

## *Artful Dodging in the Courtroom*

BY TODD ROGERS AND MICHAEL NORTON

Don't miss the trial consultant responses following this article  
from Katherine James and Charli Morris!

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*The authors are eager to conduct experimental research on how question dodging affects legal outcomes. Please contact them with opportunities or discussions about collaboration.*

While being deposed about his alleged steroid use, former baseball MVP Barry Bonds was asked directly if he had ever had a syringe injected into him by his former trainer. Bonds answered:

*I've only had one doctor touch me. And that's my only (sic) personal doctor. Greg, like I said, we don't get into each other's personal lives. We're friends, but I don't – we don't sit around and talk baseball, because he knows I don't want – don't come to my house talking baseball. If you want to come to my house and talk about fishing, some other stuff, we'll be good friends, you come around talking about baseball, you go on. I don't talk about his business. You know what I mean? That's what keeps our friendship. You know, I am sorry, but that – you know, that – I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see...*

This rambling and disjointed answer – which might best be described as him answering the question, “How has being the child of a celebrity affected your life?” - led to his conviction on obstruction of justice, for dodging the question he was asked and offering such an egregiously unrelated answer.

Our research has explored two questions: how and when can people manage to dodge questions without being detected, and how can we prevent these “artful dodgers” from getting away with it? Bonds' attempted dodge – while far from artful – highlights the relevance of our work to court rooms.

Our research suggests strategies for pushing evasive witnesses to either answer questions more directly, or be penalized more harshly by judges and juries for failing to do so.

To understand how observers could fail to detect when a speaker dodges a question, first consider a basic fact about humans: our attention is limited. Whether it's walking and chewing gum at the same time or remembering what question we were just asked, our attention is regularly tested – and regularly fails those tests. A classic example is shown in the brief video clip below. Before reading further, please take the test and see if you can get the correct answer.

[http://www.youtube.com/embed/IGQmdoK\\_ZfY](http://www.youtube.com/embed/IGQmdoK_ZfY)

Midway through, from the right side of the screen, a person in a gorilla suit walks across and bangs his chest. He then slowly walks off the screen to the left. When viewers are asked if anything unusual happened during the video, only a small fraction report noticing the gorilla. Of course, when told about the gorilla in advance, nearly everyone spots it. Without advance warning, people do not expect the gorilla to walk across the screen and so do not direct their limited attention toward it.

Does a similar blindness play out when observers watch speakers dodge questions? We studied this exact question in a [recent paper](#). In a series of experiments, we found that observers fail to detect dodges when speakers answer similar – but objectively different – questions. For example, in one study speakers were asked either what they would do about healthcare coverage in America, the illegal drug use problem in America, or America's War on Terror. They all offered the exact same answer, *"I'm glad you asked me that. There are so many important problems facing America today. We need universal healthcare because..."* (and gave a long answer about healthcare). Not surprisingly, people rated the speaker who was asked about healthcare coverage in America as trustworthy, honest, and likable – after all, he answered the question he was asked. More surprisingly, the speaker who was asked about illegal drug use but answered a question about health care was seen as just as trustworthy, honest, and likable. In short, speakers who offered an answer to a question that was similar to the one that was actually asked (i.e., illegal drug use feels at least vaguely similar to healthcare) were rated just as positively as those who were actually asked the question to which they offered an answer (healthcare). Moreover, this failure to punish the dodging speaker went hand-in-hand with failing to remember what question he was actually asked.

Question Topic	Response Topic	Perception	Question Recall	Result
Healthcare	Healthcare	On point	Yes, recalled	Trustworthy, honest and likable
Drug Use	Healthcare	Feels close enough	No, cannot recall	Trustworthy, honest and likable
War on Terror	Healthcare	Egregiously dissimilar	Yes, recalled	Untrustworthy, dishonest and unlikable

But not all dodges were equally effective. When the speaker answered a question that was egregiously dissimilar to the question he was actually asked – when he answered about healthcare to a question about the War on Terror) – he was punished as untrustworthy, dishonest and unlikable. Not unlike Barry Bonds' failed dodge attempt, people noticed the egregious dodger, and they punished him.

This blindness to artful dodges, we argue, is a result of observers devoting their attention primarily to evaluating whether or not they like and trust the speaker. They assume that the speaker will attempt to answer the question asked – that is, after all, how most discussions operate. So unless the speaker outrageously dodges the question asked, observers appear to rarely notice. Our research also shows that speakers are better off answering the wrong question well than the right question poorly. Compare the following two scenarios. In the first, a speaker asked about the illegal drug use problem offers a smoothly delivered answer about healthcare coverage,

*“I’m glad you asked me that. There are so many important problems facing America today. We need universal healthcare because...”*

In the second scenario, a speaker asked about healthcare coverage offers a stuttering and decidedly unsmooth answer about healthcare coverage,

*“I’m glad you, ummm, asked me that. There are, well, so many important, you know, problems facing America. We need, umm, universal healthcare because....”*

While we might think that offering the correct substance would triumph over delivering it the incorrect substance in an unhalting style, people actually thought the smooth speaker was more honest, trustworthy, and likable than the unsmooth speaker – even though the smooth speaker answered the wrong question.

We have identified one relatively simple solution to this disturbing pattern. Posting the text of the question on the screen *while* the speaker offers his answer directs observers to detect efforts to dodge. In many situations, of course, such interventions are unlikely to be feasible: it would undoubtedly be awkward to hold up a sign indicating the specific question you expected an acquaintance to be answering, for example.

But that may not be the case in court. Imagine that counsel had written the question asked of Barry Bonds about syringe use on a board for him – and a judge and jury – to peruse while he offered his answer. It may have discouraged him from dodging the question in the first place; even failing this, it would have made his attempt to dodge the question even more glaring to the already skeptical judge and jury. Attorneys have reported to us that because they are sensitive to being perceived as aggressive by jurors, they often resist repeating a question to a witness or highlighting that a witness dodged a question asked. Writing a key question on a board may be a strategy for helping a judge and jury detect dodging, without suffering the cost of appearing to badger a witness.

*We asked two trial consultants to respond to this article. On the following pages, Katherine James and Charli Morris offer their reactions.*

## *Katherine James responds:*

I find the basic premise of this very interesting article to be the difference between what people expect from someone in a news conference versus what people expect from someone on a witness stand. One of my “un-teaching” moments in witness preparation always comes when a witness has been “media trained.” I then get to play “how great you had that experience – because testifying in court is the opposite!”

In media training, people are often taught to say something like “I’m so glad you asked me that!” (as in) “I’m so glad you asked me about how the country is going to hell in a hand basket because of \_\_\_\_\_.” Or, “I’m so glad you asked me about what our company feels about safety in light of the fact that our entire warehouse just blew up \_\_\_\_\_.”

My experience tells me that jurors are much more likely to say, “Stop spinning!” when given some canned answer that begins with “I’m so glad you asked me that!” Consider this example: “I’m so glad you asked me about how I shot up steroids!” It just doesn’t pass the “smell” test for them when a witness doesn’t answer the question directly, much less when a witness has some self serving preamble that they expect to hear from politicians and owners of companies when the cameras are in their faces.

I look at the sad “answer from the bizarre-o-world” that Barry Bonds gave and say, “Here’s a man who completely missed the concept of listen to the question.” **Think** through it, and then **answer** that actual question. I have a whole system of teaching witnesses how to do just that. I know a lot of us at ASTC have our own systems. I have a funny feeling that whoever did or did not work with Barry missed the mark here.

**P.S.** I enjoyed taking the YouTube test. Spoiler alert – do it before reading the rest of my comments. I would pat myself on the back for seeing **everything** that many people miss and getting the right number ... but ... of course, I was saying all kinds of disparaging things to myself. Things like, “Counting! I’m so bad at **math!** Better **concentrate!**” and “These women are almost as bad at passing the ball as I am – Title IX was SO wasted on me!” and “I hope she doesn’t back into anything as she goes off stage!” and “Note to self – only use lighting changes on curtains that are that color for a comedy” and “That poor kid in the Gorilla Suit – they really need to unionize those costume character actors at every theme park. It’s like 102 degrees in those awful things...”

## *Charli Morris responds:*

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### *The Dodge Is In the Eye of the Beholder*

I would be hard pressed to defend Barry Bonds, Marion Jones or Floyd Landis on their answers to questions about illegal doping. It is equally tough to explain former Senator John Edwards' denials of his affair while he ran for President and his wife struggled with terminal cancer, or former Governor Mark Sanford's wildly varying accounts of his whereabouts after he disappeared to South America for a week.

Rogers and Norton pose two questions, one of which is, "how do we prevent dodgers from getting away with it?" Bonds was convicted and even experts say his place in baseball history books will be marked with an asterisk. Jones was convicted and forfeited her five Olympic medals. Landis was stripped of his 2006 Tour de France title. We may never know how many hundreds of thousands of dollars in endorsements were never realized by these and other athletes who stretched their credibility until it snapped.

John Edwards and Mark Sanford both went from potential presidential front-runners to public humiliation. Politicians often talk themselves right out of their positions of power even at the height of it. Arguably, each of these high-profile dodgers paid a serious price for dancing on the head of the proverbial pin. It is possible their demise may deter others.

In my view, questions about big, abstract ideas like Healthcare, Drug Use or the War on Terror are so subjective they beg to be dodged and it's no surprise speakers get away with it. Although I like the idea of showing the printed question while an evasive witnesses bobs and weaves his way around it, I see fewer applications of the research to litigation on the issue of prevention.

The authors also ask, "how can people dodge without detection?" and on this question I come in defense of the "dodge."

No ethical trial consultant (or lawyer) helps a witness avoid giving a truthful answer in a deposition or on the stand even if we think he could get away with it. On the other hand, there are undoubtedly times when witnesses can and should refuse to answer questions that are unfair, misleading or improper and we do help them master the "art" of the "dodge" for wholly legitimate reasons and through entirely professional means.

Here are three important tips we give witnesses to prepare them for navigating the tricky waters of deposition and trial testimony:

- 1. Know your rights and responsibilities as a witness.** You must always tell the truth. But you don't have to accept opposing counsel's point of view, accommodate demands to answer within arbitrary limits, or acquiesce when your truthful answer isn't satisfying to the other side.

2. **Listen carefully to every word in every question.** No matter how colloquially opposing counsel asks the questions, it isn't a conversation. Pause before answering to ensure you that you hear and understand the question before you answer it. Seek clarification if you do not. A witness must live in the moment.
3. **Use your own language in response to the question whenever possible.** The witness is the only person under oath. Individual words or phrases can matter as much as meaning. Lawyers get at least three years of higher learning and annual continuing education to hone and polish their skills. They routinely craft their questions to prove a particular point. Witnesses who aren't prepared will be unfairly over-powered.

This is only a short list of ideas and the bottom line is this: in the context of the courtroom a dodge is in the eye of the beholder. A lawyer who doesn't get his way in cross-examination may accuse a witness of dodging, but the jury may recognize that his questions weren't fair to begin with. (Tomato, To-mah-to.) A witness who resists the loaded language of a leading question from opposing counsel may not be dodging so much as he is attempting to be clearly understood. (Potato, Po-tah-to.)

Consider the following example from a recent medical malpractice case. The Plaintiffs claim that a defendant doctor failed to accurately assess the signs and symptoms of child abuse. The child was returned to an abuser who ultimately delivered the final blow, which rendered him a brain-injured, spastic quadriplegic.

The child's biological father – a one-time star athlete himself – was being challenged by defense counsel in the second of two depositions. The defendants allege that the father (the witness) was also negligent in failing to prevent the abuse committed by the child's mother's live-in boyfriend. The attorney was trying to get the father/witness to concede that he bears some responsibility for what happened to his son.

*Q. You know, we don't get to live life over again, you know, we don't get a redo. We can watch the game film, and you're a great -- I know you were a college basketball star, and you go back and watch old film. And we can't replay the games, can we?*

*A. We can't compare this to a basketball game.*

The witness/father had gained full custody and to this day gives round-the-clock care to his son in their tiny home. I don't get any credit for preparing this witness to handle a tough question so well; I wasn't involved in the case until later. But I can't think of a better response when the intention of the question was to belittle and blame the witness. It's not even clear this is a question that could be answered directly, but if the answer amounts to a dodge, I am confident that it was the attorney who paid the price for asking it.