

JURORS' COMMON WISDOM *"I don't know... I'm just the CEO"*

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In our last "Common Wisdom" column we told you that many jurors assume that plaintiff attorneys take a third of the money awarded and often adjust the award accordingly.¹ Another issue jurors insist they know as well as fee arrangements relates to a CEO's knowledge of corporate activity. Repeatedly, in mock trials and post-trial debriefings, we hear jurors opine that they do not believe CEOs or top executives who claim not to know the answer to almost any question asked during deposition or trial testimony. Many jurors believe a CEO's knowledge extends from the latest activity in the R&D department to the daily minutia in human resources. So when an executive responds, "I don't know" to the question, "Why was the Midwest region's Marketing Director fired?" jurors often cry foul because they believe this is the kind of information a CEO would naturally know.

The perception that executives are always "in the know" is pervasive; therefore, "ignorance defenses" rarely succeed. While the executive corps may feel an adrenaline surge at the thought of an all-seeing, all-knowing "Leader," their

lawyers can only cringe. Here are some common lines of reasoning we hear from jurors and mock jurors:



"Yeah, right...there is no way the CEO didn't know what was in the contract with that consultant."

"He only says, 'I don't know' when it helps him! He's gotta know – he's the CEO."

"Her lawyer told her to say she doesn't know, but she really does...or at least she should!"

"He's the president of a drug company and an expert in medicine. He should have known the details of that study."

"There is no such thing as being out of the loop when you are at the top."

"People tell you things; employees send you emails. There is no way something this important didn't come across her desk."

The problem is not necessarily that the CEO doesn't know -- many times she *really* doesn't know. The problem is with *how* your witness says, "I don't know." While you may think that telling your CEO, "Wait five seconds before answering and look aloof" (this really happened) is

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(Jurors' Common Wisdom continued)

perfectly sound advice, you're doing more harm than good.

Instead, the CEO should be trained to give "I don't know" answers without looking evasive, because evasive *is most* likely how he will come across.

Solutions lie in two areas: 1) Prepare your witnesses as extensively as possible prior to trial so they don't have to say, "I don't know" when they actually do know, and 2) Teach your witness a variety of techniques for telling the jury, "I don't know" when they actually don't know. For example, the CEO can:

State what he does know as well as what he doesn't know. *"I do know the budget was up for revision, and I know that a special finance task force was in charge of that revision, but I do not know the specifics of the changes."*

Tell the jury why she doesn't know. *"That would not be something that I have direct knowledge of. My standard practice is to delegate those decisions to my CFO who is trained in those matters. I have complete trust in the decisions he makes."* When pushed on the issue: *"The Board of Directors doesn't pay me to micromanage already capable people. My duty is to do the work on my job description, which is mostly strategic, not tactical work."*

Educate the jury about the depth, breadth, and scope of a CEO's job. *"You have to remember that this issue, while extremely important, is just one piece of our company's puzzle. I would only know the answer to the question you ask if it pertained to a broad, strategic planning issue, which it doesn't."*

Qualify or add context to the "I don't know" answer. *"I don't have an independent recollection of*

that event." *"That was over two years ago; I don't remember the details."* *"I would have to go back and check my file to be absolutely sure of that answer."* *"I don't recall as I sit here today."*

Some attorneys worry that this preparation will look "coached." To the contrary, repetitive "I don't know" answers appear more rehearsed and more evasive to many jurors than the explanatory answers suggested above. This is due to the common expectation that the CEO has prepared extensively for the deposition (which, of course, should happen when possible). The explanation of why the witness doesn't know provides a needed reality check for the jury and gives the CEO a chance to feel more in charge – more "CEO-like" – than simply offering the truthful, but so fraught with peril, "I don't know."

An additional solution is found outside of the CEO himself as you might consider using testimony from an expert on corporate responsibility or culture. A highly compelling expert witness, who has been on many boards of directors, can help explain to a jury what CEOs are paid to do and not do. In the same way that experts are used to educate a jury about securities, patents, or a physician's standard of care, educating a jury about the responsibilities of a CEO allows you to provide an explanation without making excuses. It also allows you to make an important distinction: Just because CEOs are accountable for their companies does not mean they are expected to know *everything* that goes on within those companies. In the end, jurors should not wonder about what the CEO doesn't know. Instead, jurors should realize the CEO truly *can't* know everything. ■

¹Since that article was written, a mock juror made a new entry to our data collection with his assertion that attorneys take as much as "80 to 90%." The only rebuttal to his assertion was another juror who responded, "Nab, it's only 50%."

WITNESS CREDIBILITY

A multi-dimensional construct

Anyone who has tried enough cases has probably learned what is meant by the adage, “Even the best case can be lost when a witness fails on the stand.” The days following a trial when this has happened are often consumed with trying to assess what went wrong. This is particularly true when you prepared your witness on the facts and substance of the case. Where many attorneys fall short in preparing witnesses is failing to consider how a jury will perceive a witness. This is often due to attorneys erroneously concluding the jury will interpret the testimony the way they themselves have. In litigation, regardless of whether the message receiver is a judge, jury, mediator, or arbitrator, attention should be heavily focused on how the witness’s message will be interpreted. This is not to suggest the trier of fact does not evaluate the content of testimony seriously, or often in similar ways as attorneys. However, prior to doing so, they will evaluate the credibility of the witness and, in the absence of credibility, the content of testimony loses much, if not all, of its persuasiveness.

Persuasion theory has consistently upheld the premise that people routinely adopt the shortest, most sensible route to a conclusion unless significant motivation exists to do otherwise. Consequently, the credibility of the witness offers a psychologically satisfying device by which the trier of fact can avoid having to cognitively process the complex messages that are often communicated in witness testimony. Furthermore, what one says is often not as important as how it is said. The witness with the most important message will not be successful in persuading the jury if he or she does not deliver the message effectively.

Credibility is not an innate quality of a person, but rather a construct of communication that is evaluated and judged by the receiver of the message. Few topics

of communication have received as much attention as source credibility. For years, scholars have tried to identify the criteria by which credibility is judged. The answer lies in what the trier of fact sees, hears, and perceives about a witness. Judgments are influenced by the way a witness sounds, looks, and acts when testifying. Whether juror or judge, humans make credibility assessments on many other factors than the words spoken by witnesses.

Communication research has yielded numerous studies on the construct of credibility. A quick glance at the studies shows a variety of dimensions comprising credibility. Though not exhaustive, the list includes the dimensions of competence, trustworthiness, composure, likeability, intelligence, extroversion, honesty, convincingness, intention, personality, and authoritativeness. The factors that have been most frequently identified as germane to courtroom assessments of witness credibility are **expertise, trustworthiness, and dynamism.**



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(Witness Credibility continued)

Expertise pertains to how well the witness knows what he or she is talking about. *Trustworthiness* pertains to the witness's character, specifically perceptions of honesty. *Dynamism* pertains to how charismatic a witness is. Judgments of the witness's credibility are based in large part on witnesses' nonverbal cues. Fortunately, many of the cues associated with expertise, trustworthiness, and dynamism overlap, which means that recognizing and honing certain nonverbal communication patterns can dramatically enhance credibility.

For example, when jurors perceive a witness as an expert, they believe the witness is competent in that subject. Nonverbal cues that indicate authority include direct and strong eye contact with an audience, high vocal volume, low pitch, and a moderately fast speaking rate.

When jurors believe a witness is trustworthy, they conclude the witness is telling the truth. Communication research has consistently shown nonverbal communication cues indicating extroversion and involvement are associated with honesty. This includes forceful and rhythmic gestures, strong eye contact with the audience, higher vocal volume, faster speaking rate, somewhat relaxed posture, affirmative head nods, minimal self-touching (of the mouth or face), and avoidance of non-fluencies (use of "ums," "ands," and "uhs").

Dynamism, or charisma, is displayed through nonverbal variety. Unlike a witness who uses a monotone style, the dynamic witness varies vocal pitch, rate, intonation, volume, and uses a variety of hand gestures and facial expressions. Not only is a boring witness often a less credible witness, he or she effectively becomes a non-existent witness as jurors and judges have difficulty even recalling the testimony.

Most studies show communicators who are extroverted, involved with their audiences, positive,

and moderately relaxed are perceived as more credible and persuasive than those who are not. Going over the facts and evidence is a good start, as it will help increase a witness's recall, which might lead to greater comfort on the stand. However, practicing testifying, and more specifically, practicing with audio and video feedback, so both the attorney and witness can observe and evaluate where his or her natural nonverbal communication patterns can be enhanced, is essential.

Success on the stand begins *and* ends with witness credibility. Fortunately, something can be done about it by planning ahead and practicing. ■

TSONGAS NEWS

*New & improved website
coming May, 2007*

This May, Tsongas Litigation Consulting will launch a newly redesigned website. Taking advantage of the latest innovative technology, the new look and feel of the website will continue Tsongas' history of excellence and industry leadership. The new site will incorporate all the information available on the previous website, but with vast improvements to navigation and usability. There will be easier accessibility to all practice areas, as well as quick links to seminar information. Interesting new features will include informational videos, tips for attorneys, dynamic questionnaires, and a new consultant-hosted blog. Additionally, you will have the option to opt in or out of the RSS subscription service to *The Advantage Newsletter* and other content, when posted. These significant changes will improve your ability to obtain the information you need, when you need it, and in a manner that is most convenient for you-- a continuing sign of Tsongas' partnership with the legal community into the future. ■