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La Fonda on the Plaza
Santa Fe, NM
May 10-11, 2019

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RULES OF THE ROAD™

FOR DISCOVERY, DEPOSITIONS, AND MEDIATIONS

La Fonda on the Plaza | Santa Fe, NM

May 10-11, 2019

Sponsored by: Synergy Settlements

PARTICIPANT AGENDA

FRIDAY, MAY 10, 2019

Lumpkins Ballroom

7:30 – 8:30 a.m.	**REGISTRATION AND WELCOME NETWORKING BREAKFAST** *Continental Breakfast Provided*
8:30 – 8:45 a.m.	**MODERATOR INSTRUCTIONS** Moderator: Faculty TBD
8:45 – 9:45 a.m.	**USING RULES OF THE ROAD™ TO FOCUS AND SHAPE YOUR DISCOVERY PLAN (60 MINUTES)** Patrick A. Malone *Patrick Malone & Associates, PC | Washington, DC*
9:45 – 10:00 a.m.	**SPONSOR PRESENTATION** Marci Gordon *Synergy Settlements*
10:00 – 10:15 a.m.	**MORNING BREAK**
10:15 – 11:45 a.m.	**DEPOSING DIFFICULT WITNESSES, AND MAKING THEM AGREE TO YOUR CASE RULES (90 MINUTES)** Phillip H. Miller *Miller Law Offices | Nashville, TN*
11:45 a.m. – 12:45 p.m.	**NETWORKING LUNCH** *Lunch Provided*

12:45 – 2:15 p.m.	**CORPORATE SPOKESPERSONS: UNLOCKING PANDORA'S BOX WITH RULE 30(B)(6) (90 MINUTES)** Mark R. Kosieradzki *Kosieradzki • Smith Law Firm, LLC | Minneapolis, MN*
2:15 – 2:45 p.m.	**AFTERNOON BREAK**
2:45 – 3:45 p.m.	**USING THE *RULES OF THE ROAD* TO WIN YOUR CASE IN DEPOSITION (60 MINUTES)** Brian McKeen *McKeen & Associates, PC | Detroit, MI*
3:45 – 4:45 p.m.	**TRUCKING CASES: NUTS AND BOLTS AND A LOT MORE (60 MINUTES)** Carl L. Solomon *Solomon Law Group, LLC | Columbia, SC*
5:30 - 7:30 p.m.	**NETWORKING RECEPTION** *Hosted by Patrick Malone* 1245 S. Summit Drive (shuttles available to and from La Fonda)

SATURDAY, MAY 11, 2019

Lumpkins Ballroom

7:30 – 8:30 a.m.	**WELCOME BACK BREAKFAST** *Continental Breakfast Provided*
8:30 – 8:45 a.m.	**MODERATOR INSTRUCTIONS** Moderator: Faculty TBD
8:45 – 10:15 a.m.	**ELECTRONIC MEDICAL RECORDS: EVERYTHING YOU NEED TO KNOW (90 MINUTES)** Jennifer L. Keel *Thomas, Keel & Laird | Denver, CO*
10:15 – 11:15 a.m.	**FINDING KILLER DOCUMENTS, RULES, AND EVIDENCE OFF THE GRID WHEN THEY DON'T ANSWER YOUR DISCOVERY (60 MINUTES)** Randi McGinn *McGinn, Montoya, Love & Curry, PA | Albuquerque, NM*
11:15 – 11:30 a.m.	**MORNING BREAK**

11:30 a.m. – 12:30 p.m.	**THE TEN-MINUTE RULE FOR DEPOSITIONS: SHORTER, TIGHTER, AND FAR MORE PERSUASIVE (60 MINUTES)** James B. Lees, Jr. *Hunt & Lees, LC | Charleston, WV*
12:30 – 1:30 p.m.	**AN INSIDER'S VIEW: SECRETS FROM THE MEDIATOR ON MAXIMIZING YOUR CLIENT'S RECOVERY (60 MINUTES)** Robert R. Michael *Shadoan, Michael & Wells, LLP | Rockville, MD*
1:30 p.m.	**ADJOURN** *Please hand in your CLE Certificate of Attendance, CLE Worksheet, and Program Evaluation to AAJ Staff before you leave. Thank you for coming, and we hope to see you again soon!*

DEVELOPING A DISCOVERY PLAN AND ESTABLISHING WITNESS GOALS[1]

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A major key to effective deposition taking is developing a discovery plan and establishing goals for each deposition. It isn't enough to wing it, to give it a few minutes thought. Instead, the discovery plan starts before suit is filed, and each potential deponent must be identified before the discovery plan is done.

Don't succumb to goal depletion, which is the failure to set goals for your case. Every case in litigation should have specific, set goals and a specific, detailed, and written "discovery plan." As trial lawyers, we cannot sit back during the discovery phase of litigation and anticipate that things will "fall into place." Reality has proven time and again that this probably will not happen, and it is totally inappropriate for a quality trial lawyer to so anticipate.

Finally, one overarching rule of developing a discovery plan is *not* to fall into the "LMPDI Syndrome"—better known as "let my paralegal do it." While delegation is good, some lawyers want to delegate virtually everything just because others may be able to do it. Never give a lawyerly responsibility to a paralegal just because you do not want to do it. Improper delegation is a trap you set for yourself. Be careful.

The following are several rules to follow when developing the discovery plan and establishing witness goals.

Rule 1: Consider Focus Groups to Flesh Out Discovery Issues

Pre-discovery focus groups can give you valuable information, such as what questions to ask in deposition, what is important to jurors, and development of themes. What may be important to us as lawyers may be unimportant to jurors. Use focus groups to zero in on those facts and witnesses that are important to the jurors who will hear your client's case. After all, it's what's important to the jurors, not what's important to the lawyer.

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[1] This paper borrows heavily from Paul Scoptur's paper *Developing a Discovery Plan and Establishing Witness Goals*, presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Advanced Depositions College*, New Orleans, LA, Jan. 2012.

Rule 2: Outline Your Plan and Put It in Writing

Organization is critical in developing a discovery plan. Each case involves a multitude of facts that need to be organized, not in your head, but on paper. You can use a legal pad or a myriad of software programs. Two such programs are Microsoft Word and Circus Ponies. Microsoft Word has a notebook feature that allows you to organize your discovery plan. Circus Ponies has a notebook that can form the basis of the plan. List the case's critical issues, witnesses, and documents. Whatever you use, put the plan in writing so you can visualize it and revise it as discovery progresses.

The outline should include all rules and standards you believe may apply to your case. This collection can include jury instructions, case law, statutes, trade association rules, regulations, and so on. This outline can form the foundation for how you develop themes as litigation progresses.

Talk to your client and your experts. They can tell you what is important to them and what they would like to know. The experts can tell you what to focus on when doing depositions. Finally, talk to *regular* people—yes, regular. Non-lawyer types can provide great feedback about issues in a case that you may have glossed over.

Rule 3: Identify Whom You Want to Depose and Why

Consider depositions and what a witness's testimony can and will provide. In fact, rather than the default position of automatically setting a deposition, perhaps the first question should be whether such a deposition is critical or necessary to the case. If a deposition is needed, consider where this witness fits into your case theme or story and what testimony you need to develop.

1. All cases need a theme or story that must be developed (or at least considered) with every witness.

2. Will the witness help with the following?

    a. Establishing disputed or undisputed facts (i.e., motion for summary judgment)
    b. Establishing degrees of culpability
    c. Enhancing the case story or theme
    d. Establishing rules of the case
    e. Offering jury bias protection
    f. Authenticating records

3. Never view a witness as being one dimensional. Even a bystander witness can be invaluable to establishing stories or themes.

If depositions are in order, the sequence of the discovery and depositions is crucial. Do you depose the defendant first? Perhaps a Rule 30(b)(6) deposition is first to get the important

documents. The order of how you conduct the depositions can set the stage and pace for the rest of discovery.

Rule 4: Determine the Methods of Discovery You Will Use

Discovery and depositions can take many forms. Paper discovery can be used to gain information and admissions early in the case.

Do I videotape the deposition? Do I appear in person or do it by telephone? My rule is to videotape every deposition I take. No exceptions. You can hire a videographer or do it yourself, but you just never know what is going to happen. Nonverbal communications can be extremely effective. A shrug, a head shake, or a defeated look by the witness can only be picked up by the camera.

I also do a lot of depositions by telephone. I have found this to be an effective method, and it saves money and time out of the office. Many lawyers feel a need to "be there," but I have found after too many hotels in too many cities and too many canceled flights that I don't have to "be there" to be effective. Try it—you will be surprised.

Rule 5: Restrict Discovery

Cases are won and lost in discovery. The more discovery you do, the more prepared the defense becomes. We often choose not to depose the defense experts, even in medical malpractice cases, and we rarely depose the defense medical examiner. First of all, it costs money. Second of all, it's time out of the office. Most importantly, it gives the expert a test run of cross and prepares the defense expert for your case. Consider these factors when deciding whom to depose.

Rule 6: Focus on What It Takes to Lose Your Case

Negative conclusions and attitudes held by jurors cannot be eliminated by rhetoric, metaphors, and analogies. Even bad defenses can have legs. Find out what your land mines are and figure out fixes. This is a good time to do another focus group. Once discovery has started, you will find out land mines for your case. Use focus groups to find fixes for those land mines.

Additionally, experience will teach where the weak spots of a case might be. During your development plan, consider these weaknesses and whether a discovery tool or witness can mitigate those issues. In other words, your discovery plan is not simply how to prove your case but includes how to protect your case as well.

Rule 7: Develop Takeaways

All discovery needs takeaways that will support your case. All discovery needs to have a purpose; it really cannot be random or, as Rodney Jew likes to say, "drive-by" discovery. Takeaways include showing a lack of qualifications for a specific job, establishing what the rules of conduct are, establishing violations of those rules, establishing the standard of care, and

establishing the defendant's conduct and that the conduct is an intentional disregard of the plaintiff's rights.

These takeaways can also be considered "sound bites" for your case. Such nuggets in a case can serve as foundations to your case story or develop into a central theme that drives your case and adds value. Once again, this process should begin before discovery is even initiated. Brainstorming for potential rules or standards of care can help prepare you for the time when these takeaways are presented to you.

Rule 8: Get Concessions That Support Your Case

Make the defense witnesses your witnesses. Search for common ground. Without question, the goal of the defense witness is to hurt your case. However, with proper preparation and consideration, you can find a topic or area of questioning in which that witness will ultimately help your case. Perhaps the witness can help on rules or standards, or maybe damages. It is unlikely that a witness will disagree with *everything* in your case. Search for common ground.

Rule 9: Ask About Jobs

Jurors can relate to jobs. We all have one, whether it's being a parent, a worker, a teacher. Ask witnesses about their jobs and, more importantly, what qualifies them to do their jobs. You may be surprised.

Rule 10: Ask About Rules

David Ball, in his book *Ball on Damages*, emphasizes the rules. Rick Friedman and Patrick Malone, in their book *Rules of the Road*, give a framework for deposing defense witnesses on the Rules. The framework is really quite simple: This is the rule; this is why it's important; and this is what happens when you don't follow the rules. We are a rule-oriented society. Jurors follow the rules every day, in their lives and in their jobs. They expect others to do that as well. Carry that concept forward and ask the defendant and its witnesses if it is reckless if the rules are not followed, and if you don't follow the rules, you intentionally disregard the rights of the plaintiff. That gets you to present the issue of punitive damages to the jury.

Bonus Rule: Ask About Responsibility

It drives the defense lawyer crazy. It always gets an objection, which means it must be a good question. The answer doesn't really matter. If it's "yes," that's good. If it's "no," that's even better!

Conclusion

It is not enough to plan discovery and depositions that elicit favorable testimony. The testimony, and its import, must be clear to any listener and, ultimately, the jury. This means that rather than relying on a "seat of the pants" question and answer, the questions that set up and create the

sound bites are crafted, written in advance, tested in front of focus groups, and zero in on the issues of the case. When favorable testimony occurs, it must be in a manner that will be easily understood by the jury. Exceptional discovery and depositions are not random. They only occur as a result of exceptional planning and an adherence to the rules.

DEALING WITH THE EVASIVE, NON-COOPERATIVE WITNESS DURING A "STANDARDS" DEPOSITION[1]

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I. Introduction

You took this deposition before and it went well. Then in the next deposition, the witness is unmanageable. You are doing everything right, but getting nothing. The most obvious conclusions favoring your case become muddied responses with no value.

This paper deals with the corporate representative deposition where the witness, for whatever reason, will not provide reasonable, fair testimony. We will categorize and define the most common evasive, uncooperative behaviors, and provide suggestions for what to do when encountering them in a deposition. While the focus of this paper is on deposing corporate representatives (FRCP 30(b)(6)), the techniques work with other witnesses as well.

Cicero wrote, "*If the truth were self-evident, eloquence would be unnecessary*."[2] The truth, unfortunately, is never evident when a corporate representative is evasive or non-cooperative.

In the following pages we will discuss specific techniques (core skills) for dealing with the evasive witness and the most common evasion techniques, with examples, including

1. The witness who responds with "I don't know," "I don't know who would know," "I never heard of that," "I can't answer that," or "I am not sure."

2. The witness who wants to ask you to define your terms.

3. The witness who wants to control the word choice of your questions, *e.g.*, "That's just a guideline, not a rule."

[1]

[2] CICERO, DE ORATORE bks. I and II, (E.W. Sutton & H. Rackham trans., Harvard Univ. Press rev. ed. 1967) (c. 55 B.C.E.).

4. The witness who says they do not understand the question.

5. The witness who tries to avoid being pinned down and responds with "for the most part," "pretty much all," or "not necessarily."

6. The witness who "doesn't remember" or "isn't sure" about dates, times, distances, or amounts.

7. The witness who repeatedly gives long, narrative responses.

8. The witness who constantly lays down "rabbit trails."

9. The witness who interrupts the question with her response.

Every deposition plan should anticipate the potential encounter with an evasive, non-cooperative witness. The truth is only self-evident if we anticipate non-responsive answers and devise alternate questions and approaches to deal with them. *You must anticipate evasive responses and have a practiced, written strategy to deal with them on your critical case issues and questions.*

The following pages include examples of effective techniques in a variety of circumstances. You cannot take any of these examples and expect them to be the "silver bullet" in one of your cases, unless you have put the time in to make sure it will work. The harder you work, the "luckier" you will get.

II. The "Standards" Deposition[3]

A "standards" deposition will include questions that do one or more of the following:

1. Elicit testimony that a particular standard of conduct (rule, principle, or truth) is important.

2. Elicit testimony that a particular standard of conduct has been the known standard of conduct for more than a given number of years.

3. Elicit testimony describing this standard of conduct's importance.

4. Elicit testimony that the defendant expects others to comply with this standard.

5. Elicit testimony that not complying with this standard of conduct is negligent, unsafe, or improper.

[3] The term "standards deposition" was coined by the author to describe a kind of deposition of corporate representatives and others, where part of the focus is on gaining admissions that certain standards of conduct or care, rules, or regulations exist and apply to the facts of a particular case.

6. Elicit testimony that not complying with this standard of conduct is reckless.

In most cases there are common-sense statutory, regulatory, or company policies defining what conduct is accepted, required, or the norm. "Is it important to hire safe drivers?" or "Is it important to protect a fetus from group B strep?" should not get a "no" response from *any* witness. Unfortunately, the probability exists that a witness may answer these questions with something other than an unqualified "yes." The hedging, evasive answer avoids the truth and requires that we must anticipate and be prepared to deal with the evasive, non-cooperative witness.

Mastering the evasive witness requires solid cross-examination and examination techniques, along with the discipline required to properly "set up" a witness for case critical questions.

There are three core skills you must master to deal with the evasive, non-cooperative witness. First, you must understand and design your examination incorporating much of what we know is effective in cross-examination. Second, the skills of exhaustion, boxing-in, restating, and summarizing must be incorporated into each deposition with an evasive witness. Third, you must demonstrate forethought and patience in the witnesses' set up for the critical pieces of your examination. We will deal with each of these concepts before discussing basic categories of problematic witness responses, and the strategies you may adopt to counter them.

III. Core Skill One: Depositions of Evasive, Uncooperative Witnesses Depend on Effective Cross-Examination Skills

The depositions of evasive witnesses (including experts) are often reduced to one or both of the following: (1) a frustrating dialogue with a witness where the witness will not agree or will re-define and qualify any point you attempt to make, or (2) the witness continually introduces new concepts, facts, or opinions so it seems impossible to get closure on any point or issue.

If opposition witnesses were fair and honest, it would be reasonable to expect to prove facts (or theories) favorable to your case such as:

- The witness agrees with certain facts proven by your witnesses or elemental to your case
- The witness respects the opinion, qualifications, or training of one or more of your witnesses
- One or more standards apply to the conduct of the defendant

Unfortunately, witnesses the defendant designated under FRCP 30(b)(6) are likely to be coached. They can be hostile, difficult, and evasive. Before deposing a likely difficult witness you must analyze what can reasonably be accomplished with this witness, and the questions and answers required to succeed. This means writing out the questions you will ask, and alternative follow-up questions based on the possible responses. Let us talk about how and where to start.

First, marshal the facts and standards you can use to build toward your ultimate question.

As an example of marshalling facts and standards, let us consider the trucking industry. Federal Motor Carrier Safety Regulations (FMCSR), 49 C.F.R. 390 §§ *et seq*. regulates the trucking industry. All motor carriers have multiple copies of these regulations in their possession, and incorporate the regulations into training and testing of drivers, and so on. FMCSR section 390.11 mandates, "It shall be the duty of the motor carrier to require observance" from its drivers of all duties or prohibitions the regulations impose. Included in the regulations are multiple examples of standards of conduct relevant in a negligence action. For example:

- A motor carrier "shall not require or permit" a fatigued or impaired driver to operate a motor vehicle (§ 392.3);

- "No motor carrier, its agents, officers, representatives, or employees shall make or cause to make" intentionally false statements on any report or record, including the daily log (§ 390.35; § 395.8);

- Nor shall a motor carrier "permit or require a driver" to drive in violation of service regulation hours (§ 395.3); and

- A motor carrier "shall not aid, abet, encourage, or require" its employees to violate any FMCSR rules (§ 390.13).

With this kind of prior research and study you may have identified several standards helpful to your case. The opposition witness should admit them if he is honest. However, you should not assume an opposition witness will roll over and admit these standards. The question "Your driver violated Federal Motor Carrier Regulations while he was under your employ, did he not?" is unlikely to get you an unqualified "yes." It is a big question, encompassing a lot of facts. There is a lot of wiggle room for the witness. You must set up the witness with a series of admissions or commitments that will ultimately get you to your goal.

Second, do not go immediately for the killer question. Take the time to build toward your ultimate question with multiple questions, each question about one fact.

Questions including one and only one fact is *the* technique giving you the most control of a witness.[4] You must ask about facts, not conclusions, when you want to control an evasive, non-cooperative witness. The witness will never agree with your conclusions. His disagreement with you on any point may seem completely reasonable, unless there was a proper set up (see the following questions and the next section dealing with set up). The advantage of the "one fact,

[4] This technique can also be tedious, and need not be applied to all portions of every witness' cross. It is the preferred technique to deal with witnesses who run or are evasive. For an exhaustive discussion of this technique *see* LARRY POZNER & ROGER DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES (LexisNexis 3d ed. 2018) in the bibliography.

one question" technique is when a witness "runs," i.e., they try a long, non-responsive narrative, the question can be repeated easily again and again. Each run makes the witness appear less credible and frequently results in the witness admitting the fact imbedded in the question. Stringing together multiple questions that are "one fact, one question" allows the jury to derive larger, case-critical, inescapable conclusions, even if unstated.

As an example, assume you would like the jury to conclude a trucking company hired an unsafe, dishonest driver who falsified logs. Although the company knew or should have known, it did nothing. Assume further you want to try and prove this through an opposition witness. To get the answer you want to this question, you must break down this larger question or issue into short questions. One fact, one questions, sequenced to build on one another and will lead to your ultimate goal. Along the way you must be prepared to repeat the question when the witness runs, or employs some other techniques discussed in this paper.

Q: The Federal Motor Carrier Safety Regulations apply to your company, don't they?

Q: You are required to see that your drivers comply with the Federal Motor Carrier Safety Regulations?

Q: You train your drivers on the Federal Motor Carrier Safety Regulations, don't you?

Q: Do the Federal Motor Carrier Safety Regulations require drivers to accurately complete their logs?

Q: Would it violate the Federal Motor Carrier Safety Regulations if a driver's logs did not accurately reflect his travels?

Q: Is it important to your company that your drivers' logs accurately reflect their travels?

Q: Why is it important?

Q: You train and test your drivers on their understanding of the Federal Motor Carrier Safety Regulations, correct?

Q: Some of that training and testing includes the accurate completion of logs doesn't it?

Q: And your driver, Mr. Hogan, received this training and testing?

Q: Your company required Mr. Hogan to turn in his logs every week?

Q: In fact, Mr. Hogan would not get paid unless he turned in his logs?

Q: Could your company review Mr. Hogan's logs at any time if it chose to do so?

Q: Mr. Hogan was never disciplined or counseled for a log violation, was he?

Q: You have a copy of Mr. Alstadt's review of the Hogan logs?

Q: In that summary, did Mr. Alstadt review the last six months of logs before this wreck?

Q: Did Mr. Alstadt note log violations for hours of service?

Q: Did Mr. Alstadt note instances where Mr. Hogan said he was one place, and his gas receipts showed he was at another location?

Q: Mr. Hogan's logs show more than 50 log violations during the six months prior to this wreck, don't they?

Q: In 10 of these log violations, Mr. Hogan misstated how many hours he drove in a day, didn't he?

Q: In another 10 of these log violations, he reported in his log that he was at one place, and the gas receipts said he was another place, isn't that right?

The impact of this sequence of questions and facts allows the jury to conclude, without you telling them, this trucking company hired a driver who blatantly lied on his logs and took no action to stop or discipline him.

"Much wisdom often goes with fewer words."—Sophocles

Short sentences and simple words are needed. When structuring your questions (one fact, one question or otherwise) your words and sentence structure must be short, precise, and simple. This simple sentence structure makes it easy to repeat the question, and clear for the jury when the witness attempts to be evasive. You must abandon long, compound sentences if you want to control a witness. You can get the same content by writing two or simpler sentences. The fewer words the better. Even when reduced to the fewest words you can imagine, are the words chosen best for what you are trying to accomplish? Consider an alternative if any of your word choices are potentially argumentative or unclear.

Asking about facts, rather than conclusions or opinions, will give you better control of any witness. You need to be prepared to deal with the evasive witness repeatedly trying avoid a truthful response to your question. Here are the techniques to control that kind of witness:

1. *Repeat the question*—when the witness is non-responsive, repeat the question again and again. The repetition of the question makes the witness progressively uncomfortable, and sends a clear message to the jury.

2. *Throw out the trash*—when the witness gives a non-responsive answer, say "Thank you Mr. Witness, but I did not ask you about (topic used by witness in his non-responsive run), I asked (repeat the original question)"

3. *State the opposite*—when the witness is non-responsive, state the opposite of the truthful answer, e.g., "Are you saying it is not a violation of the Federal Motor Carrier Safety Regulations if a driver's logs do not accurately reflect his travels?"

4. "*Is that a no or yes*"—when the witness is repeatedly non-responsive, include the correct answer in the question, e.g., "Then that is a 'yes'? It is a violation of the Federal Motor Carrier Safety Regulations if a driver's logs do not accurately reflect his travels?"

IV. Core Skill Two: The Skills of Exhaustion, Boxing-In, and Restating and Summarizing Must Be Incorporated into Each Deposition with an Evasive Witness

1. How to effectively use exhaustion

If you get an equivocal answer from a witness, exhaustion is used to fully explore and discover anything he might be trying to hide. It also serves to teach the uncooperative witness certain responses will not work. Instead, the equivocation leads to more and more tedious questioning forcing the witness to say everything he knows and ultimately respond, "That is all."

What is common when preparing for trial and reviewing transcripts is that "holes" are discovered where the witness' testimony on one or more critical points was not exhausted or that a question was not explored in enough detail to predict what will be said at trial. This generally occurs because the examiner made no concentrated, consistent effort to make the witness say he has nothing else. In the case of experts, this occurs by *letting the witness' answer drive the examiner to ask about a new topic before exhaustion is accomplished on the current topic (the use of rabbit trails by the witness).*

Effective exhaustion is the use of simple follow-up questions after each answer:

Q: "What else?"

Q: "Tell me more."

Q: "Did anything else happen?"

Q: "Was anything else said?"

Q: "Did you observe anything else?"

Q: "Do you remember anything else?"

Q: "Are you sure that is all you remember, saw, and heard?"

Q: "Have you told me everything you remember about the accident?"

Q: "Is there anything else you think I need to know?"

Q: "Is there anything else you know or remember you think important to know if you were asking the questions?"

Q: "Is that everything?"

Q: "Have you told me everything?"

A second key to exhaustion is the examiner must not allow the witness' answer to dictate the examiner's next topic until exhaustion is accomplished with the current topic. Witnesses often take control of the deposition's direction by mentioning facts, opinions, or perspectives so tempting the examiner goes to that "rabbit trail" before she exhausts the witness on the original topic, and confirms exhaustion on that topic. Exhaustion requires the discipline to make sure you have all of the witness' knowledge on a topic, and confirming you have it all before moving on to a new area.

2. Example: failing to exhaust because of rabbit trails

Q: Give me all the reasons you believe Dr. Smith conformed to the standard of care.

A: He discussed the alternatives to surgery with the patient. He identified the median nerve at the time of the surgery, which was *abnormally small* and *congenitally demyelinated (this part of the answer has nothing to do with why the witness believes Dr. Smith conformed to the standard of care, but creates two rabbit trails for an examiner whose original goal was exhausting "all the reasons Dr. Smith conformed to the standard of care,")* he protected the median nerve with a retractor, and he identified the injury to the median nerve in the immediate post-operative period.

Q: What do you mean abnormally small? (the examiner begins following the first rabbit trail)

A: Well, clinically, we rarely see a median nerve under 40mm. This apparently was somewhat less than that.

Q: How do you know? (the examiner continues to follow the first rabbit trail)

A: Well, the Benz retractor is 40mm at its tip, and the operative note says it covered the nerve.

Q: Well, the fact that a median nerve is less than 40mm does not necessarily mean it is fully functional, does it?

A: It may or may not be. It depends on different factors.

Q: What would those factors be? (the examiner begins following a new rabbit trail and still has not exhausted the witness on all the reasons Dr. Smith conformed to the standard of care)

Exhaustion cannot be accomplished when the examiner moves to a new topic before completing the exhaustion.

3. Example: exhaustion done correctly[5]

Q: Give me all the reasons you believe Dr. Smith conformed to the standard of care.

A: He discussed the alternatives to surgery with the patient. He identified the median nerve at the time of the surgery which was *abnormally small* and *congenitally demyelinated*. He protected the median nerve with a retractor, and he identified the injury to the median nerve in the immediate post-operative period.

Q: Have we now covered all the reasons you believe Dr. Smith conformed to the standard of care?

A: I think for the most part, yes.

Q: Well I want to make sure. When you say for the most part, that implies to me there may be more. Are there any more reasons you believe Dr. Smith conformed to the standard of care, other than the ones we covered?

A: Well now that I think of it, there is one more. The use of the longitudinal incision was the appropriate incision used here.

Q: Have we now covered all the reasons you believe Dr. Smith conformed to the standard of care?

A: Yes.

Q: Is there any other information you need to know before you fully answering this question?

[5] This example of exhaustion (without the rabbit trails I added for this example) was provided by attorney Paul Scoptur.

A: No, I have all the information I need.

Q: Is there anything else you asked for, to see, or review, before today's deposition you have not received?

A: No.

Q: What else would you need to know before you can say you gave me all your opinions as to your belief Dr. Smith conformed to the standard of care?

A: Nothing else.

Q: So with that in mind, have you given me all the reasons you believe Dr. Smith conformed to the standard of care?

A: Yes I have, there is nothing else.

Now, after exhausting the witness on the original question, the examiner can ask about the "abnormally small and congenitally demyelinated" rabbit trails the witness created. It is fine to run down rabbit trails the witnesses presented in depositions, but only after accomplishing the goal you were striving for first. Doing otherwise cedes control of the deposition to the witness, and fails to accomplish your original purpose, i.e., exhausting the witness on a particular topic.

4. How to effectively use restating and summarizing

Exhaustion of a particular topic may require many questions and many pages in a transcript. If left in its raw form, the testimony may be unmanageable and unusable with a jury or court. Restating and summarizing condenses testimony spread across several pages and makes it more concise. The concise restatement and summarization of testimony creates sound bites for use with motions, mediation presentations, and trial presentations.[6] They also make impeaching the witness possible if necessary. Restatement and summarization are meant to be used in combination with exhaustion, no matter what exhaustion preceded the summarization. After restating and summarizing the deponent's testimony, there should always be a follow-up question like "Is that everything?," "Is that all?," "Is there anything else?," or something similar.

Beginning to use techniques like restating and summarizing may not seem natural when you are asking questions most of the time. Here are some lead-in statements you can use to begin your restatement and summarization:

- "Let me understand what you have told me."
- "What you are saying is . . . ."

[6] Editing and creating video clips is simplified by use of this technique.

- "Let me make sure I get it."
- "Are you saying that . . . .?"

5. Example: restatement and summarization[7]

Q: Let me make sure I understand what you said. You indicated Dr. Smith conformed to the standard of care in several ways, correct?

A: Yes.

Q: The first way was advising the patient of her alternatives, right?

A: Yes.

Q: The second was identifying the median nerve at the time of the surgery, right?

A: Yes

Q: The third way was identifying the injury to the median nerve in the initial post-op period, right?

A: Yes.

Q: Fourth was using a retractor to protect the nerve, right?

A: Yes.

Q: Fifth was the type of incision used, correct?

A: Yes.

Q: Have we now covered all the ways you believe Dr. Smith conformed to the standard of care? (exhaustion)

A: Yes.

Q: Nothing else? (exhaustion)

A: Correct, there is nothing else.

[7] This example of restatement was provided by attorney Paul Scoptur.

6. How to effectively use boxing-in

Boxing-in is used in two circumstances and consists of two different techniques. First, boxing-in *by bracketing* is used to commit the witness to facts when the witness tries to be evasive, saying either "I don't know," "I'm not sure," or "I don't remember" regarding dates, speed, quantities, or something quantifiable. The second form of boxing-in, facts, witnesses, documents (FWD), is used when you want to reduce the risk of any change in testimony after a witness told you all he recalls, all he knows, all his opinions, or that he cannot remember.

Boxing-in by bracketing is accomplished using dates, events, distances, time, or anything quantifiable.

7. Example: boxing-in by bracketing

Q: How far apart were your truck and Mrs. Agan's car after the accident?

A: I do not know.

Q: Was it at least 10 feet?

A: Sorry, I am not really sure.

Q: Would it have been at least five feet? Say, the distance between you and me?

A: Yes, that looks reasonable.

Q: Okay, could they have been more than 25 feet apart? Say, the length of this room?

A: No, not that far.

Q: Well how about 15 feet? Say, from the wall to the end of the table?

A: No, probably closer than that.

Q: So can we say after the accident, your truck and Mrs. Agan's car were somewhere between five and 15 feet apart, is that fair?

A: Yes, I would agree.

Boxing in by FWD (facts, witnesses, and documents) is a technique that forces the witness to commit to testimony or describe any and all possible circumstances that might allow her future testimony to change. Witnesses explain their change in testimony by using one or more of three broad categories of information that a witness didn't have or

consider during their deposition. These three broad categories are: facts they did not know or recollect, witnesses or individuals they not spoken to at the time of the deposition, or documents they not seen, recollected, or considered. If none of those things exist, there is no basis for the witness' testimony changing. The use of FWD occurs after a witness is exhausted. However, exhaustion is also used at the end of FWD questioning, e.g. "Is that all?," "Are you sure?," and so forth.

8. Example: using FWD to box-in a failure to recollect

Q: Did you see Mr. Smith's car before impact?

A: Well, I do not recall.

Q: Are you sure?

A: Yes.

Q: If you were provided facts about the color or model, would it make a difference? (asking if "new" facts might change recollection)

A: No.

Q: If you were provided facts about the position and description of the other cars, would it make a difference? (asking if "new" facts might change recollection)

A: No.

Q: If you had a conversation with one of your passengers about what they remember, what they heard you say, or what they saw you do, would it possibly allow you to recollect something about seeing Mr. Smith's car? (asking if talking to a witness might change recollection)

A: No, I do not believe so.

Q: If someone showed you photos of the scene would it possibly allow you to recollect something about seeing Mr. Smith's car? (asking if reviewing a document might change recollection)

A: No.

Q: If someone showed you the officer's accident report, of the accident would it make a difference? (asking if reviewing a document might change recollection)

A: No, I do not recall.

Q: So, you have no recollection of seeing Mr. Smith's car before impact? (restating and summarizing)

A: Correct.

Q: There are no facts about the road conditions, other cars, or location that would change your recollection? (restating and summarizing)

A: Right

Q: There are no witnesses or other people you know of, that if you talked with them, might change your recollection? (restating and summarizing)

A: None I can think of.

Q: Are you sure? (exhaustion)

A: Yes.

Q: Looking at accident reports, photos, or other documents will not change your recollection? (restating and summarizing)

A: No it will not.

9. Example: using FWD to box-in an expert on opinions

Q: Have we now covered all the ways you believe Dr. Smith conformed to the standard of care? (exhaustion)

A: Yes.

Q: Nothing else? (exhaustion)

A: Correct, there is nothing else.

Q: Are there any facts you might learn from Dr. Smith that might change your opinions or cause you to have additional opinions? (asking if "new" facts might change opinion)

A: No.

Q: Are there any facts in the medical records that are part of this case, that might change your opinions or cause you to have additional opinions? (asking if any documents might change opinion)

A: No.

Q: Are there any documents you have not reviewed, that if provided, might change your opinions or cause you to have additional opinions? (asking if any documents might change opinion)

A: No.

Q: Are you sure? (exhaustion)

A: Yes.

Q: If you had a conversation with one of your colleagues about this matter, is it possible she might say something that could cause you to change your opinion or have additional opinions? (asking if talking to a witness or colleague might change an opinion)

A: Possibly.

Q: Who would that be?

A: My partner and mentor Dr. Lawson.

Q: Why him?

A: He has 35 years of experience with carpal tunnel surgery.

Q: Anyone else? (exhaust)

A: No.

Q: Are you sure? (exhaust)

A: Yes.

Q: So, there are no conversations with Dr. Smith that would change your opinion? (restating and summarizing)

A: No.

Q: And there are no facts in the medical records that would change your opinion? (restating and summarizing)

A: No.

Q: And there are no documents you can think of that would change your opinion? (restating and summarizing)

A: No.

Q: The only thing you can think of that might cause you to change your opinion, or add to it, would be a conversation with your partner Dr. Lawson? (restating and summarizing)

A: Yes.

V. Core Skill Three: Depositions of Evasive, Uncooperative Witnesses Require You to Spend More Time Thinking About the Set Up Than the "Killer" Question You Are Dying to Ask

"We are so vain that we even care for the opinion of those we don't care for."—Marie von Ebner-Eschenbach[8]

No one wants to look like a fool or incompetent while under oath. No one wants to contradict herself, especially under the circumstances of a deposition with witnesses and a printed record. Unless someone clearly and firmly committed to a position, it may be easy for him to rationalize an answer inconsistent with his prior testimony: an evasive, non-cooperative response. With this in mind, the second concept that must integrate into such witnesses' deposition is case-critical questions coming only after the witness committed herself to positions making a contradictory response. A response wholly inconsistent with the "commitments" she made.

The commitments elicited from a witness should take place on multiple levels. Earlier, we discussed the commitments elicited from a witness preluding questions about a driver with multiple log violations, but who had never been disciplined. This kind of set up occurs with each line of inquiry. You are attempting to establish a standard, but there should be an entirely different set of commitments as part of the setup, before you ever get to the real subject matter of the deposition.

In any FRCP 30(b)(6) deposition, there will or should be a notice of deposition designating the areas where the witness will give binding testimony on the corporation's behalf. The deposition's first, and the series of set-up questions' object, is the notice itself. For example:

Q: I am handing you the notice of deposition for this deposition, have you seen it before?

Q: You understand in a deposition like this, you represent the corporation, not yourself as an individual?

[8] Marie von Ebner-Eschenbach was a 19th-century baroness, novelist, and close friend of Friedrich Nietzsche.

Q: This notice says the corporation shall designate the person "with the most knowledge concerning the following designated matters, and as to such information known or reasonably available to the organization."

Q: Are you the person Start Transport designated to speak on its behalf with respect to:

- Hiring and screening employees?
- Safety, accident prevention, and reporting?
- Driver supervision and inspection of logs?

Q: Why you?

Q Are you the most knowledgeable person at Start Transport with respect to:

- Hiring and screening employees?
- Safety, accident prevention, and reporting?
- Driver supervision and inspection of logs?

Q: Are there areas regarding hiring and screening employees in which you are not knowledgeable?

Q: Are there areas regarding safety, accident prevention, and reporting in which you are not knowledgeable?

Q: Are there areas regarding driver supervision and inspection of logs in which you are not knowledgeable?

Q: Is there any person at Start Transport more knowledgeable than you with respect to:

- Hiring and screening employees?
- Safety, accident prevention, reporting?
- Driver supervision and inspection of logs?

Q: Do you have full authority to speak on Start Transport's behalf with respect to:

- Hiring and screening employees?
- Safety, accident prevention, and reporting?
- Driver supervision and inspection of logs?

Q: Do you understand the answers you give to our questions are on Start Transport's behalf?

Q: Do you understand all the answers you give to our questions represent all the information available to Start Transport?

Q: Are you aware the answers you give to our questions are binding upon Start Transport?

Q: Are you fully prepared to speak with respect to:

- Hiring and screening employees?
- Safety, accident prevention, and reporting?
- Driver supervision and inspection of logs?

In the process of asking these questions, you may find the witness will not provide you with authoritative answers. He may legitimately answer "I do not know" on case-critical areas. If the witness's answers indicate he is unable to give binding testimony, restate and summarize the witness's inadequacies on the record. Adjourn the deposition until the corporation provides a proper representative. You cannot proceed expecting to get useful, binding information.

VI. Category One of Witnesses Who Are Evasive and Non-Cooperative

The witness who responds with "I don't know," "I don't know who would," "I never heard of that," "I can't answer that," or "I'm not sure."

When you encounter a corporate witness who does not know or cannot answer a question, you have two alternatives depending on your strategy in the case:

1. Nail down the fact that this witness does not know something important; or

2. Convince the witness while he "may not know" or is "not sure," there is a plausible explanation, definition, or standard he will (inevitably) accept as true.

For either of these two strategic choices, you may choose to begin your questions with *a review on the record of questions and answers previously given* to establish the witness:

- Represents the corporation, not himself as an individual

- Has been designated by the corporation as the person "with the most knowledge concerning the following designated matters and as to such information that is known or reasonably available to the organization"

- Is the person who has been designated by Start Transport to speak on its behalf with respect to:

    - Hiring and screening employees
    - Safety, accident prevention, and reporting
    - Driver supervision and inspection of logs

- Is the person at Start Transport who is the most knowledgeable with respect to:

- Hiring and screening employees
- Safety, accident prevention, and reporting
- Driver supervision and inspection of logs

(*When you have strategically chosen to lock in that the witness does not know or remember, and so on, the second step is to restate and summarize the witness' inability to answer. And then to make sure this witness is unable to change his testimony (box-in the witness)*) Witnesses explain a change in testimony using one or more of three broad categories of information they did not have or consider during their deposition. These three broad categories are (1) facts he did not know or recollect, (2) witnesses or individuals he had not spoken to at the time of the deposition, or (3) documents the witness had not seen, recollected, or considered. The acronym used to describe the process of boxing is FWD.

FWD serves to remind the examiner to ask the deponent whether there are any facts, witnesses, or documents that might be the basis of the witness changing from "I don't know" to something else. If none exist, there is no basis for the witness's changed testimony.

Example—using FWD to box-in a representative's response "I do not know," "I never heard of that," and so on:

A restatement and summary of testimony precedes these questions for the witness. He was designated to speak for the corporation on this issue, he is the most knowledgeable, and so on.

Q: You told me you do not know anyone in the corporation who does background checks on its child care workers?

A: Well, I do not recall.

Q: Are you sure?

A: Yes.

Q: If you were provided facts about what other childcare centers do, would it make a difference? (asking if "new" facts might change recollection)

A: No.

Q: If you were provided facts about what other units of Kid's World do, would it make a difference? (asking if "new" facts might change recollection)

A: No.

Q: If you had a conversation with another employee or center manager about the hiring process, would it possibly allow you to recollect something different? (asking if talking to a witness might change recollection)

A: No, I don't believe so.

Q: Are there any policy manuals, training materials, or other documents that would change your view on whether someone is at the company doing background checks on childcare workers, if you reviewed them? (asking if reviewing a document might change recollection)

A: No.

Q: So, you never heard of anyone doing background checks on childcare workers? (restating and summarizing)

A: Correct.

Q: There are no witnesses or other people you know who might change your recollection, if you talked to them? (restating and summarizing)

A: None I can think of.

Q: Are you sure? (exhaustion)

A: Yes.

The second strategic option for the standards witness who "does not know" or "is not sure" is convincing him or making him feel foolish for denying an obvious truth. An example of each follows. The first is an excerpt from the deposition of a defendant truck driver who wanted to play ignorant about the known rules for left hand turns.[9]

Q: Now Mr. Tractor-t trailer truck driver, isn't there some rule or set of rules for drivers who have commercial driver licenses (CDL's) to follow when they drive trucks?

A: Yes.

Q: What are those rules called?

A: I think they're called "the rules of the road."

Q: Good, now is there among these rules of the road that you know of a specific rule that deals with making a left-hand turn?

A: I'm not sure.

[9] These questions and answers were taken from a deposition taken by attorney Tom Vesper, a long-time faculty member of AAJ's Advanced Deposition College and author of DEPOSITION NOTEBOOK.

Q: Well, let's see if this refreshes your recollection: isn't there some rule in the rules of the road for truck drivers that addresses when it is safe and when it is not save to make a left-hand turn across on-coming lanes of traffic?

A: I think so.

Q: Well, do you ever recall one of the rules of the road for truck drivers that says you should be very careful to avoid making such left turn maneuvers?

A: I think I recall that, yeah.

Q: Good, do you recall what the "*no left turn rule*" says and why it says to not make a left turn across on-coming lanes of traffic?

A: I think the rule is because it is safer to make right turns than left turns because you will avoid the on-coming traffic.

Q: Well, what safety reasons are there for that "*no left turn rule*"?

A: Well, you do not want any oncoming car to hit your truck?

Q: And is there any other safety reason for the "*no left turn rule*"?

A: You don't want your trailer load and cargo to get damaged.

Q: Okay, what other reasons are there for the "*no left turn rule*"?

A: Well, I suppose you don't want other cars to get damaged.

Q: Okay, are there any other reasons you can think of for the "*no left turn rule*"?

A: Well, not right off hand, not right now.

Q: Well let's just take a brief minute and think for a moment here . . . are there any other safety reasons you can think of for the "*no left turn rule*" for truck drivers to not drive across oncoming lanes of traffic?

(*Pause*)

Q: Having thought about it for over a minute can you think of any other safety reasons for the "*no left turn rule*" for truck drivers?

A: I can't think of any right now.

Q: Let me suggest one or two: isn't one of the safety reasons for the "*no left turn rule*" to prevent traffic from colliding with your truck?

A: Yeah, I think I just said that.

Q: Yes, you did say that. What I am now asking you is that an additional reason for the "*no left turn rule*" is not only to prevent damage to your truck and it cargo and the on-coming vehicles but also to prevent the loss of your life or that of the on-coming drivers; would you agree that preventing serious injury or death is another safety reason for the "*no left turn rule?*"

A: Yeah I guess . . . yeah.

Q: And do you follow the "*no left turn rule*" to avoid the death or serious injury of oncoming drivers as well as yourself?

A: I think so.

Q: Well, tell us why do you follow "*no left turn rule?*"

A: For all the reasons I just told you.

Q: And one of the reasons you follow the "*no left turn rule*" is to prevent serious injury or death, is that true?

A: Yes.

Q: And you expect other truck drivers to follow the "*no left turn rule*"?

A: Yeah.

Q: And is one of the reasons you expect other truck drivers to follow the "*no left turn rule*" because it will avoid serious injury or death to you and to them?

A: Yes.

Q: Do the other drivers in your company follow the "*no left turn rule?*"

A: I don't know what they do.

Q: But you do expect them to follow the "*no left turn rule*" for all the reasons you said, including to protect their lives and your own, isn't that true, sir?

A: Yes.

Q: You do expect not just truck I have been in a couple days ago backplane drivers but also automobile drivers and all drivers of all types of vehicles on the roads and highways you travel to follow the "*no left turn rule*" don't you?

A: Yes

Q: And one of the reasons you expect other drivers to follow the "*no left turn rule*," is, among other reasons, to protect your life as well as their own, correct?

A: Correct, yes.

Q: Would you agree with me that anyone who would intentionally ignore the "*no left turn rule*," and ignore the safety reasons of protecting the lives of other drivers as well as his own life, would be a reckless driver?

A: (After many objections, and much dialogue, and "colloquy")—I don't know if I would call it reckless.

Q: Well what would you call the act of a driver of the truck who intentionally made a left turn in front of on-coming traffic in direct violation of the "*no left turn rule?*"

A: I'd say that would be a [darn] fool thing to do! (Followed by many objections, but no colloquy)

Building on facts (some of which the defendant created), the defendant truck driver initially reluctant to give testimony and who said, "I'm not sure," ended up admitting both the desired standard (the "no left turn rule,"), that violating the standard would be counter to his expectations of other drivers, and "a damn fool thing to do."

The next example is the witness who will not admit a standard or rule, an expert, from the same case as the example above with the "no left turn" rule.

Q: Did you write as part of your professional accident reconstruction reported opinion that "the truck driver's actions were not a contributing factor" in this intersectional collision?

A: Yes I did, would you like me to explain?

Q: I will ask you that question momentarily, but for now, just try to follow my questions. Will you do that, and try not to anticipate my next question? (this is an example of not ceding control to the witness as discussed in the following sections "Category Seven" and "Category Eight.")

A: Sure.

Q: Thank you., now would I be correct in assuming that when we all get to trial you will give your professional accident reconstruction opinion consistent with what you wrote in your report?

A: Yes, of course.

Q: And, your professional accident reconstruction opinion at trial will also be consistent with your truthful testimony under oath today?

A: Of course.

Q: And, I would be correct to also assume from reading your 83- page report that you find no fault whatsoever on the tractor trailer truck driver (Mr. X) for the happening of this intersectional collision?

A: That is correct. May I explain?

Q: You may in just a moment, once I know what exactly you are going to say to the court and jury, okay? (this is another example of not ceding control to the witness as discussed in the following sections "Category Seven" and "Category Eight." The witness's explanation will have nothing to do with your depositions goals, at least at this point.)

A: Okay.

Q: So, getting back to your 83 page written report—even though you do not say it in exactly the words I will put to you now, I would be correct to assume that you will testify under oath at trial when defense counsel asks you questions that it is your professional accident reconstruction opinion that the truck driver in this case did nothing reckless, or negligent, or careless, or wrong which in any way was a cause in the happening of this intersectional collision, am I correct?

A: Yes, that is my professional opinion.

Q: And of course you know from your on site inspection and review of the police report and the eyewitness statements and the deposition of the truck driver (Mr. X) that Mr. X admittedly made a left turn across three lanes of oncoming travel at a major intersection controlled by a stoplight. which had a sign directly below it which said "no left turn"—you know that fact?

A: Yes.

Q: Okay, now before I ask you to explain your professional accident reconstruction opinion that the truck driver did nothing wrong by turning left across three lanes of oncoming travel at a major intersection controlled by a stoplight, which had a sign directly below it which said "no left turn," I want to ask you one simple question: Did you, in your professional accident reconstruction education, training, and experience ever hear, or read, or learn about what has been referred to in a prior deposition as the "*no left turn rule*"?

A: I don't think I ever heard of that rule?

Q: Well, did you read the deposition of Mr. X, the defendant truck driver?

A: Yes.

Q: When did you read it?

A: Last year.

Q: So, you read it before you wrote your 83-page professional accident reconstruction report?

A: Yes, of course.

Q: Of course, so you read where Mr. X talked about the "no left turn rule"?

A: Yes.

Q: And you read what Mr. X said about the safety reasons for the "no left turn rule," didn't you?

A: Yeah.

Q: And, sitting here today with all of you 25 years of experience, education, and training, you do not recall ever hearing any mention of or reference to the "no left turn rule?"

A: No, I can't recall.

Q: Well, if you can't recall this "no left turn rule"—does the safety reason for the "no left turn rule" sound to you, in your professional opinion, to be worthy of consideration for any driver of any vehicle?

A: I don't understand.

Q: Let me try to make it understandable to you—as an accident reconstruction expert you know there are rules of the road, correct?

A: Yeah.

Q: As a professional accident reconstruction expert you do recognize safety reasons for many rules of the road?

A: Sure.

Q: Can you think, from all your experience, training, and education (on a *long* list of his credentials in his multi paged CV) what would be a safety reason for a "no left turn rule" for tractor trailer drivers?

A: I can't think of any right off hand.

Q: So, from your education, training, experience, and long membership in several professional association such as ATARI (the Association of Traffic Accident Reconstruction and Investigation), you don't recall ever hearing, reading, or knowing about such a "no left turn rule." Nor can you, as a self-professed accident reconstruction expert who writes articles on safe driving, teaches truck drivers, lectures, and consults with trucking companies, and as you told us earlier you do about 75 to 100 collision case investigations per year (mostly for insurance and trucking companies) for an annual income of approximately $300,000, you sitting here today after you investigated, researched, and wrote your 83 page report, and then prepared for today's deposition by meeting with the defense lawyer at the scene yesterday, you cannot think of any one good safety reason for such a "no left turn rule?"

A: Correct.

In this examination, the reconstruction expert took a position that there was no such thing as a "no left turn rule." He never heard of it. Nor could he think of any safety reason for it. Will he be a credible witness? Will his testimony be given any weight?

VII. Category Two of Witnesses Who Are Evasive and Non-Cooperative

The witness who wants to ask you to define your terms.

One of the oldest witness tricks is asking the questioner to define a term used in a question. It puts the witness back in control, gives him time to consider the question, and disrupts the questioner's flow.

1. First approach: ask for and adopt the witness's definition

   The first, most natural technique is asking the witness to define the term and incorporating his definition into the question.

   Q: Would you not agree it would be improper for a nursing home to hire an aide with a past history of patient abuse?

   A: What do you mean by patient abuse?

   Q: What does patient abuse mean to you?

A: I guess it means hurting or injuring a patient.

Q: So, would you not agree it would be improper for a nursing home to hire someone with a past history of hurting or injuring a patient?

2. Second approach: use the person's life experiences to create a reasonable, fair definition

Another subtler method is to actually think about the witness as a person and the circumstances in which he used the term. Use those life experiences to move the witness towards an honest answer.

Q: Do you agree your company has a duty to hire safe drivers?

A: What do you mean by safe?

Q: Do you have kids in school?

A: Yes.

Q: When they leave for school or some activity, have you ever told them to "be safe?"

A: Yes.

Q: You expected them to understand what that meant, did you not?

A: Yes.

Q: So you have some idea of what someone may be talking about when they use the words "safe driver"

A: Yes.

Q: One aspect of a "safe driver" is that he obeys the speed limit, is that true?

A: Yes.

Q: Is it important that tractor trailer drivers obey the speed limit?

A: Yes.

Q: Why is it important that tractor trailer drivers obey the speed limit?

A: If they do not, they could be a hazard to themselves or others.

Q: Another aspect of a "safe driver" is that he obeys the traffic laws, is that not true?

A: Yes.

Q: Is it important that tractor trailer drivers obey traffic laws?

A: Yes.

Q: Why is it important that tractor trailer drivers obey traffic laws?

A: If they do not, they could be a hazard to themselves or others.

Q: Another aspect of a "safe driver" is that he gets enough rest while on the road, correct?

A: Yes.

Q: Someone who repeatedly got speeding tickets and had moving violations would not be a safe driver, right?

Q: Someone who operated a tractor trailer without getting the required rest would not be a safe driver either, right?

Q: So you would agree your company has a duty to hire safe drivers?

3. Third approach: use a regulation or rule for the definition

Q: Would you not agree it would be improper for a nursing home to hire an aide with a past history of patient abuse?

A: What do you mean by patient abuse?

Q: I am handing you a copy of State Regulation 1.11.7. I highlighted the definition for patient abuse. It says: "Abuse means causing intentional pain or harm. This includes physical, mental, verbal, psychological, and sexual abuse, corporal punishment, unreasonable seclusion, and intimidation." Is that correct?

A: Yes.

Q: So, you would agree the definition of abuse includes psychological abuse and intimidation?

A: Yes.

Q: You would agree state regulations like this apply to your facility?

A: Yes.

Q: So, wouldn't you agree it would be improper for a nursing home to hire someone with a past history of psychological abuse and intimidation of a patient?

4. Fourth approach: use a dictionary or thesaurus

Sometimes there is not a rule or regulation you can use, but the definition of a term is a key part of your case and questioning.

Q: Would it be reckless to hire an employee with a history of patient abuse?

A: What do you mean by reckless?

Q: Have you ever used a dictionary?

A: Yes.

Q: Let us look up reckless. Here it says, "marked by a lack of thought about danger or other possible undesirable consequences." Would you agree hiring someone with a history of patient abuse might show a lack of thought about possible dangers or undesirable consequences?

Q: (Using the thesaurus) Would it be *(words from thesaurus—thoughtless, irresponsible, inattentive, hasty, rash*) to hire an employee with a history of patient abuse?

VIII. Category Three of Witnesses Who Are Evasive and Non-Cooperative

The witness who wants to control the word choice of your questions, e.g., "That is just a guideline, not a rule."

Witnesses often hear the words "standard," "rule," or "principle," and try to define their way around any direct response to a question.

Q: Mr. Lentz, would you not agree one of the design principles is the risk of severe injury or death is always unreasonable and unacceptable if it could be prevented or minimized by reasonable safety measures?

A: I think that is more of a guideline.

Q: So in your mind, it is more of a guideline than a principle?

1. Alternative one

Q: Are guidelines important?

Q: Why are they important?

Q: If a guideline reduces the risk of serious injury or death, should it be followed?

Q: When is it okay to ignore a guideline?

Q: Do you expect others to follow guidelines?

2. Alternative two

Q: When you use a word like "guideline," would you expect other people to understand what you mean?

Q: You expect other people to assume you use the same definition they do, like what is in the dictionary?

Q: If the dictionary says, "A standard or principle by which to make a judgment or determine a policy or course of action." You would agree with that definition, wouldn't you?

Q: Based on the dictionary definition, a guideline is something that should be followed, is it not?

Q: Mr. Lentz, based on the definition of "guideline," wouldn't one of the design principles or guidelines be that the risk of severe injury or death is always unreasonable and unacceptable if it could be prevented or minimized by reasonable safety measures?

3. Alternative three

Q: When you use a word like "guideline," would you expect other people to understand what you mean?

Q: There are words meaning the same thing as guideline, aren't they? They are called synonyms right?

Q: Take a look at *Roget's Thesaurus*; one of the synonyms for guideline is law, isn't it?

Q: One of the synonyms for guideline is "rule," isn't it?

Q: One of the synonyms for guideline is “principle,” isn’t it?

Q: So based on the thesaurus, a guideline is like a rule or a principle, isn’t it?

Q: You agree rules or principles of design should be followed, shouldn’t they?

Q: If a product design has a potential risk for severe injury or death, the design and risks should be given careful consideration, shouldn’t they?

Q: If a product design’s risks for severe injury or death can be prevented or minimized, they should be, correct?

Q: Mr. Lentz, based on what you told me, it would be wrong to design a product without considering the risks of the product causing severe injury or death?

Q: It would be wrong to leave a design “as is” if the risks of severe injury or death could be prevented or minimized by reasonable safety measures, I sn’t that right?

IX. Category Four of Witnesses Who Are Evasive and Non-Cooperative

The witness who says they do not understand the question.

The “I do not understand the question” response is more often than not stalling so the witness can think about where you are going and what he should say. This question needs to be immediately put back on the witness so he will never say “I do not understand.” Unless he truly does not, i.e., the follow up questions are so tedious for the witness he avoids using a stall technique like “I do not understand.” There are two basic approaches to the witness who falsely claims, “I do not understand.” The first is exhaustion of all reasons and rationales that are the basis for the witness’s lack of understanding, followed by possibly rephrasing the question, and parsing the sentence to get admissions piece by piece. The following is an example of exhausting a witness on all the reasons he does not understand.

Q: Would you agree one standard of safe product design is that the risk of severe injury or death is always unreasonable and unacceptable if it could be prevented or minimized by reasonable safety measures?

A: I do not understand what you mean.

Q: What do you need to know to make the question understandable?

Q: What else do you need to know to make the question understandable?

Q: Anything else?

Q: Is that all?

Q: *So*, in order to understand this question, you need to know (restate and summarize what witness has said), is that correct?

Q: Having thought about it further, would you agree one standard of safe product design is the risk of severe injury or death is always unreasonable and unacceptable if it could be prevented or minimized by reasonable safety measures? (This may or may not work; if it does not, the questioner may go on as below.)

Q: So, now knowing the answers to your questions, would you agree one standard of safe product design is that the risk of severe injury or death is always unreasonable, and unacceptable, if it could be prevented or minimized by reasonable safety measures?

Parsing the question means breaking it down in as many pieces as necessary to get admissions leading to the ultimate question. For example,

Q: Would you agree one standard of safe product design is the risk of severe injury or death is always unreasonable and unacceptable if it could be prevented or minimized by reasonable safety measures?

A: I do not understand what you mean.

The follow-up questions breaking this large question into more palatable pieces might be as follows.

Q: Is the manufacture of safe products important to your company?

Q: Why is it important?

Q: It would be irresponsible to manufacture without any regard for safety, would it not?

Q: If the product's design can cause severe injury or death, is it something that should be given some thought, is it not?

Q: Is that important?

Q: Why is it important?

Q: A risk of severe injury or death from using a product cannot be ignored, can it?

Q: If the product's design can be corrected to minimize the risks of severe injury or death, that is a good thing, isn't it?

Q: Is that important?

Q: Why is it important?

Q: A reasonably safe manufacturer would change the design if there was a way to minimize or prevent the risk of severe injury or death, would they not?

Q: Is that important?

Q: Why is it important?

X. Category Five of Witnesses Who Are Evasive and Non-Cooperative

The witness who tries to avoid being pinned down and responds, "for the most part," "pretty much all," or "not necessarily."

Hedge responses like "not necessarily," "for the most part," "pretty much all," and "that is all I remember at this time," are designed to give the witness wiggle room at trial. Anytime there is anything other than "that is all I know" as a response, exhausting the witness is required. The process of exhaustion teaches the witness a straight, honest answer is the best alternative. The questions used for exhaustion are simple:

- What else?
- Tell me more.
- Is that all?
- (Restate and summarize what witness has said)
- Did I get it right?
- There is nothing else?

In the context of an actual deposition it would read something like this:

Q: You agree it would be improper to hire a childcare worker without a background check?

A: Well, not necessarily. (for the most part, and so on)

Q: When you say, "not necessarily," it tells me there may be reasons you do not agree with my statement. (Teach or tell the witness why that answer will not be accepted.) Give me all the reasons you say that.

Q: What else?

Q: Tell me more.

Q: Is that all?

Q: So (restate and summarize the witness' responses), did I get that right?

Q: Anything else?

Once mastered, this kind of exhaustion can be done without the examiner thinking—it is the witness who must constantly dig for justifications for his equivocations. When a witness obviously manufactured some bogus rationale for an equivocal answer, the examiner may choose to attempt to completely discredit the answer (not the witness) before moving on. An example follows.

Q: When I first asked you whether you agree it would be improper to hire a child care worker without a background check, you said "not necessarily," right?

Q: And the reasons you had for saying it was not necessarily improper to hire a child care worker without a background check were: the applicant may be the son or daughter of another employee, and you could ask them directly about the applicant's criminal and employment history, right?

Q: Is getting a reliable and accurate background check important?

Q: Why is getting a reliable and accurate background check important?

Q: Do you think it is possible a mother or other family member might be embarrassed about a child's criminal history or negative employment history?

Q: Do you think it is possible a mother, or other family member may not know about a child's criminal history or negative employment history?

Q: Would you not agree a mother, or other family member might not be a reliable source for information about a child's criminal history or negative employment history?

Q: Would you not agree it is improper to hire a childcare worker without a reliable background check from outside sources?

XI. Category Six of Witnesses Who Are Evasive and Non-Cooperative

The witness who "does not remember" or "is not sure" about dates, times, distances, or amounts.

Boxing-in *by bracketing* is used to commit the witness to facts when the witness is trying to be evasive saying, "I do not know," "I am not sure," or "I do not remember." The technique, at its simplest, is getting the witness to commit to the largest possible and smallest possible expressions of some measurement and then work down.

Example: boxing-in by bracketing

Q: How long did it take Dr. Lanson to get to the delivery room after he was called?

A: I do not know.

Q: Was it at least 40 minutes?

A: Sorry, I am not really sure.

Q: Would it have been at least 15 minutes, say the amount of time we have been speaking since the break?

A: Yes.

Q: How long does it take you to get to work? What is your best time and your slowest average time?

A: Maybe 30 minutes on a good day, 45 minutes on a slow one.

Q: Okay, then could it have been more than 45 minutes?

A: No, not that long.

Q: Well how about 30 minutes?

A: Yes, probably closer to that.

Q: Can we say after the call, it took the doctor from 15 to 30 minutes to arrive, is that fair?

A: Yes, I would agree.

XII. Category Seven of Witnesses Who Are Evasive and Non-Cooperative

The witness who repeatedly gives long narrative responses or interrupts.

If left in its raw form, testimony can be unmanageable and unusable with a jury or court. When a witness continually gives long, narrative answers the testimony may become unusable for the creation of sound bites you would use with motions, mediation presentations, and trial presentations.[10] Long, narrative responses also make it impossible to impeach the witness. Interruptions can prevent you from having a coherent question and answer for use in trial or otherwise. As already discussed, restating and summarizing condenses long, narrative testimony and make it more concise. Your control of the deposition is just as important. Interrupt the witness so the testimony comes in "chewable" bites. You must be prepared to interrupt the witness (politely) with questions such as:

- "Excuse me, let me understand what you have told me."
- "Excuse me, before we go on, let me make sure I get it."
- "Excuse me, are you saying that . . .?"

Or for the interrupting witness:

- "Excuse me, let me finish my question. (restate question)"

- "I am sorry, it is a lot easier for the court reporter to get everything down if we speak one at a time. Let me finish my question, and then you will have all the time you need to answer. (restate question)"

- "Pardon me, I am afraid the court reporter will not be able to get what you are saying down. Let me ask my question again, and then when I finish, go ahead with your answer. (restate question)"

There is also testimony you just do not want to hear. When that happens, you must take control of the deposition and direct the witness to the specific question or topic that is part of your deposition plan . . . .

- "Excuse me, I appreciate your sharing that with me, but what I am asking is . . ."

- "Pardon me, before we get into that, tell me . . ."

- "Excuse me, I know what you are saying is important, but before we talk about that can you tell me . . ."

[10] Editing and creating video clips is simplified by used of this technique.

This kind of witness's deposition (like most evasive witnesses) requires the ability to move into cross-examination, one fact, one question. Long, narrative responses are incompatible and look evasive when paired with simple fact questions.

XIII. Category Eight of Witnesses Who Are Evasive and Non-Cooperative

Dealing with the witness who constantly lays down "rabbit trails."

"Rabbit trails" are facts or testimony a witness provides (generally) with the intent of derailing the examination. The testimony is calculated to be so "interesting" the examiner must ask a follow-up question about it. This occurs with many evasive witnesses, but is most common in the case of experts.

The key to dealing with rabbit trails is simple. Your deposition is about your questions, your goals, and your issues. *The examiner must not allow the witness's answer to dictate the examiner's next topic until exhaustion is accomplished with the current topic*. When a witness mentions an enticing fact, write it down, but do not ask about it until you exhausted the witness on the subject originally under discussion, or until a later time in the examination.

1. Example: failing to exhaust because of rabbit trails

    Q: Give me all the reasons you believe this product was designed safely.

    A: We have a 30-year history of use without significant incident (rabbit trail), our chief engineer is the holder of five patents (rabbit trail), and we tested it on our employees before we sold any (rabbit trail).

    Q: What do you mean by significant incident? (There is nothing wrong with this question, but does the examiner know all the reasons at this point? The examiner begins following the first rabbit trail.)

    A: Well John Wellborne knows more about it than I do. (A new rabbit trail.)

    Q: How do you know that? (The examiner continues to follow the new rabbit trail.)

    A: Well, I think he was in charge of claims at the time.

    Q: When was that?

    A: It was sometime in the 80s, but there is a report somewhere with all the information about the claims.

Q: What kind of report would that be? (The examiner begins following yet a new rabbit trail and still has not exhausted the witness on all the reasons the witness maintains the product was designed safely.)

Exhaustion cannot be accomplished when the examiner moves to a new topic before completing the exhaustion.

2. Example: exhaustion done correctly

Q: Give me all the reasons you believe this product was designed safely.

A: We have a 30-year history of use without significant incident (rabbit trail), our chief engineer is the holder of five patents, and we tested it on our employees before we sold any.

Q: What else? (This is exhaustion, the examiner does not follow the first rabbit trail.)

A: The European supplier claimed to have tested the product.

Q: Anything else? (the examiner continues to exhaust)

A: Well, Underwriter's Laboratories approved the power supply and electronics.

Q: Anything else?

A: I do not think so.

Q: So the reasons you believe this product was safely designed include a 30 year history without significant incident, right? (the examiner begins going one fact, one question to restate and summarize the answers)

A: Yes.

Q: And a second reason you believe this product was safely designed was your chief engineer holding five patents, right?

A: Yes.

Q: And the last two reasons you believe this product was safely designed includes the European supplier claiming to have tested it, and that Underwriter's Laboratories approved the power supply and electronics, did I get all that right?

Q: Have we covered all the reasons you believe this product was safely designed?

A: Yes.

Q: Are you sure?

A: Yes, there is nothing else.

Now, after exhausting the witness on the original question the examiner can ask about the "significant incident" and other rabbit trails the witness created. It is fine to run down rabbit trails witnesses presented in depositions, but only after you accomplished the goal you were striving for first. To do otherwise is ceding control of the deposition to the witness, and failing to accomplish your original purpose, i.e., exhausting the witness on a particular topic.

XIV. Learn More About Dealing with Evasive Witnesses

- AAJ Exchange "Taking Depositions: Experts, Lay Witnesses, and Corporate Representatives"—this is over 1000 pages in pdf format including forms, motions, checklists, descriptions of techniques, and examples from actual depositions.

- For more information about AAJ Exchange materials, please go online at http://www.justice.org/exchange or call (800) 344-3023.

- THOMAS J. VESPER & MARK R. KOSIERADZKI, DEPOSITION NOTEBOOK (AAJ Press/Thomson Reuters, 5th ed. 2006)—this notebook covers everything from organization to technique, forms, motions, and case law. Money well spent for anyone with the humility to recognize they do not know it all.

- AAJ's Deposition College and Advanced Deposition College—these educational programs are designed specifically for plaintiff attorneys, combining substantive content on deposition technique, along with workshops designed to give practitioners the opportunity to try new approaches. For more information about scheduling and availability for these programs contact AAJ education at http://www.justice.org/cle or call at (202) 965-3500, ext. 8612 or (800) 622-1791.

- PETER MEGAREE BROWN, THE ART OF QUESTIONING, THIRTY MAXIMS OF CROSS-EXAMINATION (MacMillan Publishing 1987).

- CICERO, DE ORATORE bks. I and II, (E.W. Sutton & H. Rackham trans., Harvard Univ. Press rev. ed. 1967) (c. 55 B.C.E.).

- RICK FRIEDMAN & PATRICK MALONE, THE RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY (Trial Guides, 2d ed. 2005).

- ROGER HAYDOCK & JOHN SONSTENG, TRIAL: THEORIES, TACTICS, TECHNIQUES (West Pub. Co. 1991).

- JEFFREY L. KESTLER, QUESTIONING TECHNIQUES AND TACTICS (AAJ Press/Thomson Reuters, 3d ed. 1982).

- LARRY POZNER & ROGER DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES (LexisNexis 3d ed. 2018).

HOW TO BIND A CORPORATION WITH 30(b)(6) DEPOSITIONS AND USE THEM AT TRIAL[1]

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I. What Is 30(b)(6)?

It is impossible to take testimony from an organization, because only humans can give testimony. Rule 30(b)(6) provides the mechanism to require an *organization to designate and prepare people* to testify on its behalf regarding "matters" specified in the deposition notice.[2] Conceptually, using 30(b)(6), the organization is the equivalent of a single person who is the confluence of the knowledge of many people.

The designated 30(b)(6) witness does not give personal opinions, but rather represents the organization's position on the topics.[3] When the organization provides the designated witness, it authorizes and prepares that witness to speak on its behalf. In order to provide complete testimony of the organization, that organization is required to prepare its witness with all facts known to the organization, as well as the organization's subjective beliefs and opinions within the areas covered by the deposition notice. [4]

In *Brazos River Authority v. GE Ionics, Inc.*, the court ruled that the 30(b)(6) witness may testify as to opinions that go to ultimate fact, because Rule 704(a) provides that testimony "in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[5]

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[2] *See* 8A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2103, at 36-37 (2d ed. 1994).

[3] Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 433 (5th Cir. 2006) (citing United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996)).

[4] *Id*. at 433.

[5] *Id*. at 435; FED. R. EVID. 704 (Opinion on an Ultimate Issue (a) In General—Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.).

II. Binding Effect

There is much discussion among lawyers as to the binding effect of the 30(b)(6) testimony. The rule itself is silent as to whether the testimony is binding. Rather, the doctrine of binding effect arose from judicial interpretations of Rule 30(b)(6). In *Marker v. Union Fidelity Life Ins*., the court stated the following:

> The corporation then must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable, and binding answers on behalf of the corporation.[6]

However, some courts pushed back, holding that the Rule 30(b)(6) witness's testimony was not tantamount to a *judicial admission*:

> When the Court indicates that the Rule 30(b)(6) designee gives a statement or opinion binding on the corporation, this does not mean that said statement is tantamount to a judicial admission. Rather, just as in the deposition of individuals, the testimony was only a statement of the corporate person, which, if altered, could be explained and explored through cross-examination.[7]

"Judicial admission" means that the court has admitted the evidence for this case, and that the admission cannot be changed.[8]

As time went on, it became apparent that such an interpretation of the rule was squarely at odds with the underlying policy of preparation and disclosure that led to the creation of Rule 30(b)(6). Under the early interpretations, responding parties would simply not provide information during the 30(b)(6) depositions, and later attempt to add or change testimony.

The court in *United States v. Taylor* also said it would be unfair to allow the "sandbagging" of an opponent by allowing an organization to conduct "a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial."[9] In *Rainey v. American Forest and Paper Ass'n., Inc.*, the court recognized the evasive game that lawyers were playing. *Rainey* held that

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

[7] United States v. Taylor, 166 F.R.D. 356, 362-63, n. 6 (M.D.N.C. 1996) (citing W.R. Grace & Co. v. Viskase Corp., No. 90C5383, 1991 WL 211647 (N.D. Ill. Oct. 15, 1991)).

[8] State Farm Mut. Auto. Ins. Co. v. Worthington, 405 F.2d 683, 686 (8th Cir. 1968) (citing ARTHUR BEST, WIGMORE ON EVIDENCE § 2588 (3d ed. 1940) ("[C]ases hold that judicial admissions are binding for the purpose of the case in which the admissions are made including appeals. This does not make the same judicial admissions conclusive and binding in separate and subsequent cases. The purpose of a judicial admission is that it acts as a substitute for evidence in that it does away with the need for evidence in regard to the subject matter of the judicial admission.").

[9] *Id*. at 362.

the objectives of preparation and information disclosure contained in the Advisory Committee comments to Rule 30(b)(6) were to guide the operation of Rule 30(b)(6):

> Foremost among those purposes, according to the Advisory Committee notes, is to curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it.[10]

Rainey reiterated the long-established policy that the "rule aims to prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case."[11] Under *Rainey*, while the testimony is not a judicial admission, the responding organization cannot alter its testimony without establishing that the information was not available at the time of deposition.[12]

Because 30(b)(6) witness testimony is not a judicial admission, courts have taken differing approaches in dealing with changing testimony. Under the *Taylor* line of cases, the organization is subject to impeachment.[13] By contrast, under the *Rainey* line of cases, while the testimony is not a judicial admission, an organization cannot alter it unless the organization establishes that it did not have, or was unable to get, the information at the time of deposition.[14]

With an understanding of the jurisprudence surrounding "binding effect," the job of the attorney examining the 30(b)(6) designee is to establish a record of the universe of information available to the organization, and discover whether the organization provided that information to the designee. That universe includes identifying all persons, documents, and electronically stored information available to the organization.

III. Using 30(b)(6) at Trial

When introducing the deposition testimony of a nonparty 30(b)(6) witness, there is an inherent tension between the Federal Rules of Evidence and Rule 30(b)(6). The Rules of Evidence call for witnesses with personal knowledge to introduce the evidence. Whereas Rule 30(b)(6) requires that an organization prepare a designated witness to provide all knowledge known to all people within that organization.

[10] Rainey v. Am. Forest & Paper Ass'n, Inc., 26 F.Supp.2d 82, 95 (D.D.C. 1998).

[11] *Id.* (citing Ierardi v. Lorillard, Inc., 1991 WL 158911, at *3 (E.D. Pa. Aug.13, 1991)).

[12] *Id.* at 95.

[13] *Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

[14] *Rainey*, 26 F.Supp.2d at 95.

Courts have resolved the tension between Rule 30(b)(6) and the evidentiary personal knowledge requirement by explaining that a 30(b)(6) witness "testifies vicariously, for the corporation, as to its knowledge and perceptions."[15] In *Sara Lee Corp. v. Kraft Foods Inc*., the court recognized the importance of the policies that led to the creation of Rule 30(b)(6):

> When it comes to using Rule 30(b)(6) depositions at trial, strictly imposing the personal knowledge requirement would only recreate the problems that Rule 30(b)(6) was created to solve.[16]

However, the rules for introducing the 30(b)(6) deposition (or for playing the video) into evidence, differ depending on whether the 30(b)(6) witness is a party or nonparty.

1. Using 30(b)(6) transcripts of an adverse party at trial

Rule 32(a)(3) expressly allows you to use an adverse party's 30(b)(6) witness deposition at trial for any purpose. The rule states the following:

> Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).[17]

Using Rule 32(a)(3), a party may introduce the 30(b)(6) deposition of an adverse party as substantive proof. The deposition can be used regardless of whether the specific witness who gave the testimony is available or not.[18]

On the other hand, as a general rule, an organization cannot introduce the deposition testimony of its own 30(b)(6) witness. Rule 32(a)(3) allows only an adverse party to use the 30(b)(6) deposition for any purpose. However, if the 30(b)(6) witness is not available, there is an exception to that general principle. Rule 32(a)(4) states the following:

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[15] Sara Lee Corp. v. Kraft Foods Inc., 276 F.R.D. 500, 503 (N.D. Ill. 2011) (citing Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 434 (5th Cir. 2006)).

[16] *Id.*

[17] FED. R. CIV. P. 32(a)(3).

[18] King & King Enters. v. Champlin Petroleum Co., 657 F.2d 1147, 1163-64 (10th Cir. 1981); *see also* Coughlin v. Capitol Cement Co., 571 F.2d 290, 308 (5th Cir. 1978) (citing Fey v. Walston & Co., Inc., 493 F.2d 1036, 1046 (7th Cir. 1974)); Cmty. Counseling Serv., Inc. v. Reilly, 317 F.2d 239, 243 (4th Cir. 1963); DANIEL COQUILLETTE ET AL., MOORE'S FEDERAL PRACTICE § 26.29, 1653 (2d ed. 1968)).

> (4) Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:
>
> (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
>
> (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or
>
> (E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.[19]

Although the organization's 30(b)(6) witness may fall within one of these categories, such as age, illness, infirmity, or imprisonment, that alone does not allow the organization to introduce its own 30(b)(6) deposition as evidence. Before the organization can introduce the deposition into evidence, it still must show that the witness is unable to testify.[20]

2. Using 30(b)(6) transcripts from other cases

An organization may have provided 30(b)(6) witnesses to testify in depositions in other similar lawsuits. In *Runge v. Stanley Fastening Sys., L.P.*, the court explained the circumstances in which a 30(b)(6) deposition taken in a previous lawsuit could be used in subsequent lawsuits against the same party:

> The general rule is that "depositions taken in a prior action are admissible in a subsequent action if there is substantial identity of issues and parties in the two actions."[21]
>
> [C]ourts interpreting this rule "recognize that the real test should be whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent now has. As such, many cases have held that a deposition can be offered against one who was a

[19] FED. R. CIV. P. 32(a)(4)(C).

[20] *See* Delgado v. Pawtucket Police Dept., 668 F.3d 42, 49 (1st Cir. 2012) (Witness's imprisonment did not alone justify admission of his deposition testimony in lieu of live testimony without establishing that his imprisonment prevented him from testifying in person).

[21] Runge v. Stanley Fastening Sys., L.P., 2011 WL 6755161, *3 (S.D. Ind. Dec. 23, 2011).

> party to the former suit even though the party now using the deposition was not."[22]

Therefore, if the issues in those lawsuits are close enough to the issues in your case, 30(b)(6) testimony from the prior lawsuits can be used.

3. Compelling live 30(b)(6) testimony witness at trial

Rule 30(b)(6) applies to depositions but is silent about trial. Rule 45, on the other hand, does provide a procedure for compelling a person to testify at trial. The courts have reconciled these two rules by finding that the organization is a party that appears vicariously through its 30(b)(6) designee.[23] Therefore, the organization must designate a person to appear on its behalf at trial as well.

Consistent with the policies underlying Rule 30(b)(6), courts have enforced trial subpoenas that compel an organization's representative to attend (rather than a specifically identified person).[24] Similar to a Rule 30(b)(6) notice, the trial subpoena identifies the matters of inquiry for which the responding entity must prepare and produce a witness.[25]

4. Using nonparty 30(b)(6) witness depositions at trial

A deposition of a nonparty 30(b)(6) witness is a statement made outside of trial. Therefore, by definition, it is hearsay.[26] The nonparty 30(b)(6) deposition cannot be considered as admissible under Federal Rule of Evidence 801(d)(2), because that Rule applies only to party opponents. Further, because the deposition is of a nonparty witness, it not admissible under Rule 32(a)(3), which is limited to parties.[27]

In order to introduce the transcript (video) testimony of a nonparty 30(b)(6) witness, it is necessary to establish that the testimony is admissible under the Rule 32(a)(4) unavailability rule. Because it is the 30(b)(6) deposition testimony of a *nonparty*,

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[22] *Id.* (citing CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2150).

[23] Sara Lee Corp. v. Kraft Foods Inc., 276 F.R.D. 500, 503 (N.D. Ill. 2011) (citing Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 434 (5th Cir. 2006)).

[24] Conyers v. Balboa Ins. Co., No. 8:12-CV-30-T-33EAJ, 2013 WL 2450108, at *1 (M.D. Fla. June 5, 2013); *see also* Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas, 262 F.R.D. 293, 303 (S.D. N.Y. 2009); Williams v. Asplundh Tree Expert Co., No. 3:05CV479J33MCR, 2006 WL 2598758, at *2 (M.D. Fla. Sept. 11, 2006).

[25] *Id.*

[26] FED. R. EVID. 801(c).

[27] Stearns v. Paccar, Inc., 1993 WL 17084, *4 (10th Cir. 1993); FED. R. EVID. 801(d)(2).

deposition is admissible if it is established that the *person*[28] who was the nonparty's 30(b)(6) witness is unavailable under one of the conditions in Rule 32(a)(4): out of subpoena range, unable to testify because of age, infirmity, imprisonment, or exceptional circumstances.

If the person whom the organization had previously designated in response to a nonparty 30(b)(6) deposition is within the subpoena range of the court, that person will be required to testify rather than introducing the testimony transcript. That witness may testify as the organization's representative.

In *Sara Lee Corp. v. Kraft Foods Inc*., the court ruled that the 30(b)(6) witness of a nonparty, who was subpoenaed to testify at trial, could testify outside of his or her personal knowledge about matters of the corporation's "collective knowledge or subjective belief."[29] Such topics include matters about which the corporation's official position is relevant, such as corporate policies and procedures, or the corporation's opinion about whether a business partner complied with the terms of a contract.[30]

IV. Attempts to Change the Testimony at Trial

Trial by ambush is the greatest prejudice that a party can experience.[31] The very purpose of discovery is to avoid ambush.[32] Rule 30(b)(6) was created to enable litigants involving institutional adversaries to identify facts and positions before trial. Nevertheless, organizations often attempt to change their testimony.

1. Organization cannot disavow the 30(b)(6) witness at trial

   If an organization presents a witness at trial who was formerly a 30(b)(6) witness in a deposition, the organization cannot disavow that witness's status as a representative of

[28] *See* MARK KOSIERADZKI, *Details of Rule 30(b)(6): Deposing Organizations by Issue Designation, in* 30(b)(6) DEPOSING CORPORATIONS, ORGANIZATIONS & THE GOVERNMENT (Trial Guides 2016).

[29] Sara Lee Corp. v. Kraft Foods Inc., 276 F.R.D. 500, 503 (N.D. Ill. 2011).

[30] *Id.*

[31] *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 507, 67 S. Ct. 385, 392, 91 L. Ed. 451 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise"); Reed v. Binder, 165 F.R.D. 424, 431 (D.N.J. 1996) ("The failure to comply with the disclosure requirements of the Rule frustrates the purpose of the Rules—the elimination of unfair surprise and the conservation of resources.").

[32] Ierardi v. Lorillard, Inc., No. CIV. A. 90-7049, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991) (citing Fed. Deposit Ins. Corp. v. Butcher, 116 F.R.D. 196, 201 (E.D. Tenn. 1986)).

the organization. In *Brazos River Authority v. GE Ionics, Inc*., the Fifth Circuit Court of Appeals ruled that when a witness who previously testified in a deposition under Rule 30(b)(6) is made available at trial, that witness can be cross-examined about the same matters, within the organization's knowledge, that was testified about at the deposition.[33] The organization cannot make the witness available at trial and then object to matters that the witness testified about at the 30(b)(6) deposition on grounds that the witness had only institutional knowledge of the issues, not personal knowledge.[34] Once it is designated that a 30(b)(6) witness is testifying at trial, the courts have made it clear that attorneys could cross-examine that witness based on the prior 30(b)(6) testimony.[35]

2. Organization brings a different witness to trial

If the organization chooses to use a different witness who simply denies the accuracy of the 30(b)(6) deposition testimony, that witness can be cross-examined with the organization's 30(b)(6) testimony. In *Wilson v. Lakner*, the court stated that any witness who contradicted the 30(b)(6) witness's sworn testimony could be cross-examined with the 30(b)(6) deposition. The court in *Wilson* stated that the witness could be ordered to testify about why the opposing counsel was not apprised of the amendments to the changes to the 30(b)(6) testimony prior to trial.[36]

3. Organization's experts cannot contradict 30(b)(6) testimony

A party should not be allowed to introduce testimony at trial that rejects its own previous 30(b)(6) deposition testimony of positions and facts. Courts have granted motions *in limine* to exclude expert testimony that contradicts 30(b)(6) testimony.[37] Expert testimony is governed by Fed. R. Evid. 702, which states that expert witness testimony is admissible only 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 upon sufficient facts or data;

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[33] Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 434 (5th Cir. 2006).

[34] *Id.*

[35] Sara Lee Corp. v. Kraft Foods Inc, 276 F.R.D. 500 (N.D. Ill. 2011); Brazos River Auth., 469 F.3d 416 (5th Cir. 2006).

[36] Wilson v. Lakner, 228 F.R.D. 524, 530 (D. Md. 2005).

[37] Great Am. Ins. Co. of NY v. Summit Exterior Works, LLC, No. 3:10 CV 1669 JGM, 2012 WL 459885, at *8 (D. Conn. Feb. 13, 2012) (granting motion *in limine* to exclude expert testimony that contradicts 30(b)(6) factual testimony).

> (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.[38]

The expert's opinion must be based on sufficient facts or data. If the court deems that the facts or data are established by virtue of the 30(b)(6) testimony, then the expert has no foundation to speculate that the facts are other than what has been established.

[38] FED. R. EVID. 702.

MASTERING THE 30(B)(6)[1]

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Discovery involving institutional defendants can be streamlined using Federal Rule of Civil Procedure 30(b)(6) or a state rule corollary. Virtually every state has either established rules for depositions by issue designations that are substantially similar to Federal Rule 30(b)(6) or have developed procedures that accomplish the same goals sought by the federal courts. When the state rule is based on its federal counterpart, those states often look to federal authority for guidance in interpreting their state rule.[2]

Rule 30(b)(6) requires that the *organization designate and prepare persons* to speak on its behalf regarding "matters" specified in the deposition notice. Strategically crafting the "matters of examination" and enforcing the requirements of Rule 30(b)(6) can capture the core of the case in a single deposition.

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.* Rule 30(b)(6) is entitled "Notice or Subpoena Directed to an Organization," and reads:

> 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

[2] *See* Appendix A, MARK KOSIERADZKI, 30(b)(6): DEPOSING CORPORATIONS, ORGANIZATIONS & THE GOVERNMENT (Trial Guides 2016), which identifies every state's corollary rule and decisions adopting the federal jurisprudence.

> 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 regarding the topics identified by the requesting party. Having been given notice and the opportunity to prepare, the responding party can be bound by the testimony of its designated representatives.[4]

The effectiveness of the rule bears heavily upon the parties' reciprocal obligations. First, the requesting party must reasonably particularize the subjects of the intended inquiry so as to facilitate the responding party's selection of the most suitable deponent(s). In turn, the responding party, having been specifically notified as to the particular areas of inquiry, must produce one or more deponents who have been suitably prepared to respond to questioning within that scope of inquiry.[5] The ultimate goal is to streamline the discovery of potentially relevant information.

When issuing a notice of deposition under Rule 30(b)(6), rather than identifying a specific individual to testify, the notice should read:

> Pursuant to Federal Rule of Civil Procedure 30(b)(6), [Designating Entity] is required to designate and fully prepare one or more officers, directors, managing agents or other persons who consent to testify on behalf of [Designating Entity], and whom [Designating Entity] will fully prepare to testify regarding the following designated matters and as to such information that is known or reasonably available to [Designating Entity]'s organization.

By requiring the responding organization to designate who will testify, the burden of producing the correct person shifts to that organization. As in *jiu-jitsu*, any obstruction of information is redirected to that responding organization, because the court will hold it accountable for the failure to produce the correct person.[6]

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

[4] Cadent Ltd v. 3M Unitek Corp., 232 F.R.D. 625, 628 (C.D. Cal. 2005) ("This means that under Rule 32(a), depositions of corporate officers under Rule 30(b)(1), as well as Rule 30(b)(6) depositions, may be used at trial against the corporate party.") (citing Coletti v. Cudd Pressure Control, 165 F.3d 767, 773 (10th Cir. 1999); Crimm v. Missouri Pac. R.R. Co., 750 F.2d 703, 708-09 (8th Cir. 1984)).

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

[6] *See, e.g.*, Pioneer Drive, LLC v. Nissan Diesel Am., Inc., 262 F.R.D. 552, 557-61 (D. Mont. 2009).

I. Reasonable Particularity

The key to a successful 30(b)(6) deposition begins with a properly crafted deposition notice. The party seeking discovery through a Rule 30(b)(6) deposition is required to:

> *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.[7]

Courts have differed as to what "reasonable particularity" means. It has been described with varying theoretical tests, but the court decisions ultimately are based on practical concerns—will the topics in the notice permit the designee to know how to prepare?

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."[8] In those cases, the requesting party 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.[9]

Other decisions have rejected the "painstaking specificity" standard, reasoning that the application of the "reasonable particularity" phrase contained in the rule provides sufficient notice for preparation if the topics clearly delineate what the designee must prepare.[10] If from the "plain language" of the notice the court can discern what is sought, then the notice is deemed to have "reasonable particularity."[11]

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

[8] 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 Commus 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).

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

[10] *See e.g.*, Espy v. Mformation Tech., Inc., No. 08-2211, 2010 WL 1488555, at *2 (D. Kan. Apr. 13, 2010); Starlight Int'l, Inc. v. Herlihy, 186 F.R.D. 626, 638 (D. Kan. 1999); Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164-MLB-DWB, 2007 WL 1054279, at *3-4 (D. Kan. Apr. 9, 2007).

[11] 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) (citing Regan-Touhy v. Walgreen Co., 526 F.3d 641, 649-50 (10th Cir. 2008)

A discovery request 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] For example, a matter that directly asks for "facts, information, or documents that relate to a particular allegation" is reasonably particular, because a party ought to know, and can easily discern, the evidence that it bases its allegation upon.[13] Allegation inquiries "do not appear overly broad as they specifically limit the scope to specific allegations with regard to factual circumstances surrounding [a particular event in the case]."[14]

The practical test is whether the deposition "matters of examination" provides sufficient notice to the responding entity. If the entity is given sufficient notice to determine the matters for which it has to prepare the designee, then the designee is expected to testify to those topics, whether or not the specific question asked at the deposition was listed in the notice. Therefore, in any analysis of the sufficiency of the notice, the focus needs to be on whether the "matters of examination" were sufficiently clear as to give the responding entity sufficient notice to be able to prepare. In the circumstance where counsel for the parties clarified what was intended by the notice with a letter, the court found that the notice and reasonable particularity requirements were met through that medium.[15]

II. Scope of Matters of Examination

A Rule 30(b)(6) deposition can be used to seek anything within the *scope of discovery* as set out in Rule 26(b)(1) of the Federal Rules of Civil Procedure. The Rule explicitly states that a party "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 . . . . "[16]

In *Rhema v. UPS Ground Freight Inc.*, (a 2018 unpublished 30(b)(6) trucking decision from the Western District of Kentucky) the court confirmed that the long body of jurisprudence regarding

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(quoting CHARLES WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2211); Steil v. Humana Kan. City, Inc., 197 F.R.D. 442, 444 (D. Kan. 2000).

[12] 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), (citing Regan-Touhy v. Walgreen Co., 526 F.3d 641, 649-50 (10th Cir. 2008) (quoting CHARLES WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §2211)).

[13] Hartford Fire Ins. Co. v. P & H Cattle Co., No. CIV.A. 05-2001-DJW, 2009 WL 2951120, at *1 (D. Kan. Sept. 10, 2009).

[14] *Id.*

[15] Alexander v. F.B.I., 186 F.R.D. 137, 139 (D.D.C. 1998); *cf.* United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

[16] FED. R. CIV. P. 26(b)(1).

relevance is still applicable following the 2015 amendments to Federal Rule 26.[17] The court said: "It is well established by now that this language is broadly construed by the federal courts to include 'matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case.'"[18]

An organization served with a valid 30(b)(6) notice does not have the right to refuse to attend the deposition because it considers the deposition objectionable.[19] It is well established that "[i]t is not the prerogative of counsel, but of the court, to rule on objections."[20] A party cannot cancel a deposition unilaterally.[21]

The 1970 amendment to the advisory committee notes to Rule 37 specify:

> [A] party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order.[22]

The express language of Rule 37 states it is grounds for sanctions if a party refuses to attend a 30(b)(6) deposition.[23] Rule 37(d)(1)(A)(i) states,

> *Motion; Grounds for Sanctions*. The court where the action is pending may, on motion, order sanctions if: (i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition[.]

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[17] Rhema v. UPS Ground Freight Inc., 3:15-CV-00252-GNS , at *4 (W.D. Ky. Feb. 20, 2018).

[18] *Id.*

[19] Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Res. Auth., 93 F.R.D. 62, 67 (D.P.R. 1981) (citing C. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2035, at 262); FED. R. CIV. P. 37(d)(2).

[20] Plaisted v. Geisinger Med. Ctr., 210 F.R.D. 527, 533 (M.D. Pa. 2002).

[21] Pac. Elec. Wire & Cable Co. v. Set Top Int'l Inc., 03 CIV. 9623 (JFK), 2005 WL 2036033, at *3 (S.D.N.Y. 2005); Smith v. BCE Inc., No. CIV.A. SA04CA0303 XR, 2005 WL 1523354, at *1 (W.D. Tex. June 22, 2005).

[22] FED. R. CIV. P. 37 advisory committee's note, Sub. (d) (1970 Amendment).

[23] FED. R. CIV. P. 37(d)(1)(A)(i).

The *Rhema* court confirmed that the 2015 amendments to Rule 26(b)(1) "do not alter the burdens imposed on the party resisting discovery."[24] The party seeking to resist discovery still must specifically object and must still show that the requested discovery does not fall within Rule 26(b)(1)'s broad scope of relevance, or would impose an *undue* burden, or expense or is otherwise objectionable.[25]

It is not enough to claim that preparation for the 30(b)(6) deposition creates a burden. It is not good cause to merely show the disputed discovery may be inconvenient or expensive.[26] There is always a burden associated with preparation.

> "Burdens" are simply part and parcel of the process that any entity faced with the task of responding to the Rule 30(b)(6) deposition notice must undergo. Were we to hold otherwise it is difficult to imagine a corporate defendant who could not successfully claim undue burden and expense without the need to specifically establish such under oath.[27]

Further, the objecting party may not offer boilerplate objections that the discovery sought is disproportional to the needs of the case. The advisory committee to the 2015 amendment made it clear that it is insufficient to merely allege that the discovery is disproportional.

> Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.[28]

The party moving for protection must make a particularized, factual showing that preparation for the matters of inquiry would be disproportional to the needs of the case. Vague and conclusory

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[24] Rhema v. UPS Ground Freight, Inc., 3:15-CV-00252-GNS , at *4 (W.D. Ky. Feb. 20, 2018), (citing McKinney/Pearl Rest. Partners, L.P. v. Metro Life Ins. Co., 322 F.R.D. 235, 243 (N.D. Tex. 2016); *see also* Carr v. State Farm Mut. Auto. Ins. Co., 312 F.R.D. 459, 462–70 (N.D. Tex. 2015).

[25] *Rhema*, 3:15-CV-00252-GNS, at *4 (W.D. Ky. Feb. 20, 2018), (citing Mir v. L-3 Commc'ns. Integrated Sys., L.P., 319 F.R.D. 220, 226 (N.D. Tex. 2016)).

[26] Isaac v. Shell Oil Co., 83 F.R.D. 428, 431 (E.D. Mich. 1979) (citing United States v. Amer. Optical Co., 39 F.R.D. 580 (N.D. Cal. 1966)).

[27] *Rhema*, 3:15-CV-00252-GNS, at *11 (W.D. Ky. Feb. 20, 2018).

[28] FED. R. CIV. P. 26(b)(1), 2015 committee notes.

allegations are not enough.[29] Rule 26(c) "assumes that a party has the right to issue a discovery request in the first place."[30]

III. Matters of Examination

The purpose of a 30(b)(6) deposition is to cut to the chase: to identify the adversary's claims or defenses. If an organization intends to assert claims and defenses in litigation, it must adequately prepare an individual to testify as to those claims and defenses, which duty "goes beyond matters personally known to that designee or to matters in which that designee was personally involved."31 The rule itself does not limit the matters of examination that a moving party may seek in any way. The "matters of examination" can request not only *facts* within the corporation or organization's knowledge, but also its *subjective beliefs, opinion*s,[32] and *interpretation of documents and events*.[33]

After being served with the matters of examination, the designee presents the organization's "position" on the topic enumerated in the 30(b)(6) deposition notice.[34] This arises from the principle that "the designee, in essence, represents the corporation [organization] just as an individual represents him or herself at a deposition. Were it otherwise, a corporation [organization] would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions."[35] The position that the 30(b)(6) designee asserts must be the stance that the corporation takes at trial.

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[29] *In re* Skelaxin (Metaxalone) Antitrust Litig., 292 F.R.D. 544, 549-50 (E.D. Tenn. 2013). *See also,* Nix v. Sword, 11 F. App'x. 498, 500 (6th Cir. May 24, 2001); Waelde v. Merck, Sharp & Dohme, 94 F.R.D. 27, 28 (E.D. Mich. 1981).

[30] *In re* Skelaxin (Metaxalone) Antitrust Litig., 292 F.R.D. 544, 549-50 (E.D. Tenn. 2013).

[31] *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)).

[32] *See, e.g.*, Lapenna v. Upjohn Co., 110 F.R.D. 15, 20 (E.D. Pa. 1986); Kendall v. United Airlines, Inc., 9 F.R.D. 702, 703 (S.D.N.Y. 1949); 4 J. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 26.56[3], at 142-43 (2d ed. 1984).

[33] QBE Ins. Corp. v. Jorda Enters., Inc., 277 F.R.D. 676, 687 (S.D. Fla. 2012); United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C. 1996); Ierardi v. Lorillard, Inc., No. 90–7049, 1991 WL 158911 (E.D. Pa. Aug. 13, 1991).

[34] 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).

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

1. Factual testimony

Facts are the most obvious subject matter for inquiry in a 30(b)(6) deposition. One of the motives for the creation of the 30(b)(6) deposition in 1970 was to prevent the evasive tactics employed by many corporate parties. Prior to the promulgation of Rule 30(b)(6), deponent after deponent would feign lack of knowledge of facts 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 facts necessary for the litigation.[36] As a result of Rule 30(b)(6), depositions can request disclosure of facts, along with the source of those facts comprising the organization's knowledge base.

2. Sources of information

Areas of inquiry that seek the discovery of *sources of information* about the defendants' claims and defenses are relevant and therefore discoverable.[37] The advisory committee notes to the Rule 26(b)(1) directly discuss the well-established jurisprudence allowing discovery of sources of information. The committee notes state:

> A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: "including 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." 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. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case.[38]

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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[36] FED. R. CIV. P. 30 advisory committee's note, Sub. (b)(6) (1970 Amendment); 8A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE (West 2010); Atl. Cape Fisheries v. Hartford Fire Ins. Co., 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."

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

[38] FED. R. CIV. P. 26(b)(1).

3. Positions, *subjective* beliefs, and opinions

It is universally established that the Rule 30(b)(6) designee must present the organization's "position" on the matters of examination contained in the notice.[39] This extends not only to facts, but also to subjective beliefs and opinions,[40] as well as interpretation of documents and events.[41]

4. 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."[42] "Plaintiffs are entitled to know the full relationship of the corporation to each of the otherwise properly requested documents, the provenance of each document previously produced, and the corporation's understanding of the contents of the otherwise discoverable documents."[43] 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.'"[44] "[A] corporation may not take the position that its documents state the company's position and that a corporate deposition is therefore unnecessary."[45] The "document speaks for itself" is not a valid objection.

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[39] United States v. Taylor, 166 F.R.D. 356, 362 (M.D.N.C. 1996); United States v. Mass. Indus. Fin. Agency, 162 F.R.D. 410, 412 (D. Mass. 1995); Lapenna v. Upjohn Co., 110 F.R.D. 15, 21 (E.D. Pa. 1986); Toys "R" Us, Inc. v. N.B.D. Trust Co., No. 88C10349, 1993 WL 543027, at *2 (N.D. Ill. Sept. 29, 1993).

[40] Lapenna v. Upjohn Co., 110 F.R.D. 15, 20 (E.D. Pa. 1986) (citing Kendall v. United Airlines, Inc., 9 F.R.D. 702 (S.D.N.Y. 1949)). *See also* 4 J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE § 26.56[3], at 142-43 (2d ed. 1984).

[41] 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).

[42] *Id*.

[43] Rhema v. UPS Ground Freight, Inc., 3:15-CV-00252-GNS at *20 (W.D. Ky. Feb. 20, 2018).

[44] 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)).

[45] Rhema v. UPS Ground Freight Inc., 3:15-CV-00252-GNS at *21 (W.D. Ky. Feb. 20, 2018) (citing Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co., 251 F.R.D. 534, 540 (D. Nev. 2008)); ("The Federal Rules of Civil Procedure do not 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" in response to a Rule 30(b)(6) deposition notice or subpoena request.") (citing Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 127 (M.D.N.C. 1989).

5. Interpretation of events

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.[46] 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.[47] The organization must explain how varying facts should be construed in the position it advocates.[48] As the court in *United States v. Taylor* recognized: "Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions. Truth would suffer."[49]

IV. Contentions and Affirmative Defenses

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.[50] Therefore, depositions under 30(b)(6) may inquire as to the factual basis for the organization's affirmative defenses and contentions.[51]

Rule 30(b)(6) does not contain any requirement to first seek discovery of the facts underlying a claim by other means of discovery (such as interrogatories).[52] Moreover, Rule 30(b)(6)'s plain language does not limit the deposition.[53] 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

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

[47] *Id.*

[48] United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996); *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).

[49] *Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

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

[51] *E.E.O.C.*, 237 F.R.D. 428, 434 (D. Nev. 2006); Ierardi v. Lorillard, Inc., No. 90-7049, 1991 WL 158911 (E.D. Pa. Aug. 13, 1991).

[52] S.E.C. v. Kramer, 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011); 8A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2103 (West 2010).

[53] Radian Asset Assur., Inc. v. Coll. of the Christian Bros., 273 F.R.D. 689, 692 (D.N.M. 2011).

response to an interrogatory."[54] Because depositions provide a means to obtain more complete information, they are the favored process for gathering information.[55]

The corporation or organization must designate a person to speak on its behalf and it is this position that the attorney must advocate."[56] It is the responsibility of the organization, which intends to assert claims and defenses in litigation, to adequately prepare an individual to testify as to those claims and defenses.[57] Contentions are based on the facts of a case; "the attorney for the corporation is not at liberty to manufacture the corporation's contentions."[58] 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."[59]

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

[55] 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* Ierardi v. Lorillard, Inc., No. 90-7049, 1991 WL 158911, at *1 (E.D. Pa. Aug. 13, 1991) (citing Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989).

[56] United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996); Corus Eng'g. Steels Ltd. v. M/V Atl. Forrest, CIV. A., No. 01-2076, 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, 2002); A.I.A. Holdings, S.A. v. Lehman Bros., Inc., No. 97CIV-4978, 2002 WL 1041356, at *3 (S.D.N.Y. May 20, 2002); Paul Revere Life Ins. Co. v. Jafari, 206 F.R.D. 126, 127 (D. Md. 2002); United Techs. Motor Sys., Inc. v. Borg-Warner Auto., Inc., Civ. A. No. 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).

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

[58] United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996); Corus Eng'g. 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).

[59] Canal Barge Co. v. Commonwealth Edison Co., No. 98 C 0509, 2001 WL 817853, at *2 (N.D. Ill. July 19, 2001) (citing United States v. Taylor, 166 F.R.D. 356, 363, n. 8 (M.D.N.C. 1996)).

Courts repeatedly decline to prohibit factual contention inquiries in 30(b)(6) depositions.[60] Rather, any limitations on contention inquiries arise out of either the work product doctrine, or over-broad and over-burdensome claims.[61]

The majority of courts have held that nothing precludes a deposition either in lieu of or in conjunction with such interrogatories.[62] 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."[63]

In *Rhema v. UPS Ground Freight Inc*., the court stated;

> [T]he Court will not bar 30(b)(6) deposition topics based on the topics' significant similarities with contention interrogatories. The parties have a right to choose their discovery method and do not have to follow a particular sequence . . . . Moreover, the discovery devices are different: there is no possibility of follow-up with interrogatories, while depositions allow both sides to get answers.[64]

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) inquiries where the inquires would elicit the views and conclusions of counsel.[65] However, even in complex cases, if contentions and affirmative defenses are factually based, the organization is

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[60] *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., 237 F.R.D. 428, 432-34 (D. Nev. 2006); AMP, Inc. v. Fujitsu Microelectronics, Inc., 853 F. Supp. 808, 831 (M.D. Pa. 1994).

[61] *See*, e.g., E.E.O.C. v. Caesars Entm't, Inc., 237 F.R.D. 428, 432-34 (D. Nev. 2006) (denying "defendant's request for a protective order to limit the scope of Rule 30(b)(6) deposition questioning to preclude inquiry into the factual bases for defendant's asserted position statements and affirmative defenses").

[62] 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).

[63] Sec. Ins. Co. of Hartford v. Trustmark Ins. Co., 218 F.R.D. 29, 34 (D. Conn. 2003); *see also* United States v. Boyce, 148 F. Supp. 2d 1069, 1086 (S.D. Cal. 2001).

[64] Rhema v. UPS Ground Freight Inc., 3:15-CV-00252-GNS, at16 (W.D. Ky. Feb. 20, 2018).

[65] JPMorgan Chase Bank v. Liberty Mut. Ins. Co., 209 F.R.D. 361, 363 (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).

required to designate a witness to provide that factual basis in response to a 30(b)(6) deposition notice.[66] 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.[67]

[66] 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).

[67] *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 RULES OF THE ROAD™ TO WIN YOUR CASE IN DEPOSITION

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In today's world of skeptical jurors who have frequently been tainted against us by so-called "tort reformers," careful study as to how to overcome juror bias is essential. In addition to attending or listening to the AAJ lecture series on overcoming juror bias, plaintiffs' attorneys would be well advised to not only read, but to carefully study what noted jury consultant David Ball has labeled "the essential trilogy." This trilogy has been extremely useful in the course of my practice, and there is no question that my clients have benefited from my efforts to learn and practice the principals espoused in these three wonderful books. All three should not only be in every trial lawyer's library, but they also should be easily within reach and referred to frequently.

The trilogy consists of:

- *Rules of the Road: A Plaintiffs Lawyer's Guide to Proving Liability* by Rick Friedman and Patrick Malone, now in its second edition
- *The Reptile* by David Ball and Don Keenan
- *David Ball on Damages,* now in its third edition

There is now a fourth book that is a must read for all medical malpractice attorneys: *Winning Medical Malpractice Cases with the Rules of the Road Technique* by Rick Friedman and Pat Malone.

In their outstanding book, *Rules of the Road,* authors Rick Friedman and Pat Malone describe their experiences with lawyers from around the country who reported having lost good cases they felt they should have won. Friedman and Malone identified the "Three Horsemen of Defeat" that they felt were responsible for these losses. They are:

- Confusion
- Complexity
- Ambiguity

I. Establishing the Rules of the Road in Your Case

If the plaintiff's attorney hopes to win at trial, he or she must overcome those three enemies.

Friedman and Malone note that problems of complexity, confusion, and ambiguity are inherent in the practice of law where, for example, jury instructions are often vague and ambiguous (consider the phrase "reasonable and prudent," and think how amorphous this language is to your average juror). *Rules of the Road* is an excellent guide that gives the reader practical solutions to overcome confusion, complexity, and ambiguity. Plaintiff's attorneys find concrete liability standards from a variety of sources including statutes, regulations, publications, jury instructions, case law, and the like. There is a long list of potential sources for "Rules" including:

- Statutes
- Published guidelines from professional societies
- Textbooks
- Medical journal articles

By way of example, all states have laws that mandate screening of newborns for metabolic diseases, hearing impairment, and so forth. Societies such as The American College of Obstetrics and Gynecology publish practice bulletins on a variety of subjects, including screening for conditions such as Group B Strep. Medical textbooks and journals frequently have guidelines on a variety of conditions e.g., prophylaxis for deep vein thrombosis (DVT) and pulmonary embolism (PE).

In a select few cases, the defendant's conduct runs afoul of some published statute or guideline, and the task of the plaintiff's attorney is an easy one. In most cases, however, such guidelines are non-existent, and the task of establishing the rule is more difficult. It is in these cases where it becomes vitally important that plaintiff's counsel attempt to establish the Rules through the testimony of the defendant.

According to Friedman and Malone, a Rule should be:

- Easy for the jury to understand;
- A principle the defense cannot credibly dispute;
- Violated by the defendant; and
- Important enough in the context of the case that proof of a violation will significantly increase the chance of a plaintiff verdict.[1]

[1] RICK FRIEDMAN & PAT MALONE, RULES OF THE ROAD, 34 (2d ed. 2010).

The job of plaintiff's counsel is to show the jury what the Rules are, how the defendant broke them, and how this caused the injury.

In *David Ball on Damages*, the author, a noted jury consultant, takes it one step further, and encourages the plaintiff's lawyer to portray the defendant's actions not just as violations of Rules, but better yet, as "safety Rule violations." Based upon years of experience, Ball notes that "jurors will easily forgive errors and misjudgments. In contrast, jurors find it worthwhile to blame and punish people who violate safety rules."[2]

In their groundbreaking work *The Reptile*, David Ball and Don Keenan revealed that based upon their extensive research, jurors make decisions based upon their reptilian instinct for survival. As Ball states in his third edition of *Damages*:

> Protection of self and offspring is the unbeatable decision-making force, incapable of compromise. Without enlisting this force, you remain at the mercy of "Tort Reform," which itself is driven by that very force. Every case—no matter how small—offers jurors the opportunity to make their dangerous world safer. Controlling this force is Reptile's main topic.[3]

Ball and Keenan have taught many lawyers how they can improve their chances for success at trial, and demonstrate to the jury how the defendant's conduct endangered not only the safety of the defendant's clients, but also the community at large. Dozens of lawyers have won verdicts that they attribute to *The Reptile*.

II. Putting the Essential Trilogy to Work in Deposition

1. Setting the stage for the Rules

   Prior to trying to elicit agreement from the defense witness as to what the applicable Rules are for patient safety in a particular case, I have found it helpful to first review with the witness the pathophysiology of the disease process in question. It is essential to highlight the potential morbidity and mortality associated with the disease process involved.

   Discussion can then shift to how the risk of morbidity and mortality can be eliminated or reduced with diagnostic tests, interventions, and so on. The next logical step in the discussion is to show how failing to employ the appropriate diagnostic tests, therapies, or interventions can result in preventable injury or death.

[2] DAVID BALL, DAVID BALL ON DAMAGES, 1-10 (3d ed. 2013).

[3] *Id*. at 3.

2. The universal umbrella Rule

At this point, the table has been set for one to elicit a concession from the defendant healthcare provider regarding what David Ball calls the umbrella Rule for every case: "A doctor is never allowed to needlessly endanger anyone."[4] You will find that no credible witness will deny this obvious Rule; if he does, he will look foolish.

3. The case-specific Rules

Now the time is right to launch into a discussion about the specific Rules for patient safety that apply to your case. As an example, a case was recently litigated by our firm that involved a baby who suffered a preventable brain injury from neonatal hypoglycemia after a premature discharge home from the newborn nursery. Working in conjunction with our experts, we developed the following Rule for patient safety (which defendants' experts agreed to):

> No doctor or hospital is allowed to discharge an IUGR baby who has demonstrated hypoglycemia until he has proven his ability to maintain a normal blood glucose level on oral feedings alone.

Once this Rule was established, the case was, for all intents and purposes, over, because the baby clearly could not maintain his blood sugar on oral feedings alone. The hospital had prematurely discharged the baby in violation of the safety Rule, and the baby suffered a preventable brain injury.

III. Choices Trump Failures

It is always best to portray the conduct of the defendant in terms of volitional choices that were made, rather than mere omissions. Rather than asking:

- Did you order any tests to rule out [fill in the blank]?

Ask instead:

- Even knowing that there was a potential for [fill in the blank], you chose not to perform any tests?

It is even more helpful if one can show a series of choices that were made by defendant that endangered patient safety.

[4] *Id.* at 12.

In a case of failure to diagnose and treat acute coronary syndrome, rather than ask: "Is it true that you ordered no tests?," ask a series of questions like:

- You chose not to order an EKG parentheses or follow-up EKGs, didn't you?
- You chose not to order cardiac enzymes or follow enzymes, didn't you?
- You chose not to even put the patient in a monitored bed in a telemetry unit, didn't you?
- You chose not to do any tests at all, didn't you doctor?

When the inactions of the defendant are portrayed as a series of choices that endangered patient safety, this will have a much greater impact on the jury than a simple "failure to test."

IV. Logic and Common Sense as Sources for Rules

Concepts of logic, common sense, the patient's right of autonomy, and being involved in decision-making processes that affect him should also be utilized as the basis for Rules for patient safety. Defense experts will often deny that a particular action or inaction violated a standard of care, because there are no published guidelines that proscribed such action or inaction. A good cross-examiner will note that not every situation that may arise in medicine can be envisioned in a textbook or published standard. The lack of published standards does not mean that there are no Rules to protect patient safety. On the contrary, most medical malpractice cases involve situations that are not governed by published standards. What a dangerous world it would be if there were no Rules for patient safety other than those few which are published in medical textbooks!

Most defendants will agree that when dealing with a potential diagnosis that carries a significant risk of morbidity or mortality, the Rules for patient safety and the standard of care require a very high level of caution to avoid that risk. The higher the risk, the greater the need to adhere to a strict standard for patient safety.

V. The Patient's Right to Decide

Concepts of patient autonomy and the right of patients to be informed of choices that are available to them with respect to how their medical care will be managed can serve as the basis for Rules. Not infrequently, situations will arise where there may be more than one school of thought regarding how to tackle a particular medical issue. By way of example, in a case where an obstetrician is contemplating an operative vaginal delivery for non-reassuring fetal heart tones, a Cesarean section is often an available option as well. In situations where there are two or more options, each of which would be within the standard care, most defendants will agree that the patient deserves the right to be informed of her options and to participate in the decision as to which option she will select for her delivery. Jurors do not look kindly upon physicians who deprive patients of their rights of autonomy, self-determination, and the right to participate in important decision-making processes.

VI. The Recalcitrant Expert

It is not unusual to encounter defense experts who refuse to acknowledge that anything ever violated a standard of care. When dealing with such recalcitrant experts, a number of questions can be asked that will elicit answers that jurors will view as tantamount to an admission of negligence. For example:

- Doctor, do you agree that there are no published references anywhere in the world's medical literature that recommended doing what this defendant did?

- Doctor, do you agree that this is an approach that you never would have utilized?

- Doctor, wouldn't you agree that the margin of patient safety could have been increased if the defendant had conducted himself differently?

If the defense expert will not admit a violation of the standard of care, answers to these questions will serve you well. The jury will get the point.

VII. Two Standards of Care

Michael Koskoff, a great trial lawyer from Connecticut, sadly passed away very recently. Koskoff often spoke about how jurors might become confused when the plaintiff had his or her version of the standard of care, and the defendant had an entirely different standard. Koskoff would tell the jurors that, in effect, there were two standards of care, and it was up to the jurors to decide which one to adopt. Of course, the defendant's standard of care led to the disastrous outcome that resulted in the lawsuit. The plaintiff's standard, on the other hand, would lead to a better outcome. Michael Koskoff brilliantly empowered the jury to make the right choice.

VIII. Conclusion

By utilizing the concepts espoused in "the essential trilogy" and working hard with your colleagues and experts, Rules can be formulated that will help you overcome "the three horsemen of defeat" and secure victory for your client.

A TRUCK CASE WALKS IN THE DOOR: FIRST STEPS IN TRUCKING LITIGATION[1]

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I. Introduction: Truck Cases Are Different

Truck crash cases are not the same as passenger vehicle accident cases, even though some aspects are similar. These unique aspects of a truck case, however, can be used as an ally for the plaintiff. This paper will discuss some of the main issues that make a truck crash case different from a car wreck case, namely: the "Rules" of the road; the available evidence; the "players"; and the potential experts.

II. The Rules of the Road for a Trucking Case

The myriad of rules and regulations that apply to interstate truck drivers and trucking companies is probably the primary factor that makes a truck case different. The Federal Motor Carrier Safety Regulations (FMCSRs) and the Commercial Driver's License (CDL) Manual are two key sources for the rules of the road applicable in trucking cases. A solid understanding of these safety rules is essential so they can be appropriately applied in a trucking case.

In every case a trial lawyer handles, liability is essentially established by proving that the defendant failed to exercise reasonable care. There is probably no better way of doing so than employing the Rules model.[2] Truck crash cases are particularly well-suited for application of the Rules concept, largely because of the extensive safety rules and regulations that exist for truckers and trucking companies. An attorney handling a trucking case must be well versed in the

[1] This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Advanced Trial Advocacy College: Litigating Truck Collision Cases*, Scottsdale, AZ, Oct. 2015.

[2] *See* RICK FRIEDMAN & PATRICK MALONE, RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY (2d. ed. Trial Guides 2010).

FMCSRs in order to understand the potentially applicable duties the FMCSRs place on truck drivers and trucking companies.

The FMCSRs are found at 49 C.F.R., Parts 350–399. Although the "full" FMCSRs are voluminous, the bulk of the regulations relevant to truck crash litigation are in six parts: driver qualifications (Part 391); issues related to the Rules (Parts 383, 392, and 395); and equipment, inspection, repair, and maintenance issues (Parts 393 and 396). Four other potentially relevant sections may apply in special situations: 1) drug or alcohol testing[3] (Part 382); 2) insurance coverage or MCS-90 endorsement issue (Part 387); and 3) hazardous materials (Part 397). These rules are available online[4] and can be sorted and searched.

Rules from FMCSRs typically provide a broad, general statement of a rule. Additional details can sometimes be found in a Federal Motor Carrier Safety Administration (FMCSA) brochure.[5] The state CDL manual, on the other hand, provides more situation-specific rules. Prior to obtaining a CDL, a driver must, inter alia, pass a written knowledge test and a skills test. The state CDL manual serves as the would-be trucker's study guide for passing these tests. Therefore, a working knowledge of the CDL safety concepts is valuable during the evidence gathering and discovery stages of a trucking case.

Most of the current state CDL manuals are identical and based on the FMCSA "Model" CDL Manual.[6] Thus, although the citations in this paper reference the Indiana CDL Manual, the state CDL manuals are either exactly or substantially the same from state-to-state.[7] Most can be retrieved online in electronic format. Pursuant to 49 C.F.R. §383.131, the rules in the CDL manual are also arguably incorporated in the FMCSRs. Moreover, in practical terms, if the concept is in the CDL manual, truckers virtually always acknowledge and accept the rule.

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[3] 49 C.F.R. § 382.303 (a drug and alcohol test is required after every accident, perhaps making it an issue in every truck crash case). Other sections in Part 382 may or may not arise, such as testing pre-employment, random testing, testing upon reasonable suspicion, and so forth. *See generally* 49 C.F.R. § 382.

[4] *See* FED. MOTOR CARRIER SAFETY ADMIN. REGULATIONS, *available at* www.fmcsa.dot.gov/regulations.

[5] For example, the FMCSA publishes brochures on hours of service and conspicuity; these brochures and others are generally retrievable online by searching "FMCSA" and the relevant concept.

[6] *See, e.g.*, FED. MOTOR CARRIER SAFETY ADMIN., COMMERCIAL DRIVER'S LICENSE MANUAL, *available at* www.fmcsa.dot.gov/registration/commercial-drivers-license/commercial-drivers-license-manual.

[7] *Id.*; *see also* the Commercial Motor Vehicle Safety Act of 1986, which establishes the minimum national standards to be met before a state can issue a license to a commercial motor vehicle operator.

III. Evidence in a Trucking Case

Beyond the FMCSRs and safety rules in the CDL manuals, handling a trucking case also involves unique evidence. As such, the initial investigation and evidence gathering will be different. In addition, because of the vast evidence potentially available, a systematic, proactive approach to evidence preservation is beneficial.

1. Initial investigation and evidence gathering in a trucking case

    a. Investigating officer's assessment: As with passenger vehicle crashes, the officer usually will note the conditions and contributing factors related to the crash. In most cases, the officer will prepare a narrative or a diagram that can serve as a "rough" reconstruction of the crash. For crashes involving serious injuries or death, there may be a more extensive investigation by the responding agency (in Indiana, for example, it is not uncommon for the police investigation to include extensive measurements, photogrammetry, and a comprehensive crash reconstruction). If so, follow-up with the investigating agency to obtain the reconstruction report, notes, and any photos or other data recorded and collected. Also understand that any reconstruction—whether favorable to your case or not—can be subject to error and attack, and should be verified by your own reconstructionist. With or without a reconstruction, be sure to request any field notes of the responding officer, which may obtain additional information not included in the officer's report.

    b. Photos: Even when there is no formal crash reconstruction, the investigating officer may take photos. Check the crash report to see if photos were taken, and be sure to request them.

    c. Post-crash department of transportation inspection: A full roadside inspection of a tractor-trailer is customarily performed following a CMV collision. This report is then provided to the driver, who must, in turn, deliver the report to the motor carrier. The inspector will list any violations on the report. Although some violations will clearly be the result of the crash, others may have caused or contributed to the crash (e.g., in a case where the truck rear-ends a vehicle: headlights smashed versus brakes out of adjustment). Request any such report from the carrier.

    d. Driver name and address: You will need this to serve your representation letter. This information will also tell you if the driver is a state resident, which is pertinent for diversity issues.

    e. Commercial motor vehicle information: This is probably the most pertinent information you want to get from the Crash Report. This section identifies the name and address of the commercial motor vehicle carrier, identifies the carrier by name, and provides the USDOT and ICC numbers. Input either of these

numbers at www.safersys.org to obtain a wealth of information about the carrier, including insurance, safety status, and violations history.

In some cases, the insurance carrier for a defendant will dispatch a field investigator or attorney to the scene of the crash fairly quickly. It is not uncommon for a defense attorney to be assigned to a case within hours—or even minutes—of a truck crash. The opportunity to be involved in a case very early is one we plaintiff's lawyers are usually denied—which is why a quick investigation in a truck crash case is ideal. In addition, although a defendant may resist a discovery request related to its initial investigation, the factual information the defendant or its experts obtain from the scene is discoverable and will have to be shared.

2. Evidence preservation

The importance of preserving the tractor-trailer and any related equipment following a truck crash cannot be understated. Attorneys handling truck cases know that when it comes to inspecting the tractor-trailer, sooner rather than later is the rule. Unfortunately, however, an immediate inspection is not always an option. So every truck crash litigator should have a spoliation letter as a resource to put everyone who may have an interest in the case on notice to preserve relevant evidence.

The spoliation letter should be sent to the truck driver, the trucking company, the insurance carrier, and any other potential defendant, advising them to preserve the tractor-trailer and all related equipment and evidence. Advise these parties of your claim, and describe the documents, inspections, and other discovery you will be initiating. Conclude with a clear notice that any failure to maintain evidence will result in a claim for spoliation.

The purpose of the spoliation letter is to affirmatively put a defendant on notice to preserve evidence material to your claim. A party has a duty to preserve material evidence when the party knows or should know the evidence is related to a pending or potential legal claim.[8] After the defendant is put on notice, "it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[9]

The spoliation letter takes on an increased level of importance in a trucking case because commercial motor carriers may employ a policy of destroying documents once any retention period expires (which may be before the expiration of the statute of

[8] *See, e.g.*, In re Kmart Corp., 371 B.R. 823, 842 (Bankr. N.D. Ill. 2007).

[9] *See, e.g.*, Zubulake v. UBS Warburg (Zubulake IV), 220 F.R.D. 212, 218 (2003).

limitations).[10] Absent a spoliation letter, a trucker or trucking company is in a better position to argue that it could not have reasonably foreseen potential litigation. Remove this argument and send out a spoliation letter as soon as you get the case.

In addition to the spoliation letter, prepare a petition for a temporary restraining order or a motion for a protective order as an additional step to put the trucking company on notice of its duty to preserve the evidence. Although the spoliation letter, in theory, should be sufficient notice, trucking companies and lawyers sometimes refuse to preserve evidence absent a court order. Kindly oblige these folks and file your petition or motion. As with the letter, ask for an order that the trucking company and trucker refrain from destroying any relevant evidence.

If the trucking company and the driver destroy material evidence in your case, you are left with a spoliation claim. In the case of spoliation, many courts recognize an evidentiary inference in the form of a jury instruction that allows the jury to presume the destroyed evidence was harmful to the case of the party who controlled the evidence.[11] Such an instruction, of course, can be powerful because a certain level of malice seems to be automatically attributed to the party who destroys evidence. The evidentiary presumption thus opens the door for the jury to conclude the missing evidence was more harmful than it actually may have been.

When filing suit in trucking cases, sooner rather than later is preferred since it can be a tremendous aid in enabling the preservation of the tractor-trailer and related equipment. Once a lawsuit is on file, there can be no question that litigation is imminent, thereby attaching a duty to preserve evidence. Moreover, the equipment inspection can go much smoother when a lawsuit is on file, for a variety of reasons.

Trucking companies, for example, are very much interested in repairing a truck and getting it back on the road, which may cause problems when you request that it preserve equipment. With a lawsuit on file, you can simply file a motion for a protective order. Similarly, you may run into problems with the trucking company cooperating with setting up an equipment inspection. Once you file a lawsuit, often a lawyer who handles trucking cases will get involved, and can be a great asset in coordinating the inspection. He or she will also be able to retain a defense expert to attend the inspection, so there can be no claim that the inspection was not fair or arranged without the trucking company's expert present. Finally, filing a lawsuit enables you to proceed with the formal discovery process above and beyond the equipment inspection.

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[10] For example, C.F.R. § 395.8(k) requires a trucking company to keep the driver logs and the supporting documentation for the logs for just six months.

[11] *See, e.g.*, FED. CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, § 1.20, Spoliation/Destruction of Evidence (2009); IND. MODEL CIVIL JURY INSTRUCTIONS, Instruction No. 535 (Ind. Judges Ass'n 2014).

3. Tractor-trailer equipment inspection

One of the primary reasons for preserving the tractor-trailer and other evidence in a truck crash case is the eventual inspection of the equipment. An inspection of the tractor-trailer following a truck crash can be very useful. As the FMCSA warns, poorly maintained or operating vehicle equipment can significantly cause or contribute to a crash on the roadway.

The FMCSRs that relate to tractor-trailers and equipment provide the safety framework under which all commercial motor carriers must operate by specifying that all trucking companies "shall systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles subject to its controls."[12] This general duty of a trucking company to maintain its vehicles in good working order includes a duty to maintain repair records and inspection reports, the duty to maintain driver reports, and a duty to make periodic inspections of each vehicle. Beyond the FMCSRs, the state CDL Manuals are also a good resource since almost all describe in detail the seven-step process a trucker must follow for tractor-trailer inspections.[13] Not only will these resources help with understanding inspection procedures, they are also useful for developing Rules of the Road that are important in a trucking case.

In addition, a truck inspection can also yield useful information from data recorded on board. Electronic data recorder modules can be downloaded and contain information such as driver speed, throttle percentage, cruise control usage, braking, and GPS positioning. Some trucks also have a radar installed that records additional information about the tractor and any vehicle ahead of the tractor. The radar will record how far ahead a "forward vehicle" is in relation to the tractor in both time (in seconds or fractions of a second) and distance. Using GPS, the radar will also record the speed of the forward vehicle. This information can be very useful in a case where a truck rear-ends you client's vehicle.

IV. The Players in Truck Crash Cases

The proverbial "players" are also different in a truck case. Although the truck driver is obviously a key witness, there are other witnesses who may also be useful in the case. After the truck driver, the truck company safety director is arguably the next most important witness.

The safety director is the most probable witness for a 30(b)(6) deposition of the truck company. The issues to cover with the safety director include: facts related to the crash and investigation of it; the background check and hiring of the truck driver; the management and supervision of the

[12] 49 C.F.R. § 396.3.

[13] *See, e.g.,* INDIANA COMMERCIAL DRIVER'S LICENSE MANUAL, §2.1.

trucker; any complaints, grievances, or discipline involving the truck driver; and the monitoring of the truck driver to ensure hours of service compliance, vehicle locations, and safe driving practices.

After the safety director, the dispatcher may also be a key witness. The dispatcher is generally the employee on the "front line" line who communicates the most with the truck driver. The dispatcher, therefore, may be able to add pertinent information about, e.g., the trucker's driving habits, cell phone use, and the ability to meet deadlines. A dispatcher's responsibilities may also include reviewing driver logbooks, monitoring weather when scheduling a "run," and keeping tabs on the repairs and functionality of the trucks. As such, depending on the case and the issues, the dispatcher could be a significant witness.

Additional potential players in a truck case after the driver, safety director, and dispatcher will depend on the truck company and the case issues. Large trucking companies may have specialized positions for things such as custody and maintenance of company records, and knowledge and training of drivers regarding the FMCSRs. These employees can become relevant witnesses if, for example, there are spoliation or FMCSR compliance issues.

A medical examiner may also be able to provide pertinent testimony. This will depend on whether the truck driver's physical health or fitness is at issue. Truck drivers are required undergo a medical exam conducted by a physician every two years,[14] and the completed form, signed by the physician, should be in the driver qualification file with the company. Thus, in cases where a driver's fitness may be at issue, a deposition of the medical examiner may also be warranted.

V. Expert Witnesses in Truck Accident Litigation

1. Consult with experts early for equipment inspection

   Contemporaneous with the arrangement of the equipment inspection process, potential expert witnesses will be needed to perform the actual inspection of the truck, and to download and interpret on-board vehicle data, if any. A trucking consultant to perform the inspection—preferably someone with experience as a truck driver—and a crash reconstruction expert are potential experts needed for the equipment inspection and case analysis. Provide any such experts with the details of the case, including any initial evidence accumulated, such as police reports, photos, etc., and use your consultant's expertise to assist with formulating an inspection strategy.

   To the extent available, also provide experts with any repair and maintenance records. The pre- and post-trip inspection reports, periodic inspection forms, and maintenance records are an integral part of a tractor-trailer inspection, along with any information that can be retrieved from Qualcomm, GPS, and engine control module (ECM) "black box"

[14] 49 C.F.R. § 391.41.

devices. Ideally, all of this information would be available to a consultant prior to his or her inspection of the tractor-trailer. Although obtaining this information in advance of the inspection is not always possible or practical, provide it to your experts once acquired.

2. Schedule and attend the inspection with your expert

As a part of the process of scheduling the truck inspection, discuss with the experts the case issues and inspection logistics. Plan on a broad, comprehensive inspection, but discuss any important aspect of the case that may warrant some items getting closer attention. When serving a request to produce the tractor-trailer for inspection, include in the pleading language advising you will be inspecting the entire truck, including everything on the exterior and interior of the tractor-trailer. You may find records or other interesting evidence the driver stores in the cab or sleeper birth.

If possible, attend the inspection yourself, and bring a camera to take any photos beyond what the experts take. Consider any or all of the following at the inspection: sit behind the wheel and get a view from the seat; look for any electronic "toll pass" device for toll roads; make note of any computer, GPS device, cell phone mount, CB radio, or other potentially distracting communication devices in the cab; and look in all storage compartments and the sleeper berth.

After the inspection, meet with the experts to discuss the findings. Any items of significance should be covered in detail. After covering the inspection findings sufficiently, explore with the experts pertinent questions they may want answered by the truck driver, safety director, or other witness in a deposition.

The deposition of the truck driver is an opportunity to give tangible meaning to the inspection findings. But before getting into any examination about the inspection, lay a foundation with thorough questioning about the trucker's knowledge of the inspection process, the record keeping requirements, and the trucker's related duties and responsibilities. Ask the truck driver about each step of his or her inspection—the 7-step process described in the CDL manual is a good guide for this. Cover each step of the trucker's inspection in detail, including asking how long each step takes.

Get the trucker to admit the Rules applicable to tractor-trailer inspections, such as: all drivers must perform a pre-trip and post-trip inspection; if a driver finds any problems with the tractor-trailer, then the driver cannot put the vehicle on the roadway; a tractor-trailer with problems found in the inspection can be dangerous; a tractor-trailer on the roadway with lights that are not working properly can be a danger to other motorists; etc. Develop the rules you think are appropriate depending on facts of your case. After laying the foundation with the trucker's knowledge about inspections, equipment, and the applicable Rules, the driver is ripe for cross-examination on your expert's findings, the maintenance and inspection records, and the log books.

3. Crash reconstruction

After inspecting the tractor-trailer and deposing the truck driver, confer with your expert witnesses again. Share with your experts the transcript of the truck driver deposition, along with any additional documents obtained through discovery. If the expert has already prepared a preliminary crash reconstruction analysis, you can discuss how the new testimony fits or does not fit with the expert's original findings. Otherwise, discuss the expert's thoughts and approach to a crash reconstruction given the driver's testimony.

Obviously, a commercial motor vehicle is much more complex than a passenger car. It has different controls, operates differently, and can come in numerous sizes, shapes and weights. Reconstructing a truck crash must take into account not only the physical evidence involved, but also the operational capabilities and limitations of the applicable tractor-trailer.

Beyond the evidence the defendant controls (listed in your spoliation letter), your reconstruction expert may also want the additional information available from other sources, such as the crash report; scene photos; scene measurements, including impact and final rest positions, scuff marks, yaw marks, and so forth; tow company records; vehicle photos and crush measurements; the responding officer's investigation file; reports of medical responders; and witness statements. Work together with your expert to decide what evidence he or she needs, and what you want out of any crash reconstruction.

4. Medical experts

Medical experts, as in auto cases, are invariably needed for the damages side of the case. In many cases, however, the injuries are more extensive, and therefore, additional medical experts may be needed. After all, when an 80,000 pound tractor trailer and a car collide, the car is invariably the loser. As such, it is not out of the ordinary to have a client with lifelong, debilitating injuries, such as a traumatic brain injury or spinal cord injuries. As such, neurologists, neuropsychologists, life-care planners, and economists can be common in a truck crash case.

VI. Conclusion

Truck crash cases are unique. They are not just "big car wreck" cases. Years ago, I heard an experienced attorney tell the listeners at an AAJ seminar, "If you treat a CMV case the same as a car wreck case you are committing legal malpractice." When I heard this remark, my gut reaction was that the attorney was overstating the matter to make a point. Having handled trucking cases over the years, however, I appreciate the comment as more truth than overstatement.

USING 30(B)(6) DEPOSITIONS TO AID EMR DISCOVERY[1]

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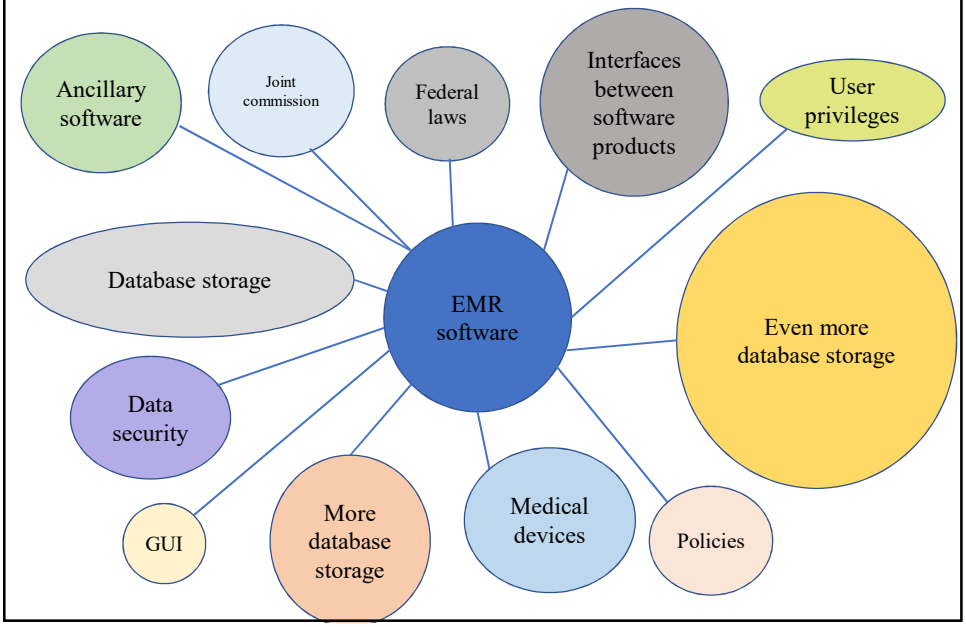
[1] This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Advanced (30)(b)(6) Seminar: The Most Powerful and Underutilized Tool*, Washington, DC, Nov. 2018.

EMRs, Audits, and 30(b)(6)



How Does Auditing Work?

- Like surveillance
- For every access, every touch to the record, there is a recording of that action
- Those being watched never see the watcher
- Surveillance records not visible to those being watched

Discovery of Audit Data

Reasons to Take a Corporate Representative Deposition

- If you already have some audit reports, and you want someone to lay a foundation for them and help you interpret them
- If you want audit information and you are getting the runaround about your requests
- Before you send requests, to learn about the system set-up
- To show what you received is not a complete response to your requests

Rule 30: Depositions by Oral Examination

(b) Notice of the Deposition; Other Formal Requirements

(6) *Notice or Subpoena Directed to an Organization.* 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.

Rule 30: Depositions by Oral Examination (cont.)

- Can notice deposition of a corporation
- Must describe topics with "reasonable particularity"
- Corporate entity must designate witnesses to testify on its behalf
- Witnesses must testify about information *known or reasonably available to corporation*
- Witnesses will bind the corporation by their testimony

The Witness

- Need not be the "person most knowledgeable"
- Need not have personal knowledge of the information
- Need not be an employee or officer of the corporation
- Can be a consultant hired for this purpose
- May not be properly prepared
- Do your own research
- Employee versus consultant witnesses

The Notice

- Must describe topics "with reasonable particularity"
- Be specific
- Majority interpretation is that questioner may exceed the scope of the notice
- Group topics into separate notices if your jurisdiction has a time limit on depositions
- NODDT—ask for materials they reviewed in preparation

EMR and Audit Topics

The Right Questions

- Words matter: “you” versus “the corporation”
- Information known to the organization
- The organization’s position
- Ask about preparation:
  - With whom?
  - How long?
  - What was reviewed?
- Ask about efforts to produce documents requested in the notice

The Unprepared or Evasive Witness

- Notified late of deposition
- Never shown the notice
- Not given access to the materials or people needed to become knowledgeable
- Encouraged not to bring materials requested in the notice
- Relying on personal knowledge as opposed to institutional knowledge
- Answering evasively about things they should know
- Answering about what he personally knows or does not know

Handling the Unprepared Witness

- "I don't know" is not an acceptable answer in this type of deposition
- Review the notice topic by topic
- Explore any areas about which he is not prepared and press him about each
- Establish his obligation as a corporate representative
- Set up your motion for sanctions in the deposition

Sanctions

- *"Where a deponent is unable to give adequate answers to questions during a corporate representative deposition and conducted minimal review of the deposition notice, such conduct is sufficient to warrant sanctions."*
- *Black Horse Lane Assocs., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304-05 (3d Cir. N.J. 2000) (noting that permitting this type of activity would be equivalent to encouraging dilatory tactics).

Sanctions (cont.)

- *"Corporate representatives unable to testify on designated topics have warranted sanctions of payment of attorney fees and costs, as well as limiting the violating party to information presented at deposition with no opportunity to take a different position at trial."*
- *Aldridge v. Lake County Sheriff's Office*, 2012 U.S. Dist. LEXIS 102514, at *12, 15 (N.D. Ill. July 24, 2012). *See also, Black Horse*, 228 F.3d at 281.

Use Your 30(b)(6) to Overcome Objections

Overcome Objections

- We don't have that, it doesn't exist
- We don't know what you're talking about
- Not relevant—not related to medical care
- Not part of the medical record
- It is privileged
- No data was recorded by ____ program(s)
- We were not required to record it then
- Too costly or burdensome to produce
- It is proprietary; we are not allowed to produce
- Audits are managed by a third-party, we cannot access them
- We upgraded to a new system, and the data is not available
- Software system is proprietary or confidential

How Do You *Know* the Audit Trail Exists?

- HITECH Act requires it
- HIPAA requires it
- §80 FR 62751 requires it
- 21 C.F.R. 10.11 and 10.30 require it
- Audit trails are also included in the 2015 Base EHR definition, which CMS is adopting in its regulations for "meaningful use." (§80 FR 62662)
- Federal laws provide penalties for not meeting requirements
- Joint Commission requires it (IM.2.20: information security and data integrity is maintained)
- Hospital policies require it
- EMR systems record it automatically
- There is no other way to verify the integrity of the record

It's Privileged (No, It's Not)

- Remember:
  - Auditing is *automatic*. That means it is kept in the *ordinary course of business.*
  - It is required by federal law. That means it is not part of peer review or quality assurance.
  - It is information about your client's chart.
  - It is created by the computer, not an attorney.
  - It does not contain mental impressions of an attorney.
  - It is objective metadata about the record, not an attorney's work product.

FINDING NEMO (NUCLEAR EVIDENCE MINED OUTSIDE DISCOVERY)

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I. Introduction

Do you ever feel like the formal discovery process is a waste of your time for getting information from defendants? You or your associates or paralegals spend hours drafting interrogatories, requests for production, and requests for admission to send to the defendant. The defendant calls, asking for an extension of time to respond, sometimes two extensions. When the discovery finally arrives, rather than finally getting the information you need to prove your case, all you get are strings of ever more creative objections to producing *anything*. You write a good faith letter. Nothing. You file a motion to compel which is set for hearing months after the discovery was due. After the hearing where the judge orders everything produced, opposing counsel will not agree to your order. You wait for another hearing on the form of the order. The order finally gets entered and . . . *they still do not produce the important stuff*.

It is this nightmare process that has my young associates questioning why I make them comply with the rules and answer, rather than object to, the defense discovery.

"Why should we comply with the discovery rules, when the other side never does?" some have asked.

The short answer is that you should never allow the other side's conduct to dictate your own behavior. The more complex answer is that when you are arguing your motion to compel, you can point out that you answered the very same discovery question that the defense sent you, but then they objected when you asked them the same thing. This helps establish credibility with the court.

Discovery obstruction is dangerous for either side, but may sow the seeds of their own destruction for defendants. Because we can now ferret out lies using the greatest investigative tool ever invented—the Internet—the defendants may be sanctioned or prohibited from using information at trial, that they finally figured out they might need (but did not produce in discovery). In one of our worst-case scenarios, a large corporation insisted it had no insurance, but was self-insured. The corporation maintained this position through three motions to compel and the eventual eight-figure jury verdict. It was only when the corporation was threatening bankruptcy and brought in a trustee, that we finally learned it had multiple levels of insurance coverage it had kept hidden. The huge problem for the company and its lawyers was that it had

not put any of the insurance companies on notice of the lawsuit, settlement discussions, or the verdict.

Arggggghhh! Enough of my rant. I know you have been there too.

Do not get mad. Get even by finding the information the defense is hiding from you in other places outside the discovery process. Then you can decide whether to disclose what you find or save it to use for impeachment.

II. Go to the Scene

There are things you learn by going to the scene of a collision, a doctor's malpractice, an act of workplace violence, or almost any other tort that you cannot learn through photos, video, Google Earth, or an interview of the client in your office. Early in the case, even before you file suit, you should go to the scene and stand in the place where the misconduct happened to your client. The sooner you can get there, the better.

Standing at the scene has helped us discover the following:

- The presence of video or security cameras which recorded the events
- That a witness could not possibly have seen the events, because there was a fence between her and the crash
- Police officers running a stop sign on the road to the jail
- How dark a place really was and how a person would be backlit and could not be identified
- What it is really like to work underground in a mine
- How close the crash cart was to the room where your client coded

III. Taped Investigator Interviews

What is better than a sworn deposition? Your one-on-one interview with the witnesses in the case and the as-yet-unrepresented potential defendant. These should be done before you file suit and with the presence of an investigator who can tape the conversation. The interviewee should be informed on tape that you are tape recording this for his or her own protection. Why do you take or send an investigator? Because you cannot testify and authenticate the taped statement or contradict what the witness said if that person changes his or her story.

IV. Sit Down with Police and the Office of the Medical Investigator (OMI)

Among the first persons you should interview in a collision case are the investigating officers. The earlier you can conduct the interview, the better—before other investigations have clouded their memories of this particular crash and the witnesses. As public servants, the police will freely talk to either side. You want to be the first to speak with them. Again, you want the statement tape-recorded by an investigator.

The other public employees who will speak with you are the coroners or forensic pathologists who perform autopsies and determine cause of death. Much of their investigation is not contained in the autopsy report. A sit-down across the table will help you learn the forensic science in a way you can explain it to the jury. OMI can steer you to articles, diagrams, and depictions to help you understand and teach what you have learned. If you ask, OMI may also give you access to the non-public part of the file with its investigator's notes, photos taken of the scene and during the autopsy, and statements of witnesses that will not be contained in the police report.

V. Freedom of Information Act Requests

If your defendant is a governmental agency or if you need information in your case from any governmental agency—think police departments, licensing boards, disciplinary or investigative bodies, highway department, Department of Transportation, federal agencies—you can obtain information even before you file suit through a Freedom of Information Act (FOIA) Request. The federal FOIA is found at 5 U.S.C. §552 (1966), but you should check to see if you have a state FOIA as well. In New Mexico it is the Inspection of Public Records Act (IPRA) and is found at N.M. Stat. Ann § 14-2-1 (2006), *et seq*.

The federal and most state acts are based on the sound democratic principle that members of the public should be allowed transparent access to the records that reflect the work of the government. The triggering mechanism is easy. You or your client (if you want to keep your representation on the down low before filing suit) just write a letter invoking the Act and requesting the documents. I have attached sample letters under both FOIA and New Mexico's IPRA. The law requires the agency to respond with the records within a reasonable time period. The best news is that the failure to produce within a reasonable, timely manner gives the requesting party the right to bring a separate lawsuit to enforce production through an injunction by the court. If production is ordered, the court awards attorney fees and costs. N.M. Stat. Ann. § 14-2-12 (2006).

VI. The Internet

The "great equalizer," particularly for sole practitioners or small plaintiffs' firms with limited resources, is the compendium and source of all modern knowledge, the vast electronic oracle—the Internet. A repository of riches, most of us who are not teenagers only scratch the surface of information available within its electronic borders. We go to Google, enter a word or two, hit

return, and then look only at the first page of results or give up if there is too much that is not relevant in our search. There is a better way to find the information you need to prove your case.

First, there are more search engines than Google, each of which yields different results. If you would use more than one search engine if you were about to go out on a date with a stranger you met online, perhaps you should do the same when looking for information for your case. The top five in the United States are as follows:

- *Google* (70 percent of market share)
- *Bing*
- *Yahoo*
- *Ask.com* (formerly AskJeeves.com)—unique because of its question and answer format; it favors expertise over popularity and is typically a more reliable source of information
- *DuckDuckGo*—the search engine that promises not to track your data and does not bombard you with ads

The next three save time by searching across various search engines:

- *Dogpile*—a search engine that returns results from Google, Yahoo, and Bing, with categories including web, images, video, and even white pages
- *MetaCrawler*—MetaCrawler makes it easy to "search the search engines," returning results from Google, Yahoo, and Bing
- *Mamma*—the "mother" of all search engines to pin down the best resources on the web, which even searches Twitter and job postings

In addition, there are specialty sites that focus on certain categories or types of information. Input the words "search engine" and the area of research you want. There are hundreds of search engines for specific data searches. Here are some examples:

- *Infomine Search Engine*—for scholarly articles by your experts, particularly in the sciences (not to be confused with InfoMine, a search engine about mining)
- *OJOSE* or *O*nline *Jo*urnal *S*earch *E*ngine, is a free search engine accessing many different databases. You can find, download, or purchase journals, articles, research reports, books, and more through this site
- *Microsoft Academic Search*—Microsoft's academic search engine offers access to more than 38 million different publications, with features including maps, graphing, trends, and paths that show how authors are connected

- *RefSeek*—With more than one billion documents, web pages, books, journals, newspapers, and more, RefSeek offers authoritative resources in just about any subject, without all of the mess of sponsored links and commercial results

- *Corporate Information*—Perfect for researching companies, Corporate Information offers an easy way to find corporate financial records

- *EDGAR* Search—The SEC requires certain disclosures that can be helpful to investors, and you can find them all here in this helpful, next-generation system for searching electronic investment documents

- *MedlinePlus*—A service of the U.S. National Library of Medicine, MedlinePlus offers a powerful search tool, and even a dictionary for finding trusted, carefully chosen health information

- *PubMed*—Also from the U.S. National Library of Medicine, PubMed is a great place to find full-text medical journal articles, with more than 19 million available

- *ISBNdb.com*—This website scans libraries all across the world for book information, which can be searched by title, author, or subject matter

- *YouTube*—For videos related to your defendant or expert witnesses

VII. Government Websites

There are now hundreds of government sites that provide information and data on any topic you can imagine. Start with FirstGov.gov, a site which lists 27 million U.S. government state and federal web pages, allowing you to find the ones you want and reach them with a click of the mouse.

Some of the places you might look for information on your defendant or expert witnesses:

- *Corporation Records*—Records in the state where the entity is incorporated may give you the names of owners and corporate officers

- *Trade Names*—Does the company use a trade name, under which it may have been sued or had misconduct reported in the press?

- *Property Records*—What does the defendant own and where? You can even see what the property looks like on Google Earth

- *Occupational Licensing*—A state agency may release all or a part of records concerning:

    - The field of certification for the defendant or expert
    - The status of any license or certificate

- The date the license or certificate was issued
- The date the license or certificate expires
- Complaints, violations, or disciplinary actions involving the defendant or expert

- *Business Records*—Check the Secretary of State's online records, in addition to social networking sites like LinkedIn. You might also try www.hoovers.com, which has a database of millions of companies

- *Tax Records*—For publicly traded or non-profit corporations, tax filings can be a boondoggle of information, showing the interconnection between parent and subsidiary corporations, where most income is generated, and any pending liabilities, including lawsuits

- *Industry Tracking Records*—Some industries are regulated, tracked, or inspected by the federal or state government. Results of the inspections are often available online or by request

To give you an example of what additional information is available for a particular industry, our firm does a lot of semi-truck cases. The trucking industry is regulated by the federal government, which will not license trucking companies without proof of at least $750,000 in insurance on each semi-truck which carries non-hazardous material, and (wait for it) $1,000,000 in insurance on semis carrying hazardous material, which may take out a whole town if released. It tracks violations by truckers at inspection sites. Online, we can learn more about the trucking company than it will ever reveal in discovery.

Insurance information and other basic information about the trucking company can be found at: https://safer.fmcsa.dot.gov/CompanySnapshot.aspx. A deeper dive that reveals the number of violations and crashes by a particular trucking company can be found through the Federal Motor Carrier Safety Administration (FMCSA) Safety Measurement System at: https://ai.fmcsa.dot.gov/SMS/.

As another example, in medical malpractice cases against hospitals, the Joint Commission (formerly JACHO) does regular inspections to accredit 21,000 facilities around the country. In so doing, it collects all kinds of data on infection rates, bad outcomes, and other quality issues, and files reports indicating where medical facilities had deficiencies before your client even walked in the door. Because this data is required to be reported for accreditation purposes, it does not fall under FOIA. Although the Joint Commission website does not carry the full reports, it tells you the dates the inspections or surveys were done, which allows you to request that information in discovery from the facility.

VIII. Do Not Forget Westlaw® and LexisNexis®

We get so used to turning to Google that some lawyers neglect the search engine services we are paying for. Westlaw® and LexisNexis® allow you to search not only legal case databases, but news sources, company and financial information, public records, and specific areas of the law.

Rather than reinvent the wheel before you file your case, wouldn't you like to know:

- Has someone filed a case like this before?
- Did that person win or lose?
- What issues did he or she face?
- Will that person talk to me and share the complaint? Discovery? Thoughts?
- What expert witnesses were used at trial? What experts did the defense use?
- How many times has this company been sued for this same thing?
- Was the company sanctioned for discovery abuses or other misconduct during the case?

All that information and more (including information on expert witnesses) is available through these paid services. Other paid services that may provide information and depositions for medical experts you may want to hire or may face across the courtroom are: MDEXonline (also known as dauberttracker.com).

IX. Finding Deleted Information—the "Wayback Machine"

Hopefully, you will conduct your search of the defendant and any company website *before* you file suit, copying and preserving what you find. If you do not, once suit is filed, someone at the company may scour and erase from the website items that might have helped out your case. Have you lost your chance to obtain that evidence? No. As many a hard-partying college student has found when he or she goes out into the world to apply for a job, everything lives forever on the Internet.

You have a second chance to obtain this information through the digital archive known as the "Wayback Machine," which is found at https://archive.org/web/ or by simply Googling the words "Wayback Machine." Named after the time machine used by Mr. Peabody, a cartoon dog, and his adopted boy, Sherman, this non-profit archive allows you to go back in time and see what was on a website before your collision. It allows you to find archived pages by inputting the web address (URL). A list of archived versions will appear, listed by the dates the version of the website was captured and copied by the archive. Click on the date you want to view and it will pop up, letting you capture what was on the website on that date.

X. Lawyer Listservs

Why have I put this last on the list of places you should look for information when this may have been the first place you thought to look? Because, like you, I have been sitting in my office trying to get a brief out the door when there has been a ping on my computer from another lawyer asking for things like this:

- "I know there is a case about successive tortfeasor, but I cannot remember the name."

- "I am filing my first medical malpractice case. Can someone send me a complaint, discovery, and a sample deposition?"

- "What is the statute about wrongful death?"

Doesn't it make you want to scream? Unfortunately, list servers have become the lazy lawyer's way to investigate and put together his or her case. Let me suggest that you want to go through all the other steps and research first, before you go to the list server to find depositions, sample complaints, and sample discovery that can help you.

XI. Search Basics[1]

How do you maximize your search capability?

If you put in several words in a search, say: *semi-truck underride collisions*, the search will return a lot of documents in four categories: (1) documents containing the word "semi-truck"; (2) documents containing the word "collisions"; (3) documents containing the word "underride"; and (4) documents containing a combination of those words. To limit the number of documents and drill down on what you want, Google, and other full-text search engines permit "Boolean" *and* searches. The Boolean *and* search locates documents in which all of the words are found, and is triggered through the use of the word "and" or quotation marks. For example, to limit your search, you might put the following in the search line: *semi-truck and "underride collisions*." Google assumes you want all the words in the searches for those documents and will narrow the search to documents which contain both terms. If you want to expand your search to include all documents containing either of your words, change the *and* to an *or* between the terms, e.g., *semi-truck or "underride collisions."*

If you must have one term and one of two or more additional terms, include the required terms within parentheses, e.g., *semi-truck* ("*underride collisions*")

Google also allows the use of special terms to further refine searches. You can use the preliminary terms to restrict search results as follows:

- *Define*: Use of this term before a word you do not understand allows you to quickly search for a definition for an unknown medical term or word that is foreign to you. There is no space after the colon in this query format. The query *define:spondylosis*.

- *Intitle*: Restricts search result to web page titles containing the word following the request. Again, there is no space after the colon in this query format. It is useful for searching for web pages for expert witnesses. *intitle:brian mcdonald*.

[1] Everything I know about search terms, I learned from Colorado attorney Richard Demarest at Advocate Resources, LLC, who, on a budget, helps CJA lawyers find the information they need to cross-examine expert witnesses. He taught me these secrets over 15 years ago, when the Internet was still new and provided me the road map to traveling this brave new world.

- *Allintitle*: Restricts the results to those with *all* of the words in the web page title with no space after the colon in this format. *allintitle:brian mcdonald economist*

- *Inurl*: Restricts search result to web page URLs containing the search term. A URL is the "Uniform Resource Locator", i.e., the website. There is no space after the colon in this query format. The query *inurl:Stroke*.

- *Allinurl*: Restricts the results to those with all of the search terms in the URL. There is no space after the colon in this query format. The query *allinurl:stroke prevention TPA*.

TEN RULES FOR AN EFFECTIVE DEPOSITION[1]

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I. Before The Deposition

1. Develop goals for your witness

    a. *Ask*: Where does this witness fit into my case theme or story and what testimony do I need to develop?

    b. All cases should have a theme or story that you must develop with each and every witness.

    c. Will my witness help with any of the following?

        - Establish disputed or undisputed facts (use for MSJ)
        - Establish degree of culpability e.g. reckless or willful and wanton (use for exemplary damages)
        - Enhance my case story or theme (e.g. unexpected hazard; greedy business owner who cut corners; no training)
        - Establish rules of the case—all cases are governed by fundamental rules

    d. Authenticate records and establish business record.

[1] Portions of this paper were first presented at the 2013 AAJ Trial Advocacy College: Depositions, Birmingham, AL, June 2013.

e. Never view any witness as one-dimensional—even a bystander witness can be invaluable to establishing your theme—do not use them as a simple discovery fact witness.

2. Prepare, prepare, prepare

a. Review all cases materials pertinent to this witness

- Discovery responses
- Disclosures (e.g. training manuals or incident reports)
- Witness statements and recorded statements
- Traffic accident report
- Website and internet
- Photos and videos
- If witness has given a prior deposition, get a copy

b. Summarize voluminous records

- You will understand your case better if you summarize medical records and other key liability records

c. Meet with the witness

- If it is your client, meet and prepare thoroughly

- If it is a fact witness, meet and review his or her testimony—bring exhibits to review

- If it is a treating physician, meet and review medical records, let him or her know what issues are in the case and what to expect the focus of defense counsel will be

- If it is your expert, meet and thoroughly review his or her report and file—be sure to ask what concerns he or she has about the deposition

- Let all the witnesses you meet know that it is completely acceptable for you to meet with them, and that opposing counsel is welcome to do the same. You want to pre-empt the "deer in the headlights" look witnesses get when opposing counsel asks them if they met with you in advance of their deposition.

3. Build rules of the case

a. All cases are governed by rules

b. Research to build your rules

- Employee training manual
- Commercial Driver's Handbook
- OSHA
- FMCSR
- MUTCD
- Building codes
- Medical societies
- Industry organizations

c. Use your rules with every witness possible

4. Put together exhibits

a. Show and tell for the jury and the witness

b. Most cases are document driven and you must incorporate them into your story

- Even a document as boring as a contract can be used to tell a story:
    - Where were you when you signed it? Who was present? You initialed each page? Your lawyer was there? A notary was there? You read all the terms? You did not ask any questions? You understood it? You have read contracts like this hundreds of times?

c. What exhibits to use

- Rule sources noted above e.g. OSHA, FMCSR, training handbook
- Photos of the scene
- Google maps of the scene—get an overhead shot
- Have witness create an exhibit (draw for me what the sign looked like)
- Journal articles
- Exemplar photos

d. Getting organized

- Pre-plan sequence of exhibits
- Only copy pertinent pages and title sheet if using lengthy materials
- Print off appropriate number of copies (yourself, witness, and one for each opposing counsel)

- Put each in its own folder or binder clip
- Pre-mark at the beginning of the deposition if you are confident you will use them and know the order in which they will be used
- Get an agreement with opposing counsel to have consecutive deposition exhibit numbers across all depositions
- Always have a marked or highlighted set for yourself

5. Write questions

   a. Create an outline based on topics or chronology

   b. Consider whether you want the witness to tell his "story" before or after you lock him into the rules

   c. If you have very important specific questions, it is okay to write them out and simply read them

   d. If you are going to authenticate a record or establish it is a business record, be sure to have your form questions ready to go—you do not want to miss a step

   e. Use you key phrases or story language whenever possible

      - If you want the mantra to be that a "slow moving" maintenance vehicle in a travel lane of a "high speed" highway is an "unexpected hazard" to oncoming drivers, use these terms as often as possible when questioning all witnesses

   f. Identify your exhibits where you plan on using them

      - This makes it much easier to consistently incorporate your exhibits
      - Include reference to page numbers and highlighted paragraphs

   g. Incorporate short checklist of goals you want to accomplish with the witness and review before you end the deposition

6. Notice deposition

   a. Notice deposition for your office when possible

- Try to get agreement that your witnesses will be at your office and vice versa

- If you are noticing a party deposition of a corporate entity, you may consider doing the deposition at its corporate office, where it will actually have access to its records and computers

- This is especially helpful when there are issues about the extent of discovery

b. Consider whether you want the witness to bring records

c. Think about a video deposition

- Opposing counsel and witnesses tend to be on their best behavior

- If they are not, you have it on film

- These can be used "for any purpose" at trial for parties and 30(b)(6) witnesses (*See* Fed.R.Civ.P. 32(a)(3))

- Excellent settlement tools—you can used video clips in your settlement statement to opposing counsel, an adjuster, or the mediator

- If you create settlement DVDs, deposition clips will be the star of your video

II. At the Deposition

1. Controlling the environment

a. Where to sit

- Arrive early

- Creating the triangle

- Want to create a conversation between you and the witness

- If your client is deposed, you want to be in a position to give him or her a sense of protection

b. Breaks

(1) Call a break or lunch when necessary

(2) After a break can be a good time to ask a witness if he spoke to his attorney, and whether he needs to change or add to his testimony

- This helps lock in witness testimony for trial and impeachment
- If the witness does add or modify, you have that he did so after talking with his attorney

2. Controlling the defense attorney and witnesses

a. Defense attorney

- Objections: form and foundation
- Have your case law and rules ready

b. Controlling the witness

- Mirroring—mirror the witnesses demeanor, speed, and posture
- So yes; so no
- Repeat question
- Toss out garbage and get your sound bite
- If you get a good response, follow up with additional similar questions to bury the witness
- Strike response
- Leading questions
- One fact, one question, and build

3. Specific techniques

a. Exhaust and summarize

- Who, what, when, where, why, how, describe, and explain
- Tell me more

- What else?
- Anything else?

b. Establish rules of the case. For example:

- The Commercial Driver's manual says you do not use the jbrake on ice. Do you agree with that rule? Do you agree it is a safety rule? That it is an important rule? It is important because someone could lose control if using the jbrake on ice? If a driver lost control, someone could be injured? Someone could be killed? You knew this at the time of the accident?

c. Go after recklessness

- If the witness will not agree that the conduct is reckless, consider the back door approach: agree to the elements

d. Take out defenses

- Walk through answer or discovery responses

4. Put the deposition to work

a. Summarize as soon as possible—do this *yourself*!
b. Use as foundation for MSJ
c. Use as settlement tool
d. Designate for trial

AN INSIDER'S VIEW: SECRETS FROM THE MEDIATOR ON MAXIMIZING YOUR CLIENT'S RECOVERY

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A good settlement is better than a good lawsuit.

—Abraham Lincoln

I. Introduction

1. In general

Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial: The Cost of Going to Trial*, N.Y. TIMES, Aug. 7, 2008.

> Note to victims of accidents, medical malpractice, broken contracts and the like: When you sue, make a deal.
>
> That is the clear lesson of a soon-to-be-released study of civil lawsuits that has found that most of the plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less money than if they had taken the offer.
>
> "The lesson for plaintiffs is, in the vast majority of cases, they are perceiving the defendant's offer to be half a loaf when in fact it is an entire loaf or more," said Randall L. Kiser, a co-author of the study and principal analyst at DecisionSet, a consulting firm advising clients on litigation decisions.
>
> Defendants made the wrong decision by proceeding to trial far less often, in 24 percent of cases. according to the study; plaintiffs were wrong in 61 percent of cases. In just 15 percent of cases, both sides were right to go to trial—meaning that the defendant paid less than the plaintiff had wanted, but the plaintiff got more than the defendant had offered.

> The vast majority of cases do settle—from 80 to 92 percent by some estimates, Mr. Kiser said—and there is no way to know whether either side in those cases could have done better at trial., but the findings, based on a study of 2,054 cases that went to trial from 2002 to 2005, raise provocative questions about how lawyers and clients make decisions, the quality of legal advice, and lawyers' motives.

2. Personal injury lawsuits

> According to the most recently-available statistics, about 95 percent of pending lawsuits end in a pre-trial settlement. This means that just one in 20 personal injury cases is resolved in a court of law by a judge or jury.
>
> Quote from lawdictionary.com.

3. Medical malpractice lawsuits

According to the Harvard School of Public Health:

> A published report in 2006 from the Harvard School of Public Health found that 61 percent of medical malpractice lawsuits are settled out of court rather than litigated in a trial. This is a sharp contrast from most general litigation, where 80 to 90 percent of cases never reach trial. Malpractice cases have fewer settlements, primarily because defendants often prevail in medical malpractice suits, and many of the plaintiffs who win recover little or no money.

II. Are Both Sides Really Ready for Mediation?

1. Is it the right time to mediate your case?

   a. The value of "early mediation."

   b. The pending motions dilemma.

   c. Is opposing counsel ready to mediate?

2. Are you prepared for the mediation?

   a. Have you updated any expert reports, including rebuttal reports?

b. Have you updated all of your medical specials?

c. Have you updated your life care plan?

d. Have you updated your economist report?

e. Have you updated your case's cost incurred number?

f. Have you calculated the cost to try the case?

g. Do you have up-to-date lien numbers?

h. Have you "scrubbed" the lien so you know the real amount of the lien?

i. Where possible, do you have agreements in place to resolve the liens?

j. Do you have the "conditional payment letter" or portal screen shot from Medicare?

k. Do you have someone with authority from the lienholder available by telephone?

l. Do you know all of the policies and their limits?

m. Your reputation as a "trial" versus "settlement" lawyer will always precede you at mediation.

3. Picking the mediator

a. What is the track record of the mediator in settling your type of case?

b. Does the mediator know the subject matter?

c. Will the defendant listen—really listen—to the mediator?

d. Is your mediator an evaluator or a facilitator?

- Evaluators: Mediator who decides in advance liability and value, and proceeds to attempt to beat both sides into submission.

- Facilitator: Mediator who expresses no opinion, but promotes information exchange.

- The ideal mediator is a combination of both.

e. Patience is more than a virtue for a mediator; it is a requirement.

4. The mediation statement

a. Consider submitting an edited copy to the defendant several weeks before the scheduled mediation to permit any necessary insurance company reviews.

b. The bigger the case, the farther in advance you need to submit your mediation statement.

c. The insurance company chain of command: The higher the value of the case, the more links there are in the chain.

d. Similarly, recent changes in the plaintiff's prognosis or damages cannot be effectively evaluated at the last minute, and may necessitate postponement of the mediation in order to provide time to proceed up the chain of command.

e. The chain of command issues are even more complex when there are multiple carriers or excess carriers involved.

f. Mediation statement purpose:

- Showing the defendant and the insurance company the strength and value of the case.
- Showing the defendant and the insurance company you are ready and willing to try the case
- Showing the defendant and the insurance company how you will deal with any weaknesses in your case
- Arming the mediator with tools of persuasion: the facts, law, and medicine

g. Highlighted *excerpts* of relevant hospital records and deposition testimony.

h. *Never*, *ever* tell the mediator you "have to settle this."

i. *Never*, *ever* tell the mediator your bottom line

j. Emphasize the jury appeal of your case.

k. Emphasize the lack of jury appeal of the defense's case.

l. Challenging and empowering the mediator: "I chose you because . . . ." "I am counting on you to . . . ."

5. Is the defendant really ready to mediate?

    a. The need to call the mediator in advance of the mediation.

    b. Are any of the defendants raising coverage issues?

    c. Are all necessary consents in place?

    d. If there are multiple defendants, have they agreed upon their respective shares for any offers?

    e. Will people with any necessary authority levels to resolve the case be physically present (not present over the telephone) at the mediation?

    f. Have the defendants raised any impediments to mediation?

    g. Do you have any questions about my case?

6. Is the plaintiff ready to mediate?

    a. The need to meet and prepare the plaintiff for mediation.

    b. Who will speak for the plaintiff at mediation?

    c. Do you have a written agreement as to division of any settlement offers, or a written agreement regarding mediation, arbitration, or a court resolution of any settlement?

    d. The ethical disclosure if plaintiffs are unable to agree.

    e. Review of the process of mediation.

    f. Review of confidentiality and non-binding nature of process.

    g. Strengths and weaknesses of their case.

    h. Settlement value range of their case.

    i. Clear explanation of the meaning of authority to settle.

    j. Expect the low ball initial offer or offers.

    k. Prepare for the “apology.”

    l. Estimated costs of further discovery and trial costs.

m. The power of the math: The net recovery calculations of likely offers versus the potential future verdict.

n. The mediator is not your friend!

o. The danger of exaggeration, histrionics, or personal attacks.

p. Prepare for the long waits.

q. Are they prepared to speak?

r. Be prepared to walk away.

III. Opening Statements: Harmful or Hurtful?

1. As with everything we do: Will an opening statement help or hurt the opportunity for settlement?

2. Does the risk of antagonizing the defendant(s) or their insurer(s) outweigh the benefit you can achieve making an opening statement?

3,. Do I want my clients in or out of the room for either opening statement?

4. If you make an opening statement:

   a. Speak directly to the people who need persuasion, not to the mediator.

   b. Avoid threats, offensive remarks, and demeaning remarks.

   c. Discuss the evidence: The good, the bad, and the ugly.

   d. Acknowledge your weaknesses and explain to the extent you can (without giving away your trial strategy) how you intend to deal with them.

   e. Ask for a chance to respond to anything needing a response.

   f. Your most powerful weapon: "Just the facts ma'am, just the facts," with a particular emphasis on, "I just can't get over" facts.

5. Judicious use of video clips, deposition excerpts, and other demonstrative evidence.

   a. What is it I want to convey with this?

   b. Why am I showing this?

IV. Handling the Stumbling Blocks

1. The single major stumbling block is no, or inadequate, authority. This is the mediator's job. Your job is to make sure in advance the mediator did his job.

2. The second most frequent stumbling block is a lack of agreement between multiple defendants on their respective shares. Again, this is the mediator's job. Your job is to make sure in advance the mediator did his job.

    - Do the defendant(s) need a mediation session in advance of meeting with the plaintiff(s)?

3. A common but flawed defendant approach: "The value of this case is the amount plaintiff may get at trial multiplied by the percentage chance of losing."

    a. There is no empiric standard against which this subjective standard can be measured.

    b. Assumptions as to the value of the case are either partially or wholly subjective.

    c. Assumptions as to the chances of winning or losing are likewise totally subjective.

    d. Comparable verdicts in other cases, while more helpful, are likewise variable.

4. In the end, the settlement value of the case is what your client is willing to take.

V. Sealing the Deal

1. Agreeing on the amount is only part of the settlement.

2. Other items that must be specifically agreed upon to avoid post-settlement conflicts:

    a. How long for payment of agreed-upon sums?

    b. Identity of payees: Special needs trusts, structured settlements, and so on.

    c. Language of confidentiality provisions.

    d. Specialty provisions regarding joint tortfeasor or *pro tanto* language.

    e. Who negotiates the liens?

    f. Who pays the liens?

g. Do liens have to be paid before release of settlement funds to plaintiff?

h. Does defendant or plaintiff control any escrow fund from which liens are satisfied?

i. What form of proof is required by the defendant regarding the “super liens?”

3. Memorializing the terms of settlement—see attached form

Author Index

AAJ Education's Rules of the Road™
for Discovery, Depositions, and Mediations

La Fonda on the Plaza
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May 10-11, 2019

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Telephone No. _____ Fax No. _____

E-mail _____

State Bar Number(s)
_____

State(s) Where Credits Are to Be Registered
_____

Signature _____

*This form should be submitted **directly to your state bar(s)** MCLE/CLE governing board. Please **contact your state** CLE Administrator **prior** to submitting this certificate to verify their self-study eligibility requirements.*