Witness training: it's an ethical thing to do

Nikki Pender suggests witness training is not necessarily a bad thing

An article in the last Bar Association newsletter[1] highlighted a recent New South Wales Court of Appeal case in which the court criticised the defendant's solicitors for engaging in unacceptable witness coaching[2]. The solicitors had sent letters to all witnesses outlining the evidenced they were expected to give, held a teleconference here the evidence to be given was discussed and had pre-trial meetings with the witnesses. The Court of Appeal found this preparation process to be improper and referred the solicitors concerned to the Legal Services Commissioner for further investigation[3].

While the decision is a timely reminder on the bounds of preparing witnesses, we must also be careful not to weight the scales too heavily the other way. After all, it's one thing to tell a witness what to day but quite another to help them say what it is they have to say.

Death by public speaking

As lawyers, we're accustomed to standing up in a formal situation and speaking to a stern, and possibly hostile, audience. That's our job. But, for the most part, our clients and witnesses aren't used to it; for many it's a frightening prospect.

Comic genius, Jerry Seinfeld puts it this way: "According to most studies, people's number one fear is public speaking. Number two is death. This means to the average preson, if you go to a funeral, you're better off in the casket than doing the eulogy."

Doing the eulogy or making a business presentation could be a walk in the park compared with giving evidence in court and undergoing cross-examination. There's a rapidly developing area of human and biological science commonly known as emotional management or Emotional Intelligence (EI) theory[4]. An underlying principle of EI is that the human brain is fundamentally a network of connections wired to ensure survival. In prehistoric times when someone faced a life-threatening situation the brain would flood their body with stress chemicals and hormones, triggering a physical response colloquially called the fight or flight

reaction. These days, the challenges we face tend to be more psychological than physical but the brain still sends out the same signals.

When they can't react physically, people will express the reaction emotionally: they may cry, become angry, rude or confused. When we are emotional the frontal lobes of the brain (those responsible for reason, planning, forethought, etc), are overrun by the older parts of the brain and we are less able to be rational, considered and controlled in our responses. It's like an emotional sabotage, working at an unconscious level.

A lack of awareness about our emotional states can also cause a disconnection between what we say and how we say it. This helps explain why some witnesses can appear incongruous: they may attempt to mask anxiety with false bravado, or put on a "happy face" while testifying about something that's not remotely cheerful.

The unreliability of reliability assessments

How reliable a judge or jury believes our witnesses to be is critical: not only can it determine the outcome of a case, but often there is little remedy available on appeal, with appellate courts traditionally reluctant to meddle with credibility findings[5].

In court, we put great store by being able to assess the reliability of a witness through observing their behaviour. Yet this may not be the best way of getting to the truth. In an article in the December 1983 Australian Law Journal[6], Loretta Re cited clinical studies dating back to the 1920s that have consistently shown that a person's demeanour is not a good indicator of honesty. Participants in the studies could not usually determine the value of a witness' statement from their non-verbal behaviour.

Lord Devlin once said[7]:

> *The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is overrated … I would adopt in their entirety the words of Mr Justice MacKenna:*
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> > I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability and sometimes that of other judges, to

> discern from a witness' demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected or is he taking time to fabricate? Is the empathetic witness putting on an act to deceive me, or is he speaking from the fullness of his heart knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity?

Justice Kirby has also been vocally sceptical about the ability of judges and jurors to assess credibility simply on the basis of how a witness performs when giving evidence. He once rebuked a lower court for "turning the court's process into one of punishing the respondent for her forensic performance instead of evaluating the objective testimony in the context of all of the evidence called at the trial.[8]"

Unfortunately not all of us are as circumspect as Lord Devlin and Justices MacKenna and Kirby. Jurors in particular are likely to rely on body language cues to establish the credibility of a witness. So, when faced with a witness who appears confuse, who mumbles, who looks at the floor and sweats profusely, the risk is that they will write him or her off as an inveterate liar, rather than an honest person stressed by their surroundings.

Justice is truth in action

So how can we ensure witnesses perform to the best of their ability? EI research shows that people with more knowledge of their emotional nature are able to slow down or minimise their emotional responses. They can then stay in control, even under extreme pressure. As an example. When someone admits being nervous about giving evidence or is worried that they'll get it wrong, they can then focus on practical ways of coping with their anxiety.

People can learn to recognise their body's response to stress and manage them. There are techniques that can be taught for handling the physiological reactions as well as the psychological.

And on a more simple level, we can educate witnesses in courtroom procedures. We can show them what to expect, we can let them experience the process before they enter the court. We can diminish their anxiety levels and allow them to concentrate on the job they have to do.

That other comic genius, William Shakespeare, once wrote: "…*truth will come to light; murder cannot be hid long; a man's son may, but at the length truth will out*."[9] A witness may know the truth but find the courtroom situation so overpowering that they can't tell it; in which case, the truth may not out.

Witnesses should not be sent into the courtroom fray ill-prepared and defenceless. Witnesses do need some coaching, not of the type that the NSW Court of Appeal came down so hard on, but training that focuses on improving the way they communicate their responses. It empowers, rather than diminishes, preparing witnesses for the rigours of cross-examination and allowing them to give evidence with confidence and congruence.

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[1] "*Witness Coaching earns sharp rebuke from NSW Court of Appeal*" Bar Association newsletter March 2006

[2] *Day* v *Perisher Blue Pty Ltd* [2005] NSWCA 110 (11 April 2005)

[3] *Day* v *Perisher Blue Pty Ltd (no 2)* [2005] NSWCA 125 (20 April 2005)

[4] For background on EI, Daniel Golemans' extensive research (www.eiconsoritum.org) and more recent research on our ability to control emotional reactions from the Univeristy of Wisocsn, Dr Richard Davidson (http://brainimaging.waisman.wisc.edu) - recently recognised by Time magazine as one of the 100 most influential people.

[5] Eg *Rae* v *International Insurance Brokers Ltd* [1998] 3 NZLR 190

[6] The Australian Law Journal Vol 57 (December 1983) 680

[7] Lord Devlin, *The Judge* (1979) 63

[8] *State Rail Authority of New South Wales* v *Earthline* (as above); Justice Kirby: *Judging, Reflection on the Moment of Decision* TJR, vol 4, 1999, p 189; Whisprun Pty Ltd

[9] *The Merchant of Venice*, II:2