

The Witness Chair

Leading-edge Ideas for CPA Experts Providing Litigation and Dispute Resolution Services

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How to Cage a Runaway Witness—Part 2: More Techniques for Cross-Examination

by Roger J. Dodd, Esq.

A runaway witness is a witness, child or adult, who is unresponsive to the question put to them on cross-examination. Some witnesses do not understand what is expected of them and need cues as to what is acceptable behavior. Others know what is expected of them, but, for their own purposes, ignore the rules of conduct implicit in a leading question format.

This unresponsiveness may take many forms. The witness may answer the question, but in such a convoluted way that it is not intelligible or may answer a different question than the one the lawyer asked; offer prejudicial information to try to undermine the cross-examiner's theory of the case; object to the question posed; or even rule on his own objection.

Example:

Q. Professor, you never measured the circumference of the aluminum alloy tube?

A. I didn't consider it to be relevant. In fact, I don't consider it relevant now. I am sure that it is not relevant. What I did was ...

Such witnesses test the lawyer and make careers other than practicing law seem safer and wiser. But there are techniques to strengthen the lawyer.

The Three Rules of Cross

The foundation of the many tech-

niques to control such runaway witnesses is grounded in the three rules of cross-examination: ask leading questions only; introduce or elicit one new fact per question; and break cross-examination into a series

When a runaway witness uses unresponsive answers, volunteers information, or ... tries to control the cross-examination, then the lawyer needs to apply sanctions—negative feedback to extinguish unwanted behavior.

of logical progressions to each specific factual goal (*The Witness Chair*, Winter 2006). These rules are the bedrock of controlling the ability of a witness to evade the questions.

The cross-examiner using these three rules can reward the short and direct answer to a leading question. The rewards offered include an encouraging nod of the head; a pleasant conversational voice; and moving on to the next question, the next subject matter, and eventually to the end of questioning on the stand.

However, when a runaway witness uses unresponsive answers, volunteers information, or, by a myriad of other devices, tries to control the cross-examination, then the lawyer needs to apply sanctions—negative feedback to extinguish unwanted behavior.

Taking Back Control

The methods are numerous and varied. Some are as simple as maintaining eye contact with the witness, while others are as strategic as using the taking of depositions in the discovery phase to begin conditioning the witness to answer questions responsively.

Ask, Repeat, Repeat

One of the most common techniques of controlling the witness is "ask, repeat, repeat." This can be used when the lawyer asks a clear, fair question in common, well-understood words, but the witness chooses to sidestep the question by giving a non-answer.

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Section ACTION

Business Valuation

by Stephen D. McMorrow, CPA

Dallas v. the CIR (T.C. Memo 2006-212) may be the most damaging ruling yet regarding tax-affecting S corporations.

In previous tax court cases [*Gross*, 1999-254 (affirmed by the Sixth Circuit Court of Appeals 272 F3d 333, 11/19/01); *Wall*, 2001-75; *True*, 2001-167; *Heck* 2002-34; and *Adams*, 2002-80] the court disallowed any form of tax-affecting.

Tax-affecting is wrong, the courts ruled, as a matter of economic theory because the principal benefit that shareholders expect from an S corporation election is a reduction in the tax burden imposed on the enterprise.

The courts have treated tax-affecting as a black and white situation—either you do or you do not. However, several authors have provided models to show the tax savings from being an S corporation depend on the level of distributions (*Business Valuation Review*, September 2004).

In *Delaware Open MRI Radiology Associates, P.A. v. Howard B. Kessler*, 2006 Del. Ch. Lexis 84, a fair value shareholder dispute case, Judge Strine valued the subject S corporation using tax rates that reflected the tax savings based on the level of distributions. This was the first ray of hope that the court would not take an all or nothing approach and set the stage for revisiting the issue in *Dallas*.

In *Dallas*, the taxpayer argued that the subject S corporation's practice of making only enough distributions to cover income taxes distinguished it from *Gross*, where the corporation distributed substantially all of its income. The taxpayer cited the *Delaware* case as precedent for his argument.

In the ruling, Judge Colvin said "fair value" in a minority stock appraisal case is not equivalent to

"fair market value" and again rejected any form of tax-affecting.

The judge had an opportunity to advance the thinking on tax-affecting S corporations begun with the *Delaware* case; instead, he reaffirmed the courts' disallowance of tax-affecting.

Stephen McMorrow, CPA, ASA, CBA is Business Valuation Section vice chair and partner in charge of business valuations at Bratton, McMorrow & Kearney LLP in Ventura.

Economic Damages

by Colin A. Johns, CPA

In 2001 the Federal 3rd Circuit Court ruled in *Official Comm. Of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 344 (3rd Cir. 2001) that "where 'deepening insolvency' causes damage to corporate property, we believe that the Pennsylvania Supreme Court would provide a remedy by recognizing a cause of action for that injury."

Although a number of courts have followed *Lafferty* in recognizing deepening insolvency as an independent cause of action, most of the more recent cases have refused to do so.

The first state court case to consider the issue was *Trenwick America Litigation Trust v. Ernst & Young, LLP*, 906 A.2d 168 (Del. Ch. Aug. 10, 2006). The court ruled that the Litigation Trust failed to state a claim on the deepening insolvency cause of action. It noted that the plaintiffs would have to rely on recognized causes of action such as fraud or breach of fiduciary duty.

Also in 2006, the 3rd Circuit in *In re CitX Corp.*, 448 F.3d 672, 677, 680-81 (3rd Cir. June 6, 2006), limited the finding in *Lafferty* to circumstances where there are allegations of fraud and the corporation that was allegedly harmed is able to bring actions under Pennsylvania law. The significance of this decision is that it was issued by the same circuit as had decided *Lafferty*.

The court ruled in *CitX Corp.* that a showing of fraud was required to

set forth a claim of deepening insolvency since the very definition of the theory is the fraudulent prolongation of the corporate life.

It appears that courts are moving away from recognizing deepening insolvency as an independent cause of action, although some courts continue to recognize it as a theory of damages.

Colin A. Johns, CPA, CFE, CA is a director in the litigation and forensic consulting practice of Hemming Morse, Inc. in San Francisco.

Family Law

by Frederick J. Glassman, Esq.

On Jan. 1, collaborative law, a dispute resolution process, officially took its place in the California Family Code, with the addition of Sec. 2013, designated as the Collaborative Family Law Act.

If the parties enter a written agreement, they may utilize a collaborative law process to resolve any matter governed by the California Family Code over which the court is granted jurisdiction. It is a process in which the parties and any professionals engaged by the parties to assist them, including financial specialists, agree in writing to use their best efforts and make a good faith attempt to resolve disputes related to the family law matters on an agreed basis without resorting to advisory judicial intervention.

At this stage it is incumbent upon attorneys engaged in family law matters to inform and advise their clients that they have process choices.

What next? Until procedural protocol for the collaborative law process is added to the California Family Law Act, the current statute is subject to discretion, or perhaps even confusion, as to specificities that have been used, and continue to be used, by professionals, including attorneys, mental health practitioners, and financial experts in collaborative law practice.

In any family law case, California Family Code Sec. 2450 (known as case management) offers judicial assistance to the parties and counsel for the pur-

pose of expediting the case, reducing the expense of litigation, and focusing on early resolution by settlement. Thus, “cooperative law” should not be confused with the collaborative law process, which has its distinct specificities, now being offered through AB 189 and setting forth proposed amendments to Family Code 2013.

The collaborative law process may not be appropriate for every case, but it is now an alternative dispute resolution process recognized in the California Family Code.

Frederick J. Glassman is a founding partner of Mayer & Glassman Law Corporation in Los Angeles. A veteran of 35 years of litigating, he focuses his practice on resolution-oriented approaches to family law disputes.

Fraud

by Jennifer E. Ziegler, CPA

At a recent Fraud Section meeting, Ellen Fischer of UCLA's Audit and Advisory Services, Internal Audit Department, presented “The Top Ten Things Auditors Do to Mess Up Investigations ... and How to Prevent Them.” The presentation highlighted pitfalls auditors may encounter at the outset of an engagement if the objective of the investigation is not clearly understood. Different objectives produce different conclusions. Fischer's tips may be of considerable assistance to examiners performing investigations and are worth reiterating.

1. It is imperative to maintain the integrity of documents by avoiding notations, stray written comments, arrows, check marks, hole-punches, or highlighting. This can be accomplished by maintaining an original unaltered copy of the documents.

2. The chain of custody of evidence must be tracked. Always identify and keep a record of when and from where evidence is received to avoid the suspicion of corruption or manipulation.

3. The U.S. Constitution's Fourth Amendment protects against illegal search and seizure. Do your homework prior to opening sealed envelopes, copying computer data,

Message from the Chair

by Mark Luttrell, CPA

The most frequent question I receive from CPAs interested in litigation work is how to grow and expand their litigation practices. For more than 10 years, my response has been simple—get involved in CalCPA committees. I see no easier path to obtaining the core ingredients of success in this field: competence, perspective, and community.

The key concept is involvement. We learn far more from doing than from listening. More important, we only build relationships by engaging ourselves. This latter element is critical to our success in litigation. Every successful litigation CPA I know has a strong network of peers and frequently leverages those peers to gain perspective and sage advice on technical matters.

In this regard, being a CPA in California is unique. CalCPA is the

only state CPA society that has, for more than 10 years, offered its members four vibrant, state-level practice sections that allow CPAs the exclusive opportunity to gain cutting-edge insight and networking opportunities.

All you have to do is get involved and get your staff involved. Attend meetings and actively participate. Be patient and persistent. Volunteer your time on task forces. Over time, you will find that your relationships and network have expanded dramatically.

Between meetings, do not hesitate to call a member you have met. You will find them to be gracious and willing to help—and their experiences will then be yours.

Mark Luttrell, CPA, ABV is the managing director of the southern California offices of CBIZ & Mayer Hoffman McCann P.C.

and obtaining the subject's personal data or information.

4. Avoid pejorative, prejudicial, and presumptive descriptions of the subject, such as immoral, criminal, shady, dishonest, or liar. Do not presume to know the subject's mental state; refrain from using descriptions such as emotional, evasive, remorseful, or defensive. Always refer to subjects formally, as informal references to subjects using first names or nicknames result in diminution of your objectivity.

5. Inclusion of business control breaches, policy and procedural violations, or neglect of professional responsibilities creates culpable crime victims. Write two reports, an Investigation Report and a Control and Recommendations Letter. The Investigation Report should focus on what fraud was committed, who committed the fraud,

and how long and with whom the fraud was committed. The Control and Recommendation Letter should focus on how the fraud was committed.

6. Ephemeral evidence, such as a disavowed confession, will not win a case. Bring witnesses to interviews to discourage subjects from retracting damaging statements at a later date.

7. Invitational interviews can be unproductive if too many people are involved or conducting the questioning. Limit the number of interview participants. Dissuade bosses from attending—employees are more forthcoming if bosses are not present.

8. Indiscriminate communication may compromise a case. Avoid the media and the discussion of investigations with friends and family.

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Keepin' It Legal



The Certified Public Detective: Part 2

by Keith Slotter, CPA

Using, practicing, and perfecting the following techniques in interviewing during the audit process or any investigative engagement should assist in detecting potential fraud schemes used in the financial accounting process.

Tighten the Circle

When dealing with financial statement fraud, self-dealing, or outright corporate theft, chances of collusion among a variety of parties are high. Never interview two or more people together in the same room at the same time. This is a cardinal sin of information gathering and will likely lead to failure.

Success lies in the ability to identify and explore discrepancies among participants. Additionally, there is power in numbers and people are more likely to confess, at least partially, to illicit behavior when attention is focused squarely on their shoulders.

Conversely, don't overwhelm the interviewee with a cadre of interviewers and interested observers. The best ratio, generally, is two interviewers for each person being questioned.

Utilize Third-Party Questioning

Eliciting information that someone

doesn't want to give up is challenging work. Using a third-party approach can sometimes begin to break down initial barriers. Third-party questions might include:

1. "What type of person do you think would be involved in something like this?" When asked this question, the guilty will often end up describing someone very much like themselves.

2. "When these people are eventually caught, what type of penalty do you think would be appropriate under the circumstances?" The innocent often fail to comment or will suggest very harsh repercussions, such as immediate termination and referral to authorities for thorough investigation. Those guilty of fraud will often recommend a more lenient resolution.

Elite interviewing skills incorporate healthy skepticism, tenacious diplomacy, a strong sense of patience and commitment, and a high level of creativity.

3. "If you're not responsible, who do you think might be?" The uninvolved will usually fail to venture down this road. They will simply deny any knowledge of fraud and happily send you on your way.

The guilty are much more attuned to placing the blame elsewhere when challenged: "I'm not really sure, but Bob down in accounts payable has always caused me some concern—with both his integrity and his accounting practices."

Upon hearing a response like that, I'd be much less concerned about

Bob in accounts payable than the individual sitting in the chair across from me.

Be Patient and Persistent

Interviewing under difficult, sometimes accusatory, circumstances is not a sprint, but a marathon. Be firm, yet flexible; friendly, yet persistent. Once one party stops talking, the interview has concluded, so it's best to keep the dialogue flowing and the door open and continue researching the matter while developing alternative strategies. The more evidence you can generate on paper and through personal verification, the stronger your position during the interview.

Elite interviewing skills incorporate healthy skepticism, tenacious diplomacy, a strong sense of patience and commitment, and a high level of creativity. Shortly after the bombing of Hiroshima, when confronted on his ideas about the use of such devastating force against any enemy, Albert Einstein said simply, "You cannot solve problems using the same level of thinking that it took to create them."

Working Together

The problem of corporate fraud has reached full crisis mode. In today's world, FBI agent accountants are challenged to utilize their skills and training to understand complex accounting frauds and gather evidence to bring criminals to justice. Likewise, CPAs must fine-tune their investigative skills to detect and report potential frauds as quickly as possible during the audit process.

By combining forces, the accounting and law enforcement professions can work together to successfully restore confidence to today's financial markets and tomorrow's model for corporate integrity.

Keith Slotter, CPA has been an FBI Special Agent for 20 years, serving in various cities throughout the U.S. Currently, he is responsible for all operations at the FBI Academy in Quantico, Virginia.

AICPA Alert

by Christian Tregillis, CPA

The AICPA and FASB are considering public comment on the International Accounting Standards Board's (IASB) Discussion Paper *Fair Value Measurements*. The deadline was recently extended to May 4 because "constituents requested more time, given the significance of the issues raised in the discussion paper," according to the IASB.

The project and discussion paper are aimed at providing a central, comprehensive source of guidance on fair value and its measurement, given that guidance on the measurement of fair value is dispersed throughout the

relevant International Financial Reporting Standards (IFRS).

The discussion paper also provides the IASB's preliminary view of the provisions of U.S. GAAP's most direct reference on the topic, Statement on Financial Accounting Standards No. 157 Fair Value Measurements (SFAS 157), and its differences to existing fair value measurement guidance in IFRS.

For example, as the IASB noted, if it and the FASB take differing views on key concepts, including use of entity specific information, whether fair value is an exit price or an entry price, and whether one can record day one gains based on an internal model when applying Level 3 fair value guidance, the accounting profession will be faced with global disharmony which will result in the need for companies to continuously maintain two sets of

books—one for U.S. GAAP and another for International GAAP — when preparing statutory financials and foreign filings.

This project forms part of the Memorandum of Understanding between the IASB and the FASB, which sets out a Roadmap of Convergence between IFRS and U.S. GAAP. The convergence is scheduled to be completed by the end of 2008.

Considering comments from practitioners and developing the discussion paper further will result in an exposure draft on fair value measurements. The IASB aims to issue the exposure draft in early 2008. The discussion paper is available for review at www.iasb.org/current+projects/intro.htm.

Christian Tregillis, CPA, ABV is managing director of Kroll Financial Advisory Services in Los Angeles.

Runaway Witness

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Take this example where the witness knows the car was blue:

Q. The car was blue? ("ask")

A. The car was traveling down the street, it started to go through the red light, I didn't even see brake lights ... and finally it did turn the corner and I still hadn't seen the brake lights.

Q. (Slower) The car was blue? ("repeat")

A. Well, it was going so fast when it went through the red light.

Q. (Slower still) The car was blue? ("repeat")

A. Yes, it was blue.

Q. The car was going south?

If this happens with an expert witness, repeating the questions reminds the witness who is in charge.

Ask, Repeat, Reverse

A second technique is "ask, repeat, reverse," best used when the witness will not answer even the most obvious and indisputable truth. This tech-

nique is particularly well adjusted when written documents are at issue.

In a medical malpractice case, an expert witness testified that the defendant doctor failed to perform up to the standard of responsible care because his post-operative and discharge notes did not reference certain critical diagnostic procedures.

Q. Doctor, you dictated operative notes of June 24, 2004? ("ask")

A. I am in the business of taking care of sick people. I am required to make certain notes about what I have done. I dictate them quickly after surgery. They are transcribed several days later ... it sometimes takes three or four weeks to have my notes returned to me. Sometimes I sign them, sometimes I initial them, and sometimes I review them but don't sign them. In comparison to all my other important duties, I just don't know.

By avoiding these other areas mentioned in the answer, the lawyer preserves the question and highlights it for the jury.

Q. You dictated operative notes of June 24, 2004? ("repeat")

A. As I said ...

Q. You did not dictate those notes, doctor? ("reverse")

A. No, no. I didn't say that. I just said that, well, I don't know. Do you have my notes there? Do I have my notes here? Oh, I see my notes. No, I didn't say that I didn't dictate it.

Q. In fact, doctor, you did dictate operative notes of June 24, 2004?

A. Yes, of course, I dictated them.

The cross-examiner who can control a runaway witness exerts more control and the witness fights less. Because the witness fights less, the attorney can concentrate on the three basic rules, teach the case, and feel more comfortable using more advanced techniques of caging a runaway witness.

*Roger Dodd, a trial attorney, is one of the most highly regarded and knowledgeable experts on cross-examination. He has co-authored two editions of *Cross Examination: Science and Techniques* and is a regular contributor to *Trial* magazine. His practice is based in Valdosta, Georgia and Jacksonville, Florida.*



H A P P E N I N G S

Litigation Sections Meetings

Business Valuation	Thursday, July 19, LAX Thursday, Oct. 11, OAK
Economic Damages	Wednesday, July 25, LAX Wednesday, Oct. 17, OAK
Family Law	Friday, July 20, LAX Friday, Oct. 12, OAK
Fraud	Tuesday, July 24, LAX Tuesday, Oct. 16, OAK

Each section will send individual meeting notices.
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Education Foundation Course Offerings—(800) 922-5272 or www.educationfoundation.org

2007 ABV Examination Review Course	Thursday, Sept. 20, Las Vegas
Advanced Family Law Workshop	Monday, Aug. 27, OC North
Audit Standards Update: The New Audit Risk Assessment Standard	Tuesday, June 26, Tahoe Monday, July 9, EB Tuesday, July 31, LAX Thursday, Aug. 9, Monterey Tuesday, Sept. 11, OC South Tuesday, Sept. 18, SFO
Business Valuation: A Review of the Essentials	Friday, June 15, SF
Business Valuation Fundamentals: Part 1	Monday, July 23, LA/BH
Business Valuation Fundamentals: Part 2	Monday, Aug. 20, LA/BH
Business Valuation Overview	Thursday, Sept. 27, BUR
California Community Property	Friday, Aug. 24, OC North
COSO Light: Internal Controls for the Nonpublic Entity	Friday, July 13, SD
Finding and Evaluating Frauds: A Case Study Approach	Monday, July 9, SD Monday, Sept. 24, EB
Fraud in Audit, Accounting and Tax Conference	Thursday, June 7, SF Friday, June 8, BUR
Fraud: Exposures and Solutions in the Non-Audit Environment	Tuesday, July 17, SFO Friday, Aug. 3, San Fernando Friday, Aug. 10, Monterey
Fraud in the Governmental and Non-for-Profit Environments	Thursday, July 26, BUR Sunday, Sept. 9, SF
Searching for Fraud: Assessing Risk and Addressing Red Flags	Thursday, June 14, OC South
Tax Consequences of Divorce	Friday, July 13, SD Monday, Sept. 17, LAX
The Accountant's Responsibility for Fraud	Friday, June 15, BUR Thursday, July 12, SD Friday, Aug. 3, Chico

Section Action

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9. Do not blur the lines between the examiner (you) and sworn officers. Remember: you are not a police officer, so do not go to the subject's home or financial institution, and avoid using words and terms such as probable cause, criminality, violation of Penal Code, embezzlement, or grand theft.

10. District attorneys have a general disdain for financial (paper) crimes. Make your case as easy to understand as possible.

Avoidance of the common pitfalls and adherence to the preventive measures illustrated in Fischer's presentation will facilitate a smooth investigation and enhance the potential for a more beneficial outcome for the victim.

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