**Commentary: Work With Witnesses to Fix Demeanor Issues**

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In 2012, presidential debates took over the primetime airwaves three times in October. More often than not, people remember how the candidates presented themselves in these debates as much as what they said. Many of the big moments from past debates were visual: George H.W. Bush looking at his watch in 1992; Al Gore sighing, rolling his eyes and invading the personal space of his opponent in 2000; John McCain generally coming across as grumpy and out of touch in 2008. Going back to the first televised presidential debate, many consider Richard Nixon's appearance to have been a key problem in his race against John Kennedy.

The lesson from these debates is simple: Demeanor matters. As a trial attorney, I am firmly convinced that how jurors perceive a witness greatly impacts the weight they afford that witness' testimony. In close-call cases, believability has quite a bit to do with demeanor. A seasoned trial lawyer and close family friend once explained it to me like this: If jurors trust and like your client, they usually find a way to take care of your client at the end of the day.

Moreover, an evaluation of witness demeanor is an inherent part of the fact-finding process at trial. The U.S. Constitution guarantees two opportunities to evaluate demeanor: A criminal defendant has the right to confront witnesses against him, and there is a right to a jury trial in civil cases. In Texas, judges instruct jurors "to make up your own minds about the facts" and tell them that they are "the sole judges of the credibility of the witnesses and the weight to give their testimony."

However, like much in life, the efficacy of evaluation of witness demeanor is not certain. Some commentators point to social science studies demonstrating that juror evaluations of witness demeanor likely do not include discernment of whether the witness actually is telling the truth. Indeed, the opposite may be the case.

Nevertheless, jurors likely believe (both of their own accord and by the instructions given to them) that their evaluations of demeanor let them separate the perjurers from the truth-tellers. Therefore, even if the metric itself is flawed, trial lawyers must operate within that framework.

Many an opening statement and closing argument will ask jurors to "remember how he looked" or remind them a witness "couldn't look you in the eye when he blamed my client for his problems." In *Anderson, et al. v. Liberty Lobby Inc., et al.* (1986), the U.S. Supreme Court upheld a bench trial verdict based, in part, upon observations of demeanor. In that case, the trial judge observed that a critical witness fidgeted when answering key questions, shifted his eyes from the floor to the ceiling and manifested "all other indicia traditionally attributed to perjurers."

From interviewing jurors after trials, I find the *Anderson* criteria to be a common metric by which jurors believe they can root out perjury, as well as volume, tone and pace of a witness' verbal response.

I do not advocate that counsel instruct witnesses to put on a show or to behave differently than they normally would. Witnesses are not actors; they are real people who would appear disingenuous if they assumed character traits or behaviors inconsistent with their normal personae. However, any testimony-preparation session must devote time to explaining the concept of demeanor, as well evaluating and correcting the witness' demeanor through a series of exercises.

In preparation, it helps to show witnesses clips of good and bad depositions. If possible, I will show the witness his prior videotaped testimony from other matters and point out things he previously has done, both helpful (smiling, good posture, moderate volume and even tone when answering a tough question) and not helpful (eye rolling, lack of eye contact or shifting around during tough questions).

If prior depositions are not available, I will show the witness deposition clips from YouTube and other websites. In particular, I find very instructive the Bill Gates testimony from the Microsoft antitrust litigation. Plus, it is always advantageous to tell a witness that he can perform better in a deposition than one of the richest people on earth.

I also try to identify demeanor difficulties with witnesses by subjecting them to cross-examination in testimony preparation. Making the practice cross-examination as close to real as possible and pushing the witness both enable the lawyer to observe how the witness handles adversity. Seeing a witness' physical response and hearing the verbal response lets a lawyer make an informed decision about how to move forward.

After identifying the issues, the attorney must work with the witness to manage and correct his demeanor, to the extent possible. For example, if a witness begins to talk rapidly when faced with a tough question, a quick fix can be as simple as telling the witness to take a short pause and breathe to steady himself before he begins to answer. Jurors likely won't notice this, but pausing and breathing will calm the witness, slow the rate of his speech and help him avoid word stumbles.

The major difference between the presidential debates and testifying in court is that the candidates get multiple opportunities to make an impression, while the witness usually gets only one. Understanding the role of demeanor can make the difference in a close case, much in the same way it arguably has made the difference in past close elections.

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