



SUPERHERO OR VILLAIN: HOW TO PREVENT EXECUTIVES FROM SAYING THE WRONG THING WHEN TESTIFYING

S. Todd Neal
David W. Gouzoules
Procopio, Cory, Hargreaves & Savitch, LLP

A Different Exercise

- Executives often scale the corporate ladder by imposing their will, controlling the room and exuding confidence.
- But these qualities can backfire under vigorous cross-examination challenging their motives, competency and business judgment.
- The stakes are high because the testimony of executives conveys who the company is and frequently plays largely into case outcome.

Extensive Preparation is Necessary

- Providing testimony is not easy. Being on the witness stand means trying to convince strangers about the merits of a claim or defense. A witness is thrown into the fire and a skilled cross-examiner will try to pick apart the executive as untruthful, a scoundrel, or maybe both.
- The only way through the experience is to prepare extensively with an experienced trial lawyer.
- Mock cross examination preparation sessions are crucial, as is thorough review of critical documents that the executive is likely to see in cross examination.

Demeanor and Temperament are Critically Important

- How executives testify goes beyond what is said and extends to demeanor, temperament and even likeability. Preparation must take this into account.
- Executives must avoid lashing out or treating opposing counsel with condescension. They must also avoid crossing the line between confidence and arrogance.

Keys to Effective Relationship Between Lawyer and Executive:

- The executive and the lawyer must have an open dialogue to ensure: 1) the attorney understands the client's perspective and goals; 2) the executive has communicated all important information that is not clear from the documentary record; and 3) the executive understands the attorney's guidance.
- The attorney must form a connection with the executive by bringing the right energy and striking a balance between zealous advocate and thoughtful counselor.
- The attorney must explain the context of the executive's testimony: the claims, legal framework and key factual disputes. Identify other witnesses and potential landmines in the case.
- Allow the executive to talk freely and be heard at initial meeting(s). Use subsequent meetings to acclimate executive to providing disciplined answers to questions.

Keys to Effective Relationship Between Lawyer and Executive:

- Attorney must be very well prepared before meeting with executives. Demonstrate that you are on top of key facts, chronology, determinative legal issues and knowledgeable of players involved including judge, opposing party and opposing counsel. Preparing an executive to testify is a confidence-instilling exercise.
- Do not overwhelm the executive with new facts that he or she was not aware of during initial meeting, or that he or she would not have personal knowledge of. This is unnecessary and can be confusing.
- If possible, schedule several shorter meetings with the executive instead of one marathon session. Attention starts to fade after a couple of hours.
- No keeping secrets from counsel. There is a reason attorney-client privilege exists. Allowing your trial counsel to be blindsided can be devastating to client's case.

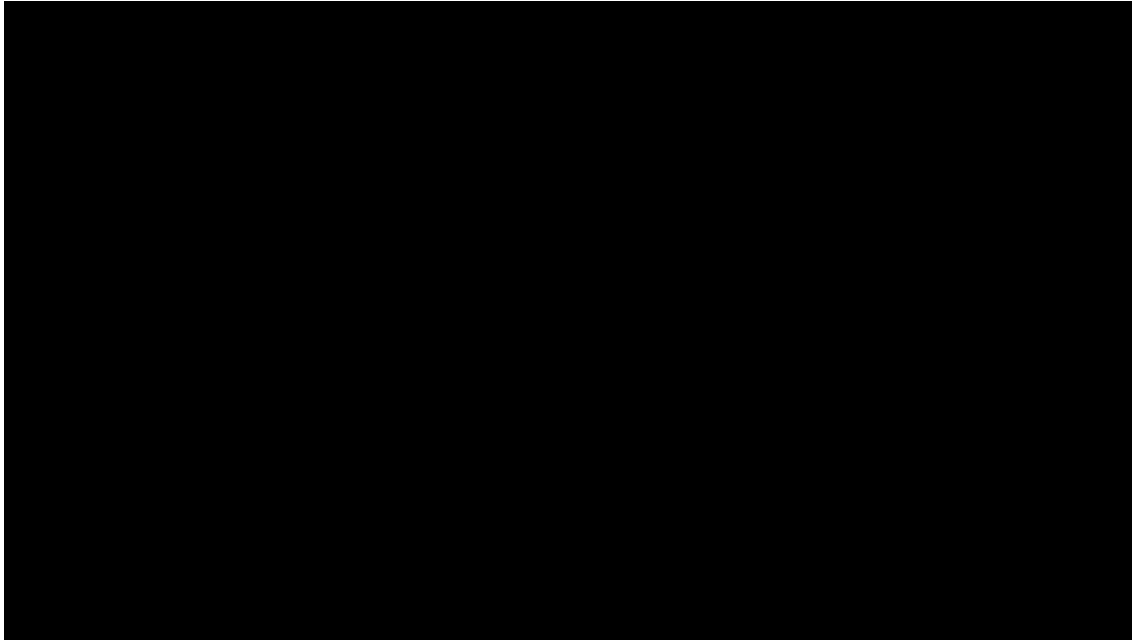
Tell the Truth!



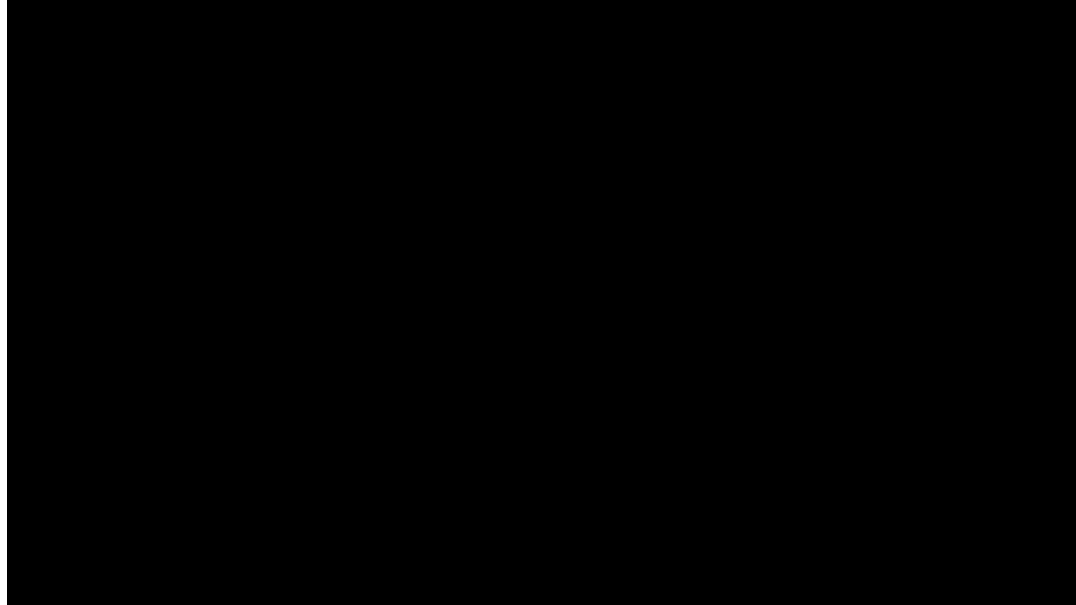
Tell the Truth!

- This is the most important rule of testimony. If the company executive can be shown to have testified falsely, the case will collapse.
- Give the shortest, truthful answer possible and then stop talking. Wait for the next question.
- Life is not a box of chocolates.
- Falsus in uno, falsus in omnibus.
- Never speculate or guess, but testimony given must be truthful.

Tell the Truth!



Tell the Truth!



Tell the Truth!

Elon Musk's Cross-Examination in recent trial in Delaware Court of Chancery:

10	Let me move on a little bit, still in	
11	the area of control, which is you agree, regardless of	
12	the technical arguments that are made in this case or	
13	by your lawyers, the world sees you as the controller	
14	of Tesla. Correct?	
15	A. No.	
16	Q. You don't believe that walking down	
17	the street, that most anybody who knows Elon Musk and	
18	Tesla goes, yeah, Elon Musk controls Tesla? You are	
19	not aware of that?	
20	A. I don't think that is the case at all,	
21	and it's certainly factually untrue.	

Ignore any Theatrics by Questioner

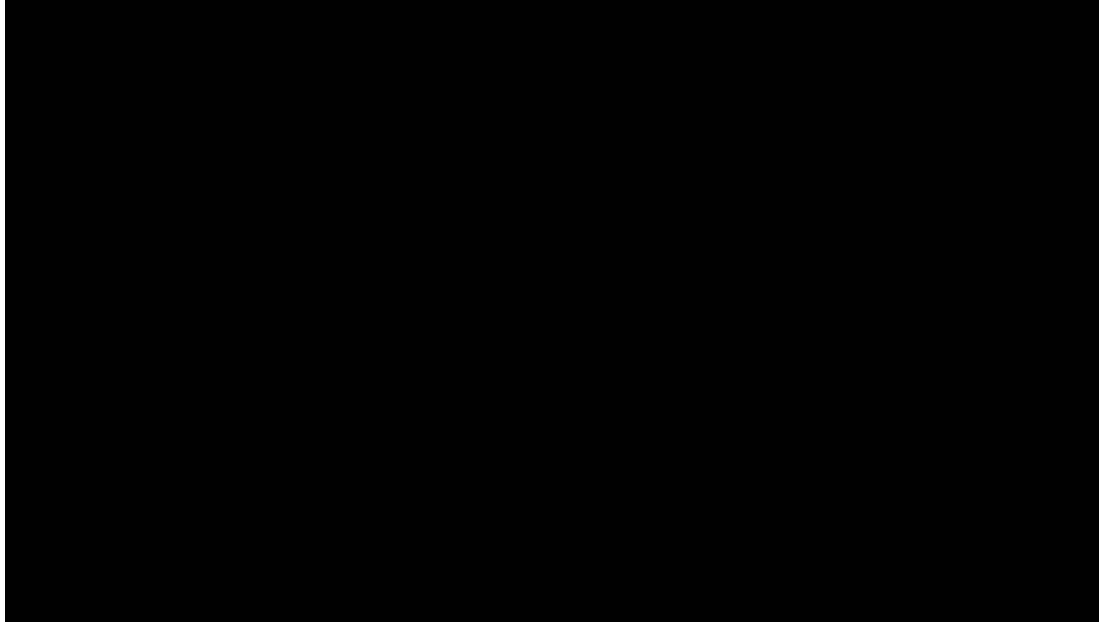
Elon Musk's Cross-Examination in recent trial in Delaware Court of Chancery:

18 Q. Sir, why were you being derisive?
19 A. Sure. So there was a firm Milberg
20 Weiss, which is a firm you went to work with before,
21 and you were mentored by the senior partners of
22 Milberg Weiss. But Milberg Weiss partners were put
23 into prison for creating false witnesses and perjury
24 and a number of other reasons.

CHANCERY COURT REPORTERS

1 Then the remainder of the firm went
2 across the road and renamed itself Robbins Geller.
3 Then the head of Robbins Geller was also put into
4 prison for perjury and false witnesses. Then, still
5 not having learned your lesson, you -- someone at your
6 firm yet again paid for a false witness in a Boeing
7 case, and, again, Robbins Geller engaged in criminal
8 action. So you were mentored by criminals, then
9 continued to be mentored by criminals, and that is why
10 I do not respect you.
11 Q. So you were derisive just because you
12 didn't like my resume?
13 A. I think you are a bad human being.

Ignore any Theatrics by Questioner



Use of Deposition Testimony at Trial

- Deposition witness is only person on camera.
- Deposition witness can do a great job for a full day of testimony but any loss of composure leading to undisciplined answer will be exploited by adversary.
- Ignore facial expressions, eye rolls, scoffs, etc. Explain to witness that they are essentially talking to the judge and jury even if they are not yet present.
- Let silence be your friend.
- Witness controls the pace of the deposition.

Acknowledge Accountability/Do Not Blame Subordinates

- Harry Truman had a plaque on his desk which said, “The buck stops here.” To a large extent, jurors expect that mentality from company executives.
- Executives should avoid passing the buck too much onto others or dodging responsibility for key items. They are leaders of their companies and the factfinder will expect them to be apprised of important developments and information within the company.

Acknowledge Accountability/Do Not Blame Subordinates

- “Plausible deniability” can backfire. Executives should not purposely insulate themselves from the truth.
- Former Theranos CEO Elizabeth Holmes’ testimony to the SEC:
 - Answered “I don’t know” over 500 times.
 - Largely deflected responsibility to Sunny Balwani, Chief Operating Officer

12 So what were you responsible for?

13 A I was CEO of the company. I, from a technology

14 perspective, was focused on inventions and named on a

15 large number of our patents. I tried to contribute

16 creatively to technical issues when we were dealing with

17 technical issues that would require invention.

Acknowledge Accountability/Do Not Blame Subordinates

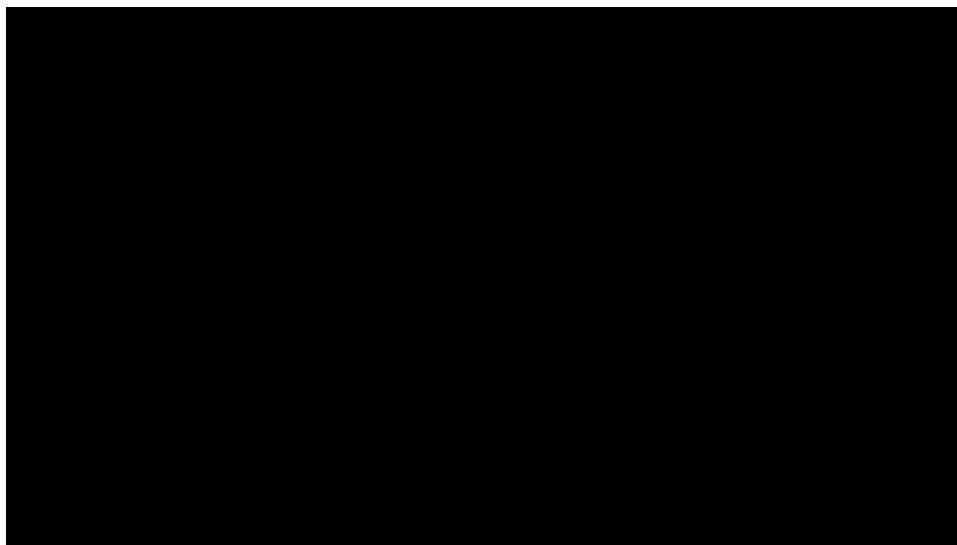
- That said, jurors often think a CEO knows every aspect of what is happening inside a company. This is unrealistic and far from the truth. The larger the company, the more difficult it is for CEOs to know every aspect of what is happening. Must explain company structure and division of responsibilities to moderate juror expectations.

Parsing Words and Being Evasive Hurts the Cause

- Qualify answers if necessary, but be straightforward. Avoid unnecessary semantics.
- Microsoft Antitrust Litigation: Bill Gates was evasive and uncooperative. When his videotaped deposition was shown at trial, the trial judge repeatedly shook his head. Gates claimed he did not understand what a browser is. The court ruled that Microsoft violated the Sherman Act and ordered that Microsoft be broken up into two separate companies.

Parsing Words and Being Evasive Hurts the Cause

Bill Clinton Grand Jury Testimony regarding Monica Lewinsky Scandal: “it depends on what the definition of the word ‘is’ is.”



Know the Fundamentals of Case but Don't Memorize the "Right Answers"



"Then everything went blank, comma, pause and wipe eyes with
handkerchief..."

Burr Shafer
May 22, 1948

Know the Fundamentals of Case but Don't Memorize the “Right Answers”

- Answers that seem rehearsed are less authentic and credible.
- It puts too much pressure on the witness to try to memorize answers.
- Witness should have 3-5 basic goals or case themes in mind when testify.
- Concentrate on what the question is asking and answer it in the shortest, truthful way possible.

Conclusion

- Prepare, prepare, prepare
- Tell the truth
- Disregard theatrics and don't take the bait
- Deposition testimony is just as important
- Don't be evasive
- Don't memorize a script