

Using Self-Efficacy for Witness Preparation

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The store manager decided to service the air conditioning units on the roof during the day. This is normally done at night because water leaks from the condensing units, drip down to the ceiling, and land just about anywhere on the slick, tile floor in the store. This creates a risk for customers to slip and fall and that is just what happened to Mr. Simon, the plaintiff you represent.

It is hard to imagine a better case. The manager did not follow store policy. The store itself is part of a nationwide chain. The store employees made statements to EMS that the store was at fault. Someone was even using the video recorder on her smart phone and has a digital recording of Mr. Simon's slip and fall. Great case ... except Mr. Simon makes a terrible witness.

Having a history of losing his commercial driver's license for a DWI arrest, Mr. Simon is somewhat defensive when answering personal questions. He has been injured on the job in the past and received workman's compensation. His doctors had to institute safety precautions when prescribing pain medication because it became apparent that he was "misusing" his medication.

When you have talked to Mr. Simon, you can tell he doesn't trust you, his own attorney. He looks at you out of the corner of his eye. He hesitates before answering. When he lets loose with an

answer, it is typically in a loud, bombastic tone. When he is done with his short and often irrelevant answer, he recoils and stares at you. Great case ... except the plaintiff makes a terrible witness.

It is pretty obvious that your witness needs witness preparation services. How you prepare your witness will be up to you. There are two dangerous paths you might follow.

The first path of danger is to use your experience with past witnesses as the basis for helping Mr. Simon. You probably have helped past witnesses by giving helpful feedback and tips but some witnesses, like Mr. Simon, are not amenable to simple instructional techniques. In plain English, some witnesses are beyond the help you have given to the typical witness. Even some old fashioned, kick in the pants, wood shedding wouldn't help Mr. Simon.

The second path of danger is for you or a trial consultant to pull out a trusty, tried and true list of Do's and Don'ts for testifying. Lists don't work. They never have. They never will.

If a list is going to be helpful, the witness must be able to perform the following, somewhat amazing, complex process:

Understand the list → Memorize the list → Translate the list from abstract instructions to concrete behaviors → Hone the behaviors in time for live deposition or trial testimony.

Lists give false confidence to the attorney and trial consultant and they undermine the confidence of the witness. The only thing a list is good for is documenting the characteristic of the perfect witness, something that does not exist in any case. So, what's an attorney or trial consultant to do? Why not try a new approach that is emerging from the scientific research on witness preparation. Why not try the self-efficacy approach?

Self-Efficacy on the Witness Stand

Self-efficacy is not a term that is frequently bandied about but, despite its somewhat obscure status, it is a simple term that is easy to understand. Albert Bandura, a social psychologist who coined the term, defined self-efficacy as a belief that a person has about how well she can perform a task (Bandura, 1986, 1997, 2000).

You can do a self-check right now. What is your self-efficacy? Think about it ... If you took some time to think about your personal level of self-efficacy, then you probably said something like, "Well, my self-efficacy is good about certain things and not so good about other things." If you said something like, this, you would be saying something that is supported by scientific research.

The research shows that self-efficacy is not static. Your self-efficacy can change as you go from situation to situation (Bandura 1989, 1993). That is probably what is happening to Mr. Simon. He probably feels a great deal of self-efficacy when doing things that are related to his job of truck driving. He feels much less self-efficacy when he is on unfamiliar turf, like talking with attorneys.

Fortunately, the research regarding self-efficacy has shown that there are ways to teach a person situation-specific self-efficacy (e.g., Kozina, Grabovari, De Stefano, & Drapeau, 2010; Schunk & Zimmerman, 2007; Settlege, Southerland, Sherry, Smith, & Ceglie, 2009). Or, more to the point, the research regarding self-efficacy can be used as the basis for preparing a witness to testify in deposition or during trial.

Enhancing Self-Efficacy

If you want to help you witness testify in an honest, accurate, and confident manner, then you can rely on one or more of these four research based techniques (Bandura, 1997; Cramer, Neal, & Brodsky, 2009):

- **Practice** – Allow the witness to practice testifying. As the witness practices, catch the witness doing something right and give the witness praise. This will increase the witness's self-efficacy, i.e., the witness will develop the belief that she can testify well. It is generally best to start slow. For instance, practice the basic give and take of direct examination. Self-efficacy is best with comfortable skills and information. Then, move to more challenging situations like cross-examination. You will probably see a growing sense of competence build with your witness by using this sequence of practice.
- **Observation** – Allow the witness to see another witness do a good job of testifying, e.g., let the witness see a videotape of good testimony. Then point out the behaviors that make the testimony effective. Help the witness reach the conclusion, "I can do that." If possible, use a sample of good testimony whose characteristics are similar to the witness. This will only help improve self-efficacy.
- **Social Persuasion** – Social persuasion refers to the use of positive reinforcement, such as compliments. Of course, you will compliment the witness during actual witness preparation sessions. Don't forget to catch her doing the right thing when she is talking with you or others. If you catch her talking in a way that is consistent with how you have been preparing her to testify, give her a compliment. Give the witness informative feedback with compliments. A witness will best learn and retain suggested improvements when receiving them in a positive way.
- **Relaxation Training** – Guided imagery is the best form of relaxation training. Many attorneys are familiar with Gerry Spence's notion of psychodrama. Guided imagery is a little bit of Gerry Spence psychodrama and little bit of deep breathing relaxation. In a nutshell, the witness practices deep breathing relaxation while imagining being on the witness stand. As an attorney, you might feel a little out of your area of expertise if you tried to do relaxation training. Not to worry, there are plenty of mental health professionals who can conduct the relaxation training. Relaxation training, like guided imagery, is most effective when conducted by a professional with a mental health background.

A useful method to apply these skills was developed by Dr. Marcus Boccaccini and his colleagues; the scientifically sound model is known as Persuasion Through Witness Preparation (Boccaccini, Gordon, & Brodsky, 2003, 2005). Using data from mock witnesses and actual criminal defendants, the following witness preparation method has been shown to improve testimony:

1. **Baseline** – Videotape the witness prior to any witness training. This serves as the baseline.
2. **Praise** – Look at the baseline videotape with the witness and identify three behaviors that the witness exhibits that result in good quality testimony. Praise the witness for these three behaviors. Encourage the witness to keep doing these behaviors. If the witness makes self-efficacy statements like, “Hey, I think I’m getting the hang of testifying”, agree with the witness.
3. **Skill Selection** – Identify three new behaviors you want the witness to exhibit. Usually, these behaviors are replacement behaviors; if the witness exhibits these behaviors; she replaces other behaviors that are inappropriate. For example, teach her to keep her interlaced fingers on the table while testifying, so she doesn’t gesture wildly.
4. **Skill Training** - Teach the behavior in a three step process: explain → role model → allow the witness to practice.
5. **Simulation** – After you have had time to help the witness practice, videotape the witness testifying.
6. **Feedback** – After the simulation, review the videotape with the witness. Focus on the positives and compliment the behaviors you want the witness to continue to use.
7. **Repeat** – Repeat Steps 2 through 6 until the witness feels self-efficacy.

There are three implicit operating principles in the foregoing witness preparation method that are so important we will take time to make these principles explicit.

First, you probably noticed that we followed the rule of three. In Step 2, you are told to praise three behaviors that the witness spontaneously exhibits. In Step 3, you are told to identify three new skills for the witness to learn. Three is the magic number, at least that is what researchers who study the brain have discovered, i.e., a person can only keep about three things in mind at any point in time.

The rule of three is the primary reason why witness preparation lists shouldn’t be used during witness preparation. The longer the list, the more likely that the witness will not remember the tips. Talk about undermining self-efficacy.

Second, we use of positive reinforcement, like compliments. Research shows that negative reinforcement or punishment undermines self-efficacy. When you use negative reinforcement, like you tell a witness not to use a specific behavior, you are telling the witness, “You aren’t doing it right.” The witness who needs witness preparation services probably doesn’t hear what you said. The witness probably goes on a silent, long, negative tirade about her performance as a witness, “I am not doing it

right. I will never do it right. What does this guy expect? I sure hope this witness training session ends right now!" We don't use negative reinforcement because it has a negative effect. Positivity empowers witnesses.

Third, we use response competition to eliminate unwanted behaviors. Step 3 of the method is perhaps the most important step because you are not only selecting behaviors you want the witness to use; you are selecting behaviors that will cancel out unwanted behaviors. For example, let's say the witness answers questions in an explosive manner and recoils to watch the impact of his bombastic delivery. You obviously want that behavior to cease. You can eliminate that manner of responding without ever telling the witness not to do it. Instead, you teach the witness how to take a deep breath, slowly exhale, and begin responding after a count of three, while looking calmly at the person who asked the question.

Can You Feel that Self-Efficacy Growing?

Can you feel self-efficacy? Sure you can and so can your witness. Self-efficacy feels a whole lot better than anxiety, so a big part of witness preparation should be teaching the witness to feel self-efficacy.

One way we teach the sense of self-efficacy is through a technique we mentioned earlier, guided imagery. Guided imagery is a technique which pairs images with a relaxation technique. Guided imagery for witness preparation can be done in three easy steps.

1. **Practice Relaxing** – Most relaxation techniques are variations on Eastern meditation traditions. The two most popular relaxation techniques are deep muscle relaxation and deep breathing. With regard to witness preparation, you want the witness to use the deep breathing technique. If the witness is particularly anxious, the witness might have to start by doing deep muscle relaxation and when that technique is mastered, the witness can switch to deep breathing relaxation.

If you or your witness has never done any relaxation training, deep breathing relaxation might sound odd, but it is simple and effective. Athletes use this technique to reach peak performance. This technique is powerful enough to treat phobias, like the fear of flying.

To do deep breathing relaxation, find a comfortable, quiet place to sit. Close your eyes. Breathe in slowly through your nose and slowly count to five. Hold the breath for about seven seconds, and then exhale through your mouth, while counting from down five to one. Repeat this for five minutes. That is all there is to it.

2. **Create a Script** – Help the witness prepare a script for imagining what it will be like to testify. Have the witness write a script that includes the following: walking into the

courtroom, sitting in the courtroom waiting to testify, being called to testify, walking up to the bench, getting sworn in, sitting in the witness stand chair, going through direct exam, and going through cross exam. When writing the script, be sure to incorporate information from the five senses. So, the script will include sensory information like the sound of the judge's voice as he swears in the witness, the feel of the wooden witness stand chair, and the appearance of the attorney doing cross examination.

3. **Practice** – Once the witness has a script and is able to properly use the deep breathing relaxation technique, the two are paired. Someone can read the script to the witness as the witness does the deep breathing exercise. Since the witness will practice daily for at least a week, it is wise to make a recording of the script that the witness can listen to the audio recording while doing the deep breathing exercise.

In vivo practice is not a bad idea, which is to say, have the witness go to the courthouse and even go to the courtroom where the trial will be held. While en route to the courthouse and while in the courthouse, the witness should practice deep breathing relaxation.

What Does the Science say about Self-Efficacy and Witness Preparation?

Unlike many other forms of witness preparation, the technique described in this paper has been studied empirically. One of the authors of this paper, Dr. Cramer, has conducted research and determined that the self-efficacy approach can influence the way the witness thinks and the way jurors perceive the witness.

As part of this research, Dr. Cramer and his colleagues developed the Witness Self-Efficacy Scale (WSES; Cramer, DeCoster, Neal, & Brodsky, 2010) as a way of measuring the effect of witness preparation services. Below is a list of WSES items. You can use these items to monitor the impact that witness preparation services have on the testimony of the witness.

1. Remain calm under cross examination
2. Control their emotions when questioned by an aggressive attorney
3. Maintain a stable tone of voice when speaking
4. Avoid fidgeting
5. Maintain a good posture throughout the testimony
6. Be comfortable on the witness stand
7. Remain poised when being questioned by an attorney
8. Maintain eye contact with the jury
9. Hold eye contact with an attorney

10. Hide nervousness
11. Convey confidence in their ability
12. Organize their thoughts
13. Comfortably admit when they are uncertain of an answer
14. Sit up
15. Lean slightly forward when answering some questions
16. Provide more than “yes/no” answers
17. Act natural
18. Be themselves when testifying

Just so we are clear, we are giving the foregoing list to you, the attorney or the trial consultant. Please don't give this list to your witness. It will only overwhelm the witness. If you talk to your witness about the items on the list, choose three and only three items to discuss with your witness. The more items from the list you discuss with the witness, the more her self-efficacy will wane.

Conclusion

Think about what good witness preparation would do for Mr. Simon. If the witness preparation services are effective, Mr. Simon will no longer deliver his responses to questions like exploding bombs. He will no longer stare down the attorney after responding to a question. Instead, he will speak in a way that others can hear and understand what he has to say. That is what good witness preparation does. It improves communication and understanding, which improves the understanding of the facts of the case.

The public misunderstands witness preparation because they are inclined to think witness preparation is designed to help the witness cover-up or lie. Nothing could be further from the truth. The witness preparation method presented in this paper helps witnesses get out of their own way so they can present a genuine, accurate message.

Attorneys and trial consultants can also have a misunderstanding of witness preparation as reflected by using rote techniques or lists, which are not individualized to the witness.

The witness preparation method presented in this paper can help. We know it works because of the heavy scientific basis for the model. We are happy to share this technique because we are always looking for a way to combine the art of law with the laws of science.

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