

Table of Contents

CHAPTER 1. FUNDAMENTALS OF QUESTIONING STRATEGY

I. PRELIMINARY MATTERS

- § 1:1 Right to deposition
- § 1:2 —Case law of those subject to deposition
- § 1:3 —Corporate employees
- § 1:4 —Designated individual
- § 1:5 Opposing counsel’s testimony
- § 1:6 Court’s role
- § 1:7 —Protective orders
- § 1:8 —Pre-discovery conferrals and counsel certification
- § 1:9 Interruption of deposition—Sanctions
- § 1:10 Right to Deposition—Use of deposition testimony
- § 1:11 The search for truth?
- § 1:12 The real objective
- § 1:13 Avoid blind adherence to traditional approaches
- § 1:14 Develop a general litigation game plan
- § 1:15 Establish a theory of the case
- § 1:16 Determine your objectives at the outset
- § 1:17 Use adaption versus adoption in creating your own examination style
- § 1:18 Mastery of the fundamentals of litigation strategy and questioning techniques is essential to virtuoso performance
- § 1:19 Maintain the external indicators of competence and professionalism—Dress and the counsel table
- § 1:20 A healthy mind in a healthy body—The importance of good physical condition
- § 1:21 Never lose sight of the ultimate objective at trial—Favorable judgment

II. PRINCIPLES OF QUESTIONING STRATEGY

- § 1:22 Thorough preparation and careful organization are essential to a successful attack on a hostile witness
- § 1:23 The dangers of remote control litigation: Do not avoid getting your hands dirty with the facts—Roll up your sleeves and dig in
- § 1:24 The only thing that counts during the examination is what you have in your head or what you can obtain within thirty seconds
- § 1:25 Know the judge
- § 1:26 Expecting the unexpected: The need for flexibility and spontaneity

QUESTIONING TECHNIQUES AND TACTICS

- § 1:27 Attacking targets of opportunity
- § 1:28 Listen carefully to the witness's responses to your questions
- § 1:29 Listen not only to what the witness says, but also to how it is said
- § 1:30 Victory may often be achieved more easily by permitting the witness to lie than by forcing the witness to tell the truth
- § 1:31 Perjury makes mountains out of molehills
- § 1:32 Do not flinch when an objection or an adverse ruling is made
- § 1:33 Ignoring the good, the bad, and the ugly
- § 1:34 Do not be embarrassed to ask about obvious matters
- § 1:35 No guts, no glory: Boldness as an element of a successful questioning strategy
- § 1:36 If it works, use it again
- § 1:37 Do not protect the lead
- § 1:38 When the chips are down, be prepared to go for broke
- § 1:39 Do not expect to score all the points
- § 1:40 Do not attack an impregnable fortress
- § 1:41 Do not attack an underdog
- § 1:42 Do not try to crack a tough nut without a nutcracker
- § 1:43 Know when to quit
- § 1:44 Do not make empty threats
- § 1:45 Do not allow your client to control examination strategy
- § 1:46 Do not telegraph the punch
- § 1:47 Do not insult the jury with your questions
- § 1:48 Do not sweep your weaknesses under the rug
- § 1:49 The white-out technique: Dealing with mistakes in the courtroom
- § 1:50 Review the transcript like a videotape replay of your performance
- § 1:51 The court's role with the transcript
- § 1:52 Do not state that a particular question is your last (it almost never is)
- § 1:53 The ethics of examination—Treat all witnesses in accordance with the accepted standards of the legal profession
- § 1:54 —Strategy versus trickery: Avoiding misleading questions
- § 1:55 —Do not stoop to conquer: Tempering toughness with reasonableness to achieve credibility
- § 1:56 Your questioning tactics must be consistent with your theory of the case
- § 1:57 The use of interpreters
- § 1:58 —“Unofficial” interpreters
- § 1:59 —The right to an interpreter
- § 1:60 —Selection of an Interpreter
- § 1:61 —Admission of interpreter's statements
- § 1:62 Illustrative questioning
- § 1:63 Telephonic testimony
- § 1:64 Other modes of testifying

TABLE OF CONTENTS

- § 1:65 Using hypothetical questions
- § 1:66 Testimony and video trials
- § 1:67 —Trials by Zoom and other videoconferencing platforms
- § 1:68 — —Tips from a Federal Court Regarding Zoom Hearings
- § 1:69 Videotaping other than depositions or trials
- § 1:70 Tips for direct examination generally
- § 1:71 Tips for direct examination of an expert witness
- § 1:72 Direct examination of an expert witness—Example
- § 1:73 Do not ask questions about subjects that cannot be introduced into evidence

CHAPTER 2. PRINCIPLES OF CROSS-EXAMINATION AND WITNESS CONTROL

I. PRINCIPLES OF TIMING, PACE, AND RHYTHM

- § 2:1 Timing the assault: Wade in or dive in? That is the question
- § 2:2 Using preliminary questions to launch a surprise attack
- § 2:3 Elicit favorable information before attacking the witness
- § 2:4 Bring out matters of bias early in the examination
- § 2:5 Damage the witness early in the examination
- § 2:6 Do not ask the right question at the wrong time
- § 2:7 Quit while you are ahead
- § 2:8 Rapid-fire questioning: The importance of hot pursuit
- § 2:9 Use transitions from one subject area to another in order to regulate the stress on the witness
- § 2:10 Avoid pauses during the examination
- § 2:11 Do not begin your examination on an important subject before a break in the proceeding

II. PRINCIPLES OF CROSS-EXAMINATION

- § 2:12 Deciding whether to cross-examine: A risk-benefit analysis
- § 2:13 Do not allow your questioning to bolster the credibility of the adverse witness
- § 2:14 The JAWS principle: Going for the jugular
- § 2:15 Sneaking up on sensitive areas: Cross-examination can be hazardous to your health
- § 2:16 Do not cover the waterfront: Choose the stiletto rather than the shotgun as your weapon for cross-examination
- § 2:17 Save your needling for a stab: Do not cross-examine on minor matters unless you are reasonably certain of success
- § 2:18 Deciding whether to confront the witness with impeachment material
- § 2:19 Make the witness eat his or her words: Prolonging the agony of impeachment
- § 2:20 The silver lining technique: Building your case with the opponent's evidence
- § 2:21 Cross-examination by repetition: The example of the Triangle Shirtwaist Factory fire trial

QUESTIONING TECHNIQUES AND TACTICS

- § 2:22 Do not make your opponent's case: Beware of the obvious question which opposing counsel has omitted during direct examination
- § 2:23 The K.I.S.S. Principle: Ask short, clear, leading questions
- § 2:24 Leading questions: A two-edged sword
- § 2:25 —Case law
- § 2:26 Insure that the witness understands your questions
- § 2:27 Require the witness to distinguish between facts and conclusions
- § 2:28 Do not allow the witness to explain answers—Do not ask why
- § 2:29 Do not let the witness cross-examine you
- § 2:30 Do not ask the proverbial one question too many
- § 2:31 Let the jury draw the ultimate conclusions
- § 2:32 Asking the ultimate question: An exception
- § 2:33 Do not argue with the witness
- § 2:34 The no-lose question
- § 2:35 The no-win response
- § 2:36 Do not limit your examination with an all-or-nothing question
- § 2:37 Do not litigate ad hominem: Prove that the witness is a liar, but do not say it
- § 2:38 Keep the summation in mind at all times during the cross-examination
- § 2:39 Coaching of witness by third party
- § 2:40 —Coaching witnesses and new trials

III. PRINCIPLES OF WITNESS CONTROL

- § 2:41 Language as a factor in witness control
- § 2:42 —Breaking the language barrier
- § 2:43 —Physiological factors
- § 2:44 —The relationship of question and answer
- § 2:45 —Avoid overuse of impact words and phrases
- § 2:46 —Blunting pointed questions to encourage responses
- § 2:47 —Yes, we have no bananas: Frame your questions with as few negatives as possible
- § 2:48 —Avoid questions that offer alternatives
- § 2:49 —Avoid questions with qualifiers
- § 2:50 —Be alert for qualifiers in the answer: Eliminate weasel words
- § 2:51 —Avoid questions with loaded words
- § 2:52 Control the witness with prior statements
- § 2:53 Control the witness with the conspicuous availability of impeachment material
- § 2:54 Use body language to control the witness
- § 2:55 Put the witness on the defensive with argumentative questions
- § 2:56 —Argumentative questions, openings and instructions
- § 2:57 The backtrack technique: Regaining lost control

TABLE OF CONTENTS

- § 2:58 The devil you know is better than the devil you do not know: Interview or depose all witnesses before they testify

IV. LIMITATIONS ON CROSS-EXAMINATION

- § 2:59 Generally
- § 2:60 Case law
- § 2:61 Cross-examination of experts
- § 2:62 —Example

V. QUESTIONING BY JUDGE AND JURY

- § 2:63 Questioning by jury
- § 2:64 Judge's questioning role
- § 2:65 —Effect of judge's comments
- § 2:66 Sample cross-examination of harasser in a sexual harassment suit
- § 2:67 Sample Cross-Examination: The Cross-Exam of Detective Mark Fuhrman in the O.J. Simpson Trial
- § 2:68 Cross-Examination During Remote or Zoom Hearings

CHAPTER 3. PSYCHOLOGICAL ASPECTS OF QUESTIONING STRATEGY

I. THE PSYCHOLOGICAL ASPECTS OF WITNESS EXAMINATION

- § 3:1 The importance of the psychological aspects of questioning strategy
- § 3:2 —The case of the Brett Kavanaugh Confirmation Hearing
- § 3:3 Developing a winning attitude
- § 3:4 —Self-confidence: Know your strengths and weaknesses
- § 3:5 —Aggressiveness and the will to win: The best defense is a good offense
- § 3:6 —The will to prepare to win
- § 3:7 Concentrate on concentration
- § 3:8 Control tension or it will control you
- § 3:9 The action-reaction principle
- § 3:10 Role-playing: Baiting the hook to suit the fish
- § 3:11 Playing the dominant role
- § 3:12 —Territory
- § 3:13 —Height
- § 3:14 —Terms of address
- § 3:15 —Facial expression
- § 3:16 —Relaxation
- § 3:17 —Eye contact
- § 3:18 —Silence and interruption
- § 3:19 Lockerbie trial testimony—How not to establish dominance
- § 3:20 Sherlock Holmes versus Lieutenant Columbo: Playing smart or playing dumb

- § 3:21 —The Columbo technique: Playing dumb
- § 3:22 The chameleon principle: Tailoring your questioning tactics to the personality of the witness
- § 3:23 —First example: The impressionistic personality
- § 3:24 —Second example: The highly structured personality
- § 3:25 The poker face technique: Visibility is vulnerability
- § 3:26 Rewarding and punishing the witness—The pressure point technique: Do not allow the witness to relax without a tactical reason
- § 3:27 —The alternating current technique
- § 3:28 —Blowing hot and cold: Displaying your capacity for sympathy and fairness
- § 3:29 —Take advantage of the fact that even hostile witnesses want to be liked
- § 3:30 —Appeal to the self-interest of the witness
- § 3:31 —Pay attention to the witness
- § 3:32 —Unnerve the witness by taking notes
- § 3:33 Gaining the psychological edge—The reconnaissance technique: Never meet the witness on unfamiliar ground
- § 3:34 —Bring a second to assist you in your duel with the witness
- § 3:35 —Double teaming the witness

II. THE IMPORTANCE OF NONVERBAL FACTORS

- § 3:36 The significance of body language in the trial process
- § 3:37 Analyzing the witness's body language
- § 3:38 Deciding not only what to ask, but how to ask it
- § 3:39 Removing physical barriers
- § 3:40 Proxemics: Putting the worry back into being close
- § 3:41 Killing them softly with silence

CHAPTER 4. WINNING THROUGH INTERROGATION: QUESTIONING TECHNIQUES AND TACTICS

- § 4:1 Introduction
- § 4:2 Basic approaches to witness examination—The development of background information
- § 4:3 —The chronological approach
- § 4:4 —The subject matter approach
- § 4:5 —The pleading analysis approach
- § 4:6 —The documentary approach
- § 4:7 —The eclectic approach
- § 4:8 —The hop, skip, and jump approach
- § 4:9 —The rhetorical question approach
- § 4:10 Determining what questions to ask
- § 4:11 The decision not to ask questions—Example of Narrative Testimony from the Charles Manson Trial
- § 4:12 Keeping question outlines organized

TABLE OF CONTENTS

- § 4:13 Determining the scope of your questions: The flashlight technique
- § 4:14 Proceeding from the general to the specific: The funnel technique
- § 4:15 Proceeding from the specific to the general: The inverted funnel technique
- § 4:16 Lead the witness with his or her own words
- § 4:17 The Mutt and Jeff technique
- § 4:18 Avoidance versus confrontation: Direct and indirect questioning techniques
- § 4:19 Convince the witness that you have complete mastery of the facts
- § 4:20 Convince the witness that you will relentlessly pursue the facts
- § 4:21 Ask about unknown information as if it were known; ask about known information as if it were unknown
- § 4:22 Convince the witness that you accept his or her integrity and have an open mind
- § 4:23 Allow the witness to talk
- § 4:24 Establish control by asking questions with known answers
- § 4:25 The I don't know technique: Making the witness appear ignorant
- § 4:26 Use highly detailed questions to create inconsistencies and reveal falsifications in the witness's testimony
- § 4:27 The accent technique: Drawing out the details of helpful testimony
- § 4:28 Do not fight the witness on the facts, where it is the interpretation of the facts that is in issue
- § 4:29 Use questions with vague or ambiguous terms to probe the character of the witness
- § 4:30 Recognize the difference between clarification and elaboration
- § 4:31 Attacking the witness's final answer on direct
- § 4:32 Saving the best for last
- § 4:33 The no exit technique: Using limiting questions to fence in favorable testimony and to prevent the witness from retracting admissions
- § 4:34 Ask the witness whether he or she wants to correct any answers
- § 4:35 The tell it again technique
- § 4:36 The ask it again technique: What you do not know can hurt you!
- § 4:37 The show me technique: Absence of evidence is evidence of absence
- § 4:38 The sheep in wolf's clothing technique: Causing the hostile witness to help your case by trying to hurt it
- § 4:39 Fighting fabrication with fabrication
- § 4:40 Use an introductory statement to motivate the witness to respond
- § 4:41 Convince the witness that a truthful answer is necessary to clear up misunderstandings about his or her conduct

- § 4:42 The you did not mean to imply technique
- § 4:43 Exploit the witness's desire to blame others: I confess, he did it!
- § 4:44 The turning tables technique: Dealing with the witness who asks for definitions
- § 4:45 The inoculation technique: Forewarned is forearmed
- § 4:46 The postscript question
- § 4:47 The polygraph technique: Pointing out signs of a shifty or evasive demeanor
- § 4:48 The Reveille technique: Alerting the jury to key points
- § 4:49 Use of an overview or summary witness
- § 4:50 Emphasizing the evasive answer
- § 4:51 The no explanation technique

CHAPTER 5. HANDLING PARTICULAR TYPES OF WITNESSES

- § 5:1 Introduction
- § 5:2 Piercing the veil: Dealing with the witness who does not recall
 - Neutralize the witness
 - Pin down the witness on his or her inability to recall
 - Show that a genuine failure of memory is unlikely under the circumstances
- § 5:3 —The converse: Using inability to recall affirmatively
- § 5:4 —Refresh the witness's recollection
- § 5:5 Use free association to trigger the witness's memory
- § 5:6 The unwilling witness: Do not mistake reluctance for hostility (the proper stranger technique)
- § 5:7 Handling hostile witnesses
- § 5:8 The matador technique: Softening up the hard-nosed witness
- § 5:9 Dealing with the honest weasel
- § 5:10 Outwitting the slow-witted witness: The dangers of stupidity
- § 5:11 The prod technique: Moving the wavering witness your way
- § 5:12 When you get the lying witness down, keep him or her down
- § 5:13 Keeping the cat in the bag—How to shut up the witness who talks too much
- § 5:14 Handling the cautious witness
- § 5:15 The child witness
- § 5:16 Case law regarding child witnesses
- § 5:17 The arresting officer in a DUI case
- § 5:18 Handling the witness who doesn't know
- § 5:19 Handling the witness who refuses to answer

CHAPTER 6. HANDLING WITNESSES WHO ASSERT THE FIFTH AMENDMENT PRIVILEGE

- § 6:1 Introduction

TABLE OF CONTENTS

- § 6:2 The scope of the privilege in civil cases
- § 6:3 —Application in criminal trials
- § 6:4 —An example of the assertion of the privilege in a criminal context: the Julius and Ethel Rosenberg trial
- § 6:5 —The privilege and discovery
- § 6:6 Grounds for assertion of the privilege: Reasonable danger of prosecution
- § 6:7 —Proving incriminatory nature of testimony
- § 6:8 —Likelihood versus possibility of prosecution
- § 6:9 —The immunized witness and the privilege
- § 6:10 —Development of the law: The fifth circuit approach
- § 6:11 —Development of the law: The second circuit approach
- § 6:12 —Development of the law: Second circuit treatment of specific questions
- § 6:13 —Development of the law: The seventh circuit approach
- § 6:14 —Development of the law: Conflict among the circuits concerning treatment of immunized testimony
- § 6:15 —Development of the law: Resolution of the conflict among the circuits by the Supreme Court
- § 6:16 —Development of the law: Impact of *Pillsbury Co v. Conboy*
- § 6:17 The scope of the court’s duty to inquire into the witness’s blanket refusal to testify
- § 6:18 Waiver of the privilege
- § 6:19 Waiver of the privilege by filing or defending suit
- § 6:20 —Constitutional objections
- § 6:21 Tactics for dealing with the witness who takes the fifth
- § 6:22 Tactics for dealing with the witness who takes the Fifth— Things that the witness may still be compelled to do
- § 6:23 Tactics for dealing with the witness who takes the fifth— Preventing surprise
- § 6:24 —Striking testimony
- § 6:25 —Drawing adverse inferences
- § 6:26 —Discovery sanctions
- § 6:27 —Remedies against corporate parties
- § 6:28 —Discovery versus self-incrimination
- § 6:29 —Tactical insights
- § 6:30 Admission of prior statement or testimony
- § 6:31 Access to grand jury testimony
- § 6:32 Additional practice hints
- § 6:33 Some considerations for defense counsel
- § 6:34 Civil protective orders and the fifth amendment privilege
- § 6:35 Rule 30(e) of the Federal Rules of Civil Procedure and the Fifth Amendment privilege
- § 6:36 The role of the court

CHAPTER 7. THE DEPOSITION: ADDITIONAL PRINCIPLES AND CONSIDERATIONS

- § 7:1 One deposition is worth a thousand interrogatories

QUESTIONING TECHNIQUES AND TACTICS

- § 7:2 Instances in which counsel may not want to take a deposition
- § 7:3 Looking ahead to the jury pool
- § 7:4 Deposition objectives
- § 7:5 The importance of procedural and evidentiary rules
- § 7:6 Limits on the total number of depositions counsel can take
- § 7:7 The isolation technique: Forcing the witness to go one-on-one
- § 7:8 The scheduling of the deposition
- § 7:9 The isolation technique: Forcing the witness to go one-on-one—The location of the deposition
- § 7:10 —The atmosphere of the deposition
- § 7:11 —Your attitude toward the hostile deponent
- § 7:12 Driving a wedge between deponent and counsel—Ignore your opponent: minimize his or her importance and effectiveness
- § 7:13 —Exploiting rifts between deponent and his or her counsel
- § 7:14 The deposition table
- § 7:15 Eliminating informal discovery—One peek is worth five motions
- § 7:16 —Avoid wastebasket discovery
- § 7:17 —Loose lips sink ships: Do not be overheard
- § 7:18 Do not allow unauthorized persons to attend the deposition
- § 7:19 Seat the deponent directly across from you
- § 7:20 Establish immediate control by setting a schedule
- § 7:21 The longest day: Increase the pressure by working long hours
- § 7:22 The opening round: Firing the first shot—The oath
- § 7:23 Questions probing the extent and nature of the deponent's preparation
- § 7:24 —The missing documents technique
- § 7:25 Do not let your questions give you away
- § 7:26 Do not ignore the reporter
- § 7:27 The pregnant pause
- § 7:28 Keeping the deposition on the record
- § 7:29 Clarifying nonverbal responses
- § 7:30 Correcting mistakes in the record
- § 7:31 When disputes arise during a deposition
- § 7:32 Be alert for lengthy cross-examination by the deponent's counsel
- § 7:33 Deposing a corporation
- § 7:34 In corporate litigation, place the upper management of your adversary on the firing line
- § 7:35 Obviating objections
- § 7:36 Do not be deterred by assertions of privilege
- § 7:37 Selective waiver
- § 7:38 Deposition objections and directions not to answer
- § 7:39 —Testimony is taken subject to objections
- § 7:40 —Facing resistance from an unreasonable adversary

TABLE OF CONTENTS

- § 7:41 —Objections based on grounds other than privilege
 - § 7:42 —Objections based on irrelevance
 - § 7:43 —When counsel can direct the witness not to answer
 - § 7:44 —Conferences between deponent and counsel
 - § 7:45 Pin down the deponent with catchall questions
 - § 7:46 Obtain daily copy of the testimony of important witnesses
 - § 7:47 Consider utilizing a real-time transcript feed during the deposition
 - § 7:48 Keep abreast of technological developments
 - § 7:49 Depositions can lead to further electronic discovery
 - § 7:50 Depositions by telephone
 - § 7:51 Tape recording of depositions prior to the 1993 amendments to the Federal Rules of Civil Procedure
 - § 7:52 —Procedures established by early case law
 - § 7:53 —Procedures established by more recent case law
 - § 7:54 —Requirement of an independent operator
 - § 7:55 —Scope of judicial discretion
 - § 7:56 Videotaping of depositions prior to the 1993 amendments to the Federal Rules of Civil Procedure
 - § 7:57 —Judicial discretion
 - § 7:58 Recording of deposition after the 1993 amendments to the Federal Rules of Civil Procedure
 - § 7:59 Case law on videotaped depositions
 - § 7:60 Use of videotaped deposition for impeachment and at trial
 - § 7:61 —Example of use of videotaped deposition at trial
 - § 7:62 Preparing for and conducting an expert deposition
 - § 7:63 Case law on expert depositions
 - § 7:64 Use of actors to read deposition transcripts at trial
 - § 7:65 Case law regarding depositions and the unavailability of witnesses
 - § 7:66 Obtaining out-of-state depositions
 - § 7:67 Defending depositions generally
 - § 7:68 Defending an expert deposition
 - § 7:69 Depositions by written questions
 - § 7:70 Ethical considerations with regard to depositions
 - § 7:71 The errata sheet and making changes to deposition testimony
 - § 7:72 Case law on uncooperative deponents
- Appendix 7–1. The Supreme Court of Ohio Commission on Professionalism: Professionalism dos and don'ts—Depositions

CHAPTER 8. HANDLING OPPOSING COUNSEL: WINNING THE BATTLE FOR CONTROL

- § 8:1 Opposing counsel should be treated in accordance with the standards of the legal profession
- § 8:2 Civility matters

- § 8:3 Prevent your adversary from gaining a psychological advantage
- § 8:4 —Provocation
- § 8:5 —Intimidation
- § 8:6 —Distraction
- § 8:7 Playing to win—There is no case that cannot be won, no opponent who cannot be defeated
- § 8:8 —The titanic principle: Never underestimate your opponent or his or her case
- § 8:9 —Know your adversary
- § 8:10 Setting the tone for the case or the examination: The importance of scoring early
- § 8:11 Deal quickly and decisively with misconduct by opposing counsel
- § 8:12 —Using objections improperly
- § 8:13 —Coaching the witness
- § 8:14 —Interfering with your examination
- § 8:15 —Introducing inadmissible matter
- § 8:16 —Mischaracterizing prior testimony
- § 8:17 —Obstreperous counsel
- § 8:18 —The noise factor
- § 8:19 —Directions not to answer deposition questions
- § 8:20 —Extrajudicial statements by counsel and the publication of discovery materials
- § 8:21 Dealing with valid objections
- § 8:22 Reserve displays of anger for real instances of bad faith by your adversary
- § 8:23 The judo technique: Responding to aggressive behavior
- § 8:24 The hollow victory technique: Exhausting your opponent's ammunition
- § 8:25 The benevolent sabotage technique: Controlling aggressive behavior by opposing counsel
- § 8:26 The save face technique: Ceding the low ground to take the high ground
- § 8:27 Do not force the opponent to prepare
- § 8:28 Keep your distance from your adversary in the presence of the jury
- § 8:29 The Archie Bunker principle: Keep disagreements all in the family

CHAPTER 9. TOTAL WITNESS PREPARATION

- § 9:1 Introduction: The offensive approach to witness preparation

I. THE ATTORNEY'S RESPONSIBILITIES

- § 9:2 There is no substitute for preparation
- § 9:3 Take the time necessary for effective witness preparation
- § 9:4 There is nothing dirty about witness preparation
- § 9:5 Avoid coaching the witness
- § 9:6 Caselaw on witness preparation and coaching

TABLE OF CONTENTS

- § 9:7 Dealing with substantive questions relating to the extent and nature of witness preparation
- § 9:8 —Asserting the attorney-client and work product privileges
- § 9:9 —Scope of privilege
- § 9:10 —Case law
- § 9:11 —Asserting privileges when a third party is being deposed
- § 9:12 —Revealing information as to documents used to refresh recollection
- § 9:13 —Explanation of technical materials prepared by deponent and counsel
- § 9:14 Third-party witnesses
- § 9:15 Fact witnesses
- § 9:16 —Direct examination of a fact witness—Example
- § 9:17 Chief executives, celebrities and other VIPs
- § 9:18 Chief executives, Celebrities and Other VIPs—Taking Their Depositions
- § 9:19 Chief Executives, Celebrities and Other VIP—The Case of Bill Cosby
- § 9:20 Chief executives, celebrities and other VIPs—The example of Bill Gates
- § 9:21 —The example of Robin Thicke
- § 9:22 Expert witnesses
- § 9:23 —Establishing the expert’s foundation
- § 9:24 —Caselaw
- § 9:25 —Caselaw regarding expert testimony on cell phones and cell towers
- § 9:26 Example of Expert Psychiatric Testimony—The Original “Twinkie Defense”
- § 9:27 Example of Expert Musical Copyright Testimony—The Case of the Hit Song “Back That Azz Up”
- § 9:28 National Institute of Justice (NIJ) Important Traits That Enhance Expert Witness Credibility
- § 9:29 Documents used in witness preparation
- § 9:30 —Conflict between privilege and discovery rules
- § 9:31 —In camera review of documents
- § 9:32 —Documents protected
- § 9:33 —*Sporck v. Peil*
- § 9:34 —Deposition of counsel
- § 9:35 —Documents prepared by party or witness
- § 9:36 —Documents prepared by a non-testifying expert
- § 9:37 —Communications between attorneys
- § 9:38 —Material beyond the content of a document
- § 9:39 —Use of documents under court order
- § 9:40 —Court management of multidistrict litigation
- § 9:41 —Party’s personal notes
- § 9:42 —Social media pages
- § 9:43 —Documents prepared by attorney
- § 9:44 —Prior deposition testimony
- § 9:45 —Witness coaching

- § 9:46 —Documents reviewed, but not necessarily used, by experts
- § 9:47 —Attorney misconduct
- § 9:48 —Attorney’s review of documents
- § 9:49 —Scope of the work product doctrine
- § 9:50 Truth and the appearance of truth: Telling it like it was
- § 9:51 Evaluate the witness
- § 9:52 Types of listeners
- § 9:53 Provide the witness with the legal and factual context of the case
- § 9:54 Prepare the witness for the full range of questioning
- § 9:55 Describe the courtroom, trial procedures, and participants in the trial
- § 9:56 Describe the question and answer format
- § 9:57 Mock cross-examination
- § 9:58 Review all relevant documents, including those authored, sent, or received by the witness
- § 9:59 Eliminating deposition by ambush: Get deposition exhibits in advance
- § 9:60 To refresh or not to refresh: Defending counsel’s dilemma
- § 9:61 —Letting sleeping dogs lie: Ethical considerations
- § 9:62 Potential consequences of improper witness preparation
- § 9:63 Prepare witnesses separately
- § 9:64 Special considerations for preparing witnesses for video depositions
- § 9:65 Using trial consultants to help prepare witnesses
- § 9:66 Physician peer review privilege

II. YOUR INSTRUCTIONS TO THE WITNESS

- § 9:67 Act naturally: Be yourself
- § 9:68 Dress conservatively in accordance with local custom
- § 9:69 Dress conservatively in accordance with local custom—
Advise clients about appropriateness of facial hair
- § 9:70 Dress conservatively in accordance with local custom—
Importance of appearance for criminal defense clients
- § 9:71 Bring your spouse to court
- § 9:72 Come to court well rested
- § 9:73 Come to court sober
- § 9:74 Do not memorize the testimony
- § 9:75 Listen carefully to each question: Think before answering
- § 9:76 Stop speaking if the judge interrupts or either counsel objects
- § 9:77 Speak in a slow and deliberate manner
- § 9:78 Listen carefully to objections
- § 9:79 Do not volunteer information
- § 9:80 Avoid the trap of giving only yes or no answers
- § 9:81 Incorporate the question into the answer
- § 9:82 If you do not know, say so
- § 9:83 Do not speculate, guess, estimate, exaggerate, or state opinions

TABLE OF CONTENTS

- § 9:84 Finish your answer
- § 9:85 Avoid the use of hedge words
- § 9:86 Never say never: Avoid taking absolute positions
- § 9:87 Avoid describing certain activities as *policies* or *practices*
- § 9:88 Maintain your cool
- § 9:89 Be polite, but not deferential
- § 9:90 Answer with words, not gestures
- § 9:91 Avoid distracting behaviors
- § 9:92 Consider all remarks to be on the record
- § 9:93 Avoid potentially offensive behavior
- § 9:94 Do not expect a shutout
- § 9:95 Correct your mistakes
- § 9:96 Do not be overcautious
- § 9:97 Do not help the examiner with his or her homework
- § 9:98 Do not tip off the examiner
- § 9:99 Do not sympathize with Lieutenant Columbo
- § 9:100 Do not accept the examiner's preliminary statements, summaries, or characterizations
- § 9:101 Use of simulations, reenactments, mock-ups
- § 9:102 Do not respond to silent probes
- § 9:103 Respond only to questions, not to statements
- § 9:104 Let flattery get the examiner nowhere
- § 9:105 When questioned about a document, ask to read it before responding
- § 9:106 Do not bring documents, notes, or other materials to the witness stand unless approved by counsel
- § 9:107 Paint with a broad brush when asked to mark exhibits
- § 9:108 Avoid hearsay testimony
- § 9:109 Watch out for questions about conversations
- § 9:110 Beware of compound questions
- § 9:111 Look out for catchall questions
- § 9:112 Pay attention to verb tenses
- § 9:113 Do not take or pass notes
- § 9:114 Never openly disagree with counsel
- § 9:115 You have no obligation to talk to either side

III. CONCLUSION

- § 9:116 The yawn index

IV. ADVERSE CREDIBILITY DETERMINATIONS

- § 9:117 Adverse credibility determinations, generally

Table of Laws and Rules

Table of Cases

Index