

## Representing the Executive Personality

*If I only had a little humility, I'd be perfect.*

*Ted Turner*

The self-confessed “kink” in Mr. Turner’s armor is common to many senior executives. A book titled *“Why CEOs Fail”* gives eleven reasons why CEOs crash-and-burn in the boardroom. Among these; arrogance (I’m right, everyone else is wrong), volatility, and melodrama.

In a review of wrongful termination claims filed in California between 1992 and 1996, almost half (49%) of the plaintiffs who alleged an implied contract cause of action were executives, middle managers, or professionals; 32% of the plaintiffs alleging discrimination and 36% of those alleging retaliation were of similar occupational status. Alas, the boldness and confidence with which corporate leaders enter the boardroom can backfire in the courtroom. It can also create headaches for the plaintiff’s attorney, whose job it is to transform the impatient, hard-charging executive into a likeable and sympathetic witness.

In the corporate world, the senior manager’s position is more akin to judge or jury. Seldom are his or her communications with others challenged, second-guessed or critiqued. Senior executives are not used to having people force them to answer their questions, particularly if they are stupid or disingenuous. They are not used to being in situations in which the consequences of losing your temper are so important.

For these and other similar reasons, preparing senior managers for courtroom testimony can be a wrenching experience for attorneys. To avoid or postpone it, however, can be deadly, both to the outcome of the litigation and the attorney/client relationship. The same executive who gratefully escaped with a half-hour pre-testimony briefing can become vindictive and unforgiving when ambushed by unanticipated cross-examination. In this article, let’s take a look at the nuts and bolts of executive witness preparation and how a litigation consultant can help a difficult executive/plaintiff connect to the jury and appear credible on the stand.

### **Anticipating Hot Buttons, Road Blocks and Reactions**

Mark Twain once said, “Truth is mighty and will prevail. There is nothing wrong with this, except that it ain’t so.” Plaintiff’s lawyers deal with this reality every day. Wronged but defensive executives all too often undermine substantive testimony by showing aggressiveness and arrogance – traits that torpedo their credibility with jurors.

A critical part of executive witness preparation is helping the professional communicate with confidence but not arrogance. It’s not the facts that damage the executive/plaintiff’s case; it’s how s/he testifies about them that can turn the jurors off. Most of the time, unprocessed fear and/or anger are at the root of every poor witness performance, and opposing counsel will do his or her best to provoke that anger.

Some of these “hot buttons” are obvious. Senior managers generally share the same intolerance for an overfocus on trivial or seemingly irrelevant details,

insubordination, or wasted time. In addition, each executive will have his or her personal "triggers" that render him or her vulnerable to opposing counsel. One of the most critical tasks in executive witness preparation is anticipating – and defusing – predictable issues that will rile your client. Saying to a client, "The other attorney tries to intimidate and I think that's going to make you angry," can go a long way in forestalling a hair-trigger reaction.

In addition, most executives can easily fall into the following witness traps:

**Play dodgeball.** Senior management executives, accustomed to verbal debate, often approach cross-examination as an opportunity to match wits with the opposing counsel. During an executive witness preparation session, I once witnessed an executive dodge a question for a full 4 minutes when the simple answer was "no." Your executive must understand the negative consequences of dodging difficult questions. No one will give him or her points for creative evasion or for making life difficult for the lawyer on the other side.

**Teaching Points:**

1. During witness rehearsal, make sure your client understands s/he *has* to answer each question with a polite "yes," "no," or "I don't know" before explaining anything. That does not mean being passive. He can insist on the truth of his direct and point out serious errors in questions. He can occasionally ask to explain an answer, a tactic that is especially effective when counsel won't let him. Nonetheless, there is a delicate balance. The human mind needs to hear a direct answer first. Reverse the order, and he will sound like he's evasive or, worse, dishonest.
2. There is nothing or improper about with not knowing or not remembering. However, an executive should never claim s/he know or has forgotten to avoid answering an uncomfortable question; from the jury box, there is a tremendous difference between someone who is stonewalling and someone who is at pains to be helpful.

**Speaking to the wrong audience in the wrong role.** Executive/plaintiffs may need to be reminded that, while the judge controls the courtroom, the real audience is the jury. Because executives tend to identify with the judge, they may forget that it's the jury that decides the case. Responses like, "I have a lot of responsibility; I didn't have the time to listen to employees whining all day," can appear condescending or insensitive to a jury, many of whom are employees who may have had experiences with an unfeeling or unfair manager.

**Teaching Point:**

1. Get the executive out of his business role. The senior manager who hasn't been able to find a job for 9 months doesn't need to come to the stand dressed as if he's ready for a corporate dress conference. During preparation, it can be helpful to tap into less authoritarian roles the executive assumes in his daily life; asking a senior executive how s/he communicates as a volunteer with his church youth group can help him or her shed some of the communication baggage that comes with his or her professional demeanor.
2. "I don't see why that question is relevant." "I already answered that question on direct examination." The executive's job on the stand is to be a witness, not another lawyer. Make sure your client doesn't object to questions asked by opposing counsel.

3. Jurors don't like whiny executive/plaintiffs, especially when they tend to already believe the plaintiff earned too high a salary to begin with. Instead of making generalized complaints and "editorializing" about their condition, executive/plaintiffs are better off telling specific stories about how their lives are different. It's the little vignettes of how the damage affects them on a daily basis that jurors can relate to.

**Misuse of emotions.** "Those greedy @#&\* at Company X fired me because they needed a scapegoat." "What do my stock options have to do with this lawsuit?" "It's none of your business." These are just a few of the potentially fatal comments I've heard executive plaintiffs make during witness practice.

Anger over what happened can lead to subtle qualifications or even negative comments on the matter at issue. Sarcasm and facetious remarks do not translate well onto the cold record of a deposition and will certainly not convey warmth on the witness stand. Your executive witness must continually communicate that s/he is a morally upstanding citizen who cares about his or her employees. An executive who loses his temper on the witness stand is likely to lose his case.

#### **Teaching Points:**

- 1) Put the executive in charge of his or her testimony. Ask your client how s/he would like his or her message to be received by the judge or jury and what s/he would most like the jury to remember. Help your executive witness identify, and then practice, implementing three or four key messages or "home bases" that are the foundation of his or her testimony.
- 2) Probe your executive on what aspects of testifying make them angry in a particular case, Make him understand that when you pass him, his demeanor cannot change. If he suddenly becomes surly or evasive with opposing counsel, the jury will turn against him.
3. Based on your knowledge of opposing counsel and the facts of the case, develop and practice realistic cross-examination scenarios. Videotape every witness practice session and play it back for your executive; it will do a far better job than you will in critiquing the witness.
3. Instill your client with confidence. S/he has to be comfortable that you know the case cold, that if he gives a bad answer or gets cut off, you will fix it on redirect. This advice should keep him from prolonged argument with opposing counsel.

#### **Getting With the Program**

Learning how to testify while displaying a demeanor consistent with the plaintiff role is a major adjustment and often requires multiple conferences with the plaintiff prior to trial. The person in charge of witness preparation should schedule multiple preparation sessions in discrete periods of time to address specific issues.

Personal attitudes will produce vastly different consequences for the executive in the boardroom versus the executive on the stand. While the focus of concern is theoretically on the facts of the case, in reality, it is the process of offering information that persuades the jury to filter disputed information as fact. Jurors decide the value of information based on their perception of the source. When they agree on the source's credibility, disputed information becomes "fact."

In fact, the manner in which that information is conveyed is of equal, if not greater, importance. The behavior exhibited with the verbal message determines the effectiveness of that message. If behavioral expression is not compatible with the verbal message's content, the value of the information decreases. Executive/plaintiffs must be able to communicate congruous verbal and nonverbal messages to offer believable testimony. A litigation consultant, who is more emotionally removed from the stakes involved in the litigation, can be a valuable asset in helping the executive develop an appropriate testimonial demeanor. This is particularly true when dealing with high stakes lawsuits or difficult clients.

### **Give Difficult Executives the Witness Test**

When an attorney does not have the time to fully prepare an executive for testimony, when the monetary stakes are high, or when an executive is resistant or reluctant to follow counsel's advice, a litigation consultant can be a case saver. The best estimate of how an executive will behave on the stand can be obtained by simulating the pressure and pace of the courtroom beforehand. A "witness test" provides this information. It also gives the executive an opportunity to listen to jurors discuss his or her testimony. Hearing jurors describe their behavior as arrogant, argumentative and ineffective can be a humbling experience. Such witnesses frequently offer greater cooperation after hearing the feedback of jury-eligible community residents.

Here's how the "witness test" works: Six to eight jury-eligible community residents are assembled and given a summary of the case by a moderator. The executive witness then undergoes both direct and cross-examination by two attorneys familiar with the case, with jurors rating the witness's communication for competency, trustworthiness, and likeability and his or her presentation for its clarity, believability, and persuasiveness. Jurors are also provided an opportunity to offer written narrative comments and observations about the witness.

After listening to the testimony and completing the rating forms, jurors are given forty-five minutes to discuss the case. They are instructed to evaluate the witness's testimony and talk about any aspect of his or her presentation they feel is worthy of comment. Their deliberations are videotaped, and the process is observed on a monitor in an adjacent room. Following their deliberations, a member of the trial team enters the deliberation room and pursues discussion of topics raised by jurors concerning the witness's style of presentation and/or elements of his or her testimony.

Witnesses who rate poorly on competency and/or likeability can be assisted to enhance their effectiveness and elicit more positive reactions from jurors. In contrast, witness training may do little to alter poor ratings on trustworthiness as jurors' trustworthiness evaluations are highly subjective. A witness who looks and sounds good, but is not perceived as trustworthy or believable is obviously a risky witness. Under such circumstances, the trial team must evaluate whether the witness can be substituted or whether another witness can provide the information. Obviously, in some cases, a substitute witness is not available. However, by knowing ahead of time that a witness who looks good, is, in fact, problematic, the trial team can avoid inadvertently hurting their own case by leaving the witness on the stand too long. For many executive/plaintiffs, less testimony (and more corroboration from others) may be more effective.

## **The Bottom Line**

Hundreds of years ago, Aristotle noted that those with wealth or power are liable to arrogance and the love of command. By subjecting them to the rule of others, he proposed, they learn to respect their freedom and justly appraise their worth. Unfortunately, Aristotle isn't available to prepare today's corporate nobility for testimony, nor to point out the available learning opportunities in temporarily transitioning from the role of king or queen to that of humble-commoner-on-trial.

On the bright side, plaintiff counsel has numerous "weapons" at his or her disposal with which s/he can prepare his or her executive witness for battle. In particular, the use of a litigation consultant to help prepare a difficult or resistant executive can significantly enhance the odds of victory in the courtroom. And prevent the executive witness from looking like the court jester – or the evil villain.

### **JURY VERDICTS IN WRONGFUL TERMINATION CASES**

by David J. Jung, Professor of Law and Director, Public Law Research Institute,  
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