GREAT!
ADVERSE DEPOSITIONS:
Principles and Principal Techniques

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§I INTRODUCTION

A. An adverse deponent – especially the opposing party – is a witness whose chief goals at deposition are to proffer evidence that is unfavorable to cross-examiner's case theory and to defeat cross-examiner's efforts to discover any information that may be favorable to cross-examiner's case theory. To achieve these goals, adverse deponent endeavors to give evasive or misleading answers; claims to have forgotten key information; cooperates with opposing attorney's efforts to obstruct cross-examiner's questioning; and frequently/usually commits perjury ... if he thinks he can get away with it.

B. Deposition cross-examination is an intellectually rigorous discipline that comprises a forensic blend of logic, rhetoric, semantics, grammar, psychology, sociology, theatre, and culture. Litigators who correctly understand its ineluctable core principles and master the panoply of rules and techniques that logically flow from those principles are always rewarded with high-quality depositions. Those rules and techniques are, of course, to be executed in accordance with the codes of civil procedure, evidence, and professional responsibility.

C. The cross-examination of adverse deponents – "fact" and expert – is a subject that deserves a full semester's course of study: 60 hours. More than any other litigation skill, the ability to take great adverse depositions determines case outcome. Although deposition cross-examination is clearly a far more complex and important subject than hornbook evidence, for example, it receives virtually no attention from law schools and only haphazard attention thereafter. Therefore, as a result of the widely accepted – and wrong-headed – belief that any bright litigator can easily become an accomplished deposition questioner by taking a couple dozen depositions, mediocre depositions are a staple of civil litigation, irrespective of the experience level of the litigator or the prestige of the litigator's law firm.

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D. Obviously, no semester-worthy subject can be adequately taught in 6 hours. This webinar presents a primer on the discipline's logic and seven of its most important rules. (Another 6-hour presentation, *Mastering the Toughest-to-Craft Credibility Arguments,* is a companion to today's material.) While most of this outline's topics are analyzed and illustrated during the webinar, because of time limitations, others are only briefly mentioned. The pace of the webinar must be rapid, but not so rapid that two questions aren't always appropriate: "What did you just say?" and "What's the teaching point?" Please ask these questions as they arise, so that webinar speaker's troublesome (?) statement is still in everyone's working memory ... especially webinar speaker's.

E. Also due to time constraints, this webinar does not address the topics of witness preparation, defending a deposition, cross-examiner's deposition preparation, or deposition-related civil procedure code sections. Webinars teaching this entry-level, albeit useful, stuff are easy to find elsewhere.

And, while today's webinar (like *Mastering the Toughest-to-Craft Credibility Arguments*) focuses exclusively on the deposition cross-examination of "fact" witnesses, all of the principles discussed herein are spot-on relevant to the deposition of any adverse expert. That said, a high-quality deposition cross-examination of an adverse expert also requires mastery of an additional set of elaborate principles and techniques, which are discussed in two 6-hour presentations: *Attacking the Expert's Opinion* and *Attacking the Expert's Pedestal*.

F. Minor Caution: This webinar offers few, if any, keen psychological insights. Those seeking to learn tricks with which they may reliably charm or coerce the misbehaving witness or jerk lawyer into serving cross-examiner's deposition agenda will have to find those tricks elsewhere … assuming any such tricks exist.

G. Major Caution: Because this webinar offers no verifiable empirical data to support any of its myriad assertions, and because webinar speaker's own accomplishments as a litigator were eminently unremarkable, all purported wisdom proclaimed herein must be skeptically scrutinized and remain

unembraced unless, by force of reason, you are convinced that the webinar's principles, rules, and techniques constitute absolute deposition-truth. In short, accept nothing on faith: ratiocination rules!

H. To illustrate key points, the webinar will use dozens of Q&A excerpts, mostly from high-profile cases, along with excerpts from the non-litigation "cross-examinations" of public figures on controversial topics. Although this webinar earnestly endeavors to make a good faith – but definitely non-scholarly – effort to present these cases and cross-examinations in an accurate historical context, it is always possible that webinar speaker's multiple and deep ingrained biases may distort his analyses. Thus, you are invited – nay, implored – to independently verify all proffered factual representations about said cases, cross-examinations, and their participants.

I. If an over-the-top slide, strained metaphor, stream-of-consciousness aside, gimmicky pedagogical ploy, or pretentious reference somehow sneaked past the webinar's keen editorial screening process, it is nevertheless hoped that your understanding of the discipline of deposition cross-examination, as explained today, will not be diminished thereby.

J. These space-saving abbreviations are used in the slide presentation:

CE: cross-examiner, who is you (and webinar speaker) all webinar long

AD: adverse deponent, who wants you to lose the case

OA: opposing attorney, who also wants you to lose the case

K. Set forth in the Appendix is a mock case: "Country Club" and an excerpt from the mock deposition of mock defendant, Mike Roberts. (Please, don't mock them.) The "facts" of this case are used to illustrate many of this webinar's teaching points. (Forgive the examples' pedagogical use of compound questions and layers of rhetoric.)

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§II "BATTLESHIPS"

A. Cross-examiner seeks to obtain the universe of first- and second-hand information that adverse deponent possesses (or claims to possess) regarding the facts, witnesses, documents, and real evidence pertinent to the instant case. This *who-what-when-where-why-how* information-gathering process is an indispensable component of every adverse deposition. This webinar's label for that process is "Battleships."

B. Although the specific facts of every case are to varying degrees idiosyncratic, many fact patterns and legal issues frequently recur in cases that involve the same field of law. In recognition of these recurrences, and in order to better ensure that adverse deponent will be questioned about all relevant and discoverable topics, experienced cross-examiners develop a topic checklist (written or memorized) for each type of deposition they take. A good checklist and a good execution of "Battleships" go hand-in-hand.

C. Of course, differences in experience levels between two cross-examiners can make a significant difference in the quality of their respective checklists and, therefore, in the quality of their respective "Battleships." That said, a reasonably bright and motivated new cross-examiner can quickly catch up to an experienced cross-examiner in terms of mastering "Battleships." How quickly? Certainly by the time he has taken two-dozen same-kind-of-case adverse depositions, and performed the other related litigation tasks (pleadings, depositions defended, written discovery, motion work, settlement negotiations, and trial preparation) involved in those cases. In other words, although "Battleships" is an indispensable component of every adverse deposition, it is not a difficult one to learn. (Note: This paragraph does not contradict the contention on page 1, namely, "mediocre adverse depositions are a staple of civil litigation, irrespective of the experience level of the litigator or the prestige of the litigator's law firm.")

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§III FOUR "NEARLY-EVERYBODY-AGREES" ADVERSE DEPOSITION RULES

A. Certainly on-point case law, the bombshell document, or the "witness from God" can be the predominant factor that determines case outcome, whether that is a settlement or a verdict. But, far more frequently, it is the skill that cross-examiner wields when taking adverse depositions that most significantly shapes that outcome.

B. How many hours have you ever devoted to seriously studying what constitutes a great deposition cross-examination? Any? Have you formulated your own integrated set of deposition cross-examination rules that inform the innumerable decisions you make deposition after deposition? Can you list those rules? Explain them? Justify them? Which of your rules are equally valid and effective for use by every cross-examiner against every adverse deponent in every case for the rest of time? Any? All?

C. Would your list of universal rules ("universal" meaning they apply to every civil litigator, no matter the area of practice) include these four? (Note the qualifying adverbs used in each rule.)

#1 Subject-by-subject, predominantly ask non-leading questions throughout the deposition, quite unlike a trial cross-examination.

#2 When you get a good answer customarily leave it alone, so you don't lose it – partially or even completely – by giving adverse deponent a second chance at it.

#3 Customarily save impeachment evidence for surprise at trial.

#4 And when – for whatever reasons – the impeachment is disclosed during the deposition, customarily conceal the case theory arguments that are based on that impeachment evidence until trial.

§IV THE G. U. T. OF CIVIL LITIGATION

"Profundity #1": _____
(premise)

"Profundity #2": _____ (…if both are done right.)
(premise)

"Profundity #3": _____
(conclusion)

§V *WHACK!*

A. *Whack!* is this webinar's term of art regarding cross-examiner's successful bonding of a clear deposition question to its clear, directly responsive answer so that together they form a module of evidence that can be reenacted any time thereafter with such a degree of reliability that the witness cannot reject the wording of his answer or its meaning, cannot modify the wording of his answer or its meaning, and cannot attack the scope of the question as having been narrow or misleading ... without risking a credibility sanction for his demonstrable attempt to flee from his own testimony.

B. If the adverse deposition is done "right" (i.e., according to the logic discussed herein), then at trial, what appears to the jury as the cross-examination of the adverse witness, will, in fact, be the controlled-by-cross-examiner expressive "reading" of the best of the deposition testimony. Assuming the trial judge enforces the 50-state rule that an answer should directly respond to the scope and terms of the question, during that reading the witness has but two options: (1) cooperate by affirming his commitment to his deposition testimony; or (2) attempt to flee from that testimony, which flight empowers cross-examiner to *Whack!* him – impeach him – with his

deposition testimony.

C. If the adverse deposition is done wrong, then, at trial, cross-examiner must seek adverse witness's cooperation to fill in deposition information-holes, clarify vague deposition words/phrases, craft final-argument rhetoric, and organize fragments of deposition testimony in a way that is favorable to cross-examiner's case theory … and contrary to adverse witness's preference. (Good luck getting that cooperation!)

D. Deposition cross-examiner enjoys seven significant advantages over trial cross-examiner:

1. At deposition there is time for cross-examiner to think about adverse deponent's answers and time to test multiple attacks against those answers.

Getting an adverse witness to cooperate at trial always eats up precious time. That's a rule. And, judges are nearly always time-challenged, nearly always patience-challenged, nearly always quicker than cross-examiners to conclude that a line of examination is "going nowhere," and thus order cross-examiner to move on to a different subject. When this happens, witness, in effect, wins regarding that subject.

Or, cross-examiner, on his own, may decide to abandon an important – but tough – line of questioning for a different, easier-to-accomplish line of questioning in the hope of preserving the judge's patience. When this happens, witness, in effect, wins regarding that subject.

Deposition is cross-examiner's laboratory! (Said once now and several times hereafter. Can't be said enough.)

2. At deposition there is no jury to observe cross-examiner's failed attacks regarding credibility issues and case theory arguments.

All of trial cross-examiner's shortcomings are revealed right in front of "voters" who are empowered to punish him for them. When flailing and failing occur, cross-examiner's jury appeal is likely diminished.

While watching a verbal tussle between cross-examiner and adverse witness, it is common for a jury to extend its sympathy to adverse witness, rather than to cross-examiner. For this reason, cross-examiner may sometimes be forced to abandon an important, but contentious line of questioning out of concern that the level of aggressiveness needed to nail the witness down may do cross-examiner's case more harm than good. When this happens, witness, in effect, wins regarding that subject.

Deposition is cross-examiner's laboratory!

3. At deposition both adverse deponent and opposing attorney are much "dumber" than they are going to be at trial about what the evidence will be and what of that evidence will convincingly prove or disprove the competing case theories, including the credibility of the witnesses.

Over the course of any litigated case each side inevitably discloses chunks of its case theory through the discovery it propounds, the discovery it produces, its motion work, settlement efforts, and trial brief. By the time of trial typically so much of the competing case theories have been disclosed that relatively few secrets remain for either side to protect. Therefore, when testifying at trial, adverse witness will always be much more savvy about what potential answers help or hurt his side than he was during his deposition. Therefore, it must be at the deposition that cross-examiner endeavors to compel adverse deponent to disclose and firmly commit to the entirety of his at-trial direct- and cross-examination to reduce, as much as possible, cross-examiner's need to seek from him good-for-cross-examiner answers to questions that had never been asked.

Deposition is cross-examiner's laboratory!

4. A bad-for-cross-examiner answer disclosed in deposition affords cross-examiner the opportunity to conduct formal and informal follow-up discovery for the purpose of developing an attack against that answer.

Rather than provide truthful, at-trial cooperation to cross-examiner, many adverse witnesses will engage in deception to try to defeat cross-examiner's purposes. Many, many trial deceptions escape successful

impeachment because cross-examiner has neither the time nor the resources to obtain last-minute impeachment material. When this happens, witness, in effect, wins regarding that subject.

5. The possibility of a favorable-to-cross-examiner settlement substantially decreases once trial commences.

6. There is ample time for cross-examiner to modify his case theory.

7. There is ample time for cross-examiner to modify his trial tactics.

Deposition is cross-examiner's laboratory!

§VI INTRODUCTION TO "THE MAGNIFICENT SEVEN"

A. Sometimes Lead (§VII)

B. Routinely Rhetoricate (§VIII)

C. Firewall Answers (§IX)

D. Make the Implied and the Hidden Express (§X)

E. Heed the Transfer of Information Rule (§XI)

F. Attack "Crap" (§XII)

G. Ditch the "Stupidest Orthodoxy" (§XIII)

Note: Dozens of deposition cross-examination rules and techniques are worthy of study. Because these seven have such broad application, they were chosen as subjects for this 6-hour webinar. Given their enormous impact on a career of settlements and trials, ideally two full days would be devoted to their explication, but, alas, the hurly-burly demands of litigation practice allow few litigators to inve$t that much time.

Each of "The Magnificent Seven" can be distinguished from the others, but sometimes those distinctions are rather fine. Each derives from the core principles of deposition-logic [to wit: ***trial is argument … deposition is trial … thus, deposition is argument***] and each contributes to establishing *Whack!* in the deposition tran***script***. Yes, they do overlap; but that's a good thing: an important belt and suspenders redundancy.

§VII SOMETIMES LEAD

A. The rule: Nearly every time cross-examiner knows the answer he prefers from adverse deponent, cross-examiner should employ a leading question, or a chain of leading questions, to encourage adverse deponent to provide that preferred answer.

B. How does cross-examiner know in an early-in-the-case deposition any answers he prefers adverse deponent to give? Simple; it's called having a case theory, which is defined as the most favorable, credible application of the law to the most favorable, credible, and appealing interpretation of the facts ... consistent, of course, with both the rules of evidence and professional conduct.

A case theory's most favorable credible interpretation of the facts determines what cross-examiner prefers adverse deponent to testify to about his knowledge, motivations (internally-imposed obligations [i.e., values] and externally-imposed obligations), the priority of motivations, actions

considered, actions taken, actions rejected, emotions, attitudes, opinions, definition of terms, practices, precedents, and memory-limits.

C. Lead nearly every time the good-for-cross-examiner is known? The potential exceptions:

1. Maybe ask a non-leading question if the subject matter is of no or relatively minor importance to either side's case theory argument ... especially where cross-examiner controls independent-of-adverse-deponent proof of the preferred answer.

Examples (See Appendix for hypo "facts."):

"Mr. Roberts, what is your job title at Diablo Canyon Country Club?"

"When did you first become the golf pro at Diablo Canyon Country Club?"

"Currently, who is your immediate supervisor at Diablo Canyon Country Club?"

These are no-big-deal issues ... and cross-examiner can readily prove – without any help from Roberts – that the true answers are: golf pro, 8 years ago, and John Church. Roberts would be foolish to try to deceive regarding any of these answers.

2. Maybe ask a non-leading question if cross-examiner's line of inquiry concerns a subject about which adverse deponent had made no prior commitment and for which there are multiple plausible answers (such as inquiries calling for the description of a multi-step event; the compilation of a list; a why; or a how) ... it may be more efficient for cross-examiner to start with a non-leading question to establish adverse deponent's claim regarding the subject.

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Examples (See Appendix for hypo "facts."):

"What are the steps – in their proper order, if there is one – that are necessary to conducting a thorough inventory of the stocked items at 10th tee snack stand?"

"Tell me all of the serious inventory irregularities concerning Anna's management of the 10th tee snack stand that you ever informed Mr. Church about."

"Tell me all the reasons why you didn't immediately inform Mr. Church of this supposed inventory irregularity at the 10th tee snack stand."

3. Maybe ask a non-leading "yes/no" question if either answer is useful to cross-examiner, which is quite often the case when the question concerns ...

a. adverse deponent's agreement with and/or adherence to a societal value: doing good and avoiding – perhaps even preventing – evil;

b. adverse deponent's agreement with and/or adherence to a legal obligation imposed by a government or by a contract;

c. adverse deponent's agreement with and/or adherence to the behavioral norms of a group or organization he joined or at least associated with; or

d. adverse deponent's recognition of and/or adherence to a matter of common sense.

Example (See Appendix for hypo "facts."):

"Do you believe, Mr.Church, that all complaints of workplace sexual harassment should be taken extremely seriously and should be promptly and thoroughly investigated?"

Cross-examiner may be able to use a "yes" answer to attack Church for failing to act in accordance with "seriously," "promptly," and/or

"thoroughly" ... or may be able to use a "no" answer to argue that he misunderstood or disregarded his obligations as general manager.

4. Maybe ask a non-leading question if cross-examiner is reasonably hopeful that adverse deponent will volunteer cross-examiner's preferred answer and/or cross-examiner is concerned that opposing attorney may successfully argue that cross-examiner's leading question put unfair or inaccurate words in adverse deponent's mouth. In some instances, opposing attorney may even argue that cross-examiner's leading question(s) ignobly bullied or tricked adverse deponent into giving the answer(s). (Discussed below in F.)

Two cautions:

a. If, in response to that non-leading question, adverse deponent initially commits to an answer that is less favorable to cross-examiner's case theory than cross-examiner preferred, will he be able to break adverse deponent's embrace of that initial answer and persuade him to adopt cross-examiner's preferred answer instead?

b. Does cross-examiner have sufficient deposition time to try to accomplish the change? And, does cross-examiner wish to spend that time, knowing that part of that time will probably be devoted to fighting opposing attorney's archetypal mantra: *"Cross-examiner, just because you don't like my client's answer doesn't mean that you are allowed to badger him into giving a different answer"*?

Example (See Appendix for hypo "facts."):

Cross-examiner's preferred answer is*, "Anna was quite well-liked by all of her co-workers and all of the Club's members."* But, being concerned about appearing to put words into Roberts's mouth, cross-examiner asks this non-leading question ...

"How did Anna get along with her co-workers and the Club's members?"

Roberts's answer: *"Her interactions were acceptable, so far as I know."*

Cross-examiner's follow-up (non-leading or leading question): *"Would/Wouldn't you say that she was quite well-liked by all of her co-workers and all of the Club's members?"* is asking to immediately change his answer ... to one more favorable to cross-examiner. That's problematic.

5. Maybe ask non-leading questions that encourage narrative responses if cross-examiner judges that one or more of these factors pertain:

a. adverse deponent is clueless about what information helps/harms his case theory;

b. adverse deponent is gabby ... whether naturally so or, perhaps, he tactically believes cross-examiner can be persuaded regarding a litigation issue;

c. opposing attorney makes no/little effort to restrain adverse deponent's responses to the scope of the questions and/or makes no/little effort to restrain the scope/number of cross-examiner's questions that invite a narrative response;

d. cross-examiner's charming Q&A demeanor is so disarming that adverse deponent can be lulled into having a revelatory "conversation" with cross-examiner.

6. Maybe use a non-leading question if the leading question would make cross-examiner feel foolish in asking it.

Example (See Appendix for hypo "facts."):

"Mr. Church, isn't it true that you knew for many months prior to Anna's resignation that your golf pro, Mr. Roberts, had been sexually harassing her, causing her to suffer severe emotional distress, and you just let it happen because you were concerned about your job security if you challenged the conduct of the popular-with-the-members golf pro?" [In effect, cross-examiner is asking Church to admit liability and significant damages (plus lack of moral courage). Absent some hint from Church that his conscience was bursting to purge itself of guilty knowledge, most

cross-examiners would understandably feel foolish asking such a question.]

D. In every case, cross-examiner strives to characterize adverse deponent as an unreliable source of information concerning one or more subjects. Proving that adverse deponent attempted to deceive about a matter of importance to the instant case, whether under oath or not, typically provides cross-examiner with the most powerful means of achieving that goal.

Thus, coaxing adverse deponent, through leading questions, into committing a provable lie is a "Holy Grail" of every adverse deposition. (There is but one exception. That deals with the summary judgment issue. Because cross-examiner always prefers to win the case in law-and-motion rather than run the risks of a jury trial – even a jury trial that looks like a clear winner – cross-examiner would be wrong to coax adverse deponent into committing a provable lie that destroyed cross-examiner's chance of prevailing on the motion for summary judgment.)

From the case's inception through the completion of each adverse deposition, cross-examiner must continually assess his store of information to identify all "Holy Grail" material, defined as follows:

1. Information that is significant to proving/disproving any contested claim in the case (including adverse deponent's credibility, which is always contested).

2. It is information that cross-examiner judges is available, admissible, and will be deemed proved by the jury even if adverse deponent denies the information's truth and, moreover, affirmatively attacks the credibility of the information's source.

3. It is information adverse deponent may not know that cross-examiner knows about (or although he does know that cross-examiner knows <u>something</u> about it, adverse deponent doesn't believe that cross-examiner will be able to prove it).

4. It is information adverse deponent may want to lie about because he recognizes that by admitting the truth of that information he may harm a self-interest, which self-interest is driven by adverse deponent's concern regarding the immediate legal consequences in the instant lawsuit and/or the consequences that certain testimony may have on important collateral matters, such as adverse deponent's self-image, personal relationships, reputation in the community, job security and criminal jeopardy.

Example (See Appendix for hypo "facts."):

Roberts made a crass, sexual remark about Anna in front of Faulkner, Silva, and Church: *"stiff shafts, back nine."*

Faulkner is dead. Because Church is a defendant, he is quite unlikely to truthfully testify about Roberts's remark and help cross-examiner thereby. That leaves Silva. If cross-examiner concludes that Silva is available for trial; concludes that his testimony regarding the remark is admissible per the evidence code; and concludes that his testimony will be believed by the jury – even if Roberts (and Church) deny his version of the event, and even if they affirmatively attack Silva's credibility – then cross-examiner wants Roberts to <u>initially</u> lie about the remark, encouraging him to tell as big and extreme a lie as possible.

Cross-examiner wants to ultimately prove the truth of the event; prove that Roberts is a liar, whose self-serving statements are unworthy of belief; prove that the event strongly supports cross-examiner's case theory (i.e., Roberts, from the outset of her employment at the club, targeted Anna for his unwanted sexual attention); and craft a significant trial-tactics problem for opposing counsel, so that the latter adjusts his settlement position to the advantage of cross-examiner.

E. Where cross-examiner concludes that unfavorable information (from adverse deponent's viewpoint) will not be admitted into evidence or even if admitted into evidence may not be deemed proved by the jury unless adverse deponent acknowledges the truth of such information, then cross-examiner must endeavor to lead adverse deponent into believing that cross-examiner can prove the unfavorable information; thereby encouraging

adverse deponent to admit the information's truth rather than risk getting caught in telling an under-oath lie.

The combined use of two unreliable techniques are essential to maximizing the chances that adverse deponent will make the unfavorable admission.

1. "Gentle the answer": establish adverse deponent's agreement in the truth/goodness/beauty of a generalized, apparently non-threatening, non-specific premise, which premise encompasses the concealed-for-the-moment specific example to which cross-examiner ultimately seeks an admission.

Example (See Appendix for hypo "facts."):

"Mr. Roberts, you certainly do the best you can to enforce all the policies of the Club, including the anti-sexual-banter policy, right? But you have many employees to supervise and you're not with each one all day long, right? And, given how much of our culture and entertainment (TV, movies, books, magazines, songs and humor) have some sexual content to them, isn't it the case that at the Country Club, like thousands of other workplaces across this wonderful country of ours, there are occasionally some good natured, well-intended remarks made by a female or male employee, maybe both – with absolutely no offense intended and absolutely none taken – that have some passing reference, at least, to sexual subjects?"

Roberts's choices are two:

a. Deny all knowledge of any such inappropriate behavior.

b. Out of caution, concede that at some unspecified time, some unspecified person at the club, may have made some unspecified, sexual remark … so that, if evidence of sexual remarks is produced, he can – attempt to – couch it in the relatively benign context set forth by cross-examiner.

2. "Cat's outta the bag": offer up the details of the unfavorable information that is nested in the pre-established, ostensibly non-

threatening, non-specific premise in the way that best conveys the following implied message: "Mr. Adverse Deponent, given that I, cross-examiner, can prove this specific event, it is hardly in your interest to lie about it, especially since I have placed it in a relatively benign context (for the moment, but not if he admits its truth). It is to your advantage to make a tactical admission … to try to portray necessity as virtue."

Example (See Appendix for hypo "facts."):

"And, Mr. Roberts, having in mind that such good natured sexual remarks abound in lots of work places, and can occasionally occur even in your work place, wasn't it the case that on the day that you hired Anna Cheaney, right about 2:44 p.m., given how confident you were that she would do a good job at the snack stand, and how pleased you thought the members of the Club and the employees of the Club would be with Anna, you said to Mr. Church, who was wearing a blue jacket and a red tie and was standing along your right side, in the pro shop, and also said to Faulkner and Silva, your trusted subordinates, who were standing on your left, each wearing their Big Ben overalls, in a good natured way, 'You take one look at Anna and there'll be a lot of stiff shafts on the back nine'?"

F. A common fear among cross-examiners is that even if adverse deponent adopts the preferred answer in response to the leading question, adverse deponent and opposing attorney will diminish or defeat cross-examiner's argument based on that answer by counter-arguing that cross-examiner unfairly put words into "poor" adverse deponent's mouth.

But this counter-argument has no reasonable prospect for success, unless it can be shown that, at the time of the deposition, adverse deponent was suggestible or intimidatable because he is quite young, quite old, slow-witted, distracted by illness, distracted by emotional problems, in need of a translator, disabled in a way that diminished his verbal capacity, or was in any other way easily confused.

None of the witnesses appearing in this webinar's videos can credibly claim that they suffered from any of the above frailties, that they were bullied or tricked into their answers. Therefore, they would have little chance of escaping the consequences of their answers to leading questions if cross-

examiner, through the use of looping (i.e., using all or part of a one answer as a predicate to another question) attacked these excuses:

1. *"I misheard the question."*

2. *"I misunderstood the question."*

3. *"I misspoke my answer."*

4. *"The court reporter misreported the question and/or the answer."*

5. *"I initially spoke off-the-cuff. Later I thought of a more apt way to say it, which I would have offered originally had I more time to think."*

6. *"Cross-examiner tricked/bullied me into the answer."*

7. *"Cross-examiner misunderstood his own question or my answer."*

§VIII ROUTINELY RHETORICATE

A. Rhetoric, as used here, is language that seeks to delineate adverse deponent's relationship to relevant societal values, relevant emotions, and relevant matters of self-interest. (Yes, these three do overlap.) Even the logic-based aspects of cross-examiner's final argument will always be more forceful if the rhetoric woven through those aspects echoes trial testimony (EVIDENCE!), as opposed to merely being the invented rhetorical flourishes of cross-examiner's forensic fancy.

B. In using rhetoric, cross-examiner's goal is to intensify arguments … those supporting cross-examiner's case theory and those attacking opposing attorney's case theory.

C. Cross-examiner can choose to wait until trial to seek adverse deponent's

cooperation in helping craft rhetoric-laden testimony that is useful to cross-examiner's final argument, but those so tempted should immediately review §V. Based on the principle that deposition-is-trial, cross-examiner should endeavor to craft trial rhetoric during the adverse deposition, while adverse deponent is still relatively ignorant of cross-examiner's case theory and still relatively ignorant of at least some of cross-examiner's store of information.

Example (See Appendix for hypo "facts."):

"Mr. Life-long Banker, as president of the Diablo Canyon Country Club's Board of Directors, isn't it correct to say that you take all allegations of sexual harassment that involve employees of the Club extremely seriously? Certainly, such allegations present an issue to the Board that is of the greatest urgency: the safety of your employees. You want to do all you possibly can to protect your employees from sexual harassment, from someone who might even become a sexual predator, right? A sexual predator presents a grave danger to all female employees, right? And whether that potential sexual predator were the lowest level employee or your golf pro, you would demand that all reasonable steps be taken to get to the truth, right? You wanted your general manager, Mr. Church, to get to that important truth, didn't you? You wanted Mr. Church to professionally conduct a fair, thorough, and accurate investigation into Anna Cheaney's allegations of unwanted and offensive touchings and into allegations of coercion, right? You wanted Mr. Church to provide the Board with a fair, thorough and accurate report of his investigation and to make all appropriate recommendations, right? At all times you told Mr. Church that he would be provided with all the reasonably necessary resources to conduct that fair, thorough, and accurate investigation, right? You recognize that although, you, yourself, have not been trained in such investigations, you and the Board had a grave responsibility to oversee Mr. Church's crucial investigation, right? You had to use your best judgment and the collective common sense of the entire board to make sure that Mr. Church had done his very best job, so that you could be certain that there was no sexual predator anywhere in the employ of the Club, right?

In this over-the-top example, cross-examiner uses rhetoric to confront the president of the club's board of directors with an uncomfortable series of binary choices: (1) to agree with the maximally-intensified characterizations regarding Anna's allegations, Church's

obligations/values, and the board's obligations/values and thereby run the risk that cross-examiner can prove the actions taken in response by Church and/or the board were inconsistent; (2) to reject any of those characterizations and thereby run the risk that cross-examiner can effectively argue that the banker failed the "good-citizenship" test regarding one or more of these no-expertise-required issues.

§IX FIREWALL ANSWERS

A. When adverse deponent gives an answer favorable to cross-examiner's case, cross-examiner wants to prevent that answer from credibly getting any "smaller."

Likewise, when adverse deponent gives an unfavorable answer, cross-examiner wants to prevent that answer from credibly getting any "bigger." Of course, any answer any adverse deponent ever gives can be changed … while the deposition is ongoing, or when adverse deponent "corrects" the deposition transcript, or when he testifies at trial.

Firewalling is a technique that anticipates adverse deponent's desire to alter the "size" of his testimony, and works to deny credibility to any such alteration. There are four aspects to firewalling:

- interrogatory-like questions,
- universal and nail-down terms,
- enumeration, and
- looping.

These do somewhat overlap, and are definitely most effective when used as a "team," but will be better understood, perhaps, if initially discussed separately (below).

B. Interrogatory-like question: a complete-thought, stand-on-its-own question ... that leaves no important-to-cross-examiner term un-expressed; thus, at trial, cross-examiner need not ask the witness to agree that he clearly understood a particular deposition question posed to him <u>silently</u>

incorporated a part of a prior question and/or answer. (At trial, adverse witnesses are not highly motivated to give such help to cross-examiners.)

The interrogatory-like question can be one that seeks a who, a what, a when, a where, a why, a how, a yes or a no. Oftentimes, cross-examiner uses an interrogatory-like question to gather fragments from prior Q&A into a trial-efficient module of evidence.

Example (See Appendix for hypo "facts."):

Assume the following fragments were dispersed over two pages of deposition testimony: *manager*; *men and women*; *different ethnicities*; *25-40 total employees*; *written policies of the club*; *club's expectations of supervisors*; *anti-discrimination policy*. The interrogatory-like question, using language that is comprehensible to every high school educated juror, gathers these fragments as follows:

"Mr. Roberts, as manager of 25 to 40 employees -men and women of several different ethnic groups- would you agree that you had an obligation to strictly enforce that anti-discrimination policy, at least so far as your subordinates were concerned?"

C. Universal terms (e.g., "all," "any, and "ever") and nail-down terms (e.g., "first," "the very next," and "last) establish the question's – thus the answer's – breadth and/or specificity.

100%	each	final	no _____	the only
absolute	empty	first	none	the very next
all	end	full	nothing	total
always	entire	ideal	oldest	ultimate
any _____	ever	last	only	unique
at all	every	least	paramount	universe
beginning	everyone	maximum	perfect	utmost
best	everything	minimum	pure	whatsoever
certain	every time	most _____	single	whole
closest	exclusive	never	sole	worst
complete	farthest	next	supreme	zero

Example #1 (See Appendix for hypo "facts."):

"Mr. Roberts, identify all of the sexually inappropriate statements – about which you have any information whatsoever – that Anna ever allegedly made during the entire time she was employed at the Club."
[Note: Redundancy in this context is never a flaw.]
Example #2 (See Appendix for hypo "facts."):

Webinar speaker's favorite word is "any," especially when used in a litany.

"Mr. Roberts, did you, at any time, in any way, by any means, make any attempt whatsoever to inform anyone of your suspicion that there was anything irregular about any of the 11th tee snack stand inventories?"

D. Enumeration: affixes a number (and a succinct label) to each element of the answer so that any change by adverse deponent can be easily demonstrated.

Example (See Appendix for hypo "facts."):

"*So, there are two and only two areas of employment in which Anna ever misbehaved while at DCCC, #1 inventories and #2 sex conduct, right, Mr. Roberts?"*

E. Looping: using all or part of a prior answer as a predicate to another question and another question and another question to deeply embed that predicate into the deposition transcript to help fight against adverse deponent trying to credibly change the deposition transcript to one more favorable to his side.

The technique of looping attacks several claims that adverse deponent may make in an attempt to escape the negative consequences of his original answer (pardon the repetition, and there's one more coming):

1. *"I misheard the question."*

2. *"I misunderstood the question."*

3. *"I misspoke my answer."*

4. *"The court reporter misreported the question and/or the answer."*

5. *"I initially spoke off-the-cuff. Later I thought of a more apt way to say it, which I would have offered originally had I more time to think."*

6. *"Cross-examiner tricked/bullied me into the answer."*

7. *Cross-examiner misunderstood his own question or my answer.*

F. Detecting a mediocre adverse deposition in 60 seconds:

1. Take any deposition transcript. Find (or ask cross-examiner to locate for you) 5 to 10 continuous pages that deal with a heart-of-the case subject. On such a subject, cross-examiner and adverse deponent may be expected to employ, respectively, their keenest logic and language skills to thwart the other.

2. Ignore all comments by opposing attorney and all comments by cross-examiner to opposing attorney; they are irrelevant to this test.

3. Initially, without reading any of the individual words of the questions or the answers, determine which predominates: longer questions than answers or longer answers than questions.

4. If, on balance over those 5 to 10 pages, the answers about that heart-of-the-case subject are longer than the questions, then invariably that adverse deposition is not a "great" one.

5. Proof? Now read the questions and the answers.

a. You will certainly discover that cross-examiner either didn't ask the leading questions he should have, or did ask them but didn't

insist on the responsive answers he was entitled to receive: "yes" or "no", each of which occupies but a single line in the deposition text.

b. And, you will almost certainly discover that cross-examiner did not road-test case theory arguments and credibility attacks; did not rhetoricate to intensify arguments; did not reason with adverse deponent to craft risk; and did not employ "firewall" techniques. [Oh please, if you come across a cross-examiner's transcript where his performance regarding leading questions was poor, but his performance regarding these techniques was skilled, send webinar speaker the transcript!!]

c. While that cross-examiner in that deposition may have been highly knowledgeable regarding "Battleships" for that particular type of case, he nevertheless took mediocre (i.e., not "great") adverse deposition, the vast majority of litigators in this country – sadly – do for their entire career.

§X MAKE THE IMPLIED OR HIDDEN EXPRESS

A. Pedagogical Point-of-Order:

Long ago, in a famous CLE video that is no doubt still played in trial practice programs at many law schools, the country's top trial advocacy teacher (now deceased) said that for an attorney to become a "minimally competent" cross-examiner required his trying at least 25 jury trials. The teacher cautioned that, even if someone were to acquire such trial experience (rare today for anyone practicing civil law), he still would have no hope of becoming a "good" cross-examiner unless he had been blessed with god-given, can't-be-taught-can't-be-learned talent for cross-examination.

Both propositions are nonsense!! The vast majority of litigators can learn to become effective cross-examiners (i.e., argument-crafters) in far less time than that needed to try 25 cases, in fact, with no jury trial experience whatsoever. With proper teaching and the conscientious application of the

discipline of deposition cross-examination, major progress can be made over the course of taking a dozen adverse depositions.

Students of cross-examination, whether they be in law schools or law firms, should never be "taught" to view cross-examination as something the litigator needs to survive, as something he should merely hope not to screw-up too badly.

Taken one at a time, all the rules and techniques discussed in this webinar (and in *Mastering the Toughest-to-Craft Credibility Arguments*) are eminently learnable … even by law students. Certainly the following rules are straightforward:

1. Lead to the preferred answers. Lead to answers that craft arguments supporting cross-examiner's case theory and undermining the opponent's. Lead adverse deponent to embrace provable deceptions.

2. Reason (a verb). Step-by-step, set forth the reasoning that supports cross-examiner's preferred answer. Then make adverse deponent either agree with the proffered chain of reasoning or force him to fully explain his claim that one or more of the predicates are untrue, making the conclusion inadequately supported; or, make him explain his claim that, although the predicates are true, the proposed conclusion is a *non-sequitur* or an overstatement/understatement.

3. Rhetoricate! Intensify arguments with values, emotions, and self-interests.

4. Firewall testimony. Through the combined use of interrogatory-like questions, universal words, enumeration, and looping try to prevent adverse deponent from credibly making good answers "smaller" and bad answers "bigger."

Yes, considerable difficulty can arise when a litigator first begins employing the rules and techniques in real-time, in an integrated fashion (i.e., as a mastered discipline), all the while trying, simultaneously, to keep close track of all the "Battleship" questions that must be addressed and jousting against

the tag-team of adverse deponent and opposing attorney. But for the determined litigator, it is difficulty that disappears in the short-run.

B. That being said, taking great adverse depositions every time out requires mastery of a **crucial** (an adjective used only three times in this outline) technique, namely, making express the implied and/or hidden "statements" in adverse deponent's answers that give cross-examiner an argument. Mastery of this technique is not likely to be acquired in the short-run because mastery requires the real-time, skillful application of two disciplines: lexicography and informal logic.

C. Lexicography:

1. Affixing the most accurate characterization (including, where applicable, value judgment) to an act, state of mind, event, or condition.

2. Recognizing vague or ambiguous terms (whether first offered by cross-examiner or by adverse deponent) and transforming them, when possible, into bright-line factual claims … claims that are at risk of being proved false.

D. Logic:

1. Applying the Aristotle stuff (e.g., *a = b; b = c; therefore, a = c*) to adverse deponent's assertion for the purpose of determining whether the assertion's implications, if any, should be made express because doing so would give cross-examiner an argument.

Adverse deponent asserts, *"A is true."* Cross-examiner's follow-up: "*If statement A is true, will you therefore agree that B must also be true; C must be false; D is probable; or E is improbable, right?"*

2. Analyzing and defining the boundaries of adverse deponent's assertion to determine if there is a hidden reservation regarding a subject beyond those boundaries.

E. Consider acquisition and study of *"Informal Logic, A Handbook for Critical Argumentation,"* by Douglas N. Walton, published by Cambridge University Press. (Note: Webinar speaker's relationship to Mr. Walton is that of an admiring reader only.)

§XI HEED THE "TRANSFER OF INFORMATION" RULE

A. The rule's short version:

Get evidence <u>from</u> adverse deponent before giving the information <u>to</u> him that helps him determine whether it is better to lie or to tell at least some portion of the truth about a particular subject.

B. The rule's multi-part, ponderously worded, long version:

1. The probability that cross-examiner can coax answers from adverse deponent that support cross-examiner's case theory – especially answers that support a credibility argument against adverse deponent – is inversely proportional (roughly speaking) to adverse deponent's at-the-time-he-answers level of knowledge about the provable details of that case theory. Thus, to best coax such answers cross-examiner must conceal the following from adverse deponent (and opposing attorney, of course), as long as practicable:

a. the specifics of cross-examiner's case theory;

b. the evidence cross-examiner already controls that supports that theory; and

c. any additional evidence that cross-examiner seeks to obtain during adverse deponent's deposition for the purpose of crafting credibility arguments against adverse deponent (especially provable lies) or for the purpose of crafting credibility arguments against any other adverse witness.

2. To coax adverse deponent into committing a provable lie, cross-examiner must endeavor to conceal his store of "Holy Grail" material until after adverse deponent has made his decision to lie or tell the truth about that material. As a reminder, that material is defined as follows:

a. information that is significant to any contested issue in the case (including adverse deponent's credibility, which is always a contested issue) ...

b. information adverse deponent may not know that cross-examiner knows (or even though he knows that cross-examiner knows <u>something</u> about it, adverse deponent doesn't believe that cross-examiner can prove it at trial) …

c. information that cross-examiner judges is available, admissible, and will be deemed proved by the jury even if adverse deponent denies the information's truth and, moreover, affirmatively attacks the credibility of the information's source …

d. which information adverse deponent <u>may</u> want to lie about because he recognizes that by admitting the truth of that information he may harm a self-interest ...

e. which self-interest is driven by adverse deponent's concern regarding the immediate legal consequences in the instant lawsuit and/or the consequences that certain testimony may have on important collateral matters, such as his self-image, personal relationships, reputation in the community, job security and criminal jeopardy.

3. Cross-examiner also violates the Transfer of Information rule by reserving the use of interrogatory-like, enumeration and looping techniques for the important questions only. Such practice runs the unnecessary risk that adverse deponent and opposing attorney will recognize this "special treatment" of a certain line of questioning and will more closely scrutinize the answers for aspects disadvantageous to them.

§XII ATTACK "CRAP"

"Crap" is a word or phrase in the question and/or the answer that reduces the likelihood that cross-examiner will achieve *Whack!* regarding a particular subject because that word or phrase affords adverse deponent a plausible escape from the meaning cross-examiner wants to ascribe to the module of question and answer, which escape may be deemed credible by the jury. During the deposition cross-examiner must strive to eliminate all such escapes. Five frequently recurring types of "crap" are addressed below.

A. The narrow question: it invites adverse deponent to respond with a narrow – and safe or relatively safe – answer. (§X, B discussed the use of universal words, "any," "all," "ever," and the rest. Their use is the principal solution to this type of "crap.")

Example: Bill Clinton on "*60 Minutes*," January 26, 1992 …

Q: *"Who is Gennifer Flowers? You know her?"*

A: *"Oh, yeah."*

Q: *"How do you know her, how would you describe your relationship?"*

A: *"Very limited, but until this – you know, friendly but limited … "*

Q: *"Was she a friend, an acquaintance? Does your wife know her?"*

A: *"Well, yeah, sure. She was an acquaintance, I would say a friendly acquaintance … In a state like Arkansas, which is small, there are literally hundreds and hundreds and hundreds of people that I know … and you know, who keep in touch with us, and that's basically what's the kind of the level of my relationship with her. I knew who she was and she had always been friendly toward me, so there's nothing out of the ordinary there."*

Q: *"She's alleging and has described in some detail in a supermarket tabloid – what she calls a 12-year affair with you."*

A: *"That allegation is false."*

Q: *"I'm assuming from your answer that you're categorically denying that you ever had an affair with Gennifer Flowers."*

A: *"I have said that before, and so has she."*

B. The dodged question: adverse deponent's answer alters an important operative term of the question ... in effect, "answering" a question of his own devising.

Example: Bill Clinton's grand jury testimony, August 17, 1998 …

A: *"If you said Jane and Harry had a sexual relationship -- and you're not talking about people being drawn into a lawsuit and being given definitions and then a great effort to trick them in some way -- but you're just talking about people in an ordinary conversation, I'll bet the grand jurors, if they were talking about two people they know and said they have a sexual relationship, they meant they were sleeping together. They meant they were having intercourse together. So I'm not at all sure that this affidavit is not true and was not true in Ms. Lewinsky's mind at the time she swore it out."*

Q: *"Did you talk with Ms. Lewinsky about what she meant to write in her affidavit?"*

A: *"I didn't talk to her about her definition. I did not know what was in this affidavit before it was filled out, specifically. I did not know what words was used -- were used specifically before it was filled out or what meaning she gave to them. But I'm just telling you that it's certainly true what she says here, that we didn't have -- there was no employment or benefit in exchange. There was nothing having anything to do with sexual harassment. And if she defined sexual relationship in the way I think most Americans do,*

meaning intercourse, then she told the truth."

C. The equivocal answer: it makes no firm and exclusive commitment to a "yes," "no," "don't know," or "don't remember" although the question was framed so that only a "yes," "no," "don't know," or "don't remember" would be truly responsive.

Example: Bill Clinton's Paula Jones deposition, January 17, 1998 …

Q: *"Mr. President, before the break we were talking about Monica Lewinsky. At any time were you and Monica Lewinsky together alone in the Oval Office?"*

A: *I don't recall, but as I said, when she worked at the legislative affairs office, they always had somebody there on the weekends. I typically worked some on the weekends. Sometimes they'd bring me things on the weekends. She – it seems to me – she brought things to me once or twice on the weekends. In that case, with whatever time she would be in there, drop it off, exchange a few words and go, she was there. I don't have any specific recollections of what the issues were, what was going on, but when the Congress is there, we're working all the time, and typically I would do some work on one of the days of the weekends in the afternoon."*

Example: Bill Clinton's grand jury testimony, August 17, 1998 …

Q: *"Did you ever have a conversation with Betty Currie about gifts or picking something up for Monica Lewinsky?"*

A: *"I don't believe I did, sir. No."*

Q: *"You never told her anything to this effect - that Monica has something to give you? That is to say, Betty Currie?"*

A: *"No, sir, I didn't. I don't have any memory of that whatever."*

Q: *"And so you have no knowledge that - or you had no knowledge at the time that Betty Currie went and picked up ... from Monica Lewinsky items that were called for by the Jones subpoena and hid them under her bed? You had no knowledge that anything remotely like that was going to happen?"*

A: *"I did not. I did not know she had those items, I believe, until that was made public."*

D. The needle and the haystack answer: unlike B and C, it does respond to the terms of the question, but the answer is muddled with information beyond the scope of the question, which information is often spun favorably to serve adverse deponent's case theory.

Example: Bill Clinton's Paula Jones deposition, January 17, 1998 …

Q: *"Do you remember giving her (Lewinsky) an item that had been purchased from the Black Dog store at Martha's Vineyard?"*

A: *"I do remember that because when I went on vacation,* ***Betty said*** *that, asked me if I was going to bring some stuff back from the Black Dog, and she said* ***Monica loved****, liked that stuff and would like to have a piece of it and I did a lot of Christmas shopping from the Black Dog and I bought a* ***lot of things for a lot of people*** *and I gave Betty a couple of the pieces and she gave I think something to Monica and something to some of the other girls who worked in the office. I remember that because Betty mentioned it to me."*

E. The "crap" spaceholder answer: it is a vague answer that affords adverse deponent a down-the-road opportunity to plausibly "interpret" his deposition answer in a way that is less advantageous to cross-examiner's case theory than the plausible interpretation cross-examiner preferred. (Yes, attacking "crap" spaceholders involves making the implied express.)

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Example (See Appendix for hypo "facts."):

Q: *"Mr. Church, on the day that Anna resigned, what, if anything, did you do during the afternoon relative to this matter?"*

A: *"I informed the club's board of directors about Anna's allegations and resignation."*

Note: Each of the three underlined terms is susceptible to Church's "interpreting" – broadly or narrowly – the meaning of his original answer. For instance, regarding which members of the board he informed, Church's answer can plausibly mean that he told all 15 members of the board or fewer (maybe a selective few who would help him with a cover-up).

By the time of trial, given the inevitable disclosure of more facts and the fuller development of each side's case theory, Church will be much more able than he was at his deposition to know which interpretation better serves his case theory, and to better evaluate the risk of impeachment should he take that position. Thus, in the deposition, cross-examiner must seek to "glossarize" the "crap" spaceholders to deprive Church of plausible, favorable interpretations at trial.

Q: *"Mr. Church, when you said you informed the club's board of directors, tell me the names of each board member you informed about Anna's allegations on the day of her resignation."*

A: *"I telephoned and spoke to Mr. Jones, Mr. Smith and Mr. Brown."*

Q: *"So, on the day of Anna's resignation, you informed three members of the club's board of directors of her resignation and allegations: one, Mr. Jones, two, Mr. Smith and three, Mr. Brown, right?"*

A: *"Correct."*

F. The "I don't remember" answer: **the** toughest answer for cross-examiner to impeach. Thus, deceitful adverse deponents frequently employ it, each

time thinking to themselves: *"Cross-examiner, you can't prove I'm lying about my memory, not unless you can obtain a 'print-out' of my true thoughts ... and I exclusively control that data."*

1. The potential harms to cross-examiner's case theory caused by the "I don't remember" are three:

a. Sometime after the deposition, adverse deponent may falsely claim that he experienced a revived memory regarding information that is unfavorable to cross-examiner's case theory. This belated memory "revival" deprived cross-examiner of his deposition opportunity (read "sacred right") to road-test attacks against that information in cross-examiner's "laboratory."

b. Adverse deponent's purported memory failure may deprive cross-examiner of testimony by adverse deponent that is favorable to cross-examiner's case theory.

c. Adverse deponent's purported memory failure may deprive cross-examiner of adverse deponent's pre-trial help in identifying leads to other sources of favorable information.

2. Compelling adverse deponent to take clear positions is crucial if cross-examiner is to achieve *Whack!* Therefore, cross-examiner should frame every important issue with a question that requires adverse deponent to respond with but one of four answers: "yes," "no," "don't know," or "don't remember."

With the first three, adverse deponent does take a clear position. He can, of course, change [read: "flee"] that position, but with every change of a "yes," "no," or "don't know" comes the risk that cross-examiner argue that adverse deponent has been inconsistent.

The "I don't remember" answer is different. It allows adverse deponent to claim:

"I didn't remember the information when you first asked me about it, but I do remember it now. I am not changing my position. I really hadn't taken a position before, except to initially say that my memory wasn't

helping me, which was true. My memory can't be inventoried with the flick of a switch; no one's can. I don't control it. I didn't change; my memory did. Happens to everybody a couple of times a day. You can criticize the memory God gave me, but you can't impugn my honesty."

3. Far too many deposition cross-examiners allow far too many "I don't remembers" to go un-attacked. In this webinar's lexicon, an un-attacked "I don't remember" on an important subject constitutes "crap."

To properly analyze – and illustrate – the complete attack against this answer requires far more time than is available in today's agenda. That attack is discussed at length in *Mastering the Toughest-to-Craft Credibility Argument,* a full-day webinar, and comprehensively in *Attacking Adverse Deponent's "I don't know," "I don't remember," & "I do remember,"* a 4-hour webinar. (Regrets that the entirety of the discipline of deposition cross-examination cannot be taught in a 6-hour webinar, not even one that moves as rapidly as this has.)

§XIII DITCH THE "STUPIDEST[1] ORTHODOXY"

A. In the history of civil litigation, the most sacrosanct – and wrongheaded – notion about deposition-taking is the "Stupidest Orthodoxy." All across this country, newbie litigators are being trained by well-intended mentors to infect their adverse depositions with the following nonsense:

Do not disclose credibility attacks during the deposition because doing so gives adverse deponent and opposing attorney far too much time to concoct successful trial escapes from those attacks. Instead, save them so you can dramatically surprise the gonna-be-flabbergasted witness in front of the gonna-be-startled jury ... thereby benefiting enormously from one of those precious Perry Mason moments.

[1] Forgive this terribly blunt adjective. This webinar aims it at no person, but at rules and techniques that are antithetical to taking ***GREAT*** adverse depositions. Its use is not intended to offend, but to, perhaps, jolt from complacency those litigators who – truth be told – have been taking mediocre adverse depositions their entire litigation careers.

B. To perfect a credibility attack against any witness in any case, cross-examiner must confront the witness with the attack, meaning that the witness is given a chance to diminish, even defeat, the attack's force. Witness always prefers to sell an explanation that attributes the problem to a third-person, including cross-examiner, or an explanation that merely admits to a good-faith error on his part, an error that is limited to a narrow subject.

Cross-examiner always prefers to argue that what best explains the credibility issue is that the witness attempted to deceive, and got caught at it.

A witness's universe of potential escapes from cross-examiner's "witness attempted to deceive; therefore, distrust all self-serving statements from the same witness" argument is limited. Those escapes are the following:

1. *"I misheard cross-examiner's question; thus my answer doesn't count."*

2. *"I misunderstood cross-examiner's question; thus my answer doesn't count."*

3. *"I misspoke my answer; thus my answer doesn't count."*

4. *"Court reporter misreported the question or the answer; thus my answer doesn't count."*

5. *"I initially spoke off-the-cuff. Later I thought of a more apt way to say it, which I would have offered originally had I more time to think; thus my answer doesn't count."*

6. *"Cross-examiner mistreated me: he tricked/bullied me into the answer… thus my answer doesn't count. Moreover, distrust/dislike cross-examiner."*

7. *"Cross-examiner misinterpreted his own question or my answer."*

Example: Roberts: *"I never said that I have always spoken about all women in the workplace with the utmost respect. I did make that momentary, yet crass, remark about Anna … but immediately thereafter I stopped all such bad conduct forever."* (See Appendix for hypo "facts.")

8. *"As frequently happens to everyone, I mis<u>remembered</u> (or didn't remember at all) the information sought/referenced in the question. Having had the opportunity to further reflect, I can say …*

   a. my memory has been refreshed. I can now accurately speak about/provide the information sought/referenced in the question. I would have done so earlier … if my memory hadn't failed me."

   b. I still can't remember; the information presented to me may or may not be accurate."

9. *"I misperceived the information referred to in the question and thereafter innocently misreported it. My perception (the ability to see, hear, smell, touch, taste) was flawed (generally or under the conditions of that particular occasion), but not my character. Trust me on all other subjects."*

10. *"I misreported information that I obtained from a person or document. I got it wrong, but not intentionally. Trust me on all other subjects."*

11. *"I misreported information because a person or document misinformed me. I, myself, was victimized. Trust me on all other subjects."*

12. *"The impeachment material* [the testimony of a person, the content of a document, or real evidence] *that cross-examiner attempts to impugn my credibility with is inaccurate.*

   e.g., Roberts: *"Silva got it wrong: he misheard, misremembered, or*

misunderstood who was the subject of the 'stiff shafts, back nine' remark, or misheard, misremembered, or misunderstood the benign context of the remark." (See Appendix for hypo "facts.")

13. *"The impeachment material* [the testimony of a person, the content of a document, or real evidence] *that cross-examiner attempts to impugn my credibility with is dishonest. I can (or I cannot) explain the reason for that dishonesty."*

e.g., Roberts: *"Silva is lying about me."* (See Appendix for hypo "facts.")

14. *"Cross-examiner's interpretation of the impeachment material is mistaken. The correct interpretation does not place my credibility in an unfavorable light."*

e.g., Roberts: *"'Stiff shafts, back nine' had a non-sexual meaning."* (See Appendix for hypo "facts.")

15. *"Cross-examiner's purported interpretation of the impeachment material is dishonest. The honest interpretation does not place my credibility in an unfavorable light. Moreover, distrust/dislike cross-examiner."*

Note: It is almost always better for the witness's attorney to make this argument rather than the witness himself.

16. *"I made an error, but don't know how it happened. It just did. The error had nothing to do with any bad character on my part. Trust me on all other subjects."*

17. *"I did attempt to deceive; but there is mitigation:*

- *"... it is not as big a deal as cross-examiner wants to argue."*

e.g., Roberts: *"It was a very dumb retelling of a very*

dumb golf joke, not a targeting of Anna as my supposed next sexual conquest." (See Appendix for hypo "facts.")

- *"... my conduct was partially, or fully, justified ... I was trying to achieve some good by my deceitful conduct."*

- *"... I've already apologized for my conduct, I am now in my redemptive stage. My character is healed; all my current statements are true. So, we should all move on to new matters."*

C. Cross-examiner must decide whether that confrontation – and witness's opportunity to escape – will occur first at deposition or first at trial.

The rule? Here it is: It is **almost always** wiser for cross-examiner to road-test impeachment evidence and other case theory arguments during the deposition; it is almost always stupid to "save" impeachment evidence for trial. In support, the following true wisdom is offered (pardon, some for a second time):

1. The time available at deposition provides an enormous advantage to cross-examiner. At deposition there is time for cross-examiner to truly deliberate about the question and the answer, and the follow-up questions and the follow-up answers. There is time to pursue the elusive adverse deponent; time to try iffy lines of questioning; time for read-backs; time to scrutinize a document; time to consult a colleague or client; and often time to obtain a transcript of depo session #1 before the commencement of depo session #2 of the same witness. At deposition, cross-examiner will never hear an impatient (and maybe incompetent) judge command, "Move on, counsel." In short, to conduct a great cross-examination requires <u>time</u>, a commodity that is abundant at deposition, but often scarce at trial.

2. At deposition, cross-examiner has the opportunity to engage in aggressive questioning without worry that his case may be harmed by a jury's disapproval of that aggressiveness. Moreover, deposition lines of examination that fail to produce a useful argument sit on the "cutting room floor" of the transcript, never to be seen by a judgmental jury.

Deposition is cross-examiner's laboratory.

3. At deposition, adverse deponent and opposing attorney are much less savvy about cross-examiner's strategy and store of information than they will be by the time of trial. Therefore, there is a greater likelihood that adverse deponent will unwittingly give cross-examiner a good answer at deposition than at trial … by which time both "bad guys" will have gotten to see and analyze much, much more of cross-examiner's case theory.

4. The more meaningful the deposition cross-examination, the more meaningful will be cross-examiner's evaluation of the impact of adverse witness's testimony on settlement value, thereby making cross-examiner's acceptance or rejection of the opposing side's offer far more knowledgeable.

Note: It is assumed that all webinar participants at all times seek a favorable settlement for their clients' lawsuits … and seek relatively free evenings and weekends for themselves.

5. Until discovery cut-off occurs, cross-examiner will have post-deposition opportunities to conduct collateral attacks to test the credibility of adverse witness's testimony. (Often, even after formal discovery closes, the subject can be informally investigated by cross-examiner.)

6. The more meaningful the deposition cross-examination, the more insightful and reliable cross-examiner's trial planning will be.

7. The more meaningful the deposition cross-examination, the more intelligent cross-examiner's settlement strategy will be.

D. The following are possible exceptions to the "nearly always road-test" rule. (Yes, some will occur but rarely.):

1. Someone other than cross-examiner controls the secret evidence; perhaps it's the opposing side. Cross-examiner hopes to obtain it for use at trial. However, cross-examiner believes that a deposition-disclosure of this evidence may create an unacceptable risk that the evidence will become unobtainable by cross-examiner because the opposing side, having been given notice of its importance to cross-examiner, successfully destroys or alters the document in question, or successfully confuses, cajoles, intimidates, or bribes the witness in question.

2. The secret evidence may be useful to the questioning of more than one adverse deponent, in which case, cross-examiner may decide to reserve disclosure of the evidence for a later and more useful deposition.

3. Cross-examiner is concerned that the secret evidence is vulnerable to a truthful or dishonest credibility attack by the opposing side ... if they are given enough time to discover a truthful attack or to concoct a false one. (However, given how relatively easy it is for the opposing side to discover "trial secrets" through the competent use of contention interrogatories, this consideration is not a strong one.)

4. Disclosure of the secret evidence may focus attention on a witness who was previously unknown to, or was deemed unimportant by, the opposing side; and, while that witness's testimony does help cross-examiner, the witness may help the opposing side even more if the latter is given time to investigate the possibilities. Therefore, cross-examiner may reasonably decide not to disclose the secret evidence at deposition.

5. Cross-examiner is concerned that if the secret is disclosed at the deposition, opposing counsel will have time to devise a successful in-limine motion that excludes its presentation during the trial. (Note: Some judges might frown on a trial attorney who surprise-attacks a witness with evidence of borderline-admissibility.)

6. Adverse deponent is vulnerable to a significant character and/or credibility attack. But he is an optional trial witness, meaning the opposing side does not have to call him to testify at trial to prove its case. Cross-examiner judges that the impeachment of this "bad-guy" witness is certain and forceful. Cross-examiner may reasonably decide that, rather than impeaching him at deposition and giving opposing side a major warning about the dangers of calling this witness at trial, it would be wiser to hold the impeachment evidence for surprise at trial so cross-examiner can launch the attack in front of the jury and, impliedly or expressly, fault the opposing side for presenting such a dishonorable witness.

7. Sometimes cross-examiner's key deposition goal is to perfect a narrow record in order to obtain a summary judgment. In that situation, cross-examiner may understandably be concerned that the application of the "nearly always road-test" rule will undermine that key goal by allowing adverse deponent an unnecessary and dangerous opportunity to recognize (with the help of opposing attorney) the legal deficiency in the record and the opportunity to build an escape route from the summary judgment before the deposition is completed.

   a. Sounds like a great goal and a reasonable concern. This webinar offers no trick whereby cross-examiner could take a "deposition-is-trial" deposition that simultaneously shapes effective trial arguments and fashions the kind of narrow record that fosters victorious summary judgment motions for cross-examiners. Alas, nobody knows of such a trick.

   b. There are two gambles that cross-examiner who prefers a narrow record for summary judgment motion may wish to ponder:

      i. First, isn't it the code of civil procedure rule in nearly all jurisdictions that deponent has 30 days from the date the court reporter produces and serves the official transcript for deponent to "correct" the deposition transcript? And if that is so, in that 30-day window can't deponent, with the connivance of opposing attorney, "correct" the deposition transcript to effectively build

that escape route? What makes you think opposing attorney will be too summary-judgment-dumb to notice the problem before the 30-day window expires?

ii. Second, how confident is the narrow-record cross-examiner that the summary judgment motion will be granted? Sure enough to risk screwing up the deposition cross-examination so that at trial, instead of reenacting the "best of the deposition," cross-examiner will be forced to test his extemporaneous cross-examination and argument skills?

8. After the deposition, adverse deponent is moving too far away forever, and cross-examiner knows that he will never be available to appear at trial to challenge the secret evidence that impeaches him. Cross-examiner may reasonably decide to conceal that evidence at deposition, thereby depriving that witness of the opportunity to memorialize his expected denial or evasion of the impeachment. Instead, cross-examiner prefers to impeach that witness at trial *in absentia*.

Note: Before cross-examiner commits to this approach, a close study of the pertinent evidence code sections and case law must be made to determine if the impeachment at trial of the far-away witness will be allowed if the trial court learns that cross-examiner knew of the impeachment at the time of the deposition, knew of witness's trial unavailability, and chose as a stratagem to deny witness the opportunity to deny or explain away the impeachment evidence.

9. Cross-examiner fears that impeaching adverse deponent will cause opposing attorney to drop the aspect of the legal case that makes that impeachment evidence relevant were there a trial.

Example: Cross-examiner represents the plaintiff who is seeking monetary damages, and is confident that he can prove defendant's liability. He controls evidence that forcefully impeaches defendant's credibility regarding a matter that is relevant to the liability issue. Cross-examiner is not interested in settling the case, and fears that if he impeaches defendant, opposing attorney will prevent the jury from learning about it by stipulating to liability while continuing to

litigate damages. Cross-examiner believes the jury will award greater damages if they can see defendant as a dishonorable person.

10. Cross-examiner reasonably fears that if adverse expert is impeached at deposition, opposing attorney will either replace the discredited expert … or just dump him and try the case without any expert in that field. Cross-examiner certainly does not want the expert to be replaced by a less vulnerable expert … and may even prefer that the expert not be dumped.

    a. Before cross-examiner decides to squander the opportunity to fully attack adverse expert in deposition (cross-examiner's laboratory!), cross-examiner must research the pertinent code of civil procedure sections to confirm that a concern of replacement is well grounded.

    b. The decision whether to impeach the adverse expert at deposition may require the consideration of numerous complexities, none of which are touched upon today. They are analyzed in a different webinar: *Attacking the Expert's Pedestal.*

11. Cross-examiner's attack against adverse expert deals with a "correctable" flaw, such as (not an exclusive list):

    a. An oral or written misstatement regarding case information.

    b. A numerical "typo" or a defective mathematical calculation.

    c. A failure to (properly) consider relevant information that is in the expert's possession.

    d. The non-review of relevant information that was never in the expert's possession, but is still obtainable by the expert.

    e. An avenue of relevant investigation that expert did not conduct, but is still doable.

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E. Sometimes cross-examiner's key deposition goal is to perfect a narrow record in order to obtain a summary judgment. In that situation, cross-examiner may understandably be concerned that the application of the "Road-Test" rule will undermine that key goal by allowing adverse deponent an unnecessary and dangerous opportunity to recognize (with the help of opposing attorney) the legal deficiency in the record and the opportunity to build an escape route from the summary judgment before the deposition is completed.

1. Sounds like a great goal and a reasonable concern. This webinar offers no trick whereby cross-examiner could take a "deposition-is-trial" deposition that simultaneously shapes effective trial arguments and fashions the kind of narrow record that fosters victorious summary judgment motions for cross-examiners. Alas, nobody knows of such a trick.

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F. Why is saving impeachment for trial truly the "Stupidest Orthodoxy"?

1. Cross-examiner squanders the opportunity afforded by the risk-free,

ample-time environment (the laboratory) to ask adverse deponent the "whole nine yards" question: a question gathers the components of a credibility argument and organizes them into a jury-can-understand, leading, rhetoric-rich, universal-in-scope, all-terms-made-express, enumerated, interrogatory-like, road-testing series of questions that present the maximum challenge to adverse deponent's extemporaneous ability to articulate – under oath – a believable escape from that credibility argument.

Example (See Appendix for hypo "facts."):

"Mr. Roberts, despite the awesome 'good to be achieved' and, according to you, your life-long devotion to telling the truth, when the Club's investigator asked you on that all-important occasion about date requests to Anna, rather than tell the all-important truth, you did your best to deceive that investigation; you lied about those date requests, didn't you, sir?"

Example (See Appendix for hypo "facts."):

"Mr. Chairman, given that you take all sexual harassment allegations extremely seriously and certainly want to protect your female employees from any sexual predator – even if that predator were the golf pro – and given that you wanted all reasonable steps to be taken to get the full truth concerning Anna's allegations about Mr. Roberts, and given the [details of Church's investigation]*, don't you agree that Mr. Church failed to conduct the kind of fair, thorough, and accurate investigation that the Board had an absolute right to expect ... if it were to fulfill its critical oversight responsibility?"*

2. Cross-examiner cannot make maximal use of the secret evidence in any other deposition.

e.g., Keeping *"stiff shafts, back nine"* secret from Roberts means it can't be used in the deposition of Church or the depositions of any of the Club's board members. (See Appendix for hypo "facts.")

3. Cross-examiner cannot make maximal use of the secret evidence in the written discovery (interrogatories, request for documents, or request for admissions) that cross-examiner propounds.

> e.g., Anna's attorney might want to send an interrogatory to the Country Club that asks whether the comment, if made, would be a violation of the club's employee conduct policy. (See Appendix for hypo "facts.")

4. Cross-examiner cannot make maximal use of the secret evidence in any motion work, whether as the party who initiates the motion or opposes it.

> e.g., Were the "County Club" defendants to file a motion for summary judgment based on the insufficiency of proof of sexual misbehavior, then Anna's attorney would have an awkward decision to make: use *"stiff shafts, back nine"* to defeat the motion, thereby ruining the secret, or run the risk that the motion can be defeated without it. (See Appendix for hypo "facts.")

5. The secret evidence may be discovered by opposing attorney through his formal discovery efforts.

> e.g., In the great state of California where webinar speaker practiced, a party can ask what's called "contention interrogatories." Roberts's attorney could ask, *"Do you contend that Mike Roberts ever uttered any sexual remark about Anna Cheaney? If you so contend, identify all the facts that support that contention, all the witnesses that can testify to those facts, and all the documents that support those facts."* In response, Anna's attorney would have to disclose *"stiff shafts, back nine;"* the witnesses: Roberts, Church, Faulkner, and Silva; and Silva's diary of the event. In short, the "trial secret" will have left the building. (See Appendix for hypo "facts.")

6. The secret evidence may nevertheless be discovered by opposing attorney through his informal discovery efforts, e.g., witness interviews.

e.g., Silva may have told another person about having heard the *"stiff shafts, back nine"* remark and of having reported it to Anna so that she could tell her attorney. That person may then tell Roberts. Trial secret gone. (See Appendix for hypo "facts.")

7. 100% minus 98.2% equals 1.8%. (Google: *"Marc Galanter"* + *"Vanishing Trial"*)

8. Opposing attorney may make a broadly framed motion-in-limine that requests cross-examiner be prevented from presenting evidence that exceeds the evidence that cross-examiner's client provided in response to opposing attorney's (supposedly) all-encompassing sets of interrogatories, request for documents, and request for admissions. The motion argues that it would be unfair were cross-examiner allowed to offer surprise evidence, which cross-examiner improperly concealed during discovery.

Such motions are not rare; nor is the risk that the trial judge, who is ignorant of cross-examiner's secret evidence, will be inclined to grant opposing attorney's on-its-face reasonable request. How does cross-examiner preserve the right to present the secret evidence, which he believes is not covered by the judge's order (a view that won't likely shared by opposing attorney) without prematurely alerting opposing attorney to that evidence?

9. The trial judge, perhaps looking to shorten the projected length of the trial, may require cross-examiner to disclose the content of a particular witness's testimony, thereby forcing disclosure of the secret evidence.

10. Cross-examiner cannot make maximal use of the secret evidence during voir dire, meaning he can neither select/challenge a juror on the basis of the juror's reaction to that evidence nor begin in voir dire to pre-condition jurors to form a favorable-to-cross-examiner view of it (a process to be continued in the opening statement).

11. Cross-examiner cannot make maximal use of the secret evidence in opening statement, thereby weakening the persuasive force of that invaluable advocacy opportunity.

12. Because cross-examiner cannot absolutely control the order of witnesses at trial, if the secret evidence is relevant to the cross-examination of more than one adverse witness, it may come about that the adverse witness of lesser importance testifies first. In that case, cross-examiner's problematic choices are the following:

a. Seek to keep the secret evidence a surprise for the more important witness by asking no questions about it during the cross-examination of the first adverse witness. (But no questions means no value to cross-examiner.)

b. Seek from the judge the right to recall the first adverse witness back to the stand to question him on the secret evidence … after the second adverse witness has been surprised by that evidence. (Good luck getting a judge to agree … without having to give an explanation that reveals something about the secret evidence.)

c. Use the secret evidence in the cross-examination of the (less important) first adverse witness, thereby ruining the original plan of surprising the other (more important) adverse witness.

> e.g., If for some reason Church were to testify before Roberts testifies, then cross-examiner has a problem. Cross-examiner wants to surprise Roberts with the *"stiff shafts, back nine"* remark, but also wants to confront Church about having laughed at it, instead of admonishing Roberts. In this situation, cross-examiner cannot confront Church without giving Roberts notice of the attack. And, rare is the trial judge who is going to allow cross-examiner to conduct only a partial cross-examination of Church, reserving the right to call him back about an issue that cross-examiner declines to disclose to the court and Roberts's attorney. (See Appendix for hypo "facts.")

13. From cross-examiner's lead-in line of questioning, opposing attorney may see the surprise – and trouble for his witness – developing. In an attempt to preclude cross-examiner from asking the keystone question, opposing attorney may make an objection, or request that both attorneys approach the bench, or request that the judge consider a recess so that the issue (about which the judge is most likely ignorant) can be given its due consideration without requiring a lot of whispering in front of the jury. This activity – especially if it involves a recess – will give the witness time to think about what's coming next, perhaps enough time to form a believable escape.

> e.g., Cross-examiner begins to question Roberts about the remark, and his attorney immediately requests the court for permission to approach the bench about a violation of a matter of prejudice to Roberts's right to a fair trial. Well founded or not, if the trial judge entertains a sidebar or, worse, decides to take a recess to resolve the issue, Roberts will be given time to concoct a composed response to the remark. Perhaps he will simply concoct the lie that Silva is lying and has a motive to lie because … whatever. The surprise impeachment is gone. (See Appendix for hypo "facts.")

14. Cross-examiner must be concerned that the trial court, through ignorance or impatience, enters a bad ruling regarding cross-examiner's trial use of the impeachment evidence.

15. If cross-examiner does keep the secret evidence a surprise for the best moment in the trial, and he does confront the adverse witness with the keystone question …

a. Does the witness give a truthful answer that undermines cross-examiner's line-of-examination goal?

i. Was cross-examiner misinformed by someone about the authenticity or meaning or import of the secret evidence?

ii. Did cross-examiner mishear, misremember, misunderstand, misevaluate something about the secret evidence?

b. Does the witness give a deceptive answer that initially undermines cross-examiner's line-of-examination goal? If so …

i. Does cross-examiner possess at that moment sufficient extemporaneous questioning skill to expose the deception?

ii. Does cross-examiner possess at that moment sufficient evidence to refute the deception?

iii. Does the judge give cross-examiner sufficient time to bring that questioning skill and evidence to bear so that the deception fails?

16. The credibility and importance that the jury assigns to the previously secret evidence may produce a result whose net value to cross-examiner is only equal to – or perhaps (substantially) less than – that value which would have been produced by settlement … had opposing attorney been given a pre-trial opportunity to evaluate the deposition confrontation between cross-examiner and adverse deponent regarding that evidence. (Remember 1/3rd of adult American believe in the existence of ghosts. What will they believe about your case theory?)

17. If cross-examiner intends to privately "try" the case to a mock jury, it may be necessary for those "jurors" to know adverse deponent's response to the secret evidence so it can render its best "verdict." (This was suggested to webinar speaker by a top litigator at a top-end litigation firm. Yes, relatively few litigators will ever "try" a case to a mock jury because of the expenditure of money and time required for such an exercise. Webinar speaker never did.)

§XIV CODA

A. All webinar "students" are earnestly encouraged to judge the quality of David Boies's deposition Q&A of Bill Gates for themselves. Google these four words: *"Good afternoon, Mr. Gates"* and you will be taken to a

Washington Post web site where you'll find the first question that Boies asked Gates, along with the rest of that famous – and lavishly praised – deposition. (A fair amount of that praise can be found in Boies's own book, "Courting Justice," especially in chapter four, entitled "Conversations with Bill Gates." It is truly a fascinating read.)

The first 90 pages of the deposition, following "Good afternoon, Mr. Gates," principally deal with the Netscape issue, which the webinar lucidly explained. You will be snap-of-the-fingers able to understand the "fight" between cross-examiner and adverse deponent; no knowledge whatsoever of antitrust law will be necessary.

Read at least 30 pages of that Q & A. Come on; you can do it! It's gonna make you feel good! Compare the cross-examination techniques employed there against what you now understand about "The Magnificent Seven." Craft all those leading, interrogatory-like, rhetoric-intense, looping, whole-nine-yards questions that <u>you</u> would love to have asked Gates. And, craft the effective attacks against his frequent "crap" answers … that so often went unchallenged, perhaps unnoticed. To that end, consider the following analysis:

Q: ***"Did you make any effort in 1996 to find out what Netscape's revenues actually were?"***

Comments:

1. What is the subject: who is the "you"? Just Gates or Gates <u>and</u> other Microsoft people? If it is Gates and others, does "others" include only Microsoft employees, as opposed to, for instance, private investigators? This poorly formed question doesn't define "you."

2. If "you" means anyone ever associated with Microsoft, has the question, nevertheless, allowed Gates to credibly answer, "I don't know" when what he might really mean (or claim at trial) is "I don't know for sure because I do not have percipient knowledge of what efforts others may have made"?

3. Assume the "you" is Gates alone. <u>If</u> non-leading is the way cross-examiner wants to go, here is a better non-leading

question because it makes a wall-to-wall, ceiling-to-floor demand:

"Did you ever make <u>any</u> attempt <u>whatsoever</u> to obtain <u>any</u> information regarding Netscape's revenues for <u>any</u> time period?"

4. If cross-examiner knows the answer he prefers, then he should lead to that answer:

"Isn't it true that at some time you [Bill Gates] *made at least some attempt to obtain some information regarding Netscape's revenues?"* [Yes, hardly pretty, but it is universal … and that is "pretty" of a far more important kind.]

5. Cross-examiner should strongly consider asking a reasoning question:

"Given that you and others at Microsoft were concerned that Netscape's browser posed a threat to Microsoft's operating system's continued domination in the computer field, you desired to obtain information about Netscape's revenues, the amounts and sources, right?"* (*Add rhetoric, perhaps *"serious"* or *"tidal-wave"* or *"jihad-worthy"* to intensify *"threat."*)

A: ***"Personally?"***

Comment: This is a legitimate request for clarification of the definition of "you," as used in the question.

Q: ***"Either personally or through some of the many employees of Microsoft?"***

Comments:

1. This is a fragmentary question. To be intelligibly re-enacted at trial, it requires the addition of *"Did you make ... "*.

2. Consider asking a Gates-only question; then asking an everybody-other-than-Gates question.

3. Make express that cross-examiner seeks disclosure of all information, however uncertain it may be, not merely first-hand, no-doubt-about-it knowledge.

A: ***"Oh, I'm sure there were people at Microsoft who looked at Netscape's revenues during that year."***

Comments:

1. This response is silent on the subject of whether Gates himself engaged in any such effort, which effort would presumably more forcefully support Boies's case theory than the efforts of Gates's subordinates.

2. Why did Gates not answer with a categorical "yes"? Is it because of his lack of memory or lack of percipient knowledge? There needs to be a follow-up question that seeks an explanation of his "I'm sure."

Q: ***"Did they communicate with you as to what those revenues were at all?"***

Comments (repeated from earlier in the webinar):

1. Better question: *"Did you ever obtain* (or *receive, acquire, get*) *any information whatsoever regarding Netscape's revenues for 1996 from any source?"*

2. Better, not only for the universals, but the broader verb. And, why not broaden the time frame to "ever"?

3. What is the antecedent of the pronoun "they"? Why run the unnecessary risk that Gates <u>silently</u> interprets the question narrowly (or the risk that he later claims to have done so) by only responding about the one or two individuals he may have directed to get information?

A: ***"Among the thousands and thousands of e-mail messages I get, I'm sure there were some that had for certain periods of time information about that."***

Comment: Again Gates uses the "I'm sure" formulation that goes unexplained. Why can't he give a categorical "yes"? What degree of uncertainty remains?

Q: ***"Did you request any information concerning Netscape's revenues in 1996?"***

A: ***"I'm sure I was in meetings where the information was presented, but I don't think I was the one who specifically asked for the presentation."***

Comment: Third time in a row Gates gives an "I'm sure" … for which Boies fails to seek a definition or explanation.

Q: ***"Whether you specifically asked for a presentation in a meeting or not, did you ask people to provide you with information concerning Netscape's revenues in 1996?"***

Comment: Again a question that Gates may silently interpret narrowly to mean "ask people to provide you: Bill Gates."

A: ***"I may have asked some questions about their revenue."***

Comment: Why the weak *"may have"*? What does that mean?

Q: ***"Do you recall doing that, sir?"***

A: ***"No."***

Comments:

1. Finally a "yes/no" answer to a "yes/no" question, unlike prior four "yes/no" questions.

2. Make the claimed limits of his memory express: *"So you are saying that, despite the 'Internet Tidal Wave' memo you authored and all the concerns about the serious threat posed by Netscape to Microsoft's operating system's continued dominance in the computer world, you are not able to summon to mind even the slightest memory of your having any communication with any person at any time about it being a good idea for Microsoft (whether it be you or someone else associated with Microsoft in any capacity) to obtain information about Netscape's revenue, right?"*

3. Read the transcript to see if this failure of memory was effectively challenged. (It wasn't.)

B. One last exhortation:

Deposition cross-examination is an intellectually rigorous discipline; its dozens of logically integrated RULES inform cross-examiner how best to attack archetypal deposition problems and exploit archetypal deposition opportunities ... in every case, for the rest of time.

The art and science of taking adverse depositions, lay and expert, is the most crucial of all pre-trial litigation skills. Yet, generation after generation, even the very best law schools and law firms across this country have pathetically failed in their obligation to train new litigators. Sadly, therefore, low-quality adverse depositions abound; great depositions are a rarity.

Many corner-office partners who run large litigation departments are completely unaware how mediocre their own adverse depositions have been ... for their entire careers! But, really, how could they know since they too received the same hand-me-down deposition "wisdom" everyone else did, including these "pearls":

- the chief purpose of a deposition is to discover the witness's story [i.e., do the "Battleships" game], and

• customarily save impeachment for surprise at trial [which trial only rarely occurs].

Out of allegiance to such wisdom, the community of litigators has unwittingly struck a *de facto*, patty-cake arrangement whereby each side to the lawsuit has "agreed" to take no better than mediocre depositions, thereby ensuring that neither side holds any "unfair" deposition-advantage. Mind-boggling, especially given how quickly any motivated litigator could learn to take dramatically better adverse depositions ... with the right teacher.

While it would be dishonest to assert that every litigator could master this discipline, anyone with the brights to make it through law school could certainly acquire deposition cross-examination skills that are markedly superior to those currently employed by the vast majority of the country's litigators, including some in the Pantheon of civil litigators.

C. With apologies to Winston Spencer Churchill:

Now, this is not the end.
It is not even the beginning of the end.
But it is, perhaps, the end of the beginning ...
of your diligent study of the awesome
discipline of deposition cross-examination.

And to George Lucas:

May the *WHACK!* be with you!

APPENDIX #1

"Country Club"

Cross-examiner's client is Anna Cheaney. Nice person. From February 2016 until her resignation in early June 2016, she worked at Diablo Canyon Country Club as the 10th tee snack stand attendant. Her immediate supervisor was Mike Roberts, the club's golf pro.

Roberts believed himself irresistible to women. Within minutes of hiring her, he was determined to make Anna his new conquest. In fact, immediately after she walked away from the pro shop where the job interview had occurred, Roberts remarked in the presence of Faulkner and Silva, two of his subordinates, "When Anna starts working here, there'll be a lot of stiff shafts on the back nine." (Having strongly disapproved of Roberts's prior conduct toward other women in the workplace, Faulkner and Silva secretly informed cross-examiner of that remark before he took Roberts's deposition.)

Anna was never interested in Roberts; nevertheless, he engaged in a series of unwanted and offensive acts toward her: sexual remarks, insistent requests for dates and "accidental" touchings of her body. All of this conduct occurred during his visits to the 10th tee snack stand.

Roberts's immediate supervisor was, both then and now, the general manager, John Church. Roberts has been DCCC's golf pro for 8 years and has become good friends with many powerful members of the club. Church, on the other hand, was an outside hire who only became general manager in April of 2016.

Although, Church heard about Roberts's inappropriate womanizing in the workplace soon after being hired, he decided that unless he received direct complaints about Roberts, he would take no action, not even make any inquiries. Church did not want to buy trouble with the entrenched golf pro so early in his tenure.

On two occasions, both in late May, Anna complained to Church that Roberts was being "far more friendly" to her than she was comfortable with, and she asked that Church get him to stop. However, Roberts's inappropriate conduct continued. On June 25, immediately following a particularly offensive verbal encounter with Roberts, Anna left the snack stand, walked to Church's office and tearfully resigned.

In a 6/28/16 memo to DCCC's board of directors, Church wrote:

On June 25, 2016, Anna Cheaney resigned. On that day, for the first time, she made vague complaints about Mike Roberts and alleged sexual harassment. Due to her emotional presentation on that day, I was unable to obtain a coherent version of events. I advised her to return when she felt more capable of providing additional information. To date, she has not availed herself of that offer.

Despite her failure to return or to re-contact me, in an abundance of caution, an investigation was conducted. In the course of that investigation, I thoroughly interviewed Mr. Roberts about any possible inappropriate supervision of Ms. Cheaney. He assured me that no inappropriate supervision or sexual harassment had occurred. He did, however, indicate that there is occasionally good-natured joking around the pro shop and on the golf course, sometimes of a sexual nature. Also, apparently Ms. Cheaney, herself, had made several such remarks at work.

Mr. Roberts also indicated that there were several serious irregularities in the inventories at the 10th tee snack stand, about which he had questioned Ms. Cheaney. She had responded to his reasonable inquiry in a rather defensive and evasive manner. The accounting department is reviewing this matter.

Mr. Roberts's conduct toward female employees or female Club members has never previously been in question and cannot be seriously questioned in this instance.

(s) John Church

AN EXCERPT FROM THE "DEPO" OF MIKE ROBERTS

#1/Q: *Mr. Roberts, having discussed your background and work experience, let's turn our attention to your present position. What is your job title at Diablo Canyon Country Club?*

#1/A: *I'm the golf pro.*

#2/Q: *How long have you held that position?*

#2/A: *About eight years.*

#3/Q: *Is it a full-time position?*

#3/A: *If you do it right it is.*

#4/Q: *Generally, describe your duties.*

#4/A: *Well, mainly I run the golf course and the driving range. Then there's the pro shop, the golf cart concession, the tournaments, the 10th tee snack shack. And yeah, of course, the golf lessons. There are a lot of little things that inevitably come up that I've got to take care of.*

#5/Q: *Well, as the person in charge of the 10th tee snack shop, were you the supervisor of my client?*

#5/A: *I'm not really in charge of the snack shack. But to answer your question, I was one of her supervisors.*

#6/Q: *What do you mean, "one of them"?*

#6/A: *Well, the snack shack is hardly my top priority. And I've got so many things I've got to do - need time for supervision of other things. For example, Dean Faulkner, the greenskeeper - he passed away a little while ago - one time I asked him to step in … take a look at things.*

#7/Q: *Who is your supervisor?*

#7/A: *Well, that's kinda hard to say. Sometimes ... sometimes it's John; ah ... others times it's probably a member of the board of directors. Kinda depending on what the topic is.*

#8/Q: *Well, which one do you answer to?*

#8/A: *Well ... ah ... let's see ... that's ... I guess I have to answer to a lot of people including the general manager and the board of directors. The golf course is my main job, my main attraction for this thing and the men are a big part of it. So I guess the golf pro has to be responsive to the concerns of a lot of people.*

#9/Q: *But isn't Mr. Church the person who is directly responsible for monitoring your job performance?*

#9/A: *Well, my job performance consists of a lot of things. John's only been here for about 18 months and some of the members of the board have been here 20 years. So some members, particularly board members, will come to me directly about an issue of interest to them. It's not just as simple as you want to make it.*

#10/Q: *Well, who hired you, the board or the general manager?*

#10/A: *I'm sure that a decision like that would be a board matter.*

#11/Q: *Are you the person who hired my client?*

#11/A: *I probably had something to do with it but ... you see I've got 25, 30, 40 people who work for me, counting caddies and depending on the season. They come and they go over time, I just can't remember if I've hired one or another ... but I probably gave the final "okay." Most of my time is really concentrating on the course and making sure the course is in playing shape and lessons.*

#12/Q: *What are the job duties of the person at the snack stand?*

#12/A: *Well, I may not be the best person to answer that, but generally they're to sell snacks and soft drinks to the golfers coming off the 9th tee ... coming off the hole ... and to provide golf messages for the ... for the golfers.*

#13/Q: *Good looks have nothing whatsoever to do with being able to carry out those duties, do they?*

#13/A: *I don't understand your question.*

#14/Q: *When Anna Cheaney was first hired to be the 10th tee snack stand person, did you say in the presence of Mr. Faulkner and Frank Silva, "You take one look at Anna and there'll be a lot of stiff shafts on the back nine"?*

Note: Until this moment Roberts did not know that Faulkner and Silva had secretly told cross-examiner about this incident, including the fact that Church had been present at the time the statement was made and, rather than admonishing Roberts, Church had laughed heartily.

Important: Prior to Roberts's deposition, cross-examiner concluded

that, were a trial to come, Silva [Faulkner has gone on to his celestial reward] would be available to testify, his testimony would be admissible, and a jury would likely determine that his testimony was credible … even in the face of denials by Roberts and Church.

#14/A: *Don't answer that question. Counsel, if you have any alleged statement that pertains to my client, then I want to see it before we continue this deposition.*

#15/Q: *I don't have to show you any statements. What authority do you have for that?*

#15/A: *Try fundamental fairness. Please think about that while we take a short break and I call my office for messages.*

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APPENDIX #2

The four Q&A excerpts below come from the key deposition in the *U.S. vs. Microsoft* antitrust case. The questioner is David Boies, who has been praised as "the most brilliant litigator of his generation," "the Clarence Darrow of his generation," "the national lawyer of the year" (for 1999 and 2000, per the *National Law Journal*), "the Wall Street lawyer everyone wants," "the Michael Jordan of the courtroom," "a superstar deposer" (referring to this very deposition), among thousands of other accolades. The witness is Microsoft's Bill Gates, who was at the time of the depo (Aug/Sept 1998), and remains, the world's richest person. The depo was a *battle royale* between two mighty opponents. [Note: The questioner for first 152 pages of the 682-page was Stephen Houck, Boies's co-counsel.]

Deposition excerpt, beginning at page 159

Q: "*Did you make any effort in 1996 to find out what Netscape's revenues actually were?"*

A: "*Personally?"*

Q: "*Either personally or through some of the many employees of Microsoft?"*

A: "*Oh, I'm sure there were people at Microsoft who looked at Netscape's revenues during that year."*

Q: "*Did they communicate with you as to what those revenues were at all?"*

A: "*Among the thousands and thousands of e-mail messages I get, I'm sure there were some that had for certain periods of time information about that."*

Q: "Did you request any information concerning Netscape's revenues in 1996?"

A: "*I'm sure I was in meetings where the information was presented, but I*

don't think I was the one who specifically asked for the presentation."

Q: "*Whether you specifically asked for a presentation in a meeting or not, did you ask people to provide you with information concerning Netscape's revenues in 1996?"*

A: "*I may have asked some questions about their revenue."*

Q: "*Do you recall doing that, sir?"*

A: "*No."*

Deposition excerpt, beginning at page 196

Q: "*And did you in 1996 make a conscious effort to try to affect what financial analysts analyzing Netscape did and thought?*"

A: "*I personally didn't, no."*

Q: "*Did Microsoft?"*

A: "*Microsoft, I'm sure, made analysts aware of what we were doing with our products including the innovative work we were doing. And I'm sure that had an effect."*

Q: "*Did you or others at Microsoft, to your knowledge, do things with the purpose of affecting what analysts analyzing Netscape wrote or thought?*"

A: "*Well, our primary focus is going out and talking about our products and what they do for customers. If the customer or the analyst asks us a question about Netscape or asks for a comparison, it's not unusual to give them an answer."*

Q: "Did you or, to your knowledge, others at Microsoft do things for the purpose of affecting what analysts analyzing Netscape wrote or thought?"

A: "*We certainly let people know about the good work we were doing. The primary purpose of that wasn't to affect Netscape, but certainly one of its effects would have been to affect how they viewed the competition between Microsoft and Netscape.*"

Q: "*In addition to talking about your good works, was one of the purposes of talking about giving away Internet software for free to affect the way analysts looked at Netscape?*"

A: "*Well, I doubt you can ascribe too much effect purely to the talking about it.*"

Deposition Excerpt #2, beginning at page 206

Q: "*In 1996 did you believe that Netscape posed a serious threat to Microsoft?*"

A: "*They were one of our competitors.*"

Q: "*Were they a serious competitor in your view, sir?*"

A: "*Yes.*"

Q: "*Did you believe that Netscape's browser was a serious threat to your -- that is Microsoft's -- operating system's business?*"

A: "*Well, you have to think about what work we were going to do to improve our software and then what Netscape and others were going to do to improve their software. You can't just look at it statically. It's more the work than -- the new things you do than the history.*"

Q: *"Did you believe that by 1996, that Netscape and Netscape's Internet browser was a serious alternative platform to the platform represented by Microsoft's Windows operating system?"*

A: "Well, as was articulated by Marc Andreessen and other people from Netscape, if we didn't do new product work, that was a very likely outcome.

Q: "What was a very likely outcome?"

A: "*That the value of the Windows platform would be greatly reduced."*

Deposition excerpt, beginning at page 607

Q: "*Now, when Brad Chase writes to you and the others 'we need to continue our jihad next year,' do you understand that he is referring to Microsoft when he uses the word 'we'?"*

A: "*No."*

Q: "*What do you think he means when he uses the word 'we'?"*

A: "*I'm not sure."*

Q: "*Do you know what he means by jihad?"*

A: "*I think he is referring to our vigorous efforts to make a superior product and to market that product."*

Q: "*Now, what he says in the next sentence is, 'Browser share needs to remain a key priority for our field and marketing efforts;' is that correct?"*

A: "*Yes."*

Q: "*The field and marketing efforts were not involved in product design or making an improved browser, were they, sir?"*

A: "*No."*