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March 2016 Jury Tip: “Your client’s testimony is really a re-enactment”

Every time I prepare a witness to testify in a deposition or trial, I tell them “to jurors, what you say isn’t as important as how you say it,” and that’s not an exaggeration. Jurors are far, far more likely to glaze over damaging admissions than over witness behavior that seems guilty and defensive. I’m only half joking when I say that I would rather have a witness calmly and politely admit a horrible fact than to angrily and nervously give testimony that looks perfect on paper.

On a mostly subconscious level, jurors assess witnesses by scrutinizing their demeanor: do they want to answer the questions? Are they nervous or defensive or angry (to jurors, angry usually means unreasonable and irrational)? When a witness calmly answers a really tough question, the calmness largely diffuses the topic being asked about. In other words, when the witness admits something that should be damaging on paper without a guilty conscience like it’s no big deal, jurors tend to think the issue isn’t a big deal. Jurors expect the things witnesses argue or squirm about to be the big deals.

But when the witness is the plaintiff or defendant in the lawsuit, your jurors will be watching with extra scrutiny, because they already have expectations and guesses and theories about your client—from what they’ve already heard in opening statement and earlier witnesses—that they’ll be testing by watching your client testify. And more specifically, watching HOW your client testifies. It may not make any logical sense, but jurors subconsciously assume that how your client acts and talks and behaves on the witness stand is exactly how they behave all the time... and exactly how they probably behaved during the key moments being discussed in trial.

I can tell you with absolute certainty that most jurors don’t like being detectives—some do, but most hate the fact that they don’t get much direct evidence in certain trials. They don’t like circumstantial evidence; in voir dire and deliberations, they complain about “he-said, she-said” cases, which to them just means “how are we supposed to know what happened or who is telling the truth?” Jurors crave concrete evidence and are uncomfortable having to make big decisions with ambiguous evidence. In short, jurors WISH there was a videotape of whatever happened... but of course, there almost never is.

So in a way, think of your client’s time on the witness stand—and in deposition, especially if it’s being videotaped and potentially shown to jurors during trial—as a “reenactment” of the liability events being discussed in trial. Let’s say that you represent an employee in a discrimination lawsuit who the defendant is saying was fired for insubordination. Or that you represent an insurance adjuster being accused of bad faith. There certainly will be no video footage of your client looking like a model employee or a stubborn one, or video footage of your adjuster treating the claims with fair, due diligence or indifference; the evidence will be largely circumstantial. But to your jurors,

watching your client on the stand is the closest thing they'll get to seeing direct evidence, because they naturally assume that what they see on the witness stand is what they would have seen on video footage.

If your client is being accused of being a hostile, abusive manager but appears genuinely patient, kind, and mild-mannered during an aggressive cross-examination, jurors tend to agree with the picture they've seen of your witness. If your plaintiff is being accused of poor work performance and appears whiny on the stand, argues during cross, and makes excuses, your jurors will be certain that the plaintiff was a lazy whiner on the job... and that the negative job evaluation was right on the money. Even though the reality may be that your plaintiff was an outstanding employee, and that their negative attitude is only a result of being unfairly fired, jurors don't make that distinction. They truly view your client's behavior on the witness stand as a representative "reenactment" of whatever happened that caused the lawsuit.

No matter how uncontrollable or unlikeable your client might be, you absolutely have to spend some time prepping your most important witness to avoid doing something that accidentally "re-enacts" exactly what they're being accused of by the other side. If your client is a sophisticated businessperson (or maybe even a lawyer) being accused of engaging in cutthroat business practices, make sure that they don't calmly talk about aggressive business practices that—to your jurors—may come across as unethical or callous. The reality may be that, in their world, these practices are commonplace and no big deal... but to your jurors, the message received is that your client doesn't "care" about fairness. Another example: your client may be a surgeon who specializes in high-risk procedures and is used to making life-or-death decisions that often result in unavoidable deaths... but if they testify without any emotion or gravity, the jurors will likely get the impression that "this doctor didn't seem to care enough" and may simply assume that there was a lack of compassion and care in the surgery room.

So here's my main point: when you prep your client, the most essential step is to identify what they're being accused of being... and to get them ready to be the opposite. It's important to prep them to be polite and clear and likeable on the stand, but most important to get them to project a personality that fits with your version of the events in the case. Think of their time on the stand as a golden opportunity to "re-enact" whatever happened in an ideal way.

Prep your witness to understand the landmines and how jurors think. Get them to fully understand the person they're being accused of being, and to be ready to present the best version of themselves possible. Even if that image is contrary to who they are at work and in their lives, get them to understand that testimony in trial is not 100% "real life," that they're not going to get the benefit of the doubt or second chances. Jurors are judgmental because they are forced to make snap-decisions—they aren't allowed to get to know each witness, to spend time with them, and to scratch under the surface of first impressions. So make sure that those first impressions are flawless... and the good news is that the spotlight will only be on for a few hours, not a few weeks.