


INTRODUCTION

In civil litigation, defendants or key defense witnesses exhibiting lingering negative thinking patterns can spell economic and strategic trouble for defense counsel. Witnesses who employ negative thinking patterns can torpedo defense counsel's best efforts during witness preparation, leading to major headaches for the defense team and client. When important witnesses engage in cognitive distortions (i.e., exaggerated or irrational thought patterns that cause individuals to perceive reality inaccurately) it can impair their mental health status, distract them from effective case preparation, and ruin their subsequent deposition and/or trial testimony.

Weak or harmful deposition testimony widens the gap between the real and perceived economic value of a case, putting a client in an unfavorable position during settlement negotiations. Specifically, poor witness testimony often leads to higher settlement values that are not economically reasonable for the defense, otherwise known as "nuclear settlements." Damaging deposition testimony, particularly video-taped testimony, can plague a defendant during both mediation and trial. Moreover, damaging deposition testimony could haunt deponents in future litigation.

At trial, ineffective testimony can anger jurors and lead to "nuclear verdicts," which can cause serious damage to a corporation's reputation and financial stability. In fact, research from mock trial studies and post-trial juror interviews suggests unequivocally that witness performance is the leading determinant of verdict and damage awards ("Nuclear Verdicts: Old Wine, New Bottles", For the Defense, Kanasky & Speckart, April 2020). The purpose of this article is to outline the 13 cognitive distortions that are crippling defense witnesses' testimony and provide solutions for addressing these errors.



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1. POLARIZED THINKING

This type of thinking occurs when witnesses feel the need to be "Mr./Mrs. Perfect" in their testimony, otherwise they see themselves as a complete failure. This type of thinking is very common with high level executives and corporate representatives, who often irrationally believe that if their testimony has any flaws, the case will be lost and that they will be fully responsible.

One of the best ways we have found to address this type of thinking is to try and alleviate witnesses' concerns about the case "resting on their shoulders." First, witnesses need to understand they are only one piece of a much larger puzzle – even CEOs. There are other witnesses, primarily experts, who will be tasked with "carrying the water" these witnesses believe they must carry. Second, witnesses must understand that there has never been, and never will be, a perfect deposition. A "good" deposition is one in which witnesses reduce the number and severity of their errors. Third, witnesses must understand that striving for perfection can adversely affect their deposition. More specifically, if they ruminate on the minor errors they are making during the deposition, they will begin dividing their cognitive resources between listening to the question being posed and worrying about their last response. Before they know it, the minor mistakes become major ones, and the exact thing they were hoping to avoid has come to fruition.



2. MENTAL FILTERING

This type of thinking is when witnesses exclusively focus on the negatives of the case (i.e., bad facts) and filter out any positive facts. In other words, they magnify negative details and refuse to accept any positive aspects of the case. This cognitive tendency is very common with first-time deponents who are new to litigation and experience high levels of case-related fear and anxiety.

Shifting the focus away from the negative details and onto the positive ones is an effective way to address this cognitive distortion. If needed, counsel can write out a list on a whiteboard with headings that indicate “negatives” and “positives.” Then, attorneys and witnesses can work together to fill out the list. By the time this exercise is complete, the witnesses will likely see more items on the “positive” side than the “negative” side.



3. OVERGENERALIZATION

This type of thinking happens when witnesses focus on a single negative event from the past and draw an extreme conclusion that all other events in the future will be negative. This is common in two circumstances: (1) when witnesses' deposition performance was poor, they will automatically assume their trial testimony will also be poor; and (2) when witnesses have testified in other cases in which there was an adverse outcome, and they assume the current case will have a similar outcome.

An effective approach to addressing this cognitive distortion is working with witnesses on cognitive reframing. To do this, witnesses should be challenged on their negative beliefs. For example, a witness could be asked, “Where are these negative thoughts coming from?” “Why do you believe they are accurate?” “What proof do you have that what occurred in the past will occur again in the future?” The key factor in this exercise is getting witnesses to understand that they cannot change the past, but that does not mean they cannot write their own future. With hard work, better focus, and better preparation, the mistakes that were made in the past do not have to be repeated.



4. JUMPING TO CONCLUSIONS

This type of thinking happens when witnesses are convinced that they or the company is “screwed” and believe there is no chance at obtaining a favorable trial verdict or settlement. These witnesses evade or downplay witness preparation and training efforts as they feel it is a waste of time, and the case is a sure “loser.”

First and foremost, witnesses need to understand that the case is not necessarily a “loser.” While there may be some bad facts, and compensation may be owed to the plaintiff, this does not necessarily mean the witnesses should throw in the towel. More likely than not, plaintiff counsel is demanding an amount that is significantly higher than the defendant believes is reasonable. If the witnesses take the deposition preparation and process seriously, then the case could be settled or tried for a more reasonable amount. However, blowing off the deposition preparation and “phoning in” the deposition can assist plaintiff counsel in receiving their requested damage amounts.



5. CATASTROPHIZING

This occurs when witnesses over-exaggerate the value of negative facts in the case, which leads to extreme anxiety. These witnesses minimize any positive aspects of the case and only focus on an exaggerated worst-case scenario (“If I don’t testify effectively, I will lose my job,” etc.).

A similar approach to the one discussed in the Mental Filtering section (i.e., shifting focus away from the negative details and onto the positive ones) can be used to address the Catastrophizing cognitive distortion. Additionally, exaggerated concerns related to a worst-case scenario can be alleviated by having a discussion with witnesses about what it would mean if they do not testify effectively. Does the attorney need the witness to be perfect? No, a perfect deposition does not exist. Will the witness lose his or her job over the deposition testimony? In almost all cases, the answer is no. Will it make the case more difficult to settle or defend at trial? Maybe, but it is unlikely the case will rise or fall based solely on the witness’s testimony.



6. PERSONALIZATION

This occurs when witnesses take the litigation very personally, forgetting that plaintiff’s counsel is primarily focused on money. These witnesses assume that the plaintiff attorney or plaintiff themselves are specifically targeting them, or that the company is not supporting them enough in the defense of the case.

One of the best approaches we have found to addressing this cognitive distortion is to allow witnesses to dump their emotions prior to beginning the deposition training. They should be told that their anger, frustration, fear, etc. are normal responses to the litigation process. They should also be told that the case, while it may feel like a personal attack, is almost always about money. If the witnesses take it personally, become argumentative, or attempt to defend their conduct, the plaintiff will likely succeed in their efforts to obtain money. Moreover, the plaintiff will likely succeed in their efforts of harming the witnesses’ credibility and reputation. Witnesses need to be told multiple times that the momentary outburst that is intended to score points is merely “winning the battle but losing the war.”



7. BLAMING

This occurs when witnesses refuse to take any responsibility for their own actions or decisions, and instead blame others at the company or even the plaintiff.

This cognitive distortion can become extremely problematic for two primary reasons. First, there are few things in a deposition that can inflame opposing counsel and jurors more than witnesses who point the finger at a plaintiff who has suffered a catastrophic injury. While the plaintiff may be at fault, witnesses must understand that there are expert witnesses who will make that assertion. Once again, witnesses must understand that blaming the plaintiff is not a burden they need to carry, nor is it a burden the defense attorney wants them to carry.

The second reason blaming can be problematic is because it plays right into the plaintiffs’ hands. Opposing counsel would love nothing more than witnesses who are pointing fingers at one another. There are also few things that jurors detest more than witnesses who appear to be blaming others to “save their own skin.” We have seen in our mock trials and focus groups that finger pointing by witnesses is a crucial factor in nuclear verdicts.



8. LABELING

This occurs when witnesses assign a judgment to themselves based on one negative incident, instead of recognizing that no one is perfect, and that people can make honest mistakes. This label is usually exaggerated and solely based on a single event. These witnesses say things like “I’m an idiot; I’m a terrible person; I’m totally incompetent,” etc.

One of the best ways to help witnesses overcome this cognitive distortion is by explaining that in litigation there is often a stark difference between the plaintiff and defense’s idea of “truth.” In a deposition, plaintiff counsel is attempting to push forward “their truth” and not necessarily “the truth” or “the whole truth.” Taking this argument one step further, witnesses must understand that just because plaintiff counsel believes a witness made a mistake, does not make it true. Just because plaintiff counsel believes that another action should have been taken, does not make the action that was taken inappropriate. Finally, just because plaintiff counsel does not like a witness’s response, does not mean the response is any less truthful, genuine, or accurate.

Another approach that can be taken to help witnesses who are criticizing themselves for their actions is to support them and show that the negative label is inappropriate. For example, we have told witnesses prior to deposition training that, “No one in this room believes that you did anything wrong. No one in this room is blaming you for what happened. No one in this room believes that you are incompetent at your job. In fact, we are going to have two expert witnesses who will testify that your actions were reasonable and appropriate.” Ultimately, this goes to the idea of attorneys creating an open and trusting relationship with witnesses.

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9. ALWAYS BEING RIGHT

This occurs when witnesses have the emotional need to always be right and/or to have an answer for everything. This is another thinking pattern often exhibited by high-level executives, physicians, supervisors, and CEOs.


Witnesses need to be told that it is OK for them not to know the answer to every question. Even when plaintiff counsel challenges the witness by stating something like, “You are the CEO of this company. You are telling me you don’t know the answer to this question?” If the honest and accurate answer is “I don’t know,” then that is the answer. Witnesses need to be made aware of the dangers of speculating. Unlike normal everyday conversations where most individuals will allow us leeway in being 90% accurate with our words, plaintiff counsel will not allow a deponent such leeway. If the answer is only 90% accurate, plaintiff counsel will pounce on the 10% inaccuracy and may use it to impugn the witness’s credibility, confuse the witness, or extend the deposition by creating a new line of questioning. Witnesses must strive for 100% accuracy in their words and avoid speculation.



10. SHOULD STATEMENTS

This occurs when witnesses fall into the trap of second guessing themselves regarding past conduct or decisions. Also known as “Monday morning quarterbacking,” witnesses admit they “should have” done something different, better, safer, faster, etc. This tendency can be perilous, as skilled plaintiff attorneys can manipulate witnesses into admitting liability. Even worse, witnesses may also admit that a different decision or course of action would have led to a more favorable outcome.

There is a cognitive fallacy known as hindsight bias where individuals falsely believe past events were more predictable than they actually were. While plaintiff counsel would like witnesses (and jurors) to agree with this fallacy, witnesses must understand that decisions are not made in a vacuum, nor are they made with the benefit of hindsight. Decisions are made in the moment, with the information available at the time. Witnesses need to be reminded that had they ordered that one more test, had they acted three minutes quicker, had they checked their side mirror one more time, etc. there is no guarantee the outcome would have been different, regardless of what plaintiff counsel would have them believe.



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11. EMOTIONAL REASONING

This occurs when witnesses’ emotional thinking replaces their logical thinking. This is also called “Amygdala Hijack,” which is when the brain’s sympathetic nervous system (i.e., the fight or flight response) overtakes the parasympathetic nervous system (i.e., logical and rational thinking). Witnesses who adopt this thinking pattern become very defensive and argumentative, or they attempt to explain their decision-making with long-winded responses.

As we have previously stated, witnesses need to be allowed to “dump their emotions” during deposition preparation sessions. This means starting the session by talking with witnesses about how they are feeling about giving their deposition, how they are feeling about being named in the lawsuit (if applicable), and any other aspects of the process they may be apprehensive or upset about. There have been countless times we have worked with witnesses and uncovered emotional triggers that counsel was never aware of.

Addressing witnesses’ emotions has at least three advantages. First, it allows them to get their emotions out in a safe space, so they do not emerge during the deposition. Second, it alerts their attorneys to potential “hot button” issues the attorneys may have never considered. Third, it helps to build trust and rapport between the witnesses and attorneys.

Witnesses also need to understand that they must “eat the bad facts.” They are facts – they cannot be run from, they cannot be spun, and no amount of “yeah, but...” responses will convince plaintiff counsel the witnesses acted appropriately. In addition, just because plaintiff counsel uses a tone or inflection in their voice to suggest the witnesses should be ashamed of their behavior does not mean it is so. Witnesses need to feel confident in their actions and have the mindset of, “I stand by my decision and would make the same one 100 times over, given the information and circumstances I had at the time.”



12. CONTROL FALLACIES

This occurs when witnesses believe they have no control over the testimony process and that they are a helpless “leaf blowing around in the wind.” These witnesses feel powerless during testimony and often assume a submissive role in the question-and-answer interaction.

Witnesses need to understand that they are the ones in control of the deposition process, not opposing counsel. Specifically, witnesses are in control of: (1) their emotions; (2) the length of time between when the question was asked and when the answer is delivered; (3) when a break can occur (as long as a question is not pending); (4) whether they agree with the terminology used by opposing counsel; and (5) whether “it depends” (or some variation) is a more appropriate and truthful response than “yes/no,” despite opposing counsel’s insistence it is a “yes/no” question.



13. FALLACY OF FAIRNESS

This occurs when witnesses believe the lawsuit isn’t “fair,” which leads to intense feelings of anger and resentment. Many defendants state that they are good people, who haven’t intentionally hurt anyone, have positively contributed to society, and feel that a lawsuit against them is fundamentally “wrong.”

To alleviate these concerns, attorneys must empathize with witnesses that the lawsuit is not fair. However, the witnesses must understand whether the lawsuit is fair or not will not make it go away. What can help resolve it is giving an effective deposition that forces opposing counsel to reconsider their settlement or trial strategy.

CONCLUSION

Cognitive distortions are exaggerated or irrational thought patterns that can cause your witnesses to perceive reality erroneously, thus negatively impacting the effectiveness of their testimony and increasing economic exposure in the case. Defense counsel can prevent cognitive distortions from turning into nuclear settlements and verdicts in four ways. First, they can educate themselves about the common cognitive distortions that witnesses experience. Most people are unaware that these common thought patterns exist, and awareness is the first step toward prevention.

Second, defense counsel should bolster their efforts to assess witnesses from a more psychological angle rather than a strategic angle. Spend more time gaining knowledge about HOW your witness thinks, not just WHAT they think.

Third, if you observe your witness struggling with one or more cognitive distortions, be prepared to intervene by helping the witness reframe their thoughts into positive and/or more realistic ones. Give your witness a different perspective, perhaps citing other cases and experiences you’ve had, to help them perceive their situation in a more realistic way.

Fourth, defense counsel can retain a non-testifying expert with advanced training in neuropsychology, cognition, and emotion to assist them with witness preparation efforts. Accurately assessing neurocognitive patterns and effectively applying interventions to your witness is not a simple task. This is particularly the case when your witness experiences multiple cognitive distortions simultaneously. Leveraging the expertise of a neuropsychology expert provides your witness with a trained resource to help them address their cognitive distortions before they cause irreparable damage to your case.