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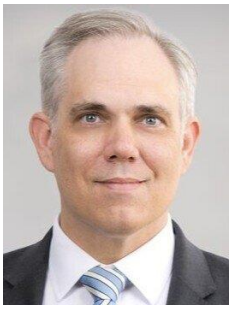
How 2 Decisions Reframed Witness-Centered Trials

By **Joshua Robbins** (March 23, 2026, 5:26 PM EDT)


Joshua Robbins

"He definitely said the right things. He put on a performance. It was clear that it was a performance. Not to say he gave a bad performance, but it was a performance."

That was the assessment of one of the jurors in U.S. v. Goldstein, in the U.S. District Court for the District of Maryland, shortly after convicting Thomas Goldstein, one of the nation's leading U.S. Supreme Court advocates of tax evasion, on Feb. 25, and rejecting the defendant's testimony in his own defense. Though he had argued more than 40 cases before the nation's highest court, his testimony, in the jury's eyes, was no match for the documentary record the government had assembled.

Hours later, the Supreme Court handed down its decision in Villarreal v. Texas, unanimously holding that trial courts may prohibit defense counsel from conferring with a testifying client about the substance of his testimony during an overnight recess. The rationale was direct: Such potential coaching sessions threaten what the court called "the central truth-seeking function of trial."

Both events, arriving on the same day and from very different directions, hint at the same possibility: that the conventional American approach to trial advocacy, particularly in commercial litigation, may rest on assumptions about what fact-finders want that are no longer entirely sound. Instead, lessons drawn from other realms of dispute resolution — such as white collar criminal prosecution and international arbitration — can help light the way toward a more modern approach.

The Traditional Model and Its Limits

American civil litigation has long treated counsel and witnesses as the stars of the show. The model centers on testimony: Identify key witnesses, build a narrative around what they will say, prepare them extensively, and present them as credibly and compellingly as possible.

Numerous and lengthy depositions serve this system by ensuring that almost nothing any witness says comes as a surprise at trial. Cross-examination is often a heavily scripted performance based on prior deposition testimony, with the transcript at the ready should the witness stray from the expected line.

There is much to recommend this approach. Thorough preparation reduces risk, credible witnesses can be persuasive and a disciplined cross-examination can be effective. But as the Goldstein and Villareal cases illustrate, the model has its vulnerabilities.

Witnesses are inherently difficult to control. They have bad days. They can forget, evade or overexplain. They may misunderstand questions and agree to loaded or misleading assertions when they should not. Some are very convincing even when fabricating stories, while others may appear dishonest even when telling the truth.

This can create a temptation to confer with the witness overnight, to recalibrate and to smooth out what went unexpectedly.

The Supreme Court's refusal to permit this kind of witness coaching, even when in tension with constitutional prerogatives, recognizes that the machinery of witness preparation, left unchecked, can press against the very integrity it is meant to serve. And even where preparation is flawless, there is a more fundamental problem — jurors are not always persuaded by witnesses, however polished.

Documents Over Witnesses

Continental European legal systems and modern English commercial practice have long operated on a different premise: that party-affiliated witness testimony should be discounted in favor of more objective evidence.

The roots of this preference can be traced at least as far back as ancient Rome, which produced the maxim "spoken words fly away, written words remain,"[1] and the prohibition on basing a legal ruling on the testimony of only one witness. And it has been incorporated into modern doctrine, such as the parol evidence rule, the statute of frauds and even the U.S. Constitution's requirement of two witnesses or a confession to support any conviction for treason.

This is not merely a philosophical preference. Rather, it acknowledges that emails, bank records and text messages — unlike witnesses — do not lie, have failures of memory or have an interest in the outcome of the case.

Prosecutors, too, have to account for the inherent unreliability of witness testimony. While carrying the burden to prove guilt beyond a reasonable doubt, they are often forced to work with particularly flawed witnesses. Cooperating defendants, for example, are sometimes necessary but invariably suffer from obvious credibility issues, leaving them vulnerable to attack.

The problem lies not only with flawed witnesses, but in the inherent limitations of the process itself. Scholars going back to Jeremy Bentham in the early 19th century and Hugo Münsterberg in the early 20th century have questioned the intrinsic reliability of witness testimony.

And more recent studies have shown that most people — including most potential jurors — are not always very skilled at identifying truthful testimony from perjury based solely on witness demeanor.[2] But empirical evidence, and reasonable inferences based on it, do not require any special skill in lie detection.

As the anonymous Goldstein juror explained, "[w]hat really kind of sealed most of the case, for me, was the preponderance of just data. Banking data, emails, text messages. It was just a lot of evidence to overcome."

The lesson for the modern advocate, particularly in commercial and civil litigation, is structural rather than stylistic. Prosecutors and lawyers experienced in international arbitration — where discovery is

narrow by design and depositions are largely unavailable — learn by necessity to construct their cases out of documents and empirical evidence, using witnesses to narrate and fill gaps rather than the other way around.

The result is a kind of architectural discipline: Every key factual proposition must be anchored in something that does not depend on any witness performing as expected.

The question this discipline imposes at the outset of case preparation is not "who will testify to this?" but "what document establishes it?" Where the answer is readily available — in a contract, an email chain or a set of financial records — the witness becomes a guide through the evidence rather than its primary source.

Where the answer is harder to find, the disciplined advocate investigates further before concluding that testimony is the only option. That instinct is not always innate in a litigation culture built around witness testimony.

Some cases, of course, rest heavily on witness testimony simply because there is no alternative — no written statements or other contemporaneous record. Credibility disputes, oral agreements or cases that turn on state of mind — these cannot always be resolved by reference to a paper trail, and no amount of comparative law instruction will make them otherwise.

But in business cases especially, the pure swearing contest is the exception. More often, the documentary record is rich, and the question is whether the advocate has built the case around it or merely used it to decorate a witness-centered narrative.

Teaching Over Performing

The Goldstein juror's observation about performance points to a second dimension of the problem. Much has been written about the so-called "CSI" effect — the tendency of jurors in criminal cases to expect forensic evidence, shaped by decades of television drama.

Something analogous, if less often discussed, may be operating in the broader question of how jurors respond to advocacy.

Modern jurors have grown up on a steady diet of social media, smartphone footage and reality television. As a result, they have become unusually attuned to the difference between genuine communication and managed presentation. This sense is not infallible, and it is not always conscious. But it is real, and can heavily affect verdicts.

The traditional image of the trial lawyer as a dramatic performer, commanding the courtroom through force of personality and carefully rehearsed rhetoric, has always been more Hollywood than reality. But it may be less viable today than ever.

That is hardly news in some contexts. Prosecutors are generally expected to be stoic and measured. Advocates in arbitration proceedings and bench trials are actively discouraged from bombast, which experienced arbitrators and judges tend to find tedious at best and counterproductive at worst.

The question worth asking is whether the jury trial is really so different — whether a lay jury, saturated with the performative media of modern life, is meaningfully more susceptible to theatrical advocacy

than a panel of experienced arbitrators.

Rather than the performer — or its cousin, the trial warrior — the more durable model is that of the teacher. The teacher's goal is not to dazzle, but to clarify — to help the fact-finder understand what the evidence shows and why it matters. That orientation is structurally different from the dramatic or martial schools of advocacy, and fact-finders can feel the difference, even when they cannot articulate it.

The Goldstein juror could not explain precisely what had signaled "performance" to him. He only knew that it had, and that the documents had told a different kind of story — one that did not need him to believe in the teller.

This is not to say an attorney's trial presentation should be dull. Keeping the fact-finder's attention matters, and a well-placed moment of color or emphasis can illuminate an argument that no amount of dry recitation could convey. The line to avoid is the one between animation and artificiality — the point at which the seams in the garment start showing, when advocacy becomes visibly strategic, where the fact-finder notices the effort at persuasion rather than the substance being urged.

An overused and overly rehearsed joke, a too-dramatic pause, or an overtly phony effort at familiarity and folksiness (especially from someone otherwise exuding formality) can easily do more harm than good.

Adaptability Over Control

A third lesson from Villarreal in particular is that the advocate must accept that trial entails at least some loss of control.

Lawyers — like the criminal defense counsel with their client on the stand — instinctively seek to leave nothing to chance. Civil litigators invest heavily in depositions precisely because they want to eliminate uncertainty — to know what every witness will say before the witness says it, and to have the means to impeach any departure. Cross-examination in that environment is less a live exercise in inquiry than the execution of a script.

Prosecutors and lawyers in continental-style international arbitration have no such luxury. Without depositions, they must anticipate a range of possible answers rather than a single expected one. Cross-examination becomes less a script and more a decision tree — a structured inquiry that accounts for multiple contingencies and draws its force not from a prior inconsistent statement but from documentary evidence, logic and probability.

That approach demands genuine adaptability: the ability to listen carefully during direct examination, to adjust in real time and to use what the witness has just said, rather than what the witness was supposed to say, as the starting point for the next question.

The government's prosecution of Goldstein illustrates what this looks like in practice. The prosecutor's cross-examination of the defendant was grounded not in any prior deposition, but in the documentary record: the documented spending at a nightclub while taxes went unpaid, the Bentleys, the vacation homes, the signatures on tax returns that said one thing while the bank records showed another.

The questions drew their force from what Goldstein had done — and the natural inference to be drawn

from it — not from what he had previously said. That is the kind of cross-examination that remains effective no matter how skilled and prepared the opposing witness, because skill and preparation cannot change what the documents say.

Conclusion

The events of Feb. 25 — a jury verdict and a Supreme Court decision, arriving the same day with the same quiet message — suggest that the traditional paradigm of American civil trial practice, with its emphasis on witness performance and assertive advocacy, may not reflect the ideal approach for the modern courtroom.[3]

The practitioners best positioned to adapt are those who have learned — whether through criminal practice, international arbitration or simple reflection on what fact-finders actually want — that documents anchor a case in ways that witnesses cannot, that teaching is more persuasive than performing and that adaptability at trial is worth more than control that was always, at some level, an illusion.

The fact-finder, in the end, is not the witness's or the advocate's to manage. The Goldstein juror said as much. The Supreme Court said it in more formal terms. The trial lawyers of today and tomorrow would do well to heed the message.

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[1] "Verba volant, scripta manent."

[2] See, e.g., P. Ekman and M. O'Sullivan, Who Can Catch a Liar? American Psychologist, 46(9), 913–920 (1991); Elizabeth Loftus, Eyewitness Testimony (1979).

[3] The pendulum could well swing again. It remains to be seen how developments in artificial intelligence and deepfake technology will affect juror confidence in documentary evidence. If a bank record can be fabricated convincingly enough, the epistemic advantage of documents over witnesses may erode in ways that are difficult to predict. That is a real and evolving challenge. But that challenge lies ahead.