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Presenting Insurance Company Witnesses

The presentation of insurance company witnesses is crucial in portraying the insurance company as consisting of individuals and not as its own profit-hungry entity. In other words, these people have a chance to help make the company human in the eyes of the jurors. This is usually necessary due to jurors' preconceived ideas (those that are and are not uncovered by voir dire), and especially if the plaintiffs are overly human. Bottom line, these executives need to portray themselves as competent and professional, but not at the expense of appearing uncaring or cold. While many jurors can and will see through a certain amount of theatrics on the part of either side, the sympathy card still gains some followers in many trials.

Post trial interviews with jurors in bad faith cases point to some common problems that testifying executives have in insurance litigation. One problem is nervousness. When a witness appears nervous these nervous mannerisms detract from the witness' credibility. Jurors are much more likely to feel a nervous witness is hiding something or lying.

Another problem that witnesses often have in testifying is they become negative or sarcastic when they are cross-examined. This negative attitude is often the result of anger and resentment over the fact that the witness has to be involved in litigation as well as the fact that they may have had a negative experience in deposition. A hostile attitude and negative tone of voice produces testimony that sounds defensive and argumentative. The defensive tone reduces the likeability and credibility of the witness.

Jurors are also very aware of how much attention the witnesses pay them. The most common way that jurors measure this is through eye-contact. A witness who consistently looks at his or her attorney and effectively ignores the jurors will be seen as less credible and believable.

Juror comments from post trial interviews suggest that the following behaviors by witnesses weaken credibility:

- ▶ Appears ill at ease or nervous
- ▶ Uses indirect eye contact
- ▶ Crosses arms defensively across chest
- ▶ Quibbles over common terms
- ▶ Sits stiffly
- ▶ Drinks a lot of water

- ▶ Looks to attorney for assistance during cross examination
- ▶ Cracks jokes inappropriately
- ▶ Defensive or evasive tone of voice
- ▶ Uses lots of “ah”s or “uh”s

On the other hand juror comments identify the following behaviors that enhance credibility:

- ▶ Uses powerful speech
- ▶ Appears relaxed and at ease
- ▶ Maintains eye contact with attorney and jury
- ▶ Likeable and polite
- ▶ Displays an even temperament in direct and cross
- ▶ Doesn't become angry or defensive when pressed
- ▶ Not affected by interruptions or objections
- ▶ Uses understandable language
- ▶ Doesn't need too much time to think before answering

Overcoming Witness Problems

There are no magic formulas for improving witnesses presentation. For most attorneys it is important to note that you are not changing the witness' personality but simply his or her behavior. For most troublesome witnesses the solution is a practice session with video feedback. Practice sessions and thorough review of testimony needs to be done in advance of trial before anxiety levels are too high and to allow for enough time to schedule a needed follow up. In recognition of potential witness problems and as a preventative measure, some insurance carriers now offer training in courtroom communication to their employees. This training sensitizes everyone to the values of communicating clearly in deposition and at trial.

Attorneys sometimes get frustrated with a witness and will get angry or negative in working with them. What is most important for the attorney is to realize that there are limits to the effectiveness of the woodshedding approach to changing the demeanor of a witness. One of the most effective change strategies is for the attorney to use a positive approach, and often positive feedback or suggestions for change. Several examples will clarify this idea.

For the sarcastic or negative witness, suggest that they try using the tone of voice they would use when talking to someone they respect.



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- ▶ For the witness who speaks too softly, suggest that they over correct. To the quiet person, sit across the room and ask them to speak too loudly.

Aside from general demeanor, there are many pitfalls that can befall insurance executive witnesses. Even at the beginning of testimony, when citing his or her accomplishments a witness may get into trouble. While questions regarding one's background appear easy to answer, witnesses should be careful in answering them. Quite often the plaintiff attorney may question the defense witness as to his or her expertise and experience in the field. While it is necessary that these executives appear competent and intelligent, overstepping these bounds is dangerous. The hubris of a witness may lead to his or her downfall. If a witness oversteps his or her bounds, later in the testimony when he or she admits no knowledge of a certain area or of actions taken by another part of the company, the witness has lost credibility with the jury.

Insurance cases usually involve a number of interpretations of specific passages in policies. While it sounds somewhat banal, there are cases where company witnesses are not in agreement in the ways of interpreting the same passage. This of course, leads to jurors discrediting everyone. These interpretations may appear clear cut to each witness, but it is important for the attorney to look at the ways in which each person's job may influence his or her take on the passage. For example, people who are more concerned with selling a policy may have a broader view of the coverage than would a claims handler.