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An Updated Practical Guide to Taking and Defending Depositions

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An Updated Practical Guide to Taking and Defending Depositions

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ABSTRACT

The deposition offers a singular opportunity to handcuff the deponent to an irreversible script. Consequently, both the attorney taking the deposition and defending counsel must prepare for and conduct the deposition with equal if not greater care than the trial.

Traditionally, lawyers have used the deposition to discover facts relating to the legal elements and the credibility, perception, and recollection of the witness. However, recent breakthroughs in neuroscience as to how the brain makes decisions have revealed a different genre of evidence that will drive how the trier of fact will decide the case. Today an attorney taking a deposition also must probe the elements of story—character traits, motives and the stakes.

Proper handling of stipulations and thorough execution of an introductory litany at the outset of the deposition are prerequisites to ensuring that the witness cannot credibly offer different or additional facts at trial without being impeached. To continue to shackle the witness to the transcript, over the course of the deposition the examiner constantly must be mindful which of three

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objectives they are pursuing—constructing nablas, admissions testing, or surfing for nablas—and adopt the questioning technique necessary to achieve that end. When examining about a document, the attorney taking the deposition must employ additional techniques to ensure the answers will bind the witness at trial. Finally, deposing counsel must understand how to respond to and manage objections—both legitimate and spurious—as well as deal with any attempts to coach the deponent or otherwise obstruct the deposition. Both during and after the deposition, the defending attorney must take permissible steps to ensure the accuracy of the testimony, minimize its damage, and preserve evidentiary privileges. However, defending counsel's most critical role–while at all times acting within the bounds of rules of professional conduct–is to fully prepare the witness for the deposition. The goal must be to make the deponent sufficiently comfortable with what will transpire so they can accurately convey what they do know, comfortably concede what they do not know, and avoid being led into admitting facts that are not true.

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INTRODUCTION

40 years ago, to commemorate the 150th anniversary of the founding of The Dickinson School of Law, the faculty submitted articles for a special Sesquicentennial Issue of the *Dickinson Law Review*. As an homage to the law school's longstanding ethos that theory and practical skills are indispensable and complementary pillars of great lawyering, I wrote *A Practical Guide to Taking and Defending Depositions*.[1]

1. Gary S. Gildin, *A Practical Guide to Taking and Defending Depositions*, 88 Dick. L. REV. 247 (1984), https://tinyurl.com/2c88y5tb [https://perma.cc/36AY-5RNH].

Notwithstanding the fact that entire well-regarded books are dedicated to deposition practice,[2] that article remains one of the most downloaded works in the Penn State Dickinson Law IDEAS database.[3] Since 2012, it has been accessed over 6400 times through the readership.works.bepress.com database by private law firms, as well as commercial and governmental entities.[4]

While flattering, the fact that a significant number of lawyers continue to consult this 1984 article is disconcerting. In the intervening four decades, rules of procedure governing depositions,[5] and my thinking on the substance and tactics of depositions, have significantly evolved. At the same time, the need for competent instruction on depositions has become more acute, due to the vanishing of civil trials.[6] Without having tried a case to verdict, it is exceedingly difficult to understand the techniques one must execute to hone the deposition

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2. *See, e.g.*, DAVID M. MALONE ET AL., THE EFFECTIVE DEPOSITION: TECHNIQUES AND STRATEGIES THAT WORK (Nat'l Inst. for Trial Advoc. 3d ed. 2007); DENNIS R. SUPLEE ET AL., THE DEPOSITION HANDBOOK (Wolter Kluwer L. & Bus. 5th ed. 2011); HENRY L. HECHT, EFFECTIVE DEPOSITIONS (Am. Bar Ass'n 2d ed. 2011); SAWNIE A. MCENTIRE, MASTERING THE ART OF DEPOSITIONS (Am. Bar Ass'n 2016).

3. *See Most Popular Papers**, PENN STATE DICKINSON LAW IDEAS, https://tinyurl.com/4ueetz4m [https://perma.cc/UC39-WJ2D] (last visited Aug. 5, 2024). Dickinson Law IDEAS is the institutional repository for Penn State Dickinson Law, an ever-expanding online collection of the scholarly works of faculty, the *Dickinson Law Review*, and law school history. The repository has been live for about five years. The earlier article on depositions was posted to the IDEAS repository on November 3, 2019, and has been downloaded 7664 times as of August 16, 2024, at which time it was the most downloaded article since the repository went live. *Id.*

4. *See* BEPRESS, https://tinyurl.com/3m22hnva [https://perma.cc/4L2X-4ADM] (last visited Aug. 5, 2024).

5. FED. R. CIV. P. 26, which sets forth general provisions regarding discovery, was amended in 1993, 2000, 2006, 2007, 2010, and 2015. Amendments to FED. R. CIV. P. 30 (Depositions by Oral Examination) were enacted in 1993, 2000, 2007, and 2015; *see* Diana S. Donaldson, *Deposition Essentials: New Basics for Old Masters*, 26 LITIG., Summer 2000, at 25, 25 ("Deposition practice today differs dramatically from what it was 20 years ago—even five or 10 years ago . . . The changes result from judicial decisions, amendments to the Federal Rules of Civil Procedure (and some states' rules), and widespread criticism of certain deposition tactics under the old regime."); Gerson A. Zweifach, *Depositions Under the New Federal Rules*, 23 LITIG., at 6 (Winter 1997).

6. The American Bar Association's Section of Litigation launched the Vanishing Trial Project to collect data on and analyze the extent of the decrease in civil trials. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEGAL STUD. 459 (2004); *see also* Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2131 (2018) ("The civil trial is vanishing. In 1938, trials resolved roughly 20 percent of civil cases in federal court. By 1990, only 4.3 of federal civil filings reached trial. By 2000, a mere 2.2 percent did. And, most recently, in 2016, the civil trial rate was halved again."); *cf.* Sarah Staszak*, Explanations for the Vanishing Trial in the United States,* 18 ANN. REV. L. SOC. SCI. 43 (2022) (suggesting further examination of other venues in which cases are adjudicated to explain and evaluate the reduction in civil trials).

transcript as an effective weapon on cross-examination.[7] Therefore, to mark the occasion of the 190th anniversary of the founding of what is now Penn State Dickinson Law, I offer this updated practical guide to taking and defending depositions. The goal of this piece remains the same as its predecessor: to capture the fundamentals of deposition practice in a single, relatively concise, open-source article usable by rookie litigators, as well as veteran trial attorneys.

I. THE SUBSTANTIVE SCOPE OF THE DEPOSITION

The past 40 years have witnessed a revolution in the substance of what trial advocates should probe at the deposition. Amendments to the rules of civil procedure regarding the scope of discovery,[8] mandatory initial disclosures,[9] electronically stored information,[10] and obstructionist conduct[11] have impacted deposition practice at the margins. But the true game changer lies in recent discoveries as to how the brain makes decisions. These findings have opened the door to a new and robust set of topics lawyers must explore while remaining within the guardrail that discovery be "relevant to any party's claim or defense and proportional to the needs of the case."[12]

The "received view" of the American trial process is founded upon a rational ideal of how the brain makes decisions.[13] We have faith that, once empaneled, jurors will warehouse the evidence as it is offered during the trial. We count on them to withhold any judgment until they have heard all the witnesses testify, listened to closing arguments, and received the judge's charge.[14] We expect that once in the deliberation room, the jurors' emotions and life experiences will not infect or override the exercise of their sworn duty to find the facts by weighing only the evidence offered at trial.[15] We are confident the jurors will apply those facts to the law by

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7. *See* Gary S. Gildin, *Cross-Examination at Trial: Strategies for the Deposition*, 35 AM. J. TRIAL ADVOC. 471 (2012); Lansing R. Palmer, *Cross-Examination Using Depositions at Trial*, 3 LITIG., Winter 1977, at 21.

8. *See* Fed. R. Civ. P. 26(b)(1).

9. *See id.* 26(a).

10. *See id.* 34(a)(1)(A), 34(b)(2)(D), & (E).

11. *See id.* 30(c)(2).

12. *Id.* 26(b)(1).

13. *See* Robert P. Burns, *The Received View of the Trial*, *in* A THEORY OF THE TRIAL 10 (Princeton Univ. Press 1999); *see also* MOLLY TOWNES O'BRIEN & GARY S. GILDIN, TRIAL ADVOCACY BASICS 25–29 (Nat'l Inst. for Trial Advoc., 3d ed. 2022).

14. *See* Judicial Council of California Civil Jury Instructions (2016), CACI No. 100 (Preliminary Admonitions) and No. 5009 (Predeliberation Instructions).

15. *Id.*; *see also* LISA FELDMAN BARRETT, HOW EMOTIONS ARE MADE: THE SECRET LIFE OF THE BRAIN xii (Houghton Miflin Harcourt 2017) ("The American legal system assumes that emotions are part of an inherent animal nature and cause

assessing whether the plaintiff established each of the legal elements they must prove to prevail. In keeping with this orthodox view of the rational ideal, the primary substantive goal of the lawyer taking the deposition was "fact-stacking:" accumulating evidence that can be offered at trial to support or refute elements of the cause of action or defense.

In addition to generating evidence relating to the legal elements, counsel used the deposition to discover facts they will muster at trial to discredit testimony of an adverse witness. Lawyers generally employed the "CPR" method. They sought to elicit answers that impugn the deponent's credibility, perception, and recollection—flaws that the jurors may consider when weighing the testimony.

While the trial process has remained unchanged since the founding of our nation, our understanding of how the brain operates has increased exponentially in the past 40 years.[16] Modern imaging technology now allows us to see the brain in action, tracking the mind's decisional process by observing communication between neurons.[17] Two central findings have upended the assumptions of the rational ideal.[18] First, the brain automatically and constantly predicts what it is learning by seeking to match new information to patterns of past life experience. Second, emotion is a part of—indeed the driver of—every decision. Now it is clear that depositions must seek facts beyond those relevant to the legal elements and the credibility, perception, and recollection of the witnesses.

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us to perform foolish and even violent acts unless we control them with our rational thoughts.").

16. *See* ANDY CLARK, THE EXPERIENCE MACHINE: HOW OUR MINDS PREDICT AND SHAPE REALITY 10 (Pantheon Books 2023) ("[T]he last ten to fifteen years has seen an explosion of work in computational and cognitive neuroscience."); BARRETT, *supra* note 15, at xv ("We are, I believe, in the midst of a revolution in our understanding of emotion, the mind, and the brain—a revolution that may compel us to radically rethink . . . central tenets of our society . . . ."); DANIEL KAHNEMAN, THINKING FAST AND SLOW 70 (Farrar, Straus and Giroux 2011) ("We have learned a great deal about the automatic working of System 1 in the last decades. Much of what we now know would have sounded like science fiction thirty or forty years ago."); LEONARD MLODINOW, EMOTIONAL: HOW FEELINGS SHAPE OUR THINKING x–xiii (Pantheon Books 2022) ("Much of our understanding comes from advances in just the past decade or so, during which there has been an unparalleled explosion of research in the field. This book is about that revolution in the understanding of human feelings.").

17. MLODINOW, *supra* note 16, at xii–xiii.

18. These findings have given rise to reassessment of practices in fields outside the law. *See* ROBERT M. SAPOLSKY, BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST 79 (Penguin Press 2017) ("There's been a proliferation of 'neuro-fields . . . neuroeconomics, neuro marketing, neuroethics and, I kid you not, neuroliterature and neuroexistentialism.").

A. Moving from Fact-Stacking to Story

The first neuroscientific discovery that disrupts conventional deposition practice relates to when and how the brain processes information it receives. Contrary to the rational ideal, our brains cannot, and do not, function as storage facilities for individual facts. The brain and its billions of neurons are encased in an opaque box. It is tasked with interpreting a constant and voluminous barrage of signals[19] emanating from both outside and inside the body.[20] And there is a limitation to the real estate that can house the hard drive. The skull must be sized both to enable its passage through the birth canal and to allow us to stand upright.[21] Consequently, the brain lacks the capacity to warehouse facts for later consideration and synthesis when called upon to decide how to act.[22]

Furthermore, while the brain occupies only 2 percent of our body weight, it consumes 20 percent of the body's energy supply.[23] To efficiently make sense of the uninterrupted siege of inputs, the brain subconsciously, automatically, constantly, and unstoppably makes instantaneous predictions of what is happening and how to react.[24] To do so, our brain compares the signals it receives at the present moment to past life experiences.[25] Once it discovers a sufficiently

19. *See* BARRETT, *supra* note 15, at 60 ("One human retina transmits as much visual data as a fully loaded computer network connection in every waking moment . . . .").

20. *See* ANIL SETH, BEING YOU: A NEW SCIENCE OF CONSCIOUSNESS 79–80 (Dutton 2021) ("Imagine, for a moment, that you are a brain . . . sealed inside the bony vault of the skull, trying to figure what's out there in the world. There's no light, no sound, no anything—it's completely dark and utterly silent."); BARRETT, *supra* note 15, at 58 ("Like those ancient, mummified Egyptian pharaohs, the brain spends eternity entombed in a dark silent box . . . it learns what is going on in the world only indirectly via scraps of information from the light, vibrations, and chemicals that become sights, sounds, smells, and so on.").

21. *See* BARRETT, *supra* note 15, at 114 ("[T]his brain has practical constraints. Its network of neurons can grow only so big and still fit inside a skull that can be birthed through the human pelvis.").

22. *See* Sapolsky, *supra* note 18, at 98 ("In the moments just before we decide on some of our most consequential acts, we are less rational and autonomous decision makers than we like to think.").

23. *See* CLARK, *supra* note 16, at 8–9.

24. *See* SETH, *supra* note 20, at 92 ("The entirety of perceptual experience is a neuronal fantasy that remains yoked to the world through a continuous making and remaking of perceptual best guesses."); CLARK, *supra* note 16, at xii ("According to the new theory called 'predictive processing, reality as we experience it is built from our own predictions.").

25. *See* KAHNEMAN, *supra* note 16, at 80 ("System 1 bets on an answer, and the bets are guided by experience."); BARRETT, *supra* note 15, at 31 ("From sensory input and past experience, your brain constructs meaning and prescribes action. If you didn't have concepts that represent your past experience . . . all your sensory inputs would just be noise."); CLARK, *supra* note 16, at 26 ("Our own actions and histories sculpt the onboard prediction machinery that in turn sculpts human awareness.");

satisfactory resemblance to past experience, the brain will not waste the body's finite glucose supply by reconsidering that prediction in light of later evidence. Instead, the brain will ignore or actively suppress that contradictory evidence without consideration and will signal the body to act in response to its original prediction.[26]

The brain does not cache past experiences in a file labeled "actions." Rather, the events of our lives that create the neural architecture of our brain are networked to two features of the persons involved in those experiences: their character traits[27] and their motives.[28] The brain predicts current reality to be what most closely matches the confluence of character, motive, and actions of past experience.[29]

We must no longer rely on the traditional use of "fact-stacking" to satisfy legal elements and mustering attacks on witness credibility as the building blocks of our persuasion at trial. To adapt our advocacy to the contemporary understanding of the operation of the brain, we must offer a single, congruent story of character, motive,

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SAPOLSKY, *supra* note 18, at 694 ("[J]ust as the threshold of the axon hillock can change over time in response to experience, nearly every facet of the nuts and bolts of neurotransmitterology can be changed by experience as well."); SETH, *supra* note 20, at 93–94 ("[O]ur perceptual experiences of the world are internal constructions, shaped by the idiosyncrasies of our personal biology and history."); MLODINOW, *supra* note 16, at xv ("Deep within our brains . . . our shadowy unconscious mind is applying the lessons of our past experience to predict the consequences of our current circumstances.").

26. *See* KAHNEMAN, *supra* note 16, at 87–88 ("[O]ur associative system tends to settle on a coherent pattern of activation and suppresses doubt and ambiguity."); BARRETT, *supra* note 15, at 114 ("[Y]our adult brain has a network to shut out information that might sidetrack your prediction."); CLARK, *supra* note 16, at 5 ("If the expectations are sufficiently strong, or . . . the sensory evidence sufficiently subtle, I may get things wrong, in effect overwriting parts of real sensory information with my brain's best guess at how things ought to be.").

27. *See* BARRETT, *supra* note 15, at 34 ("[S]ome of your synapses literally come into existence because other people talked to you or treated you in a certain way."); KAHNEMAN, *supra* note 16, at 29 ("The mind . . . appears to have a special aptitude for the construction and interpretation of stories about active agents, who have personalities, habits and abilities.").

28. *See* SETH, *supra* note 20, at 87 ("[T]he brain is constantly making predictions about the causes of its sensory signals."); BARRETT, *supra* note 15, at 97 ("[I]nfants automatically try to guess the goal behind another person's actions; they form a hypothesis (based on past experience in similar situations) and predict the outcome that will occur several minutes later.").

29. *See* SETH, *supra* note 20, at 120 ("Our perceptual world, is nothing more and nothing less than our brain's best guess of the hidden causes of its colorless, shapeless, and soundless sensory inputs."); BARRETT, *supra* note 15, at 113 ("[Y]our brain follows a [ ] process, categorizing to best fit the entire situation and your internal situations, based on past experience. Categorization means selecting a winning instance that becomes your perception and guides your actions.").

and plot. We have to choose the story that best comports with the lived experience we expect the minds of the jurors to match.[30]

To select the best story of the case for trial, we must expand the scope of our depositions. We can no longer limit our inquiry to facts relating to the legal elements[31] and the credibility, perception, and recollection of the witness. Today, we must discover the character traits and motives of all persons whose stories we might choose to tell.[32]

B. Embracing Emotion

The second neuroscientific finding that upends deposition practice concerns the role of emotion in decision-making. Our legal system presumes jurors are capable of following and adhering to the judge's instruction to set aside emotion and reach a verdict solely by rationally weighing the evidence. However, we now know that what we term "emotion" is in fact interoception—signals from inside the body telling the brain what is needed to keep us healthy.[33] Because the brain's most important job is to keep us alive, emotion is an integral part of–and most likely the driver of—every decision.[34] Contrary

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30. *See* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (2d ed. 2014); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making, in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING (Cambridge Univ. Press 2010), https://tinyurl.com/mu3z4ve7 [https://perma.cc/A4KW-NLYM] (summarizing ten years of research finding that jurors construct a story during the trial based not only on the evidence presented, but also prior knowledge of similar events and human behavior, with the juror's confidence in the story influenced by the degree to which it corresponds with what typically happens in the world and incudes all the parts of the structure of a story).

31. Of course, we must continue to discover evidence relating to elements for purposes of raising and defending against motions for summary judgment before trial, see FED. R. CIV. P. 56, and motions for judgment as a matter of law at trial, see FED. R. CIV. P. 50.

32. *See* Anna-Maria Marshall, *Foreword* to W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM xvi (2d ed. 2014) (calling for "more empirical research on the role of discovery rules in crafting stories in ways that support legal judgments" because "[t]he entire discovery process entails storytelling by many witnesses, describing and narrating many pieces of evidence, and lawyers reviewing and culling those stories for presentation at trials").

33. *See* BARRETT, *supra* note 15, at 66–83; SETH, *supra* note 20, at 182–83; CLARK, *supra* note 16, at 90–92.

34. *See* JONATHAN HAIDT, THE RIGHTEOUS MIND xxi (Vintage Books 2021) ("[T]he mind is divided, like a rider on an elephant, and the rider's job is to serve the elephant. The rider is our conscious reasoning . . . The elephant is the other 99% of mental processes—the ones that occur outside of awareness but that actually govern most of our behavior."); BARRETT, *supra* note 15, at 66 ("Your brain is always predicting, and its most important mission is predicting your body's energy needs, so you can stay alive and well."); SETH, *supra* note 20, at 98 ("The controlled hallucination of our perceptual world has been designed by evolution to enhance our survival prospects, not to be a transparent window onto an external reality."); CLARK, *supra*

to the rational ideal, the brain is incapable of using reasoning to suppress or override emotion.[35]

Lawyers cannot offer evidence or raise arguments that directly appeal to the jurors' emotions at trial.[36] Without seeking to inflame their passions, however, advocates may make the jurors aware of the non-legal stakes. We must demonstrate the way in which a favorable verdict will improve someone's life in a non-material way.[37] Those stakes will cause the jurors to be emotionally satisfied with—and perhaps even root for—the verdict we are asking them to return. That reaction is unavoidable and will be embedded in the jurors' decision-making.[38] Consequently, the operation of the brain dictates that not only must we expand our deposition into backstories and motives, but we must also probe the deponent about potential stakes.

II. OBJECTIVES WHEN TAKING A DEPOSITION

The specific questions about facts relating to the legal elements, credibility, character, motives, plots, and stakes of and for those involved will naturally turn on the particular legal and factual issues in the case. Every time we take a deposition, however, we seek to realize three goals for each of these categories of substantive inquiry. We must discover all the information the witness knows, find out what the witness does *not* know, and pursue admissions.[39]

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note 16, at 89 ("[T]he primary tasks of all the prediction machinery in our heads is to help us stay alive. A major part of that staying alive involves keeping our own inner bodily states within surprisingly tight bounds of biological variability."); MLODINOW, *supra* note 16, at 6–7 ("[O]ur emotional state influences our mental calculations as much as the objective data or circumstances we are pondering.").

35. *See* SAPOLSKY, *supra* note 18, at 58 ("[A] simplistic view is that the vm [very emotional] PFC [prefrontal cortex] and dl [deliberative] PFC perpetually battle for domination by emotion versus cognition . . . Instead they are intertwined in a collaborative relationship needed for normal function."); BARRETT, *supra* note 15, at 81 ("You cannot overcome emotion through rational thinking, because the state of your body budget is the basis for every thought and perception you have."); MLODINOW, *supra* note 16, at 9 ("In humans . . . emotion is not at war with rational thought but rather a tool of it.").

36. *See* FED. R. EVID. 403.

37. *See* TALI SHAROT, THE INFLUENTIAL MIND: WHAT THE BRAIN REVEALS ABOUT OUR POWER TO CHANGE OTHERS 66 (Henry Holt & Co. 2017) (noting that incentives are one of seven critical factors influencing persuasion, with humans "more likely to execute an action when we are anticipating something good than when we are anticipating something bad").

38. *Id.* at 8, 35–54 (noting that emotion is one of seven critical factors that "can hinder or help an attempt to influence").

39. Professor McElhaney has offered a more comprehensive and granular list of goals that may be applicable to a particular deposition:

> Learn essential facts; Nail down what you already know; Find out what the witness was shown and told in preparation for the deposition; Get and explain documents; Find out who knows the facts; Locate missing witnesses;

A. Discover All Information Known by the Witness

While both proceedings involve questioning the adverse witness, our objectives at the deposition differ from those during the cross-examination at trial. Our aim when cross-examining an adverse witness is to elicit only the facts that advance our case. We faithfully observe questioning techniques that minimize the witness's opportunity to offer harmful testimony. When deposing an adverse witness, conversely, we want to elicit the entirety of the witness's personal knowledge—not only the good, but the bad and the ugly as well. We need to learn of any damaging testimony the witness will offer, so we can gather proof to refute the evidence at trial. Discovering all the harmful facts also allows us to select the factual and legal theory for the trial that minimizes or, better yet, embraces those facts. Finally, because most civil actions settle without a trial, we must be fully aware of both the weaknesses and strengths of the case to intelligently advise our clients in formulating and responding to settlement offers.

It is easy in the abstract to understand why it is beneficial to learn the warts in your case. Yet it is inevitable that at some point while taking the deposition you will wonder whether you are making a mistake by "creating a record" of bad facts permanently codified in the transcript. To allay these doubts you must recognize that, unless the witness will be unavailable after the deposition, opposing counsel will be able to present any and all facts you did not elicit. In supporting or defending motions for summary judgment, opposing counsel may have the witness prepare a written affidavit testifying to their personal knowledge of facts that do not appear in the deposition transcript.[40] Because no rule of evidence excludes testimony on the

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> Establish damages; Find impeachment material; Develop a prima facie case; Block a claim or defense; Set up a motion for summary judgment; Develop the basis for an injunction or a temporary restraining order; Preserve testimony; Lock in the witness to prevent future 'creativity;' Get the basis for an expert's opinion; Find out what the expert reads; Evaluate the witness; Evaluate the lawyers on the other side; Show the other lawyers that their cheap tricks don't faze you; Show the other lawyers you are actually getting ready for trial.

James W. McElhaney, *Follow Your Game Plan,* A.B.A J., Nov. 2000, at 64 (citing JOHN E. MOYE, THE ART AND LAW OF DEPOSITIONS (Pro. Educ. Grp. 1994)); *see also* MALONE ET AL., *supra* note 2, at 21–28 (identifying specific deposition goals within the categories of gathering information, preserving testimony, and facilitating settlement); Mark A. Drummond, *Panning for Gold: A Depositions Roundtable*, 35 A.B.A LITIG. NEWS, Spring 2010, at 3, 14 (setting forth top ten list of deposition goals).

40. *See* FED. R. CIV. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

ground that you did not ask questions about the matter at the deposition, the witness may testify to unexamined and undisclosed facts during direct examination at trial.[41] Failing to pursue unwelcome news at the deposition harms the case in three ways. You will not be able to prepare in advance of trial to counter damaging facts, choose the factual story of the case that minimizes or embraces the facts, or knowledgeably advise the client in settlement negotiation.[42]

B. Discover What the Witness Does Not Know

A less obvious purpose of the deposition is to discover what the witness does not know. At times you will become frustrated when, contrary to your expectations, the deponent testifies that they have no knowledge of certain matters. Indeed, in some instances, the witness may revel in the belief that they are outsmarting you by flaunting their ignorance of facts.[43] In reality, for every subject on which they profess to be unaware, the witness has sidelined themselves for trial.[44] First, the rules of evidence preclude a lay witness from testifying to facts absent personal knowledge.[45] Second, should the witness claim to recall the facts at trial, you will impeach them by their inconsistent deposition testimony.

When the deponent asserts a lack of personal knowledge, you have a choice as to how to proceed. Where the witness's ignorance is helpful to your case, you immediately should pivot to your next question once the witness unequivocally states he has no personal knowledge. On the other hand, if you believe the witness harbors information supportive of your case but is attempting to evade disclosure, you need not accept the asserted lack of knowledge or

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41. Relatedly, for areas in which you failed to ask questions, you will be not able to successfully impeach the witness on cross examination by showing that the facts they testified to on direct do not appear in the deposition transcript. The witness will simply and credibly respond "you never asked me any questions about that matter."

42. While it is appropriate to use the deposition to learn bad facts, it is equally important to utilize the techniques that prevents the deponent from offering additional harmful information about the subject at trial. *See infra* Sections IV(A) & (B).

43. For examples of this phenomenon, see Dwayne Carter, Lil Wayne Deposition Video (Full Version TMZ), YOUTUBE (Nov. 12, 2012), https://tinyurl.com/y94bbdch [https://perma.cc/AV96-3L59]; CeleBuzz, Jusin Bieber Whines Being Put Through the Deposition is "Unfair," YOUTUBE (Mar. 11, 2014), https://tinyurl.com/3puwzmex [https://perma.cc/P6Q9-LMCU].

44. *See* Christopher T. Lutz, *Using and Utilizing Depositions*, 23 LITIG., Summer 1997, at 22, 27 (noting that a deposition can be intentionally used to conclusively establish the witness knows nothing about various categories of facts).

45. *See* FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.").

recollection at face value. Instead, you should press the witness using the menu of follow-up questions developed by Professor James McElhaney for the witness who may be hiding helpful information behind the curtain of their claim not to know or not to remember.[46]

C. Obtain Admissions from the Witness That Support Your Factual and Legal Theory of the Case

Depositions are not solely defensive exercises used to reveal and limit the damage the witness can inflict. Even where the deponent is the opposing party, we can use the deposition offensively to discover and memorialize evidence that buttresses our factual or legal theory.[47]

In movie and television portrayals, cross-examination is portrayed as the singularly dramatic moment of the trial where the witness is exposed as a liar—or in some instances as the murderer.[48]

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46. James W. McElhaney, *The Foundation Habit*, 26 LITIG., Summer 2000, at 51, 63.

> Did you once know the answer? Whom did you tell? Is there anything that might help you remember? Could you have written a memo about this? Where would it be? What other documents might have this information? Where would they be? What other people might know the answer? What have you heard about this matter? Who might know where to find this information? If you had to find the answer to this question tomorrow, where would you look? If you had to find the answer to this question tomorrow, who would you ask.? Do you understand that if you find the answer or remember what it is, you have an obligation to bring it to my attention?

Id.; *see also* James W. McElhaney, *A Whole Lot of Nothing: Discovery That Doesn't Probe for Information is Likely to Come Up Empty*, A.B.A J., Jan. 2003, at 56, 57; James W. McElhaney, *The Deposition Notebook*, 27 LITIG., Summer 2001, at 55, 58; Kevin A. Adams, *"I Don't Recall:" Overcoming a Witness with Selective Memory*, 45 LITIG., Fall 2018, at 38, 38.

47. One commentator suggests that for key witnesses in complex litigation, discovering what the witness knows "is, at best, of secondary importance." Joseph Mais, *An Alternative to the "Funnel" Approach for Taking Depositions*, 47 LITIG., Summer 2021, at 37, 37. Rather, the goal is to "maximize the number and force of admissions that can be obtained from the witness that validate the narrative of our case." *Id.*

48. In A Few Good Men, Lieutenant Daniel Kaffee's cross-examination of Colonel Nathan Jessep resulted in Jessep's arrest in the courtroom, although Kaffee's clients were found guilty of conduct unbecoming and dishonorably discharged. A FEW GOOD MEN (Castle Rock Ent. 1992). 1L Elle Woods' cross examination of Chutney Windham in Legally Blonde extracted Chutney's confession to accidentally killing her father, causing the judge to sua sponte dismiss murder charges against Brooke Taylor-Windham. LEGALLY BLONDE (Type A Films, Marc Platt Prods., Metro-Goldwyn-Mayer 2001). Criminal defense lawyer Perry Mason lost only one case, with most trials ending when Mason's cross-examinations procured a confession from someone seated behind the railing. *8 Riveting Facts About Perry Mason*, METV (July 11, 2016, 12:45 PM), https://tinyurl.com/bdeyfs7x [https://perma.cc/WQ4X-S55X].

In the real world, however, a far more common purpose of cross-examination is to have the witness admit facts that are consistent with your story of the case.[49] Except where the stakes are so high that the witness is sufficiently motivated to commit perjury in the presence of the judge and jury, it is implausible and inadvisable to attack the truthfulness of the witness.[50] If you instead view cross-examination through a constructive lens, in almost every instance the witness will concede information that is consistent with your chosen factual story of the case.[51]

The deposition is the opportunity to get the witness to admit individual facts that we will elicit at trial.[52] The witness may have information that supports aspects of character, motive or plot in a persuasive story, or the stakes.[53] By memorializing the admissions in the form that will enable us to successfully impeach the deponent should they deny any of those facts,[54] we can prepare and present a fail-safe constructive cross-examination.

Achieving each of the three deposition objectives assumes that the deponent will not be able to change, disavow, or supplement their answers at trial without being impeached by the transcript of the deposition. Consequently, every technique in taking the deposition is designed to chain the witness to their deposition testimony.

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49. *See* Larry Pozner, *Pozner on Cross: Constructive Cross-Examination*, THE CHAMPION, May 2023, at 57; Matt Dodd, *Crossing the Cop: Constructive and Destructive Cross-Examination in DUI Cases*, THE CHAMPION, Nov. 2016, at 50; Susan Rutberg, *Conversational Cross-Examination*, 29 AM. J. TRIAL ADVOC. 353 (2005).

50. You are not faced with the binary choice of accepting the entirety of the witness's testimony or claiming the witness is a liar. Without impugning the honesty of the witness, you may elicit facts that suggest the witness is mistaken based upon obstacles to accurate perception or recollection.

51. There are three categories of information you may elicit on cross that will be supportive of your case: "1) Facts the witness knows and admits did occur that are helpful to the legal theory, factual story, stakes or theme of your case; 2) Facts the witness knows and admits did not occur, which non-occurrence is consistent with the legal theory, factual story, stakes or theme of your case; [and] 3) Facts as to which the witness does not know whether or not they occurred." *See* O'BRIEN & GILDIN, *supra* note 13, at 123.

52. For a discussion of how to identify potential admissions in advance of and during the deposition, *see infra* p. 131.

53. *See infra* notes 30–32 and accompanying text; *see also* Kimberly L. Beck, *Tips and Strategies to Improve Your Depositions*, A.B.A LITIG. SECTION, Apr. 9, 2019, https://tinyurl.com/2ryz7v9d [https://perma.cc/9ZDK-HW49] ("Once the litigation team knows the law, the team can construct a theory of the case, and work to obtain evidence (like deposition testimony) to support the theory. The case theory serves as the backbone for each deposition outline.").

54. *See infra* notes 96–98 and accompanying text.

III. HANDCUFFING THE DEPONENT TO THEIR TESTIMONY AT THE OUTSET OF THE DEPOSITION

The process of shackling the witness to the deposition transcript begins at the outset of the deposition using two tactics—appropriate stipulations and an introductory litany.[55]

A. Stipulations

The first opportunity to buttress—or undermine—the binding effect of the deposition transcript will arise before you ask the witness a single question. Opposing counsel or the court reporter may ask whether you are taking the deposition under the "usual stipulations."[56] While not entirely sure of what is being proposed, you will feel significant social pressure to respond "of course." Understandably, you will be loath to display your ignorance or to appear unreasonable by rejecting what is customary. Accepting the "usual stipulations," however, is a serious mistake. From the first deposition you take to the final deposition of your litigation career, the only proper reply to an invitation to accept the usual stipulations is: "What specific stipulations are you proposing?"[57]

To feel comfortable with rejecting the "usual stipulations," you must understand the role and purpose of a deposition stipulation. Default rules for the conduct of depositions are baked in by the federal[58] or state[59] rules of civil procedure, local rules of the district[60] or county,[61] and the rules or order of the individual judge to whom the

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55. Other matters that will arise at the outset of the deposition include positioning of the deponent and lawyers; administration of the oath; and persons other than the deponent who may attend. *See* Dennis R. Suplee & Diana S. Donaldson, *Beginning the Deposition: A Guide for New—and More Experienced—Litigators*, 26 PA. L. WEEKLY, Dec. 22, 2003, at 8.

56. *See generally* FED. R. CIV. P. 30(b)(5)(C) ("At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.").

57. *See* Donaldson, *supra* note 5, at 26 ("Counsel often agree on the usual stipulations at the start of the deposition without stating them on the record and without knowing exactly what they are. That is dangerous."); Beck, *supra* note 53 (noting that, because there is no universal definition, "an attorney asked to agree to the 'usual stipulations' should either decline to do so or clarify on the record what is meant by that term").

58. *See* FED. R. CIV. P. 30(c)–(e).

59. *See, e.g.*, S.D. CODIFIED LAWS §§15-6-30(a)–(g); N.J. CT. R. 4:14.

60. *See, e.g.*, N.D. OHIO LOC. CIV. R. 30.1, httsp://tinyurl.com/45n8f55t [https://perma.cc/565G-GTD2] (last visited Aug. 5, 2024).

61. *See, e.g.*, *Chapter Three: Civil Division, Appendix 3.A Guidelines for Civility in Litigation*, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES COURT RULES 2 (July 1, 2011), https://tinyurl.com/3dysrknt [https://perma.cc/W6QS-SU3J].

case is assigned.[62] A stipulation is a proposal to alter these rules by mutual agreement.[63] However, a meeting of the minds as to a stipulation is not a prerequisite to proceeding with the deposition. If both counsel do not concur, the deposition will be conducted as prescribed by the default rules.

To intelligently decide whether an alteration of procedure is tactically more beneficial to your client than the default rule, you must fully understand the substance of any stipulation.[64] In addition, the ruling judge must unambiguously fathom the terms of the stipulation should a dispute arise whose resolution depends on the content of the stipulation.[65] Acceptance of the "usual stipulations" serves neither of these ends.[66]

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62. *See, e.g.*, Case Management Order No. 11 (Deposition Guidelines), *In re* Johnson & Johnson Talcum Powder Prods. Mktg., Sales Prac. and Prods. Liab. Litig., No. 3:16-md-2738-FLW-LHG, MDL No. 2738 (D.N.J June 18, 2018).

63. *See* FED. R. CIV. P. 29.

64. *Cf.* Fodelmesi v. Schepperly, No. 87 Civ. 6762 (KMW), 1990 U.S. Dist. LEXIS 10443, at *8 (S.D.N.Y. Aug. 7, 1990) (rejecting argument that because parties agreed to the "usual stipulations," party did not waive privilege by counsel's failing to object at the deposition); Steven Tolliver, *What Are "the Usual Stipulations,"* PRAC. LITIGATOR, Jan. 1997, at 25, 26 ("It is extremely important to make certain that all interested parties have a similar understanding of the usual stipulations."); James W. McElhaney, *The Specter of Waivers; Mishandling 'Usual Stipulations' in Deposition Can Kill You*, 86 A.B.A J., Apr. 2000, at 72, 72 ("Thousands of seasoned litigators aren't sure what all the usual stipulations include . . . [I]t makes no sense to agree to some same basic ground rules without knowing what they are.").

65. *See* Garcia v. Co-Con, Inc., 96 N.M. 306, 308 (N.M. Ct. App. 1980) (noting that "usual stipulation" did not waive right to review and sign where counsel did not explicitly state that "it is stipulated and agreed that the [deponent] waives signature").

66. *See* Kathy Behler, *Best Advocacy Fix: Depositions and Stipulations*, LEGAL ADVOC., Nov. 4, 2013 ("There is no judicial definition defining what this phrase [the usual stipulations] means and very few decisions explaining the meaning."). An all-jurisdiction Lexis search for cases with the terms "deposition" and "usual stipulations" generated only eighty results. Most of the cases assume the "usual stipulation" preserves for trial all objections except those as to form. *See, e.g.*, Perez v. Bruister, No. 3:13cv-1001-DPJ-FKB, 2014 U.S. Dist. LEXIS 104838, at *7 (S.D. Miss. July 31, 2014); Culbertson v. Culbertson, 455 S.W. 3d 107, 136 (Tenn Ct. App. Oct. 16, 2013). In Ranfone v. Ranfone, No. CV000445278, 2007 Conn. Super. LEXIS 1045 at *4 (Conn. Super. Ct. Apr. 24, 2007), the court interpreted Section 13-30 of the Connecticut Rules of Practice to "incorporate[] many provisions of the usual stipulations" and provides, "[e]vidence objected to shall be taken subject to the objections." *Id.* at *4 (quoting Fletcher v. PGT Trucking, CV9600547653S, 1998 Conn. Super. LEXIS 2794, at *4 (Conn. Super. Ct. Oct. 2, 1998)). In Molfese v. Fairfaxx Corp., 3:05 CV 317 (JBA), 2006 U.S. Dist. LEXIS 15795, at *3 (D. Conn. Apr. 4, 2006), the court held that the "usual stipulations" did not deprive deponent of the ability to review and make changes to the transcript, albeit under the extraordinary circumstances where the deponent, a third-party witness, did not have an attorney present at the deposition and was about to be treated for brain cancer at the time of the deposition. *See* FED. R. CIV. P. 30(d) advisory committee's notes to 1993 amendment (now Rule 30(c).

The notion of "usual stipulations" likely arose because modification of the default rules *might* serve the interests of both parties in two areas: (1) the deponent's review and signing of the deposition transcript, and (2) objections that must be raised at the deposition to be preserved for trial. While the strategic interests of the parties do not align as to the former, there is room for agreement as to the latter.

1. Stipulations Regarding Reading and Signing the Deposition Transcript

One ostensible "usual stipulation" is a waiver of the deponent's right to read and sign the transcript. The probable reason that both parties agree to this stipulation is the belief that the deponent's review is confined to correcting any errors the court reporter made in transcribing the answers given at the deposition.[67] Were this truly the limited scope of the right, it is understandable that both parties would readily agree to waive reading and signing. The possibility that the court reporter made a significant error in the transcription is remote.

In most jurisdictions, however, the deponent's review of the transcript extends beyond correcting errors made by the court reporter.[68] The person deposed can change accurately transcribed answers if, upon reflection, the witness believes they did not accurately convey their personal knowledge.[69] The only limits on amendments are:

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67. *See* Brian A. Zemil, *All Things Errata*, 47 A.B.A LITIG. NEWS, Winter 2022, at 20; Richard G. Stuhan & Sean P. Costello, *Rule 30(e): What You Don't Know Could Hurt You*, PRAC. LITIGATOR, Jan. 2006, at 7, 7; Peter Turner, *Correcting Deposition Transcripts*, PRAC. LITIGATOR, May 1996, at 39.

68. *See* ILL. SUP. CT. R. 207(a) ("Unless signature is waived by the deponent . . . the deponent will be afforded an opportunity to review . . . the deposition . . . and that corrections based on errors in reporting or transcription which the deponent desires to make will be entered upon the deposition with a statement by the deponent that the reporter erred in reporting or transcribing the answer or answers involved."); Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F. 3d 1217, 1225 (9th Cir. 2005); Thorn v. Sunstrand Aerospace Corp., 207 F. 3d 383, 389 (7th Cir. 2000); Greenway v. Int'l Paper Co., 144 F.R.D. 322, 324–25 (W.D. La. Oct. 27, 1992); Rios v. Bigler, 847 F. Supp. 1538, 1546 (D. Kan. Mar. 11, 1994); Julie M. James, *"A Deposition Is Not a Take Home Examination:" Resolving the Ambiguity of Texas Rule of Civil Procedure 203.1*, 69 BAYLOR L. REV. 217 (2017); Gregory A. Ruehlman, Jr., *A Deposition Is Not a Take Home Examination:" Fixing Federal Rule 30(e) & Policing the Errata Sheet*, 106 NW. L. REV. 894 (2012).

69. *See* FED. R. CIV. P. 30(e) (stating that deponent may make "changes in form or substance" by "sign[ing] a statement listing the changes and the reasons for making them"); Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997); Fundación Segarra-Boerman e. Hijos v. Martínez-Álvarez, No. 3:16-cv-02914 (DRD), 2019 U.S. Dist. LEXIS 241137, at *13 (D. P.R. Nov. 27, 2019); Reilly v. TXU Corp., 230 F.R.D. 486, 490 (N.D. Tex. Aug. 15, 2005); Luhman v. Dalkon Shield Claimants Tr., No. 92-1417-MLB, 1994 U.S. Dist. LEXIS 14203, at *1 (D. Kan. Oct. 3, 1994);

(a) the witness cannot amend the initial transcript but will record their new answer on an errata sheet with a citation to the page and lines of the testimony it corrects;[70] (b) the deponent must provide a non-conclusory reason for the change;[71] and (c) the court may order reopening the deposition of the witness for further questioning regarding the amended answer.[72]

a. The Preferred Tactical Positions of Counsel as to Reading and Signing

One of the principal advantages of depositions over written discovery requests is the ability to obtain answers directly from the witness rather than responses filtered by the lawyer. The right of the deponent to amend answers when reviewing the transcript jeopardizes this valuable benefit. During the review of the transcript, the lawyer who defended the deposition obviously cannot simply instruct a witness to change an answer. However, the defending attorney can cause the deponent to correct deposition responses in several ways.

United States *ex rel.* Burch v. Piqua Eng'g, Inc., 152 F.R.D. 565, 566–67 (S.D. Ohio Feb. 2, 1993); Hawthorne Partners. v. AT&T Techs., Inc., 831 F. Supp. 1398, 1406–07 (N.D. Ill. Aug. 25, 1993); Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. Apr. 2, 1981).

70. *See Podell*, 112 F.3d at 103; Daroczi v. Vt. Ctr. for Deaf & Hard of Hearing, No. 02-440-JM, 2004 U.S. Dist. LEXIS 1029, at *16–17 (D. N.H. Jan. 28, 2004).

71. *See* Holland v. Cedar Creek Mining, Inc., 198 F.R.D. 651, 653 (S.D. W. Va. Jan. 18, 2001). The courts generally have not examined the legitimacy of the reasons provided. *See Podell*, 112 F. 3d at 103; Foutz v. Town of Vinton, 211 F.R.D. 293, 295 (W.D. Va. Feb. 1, 2002); Colin v. Thompson, 16 F.R.D. 194, 195 (W.D. Mo. Oct. 1, 1954). However, by analogy to their treatment of affidavits that contradict earlier deposition testimony, some courts have scrutinized the reasons for corrections when relied upon to support or oppose a motion for summary judgment. *See* EBC, Inc. v. Clark, 618 F. 3d 253, 267 (3d Cir. 2010) ("[W]hen reviewing a motion for summary judgment, a district court does not abuse its discretion under Rule 30(e) when it refuses to consider proposed substantive changes that materially contradict prior deposition testimony, if the party proffering the changes fails to provide sufficient justification. At the same time, we emphasize that courts may, in their discretion, choose to allow contradictory changes (and implement the remedial measures discussed above) as the circumstances may warrant."); Burns v. Bd. of Cnty. Commr's, 330 F. 3d 1275, 1282 (10th Cir. 2003) (adopting a three-part test to determine whether the errata sheet may be considered); Thorn v. Sundstrand Aerospace Corp., 207 F. 3d 383, 389 (7th Cir. 2000) ("[A] change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the correction of an error in transcription."); Wigg v. Sioux Falls Sch. Dist., 274 F. Supp. 2d 1084, 1091 (D. S.D. July 2, 2003).

72. *See Foutz*, 211 F.R.D. at 295; *Luhman*, 1994 U.S. Dist. LEXIS 14203, at *1–2; *cf. Hawthorne Partners*, 831 F. Supp. at 1407 (deposition should be reopened only where deposition otherwise would be "useless" or "incomplete"); Jerold S. Solovy & Robert L. Byman, *Discovery: Sworn Mulligans*, LAW360, https://tinyurl.com/ykr48smc [https://perma.cc/DBH3-VPN4] (July 23, 2004); Robert E. Seuly, Jr., *A Brief History of Deposition Editing*, 15 LITIG., Spring 1989, at 43, 43.

Counsel *might*[73] point out aspects of the deposition testimony that contradict what the witness told the lawyer in prep sessions, prior statements of the witness, or documents. The deponent's lawyer could identify ambiguities and implications in answers that could be interpreted as an inaccurate portrayal of the witness's personal knowledge. Rather than counsel instructing the deponent to amend their testimony, the witness would then decide whether to correct the answer on the errata sheet.

To prevent the deponent from changing answers under the sway of their lawyer,[74] counsel *taking* the deposition should prefer that the witness not read, review, or correct the transcript.[75] However, the lawyer *defending* the deposition should safeguard the witness's right to

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73. The American Bar Association Standing Committee on Ethics and Professional Responsibility opined that in preparing the witness for their deposition, it would be ethical both to "use documents to refresh a witness's recollection of the facts" and "suggest choice of words that might be employed to make the witness's meaning clear." A.B.A Comm. on Ethics & Pro. Resp., Formal Op. 508 (2023), https://tinyurl.com/bdheswn3 [http://perma.cc/bdheswn3] [hereinafter Formal Opinion 508]. However, the Committee added the following footnote: "THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 116, cmt. b (2000), emphasizes that in suggesting choice of words, 'a lawyer may not assist the witness to testify falsely as to a material fact,' which would constitute knowingly counseling or assisting a witness to testify falsely or otherwise to offer false evidence. *Id*. (citing RESTATEMENT (THIRD) § 102(1)(a)." For a fuller discussion of the ethics of witness preparation and post-deposition advising, see *infra* notes 179–187 and accompanying text.

74. As noted earlier, the original answer will remain on the transcript, and can be used as a prior statement to impeach notwithstanding the corrected answer on the errata sheet. Some courts have relied on impeachment as an effective deterrent to making material changes of substance to the answers given at the deposition. *See* Elwell v. Conair, Inc., 145 F. Supp. 2d 79, 87 (D. Me. May 16, 2001). However, while you will recognize the unfairness of the correction, the jury more likely will accept the witness' explanation that upon spotting the error, they wanted to correct the answer as soon as possible so as not to mislead you. *See* Stuhan, *supra* note 67, at 15 ("If impeachment with prior inconsistent statements has any chance of success, the contradiction between the witness' trial testimony and her earlier deposition testimony must be crisp, clear, and clean. Throwing errata sheets into the mix would make that objective nearly unattainable.").

75. If the witness does not review and sign the transcript, there admittedly is an extremely modest sacrifice when using the transcript to impeach the witness at trial. While the witness must admit they were under oath, the deposition was closer in time to the event giving rise to the litigation, and that the court reporter was taking down every word spoken, you will not also be able to further elicit that the witness had the opportunity to review, correct, and then sign the transcript of the deposition. The benefit of preserving the original answers, however, far outweighs the inconsequential loss of having the witness admit they read and signed the transcript. First, there is a well over 90 percent chance that the case will settle, with the answers given at the deposition used to assess any offer. Even should the case proceed to trial, the jury—who has been witnessing the judge's unquestioning reliance on the reporter transcribing the testimony—is not likely to discount the impeachment value of the transcript based on the off-chance that a fellow court reporter did not accurately record and transcribe deposition testimony.

amend inaccurate or ambiguous answers on the errata sheet attached to transcript of the deposition.[76]

b. How Deposing and Defending Counsel Should Raise and Respond to a Stipulation as to Reading and Signing

How to address reading and signing when taking the deposition depends on the default rules of court. In jurisdictions where the rules provide the right to read and sign,[77] counsel noticing the deposition should affirmatively propose a stipulation that the witness waives reading and signing. However, not every court preordains this right. The Federal Rules of Civil Procedure specify that the deponent has the right to review the transcript and make changes only "[o]n request by the deponent . . . before the deposition is completed."[78] In jurisdictions that adopt this rule, you should not broach a stipulation. By proposing a waiver of reading and signing, you may prompt defending counsel to affirmatively assert the right.

The posture of counsel representing the deponent is just the opposite. Where the rules guarantee the right of the deponent to review and sign the transcript, you should reject any proposed stipulation to waive those rights. Conversely, you must state on the record that the deponent is requesting to read, review, and sign the transcript where the rules preserve the right only if affirmatively asserted before completion of the deposition.

2. Stipulations Regarding Objections That Must Be Raised at the Deposition to Preserve Them for Trial

A second likely subject of stipulations concerns which objections must be raised during the deposition to preserve that objection for trial. The recommended stipulation for counsel taking and defending the deposition will be better understood after a fuller discussion of objections at the deposition and therefore is reserved for Section VI(B) of this article.

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76. While the witness must admit the incremental added fact that they read and signed the transcript if it is used for impeachment at trial, see *supra* note 75, there is far greater upside to legitimately correcting problematic testimony upon review of the transcript.

77. *See* ILL. SUP. CT. R. 207(a) ("Unless signature is waived by the deponent, the officer shall instruct the deponent that if the testimony is transcribed the deponent will be afforded an opportunity to review (but not copy or disseminate) the deposition.").

78. *See* FED. R. CIV. P. 30(e)(1).

B. The Introductory Litany

The stipulation waiving reading and signing is designed to prevent the deponent from changing their answers when the court reporter has delivered the transcript. There is a second tactic to be used at the outset of the deposition to preserve the sanctity of the transcript—the introductory litany. Deposing counsel should begin the examination with a series of questions that close off avenues by which the deponent might attempt to disavow their answers at trial.[79]

You can develop the content of the introductory litany through a simple two-step process. First, imagine every excuse the deponent might conceivably proffer at trial to explain away a deposition answer. Second, extract concessions from the deponent that will render each cover story implausible. Here are a few examples:

> *Excuse:* I did not realize the deposition was as serious of a proceeding as the trial.
>
> *Litany:*
>
> Q: Do you realize that you are under oath?
>
> A: Yes.
>
> Q: Are you aware that even though we are in a conference room in a lawyer's office, the oath you just affirmed is the very same promise to tell the truth as if we were in a courtroom?
>
> A: Yes.
>
> Q: Do you understand that even though the court reporter and not a judge administered the oath,[80] you are subject to the penalties of perjury for any failure to tell the truth at today's deposition?
>
> A: Yes.
>
> Q: Are you aware that the court reporter also is taking down every question that I ask and every answer that you give?
>
> A: Yes.

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79. At times, for tactical reasons counsel may forego the introductory litany and launch immediately into one-fact, leading questions seeking admissions before the witness becomes comfortable. *See* Brandon Swartz, *'Yes' or 'No' Questions Only: How to Establish Control of a Deposition During Cross-Examination*, PA. L. WEEKLY, Nov. 30, 2010, at 8; Laurin H. Mills, *Taking Chances at Depositions*, 28 LITIG., Fall 2001, at 30, 30–31(discussing pros and cons of "the 'immediate attack'").

80. *See* FED. R. CIV. P. 30(b)(5)(A)(iv) (The officer recording the deposition "must begin the deposition with an on-the-record statement that includes: . . . the officer's administration of the oath or affirmation to the deponent").

Q: I also see that your lawyer is present and is representing you at the deposition, is that correct?

A: Yes.

Excuse: I must not have heard/understood your question accurately.

Litany:

Q: Please answer a question only if you are completely satisfied you have fully heard the question. Do you understand that instruction?

A: Yes.

Q: And if you are not 100 percent certain you have fully heard my question, please do not answer but instead tell me you are not sure you have accurately heard the question. Will you do so?

A: Yes.

Q: Also, please do not answer any question unless you are 100 percent certain that you have fully understood the question. Do you understand that instruction?

A: Yes.

Q: If you are not 100 percent certain that you have understood my question, please do not answer but instead tell me that you are not sure you have fully understood the question. Will you do so?

A: Yes.

Q: May I assume that if you answer a question, you are certain you have fully heard and fully understood the question?

A: Yes.

Excuse: I was suffering from a physical/mental condition that interfered with my ability to testify accurately.

Litany:

Q: Do you have any physical condition that in any way will prevent you from testifying truthfully, fully, and accurately today?

A: No.

Q: Do you have any mental condition that will prevent you in any way from testifying truthfully, fully, and accurately today?

A: No.

Q: Are you presently under the influence of alcohol?

A: No.

Q: Are you presently taking any medications?

A: Yes.

> Q: Do any of those medications prevent you from testifying truthfully, fully, and accurately today?
>
> A: No.[81]

Over your career you will expand your introductory litany in response to whatever unexpected, ridiculous, or bizarre explanations witnesses offer at trial to attempt to explain away their deposition answers.[82] You should conclude the introductory litany with a question that flushes out any potential evasion you have not already thwarted:

> Q: Is there anything I have not asked you about that might prevent you from testifying truthfully, fully, and accurately today?
>
> A: No.

Of course, the introductory litany cannot prevent the witness from summoning any of the alibis you preempted to try to weasel out of one of their deposition answers at trial. Should they attempt to do so, however, you immediately will confront the witness with the portion of the deposition transcript codifying the concession that renders that gambit wholly implausible.

IV. THE THREE MODES OF QUESTIONING AT THE DEPOSITION: BUILDING NABLAS, ADMISSIONS TESTING, AND SURFING FOR NABLAS

Once you have negotiated stipulations and completed the introductory litany you are ready to proceed to the core of the deposition—substantive questioning. Under the best of circumstances, examining the deponent is an arduous exercise. You must extract facts relating to: (a) the legal elements of the claims and defenses; (b) the credibility of the deponent and other witnesses; (c) possible traits of character, motives, and plots so you can choose the right story of the case for trial; and (d) potential stakes that will cause the decisionmaker to emotionally root for a verdict in your favor.[83]

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81. If the answers to any questions about physical or mental conditions are "yes," you should postpone the deposition to a time when the condition will not have any effect on the deponents' testimony. Of course, if the impairment is permanent, you should proceed with the questioning, cognizant of the limitations on the reliability of the testimony both at the deposition and later at trial.

82. *See generally* MALONE ET AL., *supra* note 2, at 82–93. One lawyer presents a preprinted explanation of the deposition, to be signed by the deponent and opposing attorney with the witness initialing each page. *See* Ira Lurvey, *Ten Tips for Getting the Most Out of a Deposition*, PRAC. LITIGATOR, May 1998, at 19. My prediction, however, is that most attorneys defending the deposition would refuse to allow the deponent to sign the document.

83. *See supra* notes 30–38 and accompanying text.

For each of these subjects, you want to learn everything the deponent knows, whether good or bad. You also must find out what the deponent does not know. And you should probe for admissions that support your version of the facts.[84]

There will be unpredictable twists and turns complicating matters, as the term "discovery" presages. The content of some of the deponent's answers will come as a complete surprise. They may reveal information that was not disclosed in response to other discovery requests or that contradicts what your client led you to believe. The witness may attempt to evade answering your question or deliberately goad you into losing your concentration and composure. Even if the deponent is cooperative, opposing counsel may lodge objections or engage in obstructionist tactics designed to stymie your ability to gather the facts.

The good news is that, notwithstanding the challenges and distractions, you can reliably achieve the purposes of the deposition and generate a transcript that handcuffs the witness. To do so, you must engage in three differing modes of questioning over the course of the deposition: (a) constructing nablas;[85] (b) admissions testing; and (c) surfing for nablas. No deposition will proceed in a scripted or linear fashion. Even so, you can be confident of success if at every moment you are mindful of which of the modes you are pursuing and adopt the questioning technique appropriate for that mode.

A. Constructing the Nabla

As discussed earlier, to allow us to select the factual story of the case that minimizes or embraces the evidence the adversary will offer, the deposition should both elicit *all* facts the witness knows and identify *all* matters on which the witness lacks personal knowledge.[86] However, we can rely on the deposition testimony in preparing for trial only if we are confident that the witness cannot credibly offer different or added information at trial. We must sequence our questions so that, should the witness deviate from his deposition answers, the jury, upon viewing the transcript, will find that testimony implausible. To do so, for every topic explored at the deposition you must create a nabla[87]—an upside down triangle—built in three stages:

84. *See supra* notes 47–53 and accompanying text.

85. *See infra* notes 87–90.

86. *See supra* notes 39–46 and accompanying text.

87. *See* Alchemy Leads, *What Is the Nabla Symbol and How to Write Incredible Content Using the Inverted Pyramid,* https://tinyurl.com/45zysaut [https://perma.cc/CB2S-27TJ] (last visited Aug. 6, 2024). This mode of questioning is often referred to as funneling. *See* MALONE ET AL., *supra* note 2, at 97–98; Adrianne Walvoord, *Coping with Deposition Disasters*, 48 TRIAL, Mar. 2012, at 30, 32. Funneling generally

(1) an opening question asking the deponent to tell you *everything* they know about the topic; (2) follow-up questions inquiring whether the deponent has any further information about the topic, which you will continue to ask until the witness concedes they have nothing more to share; and (3) a final question prompting the witness to concede they have disclosed everything they know about the topic.

1. The Opening Question

You must begin questioning on each new matter by asking the witness to relate "everything" they know about the topic. It is critical that the word or phrase "everything," "each and every," "all," or other synonym is included in the opening question.[88] The jurors, unfamiliar with the particulars of a deposition, cannot properly appreciate the significance when the witness testifies to facts they did not disclose at the deposition. The transcript of the deposition is the only tool at your disposal to teach the jurors why they should be skeptical of the witness. The transcript must unmistakably show the jury that you asked the witness to provide the entirety of their knowledge as opposed to inviting a casual, generalized conversation about the topic.

2. The Follow-Up "Anything Else" Questions

The deponent may offer one fact or launch into an extended narrative in response to the opening question. In either event, your next question will be the same—you will ask whether the witness knows anything else about the subject. If the witness offers more facts in response to that follow-up question, you will ask again whether the witness knows anything else about the topic. You will repeat the "anything else" question as many times as necessary until the witness finally answers "no."

We would never be so distrusting, skeptical, or rude in ordinary conversation. But a deposition is not an ordinary chat; our purpose

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refers to the notion of beginning with a broad question with follow-up questions that increasingly narrow the focus. The funnel is an incomplete metaphor for questioning at the deposition, as a funnel has an opening at the bottom for liquids to leave the funnel. Questioning at the deposition requires sealing the funnel so there is no room for any information to leak in or out between the end of the deposition and trial.

88. Several of the attorneys with whom I teach in our Advocacy program are of the view that this opening question is objectionable. With all due respect, assuming the question is nabla-worthy (*see infra* p. 128 and accompanying text), I see no problem with asking the witness for the entirety of their knowledge. In any event, even if an objection is raised at the deposition, you should respond by asking the witness to answer the question (*see infra* notes 112–113 and accompanying text) and then proceed to the second and third stages of the sequence.

is to educate the jury. Upon viewing the transcript, the jurors must conclude that you gave the witness every opportunity to relate all they do and do not know.

3. Closing the Escape Hatch

The opening "tell me everything" question followed by the series of "anything else" questions should make it abundantly clear to the jury that the witness has lied if they offer new information about that topic at trial. However, this will be true only if the jury followed, remembered, and comprehended the full sequence of questions. Therefore, it is essential to complete the nabla by closing the bottom point of the inverted triangle with a final question asking the witness to admit they have told you everything they know about the topic.[89] It is equally critical that you persist until the witness responds with an unqualified "yes."[90]

Here is an example of a nabla in the deposition of defendant police officer Eldon Cardinal in a hypothetical civil rights lawsuit brought by Stefan Borgen. Borgen alleges that Officer Cardinal used excessive force:

> *The Opening Question:*
>
> Q: Officer Cardinal, please tell me each and every action of Stefan Borgen that caused you to apply a chokehold.
>
> A: He was uncooperative and ignored our orders to put his hands on his head.
>
> *The Follow-Up "Anything Else" Questions:*
>
> Q: Were there any other actions of Stefan Borgen that caused you to apply a chokehold?
>
> A: He was cursing at us and making threats.
>
> Q: Anything else?
>
> A: It looked like he had a weapon.
>
> Q: Were there any other actions of Stefan Borgen that caused you to apply a chokehold?

89. If there is a manageable number of facts inside the nabla, you may instead close the nabla by listing the facts and asking the witness to agree that those facts constitute the entirety of their knowledge.

90. "More and more often witnesses are encountered who have been instructed in the strategic use of the phrase '[t]hat is all I can remember at this time.' . . . [T]he witness' ability to claim later refreshment can be limited by cutting him off from some of the sources of refreshed recollection." MALONE ET AL., *supra* note 2, at 102–03.

A: I worried that my partner, who has less experience, might overreact.

Q: Anything else?

A: No

Closing the Escape Hatch:

Q: Have you told me each and every action of Stefan Borgen that caused you to apply a chokehold?

A: Yes

Executing this sequence will make you feel decidedly anti-social. Unfailingly constructing the nabla for every topic, however, is deposition pro-social.

While easy to accomplish in the abstract, two obstacles stand in the way of consistently completing the nabla. First, the subject matter of the opening question must be "nabla-worthy." The question must be sufficiently narrow in scope so that it is possible for the witness to recount all their personal knowledge. You cannot successfully build a nabla in the above example if the opening question was: "Tell me everything you saw and did from the moment you first saw Mr. Borgen until you applied the chokehold." You must break the overall encounter into a series of smaller events which Officer Cardinal can fairly be expected to recall and to relate the entirety of their knowledge of each event.

A more intractable impediment is the temptation to "jump the nabla" when the witness offers new, unexpected, problematic, or otherwise juicy information in response to either the opening question or one of the "anything else" follow-ups. A successfully constructed nabla is a highly effective tool for the delayed gratification of handcuffing the witness to the deposition transcript at trial. However, building the nabla is not immediately rewarding and, frankly, often laborious and boring. When the deponent offers an intriguing tidbit in the midst of your construction of the nabla, you will be drawn to immediately pursue that more provocative fact.

In the above example, plaintiff's counsel is certainly anxious to learn the ways in which Mr. Borgen was allegedly uncooperative, the content of the supposed curses and threats, what looked like a weapon, and Officer Cardinal's partner's lack of experience. In the short-term, questioning on each of these matters will be more interesting, more enlightening, and potentially more productive than asking the rote "anything else" and "have you now told me everything" questions. However, if you jump the nabla mid-sequence to pursue these shiny fact objects, it is quite unlikely you will return

to complete the nabla and extract Officer Cardinal's admission that he has told you every action of Mr. Borgen that caused Cardinal to apply a chokehold. Even if you revert back to the nabla after your detour, the transcript will not plainly lead the jury to conclude that Officer Cardinal should have shared all of Mr. Borgen's actions that justified application of the chokehold.[91]

How can we find out all the actions of Mr. Borgen that caused Officer Cardinal to apply the chokehold and, at the same time, unearth the crucial details about Borgen's alleged conduct and the concern over Cardinal's less experienced partner? As you listen to Officer Cardinal's answers concerning the actions of Stefan Borgen that caused Officer Cardinal to apply a chokehold, on a separate legal pad draw and label a new nabla for each new fact you wish to probe. After completing the threshold nabla, execute the full three-part sequence for each of the new nablas you drew. If you remain faithful to this process, at trial Officer Cardinal will not be able to credibly offer: (a) added actions of Borgen that caused Cardinal to apply the chokehold; (b) further ways in which Borgen was uncooperative; (c) new details about Borgen's response to the orders to place his hands atop his head; (d) new curses or threats; (e) supplemental information about "what looked like he had a weapon"; and (f) concerns over Officer Cardinal's partner. You will be able to effectively impeach should Officer Cardinal testify to different or additional facts on any of these matters. For the transcript will clearly show the jury that Officer Cardinal's trial testimony lies outside the border of the nabla you constructed at the deposition.

Unearthing everything the deponent does and does not know requires a combination of thorough preparation and the willingness and ability to craft new questions in response to the deponent's answers. Before the deposition, you must identify all subject matters you will plumb through nablas. Once at the deposition, however, your most important tools are the discipline not to prematurely jump the nabla; your ears;[92] a pen or pencil; and paper on which to draw new nablas to be erected.

B. Admissions Testing

A second mode of questioning you will exercise when taking a deposition is the pursuit of admissions. To properly assess offers

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91. *See* Lurvey, *supra* note 82, at 22 ("Read your transcript as you are creating it—that is, segregate your questions so that you follow through with a complete topic before shifting gears.").

92. Drummond, *supra* note 39, at 14 ("Listen, listen, listen is the most important, and most ignored rule.").

of settlement and prepare for trial, you need to discover and cabin information the deponent harbors that may hurt your case. At the same time, you can weaponize the deposition to affirmatively build your case by seeking to have the deponent admit facts that support potential legal and factual theories.[93]

To freely pursue this second mode of questioning, you first must understand how the risk calculus when examining the adverse witness at trial radically differs from your strategy at the deposition. Your goal at trial is a fail-safe cross-examination, attained by obsessively taking pains to ask no question that might elicit testimony detrimental to your case. You will ask the witness only questions that satisfy two criteria: (1) you "know" the witness will admit the fact posited by the question, *and* (2) if the witness has the temerity to deny, you will confront the witness with the prior statement where they unambiguously admitted the fact. The witness can either (1) admit the favorable fact or (2) deny, in which case the jurors not only will learn that the witness previously admitted the fact, but also that they now should harbor reservations about the witness's credibility.[94]

Unlike cross-examination at trial, you do no harm to your case at the deposition if the witness denies a fact that you anticipated or wished they would have admitted. First, you need not and will not re-ask any deposition question at trial that failed to procure an admission. Furthermore, you will not reap any advantage by refraining from asking a question at the deposition for fear that the answer will be injurious. Even if you did not interrogate on the matter at the deposition, the witness remains free to testify to that fact through an affidavit on a motion for summary judgment or on the stand at trial. Unlike the carefully controlled, fail-safe approach to cross-examination at trial, you may and should use the deposition to troll for admissions.[95]

Several sources help to identify facts that the witness might be willing to admit at the deposition. You can solicit information from your client and witnesses and consult public records. You may find potential admissions in the pleadings as well as in answers to

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93. *See* Robert E. Shapiro, *Taking Depositions Backwards to Win at Trial*, 40 LITIG., Summer 2014, at 23; Dennis R. Suplee & Diana S. Donaldson, *When the Admission Isn't Made: Tactics for Questioning the Recalcitrant Fact Witness*, PA. L. WEEKLY, Sept. 15, 2003, at 8; Dennis R. Suplee & Diana S. Donaldson, *Discovery or Admissions: Two Important Deposition Goals May Conflict*, PA L. WEEKLY, Nov. 18, 2002, at 8; *see generally* Mark D. McCurdy, *Obtaining Admissions in Depositions*, 74 TEMP. L. REV. 139 (2001).

94. Deposition testimony of a party or non-party witness that is inconsistent with their trial testimony is not hearsay and is admissible for the truth of the matter asserted. *See* FED. R. EVID. 801(d)(1–2).

95. *See* Mills, *supra* note 79, at 30 ("If you are going to get a bad result, it is much better to encounter the failure at deposition than at trial.").

interrogatories and documents produced in response to discovery requests propounded before the deposition. You also may discover favorable facts at the deposition in responses to questions you posed while constructing nablas.

Unlike the open-ended questions you ask in the first two stages of constructing a nabla, you must use leading questions when probing for admissions. Given the slightest opening, the opposing party and its witnesses will resist admitting facts helpful to your case and will instead make every effort to offer testimony supporting their cause. Accordingly, the rules of evidence allow you to ask leading questions of adverse witnesses at trial to restrain them from launching into a self-serving narrative.[96] For the same reason, whenever you are striving to extract an admission at the deposition, you must lead the deponent.[97]

While necessary, asking a leading question at the deposition will not be sufficient to produce an admission that is usable at trial. It is also essential that every admissions-testing question contains only a single fact. If the question contains two facts—even if each is true—the adverse witness may choose to deny the innuendo created by the admixture of the two facts.

> Q: Officer Cardinal, isn't it true that Mr. Borgen did not in fact possess a gun or a knife?
>
> A: Counsellor, you seem to be suggesting that I had no reason to fear Mr. Borgen. I was able to clearly see a bulge in his pocket that could well have been a weapon. In these circumstances, you might be risking your life if you wait to see what he might pull out of the pocket.

To eliminate the witness's option of denying the amalgam produced by compounding multiple facts, every deposition question aimed at producing an admission must present only a single fact to the deponent.

> Q: Officer Cardinal isn't it true that Mr. Borgen did not in fact possess a gun?
>
> A: Yes

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96. *See* FED. R. EVID. 611(c) ("Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.").

97. FED. R. CIV. P. 30(c) ("The examination[s] . . . of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615."). Therefore, you are permitted to ask leading questions at the deposition unless the deponent is not the opposing party, identified with that party, or otherwise hostile.

Q: Isn't it also true that Mr. Borgen did not in fact possess a knife?

A: Yes

If the witness attempts to evade admitting the single fact, first re-ask the same question. If the witness continues to resist admitting the single fact, execute "the reversal."

Q: In fact, Mr. Borgen did not have any weapon in his possession?

A: Counsellor, you seem to be suggesting that we had nothing to fear. I was able to see a bulge in Borgen's pocket that could well have been a weapon. In these circumstances, you might be risking your life if you wait to see what he might pull out of the pocket.

Q: Thank you for volunteering that information, Officer Cardinal, but my question was simply isn't it true that Mr. Borgen did not in fact have any weapon in his possession.

A: Before I administered the chokehold, I did not know one way or another.

Q: I take it from your testimony, then, that Mr. Borgen did have a weapon in his possession?

A: No, no. He did not have a weapon.

There is an additional critical reason we must use one-fact questions at the deposition whenever we are hunting for admissions: to ensure we can effectively impeach if the witness attempts to recant the admission at trial. If the admitted fact is bundled with other facts in the answer given at the deposition, opposing counsel should and will invoke the "rule of completeness." When we wield the transcript to impeach, they will implore the court to require us to read the entire answer to the jury.[98] At best, the jury's ability to discern the contradiction between the trial and deposition testimony as to a single fact will be clouded when it hears a deposition answer that contains multiple facts. More ominously, if the additional facts in the deposition answer undermine your case, reading the full deposition answer will call the jury's attention to testimony whose harm may outweigh the benefit of impeachment.

Like the three-part nabla, you would not ask leading, one-fact questions in ordinary conversation. While it will feel anti-social, posing one-fact leading questions whenever testing for admissions is deposition pro-social and indeed mandatory.

98. *See* FED. R. EVID. 106 ("If a party introduces . . . part of a . . . 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.").

C. Surfing for Nablas

The nablas you construct and the admissions you test are prompted by the information you obtained before the deposition and by the deponent's answers to these prepared subjects of inquiry. You also should assume the deponent harbors information you have not previously mined. Therefore, you must engage in a third mode of examination when taking a deposition: surfing for nablas.

Your deposition should include a healthy dose of open-ended questions inviting the witness to offer a narrative explanation of relevant events.[99] For example, you might simply ask Officer Cardinal: "Tell me about your encounter with Mr. Borgen." Unlike constructing nablas and admissions testing, the object is not to elicit an answer that will handcuff Officer Cardinal to the transcript. Instead, you are fishing for previously undisclosed information that you then will cabin through a nabla. The new nabla in turn may generate admissions to be codified in the transcript through one-fact leading questions.

D. Summary

No matter how thoroughly you prepare, the deposition will not and should not be a linear, scripted process. In the course of building a nabla on a pre-designed topic, you may discover new nablas to be raised or admissions to be explored. An unsuccessful probe for an admission may cause you to manufacture a new nabla exploring the denial. By design, surfing for pyramids may lead you to unforeseen nablas or even unexpected admissions. The content and flow of the deposition unavoidably will be unpredictable. Nonetheless, you can reliably achieve its purposes by at all times recognizing which of the three manners of examination you are executing—setting up a nabla, admissions testing, or surfing for nablas.

V. USE OF DOCUMENTS AND ELECTRONICALLY STORED INFORMATION

The past 40 years witnessed a dramatic increase in communication transmitted and memorialized in writing, especially by email and text messaging. As a result, discovery and questioning regarding documents and electronically stored information (ESI) is suffused across every aspect of deposition practice.

Before taking the deposition, you should obtain access to all relevant documents and ESI through mandatory disclosures required

99. *See* James W. McElhaney, *A Whole Lot of Nothing: Discovery That Doesn't Probe for Information is Likely to Come Up Empty*, 89 A.B.A J., Jan. 2003, at 56, 57 (failing to ask open-ended questions is one of "ten ways to botch a deposition").

by rule,[100] requests for the production of documents from the adverse party,[101] and *subpoena duces tecum* issued to non-parties.[102] Reviewing these writings in advance of the deposition will assist you in identifying nablas to explore, admissions to test drive, and nabla-surfing questions to propound at the deposition.

The deposition is a means of discovering documents that have not been previously shared. You need to verify that your prior requests successfully identified and resulted in the production of all relevant writings and ESI. Additionally, you should ask the deponent what documents they reviewed in preparation for the deposition and what documents they brought to the deposition.[103] In some jurisdictions, the evidence rule entitling you to inspect documents the witness used to refresh their recollection overrides the work-product doctrine or other privilege that otherwise protects the document from disclosure.[104]

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100. *See* FED. R. CIV. P. 26(a)(1)(A)(ii).

101. *See* FED. R. CIV. P. 34.

102. *See* FED. R. CIV. P. 30(b)(2), 45.

103. *See* Mills, *supra* note 79, at 33 ("[W]hile many good lawyers forget to do so, it is always worth asking the witness if she brought any documents to the deposition.").

104. Courts have taken a variety of approaches to the clash between the right under FED. R. EVID. 612 to inspect writings the deponent used in advance of the deposition to refresh their recollection and the work-product doctrine sheltering documents from disclosure codified in FED. R. CIV. P. 26(b)(3)(A). *See, e.g.*, Sprock v. Pell, 759 F.2d 312, 318–19 (3d Cir. 1985) (stating that a selection of documents to be reviewed by witness in preparation for deposition is protected by opinion work-product doctrine, part of necessary protection of client for deposition, and not overridden by FED. R. EVID. 612 in absence of deposing counsel establishing the witness relied on or was influence by document in giving his testimony); Antero Res. Corp. v. Tejas Tubular Prods., Inc., 516 F. Supp. 3d 752, 754–55 (S.D. Ohio Feb. 2, 2021) (stating that the work product privilege is waived for notes created by witness in preparation for deposition testimony where witness used notes to refresh his recollection while testifying); J&R Passmore, LLC v. Rice Drilling D, LLC, No. 2:18-cv-1587, 2021 U.S. Dist. LEXIS 198758, at *6–7 (S.D. Ohio Oct. 15, 2021) (stating that where a witness used a document to refresh recollection in preparation for deposition, claim of work-product is waived); HsingChing HSU v. Puma Biotechnology, Inc., No. 8:15-cv-00865-AG (SHK), 2018 U.S. Dist. LEXIS 103353, at *33 (C.D. Cal. June 28, 2018) (adopting three part balancing test to determine whether corporate representative's review of and reliance on documents in preparation for deposition waives attorney-client privilege or work product doctrine: (1) whether the documents that the designee used in preparation for a Rule 30(b)(6) deposition was used to refresh his or her recollection; (2) whether the documents were used for the purpose of testifying; and (3) whether the interests of justice require disclosure of such documents. The competing views and their rationales are thoroughly examined in *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., 314 F.R.D. 397, 404–07 (E.D. La. Apr. 8, 2016) and Victoria E. Brieant, *Techniques and Potential Conflicts in The Handling of Depositions (Part 1)*, PRAC. LITIGATOR, Nov. 2008, at 38–41.

All the general questioning strategies apply equally to examination regarding the content of a document.[105] You should employ nabla-surfing questions that call upon the witness to narrate the meaning and significance of any document, use the three-part nabla sequence to elicit the entirety of each subject matter recorded, and utilize one-fact, leading questions to procure admissions regarding particulars of the writing.

The rules for interrogating the witness about a writing at the deposition are not the same as the evidentiary requirements for introducing the document into evidence at trial. While it is worth exploring whether the deponent has the requisite personal knowledge to lay the foundation for admission of the document at trial,[106] you need not establish that foundation before examining the witness regarding its content at the deposition. An objection to lack of foundation raised at the deposition simply preserves counsel's right to lodge that challenge at trial.[107] You are permitted and should continue to question the deponent about the content of the exhibit.

As with all other questioning at the deposition, you must conduct the examination regarding a document in a manner that ensures that the answers you procure will bind the witness at trial. Beyond the questioning techniques already discussed, you must take one additional step when inquiring about the content of a document: have the court reporter mark each document as an exhibit and refer to the exhibit number in your questioning. The purpose of these steps is to prevent the witness from negating his deposition testimony by contending the document you are showing them at trial is not the same writing they testified to at the deposition. Unless the court reporter has appended the document to the transcript of the deposition, there will be no way to definitively prove that the trial exhibit is the same document. Similarly, only by referring to the writing by its unique exhibit marking in your question can you unequivocally establish the identity of the document to which the deponent was testifying.

In sum, whenever you intend to examine the deponent about a document or ESI, you should: (a) have the court reporter mark the

105. *But see* Shapiro, *supra* note 93, at 26 (asserting that because electronic data can establish all information about the document, examining the witness about the document serves no purpose except to alert the witness and opposing counsel to its existence and your intended use).

106. *See* Lutz, *supra* note 44, at 26–27.

107. *See infra* notes 109–10 and accompanying text. Conversely, if defending counsel has refused any stipulation to alter the governing rules with respect to objections and does not object to a failure to lay the proper foundation for admissibility that could be cured at the deposition, they may have waived that objection for trial. FED. R. CIV. P. 32(d)(3)(A); McElhaney, *supra* note 46, at 51.

writing as (*name of deponent*) Exhibit (*insert number or letter*), to be attached to the transcript of the deposition; (b) attempt to lay every element of the evidentiary foundation for the exhibit; (c) fully examine the deponent about the exhibit whether or not the witness can establish the full foundation; and (d) in your questioning, refer to the document by its unique deposition exhibit number or letter.

VI. OBJECTIONS AT THE DEPOSITION

If you persist in questioning until you procure responsive answers, there is nothing the deponent can do to prevent you from achieving your objectives. A deposition, however, is not a tête-à-tête with the witness. You also must be ready to deal with objections, both legitimate and spurious, raised by opposing counsel. As the Notes of the Advisory Committee on the 1993 Amendment to Federal Rule of Civil Procedure 30(d) acknowledged, "[d]epositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond."[108]

A. Responding to Objections

To restrain opposing counsel from thwarting your inquiry, you must recognize the different trajectory once objections arise during the deposition as opposed to at trial. When opposing counsel objects at trial, the examination of the witness comes to a full stop. Only when the judge has overruled the objection may the witness answer.

No judge is present to rule on objections at the deposition.[109] As such, an objection at the deposition serves an entirely different purpose. Rather than prompting an immediate ruling, an objection by defending counsel preserves that evidentiary challenge should you offer the deponent's answer at trial.[110] Consequently, except for instances of privilege, there is no harm if the witness responds.

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108. FED. R. CIV. P. 30(d) advisory committee's note to 1993 amendment.

109. If you anticipate that opposing counsel will be particularly obstreperous, you may file a motion to have the deposition conducted in the presence of a magistrate. *See* FED. R. CIV. P. 26(c); D. COLO LOC. R. 30.1(b) (Dec. 1, 2023) ("A judicial officer may appoint a master under FED. R. CIV. P. to regulate deposition proceedings.").

110. Even a failure to object does not necessarily abandon the right to oppose admission of the deposition answer at trial; the jurisdiction's rules of procedure specify those objections that are waived unless raised during the deposition. *See, e.g.*, FED. R. CIV. P. 32(d)(3)(A) ("An objection to . . . the competence, relevance, or materiality of testimony is not waived by failure to make the objection . . . during the deposition, unless the ground for it might have been corrected at that time.").

Accordingly, the witness should answer the question when an objection is raised on a ground other than privilege.[111]

The difference between a trial and a deposition similarly dictates how you should respond to an objection. At trial you will address the judge, presenting arguments as to why the rules of evidence support the admissibility of the answer. By contrast, your reflexive rejoinder to an objection at the deposition should be to turn to the witness and state "please answer the question."[112]

Blowing off the objection would be blatantly impermissible at trial and probably will feel like you are dissing your adversary. But doing so is perfectly appropriate deposition behavior. By objecting, opposing counsel has guaranteed you cannot use the answer at trial unless you persuade the judge that the evidence is admissible.[113] There is no need to distract your attention from the already challenging job of examining the deponent by trying to persuade your adversary that the law of evidence allows the answer.

To make matters worse, efforts to justify your question will not deter further objections. By responding, you clue opposing counsel that they can learn about your theory of the case or derail your examination by raising objections. As a result, they will be incentivized to continue to object, even where not necessary to preserve the objection for trial.

B. Stipulation to Minimize Objections

Even if you avoid being lured into unnecessary argument, objections will unavoidably get under your skin. Like a dripping faucet,[114] the recurrent sound of defending counsel's voice will interfere with the focus needed to successfully conduct the appropriate mode of examination.[115] Therefore, it is worth trying to minimize the prospect

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111. *See, e.g.*, FED. R. CIV. P. 30(c)(2) ("An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection.").

112. One commentator suggests maintaining eye contact with the deponent, not looking at opposing counsel when they object. *See* Murray Ogborn, *Defusing Depositions,* TRIAL, Nov. 2019, at 18.

113. While the rules require certain objections to be raised at the deposition to be preserved for trial, the rules do not in turn require that once an objection is raised at the deposition, you state the basis for admissibility to preserve the ability to offer the answer at trial.

114. For advice on how to remediate the noise from the dripping faucet, see Tibi Puiu, *How to Stop the Annoying Sound of a Dripping Tap with Science*, ZME SCI. (June 25, 2018), https://tinyurl.com/yrkznner [https://perma.cc/W24J-AU46].

115. *See supra* Section IV.

of objections by proffering a stipulation at the outset of the deposition that *all* objections are preserved for trial.

The rules of civil procedure specify which objections are waived for trial unless raised at the deposition.[116] Generally speaking, an objection is waived where an on-the-spot rephrasing of the question would rectify the problem. By proposing that *all* objections are preserved for trial, you eliminate the need for opposing counsel to raise any objection during the deposition, even those that could be remedied by reframing the question. Put another way, you are offering that defending counsel preemptively objects to every question you ask on all grounds known to the law of evidence and has preserved those objections for trial. The stipulation ought to be attractive to defending counsel as it relieves them of the burden of vigilantly patrolling the form and substance of every question.

To be fair, there are respected attorneys who take the position that deposing counsel should prefer that all objections to the form of the question be raised at the deposition or else they are waived.[117] The rationale for this more limited stipulation is to ensure you obtain an answer that will be admissible at trial. When an objection to form is raised, you may rephrase the question to remove the defect that prompted the objection. However, you will realize that benefit only where there is a need to offer the deposition answer into evidence, opposing counsel re-raises the objection, and the court sustains the objection on the ground of the form of the question. The rarity of the confluence of those events is outweighed by the more frequent irritation inflicted by the drone of "[o]bjection to the form of the question" that must be raised under the more limited stipulation.

VII. DEALING WITH COACHING AND OTHER OBSTRUCTIONIST CONDUCT

If opposing counsel is professional, competent, prepared, and stable, the above strategies will enable you to successfully navigate any deposition without incident. However, because no judge is present and filing a motion for sanctions is costly (with the ruling distant in time and often unjustifiably lenient), depositions are breeding

116. *See supra* note 110 and accompanying text.

117. This stipulation modifies waiver under the Federal Rules of Civil Procedure, which provides that objections whose grounds "might have been corrected at that time" are waived if not raised at the deposition. FED. R. CIV. P. 32(d)(3)(A). Among other things, the rule requires raising objections as to the competence of the witness to lay the evidentiary foundation for admission of documents. *See* Donaldson, *supra* note 5, at 26–27; McElhaney, *supra* note 46, at 51.

grounds for bad behavior by lawyers who are unprofessional, incompetent, unprepared, or unstable.[118]

Legislatures and courts have prescribed an ever-increasing panoply of rules,[119] orders,[120] and case law[121] as antidotes to obstructionist

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118. *See* Loop AI Labs, Inc. v. Gatti, No. 15-cv-00798-HSG (DMR), 2017 BL 25485, (N.D. Cal. Jan. 27, 2017) (fining counsel $250 to cover damages to clothes and personal property she caused by yelling "I think you should take a fucking break" while throwing a cup of coffee at opposing counsel during deposition); Claypole v. Cnty of Monterey, No. 14-cv-02730-BLE, 2016 BL 9428 (N.D. Cal. Jan. 12, 2016) (ordering $250 donation to organization that promotes gender equality in the legal profession to be made by lawyer who told female attorney not to raise her voice during deposition because it was "not becoming of a woman"); Florida Bar v. Ratiner, No. SC08-689 (Fla. June 24, 2010) (suspending lawyer from practice of law for 60 days with public reprimand, followed by 2-year probation during which lawyer required to undergo mental health counseling and send letters of apology to deponent, court reporter and videographer present at the deposition; after opposing counsel attempted to place an exhibit sticker on attorney's laptop, attorney leaned across deposition table, lambasted counsel in a tirade while tearing up exhibit sticker, deponent expressed fear, court reporter stated "I can't work like this," and attorney's own consultant told him to "take a Xanax"); Redwood v. Dobson, 476 F. 3d 462, 469 (7th Cir. 2007) (censuring lawyer taking deposition for "shameful" conduct and ordering sanctions against lawyer defending deposition, lawyer-deponent, and lawyer representing another party for "feigned inability to remember, purported ignorance of ordinary words . . . and instructions not to respond that neither shielded a privilege nor supplied time to apply for a protective order").

119. *See* D. COLO. LOC. R. PRAC. 30.3(a), https://tinyurl.com/3mkhttt6 [https://perma.cc/H78T-T75W] ("In addition to the conduct prohibited by FED. R. CIV. P. 30(d)(3)(A), the following practices constitute abusive deposition conduct and are prohibited: (1) making an objection or a statement that has the effect of coaching the deponent or suggesting an answer; and (2) interrupting examination by counsel except to determine whether to assert a privilege."); M.D.N.C. R. PRAC. & PROC. 30.1, https://tinyurl.com/2sw4janp [https://perma.cc/22S5-YDZQ] (prescribing limits on directing the witness not to answer a question, suggestive objections, and conferences between defending counsel and the witness); D. OR. CIV. PROC. LOC. R. 30-3, https://tinyurl.com/y4wy4yda [https://perma.cc/M8RJ-GEMP] ("Counsel present at a deposition will not engage in any conduct that would not be allowed in the presence of a judge."); S.D. IND. LOC. R. 30.1(b), https://tinyurl.com/aade3pwc [https://perma.cc/K8J5-4KDZ] (limiting attorney initiating private conference with deponent about a pending question); E.D.N.Y. & S.D.N.Y., CIV. R, 30.4, https://tinyurl.com/mr3ynbcn [https://perma.cc/H5CR-4ENB] (limiting private conferences with deponent).

120. *See* Taulbee v. D'Youville College, No. 21-CV-228LJV(F), 2022 U.S. Dist. LEXIS 25037, at *8–12 (W.D. N.Y. Jan. 11, 2022) (issuing an order that included 13 Guidelines for Discovery Depositions).

121. *See* Paramount Commc'n v. QVC Network, Inc., 637 A. 2d 34, 52–57 (Del. 1994) (Court sua sponte included an addendum to its opinion having no bearing on the outcome of the case to address "instance of misconduct during a deposition in this case [which] demonstrates such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future—a lesson of conduct not to be tolerated or repeated" where defending counsel Joseph Jamail "(a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude, uncivil, and vulgar; and (c) obstructed the ability of the questioner to elicit testimony to assist the Court in this matter); Frost v. Union Pac. R.R. Co., No. SA-18-CA-84-FB, 2018 U.S. Dist. LEXIS 246433 (W.D. Tex Mar. 1, 2018)

tactics of lawyers defending the deposition. The American Bar Association Standing Committee on Ethics and Professional Responsibility recently issued a Formal Ethics Opinion providing that:

> Overtly attempting to manipulate testimony-in-progress would in most situations constitute at least conduct prejudicial to the administration of justice in violation of Model Rule 8.4(d). Violation of a court rule or order restricting such coaching behaviors would be a knowing disobedience of the rules of a tribunal in violation of Model Rule 3.4(c).[122]

An array of articles recommend means to defuse "Rambo" tactics.[123] The indispensable skill for effectively dealing with unwarranted

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("As this case begins, the Court wishes to apprise counsel and the parties of the Court's expectations concerning the conduct of discovery . . . There will be no Rambo tactics or other forms of elementary school behavior. Simply put: Do not play games."); Calzaturficio S.C.A.R.P.A. Spa v. Fabiano Shoe Co., 201 F.R.D. 33, 39 (D. Mass. June 14, 2001) (counsel "conferred with the deponents during questions, left the room with a deponent while a question was pending, conferred with deponents while questions were pending, instructed deponents not to finish answers, suggested to the deponents how they should answer questions, rephrased opposing counsel's questions, instructed witnesses not to answer on grounds other than privilege grounds, asserted the 'asked and answered' objection 81 times, engaged in lengthy colloquies on the record, and made ad hominem attacks against opposing counsel"); Morales v. Zondo, Inc., 204 F.R.D. 50 (S.D.N.Y. May 4, 2001) (ordering defending counsel to personally pay cost of the deposition, reimburse the opposing side for its attorney's fees, and pay a $1500 fine to the clerk of court for improper coaching of the deponent, interrupting the deposition to inspect exhibits and then reshuffling them to make it more difficult for deposing counsel to reference them, and denying deposing counsel access to office telephone to call court regarding deposition conduct).

122. Formal Opinion 508. In a footnote, the Opinion further states, "In some cases, such conduct may also be a violation of MODEL RULES OF PROF'L CONDUCT R.3.4(a) (unlawfully obstructing another party's access to evidence.)." *Id.* at 6 n.27.

123. *See generally* MALONE ET AL., *supra* note 2 at 161–77. *See also* Seth L. Cardell, *Deposition Obstruction*, TRIAL, Apr. 2023, at 2; Hon. Sidney Schenkier, *Discovery Mud Fights: Why They Happen and How to Avoid Them*, 48 LITIG., Fall 2021, at 38; Heidi K. Brown, *Defusing Bullies*, A.B.A L.J., Winter 2019–20, at 28; Kelley Barnett, *I'm a Lawyer, Not a Fighter: Conquering Lawyer Bullies*, 42 LITIG., Spring 2016, at 10, 10; D. Shane Read, *How to Handle an Evasive Witness or Argumentative Lawyer at Deposition,* PA. LAW., Dec. 2012, at 40; Charles Samuel Fax, *Professionalism Undermined by Misconduct in Deposition*, 35 LITIG. NEWS, Spring 2010; Brieant, *supra* note 104, at 27; Peter M. Panken & Mirande Valbrune, *Enforcing the Prohibitions Against Coaching the Deposition Witness*, PRAC. LITIGATOR, Sept. 2006, at 15; Valerie A. Yarashus & David McCormick, *Don't Let Your Opponent Disrupt Deposition*, TRIAL, Nov. 2004, at 56; Dennis R. Suplee & Diana S. Donaldson, *Dealing with the Difficult Opponent*: *Judicial Approaches to Deposition Dynamics,* PA L. WKLY., Apr. 21, 2003, at 6*;* Dennis R. Suplee & Diana S. Donaldson, *Dealing with the Difficult Opponent*: *Avoiding Disruption and Keeping Your Cool Are Crucial,* PA L. WKLY., Mar. 31, 2003, at 6*;* Robert K. Jenner, *How to Attack Discovery Abuse*, TRIAL, Feb. 2002, at 28; A. Darby Dickerson, *The Law of Ethics and Civil Depositions*, 57 MD. L. REV. 273 (1998).

interference with your questioning of the deponent is to remain calm, unbowed, unfazed, and undeterred. Bullies thrive on engaging in fights with their targets, whether the response be combative or cowed surrender. By remaining above the fray and focusing steadfastly on getting answers from the deponent, you deprive opposing counsel of sustenance for their shenanigans.[124]

Sadly, because no judge is present to rule or intervene, you ultimately are powerless in forcing counsel to stop misbehaving during the deposition. The best available tactic is to create the most favorable record for a motion for sanctions by making sure the transcript of the deposition completely and unambiguously codifies the improper actions of counsel,[125] stating for the record the rule of procedure and case law that prohibits the conduct,[126] and asking counsel to state for the record every justification for their position. By escalating the probability of future costs, you might cause your adversary to reassess the benefit of continuing to behave badly.

Beyond these general precepts, there are specific responses when the attorney (a) instructs the deponent not to answer a question or (b) coaches the witness through suggestive objections or conferences.[127]

A. Instructions Not to Answer

Opposing counsel is free to and indeed should interpose objections where necessary to preserve them for trial. On the other hand,

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124. *See* James W. McElhaney, *No Place for Fights*, A.B.A J., Jan. 2007, at 23 ("The opponent's object to inflict pain in a deposition is absolutely aimed at making your Mongo take over the hearing and concentrate on the verbal battle of the moment. Letting Mongo fight back may be emotionally gratifying, but it is almost guaranteed to make you miss something big.").

125. The court reporter typically will not record tone of voice or physical actions. Therefore, you will need to verbally describe the conduct of opposing counsel in detail on the record, in which case the reporter will record and transcribe your statement.

126. The court in Redwood v. Dobson, 476 F. 3d 462, 469–70 (7th Cir. 2007) expressly noted that the rules of procedure were "designed to defuse, or at least channel into set forms the heated feelings that accompany much litigation," particularly in depositions where no judge is present to supervise.

127. For an example of defending counsel employing the entire bag of coaching and obstructionist tricks, see Calzaturficio S.C.A.R.P.A. Spa v. Fabiano Shoe Co., 201 F.R.D. 33, 39 (D. Mass. June 14, 2001) ("Mr. O'Connor conferred with the deponents during questioning, left the room with a deponent while a question was pending, conferred with deponents while questions were pending, instructed deponents not to finish answers, suggested to the deponents how they should answer questions rephrased opposing counsel's questions, instructed witnesses not to answer on grounds other than privilege grounds, asserted the 'asked and answered' objection 81 times, engaged in lengthy colloquies on the record, and made *ad hominem* attacks against opposing counsel.")

the attorney defending the deposition may not go further and instruct the witness not to answer, except in three circumstances.[128] As Federal Rule of Civil Procedure 30(c)(2) provides, "[a] person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion [to terminate or limit a deposition which is conducted in bad faith.]"[129] Similar restrictions have been imposed by local rule,[130] case law,[131] and court order.[132]

If defending counsel impermissibly instructs the witness not to answer, you should firmly, calmly, and on the record[133] (a) verify that the court reporter has recorded the instruction; (b) state the relevant provision of the rule, precedent, or order prohibiting the directive; and (c) ask counsel to state every reason they believe the refusal to answer was justified. Have the court reporter "flag" that portion of the transcript for ease of citation in any motion to compel the answer if counsel persists in priming the witness not to answer and continue your examination of the witness on other matters. You also should consider asking the same question later in the deposition; having saved face by not visibly surrendering to your position, counsel may opt not to renew the instruction.

In rare instances, defending counsel will so frequently advise the witness not to answer that there is little to gain by continuing with the examination. Instead, you may suspend the deposition and file a motion demanding answers together with imposition of sanctions, costs, and attorney's fees.[134] Whether to suspend will depend on the egregiousness of counsel's conduct, the ability to obtain any information of value from the deponent through continued questioning, and how expeditiously the court is likely to address your motion. If by reputation or experience you anticipate defending counsel will engage in obstructive antics, find out in advance of the deposition

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128. *See* FED. R. CIV. P. 30(c)(2); Barnes v. Bd. of Educ., No. 2:06-cv-0532, 2007 U.S. Dist., LEXIS 30886 at *3 (S.D. Ohio Apr. 26, 2007) ("Under the rules pertaining to the conduct of depositions, a party is ordinarily not permitted to instruct a witness not to answer questions based on a relevance objection.").

129. *See* FED. R. CIV. P. 30(c)(2). The federal rules authorize a motion to terminate or limit the deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party." FED. R. CIV. P. 30(D)(3)(A).

130. *See supra* note 119.

131. *See supra* note 121

132. *See supra* note 120.

133. "On the record," means the reporter should record and transcribe every word you and opposing counsel speak.

134. *See* FED. R. CIV. P. 30(d)(2) ("The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates fair examination of the deponent.").

whether a judge is available and willing to entertain a motion by a phone or Zoom call.[135] Counsel will likely rescind their unjustifiable instructions not to answer as you begin to contact the judge from the deposition room.

B. Coaching the Witness Through Suggestive Objections and Speeches

Although the deposition is not conducted in the courtroom, your examination of the deponent should proceed just as if you were at trial.[136] Opposing counsel would not be allowed to adorn their trial objections with suggestions as to how the witness should answer. In turn, defending counsel should not be permitted to coach the witness during the deposition through argumentative or speaking objections.[137] As the court articulated in *Board of*

135. *See* D. OR. LOC. R. CIV. PROC. 30-6(a), https://tinyurl.com/k3whd329 [https://perma.cc/UEG3-XVSX] ("If . . . unreasonable or bad faith deposition techniques are being used, the deposition may be suspended so that a motion may be made immediately and heard by an available judge, or the parties may hold a telephone conference pursuant to LR 16-2(c).); S. IND. LOC. R. 30-1(c), https://tinyurl.com/32mybkhk [https://perma.cc/4MA5-VAF2] ("A party may recess a deposition to submit an objection by phone to a judicial officer if the objection; (1) could cause the deposition to be terminated; and (2) can be resolved without submitting written materials to the court."); Hall v. Clifton Precision, 150 F.R.D. 525, 531 (should counsel stray from their obligations as officers of the court, "they should remember that this judge is but a phone call away"); *see* Paramount Commc'ns v. QVC Network, Inc., 637 A. 2d 34, 55 (Del. Feb. 4, 1994) ("Although busy and overburdened, Delaware trial courts are 'but a phone call away' and would be responsive to the plight of a party and its counsel bearing the brunt of such misconduct [by the attorney defending the deposition]."). You also could consider moving for an order that the deposition be conducted in the presence of a magistrate. *See* Bruce Foods Corp. v. Cajun King, Inc., 1990 U.S. Dist. LEXIS 9112, U.S. District Court Docket No. F.S. 90-587, Case Ref. Misc. No. 90-203, Cancellation No. 17, 203 (D.D.C. July 23, 1990) at *3 (ordering President of defendant corporation to appear for continuation of his deposition in presence of Magistrate Judge at federal courthouse following refusal on ground of relevance to answer questions at initial deposition).

136. FED. R. CIV. P. 30(c)(1) expressly provides that "[t]he examination and cross-examination of a deponent proceed as they would at trial."

137. FED. R. CIV. P. 30(C)(2) ("An objection must be stated concisely in a non-argumentative and nonsuggestive manner."); TEX. R. CIV. P. 199.5(e) ("Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions."); MD. R. DISCOVERY GUIDELINE 9(d) ("Objections in the presence of a witness which are used to suggest an answer to the witness are presumptively improper."); Tualbee v. D'Youville College, No. 21-CV-228LJV(F), 2022 U.S. Dist. LEXIS 25037 (W.D.N.Y. Jan. 11, 2022) at *9 (setting forth Guidelines for Discovery Depositions, including "(4) Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's statements when making objections shall be succinct and verbally economical, stating the basis for the objection and nothing more"); Hernandez v. Barr, No. EDCV 16-0620- JGB (KKx), 2019 U.S. Dist. LEXIS 169954 at *37–38 (C.D. Cal. Apr. 12, 2019) (granting motion to compel new deposition of plaintiffs where, among other things, "Plaintiff's counsel made numerous, unnecessary speaking

Trustees of Leland Stanford Junior University v. Tyco International Ltd.:[138]

> A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.[139]

The protocol for deterring coaching through suggestive objections is no different than other instances of deposition misconduct. Fully describe the offending actions on the record, calmly but confidently present the authority prohibiting coaching through objections, and ask opposing counsel to state all justification for their behavior.

C. Coaching by Conferring with the Witness

In the courtroom, opposing counsel would not be permitted to confer with the witness to discuss how to answer a pending question. Hence, there should be no conferences between the deponent and their attorney to influence an answer during the deposition.[140]

While the court reporter will record every spoken word, they might not transcribe non-verbal actions. Therefore, whenever defending counsel consults with the witness, suddenly calls for a recess, or leaves the room with the deponent during your questioning, you should not

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objections and statements for the record"); Specht v. Google, 268 F.R.D. 596, 603 (N.D. Ill. June 25, 2010) (awarding sanctions for defending counsel's "blatant violations of Rule 30(c)(2),particularly extensive speaking objections and inappropriate instructions to the witness not to answer questions"); Tuerkes-Beckers, Inc. v. New Castle Assocs., 158 F.R.D. 573, 574–75 (D. Del. Nov. 5, 1993) (ordering parties "to conduct depositions in accordance with the following procedure: . . . Objections as to the form of the question should be limited to the words 'Objection, form.' All other objections should be limited to the word 'objection' and a brief identification of the ground, preferably in no more than three words"); *see also* Formal Opinion 508 ("Winking at a witness during trial testimony, kicking a deponent under the table, or passing notes or whispering to a witness mid-testimony are classic examples of efforts to improperly influence a witness's in-progress testimony. Other more subtle types of signaling also implicate ethical obligations and at times result in court-order sanctions. A familiar type of covert coaching is the so called 'speaking objection' or 'suggestive objection.'").

138. Bd. of Trs. of Leland Stanford Junior Univ. v. Tyco Int'l Ltd., 253 F.R.D. 524 (C.D. Cal. Mar. 20, 2008).

139. *Id.* at 526–27; *see also* Luangisa v. Interface Operations, 2:11-cv-00951-RCJ-CWH, 2011 U.S. Dist. Lexis 139700, at *22 (D. Nev. Dec. 5, 2011) ("Deposition testimony should be that of the deponent, not a version edited or glossed by the deponent's lawyer through coaching or speaking objections.").

140. Depositions that are conducted remotely, with the lawyer taking the deposition not present in the same room as the deponent, present added "opportunities and temptations for lawyers to surreptitiously tell or signal witness what to say or not to say." Formal Opinion 508.

only object. You also must verbally describe in detail what has occurred and ensure the court reporter is taking down your words.

How you next proceed depends on your jurisdiction's position on the bounds of proper communication between the deponent and their attorney during the deposition.[141] The most restrictive version is set forth in Judge Gawthrop's oft-cited and much-commented-upon[142] opinion in *Hall v. Clifton Precision*.[143] Judge Gawthrop reasoned that:

> The underlying purpose of a deposition is to find out what the witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness . . . . The witness comes to the deposition ready to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness' words to mold a legally convenient record.[144]

Judge Gawthrop then issued several holdings and edicts: (1) there is no absolute right of the lawyer and client to confer during the deposition;[145] (2) neither the lawyer nor the witness has the right to initiate a conference;[146] (3) the rule barring conferences applies not only during the deposition, but during coffee breaks, lunch breaks, and evening recesses;[147] (4) neither the lawyer nor the witness has the right to confer about a document shown to the witness during the deposition;[148] (5) a conference is permissible only if its purpose is to decide whether to assert a privilege, in which case "the conferring attorney should place on the record the fact that the conference occurred, the subject of the conference, and the decision reached as to whether to assert a privilege;"[149] and (6) save for

141. *See* Paul Mark Sandler et al., *Steering Clear of Minefields, Part II: Conferring with a Witness During a Deposition Break,* A.B.A, Apr. 26, 2023, https://tinyurl.com/4zh76v6t [https://perma.cc/29RV-SG7E].

142. "*Hall* is cited in countless opinions across the country and has been written about and lectured probably as equally as much." Pape v. Suffolk Cnty. Soc'y for the Prevention of Cruelty to Animals, No. 20-cv-01490, 2022 U.S. Dist. LEXIS 20837, at *7 (E.D.N.Y. Apr. 13, 2022).

143. Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. July 29, 1993).

144. *Id.* at 528.

145. *Id.*

146. *Id.*

147. *Id.* at 529.

148. *Id.* While defending counsel is entitled to receive a copy of the document, Judge Gawthrop reasoned, there is no valid reason to confer. The witness is free to ask the examiner for additional information they feel is necessary to answer questions about the document. *Id.*

149. *Id.* at 529–30

discussions whether to assert a privilege, statements made by the lawyer to the witness during conferences are not protected by the attorney-client privilege and counsel may question the deponent "to ascertain whether there has been any coaching and, if so, what."[150]

Some jurisdictions have endorsed *Hall v. Clifton Precision*'s global ban on conferences between the deponent and their attorney.[151] Other courts, although prohibiting consultation while a question is pending,[152] find discussions between the deponent and their attorney privileged where conducted during ordinary recesses.[153]

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150. *Id.* at 529 n.7.

151. *See* D. COLO. LOC. R. 30.3(a) (2023), https://tinyurl.com/25u2nxx6 [https://perma.cc/9GWP-88EJ] ("In addition to the conduct prohibited by FED. R. CIV. P. 30(d)(3)(A), the following practices constitute abusive deposition conduct and are prohibited: (2) interrupting examination by counsel except to determine whether to assert a privilege."); M.D.N.C. Loc. R. 30.1 (2023), https://tinyurl.com/2cuevmp6 [https://perma.cc/5LVV-5Q6B] (prescribing limits on conferences between defending counsel and the witness); SC. R. CIV. PROC. 30(j)(5), https://tinyurl.com/mvsp9xnu [https://perma.cc/4RSY-KH5N] ("Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order."); DEL. CT. CH. R. PROC. 30(d)(1), https://tinyurl.com/3seyen3j [https://perma.cc/RN9W-BU52] ("(1) From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order."); Chassen v. Fid. Nat. Tit. Ins. Co., No. 09-291, 2010 U.S. Dist. LEXIS 141852, at*2 (D. N.J. July 21, 2010); Vnuk v. Berwick Hosp. Co., 3:14-CV-01432, 2016 U.S. Dist. LEXIS 25693, at *4 (M.D. Pa. Mar. 2, 2016); Armstrong v. Hussmann Corp., 163 F.R.D. 299, 303 (E.D. Mo. May 10, 1995).

152. *See, e.g.*, S.D.N.Y. & E.D.N.Y. LOC. R. 30.4 (2023), https://tinyurl.com/3sv255nv [https://perma.cc/9UDZ-EJVY] ("An attorney for a deponent shall not initiate a private conference with the deponent while a deposition question is pending, except for the purpose of determining whether a privilege should be asserted.").

153. TEX. R. CIV. P. 199.5, https://tinyurl.com/2aaca5rr [https://perma.cc/TB64-B5Q2] ("Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments."); Few v. Yellowpage.com., No. 13 CV 4107, 2014 U.S. Dist. Lexis 96672, at *2 (S.D.N.Y. July 7, 2014) (Under New York law, conferences between counsel and client during deposition breaks are protected by attorney-client privilege); Murray v. Nationwide Better Health, No. 10-3262, 2012 U.S. Dist. LEXIS 120592, at *9-10 (C.D. Ill. Aug. 24, 2012) (rejecting blanket prohibition on conferences between defense counsel and defendant, permitting conferences during recesses that counsel does not request if no question is pending and during scheduled breaks); McKinley Infuser, Inc. v. Zdeb, 200 F.R.D. 648, 650 (D. Colo. June 7, 2001); Odone v. Croda Int'l PLC, 170 F.R.D. 66, 69 (D.D.C. Jan. 15, 1997); *In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D. Nev. Sept. 15, 1998) ("This Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or

Still other courts have declined to issue a bright-line rule.[154]

How you respond to a conference between deponent and their attorney depends on the jurisdiction's posture as to the applicability of the attorney-client privilege. In every case, you should describe for the record what is occurring and object to the attorney conferring with the witness.

Where the conference occurs in a context that is not protected by a privilege under the governing rules or case law, you should ask the witness to relate everything the lawyer said "to ascertain whether there has been any coaching."[155] Opposing counsel predictably will object that the conversation was privileged. You then should hand them a copy of the applicable rule or opinion, point out where it holds such discussions are not privileged, and again ask the witness to relate the substance of their conversation with the attorney. While your adversary is not likely to relent and allow the witness to answer, the risk that a court may order disclosure of the content of the exchange will deter future efforts at coaching.

Where the governing law does not automatically remove the privilege, you should not immediately ask the deponent to testify to what their lawyer said during their conference. However, you should

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misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness. So long as attorneys do not demand a break in the questions, or demand a conference between question and answers, the Court is confident that the search for truth will adequately prevail."); AM. BAR ASS'N, CIVIL DISCOVERY STANDARDS 18(b)(i), https://tinyurl.com/4axdejkw [https://perma.cc/3VJU-8J3H] ("During a recess, an attorney for a deponent may communicate with the deponent; this communication should be deemed subject to the rules governing the attorney-client privilege."); L.A. BAR ASS'N PROF'L RESP. & ETHICS COMM., Formal Op. 497 (1999), https://tinyurl.com/mpd5pdrx [https://perma.cc/YHC4-UXM2].

154. Pape v. Suffolk Cnty. Soc'y for the Prevention of Cruelty to Animals, No. 20-cv-01490 (JMA) (JMW), 2022 U.S. Dist. LEXIS 68430, at *11 (E.D.N.Y. Apr. 12, 2022) (citing Wade Williams Distrib., Inc. v. Am. Broad. Cos., Inc., No. 00 CIV. 5002 (LMM), 2004 U.S. Dist. LEXIS 12152, at *1 (S.D.N.Y. June 30, 2004) (finding a conference is not privileged if it concerns "how a question should be handled," "improper coaching by an attorney to 'remind the witness,' or to 'refresh the recollection' of a witness as to what their testimony should be," and ruling counsel taking the deposition "has the right to ask about matters [discussed at the conference] that may have affected or changed the witness's testimony.")); Musto v. Transp. Workers Union of Am. AFL-CIO, No. 03-CV-2325 (DGT) (RML), 2009 U.S. Dist. LEXIS 3174, at *6 (E.D.N.Y. Jan. 16, 2009) (finding local rule permitting counsel to initiate a private conference for purposes of determining whether a privilege exists does not entitle attorney to initiate conference with deponent they do not represent); Formal Opinion 508 ("Although there is no express ethical prohibition on communications between witness and counsel during a break in testimony, adjudicative officers have, at times, exercised control over these circumstances, including entering specific orders and imposing deposition guidelines and/or sanctions.").

155. *Hall*, 150 F.R.D. at 529 n.7.

ask the witness (a) whether the lawyer reminded the witness about their testimony; (b) whether the exchange with counsel refreshed the witness' recollection; and (c) whether consultation with the attorney affected or changed their testimony.[156] If the answer to any of these questions is "yes," you should then ask the witness the content of the communication. You can expect opposing counsel to instruct the witness not to answer on the ground of privilege, in which case you should follow the deposition dance steps described in the preceding paragraph.

VIII. DEFENDING THE DEPOSITION

As ethical counsel defending the deposition, your influence during and after the deposition is significantly limited. Consequently, your most important role lies in adequately preparing the deponent before the deposition.

A. During the Deposition

1. Stipulations

As was true for the lawyer taking the deposition, defending counsel should not proffer or accept the mythic "usual stipulations." Unambiguously setting forth the specific stipulations the parties have agreed upon is in everyone's interest should a dispute arise. You may be amenable to agreeing that all objections (or all objections except as to form) are preserved for trial, even if not raised at the deposition. However, you should not accept a stipulation to waive the deponent's reading and signing of the transcript. Equally importantly, defending counsel must assert the right to read and sign before the end of the deposition where the rules require that the party do so.[157]

While the variables are the same, your calculation regarding the right of the deponent to read and sign the transcript leads to the opposite result than the deposing attorney. Reading and signing does modestly expand the foundational litany should opposing counsel

156. *See Pape*, 2022 U.S. Dist. LEXIS 68430, at *14 (ruling that while lawyer's statements to the deponent during the break that reminded witness of facts or instructed how to answer questions would not be privileged, deposing counsel did not ask deponent questions to ascertain whether conference refreshed recollection).

157. *See* Rios v. Bigler, 67 F. 3d 1543, 1552–53 (10th Cir. 1995) (ruling that there is no right to review transcript where no record of request to review prior to completion of deposition); Agrizap, Inc. v. Woodstream Corp., 232 F.R.D. 491, 493 (E.D. Pa. May 15, 2007) (non-party deponent has no right to alter deposition transcript where neither party nor witness requested opportunity to review at the deposition and court reporter did not issue a certificate that either party had asked to review the transcript).

have occasion to use the transcript to impeach the deponent at trial. However, that add-on is not likely to make much of a difference. For whenever opposing counsel accredits the transcript in the course of impeachment, they will have the witness admit that: the deposition was closer in time to the events giving rise to the trial; the deponent was under oath; the witness understood the oath carried the same consequence as that sworn at trial; their attorney was present; and that the court reporter at the deposition recorded every word of every question and answer.

On the other hand, preserving the ability to review and sign affords the deponent the opportunity not only to correct errors in transcription, but also to fix substantive mistakes in their testimony in the manner that will most plausibly withstand cross-examination.[158] That benefit far outweighs the cost of gilding the foundational lily for the deposition transcript should the witness contradict their deposition testimony at trial.

While the positions of respective counsel are at odds with respect to reading and signing, there is a community of interest in a stipulation preserving all objections for trial. Reducing the necessity for objections relieves the party taking the deposition from the distraction and annoyance of hearing (and ignoring) objections.[159] The stipulation also serves the interest of defending counsel, guarding against waiving an objection by failing to lodge it at the deposition.[160]

2. Objections

The need to interpose objections at the deposition will depend upon which objections the governing rules of procedure require to be raised to be preserved for trial and any stipulation modifying those rules.[161] You must object where (a) the question calls for information that may be materially harmful and (b) a bona fide objection would be waived if not lodged at the deposition. However, you should not interpose speaking or suggestive objections aimed at coaching the witness.[162]

Unlike at trial, you should not assume your objection justifies the witness's refusal to answer the question subject to that objection.[163] The Advisory Committee to the 1993 Amendment to the Federal Rules of Civil Procedure looked askance at such directives, finding

158. *See supra* notes 68–72 and accompanying text.
159. *See supra* notes 112–15 and accompanying text.
160. *See supra* note 110 and accompanying text.
161. *See supra* notes 110 and 116 and accompanying text.
162. *See supra* notes 137–38 and accompanying text.
163. *See supra* notes 111, 128–32 and accompanying text.

"[d]irections to a deponent not to answer a question can be even more disruptive than objections."[164] However, even where the parties have stipulated that all objections are preserved for trial, counsel defending the deposition must instruct the witness not to answer to avoid waiving the privilege that otherwise protects the confidentiality of the communication.[165]

Despite the general rule requiring the deponent to answer notwithstanding the objection, examining counsel does not have carte blanche to engage in a fishing expedition beyond the substantive scope of permissible discovery.[166] Nor may they question in a manner that demeans, browbeats, or otherwise abuses the witness. For example, Federal Rule of Civil Procedure 30(d)(3) permits defending counsel to suspend the deposition and move to terminate or limit the examination where "it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party."[167] The applicable rules may require the lawyers to attempt to resolve a discovery dispute before filing a motion.[168] Thus, there will be occasions where—acting entirely in good faith—you should object and instruct the witness not to answer pending negotiation over the scope or manner of the questioning. If no agreement is reached, you face a binary choice: either permit the witness to answer or suspend the deposition and move for a protective order.

3. Conferences with the Deponent

Your ability to confer with the witness during the deposition turns on the extent to which your jurisdiction treats the communication as privileged.[169] However, in no instance should you huddle with the deponent to affect or cause them to change the content of

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164. FED. R. CIV. P. 30(c)(2) advisory committee's notes on 1993 amendment to rule 30(d) (current FED. R. CIV. P. 30(c)(2)).

165. Shaffer v. Pennsbury Sch. Dist., 525 F. Supp, 573, 581 (E.D. Pa. Mar. 15, 2021); Culbertson v. Culbertson, 455 S.W. 2d 107, 136 (Tenn. Ct. App. 2014); Messner v. Korbonits, 1982 Pa. D. & C. Dec. LEXIS 8, *187 (Common Pleas Ct. Chester Cnty., Aug. 3, 1982).

166. *See* Palacino v. Brogno, 2013 N.Y. Misc. LEXIS 6843 at *6 (N.Y. Sup. Ct. Oct. 22, 2013) (finding under N.Y. CT. R. §221.2, witness may be instructed not to answer a question where objecting counsel can meet the high burden of establishing that the question is "palpably irrelevant or grossly improper or burdensome").

167. FED. R. CIV. P. 30(b)3); Calzaturficio S.C.A.R.P.A. Spa v. Fabiano Shoe Co., 201 F.R.D. 33, 39 (D. Mass. June 14, 2001) (rejecting defending counsel's attempt to justify instructions not to answer, reasoning "[i]f he 'felt that the discovery procedures were being conducted in bad faith or abused in any manner, the appropriate action was to present the matter to the court by motion under Rule 30(d)") (quoting Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 74 (D. Neb. June 15, 1995)).

168. *See* FED. R. CIV. P. 26(c)(1).

169. *See supra* notes 141–154 and accompanying text.

their testimony.[170] Where the purpose of the consultation is to determine whether to assert a privilege, as is proper, you should proactively "place on the record the fact that the conference occurred, the subject of the conference, and the decision reached as to whether to assert a privilege."[171]

4. Examining the Deponent

Once counsel who noticed the deposition concludes their questioning, you have the opportunity to examine the witness. In gauging whether to pose questions, you must keep in mind that the deponent is not precluded from submitting a written affidavit in support of or in opposition to a motion for summary judgment. Also remember that the witness is free to testify at trial on matters that the party taking the deposition did not ask.[172] Unless the witness might be unavailable for trial[173] or will not voluntarily meet with you outside the deposition room, defending counsel should not question the deponent just to "put on the record" favorable facts the lawyer taking the deposition failed to elicit.[174] Doing so simply gifts your adversary added discovery that will facilitate the preparation of their case.

You might consider examining the deponent to clear up corrosive implications or ambiguities in their direct testimony. If opposing counsel uses the original answer at trial, you then will have the goods to argue they must read the later testimony at the same time to avoid misleading the jury.[175] Even if the court denies your request, you can bring out the clarifying answers you elicited at the deposition when you conduct the re-direct examination at trial. Before examining, however, you must be confident that the deponent's answers will repair rather than exacerbate the damage.

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170. *See infra* note 186 and accompanying text.

171. Hall v. Clifton Precision, 150 F.R.D 525 (E.D. Pa. July 29, 1993).

172. *See supra* notes 40–41 and accompanying text.

173. *See* Jerold S. Solovy & Robert L. Byman, *Discovery: Prepare Yourself*, NAT'L L. J., June 12, 2000, at 40, https://tinyurl.com/xbk8ju27 [https://perma.cc/Z29C-QFRV] (because "there is no such thing as a sure thing," attorney defending the deposition should carefully consider whether to preserve critical facts that cannot be proven by other means by eliciting those facts by cross examining at the deposition).

174. One commentator offers the contrary view that because most cases settle, you want the opposing side to know all the facts that harm their case. Steven Lubet, *Showing Your Hand: A Counter-Intuitive Strategy for Deposition Defense*, 29 LITIG., Winter 2003, at 38; *see also* Kenneth R. Berman, *Make the First Answer the Best Answer*, 44 LITIG., Spring 2018, at 21 (advocating rejection of "conventional preparation" that advises witness to say "as little as possible" in response to questions by opposing lawyer).

175. *See* FED. R. EVID. 106.

B. After the Deposition

Assuming that the right to read and sign has been preserved, the deponent will have the opportunity to review the transcript when completed by the court reporter.[176] Unless your jurisdiction has ruled otherwise, the witness is not limited to scrutinizing whether the transcript accurately documents their answers.[177] The deponent is entitled to correct any response that, while precisely transcribed, does not accurately convey their personal knowledge.[178]

If you represent the deponent, what input can you provide during the inspection of the transcript? Of course, you cannot direct the witness to falsify or change an answer simply because it harms the case.[179] However, if acting in good faith to satisfy your obligation not to present and to remediate false testimony, you arguably should be permitted to point out deposition answers that contradict what the witness related in the prep session. The witness then will decide whether to enter a correction.[180] A stickier ethical issue is whether you can point out answers that are accurate under one interpretation but due to ambiguity or implication may be construed differently. Ostensibly, it is up to the witness to choose whether they are comfortable that the answers they gave were accurate and truthful.[181]

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176. *See supra* notes 77–78 and accompanying text.

177. *See supra* notes 68–72 and accompanying text.

178. If the witness wishes to correct an answer, the witness will enter the amended answer on the errata sheet. The original transcript remains unchanged and may be used to impeach the witness at trial. However, the witness can point to the correction they made upon reviewing the transcript, largely undermining the impact of the impeachment. Where warranted, deposing counsel may seek a court order reopening the deposition to inquire about substance of the testimony that the witness has changed as well as related matters affected by the new answers. *See supra* note 72 and accompanying text.

179. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"); r. 3.4(b) ("A lawyer shall not . . . (b) falsify evidence, [or] counsel or assist a witness to testify falsely."); and r. 8.4(c) ("It is professional misconduct for a lawyer to . . . (d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

180. *See* MODEL RULES OF PRO. CONDUCT r. 3.1(a)(30) (AM. BAR ASS'N 1983) ("A lawyer shall not knowingly . . . (3) offer evidence that the lawyer knows to be false. If . . . the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures."). The Supreme Court of Mississippi ruled that the deponent's role is limited to correcting errors in transcription, with the party's attorney offering substantive changes to the testimony by filing an amended or response under the duty to supplement required by the rules of civil procedure. Hyundai Motor Am. v. Applewhite, 53 So. 2d 749, 758–59 (Miss. Mar. 11, 2011); Choctaw Maid Farms, Inc. v. Hailey, 82 So. 2d 911, 916 (Miss. May 30, 2002).

181. *See* Strauch v. Am. Coll. of Surgeons, No. 02 C 3314, 2004 U.S. Dist. LEXIS 2615, at *12 (N.D. Ill. Feb. 19, 2004) (disapproving deponent's offering clarification of his testimony following break in deposition during which he consulted with counsel;

But you certainly may not encourage, invite, or induce the witness to change an answer simply because you preferred the witness to use less damaging language.[182]

C. Before the Deposition

As the attorney defending the deposition, your most impactful and key role is preparing the deponent for their deposition. Nervousness, intimidation, or a cavalier attitude may cause the unprepared deponent to fail to recall helpful facts that are well within their knowledge, inaccurately testify contrary to statements they made in prior writings, or be induced or led to swear to facts that are not true. Assuming deposing counsel executed the recommended tactics, the witness is now forever handcuffed to the answers they gave at the deposition. At trial, they will not be able to testify to new facts without being impeached by omission and will not be able to contradict any testimony without being discredited by the transcript of the deposition.

Given the significant limitations on your ability to affect the testimony during and after the deposition, you must prepare your witness for their deposition with equal or even greater attention than when readying them for testimony at trial.[183] As the recently issued Formal Opinion of the American Bar Association Standing Committee on Ethics and Professional Responsibility acknowledged:

> A lawyer's roles in preparing a witness to testify and providing testimonial guidance is not only an accepted professional function; it is considered an essential tactical component of a lawyer's advocacy in a matter in which a client or witness will provide testimony. Under the Model Rules of Professional Conduct governing the lawyer-client relationship and a lawyer's duties as advisor, the failure to adequately prepare a witness would in many situations be considered an ethical violation.[184]

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court ordered that witness be instructed in advance of trial that his trial testimony must be in accordance with original deposition testimony).

182. *See infra* note 186 and accompanying text.

183. *See* Christy v. Pennsylvania Tpk. Comm'n, 160 F.R.D. 51, 53 (E.D. Pa. Jan. 31, 1995) (rejecting argument that Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. July 29, 1993) prohibits counsel from proper preparation of witness for the deposition); Diana S. Donaldson, *Deposition Essentials: New Basics for Old Masters*, 26 LITIG., Summer 2000, at 25, 30 ("The new restrictions on objections, instructions not to answer, and conferences make witness preparation more important than ever.").

184. Formal Opinion 508. The Ethics Opinion specifically provides that "it is accepted that lawyer can engage in . . . the following activities:

- remind the witness that they will be under oath
- emphasize the importance of telling the truth

You must remain cognizant that if too demanding when woodshedding the witness, you risk sabotaging their ability to accurately and credibly respond to questioning. Many articles published about witness preparation may be profitably consulted.[185] However, four transcending principles should govern your preparation.

First, to state the obvious, you must never violate the rules of professional conduct when readying the witness for their deposition.[186] As with most rules of lawyering, good ethics are also good tactics. Unless they are a professional actor, the witness will not be

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- explain that telling the truth can include a truthful answer of 'I do not recall'
- explain case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition
- suggest proper attire and the appropriate demeanor and decorum
- provide context for the witness's testimony
- inquire into the witness' probable testimony and recollection
- identify other testimony that is expected to be presented and explore the witness's version of events in light of that testimony
- review documents and physical evidence with the witness, including using documents to refresh a witness's recollection of the fact
- identify lines of questioning and potential cross-examination
- suggest choice of words that might be employed to make the witness's meaning clear
- tell the witness not to answer a question until it has been completely asked
- emphasize the importance of remaining calm and not arguing with the questioning lawyer
- tell the witness to testify only about what they know and remember and not to guess or speculate
- familiarize the witness with the idea of focusing on answering the question."

Id. at 3–4.

185. *See infra* note 188.

186. The American Bar Association Model Rules of Professional Conduct prohibit a lawyer from "counsel[ling] or assist[ing] a witness to testify falsely." *See* MODEL RULES OF PRO. CONDUCT r. 3.4(b) (AM. BAR ASS'N); *see also* Brian A. Zemil, *From Witness Prep to Dep: Temper Your Inner Coach*, LITIG. NEWS, Nov. 5, 2018, https://tinyurl.com/xvf3kse8 [https://perma.cc/TRL6-34PR] ("[C]ourts typically draw a bright-line distinction between helping witnesses provide accurate testimony and facilitating false or misleading testimony. Nevertheless, we all prepare our witnesses to influence their testimony. The critical question is whether that influence changes the facts or just the presentation of facts."); David M. Malone, *Talking Green, Showing Red—Why Most Deposition Preparation Fails, and What to Do About It,* 24 LITIG., Summer 1998, at 27, 27, https://tinyurl.com/mw63aemu [https://perma.cc/5L6S-MMHF] ("Preparation is helping the witness say what she actually wants to say, by providing word choices or assisting with organization or refreshing recollection. Coaching is improperly adding content to the witness's testimony, attempting to make it more useful to one's side. A simple rule of thumb: If the substantive content comes from the attorney, it's coaching; if it comes from the witness, it's preparation."); Richard Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995); Formal Opinion 508 (lawyers "must respect the important ethical distinction between discussing testimony and seeking improperly to influence it").

able to deliver scripted answers[187] or testify credibly if you re-engineer their persona.

Second, making the witness as comfortable as possible with the purpose and process of the deposition is a higher priority than fulfilling your agenda. From the lawyer's perspective, there are extensive instructions about testifying that would minimize disclosures and harmful admissions, if followed.[188] Even if you are satisfied that you have not crossed the bounds of professional responsibility in horse shedding, every instruction will exert added pressure on the witness to deliver the goods and heighten the chance that the witness will make substantive mistakes.[189] In addition, the deponent is less likely to respond naturally which will signal to opposing counsel that, should the case proceed to trial, a jury will find the witness unlikable or uncredible. As attorney Kenneth Berman explained:

> One problem with the standard witness preparation playbook is that it is based on unfamiliar and unnatural rules of human interaction. Not only do most witnesses have trouble processing the instructions; witnesses can stumble because the instructions require them to change lifelong habits about *how* they answer questions.[190]

Thus, your principal objective should be to address the deponent's concerns and anxieties. The late Professor Janeen Kerper aptly

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187. Formal Opinion 508 specifically included "programming a witness's testimony" among the "representative examples of unacceptable witness coaching." In an accompanying footnote, however, the Opinion notes that "[e]xcept in extreme cases of witness programming . . . the extent to which a lawyer can 'script' or 'prefabricate' otherwise truthful witness testimony has not been definitively resolved." *Id.* at 5 n.19.

188. *See* Edna Selan Epstein, *Deposition Preparation: The Four Simple Rules*, 40 LITIG., Summer 2014, at 28, 28, https://tinyurl.com/48eea5ac [https://perma.cc/HNC7-8P7M]; James W. McElhaney, *Preparing Witnesses for Depositions*, 78 A.B.A, June 2002, at 84; Stuart M. Israel, *Preparing Your Client for Deposition (Including 137 Useful Rules for Witnesses)*, PRAC. LITIGATOR, Mar. 2001, at 41; David N. Wecht, *Helpful Tips for Preparing Your Client for a Deposition*, PA. L. WKLY., May 15, 2000, at 13 (proposing 17 deposition pointers to share with client); W.B. Fitzgerald, *Checklist for the Witness, For the Defense*, July 1992, at 18 (setting forth 34 "Suggestions for Giving Accurate Testimony").

189. *See* Kenneth R. Berman, *Reinventing Witness Preparation*, 41 LITIG., Summer 2015, at 20, 21–22 ("[T]he more you drill and the more you warn, the more you actually court a danger that could be far worse than seeing your witness phrase an answer the wrong way or volunteer something that goes beyond the scope of the question. The essential core of the problem, the real danger, is that of turning a good witness into someone so afraid of saying the wrong thing that he or she fails to say the right thing."); Malone, *supra* note 186, at 27 ("Most of what attorneys tell witnesses preparing for depositions is simply wrong-headed. By increasing a witness's anxieties, it makes him less confident, less effective. The testimony is confused and inconsistent, a story told in fits and starts.").

190. *See* Berman, *supra* note 189, at 22.

captioned this approach to witness preparation as "opportunistic teaching":

> Opportunistic teaching is best expressed in the ancient Zen saying, "When the student is ready, the teacher will appear." In deposition preparation, the lawyer should not give the witness a list of do's and don't's; she should wait for the opportunity to teach the witness a rule when that rule will solve an immediate problem. Present the rule when the witness states a concern, or when critiquing a segment of an examination, or when the witness is struggling with a portion of the testimony. If the rule cures the dilemma, it will be remembered. In opportunistic teaching, each do and don't is taught in a context and in an easily digestible piece.[191]

You must avoid giving the witness the impression that the success of the deposition turns on their ability to testify in accordance with a comprehensive playbook. On the contrary, the witness should believe and be comforted by the fact that there is only one rule they need to follow: tell the truth.[192]

Third, you should explain to the witness that they may be asked questions about which they have no personal knowledge; it is not

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191. *See* Janeen Kerper, *Preparing a Witness for Deposition*, 24 LITIG., Summer 1998, at 11, 13. Included in Professor Kerper's description of opportunistic teaching is having the witness respond to questions posed by their attorney playing the role of deposing counsel. ("Most American ethicists agree that roleplay is appropriate for some purposes. Ethically permissible objectives of the role play are to refresh the witness' memory, put the witness at ease, encourage the witness not to guess or speculate, and to listen carefully to questions . . . It is not ethical to use the role play to 'script,' 'polish,' 'suggest wording,' or repeatedly 'rehearse the witness's testimony."). *Id.* at 15.

192. Solovy & Byman, *supra* note 173, at A15 ("All the articles on preparing witnesses, all the lists of do's and don'ts, all the advice, really come down to two basic rules for good witness preparation: Listen to the question, and answer it truthfully and completely."); Malone, *supra* note 186, at 28 ("I recommend that attorneys actually say to the witness, before the deposition, something like this: 'You only have one job at the deposition next week: tell the truth, and keep your answers short. That's all. I'll worry about everything else that might come up.'"). If you have reason to believe that the deponent may engage in antics designed to thwart the deposition, you may be required to instruct them not to undertake such behavior. The Delaware Supreme Court has held that because court rules generally prohibit the attorney from conferring with the client during the deposition, the lawyer is obliged in advance of the deposition to advise the deponent not to engage in "flippant, evasive, ridiculous answers and speech-making" efforts to avoid responding to questions. *In re* Shorenstein Hays-Nederlander Theatres LLC Appeals, C.A. Nos. 9380-VCMR and 2018-0701-TMR (June 20, 2019) Addendum to Opinion at 51–71, https://tinyurl.com/2smhd32w [https://perma.cc/448R-HZX6]; *see also* GMAC Bank v. HTFC Corp., 248 F.R.D. 182, 186 (E.D. Pa. Feb. 29, 2008) (ordering sanctions against lawyer who failed to intervene at the deposition to prevent deponent's "hostile, uncivil and vulgar conduct; [ ] impeding, delaying, and frustrating fair examination; and [ ] failing to answer and providing intentionally evasive answers to deposition questions").

only acceptable but proper to answer, "I do not know."[193] Absent such advice, the witness may feel obliged to provide information in response to every question and potentially offer speculative answers that will come back to haunt the case.

Finally, you should review with the witness documents that contain their prior statements or describe events of which they have personal knowledge. Before doing so, however, you must verify that the rules of evidence do not withdraw protection of the attorney-client and work-product privileges for materials used in witness preparation.[194] The goal is not to steer the witness to a particular answer but rather to unearth the witness's authentic position on any inconsistency between the document and their present recollection.

In choosing the breadth of your preparation of a particular deponent, you must be mindful of both its benefits and its burdens. Your north star should be the understanding that the witness will not be able to add facts to, contradict, or disavow their answers at trial without being impeached by the transcript of the deposition.

CONCLUSION

A. Taking the Deposition

When conducting the deposition, you should unearth everything the witness knows, what the witness does not know, and elicit as many helpful admissions as possible. By so doing, you can choose the strongest factual story of the case—the character, motive, plot, and stakes—for settlement negotiation and trial.

By implementing three fundamental techniques, you can be assured that the witness cannot add to, contradict, or repudiate their testimony at trial without being impeached by the transcript of the

193. *See* Sandler et al., *supra* note 141 ("One component of witness preparation is to inform the witness that he or she should give truthful answers, and that if the witness does not know the answer to a question, the witness should so state. But an attorney should make clear that 'I don't remember' is not an appropriate response where the client knows the answer."). In Christy v. Pennsylvania Tpk. Comm'n, 160 F.R.D. 51 (E.D. Pa. Jan. 31, 1995), plaintiff filed a motion for a protective order seeking to prohibit defense counsel from offering the following instructions to witnesses prior to deposition: "(i) Don't answer unless you know it for a fact; (ii) Don't speculate; and (iii) Hearsay is not a fact." The court denied the motion, finding Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. July 29, 1993) does not limit communications between witnesses and the attorney before depositions and to the contrary accepts that lawyers are ethically obliged to prepare a witness under Pennsylvania Rule of Professional Conduct 1.1. In a footnote, however, the court noted that both parties agreed that the alleged instruction—which counsel denied giving to witnesses—would be improper. *Id.* at 53, n.1. Arguably, the flaw lied in the third instruction, which would allow the witness to deny having heard anyone else's (hearsay) statements.

194. *See supra* note 104 and accompanying text.

deposition. First, seek the proper stipulations. Second, execute the introductory litany. Third, be aware at all times whether you are constructing a nabla, test-driving admissions, or surfing for nablas and adopt the style of questioning appropriate to that purpose.

Finally, if you understand how to respond to objections, instructions not to answer, improper coaching, and other obstructionist tactics, you can prevent defending counsel from thwarting your objectives.

B. Defending the Deposition

When defending the deposition, you must protect the witness's right to review the transcript, prevent disclosure of privileged communications, raise objections which must be lodged to preserve them for trial, and protect the client from abusive interrogation.

After the deposition, while remaining comfortably within the bounds of professional conduct, you should provide the guidance necessary for the deponent to be satisfied that the transcript accurately reflects their personal knowledge.

Your influence during and after deposition is markedly limited. Therefore, you must prepare the witness for what will be an unfamiliar and likely intimidating proceeding. You must remain cognizant that, at trial, the witness will be handcuffed to their deposition testimony. Your goal is to make the deponent sufficiently comfortable with what will occur so they can accurately convey what they do know, comfortably concede what they do not know, and avoid being led into admitting facts that are not true.

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