Defending the 30(b)(6) Deposition from the Reptile Plaintiff

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I. Introduction

The 30(b)(6) deposition of the trucking company representative is recognized as being of utmost importance in the defense of a trucking lawsuit. But, preparing the 30(b)(6) representative for a reptilian style deposition, and defending that deposition effectively, requires the defense lawyer to possess unique and specific skills. This comprehensive and critical discussion will focus on how to identify the right 30(b)(6) witness for a reptile deposition, prepare the deponent, defend the deposition, and protect the record for trial.
II. Invalid, Yet Potentially Effective: Debunking and Redefining the Plaintiff Reptile Theory

Invalid, Yet Potentially Effective

By Bill Kanasky

Defense attorneys need a clearer understanding of how the reptile tactics really work and a blueprint of how to counter attack, rather than defend, at all points on the litigation timeline.

The well-known “reptile revolution” spearheaded by attorney Don Keenan and jury consultant Dr. David Ball is now an ubiquitous threat to defendants across the nation. It is advertised as the most powerful guide available to plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform. Reptile books, DVDs, and seminars instruct plaintiff attorneys on how to implement these strategies during an entire litigation timeline, from discovery to closing argument. Most papers about the reptile theory merely define the theory itself, describe the various tactics, and provide rudimentary advice to defense counsel on how to “tame” or “beat” the reptile. However, few authors have attempted to directly challenge the reptile theory’s validity or have attempted to provide alternative explanations to why these reptile tactics often work. This article aims to accomplish both goals, as well as to provide scientifically based solutions for defense attorneys to use at all points of the litigation timeline.

To date, the best attempt at debunking the reptile theory is Allen, Schwartz, and Wyzga’s (2010) article “Atticus Finch Would Not Approve: Why a Courtroom Full of Reptile...”
tiles is a Bad Idea.” First, the authors immediately attack the reptile theory, stating that Ball and Keenan’s neuroanatomical assumptions are incorrect. They claim that reptiles can’t experience fear, as the reptile brain lacks a limbic system, the emotional center of the mammalian brain. Second, the authors state that fear responses in humans are unpredictable, thus using fear in the courtroom is a risky gamble at best. Finally, they claim that jurors “recoil” when they are treated disrespectfully, that is, as if they are reptiles, and using fear in the courtroom ultimately backfires. They go on to offer a solution to the reptile formula that focuses on constructing an effective narrative to persuade jurors.

This article is important because it is the first to challenge the neuroanatomical foundation of the reptile theory. The authors quickly point out that fear responses in humans are controlled by the higher-level limbic system, not the more primitive “reptile brain.” As mentioned, specifically, they state that reptiles cannot respond to fear because they lack a limbic system, which eliminates emotion from the equation. Since the limbic system actually controls survival responses in humans, not the “reptile brain,” the authors believe that the theory is fundamentally flawed. While they are partially correct in this analysis, the authors fail to recognize that danger is a threat, while fear is a complex emotion in response to danger. In other words, danger is a stimulus, while fear is an emotion. Ball and Keenan clearly sell danger, not fear. Their goal is to tap into the deepest part of the brain where danger is detected, and the instinctive aspects, often referred to as the “reptile brain.” Interestingly, their goal may be to bypass fear altogether and simply go directly to jurors’ automatic survival instincts because a juror has the cognitive capacity to decrease a fear, whereas it is impossible for a juror to deactivate an instinct. In sum, Ball and Keenan’s neuroanatomical assumptions are accurate as they relate to the arguments that they make about danger, and would only be inaccurate if they made a similar argument about a fear response.

As such, the authors’ attack on the reptile theory is minimally effective because they have compared apples to oranges to some degree.

Allen, Schwartz, and Wyzga’s (2010) article also provides a strategic solution to the reptile approach that is fairly inadequate: the use of narrative. While it is well-known that a persuasive narrative is an effective way to educate and influence jurors in any type of case, it only addresses one of the multiple areas that the reptile approach attacks. Ball and Keenan’s tactics begin very early in the litigation timeline with deposition testimony, and extend to other parts of a trial in which narrative is irrelevant, such as voir dire and jury selection. Additionally, while the authors generally define why narratives are so effective, they fail to inform a reader how best to construct the story to derail the reptile story provided by a plaintiff’s counsel specifically. Generalized “tips” on how to tell a better story are no match for Ball and Keenan’s precision attack methods.

For defense attorneys to succeed persistently against the reptile approach, they need a clearer understanding of how the
reptile tactics really work and a blueprint of how to counter attack, rather than defend, at all points on the litigation timeline. Therefore, this article will focus on three areas: (1) why the overall reptile theory is invalid, (2) why the specific reptile tactics work, despite the invalidity of the overall theory, and (3) scientifically based solutions to defuse these tactics.

Debunking Ball and Keenan’s Reptile Theory

The reptile theory is now well-known to the defense bar. The highlights of the theory include the following:

- The “reptile” or “reptile brain” is a primitive, subcortical region of brain that houses survival instincts.
- When the reptile brain senses danger it goes into survival mode to protect itself and the community.
- The courtroom is a safety arena.
- Damages enhance safety and decrease danger.
- Jurors are the guardians of community safety.
- “safety rule + danger = reptile” is the core formula.
- The “safety rule + danger = reptile” formula states that the reptile brain “awakens” once jurors perceive that a safety rule has been broken by a defendant, awakening survival instincts, which results in jurors awarding damages to a plaintiff to protect themselves and society. Ball and Keenan claim that use of their reptile strategy has resulted in nearly $5 billion in settlements and damage awards since 2009.

To debunk any theory, someone must show that the theory’s core principles and formulas are flawed. The linchpin of Ball and Keenan’s reptile theory is the brain’s stimulus-response reaction to danger. They claim that exposing a safety rule violation (stimulus = danger) triggers jurors’ automatic survival instincts to protect themselves and the community (response = award damages). The fatal flaws of the reptile theory are two-fold. First, a plaintiff’s counsel can only “suggest” danger to jurors, rather than actually exposing them to a true threatening stimulus that would trigger survival instincts. In other words, the core foundation of the reptile theory is that danger triggers survival responses, but in reality, jurors are never exposed to any direct danger. Therefore, without an immediate threat, awakening the reptile brain in the manner in which Ball and Keenan describe is physiologically impossible.

Secondly, Ball and Keenan fail to mention that the reptile brain, called the “brainstem” in modern science and medicine, is not the sole brain region responsible for survival behaviors in humans. In fact, the reptile brain only plays a limited role in human survival instincts, whereas higher-level brain structures play a much larger role. Specifically, the reptile brain or brain stem is responsible for multiple automatic and involuntary functions that are necessary for basic physiological survival such as cardiac function, respiration, blood pressure, digestion, and swallowing. It is also responsible for alertness and arousal, key factors for protective survival from dangers. While the reptile brain or brain stem in humans plays a key role in detecting danger, the limbic system actually processes the dangerous information and can activate the sympathetic nervous system to trigger the fight or flight survival response. As such, Ball and Keenan’s theory is invalid because true protective survival responses are not even triggered by the human reptile brain or brain stem, but rather by the more advanced limbic system.

Now, Ball and Keenan claim that even a mild threat can trigger the survival reaction. They claim that exposing a safety rule violation is an adequate stimulus powerful enough to shift jurors into survival mode. Again, the suggestion of a danger or potential threat is never enough to activate the brain’s survival instincts because the nature of the threat must be intense and immediate. If survival instincts could be tapped so easily, our behavior would be totally irrational throughout the day, which explains why an intense, immediate threat is required to activate these strong instincts. To understand survival responses, it is important to comprehend the different classifications of threats and the types of subsequent survival reactions. Consider the examples below.

Example A: You hear reports of a recent robbery in your neighborhood. This is indeed a potential threat, but survival functions do not take over because the threat is not direct or imminent. Instead, when a potential threat is suggested, people actually become more logical and make an action plan, such as having a family meeting to discuss what occurred, making a plan to check door and window locks, to be more vigilant, and to speak with neighbors. This type of survival reaction is known as “high road” cognitive processing, in which someone carefully assesses many options and makes a careful choice.

Example B: You hear an intruder entering your house. This constitutes a direct threat, which triggers the fight or flight instinctual survival response. In other words, you will either quickly attack the intruder to protect yourself and your family, or you will run and call for help because there is no time to make a logical plan due to the imminent threat. This type of survival reaction is known as “low road” cognitive processing, processing in which cognition is very limited.

Example C: You walk around the corner and your five-year-old jumps out of nowhere and screams “boo!”, resulting in you automatically jumping back and dropping the glass that you were holding. This constitutes an intense, immediate threat, which triggers a brain stem reflex that includes jumping backwards, muscle tension, causing the drop of the glass, dilated pupils, and increased heart and respiratory rate. This type of survival reaction is known as a “brain stem reflex” or “startle response,” which is automatic, involving no cognition.

In humans, the reptile brain or brain stem only detects danger via attentiveness and alertness, and then the thalamus, the brain’s “switchboard,” usually takes over...
and decides whether the danger is worthy of a survival response or a more thoughtful response. Thus, Example A illustrates high road cognitive processing, which is a slower road because it also travels through the cortical parts of the brain before a thoughtful and logical response is formed. Example B illustrates low road cognitive processing because a neural pathway transmits a signal from a dangerous stimulus to the thalamus, and then directly to the amygdala, triggering the fight or flight response, which then activates a quick survival response. Example C is more of a survival reflex from the reptile brain because the response is almost instantaneous from such an intense and direct threat.

As you can see above, suggested or potential threats simply cannot activate the survival responses in the reptile brain the way that Ball and Keenan suggest. If they could, society would be in survival mode nearly constantly, making logic extinct. The “safety rule + danger = reptile” formula is erroneous and should be replaced with “imminent danger + intensity = reptile” or “suggested danger + logic = planning.” In other words, if defendants are not specifically trained to deal with reptile questions and tactics, the odds of them delivering damaging testimony is high.

Voir Dire
Plaintiff attorneys use a psychological technique called “priming” during voir dire by establishing terms, language, and definitions early in the process, resulting in those stimuli being processed more quickly by jurors throughout a trial. Rather than fight fire with fire, defense attorneys instead tend to ask questions to identify stereotypical plaintiff jurors. By the end of jury selection, a plaintiff’s counsel has “primed” a jury for his or her opening statement, resulting in easier cognitive digestion and acceptance of the plaintiff’s story. Asking key questions to identify pro-plaintiff jurors is critically important during voir dire; however, not taking the time to “strip and re-prime” jurors with defense terms, language, and definitions can give a plaintiff a sizable advantage entering opening statements.

Opening Statement
Perhaps the most apparent area of defense attorney weakness is opening statement construction. Know thy enemy: Dr. Ball is a professional story teller with a Ph.D. in Communications and Theater. He is a master of words and themes. Dr. Ball uses strategic ordering of information within a story to place a defendant in the spotlight of blame from the start. Dr. Ball understands that the better story wins, not necessarily the better science or medicine. Defense attorneys don’t have Dr. Ball’s training, and often resist seeking the assistance of jury consultants to develop their opening statements. The result is often a sim-
people, understandable plaintiff’s story that immediately connects with a jury against a complex, confusing defense chronology that focuses on science rather than jury friendly themes.

Defender’s Testimony

When a defendant or a defense witness agrees to a safety rule on the witness stand, gets trapped, and then tries to weasel out of it, the obvious contradiction quickly leads to juror dislike and distrust that is often incurable. Again, the main mistake is insufficient witness preparation that focuses on the science or medicine more than the manipulative reptile process. The “gotcha moment,” when a defense witness gets boxed in by a plaintiff’s counsel and “gotcha moment,” when a defense witness

The Solutions

So what solutions does a defense attorney have? A defense attorney can defeat a reptile attack in three ways: defusing a plaintiff’s attorney’s voir dire priming, delivering a more effective opening statement, and preparing defense witnesses differently.

Defusing Priming in Voir Dire

Priming is a technique used to influence or control attention and memory, and it can affect decision making significantly. Specifically, priming is an implicit memory effect in which exposure to a stimulus influences a response to a later stimulus. This means that later experiences of the stimulus will be processed more quickly by the brain. For example, if the trait description of “careless” is frequently used, that description tends to be automatically attributed to someone’s behavior. In voir dire, a plaintiff’s counsel begins the priming process with the goal of exposing jurors to stimuli such as danger, risk, safety, and protection so that those themes will resonate with jurors during the plaintiff’s attorney’s opening statement. Repetition is a form of priming that can make themes more believable. Therefore, the more jurors are primed with safety claims such as danger, risk, or violation of rules, among others, in voir dire through repetition, the odds of jurors believing those claims during opening statement significantly increases. This occurs because priming creates selective attention, causing jurors to reduce future information intake so they can focus on the safety claims. Priming can essentially blind jurors from processing new information, which can spell deep trouble for defense counsel since they always follow a plaintiff’s counsel during a trial.

Defense counsel can defuse plaintiff attorney priming efforts by indoctrinating jurors during voir dire with a cognitive “plan” that can spoil a plaintiff’s counsel’s priming efforts. For example, a plaintiff attorney may attempt to prime jurors during voir dire with the notion that safety = priority with statements, such as “Who here feels that physicians should always put safety as their top priority? Who feels the community deserves that?”, in an effort to later convey in an opening statement that the only way that a physician can be safe is to follow the safety rules of medicine strictly. Many defense attorneys counter with the ineffective response of asking jurors to focus on the law or the science. The more effective strategy would be to strip the original priming and “reprime” jurors with a different cognitive plan. In a case using the physician example, the plan would focus on the following question: “Who here feels that a physician’s real priority needs to be to treat every patient as a unique individual?” This tactic would weaken a plaintiff attorney’s priming efforts and potentially create a defense priming effect that a defense attorney could build on during an opening statement.

Again, the reptile tactics that plaintiff attorneys use during voir dire have little to do with activating survival instincts. Instead, priming jurors to accept a plaintiff’s terms, definitions, and language later on in a trial is the key psychological goal. Ball and Keenan would tell you that the safety language introduced during voir dire would awaken jurors’ reptile brain. That claim is inaccurate because this priming effect is more about using fundamentally cognitive principles successfully than about triggering survival instincts. Defense attorneys can neutralize these priming tactics by stripping an original primer’s power and applying their own.

Delivering the Right Opening Statement

Before 2009, the majority of plaintiff attorneys heavily relied on sympathy-based stories to strike an emotional chord with a jury and drive them toward a high damages award. The classic defense response to such a strategy was to show how a defendant acted reasonably and to defend a defendant’s conduct. This plaintiff strategy became ineffective over time as sympathy became a less potent variable as newer, desensitized generations started to fill the jury box, particularly Generation X and Y jurors. In response, the reptile revolution has generated a new story format that is far more effective with today’s jurors: immediately putting a defendant’s conduct on trial and not focusing on injuries and sympathy.
This is where many defense attorneys have fallen behind and have failed to make the proper adjustments to their strategy. The origin of this failure is simple: you must know thy enemy.

Dr. David Ball, co-developer of the reptile theory, is a brilliant scientist of storytelling. When he assists a plaintiff counsel in developing an opening statement, he masterfully uses the tools of emphasis, information ordering and repetition to create a masterpiece of persuasion for a jury. Not only is he an expert in opening statement construction, he is also an expert at luring his adversary—defense counsel—into telling an ineffective story to a jury. Specifically, the organization of his reptilian story forces many defense attorneys into “survival” mode rather than adhering to effective defense strategy. As such, the top strategic mistake in response to a reptile opening statement is to go on the defensive immediately, and to deny each of a plaintiff’s allegations. This instinctual response makes psychological sense: a plaintiff’s counsel has bludgeoned a defendant with safety rules and danger threats for 45 minutes, resulting in great temptation to deny each allegation immediately one-by-one. However, this strategy is notoriously ineffective and is known as the “Hey, we didn’t do anything wrong and we are a good or safe person or company” approach. Addressing each claim immediately is a deadly mistake because it highlights and repeats the reptile safety themes, thus validating them.

Instead of truly activating jurors’ survival instincts, the reptile approach is actually designed to “bait” defense counsel into fighting on a plaintiff’s battleground. By reacting to a plaintiff’s story immediately, the defense plays right into the Dr. Ball’s hands and actually reinforces the plaintiff’s arguments to the jury. This effect is called the “availability bias,” meaning that jurors tend to blame the party that is most “available” or in the spotlight. If defense counsel takes the bait and illuminates safety issues relating to a client early in an opening statement, the reptile attorney has won the opening round. Avoiding this tempting “availability bias” trap is essential to developing a persuasive opening statement that will neutralize the reptile opening. Jurors only care about one thing: assigning blame. Therefore, immediately giving jurors something else to blame besides your client is imperative to derailing the reptile attack. Defense counsel needs to arm jurors with the “real” story and immediately put a plaintiff or alternative causation on trial.

During the “opening” of an opening statement, meaning the first three minutes, jurors form a working hypothesis that affects how they interpret the rest of the information presented to them. Therefore, attorneys can inadvertently stack the deck against themselves by beginning their opening statement with the wrong information, such as information highlighting safety issues, which will taint a jury’s perceptions from that point forward. Information presented early in an opening statement acts as a cognitive “lens” of sorts through which all subsequent information flows. This cognitive lens can drastically affect how jurors perceive information as a presentation progresses, so one must choose this lens very carefully. Dr. Ball specializes in creating a safety-danger lens through which jurors perceive a case, so defense counsel must provide jurors with an alternative lens immediately. Without this alternative lens, then an entire case will revolve around safety and danger, which drastically increases the odds of a plaintiff verdict with damages.

It is essential to emphasize key themes related to a plaintiff’s culpability, alternative causation, or both, depending on the case, immediately because this is the time when jurors’ brains are the most malleable. The defense story should only proceed after the “lens” has been placed, which should significantly influence jurors’ perceptions and working hypotheses of a case. As Dr. Ball knows, this powerful starting strategy was adopted from the cinema big screen and is referred to as the “flash forward” start. Many movies don’t begin at the “start” of a story, but rather begin at some other point in the story that no one expects. This creates immediate curiosity, suspense, and intrigue. This technique is often used by Dr. Ball to illuminate safety issues early in an opening statement. Unfortunately, few defense attorneys know the proper way to defuse it and to counterattack.

The best way to counterattack is by flash-forwarding immediately to culpability, alternative causation or both in an opening statement, and then to begin to tell the defense story. However, many defense attorneys are inclined to start their opening statement by introducing themselves, the legal team, and their client, followed by reminding jurors how important their civic duty is to the judicial system and how much they appreciate the jurors’ time. Then, many succumb to the temptation to tell the defense story in chronological order or, even worse, come out of the gate defending a client against each of a plaintiff’s allegations. Both methodologies are weak and ineffective, and they certainly won’t create any intrigue or curiosity. Instead, it represents a monumental missed opportunity because jurors will value that first three minutes of information more than any other part of an opening statement. Remember, jurors only care about one thing: assigning blame. Therefore, immediately giving jurors something else to blame is imperative to derailing the reptile approach.

### Behavioral Consistency

Behavioral consistency is highly correlated with honesty and truthfulness, so a reptile plaintiff attorney’s top motivation is creating and fueling the perception of inconsistency.

### Defense Trial Testimony

Black box analyses of how and why reptile plaintiffs defeat defendants during depositions and trials reveals that frequently a defense witness is ultimately trapped by an agreement to one or more safety rules, which creates a clear contradiction between a rule and a defendant’s conduct in the specific case at hand. The perceptual effect of this dramatic “gotcha moment” is devastating, especially during a trial. A trial is not a battle of science or medicine; it is a battle of perception. The party that looks
and sounds correct is usually perceived as being more correct by a jury, regardless of the substance of a case. Therefore, when a defendant’s witness is on the stand and it appears that a defendant broke safety rules in relation to the plaintiff, the perception of behavioral inconsistency has a powerful effect on jurors’ decision making. Behavioral consistency is highly correlated with honesty and truthfulness, so a reptile plaintiff attorney’s top motivation is creating and fueling the perception of inconsistency. For this reason, witnesses require special cognitive training to prevent the “gotcha moment” from ever occurring.

To create the perception of inconsistency, a reptile attorney has two tiers of attack against defendants during adverse examination: (1) the safety rule attack and (2) the emotional attack. The safety rule attack is a “word game” in which a witness needs to decide whether to accept or to reject the plaintiff attorney’s language. Baseball provides an excellent analogy to illustrate this process. An effective hitter carefully analyses each pitch coming in and classifies it, and that classification—fastball, curveball, off-speed, too high, too low—determines the timing of the hitter’s swing or whether he even swings at all. A defense witness is the hitter in this analogy, while the plaintiff attorney is the pitcher. In the safety rule attack, the plaintiff attorney (pitcher) attempts to get a defendant’s witness (hitter) to swing at a bad pitch that is out of the strike zone. Therefore, a defendant’s witnesses need special training to learn how to classify questions properly as they are delivered because their baseline cognitive processing ability is too scattered to be able to detect the elusive “curveballs” effectively without it. Keeping with the analogy, a reptile plaintiff attorney (pitcher) will cleverly set up a defendant’s witness (hitter) by repeatedly delivering questions (pitches) that are benign and easy to answer (hit). The repetitive exposure to benign stimuli leads to “cognitive momentum,” in which a witness’ brain begins to assume that subsequent questions will also be benign, and a tendency of automatic, rhythmic agreement begins to form. At this point a defendant’s witness (hitter) has been cognitively “set up” for the safety questions (curve balls), which usually results in continued automatic, rhythmic agreement. Once this occurs, a reptile plaintiff attorney goes in for the kill: he or she begins to ask case-specific questions that are factual and must be agreed with and dramatically points out the contradiction between the agreed upon safety rule and a defendant’s conduct in the case. Hence, the “gotcha moment” is brilliantly set up by using a witness’ own cognitive patterns against him or her. Advances in technology have caused the brain to evolve so that it can process several stimuli simultaneously rather than isolating attention and concentration on a single stimulus. This cognitive pattern is hardwired and very difficult to reverse and is the top reason why a defendant’s witness is highly vulnerable to reptile attorney precision attacks during adverse examination. In society, cognitive multitasking and quick thinking is very important because it leads to effective problem solving and productivity. When testifying, it is a fatal flaw that can result in a defendant’s witness becoming trapped in a dangerous contradiction. Therefore, advanced cognitive training in the areas of attention, concentration, focus, and information processing are required so that a witness can avoid being defeated by the survival rule attack.

If a defendant’s witness can develop the cognitive skills to survive the safety rule attack, a reptile plaintiff attorney must proceed with the emotional attack strategy. When a witness learns to detect and reject safety rules consistently, it puts a reptile plaintiff attorney in a difficult position because he or she cannot show any contradictions or inconsistencies. Then a reptile plaintiff attorney must use a different strategy to establish the safety rule, otherwise the dramatic contraction is not possible and the case cannot be won. The emotional attack reptile strategy attempts to force a defendant’s witness out of patient, thoughtful, meticulous high road cognitive processing and into instinctual, spontaneous, survival low road cognitive processing. By forcing low road cognition, the reptile plaintiff attorney can generate a response that will likely be negatively perceived by jurors, thus hurting a defendant’s witness’ credibility.

Three emotional attack methods can force a defendant’s witnesses into low road cognitive processing: aggression, humiliation, and confusion. All three can represent direct threats to a witness, causing him or her to depart high road cognition and regress into low road cognition, which will result in emotional and protective responses. Aggression occurs when a reptile plaintiff attorney turns hostile towards a defendant’s witness and is characterized by a dramatic negative shift in volume, tone, and body language. This tactic is specifically designed to shock a defendant’s witness and to activate low road cognitive processing and fight or flight, turning the witness hostile (fight) or instinctually to agree or become passive (flight). Either response will significantly undermine a witness’ credibility and believability and will create the perception that a reptile plaintiff attorney is correct. A reptile plaintiff attorney then humiliates a witness by displaying shock, disbelief, and even laughter towards the witness’ answers. Low road cognitive processing in this circumstance results in a defensive, survival response, characterized by “wait, wait... let me explain” types of responses that ultimately appear weak excuses in the eyes of a jury. Again, responding in a defensive manner creates the perception that a reptile plaintiff attorney is correct and that a defendant’s witness has backpedaled and tried to talk his or her way out of a question. Finally, a reptile plaintiff attorney can attack with a display of confusion or lack of understanding, which threatens a defendant’s witness by suggesting that his or her answers do not make sense. This is a very powerful emotional attack because it makes a defendant’s witness feel like an inadequate communicator who struggles
to answer questions in a straightforward manner. This type of attack can force low road cognitive processing because a witness fears that his or her answers are insufficient and that he or she should explain more to a reptile plaintiff attorney in an effort to help him or her understand. This results in a jury perceiving a witness as disorganized and unsure of him or herself. Even worse, it allows a reptile plaintiff attorney to extend his or her adverse examination and emotional attack methods.

Similar to the safety rule attack, advanced cognitive training is required to desensitize a defense witness to these emotional attacks and to train him or her to remain in high road cognitive processing at all times. High road cognitive processing allows a witness to shoot down safety rule questions persistently, as well as calmly and confidently to repeat effective answers that will become the cornerstones of a subsequent examination by defense counsel. It is important to note that after a defendant’s witness persistently rejects safety rule questions, jurors begin starving for information, deeply craving questions that begin with the words “what, why, and how.” However, a reptile plaintiff attorney would never ask such questions since they would allow a well-prepared witness to deliver a persuasive narrative answer to a jury. Therefore, it is important that defense witnesses learn the proper responses to reptile plaintiff attorney questions and not force in their explanations during adverse examination.

There are two reasons why defense witnesses agree with safety rule questions: cognitive momentum, as described earlier, and the brain’s preprogrammed acceptance that safety is good and danger is bad. Specifically, the brain is preprogrammed to embrace safety and to avoid danger, resulting in instinctual acceptance of these principles when presented in testimony. Safety rule questions are highly manipulative and come in all shapes and sizes. However, effective answers to safety questions are pre-planned and very limited in nature. Before discussing the most effective responses to safety rule questions, it is important to first classify the various types of safety rule questions that exist. There are two general types of safety rule questions: big picture safety questions and hypothetical safety questions. A reptile plaintiff attorney has become an expert at cleverly planting big picture safety questions that on the surface appear to be “no-brainers” in nature. This is precisely why the brain’s innate acceptance of safety principles becomes a major vulnerability for a defense witness. These questions focus on the following big picture principles:

- Safety is always top priority.
- Danger is never appropriate.
- Protection is always top priority.
- Reducing risk is always top priority.
- Sooner is always better.
- More is always better.

Hypothetical safety questions are more specific and often take the form of an if-then statement such as “Doctor, you would agree that if you see A, B, and C symptoms, then the standard of care requires you to order tests X and Y, correct?” These questions are especially dangerous because a reptile plaintiff attorney skillfully can cherry-pick symptoms or factors and then suggest the safest course of action to a witness. These deceptive questions are effective because they provide just enough

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information to lure witnesses into providing an absolute answer, thus setting the stage for the “gotcha moment.” Therefore, a defense witness’ ability to detect these precarious questions persistently is vital to defense counsel’s ability to defend a client effectively later in the case.

The very best way to respond to reptile plaintiff attorney safety rule or hypothetical safety questions is quite simple on the surface: be honest. If a witness can first develop the cognitive skills to understand consistently the true meaning and motivation of a reptile plaintiff attorney’s question, the honest answer will always be some form of “it depends on the circumstances.” By definition, the safety rule and hypothetical safety questions are inherently flawed because they lack the proper specificity to allow a specific answer. Therefore, the only honest answer to a vague, general question is a vague, general answer such as the following:

• “It depends on the circumstances.”
• “Not necessarily in every situation.”
• “Not always.”
• “Sometimes that is true, but not all the time.”
• “It can be in certain situations.”

These answers are highly effective for four reasons. First, they are honest and accurate answers. Again, questions that lack adequate specificity cannot be answered in absolute terms so these “sometimes” type of responses are truthful. Second, these responses put intense pressure on a reptile plaintiff attorney to ask a defendant’s witness “what does it depend on?” As stated before, the last thing that a reptile plaintiff attorney wants is to give a defendant’s witness an opportunity to deliver persuasive narrative to a jury. When the logical and expected “what” question does not follow these responses, jurors tend to become frustrated with and often suspicious of, a reptile plaintiff attorney if he or she proceeds with an emotional attack. Third, they provide an excellent opportunity for defense counsel to ask a witness to offer explanations to jurors, who are starving for information. This is when a defense witness can really shine, can become a persuasive educator to jurors. Finally, most importantly, jurors widely accept and understand these answers because they perceive them as authentic and reasonable, particularly if defense counsel has properly primed the jurors for these responses during voir dire and opening statement. On the face of it, persistently delivering these answers seems simple. However, it is a very difficult task for defense witnesses because of their multitasking brains, the phenomenon of cognitive momentum, and low road cognitive processing due to emotional attacks. As such, a defense witness must undergo advanced cognitive training to learn to detect trap questions consistently, respond effectively, detect emotional attacks, maintain high road cognitive processing, and repeat answers with emotional poise.

Conclusion

In the end, the reptile theory is simply an aggressive plaintiff strategy that is erroneously packaged in neuroscientific wrapping. The authors are a veteran plaintiff attorney (Don Keenan), and a jury consultant (David Ball), who have no formal training in neuroscience or neuropsychology, yet take highly complex neuroscientific principles and conveniently apply them to jury decision making. One thing is clear: Ball and Keenan have created a brilliant marketing campaign to (1) persuade plaintiff attorneys nationwide to attend their seminars and buy their DVDs, and (2) generate enough angst within the defense bar to get them to start brainstorming solutions.

Despite the theory’s invalidity, the individual reptile tools can certainly be effective at all points in the litigation timeline and can lead to increased economic exposure for your client. Defense counsel should do three things when facing a reptile plaintiff attorney. First, rethink your voir dire plan and develop a strategy to strip reptile plaintiff attorney priming and re-prime plaintiff attorney. First, rethink your voir dire plan and develop a strategy to strip reptile plaintiff attorney priming and re-prime plaintiff attorney. Second, work with a qualified consultant to ensure that you will tell the right story in your opening statement, and not inadvertently reinforce a plaintiff’s claims. Effectively reordering information can drastically affect jurors’ perceptions. Finally, develop a new appreciation for training witnesses before deposition and trial appearances since this is the key area in which reptile plaintiff attorneys are sure to attack fiercely. Find a qualified consultant to provide your defense witnesses with the advanced cognitive train-
III. Don’t Shoot the Messenger: Exploring Ineffective Witness Testimony

Don’t Shoot the Messenger

By Bill Kanasky, Jr.

Exploring Ineffective Witness Testimony

The inherent desire to “shoot the messenger” is a basic human instinct that has survived and evolved over hundreds of years. In ancient times, communications between warring parties were usually delivered by messengers, putting messengers in very precarious, life-threatening situations. In modern usage, the metaphorical expression still connotes negative consequences dished out to a person communicating bad news to others. In litigation, fact witnesses are the “messengers” and jurors’ perception of their credibility, believability and honesty is critical to success in the deliberation room. But time and again, attorneys and claims managers want to figuratively “shoot” witnesses when poor deposition and trial testimony increases financial exposure and decreases strategic leverage.

The path to effective witness testimony starts early in a case and remains important at all points in the litigation timeline. During discovery, each deposition has an economic value to a client. Strong, effective depositions increase a client’s financial exposure and costs, while weak, ineffective depositions result in higher payouts on claims during settlement negotiations. Therefore, the deposition setting is a critical battleground with potentially heavy casualties for a client—a large check to the enemy. Unfortunately, poor witness performance during depositions is quite common, as many attorneys use actual depositions to evaluate witness’ communication skills, rather than thoroughly assess skills prior to deposition. Some attorneys view it as “just a deposition,” and they less rigorously prepare a witness for a deposition compared with a trial. The unfortunate result is that many attorneys learn about the strengths and weaknesses of their witnesses, and often, their cases, during depositions, rather than beforehand. By then, the damage is done, it’s on the record, and a client has increased vulnerability and financial exposure. During a typical “bad dep,” attorneys often report feeling frustrated and helpless when faced with a witness’s persistent and careless mistakes. Some attorneys resort to the “kick system,” telling a witness, “If I kick you under the table once, you are talking too much: two kicks means you aren’t listening to the questions well enough.” One can only assume that three kicks under the table means that the witness should fake a seizure in an effort to postpone the deposition, obtaining much needed additional preparation time.

When asked about how poor deposition performance impacts his leverage during litigation, the director of claims and litigation of a large corporation based in the Southeast commented, “I am sick and tired of opposing attorneys using bad depositions against me during mediation and settlement discussions. I end up paying out more on that case than I should, which needs to stop. I hate surprises. I hate being told that a witness will do ‘just fine,’ and then they go bomb the deposition. Those ‘bombs’ end up costing us an extraordinary amount of money.” Clearly, poor deposition testimony greatly widens the gap between the real and perceived economic value of a case, putting a client in an unfavorable position when trying to settle.

At trial, no “kick system” exists. Attorneys and clients can only sit back and collectively grind their teeth and wince during poor testimony, as their leverage and money get sucked out of the courtroom. And since jurors highly value the testimony of fact witnesses and use it as a primary factor in decision making during deliberations, keeping a poor witness off the stand is often not an option, or at best, is a risky strategy. In fact, most jurors won’t accept or trust a company until they first accept and trust the company’s fact witnesses. If they don’t accept and trust the fact witnesses, the company doesn’t have a chance in deliberations. Jurors can, will and should shoot the messenger if a witness performs poorly on the stand. Today’s jurors do not demand perfection, but they do demand effective verbal and nonverbal communication skills when a witness testifies.

Understandably, many attorneys struggle to assess, understand and teach these communication skills adequately, as they usually have no formal training in the two academic disciplines that comprise the backbone of witness effectiveness and jury decision making: psychology and communication science. Assessing and adjusting a witness’s communication style, personality, cognition and behavior are very difficult tasks. For example, there is an enormous difference between telling a witness that:

• He or she needs to be a “better listener,” vs. teaching better listening skills;
• He or she needs to be “more patient” when answering, vs. teaching patient answering;
• He or she needs to give “more concise” answers, vs. teaching him or her how to give concise answers.

The difficulty of effective witness preparation by counsel was highlighted during one recent CLE seminar by a Chicago-based trial attorney who described his latest experience: “Last month at trial, my key witness’s testimony was so damaging that I wanted to stand up and throw my legal pad at him in an effort to get him to shut up; then the worst part: I had to face my client and explain why the witness crashed and burned on the stand, despite my preparation efforts the day before.”

Whether a deposition or a trial, when witness preparation efforts focus exclusively on substance, rather than how a witness will actually convey information in a

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cogent and persuasive manner, a witness will not acquire the skills necessary to be an effective communicator. This results in careless and often devastating mistakes during testimony. The most common and preventable witness blunders include volunteering information, guessing and not listening or thinking effectively. Let’s take each in turn.

Volunteering Information: Volunteering information occurs when the scope of a witness’ answer exceeds the scope of a question from opposing counsel. This common mistake occurs for three reasons. First, witnesses who are anxious and unfamiliar with the legal environment tend to fall back on their work and social communication skills to help them “survive” the testimony. At work, home or with friends, it is perceived as friendly, helpful and efficient when someone offers extra information following a direct question. Therefore, novice witnesses inadvertently volunteer excessive information, thinking that it will be helpful, unknowingly causing tremendous potential damage. Second, many witnesses purposely try to anticipate the next question or questions, in an effort to bring the testimony to a close more quickly. These individuals erroneously conclude, “The more I say, the faster this uncomfortable process will be over with.” Nothing could be further from the truth, as an opposing counsel will actually question a “chatty Cathy” witness longer than a witness who volunteers less information. Third, witnesses experience an intense, internal urge to explain away a witness from the fact witnesses. This pattern is efficient and friendly in the workplace or social settings, it is extremely dangerous in a legal environment. Listening and thinking simultaneously as a witness results in poor answers, because the witness does not hear the question in its entirety. What happens next is that the witness answers:

- A different question from what was actually asked, which makes the witness appear evasive;
- A question incorrectly, for example, inadvertently accepting the questioner’s language and agreeing with a statement that isn’t true;
- A question that shouldn’t be answered in the first place—questions to which an attorney would raise form or foundation objections; or
- A question beyond the scope of the inquiry, which volunteers information and makes the witness appear defensive.

Regardless of educational attainments or professional achievements, fact witnesses have no chance of out-dueling a skilled, veteran questioner with years of trial experience. The only way to level the playing field is to teach a witness how to use his or her cognitive resources most effectively, which means training him or her to listen first, think second and speak last. This form of communication seems awkward to witnesses, because it is vastly different from work and social communication. However, it protects them against attorneys’ tricks and traps, as well as careless mistakes related to inattention and lack of concentration. Many attorneys struggle to manipulate and intimidate witnesses who listen carefully, think patiently and answer concisely. This is exactly why teaching these communication skills to witnesses needs to be a top priority early in the litigation plan.

Needless to say, quality witness testimony, or lack thereof, has a tremendous impact on the outcome of litigation. Despite this, the time, effort and resources dedicated to witness assessment and preparation.

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Most jurors won’t accept or trust a company until they first accept and trust the company’s fact witnesses.

Experts at creating this powerful emotional reaction. The standard trick is to say to a witness, “You’ve been an employee at Company X for 15 years and you can’t answer my important question? My client has a right to an answer. Let me repeat my question, and let me remind you that you are under oath.” At this very point, 99 percent
Ineffective Witness Testimony

typically pales in comparison to other
discovery and pretrial preparation activi-
ties. For that reason, when the messenger
is “shot” by the jury, it is rarely the mes-
senger’s fault. It is important for attorneys
to truly understand the strategic and eco-
nomic leverage that can be won or lost with
testimony and how that leverage impacts a
company’s financial exposure. Inadequate
witness preparation, even if unintentional,
can also raise ethical considerations related
to competent representation, because it can
increase litigation exposure. The best strat-
egy is to place great emphasis on witness
preparation prior to key deposition testi-
mony, giving clients strategic leverage early,
minimizing vulnerabilities and obviating
the “shoot the messenger” syndrome.

Retaining an expert who specializes in
assessing and developing effective witness
communication skills is very wise, as the
return on this investment is extraordinary.
Many attorneys across the nation, even the
ones who consider themselves “old school,”
have acknowledged the strategic and eco-
nomic benefits of expert consultation for
witness preparation. As a veteran trial attor-
ney recently stated, “I’d rather spend a few
thousand dollars on expert consultation to
help prepare my witnesses than risk mil-
lions—or even billions—of dollars of my
client’s money at deposition or trial.”
Beyond the Language Barrier

Preparing the Foreign-Born Witness for Trial

Most articles covering the topic of foreign-born witnesses focus on language barriers and the impact of using an interpreter during courtroom testimony. While an important topic, it is a rare occurrence and is not a common challenge that trial teams face as they prepare for trial. However, what is quite common in today’s courtrooms is foreign-born, English-speaking witnesses whose role is to convey believable, persuasive (and critical) testimony to a panel of jurors. There is a misconception among trial attorneys and corporate counsel that the “language barrier” is the primary obstacle to effective courtroom testimony with foreign-born witnesses.

The heart of the matter is that foreign-born witnesses are often very poor communicators in the courtroom, not because of the language barrier, but rather because of deep cultural traits that hinder their ability to get their messages across to jurors.

With millions, if not billions, of dollars at stake in civil litigation matters, the unique verbal and nonverbal communication challenges associated with foreign-born witnesses can leave trial attorneys and their clients economically vulnerable in the courtroom. Therefore, as the country continues to diversify culturally, and the number of foreign-born witnesses continues to increase over time, trial teams will need to alter and supplement their witness preparation efforts.

This article will help explain who foreign-born witnesses are and in what types of cases their testimony is commonly seen. It will address the linguistic and cultural barriers that are likely to present themselves and will also offer practical advice about the key preparation steps that should be taken before a foreign-born witness testifies. If your company is facing litigation that will involve key testimony from a foreign-born witness, please share this article with your outside counsel and any assembled trial team members to help ensure that optimum and accurate perceptions of liability and damages are presented at the jury level.

Foreign-Born Witnesses: Who Are They?

These witnesses were born and raised abroad and have subsequently immigrated to the United States. Some of these individuals were formally educated in their home countries prior to immigrating, while others were educated in U.S. universities after immigration. English is usually their second language, but most importantly, American culture is their second culture. The employment roles of these witnesses are wide-ranging, from executives, to middle managers, all the way down to administrative staff and blue-collar employees. Importantly, they are now present in all industries in the United States, from A to Z.

Today, foreign-born witnesses testifying in U.S. courtrooms is not only commonplace, but is a trend that will continue to grow exponentially. For example, a growing number of foreign-born executives and senior managers currently hold top positions at U.S. Fortune 500 companies. This trend makes sense, as large businesses—like Alcoa, Pepsi, Coca-Cola, and AIG—are already global businesses that generate a significant percent of their sales abroad. Therefore, large U.S. companies know that it is vitally important to have culturally diverse executives and managers who are comfortable operating around the world. However, these same large companies face frequent civil litigation challenges that can leave them vulnerable, and their foreign-born employees will be called upon to provide critical testimony to jurors when the case reaches the courtroom.

Similarly, the U.S. health care system has become increasingly culturally diverse over the last 20 years. Currently, one in four U.S. physicians and surgeons were born abroad. Like all other physicians, foreign-born physicians are prime targets for medical malpractice claims. As a result, these foreign-born physicians are regularly testifying as both defendants and experts in U.S. courtrooms, and this trend will only increase with time. Hospitals and their employees, mainly nurses, are also major targets for medical malpractice lawsuits. In those matters, nurses are usually providing the key testimony at trial, as patient care is their primary job responsibility. Due to a persistent national nursing shortage and low enrollments at U.S. nursing schools, the demand for foreign-born nurses is exploding and will continue to grow indefinitely. As more foreign-born nurses are hired at hospitals across the nation to counter the shortage increases, they will be called upon more frequently to deliver credible, believable testimony to jurors in the courtroom.

Credibility and Believability of Foreign-born Witnesses

Surprisingly, the factors that kill witness credibility and believability are identical between U.S.-born and foreign-born witnesses. In other words, the communication problems that plague U.S.-born witnesses are the very same problems that plague foreign-born witnesses. The only difference is the underlying cause for the flaw. Poor eye contact with jurors; negative facial expressions; unprofessional body language; a defensive or argumenta-
U.S.-born witnesses might not make sufficient eye contact with jurors because they feel they need to respond back to the questioning attorney to prove their points, whereas foreign-born witnesses might do the same because culturally they find it rude to make direct eye contact with others while speaking.

U.S.-born witnesses might be timid and soft-spoken because of significant anxiety and nervousness, whereas foreign-born witnesses might do the same because their primary culture defines that communication style as respectful and courteous (with assertiveness often being seen as aggressive).

U.S.-born witnesses might persistently respond to questions too quickly because they are anticipating questions rather than listening and thinking carefully, whereas foreign-born witnesses might respond quickly because in their culture a quick response conveys confidence and competence.

U.S.-born witnesses might use various gestures while they are testifying because they are angry and frustrated with the questioner, while foreign-born witnesses might use the same gestures because it displays honesty and candidness in their culture.

Identifying a foreign-born witness’s verbal and nonverbal communication flaws is certainly an important part of the witness preparation process. However, determining the true cause of the flaw is the key to discussing it effectively with the witness and correcting it through intense training during witness preparation efforts. Simply instructing foreign-born witnesses to “change” their communication style is insufficient and ineffective, usually resulting in frustration, decreased confidence, and diminished trust.

Finally, just as foreign-born witnesses are increasing in number as the country continues to diversify, the number of foreign-born jurors is also increasing at an alarming pace. These jurors can be naturally empathetic towards foreign-born witnesses in some cases, as they can identify with each other on many levels, particularly having English as a second language and American culture as a second culture. However, diversity in the jury box can also present unique obstacles for the foreign-born witness, as some cultures have natural conflicts and a long history of distrust. For example, in a 2010 trial in Cook County, Illinois, the defendant, a physician from Pakistan, informed the trial team that no one from India could possibly be on the jury under any circumstances because he believed there was no way an Indian would accept and believe testimony from a Pakistani, given the long term tension and distrust between the two countries. Therefore, it is important for legal teams preparing for jury selection and trial to be aware that nationalism can play a powerful role in the cultural identities of both witnesses and jurors, and that trust and credibility can be instantly compromised when a cultural conflict is present between the witness stand and the jury box.

The “Real” Language Barriers

To jurors, words alone are not reality. Words from the witness are combined with the jurors’ perceptions of the witness to create the whole reality of the message. Therefore, the first “real” language barrier occurs when the witness’s tone, attitude, and nonverbal behavior obscures and distorts the message to the jury. Tone, attitude, and nonverbal behaviors are strongly linked to witnesses’ emotional status during their testimony. Negative emotions impede core communication skills for all witnesses and are the top barrier to effective courtroom testimony. One could argue that the foreign-born witness has a much higher emotional burden compared to U.S.-born witnesses because:

- The U.S. Court System: The emotional burden of litigation is higher for foreign-born witnesses because they have the additional stress of being very unfamiliar with the U.S. court system and the procedures of civil litigation. Many foreign-born witnesses, particularly those from nondemocratic nations, instinctively perceive courts and government as oppressive, violent, or dangerous, due to their previous experiences in their native countries. In other words, many foreign-born witnesses have intense fear of anything related to a court system or government procedures.
- Jury of “Peers”: Many foreign-born witnesses feel the jury system is unfair as the jurors rarely look like the witnesses’ peers. Foreign-born witnesses often feel that they will be discriminated against from the start of the trial, particularly witnesses who were born in countries that the U.S. is currently at odds with (e.g., Iraq, Iran, Syria, Libya, Afghanistan, Korea, or Cuba). This results in significantly increased levels of fear and anxiety for the foreign-born witness.
- Witness Order: Most foreign-born witnesses feel it is deeply unfair for them to be called as an adverse witness during trial. This often results in feelings of resentment and bitterness, as foreign-born witnesses believe it is unjust to be examined by the opposing attorney prior to being questioned by their own attorney.

This higher than normal emotional burden creates significant anxiety, fear, and discomfort, which can easily impede communication skills, which in turn can severely hurt foreign-born witnesses’ credibility and believability when they testify.

The second “real” language barrier is rapid speech. Foreign-born witnesses, especially those with strong accents, often
Fast-speaking foreign-born witnesses need to be trained to do the following:

- **Breathe More:** Fast-speaking foreign-born witnesses breathe very shallowly, or don’t breathe at all when they testify. This results in increased anxiety and tension, which fuels the rapid speech problem. Training them to breathe more and to breathe deeper will force them to become calmer and to slow down their speech. Slower, calmer speech conveys poise and confidence.

- **Pause More:** Pausing gives jurors a chance to cognitively digest the information the witness is providing. Foreign-born witnesses need to understand that jurors have poor attention spans and often struggle to comprehend the information being directed at them. Pausing allows the jurors a chance to “keep up” with the witness, rather than “fall behind,” which results in testimony being lost or ignored.

- **Empathize More:** Jurors are put into a very challenging and anxiety situation. They are paid poorly; have to sit in uncomfortable chairs all day; spend long hours listening to large volumes of information; can’t discuss the case with each other until the end; and in many venues, can’t take notes or ask questions. In other words, being a juror isn’t fun. Foreign-born witnesses need to be sensitive to what jurors must endure, and recognize that jurors naturally struggle to hear and understand testimony at times. The foreign-born witness must be trained to understand the trial from the jurors’ perspective and learn how to meet jurors’ unique needs. This will provide the witness with plenty of motivation to slow down the pace of speech.

The third “real” language barrier comes in the form of inefficient information processing. Specifically, foreign-born witnesses often do not process information the same way U.S.-born witnesses do. U.S.-born witnesses listen to the question, process the information in the question, think about their response, and then respond accordingly. However, many foreign-born witnesses instead do the following:

- **Listen to the question,**
- **Translate the question into their native language,**
- **Process the information in the question,**

Simply instructing foreign-born witnesses to “change” their communication style is insufficient and ineffective, usually resulting in frustration, decreased confidence, and diminished trust.

- **Think about their response in their native language,**
- **Translate their answer into English,**
- **Then deliver their answer to jurors.**

Consequently, it often takes the foreign-born witness longer to complete the question-answer cycle, which can be misperceived by jurors. Hesitations, longer pauses, and awkward silences can be perceived by jurors as signs of evasiveness, uncertainty, and guilt. Therefore, depending on the case and the witnesses involved, the trial team might have to introduce this information processing issue to jurors in voir dire to ensure that jurors know precisely why some foreign-born witnesses may not answer questions as fluidly as U.S.-born witnesses. Jurors are usually very understanding about this issue and do not hold it against the witness as long as the trial team makes the issue crystal clear during voir dire. Finally, it is important to mention that some foreign-born witnesses may not answer questions as fluidly as U.S.-born witnesses. Jurors are usually very understanding about this issue and do not hold it against the witness as long as the trial team makes the issue crystal clear during voir dire. Finally, it is important to mention that some foreign-born witnesses process information much more effectively and efficiently than others. This can create perceptual discrepancies with jurors, which can negatively impact a witness’s credibility if one foreign-born witness can’t process information as quickly as another. Again, it is critical to discuss this issue with jurors during the voir dire process so they clearly understand why communication skills may vary widely between various foreign-born witnesses.

### How to Prepare the Foreign-born Witness for Trial

#### Build Trust

With *any* witness, trust is often difficult to form and takes time, as most witnesses are highly skeptical and distrustful of attorneys and the legal system. With foreign-born witnesses, trust does not come easily. First and foremost, they need to be welcomed as a valued member of the team, rather than just an important witness. Plenty of time must be dedicated to answering their questions and addressing their emotional concerns about the case, as well as identifying their role and setting expectations. At this point, trust is the key element in helping the foreign-born witness overcome natural feelings of distrust, discomfort, and vulnerability. A trustful bond must be formed between the witness and members of the legal team, otherwise most witness preparation efforts will be ineffective.

#### Common Mishap

This step usually gets rushed, if not skipped altogether. Jumping ahead too soon prevents trust from forming and actually increases levels of distrust. Earning trust with a foreign-born witness requires persistent time, attention, and empathy. In other words, attorneys need to step out of the legal role early and step into the human role.

#### Psychological Evaluation

Emotional instability is the top factor that inhibits effective witness performance. Every foreign-born witness has some form of emotional “build up” that needs to be vented, understood, analyzed, and addressed. Anger, anxiety, frustration, fear, and dread are very common feelings for witnesses to experience as their testimony approaches. When problematic personality traits and cultural differences are combined with these emotional imbalances, the situation becomes exponentially complicated. If undetected or disregarded, these factors can severely impact a witness’s abil...

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ity to testify effectively. Three key issues here:

- Foreign-born witnesses with emotional problems have great difficulty learning new skills and information (which is the crux of witness preparation).
- Emotional witnesses make devastating verbal and nonverbal mistakes during trial testimony.
- Problematic personality traits and cultural differences need to be handled very carefully and incorrect strategies can increase frustration and decrease trust.

**Common Mishap**

This step is usually skipped completely, as most attorneys (a) don’t realize that emotional and personality factors are key predictors of witness performance, especially with foreign-born witnesses, and (b) don’t know how to accurately assess and analyze psychological constructs. Therefore, many attorneys simply tell the witness that he or she needs to “relax” or “calm down,” which is highly ineffective and usually results in increased stress and tension.

**Communication Skills Evaluation**

Both verbal (e.g., tone, length of answers, assertiveness and confidence) and nonverbal (e.g., facial expressions, body language, gestures and eye contact) communication skills need to be assessed carefully, early in the witness preparation process. However, the two most important communication skills occur well before the witness responds to a question: listening and thinking. Most witnesses are terrible listeners and ineffective thinkers, regardless of their intellectual capacity, language, or cultural background. This is because people are now cognitively hard-wired to listen and think simultaneously when communicating with others. From a neuropsychological standpoint, a respondent is extremely vulnerable to error because concentration and attention are split between two activities—listening and thinking—instead of dedicated to one cognitive activity. Listening and thinking simultaneously as a witness results in poor answers, because the witness does not hear the question in its entirety and does not spend enough time thinking prior to responding. Therefore, it is important to assess the listening and thinking skills early and to do the appropriate teaching in the education phase. This is especially true for foreign-born witnesses who might have to translate before responding.

**Common Mishap**

Few attorneys understand how cognitive resource imbalances and the interaction effects of listening and thinking can lead to persistent damaging answers. Therefore, many attorneys simply tell the witness to “listen more carefully” and “be more patient,” rather than training them to use their cognitive resources more effectively.

**Awareness**

If foreign-born witnesses are not aware of their psychological and communication flaws, preparation efforts will be ineffective. Witnesses must be informed that their communication style or persona needs to be adjusted. Some witnesses in this stage are unaware (or are in denial) of their communication or persona problems. Once witnesses exhibit awareness and acceptance of their communication flaws, preparation efforts can proceed. Additionally, witnesses need to know that a) the flaws are natural and common, and b) the witness preparation program can and will help them improve.

**Common Mishap**

Most attorneys attempt to make witnesses aware of their flaws first, during mock testimony, rather than introducing it to them beforehand and helping them cope with their shortcomings. This leads to discouragement, helplessness, and frustration. Instead, this process needs to be handled in a comforting, sensitive, and constructive manner.

**Education**

Once the psychological and communication skill evaluations are completed, and witnesses are aware of their flaws, foreign-born witnesses are ready to be taught the “nuts and bolts” of effective witness testimony. Skills to be introduced to the witness during this step consist of the following: controlling the pace of the examination; identifying and categorizing open and closed ended questions; using appropriate tonal and nonverbal communication; answering concisely and on-target; detecting “trick” questions; identifying high-value questions; maintaining emotional control; and learning the appropriate listen first, think second, then respond cognitive sequence. Many questioning attorneys struggle to manipulate and intimidate witnesses who listen carefully, think patiently, and answer concisely. This is exactly why teaching these communication skills to witnesses needs to be a top priority. The manner in which this information is conveyed to foreign-born witnesses is critical, and should be modified appropriately based on their cultural backgrounds and unique characteristics. Foreign-born witnesses cannot practice testifying until they get acquainted with the playing field and the rules of the game. Practice before education leads to early failures and high levels of anxiety and frustration.

**Common Mishap**

Many attorneys introduce their custom-made “tips” concurrent with simulation of testimony, which is ineffective as it overloads the witness and prevents proper memory encoding. Additionally, this information is rarely tailored to the witness’s culture, personality, learning style, and communication ability, which can impede the learning process.

**Basic Training**

Mistakenly, this is where most witness preparation efforts usually start. Rather,
the trial team should first address the preceding five areas to ensure that the witness is optimally “ready” to begin training and to be in the position to learn, grow, and develop as a witness. Basic training focuses on helping witnesses modify their communication style and persona in order to overcome their weaknesses. It involves implementing the skills learned in the education phase and receiving constructive feedback on how to improve. During this step, witnesses practice listening and answering questions in an informal, safe, and nurturing training atmosphere. Practice questions during this step are not case specific, but rather more benign “softball” questions regarding background, training, policy, and other general areas. The goals are to a) build confidence in the witness, b) have him or her make mistakes, c) help him or her identify and work through the mistakes (i.e., learn), and d) get him or her accustomed to the pace and structure of questioning. Success and confidence with “training wheels” first is very important, as foreign-born witnesses are often highly intimidated of the process.

**Common Mishap**

Many attorneys like to jump right into the more difficult (and stressful) case-specific questions, rather than letting the witness experience success with the more benign introductory questions. “Hammering” your witnesses too early will not only increase their anxiety and fear, but can also destroy trust between the witness and the attorney.

**Advanced Training**

This is the final and most advanced step in which the foreign-born witness works to consolidate the gains attained during the previous six steps. This step includes fully simulated mock direct and cross-examination that is often videotaped and played back to witnesses while they receive constructive, yet encouraging feedback. This is the step where “practicing like you will play” is key. Therefore, it is critical that the testimony practice be done in front of others who can play the role of jurors (other attorneys, staff, secretaries, or even a hired panel of mock jurors), as the trial atmosphere is very different from that of a deposition. Recreating the intensity of a courtroom atmosphere is very important in this stage, so the questioning should not be informal or casual.

**Common Mishap**

Again, many attorneys inadvertently “throw the witness into the deep end” and make them sink or swim first, and then try to prepare them from that point. That is a huge mistake, as it increases anxiety and frustration, and also damages trust. Additionally, many attorneys resist putting the time, effort, and resources into creating a realistic atmosphere for mock questioning. Forcing your witness to deal with objections, documents, and jurors for the first time during the actual trial is very unwise, as those are all important factors that witnesses must be comfortable with if they are to deliver effective testimony.

**Conclusion**

It is undeniable that companies across the nation, both big and small, are culturally diversifying at an amazing rate. The diversification is widespread, ranging from the boardroom all the way down to the janitor’s closet. As companies approach civil litigation battles in the courtroom, the communication abilities of their foreign-born witnesses will play a central role in jurors’ perceptions of liability and damages, both now and well into the future. Trial teams with foreign-born witnesses in key testifying roles need to be fully aware of the unique communication challenges they will face and they must have the ability to train their witnesses effectively to be credible and believable communicators at the jury level. However, most attorneys do not receive formal training in cultural diversity, communication science, or psychology, putting them in a difficult position when facing the unique challenges of foreign-born witnesses. Therefore, retaining an expert who specializes in developing foreign-born witness communication skills is very wise, as the strategic and economic benefits are extraordinary. Otherwise, your witness’s message may be “lost in translation,” resulting in jury misinterpretation, or even worse, defeat in the courtroom.