

# BOYD TRIAL CONSULTING

## *Keeping Your Case Above Water*

### **How to Deal With an Evasive Witness**

(without making the jury mad at you!)

Every trial lawyer faces the challenge of a witness who won't answer the questions they are asked. I recently heard a highly-credentialed political researcher from Harvard [1] talk about an interesting study that I believe has a lesson for trial lawyers. The subject of the study was politicians who "dodge" questions; those who when asked questions in interviews or debates give answers that are not responsive to the questions.

In the study, mock politicians were orally asked questions in front of a group of listeners. Each orally answered one of these questions:

1. What will you do about the health care problem?
2. What will you do about the illegal drug problem?
3. What will you do about the terrorist problem?

The listeners/test subjects were then asked whether they thought the response answered the question, and how they felt about the person who gave the answer. What made the test interesting is that **regardless of which question was asked, the answer was always the same:** *"I'm glad you asked that. We need universal health care in America."*

There were many interesting findings, but the one I think is important for trial lawyers is this: listeners who heard this answer after hearing question #2 were generally satisfied that the speaker had answered the question. The dodge worked!



*Jeffrey D. Boyd, Esq.*

**"Even an intentionally evasive witness can end up with the jury's sympathy if the witness is handled the wrong way."**

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- Interactive Focus Groups
- Mock Trials
- Evaluation of liability, damages, defenses, exhibits, demonstrative evidence, and witnesses/parties (live or videotaped)
- Developing themes
- Witness preparation

Why? The research showed that in the #2 scenario, the listener's **memory of the question was changed by the answer**. That is, after hearing the question and hearing the answer, many people thought the question had been answered because they remembered the question as asking about something to do with health care. They forgot it was really about illegal drugs. However, this was only true when the question and answers were given orally; **if the listener had the question in writing in front of them, they were much more likely to feel that the question had been dodged**, and to be upset with the person answering.

### **So what does this mean for lawyers in the heat of a trial?**

I believe the underlying social premise at work here is: **fair questions call for fair responses**. A fair question should be answered fairly. If it is not, the questioner has earned the right to push to get a responsive answer and the speaker will lose credibility if they don't give one. However, if the audience feels a fair answer has been given, they don't like the lawyer repeating the question, looking for a "better" answer.

We have all told witnesses they can't be hostile towards a questioner until they have "earned" that right, which usually means suffering through some unfair questions. Likewise, as questioners, we know to be slow to squeeze a witness; we have to meet the social criteria of getting an unfair response to a fair question before we are "allowed" to ask sharper questions. This matters, because in an "unfair" exchange the jury's sympathy shifts to the party being treated unfairly. Even an intentionally evasive witness can end up with the jury's sympathy if the witness is handled the wrong way.

Based upon the research, **the solution is to show the jury the original question**. Let them see it, so they can directly compare the question and the answer and so be in a position to judge whether the answer is responsive or is a dodge. The best way to do this is real-time transcription. If that is not available, write the question down on a whiteboard or a piece of paper so the jury can see it, and ask it again. At the least, have the court reporter read back the original question, so their memory of the question will be refreshed. Once you have demonstrated that the answer is a dodge, you will have

● Development of Voir Dire techniques

● Assistance with jury selection, in person, at trial

● Development of Supplemental Jury Questionnaires

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"Jeff recently worked with me as a trial coach in a case I took to trial that resulted in a substantial verdict. He helped me strengthen and simplify my message to the jury, and made me more confident that I was on the right path with the case."

-Jim Holland, Esq.

the jury's "permission" to push harder to get a real answer.

A sad footnote is that the research found people who dodge questions artfully with smooth, polished, dodges, are liked and trusted more than people who respond to questions truthfully but with less polish. Sometimes it is form over substance; another lesson for the trial lawyer.

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[1] Thanks to Michael I. Norton, Ph.D., Associate Professor of Business Administration at the Harvard Business School, for "*The Art of Dodging Questions: from Kissinger to Palin and Beyond.*"

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