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The Evolution of the Deposition: Survival of the Prettiest

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Special to the Legal

In a recent contract-dispute case regarding an oral agreement, the defense's star witness claimed in a video deposition that although she engaged in negotiations, she never made an agreement with the plaintiff. The defense team was convinced they had a slam-dunk through her powerful testimony: She communicated all the key messages with clear conviction.

Amazingly, however, after delivering the most important, case-defining statement in the deposition, she turned and winked at her attorney - all of which was caught on her deposition tape.

This exemplifies not only the crucial importance of a witness's communication style, but how video depositions require a whole different way of preparing witnesses than traditional depositions do.

Despite their understanding of the impact of witness behavioral cues on the stand, many attorneys are not preparing witnesses differently for videotaped depositions.

A competent witness at a nonvideotaped presentation, for instance, understands the importance of responding with as few words as possible, taking as much time as needed



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to formulate an answer, and focusing on content - without concern for strength of voice, intonation, pausing and posture.

On the other hand, using that same style for a videotaped deposition may backfire. Mechanical, short answers may be interpreted as curt and evasive. Pregnant pauses may be seen as a sign of lying. A soft tone of voice may be perceived as anxiety.

Jurors read a witness's nonverbal cues to evaluate the witness's credibility and interpret the testimony's content. In a recent research exercise conducted by a national litigation research-consulting group, jurors evaluated the "most important point" on the effectiveness of a witness's testimony as being the impact of witness communication

style. Juror comments included the following:

"He was very visibly nervous by blinking his eyes a lot."

"Body language of Mr. X and his testimony showed knowledge."

"He seemed very credible, very calm, and comfortable with the questions asked."

"He simply answered the questions in a bored, uninterested, and unemotional way."

With that in mind, here are strategies you can use to empower your witness's video deposition.

Image is everything. Content aside, image is everything in video depositions. Good witnesses develop rapport with jurors through eye contact, maintain appropriate appearance and attire, and demonstrate conviction through posture and voice projection.

According to the *Elaboration Likelihood Model* (Petty & Cacioppo, 1986), two "routes" to persuading jurors apply to witness testimony. The central route relates to the actual content and quality of the witness' message. The peripheral route relates to the "image" of the witness' testimony, such as behavior, attractiveness and speech intonation.

Video depositions portray not just the central persuasive message but the

peripheral one as well. You must consider both the image your witness is trying to convey, and the need for consistency (content and communication style) between deposition and the stand.

Look the part. Jurors notice overly casual dress, uncombed hair and slouching posture (e.g., one witness from a recent insurance matter dressed appropriately at his deposition but had his feet up on his desk throughout questioning). If a witness appears not to take the process seriously, he will lose credibility.

Connect with your audience. Make sure your witness faces the camera so jurors will feel he is looking them in the eye. Other logistical tactics you can use to connect with jurors include:

Position the camera behind the examiner. If the camera is placed away from the examiner, the witness will naturally look away from it and toward the examiner, or give the impression of “tennis head,” bouncing back and forth from the camera to the examiner.

Talk to the cameraman. Interacting and looking directly toward a particularly snarling examiner can cause a witness to stumble. Some witnesses find it helpful in these instances to give their answers to the cameraman, who is typically much friendlier.

Manage behavior. Make it easy for your witnesses to avoid fidgety behaviors that may be misinterpreted. This is especially important with witnesses who have a high public self-consciousness. These witnesses tend to overreact to aggressive questioning. Witnesses who have a high private self-consciousness, however, make their own self-judgments and have more control over their reaction to aggressive questioning.

Some simple practices to manage anxious behaviors during video depositions include:

Avoid having “toys” in front of your witness. In countless depositions, witnesses are seen playing with phone cords, paper clips, rubber bands, pens and anything else within reach. These things are often seen by juries as distracting and a sign of anxiety.

Avoid swivel chairs. If the chair swings, the witness will swing it. This constant movement on video may become distracting to the point that jurors are no longer hearing what she is saying.

Instruct witnesses not to react to attorney banter. Attorneys typically bicker back and forth during a deposition. It is important, though, for the witness not to involve herself but, instead, to sit calmly and wait until asked another question.

Hire a trial consultant. It has become common practice among trial attorneys to hire a trial consultant or communication specialist to help prepare witnesses for depositions, including videotaped ones. While your trial team focuses on the content of your witness’s testimony, the trial consultant, who is an expert in behavioral modification and communication training, keys into the form of the testimony and behaviors that impede your witness’s message.

Practice makes perfect. As psychologist Stanley Brodsky said in 1999, “Overprepare: As in marriage, personal complacency can keep (your witness) from coping effectively with courtroom strife.” With help from your trial consultant, take your witness through practice rounds of giving videotaped testimony, preferably using a surrogate examiner unfamiliar to the

witness. Go over the video with the witness so he can see for himself the impact of looking at the camera, behavior management, communication style, etc.

You may be nervous about having your witness practice with a trial consultant or communication specialist, considering that typically one of the first questions asked at deposition is, “What did you do to prepare for this deposition?” First, teach your witness to respond to this question honestly without going into details: “I met with the trial team to review documents and go over what the deposition process would be like.” It is often more dangerous to allow a witness to go into the heat of the battle unprepared than to take the chance that opposing counsel discovers that a communication specialist worked with the witness. In fact, in a survey of more than 1,000 potential jurors nationwide, only 22 percent said they would find a witness less credible if they discovered the witness was prepared by a communication specialist.

In conclusion, as processes in litigation evolve and technology reveals more about our witnesses in deposition than just their words, our practices for preparing witnesses must evolve along with them. The unprepared witness in a video deposition runs the risk of losing the effectiveness of good content to poor style when clips are presented at trial. So in understanding Darwin’s theory of survival of the fittest, we owe it to our clients to give our witnesses the tools they need to be strong witnesses and succeed in their testimony. •