

Don't Shoot the Messenger:

Exploring the Economic Impact of Ineffective Witness Testimony



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The inherent desire to “shoot the messenger” is a basic human instinct that has survived and evolved over hundreds of years. In ancient times, communications between warring parties were usually delivered by messengers, putting messengers in very precarious, life-threatening situations. In modern usage, the metaphorical expression still connotes negative consequences dished out to a person communicating bad news to others. In litigation, fact witnesses are the “messengers” and jurors’ perception of their credibility, believability and honesty is critical to success in the deliberation room. But time and again, attorneys and claims managers want to figuratively “shoot” witnesses when poor deposition and trial testimony increases financial exposure and decreases strategic leverage.

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The path to effective witness testimony starts early in a case and remains important at all points in the litigation timeline. During discovery, each deposition has an economic value to a client. Strong, effective depositions decrease a client’s financial exposure and costs, while weak, ineffective depositions result in higher payouts on claims during settlement negotiations. Therefore, the deposition setting is a critical battleground with potentially heavy casualties for a client—a large check to the enemy. Unfortunately, poor witness performance during depositions is quite common, as many attorneys use *actual depositions* to evaluate witness’ communication skills, rather than thoroughly assess skills prior to deposition. Some attorneys view it as “just a deposition,” and they less rigorously prepare a witness for a deposition compared with a trial. The unfortunate result is that many attorneys learn about the strengths and weaknesses of their

witnesses, and often, their cases, *during* depositions, rather than beforehand. By then, the damage is done, it’s on the record, and a client has increased vulnerability and financial exposure. During a typical “bad dep,” attorneys often report feeling frustrated and helpless when faced with a witness’s persistent and careless mistakes. Some attorneys resort to the “kick system,” telling a witness, “If I kick you under the table once, you are talking too much; two kicks means you aren’t listening to the questions well enough.” One can only assume that three kicks under the table means that the witness should fake a seizure in an effort to postpone the deposition, obtaining much needed additional preparation time.

When asked about how poor deposition performance impacts his leverage during litigation, the director of claims and litigation of a large corporation based in the Southeast commented, *“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. Those ‘bombs’ end up costing us an extraordinary amount of money.”* Clearly, poor deposition testimony greatly widens the gap between the real and perceived economic value of a case, putting a client in an unfavorable position when trying to settle.

At trial, no “kick system” exists. Attorneys and clients can only sit back and collectively grind their teeth and wince during poor testimony, as their leverage and money get sucked out of the courtroom. And since jurors *highly* value the testimony of fact witnesses and use it as a primary factor in decision making during deliberations, keeping a poor witness off the stand is often not an option, or at best, is a risky strategy. In fact, most jurors won’t accept or trust a company until they first accept and trust the company’s fact witnesses. If they don’t accept and trust the fact witnesses, the company doesn’t have a chance in deliberations. Jurors can, will and *should* shoot the messenger if a witness performs poorly on the stand. Today’s jurors do not demand perfection, but they do demand effective verbal and nonverbal communication skills when a witness testifies.

Understandably, many attorneys struggle to assess, understand and teach these communication skills adequately, as they usually have no formal training in the two academic disciplines that comprise the backbone of witness effectiveness and jury decision making: psychology and communication science. Assessing and adjusting a witness’s communication style, personality, cognition and behavior are very difficult tasks.

For example, there is an enormous difference between telling a witness that:

- ◆ **He or she needs to be a “better listener,” vs. *teaching better listening skills;***
- ◆ **He or she needs to be “more patient” when answering, vs. *teaching patient answering;***
- ◆ **He or she needs to give “more concise” answers, vs. *teaching him or her how to give concise answers.***

The difficulty of effective witness preparation by counsel was highlighted during a CLE seminar by a Chicago-based trial attorney who described his latest experience: *“Last month at trial, my key witness’s testimony was so damaging that I wanted to stand up and throw my legal pad at him in an effort to get him to shut up; then the worst part: I had to face my client and explain why the witness crashed and burned on the stand, despite my preparation efforts the day before.”*

Whether a deposition or a trial, when witness preparation efforts focus exclusively on substance, rather than how a witness will actually convey information in a cogent and persuasive manner, a witness will not acquire the skills necessary to be an effective communicator. This results in careless and often devastating mistakes during testimony. The most common and preventable witness blunders include volunteering information, guessing and not listening or thinking effectively. Let’s take each in turn.

VOLUNTEERING INFORMATION

Volunteering information occurs when the scope of a witness' answer exceeds the scope of a question from opposing counsel. This common mistake occurs for three reasons. First, witnesses who are anxious and unfamiliar with the legal environment tend to fall back on their work and social communication skills to help them "survive" the testimony. At work, home or with friends, it is perceived as friendly, helpful and efficient when someone offers extra information following a direct question. Therefore, novice witnesses inadvertently volunteer excessive information, thinking that it will be helpful, unknowingly causing tremendous potential damage. Second, many witnesses purposely try to anticipate the next question or questions, in an effort to bring the testimony to a close more quickly. These individuals erroneously conclude, "The more I say, the faster this uncomfortable process will be over with." Nothing could be further from the truth, as an opposing counsel will actually question a "chatty Cathy" witness longer than a witness who volunteers less information. Third, witnesses experience an intense, internal urge to explain away answers to simple, direct questions. They feel that if they don't, they are letting down the team and hurting the case. The classic, "Yes, that is true, but here is why" type of answer from a witness is particularly damaging, as the unsolicited explanation fuels opposing counsel's attack.

GUESSING

Guessing comes in many forms, and witnesses often take educated guesses instead of stating that they "don't know," "don't remember" or "don't have any personal knowledge of that." Why do witnesses so often opt to guess rather than admit not knowing something? Two reasons: embarrassment and intimidation. Many witnesses feel embarrassed if they can't provide an answer to what is perceived as an important question, and attorneys are experts at creating this powerful emotional reaction. The standard trick is to say to a witness, "You've been an employee at Company X for 15 years and you can't answer my important question? My client has a right to an answer. Let me repeat my question, and let me remind you that you are under oath." At this very point, 99 percent of witnesses take an educated guess, simply because they feel compelled to correct the perception that they don't know. They end up feeling obligated to provide "something," regardless of its accuracy or relevance. Intimidation is also a powerful tool. Attorneys can raise their voices, increase the pace of questioning and become sarcastic or aggressive towards witnesses and "bully" them into answers. When this occurs, a witness becomes scared, rattled and very uncomfortable. The witness then provides an educated guess in an effort to give the attorney "something" so that they will back off. Regardless of the cause, guessing is a devastating witness blunder, which leaves an attorney and a client vulnerable. Guesses are rarely accurate, and a savvy attorney can use a witness' guesses against him or her, heavily damaging that witness' credibility and believability.

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NOT LISTENING OR THINKING EFFECTIVELY

In today's high-speed, instant-gratification society, people are now cognitively hardwired to listen and think simultaneously when communicating with others. In other words, when someone asks a question, the respondent *automatically* begins to think about his or her response in the middle of the questioner's inquiry, rather than listening to 100 percent of the question, then thinking 100 percent about his or her response. From a neuropsychological standpoint, a respondent is extremely vulnerable to error, as concentration and attention are split between two activities—listening and thinking—instead of dedicated to one cognitive activity. While this pattern is efficient and friendly in the workplace or social settings, it is extremely dangerous in a legal environment. Listening and thinking simultaneously as a witness results in poor answers, because the witness does not hear the question in its entirety.

What happens next is that the witness answers:

- ◆ **A different question from what was actually asked, which makes the witness appear evasive;**
- ◆ **A question incorrectly, for example, inadvertently accepting the questioner's language and agreeing with a statement that isn't true;**
- ◆ **A question that shouldn't be answered in the first place—questions to which an attorney would raise form or foundation objections; or**
- ◆ **A question beyond the scope of the inquiry, which volunteers information and makes the witness appear defensive.**

Regardless of educational attainments or professional achievements, fact witnesses have no chance of out-dueling a skilled, veteran questioner with years of trial experience. The only way to level the playing field is to teach a witness how to use his or her cognitive resources most effectively, which means training him or her to listen first, think second and speak third. This form of communication seems awkward to witnesses, because it is vastly different from work and social communication. However, it protects them against attorneys' tricks and traps, as well as careless mistakes related to inattention and lack of concentration. Many attorneys struggle to manipulate and intimidate witnesses who listen carefully, think patiently and answer concisely. This is exactly why teaching these communication skills to witnesses needs to be a top priority early in the litigation plan.

Needless to say, quality witness testimony, or lack thereof, has a tremendous impact on the outcome of litigation. Despite this, the time, effort and resources dedicated to witness assessment and preparation typically pales in comparison to other discovery and pretrial preparation activities. For that reason, when the messenger is "shot" by the jury, it is rarely the messenger's fault. It is important for attorneys to *truly* understand the strategic and economic leverage that can be won or lost with testimony and how that leverage impacts a company's financial exposure. Inadequate witness preparation, even if unintentional, can also raise ethical considerations related to competent representation, because it can increase litigation exposure. The best strategy is to place great emphasis on witness preparation prior to key deposition testimony, giving clients strategic leverage early, minimizing vulnerabilities and obviating the "shoot the messenger" syndrome.

Retaining an expert who specializes in assessing and developing effective witness communication skills is very wise, as the return on this investment is extraordinary. Many attorneys across the nation, even the ones who consider themselves "old school," have acknowledged the strategic and economic benefits of expert consultation for witness preparation. As a veteran trial attorney recently stated, "*I'd rather spend a few thousand dollars on expert consultation to help prepare my witnesses than risk millions—or even billions—of dollars of my client's money at deposition or trial.*"