THE FUNDAMENTALS OF EFFECTIVE DEPOSITIONS

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I. Purpose of this Guide

This guide is intended for lawyers of all levels of skill and experience. It sets forth the main goals of a depositions, ideas on how to plan for a deposition, and specific tools that an examiner can use to achieve his goals.

A competent examiner will understand the purposes of a deposition, craft a plan for each deposition based on the circumstances of the particular lawsuit and the witness being deposed, will successfully use the funnel method to gather information (See Part 3.0), and will successfully use the documents in a case to get useful admissions from the witness. A competent examiner, in other words, can create a plan and do a reasonably good job of getting the admissions and information that the examiner set out to get.

An elite examiner should get more. Some years ago, as a first-year lawyer, I was told by a more-senior (but still very junior) lawyer that her goal in taking the plaintiff's deposition was just to get the plaintiff's story locked down; it did not matter to her what the witness's story was, so long as the witness could not change it later. This guide assumes that this advice was wrong, that the examiner cares very much what comes out at deposition, and that the primary goal of a deposition is not just to lock the witness down – though locking the witness down is useful and necessary – but, instead, to start to tear down the foundation underlying the other side's case.

The assumption here is that a high-level examiner can exercise a surprising amount of influence over how testimony comes out at deposition. This does not mean that the examiner can control everything that a witness says; that is obviously not the case. But witnesses are usually prepared to take a firm position on relatively few issues. Those are the big issues in the case, and the witness's position is probably set in stone before the deposition. Unless the plaintiff is completely unprepared or inept, the plaintiff is not going to agree that he suffered no damages. (The conclusion is sacrosanct, and the witness won't shift. But as discussed elsewhere, he may give simple, fact-based admissions that undermine his conclusion if the examiner does his job properly.)

But an examiner has a substantial advantage over the deponent in most cases; the examiner knows exactly what he wants and why. The witness rarely does outside of a few big issues. And this means the witness can be directed into taking positions that undermine his case or bolster the examiner's. And this should be our goal. Our goal should be not simply to gather information, not simply to lock down a witness's story; but to find and shine a spotlight on the cracks in the foundation, the holes in the legal theory.

II. Preparing to Take an Effective Deposition

A. Knowing What We Want to Achieve and Avoiding Holes in our Preparation

Depositions often have two goals: obtaining information and harvesting useful soundbites to use in motions, mediation, and cross examination at trial. To achieve either goal, an examiner must be prepared, which means she must understand the major issues in the case, the holes in her existing evidentiary record, the critical documents, and the factual admissions that are most likely to make a difference in the outcome.

The process should begin with a thorough examination of the case, preferably in writing. Some lawyers prepare their anticipated closing argument before taking depositions; others craft an opening statement; I prefer a combination of the two, because I want both the full story I intend to tell (to the extent I can craft it that early in the proceedings) and an understanding of the key legal issues. Doing this work before depositions begin will highlight the holes in your evidentiary record and the facts you must discover in order to tell a complete, compelling story at trial. The document will obviously undergo substantial revisions over time. But preparing such a document before depositions is critical to taking successful depositions in a case of any real complexity. And, obviously, doing this work obviously requires a very careful review of the documents produced in the case, all substantive pleadings, all declarations or affidavits, and the facts that you have received from your own client.

One other point is worth of mention here. Preparing for depositions in this manner will also help identify who the critical witnesses are. It is also at this point in the case when we should start to identify the third-party witnesses who can help. Nothing is more effective at trial than a third-party witness who supports your story, yet lawyers often fail to focus on finding such witnesses until very late in the process, often after discovery has closed. (This is, I suspect, because most lawyers spend their time in discovery and drafting and opposing dispositive motions. Witnesses associated with your client can often provide the declarations to survive summary judgment, and many civil litigators don't think past that point unless trial is imminent.) Identifying potential third-party witnesses—which means, of course, potential third-party deponents—is critical and should be done early in the process.

III. The Fundamental Methods for Gathering Information

A. The Listing Method

One of the major challenges in deposition taking is gathering all of the information you need without leaving holes in the record while also staying nimble enough to follow up on unexpected issues that arise during the course of the deposition. This task is made easier with proper organization.

One useful method for staying organized is what I call the listing method. (NITA calls is the funnel method; the process is the same. But for reasons I won't go into here, I think NITA has the analogy backwards. I think the funnel is upside down.) In each area of examination, create a list of categories of information that fit within that subject, and close out your list before moving on to the specifics of any one category. For example, if we're interested in the witness's educational background, we might start by having the witness list all of the schools and educational programs she has attended. Then close out the list. (Are there any others?) Once you have your full list—all of your categories for potential follow up—you can begin to explore one or more of them.

As we explore one of the categories in that list, we make a new list of relevant categories of information under that initial category. So if one of the witness's schools was Harvard Medical School, we can create a list, for example, of what courses the witness took at Harvard. Close out the list. (Are there any others?) Then you can choose to explore any of the items on your new list, such as Intro to Human Anatomy.

By staying organized in this manner, you can constantly move back and forth between different levels of specificity and different topics while still being confident that you have notes that will allow you to fully understand the scope of a category (so you don't miss something important) and concentrate your time on those categories that matter most.

B. The Jigsaw Approach

It is critical to understand that the purpose of a deposition is to leave with more material than you had at the beginning. If we're doing our jobs properly, we identify the helpful facts we have in the record before the deposition and then multiply them. Ultimately, we need to build out a complete and compelling story. Stories require facts; facts about what people have done, seen, and said. Because in stories, people go places, see things, do things, say things. We can't tell a story without facts. Depositions should be used to build out our factual record. That is the primary goal. The primary goal is not to chase conclusions. (More on that in a minute.) Lawyers sometimes forget or don't understand this, especially when working with documents.

The facts of a lawsuit are like the pieces of a jigsaw puzzle. The more facts we have to support our story—the more puzzle pieces we have in place—the clearer the picture becomes, and the more complete and compelling the story we can tell. At some point, even without all of the pieces in place, you can see the picture.

But the fewer pieces we have, the more likely it is that the decision-maker—who (brain science tells us) is constantly taking in the facts and trying to create a coherent narrative based on the fact patterns already present in her brain—might come up with a wildly different narrative. The decision-maker might even ignore facts you think are crucial because, absent a narrative that can replace the one already in her brain, the decision maker has already started to adopt a different story, and your new facts may not fit the existing pattern. They simply get rejected, ignored.

But how is it possible to multiply facts? The same way we put together a jigsaw puzzle. We take the pieces we have and we find the additional, related facts like the connecting jigsaw pieces. Each fact is part of a much bigger picture, and each fact is connected to a whole series of related facts just like jigsaw pieces are related to other pieces. Because of the shape and color of a jigsaw puzzle piece, we can make informed inferences about the pieces that connect to it, and we can therefore look for them. That's how we identify the pieces we need and build the picture.

The same is true of trial facts. Taking the facts we know and logic, we can deduce that other, related facts must also be true. And, therefore, while they may not appear in the document we're using, for example, we can often have a firm conviction that they are true and that we can establish them, even through an adverse witness.

Let me provide a simple example in an area where lawyers often fail: the use of documents. Imagine that a witness wrote a memo summarizing a meeting. We have the facts that appear inside the memo. But there are a whole range of useful, related facts that are almost certainly true. For example, this was a meeting that was important enough for the witness to take the time to summarize it. The writer cared to memorialize the meeting. The writer wanted to capture the most important things that were said or decided, etc. We can continue, but you probably already see the point. We can infer all kinds of additional facts here, and many of those will likely work their way into our eventual cross.

This process of building out the related facts is critical, because facts are social animals: they can thrive only in the company of other facts. A solitary fact is not memorable, important, or useful. That Jacob lives at 123 Main Street means nothing outside the context of the story, and the story depends upon a whole series of other facts. Our decision-maker can understand, remember, and use our facts only if he or she can put those facts into the context of a narrative. It is the narrative, the story, that makes those facts important. People — all people — only think in stories.

But far too often, lawyers take the memo, have the witness agree that she wrote it, have the witness agree as to one or more facts in the memo that we believe are useful, and then either move on or try to use those facts to get the witness to agree to the conclusion we have reached based on that memo, which the witness will generally refuse to do.

A far better approach is to take the facts in that document, identify the other facts that should be true because they connect, like a jigsaw puzzle, to the facts that we know, and get the witness to agree to as many of those additional, connecting facts as possible. That is far more important than chasing a conclusion the witness has already been prepared to avoid giving us.

IV. Tools for Getting What We Want

The tools discussed below are useful in steering the witness the direction you want him or her to go. Let's assume we have thought enough about our case to have some big-picture goals for the deposition: undermining the other side's damages case might be an example. And let's assume that instead of spinning our wheels just trying to get the witness to agree to a helpful conclusory statement – something a witness is not inclined to do – we are committed to doing the painstaking and truly important work of building the factual admissions necessary to support our conclusion that there are no damages. We have committed, that is, to establish as many underlying facts as possible to establish our desired conclusion. What tools can we use to accomplish that goal?

A. Stay Simple

Our goal is to get useful soundbites. A soundbite is useful only if it is clear and generally short and uncomplicated. To get soundbites like that, our questions must be clear, short, and uncomplicated. Long, complicated questions almost always give rise to long, complicated answers. And long, complicated answers are seldom useful.

This does not mean that all of our questions have to be short. It does mean, however, that when we uncover something valuable, a fact that we will want to use in a motion, at mediation, or at trial in cross, we must get it into a useful soundbite. If the witness makes a statement in a long, complicated answer, we must pull the useful statements out of the long answer and put each of them into a short, clear question and answer to get our soundbites.

To summarize, as a general rule, do not cram multiple facts or assumptions into a single question unless you have to. And if you have to, follow up with shorter, punchier questions that break up the pieces of the longer, more complicated question.

B. Misdirection, or Deposition Judo

Witnesses have kneejerk reactions. That is, they are predisposed to behave in certain ways on any issue when it is not obvious what the significance of the issue is and they have not been coached. We can often steer them our direction by taking advantage of these kneejerk reactions. Here are two examples.

Many witnesses are inclined to disagree with the lawyer deposing them, thinking rightly that the lawyer is not their friend and does not want what is best for them – so if he wants it, I don't. This kneejerk reaction can often be exploited to great effect. We use the witness's natural response against him, much the same way a judo master uses his opponent's momentum against him. But success hinges on keeping the witness in the dark as to your true intentions.

It is also true that, all else being equal, witnesses do not like to be portrayed as lazy, stupid, careless, or in any other derogatory manner. This means that, unless the witness is prepared to understand the significance of a line of questioning, a witness will almost invariably defend his or her honor, so to speak, in deposition. Thus, most witnesses will have a kneejerk reaction to defend themselves from inferences that they are lazy, careless, greedy, and the like. But, again, to use this kneejerk reaction effectively, we must hide our real intent.

Thus, we need to distinguish between cross examination at trial and hunting for soundbites through misdirection in deposition. At trial, misdirection is risky and often counterproductive. To score points in cross examination, the jury must be able to follow the logic of the examination and understand why it matters. And if the jury understands, it is highly likely that the witness also understands.

But in deposition, misdirection is critical. Imagine that it is useful to establish that the witness reviewed a contract and understood its terms. A witness who is predisposed to disagree with the examining attorney and protect himself (or herself) can often be very easily directed toward the examiner's goal. Questions that imply the witness was lazy, stated in a way that implies the examiner is deeply skeptical that the witness was actually careful or conscientious and is trying to prove they were lazy or careless in this case, will often do the trick. Long before we pull out the critical contract, get the witness to lay a foundation that the witness cares about his job, does it to the best of his ability, reads critical emails and other correspondence, makes sure he is up-to-speed on critical events, etc. As a knee-jerk response, most witnesses will give you those types of soundbites. Later, when trying to establish that the witness carefully read the contract at issue, those soundbites will make it much more difficult to argue that he did not look at it carefully.

C. Cloaking

Another related tool is cloaking. Here the focus is not so much on pushing the witness in one direction in order to get the witness to push back in the other direction. Here we're simply talking about cloaking the significance of a fact. If, to use the example in the last section, it is useful to establish that a witness reviewed a contract, we are more likely to get the witness to agree that she reviewed the contract before she knows that that fact will hurt her. Therefore, we must think carefully about the order in which we examine a witness and how we group topics. We are more likely to get useful admissions on damages, for example, if the witness has no idea that the facts being elicited concern damages. Don't do all of our damages questions at the same time. Break them up; intersperse them with other issues; and ask yourself whether some of those factual admissions are more easily obtained if you seek them early in the deposition before the witness understands the significance of the questions. You are always better off if the witness does not understand the significance of the questions you are asking.

An especially useful technique is cloaking through boredom. If a fact is useful to you but not of obvious significance, try to get the witness's agreement to that fact while asking a series of trivial and unimportant questions, maybe by going through a whole series of documents and having the witness authenticate each one and answer a question or two about each that is

designed merely to bore the witness and convince the witness that this whole procedure is a giant waste of time.

D. Steering with Documents

All else being equal, a witness is inclined to agree with his or her past writings, the writings of the company or organization to which he or she belongs, and the writings of the witness's lawyer. Every competent examiner understands this, and most will come into a deposition prepared to use a document with a favorable statement. The question is how best to use it.

Too often, attorneys see documents like this as an opportunity to set up impeachment. Hide the document, have the witness say something inconsistent, and then impeach, usually in the deposition itself, sometimes at trial. I think this is almost always the wrong approach.

Where the statement in the document is on an issue on which the witness can be steered, it is almost always better to use the document to have the witness provide a soundbite with the useful fact. This is true for two reasons. First, lawyers almost always overrate impeachment. As is discussed below, impeachment is difficult and often falls flat at trial. And impeachment at deposition is even less useful in most cases. Showing deposition impeachment by video is largely ineffective, and getting the witness to agree on cross examination that the witness was impeached at deposition is not much better.

Second, shouldn't we always want the other side to agree with us? Isn't our best-case scenario in litigation that we put the other side's witnesses on the stand and witness after witness agrees with our story on all key issues in the case? What could be better than that? Therefore, when you have a choice between having the witness agree with you and having the witness disagree with you, with rare exceptions you should choose to have them agree.

How do we do this? Before asking the relevant questions, put the documents in front of the witness and ask them questions that get them to buy into what's on the paper. For example, "This is an email you sent? You generally tell the truth in your emails? You don't make a habit of lying? You can't think of any reason why you'd be lying here?" And then have the witness start agreeing to the statements in the document. In doing so, combine the document with cloaking or misdirection. It's usually best, that is, not to focus only on the statement that matters to you. Indeed, sometimes it's best not to focus even on the document you care about. Have the witness agree to a series of statements in a series of emails. Make it as boring as possible. Cloak your real intentions. Usually the witness will go along. And now that fact is established in your case.

E. Looping

This is a common deposition technique and will be familiar to any experienced practitioner. Looping is when the questioner uses the witness's own words in follow-up questions. One obvious benefit is that it removes the definitional issues that so often plague depositions – "I don't know what you mean by that word – can you rephrase?" We deal with some specific times

when looping is beneficial in the sections ahead, and there is no reason to spend substantial time talking about it here.

But it is important to raise one issue with looping. Sometimes it makes sense to get away from the approach you planned and use the witness's own language in deposition. Sometimes it doesn't, because the particular words are critical to the case. The only way to know which of those situations you are in is to come fully prepared. You must know when the specific word choice is required – maybe the case law uses a particular word on a particular element, and it's critical to use that word throughout that deposition – versus when you're free to use the witness's own words and loop throughout the deposition. You only know this after thorough preparation.

F. Taking a Position to its Logical (Absurd) Conclusion; Putting the Witness on the Slippery Slope

One of the most effective deposition techniques when the witness takes a position that the examiner does not like involves pushing the witness to the logical extremes of his position, where he will either look foolish or he will abandon the position as it relates that that extreme. But once the witness is willing to abandon the position in the extreme case, the witness is on a slippery slope. He must figure out where to draw the line, and if the position he chooses is arbitrary, he will have no ability to do so in a compelling fashion.

Let's imagine the following hypothetical. Imagine that we want to establish that the defendant company was careless in handling some dangerous materials. And imagine further that we are deposing the shipping manager of the defendant company. We would like the witness to concede that he was careless in how he and his employees handled the materials. He will not want to concede that point. But imagine that we've established a series of errors that he and his people made. Let's take his position to the extreme. "You handled this situation perfectly?" "This was a textbook operation?" "Your people were flawless in how they shipped the materials?" Notice that all of these questions put the witness in a terrible position. If he agrees that he and his people were flawless, even though an accident took place and even though there are a series of facts that would seem to support their negligence, he looks foolish and his credibility is damaged. But if he admits that they were not flawless in their handling of the situation, he is on the slippery slope. We will not only get him to list the things he could and should have done differently, but we can also get him to characterize his work in his own language. "You agree your people weren't flawless. How would you describe their efforts?" If his word choice is favorable to his side – "they were competent" – then we're back to the same game as before: "It's competent to leave flammable materials to new employees?" "It's competent to give new employees 15 minutes to move and store dangerous materials?" On and on we go. Every time he tries to use his favorable-to-him word choice we contrast it with their established failures, and the witness loses credibility.

Conversely, if the witness gives a favorable-to-us characterization – "this was handled inexpertly" – then we have the witness a little closer to our desired conclusion, and we have laid another brick in our coming trial impeachment. We can loop using the witness's own words and get a series of answers using the helpful language. Or we can try to get yet another favorable

characterization, another admission that is closer to our desired conclusion that the witness and his employees were careless.

G. Training the Witness through Discipline

Witnesses are not machines; they're people. And that means they are subject to the same psychological ploys as any other human being. For example, people do not like to appear stupid in front of others; it's embarrassing, and they don't like to be embarrassed. They also do not like to be punished for wrong behavior, and they tend to stop the wrong behavior if it will stop the punishment. This means that witnesses are similar to puppies; if you smack them on the nose when they misbehave, most witnesses will begin to behave. Thus, there must be consequences for bad behavior.

One example of how to apply this principle involves objections. Many witnesses are taught never to answer a question if the defending lawyer objects that the question is "vague and ambiguous." This is inappropriate. But we can frequently fix the problem by putting the witness on the spot. When the lawyer objects and the witness reflexively says he doesn't understand the question, make the witness identify what he doesn't understand. "What is confusing about my question?" If that doesn't work, take the witness word-by-word and have the witness tell you whether he or she understands each of the words you used. Usually the witness will capitulate in the middle of the process. And if the witness does identify a word, define it or change it and ask again.

This process frequently makes the witness look foolish – because the witness usually is being foolish – and the witness does not like that. The witness was also forced to answer a series of questions – embarrassing questions – that the witness would like to have avoided. For both of these reasons, the witness will not be inclined to continue with the same foolish tactic of claiming that he doesn't understand the question just because his lawyer said "vague and ambiguous."

A similar approach should be used when a witness unfairly refuses to answer an understandable question. Obviously, if the question is important and the witness refuses to answer it squarely, we must get an answer. But even on questions that are not critical, the witness cannot refuse to answer a question. Any time the witness dodges a question, the witness must pay a price. Most witnesses will quickly conclude that dodging questions simply doesn't pay; they will ultimately have to answer anyway, and they'll spend a lot of time and pain in a hopeless effort to avoid answering. By insisting on an answer to every question, you train the witness.

One final example: impeachment. When you impeach at deposition (later we'll discuss when you might want to do so), the witness learns that there is a cost to be paid for answering inconsistent with the lawyer's expectations. The witness is made to look like a liar or a fool in front of her lawyer, the court reporter, the videographer, opposing counsel, and sometimes witnesses. This is painful. Some witnesses are so traumatized by the process that they quickly learn to give the answer that the attorney seems to want. They simply stop fighting.

H. Some Thoughts on Timing

With most witnesses, even the most hostile witnesses, there are some useful facts with which the witness will agree. Most attorneys believe that starting the deposition in a manner that is as non-threatening as possible makes sense, for the witness will be more relaxed and we can chase after the facts that we should be able to get. Once the witness is hostile and defensive, however, it may be a fight to get just about anything.

This is sound thinking, but I'd like to add a caveat. Most witnesses are not familiar or comfortable with the deposition process. It takes them some time to feel comfortable, and when they feel comfortable, they are likely to perform better. (Even NFL quarterbacks – people at the top of their profession who have been playing the game for many years – often struggle in the first few minutes of the Super Bowl because of nerves.) Sometimes it makes sense to challenge the witness immediately when the witness is nervous and uncomfortable, and therefore more likely to make a mistake.

Sometimes the best type of question to ask is the big-picture question on an issue of weakness for the other side's case, such as "What did the defendant do wrong?" Seldom is a witness prepared for such a question. The witness has probably spent time discussing all of the critical facts that support their position, but they probably do not have a solid soundbite in mind. Ask this question, especially early, and the witness is likely to give a half-baked, poorly thought-out response. Use the traditional funnel or listing method to lock the witness down, and you're likely to have a useful chunk of testimony. The witness may have left out important parts of the other side's theory, he or she may have characterized their position poorly, and you can probably follow up to ask a series of difficult questions. Keep in mind that the witness is now not only trying to defend what may be a weak liability theory (or damages theory or just about anything else), but the witness is also trying to defend his or her earlier answers.

V. How to Capitalize on a Useful Soundbite Without Going Too Far; When is Enough, Enough

We have all heard the advice related to cross examination not to ask one question too many. In his famous Ten Commandments of Cross Examination, Irving Younger counseled lawyers to be careful not to ask one question too many. His famous example involved a case being tried by Abraham Lincoln. Abraham Lincoln was defending a man charged with assault and battery and manages to get the witness to admit that he never actually saw the defendant bite off the nose of the victim. But he then asked the (allegedly) fatal question: "If you didn't see him bite off the nose of the victim, how do you know that he did?" "That's easy," the witness responds, "because I saw him spit it out."

Younger uses this as an example of asking one question too many. And for that, his story is unpersuasive. If Lincoln ends his cross one question earlier and sits down to much acclaim from Younger and other trial analysts – What control! What ability to avoid asking that final, fatal question! – his cross is destroyed on re-direct when opposing counsel asks the witness the question that Lincoln was supposed not to have asked.

But there is a widely accepted principle here that we need to grapple with, and this principle is accepted not only at trial but at deposition: the principle that it's important to know when to stop and, specifically, that there's a danger in asking too many questions and letting the witness repair damage that has been done in their examination. Is it true that there are times when continuing a particular line of questioning is likely to do more harm than good? And if so, how do we know when enough is enough. Far too often, lawyers give their less-experienced colleagues the advice not to ask too many questions but, when pressed what that means, give the remarkably unhelpful answer: it's a judgment call.

Well, thank you. But this sounds suspiciously like we don't know when to stop, possibly because there are no standards or guidelines for when we should stop, and we should simply guess and hope we're right. And maybe, just maybe, the longer we do this, the better we get at guessing.

I think that's wrong. I think there are principles we can apply so we do when to stop and when to keep going. And I believe that the fear of asking one question too many is probably overblown. It is far better to be thorough, in a positive way, than to stop out of fear that you'll ask too many questions.

A. Distinguishing Between Stopping Because You Have Achieved Your Goal and Quitting a Line of Questioning Out of Frustration

Before diving in, one word of caution. You're not allowed to quit. Specifically, don't use the rule against asking one question too many as an excuse to quit when you are struggling.

Generally speaking, the witness and opposing counsel are not out to help you. They want to make your life difficult. They want to hide the weak spots in their case and highlight only the

stuff that helps them. They will be cagey. They will be difficult. You're searching for soundbites – short, clear statements that support your case or undermine theirs – and it's not easy to get them. That's good. If it were easy, anybody could do it, and you wouldn't be valuable.

But this means we must be clever. We must use misdirection. We must use stealth. We must use all the tools at our disposal. But mostly, we must use persistence. Obtaining a useful soundbite at deposition requires persistence and a willingness to attack the same subject matter from multiple angles using different angles. It's similar to trying 15 or 20 keys on a lock until you find the right one. Don't quit. If there are additional approaches that might unlock the door and get the soundbite you need, use them. Choosing not to ask further questions is a tactic we must exercise from a position of strength.

B. Categories of Admissions and How to Handle Each One

But let's assume you've gotten something useful from the witness. How do we know when to quit? I start from the assumption that our fundamental goal – in deposition and at trial – is to shine a spotlight on the truth. Is there a weakness in the other side's position? Then we need to illuminate it so everybody can see. And if a plank of our case is not based on the truth – if it's trickery, smoke and mirrors – then our problem is not that we might lose a useful soundbite to help us prop up that argument; our problem is that we're relying on such an argument at all.

If we accept this philosophy as our lodestar, then I think we can reach some definitive conclusions about when we should stop a line of questioning, and we can even systematize the process of searching for those soundbites that help shine a spotlight on the truth.

So let's identify the various types of soundbites – again, clear, short, useful admissions from the other side that undermine their case or support ours.

The first type of soundbite we may come across is one I'll call the Factual Foundation problem. This is when the other side makes an admission that shows there is a factual problem with their case. A fact is missing or there is a fact contrary to what the other side needs to prove. Often this missing or contradictory fact concerns an element of a claim, but it could be a part of the other side's intended story at trial. "We don't know how many sales we lost" is an example of this type of admission.

The second type of soundbite is what I'll call the Harmful Characterization. This is where the witness characterizes facts in a way that helps us and hurts them. The difference between this and a Factual Foundation problem is that the characterization is often not an important fact itself but how you describe a fact in the case. "Our investigation was sloppy" is an example of this type of admission. Sloppiness is not an element of a cause of action. But sloppiness in an investigation may help color how the jury sees the important facts in the case.

The third type of admission is what I'll call the Careless Mistake. These soundbites occur when the witness uses poor language, misspeaks, or gives testimony that is incorrect because the witness is unprepared or ignorant. But in all cases, the witness could have avoided the admission had the witness been careful or prepared.

1. *Handling the Factual Foundation Admission*

We have already discussed that each chapter or module of our cross examination should have a clear thesis, which describes

So how do we deal with these three types of useful admissions. Let's begin with the first type, the Factual Foundation problem. Keep in mind that a true weak point can't survive rigorous inquiry. There's never a time when asking another question will allow the other side to fix such a problem; it's a problem because it is a weakness, and no amount of bluster can patch over it. Thus, the danger here is not so much that we ask too many questions – the more, the better – but that we fail to ask enough or fail to ask questions that are good enough.

Take our hypothetical admission: "We don't know how many sales we lost." If this is truly a Factual Foundation problem – rather than a Careless Mistake – then it is a problem for the other side because they cannot support their damages case with evidence. Shine the light on this problem and do it thoroughly.

But don't do what most lawyers do in this situation, which is ask a broad, conclusory question and try to browbeat the witness into agreeing. "So you have no evidence to support your lost profits claim, right?" This is a useless question at best and, at trial, may actually be harmful. No, the witness has already given us the conclusion we need, now it's our job to support it with a proper foundation.

Good cross examination at trial always involves not just a useful admission from the other side, but also context and build-up. Many lawyers miss this, and it's why their cross-examination – particularly impeachment – falls flat. The jury must understand why the statement is important (this is context) and the jury must feel the weight of the statement when it is finally delivered at the end of a line of questioning, best seen as a path to an intended and inevitable destination (this is build-up).

Therefore, if the witness concedes that he does not know how many sales his company lost, we don't run from the topic because we're afraid of asking too many questions. And our goal isn't to get an answer to the conclusory question that we know the witness will fight: "You have no evidence for your lost profits claim." Nor do we invite the witness to re-examine the useful admission – the useful conclusion – that he's already given us. Instead, we lay the necessary foundations for good impeachment. First, establish the importance of this witness on this topic and the witness's knowledge. "You are the national sales director?" "It's your job to know your customers?" "You get paid to know why your customers buy or don't buy your products?" There are any number of possibilities, but the goal is the same: to establish that the person making this useful admission is a person with a reason to know the information and a person who should be listened to on this subject.

Next, build out the factual underpinnings for the admission. If the company does not know how many sales it lost, there are a large number of factual reasons why this is the case. "Have you conducted surveys of buyers to understand why they buy the products they buy?" "Have you studied the sales trends before and after the alleged infringement? Was there a change? Have

you done any work to isolate the reasons for the change? Has anybody else?" These questions give us a factual basis for explaining why the other side had to make the admission they made, and they give us the questions we ask for our build-up at trial – they make up the questions that lead us on the path to the inevitable conclusion that the other side does not know if they lost any sales or, if they did, how many they lost.

Therefore, we lose a great deal if we run from the topic of lost sales once the witness has given us the useful admission that they do not know how many sales they lost.

2. *Handling the Harmful Characterization Admission*

The analysis is similar but slightly different when it comes to the second type of admission, the Harmful Characterization. The difference is that this admission is not factual in nature; it is descriptive and often subjective. "Our investigation was sloppy." With this type of admission, there is a reasonable case to be made to take the admission and run, knowing that the witness and opposing counsel will want to clean up the problem by re-characterizing and disavowing the earlier characterization as a mistake.

But even with this type of admission, immediately running from the topic is usually a mistake. Keep in mind, just because you run away doesn't mean that the witness won't try to disavow the earlier characterization and clean up the mess he has made. He will most likely to so immediately, or if he doesn't recognize the problem, after the first break (when his lawyer tells him about it). He may even do so at trial.

Our goal, then, is to make it as difficult as possible for the witness to walk away from the Harmful Characterization. We do this not by running from the topic, but by asking as many questions as possible, as quickly as possible, that adopt the witness's characterization. We do not invite the witness to re-visit the characterization. Thus, these follow-up questions need not be great questions. In fact, they should be simple and require very little thought. The less the witness has to think about his answer, the less likely it is that he'll fix the mess he's created. So while I love the question "Why?" as a follow up to "Our investigation was sloppy," I may wait a minute before asking it. I may first ask "Who was in charge of the sloppy investigation?" "When did this sloppy investigation begin? When did the sloppy investigation end?" What I'm looking to do is get the witness to answer as many questions containing his Harmful Characterization as possible. The witness may be able to walk back a poor choice of words in a single question. But after he's answered 20 questions with that same choice of words? Much more difficult.

He will eventually try, of course. But he's likely to try anyway, and now the record is harder to run from. And in cross at trial, instead of having a single question and answer that we can use for impeachment to establish this characterization that we want, we may have 5, 10, or 20, and our cross will be far more effective.

Keep in mind also that if the witness offers up a Harmful Characterization, there is probably a reason for it. In our hypothetical, there are no doubt facts that would support the characterization – otherwise, the witness never would have said it. You can always go back and build a factual

foundation for the characterization, using the same types of questions that you would ask for a Factual Foundation problem. "Were all of the participants interviewed?" "Was the interview conducted by a first-year associate?" These sorts of questions are necessary; ask them. But ask them after first getting the witness to adopt the Harmful Characterization as many times as possible in additional questions first.

3. *Handling the Careless Mistake Admission*

The final type of admission is the Careless Mistake. First a word of caution. It is, I believe, always a mistake to base your case or any portion of it on what you believe is untrue. A mistake, by definition, is something that is not true. If the witness has simply made a mistake – even one that really sounds great on paper and would seem to help the cause – there is likely a paper trail and other witnesses who will establish the true facts and support the witness when he or she inevitably tries to rectify the mistake. And if we have based our case—and our credibility—on the mistake, we're likely in a great deal of trouble. **In an adversarial proceeding, the truth usually comes out. Do not base your case on anything other than what you believe to be the truth.**

Now sometimes we won't know whether an admission is a Careless Mistake or a Factual Foundation problem. And in those cases, you treat the admission as a Factual Foundation problem. As you do so – as you ask the simple, fact-based questions necessary to lay a foundation for proper cross examination on a Factual Foundation problem – you may discover that the witness made a mistake, and the admission is not nearly as good as you thought it was.

And this is a good thing. True, the admission you obtained has been compromised, but in the process of trying to lay a solid foundation, you discovered that the admission simply isn't as good as you first believed, and it probably should not play a significant role at trial.

Sometimes, of course, you may know that the admission is a Careless Mistake from the beginning. If so, you should also realize it's lack of true significance. Our job is to shine a spotlight on the truth; shining a spotlight on a mistake will simply identify the statement as a mistake.

But if you insist on using the admission – maybe because the client wants you to, maybe to make the witness uncomfortable, maybe to give the other side something to worry about for purposes of settlement – then asking the types of factual foundation questions you ask for a Factual Foundation problem is probably unhelpful. Instead, you should treat the admission like you would the Harmful Characterization. Adopt the mistake into as many questions as you can, and try to get the witness to answer those questions without realizing and correcting the mistake. Note that you need to ask these questions right away, before the witness discovers the error – he or she will – and certainly before opposing counsel is able to coach the witness to fix the problem.

In following this system in handling the admissions we receive at trial, we need not exercise some type of mysterious "judgment" to determine when we ask follow-up questions and when we run away. We ask the right types of follow-up questions to give us the best chance of using

that admission effectively at trial. We need not fear asking one question too many. Ask, and keep asking. But ask the right kind of questions.

VI. Setting Up Effective Impeachment

One of our primary goals in a deposition is to set up the witness for impeachment. Impeachment does not always mean showing that the witness is lying, although that is one form of impeachment. Impeachment is when we establish that the witness's testimony cannot be relied upon because of truthfulness, bias, character, competency (the witness does not really know what he's claiming to know) or some other problem. If we assume that the witness is an adverse witness, then some amount of impeachment may be necessary. A good deposition transcript is the best tool for impeaching a witness later.

A. Impeach at Deposition or Not?

Where it is necessary to impeach a witness, the examiner must decide whether to impeach the witness at deposition or wait until trial. (We are assuming that the witness will be available for trial. If the witness's attendance at trial is uncertain, you obviously have no choice but to impeach at deposition.) Which course the examiner takes often depends upon a number of factors.

First, is the case likely to settle? Most civil cases settle, and one of the litigator's goals is to convince the other side that there are sufficient problems with their case – sufficient uncertainty – that they should be eager to settle. Impeaching a critical witness at deposition on an important point may be one factor in helping the other side to take a reasonable settlement position. And unused impeachment may never be a factor in the case if the parties settle before trial.

Second, can you steer the witness your direction through impeachment at deposition? We argued earlier that it is almost always better to have the witness agree with you than it is to impeach the witness. If you want the witness to agree with you on a point, and the witness refuses, impeaching the witness at deposition may force the witness to take your position at trial. Note that your impeachment will likely not be used as impeachment at trial. Instead of showing the jury that the witness answered the question "incorrectly" in deposition, you simply have the witness answer the question "correctly" at trial since the witness knows he or she will be impeached otherwise. Note, however, that if the witness still chooses to take the "incorrect" position, the witness may be in a better position to fight your impeachment efforts at trial, having had months (or in some cases, years) to think about a way out of the trap that they know you will try to spring.

Third, how comfortable are you with the impeachment trap you wish to spring? The danger of waiting until trial to impeach is that you don't necessarily know what the witness will say in response. If the witness has a good response to your impeachment efforts, your impeachment may fall flat, and worse, you may harm your own credibility to losing a high-stakes battle with the witness in front of the jury. Saving impeachment for trial is only an option when you are comfortable that the impeachment will be effective and the witness does not have a reasonable out.

Fourth, special considerations apply with expert witnesses. Experts are in a much better position to fix impeachment than percipient witnesses are. If a percipient witness was not in a position to see whether the light was red or green, there is very little the percipient witness can do to fix this problem. But experts form opinions based on assumptions and factual conclusions they are given or arrive at through their analysis. Thus, a little further analysis after the deposition usually gives the expert a plausible path around the impeachment efforts.

For example, imagine that the expert's opinion is subject to attack because the expert did not consider a fact that came out in a deposition of one of the other side's witnesses. Whether we impeach at deposition or save the impeachment we will probably start he same way: locking down the expert as to what we considered, and ensuring that the deposition transcript in question was not considered. Now we either confront the expert with the relevant testimony or wait and do so at trial. If we do so immediately, a good expert will admit that he did not consider it, will give a reason why it probably does not affect his opinions, but will also state that he will want to consider this fact after. At trial, he will say he considered it and will have the best possible explanation for why it does not matter. Therefore, in most cases with an expert, we are better off saving the impeachment. But, note, this is risky. If we're not sure how the expert will explain his position once he is confronted with the testimony at trial, we do not know whether we will want the exchange. And, finally, saving impeachment for trial only makes sense where the impeachment material and position can remain hidden. If you have an expert on your side who issues an expert report criticizing the opposing expert for failing to take these facts into consideration, waiting makes no sense. Run the issue to ground in the deposition.

B. How to Set Up Effective Impeachment at Trial

Most lawyers fail to use their deposition to set up a witness for proper impeachment at trial. The primary reason for this is most lawyers don't know how to impeach at trial effectively. Often, they've never been in a position to try, or have tried on few occasions and don't really understand how to do it well. To set up a witness for impeachment at trial, we need to understand how to impeach effectively at trial, and we need to understand why impeachment at trial so often falls flat.

Effective impeachment at trial requires context and build-up. Context helps the jury to understand why the impeachment is important: (1) why this is an important issue in the case, (2) why this particular witness's testimony on the issue is important. Build-up increases the drama of the moment and keeps the jury from missing the impeachment when it takes place.

Lawyers often fail to use their depositions to set up effective impeachment because they are focused on the wrong things. They want the witness to agree to their conclusion, and witnesses rarely do. After a useful fact or two come out in deposition, the examiner tries to get the witness to agree to his desired conclusion: "So you were careless in handling the materials?" Seldom will a witness agree to such a conclusion, and the examiner and witness are left squabbling over the witness's failure to agree.

Yet even in those rare cases when the witness agrees to our conclusion, that does not mean the soundbite we've acquired will be compelling at trial. Absent context and build-up, the jury is likely to miss the big moment.

Thus, instead of fighting with the witness over your desired conclusion, and instead of running from the subject once the witness surprisingly agrees to the desired conclusion, spend some time establishing as many underlying facts that would support the conclusion as possible. And spend time establishing facts that would explain why the conclusion is critical, and why this witness's testimony is critical to the question. (The CEO's admission on company policy is critical; the head engineer's position on a marketing document may not be.) Once we get these building blocks in place, effective impeachment at trial is possible.

C. Getting the Conclusion We Want

Do not assume from the previous discussion that we ignore the importance of getting the witness to agree to our desired conclusion. But understand that we're likely to get the conclusion either through misdirection and cloaking – when the witness does not understand the importance of the conclusion, he or she is more likely to give it to us – or after we've laid the necessary factual groundwork. The witness may still not agree that he "was careless in handling the materials" after we've established 17 different facts that support the conclusion, but he is more likely to do so.

More importantly, we can get him closer to our conclusion buy putting him on the slippery slope. If, for example, the witness concedes that he left the materials to be handled by two new employees, that he did not give them any special instructions, that they were given only about 15 minutes to store the materials, and a handful of other, useful facts, look at the witness's position. He may agree that he was careless. But even if he doesn't agree to that, he may agree that these were not ideal conditions. That it might have been better to have a more experienced person there or to have given a warning to the employees before they started the project. We may, in other words, get something that gets us closer to the mark. And the closer the witness gets to the mark – the closer he gets to admitting he was careless – the better off we are, and the more effective our trial impeachment will be.

At trial, then, we use the myriad facts we've established at deposition to show what the issue is and why it's important, why this witness is important on this issue, and then we start down the path toward our desired conclusion. Each fact that supports our conclusion, each fact that shows the witness's carelessness, is brought out one-by-one in an inevitable walk towards our conclusion. If the witness agree to the conclusion, that's the coup de grace. But even if the witness never adopted our conclusion, each fact he admits to, each admission he did grant us that gets us closer to the conclusion we desire, gets us closer and closer to the mark. The witness may never admit the conclusion, but by the end, the jury is already there.