

Why Do Well-Prepared Witnesses Crash and Burn?

Ross P. Laguzza, Ph.D.

Houston, Texas

While traditional witness preparation for deposition or trial has its place in reviewing case facts, it falls short with respect to helping your witness become an effective communicator. This author discusses why traditional witness preparation fails and how to improve upon it.

You work several days straight preparing a key witness for deposition or courtroom testimony. You cover all the important areas of testimony and review all the potential traps and pitfalls. The witness is more than cooperative and savors every juicy strategic morsel you impart, even to the point of taking copious notes every time you open your mouth. The witness is concerned about "knowing all the answers," and you do everything you can to help her feel comfortable with her testimony. She tells you she understands the purpose and direction of her testimony. She tells you that she comprehends why certain answer strategies are less effective than others. Your witness couldn't be a better student. Earlier, you had been worried that this witness might have real problems, but now she seems to really be catching on, and you think to yourself, "Okay, everything is under control." The witness is declared "ready," and you enjoy a good night's sleep. Then, the witness commences testifying, and

lo and behold, disaster strikes. You watch all of your handiwork destroyed by thoughtless answers that bear no relation to the hours of preparation so faithfully performed. This is no mere shaky performance. This is pure, unadulterated ugliness as manifested in this sample exchange:

Examiner: "Wouldn't you agree, ma'am, that this memo shows the company did not care about safety?"

Witness: "Wow, you are right. This sure looks pretty bad."

This is beyond "deer caught in the headlights" stuff. This is *really bad*, like a deer caught in the headlights while being thrown off a cliff into a sea of crocodiles. Instead of maintaining control and

Ross P. Laguzza, Ph.D., began studying juror psychology in 1981 and over the years has consulted with attorneys in more than 500 major trials in 47 states. He is a frequent lecturer on the principles of decision making and strategies for persuasion. He is a senior vice president at DecisionQuest's Houston office.

confidence, the witness spins wildly out of control, ultimately self-destructing in a flaming ball of fire. During the postmortem, you want to know how the witness could have mangled all that was so carefully planned. You ask, "This witness was really okay during the prep. Why did she flame out during the real thing?"

Does any of this sound remotely familiar? It is a very common experience among seasoned and unseasoned trial attorneys alike who have spent countless hours teaching, cajoling, begging, and, at times, threatening witnesses to encourage better performance. It is not that the witness was intentionally trying to give you an ulcer, but it is because she was never "ready" in the first place. The preparation may have been intensive, yet inadequate all the same. In fact, years of psychological research on jurors' perceptions of witness behavior and years spent working with witnesses in preparation sessions lead to the following conclusion: Traditional witness preparation not only is ineffective, it can often do more harm than good.

WHY TRADITIONAL WITNESS PREPARATION FAILS

Traditional witness preparation is based on the myth that the lawyer is the teacher/mentor with all the important information and the witness is the student who, being inexperienced and ignorant, must learn from the teacher all the critical details of the testimony and the intricacies of trial procedure. When the witness proves to be a good student who has learned the master's teachings (as in, "snatch the pebbles from my hand, grasshopper"), the witness is deemed ready to go out and face the perils of courtroom testimony. What makes this myth particularly seductive is that it appeals to both the lawyer, who is usually comfortable in the role of trial manager with ultimate control, and to the witness, who is looking for simple answers to complex problems. This myth fails in practice primarily for the following reasons:

1. It places the responsibility for the testimony on the lawyer *rather than on the witness*, where it belongs. The witness learns to be helpless and dependent on the attorney. The witness, threatened by the prospect of testimony, cons the attorney into doing all the work, which reduces some of the witness's anxiety. The attorney, worried about how the witness will perform, is more than will-

ing to step in and take control, which alleviates some of the attorney's anxiety. The dysfunctional nature of this arrangement becomes apparent only when the witness is on his or her own, but by then it is too late.

Witnesses are not provided with effective coping strategies for dealing with difficult questions and subjects.

2. Witnesses, particularly those with excellent verbal skills, see the goal of the preparation process as determining the complete array of potential question-answer combinations and then committing those to memory. This is like learning to hit a golf ball by memorizing the thousands of intricate physical movements that must take place for the ball to be hit correctly. The would-be golfer approaching the task in this manner ultimately becomes paralyzed over the ball. Many witnesses report a similar experience as they try to recall "all the things I was supposed to say and exactly how I was supposed to say them." Instead of reducing the training experience to a cram session for the LSAT, the focus should be on helping the witness identify and then practice implementing three or four key messages or "home bases" that are the foundation of the testimony. Most ineffective witnesses (a) do not know their home bases, (b) have the wrong home bases, and/or (c) don't know how to get to their home bases during cross-examination.
3. Lawyers feel less worried about witnesses who are seriously studying all the questions and answers because it fits their personal philosophy of learning, and they directly and indirectly reinforce this learning strategy during preparation. As a consequence, witnesses inadvertently are encouraged to prepare for an "exam" of logical questions. The actual testifying experience often comes as quite a shock.
4. Witnesses are rarely probed on what aspects of testifying make them afraid and/or angry in a particular case, even though unprocessed fear and/or anger is at the root of every poor witness performance.
5. Witnesses are not provided with effective coping strategies for dealing with difficult

questions and subjects. Too much time is spent by well-meaning attorneys and by incompetent consultants on communication style (how much eye contact the witness makes with the jury, how the witness dresses, whether the witness is fidgety, and so on), and virtually no time is spent on simple strategies the witness can use to extricate himself or herself from a tough situation. Research and real trial experience indicate that jurors often are persuaded by witnesses with all types of style faults, but who clearly convey the right message. On the other hand, articulate and confident witnesses with excellent style often do the most damage to the case because they articulately and confidently send the wrong message.

GETTING WITNESSES TO TAKE RESPONSIBILITY FOR THEIR OWN TESTIMONY

The first thing a witness needs to understand is that the responsibility for his or her performance rests on his or her own shoulders. This is not something you can simply tell a witness, because he or she will agree and then continue to con you by acting helpless, forgetting, acting angry and frustrated, or worse, being totally compliant. Here are some more effective interventions:

1. *Put the witness in charge of his or her testimony.* Ask the witness to imagine the completion of his or her testimony and then to describe how he or she hopes to be personally perceived by the jury or judge and what he or she hopes the jury will remember about the testimony. It is important to let the witness frame these goals in his or her own words without editing by the attorney (as tempting as that will be). I have not met a difficult witness yet who, in his or her heart, did not care about the jury's impression. These hopes are then translated into the basic goals for that witness. All witness behavior is evaluated based on whether it furthers or impedes these goals. This is the first step to getting the witness to "own" his or her testimony.
2. *Don't allow yourself to be conned into doing all the work.* When the witness says, "Gee, this is all so overwhelming, I don't know how I am going to pull this off" or "Golly, I just

keep forgetting what I am supposed to say," say, "Yes, how are you going to make sure you meet your own goals?" or "Yes, I notice you have trouble stating what you truly mean. What are you going to do about that?" Don't rush in to rescue the witness with comments like "Oh, don't say that, Mark. I will tell you everything you need to know." Remember, the best help you can provide your witness is allowing him or her to experience the power and control associated with managing his or her own performance. Most lawyers are unaware of how they sabotage the training process and undermine the witness's confidence by giving the witness what he or she seems to be asking for, instead of what he or she really needs.

The best help you can provide your witness is allowing him or her to experience the power and control associated with managing his or her own performance.

3. *Ask the witness to develop his or her own home bases.* Don't let these number beyond three or four. Ask the witness to write down what he or she thinks these messages are, and then help the witness to reduce these to simple statements or, better yet, one or two words per home base. Once the witness understands that his or her entire testimony really boils down to communicating three or four key messages, he or she will begin to relax and be ready to start thinking strategically about his or her performance.
4. *Conduct short, videotaped practice sessions that do not exceed 10 minutes.* Most practice sessions are far too long, and the witness quickly becomes overwhelmed with performance errors and lawyer feedback. These sessions should focus on how the witness can get to home base messages from any examination situation, the tougher the better. Ask the witness to watch the tape and be the first one to offer criticism. Proceed to the next practice segment only when everyone is clear about what happened during the last segment. Don't hesitate to repeat a segment over and over until the witness feels he or she has mastered a particular issue area. Spread the training over several days rather than an intense cramming session.

This is the fastest way to help people identify problems and improve their own performance, and it is consistent with allowing the witness to take ultimate responsibility for his or her testimony.

5. *Ask the witness what bothers him or her the most about the witness role.* If you ask the question sincerely and listen attentively, you will often be surprised by what you hear. One particularly recalcitrant witness, on being asked this question, admitted he believed his company *had* made a mistake. Up until that point, he had been a frustrating student who didn't seem to understand anything. Well, it turns out he understood plenty and that was the problem. Again, don't be too quick to reassure the witness that his or her fears are unwarranted. Instead, help the witness develop strategies for managing emotions while under attack.

THE WITNESS AS TEACHER: USING THE WITNESS PERFORMANCE MATRIX

Most witness coping strategies can be described along two dimensions: *information* (how much the witness discloses or withholds) and *activity* (how active or passive the witness is). At any point, a witness can give too much or too little information and can be too active (aggressive) or inactive (passive). The juxtaposition of these two dimensions produces the nine-cell matrix shown in **Figure 1** below. Each

cell describes a unique coping strategy. One witness could use all of these strategies at different times, but most rely on only a few. Most witnesses use different strategies for direct and cross, which typically gets them in trouble with the jury. All strategies other than the center cell ("communicator") are associated with less-than-adequate performance, and some do more harm than others ("wiseguy" and "victim" being among the most damaging strategies). An effective witness is one whose answers fall into the center cell ("communicator") most of the time. This person knows his or her home bases and how to identify opportunities to share them with the jury.

An excellent method for improving witness performance is to familiarize the witness with this matrix and then ask the witness to *score his or her own videotaped performance* by placing a tick mark in the cell that best represents his or her strategy for each answer. Why does this work? First, the witness learns to think of his or her answers as reflecting a *strategy*, which for most witnesses is a revelation of sorts. Second, it raises the witness's awareness of when he or she uses certain strategies ("Gee, I seem to become more evasive every time the examination focuses on a particular document"). Third, it is an effective way for the lawyer to see how the witness perceives his or her own performance. If the witness is misclassifying his or her strategies or at least is classifying them differently than the lawyer would, the lawyer can use this disparity as a taking-off point for an in-depth discussion with the witness. Finally, it places the burden for understanding witness performance issues in the hand of the one person who can actually do something about it: the witness. Once witnesses under-

Figure 1. Witness Performance Matrix

		INFORMATION		
		Nondisclosing	Informative	Overdisclosing
ACTIVITY	Aggressive	EVASIVE/ANGRY "Wiseguy"/"Villain," hostile demeanor and won't tell anything.	HEAVY HANDED Like "Bad Medicine," has good things to say, but hard to take.	CARELESS BULLY "Know-it-all" who wants to win every point and prove self.
	Assertive	UNPREPARED Has no doubt, but no facts.	COMMUNICATOR/GOOD LISTENER "Newscaster," tells story well; does not overpersonalize.	LOOSE CANNON "Sloppy Joe/Chatty Cathy," strays too far from home bases.
	Passive	EMPTY CHAIR "Wallflower," does little, says little, shows no passion	BORE "Drones," informative but dull delivery; no commitment.	VICTIM Plays "Kick me," afraid, volunteers harmful infor- mation, overly cooperative.

stand how their strategies interfere with achieving their goals, they are more receptive to learning and implementing new strategies.

**NO MATTER HOW YOU SLICE IT,
WITNESS PREPARATION IS HARD
WORK**

Witness training is far more difficult and complicated than even most seasoned attorneys realize.

However, even the worst witnesses can improve if given the responsibility and the opportunity. Traditional training has its place in reviewing case facts. When it comes to developing and implementing a strategic message, we have seen the traditional approach be quite ineffective and, at times, harmful. There is no substitute for the hard work required to help a witness become an effective communicator. What is important is that *the witness* does the work.