ITINERARY FOR THE OCTOBER 19, 2011, MEETING OF THE GEROGE MASON AMERICAN INNS OF OURT

Program Title: "Pre-Game Warm-Up"
Preparing Your Client for Deposition, ADR and Trial

A. Introduction

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B. Mock Deposition

C. "Rules for Preparing Your Client for Deposition, ADR and Trial"

D. Deposition "Re-Do" (time permitting)

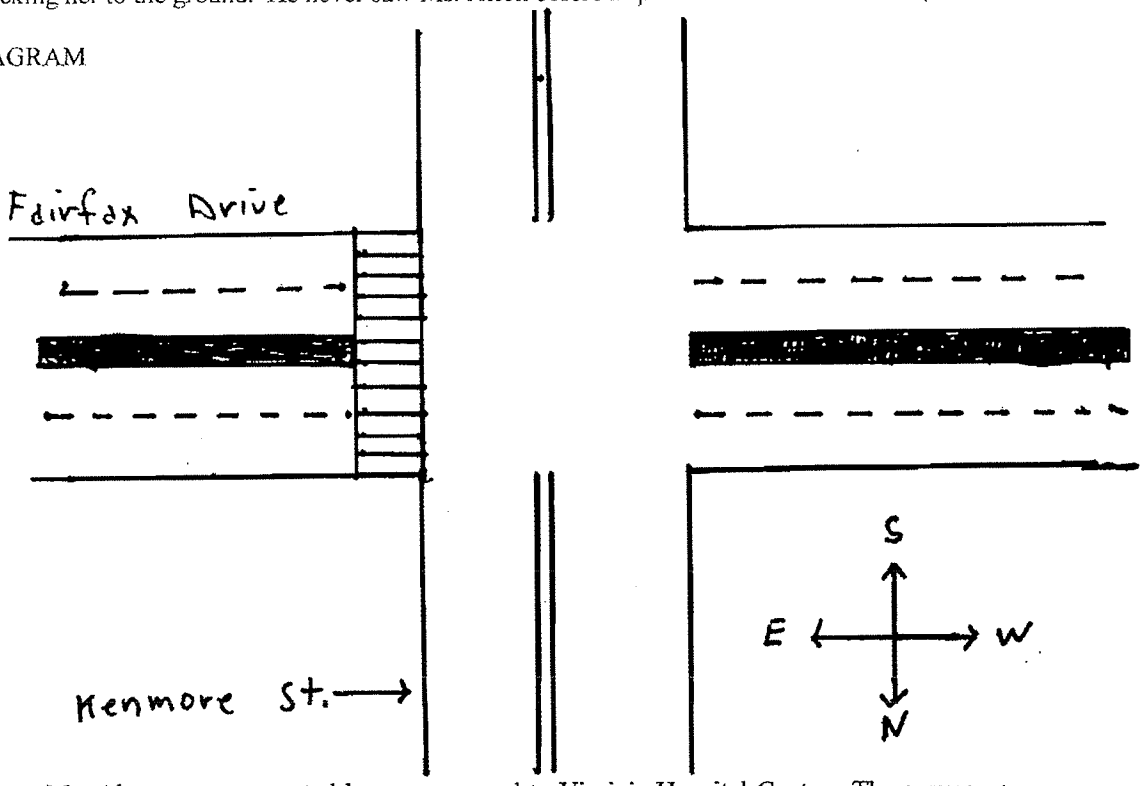
E. Floor Questions and Discussion

FACT PATTERN

On September 8, 2010, at 9:30 p.m., Liz Alton was injured when she was crossing Fairfax Drive at Kenmore Street in Arlington, Virginia. As the light facing her turned to green she stepped out into the crosswalk when she was struck by a vehicle driven by Dennis Delano. Ms. Alton was crossing Fairfax Drive from north to south on the east side of Kenmore Street.

Mr. Delano was stopped at a red light in the west bound right-hand lane of Fairfax Drive. His intent was to make a right turn on red onto Kenmore Street. He had his turn signal on. He commenced into his right-hand turn when the front right corner of his vehicle struck Ms. Alton, knocking her to the ground. He never saw Ms. Alton before impact.

DIAGRAM



Ms. Alton was transported by rescue squad to Virginia Hospital Center. There were no independent witnesses. The police charged Mr. Delano with "failure to yield to a pedestrian". He pleaded not guilty but was found guilty in the Arlington County General District Court.

Ms. Alton is claiming permanent injuries to her left knee, back and neck and to date has incurred $27,500.00 in medical bills. Three (3) years earlier she injured her neck in a rear-end automobile case in Dearborn, Michigan. She treated with a chiropractor in Michigan for 4 months and settled that case without filing suit.

Ms. Alton has brought suit against Mr. Delano in the Arlington County Circuit Court and is seeking $350,000.00

"PRE-GAME WARM-UP"

PREPARING YOUR CLIENT FOR DEPOSITION, ADR, AND TRIAL

By: Michael L. Davis

Brendan Mullarkey (GMUSL)

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22 Rules For Preparing Your Client for Deposition

1.—Depositions are not given, they are "taken".

2.—Purposes of a deposition.
- fact finding.
- pinpoint succinct question and answer for use as substantive evidence at trial and/or impeachment at trial.
- evaluating the client/witness.

3.—Client is examined adversely.
- "leading" questions allowed.

4.—Know all the facts.
- the good, bad and ugly.

5.—Know the law.
- the good, bad and ugly.

6.—Explain in advance exactly what a deposition is, what is expected, and how it is taken.
- see attached "Suggestions Concerning Your Deposition".

7.—Meet in advance to prepare your client.

8.—Rehearse in advance.
- play "devil's advocate".

9.—Dress the appropriate part.

10.—Determine whether deposition is by transcript, video-tape/DVD, or both.

11.—Assure client that you are there for him/her at all times.
- client will not go to jail!

12.—Most importantly---
- tell the truth!
- tell the truth!
- tell the truth!

13.—Listen to the complete question before answering.
- "think" before you answer.

14.—Only answer the question asked.
- avoid the "I need to explain" instinct.
- don't think out loud.

15.—Keep all answers short and concise.

16.—Remember---your client's best answers are:
- "Yes."
- "No."
- "Can you repeat the question?"
- "I don't know."
- "I don't remember."
- "I don't understand your question."

17.—Listen to your attorney.
- "Answer the question".
- "Do not answer the question".
- "Can you [opposing counsel] please clarify the question?"

18.—Client must answer the question even if you or your client believes it seeks "irrelevant" information.
- only questions involving "privilege" or "work product" are objectionable.

19.—It is improper for an attorney to take a recess in order to provide one's client the opportunity to formulate better responses to questions.
- Estate of Smith, 65 Va. Cir., (Madison County 2004).

20.—Never have your client bring materials used in preparation for the deposition to the deposition and never have your client voluntarily bring any diaries, address books or cell/smart phones into the deposition.

21.—Prepare your client for the possibility of follow-up questioning by you.

- questioning should be limited, if at all.
- follow-up questioning by you should only be to clarify a prior response by your client so that his/her answer is not taken out of context.
- asking too many questions can do more damage than good.
    - remember---your client is not here to help your opponent.

22.—Act professionally throughout the entire deposition.

- treat opposing counsel with respect (even if his/her conduct is not reciprocal).
- ask and allow breaks if the deposition is lengthy.
- never lose your cool-- pretend that your grandmother is sitting next to you—. Would she be proud or embarrassed by your behavior?

Additional Rules For Preparing Your Client For ADR or Trial

1.—Follow the applicable 22 rules for preparing your client for deposition.

2.—Rehearse testimony in advance in front of real people—direct and cross-examination.

3.—Explain why you can't "lead" your client on the witness stand.

4.—Be sure your client acts and dresses his/her part—be real.
- no faces or rolling of eyes.

5.—Prepare any maps, diagrams or charts in advance of trial—not on the witness stand.

6.—Arrive early to the courthouse and place your client on the witness stand before trial commences in order to establish a higher comfort level for your client.

7.—Allow the client to actively assist in selecting the jury and encourage note taking during trial.
- juries like engaged clients.
- check your client's notes after examining each witness (before sitting down). and before closing argument.

8.—Remind client that everyone in or near the courthouse is a "potential" juror so act accordingly.

SUGGESTIONS CONCERNING YOUR DEPOSITION

A deposition is the taking of your testimony, under oath, in the presence of a court reporter. This testimony, or some part of it, may be used at trial. There is no reason to be apprehensive with respect to your deposition. If you give careful consideration to, and follow, the suggestions listed below, you will be an effective witness.

1. Recall and review the facts of the incident.

Concentrate and reflect upon the facts surrounding the incident leading up to, evolving around, and subsequent to the incident itself.

2. Be prepared to draw a rough diagram or any other aid to assist you in recapturing the details of the incident. We will review this prior to the deposition.

3. Be sure you understand the question before you answer.

If, at the deposition, you do not understand a question asked by the opposing lawyer, make no attempt to answer it. Inform the questioner that you do not understand it. An inaccurate answer in response to a misunderstood question can materially affect the results of your case.

4. Answer the question as briefly as possible.

(a) If possible, answer the question with a "yes" or "no."
(b) Do not volunteer any additional information.
(c) Answer only the question asked.
(d) Do not guess or speculate.

5. Maintain a pleasant demeanor.

In answering questions asked by the opposing attorney, maintain a polite and cooperative attitude. If you feel the other attorney is taking advantage of you, do not display this feeling. Your attorney will be present and will take whatever action is permissible and expedient.

6. Avoid exaggeration.

Do not try to improve upon the facts of your case as this conduct is invariably recognized by the opposition who can later exploit the inaccuracy to his advantage. If, at a subsequent time, the judge or jury feels that you have exaggerated on the point, they may well surmise that you have exaggerated on other points. Undesirable results have been known to occur because of an unfortunate tendency to exaggerate.

7. Make an effort to enunciate clearly.

The court reporter is recording everything you say, which later may be used in court. You should speak audibly and clearly so that the reporter properly records precisely what you have said. (You will, however, have an opportunity to read your deposition after it has been transcribed by the reporter.)

8. Present your best appearance.

When you appear at your deposition, the opposing lawyer will be appraising you and making some tentative evaluations of how you will impress the jury. Therefore, you should dress neatly and conventionally. You should appear interested in your case and project a sincere, candid demeanor.

9. Carefully scrutinize documents presented.

If photographs, drawings or records are displayed by opposing counsel, and you are asked specific questions about them, carefully examine before you answer. If you cannot be certain, you should so indicate.

10. Do not qualify favorable facts.

Answer questions concerning favorable details as definitely as possible. Avoid expressions such as, "I think," or "I guess."

11. Suggested behavior when your attorney objects.

During a deposition, if your attorney enters an objection, refrain from answering further until the matter has been resolved. Your attorney will have this objection noted for the record and will direct you as to whether an answer is required.

In most instances, you and your attorney will have an opportunity for a pre-deposition conference to go over the facts and circumstances of the case. He will alert you to the questions expected to be asked by opposing counsel. The above only are meant to be some helpful hints about depositions in general.

The Five People You Meet Preparing for Your Deposition

by Charles H. Samel

This article is not written for other lawyers. Instead, it is for a chief executive officer or other senior business leader in bet-the-company litigation. Sooner or later, you and other senior executives of the company will need to give a deposition in the case. Without prior experience, you might think that it will be a simple and straightforward exercise, like an interview. You may not know that the company's lawyers will carefully design strategies specifically for each deposition and prepare you and the others to understand and execute those strategies. Right now, you may not fully understand that psychology plays an important role in how jurors will perceive your deposition testimony, especially when they see it on videotape. And you may not appreciate that you can learn techniques to recognize and control negative body language, and to answer deposition questions truthfully yet in a way that will help your company.

The company's lawyers will explain all of these things to you in great detail at the appropriate time. They will tailor the preparation to your particular role and the specific lawsuit your company is facing. Depending upon the situation, they may do some of the things suggested here but not others. Or they may have additional advice for you. This article will familiarize you generally with what you can expect in preparing you for your deposition.

The story told in Mitch Albom's *The Five People You Meet in Heaven* is a useful construct for describing the journey upon which you are about to embark. In the book, a grizzled war veteran named Eddie dies while trying to save a young girl from being struck from above by a plummeting amusement park ride. After more than eight decades on earth, Eddie finds himself in the afterlife. He meets five people who, although he did not realize it at the time, were integral to his life. Some of them are strangers; others, he knows well. Each takes Eddie on a journey back in time to relive a series of seemingly unconnected moments in his life. Events are replayed as Eddie and his guides watch and provide commentary. Eddie sees things on the replay that he missed when life was happening. He learns more about the people he knew, why they said and did certain things, how they affected him and others, and the ways in which they were related to one another. He discovers that each person in his life was there for a reason and that all of his actions had intended and unintended consequences.

At first, preparing for a deposition may seem daunting and unfamiliar. Eddie felt that way, too, entering the afterlife. He did not know where he was or how he got there. He did not know what he was supposed to do or what would happen next. And he did not know many things about his own past life and the people who had entered into it. Eddie found himself meeting new people and old friends.

The advice you will receive from your lawyers also may appear random and unconnected, like the people and events in Eddie's life, until you appreciate how it all fits together. Eventually you will see the big picture, as Eddie did. The good news is that you have an advantage that Eddie did not. You can connect the dots now, well in advance of the deposition. With that insight, you can manage the process going forward, just as you do any other business challenge. You will see that it is a matter of execution.

If you, a senior executive, are about to be deposed, we know the case is a big one. Maybe it goes something like this: Your company is one of several defendants in lawsuits that were filed within the past few months. The plaintiffs are after hundreds of millions of dollars in damages. Their lawyers learned that the Department of Justice had opened an investigation into alleged collusion by firms in your industry. "Alleged" was all the plaintiffs' bar needed to hear. They filed a national class action in federal court on behalf of all of your distributors, claiming that your com-

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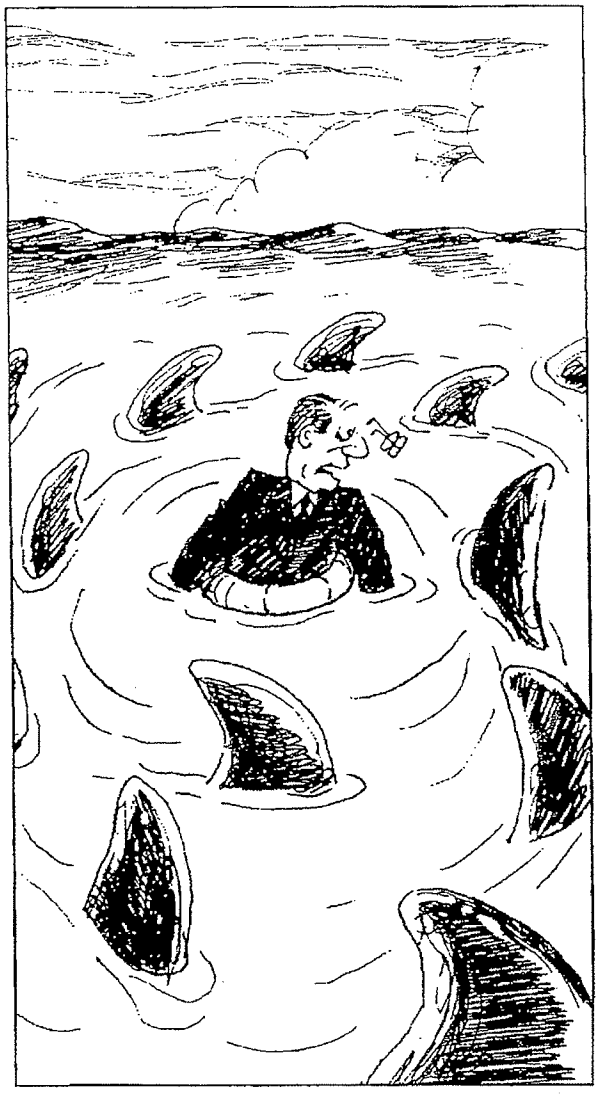
pany and the other manufacturers conspired to fix prices in violation of the antitrust laws.

After that, it was like blood in the water. Consumers who bought your products from retailers in California sued the company for violating state antitrust law. They filed several class action lawsuits throughout the state. Others filed the same cases in state courts in Kansas and Tennessee. Only a few weeks later, the company was named as a defendant in class actions filed in more than 20 states, in addition to federal court.

You ask yourself how the company could be facing such massive exposure. In the beginning you questioned whether this was something you needed to take seriously. There was no evidence that anyone had done anything wrong. The Justice Department closed its investigation without taking any action against the company. In fact, the government lawyers commended your company's leaders and its general counsel for being proactive and making antitrust compliance a priority within your company's culture. The company already had a best-in-class global antitrust compliance program. It provided ethics and compliance training throughout the organization and the world. None of this seemed to matter, however, to the plaintiffs in the class actions. They wanted their day in court, or at least a hefty settlement. The board agreed that the company should hire the best antitrust trial lawyers and defend the case vigorously.

Your journey has begun.



General Counsel

The first person you meet in preparing for the deposition is the general counsel. He is the best, always one step ahead of everyone else in the room. From the beginning, he told you about the company's exposure and the necessity for you to give a deposition in the case. He was candid with you about what to expect because you encouraged your staff to be honest about the truth of the present condition. They understand that you in turn share their integrity and can realistically evaluate any challenge once you have all the facts. Your team trusts you, and you trust them.

That is why you listened when your general counsel said that this would be like no other lawsuit the company had faced in the past. The stakes are too high. He walked you through the allegations in the complaint so that you could appreciate the facts and issues that were likely to arise. You were briefed on the basics of antitrust law even before the company filed papers in court to respond to the lawsuits. You have all of the information needed to make your own judgment. You think to yourself that this might be one that cannot be settled. You could be living with the case for a long time.

But you are surprised that the general counsel is so certain that the plaintiffs will take your deposition. None of them has accused you personally of doing anything wrong. You have never spoken with your competitors about business plans or operations. You do not know of anyone from your company who ever discussed prices with competitors. You cannot imagine what the plaintiffs' lawyers could ask you.

Your Trial Lawyer

The second person you meet in preparing for your deposition is your trial lawyer. The general counsel has already done something really smart; you do not fully appreciate it yet, but you will: He arranged a meeting early in the case between you and your lead outside trial lawyer, hired by your company, and the GC's team. You question whether it is a good use of your time. It seems too early in the case. It is a matter of business priorities: You don't have the time or the interest to hear about things like venue motions and the judicial panel on multidistrict litigation. You feel that this time is for the in-house legal team to strategize with the trial lawyers. Just keep you posted with regular briefings.

But your general counsel is insistent, so you block off an afternoon and an evening to attend the meeting and have dinner with the trial team. The lead trial lawyer and his team give a presentation about the current status of the cases around the country and all the things that are likely to happen over the next few years. They tell you, as best they can at the time, what to expect in terms of the disruption to the company from discovery and from other events that are likely to occur in the litigation. They identify issues that may involve your public relations team.

You and the team discuss the potential expense of the liti-

gation and the steps you expect them to take to control the budget in the case. You tell them that the most important thing to you, more than the expense itself, is that—if humanly possible—you not be surprised by anything. You do not expect clairvoyance, but you want the lawyers to inform you of potential outcomes, changed strategies and goals, new plans, and revised budgets, all well in advance. Litigation involves uncertainty, but so does business. "Our company executes its strategies despite many uncertainties, and so can our lawyers," you tell them. The general counsel will keep you up to date, but you expect to receive news *immediately*, and bad news sooner than that.

During that one day, you and your lead trial lawyer develop a bond. From your first meeting, two years before the deposition, you establish a core principle of open and honest communication, a solid platform for building trust. You have regular quarterly briefings with the trial lawyer. You ask him to deliver similar presentations for the board at least once a year. The two of you may form a personal friendship. He will become another one of your trusted advisers, and you will thank the general counsel for being so proactive.

You contrast your experience with the horror stories you have heard from executives you know at other companies. They were not told of the importance of the case until much later in the process, and found out even later that they would have to give depositions. They did not meet the outside trial lawyer until the day before their depositions.

The difference in these experiences, of course, depends on the nature of the general counsel. In some cases, the executives' general counsel said that their bosses would not want to be bothered with such trivial details. That reluctance to face reality carried through later to the deposition preparation itself: For one reason or another, the lawyers failed to give constructive criticism that would have helped the senior executive avoid embarrassing and costly mistakes. In some situations the general counsel was afraid to advocate the importance of something the boss considered a distraction from the business imperative, a nuisance. She did not articulate a rationale to help the executive understand why his deposition was important. As a result, the executive ended up being prepared only hours before the deposition, by a lawyer he was meeting for the first time. Of the precious little time they had together, they spent most getting to know each other instead of getting ready to testify.

This will not happen to you. You and your lead trial counsel will know and trust each other because of all the time you will have spent together. You will have confidence in him, and so will your board.

About three months before the deposition itself, you have a preliminary meeting, lasting about two hours, with just the general counsel and the lead trial lawyer. You discuss the deposition as a process, focusing more on how it fits into the overall litigation and less on the substance of what will be said. You learn that during the deposition, your outside counsel will use objections to protect you and the company and to ensure that the process is fair and according to the rules. If the other side tries to do anything improper, your lawyer will stop the deposition then and there. Your job is simple: Tell the truth.

During this brief meeting, the general counsel and the company's trial lawyer identify their best guesses, to a high degree of confidence, about the three or four substantive areas in which the opposing lawyer likely will focus her questions. There certainly will be questions in the deposition, however, about topics that no one will have anticipated. You learn that lawyers prepare witnesses to handle these unexpected questions. Near the end of the meeting, your general counsel and trial lawyer review the plan for how to get from here to there. You agree to at least two more preparatory sessions before the deposition—and will need to commit to that to be properly prepared.

Your next meeting, about one month before the deposition, is with a larger group from the trial team. It takes one full day, which begins with a conversation about the case. The lawyers want to hear you speak about events in your own words. They probe your knowledge about various meetings, presentations, press reports, people, places, conversations, business decisions, and so on. The lawyers gauge what you know and how you describe that knowledge. They take measure of the further preparation that needs to be done. They also explain the mechanics of the deposition, showing you where you will sit, where your lawyer will be, where the court reporter will sit,

Sometimes lawyers intentionally ask questions in a way designed to mislead witnesses.

where the camera will be set up, and where the lawyer asking questions will position herself.

The lawyers then explain the procedural legal rules that govern the deposition: You will be under oath; the court reporter will use a stenographic machine to record your testimony, in addition to the videotape, and will prepare a printed transcript for you to review for accuracy; you must answer audibly because the court reporter cannot record nods of the head in the transcript. You also learn that you should listen to the complete question, decide whether you understand it, and, if you do, formulate an answer before speaking. The lawyers have you practice knowing the beginning of the answer, its middle, and its end before you speak. You learn to give your lawyer time to object to an improper question. But you discover that even when your lawyer objects to a question, you must still answer it—except when you do not understand it. In that case, you must ask the questioner to be clearer. That might happen quite often, the lawyers explain, depending upon the skill and experience of the questioner.

You also learn about the questioning techniques of the opposing lawyer and some examples of improper questions. Sometimes opposing lawyers make innocent mistakes and ask poorly framed questions. In other cases, lawyers intentionally ask questions in a way designed to mislead witnesses. Your lawyers explain that they will object to so-called compound questions (for example, "Did you attend the meeting and give a presentation?") because exactly what the opposing lawyer is asking is unclear. The lawyer must ask those two questions separately, one at a time.

The lawyers tell you to be especially careful to listen for

questions that have unproven assumptions embedded within them. They tell you that they will object because those questions "assume facts not in evidence," and will ask the opposing lawyer to rephrase the question. They give examples to illustrate this point, such as the opposing lawyer's asking, "When did you stop agreeing with your competitors to fix the floor price?" There was never any such agreement, so it could not have stopped. The question is improper.

Talking to a lawyer in a deposition, you discover, will not be at all like talking to a newspaper reporter—or to anyone else, for that matter. Everything you say and do will be recorded and on the record. Nothing will be private or confidential. Unless an order in the case prevents disclosure of what is said at the deposition, everything you say could be made public immediately.

During the meeting, your lawyer likely conducts a practice session on videotape. You learn that the camera captures every facial expression and every sound, so do not lean over to whisper to your lawyer, because the microphones may pick up what you say. Instead, ask for a break to confer, and wait until the videographer says the session is "off the record" to be sure you are not being recorded.

One of the things you hear from your lawyers, probably several times, is that it is important to answer only the question that is being asked; volunteering information helps only the other lawyer and her clients. For one thing, even the most skilled and well-prepared lawyers do not think of everything to ask. But they will certainly follow up on whatever you tell them. A broader answer than necessary could lead the other side to new witnesses or documents. Opposing counsel could ask the company to search its files again or to produce different employees for deposition to explore new subject matters you introduced in your answer.

You tell the lawyers that you like to make notes during board and shareholder meetings to remind you of points that you want to include in answering questions. They explain why that is a bad idea: The opposing lawyer might be entitled to a copy of your notes and will then ask additional questions about them. You make a mental note not to bring anything at all to the deposition: no documents, no computer, no PDA, no cell phone, and no briefcase.

Opposing Counsel

The third person you meet in preparing for your deposition is the opposing counsel. Of course, you do not actually meet her until the deposition itself, but by then you will feel like you already know her. The opposing counsel will do her best to make you look bad to anyone who watches the videotape of the deposition. For instance, she may try to trip you up by questioning you about topics in a random, unconnected way rather than taking them in sequence. It might be difficult for you to follow her questions as they jump among different subjects. But the opposing lawyer has an advantage; she can take the final deposition transcript and videotape and edit the topics back into sequence to use later at trial. You need to be prepared for that tactic, and others, which is why your lawyers practice cross-examination with you.

While one of your lawyers plays the role of defending you so you can get the feel for someone's interposing objections after the question and before your answer, your lead trial lawyer acts as the opposing counsel—and he grills you. You are impressed that he seems to know the other side's case just as well as he knows the company's defense. Most witnesses say that the cross-examination is tougher during preparation than during the real deposition. If you feel this way, you will know that the trial lawyer prepared you well.

Jury Consultant

The fourth person you meet in preparing for your deposition is the jury consultant, if the lawyers think that the case warrants one. She may have a Ph.D. in psychology, appear as a commentator on Court TV and CNN, or have similar credentials. She probably has worked with the company's lawyers during several trials in the past and has a great track record. She is an expert in understanding human behavior and is there to help clarify how the jury may perceive you at trial or on the videotape of your deposition. The company's trial lawyers engaged her early in the process to gather information. They used her work to formulate the trial strategy instead of waiting to do so until it was almost time to pick the jury. You learn that she has run research studies and focus groups at various stages in the litigation to test how a jury will understand the different theories.

You may think that it's overkill to have the jury consultant participate in the preparation for a deposition. Trial lawyers do not bring in a jury consultant to work with every witness in every case, or even every deposition of a chief executive officer or other senior executive. Their doing so indicates the deposition is just too important to forgo her expertise. Afterward, you will agree. The consultant tells you things about your demeanor, style, and appearance that you may not really want to hear and that your general counsel or others may be reluctant to tell you, regardless of the degree of trust you share. It is always tough to criticize the boss on such a personal level, no matter who you are.

The first thing she talks about is what you should wear to the deposition. There is much more science to this than most people realize. She may show you videotaped examples of bad choices and how they distract from testimony. She works with you on how to sit in the chair comfortably, where to put your hands, and how to look into the camera. She reminds you not to have coffee cups or water glasses in front of you during the deposition because it looks sloppy or cluttered or distracts the jury from what you say.

After the basics are out of the way, the jury consultant reviews the videotape of your practice deposition. She helps you focus on techniques that will increase your ability to be perceived positively by the jury. The videotape may reveal behaviors, mannerisms, and even certain answers that look damaging when replayed on the courtroom monitor. She notes the following points:

- Long pauses between a question and answer are boring for the jury.
- The jury may think you are not being truthful when you take a long time to answer.
- At the same time, wait before answering to be sure you understand the question, to give your lawyer time to object, and to listen to his objection.
- Glancing over toward your lawyer during a question or answer makes you look unsure about what you are saying.
- Avoid negative body language like crossing your arms, grimacing, or rolling your eyes.

The consultant reviews ways you can defend yourself, by

telling the opposing lawyer that you do not understand a vague question, or any word or phrase in the question, and by asking for clarification. You also learn not to abuse the power by asking for unnecessary definitions, lest you look silly. The jury consultant will remind you of President Clinton's deposition statement, "It depends what you mean by 'is'"; and of Bill Gates's quibbles over the definitions of words like "concerned," "ask," and "definition."

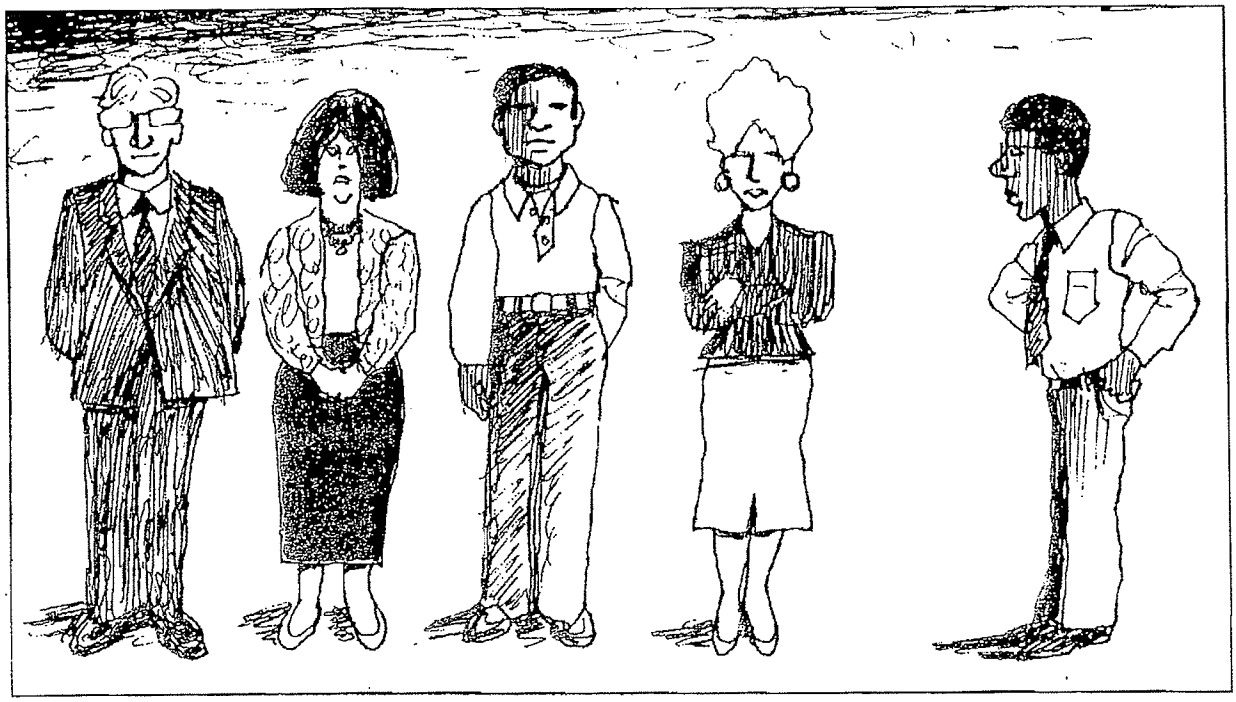
The lessons may seem endless: Stop talking when interrupted; display a pleasant expression on your face despite tough or even rude questioning; sustain eye contact; maintain an even tone of voice, a comfortable body position, and a calm, attentive demeanor. You may remember some famous examples of less well-prepared chief executives, those who kept talking or acted annoyed or angry when interrupted, raised their voices in response to tough questioning, were argumentative or evasive, took lengthy pauses between questions and answers, shifted around or slumped in their chairs, or frequently glanced around the room or at their lawyers, which made them appear shifty to the jury.

Your lawyers suggest ways to remain positive, upbeat, and confident at all times during the deposition. They tell you how important it is to use words consistent with your company's theory of the case and to avoid words consistent with your opponent's theory of the case. This goes beyond semantics, and by now you have learned to trust in their experience. You learn to turn allegations into denials. For example, instead of saying, "I did not conspire," you might say, "That is not correct because competition in this industry is vigorous. We do not discuss prices with one another, and each of the firms independently determines prices for its own products in its own self-interest to maximize profits for itself." You learn to begin your answer by first setting the record straight: "No, we see it differently. Let me explain."

The trial lawyer and the jury consultant work with you on documents that are likely to be used during the deposition. Your general counsel likely sent you articles highlighting how unfavorable documents had the potential to burn other companies even when they had not done anything wrong. You will be glad your general counsel was proactive in educating your employees to be more careful in their written and oral communications and to understand that nothing is private anymore. But since unfavorable documents are inevitable, your lawyers teach you how to deal with them in your deposition. You may be surprised to learn how many paper and electronic documents you have kept unnecessarily. The lawyers likely show you copies of e-mails and electronic documents that you had deleted—but that the recipient had not. You are surprised at how many e-mails addressed to you, or showing you as a "cc" or "bcc," you do not remember seeing at all—and may never have seen.

You and the trial team carefully review documents that are helpful to your case and those that are not. You talk about the attorney-client privilege. You learn that the opposing lawyer cannot ask you about what was said in the meetings with the company's lawyers, or what documents they showed you, unless a document refreshes your recollection. You probably have a basic understanding of the attorney-client privilege because your general counsel or other in-house lawyers explained it to you in the past. The lawyers still take the time to alert you to situations in which privileged matters might come up during the deposition. In this way they prepare you for what the opposing lawyer might do, what the lawyers then will do, and what you should do.

But your lawyers tell you that anytime they have a good faith belief that your answer may require you to divulge privileged information, they will object and instruct you not to answer the question. The only time you can refuse to



answer a question in the deposition is when your lawyer instructs you not to answer it. Otherwise, the lawyers explain, you must answer every question, although the answer may be "I don't know," "I don't remember," or "I don't understand the question."

At some point during your preparation, the blurry image of what seemed random and unconnected principles becomes clear. You begin to appreciate why your lawyers are spending so much time on the details of what the camera and microphones will pick up, and how it could affect success in the litigation. For example, the plaintiffs might play a portion of the deposition for the jury at trial. You then testify in person and give an inconsistent answer. The plaintiffs then might show the videotape of the deposition on a large monitor positioned right next to you on the witness stand, and play the inconsistent testimony as you sit there looking on with everyone else.

Yourself

The fifth and last person you meet in preparing for your deposition is yourself. Your deposition is an entirely new experience, and it challenges you. You learn things about yourself at the deposition that you did not know before, which require new skills that you may not have honed as a business leader. You are used to answering questions from stakeholders in various settings like board or shareholder meetings. But the deposition is altogether different, and it may make you uncomfortable at first.

In your role as chief executive or a senior leader in the company, you are expected to have all of the answers. You know the company's strategic vision and mission, as well as its operating plan and how your people will execute it. You know more about the company's assets, financial performance, products, services, and people than anyone on the planet. You are one of the stars of your industry. You are competitive, a winner, charismatic, and savvy. Whatever the business goal, your company looks to you to lead it to success, and others regard you as one of the best and brightest business leaders.

Identify opportunities in the deposition to make key points that help the company.

Although leadership is your everyday job, in the deposition it is not. You may be asked a number of questions to which you do not know the answer. This may feel unnatural in your role as a business leader, but you are not expected to know about everything that you are asked in a deposition. You should not be evasive but instead learn to say "I don't know" when it is appropriate, or sometimes to indicate that there are others in the company better able to provide the answer. You can learn to be comfortable with the limits of your involvement in the transactions and events at issue. Even when you were responsible for a final decision and take responsibility for it, others in the company often are much more familiar with the events or detailed analysis leading up to it. Remember that it is much better to say that you are not familiar with certain documents than to say that the documents do or do not exist, when you do not really know. Judges and jurors understand that senior executives delegate tasks to many others throughout the company. You learn how to resist the temptation to sound authoritative about something you actually know nothing about solely because you think that, as a business leader, you *should*.

You may be surprised when your lawyers say that it is likely they will not ask you any questions during the deposition. They explain that the deposition is not the trial. You do not need to make the company's case in the deposition. The lawyers work with you to identify opportunities to make key points that help the company, if they are part of answers to the questions that you are asked. Otherwise, the company will tell its side of the story at trial through you and other witnesses. In most cases, lawyers say that there is no good reason to ask questions of their own witnesses. Exceptions occur if a prior answer needs to be clarified, for example, or if testimony from the witness might support a motion to have the case dismissed before trial.

The lawyers also tell you that it is perfectly fine if you discover during the deposition that you need to add to or change an answer. If it happens, your lawyer will probably prepare you to tell the questioner at the next break and suggest how best to bring it up when questioning resumes. If all goes as planned, your lawyers will not need to ask you questions to clarify your testimony after the opposing lawyer finishes her examination. In fact, your lawyers will probably tell you to get up from the chair and go out the door as quickly as possible after opposing counsel says "no further questions," so that she has no time to change her mind.

The final preparation session takes place over a few hours, probably one or two days before the deposition. Your lawyers spend some time refreshing you on the deposition mechanics and a little more time covering the three or four key substantive areas they expect you to be asked about. That leaves you with enough time between the preparation and the deposition to decompress and relax. You take a few business meetings, answer e-mail and phone calls, and work a regular day—but leave plenty of time to get home and relax so that you will be well rested the day of the deposition. The lawyers will probably try to arrange holding the deposition in a private conference room at your company headquarters. If so, it will feel comfortable to be on your home turf.

Eddie did not realize the significance of the events in his life until it ended. He did not appreciate the interconnectedness of the lives he touched. You may feel the same way as your team guides you through the journey of preparing for your deposition—which, if you have read this far, has already started. You will have traveled a long way to achieve enlightenment. It may seem random at times. As you look back later, however, you will see how each of these five people contributed to completing the puzzle for you. Litigation and depositions are no different from other business challenges that you already know how to meet. You develop a strategy, enlist others, and execute the plan. You can manage the deposition process the same way you manage your staff and the business. In the end, there will be no surprises.

• *Appendix D* •

Deposition Instructions to the Prospective Witness

(1) Do Not Try to Win the Case in the Deposition

You cannot win, you can only lose. You will not get the other attorney to admit that his client is wrong, and there is no jury present to hear your persuasive testimony. The other attorney will read the transcript of your admissions and your mistakes to the jury. Your attorney cannot read the rest of your testimony to the jury so your efforts to win the case at the deposition will be wasted. **The overall objective is just to get through this experience with as little damage as possible to the case.** Of course, if you have factual testimony that tends to show that the other side is wrong, this fact will not be lost on the deposing attorney and this may help in settlement discussions.

(2) This Is Not a Conversation

In a normal conversation you try to help communicate with the other person. You volunteer information. If asked a question you give an answer you think gives the essential information the questioner wants to know, even if the question was not exactly the right one to ask. You get into a dialog, you open up, you drop your guard, you blurt things out—in short you do all kinds of things that are inappropriate at a deposition. Here the objective is NOT to communicate or convince, it is just to get through the experience with as little damage as possible. Do not get lulled into thinking that you are schmoozing with a nice, interested person. Do not fall into the rhythms and habits of a normal conversation. Always keep in mind that each question is, in some way, designed to help the other side defeat your case.

Therefore:

Listen carefully to the question.

Keep an even, slow cadence. Pause before answering. This is a very good way to keep you on your guard and to prevent you from falling into a conversational

mode. This also gives your attorney time to interpose an objection and gives you time to think about the question.

Ask yourself why the deposer is asking the question and how a careless answer could hurt your case.

Keep your answers short. Give a truthful, responsive answer that is the minimum answer consistent with credibility. Do not be evasive, do not get "cute," but give no more than necessary.

Do not volunteer information not specifically asked for, or "help out" the questioner. The questioning attorney is looking for anything that may help his case, and whatever you volunteer may do so when otherwise it might never have come up. Volunteered information, even if not harmful to your side, could lead to a boring and time consuming series of questions that would otherwise have been avoided by just not mentioning the volunteered information. Do not give cues that tell the questioner what his next question should be or the area where the information he wants is located. This can be quite unconscious on your part, so you have to keep on your guard to keep it from happening.

EXAMPLE:

Q. Did you discuss [X] at this meeting?
A. No.

NOT:

A. We didn't talk about it on THAT occasion.
(This response just tells the questioner to ask about another occasion on which it *was* discussed.)

Do not do the questioner's work for him. Make him ask the specific questions needed to properly and fully elicit your testimony. Make the questioner work for your testimony.

Give a General Answer to a General Question. Avoid lengthy, detailed answers to simple, broad questions.

EXAMPLE:

Q. What business is your company in?
A. Leasing.

NOT:

A. We organize numerous investment partnerships to raise money for the purchase of various types of equipment which we lease to various qualified parties through programs that. . . .

This precept follows from the preceding points: keep your answers short, do not volunteer information not specifically asked for, and make the questioner do the work.

(3) Listen to Your Attorney's Objection to the Question

Consider what the objection means and why your attorney is making the objection. Consider how to use those cues as a guide in giving your answer or asking to have the question rephrased. **The most common objections are:**

Vague and ambiguous. This objection means that the question could be interpreted in more than one way, or contains a term that could be interpreted in a way you do not intend. You should think about what part of the question creates the problem and either phrase your answer to clear up any ambiguity as to what you mean, or ask the questioner to rephrase the question to remove the vagueness or ambiguity.

EXAMPLE:

Q. Did you think that Mr. Doe's comment was funny?
Objection. Vague and ambiguous.
A. I thought it was an odd comment to make, so it was funny in that sense. I did not think it was humorous.

Lack of foundation. This means that the questioner has failed to establish that you would have any proper basis on which to answer the question (for example, that you saw or heard the matter being asked about, or that you are qualified to answer regarding some technical matter). Be alert to distinguish what you know from personal observation as opposed to repeating second-hand information.

EXAMPLE:

Q. How many cars are imported into the United States in a year?
Objection. Lack of foundation.
A. I do not know.

Calls for speculation. This means that the questioner is asking you to testify about something you do not have personal knowledge of.

EXAMPLE:

Q. What did Jim think of that situation?
Objection. Calls for speculation.
A. I do not know.

Misstates the testimony. This means that the question assumes or implies something about the prior testimony that is not completely accurate. This is a way of putting words in your mouth. Be careful.

EXAMPLE:

Q. When you earlier testified that Mr. Doe's comments were funny, would that also include his comment to Ms. Roe?
Objection. Misstates the testimony.
A. I never said that Mr. Doe's comments were funny. I said that they were odd.

Assumes a fact not in evidence [or not established].

EXAMPLE:

Q. When did you stop beating your wife?
Objection. Assumes a fact not established.
A. I never did beat my wife.

Calls for privileged information.

EXAMPLE:

Q. What did your attorney tell you about this?
Objection. Calls for privileged information and I instruct the witness not to answer.
A. [No answer given.].

Calls for a legal conclusion.

EXAMPLE:

Q. Weren't you bound by your agreement to supply both dealers once the territories were divided?
Objection. Calls for legal conclusion.
A. I am not a lawyer and so I cannot give a legal opinion.

Note that even if your attorney does not make an objection but you feel that the question suffers from any of the above defects you have the right to say so and you definitely should.

(4) Watch Your Language

The use of language is very important at a deposition. Using proper terminology and carefully wording your answers is a must. Do not let down your guard!

Talk naturally. While you should not swear or use vulgar language, use the words you ordinarily use — not "big" words or words you think are more "proper" or sound "more intelligent." Do not speak in a stilted artificial way. Talk about "cars" not "vehicles." Do not get "cute" with your answers ([e.g., *Q.* Can you spell your last name? *A.* Yes, I can. (smirk)].

Do not joke or use irony or sarcasm. Avoid statements like, "Sure, I always lie under oath" (intended to be sarcastic), or "No, I do not have a drinking problem, I drink, get drunk, pass out — no problem" (intended to be a joke). A joke may seem funny at the time, but it is never that funny when you read it in the transcript. *Why give your opponent words that can be twisted in a very sinister way?*

Tell your side of the story forcefully where called for.

EXAMPLE:

Q. What do you claim Mr. Jones did to you?
A. He took this big old book, a dictionary I think, and began hitting me with it. He hit me in the head several times and just about knocked me senseless. I was scared. I thought he was going to kill me.

NOT:

A. He hit me.

NOR, GOD FORBID:

A. I don't recall.

Do not adopt the language of the questioner. The attorney taking your deposition will probably try to get you to agree with statements phrased in a way most helpful to his client's case, and most harmful to yours. In other words, he will try to

put words in your mouth. Do not adopt the phraseology implied or used by the questioner unless you are completely comfortable with it.

EXAMPLE:

Q. So, you crept around the house and peeped into the window?
A. I wouldn't say that. I happened to be walking past the house and glanced in.

Your attorney may alert you to an attempt by the questioner to put a "spin" on the question by objecting to the question as "vague and ambiguous" or as "misstating the evidence." Pay attention to such objections and phrase your answer to avoid the innuendo hoped for by the questioner.

EXAMPLE:

Q. Did you often have to reject defective parts?
Objection. Vague and ambiguous as to the word "often."
A. I'm not sure what you would call "often" since only about one out of a thousand were found to be defective, but it did happen occasionally.

NOT:

A. Well, it did happen every day, so I guess that would be "often."

(5) Do Not Make Unnecessary Concessions

This is especially true as to matters not specifically discussed with counsel. You should always confer with counsel before conceding anything.

EXAMPLE: (The defendant's attorney is trying to get concessions from the plaintiff)

Q. Those problems were minor and didn't really cause any damages, isn't that right?
A. I haven't really done a study of this, so I don't know at this time.

NOT:

A. I guess you're right. I don't have any quarrel with those matters.

(6) It Is OK to Say "I Don't Know" or "I Don't Understand the Question."

Witnesses never seem to want to say they do not know something and go ahead hazarding guesses, speculating, and the like. *Do not guess or speculate.* If you honestly do not know the answer to a question, even if you think you should or feel stupid that you do not, *just say you do not know.* Do not testify as to what you think *must* have happened. Do not testify as to what *usually* happens (unless so asked). If you have an idea what *might* have happened but do not *really* know, you can tell your idea to your attorney off the record, but testify that you do not know. Please be aware that what you "know" is what you have perceived with your senses—it is not what someone else told you. Be very careful to make this distinction.

EXAMPLE:

Q. What color was the traffic light when the accident occurred?
A. I do not know.

NOT:

A. It must have been red.

OR:

A. The lady next to me said it was red.

If you are asked what you heard or were told, then you must provide such second-hand information, but unless specifically asked to do so, do not include it in your answer.

If you have any doubt about whether you understand the question, say so. You can ask what the questioner means by some term or phrase he uses, or just say you do not know what it means. If the question "isn't quite right" (it has some fact or even a word wrong), say so. If the question is too vague to answer, say so. Do not try to answer a defective question.

(7) Leave Yourself "Outs"

Try to answer questions in a way that will permit some room for maneuvering in case you find out additional information later, or in case you forgot something, or if you are not really sure about something.

EXAMPLE:

Q. What are all the factors that determine the output?
A. The factors *that I can recall here today* are _____.

OR:

A. I'd have to review [X] in order to answer that fully and accurately.

OR:

Q. How many times did the machine malfunction?
A. I think it was about 10 to 20 times, but that is just an estimate.

Such answers give you a chance to later testify more accurately or fully without being impeached by your prior answer.

(8) Do Not Reveal Privileged Information

You must try to separate in your mind anything you learned as a result of a privileged communication, and even if that information is responsive to the question you are asked, you must not reveal it. If you already knew the information you must respond because your knowledge did not come from a privileged communication. If you have *any* doubt about this when trying to answer a question *consult with your attorney*.

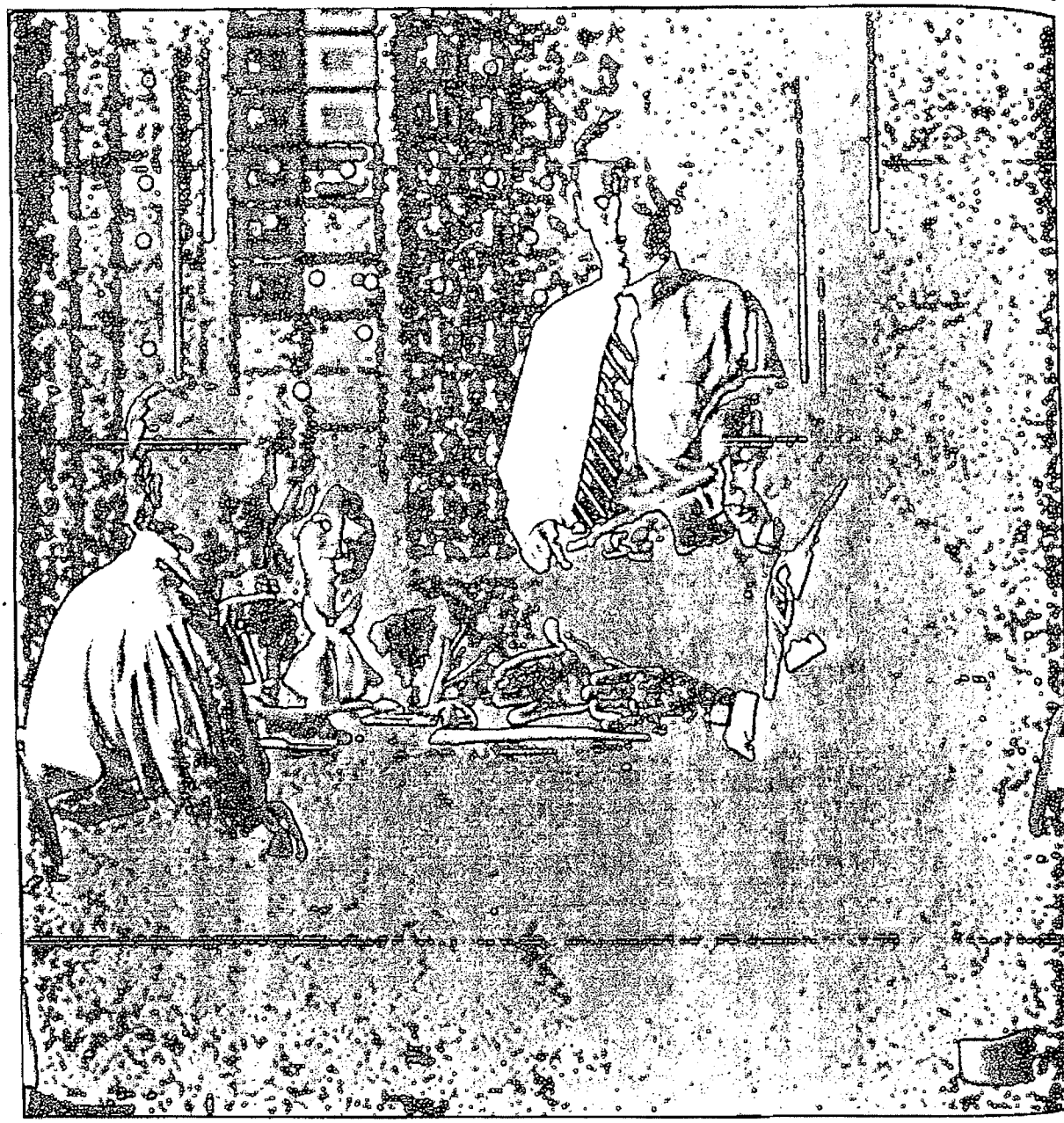
(9) Read Each Document Carefully and Fully Before Answering Questions About It

It is very easy to mistake a document you are shown for some other document you reviewed or remember, or to misremember what the document actually says. This can cause serious problems in your testimony. It is easy to avoid this by being sure to read the document you are handed and are about to be asked about.

(10) Tell the Truth

Last, but certainly not least, never, never, never tell a lie.

Preparing Your Client



For Mediation

While clients are usually up to speed on the litigation process, not all fully understand mediation. Drawing from his personal experience as a mediator, the author offers practical advice to lawyers on how best to prepare their clients. He recommends staging mock mediations, using proactive teaching techniques, and being creative wherever possible to help clients grasp the unique and unpredictable nature of what he calls the "negotiation dance."

By L. Randolph Lowry

The author is founder and director of the Straus Institute for Dispute Resolution and a law professor at Pepperdine University School of Law in Malibu, California. As a mediator, dispute resolution consultant, and trainer, he has spent the last 15 years assisting and preparing neutrals and advocates for the mediation process.

The well-dressed corporate officials looked anxiously across the long mahogany table as the plaintiff's counsel described his client's age discrimination claim against their company. In the lawyer's mind the facts were clear, the liability certain and the damages substantial. As the corporate officers listened intently to the lawyer's presentation, they carefully considered the position they would take in response to the coming accusations.

Those business executives were impressed with the dispute resolution process in which they were participating. They saw how it encouraged the parties to communicate across the negotiation table with the assistance of a professional facilitator. In mediation, they were involved in listening, in sharing their perspective, and in working toward a solution they could help craft. It was a far cry from the formality of the courtroom that treated clients as little more than observers in the drama of litigation.

Litigation is most familiar to clients because of... television shows such as "Matlock," "Perry Mason," "The People's Court," and "L.A. Law."

While real in appearance, atmosphere, and conduct, the entire process described above was only a staged enactment of what the lawyers for the executives expected would take place the following day when the case would be subject to actual mediation. It was a rehearsal undertaken to acquaint the business clients with the dynamics and strategies of what to them was a new and different approach to resolve conflict.

Prepare a client for mediation? Pay a mediator to conduct a mock process and critique the performance of your client or the strategy of your negotiation? Invest time to anticipate an "informal" process? At first blush, such action might seem foreign to practitioners who already have too much to do, who are under pressure to avoid extra expenses, or who simply view mediation as an inconvenience on the way to litigation.

It surprised me when an excellent litigator from a large Los Angeles law firm called and asked if I would conduct a "mock" mediation—complete with hired plaintiff's counsel—to prepare his business clients for the mediation of an important age-discrimination case. Yet looking back, it made all the sense in the world. Such preparation is clearly a part of the evolution of dispute resolution activities in this country.

During the last decade, mediation—a process of facilitated negotiation—has emerged as a prominent avenue to settle legal disputes. Mediation has been defined as "[A] form of facilitated negotiation in which an impartial third party attempts to help disputing parties reach a mutually satisfactory solution to their problems, without the element of compulsion."[1] It is legislatively approved in many cases.[2] In some areas of the law, such as domestic relations, it is used extensively.[3] Mediation is court-mandated in many jurisdictions.[4] It is included in thousands of contracts.[5] While there are many views about mediation, its presence is now part of society's dispute resolution fabric and one of the legal profession's most promising resources in settling disputes.

Lawyers increasingly use mediation to assist in settling their clients' cases. A recent survey of general counsel, deputy counsel, and chief litigators from 528 of the largest 1,000 corporations in America indicated that 85%

84% said they were likely or very likely to use mediation in the future. The survey also indicated that 81% of the respondents felt mediation provides a "more satisfactory process" than litigation, 66% said mediation provides "more satisfactory settlements" and 59% said mediation "preserves good relationships."[4]

Recently, when beginning the mediation of a construction defect case in southern California, I asked the eight lawyers in the room if any had been to mediation before. All eight raised their hands. In several California counties, virtually every case involving high emotion or ongoing relationships between the parties is being sent to a mediation process using a trained facilitator. The question is no longer, "Will lawyers and their clients use the mediation process?" but rather, "How can lawyers and clients prepare to maximize the resource of the mediation process?"

When I received the request from the Los Angeles law firm to prepare the lawyer and the business clients for mediation, I began thinking about what experiences might be most helpful and what information might be most useful. The following are a few ideas that should be considered by lawyers and clients alike.

Seeing and experiencing the mock mediation resulted in excellent questions by the clients, a modified strategy for their presentations, and the sense that they were full participants in the strategy that was offered to resolve their legal dispute.

Understanding the Mediation Process

Professionals in any field are familiar with their nomenclature and their forms of practice. They may fail, however, to understand how unfamiliar the client may be with such language and practice. Some clients have experienced litigation, and a smaller number have sat in on an arbitration proceeding. Even in the late 1990s, however, relatively few clients have been involved in mediation.

Of the growing variety of dispute resolution processes, litigation is most familiar to clients because of highly publicized trials and generations of television shows such as "Matlock," "Perry Mason," "The People's Court," and "L.A. Law." In the minds of most clients, the vision of processing any legal case probably includes a collage of what has been experienced and, therefore, what is expected.

ences between the adjudicative processes of litigation and arbitration, and consensual processes of negotiation and mediation. It is imperative that the fundamental differences in these processes be understood so that the client can effectively join the advocate at the mediation table.[5]

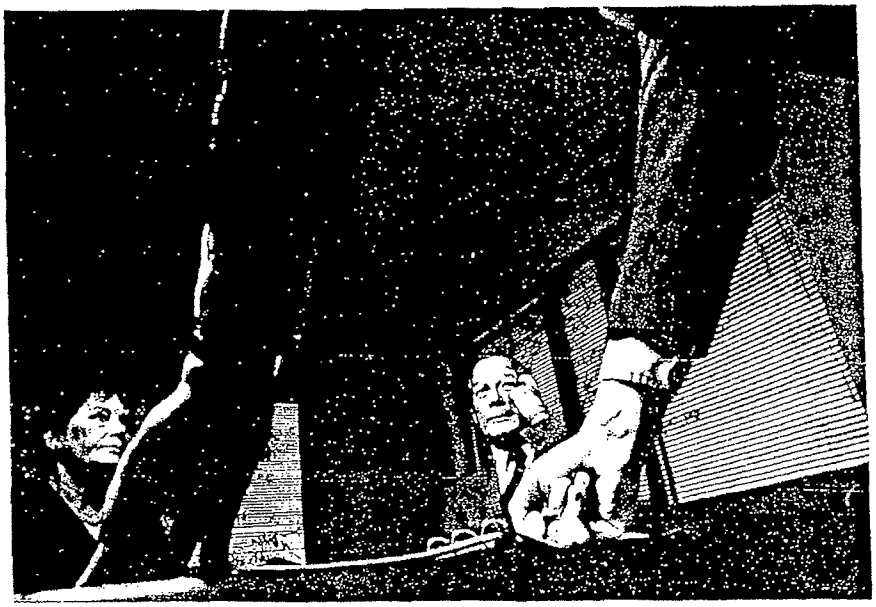
For instance, many clients assume that whatever the process, sooner or later someone will "decide the case." They are more familiar with judges making decisions than with mediators facilitating the development of settlement options.

Recently I was explaining mediation to a prospective user. I was quite deliberate in describing each step of the process—convening the parties, opening statements, information sharing, reality testing, option generating, and closure.[6] After my elaborate and, I thought, accurate explanation, he asked, "And when do you make the decision?" I recognized that, even though I painstakingly explained the process as I had done many times before, his expectations still involved some form of adjudication. One can seldom assume an accurate understanding of the process.

In addition, it is also important to recognize how difficult it is to verbally describe what is a dynamic and somewhat unpredictable process. Lawyers do not learn litigation skills by just listening to lectures; neither will clients understand mediation by hearing only verbal descriptions. Recognizing this reality, one prominent Los Angeles lawyer/mediator[7] created a videotape library so clients may observe an abbreviated mediation. In the era of video technology, such is a responsive attempt to help the client understand by seeing.

While such resources will be increasingly helpful, the law firm that asked me for assistance wanted the clients not only to observe the process but to actually participate in it. In response to the lawyer's request, I described the mediation process to his client, and then held an abbreviated mediation session with opening statements, information sharing, caucusing, and reality testing. The purpose was to have clients become so familiar with the process, they would be relaxed while it was actually conducted and be able to contribute confidently to its dynamics. The preparation process worked. Seeing and experiencing the mock mediation resulted in excellent questions by the clients, a modified strategy for their presentations, and the sense that they were full participants in the strategy that was offered to resolve their legal dispute. The clients' participation would not have been as effective without actually experiencing mediation. A wide body of recent literature proposes that

dult education, as opposed to children's education, depends upon proactive rather than reactive teaching techniques.[10] Adult education is integral in any employee training scenario; and corporate training manuals often cite the efficacy of proactive teaching techniques.



The role of a mediator is to facilitate negotiation, with the ultimate goal of aiding parties in reaching a settlement.

Mediation is a Continuation of Negotiation

Clients in the mediations I conduct often forget that the essence of the mediation process is negotiation—that give-and-take communication process we use to put deals together and resolve conflicts. In mediation, unlike adjudicative processes such as arbitration and litigation, the parties themselves attempt to reach a satisfactory settlement. The "real business" of a mediation session is the negotiation of a settlement.[11] The mediator merely facilitates the discussion.

While obvious to experienced lawyers, clients who do not recognize the application of negotiation strategies in mediation never reap the potential benefits of the process and often severely jeopardize their cases. For instance, a client entering the mediation room and directing comments to the mediator rather than the opposing party misses a tremendous opportunity to influence the only person in the room who can agree to settle the case.[12] A client making a "final offer" too early in the mediation process may demonstrate a lack of understanding of the time necessary for the "negotiation dance" to function effectively.[13] A client with a single outcome in mind will not be open to the creative possibilities—even in acute, legal conflict—and may miss the very opportunity he or she seeks to resolve the case in a satisfactory way.[14]

Each of these mistakes may be innocently made. Nevertheless, they reflect a lack of understanding of what is happening in negotiation. Many times the most persuasive conversation is between the parties rather than between a party and the mediator. Most of the time, a series of negotiation moves will be necessary to reach agreement. Creativity, while not the key to resolving every case, is a highly recognized tool; but it is dependent on how the parties use it.[15] Effective negotiation strategies must be understood by the client (and lawyer) in mediation. When understood, such strategies can be carried out in a more effective way.

Several years ago I mediated a high-dollar employment discrimination case between a terminated executive and his former corporate employer. Midway through the first day of the lengthy mediation, the president of the company pulled me aside and asked if he could explain his perspective to the plaintiff. The president then explained to the plaintiff that he had come to the company after the incident involving the employee had taken place and that he wanted the employee to know that, regardless of the outcome of the employee's litigation, he regretted what had happened and was committed to its not happening to anyone else. In response to that explanation, did the plaintiff and his lawyer bringing the lawsuit pack up and leave? Of course not. After the explanation, did that direct and candid communication influence the nature of the negotiations, bringing the parties closer to settlement? Absolutely! The president was a client who saw the big picture, recognized that the legal positions did not reflect the entire conflict, and sought to influence the negotiation deliberately. He understood that negotiation is a communication process and used it to assist in the settlement effort.

Mediation is a Participatory Process

Mediation is demanding of clients, but also responsive to them. To a large extent, clients sit on the sidelines in adjudicatory processes such as arbitration and litigation. Compare this with the mediation hearing, where it is the lawyers who often sit on the sidelines as coaches.[16] In adjudicative processes, clients speak only when they are asked, do so under the careful control of their counsel, and give up much of who they are in order to participate in a very structured process. While there may be great security for lawyers in

... to have the energy, talent, and/or passion of the client involved in the resolution of the client's dispute. Mediation provides the opportunity to capture these elements for the client and have them contribute to the settlement.

Several years ago, while mediating an age discrimination case involving an older woman who was probably the victim of wrongful termination, the importance of client involvement became abundantly clear. The lawyers spent almost two hours describing the legal dimensions of their cases. Although artfully done, everyone in the room knew that neither side would convince the other nor could anyone totally predict the outcome at trial. That did not keep them from trying.

It was the client, however, who, frustrated by the ongoing legal argument, stated simply that what was most important was her lost medical benefits. She described her needs as sole provider of financial support for her son and daughter, both of whom had serious diseases, and her husband who was terminally ill with cancer. No lawyer could have described it as well nor provided as graphic a picture of her circumstances. Her somewhat spontaneous, but very human involvement in the mediation process caused the defendants to re-evaluate their case more objectively. The case settled that afternoon. In the confidential setting of the mediation room, important things happen when those who own the conflict participate in its resolution.[17]

To a large extent, clients sit on the sidelines in adjudicatory processes such as arbitration and litigation. Compare this with the mediation hearing, where it is the lawyers who often sit on the sidelines as coaches.

Mediation is a Creative Process

Lawyers who expect legal disputes to be resolved in courtroom adjudication and clients who assume a decision-making model for dispute resolution generally adopt a "right" position for their case and seek to persuade the opposite party to accept it. It is quite likely, however, that even in a lengthy litigation process, there will still be only two solutions on the table or before the court—one advanced by the plaintiff, and one advanced by the defendant.

This is not surprising considering how lawyers ... are challenged to take and advocate positions.[18] At times, the position taken is even less important than the ability to advocate persuasively for it in the context of "thinking like a lawyer."

Such skills serve lawyers well when conducting courtroom arguments in the 3% to 5% of cases that are fully litigated. Such skills are woefully limiting, however, when the focus is on problem-solving at the mediation table. While persuasion is important, mediation affords the opportunity to change the dynamic, refocus the conversation, and capture the potential of more creative and innovative solutions—*if* the lawyers and the clients are prepared to pursue them.

In the case of the older woman described above, that is what happened. After the brilliant oral advocacy, the real question became, "How might the lawyers address her primary need for medical insurance during her retirement years?" The defendant company was quick to reject writing out a check for $187,000, the estimated cost of such coverage. One lawyer, in a creative moment, correctly pointed out that if the plaintiff had been able to retire, those benefits would have been automatically extended to her—and the cost to the company would have been so insignificant that "it would not be worth talking about." The ultimate settlement, in addition to some immediate consideration, included her "re-employment" so that the benefits could be extended to her. She was given the choice, however, whether she would return to work or, with her salary, stay home and take care of her dying husband. While obviously not possible in every wrongful termination case, in this instance it was far easier for the company to justify compensation valued at a few hundred thousand dollars being paid through re-employment, rather than through a much larger cash settlement. The creativity of that solution would never have occurred in court. It is not the least bit surprising as a result of mediation. Unlike litigation, which places primary emphasis on monetary damages, mediation enables parties to "fashion a creative solution to their disputes that will address their unique situation."[19]

Lawyers usually find it relatively easy to get business clients to think creatively—that is how businesspeople are trained in business school. They understand brainstorming solutions, free association, inventing options, and taking risks—their business success depends on it. Lawyers need to encourage businesspersons to use such skills in the mediation process and then join them in that creative and fulfilling work.

The Theater of Mediation

Every dispute resolution process is set up to deal not only with the substance of the dispute

Mediation is not a staged production that imitates reality, but rather a process that allows the parties—who are the ones "on stage" in mediation—to feel that their needs are truly met.

but also to provide some degree of satisfaction with the process of resolution.[20] In court, parties depend upon the integrity of the litigation process being high enough that even the losing party will accept the mandated result. Those who are satisfied with a decision are much more likely to comply with it.[21] In mediation, we depend upon the credibility of the process so that parties can work toward and find agreement which they can support.[22] Part of their ability to be supportive is related to how the "theater" of the process is performed.

Mediation is not a staged production that imitates reality, but rather a process that allows the parties—who are the ones "on stage" in mediation—to feel that their needs are truly met. For instance, it is important for clients to express, sometimes quite emotionally, their view of the conflict and its implications. The adversarial system stifles the ability of the parties to express their views of the conflict. It "may not allow parties to resolve their underlying differences and often leaves their relationship permanently scarred."[23] Mediation, on the other hand, "provides opportunities for expression of feelings and discussion of legally extraneous matters.... Sometimes airing and acknowledging emotion facilitates the quest for settlement."[24]

While theatrical, this part of the mediation process is not always pleasant. It is necessary, however, to relieve clients of pent-up feelings that have festered for weeks, months, or years. In addition, it is necessary for lawyers to express, in front of their clients, their own indignation regarding the case—not because it is necessary for them to release their frustrations—but because the client needs to see the lawyers working as "zealous advocates."

Finally, it is critical, at times, for a client, such as a corporate defendant, to make the offer to the plaintiff personally. The corporate officer, not the company's lawyer, is a representative of the offending party. The satisfaction of hearing the settlement offer from the offending party provides value beyond the dollars exchanged. It becomes the emollient that allows the plaintiff to settle the case and get on with life. To achieve it, however, the company official must see and participate, sometimes after being coached in the theater of the moment.

Describing mediation as theater is not to suggest a contrived, dishonest, or artificial circumstance but rather to recognize the real human emotions and needs that must be met in effective dispute resolution. Responding to them through a carefully conducted process is key to making effective use of the unique mediation environment.

Good lawyers and helpful clients will discover, through repeated involvement in the mediation process, these observations that came from the mediation preparation experience at the Los Angeles law firm described earlier. Knowing the mediation process, understanding that mediation is continued negotiation, watching the participatory nature of the process, seeing the creativity possible in mediation, and appreciating the theater of mediation, comprise only a beginning list of items lawyers will want their clients to know to maximize the benefits of facilitated negotiation. The influence each of these items has in achieving a result acceptable to a client should not be underestimated.

While there were many reasons for the successful, real mediation that took place, the lawyer in the mock mediation described at the beginning of this article was gracious to attribute much of his client's success to the "hands on" preparation experience. The result the lawyer and his client achieved—a settled case—was the result sought by those choosing that dispute resolution process. It is most likely to occur when the lawyer and the clients prepare to take full advantage of the resource of mediation.

ENDNOTES

[1] David Plimpton, "Mediation of Disputes: The Role of the Lawyer and How Best to Serve the Client's Interest," *Me. B.J.* 38 (1993). For further definitions of mediation, see, for example, Christopher W. Moore, *Mediation Process: Practical Strategies for Resolving Conflict* 14 (1986), and Wayne D. Brazil, *Effective Approaches to Settlement: A Handbook for Lawyers and Judges* 17 (1988).

[2] See, for example, Cal. Civ. Proc. Code § 1775 (West 1993 and Supp. 1994); Tex. Civ. Prac. Rem. Code Ann. 154.021 and 154.023 (Vernon Supp. 1994). See also *Legislation on Dispute Resolution: 1990/1991 Addendum*, 19 A.B.A. Standing Committee on Dispute Resol.

[3] See, for example, Cal. Civ. Code § 4607 (West Supp. 1994); 3 *Del. Fam. Ct. R.* 16(b) (1992). For a general discussion on the use of mediation in domestic relations disputes see Leonard L. Riskin, "Mediation and Lawyers," 43 *Ohio St. L.J.* 29, at 32 (1982); Stephen J. Bahr, "Mediation is the Answer: Why Couples Are So Positive About this Route to Divorce," *Fam. L. Advocate*, Spring 1981, at 32.

[4] See, for example, Tex. Civ. Prac. & Rem. Code Ann. 152.001 to 152.004 (Vernon Supp. 1989); Okla. Stat. Ann. tit.12, § 1801 (West Supp. 1990). In general, see Andrea Nelle, "Making Mediation Mandatory: A Proposed Framework," 7 *Ohio St. J. on Disp. Resol.* 287 (1992).

ee Nelle, *supra*, note 4, at 289. See generally Robert M. an, "ADR Contract Clauses," in *Donovan Leisure & Irvine ADR Practice Book* 241 (J. Wilkinson, ed.

Gary Phelan, "Dispute Resolution the Mediation Way," *L. Trib.*, Aug. 18, 1997. The survey was conducted by Waterhouse, Cornell University and the Foundation for evention and Early Resolution of Conflict.

The consensual nature of mediation is implicit in its defn. See *supra*, note 1. Note, "Mandatory Mediation and nary Jury Trial: Guidelines for Ensuring Fair and tive Processes," 103 *Harv. L. Rev.* 1086 (1990). See, for ple, Nancy H. Rogers & Craig A. McEwen, *Mediation: Policy & Practice* 20 (1989). See also John B. Bates, Jr., ng Mediation to Win for Your Client," 38 *Prac. Law.* ch 1992) p. 24; Nelle, *supra*, note 4, at 287.

For a more detailed discussion of the mediation process, logers & McEwen, *supra*, note 7, at 7-10 (1989); Moore, , note 1, at 153 et passim.

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See, for example, Malcolm Knowles, *The Adult Learner: eglected Species* (1990); Manuel London, *Managing the ince Enterprise* (1989); Thomas L. Quick, *Training agers So They Can Really Manage* (1991).

Charles Guitard, "Preparing for Mediation and otiation," pt. 2, 37 *Prac. Law.*, October 1991, at 66.

"The mediator does not have the authority to write the ds of the agreement." Frank Strelec, "A Trial Lawyer's de to Mediation," *Fla. B.J.*, July-Aug. 1991, at 70.

See Roger Fisher & William Ury, *Getting to Yes: otiating Agreement Without Giving In* (1981) pp. 11-13.

See, for example, Fisher & Ury, *id.* at 76-77. See also, lliam Ury, *Getting Past No: Negotiating with Difficult People* 91) pp. 18-19.

See, for example, Ross R. Hart, "Improving Your Chance Success During Construction Mediation," 47 *Arb. J.*, Dec. 1992, at 14; Peter Lovenheim, *Mediate, Don't Litigate*, at 67.

Compare this with the mediation hearing, where it is the lawyers who often sit on the sidelines as coaches. Martin Kobren, "Preparing for Mediation," *Md. B.J.*, Jan. 1993, at 46. Whereas the lawyer's role in litigation is generally seen as "a knight in shining armor, whose courtroom lance strikes down all obstacles" (Warren E. Burger, "Isn't There a Better Way?," 68 *A.B.A. J.* 274 (1982)), it is the parties in a mediation session who are involved directly in the give and take of negotiation. Rogers & McEwen, *supra*, note 7, at 20. For a good general comparison of the lawyer's role in litigation and mediation, see Curt Micka, "From Litigation to Mediation," 23 *Med. Q.*, (Spring 1989) at 87.

In mediation, "those who are in the best position to determine the outcome do so." John B. Bates, Jr., "Using Mediation to Win for Your Client," 38 *Prac. Law.*, March 1992, at 25. See also Rogers & McEwen, *supra*, note 7, at 22.

See generally Micka, *supra*, note 16.; Edward Sutton, "ADR and Law School Curricula," (1984) Vt. Law School Dispute Resol. Project; Burger, *supra*, note 16, at 275.

Mary K. McLeod, "Preparing Your Client for Mediation," 50 *Bench & Bar of Minn.* 26, (1993) at 26-27 .

For general information and psychological analyses of client satisfaction with the process and why procedural fairness is important, see Tom R. Tyler, "The Psychology of Disputant Concerns in Mediation," 3 *Neg. J.* 367 (1987). Jessica Pearson, "An Evaluation of Alternatives to Court Adjudication," 7 *Just. Sys. J.* 420, (1982) at 431-33.

See, for example, Rogers & McEwen, *supra*, note 7, at 23.

Some commentators cite the "coercive nature of adjudication" as the reason for noncompliance. Pearson, *supra*, note 20, at 420. In contrast, the "consensual process" of mediation "encourages more cooperative relations in the future." Note, *supra*, note 7, at 1092.

Note, *supra*, note 7, at 1091.

Rogers & McEwen, *supra*, note 7, at 21.

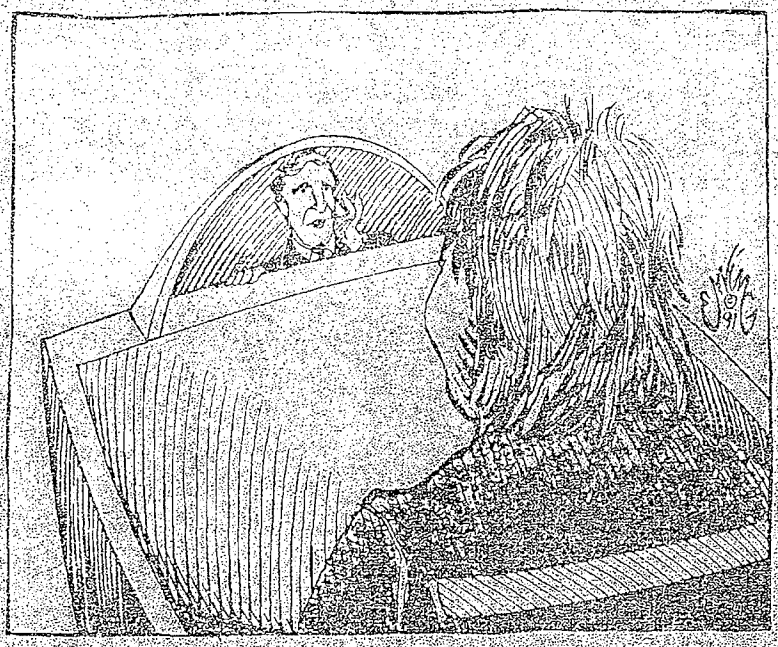
PREPARING A FOREIGN CLIENT FOR TRIAL

How to ensure an effective and positive presentation.

The continuing influx of new immigrants into California has added a new dimension to the practice of litigators. To many foreign-born clients, involvement in litigation has far more personal implications than it has to their American-born counterparts. American-born clients have become somewhat desensitized to the frequency of lawsuits, spiralling costs and escalating cash settlements over the last 15 years. However, in many cultures, being involved in litigation is a disgraceful event that can bring shame and dishonor not only upon the litigants but also upon their immediate family, extended family and the community in which they dwell.

Attorneys must prepare foreign-born litigants for the experience of a trial, deposition or arbitration under the American system of justice. This preparation will not only help to minimize the clients' anguish but it is frequently important to the successful outcome of the litigation.

Counsel should first stress that the implications of litigation may not be as far-reaching in America as they are in the immigrant's native country. While foreign-born litigants may have an excellent knowledge of the United States Constitution, many have only a vague understanding of legal proceedings. Much of what litigants think they understand of the legal process frequently comes from popular culture, and not from any direct experience. It is helpful to explain to them fully the role of the judge and the jury. In many instances, it is very beneficial to have foreign-born litigants actually attend an event similar to the one in which they will participate.



RICHARD EWING ILLUSTRATION

CULTURAL DIFFERENCES

Cultural differences also play an important role in the litigant's presentation of the facts. Many foreign-born individuals may not realize what is appropriate communication in our culture and the significant role that both verbal and non-verbal communication play in the outcome of their trial. Litigants need to understand that attention is given to their manner of presentation as well as to their verbal responses.

Appropriate non-verbal communication is essential not only when litigants are being questioned directly but also during other phases of the trial—while the jury is being selected, when other witnesses are being questioned, when counsel confers with them or when questions are being asked from the bench. Foreign-born clients must realize that how they respond in the courtroom is constantly being observed by the judge, the jury and opposing counsel who are all using American standards of conduct to gauge the client's behavior.

In order to preempt unintentional mistakes, it is important that clients understand that communication is not only the speech and language that is used; it is the total manner of their presentation, which encompasses both verbal and non-verbal skills including listening, tone of voice, facial expressions, body language and gestures. Each culture has its own acceptable standard for appropriate verbal and non-verbal communication. Appropriate behavior comes naturally to foreign-born litigants in their native cultures; however, behaving appropriately in a different culture frequently will require a great deal of concentration. This is especially important during trial, as the outcome can be affected by the client's manner of communication and presentation.

In many foreign cultures being direct, asking questions, maintaining eye contact or projecting voices are improper methods of communicating. This communication style which is appropriate in the American culture, is inappropriate in some other cultures even during cordial face-to-face communication. In such cultures, it is even more inappropriate in situations that demand greater respect and formality such as a courtroom presentation.

AVOID IDIOMS

To make the counsel/client interaction more effective and less frustrating, attorneys should avoid using idioms during consultations. Phrases such as, "don't let the cat out of the bag" or "that's putting in the hole" only serve to confuse foreign-born clients who do not have the slightest idea of what these expressions mean.

Counsel should explain fully any legal terms that the client is likely to be confronted with or need to use at trial. Key points can be stressed by pronouncing them slower and slightly louder and by repeating them when necessary. Counsel can encourage questions by asking, "Is

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there anything further that you would like to know" rather than "do you have any further questions." Frequently, people from different cultures will be embarrassed if there is a lack of understanding and therefore they will not ask the necessary questions unless encouraged.

NON-VERBAL COMMUNICATION

Prior to a deposition, arbitration, trial or meeting with opposing counsel, foreign-born clients should be advised about the following appropriate methods of non-verbal communication. For a successful presentation, a client should:

- Maintain eye contact with the person to whom he is speaking.
- Maintain good body posture. The client should sit up in his chair and place his head in a forward but nonaggressive position, with his arm resting comfortably on the witness box.
- Speak in a pleasant, professional tone of voice.
- Moderate facial expressions.
- Make certain to project his voice so that he can be understood.
- Wear the proper attire to the event. In many cases it may be necessary for counsel to provide guidance on what attire is appropriate in a given circumstance.

Clients must also be cautioned against inappropriate non-verbal behavior. The following is a list of frequent mistakes made by foreign-born clients in non-verbal communication. They should not:

- Shout, yell, or use an abrupt tone of voice.
- Continuously look down or away from the person with whom they are speaking.
- Flail or swing their arms.
- Pound their hands, stomp their feet or shake their fists.
- Make any kind of blowing or exasperating noises or exaggerated facial expressions.
- Constantly interrupt their counsel.
- Laugh inappropriately.

In many foreign cultures being direct, asking questions, maintaining eye contact or projecting voices are improper methods of communicating.

Finally, it is important to develop a strategy for positive and effective verbal communication. In order to prevent errors, counsel should advise their clients to:

- Stay in control and not respond until they are ready.
- Ask the attorney or judge to repeat, rephrase or break down any question that they do not understand.
- Think about what they are going to say and how they are going to respond prior to answering.
- Answer only the question that has been asked in a precise manner. They should not ramble.
- State "I do not know" if they do not know the answer to a question. They should not give an answer to a question that does not respond to the question that has been asked.

Different communication styles are frequently a source of misunderstanding and confusion for attorneys and their foreign born clients. The lack of knowledge or what is appropriate in American culture may lead some foreign-born litigants to project a negative image that is not in their best interest in any adversary proceeding. Such conduct will often cloud the real issues at hand, frequently with disastrous results for the clients. Attorneys can facilitate the litigation process for their foreign-born clients and achieve positive results by providing coaching and information to ease the culture shock. ◆