



ARMING WITNESSES FOR SUCCESS: TIPS AND TOOLS FOR EFFECTIVE DEPOSITION PREPARATION AND PRACTICE SESSIONS

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A 2012 National Institute of Mental Health study found 75% of Americans suffer from communication anxiety associated with public speaking. Other surveys show many Americans rate public speaking as their greatest fear, just ahead of dying in a plane crash and drowning. The implications are significant. Studies show communication anxiety leads to perceptions of the speaker as less attractive, less intelligent, and less capable. Other studies show a strong negative association between this anxiety and the overall cognitive performance of the speaker during the communication act. Communication anxiety even leads to physical reactions in the speaker, such as increased blood pressure, heart rate, numbness, shortness of breath, heart palpitations, sweating, stomach distress, and nausea.



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A deposition setting only compounds these problems, bringing its own unique combination of stress, complexity, and communication hurdles. Witnesses can be blinded by self-interest, worried about “screwing up” or “losing the case,” intimidated by appeals to the authority of the judge, distracted by the tactics of opposing counsel, or simply confused by the process or case complexities. There is a large body of research that shows the questioning techniques deployed in cross-examination can confuse and mislead a witness, ultimately undermining the accuracy of the testimony. These barriers often interact to undermine the credibility of the witness. For example, studies in nonverbal communication have repeatedly shown, when a speaker’s verbal message conflicts with his or her verbal message, the nonverbal message prevails. In other words, a nervous witness who provides “good” substantive answers may still prove detrimental to the case. In my own practice, I’ve seen corporate witnesses whose substantive answers were near perfection, but whose nonverbal performance on the stand erased any benefit brought by the perfect answers. In these situations, jurors who dislike a witness because of his or her nonverbal performance will explain away the “good” answers by arguing he or she is lying, a talking head, or something else.



Conversely, I’ve seen witnesses who “screwed up” on the substance, but came across as very likeable. In these instances, the jurors did not notice or did not care about the “screw ups.” For example, in a medical malpractice case, jurors may let a likable health care provider “off the hook” if the provider comes across as the type of person the jurors would want to receive health care from.

UNDERPREPARED WITNESSES

Credibility assessments of witnesses by a trier-of-fact are significantly influenced nonverbal behavior. Yet, the typical witness preparation session between a witness and an attorney tends to focus on a discussion of the key topics and a review of important documents with no actual testimony practice. In other words, what sometimes matters most (the nonverbal presentation) receives little or no attention. The consequences can be



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significant. Poor testimony can make a case more difficult to settle or even increase the likelihood of losing on summary judgment.



THE IMPORTANCE OF PRACTICE

Practice is crucial to success. Repetition makes us more comfortable with any activity. In litigation, it desensitizes the witness to the panic, fear, or anxiety associated with their testimony. It familiarizes them with an unfamiliar and uncomfortable communication environment and helps them understand that they are simply communicating, not performing. Additionally, practice sessions can provide witnesses with the tools they need to overcome common testimony hurdles and arm witnesses with confidence in their ability to successfully navigate the otherwise cumbersome process. Finally, research shows prepared witnesses are significantly more likely than their unprepared counterparts to provide correct responses to cross-examination questions.

Practice should be the primary focus of any witness preparation session. No less than two hours should be devoted to pure practice with focus on both the nonverbal presentation and the substantive issues. For example, rather than telling a witness how to deal with a particular topic, ask him or her questions about the topic while practicing and see how he or she deals with it. The end result will be a significant improvement in the overall quality of your witness's testimony.

COMPONENTS OF AN EFFECTIVE DEPOSITION PRACTICE SESSION

Overview The most effective preparation sessions minimize the tasks for the witness and streamlines the case. Witnesses need to feel capable. The biggest risk of any pre-deposition session with a witness, regardless of form, is



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overwhelming the witness with information about the case, process, etc., to the extent of diminished returns. If everything is important, nothing is important. A few general rules about the process and a global view of the case can reassure the witness that the process is manageable and provide confidence in his or her ability to tell the truth well.

Logistics The ideal preparation session lasts 3-6 hours and is primarily broken up into 10-15 minutes role-playing segments of testimony practice. It should occur no more than two weeks out from the witness's deposition (the closer in time, the better). Sometimes, it's possible to hold the prep session in the actual room where the deposition is going to take place (i.e. at the attorney's office). This can help the witness become more comfortable by familiarizing him or her with the location, thereby eliminating one of the many "unknowns." Attorneys are encouraged to ask a colleague at their firm to play the role of opposing counsel. While not essential, this can create a better role-playing environment by forcing the witness to answer questions from an unfamiliar face, as will be the case with opposing counsel. If a colleague is not available, the attorney should play the role of opposing counsel.

Video Playback Video playback can provide a valuable feedback tool to allow the witness to see the strengths and weaknesses of his or her testimony and presentation rather than take the attorney's word for it. This is particularly effective in light of the fact that many witnesses unknowingly engage in problematic nonverbal behaviors. Sometimes, it's necessary to show them video of their testimony to help them appreciate the nature and extent of the problematic behavior. It is not necessary to have the witness watch the entire 10-15 role-playing segment. Instead, choose a few clips that highlight both strengths and weaknesses. It is important to highlight things the witness has done well in order to maintain confidence.

Safe Harbors One often-overlooked reality of witness testimony is how its entire scope can typically be reduced to 3-5 simple, thematic points. It does not mean there are not a hundred details to address, but instead, those hundred details are subordinated to broader thematic cornerstones of the case, making the substance significantly more manageable for the witness. Furthermore, it provides the added advantage of helping the witness



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understand how to tackle difficult questions or issues by bringing the answer back to one of the key safe harbors. Finally, this global view helps the witness understand what wins the battle versus what wins the war in his or her testimony, which can be crucial to his or her credibility. The attorney and witness should discuss the safe harbors at the start of any prep session.

The Ground-Rules Effective deposition practice sessions focus on ground rules that arm the witness to tackle the vast majority of issues that may arise during the deposition. In my personal experience preparing witnesses over the last decade, there are five issues that can account for the vast majority of problems a witness experiences in a deposition. Identifying these five issues at the start and tying subsequent feedback to them empowers the witness by helping him or her perceive the problems and hurdles as few and manageable. Here are the five ground-rules:

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- ◆ *A deposition is an exercise in listening.* While the witness tends to focus on the talking part, the reality of depositions is that they are primarily an exercise in listening. The witness needs to understand the importance of listening closely to the entire question before thinking about it or providing his or her answer. Explaining the importance of listening and taking the deposition one question at a time can help ease any stress or anxiety. Unfortunately, many witnesses start thinking about their answer (and consequently, stop listening to the question) halfway through the question once they think they know what is being asked. A sure sign of this is answers that start before or immediately after the question is asked, removing any opportunity for objections. In some instances, I've had witnesses count to three out loud before every answer for an entire 15-20 practice segment to help them internalize the process of waiting a moment before answering.
- ◆ *Answer only the question at hand.* A common witness problem is attempting to guess where a question is going and focusing the answer on the anticipated direction rather than the actual question. A silly example is the question, "do you know what your phone number is?" Rather than simply replying "yes," many witnesses would instead provide their actual phone number, which is not what the question asked. Witnesses need to understand the dangers of providing information that is nonresponsive to the question at hand and appreciate that such answers can actually prolong the painful



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deposition process by opening up new lines of questions that might not have otherwise been asked.

- ◆ *There are three sources of content.* With the exception of corporate representatives (i.e. 30 (b)(6)) or other similarly-situated witnesses, the content of most witness's testimony should come from one of three sources: 1) what the witness personally knows or remembers; 2) what the records show; or 3) what the witness's common practice was at the time. Anything outside of these three categories is speculation or guesswork and should be avoided.
- ◆ *Look for opportunities to disagree.* If opposing counsel is doing their job, there will be plenty of opportunities for the witness to disagree. The witness should understand that he or she does not have to agree to use or base an answer on a flawed characterization or description. For example, if the question is "did you buy those ugly shoes at Macy's," many lay witnesses do not appreciate that they can disagree with the characterization in their answer by saying, for example, "I'd disagree that they are ugly shoes, but yes I bought them at Macy's." However, in order for a witness to disagree, he or she has to listen carefully to the question and understand when such an opportunity arises, which gets back to the first ground-rule.
- ◆ *Don't try to answer confusing questions.* Many witnesses fail to realize that they can ask for clarification or indicate that they do not understand the question. Instead, these witnesses often try to "make sense of the question" and provide an answer that they believe gets at what opposing counsel is trying to ask. This can be both dangerous and uncomfortable for a witness. Help them understand that it is not their job to make sense of a confusing question, but opposing counsel's job to ask clear and understandable question. On a similar note, witnesses need to understand the importance of seeking clarification on terms and language even when the question is understandable. For example, if opposing counsel asks about the witness's training within their industry, does "training" refer to only formal training such as courses, or does this also include informal training such as on-the-job experience, etc.?



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Tricks of the Trade Finally, a prep session should give the witness the opportunity to experience many of the common “tricks of the trade” deployed by opposing counsel in depositions. Don’t discuss these tactics with the witness beforehand. Instead, deploy them periodically during the 10-15 minute practice segments and then discuss with the witness how he or she handled them. Here are some of the common tricks:

- ◆ *The loaded question.* The example provided earlier was, “did you buy those ugly shoes at Macy’s?” This one typically requires the most practice. Consequently, look for opportunities in the practice segments to incorporate loaded assumptions or characterizations into the questions. Easy red flags for a witness are questions that begin with “is it fair to say” or “would you agree.” Additionally, help the witness understand they he or she needs to correct the language or assumption every time it occurs. Some witnesses think if they’ve corrected it once, they’ve done their job. Unfortunately, this opens the door for sound-bites that are helpful to the other side since a later failure to correct an assumption or characterization may create the impression that the witness instead agrees with it.
- ◆ *The rapid-fire pace.* A common strategy by opposing counsel for reducing the witness’s critical thinking time is to try to establish a rapid-fire pace with the questions. Most witnesses fall into this trap and mimic the rapid-fire pace in their responses. One easy tool that can help the witness control the pace is to have him or her repeat the question in their answer. This forces them to listen closely to the entire question, makes it easier for them to catch problematic language (since they have to repeat it), and naturally slows the pace of the questions and answers.
- ◆ *Repeated questions.* Attorneys know that if they ask the same question over and over again in different forms, the witness may change his or her answer. Witnesses need to understand that a good answer once is a good answer twenty times. In some instances, witnesses may feel their answers are inadequate if they keep getting asked about the same issue and change their answer to appease opposing counsel.

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- ◆ *The general principle questions.* Many attorneys try to get a witness to agree to a general principle early in a deposition, usually by making it seem eminently reasonable, and then establish that the witness violated the principle with a later question. At some point, professionals have to agree to some sort of basic principles in order to maintain credibility, but otherwise witnesses should avoid setting up difficult standards. A common strategy that helps witnesses deal with this trick is to respond by couching the issue in their own personal experience. For example, a witness can say, "I can tell you in my own personal experience and training, this is what I do."
- ◆ *The thought process of other people.* A witness should never speak for other witnesses, yet many willingly do so, particularly when they know the other witnesses well. In the practice segments, ask the witness why another person made a certain decision. See if the witness falls for this trick and discuss the importance of the three sources of content previously discussed under ground-rules.
- ◆ *Silence.* Most witnesses find silence during a deposition uncomfortable and cannot resist the temptation to fill the silence by adding on to their responses. Give your witness practice with this issue by incorporating some silent pauses after he or she has responded, before asking the next question. Teach them to finish their response and wait in silence for the next question, no matter how long that silence lasts.

THE CASE FOR A CONSULTANT

Litigation consultants are not essential to a productive witness preparation session, but can provide significant value in the following respects:

- ◆ A litigation or jury consultant brings an empirical perspective on how jurors and judges deal with various litigation types and make sense of some of the common, related issues. This perspective can inform the selection of safe harbors as well as the effective packaging of key issues or testimony in the case in order to help the witness tell the truth well and perform to the best of his or her abilities.



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- ◆ Litigation or jury consultants have devoted years to research on how jurors and judges perceive a witness's verbal and nonverbal behavior and how such perceptions impact the overall credibility of the case.
- ◆ Most litigation or jury consultants have backgrounds in communication training, which can help a witness fully understand how his or her verbal and nonverbal behavior impact the credibility of the testimony. This also means consultants can identify strategies for overcoming various communication hurdles in depositions.
- ◆ Some witnesses are more open to feedback from a communication expert than they are to feedback from their attorney.
- ◆ Sometimes attorneys prefer that constructive, but critical feedback about a client's performance in deposition or on the stand come from an outside communications expert rather than from them.

ABOUT THE AUTHOR

Thomas O'Toole, Ph.D., is President and Consultant at Sound Jury Consulting. He has practiced across the nation for over ten years in nearly every litigation type. He has consulted on matters as small as low exposure medical malpractice and as large as "bet-the company" MDL class actions and billion dollar environmental claims. He received his Ph.D. in litigation psychology and communication at the University of Kansas.



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