

Cross-examination is the highest art form—a finely tuned ballet of movement, gesture and articulation, meticulously choreographed by the lawyer-artist for the sole purpose of seizing and conducting the thoughts and words of a forewarned and unwilling enemy.

Chapter 10

Depositions

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§10.10 Basic Training and Strategy

Cross-examination is often the first thing that comes to mind whenever we speak of deposition skills. It is a decisive skill to be sure and one that we intend to cover thoroughly,¹ but as this chapter's lengthy synopsis indicates, there are many other facets requiring a number of other skills and strategies. These strategies can vary significantly depending upon several factors, the most significant of which include the expertise of the witness (or lack thereof), and the witness' alignment with respect to your client.

The deposition is the discovery device of choice for the majority of attorneys, and although weapon exclusivity is never recommended, for many, it is the only mechanism deployed after the mandatory disclosure items have been received. It is a powerful apparatus because of its up-close and personal nature; but another equally important feature is its near-seamless ability, in certain instances, to be *plugged into* the trial itself. The expanding popularity of the videotaped deposition has added a new dimension to the oncesterile, printed word. No discovery plan should entirely exclude this weapon.

The deposition enjoys several advantages over the other discovery weapons—the most notable being the element of surprise. The deponent may be unfamiliar with your techniques and unable to predict the methodology and substance of your interrogation. And, of course, the element of surprise is normally a vital component of every battle. But with any potent tool comes disadvantages. Perhaps the best way to evaluate the pluses and minuses is to compare the *Deposition* to the *Set of Interrogatories*, that *other* major weapon in the never-ending lawyer struggle for information.

Although this chapter (and book) is fundamentally concerned with civil litigation, all practitioners

should familiarize themselves with some of the basics of criminal discovery; civil issues often involve criminal misconduct.² Despite the “No discovery in criminal cases” myth, depositions are permitted under limited circumstances.

There are two basic functions underlying the deposition in civil litigation; the strategies for each are vastly different. The first type, the **Preservation Deposition**, is often taken for the purpose of saving and preserving friendly or “neutral” testimony. The deponent may be your own party, an expert of your choosing or an independent witness. Also included within this type of deposition are those witnesses whose position or “favorability rating” has yet to be determined. Because the Preservation Deposition involves non-adversaries, the use of leading questions is often improper and dangerous.³ Even if they are not totally excluded at trial, leading interrogation of a friendly or independent witness can certainly diminish the evidentiary value of the testimony.

In sharp contrast to the Preservation Deposition is the second type, the opposition deposition or what I like to refer to as the **Destruction Deposition**. It is so-named because its goal is to destroy the case of an enemy party, expert or witness.

As the name suggests, the destruction deposition is truly adversarial. Both the deponents and their attorneys are likely to take up arms against you; for that reason alone, the format quite appropriately consists of cross-examination. Unlike the direct examination of a non-hostile witness, leading questions can and should always be asked during the course of the interrogation.

There are other key differences between the Preservation and Destruction depositions that will become more apparent as you read the remainder of this chapter. As a matter of fact, the distinctions are highlighted in both the text and the headings of the subsections that follow.

¹ See §10.52 and its sub-parts for concentrated discussions, rules and examples.

² In fact, every victimless crime has a corresponding civil consequence.

³ Leading questions and the respective answers of friendly or non-adversarial witnesses may later be stricken. An exception exists for foundational, preliminary, or non-material issues. For those situations, the witness may be led, regardless of whether he or she is friendly or hostile. See §10.61(f) (Crash Course on Objection Warfare).

Attention

As a matter of overall strategy, consider taking the deposition of enemy witnesses as soon as possible; there is a much greater likelihood of catching them off guard *before* they have had time to compare notes, discuss the case, gossip or get friendlier with the opposing attorneys. For that very same reason, the greater the delay with respect to your *own* client's deposition, the better.

Finality of Answers, in General

Although not expressly addressed in the written rules, as a **general** rule, changing answers is no fair. Once the deponent's response is spoken, taken and recorded, there is no authority for permitting that deponent to change his or her answer at a later date in the absence of an error or mistake.⁴

Any statement made by a party could constitute an admission and should therefore be admissible and binding. Admissions are considered as non-hearsay and are, therefore, not subject to the exclusionary effects of the Hearsay Rule.⁵ While statements made by non-party witnesses may not necessarily rise to the level of an admission, they are just as final. For, in the event that a witness attempts to negate his or her deposition statement, that contradictory statement would permit the introduction of the deposition testimony as a prior inconsistent statement.⁶

§10.11 Introducing Hand to Hand Combat

The deposition is up-close and personal. If conducted skillfully, it is an antagonistic affair, not for the faint of heart. Nor is it meant for the new practitioner who has yet to "sit in" on a deposition conducted by an associate or firm partner.

The destruction deposition, in particular, employs the highest skill level of combat that an attorney is expected to attain—the ability to effectively cross-examine an enemy witness. Suspicious spouses seem to be born with that skill; the rest of us must develop it. And while there is no substitute for experience, the nonsense lists, shortcuts and sample dialogues presented later in this chapter are designed to get you combat-ready in a relatively short period of time.⁷

The contentious nature of the deposition no doubt results from the ability to use it at trial, subject of course, to valid evidentiary objections.⁸ In addition, unlike interrogatories and other weapons fired from afar, the deposition puts the enemies face to face. And, in the case of videotaped depositions, the parties will, for all practical purposes, be conducting a "piece" of the trial itself, i.e., the final battle.

Sometimes the battle can become so heated that a special "Master" may be required to cool down the litigating lawyers.⁹ And in addition to state and federal rules, local courts have found it necessary to promulgate additional ordinances to control the carnage.¹⁰

⁴ But see Rule 30(e) of the Federal Rules of Civil Procedure. See also *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98 (2nd Cir. 1997); *Allen and Company v. Occidental Petroleum Corp.*, 49 F.R.D. 337 (S.D.N.Y. 1970).

⁵ See Rule 801(d)(2) of the Federal Rules of Civil Procedure.

⁶ With respect to the use of depositions in court, in general, see Rule 32 of the Federal Rules of Civil Procedure.

⁷ See §10.52 and §10.54.

⁸ See Rule 32 of the Federal Rules of Civil Procedure.

⁹ For a good, action-packed deposition, see *Van Pilsum v. Iowa State University of Science & Technology*, 152 F.R.D. 179 (S.D. Iowa 1993), which featured lawyers who constantly interrupted one another, argued and quarreled, all while signaling their respective clients on how to answer one another's questions. You won't want to miss this feature presentation styled as "Rambo Litigation." See also the *American Bar Association, Litigation Section, Civil Discovery Standards* 16 et. seq (1999).

¹⁰ The guidelines set down by the Superior Court for Los Angeles County (*L.A. Sup. Ct. Rule 7.12*), for example, provide some restraints for inappropriate, Rambo-type deposition misconduct: "(a) Counsel may not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer; (b) Counsel should not make speaking objections or self-serving speeches during any deposition; (c) Counsel should not ask questions about a deponent's integrity or personal affairs where such inquiry is irrelevant to the subject matter; and, (d) Counsel should refrain from questions that take on the form of an argumentative nature or those that are repetitive."

Even the comparatively benign Preservation Deposition may involve a confrontation with an enemy attorney over the substance and form of your questions.

Caution

In addition to the visible confrontation, there are hidden land mines. A cool headed, depo-defending warrior, familiar with the rules of evidence, knows when to sit back and say nothing with respect to some of your questions, anticipating that the questions and answers will be stricken from the record at trial. To solve that problem, we are going to give you an instant crash course in evidentiary objections (designed for both the new recruit and the seasoned warrior); we don't want your legs blown out from under you.¹¹

As you proceed through the remainder of this chapter, keep in mind that every sword has two edges, and the skilled soldier walks a fine line between aggressiveness and restraint. If you are too aggressive or obstructive, the court will certainly sanction you; timidity, under fire, however, can cost you the entire war. The trick, therefore, is to be tough while at the same time being polite and courteous.

§10.20 The People That You Intend to Depose

There are basically three types of people in the world: Parties, Lay Witnesses, and Expert Witnesses. The parties are, of course, the live targets of the interrogation process. They are the warriors for whom it is always open season. They are subject only to federal and state limitations on *number* and *time*, as the case may be.¹² There is no need for a subpoena.

Lay witnesses, often referred to as “eyewitnesses,” may or may not be aligned with any given party. It must always be remembered that, theoretically at

least, witnesses are thought of as being *disinterested*, and therefore, their testimony will carry much more weight than those of the parties. These persons might be referred to as civilians. You must tread easily with them. For them, subpoenas must always be issued, *even* if they are friendly.

The deposition of experts is a matter that is strictly regulated and carefully timed by applicable court rules. Experts are not eyewitnesses to the events which are the subject of the lawsuit. They are strictly hired mercenaries, and are therefore entitled to respect even though it is also “open season” on them, but hunting is limited to specified times and specified circumstances.¹³

§10.21 Parties in General

Parties come in two sizes—enemies and allies. For the enemies, you will engage in a Destruction Deposition. For the allies, you may conduct a Preservation Deposition. It is that simple.

§10.21(a) Enemy Parties

The parties, as previously indicated, are fair game. Individual parties are relatively easy to identify. Corporations and other business entities, on the other hand, can be a bit more problematical. Oftentimes, trying to determine the correct officer to depose may be akin to shooting at an invisible target.

It is quite possible that the information you seek may be in the hands of several different officers. And even if it is not scattered about, the entity may engage in a shell game to keep you from identifying and deposing the correct party. Rule 30(b)(6) of the Federal Rules of Civil Procedure claims to eliminate the problem. It doesn't. The Rule pretends to place responsibility for determining the *proper* persons on the entity itself; it can't. Corporations don't talk, and you can't put them behind bars.

¹¹ Attorneys conducting a deposition are presumed to know the rules of evidence pertaining to their cases and the subject matter of the deposition; many do not. While a detailed course in *Evidence* would be beyond the scope of this text, we have provided some important basic information in a very condensed form. For a more detailed, but *fast-answer* evidence guide, see Lipson, *Is It Admissible?*, James Publishing.

¹² See §§10.40 and 10.41.

¹³ See §10.23

Common sense suggests that the enemy is not going to “correctly” guess the very best persons for your unidentified issues unless, of course, you tip your hand and let them know what you are going to ask.¹⁴ The solution is simple; use interrogatories to identify the individuals who are responsible for the information that you need.¹⁵

§10.21(b) Allied Parties

Be very careful about deposing your own allies. Unless the deposition is absolutely needed, you may be unnecessarily subjecting your own soldiers to cross-fire. If your client is seriously ill or may not otherwise survive until trial, you may have no choice but to take a preservation deposition. The preservation deposition can be taken at virtually any time, even earlier than the filing of the lawsuit or as late as the period of post-judgment appeal, depending upon the severity of the circumstances.¹⁶

§10.22 Lay Witnesses

Lay witnesses, as the term is used in this subsection, may or may not be aligned with a party. Unlike the parties themselves, witnesses sometimes have a very twisted notion about the law; some even think they are supposed to tell the truth.

By far, the smartest thing that you can do is determine in advance the nature of the testimony that such a witness will give and the relationship, if any, between that witness and the parties to the litigation. If the testimony is to be unfavorable, you will want to probe any bias that the witness may have against your client or in favor of the opposition.

Ignore the myth suggesting that witnesses are reluctant to speak to attorneys. They love to yack. I can recall members of a personal injury firm mailing objective-looking questionnaires designed to “obtain an accurate description of the witnesses events that occurred on” A surprising number were filled out, signed and returned.

Caution

You must be extremely careful when advising or prepping non-party witnesses. First, assume that nothing will be protected by attorney-client privilege. It is easy to unintentionally disclose your strategy, which in turn, may find its way into enemy hands. Next, if you decide that it is strategically beneficial to assist and prep the witness, be careful not to give the impression that you are trying to influence his testimony. Keep repeating the direction to “always tell the truth.”

§10.23 Expert Witnesses

Expert witnesses, the so-called hired guns of scientific truth and justice, come in only two flavors—for and against. You can always predict the *pure* scientific outcome and truth of any problem by looking at the signatures on their paychecks. Experts must be revealed in conjunction with pre-trial disclosures.¹⁷

Caution

The *Expert Witness Shell Game* is a common means by which larger parties gain advantage over those with limited resources. The

¹⁴ Rule 30(b)(6) provides: “A party may in the party’s notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.”

¹⁵ With respect to interrogatories, in general, see Chapter 6.

¹⁶ See also Rule 27 of the Federal Rules of Civil Procedure.

¹⁷ See Rule 26(a)(2) of the Federal Rules of Civil Procedure.

wealthier party will typically designate *many* different witnesses on its expert witness list, thereby leaving the poorer party to conduct many depositions of witnesses that are never going to be used at trial. This also provides an opportunity for the wealthier party to pick and choose among those who perform best at the deposition.

Daubert Dynamite

The Landmark *Daubert v. Dow*¹⁸ and its aggressive offspring are always poised to wipe out entire causes of action based on questionable scientific principles or methodology. *Daubert* empowered the federal district courts to act as gatekeepers for excluding unreliable evidence that pretends to be “science.” This power is quite broad and the district court’s decision will not be overturned absent an abuse of discretion.¹⁹ The term “scientific” is also interpreted broadly so as to include technical knowledge.²⁰

The *Daubert* gatekeeper may be a blessing or a curse depending upon whose expert is relying upon esoteric or questionable scientific data. In either case, you must be aware of the problem *before* the experts are deposed.

The groundwork for your attack on an enemy expert should be **first** be laid by way of interrogatories²¹ and expert witness disclosures. The *Daubert* standard and its offspring provide the following critical factors:

- [1] Has the theory or technique been tested?
- [2] Has it been subjected to peer review or publication?
- [3] What is the known or potential rate of error?

[4] Has the theory or technique been generally accepted?

[5] How was the methodology applied?²²

After obtaining your opposition’s required disclosures and any additional information that you procure by way of interrogatories about the enemy expert, you should, by then, have secured the enemy’s answers to the preceding questions. From there, you can begin to tear through any *Daubert* weaknesses.

§10.23(a) Enemy Experts

Before you **ever** set foot in the deposition of an enemy expert, you must thoroughly prepare for both (A) the subject matter of the deposition, and (B) the issues relating to your particular case. Consider the following checklist:

A. Enemy Expert Preparation

1. Obtain and thoroughly read the report of the expert whom you are going to depose.²³
2. Review the report with your own expert witness.
3. Read, or have your own expert witness read, relevant applicable papers or treatises published by the expert.
4. Find out if the expert has testified inconsistently at other trials, or has testified a bit **too** consistently.

If you are going to effectively cross-examine your opposing expert witness, you must, for the time being, **become** an expert, at least insofar as the facts of your particular case are concerned. This undertaking is not for the untrained foot soldier.²⁴

Once you have thoroughly schooled yourself in the subject matter of the dispute, you should draw up

¹⁸ 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

¹⁹ *General Electric v. Joiner*, 522 U.S. 136, 118 S.Ct. 512 (1997).

²⁰ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999).

²¹ See Chapter 12.

²² This fifth element has etched its way onto the standards following *Daubert* decision.

²³ The latest that this report can be withheld from you is 90 days prior to trial. See Rule 26(a)(2)(C) of the Federal Rules of Civil Procedure.

²⁴ Consider adding this to your armory: Clifford, *Qualifying & Attacking Expert Witnesses*, James Publishing.

a list of questions designed to attack the enemy and render him a babbling mass of jelly:

(B) Enemy Expert Attack

1. Attack [missing] qualifications.
2. Attack competence.
3. Show payment for services.
4. Show incompetence.
5. Attack his or her underlying factual and technical foundations.
6. Show inconsistencies.

Important

Here are your **target** questions that you are aiming to deliver and establish. They have been developed over the years for the purpose of spearheading attacks on expert witnesses. If space permitted, we could present pages of sample deposition transcripts aimed at these issues:

- Q1. Do you concede that there is a difference of opinion among experts in your field?**²⁵
- Q2. Would you agree that your opinion might change if the facts were to change?**²⁶
- Q3. Would you agree that your opinion would be more solid if you performed tests yourself as opposed to reading the reports of others?**²⁷
- Q4. Would you agree that as a paid expert, your opinions are essentially for sale?**²⁸

Affirmative answers open the door for impeachment. It is presumed that no “professional” expert

would provide an unequivocal “yes” to any of the above questions. The following are typical responses:

- A1. There have been and always will be differences of opinion in every field of endeavor.
- A2. Changing the facts can change anything; you have to be more specific.
- A3. It depends on the accuracy of the reports

or

Not necessarily; a report, for example, that contains details of measurements and other minutia would permit a far better use of my time than if I were required to spend all day with a ruler or tape measure.

- A4. I am paid for what I do, counselor, just as you are paid for what you do, just as all professionals are paid for what they do.

A fundamental attack on an enemy expert will often employ the works of opposing experts. The *trick* is to obtain a concession that the opposing expert is *authoritative* and, if possible, a “leader in the field.” Consider the following two cases:

Authority Acknowledged:

- Q. (*Questioning Attorney*) Would you agree that in order to stay advised and keep current in your particular field, it is necessary to read articles, books and publications?²⁹
- A. (*Enemy Expert*) Yes.
- Q. And do you keep current by reading field- related publications?

²⁵ A negative answer would be followed by: “Do you mean to tell this court that you are not familiar with the works of _____ [Provide a long list of experts who disagree]?”

²⁶ Follow a negative answer with an extreme example that must, according to common sense, change the expert’s opinion.

²⁷ Follow a negative answer with: “But you have no way of determining the accuracy of someone else’s report, do you?” and “There is no guarantee that the report’s author will include all of the details that any qualified expert should be concerned with, isn’t that so?” Do not ask a “How?” or a “Why?” question.

²⁸ Follow a negative answer with: “Are your services free?”

²⁹ **TIP:** Try to resist the temptation to use the phrase “Is that not so?” A “yes” answer might ambiguously mean “Yes, it is *not* so” or “Yes, it *is* so.”

- A. Of course.
- Q. Are you familiar with the works of Dr. _____, a leading expert in the field?
- A. Yes.
- Q. Are you familiar with his/her work titled “_____” ?
- A. Yes.
- Q. Would you agree that the work titled “_____” is an authoritative work [or reliable authority] with respect to the subject of _____?
- A. Yes.
- Q. I ask that Dr _____’s treatise titled “_____” be marked as “Deposition Exhibit A.” Now, I draw your attention to Page _____. Do you see it?
- A. Yes.
- Q. Now, as I recall in your earlier testimony, you took the position that _____

Is that correct?
- A. Yes.
- Q. But Dr. _____, on Page ____ takes the position that _____

doesn’t he?

Authority Not Acknowledged:

- Q. (*Questioning Attorney*) Do you keep current by reading field-related publications?
- A. (*Enemy Expert*) Yes.
- Q. Are you familiar with the works of Dr. _____, a leading expert in the field?

- A. He is not a leader.
- Q. I beg your pardon. Are you familiar with his qualifications?
- A. No.
- Q. But yet you, nevertheless, claim to know whether or not he is a leader in the field?
- A. I am familiar with all of the leaders in the field. He is not one of them.
- Q. Do you consider yourself a leader in the field?
- A. Yes.
- Q. Are you familiar with the following list of publications that Dr. _____ authored:

_____?
- A. Some of them.
- Q. Are you familiar with the fact that Dr. _____ has taught the following courses: _____?
- A. No.
- Q. Are you familiar with the fact that Dr. _____ has: _____?

[The trick at this juncture is to focus on those qualifications of the expert whom *you* are trying to establish as authoritative,³⁰ placing particular emphasis on those checklist items that weigh more heavily than those of the deponent.]

- Q. Would you agree that the Dr’s work titled “_____” is an authoritative work with respect to the subject of _____?
- A. No.
- Q. Would you agree that because you are not familiar with his works that you are not in the best position to evaluate his work?

³⁰ See the Expert Qualification Checklist in §10.23(b).

If the deponent is obstinate and continues to refuse to recognize the authority or expertise of the competing expert, that refusal may provide a basis for impeachment during trial. In any event, the opposing work may then require a foundation under the *Learned Treatise Exception* to the *Hearsay Rule*. Keep in mind that it is generally easier to admit learned treatises for impeachment purposes than as substantive proof.³¹ That is one reason why the deposition is so important.

§10.23(b) Allied Experts

If you are required to take the deposition of your own expert, he or she must be prepared for both direct examination and the cross-examination that will follow. Right now we are going to be concerned only with the direct examination. We have another training camp to handle cross-examination.³²

What Every Expert Must Be Asked [The Big Four]:

Regardless of the expertise involved in the testimony, every expert must be asked four sequences of questions during direct examination. They are:

1. **Please state your qualifications with respect to the science³³ of _____.**³⁴
2. **Did you investigate, analyze and study the matters relating to _____ .**
3. **Did you form an opinion?**
4. **What is that opinion?**

The above questions are designed to elicit the basic information that the expert should be required to present at trial in order to make his or her opinion “stick.”

Expert Qualification Checklist

Here are some important qualification items that may be used during the battle of the competing experts:

- [a] Education, degrees
- [b] Training,
- [c] Awards,
- [d] Certification,
- [e] Experience,
- [f] Speeches, lectures and seminars,
- [g] Societies,
- [h] Publications, including books, contributions to books, articles, and treatises,
- [i] Advisory committees,
- [j] Teaching assignments and professorships,
- [k] Occupations,
- [l] Consultations, and
- [m] Research and research grants.

If your expert plans to use a demonstrative exhibit in conjunction with the testimonial presentation during the course of a videotaped deposition, consider this lead- in question:

“Will the following (chart, graph, demonstration, photograph, map, model, reconstruction, simulation, blowup, etc.) assist you with your explanation and help clarify your testimony?”

³¹ *Freshwater v. Scheidt*, 56 Ohio St.3d 260, 714 N.E.2d 591 (1999), *Green v. Goldberg*, 630 So.2d 606 (Fla. Dist.Ct.App., 1993), *Ellis v. International Playtex Corp.*, 745 F.2d 292 (4th Cir. 1984). See also *Wilson v. Knight*, 26 Kansas App.2d 226, 982 P.2d 400 (1999).

³² See §10.23 and §10.52.

³³ Some fields of expertise may be technical as opposed to “scientific.” Nevertheless, you should use the term “scientific” whenever possible; it lends credibility to your expert’s area of expertise, be it truth or crock.

³⁴ Of course your expert should never be expected to spit out all of his qualifications; that would make him appear immodest. You should be expected to pull them out of him by calling for the checklist that follows.

If you are in federal court, a state that follows the Federal Rules of Civil Procedure or a state court that requires expert witness disclosures, be certain to review the information that you already supplied to the opposition.³⁵

§10.30 Tips for Timing and Positioning Your Attack

Always keep in mind that while there are several different types of persons and entities that might become deposition targets, there are only two basic purposes: preservation and destruction. Preservation, by its very nature suggests that haste could become a critical issue, particularly where witnesses may be preparing to leave the country or worse, keel over and die. In theory, if good reasons are presented, a deposition can be conducted at virtually any point in the litigation stream, as previously discussed, even before an action has been commenced. Notice from the time-line that the ability to schedule and conduct depositions is heavily based on other pre-trial procedures:

A--	Day A-	Day A	Day A+10	-90	-60	-30	Day 0	0 +
↕	↕	↕	↕	↕	↕	↕	↕	↕
Before Suit Filed	Suit Filed	Initial Meeting	Initial Disclosures	Expert Disclosures	Rebuttal Expert Disclosures	Pretrial Disclosures	TRIAL	APPEAL

Depositions are quite flexible in terms of timing. Subject to the restrictions imposed by the rules, they can be scheduled during any time interval. As is the case with all of the discovery weapons, the general rule prohibits the setting of depositions prior to the Rule 26(f) Meeting (Day A). You may, however, take a Preservation Deposition³⁶ at any time prior to the Initial Meeting, even prior to the commencement of your lawsuit by invoking Rule 27(a) of the Federal Rules of Civil Procedure or an applicable state counterpart and filing the required petition.³⁷ You can even take a deposition after a judgment has been rendered, during a pending appeal. The details are provided in Rule 27(b). In extraordinary situations, you may even take a deposition in the middle of a trial.³⁸

PRACTICE TIP

Timing can be very important both as it relates to the standing order schedules **and** the discovery that precedes it. In particular, before a deposition is scheduled, you may want to utilize other devices and weapons to determine precisely who should be deposed and what information should be sought.

³⁵ FRCP 26(a)(2)(B) provides: "Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

³⁶ See §10.11 for the distinction between a Preservation Deposition and a Destruction Deposition.

³⁷ Rule 27(a)(1) lays out the specific requirements for the petition.

³⁸ *In re Air Crash at Charlotte, N.C. on July 2, 1994*, 982 F.Supp. 1084 (D.S.C. 1997).

§10.40 The Rules That You Need

The commands pertaining to the *Notice* and the *Conduct* of depositions are spread throughout several rules. The most frequently sought after information can be found in Rule 30 of the Federal Rules of Civil Procedure and its state counterparts; in essence, it leads the charge.

Rule 27 dictates the time frames within which depositions may be noticed. Rule 28 pertains to *deposition officers*, the Sergeant at arms for the proceeding. Rule 29 enables the parties to vary the guidelines of the rules by permitting stipulations; Rule 29 happens to encompass all of the discovery weapons, not just depositions. Rule 31 is directed to depositions upon written (as opposed to oral) questions. And Rule 32 describes the manner in which the depositions may be used in court.

§10.41 Federal Rules Pertaining to Depositions

As previously indicated, there are several rules pertaining to depositions. But most questions can be answered by Rule 30 of the Federal Rules of Civil Procedure, which is summarized by our "Quickie" chart":

FEDERAL RULES FOR DEPOSITIONS QUICKIE SUMMARY	
When do I do It?	Any time after the Rule 26(f) initial meeting, or by leave of court.
How many can I do?	1 Shot (i.e. 1 deposition session) per person; no more than 10 depositions altogether.
What can I get?	Everything permitted by Rule 26(b)(1), in addition to documents.
Appearance date set?	A reasonable period; 5 to 33 days depending on the circumstances.
How long can I go?	No set time, but after 6 hours, you are stretching it.

Don't Forget. After your Rule 26(f) initial meeting, the enemy must deliver a substantial amount of information that you can use without being requested to do so. The information may provide ammunition (in the form of facts or documents) for a follow-up assault by deposition. In any event, always be cautious about using your weaponry to obtain information that the enemy is required to surrender automatically.

§10.50 Scheduling and Taking the Deposition

The attorney for the party desiring to take the deposition calls the shots. He or she must schedule the deposition (referred to as “noticing the deposition”) by providing written notice to all other parties to the litigation.³⁹ For very special circumstances, an oral notice of deposition might be permitted. But it would, nevertheless, foolishly jeopardize the later use of the transcript.⁴⁰

§10.51 The Skills of Direct Examination

With respect to your own clients and those witnesses who are favorable to them, you will conduct standard direct examination, just as you would if you were examining a friendly witness during the course of trial. First, client preparation will be considered. Next, you will be issued a set of methods for taking care of some of the most common errors made during the course of deposition questioning. Then, later you will receive instruction on how to combat disruptive and improper tactics by the enemy during the course of your questioning.⁴¹

§10.51(a) Client Preparation

If your own clients are going to be the deponent of your deposition, there is no excuse whatsoever for failing to adequately prepare and rehearse them. You may **not** instruct your client to lie; you **may**, however, rehearse, practice and discuss the answers to the questions that you are providing in advance. This is a deposition, not a quiz show.

Before the deposition, both you and your client must know the precise questions that are going to be

asked and the anticipated answers. At the very least, make certain that your client has reviewed the Complaint, Answer and any relevant documents, particularly those that may have been authored or signed by that client. Your discussions are, of course, subject to attorney-client privilege.⁴²

In addition to preparing your client for your own questions, you must also prepare him or her for the enemy’s cross-examination. That task may be considerably more time consuming depending upon the tenacity of the opposition.⁴³

Important

As you prepare your client for cross-examination by opposing counsel, be certain that you review and discuss the following dialogue:

- Q. (*Enemy is questioning your client*) Did you discuss this deposition with your attorney prior to today’s hearing?⁴⁴
- A. (*Client*) Of course I spoke to him; that’s why he’s my attorney. He told me to tell the truth.
- Q. Really. What else did he tell you to say?
- Y. (*You. Interposing an objection*). You know full well, counselor, that such conversations are privileged.⁴⁵

§10.51(b) Tips for General Interrogation

Your deposition only consists of questions and answers, nothing else. And it follows that if your questions are worthless, the deponent’s answers will like-

³⁹ See Rule 30(b)(1) of the Federal Rules of Civil Procedure. See also *General Insurance Company of America v. Eastern Consolidated Utilities, Inc.*, 126 F.3d 215 (3rd Cir. 1997).

⁴⁰ See *Hart v. United States*, 72 F.2d 285 (6th Cir. 1985).

⁴¹ See §10.53.

⁴² With respect to attorney-client privilege, see §14.11(a).

⁴³ See §10.60 (Defending the Deposition).

⁴⁴ See §10.61(c).

⁴⁵ Virtually any follow-up question will draw this response.

wise be worthless. That is why the following guidelines are so important:

[a] No Pronouns

If ever there came a time when I was close to strangling a partner or young associate, it occurred after reading a deposition transcript filled with pronouns. There are always multiple individuals and entities involved in most forms of litigation. For that reason, those miserable “he’s, she’s, they’s, them’s,” and “we’s” often render it impossible to make head or heels out of the questions and answers. Even if the parties happen to know who the speaker is referring to, the jurors will not. Pronouns, by their very nature introduce ambiguity and confusion into the question-answer process, and therefore, tend to diminish the value of the transcript in general. Repeating proper names may sound redundant, but it will never be a source of confusion.

[b] Keep Questions Short and Simple

Never ask a long, rambling question. It will introduce confusion into the process and may render the answer valueless. Break your long question down into several shorter ones.

[c] Use Leading Questions Sparingly

You are not supposed to lead your own witnesses. But you may ask leading questions for preliminary, uncontested, or foundational matters. Rule 611(c) of the Federal Rules of Evidence (a model for most states), provides:⁴⁶

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

What does all of this mean? Basically, you are permitted to lead your own witness in order to lay out the basic setting of the controversy. But as soon as contested facts are to be elicited, you must refrain from asking leading questions.

[d] Mark Documents

Be sure to have the deposition officer mark as exhibits all documents and writings that the witness refers to or discusses.

[e] Visualize the Spoken Words Written

This particular suggestion may be meaningless for audiotaped or videotaped depositions. But for standard, stenographically transcribed depositions, it is critical that you visualize the manner in which the words are going to appear on the paper. They could be somewhat different from the intended words. Likewise, you should give careful thought to your own questions before you ask them.⁴⁷

[f] Listen to Your Client’s Answers

Do not assume that your own client will necessarily produce answers that are predictable or vaguely

⁴⁶ The Federal Rules of Evidence have been adopted by most of the states, sometimes word for word. Those that have not (most notably New York and California) furnish provisions very close to Rule 601(c) in so far as leading questions are concerned.

⁴⁷ You would be surprised how easy it is to look stupid if you fail to think your question through before asking it. Consider some deposition questions from actual cases: [1] “Now doctor, isn’t it true that when a person dies in his sleep, he doesn’t know about it until the next morning?” [2] “The youngest son, the twenty-year old, how old is he?” [3] “Were you present when your picture was taken?” [4] “Were you alone or by yourself?” [5] “Was it you or your younger brother who was killed in the war?” [6] “Did he kill you?” [7] “How far apart were the vehicles at the time of the collision?” [8] “You were there until the time you left, is that true?” [9] “How many times have you committed suicide?”

similar to the ones that you spent hours rehearsing. Be sure to listen carefully to each of his answers so that you can perform the proper follow-up.⁴⁸

If you are in doubt as to your own question, do not hesitate to say to the deposition officer: “strike that,” and then repeat the question. Nor should you hesitate to have the officer read back questions and answers that you have doubts about. That is what they are getting paid for.

§10.52 The Art of Cross-Examination

[Direct Examination of Opponent]

Cross-examination is the highest art form ever devised in the history of the human race. It is a ballet of hand and eye gestures, movement, vocal gymnastics and intellectual warfare. It is the ability to stare an enemy litigant in the eye with the understanding that you are going to take control of his mind and speech. Gymnasts and ballerinas are opposed only by inanimate objects and the force of gravity, each constant and predictable, each conquerable by rehearsal. The cross-examiner, on the other hand, is opposed by a trapped animal with the brain of a human, sometimes.

Skill and practice, over time, are often required to develop the techniques necessary for effective cross-examination.

Despite the complexity of the cross-examination process, the goals for both lay and expert witnesses may be completely summed up as follows:

§10.52(a) Cross-Examination Goals

1. Discredit (impeach) the testimony of the witness.
 - A. Show physical impossibility of events.
 - B. Show an inconsistent prior statement.
 - C. Show lack of knowledge, expertise, or care.
 - D. Show that witness has previously lied (collateral).
2. Diminish the testimony of the witness.
 - A. Show that observation has an "innocent" explanation.
 - B. Show what witness did not see, hear, or personally experience.
 - C. Show bias on the part of the witness.
 - D. Show failure to investigate other options.

⁴⁸ You can look pretty foolish if you don't pay attention to the answers. Consider some deposition follow-up questions from actual cases:

[1] Q (To mother): “So the date of conception of the baby was August 8th?”

A: “Yes.”

Q: “And what were you doing at that time?”

[2] Q: “She had three children, right?”

A “Yes”

Q “How many were boys?”

A: “None.”

Q: “Were there any girls?”

[3] Q: “You say the stairs went down to the basement?”

A: “Yes.”

Q: “And these stairs, did they go up?”

[4] Q: “How was your first marriage terminated?”

A: “By death.”

Q: “By whose death?”

3. Obtain favorable testimony, if possible.
 - A. Show observation has exculpatory explanation.
 - B. Obtain or lay foundation for favorable evidence.

Based on an examination of many lists of do's and do not's for the cross-examiner, here is a condensed, yet comprehensive list with some additional elements drawn from experience. There was a time when we would extract sharp distinctions between the strategies governing court cross-examination as compared with deposition questioning. However, with the increased use of audio and video depositions, those distinctions have become somewhat diminished.

§10.52(b) Critical Tips for an Effective Attack on the Deponent

Let's put kindness aside for the moment. Your purpose now is to cause the enemy to make admissions that will harm his or her case. Also, do not forget that the enemy's purpose is to destroy your client's case. Review your "Goals" in light of the preceding section, and then consider the following:

A. Precision

There is nothing worse than spending a day acquiring key admissions only to find out that they are worthless because the deponent failed to identify them by **date**, **time** or **speaker**.⁴⁹ The following is a hypothetical deposition of corporate officers charged with fraud and violations of federal securities laws:

- Q. (*Cross-examiner*) So, Mr. Killing, as Endrun's Chief Financial Officer, you admit encouraging the shareholders to purchase the stock in Endrun.
- A. (*Killing*) Yes.
- Q. And did you hear C.E.O. Ken Play also encourage shareholders to purchase the stock?
- A. Yes.

- Q. And did both you and Ken Play tell the shareholders that the stock would likely increase in value significantly?

A. Yes.

[Even if we were to assume the worst (i.e., that later Endrun collapsed and the stock became worthless), the statements are worth as much as the stock without the following critical times and circumstances.]

- Q. By what means did you make your statements to the shareholders?
- A. At an annual shareholders' meeting.
- Q. When was that?
- A. December 29, 2001.
- Q. Was that before or after your accountants, *Arthur Handbersome and Company* provided you with a private draft of the 2001 Third Quarter report.
- A. After.
- Q. Did you read the report?
- A. Yes.
- Q. When did you read the report?
- A. December 1, 2001.
- Q. What did you conclude from the report?⁵⁰
- A. The stock was headed for the bottom of the toilet bowl.

B. Specificity

The manner in which you select and employ your words and phrases can be crucial to your ability to pin the enemy down as opposed to permitting him to escape. A foolish choice of vague words or phrases can either destroy the value of an admission or create ambiguity where there should be none. To illustrate a

⁴⁹ See §10.51(b) (Tips For General Interrogation).

⁵⁰ You would **not** ask this question at trial. But because it is being asked during a deposition only an a response *unfavorable* to the deponent (i.e., an admission) is automatically admissible into evidence.

substantial blunder and how it might have been averted, we've selected a portion of an actual deposition from a case wherein, *after much unnecessary wrangling and debate*, sanctions were imposed upon the deponent for lying:⁵¹

Q. (*Attorney For Paula Jones*) Do you know a woman named Monica Lewinsky?

A. (*President Clinton*) I do.

Q. How do you know her?

A. She worked in the White House for a while, first as an intern ...

Q. Is it true that when she worked at the White House she met with you several times?

A. I don't know about several times. There was a period when the...when the Republican Congress shut the government down that the whole White House was being run by interns, and she was assigned to work back in the chief of staff's office, and we were all working there, and so I saw her on two or three occasions then, and then when she worked at the White House, I think there was one or two times when she brought some documents to me.

Q. Well, you also saw her on a number of social functions at the White House, didn't you?⁵²

A. Could you be more specific. I mean we had like big staff things ...
[*Lengthy portions omitted*]

.....

Q. Have you ever met with Monica Lewinsky in the White House between the hours of midnight and 6:00 a.m.?⁵³

A. **I certainly don't think so.**⁵⁴

Q. Have you ever met - [*Interrupted*]

A. Now let me just say, when she was working there, during, there may have been a time when we were all—we were up working late. There are lots of, on any given night, when Congress is in session, there are always several people around late in the night, but I don't have any memory of **that**. I just can't say that there could have been a time when **that** occurred, I just—but don't remember **it**.⁵⁵

Q. Certainly if it happened, nothing remarkable would have occurred?⁵⁶

A. No, nothing remarkable. I don't remember it...

.....

Q. Has Monica Lewinsky ever given you any gifts?

A. Once or twice. I think she's given me a book or two.

⁵¹ *Jones v. Clinton*, 36 F.Supp.2d 1118 (E.D., Ark. 1999).

⁵² Most of the earlier portions of the deposition were invitations to specific rambling answers that were graciously accepted.

⁵³ Here is an admirable and correct attempt at specificity.

⁵⁴ **Attention.** Always watch out for "hedges." This one was clear and obvious. A hedge occurs when a question can easily be answered by a simple "yes" or "no." This was truly a missed opportunity for the questioner. Consider the following hypothetical follow-up: Q. Wouldn't you remember whether or not you were ever alone with a young woman at that time of night?" or "Well, may I assume, Mr. President, that you are not often alone with young ladies at that time of night?"

⁵⁵ **Listen** carefully to the "it" and the "that." What is the "it" that he doesn't remember?

⁵⁶ The term "remarkable" is useless. It's an excellent example of a non-specific term.

- Q. Did she give you a silver cigar box?
- A. No.⁵⁷
- Q. Did she give you a tie?
- A. Yes, she has given me a tie before. I believe that's right. Now, as I said, let me remind you, normally when I get these ties, I get ties you know together, and then they're given to me later, but I believe that she has given me a tie ...
- Q. Did you have an extramarital sexual affair with Monica Lewinsky?⁵⁸
- A. No.
- Q. If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?
- A. It's certainly not the truth. It would not be the truth.
- Q. I think I used the term "sexual affair." And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the court? ...⁵⁹
- A. I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.⁶⁰

NEVER use ambiguous words or terms for material questions; nor should you use phrases that are complex or indirectly cross-referenced. Examine the last question, paying particular attention to the critical

term 'sexual relations' (as that term was defined in Deposition Exhibit 1).⁶¹ That phrase contains more escape routes than a James Bond movie. Instead of using vague cross-references, consider these simple questions:

- Q. At any time whatsoever did Monica Lewinsky ever touch or otherwise make contact with your genitals?
- A. ?
- Q. At any time whatsoever did you ever touch or make contact with Monica Lewinsky's breasts or genitals?⁶²
- A. ?

C. Always Listen to the Answers

A powerful method of cross-examination usually reserved for the courtroom involves "looping" or using a witness' answer to form your next question. Notice that the preceding portion transcript (particularly the bolded portions) are laden with missed opportunities.

D. Never Accept "I Don't Remember"

We can't deny it. The "*I don't remember*" is the safe harbor for many a deponent. Nor is there any single, simple method for combating it. But there are several different methods of attack.

Two Important Things For You Not To Forget

1. First, do not give up easily. At the very least, you can cast suspicion on the *convenient* failure of the deponent to remember.

⁵⁷ Notice that the witness **will** provide simple answers when there is no need to hedge.

⁵⁸ Even without the benefit of hindsight, the term "extramarital sexual affair" is far too ambiguous. Does a one-night fling equal an "affair?" (Certainly not by California standards).

⁵⁹ It is possible to ask a more poorly worded question than this one? With a double indirect reference! Probably not. Any deponent should be ashamed of himself for getting caught by this question.

⁶⁰ A simple "no" would have served the deponent well.

⁶¹ The term "sexual relations" was extracted from a statute that Clinton had previously signed into law. The definition of the term that was to be used during the course of the deposition was later modified by the parties.

⁶² For more information about this historic deposition, see Hunter, *The Power of Procedure, The Litigation of Jones v. Clinton*, Aspen Law & Business (2002).

2. Second, you may use *any* reasonable means or tools to refresh the recollection of a forgetful witness. These “means” whether they consist of words, documents or other prompts, need **not** be admissible into evidence. The magic words: “Does it refresh your recollection?” can be used to introduce most anything.

Consider the following hypothetical deposition and the several methods that the questioner uses to elicit an answer from an extremely stubborn deponent. You might consider each question and method despite the response by *our* hypothetical deponent. Keep in mind that we have designed a particularly obnoxious unyielding target:

Q. (*Questioner*) Tell us what happened at the meeting that you attended on May 1, 2001.⁶³

A. (*Deponent*) I don't remember.

Conduct Intrinsic Attack:

Q. Can you tell us anything about the meeting?

A. I don't remember.

Q. Sir, do you even remember attending such a meeting?

A. I don't remember. It was over a year ago.

Q. So you at least remember when it was. What else can you tell us about the meeting?

A. Nothing. By the way, good try, but you just told me the date.

Provide Negative Inferences:

Q. Is there any particular reason *why* you cannot remember?

A. I can't even remember my wife's birthday.

Q. Do you find these proceedings humorous, Sir?

A. Hey Sport. You asked. I answered.

Q. Did anyone tell you not to remember or otherwise suggest that it would be better if you did not remember?⁶⁴

A. No.

Q. You would certainly agree, wouldn't you, that the events of the meeting are important to this litigation?

A. How can I know that if I can't even remember what happened?

Conduct Extrinsic Attack (Documentary):

Q. I'm handing you *Deposition Exhibit Number 1*, which is titled “Minutes of Meeting Held May 1, 2001,” consisting of 5 pages. Would you please take a moment or so to review Exhibit 1 and tell me if you can identify it.

A. Yes.

Q. Can you identify it?

A. Yes. It doesn't help me.

Q. Not so fast. The document is five pages long. You haven't even turned a single page yet, have you?

A. Ya don't need a weatherman to know which way the wind's blowin'.

Q. What do you mean by that?⁶⁵

A. Nothing.

Q. Please answer my prior question. You have not turned a page yet, have you?

⁶³ Notice that the questioning does **not** begin with “Can you remember?” “Do you remember?” “Do you recall?” or “Are you able to recall?” Such questions provide the witness with a choice and invite an opportunity to dis-remember.

⁶⁴ If the opposing attorney is foolish enough to interpose an attorney-client privilege, you have your answer, and have hit the jackpot at the same time.

⁶⁵ Always listen carefully to answers, no matter how off-the-wall they may appear to be. You never know when a witness might accidentally provide a link to the “forgotten” event.

- A. Not true. I've been 'a flippin' while you've been 'a talkin'.
- Q. That's very admirable. Please take the time that you need to thoroughly review the Minutes.
- A. O.K.

[Keep track of the time that lapses while the deponent reviews the document.]

- A. I'm done.
- Q. You've spent approximately 10 minutes reviewing the Minutes of the May 1, 2001 meeting. Tell us now what you can remember about the meeting.
- A. Nothing.
- Q. Are you telling me that after spending ten minutes reviewing the minutes, that you don't remember a single thing about the meeting or anything contained in the minutes?
- A. That's the fact, Jack.
- Q. Can you tell me whose signature appears at the bottom of the document?⁶⁶
- A. [Much will depend on this answer. If the deponent signed the document, he can be directly impeached for denying any information to which he attested. On the other hand, if he did not sign or draft the writing, consider reading into the record those portions of the document that you need, followed by: "Does that portion refresh your recollection?"]

Conduct Extrinsic Attack (Oral):

- Q. If I were to tell you that the Plaintiff has stated that at the May 1 meeting, you stood up and announced that "Off the record, the company needed to get rid of all of the old-timers and female employees." Does that help refresh your recollection?
- A. I said that?!
- [Counsel for Deponent:** Let the record show that the witness answered the preceding question with an interjection of disbelief that the statement was attributed to him. I ask that the record contain both an exclamation mark and a question mark following "I said that."]⁶⁷
- Q. Was the plaintiff lying?⁶⁸
- A. I'm not going to call anyone a liar, whether they are or aren't. I'm just saying that I don't remember.
- Q. Well, is it possible then that someone else might have a better memory than you do with respect to the May 1 meeting?
- A. I would have to concede that point since I don't remember anything at all about the meeting.
- Q. Then it's possible that the Plaintiff's memory is correct?
- A. No.
- Q. Are you personally familiar with internal brain functions and capabilities of the Plaintiff?
- A. No.

⁶⁶ If the deponent did in fact sign the document, the signature issue should normally have been addressed earlier, as soon as the deponent identified the writing.

⁶⁷ **Caution.** The witness' answer can have two diametrically opposed meanings. Whether or not counsel for Deponent was out of line will depend upon the vocal tone of the witness' answer.

⁶⁸ Generally, this question is inappropriate and objectionable; it may, however, be permitted for a particularly evasive witness.

- Q. Then how can you possibly know what the Plaintiff remembers?
- A. I know what I said at the meeting.
- Q. So you now admit that you **do** remember what you said at the meeting?
- A. Through a vague foggy cloud and a set of dark glasses.
- Q. What else do you remember through this vague foggy cloud?
- A. Nothing.
- Q. So you have no way of knowing whether or not the Plaintiff's recollection is completely accurate. Isn't that so?
- A. Yes. That is possible.

Conduct Extrinsic Attack (Event Oriented):

- Q. If I told you that Dino, Desi and Billy attended the meeting, would that help refresh your recollection?
- A. No. I see Dino, Desi and Billy all the time.
- Q. If I told you that you had a pizza ordered in would that help refresh your recollection?
- A. No.
- Q. Is there anything at all that might help refresh your recollection about the May 1 meeting?⁶⁹

Impeach:

- Q. Did you ever make any statements to anyone about the discussions that occurred at the May 1 meeting?
- A. No.
- Q. Well, what about the conversation with Joe Joseph on June 1, 2001?
- A. Do you want to refresh my recollection about that?
- Q. Certainly.

E. Don't Accept Evasive Answers

Do not be afraid to repeat a question several times when dealing with an evasive witness. Be particularly insistent when the witness fails to provide a direct answer to a simple *yes or no* question.

- Q. Did you throw the first punch?
- A. It all happened so fast. I was swinging, he was swinging. It's like it all happened at once. I know that I certainly got hit.
- Q. Did you punch him first?
- A. Like I said, we were both punching?
- Q. But you threw the first punch, didn't you?
- A. I guess so.
- Q. Sir, were you were present during the fight, weren't you?
- A. Yes.
- Q. And you could see what happened, couldn't you?
- A. Yes.
- Q. In fact, you know that you threw the first punch, didn't you?
- A. I guess so.
- Q. Would you please answer a "yes" or a "no."
- A. Yes. I threw the first punch.

F. Establishing a Range for Quantitative Information

A fundamental law of mathematical analysis states that every finite set is bounded both above and below. This, in essence, means that with very little effort you can always pin a witness within certain parameters with respect to numbers, dates and times. Consider the following:

- Q. How far were you from the intersection when the Defendant turned in front of you?

⁶⁹ Notice that every time the meeting was mentioned in the questions, the date precedes it. Experienced attorneys often omit the identifying information to avoid the appearance of redundancy. In truth, such identifying adjectives should **not** be omitted. There may be **other** meetings discussed by other witnesses or by the same witness.

- A. I couldn't begin to know.
- Q. Could you give us a range?
- A. No.
- Q. Well, were you 500 miles away?
- A. Of course not. Much closer. Within a quarter mile.
- Q. An inch away?
- A. Of course not. Further. Somewhere maybe between an eighth of a mile and a certain number of yards. But I warn you that I'm not good with that type of measurement. I'm a dancer, not a highway surveyor.
- Q. Well let's assume that right now you are in your car just prior to the collision. I'm going to step backwards. You tell me when to stop. I want you to place me at the intersection at the point in time that you first saw the Defendant pull in front of you. Do you understand?
- A. Yes.
- Q. O.K., let the record show that I am moving away from the witness. Tell me when to stop.
- A. Stop.
- Q. I'm now going to measure the distance. If there is no objection,⁷⁰ let the record reflect that the distance indicated by the witness is 20 feet.

G. Catch the Liars

Catching liars is a highly advanced art form that is omitted in most books such as ours; and with good reason. It is a knack that goes beyond one's legal skills into the realm of psychology, timing, and body movement. Catching a liar through cross-examination is nothing short of a ballet. Indeed, we could spend an entire book on the subject, for the methods are as varied as the facts and the liars who distort them. Because of space limitations, we want to provide some of the most comprehensive and effective techniques.

As Hannibal Lector might say, Let's consider the nature of the animal and what he covets.⁷¹ To do so, we might first divide our subjects into pathological and non- pathological liars. Thankfully, most fit into the second group, for catching pathological liars can be a near-impossible feat since they often believe their own lies. Impeach them, if you must, through reliable extraneous evidence or testimony. Let's consider the "average" liar.

First, there isn't a human being on the planet who has not lied. Whether the "lie" involves innocent compliments⁷² or insidious destructive falsehoods, the fact remains. It is human nature. Nevertheless, there is this notion that has conveniently developed among jurists over a period of centuries that if you catch a person lying once about anything, then automatically, everything else that they say is unreliable.⁷³ If that is how the game is played, so be it.

Second, most people, even habitual liars, see themselves as honest and basically truthful. Even bad people covet the notion that they are really good people. That is important news and good news, for they **hedge** when they lie. Most every liar that I have ever encountered during the course of a deposition attempted to hedge.⁷⁴ That is a cue to move in for the kill.

⁷⁰ The purpose of this comment is to invite participation or stipulation by opposing counsel.

⁷¹ Paraphrased from *Silence of the Lambs*.

⁷² According to Comedian Joan Rivers, the only thing that a husband can say to his spouse without getting into trouble is: "*I like your hair and your shoes really do match your dress.*"

⁷³ The premise certainly benefits our efforts to impeach and discredit witnesses. But in fact, even the worst of non-pathological liars are capable of telling the truth. And remember, even a broken clock is right twice a day.

⁷⁴ There are two basic reasons for this. First, liars don't really want to admit to themselves that they are *outright* liars; a *hedge*, therefore, tends to make it all right. Second, There is always the fear that the truth may be revealed; a *hedge* leaves some wiggle room.

Consider the following example as typical:

Example: Consider the following portion of a day-long deposition taken in a wrongful discharge action filed against an employer and union (the employer discharged the plaintiff employee for theft); we pick up at the end of the day where the Plaintiff, who has been grilled by four defense attorneys, continuously denied that he committed theft from his employer. At the end of the day, the attorney for one of the defendants conducted the following examination:

- Q. (*Questioner, stretching*) It has been a long day and we're pretty much finished.⁷⁵ I just have a final concluding question or two and then we can all finally go.
- A. (*Deponent*) Good, I was starting to get hungry.
- Q. Now you've continuously denied that you ever pilfered or took anything at all from your employer's store while you were working there.
- A. That's right.
- Q. (*Questioner with head down, moving eyes upward toward deponent with a slight "knowing smile"*) Is it just possible that you may have said something to someone...anyone...causing *them* to think that maybe you took something?⁷⁶
- A. I might have said something.⁷⁷
- Q. To whom would you have made the statement?
- A. Probably my wife. Or my buddies.
- Q. What did you say?⁷⁸
- A. I might have taken some minor stuff.

- Q. What did you take?
- A. A camera, some minor stuff.
- Q. What kind of camera was it?⁷⁹
- A. An Olympus.
- Q. Did you take anything else from the store that you worked at?
- A. Yes.
- Q. Please tell us what else that you took...and oh, by the way, you never paid for these small items, did you?
- A. No.
- Q. O.K., you can give us the list.
- A. [*And the deponent did just that. He provided a list that extended the deposition for another hour.*]

Third, when people lie, they lie in generalities, not specifics. Specific are verifiable, vague generalities are not. In addition to "hedge words," such as "mostly," "probably," "for the most," watch for general answers to specific questions. Which answer sounds more credible?

- Q. Where were you at the time that Left Eye Louie was lynched?
- Alternate Answer 1: I went to the movies or something.
- Alternate Answer 2: I left my home at 7:00 p.m., drove to Bijou and watched the 7:30 showing of *Spiderman*.

Fourth, often impeachment will come by way of extrinsic contradictory evidence. A common mistake by both experienced attorneys and neophytes involves a failure of patience. In particular, it is important to allow enough time for the deponent to swallow the bait and swallow it thoroughly. Inconsistencies can

⁷⁵ At this point in the question, the deponent dropped his guard and became visibly relaxed.

⁷⁶ **Another fundamental rule of human nature:** People talk. And when they do, they can never be certain where the information will end up.

⁷⁷ This is the critical "hedge."

⁷⁸ Notice how quickly the "might" and "probably" turned into a hard fact.

⁷⁹ Let the fish swallow the "friendly hook" before dispersing any unfriendly accusations.

often be explained away by a clever liar. Consider the following example:

- Q. (*Questioner*) Did you, as the defendant company's CEO, ever know about the sexual harassment claims and charges that were made by the Plaintiff?
- A. (*Deponent*) Well, I knew about them when we were sued, obviously.
- Q. Did you know about the problem back in December of 2001?⁸⁰
- A. No.
- Q. Well, take a look at this partially shredded, November 30, 2001 memo bearing your signature that discusses the Plaintiff's problems.

This trap was sprung far too soon. Let's examine some of the many escape routes that a slippery deponent might select:

- A1. *I'm sorry. I misunderstood. Did you say December of 2000 or 2001?*
- A2. *I'm sorry. I thought you meant: "Did I learn of the problem in December?" I learned of the problem in November, but you didn't ask about November.*
- A3. *I'm sorry. I misunderstood what you meant by "problem." We weren't sued until later.*

Now consider the continuation of the questioning by the cross-examiner immediately **prior** to the last question.

- Q. When did you first become aware that there might be a sexual harassment problem involving the Plaintiff?
- A. Not until after we were sued in 2002.
- Q. Are you saying that you were never made aware of the problem prior to the end of 2001?
- A. That's correct.

- Q. So then, you say that there is no chance that you knew about the problem prior to being sued?
- A. That's what I said.
- Q. Do you want to review any documents or examine a calendar to make sure?
- A. No. I'm sure.
- Q. Well, take a look at this partially shredded, November 30, 2001 memo bearing your signature that discusses the Plaintiff's problems.

H. Show Bias

Bias is a *given* for parties. For non-parties, it must sometimes be established. Evidence relating to bias is always admissible during trial for impeachment purposes, and it is certainly fair game for discovery. Bias normally results from one or more of the following circumstances:

- [B1] The deponent has a financial interest in the outcome;
- [B2] The deponent is related to, or friendly with, the enemy;
- [B3] The deponent is hostile to your client;
- [B4] The deponent is jealous of your client's position.

For economy, we will use one set of facts to demonstrate attempts to establish each of the four listed items. Assume that the deponent is a co-worker of a discharged employee who has *taken sides* with management in a wrongful discharge action:

- Q. (*Plaintiff's Attorney*) You have testified that the Plaintiff performed sub-standard work on a regular basis, haven't you?
- A. (*Deponent*) Yes.

[B1] Show that the deponent has a financial interest in the outcome.

- Q. You are still employed at the company, aren't you?

⁸⁰ You may assume for purposes of this exercise that in sexual harassment cases against co-workers and immediate supervisors, the corporate employer will not be held liable unless its managers knew about the problem and failed to act.

- A. Yes.
- Q. And you, no doubt, are aware that your bosses and supervisors are going to be made of what you say here today. Isn't that so?
- A. Yes. But that doesn't change the truth of it.
- Q. But you weren't Plaintiff's supervisor, were you?
- A. No.
- Q. And, you weren't in a position to evaluate her, were you?
- A. No.
- Q. Now, you don't want to intentionally do anything to make your own supervisors unhappy with you, do you?
- A. No.
- Q. Do you think that they would be pleased by testimony in favor of someone who was suing them?
- A. No.
- [B2] The deponent is related to, or friendly with, the enemy.**
- Q. How long have you been with the company?
- A. Five years.
- Q. How long have you known Hal Firer (assume that Hal fired the Plaintiff)?
- A. Five years.
- Q. Do you have a good relationship with Hal?
- A. How do you mean?
- Q. I'm not implying anything other than a basic friendship.
- A. I would consider Hal a friend.
- Q. Have you ever seen him socially, outside of the plant?⁸¹
- A. No.
- Q. Did you know Hal before you came to work at the Company?
- A. No.
- [B3] The deponent is hostile to your client.⁸²**
- Q. How would you consider your relationship with the Plaintiff?
- A. We got along ok, I guess.
- Q. By "got along," am I correct in assuming that you were not close friends.
- A. We got along.
- Q. Do you recall an incident between you and the Plaintiff that occurred some time ago in the lunchroom?
- A. We had a little argument. Who doesn't?
- Q. Isn't it true that you nearly had a physical confrontation with Plaintiff?
- A. No one got hurt.
- Q. In truth, you don't like the Plaintiff, do you?
- A. That's not true.
- Q. Did you ever make any statements to anyone that might have given the impression that you don't like the Plaintiff?
- A. Possibly.
- Q. Tell me what you said?
- A. I might have said that she was a nasty, manipulative, lying, low down, back stabbing, trailer trashed, Jerry Springer reject or something like that.

⁸¹ With a basic friendship established, this exploratory question is designed to strengthen the bias. A non-negative answer should be followed by questions that seek specific information about the frequency and extent of any social contact such as dinners, theater, dancing, etc.

⁸² Hostility need not always be personal. It commonly arises between different groups. For example, uneducated people may tend to resent those with degrees; Alabamians may resent those with Yankee accents; medical personnel may resent lawyers.

[B4] The deponent is jealous of your client's position.

- Q. Are you aware that last year, the Plaintiff was promoted to Group Leader?
- A. Yes.
- Q. Do you feel that you were qualified and eligible for that position?
- A. Not necessarily.
- Q. But you testified previously that the Plaintiff performed substandard work, didn't you?
- A. Yes.
- Q. Do you perform substandard work?
- A. No.
- Q. Then do you feel that your work record was superior to that of Plaintiff?
- A. Yes.
- Q. Then do you feel that you should have been promoted instead of Plaintiff?
- A. She had more seniority.

§10.52(c) Quips and Tricks for Handling Difficult Deponents

Always keep in mind that during direct examination, the jury will focus upon the witness' answers; during cross-examination, it is the questions that count. Accordingly, the focus will be upon the interrogator. You must, therefore, always be in control and look like you are in control. You must **never** permit the enemy to get the upper hand. Here are some common responses designed to help you stay on top:

The "whatever you say" wisecraker witness:

- Q. Well, isn't it true that you were quite angry when your wife left the party without you?
- A. Whatever you say.

- Q. **No; what I say doesn't matter. It's what you say that counts; now please answer the question.**

The "You're putting words in my mouth" crybaby witness:

- A. *You're putting words in my mouth.*
- Q. **I beg your pardon; only you can put words in your mouth.**

The "You're twisting my words" contortionist:

- A. *You're twisting my words.*
- Q. **Only you can twist things. You are the one answering the questions, not me.**

The "I don't understand" pretending-to-be-an-idiot, imbecile:⁸³

- A. *I don't understand what you're talkin' about, partner.*
- Q. **Then I will repeat the question. I will continue to repeat it until you are satisfied. [Question repeated].**
- A. *I still don't understand.*
- Q. **Which word didn't you understand. Tell us, and we can both look it up.**

The Bob Hope:

- A. *[Any humorous comment.]*
- Q. **Do you find these proceedings funny, Mr. _____?**

The Protester:

- A. *I protest and object to these questions.*
- Q. **I'm sure you do. But you are required to answer them anyway.**

The Heavy Pauser:

- A. *[thinking.....]*
- Q. **Come now, surely an easy question like that can't possibly take so much time to answer. According to**

⁸³ Overuse of this tactic is a strong indicator that the deponent has already achieved the status of imbecile, but isn't quite smart enough to know it.

**my watch, it's already taken you
_____ minutes .**

The Arm Chair Attorney:

A. *Let me ask you a question. [Or deponent responds with a question].*

Q. **It's my job to ask the questions and yours to answer them.**

**The "Mr. Deeds Goes To Washington" Speech
Maker:**

A. *[Makes a long speech instead of answering the question].*

Q. **That was fascinating; now would you please answer the question that I asked you.**

It is extremely important that you do not give into the temptation to become a wise guy. And most important of all, never argue with the witness. Once you do, you have lowered yourself to the level of a lay enemy and have lost the battle.

**§10.52(d) The Ten Commandments of
Cross-Examination**

Everyone has a list of cross-examination commandments.⁸⁴ As for my list, I compiled it after many years spent cross-examining witnesses and examining other lists. Here it is:

1. Know precisely what your goal is before you ever commence cross-examination.
2. Make certain that you have studied the pleadings, witness statements and any information that you have about the witness prior to cross-examination.
3. Be sure that you have become knowledgeable with respect to any technical matters before you begin cross-examination.

4. Know precisely when to quit, but do not quit too soon.⁸⁵
5. Don't ever accept "I don't remember," as an answer to a material question. You are permitted to use whatever means you can to refresh the recollection of the witness even if it involves inadmissible material.⁸⁶
6. The force of the attack on the opposing witness should vary directly with the strength of his or her attack on your client and should vary inversely with the witness' sympathy factor (sweet little nuns get a lot of sympathy; bookies and ex-cons get little).
7. In cross-examination, the attention is often directed to the questions as opposed to the answers; don't ever let them see you bleed. If a witness' answer did damage, quickly and unceremoniously move to another question.
8. Never jump the gun or become over-anxious as you lay your foundation for impeachment. Make certain that the fish has swallowed the hook.
9. Never lose your confidence; always stay in control. Never laugh at your own quips or responses, or engage in self-congratulation if you happen to score.
10. Don't ever accept any list (even this one) as immutable; every case and every witness presents a unique set of circumstances.

**§10.53 How to Combat Obnoxious
Lawyers**

Above everything else, never forget that you are at war. All of those rules of civility and politeness that you have been exposed to are nothing more than an attempt to reduce the bloodshed inherent in any adver-

⁸⁴ Here is Professor Irving Younger's excellent list: [1] Be brief, [2] Short questions; plain words, [3] Only leading questions; never "why" questions, [4] Don't ask the question if you do not know the answer, [5] Listen to the answer, [6] Don't quarrel with the witness, [7] Don't repeat the direct examination, [8] Don't permit the witness to explain, [9] Don't ask the one question too many, and [10] Save the ultimate point of the cross-examination for summation at trial.

⁸⁵ Consider the actual case of an attorney who did not know when to quit: Q: "Doctor, before you performed the autopsy, did you check for a pulse?" A: (Doctor): "No" Q: "Did you check for blood pressure?" A: "No." Q: "Did you check for breathing?" A: "No." Q: So, then it is possible that the patient was alive when you began the autopsy?" A: "No" Q: How can you be so sure, Doctor?" A: "Because his brain was sitting on my desk in a jar." Q: "But could the patient have still been alive nevertheless?" A: "It is possible that he could have been alive and is now practicing law somewhere."

⁸⁶ See §10.52(b)[D].

sary proceeding. Think of them as a *Geneva Convention* for conducting discovery. If they impede the warrior, they also impede the enemy. So as distasteful as these rules of civility may be to your very existence, you may as well use them to your advantage.⁸⁷

§10.53(a) Generally Obnoxious Behavior

If it were against the law to be generally obnoxious, they would have come and hauled away our in-laws long before now. Nevertheless, being obnoxious during a deposition is serious business that can result in fines and even suspension from the practice of law.⁸⁸

Important Tip

Blatant obnoxious conduct *speaks for itself* as far as the record is concerned. The more polite that you remain in the face of such conduct, the more opprobrious the enemy conduct becomes as the two dialogues are later compared. In the actual case that follows, whether or not Mr. Rosen could have remained more calm in the face of the Williams' misconduct is subject to debate. In any event, Williams, a master of obnoxiousness, was severely sanctioned for the following vicious attack:⁸⁹

Rosen: If you're going to hand the complaint to him to coach him, we are going to see the judge.

Williams: Just get your foul odious body on the other side.

Rosen: Then don't show the witness more.

Williams: I'm giving the witness the complaint ...

Rosen: You're not entitled to coach the witness any further, you're not entitled to ...

Williams: Don't use your little sheeny Hebrew tricks on me Rosen.

Rosen: Off the record ...

Williams: No. On the record.

Rosen: You son of a bitch.

Cox: Let's call a recess.

Rosen: Tell the judge I called him a rotten son of a bitch for calling me a sheeny Hebrew, and I want to go see the judge right now.

Williams was sanctioned. Courts will not tolerate such misconduct, particularly that which involves racial, religious, or gender slurs. Judges will impose very heavy sanctions to discourage such obnoxious and disruptive behavior.⁹⁰ General, non-specific rudeness is also sanctionable.

A word of caution. Experience has taught that as the day wears on and a lengthy deposition nears its end, attorneys are most prone to becoming short-tempered.⁹¹

More often than not, sanctions are imposed for

⁸⁷ Chapter 16 is devoted, in its entirety, to exposing abusive tactics and dealing with them. See also the *American Bar Association, Litigation Section, Civil Discovery Standards* 16 et. seq (1999).

⁸⁸ According to the Advisory Committee Notes for the 1993 Amendments: "Paragraph (3) authorizes appropriate sanctions not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1) ..."

⁸⁹ See *In re Disciplinary Action Against Williams*, 414 N.W.2d 394 (Minn. 1987), wherein the court imposed sanctions that included a public reprimand, a \$750.00 fine and a six month suspension from the practice of law. Admittedly, the extreme nature of these sanctions involved something extra; in particular, Williams included some racial slurs in his repertoire. See also *Bryan v. Riddel*, 875 P.2d 131 (Arizona 1994), wherein sanctions were imposed for more run-of-the-mill misconduct, which only included rude remarks and threats.

⁹⁰ See *Cincinnati Bar Association v. Gebhart*, 431 N.W.2d 1031 (1982). See also Robert C. Black, *Attorney Discipline for "Offensive Personality"* in California, 31 Hastings L.J. 1097 (1980).

⁹¹ See *Paramount Communications, Inc., v. QVC Network, Inc.*, 637 A.2d 34 (1993), wherein extreme rudeness prompted a Delaware court to quote a portion of an address delivered by Justice Sandra Day O'Connor before an American Bar Association group on December 14, 1993 (titled: "*Civil Justice Improvements*"): "I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another."

those situations involving a history of bad blood between attorneys as opposed to a single indiscretion.⁹²

Sanctions could include action against the case (i.e., the client); these might involve the possibility of a dismissal or preclusion of evidence.⁹³ But normally, severe action is a two-step process, the first of which should provide adequate warning that the sky will fall if the misconduct continues.⁹⁴

§10.53(b) Coaching During Interrogation

There used to be a time when coaching your client during the deposition was considered by some as a constitutional right. It is not. Coaching can lead to serious trouble.⁹⁵ Note, however, that coaching **prior** to the commencement of the deposition is another matter; that communication is protected by the attorney-client privilege.⁹⁶

In order to make your attack more meaningful, you should warn your opponent for two reasons. First, the warning itself may be the only evidence that coaching actually occurred, particularly where the assistance comes in the form of non-verbal assistance. Second, the court will consider the action that much more egregious if the coaching continues after your warning has been issued. Consider these:

Response to Non-Verbal Coaching:

If you don't mind, counselor, I would rather hear your client's answers instead of your suggestions. Please refrain from future gestures and facial expressions directed at your client.

Response to Verbal Coaching:

If you're going to testify instead of your client, would you mind being placed under oath?

Responding when the Coaching Continues:

Counselor, I must once again ask you to please stop coaching your client. I need his answers, not yours.

There are many ways to engage in on-the-record coaching. One particular method to guard against involves *restatements* or so-called *clarifications* by the opposing attorney. Carefully consider the *Examiners'* countermeasures.

Twisting the Answer:

Q. (*Examiner*): The light was red for you at the time that you proceeded through the intersection, wasn't it?

A. (*Deponent*): Yes.

(*Deponent's attorney to his client*): In order to clarify the record, you meant to say that the light had just turned from yellow to red while you were in the intersection.

⁹² Consider this passage from *Mercer v. Gerry Baby Products Company*, 160 F.R.D. 576 (S.D. Iowa 1995), wherein the court took the unusual step of appointing a *Special Discovery Master*. The court stated: This file is presently over 6 volumes, 30 pages of docketing and has more than 175 pleadings, many of which relate to discovery disputes. No fewer than 27 motions to compel or for protective orders have been filed. Spoliation of evidence has been alleged against parties, and fraud against counsel. Typically these motions include ad hominem attacks, and demonstrate counsel's inability to personally confer to resolve or narrow disputes. The depositions have been fraught with interruptions, instructions not to answer and unilateral time limitations. They have included great moments in oratory such as:

Mr. Wallace: "Please sit down, do not hover over the witness."

Mr. Gordon: "Stick it in your ear."

⁹³ See generally Rule 37 of the Federal Rules of Civil Procedure and §12.40.

⁹⁴ See Rule 37(a)(2)(B) of the Federal Rules of Civil Procedure, which first requires a motion and order; then see Rule 37(b)(2), which provides a list of sanctions for failure to obey the order. See also *Corsini v. U-Haul International, Inc.*, 212 A.D.2d 288 (N.Y. App.Div. 1995), and *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D.Pa. 1993).

⁹⁵ See *Jaen v. Coca Cola Company*, 157 F.R.D. 146 (D.Puerto Rico 1994) wherein the court refused to set aside an order imposing \$3,000.00 in sanctions despite joint motion by the parties requesting same. (The parties settled their case, but the court refused to forgive the inconvenience that it was caused by the misconduct, which included coaching during a deposition.) See also *Service Agency Inc., v. Beam*, 131 F.R.D. 15 (D.D.C. 1990).

⁹⁶ See *Christy v. Pennsylvania Turnpike Commission*, 160 F.R.D. 51 (E.D.Pa. 1995).

- A. (*Deponent*): Yes. Yes. That's what I meant to say.
- Q. (*Examiner to deposition officer*): I would prefer that the deponent answer the questions, not her attorney. Please see to it that the Deponent's original, un-coached answer remains on the record.

Twisting the Question:

- Q. (*Examiner*): The light was red for you at the time that you proceeded through the intersection, wasn't it?
- (*Deponent's Attorney to his client, the deponent*): He means, "Was it red *after* you were already in the intersection."
- A. (*Deponent*): Yes. It was *after* I was already into the intersection.
- Q. (*Examiner*): I would prefer that you not re-word my questions, counselor. Now, because of your coaching, we may not ever know how the witness might have answered. But let me try again.⁹⁷
- Q. (*Examiner*): At *some* point, the light was red for you. Correct?
- A. Yes.
- Q. You didn't have time to look back in your rear mirror before the collision, did you?
- A. No.
- Q. Then at some point as you proceeded through the intersection, you actually saw the color red on the light. Isn't that correct?
- A. Yes.

- Q. Then it's safe to say, is it not, that the light was red before you were directly under it?

A. Yes.

Consider this portion a court's opinion in a case wherein the offending attorney was sanctioned for his particular style of "Rambo Litigation." In any brief supporting a motion for sanctions, you might consider the court's particularly eloquent analysis and description:⁹⁸

From the review of the transcript of the deposition, it appears that she [*Plaintiff*] has no difficulties understanding or communicating in the English language. However, her counsel, Mr. Barrett repeatedly took it upon himself to restate Defendants' counsel's questions in order to clarify them for the plaintiff. Mr. Barrett consistently interrupted Mr. Young and the witness, interposing objections which were thinly veiled instructions to the witness, who would then incorporate Mr. Barrett's language into her answer. The witness comes to the deposition to testify, not to indulge in parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness, not the lawyer, who is the witness.

§10.53(c) Coaching Off-the-Record

The off-the-record conference is a common technique that attorneys will use when the blood of a client is being heavily spilled. There is nothing in any court rule that permits such a conference, which is obviously for the purpose of coaching.⁹⁹ A word of caution; you must be certain to object if the opposing attorney requests that you go off the record for the purpose of a private consultation with his client. If not, you may waive your right to complain. Consider the following:

⁹⁷ The damage may be irreversible, which is why you must guard and caution against future interruptions. Special skill (and some luck) may be required to overcome the interruption.

⁹⁸ *Van Pilsun v. Iowa State University of Science and Technology*, 152 F.R.D. 179 (S.D. Iowa, 1993).

⁹⁹ See *In re Asbestos litigation*, 492 A.2d 256 (Del.Super 1985).

- E. *(Enemy). Can we go off the record for a moment?*
- Q. **For what purpose counselor?**¹⁰⁰
- E. *I need to consult with my client.*
- Q. **I would much prefer that you wait until we have completed the questioning before you do so.**
- E. *It can't wait.*
- Q. **Why not?**
- E. *Because it can't.*
- Q. **Then your purpose can only be to discuss these questions and answers. I am going to object to any such coaching of the witness while this deposition is continuing. I am going to request the deposition officer to remain on the record.**¹⁰¹

The off-the-record conference is a hot item. Two very important principles of jurisprudence are in conflict. First, is the almost absolute right of a client to consult with his or her attorney at virtually every point in a legal proceeding. Next, however, is the principle that a witness should answer questions truthfully without being told what and what not to say.

There is not a great deal of case law on the subject, and there is a landmark of sorts in the form of *Hall v. Clifton*.¹⁰² *Hall*, which held that: (1) A witness being deposed and his or her attorney may not confer during the course of the deposition unless the conference is for the purpose of determining whether a privilege should be asserted, and (2) the witness and counsel are not entitled to confer about a document shown to the witness during the deposition before the witness

answers questions about it.¹⁰³ Here is the famous (or infamous) order entered in *Hall*; you may want to incorporate some of its provisions in your own request for relief:

ORDER

AND NOW, this 29th day of July, 1993, upon consideration of the oral arguments and letter briefs of the parties regarding the dispute over the conduct of counsel at depositions, it is ORDERED that the following guidelines for discovery depositions are hereby imposed:

1. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness's own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition. The witness shall abide by these instructions.
2. All objections, except those which would be waived if not made at the deposition under Federal Rules of Civil Procedure 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Federal Rules of Civil Procedure 30(d), shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.
3. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.

¹⁰⁰ There is no reason to get upset or object if opposing counsel is seeking to clarify a question or request something in a non-suggestive manner.

¹⁰¹ Be certain to note, on the record, the start time that the opposing attorney and his client take the break, and also note the time that they return. Try to avoid wise cracks such as "Have you thoroughly prepared your client, counselor?"

¹⁰² 150 F.R.D. 525 (E.D.Pa. 1993).

¹⁰³ But see the following cases that have either limited or refused to follow *Hall*: *Means v. King*, 205 W.Va. 708, 520 S.E.2d 875 (1999); *In re Stratosphere Corporation Securities Litigation*, 182 F.R.D. 614 (D.Nev. 1998); *In re PSE & G Shareholder Litigation*, 320 N.J.Super. 112, 726 A.2d 994 (1998); *Christy v. Pennsylvania Turnpike Commission*, 160 F.R.D. 51 (E.D.Pa. 1995); *Damaj v. Farmers Insurance Company, Inc.*, 164 F.R.D. 559 (N.D.Okla. 1995).

4. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsels' statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more.
5. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege.
6. Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.
7. Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.
8. Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.
9. Depositions shall otherwise be conducted in compliance with the Opinion which accompanies this Order.

§10.53(d) Obnoxious Objections

Rule 30(d)(1) of the Federal Rules of Civil Procedure states that: "Any objection to evidence during a deposition shall be stated concisely and in a non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3)."

There are certain objections that **must** be made or else they will be forever waived.¹⁰⁴ And yet, even the repeating of those objections could get an attorney in trouble and cause the deposition to be rescheduled.¹⁰⁵ Objection frequency may very well be an indicator that the questioning attorney has difficulties; but excessive objections may also reflect adversely upon the objecting attorney.¹⁰⁶

Regardless of whether or not the objections are ill founded, you certainly have right to know the basis for all objections. This is a rule that applies both during trial and during depositions. The purpose is to permit the questioning attorney to correct whatever error may have occurred.¹⁰⁷

Caution

There is authority for the proposition that **even** legitimate objections may be sanctionable if they are excessive in number.¹⁰⁸

§10.60 Defending the Deposition

The term "defend" implies that the deposition is being scheduled by the enemy attorney, and that he or she intends to depose your client. For this particular type of deposition, you can and must prepare your client thoroughly in advance of the deposition.¹⁰⁹ The less that you are forced to say during the course of the

¹⁰⁴ See Deposition Objection Chart, §10.61(f).

¹⁰⁵ See *Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56 (E.D.Pa. 1993).

¹⁰⁶ See *Thomas v. Hoffman - La Rouche, Inc.*, 126 F.R.D. 522 (N.D. Miss., 1989), wherein the sanctioned attorney made 104 objections to *leading* questions, 239 objections based on *vagueness and ambiguity*, 58 objections that a question was *argumentative*, 77 objections were directed at *compound questions*, 71 objections that questions called for speculation and 26 on other grounds.

¹⁰⁷ See *Mayor and City Counsel of Baltimore v. Theiss*, 729 A.2d 965 (Md., 1999), wherein the trial court simply overruled defendant's *opinion-based* deposition objections because counsel did not state the basis for the objections, even though the questions would have been clearly improper at trial.

¹⁰⁸ See Advisory Committee Notes on the 1993 Amendments to Rule 30 of the Federal Rules of Civil Procedure.

¹⁰⁹ But not too far in advance. Clients tend to have very short memories

deposition, the better. And common sense suggests that the better the client is prepared, the less he or she will require your assistance. Defending a deposition of your expert calls for a different, more specialized strategy.¹¹⁰

Where independent witnesses are to be deposed, you may have to exercise your control during the course of the deposition instead of prior to it. You certainly have a right to speak to witnesses; and if at all possible, you should try to ascertain the nature of their testimony well in advance of the deposition so that you can brief your client. But you are not entitled to “coach” independent witnesses.

If an enemy party is being deposed for preservation purposes, you should prepare for cross-examination. You will, under any set of rules, state or federal, be entitled to engage in your own cross-examination following the direct examination that will be conducted by the deponent’s own attorney. Plan to bring your client even though his presence is not required. It is much more difficult to lie about an event if another witness to that same event is looking you right in the eye while you are testifying.¹¹¹

§10.61 Preparing and Defending Your Client

Regardless of the type of deposition that you are defending, to be effective, you must know the material facts of the dispute. And if your client is the target of the deposition, you must certainly try to know as much as that client. But, in this regard, there are two basic problems that have plagued lawyers since the beginning of time. First, how do you get the truth out of your client before the enemy does? Second, how do you make certain that your client does **not** fold under cross-examination. I have found one and only one solution to these problems. Both solutions are effective if executed properly.

First, there is only one way to get clients to level with you. After you have delivered the “everything you tell me is privileged” spiel and the “I need to

know the truth to help you” routine, you will still have an incomplete picture, regardless of how convincing you think that you were. In fact, clients are bred and trained to present only one side of the story. They want you to believe in them. There is, however, a serious problem; you simply cannot prepare your client for a deposition when **you** do not know all of the facts. How then do you get the truth? Here’s the secret:

Military Secret

These are the secret words that you must speak to get the truth from your own client:

“I know that you’ve told me the truth and I believe you. But we have to prepare for those lying S.O.B.’s on the other side. What kind of lies are they going to tell? Tell me what lying description of the events they are going to tell so I can prepare for them.”

I guarantee, that what follows will be the entire truth. Armed with that information, you may then move to the next task of preparing your client to answer the questions that he or she will actually confront; this involves telling your client **how** to present the truth.¹¹²

§10.61(a) Attacking the Notice of Deposition

The receipt of the Notice of Deposition is the first step involving enemy engagement. The Notice is, therefore, your first target of concern. Rule 32(d)(1) of the Federal Rules of Civil Procedure provides that “All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.”

Throughout this book, we have continuously cautioned against objecting for the sake of causing trouble. But if you must, the following is a list of notice-related objections. It is not, however, a complete list.

¹¹⁰ See §10.23(a).

¹¹¹ Also, the client’s presence will increase the effectiveness of your questioning because he or she has been privy to facts that you did not personally observe.

¹¹² See §§10.61(b) and (c).

NOTICE RELATED OBJECTIONS:

1. This Party objects to the Notice of Deposition on the grounds that it fails to provide reasonable notice as required by the applicable court rules.¹¹³
2. This Party objects to the Notice of Deposition on the grounds that because it was provided orally (or by e-mail), it fails to comply with the “written” notice requirements of the applicable court rules.¹¹⁴
3. This Party objects to the Notice of Deposition on the grounds that the noticing party has already taken the deposition of this deponent in this case.¹¹⁵
4. This Party objects to the Notice of Deposition on the grounds that the noticing party has already taken 10 depositions in this case.¹¹⁶
5. This Party objects to the Notice of Deposition on the grounds that it requires a non-party witness to travel more than 100 miles from his present residence or the place where he is employed.¹¹⁷

Keep in mind that the deployment of *canned* language, by itself, is normally ill-advised. Under typical circumstances, the form or “boilerplate” language serves to make certain that you have selected the appropriate basis for your objection, which should then be backed up by more specific allegations. Therefore, even though most of the objectionable defects will be evident from the face of the Notice, consider filing an affidavit of supporting facts, nevertheless.

§10.61(b) The Client Preparation Checklist

Clients are basically people whom you call to the witness stand to destroy your case and all of the preparation that you have invested in it. Under skillful cross-examination, they instinctively crumble. “Born to crumble,” may as well be tattooed on their foreheads. For whatever it may be worth, you should, nevertheless, go through the checklist of information that attorneys commonly provide to their clients prior to a deposition:

1. Listen to the questions carefully.
2. If you do not understand the question, ask him to repeat it.
3. If he asks a long rambling question, ask him to repeat it.
4. Do not volunteer information; answer “yes” or “no,” if possible.
5. If you’re going to get religion, get it now! Not on the stand! ¹¹⁸
6. Go slow and think about your answers before you speak them.
7. If you are not certain about an answer, do not guess. If pressed for an approximation, state that “This is a rough estimate” or “rough approximation.”
8. Never make a sarcastic statement such as “Sure I did it!” and never ask a question by making a statement such as, “I did it?!”¹¹⁹

¹¹³ See Rule 33(b)(1) of the Federal Rules of Civil Procedure.

¹¹⁴ See Rule 33(b)(1) of the Federal Rules of Civil Procedure.

¹¹⁵ See Rule 30(a)(2)(B) of the Federal Rules of Civil Procedure.

¹¹⁶ See Rule 30(a)(2)(A) of the Federal Rules of Civil Procedure.

¹¹⁷ See Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure.

¹¹⁸ Some clients tell you one story; then after the *hand raising* and *swearing to tell the truth* formality, they decide to tell a different story (i.e., they have a sudden spiritual awakening and desire to tell the truth for the first time in their entire lives).

¹¹⁹ The deposition officer will type “I did it.” See “*My Cousin Vinny*,” directed by Jonathan Lynn (1992), wherein teenager Ralph Macchio, when questioned by police about a murder that he did not commit, stated “I killed the clerk?!” Later the officer testified that the “yute” (i.e. “Youth”) confessed to the murder.

9. Be very cautious when the questioner uses conclusory terms such as, “reasonable,” “unreasonable,” “negligent,” “guilty,” “duty,” or “responsibility.”¹²⁰
10. Do not bring any materials to the deposition unless they are specifically requested in the Notice of Deposition.
11. Do not be argumentative, sarcastic or discourteous.
12. If anything, such as a document, is placed before you, always take time to review it, even if you have done so previously.
13. With respect to writings, be careful about your questioner’s mis-characterizations and interpretations. Be particularly cautious about judgmental adjectives.
14. Always tell the truth, even if you think that it hurts.

You must consider and discuss the hot areas of the case, and above all, you **must** conduct several practice examination sessions. There are many reasons for presenting a good show at the deposition. A poor performance will have an adverse effect on the case and any chances of settlement. It would also be nice if your client could make it through the deposition without looking like a total idiot.¹²¹

§10.61(c) Simulated Examination

Clients are rarely properly prepped for depositions. In my many years of practice, I have yet to encounter a witness who wasn’t anxious to spill his guts all over the floor at the slightest provocation. There is only one way to prep a client. **You must skill-**

fully, effectively and AGGRESSIVELY cross-examine that client, and you must do it several times.

You must examine and cross-examine your client repeatedly if you expect him or her to be ready. You must do so aggressively and without mercy. But first you must say these words to your client so that he or she does not think that you are becoming personally antagonistic (or that you are taking the side of the enemy):

“We are going to go through a rehearsal. I am going to be as tough on you as I can be. But if you survive my cross-examination, you won’t have anything to worry about with the enemy attorney at the deposition.”

Now comes the tough part. As you cross-examine your own client, you must do so with the intention of destroying his case and credibility. Only then will both of you be prepared to confront a formidable enemy.

Attention—The Oldest Trick in the Book

Be sure to prepare your client for an old trial trick. It goes like this. The opposing attorney will look at your client with that *I know you’re really nothing but a chicken thief* look and say “Did you discuss this deposition with your attorney prior to today’s hearing?” An unprepared client will instinctively recoil and answer “No” as if it were the only answer. The opposing attorney will then proceed to impeach the client. To avoid this, you must instruct your client to answer:

“Of course I spoke to him; that’s why he’s my attorney. He told me to tell the truth.”¹²²

¹²⁰ During your practice, simulated examination (See §10.61(c), you must zero-in on the conclusory term that the enemy will try to extract from your client. For example, “Was it your responsibility to see to it that...?”

¹²¹ Consider some actual cases wherein the client was not so lucky:

[1] Q: “Is your appearance here this morning pursuant to a deposition notice which I sent to your attorney?”
A: “No, this is how I dress when I go to work.”

[2] Q: “All your responses must be oral, OK? What school did you go to?”
A: “Oral.”

[3] Q: “You were not shot in the fracas?”
A: “No, I was shot midway between the fracas and the navel.”

¹²² Technically, this statement might be deemed to waive the attorney-client privilege, at least with respect to the “tell the truth” portion of the testimony. However, I have never encountered an attorney who made that claim during a deposition.

§10.61(d) Attending the Deposition

As opposed to a deposition that you scheduled, this particular subsection involves your attendance at a deposition that has been noticed by the enemy.¹²³ This means that the deposition is not designed to do you or your client any good. Unfortunately, your ability to disrupt and sabotage the proceedings has been severely curtailed in the past several years. Both the applicable rules committees and the courts, state and federal, frown upon techniques that disrupt or delay the questioning. So like it or not, you have to play square.¹²⁴ You may not continuously interrupt or inflict pain upon the enemy attorney just for the joy of it.¹²⁵

[a] Coaching the Witness

You certainly may not coach your witness during the course of a deposition. Such conduct is certain to anger the court. And despite the universal truths involving the right of a client to confer with his or her attorney, there is no right to interrupt a deposition for that purpose. Courts will likewise frown upon that conduct.¹²⁶ If you are going to take a break to consult with your client, the consultation had better involve some form or type of privilege.¹²⁷ I will leave the logistics of a restroom break to your imagination.

[b] Instructing the Witness not to Answer

Because your ability to object is limited, the only shield that you carry into the deposition is the ability to bring a halt to the proceeding in order to file a Motion for a Protective Order. You may also direct your client or witness not to answer certain questions.¹²⁸ Here is a list of the limited “proper” circum-

stances under which you may direct a client to refrain from answering:

1. **Privilege:** If the information sought by the question is subject to some form of privilege, do not under any circumstances permit your client to answer.¹²⁹
2. **Work Product Doctrine:** Where a witness is questioned about the results or findings of any investigation conducted on your behalf, the responses may be subject to protection as work product.¹³⁰ Depositions of experts are carefully regulated; be certain to review any applicable local rules.
3. **Court Ordered Restriction:** If the information sought is excluded by the court, the witness should not answer.
4. **Stipulated Restriction:** If opposing counsel has stipulated that the deposition is for a limited purpose, his questioning should be held to that purpose.

§10.61(e) Terminating the Deposition

The Rule 30(d)(3) List: If the interrogation is subject to one of the vague cockamamie objections listed in this rule, it may be terminated. Here is the list:

- [1] The deposition is being conducted in bad faith or in such manner as unreasonably to
- [2] annoy,
- [3] embarrass, or
- [4] oppress the deponent or party.

¹²³ If you are attending a deposition that you noticed, you belong in §10.50.

¹²⁴ You can no longer apply the *Rio Lobo* Philosophy. In that classic film, Dean Martin noted that when you are at a poker game and the opposition is holding all of the Aces, there is only one thing left to do—“kick over the table.” Also, remember that what’s good for the goose....” Therefore, you must review §10.53, “Combating Obstructionist Tactics.”

¹²⁵ See *Van Pilsum v. Iowa State University of Science & Technology*, 152 F.R.D. 179 (S.D. Iowa 1993). This “Rambo Litigation” featured lawyers who constantly interrupted one another, argued and bickered, all while signaling their clients on how to answer one another’s questions.

¹²⁶ See *Odone v. Croda International PLC.*, 170 F.R.D. 66 (D.D.C. 1997).

¹²⁷ See *O’Brien v. Amtrack*, 163 F.R.D. 232 (E.D.Pa. 1992).

¹²⁸ See Rule 30(d) of the Federal Rules of Civil Procedure. See also §10.61(b).

¹²⁹ See Chapter 15.

¹³⁰ See Rule 26(b) of the Federal Rules of Civil Procedure.

Terminating a deposition in the middle is risky business. Before attempting such a move, make certain that you have the transcript or material to support it.

§10.61(f) Crash Course in Objection Warfare

To object or not object, that is the question. Unfortunately, the rules guiding your trigger finger in that critical decision can be confusing. Remember that your rules drafters have only two major functions in life: [1] to demonstrate their incompetence, and [2] to create land mines that will blow limbs from trusting attorneys like yourself.

First, you are permitted to object during the course of a deposition, but that right is limited.¹³¹ But then, the rules tell you that you **do not** need to object to inadmissible questions in order to preserve your right to object (i.e., your objections will not be waived). Accordingly, Rule 32(b) of the Federal Rules of Civil Procedure states that even though you fail to raise an objection during a deposition, your right to object at trial will be preserved. **However**, notice how the rule begins: “Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule...” Rule 28(b) concerns foreign depositions, not an everyday occurrence, **but** Rule 32(d)(3) contains subsection (A), which states as follows:

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, **unless the ground of the objection is one which might have been obviated or removed if presented at that time** (Emphasis supplied).

After completing your attempted toe dance through the above rules and sub-rules, you should come to the conclusion that if an objectionable question could be addressed (i.e., addressed by way of objection) and corrected during the deposition, you had better make it. The rules do not, however, bother to tell us which objections fall into this category and which do not.

The rules more than suggest that objections going to the **form** of the question **should** be presented during the deposition, while those that are based on **content** (i.e., relate to the ultimate admissibility of the evidence itself) are preserved and need not be made. The drafters, who are well-meaning though mentally challenged, intended that if objections to form were interposed at the deposition, the questioner would have the same opportunity to correct or re-state the question that he would have at trial. But does that mean that you should sit back and remain silent for questions that might violate privilege, call for damaging hearsay or assume facts not in evidence? Not on your life!¹³²

The *Deposition Objection Chart* that follows is designed to provide a crash course in evidentiary objections. Notice that the chart contains twelve and only objections. That is because, despite what you’ve heard, there are only 12 legitimate objections in the world with respect to direct examination.¹³³ There are, of course, many objections that are statute or policy-based; but by definition, they fall within the “Irrelevance” pigeonhole since the information is deemed irrelevant as a matter of law. Included within that scope is evidence whose probative value is substantially outweighed by its prejudicial effect.

¹³¹ Rule 30(d)(1) of the Federal Rules of Civil Procedure states: “Any objection to evidence during a deposition shall be stated concisely and in a non-suggestive manner ...”

¹³² The Advisory Committee Notes on the 1970 Amendment to Rule 32 are not of tremendous help: “A change is made in new Rule 32(a), whereby it is made clear that the rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. This eliminates the possibility of certain technical objections which are based, not on the contents of deponent’s testimony, but on his absence from court. The language of present Rule 26(d) does not appear to authorize these technical objections, but it is not entirely clear.”

¹³³ The same 12 apply to cross-examination with one major change: Substitute “Exceeds the scope of direct examination” for “Leading.” Clearly, you are permitted to lead during cross-examination. By the same token, it is equally clear that the “*Exceeds the scope*” objection could not possibly apply to direct examination.

Caution

We must tell you from the outset that if you are in doubt, **make an objection**, and then move on. Under **no** circumstances should you ever permit a client to waive any type of privilege. (You may even be under an ethical duty to inform independent witnesses of their rights to assert privilege where privilege applies.)

DEPOSITION OBJECTION CHART

The following chart is based more on common sense than strict adherence to the rules. But in fact it represents an attempt to logically reconcile the demands of several rules:

1. **The question is ARGUMENTATIVE.**
2. The question violates the BEST EVIDENCE (or PAROL EVIDENCE) RULE.
3. **The question calls for a CONCLUSION.**
4. *The question assumes FACTS not in evidence.*
5. *The question calls for HEARSAY.*
6. The question is IRRELEVANT or IMMATERIAL.
7. **The question is LEADING.**
8. **The question is MULTIPLE or COMPOUND.**
9. The question violates PRIVILEGE.
10. **The question is REPETITIVE.**
11. *The question is SPECULATIVE.*
12. **The question is VAGUE.**

Any attempt to guess at what the rules drafters intended would, of course, be speculative. But it would certainly appear that the **bolded items** fall within the scope of Rule 31's objections as to "form." In other words, Objections 1, 3, 7, 8, 10, and 12 must, according to that rule, be asserted at the deposition. A leading question, for example, must be objected to so that the person conducting the interrogation can rephrase it.¹³⁴

Notice that Item #9 is bolded even though it is not mentioned in Rule 31. This is due to the obvious

fact that if an objection is **not** asserted, the privileged communication may be waived, in which case there will be nothing left to preserve at trial. Stated in another way, privileged communications must always be preserved, regardless of what the rules drafters may otherwise seem to suggest.

The italicized Objections (Items 4, 5 and 11) are judgment calls. An aggressive attorney should, at the very least, note an objection for the record even though they are likely to be preserved in the absence of such an objection.

§10.62 Preparing and Defending Your Expert

Regardless of whether you have scheduled a Preservation Deposition for your own expert or whether the enemy is seeking the deposition, the subject matter of the proceeding is basically going to be the same. You will prepare the expert to present his position and defend it during cross-examination. Therefore, in addition to this section, you should also read the material pertaining to the expert's Preservation Deposition.¹³⁵

Experts can be head strong, and if you do not put them in their place (by reminding them who retained them), they can deliver disaster. You must take charge and let the expert know who the boss is. This is extremely important. While your client is called to destroy your case, experts are people whom you pay to destroy your case. The following hypothetical, but common, dialogue may help you confront the problem:

- Expert: Don't tell me what to say. No one puts words into my mouth.
- Attorney: You're the expert. It's your job to present your opinion. But as the so-called legal expert, it's my job to control the manner in which you present it. That's why you can't even say anything until I ask the question.

¹³⁴ See *Roy v. Austin Co.*, 194 F.3d 840 (7th Cir. 1999), holding that an objection to a leading question must be made at the deposition or else it will be waived for purposes of trial.

¹³⁵ See §10.23(b).

Expert: But I'm going to tell the truth; that's all there is to it.

Attorney: And I wouldn't have it any other way. But any expert worth his salt knows that there are many ways to present the truth. Now let's discuss *our* truth.

Prepping for a *Daubert* Attack

The landmark *Daubert v. Dow*¹³⁶ and its fallout are capable of wiping out entire cases based on questionable scientific principles or methodology. As a result, there is currently a five-factor test that is generally used by the courts to determine whether or not an expert should be permitted to testify.¹³⁷

Caution

The last thing in the world that you want to do is provoke a *Daubert* attack on your own witness, particularly where that witness is using new or questionable scientific theories.

Without provoking an attack by mouthing *Daubert* issues, you will, nevertheless, want to make certain that your expert is prepared to answer questions that may later be used at a *Daubert* hearing. In all probability, your expert will have been prepped when you complied with Rule 26(a)(2)(B) disclosures. Be certain to prep the expert again. Those disclosures can be viewed as a partial checklist, and they require a report, which in turn might be structured into the following checklist of items that are required to appear in that report:

[1] All opinions to be expressed and the basis and reasons therefor;

[2] The data or other information considered by the witness in forming the opinions;

[3] Any exhibits to be used as a summary of or support for the opinions;

[4] The qualifications of the witness including a list of all publications authored by the witness within the preceding ten years;

[5] The compensation to be paid for the study and testimony; and

[6] A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

A competent opposition may attempt to dissect and find fault with the methodology used by your expert. Consider reviewing the "reasoning," "sampling," and "testing" processes prior to the deposition.

§10.70 Enforcement

If a would-be deponent fails to show up for a deposition, or after arriving, fails to answer your questions, you may have no choice but to seek sanctions. It is that simple. The enforcement process for depositions is not quite as elaborate as that employed for enforcing answers to interrogatories.¹³⁸

Note that the sanctions flow both ways. If the attorney who schedules the deposition fails to show up, he or she may be subject to sanctions, the most common being the payment of the costs and travel expenses of those parties and attorneys who do, in fact, appear.¹³⁹ It is common for attorneys to re-schedule or cancel depositions and then forget to notify **all** of the parties.¹⁴⁰

¹³⁶ 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

¹³⁷ [1] Has the theory or technique been tested? [2] Has it been subjected to peer review or publication? [3] What is the known or potential rate of error? [4] Has the theory or technique been generally accepted? [5] How was the methodology applied? See §10.23.

¹³⁸ See Rule 37 of the Federal Rules of Civil Procedure.

¹³⁹ See Rule 30(g) of the Federal Rules of Civil Procedure. See also *Keats v. United States*, 121 F.R.D. 53 (E.D.Mich. 1988); *Fino v. McCollum Min. Co.*, 93 F.R.D. 455 (N.D.Tex. 1982).

¹⁴⁰ See *Country Club v. Polo Ralph Lauren Corp.*, 127 F.R.D. 471 (D.S.C. 1989); *C & F Packing Co., v. Doskocil Cos.*, 126 F.R.D. 662 (N.D.Ill. 1989). A word of **caution**: secretaries will likewise forget to notify all of the parties.

What should you do when a deponent fails or refuses to answer a question? Should you stop the deposition and file a motion for sanctions under Rule 37(a)(2)(B)? Or should you keep going? Certainly a big factor in this determination will depend upon whether the refusal involves what I refer to as “base” or foundational questions that are critical to the remaining questions that you intend to ask.

Think of sanctions as a special brand of prisoner torture that is dispensed in proportion to the severity of the offense.¹⁴¹ At the low end of the scale, it may consist of the payment of costs and attorney fees. At the other end, you might find the most extreme form of punishment, the dismissal with prejudice.¹⁴² Keep in mind the distinction between punishing the attorneys and punishing the clients. The most extreme penalties will no doubt, effect both. Judges, however, are, as a rule, reluctant to punish the client for the attorney’s misconduct.¹⁴³

The decision to impose the most extreme form of punishment, i.e., the dismissal with prejudice, will be rendered only after a willful or repeated failure of

a party to respond to discovery requests. A combination of failing to appear for a deposition twice together with incomplete responses to interrogatories may very well do the trick.¹⁴⁴

Most courts follow an intelligent, progressive approach to sanctions with the intention of impressing the significance of the discovery proceedings upon an otherwise unwilling subject.¹⁴⁵ Consider the example of a plaintiff, who twice failed to appear at her deposition, and as a result, was required to pay costs and attorney fees. The magistrate ordered her to appear a third time at a specific time and place; when she failed to do so, her case was dismissed with prejudice.¹⁴⁶

In other matters, repeated and explicit warnings constituted an adequate prerequisite to a dismissal with prejudice for a repeated failure to attend depositions.¹⁴⁷ The failure of a party to explain why he or she failed to appear might warrant a dismissal.¹⁴⁸

Consider a situation where a witness appears totally unprepared to answer the questions and provide the required information. This can, according to the court, be tantamount to a failure to appear.¹⁴⁹

¹⁴¹ **Note.** Be sure to see §4.30, which contains additional statutes and information pertaining to the enforcement of this discovery device and others.

¹⁴² The defendant's counterpart would be the striking of defenses.

¹⁴³ *Armstrong v. Hussmann Corp.*, 163 F.R.D. 299 (E.D.Mo. 1995) resulted in sanctions against the attorneys for obstructive techniques during the course of a deposition. The attorney for Plaintiff continuously interrupted the deposition of the Plaintiff with objections that suggested the answers.

¹⁴⁴ *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. Colo. 1992); *Hashemi v. Campaigner Publications, Inc.*, 572 F.Supp. 331 (N.D.Ga. 1983).

¹⁴⁵ *T.B.I. Industrial Corporation v. Emery Worldwide*, 900 F.Supp. 687 (S.D.N.Y. 1995).

¹⁴⁶ *Viswanathan v. Scotland County Board of Education*, 165 F.R.D. 50 (M.D.N.C. 1995). See also *Stars' Desert Inn & Country Club, Inc., v. Hwang*, 105 F.3d 521 (9th Cir. 1997). See also *Carter v. Prince George's County Md.*, 155 F.R.D. 128 (D.D. 1994), which sanctioned the dismissal of a case without prejudice for failure of the plaintiff to comply with various discovery requests, including a failure to appear at a deposition.

¹⁴⁷ *Hyde & Drath v. Baker*, 24 F.3d 1162 (9th Cir. Cal. 1994); *Valentine v. Museum of Modern Art*, 29 F.3d 47 (2nd Cir. N.Y. 1994).

¹⁴⁸ *El-Yafi v. 360 E. 72nd Owners Corporation*, 164 F.R.D. 12 (S.D.N.Y. 1995).

¹⁴⁹ *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996).

§10.80 The Forms That You Need

- Form 10.1 Notice of Deposition (Basic)
- Form 10.2 Petition to Allow Deposition Prior to Commencement of Action to Preserve and Perpetuate Testimony
- Form 10.3 Notice of Deposition to Preserve and Perpetuate Testimony (Prior to Commencement)
- Form 10.4 Stipulations of Counsel Pertaining to Discovery Depositions
- Form 10.5 Notice of Deposition (To a Business Entity, Agent Identified)
- Form 10.6 Notice of Deposition (To a Business Entity, Agent Unidentified)
- Form 10.7 Notice of Deposition (To Records Custodian)
- Form 10.8 Notice of Deposition (Non-Stenographic)
- Form 10.9 Petition to Allow Deposition Pending Appeal
- Form 10.10 Motion for Deposition Pending Appeal
- Form 10.11 Motion for Additional Deposition
- Form 10.12 Application for Commission
- Form 10.13 Commission
- Form 10.14 Combined Discovery Request
- Form 10.15 Notice of Deposition and Notice for Production of Documents (Non-Party)
- Form 10.16 Objections to Notice of Deposition
- Form 10.17 Motion to Quash Deposition Subpoena
- Form 10.18 Motion to Terminate Deposition
- Form 10.19 Motion for Costs for Failure to Issue Deposition Subpoena
- Form 10.20 Motion to Suppress Deposition
- Form 10.21 Set-up Letter (Failure to Attend Depositions)
- Form 10.22 Motion to Compel Deposition
- Form 10.23 Motion to Compel Deposition Upon Oral Testimony
- Form 10.24 Motion for Contempt Citation, Sanctions, and Dispositive Relief
- Form 10.25 Response to Set-up Letter (Failure to Attend Depositions)
- Form 10.26 Answer to Motion to Compel Deposition
- Form 10.27 Answer to Motion for Sanctions and Dispositive Relief

Form 10.1 Notice of Deposition (Basic)

UNITED STATES DISTRICT COURT
FOR A SAMPLE DISTRICT

)
_____,
Plaintiff,)
)
v.)
)
_____,
Defendant)
_____)

Case No.:

Noticing Party: _____
Responding Party: _____
[Address of Responding Party] _____¹⁵¹

NOTICE OF DEPOSITION
(Basic)

PLEASE TAKE NOTICE that in accordance with Rule 30 of the Federal Rules of Civil Procedure, the [Noticing Party] intends to take the oral deposition of the [Responding Party] at the offices of the undersigned attorney, located at _____, in the city and state of _____, on the date of _____, at ____ o'clock (am/pm) before a Certified Court Reporter or Deposition Officer authorized to administer oaths and record the taking of such testimony. The deposition will continue from day to day until it is completed. You are invited to attend and cross-examine.¹⁵²

Date: _____

Attorney for _____

¹⁵¹ Though not always required by court rules, you might make a habit of including as much contact information as possible, such as Fax and telephone numbers in addition to e-mail. During the confusion and fire-fights involved in adjournments and re-scheduling, it helps to have this information at your fingertips.

¹⁵² This last sentence is standard fare even though, when directed at an enemy party, it may seem superfluous to "invite" that party's attorney to attend and cross-examine his or her own client.

Form 10.2 Petition to Allow Deposition Prior to Commencement of Action to Preserve and Perpetuate Testimony

UNITED STATES DISTRICT COURT
FOR A SAMPLE DISTRICT

Plaintiff,
v.

Defendant

Case No.:

Petitioner: _____
Respondent: _____

PETITION TO ALLOW DEPOSITION PRIOR TO COMMENCEMENT OF ACTION TO PRESERVE AND PERPETUATE TESTIMONY

The Petitioner, who intends to file an action bearing the above titled caption, hereby requests that this honorable court [in conjunction with Rule 27(a) of the Federal Rules of Civil Procedure] issue its order permitting Petitioner to issue a notice of deposition prior to commencement for the following reasons:

1. Within _____ weeks, the Petitioner intends to commence a lawsuit against _____, as defendant(s). The lawsuit is in the nature of a claim for:

2. This court has both subject matter and territorial jurisdiction over the intended parties. Petitioner is a resident of _____; the intended defendant resides at _____ . Jurisdiction of this court is predicated upon _____.
3. The Petitioner requires the testimony of the prospective deponent for the following reasons:

4. Upon information and belief, the substance of the testimony to be provided by the deponent will be as follows:

5. The Petitioner is fearful that unless he is permitted to preserve and perpetuate the testimony of _____ without delay, such testimony will be forever lost because the prospective deponent _____ [*shall soon leave the state or country, is terminally ill, suffers from early stages of Alzheimer's disease, is a substantial flight risk, etc.*]. In particular, the Petitioner factually represents that:

WHEREFORE, the Petitioner respectfully requests that this honorable court grant an order permitting the issuance of a notice of deposition prior to commencement of the above titled action for the purpose of preserving and perpetuating the testimony of _____.

Date: _____

Attorney for _____

**Form 10.3 Notice of Deposition to Preserve and Perpetuate Testimony
(Prior to Commencement)**

UNITED STATES DISTRICT COURT
FOR A SAMPLE DISTRICT

Plaintiff,
v.

Defendant

Case No.:

Noticing Party: _____
To:
[All Potential Parties]

**NOTICE OF DEPOSITION TO PRESERVE AND PERPETUATE TESTIMONY
(Prior To Commencement)**

PLEASE TAKE NOTICE that in accordance with Rule 27 of the Federal Rules of Civil Procedure, the [Noticing Party] intends to take the oral deposition of _____, prior to the commencement and filing of the above titled action, at the offices of the undersigned attorney, located at _____, in the city and state of _____, on the date of _____, at _____ o'clock (am/pm) before a Certified Court Reporter or Deposition Officer authorized to administer oaths and record the taking of such testimony. The deposition will continue from day to day until it is completed. You are invited to attend and cross-examine.

Date: _____

Attorney for _____

Form 10.4 Stipulations of Counsel Pertaining to Discovery Depositions

UNITED STATES DISTRICT COURT
FOR A SAMPLE DISTRICT

)
_____,
Plaintiff,)
)
v.)
)
_____,
Defendant)
_____)

Case No.:

Plaintiff: _____
Defendant: _____
[All other parties]: _____

STIPULATIONS OF COUNSEL PERTAINING TO DISCOVERY DEPOSITIONS

THE UNDERSIGNED PARTIES, in conjunction with Rule 29 of the Federal Rules of Civil Procedure, do hereby stipulate and agree as to the following deposition procedures for the above titled cause:

1. The plaintiff(s) and the defendant(s) shall each be permitted to take a limit of _____ depositions.
2. The deposition of the following named deponents shall be permitted to continue from day to day, with or without adjourned intervals, at the discretion of the noticing party, provided however that the total time for all depositions for any given listed deponent shall not exceed _____ hours. Regardless of the number of times that each listed deponent is deposed, his or her deposition shall only be counted as one for purposes of paragraph 1.
3. Depositions may be stenographically transcribed or may be transcribed by non- stenographic means, including but not limited to videotape, at the discretion of the noticing party.
4. [Virtually every aspect of the discovery process, excluding some matters involving subpoenas, can be regulated by way of stipulation] [*Insert stipulation here*] _____

Date: _____

Attorney for Plaintiff

Attorney for Defendant

Form 10.5 Notice of Deposition (To a Business Entity, Agent Identified)

UNITED STATES DISTRICT COURT
FOR A SAMPLE DISTRICT

_____)	Case No.:
_____)	
Plaintiff,)	
_____)	
v.)	
_____)	
Defendant)	
_____)	

Noticing Party: _____
 Responding Party: _____
 [Address of Responding Party] _____

**NOTICE OF DEPOSITION
(To a Business Entity, Agent Identified)**

PLEASE TAKE NOTICE that in accordance with Rule 30 of the Federal Rules of Civil Procedure, the [Noticing Party] intends to take the oral deposition of _____ as an agent (or officer, or director) of the [Responding Party] at the offices of the undersigned attorney, located at _____, in the city and state of _____, on the date of _____, at _____ o'clock (am/pm) before a Certified Court Reporter or Deposition Officer authorized to administer oaths and record the taking of such testimony. The deposition will continue from day to day until it is completed. You are invited to attend and cross-examine.

Date: _____

Attorney for _____

Form 10.6 Notice of Deposition (To a Business Entity, Agent Unidentified)

UNITED STATES DISTRICT COURT
FOR A SAMPLE DISTRICT

_____)	Case No.:
_____)	
Plaintiff,)	
_____)	
v.)	
_____)	
Defendant)	
_____)	

Noticing Party: _____
 Responding Party: _____
 [Address of Responding Party] _____

**NOTICE OF DEPOSITION
(To a Business Entity, Agent Unidentified)**

PLEASE TAKE NOTICE that in accordance with Rule 30 of the Federal Rules of Civil Procedure, the [Noticing Party] intends to take the oral deposition(s) of the Responding Party, _____, Inc., (or LLC, LLP, Partnership, Limited Partnership, etc.) at the offices of the undersigned attorney, located at _____, in the city and state of _____, on the date of _____, at _____ o'clock (am/pm) before a Certified Court Reporter or Deposition Officer authorized to administer oaths and record the taking of such testimony. The deposition will continue from day to day until it is completed. You are invited to attend and cross-examine.

The person or persons to be deposed shall be one or more of the Responding Party's agents, officers, employees, directors or other individuals who are most knowledgeable with respect to:

Date: _____

Attorney for _____

Form 10.7 Notice of Deposition (To Records Custodian)

UNITED STATES DISTRICT COURT
FOR A SAMPLE DISTRICT

_____)	Case No.:
_____)	
Plaintiff,)	
_____)	
v.)	
_____)	
Defendant)	
_____)	

Noticing Party: _____
 Responding Party: _____
 [Address of Responding Party] _____

**NOTICE OF DEPOSITION
(To Records Custodian)**

PLEASE TAKE NOTICE that in accordance with Rule 30 of the Federal Rules of Civil Procedure, the [Noticing Party] intends to take the oral deposition of the Records Custodian of the Responding Party, _____, Inc., (or LLC, LLP, Partnership, Limited Partnership, etc.) at the offices of the undersigned attorney, located at _____, in the city and state of _____, on the date of _____, at _____ o'clock (am/pm) before a Certified Court Reporter or Deposition Officer authorized to administer oaths and record the taking of such testimony. You are invited to attend and cross-examine.

The Records Custodian will be asked to identify and provide specific information pertaining to the following records:

Date: _____

Attorney for _____