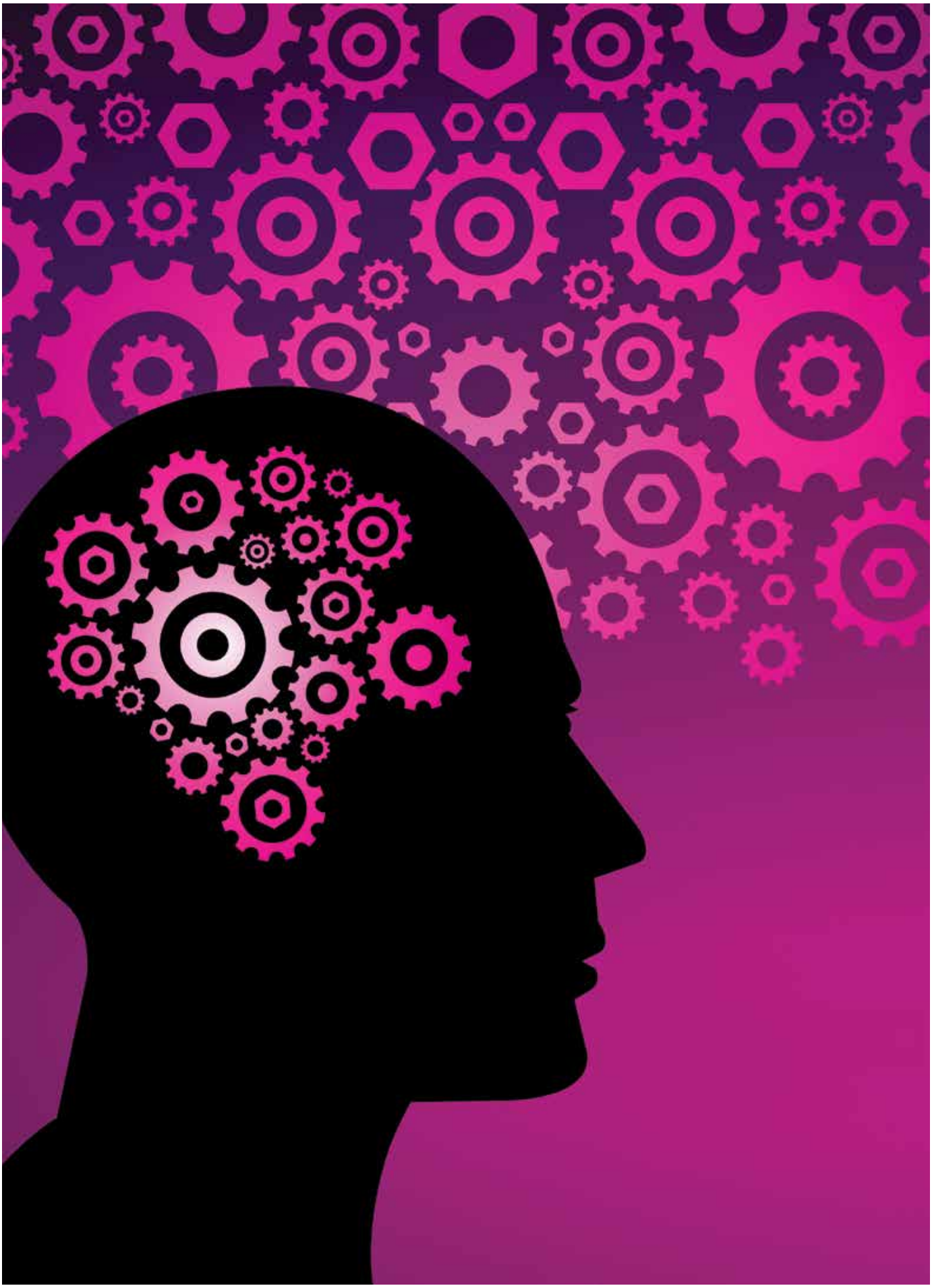

Less IS MORE

Part Two of Preventing Nuclear Settlements at Deposition

By William F. Kanasky, J. Thaddeus Eckenrode, and Steve Wood

When it comes to civil litigation, there is far more attention on nuclear verdicts compared to nuclear settlements. However, with only approximately 5% of civil cases going to trial, nuclear settlements are considerably more frequent. How witnesses perform during deposition can greatly influence whether a nuclear settlement is triggered or avoided.

In our previous article on this topic, "Preventing Nuclear Settlements at Deposition," which ran in the May 2023 edition of *CLM Magazine*, we discussed the two conflicting approaches to witness testimony in depositions—pivoting and embrace/reject—and how poor deposition performance can impact verdicts and increase settlement value. While there are proponents of both approaches, we believe the embrace/reject approach lessens the likelihood that a witness' deposition testimony will lead to a nuclear settlement.

In this article, we examine the rationale for pivoting and highlight several risks to the defense case when witnesses pivot.

RATIONALE FOR PIVOTING

In preparing for depositions, some defense attorneys, in an effort to show they can defend the case, will not want to be seen as conceding points. 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 even tell the mediator (or jury), "Mr. X even admits Y."

In an example from our previous article, a plaintiff's attorney asks, "Isn't it true that you didn't obtain an MRI post-operatively?" The honest answer to that specific question is, "Yes," but some attorneys and most witnesses believe they should attempt to explain it away immediately. Witnesses of this mindset feel that explaining why they did not do so helps them and the case overall. We disagree.

One must own the true facts: They are what they are. You still get to challenge what the plaintiff's attorney tries to do with those facts. For example, if the next question is, "And that's a deviation from the standard of care, isn't it, Doctor?" then the witness can answer with a simple, but confident, "Absolutely not" without further explanation. However, if the witness jumps in with explanations, he can give away the entire defense theme and the plaintiff's expert can fully prepare for it before she is deposed.

In the MRI example, if the witness sticks with short answers, then, when deposing the plaintiff's expert later and she says failure to obtain an MRI was a deviation from the standard of care, defense counsel can ask her, "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 the plaintiff's expert has weeks or months to prepare for such questions.

Some believe that if a witness fights back at a deposition by pivoting, the mediator will see the conduct as more defensible, or conclude that the defendant is very confident about his 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 will not be a good defense witness at trial. 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 tries to move defendants to a settlement amount that is much higher than they hoped.

The bigger issue is ensuring the witness is responsive to the questions asked. Adding "but"

or "because" explanations sounds responsive, but that often comes off as evasive and argumentative. In addition, most plaintiff's attorneys are bound to follow "yes/no" questions with, "Why?" If they do, then the witness can go ahead with a concise, strategic explanation while remaining truly responsive.

Another reason witnesses and attorneys oppose simple "yes/no" answers is their inherent need to defend themselves. 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. But, giving the plaintiff free information at the deposition is not "defending" their conduct, it is weakening their eventual defense position.

The most contemporary example of this type of poor witness performance was seen in the deposition of former President Donald Trump in the sexual abuse/defamation lawsuit brought against him by E. Jean Carroll. When asked if he had, in fact, said during the "Access Hollywood" interview many years ago that he "just kisses" women, that "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 that he could have fallen back on his "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's 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 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).

When faced with a simple deposition inquiry such as, "Do your safety guidelines require you to inspect this equipment every six months?" the testifying corporate representative must understand that the question is very straightforward. Whether he 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 explaining for trial, or in caucus with the mediator.

PIVOTING CUTS BOTH WAYS

Most plaintiff expert witnesses like to hear themselves talk, and few will concede simple facts or give short answers in a deposition. Defense counsel realizes that a plaintiff expert who rambles in response to a question that should be answered simply is a witness they will likely be able to break down at trial. To the contrary, a witness who does not add any detail beyond what is truly responsive to a question, or who masters the art of the simple "yes" or "no," tends to be a difficult expert to face at trial.

Consider that the same is true for plaintiff's attorneys: They love defense witnesses who pivot and ramble because it makes their job easier and gives them plenty of ammunition for mediation or trial.

RISKS OF WITNESS PIVOTING AT DEPOSITION

Defense counsel and clients must carefully assess the known risks of witness pivoting:

1. **Less cognition and 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, she is answering multiple questions simultaneously in her explanation, rather than answering one question at a time. Habitual pivoting by the witness leads to increased errors in testimony, as her explanations often become long and disjointed.
2. **Longer depositions and more fatigue.** The more a witness talks, the more questions she will receive from the cross-examiner. Witnesses who provide excessive explanations 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. **Amygdala hijack.** During amygdala hijack, the amygdala—the area of the brain where the fight or flight reaction is housed—overtakes the prefrontal cortex, the area of the brain responsible for logic and judgment. This could render a witness unable to rely on strategic responses learned in witness preparation sessions. Instead, the witness abandons the deposition game plan and begins answering questions with the goal of defending and protecting herself (i.e., attempting to "win" the case). These responses can come across as evasive, defensive, and argumentative. 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. 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.
6. **Hurting defense's mediation stance.** Even if defendants have every intention of trying to settle the case, defense witness pivoting at deposition can 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, allowing plaintiff's counsel and his experts to maximize their preparation and counter-attack strategy for trial.
8. **Undermining expert testimony.** Defendant pivoting may potentially make a defense expert change 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 she can no longer support the defendant because 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.
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 can is a recipe for a nuclear settlement. Even educated witnesses who communicate well 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.

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. 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. 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. 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." ■

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