

“You Can’t Handle the Truth!” – How to Handle a Lying Witness Before and During Trial

PRESENTED BY NEW MEDIA LEGAL PUBLISHING

OCTOBER 1, 2024

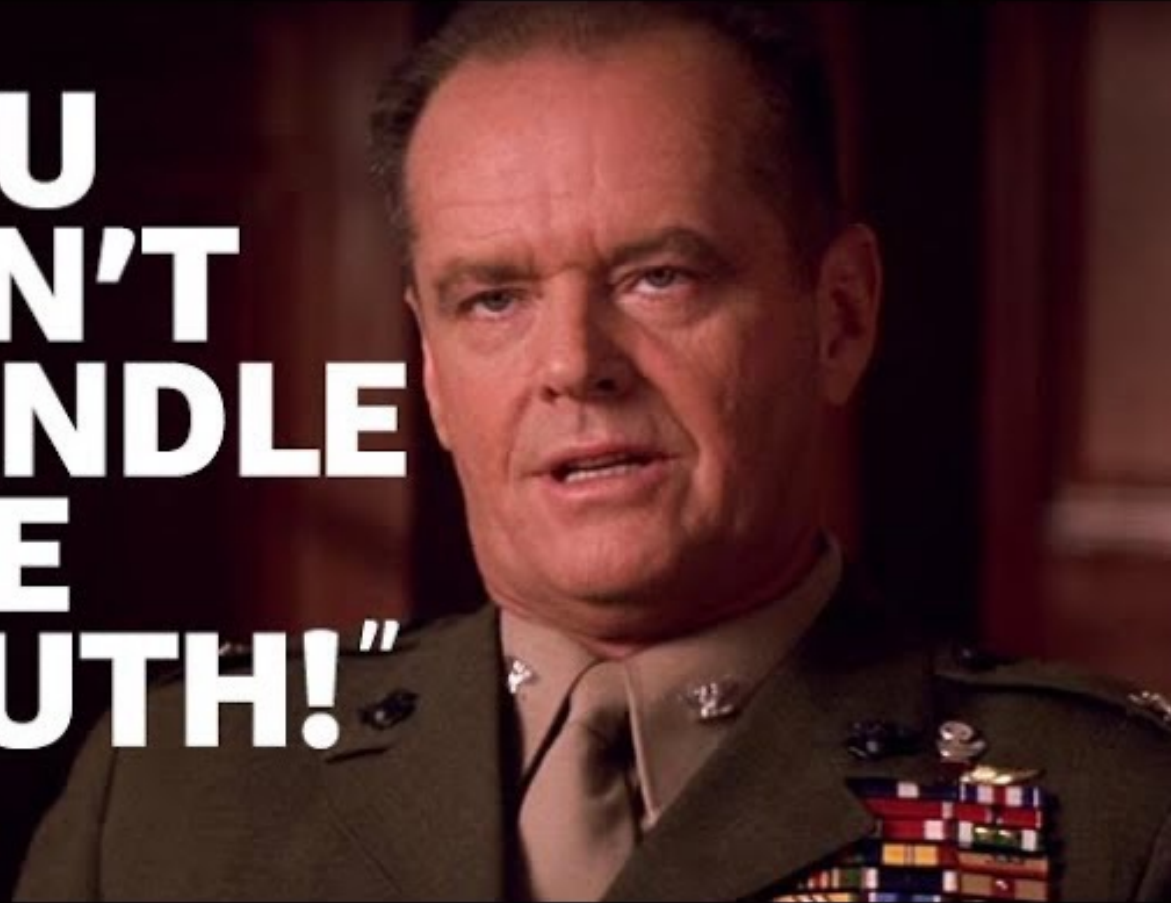
PAUL FRAIDENBURGH, PARTNER, PILLSBURY, SAN DIEGO, CA

Some Inspiration from Hollywood



Some Inspiration from Hollywood

**"YOU
CAN'T
HANDLE
THE
TRUTH!"**



Key Considerations

- Your credibility – and the credibility of the witnesses you offer – are your most important assets in the courtroom
 - Often, jurors are instructed that their job is to assess the credibility of witnesses (see, e.g., Cal. Civ. Jury Instructions No. 107)
- Your job as a lawyer in the courtroom is not to win at all costs, but rather to help the trier of fact reach the right result for the right reasons
 - Lawyers owe a duty of candor to the court (see, e.g., ABA Model Rule 3.3; Cal. Bus. & Prof. Code Section 6068)

Deposition Testimony

- Two schools of thought on how to handle the lying witness in depositions:
 - Don't challenge him or her now, and wait until trial to impeach the witness in front of the jury (the "hide the ball" strategy)
 - Treat the deposition like a trial, and do what is necessary to get the truth out on the table (the "out on the table" strategy)
- The "out on the table" strategy is better because:
 - Otherwise, you could be the one who is surprised or trapped at trial
 - Also, you don't always know what is true at this stage in the case and it's better to understand all of the possibilities so you can react to them
 - Exposing lies in depositions also can increase your leverage in the case

Deposition Testimony: Additional Tips For Experts

- Referring to professional standards is a good way to keep experts honest
- Exposing false or exaggerated credentials is another useful method
- If the expert is honest and reputable, consider other ways the expert can help you expose lies or misleading information the other side is presenting in the case

Trial Testimony

- Probe the witness's qualifications and/or ability to give the testimony he or she is offering
 - Challenging a witness's memory (in a gentle way) can be an effective technique
- Explore the witness's potential biases
 - Consider when raising bias will deliver the maximum effect on the trier of fact

Trial Testimony

- Raising prior criminal convictions is another effective way to challenge credibility (see Fed. R. Evid. 609)
 - Once again, consider the optimal timing for maximum effect
- Consider other permissible avenues for attacking a witness's character for truthfulness (see Fed. R. Evid. 608)

Trial Testimony

- The main event: impeachment by prior, inconsistent statements (see Fed. R. Evid. 613; Fed. R. Evid. 801[d][1])
 - Unlike the other methods, you may not have much time to prepare to impeach because it requires the witness to give inconsistent testimony on the stand
 - Having a comprehensive cross-examination outline and a binder with the prior testimony are the keys to being able to impeach effectively on the spot

Trial Testimony

- Never forget the key question: Is this important enough to impeach this witness on this point?
 - Wasting the jury's time is a big mistake, and they may never forgive you for it

Trial Testimony

- The mechanics of impeaching with a prior, inconsistent statement:
 - Confirm the statement to lock them in to the testimony in an unambiguous way
 - Credit the prior, inconsistent statement to show that the witness had every reason to be truthful on that prior occasion
 - Confront the witness with the prior, inconsistent statement to impeach him or her

Trial Testimony

- Don't allow yourself to be distracted or deterred by the other side's objections
 - Prior, inconsistent statements are not hearsay (see Fed. R. Evid. 801)
 - But the statements cannot be offered for the truth of the matter asserted unless they were made under oath (see Fed. R. Evid. 801)

Testimony By Your Own Witness

- When preparing your own witnesses to testify on deposition, emphasize repeatedly that they must always tell the truth
 - If your witness gives an answer that you believe may not be true, the first task is figure out why this is happening (e.g., did the witness misunderstand the question, is the witness mistaken, etc.)
 - In a deposition, use breaks to get to the bottom of the discrepancy so that the witness can correct the testimony later in the deposition, if necessary

Testimony By Your Own Witness

- At trial, your primary concerns are your ethical obligations not to offer false testimony to the tribunal (see ABA Model Rule 3.3) and not to assist or counsel a witness to testify falsely (see ABA Model Rule 3.4[b])
 - California lawyers have a further obligation to correct false statements of material fact or law made by the lawyer to the tribunal (see Cal. R. Prof. Conduct 3.3[a][1])
- In rare cases where clients may intend to testify falsely, your duty of candor may conflict with your duty of zealous advocacy, requiring you to tread carefully to ensure that you satisfy each of these ethical obligations

Final Thoughts

- Your credibility, and the credibility of the clients you represent and the witnesses whose testimony you offer, are the most important assets you have in a case
- If you emphasize to your clients and witnesses at the outset the importance of always seeking to bring out the truth in the case, you'll likely encounter fewer ethical issues, and the trier of fact likely will see you as a credible and highly-effective advocate for your client's case