

NEW APPROACHES TO DISCOVERY

By pushing a precise but inadequate formulation to an unacceptable conclusion, we can often expose the exact source of the inadequacy and consequently gain a deeper understanding... More positively, a formalized theory may automatically provide solutions for many problems other than those for which it was explicitly designed.

Noam Chomsky

Those learnings which are threatening to the self are more easily perceived and assimilated when external threats are at a minimum.

Carl R. Rogers

Every patient had the right to refuse permission for a rectal and hernial examination, and many patients do. I tell my patients, sympathetically, that I know they are tired of having me peer into their eyes, and peak into their ears and up their noses, and poking and thumping here and there, but that, as soon as I complete the rectal and hernial examinations, they can say good-bye to me. And they always wait patiently to say that good-bye.

Milton H. Erickson on how his daughter used his techniques on double-binds when she was a medical student.

GENERAL PLEADING STRATEGY

After taking the time and trouble to determine what the case is about, ask, "What is the defense? What ambushes have been set by the defense? What is the fuss about? How does one define the issues of the lawsuit? How can the proof be

streamlined for the jury? How does one avoid the tricks and traps sprung by the defense in the past? ”

The purpose of this paper is to outline how to structure pleadings, discovery strategy, and trial strategy with an emphasis on Rule 30 (b)(5) and (6) and alternative strategies to witnesses at depositions. The main points are to:

- 1) use **JURY INSTRUCTIONS** to draft pleadings and to focus one’s attention on the statement of the case instruction;
- 2) compare the **COMPLAINT** to the answer; ask the opposing party to admit everything denied in the answer in simple **“YES/NO”** format (with follow up interrogatories and production);
- 3) file a **MOTION FOR SUMMARY JUDGMENT** when the defendant does not disclose evidence in discovery necessary to defeat such a motion;
- 4) have the court **RULE** when necessary **ON OBJECTIONS**;
- 5) use a **“YES/NO”** format to lock in admissions in depositions;
- 6) explore the options of “framing”, “de-framing,” “reframing,” and inter-active listening to change the tenor of depositions.
- 7) use the admissions or denials of bad conduct (especially when ruled on in one’s favor by the court

at summary judgment or directed verdict), to show to the jury the **DEFENDANT'S CHOICES**, personal responsibility, lack of candor, and how the defendant has challenged the plaintiff to prove what the defendant should have admitted.

- 8) use analytical models of the expert or industry to frame your examination at deposition or trial.
- 9) Try a more witness focused way of examination, whether on cross or directr examination.

The above will save counsel stress, time, and money.

I have to admit that I never understood pleadings as anything more than an annoyance until an older attorney told me to start with the jury instructions in drafting petitions and complaints. I had practiced for five years; I was still clueless. The only slightly good news is that the older lawyer also told me that he had only recently started doing what he had suggested himself. By using the jury instructions to outline the elements as the starting point, the chances of having a Rule 12(b)(6) motion sustained become nil. If one focuses on the elements of proof prior to filing suit, one knows what has to be proven, the focus is on how to prove it, and the chances of losing on a motion for summary judgment or directed verdict also approach zero. This approach makes drafting the statement of the case instruction much easier. Some jury instructions, such as for

Colorado or Nebraska, are online in Westlaw, for easy searching and downloading. Unfortunately, Wyoming was not yet online on either Westlaw or at the Wyoming State Bar site when I checked on May 25, 2005. With the online databases, such as the one on Westlaw, you can search within the annotated Jury instructions for the relevant law as well as for the instructions themselves. The jury instructions should be the starting point for all research prior to filing the petition, and they help to analyze the elements and to counter the defenses. The traps that previously had been set and sprung on foundation for exhibits had left me smarting. Requests to admit make these traps easier to identify and to cure. Minnesota Trial lawyer Mark Kosieradski says that in all complex cases the truth is in the documents.

A second time for thought and change came after losing three medical malpractice cases and a rear-end accident case where liability was not an issue. Ouch! In the malpractice cases, the defendants sought to obscure the facts, the legal issues, the complexity of the medical issues, made rustling sounds like gerbils with papers or X-rays during key questions and answers, and they succeeded. In the rear-end collision case, the jury hated my client. The old saying is true that if you have a likeable client you are halfway home, if not likeable, stay home. The jury did not even award payment of the medical bills. The focus changed to simplifying the issues, proof, and testimonial conflicts throughout the trial (and to exercise better client selection, to make my client more likeable, or to make his or her behavior more explainable). It worked.

FILE AND ISSUE ORGANIZATION

My typical trial folder has six slots, all with two hole Perma-clips at the top. The first two slots contain the petition or complaint followed by the answer. Thus, when the folder is opened, the petition and answer are there for ready comparison. I pencil in the margins of the petition whether each allegation has been admitted or denied.

The next steps are as follows:

1. Ask the defendant to admit each allegation it has denied in its answer;
2. Include an interrogatory asking the defendant to state the true facts for each request it has denied in whole or in part;
3. Include an interrogatory asking the defendant to state for any request for which it claims a lack of knowledge, what inquiry it has made to determine the true facts;
4. Include an interrogatory asking the defense to state if it has any reason to believe that the damages are not as alleged, and to state those reasons;
5. Ask the defendant to admit that the plaintiff received injuries in the accident or event described in the petition as listed;
6. Ask the defendant to admit that each medical bill is fair, reasonable, and necessary to treat the plaintiff's injuries;

7. Ask the defendant to admit foundation for any other matter for which foundation is necessary;
8. Ask the defendant to admit any fact crucial to the case (if not already done) to take it out of play;
9. Ask the defendant to identify in an interrogatory and to produce any evidence used to deny any allegation in the answer, or in response to any request to admit;
10. Notice in the key documents or witness(es) with a Rule 30(b)(5)(6) deposition;
11. Reduce the elements of proof by the use of "yes" or "no" questions;
12. When asking about the "yes" or "no" questions at depositions, if there is no immediate agreement, listen to the witness, and find out how the question can be framed, de-framed, or reframed to foster agreement;
1. Adapt to the style of the witness so the witness feels he or she has had a fair hearing;
13. Focus on limiting the scope of the dispute.
14. Incorporate the terminology or language, conceptual framework or methodology, and ethical professional "Bibles" into your exam;
15. Use a similar terminology, analytical model, methodology, or framework as the expert whose opinion you are trying to get to commit, to impeach or to

solicit, and then translate that into simpler terms or concepts;

16. Use as many witness focused techniques as you are able from the writings or teachings of Milton H. Erickson or Carl R. Rogers.

LACK OF COMPLIANCE AND SUMMARY JUDGMENT

Interrogatories are often ignored; however, if requests to admit are ignored, they may be deemed admitted. This seems to encourage the needed timely disclosure. If the defense does not make the needed disclosures, I file a motion for summary judgment. Although some look upon motions for summary judgment with disfavor, what a discovery tool! When I first started in civil practice, it seemed the defense bar never disclosed anything until right before the discovery deadline, which forced me to scramble. I hated it! If the motion for summary judgment does not smoke out what one suspects has been concealed with regard to evidence or experts, you win (at least in part). The expert disclosures, if any, tend to be more specific since the point has been forced. I sometimes chuckle at the number of times defense attorneys have listed no experts in answers to interrogatories only to have those experts miraculously and immediately surface a day or two after the filing of a motion for summary judgment. You rapidly learn the defense theory of the case, and their underlying evidence, or you have your judgment on

liability. Previously, I thought I would get more in damages by leaving liability open. Now, I would prefer to have the judgment on liability.

EFFECT AND USE OF REQUESTS TO ADMIT

An admitted request to admit conclusively establishes that fact. Consider the statement of the case jury instruction where what the opposing side admits is clearly spelled out; the admissions take away any need for proof on that matter. If a party has denied a fact and it has been proven at a motion for summary judgment or by a directed verdict, the instruction should include that the defendant denied the matter and that the court determined, as a matter of law, that the fact was true. The next step in argument is that the defendant has, once again, denied the truth, chose to avoid responsibility, and forced the plaintiff into trial, into embarrassment, expense, and time to prove his or her case. This has encouraged some opposing counsel to admit liability or requests to admit on liability (where they did not before) rather than face that instruction and argument. Consider also how easily the admissions can be blown up into poster size for presentation to the jury.

RULE 34 REQUESTS TO PRODUCE

Rule 34 requires the production, inspection and copying of documents by the parties to a lawsuit. The responding party must be given at least thirty days to assemble and produce the requested items. If the discovery is filed with the Complaint,

the Rules allow 45 days for a response. Objections should be stated within the specific time period, or they are waived. The Rules require the documents should be produced as they are kept in the usual mode of business, or organized to correspond with the categories in the request, and labeled to correspond to the categories in the request.

The reality is that the responses are often couched after bogus objections, leading to evasive, incomplete responses. Traditionally, one was required to meet and confer before seeking judicial relief. Judges want to hear discovery disputes about as much as soccer Moms want to know who started the backseat dispute, as in “I don’t care which one of you kids started it, Just Shut Up!” What to do? I think a better follow up is to use Rule 30(b)(5)(6) deposition.

DISTINCTIONS BETWEEN RULE 34 AND RULE 30(b)(5)(6)

A non-party witness can be compelled through a Rule 45(a)(1)(C) subpoena duces tecum, and party witness through a notice of deposition to be compelled to bring documents to a deposition. For each include a description of the items sought in the notice. While the 30 day time requirements of Rule 34 must still be met, the otherwise, reluctant, evasive, or unknowing corporate witness may bind the corporation. In ***U.S. v. Taylor***, 166 F.R.D. 356, 362, the court reasoned:

When the Court indicates that the Rule 30(b)(6) designee gives a statement or opinion binding on the corporation, this does not mean that said statement is tantamount to a judicial admission. Rather, just as in the case of a deposition of individuals, it is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered. ***W.R. Grace & Co. V. Viskase Corporation***, No.C5383,

1991 WL 211647 (N.D.Ill. Oct 15, 1991). However the designee can make admissions against under Fed. R. Evid. 804(b)(3) which are binding on the corporation. ***lerardi v. Lorillard, Inc.*** Civ. A. No. 90-7049, 1991 WL 158911, at 3 (E.D. Pa. Aug. 13, 1991).

Like Rule 34 a party can be compelled to bring documents or tangible things to a deposition. As you may not know who to depose, the corporate defendant gets to pick who will be their champion or champions. As the advisory committee to the 1970 amendments noted:

It will curb the ‘bandying’ by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. *Cf. Haney v. Woodward & Lothrop, Inc.* 330 F.2d 940, 944 (4th Cir. 1964). The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge.

Following the amendment, some authors have suggested that a 30 (b)(6) deposition more efficiently produces the most appropriate party for questioning, curbs the elusive behavior of corporate agents who, one after another, know nothing about facts clearly available within the organization and suggest someone else who has the requested knowledge, and reduces the number of depositions for which an organization’s counsel must prepare agents and employees. The corporate designee does not have to be an employee of the corporation, but can be another who consents to the designation. If the corporate designee’s knowledge is deficient the corporation must immediately

provide a substitute witness. **Dravo v. Liberty Mutual Ins. Co.**, 164 F.R.D. 70, 75 (D. Neb. 1995), **Marker v. Union Fidelity Life Insurance Co.**, 125 F.R.D. 121, 126 (M.D.N.C. 1989).

The corporation has a duty to prepare the witness to testify to matters not only known by the deponent, but those that should reasonably known by the designating party. **Alexander v. Federal Bureau of Investigation**, 186 F.R.D. 148, 152 (D.D.C. 1999). Witnesses must be prepared to answer completely, knowledgeably, and unevasively provide binding answers to questions within the scope of the matters specified in the deposition notice. **Dravo v. Liberty Mutual Ins. Co.**, 164 F.R.D. 70, 75 (D. Neb. 1995). Otherwise, it would “(A)llow the responding corporation to “sandbag” the deposition discovery process “by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial.” **U.S. v. Taylor** 166 F.R.D. 356, at 362).

USE OF 30(b)(5)(6) DEPOSITIONS

Under Rule 30(b)(6) a party may specifically notice areas of inquiry to a corporation, partnership, association, or governmental agency. The named organization must then designate one or more representatives to testify to the noticed areas of inquiry. Thus, the testimony of the deponent represents the organizations’ knowledge of the corporation, thus decreasing the chances of a corporate “Sgt. Schultz” appearing (“I know nothing, I hear nothing, I see nothing.”) As stated above, the testimony becomes an Fed. R. Evid. 804(b)(3) evidentiary admission, which may be controverted or explained by a party rather than a judicial admission. If the designee asserts a lack of

knowledge of the type of information that the corporation should know, they may be bound by that lack of knowledge. ***U.S. v. Taylor***, 166 F.R.D. 356, 362 (see above). The subpoena or notice must state that the organization has a duty to designate a representative, and list the areas of inquiry with reasonable particularity. The organization shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and the matters on which they will testify. Consider starting the deposition by identifying the deponent, confirming that the deponent is the designated representative, making the notice of deposition an Exhibit, and to have the deponent mark on the deposition notice on what areas he or she will testify. If the designated representative fails to appear, or if a corporation produces witnesses who cannot answer the areas listed in the notice, the corporation may be precluded from offering testimony from any witnesses not produced for deposition. See for example, 166 F.R.D. at 363, footnote 8. "What the corporation cannot do is have the attorney assert that the facts show a particular position on a topic when, at the Rule 30(b)(6) deposition, the corporation asserts no knowledge and no position. " Rule 37(d) sanctions for a failure to appear may apply. "Producing an unprepared witness is tantamount to a failure to appear. ***Resolution Trust Co. V. Southern Union***, 985 F.2d at 197" 166 F.R.D. at 363. The Thomson-West Federal Civil Rules Handbook 2005, at page 647, states that organization may be prohibited from using theories or information not disclosed during the Rule 30(b)(6) deposition unless the information was unavailable at the time of the deposition, citing ***Rainey v. American Forest and Paper Assoc., Inc.*** 26 F.Supp. 82,94 (D.D.C. 1998).

Consider following up the declarations against interest or the actual documents

adduced at the deposition with a request to admit the substance of the testimony or the authenticity of the documents. Matters admitted are conclusively established under Rule 36(b). The standards for withdrawal of a Requested Admission are that the party who obtained the admission must satisfy the court that the withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Although changed circumstances or honest error often will be valid grounds. Thomson-West Federal Civil Rules Handbook 2005, at page 711.

SCOPE

The deposition is not limited to the topics contained in the notice. As **Wright and Miller** at § 2103 suggest:

In keeping with that orientation, it has been held that once the organization has designated a witness to speak for it, the scope of the inquiry is governed only by the general scope of discovery, and not limited to the specific areas identified, but there is reason for caution about overuse of this deposition technique.

In two different cases I have had **NIOSH** alert on the very subject that the defendant knew or should have known about. In both cases, the requisite warnings were not given. In a third case, the defendant corporation correctly the word, "**Corrosive**" but did not use the **ANSI Z.129.1** correct signal word, "**Danger**" nor did it warn of the hazard of permanent burns from the chemicals use describing it incorrectly instead as an "**Irritant**". These points were set out in a "**Yes/No**" examples of which are attached.

"YES" OR "NO" QUESTIONING

FRAMING, DE-FRAMING OR REFRAMING

Framing provides the structure of your case analysis giving it your meaning where none already existed Deframing is the process of challenging or casting doubt on the witnesses current meaning or term definition. Reframing is the process of providing a new or alternative meaning, and getting agreement with that meaning.

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A MORE PRINCIPLED APPROACH TO EXAMINATION (ERICKSON'S PRINCIPLES)

CONCLUSION

Start with the iury instructions. Think in "Yes/No" format. Use requests to admit to get focused on having as many issues as possible resolved in one's favor, or at the opponent's costs when the admissions are wrongfully denied. The thought process to state matters clearly for admission helps trial strategy and organization. The "Yes/No" format makes admissions and impeachment easier at trial.

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