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# Preventing Nuclear Settlements at Deposition

By: Bill Kanasky, Jr., Ph.D., J. Thaddeus Eckenrode, Steve Wood, Ph.D.

# INTRODUCTION

One of the hottest topics in civil litigation of late is nuclear verdicts. Presentations, articles, and books have been written on the topic. The defense bar, insurance carriers, and corporations have taken a keen interest in understanding and defending against the causes of nuclear verdicts. With less than 5% of civil cases going to trial, the number of nuclear verdicts pales in comparison to the number of nuclear settlements that occur throughout the United States daily. And yet, there is little discussion in the legal community about the causes of nuclear settlements.

Attorneys know ineffective fact witness testimony in depositions can dramatically inflate settlement values. There is a growing debate among defense attorneys regarding how witnesses should answer difficult leading questions during depositions. When presented with unfavorable yet indisputable facts, should witnesses agree with the fact and stop talking, or agree with it and explain it away with a defense-friendly theme? When deponents are accused of negligence and causing harm, should they disagree with the questioner and stop talking, or disagree and explain why they are not at fault? Which philosophy is more effective at suppressing settlement values? We strongly believe that the more talkative witnesses do themselves a disservice and lead to setting up their cases for disastrous results, even if the plan is to try to get the case settled and not take it to trial.

It is exceptionally rare that defense witnesses "win" the case through their deposition testimony. A more likely outcome is defense witness testimony will "lose" the case during the deposition. Without extensive preparation, the confrontation between defense witnesses and skilled trial attorneys is not a fair fight, regardless of the witnesses' intelligence or case facts. Savvy plaintiff attorneys salivate when defense fact witnesses launch into arguments or attempt to explain away unfavorable case issues. This results in a mismatch in relative skills – defense witnesses are completely out of their element, fighting on foreign soil, and attempting to out-argue a professional trial lawyer.[1]

# CONSIDER THE FOLLOWING EXAMPLES

## EXAMPLE 1:

A trucking accident case in which one of the allegations against the defendant trucking company is that its driver was not paying attention while driving, leading to a fatal collision. The defense denies the allegation, stating that the accident was the decedent's fault for abruptly stopping in front of the truck. At deposition, opposing counsel shows the company's safety director the in-cab video of the driver cleaning off snow and ice from his side mirror while driving moments before the fatal collision. The deponent is then asked, "Isn't it true that your company policy states that drivers should clean off their mirrors during their pre-trip inspection of the vehicle before putting the vehicle in motion?" The safety director is then shown the policy. How should this individual respond to the factual question?

In this example, the witness is presented with an indisputable fact and is asked to confirm the fact by the cross-examiner. The facts presented, however, are not favorable to the defense. In each instance, the deponent has two options:

**Embrace:** Accept the fact by answering the question directly and providing no further information beyond the question.
Ex: "Yes, that is correct."

**Pivot:** Accept the fact, then immediately provide an explanation to make the fact appear less damaging by answering.
Ex: "Yes, but if you recall that was a very cold, frosty morning and it would not be unusual for the mirror to frost up again."

## EXAMPLE 2:

A medical malpractice case in which one of the allegations against the defendant physician is that she failed to obtain an MRI after a major surgery, which led to a delay in diagnosing a serious medical condition. The defense denies the allegation, stating that getting an MRI was impossible because the patient was too large for the on-site scanner. At deposition, opposing counsel asks the physician, "Isn't it true that you breached the standard of care by failing to obtain a post-surgical MRI?" The deponent is shown the medical record, clearly indicating that an MRI was not obtained. In this example, the witness is being accused of negligence by the cross-examiner. Assuming the defense is not admitting liability, the witness cannot agree with this allegation. In this instance, the deponent has two options:

> **Reject:** Reject the allegation by answering the question directly and providing no further information.
> Ex: "No, I disagree."
>
> **Pivot:** Reject the allegation, then immediately provide an explanation to defend their position.
> Ex: "No, because we attempted to get one, but the patient was too large to fit into our MRI scanner. We performed a CT scan instead, which was unremarkable. The plan was to transfer him to another hospital that had an 'open' MRI device that would be more suitable for the patient's size. By the time we set up transport to the other hospital, the patient had developed significant cardiac and pulmonary problems that made him too unstable for the scan."

In these examples, both witnesses were instructed to pivot and both cases resulted in nuclear settlements.

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# EMBRACE/REJECT VS. PIVOTING

Defense attorneys and litigation consultants continue to argue the "embrace/reject" and "pivot" approaches. Regarding questions asking defense witnesses to confirm an unfavorable fact, some individuals believe witnesses should admit and embrace case facts without providing an additional explanation until specifically requested. This approach allows witnesses to be truthful and cut off additional counter-attack opportunities by opposing counsel. However, others believe it is essential to deny opposing counsel's attempt at a "sound bite" (i.e., agreement to the unfavorable fact) and believe witnesses should agree to the fact and immediately pivot to a defense-friendly explanation to take away the "sting" of the bad fact.

Regarding questions alleging negligence, some defense attorneys think witnesses should confidently reject the accusation without providing additional information. This approach allows witnesses to strongly disagree with the questioner and not become argumentative or defensive. If the questioner follows up with a "Why?" question, witnesses should provide a concise explanation confidently while saving more elaborate explanations for trial. However, other attorneys believe that defense witnesses need to "fight fire with fire" and actively seek opportunities to defend their position with defense-themed explanations, especially when facing an accusation of wrongdoing. Rather than waiting for a "Why?" question, witnesses are instructed to respond with "No, because (explanation)."

## THE UNDERLYING LEGAL STRATEGIES IN THE PRIOR EXAMPLES ARE:

**Embrace Facts/Reject Accusations**

- Explanations should be saved for trial when defense witnesses will have ample opportunity to explain themselves on direct (or rehabilitation) examination.
- It is unwise to show all your strategic cards at deposition, as it allows your adversary time to better prepare for your plan at trial.
- Agree with facts, reject allegations, and then stop talking; only explain yourself if you are explicitly asked.
- More talking leads to more questions, which increases the odds of opening a door that defense counsel wants to keep closed.

**Pivoting**

- Most trials settle, and witnesses must "win" the deposition by providing explanations for negative facts and allegations immediately.
- It is unwise to allow opposing counsel to obtain damaging "sound bites" of defense witnesses agreeing to harmful facts or denying an accusation without explanation.
- Elaborate and immediate explanations by defense witnesses may convince opposing counsel that they "have no case" and will cause them to rethink their settlement stance.
- Defense witnesses need to have a spine and fight back against accusations.

Below is a real-life example of a witness pivoting in a medical malpractice case.

***Q: Doctor, what are the known published indications for a pancreatic sphincterotomy?***

A: Well, (the patient) had excellent indications for performing a pancreatic sphincterotomy. The patient had a dilated pancreatic duct that was clearly visible on her MRCP. Now, the radiologist that read that film correctly identified the dilated bile duct at 11 millimeters. Now, I measured it at 11.7 millimeters. He correctly identified the dilated bile duct, and it's in an intact gallbladder. For the jury to know that typically a normal bile duct in the presence of an intact gallbladder, the measurement should be under six milliliters. So right now her bile duct is twice the normal diameter. In addition, what the radiologist did not read was that the -- there was dilation of the pancreatic duct. I read it to be 4.7 millimeters to 5.4 millimeters, and they had the pancreas above the ampulla/papilla.

So, I knew going into my procedure that this patient had abdominal pain. Her abdominal pain initially was intermittent. It was located in the epigastric area and right upper quadrant. It radiated into the back. It was accompanied – she went to the emergency room like twice on two visits, November 21st and -- I'm sorry, November 14th and November 24th. Both visits, she had pain and abnormal liver function tests. Both of those visits, however, she had a normal amylase and lipase.

And I confirmed the dilated pancreatic duct at the time of my contrast injection into the pancreatic duct showing now the pancreatic duct measured seven millimeters. So, on the MRCP, which was performed I believe the 18th of November, it was anywhere from 4.7 millimeters to 5.4 millimeters. However, now at the time of the ERCP, it's dilated even progressively more to 7 milliliters, and for the jury to know that the normal diameter of the pancreatic duct and the head is 3 millimeters.

***Q: Are you done, Doctor?***

A: Yes.

***Q: Okay. My question was: What are the known indications for a pancreatic sphincterotomy?***

After providing a three paragraph "response," the examiner repeats the question because the witness spent less time answering the question and more time pivoting and making sure he provided information "for the jury to know." Even an open-ended question is not a license to be non-responsive and pivot to your talking points (thereby disclosing the entire defense theme) as politicians do, but still only calls for a focused, limited, and responsive answer.

The above response by the physician is problematic for several reasons. First, it is clear from the examiner's follow-up question that the witness was not responding to the actual question. Second, the response was 37 lines of text in the deposition transcript, approximately 30 more than were needed to respond appropriately to the question. Third, providing so many lines of text increases the likelihood that opposing counsel will ask additional questions about the various pieces of information voluntarily offered by the witness. Therefore, rather than shorten the deposition, this witness has significantly increased it by his own doing. Fourth, opposing counsel was not overly concerned with the witness's long-winded response. Rather than say, "Thank you, Doctor, for that explanation; that clarifies many of my questions," opposing counsel repeated his initial question. Fifth, the witness was focused on the information "for the jury to know" without appreciating they would likely be unable to follow along and retain all this information. This witness could have offered the same information across several questions from opposing counsel – if counsel ever thought to ask these questions. Finally, this witness was in "teacher mode" and felt compelled to try to explain everything that was done in this case. Rather than confidently embracing his conduct, this witness looked defensive, and the lengthy response gave the impression that the witness was trying to explain away his alleged mistake.

## LEGAL TESTIMONY VS. POLITICAL DEBATES

Pivoting is a technique used in both media training and political debate preparation. Specifically, people being interviewed by the media or participating in a political debate are taught by their expert consultants to "pivot" their message when they are asked a question they do not wish to answer. In other words, by definition, pivoting is an accepted evasive maneuver in politics that is more commonly known as "dodging" a question. This approach is commonplace in contemporary politics, and politicians receive advanced training in pivoting methods to master these skills before debates.

Todd Rogers, a Harvard professor, was reportedly "enraged" by the amount of pivoting he saw in the 2004 presidential debates and wanted to explore the effectiveness of pivoting on voters. He conducted an experiment in which he recorded a moderator asking candidates a series of questions and manipulated the level of pivoting in the candidates' responses. Overall, he found that egregious pivots were easily detected by the research participants and led to negative ratings of the candidates' likability, honesty, and trustworthiness. However, he found that more nuanced pivots often go undetected by the average person. Rogers concluded that many people are incapable of detecting subtle evasion maneuvers and believes politicians can get away with dodging questions as much as 70% of the time.[2]

However, deposition and trial testimony are completely different scenarios relative to a political debate:

1. Witnesses are under oath during sworn testimony, unlike politicians at debates. Politicians dodge questions, deceive, or even flat-out lie with little consequence.
2. Unlike a political debate moderator, a cross-examining attorney can punish defense witnesses for pivoting attempts and badly damage their credibility by illuminating the pivot attempt and repeating the question to force the witnesses into answering the question directly.
3. If a case does get to the trial phase, jurors have vastly different expectations of witnesses in civil litigation compared to explanations and promises made by politicians. Society expects politicians to dodge questions and be slippery during media interviews and political debates. That is not the case in litigation – jurors expect witnesses to be honest and straightforward during their testimony.
4. Jurors do not want to be in a trial any longer than they have to be. They often view non-responsiveness and pivoting as a significant waste of their time, which shines a negative light on the side appearing doing so. In depositions, pivoting, rambling witnesses can provide plaintiff's counsel insight into the defendant's trial theme. Plaintiff's counsel will be much better prepared for trial if defense witnesses give away all they might say on the witness stand.

For the same reasons we strongly promote the idea of keeping our own clients' answers short and responsive, defense counsel should get mileage out of testimony from plaintiffs or their expert witnesses if they try pivoting themselves. It may extend the length of a deposition, but allowing pivoting plaintiff witnesses to talk as much as they like is rarely bad – other than the headache it will cause you to listen to them. They look as argumentative, non-responsive, and uncooperative as any witness or politician who will not answer a simple question with a simple answer. If defense witnesses give responsive answers, the dichotomy between the sides will be apparent. Jurors can easily conclude that while the defense has nothing to hide, the plaintiff witnesses keep trying to re-direct the examination. Whether to call them out with a "Why won't you just answer the question?" type of statement is a game-time strategic decision. Defense counsel may not want to be seen as bullying the non-responsive witness. One easy approach at trial is for defense counsel to ask simple, short, and straightforward questions. After a lengthy "pivoting" response, say, "Let me try this again, sir. All I asked you was…." The occasional refrain of "let me ask again" or "once again, sir," etc., makes it clear to jurors (if they have not already figured it out) that the witness won't answer the question.

## RATIONALE FOR PIVOTING

In preparing for depositions, many defense witnesses ask, "Don't I have the right to defend my actions?" Likewise, some defense attorneys think, "We don't want to come off as conceding things. We need to show that we can defend this case." These attorneys believe that if the witness just says "Yes" to a factually based question, it looks like a concession of wrongdoing. The plaintiff's attorney will tell the mediator (or jury) that "Mr./Ms. X even admits Y". In our MRI example earlier in this article, since the question was simply "Isn't it true that you didn't obtain an MRI post-operatively, did you?", the honest answer to that specific question IS "Yes", but some attorneys and most witnesses do not want to leave that alone, and want to explain it away immediately. Even though it is a fact, they think that if they do not explain it immediately then the plaintiff's attorney will crow about how "I got him to admit that he didn't obtain an MRI" in mediation or at trial. Witnesses with this mindset feel that explaining why they did not do so helps them and the case overall. The authors disagree.

One must own the true facts – they are what they are. You still get to challenge what the plaintiff attorney tries to do with those facts. If the next question after the above is, "And that's a deviation from the standard of care, isn't it, doctor?", the witness can answer with a simple but confident "Absolutely not," without further explanation. However, the tendency for witnesses to want to jump in and explain why can be infuriating. The witness can give away the entire defense theme, and the plaintiff's expert is fully prepared for that before he/she is deposed. If the witness sticks with those short answers, then when deposing the plaintiff's expert later, and he/she says that failure to obtain an MRI was a deviation from the standard of care, defense counsel can ask them, "Well, doctor, were you aware that the patient was too big for the scanner? Did you see references in the records to his size and body habitus? He certainly wasn't in a condition to be transferred elsewhere at that point, was he? And you don't want to try to jam a postoperative patient into a scanner that is so tight you have to grease him all over to get him in, do you?" Whether those questions are effective will depend on the expert, of course. However, if you have exposed your theme of "he was too big for the MRI scanner" explanation in the defendant's deposition, then every plaintiff's expert has weeks or months to prepare for such questions.

Contrarians also suggest that a "pivoting" explanation helps the defense at mediation. They believe that the plaintiff's attorney is less likely to be able to sell the "I got him to concede X" statements to a mediator who has read the defendant's deposition explanations about why the MRI was not done, etc. This ignores the fact that defense counsel can enlighten the mediator about any facts not already known by him or her through their own confidential mediation statement or in caucus meetings. The thinking by those attorneys who want their witness to explain everything at deposition is that if a witness fights back (pivots) in the deposition, the mediator will see the conduct as more defensible or conclude that the defendant is very confident about their actions and push for a more reasonable settlement figure. More likely, however, the mediator will think (and be frequently told by the plaintiff's attorney) that the defendant had a very defensive streak and may conclude they will not be a good defense witness at trial and will push the defendants to settle at all costs. More than one mediator has come into a defendant's caucus room to say, "I'm not sure your guy is going to hold up well at trial; you probably want to settle this one," as he/she tries to move defendants to a settlement amount that is much higher than they hoped.

The bigger issue is being perceived as "responsive" to the questions asked. Adding the "but" or "because" explanation after even an appropriate "yes" or "no" answer might sound responsive but comes off as evasive and argumentative. Most plaintiff's attorneys are bound to ask "Why" (to an answer, for example, that one's conduct was not inappropriate) anyhow, and if they do, then the witness can go ahead with a concise, strategic explanation. Notably, however, the witness is then being truly responsive to that "why" question and to every other question asked, which increases the witness's credibility.

**One must own the true facts – they are what they are. You still get to challenge what the plaintiff attorney tries to do with those facts.**

Another reason that most witnesses and some attorneys are opposed to giving simple "yes/no" answers is their inherent need to defend themselves. Whether it is ego or simple fragility, it is dangerous. This, by definition, is the precursor to amygdala hijack. For those defense witnesses who ask defense counsel, "Don't I have a right to defend my actions?", the answer is that they absolutely do and absolutely will, but at the right time – during the defense case at trial. Giving the plaintiff free information at the deposition is not "defending" their conduct, it is weakening their eventual defense position. On very rare occasions, if the defendant's deposition answers leave some important fact undiscussed, defense counsel may choose to ask very limited cross-examination questions to bring those out, but he/she needs to think about why that information must be addressed now, as opposed to a later point in time.

A contemporary example of this type of poor witness performance was seen in the deposition of former President Donald Trump in the rape/defamation lawsuit brought against him by E. Jean Carroll. When asked if he had, in fact, said during the "Access Hollywood" interview of many years ago that he "just kisses" women, "they let you do it if you're a star" and that you can just "grab them by the p----", he should have simply said "Yes". If asked why he said those things he could have fallen back on his "just locker room talk" response. Instead, he gave a rambling answer that was essentially argumentative, and followed it up with his comment that "it's always been that way – fortunately or unfortunately". None of that helped his case, and a simple "yes" answer could not possibly have been worse.

## CORPORATE REPRESENTATIVE DEPOSITIONS

Like video clips or audio soundbites that come back to haunt politicians years later, deposition testimony lasts forever. In that regard, a bad deposition given by a corporate representative will impact a company or corporate defendant for years in all subsequent litigation. As all defense counsel know, plaintiff attorneys liberally share and exchange material that they generate with other attorneys who may be suing the same entity in other venues or on later dates. It is not unusual to see a 30(b)(6) deposition notice in one case that is virtually identical to one against the same defendant in another case thousands of miles away. To that end, when the corporate representative starts getting defensive, scared, and talkative, it is almost a guarantee that his/her deposition answers will be used by all counsel in all subsequent cases. The 30(b)(6) witness who continually pivots with each response will tie the hands of subsequent witnesses who may be produced by the same defendant with questions like, "In an earlier deposition, your corporate safety officer testified that [reads prior long, rambling answer]. Do you agree with that statement?" That leaves the subsequent witness vulnerable (i.e., either agreeing with the long-winded pivoting response given previously or disagreeing with another witness from the same company). This may allow a plaintiff's attorney to get a "defensive" statement into a deposition that is otherwise being handled smoothly by a well-prepared 30(b)(6) witness. Either way, it increases the pressure on the corporate defendant to resolve that litigation before things get worse. Settlement value increases, sometimes exponentially.

When faced with a simple deposition inquiry, like, "Do your safety guidelines require you to inspect this equipment every 6 months?", the testifying corporate representative must understand that the question is very straightforward. Whether you did or did not do so in this case, the guidelines say what they say and are in writing. An attempt to pivot when the simple answer is "yes" will do more harm than good in the long run. Own the conduct, give an honest, simple answer, and save the "splainin'" for trial (or in caucus with the mediator).

# PIVOTING CUTS BOTH WAYS

Most plaintiff expert witnesses like to hear themselves talk. Either because of their hourly rate for testifying or because of their own inflated egos, few will concede simple facts or give short answers in a deposition. Defense counsel realize that a plaintiff expert who rambles on and on to a question that can and should be answered simply are the witnesses they will most probably be able to break down at trial, or at least make them look arrogant and non-responsive to the jury. To the contrary, a witness who does not add any detail beyond what is truly responsive to a question, or the ones who master the art of the simple "yes" or "no", tend to be the most difficult experts to face at trial. Few attorneys are foolhardy enough to ask a cross-examination question at trial, of an expert no less, to which they do not know the answer. This makes careful questioning of the plaintiff expert at deposition critically important to defense counsel. Likewise, it is why plaintiff attorneys love defense witnesses who pivot and ramble…it makes their job easier and gives them plenty of ammunition for mediation or trial.

## RISKS OF WITNESS PIVOTING AT DEPOSITION:

Instructing witnesses who are under oath to utilize manipulative communication tactics (evasion/dodging/pivoting) that are used predominately by politicians, arguably the most universally distrusted people in our society, should raise some concerns for defense counsel. Do defense attorneys really want their witnesses emulating politicians when delivering key testimony? In evaluating that question, defense counsel (and clients) must carefully assess the known risks of witness pivoting.

**1. Less Cognition, More Errors** – Maximizing cognition prior to each answer leads to increased accuracy and effectiveness of answers while minimizing cognition results in increased errors and inaccuracies. When a witness pivots, they are answering multiple questions simultaneously in their explanation, rather than answering one question at a time. Ideally, the witness should think carefully before each answer. However, when a witness pivots, they are sacrificing precious time to adequately think about their answer before speaking. Habitual pivoting by the witness leads to increased errors in testimony, as their explanations often become long and disjointed.

**2. Longer Depositions, More Fatigue** – The more a witness talks, the more questions they will receive from the cross-examiner. Witnesses who provide excessive explanations, particularly when those explanations are forced by the witness, open themselves to counter-attack opportunities from the plaintiff's counsel. Additionally, longer depositions cause the witness to fatigue, leading to decreases in attention and concentration. An attentive witness who can maintain maximum concentration levels during deposition is far less vulnerable to making critical testimony errors compared to an inattentive witness who struggles to concentrate.[3]

**3. Amygdala Hijack** – During amygdala hijack, the amygdala (the area of the brain in which the 'fight or flight' reaction is housed) overtakes the prefrontal cortex (the area of the brain responsible for logic and judgment), rendering the witness unable to rely on strategic responses learned in witness preparation sessions. The consequences of such an approach are often devastating to the defense case because poor deposition testimony inevitably transfers to the courtroom. During amygdala hijack, the witness abandons the deposition game plan generated during witness preparation sessions and instead answers questions with the goal of defending and protecting him- or herself (i.e., attempting to "win" the case). These responses can come across as evasive, defensive, and argumentative, and often they will open a new "can of worms" that exposes the witness, and subsequent witnesses, to further attack. The defense witness who plans to "win" the deposition by attempting to go toe-to-toe with the plaintiff's counsel enters the deposition primed for amygdala hijack.

**4. Illuminating Bad Facts** - Bringing unnecessary and repeated illumination to bad facts is unnecessary at deposition, but the pivoting witness does just that. When a witness pivots and dodges questions, savvy questioners will repeat questions and persistently draw attention to the unfavorable fact. Pivoting fuels a plaintiff's attorney's attack, giving them ample opportunity to illuminate the unfavorable facts of the case over and over again until the witness FINALLY acknowledges them. Specifically, the pivoting witness tries to run but ultimately cannot hide from the facts. It is especially damaging when a witness evades and fights with the plaintiff's counsel on an unfavorable fact for two pages of the deposition transcript, then finally admits the fact at the end of the sequence. Simply agreeing to and embracing the unfavorable fact from the start would eliminate the two pages of defensive dodging and shorten the deposition.

**5. Juror Perception of Evasiveness** – Evasiveness from witnesses frustrates jurors. Some cases do go to trial, and videotaped deposition testimony can come back to haunt key defense witnesses if they appear evasive during their deposition. Pivoting at trial is especially damaging, as a skilled cross-examiner will point out that the witness is not directly answering the questions. "That's nice, but that is not the question that I asked you, so let's try this again" (followed by repeating the original question) is an effective counter to witness pivoting that the plaintiff's counsel can employ in front of the jury that can severely hurt a witness' credibility.

**6. Hurts Defense Mediation Stance** – Even if defendants have every intention of trying to settle the case, defense witness pivoting at deposition can still be counterproductive since the plaintiff's attorney can use that "defensiveness and evasiveness" against the defense at mediation by suggesting to the mediator that the witnesses were evasive and were scrambling to defend their conduct. Plaintiff's counsel can take an aggressive position and demand more money to settle the case than it may truly be worth, or may even refuse to settle, using the defensive deposition testimony as leverage.

**7. Revealing Trial Strategy** – Witnesses who persistently pivot during depositions, particularly when being accused of wrongdoing, often expose the defense trial strategy to the plaintiff's counsel. This allows the plaintiff's counsel and his/her expert(s) to maximize their preparation and counter-attack strategy for trial as they will be well-educated on the defense's game plan. If necessary, defense counsel can ask their client limited and strategic open-ended questions at the end of the deposition to get key explanations on the record in a manner that will not ultimately reveal the defense strategy.

**8. Undermining Expert Testimony** – Defendant pivoting may potentially make a defense expert change his/her opinions about the case if the witness testifies in a manner the expert finds problematic. A previously supportive expert can have a change of heart after the defendant's deposition and state that they can no longer support the defendant because he/she felt some of their answers showed a lack of understanding of certain events in the case, were just too argumentative, or effectively contradicted the expert's own opinion. On the other hand, if the defendant embraces facts and rejects accusations without a defensive explanation, the expert can usually remain on board.

**9. Pivoting Becomes Habitual** – Defense counsel who subscribe to the pivoting method often tell witnesses, "If you have an opportunity to add more to your response to push forward our narrative, try and do it." The problem with this approach is that most lay witnesses do not have the self-discipline to know when to pivot and when not to. As a result, witnesses see every question as an opportunity to push forward the defense's narrative and fall into a routine of arguing, explaining, or adding detail in response to every question, even simple ones that require no further comment.

**10. Pivoting Takes a High Level of Sophistication** – Witnesses will run the gamut of cognitive sophistication, communication skills, and testifying experience. For the most part, they will have some level of deficiency in one or more of these areas. Therefore, expecting an uneducated, poor communicator to be able to pivot the same way as an educated, good communicator is a recipe for disaster (or a nuclear settlement). However, instructing witnesses to answer questions with a simple "yes/no" response when that is all that is required can help alleviate their concerns about whether they are sufficiently "scoring points" the way defense counsel wants them to. Moreover, even highly educated witnesses (physicians, scientists, engineers, etc.) who communicate well or might be thought of as "smart enough" to sell a pivoting story are still out of their element against a skilled cross-examiner, and their belief that they can talk circles around the questioning attorney sets them up for a big fall.

**Instructing witnesses who are under oath to utilize manipulative communication tactics (evasion/dodging/pivoting) that are used predominately by politicians, arguably the most universally distrusted people in our society, should raise some concerns for defense counsel.**

## CONCLUSION

While nuclear verdicts tend to get the most media attention, the "silent danger" in civil litigation is nuclear settlements. At the heart of many of these exorbitant settlement amounts is ineffective witness testimony in depositions. Rather than embrace or reject their conduct, witnesses often feel the need (or are trained by their legal team) to pivot away from the question and try to "win" the deposition – something they do not need to do, nor are they able to do.

Witnesses must understand they rarely "win" a case because of their deposition testimony; however, they can often lose it – or at least set the case up for a substantial settlement payment. It is undeniable that ineffective defense witness testimony can lead to both nuclear settlements and verdicts. The defense mantra of "the quality of the depositions determines your fate" has never been more accurate given the plaintiff bar's relentless attack on defense witnesses during discovery. The authors of this paper believe that the Embrace/Reject methodology of answering factual and accusatory questions is far more effective than pivoting for fact witness testimony at deposition (and trial, if necessary). Therefore, witnesses should not be instructed to engage in a verbal joust with a skilled litigator, as such efforts can easily backfire and lead to more economic exposure for the defense in the long run. Rather, fact witnesses should be advised that the goal of the deposition is not to "win" the case. The goal, as North Carolina State's former Head Basketball Coach, Jim Valvano, once said, is to "survive and advance."

## CITATIONS


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