Witness Demeanor Preparation—Ignoring Your Witness's Nonverbal Testimony Could Kill Your Case

— by S. D. Chambers, III —



"Actions speak louder than words." This timeworn maxim is still true today. Witness demeanor is testimony, and the task of witness demeanor preparation is to ensure that your witness's words match the coinciding demeanor. It is well established that witness credibility results from consistency in all the information offered through testimony. As with the substantive information offered, consistency between a witness's verbal and nonverbal statements is vital to gain juror confidence. A witness must not only tell the truth, but tell it in a way that is both strong and believable.[1] Conflicting verbal and nonverbal testimony can negate convincing facts and kill a strong case.

For years, studies have shown that nonverbal messages play a critical role in communication. In fact, vocal characteristics (volume, pace, hesitations) and visual behavior (eye contact, posture, gestures) may constitute as much as 93 percent of the total information offered in an interaction.[2] The power of testimony depends not upon the intended message of substance, as one might assume, but, rather, the demeanor associated with the expressed verbal statement. To obtain accurate, clear, and credible testimony, your witnesses must control even the most subtle nonverbal messages that distract from, confuse, and contradict their verbal statements.

Recognizing the importance of nonverbal communication offers many general advantages to attorneys. In his article, *Body Language, Speaking from the Other Side*, attorney John Barkai presents a few of the valuable practical applications nonverbal communication skills provide every practicing attorney.[3] Communication research demonstrates a strong correlation between specific nonverbal signals and the important human qualities of persuasion and credibility upon which jurors rely.[4] Incorporating such knowledge into one's case presentation can be an invaluable asset for litigators. Government defense attorneys have much to gain from paying closer attention to the unconscious and nonverbal communication their defendants broadcast to jurors.[5] Trial attorneys who prepare for the significant effect nonverbal messages have upon credibility are at a clear advantage.

A general understanding of nonverbal communication is clearly beneficial to all practicing attorneys. When preparing your witnesses to testify, it is helpful to know the factors that underlie your witness's demeanor. Demeanor conveys feelings. The feelings expressed through demeanor convey the human character qualities that determine how your witness is perceived. These character qualities are essential to both witness credibility and your case theme. Jurors formulate their opinion of each witness's character based upon their own observations. If your witness does not appear as you claim, you lose credibility.

Our jury system relies upon each juror's intuitive feeling as the ultimate judge of witness credibility. Certainly, the facts matter; however, the substance you offer at trial is only as strong as its source. If your witness's demeanor conflicts with the verbal testimony, jurors believe the demeanor, credibility is lost, and the substance is compromised—if not totally rejected. Witness preparation should conscientiously address all the factors that could negatively impact your witness's substantive testimony. Planning for the influence of demeanor helps to ensure witness credibility by protecting against unexpected, inconsistent, and misleading nonverbal testimony.

Human Factors Speak

Physical traits, personal speaking skills, and learned habits can have an important influence upon testimony. Studies show that fear, distress, and anger, which can control a witness's temperament, may partially be a function of his or her biology.[6] Given this fact, simply telling your witnesses not to be nervous will do little to help them manage their feelings in the way that you need.

Environmental influences, such as accents, slang words, and colloquialisms, may be misunderstood and rejected by jurors. Idiosyncracies and routine habits may distract or confuse jurors. In a recent case I observed, an important witness worried that he would be disliked in California because he spoke with a strong New York accent. True or not, the apprehension he felt concerning his own communication skill was real and could have deeply affected his confidence and demeanor at trial. Speaker anxiety increases if the audience is perceived as less friendly.[7] The relaxed communicator conveys confidence.[8] Confidence conveys conviction with what one is saying. Successful witness preparation requires knowing how your witness's personal communication skills may affect both your witness and the jury.

Evaluating your witness's ability to clearly communicate important substantive information to a specific jury population should be a standard consideration for witness preparation. The value of each witness to your case demands identifying and limiting the negative influence personal traits, speaking skills, and habits have upon communicating important facts in a clear and accurate manner. Know your witness's personal style and know your audience.

Physical health affects communication. Back problems can cause excessive twisting or shifting and mistakenly convey discomfort with the substance. Poor vision can cause excessive squinting and create a hostile appearance. Poor hearing can cause leaning forward, tilting the head, not hearing the question—all making your witness appear defensive or evasive. Aching muscles or joints invite self-touching, commonly

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associated with excessive nervousness and deception. All of these nonverbal signals affect the qualities of persuasiveness and credibility.[9]

The problem with these seemingly innocuous nonverbal signals is that jurors mistakenly associate them with the accompanying verbal comments. The complete message becomes a confusing statement that jurors are forced to interpret. Demeanor preparation should prevent mixed messages that force jurors to interpret who your witnesses are and what they mean to say. Anticipating unavoidable, distracting, nonverbal testimony caused by physical health will ensure that your witnesses will be heard clearly and not misunderstood.

Similarly, personal stress can have a confusing effect upon communication. Just speaking in public is perceived to be one of the most anxiety-inducing experiences that a person can encounter.[10] You do it for a living. Most witnesses do not. For the ordinary lay witness, litigation is extremely stressful. The demand to offer testimony under an oath can affect careers, relationships at work, friendships, and most significantly, relations at home. In the end, your witnesses' ability to testify effectively depends a great deal upon their ability to manage all their emotions at a time when they will be facing the unfamiliar burden of testifying.

We know that intense emotions are primarily conveyed through visual behavior and audible voice characteristics.[11] Studies show that people decide whether a person is likable or not likable, and then use this judgment as the foundation on which to organize all subsequent information.[12] Credibility is correlated with three perceived human qualities: competence, trustworthiness, and energy.[13] Conveying strength and stability through fluent, non-hesitant speech affects perceived credibility.[14] On any given day, your witness's personal stressors can affect the ability to effectively convey competence, trustworthiness, and energy. Witness demeanor preparation should carefully and sensitively explore how your witnesses' personal stress could affect their ability to communicate effectively under pressure, when it counts.

Earning Credibility Under Unfamiliar Pressure

Our physical surroundings influence how we feel. In unfamiliar territory, we can feel unsure of ourselves. When feeling unsure, we nonverbally convey feelings of doubt and insecurity that become associated with our verbal statements. Situational factors influence our anxiety.[15] When we are in familiar surroundings, we feel confident. When we feel confident, we feel comfortable, remain focused, and convey the self-assuredness essential to credibility.

Is the complete message a confusing statement that jurors are forced to interpret? Demeanor preparation should prevent mixed messages that force jurors to interpret who your witnesses are and what they mean to say.

It is easy for an experienced attorney to forget what it was like to speak in court for the first time. This can lead to mistakes when attempting to prepare witnesses who do not make their living speaking under pressure. The common instruction, "Don't be nervous," only heightens their stress. Rather, your preparation should anticipate this common reaction and help prepare witnesses to manage their anxiety in a constructive way.

Assuming your witness will feel comfortable speaking in a formal setting under an oath is a risk. Asking lay witnesses to deliver effectively what you need from them, under unfamiliar pressure, is a large demand. For you, the courtroom is a routine environment. It is your workplace. For a nonprofessional witness, it is not.

The best approach is to assume that your witnesses will experience stress and then take the steps necessary to identify and minimize the damage their stress could cause. This might call for a trip to the courtroom, watching a real trial on television, or observing a trial or deposition in person. Familiarity breeds confidence. Creating a realistic environment and role-playing using mock questions helps to trigger and correct the specific stress related demeanor that surfaces only under the pressure of the situation. Describing your opening statement to your boss and performing it are two different things. In the latter case, your feelings come into play. Don't base your evaluation of your witness on a cerebral office chat, because you will be ignoring the most important factors that determine credibility.

Our self-image influences both how we communicate and how we are perceived. The shy witness may speak with a quiet voice and appear uncertain, guilty, or apologetic. The confident or domineering personality may convey indifference, arrogance, or disrespect for the process. Jurors react positively or negatively based upon the personality qualities communicated by specific demeanor. Posture, shifting, pausing, pace, and elaborations are just a few of the nonverbal signals that influence whether a witness is likable or not likable.[16] Even jury selection is a function of communication traits, style, and perceived juror personality, apart from the case relevant issues.[17]

Despite the uncomfortable circumstance, shy witnesses cannot allow the opposing counsel to control their testimony and, most important, how they are perceived. In the same manner, witnesses with strong personalities must understand and control the effect their communication style has upon the interpretation of their words and character. Your witnesses, despite their personalities, must be able to stand firm, in a likeable manner, and convey the important substantive points you expect them to bring to your case.

Breaking Stereotypes and Representing the "Evil Empire"

Government witnesses must be prepared to break negative stereotypes and convey the genuine human character qualities that jurors want to sense in them. The "evil" bureaucracy you represent must have a human face. However, despite your fervent claim that your officer-defendant is patient and reasonable, that your administrator is kind and fair-minded, or that your health professional is indeed compassionate, jurors

will not accept your word, alone. Jurors develop their opinions based upon the feelings your witness communicates in their presence. In the case of defendants, this evaluation begins long before the defendant takes the stand. During jury selection, opening statements, and witness testimony, the jury is watching and formulating an impression of your defendant. Nonverbal testimony occurs as long as your witness can be seen by the jury.

One of the most obscure yet important issues witness preparation should address concerns the influence a witness's occupation has upon his or her communication style. The police-witness wants to maintain authority and often gives commands. The educator-witness wants to theorize and speak in abstracts. The politician-witness wants to tell jokes, be cute, and campaign. The health professional often conveys guilt and self-blame. The attorney-witness wants to argue the case. The habits, style, and routine demeanor common to our occupations can become confusing and damaging when offering testimony. Unless witnesses understand their new role, they will continue to communicate in the manner they are most familiar. Testifying effectively demands that your witnesses communicate in the manner fitting to their role in the trial.

Clear, accurate, and credible testimony occurs when the feelings communicated with a verbal statement pertain only to the subject of that statement. The difficult challenge for every witness is to control all nonverbal messages that have nothing to do with the specific question asked. In normal conversation, we expect appropriate emotions to be conveyed with certain subject matters. We don't have to think about it. In comfortable circumstances, we do it naturally. The human qualities others attribute to us are a result of this natural expression of subjects with their congruent emotions. Communicating in the same natural manner while under the unfamiliar pressure of testifying is difficult, to say the least. Nevertheless, jurors expect witnesses to convey appropriate feelings with whatever topic they are asked to address. This is a natural and unconscious expectation. I submit this is what is meant with the instruction to, "Use your human experience to decide who is telling the truth." If your witnesses fail to be "human," jurors are forced to interpret why their feelings don't support their words. Most often, the interpretation is wrong and witnesses are misjudged.

Conclusion

Some of the factors that influence nonverbal testimony are easy to identify and control. Others are more obscure, have deep roots, and exert greater control over demeanor. Regardless of the source, all of these factors, if ignored, are potentially damaging to your witness's testimony. Because nonverbal messages are always associated with the accompanying verbal statement, they must be controlled to secure effective testimony.

Witness demeanor preparation should address the powerful influence of demeanor upon testimony. With proper demeanor preparation, your witnesses can improve personal communication skills, build confidence, and face the unfamiliar pressure of testifying feeling comfortable and in control. When your witnesses feel confident and comfortable, they will effectively convey the important factual substance and the essential character qualities that determine their credibility. The feelings you need your witness to convey must be communicated in a genuine manner and in a way that will not be misunderstood. Your witnesses will be successful conveying confidence and self-assuredness if your preparation sends them to the stand actually feeling that way. Take the extra time. Don't get caught ignoring nonverbal testimony that could kill a winning case.

Notes

1. Alexander M. Selkirk, Jr, *Witness preparation: key to a successful trial strategy*, 1992 N.Y. St. Bar J. 10-23 (1992).
2. John L. Waltman, *Nonverbal elements in courtroom demeanor*, FBI law enforcement bulletin, Mar. 1984, at 21-23.
3. John L. Barkai, *Nonverbal communication from the other side: Speaking body language*, 27 San Diego L. Rev. 101-125 (1990).
4. Burgoon, Birk, and Pfau, *Nonverbal behaviors, persuasion, and credibility*, 17 Human Comm. Res. 140-169 (1990).
5. Howard Varinsky, *Nonverbal communication enhances witness credibility*, For The Defense, May 1992, at 28-31.
6. Cary Wecht Horvath, *Biological origins of communicator style*, 43 Comm. Q. 394 (1995).
7. M. Beatty, *Situational and pre-dispositional correlates of public speaking anxiety*, 37 Comm. Educ. 28-39 (1988); J.L. Daly and L. Stafford, *Avoiding communication: Shyness, reticence and communication apprehension*, Correlates and consequences of social-communicative anxiety 125-43 (McCroskey Eds., 1984).
8. R.W. Norton, *Foundation of a communicator style construct*, 4 Human Comm. Res. 257-282 (1978); R.W. Norton, Communicatory style: Theory, applications, and measures (Beverly Hills: Sage 1983).
9. Burgoon, Birk, and Pfau, *Nonverbal behaviors, persuasion, and credibility*, 17 Human Comm. Res. 140-169 (1990).
10. J. Jackson & B. Latane, *All alone in front of all those people: stage fright as a function of number and type of co-performers and audience*, 40 (1) J. Personality & Soc. Psychol. 73-85 (1981).
11. Ross Buck, The communication of emotion (New York: Guilford 1984).
12. T. K. Scull & R.S. *Wyer, Person memory and person judgement*, 96 Psychol. Rev. 58-83 (1989).
13. James P. T. Fatt, *It's not what you say it's how you say it*, 16 Comm. World 37-40 (1999).
14. Judee K. Burgoon, *Nonverbal behaviors, persuasion, and credibility*, 09/01 Human Comm. Res. (1990).
15. A. H. Buss, Self-consciousness and social anxiety (San Francisco: W. H. Freeman 1980); *J. C. McCroskey, The communication apprehension perspective.* Avoiding communication: Shyness, reticence, and communication 13-38 (J. A. Daly & J. C McCroskey Eds,. 1984) M. Beatty, G.L. Balafantz & A.Y. Kubara, *Trait-like qualities of selected variables assumed to be transient causal of performance state anxiety*, 38 Comm. Educ. 277-89 (1989); M. Beatty & M.H. Friedland, *Public speaking state anxiety as a function of selected situational and pre-dispositional variables*, 38 Comm. Educ.142-147 (1990).
16 . J.L. Monahan, *I don't know it but I like you: The influence of nonconscious affect on person perception*, 24 Human Comm. Res. 480-500 (1998).

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17. C.J. Wigley, III, *Disclosiveness, willingness to communicate, and communication apprehension as predictors of jury selection in felony trials*, 43 Comm. Q. 342-51 (1995); C.J. Wigley, III, *Verbal aggressiveness and communicator style characteristics of summoned jurors as predictors of actual jury selection*, 66 Comm Monographs 266-75 (1999). ML

Federal

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In addition to finding no evidence of express preemption, that court refused to find field preemption, as the plaintiffs failed to show "that Congress exhibited a clear and manifest intent to render the regulation of carbon dioxide emissions from motor vehicles exclusively a federal domain."[18]

IMLA is participating as an amicus in both the *California v. EPA* case and *Central Valley Chrysler Jeep v. Goldstene*. Oral argument in front of the Second Circuit in *Goldstene* is set to begin around the time of the publication of this issue of the *Municipal Lawyer*. Whether either party will be able to deliver a knock-out punch in this round is yet to be seen, but, certainly, the parties are training for a possible bout in front of the big stage – the United States Supreme Court.

Notes

1. 42 U.S.C. §7521(a)(1) (West 2009).
2. 549 U.S. 497, 532 (2007).
3. Jennifer Parker, *Supreme Court Rejects Bush in Global Warming Debate*, ABCNews.com, Apr. 02, 2007, at http://abcnews.go.com/Politics/story?id=3000959&page=1&CMP=OTC-RSSFeeds0312.
4. The author agrees that Round Two started before Round One ended, so perhaps it should be called Round 1.75; for simplicity's sake, though, let's just call it Round Two.
5. 42 U.S.C. § 7543(b)(1) (West 2009).
6. *Id.*
7. Notice of Decision Denying a Waiver of Clear Air Act Preemption, 73 Fed. Reg. 12,156, 12,157 (Mar. 06, 2008).
8. *California et al. v. EPA, et al.* (No. 08-1178, filed May 05, 2008, D.C. Circuit).
9. Memorandum for the Administrator of the EPA, 74 Fed. Reg. 17, 4905 (Jan. 26, 2009).
10. *Obama Moves to Let States Cap Car Emissions*, MSNBC.com, Jan. 26, 2009, at http://www.msnbc.msn.com/id/28846202.
11. 529 F. Supp.2d 1151 (E.D. Calif. 2007).
12. 508 F. Supp.2d 295 (D. Vt. 2007).
13. This includes motor vehicle dealerships, manufacturers, and a manufacturers' industry association (the Alliance of Automobile Manufacturers).
14. 49 U.S.C. § 3902.
15. 71 Fed. Reg. 17,659.
16. Brief for Appellant at 22, *Central Valley Chrysler Jeep v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Calif. 2007) (No. 08-17378).
17. Green Mountain Chrysler Plymouth Dodge Jeep, 508 F. Supp.2d at 354.
18. *Id.* ML

Supreme Court

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lawsuit brought on behalf of foster children in the custody of the Georgia Department of Human Resources (DHR). The plaintiffs sued the state, the DHR, various counties, and each county's department of family and children services and its directors, alleging systemic deficiencies in the counties' foster care systems and asserting 15 causes of action under federal and state law. The complaint sought declaratory and injunctive relief, as well as attorneys' fees and expenses. The matter was resolved by way of a settlement agreement that stated "Plaintiff Class is entitled to recover its expenses of litigation, including reasonable attorneys' fees and nontaxable costs, pursuant to 42 U.S.C. § 1988 and Fed.R.Civ.P. 23(h)." If the parties could not reach an agreement, then the amount of any award was to be determined by the court, which is what happened. Counsel sought a total of $14,342,860 in fees, about half of which was an enhancement of the fee award for a job well done. Over the defendants' objections, the district court awarded a basic ("lodestar") fee of $6,012,802.90 and allowed the enhancement, noting that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." The defendants appealed, and the plaintiffs, "convinced that the district court was not generous enough," cross-appealed, insisting that they "deserve[d] even more" than the $10,500,000 total fees awarded to them.

The Eleventh Circuit noted that a merits-exceeding result for the plaintiffs had to be the product of one, or some combination, of "superior lawyering by plaintiffs' counsel, bad lawyering by defendants' counsel, poor decision making by the court, or dumb luck," but that Supreme Court precedent held that superior lawyering by the plaintiffs' counsel was not a proper basis for an enhancement. Further, there was a "perverse irony" in the "seven figure, court ordered gratuity in this case," in that it reduced the amount of state funds available to care for foster children, the very group in issue and described as some of Georgia's "most vulnerable citizens." Nonetheless, it declined to interfere with the award, indicating that, under the prior panel precedent rule, it was not free to decide the enhancement issue.

The matter now comes before the Supreme Court, which will decide whether a reasonable attorney's fee award under a federal fee-shifting statute can ever be enhanced based solely on the quality of performance and results obtained, when these factors already are included in the lodestar calculation, and whether an enhancement to the lodestar based on the quality of representation and results was contrary to the Court's prior rulings, particularly after the lodestar has been reduced for excessive hours billed.

IMLA will continue to update our members on these cases through our bi-weekly e-mail newsletter and this magazine. ML