

FROM MY SIDE OF THE BENCH

What Are the 10 Hardest Questions?

BY HON. RANDY WILSON

I'M SITTING ON MY BENCH AND WATCHING a simple breach of contract case. The case involves a franchise relationship gone bad. The plaintiff has finished his direct examination and the defense attorney has just begun. One of the first areas of questions by the defense attorney involves a memo written by the plaintiff where the author says that the termination of the franchise relationship by the defendant hasn't really hurt plaintiff's business. Needless to say, it's a critical document. The defendant's attorney asks the witness why he said what he said. Astonishingly, the witness gives a deer in the headlights look and mumbles a largely incoherent answer. My eyes cut over to the plaintiff's attorney who is wincing. Here is one of the most significant documents in the case, and, to my surprise, the witness was unprepared for the question. I wish I could say that this was an isolated incident. Unfortunately, it's not.

In every case I've tried, there are core issues and contested facts. Every case has warts and problems. Before your client is either deposed or goes on the witness stand in trial, he must be prepared absolutely on these problem areas. There is no better way to do this than sitting down with the witness and preparing "The 10 Hardest Questions."

Before your client/witness is deposed, and again before trial, sit down in the quiet of your office and think through your case, including liability, causation, damages and defenses. Think of the 10 hardest questions that the other side could ask your client, such as:

- Why did you write this letter?
- Why haven't you gone back to work?
- Isn't this memo inconsistent with your contentions in this lawsuit?
- Why did you, a year before the accident, tell the doctor that your back hurt?

- How can you claim lost profits when your business has never made money?
- How can you claim that you didn't know the house had termites when the inspection report reveals these problems?

You know your own case and you know its problems. After you prepare the list, sit down with your client and review it. Ask him the hard questions. See what his answers are. You're the lawyer and it's your job to help him answer these questions. Write down the answers. Ask them again. In other words, make sure that your client is absolutely confident of his position and his answers. That way, at trial, the witness is confident and waiting for these hard questions rather than dreading them. That way, the witness can turn to the jury and confidently give an answer to these crucial questions and show the jury that he's not afraid of anything the other side has to throw at him.

**"Every case has warts. . . .
Sit down and prepare
The Ten Hardest Questions."**

The Ten Hardest Questions is an amazing tool for both witness and lawyer. The witness can become confident and self-assured. The exercise of dreaming up the questions forces the lawyer to confront the inevitable problems in his case.

And, if you and your client can't come up with a plausible answer to these questions, it may be a good time for the two of you to re-evaluate that last settlement offer.

Hon. Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective. ★