NEW APPROACHES TO DISCOVERY

"Knowledge, like truth, is relative to understanding. Our folk view of knowledge as being absolute comes from the same source as our folk view that truth is absolute, which is the folk theory that there is only one way to understand a situation. When that folk theory fails, and we have multiple ways of understanding, or 'framing,' a situation, then knowledge, like truth, becomes relative to that understanding. Likewise, when our knowledge is stable and secure, knowledge based on that understanding is stable and secure. Is such knowledge 'real knowledge'? Well, it's as real as our knowledge ever gets--real enough for all but the most seasoned skeptics." George Lakoff

"Reality is that which when you stop believing in it, doesn't go away." Phil Dick

INTRODUCTION

The purpose of this paper is to follow up two previous presentations given at the Wyoming Trial Lawyers Association conference in 2005. Part of that presentation will be repeated, initially, as it sets the stage for this presentation. In order to take better depositions, consider strengthening your case and file foundations. Most skill building is hierarchical. If you do the foundational things better, you will be able to do the more sophisticated things better. Start with the elements; use the jury instructions and annotations or commentaries to frame your pleadings; follow up with requests for admissions; use yes/no questioning; use subpoenas or Rule 30 (b)(5) and (6) notices for depositions; follow up securing admissions; borrow from psychologists to use a more inter-active listening and witness friendly examination; make charts of the above to make your case more visual for the jury; use as much of the Stanislavski system approach as you can, and, with any luck, enjoy the process a little bit more. Some of the participants at the 2005 seminars asked me to speak in more detail on deposing the defendant, deposing the defense expert, and to comment on defending a deposition, or when and what questions one should consider asking at the defense deposition.

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? "

After structuring pleadings and paper discovery strategy, how does one depose witnesses with an eye to trial strategy? The main points are to:

1) Use **JURY INSTRUCTIONS** to draft pleadings and in structuring witness outlines, and to focus one's attention on the statement of the case jury 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, production, and depositions);

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** to discovery;

5) Use a **"YES/NO"** format to lock in admissions in depositions for use in opening, cross, and final argument;

6) For the defendant or opposing expert, explore the options of "framing", "de-framing," "reframing," and "inter-active listening" to change the tenor of depositions; find out what facts would have to be true for the opposing expert

to agree with you, and with what facts the expert can agree;

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 and simply explain the terms or art and analytical models of the expert or industry to frame your questions and examination at deposition or trial;

9) Try a more witness-focused way of examination, whether on cross or direct examination;

10) Let the uncontrollable witness talk and talk;

11) Use as many of the Stanislavski suggestions as you can to make your case become more alive; and,

12) Damage control: rehabilitate when necessary the plaintiff, the expert or other witness.

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, himself, had only recently started doing what he had suggested to me. 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 state jury instructions, such as for Colorado and 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 6, 2006. Apparently, the hard copy can be purchased with a CD. 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 or complaint, 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 (with some repetition from above) 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 and/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;
13. Adapt to the style of the witness so the witness feels he or she has had a fair hearing;
14. Focus on limiting the scope of the dispute; outline for the fact finder what the areas of dispute are.
15. Incorporate the terminology or language, conceptual framework or methodology, and ethical professional "Bibles" into your exam;
16. Use Trialsmith to get depositions to familiarize yourself with the format, phraseology, and linguistic and analytical patterns of the opposing expert;
17. Adapt to the linguistic style of opposing witnesses or experts by using a similar terminology, analytical model, methodology, or framework as that of the witness or expert to derive facts or whose opinion you are trying to get to commit, to impeach or to solicit, and then translate that information into simpler terms or concepts;

18. Use outlines and forms for each of the above that can be re-adapted and refined to the next case;

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

20. Use the Stanislavski techniques to make your case come alive;

21. For each witness, focus on what things they CAN agree to, as well as what the areas are where they CANNOT. Use defense witnesses to secure agreements on as many points as you can. Prepare summary outlines on those points.

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 now tend to be more specific since ***Daubert***, and its progeny. I used to chuckle at the number of times defense attorneys early on 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 DENIALS OR ADMISSIONS

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 in pleadings or at a deposition, and it has been proven at a motion for summary judgment or by a directed verdict, the statement of the case jury 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, chosen 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 to poster size for presentation to the jury.

DEPOSITION OF THE DEFENDANT

The basic questions are often the best: ask, "Who, What, Where, When, How and Why?". The more you know about who the defendant is, the better able you will be to know what to elicit. For example, if the defendant is a trucker or trucking company, there are very few driving examples which are not in the CDL or Commercial Driver's License manual. Frame your accident facts in the same terminology as the driving examples from the manual, and I think you would be surprised at what the driver will admit he knew before the accident. Consider what can verify or dispel the actions of the trucker before the accident. If the accident is big enough, what do the event data recorder, any satellite communication systems, and fuel cards say? We have all seen the ad on television for the on board fleet management systems, which can replace paper log books (known often as “liar’s logs”) which record state line crossing for purposes of fuel tax calculations, automatic arrival, departure, load status, routing information, location, and the truck’s mechanical status. Cummins and Detroit Diesel have developed road relay systems that are capable of providing detailed reports of, for example, driving time and miles driven, fuel economy, RPM, use of cruise control, range of vehicle speeds, hard braking events, and maintenance. Comdata cards are often used at truck stops and can provide date, time, fuel, and maintenance, as well as cash advance information. The technology can be compared to the driver’s log, and a time line contrasting them is powerful visual evidence. Does the truck itself have a background of accidents which may point to mechanical defects which should have been anticipated? Do the company files show that the driver was qualified to drive? What do the company’s records show in the duty status records or personnel file? Did the driver have any additional part time jobs which would put the driver over the top for hours of service? Also, check out what information the employer should have by looking at what information is out there at ,for example, **jjkeller.com** or from the National Safety Council.

J. J. Keller has some marvelous safety guides for trucking safety and OSHA compliance. Ask the defendant if its employee’s behavior comported with the company’s training. Often, it will not. Alternatively, the company may often subject its employees to the same risk that injured your client. Since April of 1994, OSHA, under §1910.132 (d), (e), and (f), has mandated that employers assess their workplaces for hazards, and train their employees in the use of personal protective equipment. An employer or manufacturer has a duty to do this hazard analysis. They either do it or they don't. They either produce it or they face sanctions.

The "What" part of the deposition can be readily seen to be the compared to what standard of what the defendant did or didn't do compared to what should have been done. Think how that can work on a FELA case against the railroad or a warning case against a chemical manufacturer to compare what they should have done versus what they did. Most competent engineers use a variant on the safety hierarchy of anticipate and identify the hazards, eliminate the hazards, guard against any remaining hazards, warn or communicate about any remaining hazards, including the need for personal protective devices, and maintain and review a claims history through the life of the product. Most will agree that is the standard of care in engineering and for manufacturers. The rest is how the defendant made bad choices which hurt your client and may be hurting many others.

For the "What" part, consider the flips. Lookout, speed, and control are flips. Visit every accident scene and have four-sided panoramic photographic overlays taken. If the defendant had only taken the care to look earlier, he or she would have seen our car. If the view is shown to be blocked, then the defendant didn't take the time to slow to maintain control of the car. If the defendant says that he or she couldn't stop, same thing. If the accident reconstruction engineer monkeys with the coefficient of friction, (*i.e.* reducing it to reduce the defendant's speed), you can first cross reference your data to the ***Northwestern Traffic Accident Reconstruction Manual***. Second, show how significant reduction of the coefficient of friction increases the stopping distance well into too fast for existing conditions. If you want to try it yourself, look at

http://www.csgnetwork.com/stopdistcalc.html.

For corporate defendants who allege contributory negligence, the flip is to get them to commit strongly on whatever acts they complain the plaintiff did wrong, and then flip how the company was well aware of that point, tying it into same or similar incidents, or lack of warnings, or what safety devices or other products could have prevented the same accident or mechanism of accident and injury.

Returning to the "Who" component, if your corporate defendant manufactures things, do they adhere to the **Code of Ethics for Engineers** which holds paramount the safety, health, and welfare of the public? If not, do they adhere to any ethical or moral code? The codes of responsibility for business, engineering, health, the law, and most professions are compiled in **Codes of Professional Responsibility, Ethics Standards in Business, Health, and Law**, Fourth Edition, Gorlin, ed. For example, the Fundamental Canons for engineers requires, "Engineers, in the fulfillment of their professional duties, shall: 1. Hold paramount the safety, health and welfare of the public." Engineers are either licensed professional engineers or not. If they are licensed, they are ethical or not. If they are not licensed and they do not adhere to the Code of Ethics for Engineers, they may be said to have no ethics. The same can be said for corporations or many professions. This is one path that led me to "Yes/No" type questioning, which will be discussed below.

The "Where?" and time lines often fit like hand in glove. From the miscreant driver whose excessive driving by time or speed is found out by computer data, credit card receipts, or GPS, the visual is compelling. Use a "motive" outline showing bad manufacturing or design decisions motivated by financial costs can provide chilling answers to the “Why?’ question. Why not ask the engineer how he or she could have re-designed the product to avoid the accident? Or, how he or she could have re-designed the product to have made it less likely to occur, or the consequences not so severe? If they cannot think of anything, they aren’t saying much for their engineering skills. If other safety measures have been made after the accident, those subsequent remedial measures come in, if negligence or other culpable conduct is alleged under FRE 407, when feasibility of precautionary measures is denied.

If you have an ego-centered witness who is overeager to fence with you, you may consider a variation on the flip, or something akin to the counter play in football, where everyone goes in one direction except the player who has the ball. “Dr. Smith, if Mr. Jones had only come to see you sooner, you could have saved him, is that correct?” An affirmative answer may be followed with, “Then, you agree that if you had not discharged him from the hospital, he would be alive today?” This answer concedes the more difficult question of causation.

In two different cases, I have had a **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 used 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 chemical’s use describing it incorrectly, instead, as an “**Irritant**”. These points were set out in a “**Yes/No**” chart, examples of which are attached.

“YES” OR “NO” QUESTIONING

When I first started practicing, I had that problem of how to even phrase questions. I started writing the questions out, long hand. Then I progressed to having the elements and exhibits listed as check boxes. Then I had a hand drawn larger chart with a blend of elements, witnesses, and exhibits, who would lay foundation, and who would establish relevance. I read a book on using Microsoft Project Management software that set up PERT and GANTT charts on a time table with the steps and pre-conditions, and which parts could overlap all set out. My perception of how to prepare a lawsuit changed. From the project management analogy, I saw a lawsuit more akin to farming where you have to prepare the equipment, check the market conditions, make sure the soil is prepared, seed, fertilize, make sure the weeds are taken care of, harvest, market your product, and make sure you get paid.   The focus changed to accepting the different steps and the timing of those steps. My staff became trained on the sequencing of a lawsuit, which resulted in more orderly preparation and settlements and less last minute scurrying.

A parallel event happened with witness preparation. After suing the local hospital three times and losing, I was “barred” from using its medical library, and I was told that if I entered it, I would be prosecuted for trespassing. I learned to do online research over twenty years ago as a result. I learned to do medical and engineering research online before I had access to Westlaw. What I found was articles or standards on the very points I thought were critical to my case. I sought out the hard cover “Bibles” from whatever profession I needed to deal with.   Now many more of the “Bibles” are online.

Another path involved getting the terms of art down from the relevant profession.

First, learn the terms of art, next learn the relevant concepts, and then how to analyze the relevant concepts, and how they change. Bandler and Grinder, who are students of Milton H. Erickson, suggest that we do not operate behaviorally *directly* on the world, rather that we operate through a map or model (a created representation) of what we *believe* the world to be. They suggest that the map is not the territory. The models that we create differ from the real world often in three ways, and the same is true for expert witnesses. One process involves deleting important aspects from our experience. Part of the process involves filtering data so that we are not overwhelmed. While this is necessary, it can impoverish the richness of our data. A second process involves distorting factual data. Through this process, we can make shifts in our experience of sensory data. We could, for example, imagine a purple cow. A positive aspect of distortion is to change the underlying factual assumptions to secure agreement, if the facts were otherwise. A third process is by generalization. Thus, one element of the world comes to represent an entire category of which it is only an example. The good news is that these generalizations allow us to operate more efficiently from context to context and to re-code our experiences at higher levels of patterning. Think of how you can apply the deletion, distortion, or generalization processes to your approach to evidence, to concepts, or to witnesses. Trying to impeach a witness at trial from a deposition is rarely a pretty sight. The admissions are sometimes not so clear, and the answers are often equivocal. If you have committed the defendant or the defense expert witness to a “Yes” or “No” with those answers on a big chart, a lot of these problems disappear. Frame your case and your questions so that the answers will not matter to you, but that you have the witness or party committed to a position. Consider reading George Lakoff on framing for a linguistic approach to the same subject.

If you start your exam by establishing rapport with the witness, listening very carefully to what the witness has to say, and let the witness have his or her chance to answer and to explain the reasons for his or her opinion, he or she will be more open to your attempts to find out if the difference in what you believe the facts to be is from deletion, distortion, or generalization, for example. Carl R. Rogers suggested that learning which involves a change in self perception is threatening and tends to be resisted. When external threats are at a minimum, or when threats to the self are low, this increases the chances for new perceptions. Learning may be more easily acquired through doing. Learning is facilitated when the student participates responsibly in the learning process. The more the whole of the person's emotions, feelings, perceptions, as well as intellect are involved, the more lasting and pervasive is the experience. Independence, creativity, and self-reliance are facilitated when self-criticism and self-evaluation are self-induced.

The same principles enrich the testimony of any witness. Use a multi-sensory approach. Let the witness describe or critique his or her own analysis of the situation, his or her efforts, emotions, senses, feelings, and plans. Let the witness identify whether there are any deficiencies in his or her own conduct. Would they do the same thing over again? Why not? What course would they take if they only knew...? What facts that they know now would have changed their behavior? Similarly, if you want to impeach a witness with a document, ask the witness to identify the document, then ask one or two innocuous questions before seeking the devastating admissions contained in the document.

Rogers asserts that the most socially useful learning in the modern world is to learn the process of learning; that is, to maintain a continuing openness to experience and to incorporate oneself of the process of continuous openness and change. Just as a facilitator in the Rogerian world, if the lawyer is similarly open to change to a perpetual learning mode, it can set a similar mood or climate in the examination. More can be accomplished often if the tone is less adversarial. If the lawyer is open to the views of the witness, often the converse will be true, and once the witness feels he or she has had a fair hearing, the witness will listen to you. The same is often true for open ended questions in *voir dire*. Both depositions and *voir dire* become places to continually work on your inter-active listening and learning skills, with pacing, anchoring, and a thoughtful whole brain approach.

WHAT DO YOU BRING TO THE PICTURE?

The photographer, Ansel Adams, began as a classical pianist. He and Fred Archer developed the zone system in photography which is analogous to taking a musical scale and putting black on one end and white on the other. Zone I is black with no detail.   Zone III is black or shadows with detail. Zone V is neutral grey. Zone VII is highlights or whites with detail.   Adams said that taking a picture is like writing a musical score. Printing the picture is performing the score.   The point is that whatever your background is, whoever you are, bring that to the deposition or to the trial and show it to the witnesses. The more you are yourself and show that, the more your personal credibility will increase.   Avoid acting or talking like a lawyer. Your rapport with the witnesses will increase the more you listen.

The actor and director, Joshua Karton, helped me to understand that no matter how hard you have worked on your outlines, your preparation or your presentations – put them down; listen and talk. Review the outlines at a break or before you finish. Karton also points out the problem with the conventional wisdom of never asking a question that you don't already know the answer to at trial. If you already know the answer and act like it, why would anyone answering the question or a juror be interested? The drama draws people in. Much of the above is applicable to trial. Take depositions like they are the trial. Karton also helped me to understand the role of silence to build tension, interest, and also to let the witness who appears to be uncontrollable to talk and to hang himself or herself. He emphasizes being in the moment, and able to respond to those unexpected or sometimes unwanted events which always take place. Show empathy to the ones you want to give it to you – the jurors. Similarly, at depositions, show that the defendant or his or her expert have no empathy, if they don't.

Karton also recommended to me to read Stanislavski's, **<u>An Actor Prepares</u>**, **<u>Building a Character</u>**, and **<u>Creating a Role</u>**; literally the A,B,C's of acting. Stanislavski emphasizes life within the moments, psychological realism, and emotional authenticity. Karton also recommended to read Stella Adler, Uta Hagen, and others.

One of the oldest trial practice books I have is by a Roman lawyer named Quintilian who taught oratory. He said that the three most important things for lawyers were **unity of approach, credibility, and emotions appropriate to the case**. With those, one will win far more cases than one loses; without them, the opposite is true. Part of the art of being a lawyer is to achieve that unity between the external data with a convincing internalized approach which gets everyone emotionally involved in a good way (hopefully) with your presentation. Listening (particularly inter-active listening) enhances rapport and opens up the speaker to then listen. Credibility is enhanced by grace and humanity under pressure, and authoritative knowledge of the case. How does one unwrap and present the right emotions? Stanislavski sought to have his actors discover the inner truth of their roles. For example, he says:

> "In our art you must live the part, every moment that you are playing it, and every time...never allow yourself to portray anything that you have not inwardly experienced and which is not even interesting to you... Truth on the stage is whatever we can believe in with sincerity, whether in ourselves or in our colleagues...Always and forever, when you are on the stage, you must portray yourself. But it will be in an infinite variety or combinations of objectives, and given circumstances which you have prepared for your part, and which have been smelted in the furnace of your emotion memory...Consequently it is best for you to make a practice of: (1) finding your real object on the stage and getting into active communication with it, and (2) recognizing false objects, false relationships and combating them. Above all give special attention to the quality of the spiritual material on which you base your communication with others,

If someone asks you if it is cold outside, revisit it in your imagination -- how you walked or drove, how the people dressed, with hats, collars turned up, whether the snow crunched under your feet. He wanted actors to see how easily falsehoods -- those aspects of behavior that an audience can detect even without being aware -- are assumed by an untrained or inexperienced actor in performance. Stanislavski wished to analyze as far as possible the qualities of a given phenomenon to give an awareness to the actor of the complexities of human behavior. Dyer Bilgrave describes Stanislavski's directions to his actors to extract and articulate the goals of their characters from the scripts to produce realistic behavior on stage, to justify these goals to make them deeper, more necessary, more embedded in inner life. The appearance of reality is enhanced by asking the "Magic If." "If I were in Macbeth's position, what would I do?" Meaningful objectives stimulate desire. The actor must ask, "What do I do? Why do I do it? How do I do it?" Consider the matrix of time and space, economic background, work history, medical history, social history, and the plaintiff's key formative experiences. The play in simplest form has objectives, efforts, changed circumstances, and adjustment to those changed circumstances until the objective is achieved or relinquished. The plaintiff's life becomes the trial. Stanislavski constantly tried to find more effective ways for actors to perform. For years, he hesitated to publish as his views evolved. Perviz Sawoski suggests that if Stanislavski was still alive today most likely those views would still be changing, so his ideas should not be fossilized. Respecting that observation, the following is a composite outline of Sawoski and others for the Stanislavski system:

1. Physical actions and psychological processes are interdependent: emotions can be stimulated by physical action. The issue was to develop a map or system of physical actions to trigger the necessary emotions in an actor's performance. Physical actions are to acting as knowledge of grammar is to

writing. Both require a fertile imagination.

2. To create this map of physical action, Stanislavski developed points of reference for the actor now generally known as units and objectives. Each objective for the actor in a scene was a unit, and every unit had an objective for each character. An active and transitive verb expressed the objective: *to seduce her* or *to annoy him* with a corresponding action to help achieve that objective.

3. Stringing together objectives in a logical and coherent fashion mapped the action for the character. The superobjective, the final goal of every performance, conceptualized this sense of the whole through the line of action. For example, for the superobjective *to win back the love of another character* the successive unit objectives could be *to tease her, to please her, to excite her, to provoke her,* and *to placate her*. Sawoski describes this saying that these objectives, when strung together, reveal the superobjective, the logical coherent theme through the line of action.

4. To analyze the text through action, the actor must ask and answer, "'What do I (the character) do?' 'Why do I (the character) do it?' How do I (the character) do it?'" to help to understand the main idea of the play. Too much analyzation of play without rehearsal could lead to a separation of emotion and behavior.

5. The "Magic If" or "If I were in Macbeth's position what would I do?" Imaginative and powerful "if" theatrical choices make the character appear

real, true, and believable to the audience creating “scenic truth.”

6. Imagination: “There is no such thing as actuality on stage. Art is the product of the imagination, as the work of a dramatist should be. The aim of the actor should be to use his technique to turn the play into a theatrical reality. In this process imagination plays by far the greatest part.”

7. Subtext: Subtext presents the meaning lying underneath the text as the actor interprets the text with intonation, gesture, body posture, pauses or choices in action. Stanislavski said, “Spectators come to the theatre to hear the subtext. They can read the text at home.” Subtext and dialogue may not be consistent – for example, pleasing words with a body that shows discomfort, but subtext must always be consistent with the objective.

8. Motivation: Stanislavski thought that the triumvirate of feelings, mind and motivation impelled our psychic life. Emotions or mind drive physical actions. Richard Hornby suggests that motivation looks backwards into psychology and the past, while objectives move forward and toward a goal. Motivation may show subtext or hidden meanings.

9. Concentration: Learning to think like an actor and to focus on the problems at hand and not letting the outside world influence his actions. Stanislavski differentiated between external attention to material or objects outside of the actor, and internal attention based on the imaginary life created by the actor using all five senses consistent with the given circumstances of the play.

10. Relaxation: Learning to relax or to control desired muscular tension while

performing particularly in moments of strong dramatic emotions to communicate most effectively;

11. Working with the senses: Discovering the sensory basis of the work; learning to recall those senses and memories; learning to expand from a small sensation to other spheres of attention.

12. Emotional Memory: To bring truth and conviction, an actor should draw on his own emotional store of memories.

Now, think of how you can tie the psychological approaches with those from acting. Recreate the scene of the accident with your senses in your own imagination, and use that to recreate the emotional memory in others. Ask the defendant, "Did you hear Jennifer scream?" "You saw that she was trapped in the car?" "You heard her cries for help?" "Could you smell the smoke?" "You saw the fire department squirt away the spilled gas?" "What were your fears?" " Were you afraid that the car would explode?" "What did you do?"

FRAMING, DE-FRAMING OR REFRAMING

Framing provides the structure to your case analysis to give it your meaning, where no such meaning or structure existed before. Deframing is the process of challenging or casting doubt on the current meaning or term definition. Think of how many times you have had an expert witness try to deframe you. Reframing is the process of providing a new or alternative meaning, and getting agreement with that meaning. You can still lead or pace the witness, or use your own personal approach if need be. One of my lawyer pals has said for years that whoever frames the case wins. If you start with the key factual assumption, put those into the "right" language, and move the witness down the path, the case is properly framed. If the witness balks at the yes/no format, let him or her be heard, and find out where the fuss is. Sometimes the issue is one of deframing the witness's definition. As Abraham Lincoln asked, "If you call a tail a leg, how many legs does a dog have?" The answer, "Four. Calling a tail a leg, doesn't make it a leg." Sometimes, it can be as simple as having the witness write in his or her own qualifiers. Some examples of actual charts I have used are attached.

One day I had the tired, overworked orthopedic surgeon slump in an hour and a half late for his deposition with that "whooped puppy" look of, "Don't do this to me." I promised that we would not make it long. Previously, my depositions of surgeons had been what I had seen other lawyers do: a tedious litany of every contact or office visit often with that video close up of the top of the good doctor's balding head as he stared at his notes and occasionally looked up. I needed to do it another way and quickly. I tried to frame the questioning to use the same terminology and methodology as the witness. Most medical witnesses use the format of history and physical exam, working or differential diagnosis, follow up testing or studies, course of treatment, and prognosis. If your exam follows that format, the doctor will not be as hesitant because you are using terms and concepts familiar to him or her. We must add terms like maximum medical improvement, some foundation on the medical bills, if not waived, and the need and expense of future treatment, impairment according to the ***A.M.A. Guides***, and whether the doctor is familiar enough with the patient to have an opinion on disability. I happened to have a model of the hip joint and asked the doctor to show the jury what he did. The doc lit up and was like a kid at show and tell. The deposition took about 20 minutes and was very effective. The doc was sent home happier and earlier than he thought, too. I try to shorten all my depositions (whether direct or cross) in a similar fashion.

All negligence is as the old comedian, Henny Youngman, who when asked "How's your wife?" answered, "Compared to what?" For one 30(b)(6) deposition, the witness designated by the defendant railroad admitted that he didn't even look for the materials we had requested, not realizing the legal implications of how they would be bound by his answers, and that a motion for sanctions would be forthcoming. The case settled before the sanction motion was heard. In another case, a chemical could only be smelled upon over exposure. When chemical company's 30(b)(6) designee was asked what the chemical (for which we claimed they failed to warn) smelled like, he described, from personal experience in defendant's lab, its characteristic pungent odor and burning taste. The manufacturer did not adequately warn nor even protect its own employees in its lab site from its own hazardous chemicals, which could kill on over-exposure.

WHAT QUESTIONS SHOULD YOU ASK? REHABILITATION

The biggest problem I have seen that requires follow up questioning concerns a failure to protect an expert against an upcoming ***Daubert*** challenge. The best analogy I know of for ***Daubert*** is to show that you need to have the right expert, who had the right cookbook, and who followed the right recipe. How the ***Daubert*** cake came out does not matter as long as the expert followed the methodological recipe. Regardless of the cross, if you think a challenge is coming, ask your expert why he is the right expert, and what the agreed upon methodology in his or her field is. Identify what authoritative sources show that methodology. Identify how he or she followed that methodology step by step with the facts which support each step. List the opinions that the expert has or mark and offer his or her reports. Otherwise, you run the risk of the defense running the mini ***Daubert*** trial, and getting a second (and costly to you) shot at your expert before trial. I try to get my expert opinions in ***Daubert*** proof form that can be used also for Motions for Summary Judgment. I use the affidavit and/or deposition of my expert to rebut the challenge.

When the witness goes south on you, it is always a judgment call on what to do or whether to do it in the deposition. Trust your gut about what is right. In one case, despite our preparation attempts, we had one plaintiff who was led down the path into at least four different versions of what happened to him – he had been filling a jerry can with gas when static electricity caused an explosion and fire. After our “Come to Jesus” meeting, he, on cross at trial, blurted out the truth that he was on fire; he thought he was going to die; he still doesn’t know what happened; what he wished he did; what he has had nightmares about doing; and he didn’t recall what really happened until the fire got put out. The jury believed him. If I think the witness has misunderstood the question or has just mis-spoken, I will try to correct that at the deposition.

CONCLUSION

Recall Quintilian: unity of approach, credibility, and emotions appropriate to the case. To achieve that unity, weave in your imagination the threads of the relevant facts with the relevant legal theories with emotional memory. Start with the jury instructions. Secure Admissions. 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. Follow up with Rule 30(b)(5) and (6) deposition where appropriate. The "Yes/No" format makes proving admissions or impeachment easier at trial. Use a multi-sensory approach whether with technology or more charts for more juror and witness friendly approaches. The first part of the above outline shows a fairly cognitive approach to trials, witnesses, and trial organization. The second part attempts to show how to bring the case to life. Your life will have emotional experiences and gifts that others lack. How you bring yourself to the witnesses and to the trial is part of the art of your life.

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