporating a diverse array of nonverbal criteria. But it is a decision that is made based on the witnesses.

The second question in the "cognitive map" is *What are their duties and responsibilities?* What is it that they did that they should not have done, or what is it that they failed to do that they were obligated to do? The manner in which these two questions are answered tilts the entire psychological playing field for the whole trial.

Witness training, therefore, adjusts the "cognitive map" in a profound manner. Not surprisingly, affecting the outcome of the case in this way requires a substantial amount of intensive effort. As observed previously, most trial teams appear to regard witness training as some variation of "sitting down and talking to the witness" when, in reality, witness training has more in common with teaching your five year old how to ride a bike. Creating the necessary impact to alter the flow of a case through enhancement of witness credibility is not a matter of finding a magic key, or a hidden shortcut. It is a matter of sweat, diligence and hard work. In other words, the key missing element from most trial teams is the systematic *implementation of practice*.

Practice – and in particular, practice with videotape – along with the resolve to do it over and over until the results are right – represents the single most overlooked aspect of witness training as currently implemented by most trial teams. Concerns about discoverability of videotape may often interfere with the necessity of making video recordings of the witness to ensure competent testimony in this manner. Without rendering an opinion in this regard, it is nonetheless emphasized that, regardless of discoverability issues, witnesses are not ready to testify until they have mastered numerous behaviors that resist verbal description (i.e., the behaviors can only be referenced by pointing to video clips). Far too often they are not given the opportunity to practice and deal with such behaviors, either as a result of the "trial by hurry" factor, or concerns about the discoverability of videotape, or both. But most typically the bottom-line reason for poor witness performance is the assumption that "sitting down and talking" is sufficient when in reality the skills that need to be transferred require practice, with video feedback.

Simply stated, many witnesses need to see what they are doing (or not doing) before they can become fully aware of the subtle nuances of nonverbal behavior that can cripple their persona. With these considerations in mind, it may indeed be the case that trial teams should take a second look at the comparative vulnerabilities entailed in discovery of a videotape versus the vulnerabilities connected with poor witness testimony that occur because the witness was not properly trained. Many witnesses simply cannot absorb the severity of their shortcomings without being able to see them. In the final analysis, some difficult decisions may need to be made regarding the relative risks involved with discovery versus those connected with unstable witness performance.

The Ten Commandments

While the requisite skills for attaining high levels of credibility require a great deal of explanation to put them into actual practice effectively, they can, to a substantial degree, be summarized succinctly in a general fashion. First, it is important to review a few basic axioms of jury psychology in order to improve witness performance.

Jurors are desperate to understand, because they are trying to please the judge and do their civic duty. Therefore, they expect a witness to be a "clear window" to the truth. They do not appreciate embellishments, delays, and tricks of any kind. Moreover, they want to go home. This means they want questions answered concisely and directly – as does the judge.

Jurors want to be led to a comprehensive understanding as quickly as possible with a minimum of cognitive discomfort. While many "non-answers" occur because a witness is trying to be clever, more commonly *they occur because the witness is thinking about potential responses when the question is being asked*. In other words, witnesses inadvertently impede their own attention and concentration levels by trying to listen and think simultaneously. From a neurocognitive standpoint, the brain is forced to split the vital resources necessary to listen carefully

and respond appropriately, which leads to poor listening skills and careless mistakes in responses.

For example, talking on a mobile phone while driving is dangerous not because the driver is looking away from the road, but more because the neural pathways required for cell phone usage are the same ones required to make judicious and prudent safety decisions while driving a car. In essence, cell phone use "competes" with the same brain functions that are needed for driving. In the same way, the most salient problem encountered with most witnesses is a failure to adequately listen to the question, and the primary cause of this problem is that the witness is using the neural pathways needed for listening to the question in pursuance of some other goal – generally, a goal connected with formulating a response, outsmarting the interrogator, or some other motives unconnected with the simple task of listening to the question.

Therefore, these considerations lead to three commandments:

1. Thou shalt listen to the question, forsaking all other thoughts at this juncture;

2. Thou shalt answer only the question that has been asked and only after that question has been completed; and

3. Thou shalt meet the jury where *they* are and meet their psychological needs first (trust, likability, honesty, etc).

The judge and the jury are aligned in the sense that both want to get the case finished in a timely manner. Therefore, the "no-nonsense" rule of directness in responses reigns supreme. At the same time, however, jurors do react as humans and like things that other people like. A sound piece of advice, therefore, is to tell potential witnesses to decide in advance that they *like* the jury and that they *care* that the jurors understand. Moreover, there is a double standard in jury psychology: Attorneys are "allowed" to become histrionic, aggressive, and combative – witnesses, however, do not enjoy this luxury. Thus, the following commandments also come into play:

4. Thou shalt not get into arguments, become sarcastic, or show anger or frustration of any kind;

5. Thou shalt care about the jury and care whether they understand.

6. Thou shalt be professional, confident and friendly at all times, both verbally and nonverbally.

While a comprehensive overview of effective nonverbal behavior (facial expressions, vocal tone, eye contact, posture, etc.) is beyond the scope of the present treatise, it is noted that many of the most optimal nonverbal behaviors come into play naturally and effortlessly when the witness fully adopts the prior admonitions. For example, one question that is frequently asked by witnesses is "How often should I look at the jury?" One answer to this question is that, if the witness truly *cares that the jury understands*, the manner and extent to which the witness looks at the jury will flow naturally, as he engages in explanations or answers any questions that require more than a few words. This works far

better than a forced, robotic back and forth head movement arising from a conscious decision to look at the jury with each and every response, not matter how short.

One colleague remarked that "the problem with most witnesses is that they forget who they are and become someone else on the witness stand." In response to the unnatural environment that is litigation, many witnesses "morph into something else" by means of the unnatural responses that are a result of this unnatural environment. Accordingly, a vital part of witness training is to ensure that the witness maintains his or her own innate characteristics that create affinity among others, making a special effort to preserve natural reactions that are charismatic, endearing and positive. The following commandments therefore are applicable:

7. Thou shalt not memorize or rehearse your testimony;

8. Thou shalt testify naturally, only according to your best current recollection.

Holding one's own, consistency, and coherency are of course key elements in the need for a witness to "cash the checks" written by the lawyer in opening. Establishment of a thematic structure that is invariant and reliable regardless of the pressure being exerted in a hostile cross examination is essential to a solid impression of credibility. This "thematic structure" is intended to mean essentially a set of lynchpin, cornerstone, or anchoring concepts that unify, integrate, and summarize a witness' essential position. Deriving and confirming the substantive content of these concepts requires the knowledge of what is in the case evidence, what the core theory of the case is, and other factors. These considerations lead to the final commandments:

9. Thou shalt do thy homework;

10. Thou shalt know thine rights.

The "rights" of a witness pertain to various entitlements or privileges – for example the witness needs to learn how to protect his testimony from becoming twisted, distorted, mischaracterized, and even interrupted – as well as the requirements that the witness know what he or she is allowed to do in certain situations – like refusing to answer a question without seeing a supporting document, if necessary. While exemplars are too numerous to list exhaustively at present, the final commandments are, in many instances, the most critical of all.

Some admonishments are applicable to some environments (e.g., in depositions, do not volunteer information) but not others (in the courtroom, sometimes strategically beneficial information needs to be introduced by a witness or otherwise "inserted" to combat a tough cross). Moreover, there are other aspects of witness training that should not be considered as general as a commandment per se, since they are conditional in nature. For example, while witnesses are warned never to get angry, in some instances a "touch of indignance" may be just the ticket to add a necessary dimension of credibility to a certain response.

Conclusions

While the awareness of the key tactical value of witness testimony is obviously not a new development, the continued appearance of witness performance that is sadly lacking in credibility points to the need for an increased understanding of the flaws in "status quo" witness preparation procedures. Two principal deficiencies most commonly observed in witness preparation as typically implemented are: 1) the omission of structured practice using video feedback, with the recognition that repeated sessions are often required; and, 2) the erroneous assumption that a legal team can effectively incorporate psychological principles of nonverbal communication into witness preparation.

Simple economic analyses of the detrimental impact of substandard witness performance on exposure point to the obvious conclusion that witness training by experienced psychologists can be extremely cost effective. The chief impediment to the use of psychologists in witness training is the apparent belief that incorporation of such expertise within the legal team will end up costing more, and in the short term, that analysis is correct. However, in the longer term, the decision *not* to use such expertise frequently has *far more expensive results*, once mediation, settlement, and jury awards have been taken into account.

About the Authors

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