

In the Mood? Strategies for Working with Depressed and/or Anxious Witnesses

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Which of the following have you felt at some point in time?

- I'm in a funk.
- I'm so stressed out.
- I'm not sleeping very well.
- Work is overwhelming right now.
- I can't concentrate.
- I'm feeling a bit testy and short-tempered.
- I don't have the energy to make it through the day.

I'd be willing to bet a dollar to every single reader that you identified with at least one of the statements above. If not, you are superhuman and I want to know your secret.

Witnesses experience these emotions too and their moods can affect their ability to testify effectively. Scientific research shows that moods like anxiety and depression actually impair brain function, communication, and the ability to access memory. Couple this with the added pressure of testifying, and the seemingly simple act of processing a question, retrieving the answer from memory and articulating the answer in a coherent, confident manner becomes a daunting task.

Today's world is stressful: the economy is unstable, the job market is poor, and workloads have increased while free time has decreased. A 2008 Pew Research study reported that 28% of adult Internet users looked online for information related to depression, stress, anxiety, or other mental health issues. Based on the upward trend from 2002 to 2008, it's not unreasonable to opine that the percentage is even higher today.

The latest statistics from the Centers for Disease Control and Prevention (CDC) indicate that 15.1% of the U.S. population has been *clinically diagnosed* with depression, and 13% clinically diagnosed with anxiety. This amounts to more than 80 million people who are struggling with one or the other, and millions who are dealing with both.

But let's not forget about the folks who don't talk to their doctors about their symptoms, who don't seek treatment, or who – for reasons we all know too well – are simply dealing with situational issues that cause some of the symptoms to appear on a temporary basis.

So how does depression or anxiety impact my witness?

Some people might say depressive and anxious moods are like in-laws: they come in many shapes and sizes, they stay for different lengths of time, and they impair our day-to-day routine to varying degrees. Like pain or hunger, our threshold for what we are willing to tolerate varies when it comes to feeling blue or stressed, as does our ability to cope and work through the issues.

Brain science and research indicate that strong feelings cause the neural activity in the sympathetic nervous system and parasympathetic nervous system to get out of whack. Hormones keep these two systems in a balance, but when select hormones remain active in the brain for too long, it causes injury (or even death) to brain cells in the area of the brain needed for memory and learning. When these systems are out of whack, our ability to think clearly and rationally is diminished.

Physiologically, anxiety and depression can wreak havoc on our bodies: upset stomach, headache, disturbed sleep patterns, a change in weight, increased blood pressure, decreased energy level, muscle tension... the list goes on. The world also becomes a little duller. There is recent research from Germany to suggest our ability to detect weak smells is diminished and our retina's response rate is reduced.

Cognitively, these moods not only interfere with our ability to absorb new information, but also to retain it. Researchers have known for years that long-term exposure to stress impairs learning and memory functions, but recent research shows that exposure to short-term stress for just a few hours can also have a negative impact.

The kicker? As a witness struggles to comprehend the information, he begins to feel more confused, which in turn increases anxiety levels. And guess what? Increased anxiety interferes with his ability to comprehend, think rationally and actively engage in deductive reasoning. It's a vicious cycle.

What's really fascinating is that positive feelings – such as feeling appreciated, understood, accepted, valued – can actually help the brain functioning get back in sync, which helps our cognitive functioning return to normal. This is a very important factor to consider when working with witnesses.

Consider these scenarios:

Case Study #1: Jane

Not too long ago, I was retained to help prepare a witness for deposition testimony. The witness was a young woman who had been individually named in a wrongful death lawsuit. She was, at the time in question, a pre-school teacher who had a student die while in her classroom. Jane would obviously need to testify about the event in question, her experience in working with pre-school children, her credentials and education. Most importantly, she would have to defend herself against implications that she was negligent in her care and was personally responsible for causing the death of the child. When I first met Jane, she could not look me in the eye or say the child's name without a

quivering, barely audible voice and a river of tears rolling down her cheeks. She was riddled with self-doubt, loathing, feelings of worthlessness and shame. How on earth would she survive a videotaped deposition?

Case Study #2: John

I've also worked with a number of witnesses in the medical profession. Not too long ago, a labor and delivery nurse was facing a tough video deposition in a heart-wrenching matter involving the birth of a mother's first child, during which the child died. These L&D med-mal cases are always tough – no matter which side you're on. Every aspect of this nurse's care was going to be scrutinized during the deposition, including his charting, communications with the doctors, chain of command, policies and procedures, quality of care, his interpretations of the fetal heart rate monitoring, and what interventions he did when. John's anxiety level was so high he almost seemed manic: his speech pattern was too fast, his body was constantly moving, and his ability to slow down, think carefully about the question and state a concise truthful answer was seriously impaired.

How could I effectively prepare these witnesses for their upcoming testimony without exacerbating the very manifestations that were causing the challenge to begin with? How could I help "quite the noise" and empower them to embrace the truth and to testify with confidence?

The key is working with the moods, not against them. You can tell someone a million times to stop fidgeting, but until that person can channel the anxiety elsewhere, the fidgeting is bound to return. And telling someone to "cheer up" or "get over it" is futile. You can't "fix" or "cure" the emotions that another person is experiencing. However, if you acknowledge them and work with them, it is possible to minimize their negative effects.

In my 14+ years of trial consulting, I have found that the following strategies work well for almost every witness, but they are on my short-list of strategies when working with someone who exhibits a depressed mood, high levels of stress or excess manifestations of anxiety.

Tips from the Trenches:

1. Don't Cram.

It is absolutely critical to begin preparing the witness weeks ahead of the scheduled date of testimony – weeks, not days. Does it make scheduling more difficult? Absolutely. But the pay-off is well worth the inconvenience or added expense. By breaking the prep sessions into multiple sessions, you not only enable the witness to tackle difficult subject matter over a period of time, but you provide yourself ample opportunity to identify strengths and weaknesses and to work through the kinks. Last minute surprises are difficult under the best conditions, but last minute surprises could be the death of your case when working with a witness whose mood can hinder cognitive functioning. Schedule multiple sessions over a period of weeks with at least a few days rest between the sessions to allow the witness time for reflection and relaxation.

Even if you conduct multiple prep sessions, keep them short and break up the tasks into manageable pieces. Shorter is better. It minimizes the chance of cognitive or emotional overload for the witness and allows the witness to focus more effectively on the task at hand. Marathon sessions may exacerbate the witness's mood, so limit the first session to less than a few hours, including breaks. Assess whether the witness has the capacity for lengthier sessions and re-adjust accordingly for follow-up sessions.

2. Keep It Small.

If your case is multi-party or involves a number of attorneys, resist the temptation to involve the entire team during witness preparation. Keep the session small and intimate. If at all possible, limit the preparation session to just the presenting/defending attorney, the witness, and the jury consultant (if you're using one). The small group minimizes potential conflict, having "too many cooks in the kitchen" and it has the added benefit of creating a less intimidating, safer environment for the witness.

3. Build Confidence.

Many witnesses struggle with confidence when faced with giving testimony under oath. I find this to be especially true when working with witnesses accused of personal wrongdoing, negligence, or who are in some way "in the hot seat" for personal or professional choices. While everyone occasionally second-guesses their decisions, the jury will likely view the witness who does so as lacking credibility and conviction in his actions. Moreover, the witness who lacks confidence becomes more vulnerable to attack by opposing counsel.

- ***Define the Role of A Witness.*** Unless a witness has testified in the past, most believe their role is to win the case and tell every detail of the story. In my experience, this perception seems to be magnified in those witnesses with acute anxiety. The need for perfection creates an unnecessary burden, and often causes witnesses to overcompensate, over-equivocate or attempt to win every exchange with opposing counsel. It's important to teach witnesses about their limited role, the topics that are home base or out of bounds, and the importance of knowing their boundaries. Without boundaries and a clear role, a witness can easily go rogue – not because he consciously intends to, but because his cognitive processing is burdened.
- ***Tools to Regain Control.*** Witnesses are typically surprised when I tell them they are, in some ways, in the "driver's seat" and not the "hot seat" when testifying. I find that witnesses who are exhibiting a depressed or anxious mood are often less willing to assert themselves or to correct a mischaracterization because they are struggling with self-esteem issues, fear of the unknown or have extra "noise" in their head. They often accept what opposing counsel states as fact and answer questions assuming the attorney knows best. Witnesses are empowered by the realization that they can, to some degree, control the process. They can help control the pace by slowing down their speech; they can help control the tone by answering with a calm, even voice; they can even help control the content by listening carefully to the question and answering only the question and of course, knowing the boundaries. These instructions are basic, but to many witnesses, embracing these strategies not as rules, but as tools for maintaining some semblance of control during a difficult process can do wonders for their confidence.
- ***Self-Affirmation.*** Jane, our first subject, had zero confidence: her depressed mood and fear overshadowed her strengths and caused her to question her decisions. In an effort to shift her thinking from negative to positive, we each wrote down a list of words that

described her strengths and successes. The list had nothing to do with the lawsuit or the allegations, but was personal in nature. We then posted the descriptors on a white board and talked about why they were strengths. I realize this seems like an elementary task, and it's certainly not one I would do with every witness, but because research supports the act of reinforcing the positive to help minimize impaired brain function, it's a task worth considering. Before Jane left for the day, we wrote the list on a sheet of paper and she said she would hang it on her bathroom mirror and read it every day. By the time Jane gave her deposition testimony, her confidence had notably improved... along with her ability to properly assert herself and correct mischaracterizations. Self-affirmation is a powerful thing.

4. Practice Telling the Story.

When working with witnesses who have a difficult time talking about the events in question, use repetition to your advantage. Assuming you meet with the witness over multiple sessions, have the witness tell the story during each session. Just listen. If you have to prompt the witness to tell more or to expand on an issue do so with as few words as possible, but let the witness tell the story with minimal interruption. It does not need to be a perfect story. It does not need to be testimony-worthy. It just needs to be accurately told. Repeatedly practicing the story of events not only acclimates the witness to the process, but it also minimizes the raw nature of the associated emotion. Over time, the act of repetition teaches the witness that she can, in fact, tell the story and tell it well.

When Jane was asked to tell the story in our first session, her emotions hijacked her thought process. She struggled with fact recall and communicating the story she had to tell. Because she could not complete the entire story, we used a modified form of "chaining": a process where a portion of the story is told and built upon over time. Each session, Jane was able to tell more of her story; and each session, we worked on skills and strategies for telling it with conviction, confidence and clarity. By the time we had our last session, Jane could not only tell the story from beginning to end, but she could do so with her head up, eyes forward, a strong voice and no tears.

5. Acknowledge the Feeling.

Empathize with your witness and make an effort to acknowledge their feelings and emotions. Whether you like the feeling or not, you cannot change how a witness feels; you can, however, foster a safer environment for the witness and potentially quell the nerves and tears by merely recognizing the elephant in the room. Rather than labeling the emotion, consider providing supportive statements instead. "I can only imagine how difficult this is for you." "It can be really stressful to testify in front of a jury." "I get nervous when I have a video camera in front of my face too." "Your story is a heartbreaking story; it's okay to feel sad."

If you accept the emotion, you not only build rapport with the witness, but the simple act of acknowledging the feeling actually helps get the brain back in sync, thereby resulting in improved cognitive processing. Sure, this might seem a little touchy-feely, but the potential benefit is worth it.

6. Channel the Anxiety Elsewhere.

Anxiety is a funny creature and manifests itself in a variety of ways. The witness might twist and turn in his chair; she might constantly move her hands; he might shake his foot so violently his entire body moves; she might mindlessly twist the ends of her hair; he might take a sip of water before answering the difficult questions; he might chew the end of his glasses (which, I might add, jurors hate!).

It is unlikely that the anxiety will disappear altogether, but it is possible minimize its impact. Channel the anxiety elsewhere or remove the item that is making the anxiety more noticeable. For example: replace the chair with one that does not swivel; remove the water; ask the witness to wear her hair in a clip or ponytail; consider wearing contacts rather than glasses.

When I'm working with a "mover-and-a-shaker", I often provide the witness with a small item to occupy his hands: a rubber band; a tennis ball; a stress ball; Silly Putty. The challenge is choosing an item that does not make noise, and one that is malleable enough to allow the witness to pull, twist, knead, etc. Attorneys always ask me, "What if the jury sees the witness playing with the stress ball?" "What if opposing counsel asks him about the rubber band on video during the deposition?" My answer: address it early on and have the witness explain that the object helps quell his nerves and helps him focus on the questions. Jurors really won't care, and if opposing counsel makes a stink about it, he could lose favor in the eyes of the jury. As long as the item does not interfere with the witness's ability to answer truthfully, cause issues with noise or distract others, I think it's a reasonable strategy.

Remember John the fast-talking-agitated L&D nurse? We gave him a gel-filled stress ball during our preparation sessions. The transformation was amazing. His speech slowed down. He focused on the questions with more purpose. His answers were shorter. He was visibly calmer. And his confidence increased. Underneath the table, his hands were busy playing with the stress ball; but above the table, he looked calm, attentive and confident.

7. Address the "What-Ifs."

How many times have we heard the following: "What if I get the answer wrong?" "What if I didn't get to tell the whole story?" "What if I can't remember the dates?" "What if I'm so nervous I can't remember anything?"

The best way to address these questions is to provide the witness with a strategy for regaining control and a tool for managing the issue. Don't simply dismiss the question; provide the witness with a workable solution should the what-if scenario play out.

- "If you tell the truth, there are no wrong answers."
- "If you misstate something or get confused, you can correct it later."
- "If you don't get to tell the whole story and it's an important issue, trust me to ask about it later. If it's not that big of a deal, I won't bother with it."
- "If you can't remember the dates, a general range is okay or a description of the time of year (i.e., fall, summer, holidays, etc.)."

Another strategy is to take that “what-if” question and turn it into a positive. Teach the witness to view the situation in a different way. For example, instead of “What if I get the answer wrong,” encourage the witness to say, “What if I just tell the truth?” “What if I don’t get confused?” “What if I just answer the question and trust my attorney to make sure the story gets told?” “What if I can remember more than I think I can?” “What if I feel calmer on the witness stand than I do right now?” It’s a small thing, but positive self-talk can work wonders.

8. Create a Fear List.

One constant in every witness preparation: I ask the witness to create a “fear list.” In the case of witnesses who are more prone to anxiety or mood fluctuations, a fear list can give them yet another outlet for channeling the noise in their heads. A fear list is just what it sounds like: a list, created independently by the witness, containing issues that scare him: questions he hopes nobody asks; questions he feels uncertain answering; questions that give him heartburn. If the witness creates a fear list, he can then share it with counsel who can then help address the fears. It has the added benefit of giving some semblance of control to the witness, establishing trust, fostering communication and addressing strategies for handling the very issues that raise the witness’s anxiety.

9. Sleep. Eat. Play.

If the witness’s most basic needs are not met and satisfied, he will almost certainly feel more anxious and his ability to engage in higher-level thought will be even more impaired.

The two most basic needs, according to Abraham Maslow, are physiological needs and a feeling of safety. We’ve already addressed a number of strategies that can promote a safe environment. The instructions below will help your witness meet basic physiological needs, and consequently, prepare the body and mind for the task ahead.

- Get a solid, restful night’s sleep before testifying. Avoid the temptation to “cram” or to review notes or to stay up late watching a movie on HBO. Sleep, and sleep well.
- Eat breakfast! Yes, Mom was right and research shows that kids who eat breakfast perform better in school. We need food to nourish our bodies to keep our brain sharp and focused. We all know what it’s like to work through hunger. Fuel the body and fuel the brain.
- Play. Do something you really enjoy as your testimony date approaches. Go see a movie. Go to yoga. Catch a baseball game. Sneak out without the kids for “date night.” Run. Golf. Read. Take a bath. Enjoy yourself and relax. It’s good for the soul and the mind.

Testifying is draining under the best circumstances, but when someone is struggling with mood-related issues such as anxiety or depression, it can be even more daunting than usual. By implementing the suggested strategies, you can work with the mood and foster a safe environment for the witness to work through their challenges, develop confidence and learn strategies for becoming a better storyteller.

The truth is all that matters. Help your witness tell it effectively.