

Start with the broad picture

- ▶ What is at issue?
 - ▶ Often very different than what's pled
 - ▶ Emotion – person just wants to be heard
- ▶ What do the parties need to prove?
 - ▶ Burden of proof
 - ▶ Jury instructions
- ▶ Consider your strategy – how to resolve the case for your client

NOW, what information do you need?
(This will likely include depositions.)

Who to depose?

- ▶ Anyone with knowledge of relevant information, i.e. a witness.
- ▶ An entity through a 30b6 deposition
- ▶ Your own witness for trial preservation testimony
- ▶ Exceptions:
 - ▶ apex doctrine
 - ▶ highly placed government officials
 - ▶ incapacitated witnesses

When to take the deposition?

- ▶ After discovery planning conference or start of discovery (Rule 26(d),(f))
 - special rule for experts
- ▶ Strategic planning on when, need leave of court to depose a witness twice
- ▶ Is written discovery needed first?

When to take the deposition? continued

- ▶ Scheduling

- ▶ By Agreement

- ▶ notice and, where applicable, waiver of service of subpoena

- ▶ Absent Agreement

- ▶ notice and, where applicable, subpoena
 - ▶ objecting party seeks protective order
 - ▶ objecting witness moves to quash the subpoena

How to notice it?

- ▶ Parties – Notice (Rule 30(b))
 - ▶ Notice to Include:
 - ▶ Time, Place of deposition
 - ▶ Name and address of deponent (if a 30(b)(6) deposition must include topics sufficient to allow the entity to identify witnesses)
 - ▶ Recording method (stenographic, video, audio)
- ▶ Nonparties – Subpoena (Rule 45)
 - ▶ Subpoena to Include:
 - ▶ Same information included in Notice
 - ▶ If also subpoena to produce must include a list of materials to be produced
 - ▶ Issued from Court

Where for the deposition?

▶ Parties


- ▶ Plaintiff – reside, work, filed suit, district of principal place of business (entity)
- ▶ Defendant - reside, work, district of principal place of business (entity)
- ▶ Corporations - district of principal place of business, reside
- ▶ Nonparties – within 100 miles of where deponent resides, works, or regularly transacts business (Fed. R. Civ. P. 45 (c)(1))

AND Why Take a Deposition?

3 Primary Reasons:

1. To Gather Information
2. To Preserve Testimony (for trial, motion, etc.)
3. To Facilitate Settlement

- ▶ What is your goal?
- ▶ Reason often dictates style and technique.



WHAT TYPES OF QUESTIONS TO ASK?

1. Information Gathering
2. Obtaining Statements/
Seeking Admissions

**The type of question you ask will
be driven by what your goal is at
that particular point in the
deposition**

Preparing for the Deposition

- ▶ **Decide on your Intended Purposes, Goals**
- ▶ **Read the pleadings and case file again**
- ▶ **Research the Underlying Law**
- ▶ **Draft an Outline**
- ▶ **Identify the Available Facts**

Deposition Preparation

- ▶ **Organize Outline**
 - ▶ Chronologically
 - ▶ By Topic
- ▶ **Use Outline, but as a guide- always listen**
 - ▶ Was the question answered?
 - ▶ Did the answer raise further questions?
 - ▶ Keep digging!
- ▶ **Try to always watch the witness while answering**
- ▶ **Be flexible (don't overly rely on outline)**

Deposition Checklist

1. Review Rules 26, 28 ,29, 30, 32, 45 and local rules.
2. Attempt cooperation with parties regarding time and place.
3. Consider need for documents. Prepare written discovery, RFP or subpoena to produce.
4. Consider need for protective orders. (Who can attend? Or certain information under protective order, trade secrets to be discussed?)
5. Determine method of recording.
6. Reserve room and court reporter (possibly a videographer).
7. Notice to all parties 14 days out. Attach subpoena to produce documents if applicable
8. Subpoena nonparties if necessary.

Beginning the Deposition- Explaining the Process & Expectations

Purpose:

- ▶ Fair treatment of witness
(especially *pro se*)
 - ▶ Fair nature of deposition process
 - ▶ Develop rapport and help the
witness relax
-
- ▶ Speculating and Guessing ???

Style & Tone

- ▶ **Catch More Flies with Honey**
 - ▶ *doesn't always work, depends on the witness*
 - ▶ *tone and style can, and often should change during a deposition*
- ▶ **The Curious Cat**
- ▶ **The New Friend**
- ▶ **The Sympathetic Ear**
- ▶ **The Old Enemy**
- ▶ **Jaded Attorney**

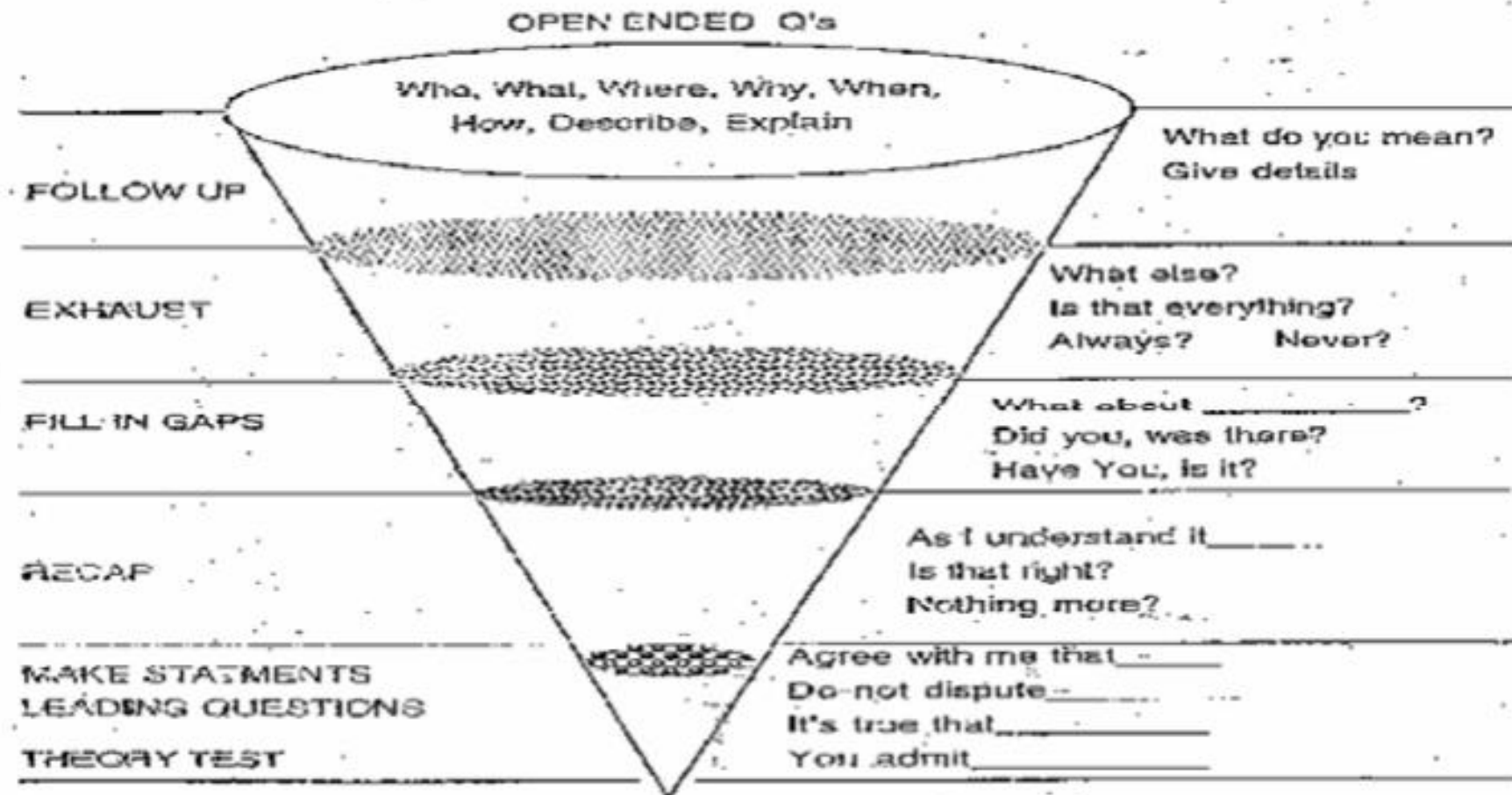
How much background is enough?

Factors to Consider:

- ▶ the role of the witness in the story
- ▶ the importance of the witness' background to issues, expected payoff
- ▶ \$\$\$\$
- ▶ time needed for substantive questions
- ▶ Do ask what the witness did to prepare

Taking A Deposition

THE FUNNEL TECHNIQUE



USE THE FUNNEL TO GET: INFORMATION :
ADMISSIONS
AMMO
DIRT

Funnel Technique – Other

- ▶ Going Back Up the Funnel
- ▶ Using Multiple Funnels/Sub-Funnels
- ▶ Suggest New Facts
- ▶ Matter of judgment how far to exhaust



Obtaining Statements

Purposes of Obtaining Statements

1. **Test lines of cross at trial**
2. **Support a motion**
3. **Encourage settlement**
4. **Test case theory**

Planning for Admissions/ Obtaining Statements

Theory Testing

1. What is your theory?
2. What is your opponent's theory?
3. What statements do you need to support/discredit each?
4. Which witness might provide which statement(s)?

Obtaining Statements

Cross-Examination Techniques – Form of Qs

- ▶ **Leading Questions** – the answer is in the question; witness answers yes or no
- ▶ **Short Questions** – less confusing, harder to evade
- ▶ **One-Fact Questions** – reduce the opportunity to disagree; again the fact is in the question, the witness either agrees or disagrees.
- ▶ **Looping Questions** – incorporates witness's answer into the next question.
- ▶ **Sound-Bite Questions** – Elicit a stand-alone, dramatic statement
- ▶ Revert back to open-ended questions if you encounter a roadblock!!

Obtaining Statements

Cross-Examination Techniques – Boxing In

- ▶ **Conceal your objective** for as long as possible.
- ▶ **Do not react** to favorable/unfavorable answers.
- ▶ Commit the witness to **general principles** and **undisputed facts**.
- ▶ Start with “**must admit**” facts before moving to facts you’d like the witness to admit.
- ▶ Close off **escape routes**.
- ▶ Insist on absolutes/**firm answers**.
- ▶ **Wrestle** if necessary by challenging logic.

Obtaining Statements

Witness Control - Cross Examination:

- ▶ **Eye Contact**
- ▶ **Falling Inflections**
- ▶ **Tone**
- ▶ **Rapid-Fire Questions**
- ▶ **Long Pauses**

Obtaining Statements

Cross-Examination Techniques – Other

- ▶ **Push as Far as Possible** (usually)
- ▶ **Stop** when you get what you want and if its adequately protected
- ▶ **Challenge Harmful Conclusions**-do not want to be surprised at trial
- ▶ Deposition (not trial) is the Time to Go for **Subjective** Words/Phrases
- ▶ **Clean Up** Messy Answers
- ▶ **Summarize** Answers **Sparingly**

Ending the Deposition- Reading and Signing- Concluding

- ▶ Normally do want waive for your witness
 - ▶ Or want other side to
 - ▶ BUT Experts may waive stay tuned
- Part II- Taking and/or Defending
Expert, Rule 30(b)(6), & Trial
Preservation Depositions