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Taking Exceptional Depositions[1]

Introduction

Depositions too often are nothing more than discovery exercises comprised of an endless, persistent string of "who, what, where, why, when, how" questions. At the end of such a deposition you know (maybe) most of what a witness knows or remembers. Big deal. No defense attorney or carrier will lose sleep because you managed to spend 6 hours asking a corporate representative "who, what, where, why, when, how" questions, and those kind of questions by themselves are unlikely to change case value or increase the chances of prevailing in court either by motion or verdict.[2]

Exceptional depositions do not result from this kind of approach, but from a focused effort to elicit testimony that accomplishes specific goals critical to case outcome. This paper discusses the techniques required for anyone who wants to take exceptional depositions, including exhaustion, boxing-in, re-stating and summarizing, the use of learned treatises and published studies, cross skills needed with difficult and evasive witnesses, and establishing standards of conduct (or care) through defense witnesses. Each of these techniques has a special purpose and when there are used and sequenced appropriately within a deposition the outcome can be exceptional.

I. How to effectively use Exhaustion

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[1] The author thanks (and has freely borrowed from) his friends and gifted trial lawyers, Mark Kosieradzki of Minnetonka, Minnesota; Paul Scoptur of Milwaukee, Wisconsin, and Tom Vesper of Atlantic City, New Jersey.

[2] Because these kinds of questions are not focused on prevailing on a motion or a verdict, their ability to accomplish this kind of goal is diminished. While it is true "Even a blind hog finds an acorn every now and then", that's hardly a strategy for success.

Exhaustion is finding out everything a deponent knows. It is the one goal that all examining attorneys strive to accomplish in their depositions. Unfortunately, it is freakishly uncommon to find a transcript where exhaustion has been accomplished. What is more common is that when preparing for trial and reviewing transcripts "holes" are discovered where the witness' testimony on one or more critical points was not exhausted or that a question was not explored in enough detail to predict what will be said at trial. This generally occurs for three reasons: over-use of closed ended questions, failure to make the witness say they have nothing else, and particularly in the case of experts- *letting the witness' answer drive the examiner to ask about a new topic before exhaustion has been accomplished on the current topic.*

The first reason that traditional "exhaustion" examinations fail is that many so called exhaustion questions are not open ended. Instead, the witness is asked a closed-ended question that allows the witness to limit his/her answer and NOT exhaust all the facts they know or recollect. For example, is:

"What cars did you see in the intersection at the time of the wreck?"

a question that has the potential to exhaust? No matter what the follow-up is, the initial question allows the witness to limit his answer to "cars" and "intersection" and "at the time of the wreck". Answers to this question will not include all the facts known by the witness. Vehicles other than cars, areas approaching the intersection, and actions before the impact are not covered by the question. An opened ended question would be "Tell me what you recall" followed by "Tell me more" and "What else".

In addition to the use of open-ended questions, the second key technique to effective exhaustion is the use of simple follow-up questions like the following after each answer:

- "What else"
- "Did anything else happen?"
- "Was anything else said?"
- "Did you observe anything else?"
- "Do you remember anything else?"
- "Are you sure that's all you remember/saw/heard?"

- "Have you told me everything you remember about the accident?"
- "Is there anything else you think I need to know?"
- "Is there anything else you know or remember that you would think would be important to know if you were asking the questions?"
- "Is that everything?"
- "Have you told me everything?"

The third key to exhaustion is that *the examiner must not allow the witness' answer to dictate the examiner's next topic until exhaustion has been accomplished with the current topic*. Witnesses often take control of the direction of a deposition by mentioning facts, opinions, or perspectives that are so tempting that the examiner goes to that "rabbit trail" before he/she has exhausted the witness on the original topic and has confirmed exhaustion on that topic. Exhaustion requires the discipline to make sure you have all of the witness' knowledge on a topic and confirming that you have it all before moving on to a new area.

Example: Failing to Exhaust Because of Rabbit Trails

Q: Give me all the reasons you believe Dr. Smith conformed to the standard of care.
A: He discussed the alternatives to surgery with the patient, he identified the median nerve at the time of the surgery which was *abnormally small and congenitally demylenated (this part of the answer has nothing to do with why the witness believes Dr. Smith conformed to the standard of care, but creates two rabbit trails for an examiner whose original goal was to exhaust "all the reasons Dr. Smith conformed to the standard of care"),* he protected the median nerve with a retractor and he identified the injury to the median nerve in the immediate post-operative period.

Q: What do you mean abnormally small? (the examiner begins following the first rabbit trail)

A: Well, clinically we rarely see a median nerve under 40mm, and this apparently was somewhat less than that?

Q. How do you know that? (the examiner continues to follow the first rabbit trail)

A. Well, the Benz retractor is 40mm at its tip and the operative note says it covered the nerve.

Q. Well the fact that a median nerve is less than 40mm doesn't necessarily mean it is

fully functional does it?

A. It may or may not be, it depends on different factors.

Q. What would those factors be? (the examiner begins following a new rabbit trail and still hasn't exhausted the witness on all the reasons Dr. Smith conformed to the standard of care)

Exhaustion cannot be accomplished when the examiner moves to a new topic before completing the exhaustion.

Example: Exhaustion done correctly[3]

Q: Give me all the reasons you believe Dr. Smith conformed to the standard of care.

A: He discussed the alternatives to surgery with the patient, he identified the median nerve at the time of the surgery which was *abnormally small and congenitally demylenated* , he protected the median nerve with a retractor and he identified the injury to the median nerve in the immediate post-operative period.

Q: Have we now covered all of the reasons why you believe Dr. Smith conformed to the standard of care?

A: I think for the most part, yes.

Q: Well I want to make sure, and when you say for the most part, that implies to me that there may be more. Are there any more reasons why you believe Dr. Smith conformed to the standard of care other than the ones we have covered?

A: Well, now that I think of it there is one more. The use of the longitudinal incision was the appropriate
incision to use here.

Q: Have we now covered all of the reasons you believe Dr. Smith conformed to the standard of care?

A: Yes.

Q: Is there any other information you need to know before you can fully answer this question?

[3] This example of exhaustion (without the rabbit trails I added for this example) was provided by Attorney Paul Scoptur.

A: No, I have all the information I need.

Q: Is there anything else you have asked for, asked to see or review, before today's deposition that you haven't been given?

A: No.

Q: What else would you need to know before you can say I have given you all my opinions as to you why you believe Dr. Smith conformed to the standard of care?

A: Nothing else.

Q: So with that in mind, have you now given me all of the reasons as to why you believe Dr. Smith conformed to the standard of care

A: Yes I have, there is nothing else.

Now, *after* exhausting the witness on the original question the examiner can ask about the "abnormally small and congenitally demylenated" rabbit trails created by the witness. It is fine to run down rabbit trails presented by witnesses in depositions, but only after you have accomplished the goal you were striving for first. To do otherwise is to cede control of the deposition to the witness, and fail to accomplish your original purpose, i.e. to exhaust the witness on a particular topic.

II. How to effectively use Restating and Summarizing

Exhaustion of a particular topic may require many questions and many pages in a transcript. If left in its raw form, the testimony maybe unmanageable and unusable with a jury or court. Restating and summarizing condenses testimony that may be spread across several pages and makes it more concise. The concise restatement and summarization of testimony creates soundbites for use with motions, mediation presentations, and trial presentations[4]. They also make it possible to impeach the witness if necessary. Restatement and summarization are meant to be used in combination with exhaustion, no matter what exhaustion preceded the summarization. After restating and summarizing the deponent's testimony, there should always be a follow up question like "Is that everything?", "Is that all?", "Is there anything else?" or something similar.

Beginning to use the techniques of restating and summarizing may not seem natural when most of the time you are asking questions. Here are some lead-in statements that you can use to begin your restatement and summarization:

- "Let me understand what you have told me."
- "What you are saying is…"
- "Let me make sure I get it."
- "Are you saying that…?"

Example: Restatement and Summarization[5]

Q: So let me make sure I understand what you have said. You indicated that Dr. Smith conformed to the standard of care in several ways, correct?

A: Yes

Q: The first way was in advising the patient of her alternatives, right?

A: Yes.

Q: The second was in identifying the median nerve at the time of the surgery, right?

A: Yes

[4] Editing/creating video clips is simplified by used of this technique.

[5] This example of restatement was provided by attorney Paul Scoptur.

Q: The third way was in identifying the injury to the median nerve in the initial post-op period, right?

A: Yes.

Q: Fourth was using a retractor to protect the nerve, right?

A: Yes.

Q: Fifth was the type of incision used, correct?

A: Yes.

Q: Have we now covered all of the ways as to you why you believe Dr. Smith conformed to the standard of care? (exhaustion)

A: Yes.

Q: Nothing else? (exhaustion)

A: Correct, there is nothing else.

III. How to effectively use Boxing In

Boxing in is used in two circumstances and consists of two different techniques. First, boxing in *by bracketing* is used to commit the witness to facts when the witness is trying to be evasive by saying "I don't know", "I'm not sure" or "I don't remember". The second form of boxing in (FWD – facts, witnesses, documents) is used when you want to reduce the risk of any change in testimony after a witness has told you all they recall, all they know, all of their opinions, or that they cannot remember.

Boxing by bracketing is accomplished by using dates, events, distances, time, or anything that can be quantified.

Example: Boxing in by Bracketing

Q: How far were the cars apart after the accident?

A: I don't know.

Q: Was it at least 10 feet?

A: Sorry, I'm not really sure.

Q: Would it have been at least 5 feet, say the distance between you and me?

A: Yes, that looks reasonable.

Q: Okay, then could they have been more than 25 feet apart, say the length of this room?

A: No, not that far.

Q: Well how about 15 feet, say from the wall to the end of the table?

A: No, probably closer to that.

Q: So can we say that after the accident, the cars were somewhere between 5 and 15 feet

apart, is that fair?

A: Yes I would agree.

Boxing in by FWD (facts, witnesses, documents) is a technique that forces the witness to commit to testimony and/or describe any and all possible circumstances that might allow their future testimony to change. Witnesses explain their change in

testimony by using one or more of three broad categories of information that a witness didn't have or consider during their deposition. These three broad categories are: facts they did not know or recollect, witnesses/individuals they had not spoken to at the time of the deposition, and/or documents they had not seen, recollected or considered. If none of those things exist, there is no basis for the witness' testimony changing. The use of FWD occurs after a witness has been exhausted, however exhaustion is also used at the end of the FWD questioning, e.g. "Is that all?", "Are you sure?" etc.

Example: Using FWD to box-in a failure to recollect

Q: Did you see Mr. Smith's car before impact?

A: Well, I don't recall.

Q: Are you sure?

A: Yes.

Q: If you were provided facts about the color or model would that make a difference? (asking if "new" facts might change recollection)

A: No.

Q: If you were provided facts about the position and description of the other cars, would that make a difference? (asking if "new" facts might change recollection)

A: No.

Q: If you had a conversation with one of your passengers about what they remember or what they heard your say or what they saw you do, would that possibly allow you recollect something about seeing Mr. Smith's car? (asking if talking to a witness might change recollection)

A: No, I don't believe so.

Q: If someone showed you photos of the scene would that possibly allow you recollect something about seeing Mr. Smith's car? (asking if reviewing a document might change recollection)

A: No.

Q: If someone showed you the officer's report of the accident would that make a difference? (asking if reviewing a document might change recollection)

A: No, I don't recall.

Q: So, you have no recollection of seeing Mr. Smith's car before impact? (restating and summarizing)

A. Correct.

Q. And there are no facts about the road conditions, or other cars, or location that would change your recollection? (restating and summarizing)

A. Right

Q. And there are no witnesses or other people you know of that if you talked to them might change your recollection? (restating and summarizing)

A. None I can think of.

Q. Are you sure? (exhaustion)

A. Yes.

Q. Looking at accident reports, photos, or other documents won't change your recollection? (restating and summarizing)

A. No it won't.

Example: Using FWD to box-in an Expert on Opinions

Q: Have we now covered all of the ways as to you why you believe Dr. Smith conformed to the standard of care? (exhaustion)

A: Yes.

Q: Nothing else? (exhaustion)

A: Correct, there is nothing else.

Q: Are there any facts that you might learn from Dr. Smith that might change your opinions or cause you to have additional opinions? (asking if "new" facts might change opinion)

A: No.

Q: Are there any facts in the medical records that are part of this case, that might change your opinions or cause you to have additional opinions? (asking if any documents might change opinion)

A: No.

Q: Are there any documents that you have not reviewed, that if provided might change your opinions or cause you to have additional opinions? (asking if any documents might change opinion)

A: No.

Q. Are you sure? (exhaustion)

A: Yes.

Q: If you had a conversation with one of your colleagues about this matter, is it possible that they might say something that could cause you to change your opinion or have additional opinions? (asking if talking to a witness/colleague might change opinion)

A: Possibly.

Q: Who would that be?

A: My partner and mentor Dr. Lawson.

Q: Why him?

A: He has 35 years of experience with carpal tunnel surgery.

Q. Anyone else? (exhaust)

A: No.

Q. Are you sure? (exhaust)

A: Yes.

Q. So, there are no conversations with Dr. Smith that would change your opinion? (restating and summarizing)

A. No.

Q. And there are no facts in the medical records that would change your opinion? (restating and summarizing)

A. No.

Q. And there are no documents that you can think of that would change your opinion? (restating and summarizing)

A. No.

Q. And the only thing you can think of that might cause you to change your opinion or add to them would be a conversation with your partner Dr. Lawson? (restating and summarizing)

A. Yes.

IV. How to effectively use Exhaustion, Restating & Summarizing, and Boxing In the set-up for Impeachment

Impeachment is showing the jury that a witness has changed his/her story and their new testimony is not credible. It is the process of exhaustion, restatement, and boxing-in that will give you the testimony needed to impeach the witness if he/she attempts to change testimony or equivocate at trial.

The basic technique for impeachment has 3 steps:

1. Lock in the exact testimony you are prepared to impeach, i.e. have the witness repeat it or make sure you do word for word. If you paraphrase you may lose the effect. Make sure the jury will have no question what the witness has said. This is an exception to the general rule of never letting a witness repeat direct testimony.

2. Remind the witness of the date and circumstances of the prior statement.[6] If it is possible, emphasize the positive aspects that may indicate that the prior statement would be more reliable, e.g. closer to the time of the event, and that any basis for a change in testimony was negated (there were no facts, no witnesses, no documents that would change the testimony).

3. Read the prior statement (a concise restatement and summarization) and ask the witness if he/she made it.[7]

If you have the good fortune to have a witness who has made multiple misstatements of fact, use this process for each individual fact. The more times you can impeach, the better.

Witnesses are generally prepared to explain why their testimony at trial, although different is correct. Boxing-in can generally make this difficult but an

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[6]FRE 613(a) does not require showing a witness an impeaching document before using it, although you must generally show it to counsel. Local rules often require that the document be shown to the witness at this point.

[7]Generally, there is an admission by the witness but if not you must be prepared to introduce the prior statement into evidence.

explanation may be credible if the testimony is not about facts. Testimony that consists of vague characterizations or vague opinions cannot be effectively impeached. For example, if you go to trial relying on prior testimony that the car was going "too fast", and the in court testimony is that the car was going 25 miles per hour, you are not going to successfully impeach the witness on this point. The original answer is a vague and the jury has now heard and accepted 25mph as the correct testimony. The jury may perceive your attempted impeachment as quibbling rather than substance. *This means that when you exhaust, restate and summarize, and box-in you want to emphasize facts not unclear statements that can be re-defined or explained away.*

V. How to effectively use Learned Treatises

Treatises can be used during the examination of an expert in a deposition, not just in trial. Federal Rule of Evidence 803(18) provides:

> "To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits."

It is not necessary that an expert relied on a treatise to use that treatise on cross. It is necessary that the expert (or another expert) testify that the treatise is a reliable authority generally recognized in an area. Once that is done, the content of the treatise can be read into evidence. If a particular treatise is a linch pin of your cross, it makes sense to build up the significance of the treatise by pointing out the widespread use of the treatise.

The attorney using a learned treatise must know everything that is in the article, not just a small excerpt. There is a risk that other language in the article can be used against affirmatively by the expert.

The technique for executing the learned treatise cross begins by identifying the specific conclusion(s) of the article to be used for cross. Each conclusion should be segmented into as many individual facts as possible that compare to the plaintiff's wreck, injury etc. Finally, the examiner asks the witness "would you agree that ... " for each fact from the plaintiff's case that corresponds to a fact supporting the conclusion in the learned treatise.

After getting the expert to agree with the litany of facts related to the plaintiff's case (that are also reflected in study), the witness is asked about the favorable conclusion selected from the treatise. At this point the expert will "run" or disagree with this conclusion.

After the expert's run or disagreement the examiner may ask "Well, Mr. Smith are you testifying today that you disagree with the authoritative journal (name journal) which clearly states on page xxx [read statement from treatise]?"

Sometimes, the expert will be evasive again and necessitate a follow-up by the examiner such as:

"Mr. Smith, are you simply unwilling to acknowledge the truthfulness of this statement taken from the authoritative journal (name of journal, treatise, etc.) that [statement from treatise] ?"

Example: Use of Learned Treatise in a Deposition

Treatise Excerpt:

John R. Brault, et al. "Clinical Response of Human Subjects to Rear-End Automobile Collisions" Archive of Physical Medicine Rehabilitation, Vol. 79, January 1998 contains the conclusion:

> "Approximately 29% of the subjects exposed to 4km/h speed changes experience whiplash associated disorders with cervical symptoms and headaches predominating."

A learned treatise cross using this conclusion would be:

Q. You have testified that the change in velocity for this case was approximately 3mph ?

Q. That would be the same as 5 km/hr?

Q. And you have also testified that no injury can occur at this velocity change haven't you?

Q. And you are absolutely sure about that opinion?

Q. No question at all?

Q. And you have relied on some studies to support that conclusion haven't you?

Q. And there is no study contrary to your opinion.

Q. My client, Ms. Jones is 27 years old isn't she?

Q. She was struck from behind?

Q. She was unaware of the collision?

Q. She was subjected to a delta v of 5km/hr?

Q. She reported neck pain and headache at the scene and the emergency room didn't she ?

Q And if the medical personnel called that neck pain "cervical symptoms" you would know what they meant?

Q. Isn't it true that 29% of women in this age range, who are struck from behind at 4km/hr, and were unaware of the collision will sustain cervical symptoms and headaches ?

(the witness runs)

Q. Well, Mr. Smith are you testifying today that you disagree with the authoritative journal Archive of Physical Medicine Rehabilitation, which in an article titled "Clinical Response of Human Subjects to Rear-End Automobile Collisions" and published in January 1998 clearly states on page 72

> "Approximately 29% of the subjects exposed to 4km/h speed changes experience whiplash associated disorders with cervical symptoms and headaches predominating."

(the witness runs)

Q. Mr. Smith, are you simply unwilling to acknowledge the truthfulness of this statement taken from the authoritative journal Archive of Physical Medicine Rehabilitation, which clearly states on page 72

> "Approximately 29% of the subjects exposed to 4km/h speed changes experience whiplash associated disorders with cervical symptoms and headaches predominating."

At this point the examiner could go on if the witness continued to be evasive, but it is unlikely to be necessary. This approach is helpful in a case that is unlikely to go to trial, but one where unsettling the defense expert can payoff in mediation or settlement negotiations.

VI. How to effectively use Cross skills with difficult and evasive witnesses.

The examination of experts or other evasive witnesses in a deposition often is reduced to one of two things: (1) an extended argument or harangue of a witness, or (2) the witness continually introducing new concepts, facts, or opinions so it seems impossible to really know what the witness will ultimately say in trial.

If opposition witnesses were fair and honest, it would be completely reasonable to expect to prove facts (or theories) favorable to your case such as:

- the witness agrees with certain facts proven by your witnesses and/or elemental to your case.
- the witness respects the opinion, qualifications, or training of one or more of your witnesses.
- one or more of the plaintiff's theories are reasonable alternatives to that proposed by the opposition.

Unfortunately opposition witnesses are often hostile, difficult, and evasive. Depositions of such witnesses must incorporate what we have already discussed (exhaustion, restating and summarizing, and boxing-in), as well as incorporate specific techniques for control.

Before deposing a witness who is likely to be difficult, you must analyze what can reasonably be accomplished with this witness, and the questions and answers that will be required to succeed. This means writing out the questions you will ask and alternative follow up questions based on the possible responses.

Examination of the evasive or difficult witness means you must incorporate basic elements of control including the following:

First, **avoid open-ended questions.**

You must learn to avoid the open-ended question (why, how, please explain, etc.). You cannot control a witness with an open-ended question, and you cannot be the one who is testifying if your questions are open ended.

Second, ***make*** **each question about one fact, not an opinion, not a conclusion.**

This is the technique that gives you the most control.[8] Ask about facts, not conclusions. The witness will never agree to your conclusions and it is foolhardy to ask a question that allows a witness to state his/her conclusion. The advantage of this technique is that when a witness "runs", i.e. they try a long non-responsive narrative, the question can be repeated easily again and again. Each "run" makes the witness appear less credible and frequently results in the witness admitting the fact imbedded in the question. If you ask the question "You were drinking all night on January 14 weren't you", it is unlikely the answer you get will be "Yes". Instead, you must break down this question into short questions, one fact-one question and be prepared to repeat the question when the witness runs. For example:

Q. You got home from work some time after 5 that night ?

A. Yes.

Q. You had a couple of beers at home?

A. Well, it was after 5 and I had a full meal in my stomach before I drank any at all.

Q. You had a couple of beers at home?

[8]This technique can also be tedious, and need not be applied to all portions of every witness' cross. It is the preferred technique to deal with witnesses who run or are evasive. For an exhaustive discussion of this technique see Pozner and Dodd, *Cross-Examination: Science and Techniques,* in the bibliography.

A. I usually will have something when I get home from work, it's hot in the summer and I don't have air conditioning.

Q. You had a couple of beers at home.

A. [At this point the witness' answer becomes irrelevant, everyone knows the answer]

*Third, (*as shown in the example above) **your words and sentence structure must be short, precise, and simple**;

Fourth, **announce a change of subject matter so the jury (and the witness) will understand that the subject is changing.** For example, you might want to signal the jury that your question is going to relate to the plaintiff's injuries at the scene by saying "Let me ask you about how the plaintiff looked at the scene. . . was he able to get out of the car ?"

Fifth, **master the following control techniques to supplement one fact, one question:**

Repeat the question – when the witness is non-responsive, repeat the question (again and again).

Throw out the trash – when the witness is non-responsive say "Thank you Mr. Witness, but I didn't ask you about (topic used by witness in his non responsive "run"), I asked (repeat the original question)?

State the opposite – when the witness is non-responsive state the opposite of what the truthful answer is, e.g. "Are you saying you didn't have 2 beers at home?"

"That's a no/yes" – when the witness is repeatedly non-responsive, include the correct answer in the question, e.g. "Then that's a yes, you did have 2 beers at home."

Sixth, **string together multiple questions that are "one fact-one question"** – sequencing multiple facts which you can compel the witness to answer allows the jury to derive conclusions that are inescapable, even if unstated. A conclusion made by a jury is stronger than any conclusion you may spoon-feed to them.

For example, if you would like the jury to conclude that a trucking company hired a unsafe, dishonest driver, and you want to prove it through an opposition witness:

Q. Mr. Hogan had 3 collisions in the 3 years prior to his hire didn't he?
Q. Mr. Hogan's logs show more than 50 log violations during the 6 months prior to this wreck don't they?
Q. On 10 of these log violations Mr. Hogan misstated how many hours he drove in a day, did he?
Q. On another 10 of these log violations he reported in his log that he was at one place and the gas receipts said he was another place, isn't that right?

The impact of this sequence of questions and facts allows the jury to conclude, without you telling them, that this trucking company hired an unsafe dishonest driver.

VII. How to effectively Establish standards of conduct through defense witnesses[9]

The goal of an *exceptional* deposition is to help persuade the decider of fact and imbed principals of conduct and truths, that allow justice to prevail during deliberations. Establishing standards of conduct through defense witnesses can obviate the need for an expert, change the defense's evaluation of the case, provide credible persuasive testimony at trial, and drive settlement on terms favorable to your client.

Rule 1 **Before doing depositions- Analyze your case in writing**

Although it sounds premature, most case facts are known before depositions are taken. Organizing the entire case "in your head" is never as effective as paper and the more witnesses you have, the more difficult it can be to maintain focus and direction. Begin your analysis by listing the probable case critical issues including defenses, juror attitudes that could sway deliberations, witnesses who are likely to be deposed, documents, and the anticipated sequence of discovery depositions.

a. Write out responses that will take out defenses

After writing out and thinking about the defenses, you will identify many that aren't substantive but need to be rebutted nonetheless. Even "lame" defenses can have legs, but they can often be taken out with opposition witnesses if they are part of the deposition plan. "Defenses" should include potential negative juror conclusions cannot be eliminated by simple rhetoric, metaphors, and analogies.

b. Write out responses that will Create a record (a concise soundbite) for

Opposition to motions for summary judgment
Motions in limine
Amendments for punitive damages
Motions for Spoiliation
Mediation/Settlement Presentations
Opening Statement

[9] This approach, dubbed by Tom Vesper "The Miller Mousetrap" has been taught to attorneys who have attended the ATLA deposition colleges, and used effectively by them in cases across the United States.

c. Identify standards of conduct that are important to your case.

In most cases there are common sense, statutory, regulatory, or company policies that define what is conduct is accepted, required, or the norm. "Is it important to hire safe drivers?" or "Is it important to protect a fetus from group B strep?" are unlikely to get a "no" response from any witness.

Rule 2 **Elicit testimony that a particular standard of conduct is important.**

Rule 3 **Elicit testimony that a particular standard of conduct has been the known standard of conduct for more than XX years.**

Rule 4 **Elicit testimony describing why this standard of conduct is important.**

Rule 5 **Elicit testimony that the defendant expects others to comply with this standard.**

Rule 6 **Elicit testimony that not complying with this standard of conduct is negligent/unsafe/improper.**

Rule 7 **Elicit testimony that not complying with this standard of conduct is reckless.**

Rule 8 **Make the case bigger than 1 client**

Jurors can feel their time is being wasted. They want to feel they are deciding something that is important. What about the case could have broader implications? Is the case about a misdiagnosis by an ER doctor or An ER doctor who is too disinterested in his job to give good care? Is it about a bad truck driver or a company who has 120% turnover a year and will hire anyone? Is it about a mistake by an aide in a nursing home, or a company that ignores regulations and won't hire enough staff to do the work that is needed?

Rule 9 **Write out your key questions and re-sequence them for maximum effect.**

Cicero said "Eloquence comes from the written word."[10] It is the unavoidable truth that succinct, concise questions are not a natural part of attorney speech. Questioning "from the hip" is unlikely to have the persuasive power of questions that are written, parsed, and then sequenced and resequenced with other questions for maximum affect.

Rule 10 **Anticipate evasive responses and have a written strategy to deal with them.**

Cicero wrote "If the truth were self-evident, eloquence would be unnecessary."[11] In the context of exceptional depositions, the truth is only self-evident if we anticipate non-responsive answers and devise alternate questions and approaches to deal with them. Eloquence, and taking exceptional depositions, is within your grasp.

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[10] Cicero, De Oratore, Harvard University Press, 1967
Translated by E.W. Sutton

[11] Cicero, De Oratore, Harvard University Press, 1967
Translated by E.W. Sutton

Resources for those who want
to take Exceptional Depositions

ATLA Exchange "Taking Depositions: Experts, Lay Witnesses, and Corporate Representatives" – this is a CD with over 1000 pages in pdf format including forms, motions, checklists, descriptions of techniques and examples from actual depositions. For more information about ATLA Exchange materials, please go online at http://www.exchange.atla.org or call 800-344-3023.

ATLA Deposition Notebook, Thomas J. Vesper (West Group 2006) – this notebook covers everything from organization to technique, forms, motions, and case law. Money well spent for anyone who has the humility to recognize they don't know it all.

ATLA's Deposition College and Advanced Deposition College – these educational programs are designed specifically for plaintiff attorneys and combine substantive content on deposition technique along with workshops designed to give practitioners the opportunity to try new approaches. For more information about scheduling and availability of for these programs contact ATLA education at http://www.atla.org/education/ncacal.aspx or call at 202-965-3500, ext. 335 or 800-622-1791.

Brown, Peter Megaree, *The Art of Questioning, Thirty Maxims of Cross Examination,* MacMillan Publishing, New York, 1987.

Cicero, *De Oratore*, Harvard University Press, 1967
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Friedman, Rick and Malone, Patrick, *The Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability*, Trial Guides Publishing, 2005.

Haydock, Roger and Sonsteng John, *Cross Examination: Trial Theories, Tactics, Techniques* West Publishing Company.

Pozner, Larry S. and Dodd, Roger J., *Cross-Examination: Science and Techniques,* Michie Publishing, 1993.