Improve Testimonial Impact

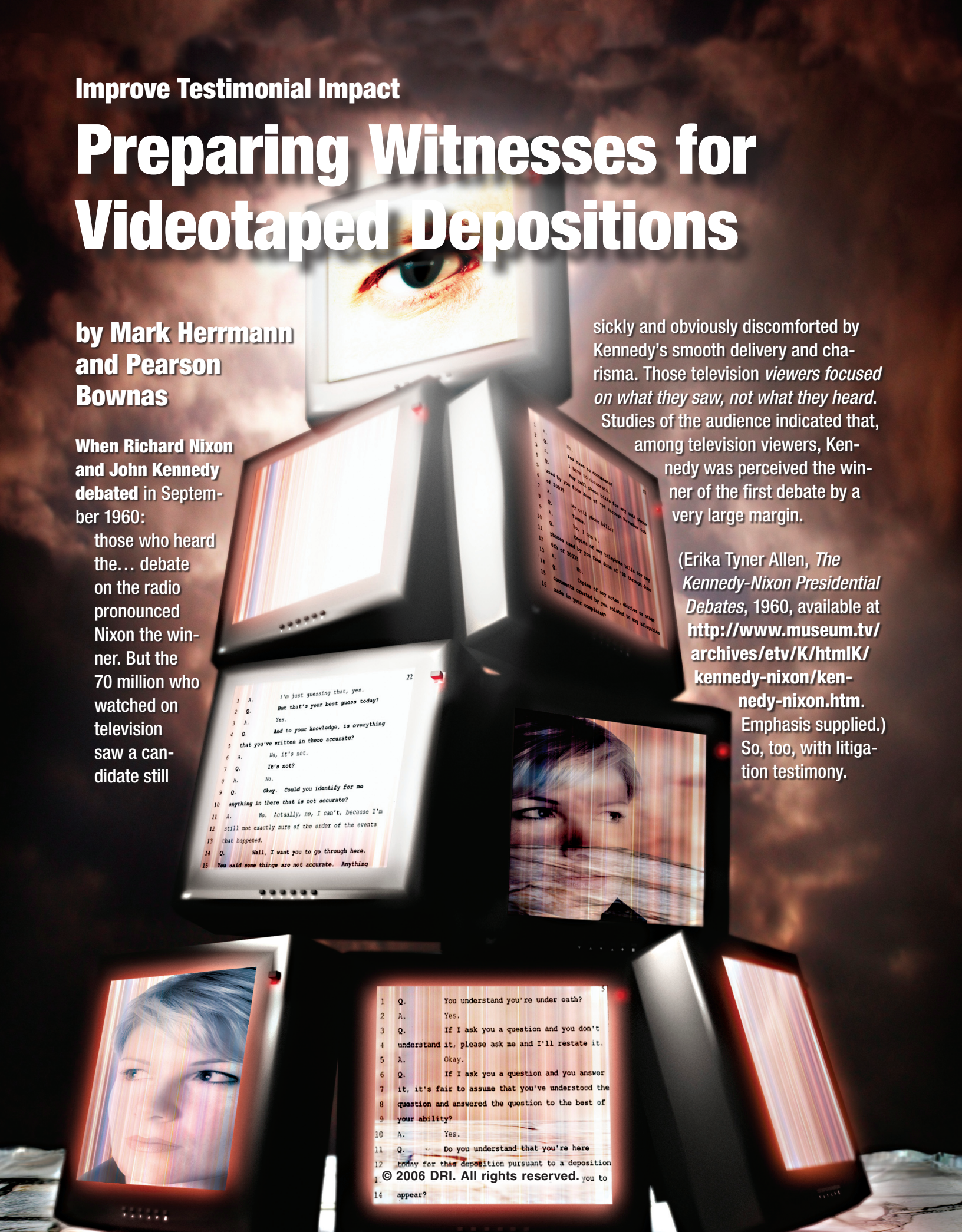
Preparing Witnesses for Videotaped Depositions

by Mark Herrmann and Pearson Bownas

When Richard Nixon and John Kennedy debated in September 1960:

> those who heard the… debate on the radio pronounced Nixon the winner. But the 70 million who watched on television saw a candidate still sickly and obviously discomforted by Kennedy's smooth delivery and charisma. Those television *viewers focused on what they saw, not what they heard.* Studies of the audience indicated that, among television viewers, Kennedy was perceived the winner of the first debate by a very large margin.

(Erika Tyner Allen, *The Kennedy-Nixon Presidential Debates*, 1960, available at **http://www.museum.tv/archives/etv/K/htmlK/kennedy-nixon/kennedy-nixon.htm**. Emphasis supplied.) So, too, with litigation testimony.



© 2006 DRI. All rights reserved.

When deposition transcripts are read into a trial record, jurors are told to consider only the words they hear. When videotaped depositions are played, jurors have much more to consider. According to a litigation consulting firm, when jurors were asked "How do you evaluate whether someone is being honest with you?," the top two answers (accounting for 46 percent of the responses) were body language and eye contact. (DecisionQuest, http://www.decisionquest.com/press_center.php?NewsID=45.)

Of course, the substance of a witness's testimony still matters. No matter how attractive a witness appears on the television screen, if his or her testimony is contradictory or belied by the documents, the jury probably will not believe it. But even credible, unassailable testimony can be undercut by jurors' perceptions or poor body language on videotape. Videotape deposition witnesses must therefore as be prepared as they would be for the courtroom even though the deposition is being held in a dingy hotel conference room shortly after the complaint was filed.

The Usual Deposition Preparation May Backfire on a Videotaped Deponent

The first, last, and most important instruction to give a witness is always to tell the truth. That never changes, no matter how the testimony is being recorded. Beyond that, many attorneys traditionally advise a witness to give the shortest possible truthful answer to a question, and then stop talking. Some observers, however, contend that this approach can backfire in a videotaped deposition: short, mechanical answers played to a jury may be perceived as rude or evasive. Melissa M. Gomez, *The Evolution of the Deposition: Survival of the Prettiest*, The Legal Intelligencer, Vol. P. 3643, at 7 (May 17, 2005). Video deponents should therefore be encouraged to add some context to certain answers.

For example, having lived through the Iran-Contra and Whitewater investigations, some skeptical jurors may perceive a witness's perfectly honest response of "I don't recall" as a legalistic dodge. This is especially true if your adversary can edit together a string of "I don't recall" responses to play to the jury. Whenever possible, videotaped witnesses should give truthful, common sense explanations for why they do not remember certain information (*e.g.*, "I attend a half-dozen meetings every day and don't remember the details of each one;" "that was more than five years ago and I just don't remember those details any more").

Pregnant pauses, stammering and excessive "uh"s during testimony, which deposition transcripts either conceal or minimize, can also be interpreted by jurors as signs of discomfort or dishonesty. Jurors may assume that the truth should be easy to tell, and only someone spinning a yarn needs to think about what to say next. These problems often arise when the witness encounters a line of questioning for the first time under the deposition spotlight. Thorough substantive deposition preparation minimizes this issue.

Whether in discussion or question-and-answer format, attorneys should get their witnesses' mental juices flowing in pre-deposition preparation sessions. While most attorneys prepare witnesses before depositions, thorough preparation becomes even more important for a witness whose deposition will be videotaped. Attorneys should force the witness to think carefully about important events and concepts. Attorneys should anticipate the topics the witness will be asked about, if not the actual questions the witness will be asked. Attorneys should show—or, if appropriate, discuss with—the witness documents that are likely to be used as exhibits during the deposition. These strategies will familiarize the witness with the relevant issues and make smooth and easy answers more likely.

Attorneys may want to rethink other common advice they give to deponents when a deposition is videotaped. Quibbling over unimportant details, for example, can have greater consequences for a witness in a videotaped deposition than in a transcribed deposition. Most lawyers will usually tell their witnesses to listen carefully, answer narrowly, and do not accept words in a question that you would not use as your own words. When videotaped exchanges are played at trial, however, any delays or quibbling carry the risk of being perceived as evasive. In a videotaped deposition, therefore, it is very important for witnesses to pick their battles carefully. The opportunity may even present itself for the witness to appear helpful and non-evasive, with interest in simply keeping the deposition moving. Such a positive attitude will not be lost on the jury.

To Tape or Not to Tape a Preparation Session?

In addition to thinking about the words your witness will speak at the deposition, an attorney defending a videotaped deposition must also prepare his or her witness's body language for testimony. While certain questions can be anticipated and the witness's answers repeated until they flow smoothly, body language is usually spontaneous, reflexive and unedited. Videotaped depositions can reveal to the jury and magnify such unconscious behavior as blinking, smiling, frowning and eye rolling, which jurors may per-

Mark Herrmann is a partner, and Pearson Bownas an associate, resident in the Cleveland office of the international law firm Jones Day. Mr. Herrmann is a member of DRI. The views expressed in this article are those of the authors and not necessarily those of their clients or firm.

ceive as signs of nervousness, sarcasm, discomfort and arrogance.

Attorneys must therefore teach their videotape deposition witnesses to be aware of, and to control, their body language. One effective way to bring this message home is to subject the witness to a videotaped practice deposition. Then review the tape with the witness so he or she can see what the jury will see.

Videotaping deposition preparation sessions and reviewing those tapes with your client, however, carries at least some theoretical risk that the tapes will be discoverable. Presumably, these tapes should be protected by the attorney-client privilege or work product doctrine. These protections, however, are not guaranteed. In a case addressing the discoverability of a videotaped communication between lawyer and client (albeit not a communication to prepare the client to be deposed), one court ruled that the presence of the videographer destroyed the attorney-client privilege. *Grenier v. City of Norwalk*, 2004 WL 3129077, at *1, 2004 Conn. Super. LEXIS 3719, at *1–*2 (Dec. 16, 2004) (holding that, "[w]hile the videographer was necessary for the videotaping of [the client's] statement, he was not necessary for [the client] to consult with her attorney"). One could assert that the videographer was the lawyer's assistant, like a secretary, whose presence should not waive the privilege. Or one could avoid this issue entirely: Either operate the camera yourself or have the videographer set the shot, press the record button, and leave the room.

The work product argument for protecting videotaped deposition preparation sessions also has theoretical vulnerabilities. First, the work product doctrine is not inviolate. It can be defeated by an opponent's showing of a substantial need for the information at issue and an inability to obtain the information from another source without undue hardship. *See*, *e.g.*, Fed. R. Civ. P. 26(b)(3). It is hard to imagine this limitation forcing the disclosure of a videotaped deposition preparation session, but one never knows.

Second, in *Southern Pacific Transportation Co. v. Banales*, 773 S.W.2d 693 (Tex. 1989), the Texas Supreme Court refused to find that practice deposition videotapes are *per se* work product. There, "[a]s part of [a defense witness's] preparation to testify by videotaped deposition, [the defendant's attorney] staged a practice deposition." *Id.* at 693. This came to light during the witness's deposition, and the opposing party sought to discover the videotape from the practice deposition. *Id.* The defendant's attorney argued that the practice deposition session constituted work product and revealed the attorney's mental impressions. *Id.* at 693–94. The plaintiff argued "that the practice video is not work product but a potential attempt by [the defendant's] attorneys to shape the [witnesess'] testimony… and hide all such efforts behind a 'cloak' of work product." *Id.* at 694. The witness submitted an affidavit swearing that "he never saw the videotape, nor was it utilized in any way after it was taken." *Id.* The trial court ordered the defendant's attorney to produce the tape. *Id.* at 693. The Texas Supreme Court ordered the trial court to review the videotape *in camera* to determine whether it actually disclosed the mental impressions of the attorney or contained information tending to mold the witness's testimony. *Id.* at 694.

Non-recorded deposition preparation is privileged. Why should a different rule apply to taped sessions?

On its face, the Texas Supreme Court's reasoning is not limited to videotaped deposition preparation. Surely a witness's testimony can be molded improperly in the absence of a videotape, but non-recorded deposition preparation is privileged. Why should a different rule apply to taped sessions?

Moreover, the witness's testimony in *Southern Pacific* that he had not reviewed his own videotaped practice deposition meant that the defending attorney had not used the tape to its full potential in preparing the witness. To the extent this fact matters to courts (and why should it?), actually using the practice videotape with the witness may increase the likelihood that it will be discoverable. Additional risks of discovery may be present in jurisdictions that permit discovery of witnesses' prior statements. Even the possibility that deposition preparation videotapes may be discoverable under certain circumstances could lead some attorneys to conclude that the videotapes must be disclosed on privilege logs in response to document requests. Attorneys should also be aware of potential spoliation of evidence issues that may arise if tapes are erased or discarded.

An imperfect, but still potentially useful, solution to these concerns is to videotape the witness in a practice deposition setting without asking the witness substantive questions about the case. Instead, the witness can be asked innocuous questions about his or her family, educational history, and similar topics. This will allow the lawyer and witness to review the witness's videotape performance and identify any visual distractions without risking that substantive preparation will fall into the opponent's hand. Creative lawyers can formulate non-substantive questions that should reveal whether the witness has a "tell" when answering questions that projects discomfort or forces him or her to recall distant events. Important substantive matters can be discussed off-camera.

Another risk of videotaping a deposition preparation session and reviewing the tape with your witness is that your exercise will be revealed to the jury when the witness testifies. Jurors may be skeptical of testimony that they perceive to be coached or over-rehearsed.

Videotape Deponents Should Dress Appropriately for the Camera

Attorneys defending videotaped depositions should advise their witnesses how to dress for the camera. Advise witnesses to

Videotaped, continued on page 70

Videotaped, from page 14
avoid clothing with small patterns, stripes, tweeds, plaids or checks. Many cameras and tapes cannot distinguish among the fine lines and the clothing may appear to vibrate or be shiny. *See* Paul M. Lisnek & Michael J. Kaufman, *Depositions: Procedure, Strategy and Technique* §5.5 (3d ed. 2003). Instead, witnesses should wear solid, neutral colors. Blue is a good choice; red and other bright colors can smear. *Id.*; Andre M. Lagomarsino, *Strategic Use of Video Depositions*, 11 Nevada Lawyer 8, 9 (June 2003). Advise female witnesses to use a light touch when applying makeup for a videotaped deposition. Advise male witnesses who shave in the morning to shave again before a late-day videotaped deposition or at the lunch break of a deposition that is expected to continue into the evening. Videotapes can unflatteringly emphasize heavy makeup or a five o'clock shadow. Lisnek & Kaufman, *supra*, §5.5.

Pick the Deponent's Audience

There is sharp disagreement about whether a witness should look into the camera when testifying at a videotaped deposition. Some people insist that "a deponent ought to be cautioned to answer to the camera rather than to the examiner." *Business and Commercial Litigation in Federal Courts* 317 (Robert L. Haig ed. 1998). Others advise that deponents should be instructed to "look only at the questioner's face…; don't look directly at the camera…." DecisionQuest, http://www.decisionquest.com/press_center.php?NewsID=45. Jurors have remarked that they found witnesses who did not look them in the eyes to be untrustworthy—*even when the witness was testifying by videotaped deposition*. Dan R. Gallipeau, "Juror's View of Courtroom Technology & Trial Graphics," at the Ohio State Bar Association Federal Bench Bar Conference (September 30, 2005). Talking to the camera, however, will be unnatural and distracting to some witnesses, and you want your witness free from as many distractions as possible. The witness could be taught to look only at the camera throughout the deposition, although that requires a great deal of self-discipline. It may also seem rude to interrogating counsel. On the other hand, the bouncing back and forth of your witness's head if he or she makes eye-contact with the questioning attorney and then returns to the camera to answer can distract and annoy jurors.

A possible compromise, if circumstances permit, is to have the camera placed behind and directly over the shoulder of the questioning lawyer. This way, the witness can naturally respond to the human being in the room actually asking the questions while still appearing to speak directly to the jury watching the videotape later. If you decide to have your witness speak directly to the camera, consider taping a piece of paper just above or below the camera lens that says "JURY" to remind your witness what he or she is doing.

Attorneys who are concerned about the camera angle or the lighting or the backdrop should not hesitate to peak through the camera to see how the witness will appear. It is fair for a defending attorney to ask for minor adjustments that will improve the witness's appearance.

Manage the Witness's Behavior at the Deposition

Attorneys should advise each videotape deposition witness that the witness is always on camera. When the questioning attorney is speaking, the dynamic within the deposition room will temporarily shift away from the witness. In most instances, however, the camera will remain fixed on the witness. The witness's body language is important during this on camera down time, too. Some attorneys suggest that the witness keep a note that says "You're on camera" in front of him or her during the deposition.

Videotape deposition witnesses should be advised to keep their body position open and their hands on the table, and to lean slightly forward in their chairs. Crossed arms can signal defensiveness; hands on a witness's face as he or she talks can signal dishonesty; leaning back can signal arrogance or disinterest. The area around the deponent should be clear of everything except exhibits. Playing with a paper clip or rubber band while testifying is just plain annoying, and jurors will interpret it as disrespect.

Facial expressions and hand gestures can appear exaggerated on tape. Witnesses should act naturally; they should not intentionally make expressions or gestures for show.

Lawyers frequently instruct their deposition witnesses to pause before answering questions, both to allow the witness to consider fully the question and to give the lawyer time to object, if necessary. To juries, however, pregnant pauses can indicate uncertainty, reluctance or hesitancy to give an answer. The witness should be instructed to answer as soon as he or she is ready. If the lawyer needs more time to consider whether to object, the lawyer should interrupt.

If a witness spends long periods of time with his or her head down in silence, jurors may believe he or she is avoiding the questioner and trying to delay. What the jurors may not know is that the questioning lawyer just slid across the table—and out of the camera's view—a 36 page contract. Before the witness reads a lengthy exhibit, the defending attorney should note the length of the exhibit for the record.

Finally, even the best witness is eventually going to lose steam and forget your advice. Attorneys should keep a sharp eye on witnesses and take breaks whenever necessary.

Witnesses have plenty to remember on the day they are being deposed. Bombarding them with more rules, unique to videotape, will only increase their performance anxiety. But careful, repetitive witness preparation can dramatically improve the impact a videotaped witness will make at trial; surely it is worth the extra effort. Indeed, if Richard Nixon had considered these issues 50 years ago, he might have gained the White House eight years earlier. FD