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## A Fish Out of Water: The Corporate Executive as a Testifying Witness

By David S. Poole, Esq., and Kathy Kellermann, Ph.D., M.S., M.A.

The challenges facing a corporate executive who testifies in a legal proceeding were, perhaps, nowhere better illustrated than Microsoft Chairman Bill Gates' infamous deposition testimony in the Department of Justice antitrust case against his company. As one observer noted,

*"Gates came across as a hair-splitting nebbish who was spectacularly uninformed about critical decisions governing the company's relationship with Apple Computer.... Slumped in his chair in an ill-fitting suit, there was Gates playing the part of village idiot, repeatedly evading Boies' probes by saying he didn't know the answer or couldn't remember.... 'I have no idea what you're talking about when you say 'ask,' Gates said. And then he began to rock back and forth in his chair, periodically scratching his head as if praying for an act of nature to strike his tormentor."*<sup>1</sup>

Bill Gates is not the only powerful person who has been made to look untrustworthy or downright silly while testifying. Bill Clinton's deposition debacle has its own place of ignominy in American history. There are hosts of others.

Counsel who have worked with CEOs and other high level corporate officers to get them ready for deposition or trial testimony understand all too well that they are often involved in a high risk venture with many barriers to preparing that individual effectively to testify. The very skills that propelled the executives to their lofty position and that have enabled them to maintain their power base in the boardroom—a strong will, verbal skills which can inspire their underlings and intimidate any would-be dissenters, a strong vision of what they believe to be

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1941 Greenspring Dr.  
Timonium, MD 21093  
Tel: (410) 560-7949  
Fax: (410) 560-2563  
[www.TheJuryExpert.com](http://www.TheJuryExpert.com)

### WHAT'S INSIDE

7

#### ASTC Marks 25 Years:

Discover the wealth of research and practical tips presented at this year's ASTC national conference.

8

#### Quick Courtroom Tips:

A reminder that "What the People Believe, Is True."

9

#### Juror Attitudes: Corporate America

Current data on business executives, corporate responsibility and conduct.

10

#### Actor Tools for the Courtroom:

Getting into character helps bring passion to the representation of unsympathetic clients.

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the corporate reality—are the very things that can lead to disastrous consequences in the courtroom. The skills required in the boardroom are not the skills required in the courtroom.

### Challenges for the Testifying Executive

Testifying executives face many challenges. First, executives must find time to be prepared to testify. Demands on the executive's schedule often make it difficult to have the quantity and quality time counsel need to prepare the individual adequately for direct testimony and cross-examination.

We have witnessed executives who show up to testify with an obvious lack of understanding as to the key issues in the case. Unaware of key issues and facts, executives are often forced to answer questions by saying they cannot remember or do not know. However, data from mock trials and post-verdict interviews of jurors consistently show that jurors do not trust witnesses who often say "I don't recall" or "I don't know."

On the other hand, jurors will fault witnesses, especially corporate officers, for offering incorrect information: "He said he followed company procedures, but then he didn't know what the company policy was." "The witness used inappropriate numbers, didn't do deductions properly, presented things in a roundabout way, and gave a lot of incorrect information." This problem results from the far too frequent occurrence of witnesses mistakenly believing that because they are being asked questions about a particular issue or fact, they must have the responsibility to "deliver for the company" on that issue, and they will boldly give opinions or their understanding of certain events even where they were not percipient witnesses. Preparation is a priority, and it is the only thing that prevents strong-willed executives from ending up

appearing "spectacularly uninformed."

A second challenge executives face when testifying is having to disengage their often well-honed desire to control the actions of those around them. Frequently, executives try to take command of the deposition and courtroom, much as they take command of meetings in the boardroom. Not used to being aggressively challenged or having their recall of events picked apart by contrary documentary evidence, the executive's world as he or she imagines it to be can often have an ugly collision with another reality. Many corporate executives become combative when testifying, and rise up and fight to "score points." Their passionate advocacy and overpowering of stubborn opponents in the boardroom is contrary to the role demanded in the courtroom.

The right to refuse to answer questions in the boardroom is not a right executives have in the courtroom. Post-verdict juror interviews of testifying corporate executives reveal that jurors dislike this combative posture: "*He spent all his time fighting, and didn't answer anything.*" This combative posture is judged even more negatively by jurors when testifying executives adopt a Jekyll and Hyde approach of fighting opposing counsel while cooperating with their own counsel. "*He refused to answer questions sometimes. His testimony didn't hold much water with us in the jury room. He wouldn't answer a question unless it favored his side.*" Executives need to adopt a non-combative, less controlling role in the courtroom.

A third challenge executives face when testifying is recognizing that they must actively seek to get others (e.g., judge, jurors, etc.) to like them. Many executives have survived for years based on achieving certain economic goals which did not require them to be the most popular person in the company

cafeteria. In fact, the difficult bottom line decisions of successful management are often challenging for the warm and fuzzy types. Yet, the executive who walks and talks with what is perceived to be a condescending, powerful or arrogant demeanor may find that such a persona adversely impacts the judge or jury—who will, consciously or subconsciously, root for the person that they most like.

Executives’ tendency to focus on competence often overlooks or disregards key standards jurors use to judge executives as witnesses. Standards equally, and often more, important to jurors are the executive’s:

- trustworthiness (honesty),
- composure (being at ease),
- dynamism (involvement), and
- sociability (likeability).

Jurors want to hear the truth spoken politely, through clear and direct answers to questions, with an even temper in direct and cross, using ordinary language with no evasions, and unaffected by interruptions or objections. When testifying, executives must overcome projecting their boardroom persona, a persona that elevates competence over trustworthiness, politeness and sociability.

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*The skills required in the boardroom are not the skills required in the courtroom.*

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The challenge for the executive is not limited to overcoming the transfer of his or her own boardroom tendencies to the courtroom, but also to assist in overcoming the bias that exists in jury populations against “Corporate America.” A significant portion (from 50 to 75 percent) of the urban jury pool throughout the country believes that big business cannot be trusted, is unethical, and pursues profit at any cost. Roughly one in two jurors believes that an important function of juries is to send messages to corporations to improve their behavior, and one in three jurors wants to award punitive damages to punish a company even if the company did not intend to hurt

anyone. Many jurors (from 50 to 70 percent) believe that a company that has been sued has to prove it did nothing wrong, and place the corporate executives in a one-down position relative to providing that proof, believing that large companies will lie to win a lawsuit and that corporate executives will say whatever it takes to keep the company out of trouble.<sup>2</sup>

Jurors are distrustful of executive testimony, scrutinize what executives say carefully, and hold executives to a higher standard of recall, knowledge and articulateness than other witnesses. Today’s juror is skeptical of corporate behavior, and places corporate executives in the position of having to earn, rather than expect, credibility, a position relatively few executives face in everyday life. The challenges an executive faces are many, and the day-to-day means the executive uses to overcome these challenges create problems when testifying.

### Executive Witness Preparation

Once the decision is made that a corporate executive will testify, plans should be made to get on his or her calendar for multiple sessions to prepare for the event. We recommend an early “get to know each other session” where the major topics that are the subjects of the dispute are discussed and any major issues the witness has can be identified. Such a session will enable counsel and the witness to determine factors to be dealt with and what additional preparation should be undertaken before the date of testifying. With certain witnesses, adequate preparation may require several preparation sessions and it is critical that such a determination be made well ahead of the scheduled testimony to be able to accommodate all needed sessions.

**The testifying executive’s role.** Counsel will need to determine the strategy for the role of the witness in the anticipated hearing,

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<sup>2</sup> Statistics are based on mock trial, community attitude, and juror questionnaire data collected while Dr. Kellermann was a Senior Consultant at Trial Behavior Consulting from 2003 to 2006.

deposition or trial prior to the second session of preparation. The strategy should resolve the issue of how much, if any, the executive should review documents or undertake other efforts to refresh his or her recollection before testifying, as this will drive other decisions regarding preparation. At a minimum, every witness should know certain basic information before they testify. Among the things they should know before they testify are the general nature of the claims of the parties, the legal theories which are being pursued by both their company and the opposition, and any areas of weakness in their company's case.

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*The executive who has what is perceived to be a powerful demeanor may find that such a persona adversely impacts the judge or jury, who will root for the person that they most like.*

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It is critical that they also understand what their intended role is, and how to perform that role effectively *from the point of view of the decision-maker(s)*.

In addition to understanding their case role, testifying executives also have to learn the *witness* role. Executive witnesses commonly understand the witness role as one of a "teller," a competitive advocate who controls the question-answer interchange, arguing for their cause and swinging for home runs, not unlike their boardroom persona of a competent professional. The most effective witness role, however, is that of an "answerer," a thoughtful and cooperative responder, who is pleasant and trying to be helpful, with the purpose of assisting, rather than winning.

Many executives have personas other than their boardroom persona, ones they exhibit socially, or with their children, or when meeting persons for the first time. The sympathetic and likeable person that testifying executives can possess when in non-work or prior work environments needs to appear when testifying, rather than the professional boardroom persona to which they often default. Frequently, one of these other personas offers the very behaviors and tone that is needed in the witness role. For

example, an insurance executive who had worked extensively in customer relations was able to adopt that role effectively when testifying, because in that role he knew and could enact instinctively the behaviors of helpfulness and friendliness as well as competence. Identifying a persona with which an executive is already familiar that engages behaviors consistent with a cooperative answerer role is a particularly effective way of helping the executive adopt the appropriate behaviors and tone. The most needed behaviors for the activated role (in addition to competence) are smiling, short sentences, simple language, respectfulness, attentiveness and politeness.

**Developing safe harbors.** Litigation is filled with landmines, and testifying executives need to be offered safe harbor, that is, a place to run when they are stuck and do not know what to say. What follows are examples of behaviors that provide safe harbors to executives when testifying. The more of these behavioral techniques testifying executives can learn the more effective they will be as witnesses. These behavioral techniques complement and promote the desired witness role of a cooperative answerer.

- **Rely on thematic answers.** Each executive witness needs to learn specific defense case themes they can use while answering counsel's questions. These defense case themes provide the defense's narrative, as well as a way to answer questions when specific answers are unknown, and are best if articulated in the executive's (and not the attorney's) own words. Executive witnesses can also reinforce key personal values (e.g., doing one's best, helping others) or their personal philosophy when specific knowledge or recall fails (e.g., "I try to do the best I can." "I did this because it would help the stockholders." "My personal

philosophy was to do what was good for the customer.”). These thematic answers tell the story of the defense case, offer positive motives for the company’s behavior, and reduce the need to respond “I don’t know” or “I can’t recall.”

- **Speak in short, complete sentences.**

People often answer questions in day to day life with phrases, rather than sentences (e.g., “What’s

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*Today’s juror is skeptical of corporate behavior, and places corporate executives in the position of having to earn credibility.*

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your name? John Doe”). Sometimes, open-ended questions are answered with relatively lengthy replies. Both of these tendencies are problematic for the testifying executive. The first appears curt, while the second appears incompetent and may offer more information than is desired by counsel. Answering in short, complete sentences is perceived as both thoughtful and polite (e.g., “What’s your name? My name is John Doe”) and fulfills the “cooperative answerer” role without becoming overly helpful.

- **Condition answers.** When asked “yes” and “no” questions, many executives struggle. A single word response may be overly broad, sounds curt, and lets the longer questions seem more important than the shorter answers while fighting the question is combative. Neither response leads to judgments of thoughtfulness and helpfulness. Short conditioning phrases offer accurate answers, while sounding significantly more thoughtful and helpful. Rather than “yes” or “no,” executives can say, “In some cases, yes,” “Generally, no,” “Under some circumstances, yes,” or “In this situation, no.” We recommend that the “yes” or “no” go at the end of the answer, so that opposing counsel

cannot prevent the conditioning phrase from being uttered.

- **Use responsive answering.** Responsive answering employs words and concepts used in the question to start the answer. For example, if asked, “What happened during your initial interview with Mr. Smith?” the witness

might say, “During that interview, the first time I met with him, Mr. Smith said...” Responsive answering is polite (it shows listening), is perceived as

thoughtful and helpful, and makes the answer sound responsive even when it may not be completely so.

- **“Own” bad facts.** The most effective executive witnesses admit what is obvious, addressing mistakes in a non-defensive manner and framing them as unintentional. Learning from mistakes and taking action after learning of them makes executives appear competent, concerned, and thoughtful. The more competent a person’s image, the more admitting an error (and learning from it) makes the person likeable to others.

- **Explain mental lapses.** Stating a desire to know or recall the requested information makes executives appear cooperative and helpful (e.g., “I wish I could help you.” “I’d like to help, though that document is not something I recall seeing previously.”). Offering a reason for mental lapses is also important. A reason might be contextual (“I was not an executive at this company in 1975-77, so I would need to get that information for you.” “My role was accounting, and marketing is really Bill’s area.” “I never worked on that matter.” “I was not present at that meeting.” “I was not normally in the chain of communication about that claim.”).

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A reason might be temporal (“That was many years ago and my memory has faded.” “I haven’t read that document recently.”). A reason might be surprise (“I’ve not been asked that before. Let me think.” “I don’t believe I’ve seen this before.”). No matter, providing a reason for mental lapses is a way of maintaining the answerer role while avoiding the answers, “I don’t know” and “I can’t recall.”

- *Smile.* Perhaps the most forgotten, yet most important, way of improving the testimony of executives is to have them smile (avoiding smirks, grins, jokes, and other problematic interpretations). Smiling begets smiling, and we like people better who smile. Recently, we worked with a young and very capable executive who jurors at a mock trial thought was a “cold fish,” despite his being attractive and well-spoken. Having the executive smile while testifying changed jurors’ perceptions dramatically: in post-trial interviews, jurors offered that this executive was nice, approachable and accomplished.

These are just some of the behavioral techniques that can help executives safely through their trial testimony, and that promote the “answerer” role that is desired.

No magic formulas exist for witness preparation. Preparation takes time and energy for everyone involved. Executives are people, and the goal of witness preparation is to capitalize on their strengths and offer additional behaviors that help protect them, not to change their personality. Positive feedback is critical, as is focusing on what *to do* rather than on what *not to do*.

The testimony and demeanor of corporate executives is critical in most litigation. Testifying at a hearing, deposition or trial seems like it is becoming a rite of passage for executives. The skills required of executives in the boardroom are different than the skills

required of executives in the courtroom. The skills can be learned and executives, if willing, are usually exceptional students.

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*Dr. Kathy Kellermann, Ph.D., M.S., M.A., is the Founder and President of ComCon Kathy Kellermann Consulting in Marina del Ray, CA. She is an expert in communication and trial strategy and has consulted on numerous cases throughout the country, as well as taught CLE workshops on persuasive advocacy and storytelling techniques to litigators. She has special expertise in case analysis and trial strategy, witness preparation, and developing persuasive strategies and trial themes for openings, closings and witness examinations. Kathy may be reached at (310) 822-8064 or by e-mail at [drkathykellermann@yahoo.com](mailto:drkathykellermann@yahoo.com).*

*David S. Poole is a partner in the Los Angeles office of the law firm of Poole & Shaffery, LLP. He specializes in complex civil litigation and environmental law. His representations have included defending and prosecuting claims on behalf of both international and domestic business entities and individuals in a variety of business, commercial, environmental, product liability, intellectual property, trade secret, employment and real property matters. He particularly enjoys cross-examining corporate executives and experts. He may be reached at Poole & Shaffery, LLP at (213) 439-5390.*

**Correction:**

Amy Pardieck’s contact information was incorrect in the last issue (*Differ or Die: Prevailing in an Era of Rampant Anti-Plaintiff Bias*). She may be reached at (812) 336-5494 or by e-mail at [amypardieck@sbcglobal.net](mailto:amypardieck@sbcglobal.net). We apologize for the error.