

A SURVEYOR'S ROLE IN LITIGATION AND HOW TO BE AN EFFECTIVE WITNESS

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*The subject matter and content of this presentation may not reflect the position of the Utah Attorney General or the Office of the Utah Attorney General.

How Can Surveyors Find Themselves in Civil Litigation?

- ▣ Experts
 - Consultant to Lawyer (we need lots of help!)
 - Consultant to Appraiser
 - Consultant to Engineers
 - Expert Reports
 - Depositions
 - Affidavits
 - Trial Testimony
- ▣ Third Party Witness (but still an expert!)
 - Recorded Surveys
 - Supporting Material for Other Experts

Overview of Civil Litigation

- ▣ Pre-Trial
- ▣ Pleadings (Complaint, Answer, Motions)
- ▣ Fact Discovery
- ▣ Expert Discovery
- ▣ More Motions
- ▣ Lawyer Shenanigans
- ▣ Trial!
 - 18 months is fast
 - 20 years is not unheard of
 - 2-3 years is typical in State court

Overview of Civil Litigation

▣ Pre-Trial

- The most important part of the litigation...it is when the injury/event that give rise to the lawsuit occurs!
- Events surrounding the injury
 - ▣ Memories formed – but what will be remembered, and how will it be remembered?
 - ▣ Documents created – but what will be preserved?
- Party Discussions
 - ▣ Settlement?

Overview of Civil Litigation

- ▣ Pleadings (Complaint, Answer, Motions)
 - Complaint / Summons - Start the Litigation Process
 - ▣ Identifies actions that caused the harm and legal basis holding defendant responsible
 - ▣ Notice pleading is all that is required
 - ▣ New Rules of Civil Procedure require statement of amount of money you seek (or injunctive relief)
 - What you assert are your damages (or if you fail to do so), should limit what you can recover at trial
 - Answer – Defendant’s response and affirmative defenses
 - ▣ Does not have to be as detailed as Complaint
 - ▣ Counterclaim can be filed , and must be filed if it arises out of the same transaction / occurrence
 - Motions – Can be filed to require more specifics or to dismiss claims that lack merit (or to educate the judge)

Overview of Civil Litigation

- ▣ Fact Discovery – Most time consuming part of civil litigation
 - Written Discovery
 - ▣ Interrogatories
 - ▣ Requests for Admissions
 - Documents
 - Witnesses
 - ▣ Depositions – Sworn Testimony

Overview of Civil Litigation

- ▣ Expert Discovery
- ▣ Party with Burden Goes First
- ▣ Report :
 - Name and qualifications (resume)
 - Publications authored in last 10 years
 - List of other cases in which testified (trial or depo) in the last 4 years
 - Brief summary of opinions on which expect to testify
 - All data/info relied upon in forming opinions
 - Compensation paid
 - Election by opposing side: 4 hour deposition OR Complete statement of all opinions and reasons therefor (if not fairly disclosed in this report, cannot testify about it at trial)
 - Communications with lawyer protected (with exceptions)

Overview of Civil Litigation

- ▣ Why Experts?
 - Rules of Evidence generally disfavor opinion testimony – our civil system wants the jury to decide
 - Expert testimony is the exception (albeit a very big one)
 - ▣ Scientific, technical, or other specialized knowledge opens the door
 - ▣ Principles/methods must be (i) reliable; (ii) based on sufficient facts/data; and (iii) reliably applied
 - Generally accepted by relevant expert community
 - ▣ Evidence relied upon need not be otherwise admissible if of a type reasonably relied upon by experts in the field
 - This is another gaping exception in the Rules of Evidence

Overview of Civil Litigation

- ▣ More Motions / Lawyer Shenanigans
- ▣ Motions for Summary Judgment
 - Deposition Testimony
 - Discovery Responses
 - Affidavits
- ▣ Pre-Trial Disclosures
 - Summaries/Charts/Demonstrative Exhibits
 - ▣ Experts Often Very Important – Think About These at the Report Stage

Overview of Civil Litigation

- ▣ Trial
 - Jury Selection
 - Openings
 - ▣ No argument, presentation of what the case is about and what the evidence will show – Plaintiff goes first
 - Plaintiff's Case in Chief
 - ▣ Witnesses and evidence
 - Defendant's Case in Chief
 - ▣ Ditto
 - Plaintiff's Rebuttal
 - Jury Instructions
 - Closings
 - ▣ Arguments – Tie case together
 - Verdict

How to Become an Expert

- ▣ No magic formula
- ▣ Education
 - Advanced degrees
 - State license is a must
 - Keep out of trouble
- ▣ Articles
- ▣ Teaching
- ▣ Communication skills - You must learn to speak to a jury
 - Teaching!
 - Lecturing
 - Toastmasters
 - Acting classes
 - Watch a trial
- ▣ Hang out with lawyers

Depositions*

- ▣ What is a deposition?
 - Legal proceeding
 - ▣ You will get a subpoena
 - Preserves testimony for later use in court/trial
 - Do not let the informality of it fool you...it counts
 - Sworn testimony
 - ▣ Very few questions that are off-limits at a deposition

*With thanks and credit to Thomas O. Baker's Operator's Manual for a Witness Chair

Depositions

- ▣ Why Take a Deposition?
 - Discovery
 - ▣ What you know
 - ▣ Will you help or hurt their case
 - Good and bad information
 - How will you be perceived by the jury
 - Commit your testimony
 - Create conflicting testimony
 - Preserve testimony

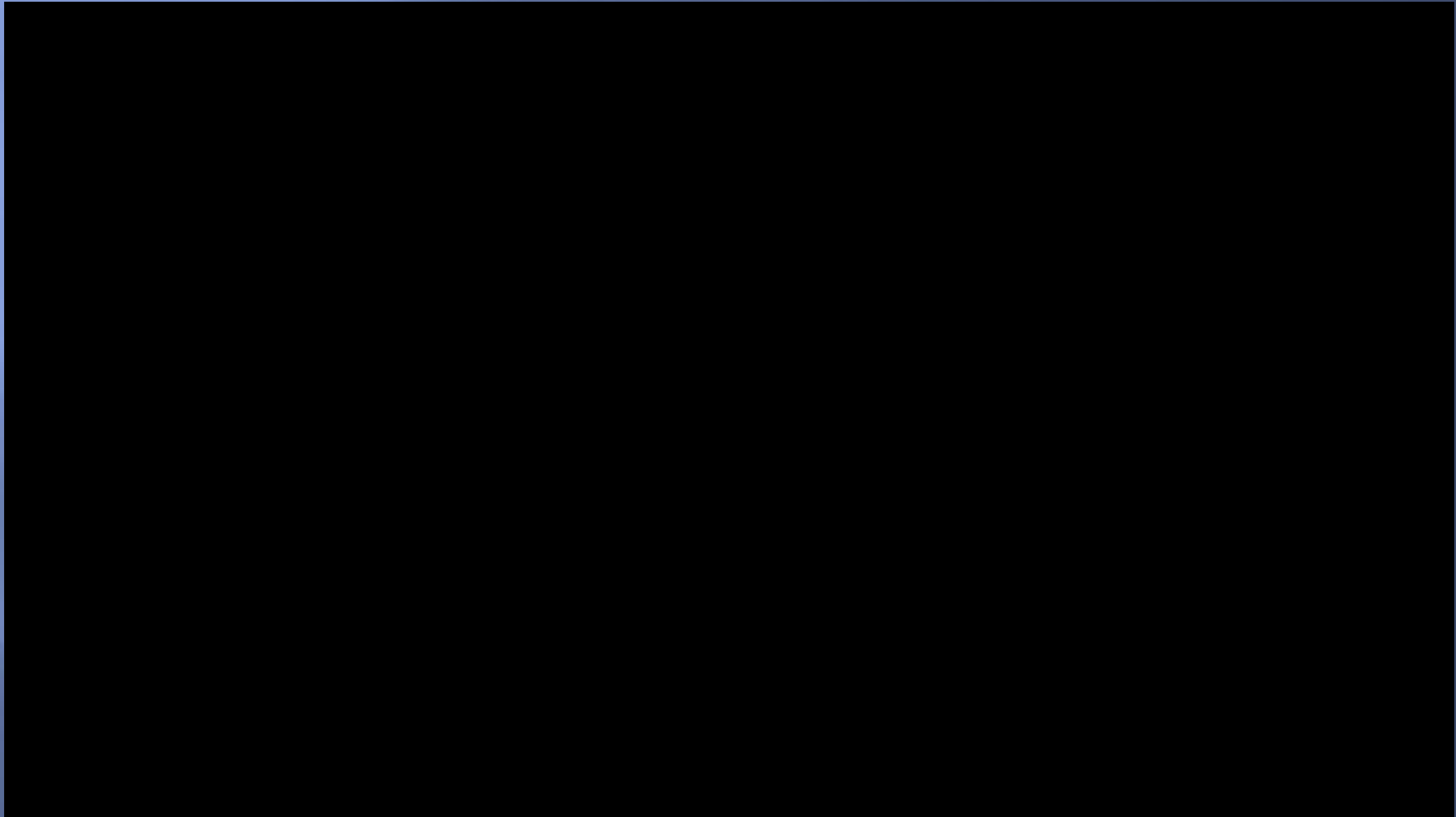
Depositions

- ▣ Process
 - Raise your right hand
 - Questions
 - ▣ Objections – only those that can be cured are waived
 - ▣ Documents
 - Breaks
 - Be comfortable
 - More questions
 - Copy sent to you for review
 - ▣ Make corrections – 28 days

Depositions

- ▣ Always tell the truth
- ▣ Do not exaggerate
 - Be fair – tell it like it is
- ▣ Be accurate
 - Listen
 - Respond
- ▣ Be yourself

Be Yourself...



Depositions

- ▣ Handling lawyers
 - Remember, this is a formal legal proceeding
 - Informalities aside, your testimony is on record
 - Attorneys will play games
 - ▣ Aggressive
 - ▣ Bored...even asleep
 - ▣ Lots of objections
 - ▣ No objections
 - Stick to your job as a witness – it is all that matters

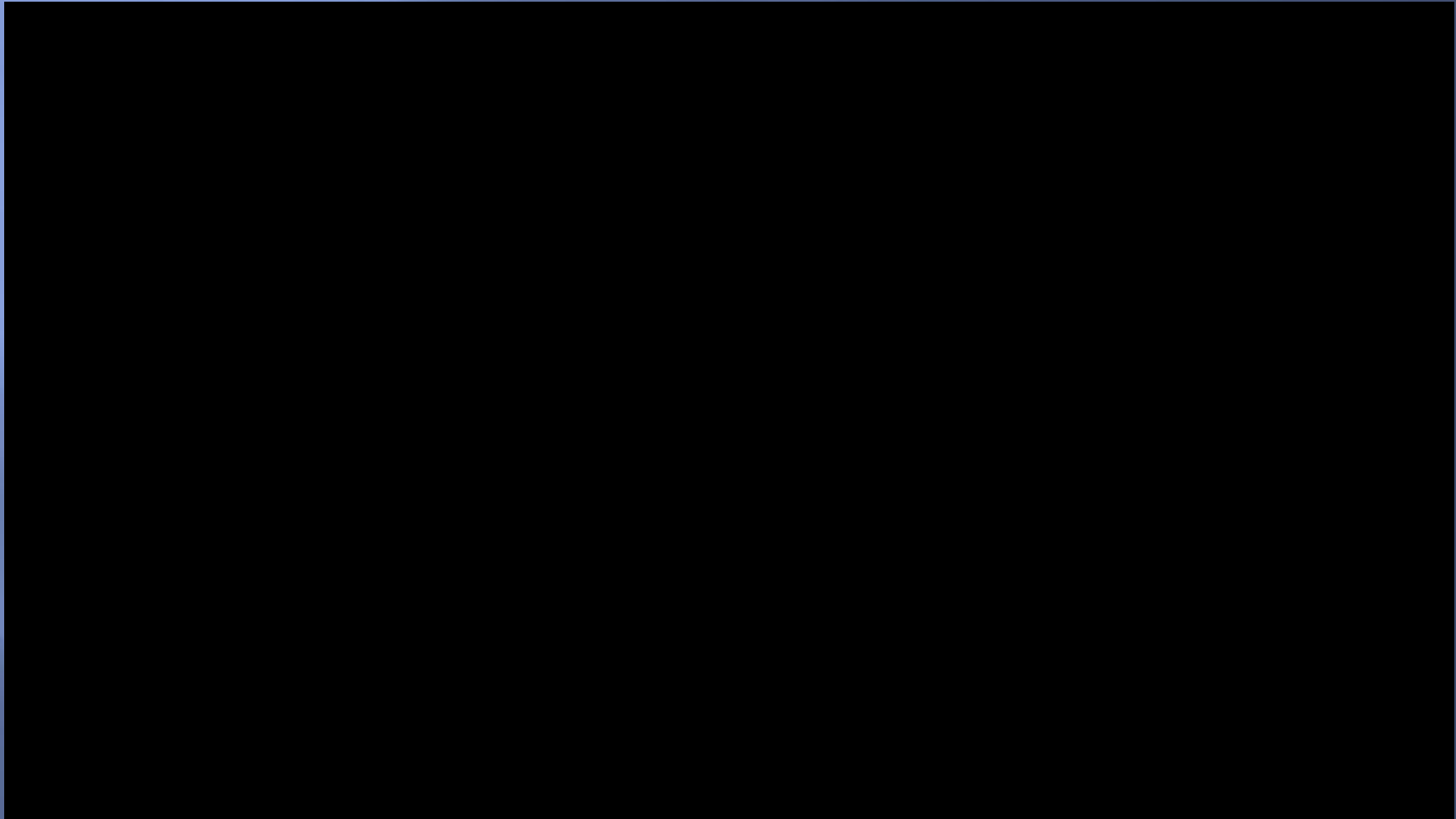
Answer the Question



Depositions

- ▣ Listen to the question and answer it (if it can be answered)
 - Speak clearly
- ▣ Do not volunteer information
 - “Helpful” witnesses only help the other side
 - Counter-intuitive
- ▣ Do not help with questions
 - It is not your job
- ▣ But do not hide information
 - Be fair
 - Tell the truth

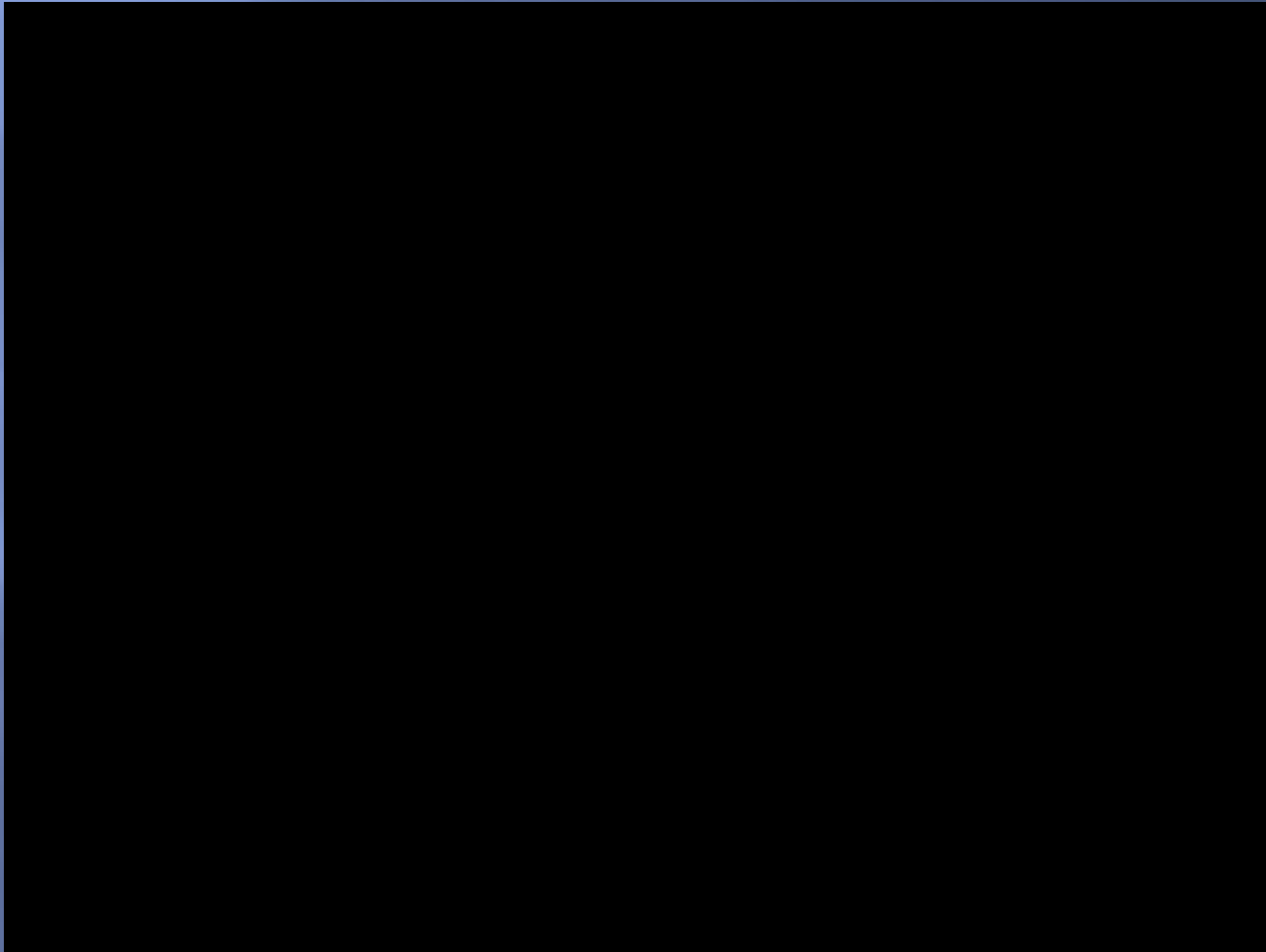
Give Your Full Attention



Depositions

- ▣ If you do not understand the question, ask the lawyer to rephrase it, even if it is your lawyer
 - Every lawyer asks unintelligible questions
- ▣ If you do not hear the question, have it repeated
- ▣ Requesting clarification is legitimate
- ▣ But don't play games!

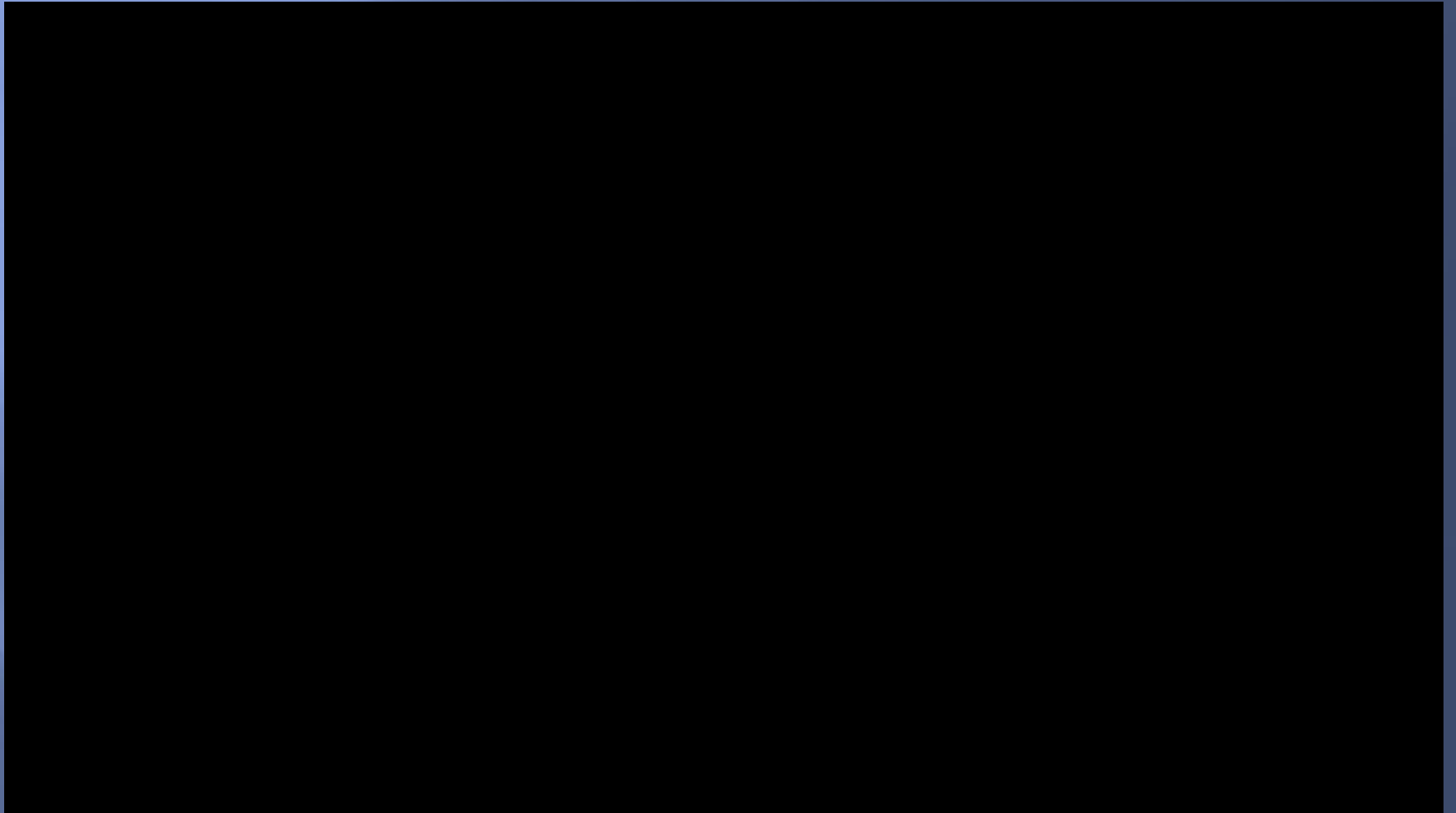
Games Can Backfire



Depositions

- ▣ Take your time
 - Listen to the whole question
 - Consider the question
 - Think through your answer ...compose it before speaking it
 - Your answer is more important than anyone's schedule
 - Being “helpful” is not
 - ▣ You cannot speed up the lawyer, but you can encourage more questions
 - Taking your time allows your lawyer time to object

“I Don’t Recall” is a Perfectly Acceptable Answer



Depositions

- ▣ “I don’t recall” and “I don’t know” are perfectly acceptable answers if they are true
- ▣ Never ever, ever guess or speculate
 - Estimates are ok when asked for, but make it clear that is what you are doing
 - Assumptions are dangerous
 - Never assume falsely
- ▣ Do not fill in knowledge gaps

Temper, temper...

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Depositions

- ▣ Never, ever lose your temper
- ▣ Be polite
 - Sarcasm does not show up in the deposition transcript and it does not play well with juries
 - No cursing
 - No shouting
 - But do not back down from the truth

Depositions

- ▣ Finish your answer
 - Do not let a lawyer cut you off
- ▣ Correct anything that needs to be corrected
 - Do not hesitate if it needs to be done

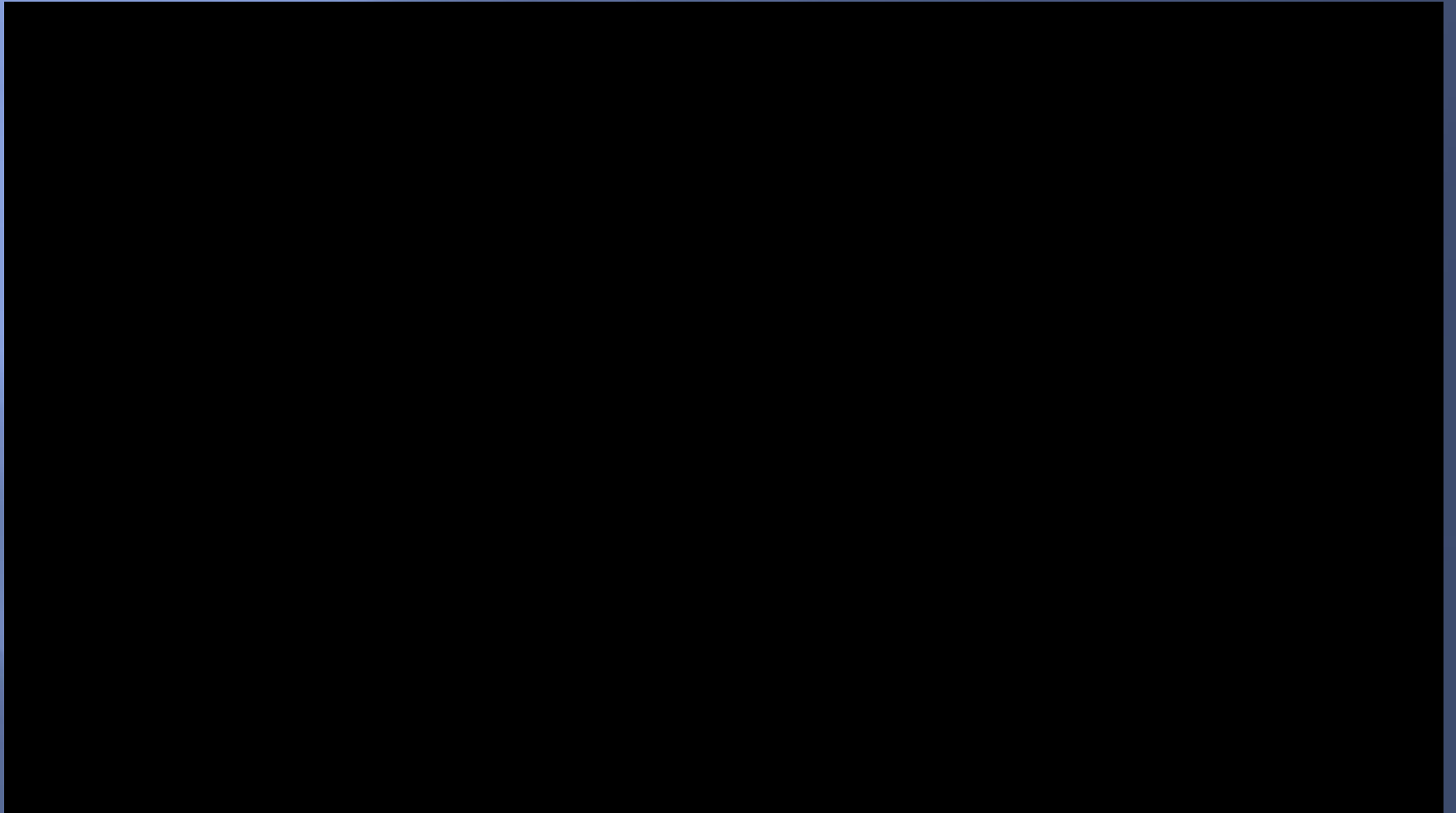
Depositions

- ▣ Documents
 - Have you seen it before?
 - ▣ Is it the final version?
 - ▣ Is it a complete version?
 - ▣ Take the time to review it
 - Keep it while you are talking about it
 - Does it say what the lawyer claims?
 - Experts: be wary of published authority
 - Talk with your lawyer about what you bring to the deposition

Depositions

- ▣ Objections
 - Listen to them
 - Probably an unfair question
 - ▣ Vague, ambiguous, confusing, misleading
 - ▣ Misquotes prior testimony
 - ▣ Redundant, repetitious
 - ▣ Compound question
 - ▣ Speculative
 - You still have to answer, unless the question calls for privileged information

They Are Not All Trick Questions



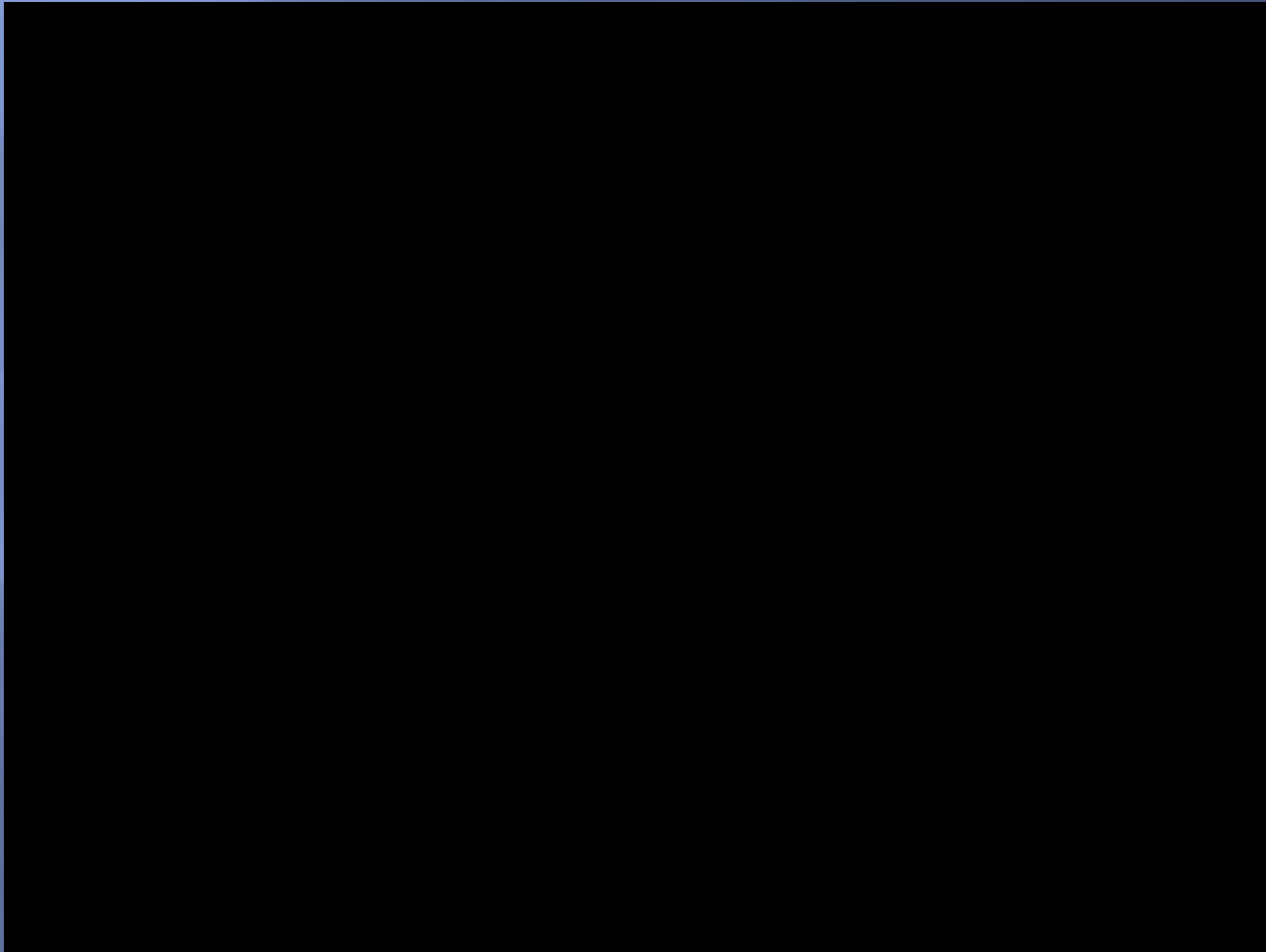
Depositions

- ▣ Most questions are not tricks
 - Shell game
 - Sham / Statement
 - Vanity
 - Summary
 - Have you talked to anyone?
 - What did the lawyer tell you to say?
 - How much are you getting paid?
 - Why did you not do more?
 - Broad questions
 - Silence

Affidavits

- ▣ Sworn statement, reduced to writing
 - Usually notarized, but doesn't have to be
 - Often drafted by others
 - Tell the truth!!!
 - Be precise and get to the point
 - Avoid things that cannot be verified
 - Follow legal formalities
 - ▣ Case caption
 - ▣ Affiant's oath
 - ▣ Facts/statements
 - ▣ Signature

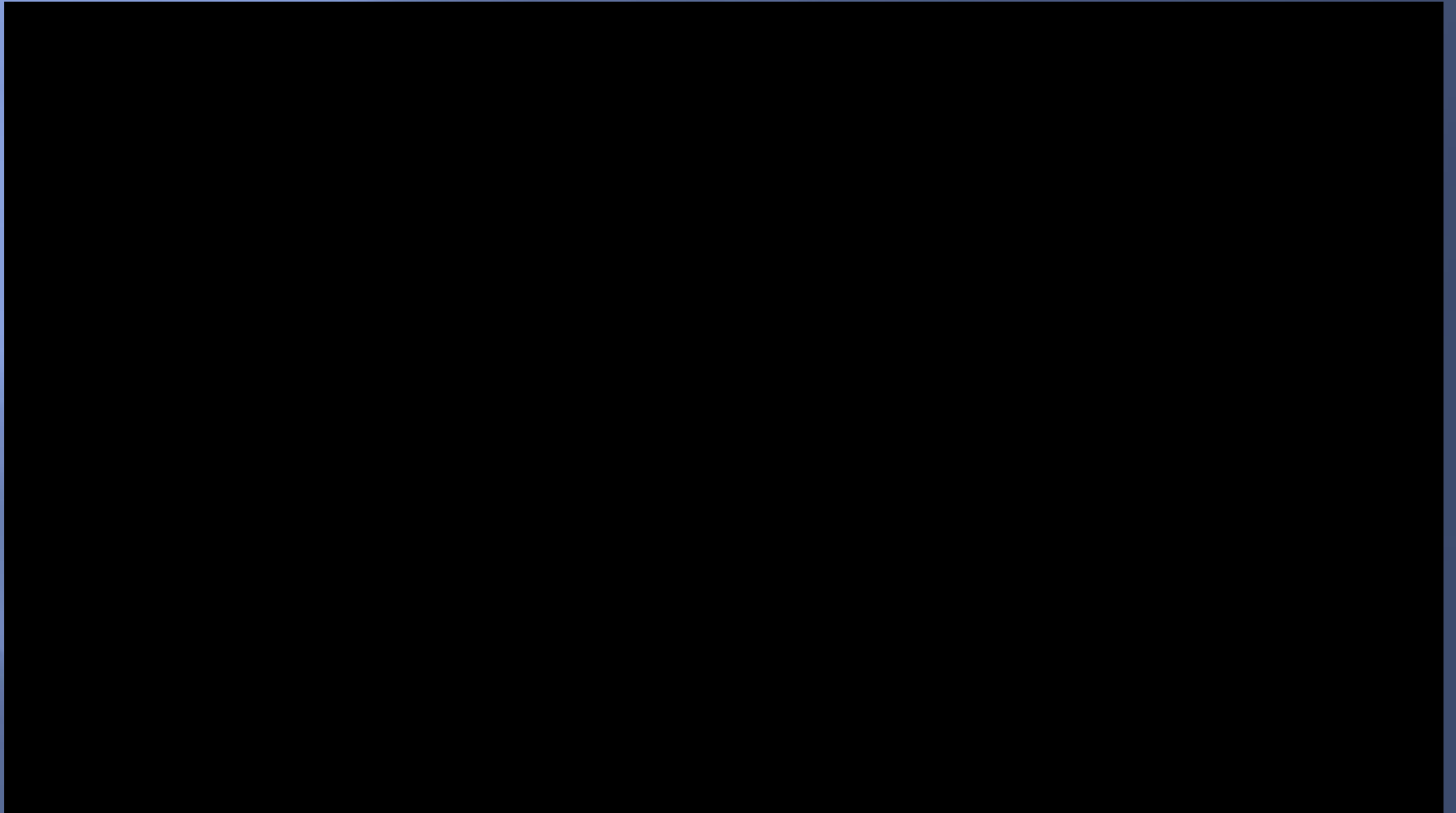
Courtroom Etiquette



Trial Testimony

- ▣ Attire
 - Look professional
 - Be comfortable
- ▣ Demeanor
 - Act like a professional
 - ▣ On and off the stand
 - ▣ The Judge is “Your Honor”
 - The microphone is live
 - Turn off your cell phone (silent is not good enough)

What Would Judge Judy Think



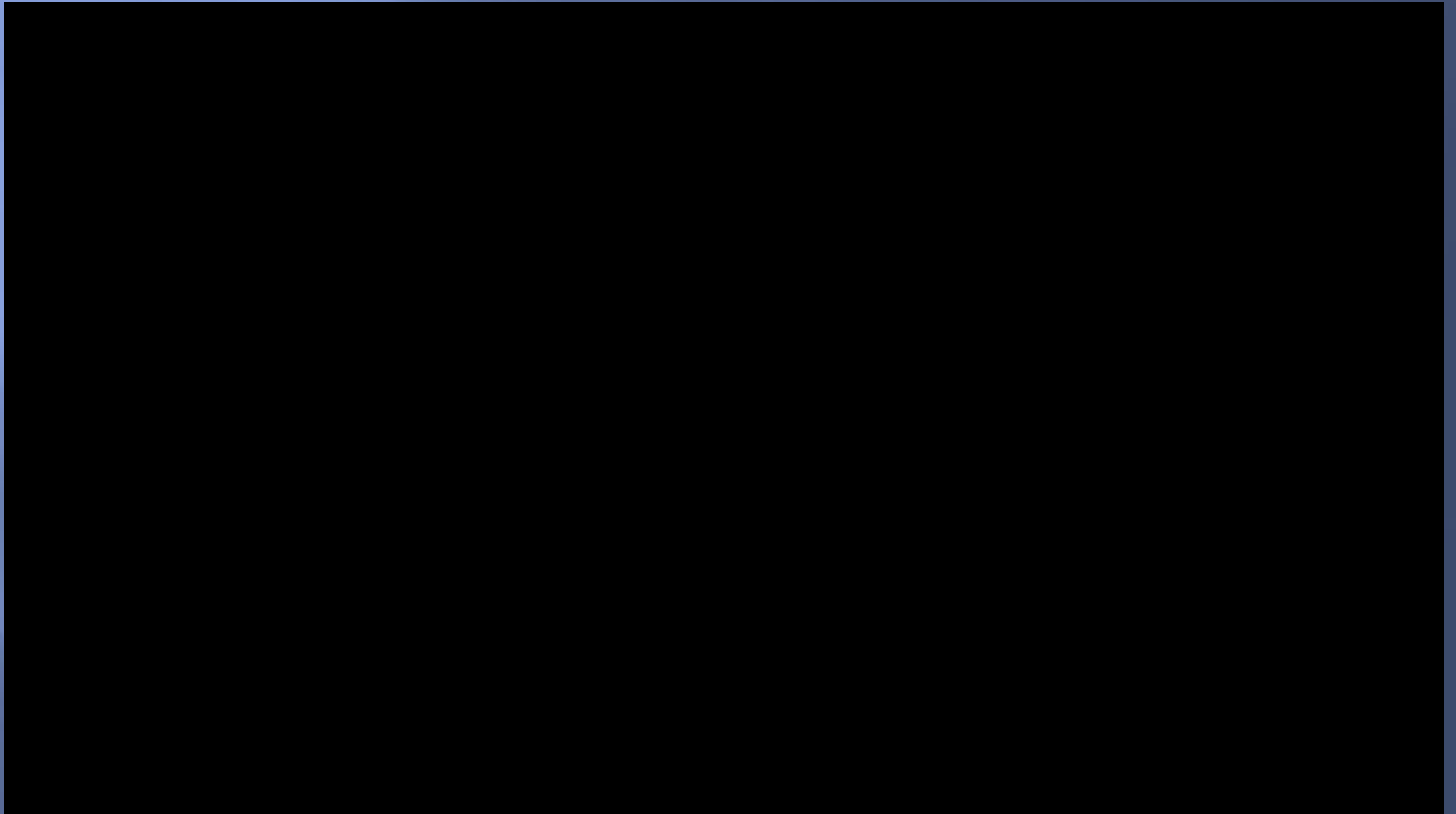
Trial Testimony

- ▣ Prepare, prepare, prepare
 - Read your deposition and any other statements you may have given
 - Review all pertinent documents
 - Attend another trial
 - Visit the courtroom before the trial
 - Avoid speaking with other witnesses
 - Tell your counsel everything
 - ▣ Surprises are bad

Trial Testimony

- ▣ On the stand
 - Swearing in
 - Sit up
 - Look at the lawyer for the question
 - Always testify to the jury
 - ▣ Don't ever look to counsel, co-defendants, or people in the audience to help you answer a question
 - ▣ Don't ever ask counsel if that was the right answer
 - ▣ Only you know what you know
 - Hands in your lap

Hands Down



Trial Testimony

- ▣ Objections
 - They are different than at deposition
 - Wait for the Judge to rule!
 - ▣ Overruled -> Answer
 - ▣ Sustained -> Wait for the next question
- ▣ Testimony
 - Rules of the deposition generally apply
 - Speak clearly – avoid jargon
 - Do not fear cross examination
 - Seek feedback

And Remember

- ▣ Always tell the truth
- ▣ Do not exaggerate
 - Be fair – tell it like it is
- ▣ Be accurate
 - Listen
 - Respond
- ▣ Be yourself