The Effective Deponent

Preventing Amygdala Hijack During Witness Testimony

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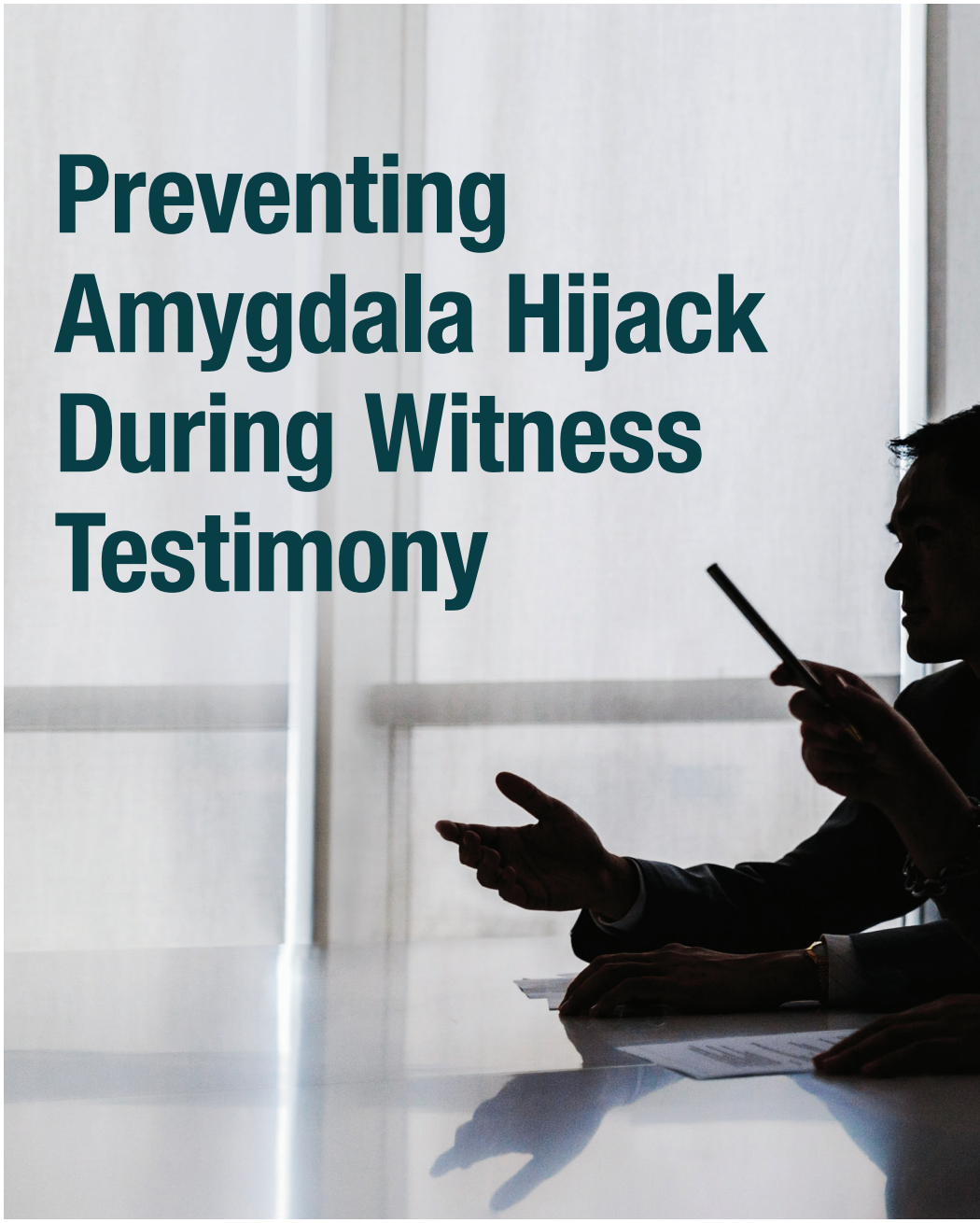

Skilled cross-examiners often use various tactics to induce an amygdala hijack in witnesses, but witnesses can learn skills to overcome a hijack.

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It is exceptionally rare that a defense witness "wins" the case through his or her deposition testimony. Indeed, it is far more likely that the testimony of the defense witness will "lose" the case during the deposition. Without extensive preparation, the confrontation between a defense witness and a skilled trial attorney is not a fair fight, regardless of the witness' intelligence or the facts of the case. A defense witness who allows plaintiff's counsel to trigger an emotional desire to explain, justify, or argue the facts represents a clear and present danger to the defense. A savvy plaintiff attorney begins to salivate when a defense fact witness launches into an argument or attempts to explain away unfavorable issues in the case. This results in a mismatch in relative skills: the defense witness is completely out of his or her element, fighting on foreign soil, and attempting to out-argue a professional trial lawyer. The consequences of such an approach are often devastating to the defense's case, because poor deposition testimony inevitably transfers to the courtroom testimony.

"Amygdala hijack" is a term coined by Daniel Goleman in his 1996 book *Emotional Intelligence: Why It Can Matter More Than IQ*. When a witness experiences an amygdala hijack during deposition, the

amygdala (the area of the brain in which the fight or flight reaction is housed) overtakes the prefrontal cortex (the area of the brain responsible for logic and judgment), rendering the witness unable to rely on strategic responses learned in witness preparation sessions. When this occurs, the hypothalamus releases stress hormones into the bloodstream that can take hours to clear, and working memory is essentially halted (Freedman, 2009). During the hijack, the witness *abandons* the deposition game plan generated during witness preparation sessions and instead answers questions with the goal of defending and protecting him- or herself (*i.e.*, attempting to "win" the case). These responses can come across as evasive, defensive, and argumentative, and often they will open a new "can of worms" that exposes the witness, and subsequent witnesses, to further attack.

So how does a witness learn to avoid amygdala hijack and maintain prefrontal cortex processing during testimony? Answer: active cognitive reappraisal skills. Cognitive reappraisal is an emotional regulation strategy that involves actively reinterpreting a negative stimulus as a neutral stimulus.

The defense witness who plans to "win" the deposition by attempting to go toe-to-toe with plaintiff's counsel enters the deposition primed for amygdala hijack. Efforts by some to adapt political "pivoting" strategies to deposition witness preparation actually risk a catastrophic deposition performance. This destructive strategy may result in a witness with severely damaged credibility, a defense attorney who is now strategically handcuffed to harmful testimony, and a corporate client that is economically handcuffed as mediation or trial approaches.

This article is the first of its kind. It analyzes the damaging effect of a witness's emotional decision to try to "win" the deposition from three key perspectives: the neuropsychological perspective, the defense attorney perspective, and the corporate client perspective. Specifically, this article will do the following:

- Provide a neuroscientific rationale for training witnesses *not* to attempt to "win" the deposition;
- Explain how argumentative witnesses create vulnerabilities that inhibit defense counsel from effectively defending the case;
- Describe the economic vulnerability of clients during discovery and trials when defense witnesses take matters into their own hands; and
- Identify a neuroscientifically supported approach to witness training that will allow the witness to be simultaneously effective and protective during testimony, without being perceived as defensive or evasive.

The Neuropsychological Perspective

The next sections draw from the expertise of Drs. Kanasky, Loberg, and Parker.

Neurocircuitry: The Prefrontal Cortex–Amygdala Connection

To understand amygdala hijack in witness testimony, one must have a fundamental understanding of the brain's neurocircuitry. There are major neural connections between the amygdala and the prefrontal cortex that play important roles in emotional regulation. The basic function of the amygdala is to recognize a potential threat and communicate the potential threat to the prefrontal cortex. The prefrontal cortex evaluates the potential threat and then signals the amygdala if a fight or flight response is necessary. In other words, these two important brain structures systematically work together to determine whether a potential threat is really a true threat, and to respond appropriately. However, when the amygdala "hijacks" the system, the prefrontal cortex is incapable of regaining control, and the imbalanced system that then exists perceives all potential threats perceived as "true." This imbalance also leads to strong emotional responses to negative stimuli.

During testimony, skilled cross-examiners often use psychological "threats" to induce an amygdala hijack in a witness. Specifically, three emotional threats during cross-examinations can quickly trigger an amygdala hijack: aggression, humiliation, and confusion. All three can represent direct threats to a witness, causing the witness to depart from logical cognition and regress into survival cognition, which will result in defensive responses. On the other hand, activation of the prefrontal cortex allows a witness to shoot down attacks calmly and persistently, as well as to repeat effective answers that will become the cornerstones of a subsequent examination by defense counsel calmly (Kanasky 2014). Therefore, it is essential that witnesses receive advanced cognitive training to desensitize them to these emotional attacks and to train them to maintain prefrontal cortex processing throughout their testimony. This is especially true at trial, as thousands of post-trial interviews conducted by litigation psychologists since the early 1980s reveal that jurors make the bulk of their decisions about liability during fact witness testimony, rather than the long-held myth that jurors make these decisions during opening statements (Speckart *et al.* 2017).

Another classic threat tactic exhibited by skilled cross-examiners is to display negative facial expressions toward the witness in response to an effective answer. Functional magnetic resonance imaging (fMRI) studies indicate that negative facial expressions, more than neutral or other expressions, quickly activate the amygdala (Breiter *et al.* 1996; Morris *et al.* 1996; Whalen *et al.* 2001). A 2014 study by Mattavelli and colleagues showed that a facial expression of anger produced significantly higher amygdala activation than neutral and mildly happy faces, which is consistent with the hypothesis that the amygdala is involved in processing threat-related facial expressions. Again, witnesses who lack

the proper cognitive and emotional skills can very quickly perceive negative facial expressions from opposing counsel as a threat, and their brains can be baited into amygdala activation.

Witness Preparation Strategy

So how does a witness learn to avoid amygdala hijack and maintain prefrontal cortex processing during testimony? Answer: active cognitive reappraisal skills. Cognitive reappraisal is an emotional regulation strategy that involves actively reinterpreting a negative stimulus as a neutral stimulus. In testimony, it would entail the witness identifying an emotional threat from opposing counsel and calmly recharacterizing the threat as a clever attempt to bait the witness into argumentation. It is important to note that active cognitive reappraisal is a careful, deliberate tactic to prevent the brain from an impulsive, spontaneous survival reaction to a negative stimulus.

Cognitive Reappraisal Example

Amygdala hijack after a negative stimulus can induce either a fight or a flight response in a witness, as in the following examples.

> Negative Stimulus by Attorney: Opposing counsel expresses frustration and anger during cross-examination; his or her tone and facial expression becomes threatening.
>
> Initial Fight Appraisal by Witness: How dare he or she treat me like this. I need to set that attorney straight by giving him or her a piece of my mind.
>
> Initial Flight Appraisal by Witness: Oh no, he or she is upset with me. I must have said something wrong. I need to provide a detailed explanation that will calm this situation."

A cognitive reappraisal permits the witness to react this way.

> Cognitive Reappraisal by Witness: I saw this coming a mile away; this is a desperate attempt to bait me into an argument. I will stick to my original position and not budge.

Recent research clearly shows that active cognitive reappraisal skills are the key to maintaining prefrontal cortex activation when a negative stimulus is present. For example, Banks and colleagues (2007) describe previous brain-imaging studies that demonstrate how cognitive reappraisals of negative emotional stimuli engage multiple areas of the prefrontal cortex (Hariri *et al.* 2000, 2003; Taylor *et al.* 2003), while *reducing* amygdala activation (Etkin *et al.* 2006; Hariri *et al.* 2000; Pessoa *et al.* 2002; Taylor *et al.* 2003). Banks and colleagues' 2007 experimental neuroimaging findings are fascinating. They show that a passive cognitive approach to emotional regulation is *ineffective* in (1) activating the prefrontal cortex, and (2) deactivating the amygdala. Specifically, the authors illustrate that active cognitive reappraisal skills significantly increase prefrontal cortex activation and decrease amygdala activation compared to passive cognitive strategies. This finding is particularly relevant to witness preparation methods, which often include passive instructions to the witness to "*stay calm; keep your cool; don't get angry.*" Such a passive, yet very common, approach to emotional regulation by attorneys during witness preparation has been largely shown to be ineffective. The research on neurocircuitry and emotional regulation described above illustrates why instructions grounded in passive cognitive strategies to a witness regarding emotional control during testimony are useless from a neuropsychological perspective, and why a more sophisticated approach is necessary to improve witness performance.

In sum, these findings strongly suggest that a witness training program heavily grounded in active cognitive reappraisal techniques would simultaneously increase the odds of logical, prefrontal cortex activation and decrease emotional, amygdala-driven responses that may harm the case. Moreover, Banks and colleagues' (2007) findings suggest that simply instructing a witness to "*remain calm*" (*i.e.*, passive maintenance strategy) during intense cross-examination will ultimately fail. Such a passive cognitive approach to a strong negative stimulus will weaken prefrontal cortex activation and instead lead to amygdala activation and hijack.

Avoiding the Political Pivot Error

Interestingly, some recent witness training methods that are grounded in political debate theory actually *invite* defense witnesses to duel with opposing counsel. Specifically, a witness is instructed to use a preemptive strike of sorts by anticipating where the questioner will go and proactively inserting a defense-oriented explanation before the questioner can complete his or her line of questioning. The goal of this technique is to disrupt opposing counsel's series of leading questions to prevent being "trapped" by the questioner later down the line. These deliberately evasive maneuvers were born in the political arena and are referred to as "pivoting," or "beating them to the punch." This occurs when a political candidate deflects an attack by another candidate and quickly counterattacks, rather than answering the actual question on the table. As with most political debates, these aggressive tactics quickly turn emotional as each side pivots back and forth on each question. However, this technique is inherently flawed, because one or both of the candidates eventually fall victim to amygdala hijack and abandons their strategic plan. When this occurs, the debate often shifts from strategic attacks on policy to personal attacks on character (*i.e.*, "mudslinging"). In the end, one if not both candidates damage their credibility with voters.

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Pivoting techniques are acceptable in political debate because voters fully expect it from sly politicians. However, sworn testimony is very different from political debate, and juror decision making is very different from voter decision making. Jurors expect honesty and truthfulness from defense witnesses, not active avoidance

of challenging questions. Mock jury data clearly illustrates that a witness who consistently pivots or preemptively tries to beat the questioner to the punch is often described as "dodging" and "sidestepping" questions. Jurors certainly don't expect a corporate representative or key fact witness to communicate like a slippery politician. Persistent attempts to circumvent opposing counsel's questions and counterattack dramatically increase the odds of amygdala hijack, leading to emotional responses that will be perceived as defensive, argumentative, or evasive by jurors.

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There are three additional problems with the political pivoting approach. First, a savvy cross-examiner would never allow a witness to use this tactic throughout the entirety of the testimony. Skilled attorneys can and should cut off a witness's self-serving narrative and force him or her to answer the question directly. Wise attorneys will re-pivot and tell the pivoting witness, "that's nice, but that is actually not my question… so please listen carefully," which causes the witness look evasive, particularly if the witness continues to pivot repeatedly and give nonresponsive answers. Many attorneys move to strike these answers as nonresponsive, which greatly frustrates both witnesses and defense attorneys. Bottom line, this technique is a deliberate, evasive maneuver and can easily be exposed at deposition or trial. Second, forcing explanations during cross-examination allows the questioner to author additional questions and further attack the witness. This is precisely how a three-hour deposition transforms into a five-hour deposition. Each explanation generates additional questions. Third, repeatedly forcing elaborate explanations during deposition testimony essentially hands the defense trial strategy to the plaintiff's legal team on a silver platter. This allows the adversary ample time to develop counterattacks for trial.

For example, the testimony below illustrates a witness's use of pivoting in a trucking case to try to avoid the actual question and then provide a defense-oriented explanation.

Attorney Question: As president of XYZ Trucking Company, you could simply implement a policy that all trucks have sensors to test for alcohol on the breath of drivers, couldn't you?

Ineffective Pivoting Answer from Witness: Yeah, but our competitors are not placing sensors on all of their trucks.

Attorney Question: I did not ask about your competitors. Again, you are president of XYZ Trucking Company, so you have the authority to implement the simple policy that all trucks driven by your drivers have sensors to test for alcohol on the drivers' breath, isn't that true?

Ineffective Pivoting Answer from Witness: Yes, but again it is rare that we have a driver who is driving under the influence and some of our drivers have their own trucks so it would be difficult to place sensors on every truck. It would not make sense to take the time and money to place sensors on every truck and it would impact our cost and service to our customer.

Attorney Question: Oh, so you are telling this jury that time and money are more important than safety? Thank you for that information, sir.

As you can see, this witness has just opened him- or herself up to another series of questions regarding the company's prioritizing time and money over safety. To a jury, this witness at first appeared to be evasive because the witness tried to point to competitors with an "everyone else is doing the same thing we are" excuse. Then, when pushed to answer the actual question, the witness became angered and defensive (amygdala hijack). Instead, the witness could have responded truthfully and effectively without engaging in argument:

Attorney Question: As president of XYZ Trucking Company, you could simply implement a policy that all trucks have sensors to test for alcohol on the breath of drivers, couldn't you?

Effective Answer from Witness: I completely disagree with that statement.

This response is truthful, accurate, and effective, and it will surely lead the questioner to abandon the attack and ask, "*why* do you disagree?" Now, the witness can maintain prefrontal cortex activation and deliver an effective explanation that will be confident and nonargumentative.

Additional examples follow.

Medical Malpractice Example

Attorney Question: Doctor, isn't it true that the patient's blood pressure at 1:15 p.m. is documented to be 195/110?

Ineffective Pivoting Answer from Witness: Yes, but he had been in physical therapy right before this reading, so it didn't concern me; our physical therapists take really good care of our patients, and Mr. Brown didn't report any discomfort at the time. We did everything that we could for this patient.

Effective Answer from Witness: That is what the record indicates, yes.

The blood pressure reading is factual information, but it is perceived as a threat by the witness. The pivot answer is not only defensive, but it opens the door to several potentially harmful follow-up questions that will put the physical therapists at risk, and it allows the questioner to take full advantage of the testimony that "everything" was being done for this patient. Calmly and confidently conceding the fact is the far more effective and responsive answer than the pivoting answer.

Product Liability Example

Attorney Question: By placing safety device technology on all of the table saws that your company makes, you could prevent the type of injury that happened to my client and that happens to thousands of people in America every year?

Ineffective Pivoting Answer from Witness: No, because you can still be injured, even with the safety device, if you come into contact too quickly with the blade. Plus, con-

sumers would just compare the price of our table saws with the safety device to the ones that our competitors make without one, and some would still decide to buy saws without because they would be cheaper.

Effective Answer from Witness: That is not entirely true and certainly not how our industry works.

Again, the pivoting answer above is defensive and brings up two sensitive issues: consumer culpability for injuries and the cost of products. While the answer may be accurate, it is nonresponsive to the actual question and results in the witness trying to "win" the interaction. By calmly shooting down the questioner's statement, the witness maintains prefrontal cortex activation and can wait for the "why not" question. At this point, the witness can give a confident, strategic answer that will not leave him or her vulnerable later in the testimony.

Neurological Perspective Summary

Whether it is in a deposition video or on the stand at trial, juror decision-making research over the last 30 years clearly demonstrates that most jurors greatly dislike and distrust witnesses who argue, defend, or dodge questions during examinations. When amygdala hijack occurs during testimony, witnesses experience an intense, internal urge to explain away answers to simple, direct questions. They feel that if they don't, they are letting down the team and hurting the case. The classic, "*yes, that is true, but here is why*" type of answer from a witness is particularly damaging, because the unsolicited explanation fuels opposing counsel's attack and damages the witness's credibility.

Any yes or no answer followed by a comma and *but, because, or however* represents the initiation of amygdala hijack. This plays directly into a cross-examiner's hands, because the answering witness will inevitably open a door that defense counsel and the client never wanted opened. Moreover, this will result in a long-lasting neurochemical response from the hypothalamus that will keep the witness in fight or flight mode, which will prevent the brain from returning to logical mode. In the end, a witness who persistently fights, runs away, ducks, and dodges is a strategic vulnerability during deposition and is perceived as a weak witness at the jury level.

The Attorney Perspective—Part 1: Product Liability and Commercial Litigation

The next sections turn to the attorney perspective, drawing from Andrew Chamberlin's product liability and commercial litigation expertise.

The confrontation between an experienced trial attorney and an inexperienced fact witness is a mismatch that always favors the attorney. When the witness allows his or her emotions to be triggered, the mismatch becomes even more severe. Almost without exception, the witness who enters the deposition determined to "win" the case fairs even worse. The attorney enters the encounter with three principal advantages.

Initially, of course, the attorney generally has a superior understanding of the dispute at issue. While the witness may have unique knowledge of certain facts, the attorney is in a better position to understand the "big picture" of the case, the relevant law, and the total body of evidence collected from other sources. In addition, the attorney has exclusive knowledge of his or her carefully crafted strategy to advance the case to its best advantage. This disparity in knowledge is one factor that contributes to the vulnerability of the inexperienced witness. In many instances, without adequate preparation, a witness may not recognize the significance of a given question or line of questions, or how the answers to these questions may or may not contribute to the development of the case. This is particularly true when a witness becomes defensive and attempts to out-argue the opposing attorney. It is impossible for the inexperienced witness to anticipate the risks of such an engagement.

Second, many witnesses naively feel secure in the idea that if they tell the truth, the process will support their desired outcome. However, the examining attorney inevitably understands that the nature of the dispute is a battle between relative truths: the truth as perceived and relayed by one side compared with the truth as perceived and relayed by the opposing side. Accordingly, regardless of whether the witness realizes it, his or her testimony is one battlefield on which the war over the relative truth is fought. All other factors being equal, the side that prevails will be the one that best presents their relative truth or best attacks the relative truth of their opponent. In a very real sense, the performance of the witness in this stressful environment can be as important as the truth of the words that the witness speaks.

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Finally, and most importantly, the experienced attorney has the opportunity to use skills and techniques that have proved effective over time against a stressed, emotional, and inexperienced opponent. These techniques are too numerous to catalog, but generally they can be grouped into categories based on their goals:

- To speed up the witness;
- To trigger an emotional response from the witness;
- To unleash the witness's native insecurities;
- To cause the witness to feel bound to "assist" or "fill in";
- To persuade the fact witness to substitute his or her reason for his or her knowledge
- To persuade the fact witness to accept the examiner's "facts";
- To elicit a "reptile" approach response, by employing some combination of these tools.

Without adequate preparation, the battle over the relative truth between a defensive, inexperienced witness and an experienced trial attorney can be lost in a single witness deposition. Obviously, the preparation process involves thoroughly reviewing the true facts known to the witness and providing an overview of the dispute at issue as known by the attorney. More challenging is the effort to prepare the witness to identify

and counter the tactics that the examining attorney may deploy to shape and manipulate the witness's testimony.

For example, teaching the witness to recognize a "reptile" examination, or any of the other techniques above, is hard work because the witness's brain is not wired to identify and defeat such attacks. Each lawyer has his or her own approach, but any meaningful preparation effort requires putting the witness through a realistic mock examination that uses these tactics. The mock examination serves multiple purposes:

- It prepares the witness for the overall process.
- It provides a mechanism to assess the cognitive and emotional skills of the witness and his or her ability to learn.
- It familiarizes the witness with techniques that might be used to trigger his or her emotions/insecurities and thereby alter his or her testimony.
- It demonstrates the witness's vulnerability to these techniques absent preparation.
- It provides an ideal opportunity for the witness to learn how to fend off such attacks.

Teaching the witness to resist these efforts (and similar efforts) to warp his or her testimony requires practice. Obviously, the witness has to tell the truth. However, the witness does not have to agree to false premises that sound logical but are not factual, accept generalized sets of rules that do not exist, or anticipate enhanced risks to the public that did not occur in the case at issue. Nor does the witness need to attempt to carry a case on his or her shoulders and attempt to "score points" during his or her testimony with opposing counsel.

The frustrated and inexperienced witness typically speeds up, fails to recognize the significance of the line of questioning, fails to separate fact from supposition, and blunders into one or more major concessions.

Preparing the witness to handle such techniques involves teaching the witness to slow down the pace, listen fully to the question, and to identify the type of question or technique used by opposing counsel. For example, factual questions should be answered with short, factual answers, while general conduct questions that ask the witness to agree to a "reasonable" conclusion require a qualified answer. Many witnesses struggle with agreeing to unfavorable facts in the case, feeling that their agreement ultimately hurts the case. The common error in this situation is instead to volunteer a narrative to make the unfavorable fact appear more palatable. Such a response is not only unresponsive to the question, but it appears defensive and can certainly lead to damaging follow-up examination.

It is important that the witness be trained to stay calm, patient, and disciplined. If a witness remains disciplined, he or she may force opposing counsel to abandon his or her efforts to control the witness and resort to more open-ended questions beginning with the word "why." A well-prepared witness may use such a "why" question as an opportunity to provide an answer that articulates a well-considered, well-tested summary of the defense position or an element of the defendant's case. Such answers can serve as "anchors" for the defense case, and if delivered in response to an open-ended question, they will not be perceived as defensive or argumentative. If properly delivered, such answers can shut down an entire line of questioning. However, if such explanations are prematurely and emotionally "forced" into the testimony after leading questions (*i.e.*, "pivoting"), the witness can inadvertently derail the defense's case very quickly.

Of course, when a witness loses control of his or her emotions, loses patience, and abandons the tools that he or she has been equipped with, or attempts to "win" the deposition, the witness never comes out on top. In those instances, the examining attorney quickly will identify the "buttons" that work on that particular witness and will continue to press those buttons until they achieve a favorable result. The frustrated and inexperienced witness typically speeds up, fails to recognize the significance of the line of questioning, fails to separate fact from supposition, and blunders into one or more major concessions. The combative witness almost always loses situational awareness, fails to appreciate the defensive nature of his or her argument, and provides additional openings for opposing counsel to exploit. Accordingly, witness preparation efforts need to go far beyond merely reviewing the case facts and documents to include more advanced training to address mental and emotional skills that will allow the witness to adhere to the game plan throughout the testimony.

The Attorney Perspective—Part 2: Medical Malpractice Litigation

The next sections turn to the attorney perspective, drawing from J. Thaddeus Eckenrode's medical malpractice litigation expertise.

In medical malpractice cases, the witness preparation methodology of teaching defense witnesses to "pivot" as a deposition tactic is, at best, ineffective, and in many cases, it is more likely to cause the witness to dig him- or herself a much deeper hole from which extrication at trial is an overwhelming challenge. Despite the general intelligence and years of education that most physicians have, they are not in their element at a deposition, and they incorrectly assume that the process is one that they can control. Many physician defendants still surprisingly seem to believe that all they have to do is explain themselves and their care in a deposition, and then a reasonable plaintiff's attorney will realize that he or she has made a mistake and quickly dismiss the case. They should be rapidly disabused of that idea, since most plaintiff attorneys have already retained strong enough experts to support their case, no matter what the physician's deposition answers may be. To that end, medical malpractice depositions are more frequently used to box in the deponent to a set of facts or an explanation that falls in line with the plaintiff's trial theme. As such, giving too much information in

response to the questions posed will only help the plaintiff's attorney to tailor his or her trial examination of the physician more carefully, as well as allow the examining attorney to be well-prepared for those very explanations, excuses, and retrospective rationale for the defendant's conduct.

A better deposition approach is the tried-and-true "shortest answer possible." In the setting of the "yes or no" question, even when that simple one-word answer seems harmful, it is rarely fatal if a careful explanation might be more illuminating. However, to control the explanation without plaintiff's attorney poking holes in it from the inception, it should usually come during the defense case at trial, in a well-organized direct examination. A witness who is asked in a deposition "*isn't it true that leaking gastric fluid can cause sepsis and even lead to death*?" will be anxious to say "*yes, but we recognized the infection here and started aggressively treating it with antibiotics*," or to give some other defensive response. The physician simply can't understand how just saying "*yes*" won't be harmful. However, if the honest answer is affirmative, the smarter witness will just say "*yes, it can*" and say nothing more. At trial, through a well-prepared and controlled direct examination, that same physician can explain that there are many circumstances during which leaking gastric fluid does not cause devastating results, and he or she was well aware of the possible implications of the event and was prepared for it, recognized it here in a timely fashion, and addressed it appropriately.

In one recent case, a defendant who had been trained to "pivot" took that education to illogical extremes, literally unable to answer the simplest of questions with a "yes," "no," or a short, one- to three-word answer. In response to a question about whether a bowel perforation was a risk of a certain operative procedure that he had performed, the witness responded with a narrative explanation that went on for two pages of the deposition about how he had explained such risks to the patient. Not to be deterred or otherwise distracted, the plaintiff's attorney again quite properly asked if a perforation was a risk of the procedure. Once again, instead of simply saying "*it can be*," or even "*yes*," the physician tried to pivot away from the question by explaining that every procedure carries risks and further explained this particular patient's need for this procedure. As an intelligent plaintiff's attorney will do, the examining attorney once again asked the same question of the physician, and finally elicited an affirmative response. The witness gained nothing from this exercise, but the plaintiff's attorney gained almost 10 minutes of videotape of the physician trying not to answer a simple question, which was played to the jury at trial. Instead of looking credible and honest, the physician looked evasive and of questionable integrity. Had he simply answered the question with a "*yes*," the explanation at trial could have been offered by the defense to tell the story of the risks that the procedure carries, why it was the proper treatment alternative, using a logical risk-benefit analysis, and how it was carefully explained to the patient in the informed consent discussion.

Defense counsel must educate their witnesses, individually and with the assistance of qualified witness preparation specialists, to understand that the case will not be won in the deposition, but it can certainly be lost there. The time for explanations and details is during the defense presentation at trial. There is nothing to be gained by giving a plaintiff's attorney a detailed preview of the defense case. Likewise, physician witnesses need to understand that their response to any question may only be one to three words (*i.e.*, "*yes*," "*no*," "*I don't recall*," "*it depends*"), and that they need not (and should not) continue talking simply because the plaintiff's attorney continues to stare at the witness as if anticipating more.

Many times, the attempt to "pivot" the response to raise a new issue will make the witness seem overly defensive when there is no need to give more than a simple response. Here, instead of agreeing that some anatomy may be more prone to perforation, the attempt to deflect the issue by discussing informed consent was actually nonresponsive to the simple question posed, and it did nothing for the defense case at this point (all of which could have been drawn out during the defense case-in-chief).

> Attorney Question: And the weakening of the wall, does that make the duodenal wall more prone to perforation if the surgeon is not careful during the procedure?
>
> Answer from Witness: It's been long known that duodenal diverticulum periampullary does lead to increased risks of an ERCP. These risks would include an increased risk of bleeding and an increased risk of perforation. Both of those increased risks were specifically addressed with the patient and his wife because I had the opportunity of knowing before doing this procedure that I was up against a duodenal diverticulum and the papilla was buried in it.

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Many physicians simply can't stomach the idea of responding to a "tough" question with a simple answer, and they feel an explanation is required. Others have been trained incorrectly to try to control the examination by changing the question to an opportunity to "explain" the defense theme. That does far more harm than good: it makes the witness look nonresponsive, defensive, and even doltish. Likewise, it takes much of the wind out of the defense sails. Physician defendants should be educated to understand that they will get an opportunity to explain everything in the controlled setting of defense counsel's direct exam at trial and that they will not gain anything by blurting it all out in deposition when they haven't even been asked.

The Client Perspective

The next sections turn to the client perspective, drawing from claims specialist Jorge Campo's experience.

The testimony of the defendant in a discovery deposition is perhaps one of the

most critical pieces in the defense of almost any claim in civil litigation. There is an old axiom frequently overheard from attorneys in this business: "you can't win a case at deposition, but you sure can lose it." From a claim specialist's perspective, truer words were never spoken. Errors during a discovery deposition can range from the mild (*e.g.*, an inappropriate emotional response such as anger), to the severe or even catastrophic (*e.g.*, inadvertently admitting to a breach of accepted standards of care). The net effect of a poor discovery deposition on the overall evaluation of the claim is significant. Even without catastrophic mistakes, a weak performance at deposition creates uncertainty about the prospects of prevailing at trial. Juries always place the greatest weight on the testimony from each party in a case, as opposed to any of the expert witnesses. A poor discovery deposition from the defendant physician can drive the decision making regarding settling versus defending a case at trial. This can have huge economic ramifications.

Personal injury cases often involve serious injury or death, and a defendant's anger can be construed by a jury as indifference, perhaps the most dangerous emotion of them all.

If deposition preparation is not among the forefront of concerns for a claims team after a lawsuit is filed, it probably should be. The planning and preparation of the defense should focus on the defendant's anticipated testimony starting from the very first meeting. It will be the cornerstone of the defense because the thinking and rationale behind a defendant's actions will come to light, and the defenses and the themes used at trial to explain the defendant's case to a jury will usually flow from that testimony. One common mistake seems to be preparing the witness to be thoroughly familiar with documents and the rationale behind their actions (or lack of any), but not really preparing the witness for the significant emotional challenge that a discovery deposition can present. Having knowledge of the case documents is certainly critical, but understanding the rules, the dynamics, the dangers, and the pitfalls of giving sworn testimony with special regard to emotional and cognitive errors is equally critical. The net effect of emotional and cognitive errors and how they financially affect the evaluation and handling of a claim for the claims specialist is enormous.

Emotional responses that trigger errors at deposition can manifest themselves in several different ways. For example, a defendant's testimony at deposition may be too conciliatory, rendering useless key points that should have been available to the defense, after the witness agrees with a false or misleading premise suggested by plaintiff's counsel. Fear is also a very dangerous emotion for the untrained and inexperienced witness. The witness may answer a question that he or she didn't really understand out of fear of looking stupid. He or she may misinterpret a poor question from the plaintiff's attorney, believing that he or she is helping the defense, while in actuality hurting it. Fear can also cause a witness to change an answer and concede a point after being badgered with the same question over and over for fear of appearing uncooperative or contrary. A witness may have answered the question perfectly three times, but the questioner still seems frustrated and upset with that answer. The witness starts to think that he or she must have given the wrong answer, or he or she needs a better answer, and if he or she changes or rewords it, the other side will finally understand. These emotional errors affect the evaluation of the claim because most states allow witnesses to be impeached with their answers to questions in discovery depositions if their responses at trial are different. A sloppy deposition answer will require more explaining at trial. Another old axiom goes like this: "if you're explaining at trial, you're losing." Again, the net effect of these deposition errors can be very costly.

Another very common defendant emotional response is anger. If a witness gets angry and combative in response to a question, that flash of anger can end up being *the* video clip that a jury is shown over and over again at trial. The witness may have done a great job during the rest of the deposition. His or her answer may even be the right answer and the answer that should have won the point, but it can easily be lost on a jury that is not focused on what was said, but rather, on the way that it was said. Just a flash of anger can turn off a jury. Personal injury cases often involve serious injury or death, and a defendant's anger can be construed by a jury as indifference, perhaps the most dangerous emotion of them all. Sadness and remorse can also be misconstrued as guilt. A lack of confidence can be misconstrued as incompetence. Arrogance can be dangerous, too, but indifference, without question, is the most dangerous of them all. If a jury thinks that a defendant just doesn't care about what happened, or a defendant believes that he or she should not even have to answer for it, the potential to inflame a jury becomes very real. Marginal cases for a plaintiff can become great cases when these emotional errors are made.

In conclusion, the weight of the defendant's deposition testimony in the evaluation of a case is immense from the claims specialist's perspective. In poll after poll of juries that have deliberated on such cases, the testimony of the expert witnesses is rarely a big deciding factor. Many claim professionals make the mistake of putting too much weight on the credentials and presentation of the defense expert witnesses, believing that superiority over the plaintiff's experts equates to a decided advantage. In fact, most juries believe that hired experts are paid for their opinions. At the end of the day, the testimony of the defendant and the plaintiff are without question the most important at trial. The chance to win a case outright comes at trial; at deposition, the objective is survival. Unfortunately, many defense witnesses struggle to grasp this, and instinctually attempt to "win" the deposition by offering explanations. While perhaps truthful, the persistent use of unsolicited explanations in response to direct questions is a major turn off to jurors. While pivoting away from an

unfavorable fact and focusing on a better fact may make the witness feel better emotionally, it actually does great damage to the witness's credibility in the long run. If the deposition is a hockey game, the witness is the goalie (and *not* Wayne Gretzky). The time and the place to offer key explanations will be at trial, during direct or rehabilitation testimony.

The vast majority of malpractice claims never make it to trial. Claims with merit when liability is reasonably clear are settled; cases with questionable merit for which liability is hotly contested require an intense analysis of the chances for success at trial. The most critical component of this analysis should be the deposition testimony of the defendant and the potential for the defendant to be a good witness at trial. Bottom line, a poor performance at deposition can drastically affect the claims specialist's evaluation of reasonable settlement value. Plaintiff attorneys are acutely aware of this, so they are usually more prepared for these depositions than any others. They know that forcing defendants to make emotional errors is very important to maximizing their potential recovery. Once the poor deposition is on the record, it becomes a major factor in the evaluation of the claim for settlement. More often than not, it's a very costly one.

Conclusion

The crux is that your witness's brain is inherently wired to defend itself automatically in the face of an adversarial examination and unfavorable case facts. That defensive survival response, resulting from amygdala activation, comes in the form of forced explanations designed either to defeat the questioner (fight), reframe the issue or "put lipstick on a pig" (flight), or pivot to a different issue (evade). All three responses—fight, take flight, or evade—are not only ineffective in testimony, but they do severe damage to witness credibility. Explanations should never be forced during deposition, but rather should be saved for direct or rehabilitation testimony at trial. This is the time for the witness to persuade the jury, with the guidance of his or her attorney. However, the only way that this can be accomplished is if the witness has the cognitive and emotional skills necessary to remain disciplined throughout the entirety of his or her deposition. A witness's ability to control emotion depends on having the capacity to modulate negative emotional responses through the use of cognitive-emotional strategies. Such skills can be learned through advanced cognitive-emotional training, which will result in witnesses maintaining logical, prefrontal cortex processing of information (Kanasky, 2014). As a result, witnesses will be more likely to adhere to strategies formed during witness preparation sessions throughout their testimony, and they will avoid becoming evasive, defensive, and argumentative.

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At the end of the day, the testimony of the defendant and the plaintiff are without question the most important at trial. The chance to win a case outright comes at trial; at deposition, the objective is survival.