



# Can this witness be saved from the “Magic List”?

*Preparing your client for a deposition should involve productive role play, not a lecture*

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I had been waiting in the conference room for an hour, looking at a beautiful view of the mountains and hoping for the best. The attorney – who I had met only over the phone but came highly recommended by my good client, Charlie – had popped his head in after the receptionist seated me at 9 a.m., purring, “He’s here, but I just want to go over a few things with him first.”

I cooled my heels knowing the attorney was doing one of two things with the witness: Discussing something that he didn’t want me to know (good news for me – this is a guy who has a healthy respect for privilege) or he was giving the witness what I have come to call The Magic List lecture of *do’s* and *don’ts* for deposition. I call these lists *magic* because lawyers believe that by telling witnesses all these things in a lecture format, it is like sprinkling the fairy dust of knowledge on their heads. The witness will miraculously emerge with The Magic List fully understood, integrated, and ready for the battle ahead.

I have yet to meet a lawyer who does not have a Magic List for deposition. And trial. And arbitration. Magic List lectures sound something like this: “We are now getting ready for your deposition. A deposition is a...blah blah

blah...don’t answer if you don’t understand the...blah blah blah...take your time before answering the...blah blah blah...for God’s sake don’t volunteer...blah blah blah...if you don’t know, if you don’t remember just...blah blah blah...one time I had a witness who didn’t listen to me – of course, he is dead now and his wife is in a mental hospital and his children are on welfare...blah blah blah...don’t worry, I’ll be right beside you the whole time.”

If this attorney was giving The Magic List lecture, I was happy to be out of the room. It is really painful to watch a lawyer hammer a perfectly nice human being into a terrified lump who is bound to fail. Not that most people aren’t going to pick up something from a lecture, but no one really learns best this way – including attorneys. Attorneys were taught to lecture by law professors, mentors, and senior partners who lectured to them, and so they lecture.

## **And now, back to the story...**

The door burst open. “We’re dead,” the attorney whispered to me as he entered the room. I could see the edges of the witness behind him – sort of rounding out the attorney’s long lean edges with chubby navy-suited lumps on either side of his thighs. In a bright and cheery

voice filled with the kind of false bravado that anyone who has seen *Pollyanna* would recognize as “Let’s Play The Glad Game,” the attorney said, “Why don’t I leave you two alone for a moment and you can chat about those great deposition tips Charlie told me you have!” So much for the guy being in love with attorney-client privilege.

As a practicing trial consultant for over 30 years, I know that I do not want to be in a room by myself with a witness. While I was going to remind him that I could not cover anything that might blow the attorney-client privilege, the attorney disappeared out of the conference room and into oblivion with, “Come get me when you’re done!” So there I was – alone with this man in a blue suit whom I assumed was going to “kill” us.

I introduced myself to him, holding out my hand for him to shake. He just kept pacing. “You can just shout out your ‘tips’ at me from there. I’d rather be a moving target this time.” He did remind me a little of a fat duck in one of those shooting games at the county fair. A little fat duck in a navy blue suit waiting to get shot at in front of the beautiful mountain scenery. Waiting to be “Magic Listed.” Instead, I hit him with, “I don’t do tips.”

He stopped and looked at me. “You don’t?” he quacked.



“No,” I said.

“Well, whatever you do, you’ll never get it through my head. God, it was just like in school. He just sat there and talked at me and talked at me and talked at me...”

“Did it sound to you like ‘blah blah blah?’” I said conspiratorially.

“How did you know? Are you psychic?” he whispered.

Ah, yes, another victim of attorney-assisted near death by Magic List lecture. I am not putting down Magic Lists themselves. Let’s face it – Magic Lists come from a combination of vital information which an attorney is obligated by law to impart to the client AND experience – that horrible teacher who makes the Magic Lists of any trial attorney longer and longer, year after year.

### Let’s try this a different way

It is lecturing that I am putting down. That’s because giving testimony is a “doing” activity. “Doing” activities are best learned through actual doing – not by lecture. Think about it. Remember when someone came over to teach you how to use the computer and sat in the chair in front of the screen and worked the mouse and you said, “Please switch places with me – I can’t learn this by sitting next to you. I have to do it?”

But...how does this work with witness preparation? How is the Magic List information – ALL of which is actually important for the attorney to communicate to the witness – covered?

At the witness preparation session, I invite the attorney to bring their written Magic List and keep it *right next* to all the attorney’s other materials. It is to sit there until the end of the preparation session.

I start out by asking the witness, “What concerns do you have about giving your deposition?” Then, the attorney or I only answer that one question.

For example, the question, “Where am I going to sit?” is answered by the attorney.

The attorney says, “In a chair at a table between me and the court reporter.” Resist the urge to add, “In a conference room just like this one and the table will be probably on this side and opposing counsel will sit...blah blah blah...and you’ll have water...blah blah blah...”

Instead, this is the time to ask, “Anything else?”

“Is the doctor who did this to me going to be in the room?”

Your answer is, “I don’t know. Maybe, maybe not.” Resist adding, “Any party to a lawsuit in the United States...blah blah blah...usually doctors are too busy...blah blah blah...if he is here he will be sitting... blah blah blah...but I want you to treat him like...blah blah blah...” Instead, ask, “Anything else?”

At some point in this process, there will be one last “Anything else?” because the answer by the witness will be, “I can’t think of anything else right now.” It is now time to say, “Want to try it?”

### Mock testimony

The preliminary question and answer is over. Now it is time for mock testimony or role playing. The attorney plays opposing counsel for the mock deposition, and I play the court reporter. I almost always have a video camera rolling so that we can play back and learn from the piece of mock testimony we have just done. I recommend starting with five to ten minutes of testimony – tops. Play back, discuss, do another segment. When the witness gets more skilled and comfortable, then the segments can get longer.

At the end of the witness preparation session, I invite the attorney to look at The Magic List. I say, “Check it over and see if we left anything out.” Magically, The Magic List is almost always already covered. Some points came up and were answered in the questions that the witness asked at the beginning of the session. Others were covered in the “discussions” while watching the segments

played back. And – my favorite part of all – some points were never made because the witness was doing this part perfectly already.

Can you imagine the look of delight on the face of a witness when the attorney says, “Wow – we never talked about how it is all right not to know all the answers in a deposition. I loved how, when you didn’t know the answer, you just said so. You wouldn’t believe how many witnesses I’ve prepared who aren’t able to do that without lots of practice!”

### Can this witness be saved?

For the blue-suited witness in front of me, it was too late to do it *exactly* this way, so I said to him, “Do you learn better by doing something rather than listening to a lecture?”

His face lit up. “Do I? You BET I do.”

“Okay,” I said. “I am going to go in and tell the attorney we are ready for him, and we are going to learn by doing for the rest of the day. But you have to promise me one thing...when he comes in here you have to say, ‘Wow! Her list of tips is magic and I can’t wait to try them out!’ Got it?”

We worked on role play for the rest of the day, and at the end of our time the witness was ready, the attorney was ecstatic, and I dared to become psychic: “This witness will turn out to be a killer – to the other side.” Works like magic!

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