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In Transit

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In This Issue

Leadership Note

From the Chair

By Matthew S. Hefflefinger

Hello 2020—what an interesting year it has been! Our Trucking Law Committee is more than 1,000 strong, and the Steering Committee has grown to a total of 73 individuals who occupy 91 positions. Incredible! Steve and I cannot thank you all enough for your hard work and dedication.

Despite some of the current uncertainties, we are confident that the Trucking Law Committee will have a greater focus and emerge stronger from the current crisis.

Consistent with the history of the Trucking Law Committee, we have three excellent articles in this edition of In Transit. The articles touch upon issues involving Federal Preemption of State Law Negligence Claims Against Freight Brokers, Preventing a DOT Audit and Tips for Defeating the Reptile.

Patrick Foppe, Publications Chair, has a number of writing opportunities available for anyone wishing to get published. This is the first of three newsletters, and we also have opportunities to publish in The Voice, For The Defense and In House Defense Quarterly. If you have an interest in writing an article, please communicate with Patrick Foppe at pfoppe@lashlybaer.com.

As many of you are aware, we previously had scheduled the Trucking Law Seminar in Austin, Texas in late April. It was postponed due to the current crisis, but we are ecstatic to inform you that the Trucking Law Seminar will be conducted in Austin, Texas on November 19 through November 21, 2020 at the Austin Marriott Downtown. The Austin Marriott Downtown is a brand new hotel that will not open for business until August, 2020. We are deviating slightly from past practice by having the Seminar run from Thursday through Saturday. Our tentative plan is to conduct Panel Counsel Meetings on Thursday, November 19, with the Seminar proceeding Friday, November 20 and Saturday, November 21. We plan to hold a fun offsite event, and we will also conduct a Philanthropy project. The details of these activities will be forthcoming, but our intent is to have the Seminar look similar to our previously planned Seminar, with the caveat that we will certainly implement some developments in the trucking industry as a result of COVID-19.

The DRI Annual Meeting (or "Summit") is scheduled at the Hilton in Washington, D.C., on October 21–24, 2020. We are taking a unique approach this year to our CLE. We are partnering with Cybersecurity and Data Privacy, Insurance Law and Workers' Compensation in developing a state of the art CLE program. We are in the final planning stages, but we are confident that the program will appeal to a wide audience, including those engaged in serving the trucking industry. The information regarding the DRI Annual Meeting is currently posted on the DRI website.

We are greatly expanding our Online Programming in 2020. Our Online Programming Chair, Melody Kiella, has done an excellent job of organizing a very ambitious Online Programming campaign for 2020. Our first Webinar conducted March 5, 2020 entitled "The Ghost of Treatment Past: Phantom Medical Bills, Medical Litigation Funding, and How to Fight Them" was a huge success. We will not only be conducting more Webinars throughout 2020, but we will also have Recorded Programming available for review on the DRI website as well as Podcasts, with the initial thought that we will address the Reptile in a Podcast series.

The use of our Online Community Page has grown, and we fully expect that it will be very active this year. We encourage all of you to continue using the Community Page, which serves as a platform for us to communicate with each other so that we can better serve the interests of our clients and the trucking industry.

Our Subcommittees, or "Specialized Litigation Groups," are organizing and will be active throughout the year. The Subcommittees will be posting to our Community Page, and they will also be involved in publishing articles and developing some online programs. If you are interested in getting involved in the work of the Committee, there are great opportunities through one of our Subcommittees, which include Biomechanic/Accident Reconstruction, Cargo Claims, Insurance Coverage, Logistics, Regulatory/Governmental Affairs and New Trucking Attorney/Young Lawyers. If you have any questions about getting involved in the work of our Subcommittees (or "Specialized Litigation Groups"), please reach out to our Chair, Sarah Hansen.

We welcome your involvement in the Committee. Given the growth in the number of individuals involved in the

Steering Committee, we obviously are committed to making room for anyone who expresses an interest and wants to get involved. It is important to note, however, that we have an expectation that individuals will "roll up their sleeves" and undertake work that benefits the Committee, DRI, each of us as lawyers as well as the trucking industry. If you have interest in getting involved, please reach out to me—mhefflefinger@heylroyster.com or Steve Pesarchick—spesarchick@sugarmanlaw.com. We will find a place for you.

Matthew S. (Matt) Hefflefinger is a Shareholder in the Peoria, Illinois office of Heyl Royster Voelker & Allen PC and is chair of the firm's Trucking Practice Group. His practice is devoted primarily to the defense of complex personal injury cases in the trucking and construction industries. Matt is an aggressive advocate who has tried many cases to verdict and is frequently contacted by clients immediately after a catastrophic loss to help develop the facts and case strategy. He is a frequent presenter on a variety of litigation related topics at local and national legal seminars. Matt is the currently the chair of the DRI Trucking Law Committee.

Feature Articles

United States Court of Appeals Likely to Weigh In on Federal Preemption of State Law Negligence Claims Against Freight Brokers

By Ryan A. Kemper

Freight brokers operating in interstate commerce find themselves in an increasingly precarious position balancing the contradictory demands of federal regulations and state negligence law. A reputable freight broker will, in compliance with federal regulations, generally confirm its retained motor carriers are in good standing with the Department of Transportation. Its due diligence should, at minimum, consist of confirming the carrier's adequate rating and crash history with the Federal Motor Carrier Safety Administration (FMCSA). The broker rightfully believes that its motor carrier's compliance with federal regulations is adequate to confirm that they are brokering a load that will be handled by a safe, reputable carrier, who will ensure that its drivers are properly trained.

Nonetheless, plaintiffs' attorneys seeking additional monetary compensation avenues for their clients in personal injury actions arising out of trucking accidents are increasingly casting a wider net. Plaintiffs' counsel not only file suit against the truck driver and the motor carrier employing him, but also companies with an ancillary role in managing the load, including the shipper and freight broker. These parties obviously have little or no ability to directly control the driver and, in the usual course of events, have no contractual right or obligation to train, instruct, or monitor the driver transporting the load. Unfortunately, the costs of such litigation can be substantial for a freight broker, even where the plaintiff cannot ultimately show any wrongful conduct.

Over the last several years, United States District Courts have become receptive to the argument that state-law negligent hiring claims should not be permitted against freight brokers, because such claims implicitly add arbitrary state-law requirements to the federally regulated trucking industry. A business brokering loads across state lines should not be burdened by state-by-state assessments with varying requirements and enforcement. Filed in the form of a state court negligence claim, the real issue in these cases is what constitutes proper conduct of a broker when the broker complies with federal regulations and has no direct control of the conduct of the motor carrier This argument has taken the form of federal preemption.

In a recent string of cases, including *Volkova v. C.H. Robinson Co.,* 2018 U.S. Dist. LEXIS 19877 (N.D. Ill. 2018); *Georgia Nut Co. v. C.H. Robinson Co.,* 2017 U.S. Dist. LEXIS 177269 (N.D. Ill. 2017) and *Creagan v. Wal-Mart Transportation, LLC*, 354 F. Supp. 3d 808 (N.D. Ohio 2018), U.S. District Courts have shown a willingness to grant summary judgment in favor of freight brokers under the preemption provision of the Federal Aviation Administration Authorization Act ("FAAAA"), which applies to "any

motor carrier, broker, or freight forwarder" and prohibits States from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier... broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. §14501(c)(1).

The Congressional objective of the FAAAA has been described as "preventing states from undermining federal deregulation of interstate trucking through a patchwork of state regulations." *Miller v. C.H. Robinson Worldwide, Inc.,* 2018 U.S. Dist. LEXIS 194453 (D. Nev. 2018). Arguably, under the preemption provision, a plaintiff cannot assert a state-law negligent hiring claim against a broker, because any such claim has a significant impact on the regulatory objectives of the FAAAA and is therefore explicitly precluded by federal law because of the interstate nature of the industry.

Specifically, in addressing preemption under the FAAAA, the Supreme Court has stated that "[t]he phrase 'related to'... embraces state laws 'having a connection with or reference to 'carrier rates, routes, or services,' whether directly or indirectly." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (U.S. 2013). The question, then, is whether the imposition of a patchwork of state-law "reasonableness" standards on freight brokers, under a negligent hiring rubric, has a significant economic effect on such services, either directly or indirectly. The only logical answer is in the affirmative.

In the absence of federal preemption, a broker arranging transportation of a load from Maine to California, would be responsible for no less than fourteen individual state-by-state determinations of what constitutes appropriate vetting of a motor carrier it intends to hire. Thirteen of those states may determine that it is reasonable, and therefore lawful, for the broker to rely on FMCSA registration and accompanying safety review to ensure it is hiring safe motor carriers and drivers. But, should one state disagree, the additional costs are tremendous.

It would undoubtedly place a substantial economic burden on interstate commerce if a local court, in a state-law negligence claim, determines the vetting process accepted by their sister states is inadequate, and a broker is responsible for conforming not only with the FMCSA, but also the particular local or state vetting obligations. Under such a determination the broker could confirm FMCSA registration of a carrier, but be found to be unreasonable in hiring a properly registered motor carrier without, for example, first hosting weekly training sessions with every driver employed by a motor carrier, drug testing the drivers before each transport, or monitoring the individual driving behaviors of each employee of the motor carrier throughout transport. There is no logical termination point to what any single state may require. The costs would be prohibitive, and there is no clear method by which the broker could begin to meet such an obligation to oversee employees or contractors of the motor carrier with whom it has no direct contractual relationship. Avoiding such unreasonable and prohibitive costs is the express purpose of the FAAAA.While some argue the imposition of state by state rules is cost prohibitive, plaintiffs set forth opposing arguments. First, plaintiffs question whether or not a personal injury action resulting from motor carrier negligence actually "relates to" the service of the broker, thus falling within the preemption language. The better reasoned decisions hold that the service of the broker—*i.e.* arranging for the transportation of a shipment by a motor carrier—does not change, regardless of whether the actions of the motor carrier resulted in property damage or personal injury. However, not all courts have agreed with this analysis. Many courts find a distinction when personal injury is involved because such claims arguably do not have as significant an impact on the regulatory scheme. See *Mann v. C. H. Robinson Worldwide, Inc.,* 2017 U.S. Dist. LEXIS 117503 (W.D. Va. 2017).

Second, plaintiffs point out that the FAAAA contains a safety regulatory exception which provides, in relevant part, that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. §14501(c)(2)(A). This is the heart of the current debate. For years federal courts reasoned that a common law claim arising from the negligent procurement of a trailer represents a valid exercise of the state's police power to regulate safety. See *Finley v. Dyer*, 2018 U.S. Dist. LEXIS 182482 (N.D. Miss. 2018).

In rejecting this reasoning, the court in *Creagan v. Wal-Mart Transportation, LLC*, 354 F. Supp. 3d 808 (N.D. Ohio 2018), found that to construe the regulatory exception so broadly would essentially swallow the preemption rule entirely. The *Miller* court likewise distinguished the regulatory exception as one limited to a recognition of the state's police power, but not exempting a private cause of action. *Miller v. C.H. Robinson Worldwide, Inc.,* 2018 U.S. Dist. LEXIS 194453 (D. Nev. 2018). The court in *Miller* also correctly pointed out that the term "broker" does not appear in the in the language of the safety regulatory exception, which, on its face, only allows state regulation of motor carriers. This strongly suggests Congressional

intent to treat brokers differently due to their limited direct control over drivers.

Finally, in applying FAAAA preemption to bar negligent-hiring claims against freight brokers, the *Volkova* and *Creagan* courts recognized that an injured plaintiff is not left without recourse, because the plaintiff may still proceed against the motor carrier, and the FAAAA mandates that a motor carrier must carry liability insurance to register. *Volkova.,* 2018 U.S. Dist. LEXIS 19877 (N.D. Ill. 2018); *Creagan,* 354 F. Supp. 3d 808 (N.D. Ohio 2018). The statutory insurance requirement specific to motor carriers likewise suggests a congressional intent to preempt claims as to more ancillary parties such as the shipper and broker, who are not explicitly required to carry insurance under the regulatory scheme.

To date, no federal circuit court has addressed the FAAAA preemption issue, leaving district courts with no binding authority or guidance. Each district court is left to reconsider the same questions on the basis of persuasive authority in every case. Given the divergent decisions in various district courts, that is likely to change in the near future. In *Creagan, Jr., et al. v. Wal-Mart Transportation, LLC, et al.*, 19-3562 (6th Cir.), the Sixth Circuit may have the first opportunity to weigh in on this important issue to freight brokers, likely setting the tone for future challenges across the country.

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Fight the Good Fight to Prevent a DOT Audit Through Written Discovery

By Bridget Boyle and Larry Hall


Watching your favorite television show, scrolling through Facebook, and commuting to work are all likely to have one thing in common. During each activity you will probably be bombarded by local and national plaintiff's lawyers advertising for clients who have been involved in collisions with commercial motor vehicles. The competition for these cases has become so intense many plaintiffs' attorneys advertise their "investigation" abilities in addition to achieving large settlements and verdicts to stand out in a crowded field. Many of these attorneys have made accident litigation look more like a Department of Transportation audit, than a legal dispute related to a specific set of facts and circumstances. These attorneys typically justify their fishing expeditions by claiming a failure to comply with each and every regulation, regardless of the relation to facts, is relevant to show a jury the driver and company are unsafe. They often retain retired motor carrier enforcement officers to conduct audits in an effort to extract a settlement where the commercial motor vehicle driver is not at fault, or, to significantly increase a case's perceived value.

Responding to written discovery requests numbering in the hundreds in a routine collision with no injuries reported on scene, forces defense counsel to thread the needle by complying with applicable discovery rules, advocating for our clients, and observing local practices and customs. The good news is that recent amendments to the Federal Rules, with some states following suit, have given defense attorneys a new approach to defend a DOT audit through discovery.

In December 2015, the Federal Rules of Civil Procedure were amended to, amongst other things, narrow discovery. Marinelli, J., *New Amendments to the Federal Rules of Civil Procedure: What's the Big Idea?*, ABA Business Law Blog (February 20, 2016). Notably, the Advisory Committee reinstated proportionality factors into Rule 26(b)(1) and removed the broad "subject matter" standard for relevancy. *Id.* This was done in an effort to scale back the immense undertaking of written discovery, which often is

the most time-consuming and potentially hazardous portion of the case for defendants and defense counsel. *See id*. The factors provided in Rule 26 are used to determine whether discovery is proportional or not, which makes these changes universally impactful. *Id*. Under the revised rule, the trial court may consider six proportionality factors:

> (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. Pro. 26(b)(1).

Across all areas of litigation, the impact from the Rule 26 amendment was received more like a ripple than a wave. Waterworth*, Proportional Discovery's Anticipated Impact and Unanticipated Obstacle*, 47 U. Balt. L. Rev. 139, 163-64 (2017). After the implementation of the new and improved discovery rule, the proportionality factors were, of course, applied increasingly by federal courts. *Id*. Data comparing federal discovery decisions before and after the amendment, however, suggests there was only a minimal increase in discovery restrictions. *Id*. Before the change, courts gave at least some discovery restriction in 56 percent of cases. *Id*. In cases after the amendment, courts provided restrictions on discovery in 61 percent of cases. *Id*. The distinctive and intentional change to the Rule, it seems, did not have the intended impact. *Id*.

Accordingly, industry-level change has neither been loud nor vast. It is hard to tell whether this is due to lack of merit or lack of fight. Regardless, the fight is still worth it to protect your client from unreasonable burden and also to prevent defending irrelevant compliance issues meant to distract and confuse the jury. Making the effort to object on proportionality and relevancy can still pay off. For example, in *Cabarris v. Knight Transportation*, a federal district court limited discovery of a driver's logs and personnel file in a personal injury action based on an accident involving a tractor trailer truck. WL 5650012, at *1–2 (W.D.N.Y. 2018). While the plaintiff in *Cabarris* initially requested 90 days-worth of logs, the defendant only produced logs from nine days. *Id*. The plaintiff filed a motion to compel. *Id*. In response, the court ruled in favor of the defendant, holding that nine days of logs were sufficient in proportionality and relevancy. *Id*. The plaintiff also requested production of the driver's entire personnel file. *Id*. While the court directed defendants to produce information from the personnel file, the production was limited to information relating only to the driver's termination from employment. *Id*. In this case, fighting back on discovery requests significantly impacted the data available to plaintiffs.

Other cases have also shown the value of fighting back against overbroad and abusive discovery. Commercial motor carriers have successfully prevented plaintiff's counsel from seeking Rule 30(b)(6) designees through interrogatories without stating with reasonable particularity the issues or topics on which the company is to provide testimony. *Merriweather v. United Parcel Service, Inc.*, 2018 WL 3572527 (W.D. Ken.). In the same case, the Court found the wreck register for one year prior to the accident was not discoverable, as "it is unlikely that any information listed in the wreck register would have any bearing on the foreseeability of the wreck or show any similarities of the wreck itself. *Id.* at *16–*17. Additionally, the Court found a request for "all company manuals, policies, and guidelines covering truck safety," and similar requests, overly broad and limited to the discovery to only the training and materials provided to the driver involved in the collision at issue. *Id.* at *17–18. (*See also Francois v. Colonial Freight Systems, Inc.*, 2007 WL 679998 (S.D. Miss. 2007) (granting the motor carrier's protective order in response to a 30(b)6) notice preventing plaintiff's counsel from inquiring about "safety policies, procedures, regulations and/or standards employed by Colonia during, preceding and subsequent to the accident in question," past complaints or civil actions, and all individuals responsible for management, supervision and control of the company); *Dalka v. Sublett*, 2002 WL 1482532 (W.D. Tenn.) (denying plaintiff's request for driver's worker's compensation file, medical records, and documents filed with Department of Labor).

The change in the Federal discovery standard is now impacting some state courts as well. For example, this past summer Missouri changed its Supreme Court Rules in relation to discovery. Harris, R., *What you need to know about Missouri's updated discovery rules*, Thomp. Cob. Publications (September 17, 2019). The changes to the discovery rule, Rule 56.01(b), came into effect in late August, and adjusted Missouri's discovery rules to better align with the Federal Rules. *Id*. As a result, Missouri now requires discovery to be proportional to the needs of the case. *Id*. Furthermore, the new Rule gives the court discretion to limit discovery in certain circumstances. Mo. Sup. Ct. R. 56.01(b). The court must, on motion or on its own, limit discovery if it determines that a party seeks discovery that is duplicative, outside the scope of the rules, or can be obtained through less burdensome means. *Id.* Following the rule change, our firm has successfully challenged discovery in commercial motor vehicle accident litigation where it was clear plain-

tiff's counsel had little desire to litigate the accident itself, instead focusing solely on every technical aspect of Federal Motor Carrier Safety Administration compliance. We have found explaining to the Court what plaintiff's counsel is doing and why it is improper is helpful.

The change to Rule 26(b) of the Federal Rules of Civil Procedure was intended to empower courts and parties to limit discovery by providing a new avenue to object. Despite the statutory intent, fighting discovery in commercial motor vehicle accidents remains an arduous task. The typical audit that occurs in trucking cases, masked as discovery, is the perfect opportunity to push back with the proportionality factors and insistence that discovery requests are relevant to the claims rather than the broad subject matter. Breaking the mold takes dedication and a unified front, but limiting access to irrelevant motor carrier data, in any degree, is worth the fight.

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Lawrence Hall is a shareholder of Sandberg Phoenix in St. Louis. He joined the firm in September 2011 and focuses his practice on matters of transportation, product liability and personal injury. He chairs the firm's transportation team and is a member of the product liability practice group.

The Ring of Fire

Tips for Defeating the Reptile—Avoiding Low-Road Cognition in Depositions

By Paul W. Murphy

The Ring of Fire is the most deadly and destructive part of a hurricane or other major storm system. Of course, if you're already inside the storm, the eye is the safest place to stay—but that's easier said than done. Although conditions might be sunny and clear within the storm's peaceful eye, it's challenging to stay inside it. Because the eye is constantly moving, you must move *with* the storm until it subsides. A slight drift in any direction could mean a visit to the Ring of Fire.

For our clients, each lawsuit represents a potential storm, and an unfavorable deposition can mean a one-way ticket to the Ring of Fire. Unfortunately, even when factually well-prepared, witnesses can still fall prey to the emotional, psychological, and cognitive stressors of the deposition environment. Even with the best of intentions, defense attorneys do not always have the time, ability, or budget to prepare their witnesses for the full spectrum of challenges they may face during the deposition.

The goal of this article is to give you tools and tips for preparing your witnesses, especially those unaccustomed to giving deposition testimony. In doing so, we discuss the plaintiffs' goals, the story they're trying to tell, and the image of defendant they want to create for the jury. By shedding light on some of the most common tricks used by plaintiff attorneys, we hope to make it more difficult for plaintiffs to view or paint our clients in a negative light.

Who's Telling Your Client's Story?

When it comes to litigation, Lady Justice may be blind, but she certainly doesn't move very quickly. Due to any number of factors, civil lawsuits can last two, three, or four years (or more) before ever getting to trial. Within this vast expanse of time, the few hours comprising a defendant's deposition represent a miniscule percentage of the length of the case. A proverbial drop in the bucket. However, as most of us have experienced, a defendant's poor performance at deposition can change the trajectory of the entire case, making that "drop" critical.

Yet how many times has it happened that, despite excellent preparation, a defense witness totally bombs a deposition? They become hostile, stammer, make damning admissions, give incorrect answers (inadvertently lie), or say something exactly opposite from how they were prepared. At some point, every defense lawyer will face the fallout from these types of experiences. And although they seem bizarre when they happen ("*I don't get it—we spent hours reviewing that concept!*"), poor deposition

performance usually occurs because the deponent gets "psyched out" in some way.

Whether the deponent is a driver, terminal manager, safety director, corporate representative, or other defense witness, they each play a role in telling the company's story. Under plaintiff's tactics, such as the Reptile Theory, the plaintiff hopes to create a story of corporate greed—shameless acts of gross negligence carried out by unfeeling corporate automatons who unapologetically prioritize profits over safety. Every good story needs a villain, right? And when defense witnesses fall into certain traps skillfully set by the plaintiff's attorney, they unwittingly play their "role" in this story perfectly.

On the other hand, by preparing for these traps in advance, defense deponents have a unique opportunity to connect with the future jury, humanize the defendant corporation, and tell a new version of the story to counteract the plaintiff's "villain" story. When juror's see the defendant and its representatives as kind, respectful, and empathetic, they naturally feel connected to the defendant. As a result of this connection, the desire to punish or "teach a lesson" to the defendant is naturally diffused. For this reason, plaintiff's deposition traps are designed to make the witness appear hostile, unfeeling, or *in*human, and break any possibility for connection. As defense attorneys, when we prepare our witnesses to put their humanity on display, we better protect our client from the possibility of an adverse outcome.

Deposition Traps: An Overview

At the most basic level, jurors tend to place blame on people they perceive as "idiots," "liars," and "jerks." And it doesn't particularly matter what the evidence shows. If jurors *feel* like the defendant (or its representative) is an idiot, a liar, or a jerk, they will assume that—regardless of the evidence—the defendant probably did something that deserves punishment. For this reason, skilled plaintiff's lawyers have an arsenal of tricks to nudge the jurors' perception in plaintiff's favor. No matter the level of preparation, experience, education, or intellect, all deponents are susceptible of falling into plaintiff's traps at some point.

Emotional vs. Cognitive Traps

Although there are hundreds of "tricks" lawyers might use, most fall into two basic categories: *emotional traps* and *cognitive traps*. Emotional traps are calculated to put the deponent into fight-or-flight mode. Once his body and brain are flooded with the stress hormones produced by this emotionally charged state, the witness makes the plaintiff's job easy because his words and actions make him look or act like a villain. Emotional traps are less about facts and more about the image the witness portrays for the jury.

By contrast, cognitive traps are designed to play tricks on the mind and extract information. Unlike emotional traps, the purpose of these mind games is to elicit admissions from the deponent, not only laying the groundwork for plaintiff's primary case, but forming the factual justification for invasive discovery and punitive or otherwise excessive damages. For instance, the "safety rule" trap used by Reptile Theory practitioners (discussed in more detail below) is one type of cognitive trap. By preparing for the deposition with these traps in mind, your witness is more likely to give clear, confident testimony that presents the company in an empathetic, human light.

The Dangers of Low-Road Cognition

Our brains constantly process tons of information, both consciously and subconsciously. As long as our brain doesn't detect any signs of danger, it allows us to think and behave like the evolved, intelligent *homo sapiens* that we are. This is "high road" cognition and the optimal condition for giving deposition testimony. In this state, we stay in the captain's chair, process information rationally, and maintain control over our emotions. If we stay on the high road, we can remember, analyze, strategize, and make well-reasoned decisions.

However, the moment danger is perceived, the brain shuts down all but the most essential physical and cognitive processes to *fight* or *flee* from the perceived threat, and it *keeps* us in this "fight-or-flight" mode until safety is fully restored. This is "low road" cognition. Once your witness detours toward the low road, his emotions have taken control of the ship and are guiding his thoughts, words, and actions. Low-road cognition is the quickest route to the Ring of Fire. When deponents start answering questions in low-road cognition, the forecast is pretty bleak. *At best*, they'll end up sweating, stammering, stuttering, and forgetting key names, dates, and facts—which makes them look either like an idiot or a liar. *At worst*, they'll end up becoming angry, sarcastic, belligerent, threatening, or even violent—which makes them look like a jerk. Either way, it's a lose/lose scenario for the defendant.

Although many different types of triggers can induce fight-or-flight mode, depositions are usually free from most "real world" stressors like bears, brawls, and bumps-

in-the-night. Rather, during depositions, attorneys induce low-road cognition using three primary tactics: aggression, humiliation, and confusion. *See, e.g.*, B.F. Kanasky, *et al.*, "*The Effective Deponent: Preventing Amygdala Hijack During Witness Testimony*," *For The Defense*, June 2018. We will address each of these in greater detail below. As one might imagine, however, different personality types will be more or less vulnerable to the different tactics. If your witness is someone you do not already know well, it's imperative that you spend extra time getting to know him or her. After all, the first step to humanizing the company is to humanize yourself to the witness, and vice versa.

Hurricane Conditions

As if the pressure of the deposition itself weren't enough (being in a room filled with people with their eyes, and usually a video camera, homed in), deposition traps are designed to capitalize upon a witness's hidden or subconscious emotional weaknesses, insecurities, or "triggers." And everyone has them. In addition to personal insecurities, many deponents are naturally concerned about the outcome of the deposition and the case as a whole. They might be worried about the future of their jobs or the health of their company as a result of the litigation. Plus, depending on the day, many different stressors *unrelated* to the deposition could be in your deponent's personal landscape, including family problems, financial issues, indigestion, back pain, or lack of sleep the night before. As a result, even experienced deponents are never fully immune from deposition traps. Whatever is going on in their inner psyche will be magnified and thus "trigger-able" once the deposition begins. By like token, concern over matters related and unrelated to the deposition can create worry, anxiety, and mental distraction that creates additional vulnerabilities.

Unfortunately, these are also the issues that witnesses often do not share with their own attorney. They might be embarrassed about something or simply believe that personal issues, fears, and stressors are irrelevant in the deposition context. For this reason, it is critical to spend enough time with your witness in advance of the deposition to get to know him or her on a more personal level. When you engage the witness, it lets them know that you care about them and what's going on in their lives. By establishing a deeper level of trust and teaching them about the types of emotional triggers they may face, the witness is more likely to open up and share information with you that will better enable you to defend them throughout the deposition, reducing the chances of unpleasant surprises.

Because all witnesses have some amount of preexisting stress, in reality, most attorneys don't even have to try very hard to activate witnesses' triggers. The higher the preexisting stress, the easier the opposing lawyer's job becomes. In other words, when deponents are unprepared for emotional traps, they become their own worst enemies. Moreover, sometimes these traps are not even purposefully "set" by the plaintiff's lawyer, but arise naturally as a function of personality, conversational style, disorganization or lack of preparation (on the part of plaintiff's attorney), or the introduction of certain facts that any good lawyer would inquire about. Unfortunately, even these inadvertent triggers can feel like personal attacks, creating unnecessary defensiveness and additional stress for the witness. Again, the importance of preparation cannot be overstated.

Emotional Traps

Within the context of a deposition, the top three methods for putting a deponent in an emotional reactive, fight-or-flight state are aggression, humiliation, and confusion. This section dives deeper into each of these methods, with illustrations and examples. Although presented here as separate, discrete concepts, as a practical matter, emotional traps are often mixed together in a kind of sinister cocktail. When the lines are blurred, it's hard to tell where one trick stops and the next one starts. However, taking the time to learn about and prepare for any emotional trap will empower your witness to handle most situations.

Aggression

As the name suggests, aggression tactics are calculated to make the deponent feel scared, powerless, disrespected, angry—or all of the above. Aggression techniques can be used separately or together, in any order, and are limited only by the scope of the attorney's imagination.

The Power Grab

The goal of "power grab" techniques is to establish dominance and control over everyone in the room, including and especially the deponent. These tactics involve the use of social cues, verbal directives, and rhetorical techniques to gain "alpha" status (their turf, their rules, their timeline). Here are some ways the power grab might play out:

- Ignoring the witness – Failure or refusal to use basic courtesy in initial introduction and subsequent interactions with the witness.

- Setting rules – Announcement of certain "rules" about when, where, and how the witness can sit, stand, speak, eat, take breaks, etc., both before and during the deposition.
- Giving commands – Use of verbal cues to control witness's body movements ("*look me in the eye and tell me…*" "*show me exactly where on that document it says…*")
- Interrupting the witness – Talking over the witness or refusing to let the witness complete a sentence.

Power grab techniques can have different effects depending on the witness's personality. For those who are accustomed to being the "alpha" in their own worlds, these tactics can be seen as an overt act of hostility. Conversely, because power grab tactics defy social conventions, people who are normally congenial can become quickly uncomfortable. When this happens, they may develop a subconscious desire to please the aggressor in order to reestablish a more sociable atmosphere.

Intensity & Intimidation

When attorneys use intensity and intimidation, the goal is to make the witness uncomfortable and fearful. This can be accomplished through the use of verbal and non-verbal techniques:

- Volume – Shouting or speaking uncomfortably loudly.
- Tone – Caustic, abrasive, or sarcastic tone of voice.
- Body language – Anything used to signal emotions like contempt, anger, frustration or exasperation: glaring, eye-rolling, crossed arms, clenched/pounding fists, or other dramatic gestures.
- Open display of anger – Achieved through combination of volume, tone, and body language.
- Threats – Any implication that the "wrong" answer will have serious financial or criminal consequences for the witness, his family, or the defendant company.

Witnesses with shy or timid personalities, especially those afraid of conflict, will be highly triggered by these tactics and may become compliant simply from a desire to "make it stop." On the other hand, deponents with naturally aggressive personalities will be tempted to mirror the attorney's intensity, which usually reflects poorly on the defendant.

The Personal Attack

Personal attacks involve use of non-necessary verbal questions/statements or non-verbal cues designed to express or imply contempt or disdain for the witness, either personally or professionally. The goal is to make the witness mad, and, because all humans subconsciously or consciously crave respect, *everyone* is at risk of getting triggered by personal attacks. Here are a few examples:

- Obvious questions – To insult the deponent's intelligence.
- Invasive questions – To insult the witness or her family, based on information specific to the witness's past (past marriages, past lawsuits, business failures, crimes, etc.) or information about the witness's family (like a child's inappropriate social media post, for example). The information sought is usually irrelevant to the lawsuit.
- Insults – To make the witness feel inferior, individually or as part of the defendant company.
- Labeling/stereotyping – To make the witness feel inferior as part of a group, profession, or industry ("*all truck drivers…*" "*trucking companies only care about…*").

Humiliation

Humiliation is one emotion that all humans dread and most of us spend our lives trying to prevent…or forget. Although memories of past experiences of embarrassment or shame can be suppressed, they never really go away. Humiliation is an attack on a person's pride, leading to a state of being humbled, lowly, or reduced to submission. In fact, we tend to experience humiliation any time we perceive a decrease in our *social status*. This is the key. Whether it happens on purpose or by accident, humiliation simply can't happen unless *someone else* is involved.

After a humiliating experience occurs, no matter how much time passes, the humiliating memory becomes a powerful undercurrent in our lives, subconsciously shaping our fears, influencing our preferences, and informing our decisions. In the deposition context, witnesses can find themselves caught in this powerful undercurrent through an attorney's use of embarrassment and moral superiority.

Embarrassment

Embarrassment tactics are one way that attorneys attempt to trigger low-road cognition through the use of intimidation and mistreatment. Unlike aggression tactics, however, embarrassment tactics have the added goal of making

the witness feel socially inferior in some way and involve invasive questions or passive-aggressive insults about something in the deponent's background:

- Education
- Family/parenting
- Intelligence
- Professional skills/competence
- Country of origin
- Age
- Physical/mental limitations
- Medical/psychological conditions
- Other personal traits, such as an accent or speech impediment

To prevent any unexpected embarrassment, remember to prepare your witness to be questioned about the following:

- Any criminal history (no matter how old or irrelevant)
- Any prior accidents
- Any prior lawsuits (of any type)

One of the telltale signs that an attorney is trying to embarrass a witness is that the question or comment will be legally irrelevant to the current lawsuit and highly personal to the witness. Although attorneys can always step in and object to blatantly abusive lines of questioning, embarrassment tactics will often fall just shy of blatant abuse. Rather than trying to protect your client from any possible embarrassment, empower your client through preparation.

Moral Superiority

Another common way to induce low-road cognition through humiliation is through the use of moral superiority. In contrast to embarrassment, moral superiority creates a false sense that the witness has violated a professional or moral standard and should therefore feel guilty or ashamed. When successful, these tactics can literally cause deponents to shrink down, lower their eyes, and cower in their chairs.

Moral superior tactics are trickier than embarrassment tactics because they're more difficult to recognize and prepare for. For example, your company's safety director is being questioned about hiring practices. Your witness is well prepared, and their documents are fully compliant with the regs, so she's feeling great. Then the attorney asks:

> *"So, in hiring professional drivers that share the road with millions of other people, including mothers, fathers, and children, do you mean to tell me that your company's policy is to collect only the bare minimum information required under the regulations?"*

Through this loaded question, the attorney has implied, not only a superior knowledge over the witness, but that there is some greater standard that the defendant company should have been following. Moral superiority questions are designed to catch the witness off guard. Even experienced deponents may feel a momentary sense that they (or their company) have done something unprofessional or irresponsible, leaving them questioning their own conduct and abilities.

Confusion

The third way attorneys might trigger low-road cognition in deponents is through the use of confusion. When the human brain is confused, reactions can be erratic and vary widely from person to person. For some, confusion induces fear and paralyzing insecurity. Others might experience anger, annoyance, embarrassment, or frustration. Some people become hopelessly sleepy as their brains seek to escape the confusion, while others experience a kind of energetic anxiety as they attempt to reestablish clarity. In fact, these reactions are all forms of the fight-or-flight response. Due to the vulnerability we experience when confused or disoriented, our brains actually perceive mental confusion as a physical threat to our lives.

Although some confusion tactics are purposeful, deponents can also become confused due to the intense, lengthy, and unfamiliar nature of the deposition environment. Consider the following:

The Blood Sugar Game

When a person's blood sugar takes a dive, this decreases their overall mental clarity, increases their levels of impatience and frustration, and can even induce emotional outbursts. If your witness enters this state due to the length of the deposition, she is primed for low-road cognition. The attorney might even bait you and your client into skipping lunch in the name of finishing quickly so everyone can "beat the traffic," "get home to their families," etc. Whether purposeful or not, be sure to have snacks on hand to prevent low-blood-sugar confusion.

Excessive Objections

For witnesses new to the deposition environment, they can find it unsettling to have their answers interrupted by objections from the opposing attorney. Not only does it break their concentration and interrupt the flow of the answer, it can also be highly confusing to hear that their thoughtful and carefully considered response is somehow "nonresponsive" from the lawyer's perspective. Although objections are part of every deposition, some attorneys are skilled at using excessive or meritless objections to induce confusion and frustration in the deponent. When witnesses are unprepared to be interrupted by objections, they can be left feeling defensive or unsure of themselves, perhaps even feeling the need to overexplain or argue.

The White Out

Another component of most depositions is the introduction of exhibits. For some deponents, flipping through exhibits while attempting to answer questions can be a confusing experience by itself. Some attorneys will create an exaggerated confusion response by using a trick called the "white out," wherein the attorney introduces an excessive number of exhibits and asks questions about all of them in a disjointed fashion. This causes the witness to become annoyed, angered, or overwhelmed while flipping back and forth between all the different pieces of paper.

The above confusion tricks can be easily prevented by preparing your client for the physical and functional aspects of the deposition environment, rules, and procedure. Confusion can also be induced through mind games designed to frustrate the deponent.

Whac-a-Mole

These are subtle confusion tactics in which the attorney uses syntax, vocabulary, and other rhetorical tricks to make the witness feel mentally unsteady, unsure of what to focus on, and unable to anticipate what might be coming next. With whac-a-mole tactics, the attorney will ask a question or series of questions that are hard to follow. Once the witness's brain is exhausted from mental gymnastics, she will be more likely to become frustrated and more easily confused going forward. Some examples of whac-a-mole tricks are:

- Long sentences – Use of overly long or complicated sentences, especially numerous explanatory clauses that separate subject and verb.
- Jumping around – Questions that move around in an unpredictable manner on a timeline or are otherwise out of sequence.
- Non-sequiturs – Any rhetorical tactic that leaves the deponent's mind working on a portion of a question, or previous question, that does not seem to follow or fit logically in the sequence.

The Twilight Zone

The goal of twilight zone tactics is to make the witness feel unsure of previous testimony or induce frustration. Deponents who are new to depositions, shaky on the facts of the case, easily suggestible, or lacking in confidence will be particularly vulnerable here. When using twilight zone tricks, the attorney asks questions that make the witness feel crazy. This creates annoyance, frustration, and self-doubt as the witness is forced to repeat or explain herself in a way that seems unnecessary. Here are a couple of examples:

- Looping – Asking the same questions or repeatedly returning to the same topics.
- Feigning confusion – Pretending to be confused about an answer, especially one that seems clear or simple, in order to frustrate or annoy.

Confusion tactics like these can create fertile ground for low-road cognition. Like aggression and humiliation, confusion tactics are designed to make the witness feel stupid, incompetent, flustered, or angry.

Cognitive Traps

Although low-road cognition is one of the most important dangers to avoid during a deposition, it's not the only danger. After all, the opposing attorney's main goal is to get *information* from your witness. Although emotional traps and cognitive traps can be, and frequently are, used by themselves, they are particularly effective when used in tandem. Certain cognitive traps, in particular, become highly effective when preceded by one or more emotional traps because the witness is more vulnerable and/or suggestible when emotionally flustered or psychologically exhausted.

Cognitive traps can be divided into two main categories: mental and logical. Mental traps are designed to tie up the logical mind through various techniques, temporarily giving the interrogator access to the suggestible, subconscious mind. By contrast, logical traps are designed to *engage* the logical mind through a carefully planned series of questions, ultimately resulting in an admission that the witness knows

is wrong, but feels unable to contradict. In other words, the witness feels "boxed in" to giving a particular answer.

Although these traps can be used to extract true admissions, in fact, they are commonly used to trap witnesses into accidentally lying—making an admission that supports the plaintiff's story, but which is actually not true in fact. Thus, preparing your witness to handle cognitive traps is *not* about concealing truthful information (that's your job as the attorney to deal with bad facts), but helping them avoid saying things that are inadvertently false.

Mental: Confusion Hypnosis

As we've already discussed, confusion is a very uncomfortable state for humans to find themselves in. Think of confusion like driving in fog. Some people may brake suddenly, slow to an unsafe crawl, or stop altogether. Others frantically flip on their high beams only to become blinded by the glare. These are examples of erratic reactions that occur when confusion triggers the fight-or-flight response. However, there is a different type of response altogether. In the frantic search for any type of guiding light, some drivers experience a type of hypnotic tunnel vision, becoming ultra-focused on the taillights of the car in front of them. When this happens, the driver is no longer being controlled by the clock, his agenda, his memory, his GPS, or any other external inputs (like streetlights and traffic signs). Instead, the driver is now fully controlled by the car ahead and will follow wherever it leads—even, say, over a cliff.

The famous American hypnotherapist, Milton Erikson, was one of the first people to discover that confusion could induce a trance-like state in human beings and was therefore an effective hypnosis technique. This is because confusion makes us hyper-focused as our brains search for clarity in the fog. While our conscious minds are occupied with this confused yet focused attention, our unconscious minds become easily suggestible.

As naturally cooperative creatures, we tend to give people the benefit of the doubt that their words make sense. In situations where you expect to be able to logically understand the subject matter and the language of the person speaking, and you know your answers are supposed to be important, you're going to pay attention. If the words or meaning become suddenly unclear, you're going to work extra hard, and give extra focus, to what's being said. However, this hyper-focused state is like being engulfed by fog. If this happens to your witness, he just might start looking for some taillights to follow.

It is in this state of confusion hypnosis that deponents are at risk of making accidental admissions, *i.e.*, accidently lying. As far-fetched as it may sound, this happens all the time. If you've ever heard your deponent say after a deposition, "Wait, I never said that," or "I don't remember agreeing with that," they were probably under some form of confusion hypnosis.

Certain confusion tactics discussed above, such as whac-a-mole tactics and lawyer shenanigans can serve a double function, laying the groundwork for confusion hypnosis by tying up the logical, conscious mind and freeing up the witness's subconscious mind for a direct conversation with the interrogator. On the other hand, in contrast to inducing hyper-focus, attorneys can also use tricks to make the conscious mind "zone out," which has the same effect of granting access to the subconscious mind. Here are a couple of examples:

- **Lulling** – True to its name, Lulling is when an attorney asks a long string of easy, boring questions. After you have been lulled into a stupor of boredom, your conscious mind may be tempted to disengage. When this happens, your unconscious mind becomes more open to suggestive questioning.
- **Pacing –** Pacing is similar to Lulling. Like lulling, pacing usually involves a long string of relatively easy questions, but also includes the rhythm and speed of the questioning. Think of it like a ping-pong match. Question, answer, question, answer, ping, pong, ping, pong, ping, pong…typically speeding up as the questioning progresses. Once the deponent is in the flow of the questions, she forms an unconscious expectation for maintaining that pace, making it more likely that she'll unconsciously chose a quick wrong answer over a longer, better answer that breaks pace.

Plus, with hypnotic confusion, the *format* of the question is critical. To avoid "waking up" the witness's conscious mind, the attorney will ask questions with the "correct" answer (the answer he wants) embedded in the question. For example, instead of asking, "Were you speeding just before the collision?" the question will be phrased as a *suggestion*: "So it's possible that you were speeding just before the collision." See the difference? The first question ("Were you speeding…?") is open-ended, forcing the conscious brain to reengage in order to make a yes/no decision. The second question isn't a question at all. It is a clear suggestion that the deponent's unconscious mind might hypnotically agree with while her conscious mind is still lost in the fog. The

attorney will phrase each question with the goal of making her say "yes," consciously or unconsciously.

Logical: The False Horizon

In the world of aviation, the "false horizon" is the phenomenon that occurs when the pilot experiences a sensory illusion and perceives a horizon line that is different from the true horizon. When this happens, the pilot may orient the plane at an unsafe angle, start to descend, and ultimately crash. In the deposition context, the false horizon is a form of intellectual manipulation that occurs when the opposing attorney alters the underlying premise of a question in some manner. By changing, expanding, or limiting the factual premise of a question, the attorney creates a new "reality" in the jury's and, often, even the witnesses' perception. The goal is that the witness will then orient his "plane" (his answer) to align with the false horizon the attorney created.

When using this technique, the goal is to make it appear that the deponent answered a complete question when, in reality, its premise is partially incomplete or incorrect. After all, the jury doesn't know any better, and will typically assume that the question being posed is fair, complete, and accurate. False horizon tactics are designed to create an expectation in the minds of the jury to hear one specific answer, which will appear to be the only logical answer, leaving no room for additional context or explanation. Plus, if the attorney has successfully established frame control through intimidation or other emotional traps, the witness may not feel like she has permission to correct the attorney or give an answer outside the scope of the question. Alternatively, the need to correct the attorney might be so great that the witness becomes argumentative, or begins overexplaining in a manner that appears incompetent or untrustworthy to a jury.

False horizon tactics are rarely inadvertent on the part of the opposing attorney and usually call for some type of deceit or misdirection in order to be successful. Consider the following examples:

Misleading Facts

Phrasing a question that has a technically true answer, but presupposes conditions that are *not* true.

Example: In some situations, post-accident drug testing is required for commercial drivers, but this accident was not one of those situations. However, the attorney might phrase the question in a misleading way. "*So, since you didn't get tested for drugs or alcohol after this accident, we'll never know whether you were intoxicated or impaired at the time of the accident.*"

Technically the statement is true, but the jury will be misled into believing a requirement existed (for drug testing) unless additional context is given.

Black/White Options

Narrowing the scope of the question to lock the witness into a yes/no answer.

Example: Your company has a policy that requires a driver to be terminated if he has more than 2 preventable accidents within a 12-month period. Your driver had 4 accidents in 12 months, but only 1was deemed preventable and, further, he was satisfactorily retrained and reassessed following the preventable accident. "*Your company policy requires that a driver be terminated after 2 accidents, yet he is still continuing to drive for your company even after having 4 accidents within 12 months, correct?*"

By phrasing the question in a way that ignores relevant details and exceptions, the attorney hopes to downplay the "gray area" and limit the witness to a black-and-white answer.

Improper Hypotheticals

Unless your deponent is an expert witness, it's typically improper for an attorney to ask hypothetical questions. But that doesn't mean the attorney won't try. Hypothetical questions are powerful suggestive techniques because they depart from reality entirely—and the jury won't know the difference.

Example: Your driver was involved in an accident in the early afternoon. He had not stopped to eat lunch yet and still had ample time to make his delivery. However, the attorney may set up a hypothetical question to suggest a different set of facts to the jury. "*So, let's suppose that you just left McDonalds having eaten a greasy lunch and jumped back in your tractor-trailer before your break was over so you could make your delivery on time. Wouldn't you think you might start feeling sluggish and drowsy at that time of day?*"

These are obviously not the facts of the case, but since the question is framed as a hypothetical, the witness might be tempted to answer the question hypothetically.

Analytical Gaps

The use of subtle logical fallacies that are usually imperceptible to a jury.

Example: The Federal Motor Carrier Safety Regulations announce certain regulations and standards for drivers and motor carriers. While they are important guidelines, they are not laws, and do not provide one-size-fits-all guidance in every possible driving situation. Your driver was unable to comply with a specific regulation due to weather and roadway conditions on the day of the accident. "*The FMCSRs announce rules for drivers. Mr. Driver was not in compliance with Regulation XYZ on the date of the accident and therefore violated the rules, correct?*"

This is akin to saying A + B = Z, skipping over numerous variables to reach a conclusion. Although the question may be true *sometimes*, the logical fallacy is that it is not true all the time.

The Primrose Path

A logical progression or series of questions with "obvious" affirmative answers, resulting in cognitive dissonance when the deponent is forced to agree with the "trap" question or risk looking like a liar or an idiot.

Example: The best example of this technique is the classic "Safety Rule" trap. Consider the following questions in the deposition of your client's safety director.

Obvious questions:

- You agree that there's nothing more important than human life, right?
- And commercial drivers should never needlessly endanger human life, right?
- You agree that the FMCSRs announce safety rules to protect human life, right?
- And if someone were to violate the safety rules that could result in a needless danger to human life, right?

Trap question:

- Your driver failed to comply with the safety rules in this accident and therefore needlessly endangered human life, correct?

Here, if the "obvious" questions are answered affirmatively, the witness will feel compelled to answer the "trap" question affirmatively as well.

Preparing Your Witness

When it comes to preparing your witness, a few fundamentals will serve you in any type of case and with any type of deponent. Along with introducing them to the types of emotional and cognitive tricks they are likely to encounter, you can equip them with tools for handling stressful, hostile, or overwhelming situations. Here are seven key topics to review during your preparation.

First, help them learn to recognize the physical and emotional signs of low-road cognition. The key to maintaining high-road cognition is vigilant self-awareness. Witnesses who have practiced this type of self-monitoring perform much better in depositions than those who have not.

Physical - Under stress, our bodies start preparing for fight or flight and will automatically begin displaying certain physical symptoms that can alert your witness to oncoming low-road cognition. These physical symptoms could include:

- increased heart rate
- sweaty palms
- increased general perspiration
- increased/sudden need to use the restroom
- shortened breath
- nausea
- tightness in chest
- frown/pursed lips
- tight jaw
- furrowed eyebrows/forehead

Emotional - When we pay attention to them, our emotions can tell us a lot. In fact, once triggered, we will start experiencing emotions subconsciously *before* our brains notice them consciously. So even if everything else appears generally calm on the outside, your witness could be headed toward the low road if she starts feeling emotions like:

- annoyance (even mild)
- anger
- embarrassment
- frustration
- fear
- defensiveness
- confusion / brain fog
- any kind of hostile or violent impulse

Along with the ability to self-monitor, deponents must understand the importance and ramifications of low-road cognition and, particularly, the dangers of becoming hostile,

defensive, or aggressive while on video for the future jurors to see. Once they understand that the jurors are not just listening to the substance of their answers, but that they are reading their personality to determine honesty and trustworthiness, they will be more encouraged to control their emotions, mind their body language, and deliver calm, confident responses.

Second, help build their confidence in the deposition process. For first-time witnesses, make them comfortable with the rules and procedures of the deposition: how people will be sitting, the introduction of exhibits, the process and purpose of objections, the length of time, how/when to take breaks, etc. It's amazing how often these small details are overlooked in the rush to prepare for the substantive part of the deposition.

Third, discuss any specific vulnerabilities that might come up during the deposition, whether related or unrelated to the facts of the case. This could include personal issues, such as family drama, past arrests, dropping out of school, or anything that will make the deponent feel uncomfortable or ashamed during the deposition. Although this might create some hesitation, with proper explanation, most witnesses understand that the more they share, the better their attorney can protect them. Also, make them aware of the kinds of information that will probably never get shown to a jury, but which arise from questions that are asked for the sole purpose of upsetting the witness. If they understand that, although you might not appear to be "going to bat" for them during the deposition, you will be fighting to exclude any irrelevant evidence after the fact, they will have greater trust and confidence throughout the deposition and will be less likely to become flustered or angry when faced with personal questions.

Fourth, teach them to control the speed of their answers. By speaking slowly and pausing before answering, witnesses can disrupt the flow of an attorney's questions, especially those attempting to use pace or lulling to their advantage. It can also give the witness much-needed time to deliberate more carefully or take a breath and get their emotions in check before answering a question.

Fifth, remind them that you're the attorney and you've got everything under control. Sometimes witnesses feel the need to outsmart the attorney, anticipate every line of questioning, or understand the reason for every question asked. Remind the client to take every question at face value, even if the question has been asked before, and answer it calmly and confidently. Trying to guess the attorney's strategy or anticipate the next question wastes valuable physical and mental energy that the witness will need to stay sharp throughout the deposition.

Sixth, prepare your witnesses to reframe questions if needed. Although short, one-word answers are often preferable, if the question is unfairly posed or relies on a false premise, then the witness will need to be able to reframe the question or qualify the answer in a way that is not aggressive or argumentative. Deponents sometimes don't realize that they have permission to do this and can fall victim to many different emotional or cognitive traps if they fail to reframe or qualify an unfair question.

Seventh and finally, help them internalize the overall goal of the deposition—to be human. Although this can feel like a tall order when the opposing attorney is acting aggressive or otherwise inhuman, kindness and confidence always reflect best on the deponent and the company. By staying focused, at all times, on connecting with the *jury* who may someday watch the deposition video, it will help the witness maintain the proper perspective throughout the deposition experience.

Conclusion

Although staying in the "eye" of the storm is no easy task, preparing your client for the mental, psychological, and emotional challenges of a deposition is critical for avoiding the perils of low-road cognition and the risk of accidental admissions. Remember, the Ring of Fire is the Reptile's playground. By taking the time and using these tips to prepare your witness, you will better protect your client from the fallout from a negative deposition experience and ensure that the time and effort you spend on the substantive portion of the preparation does not go to waste.

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