

Expert Witness Preparation: What Does the Literature Tell Us?

by Tess M.S. Neal

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Expert witnesses are retained to take the stand and share specialized knowledge with the court – specialized knowledge that may help the trier of fact make the decision they are charged to make. Naturally, expert witnesses (and the attorneys who retain them) want to appear confident and credible on the stand. However, expert witnesses are not necessarily experts at being witnesses (Brodsky, in press). Witness preparation scholar Stanley Brodsky suggests that expertise is situation-specific: an effective expert witness must prepare for the role of expert witness (in press). The rationale for expert witness preparation is supported in empirical research, which has found that experts who are less credible are less persuasive (Boccaccini, 2004; Boccaccini, Gordon, & Brodsky, 2004; Boccaccini, Gordon, & Brodsky, 2005). This article offers a thorough review of the research literature supporting expert witness preparation as a useful tool for effective expert witness communication at trial.

Most common methods of expert witness preparation.

One of the most common methods of expert witness preparation appears to be self-preparation. There are several books devoted to helping expert witnesses prepare themselves for testimony in court. Warren (1997), Lubet (1998), and Brodsky (1991, 1999, 2004) have all written texts specifically devoted to helping expert witnesses prepare themselves for court testimony. Dozens of other books target specific types of expert witness preparation. Gutheil's (1998) text targets psychiatrists, Blau's (2001) targets psychologists, and Ziskin's (1995) book targets psychiatrists and psychologists who will testify as expert witnesses. There are books written for sociologists who testify as expert witnesses (Jenkins & Kroll-Smith, 1996) and handbooks for mental health professionals as experts (Tsushima & Anderson, 1996). Experts in technical professions (e.g., engineers, chemists, computer analysts, etc.) may turn to Matson's (1990) or Smith and Bace's (2002) books for help in preparing themselves. Ceci and Hembrooke's (1998) edited book and Stern's (1997) book were written for expert witnesses to prepare themselves for testifying in child abuse litigation. There are also books written for both expert witnesses and the attorneys who are working to prepare them for testimony (Lubet, 1998; Stern, 1997).

Attorneys also work with expert witnesses to prepare them for testimony by reviewing, discussing, and sometimes modifying the testimony material with the witness (Applegate, 1989; Boccaccini, 2002). Attorneys have a vested interest in having the experts they retain appear credible and believable on the stand for maximum impact. An important distinction needs to be made between preparing an expert witness to be an effective testifier from preparing an expert witness's testimony. Clearly, untrue or misleading testimony is unethical and illegal; and it is unethical and illegal for attorneys to prepare a witness to deliver false or misleading testimony (American Bar Association, 2001, §1.2d & § 3.4b). The goal of expert witness preparation is to assist the expert in delivering the message he or she has to share in an effective and responsible manner. The following section presents an overview of suggestions and recommendations for effective witness preparation.

Elements of expert witness preparation.

In his 2002 review of the state of witness preparation, Boccaccini wrote that the techniques recommended by attorneys (Aron & Rosner, 1998; Beals, 1996; Berg, 1987; McElhaney, 1987; Selkirk, 1992), trial consultants (Anthony & Vinson, 1987), and forensic psychologists (Brodsky, Sparrow & Boccaccini, 1998; Nietzel & Dillehay, 1986) overlap to a large degree. From this review, he distilled three basic components of witness preparation: witness education, attorney education, and modification of testimony delivery.

Witness education. The witness education component consists of orienting the witness to the trial process and physical layout of the courtroom in addition to reviewing prior statements and the subject matter of testimony (Brodsky, 1991). These are important elements that prevent the witnesses from making contradictory statements and from appearing nervous or uncomfortable on the stand (Boccaccini, 2002; Brodsky, in press). Experts should also know what to expect during direct examination. Attorneys should review the actual statements witnesses have provided in previous statements (e.g., depositions, police statements) prior to testimony and try to anticipate the questions experts will be asked during direct examination (Beals, 1996; Brodsky, in press). Witnesses should also be physically familiar with the actual courtroom they will testify in prior to taking the stand (Brodsky, 1991; Brodsky, in press; Nietzel & Dillehay, 1986). Brodsky (in press) suggests that witnesses look for opportunities to view other experts testifying and to habituate to the courtroom atmosphere prior to testifying.



Attorney education. Attorney education consists of knowing the strong and weak points of the witness's testimony and becoming thoroughly familiar with the anticipated testimony to avoid surprises (Aron & Rosner, 1998; Brodsky, in press). Attorneys should interview and learn about each witness's case-related knowledge in full before deciding which witnesses to call to testify (Boccaccini, 2002).

Modification of testimony delivery. Modification of delivery may be the most important of the three components (Aron & Rosner, 1998; Berg, 1987; Brodsky, in press). Modification of testimony delivery includes working with witnesses to increase their testimony delivery skills, which includes any witness characteristics or behaviors the court will hear or see. The witness's physical appearance, demeanor, pace of speech, and confidence may all be targets for preparation (Boccaccini, 2002; Brodsky, in press; Smith & Malandro, 1985).

Boccaccini (2002) summarized the fundamental testifying skills witnesses should be equipped with in his review of the literature. He described the following question-answering and non-verbal behavior skills as fundamental for witnesses.

When *answering questions*, witnesses should:

- 1) always tell the truth,
- 2) listen carefully and then pause and take a breath before answering,
- 3) only answer the question that is asked,
- 4) avoid slang and jargon,
- 5) not memorize answers to anticipated questions,

- 6) speak loudly and clearly,
- 7) not argue with opposing counsel about the line of questioning,
- 8) understand that it is OK to ask for a question to be repeated or rephrased,
- 9) understand that it is necessary to say ‘no’ or ‘I don’t know’ rather than guessing on the witness stand, and
- 10) avoid qualifiers (e.g., ‘I think’ or ‘I guess’) and hesitation words (e.g., ‘uh’ or ‘um’) (p. 166).

Regarding *non-verbal behavior*, witnesses should

- 1) maintain good posture,
- 2) remember to look at the jury (but not stare) when testifying,
- 3) not look to the attorney for answers, and
- 4) use a moderate and natural number of mannerisms and gestures (p. 166).

Boccaccini (2002) also suggests that the witness should be asked, ‘How do you know when a person is believable?’ The witness should then be asked to evaluate their testimony using their own internal norms for believability (p. 166).

Brodsky (in press) suggests there are three elements of the witness modification portion of expert witness preparation. He writes about how he first reviews videotapes of past testimony or in-person testimonial practice by the witness to identify the weaknesses in the witness’s self-presentation. The second step is to give feedback to the witness, followed by behavioral rehearsals or role plays with additional directive feedback to correct the identified problems. His third step is to include an anxiety-reduction component. Brodsky advocates for teaching relaxation techniques – specifically breath control techniques – to help expert witnesses feel relaxed and prepared prior to and throughout testifying.

Regarding preparation for cross-examination, Brodsky (in press) recommends that witnesses think through the ways in which the expert’s credibility could be damaged. He draws from the Federal Rules of Evidence (FRE) criteria for the qualification of a witness as an expert in his systematic exploration of the kinds of questions expert witnesses might be asked on cross. He suggests that challenges to the expert’s knowledge, skill, experience, training, and education are likely, and that prepared experts will be more fully ready to answer questions aimed at these kinds of issues that could potentially diminish the expert’s credibility. In his other books, Brodsky (1991, 1999, 2004) gives specific suggestions for how such questions might be answered well. It should be pointed out that the substance of the expert’s testimony should also be prepared – this isn’t something the attorney can do for the witness, but it is certainly something the witness needs to be doing on his or her own (Brodsky, in press). If a witness is truly up-to-date and familiar with the state of the field and how the issues of the case are related to their professional expertise, he or she will be substantively prepared to handle cross-examination (Brodsky, in press).

Research with expert witness preparation implications.

Some literature has been published that is indirectly related but has relevance for expert witness preparation. O’Barr’s (1982) book described a series of studies conducted in the 1970s and early 1980s through the Law and Language Project at Duke University. The project focused on four styles of courtroom verbal communication: 1) powerful versus powerless speech, 2) narrative versus fragmented testimony, 3) hypercorrect speech, and 4) simultaneous speech. The researchers found that witnesses who used powerless speech (e.g., excessive politeness, hedges such as ‘kind of,’ intensifiers such as ‘very,’ and hesitation words such as ‘well’ or ‘um’) were perceived as less competent, intelligent, trustworthy, convincing, and truthful than witnesses employing powerful speech (e.g., the

absence of markers of powerless speech) (Erickson, Lind, Johnson, & O’Barr, 1978). Witnesses who testified in a narrative (e.g., descriptive and lengthier answers) style rather than a fragmented style were found to be more dynamic and competent (Lind, Erickson, Conley, & O’Barr, 1978). Hypercorrect speech (e.g., using words that are more formal than one would otherwise use) when employed by witnesses in testimony led mock jurors to perceive the witness as less competent, intelligent, convincing, and qualified than witnesses who did not use hypercorrect speech (O’Barr, 1982). Finally, O’Barr (1982) reported that witnesses were perceived as having more control than attorneys who spoke over them by accident or potentially on purpose during cross-examination. These collective findings suggest that expert witnesses should be prepared to employ more powerful speech, a narrative style of testimony, to avoid hypercorrect speech, and not to worry so much if they are interrupted during testimony.

In addition to these studies on verbal communication, studies have examined the impact of witnesses’ nonverbal communication styles. Nonverbal cues are an important aspect of communication and may convey more of one’s message than the actual words one uses (Mehrabian, 1981). Jurors may use information conveyed through nonverbal means (e.g., facial expressions, bodily gestures and posture, eye contact, and vocal cues) to make inferences about a witness’s emotions that may impact the way they perceive the witness’s credibility (Smith & Malandro, 1985). Studies show that witnesses who maintain eye contact with attorneys and the jury are perceived as more credible than witnesses who do not maintain eye contact (Hemsley & Doob, 1978; Neal & Brodsky, 2008). Other research finds that people (not specifically witnesses) who lean slightly forward but with a moderately relaxed posture, face in the general direction of their audience, shift their postures relatively infrequently, and use illustrator gestures (e.g., gestures that reinforce a verbal message such as pointing or shaking or nodding one’s head) are linked to more positive evaluations by others (Leathers, 1997). Frick (1985) found that speakers who end their sentences with a rise in pitch may communicate uncertainty and be perceived as less credible than speakers who avoid doing so. These findings suggest that expert witnesses should be instructed to attend to their nonverbal communication cues: specifically, they should maintain eye contact with their audience (including both the attorney and the jury or judge); they should have a relatively relaxed posture, lean forward slightly as they testify, avoid frequent posture shifts, and face in the direction of their audience; they should use illustrator gestures as appropriate; and they should avoid ending their sentences with a rise in pitch.

Anecdotal reports suggest that female expert witnesses are more likely than male experts to be asked personally intrusive questions (e.g., “Have you ever been raped?” or “Are you sexually attracted to the defendant?”). Larson (2008) researched gender-intrusive questioning of both male and female experts to see how their responses to such questions affected mock jurors’ credibility ratings. She found that male and female experts were rated more positively in the gender-intrusive questioning conditions than in non-intrusive conditions. Further, she found that experts who responded assertively to the intrusive questioning were rated as more credible than experts who became defensive or passive.

Assertive responses included pointing out the inappropriateness of the questions, that the questions were intruding unnecessarily into the privacy of the expert, and that such questions targeted personal opinions or experiences and had nothing to do with the professional conclusions the expert was offering to the court. Other research supports that jurors perceive as credible assertiveness on the part of both male and female expert witnesses. For instance, Neal and Brodsky (2008) found that both men and women expert witnesses who maintained high levels of eye contact with the questioning attorney and/or mock jurors were rated as more credible than experts who didn’t maintain high levels of eye contact. The implications for expert witness preparation are that women and men expert witnesses should not be



defensive or passive when asked intrusive questions, but rather appropriately assertive. Additionally, expert witnesses should be sure to maintain high levels of eye contact with the attorney and the jury.

Expert witness credibility is linked to the persuasiveness of the expert (Boccaccini, 2004; Boccaccini, Gordon, & Brodsky, 2004; Boccaccini, Gordon, & Brodsky, 2005). A series of studies has found support for the assertion that credible expert testimony is characterized by knowledge, confidence, trustworthiness, and likability. Griffin, Brodsky, Blackwood, Abboud, Flannagan, and Bradsell (2005) developed a specific and quantified scale to measure the perceived credibility of an expert witness. The reliable 20-item Expert Witness Credibility Scale (alpha = .945), has four empirically derived subscales: knowledge, confidence, trustworthiness, and likability. Additional studies have begun to examine the four components of expert witness credibility separately. Cramer (2005) manipulated expert witness confidence, finding that witnesses with moderate levels of confidence were more credible than experts with “too high” or “too low” confidence. Brodsky, Neal, Cramer, and Ziemke (In press) manipulated the likability of expert witnesses, finding that experts who were more likable were perceived as more credible than experts who were less likable. The knowledge and trustworthiness components of expert witness credibility still require further investigation. However, findings thus far suggest that experts with very high confidence may come across as arrogant and should be prepared to testify with less off-putting overconfidence, and experts with low confidence who might come across as nervous or deceptive should be prepared so they feel more comfortable with their role. Experts should also work to be likable on the stand (e.g., avoid using jargon, smile when appropriate, use inclusive terms such as “we” and “us,” maintain an open posture, etc.).

These recommended techniques and other related research for witness preparation are available in the published literature, but Boccaccini (2002) noted that the methods by which (or the effectiveness of which) attorneys *actually* prepare witnesses are largely unavailable in published literature. He pointed out the several reasons this may be the case, including proprietary protection, practical limitations of investigation, the fact that the people who do witness preparation are generally not researchers, and that ethical concerns may be an issue. He argued for more empirical research on the methods and effectiveness of witness preparation. Thus, the rest of this article focuses on that body of work. Importantly, no studies that examined empirical support for methods of witness preparation specific to *expert* witnesses are available – rather, the body of work represents witness preparation more generally.

Empirically supported methods of witness preparation.

Only two empirical studies examining the effectiveness of witness preparation were published prior to Boccaccini’s (2002) call for more research. Neither of these studies examined *expert* witness preparation – rather, each had to do with the preparation of *eyewitnesses*. Nevertheless, each study found that “prepared” witnesses differed from “non-prepared” witnesses, which had a positive impact on mock juror perceptions of the witnesses’ credibility and persuasiveness (Spanos, Quigley, Gwynn, Glatt, & Perlini, 1991; Wells, Ferguson, & Lindsay, 1981).

Boccaccini (2004) developed a model for preparing witnesses called Persuasion Through Witness Preparation (PTWP). The PTWP model addresses 11 specific, behavioral elements of witness behavior as targets for preparation (please refer to Boccaccini, Gordon, & Brodsky, 2005 for more information). The 11 witness behaviors included 1) poor posture, 2) fidgeting, 3) expressiveness, 4) gaze, 5) voice quality, 6) response quality, 7) contempt, 8) other individual items, 9) general credibility, 10) confidence, and 11) emotion.

To test hypotheses about the effects of witness preparation, Boccaccini, Gordon, and Brodsky (2004, 2005) had mock criminal defendants testify twice about things they had actually been accused of at some point in their lives. They provided witness preparation to only half of the mock defendants after their first testimony. The witness preparation consisted of improving posture, reducing hand fidgeting, improving the clarity of responses, reducing

guesses, improving phrasing, reducing nervous smiling, increasing illustrator gestures, and reducing inappropriate facial expressions of anger and contempt. The findings revealed that only the witnesses who participated in witness preparation were more confident about testifying (Boccaccini, Gordon, & Brodsky, 2004). Participants in both the prepared and unprepared conditions felt less nervous over time, which suggests that testimony simulations, even without targeted witness preparation, may be important for nervousness reduction (Boccaccini, Gordon, & Brodsky, 2004). Prepared mock defendants were seen as using more effective testimony delivery skills, less likely to be guilty, and more credible than unprepared mock defendants (Boccaccini, Gordon, & Brodsky, 2005). In a second study, Boccaccini, Gordon, and Brodsky (2005) found that trained evaluators perceived public defender clients who underwent witness preparation as having higher testimony delivery skills, better overall testimony quality, and lower apparent guilt.

Summary and Conclusions

If expert witnesses are prepared for testimony, it is generally through self preparation (e.g., reading books written to help experts prepare themselves for testimony) or by attorney preparation of the witness. When attorneys or trial consultants work to prepare witnesses, the three basic components of the preparation include witness education (e.g., reviewing prior statements and orientation to court processes), attorney education (e.g., becoming familiar with the witness's testimony), and modification of testimony delivery, which may include working with the witness on their communication skills, courtroom demeanor, confidence, and physical appearance.

There are few published studies that specifically explore and evaluate the methods or effectiveness of witness preparation. Research on verbal and nonverbal communication suggests witnesses should speak powerfully in a narrative style and avoid hypercorrect speech in addition to attending to their nonverbal cues. Nonverbally, witnesses should maintain eye contact, have a moderately relaxed posture, lean forward slightly, avoid frequent posture shifts, and avoid ending their sentences with a rise in pitch. Other research conducted with expert witnesses suggests assertiveness is appropriate, particularly when intrusive questions are asked. A series of studies has found empirical support for the assertion that credible expert testimony is characterized by knowledge, confidence, trustworthiness, and likeability on part of the witness.

Research has only begun to explore how and why particular methods of witness preparation work. Boccaccini's Persuasion Through Witness Preparation model proposes 11 specific, behavioral elements of witness behavior should be targets for preparation (Boccaccini et al., 2004, 2005). He and his colleagues have begun to explore the effects of witness preparation methods, finding in general that witness preparation leads to greater witness confidence, credibility, and persuasiveness. Future research will continue to investigate methods and effectiveness of witness preparation.

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Welcome to our March issue of *The Jury Expert*!

As spring moves in and brings new life to the world around us, so this issue of *TJE* is packed with new ideas and energy. Some ideas you may find to be things of beauty, others may make you go ‘hmmmm’, and still others may make you wrinkle your face with disgust. Our hope is that every article in *The Jury Expert* elicits some response in you--agreement, disagreement, aha moments, and yes, even disgust!

This issue is filled with contributions from ASTC member trial consultants and from the academics who actually perform the research upon which much of what we, as trial consultants, do is based. Flip through the pages of this pdf file or travel about on-line at our website and view all of *TJE* on the [web](#).

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-- [Rita R. Handrich, PhD](#)
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