



Witness communication: Give yourself and your client an edge at depo and trial

Show your witness how she will look and sound to a jury.

DAVID ILLIG, PH.D

Let's start with a basic truth that is known in other fields more than it is known in law. Being a witness, being interrogated by an expert interrogator, being interviewed, is neither a natural act nor an easy act. It is a very difficult communication situation for most humans, including your typical plaintiff. Nothing tells us that being an accident victim or sexual harassment victim is excellent training for public speaking, being interrogated or being interviewed.

The reality is that plaintiffs rarely receive the amount of help and training they need in order to be the best witness communicators they can be. You will have an edge over your competition if you use more atypical methods of preparation than your competition. Interestingly, you will do better if you proceed in ways that are more typical of other fields involving communication than the field of law. You put in years becoming a skilled interrogator. Responding to interrogation also takes training and practice if a person is going to do his best.

You *will* consistently learn important case information during the extensive witness communication training that you wouldn't get without it. However, most often extensive time should be spent with the witness gathering key information before the witness communication training.

What are some ways the witness training would differ so as to give you an

edge over most of your colleagues? It would include behaviors and philosophies and even attitudes. You would use more practice and role play than lecture alone. Behavior would be combined with theory or concept. "Keep your eye on the ball. Keep your head down." are common instructions in sports. They are "concepts." Good ones. A higher level of training is to add behavioral practice and exercises that involve eyes-on-balls and keeping-head-down.

Higher level witness prep means you will combine *talking* about talk with *doing* talk. The doing of talk can be you or somebody else demonstrating what communication behaviors we are talking about, as well as having the witness use the behaviors you are talking about.

An important discovery is that it is rarely beneficial for witnesses to engage in behavior that is ineffective, but which is typical and common for them. It is better to teach new behaviors and philosophies that generate new behaviors rather than to repeat ineffective patterns again and again. Limit their use of old ineffective patterns before changing them. You can't change everything at once, but teach first before extensive role play. People strongly prefer doing what they usually do. Testifying requires new behaviors.

A working premise for the exceptional attorney should be that humans actually have very poor awareness of their own behavior. The more stress and anxiety

is involved, the less accurate they are about that they are doing.

Attorneys are often amazed at what their witnesses are doing, saying, communicating. The irony is that the witnesses are also surprised at what they themselves are doing. A simple example is that many witnesses *think* they are going slow and careful, and they are actually going very fast and being sloppy, and don't know it. It feels slow, but it isn't. This is often as true with smart educated witnesses as it is with dumb ones.

Without better preparation, it's hard to know ahead of time exactly what a witness does have accurate self knowledge of and what they don't. They may be aware of speed but very unaware of their own volume. Furthermore, the interrogation or interview-under-stress often brings out behavioral patterns that are unique in a witness's life, new inaccuracies.

Reaching a solution

The solution? Simulation and role play of the interview or interrogation. Teaching. And feedback.

Three types of feedback are available: The first and most common is simple verbal feedback from the attorney: "Henry, you are talking way too fast. Did you know that? Let's do that again and I want you to slow it way down. Let's try that... That's still not slow enough. Let's try it again even slower..."

The second form of feedback is video. This is often much more effective



Question of the Month

How can I get witnesses to listen to me and follow my instructions?



James

Answered by Katherine James, MFA, ASTC

This question comes from an experienced trial lawyer with whom I was working the other day: "The trouble with witnesses is that some listen to what you say and some don't. The ones who listen to me and pay attention to my rules and follow them are great – the ones who don't are lousy. I wish I could find a way to only choose clients who know how to listen to my rules and follow my instructions when I prepare them for deposition and trial."

The problem isn't with the witness. The problem is with the attorney. This attorney needed to heed David Illig's advice: "Interestingly, you will do better if you proceed in ways that are more typical of other fields involving communication than the field of the law."

The session began with the attorney saying to me, "I have a few things to say and then we can begin your talk." This attorney had one way – and only one way – to prepare his plaintiffs. Largely it involved lecture – which is always problematic. Role playing allows people to learn a "doing activity" (having your deposition taken) in a "doing way" (pretending you actually are having your deposition taken). He expected me to "talk" after he "talked". Of course, since that isn't my way, role playing directly followed his "talk".

Even within the lecture, there are many ways to choose your words. David Illig suggests some great ones from the world of sports ("Keep your head down" and "Keep your eye on the ball") that translate directly into concepts for witnesses that will help while being deposed or cross examined. Sports metaphors are good for some people – people who play sports, or who played sports, and who had a good experience playing sports. But there are many of us (and I do not use the word "us" lightly) who do not relate to sports metaphors. How many times have I been in a room where the following exchange takes place:

Attorney: Do you play golf?

Witness: No.

Attorney: Well, in golf, there is this thing called *follow through*. Got it?

Witness: Not really.

Attorney: It means when you stroke the ball with your club you keep going – you follow through with the club. You see?

Witness: Ummm....

Attorney: That's what I want you to do – follow through – just like you are playing golf – with every question. Got it?

Witness: Sure. Okay. Whatever. Right.

This attorney loves the golf metaphor. Always uses the golf metaphor. You can get from the above exchange, however, that this witness is going to "be lousy" when it comes to following through.

Talk to the witness. Find out what the witness likes to do. Find out what life experiences the witness has – cooking, child rearing, gardening, traveling, hunting, woodworking, sailing, hiking, writing, playing cards – this witness is good at something. This witness enjoys something. It is up to you, the attorney, to find out what that area or those areas are.

Then it is up to you to find the metaphors and concepts. True, it is more difficult than just giving a lecture you already know how to give and to which you relate – but – what good is your lecture if it falls on deaf ears? You have to find the "hearing" ears of your witnesses.

Don't forget – this column relies on you, our readers, to ask questions. We will respond with articles aimed at answering those questions. If you have a question that can't wait, I will endeavor to make sure that it gets answered by me or by one of my colleagues at The American Society of Trial Consultants. Please feel free to phone me or to e-mail me: katherine@actofcommunication.com or 310-391-9661.

Katherine James is the founder of ACT of Communication and a board member of The American Society of Trial Consultants. A trial consultant for 31 years, she has taught over 30,000 attorneys in her workshops and helped take almost 1,000 cases to trial as a part of the trial team. A specialist in live communication skills, she has written several articles for Plaintiff.

than verbal feedback alone. Almost nobody likes being videoed, but it is incredibly helpful. Sometimes it is useful to look at the video frequently during the training. More often, I have found it more effective to have the witness watch their video when they go home. The camera should be showing what the target audience is seeing of the witness – at eye level.

The video can often be surprising and shocking to a witness. But it does give helpful feedback. And until the *behavior* or *look* you care about is showing up on the video, it isn't happening. It's amazing how often bright clients believe they are doing what you have asked, but they aren't. The video can take the pressure off of you. For example, many witnesses say that they had no idea how angry they looked.

A third type of feedback is simultaneous feedback. A problem with the video is that it is not giving feedback to the witness in real time. The witness is not doing the behaviors at the same time they are seeing them. They are not feeling from the inside the behaviors at the same time they are doing them.

A solution? Live, real-time feedback. You can do it one of two ways: Set



up a video monitor, so that the monitor is showing the witness exactly what the camera is seeing, right as they are doing it. You put the monitor right beside or in front of the camera. Have the camera show what the important audience is seeing. So, if the witness is frowning, they are seeing themselves frown right as they are doing it. It's real-time-feedback. The camera is acting as a non-reversed mirror. If you don't have a camera and monitor available, simply use a mirror. It gives live feedback of what the witness is doing right while they are doing it. Gradually remove the mirror/ monitor as the witness gains control over his behavior.

Either method calibrates the witness about his behavior. It's amazing what people do that they are not aware of but which has a huge impact. Unconscious twitching, grimacing, frowning, eye rolling, eyes shifting, shrugging can rapidly disappear with real-time feedback. The mirror is a simple solution that is underused. Some people can't handle it so you have to use your judgment. Don't give up too easily. Push.

Audience, audience, audience!

I have discovered that one of the greatest advantages an attorney can have over opponents or competition is to have a deep and persistent understanding and focus on *audience*. I even call it a "magic word." It's a common word in other fields. It's a magical advantage in the world of law because law seems to lose track of who the real audience really is. It will give you a huge edge if you and your witnesses think about it a lot. Witnesses have many reasons to be upset, angry, resentful, frustrated, impatient, anxious or fearful relative to the litigation and what

has happened to them. They have reasons to be angry at the defendants who injured them. They have reasons to be mad at the defense attorneys. They even have reasons to be angry at you for what you are putting them through. These emotions all make some "sense."

However, your witness must come to understand that their expression of these emotions towards the *real audience*, the *jury*, makes no sense to that audience. The jury hasn't done anything harmful to the plaintiff; the jury isn't doing anything negative to the witness. The reactions might be appropriate to the opposition attorney or the defendants. Unintentionally directing these emotions to the jury, the real audience, is not effective. Mock trial jurors often ask us; "Why is the plaintiff witness so angry at us, so irritated with us, or so arrogant with us?" The witness isn't aware of the expressions he or she is using and seemingly directing at the jury. Either the mirror or the camera/monitor right in front can show this clearly. However, the attorney does need to teach the *concept* to the witness about the real audience.

Who is the real audience? Jury, jury, jury

Most witnesses do not understand who their real audience is. Once they do, once they really get it, they improve drastically. And really getting it means that their emotional expressions match that real audience, the jury. Most jury trials frequently miss who the real audience really is. Not only do many witnesses miss who the real audience is, their attorneys do, too, in actual practice. In theory the attorneys know. But is their behavior really an expression of knowing the jury is the audience? Often not.

All witness communication training should focus on communicating to the real audience. This includes words, concepts, sounds, behaviors, attitudes and emotions. Almost no communication is actually directed to either attorney.

A discovery of the last few years is that you will produce the most effective depositions if your witnesses also believe and act as if the jury is the only important audience during the deposition. Have your witness imagine the jury is sitting behind the interrogating attorney or camera, and they are communicating to them. This takes lots of practice and training to pull off. It's difficult. But it works and makes a huge difference in the depositions. The depositions become real communications. After all, it's the jury or expert who might read the deposition that you care about. This jury-focused deposition is more effective in the 95 percent of cases that don't go to trial. So teach your witness to "speak" to that juror who may read the deposition, and not to opposing counsel.

Dr. David P. Illig is the owner and primary consultant of Litigation Psychology, a full-service trial consulting firm headquartered in Portland, Oregon, providing service nationally. Dr. Illig's Ph.D. is from Penn State University in the dual areas of clinical psychology and communication. He also has a degree in engineering. Licensed as a psychologist in both Oregon and Washington, he has worked as a trial consultant since 1990 throughout the U.S. with several thousand witnesses preparing for trial and deposition. He sits on the Education Committee of the American Association of Trial Consultants.

