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Advocacy Track: Depositions and Pre-Litigation Strategies for Uncovering Critical Information

Presented with the New Lawyers Division

Establishing Rules, Principles, and Standards Through Defense Witnesses: The Miller Mousetrap[1]

William P. Lightfoot
Koonz McKenney Johnson DePaolis & Lightfoot
2001 Pennsylvania Ave.
Ste. 450
Washington, DC 20006
(202) 822-1864
wlightfoot@koonz.com

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Miller Mousetrap

- The goal of the Mousetrap is to get the witness to personally commit to a position that is the beginning of a long slippery slope, including a possible admission that the conduct is both negligent and reckless

Miller Mousetrap (cont.)

- Some things are undeniably true, and most witnesses will tell the truth if you lead them to it by using a combination of questioning techniques
- Techniques described in:
  - PHILLIP MILLER & PAUL SCOPTUR, ADVANCED DEPOSITIONS (Trial Guides, 2013).
  - DAVID MALONE ET AL., THE EFFECTIVE DEPOSITION: TECHNIQUES AND STRATEGIES THAT WORK (NITA, 4th ed. 2012).

Questioning Techniques Useful to Spring the Mousetrap

- Exhaustion
- Boxing in
- Open-ended questions
- Funnel approach
- Restating and summarizing

Steps For The Miller Mousetrap

- Identify standards of conduct
- Search statutory, regulatory, professional standards, common sense
  - Do focus groups
- Read *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability* by Rick Friedman and Patrick Malone

Defendant Recognizes the "Rule"

- State the rule
- Do you agree?
- The form of the question is not significant
- The commitment to recognize the truth of the rule is significant

Defendant Agrees with the Rule

- "Is one of the safe driving rules to stop within the distance of your headlights?"
  - Using the word rule may draw an objection
- "Do you agree that drivers have a duty to look ahead?"

"I Can't Do That in My Jurisdiction"

- Think of objections to the question and have alternative language available, such as
  - Responsibility
  - Policy
  - Practice
  - Obligation
  - Belief
  - Guideline

In What Order Do the Rules Appear?

- Lawyer must make a strategic decision of the progression of the rule questions
- Work backwards from the ultimate “yes” answer that you want from the witness

When and of Whom Do You Ask The Rule Questions?

- Lawyer to make strategic decision
- Select a witness who can bind the defendant to the answer
  - Defendant
  - 30(b)(6) designee
  - 30.02(6) designee
  - Employee acting in the scope of employment
    - Binding as admission of party opponent

Ask Witness To Agree with the Rule

- Use a visual
- Opposing counsel will object to the visual
  - Objection to questions about document not allowed, *Hall v Clifton*, 150 F.R.D. 525 (D. Pa. 1993).
- Do not go for the kill shot early
  - Make the question generic
- Do not personalize the question to the defendant
- Do not load the question with the ultimate facts related to safety

Ask Why The Rule Is Important

- Ask the witness *if the rule* is important
- Why?
  - Use exhaustion technique with whatever answer
- Witness is committed
  - It is a multi-step process to achieve goal

Create Context So The Witness Cannot Back Away

- Identify the universal features of the rule
  - Time, generally accepted, taught, basic responsibility, expectation of conduct
  - Affirmation of the rule

Not Complying Is Unsafe

- Ask “Would it be wrong to ignore or violate the standard or rule?”
- But, only ask after completing the first four steps:
  - Identified rule
  - Stated its importance
  - Explained reason rule is important
  - Discussed context of rule

Not Complying Is Reckless

- "Would that kind of conduct put the public in danger?"
- "Would it be reckless?"
- "Assuming the person knew the conduct was wrong, would it be fair to refer to the continuing conduct as willful misconduct?"

Not Complying Is Reckless (cont.)

- Not all witnesses will admit reckless conduct, but the question is important because
  - It potentially changes the perception of the risk
  - Addresses the "stuff happens juror" who tends to look for intentional conduct to find liability
  - Makes the case bigger than one event
    - Read *Reptile: The 2009 Manual of the Plaintiff's Revolution* by David Ball and Don Keenan

Analogize Conduct To Jurors' Experience

- Breaking the rule is like
  - Running a red light
  - Going fifty in a school zone
  - Crossing the double yellow line
  - Lighting a match when you smell gas

Witness Will Not Admit a Rule

- Witness testifies that defendant did nothing wrong
- Control the witness
- Repeat facts that show rule was broken by defendant
- Has ever heard of the rule
- Repeat witness's background and repeat that witness is not familiar with rule
- Summarize defendant's testimony that defendant recognizes the rule
- Ask witness to identify the safety purpose of the rule

Summary

- Rules provide an analytical framework for jurors to interpret the evidence
  - Is there a rule of reasonable conduct?
  - Does the defendant recognize the rule?
  - Does the defendant recognize the importance of the rule?
  - Did the defendant follow the rule?

CASE EVALUATION: THEMING FROM DAY ONE[1]

Lance M. Sears
Sears & Associates, PC
2 N. Cascade Ave.
Ste. 1250
Colorado Springs, CO 80903
(719) 471-1984

I. What Is a Theme? What Does It Mean for the Trial Lawyer?

1. A theme is more of an explanation as to why the individual participants in the story acted as they did, making the story unfold in the manner in which counsel claims it did. Themes are the anchors around which the jurors picture the case. All cases can be organized around a theme summarizing your position on the evidence. Themes are the universal truths about people and events we learn about during our lives.

2. The theme of your lawsuit is the "why you are going to win." You must thoroughly understand the theme, or you will never be able to convey your message to the jury. From the very beginning, think about the theme and prepare your case in terms of how that theme will win.

3. Your theme can be a saying or a thought. It can be pictorial or conceptual. But it should embody the absolute heart of what you're going to argue. You can intrigue the jury by introducing your theme with a story, a quote, an analogy, and so forth.

4. Properly defined, a theme differs fundamentally from a theory. The theme is the label for the attorney's strongest argument on the pivotal element of the theory. Some writers suggest that it is "the strong point of your case" or the one idea that "tells the jury why your client should win the case."

5. The theme is the recurring concept that unifies the case. Every strong presentation of a case needs at least one theme. It may be the principal idea or foundation for the key contention or theory of the case. The theme can be intertwined with the critical facts, but may also relate to a social or psychological issue. There may be one central theme for the case or several themes covering a limited number of specific issues. It gives the jury an impression of the key concepts of the case.

6. The theme should relate to the pivotal element of the theory. If the parties have evolved the case adequately during pretrial discovery, by the time of trial, the case may be

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reducible to a single issue. Finally, the attorney should reduce the strongest argument on the key element to a short, memorable expression. The expression is a "shorthand" label for the argument.

II. Why Is a Theme Important? What Can Themes Do for Your Case?

1. Five Ways a Case Theme Contributes to Your Courtroom Success

   a. You control the definition of your case.

      By creating a case theme, you control the definition of your case. You do not allow opposing counsel to define it for you, because they are not going to define it in a way favorable to you.

   b. You provide a mental handle for the jurors.

      A case theme gives the jurors a mental handle with which to understand the case. This is the first element of structure. A case without a theme is too difficult for the jury to make sense of, they need something definite, something concrete to make order out of that chaos. A case theme gives the jurors a central concept to grab onto, a generalizing principle around which they can organize the information given during the trial.

   c. You provide a mental handle for yourself.

      In the same fashion as a case theme gives the jurors a generalizing principle around which information can be organized, so too does it give you one. The great trial lawyers emphasize the need for an overall strategy as well as day-to-day tactics.

   d. You provide guidance for the jurors throughout the trial.

      The successful trial attorney gives the jurors that guidance, right from the beginning of the trial and all throughout the trial, in the form of the case theme. If you have created a good case theme, and organized your case succinctly and consistently around that theme, you have given the jurors an excellent guide through the informational jungle which is a trial.

   e. You enhance your professionalism.

      By establishing a case theme, you let the jury know that you see the case in a very specific way, which lends credence to your professionalism and competence. Successful trial lawyers are never wishy-washy.

2. The value of a trial theme is that it: 1) personalizes case issues and 2) helps jurors form impressions—and impressions win lawsuits.

    a. Jurors deliberate in themes.

    b. The case theme is the primary mental organizer that helps jurors remember facts.

    c. A good theme enables jurors to look for evidence that "fits."

    d. Themes facilitate evidence comprehension and enable juries to reach pre-deliberation verdict decisions.

3. When it comes to final deliberations, most jurors will rely on their memories of what happened during trial rather than on notes or the evidence. *Themes help jurors remember* in a variety of ways:

    a. The theme incorporates a value system that may have great significance for jurors.

    b. The theme makes key elements more familiar to jurors and, therefore, easier to recall.

    c. The theme helps jurors better understand the motives of a party or key witness.

    d. The theme helps jurors remember the evidence.

4. Consider one central theme. Psychologists call the phenomenon "the principle of the whole." It rests, in part, on four cornerstone premises:

    a. Everyone, including jurors, remembers a general principle, an overall theory, a central theme, if you will, better than individual details.

    b. Jurors feel a need to resolve conflict, and that need gets critical as the trial nears its end.

    c. Jurors get nervous when offered alternative positions by the suitor. It tends to destroy their confidence in all of his or her positions.

    d. Jurors look for that one explanation, that one central theme that best reconciles the greatest number of discrepancies.

5. A theme satisfies the need for a Rosetta Stone. Whatever life's problem, we all want to think there is some simple solution to it, somewhere—a master key, a formula, which, if we could but find it, would unlock the secret to success. Jurors are no exception.

6. Themes can express different aspects of our lives. We are all familiar with theme parks, theme parties, and theme songs. Themes are integral to advertising. Every effective ad includes a short statement to describe the product, its characteristics, or something about the company. Some examples: "People are our most important product," "Put a Ford in your future," and "You can be sure if it's Westinghouse." Themes sell.

7. Use your theme(s) to tell a story. Social actions are often so complex it is impossible or impractical to present detailed descriptions of them in a courtroom. So lawyers must simplify and organize the event so that jurors can understand it. Storytelling has accomplished this goal for years. Jurors seek to organize information into a story of what they think happened.

III. What Makes a Good Theme? How to Develop a Helpful Theme

1. As arguments are tested and selected, a lawyer must also be thinking of a case theme. The theme must be cohesive, logical, and persuasive. Five steps should be followed in developing a case theme.

    a. First, each of the elements that originally caused the action to be brought should be reviewed. This information should be found in the trial notebook and in the instructions.

    b. Second, the evidence that can be presented through witnesses and exhibits should be evaluated. Where is it strong and where is it weak?

    c. Third, the evidence that can be presented through an adversary's witnesses and exhibits should be evaluated. Where is it strong and where is it weak?

    d. Fourth, a thorough analysis should be made of the predicted admissibility of evidence on both sides of the case.

    e. Fifth, given what evidence the lawyer thinks will be admissible, an analysis must be made of the strengths and weaknesses of both sides of the case. If an attorney finds his or her case weak in certain areas, and these areas are central to the proposed theme, either those areas have to be strengthened, or the theme has to be altered to adjust to the strongest arguments in the case.

    Once these steps have been followed, a singular and unique case theme must be developed. Unique or novel themes help to make a lawyer's case unforgettable and influential. Counsel should be able to state a case theme in one sentence of no more than ten words. The retention value is higher and the theme can be easily repeated. A theme statement that is too long or cumbersome will not stick in the jurors' minds.

2. The chosen theme must account for both the strengths and the weaknesses of the case. A theme which requires the jury to believe that the plaintiff is absolutely right and the defendants are entirely wrong is usually destined to alienate most jurors.

3. The key to selecting and developing a good theme is to simplify. The jury should only make minimal findings for the plaintiff to recover. Even a complex case should be reduced to its essential elements so the jury can readily understand it.

4. If you have more than one theory or theme, should you take them all to trial? The supposition is that all the remaining theories rest on recognized legal rules and are sustained by legally sufficient evidence. The choice calls for prudential judgment rather than legal analysis. In making the choice, the attorney should consider the following factors:

    a. Which theory has the largest volume of and most cogent corroboration?

    b. Is the theory based on substantial justice rather than a rule that may strike the jurors as a legal technicality?

    c. Will the judge give the jury an instruction with favorable language about the theory? The jurors know that the attorneys are partisan advocates. Consequently, the jurors discount what the attorneys say during trial. The jurors accord far more significance to what the judge says at trial, including the judge's statements in the final jury charge.

    d. Does the theory cast the client in a role with which the jurors can identify?

    e. Does the theory require that the jurors find intentional misconduct by the opposing party?

5. Two questions help in formulating your theme. Ask yourself, "What must the jury believe for my side to win?" Then ask, "What mustn't the jury believe or my side will lose?" Bear in mind at all times that the emotions are accessed through the senses. Ask yourself, "What did this experience feel like?", and then ask yourself, "How do I have to describe this so the jurors feel it that way, too?"

6. Trial lawyers must be in tune with the current social climate and prevailing values to frame the theme within this background so that it can be used to the case's best advantage. The public's view on litigation is constantly shifting.

7. An effective theme has four characteristics. It should be:

    a. Short and to the point;

    b. Simple and easily understood;

c. Catchy—good themes abound in rhymes, alliterations, or puns and we find ourselves repeating them simply because they are fun to say; and

d. Unequivocal and uncompromising in the proposition it espouses. The theme drafter must "go big or go home."

8. Question to Ask When Formulating Your Theme

a. All good final arguments are structured around a central theme, or possibly two or three complementary themes. In preparing yourself, ask, "What is the message I want to transmit to the jury; what is the theme to which I can connect the major pieces of evidence?"

b. In developing your theory, there is no straight path. Some facts exist apart from testimony. Others are a product of testimony. In the creation or selection of a central theme you must consider all of it separately, and all of it together, to first answer one critical question: what will jurors certainly believe after hearing all of this stuff—what facts will every juror believe to be true?

c. Ask yourself: What is the image we need to create here?

d. Ask: What is this case about?

e. Ask: What must the jury believe for your side to win?

9. Means of Communicating Theme

a. Communicate your client's themes and your opponent's weaknesses in words, pictures and feelings. Different people process information differently, but all of us rely primarily on one of three modes at any given time: words, pictures or feelings. Unless you are scoring your points in all three different ways, then you are likely to leave out one or more of the jurors.

b. We are a visual society. On average, telling alone achieves a 20 percent memory retention; showing alone has 50 to 70 percent memory retention; but showing and telling produces an enhanced 85 percent retention level. Find a way to show your theme as well as tell it.

c. How something is said, rather than just what is said, makes the key impression on a jury.

d. "I want you to pay close attention to what I am about to say, because this is the most important thing you will hear during this entire trial." This is a simple, yet effective method.

10. Consider Developing a "Key Fact" Theme

a. Sometimes the theme will be established through a "key" fact on which the advocate claims the whole case revolves. The secret of this kind of approach is in your choice of the "key" fact. It must be one that you know will win. However, in selecting a winner, you may have to drift to a peripheral fact. This ability to choose a suitable peripheral issue and win it (the proverbial "straw man" that gets knocked down) is a valuable talent to cultivate.

b. The object in ranking the importance of the available evidence is not to find a single fact and translate it to a theme. Rather the task is to find specific facts which are compatible with a general premise.

11. Develop the Universal Nature of Your Theme

a. Often, in order to formulate a case theme that will be both meaningful to a given jury and persuasive, you must elevate your theme to a higher cause. You will not engage a jury emotionally, for example, by simply arguing the details of whose car hit whose in an automobile personal injury case; raise the theme to a larger issue, that of irresponsible drivers, for example, or of the state of automobile safety, issues with which the jurors can connect emotionally. Open to the jurors the possibility of making their community safer for other drivers, of preventing many needless deaths, give them the opportunity to right some fundamental wrong. These are moving issues, persuasive issues, issues to which people can commit on a feeling level. This is the Reptilian concept.

b. These concepts appeal to righteousness, duty, and a sense of community. The universal concepts often involved in a good theme include:

(1) Individual responsibility in society

(2) Righteousness

(3) Correcting a wrong against the plaintiff

(4) The finality of the jury's decision

(5) People should be treated fairly and equally

(6) Hard work and thrift deserve compensation

c.. The theme is often introduced by giving the case a title. Experienced trial lawyers tell the jury in opening statement (or even in voir dire) that "this is the case of . . . ."

12. The Necessity to Simplify (KISS)

a. Stated simply: you can't persuade the jurors if they are confused. Aristotle's recommendation is worth noting: "Think as wise men do, but speak as the common people do." Verbosity, complex expressions, indirect questioning, are all confusing to a juror. The more direct your speech, the clearer it is, the more powerful it will be.

b. Simplicity is the byword for developing and using a theme. In a complex case, jurors should be able to easily fit the pieces of the case together. The essential issues can be simplified by using the right theme. The theme should be presented with simple and understandable language, not legalese.

c. The art of the advocate stresses the simple—never the complex. Yet how very often we hear lawyers say to judge or jury, "This is a complicated case." That is a phrase you should never use.

d. If you cannot state your theme in 30 seconds, or 25 words or less, then you have not developed an effective theme. Simplicity and clarity are your goals, not eloquence or creativity. Follow these rules:

(1) Use simple English, not legalese;

(2) Avoid any words that are not absolutely necessary; and

(3) Avoid the use of lofty or legal concepts.

13. The Use of Analogies in Developing Your Theme

a. Analogies and similes are ways of creating links between an idea you want to get across, and the jurors' life experiences. Analogies compare ideas or situations which are identical in some ways but not in others; for example, cooperation on a surgical team may be compared to that on a baseball team.

b. Analogies and similes, by comparing the legal issue to something commonly understood and experienced, allow the jurors to relate and connect emotionally to the issue.

c. How to Avoid the Problems Inherent in Using Analogies

(1) Make sure your analogy is accurate; opposing counsel can take your analogy and turn it against you.

(2) Avoid overstatement; be careful not to overstate or over-emotionalize your case.

(3) Be sure your analogy suits your jury; if your jury is primarily from Nebraska, football may be helpful.

(4) Choose analogies from your own experience.

(5) Last of all, choose analogies that make sense to you. You cannot be persuasive discussing something you know nothing about.

d. Analogies are "likenings or comparisons between things, processes, persons, or events." By use of analogies, the lawyer can present a situation familiar to the juror, which helps the jury to form generalizations about certain situations that can then be applied to the unfamiliar situation that is involved in the trial.

14. Use of Anchoring in Developing Your Theme

a. One of the most effective techniques is a process known as "anchoring." Anchoring makes jurors react positively on cue to an unspoken message. The procedure involves using a specific gesture—a positive behavioral anchor—simultaneously with a verbal "message" to produce a classic Pavlovian response in jurors.

b. In effect, this conditioning technique establishes an altered state of consciousness very much like hypnosis among the jurors.

15. Use of "Money Words" in Developing a Theme

a. Advertisers have come up with a concept called "money words." A "money word" is a word that represents something of value for people in a given culture and which is therefore emotionally loaded. It is no accident, for example, that they created a credit card called "Discover."

b. The most valuable money words of all are "you," and a person's name. There really is no better attention-getter than a person's name.

c. Language affects the way people perceive reality; that is, the way we react to the word by which things are labeled can affect the way we react to the things themselves. For example, a department store manager in an experimental mood once placed identical piles of high-quality linen handkerchiefs in two separate piles on opposite ends of a counter. He labeled one pile with a sign that read, "Fine Irish Linen—50 cents," and he labeled the other pile with a sign that read, "Nose Rags—3 for 25 cents." The "Irish linens" outsold the "nose rags" five to one. Thus, the symbol people attach to a thing will affect the meaning people give to the thing.

16. Use of Metaphors

Metaphors are figures of speech that function like examples and analogies in that they connect what is known and familiar with what is unknown and unfamiliar. They reflect attitudes and evaluate. For example, Mel Block used the metaphor of a prison in

describing how his client is limited by the arthritis that has developed as a result of the negligence of the defendant when he told his client's story.

17. Beware of Clichés and Adages in Formulating Your Theme

    a. There is a natural tendency to draw from tried and true adages, analogies, and clichés as a source of themes, such as "the smoking gun," "red herrings," and so forth.

    b. The phrase that is so familiar to you, your colleagues, and friends may be limited by education, social status, and experience. There are few trials in which the words "red herring" have failed to crop up.

    c. Clichés can be barriers to persuasion when jurors disagree with the point being made.

    d. In most cases, *use these phrases to support and illustrate your themes, not in place of them*.

18. Use of the Rule of Three in Developing and Imprinting the Case Theme

    a. The Psychological Advantage of the "Rule of Threes" in Substantiating Your Case Theme

       Once you've established your case theme, select no more than three main points or issues to substantiate it. Information is most compelling when it is grouped in sets of three: three points, three arguments, three phrases.

    b. The theory of threes applies to themes. "Safety, sense, and experience" are what the manufacturer had in mind. "Possible death, probable injury, certain disaster" is what the defendant overlooked.

    c. Three-part themes should never be corny or too catchy. But they should use language the audience is already familiar with and is comfortable using.

19. Use of Focus Groups and Mock Trials in Refining Your Theme

    a. The jury scientist enlists a small group of people, representative of the jury pool, or several small groups, to listen to an abbreviated version of the facts and arguments in the case. Typically, a moderator will guide the presentation and the resulting discussions. The purpose of the session is to explore basic attitudes and reactions to the key issues and themes in the case, and, as a byproduct, to determine whether there are additional issues or themes which the focus group deems important. The focus group is most useful at the outset of trial preparations, for it helps to validate themes which have been preliminarily

identified, to identify themes which may have been missed but are important to the average juror, and to gauge reactions to the key issues in the case.

b. The organization of jury focus groups and jury simulations is not an art—it is a science. This field is known as litigation research. It employs actuarial methods based on experimental design.

c. Every surrogate jury is "case specific" and is usually conducted in the venue where the trial will take place. The focus group identifies which "personality types" will likely perceive the facts of the case favorably or unfavorably; what issues jurors consider most important; which trial theme and case strategy have the most appeal; what voir dire questions work best; what areas of the case are subject to faulty perceptions by jurors; what the problem areas of the case are; what the assessment of damages should be; and so on.

d. A focus group is designed to gather qualitative data on jurors' attitudes toward plaintiff's and defendant's trial stories. A trial behavior consultant or lawyer selects subjects (people representative of a typical jury panel), designs the research task (a structured but non-directive discussion of the trial stories of both parties), and measures factors (the subjects' reactions, questions, statements, etc.) relevant to the analysis of the litigants' story constructions and case strategies.

e. Through abbreviated presentations at mock trials, jury responses are elicited during the presentations to determine how the jury is moved by certain themes. Sometimes, the jurors are asked to deliberate and, after filling out their individual forms, to determine how they are moved as a group and what themes and points are most persuasive in that movement.

IV. Incorporate Jury Bias Principles into Every Theme

1. The Availability Principle

   a. Jurors focus on and talk about evidence that is most readily available. What they have heard, what has been the focus of the proof and what they remember depend upon what has been placed in front of them the most persuasively and the most often.

   b. Take the jurors through the choices made by the defendant. In order to do so one must discover, through depositions, all the choices available. Let the jury conclude themselves that the defendant's conduct was wrong. Through sequencing you can mitigate the tendency to blame the plaintiff because the blame is already subconsciously on the defendant.

2. Sequencing

a. David Wenner and Greg Cusimano have proven through thousands of focus groups that the order in which the plaintiff's lawyer tells his or her story is important, if not imperative, to how that story is perceived by the jury. Let's take this example:

(1) Greg is intelligent, industrious, impulsive, critical, stubborn, and envious.

(2) Greg is envious, stubborn, critical, impulsive, industrious, and intelligent.

b. Greg is rated more positively in the first paragraph than in the second. Therefore, it is imperative to sequence the trial story in such a way as to focus attention on the defendant's behavior. This can only be done by focusing on the defendant's behavior in depositions and discovery. Jurors must construct their understanding of the case within the context of the defendant's behavior and, thus, the order of the presentation of the information will most often be determinative of how the conduct is to be interpreted.

c. Be sure to apply the same sequencing concepts within the theme.

3. Personal Responsibility: Incorporate This Concept into Your Theme

a. Personal responsibility is one of the true battlegrounds of the courtroom. The jury will have a discussion about this concept, with or without you, as the concept is ingrained within each of them. The question they will ask is who is accepting personal responsibility in the case. The plaintiff's lawyer must emphasize the personal responsibility of the plaintiff and contrast that with the defendant's failure to accept responsibility. Through discovery one can easily and readily establish the irresponsibility of the defendant. For example, how the injury could have been avoided; how the plaintiff took steps to avoid the injury notwithstanding the outcome; and how the defendant had the ability to prevent the injury and failed to do so. Similarly, plaintiff's counsel must establish that the plaintiff has, in fact, acted responsibly. This can be done through non-family member testimony and through the many examples of the plaintiff as a responsible person. For example, as a parent and family member, as a worker, as a member of the community, and as a volunteer.

b. We all know that the insurance industry has created the fictional frivolous lawsuit as the stalking horse for legitimate claims. Therefore, the plaintiff must distinguish his or her case from "frivolous lawsuits," or at least the "concept" of the frivolous lawsuit, as wholly created by the Chamber of Commerce and the insurance industry. The plaintiff must establish that "money for nothing" is wrong, that an award of damages is money in exchange for health. The plaintiff has paid with his or her health and, therefore, the question remains who else must pay.

4. Factors to Consider in Developing Norm Violations Within Your Theme

a. The more jurors perceive the party's conduct as routine the less likely it will be viewed as negligent.

b. In contrast, unusual or exceptional events are likely to draw attention and in turn jurors will ask if changing this conduct would have changed the outcome.

c. The person upon whom attention is focused receives the most criticism.

d. The greater the number of options available to the defendant, the more likely jurors are to find liability.

e. Jurors award more for plaintiffs where the defendant's alternatives are many and readily available.

5. The Reptile's Safety Theme Should Be Directly or Indirectly Implemented into the Theme

a. When you show that justice creates safety, then the reptile within each juror acts to protect themselves and the community.

b. The reptile fights to maximize survival advantages and minimize survival damages.

PREPARING FOR THE 30(B)(6) DEPOSITION[1]

Mark R. Kosieradzki
Kosieradzki Smith Law Firm, LLC
3675 Plymouth Blvd.
Ste. 105
Minneapolis, MN 55446
(763) 746-7800
mark@KosLawFirm.com

Discovery involving institutional defendants can be streamlined by using Federal Rule of Civil Procedure 30(b)(6) or a state corollary rule. When a state rule is based on its federal counterpart, those states often look to federal authority for guidance in interpreting their state rule.[2]

Depositions taken under Rule 30(b)(6) focus *on information sought from the organization as a whole, rather than the knowledge of the individual to be deposed.* The rule requires an organization to designate and prepare persons to speak on its behalf regarding "matters" specified in the deposition notice. Rule 30(b)(6) reads as follows:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.[3]

Once Rule 30(b)(6) is properly invoked, the responding entity is required to designate and prepare one or more persons to testify on its behalf, providing all information known or reasonably available to the organization regarding the topics identified by the requesting party.

The motive for the creation of the 30(b)(6) deposition in 1970 was to prevent the evasive tactics employed by many institutional parties. Prior to the promulgation of Rule 30(b)(6), deponent

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 Portions of this paper will be found in MARK KOSIERADZKI, 30(B)(6): DEPOSING CORPORATIONS, ORGANIZATIONS & THE GOVERNMENT (2016).

[2] *See* Appendix A, *30(b)(6): Deposing Corporations, Organizations & the Government*, Trial Guides, 2016, which identifies every state's corollary rule and decisions adopting the federal jurisprudence.

[3] FED. R. CIV. P. 30(b)(6) (emphasis added).

after deponent would feign lack of knowledge of information that would clearly be known by the organization. As a result, the parties would continue on a path of an endless string of depositions in search for a witness to discover information necessary for the litigation.[4]

Rule 30(b)(6) enables the discovering party to cut to the chase: to identify the adversary's claims or defenses. After being served with the matters of examination, the designee must present the organization's "position" on the topics enumerated in the 30(b)(6) deposition notice.[5]

The effectiveness of the rule comes from the parties' reciprocal obligations. The requesting party must reasonably particularize the subjects of the intended inquiry. In turn, the responding party must produce one or more deponents who have been suitably prepared to respond to questioning within that scope of inquiry.[6]

I. Critical Thinking: Planning Your Case

The key to a successful 30(b)(6) deposition starts with a properly crafted deposition notice. Before you can craft an effective strategy for deposing an organization, you must know precisely what you must prove and what defenses you must redress. The protocol is simple. Start by identifying the elements of the case. Then the anticipated legal defenses. Finally, identify the issues that may cause a jury to reject a prima facie case.

Lock Down the Facts

Notwithstanding the blanket denials in the pleadings, not all facts are in dispute. Rule 30(b)(6) depositions can help you identify what facts are missing from your trial story and what facts are undisputed. The 30(b)(6) deposition enables you to establish a clear record of case-critical facts, eliminate defenses, and strategically bring your own summary judgment motions.

Establishing facts through the adversary is also an effective persuasion tool. Jurors don't trust lawyers. They think attorneys only introduce evidence and arguments that best advance their case. As a result, jurors discount evidence a party offers and place greater weight on evidence

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[4] FED. R. CIV. P. 30 advisory committee's note, Sub. (b)(6) (1970 Amendment); 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1994); Atlantic Cape Fisheries v. Hartford, 509 F.2d 577 (1st Cir. 1975) (citing advisory committee's note to Rule 30(b)(6), "Rule 30(b)(6) . . . is an additional, supplementary and complimentary deposition process designed to aid in the efficient discovery of facts.").

[5] United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (citing United States v. Mass. Indus. Fin. Agency, 162 F.R.D. 410, 412 (D. Mass. 1995)); Toys "R" Us, Inc. v. N.B.D. Trust Co., No. 88C10349, 1993 WL 543027, at *2 (N.D. Ill. Sept. 29, 1993); Lapenna v. Upjohn Co., 110 F.R.D. 15, 21 (E.D. Pa. 1986).

[6] *See, e.g.*, Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 638 (D. Minn. 2000).

developed through cross-examination.[7] Rule 30(b)(6) depositions enable you to prove your case through the other side's witnesses.

Neutralize Defenses

Success at trial, however, requires much more than establishing a prima facia case. Success also requires considering all of the ways you might lose your case. It is important to be prepared to respond to the legal defenses that will be raised in your case. Predicting the defenses requires strategic analysis and legal research.

Because every case is different, there is no laundry list. However, some common legal defenses to consider include comparative fault, no duty, immunity, open and obvious defects, superseding cause, and attempts to undermine proximate cause. You must carefully analyze your case at the outset to forecast what issues your adversary will raise later. If you anticipate what is coming, you can craft a plan to factually preempt the defenses long before you face a motion or trial.

Establish Standards of Conduct

Once you have narrowed or eliminated the factual disputes, the focus then shifts to whether the defendant acted reasonably. You can use 30(b)(6) depositions to gain consensus on what reasonable behavior is—compliance with the rules. If both the facts and the rules are established through defendant testimony, there is little left for opposing counsel to argue.

With a clear understanding of the legal framework and the jury biases controlling your case, you can develop a discovery plan to not only lock down the facts necessary to prove your case, but also to neutralize the anticipated defenses.

II. Crafting the Notice

The party seeking discovery through a Rule 30(b)(6) deposition is required to "[d]escribe with reasonable particularity the matters for examination."[8] There are two lines of interpretation of the term "reasonable particularity." The more stringent approach calls for the requesting party to designate, "with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute."[9] In those cases, the requesting party

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[7] ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS (Lexis Law Pub., 1990).

[8] FED. R. CIV. P. 30(b)(6). (Emphasis added.)

[9] Hartford Fire Ins. Co. v. P & H Cattle Co., No. CIV.A. 05-2001-DJW, 2009 WL 2951120, at *10 (D. Kan. Sept. 10, 2009); McBride v. Medicalodges, Inc., 250 F.R.D. 581, 584 (D. Kan. 2008); Lipari v. U.S. Bancorp, N.A., No. CIVA 07-2146-CM-DJW, 2008 WL 4642618, at *1 (D. Kan. Oct. 16, 2008); EEOC v. Thorman & Wright Corp., 243 F.R.D. 421, 426 (D. Kan. 2007); *see also* Sprint Commc'ns Co., L.P. v. Theglobe.com, Inc., 236 F.R.D. 524, 528 (D. Kan. 2006); Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 638 (D. Minn. 2000).

has the responsibility of preparing "a roster of information which is reasonably specific and intelligible to the defendants so that they know about which specific representations their designee needs to acquire knowledge."[10]

Other decisions look to whether the topics in the notice provide sufficient information to let the designee know for what to prepare.[11] Ultimately the notice should be sufficiently definite and limited in scope that it can be said "to apprise a person of ordinary intelligence" what is requested and to enable the court to determine whether the requested information has been produced."[12]

III. Matters of Examination: What Can You Ask?

A responding party must prepare its designee to discuss the matters indicated in the 30(b)(6) notice if they intend to assert any information on those matters in the litigation.[13] The rule itself does not limit the matters of examination that a moving party may seek in any way. Rather, the scope of Rule 30(b)(6) "matters of examination" is controlled by Rule 26(b)(1).

In 2015, Federal Rule of Civil Procedure 26(b)(1) was amended to require that the scope of discovery be both relevant and proportional to the needs of the case:

> Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is *relevant to any party's claim or defense and* proportional to the needs of the case . . .

Courts interpreting the 2015 Amendment to Rule 26(b)(1) have determined that "Rule 26 was amended in 2015 to include the 'proportionality' requirement. However, the 2015 amendments *do not alter the basic tenet that Rule 26 is to be liberally construed to permit broad discovery*."[14]

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[10] Brunet v. Quizno's Franchise Co., No. 07-CV-01717, 2008 WL 5378140, at *4 (D.C. Dec. 23, 2008).

[11] *Hartford Fire Ins. Co.*, 2009 WL 2951120, at *10 (citing Regan–Touhy v. Walgreen Co., 526 F.3d 641, 649-50 (10th Cir. 2008)); Steil v. Humana Kan. City, Inc., 197 F.R.D. 442, 444 (D. Kan. 2000).

[12] *Id.*

[13] In re ClassicStar Mare Lease Litig., 2009 WL 1313311, at *2 (E.D. Ky. May 12, 2009) (citing United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996)).

[14] State Farm Mutual Automobile Ins. Co. v. Warren Chiropractic & Rehab Clinic, PC., 315 F.R.D. 220, 222 (E.D. Mich. 2016); State Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC, 255 F. Supp. 3d 700, 704 (E.D. Mich. 2017), aff'd, No. 14-CV-11700, 2017 WL 3116261 (E.D. Mich. July 21, 2017).

Factual Testimony

Facts are the most obvious subject matter for inquiry in a 30(b)(6) deposition. Rule 30(b)(6) depositions can request disclosure of facts comprising the organization's knowledge base.[15] A requesting party should not be obligated to depose a string of employees, none of whom is able to speak for the organization, to determine how an incident in question occurred.[16]

Interpretation of Facts

The scope of the Rule 30(b)(6) "matters of examination" is not limited to facts within the corporation or organization's knowledge. Rather, the organization must also disclose its *subjective beliefs, opinion, and interpretation of documents and events.*[17]

Rule 30(b)(6) requires organizations to be more than mere document gatherers; they must produce live witnesses who know or who can reasonably find out what happened in given circumstances.[18] The organization must explain how varying facts should be construed in the position it advocates.[19]

Sources of Information

Areas of inquiry that seek the discovery of sources of information about the defendants' claims and defenses are also relevant and therefore discoverable.[20] The 2015 Comment to Rule 26(b)(1) affirms the appropriateness of learning about the "existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." The comment states:

> Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples.

By understanding the source of information, it is possible to vet those sources to ensure that all information was fully disclosed.

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[15] United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

[16] Wilson v. Lakner, 228 F.R.D. 524, 529 (D. Md. 2005).

[17] *Taylor*, 166 F.R.D. at 361.

[18] *Wilson*, 228 F.R.D. at 530.

[19] *Taylor*, 166 F.R.D. at 363; In re Neurontin Antitrust Litig., MDL 1479, 2011 WL 253434, at *7 (D.N.J. Jan. 25, 2011) aff'd MDL 1479, 2011 WL 2357793 (D.N.J. June 9, 2011).

[20] E.E.O.C. v. Caesars Entm't, Inc., 237 F.R.D. 428, 434 (D. Nev. 2006).

Interpretation of Documents

Since "documents can always be interpreted in various ways . . . plaintiffs are entitled to discover the interpretation that [the organization] intends to assert at trial."[21] Even where information is already provided in documents, these inquiries are "useful to testify as to interpretation of papers, and any underlying factual qualifiers of those documents."[22]

Contentions and Affirmative Defenses

Generally, inquiry regarding an organization's legal positions is appropriate in a Rule 30(b)(6) deposition.[23] Contentions are allegations or responses in the pleadings on which the parties base their claims and defenses. Facts and documents regarding an organization's claims and defenses are clearly relevant and discoverable under Rule 26.[24] Therefore, depositions under 30(b)(6) may inquire as to the factual basis for the organization's affirmative defenses and contentions.[25]

Rule 30(b)(6) does not contain any requirement to first seek discovery of the facts underlying a claim by other means of discovery.[26] Nor do the rules permit a party served with a Rule 30(b)(6) deposition notice or subpoena request "to elect to supply the answers in a written response to an interrogatory."[27] Because depositions provide a means to obtain more complete information, they are the favored process for gathering information.[28]

The corporation or organization must designate a person to speak on its behalf and it is this position that the attorney must advocate."[29] It is the responsibility of the organization, which

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[21] Ierardi v. Lorillard, Inc., No. 90-7049, 1991 WL 158911, at *2 (E.D. Pa. Aug. 13, 1991); 4 J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 26.56[3], at 142-43 (2d ed. 1984).

[22] Dongguk Univ. v. Yale Univ., 270 F.R.D. 70, 74 (D. Conn. 2010) (citing Beckner v. Bayer CropScience, L.P., 2006 U.S. Dist. LEXIS 44197, *27, 29-30 (D.W. Va. June 28, 2006)).

[23] Canal Barge Co. v. Commonwealth Edison Co., No. 98 C 0509, 2001 WL 817853, at *2 (N.D. Ill. July 19, 2001); *Taylor*, 166 F.R.D. at 362.

[24] E.E.O.C. v. Caesars Entm't Inc., 237 F.R.D. 428, 434 (D. Nev. 2006).

[25] *E.E.O.C.*, 237 F.R.D. at 434; *Ieradi*, 1991 WL 158911.

[26] S.E.C. v. Kramer, 778 F. Supp. 2d 1320 (M.D. Fla. 2011) (citing 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2103 (2d ed. 1994)).

[27] Marker v. Union Fid. Life Ins., 125 F.R.D. 121, 126 (M.D. N.C.1989).

[28] Great Am. Ins. Co. v. Vegas Const. Co., Inc., 251 F.R.D. 534, 539 (D. Nev. 2008) (citing Marker v. Union Fid. Life Ins., 125 F.R.D. 121, 126 (M.D.N.C. 1989)); *see also Ieradi*, 1991 WL 158911, at *1 (citing Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989).

[29] United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996); Corus Eng. Steels Ltd. v. M/V Atl. Forrest, Civ. A., No. 01-2-76, at *2, 2002 WL 31308335 (E.D. La. Oct. 11, 2002); Twentieth Century Fox Film Corp. v. Marvel Enter., Inc., No. 01 Civ. 3016 (AGS), 2002 WL 1835439, at *3 (S.D.N.Y. Aug. 8,

intends to assert claims and defenses in litigation, to adequately prepare an individual to testify as to those claims and defenses.[30] Contentions are based on the facts of a case; "the attorney for the corporation is not at liberty to manufacture the corporation's contentions."[31] A corporation cannot "have [its] attorney assert that the facts show a particular position on a topic when, at the Rule 30(b)(6) deposition, the corporation asserts no knowledge and no position."[32]

Courts repeatedly decline to prohibit factual contention inquiries in 30(b)(6) depositions.[33] The majority of courts have held that nothing precludes a deposition either in lieu of or in conjunction with such interrogatories.[34] In *Security Insurance Co. of Hartford v. Trustmark Insurance Co.*, the court explained, "As courts have held contention interrogatories seeking the factual bases for allegations would not encroach on protected information, it is not apparent how the same information would be otherwise unavailable through questions posed to a deponent in the course of a deposition."[35]

In a limited number of complex cases, such as patent, antitrust, or surety bond evaluations, which necessarily involve mixed questions of law and fact, some courts have precluded 30(b)(6)

2002); A.I.A. Holdings, S.A. v. Lehman Bros., Inc., No. 97CIV-4978, 2002 WL 1041356, at *3 (S.D.N.Y. May 23, 2002); Paul Revere Life Ins. Co. v. Jafari, 206 F.R.D. 126, 127 (D. Md. 2002); United Tech. Motor Sys., Inc. v. Borg-Warner Auto., Inc., No. Civ. A. 97-71706, 1998 WL 1796257, at *2 (E.D. Mich. Sept. 4, 1998); Exxon Research & Eng'g Co. v. United States, 44 Fed. Cl. 597, 599-600 (Fed. Cl. 1999).

[30] In re ClassicStar Mare Lease Litig., 2009 WL 1313311, at *2 (E.D. Ky. May 12, 2009).

[31] United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996); Corus Eng. Steels Ltd. v. M/V Atl. Forrest, Civ. A., No. 01-2-76, at *2, 2002 WL 31308335, at *2 (E.D. La. Oct. 11, 2002); Twentieth Century Fox Film Corp. v. Marvel Enter., Inc., No. 01 Civ. 3016 (AGS), 2002 WL 1835439, at *3 (S.D.N.Y. Aug. 8, 2002); A.I.A. Holdings, S.A. v. Lehman Bros., Inc., No. 97CIV-4978, 2002 WL 1041356, at *3 (S.D.N.Y. May 23, 2002); Paul Revere Life Ins. Co. v. Jafari, 206 F.R.D. 126, 127 (D. Md. 2002); United Tech. Motor Sys., Inc. v. Borg-Warner Auto., Inc., No. Civ. A. 97-71706, 1998 WL 1796257, at *2 (E.D. Mich. Sept. 4, 1998); Exxon Research & Eng'g Co. v. United States, 44 Fed. Cl. 597, 599-600 (Fed. Cl. 1999).

[32] Canal Barge Co. v. Commonwealth Edison Co., No. 98 C 0509, 2001 WL 817853, at *2 (N.D. Ill. July 19, 2001) (citing *Taylor*, 166 F.R.D. at 363, n.8).

[33] *See, e.g*, Radian Asset Assur., Inc. v. Coll. of the Christian Bros. of New Mexico, 273 F.R.D. 689, 692 (D.N.M. 2011); E.E.O.C. v. Caesars Entm't, Inc., 257 F.R.D. 428, 432-34 (D. Nev. 2006); AMP, Inc. v. Fujitsu Microelectronics, Inc., 853 F. Supp. 808, 831 (M.D. Pa. 1994).

[34] Sec. Ins. Co. of Hartford v. Trustmark Ins. Co., 218 F.R.D. 29, 33 (D. Conn. 2003); Protective Nat'l Ins. Co. v. Commonwealth Ins. Co., 137 F.R.D. 267, 272-77 (D. Neb. 1989).

[35] *Sec. Ins. Co. of Hartford* 218 F.R.D. at 34; *see also* United States v. Boyce, 148 F. Supp. 2d 1069, 1086 (S.D. Cal. 2001).

inquiries where the inquires would elicit the views and conclusions of counsel.[36] However, even in complex cases, if contentions and affirmative defenses are factually based, the organization is required to designate a witness to provide that factual basis in response to a 30(b)(6) deposition notice.[37] The distinction turns on whether the matters of examination are seeking valid factual bases for contentions or appear to seek counsel's legal theory or strategy.[38]

[36] JPMorgan Chase Bank v. Liberty Mut. Ins. Co., 209 F.R.D. 361, 362 (S.D.N.Y. 2002); SEC v. Morelli, 143 F.R.D. 42, 47 (S.D.N.Y. 1992); TV Interactive Data Corp. v. Sony Corp., C 10-475 PJH MEJ, 2012 WL 1413368, at *2 (N.D. Cal. Apr. 23, 2012); Exxon Research & Eng'g Co. v. United States, 44 Fed. Cl. 597, 599-600 (Fed. Cl. 1999) (disallowing contention deposition on condition that interrogatory responses are forthcoming, but allowing for potential subjective testimony of patent claim in deposition of in-house attorney who does not work for the firm handling the litigation if the contention interrogatories are not sufficient to get the requested information).

[37] Canal Barge Co. v. Commonwealth Edison Co., No. 98 C 0509, 2001 WL 817853, at *2 (N.D. Ill. July 19, 2001); AMP, Inc. v. Fujitsu Microelectronics, Inc., 853 F. Supp. 808, 831 (M.D. Pa. 1994) (compelling a corporate patent defendant to produce a 30(b)(6) witness to answer questions regarding contentions and affirmative defenses in the defendants' answer and counterclaim).

[38] *See* Radian Asset Assur., Inc. v. Coll. of the Christian Bros. of New Mexico, 273 F.R.D. 689, 691-92 (D.N.M. 2011) (examining the distinction between cases that permit and those that disallow contention inquiries).

Using the Deposition to Set Up Cross-Examination

Isobel Thomas
Thomas Keel & Laird
50 S. Steele St.
Ste. 450
Denver, CO 80209
(303) 382-1990
ithomas@thomaskeel.com

Do Your Homework: No Detail Is Too Small

- Check board certifications
- Open Records Act
  - Hospital policies
  - Medical board files
- Expert referral services
- SEAK
- Variety websites (*e.g.*, JohnSmithMD.com)
- YouTube

Literature

- Read it and annotate it
- Don't assume the literature cited in expert reports is accurate or verbatim without checking it yourself

ERRORS IN CITES TO LITERATURE BY DEFENDANT'S EXPERTS

PAGE	REFERENCE	OPINION	NOTES
129, ¶ 3 (2nd s)	No. 21 at Pp. 462 - 463	JR, like 80% of patients with Strep TSS, developed a soft-tissue infection – necrotizing myositis/myonecrosis.	No such pages. If this was actually citing No. 23, it still does not make sense. I do not see this statistic nor anything related to Strep TSS.
129, ¶ 3 (last s)	No. 15 at P. 526	Invasive GAS infections that cause TSS and NSTI "proceed fulminantly and kill quickly even in immune competent hosts[,]" like JR.	They left out *"may"*. The actual quote is: "It is apparent from this review that invasive GAS infections may proceed fulminantly and kill quickly even in immune competent hosts.
130, ¶ 1	No. 22 at P. 243	"Prompt and aggressive surgical exploration and debridement of suspected deep-seated streptococcal infection are mandatory."	No such page. Actually referencing No. 24.

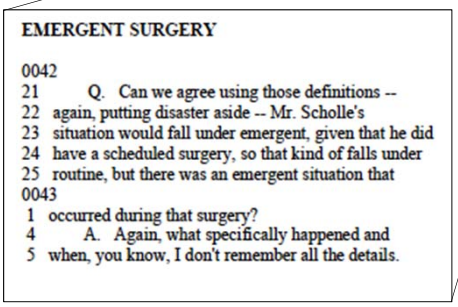
Prior Testimony

- Read it, even if you think it is not related to your case
- *Deposition of Defendant where Defendant was also an expert:*

51-53	Q. And it's a fact—you testified last month in open court that you made almost half a million dollars last year doing just this type of work for defendants, correct? A. Yes, sir. Q. And the year before that, about 300 and a half thousand dollars? A. Yes, sir. It's about --less than 15 percent of my overall income. Q. And the year before that, about a 112,000. Does that sound about right? A. Yes, sir. Q. Do you think that defendants like what they hear? A. I'm sorry. Excuse me? Q. They're contacting you because your results are good for them? A. So -- Q. You're getting more money for it. A. Just how it works, I don't actively seek out this business. I started this because my wife has a Bernese Mountain dog and one of the people in our litter was an attorney and they asked me to look at a case. And so I looked at it and they liked what I said about it. And then people will contact us. We don't have a website. We don't knock on doctors' office --or lawyers' offices and give us their cards. People will call us up and ask us to look at these things. And I don't pick and choose. The ladies will hand me a chart and say, They've asked us to look at this. Look at this, please. And that's what I do. I don't pick and choose. Like, for example, if you wanted to retain me, I wouldn't say, no, I'm not going to look at your case. It's whoever contacts us. And I guess, because I'm -- maybe I do a good job, that people ask me to do it again.

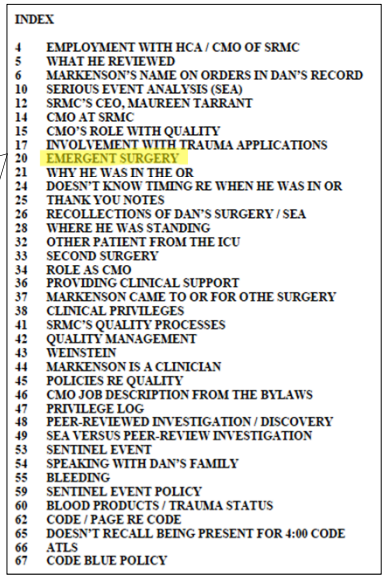
Prepping for Trial

- Annotate the deposition (not a deposition summary)



EMERGENT SURGERY

0042
21 Q. Can we agree using those definitions --
22 again, putting disaster aside -- Mr. Scholle's
23 situation would fall under emergent, given that he did
24 have a scheduled surgery, so that kind of falls under
25 routine, but there was an emergent situation that
0043
1 occurred during that surgery?
4 A. Again, what specifically happened and
5 when, you know, I don't remember all the details.



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Simple Stuff (But Often Forgotten)

- Make sure you have the actual original transcript at the podium at trial
- Make sure you have the errata sheet. This makes a huge difference for impeachment when someone changes their answer and they make no changes from the errata sheet.

Q. Let me run through some of your deposition testimony because maybe I can lay some groundwork. Obviously you testified truthfully; true?
A. Yes.
Q. And you had a chance to read and review your deposition as you've done in the past true?
A. Yes.
Q. You certainly are not new to the process you understand how it works; right?
A. Correct.
Q. You understand that you correct your answers while we're sitting in the deposition; true?
A. Correct.
Q. And you understand that you sign and have notarized changes to your deposition; true?
A. That's right.
Q. And you did that in this case on June 28th; right?
A. That sounds right.
Q. Okay. And you made three changes which looked like they were spelling changes for oxycodone and OxyContin; true?
A. Correct.
Q. You did not change the substance of any of your deposition testimony, did you?
A. No.
Q. That was your opportunity to do so had you felt any of it was inaccurate; right?
A. Correct.

Trial Testimony—Defense Experts Examples

Q. Doctor you were under oath at the time you gave your deposition in this case on June 10th; true?
A. True.
Q. And you answered my questions to the best of your ability; true?
A. Yes.
Q. Mr. Wolanske was present and could object to those questions; true?
A. Yes.
Q. And you told the truth at that time; true?
A. Yes.

Trial Testimony—Defense Experts Examples

Do you have that? Doctor did I ask you after you told me it's certainly possible that Dr. Wuarin had the stroke on September 2 that the only way to determine medically if in fact she was having a stroke on the 2nd was for Dr. Sanazaro or Alpine to send her for imaging of her head; true in your answer at that time was imaging could have ruled in it or ruled it out. Is that still your testimony Doctor?
A. I think I misspoke.
Q. Well, let me stop you here doctor. You carefully reviewed your deposition and signed changes under oath and you made no change to this did you not?
A. True.
Q. So that was the testimony you gave under oath when you were sworn in by a court reporter like Carrie when I paid you for your deposition time about six weeks ago; true?
A. True.
Q. And you may have misspoke there but I went on and I said exactly and that would have been the only way to definitively diagnose a stroke or like I said rule out a stroke; true and you said true. Was that your testimony under oath?
A. Yes.
Q. So you are telling the jury that the only way to definitively rule in or rule out a stroke for Dr. Wuarin would have been imaging of her head. As you testified to under oath; true?
A. The.
Q. Doctor; is that true or false?
A. Well, that's -- that is what the record shows.
Q. Thank you you. You were and telling the truth and you were sworn to tell the truth?
A. True.
Q. And you knew I relied on your deposition to prepare for this case for Dr. Wuarin; true?
A. True.
Q. And I want to go on because my next question to you it was up to Dr. Sanazaro and to Alpine to as a team determine what was causing her symptomatology on the 2nd; true? And your answer was true and you stand by that; right?
A. Yes.
Q. And so because you'll tell the jury in this case it's possible she was having a stroke on the 2nd, you will also honestly tell the jury that Dr. Sanazaro may have just gotten it wrong on the 2nd; true? Your answer, I think that's a possibility but it's also possible that her stroke occurred sometime after the 2nd. Was that the answer you gave me under oath?
A. Yes.
Q. And it was true at that time and it's true today?
A. Yes.

ADVANCED DEPOSITION TECHNIQUES

Sach Oliver
Bailey & Oliver Law Firm
3606 W Southern Hills Blvd.
Rogers, AR 72758
(479) 202-5200
soliver@baileyoliverlawfirm.com

I. Introduction

Depositions are not for discovery but instead to destroy your opposition. You must have a systematic approach to developing your deposition outlines and the goals you intend to accomplish. To successfully take a deposition, you must begin with the jury instructions, move to rules and principles, conduct focus groups, develop an outline with each question written out, role play the deposition, and then record video of the final product.

II. Jury Instructions

In Rick Friedman's new version of *Rules of the Road*, he discusses the importance of jury instructions, and he analogizes jury instructions to flossing your teeth. It's funny, but it makes sense. How many of us know we should be flossing our teeth but don't? How many of us know we should do our jury instructions at the beginning of the case yet don't do it? A critical step in trial preparation is organizing your jury instructions at the outset of the case. Know that it is very possible throughout discovery that jury instructions may change, but you have a foundation. You have a road map, just like you have plans to build a house. Your jury instructions are the plans to build your case. Without fail, we prepare jury instructions before we move the case into litigation. Jumping ahead a little bit, something else we do with jury instructions is the moment we know our elements of the case, we file our jury instructions with the court. We don't wait until the scheduling order or the judge's requirements of two weeks prior to trial or three days prior to trial submit your jury instructions. If six months prior to trial or one year prior to trial we're confident that these are our jury instructions, we file them with the court. Filing your jury instructions well in advance is a sign of force and preparation. It is intimidating to the insurance companies and the defense lawyers to know you are that prepared to present your case to the jury.

The jury instructions are the foundation for destroying the deponent. Knowing your target allows you to shoot it. Fulfilling the proof needed to answer the jury instructions in your favor at trial is your target. Simply ask yourself what proof is needed from this witness to successfully answer this question at trial—then develop a plan to go get it.

III. Rules and Principles

If you are trying cases and not using the rules approach, you might consider reading *Rules of the Road* by Friedman and Malone. In essence, the rules approach is simple and it works for juries. I personally have tried cases using the rules approach, and all of them have been successful in the eyes of the jury.

The defense in most cases is confusion and complexity. Applying rules to your case will simplify and clear up any confusion for the jury. For example, if the tractor trailer driver did not act as a reasonably careful tractor trailer driver would under the conditions, you may find they are negligent versus a rule: The driver of a tractor trailer company must have brakes to prevent harm. Or, a driver of a tractor trailer must have safe steering to prevent harm. The difference is clear.

Before we file suit, we develop a set of rules that apply to the case, and we obtain these rules from jury instructions, focus groups, policies and procedures if they are available pre-suit, federal regulations, statutes, case law, and most importantly common sense. You'll find that these rules are similar to the jury instructions, as they are the floor plan for building your case.

The deposition outline must consist of rules and principles that support those rules. Your outline should systematically walk the witness down a road that proves liability with the use of rules.

The following is an example in a simple medical negligence case:

Doctors must rule out a punctured colon in patients with abdominal pain after a colonoscopy for patient safety.

1. The physical examination always begins with a general inspection of the patient, followed by inspection of the abdomen itself. [4]

2. The abdominal examination includes:

    a. visual assessment, true?
    b. auscultation, true?
    c. palpation, true?
    d. percussion of the abdominal wall, true? [3]

3. Abdominal inspection involves looking at the contour of the abdomen, and seeing whether it appears distended or scaphoid or whether a localized mass effect is observed, true? [4]

    a. distended = extended, bloated; scaphoid = shaped like a boat

4. Auscultation is the act of listening for sounds made by internal organs, true?

5. Auscultation aids in the diagnosis of certain disorders, true?

6. Auscultation can provide useful information about the gastrointestinal tract and the vascular system, true? [4]

7. Palpation typically provides more information than any other single component of the abdominal exam, true? [4]

8. Percussion is used whether there is gaseous distention of the bowel, free intra-abdominal air, degree of ascites, or presence of peritoneal inflammation, true? [4]

    a. Ascites = an abnormal accumulation of fluid in the abdomen.

9. When a patient is suffering from an acute *surgical* abdomen, they experience pain first, true?

10. And this pain typically stimulates vomiting, true? [4]

11. Early symptoms of a punctured bowel include persistent abdominal pain and abdominal distention, true? [1]

12. By the end of the history and physical examination, a skilled clinician will be able to develop a narrow and accurate diagnosis for most patients, true? [4]

13. If a doctor suspects that the patient has a perforation of the colon, he or she should immediately rule it out in patients who have an acute abdomen, true? [3]

14. Doctors should urgently rule out a punctured bowel in a post-colonoscopy patient with acute abdominal pain for the safety of the patient.

15. *Doctors must rule out a punctured colon in patients with abdominal pain after a colonoscopy for patient safety.*

This technique applies to all cases—tractor trailer cases and so on.

IV. Focus Groups

Our firm is a big believer in focus groups. We've done well in excess of 250 focus groups, and we conduct focus groups on a regular basis. As a matter of fact, we will schedule a focus group in advance on a regular basis without knowing which case we're going to focus group just so we've got a set of jurors coming into our court room. We plug in a case that fits. Focus groups are utilized to determine the community's impressions, curiosities, opinions, attitudes,

information well known to the community, feelings, and other vital information a jury will give you about a fact pattern. If you're not doing focus groups prior to a trial, then that is similar to playing in the Super Bowl without practicing all season long—it's crazy.

Focus groups are simple, easy, and inexpensive. All you have to do is put together a group of six to 18 people, put them in a room, give them each a donut, and put a set of facts in front of them and then shut up and listen. You will be absolutely amazed at what information you learn from the members of the community where the case will be tried. We often conduct as few as six and as many as 18 focus groups on a case. If you need more information about focus groups, please give me a call or shoot me an email, or buy some well-recommended literature from www.trialguides.com.

How can focus groups help with depositions? Jurors will tell you where you need to go with the witness, the facts you need to establish, and the right words to use to establish your case. I have often brought a person into the room, sat them in a chair, and then told the focus group, "Pretend this is the truck driver. What do you want to ask him?" "Or the doctor?" "Or the CEO?" Basically, for each point the jurors want to establish, you should develop serious questions to establish that point. Let the focus group help you.

Also, make sure that the questions and the words you are using in your deposition are jury-approved in a focus group. We use deposition video clips on other witnesses in deposition, in mediation, in hearings with the judge, and most importantly in trial. It doesn't do you much good to have a deposition video clip using long, confusing, complex words that aren't jury-approved. Get them approved before you go into deposition.

V. Deposition Outlines and Questions—Role Play

Write out each question you intend to ask in deposition and role play those questions and scenarios on someone in your office. If you know where the witness is going, you can prepare your next move. Think how easy chess would be if you knew your opponent's next move. Role playing your depositions with your deposition questions provides you a snapshot of what your opponent's next move is going to be. Quash them.

VI. Mouse-Trapping Defendants

This technique is fun and it works on defendants in deposition. The concept was developed by a Nashville, Tennessee attorney, Phillip Miller. Many attorneys call it the "Miller Mouse Trap." The whole purpose behind this simple yet genius technique is to walk the defendant into a trap before they even know it. The technique works on all sorts of cases and simply takes practice to implement. It is suggested that you write out your questions ahead of time and anticipate the defendant's responses to adequately prepare for the deposition. Mouse-trapping defendants works hand-in-hand with the Rules of the Road, establishing the rules of the case that have been violated and that caused the harms and losses. So it is critical that before the deposition begins, you have a list of rules that apply to the case that will be used to mouse-trap the defendant.

The basic rundown of the method is as follows:

1. Establish the rule.
2. Is the rule important?
3. Why is the rule important?
4. Do you rely on others to follow the rule?
5. Why do you rely on others to follow the rule?
6. Is it careless not to follow the rule?
7. Is it negligent not to follow the rule?
8. Is it reckless not to follow the rule?

When establishing the rule, it is important to use hypothetical language and not direct the rule toward the parties in your case. So use words that lower the guard of the defendant, such as "hypothetical," "let's say," "assuming," or "what do you think about this scenario?" Remove the parties from the rule, and it makes the rule seem distant from the defendant.

Hint: This process only works if you completely ignore the objections of defense counsel and continue as if he or she is not there. Usually, the only time you get objections is when you ask about negligence or recklessness. For some reason, they do not seem to mind the word "carelessness." That is why I ask it first.

Example on a T-bone wreck where defendant is denying liability:

> Q: When you're traveling down the highway and someone pulls out in front of you and a wreck occurs, is there a safety rule that could have been followed to avoid the wreck?
>
> A: Yes.
>
> Q: What is that rule?
>
> A: Duh . . . Don't pull out in front of oncoming traffic.
>
> Q: If you're driving down the road, do you have the right-of-way to continue on in a forward motion?
>
> A: Yes.
>
> Q: And why is it important that someone not pull out in front of you when you're driving down the road?
>
> A: So you don't have an accident.
>
> Q: What else?

A: So people don't get hurt.

Q: What else?

A: So it won't be chaotic out on the highways.

Q: Do you rely on this rule that someone's not going to pull out in front of you when you're driving down the road?

A: Yes.

Q: Why do you rely on this rule when you're driving?

A: I don't want to get hurt and don't want my family hurt.

Q: If someone doesn't follow this rule and pulls out in front of you while you're driving down the road, would you consider that other person to be careless?

A: Yes.

Example on a nursing home case:

Q: Hypothetically, at your typical nursing home, is important that the doctor be called when a patient is not getting enough water to sustain life?

A: Yes.

Q: Can we agree there is a rule in nursing homes that the doctor should be called if a patient is not getting enough water to sustain life?

A: Yes.

Q: Why is this rule important?

A: Some patients are so frail that they can't take it without water.

Q: What else?

A: Well, water is one of the essentials we need to live.

Q: Please tell me more reasons why this rule is important?

A: The doctor needs to know if the patient is not doing very well, and not getting enough water to live is critical information.

Q: What else?

A: Well, I don't know what you are looking for, but when a patient becomes dehydrated they seem to have more problems.

Q: Do patients or patients' families rely on this rule?

A: I think patients and their families think the nursing home will call the doctor if it's bad enough.

Q: If your mother was in the nursing home and she was not getting enough water to sustain life, would you rely on this rule that they would call the doctor?

A: Yes.

Q: Why would you rely on that rule?

A: Well, that is their job and Medicare will require the doctor make an order before we can do anything.

Q: If someone did not follow this rule and it hurts someone, would you consider that carelessness?

A: I guess so, if it hurt them.

Q: Assuming it did hurt them, would you consider not following this rule negligence?

A: I think so.

Q: Assuming not following this rule hurt someone or even your loved one, would you consider that recklessness to not follow this rule we have been talking about?

A: I think so.

Example of trucking case where trailer fish-tailed and crossed center line, and defense is denying liability:

Q: If you and your family are driving down the road and you meet a tractor trailer, do you want the tractor trailer to stay on its side of the road?

A: Yes.

Q: When you say you want the tractor trailer to stay on its side of the road, do you mean the tractor and the trailer, or is it ok for the trailer to come on your side of the road?

A: I don't want either on my side of the road.

Q: When you say you don't want either on your side of the road, do you mean you don't want the tractor or the trailer to cross the double yellow line onto your side of the road?

A: Yes.

Q: Can we agree that when you and your family are driving down the road, a tractor trailer should stay on their side of the road?

A: Yes.

Q: Is this rule important for tractor trailers?

A: Yes.

Q: Why is it important for tractor trailers to stay on their side of the road?

A: That is obvious, so other people don't get hurt or so the driver of the tractor does not get hurt if the tractor rolls.

Q: Why else is this rule important?

A: Tractor trailers can cause quite a bit of damages because they're bigger.

Q: When you are driving down the road with your family, do you rely on others to follow this rule?

A: Yes.

Q: Why do you rely on others to follow this rule?

A: I don't think I would ever leave the house if people didn't stay on their side of the road.

Q: Why else do you rely on the rule that tractor trailers should stay on their side of the road when you and your family are driving?

A: I don't want my family hurt.

Q: If a tractor trailer did not follow this rule and crossed the center line and hurt your family, would you consider that recklessness?

A: I suppose so.

Q: Carelessness?

A: Yes.

As you can tell, these examples can be adjusted to fit any case, and it works more easily when not dealing with a professional witness. However, I have seen this done effectively even on a professional witness.

VII. Video

In conclusion, record video of the deposition. If the deposition is not worthy of video, don't take it. The same is true for writing out your questions. If the deposition is not worthy of writing out your questions, don't take it.

DEPOSING EXPERTS: PREPARING TO OBTAIN THE BEST POSSIBLE TESTIMONY ON CROSS-EXAMINATION[1]

Jennifer R. Liakos
Napoli Shkolnik, PLLC
5757 W. Century Blvd.
Ste. 680
Los Angeles, CA 90045
(212) 397-1000
jliakos@napolilaw.com

Deposing an expert witness can be one of the most daunting tasks undertaken by a lawyer. Unlike other witnesses, an expert is typically an immensely educated professional with a high degree of sophistication in her field. By the very nature of being a qualified expert, the witness has specialized knowledge and skill. Furthermore, he or she is usually a polished and effective communicator, and a master of the jargon on the subject. Without an adequate amount of preparation and a plan for the deposition in place the deposition can be, at best, a waste of time—at worst, very damaging to your case. However, there are a few tricks that can be used to even the playing field.

I. Know the Law

Before you even begin to research the particulars of a specific expert witness, you must have an understanding of the law that is governing your case and the requirements and limitations in the jurisdiction regarding expert testimony. Many states, New York for example, have laws that prevent attorneys for deposing expert witnesses. Other states, like California, permit a deposition, but do not require the production of an expert report in advance of the deposition—making it much harder to prepare. Federal Court and many state courts provide for both a report and a deposition.

The admissibility of expert witness testimony in Federal Court, and many state courts as well, is governed by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). In *Daubert*, the Supreme Court superseded the prior "general acceptance" test held in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and instead followed the language of the Federal Rules of Evidence (FRE).[2] According to the Court, the Rules, which were adopted by Congress in 1975, place appropriate limits on the admissibility of scientific evidence while offering a "general approach of

[1] This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Annual Convention*, Denver, CO July 2018.

[2] Several states, including: California, Illinois, Maryland, Minnesota, New Jersey, New York, Pennsylvania, and Washington still use the *Frye* standard in determining admissibility of expert testimony.

relaxing the traditional barriers to 'opinion' testimony." *Daubert*, 509 U.S. at 588. The Court specifically focused on FRE 702, which governs expert testimony. Pursuant to FRE 702 [amended in 2000]:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

The holding in *Daubert* altered the gatekeeping function of trial judges by requiring them to screen expert testimony to determine the relevancy and reliability of the scientific methodology and reasoning underlying the opinions proffered.

The principles of *Daubert* were further clarified and expanded in two subsequent Supreme Court decisions: *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997) and *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

In *Gen. Elec. Co. v. Joiner*, the Court established the standard of review on decisions made by trial judges to admit or exclude scientific evidence under the *Daubert* test. Decisions are to be reviewed under the standard of abuse of discretion, such that it will not be overturned unless it is "manifestly erroneous." *Joiner*, 522 U.S. at 142. Moreover, the Court advised that while the focus under *Daubert* is on the expert's methodology and techniques employed, "conclusions and methodology are not entirely distinct from one another." *Id.* at 146. As such, a trial judge may properly exclude the testimony if there are significant analytical gaps between the expert's methodology and opinion. *Id.*

In *Kuhmo Tire Co. v. Carmichael*, the Court clarified the "gatekeeping" obligation required under *Daubert* as applying not solely to scientific testimony, but to all expert testimony. *Id.*, 526 U.S. at 147. The Court further clarified that the factors expressed in the *Daubert* holding for courts to consider in assessing the validity of scientific techniques do not constitute a "definitive checklist or test," but should be construed as a flexible aid. *Id.* at 150.

To assist federal trial courts, the Supreme Court listed several non-exhaustive factors to consider when determining whether to admit or exclude expert testimony; these factors are illustrative and not all are applicable to each case. *See Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1314 (9th Cir. 1995) ("Daubert II"). Non-exclusive factors include:

- "whether the theory or technique employed by the expert is generally accepted in the scientific community;

- whether [the opinion] has been subjected to peer review and publication;

- whether it can be and has been tested;

- and whether the known or potential rate of error is acceptable."

Further, the Court noted: "We also consider whether experts are testifying 'about matters growing naturally' out of their own independent research, or if 'they have developed their opinions expressly for purposes of testifying.'" (quoting *Daubert II*, 43 F.3d at 1317).

Finally, when providing a causation opinion, the Supreme Court has required that experts apply recognized methodologies—like the Bradford Hill criteria[3]—which is used to assess whether a statistical association signifies a general causal relationship between an exposure and a disease in assessing general causation.[4]

Even given the extensive guidance provided by the Court, each circuit (and state for that matter) has its own interpretation of the *Daubert* test, which requires additional research to understand the nuanced standards in each jurisdiction. For example, the Ninth Circuit has adopted a fairly liberal view of the *Daubert* requirements. In *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227 (9th Cir. 2017), the California Supreme Court noted: "The Supreme Court in Daubert aimed at screening out unreliable or bogus expert testimony. Nothing in *Daubert*, or its progeny, properly understood, suggests that the most experienced and credentialed doctors in a given field should be barred from testifying based on a differential diagnosis." *Id.* at 1235 (allowing expert testimony in a case with no epidemiological support). The California Supreme Court further offered that ". . . expert testimony may be reliable and admissible without peer review and publication" and " . . . neither [animal or epidemiological studies] are necessary for an expert's testimony to be found reliable and admissible." *Id.* (quoting *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1056 (9th Cir. 2003)); *id.* at 1236 (citing to *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1229 (9th Cir. 1998)). Finally, the Court noted that:

> "Not knowing the mechanism whereby a particular agent causes a particular effect is not always fatal to a plaintiff's claim. Causation can be proved even when we don't know precisely how the damage occurred, if there is sufficiently compelling

[3] Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146-147 (1997).

[4] The Bradford Hill criteria were first proposed in 1965 by the famed English statistician Sir Austin Bradford Hill. Sir Bradford Hill proposed nine criteria to be used in assessing provide epidemiologic evidence of a causal relationship between a presumed cause and an observed effect. The criteria include: 1.) The strength of the association; 2.) The consistency of the findings; 3.) Specificity; 4.) Temporality; 5.) Biological gradient; 6.) Plausibility; 7.) Coherence; 8.) Experiment; and 9.) Analogy. The factors are considerations and not all of them must be met for the expert testimony to be admitted.

proof that the agent must have caused the damage somehow.'" *Id.* at 1236-37 (quoting *Daubert II*, 43 F.3d 1314).

In contrast, in *Wells v. SmithKline Beecham Corp.*, 601 F.3d (5th Cir. 2010) the court held that even though the experts relied on scientific articles to support their conclusions, they considered them "anecdotal evidence" due in part to the fact that only one study reached statistical significance. *Id.* at 379-380. Therefore, the experts' opinions were disqualified by the Court. This strict interpretation of the Bradford Hill and *Daubert* criteria is a stark contrast from the generous inferences permitted by the Ninth Circuit.

Once you have a clear understanding of the standards accepted and required in the jurisdiction, you can craft your examination of the expert in a way that will elicit the testimony needed to potentially disqualify the expert in the given court.

II. Know the Subject

The second critical step in preparing to depose or cross-examine an expert witness is to know as much as possible about the expert's field prior to the deposition. It is nearly impossible to effectively cross a witness without a working knowledge and general understanding about the concepts being discussed. With respect to learning the basic jargon and subject matter generally, there are several easily accomplished tasks that will help.

- Obtain and read a text book on the subject—particularly if the expert has written or contributed to the textbook. Not only will you learn the fundamentals—you may find that your deponent has taken a conflicting position on a particular issue when not in litigation.

- Acquire the relevant standards or guidance on the subject from professional organizations. Look for "The Rules" and definitions the expert is likely to agree with because they are the standard from the organization that sets the guidelines in the industry—examples: World Health Organization, Food and Drug Administration, American Heart Association.

- Arrange one-on-one tutoring sessions with an expert consultant in the field. Spend enough time to gain the necessary understanding of the expert's opinions and the language used. Be able to converse intelligently about the opinions and the reasons for those opinions. Provide your consultant with a copy of the report, if available, and have the consultant draft questions or propose topic areas of inquiry.

- Prepare a glossary with key terms that you were not familiar with prior to your research so you have a quick reference guide at your fingertips in a pinch.

- Discuss the expert's report and opposing arguments with your expert in the case. Maybe there are questions you can ask that will help your expert contradict her conclusions or understand the nuances of the opinions more accurately.

III. Know the Witness

Probably the most critical step in preparing to depose or cross-examine an expert witness is to know as much as possible about the background of the expert and her field prior to the deposition. This will enable you to use any prior inconsistent publications, testimony, and opinions to attack her current views.

Of course, there are investigators and research companies you can hire to prepare a report on the expert for a price, but there are also several free and nearly free sources that can be easily used to do your own research. Moreover, you understand the case better than the hired investigator.

You may notice something the investigator misses—or later remember something that you read during the deposition that you would not know if you did not do your own research.

We employ this easy checklist to ensure no stone is left unturned.

- Background life—Obtain the CV but use that as a jumping-off point. Remember the CV contains the description and details the expert wanted to include—treat it as a guide—but consider it a challenge to find what is *not* included. Look for disciplinary actions, malpractice suits, gaps in employment, criminal history.

- Current life—Use LinkedIn or other professional websites to research current employment, good-standing in professional boards, any current litigation.

- Social media—Twitter Posts, Facebook, Instagram, YouTube. Look for photos and videos online and watch them to get a better sense of speaking patterns, mannerisms, accents, and a general understanding of how the expert presents. Tailor your exam to address the age, experience level, and personality of the expert. Also, look for any posts regarding viewpoints or statements that conflict with her position in your case.

- Funding and Conflicts of Interest—Use Dollars for Docs and compare it with her literature disclosures (cross-reference with employments and payments). Look for grants from pharmaceutical companies or other sources that conflict with your interest—include grants made to her practicing institution, department, or university in the search. The expert typically gleans a benefit from grants made to her department or university.

- Publications—Do a Google Scholar and PubMed search (or other applicable publication search). Look for conflicting opinions or positions—compare the publications with her report, cross-reference with the CV, and look for omissions and missing publications in the CV. Maybe they have left articles off their CV that conflict with their opinions in your case. Look for money—who has he or she published with, who paid for the publication or the research.

- Presentations—Use YouTube, the expert's own website, and Slideshare.net to look for any presentations the expert has given. Look again for conflicts or clues as to how she presents.

- Prior Reports and Testimony—Look for inconsistencies, bias, undisclosed funding, testimony style, and prior conclusions. Lexis Search for prior reports and transcripts. Reach out on listservs to obtain prior testimony or reports.

- Meet with Your Consultant—Ask for attacks and errors in the report.

- Look for Dirt—Disgruntled patients, news articles, plagiarism, recycled reports (Grammarly.com). Read articles she cites to—do they say what she says they say?

Though there is a lot of work involved in preparing to depose an expert, adequate preparation is worth it. Once you have completed the above steps, you will go into the deposition with many ways to expose bias, counter opinions, and damage the credibility of the expert she likely will not anticipate.

Difficult Depositions: Ethical Issues and Strategies

How to Handle Improper Deposition Etiquette

Stephen Herman
Herman Herman & Katz, LLC
820 O'Keefe Ave.
New Orleans, LA 70113
(504) 581-4892
Sherman@hhklawfirm.com

Common Challenges

- Deponent is combative or evasive
- Opposing counsel is combative or evasive
- Our own witness is combative, evasive, or potentially untruthful

Pre-Deposition Considerations

a. Goals

b. Dynamic

c. Existing tools

d. Additional tools

Goals

Litigation Goals

- Issues
  e.g., addiction, targeting kids

- Themes
  e.g., profits over safety, think before you shoot, asleep at the wheel

- Legal Hurdles
  e.g., preemption, choice of law, parent corporation liability

- Strategies
  e.g., maximization of one defendant's fault over another's

Goals (cont.)

Witness-Specific Goals

- Position
- Documents
- Relationship to events in question

Goals (cont.)

Evidentiary Goals

- Authentication of documents
- Disputed facts for motion for summary judgment (MSJ) purposes
- Methodology for *Daubert* purposes
- Discovery and spoliation issues

Dynamic

- Co-defendants
- Government
- Other third parties
- Bosses and underlings
- Other departments and divisions
- Current and former employees

From Haidt's *The Righteous Mind*

Loyalty and Betrayal

Emotion:
Rage at traitors

Virtue:
Loyalty

	Care/ harm	**Fairness/ cheating**	**Loyalty/ betrayal**	**Authority/ subversion**	**Sanctity/ degradation**
Adaptive challenge	Protect and care for children	Reap benefits of two-way partnerships	Form cohesive coalitions	Forge beneficial relationships within hierarchies	Avoid contaminants
Original triggers	Suffering, distress, or neediness expressed by one's child	Cheating, cooperation, deception	Threat or challenge to group	Signs of dominance and submission	Waste products, diseased people
Current triggers	Baby seals, cute cartoon characters	Marital fidelity, broken vending machines	Sports teams, nations	Bosses, respected professionals	Taboo ideas (communism, racism)
Characteristic emotions	Compassion	Anger, gratitude, guilt	Group pride, rage at traitors	Respect, fear	Disgust
Relevant virtues	Caring, kindness	Fairness, justice, trustworthiness	Loyalty, patriotism, self-sacrifice	Obedience, deference	Temperance, chastity, piety, cleanliness

From Haidt's *The Righteous Mind*

	Care/ harm	Fairness/ cheating	Loyalty/ betrayal	Authority/ subversion	Sanctity/ degradation
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Authority and Subversion

Adaptive Challenge:
to forge beneficial relationships within hierarchies

Emotion:
respect, fear

Virtues:
obedience, deference

Dynamic

Art, Not Science

Likely Truths

- People want to tell their stories
- People are defensive
- People have loyalties (and generally value and expect loyalty in others)
- People arrange the world in hierarchies (and generally value and expect that they be respected)

Planning and Sequencing

- Discovery versus trial
- Easy versus hard
- Early concessions
- Building blocks

Planning and Sequencing (cont.)

One potential way of breaking it up:

- Discovery (no documents)
- Foundation for documents (and early concessions)
- Discovery with documents

[break]

- For trial

Ethical Issues

a. Instructions not to answer

b. Speaking objections

c. Conferring with witness during the deposition

d. Abusive conduct

e. Candor to the court

Instructions Not to Answer

A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion to limit or terminate the deposition.

FED. RULE CIV. P. 30(c)(2)

Instructions Not to Answer (cont.)

A lawyer shall not unlawfully obstruct another party's access to evidence.

MODEL RULE OF PROF'L CONDUCT r. 3.4(a) (AM. BAR ASS'N 1983)

Instructions Not to Answer (cont.)

The Official Comments to the ABA Model Rules specifically reference "obstructive tactics in discovery procedure" as an example of what is prohibited.

MODEL RULE OF PROF'L CONDUCT r. 3.4(a) cmt. 1 (AM. BAR ASS'N 1983)

Instructions Not to Answer (cont.)

Courts have sanctioned attorneys for inappropriately instructing witnesses not to answer and have suggested that such conduct also violates the professional rules.

See, e.g., *Redwood v. Dobson*, 476 F.3d 462, 468-69 (7th Cir. 2007).

Speaking Objections

An objection must be stated concisely in a nonargumentative and nonsuggestive manner.

FED. RULE CIV. P. 30(c)(2)

Speaking Objections (cont.)

A lawyer shall not unlawfully obstruct another party's access to evidence.

Nor shall a lawyer counsel or assist a witness to testify falsely.

MODEL RULE OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 1983)

Speaking Objections (cont.)

"Objections and colloquy by lawyers tend to disrupt the question-and-answer rhythm of a deposition and obstruct the witness's testimony. Since most objections, such as those grounded on relevance or materiality, are preserved for trial, they need not be made."

Hall v. Clifton Precision, 150 F.R.D. 525, 530 (E.D. Pa. 1993).

Speaking Objections (cont.)

"A favorite objection or interjection of lawyers is 'I don't understand the question . . . .' This is not a proper objection. If the witness needs clarification, the witness may ask the deposing lawyer for clarification . . . In addition, counsel are not permitted to state on the record their interpretations of questions, since those interpretations are irrelevant and often suggestive of a particularly desired answer."

Hall v. Clifton, 150 F.R.D. 525, 530 n.10 (E.D. Pa. 1993).

Speaking Objections (cont.)

"The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions…. It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question."

Hall v. Clifton, 150 F.R.D. 525, 530-31 (E.D. Pa. 1993).

Conferring During Deposition

The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence.

FED. RULE CIV. P. 30(c)(1)

Conferring During Deposition (cont.)

(*Hall* Line of Cases)

"During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony . . . . The fact that there is no judge in the room to prevent private conferences does not mean that such conferences should or may occur. The underlying reason for preventing private conferences is still present: they tend, at the very least, to give the appearance of obstructing the truth."

Hall v. Clifton, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

Conferring During Deposition (cont.)
(*Hall* Line of Cases)

"These rules also apply during recesses. Once the deposition has begun, the preparation period is over, and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules."

Hall v. Clifton, 150 F.R.D. 525, 529 (E.D. Pa. 1993).

Conferring During Deposition (cont.)
(*Hall* Line of Cases)

To the extent a conference does occur, any attorney-client privilege is thereby waived.

"Such conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what."

Hall v. Clifton, 150 F.R.D. 525, 529 n.7 (E.D. Pa. 1993).

Conferring During Deposition (cont.)
(*Stratosphere* Line of Cases)

"This Court agrees with the *Hall* court that a questioning attorney is entitled to have the witness, and the witness alone, answer questions. When there is a question pending neither the deponent nor his or her counsel may initiate the interruption of the proceeding to confer about the question, the answer, or about any document that is being examined, except to assert a claim of privilege (conform to a court order or seek a protective order)."

In re Stratosphere Sec. Lit., 182 F.R.D. 614, 621 (D. Nev. 1998).

Conferring During Deposition (cont.)
(*Stratosphere* Line of Cases)

However: "It is this Court's experience, at the bar and on the bench, that attorneys and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid morning or mid afternoon, the lunch recess, [or] the evening recess. The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial)."

In re Stratosphere Sec. Lit., 182 F.R.D. 614, 621 (D. Nev. 1998).

Conferring During Deposition (cont.)
(*Stratosphere* Line of Cases)

"This Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness. So long as attorneys do not demand a break in the questions, or demand a conference between question and answers, the Court is confident that the search for truth will adequately prevail."

In re Stratosphere Sec. Lit., 182 F.R.D. 614, 621 (D. Nev. 1998).

Conferring During Deposition (cont.)
(*Stratosphere* Line of Cases)

In some cases, where a conference occurs while a question is pending, the courts have allowed direct questioning regarding the attorney-client conference.

See, e.g., *Pia v. Supernova Media*, No.09-840, 2011 WL 6069271 (D. Utah Dec. 6, 2011).

Conferring During Deposition (cont.)

(*Stratosphere* Line of Cases)

In other cases, courts have suggested that the jury can be presented with the alleged change-in-testimony and take that into consideration in assessing the credibility of the witness.

See, e.g., *Diabold v. Continental Casualty,* No. 07-1991, 2009 WL 10677801 (D.N.J. Aug. 20, 2009).

Abusive Conduct

It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 1983)

Abusive Conduct (cont.)

A lawyer should conduct himself or herself with honesty, dignity, civility, courtesy and fairness, and should not engage in demeaning or derogatory actions or commentary toward others.

LA. CODE OF PROF'L CONDUCT (LA. BAR ASS'N 2018)

Abusive Conduct (cont.)

Courts have found that abusive questioning and demeaning comments made off the record are prejudicial to the administration of justice and can form the basis of disciplinary sanction.

See, e.g., *In re Golden*, 496 S.E.2d 619 (S.C. 1999); *In the Matter of Pengilly,* No.74316 (Nev. Sept. 7, 2018) (425 P.3d 381 (Table)).

Misstatements by Client

A lawyer shall not offer evidence that the lawyer *knows* to be false. If the lawyer, the lawyer's client, or a witness called by the lawyer, has offered materially false evidence, the lawyer shall take reasonable remedial measures.

A lawyer *may* refuse to offer evidence that the lawyer *reasonably believes* to be false.

MODEL RULES OF PROF'L CONDUCT r. 3.3. (a)(3) (AM. BAR ASS'N 1983)

Misstatements by Client (cont.)

The Rule applies to an ancillary proceeding conducted pursuant to the tribunal's authority, such as a deposition.

MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 1 (AM. BAR ASS'N 1983)

Techniques

Setting the Tone

- Don’t start with background
- Don’t waste time with “ground rules”
- Keep asking until you get the answer
- Ignore opposing counsel

Q. Can you state your name for the record, please?

A. Dwayne Phillips.

Q. You guys had a lot of problems with IPS on this delayed coker project?

A. I'm not sure if it was problems with IPS or what.

Q. Is it your recollection that IPS delivered some spools late?

A. Yes.

Q. That you had to put a hold on some spools?

A. Yes, we put a hold on spools for revisions that were coming up.

Q. Just for the record, what do you mean when you say spools?

A. These are piping components prefabricated that fit on the floor of a truck, to be hauled to the site.

Q. Do they have specific types of alloys that IPS is supposed to use?

A. They have specific type alloys, yes.

Q. And is it important that the piping that IPS fabricates complies with the specifications in terms of the type of alloy?

A. Yes.

Q. Fluor had problems with some of the alloys in some of the spools that you got from IPS, correct?

A. Not that I recall.

Q. Okay. Well, we'll get to that in a minute. You were a piping engineer of some kind for Fluor at this time?

A. I was a PL engineer.

Q. And you were communicating with IPS?

A. Yes.

Q. Do you recall Fluor ever attempting to conduct some type of an audit of IPS during the construction process?

A. No.

Tether to Witness Background or Position

- 30(b)(6) designation
- Job title
- Other background or experience
- Proffered area of expertise

What Does This Do?

a. Moots objections

b. Makes witness feel like he or she should know the answer

Q. As a trustee of The Peroxisome Trust or as a trustee of The Marshall Heritage Foundation, aren't you called upon in the ordinary course of events to evaluate the prudence of the decisions that you are making as a trustee?

A. Yes.

Q. Before taking any action as a trustee of Peroxisome, as a reasonable and prudent trustee, you have to be cognizant of the potential tax implications, correct?

MR. FENDLER: Objection. Calls for a legal conclusion.

MR. HERMAN: I said as a trustee.

MR. FENDLER: Same objection.

MR. HERMAN: Can he answer?

MR. SANCHEZ: No.

MR. HERMAN: You're not letting him answer?

MR. SANCHEZ: No.

Q. Okay. Is there something in the law that you're aware of that requires you to be a lawyer in order to be a trustee?

MR. FENDLER: Objection. Calls for a legal conclusion.

MR. HERMAN: Okay.

Q. Are you aware of any requirement?

A. That requires a trustee to be a lawyer also?

Q. Yes.

A. No.

Q. And you don't know of anything in either The Peroxisome Trust documents or the Marshall Heritage Foundation Trust documents that requires trustees to be lawyers, correct?

A. I have not seen that as a pre-qualification.

Q. And you are, in fact, a lawyer, correct?

A. I am.

Q. Okay. So as a trustee of Peroxisome who also happens to be a lawyer, wouldn't it be fair to say that, when you're taking actions as a trustee of Peroxisome, you have to be cognizant of making sure that whatever you're doing is in compliance with maintaining the tax-qualified status of the Trust?

A. I'm not acting as a lawyer. I'm acting as a trustee, not as a lawyer. I don't think that the standard - whether you're a lawyer or not is any different.

Q. I agree. He wouldn't let you answer the question.

Turn Around

When Witness Denies Duty or Responsibility

Q. Wasn't Flour responsible for material controls on the delayed coker unit construction project?

A. To the best of my knowledge, TransAmerican was doing the material controls.

Q. And so it would be your testimony to the jury that Fluor made absolutely no effort to provide any type of material controls with respect to this construction project?

A. No.

Q. Okay. What efforts towards maintaining material controls did Fluor undertake in connection with the delayed coker unit construction project?

A. I think it was more of a consulting role with TransAmerican as to the types of material controls that should be taken.

Q. And so TransAmerican was relying on Fluor, at least in part, to help TransAmerican with material controls with respect to the delayed coker unit construction project; correct?

A. Yes, to the best of my knowledge.

Turn Around Combined with Tethering to Experience

Q. Have you heard the term QA/QC before?
A. Yes.
Q. And QA is quality assurance; is that correct?
A. That's correct.
Q. And QC is quality control; is that correct?
A. That's correct.
Q. Do you understand QA to be different from QC?
A. Yes.
Q. What's the difference between QA and QC?
A. Quality control is the actual hands-on inspection, day-to-day activities going on out there, verifying what's going on. Quality assurance is to assure that those activities are carried out.
Q. And in connection with the coker unit construction project, is it fair to say that Fluor undertook both QA and QC roles in some capacity?
A. I'd say it was strictly a QA.
Q. So Fluor undertook absolutely no effort to try to ensure quality control?
A. We didn't have any inspectors out there.

Q. Isn't it part of the construction manager's job to ensure that what is actually built is what's called for in the plan?

Object to form. Vague and ambiguous. With respect to the construction manager's job. Are you talking about on this job, what this contract says?

Q. Based on your knowledge, understanding, and experience in the past 15-plus years of construction, wouldn't you agree that part of the construction manager's job is to ensure that what is actually constructed is what's called for in the plan?

A. Yes.

Q. And didn't Fluor, as the construction manager for the delayed coker unit construction project, undertake some effort to try to ensure that what was actually constructed was what was called for in the plan?

A. I'm sure they did.

Q. Isn't that the whole point of somebody hiring Fluor to do the construction management?

[LONG SPEAKING OBJECTION]

A. Yes.

Use a Document

When Witness Pretends Not to Know What You Are Asking

Q. Did Mr. Adams indicate to you that he had spoken with any of the hospital's creditors about Lake Charles Memorial Hospital prior to making this decision to buy the bonds?

A. You have to tell me what you mean by "creditors."

Q. Well, what do you think creditors means?

A. It's a very large term. It can mean trade creditors. It can mean former trade creditors. It can mean current creditors. It can mean debt creditors. It can mean a whole range of things in a very broad number of companies.

Q. Okay. Let's look at Exhibit 96.

* * *

Q. We were talking about a definition of creditors and you see in the first sentence of this letter from Mr. Rochford, "The creditors have received your letter"?

A. Uh-huh (indicating affirmatively).

Q. And in the second paragraph, it says, "I'm writing this letter on behalf of the creditors"?

A. Yes.

Q. Do you have an understanding of who Mr. Rochford is talking about?

A. I would assume he was talking about the long-term debt creditors.

Q. Okay. And if you look at the list of the people that were cc'd on this letter, does that give you further confidence in that assessment?

A. That's what it would appear to be, along with some other folks, but that's what it would be appear to be.

Q. You don't recall when you received a copy of this letter or whenever you reviewed it having some question in your mind as to who Mr. Rochford was referring to when he referred to the creditors, did you?

A. When I got the letter, I don't remember what I thought, but - reading it, I would say I think he's talking about the long-term debt creditors.

Opposing Counsel

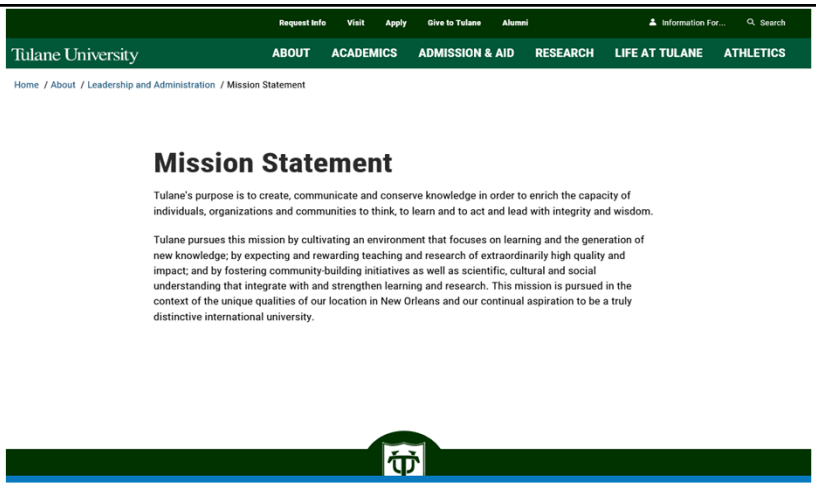
- As much as possible, try to ignore
- “It was asked, but not answered”
- Every once in a while, ask for basis of “objection to form”
- If they instruct a witness not to answer, ask the witness:
  * to explain why it’s privileged
  * why it would be burdensome to answer
  * Do you really think I am asking you this question for no other reason than to harass you?

Using Documents

- Laying foundation
- Notice (time and date)
- Definition
- Role and relationships (circumstantial or collateral)
- Document itself (“hot doc”)
- Discovery
- Impeachment

Using a Document for Definitional Purposes

- At outset
- On document probably
- Not prepped on
- Before witness realizes significance



Tulane's purpose is to create, communicate, and conserve knowledge in order to enrich the capacity of individuals, organizations, and communities to think, to learn and to act and lead with integrity and wisdom.

Research and development expenditures relate to the processes of discovering, testing and developing new products, upfront payments and milestones, improving existing products, as well as demonstrating product efficacy and regulatory compliance prior to launch.

For Trial

- You don't know the court where or the judge before whom deposition might be used
- Imagine what the jury will actually see and hear in the courtroom
- Assume that trial attorney may only use a single line of questioning *(sufficient background and context; questioning self-contained and complete)*
- Judge will rule on admissibility after defendants have thoroughly objected, and knowing what the witness's answer will be

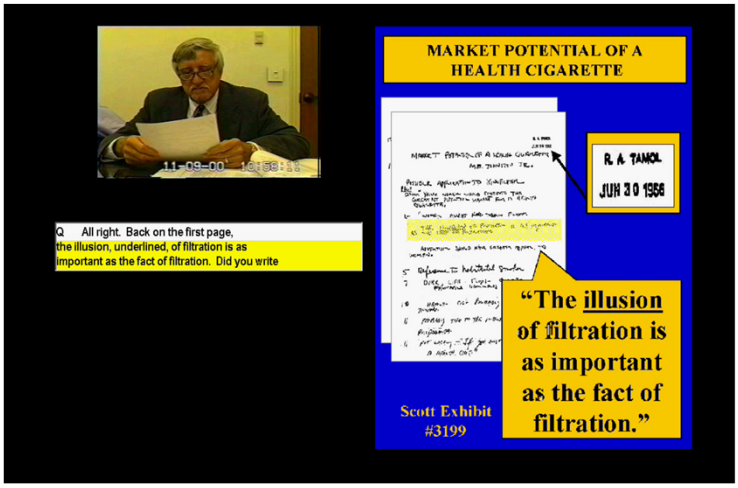
Questioning from Document

Do *not* ask: "Did I read that correctly?"

Sample Questioning from Document

Q. I am showing you a Fluor Daniel interoffice memorandum?
A. Yes.
Q. And are you the D. Phillips that one of the copies was cc'd to?
A. Yes.
Q. And the subject line is Faulty Chrome Welds?
A. Yeah.
Q. What is a chrome weld?
A. A chrome weld is, it's got a percentage of chromium in it.
Q. Is the percentage of chrome or the existence of chrome significant?
A. Yes.
Q. Why is it significant?
A. Chrome is used basically for higher pressures and elevated temperatures.
Q. And so Fluor is alerting TransAmerican that they might have a problem with the chrome welds that came from IPS?
A. That's what it looks like.

Might Want to Make Demonstratives in Advance



OMS on Contractor-Owned Rigs in the Gulf?

A. Was complete on April 20, 2010

B. Was intended to be completed sometime after April 20, 2010

C. Is a bad idea because it might lead to confusion

Sources: (A) McKay Testimony, 2/26/13, pp. 532-34; Shaw Testimony, 4/9/13, p. 8047; (B) Hayward Deposition, pp. 154-56, 183, 304, 662-63, 788, 793-94; (C) Cross-Examination of Dr. Bea, 2/26/2013, pp. 402-5; Shaw Testimony, 4/9/13, pp. 8054-56.