



# AN ALTERNATIVE APPROACH FOR TAKING DEPOSITIONS

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# **TWO PROPOSITIONS**

- 1. TRIALS ARE COMPETING NARRATIVES**
- 2. DEPOSITIONS ARE TOO VALUABLE TO WASTE ON DISCOVERY**

# Agenda



**Who We Are**

**The Traditional “Funnel” Approach  
for Taking Depositions**

**Lessons Learned from Cold  
Cross-Examinations**

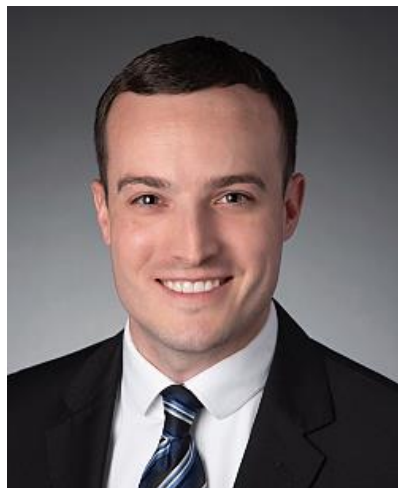
**An Alternative Approach  
for Taking Depositions**

# Who We Are



**JOE MAIS**

**PARTNER**



**AUSTIN YOST**

**ASSOCIATE**



**MARGO CASSELMAN**

**ASSOCIATE**

# One Way to Gather Unknown Information



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# **THE “FUNNEL” APPROACH FOR TAKING DEPOSITIONS**

# The “Funnel” Approach

## WHAT IS IT?

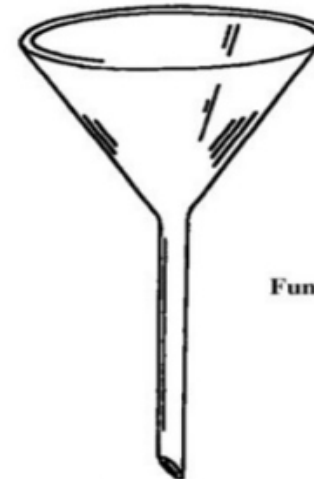
Start Each Topic with Open-Ended Questions

Follow Up on the Deponent’s Answers with Narrower Questions

Confirm with a Summary Question, and then Transition to the Next Topic

## The “Funnel”

**Who, what, when, where  
how, describe explain**



Funnel

### **FOLLOW UP**

What do you mean  
Give details

### **FILL IN**

Did you? Was there?  
Have you? Did you ever?

### **EXHAUST**

What else?  
Is that everything?

### **RECAP**

As I understand it . . .  
Is that right?  
Nothing more?

# The “Funnel” Approach Revisited

## **SUBOPTIMAL BECAUSE DEPOSITIONS ARE TOO VALUABLE TO WASTE ON DISCOVERY**

- In a complex case, unknown and unsuspected facts should be **few and far between**.
- Open-ended questions invite the witness to describe events **in his or her own (rehearsed) words**.
- The witness’s own words will not **advance your narrative**.
- Videotaped, clean admissions are **powerful**, and the “funnel” approach **is unlikely to elicit them**.







**LESSONS LEARNED  
FROM COLD-CROSS  
EXAMINATIONS**

# Cross-Examinations

## STANDARD RULES

- **Control the witness.**
  - No open-ended questions.
  - No narratives.
- **Admissions, admissions, admissions.**
- **Impeachment.**
- Don't ask questions when **you don't know the answer.**



## PROPOSED REVISION

- Ask questions only when **you don't care what the answer is.**

# Cold Cross-Examinations



## **USE THE INFORMATION AVAILABLE TO YOU**

- The pleadings.
- The documents.
- Publicly available information.
- Fact witness interviews and statements.
- Guidance from your expert witness.
- Common sense and reasonable inferences.

# Cold Cross-Examinations

1

- Develop the overall **narrative and themes** of the case.

2

- **Master the record** relevant to the witness.

3

- **Structure a detailed outline** in subject matter segments, each of which is designed to elicit admissions that support a key component of your narrative.

4

- **Script** critical questions.

5

- Allow time to **restructure and refine** the outline.

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# **AN ALTERNATIVE APPROACH FOR TAKING DEPOSITIONS**

# An Alternative Approach



## WHAT IS IT?

**Use the treasure trove of available information to craft an outline that seeks to maximize the number and force of admissions that advance my narrative of the case.**

# An Alternative Approach

1

- Develop the overall **narrative and themes** of the case.

2

- **Master the record** relevant to the witness.

3

- **Structure a detailed outline** in subject matter segments, each of which is designed to elicit admissions that support a key component of your narrative.

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- **Script** critical questions.

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- Allow time to **restructure and refine** the outline.

# An Alternative Approach

## WHAT ABOUT LEARNING UNKNOWN FACTS?

In most key depositions, you have all of the information sources available in cold cross-examinations

+

- Disclosure statements;
- Written discovery responses; and
- Other depositions.



If you have done your homework, then surprises should be **few and far between.**



And you should quickly **grasp their significance.**



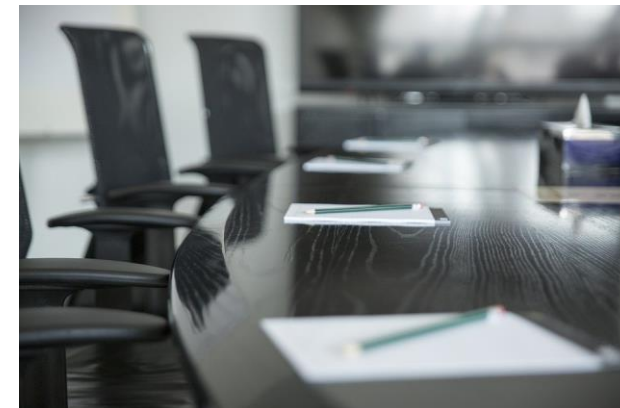
# An Alternative Approach

## WHAT ABOUT AVOIDING UNFAIR SURPRISE AT TRIAL?

While there may be some modest value in knowing precisely how a witness is going to hurt your case at trial, as opposed to not knowing, **the right goal is to neutralize the witness** or to at least minimize the harm.

## FOR EXAMPLE:

- Instead of saying:
  - *“Tell me about the meeting,”* or
  - *“What was said at the meeting?”*
- Ask: Specific questions **based on the documents you’ve reviewed,** and then **press for admissions.**



# An Alternative Approach

## WHAT ABOUT SUMMARY (OR RECAP) QUESTIONS?

- Summary questions unhelpfully open the door for the deponent to **backtrack and explain away** his or her previous admissions.
- Use summary questions only when:
  - They will **increase the impact** of the deponent's admissions; or
  - You are **confident** that you will get the expected answer.



# An Alternative Approach

## INDIRECT BENEFITS OF THIS ALTERNATIVE APPROACH

- Helps thematic and narrative development.
- Make **unexpected connections** and gain **new insights** into your case.
- Scripted questions:
  - Maximize the impact of the admission; and
  - Minimize the risk that you will **fool yourself** into thinking that you got a clean admission in a deposition **when you didn't**.
- Deponents under pressure get discouraged and **make mistakes**.



- The **sponsorship theory of advocacy** holds that juries treat evidence differently depending upon who “sponsors” it. The theory thus provides that it is persuasive when you **let the other side do your talking by telling your narrative**.

# An Alternative Approach



## WHAT ABOUT COST?

- In a **complex, high stakes case**, the incremental cost of this alternative approach is **modest** compared to the amount in controversy and overall cost of the litigation.
- In any event, **regardless of the stakes**, this basic process is still the **right approach**.
  - Know your case narrative and themes;
  - Determine where the witness fits; and
  - Pose questions to maximize admissions and impeachment opportunities.

# An Alternative Approach

## ADDITIONAL TACTICS

- Don't waste any time with early **softball questions**.
- Stick to the **facts and reasonable inferences**.



- Uncooperative witnesses: **Get what you can and move on.**

## SPECIAL CASES

- **Rule 30(b)(6) witnesses:**
  - Structure your deposition outline by topic; and
  - Use the entity's document production to your advantage.
- **Testifying expert witnesses:**
  - Use the Federal Rule of Civil Procedure 26(a)(2)(B) "complete" statement of opinions to your advantage; and
  - Avoid asking questions that invite the witness to correct or embellish statements in his or her report.

# CLE Code Word

**“STRATEGIES”**

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**QUESTIONS?**