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Halloween illustrates element of surprise at trial

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When we moved from the city, our suburban neighbors introduced us to the local Halloween tradition — getting "booed." Of course, at first, we had no clue what it meant. Now, we understand that a family is "booed" when a phantom — usually a child's classmate — fills a plastic pumpkin with goodies, drops it on the front door step and rings the doorbell. When the family member opens the door, the phantom has vanished and the treats are yours. It's kind of a magnanimous ding-dong ditch.

The first year we were "booed" our phantom left us a poem and an image of a ghost to display in our window to ward off spirits, filling in the gaps that my overpriced security system obviously overlooked. Don't get me wrong, I love to laugh and had no problem embracing this new family holiday event. In fact, those who know me wouldn't be surprised to hear that I was probably a bit more into it than my son. Ultimately, the phantom's poem passed the proverbial torch to the Kroll family, anointing us the new neighborhood "phantoms."

At nightfall, taking a cue from "The Incredibles," we formulated our plan, agreeing it's best to go incognito and on foot. My then 5-year-old son shrieked when he discovered that he had outgrown his black coat; a Batman mask and a bright, red coat would have to do. Friends across the street were our first target — no ghost in their window, so they were fair game. Next, we targeted some of my son's school friends and slipped away unnoticed. Our biggest challenge was our last target. While only a short, one-block walk from our house, four older boys lived there and a chase seemed inevitable. On the walk over, I taught my son how to drop and roll. I know it slowed us down, but he looked hilarious rolling in wet leaves wearing a Batman mask.

Ah, the element of surprise.

When it comes to jury trials, most attorneys strive to eliminate the possibility of surprise. Anyone that has ever presented testimony in court has most likely encountered a witness who provided a different version of the incident on the stand than they had during preparation. You know what, even with proper preparation, sometimes "stuff" happens.

But, what if trial attorneys learned to embrace the element of surprise at trial, instead of fearing it? Personally, I do not like to give away all the strengths of my case during pretrial discovery. Often, I forgo the long, extended deposition of a particular witness if I believe that I am going to try the case. Sometimes, if I know that I am going to conduct cross-examination of a particular witness at trial, I want another attorney in the office to take the discovery deposition. See, a trial surprise doesn't have to be eerie, so long as you are the one introducing it, not your opponent.

In some cases, for example, I am a proponent of taking very generic discovery depositions. Since law school, mentors, senior attorneys and even judges have warned us not to ask a question that we do not know the answer to. Solid advice. However, I see no harm, at times, in forgoing the questions that we do know the answers to (at the discovery deposition only, of course — don't be the wise guy that forgets to prove his case!). During trial preparation, I know that opposing counsel is going to have the witness review his discovery deposition. If I did not ask a line of questions at a deposition, the witness may not be expecting the unasked questions at trial. Then, we get to the trial. BOO, there it is! Happy Halloween. A scary surprise for the witness. Even if I do not get the answer that I expected at trial, I am confident and ready to set the witness up for failure because I know what other witnesses will say during their time on the stand.

Now, I understand that the purpose of Illinois Supreme Court Rule 213 is "to avoid surprise and to discourage tactical gamesmanship." *Sullivan v. Edward Hospital*. 209 Ill. 2d 100, 111 (2004). I am in no way advising that trial attorneys ignore the all-mighty (and potentially frightening) Rule 213. Disclose everything — every opinion and their bases, every document, every potential piece of evidence — and on time.

Yet, cross-examination is a different ghost. Rule 213(g) states: "Without making disclosure under this rule ... a cross-examining party can elicit information, including opinions, from the witness." Ill. Sup. Ct., R 213 (2011). The committee notes further explain, in part: "Parties are to be allowed a full and complete cross-examination of any witness and may elicit additional undisclosed opinions in the course of cross-examination." *Id.*, Committee Comment to March 28, 2002, Amendment, Paragraph (g). See also, *Stapleton v. Moore*. 403 Ill. App. 3d 147, 156-157 (1st Dist. 2010) ("holding that Rule 213(g) does not require a party to disclose journal articles that the party intends to use while cross-examining the opposing party's opinion witness"). This, my friends, is why I love cross-examination.

In fact, cross-examination can be the place to really shock your opponent. Take a recent 1st District Appellate Court case, *Van Gelderen v. Hokin*. 2011 Ill. App. LEXIS 785(1st Dist. 2011) . There, the plaintiff was injured when he fell down a stairwell upon exiting the side entrance to the defendant's home. At trial, the defendant testified that he had not changed anything about the side entrance and that no one since the plaintiff had been injured by falling down the stairwell. 2011 Ill. App. LEXIS 785, *22. The plaintiff, in turn, properly impeached the

defendant by introducing evidence of a baby gate that had been installed after the incident. By testifying that no one had been injured and no changes had been made, the defendant opened the door to allow evidence of the installation of the baby gate, permitting otherwise inadmissible evidence of a subsequent remedial measure to be introduced at trial. *Id.*, see also, *Herzog v. Lexington Township*, 167 Ill. 2d 288, 302 (1995) (evidence of subsequent remedial measures may be admissible for the purpose of impeachment). I do not know whether or not the plaintiff's attorney expected the defendant's response that "no changes had been made," but the fact that the attorney had the evidence of the subsequent remedial measure available at trial is commendable.

What advice can you give your witness in the event of a surprise while testifying? Witnesses are often scared of testifying. Just like trial attorneys, they do not like surprises. However, it is better to be prepared for them, then to deny that they happen. My simple advice to witnesses is a lot like the storage advice on a jar of mayonnaise: Upon opening, keep cool and don't freeze!

Having lived in the suburbs for six years now, the Kroll family has become accustomed to being booed and booing in return. As I sit at home tonight, thinking about embracing the element of surprise at trial ... argh, have to run! We were just booed. Time to find my Batman mask ... I mean, my son's Batman mask.

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