

By Dr. George Speckart

With an eye to expertise, objectivity, and communicativeness, you can unlock the true performance potential in your witness.

Unlocking The Performance Potential In Your Witness

I was sitting with in-house counsel of a major bank, and he was livid. A key witness had just botched his deposition. I asked him, “What happened?” He replied, “They gave him this to read.” He handed over an eight-page document with the standard admonitions (“Don’t volunteer information,” “Don’t speculate” etc.) but that was it. The “they” he had referred to was one of the largest and most respected law firms in the country.

There is nothing more critical than witness performance in a case, and since most depositions are videotaped, even depositions can readily become in-court testimony. Moreover, research on communication clearly demonstrates that nonverbal components (mannerisms, facial expressions, vocal intonation, and so on) can easily dominate over verbal content, and few of those charged with preparing witnesses are adequately equipped to optimize performance in such domains.

Witnesses often possess the latent capability of far superior performance than is typically realized. On the negative side, they also exhibit “body language” suggesting deception by simply bracing themselves in reaction to the courtroom environment when, with a few simple adjustments, they could activate a dormant capacity to “capture the room” in a positive sense and bring the case home to their team.

A Framework for Optimal Evaluation, Training, and Performance

An approach is proposed presently incorporating a systematic approach to training witnesses that avoids many of the pitfalls inherent in more casual approaches that are based on intuition and that frequently overlook critical aspects of nonverbal communication. A foundation

is first provided for evaluating witnesses through the assessment of their performance using a straightforward framework consisting of three essential dimensions of credibility. The results of the evaluations may then be implemented utilizing a training regimen that maximizes the appeal and persuasive impact of the witness’ performance. The conclusion describes the procedural components of this witness training regimen.

The proposed framework is intended to provide a parsimonious basis on which witnesses may be evaluated and trained for optimal performance using a minimal set of criteria. It is “parsimonious” in the sense that a wide range of performance criteria may be assessed using only a small number of underlying dimensions that represent a complete basis in accounting for overall performance. It is comprised of three independent, or orthogonal dimensions that each reflect foundational aspects of credibility. The three dimensions are 1) expertise; 2) objectivity; and 3) communicativeness.

Many familiar terms of witness credibility fit within the three-dimensional framework of expertise, objectivity, and communicativeness. For example, for a witness to be perceived as truly objective, as defined presently, he must also be judged to be “honest.” In addition, if he is seen as honest and having a high level of expertise, he must also be perceived as “trustworthy.” “Persuasiveness,” being essentially a synonym for “credibility,” is considered presently to be a function of all three dimensions.

Others may supply their own terms to fit this framework, or may indeed object to it, because one of their favorite, intuitive labels has not been included here. However, this



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three-dimensional framework represents one of the best combinations of parsimony and comprehensiveness in describing the performance of a witness.

It is applicable to both fact and expert witnesses, although some dimensions may be more dominant for one type of witness than another. For example, the dimension of expertise may be somewhat less influential for a percipient witness compared to an expert. However, when considered broadly, each of the three dimensions holds the requisite explanatory power to thoroughly describe performance for experts as well as fact witnesses. Thus, expertise as defined presently includes not only components such as “credentials” and “reputation” (more relevant for experts) but also “memory” and “aptitude” (more relevant for fact witnesses; “aptitude” is currently defined to include the quality of perceptiveness).

The three components of credibility proposed presently may be understood as follows:

1) Expertise refers to the extent (breadth and depth) of the witness’ knowledge. In essence, it is his degree of knowledgeability, or “grasp of the situation.” In practice, this dimension is itself multidimensional, consisting of, for example, a) qualifications (education; training; credentials; achievements; reputation); b) diligence (How much work was actually undertaken and completed? Were shortcuts taken? How thoroughly was the work done?); c) aptitude (How insightful is the witness? How well does he apply the known information to new problems or challenges? How perceptive is the witness?); and d) experience (longevity; amount of cumulative time invested in obtaining knowledge; length of his career).

It should be noted that occasionally unforeseen elements will work their way into a dimension such as expertise and become a factor that impacts its overall salience. For example, if an expert obtains a large grant amounting to substantial funds to design and implement an expensive study, the resulting e) resources could be considered as an augmentation to the existing level of expertise. Or, perhaps a

witness’ resources could be increased if he owns state-of-the-art laboratory equipment across a wide range of conditions or locations.

Similarly – especially for fact witnesses -- a good versus poor f) memory may boost or damage perceived levels of expertise. Additional factors may also come into play, such as g) accuracy (precision and thoroughness in making observations or assessments) and h) consistency (Does the witness fluctuate in the reliability of his observations?). Thus, factors a) – h), and potentially others, could potentially affect the overall perception of this dimension. Such unnamed “other” factors may become relevant depending on idiosyncratic aspects within the case fact scenario that arise which are also related to perceived expertise.

For fact witnesses, some of the preceding qualities (e.g., credentials; reputation; and so on) may become irrelevant, whereas other aspects of expertise (primarily memory, accuracy and consistency) come into play. The ability of the witness to hold up under cross examination (consistency) is a particularly critical element of expertise for expert and fact witnesses. Related to accuracy for fact or percipient witnesses would be determinants including the extent or depth of the witness’ exposure to the situation; his placement or inherent capability to gather and obtain information; the absence of perceptual impediments (visual obstacles, poor lighting, etc.); and so on.

2) Objectivity refers to the neutrality or lack of bias in the witness’ own perspective and account of the situation. Generally, the objectivity of a witness is inversely proportional to the witness’ degree of perceived involvement in the outcome of the case. For objectivity to be optimal, the jury must believe that the witness is equally satisfied to have the case resolved favoring either party. In essence, the witness should be seen as “letting the chips fall where they may” as a consequence of his testimony.

Perceptions of objectivity are related to the witness’ a) neutrality

(absence of bias); b) honesty; c) candor; and d) autonomy (independence, or absence of interest in or obligations to other parties); and e) consistency in terms of correspondence with other known data sources. The overall impression of consistency is in turn related to an equal application of expertise to competing interests or outcomes.

Consistency is an element that is connected to both expertise and objectivity, as we have just seen. This state of affairs arises from the fact that consistency may have different manifestations, generally referred to as “external consistency” versus “internal inconsistency.” Consistency is “external” if it relates to comparisons with sources, findings, methods or data that originate from “outside” the witness (i.e., independent or exogenous starting points), whereas it is “internal” if it arises from comparison of two or more different sources developed by the witness himself. “Internal” includes consistency with one’s own deposition when the witness takes the stand, as well as consistency between direct and cross examination. Thus, if a witness corroborates findings that come from other competent sources, his expertise is enhanced; if, on the other hand he replicates his own statements or findings at a different times or contexts, his objectivity is supported.

With the introduction of the concept of objectivity – and especially as regards the next dimension, communicativeness – the realm of nonverbal behavior (“body language,” mannerisms, eye contact, facial expressions, and so on) comes into play as being a central factor. For example, the realm of deceptive communication has become a significantly developed field of study in universities over the past few decades. The field mainly addresses the issues pertaining to the nature of nonverbal communication that may be connected with the generation of a deceptive message. The identification of a reliable set of nonverbal behavior indicia that cause jurors to doubt the veracity of a communicator’s message represents a vital aspect of witness preparation and training. If a witness is



seen as dishonest, objectivity collapses, and with it, his overall credibility.

The most important set of findings linking specific nonverbal behaviors to lack of honesty include i) response latency and ii) “adaptors.” Response latency in simple terms is manifested as waiting too long to answer a question. “Adaptors” refers to excess, repetitive, peripheral body movements (i.e., “fidgeting”). Two “old wives’ tales” of nonverbal behaviors connected to deception – failure to maintain eye contact and crossing one’s arms – do not receive empirical support as reliable indicia of lying behaviors. (For example, some people will not look you in the eye simply because they are shy).

Objectivity for an expert entails the ability of the witness to consider equally two or more alternative, conflicting interpretations of a given problem (e.g., the antecedent causes of an automobile accident). This ability requires that cross examination questions be answered with an equal level of expertise (aptitude, diligence, accuracy and consistency) as direct examination questions. Moreover, demonstrating objectivity to a jury compels the witness to use expertise to empirically show to the jury why one of any number of conflicting views is in fact most probably correct. This in turn necessitates that the perceptual data provided by the witness be equally capable, on an a priori basis, of providing results which could support any of the

conflicting theories of the case. In other words, objectivity requires that the reported perceptions or tests are not “set up” in such a manner as to be capable of supporting only one side of the conflict. Finally, the demonstration of objectivity requires that the witness be unencumbered by dislike, disdain or any other subjective form of rejection of the opposing party’s case theory. His preference for one side must be completely a function of hard evidence and rigorous application of his own preexisting expertise -- in short, his desire to know the truth, whatever it turns out to be.

- 3) Communicativeness -- The third goal for a witness is that he be communicative. As in the case of the previous dimensions, this one also incorporates additional component qualities including a) clarity; b) likeability or pleasantness; c) confidence; d) preparedness; and e) use of media, charts, graphics, and demonstrative aids.

This quality encompasses the ability to clarify unfamiliar, arcane, or esoteric issues so that they are comprehensible to one of more ordinary sophistication. A communicative witness is sensitive to the fact that what is simple to him may be hard for someone else to grasp -- indeed, for experts, the learned language natural to an expert is usually more akin to a foreign language to the untrained juror. Moreover, the communicative expert

witness must give the impression that he cares whether others understand. Such caring encompasses a factor of pleasantness and is reflected in the choice of terminology he selects to explain or make analogies; his use of lucid and appealing visual aids; and the pauses he takes to give jurors time to assimilate information.

Finally, the pleasantness of a witness is also communicated by an aura of likeability and confidence. Such attributes are influenced by attractiveness, attire, grooming and various mannerisms. This domain is particularly linked to critical nonverbal communication including facial expressions, eye contact, speech rate, volume, articulation, tone, vocal inflections, and even posture and other forms of “body language.”

Jurors do not deliberate based on what happens in the courtroom; rather, they deliberate based on what they have stored and retained in memory and what they subsequently retrieve from memory in the deliberation room. What is stored, retained, and later retrieved from memory is strongly connected to the subjective, affective, or emotional qualities that have been linked to the witness. This is the realm that is most decidedly influenced by nonverbal communication. This is the playing field on which a witness may “capture the room.” The most obvious question then becomes, “How do you do this?”

In the training of a witness, the concept of “pre-liking” may be used to induce the witness to adapt a position of affinity toward the jury prior to his appearance – in essence, learning to care about them as people, before entering the courtroom. When this is accomplished, the witness takes on an attitude of caring that the jury truly understands. His attitude becomes concern with being truly helpful to the trier of fact. This approach obviates the need for the witness to attempt to monitor or control his own nonverbal behavior, as eye contact, vocal intonation, and other factors naturally “fall into place” as a consequence of this care for the jury. This process is familiar to those in theater arts who seek to make a profound impact on the audience, and although the process is similar to the psychological preparation that actors often use, it can be effective for the witness to fortify his likeability with the jury when it is successfully incorporated into his testimony.

For experts in particular, the use of effective demonstrative materials enhances the overall dimension of communicativeness. Such demonstrative material may include models, computer simulations (animations), document blow-ups, photographic exhibits, graphic charts with overlays, and various other forms of visual aids. The point is that the use of dramatic demonstrative evidence makes the material more memorable, and it makes the witness seem better prepared, more communicative, and therefore, more credible.

Often, the issue of communicativeness comes through most strongly during cross examination. By the time the defense case is presented, jurors have figured out that all witnesses can appear to be pleasant, stable, and self-assured on direct examination. Only well-trained witnesses, however, continue to appear confident, articulate, helpful and non-defensive when being attacked by the attorney on the other side.

Training the Witness Using the Three-Dimensional Framework

Too often, witness preparation is unstructured, unsystematic, and represents

a hodgepodge collection of vague admonitions, incomplete instructions, or simply a review of case documents when the true impact of a witness may be founded upon a variety of neglected determinants, especially in the realm of nonverbal behavior, which is actually the dominant factor in establishing credibility. A more systematic approach to witness training is proposed in the remaining sections that incorporates the three-dimensional framework described presently.

The framework allows an emphasis on ensuring that the accompanying nonverbal behavior of the witness provides the requisite subjective or affective foundation to ensure that the witness captures the hearts and the minds of jurors in the most strategically beneficial manner possible. Without this framework, the crucial aspect of nonverbal behavior is more likely to be overlooked, as it is in most witness preparation conducted in preparation for trial.

With the proviso that a complete tutorial on how to train a witness cannot be accomplished within the scope of this discussion, the components of a training program may briefly be considered as follows:

Part One -- First, it is acknowledged that neither the trainer nor the witness will have sufficient insight into the relevant nonverbal behavior under examination without the benefit of videotape. In some cases, counsel will object that such videotaping of a witness is “discoverable” although this situation may be easily remedied by recording over the testimony soon thereafter. Overall, however, after watching many approaches to witness training, it appears that not using videotape in practice (i.e., “mock Q&A”) represents the most frequent – and the most important -- omission in the procedure.

The initial step, then, is to “throw the witness in the water and see if he can swim,” using videotaped mock Q&A. If the witness is expected to be called adverse, then cross examination should precede direct. If the team is preparing for a deposition, then the team should simulate a deposition environment. The overall goal in this initial segment is to ascertain the witness’ baseline performance simulating the actual

conditions of testimony as faithfully as possible.

Measurements are obtained in this step that assess performance according to the components of the three-dimensional framework described previously. Thus, to evaluate expertise, scales that measure elements a) through h) as defined above may be used, with some omitted as appropriate (for example, one need not measure b) diligence for a fact witness. The subfactors a)-h) for expertise; a)-e) for objectivity; and so on need not be considered as the necessary components of the measurements in this first step, but rather as the pool from which all measurements may be drawn in this step). To complete the measurements, additional open-ended queries will be essential (e.g. “What is most appealing about this witness?” “Are there any irritating behaviors?” “Were there any fidgeting or unnecessary repetitive movements?” “Did he wait too long to answer or answer too quickly?” etc.).



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Part Two – At this juncture, the witness is evaluated on the basis of the previously obtained measurements and educated as to the significance and overall conclusions which may be drawn from them. He is shown the videotape and typical response patterns are reviewed and discussed. This section also utilizes the core components of witness training that involve an education as to the needs and emotional predispositions of jurors; how they are persuaded; the cognitive factors a witness needs to consider to maximize performance; common errors, behaviors to avoid, or ‘do’s and don’ts’ that are important for a witness to keep in mind; the importance of

answering the question that was asked, and remaining calm and non-argumentative; and so on. There is, however, a strong emphasis on educating the witness as to the nature and significance of various nonverbal behaviors, in particular with explicit connection to the witness' own proclivities based on the videotaped patterns observed in Part One. This second section is euphemistically referred to by some litigators as "charm school."

Part Three – Here the witness, together with the entire team, determines what "water the witness can carry" in terms of supporting the team's key substantive themes in the case. In this third section is included the review of case evidence and documents that are the typical focus of most witness preparation conducted by trial teams. Using such evidence, witness testimony is partitioned into discrete thematic categories, each of which represents a "pillar" of the overall theory of the case. This process allows core themes of the case to be systematically distributed among witnesses so that each witness is "carrying" only those topics or portions of the case that are most effectively delivered

by him. The format also allows the witness to see the bright line boundaries of the substance of his testimony so that he does not deviate from the team's theory of the case, or "wander off the reservation."

Part Four – This concluding "lather, rinse, repeat" section represents cumulatively the iterative process of getting it right through multiple (if necessary) video tapings of mock Q&A. Measurements conducted in Part One are repeated to determine the extent of performance changes over time. Moreover, recognizing that witness training is like teaching a child to ride a bicycle, the videotaped mock Q&A is repeated until the training "sticks." It is this element of practice that allows the witness to later walk into a courtroom and no longer feel nervous as to whether he can carry out what is expected of him. It is also the repetition aspect that assists the witness in remembering what his key themes are. (We note that witnesses are never urged to script or memorize their testimony; they are only asked to testify according to their current best recollection of the facts.)

Conclusions

Enforcing compliance with the three dimensions of witness credibility—expertise, objectivity, and communicativeness—in the context of this four-part training procedure ensures that the critical aspects of nonverbal communication will no longer be overlooked in preparation for trial. This is especially the case if a psychologist with litigation experience and a background in psychometrics (measurement) is incorporated as part of the team. Too often the trial team does not even know whether a witness will be communicative until he takes the stand. Hoping that a witness performs in a convincing manner with regard to nonverbal behavior is not a legitimate trial strategy. With the implementation of the proposed training structure under the guidelines of the three-dimensional credibility framework, the influence of nonverbal behavior can be harnessed with confidence to a tactical advantage.



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