

Enhancing Fact Witness Effectiveness

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Manner of presentation affects a witness's persuasiveness; this can be enhanced by applying basic principles from social psychology. However, audience expectations of experts and fact witnesses differ significantly, and the latter often lack preparation to testify convincingly. These authors present two actual cases that illustrate fact witness preparation and provide practical tips for enhancing both expert and fact witness effectiveness.

The primary role of a courtroom witness, fact or expert, is to inform the decision maker(s), most often a jury,¹ about facts of which the witness has knowledge greater than the jury. The goal of all witness testimony is, of course, to persuade the jury to view the case in one way, which excludes alternative ways of viewing the case. In this regard, all witnesses use, implicitly or explicitly, a communication strategy in an attempt to be effective persuaders to their point of view. However, most often these strategies are used by witnesses with little specific attention paid to how their behavior influences their effective-

ness, that is, the acceptance or rejection of their testimony.

Much is known about factors that can be explicitly used to enhance witness effectiveness. For example, considerable literature has been written about social psychological factors that enhance persuasion in general. Furthermore, some literature addresses specific factors that enhance the effectiveness of expert witnesses. Relatively little attention has been focused, however, on factors that enhance fact witness effectiveness.

This article is based on several premises. First, it is based on the premise that the basic social psychological factors affecting persuasion in general

Acknowledgments: Special thanks go to Robert R. Feagin IV and Neal F. Webb for providing the background research for this article. Thanks also are due to Lazara Varona for preparing the manuscript and to David Fauss and Bernard Salzberg, Ph.D., Esq., for their suggestions upon reviewing previous drafts of the article.

The Trial Lawyer, Vol. 21, 309-320 (1998)

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can be applied in a strategic fashion to enhance both fact and expert witness effectiveness. Second, although there are important similarities in how these factors in persuasion apply to enhancing the effectiveness of both fact and expert witnesses, there are also important differences that must be taken into account in their application to fact witnesses as contrasted with expert witnesses. Finally, this article is based on the premise that the adequate preparation of fact witnesses to enhance their effectiveness is an important aspect of legal practice that is often deficient and, consequently, deserves remedying.

Communicators who have both expertise and trustworthiness (that is, who are perceived as having little to gain from stating facts or opinions) are the most credible, or believable, to the audience.

This article originated from the authors' direct experiences as consultants on a wide variety of civil and criminal lawsuits in which witness testimony, both expert and fact, played a key role in the outcome of the case. We will begin by briefly reviewing the social psychological literature on persuasion in general, as well as specific studies in the legal arena with a focus on applications for expert witnesses. We will then apply these principles to enhancing the effectiveness of fact witnesses, followed by the brief presentation of two illustrative cases that demonstrate preparation of key fact witnesses for trial. The final section of the article provides guidelines for attorneys seeking to maximize fact witness effectiveness.

PERSUASIVE COMMUNICATION FUNDAMENTALS

Persuasive communication has been a widely studied area of social psychology for almost 50 years. Three fundamental factors have consistently been found to be important in attitude change: *source* (communicator) *characteristics*, *message characteristics*, and *audience characteristics*. Source characteristics relevant to enhancing witness credibility refer to how the witness is perceived as an individual—for example, as trustworthy or not. Message characteristics refer to the content of the message itself—for example, whether a communicator draws a conclusion after a statement or whether

the audience is left to draw its own conclusion. Audience characteristics refer to the traits of the decision makers—for example, the intelligence level and initial attitude of the judge or jury.

Source (Communicator) Characteristics

Source characteristics are the primary focus of the present discussion because they are the communication fundamentals that are most applicable to an understanding of witness effectiveness. There are four types of source characteristics in persuasive communication, each of which combines with the others to influence the persuasive effectiveness of the communicator. These are *credibility*, *likability*, *attractiveness*, and *power*.

Credibility

Credibility is the most fundamental communicator characteristic. Credibility is composed of expertise and trustworthiness.² Expertise is the communicator's knowledge about the subject on which he or she is speaking; trustworthiness relates to the communicator's motives or intentions. Communicators who have both expertise and trustworthiness (that is, who are perceived as having little to gain from stating facts or opinions) are the most credible, or believable, to the audience.

Likability

The second key communicator characteristic is likability. It is widely accepted among social psychologists that liking is a key component of attitude change.³ That is, people are far more willing to believe what someone has to say if they like that person. This is especially true if a speaker is supporting an unpopular position. In general, people like others who are most similar to themselves.⁴ The most persuasive communicators are similar to their audience, because similarity leads to liking and liking leads to persuasion. (Therefore, it should be noted that this source characteristic also can be viewed as dependent on audience characteristics.)

Attractiveness

Closely related to likability is attractiveness. Generally, attractive people are better liked than unattractive people.⁵ In addition, there is an attractiveness stereotype in which physical attractiveness is associated with other positive traits ("what

is beautiful is good"). Attractive communicators are thus more effective in persuading an audience to see things their way.

Power

The last communicator characteristic, power, has received considerable scientific scrutiny in its own right. Social power is one of the most important aspects of social influence, which is the process by which attitude change occurs. Power is defined as the ability to change other people's actions.⁶ There are six bases of social power: reward, coercive, referent, informational, legitimate, and expert. Each of these power bases is present to some degree in all communicators. Reward power and coercive power, although important in many contexts, will be excluded from further mention because of their limited applicability in courtroom situations. Thus, *referent*, *informational*, *legitimate*, and *expert* power bases are present in expert witnesses, while fact witnesses' credibility is based only on *referent* and *informational* power.

Both expert and fact witnesses achieve referent power from being liked or admired. The jurors will be motivated to change their attitude in the direction proposed by the witness to the extent that they desire to be similar to the witness or to view the witness as a role model. Informational power stems from possessing information others do not have. This does not require that the information be expert information. If possession of the information is desirable to the jury, any witness who communicates that information will command a certain level of power.

In addition to referent and informational power, expert witnesses can rely on legitimate and expert power. Legitimate power is the power of being in a high-status role. Authority figures, such as judges, have legitimate power. Expert witnesses who enjoy high status (for example, police chiefs) will also be able to capitalize on their legitimate power over the jury. Expert power, the last power base, is achieved by having knowledge that other people do not typically possess, such as professional knowledge. The fact that expert witnesses, unlike other witnesses, may give opinions and answer hypothetical questions is due to the court's recognition of their expert power.⁷

Witness testimony that capitalizes on many power bases is likely to produce greater attitude change in the audience than testimony capitalizing on fewer power bases. When expert opinions differ, jurors intuitively weigh each witness's overall

power to help determine who is the most believable. Likewise, a witness who ranks high in many or all of these source characteristics will most likely have an advantage in effectively presenting testimony.

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Finally, it should be noted that in some cases, even for expert witnesses, what is generally considered to be an asset may actually be a detriment in a specific application. For example, a high-status expert witness may find that status is detrimental if the audience is a low-status group that holds animosity related to the status difference between itself and the witness. Therefore, any generalizations from communication fundamentals should be viewed in light of the unique circumstances of their application.

Language Usage and Communication Styles

In addition to research on source characteristics in persuasive communication, a number of studies of language usage and communication styles apply directly to the way that witnesses are perceived in the legal arena. Surprisingly, few empirical studies address the direct impact of expert testimony on jurors' decisions. Furthermore, we know of none pertaining to fact witnesses. It is possible, however, to extrapolate from general principles as well as from knowledge of expert witness effectiveness and then to draw important conclusions regarding fact witnesses. In this regard, it should be noted that while "the primary agent of attitude change is the attorney,"⁸ it is *through the witness*, whether fact or expert, that the attorney must introduce evidence that is persuasive to the jury.

Passive Voice

Some studies have focused on examining trial testimony in an attempt to measure witness credibility. One such study found that experts' credibility increased with the use of the *passive voice*.⁹ The passive voice emphasizes objectivity over personal opinion. For example, a statement prefaced by "It has been shown by research" is passive, whereas "I believe . . ." is an active voice statement. Language

choice has been shown to be the primary means of conveying message strength.¹⁰

It is widely believed that precise, assertive, and clear language leads to greater attitude change than imprecise, unassertive, and unclear language; thus, the finding that passive statements increased expert credibility is of particular interest. Once again, it is important to note in this regard that what has been demonstrated to be effective for an expert witness may not apply to a fact witness. That is, a fact witness who speaks in the passive voice may sound indecisive rather than objective.

Intensity

In addition, the *intensity* of a message has been found generally to enhance persuasiveness, but only for a credible source.¹¹ In other words, for the testimony to be effective, jurors must understand the message and perceive that the witness believes in the opinion expressed. This principle applies to both fact and expert witnesses.

Storytelling

Jurors, like almost everyone else, enjoy stories. As a result, witnesses who employ a narrative, *storytelling* style have been found to be perceived as more credible than other witnesses.¹² The witness using this strategy is faced with a challenge: having to carry on conversations with two audiences simultaneously. To be perceived favorably in using the storytelling strategy, the witness must converse with the examining attorney while simultaneously telling a story that answers the questions in a manner that the jury is likely to understand. Expert and fact witnesses alike are well advised to employ the story strategy in their testimony.

Immediacy

The effective witness, expert or fact, also may benefit through regularly "connecting" with the individual jurors in a personal way. Witnesses who have this ability often employ the strategies of *immediacy*. Immediacy behaviors include communicating at a short distance, smiling, and maintaining eye contact with one's audience.¹³ Immediacy has been found to lead to increased processing of positive thoughts and less processing of negative thoughts, thereby enhancing perceptions of the witness's likability, competence, trustworthiness, and similarity.¹⁴

Direct Statements

Some researchers have studied social power as it is manifested in speech. In general, people of high power use short, *direct statements*. They do not use intensifiers (for example, *very, surely*), hedges (*sort of, kind of, like*), polite forms of speech (*yes, sir*), or hesitations (*uh, um*).¹⁵ Powerless speech is speech that in any way deviates from standard dialect or that adds more verbiage than necessary.¹⁶ Although the use of power and influence is usually associated with masculinity,¹⁷ the gender of the person who seeks to influence others has been shown to be less important than perceived power.¹⁸ Females who adopt strategies associated with powerful speech are generally perceived favorably.¹⁹

The use of direct statements is oppositional to the use of the passive voice, or indirect way of making a statement. This is an illustration of how one principle can work to oppose another; that is, passive voice increases the perception of objectivity, hence increasing credibility, but decreases perception of power, hence decreasing influence. Because fact witnesses are not expected to have the same degree of objectivity as experts, particularly if testifying for their own case, we conclude that direct statements are likely to be more effective in their testimony.

Honesty

An important key to a favorable perception among jurors is for the witness to be viewed as *honest*. It must be emphasized that honesty and accuracy in testifying are crucial characteristics of a witness with high credibility among jurors.²⁰ Honesty is also important as a factor in expert witness credibility, since a witness with great expertise who is perceived as biased will have a more negative impact on a jury than will an unbiased expert witness who lacks expertise.²¹ One of the primary sources of bias in witness testimony is the attorney who attempts, either directly or indirectly, to influence the substance of witness testimony. While all expert witnesses are potentially subject to undue influence by the lawyers who hire them, the effective experts are those who go to great lengths to retain their objectivity.²² Lawyers will often test the limits to which an expert will go, and it is the expert who must set those limits.²³ Experts must often take strong measures to avoid overgeneralizations and broad interpretations of the facts. Likewise, being perceived as honest is crucial for fact witnesses.

A summary of the factors related to witness effectiveness is presented in Table 1.

Table 1. Summary of Factors Related to Witness Effectiveness

	<ul style="list-style-type: none"> • Credibility <ul style="list-style-type: none"> - expertise - trustworthiness • Likability <ul style="list-style-type: none"> - similarity • Attractiveness • Power <ul style="list-style-type: none"> - referent - informational - legitimate - expert - reward - coercive • Communication Styles <ul style="list-style-type: none"> - passive voice - precision - intensity - storytelling - immediacy - direct statements - honesty 	
Expert witness	{	Fact witness

ISSUES RELATED TO EXPERT WITNESSES

The following discussion provides a basic background about expert witnesses from which distinctions between expert and fact witnesses can be compared and contrasted. The legal basis for allowing expert witnesses to testify is Rule 702 of the Federal Rules of Evidence.²⁴ The standard for evaluating the admissibility of expert testimony in most states is set forth in *Daubert*.²⁵ The *Daubert* standard replaced 70 years of reliance on the *Frye* standard for evaluating expert testimony. Courts scrutinize expert testimony using three tests provided in *Daubert*: reliability, relevance, and the legal sufficiency of testimony.²⁶ Expert testimony, while increasingly prevalent in court, is increasingly controversial. Some people believe all scientific evidence is inappropriate for the courtroom because experts with the most extreme views are favored, the adversarial system promotes "battles of the experts," and professional differences are emphasized at the expense of scientific consensus.²⁷

Expert as Educator

Regarding the first concern, that extreme views are favored over moderate views, "the law expects experts to be unbiased educators and not advocates."²⁸ While it is acceptable, and even expected, that attorneys act as passionate advocates for their clients, the role of the expert is to keep advocacy honest by educating the jury regarding the truth. The roles of advocate and educator often conflict, but the witness must keep in mind that the courts require experts to be impartial in their assistance to fact finders.²⁹

Expert Objectivity

Three models of expert witnesses have been proposed: objective, adversarial, and hired gun.³⁰ The adversarial expert and the hired gun (defined as extreme advocacy) are viewed by most experts (nonattorneys) as unethical in their attempts to influence the jury. However, attorneys may prefer adversarial experts because they typically testify only in cases in which they hold a strong opinion (one similar to the attorney's opinion).³¹ Only the experts can decide how impartially they will testify and whether to include all known information, information that meets professional standards of accuracy, or information that supports the position of the hiring attorney.³²

Ethics of Experts

Expert witnesses who are scientists face particularly difficult ethical dilemmas due to the inherent conflict between the goals of attorneys and scientists.³³ The conflict arises from the adversarial nature of the legal system and the nonadversarial nature of science. Often, attorneys choose experts who can persuade as opposed to experts who are the best scientists. Even when the rules of science dictate tentativeness, attorneys demand definitive conclusions.³⁴ The ethics codes of scientists appear to be the best safeguard against undue influence by attorneys.

Duty to Attorney

Many experts, scientists and nonscientists alike, face a choice between being willing to say enough to be retained to testify and being reluctant to state strong opinions in order to remain objective. Experts must engage in four activities in fulfilling their duty to the attorney:³⁵

1. investigation—research on the substantive issues on which the testimony will be based;
2. evaluation—determination of whether an opinion can be given on the merits of the case;
3. recommendation—development of appropriate trial strategy with the attorney; and
4. testifying.

None of these expert witness roles involves advocacy, which should remain the domain of the attorney.

Common signs of advocacy, to be avoided by the ethical expert, are:

1. exclusively testifying for one side;
2. stating that he or she cannot be wrong;
3. refusing to describe methodologies used to develop testimony;
4. refusing to bring to court data and other documents supportive of testimony; and
5. attacking the credibility of opposing witnesses.³⁶

Attorneys who are in a position to retain experts should be wary of these warning signs. In addition, the expert and attorney have much to learn about how experts may resist advocacy through careful attention to attacks by opposing counsel.

Expert Effectiveness

Two studies have summarized the results of surveys on attorneys' opinions of the ethics and effectiveness of experts.³⁷ One study found the most desirable traits of experts, as perceived by litigators, to be certifications and experience in testifying.³⁸ The other study revealed that the best experts are "understated and conservative."³⁹ Attorneys participating in the latter survey cautioned experts to avoid all defensiveness and never to overstate evidence. Interestingly, the attorneys believed that the most common errors in witnesses' testimony were due to an attorney's failure to adequately prepare the witness. At a minimum, an effective expert must have a basic understanding of court proceedings. He or she must be able to withstand pointed attacks on credibility while remaining poised, confident, and most importantly, professional.⁴⁰ Experts' only allegiance should be to the truth.

The most common basis for selecting an expert was reported to be the attorney's prior satisfaction with the expert. The most common types of expert witnesses, according to a large-scale survey of liti-

Table 2. Common Themes in Advice to Experts

- Develop courtroom rapport.
- Develop experience for both sides.
- Develop the ability to tell a story or paint a picture for the jury.
- Modify approach based on observation of jurors' reactions.
- Work with the attorney to be spontaneously honest.
- Prepare a written summary of proposed testimony for the attorney.
- Eliminate jargon from speech.
- Consider retaining an attorney to represent own interests.
- Answer only the questions that have been asked.
- Maintain integrity.
- Be forthcoming during cross-examination.
- Coordinate with the attorney on all aspects of testimony.
- Separate fact from opinion.
- Learn everything possible about opposing counsel.
- Be totally competent in field of expertise.
- Recognize the difference between science and common sense.
- Anticipate questions from opposing counsel.
- Verify opinions with other experts.
- Have practical experience in field of expertise (research and teaching are preferred).
- Be analytical and creative.

gators,⁴¹ are economists. Following economists in frequency of use are medical experts, actuaries, and accountants. A review of 11 studies providing practical tips to various types of expert witnesses yielded common themes across professions.⁴² These themes are summarized in Table 2.

As the reader will note, while the professions yielding experts have little in common on the surface, the commonalities increase when individual professionals face the daunting task of testifying. One pair of writers⁴³ likened testifying to defending a doctoral dissertation, a prospect only the hardiest professional would even begin to consider! Overall, the role of the expert witness is a challenge to be accepted only after careful consideration of all the costs and benefits.

ISSUES RELATING TO FACT WITNESSES

As previously mentioned, there has been relatively little research or professional writing directed toward the preparation of fact witnesses. Therefore, we consider it important to examine the similarities between factors enhancing the effectiveness of experts and factors enhancing the effectiveness of fact witnesses. We consider it equally important, however, to note that in some circumstances the very criteria that would enhance the jury's acceptance of an expert's testimony could impede its acceptance of a fact witness. For example, a murder defendant with source characteristics that would be highly favorable for an expert could find that these same characteristics elicit a negative reaction, rather than acceptance, toward his or her testimony.

Fact Witness as Advocate

The basic social psychological principles governing credibility apply to all witnesses, expert and fact, but there are salient differences for the two types of witnesses. Therefore, we also will examine some relevant differences between positive factors for experts and factors enhancing the effectiveness of fact witnesses. First, an effective expert witness should always be more of an objective educator than an advocate, whereas fact witnesses are often expected to be advocates, particularly if they are testifying on their own behalf. Second, because fact witnesses are not expected to derive their credibility from their expertness, if they are perceived as too polished or prepared, this can be counterproductive to their credibility. Third, expert witnesses are most likely individuals relatively free from major psychological distress (notwithstanding the fact that testifying is often stressful to experts), whereas fact witnesses may be experiencing extreme psychological discomfort due to their direct involvement in the trial. Fourth, expert witnesses may have a professional stake in how they perform in terms of their livelihood or status, but seldom do they have a personal stake in the outcome of the case.

Psychological Stress

Fact witnesses, on the other hand, can often have extremely high stakes resting on the outcome of their performance as a witness, including the ultimate stake, their lives. In addition, fact witnesses are often in difficult circumstances, which some-

times derive, at least in part, from their underlying psychological difficulties. These circumstances almost always place a fact witness who has a significant stake in the outcome under extreme psychological stress. The stress of litigation can, therefore, become so extreme that an otherwise psychologically healthy individual may become very emotionally unstable.

Because fact witnesses are not expected to derive their credibility from their expertness, if they are perceived as too polished or prepared, this can be counterproductive to their credibility.

Consequently, even though the basic social psychological principles applicable to expert witness testimony also apply to fact witnesses, they apply differently. Specifically, there must be a more selective application of these principles to enhance the credibility of fact witnesses, based on the unique set of constraints that define the purpose of the testimony. This includes remaining sensitive to underlying psychological issues of fact witnesses that may overtly interfere with their performance.

EXAMPLES OF ENHANCING FACT WITNESS EFFECTIVENESS

From the foundation of knowledge provided by the previous discussion, the following section demonstrates two specific examples of applying this knowledge to actual cases in which we were retained to enhance the effectiveness of witnesses after the witnesses were perceived negatively during mock jury research. One case has been chosen from the civil and one from the criminal arena, respectively, to give a balanced presentation. In discussing these cases, we have endeavored to conceal the identities of the witnesses by changing specific details that would violate client confidentiality, while preserving the major dynamic factors involved in enhancing the effectiveness of these fact witnesses.

The Case of the Overly Honest Consultant

The first case involved a multi-million-dollar claim against a consulting firm for allegedly having made technical errors resulting in considerable damages to its client. The president of the firm,

whom we will call Mr. Smith, was the key fact witness in defense of the firm due to his role in the company and his direct involvement in the project. The attorney representing the firm knew that Mr. Smith's testimony would be crucial to the outcome of the case. The attorney also believed that Mr. Smith would present himself poorly to potential jurors and, for this reason, subjected him to a vigorous cross-examination in front of two groups of mock jurors. As expected, mock jurors reacted negatively to Mr. Smith, faulting him primarily for trying to tell his "life story" while avoiding giving direct answers to the attorney's questions. Mock jurors perceived Mr. Smith as having something to hide. In addition to facing a potentially negative reaction from a real jury, Mr. Smith's attorney had become so frustrated with Mr. Smith that the two had developed considerable friction in working with each other as the trial loomed closer.

Mr. Smith was a distinguished-looking man who appeared both dignified and highly intelligent. However, when discussing the case during an initial interview, he immediately expressed both sorrow and considerable guilt over being subjected to the allegations of professional negligence. He had been born to a poor family but had excelled educationally and was a deeply religious man. After graduating from professional school, he built a large company, based on not only his talent, but also his integrity. He was a man with strong values of right and wrong, yet very humble and self-effacing.

Mr. Smith expressed great concern that the firm he had built could be put out of business due to his actions, hurting his many loyal employees, and he was adamant that some mistakes might have been made. When pressed, he denied primary culpability for the problems that had ensued with the project, but he seemed to have difficulty segregating the fact that less-than-perfect performance does not constitute negligence. Furthermore, he consistently sabotaged his denials of wrongdoing with incessant voluntary admissions of shortcomings in his work and the work of his firm. In addition to these disqualifying statements against his denial of culpability, more damaging were his vocal intonations and body language; both clearly expressed his belief that he had been negligent.

After the initial interview, we interviewed Mr. Smith with his attorney present. As soon as Mr. Smith repeated the same process of sabotaging his credibility through his voluntary admissions of shortcomings and his nonverbal expressions of guilt, his attorney became noticeably upset. The attorney attempted to coach Mr. Smith, but to no

avail. Mr. Smith protested in a passive way that he could only tell the whole truth in this fashion and that how he expressed himself constituted, for him, the issue of his integrity, which he would not compromise. The destructiveness of the impasse between the two of them became highly evident.

Mr. Smith presented his testimony in a way such that no jury was likely to hear him as he needed to be heard.

Thus, this case was in severe jeopardy in two regards. Mr. Smith presented his testimony in a way such that no jury was likely to hear him as he needed to be heard. Furthermore, because he and his attorney were no longer capable of cooperating as a team on this issue, there was little likelihood of Mr. Smith's changing his presentation style without outside intervention.

We presented a two-part intervention to Mr. Smith and his attorney. The first part focused on Mr. Smith's style of communication, as well as on the underlying reasons for Mr. Smith's being so guilt-ridden. The goal of this part of the intervention was to help him recognize that both the content of his voluntary admissions of possible wrongdoing as well as his nonverbal expression of guilt constituted self-sabotage, not integrity, and then to teach him to change his expression in a way that was both congruent with his self-image and effective in persuading the jury to return a verdict of no negligence.

The second part of the intervention focused on the conflict between Mr. Smith and his attorney. Clearly, these two individuals, although they had formed a strong friendship, saw the world in very different ways and were failing to communicate. In fact, when the attorney was trying to help Mr. Smith, he was really polarizing Mr. Smith into his self-defeating position. Consequently, the goal of this part of the intervention was to heal the rift between the two so that they could form an effective team.

We conducted the first part of intervention with Mr. Smith without his attorney present. We explored the issue of integrity with Mr. Smith and discussed some childhood experiences for their role in his development of a need to be perfect and his resulting guilt when perfection was not attained. Furthermore, it became apparent that Mr. Smith deeply believed that it was wrong to get angry. We directed our focus toward teaching

Mr. Smith that getting angry is not necessarily wrong, but instead is an adaptive response that may vary in terms of its functionality depending upon the situation. We pointed out to him that even though he and his life's work were being unfairly attacked, he could blame himself only for minor omissions. When Mr. Smith was finally able to understand why he was caught in his self-defeating stance, he could then agree to learn how to make the necessary changes, including suppression of any expressions of guilt and demonstrating appropriate anger toward unfair accusations.

At this point, we brought Mr. Smith and his attorney together to rebuild their team. With both present, Mr. Smith was able to explain to his attorney a deeper understanding of his former reluctance to change his mode of expression and how this had been resolved. With this revealed, he and his attorney were able to reconcile and focus on how Mr. Smith needed to change behaviorally to become an effective spokesperson for the defense.

The attorney cooperated in this process by conducting extensive mock direct examination and cross-examination with Mr. Smith. We provided feedback to Mr. Smith along the way. Comments included focusing on nonverbal expressions, such as how his voice vacillated in pitch or how he averted his eyes, as well as on the content of what he expressed. We offered concrete advice and repeatedly critiqued his presentation. When Mr. Smith became caught in expressions of guilt, we stopped the process and addressed the issue of guilt. We also encouraged him to express appropriate anger, which he did manage, but with some difficulty. He learned to recognize when guilt was intruding on his testifying and to use a behavioral cue to gain control over it by substituting anger for guilt. His attorney began to learn from the process and was also able to cue him in more productive ways. Finally, his presentation began to shape up to an acceptable level. The end result was they won the case; Mr. Smith's positive testimony was cited by his attorney as one of the most important reasons for the victory.

The Case of the Pessimistic Young Murder Defendant

A 19-year-old man from a middle-class background, whom we will call Mr. Jones, was standing trial for first degree murder in a case in which two of his older friends killed a rival suitor who

had been harassing one of the other men's girlfriend. This event occurred when Mr. Jones was a minor and he claimed not to have participated directly in the brutal slaying or even to have known it was planned. The older friends had testified against him to receive lesser sentences. The attorney decided that it was crucial for Mr. Jones to serve as a witness in his own defense. After conducting mock jury research, in which jurors viewed a videotaped statement by Mr. Jones along with other evidence, then convicted him of first degree murder on the first vote after deliberations, his attorney thought it wise to subject Mr. Jones to witness evaluation and preparation.

The intervention plan for preparing this young man to testify first included bolstering his self-esteem and giving him a sense that life could offer him some rewards in the future if he did well in presenting himself.

Upon first meeting, Mr. Jones slumped in his chair, avoided eye contact, spoke in a barely audible fashion, occasionally stammered his words, gave terse answers to questions, and appeared not to care about anything. He expressed a combination of low self-esteem and pessimism—that his future was ruined regardless of how his case would be resolved. It was readily obvious that Mr. Jones felt he had no chance of being acquitted or convicted on a lesser charge. Furthermore, he did not believe that he would have any quality of life, even with a light sentence. He truly had no confidence or hope for the future, and this translated into a negativistic message that eroded his credibility with a potential jury.

The intervention plan for preparing this young man to testify first included bolstering his self-esteem and giving him a sense that life could offer him some rewards in the future if he did well in presenting himself. We then followed this with behavioral coaching to help him correct the negative messages he was exuding.

The first part of the witness preparation involved a combination of supportive psychotherapy combined with vocational counseling. We demonstrated to Mr. Jones that there were viable options for him to rehabilitate himself. If he did well in testifying, he would most likely be convicted on a lesser charge than first degree murder and would receive a short prison sentence. Surprisingly, with a few facts and some brief logical arguments, he changed his attitude quickly. Mr.

Jones was transformed into a willing, even eager, participant in his witness preparation.

Witness preparation does not typically address what the witness says, but how it is said.

The second part of the intervention involved behavioral coaching. We taught Mr. Jones to inhale before speaking and to breathe out slowly while speaking. His voice became louder and his stammering ceased. We corrected his posture, but then he began to sit rigidly upright, an overcorrection that he had to moderate. He learned how to elaborate on his answers so that they were less terse. He began to emanate confidence and a positive, hopeful attitude. We then invited his attorney to use mock direct examination and cross-examination. Throughout this process, we observed Mr. Jones' behavior and provided appropriate feedback. The young man was a quick learner, and his performance became excellent.

The young man was eventually convicted, but of second degree murder with the lightest possible sentence. The feedback from the attorney after the trial was that Mr. Jones had continued to gain confidence after the witness preparation consultation and had actually appeared somewhat overconfident in court, quite the opposite of his former appearance. Specifically, the attorney stated that Mr. Jones had even begun to act a little "cocky" in court and that he, the attorney, had had to caution Mr. Jones during the trial to moderate that overcorrection. Fortunately, the attorney had carefully noted the techniques used on Mr. Jones prior to the trial and was able to utilize the same approach successfully during the trial. The overall result was favorable in that Mr. Jones had faced life imprisonment.

PRACTICAL TIPS FOR ENHANCING FACT WITNESS EFFECTIVENESS

The previous examples provide concrete illustrations of how we professionally prepared fact witnesses to enhance their effectiveness. Note that we directed none of the preparation toward the content of the testimony; rather, our efforts concentrated on the presentation of the testimony. Witness preparation does not typically address *what* the witness says, but *how* it is said. The following discussion provides practical tips to facilitate the enhancement of fact witness testimony based on application of social psychological principles.

Jury Expectations

To apply these principles to maximize fact witness effectiveness, first the attorney must assess the specific testimonial demands on the witness in context. For instance, it is crucial that expert witnesses appear nonbiased, whereas fact witnesses having a great stake in the outcome of their testifying will appear unbelievable if they attempt to sound nonbiased. Likewise, fact witnesses who appear overly sure of themselves or too prepared may invite disbelief, although a high level of expressed confidence and preparation would, in general, be a valuable attribute of an expert witness. Thus, while there is no single correct way for a witness to behave, the witness's behavior should be congruent with the expectations of the fact finders. Another example of meeting the jury's expectations is paying careful attention to the physical dress of the witness to enhance likability. Rather than having all witnesses dress in dark suits, factors such as age, station in life, and so on should dictate the clothing of the witness.

Assessing Presentation

Second, an objective assessment of the presentation skills of the witness, relative to the task demands of the context, is mandatory. Assessing the witness's presentation skills through direct examination and cross-examination conducted before a mock jury can reveal areas of deficit requiring attention. Mock jurors are typically forthright in expressing their opinions of witnesses; their confirmation of problem areas discovered by the attorney provides a valuable starting point for witness preparation efforts. When witnesses have the opportunity to observe how they are perceived by jury-eligible citizens, often the attorney will have little difficulty convincing them that pretrial preparation is warranted. While this process may be somewhat traumatic for the witness (depending on mock jurors' reactions), preparation often makes the difference in winning or losing a case, as well as in the extent to which damages are awarded.

Witness Preparation Plan

Third, a specific intervention plan appropriate to help the witness further develop his or her presentation skills should be constructed and implemented. This plan could include further mock direct and cross-examinations or other creative interventions to increase the effectiveness of the

witness based on the principles outlined. A witness preparation expert should be consulted to create the intervention plan and to implement it with the attorney to enhance the performance of the witness.

Psychological Consultation

Finally, it must be recognized that people with significant psychological disturbances often are relied upon to provide fact witness testimony. In addition, the stress of litigation can bring about psychological disturbances in relatively intact individuals who provide fact witness testimony. This suggests that professional mental health consultation with witnesses who reveal psychological difficulties may be frequently warranted as a major part of any strategy to enhance fact witness credibility.

Ultimately, the jury decides who wins the case by evaluating the credibility and overall effectiveness of the attorneys, parties, and witnesses. Trusting a communication source, a witness, is more important to a jury than actual accuracy of a source, especially when technical matters are concerned.⁴⁴ Similarly, cross-examination is more important in establishing a witness's effectiveness than direct examination. Jurors are increasingly cognizant of the fact that direct examination is conducted by a "friendly" attorney; as such, points made under more hostile conditions will carry greater weight. In general, jurors react more favorably to witnesses who behave as if they have been expecting to testify. Practicing one's testimony by putting oneself in the jury's place has been cited as one way to have maximum impact as a witness.⁴⁵

Five C's of Effectiveness

As stated in the first section of this article, little has been written about enhancing the effectiveness of fact witnesses. There are three practical guides for the novice expert witness, all of which are recommended reading for the attorney and witness alike.⁴⁶ Each of these sources contain insights that are applicable to fact witnesses as well, particularly when the fact witness is testifying in complex litigation. The "five C's of effectiveness"⁴⁷ are important for all witnesses to consider as they prepare for their day in court:

- *Be credible.* Be modest, be patient, and use humor appropriately.
- *Be correct.* Be consistent with other witnesses on the same side.
- *Be clear.* Avoid jargon and overstatements.

- *Be concise.* Do not wander or volunteer any information.
- *Be candid.* Be natural, sincere, honest, and graceful.

Witness Preparation: An Attorney's Responsibility

The preparation of fact witnesses for testifying should be an important part of the attorney's role. Indeed, it has been our experience that witnesses, fact and expert, often desire more thorough preparation by the attorney. Even experienced experts want to gain a greater understanding of what the attorney expects of them in depositions or trials. Fact witnesses, for whom the courtroom is foreign territory, certainly need to be prepared for the critical role they play in litigation.

The basic social psychological principles applicable to witness effectiveness in general should be kept in mind while preparing fact witnesses. However, because significant differences must be considered carefully in the preparation of fact witnesses as compared to what is required of expert witnesses, the prudent attorney should carefully analyze how to apply these principles in each unique situation. We hope that the present discussion has clarified some of these issues and has provided, through examples, suitable illustrations that will stimulate litigators to utilize productive efforts to enhance the effectiveness of their fact witnesses as part of responsible legal practice.

In conclusion, a trial is an experience like no other. The only way to get information to the jury is through witnesses; attorneys cannot testify. There is only one opportunity for the witness to testify—if the witness does not make the right impression, the case may be lost. Witnesses, fact or expert, do not intuitively know how to communicate persuasively. It is the attorney's job to teach the witness how to impart information for maximum effect. If the witness does not carry the day because of lack of preparation, the attorney has failed to fulfill his or her responsibility. An important part of the attorney's responsibility is to take advantage of what social science has to offer.

ENDNOTES

¹We will refer to decision makers in this article as the jury, but this term is also applicable to judges, arbitrators, or other relevant decision makers in the legal arena.

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