"Pain-Free" Witness Preparation

For:

Valero Energy Corporation

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By:

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This course has been approved for Minimum Continuing Legal Education credit by the State Bar of Texas Committee on MCLE in the amount of 1.5 credit hours, of which 0.5 credit hours will apply to legal ethics/professional responsibility credit.

INTRODUCTION AND OBJECTIVE: The overall objective and purpose of the program is to provide a "best practices" guide to witness preparation for deposition or trial testimony, within the guidelines provided by the ethical canons and Texas rules of procedure.

I. Many see the production of witnesses like a trip to the dentist. Why is witness preparation so difficult and so stressful for both the witness and all counsel concerned with the process?

A. Neither the lawyers or the witness are in control. Many of us have attained our positions in part by asserting control over our environment and mastering it. The deposition process, however, does not permit this degree of control. Once the witness begins answering questions, particularly in localities like Texas that severely limit what a lawyer defending a deposition can do, he is largely on his own.

B. We are haunted by “old saws” expressing the futility of deposition preparation. We are told from the beginning of our legal careers that you “cannot win a case during depositions, but you can lose it.” Great! Now we have a task with no upside and only downside. These old saws are then too often reflected in one-directional client expectations: the witness is a “good guy” so the “lawyers” must have messed up the process.

C. Preparation is often done inefficiently and too much time is spent on it, leading clients to conclude that it is too great a diversion from their

"real" work on behalf of themselves or the company.

II. What are the essentials of "pain free" witness preparation? After preparing more than 500 witnesses for deposition and watching the reaction of both the witness and client to the process, several keys to successful witness preparation have become apparent.

A. You must set reasonable **goals** for the deposition based upon the client's **decisions** and ensure that the **client's expectations** are consistent with those goals.

B. The session(s) must be **efficient** and **focused** on the job that the witness will have to do. Avoid wasted time by having a very clear game plan for the witness role, the "hot button" issues and their treatment.

C. The witness must be made to understand the **rules of the road** and how they apply to both preparation and the deposition itself.

D. You must have the witness' **time** and **attention**. This sounds as basic as the instruction to "just meet the ball with the bat," but as with that baseball-related admonition, the devil is in the details.

E. The witness must **practice precisely the functions he will have to carry out in the deposition**. Decide in advance if this is a witness who will require

two hours of preparation or several days of preparation and plan accordingly.

All of these general guidelines are explained in greater detail in sections III through VII below.

III. Developing substantive and procedural goals and living with the byproduct—client expectations.

A. Generic goals for any witness. Goals for witness preparation fall into two categories—subject matter and procedural. Subject matter goals describe *what* the witness will say; procedural goals describe *how* the witness will say them.

B. Deciding on realistic **subject matter goals** is essential to good witness preparation. When counsel and the client fail to make key substantive decisions early in the preparation process, the result is ambiguity for the witness and counsel about the witness' role. When testimony is being taken under oath, uncertainty is poisonous because the witness may fail to give important helpful testimony or may give inaccurate or even dishonest testimony because he feels he is being forced to speak outside of his role or is being forced to take an essentially indefensible position. Worse still, the witness may appear evasive, even though he fully understands the situation and would otherwise feel free to answer.

1. Assess the case early so that the "basic story" of the case is developed, agreed to and understood by everyone associated with the

case. If the basic story line doesn't work (*i.e.*, fit the facts and be jury-ready), fix it. Ideally, the basic storyline of a case should be simple, appealing and easy to state in a positive way. For example: not "we didn't steal trade secrets from their data room," but rather "we found these great producing properties because of our own hard work and because we were willing to take risks our opponent wouldn't take. They now want to gain in the courthouse what they were unwilling to try for in the real world." The single most difficult facet of this process is recognizing and developing a suitable plan to deal with bad decisions or troubling documents that are inconsistent with your theory of the case. At the earliest portion of the case, these major headwaters issues may require remedy, even by substantive concessions or changes in the client's real world position. The client should be advised of these "problems" and the risks attendant to them early so that they can decide if they wish to aggressively deal with them or to instead "ride out the storm" throughout the pretrial procedure. At a minimum, clients should not expect that witness preparation alone, however capable and careful, will bail them out of major substantive problems.

2. Decide which witnesses are necessary to tell the essential story. By listing trial witnesses

early in the case and giving them a rough order of priority, you can clarify each witness' role.

3. Decide how to deal with bad facts and bad documents. In many cases, how you deal with difficult facts or bad documents spells the difference between success and failure. To deal with bad documents or bad behavior, the client must fundamentally decide between two options: (1) embrace and explain/justify the behavior or documents, or (2) divorce from the behavior or documents. Vacillating between these largely polar opposites, a tempting option to any client having difficulty deciding its path, is a recipe for disaster. One option that has not been included here is "burial" of the bad facts or behavior under claims of privilege. Even where this tactic is possible, and it rarely is appropriate under privilege law, and it is wrong and you shouldn't do it.

C. Procedural goals every preparer should have. Jury research parallels our common experience and dictates how we prepare witnesses. The reams of research that have been done on how juries react to witnesses confirm many of our "seat of the pants" notions about what makes a witness credible and effective.

1. Even neutral witnesses are surprisingly fallible, and juries have great difficulty

filtering their testimony. PATRICK WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965); Gary Wells, R. Lindsay & T. Feguson, *Accuracy, Confidence and Juror Perceptions in Eyewitness Identification*, 64 J. APPL. PSYCHOLOGY 440 (1979).

2. Juries rely on simple stories or analogies to filter evidence. Researchers like to say that juries employ "heuristic principles" to reduce complex tasks to simpler and more manageable judgmental operations. C. Jolls, C. Sunstein & R. Thaler, *A Behavioral Approach to Law and Economics*, 50 STANFORD L. REV. 1471, 1477 (1998). Although these "heuristic principles" permit more comfortable decision making, they frequently induce mental shortcuts and erroneous judgments. *Id.* For the experienced trial lawyer and witness preparer, these heuristic principles evolve into "basic storylines" that the client must be prepared to carry forward in order to appeal to the jury's basic sense of right and wrong.

3. Differences in presentation make enormous differences in the acceptance of testimony—*whether a witness is telling the truth or not*. While the essential storyline of a case most often dictates whether a fact finder *wants* to believe a witness, the person's demeanor tends to dictate *whether* the testimony will be accepted. Psychological studies have consistently illustrated that both experts (police officers, child services workers, etc.) and laymen accept common cues to indicate

deception. Par Granhab & Aldert Vrij, Deception Detection, in PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 70 (Neil Brewer & Kipling Williams ed., The Guilford Press 2005). One study demonstrates the difference in a witness' demeanor and responsiveness. In the study, the same witness (actor) portrayed the same essential message to two different mock juries with the only variance being the demeanor of the witness. In the first portrayal, the witness sat upright, moved little, maintained eye contact with the examiner, politely waited for questions (by an adverse questioner) and consistently answered with the script-dictated "truth" even where unfavorable to his position. In the second portrayal, the witness slouched, looked away from the questioner, was physically furtive and on occasion either refused to answer or gave evasive answers. The results were surprising only in their magnitude: the mock jury observing the first portrayal recalled and gave high belief marks (more likely true than not) to the vast majority of the key testimonial components of the witness' testimony. The mock jury observing the second portrayal gave high belief marks to a very small portion of the same testimony. More critically, the mock jury observing the second portrayal felt by a greater than three-to-one ratio compared to the "honest" portrayal that the witness deserved punishment for his dishonesty. DePaulo, Lindsay & Malone, *Cues to Deception*, 129 PSYCH. BULL. 74

(2003) (also listing over 100 experimentally studied demeanor cues).

4. Common jury perceptions of reliability dictate the procedural goals of witness preparation. Juries want witnesses who will:

   a. "look them in the eye";

   b. be polite, open and friendly;

   c. answer the question rather than "running from the truth";

   d. "tell the truth even though it hurts them"; and

   e. "take responsibility for their own actions."

5. Our experience mirrors these research findings. The vast majority of cases tried or arbitrated are won or lost on the few basic facts that create the jury's storyline. The remaining facts are selected or rejected by the jury to conform to that story. The worst "runaway" verdicts we have encountered arose from a combination of bad facts and witnesses who were either clearly untruthful or who ran from obvious conclusions because they have been told to hew to a particular party line. On the other hand, our experience has been that juries do not punish people or companies whose people they *like and respect*.

IV. There are "rules of the road" that both witnesses and preparers must understand. Both the witness and his counsel operate under significant legal and ethical restrictions in connection with deposition conduct and preparation.

A. To understand the rules of the road, the witness first needs to understand the basic nuts and bolts of a deposition. Unlike the preparer, unless the witness is a seasoned expert or executive who has attended many depositions, he is likely to be totally unfamiliar with the deposition process. The preparer's job is to walk him through the process on a step-by-step basis, leaving nothing to chance. By familiarizing the witness with even the most basic concepts (where you sit, where opposing counsel sits, where the court reporter sits, what the reporter does, do you have a chance to read the transcript for accuracy?, can you ask questions?, how long the deposition lasts, can you take breaks?, etc.), you seriously reduce the stress that your witness is operating under. This basic advice alone is insufficient to put the witness at ease, but it is a virtual guarantee that if you do not cover these basics, your witness will not be as comfortable or effective as she could be.

B. Rule One that every witness should understand is that he is obligated to tell the truth and that the failure to do so can result in substantial personal liability. Rule One does not mean that a witness should not be aggressively prepared—your witnesses should understand the client's position

and be prepared both to defend it and to anticipate and diffuse efforts to confuse the issue or negate your position. Nor is it suggested that this be the first item mentioned so as to make an already tense witness more so. Rather, the principle should be demonstrated practically, in the study sessions in which the lawyer and witness ascertain what the true facts are and what role the witness might have in explaining them.

1. The corollary to Rule One is that the lawyer is forsworn to avoid perpetrating known falsehoods or from helping others to do so. A host of ethical rules come into play in connection with the preparation and presentation of a witness for deposition. The listing in this paper should not be seen as exhaustive, but rather contains some of the more important and commonly applicable rules.

2. Improper interference with the truth-finding process. Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct ("TDRPC") is entitled "Fairness in Adjudicatory Proceedings." As the name implies, these rules are designed to ensure that the essential fact-finding or truth-finding function of the court system is not corrupted by counsel or others. TDRPC 3.04(a) starts by precluding any counsel from "unlawfully obstructing" another's access to evidence. Some aspects of the rule are crystal clear, while others

involve judgment calls. It is crystal clear that attorneys and their witnesses may not unlawfully alter, destroy or conceal a document or other material. The use of the word "unlawfully" obviously means to import from both the civil and criminal law the concepts of intent and knowledge of the implications of the destruction or concealment. The question of concealment is only slightly more obtuse. Both federal and Texas Rules of Civil Procedure have well-defined methods of stating and preserving privileges such as the attorney-client, work-product or peer-review privileges. All of these procedures rely on an elemental level on the good faith of the asserting party. While judgment calls (even doubtful or aggressive ones) are routinely given the benefit of a doubt, the use of outright baseless objections to production based upon false claims of privilege subject the violator to sanctions, up to and including dismissal of his claim or defense.

3. TDRPC 3.04(b) prohibits counsel from encouraging the creation or presentation of false evidence or testimony. Clearly, attorneys are not to "counsel or assist a witness to testify falsely." This subsection of the rule makes it clear that this result may be accomplished by any means and that the rule is designed to preclude the use of all of them.

Utilizing "contingent fees" for witnesses or paying unreasonably high compensation for the witness' time to accomplish the same result is also prohibited.

4. TDRPC 3.03(a)(5) precludes counsel from offering or using evidence that the lawyer knows to be false. Every lawyer will be faced with a client at some point in her career who offers to give false or misleading testimony. This rule, as well as Rule 3.03(b), prohibit the practice and describe counsel's duties when faced with the problem. Counsel is first obligated to engage in a "good faith" effort to use persuasion to convince the witness to testify truthfully. Should this advice be rejected, counsel is required not to "offer" that evidence—*i.e.*, to use it in an adjudicatory proceeding, *regardless of the client's wishes*. *See* TDRPC 3.03, comment 6. Should counsel's persuasive efforts be insufficient, she is to ask the client to permit her to correct or withdraw the false testimony once it is given. Should these steps prove inadequate, counsel is commanded to take "remedial measures," including "disclosure of the true facts." *Id.,* TDRPC 3.03(b). The obligation to take remedial steps continues until they are no longer "reasonably possible." TDRPC 3.03(c). The timing and scope of remedial measures to be undertaken vary considerably, depending upon whether the false testimony is "to be"

proffered or has already been proffered. *See* TDRPC 3.03, comments 6, 7.

C. Rule Two: Once the deposition commences, it is largely "hands off." Years of suggestive answers by counsel defending depositions, followed by the inevitable recriminations and motions, have led both the federal and state courts to adopt rules of conduct for the defense of depositions that place a premium on advance preparation. They also mean that thorough advanced preparation is all the more critical.

1. Federal: Federal Rule of Civil Procedure 30(c) and local rules requiring "hands off" procedures. While the concept of ensuring that truth is determined by the witness' testimony rather than by testimony of counsel has long been a stated goal, the effort to obtain that goal picked up steam with the seminal decision in *In re San Juan Dupont Plaza Hotel Fire Lit.*, 117 F.R.D. 30 (D.P.R. 1987). While Federal Rule of Civil Procedure 30(c) merely provides that depositions "may proceed as permitted at trial," leaving bad behavior to be dealt with on a post-facto basis through sanctions motions, the court in *In re San Juan Hotel Fire* grew tired of the bickering and directed answers by counsel for the defense. It therefore imposed upon them strict regulations concerning what could be said in the deposition. The decision in *In re San Juan Hotel Fire* tapped a current of

judicial dissatisfaction with the deposition process, leading many district courts to pass local rules restricting in-deposition coaching. For example, Rule CV-30(b) of the Local Rules of the United States District Court for the Western District of Texas mimics both Texas Rule of Civil Procedure 199.5(d) and the *In re San Juan Hotel Fire* decision.

2. Texas: Texas Rule of Civil Procedure 199.5(d) and (f) govern behavior in an oral deposition. Only two years after the decision in *In Re San Juan Hotel Fire*, the Texas Supreme Court adopted forceful rules of deposition conduct. Under these rules:

   a. Private conferences may occur in the deposition only for the purpose of invoking privilege.

   b. Private conferences may otherwise be held only during "agreed recesses and adjournments."

   c. Only two objections to questions (other than the invocation of privilege) are permitted: (1) objection—leading and (2) objection to form.

   d. Only one objection is permitted to an answer—that it is non-responsive.

   e. Argumentative or suggestive objections are prohibited.

f. Attorneys may instruct their witnesses not to answer only:

- to preserve a privilege or
- if the question is so inherently misleading that any answer would be misleading.

V. How do we conduct witness preparation efficiently?

A. Understand what is going on in the witness' head as he begins to prepare.

1. He is intimidated by the deposition process and lawyers whom he feels are "trying to trick him."

2. He is afraid of screwing up and making himself or the company look bad.

3. He is annoyed that he has to take time out of the "real world" to deal with "this B.S." (a condition linearly connected to the height of the employee's position with the company).

4. He doesn't know or trust you all that much more than the opposing lawyer—you are all foreign to him.

B. Understand your role in all of this. As the preparer, you're in charge until the time the first question is asked.

1. Be a calming influence by acknowledging her feelings and giving them some validity. "I

know this is very foreign to you." "You may be concerned that you'll screw up." "I know there is a very long list of other things you would rather be doing."

2. Listen to her once you've given this opening. The witness may surprise you with new concerns or enable you to take some off the list.

3. Explain all the basics you take for granted but which may be new to him. "You'll sit here, opposing counsel will sit over there, and the court reporter will be here. They may videotape." Reduce or eliminate surprises to reduce the witness' tension.

4. Explain that he has rights, too—he isn't defenseless, and you are there to protect him.

5. Reassure her by example and by substance that you know what you're doing.

6. Reassure her that there are established methods of addressing the things that concern her and that they work, that you've prepared many witnesses and that she's in good hands.

C. Assess the case and the witness before preparation commences.

1. Assess case size and importance. Clearly, witness preparation is limited by the practical economic considerations that all lawyers face. No company prepares for a factually important

deposition in a $150,000 case the same way as it would for a $150,000,000 case. By communicating with the client early in the case what will be necessary as the case proceeds, the lawyer avoids friction over time commitments.

2. Assess the opposition's approach and get to the bottom line in your case as quickly as possible. Hours and hours of deposition preparation are wasted by counsel who has not focused on what the opposition is doing in the case and what they intend to do with the witness being prepared. Coming to know the opposition's case as well as your own is the ultimate cure for this problem. It enables the lawyer to unearth potential problems and to project the witness as well as possible in those problem areas. If this pre-preparation work is not done, and if the client and lawyer have not resolved their fundamental approach to the case, the result is a choking uncertainty of the direction in which your case will go, as well as a concomitant waste of time.

3. Assess the witness' background for cues as to how easily the witness can be prepared.

    a. Does the witness have experience in which she has been "under the lights" or under pressure to speak with an audience observing?

b. Does the witness have prior deposition experience? Was she well prepared for it, or has she been taught bad habits?

c. Does the witness come into the preparation carrying a "burden," such as being the instigator of a questionable decision or policy? Are the bad documents or events in the case traceable to her?

4. Assess the importance of the witness to the case. Similarly, even in sufficiently large cases, not all witnesses are of equal importance and some merit more time and effort than others. The software designer alleged to have stolen software from his prior employers in a theft of trade secrets case will clearly be at the epicenter of the controversy, while the third-tier salesman of the new product containing the implicated software will not. Allocate your assets, including the time for preparation, according to the importance of the witness to the resolution of the controversy.

5. Set the scope of true knowledge before meeting with the witness—then adjust as you meet with her. True knowledge consists of the information on topic that the witness actually has on a first-hand basis. A common mistake occurs when counsel prepare the witnesses under their charge to answer every

possible question that may be asked of any witness in the case. This kind of preparation unduly stresses the witness, lengthens the preparation process and reduces focus on the truly critical factual information that a witness has to offer. Thus, *before* preparing the witness, determine the areas in which the witness has factual knowledge, then (1) prepare the witness to respond to the questions you know are coming and (2) teach her how to deflect "off topic" questions. The result is a shorter and effective preparation session and a better witness.

D. Obtain the witness' full attention by hook or crook. Regardless of who they are, clients are frequently challenged to set aside enough time to focus upon witness preparation. The witness may be the focal point of communications amongst the client on a number of items and therefore constantly under assault with e-mails and cellular telephone calls. These interruptions are anathema to successful witness preparation and inevitably injure the final product.

1. Schedule. Get on the witness' schedule early and well before the deposition. Do so far enough in advance that the schedule can be preserved. You must sell to the client the importance of preparation.

2. Shut off and shut out the rest of the world. Lawyers are remarkably unproductive when

their days are punctuated by 20 to 30 calls and 50 to 100 e-mails. What makes us think that witnesses will be any more successful in managing this overload of information?

3. Get out of the office. The distractions for your witness are multiplied at her office. Fellow employees feel free to drop in, and worse, the witness feels free to continue "working" because, after all, she is at work. Set up a separate location for witness preparation. If it must be done at the client's office, choose the executive conference center away from the work "bullpen."

4. The preparer must be focused and efficient. The key to obtaining the client's focus and best effort is her knowledge that you have already done your homework and aren't going to waste her time. You have to be prepared to "take" the witness' deposition before you ever begin preparation for it. By being as prepared as your opponent to take your client's deposition, you confirm to your witness that (1) this is serious business; and (2) you know what you are talking about.

VI. Practice, practice, practice. If we have done our job, we already know the vast majority of questions that are to be asked of our witness. We've developed the opposition's game plan and we know what they intend to accomplish and whether or not it hurts us. We also now know the witness' whole story through the initial

interview and the "true facts" that the witness possesses. We have explained the rules of the road so that the witness knows how the deposition will unfold procedurally. It is now time to prepare her for the nuts and bolts of the process.

A. All of the advocacy goals we seek can be obtained by differentiating the facts into "oaks" and "willows" and preparing the witness to stand tall on the oaks.[1]

1. Oaks don't move with the wind; willows do. Oaks are the facts upon which the witness cannot bend and about which he cannot allow confusion to reign. On a macro level, they are the five to ten facts in the case that will make all the difference to the jury. On a micro (witness) level, they are the facts/opinions that this witness carries relating to those five to ten.

2. Willows are everything else.

3. By separating the facts into these two camps, you reduce the stress of the deposition for the witness by an enormous degree.

4. You also reduce the chance of producing inadvertently poor testimony on key subjects.

5. You make the witness more appealing by allowing him to be more relaxed and engaging.

[1] I thank my friend and former partner JC Nickens for these useful symbols.

B. Introduce the witness to the **four basic rules** in answering any question. The rules referenced below look simple, and they are, but like all rules, they thrive on proper execution. A perfect golf swing in front of the cameras looks perfect, but it takes practice. Tell your witness to...

1. Listen to the question. It sounds incredibly basic, but this is where about 95% of witness problems arise.

2. Ask yourself: "Do I understand the question?"

3. Ask yourself: "Do I know the answer to the question?"

4. Give the truthful answer.

C. Practice with the witness using videotape and repeating the same central issue ("oaks") questioning.

1. Put him on videotape. There is no substitute for a witness watching himself. It leads to rapid self-correction. It also heightens his reliance upon you as a professional—you are prepared and you know what you're doing.

2. Cross-examine on the oaks. Don't waste his time practicing on the background questions that the witness will hear—get after him on the oaks and see how he reacts to the most important questions.

3. Repeat the same subject matter again and again until you and she are satisfied with the result. Once you are satisfied with the expression of testimony on the first key subject, move to the next key area and repeat it as many times as necessary. By repeating the same testimony again and again, you ingrain a *pattern* of response by the witness. The witness may think that you are teaching them "what" to say—when in reality you are simply teaching them how to deal with any series of questions.

4. If you have time, practice a second time after a day's rest. Lessons sink in on day 1 and are reaffirmed on day 2.

5. Use your opponent's techniques, particularly if he regularly engages in deception.

D. Avoid "don't lists." The tension visited on us as preparers causes us to worry that the witness will make serious mistakes. This tempts us to tell a witness "Don't say x" and "Don't say y or z." This is a mistake.

E. It is your job as the preparer to prioritize the facts and spell out for the witnesses the oaks and the willows. Giving a list of 20 "don'ts" implicitly tells the witness to treat all fact issues equally. He is likely to fight every possible battle with the questioner but lose the war for credibility.

1. He will go into the deposition performing the wrong function. Instead of performing the four basics, he is thinking "What did that lawyer tell me to say?" "What did he tell me not to say?"

2. The result: he will look like a witness who is trying to avoid the obvious, or who is quoting his lawyer, in short, and guy who is shooting his own credibility in the foot.

3. The cure: practice the four basic rules using the oaks. Work with him about how to say what must be said, then quit sweating.

F. Corollary: Quit worrying about the "don't volunteer anything" bugaboo...

1. The traditional first rule of deposition preparation was "don't volunteer anything." The basic notion is sound but gets over-applied.

2. In today's information-intense corporate environment, the chance that the witness will volunteer a truly new and unsettling fact is diminished.

3. The instruction comes at a price: (1) worry by the witness over whether he is giving up too much information and (2) a witness so afraid of volunteering that he fails to give complete and truthful testimony.

4. The better practice: work on following Rule 1—to listen carefully. The witness who is asked if the car was blue and says it was a "blue Dodge Caravan traveling at a high rate of speed" is simply not listening to the question. Practice responsiveness, and it will largely correct the "volunteerism" problem.

G. Let the witness know of some common deceptive practices and their cure. Here we underline the offensive portion of the question.

1. *Absolute questions*. "Did you ever talk with Joe about x?" Your witness says "no," but the opposing counsel is sandbagging with documents that show otherwise. Result: your witness gets impeached as being untruthful, when he is not.

   The solution. When you hear the words "ever" or "never" or their equivalent, be wary of the exceptions. "I don't recall having a conversation, but I can't say it is impossible. If you have a document you'd like to show me, I'd be happy to look at it."

2. *Value-laden questions*. Wouldn't you agree that the fair way to approach this is "X?" "Isn't it ordinary for a partner to ignore some of the formalities?" "Wouldn't the honest approach to this have been to disclose the problem?" Result: your witness characterizes (and may mischaracterize) the company's conduct on behalf of all witnesses.

The solution. The virtually universal cure for these poison-pill questions is the truthful answer that "It depends." The answer forces the opposing lawyer to either give up or adequately define his question by asking "What does it depend on?" Either way, your witness gets a real question he can answer.

3. *Unfair hypothetical questions*. "If your look in your program code and find exact duplication of their program code, you would have no explanation for that other than theft, would you?" The truth is that the code was created from a mutually available public program used by both plaintiff and defendant.

   The solution. "Not necessarily" or "It depends." The use of this answer to the unfair hypothetical removes any value your opposition may hope to get from it. The questioner now faces the Hobson's choice of either giving up or of letting your witness supply the true and exonerating facts in his answer.

4. *Documents taken out of context*. "You agree with me that it says right here 'We cannot go public with this problem on the horizon?'" when the document says in the following paragraph that the problem is about to be licked and other documents conclude that it was solved completely before the company went public.

Solution. "Yes, that is what *this* document says." The lawyer is entitled to gather answers to as many stupid or ineffectual questions as he wants. The witness is asked "Does it say X?," and if the answer is "yes," he gives it. The witness must trust his counsel to ask on redirect "What happened with the problem?" and thereby to blow the misleading testimony out of the water by permitting the witness to testify that the problem was fully corrected before their stock went public. The only time the lawyer should step in is when the answer is inherently misleading because of question phraseology: "<u>You went public without disclosing this key problem, didn't you?</u>" This form of the question commits the company to fraud because it does not permit the witness to make the explanation that the problem was fixed before the IPO occurred. It is your job as the lawyer to address the issue by an instruction not to answer if necessary.

VII. Conclusion. Preparation of witnesses for their depositions, and defending them in depositions, need not be painful for the witness or counsel. Successful preparation does, however, require a commitment by the lawyer to understand where the opposition will attempt to take the witness and a structured game plan to equip the witness with the knowledge necessary to handle anticipated questions. Conversely, the witness needs to be completely familiar with the situation before the deposition commences and made aware of

both the key testimony and procedure for answering questions. The result will be a witness that will do herself, her employer and you proud.

* * *

Instructor:

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Tom Fulkerson is a partner in the Houston and Austin offices of Wilson Fulkerson LLP. His trial, arbitration and appellate practice is concentrated in disputes arising in the oil and gas, contract, intellectual property and entertainment law fields. He has been included in several prior editions of the Best Lawyers in America and was named a Texas Monthly Super Lawyer for 2003, 2004 and 2005.

Mr. Fulkerson maintains a diverse litigation practice that encompasses oil and gas technology, royalty, joint venture and joint interest disputes, civil fraud, contractual conflicts, partnership disputes, bankruptcy fraud and other areas. In his entertainment-related practice, Mr. Fulkerson has represented both artists and institutional clients, including Destiny's Child, Beyoncé Knowles, Kelly Rowland and Michelle Williams, and Sony Music Entertainment Inc. In his commercial trial practice, he has represented ExxonMobil Corporation, B.P. Huddleston & Company, Duke Energy, EOG Resources, Inc., the Celotex Corporation, Gyrodata, Inc., JMB Properties Company, Vetco Gray, Inc. and numerous estates in bankruptcy.

Mr. Fulkerson has lectured and written on a variety of legal topics relating to elements of his practice, including bankruptcy litigation, parent/subsidiary corporate liability law and both procedural and tactical aspects of the trial practice. He has recently completed continuing legal education speeches sponsored by the University of Houston School of Law and at the invitation of the Harris County district judges. He is a member of numerous bar organizations, has served on the board and as president of St. Catherine's Montessori School, as a coach of children's soccer, basketball and baseball teams, and as a den leader with Pack 130 of the Sam Houston Area Counsel of the Boy Scouts of America.

Mr. Fulkerson was born in Louisville, Kentucky on October 18, 1958. He grew up in central Kentucky where he lead LaRue County High School to a state debate championship and the first perfect record in the history of the tournament. He obtained a B.A. in Economics from Northwestern University in 1980 where he and his partner won the National Debate Tournament. Between 1978 and 1980, Mr. Fulkerson won or was in the finals or semi-finals of 16 nationally ranked debate tournaments and one of the top speakers at competitions held at Harvard University, Emory University, Dartmouth College, the University of Southern California and the University of Kentucky.

Mr. Fulkerson received his J.D. *cum laude* in 1983 from Baylor Law School, where he was case notes and comments editor of the Baylor Law Review and the winner and two-time top speaker of the Leighton B. Dawson open moot court competition. Mr. Fulkerson has been a member of the State Bar of Texas since his admission in 1983 and is admitted to practice before various federal courts, including all four federal districts in Texas and the United States Court of Appeals for the Fifth Circuit. Mr. Fulkerson carries an AV rating in the Martindale-Hubble™ rating system.