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Nonverbal Communication in Expert Testimony

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SYNOPSIS: I will try to show that nonverbal communication in the courtroom is a little noticed, yet powerfully important part of the communication process. My research suggests that nonverbal communication might, under certain circumstances and conditions, change the outcome of a trial. Second and probably most importantly, I will try to share with you the techniques and insights that I use as a consultant for law firms preparing for trial. I will explicate pretrial preparation; the importance of physical appearance and establishing your expert qualifications; and how to describe your research, use videotape, state your conclusion, transcend your ego, answer hypothetical questions, and handle cross-examination.

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In overview, I want to talk about two large areas and, so you will know where I am going, I want to give you a little road map. First, I want to tell you about my research in nonverbal communication in the courtroom and, second, I want to share with you a day in the life of a communication consultant assisting a law firm in trial preparation. Specifically, I will isolate the work I do in preparing an expert witness to be effective during the trial. My purpose is to try to help you be most effective. How can you as an expert witness be most effective? I have structured my entire paper to answer that question. But before I get to that answer, let me first share with you how I became interested and involved in the area of courtroom communication research. When I started my quest I wanted to answer the question—what is it that makes an expert witness credible? I discovered that scholars before me had found that there were many things involved in what our field calls source credibility. In another paper, Professor Ken Serreno from the University of Southern California will identify the major components of source credibility of the expert witness. Unfortunately, research in this area has not explored the role that *nonverbal* communication can play in the determination of source credibility. Thus I found myself breaking new ground.

Kalven and Zeisel [*1*] in their famous study on the American jury reported judges and juries were in agreement on the verdict 75% of the time. They used this statistic to suggest that this demonstrates that the jury understood the cases they were hearing most of the time. My observation of courtroom trials led me to suspect that the judge was indicating nonverbally how he felt about witnesses, each side's case, and so forth, and I suspected that some of

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the time the jury was influenced by these nonverbal indications and merely followed the judge. Of course this is a very difficult speculation to prove.

As an initial step, I hypothesized that if I could film the testimony of a witness and have the judge respond nonverbally both positively and negatively toward the witness in full sight of the jurors, I predicted that his or her credibility would go up or down depending on the judge's nonverbal behavior. My findings confirmed my hypothesis.

From this initial research I became very interested in the area of courtroom communication and have subsequently done research on every aspect of the trial procedure. Certain enlightened law firms have found this information helpful to their litigation departments and have enlisted my aid in trials involving millions of dollars.

In assisting the trial preparation process, I first read all the depositions and interrogatories in the case so I have a good idea of the large picture and the major issues involved. With respect to choosing a jury, I prepare a profile of the ideal juror we are looking for and, from the jury pool list, we grade each prospective juror on various scales. In addition, I also will assist the witnesses in preparing their testimony. We put the witnesses on videotape and let them see themselves. We try to isolate their strengths and weaknesses on a communication level. Similarly we also videotape the attorneys making the opening and closing. Next I go to the trial and assist in the selection of the jury. After the jury is seated, I observe the trial, in particular the jurors and their individual reactions toward particular witnessess. At the end of each day I give the attorneys a report on what happened in the courtroom from a communication perspective. We try to reinforce positive reaction and clarify any possible contradictions or confusing elements in our case and try to act as a shadow juror.

But one of the most interesting parts of this process is how I assist expert witnesses in being most effective. My education in this respect and many of the insights that I will share with you come from lectures I have heard that were given by the California Bar Association Committee for Continuing Education [*2*] Wellman's *The Art of Cross-Examination* [*3*] and Goldstein's *Goldstein Trial Techniques* [*4*]. In addition, I have prepared a 30-page bibliography.

Pretrial Preparation

The first thing we are looking for with the expert witness is that they be prepared. The first thing we do is brief the experts on the facts in the case. What is the full lay of our presentation? What are the issues? What are we trying to prove? Now, if you are called upon to be an expert witness, I suggest that you demand that information. Yes, *demand* to know it. For those of you that have gone to trial and been "hung out to dry" because you were not told everything that was going on in the case, you will appreciate my suggestion. Extensive pretrial preparation will increase your effectiveness.

Physical Appearance

As was suggested earlier in the symposium, the physical appearance of the experts, how they appear, and the color and kind of suit they wear is of great interest to the communication researcher. Additionally, we try to isolate on videotape any nervous habits or distractions that might distract the experts from their presentation so they can see them. The book *Dress for Success* by Molloy [*5*] offers many helpful tips on effective dress.

Establishing Qualifications

The first thing we do with expert witnesses is emphasize their expertise and so we ask for their qualifications; I would recommend to you that you not be humble. Share any and everything you can with your trial attorney. Presenting your qualifications is how the trial attorney can make you more credible in the eyes of the juror. The first thing that he probably

will ask about are your qualifications as an expert. Now as hard as it may be to believe, I have met some modest expert witnesses whose arms I had to twist in order to get more information and data out of them.

Let me give you some idea of the things you should talk about. You should mention your education, any postdoctoral training, your work experience, any publications you have written, articles, and any professional societies you belong to. Most important is your expertness when it comes to the issue that you are going to be testifying about. Also, I think it is very critical that the attorney go through your qualifications with you and present them in open testimony. You may hear the other attorney say, "Your honor, I will stipulate that this witness is qualified." Do not let this stop your attorney from asking questions about your qualifications. It is important that the jury hear all those books and articles you have written. You want them to know that you are an expert because that is your power. The more expertise the jury perceives you possess, the more likely it will be that they will be persuaded by your testimony. Attention to physical appearance and establishing your qualifications will increase your effectiveness.

How to Describe Your Research

How many of you have had the experience of putting the jury to sleep or boring them with too much detail? You must be very careful about this and try to present direct answers. I think the best kind of answers that come from experts are the ones that are presented in the narrative fashion. You can talk for a while and the attorney can then ask another question and then you can continue further. Now I said do not bore them, but sometimes you do have to talk about the technical nature of your investigation or your test and here are some of the things that we like to include with the expert witness to make sure that what you say is credible. In short, what I am saying is that you want to impress them with your *methodology*. You want them to think that it is very valid. You should tell them how long you have looked into this. Secondly, you should say what you did. Which test did you perform? Thirdly, what was the rationale for doing the test? Why did you do this test and not some other test.

Video Tape-Visual Aids

I want to integrate here some of Dr. Kessler's paper. I think that in some instances the videotape can be a very valuable tool in the presentation of your testimony. If it shows something in a dramatic manner or shows it better than what you would say, then the saying "a picture is worth a 1000 words" is very true here. If you can show your test on videotape, do not hesitate to do that. Also, if you can videotape your testimony before trial, you can iron out a lot of the problems with your statements. I would advise you though, in terms of using videotape for your presentation, to always have a backup system. We always have a second system standing by. Machines break down and there is nothing that makes a jury more angry than to sit there and wait while you have to correct the problem.

Briefly State Overall Conclusion—Then Explain

The next thing I try to do is sensitize the expert witness to the ultimate issue in a case. When an attorney asks, "Have you reached a conclusion or opinion about the issue?" it is very critical that you just answer yes or no initially and give a short statement of what your conclusion is. Do not launch into an extensive rationale immediately, giving your whole presentation. Sum up your position at the end. Tell the jury your conclusion. "Yes, I thought there were grounds to feel that this was a definite manufacturer's error," or whatever it is you are testifying about and *then* give your rationale and *then* explain how you arrived at that conclusion. It is critical that you give that short answer first so that your jury knows what point you are leading to. Once again, it helps the communication process

because you say it more often. I would suggest that you find out what the jury instructions will be, because if you tailor some of your testimony and presentation to the instructions the jury will hear later, you are going to be more effective and helpful.

Transcending Your Ego

I think someone outside the legal and medical profession needs to level with forensic science witnesses. My biggest problem working with experts has been their egos. Egos are a problem for a couple of reasons. I would remind experts that they are respected. They are very learned men and women, *but* still must ultimately work with the trial attorney. As an expert witness, you have got to work with the lawyer for your side. If you act like a prima donna or want to do it your way or say it your way, that may be satisfying to you but you may not communicate effectively to the jury. My second point is that I think your goal should be to *communicate* to the jury. Remember, they are the ones that ultimately will say yes or no to you. They will grant adherance to your testimony or reject it.

Juries usually have less education than you. What does that mean in terms of tailoring your message so you communicate to them? Eliminate the unnecessary jargon. Experts may have a polysyllabic vocabulary, but using big words may not always be effective. Big words do not work in the courtroom unless you are trying to establish your credibility or baffle the jurors. If your goal is to communicate, then try to do that. I have also noticed that a lot of experts try to talk down to the jury or the attorney. This can work against you as well. *Some* terminology can add to your credibility, but overdone, the big words may become counterproductive.

Hypothetical Questions

I want to say a word about hypothetical questions for expert witnesses. How many of you have faced hypothetical questions? Should the attorney ask you how long you have thought about the hypothetical question that has just been presented, your reply should be, "I have thought about it for a couple of weeks." You can enhance your credibility in this way. This way it will not appear as if you are just "winging it" on the spot, but that you have studied and then seriously thought of the question. One word of caution. I am sure some of you had this happen to you. The other side's attorney pulls one or two facts out of the hypothetical question and asks if that changes your opinion. You should be careful about that.

Cross-Examination

How many of you fear cross-examination? How many of you get a little nervous about it or would rather not have it happen? How many of you have had some unpleasant experiences being cross-examined? How many have found cross-examination pleasant? What I try to do is warn the experts as to what is coming in cross-examination so that it is not unpleasant. First, there are usually questions about whether you are qualified in the area of dispute. You want to be sure that when you take on a trial, in fact, you are qualified! Secondly, in my experience, a lawyer occasionally will ask you about the qualifications of an opposing expertise or someone else in the field. Usually the answer is, "He is nice," or "He is learned."

You *can* hurt yourself by engaging in personal attacks on someone who is opposing you in the trial. The third area of cross-examination preparation is making our expert witnesses very knowledgeable about all the information in the trial. This helps make the experts' testimony more effective. Another thing that you can expect in cross-examination is to be attacked for your bias. "How much are you being paid?" "How often do you testify?" "Which side?" If you are making expert testimony a career, you may want to consider spacing out your presentation for both plaintiff and defendant. I am reminded of the Patty Hearst trial in which F. Lee Bailey went after one of the expert witnesses for being a "paid mouth" who will say anything!

Handling Attack

There are other indirect ways the opposition will attack you. I think you can expect to be investigated. If you find yourself being subjected to a very strong attack by the other side, you should be flattered. That means you probably harmed their case pretty badly and they are worried. If they ask you a few polite questions you should assume that perhaps you are fairly inconsequential or they do not want to draw too much attention to you. But if you find a lawyer being very hard on you, you should be flattered. Another thing that you will be asked in cross-examination is to explain the nature of the disagreement between you and another expert. You should anticipate this. You should know who the others are and have an explanation ready for the question: "How is it that this other learned doctor who looked at the same set of facts came up with exactly the opposite conclusion?" Another word of caution about answers in cross-examination: you should answer exactly what is asked of you and not try to pontificate on the subject or volunteer more information than you were asked about. My article on cross-examination [*6*] will help you better understand the goal and your role in the process.

The last thing that I have noticed is that some experts are belligerent. They decide that they are not going to cooperate with the attorney. Some experts are not going to answer the attorney's questions. "They are not going to give him an inch." I would encourage you not to act in this manner. It hurts you in the mind of the jurors. It makes you a little less credible. It often appears as if you have something to hide and of course the smart attorney will ask the judge to admonish you to answer the question and of course if that happens, your credibility decreases in some degree.

Summary

I have tried to show you that nonverbal communication in the courtroom is a little noticed, yet powerfully important part of the communication process. My research suggests that nonverbal communication might, under certain circumstances and conditions, change the outcome of a trial. Second and probably most importantly, I have tried to share with you the techniques and insights that I use as a consultant for law firms preparing for trial. I have explicated pretrial preparation; the importance of physical appearance and establishing your expert qualifications; and how to describe your research, use videotape, state your conclusion, transcend your ego, answer hypothetical questions, and handle cross-examination.

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