

The Best Way to *Lose* at Deposition

Deborah Johnson, MC
High-Stakes Communication, LLC



It's every attorney's nightmare.

Your plaintiff is two hours into a medical malpractice deposition. He is holding up well, listening to the questions, pausing before answering, and answering briefly. Just like you talked about. Then the attorney for the defendant suddenly kicks up the pace, leans in, sounds more urgent and demands to know why your witness hadn't told the doctor about the pain in his back on the *first* visit? Wasn't he smart enough to know that it was important? Didn't he *want* to get better? Oh, he did tell the doctor, but which day? Was it a Tuesday or a Wednesday? Is he certain? Did he make sure the doctor wrote it down in his notes?

You went over everything with your client: the goal of deposition, who would be there, how it would go, sit up straight, ask for breaks, make sure you listen to the whole question, answer with yes or no, don't speculate, don't argue, it's OK to say you don't know, and on and on. You spent hours going over potential questions.

Yet, your witness just got hijacked. And is melting down right before your eyes.

This is an excellent example of how to lose at deposition. Quite simply, you focus on telling your witness what to "do" and not on developing the skills they need to actually do it. It doesn't matter if your witness intellectually knows what to do in deposition. The only thing that matters is can they do what they need to under the stress of deposition?

Iceberg Theory

Witnesses are like icebergs – about 7/8 is hiding below the surface. If you want to sink your case at deposition, treat only the top 1/8. Deal only with the symptoms and not the root causes. Ignore the 7/8 that's hiding below the surface. I see it time and time again. Attorneys either don't recognize or don't know how to deal with their witness' personality or emotional state. They don't recognize how weaknesses in communication skills adversely impact the effectiveness of testimony. They don't recognize that problem body language is only the symptom of something deeper that must be addressed. If you don't assess and actively address these vulnerabilities you open the door for opposing counsel to exploit them, to devastating results.

Deposition is Not a Fair Fight

Nearly all witnesses are completely out of their element if they try to go toe-to-toe with a savvy attorney. No matter how smart or how good a grasp of the facts, all witnesses are vulnerable if they are not properly assessed and trained. A successful executive with an extensive background, highly experienced, articulate, clever and witty can be victim to the strategies of opposing counsel. The same with a blue-collar worker or an expert witness. You leave your witness open to being decimated if you skip over assessing and then training them.

Hijacking

One of the fastest and easiest ways to lose at deposition is to allow your witness to get emotionally hijacked. It's all about how your witness' brain is wired. The brain's job is to be constantly vigilant for danger or threat. When it perceives a threat, it immediately shifts into fight or flight to protect itself. It totally abandons higher-level parts of the brain where logic and judgment operate. Working memory shuts down. Stress hormones are released and can take hours to clear. It's the perfect storm for a devastating deposition.

In the opening example the skillful attorney uses the three key hijacking triggers on your witness: aggression, humiliation, and confusion. When any of these are used on your untrained witness, they can trigger an emotional desire to explain, justify or argue the facts of the case. I see it all the time. One instant the witness is fine, the next they are in fight or flight, scrambling to protect themselves. Anywhere your witness has emotional attachments about your case, they are totally vulnerable to being hijacked. It might sound impossible to avoid this, but it is possible to train them to stay in their higher-level, logical brain.

Train Not Talk

Note that I said "train" and not "prepare." I purposely use "train," because I know that passive preparation doesn't work. Talking with your witness about what to do, is a great first step. But, if you stop there, the game is lost. Active preparation that gives your witness new skills, teaches them how to use them, and drills the skill, is the only way you can count on a good outcome.

Your witness must be able to "do," under the duress of deposition. What your witness knows is irrelevant. In the hijacking example above, your witness has to have tactics to deploy. They need to be able to stay in the logical part of their brain by slowing down, identifying these attacks for what they are, and responding appropriately. One of my favorite results is from a dental medical malpractice case. My well-trained witness called me right after her deposition. She said she had been "brilliant" in her deposition, never falling for the hijacking tactics. In fact, she reported, the more calm she was, the more agitated opposing counsel became!

Bad Communication Skills

Most witnesses have a communication deficit: they ramble, interrupt, mumble, don't pay attention, or use "um," "uh," or "like" ad nauseum. These bad habits are deeply entrenched inside their brain. They have rich neuropathways that cause your witness to behave unconsciously.

You can't root out a bad habit by telling your witness, "Stop doing that." You have to retrain their brain. I'm certified in Human Interaction Technology, utilizing neuro linguistic programming techniques. One of my favorite ways to retrain witnesses is called pattern interrupt. This simple, easy technique will stop your witness' problems behaviors very quickly because it's active training, not passive talking.

If your witness is struggling with clear, concise answers, it's tempting to spend a lot of time telling them how *you* think they should answer every question. Big mistake. This focuses your witness on trying to remember what you said. Instead, invest the time in culling out their "truth," their version of things. I work with huge sheets of paper and have the client write things out. They take ownership of their own words, embed them, and are unshakeable in testimony.

The Secret Message Behind Body Language

Research shows that more than half of all communication is body language: hands, eyes, shoulders, posture, everything. It's the yardstick by which your witness' words are measured. Our brains are wired so that someone else's body language trumps their words every time. Most important of all, is that body language is driven by feelings. If your witness feels the least little bit guilty, afraid, angry, frustrated, or worried, their body language will telegraph it. An adamant, "Yes, I told the doctor!" is believable. But if your witness then breaks eye contact and drops their head, their body language betrays their words.

In the iceberg theory, this is the 7/8 below the surface. It's critical to assess what's behind any concerning body language. Resolve your witness' personality or emotional issues and their problematic body language will resolve itself.

Conclusion

When you have concerns about how well your witness will perform under the duress of deposition, don't get caught off-guard by these mistakes. The only way to avoid torpedoing your case is to take a disciplined approach to training your witness. Take the time, be patient, and employ proven practices to train your witness to achieve the highest level of testimony at your next deposition.

Deborah Johnson, MC is the President of High-Stakes Communication. She is an industry expert in effective communication and a 6-time EMMY Award-winning writer/producer. She has consulted on a wide variety of high-stakes civil, criminal, and family law cases, including a \$5.3 million civil rights case and multi-million-dollar divorce cases. www.High-StakesCommunication.com Deborah@High-StakesCommunication.com 602.216.0049