

# Witness Credibility in the Age of Video Conferencing Trials

by Hon. Jesse G. Reyes

Demeanor is often used as part of the evidence probative of a witness's credibility. In fact, the United States Supreme Court has held it is appropriate for the trier of fact to judge a witness "by his demeanor upon the stand and the manner in which he gives his testimony is worthy of belief."<sup>1</sup>

In *People vs. Unger*,<sup>2</sup> Clarence Darrow represented Francis Brown, one of the co-conspirators who were alleged to have participated in an insurance fraud scheme against New York Life Insurance Company. An observer at the trial later described one of the prosecution's key witnesses with a rather unappealing appearance in the following manner:<sup>3</sup>

"He was a squat, heavy-set man of medium height...His swollen face, bleary eyes, puffy eyelids, and reddish-purple nose marked the habitual drunkard. His shaggy...hair had been stranger to brush or comb so long as to have become tangled and matted. His clothes...were covered with dirt and grease. His huge hands...were covered with grime."<sup>4</sup>

On cross-examination, Darrow asked no questions of the witness. He merely requested that the witness stand up and turn around for the jury. Darrow's follow up statement to his request was concise and effective: "That's all. I just wanted the jury to get a good look at you."<sup>5</sup>

As Darrow's example demonstrates, assessment of demeanor on many occasions depends upon direct observation of the witness; a lesson which is more poignant today than ever in this new arena of litigation involving video conferencing. While some jurisdictions are slowly coming to grips with this technology as a means of conducting the court's business, others, like Illinois, have forged ahead. In fact, some courts have already delineated the responsibilities of counsel as it pertains to the presentation of a witness, so that the court may be able to view and judge the credibility of the witness.<sup>6</sup>

While some members of the judiciary are still becoming accustomed to this new method of proceeding with trials and hearings, others feel video conferencing allows them to truly assess a witness' credibility since they are making prolonged "eye-to-eye" contact. This is often achieved on a large computer screen sitting directly in front of the trier of fact. This format also allows for fewer distractions and more focused attention on the witness than in a traditional courtroom. When utilizing this method of presenting a case, the responsibility falls on counsel to prepare the witness for the "eye-to-eye" contact in the virtual courtroom.

Without question, in preparing a witness for trial, one of the primary concerns of a litigator is to ensure that your witness effectively conveys credibility. Though that same concern is present when preparing a witness to testify in a traditional courtroom, achieving the same result in a videoconference proceeding poses very different challenges. The following are suggestions counsel may want to consider.

Counsel should not only thoroughly prepare his or her client, but should also take the time to practice with all potential witnesses to ensure everyone understands the procedures and the technical requirements involved in participating in a videoconference proceeding. One should practice utilizing the video conferencing technology as much as needed beforehand, just as you would in an onsite trial "war room."

Counsel will also need to find the right setting from where the video conferencing will occur. Ensure that the witness' location will be devoid of external distractions, heavy shadow-inducing backlighting, or poor acoustics. Also, test your setup with each witness so that you may address any issues with internet connections.

Counsel, accordingly, should assist each witness in tailoring their communication skills specifically for the videoconference. For example, counsel should advise the witness to look directly into the camera while speaking. This will create a more direct presentation for the viewers. During videoconferences, many people have a tendency to focus on the other participants or on their own faces in the video display rather than looking into the camera, which may give the wrong impression of the witness being disinterested or distracted.

In many instances, the witness may need assistance in finding their voice.

Since most witnesses will be sitting in the comfort of their home, they may be tempted to speak in a soft, conversational voice. Therefore, prior to testifying, the witness should practice articulating loudly and clearly to overcome any potential technical problems with the audio. This will ensure that the full content of the testimony is heard and will prevent the answers from trailing off or appearing to waver in and out, which could be interpreted as conveying a lack of confidence or nervousness. Conversely, a loud witness may come across as overly aggressive or arrogant. Also, in terms of communication, if your witness has a tendency of speaking with their hands, have them practice keeping hand gestures in the video frame when necessary, but also keep in mind that unnecessary hand movements or gestures may be distracting or may even block the camera.

Lastly, as with any appearance in a court of law, whether in a physical structure or on a computer screen, a witness should dress neatly and professionally and maintain an attentive posture. The witness also should pause after being asked a question before responding, this is particularly important when on video due to the common lag that occurs within video transmission. Rehearsing the question and answer format with your witness is always a good idea in order to avoid awkward interruptions during the actual videoconference trial.

The looming fear of the coronavirus is moving more and more courts to conduct the people's business via video conferencing. As this trend appears to be expanding, some judges and court officials believe it will become an important tool long after the pandemic is gone. Whether this mode of litigation continues or ceases, the trier of fact will always want to take a good look at your witness in determining the issue of credibility.

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<sup>1</sup> *Mattox vs. United States*, 156 U.S. 237, 242-243 (1895) & *Coy vs. Iowa*, 487 U.S. 1012 (1988)

<sup>2</sup> *People v. Unger*, Criminal Court of Cook County, Ill., No. 61606-A.

<sup>3</sup> Francis Xavier Busch, *Casebook Of The Curious And True 120* (1957).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Jo Daviess County, 15th Judicial Circuit, par. 22, (June 2, 2020)