2

Taking Testimony Seriously

Why Do So Many People Cringe at the Thought of Testifying?

For some IT professionals, participation in any of the formal, regimented rituals of life is mind-numbing, something to be avoided at all costs. For other IT experts, legal and business tasks and functions are unappealing because they violate two of the most important conditions for happiness in the technical world: first, the need for a great deal of control over the environment and conduct of one's life and work, and second, the need for a constant stream of intellectual stimulation. Were members of the IT community asked to name two things universally reviled by IT experts, they'd likely select micromanagement and boredom.

For those IT wizards who possess these aversions, the first question that might arise in the discussion of expert witness skills is "Why would I ever want to do something like that?" Why should any self-respecting IT expert ever want to get involved in the legal process? After all, the worst attorneys (who seem to be the only ones we ever see featured on the nightly news, depicted in TV shows or movies, or described in novels) are usually characterized as ranging from obnoxious to sleazy, terminally bureaucratic to heavy-handed, archaic to simply slow-paced. This implies that any involvement with the legal community is likely to produce either intense discomfort or boredom for the IT professional who is unfortunate or foolish enough to be caught in its clutches.

In this chapter, we begin the process of arguing the case for why you, as a technical expert, should look forward to your day in court. Our message is simply that it is far better for you to prepare to be a witness (expert or otherwise) as a basic part of your professional duties and skills than to continue to deny that your day is coming and then become bitter about the results when you are finally called to the stand. As you will see evidenced in a major case, *U.S. v. Microsoft*, regardless of your status and personal views of the desirability of becoming involved as a witness, you might not be able to opt out of it. The witness stand is a powerful symbol within our legal system. Potential witnesses (even when they are as important an individual and as highly acknowledged an expert as Bill Gates) do not always have the final say about whether they end up there. The power of testimony is a two-edged sword, one that can devastate those associated with the witness as easily as help to defend them in a criminal case or advance their just cause in civil litigation. Once compelled to serve as a witness, it is too late to begin rationalizing about why you don't want to be there and the fact that you don't know how to prepare for the experience. Unless you have taken the time to carefully prepare both yourself and your testimony, there are no guarantees that you will survive the experience with reputation, finances, and sanity all intact.

However, the reality of the litigious world in which we live does not need to terrify the potential expert witness. Much like learning to dance gracefully, to competently play a competitive sport, or to persuasively speak in public, we believe that you can develop some basic skills that will enable you to survive the experience of serving as an expert witness. With guidance from the attorneys who are involved with the witness, a beginner can also learn to master the practice to the extent that it becomes an enjoyable and profitable experience. In this book, we provide information and techniques for motivated technologists that will prepare them for this journey.

Why Should a Technical Expert Want to Work in the Legal System?

There are three very good reasons to acquire the skills necessary to become a good expert witness: (1) simple self-preservation, (2) the duty of any professional to help shape his or her community of interest, and (3) the very practical need of any expert to improve communication skills. Beyond these personal and professional responsibilities, experts must also attempt to affect the controls that society will inevitably impose on their own IT industry. When the industry does not develop its own acceptable standards and professional self-regulatory safeguards, outside of those imposed through the judicial process on a case-by-case basis, experts must be prepared to contribute to that process, in lieu of any other effective alternatives.

Given that our legal system is based on precedent, it's important to encourage courts to resolve conflicts involving technology using adequate and accurate explanations of the technology. Bad legal judgments based on poor or incomplete understanding of technical systems or devices are especially problematic since they are likely to affect the development of industry standards. Bad decisions can also create confusion in understanding where the definition of best practices stands for a given forensic discipline at any given time. These ad hoc standards tend to subject the profession to legal control by default rather than to gradual improvement resulting from constant peer review and constructive criticism, followed by general acceptance of improved standards by recognized experts within the discipline. This can stall needed technological advances—even those that remedy acknowledged flaws in existing systems and technology. For similar reasons, it's also important for information technologists to be heard in regulatory and legislative processes. These can lead to carefully crafted laws or regulations contributing to appropriate solutions to recognized problems.

Technological advances can drive broadscale, even revolutionary changes in everyday life. This often intimidates the general populace, many of whom neither work with nor understand the technologies. Although technological change in the United States has been going on constantly for nearly two hundred years, IT has sped up the velocity of that change and arguably also the pace of social changes in adopting and then adapting to these new technologies. Similar to the adoption of motor vehicles, IT has had unanticipated and profound effects on modern life, changing common perceptions of ownership, control, time, and space. As IT enables access to information that many people believe should remain private, it provokes considerable debate about privacy rights and personal information control. Its automation tends to eliminate human intervention from many mainstream processes (and the employment that human intervention represents), thereby threatening the personal security of some members of society. This introduces subsequent complications, making it difficult for society to fully understand how best to assign responsibility when IT failures result in financial or physical injuries—without killing the technological goose that lays the golden eggs.

It is predictable, even understandable, that those people most threatened by technology should seek to alter its perceived ill effects by lobbying their government representatives for additional regulation. At times, government can consider restrictions so Draconian that they can serve as roadblocks to technological progress. Similarly, many seeking to control perceived threats and the inevitable damages that accrue from new technology may attempt to deal with such problems by using the court system in both appropriate and inappropriate ways. Some file lawsuits, while others allege criminal violations by those who use the technology in a less orthodox fashion. Determining whether a lawsuit is appropriate or inappropriate often requires the

early assistance of competent experts who can help the attorneys and the courts separate the dross from the gold in claims and counterclaims. Experts help provide a layperson lawyer and his or her client with a correct and comprehensible understanding of what the technology was designed to do and what it actually did in a particular situation.

All of this is quite in keeping with the American tradition of the law playing catch-up with an evolving technology that large portions of society are embracing. The problem is that we have never had to deal with a new technology quite as pervasive as IT adopted in so short a time. Not only does IT radically change the ways we communicate and process all kinds of information; it also has a dramatic effect on the very nature of a particular kind of information that the legal system calls evidence. Given the precedent-driven nature of common law, technology-related legal actions carried forth in the absence of objective and thoughtful technical experts can create problems. They represent a very shaky foundation on which to erect a set of standards and precedents to guide future attorneys and judges in the essential discovery, production, and sharing of evidence required for the efficient and equitable litigation of cases. As problematic as it is to have too few decisions to guide us (as is the case now with regard to IT problems and solutions), once even a few bad decisions are made it can be very difficult to correct or reverse them through the legal system.

Even if you do not believe that either your own self-interest or your duty to contribute to the creation of appropriate standards requires you to get involved with giving testimony in court, a prudent IT professional should still acquire expert witness skills. There has been a steady growth over the past few years in the number of lawsuits involving IT-related services and issues raised in civil cases regarding the discovery and authenticity of electronic evidence. Though you may read this book and never anticipate volunteering to be qualified as an IT expert or even as a non-expert witness in court, you will almost certainly be called on to serve in such a capacity if you continue to work in this area. You may be asked by an employer or a party to a lawsuit to play the additional role of a witness or a consultant to in-house counsel or to another expert witness. Furthermore, the different roles IT professionals are asked to play may depend on their existing roles in managing or consulting on a technical issue that becomes involved somehow in litigation. In other words, it is very likely that during the course of your IT career you will sooner or later be called upon to serve as a witness, at least to the facts relevant to some issue in a case in controversy. Your expertise will be at issue one way or another. This may be due to a discovery that occurs on your professional turf or a disaster that occurs on your watch. Everyone needs certain core skills to be the most effective witness he or she can be. While these threshold skills will not necessarily be sufficient to qualify you as a top-flight expert witness, they will serve as the foundation on which to build solid expert witness skills that you can apply to provide effective testimony.

Everyone Is Subject to Subpoena

In Western culture, when push comes to shove and we really need to figure out what happened, our legal system has decreed that we're all potential witnesses. On reflection, this should not seem all that unusual. We are, after all, members of an open society that has endorsed neither royalty nor a privileged aristocracy as immune from giving testimony in our courts. Most of the belief systems underlying the everyday conduct of the culture rely on testimony to convey key information to us on a daily basis. As in other life skills, your skills as a witness can vary based on personality, experience, training, and attitude. The ability to communicate, both verbally and nonverbally, and the ability to relate to those outside your inner circle of friends and associates are clearly skills that you can hone over time. What may not be as clear to those who are celebrated for their mastery of technology is the impact of neglecting the development of such skills.

An example of this point should be familiar to most readers since it was splashed in lurid detail across most of our television and computer screens in 1999 during *U.S. v. Microsoft Corporation*, the antitrust case against the Microsoft Corporation. In late April 1999, the U.S. government released the full transcripts of the deposition of Bill Gates, President and CEO of Microsoft. At the same time, the government released the video recordings of that deposition.

The negative reaction to the public display of the three-day deposition (which surfaced for the first time during the trial that took place several months after the deposition) was immediate and intense. Gates has been criticized as not having been at his best during the deposition, with a demeanor that has been characterized as swinging from agitated, bored, or just plain irritated to impatient and uncooperative. The legal experts retained by the media to comment on the trial were flabbergasted by Gates's performance in the deposition; they mused about and openly questioned the quality of the Microsoft legal strategy in not better preparing Gates for his testimony.

Consider this exchange between Gates and David Boies, lead counsel for the government. Some commentators have suggested that this deposition is a textbook example of how *not* to conduct oneself during testimony. The questions explore Gates's communications concerning the intentions of Microsoft to give away its browser.

Q (David Boies): Were you in 1996 trying to get financial analysts to develop a more negative and more pessimistic view about Netscape's business prospects?

A (Bill Gates): Except through the indirect effect of them seeing how customers received our products and our product strategies, that was not a goal.

Q: If that was not a goal, sir, why did you say in substance that the Internet browser would be forever free?

A: That was a statement made so that customers could understand what our intent was in terms of that set of technologies and how it would be a part of Windows and not an extra cost item, and so people would have that information in making their decisions about working with us on Windows.

Q: Now, is it your testimony that when Microsoft told the world that its browser would be forever free, that the desire to affect financial analysts' view of Netscape played no role in that decision?

A: I can be very clear with you. The reason we told people that it would be forever free was because that was the truth. That's why we told them that, because it was the truth.

Q: Now, Mr. Gates, my question to you—

A: That's the sole reason we told them.

Q: And my question to you is whether or not the truth was, in part, due to your desire to adversely affect financial analysts' view of Netscape. Did that play any role, sir?

A: You've been asking me a question several times about why did we say something. We said it because we thought our customers would want to know and because it was the truth. And that explains our saying it completely.

Q: And what I'm asking you, sir—and it may be that the answer to my question is, "no, it played no role." But if that's your answer, I want to get it on the record. And my question—

A: Are you talking about saying it?

Q: Yes.

A: Or how we came up with our decision about how to price our products?

Q: Let's take it each step at a time, one step at a time, so that your counsel doesn't say I'm asking you a compound question, okay? And first let's talk about saying it. I know you're telling me it was the truth. In addition to it being the truth, did the fact that this would, in your view, adversely affect the view of financial analysts of Netscape play any role at all in your decision to announce that your browser would be forever free?

A: I actually think that came up in response to some questions that people asked in an event we had on December 7, 1995. So it wasn't so much a question of our saying, okay, we're going to go make this a headline, but rather, that there were questions that came up during that, including our future pricing plans.

Q: This was a meeting on December 7 of what year?

A: 1995.

Q: And was it attended by people outside Microsoft?

A: It was a press event.

Q: And prior to attending that press event, had you made a decision that it would be forever free?

A: Well, if you really want to probe into that, you'll have to get into the different ways that we made Internet technology available. In terms of what we were doing with Windows 95 and its successors, yes. In terms of some of the other ways that we offered the Internet technologies, there was some—there hadn't been a clear decision about that.

Q: When you refer to other ways that you offer Internet technologies, would you explain for the record what you mean?

A: Oh, we created an offering that ran on the Macintosh OS that offered some but not all of the capabilities that we put into Windows and used a common branding for that. And we came up with a package that ran on a previous version of Windows, Windows 3.1, and made an offering of that. Subsequently I mean, not on that day, but subsequently.

Q: And those were charged for; is that what you're saying?

A: I'm saying that before the December 7th event, it was clear to everyone that in the Windows 95 and its successors, that the browser technology would be free for those users. But it was unclear to people what we were going to do with the other ways that we packaged up the technologies.

Q: Would you read the question back, please?

(The following question was read: "**Q:** And those were charged for; is that what you're saying?")

The Witness: Well, they weren't available. So if we're talking about December 7, 1995, it's not a meaningful question. Subsequently those products were made available to the customers without charge. But I'm saying that there was some lack of clarity inside Microsoft even up to the event itself about what we were going to do with those other ways we were providing Internet Explorer technology.

Q (Mr. Boies): Uncertainty as to whether you would charge for them; is that what you're saying?

A: That's right.

Q: Okay. Prior to the December 7, 1995 meeting, had a decision been made to advise the world that not only would the browser be free, but it would be forever free?

A: Well, it's always been the case that when we put a feature into Windows, that it remains part of Windows and doesn't become an extra cost item. So it would have been kind of a silly thing for anyone to ask, including about that particular feature. And by this time, of course, browsing is shipping with Windows 95.

Q: Exactly sort of the point I wanted to come to, Mr. Gates. When you put things into the operating system generally, you don't announce that they're going to be forever free, do you?

A: Yes, we do. If anybody—

Q: You do?

A: If anybody asks, that's obviously the answer we give.

Q: Have you finished your answer?

A: Yes.

Q: Okay. Could you identify for me the products other than browsers that Microsoft has announced that they would be forever free, expressly said, "These are going to be forever free"?

A: As I said to you, I think that actually came up only in response to some questions. So it's not proper to ask me and suggest that we announced it like it was some, you know, press release announcement or something of that nature.

Q: Well, let me come back to that aspect of it and just ask you for the present. What products has Microsoft said publicly, whether in response to a question or otherwise, that these would explicitly be forever free?

A: I've said that about the broad feature set that's in Windows.

Q: When did you say that, sir?

A: I remember an analyst talking to me about that once at an analyst meeting.

Q: When was that?

A: It would have been one of our annual analysts meetings.

Q: When?

A: Not this year. Either last year or the year before.

Q: Is there a transcript of that analyst meeting?

A: Not with the conversation with that analyst, no.

Q: There are transcripts of analysts meetings, aren't there, Mr. Gates?

A: Only of the formal Q and A, not of the—most of the Q and A, which is where people are mixing around with the press and analysts who come to the event.

Q: And this question that you say happened happened after the transcript stopped being taken; is that what you're saying?

A: That's my recollection, yes.[1]

So What Happened in This Deposition?

We do not intend to second-guess the strategy of Gates and his legal team. Many analyses performed by experts in the business and legal communities alike criticize either the behavior of the witness or the legal team's performance. A typical critique comes from David Bank, staff reporter at *The Wall Street Journal*, in his book *Breaking Windows*:

> *As a legal tactic, Gates's approach backfired. Microsoft's attorneys claim they believed the videotaped deposition would never be played in court. That's plausible, if only because they could hardly have staged the deposition more poorly. In the harshly lit Microsoft conference room, Gates projected a visual image of an evasive smart aleck. It was a win for the government. The video effectively countered Gates's popular persona as Chief Digital Seer.*[2]

Regardless of the Microsoft legal team's strategy and its relative effectiveness in the final analysis, the transcripts of Gates's testimony emphasize the importance of a witness considering what the fact finder sees when testimony is given. What becomes evident to a spectator who is also a technologist is the mismatch between the naïve expectations of the technical witness and those of the ultimate fact finder in the formal context of a trial. Technologists may initially think this is reasonable and appropriate conduct for an antagonistic exchange between two technically savvy people. But this may not be as apparent to a fact finder who is reviewing these deposition tapes at a later date to determine what actually happened and to decide an important legal case. So, what could conceivably be considered acceptable, though rather cantankerous, technical discussions by an acknowledged technical expert with an attorney, about things they both presumably know a great deal about, can still place the witness in a bad light with a judge or jury. The sort of demeanor that is necessary to present and preserve personal and professional credibility in formal legal proceedings turns out to be oceans apart from just getting the best of another techie or dodging a difficult ques-

1. All quotations of Gates's deposition testimony in this chapter are taken from the U.S. Department of Justice Antitrust Division Web site, accessed in July 2002 at *http://www.usdoj.gov/atr/cases/ms_gates2.htm*.

2. Bank, David. *Breaking Windows: How Bill Gates Fumbled the Future of Microsoft*. New York: The Free Press, 2001, p. 149.

tion posed by an astute attorney. In this particular case, such decorum was even more important, given that Gates's opponent had a stacked deck comprised of hundreds of prejudicial e-mails to and from the witness, already thoroughly analyzed by a team of lawyers and now in the mind and hands of a highly skilled cross-examiner.

It was no secret that the government and Boies had powerful statements in the form of e-mails before the deposition began. The record of the decisions by the witness as to how to react to such locked and loaded questions, obviously based on Gates's and others' multiple prior statements, allows future witnesses the luxury of benefiting from Gates's discomfort. These transcripts can provide hours of free training in considering how you would have handled these kinds of questions in a deposition or trial. The point of this chapter is not to criticize Gates or his lawyers for what happened in the Microsoft trial but to learn from the record of that performance. Fortunately, these videos of one of the most important depositions in the world of IT litigation are all available for viewing, through the interlibrary loan services of state depository libraries for public government documents.

Every Transcript Tells a Story

During the widely covered courtroom proceedings associated with *U.S. v. Microsoft*, most trial observers realized that Bill Gates was testifying as a witness to facts—*and as something like an interested party witness*. While Gates was clearly not the corporate party to the lawsuit, he was at least the personification of Microsoft in the popular mind, and his testimony was probably the most important testimony in the entire case. Gates's special status as a witness, whether regarded as a fact, expert, or symbolic party witness, was especially apparent given his testimony regarding e-mail communications and meetings with Microsoft officials during which competitive strategies were discussed. However, few commentators acknowledged that, at times, Gates also could have been perceived by the fact finder, who in this case was a federal judge rather than a jury, as testifying (or at least as having been characterized by the government examiners from time to time) as an expert. After all, Gates was acknowledged for his technical acumen and was certainly able to address and explain technical details of Microsoft's software products to the court.

When perusing all the examples of testimony contained in this book (and in the online and videotape versions available for sale or library loan), keep in mind that when someone is called to the stand, that witness may be qualified as an expert but used only to testify about what he or she saw, heard, or did. In this role, the witness's expertise may be largely irrelevant to his or her role as a witness in a particular hearing or trial. In the example cited here, Gates is a special kind of witness, offering testimony that can be considered by the fact finder as going well beyond his knowledge of the facts and touching on his presumed expertise. He is also testifying in a context that

places him in a very similar position to a party witness in the case, which heightens the importance of his performance to the fact finder. Gates is, in the eyes of the fact finder, at least the most influential person in deciding on and recalling in his testimony the acts of Microsoft, the corporate party, which were alleged to have given rise to the claims made by the United States. For such witnesses, certain expectations and presumptions by the fact finder naturally come into play as to how to view and consider the testimony that the witness chooses to give.

This is high-risk testimony for anyone placed in such a role, especially with the well-known expertise and depth of involvement that this witness is assumed to have had in the technologies his company produced. Nevertheless, any witness, whether a routine fact witness or the most important representative of a party involved in high-profile, high-stakes litigation, arrives at the witness stand in possession of his or her skills and experiences. This accompanying baggage of expertise or the lack thereof can be injected into the case by either or both parties. More importantly, perhaps, in the case in point is the assumption the fact finder is likely to make about the knowledge and expertise that such a witness has that can help the fact finder determine all the facts in the case. It therefore behooves the attorneys and the witness to consider carefully how this potential expertise may be used or abused and what the fact finder can be anticipated to make of it. In the Microsoft case, the reasonable expectations of the fact finder as to how such a witness should behave in the course of testimony apparently came into play, to the dismay of the defendant company. The judge's determination of the credibility of this key witness, as well as other witnesses for the company, and the judge's decision in deciding the outcome of the case tried before him may have been affected by Gates's behavior during the three days of deposition testimony.

Quibbling with Counsel Can Be Counterproductive

On further review of the transcript, several commentators suggested that Gates was less helpful than he might have been to the questioners in his deposition, weaving and dodging what appear to be the simplest questions asked him by the government's counsel.

Q (Mr. Boies): Let me show you a document that has been marked as Exhibit 386. The second item here purports to be a message from you to a number of people dated April 6, 1995. Do you see that?

A (Gates): Yes.

(The document referred to was marked by the court reporter as Government Exhibit 386 for identification. . . .)

Commentary: *Note that this is one of many instances during the deposition when the government's attorneys confronted the witness with a copy of an e-mail and introduced it into the record so that it would be clear to the fact finder what was being discussed. This forces the witness to admit or deny that this e-mail is indeed his prior statement, regardless of what interpretation he attempts to give its text. This is also an example of the power of e-mail and other recorded statements to shape and control the examination of a witness and to limit or change the inclinations of witnesses to explain away suggestions of counsel in the absence of such prior statements.*

Attorneys also recognize that this power can serve as an impediment to an expert in communicating with attorneys appropriately, effectively, and efficiently during the assignment. As they further recognize that e-mail exchanges have replaced telephone conversations and that the rules of procedure dictate what attorney-expert communications must be disclosed, they often enter agreements not to subpoena e-mail communications between attorneys and their experts during the expert's assignments.

Let's return to Gates's deposition.

Q (Mr. Boies): Did you send this message on or about April 6, 1995?

A: I don't remember sending it, but I don't have any reason to doubt that I did.

Q: Now, attached to this message, as it was produced to us, I believe, by Microsoft, is a two-page document headed "Netscape as Netware." Do you see that?

A: I see a three-page document, yes.

Q: Yes, three pages. Pages 3558 through 3560. Have you seen this before?

A: I don't remember seeing it before.

Q: Now, the title of this three-page attachment is "Netscape as Netware" and there is a footnote that says, "The analogy here is that the major sin that Microsoft made with Netware was to let Novell offer a better (actually smaller and faster with simpler protocol) client for networking. They got to critical mass and can now evolve both client and server together." Do you see that?

A: Uh-huh. Yes.

Q: In or about April of 1995, was Microsoft concerned with Netscape getting to what is referred to here as critical mass?

A: I don't know what Paul meant in using that word.

Q: Do you have any understanding at all about what Mr. Maritz meant when he referred to a competitor getting "to critical mass"?

A: He seems to be using that phrase with respect to Netware or Novell, but I'm not sure what he means by it.

Q: He is also using it with respect to Netscape in the analogy, is that not so?

A: It's not clear that the term "critical mass" is part of the analogy, is it? It's not to me.

Q: Okay. This document is about Netscape, it's not about Novell; correct, sir?

A: I didn't write the document. The document appears to refer to "Netscape as Netware" as its title, so Novell is talked about in this document and a lot of things seem to be talked about here. Do you want me to read it?

Q: If you have to, to answer any of my questions. Netware is something from Novell; correct, sir?

A: Fact.

Q: What?

A: Fact.

Q: Does that mean yes?

A: Yes.

Q: And what Mr. Maritz here is doing is analogizing Netscape to Netware; correct?

A: It's kind of confusing because Netscape is the name of a company and Netware is the name of a product and so I'm not sure what he is doing. Usually you think of analogizing two products to each other or two companies to each other, but he appears to be analogizing a company to a product, which is a very strange thing.

Q: Well, sir, in April of 1995, insofar as Microsoft was concerned, was Netscape primarily a browser company?

A: No.

Q: It was not?

A: No.

Q: All right, sir. In this document do you understand what Mr. Maritz is saying is that Microsoft should not make the same mistake with Netscape's browser as it did with Novell's Netware?

A: I'd have to read the document. Do you want me to?

Boies continues the questioning.

Q: And the question is, do you understand that what this document is saying is that Microsoft should not make the same mistake with Netscape's browser as it did with Novell's Netware? And you can read any portion that you want, but I am particularly interested the heading which says "Netscape as Netware"

and the footnote right off that heading, "The analogy here is that the major sin that Microsoft made with Netware was to let Novell offer a better (actually smaller and faster, with simpler protocol) client for networking. They got to critical mass and can now evolve both client and server together."

A: Are you asking me a question about the whole document?

Q: No, I didn't think I was. I thought it was possible for you to answer the question by looking at the title and first footnote.

A: I thought you were asking me what the document is about.

Q: I think it's possible to answer the question by looking at the heading and that footnote. My question is whether, as you understand it, what Mr. Maritz is saying here is that Microsoft should not make the same mistake with Netscape's browser as it did with Novell's Netware?

A: Does it say "mistake" somewhere?

Q: All I'm asking you is whether you interpret this that way.

A: Does it say "mistake" somewhere?

Q: Mr. Gates, we have had a conversation about how I ask the questions and you give the answers. I think—

A: I don't see where it says "mistake."

Q: It doesn't say "mistake." It says "major sin." If you think major sin is something different than mistake, you can answer the question no, that's not what you think Mr. Maritz means. My question is clear. You can answer it yes, no, or you can't tell.

A: What is the question?

Q: My question is whether—as you understand what Mr. Maritz is saying here, is he saying that Microsoft should not make the same mistake with Netscape's browser as it did with Novell's Netware?

A: No, I think he is saying something else.

Q: Okay. Do you think that when Mr. Maritz uses the term "major sin" that Microsoft made, he is referring to what he thinks is a mistake?

A: Probably.

One might argue that Gates was, in these depositions, fulfilling his responsibility to answer the questions posed by the opposing counsel and furthermore to answer them in as truthful a fashion as required without volunteering any information. One might further posit that he answers these questions while complying with the most minimal requirements of testifying. Unfortunately, he may have neglected one of the

most important considerations for an effective witness—appearing credible in the eyes of the court. It is typical for attorneys to advise almost any witness, whether an expert or not, to just answer the questions and in doing so to avoid volunteering information beyond that necessary for an adequate answer to what is being asked. Before depositions were routinely videotaped, this served as standard operating procedure. Everyone knew that if the case did not settle, as most cases do, the witness would testify at trial anyway. Furthermore, and perhaps more importantly, concise answers were advisable because reading lengthy depositions was boring for the jury. Videotaping depositions changes this. When a deposition is videotaped and can be introduced as substantive evidence at the trial in lieu of calling the witness to the stand, the witness must balance the original desire for terse answers with the desire to enhance his or her credibility.

Fact finders (in this case the judge) take many factors into account when considering the testimony of witnesses. The most crucial of these is credibility. A necessary part of establishing and maintaining credibility is acting with a demeanor proper to a witness who has a great deal of relevant information to bring to bear on the issues in a given case. For whatever reasons (strategic or otherwise), Gates is generally considered by his critics to have missed getting the highest marks in demeanor, which may have undermined the credibility of his deposition.

When Bad Strategy Happens to Competent Technologists

As the deposition continued, Gates's testimony descended into increasing murkiness.

Q (Mr. Boies): The November 27, 1996, Nehru e-mail that you sent around is headed "Netscape Revenues"; correct, sir? And it is a discussion of an analysis of Netscape's revenues?

A (Gates): I didn't send it around. Amar sent it around. I enclosed it.

Q: I thought we established that you then sent it around.

A: I enclosed it, yes.

Q: When you say you enclosed it, that means it's enclosed with what you have written so that it goes around to everybody that your e-mail is directed to; correct?

A: Well, Amar had already sent it to quite a large superset of the people I copied on my e-mail, so he sent it to them.

Q: He sent it to them and then you sent it to everybody that is on the addressee or copy list of your e-mail; correct?

A: I enclosed it to those people who had already all gotten it from Amar.

Q: And by enclosing it means you sent it around?

A: That's not the word I would use, but it was enclosed in the e-mail I sent to those people who had already received it directly from Amar.

Q: So when people got your e-mail—all I'm trying to do is—I don't think this is obscure. All I'm trying to do is establish that when you sent your e-mail to the five people that you sent it to, with your e-mail they got Mr. Nehru's e-mail?

A: Which they had already gotten.

Q: And they got it again?

A: As an enclosure, yes.

Q: As an enclosure to your e-mail?

A: Right.

Q: And that e-mail from Mr. Nehru that you enclosed with your e-mail is a discussion of Netscape's revenues; correct, sir?

A: That's the subject line of his e-mail.

Q: Not only is it the subject line, that's what the substance of the e-mail is?

A: Do you want me to look at it?

Q: If you need to to answer the question.

A: It appears to be a discussion of Netscape's revenue, or what he was able to find out about it at a 70 percent confidence.

Q: And the first line of your memo that you sent to the five people indicated here, including Mr. Maritz and Mr. Ballmer, is, "What kind of data do we have on how much software companies pay Netscape?" correct, sir?

A: Yes.

Q: And did they furnish you with that information?

A: I don't think so.

Q: You say in the next line, "In particular, I am curious about their deals with Corel, Lotus and Intuit." Do you see that?

A: Uh-huh.

Q: You've got to say yes or no for the—

A: Yes.

Q: Did you ever receive information about what revenues Netscape was getting from any of those companies?

A: I'm quite sure I didn't.

Q: Netscape was getting revenues from Intuit. You knew that in December of '96; correct, sir?

A: I still don't know that.

Q: You still don't know that? You tried to find that out in December of 1996; correct?

A: I did not myself try and find that out.

Q: You tried to find it out by raising it with people who worked for Microsoft, didn't you? That's what this message is?

A: It says I'm curious about it.

Q: Well, the first line says, "What kind of data do we have about how much software companies pay Netscape? In particular I am curious about their deals with Corel, Lotus and Intuit." That's what you wrote to Mr. Nehru, Mr. Silverberg, Mr. Chase, Mr. Ballmer and Mr. Maritz; correct, sir?

A: Right, because Amar's mail didn't seem to have any data about that.

Q: And is it your testimony that you never got any data about that?

A: That's right. I don't remember getting any data. I'm quite sure that I didn't.

Q: Did you follow up to try to get an answer to those questions?

A: No.

Q: After December of 1996, Microsoft entered into an agreement with Intuit that would limit how much money Intuit paid Netscape; correct, sir?

A: I'm not aware of that.

Q: Are you aware of an agreement that Intuit entered into with Microsoft?

A: I know there was some kind of an agreement. I wasn't part of negotiating it, nor do I know what was in it.

When reading this portion of the transcript of the deposition and when viewing the videotapes, one can almost sense the frustrations building in the witness, who at various points appears not to want to be testifying. The novice might assume that Boies is also frustrated by Gates's vague and evasive answers. However, experienced experts and legal strategists can recognize when the playing field of a deposition is under their control. The extraordinary number of prior e-mail statements that Boies could use to control the ability of Gates to answer and explain his answers represented a formidable advantage. Regardless, it is clear at this point in the deposition that any witness would be in for a rough time. Almost any strategy that attempts to get around the massive amount of impeachment material is likely to make it look like the witness is attempting to frustrate the legitimate efforts of the examining attorney to establish the facts that are most relevant to the lawsuit.

Furthermore, Boies is widely acknowledged in legal circles as an expert linguist and a consummate examiner of witnesses. We get the idea that he was delighted with

what he was eliciting from the witness over the three days of the deposition. Therefore, he was content to appear in the video and written transcript to be fairly but futilely attempting to get from the witness a straight answer that contained all the information that was available as to a particular issue. From the government's perspective, Boies was in a win-win situation. After all, he had already obtained most of the essential evidence in the form of admissible prior statements of the witness or others discussing these issues. Gates's only real hope was to come across as a knowledgeable and helpful witness while explaining these e-mail messages, in order to score any points at all with the fact finder.

On the other hand, in fairness to the witness, the last exchange is also an example of testimony that, in the absence of the cumulative effect of dozens of other exchanges that put Gates at a distinct disadvantage, might almost as easily be scored by the fact finder in favor of the witness. Such an isolated exchange as the one quoted immediately above could reasonably be interpreted as nitpicking questioning by the lawyer, rather than as a failure by the witness to be responsive or cooperative and therefore completely credible. It is important for technical experts to pick their fights carefully and not to assume that if they consistently react defensively to all lines of questions, the fact finder will continue to empathize with the witness. After enough of these defensive answers, the most open-minded fact finder may conclude that the witness is simply refusing to explain what he or she knows, whether the questions are reasonable or not.

Some legal observers have wondered why the Microsoft counsel did not call more time-outs. From time to time the Microsoft counsel objected and in other ways attempted to smooth over a situation that was, in retrospect, not helping to make the witness appear credible. This loss of control over the impressions made during the deposition had an impact on the future trial strategy. Some commentators have suggested that after viewing the videos, the existence of the taped deposition may have convinced the legal team members of their inability to effectively rehabilitate the witness once the deposition was introduced into evidence at the trial. This may have persuaded the Microsoft counsel not to present Gates as either a factual witness or as an objective and wise expert—his bias and interest in the outcome of the case notwithstanding.

Although it may appear to the reader that Boies is being unnecessarily picky in his repeated questioning of Gates on details of the e-mail messages, he is expertly and dramatically drawing the attention of the court to the witness's antagonistic and picky behavior, which could be construed as that of someone failing to adequately respond to a legitimate line of questioning.

David Bank has a less generous interpretation of Gates's intent:

> *Gates tried to stall Boies. While he otherwise had crisp recall of the pros and cons of every strategy debate since Microsoft's inception, he, in his deposition, claimed not to*

remember whether he did or did not write or receive any of the dozens of e-mails put before him. . . .

In what turned out to be his only chance to influence the trial, Gates had opted for obfuscation rather than clarity. His evasiveness and forgetfulness in the deposition had disqualified him as a witness in the courtroom. The forceful defense he might have later chosen to make would be fatally undermined by his lack of credibility. So Gates effectively gave up his chance to defend Microsoft's strategy as simply the best adapted to the new form of competition in high-technology markets. . . . [3]

A Learning Experience for Both Litigators and Witnesses

Lawyers have not missed the opportunity to use Gates's performance to make a number of points about the art of giving and taking depositions for the education of trial attorneys. Such depositions are especially well suited for instructional purposes when they are videotaped, as this one was, and then dramatically introduced in relevant portions during the presentation of the case and the examination of other witnesses at the trial. Former Federal Judge Herbert J. Stern and George Washington University Law School Professor Stephen A. Saltzburg have devoted an entire chapter to the analysis of portions of the Gates deposition in the fourth volume of their series for attorneys, *Trying Cases to Win*.[4]

Along with Bank, Stern and Saltzburg also have pointed out that, regardless of the reasons that prompted Gates to testify as he did, the resulting performance made it extremely difficult for him to take the stand after the deposition had been introduced by the plaintiff in the trial before the judge. They also discuss why it makes good sense to treat the videotaped deposition as if it were itself the trial. According to Stern and Saltzburg, the strategy of having as knowledgeable and important a witness as Bill Gates (the personification of the defendant in the lawsuit) appears to deny the plain meaning and significance of one evidentiary document after another ultimately harms the case for the defendant. It erodes the credibility of one of the main witnesses and may also enhance the importance of the documents to the fact finder, in this case, the judge. These are heavy potential losses to incur during the discovery phase of litigation. Such losses can turn out to be powerful and persuasive admissible trial testimony from which the legal team cannot recover during the actual trial.

3. Bank, *Breaking Windows*, pp. 149–150.

4. Stern, Herbert J., and Stephen A. Saltzburg. *Evidence: Weapons for Winning, Trying Cases to Win*. Vol. 4 in the *Trying Cases to Win* series. New York: Aspen Publishing, 2001.

What Fact Finders Say about the Importance of Testimony

You may wonder what impact Gates's demonstrated difficulties in deposition had on the outcome of the case. In other words, what real damage could testimony, perceived as Gates's performance was generally perceived, actually incur? This is an unusual case because shortly after the trial the judge supplied a journalist with significant evidence that supports the conclusion that the fact finder did score points against the defendant and for the plaintiff, based on his analysis of the witness's performance. Ken Auletta, a reporter for *The New Yorker*, interviewed Judge Robert Penfield Jackson (who presided over the Microsoft case) many times during the trial. Ultimately, Jackson's comments on the trial were published in an article that appeared in *The New Yorker* in January 2001.[5] Jackson's remarks quoted in the article led to a remanding of his judgment against Microsoft on appeal and to further proceedings. Furthermore, the Court of Appeals returned the case to the lower court and assigned a new judge to reconsider it.

In his article (and in his subsequent book on the Microsoft case[6]), Auletta quoted Jackson as saying that Jackson became irritated with what he called Microsoft's "obstinacy" displayed, for example, by Gates during his videotaped deposition. Jackson was also disturbed by the apparent contradictions between the text of some Microsoft e-mails presented as evidence and the testimony of its witnesses.

Another exchange, this time between Gates and Stephen Houck, illustrates a key problem.

Q (Stephen Houck): Do you understand that in this e-mail here Mr. Siegelman is opposing a proposal to give MCI a position on the Windows 95 desktop as an Internet service provider?

A (Gates): I don't remember anything about MCI. This talks about how we'll have a Mosaic client in Windows 95. I don't see anything in here about the desktop.

Q: It references in this e-mail the Windows box. What do you understand the Windows box to mean?

A: Well, the Windows box is certainly not the Windows desktop. The Windows box is a piece of cardboard.

---

5. Auletta, Ken. "Final Offer-What Kept Microsoft from Settling Its Case (Annals of Communications)." *The New Yorker*, January 15, 2001, p 26.

6. Auletta, Ken. *World War 3.0–Microsoft and Its Enemies*. New York: Random House, 2001.

Jackson later asserted in remarks to Auletta that Gates's deposition was a critical mistake because it essentially supported the prosecution's contention that Microsoft was arrogant and unfair. The judge asserted that after observing Gates's testimony, he had no choice but to rule for the prosecution, returning a judgment that ordered a split of Microsoft into two separate companies.

Gates himself later came close to admitting his mistake in the approach he took as a witness in the case. After Jackson's findings and his order to break up the company, Gates offhandedly acknowledged that perhaps he should have chosen to testify in Microsoft's defense. "If we look back, I think it's clear that the whole story of personal computing—how the great things that have been done there and how we created an industry structure that's far more competitive than the computer industry before we came along—that story didn't get out," Gates said on Good Morning America. "And I do wonder if I'd taken the time to go back personally and testify, if we might have done a better job in getting that across."[7]

When Auletta was asked to identify the most critical flaw in Microsoft's legal team's strategy, he responded, "[The Microsoft legal defense team] ignored things like credibility, intent. They handled [the trial] like an engineer would. And they are paying for it."[8]

Testifying Effectively Is Not the Same as Solving Engineering Problems

Auletta's analysis of the flaws in Microsoft's legal strategy is of special interest to those who might serve as expert witnesses. Technologists often want to believe that the law is logical and that they can therefore understand the tenets of the law and how it applies to most situations. This view might lead them to believe that they can afford to ignore the illogical details of the legal ritual that has evolved over centuries. This is a disaster in the making.

We live in an age when the massive effect of technology on everyday life has accorded those who demonstrate mastery of technology the status of court magicians. Understanding technology involves a great deal of academic effort and certain analytical talents, attributes that do not come easily to everyone. Technologists are understandably proud of their skills and their accomplishments won by using those skills. It's only natural to believe that the systematic analytic process learned in the course of a technical education can be generalized to dealing with all the challenges of life.

7. As quoted in Bank, *Breaking Windows*, p. 150.

8. As quoted in Garfield, Matt. "*New Yorker* Author Analyzes Microsoft 'Trial of the Century.'" *Davidson News & Events* (Davidson College newspaper, Davidson, NC), January 22, 2001, p. 1.

However, this technical approach does not satisfy some of the key requirements of the adversarial legal system, which relies in the end on the understanding by judges and jurors of the facts that are crucial to reaching a decision. In every case the facts are developed either in whole or in part by the testimony of lay and expert witnesses. It is often the credibility of those witnesses that makes all the difference.

Testimony—Take Two

In April 2002, as this book went to press, Bill Gates returned to the witness stand in *U.S. v. Microsoft*, this time concerning the claims of nine states and the District of Columbia. This set of claims asserted that the settlement reached between the Department of Justice and Microsoft was insufficient to serve the best interests of the consumers in their respective jurisdictions.

The media and press celebrated a "different Bill Gates," one who was well prepared and appropriately deferential to the judge and the plaintiff counsel. According to press accounts, Gates was initially nervous but soon regained his composure, delivering a clear message to the judge that the punitive measures proposed by the plaintiffs would inflict significant damage on both Microsoft and the U.S. economy as a whole.

Consider and contrast this description of Gates's assuming the mantle of the prepared and composed expert with his previous performance in the original deposition:

> *On Monday, Gates began his testimony with an elaborate PowerPoint presentation and painstaking definition of technical terms. He said that arbitrarily "removing code" from Windows would have disastrous consequences because software would lose application program interfaces—he called it "published ways of calling on functions"—and cease to work.*[9]

In another turnabout from his previous witness persona, Gates was clear and candid when asked by the states' attorney about a previous claim of improper activity:

> *"Cloning is a strategy that Microsoft has employed, isn't it?" asked [states' attorney Steven] Kuney.*
>
> *"We have done it," Gates responded, adding that he believes cloning is appropriate if a company does it without improperly obtaining another firm's source code.*[10]

Consider the contrast between this succinct exchange and Gates's endless parrying with Boies during the deposition (and consider the difference made to the court). Clearly Gates learned from his first experience as a witness in the deposition. In

9. McCullagh, Declan, and Robert Zarate. "Gates: Leave My Windows Alone." *Wired News*, April 23, 2002. Accessed July 10, 2002, at *http://www.wired.com/news/print/0,1294,52027,00.html.*

10. Krim, Jonathan. "Gates Tries Softer Voice in Loud Court Battle." *Washington Post*, April 22, 2002, p. E01.

reflecting those lessons learned in his return visit to the court, he demonstrated that with experience and preparation, an expert can indeed learn new tricks about the art of testifying!

If Credibility Is Always the Answer, What Are the Questions?

The legal system has slowly evolved, reflecting the influences and experiences of Western culture through many generations and regenerations of theories and practices of conflict resolution. One point that may be difficult for technologists to accept, given that so much of the IT revolution is driven by the need for speed, is that the law is "designed" to function slowly. This is to accommodate the "one step forward, two steps back" nature of technological and societal progress without making social policy that either cripples further advance or creates too many unacceptable risks for society in the adoption of new technologies. Furthermore, the law ultimately attempts to deal with the most difficult scenarios that arise when scientific crispness meets human messiness—the addition of humans to even the most elegant analytical constructs can result in wildly unpredictable results. Because it deals with human frailties, the law tends to focus its attention in the process of litigation on human attributes of trust and believability, and not solely or even primarily on the absolute properties of correctness.

Thus some of the things that matter most when participating in the legal rituals of litigation and dispute resolution are determined by legal and philosophical concepts that have been around at least since the time of Cicero.

- Is the testimony relevant?
- Is the witness believable?
- Do other similarly qualified and credible witnesses agree with these conclusions?
- Is the witness's testimony comprehensible?
- Is there admissible evidence to show that the testimony is factual?

Contrast that set of criteria to the questions asked when testing a scientific or technical argument.

- Is the argument logical?
- Is it based on a provable hypothesis?
- Has it been rigorously tested?
- Does it follow from established scientific fact?
- Has it been subjected to published peer review and critique?

Although one might argue that the goal of the legal process is to derive the truth—presumably the same goal as an unbiased scientific or technical inquiry into

causation or proof—there are differences in the techniques applied for the process of considering the issues and for reaching the final judgment about the results of the inquiry. In particular, the treatment of context is quite different. In technical inquiry, in order to use mathematical models of process, researchers and design engineers often try to eliminate or else dampen the effect of context. In legal process, given the importance of bias, motive, and interest to the credibility of witness testimony, establishing the full context is critical to establishing all the relevant facts of a matter in litigation. This context is established through an objective assessment of all the evidence as subjected to rhetorical interpretations by the advocates. In the end, the fact finder applies his or her common sense to those arguments and the evidence and seeks to reach a fair and final verdict.