Witness Preparation Advice, Techniques and Tactics from a Trial Consultant

Trial Innovations

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Dr. Cannon is co-founder of Trial Innovations and is based in the Los Angeles area. Dr. Cannon has been the lead trial consultant in cases across the country, ranging from insurance defense and corporate litigation, to capital cases and white collar crime. His principal activities involve witness workshops; focus groups and mock trials; online juror surveys; continuing legal education presentations; voir dire and jury selection consultation; and post-trial juror interviews.

Dr. Cannon earned his Masters’ and Doctorate degrees at the University of Alabama, one of the few institutions in the country that offers a concentration in clinical psychology and law. His academic and applied experiences provide a rare blend of expertise in clinical psychology, communication, research methods, and law. He uses his clinical and communications expertise to prepare witnesses for deposition and trial testimony and has worked with witnesses from various ethnic and cultural groups throughout the country. He also provides psychological snapshots of prospective jurors for jury selection; conducts voir dire training; and has developed a special expertise in the effects of diversity in the courtroom and the effects of lawyer characteristics on juror decision-making.
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# Table of Contents

<table>
<thead>
<tr>
<th>Topic</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>2-3</td>
</tr>
<tr>
<td>Juror Psychology and Cognition</td>
<td>3-4</td>
</tr>
<tr>
<td>Exhibits and Demonstratives</td>
<td>5-6</td>
</tr>
<tr>
<td>Plan to their Way of Thinking</td>
<td>7-9</td>
</tr>
<tr>
<td>Witness Preparation Overview</td>
<td></td>
</tr>
<tr>
<td>- Juror Misconceptions</td>
<td>9-11</td>
</tr>
<tr>
<td>- Witness Preparation Tactics and Strategies</td>
<td>11-13</td>
</tr>
<tr>
<td>- Powerful and Powerless Speech</td>
<td>13-16</td>
</tr>
<tr>
<td>- Direct Examination</td>
<td>17-18</td>
</tr>
<tr>
<td>- Cross Examination</td>
<td>18-21</td>
</tr>
<tr>
<td>- Witness Assessment</td>
<td>22</td>
</tr>
<tr>
<td>Contact</td>
<td>23</td>
</tr>
</tbody>
</table>
Drawing from Experiences

• Education
• Research
• Experience
  • Mock Trials
  • Focus Groups
  • Post Verdict Interviews
  • Witness Evaluations
  • Shadow Juries
I. Keeping your audience in mind
II. Juror psychology & cognition
III. Preparation tactics
Understanding the Audience

• **Who** they are…
• **What** they think…
• **Why** they think what they think…
• **What** they experience on the other side of the rail…
Understanding the Audience

Only Then Can We Learn

• How to communicate
• How to educate
• How to persuade
Stages of Memory

1. Perception
2. Encoding
3. Retrieval
Novelty heightens alertness, especially in unfamiliar situations
Long-term memory is facilitated by rehearsal and repetition of information.
Exhibits and Demonstrative Evidence
Retention of Learning

- Read: 10%
- Hear: 16%
- See: 41%
- Hear & See: 61%
- Say: 81%
- Say & Do: 100%
## Recall

<table>
<thead>
<tr>
<th></th>
<th>3 Hours</th>
<th>3 Days</th>
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<tbody>
<tr>
<td>Heard</td>
<td>65%</td>
<td>15%</td>
</tr>
<tr>
<td>Seen</td>
<td>70%</td>
<td>40%</td>
</tr>
<tr>
<td>Both</td>
<td>85%</td>
<td>65%</td>
</tr>
</tbody>
</table>
Retention After Three Days
Based on How Information is Received

- **Verbal Only**: 20%
- **Verbal & Visual**: 70%
adipisicing elit, sed do eiusmod tempor incididunt ut

Make sure the important testimony aliqua. Ut enim ad minim veniam, quis nostrud exercitation labori Stands Out! commodo consequat. Duis aute irure dolor in reprehenderit in voluptate velit

nulla

Clear = Instantaneous Message cillum dolore

Simple = Build to a Point, Don’t Bury It eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum. Lorem ipsum
Make sure the important testimony stands out!

Clear = Instantaneous Message
Simple = Build to a Point, Don’t Bury It
Plan your case to play TO THEIR WAY of thinking
Most Cases Are Presented Inductively

1. Insurance Company “X” has paid many claims
Most Cases Are Presented Inductively

1. Insurance Company “X” has paid many claims

2. Certain claims are excluded from coverage
Most Cases Are Presented *Inductively*

1. Insurance Company “X” has paid many claims

2. Certain claims are excluded from coverage

3. Therefore the denied claim *must* have been excluded from coverage
Most Jurors Make Decisions *Deductively*

1. The denied claim was excluded from coverage
Most Jurors Make Decisions *Deductively*

1. The denied claim was excluded from coverage
2. Several people I know said they were denied coverage unfairly
Most Jurors Make Decisions *Deductively*

1. The denied claim was excluded from coverage
2. Several people I know said they were denied coverage unfairly
3. Insurance Company “X” *must* have denied coverage unfairly
Witness Preparation
Are Your Witnesses:

- Trustworthy?
- Competent?
- Likeable?
Juror Misconception #1

“I’m a good judge of a witness’ credibility”

- Research shows that people are not very good at detecting deceit with strangers
- They often misinterpret anxiety for deception
Juror Misconception #2

“Drama at the time of an event heightens recall. It leaves an indelible imprint on the mind.”
Juror Misconception #2

“Drama at the time of an event heightens recall. It leaves an indelible imprint on the mind.”

Complexity or anxiety producing events result in overestimates of:

- Distance
- Speed
- Time
Juror Misconception #3
“Confidence equals accuracy”
Witness Preparation

Begin Before Deposition!

- Setting — conference room vs. courtroom
- Spaced vs. massed practice
- Build rapport and credibility
Witness Preparation

Educate and Demystify

• His/her role in conveying the story
• The theories of the case
• The themes of the case
Witness Preparation

Testimony

• Discuss the outline of direct
• Discuss the likely outline of cross
• Explain re-direct
Witness Preparation

Evidence and Demonstratives

- Review documents
- Consider demonstrative exhibits
Witness Preparation

The Courtroom

- Suggest courtroom visit
- Discuss when to turn to the jury
- Give permission for “I don’t know”
Reinforce that the witness **SHOULD NOT** try to outwit, out-smart, out-shine or out-do opposing counsel.
Witness Preparation

1. Practice!
2. Practice!
3. Practice!
4. Adjourn
Witness Preparation

5. Reconvene

6. Review

7. Practice!

8. Practice Again!
Witness Preparation

Powerful vs. Powerless Speech

Jurors are sensitive to linguistic subtleties perceiving hypercorrect speakers as significantly less:

- Convincing
- Competent
- Qualified
- Intelligent
Witness Preparation

Powerful vs. Powerless Speech

Hypercorrect Speech:
• “Allegedly”
• “Residing” (versus “living at”)
• “Exited” (versus “left”)
Witness Preparation

Powerful vs. Powerless Speech

Over Use of Intensifiers:

• “Very!”
• “Incredibly!”
• “Definitely!”
Witness Preparation

Powerful vs. Powerless Speech

Hedges:
• “As I recall”
• “I think”
• “I believe”
• “Kind of”
Witness Preparation

Powerful vs. Powerless Speech

Over-Politeness:

• “Sir”
• “Ma’am”
Witness Preparation

Powerful vs. Powerless Speech

Hesitation/Overuse of Qualifiers:

- “Well”
- “Um”
- “You know”
Witness Preparation

Powerful vs. Powerless Speech

Describe the Jury Panel to Your Witness:

- Help the witness understand the audience
- Personify members of the jury
Witness Preparation

Powerful vs. Powerless Speech

Deposition:

• Explain: It’s like a fishing expedition
• Don’t be too helpful
• As concise and succinct as the question
• Stay within the scope (phone example)
Witness Preparation

Deposition: Remember to …
Direct Examination
Direct Examination

Remember: Get To the Point

• “Introduce yourself to the jury”
• “Did you witness the collision between the Chevy and the Ford on June 6, 1990, which Is at issue in this case?”
• “Tell us about yourself…”
Direct Examination

Highlighting Testimony on Direct:

During witness examination — find an excuse to write out significant points as they are raised
Direct Examination

Repetition — “Say it again, Sam”

Q  “So what did he do?”

A  “He did xyz”

Q  “So after he did xyz, what did he do?”
Direct Examination

Use “Headlines”

- Use “headlines” to help the jury understand where you are and where your witness is going with his/her testimony
Cross Examination
Witnesses are **HORRIFIED**: Jurors **LISTEN** to Cross Examination
Cross Examination

Educate and Demystify:
Opposing counsel is trying to “testify”
Cross Examination

Education:

• Visualization and feedback
  • What are your biggest fears?
• Lawyerly tricks
  • So… FACT
• Empower = Redirect
Cross Examination

Battle lines:

• Don’t argue every point
  • Compliant and forthcoming
  • Trick to make you argue every point
• Identify and argue only points that matter
Cross Examination

Education:

- “Home Base”
- Pace
- Broken Record
- Don’t answer what you don’t understand
  - Repeat/Rephrase
Cross Examination

It's Not As Bad As It Seems:
It's the inconsistencies in real-time that count
Cross Examination

Jurors like the drama of a good cross, but DON’T GET CAUGHT UP in the drama
Cross Examination

Witness Behavior

- Look for troublesome behaviors
- Provide constructive feedback while considering the personality/coping style of the witness
Cross Examination

Demeanor

• Level of aggressiveness
• Tone of voice
• Sarcasm
Witness Workshops:
Wheel of Communication Effectiveness

- Competence
- Sincerity
- Dynamism
- Credibility
- Training
- Clarity
- Likeability
- Attractiveness
- Similarity/Identification
- Power
- Respect
- Appropriate Vocabulary
- Internal Summaries, Transitions
- Use of Persuasion Icons
- Consistent Paralinguistic & Nonverbal Cues
- Responsiveness
- Behavior Modification
- Cognitive Restructuring
- Self-Observation/Self-Evaluation
- Relaxation Training
- Role Playing
- Cued Responses
**Witness: Mr. Smith**

<table>
<thead>
<tr>
<th>Category</th>
<th>Score</th>
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<tbody>
<tr>
<td>Very unqualified</td>
<td>3.17</td>
</tr>
<tr>
<td>Very Nervous</td>
<td>2.57</td>
</tr>
<tr>
<td>Very difficult to understand</td>
<td>3.14</td>
</tr>
<tr>
<td>Very unlikable</td>
<td>2.64</td>
</tr>
<tr>
<td>Very evasive</td>
<td>2.32</td>
</tr>
<tr>
<td>Not at all credible</td>
<td>2.62</td>
</tr>
<tr>
<td>Very dishonest</td>
<td>2.74</td>
</tr>
<tr>
<td>Not at all persuasive</td>
<td>2.40</td>
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</tbody>
</table>

- Very qualified: 1
- Very relaxed: 2
- Very easy to understand: 3
- Very likeable: 4
- Very open: 5
- Very credible: 6
- Very honest: 7
- Very persuasive: 8
**Witness: Mr. Smith Clip Two**

1. **Very unqualified**
   - Score: 3.23

2. **Very Nervous**
   - Score: 2.64

3. **Very difficult to understand**
   - Score: 3.50

4. **Very unlikable**
   - Score: 2.64

5. **Very evasive**
   - Score: 2.21

6. **Not at all credible**
   - Score: 2.69

7. **Very dishonest**
   - Score: 2.57

8. **Not at all persuasive**
   - Score: 2.67

9. **Very qualified**
   - Score: 3.50

10. **Very relaxed**
     - Score: 2.64

11. **Very easy to understand**
     - Score: 3.50

12. **Very likeable**
     - Score: 2.64

13. **Very open**
     - Score: 2.21

14. **Very credible**
     - Score: 2.69

15. **Very honest**
     - Score: 2.57

16. **Very persuasive**
     - Score: 2.67
A **DRY RUN** of direct never hurts!
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