PERSUASION STRATEGIES™

Effective Testimony

The following table addresses the question of what is more effective and less effective in testimony. In general, we can see an effective deposition, trial or hearing witness as having seven traits. An effective witness:

- ✓ Stays within clear parameters of testimony
- ✓ Focuses and Listens Carefully
- ✓ Is Verbally Precise
- ✓ Doesn't Give Up Full Control to the Questioner
- ✓ Resists Defensiveness
- ✓ Employs Clear and confident *Verbal* Communication
- ✓ Employs Clear and Confident *Non-Verbal* Communication

Each of these principles are addressed below, in both their *effective* and *ineffective* manifestations.

An Effective Witness….

Principle	Ineffective	Effective
1. Stays within clear parameters of testimony		
a. Stay within area of expertise	Take a guess when counsel asks you a question which goes beyond your scope of *expertise* (experience and training).	"It is important for me to focus on my own experience and area of expertise."
b. Stay within area of knowledge	Take a guess when counsel asks you a question which goes beyond your scope of *knowledge* (direct observation of the facts).	"I don't know."
c. Testify only about what you remember	Try to fill in gaps and make estimates about what *probably* happened if you don't specifically remember.	"I don't remember if her blood pressure had been taken by that time or not."

Phone [303] 295-8181 **Fax** [303] 295-8182 www.**persuasionstrategies**.com
555 17th Street, Suite 3200, Denver, Colorado 80202 **Mailing Address** P.O.Box 8749 Denver, CO 80201-8749

Principle	Ineffective	Effective
d. Don't volunteer information beyond the scope of a question (don't mention individuals, events, or documents unless asked about them).	Try to ensure that the questioner gets the whole story by providing information they didn't ask for: "No, I didn't check her temperature, but I do remember asking a nurse to do that…"	Just answer the question asked. If additional information needs to come out, your attorney will make sure that it does.
e. Don't get sucked into hypotheticals	Go along with counsel's fictitious scenario so that they can later retrofit it into the case.	"Objection" (by attorney) or "The answer would depend on too many factors that are difficult to spell out in a hypothetical scenario," or "Based on the information you've provided, I don't know."
f. Be careful of evaluating another's testimony	Allow counsel to magnify conflict and pull you into speculation about testimony you didn't hear.	"I don't know what Ms. X has said or will say, but I believe the she can best speak for herself."
g. Resist addressing the motives (or other unknowns) of others	Freely speculate about what other people might have been thinking.	Testify about what you know, heard, or saw. "I can't speak to her motive." "No, I don't know why she did that."
h. Be careful of 'custom and practice' questions	Allow counsel to turn you into an expert witness by eliciting statements about the common standards and practices within a specialization.	Follow your counsel's advice on whether you need to answer these questions or not. When you do, stick to what you know is true.
i. Avoid humor	Try to lighten the mood by making counsel laugh.	You don't have to play it rigid, but you should play it straight. It is never as funny in the transcript.
2. Focuses and Listens Carefully		
a. Listen to every word of the question	Make a guess about where the question is going once you've heard the gist of it.	Focus on each word.
b. Don't answer until you understand the meaning of a question	Answer your 'best guess' of what you thought that the question meant.	Ask for a repeat or a clarification if you drifted during a question.

Principle	Ineffective	Effective
c. Wait for question completion before answering	As soon as you know the answer, blurt it out, even if the questioner hasn't finished yet.	Make sure that the questioner is finished.
d. Allow a brief pause before answering	Answer immediately after the questioner finishes.	Allow a quick beat of silence before you answer – to ensure that you are on the right track and to allow your lawyer to object.
e. Listen to objections	Just assume that it is all "lawyer talk" when your attorney objects.	Listen to the content of the objection – treat "calls for speculation" as a reminder not to speculate in your answer.
f. Don't divide attention between a question and a document	When counsel hands you a document and asks you a question at the same time, immediately answer (while reading).	"Give me a moment to look this over, then I'll answer your question."
3. Is Verbally Precise		
a. Ask for clarification when you need it.	Guess at the meaning of an unclear or garbled question.	"I want to make sure that I'm understanding your question correctly – could you rephrase it?"
b. Correct assumptions within the question	Just answer the question, let the assumption slide.	"Your question contains the assumption that.... and I am not sure that is correct."
c. Correct inaccuracies	If inaccurate assumptions or language is built into a question, just let it pass and answer the question.	"Your question contains the assumption that.... and I am not sure that is correct."
d. Break down multi-part questions	When asked a multi-part question, give a general answer which seems to indicate agreement with all of the parts of the question.	"Well, there are really two questions there. Let me answer the first."
e. Don't be sucked in by an over-broad question	Take an overbroad question (like "tell me about being a doctor") as a 'speech topic' and launch off on a long monologue.	Answer the question at the same level of generality: "being a doctor is an interesting line of work."

Principle	Ineffective	Effective
f. Avoid inaccurate absolutes (always, never)	Use absolute language just to show emphasis. Uncritically accept absolute language in the question.	It's only "never" if you mean "never," and it is only "always" when it is absolutely always.
g. Avoid unnecessary qualifications	"In my opinion…" "To the best of my recollection…" "I think…."	Use these qualifications to convey real and accurate uncertainty – not as habits of speech which just convey hesitancy or self-protection.
h. Keep lists open	When counsel tries to box you into a limited set of responses for a specific question, just chose from among the options given.	Don't rely on the list of options given: "I think there is another possible answer to that question and it is…"
i. Don't re-answer a question you have already answered	If counsel asks you for a second time, presume that there was something wrong with your first answer, so answer it a little different this time.	Your own lawyer may object, but if not: "I believe I provided the best answer to that question when you asked it just a moment ago."
j. Don't think out loud	Verbally ponder: "Lets see, was that the first or the second time I saw that chart. It seems like the first time, but on the other hand…"	Think (silently), be sure, then answer. Pause if you need to.
4. Doesn't Give Up Full Control to the Questioner		
a. Give full sentence answers	Allow opposing counsel to lull you into the pattern of single word answers "yes," "no," "2002," "4 centimeters," etc.	Complete the thought: "Yes, I did record her temperature on the chart." "I received my license in 2002." "Dilation at that time was 4 centimeters."
b. Answer in your own words	Parrot counsel's words and phrases in your answer. Q: "So, you were completely ignorant about that?" A: "Yes, I was completely ignorant about that."	Q: "So, you were completely ignorant about that?" A: "I did not have any knowledge about that at the time."

Principle	Ineffective	Effective
c. Be critical of counsel's attempts to summarize your testimony for you	Allow counsel to wrap your testimony up into one big ball, which you can then say "yes" to.	"Just so that I'm sure I'm giving you the most accurate answers, I would prefer to take those items one at a time."
d. Be critical of attempts to lead	Just fall into to natural pattern of saying "yes" to each of counsel's statements.	Answer in your own words, not theirs: "I would put it this way…"
e. Keep your own pace, don't get sucked into a rapid-fire pace	If counsel is asking questions fast, then respond by answering questions equally fast.	Recognize that only you have the power to set the pace and no one will hold it against you to have a moment of thought before answering.
f. Don't get confused by the attorney's structure, or lack of structure	When counsel jumps around from topic to topic, try to figure out where she is going, or draw conclusions from the fact that she moved from topic A to topic B.	Make sure you understand what topic you are on for each question. Then, take each question as it comes.
g. Don't be 'baited' by a 'baited silence'	If counsel is silent after you have provided a complete answer, continue talking, provide more information.	Simply enjoy the silence and wait for the next question.

5. Resists Defensiveness		
a. Don't get angry	Let your emotions show – raise your voice, refuse to look at counsel. Make your answers as cutting and sarcastic as the questions.	Remain poised, don't give opposing counsel the satisfaction, save your anger for after the deposition, then share it with your own lawyer.
b. Don't be riled by 'loaded language'	Respond emotionally to the connotations of counsel's language.	Answer on your own terms. Correct inaccuracies, but otherwise just answer the questions.
c. Don't respond to hostile questions with hostility	Reduce your responses to grudging one-word grunts, or embark on long impassionate defensive speeches.	Work on the contrast: the questioner is hostile, and you are not.
d. Don't fight an obvious (or inevitable) answer	If you didn't look at the chart, but you know where counsel is going with that, then try to dance away from that response for as long as possible before finally saying "no."	Avoid the drama and provide the obvious and inescapable answer right away.
e. Accept that there may be small errors or inconsistencies	Act like it is a quiz show and any error or inconsistency is a point against you. Respond to suggestions of error with defensiveness, denial, resignation, and regret.	Own up to inescapable errors and inconsistencies immediately in order to deprive them of their power.
6. Employs Clear and Confident *Verbal* Communication		
a. Give complete and concise answers (more than a word, less than 3 sentences)	Either reduce your answers to one word, or provide long rambling speeches.	Think, then answer in a complete and concise fashion. The first sentence is for the answer. The second sentence (only if necessary) is for the explanation.

b. Avoid unnecessarily technical language	To show how qualified you are in your field, use terms that your listeners are unlikely to understand. E.g., it isn't a "headache" it is "Cephalalgia." Don't explain what you mean unless you are pressed to do so.	Use an unfamiliar term only when understanding *the term* (and not just the concept) is important to listeners. Ideally, break it down to simple English: "She had a severe headache." When you use an unfamiliar term, explain what it means before you use it.
c. Avoid vocal fillers	Use vocal pauses like "um" and "ahh." Use content-free words like "like" and "okay." Use intensifiers like "really" and "actually" and "truly."	Speak more slowly and think through your messages so that you can eliminate or minimize filler words.
d. Avoid non-literal indications of uncertainty	Pepper your language with phrases like "I think.." "I believe…" "Kind of…." etc.	Reserve indications of uncertainty for those times when you genuinely are uncertain. Don't let it become a habit of speech.
7. Employs Clear and Confident *Nonverbal* Communication		
a. Speak loud enough to be heard easily	Mumble and speak softly. Force the court reporter and the questioner to frequently ask you to repeat yourself.	Speak at a volume that is suited to the room, so that everyone can hear you without trying.
b. Maintain a relaxed and alert posture	Slouch in your chair. Lean back. Hunch your shoulders. Let your head tilt to one side or the other. Fold your arms in front of you.	Sit straight, leaning slightly forward. Place your arms on the rail or table in front of you, gesturing when it is appropriate. Keep your head erect and toward the questioner.
c. Maintain a relaxed facial expression	Look tense: Furrow your eyebrows and wear a skeptical, hostile, or bewildered expression when counsel is speaking to you.	Convey that you are alert and interested, but not tense or angry.
d. Avoid repetitive or distracting mannerisms	Tap on the table, play with a pen, gaze at the ceiling or the floor.	Don't let nervous energy take the form of uncontrolled movement. Move when you want to gesture, otherwise, stay still.

e. End sentences with a strong vocal period	End each sentence like you are asking a question? With a rising intonation at the end? Like you are uncertain about what you're saying?	Let your voice drop at the end of a statement to indicate that it *is* a statement and you're sure about it.

Turn in a Powerful Deposition, Doctor Defendant

By Dr. Ken Broda-Bahm:

The Hippocratic oath also applies to doctors caught in the litigation process. In deposition, the rule is “first, do no harm” to your case. No one wins their own case in deposition. But a medical defendant might end up losing it by falling prey to some common mistakes. Depositions are taken in order to shape an adversary’s case, and to be used one day by a potential fact finder. In our experience, jurors have a natural inclination to support the doctor. There is a good psychological reason for that: It is more comfortable to believe that those we entrust with our health and our lives know what they’re doing. When plaintiffs are able to overcome this strong motivation to believe in the doctor, it is often because the doctor conveyed something in deposition or trial that unwittingly served to help the plaintiff.

For example, feeling the emotional insult of a malpractice case, the physician may come across as defensive, arrogant, or uncaring. Taking too much care to avoid error, the doctor might seem reluctant to say anything and, as a result, appear unhelpful and uncommunicative. Ultimately, jurors are looking to see someone they would trust as their own doctor. If they instead see someone who is uncertain, irritated, or frazzled – a fish out of water – they come to distrust the doctor’s level of competence and care. That loss of credibility helps make a plaintiff’s case by allowing jurors to set aside their default trust for doctors in order to say

that in this case, or against this doctor, the patient actually has a valid claim. In this post, I'll provide a brief overview of ten areas where doctor defendants can adhere to a "do no harm" strategy during depositions.

1. Case Assessment

Plaintiff's counsel wants you to think you have no chance. Targets of physician lawsuits can have an image of the out of control jury, driven by sympathy and aiming toward perceived deep pockets. The hope is that nervous defendants will be rattled by the deposition and immediately believe they should settle the case. But the data on what happens to physician lawsuits doesn't bear out that fear.

Instead, you should understand your advantage. Recent data from the Physician's Insurance Association of America (that we wrote about in this post) backs up the notion that jurors tend to support the doctor. While many cases are filed, only 20 to 30 percent result in any kind of payout, and the great majority of those are relatively modest settlements. Only one percent of cases filed make it all the way to trial and a plaintiff's verdict.

2. Language

Plaintiff's counsel wants to control your words. A deposition is not really about the "discovery" of what the other side has to say. Instead, it is an effort to create evidence supportive of the deposing party's theory of the case. For the malpractice plaintiff, that means documenting the failure to reach the standard of care using the doctor's own words. For that reason, the best strategies of the deposing attorney are strategies of control. So the attorney leads, summarizes, and plants specific words and facts to control the testimony.

Instead, you should speak for yourself. One of the most critical habits for deponent witnesses to develop is the habit of answering in your own words. Simply saying "yes" or "that's correct" leaves the choice of language to opposing counsel, and that choice isn't neutral. Jurors will also expect a credible doctor to be an authoritative source of information, and you don't get that by just being a rubber-stamp "yes" to the attorney's language. As often as possible, answer questions briefly, but in a complete sentence.

3. Volunteering

Plaintiff's counsel wants you to open the tap. Sometimes the lawyer on the other side is just fishing. An open-ended question followed by silence can be enough to induce a gregarious or simply nervous witness to just keeping talking, providing long and unfocused answers, and giving the adversary the opportunity to fish for comments and admissions that help the plaintifff's case.

Instead, you should control the scope of your answer. Nervous attorneys will often tell their clients, "just answer the question and stop." I've also heard the advice given to just pick one of four possible answers ("Yes," "No," "I don't know," and "I don't remember"). While you need to use your own language (see #2 above), it remains true that you need to stick to just the question and not stray beyond it. Remember, it is a question, not a speech topic. Provide a brief answer in your own words, then stop.

4. Nonverbal Tone

Plaintiff's counsel wants to control your style. The deposition depends not just on what you say, but on how you say it. When videotaped, your tone sends its own message when it is defensive or uncertain. Even when the deposition room is camera-free, a testimony style that sounds less than confident sends an important message to opposing counsel saying, "This is a doctor I can push, and potentially score against during trial."

Instead, you should use your own style. The ideal bedside manner for a doctor in deposition is conversational style. That isn't to say that the deposition is like a conversation — it isn't. But when you listen to your own voice when in relaxed conversation, pay attention to the pauses, the emphasis, and the natural highs and lows of your voice in your natural register, and that is the sound that you should aim for in your deposition.

5. Visual Message

Plaintiff's counsel wants you to look uncomfortable. Just as with how you sound, how you look on the camera is important. Even when there is no camera, opposing counsel is still assessing how you'll come across on the stand. It is easily correctable, but too often it goes uncorrected and the

doctor looks cowed or irritated, or looks pushed back in the seat as if actually trying to disappear.

Instead, you should show your personal best. The rules sound like they're straight out of parochial school, but they work: Sit up straight, don't lean back, put your forearms on the table, fold your hands instead of kneading them, keep your face relaxed and pleasant, and give the questioner full and direct eye contact. Practice those behaviors and you'll look confident rather than defeated.

6. Conflict

Plaintiff's counsel wants a fight. The opposite of a defeated witness is an angry witness, and the plaintiff's attorney is honestly happy with either. When two professionals – a doctor and a lawyer, both highly trained and intellectually astute – face off across the deposition table, tempers can flare. Or the doctor might feel like outwitting the opponent counsel and winning in deposition. What is more likely is a loss of focus and witness credibility.

Instead, you should control your anger and competitive drive. It is best to remember that this is the lawyer's turf. Even though the case is about medicine, the strategy is about language and the law, and these are the lawyer's tools. Focus on answering the question and not on gamesmanship. Stay calm during your deposition, no matter the provocation. When you can't do that, ask for a break.

7. Pace

Plaintiff's counsel wants you to answer too quickly. One thing doctors are used to is multitasking: listening to a nurse's update while reviewing a chart and thinking about the next patient. In your practice, that ability to multitask helps you survive, but in deposition, it can spell doom. Nearly all bad answers in deposition can be traced to answering too quickly with too little reflection.

Instead, you should pause and think. Before opening your mouth to give an answer, it helps to do a few things: 1) a mental check to make sure you know what the question is; 2) a pause to retrieve the necessary information in your head and; 3) a final moment to put your answer into

words. Then you can speak. A pause does not diminish your credibility. Instead, for all questions that require recall or judgment, a pause shows that you are taking the question seriously.

8. Listening

Plaintiff's counsel wants a careless listener. Listening works differently in deposition. In real life, we are used to listening for key words or the 'gist' of what is meant. In depositions, on the other hand, the attorney's language tends to be very purposeful and precise. Doctors who respond to what they expect counsel to say, or answer the point that they think the attorney is getting to are the ones who get into trouble.

Instead, you should remember every word is important. Be overly literal. If the question is "Do you know what time it is?" the answer isn't "Eleven O'clock," it is "Yes." The acronym "EWII" or "Every Word is Important" should help you to remember to consider each question as it is specifically stated before you answer. Where it is unclear, ask for clarity. Where it is inaccurate, correct it.

9. Memory

Plaintiff's counsel wants you to forget or misremember. Memory can be tricky, especially when questions are asked about events that occurred years ago, or when it focuses on that one patient out of a thousand. Any deponent, including a doctor, can feel that pressure to be helpful by "remembering" something that isn't quite in one's conscious recall. The problem with the shaky reconstruction, though, is that it leads to inconsistency – a witness's quickest path to a loss of credibility.

Instead, you should stick with what you can recall. Early in the life cycle of your case, sit and take stock of what you do and don't remember, and stick with that. Also understand that what you know need not be supported by independent recollection, but can also be supported by records or by your pattern and practice.

10. Comfort

Plaintiff's counsel wants you to be uncertain. Ultimately, plaintiffs have a better case against a doctor who is uncomfortable with the legal process,

uncertain about how it works and what is expected. Owing to the natural fact that doctors make their living in medicine rather than law, that disconnect is predictable. But the job of the doctor's legal team is to minimize it.

Instead, you should be prepared. Putting these recommendations into practice takes work. It doesn't come naturally to very many witnesses. And why should it? A deposition is a pretty unnatural situation for any witness. But for a doctor who would much rather be back at work helping people instead of being grilled by a lawyer, it can be particularly galling. The answer is practice. When you meet with your attorney and your team, don't just talk about the deposition, practice it.

Of course, much of this advice applies in its own way to all deponents. Doctors in deposition need to focus on the same skills of clear and careful communication that a jury or judge would expect of any witness. For doctors, though, fact finders are also asking the additional question, "Would I trust this person to be my own doctor?" To get to a "yes" answer to that question, aim to convey three qualities:

- Confidence
- Competence
- Compassion

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