

Deposition Admissions: Maximizing the Number and Force of Admissions in Key Depositions

Creating Streamlined and Simple Narratives in Complex Cases and Sowing Distrust of Opposing Themes

THURSDAY, APRIL 7, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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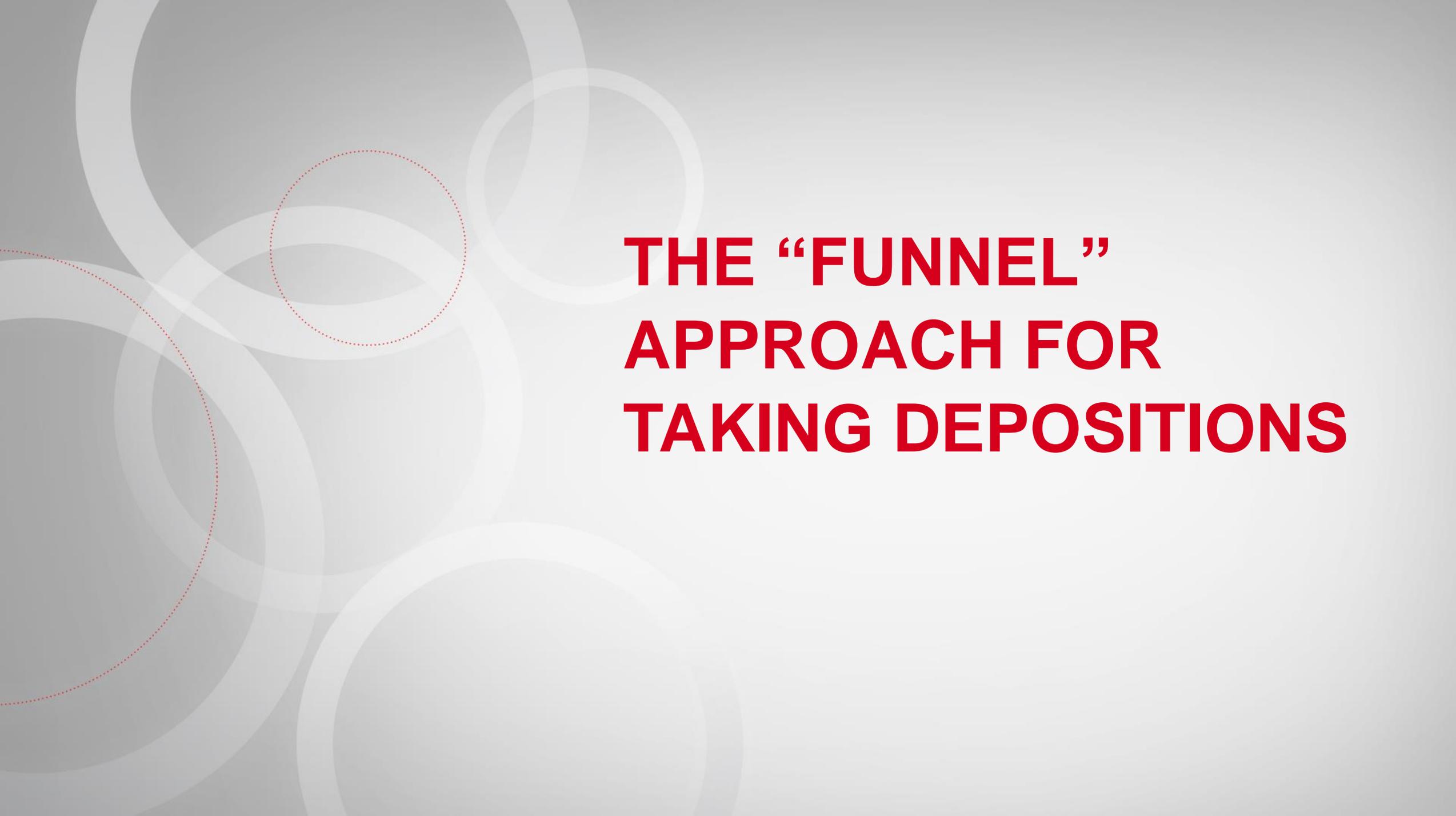


AN ALTERNATIVE APPROACH FOR TAKING DEPOSITIONS

APRIL 7, 2022

TWO PROPOSITIONS

- 1. TRIALS ARE COMPETING NARRATIVES**
- 2. DEPOSITIONS ARE TOO VALUABLE TO WASTE ON DISCOVERY**

The background features a light gray gradient with several overlapping, semi-transparent circles in various shades of gray. A single dotted red circle is positioned on the left side of the image, partially overlapping the other circles.

THE “FUNNEL” APPROACH FOR TAKING DEPOSITIONS

The “Funnel” Approach

WHAT IS IT?

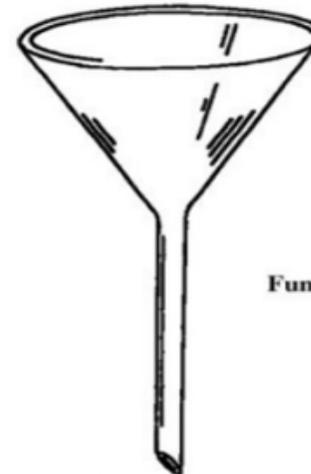
Start Each Topic with Open-Ended Questions

Follow Up on the Deponent’s Answers with Narrower Questions

Confirm with a Summary Question, and then Transition to the Next Topic

The “Funnel”

**Who, what, when, where
how, describe explain**



Funnel

FOLLOW UP

What do you mean
Give details

FILL IN

Did you? Was there?
Have you? Did you ever?

EXHAUST

What else?
Is that everything?

RECAP

As I understand it . . .
Is that right?
Nothing more?

The “Funnel” Approach revisited



SUBOPTIMAL BECAUSE DEPOSITIONS ARE TOO VALUABLE TO WASTE ON DISCOVERY

- In a complex case, unknown and unsuspected facts should be **few and far between**.
- Open-ended questions invite the witness to describe events **in his or her own (rehearsed) words**.
- The witness’s own words will not **advance your narrative**
- Videotaped, clean admissions are **powerful**, and the “funnel” approach **is unlikely to elicit them**.

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AN ALTERNATIVE APPROACH FOR TAKING DEPOSITIONS

An Alternative Approach



The **sponsorship theory of advocacy** holds that juries treat evidence differently depending upon who “sponsors” it. Your narrative is more persuasive when you **let the other side make your points.**

An Alternative Approach

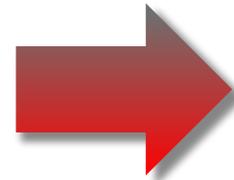
- 1 • Develop the overall **narrative and themes** of the case.
- 2 • **Master the record** relevant to the witness.
- 3 • **Structure a detailed outline** in subject matter segments, each of which is designed to elicit admissions that support a key component of your narrative.
- 4 • **Script** critical questions.
- 5 • Allow time to **restructure and refine** the outline.

An Alternative Approach

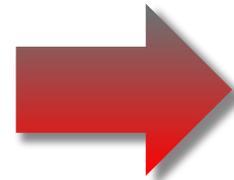
WHAT ABOUT LEARNING UNKNOWN FACTS?

USE THE INFORMATION AVAILABLE TO YOU

- The pleadings.
- The documents.
- Disclosure statements.
- Written discovery responses.
- Other depositions.
- Fact witness interviews and statements.
- Guidance from your expert witness.
- Publicly available information.
- Common sense and reasonable inferences.



If you have done your homework, then surprises should be **few and far between.**



And you should quickly **grasp their significance.**

An Alternative Approach

WHAT ABOUT AVOIDING UNFAIR SURPRISE AT TRIAL?

While there may be some modest value in knowing precisely how a witness is going to hurt your case at trial, as opposed to not knowing, **the right goal is to neutralize the witness** or to at least minimize the harm.

FOR EXAMPLE:

- Instead of saying:
 - *“Tell me about the meeting,”* or
 - *“What was said at the meeting?”*
- Ask: Specific questions **based on the documents you’ve reviewed**, and then **press for admissions**.



An Alternative Approach

WHAT ABOUT SUMMARY (OR RECAP) QUESTIONS?

- Summary questions unhelpfully open the door for the deponent **to backtrack and explain away** his or her previous admissions.
- Use summary questions only when:
 - They will **increase the impact** of the deponent's admissions; and
 - You are **confident** that you will get the expected answer.



An Alternative Approach

INDIRECT BENEFITS OF THE ALTERNATIVE APPROACH

- Helps **thematic and narrative development**.
- Make **unexpected connections** and gain **new insights** into your case.
- Scripted questions:
 - Maximize the impact of the admission; and
 - Minimize the risk that you will **fool yourself** into thinking that you got a clean admission in a deposition **when you didn't**.
- Deponents under pressure get discouraged and **make mistakes**.

An Alternative Approach



WHAT ABOUT COST?

- In a **complex, high stakes case**, the incremental cost of this alternative approach is **modest** compared to the amount in controversy and overall cost of the litigation.
- In any event, **regardless of the stakes**, this basic process is still the **right approach**.
 - Know your case narrative and themes;
 - Determine where the witness fits; and
 - Pose questions to maximize admissions and impeachment opportunities.

An Alternative Approach

ADDITIONAL TACTICS

- Stick to the **facts and reasonable inferences.**



- Get the witness to agree to facts that fit your narrative, even if undisputed.
- Uncooperative witnesses: **Get what you can and move on.**

SPECIAL CASES

- **Rule 30(b)(6) witnesses:**
 - Structure your deposition outline by topic; and
 - Use the entity's document production to your advantage.
- **Testifying expert witnesses:**
 - Use the Federal Rule of Civil Procedure 26(a)(2)(B) "complete" statement of opinions to your advantage; and
 - Avoid asking questions that invite the witness to correct or embellish statements in his or her report.

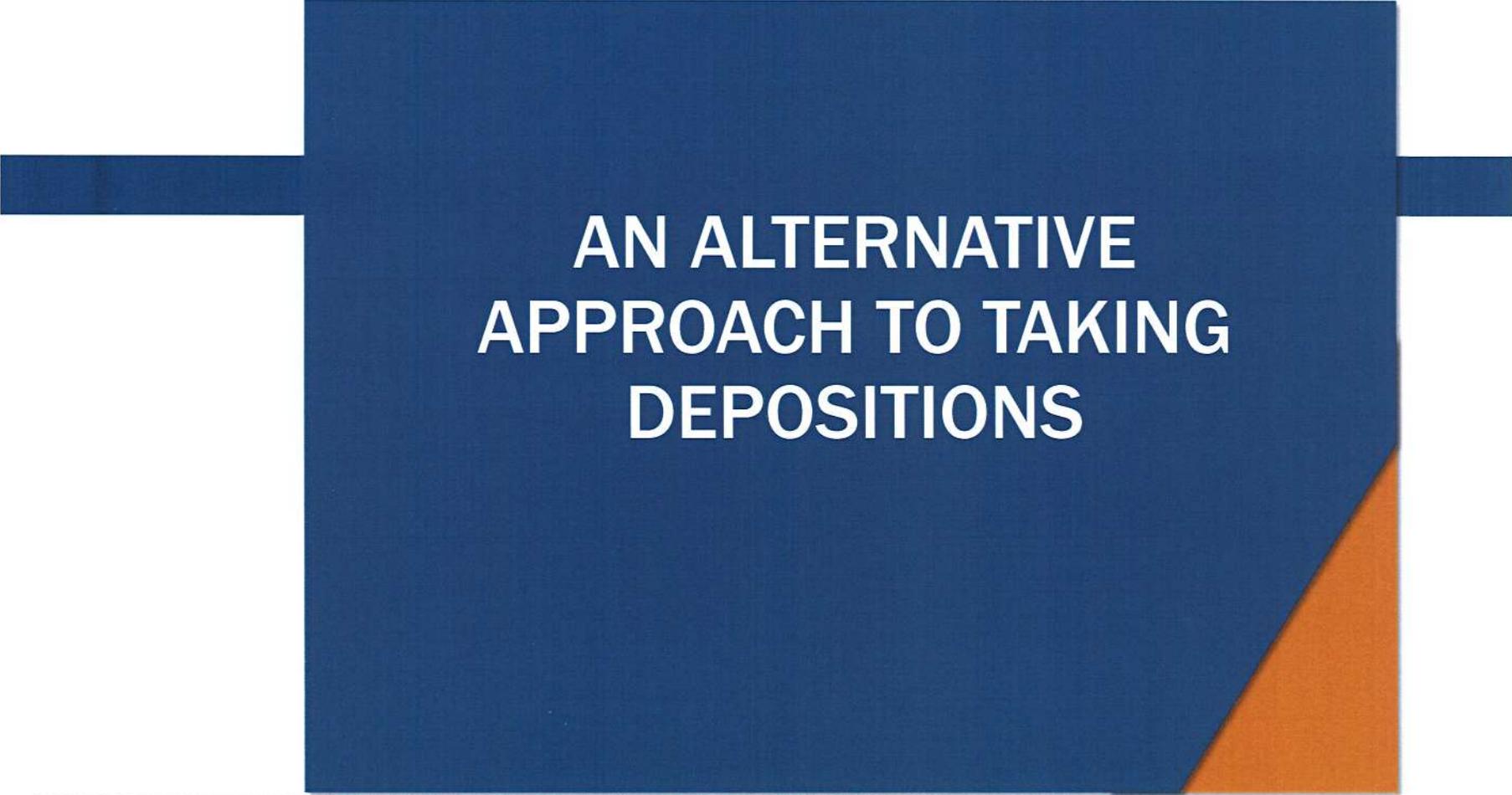
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AN ALTERNATIVE APPROACH TO TAKING DEPOSITIONS





Develop the overall narrative and themes of the case.



- **Research the legal elements of your claim or defense so you know substantively what you need to prove**
 - **Identify the elements of your claim or defense**
 - **Complaint or Answer**
 - **Jury Instructions**
 - **Pattern Instructions**
 - **This Judge's Instructions**
 - **Bench memo/trial brief**
 - **Plan for Summary Judgment Motion**



Elements of a claim



Fraud elements:

- (1) Representation of an existing fact;**
- (2) Materiality of the representation;**
- (3) Falsity of the representation;**
- (4) The speaker's knowledge of its falsity;**
- (5) The speaker's intent that it be acted upon by the plaintiff;**
- (6) Plaintiff's ignorance of the falsity;**
- (7) Plaintiff's reliance on the truth of the representation;**
- (8) Plaintiff's right to rely upon it; and**
- (9) Resulting damage.**



Jury Instruction on Reliance



The plaintiff must prove by a preponderance of the evidence that [he] [she] [it] justifiably relied on the alleged misrepresentation or omission in deciding to engage in the [purchase] [sale] of the [security] [securities] in question.

The plaintiff may not intentionally close [his] [her] [its] eyes and refuse to investigate the circumstances or disregard known or obvious risks.



Reliance



Q. Did you rely on Dr. Welby's statements that a decision had been made to change your pay and position?

A. Of course I did to my detriment.

Q. How did you rely on their statements?

A. I resigned for good cause, for good reason.



Know the Legal Standard



Fluorine On Call, LTD v. Fluorogas Limited, 380 F.3d 849 (5th Cir. 2004)

- Q.** You've done no analysis whatsoever of what a willing buyer would be willing to pay for the MOU on February 23rd 2001; is that correct?
- A.** Well—no. I haven't done an analysis of what a willing buyer, willing seller would have paid for the MOU on the date it was canceled.



“Thus, Bratic did not do any of the calculations that distinguish a lost asset damage model from a straightforward lost-profits one. Instead, he calculated the value based solely on expected future profits. Because of this, the record contains no evidence of the market value of the exclusive license.

... The only evidence of damages—Bratic’s testimony—reflects a speculative lost-profit analysis and fails to show any evidence of the fundamental aspect of its own damage theory. For that reason, we reverse the \$120 million award of lost asset damages.”



Timing

What do you know? What do you not know?



**You must have the necessary information in hand in order to
develop your theme and narrative**



Learning Unknown Facts? Obtaining and using available information



- Puts a premium on timely discovery responses from the opposing party
- Dealing with the opposing party who does a “rolling production” that “slow rolls” documents to you slowly over time?
 - eDiscovery – search terms
 - Rule 26(d)(2)(B) – “A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”
 - Rule 26(b)(1) – “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”



Crafting your questions - Anticipate Objections

When designing your questions, anticipate objections at the deposition that are intended to disrupt, confuse, delay, obstruct, etc.

For example –

“Objection, leading” [Is the witness “a hostile witness, an adverse party, or a witness identified with an adverse party”? – Fed. R. Evid. 611(c)]

“Objection to form”

“Objection, calls for speculation”

“If he knows”

“Objection, misstates the witness’s earlier testimony”

“Objection, when?”

“Objection, lack of foundation”

The evasive witness, and the objection, “Ask and answered.”

The witness who takes an inordinate amount of time to read a document/exhibit?

The witness who wants to consult with counsel?



TYPICAL OBJECTION



Q. Who made the decision not to pay Dr. Welby his vested retirement benefits?

COUNSEL: Objection to the form. Facts not in evidence.

Q. Subject to his objection, you can answer.

A. Are you asking me if I know who decided not to pay Dr. Welby his vested retirement benefits to him?

Q. Correct.

A. I do not know.



Weighing the Pros and Cons of the Alternative Approach



The Pros And Cons – Initial Question



➤ Who Are Key Witnesses?

- Witnesses identified in Initial Disclosures, who will likely appear at trial
- 30(b)(6) witnesses
- Witnesses (if different) who are unavailable to testify at trial, who will appear by deposition
- Witnesses who authenticate documents
- The opposing side's experts



The Pros And Cons – Initial Question



➤ Who Are Not Key Witnesses?

- Pure discovery witnesses – e.g., electronic document collection
 - There will not be many such witnesses
- If a deponent is not a key witness, ask why are you taking the deposition?



The Pros And Cons – Disadvantages



- Not a perfect solution for all key witnesses
- May lose flexibility as case changes
 - Case will always change over time – at least to some extent
 - New facts become relevant
 - Positions change
 - Other side may be creating its case – the evolving target
 - Other side may be changing its case – the moving target
 - Other side may advance irrational positions – the unknowable target
 - Other side's positions may be unknown at time of deposition or may change
 - Modification of theories and themes may be required over time



The Pros And Cons – Disadvantages

- Risk of missing key knowledge of witness and key testimony at trial if unduly focused
 - Use more open-ended questions to eliminate potential knowledge of subject areas
 - **BUT** use open-ended questions only where needed, and use narrowly
- Risk of obtaining admissions without context enabling jury to understand significance of admission
 - Admissions in isolation may be flawed
 - Line of questions should be crafted as part of script



**Risk of missing key knowledge of witness and
key testimony at trial if unduly focused**



Don't slavishly follow your written questions

Listen to the answers



Be alert – Be flexible



- You craft your question based on your best available information, presenting your narrative and theme.
- The witness agrees with what you say but then adds a new previously-undisclosed wrinkle.
- You've been sandbagged by a “slow roll” or a “reservation of the right to plead other affirmative defenses as they become known.”



Admissions in isolation may be flawed



- **Other side may be creating its case – the evolving target**
- **Other side may be changing its case – the moving target**



The Moving Target a/k/a “Hide the ball”

Answer –

- Plaintiff not entitled to contract benefits - He failed to comply with contract requirements.
- General denials.
- Defendants reserve the right to plead other affirmative defenses as they become known.

During discovery –

- Even if Plaintiff complied with contract requirements, there are “regulatory reasons,” an affirmative defense, why the Defendants cannot pay the contract benefits.



The Pros And Cons – Disadvantages



- **May** be more expensive if case does not go to trial
 - Most don't – but how do you know which ones will?
 - Approach may make trial less likely
 - May be **less** expensive, even if there is no trial
 - Need to learn case and facts at some point, anyway
 - Avoid waste of time



The Pros And Cons – Advantages



- **Force to learn and assess case early**
 - If case flawed, why waste any more time and money?
 - Seek reasonable settlement and remedial action
- **Benefits of quality admissions**
 - Promote settlement
 - Summary judgment
 - Prevail at trial



The Pros And Cons – Advantages



- **Save time at depositions**
 - Time is limited
 - Don't need to fill all allotted time for deposition
 - Omit unnecessary lines of examination as prepare
- **Avoid memorializing unfavorable testimony**
 - Want your testimony to tell clear story
 - Don't get admission lost in irrelevant testimony
 - Unavailable witness
 - Don't get other side testimony for counter designation



A Hybrid Approach



*Funnel
and
Focused*



A Hybrid Approach



- **Alternative Focused Approach is not the perfect fit for all circumstances**
 - It is a goal, not a rigid rule
- **Things you might miss if too rigid**
 - Important subject matter of witness testimony
 - Key facts
- **When funnel approach used, be judicious**
 - Separate funnel testimony from focused testimony so admissions are clean
 - Always try to avoid bad testimony – even in funnel



A Hybrid Approach – An Example



- **Cutting off escape routes in summary judgment**
 - Title VII case example: It is critical to get all the facts surrounding each allegation of discriminatory conduct
 - The funnel is useful in reducing the ability of plaintiff to submit an affidavit in response to a motion for summary judgment on a fact that was not locked down during deposition

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