WHAT JURORS LOATHE AND LOVE ABOUT HR PROFESSIONALS

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Mary is working quietly in her cubicle, when "ding," she hears that familiar "you've got mail" sound. She reads the message about a training procedure. She has some questions so goes to human resources, hoping for clarification. Unfortunately, the HR manager doesn't know the answers and doesn't seem to want to spend the time to find out who does. The HR manager says to Mary, "Well, I'm sure you'll figure it out—I have confidence in you"—a pat answer that does nothing to help Mary. Off Mary goes, as perplexed as before, but now fearing she should have been able to figure it out on her own, and worrying why HR was so unhelpful.

As an HR professional, you may think, "I would never do that. I would never leave an employee in the dark." But jurors, with their eyeballs trained on you as you sit nervously in the witness box about to testify on behalf of your company, have probably had such an experience and that impacts the way they view your testimony.

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JURORS' HR EXPERIENCE

Most jurors have been or are currently employed somewhere along the work food chain: maintenance, sales, office work, labor, or management. In many cases, aside from the day they were hired, their interactions with HR have been less than pleasant.

What common distressing opinions about HR do people bring to the jury box?

- HR is not there to help them.
- HR is all show and no go.
- HR talks a great game about employee rights and being there for the employee, but in reality HR doesn't care. HR does management's dirty work.
- HR doesn't listen.
- HR doesn't follow through.

Unfortunately, these opinions are often borne out during testimony. Too often, the HR person is not properly prepared by the company attorney, and as a result, appears uncaring. Responses on the stand such as "That's not my expertise—I don't write training manuals" or "Legal handles that" or "Not my department" may be entirely accurate, but for jurors, those answers just fortify their already negative view of HR.

WINNING JURORS OVER

Be informed. Know the policies and procedures that affect your workers and how these are implemented, developed, and applied. For example, when you are about to testify in an age discrimination lawsuit, instead of taking two minutes to quickly learn the relevant issues on a legal Web site the night before trial, take a seminar, read literature, or talk with colleagues when complaints first start appearing—doing so shows jurors that you care and are dedicated to helping employees.

Be responsible. Immediately respond to employee problems and dilemmas. Don't ignore them. If you are faced with multiple complaints about age discrimination, for example, investigate the problems. If the cases eventually end up in court, jurors will see that you listened and followed through.

In one case, an HR professional was asked, "How many complaints would it take for the company to concern itself with age discrimination?" He answered: "I don't know," which is no doubt accurate, but is extremely off-putting to jurors. He could have simply said, "We take every complaint seriously." If he had evidence of having done so by taking appropriate action, he could have spoken about it, which would have shown jurors that he cares, listens, and follows through.

Winning jurors over starts with winning employees over with your actions at work. When sitting on the witness stand, you need to convince jurors that any negative views they may have of HR do not apply to you.

THE SEVEN MOST COMMON REASONS FOR POOR TESTIMONY AND HOW TO FIX THEM

Preparing to give a deposition or testify at trial seems largely a matter of content. You are rightly concerned about what you have to say. But how you say it is just as important. You may find yourself over-answering, or you may get defensive, angry, or withdrawn, which is painful for you and ineffective for the jurors.

1) Failure to understand the purpose of deposition/ testimony

People are generally under the mistaken belief that deposition/ testimony is their opportunity to tell their story. They seize every possible opening to get in yet another piece of their story.

Here's an example:

An HR professional responds to a question in deposition.

The lawyer asks: "Based on what you discovered during the course of your investigation, did you make any changes?"

Answer: "After the investigation, I still wasn't sure about what to do. I mean, I knew I needed to make some changes, but I wasn't convinced that I had enough information to make good changes, after all you don't want to change things just for the sake of change, right? That would be unprofessional, and one thing I'm not is unprofessional. So um, right. Like that."

This HR professional was, to say the least, unresponsive, but not through any ill-will or incompetence, rather through a mistaken understanding of the process. The witness failed to answer the question, because of her intense desire to tell her "story."

Deposition and trial testimony are pieces of a case puzzle. Many different pieces are involved with each piece representing a different part of the "story." When you are deposing or testifying, the pieces you contribute to that puzzle are the answers that you give to the specific questions asked of you. Your job is simply to answer the question asked—not to defend your position or advocate on your own behalf. That seems simplistic, yet given what's at stake in a lawsuit, it's surprisingly difficult to do. Your "story" will indeed come out, but not through your voice alone. It is your attorney's responsibility to fit all the pieces of the puzzle together so that a coherent story is told.

2) Not knowing how to "answer the question asked"

"Answer the question asked" by carefully listening for the information the question actually requires.

Using the same example as before:

The lawyer asks: "Based on what you discovered during the course of your investigation, did you make any changes?"

This question asks for two pieces of information: 1) Did the HR professional make any changes? 2) Were those changes based on what she discovered during the course of their investigation?

Assuming that the investigation was conducted, the question could be answered one of the following ways:

1) "Yes."

2) "I made changes, but not only based on that investigation."

Witnesses are often so eager to answer, they only half-listen to the question and therefore answer poorly. Your ears are your first line of defense in deposition or trial. Take time to fully listen. Don't rush to answer the question. Make sure that you fully understand the type of information requested.

Not all attorneys ask good questions. Anytime you don't fully understand a question, don't attempt to answer it, but rather politely request a rephrasing. The easiest and most effective way to do this is simply to say, "I don't understand the question." If you don't fully understand the question, you will probably answer poorly and ineffectively. Interestingly, the more educated a person, the more he or she tries to answer questions not fully understood. Bright people assume they

can figure a question out even when it is unclear—and that is a very dangerous assumption.

3) Not thinking and organizing an answer before speaking

In ordinary day-to-day conversation, we often think "out loud": it is highly unusual for someone to be hanging on our every word, or if they are, we have the opportunity to clarify any misunderstandings. However, in deposition/trial, thinking "out loud" can cause all sorts of problems.

For example:

The lawyer asks: "What happened on the 4th of June at 4:00 p.m.?"

The witness (thinking out loud) replies:

"Let's see, on the 4th—I was in a meeting with the department heads all morning, that's right, we've had this ongoing situation with employee Brown and I think that went until—well, lunch time at least, and then, uh, I think I reviewed some termination requests, yeah and then—four o'clock, I facilitated a meeting with Ms. Smith and Ms. Jones."

Because the witness was thinking out loud, he gave opposing counsel information that could damage the case, namely that there was a situation regarding employee Brown and that some terminations were being considered, when all that was necessary was for the witness to say was, "On June 4 at 4:00 p.m., I facilitated a meeting with Ms. Smith and Ms. Jones." Answer only the question asked.

Think through your answer and generally organize it before verbalizing the answer. This is especially important when you're dealing with cross examination. Witnesses are often reluctant to take time to think before speaking because they are afraid that the amount of time will be too long, and that jurors will assume they are hedging or lying. Instead, take a moment or two to think before answering. Your answers will be far more coherent, to the point, and effective. This pause allows the jurors to absorb the question and get mentally ready for the answer. The pause gives your attorney the opportunity to object if necessary. The pause allows you to retain your ability to think when opposing counsel asks you questions thick and fast during cross examination. The pause is one of the single most important tools you can use during testimony.

4) Not understanding the impact of emotion on testimony

Most witnesses become upset, anxious, angry, defensive or sarcastic because of the nit-picky, repetitive, often accusatory quality of legal questioning. It is not the way questions are asked in our day-to-day existence. When you are in the grip of strong emotions, you lose the clarity and logic so essential to good testimony.

Prepare yourself for the lengthy, detail-oriented, often redundant style of questioning common to deposition and testimony. You will survive the process with a minimum of discomfort (or rage) by taking a deep breath whenever you feel your emotions rising—whether anger, anxiety or tears. Remind yourself that this is just the way things are done; it's nothing personal. When you take charge of your emotions, you will feel a lot better during the deposition or trial, and your testimony will be far more effective.

5) Witness's responses don't match the question.

Jurors are primed by attorney questions for certain answers. The question, for example, "When did you first meet Mr. Smith?" gets jurors ready for a date or time. When you respond, instead, "Mr. Smith was no concern of mine. I was just taking care of…," it throws jurors off their expected track. Jurors, who rarely want to be in the jury box in the first place, dislike having to exert more effort than is absolutely required. Therefore, a witness who persists with non-responsive answers irritates jurors. If witnesses continue in this mode, they will eventually appear evasive. Jurors are willing to forgive a few non-responsive answers, but only a few.

You'll appear more responsive to questions if you incorporate part of the question in your answer—usually the back end of the question. This technique helps you stay on track. For example, "What happened during your initial interview with Mr. Smith?" is answered with "During that interview, the first time I met him, Mr. Smith said…"

Jurors, having heard an answer that "matches" the question, are satisfied, and your credibility is maintained. Answering in this manner also helps prevent you from being unintentionally evasive.

6) The curse of the "Yeah, but" response

It's easy to get frustrated during cross-examination when opposing counsel is doing everything to block you from responding with anything but agreement. Cross-examinations are often filled with a litany of "Isn't it true that…" or "Wouldn't you agree that…" style questions. Witnesses buck at being forced to answer something that isn't either entirely true or entirely false, and will respond with "Yes, but…" or "No, but…" These answers make witnesses seen defensive to jurors. Enough "Yes, but" or "No, but" responses and jurors, who don't realize what opposing

counsel is up to and why, begin to tire of what they perceive as a quarrelsome witness.

You can't, however, just sit there and agree with opposing counsel as you're led down the merry path to misrepresenting your reality entirely.

Get around this dilemma by using a brief qualifying phrase before your "yes" or "no" responses. For example, you can respond by using such phrases as "In this situation, yes"; "Under certain circumstances, no"; "At the time, yes"; "Not as I understand it, no." The key is to keep the qualifying phrase sufficiently brief so as not to appear evasive and saying the "yes" or "no" after the qualifier so as not to appear non-responsive.

7) Ineffective eye contact

Eye contact matters greatly in court. When eye contact is done properly, you establish terrific credibility with the jurors. When it's done incorrectly, eye contact can unfortunately have the opposite effect.

A witnesses loses credibility by

1. Never looking at the jurors
2. Always looking at the jurors
3. Looking at the witness's lawyer while being cross-examined

Unless they have been on the stand themselves, jurors have little idea of how intimidating and difficult testifying can be. Nonetheless, jurors want to see a composed witness who makes natural eye contact with them. To a large extent, jurors determine the veracity of testimony by what they see in witnesses' eyes as they speak. Jurors tend to feel that witnesses who do not look at them at least some of the time during their testimony is less than credible. However, witnesses who ignore the lawyers and simply stare at the jurors during their entire testimony can be a jury turn off as well. In that circumstance, jurors feel "played to" rather than communicated with.

So, what is effective eye contact? Look at the attorney who is asking you the question when he or she is asking. If your response is going to be short, keep your eyes on the questioner. For example, when the attorney asks, "When were you first hired by X Company?" your response will be very short—"in May of 2005" or "last fall." In this case, keep your eyes on the attorney. However, when your response is likely to be more than a few words, look at the attorney for the first few words of your response, then turn out towards jurors and look at them while providing the body of your answer. Conclude by turning back to the attorney as you finish your response. There is a rhythm that comes with practice to make these movements look natural so witnesses do not appear as if they are being manipulated.

One behavior to guard against is looking at your own attorney when you're being cross examined by the other side's attorney. When you're on that stand being zinged with hostile questions, you're going to want a lifeline, and looking at your attorney is hard to resist. But resist you must. Witnesses who look at their own attorney when being cross-examined send a lethal message to the jurors, as in: "I don't know what I'm doing—is this right?" Jurors are put off by such eye contact, and generally figure that the witness has been coached to the nth degree and is probably lying. When you are on the stand, either look at the lawyer asking you questions, or at the jury—nowhere else. The exception is if the judge asks you a question or speaks to you directly, in which case you should immediately direct your attention to the judge.

MAKE JURORS YOUR ALLIES INSTEAD OF YOUR ENEMIES

Jurors see their job as gathering information to make informed decisions. Your time on the stand is a great opportunity to relay facts in a clear, believable manner. In a sense, you are using your human resource skills—the ability to communicate effectively and educate others—to increase the probability of effective testimony and a successful case outcome.

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