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Cross-Examination at Trial: Strategies for the Deposition

Gary S. Gildin[†]

Abstract

There is a close relationship between deposition and cross examination strategies. In order to conduct an effective cross-examination, certain techniques should be followed when initially deposing a witness. This Article explains these techniques so that even an advocate without trial experience will be able to conduct a deposition that sets the stage for a successful cross-examination at trial.

I. Introduction

"The Vanishing Trial"—the precipitous decline in the incidence of trials in civil cases—has generated lively commentary.[1] Much of the debate focuses on the question of whether alternative dispute resolution mechanisms afford equivalent justice, whether perceived or actual, to the litigants.[2] Insufficient attention has been paid to serious adverse conse-

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[1] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459-570 (2004). Papers prepared for the American Bar Association's December 2003 Symposium on "The Vanishing Trial" are published in the *Journal of Empirical Legal Studies*. *Id.* at 459-984; *see also* Margo Schlanger, *What we Know and What we Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35, 42-50 (2006) (compiling sources of data and articles about the incidence of trials as part of a "Vanishing Trial" Symposium).

[2] *See* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (2009); Joseph F. Anderson, Jr., *Where Have you Gone, Spot Mozingo? A Trial Judge's Lament Over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99 (2010); Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 399-403 (2011); Robert P. Burns, *What Will we Lose if the Trial Vanishes?*, 37 OHIO N.U. L. REV. 575 (2011). Commentators have also criticized the increased disposition of cases on motions for summary judgment. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEG. STUD. 591, 591-626 (2004); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998).

quences to the abilities of the twenty-first century trial lawyer—now retitled "litigator." Obviously, the paucity of hours logged in the well of the courtroom undermines the ability of the advocate to zealously represent the client, should the case proceed to trial.[3] However, without the challenging experience of cross-examining witnesses at trial, the lawyer also fails to gain the skills necessary to conduct pre-trial depositions effectively.[4] Because the fruits of discovery likely form the principal basis for evaluating the case for settlement or advocating the cause in alternate dispute resolution fora, deficiencies in the lawyer's deposition skills will significantly penalize the client whose case is resolved shy of trial.

There are many excellent writings on the art of cross-examination at trial.[5] Likewise, books,[6] articles,[7] and continuing education programs

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[3] *See* Tracy W. McCormack & Christopher J. Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155 (2010).

[4] To be fair, certain deposition strategies may be dictated by the supposition that the case will not proceed to trial. As argued by one commentator, the fact that most civil cases are resolved before trial should alter the conventional wisdom about defending depositions. Rather than prepare the witness to share as little information as possible, the deponent should be encouraged to freely volunteer evidence that demonstrates the strength of the defending counsel's case. Steven Lubet, *Showing Your Hand: A Counter-Intuitive Strategy for Deposition Defense*, LITIG., Winter 2003, at 38. Deposing counsel may also adopt a different strategy in an effort to resolve the case favorably through a motion for summary judgment. *See* Richard J. Gonzalez, *Depositions in the Age of Summary Judgment*, TRIAL, Aug. 2004, at 20.

[5] *See* F. LEE BAILEY & HENRY B. ROTHBLATT, CROSS EXAMINATION IN CRIMINAL TRIALS (1978); JOHN N. IANUZZI, CROSS-EXAMINATION: THE MOSAIC ART (1982); TERENCE F. MACCARTHY, MACCARTHY ON CROSS-EXAMINATION (2007); JAMES H. MCCOMAS, DYNAMIC CROSS-EXAMINATION (2011); LARRY S. POZNER & ROGER J. DODD, CROSS- EXAMINATION: SCIENCE AND TECHNIQUES (2d ed. 2004); HERBERT J. STERN, TRYING CASES TO WIN (1991); FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION (Legal Classics Library 1983) (1904); Irving Younger, *The Art of Cross Examination*, 1976 A.B.A. SEC. LITIG. 1.

[6] *See* DAVID A. BINDER ET AL., DEPOSITION QUESTIONING STRATEGIES AND TECHNIQUES (2001); BRADLEY G. CLARY ET AL., SUCCESSFUL FIRST DEPOSITIONS (2001); HENRY L. HECHT, EFFECTIVE DEPOSITIONS (2d ed. 2010); PAUL M. LISNEK & MICHAEL J. KAUFMAN, DEPOSITIONS: PROCEDURE, STRATEGY AND TECHNIQUE (3d ed. 2011); DAVID M. MALONE ET AL., THE EFFECTIVE DEPOSITION (3d ed. 2007); DENNIS R. SUPLEE & DIANA S. DONALDSON, THE DEPOSITION HANDBOOK (2d ed. 1992).

[7] *See* Diana S. Donaldson, *Deposition Essentials: New Basics for Old Masters*, LITIG., Summer 2000, at 25; Jerome P. Facher, *Taking Depositions*, LITIG., Fall 1977, at 27; Christopher T. Lutz, *Using and Utilizing Depositions*, LITIG., Summer 1997, at

offer first-rate instruction on taking depositions. However, these resources do not systematically explain the symbiotic relationship between two skills—how the success of cross-examination in the courtroom depends upon how counsel conducted the deposition in the conference room. This Article is a modest attempt to fill that void, detailing how each of the core tactics of cross-examination at trial dictates the particular techniques to be executed at the deposition.

II. The Vital Role of the Deposition Transcript During Cross-Examination at Trial

When conducted correctly, cross-examination at trial is fail-safe. For every question asked, there should be only two possible results. As desired, the witness could agree that the fact posed by the question is true. Alternatively, should the fact be denied, the cross-examiner will immediately confront the witness with the portion of the deposition transcript[8] where the witness admitted that very fact.

The core challenge of cross-examination at trial is to control the witness so that only these two outcomes are available. A prerequisite to conducting a fail-safe cross-examination is that counsel must exercise self-restraint by limiting the substance of every question. The tried and true adage is that the cross-examiner should ask only questions to which she "knows" the answer.[9] The successful execution of this age-old

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22; Larry G. Johnson, *The 10 Deadly Deposition Sins*, A.B.A. J., Sept. 1984, at 62; James W. McElhaney, *A Whole Lot of Nothing*, A.B.A. J., Jan. 2003, at 56; James W. McElhaney, *Know What you're After*, A.B.A. J., July 2011, at 22; James W. McElhaney, *No Place for Fights*, A.B.A. J., Jan. 2007, at 22; James W. McElhaney, *The Foundation Habit*, LITIG., Summer 2000, at 51; Laurin H. Mills, *Taking Chances at Depositions*, LITIG., Fall 2001, at 30; Stuart A. Summit, *Conducting the Oral Deposition*, LITIG., Spring 1975, at 22; Jay S. Blumenkopf, *Deposition Strategy and Tactics*, 5 AM. J. TRIAL ADVOC. 231 (1981); Gary S. Gildin, *A Practical Guide to Taking and Defending Depositions*, 88 DICK. L. REV. 247 (1984); Dennis R. Suplee, *Depositions: Objections, Strategies, Tactics, Mechanics and Problems*, 2 REV. LITIG. 255 (1982).

[8] *See* Lansing R. Palmer, *Cross-Examination: Using Depositions at Trial*, LITIG., Winter 1977, at 21. Of course, the cross-examiner may use any prior statement of the witness to impeach.

[9] Kenneth P. Nolan, *Cross-Examination*, LITIG., Winter 2011, at 63, 65; Irving Younger, *A Letter in Which Cicero Lays Down the Ten Commandments of Cross-*

advice, however, requires a situational understanding of what it means to "know" the answer to the question. In the belly of the courtroom, the cross-examiner does not "know" the answer if she hopes, believes, expects, or is even certain beyond a reasonable doubt that the witness will respond favorably. "Knowing" the answer demands that if the witness denies the fact posed by the question, counsel is able to use the transcript of the deposition to demonstrate to the trier of fact that the witness unambiguously admitted that very fact at an earlier time. In other words, the cross-examiner exerts absolute control over the witness by limiting the substance of the cross-examination to questions to which she can summon the "known" answer by citation to the page and line of the deposition transcript with which she will confront the witness.

The cross-examiner's success in wielding the deposition transcript to control the witness at trial turns on proper execution of several strategies during the deposition. To properly implement these deposition tactics, it is necessary to understand the precise technique by which counsel will use the deposition transcript at trial to impeach the witness who testifies inconsistently with his deposition answer. There are three ingredients to impeachment: (1) accrediting the deposition transcript, (2) recommitting the witness to the answer that will be impeached, and (3) confronting the witness with his deposition testimony.

A. Accrediting the Deposition Transcript

The first step in impeaching the witness at trial with his prior inconsistent deposition answer is to accredit the transcript of the deposition. Most jurors will be unfamiliar with what a deposition is, much less the significance of a deposition transcript. Consequently, for the contradiction between the witness's trial and deposition testimony to be meaningful, the cross-examiner must first teach the jury that the deposition transcript is the verbatim text of a sacred and solemn event. The court will not allow the attorney to interrupt her cross-examination to give a speech to the jury explaining depositions. Hence, the cross-examiner

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Examination, LITIG., Winter 1977, at 18. *But see* Mark A. Neubauer, *Mastering the Blind Cross-Examination*, LITIG., Winter 2009, at 23 (identifying strategies for cross-examining a witness in the absence of prior testimony or discovery).

must establish the reliability of the deposition testimony through questions to the witness:[10]

Q: Mr. Benson, this is not the first time that you have given a statement about what you saw at the scene of the accident, is it?
A: No.
Q: You came to my office to take what is called a deposition in this case, didn't you?
A: Yes.
Q: Your deposition was conducted in August of 2010?
A: Yes.
Q: That deposition took place six months after you saw the accident?
A: Yes.
Q: Obviously, the testimony you gave at the deposition was closer in time to the accident than the trial testimony you are giving today?
A: Obviously.
Q: Before you took the witness stand today, you took an oath?
A: Yes.
Q: The oath was to tell the whole truth, and nothing but the truth?
A: Yes.
Q: Before you answered any questions at the deposition, you also took an oath?
A: Yes.
Q: Like the oath you took today, you swore to tell the whole truth and nothing but the truth at the deposition?
A: Yes.
Q: Even though the deposition did not take place in a courtroom, you understood that you had sworn to give only truthful testimony at the deposition?
A: Yes.
Q: You also understood that it was important to testify accurately at the deposition?
A: Yes.

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[10] *See* HENRY L. HECHT ET AL., EFFECTIVE DEPOSITIONS 714-16 (2d ed. 2010). Once the jury has been educated as to the significance of the deposition, the cross-examiner need not go through the entire roster of accrediting questions for subsequent impeachment of the witness. Likewise, accrediting will be unnecessary where the trier of fact is the judge.

Q: Your lawyer is with you in court today?
A: Yes.
Q: And your lawyer was with you at your deposition as well?
A: Yes.
Q: Do you see that there is a court reporter in the courtroom today?
A: Yes.
Q: You are aware that the court reporter is recording every word of every question that I ask you?
A: Yes.
Q: And you know that the court reporter is recording every word of every answer that you give?
A: Yes.
Q: There was also a court reporter at your deposition?
A: Yes.
Q: You knew that the court reporter at the deposition was taking down every word of every question that I asked at the deposition?
A: Yes.
Q: And you knew the court reporter at the deposition was taking down every word of every answer that you gave, under oath, at the deposition?
A: Yes.[11]

At the conclusion of the accrediting litany, the jury should fully understand that while the deposition did not take place in a courtroom, the witness's testimony at the deposition should be equivalent in truthfulness and accuracy to testimony given at the trial.

B. Recommitting the Witness to the Trial Testimony

Only after teaching the jury why the witness's deposition testimony should have been truthful and accurate should the cross-examiner proceed

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[11] Where the deponent asserts his right to review and correct the transcript of the deposition, FED. R. CIV. P. 30(e), the accrediting phase of impeachment would include explanation that the witness reviewed the transcript, had the opportunity to correct any errors in the transcript, and then signed the transcript verifying that it was an accurate transcription of his testimony. As will be discussed, the party taking the deposition may prefer the advantages of having the witness waive the right to review and sign the transcript over the incremental additional value that reading and signature provide in accrediting the transcript. *See infra* Part III.

to show the jury the conflict between what the witness said at trial and what he said at the deposition. The cross-examiner must first remind the jury what the witness testified to at trial, particularly where impeachment relates to an answer the witness gave perhaps hours earlier on direct examination. Therefore, after accrediting the deposition,[12] counsel must recommit the witness to his trial testimony before disclosing the inconsistent answer the witness gave at the deposition:

Q: Mr. Benson, on direct examination you testified that at the time of the accident Mr. Antone was driving twenty-five miles per hour?[13]

A: Yes.

C. Confronting the Witness with the Prior Inconsistent Statement

Once the cross-examiner has recommitted the witness to his trial testimony, she will reveal to the jury the contradictory answer that the witness gave at the deposition. In theory, the cross-examiner should be able to accomplish the confrontation simply by asking the question: "Isn't it true that at your deposition, you testified that Mr. Antone was driving 45 miles per hour at the time of the accident?" Anyone who has lobbed this question at trial will recognize that successful confrontation is not so easy. Like fellow members of the animal kingdom, the stress of being cornered will activate the witness's fight-or-flight response. Knowing that he cannot fight the deposition answer, the witness will desperately seek any opportunity to escape. To effectively confront the witness with

[12] Technically, to establish the relevancy of the accrediting questions, the recommit should precede the accrediting of the deposition. However, the impact of impeachment could be diminished or lost if the set of accrediting questions and answers comes between the recommitted trial testimony and the inconsistent deposition testimony.

[13] Counsel may tweak the recommit question to "simultaneously fuse the question with a subtle cue to the jury (and to the judge) that the testimony the jury is about to hear repeated is inaccurate." POZNER & DODD, *supra* note 5, § 16.15. Pozner and Dodd further suggest that the cross-examiner "tie the new version of the story around the witness's (and hopefully the opponent's) neck so that the witness and the opponent's case appears to be established only if that new version is accepted." *Id.* § 16.16.

the impeaching deposition answer, the cross-examiner must understand and eliminate the available means of avoiding capture.[14]

The witness's first and easiest avenue of evading impeachment is to fail to recall the specifics of the deposition testimony:

Q: Mr. Benson, isn't it true that at your deposition, you testified that at the time of the accident, Mr. Antone was driving forty-five miles per hour?

A: I do not remember everything I said at the deposition. I was asked hundreds of questions. We were there for more than six hours.

To cut off this dodge, counsel should not ask a question that implicitly asks the witness to remember his deposition testimony. Instead, the cross-examiner should hand a copy of the deposition transcript to the witness and refer the witness to the specific page and line of the testimony in that transcript.[15] While no longer allowing the witness to plead a failure of recollection, handing the transcript to the witness will not guarantee successful impeachment:

Q: Mr. Benson, I am handing you a copy of the transcript of your deposition. These are the questions I asked and your answers to those questions at the deposition that the court reporter typed up, correct?

A: Yes.

Q: Please look at page seventeen of the transcript, lines four through fourteen. Isn't it true that you testified at the deposition that at the time of the accident, Mr. Antone was driving forty-five miles per hour?

A: [Looking for any way to elude the admission, the witness will grasp onto the word "testify" as an inquiry about his thought process at the deposition, rather than the words that came out of his mouth.] When I answered the question, I was thinking about the whole time I saw Mr. Antone's car. At some earlier point he

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[14] In addition to using proper technique when confronting the witness at trial, deposing counsel must take steps at the deposition to close the most predictable escape hatches. *See infra* Part III.

[15] *Cf.* HECHT ET AL., *supra* note 10, at 716 ("Showing the witness a transcript . . . gives the witness additional time to collect his thoughts and prepare an explanation. Some witnesses will even try to look at additional pages of the transcript in an effort to place the impeaching testimony in context.").

was traveling forty-five, but by the time of the accident his car had slowed to twenty-five.

To forestall this means of slipping away, the cross-examiner should not ask the witness about his "testimony" or other synonym that offers the witness interpretive space to explain away the answer. Instead, the cross-examiner should ask the witness only about the words that appear in the transcript. Believing impeachment will be enhanced if the jury hears the contradictory statement come from the mouth of the witness, the cross-examiner will be sorely tempted to have the witness read aloud the question and answer from the transcript. By asking the witness to read the transcript, the cross-examiner hands over the keys that allow the witness to unlock the shackles of the transcript:

Q: Mr. Benson, please read aloud lines four through fourteen of page seventeen of the transcript of the deposition?

A: I see that I did say Mr. Antone's car was driving forty-five miles per hour, but I must have been remembering the entire time that I saw his car when I answered your question. It is true, as I said at the deposition, that at some point Mr. Antone's car was traveling forty-five, but by the time of the accident, his car had slowed to twenty-five.

To successfully induce the witness to affirm the words that appear in the deposition transcript, counsel must prevent the witness from editorializing. Accordingly, the confrontation should proceed by the cross-examiner reading the transcript:

Q: Mr. Benson, I am handing you a copy of the transcript of your deposition. This is what the court reporter typed up as to the questions that I asked you and your answers to those questions, correct?

A: Yes.

Q: I am showing you page seventeen of that transcript, line four. Please follow my finger. "Question: At the time of the accident, Mr. Antone's car was traveling forty-five miles per hour? Answer: Yes." *Did I read that correctly?*[16]

A: Yes.

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[16] With the court's permission, counsel may also display the transcript using a document camera or trial display software so that the jury can see the transcript at the same time that the cross-examiner is reading the transcript aloud.

As such, the "confront" question asks the witness only about the accuracy of the cross-examiner's reading of the transcript. The witness is not asked to recall or to interpret his "testimony."[17] Because the witness is not reading the transcript aloud, he cannot spontaneously interject personal interpretations of the words that appear in transcript. And should the witness attempt to narrate in response to the "Did I read that correctly?" question, the cross-examiner can accentuate the impeachment. After calmly and patiently allowing the witness to run at the mouth, counsel will then read the transcript a second time:

Q: Thank you for volunteering that information, Mr. Benson. However, that was not my question. Please follow my finger. "Question: At the time of the accident, Mr. Antone's car was traveling forty-five miles per hour? Answer: Yes." *Did I read the transcript correctly?*[18]

Although the deposition takes place in a conference room rather than in a courtroom months or more likely years before trial, the deposition writes the script for the cross-examination at trial. At trial, counsel will control the cross-examination by asking only questions that elicit facts that the witness admitted at the deposition. Should the witness give a different answer at trial, after accrediting the deposition transcript and recommitting the witness to his trial testimony, the cross-examiner will confront the witness—forcing the witness to concede that counsel accurately read the portion of the transcript of the deposition where the witness admitted the very fact that the witness denied at trial. As such, at every juncture of the deposition, deposing counsel must visualize the deposition transcript.[19] Counsel must also execute a series of deposition strategies that will codify the answers as "known" for purposes of the eventual cross-examination at trial.

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[17] As with many trial tactics, there is no universal agreement as to the method of best confronting the witness with the prior statement. *See* HECHT ET AL., *supra* note 10, at 716-18 (identifying three methods of confrontation, including asking the witness whether he testified differently under oath before trial.).

[18] If the witness launches into an explanation a second time, then counsel can implement "the reversal," by asking: "I did *not* read the transcript correctly?" *See* POZNER & DODD, *supra* note 5, §§ 18.01-.30.

[19] *See* SUPLEE & DONALDSON, *supra* note 6, § 7.11.

III. The Deposition Must Eliminate the Witness's Ability to Disavow the Reliability of the Deposition Testimony at Trial

The execution of a fail-safe cross-examination at trial rests on counsel's ability to successfully wield the deposition transcript should the witness give an answer at trial that differs from the witness' deposition testimony. By asking the witness to confirm that counsel accurately read the words on the deposition transcript, the cross-examiner affords the witness no means for denying the text of the *specific* deposition answer. With no choice but to admit the cross-examiner correctly read the inconsistent deposition answer, the witness—now fully in flight mode—may attempt to disavow the general reliability of the testimony she gave at the deposition. Therefore, to secure a fail-safe cross-examination, the advocate must take steps at the deposition that will must prevent the witness from plausibly repudiating the credibility of her deposition testimony during the trial.

The general conceit is as follows. First, counsel must anticipate every possible excuse the deponent could use to forsake a deposition answer.[20] Second, counsel must elicit concessions at the deposition that prevent the deponent from credibly invoking each excuse at trial.[21] Should the witness attempt to disclaim a deposition answer at trial by invoking one of the excuses, the cross-examiner will confront the deponent with the concession in the deposition transcript that renders the excuse wholly implausible.[22] The following vignettes (a) identify the most common excuses a witness might offer at trial to disown his deposition answer, and (b) set forth the litany that will elicit concessions in the deposition transcript, which the cross-examiner can read to refute the excuse if invoked at trial.[23]

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[20] *See* HECHT, *supra* note 6, at 280-84.

[21] *See id.* at 251-56; MALONE ET AL., *supra* note 6, at 103-05.

[22] *See* POZNER & DODD, *supra* note 5, §§ 20.01-.08.

[23] *See* HECHT ET AL., *supra* note 10, at 703-23.

A. "I Didn't Know I Was Under Oath"

Excuse: I did not realize the oath I took at the deposition was a courtroom oath.[24] *Litany:*

Q: Mr. Sagret, do you realize you are under oath?
A: Yes.
Q: Do you understand that even though we are not in a courtroom, this is the very same oath as the one you take when testifying in court?
A: Yes.
Q: Do you know that, as in the courtroom, you are subject to penalties of perjury if you do not testify truthfully here today?
A: Yes.
Q: Do you understand it is important to give truthful testimony?
A: Yes.
Q: Do you understand we need the whole truth?
A: Yes.
Q: And nothing but the truth?
A: Yes.

B. "I Didn't Feel Well"

Excuse: I was not feeling well, or was under the influence of medication, and that affected my ability to testify truthfully and fully at the deposition.[25] *Litany:*

Q: Mr. Sagret, are you suffering from any physical condition today that would interfere with your ability to testify fully and truthfully?
A: No.
Q: Are you suffering from any mental condition today that would interfere with your ability to testify fully and truthfully?
A: No.
Q: Did you take any medications or drugs in the last twenty-four hours?

[24] *See* HECHT, *supra* note 6, at 253.
[25] *See* MALONE ET AL., *supra* note 6, at 84-85, 92-93.

A: No. (If the answer is yes, explore the side effects of the medications and get the witness to concede that none of the medications would affect his ability to testify fully and truthfully.)
Q: Did you drink or consume any alcohol in the last twenty-four hours?
A: No.
Q: Is there anything at all that would interfere with your ability to fully and truthfully testify today?
A: No.[26]

C. "I Didn't Hear You"

Excuse: I must not have heard the question you asked at the deposition.
Litany:

Q: Mr. Sagret, do you have any difficulty hearing?
A: No.
Q: [Whether or not the answer to the first question was yes or no]. Mr. Sagret, if for any reason you think you did not completely hear a question, please do not answer the question. Instead, just tell me that you might not have heard the question completely and I will ask the question again. Will you agree to tell me if, for any reason, you think that you did not completely hear the question?
A: I will.
Q: So may I assume that if you answered a question, you completely heard the question?
A: Yes.

D. "I Didn't Understand the Question"

Excuse: I must not have understood your question at the deposition.
Litany:

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[26] MALONE ET AL., *supra* note 6, at 92-93 (If the witness suffers from a condition, or is under medication, that would undermine his ability to testify truthfully and accurately, counsel should postpone the deposition to a later date when the witness is not impaired.).

Q: Mr. Sagret, if for any reason you think you might not have completely understood a question, please do not answer the question. Instead, just tell me you might not have understood the question and I will ask a question that you do understand. Will you agree to tell me if, for any reason, you think that you might not have completely understood a question?

A: I will.

Q: So may I assume that if you answered a question, you fully and completely understood that question?[27]

A: Yes.

E. "The Transcript Is Wrong"

Excuse: The transcript does not accurately reflect what I said at the deposition. This particular excuse may be pre-empted in one of two ways, each with attendant costs and benefits. *Litany Option 1:* Where the deponent reads and signs the transcript:

Q: Mr. Sagret, do you see that there is a court reporter present in the room?

A: Yes.

Q: Mr. Sagret, do you understand that the court reporter is taking down every word of every question that I ask at the deposition today?

A: Yes.

Q: Do you understand that the court reporter is taking down every word of every answer that you give at the deposition today?

A: Yes.

Q: Do you know that the court reporter will type up a transcript of all the questions and answers?

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[27] *But see* MALONE ET AL., *supra* note 6, at 89-90 ("Quite often, this 'assumption' instruction merely impels opposing counsel to interject that the deposing attorney . . . can 'assume' anything she wants, but that will not change whether or not the witness understood a question . . . ."). *See also* HECHT, *supra* note 6, at 254 ("Whether this question and answer have any binding effect is debatable."); SUPLEE & DONALDSON, *supra* note 6, at 73 ("Counsel for the witness may respond . . . by noting that the witness thinks she may understand a question when in fact she does not and, thus, the mere fact that the witness answers a question should not be taken as a guarantee that she understood it.").

A: Yes.

Q: Mr. Sagret, do you understand that you will have the opportunity to review the transcript to be sure that the court reporter accurately typed the questions that I asked and the answers that you gave at the deposition?

A: Yes.

The advantage of including this litany is obvious. If at trial the witness denies the transcript accurately reflects what he testified to at the deposition, the cross-examiner will confront the witness by reading the litany. The cross-examiner will then have the witness authenticate his signature on the transcript, affirming that he has reviewed the transcript and found it accurate.

However, there is a downside to employing this litany to prevent the witness from disavowing his deposition testimony. Asking these questions is useful only if counsel affords the deponent the opportunity to review the transcript, rather than having deponent waive reading and signing. Yet, the deposing attorney risks losing "known" answers if the witness reviews the transcript. It is mistakenly believed that the only changes the deponent can and will make upon reviewing the transcript are asserted errors in transcription. In fact, the witness may make changes to the substance of any answer without limitation[28]—even if the court reporter accurately transcribed the answer that the witness gave at the deposition. It is true that should the witness change the substance of a deposition answer, the answer he gave at the deposition remains on the transcript and is admissible at trial.[29] However, the witness can easily thwart counsel's attempt to use the original answer at trial to impeach:

Q: Mr. Benson, isn't it true that at the time of the accident, Ms. Antone was driving forty-five miles per hour?

A: No, he was driving twenty-five miles per hour.

Q: [After accrediting the deposition and getting Mr. Benson to recommit to his denial, the cross-examiner confronts Mr. Benson

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[28] If appropriately requested, the deponent may review the transcript and "if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them." FED. R. CIV. P. 30(e)(1)(B). *See* Gildin, *supra* note 7, at 250, nn.13-14; Gregory A. Ruehlmann, *"A Deposition Is Not a Take Home Examination": Fixing Federal Rule 30(e) and Policing the Errata Sheet*, 106 NW. U. L. REV. 2 (forthcoming 2012), *available at* http://ssrn.com/abstract= 1840763.

[29] Gildin, *supra* note 7, at 250, n.15.

with the transcript.] Mr. Benson, I am handing you a copy of the transcript of your deposition. This is what the court reporter typed up as the questions I asked and your answers to those questions. Correct?

A: Yes.

Q: I am turning to page seventeen of that transcript line four. Follow my finger. "Question: At the time of the accident, Mr. Antone's car was travelling forty-five miles per hour? Answer: Yes." Did I read that correctly?

A: You read that part of the answer correctly. But, as soon as I read the transcript, I realized that I had made a mistake. I wanted to make sure that I did not mislead you or anyone else. So, I immediately wrote the correct answer on the sheet the court reporter gave to me to make my corrections. If you look at that sheet, which should be attached to the transcript, you will see that I indicate that the true answer to your question is that while at some point Mr. Antone's car had been travelling forty-five miles per hour, by the time of the accident, the car had slowed to twenty-five.

Attorneys will recognize that changing the substance of deposition answers on the errata sheet to the transcript seams fishy. However, it is difficult, if not impossible, to convey that unfairness to jurors unfamiliar with the discovery process.[30] The only redress available to counsel where the deponent has made substantive changes to the answers in the transcript is to file a motion to re-open the deposition for further questioning on the subject matter of revised answers. That remedy, however, does not undermine the deponent's ability to point to the corrected answer on cross-examination to disavow the reliability of the answer originally given at the deposition.

Litany Option 2: Where the deponent waives reading and signing. To preempt the deponent from making changes to the substance of the

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[30] To attempt to make the unfairness of changes to the transcript more apparent to the jury, counsel could expand the litany by adding the question: "Do you understand that if you make any changes to the transcript, the answers you give today can still be used against you at trial?" Thank you to attorney Michael Roarke for making me aware of this suggestion in the excellent lecture he delivered at the ACLU Deposition Skills Training in February 2011.

answers that appear in the deposition transcript, deposing counsel may attempt to procure a waiver of the witness's right to read and sign the transcript. The method of seeking waiver depends on the rules of civil procedure of the jurisdiction. Federal Rule of Civil Procedure 30(e)(1) provides that the deponent must be allowed to review and make changes to the transcript "[o]n request by the deponent or a party before the deposition is completed."[31] Thus, in federal court and in states with a similar rule, deposing counsel preferring waiver should refrain from including the deponent's opportunity to review and sign the transcript in the litany. Reading and signing will then be waived, unless the deponent or the opposing party asserts the right before completion of the deposition.

In many states, the rules of civil procedure grants the deponent's right to review, sign, and change the transcript without requiring the witness to assert those rights at the deposition.[32] In these jurisdictions, the attorney conducting the deposition can propose a stipulation that the deponent waives the right to review and sign.[33] Deposing counsel may succeed in procuring the stipulation because the defending attorney (a) does not recognize that the rules allow the deponent to change the substance of the answers as part of the review, or (b) believes waiving the signature will diminish the value of the transcript for impeachment. If reading and signing is waived, deposing counsel should omit the witness's opportunity to read and sign the transcript from the litany.

To be sure, obtaining waiver of the deponent's right to review and sign the transcript has a modest cost. When confronted with the impeaching deposition answer, the witness may claim that the court reporter did not accurately record or transcribe the answer. In such cases, the cross-examiner can still convince the jury that the transcript accurately reflects the witness's deposition testimony by (a) pointing to the court reporter's certification of the accuracy of the transcript, or (b) later calling the court reporter as a witness to verify that the transcript accurately reflects the questions asked and answers given at the deposition.

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[31] FED. R. CIV. P. 30(e)(1).

[32] *See* PA. R. CIV. P. 4017(c) ("When the testimony is fully transcribed a copy of the deposition with the original signature page shall be submitted to the witness for inspection and signing . . . unless the inspection, reading and signing are waived by the witness and by all parties who attended the taking of the deposition. . . .").

[33] *Id.*

The catalog of potential escape hatches discussed in this section does not purport to be comprehensive.[34] The attorney taking the deposition can and should expand the litany to thwart any additional excuses that she anticipates the deponent might use at trial to cast doubt upon the reliability of his deposition testimony.

IV. Using the Deposition to Test-Drive the Substance of Cross-Examination

The previous sections explained how the technique for using the deposition transcript to impeach during cross-examination at trial dictates tactics that the attorney must execute at the deposition to prevent the witness from disavowing the answers given at the deposition. But understanding cross-examination at trial also influences the substance of the questions posed at the deposition. Counsel must use the deposition to test drive potential lines of cross-examination.[35] At trial, the cross-examiner will ask only those questions that elicit helpful "known" responses from the deposition. Counsel should not re-ask the deposition questions that crashed and burned. Therefore, to properly use the deposition as a proving ground, the attorney conducting the deposition must fully understand all of the purposes cross-examination at trial may serve.

Television and movies consistently portray cross-examination as the means by which counsel dramatically exposes the witness to be a liar. Tom Cruise's cross-examination of Jack Nicholson in *A Few Good Men*[36] was so successful in betraying falsehoods that Nicholson was escorted, under arrest, from the witness stand. Reese Witherspoon's performance as a first-year law student—Elle Woods in *Legally Blonde*[37]—surpassed Cruise. Witherspoon's cross-examination not only prompted the arrest of the witness, but also secured dismissal of murder charges against her client. Perry Mason[38] was such a potent cross-examiner that he invariably

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[34] *See* HECHT, *supra* note 6, at 251-56; MALONE ET AL., *supra* note 6, at 82-93; SUPLEE & DONALDSON, *supra* note 6, § 7.10.

[35] *See* Mark D. McCurdy, *Obtaining Admissions in Depositions*, 74 TEMP. L. REV. 139, 140 (2001).

[36] A FEW GOOD MEN (Castle Rock Entertainment 1992).

[37] LEGALLY BLONDE (Metro-Goldwyn-Mayer Pictures 2001).

[38] *Perry Mason* (CBS television broadcast 1957).

elicited a trial-ending confession—not necessarily from the witness, but often from a member of the gallery who succumbed from afar to the force of Mason's withering interrogation. Such dramas gave birth to the lore that the sole ambition of cross-examination is to destroy the credibility of the witness.

In reality, any line of cross-examination may serve one of three very different purposes: constructive, soft destructive, or hard destructive. Because the script for cross-examination at trial will be written at the deposition, counsel who prepares questions to be asked at the deposition must understand and choose among all the available purposes.

A. The Constructive Cross-Examination

The polar opposite of the destructive cross-examination favored by Cruise, Witherspoon, and Mason is a line of questioning that elicits facts, which help build the cross-examiner's case.[39] Instead of seeking to establish that the witness lied, the cross-examiner should wholly embrace the truthfulness of the witness and ask the witness to admit a series of facts that support the cross-examiner's case. Opposing counsel cannot plausibly contest the facts admitted on cross, as they came from the mouth of his own witness. Furthermore, as the jurors watch the witness consistently agree with the cross-examiner, they may perceive that the cross-examiner has neutralized, or even "flipped," the witness.

The attorney taking the deposition must then consider what facts the deponent knows that may be helpful to the deposing counsel's theory of the case. The specific facts will vary with the individual case and individual witness. However, the types of facts that can be constructive fall within four identifiable categories. First, the deponent may have personal knowledge of facts that *did* occur, which support the plot of the story that the deposing attorney will try to prove to the trier-of-fact. Second, the deponent may have knowledge of facts that *did* occur, which are consistent with the character, motive, emotion, or theme of the cross-examiner's story. Third, the advocate may further her theory of the case

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[39] *See* Charles T. Hvass, Jr., *The New Commandments of Cross-Examination*, LITIG., Summer 2002, at 26, 26-27; James W. McElhaney, *Cross-Examination Choices*, LITIG., Fall 2001, at 57, 71.

by having the deponent admit to personal knowledge of facts that *did not* occur; the admission of what *did not* happen will be consistent with the cross-examiner's story of what *did* happen. Finally, the attorney may ask the deponent to admit that he does not have personal knowledge of whether a series of facts *did or did not* occur. Admissions of lack of knowledge can remind the jury that, albeit called to testify by opposing counsel, the witness does not and cannot contradict particulars of the cross-examiner's theory of the case.

B. The Soft Destructive Cross-Examination

A second potential purpose of cross-examination is "soft destructive." Like the constructive cross-examination, the soft destructive cross-examination does not aim to persuade the trier of fact that the witness lied. However, the soft destructive cross offers reasons why, notwithstanding the truthfulness of the witness, the jury should reject the substance of the witness's testimony. There are two principal reasons that a jury may dismiss the testimony of a witness without deeming that witness a liar. First, the jurors may find that the witness did not accurately perceive the event. Second, even if the jurors have no doubts as to the witness's powers of perception, they may still question whether the witness fully remembered what he saw.

The soft destructive cross-examination may elicit facts that suggest that the witness lacked the ability to accurately perceive the event. Accordingly, counsel should consider asking questions that test whether the deponent's perception was impaired by poor lighting conditions; the witness's distance from the event; physical objects obstructing the witness's vision; the short time that the witness observed the incident; or problems with the witness's eyesight.[40]

The deposing counsel may also probe facts that would permit the jury to conclude that, even if he accurately perceived the facts, the witness may not fully recall the event. This does not require proving that the witness

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[40] *See* Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 440-46 (2008) (providing an excellent summary of psychological research on factors that affect perception).

suffered complete or partial amnesia. The jury may question whether the deponent could fully recall what happened in a situation where the witness does not speak to the police officer that arrived at the scene or give any statements to an investigator. The lapse of time between the incident and the witness's testimony alone could undermine the fullness of the witness's recollection.[41]

C. The Hard Destructive Cross-Examination

Cross-examination designed to expose the lying witness is not limited to fictional portrayals on television and in movies. Witnesses do lie, even in civil cases; however, attacking the believability of the witness on cross-examination will succeed only where three factors are present. First, the cross-examiner must have the evidentiary goods to establish that the witness lied.[42] Second, the trier of fact must find it plausible that the witness would choose to commit the felony of perjury while on the witness stand. Finally, the advocate's theory of the case must require successfully arguing that the witness perjured himself during direct examination.[43]

Understanding that exposing the witness as a liar is but one of three available purposes of cross-examination, in turn, expands the range of topics that counsel should test-drive at the deposition. The attorney taking the deposition should probe the four categories of facts through which the witness may be used constructively on cross-examination at trial.

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[41] *Id.* at 473-86 (summarizing factors that affect accuracy of memory).

[42] The law of evidence identifies several means by which evidence may be used to suggest that the witness is not to be believed. *See* FED. R. EVID. 608(a) (character for untruthfulness); FED. R. EVID. 609 (prior convictions); FED. R. EVID. 613(b) (prior inconsistent statements). The general rule of relevance also permits counsel to suggest that the witness is not credible by proving bias, prejudice, or an interest in the outcome of the case. FED. R. EVID. 401.

[43] *See* Susan Rutberg, *Conversational Cross-Examination*, 29 AM. J. TRIAL ADVOC. 353, 355 (2005) ("The 'gladiator' style of cross-examination should be limited to those relatively rare situations when the cross-examiner has a good faith belief that the witness is lying."); Mark J. Stanziano, The First and Only Rule of Cross-Examination: "Don't Be a Flaming Jackass" 3 (January 2012) (unpublished material prepared for National Defender Training Project 2012 Ohio Public Defender Cross-Examination Program) (Impeachment should be used "most reluctantly" and only "[w]hen you absolutely have to" and "[w]hen you're pretty certain to be able to achieve it.").

Deposing counsel should explore any deficiency in the witness's perception and recollection that would allow the jury to reject the witness's testimony without questioning his truthfulness. Finally, where the jury would find that the witness has a reason to lie, *and* arguing the witness's lack of credibility is consistent with and necessary to the theory of the case at trial, deposing counsel should discover those facts that the law of evidence admits to attack the truthfulness of the witness.[44]

V. Borrowing Techniques of Cross-Examination to Maximize Admissions at the Deposition

The deposition will generate "known" answers for a constructive, soft destructive, or hard destructive cross only if the deponent admits facts that support the purpose. The beauty of the deposition is that, unlike cross-examination at trial, there is no harm if the witness denies the proffered fact; counsel simply will not ask that question on cross-examination at trial. Nonetheless, cross-examination at trial will improve in direct proportion to the number of admissions the advocate succeeds in procuring at the deposition.

There are three techniques of cross-examination at trial that confine the witness's ability to deny a fact. By using these same techniques during the deposition, counsel can elicit the maximum number of admissions that will serve as "known" answers on cross-examination at trial.

A. Leading Questions

At trial, the cross-examiner operates under a core presumption: given the slightest opportunity, the witness will reiterate portions of the direct examination that are harmful to the cross-examiner's case. This is patently true for the motivated witness, the opposing party, and the witnesses aligned with that party. However, over the course of pre-trial

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[44] Janeen Kerper, *Killing him Softly with his Words: The Art and Ethics of Impeachment with Prior Statements*, 21 AM. J. TRIAL ADVOC. 81, 85 (1997) ("[A]n extremely important factor in deciding whether to impeach will be whether the impeachment is consistent with counsel's theory of the case.").

preparation, even neutral witnesses come to feel part of the direct examiner's team, defending the case whenever possible on cross-examination.

The law of evidence reflects this presumption in its treatment of leading questions. The leading question points the witness to the answer, in effect replacing the testimony of the witness who has personal knowledge with that of the examiner hired to advocate the party's case. Therefore, the rules of evidence generally prohibit the use of leading questions on direct examination.[45] However, where the witness cannot be trusted to confine his answers to the subject matter of the question, but may be inclined to launch a narrative defending the opposing party's position, the examiner is entitled to use leading questions to preempt the witness's advocacy. Accordingly, leading questions are permitted on cross-examination, as well as on direct examination, "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."[46]

Similarly, the witness who is motivated to harm the cross-examiner's case at trial is likely to be resistant to admitting facts at the deposition that would be helpful to the cross-examiner. Therefore, deposing counsel should ask leading questions when seeking admissions at the deposition.[47] Federal Rule of Civil Procedure 30(c)(1) provides: "The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence . . . ."[48] Because Federal Rule of Evidence 611(c) permits leading questions of the adverse party and witnesses aligned with that party—whether on direct or cross-examination—the attorney should ask leading questions at the deposition when cultivating admissions for use on cross-examination at trial.

While a necessary condition, leading questions are not sufficient to restrain the witness on cross-examination at trial. There are two other devices used to control the witness on cross-examination that should also be employed when trolling for admissions at the deposition.

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[45] FED. R. EVID. 611(c) ("Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.").

[46] *Id.*

[47] As is discussed below, deposing counsel will use non-leading questions in the portions of the deposition where the goal is gathering comprehensive information as opposed to generating admissions. *See infra* Part VII.

[48] FED. R. CIV. P. 30(c)(1).

B. One Fact Per Question

Asking a leading question alone will not prevent the witness from launching a narrative that revisits the direct examination. During cross-examination, counsel must abide by a second tenet regarding the form of the question—each leading question should pose only one additional fact to be admitted or denied. The attorney conducting the deposition must rigorously adhere to the same maxim when admissions-testing.

Asking more than one fact in a leading question—even if the witness would admit each fact separately—enables the witness to avoid conceding the facts. Predisposed to resist the cross-examination, the witness will perceive that a question posing multiple facts does not only seek admission of the facts. Instead, the witness will conclude that the question also invites him to agree with the inference to be drawn when the facts are combined. Consider the following situation: State Police Officer Williams stopped Ryan Borland for speeding. In the course of the traffic stop, Officer Williams decided to investigate whether Borland was transporting narcotics in his car. Two hours after the traffic stop, which concluded with a search that revealed no drugs on Borland or in his car, Officer Williams released Borland. Borland then filed a civil rights action against Officer Williams, alleging Williams detained him beyond the scope of the traffic stop without reasonable suspicion. Here is the likely outcome of the cross-examination of Officer Williams if counsel, albeit leading the witness, violates the one fact per question rule:

Q: Officer Williams, you pulled Mr. Borland over, correct?

A: Yes.

Q: You were on routine traffic patrol?

A: That's right.

Q: You pulled Mr. Borland over because he had committed a traffic violation, not because you had a tip that he was a drug courier?

A: Counsel, we receive extensive training in the state police academy so that during every traffic stop on an interstate highway, we must be alert for objective indicators that the person is a drug courier. Interstate 78 (I-78) is a common road used by couriers moving drugs from New York City to Harrisburg. The type of car Mr. Borland was driving—a blue, Honda Accord—is precisely the type of car that drug couriers use because it is so common that it

does not attract attention. I also observed fast food bags in the car. Drug couriers do not like to leave their cars when they are transporting drugs, so they usually use the drive through at fast food restaurants.

Rather than admit to the two individual facts posed in the question, both of which were true, Officer Williams denied the inference created by combining two facts—that he had no objective reason to suspect Borland was a drug courier.

The cross-examiner can eliminate the witness's option to respond to an inference by restricting each leading question to a single fact. The witness's only choices are then (a) to admit the single fact, or (b) to deny the one fact. The same cross of Officer Williams can be made fail-safe by including only one new fact in each question:

Q: Officer Williams, you pulled over Mr. Borland?

A: Yes.

Q: You pulled Mr. Borland over when he was driving on I-78?

A: Yes.

Q: When you pulled Mr. Borland over, you were on routine traffic patrol?

A: Yes.

Q: You pulled Mr. Borland over because he had committed a traffic violation?

A: Yes.

Q: At the time you pulled Mr. Borland over, you did not have a tip that there was a drug dealer driving on I-78?

A: No, I did not.

Q: At the time you pulled Mr. Borland over, you did not have a tip there was a drug dealer named Ryan Borland driving on I-78?

A: No, there was no such tip.

Q: At the time you pulled Mr. Borland over, you had not received a tip that he was driving a Honda Accord?

A: No, there was no such tip.

Q: And at the time you pulled Mr. Borland over, you had not received a tip that he was driving a Honda Accord loaded with drugs?

A: No.

At the deposition, counsel should adopt the same tactic when seeking to have the deponent admit facts that will support a constructive, soft

destructive, or hard destructive cross-examination. It is not enough that every question is leading. Every question must also present only one fact.

Using the one-fact-per-question technique at the deposition does not only serve to maximize admissions. Posing leading questions limited to one fact is also necessary to effectively impeach the witness, should he depart from his deposition testimony and deny the fact at trial. Where the admitted fact is embedded in a deposition answer that includes multiple facts, counsel will be significantly hampered in impeaching the witness, should the witness deny the fact on cross-examination at trial. Where the cross-examiner attempts to impeach the witness through a deposition answer that includes not only the helpful admitted fact, but also contains information that is harmful to the cross-examiner, opposing counsel should insist that fairness and completeness require that the entire deposition answer be read.[49]

The effectiveness of impeachment will be impeded where—even though not containing harmful facts—the deposition answer contains multiple facts. The witness may rely upon the inference flowing from combining the two facts to fend off the supposed inconsistency with his trial testimony. Even if the witness does not attempt to explain the deposition answer, impeachment will be compromised. The contradiction between the witness's denial of the single fact at trial, and his admission to that same fact while bundled with other facts in the deposition answer will be less evident to the trier of fact.

C. Ask for Objective Facts, Not Subjective Conclusions

The attorney conducting a deposition should also employ a third device that is marshaled on cross-examination to obtain admissions and to deter the witness from launching a harmful narrative. As a general rule, the

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[49] *See* FED. R. EVID. 106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part . . . that in fairness ought to be considered at the same time."); FED. R. CIV. P. 32(a)(6) ("If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced . . . .").

cross-examiner will not ask the witness to admit a subjective conclusion. Rather, the cross-examiner will ask the witness to admit only a series of objective facts. Taken collectively, and in the order they are presented, the admitted facts will scream the subjective conclusion to the trier of fact. However, the cross-examiner never asks the witness what Irving Younger immortalized as the "one question too many"[50]—the conclusion that follows from the just-admitted facts.

Even if leading and restricted to a single proposition, a question that seeks a subjective conclusion is an engraved invitation to the motivated witness to undermine the cross-examiner. The witness will instinctively resist admitting any conclusion that harms the direct examiner's case. Instead, the witness will invariably find a plausible way to explain why the proposed conclusion does not follow from the objective facts that the witness previously admitted.

Take a simple example: The defendant in a negligence action arising out of an automobile accident knows, and must admit, that he was driving forty miles per hour in a thirty mile per hour zone. The following is the predictable outcome of the cross-examination if counsel asks the witness to admit a subjective conclusion:

Q: Mr. Winters, the speed limit on College Street at the time of the accident was thirty miles per hour?

A: Yes.

Q: Isn't it true that as you drove on College Street at the time of the accident, you were speeding?

A: I was driving with the flow of traffic. I think that is what most people would do. In fact, that is what everyone else on the road at the time was doing. It would have been dangerous if I was driving slower than all of the other cars and trucks.

The cross-examiner can eliminate the witness's ability to escape the admission by restricting the questioning to objective facts. By carefully arranging the order in which the objective facts are elicited, the desired subjective conclusion will be apparent to the trier of fact—even though counsel will never ask the witness to admit the conclusion. The following is the same cross-examination, purged of any subjectivity:

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[50] Younger, *supra* note 9, at 20.

Q: You saw road signs as you drove on College Street?
A: Yes.
Q: One of those signs listed the maximum legal speed?
A: Yes.
Q: You saw that sign?
A: Yes.
Q: The sign stated that the speed limit was thirty miles per hour?
A: Yes.
Q: You then looked at your speedometer to see how fast you were driving?
A: Yes.
Q: The speedometer indicated that your speed was forty miles per hour?
A: Yes.

The cross-examiner did not ask any question posing the subjective conclusion that the witness was speeding. As a result, the witness was not given the opportunity to explain away, qualify, or deny the inference that the trier of fact already will have drawn from his admissions to the objective facts—that he was, in fact, speeding.[51] Attorney Donald Ladd has aptly summarized this technique as follows: "The purpose of the leading question is to allow the questioner to control the order, context and tone of the facts being presented in such a way that the jury is led to a conclusion that the witness would deny, if given the chance."[52]

While a prerequisite to successful cross-examination at trial, must counsel test-driving admissions during the deposition similarly restrict the interrogation to objective facts? Unlike cross-examination at trial, arguably no harm can befall the attorney who asks the witness at the deposition to admit the conclusion that follows from already admitted objective facts. In the above example, after getting the deponent to agree that the posted speed limit was thirty miles per hour and also to concede that he was driving forty miles per hour, counsel could then ask the deponent to admit that he was speeding. If the deponent admits that he

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[51] On redirect examination, the witness will have a chance to justify why his conduct was not "speeding." By this time, the trier of fact already owns the conclusion, consigning the redirect to damage control.

[52] Donald F. Ladd & Daniel J. Ferhat, *Direct Examination of a Lay Witness*, TRIAL TACTICS, TIPS & TECHS. 85, 90 (2011) (emphasis omitted).

was speeding, on cross-examination at trial counsel may safely ask the witness to agree that he was speeding, at the peril of being impeached, should he deny the conclusion. Conversely, at the deposition, the witness may deny he was speeding and instead explain how he was driving with the flow of traffic. In that case, counsel will restrict the cross-examination at trial to the objective facts about the posted speed limit and defendant's actual speed, refraining from asking the defendant whether he was speeding.

On the other hand, there is a downside to asking the subjective question at the deposition. If the witness does not admit the conclusion at the deposition, during cross-examination at trial opposing counsel may succeed in forcing disclosure of the deponent's denial of the subjective conclusion. Let us assume that at the deposition, plaintiff's counsel gets the witness to admit the objective facts concerning the speed limit and his precise speed, and then unsuccessfully tries to get the witness to agree that he was speeding:

Q: You saw road signs as you drove on College Street?
A: Yes.
Q: One of those signs listed the maximum speed limit?
A: Yes.
Q: You saw that sign?
A: Yes.
Q: The sign stated the speed limit was thirty miles per hour?
A: Yes.
Q: You looked at your speedometer to see how fast you were driving?
A: Yes.
Q: The speedometer indicated your speed was forty miles per hour?
A: Yes.
Q: So isn't it true that as you were driving on College Street, you were speeding?
A: I was driving with the flow of traffic. I think that is what most people would do. In fact, that is what everyone else on the road at that time was doing. It would have been dangerous if I was going slower than all of the other cars and trucks.

At trial, the cross-examiner is not obliged to re-ask every deposition question on a topic. Therefore, the advocate could limit the trial cross-

examination to the objective facts admitted at the deposition, but choose not to ask the defendant to admit that he was speeding. However, the well-prepared witness will be alert to the innuendo suggested by the cross-examiner's question that asks whether the witness was driving forty miles per hour. Rather than flatly admit the objective fact, the witness will volunteer why the conclusion that he was speeding—even though not posed by the question—is not true. Because he asked the subjective question at the deposition, the cross-examiner's effort to use the deposition transcript to impeach the witness will be undermined:

Q: Mr. Liney, you looked at your speedometer to see how fast you were driving as you approached Louther Street?

A: Yes.

Q: The speedometer indicated that your speed was forty miles per hour?

A: I was driving with the flow of traffic. I think that is what most people would do. Everyone else on the road at that time was going forty. It would have been dangerous if I did not keep up with the flow.

Q: [After accrediting the deposition and recommitting the defendant]. Mr. Liney, I am handing you the transcript of your deposition. Please take a look at page forty-two, line six. Follow my finger. "Question, the speedometer indicated your speed was forty miles per hour? Answer: Yes." Did I read that correctly?

Opposing Counsel: Your Honor, I object. Counsel left out the next question and answer, where the witness explained that he was driving with the flow of traffic, just as he testified today. Under Federal Rule of Evidence 106 and Federal Rule of Civil Procedure 32(a)(6), counsel should be required to read the next question and answer in order to avoid misleading the jury.

If the court requires the cross-examiner to read the witness's deposition testimony explaining why he was justified in driving forty miles per hour, not only is impeachment defeated, but opposing counsel has successfully punctured the conclusion that the jury would have drawn from the "order, context, and tone" of the objective facts the witness already admitted.

Trial lawyers have varying appetites for risk. However, where the deponent has admitted objective facts which, properly sequenced, would lead the trier of fact to a conclusion that the witness might deny if given

the chance, the deposing attorney will maximize admissions usable on cross-examination by restricting the questioning at the deposition to those objective facts. By asking "one question too many" at the deposition—the subjective conclusion that follows from those facts—counsel chances arming her adversary with the option to invoke the rule of completeness at trial to negate the conclusion that the jury would otherwise reach.

VI. Using Some, But Not All, of the Chapter Method of Cross-Examination at Trial During the Deposition

Perhaps the leading innovation in cross-examination strategy in recent memory is the "Chapter Method" of cross-examination, coined by the seminal work of Larry Pozner and Roger Dodd.[53] The Chapter Method revamped the conventional wisdom regarding the organizational structure of cross-examination at trial. As will be discussed next, counsel conducting the deposition should implement some, but not all, of the teachings of the Chapter Method.

The old school approach to cross-examination enhanced the likelihood of eliciting admissions from the witness by consistently jumping from topic to topic. Since the witness could not discern the point that the cross-examiner was trying to make, he was less prone to deny or to qualify the fact sought by the question. Unfortunately, the trier of fact was equally mystified. Counsel would rectify the jurors' confusion by dramatically revealing the significance of the cross for the first time in closing argument, in theory generating both a favorable verdict from, and admiration of, the jury.[54]

Although most certainly promoting admissions during the cross-examination, there was a fundamental flaw in the "bob and weave"

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[53] *See* POZNER & DODD, *supra* note 5, §§ 9.01-.02; Larry Pozner & Roger Dodd, *The Chapter Method of Cross Examination*, THE CHAMPION, Nov. 1994, at 33.

[54] *See* Younger, *supra* note 9, at 49 ("In summation, the lawyer will recall the puzzling cross-examination and at last make everything clear. The jurors' relish of satisfied curiosity will render the lawyer's argument irresistible and a favorable verdict inevitable. All this because the cross-examiner saved the explanation for the summation.").

approach to cross-examination—the jurors were likely to reach their conclusion as to the outcome of the case before the closing argument.[55] The delayed unveiling of the point of the earlier cross-examination was not likely to be so brilliant as to reverse the jurors' already embedded view of the case.

The Chapter Method of cross-examination adopts the converse approach to the structure and ambition of each cross-examination:

> A trial is a book of information . . . . The individual topics within the cross-examinations are the chapters of the book. Each chapter has a designed goal. The jurors can understand the purpose of each chapter as the cross-examiner assembles related facts into one logical sequence, designed to paint one picture. The chapter method is the polar opposite of the freewheeling style of cross-examination.[56]

Under the Chapter Method, the cross-examination of each witness at trial proceeds in a series of chapters; each chapter consists of "a cluster of related facts grouped to establish one particular point useful to the questioning party."[57] The jury immediately understands the point of the chapter during the cross-examination. While the witness recognizes the point as well, the questioning techniques used to control the witness on cross-examination render the witness helpless to resist.

In contrast to examination at trial, admission-seeking at the deposition should not necessarily proceed in logical chapters.[58] Consistently shifting topics during cross-examination may succeed in extracting more admissions by preventing the witness from anticipating and fending off the point of the questions. Therefore, deposing counsel may deliberately depart from a discernible order in questioning to cultivate admissions.[59]

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[55] *See* POZNER & DODD, *supra* note 5, § 9.07.

[56] LARRY POZNER & ROGER J. DODD, CROSS-EXAMINATION SKILLS FOR LAW STUDENTS § 5.01 (2009).

[57] *Id.* § 5.02.

[58] Counsel should use the Chapter Method where the deposition is taken to perpetuate testimony of a witness who will not be available to testify at trial. *See* FED. R. CIV. P. 27.

[59] While the admissions testing aspect of the deposition need not necessarily proceed logically, deposing counsel must proceed systematically, using the funnel technique when attempting to obtain exhaustive information from the witness on matters that may be harmful to the deponent's case. *See infra* Part VII.

The cross-examination delivered at trial need not, and will not, proceed in the same random sequence. Rather, the cross-examiner will group and organize the individual admissions scattered throughout the deposition transcript into their respective chapters.

While the organizational mandate of the Chapter Method does not dictate deposition strategy, another aspect of the Chapter Method should be used in conducting the deposition. The cross-examiner executing the Chapter Method does not merely elicit the individual facts that relate to a single point. Each chapter of the cross-examination will also have an independent beginning and end.[60] Every chapter starts with a general question that sets forth the broad topic of the chapter. The examination then proceeds by questions that pull "the witness along an ever-narrowing path until, at the conclusion of the chapter, the witness answers the specific question that completes the goal."[61]

The question that begins the chapter does more than blandly introduce the topic. Properly crafted, the introductory question will procure a seemingly innocuous and irrefutable admission whose effect in hammering home the point of the chapter is unbeknownst to the witness until it is too late. Consider the following example: Jane Doe has sued Nathan Jones for damages arising out of an alleged sexual assault. Jones admitted that he had sexual relations with Doe, but contends that it was a consensual act. The following cross-examination exemplifies the grouping of admissions from Jones within a chapter whose topic is "Doe's injuries are consistent with being a victim of sexual assault":

Q: Mr. Jones, you had sex with Ms. Doe?
A: Yes.
Q: After you had sex with Ms. Doe, she had bruises on her arm?
A: Yes.
Q: After you had sex with Ms. Doe, she had bruises on her leg?
A: Yes.

After hearing these admissions, the jury could conclude that Doe's injuries were a result of sexual assault, the subjective question that the cross-examiner should not ask Jones. By getting Jones to admit an undeniable general proposition that introduces the chapter, the cross-

[60] POZNER & DODD, *supra* note 56, § 5.01.
[61] *Id.* § 6.25.

examiner will make the inference more obvious without ever offering Jones the opportunity to refute the inference:

Q: Mr. Jones, you had sex with Ms. Doe?
A: Yes.
Q: The purpose of sex is to bring pleasure to the person having sex?
A: Yes.
Q: The purpose of sex is not to cause physical injuries to the person having sex?
A: Correct.
Q: After you had sex with Ms. Doe, she had bruises on her arm?
A: Yes.
Q: After you had sex with Ms. Doe, she had bruises on her leg?
A: Yes.

Although the attorney taking the deposition need not, and arguably should not, use the Chapter Method to organize questioning during the deposition, she should test-drive potential chapter-openers at the deposition. If admitted, counsel may safely ask the same chapter questions at trial, wielding the deposition transcript to impeach the witness, should he deny the "known" answers.

VII. Deposition Tactics that Facilitate Cross-Examination Should the Witness Offer New Damaging Information at Trial

The deposition strategies that have been discussed thus far are designed to create "known" answers to questions the cross-examiner may then safely pose at trial to advance her theory of the case. However, depositions are not limited to generating information that will be helpful to the case. A co-equal purpose of the deposition is to discover all of the information that the deponent has that is harmful to the deposing attorney's case—evidence that will be elicited at trial during the adversary's direct examination of the witness being deposed. Learning the ugly facts from the deponent is essential so that counsel may: (a) seek information from other sources that contradicts the bad facts; (b) develop a factual or legal theory of the case that embraces, or mitigates the damage caused by the facts; (c) blunt the perceived impact of the harmful facts at trial

by conceding the facts during voir dire, the opening statement, and direct examination; or (d) settle the case.

On its face, unearthing bad news at the deposition does not appear to relate to the eventual cross-examination at trial. In fact, the sequence of questions through which deposing counsel elicits unfavorable facts can lay the groundwork for effective cross-examination if the deponent testifies to new harmful facts during trial. By taking pains to establish the prerequisites to impeachment by omission for each topic explored at the deposition, counsel can create a transcript that will enable her to attack the plausibility of any additional damaging information that the witness offers at trial.

A. Impeachment by Omission at Trial

Unlike impeachment by the prior inconsistent statement, the cross-examiner will not confront the witness with an answer in the deposition transcript that squarely contradicts his trial testimony. However, the cross-examiner will continue to rely upon the deposition transcript to persuade the trier of fact to find the witness was mistaken or lying concerning particular facts testified to on direct examination. Counsel will show the jury that at his deposition, the witness did not testify to the facts that the witness included in his direct testimony at trial. The omission alone will not induce the jury to discredit the testimony. The cross-examiner must also cause the jury to conclude that, given the type of questions posed at the deposition, the witness would have and should have included the omitted facts in his answers if the facts were true. Therefore, the deposition transcript must unambiguously show the jury that the witness was asked and given every opportunity to tell all of the facts that he knew about each topic of inquiry.

B. The Funnel Technique

The sequence of questioning at the deposition designed to enable impeachment by omission at trial is often referred to as the "funnel technique."[62] By religiously adhering to the funnel technique for each subject

[62] MALONE ET AL., *supra* note 6, at 97-98.

explored at the deposition, counsel can generate a transcript that leaves no doubt in the minds of the jurors that the witness must have fully disclosed all of the facts that he knew about the subject during the deposition.

The first step in the funnel technique is the entry question to the topic. The entry question must explicitly ask the deponent to tell "everything" he knows about the subject matter of the funnel. Inclusion of the words "every," "each and every," or "all" in the entry question is not just designed to invite the witness to be comprehensive in his response. The entry question serves an important educational function for the jurors, who are not familiar with depositions. By establishing the witness was asked to disclose "each and every" fact, counsel begins teaching the jury why the witness should have shared all information he knew about the topic at the deposition.

While necessary, the entry question will not be sufficient to satisfy the jury that the witness should have disclosed all of the known facts. Counsel must ask a series of follow-up questions to create a transcript that convinces the jury that the witness told everything he knew about the topic of the funnel. Regardless of how comprehensive or abbreviated the witness's answer to the entry question, deposing counsel must persist in asking whether the witness has any more information about the subject; counsel must continue asking follow-up questions until the witness admits that he has no further knowledge about the topic. Simply stated, the attorney taking the deposition should follow the entry question by asking "anything else" as many times as necessary until the witness stops providing information about the subject and answers, "no."

The final step in the funnel technique is to seal off any escape routes that the witness might seek at trial to keep the jury from concluding that he disclosed all information about the topic at the deposition. The entry question prompts the witness to tell "everything" he knows about the topic. The series of "anything else" questions gives the witness multiple opportunities to supply any added facts that he did not include in the response to the entry question, until the witness admits that he does not know "anything else" about the topic. Nonetheless, counsel must close any remaining loopholes by asking the deponent to affirm unambiguously that he has testified as to all knowledge about the topic. Accordingly, once the witness answers "no" to the "anything else" question, counsel

should ask "have you now told me everything" about the [subject of the entry question].[63]

The following demonstrates the three-step funnel technique in the deposition of the corporate defendant's officer in an action for wrongful termination of plaintiff's automobile dealership:

Q: Ms. Eckhardt, are you the individual who made the final decision to terminate Mr. Storch's Volvo dealership?

A: Yes.

Q: [Step One] Please tell me *each and every* reason you terminated Mr. Storch's Volvo dealership.

A: Mr. Storch failed to meet his quota for sales of new Volvos for two consecutive years.

Q: [Step Two] Were there any other reasons that you terminated the dealership?

A: Mr. Storch had been late in making payments due on new Volvos we supplied him.

Q: Any other reasons?

A: Mr. Storch did not maintain the cleanliness of his dealership to the standards we require of Volvo dealers.

Q: Anything else?

A: No.

Q: [Step Three] Have you now told me each and every reason you terminated Mr. Storch's Volvo dealership?

A: Yes.

Assume that on direct examination at trial, Ms. Eckhardt testifies to an additional reason that she terminated Mr. Storch's dealership—Volvo received numerous complaints from customers about Mr. Storch's service department. As with impeachment by contradiction, the cross-examiner will first accredit the deposition, and then recommit Ms. Eckhardt to her direct testimony that Mr. Storch was terminated because of numerous customer complaints.[64] However, confronting the witness with the

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[63] *Id.* at 101-03. The questioner must also be attentive to the witness's answer to the closing question. In particular, counsel should avoid the witness answering with, "I have told you everything I recall." Deposing counsel must eliminate the witness's ability to credibly claim that he refreshed his recollection after the deposition. *Id.* at 102.

[64] *See supra* Part II.

omission is different than confronting the witness with an inconsistent statement:

Q: Ms. Eckhardt, I am showing you the question you were asked at page thirty-five of your deposition, line five. Please follow my finger. "Please tell me *each and every* reason you terminated Mr. Storch's Volvo dealership." Did I read that correctly?

A: Yes.

Q: Could you take this red pen[65] and please circle where in your answer you stated that one of the reasons you terminated Mr. Storch's dealership was that there were numerous complaints from customers about the service department.

A: I did not include that reason in the answer to that specific question.

Q: Let's take another look at page thirty-five of your deposition, lines twenty through twenty-seven. You were asked three more times whether there were any other reasons you terminated the dealership, am I correct?

A: Yes.

Q: Could you please take the red pen and circle where in response to any of those three questions you answered that one of the reasons for termination was customer complaints about the service department?

A: I did not include that reason in my answer.

Should Ms. Eckhardt tender some excuse for not including customer complaints in her deposition answers, counsel can use the third step in the funnel technique:

Q: You then were asked three times whether there were any other reasons you terminated the dealership. Could you please take the red pen and circle where you indicated one of the reasons for termination was customer complaints about the service department?

A: I told you quite a few reasons for the termination. I guess I did not realize that I was supposed to give every last detail.

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[65] Many thanks to public defenders Mary DeFusco and Sharon Meisler for introducing me to this "red pen" technique during the Public Defenders Association of Pennsylvania Trial Skills Training.

Q: Ms. Eckhardt, look at page thirty-six of the deposition transcript line eighteen. Please follow my finger. "Question: Have you now told me each and every reason you terminated Mr. Storch's dealership?" Answer: "Yes." Did I read that correctly?

A: Yes.

By strictly adhering to the funnel technique, the attorney conducting the deposition can prevent Ms. Eckhardt from credibly testifying to new reasons for terminating Mr. Storch's dealership at trial. Should Ms. Eckhardt offer any additional grounds for ending Mr. Storch's franchise, on cross-examination the jury will understand that (a) Ms. Eckhardt did not testify to that ground at her deposition, (b) counsel initially asked Ms. Eckhardt to give "each and every" reason she terminated Mr. Storch's dealership, (c) counsel continued to ask Ms. Eckhardt whether there were any additional reasons she terminated Mr. Storch's dealership, until she answered "no," and (d) Ms. Eckhardt affirmed that she had disclosed each and every reason for termination of the dealership.

C. Alternate Ways to Close the Funnel

There are other techniques for closing the funnel, each of which carries different benefits and costs. After Ms. Eckhardt answered "no" to the final "anything else" question, counsel could repeat "the list" of reasons she has just given, and then ask Ms. Eckhardt to affirm that "the list" includes all of the reasons she terminated Mr. Storch's franchise:

Q: Ms. Eckhardt, you told us that you terminated Mr. Storch's Volvo dealership for three reasons. First, he failed to meet the quota for sales of new Volvos for two consecutive years; second, he was late in making payments due on new Volvos you supplied him; and third, Mr. Storch did not maintain the cleanliness of his dealership in the way that you require of Volvo dealerships. Are those three reasons all the reasons that you terminated Mr. Storch's dealership?

A: Yes.

The obvious virtue of "the list" is that, should Ms. Eckhardt offer a new reason at trial, the jury will not need to follow the entire series of questions and answers in the funnel to understand the significance of the omission. Ms. Eckhardt's endorsement of "the list" will teach the jury

that the additional basis for termination she offered at trial is not credible. Yet, "the list" is not a panacea. For some topics, the witness's knowledge cannot readily be reconstituted in a finite list—or if it could, the effort to do so would chew up limited deposition time that could be used more fruitfully to unearth new information or to probe different topics.[66]

Another method of eliminating avenues of escape from the finite amount of information disclosed within the funnel is to pose specific facts that the witness did not disclose in her previous answers, and then to ask whether she had any knowledge of those facts. After Ms. Eckhardt answered "no" to the final "anything else" question, counsel could ask about additional bases for termination:

Q: Ms. Eckhardt, did you terminate Mr. Storch's dealership because he failed to use his best efforts to meet the terms of the franchise agreement?

A: No.

Q: Did you terminate Mr. Storch because his dealership did not meet the plans and specifications for Volvo dealerships?

A: No.

Q: Did you terminate Mr. Storch because of any customer complaints?

A: No.

The advantage of this strategy is, should Ms. Eckhardt testify on direct examination at trial that Volvo terminated Mr. Storch's franchise because of any additional reasons proffered by counsel, Ms. Eckhardt will be impeached by contradiction rather than by omission. However, there is a downside to probing additional bases for termination at the deposition, which Ms. Eckhardt does not volunteer as part of her exhausted recollection. The questioning may prod Ms. Eckhardt to agree that an added reason for terminating the franchise was customer complaints about Mr. Storch's service department. By his own questioning, counsel will have sacrificed the already-established ability to impeach by omission at trial were Ms. Eckhardt to offer customer complaints as a justification for terminating Mr. Storch's dealership.

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[66] *See* FED. R. CIV. P. 30(d)(1) (limiting deposition to one day of seven hours absent stipulation or court order).

Regardless of which particular closing technique she employs, counsel should employ the funnel technique for every topic explored at the deposition. Only then can she reliably wield the deposition transcript on cross-examination to impeach by omission, should the deponent offer new harmful facts at trial.

VIII. Conclusion

Whether seeking admissions to further the theory of the case, or unearthing information that the witness knows is harmful to the case, at every moment of the deposition the examiner is either helping or hindering the cross-examination for trial. By understanding how each of the individual tactics of cross-examination dictates deposition technique, even the advocate without trial experience can develop a deposition transcript that will (a) guarantee a fail-safe cross-examination at trial that elicits only "known" answers advancing the theory of the case, and (b) discredit any new bad facts that the witness offers at trial by showing the jury that, if true, the witness would have disclosed those facts in the funnel of questions asked at the deposition. Counsel's use of deposition techniques founded in a fulsome understanding of the delicate and precarious science of cross-examination will likewise maximize the client's position if, as is likely, the case is resolved through an alternative dispute mechanism that causes the trial to vanish.