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TRUCKING LAW

The Prequel to Reptile Analysis

By Alyssa Parker
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The preexisting emotional style of your witnesses may leave them more vulnerable to reptilian hijacking by plaintiffs' counsel.

Witness Emotional Preconditions

Although you have met with your client, reviewed the process in depth, and prepared him or her for every conceivable scenario, your witness walks into deposition and immediately begins making the mistakes you

repeatedly warned him or her against. How does this happen? One of the primary reasons is the tendency to focus on state emotional arousability, or getting emotional in the moment, during preparation (e.g., “go slow,” “stay calm,” “don't get upset”), while neglecting preexisting, persistent emotions that preclude a witness from giving effective, credible testimony in the first place.

Nuclear verdicts, or verdicts that exceed \$10 million, have been a consistently increasing theme in the trucking industry over the past several years and appear to have no end in sight. Seth Holm, *Are Nuclear verdicts out of control?*, Freight Waves (January 13, 2020), <https://www.freightwaves.com>. In fact, a recent mock trial of a trucking case involving the death and serious injury of a family in a

passenger vehicle resulted in juror awards upwards of \$130 million, the majority of which were punitive damages. While the cause for this trend has been widely speculated, decades of post-trial juror interviews have found the most common response to the question, “When did you make up your mind?” has been “*I made up my mind while watching the witnesses.*” George Speckart, Bill Kanasky, Alyssa Parker, *What is a Litigation Psychologist and Why Should You Care?* (Unpublished manuscript), Courtroom Sciences, Inc. (2017). A more general treatment of the origins of nuclear verdicts has been discussed by Speckart and Kanasky, and not surprisingly, witness performance is at the top of the list of causative factors. George Speckart and Bill Kanasky, *The*

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Nuclear Verdict: Old Wine, New Bottles. For The Defense (April 2020).

In an era of neuropsychological manipulation and plaintiff reptile tactics, witnesses are even more susceptible to being thwarted by their own emotions. This has been demonstrated repeatedly in trucking litigation, where four, specific, high-risk, emotional styles have emerged among witnesses:

- The overly agreeable witness;
- The defensive witness;
- The angry, victim-role, or former employee witness; and
- The apathetic witness.

At times, witnesses may fall into one or more of these categories. During discovery, strong effective defense depositions decrease a client's financial exposure and costs, while weak, ineffective depositions result in higher damages during settlement negotiations or at trial, making it essential not only to identify your witness' emotional style accurately prior to deposition testimony, but also to address and control it effectively.

Witness Emotional Styles

The following emotional states, prevalent in many witnesses, can tip the scales to favor the plaintiff if the defense attorney isn't aware of how damaging these emotions can be.

Overly Agreeable

Overly agreeable witnesses readily, and often eagerly, agree with premises and assertions made by the plaintiff attorney during deposition, resulting in admissions of fault, negligence, egregious conduct, and/or causation. This tendency to agree with the plaintiff attorney's line of questioning is typically rooted in feelings of guilt or a perception of inadequacy.

Cases where witnesses feel significant amounts of guilt are frequently defensible but involve tragedy. Imagine a teenager on a bicycle flying out into oncoming traffic then getting struck and killed by a moving vehicle. The driver of the vehicle is readily willing to accept fault, despite eyewitness and police testimony to the contrary, simply because of the guilt he or she is experiencing over "killing a child." These feelings often arise due to a sense of betraying one's own rules for ethical

behavior or code of moral conduct. Witnesses experiencing remorse and regret tend to play directly into the hands of the plaintiff's attorney because the attorney is asking all the same questions the witness has already been asking him- or herself (e.g., "What if I had been going slower, or had reacted differently, or had taken a different route, or had left earlier?"). To the extreme, some of these key witnesses even believe they should be punished for their actions—the only way to be "forgiven" is to admit fault.

Those witnesses experiencing a perception of inadequacy tend to have less education and feel intimidated by both the process and the questions being asked by people they may view as "intellectually superior" to themselves. These individuals become "flight witnesses," in that they are willing to agree to anything in an effort to end the deposition as quickly as possible and leave.

Defensive

Witnesses who feel they need to protect themselves, protect their employer, or defend their actions will try to "explain away" unfavorable case facts. During preparation, these witnesses frequently become frustrated and make comments such as, "I just need to explain how this works" or "you guys don't get it." These witnesses may or may not believe they have done something wrong, but a defensive response will always make them look guilty in the eyes of the jury. In deposition, they will become argumentative or give long-winded answers that can be used against them, since arguing or attempting to explain away an unfavorable fact is akin to attempting to diffuse a bomb that has already detonated. These are also the witnesses who believe it is their job to win the case and cannot see where they properly fit in on the trial team. Most importantly, "fight" witnesses respond from a place of emotion rather than rational cognition, making it highly unlikely for strong, effective testimony to ensue.

Angry / Victim Role / Former Employee

Witnesses who are angry or have taken on the role of a victim often feel like their lives have been negatively affected by the accident in question through no fault of their own. Sometimes, their innocence in the sit-

uation is real; other times, it is a personal defense mechanism in response to the ultimate outcome. If your witness is the truck driver, it is possible he or she has been fired as a result of the incident, making him or her much more likely to blame the defendant company or the defendant company's policies, procedures, or training when questioned. The witness may also blame

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the plaintiff during deposition if he or she believes the plaintiff is at fault or played a role in the incident.

Angry witnesses are resistant to preparation sessions and are highly likely to become argumentative in deposition. They are perceived by jurors as being unlikeable and not credible. These witnesses may have trust issues with both the defendant company and the defense attorneys, who they perceive as only caring about the company. It is also possible, especially among truck drivers, that symptoms of depression are present and manifesting as anger rather than sadness.

Apathetic

Apathy is not uncommon among witnesses who actually feel quite badly about the outcome of the accident. Many of these individuals are unsure of how to, or have never, adequately expressed their negative internal states, including their thoughts and emotions. As a coping mechanism, they have hardened themselves to the incident.

Witnesses' mistakes

are caused by inadequate pre-deposition preparation that focuses exclusively on substance and ignores the intricacies of the reptile strategy.

These witnesses are frequently described by mock jurors as “cold,” “callous,” or “uncaring.” Similarly, a former employee may appear indifferent because they perceive the outcome of the litigation as no longer affecting them.

The negative, non-verbal message conveyed by apathy is powerful and memorable in a way that can override any quality verbal testimony provided by the witness. Consequently, an apathetic witness makes the plaintiff look more sympathetic and may increase damages, including punitive damages, even when jurors are unsure of the culpability of the defendant company.

Plaintiff Reptile Tactics and Amygdala “Hijack”

Witnesses in the trucking industry, especially truck drivers and safety directors, are notorious for falling victim to David Ball and Don Keenan’s plaintiff reptilian tactics. David Ball and Don Keenan, *Reptile: The 2009 Manual of the Plaintiff’s Revolution* (2009). Furthermore, witnesses cannot be faulted for this damaging testimony because reptile theory employs emotional and psychological tactics to manipulate them into admitting fault. Witnesses’ mis-

takes are caused by inadequate pre-deposition preparation that focuses exclusively on substance and ignores the intricacies of the reptile strategy. Bill Kanasky, *Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution*, For The Defense, Apr. 2014.

Pre-deposition preparation that includes an in-depth review of the reptile strategy, however, may remain ineffective with these high-risk, emotional styles, as the witness will have difficulty acquiring and internalizing the critical information. There is a mood-memory cycle that has two important effects on memory. The first effect is a reciprocal feedback loop: your mood determines the memories that come to mind and the memories that come to mind influence your mood state. For example, a depressed individual, compared to a non-depressed peer, remembers more negative personal experiences when faced with even a neutral stimulus, which then maintains that negative emotional state. In other words, the more you focus on a case with a witness who falls into a high-risk emotional category, the more likely it is for him or her to become further entrenched within that negative state. The second, more powerful, effect of mood is its effect on concentration and one’s ability to remember general rather than specific details. Ira Hyman, *Can You Break the Mood-Memory Cycle?*, Psychology Today (Mar 27, 2015), <https://www.psychologytoday.com>. Therefore, to truly be able to prepare these witnesses, their preexisting negative emotional state must be addressed before any education and practice can occur.

Similarly, inadequate assessment and management of these high-risk emotional styles makes witnesses more susceptible to an “amygdala hijack” in deposition. Bill Kanasky et al., *The Effective Deponent: Preventing Amygdala Hijack During Witness Testimony*, For The Defense, May 2018. A term coined by Daniel Goleman, amygdala hijack occurs when the amygdala (the area of the brain in which the fight or flight reaction is housed) overtakes the pre-frontal cortex (the area of the brain responsible for logic and judgement). Daniel Goleman, *Emotional Intelligence: Why It Can Matter More Than IQ* (1995). Our ability to experience distressing emotions (e.g., fear, anxiety, anger) is an inherited trait that historically gives human beings a survival advantage by

giving an early warning of impending threat or danger in our external environment. Arne Öhman and Susan Mineka, *Fears, Phobias, and Preparedness: Toward an Evolved Module of Fear and Fear Learning*. 108.3 Psychological Review 483 (2001). That is to say, the brain is inherently wired to defend itself in the face of an adversary. This intuitive use of emotion, however, works against a witness when instinct forces him or her into survival mode in the face of a perceived threat, such as adverse examination or unfavorable case facts, rendering him or her incapable of relying on strategic responses learned in witness preparation sessions. A witness with a high-risk emotional style is especially primed to deliver defensive survival responses resulting from this subcortical amygdala activation. The amygdala hijack causes forced explanations designed to defeat the questioner (fight), attempting to reframe the issue (flight), or pivoting to a different issue (evade). Kanasky et al., 2018. A witness’s ability to control emotion depends on having the capacity to modulate negative emotional responses through cognitive-emotional strategies.

Assessment of Witnesses

Prior to beginning preparation of the witness, it is important to assess the individual’s strengths, weaknesses, and emotional style. Trust is key when it comes to a witness expressing vulnerabilities; therefore, the assessment can take some time and should be completed through both general conversation as well as pointed questions. In addition to the substance of his or her answers, the style in which the witness responds becomes crucial to your evaluation of his or her emotional predisposition. Meeting with your witness in person, early in the case, should be the beginning of the assessment. By speaking on the phone and interacting with the witness in person, counsel will gain insight into the emotional state of the witness. Often, speaking with the witnesses’ supervisor may provide additional insight into the witness’s emotional style.

An effective line of questioning includes an assessment of what the witness thinks of the case; what his or her understanding is of the claims being made; what his or her understanding of the litigation process is; how he or she is feeling about the process; and so on. Self-reflection may be encouraged by re-

questing specific feedback from the witness, “You said you are feeling fine about everything, but when I listen to you talk, it seems like you feel frustrated. Am I misreading that? From your perspective, what is it that is making you feel frustrated?”

Assessment can also be very effective during mock questioning, as the witness’s answer style will provide a plethora of information regarding the individual’s emotional state. Once again, feedback to the witness is required to facilitate and encourage conversation.

Addressing Preexisting Emotions—The Solution

The first step in addressing high-risk or preexisting emotion is having the witness be able to express said emotion. The ability to “dump” these toxic emotions, while simultaneously having the emotion acknowledged, can be extremely cathartic to many individuals in and of itself. Furthermore, and perhaps more critically, the more the witness expresses the emotion in the preparation environment, the less likely he or she is to express it during the deposition.

Emotional regulation skills must then be put into place. “Emotional regulation” is a term generally used to describe a person’s ability to manage and respond to an emotional experience effectively. It is not the experience of an emotion in and of itself

that leads to difficulties, it is the interpretation of the emotion, or negative thoughts, that are problematic. The use of cognitive insight skills allows the witness both to self-reflect and to evaluate the unhealthy thoughts that have led to their ongoing negative emotional state. Aaron T. Beck and Debbie M. Warman, *Cognitive Insight: Theory and Assessment*, 3–30.2 (X.F. Amador and A.S. David eds. 2004). Cognitive reappraisal skills are then taught to the witness so that he or she might reinterpret negative thoughts in general, and negative stimuli within the deposition environment more specifically. Active cognitive reappraisal is a careful, deliberate tactic to prevent the brain from an impulsive, spontaneous reaction to a negative stimulus, ultimately leading to high level cognitive processing and effective testimony. Kanasky et al., 2018.

The final, most important step is practice. The more mock questioning that can be done with a high-risk, emotional witness, the more comfortable he or she will become with the process and the more desensitized he or she will become to the associated emotion. Being able to provide strong, effective testimony while thwarting a plaintiff attorney’s attempts at neuropsychological manipulation will become more like muscle memory to the witness with continued practice and use of learned skills.

Conclusion

This article is essentially the prequel to any analysis of reptilian theory from plaintiffs’ counsel. Yes, we need to know and prepare against those tactics; however, answering the following questions may very well determine the effectiveness of your witness preparation.

- Who is your audience?
- Who is your witness at his or her core?
- How does he or she feel about this case?

These are imperative elements that will enable a successful witness preparation and resulting deposition. Without answering these questions, time may be wasted, the client frustrated, and the intended result will actually be less likely.

Your client may be predisposed to traps or tactics based on personal feelings or experiences. Without gaining the trust and building a connection with the client, defense counsel will not know of these potential pitfalls. This process can assist in targeting preparation topics, subjects, or emotions where the deponent is more susceptible to being manipulated by preexisting emotion. Just as defense counsel seeks to find out everything about the plaintiff and his or her preexisting conditions, so should counsel explore their client’s emotional condition(s) and experiences. This insight takes time and should be developed over numerous interactions with the client, or when appropriate, with outside assistance. 