

COMMON PRACTICE, BUT WHAT ARE THE RULES? AN ANALYSIS
OF THE WITNESS PREPARATION PROCESS AS REPORTED
BY TRIAL CONSULTANTS

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A COMMON PRACTICE, BUT WHAT ARE THE RULES? AN ANALYSIS
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THESIS ABSTRACT
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This study explores the communicative behavior related to a crucial element of the trial process – witness testimony. Using a secondary analysis of data initially gathered by the American Society of Trial Consultants (ASTC), this study examines trial consultants' perceptions of the role of witness preparation in the litigation process, the goals trial consultants have for witness preparation, as well as the procedures and techniques used during the preparation process. The aim of this analysis is to increase our understanding of the scope of witness preparation practices in two ways. First, it addresses the extent to which

established communication techniques are incorporated into the witness preparation process. Second, it examines how the goals and procedures that are utilized reflect the standards and rules of both the American Bar Association (ABA) and the American Society of Trial Consultants (ASTC).

Overall, there appear to be three primary themes when discussing witness preparation: procedure, demeanor and/or psychological state, and content. The concept of witness credibility appears to be an important aspect of each theme. Furthermore, knowing what to expect is especially useful in stressful and anxiety-prone situations, such as those common to the courtroom. Similarly, results indicate anxiety reduction as a common goal for witness preparation and is most often reduced through witness education of the process and behavioral techniques such as performance visualization, skills training, and practice. However, preparation regarding the content of witness testimony appears to be an area of uncertainty especially as related to ethical practices. Results of this analysis suggest that additional information regarding standards and guidelines for witness preparation is needed to reduce the ambiguity surrounding the practice, as well as increase understanding as to what is acceptable and what is not.

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I. INTRODUCTION

Numerous legal commentators and social scientific researchers have noted the importance of effective communication in the legal setting (Condra & Hudson, 1996). Jacobson and Berger (1974) reasoned that applying communication theory to strategies used in the legal setting should result in positively influencing judgments of the guilt of innocence of a defendant, while Gibson (1991) argues that a number of communication theories and concepts can be applied to understand and explain the legal outcomes and behaviors. In fact, Gibson (1991) contends that “law and communication don’t just intersect -- certain legal processes hinge entirely on specific communication processes” (p. 37). Ultimately, the “goal of communication, whether in a legal setting or otherwise, is to be understood and believed” (Ramsey, 1999, p. 44).

Witness testimony is a vital part of the litigation process. The information provided through witness testimony not only aids in the development of a case, but also serves as evidence from which the verdict is decided (Fyfe, 2005; Schag, 2004). Plotkin (2005) explains that juror members have the option to either believe or disbelieve the testimony of a witness. In fact, negative perceptions developed about the witness could affect the way in which a juror or jury assesses the testimonial evidence, potentially affecting the case outcome (Salmi, 1999). As a result, Lubet (1997) suggests that “every trial ultimately rests on the shoulders of the witness” (p. 341). Therefore, instead of simply arriving at the courthouse and testifying about what they know, witnesses often meet with an attorney or a trial

consultant to prepare for their testimony and to improve its effectiveness (Applegate, 1989; Boccaccini, Gordon, & Brodsky, 2003). Due to its importance, witness preparation has become a common and often necessary part of preparing for trial.

This study explores the communicative behavior related to a crucial element of the trial process – witness testimony. Although witness testimony is arguably one of the most important elements of both criminal and civil trials, little research has addressed how witnesses are prepared for trial (Gershman, 2002). Thus, the goal of this thesis is to expand our knowledge of how attorneys, witnesses, and trial consultants view the witness preparation process, by examining trial consultant views of witness preparation. Using a secondary analysis of data initially gathered by the American Society of Trial Consultants (ASTC), I examine trial consultants' perceptions of the role of witness preparation in the litigation process, the goals trial consultants have for witness preparation, as well as the procedures and techniques used during the preparation process. The aim of this analysis is to increase our understanding of the scope of witness preparation practices in two ways. First, it addresses the extent to which established communication techniques are incorporated into the witness preparation process. Second, it examines how the goals and procedures that are utilized reflect the standards and rules of both the American Bar Association (ABA) and the American Society of Trial Consultants (ASTC).

Previous research relative to witness preparation and trial consulting is discussed in Chapter Two. Chapter Three features information regarding the methodology used in this study, including participants, research materials, and procedures. The results of data analysis

are presented in Chapter Four. Chapter Five concludes this thesis with a discussion of the key findings.

II. A REVIEW OF LITERATURE

This chapter provides an overview of previous literature relevant to the focus of this study. First, factors affecting witness credibility are discussed. Next, the controversy surrounding witness preparation is explored. Lastly, the need for research is described.

Factors Affecting Witness Credibility

Salmi (1999) notes that impressions formed about a witness have a strong effect on the way in which a juror or jury evaluates the testimonial evidence, potentially affecting the case. Impression formation, involves developing judgments based on the behavior and performance of communicators (Burgoon & Hoobler, 2002). Rieke (1990) explains that impression formation provides an efficient method of judging the qualities and character of another individual. In the legal setting, when deciding whether or not to believe witness testimony, Plotkin (2005) suggests that impressions of credibility are more influential than testimonial content. Overall, individuals tend to agree more with statements made by a high-credible source than a low-credible source (Tormala & Petty, 2004).

According to Rockwell and Hubbard (1999), credibility consists of judgments regarding the believability of a communicator. Rieke & Strutman (1990) explain that “credibility refers to the persuasive influence that results from the perceived characteristics of the communicator” (p. 116). Perception is a key component of credibility. As Reike & Strutman (1990) note, “a communicator is only as credible as others are willing to believe, no matter how objectively honest or competent that person might be” (Reike & Strutman, p.

116). Henningsen, Valde, and Davies (2005) explain that in trials, juries and judges are called upon to assess the credibility of individuals giving testimony.

Expertise & Trustworthiness

As any student of public speaking knows, expertise and trustworthiness are two primary components of credibility (Tormala & Petty, 2004). Expertise involves the perception that the individual has the knowledge, ability, and experience necessary to make correct claims, while trustworthiness refers to the perceived validity of the claim (Reike & Strutman, 1990; Sternthal, et al., 1978).

DeBono and Synder (1992) explain that source expertise becomes especially important when message recipients lack the motivation and ability to think critically about the content of a message. In such situations, expertise becomes a heuristic cue, or mental shortcut, used to determine the validity of the message. Ivkovic and Hans (2003) found that jurors tend to associate expertise, or increased knowledge in the area of interest, with credibility.

Liu and Leach (2001) note that if an individual is perceived as an expert, they often become a valued source of information. Research indicates that perceptions of expertise are indicators of trust, as individuals typically view experts as having specialized knowledge relevant to the situation at hand (Liu & Leach, 2001).

Reike & Strutman (1990) also suggest that an individual is viewed as being trustworthy when there appears to be no motive to lie or engage in deceptive behavior. In general, individuals who are perceived as more trustworthy and/or an expert tend to produce

more favorable and positive attitudes towards the message they are advocating (Hovland & Weiss, 1951; Lui & Standing, 1989; Tormala & Petty, 2004).

Consistency and Confidence

Additional factors commonly associated with witness credibility are testimonial consistency and confidence (Brewer & Burke, 2002; Kaplan, 1976; Tetterton & Warren, 2005; Wells, Lindsay, & Ferguson, 1979). Schelenker (1980) suggests that the appearance of consistency is generally viewed positively. Specifically, he (1980) argues that “consistency gives actors a desirable degree of predictability and trustworthiness, and it generates liking and respect” (p. 232). Tetterton and Warren (2005) note that individuals tend to rate highly confident testimonies as more believable.

However, research suggests that it is difficult to separate consistency and confidence when listening. For example, Brewer and Burke (2002) found that witness confidence has a strong impact on mock-juror judgments, regardless of testimonial consistency. Their research suggests that the level of confidence appears to mediate inconsistency in testimony. Specifically, the inconsistent statements are evaluated less negatively when they come from individuals who are perceived to be confident. Consistency does not appear to lead to more positive juror evaluations when statements are made by individuals who lack confidence.

Inconsistency can also have a negative effect on situational outcomes (Frank & Ekman, 2004; Schelinker, 1980). Reike & Strutman (1990) explain that individuals tend to have a set of expectations for courtroom behavior based on previous knowledge and experience. Violations of these expectations can affect receptivity of the message being communicated. However, violations can be either positive or negative. Reike & Strutman

(1990) explain that “when a communicator performs a behavior or uses language conforming more closely than anticipated to norms of appropriate communication, a positive expectancy violation occurs which facilitates persuasion” (p. 113). Overall, Ivkovic and Hans (2003) found that jurors tend to associate a consistent testimony with credibility.

Nonverbal Communication

Burgoon, Birk, and Pfau (1990) argue that “nonverbal behaviors exert their greatest influence indirectly by affecting source credibility which, in turn, affects persuasion” (p. 141). Similarly, Boccaccini (2002) explains that the manner in which a witness behaves and communications often has a strong impact on the evaluations made by the jury, as well as their subsequent deliberations. Increasing the effectiveness of testimony delivery is arguably the most important component of witness preparation (Applegate, 1989; Aron & Rosner, 1998; Boccaccini, 2002; DiBlasi, 1993). In fact, Wellborn (1991) suggests that judgments of credibility tend to be more accurate if individuals are able to view the demeanor of the witness than if they do not. Furthermore, due to the limited amount of time that the jury is exposed to a witness, impressions regarding credibility are commonly formed from the demeanor of the witness (Plotkin, 2005). Therefore, it is suggested that witnesses be frequently reminded during pretrial preparation about the imperative nature of first impressions and offered guidance regarding the manner with which they present themselves in court (Plotkin, 2005).

Plotkin (2005) advises attorneys to devote an equal amount of time, if not more, on the overall demeanor of a witness as on the actual content of their testimony. Preparation often involves providing a witness with information regarding his or her demeanor and what

the trial team believes the jurors perceive as honest or dishonest nonverbal behavior (Wellborn, 1991).

Aguinia, Simonsen, and Pierce (1998) explored that relationship between nonverbal behaviors and attributions. Results from their study indicate that relaxed facial expressions, in comparison to nervous ones, as well as direct eye contact increased rating on credibility. Kleinke (1986) explains that eye contact has an informational function that influences perceptions of credibility. Averting eye contact away from others is often viewed less credible than if eye contact was maintained. In the legal context, Moore (2005) note that making eye contact with jury members can have a positive affect by encouraging perceptions of sincerity. Individuals who are not sincere or attempting to be deceptive will often have less eye contact with their audience (Mehrabian, 1971).

Nonverbal elements of the voices are elements such as pitch, rhythm, and inflection that are apparent in the delivery of a message rather than the content (Pearce & Brommel, 1972). These vocal cues are also often associated with perceptions of pleasantness and effectiveness (Burgoon, Burke, and Pfau (1990). Pearce and Brommel (1972) note that communicators are often described as more trustworthy when their vocal delivery appears more conversational and natural. Pearce and Conklin (1971) explain that since vocal cues can influence perceptions of credibility, they should be considered an important component of oral communication. Mendoza, Hosch, Ponder, and Carrillo (2000) also recognize the impact of vocal communication on credibility reports of witnesses. They found that the prosecution witness' testimony was as not persuasive when powerless speech, such as hesitations and hedges, was used. Specifically, they reported a likelihood in defendant convictions.

Communication Apprehension

Kaufmann, Drevland, Wessel, Overskeid, and Magnussen (2003) note that perceptions of credibility are often affected by feelings and emotions displayed by the communicator. One common factor negatively affecting perceived communicator confidence is communication apprehension (McCroskey & Richmond, 1976). In fact, communication apprehension can have a negative affect on situational outcomes as cues typically associated with nervousness may also serve as indicators of deception (Henningesen, Valde, & Davies, 2005). For example, Feeley and Young (2000) found that individuals report using perceptions of nervousness to distinguish between truthful and deceptive statements. As a result, signs of communication apprehension often lead to perceptions of ineffective communication and/or lack of credibility.

Overall, higher levels of communication apprehension are generally associated with lower levels of perceived credibility (McCroskey & Richmond, 1976). For example, Cole and McCroskey (2003) found that supervisors who were viewed as apprehensive were perceived as far less credible than those who were less apprehensive. Employees were able to differentiate between supervisors who were shy or simply choosing not to talk and supervisors who were afraid to talk. Results from this study support the idea that reduced evaluations of credibility are associated with communication apprehension. As a result, individuals with low communication apprehension tend to be more influential and receive more positive character evaluations (McCroskey & Richmond, 1976). Thus, in the courtroom setting, prone to heightened apprehension, witnesses could inadvertently cause jurors to perceive them as lacking credibility when in actuality they are just nervous.

Schlenker and Leary (1982) explain that individuals experience increased anxiety in situations where they want to make a positive impression on others. Shaw and Zerr (2003) suggest that this is particularly evident in situations involving intense social pressures, such as those encountered when being examined on the witness stand. However, a review of communication research in this area suggests there are variety methods that are commonly suggested to reduce communication apprehension. Specifically, Schlenker and Leary's (1982) argue that anxiety can be reduced by increasing the amount of information regarding what can be expected and/or the processes involved, as well as by employing a number of techniques in preparation.

Familiarizing with the Process

Both legal and communication scholars acknowledge the importance of familiarizing an individual with processes involves with testifying at court, with many arguing it is an important and effective method of reducing communication apprehension (Boccaccini, 2002; Myers & Arena; Schlenker & Leary, 1982; Varinsky, 1998; Witt & Behnke, 2006; Wydick, 1995; Yarbrough,2001). Within the legal context, Boccaccini (2002) suggests that witness preparation aims at educating the witness. As described by Simon (2001), testifying in court is “an alien, frightening experience for most” (p. 33). In fact, Yarbrough (2001) notes that many witnesses are called to testify and are not familiar with the dynamics of the courtroom or the tension commonly associated with the litigation process. When individuals encounter unfamiliar situations they attempt to reduce the associated uncertainty by using communication in order to increase their understanding of the circumstance and better predict what will, and should, occur. Witt and Behnke (2006) explain that communication often

facilitates giving and/or receiving information in order to decrease the amount of uncertainty in social situations. As a result, individuals usually feel more relaxed when they know what to expect. Therefore, providing knowledge and information regarding witness preparation, a situation often associated with uncertainty and anxiety, would be beneficial towards reducing communication apprehension.

Witness preparation provides a witness with an increased understanding of the trial process, knowledge about relevant case issues, and communication efficacy and confidence (Applegate, 1989; Boccaccini, Gordon, & Brodsky, 2003). Overall, Varinsky (1998) argues that “witnesses perform better when they understand the terrain – by learning the rules and culture of the courtroom, and by knowing what each side is attempting to achieve during direct and cross examination” (p. 12). Therefore, preparation sessions often involve an orientation to both the courtroom setting, as well as to the litigation process in general (Boccaccini, 2002; Singer, 1996). The information provided during witness preparation not only can decrease feelings of uncertainty, but also enables the witness to develop meaning for the event (Brashers, 2001).

For example, witness education also often includes familiarizing the witness with the question and answer process that typically occurs during testimony, which also can be a source of uncertainty and apprehension (Boccaccini, 2002). Such preparation usually involves discussing various types of questions that will most likely be encountered during testimony, as well as providing suggestions for responding to them effectively. Schlenker and Leary (1982) suggest that individuals are more comfortable when they have a plan for a given situation, or at least know what to expect.

Witt and Behnke (2006) argue that if an individual is uncertain about an upcoming speaking situation, he or she will experience a heightened level of anxiety. The resulting “communication apprehension is one form of affective competence that influences behavior” (Rubin, Rubin, and Jordan, 1997, p. 104). In the courtroom context, Myers and Arena (2001) argue that stress and anxiety may cause a witness to come across to the jury as abrupt, arrogant, or even deceptive and untrustworthy.

Witt and Behnke (2006) note that individuals anticipate the amount of anxiety expected to occur during unknown situations. For example, they report that public speaking assignments involving manuscript writing, where every word is planned in advance, often results in lower levels of anxiety experienced by students. With every word planned, the student does not need to worry about what or how he or she is going to communicate the message. In contrast, impromptu speaking, with little or no advanced preparation, often results in the highest level of anxiety. In this situation, the student experiences increased uncertainty regarding the message, as well as reduced predictability of the experience. Witt and Behnke (2006) found that the unpredictability of specific wording often resulted in a greater degree of tension and nervousness during the speech. As a result, speakers are less likely to focus “their attention on critical elements of the audience and speech performance itself,” and more likely to “became distracted by the unfamiliar and uncomfortable feelings of being unsure of themselves or out of control” (Witt & Behnke, 2006, p. 175).

In many ways, witness testimony reflects the anxiety that many public speakers experience. Reflecting the same “speaking preparation” ideas outlined by Witt and Behnke, Boccaccini (2002) suggests that witness education should include enhancing the level of

understanding that witnesses have regarding their testimony. For instance, Yarbrough (2001) notes that during preparation the trial team should make sure that the witness conceptually understands the goal of their testimony, without instructing the witness as to what specifically to say. Ideally, Sanchirico (2006) explains that witness preparation should enable the witness “to so internalize her story that reciting it and maintaining it becomes nearly as rote as those few other cognitive tasks – like remembering one’s address and phone number – that can still be reliably accomplished by those who are mentally drained” (p. 1397). This becomes crucial to successful witness preparation, especially if the witness is exposed to a long, often mentally exhausting, period of questioning.

Applegate (1989) notes that the probability of presenting a witness thoroughly familiar with the content of his or her testimony is enhanced through the process of witness preparation. Increased familiarity with testimonial content in turn improves the ability of a witness to effectively communicate his or her testimony. Such preparation can be vital for the apprehensive witness. When forced to communicate, as is the case with many witnesses, previous communication research suggests that individuals with high apprehension prefer settings where they are able to plan ahead (Arkin & Grove, 1990).

Overall, Schlenker and Leary (1982) argue that the level of anxiety will be reduced over time as the individual gains more information about the unknown situation. Thus, familiarizing the witness about the courtroom environment, his or her role in the litigation process, as well as what to expect while testifying can drastically decrease the possibility of the witness becoming nervous and/or confused while testifying in court (Applegate, 1989; Myers & Arena, 2001). The increased information and knowledge enables witnesses to

predict with greater certainty what to expect during the speaking situation (Schlenker & Learly, 1982). However, in addition to becoming more familiar with processes, a witness could also benefit from a number of behavior techniques such as, visualization and practice, employed during preparation.

Behavioral Techniques

Performance Visualization. Ayres and Sonadre (2003) indicate that visualizing an effective speaker, whether it be a peer or a famous speaker, is an effective method of reducing communication apprehension. In fact, visualization tends to result in immediate lower levels of apprehension, as well as over time (Ayres & Hopf, 1989; 1990). Shobe, Brawn, and Carmach (2005) note that visualizing success can help students suffering from text anxiety. They found that visualization was an effective method for reducing anxiety for both difficult and easy math tests. Students felt more confident in their abilities after visualizing success. Furthermore, performance improved through visualizing success. A number of scholars suggest that this same technique can be used in to improve communication skills (Ayres & Sonadre, 2003; Hinton & Kramer, 1998; Roach, 2003; Shobe, et al., 2005; Singer, 1996). However, visualization is not as simple as it first appears. For example, when exploring anxiety experienced by graduate teaching assistants, Roach (2003) found that individuals with high levels of communication apprehension were less likely to use visualization as a coping technique. A possible explanation is that individuals with high levels of apprehension simply have a more difficult time visualizing themselves in a successful speaking situation. Thus, those who may benefit the most appear to be the least likely to use it.

Videotape Feedback

Singer (1996) suggests the use of operant conditioning techniques, such as mirrors or video cameras. According to Singer (1996) witnesses are more likely to accept constructive advice after they see how they appear when testifying. A mirror provides immediate feedback, while the video camera is more conducive for follow-up discussion. For example, the video could be useful for discussing emotional responses given for specific questions. The witness could be asked to discuss how he or she was feeling while the question was being asked, the way in which their response is representative of that feeling, the usefulness of displaying the emotion, as well as suggestions for controlling his or her emotions while testifying (Singer, 1996). This technique could be useful for determining possible causes of apprehension felt by the witness, as well as methods to control or prevent such emotional responses.

Hinton and Kramer (1998) note a variety of benefits of using video feedback in improving communication competencies. For example, viewing a videotaped performance enable the individual to focus on particular areas that seem to highlight weaknesses and ineffective skills. As a result, the individual might spend more time practicing their communication skills rather than simply focusing on the content of their message. Greater practice likely leads to less apprehension during the communication encounter. In addition, individuals with high communication apprehension tend to have more negative thoughts. However, viewing themselves in a successful communication situation could result in more positive perceptions (Hinton & Kramer, 1998), potentially increasing his or her ability to engage in positive visualization.

As noted earlier, testimony rehearsal is also frequently videotaped, which enables the possibility for further analysis at a later time (Boccaccini, 2002; Kerrigan, 1999; Myers & Arena, 2001; Yarbrough, 2001). The videotape could be utilized solely by those directly involved in the preparation session or it could be the basis for additional research. For example, the videotape could be evaluated by mock jurors and/or the witness themselves to further highlight or identify problematic characteristics or behaviors, as well as to verify that the testimony is understandable.

Skills Training. Skills training provides knowledge and experience in order to create positive changes in an individual's ability and satisfaction when communicating (Schroeder, 2002). Rubin et al. (1997) note that skills training not only helps to manage speech anxiety, but also tends to increase communication competence as well as perceived effectiveness. Furthermore, Schroeder (2002) found that students often have more positive perceptions of their communication abilities after taking a basic skills course.

Schag (2004) explains that witness preparation is often used to reduce, or possibly eliminate, any ineffective communication characteristics caused by anxiety and nervousness. Witnesses are often provided with instruction regarding the skills necessary to effectively communicate in the legal setting, where feelings of anxiety are often rampant (Boccaccini, 2002). For example, Beals (1996) suggests that witnesses should receive training on effectively pausing during the question and answer process. During high anxiety situations, individuals often experience a lack of control in their communicative abilities. Pausing provides time for witnesses to gather their thoughts before responding, improving the chances that they will provide a concise answer that is within the scope of the question.

Practice. Individuals experience anxiety when they lack appropriate and/or effective social skills (Schlenker & Leary, 1982). Sawyer and Behnke (2002) suggest that improving social skills through realistic practice and rehearsal is an effective way to reduce anxiety. For example, Menzel and Carrell (1994) note that the level of anxiety can be reduced through preparation, especially with rehearsals before a real audience. Additionally, realistic practice often results in a better overall performance (Smith & Frymier, 2006). Smith and Frymier (2006) found that practicing in front of a mirror had a positive association with public speaking evaluations. This method of rehearsal enables individuals to give themselves feedback regarding their speech performance before having to face an outside audience.

Pearson, Child, and Kahl (2006) examined the amount of time and activities typical of college students' preparations for speeches. They found that individuals with high apprehension spend more time preparing the written elements of the speech and less on the communicative elements, such as delivery. As a result, these same individuals tended to receive lower grades on their speeches. In contrast, students who spent more time practicing their delivery earned higher speech grades.

Public speaking students are frequently told that increased time preparing is needed in order to deliver speeches of high-quality (Pearson et al., 2006). Practice and preparation typically result in greater confidence in addition to lower levels of communication apprehension (Pearson et al., 2006). As a result, an individual's willingness and ability to communicate should increase as he or she spends more time practicing.

Boccaccini (2002) explains that both instruction and testimony rehearsal are primary preparation techniques used to increase the effectiveness of testimony delivery. Typically,

instructions ranging from proper courtroom attire to acceptable behavior are initially provided to the witness followed by testimony rehearsal to examine his or her performance. Wells, Ferguson and Lindsay (1981) argue that rehearsing witness testimony is an effective way to enhance confidence, which in turn often leads to greater testimonial accuracy. After observing a witness during witness rehearsal, the attorney and/or consultant is then able to make accurate suggestions regarding behaviors that could potentially be problematic if present while testifying in court. However, the amount and level of such suggestions should be carefully monitored. Applegate (1989) warns that a witness who appears rehearsed to the jury, may negatively affect the credibility of the testimony and ultimately the outcome of the case.

In sum, Rieke (1990) suggests that “the creation and maintenance of a good image is an incessant process and goal, one that plays a vital role in determining success or failure in social situations” (p. 109). Due to the potential impact witness testimony may have on trial outcomes, it is crucial to present effective witnesses. However, as seen in the previous review, witness credibility can be negatively affected by communication apprehension. Schag (2004) argues that the unpredictable nature of individuals testifying in court makes every witness a potential risk to the case. However, engaging in witness preparation has become increasingly important in order to ensure, or at least increase the probability, that a witness will testify as effectively as possible. Boccaccini (2002) observes that it is becoming increasingly rare for a witness to testify without some form of pretrial guidance or consultation, an indication of both the usefulness and positive impact resulting from witness preparation. Applegate (1989) explains that the witness preparation process is specifically

aimed towards enhancing or improving legal testimony in terms of substance and/or presentation, while DiBlasi (1993) notes that the goal is to present a witness that “makes an honest, candid and straightforward impression on a jury” (p. 48). It is important to recognize any potential difficulties or ineffective qualities of a witness during the pretrial stages of trial preparation in order to provide ample time to reduce, or possibly eliminate, negative characteristics or nervous habits – problems often associated with communication apprehension. In general, an increased amount of time with a witness in preparation for trial enables the trial team to enhance the ability of a witness to effectively communicate with the jury.

Controversy Surrounding Witness Preparation

Despite the reported effectiveness of techniques used during witness preparation, and although it is argued to be a crucial aspect of trial practice, it is also one that presents the greatest potential for criticism (LeGrande & Mierau, 2004; Piorkowski, 1987). These criticisms revolve around two distinct areas. The first area addresses issues associated with ethical witness preparation. The second addresses the use of outside consultants to prepare witnesses. Small (2006) explains that:

Good witness preparation is an important, and often misunderstood, part of proper trial preparation. Done right, it can ease the difficulty and unnatural burden of being a witness and assist the trial process. Done wrong, ..., it can be a disaster (§ 8).

However, a fine line exists between what is both acceptable and ethical during witness preparation and what is not (Joy & McMunigal, 2003; Piorkowski, 1987). Specifically, three

primary areas of concern include a lack of rules, privacy and secrecy issues, and memory distortion.

Ethical Issues

Lack of Rules

First and foremost, witness preparation is frequently criticized for the lack of rules governing the practices involved (Applegate, 1989). Joy and McMunigal (2003) argue that no rules outlining what may or may not be done during witness preparation exist. However, as seen in the following pages, this statement is only partially true.

For example, the American Bar Association (ABA) outlines several ethical duties in their Model Rules of Professional Conduct (“Model Rules”). However, these rules contain only a few stipulations that could be applicable to witness preparation (LeGrande & Mierau, 2004; Salmi, 1999). In addition, the ambiguity of the language used makes it difficult to discern the manner in which the rules could or should be applied to witness preparation (Salmi, 1999). For example, Model Rule 8.4(c) states that “it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation” (Model Rules, 2002). Salmi (1999) explains that such regulation provides no explanation or definition of such behavior. As a result, Salmi (1999) argues that the rules are not enforceable because an individual could simply say that they were unaware that their behaviors directly caused the witness to testify dishonestly.

In addition, most members of a trial team receive little to no formal training in witness preparation (Applegate, 1989; Aron & Rosner, 1998; Boccaccini, 2002; Wydick, 1995). In fact, Salmi (1999) notes that “it is neither taught in law school nor directly

regulated, and is rarely litigated or even discussed in scholarly literature” (p. 136). The lack of information and training leaves potential for both the trial team, as well as the witness, to participate unknowingly in improper witness preparation.

Privacy and Secrecy

An additional obstacle impeding the credibility of witness preparation is the privacy or secrecy in which it is ordinarily conducted (Applegate 1989). Gershman (2002) explains that the privacy and lack of information shared with outsiders makes it difficult to gain a true understanding of what exactly occurs during preparation sessions. Furthermore, the procedures used and information discussed is protected by attorney-client privilege, enabling the preparation session to be conducted in private without the potential for discovery from other parties (Boccaccini, 2002). Understandably, witness preparation is frequently referred to as the “dark secret” of the legal profession (Applegate, 1989; Salmi, 1999). However, Applegate (1989) argues that the lack of shared information regarding the preparation of witnesses leads to the belief that attorneys and their clients collaborate in the fabrication of misleading, embellished and/or false testimony.

Although an attorney is legally required to disclose any pretrial statements made by a witness to the opposing lawyer, police, or other government agents, Gershman (2002) explains that such statements are rarely available for a number of reasons. Pretrial statements made by the witness might not exist due to the fact that the attorney, police, or other agent is not legally required to take notes. Additionally, Gershman (2002) notes that “some agents as a matter of policy do not take notes specifically to avoid creating contradicting evidence” (p. 852).

Such secrecy also makes it almost impossible to investigate interaction that occurred during preparation process to determine the extent to which a witness was improperly influenced to give a false or misleading testimony (Gershman, 2002). Lack of information or ability to explore what occurs during witness preparation sessions also makes it difficult to further analyze the effects of cognitive factors such as memory, language, and suggestion on the accuracy and truth of courtroom testimony. Even if unethical procedures are being used to prepare a witness, they are difficult to detect without knowledge of what occurred behind closed doors, which makes any rules or standards near to impossible to enforce (LeGrande & Mierau, 2004; Salmi, 1999).

Memory Distortion

An additional source of criticism refers to the potential for memory distortion to occur during witness preparation. As witnesses are prepared and presented with an abundance of information, Patterson (2004) notes the possibility that facts learned during the preparation process can become incorporated, or assimilated, into his or her original memory of the event or situation in question. Consequently, as conversations with a witness progress, his or her memory may be altered (Wydick, 1995). This is especially possible during longer preparation sessions where a witness tells and retells his or her account with the accompaniment of comments and/or suggestions from an attorney or consultant. As a result, the distinction between the original testimony of a witness and extraneous factors presented during the preparation session can easily become blurred. Memory distortion that may occur during pretrial preparation often results in the development of a false or misleading testimony (Boccaccini, 2002).

For example, when individuals are provided new information that is misleading, they often have increased errors in reporting their original account of the situation in question. Loftus and Hoffman (1989) have termed this type of error in reporting the “misinformation effect.” One reason for these errors is that individuals tend to incorporate the post-event information into their memories. This new information is often used to supplement or alter a person’s memory of the original situation. The result is that individuals exposed to misinformation tend to have memory recollections consistent with the misinformation (Cann & Katz, 2005). Individuals are also susceptible to misinformation when time has elapsed since the event (Loftus, 1992). This is a particularly important problem in the trial context, as a case can take weeks and sometimes years to come to trial. Over time memories fade, causing them to be more vulnerable to post-event misinformation. Individuals are then less confident with the accuracy of their original memory, causing them to be more susceptible to the misinformation effect (Cann & Katz, 2005). As a result, a witness may decide to replace missing information with what he or she thinks is in accord with the expectations of the attorney and desired trial outcome.

Witnesses can also fall victim to the discrepancy detection principle (Loftus, 1992). As Loftus (1992) explains, witness “recollections are more likely to change if a person does not immediately detect discrepancies between post-event information and memory for the original event” (Loftus, 1992, p. 121). However, if individuals notice a discrepancy at the time the misinformation is presented, he or she is more likely to reject the new information (Loftus, 2005). This suggests that problems with memory impairment can be attenuated to some degree. For example, if individuals are given an explicit warning that they might be

exposed to misinformation in the future, they are more likely to detect a discrepancy and therefore more resistant to its influence (Loftus, 1992; Loftus, 2005).

Altering testimony is not always intentional. Gershman (2002) notes that such witnesses “adjust their testimony based on leading, suggestive, coercive or intimidating questions or statements” (p. 862). The consequence of such techniques is that the witness may be unaware or unable to prevent his or her testimony from being influenced or altered. For example, Pezdek, Sperry, and Owens (2007) note that forced falsification of memory could occur when witnesses are pressured to provide a response when they have already indicated that they do not know or are unsure of the answer.

In addition, confirmatory feedback may lead them to further discount doubts they may have regarding their memory of the event or situation (Zargoza, Payment, Ackil, Drivdahl, & Beck, 2001). Hanaba & Zaragoza (2007) note that confirmatory feedback involves verbally affirming a response (i.e., “Good, you identified the suspect”) (p. 434). Confirmatory feedback can also lead to the elaboration of memories in an effort to make the misinformation fit in with what was actually witnessed and remembered (Zargoza, et al., 2001). Hanba and Zaragoza (2007) explain that statements reinforced with confirmatory feedback tend to be perceived by others as credible. They suggest that confirmatory feedback causes stronger beliefs in the accuracy of the fabricated or false event. Thus, an increased belief in the accuracy of an event may cause witnesses to testify with greater consistency and confidence, leading to increased perceptions of credibility.

In sum, misleading information can distort the truthfulness of a memory (Loftus, 1992). Individual may believe that they experienced or witnessed events that never occurred

or might think that things happened differently. As a result, individuals often become confident in their altered memory and believe them to be genuine.

Horse-Shedding and Coaching

Perhaps one of the greatest sources of controversy underlying witness preparation is what is commonly referred to as “horse-shedding,” “coaching,” or “scripting” (Gershman, 2002). In short, Silver (1991) defines witness coaching as preparing a witness to lie. Witness coaching includes altering or encouraging misleading testimony (Wydick, 1995). Two common practices encompassing the horse-shedding controversy include: (1) suggesting changes in the testimony of a witness for the purposes of obtaining false evidence and, (2) providing suggestions that are inconsistent with previous information provided by the witness (Zacharias & Martin, 1999). Gershman (2002) explains that rather than promoting truthful testimony, it has been argued that attorneys may engage in witness preparation practices that purposefully alter or manipulate the testimony of a witness in attempt to secure a desired trial outcome (Gershman, 2002).

As noted previously, the ABA’s Model Rules of Professional Conduct (Model Rules), outlines ethical behaviors of attorneys. For example, Model Rule 3.4(b) states that “a lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law” (Model Rule, 2002). However, despite mandates such as this one, witness coaching does occur. For instance, witness coaching occurred in the high profile federal death-penalty case of Zacarias Moussaoui (Ward, 2006). Moussaoui had pleaded guilty to conspiring with al-Qaida terror network to plot terrorist attacks. During this case, the defense attorney emailed a copy of the courtroom transcript to seven witnesses who

had been already been sequestered. The information contained in the transcripts could have easily altered the testimony of the witnesses or might have provided suggestions regarding information to be included, practices typical to witness coaching (Gershman, 2002).

An attorney does not necessary need to tell the witness what to say verbatim for improper witness preparation to occur. In fact, coaching also takes place when attorneys suggest “better” answers, which either contradict their original answer or subtly alter the truth (Salmi, 1999). For example, the two expressions “she slammed into the floor” and “she fell to the floor” basically convey the same facts with equal accuracy, but differ in terms of emotional impact. Slamming into the floor is perceived as more aggressive than falling to the floor.

Kerrigan (1999) explains an additional area of controversy regarding witness coaching involving the extent to which an attorney is truly aware that the subsequent evidence presented is indeed false or misleading. For example, the witness might be influenced by other factors such as what Kerrigan (1999) calls the “win-win mentality of our society” and alter their testimony without the attorney realizing that it occurred (p. 1371). In this case, they focus on framing testimonial content so that it will result in the desired trial outcome. They are not necessarily interested in communicating the truth, but rather that which will result in success at trial.

Although cross-examination is frequently assumed to be an effective means of discovering inconsistencies in witness testimony and/or if any improper pretrial preparation occurred, there is little empirical support for this claim (Applegate, 1989; Gershman, 2002). In fact, Gershman (2002) explains that “given the subtle ways that a witness’s testimony can

be manipulated, it is highly unlikely that cross-examination will disclose coaching” (p. 854). For example, if a witness had been coached during pretrial preparation but is able to provide clear and convincing testimony, it would be quite difficult for the opposing party to determine and/or illustrate that the well-performed testimony was a product of improper preparation. (Gershman, 2002).

Specifically regarding prosecutors, Gershman (2002) further argues two reasons why the absence of critical examination of witness coaching is perplexing. First, an increased concern has been expressed regarding the adversary system being used for self-serving purposes rather than for truth seeking purposes. Attorneys may prepare a witness to give a testimony with the goal of not necessarily presenting the truth, but rather to manipulate the truth in order to secure a legal outcome (Gershman, 2002; Miller, 2003). A second reason is in regards to accusations, based on reports of wrongful convictions, that the judicial system is prone to error (Gershman, 2002). It has been suggested that the origin of the errors can be traced back to procedures that occur before the trial begins. Gershman (2002) suggests that the inability for the adversarial system “to produce accurate results may be attributed in many cases to techniques used by prosecutors to prepare, shape, and polish the testimony of their witnesses” (p. 833).

Salmi (1999) argues that the reputation of the legal system suffers because of the presence of witness coaching and other unethical behaviors. Instead of viewing attorneys as helpful and justice-seeking, individuals may believe that “all attorneys are crooks who will tell their witnesses and clients to say anything in order to win a lawsuit” (Salmi, 1999, p. 178).

Use of Outside Consultants

Depending on the nature of the case, an attorney may prepare a witness him or herself or may solicit help from a consultant. If an attorney does delegate the preparation of witnesses to the trial consultant, Boyd and Dominic (2002) recommend a team approach, arguing it is most effective in producing a competent witness. Working as a team will increase the number of perspectives being offered as well as save time because everyone on the trial team will be aware of what has occurred. However, whether preparing a witness as a team or individually, the techniques and procedures used during witness preparation tend to overlap (Boccaccini, 2002).

Shartel (1994) suggests that an increasing number of witnesses are prepared by an outside specialist commonly referred to as a trial consultant. Attorneys often turn to trial consultants to facilitate clear communication and assist witnesses in effectively testifying. In fact, Ratcliff (2002) explains that “consultants are increasingly recognized as a tool to help lawyers zealously represent their clients” (p. 33). However, the use of services provided by a trial consultant is frequently an additional target of criticism surrounding witness preparation.

History of Trial Consulting. Ratcliff (2002) notes that the presence trial consulting dates back to 1971 in Harrisburg, Pennsylvania when anti-war activists were accused of participating in anti-war activities. The defense hired a team of social scientists to conduct research in hopes of combating what seemed to be endless resources available to the government. Based on a number of surveys they conducted, the sociologists compiled the necessary data to create profiles for both desirable and undesirable jurors. The information was provided to the defense lawyers, who then used the profiles to assist in jury selection.

The trial resulted in acquittal, which many credited to the work of the social scientists hired by the defense.

Since 1971, the use of trial consultants has increased to the point that many argue that “it’s no longer an issue of whether to use a trial consultant... but which one to use” (Ratcliff, 2002; p. 33). Even jurors have started to expect an expert to be part of the trial team with larger cases (Ratcliff, 2002). As the use of trial consultants continues to increase, so does the number of consulting firms and the scope of services provided. While originally focused on providing assistance during voir dire, the role of the consultant has evolved to include virtually every stage of the litigation process (e.g., pretrial research, jury selection, courtroom presentation and strategy, and post-trial services) (Strier & Shestowsky, 1999; Yarbrough, 2001).

Overview of Trial Consulting. Voss (2005) explains that “just as professionals in other fields eagerly employ the latest and greatest technologies, attorneys have also eagerly embraced social-scientific principles of persuasion in an effort to gain a competitive edge in the courtroom” (p. 302). The two primary reasons why an attorney might hire a trial consultant to perform functions traditionally served by the attorney. First, time constraints are often an influential factor causing attorneys to rely on specialists for services such as witness preparation. Myers and Arena (2001) argue that utilizing the services provided by trial consultants enables an attorney to focus their attention on legal issues, which are more inline with their expertise and training. Myers and Arena (2001) go on to note that “attorneys are experts in legal matters, not human behavior, and understanding how a jury operates requires expertise in the social sciences” (p. 386). For this reason, Follingstad (1994) suggests that a

second more frequently provided reason is that many attorneys are unskilled in communication and behavior-change techniques required for effective witness preparation. Similarly, Varinsky (1998) argues that with little to no psychological training or empirical knowledge regarding the manner in which jurors might evaluate a witness, most attorneys lack the skills needed when preparing witnesses.

Thus, trial consultants offer an expertise in communication and behavior modification that many attorneys lack. As experts, Simon (2001) notes that consultants play an important role in managing any psychological or emotional factors that could impede upon the abilities of a witness to testify effectively. Strier & Shestowsky (1999) describe trial consultants by illustrating their role as a marketing function:

First, a target audience is identified, that is, those who will be most receptive to the client's case, in much the same way marketing experts would test public receptivity to new consumer products. Then, a strategy is devised to help persuade the jury qua customers to 'buy' the client's product by emphasizing those case-specific factors having the most appeal to the particular individuals on the jury (p. 445).

The tools and expertise offered by trial consultants can make the difference in high stakes litigation (Strier, 1999). Overall, a growing number of attorneys have come to rely on trial consultants to prepare witnesses (Davis & Beisecker, 1994). Ratcliff (2002) argues that "consultants are increasingly recognized as a tool to help lawyers zealously represent their clients" (p. 33). In fact, Strier & Shestowsky (1999) report that witness preparation is among the top trial consulting services utilized.

Criticisms of the use of Trial Consultants. Despite its usefulness and popularity, the use of a trial consultant has also been viewed as a controversial issue within the legal system. In addition to the controversial elements outlined previously, a number of additional ethical concerns have been raised regarding the use of trial consultants and the services they provide (Voss, 2005). Two primary areas of criticism include fairness and lack of regulation, both of which are discussed in the following pages.

Fairness. It has frequently been argued that trial consulting impinges upon an individual's Sixth Amendment right to a fair trial and an impartial jury (Strier & Shestowsky, 1999; Zawada, 2005). The basis for such criticism is the excessive costs associated with hiring trial consultants, making their services available only to the wealthy. However, Strier and Shestowsky (1999) note that "what is "unfair" about trial consulting is a metaphor for what is unfair about the adversary system as a whole" (p. 475). For instance, wealthier individuals are financially able to hire more expensive, and supposedly more effective attorneys, therefore causing them to potentially have an advantage over those who are not as financially well-off. Therefore, Zawada (2005) argues that such criticism should not necessarily be targeted directly towards the trial consulting industry, but rather to the legal system in general.

Lack of regulation. Similar to criticisms of the ABA standards, lack of regulation is a primary criticism of the trial consulting profession (Voss, 2005). However, standards have been established by the American Society of Trial Consultants (ASTC), the professional organization of trial consultants founded in 1982. The ASTC has outlined a professional code to help guide witness preparation practices of its members. The first page of the ASTC

Professional Code explains that “the Code provides enforceable standards and offers guidance in many areas common to trial consultants working in this diverse field” (p. 1). The document provides information regarding ethical principles, professional standards, and practice guidelines. Specifically, the Code provides guidelines for the following practice areas: venue, surveys, witness preparation, small group research, jury selection, and post trial juror interviews. The following are six standards for witness preparation outlined in the Code:

- I. Trial consultants shall advocate that a witness tell the truth.
- II. Trial consultants shall familiarize themselves with applicable law and rules which may apply to witness preparation services.
- III. Trial consultants shall clarify the client’s goals for witness preparation and the role which the trial consultant will perform.
- IV. Trial consultants shall describe the process employed in preparing a witness including techniques and their limitations.
- V. Trial consultants shall provide witness preparation services within the boundaries of their competence based upon education, training, supervised experience or other, appropriate professional experience
- VI. Trial consultants shall discuss with clients limitations on confidentiality in the provision of witness preparation services and foreseeable uses of information that witness preparation services were utilized by the attorney or her client (ASTC Professional Code).

Despite the existence of the Practice Guidelines outlined above, LeGrande and Mierau (2004) complains that the Guidelines are unenforceable. As explained in the Preamble to the Code, the Practice Guidelines “consist of suggested business practices” (ASTC Website). LeGrande and Mierau (2004) note that the vague language used makes it difficult to ensure consistency among members of ASTC. However, the ASTC does have a grievance policy, which indicates that a member can be censored or removed from the society (ASTC Website). However, this is not a proactive policy because it requires the rare instance of someone lodging a complaint. However, the ASTC website does indicate that the Code is a work in progress.

Strier (1999) also criticizes ASTC standards. He (1999) argues that the ethical standards that are provided by ASTC are not nearly as rigorous as those of the American Psychological Association. Similarly, LeGrande and Mierau (2004) note that “while lawyers are governed by various model rules and ethical codes, there are no external controls whatsoever on the conduct of trial consultants. Neither are trial consultants subjected to enforceable internal standards” (p. 960). Strier (1999) further claims that “the ethical standards of the trial consulting profession are arguably more lax than those of the two professions – psychology and law – that necessarily suffuse and coexist with trial consulting (p. 704).

In fact, Strier (1999) notes that ASTC does not require specific credentials for membership. Membership simply entails completing a Membership Application, which can be submitted online or by mail, along with a payment of \$185 for regular membership or \$60 for students. The application, which can be completed or downloaded from the ASTC

website, asks for basic information such as name, company, and address, as well as information such as areas of practice (i.e., civil defense, civil plaintiff, criminal defense, criminal prosecution, commercial litigation, etc.), and areas of trial consulting (i.e., focus groups, jury selection, graphics, trial simulations, voir dire, witness preparation, post-trial juror interviews, etc.) for the organization's directory (ASTC Website). However, membership in the organization is not a requirement for an individual to practice trial consultation. Regardless of education or professional background, LeGrande and Mierau (2004) explain that any individual may label him or herself as a trial consultant.

One might wonder how the trial consulting field has survived despite such criticism. However, some of the issues of primary concern, such as the high price of their services, also demonstrate the success of the industry. For example, Strier and Shestowsky (1999) suggest that the willingness of attorneys and their clients to pay high fees for trial consulting services provides a clear indication of the success of the industry. It is quite unlikely that attorneys would pay the high cost of trial consulting services if they were ineffective. In fact, the free market should weed out less effective trial consultants, leaving those who provide the highest quality services (Stole, Robbenolk, & Wiener, 1996; Strier & Shetowsky, 1999). Additionally, the success of the trial consulting industry is further indicated by the number of law firms that have started to hire in-house trial consultants. Despite criticisms, it appears that trial consultants play an important and effective role in achieving litigation success. In fact, Moran (2001) suggests that "misunderstanding about what trial consultants are capable of doing and what they actually do" is at the root of the criticism surrounding the trial consulting industry (p.80).

Despite the criticisms aimed at trial consultants, Shartel (1994) suggests that an increasing number of witnesses are prepared by these outside specialists. Attorneys turn to trial consultants to facilitate clear communication and assist witnesses in effectively testifying. However, as seen above, the use of services provided by trial consultants is frequently an additional target of criticism surrounding witness preparation.

Need for Research

Despite the controversial nature of preparing witnesses, as well as the involvement of trial consultants in the process, Gershman (2002) notes that witness preparation “has received relatively modest attention” (p. 830). The minimal attention that is given to witness preparation is primarily found in manuals providing general guidance or in dramatizations provided by popular culture (Gershman, 2002). Furthermore, Strier and Shetowsky (1999) note that the few empirical studies regarding trial consulting tend to be focused primarily on the predictive nature surrounding the use of scientific jury selection. Overall, the lack of research and protocol specifically regarding witness preparation has been frequently noted (Gershman, 2002).

A better understanding of how attorneys, witnesses and consultants view the preparation process is needed. Additional research regarding effective witness preparation techniques would be useful in developing and modifying procedures used to prepare witnesses to testify in court (Boccaccini, 2002). Although studies have explored the influence of communicative behaviors and characteristics of a witness on jury decisions, only a few have examined the impact of witness preparation techniques (Spanos, Quigley, Gwynn, Glatt, & Perlini, 1991; Wells et al., 1981).

As seen in the previous review, the perceived credibility of a witness can be impaired by factors such as apprehension and uncertainty (Witt & Behnke, 2006). The influential effect of these negative characteristics highlight the importance of engaging in practices targeted towards credibility enhancement. The literature suggests that legal and social science scholars agree that credibility plays an important role in juror evaluations of witness testimony (Burgoon & Hoobler, 2002; Plotkin, 2005; Rieke, 1990; Tormala & Petty, 2004). In addition, trial consultants are commonly used by attorneys to help with the preparation process. However, the research is generally silent on how trial consultants view the importance of credibility. Thus, this study addresses the following research question:

RQ1: How do trial consultants approach the concept of credibility when preparing witnesses?

In addition, based on the previous review, it is clear that high levels of anxiety can negatively affect witness testimony. As seen in the previous pages, apprehension can be reduced by employing various techniques. However, more information is needed regarding what techniques are used by trial consultants during the witness preparation process and how those techniques reflect recommendations by communication and other social science scholars. To explore the idea of apprehension reduction, this study poses the following research question:

RQ2: What are trial consultant views of communication apprehension and how do they attempt to reduce it?

Lastly, the techniques that are being employed should necessarily reflect the ethical standards of both the American Bar Association and the American Society of Trial

Consultants. Thus, this study also explores the opinions and practices of trial consultants as they relate to the rules and standards governing the individuals involved by asking the following question:

RQ3: Do trial consultants engage in practices and techniques in keeping with ABA and ASTC standards and guidelines?

This thesis is a first step in expanding our knowledge of the view of trial consultants and the role of communication in preparing witnesses. The previous sections outlined primary controversies relevant to the study of witness preparation and trial consulting. The next chapter will review the methods, materials, and procedures used in this study.

III. METHODOLOGY

This chapter describes the research designs and methods used in the present study. A general overview of the research design, data collection strategies and data analysis techniques are presented.

Design

This study employs a mixed method design based upon a secondary analysis of data collected as part of witness preparation survey administered by the American Society of Trial Consultants (ASTC) in February 2006. A secondary analysis uses a previously collected data set to answer current research questions that may or may not have been proposed when the data was originally collected (Rew, Koniak-Griffin, Lewis, Miles, & O’Sullivan, 2000). Castle (2003) notes reduced costs and resource savings as two advantages to secondary analysis. For instance, data sets often take a long period of time to collect or might require a large sample size. Therefore, a secondary analysis of such data provides a cost effective method of analyzing data. Furthermore, Sales, Fevola and Lichtenwalter (2006) suggest that a secondary analysis often provides “the opportunity to conduct research on large samples that are beyond the capacity and resources of one individual or research team” (p. 549).

Both quantitative and qualitative data can be examined during secondary analysis. Combining quantitative and qualitative elements in the data collection and/or analysis is typically referred to as a mixed methods approach (Hermerinta-Peltomaki & Nummela, 2006). A mixed methods approach is often used to improve the validity of the research and to

help the research gain a deeper understanding of the research topic (Jick, 1979). Mixed methods can be employed during one phase of the research process or throughout each phase. Specifically, this study employs a thematic analysis using both open- and close-ended questionnaire items to explore trial consultant views of witness preparation, as well as the techniques typically used.

Data Collection

As mentioned above, the data for this study was gathered through a membership-wide online survey administered February 2006 by the ASTC. Five-hundred and thirteen (513) ASTC members were sent a link to the survey via email on February 14, 2006. A reminder was sent on February 17, 2006 to those who had not started the survey. Approximately one week was provided for respondents to complete the survey (February 14, 2006 to February 20, 2006). Permission to use the survey data for this study was provided by the Executive Director of ASTC and approval of the use of this data set for this study was given by the Auburn University Institutional Review Board.

Participants

Fifty-three individuals completed the survey, resulting in an overall response rate of 10.3%. However, of the 513 members of ASTC, a total of 283 individuals self-report witness preparation as an area of practice (ASTC Website). It is probable that those who do not practice witness preparation would view the survey as irrelevant and disregard it. Thus, respondents to the survey most likely only included members of the ASTC who practice witness preparation and volunteered to complete the online survey. Taking this subset of the ASTC membership into consideration, the adjusted response rate of the survey was 18.73%.

Twenty-five of the respondents reported working as a trial consultant for more than 15 years (for a complete breakdown see Table 3.1). With regard to highest education level, 32 reported having a Doctoral degree, 11 reported a Masters, 10 a Bachelors, seven a Law degree, and one reported having a Medical degree (see Table 3.2). Specifically, in an open-ended question, 45 of the 53 respondents (84.9%) indicated Psychology, Communication, and Law (or a combination of the three) as the primary areas of their educational training.

Table 3.1

Number of Years Working as a Trial Consultant

# of years	<i>n</i>	Percent
1 year or less	2	3.8
2 - 5 years	3	5.7
6 – 10 years	10	18.9
11 – 15 years	13	24.5
15+ years	25	47.2
Total	53	100

Table 3.2

Highest Education Level

Degree type	<i>n</i>	Percent
Bachelors	10	19
Masters	11	21
Doctorate	32	60
Medical	1	2
Law	7	13
Total	53	100

Survey Design

The online survey consisted of 35 questions divided into four sections (see Appendix A). Overall, seventeen of the 35 questions were closed-ended. There were a total of eighteen open-ended items, eight of which were optional.

The first section of the survey labeled “description of services,” asked participants to provide information regarding experiences as a trial consultant, educational training, and pre-witness preparation contact with the attorney/client. This section contained ten questions, half of which were open-ended and half were closed-ended. Participants were first asked to provide basic information regarding their level of experience as a trial consultant and educational background. Next, participants were asked to provide the words or phrases they typically use to describe witness preparation services to attorneys. Additional questions found in this section of the survey probed for information regarding common practices used prior to the witness preparation session.

The second section of the survey consisted of questions focusing on witness preparation goals. A total of five questions were asked during this section. The section began with open-ended items, asking participants to list their top three goals for witness preparation. They were then asked to indicate if, and when, their goals differed from those of the attorney/client. Next, participants were asked to provide their opinion regarding the acceptability of specific goals for witness preparation. For the close-ended item, a list of possible goals and objectives was provided and participants indicated whether each was acceptable, unacceptable, or if they were unsure. Examples of the goals and objectives listed included, “educate witnesses about giving testimony,” “reduce witness” anxieties about

testifying,” and “refine topics or content for direct exam” (see Appendix A, Item # 14). This section ended with an optional question encouraging participants to provide and explain additional goals or objectives that were not addressed in the previous questions.

Questions found in the third section of the survey probed for information and opinions regarding techniques used during witness preparation. A total of twelve questions were included in this section. Seven of the questions were open-ended, two of which were optional. The first question during this section asked participants to list unacceptable witness preparation techniques and provide examples when possible. Next, participants were asked what they typically tell the witness regarding the purpose of the preparation session(s). In addition, closed-ended questions during this section of the survey were used to gather information regarding how frequently specific techniques are typically used. For example, using a Likert type scale (i.e., never, rarely, often, always, N/A), the respondents were asked to indicate how frequently they engaged in a list of techniques provided. The following were among the list of techniques: “assess witness’ baseline performance,” “advise on the content of witness’ testimony,” and “discuss juror/audience perceptions, biases and/or attitudes” (see Appendix A, Item # 18 and 19). Other items in this section probed for information regarding ethical issues. For instance, participants were asked how they prepare witnesses to respond to questions by opposing counsel. They were also asked whether they had ever encountered unethical situations while preparing a witness, and if so, to describe the situation.

The final section of the survey was focused on gaining information regarding the role of the attorney during witness preparation. A total of eight questions were asked during this section. Three of the questions were open-ended, two of which were optional. Specifically,

questions in this section included asking the participant to provide information regarding the degree to which the attorney is present during the preparation session, what occurs when the attorney is not present, as well as issues regarding attorney-client privilege.

Data Analysis

The questionnaire included both open- and close-ended questions, which allowed a mixed-method design to be used for analyzing the data. As explained by Greene, Caracelli, and Graham (1989), mixed-method designs are “those that include at least one quantitative method (designed to collect numbers) and one qualitative method (designed to collect words)” (p. 256). Analyzing responses to both question formats enables a more in depth and accurate measure of respondent attitudes and opinions (Geer, 1991).

Specifically, descriptive statistics, such as frequency and percentage distributions of the data, were employed with close-ended items while responses to open-ended items were analyzed using an inductive open-coding approach (Strauss & Corbin, 1990). This approach involves looking first at the overall response of each participant, and then examining the data in order to identify distinct themes, categories, and patterns. This method is also commonly referred to as thematic analysis. Braun and Clarke (2006) define thematic analysis as “a method for identifying, analyzing and reporting patterns (themes) within data” (p. 79). The data set is not only organized, but also described and often interpreted using this method of analysis.

Description of Thematic Analysis Process

Braun and Clark (2006) outline six phases of thematic analysis, starting with becoming immersed in the data. Becoming familiar with the depth and breadth of the data

content often requires the researcher to read and reread the data. Braun and Clark (2006) stress the importance of this phase by describing it as “the bedrock for the rest of the analysis” (p. 87). Preliminary ideas regarding interesting aspects of data content should be noted while thoroughly reading the data during this phase. Any initial ideas for thematic categories are by no means definite, as themes continue to be developed and defined throughout the entire analysis (Braun & Clark, 2006).

The second phase involves developing initial codes from the data (Braun & Clark, 2006). Coding is the process of organizing the data into meaningful groups. Braun and Clark (2006) recommend coding for “as many potential themes/patterns as possible” (p. 89). Furthermore, in order to reduce the potential for any context to be lost while coding, it is advised that extracts of data are coded inclusively (Braun & Clark, 2006). In other words, if relevant, a little of the surrounding data should be kept. Additionally, Braun and Clark (2006) note that individual extracts of data may be coded “in as many different ‘themes’ as they fit into – so an extract may be uncoded, coded once, or coded as many times, as relevant” (p. 89). As a result, the process involved during this phase of thematic analysis is identification of interesting aspects of the data, which may form the basis of repeated patterns, or themes, across the data set are identified.

Phase three begins after initially coding the entire dataset, which includes obtaining an extensive list of various codes present across the data (Braun & Clark, 2006). During this phase, the codes developed in the previous stage are sorted into common groups indicating potential themes. A theme, as explained by Braun and Clarke (2006), “captures something important about the data in relation to the research question, and represents some level of

pattern response or meaning within the data set” (p. 82). According to Owen (1984), three criteria, recurrence, repetition, and forcefulness, should be met in order to determine the presence of a theme. Themes are often broader and are used for a more interpretative analysis of the data. Braun and Clark (2006) explain that it is during this phase of thematic analysis when the researcher(s) “start thinking about the relationship between codes, between themes, and between different levels of themes (e.g., main overarching themes and subthemes within them)” (p. 89-90).

The process of thematic analysis is described by Freeday and Muir-Cochrane (2006) as “a form of pattern recognition within the data, where emerging themes become the categories for analysis” (p. 4). Themes are reviewed and refined during the forth phase of analysis. This might involve combining similar themes, separating a theme into two or more themes, or even eliminating a theme. Braun and Clarke (2006) explain that “at the end of this phase, you should have a fairly good idea of what your different themes are, how they fit together, and the overall story they tell about the data” (p. 92).

Phase five involves defining and further refining the themes, as well as analyzing data within the themes. This includes “identifying the ‘essence’ of what each theme is about (as well as the themes overall), and determining what aspect of the data each theme captures” (Braun & Clarke, 2006, p. 92). During this phase, any subthemes, or themes-within-a-theme, are identified. Subthemes are “useful for giving structure to a particularly large and complex theme, and also for demonstrating the hierarchy of meaning within the data” (Braun & Clarke, 2006, p. 92).

The final phase features a final analysis and report. Braun and Clarke (2006) explain that the analysis and report should provide “a concise, coherent, logical, non-repetitive and interesting account of the story the data tell – within and across themes” (p. 93). In addition to providing a description of the data, an argument should be made in relation to the research questions.

During data analysis, each response was then coded and placed into a category with similarly coded units. For example, Question 31 of the survey asked, “Do you have any additional comments about prepping witnesses with or without presence of attorneys?” Based on this question, a possible recurrent theme might include the notion that the “attorney must be present.” This attitude-theme is indicated by responses such as, “would not do it, attorney must be there, do not do it, should not be done, prefer to have the attorney in the room, require presence of the attorney, etc.”

The data was coded not only for the specific concept or category, but also for words or phrases that imply the same idea. For example, question number 5 asked, “What words/phrases do you use to describe witness preparation services to attorneys/clients?” (See Appendix A). One possible response theme is in regard to the demeanor and/or psychological state of the witness. Specifically, within this thematic category is the anxiety reduction subtheme. A number of similar responses might be grouped within this subtheme. For example, the following examples would be categorized within the anxiety reduction subtheme: “prepare the witness for the stress of trial,” “address concerns of witness,” and “help to relax the witness.”

Any additional information not included in the pre-defined categories was classified under the category labeled “other.” For example, responses such as, “does not apply,” “depends on situation,” and “not sure” would be grouped under the “other” category. Providing such a category not only enabled the category system to be exhaustive, but also presents an additional area of interest when analyzing the data. Such information reveals possible areas of discrepancy and potential controversy regarding witness preparation.

This chapter featured an overview of the research design for the study. Methods and procedures for data collection and analysis were discussed. This study employs a mixed method design, primarily relying on thematic analysis to explore common practices and opinions regarding witness preparation. Results obtained from the analyses are presented in the following chapter.

IV. RESULTS

The findings from the thematic analysis are first presented during this chapter. The results are organized using the six phases of thematic analysis outlined in the previous chapter (Braun & Clark, 2006). Relevant close-ended items are also included within the presentation of the results.

Thematic Analysis of Open-Ended Data

The aim of this study was to explore the thoughts and opinions of trial consultants regarding witness preparation, as well as to identify common techniques and practices utilized. As previously discussed, an open-coding thematic analysis approach was used when analyzing the responses to questionnaire data provided by the 53 participants (Strauss & Corbin, 1990; Braun & Clark, 2006). Responses to open-ended questionnaire items were the basis of analysis during the initial data analysis. Specifically, participant responses were analyzed following the six phases of thematic analysis outlined and described by Strauss and Corbin (1990). Themes were generated inductively from the raw questionnaire data. Thematic analysis was first conducted for each open-ended question individually, followed by an analysis across both open- and close-ended questions in order to identify commonalities throughout the data as a whole. Findings from each phase of thematic analysis are reported below.

Phase One: Preliminary Review

The first phase of the thematic analysis employed a preliminary review of the data content, noting interesting aspects and/or potential codes. This phase involved gaining an overall familiarity with the information presented in the data through repeated rounds of reading and reviewing the data. Immersion into the data set enabled a greater understanding of the breadth and depth of question responses. Furthermore, since the data was collected by an outside source, the American Society of Trial Consultants, and provided for this study, becoming immersed in the data was important to becoming familiar with all aspects of the material. Braun and Clarke (2006) note the importance of this phase by describing it as “the bedrock for the rest of the analysis” (p. 87).

Due to the fact that this study employs a secondary analysis of a questionnaire developed by an outside source, the preliminary review of data primarily consisted of increasing familiarity with the structure of the questionnaire, as well as the information requested from respondents. As discussed in the previous chapter, the survey was divided into four sections and consists of a total of 35 questions. Seventeen of the questions were closed-ended and eighteen were open-ended. However, the questions were not distributed equally among the four sections. The first section of the questionnaire contained ten questions requesting information and descriptions of witness preparation services. Half of the questions were open-ended ($n = 5$), and the other half were closed-ended ($n = 5$). Two of the closed-ended items asked participants to check all that apply and one of the open-ended items was optional (see Appendix A, items 3, 7 and 9). The next section of the questionnaire (items 11-15) asked respondents to provide information regarding goals for witness preparation.

This section contained five questions, three of which were open-ended. One of the optional open-ended items address additional goals or objectives not previously mentioned in the questionnaire. The third section of the questionnaire contained 12 questions asking respondents for information about techniques used during witness preparation (items 16-27). Seven of the questions were open-ended, two of which were optional. One of the closed-ended items asked participants to check all that apply. The final section of the questionnaire, items 28 through 35, probed for information regarding the role of the attorney during witness preparation. A total of eight questions were asked during this section. For example, one of the closed-ended items asked how attorneys typically participate in the witness preparation process.

The preliminary review of the data presented a number of initial ideas regarding various response patterns. Recurrent responses were primary indicators of potential patterns and significant topics. For example, throughout the entire questionnaire it was noted that participants frequently discussed the stress and anxiety typically associated with the testimonial setting, as well as the overall psychological state of the witness. Additionally, concern regarding the actual content of the testimony was also a recurrent topic discussed throughout the questionnaire responses. A third recurrent topic addressed the presence and impact of the attorney and consultant during the witness preparation process. Overall, the first phase of analysis provided an overview of the data set. Increased familiarity that resulted from becoming immersed in the data enabled three initial response patterns to be identified: stress and anxiety, content of the testimony, and presence and impact of the attorney and consultant. This information was useful in the second phase described in the next section.

Phase Two: Initial Code Development

The second phase of the thematic analysis involved developing initial codes. Braun and Clark (2006) explain that “codes identify a feature of the data that appears interesting to the analyst” (p. 88). Overall, this phase of the thematic analysis was completed with little difficulty since the topics and ideas noted during the preliminary review were easily transformed into codes to be used in the initial analysis.

Braun and Clark (2006) suggested writing notes on a printed copy of compiled responses to manually mark potential patterns in the data. Using this approach, similar and recurrent responses were noted by keywords and phrases written in the margin next to the response. For example, “stress/anxiety” was noted in the margin next to responses regarding the stress and/or anxiety involved in either the preparation process or in the actual courtroom setting (e.g., “acknowledge their nervousness”). The word “process” was written in the margin to indicate responses referencing the process involved in witness preparation or courtroom proceedings. For example, the response “we will help your witness become familiar with the testimonial process” and “educate them about courtroom protocol” would be coded as “process.” When discussing specific techniques (e.g., “video feedback”) used by the consultant and/or any individual involved in the process, the margin was marked with the word “techniques.” An additional recurrent response item dealt with the truthfulness of witness testimony (e.g., “to help a witness testify truthfully”) and was coded with the word “truthfulness” in the margin. The word “persuasiveness” was noted when responses discussed the persuasiveness and/or effectiveness of the witness testimony (e.g., “to help a witness testify convincingly”), and lastly, the word “scripting” was used to indicate responses

that referenced the act of providing, altering, and/or manipulating witness testimony (e.g., “an attorney wanting to put words in a witness’ mouth”). In sum, during this phase of analysis the following initial codes were developed: stress/anxiety, process, techniques, truthfulness, persuasiveness, and scripting.

Phase Three: Theme Development

The next phase of data analysis involved the development of themes. Braun and Clark (2006) explain that the themes developed should be broader than the initial codes identified during the previous phase. In fact, it is common for a number of the initial codes to be sorted into the same potential theme. For example, during this phase of the study, responses with similar initial codes were grouped together and for organizational purposes, each group was labeled with short descriptions of responses and codes contained inside. Groups were then reviewed and analyzed individually in order to indicate potential thematic categories. This process was repeated for each set of similar comments within each section of the questionnaire. Each of the initial themes developed, including relevant coded data are discussed below.

Attitudinal and Psychological State

While sorting and combining the various initial codes, it was apparent that a potential theme would need to reference the attitudinal and psychological state of the witnesses. Responses concerning anxiety or stress would be typical of this potential thematic category. For example, during the first section of the questionnaire participants indicated that witness preparation services are used to “prepare witnesses for the stresses of trial,” and “to calm the client.”

Witness Demeanor

An additional potential theme referenced the demeanor of the witness. For example, this potential theme would include responses regarding witness rapport. The following are typical codes within this theme: addressing presentation problems, minimize nervous gestures, and minimize distracting mannerisms.

Truthfulness

Participants frequently noted the importance of truthfulness during witness preparation as well courtroom proceedings. For example, when asked to describe witness preparation services, a common response was “to help a witness testify truthfully.” As a result, truthfulness was one of the initial codes developed in the previous phase of the thematic analysis. The frequency of such responses eventually resulted in the decision to identify truthfulness as a potential theme.

Testimonial Script

Another thematic category present among participant responses addressed wording, or testimonial scripting. Specifically, typical responses categorized within this theme were those that referred directly to the substance included in witness testimony. Also included in this theme were responses that discussed the actual language or wording of the testimonial message, as well as specific case themes.

Persuasiveness

A number of participants expressed concern regarding the persuasiveness and/or effectiveness of witness testimony. As a result, an initial thematic category labeled

“persuasiveness” was developed. Examples of coded data typical of this themes include, “being as persuasive as possible,” “convincing,” and “influential.”

Clarity

Furthermore, a separate initial theme was also identified based on responses that frequently noted the importance of clarity during witness testimony. For examples, one participant described witness preparation as “a means of enabling a witness to communicate the truth in a way that ensures understanding by juror members.”

Procedural Issues

The thematic category labeled procedural issues was defined in terms of the process or procedures involved in either witness preparation and/or the courtroom in general. For example, participants often expressed concern regarding the level of understanding a witness has about possible techniques that may be used by the opposing counsel during cross examination. Furthermore, many respondents also indicated concern regarding the extent to which witnesses understand their role.

In sum, the initial themes developed during this phase included attitudinal and psychological state, witness demeanor, truthfulness, testimonial script, persuasiveness, clarity, and procedural issues. Overall, these themes are representative of the initial codes developed during the previous phase. In fact, as previously explained, responses with similar initial codes were grouped together to form a potential thematic category. The emergent initial themes were further reviewed and developed during the next phase of data analysis.

Phase Four: Review of Themes

The fourth phase of analysis involved reviewing the initial thematic categories and determining if any modifications are needed. While evaluating themes, Braun and Clark (2006) suggest that “data within themes should cohere together meaningfully, while there should be clear and identifiable distinctions between themes” (p. 91). After reviewing the initial themes developed during the previous phase, it was apparent that some could be combined to form larger overarching theme.

Specifically, the initial theme labeled “Demeanor” was extended to include responses regarding the psychological state of the witness. Being relaxed is frequently noted in descriptions of an effective demeanor (Wellborn, 1991). Nervousness and anxiety often takes away from the appearance of being relaxed. Although nervousness and anxiety were originally classified as a psychological state, after further thought their role in the demeanor of an individual became apparent. As a result, the two themes were merged together to form one overarching theme. Individuals often rely on demeanor to determine the psychological state of others (Mehrabian, 1972). Therefore, the label of the new theme became “Demeanor and/or Psychological State.”

In addition, after re-examining the coded responses grouped with four of the initial themes, Truthfulness, Testimonial Script, Persuasiveness, and Clarity, it was apparent that a new, broader theme could be created that would combine them into one overarching thematic category labeled “Testimonial Content.” As seen in Table 4.1, this new theme is broader in nature and more effectively captures the essence and scope of the coded responses (i.e.,

testimonial content). Thus, data originally coded within the four separate initial themes were re-coded and classified under this new Testimonial Content theme.

Phase Five: Defining Themes and Identifying Subthemes

The fifth phase of the thematic analysis consisted of a deeper analysis of the previously developed and modified themes. During this phase, Braun and Clark (2006) suggest exploring each theme individually, as well as in relation to the other themes. In the following sections the way in which each theme was defined during data analysis is further explained, as well as the overall meaning and significance of the theme in relation to the data as a whole. Furthermore, data within each theme were also analyzed in effort to identify any subthemes, or “themes-within-a-theme,” present within each of the overarching thematic categories (Braun & Clarke, 2006, p. 92). Each theme is further described below and subthemes within each thematic category are identified (see Table 4.1).

Demeanor and Psychological State

Throughout the entire questionnaire, respondents frequently mentioned the demeanor and/or psychological state of a witness. This thematic category includes information regarding how a witness behaves while testifying in terms of his or her body language and attitude. In general, the demeanor of a witness includes all aspects of a witness’ appearance excluding the actual substance of the testimony.

As seen in Table 4.1, three subthemes emerged within the Demeanor and Psychological State thematic category. The three subthemes identified were, (1) Anxiety Reduction, (2) Confidence, and (3) Credibility/Likeability. The Anxiety Reduction subtheme included responses relating to calming the witness, eliminating uncertainties, and/or

decreasing the amount of stress or anxiety associated with testifying. Among responses within the second subtheme, Confidence, were participant reports that the witness preparation process has an impact on the confidence level of a witness. Specifically, as a witness becomes more involved in the witness preparation process, they gain insight about their abilities. Responses within the third subtheme, Credibility, discuss the witness being believable or trustworthy, as well as how pleasing or engaging a witness is perceived.

Table 4.1

Themes and SubThemes Drawn From Open-Ended Questionnaire Data

Theme	Subtheme	Sample Response
<i>Demeanor/Psychological State</i>	Anxiety Reduction	Help them feel more at ease with upcoming deposition/testimony
	Confidence	Empower the witness, want witness to feel more confident/comfortable as a result of our time together
	Credibility	Will leave an impression on the jury and your behavior contributes to that impression
<i>Testimonial Content</i>	Truthfulness	Make sure the witness understands the importance of telling the truth
	Persuasiveness/effectiveness	To testify convincingly
	Message Clarity	Help them tell their story with maximum clarity
	Wording of message	Giving witnesses safe harbor concepts to return to when dealing with difficult issues
<i>Procedure</i>	Techniques	Recognize the techniques and traps typically used in cross
	Roles	To make sure a witness is clear on his role in the process & also fully understands the role of the attorneys on both sides of case
	General Procedure	Helping witnesses to understand the process, procedure and realities of communicating in an atypical environment
<i>Other</i>		Depends on the capacity of the witness

Testimonial Content

A second thematic category present among participant responses throughout the questionnaire was labeled “Testimonial Content.” Specifically, responses categorized within the Content theme were those that were in direct reference to the testimonial substance of a witness. Within this thematic category, responses were grouped into four subthemes: (1) Truthfulness, (2) Persuasiveness/Effectiveness, (3) Message Clarity, and (4) Wording of the Message. The subtheme labeled “Truthfulness” included responses regarding testimonial content that is candid and honest. The second Content subtheme, Persuasiveness and/or Effectiveness, included responses that referenced testimonial content resulting in the intended or desired outcome. An effective and persuasive testimony convinces the trier of fact to believe the sequence of events and evidence as presented by that witness. Additionally, responses within the Message Clarity subtheme expressed the importance of having the ability to articulate thoughts and ideas in a clear and consistent manner. The Message Clarity subtheme also includes responses concerning the level of understanding both the witness and jury have regarding the testimony.

Procedure

The final salient theme emerging from the questionnaire data was in reference to procedural issues. Participants frequently expressed concern over the knowledge level of a witness regarding the processes and procedures involved in the legal setting. Therefore, during data analysis the Procedure theme was defined as “responses that help others understand and make sense of the organizational issues and policies relevant to witness preparation and/or any other aspect of the litigation process.” Three subthemes identified

within the Procedure thematic category included, (1) Techniques, (2) Roles of Personnel Involved (i.e., witness, consultant, attorney, and/or other personnel), and (3) General Process and Procedures. Responses grouped within the subtheme labeled “Techniques” were those that made reference to specific practices used during either witness preparation or trial. For example, a response classified within this subtheme might provide information regarding methods of preparing a witness to testify. Additionally, responses within this subtheme might also provide information regarding techniques or strategies typically used by opposing counsel during cross-examination. The subtheme labeled “roles” included coded data referring to the roles, duties, tasks, or relation to others of any personnel involved in either witness preparation and/or the legal process as a whole. For instance, a participant might provide a response that explains the role of individuals such as the witness, consultant, attorney, and/or any other personnel of interest. The final subtheme within the Procedure thematic category was labeled “General Process and Procedures.” Responses within this subtheme provided general information regarding what to expect during both witness preparation and trial.

Other

Braun and Clark (2006) explain that a theme labeled “other” or “miscellaneous” may be used to group responses that do not seem to fit within the main themes. For example, the following are responses typically found in the category labeled “other”: “N/A,” “depends,” and “don’t know.”

In sum, the fifth phase of the thematic analysis consisted of a deeper analysis of the themes previously developed. Additionally, subthemes within the thematic categories were

identified. Overall, four themes, Demeanor/Psychological State, Testimonial Content, Procedure, and Other were identified, each of which capture the essence of the majority of the open-ended data.

Phase Six: Final Analysis and Report

The last phase of a thematic analysis, as outlined by Braun and Clarke (2006), involves a final analysis of the data and provides an “analytic narrative” of the data set as a whole (p. 93). This phase goes beyond simply explaining the data. Braun and Clarke (2006) explain that the purpose of this phase is “to tell the complicated story of your data in a way which convinces the reader of the merit and validity of your analysis” (p. 93). In fact, this section not only provides additional information regarding the content in the data, but also reports various thematic patterns within the content of the data and the meaning of such patterns.

In order to provide an overall description and explanation of the data as a whole, a brief summary of each thematic category, and relevant subthemes in the four sections of the questionnaire was created. The summaries developed not only reduced the amount of raw data, but also provided a synopsis of typical responses to the questions within each section of the questionnaire. The various summaries were then examined and compared to determine any similarities or differences among responses within each section of the questionnaire.

Section One: Description of Services

The questionnaire began by asked participants to provide descriptions of witness preparation services. Questions during this section were most interested in descriptions of services provided to the attorney. Although each individual’s responses varied, similarities

and shared experiences were evident. The sections below outline the themes commonly shared among participants in regard to descriptions of witness preparation services.

Testimonial Content theme. When indicating specific words or phrases used to describe witness preparation services to attorneys/clients, the Testimonial Content theme emerged most frequently. In fact, this theme was referenced in 30 responses categorized within the four subthemes, which include Persuasiveness/Effectiveness, Truthfulness, Message Clarity, and Wording of Message (see Table 4.2).

Specifically, 13 responses described witness preparation services as a method of enhancing the persuasiveness and/or effectiveness of testimonial content. For example, when asked to provide words or phrases typically used to describe witness preparation services to attorney/clients, the description provided by one participant was to “make witness as persuasive as possible.” In addition to being persuasive, participants indicated the usefulness of using witness preparation to increase the overall effectiveness of a testifying witness. For instance, a participant indicated that witness preparation services “teach the clients and witnesses effective communication techniques, on and off the witness stand.”

Participants also indicated that the Testimonial Content subtheme Truthfulness was an important element of witness preparation services ($n = 8$). For example, it was often stated that witness preparation services are “to help a witness testify truthfully.” Another participant explained that witness preparation services help a witness “remain truthful.”

In addition, five participants referenced the message clarity when describing witness preparation services. For example, one response was to “help them to tell their story with maximum clarity.”

Finally, a few participants also expressed concern regarding the wording of the message when describing witness preparation services ($n = 4$). For example, one respondent mentioned that witness preparation services “assist attorneys in organizing testimony and deciding what they need to tell jurors and what they need to show them.”

Table 4.2

Words/Phrases Used to Describe Witness Preparation Services to Attorneys/Clients

Theme/Sub-theme	Sample Response	<i>n</i>
<i>Testimonial Content</i>		30
Truthfulness	To help a witness testify truthfully	8
Persuasiveness/Effectiveness	Assist in being more persuasive	13
Message Clarity	Help them tell their story with maximum clarity	5
Wording of Message	Themes that resonate	4
<i>Demeanor/Psychological State</i>		22
Anxiety Reduction	Decrease anxiety and other difficult feelings or negative associations	12
Credibility	Credibility enhancement	8
Confidence	Increase confidence	2
<i>Procedure</i>		9
General Process	Helping witnesses to understand the process, procedure and realities of communicating in an atypical environment	8

Demeanor/Psychological State theme. The second most frequently used thematic category when describing witness preparation services was the Demeanor and/or Psychological State of the witness. Specifically, 22 of the descriptions of witness preparation services addressed the demeanor theme. The majority of responses fell into two of the previously identified subthemes – Anxiety Reduction and Credibility.

The first recurrent subtheme was Anxiety Reduction ($n = 12$). Participants frequently expressed concern regarding the stress and anxiety commonly associated with testifying and

the usefulness of witness preparation in reducing such feelings. For example, one participant specifically explained that witness preparation services are used to “prepare witnesses for the stresses of trial.” Another participant explained witness preparation services as a way “to calm the client.”

Additionally, Credibility was a second recurrent subtheme within this thematic category ($n = 8$). When discussing witness preparation services, many of the responses referenced the confidence and likeability of the witness being prepared to testify. For example, one respondent provided the following answer when asked to describe witness preparation services:

We work at making the client as likeable as possible. Juries put a great deal of weight on whether they like the client...and if they like him/her, jurors are more likely to want to believe the client. Because most clients don't know how ‘to be’ in front of a jury, we give the client ‘permission’ to be him/herself and at the same time, know what to expect.

Interestingly, only two respondents addressed the final subtheme, Confidence.

Procedure theme. When asked to describe witness preparation services, the fewest number of responses were classified in the Procedure thematic category ($n = 9$). However, the most prevalent sub-theme among these responses addressed General Procedures ($n = 8$). For example, one respondent described witness preparation services as, “helping witnesses to understand the process, procedure, and realities of communicating in an atypical environment.”

Section One Close-Ended Survey Items. The first section of the survey also included several closed-ended items asking participants to provide information regarding specific practices used when communicating with the attorney prior to witness preparation sessions. Approximately half of the participants reported that they always obtain a written and signed letter of agreement upon initial contact by the attorney ($n = 25$). Eighteen participants indicated that they sometimes engage in this practice. Seven individuals noted that they rarely obtain a letter of agreement and one participant reported that he or she never engages in that practice.

In a close-ended question, participants identified information typically provided to the attorney prior to being engaged for witness preparation (see Table 4.3). For example, the majority of participants indicated that limits of confidential/privilege is often discussed prior to participating in witness preparation ($n = 32$). Additionally, information regarding the goals of witness preparation ($n = 41$), as well as techniques to be used ($n = 32$) are frequently provided by the trial consultant prior to the session. Participants also report that before witness preparation begins, the role of the attorney is discussed ($n = 38$). However, responses to the survey indicate that it is uncommon for written descriptions of the witness preparation process to be provided to the attorney prior to engaging in witness preparation ($n = 12$). As a result, it is unclear whether such information is provided orally or not.

Table 4.3

Information Provided to Attorney Prior to Being Engaged for Witness Preparation

Information	<i>n</i>	%
Limits of confidentiality/privilege	32	60.4
Goals of witness preparation	41	77.4
Techniques to be used in witness preparation	32	60.4
Role of attorney in witness preparation	38	71.7
Written description of witness preparation process	12	22.6

After obtaining a contract for services, participants report that they typically engage in a number of practices (see Table 4.4). The largest number of participants indicated that he or she always obtains the attorney's goals for witness preparation ($n = 40$). Another practice relevant to the procedural theme (typically engaged in after obtaining a contract) includes clarifying the role of the attorney in the witness preparation process ($n = 35$).

Table 4.4

Frequency of Conducting Practices After Contract for Services is Obtained

Practice	Always	Often	Rarely	Never	N/A
	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>
Review case materials in preparation	38	12	-	-	1
Obtain the attorney's goals for witness preparation	40	12	-	-	1
Discuss techniques consultant may use during witness preparation (with attorney, witness, or both)	28	22	1	1	1
Review existing videos of witness (if available)	20	26	5	-	2
Address concerns regarding discoverability with attorney	25	19	8	-	1
Clarify attorney's role in the witness preparation process	35	16	1	-	1
Discuss whether attorney should do mock cross-exam of witness	34	15	3	-	1
Provide written description of process of witness preparation	5	7	26	13	2
Discuss group preparation versus one-on-one preparation	1	7	26	11	8

Note. Dashes indicate that no participants gave the indicated response.

Section Two: Witness Preparation Goals

The second section of the questionnaire probed for information regarding goals for witness preparation. To begin, participants were asked to list their top three goals. Participants were then asked to indicate how often their goals matched those of their client. Towards the end of this section, participants were presented with a list of goals and objectives for witness preparation and asked to indicate whether each was acceptable or not.

First, participants were asked to list their top three goals for witness preparation. Similar to the first section of the questionnaire regarding descriptions of witness preparation services, the Testimonial Content theme was most frequently mentioned by participants when asked about their goals for witness preparation. In fact, when the three goals were combined, 84 responses fell into the Testimonial Content theme, followed by Demeanor and Psychological State ($n = 65$), Procedure ($n = 54$), and Other ($n = 4$), respectfully (see Table 4.5). As noted previously, Braun and Clark (2006) explain that a theme labeled “other” or “miscellaneous” may be used to group responses that do not seem to fit within the main themes. For example, the following are responses typically found in the category labeled “other”: “N/A,” “depends,” and “don’t know.”

First goal. When analyzing the responses specifically listed as a top goal, the Testimonial Content thematic category was mentioned most frequently by the participants ($n = 25$), followed by the Demeanor and Psychological State theme ($n = 23$) and the Procedure theme ($n = 20$) (see Table 4.5).

Regarding the Testimonial Content theme, participants expressed the importance of having the witness “testify truthfully” ($n = 7$), as well as ensuring “clarity of testimony”

and/or “clarifying testimony for the witness so that he or she understands” ($n = 6$). The Message Clarity subtheme was used in two distinct ways by participants. First, responses indicate that a top goal for witness preparation is to ensure that the witness understands his or her testimony. A second goal was ensuring that the testimony is communicated in a manner that will be clear to members of the jury. For example, one participant’s top goal for witness preparation was to “clarify testimony for the witness so he/she understands,” while another participant indicated that it was “helping to communicate clearly and succinctly.” The largest number of responses regarding Testimonial Content indicated the persuasiveness and/or effectiveness of the message to be a top goal.

In addition to testimonial content, the Demeanor and/or Psychological State of the witness was a prevalent thematic category among responses regarding the top goal for witness preparation, with the largest number of responses addressing the Anxiety Reduction subtheme ($n = 14$). Participants often indicated the importance of relaxing the witness and ensuring that he or she feels comfortable. For example, the top goal of one participant is to “reduce nervousness and feelings of lack of control.”

Finally, some top goal responses also fell into Procedure thematic category ($n = 20$), with the most common response addressing the General Processes ($n = 9$). For example, one participant indicated that their top goal during witness preparation is “educating the witness about the process of testifying.” Participants indicated that enhancing the witness’ level of understanding regarding procedures involved in both witness preparation and the litigation process in general was among their top priorities. Similarly, participants indicate the importance of making sure that witnesses understand the roles of various individuals

involved in the preparation and litigation process, including themselves, as well as how their testimony fits into the general process ($n = 7$).

Table 4.5

Frequency of Themes and Subthemes Present in Top Three Goals for Witness Preparation

Theme/Subtheme	Goal One	Goal Two	Goal Three
	<i>n</i>	<i>n</i>	<i>n</i>
<i>Testimonial Content</i>	25	32	27
Truthfulness	7	7	5
Persuasiveness/Effectiveness	9	11	7
Message Clarity	6	4	3
Wording of message	3	10	12
<i>Demeanor/Psychological State</i>	23	21	21
Anxiety Reduction	14	10	6
Credibility	5	6	11
Confidence	4	5	4
<i>Procedure</i>	20	15	19
General Process	9	5	0
Techniques	4	7	16
Roles	7	3	3
<i>Other</i>	1	1	2

Second goal. Similar to the top goal, the largest number of responses when listing the second goal for witness preparation were categorized into the Testimonial Content theme ($n = 32$), followed by Demeanor and/or Psychological State ($n = 21$), Procedure ($n = 15$), and Other ($n = 1$), respectfully. However, within the Testimonial Content thematic category for the second goal, the two most common subthemes were Persuasiveness/Effectiveness ($n = 11$) and Wording of Message ($n = 10$). Participants also indicated that their second goal was to have the witness tell the truth ($n = 7$). Overall, the three primary areas were anxiety

reduction, persuasiveness, and wording. The first is in keeping with previous discussion of the top goal as was persuasiveness. The third area, wording, differed, as it was at the bottom of the list as a top goal, but listed among the top three as a second goal.

Third goal. When providing information regarding the third goal for witness preparation, the largest number of responses were also grouped into the Testimonial Content category ($n = 27$), followed closely by Demeanor and/or Psychological State ($n = 21$). This finding was similar to the primary areas report for the top two goals. Nineteen responses fit within the Procedure theme. Both Credibility ($n = 11$) and Anxiety Reduction ($n = 6$) received the largest number of responses within the Demeanor and/or Psychological State thematic category for the third goal. The Wording of the Message ($n = 12$) and its Persuasiveness and/or Effectiveness ($n = 7$) were most frequently mentioned in regards to the Testimonial Content theme.

Acceptability of goals. An additional question presented in this section of the questionnaire asked participants for their opinion regarding the acceptability of specific witness preparation goals. A list of possible goals was provided and respondents were asked to indicate if they thought the specific goal was acceptable, unacceptable, or if they were unsure. Overall, little variation was found in the responses. As shown in Table 4.6, the majority of respondents indicated that each of the goals listed were acceptable. Furthermore, all of the 53 participants reported that each of the goals grouped in the Demeanor and Psychological State theme were acceptable. Goals listed within this theme included, increasing confidence, clarifying uncertainties, reducing anxiety, and improving the physical appearance of the witness.

Table 4.6

Acceptability of Goals/Objectives for Witness Preparation.

Theme/Subtheme	Acceptable	Unacceptable	Not Sure
	<i>n</i>	<i>n</i>	<i>n</i>
<i>Procedure</i>			
Educate witness about giving testimony	51	-	2
Provide strategies for cross-exam	46	1	6
Discuss role of witness testimony in overall case presentation	49	-	4
Rehearse/practice cross-exam	50	1	2
Address difference between deposition and trial testimony	50	2	1
<i>Demeanor/Psychological State</i>			
Increase witness' confidence	53	-	-
Clarify witness' uncertainties/anxieties about testifying	53	-	-
Reduce witness' anxieties about testifying	53	-	-
Improve witness' physical appearance	53	-	-
<i>Testimonial Content</i>			
Teach the witness effective verbal communication skills	53	-	-
Teach effective nonverbal communication skills	52	-	1
Help witness identify most persuasive words or phrases to use	44	2	7
Refine topics of content for direct exam	44	4	5
Apply case themes to witness' testimony	45	1	7
Explore fact recollection	40	4	9
Confirm witness' testimony (and relate support for opinions)	37	2	14
<i>Other</i>			
Address communication problems between attorney and witness	47	-	6

Note. Dashes indicate that no participants gave the indicated response.

In contrast, responses were not unanimous regarding the goals grouped within the Testimonial Content and Procedure categories. When compared to all the goals listed, those falling into the Testimonial Content thematic category were reported as unacceptable by the largest number of respondents. For example, 70% ($n = 37$) of the respondents indicated that

the goal “confirm witness’ testimony (and related support for opinions)” was acceptable, while 4% ($n = 2$) said it was unacceptable and 26% ($n = 14$) responded that they were not sure. Similarly, 75.5% ($n = 40$) of respondents indicated that it was acceptable to explore fact recollection, 7.5% ($n = 4$) answered unacceptable, and 17% ($n = 9$) were not sure. Overall, the Content theme presented the greatest variation in responses.

Section Three: Witness Preparation Techniques

The third section of the questionnaire probed for information regarding witness preparation techniques. Included in this section were questions asking about unacceptable techniques, as well as practices and techniques typically used by trial consultants. When examining this section of the questionnaire as a whole, the content thematic category was once again most prevalent.

Unacceptable techniques. The first question in this section specifically asked participants to provide information regarding unacceptable witness preparation techniques. Responses to this open-ended question often included more than one idea, enabling a single response to fit within in a number of thematic categories.

As seen in Table 4.7, the majority of responses to this question were grouped into the Testimonial Content thematic category ($n = 57$). In fact, all but two of the responses made at least some reference to content. Among these responses, the subtheme labeled “Wording of Message” was noted most frequently by respondents as contributing to unacceptable witness preparation techniques ($n = 41$). In particular, the idea of “scripting,” “horse-shedding,” or “coaching” witness testimony was most common among the responses. For example, participants provided responses such as, “telling the witness what to say or not to say,”

“suggesting possible answers or directing a witness towards preferable expressions of their testimony,” and/or “planting false recollections,” each of which were similarly coded and grouped within this subtheme.

Additionally, when discussing unacceptable witness preparation techniques participants often expressed concern regarding another content subtheme labeled “Truthfulness” ($n = 16$) However, due to the negative wording of the question, the majority of responses grouped in this subtheme were framed as lying or not being truthful. In general, participants indicated that it was unacceptable to instruct, advise, or encourage a witness to lie or be untruthful in their testimonial content.

Table 4.7

Unacceptable Witness Preparation Practices

Theme/Subtheme	Sample Response	<i>n</i>
<i>Demeanor/Psychological State</i>		
Anxiety Reduction	Witness leave with added doubt or anxiety	1
Confidence	Reface witness confidence by playing psychological tricks	7
Credibility	Instruct clients/witnesses to act in ways to try to manipulate the jury (for instance, flirting)	3
Other	Not discuss the case but only pure demeanor issues	1
<i>Procedure</i>		
Presence of attorney	Working with witness without an attorney present	2
Roles	Telling witness you are a lawyer when you are not	1
Techniques	Encourage breaking of court rules or laws	7
<i>Testimonial Content</i>		
Wording/language of message	Telling witness directly what to say or not to say	41
Truthfulness/Lying	Instructing a witness to lie	16
<i>Other</i>	Don't know	5

Purpose of preparation session. The questionnaire continued by asking participants what they typically tell the witness regarding the purpose of the preparation session(s). Testimonial Content ($n = 34$) and Demeanor and Psychological State ($n = 32$) thematic categories were most frequently mentioned in responses to this question (see Table 4.6). Within the Testimonial Content theme, participants frequently commented on the Persuasiveness and/or Effectiveness ($n = 13$) of witness testimony, as well as its Message Clarity ($n = 11$). For example, one participant stated that the purpose of the preparation session is “to help him/her be as persuasive as possible.” According to another respondent:

Everyone can be misunderstood and this is heightened in an unnatural communication environment where the opposing attorney is trying to twist their words and/or meaning. This session is to arm them so that they can clearly communicate the truth to a bunch of strangers.

However, participants also described the purpose of preparation in regards to the Demeanor and/or Psychological State of the witness ($n = 32$). Specifically, the majority of respondents mentioned Anxiety Reduction in their descriptions ($n = 22$). For instance, one participant stated that the purpose of the sessions is “to help them feel more at ease with their upcoming deposition/testimony.” Others also mentioned that the sessions provide an opportunity to address any concerns that the witness may have and to help them feel more comfortable. In fact, as shown in Table 4.8, anxiety reduction was most frequently mentioned among the subthemes within all three thematic categories.

Table 4.8

Purpose of Preparation Session(s) as Told to Witness

Theme/Subtheme	Sample Response	<i>n</i>
<i>Procedure</i>		<i>18</i>
General Process	Understand the process	13
Techniques	Review anticipated areas of questioning	2
Roles	Help them understand their role in trial	3
<i>Testimonial Content</i>		<i>34</i>
Truthfulness	Help them communicate the truth	7
Persuasiveness/Effectiveness	To help him/her be as persuasive as possible	13
Message Clarity	Make sure testimony is clear/understandable	11
Wording of message	Help with their testimony	4
<i>Demeanor/Psychological State</i>		<i>32</i>
Anxiety Reduction	To help them feel more at ease with their upcoming deposition/testimony	22
Credibility	Our work will help them appear credible	2
Confidence	Give them confidence	5
<i>Other</i>	Depends on the capacity of the witness	<i>11</i>

Of particular note are those items listing a technique that the majority of respondents state they never engage in, and those they noted that they always do (see Table 4.9). For example, when specifically asked how often written answers are provided to the witness, the majority of respondents indicated that they never use that technique ($n = 48$). When asked the frequency of providing oral answers to the witness, a smaller number of respondents indicated that they never do so ($n = 38$). However, greater variations in responses were present when asked the frequency with which areas of testimony are suppressed or shaped. Specifically, when asked the frequency of using the technique of suppressing areas of testimony, 28 participants indicated never, 15 responded rarely, and seven said that they often suppress areas of testimony. However, when asking about a different, yet similar

technique, almost half of the respondents indicated that they often shape areas of testimony ($n = 24$). Seven participants responded that they always shape testimony, while nine indicated never, and 11 said that they rarely shape areas of testimony.

Table 4.9

Frequency of Using Specific Techniques When Preparing Witnesses

Theme/Subtheme	Never	Rarely	Often	Always	N/A
	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>
<i>Testimonial Content</i>					
Advise on the content of witness' testimony	7	13	21	10	2
Provide written answers (script) to the witness	48	4	-	-	1
Provide oral answers (script) to the witness	38	12	1	1	1
Discuss juror/audience perceptions, biases/attitudes	-	4	32	16	1
Suppress areas of testimony	28	15	7	1	2
Shape areas of testimony	9	11	24	7	2
Teach strategies to deal with objections	2	11	28	11	1
Provide strategies to deal with hostility	-	3	30	19	1
Advise on how to best tell the case story/themes through witness testimony	4	7	27	14	1
Advise on sequencing of testimony	4	17	25	6	1
Suggest themes for testimony	6	11	21	14	1
<i>Procedure</i>					
Conduct role plays with witness	-	4	21	27	1
Videotape practice sessions	4	8	25	14	2
Critique of mock direct-examination	1	5	25	21	1
Critique of mock cross-examination	1	5	24	22	1
Review videotape with witness	5	7	27	11	3
Give videotape to witness to take home	34	9	3	2	5
Test witness live with a focus group	17	21	13	-	2
Test video of witness with a focus group	6	15	29	2	1
Visit the courtroom with witness	11	27	12		3
Assess witness' baseline performance	1	5	13	32	2
Provide feedback on witness strengths/weaknesses	-	1	8	43	1
Advise on how to use visual aids, graphics	2	12	25	12	2
Provide handouts to witness with tips/suggestions	30	13	3	6	1
Prepare witnesses with other witnesses present	19	27	4	-	3

Note. Dashes indicate that no participants gave the indicated response.

Table 4.9: (Cont.)

Frequency of Using Specific Techniques When Preparing Witnesses

Theme/Subtheme	Never	Rarely	Often	Always	N/A
	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>
<i>Procedure (cont.)</i>					
Discuss goals of the preparation session	-	1	12	38	2
Review an outline of preparation procedures	10	13	18	8	4
Explain experience and qualifications for conducting witness preparation	6	20	18	8	1
Assure witness that preparation is ethical/legal	5	11	16	19	2
Discuss areas of assessment	4	8	24	15	2
Have witness conduct a self-assessment	5	13	21	11	3
Review witness' self-assessment	6	15	18	11	3
Discuss role of consultant in witness preparation	2	10	12	28	1
Discuss limits of confidentiality	5	13	10	24	1
<i>Demeanor</i>					
Identify the witness' fears/anxieties of testifying	-	2	15	35	1
Teach anxiety management strategies	-	6	25	21	1
Advise about appearance	-	8	25	19	1
Advise on effective nonverbals (e.g., eye contact, posture, etc.)	-	2	16	34	1
Address witness' vocal delivery skills	-	4	25	23	1
Address potential questions regarding witness preparation	1	5	24	22	1

Note. Dashes indicate that no participants gave the indicated response.

Additional comments. An open-ended follow-up question enabled participants to provide any additional comments about techniques used to prepare witnesses not previously listed in the closed-ended items. Once again, as expected due to the nature of the question, the largest number of responses were grouped in the Technique subtheme ($n = 12$) within the Procedure thematic category (see Table 4.10). For example, one participant provided the following response, “more and more I find myself doing witness preparation via phone and/or video conference with witness.” A few participants also mentioned the Wording of

Message ($n = 4$) and one discussed Truthfulness ($n = 1$), both of which are subthemes of the content thematic category.

Table 4.10

Additional Comments about Techniques Consultants Use to Prepare Witnesses

Theme/Subtheme	Sample Response	<i>n</i>
<i>Testimonial Content</i>		5
Truthfulness	Tell the truth	1
Wording of message	The suppression of scope of testimony only refers to not offering more evidence than the question should elicit (not withholding the truth)	4
<i>Procedure</i>		12
Techniques	More and more I find myself doing witness preparation via phone and/or video conference with witness	12
	Demonstrate how visuals should be used	
<i>Demeanor/Psychological State</i>		4
Anxiety Reduction	Provide emotional support	1
Other	Assist witness with clothes shopping	3

Anxiety management techniques. During this section of the questionnaire participants were also given a list of anxiety management techniques and asked to indicate which techniques they typically teach witnesses (see Table 4.11). According to the data, approximately half of the respondents teach witnesses techniques such as deep breathing ($n = 30$), relaxation ($n = 28$), visualization ($n = 26$), cognitive reframing (i.e., self talk) ($n = 27$), and exposure/desensitization ($n = 23$). In addition to the specific techniques provided, some participants ($n = 7$) also listed other techniques. Among the additional techniques listed were pacing, exercise, practice, visiting the place where they will testify, listening carefully. Some respondents also indicated that they do not teach any anxiety management techniques ($n = 7$).

Table 4.11

Anxiety Management Techniques

Technique	<i>n</i>
Deep breathing	30
Relaxation	28
Visualization	26
Cognitive reframing (i.e., self talk)	27
Exposure/desensitization	23
Other	9
None – I don't teach any anxiety management techniques	7

Video and audio tapes. The use of video or audio tapes when preparing a witness was also addressed during this section of the questionnaire. Approximately 64% of respondents ($n = 34$) indicated that they did use video or audio tapes, while 36% ($n = 19$) indicated that they do not (see Table 11). Respondents using video or audio tapes when preparing witnesses were asked a follow-up open-ended question asking what was typically done with the tapes at the end of the session. The largest number of respondents said that they give the tape to the attorney ($n = 18$). Other participants also indicated that they destroy the tapes ($n = 8$), reuse ($n = 7$), erase ($n = 6$), keep ($n = 4$), or review ($n = 3$) them.

Witness preparation ethics. The final two questions of this section of the survey addressed the ethics of witness preparation practices. Participants were first presented a closed-ended question simply asking if they have ever encountered any potentially unethical situations in their witness preparation practice. Approximately 47% ($n = 25$) of the respondents indicated that they have encountered such situations in their witness preparation

practice. Of the rest, seven participants were unsure if they had or had not encountered potentially unethical situation.

A follow-up, open-ended question asked the twenty-five participants who previously indicated that they have encountered potentially unethical situations to further elaborate about the situation ($n = 25$). The majority of respondents explained that the unethical situation involved the content subtheme labeled ‘wording or language of message’ ($n = 28$). Specifically, responses most frequently indicated that the unethical situation involved the attorney shaping or scripting witness testimony ($n = 15$) or asking the witness to lie ($n = 13$). For example, one participant described encounters where the “attorneys insist[ed] on instructing witnesses on answers to give or not to give.” Of all the responses to this question, 72% were framed in a manner attributing the causes of the potentially unethical situation to attorney behavior. Responses placing responsibility on the attorney often included phrases such as, “attorney telling,” attorney wanting,” “attorney suggesting,” “attorney demanding,” etc.

Section Four: Role of the Attorney during Witness Preparation

The final section of the questionnaire probed for information regarding the role of the attorney during witness preparation. The majority of responses regarding the role of the attorney during witness preparation were categorized into the procedural theme. Within this thematic category, a recurrent subtheme addressed was roles. For example, participants frequently addressed the presence of an attorney during witness preparation sessions. In fact, when specifically asked the majority of respondents reported that the attorney should always be present when preparing witnesses ($n = 41$) (see Table 4.12).

Table 4.12

Frequency of Attorney Presence During Witness Preparation

	<i>n</i>	%
Always	41	77
Sometimes	8	15
Rarely	2	4
Never	1	2
N/A	1	2
TOTAL	53	100

However, as seen in Table 4.13, it appears “attorney presence” was interpreted in several ways. For instance, when asked the minimum acceptable practice when preparing witnesses approximately 57% ($n = 30$) indicated that attorney should at minimum be present in the room, while 24.5% ($n = 13$) answered that having the attorney on the premises but not in the room was the minimum acceptable practice. Two participants indicated that the attorney could be on the phone line ($n = 2$), while eight individuals said that not having the attorney present at all was the minimum acceptable practice when preparing witnesses (see Table 4.13).

Table 4.13

Minimum Acceptable Practice When Preparing Witnesses

Response	<i>n</i>	%
Attorney present in the room	30	56.6
Attorney on premises but not in the room	13	24.5
Attorney on phone line	2	3.8
Attorney not present at all	8	15.1
TOTAL	53	100

Although the majority of participants indicated that an attorney should always be present during witness preparation; responses varied when asked if certain practices were acceptable or unacceptable when an attorney is not present (see Table 4.14). As noted earlier, in reference to the Roles subtheme within the Procedure thematic category, 77.4% ($n = 41$) of respondents indicated that the attorney should always be present during witness preparation. A slightly smaller, but comparable number of participants also responded that it is unacceptable to conduct witness preparation practices as usual when the attorney is not present ($n = 38$, 71.2%). Similarly, 73.6% of respondents believe witness preparation should not be conducted in the absence of the attorney. Each of these questionnaire items probe for basically the same information. The consistency of responses suggests that little confusion exists regarding whether the attorney should be present.

Of note, responses were split regarding the acceptability of other practices when the attorney is not present. For instance, approximately half of the participants ($n = 25$, 47.2%) responded that when an attorney is not present, it is acceptable to conduct witness preparation practices as long as it is explained that it may not be protected under attorney-client privilege or work product. Likewise, 45.3% ($n = 24$) indicated that it is acceptable to conduct witness preparation without the attorney present as long as case-related information is not discussed.

Table 4.14

Acceptability of Practices When Attorney is Not Present

Practices	Acceptable		Unacceptable	
	<i>n</i>	%	<i>n</i>	%
Conduct witness preparation practices as usual	15	28.3	38	71.7
Conduct witness preparation practices, but explain that it may not be protected under attorney-client privilege or work product	25	47.2	28	52.8
Conduct witness preparation but do not discuss any case-related information	24	45.3	29	54.7
Do not conduct witness preparation practices	39	73.6	14	26.4

Note. Percentages do not equal 100% because participants could check all that apply for this item.

Overall Findings

In sum, three overarching themes emerged from responses to throughout the questionnaire. These themes pertain to both the opinions and common practices employed by participants during witness preparation. The first theme, Demeanor and Psychological State, was present in responses discussing anxiety reduction, credibility, and/or confidence. The second theme, Content, related directly to the substantive content of witness testimony, including the truthfulness, persuasiveness and/or effectiveness, clarity, and/or language or wording of the message. The final theme, Procedure, related directly to responses discussing the techniques, roles, and/or general process and procedure involved in witness preparation. These three themes indicate areas of importance during witness preparation, as viewed by trial consultants.

This chapter presented the results from the data analysis of both open- and close-ended items. The next section provides a detailed explanation of the key findings, as well as

explores the implications associated with those results. Limitations and suggestions for future research are also considered.

V. DISCUSSION

Witness preparation is one of the most important and controversial services provided by trial consultants (LeGrande & Mierau, 2004). LeGrande and Mierau (2004) suggest that the trial consulting industry has further complicated a practice, with an already long history of criticism. However, Moran (2001) argues that at the root of the criticism is a “misunderstanding about what trial consultants are capable of doing and what they actually do” (p.80). Furthermore, witness preparation is usually conducted in private, adding to the lack of information and uncertainty about what occurs and the role of trial consultants during the process (Applegate, 1989; Gershman, 2002; Salmi, 1999). Gershman (2002) explains that the private nature of the practice makes it difficult for outsiders to gain a true understanding of what actually occurs during witness preparation. As a result, speculations and false assumptions are often formed, further adding to the negative reputation of the witness preparation process, as well as the individuals involved.

The goal of this study was to explore the views and opinions of trial consultants regarding witness preparation, including the techniques customary to the process. Results provide insight into the opinions and practices of trial consultants as they relate to specific areas of witness preparation as well as to the rules and standards governing the individuals involved. The discussion of these results will proceed in three stages. First, the findings are interpreted as they relate to the three research questions. Second, limitations of this study are discussed. Finally, suggestions for future research are provided.

Research Questions

The credibility of a witness can have a profound affect on the outcome of trial procedures, as the information provided during testimony serves as evidence from which a verdict is decided (Fyfe, 2005; Schag, 2004). To further explore this idea, the first research question asked how trial consultants approach the idea of credibility when preparing witnesses. Relationships between the thematic categories and trial consultant's perceptions of credibility were discovered while investigating this research question. The role of credibility as revealed by these three overarching themes is discussed below.

Research Question One:

How do Trial Consultants Approach the Concept of Credibility when Preparing Witnesses?

Elements and Importance of Credibility

Both legal and social science scholars note the importance of credibility to the trial process (Burgoon & Hoobler, 2002; Plotkin, 2005; Rieke, 1990; Tormala & Petty, 2004). Witness credibility is important because it affects evaluations made by jurors and can potentially impact the outcome of a trial (Fyfe, 2005; Schag, 2004). Individuals perceived as being credible also tend to be more believable and influential (Reike & Strutman, 1990; Tormala & Petty, 2004). As noted previously, expertise, or specialized knowledge, is an important element of credibility and is often used as a heuristic cue to determine the validity of a message when individuals lack motivation or ability to think critically (DeBono & Synder, 1992). Perceived credibility also relies on trustworthiness, or the perceived validity of the claim (Rieke, 1990; Sternthal et al., 1978). Consistency helps to encourage trustworthiness (Schelenker, 1990). However, inconsistent statements are often viewed less

negatively in terms of credibility when the source is perceived to be confident (Brewer & Burke, 2002).

Nonverbal communication is often used to distinguish the credibility of individuals (Boccaccini, 2002; Burgoon, Birk, and Pfau 1990; Wellborn, 1991). Direct eye contact as well as a vocal style that is conversational are two elements of nonverbal communication that increase perceptions of credibility (Aguinia et al., 1998; Kleinke, 1986). Behavioral cues also indicate individual's level of communication apprehension (Kaufmann et al., 2003). High communication apprehension is often perceived as more confident and credible (McCroskey & Richmond, 1976). In sum, the perceived credibility of witnesses has an effect on judgments made by jurors.

Trial Consultants Recognize Importance of Credibility

Results from this study strongly suggest that trial consultants recognize the importance of credibility. Although not explicitly stated, relationships between the thematic categories and trial consultant's perceptions of credibility were discovered while investigating this research question. For instance, without using the term "credibility," a response could discuss credibility by use of its numerous elements (i.e., expertise, trustworthiness, consistency, nonverbals, etc.).

Participant responses indicated that trial consultants often provide witnesses with information regarding techniques typically used during preparation sessions as well as during the trial process in general. An increased understanding of what to expect often results in better performance (Boccaccini, 2002; Yarbrough, 2001). Participants frequently expressed concern regarding the level of knowledge a witness has regarding the procedures typically

involved in witness preparation as well as the legal system in general. Accordingly, responses indicated that preparation practices are often aimed towards providing general information as to what can be expected. In fact, witness preparation provides a prime opportunity to ensure that a witness thoroughly understands procedures typically encountered during preparation sessions as well as at trial.

As previously mentioned, providing information regarding possible technique that could be used during processes can enhance perceived comfort and credibility (Boccaccini, 2002; Varinski, 1998; Yarbrough, 2001). Findings from the current study indicate that witnesses are often provided information regarding techniques typically used during preparation and trial processes. For example, throughout the questionnaire participants often reported the usefulness of preparation in enhancing the effectiveness of a witness during cross-examination.

Previous research provides supports for this witness preparation practice (Boccaccini, 2002; Simon, 2001). In fact, Boccaccini (2002) recommends that witness preparation sessions include discussions regarding various types of questions and techniques that the witness is likely to encounter at trial, as well as providing suggestions for responding effectively. Knowing what to expect is especially useful in stressful and/or anxiety-prone situations, such as those common to the courtroom. Reducing, or eliminating uncertainty increases the witness' comfort and confidence, both of which have positive affects on perceived credibility (Brewer & Burke, 2002; Kaplan, 1976; Tetterton & Warren, 2005; Wells et al., 1979). Therefore, it is understandable why participants in the current study

frequently noted the importance and usefulness of witness preparation in informing about common techniques used during cross-examination and strategies to prevail.

Although the Procedure theme was frequently mentioned by participants, the Demeanor and Psychological State theme as well as the Testimonial Content theme were more prevalent among responses, an indication that both are knowledgeable parts of witness preparation.

Enhancing Credibility through Demeanor and Psychological State

Participants frequently mentioned the demeanor and/or psychological state of a witness when discussing various aspects of witness preparation. In general, the demeanor and psychological state of a witness includes all aspects of his or her appearance excluding the actual substance of the testimony. Responses often suggested that how a witness behaves while testifying, in terms of his or her body language and attitudes, is an influential aspect of witness testimony. Furthermore, participants indicated that witness preparation typically involves providing advice regarding effective nonverbal behaviors.

As outlined at the beginning of this study, a considerable amount of previous research supports witness preparation practices addressing the demeanor and/or psychological state of a witness (Applegate, 1989; Boccaccini, 2002; Lubet, 1997; Plotkin, 2005). Specifically, the demeanor and psychological state of a witness can directly impact juror evaluations of the witness (Applegate, 1989; Aron & Rosner, 1998; Boccaccini, 2002; DiBalsi, 1993; Plotkin, 2005). This is especially important due to the limited amount of time a witness is given to testify in front of the jury (Plotkin, 2005). In fact, both legal and communication scholars seem to agree that when deciding to believe or disbelieve witness testimony, jurors often rely

on impressions of credibility based behavioral cues (Burgoon, Birk, and Pfau , 1990; Lubet, 1997; Plotkin, 2005).

Results from this study also support demeanor and psychological state as two important topics addressed by trial consultants when preparing witnesses. In fact, the impact and importance placed on addressing the demeanor and psychological state of a witness is present in participant responses to a number of questionnaire items. Most noteworthy is its presence in open-ended responses regarding top goals and objectives for witness preparation. For example, when discussing the top goals for witness preparation, participants ranked Anxiety Reduction first among the subthemes in all three thematic categories. Additionally, all 53 participants indicated in a closed-ended item that reducing witness' anxiety about testifying and clarifying uncertainties and/or anxieties about testifying were acceptable goals or objectives for witness preparation. Responses indicate that any fears or anxieties regarding testifying are typically identified during witness preparation. Thus, it appears that trial consultants both understand the need for, and actually work toward, increasing the comfort level of a witness – an important element to increasing witness credibility (Witt & Behnke, 2006).

While respondents tended to be consistent with their views of the importance of credibility and the need to address the demeanor and psychological state of the witness, results from this study indicate some uncertainty in the area of testimonial content. For example, when respondents were provided a list of possible goals for witness preparation and asked to indicate if they were acceptable, responses varied regarding the acceptability of confirming witness testimony and fact recollection. In fact, 14 participants indicated that they

were not sure if confirming witness testimony was acceptable and nine were unsure about fact recollection. As noted in the literature review, witness testimony can be affected by a number of memory distortion problems (e.g., over time memories fade and witness may decide to replace the missing information with information provided during preparation (Cann & Katz, 2003; Loftus, 1992).

Misleading information and the resulting memory distortion can have negative affects on jurors' perception of witness credibility. If misleading, or false testimony is detected, the witness will most likely not be viewed as trustworthy. Previous research identifies trustworthiness as an important element of determining credibility (Hovland & Weiss, 1951; Lui & Standing, 1989; Tormala & Petty, 2004). As witnesses are prepared, they are often presented with an abundance of information. Patterson (2004) notes the possibility that facts learned during the preparation process can be incorporated, or assimilated, into his or her original memory of the event or situation in question. The possibility for memory alteration increases as recollection is accompanied by comments and/or suggests from the attorney or consultant. Loftus (2003) suggests that the ease with which memories can become distorted leads to questions regarding the validity of trials relying largely on the testimony of witnesses. In fact, false memories could contribute to false accusations and injustices that could have been avoided or minimized (Loftus, 2003; Zaragoza, Payment, Ackil, Drivdahl, & Beck, 2001). Unfortunately, no items on the survey asked to identify how consultants may try to reduce memory distortion.

However, overt changes in witness testimony were addressed. For example, the majority of responses mentioned altering or scripting testimonial content when asked to

provide information regarding unacceptable witness preparation practices and techniques. Increasing our knowledge regarding what is acceptable and unacceptable in the minds of those involved in witness preparation is especially important if consultants wish to refute critics of witness training. For instance, previous criticisms have suggested that coaching witnesses to lie and/or scripting witness testimony are common practices during witness preparation (Gershman, 2002; Silver, 1991; Zacharias & Martin, 1999). Importantly, results from this study indicate that trial consultants view coaching a witness to lie and scripting as unacceptable goals.

In summary, results of this analysis suggest that trial consultants do not explicitly discuss “credibility” as a part of witness preparation. Instead, they address it indirectly by discussing elements commonly associated with the concept (e.g., demeanor, trustworthiness, etc.).

Research Question Two:

*What are trial consultant views of communication apprehension
and how do they attempt to reduce it?*

The second research question was aimed towards increasing our knowledge regarding trial consultant views of communication apprehension and how they attempt to reduce it when preparing witnesses. The importance placed on reducing anxiety during witness preparation is supported by previous research which indicates that the level of apprehension an individual is experiencing can have an effect on perceived credibility (Cole & McCroskey, 2003; Kaufmann, et al., 2003; Rubin, et al., 1997). Preparation enables witnesses to gain more information regarding testifying, an anxiety prone situation, which increases the

possibility of effective communication that will be perceived as credible (Brasher, 2001).

Increased familiarity with the situation and knowing what to expect leads to less anxiety and higher confidence (Schlenker and Leary, 1982).

Menxel and Carrel (1994) explain that preparation is an effective way to reduce the amount of apprehension an individual experiences. Results from this analysis suggest that trial consultants often explain to witnesses that the purpose of the preparation session is to reduce any anxiety that he or she is experiencing. When participants were asked in the third section of the questionnaire what they typically tell witnesses regarding the purpose of the preparation session(s) participants frequently mentioned that the preparation session allows witnesses to discuss any fears or anxieties they are experiencing and to make them more comfortable and at ease with the idea of testifying. Furthermore, as mentioned previously, all 53 participants indicated in a close-ended question that anxiety reduction was an acceptable goal for witness preparation. This is especially useful because previous research has indicated that witnesses often experience a heightened level of anxiety and nervousness regarding their upcoming testimony (Myers & Arena, 2001; Shaw & Zerr, 2003).

Apprehension is often a product of uncertainty and not being used to the given situation (Witt & Behnke, 2006).

Schlenker and Leary (1982) note that as people become more familiar with an anticipated situation, they will be able to predict with greater certainty what to expect. Furthermore, as the comfort level of a witness increases, so does his or her confidence (Applegate, 1989; LeGrande & Mierau, 2004). More importantly, the level of confidence a

witness portrays can have an impact on jurors' perception of him or her. In fact, jurors often rely on confidence as an indicator of accuracy (Tetterton & Warren, 2005).

Results from this study indicate that trial consultants also view increasing familiarity as an important part of witness preparation. For example, respondents indicated that witnesses are often provided information regarding techniques that typically used during preparation sessions as well as during cross-examination in court. Throughout the questionnaire, participants often reported the usefulness of preparation in enhancing the effectiveness of a witness during cross-examination. For instance, 46 participants indicated in a close-ended item that providing strategies for cross-examination is an acceptable goal/objective, while 50 individuals indicated that rehearsing/practicing cross-examination is an acceptable goal/objective for witness preparation. Previous research provides supports for this witness preparation practice (Boccaccini, 2002; Simon, 2001). In fact, Boccaccini (2002) recommends that witness preparation sessions include discussions regarding various types of questions and techniques that the witness is likely to encounter at trial, as well as providing suggestions for responding effectively. Knowing what to expect is especially useful in stressful and/or anxiety-prone situations, such as those common to the courtroom. Therefore, it is understandable why participants in the current study frequently noted the importance and usefulness of witness preparation in informing about common techniques used during cross-examination.

Increased familiarity with the situation as well as engaging in specific techniques can help reduce apprehension. Specifically, the top three anxiety management techniques reported in a closed-ended question include deep breathing, relaxation, and visualization.

While visualization appears to be empirically supported by communication and legal scholars, deep breathing and relaxation receive modest attention in social science literature (Ayres & Sonadre, 2003; Hinton and Kramer; 1998; Shobe et al., 2005).

Twenty-six respondents to the ASTC survey indicated that they teach visualization as an anxiety management technique. As discussed earlier, visualization is an effective apprehension reducing method. Shobe et al. (2005) explains that as individuals visualize success they become more confident in their abilities, which in turn has a positively affects their performance. In the courtroom context, jurors tend to associate consistency with credibility, both of which can boost the believability of witness testimony (Brewer & Burke, 2002; Ivkovic & Hans, 2003; Tetterton & Warren, 2005).

While not specifically addressed as an anxiety management technique in the survey, videotaping appears to be a technique valued by trial consultants. In a close-ended item asking participants to indicate how frequently they use specific techniques when preparing witnesses, 39 participants indicated that practice sessions are either often or always videotaped. A similar number of participants reported that they review the videotape with the witness ($n = 38$). Reviewing the video with an effective apprehension reducing technique because the witness will be able to personally see how they appear and will be more receptive to constructive advice (Singer, 1996). While reviewing the tape, specific weaknesses or ineffective communication qualities that the witness might have been unaware of can be highlighted. Hinton and Kramer (1998) suggest that the witness will then be more inclined to practice their communication skills. Furthermore, videotaping performances may also help witnesses visualize success, further decreasing anxiety and improving confidence

(Shobe, et al., 2005). As noted by Pearson, et al. (2006), practice and preparation often leads to greater confidence, which in turn reduces communication apprehension. Witnesses are then able to testify in a manner encouraging perceptions of credibility. Trial consultants appear to regularly engage in two empirically supported communication apprehension reduction techniques – performance visualization and videotape feedback.

However, as mentioned above, the remaining two techniques, deep breathing and relaxation, received little attention in the reviewed literature. One possible reason for this lack of coverage is that these two techniques are not directly linked to skills-based training. Skills-based training focuses on knowledge and experience in order to create positive changes in an individual's ability and satisfaction when communicating (Schroeder, 2002). It is interesting that respondents utilize these techniques, given that much of their practice, and many of their comments, reflect a skills based approach to witness preparation training.

In sum, results from this study indicate that trial consultants recognize the importance of reducing apprehension during witness preparation and attempt to lessen it by employing techniques such as increasing familiarity with trial processes and skills-based training (e.g., visualization, videotape feedback, etc.). Trial consultants recognize, and the literature supports, these techniques as effective means of decreasing feelings of uncertainty and anxiety. Importantly, in the courtroom context, they can increase the probability that the witness will be perceived as credible by both judges and jurors.

Research Question Three:

*Do trial consultants engage in practices and techniques in keeping
with ABA and ASTC standards and guidelines?*

Piorkowski (1987) argues the legitimacy of witness preparation by noting that effectively preparing a witness “serves not only the interests of the attorney’s client, but also enhances the efficiency of the judicial system” (p. 391-392). For example, witness preparation sessions provide an opportunity to educate a testifying witness about rules of evidence (Joy & McMunigal, 2003). Subsequently, this could reduce the possibility of a witness mentioning inadmissible or potentially prejudicial information when testifying in court

This study also explored the opinions and practices of trial consultants as they relate to the rules and standards governing the individuals involved. Specifically, the third research question asked if trial consultants follow the rules and standards outlined by the ABA and ASTC, the two organizations most directly involved.

Procedure Theme

In general, participant responses expressing the importance of general procedural knowledge were consistent with the standards for witness preparation outlined in the ASTC Professional Code (ASTC Website). The Code indicates that “trial consultants shall describe the process employed in preparing a witness including techniques and their limitations” (ASTC Website). Similarly, throughout the questionnaire, responses frequently referenced procedural knowledge as an important aspect of witness preparation.

The ABA's Model Rules of Professional Conduct also indicate the importance of understanding legal process and procedures. For example, Model Rule 1.1 states "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation" (Model Rules). However, the way the Rule is framed limits its utility to include only attorneys. In fact, the ABA does not have any specific rules governing training or helping witnesses understand trial procedures. Therefore, participant responses indicating the importance of witness procedural knowledge is a factor unaddressed by the rules outlined by the ABA.

Demeanor and/or Psychological State Theme

Based on relevant literature as well as the findings from this study, it is evident that addressing the demeanor and psychological state of a witness is an important aspect of witness preparation. The frequency in which participants referenced both demeanor and psychological issues when providing opinions and descriptions of witness preparation indicates that it is fundamental to their practices.

However, despite the frequency of such responses, few witness preparation standards or guidelines address the demeanor and psychological state of witnesses. In fact, both the ASTC Professional Code and the ABA's Model Rules of Professional Conduct primarily provide general information regarding witness testimony in terms of content. For example, the first guideline provided by the ASTC Professional Code states that "trial consultants shall advocate that a witness tell the truth" (ASTC Website). Although it can easily be assumed that this guideline is referring to the substantive content of a testimony, it is unclear whether

it could extend to include nonverbal aspect of witness testimony. After all, demeanor can significantly influence content (Boccaccini, 2002; Lubet, 1997, Plotkin, 2002).

Similarly, the ABA's Model Rule 3.4(b) states that "a lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law" (Model Rules, 2002). In general, the Model Rules of Professional Conduct indicate that it is misconduct for lawyers to engage in any practice involving dishonesty (Model Rules, 2002). However, few references are made regarding the psychological preparation of witnesses or preparation aimed towards adjusting the demeanor or nonverbal behaviors of witnesses. Perhaps this is because attorneys might be focusing their attention more on the legal issues than on human behavior (Myers & Arena, 2001).

Overall, the importance placed on witness demeanor and psychological state by participants and relevant literature indicate that information regarding such practices should be more specifically addressed in the standards and guidelines provided by both ASTC and the ABA.

Testimonial Content Theme

Results from this study indicate that trial consultants typically view instructing a witness to lie or be untruthful as an unacceptable practice during witness preparation. Furthermore, participant responses stressing the importance of truthfulness are in accord with the witness preparation standard outlined by the American Society of Trial Consultants suggesting that preparation include encouraging witnesses to tell the truth (ASTC Professional Code). Similarly, the rules prepared by the American Board Association

mandate that engaging in dishonest behavior and falsifying evidence as professional misconduct (Model Rules, 2002).

More specifically, participants frequently mentioned that it is unacceptable for any practice or technique to be directed at influencing or altering the specific language or wording of testimonial content. For instance, the majority of respondents indicated that it was unacceptable to tell a witness what to say or what not to say. Previous research suggests a general agreement that it is unacceptable to create and/or influence the substantive content of witness testimony (Gershman, 2002; Silver, 1991; Zacharias & Martin, 1999). This practice is frequently referred to as scripting, horse-shedding, or coaching and is often one of the primary criticisms against witness preparation (Gershman, 2002; Silver, 1991; Zacharias & Martin, 1999). Overall, based on the questionnaire responses, it can be assumed that providing a witness with written answers and/or testimonial content is an unethical and unacceptable practice during witness preparation. In fact, the vast majority of participants in this study reported that they never engage in providing written answers to the witness ($n = 48$). However, scripting, or providing answers, is not limited to written form.

Findings from this study suggest that confusion or uncertainty may exist regarding what exactly constitutes scripting witness testimony. In fact, in contrast to the general agreement that scripting, in written form, is unethical, greater variation was found in responses regarding practices that could be considered an oral form of scripting. For example, based on closed-ended results from the survey, it appears as though consultants are uncertain if it is acceptable to give general advice on the content of witness testimony (see Table 4.9). Some participants indicated that they always advise on testimonial content, while

others report never doing so. In addition, over half of the participants in this study indicated that they often or always shape areas of testimony, as well as provide advice regarding how to best tell the case story/themes through witness testimony.

Although perhaps not directly telling the witness the words to say, shaping the manner in which the testimony is told is still affecting the actual content of the testimony, as well as subsequent reactions to the testimony. Findings from this study give the impression that, although not in written form, behaviors that some might perceive as unethical could be occurring during witness preparation practices. Thus, research that more specifically addresses scripting, as well as related practices, is needed to fully explore this aspect of witness preparation. In the interim, it would be beneficial for the ASTC to develop standards, guidelines, or commentary providing more information and guidance in this area. Greater specificity in standards and guidelines leads to less ambiguity, and a better in understanding what is accepted and what is not.

Responses regarding the language or wording of testimonial content were not limited to descriptions of practices and techniques engaged in by trial consultants. In fact, the language or wording of witness testimony was most prevalent among responses when discussing the role of the attorney during witness preparation.

Despite general agreement that the attorney should be present during witness preparation, participants also noted that the attorney's presence is often problematic. For example, as previously mentioned, scripting witness testimony is frequently a source of criticism regarding witness preparation, however, many consultants note that it is the attorney who wants, and even attempts, to alter witness testimony. In such instances, their association

with the preparation process leads trial consultants to become targets of criticism by outsiders. Unfortunately, shifting focus to attorney behavior is not a refutation of the criticism. Rather, such statements suggest that unethical practices, such as scripting or horse-shedding do occur.

Overall, it seems as though responses regarding scripting or horse-shedding were frequently phrased in a manner which placed blame on the attorney. Therefore, although it might occur during witness preparation, consultants may not think it is their fault. They may not think they are personally involved in unethical behavior since they are not the one enacting the behavior. The problem is how to address such potentially unethical behavior. While the ASTC could develop rules and regulations addressing attorney behavior, they are less likely to be effective than if similar standards were developed by the ABA.

As explained by Joy and McMunigal (2003), unethical behavior on the part of attorneys could be caused by simply being unaware of the unethical situation in the first place. Although failing to recognize unethical behavior is by no means an excuse, Salmi (1999) explains that the American Bar Association (ABA) provides little information and descriptions of unethical behaviors. The Model Rules for Professional Conduct does indicate that “conduct involving dishonesty, fraud, deceit or misrepresentation” constitutes as professional misconduct (Model Rules, 2002). However, Salmi (1999) notes the vagueness in the language, which makes it easy for attorneys to claim that they were unaware that they were engaging in unethical behavior. Thus, greater specificity in the ABA Model Rules may be one means of addressing this type of unethical behavior.

It is true that the Model Rule 3.4(b) states that “a lawyer shall not falsify evidence, counsel or assist a witness to testify falsely” (Model Rules, 2002). However, this mandate does not directly state that it should be applied to witness preparation (Salmi, 1999). In fact, it is located within the section of Model Rules entitled “Fairness To Opposing Party And Counsel” and does not provide any indication that it is relevant to preparation or communication with one’s own witnesses. In fact, as a whole, the Model Rules do not make a direct reference to witness preparation.

In contrast, the ASTC Professional Code outlines six standards directly referring to witness preparation (ASTC Professional Code). However, the six standards are “stand-alone” statements. While comments and relevant sources are provided for other practice areas, none are given in the area of witness preparation. Such commentary could be useful in clarifying apparent “gray” areas in the Standards.

Summary of Findings

Trial consultants engage in a variety of practices and techniques during preparation specifically aimed towards benefiting the witness. In fact, the purpose of witness preparation is typically described as enhancing testimony in terms of substance and presentation (LeGrande & Mierau, 2004, Small, 2006). Boccaccini (2002) explains that although attorneys play a critical role in the presentation of information during trial by deciding which witness to call and determining what questions to ask, the majority of the information presented comes from the testimony given by the witness. Ultimately, it is witness testimony that serves as evidence from which a jury must render a verdict (Fyfe, 2005; Schag, 2004). As a result, enhancing credibility is a vital component of preparing witnesses.

In sum, results from this study provide insight into the opinions and practices of trial consultants as they relate to specific areas of witness preparation as well as to the rules and standards governing the individuals involved. Overall, there appear to be three primary themes when discussing witness preparation: procedure, demeanor and/or psychological state, and content. The concept of witness credibility appears to be an important aspect of each theme. Furthermore, knowing what to expect is especially useful in stressful and anxiety-prone situations, such as those common to the courtroom. Similarly, results indicate anxiety reduction as a common goal for witness preparation and is most often reduced through witness education of the process and behavioral techniques such as performance visualization, skills training, and practice. However, preparation regarding the content of witness testimony appears to be an area of uncertainty especially as related to ethical practices.

Based on the findings from this study, it is reasonable to conclude inconsistencies exist between common witness preparation practices and the rules and standards provided by governing bodies. Of particular concern is the overall minimal information provided by both the American Board Association and the American Society of Trial Consultants. However, when compared to ABA's Model Rules of Professional Conduct, the ASTC Professional Standards are more explicit in addressing witness preparation. In fact, while the ABA lack specific rules governing training or assisting witnesses during preparation, the ASTC at least acknowledges the practice of witness preparation, providing six specific standards. Results of this analysis suggest that additional information regarding standards and guidelines for

witness preparation is needed to reduce the ambiguity surrounding the practice, as well as increase understanding as to what is acceptable and what is not.

Limitations

As with most research, this study is subject to some limitations. First, as a secondary analysis, items on the survey reflect the perspectives and needs of the original investigators and may not adequately reflect the questions of interest to the current study.

Additional factors may also affect the validity of the questionnaire. For instance, the questionnaire was administered online. Although participants were able to complete the questionnaire at a convenient time, they were unable to ask clarifying questions.

Finally, participant views regarding the topic of study could be a potential limitation. Witness preparation is a controversial topic. Respondents could be inclined to provide socially desirable answers, presenting witness preparation in the best manner possible. As a common, but often criticized practice, trial consultation, it is understandable why some respondents might feel the need to defend the witness preparation as well as the credibility of their chosen profession.

Suggestions for Future Research

As previously mentioned, a better understanding about how attorneys, witnesses and trial consultants view the witness preparation process is needed. This study is a first step in expanding our knowledge regarding the view of one of these groups – trial consultants. In addition to further exploring the views and practices of trial consultants, it would be beneficial for future research to examine the views and opinions of attorneys and witnesses. Such research might provide additional insight into the relationship between the attorney,

witness, and trial consultant during a witness preparation session, identifying common expectations or potential sources of miscommunication.

In addition, the findings from this study illustrate the large scope of practices and techniques commonly involved in the preparation of witnesses (Boccaccini, Gordon, Brodsky, 2005). Variation in participant responses regarding techniques typically used suggests that more research regarding witness preparation practices is needed. While this study suggests that consultants are using a number of empirically supported techniques, additional research would provide greater insight into witness preparation practices, perhaps providing further support for the procedures and techniques used. Ideally, training programs geared towards witness preparation could result. Such programs would help to encourage attorneys and trial consultants to use procedures and techniques that have been classified as both ethical and effective. Finally, as the use of trial consultants is becoming more frequent, it would be beneficial to establish more specific guidelines and standards (LeGrande & Mierau, 2004).

Overall, a more in-depth analysis and an increased understanding of what typically occurs during witness preparation would provide a stronger defense against criticisms. Additional research would help support witness preparation as a useful pretrial practice, while refuting claims that it negatively or unfairly affects trial outcomes (Boccaccini, 2002).

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APPENDIX A

Witness Prep zOpinion Survey

DESCRIPTION OF SERVICES

1. How many years have you worked as a trial consultant?
 - (1) _____ 1 year or less
 - (2) _____ 2 - 5 years
 - (3) _____ 6 - 10 years
 - (4) _____ 11 - 15 years
 - (5) _____ 15+ years

2. On average, how many witnesses do you prepare in a typical year?
[OPEN ENDED]

3. What is your highest education level? **[If you have dual degrees (e.g., Ph.D. and J.D.) [CHECK ALL THAT APPLY]**
 - (1) _____ Bachelors
 - (2) _____ Masters
 - (3) _____ Doctorate
 - (4) _____ Medical degree
 - (5) _____ Law degree

4. What are the primary areas of your educational training?
[OPEN ENDED]

5. What words/phrases do you use to describe witness preparation services to attorneys/clients?
[OPEN ENDED]

6. Upon initial contact by attorney, how often do you obtain a written/signed letter of agreement?

- (1) _____ Never
- (2) _____ Rarely
- (3) _____ Sometimes
- (4) _____ Always
- (5) _____ N/A

7. Which of the following do you typically provide to the attorney prior to being engaged for witness preparation? **[CHECK ALL THAT APPLY]**

- (1) _____ Proposal of fees and expenses
- (2) _____ Outline of services
- (3) _____ Limitations of services
- (4) _____ Limits of confidentiality/privilege
- (5) _____ Results of a conflict check
- (6) _____ Background, training, or experience of consultant
- (7) _____ Goals of witness preparation
- (8) _____ Techniques to be used in witness preparation
- (9) _____ Role of attorney in witness preparation
- (10) _____ Written description of witness preparation process
- (11) _____ Number and length of witness preparation sessions
- (12) _____ None of the above

8. Once you have a contract for services, how often do you conduct each of the following practices?

Practice	Never	Rarely	Often	Always	N/A
a) Review case materials in preparation					
b) Obtain the attorney's goals for witness preparation					
c) Discuss techniques consultant may use during witness preparation (with the attorney, witness or both)					
d) Review existing videos of witness (if available)					
e) Address concerns regarding discoverability with attorney					
f) Clarify attorney's role in the witness preparation process					
g) Discuss whether attorney should do mock cross-exam of witness					
h) Provide written description of process of witness preparation					

i) Discuss group preparation versus one-on-one preparation					
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9. Please provide any additional comments you have about the description of witness preparation services or arranging a contract for services below.
[OPEN ENDED – optional]
10. In terms of establishing a contract for witness preparation services with an attorney, what are the 2-3 most important guidelines that govern your own practice?
[OPEN ENDED]

GOALS FOR WITNESS PREP

11. What are *your top three* goals or objectives when preparing a witness?
[OPEN ENDED]
12. How often do *your goals/objectives* for witness preparation match the *goals/objectives of your client*?
 (1) _____ Never **[GO TO QUESTION 14]**
 (2) _____ Rarely
 (3) _____ Sometimes
 (4) _____ Always
 (5) _____ N/A
13. To the extent your goals/objectives for witness preparation differ with those of your client, please explain how they differ and what, if anything, you do about it.
[OPEN ENDED]
14. Below is a list of possible goals/objectives for witness preparation. Please indicate whether each of the following is an acceptable or unacceptable *goal* of witness preparation. *Techniques* for witness preparation will be addressed later.

	Acceptable	Unacceptable	Not Sure
a) Educate witnesses about giving testimony			
b) Increase witness' confidence			
c) Clarify witness' uncertainties/anxieties about testifying			
d) Reduce witness' anxieties about testifying			

	Acceptable	Unacceptable	Not Sure
e) Teach the witness effective verbal communication skills			
f) Teach effective nonverbal communication skills			
g) Help witness identify most persuasive words or phrases to use			
h) Improve witness' physical appearance			
i) Refine topics or content for direct exam			
j) Provide strategies for cross-exam			
k) Discuss role of witness' testimony in overall case presentation			
l) Apply case themes to witness' testimony			
m) Rehearse/practice cross-exam			
n) Address difference between deposition and trial testimony			
o) Explore fact recollection			
p) Confirm witness' testimony (and related support for opinions)			
q) Address communication problems between attorney and witness			

15. If you have any goals/objectives in your witness preparation not addressed above, please explain in the space below.
[OPEN ENDED – optional]

WITNESS PREPARATION TECHNIQUES

16. What witness preparation practices are unacceptable (please include any relevant examples)?
[OPEN ENDED]
17. In your practice, what do you typically tell *the witness* regarding the purpose of the session(s)?
[OPEN ENDED]

18. How often do you do each of the following with a witness?

	Never	Rarely	Often	Always	N/A
a) Discuss goals of the preparation session					
b) Review an outline of preparation procedures					
c) Explain experience and qualifications for conducting witness preparation					
d) Assure witness that preparation is ethical/legal					
e) Discuss areas of assessment					
f) Have witness conduct a self-assessment					
g) Review witness' self-assessment					
h) Discuss role of consultant in witness preparation					
i) Discuss limits of confidentiality					

19. When you prepare witnesses, how often do you use each of the following techniques?

	Never	Rarely	Often	Always	N/A
a) Assess witness' baseline performance					
b) Provide feedback on witness' strengths and weaknesses					
c) Advise on the content of witness' testimony					
d) Provide <i>written</i> answers (script) to the witness					
e) Provide <i>oral</i> answers (script) to the witness					
f) Discuss juror/audience perceptions, biases and/or attitudes					
g) Suppress areas of testimony					
h) Shape areas of testimony					
i) Teach strategies to deal with objections					
j) Provide strategies to deal with hostility					
k) Conduct role plays with witness					
l) Videotape practice sessions					
m) Critique of mock direct-examination					

	Never	Rarely	Often	Always	N/A
n) Critique of mock cross-examination					
o) Review videotape with witness					
p) Give videotape to witness to take home					
q) Test witness live with a focus group					
r) Test video of witness with a focus group					
s) Visit the courtroom with witness					
t) Advise on how to best tell the case story/themes through witness testimony					
u) Identify the witness' fears/anxieties of testifying					
v) Teach anxiety management strategies					
w) Suggest themes for testimony					
x) Advise on how to use visual aids, graphics					
y) Advise about appearance					
z) Advise on effective nonverbals (e.g., eye contact, posture, etc)					
aa) Address witness' vocal delivery skills					
bb) Advise on sequencing of testimony					
cc) Provide handouts to witness with tips/suggestions					
dd) Address potential questions regarding witness preparation					
ee) Prepare witnesses with other witnesses present					

20. If you use any techniques not list above, or if you have any other comments on techniques consultants use to prepare witnesses, please provide them below.
[OPEN ENDED – optional]

21. How do you prepare witnesses to handle potential questions on whether they were prepared for their testimony by a consultant?
[OPEN ENDED – optional]

22. Which of the following anxiety management techniques do you teach witnesses? **[CHECK ALL THAT APPLY]**
- (1)_____Deep breathing
 (2)_____Relaxation
 (3)_____Visualization
 (4)_____Cognitive reframing (i.e., self talk)
 (5)_____Exposure/desensitization
 (6)_____None – I don't teach any anxiety management techniques
 (7)_____Other_____
23. Do you use video or audio tapes when preparing a witness?
 (1)_____Yes
 (2)_____No **[IF NO, GO TO QUESTION 25]**
24. **If yes**, what do you typically do with the tape at the end of the session?
 [OPEN ENDED]
25. In terms of the techniques you use to prepare witnesses, what are the 2-3 most important guidelines, or your personal best practices, that govern your own practice?
 [OPEN ENDED-optional]
26. Have you ever encountered any potentially unethical situations in your witness preparation practice?
 (1)_____Yes
 (2)_____No **[IF NO, GO TO QUESTION 28]**
 (3)_____Not sure **[IF NOT SURE, GO TO QUESTION 28]**
27. **If yes**, what difficult and potentially unethical situations have you encountered in your witness preparation practice?
 [OPEN ENDED – optional]

ATTORNEY'S ROLE IN WITNESS PREPARATION

28. When you prepare witnesses, how often is the attorney present?
 (1)_____Never
 (2)_____Rarely
 (3)_____Sometimes
 (4)_____Always
 (5)_____N/A
29. Which of the following is the minimum acceptable practice when preparing witnesses?

- (1) _____ Attorney present in the room
- (2) _____ Attorney on premises but not in the room
- (3) _____ Attorney on phone line
- (4) _____ Attorney not present at all

30. When an attorney is not present, are the following practices acceptable or unacceptable?

Statement	Acceptable	Unacceptable
Conduct witness preparation practices as usual		
Conduct witness preparation practices, but explain that it may not be protected under attorney-client privilege or work product		
Conduct witness preparation but do not discuss any case-related information		
Do not conduct any witness preparation practices		

31. Do you have any additional comments about prepping witnesses with or without presence of attorneys?
[OPEN ENDED – optional]

32. How do your attorney clients typically participate in the witness preparation process? [**CHECK ALL THAT APPLY**]

- (1) _____ Prepare (written) direct and cross-exam questions in advance
- (2) _____ Ask the direct exam questions of the witness
- (3) _____ Ask the cross-exam questions of the witness
- (4) _____ Silently observe the process
- (5) _____ Share in giving feedback to the witness
- (6) _____ Goes over substantive matters before preparation session with consultant
- (7) _____ Other _____

33. When you prepare witnesses, how often do you “play the attorney” by asking direct or cross-examination questions?

- (1) _____ Never
- (2) _____ Rarely
- (3) _____ Often
- (4) _____ Always
- (5) _____ N/A

34. What do you do to protect attorney-client privilege or attorney work product?
[OPEN ENDED]

35. If you were drafting suggested guidelines for trial consultants regarding the role of attorneys in preparing witnesses, what would they be or what topics would they cover (exact language is not as important as the general ideas)?
[OPEN ENDED-optional]