
STRATEGIES FOR HANDLING DIFFICULT WITNESSES (YOURS AND THEIRS)

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originally prepared by and used with permission of
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INTRODUCTION

This presentation is for lawyers and judges who enjoy jury and nonjury trials. Dealing with difficult witnesses is a part of our daily bread. This is an attempt at the development of strategies for handling difficult witnesses effectively.



TOPICS WE'LL COVER IN TODAY'S SESSION

Part 1:

How Witnesses Fit into
Your Case Strategy

Part 2:

Mastering the Art of
Thoughtful Witness
Examination

Part 3:

Tuning in to the Nonverbal
Signals that Matter

Part 4:

Key Trial Ethics Principles
for Success



Part 1:

HOW WITNESSES FIT INTO YOUR CASE STRATEGY

WHY DO WE NEED WITNESSES?

- To establish elements of proof
- To identify documents, signatures, or custodianship
- To corroborate facts
- To rebut opposing party's testimony
- To provide expert guidance
- To impeach or assert bias
- To assert a privilege

BEFORE USING ANY WITNESS, CONSIDER:

- How does this witness help you?
 - Establishes a necessary element of proof?
 - Proves up documents?
 - Rebuts damaging testimony?
 - Provides expert explanation of complex facts?
- Will you have time to prepare the witness?

Always have a good reason to use a witness!

HOW LAWYERS BUG JURIES (AND JUDGES) WITH WITNESSES

1. Asking too many repetitive questions
2. Using legalese with witnesses without explanation
3. Not letting jurors ask witnesses questions (this may be changing)
4. Bickering with witnesses



THINGS JURIES MOST ENJOY ABOUT WITNESS EXAMINATION

1. Connecting the testimony to jury selection and opening statements
2. Observing witnesses' body language
3. Watching a lying witness squirm on cross-examination
4. Watching a difficult witness get their comeuppance



Part 2:

MASTERING THE ART OF THOUGHTFUL WITNESS EXAMINATION

GOLDEN RULES OF WITNESS EXAMINATION

1. Be prepared
2. Be brief
3. Be professional
4. Be seated



GOLDEN RULES OF PREPARING YOUR OWN WITNESS

1. Make sure your witnesses know HOW they fit into the entire case
2. Explain what “bricks” they’re laying for you in this proceeding
3. Rehearse critical testimony for utmost clarity
4. Review how to handle cross-exam and what to expect

DOS AND DON'TS OF WITNESS EXAMINATION

1. DO sell yourself on a point before cross-examining a witness
2. DO cross-examine the witness for the right reasons
3. DO cut out the small talk and get down to business with the witness
4. DO forget about stereotypes
5. DON'T give up: if you get knocked down, get back up
6. DO show your anger or disgust, when appropriate
7. DO always listen to the answer and be learning

DOS AND DON'TS OF WITNESS EXAMINATION (cont'd)

8. DO remain in charge of your examination
9. DO get, be, or feel comfortable in examination
10. If you get hot on a point, DO stay hot until the point is established
11. DO expect some bad answers, but stay positive
12. DON'T make the witness examination look and feel like you should be replaced
13. DO put your whole effort into it
14. DO leave your disgust with the witness in the courtroom

THE BIGGEST “DON’T” OF WITNESS EXAMINATION

DON’T cross-examine an adverse witness who hasn’t “laid a glove” on your case. (This includes “know-nothings” and “crazies.”)

**BOTH THE JUDGE AND JURY WILL APPRECIATE
YOUR WISDOM**

SELLING YOURSELF WITH THE JUDGE AND JURY ON EXAMINATION OF WITNESSES

1. You're a salesperson. Look professional. [No more "country lawyer"]
2. Always be selling your story. Set up the story in voir dire or opening statements. What's your "elevator speech"? Describe your case in 60 seconds.
3. In direct or cross-examination you are a **SELLER** of **A PRODUCT** to **A BUYER**, the jury.

FUNDAMENTAL CONCEPTS OF SELLING YOUR CASE TO THE JURY DURING WITNESS EXAMINATION

1. Decide on a story model
2. Build on the story with the jury, through direct or cross-examination
3. Follow, or track, your opening statement
4. A credible witness is a believable witness
5. A credible lawyer is a believable lawyer
6. Anchor to your theme or story model on direct or cross-examination

REMEMBER: THE JUDGE HAS WIDE LATITUDE

Fed. Rule Evid. 611 gives judges
“reasonable control” so as to:

1. Make it effective for finding the truth
2. Avoid wasting time
3. Protect witnesses from harassment or embarrassment

It's generally the same in state court
(e.g., TX Rule Evid. 611)

Thus, keep the judge informed of
why the exam is important



TELLING YOUR STORY THROUGH THEIR DIFFICULT WITNESS

- Juries generally dislike difficult witnesses, and enjoy a good "gotcha"
- Speak in as much narrative as the judge will allow ("What *really* happened was this... right?")
- Set at least a couple of traps when the witness disagrees (facts you can prove)

THE JURY IS YOURS FROM THEN ON

SETTING UP THE ADVERSE WITNESS

Ask questions that require easy answers:

- “The question I asked was...”
- “Do you think you answered that question?”
- “So your answer is ____.”
- “Do you know the difference between fact and opinion?”
- “Can you give us factual answers to these short questions?”
- Lead... Lead... Lead...

ATTACKING THE EXPERT WITNESS

The U.S. Supreme Court (in Daubert, 509 US at 591) listed four non-exclusive factors for determination of reliability of an expert's testimony:

1. Is the methodology tested or susceptible to testing?
2. Is the methodology peer-reviewed?
3. What is the known or potential error rate?
4. Is it accepted by the scientific community?

Determine what the expert's weaknesses are!



Part 3:

TUNING IN TO THE NONVERBAL SIGNALS THAT MATTER

LEARN TO INTERPRET BODY LANGUAGE

1. Everyone communicates with nonverbal signals
2. Jurors perceive communication through sight (85%), hearing (8%), and other senses (7%)
3. Your character equals believability
4. Analyze: Is the witness sending “buy” or “lie” signals to the jury?

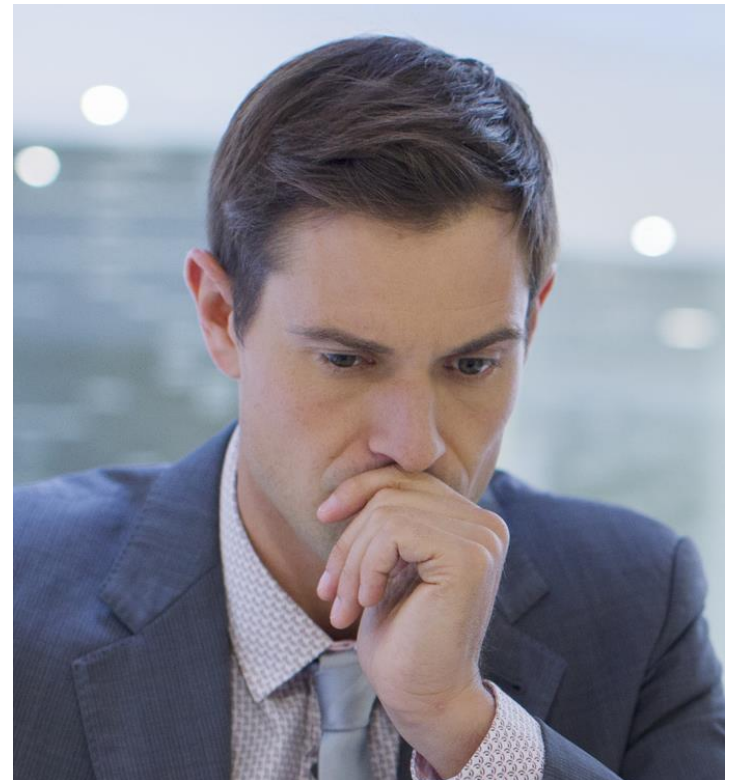
“BUY” SIGNALS THAT WITNESSES SEND

1. Open palms
2. Relaxed body posture
3. Happy face
4. Synchronized body movements
5. Expression of positive feelings
6. Talking directly to the jury



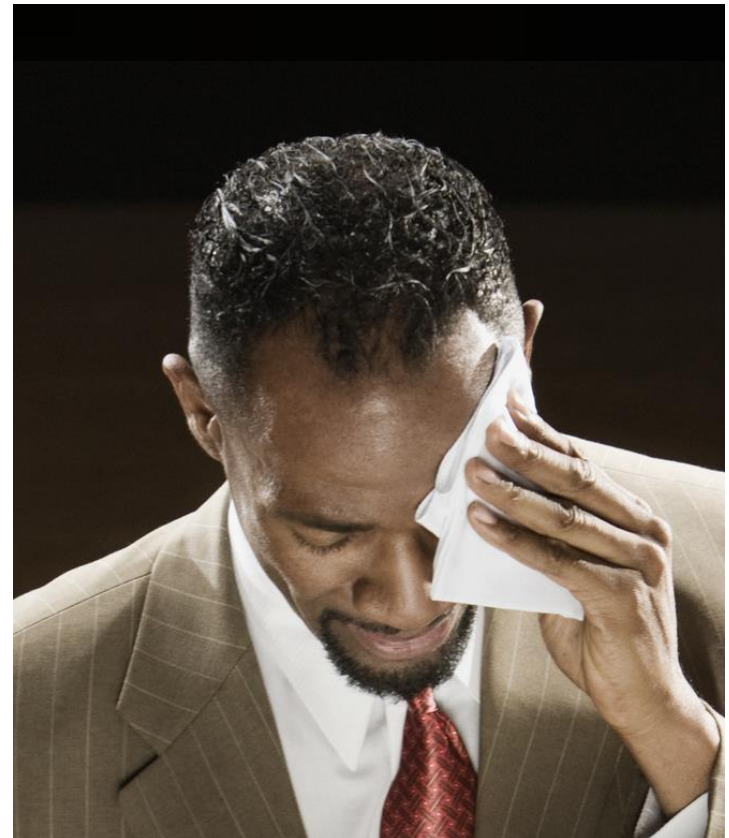
“LIE” SIGNALS THAT WITNESSES SEND

1. Changes in mood, stance, posture, or facial expression
2. Fingers over mouth, showing intuitive thinking about a response
3. Overstated feelings, which can be concealment of the truth
4. Freudian slips with immediate editing
5. Decrease in gestures

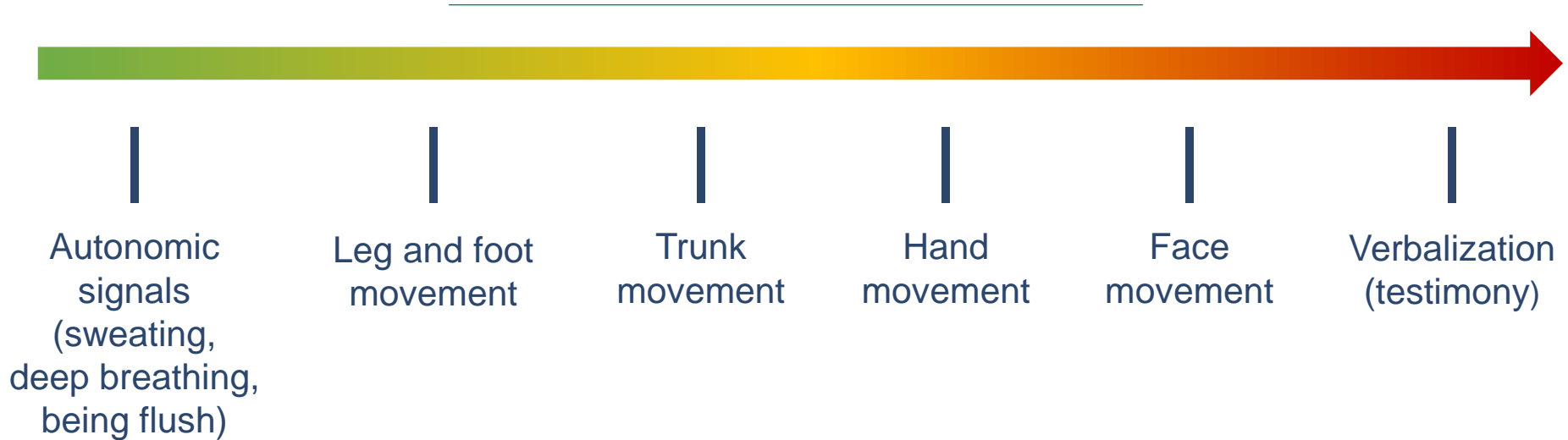


“LIE” SIGNALS THAT WITNESSES SEND (cont’d)

- 6. Decrease in words used
- 7. Incongruent body signals
- 8. Decrease in eye contact,
talking away from the jury
- 9. Autonomic (involuntary) signals
such as sweating, breathing,
dry mouth, etc.



BELIEVABILITY SCALE OF WITNESSES: MOST BELIEVABLE TO LEAST BELIEVABLE





Part 4:

KEY TRIAL ETHICS PRINCIPLES FOR SUCCESS

AVOIDING DISCLOSURE OF CONFIDENCES

Lawyers love to tell war stories. Contain yourself around trial time.

- Avoid courthouse gossip
- Avoid inadvertent disclosures
- Review what you send via mail or email
- Don't rely on friendship to save you if you've disclosed important facts

DEALING WITH UNREPRESENTED PERSONS

Occasionally you'll deal with pro se parties, or simply unrepresented witnesses.

- Don't threaten—it always gets back to the judge
- Don't pretend you're neutral—you're not
- Keep notes and records of all contacts and conversations—these are your best protection
- Don't become the victim—always reply to contact appropriately

AVOIDING IMPROPER ARGUMENTS

Know what the opening statement is for:

- It's not to show evidence
- It's to give the jury your “trial theme” and a road map of what to look for and what you expect they will find
- It's your best chance to address the negatives of your own case, including difficult witnesses (“We often don't get to choose who ends up as a fact witness”) or to prepare the jury for an unusual witness or a witness with a disability.

AVOIDING IMPROPER ARGUMENTS (cont'd)

Know what constitutes error in a closing statement:

- Although you may argue the *bias* or *interest* of the witness, or the reasonableness or unreasonableness of testimony, you may not vouch for your own witness, e.g., “I KNOW HE IS TELLING THE TRUTH!”
- Never try to appeal to prejudice or personal criticism of race, religion, national origin, or occupation.

Finally, know how to object, and always secure a ruling!

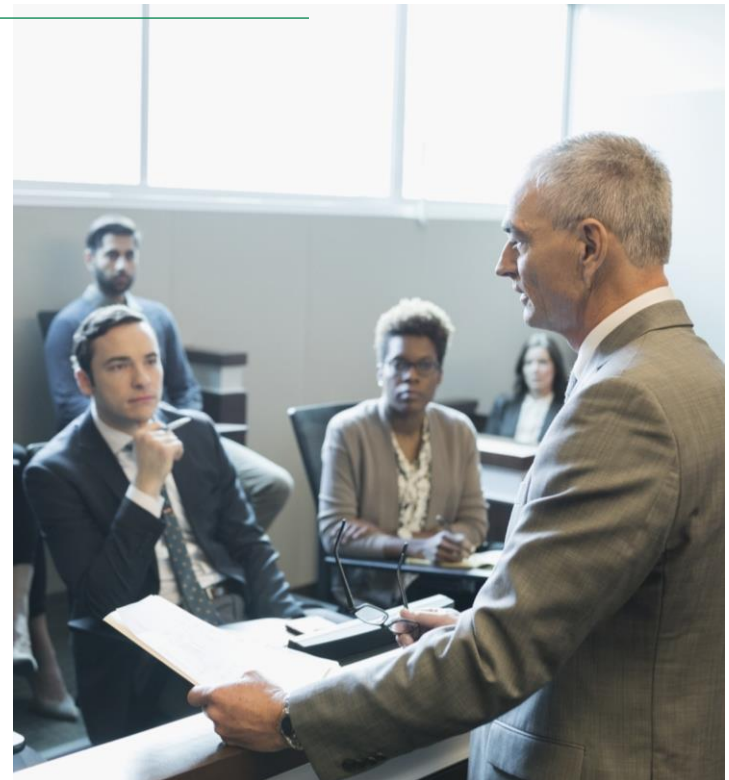
TESTIMONY TAKEAWAYS

- Know why you need every witness and how they fit in your case.
- Prepare YOUR Witness carefully
- Don't waste time on unnecessary cross-exam.
- Learn the “BUY” and “LIE” signals of body language.
- Protect your record with Objections and securing rulings
- Prepare the jury for an unusual witness or a witness with a disability.
- Know what constitutes appropriate and inappropriate argument.

HONESTY: THE BEST POLICY, AND YOUR DUTY

Model Rules, and Texas Lawyer's
Creed requires complete candor in:

- Communications with opposing counsel
- Communications with clients
- Communications with the court



CLAUDE'S BIG THREE RULES

- Always tell the truth—there will be far less paperwork
- Treat everyone you deal with like they'll be your next-door neighbor for the rest of your life
- Never whine or complain (at least not publicly). If you're in private practice, never sue for a fee, unless you must. Go make new money.

IMPROVE AND DEFEND YOUR PROFESSION

- We are the guardians of the “Rule of Law,” our social compact to handle disputes through rules and processes, rather than brute force. Make sure people understand that importance.
- Support the fair administration of justice.
- Make sure people understand the judiciary is the third branch of government.
- Speak out as a true professional when you see undue criticism.



