



Taking Depositions: “The Middle of the Funnel”

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Recap: Why Take a Deposition?

- Discovery
 - To learn what the witness knows
 - To confirm facts you already know
 - To obtain evidence in support of your claims or defenses
 - To test your theories
- To educate your client
- To see, hear, and assess the witness

Recap: How Do You Use a Deposition?

- ✓ To impeach a testifying witness
- ✓ As affirmative evidence for motions or trial
- ✓ To refresh recollection of a testifying witness at trial



Recap: The Funnel Approach

- You have already heard about the Top of the Funnel
- Your questioning covers broad areas
- You're using open-ended questions – HOW, WHAT, WHO, WHEN, WHERE, WHY, DESCRIBE, EXPLAIN, TELL ME

THE FUNNEL APPROACH

Open-ended

Who; What;
Where; When Why,
How; Describe,
Explain; Tell me;

Follow-up

What do you mean?;
Tell me the details;

Exhaust

What else?; Always?; Never?;
Is that all?

Fill in Gaps

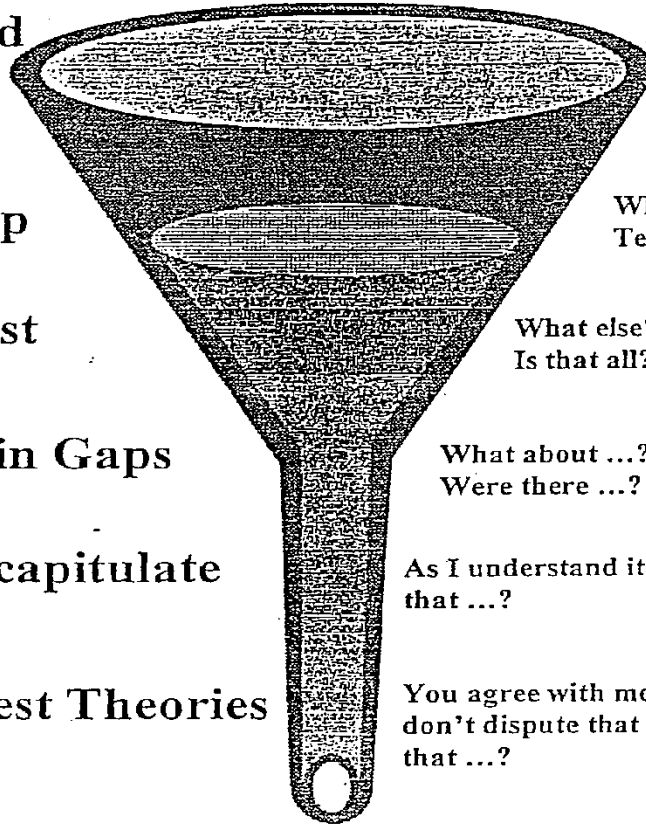
What about ...?; Have you ...?;
Were there ...?

Recapitulate

As I understand it ...; Is it right
that ...?

Test Theories

You agree with me that ...?; You
don't dispute that ...?; You will admit
that ...?



Admissions



Middle of the Funnel

- Follow-up, exhaust, fill in gaps
- Narrow your areas as you understand what is relevant and useful
- Ask narrow and focused questions as you fill in details and seek admissions
- Dig, dig, dig – GET TO THE FACTS!



Two Types of Depositions

Rule 30(a)(1) v. 30(b)(6)



Rule 30. Deposition by Oral Examination

(a) When a Deposition May Be Taken.

(1) Without Leave. **A party may, by oral questions, depose any person, including a party,** without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.



Rule 30. Deposition by Oral Examination

(b) Notice of the Deposition; Other Formal Requirements.

(6) Notice or Subpoena Directed to an Organization. **In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify.** A subpoena must advise a nonparty organization of its duty to make this designation. **The persons designated must testify about information known or reasonably available to the organization.** This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | | |
|-----------------|---|-----------------|
| JOHN DOE, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | C.A. No. 18-002 |
| | : | |
| XYZ CORPORATION | : | |
| | : | |
| Defendant. | : | |
| _____ | : | |

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, Defendant XZY Corporation will take the deposition of **AJAX CORPORATION, on April 24, 2018, at 1:00 p.m., at the offices of Hinckley, Allen & Snyder LLP, 100 Westminster Street, Suite 1500, Providence, Rhode Island 02903.**

Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, AJAX CORPORATION is required to designate one or more of its offices, directors, managing agents or other persons knowledgeable regarding the subject matters referenced in Schedule A to appear and testify at the deposition. The deposition will continue from day to day until completed. You are invited to attend and cross-examine.

SCHEDULE A

1. John Doe's job responsibilities at Ajax Corporation.
2. John Doe's salary and other compensation at Ajax Corporation.
3. The reasons for John Doe's termination from Ajax Corporation.



Take Control of the Deposition: Rule 30(c)

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(2) Objections. An objection at the time of the examination – whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition – must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. **An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).**



Possible Responses:

- Please do not coach the witness.
- Your objection must be short, concise and not suggest the answer.
- You are obstructing this deposition.



Middle of the Funnel – The Basics

- Listen to the answers and follow up when necessary and appropriate
- Exhaust each topic before moving on to a new topic
- Questions should be short and clear
- Don't leave any stones unturned
- Dig, dig, dig – GET TO THE FACTS!



Middle of the Funnel – Topics

- Events or occurrences
- Meetings or communications
- Recollections
- Witnesses
- Others with knowledge
- Documents



Events or Meetings

- Where did it occur?
- When did it occur?
- Who was present – names, titles, contact information?
- What occurred?
- How long did it last?
- What was discussed?
- Who said what to whom?
- Any documents generated?
- Where are those documents?



Example – Fender Bender

Q: When did you first see the plaintiff?

A: I saw him about 200 yards away, approaching on Kirby Street.

Q: How far was the plaintiff from the intersection?

A: About 100 yards.

Q: How far were you from the intersection?

A: About the same distance.

Q: What traffic control devices, if any, were there at the intersection?

A: It was a four-way stop with stop signs at all four corners.

Q: What did the plaintiff's car do when it arrived at the intersection?

A: It came to a stop.

Q: What did you do when you came to the intersection?

A: I slowed down to about five miles per hour.



Example – Documents

- Were any documents created?
- What kind? (Notes, e-mails, etc.)
- By whom?
- How many?
- What is contained in each document?
- Where are they now?
- Where are they normally kept?
- If they do not exist, why?
- What is your document retention policy?



Documents (con't): Hearsay Exceptions

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the opponent does not show that the source of information nor or the method or circumstances of preparation indicate a lack of trustworthiness.



Documents (con't): Hearsay Exceptions

(8) **Public Records.** **A record or statement of a public office if:**

(A) it sets out:

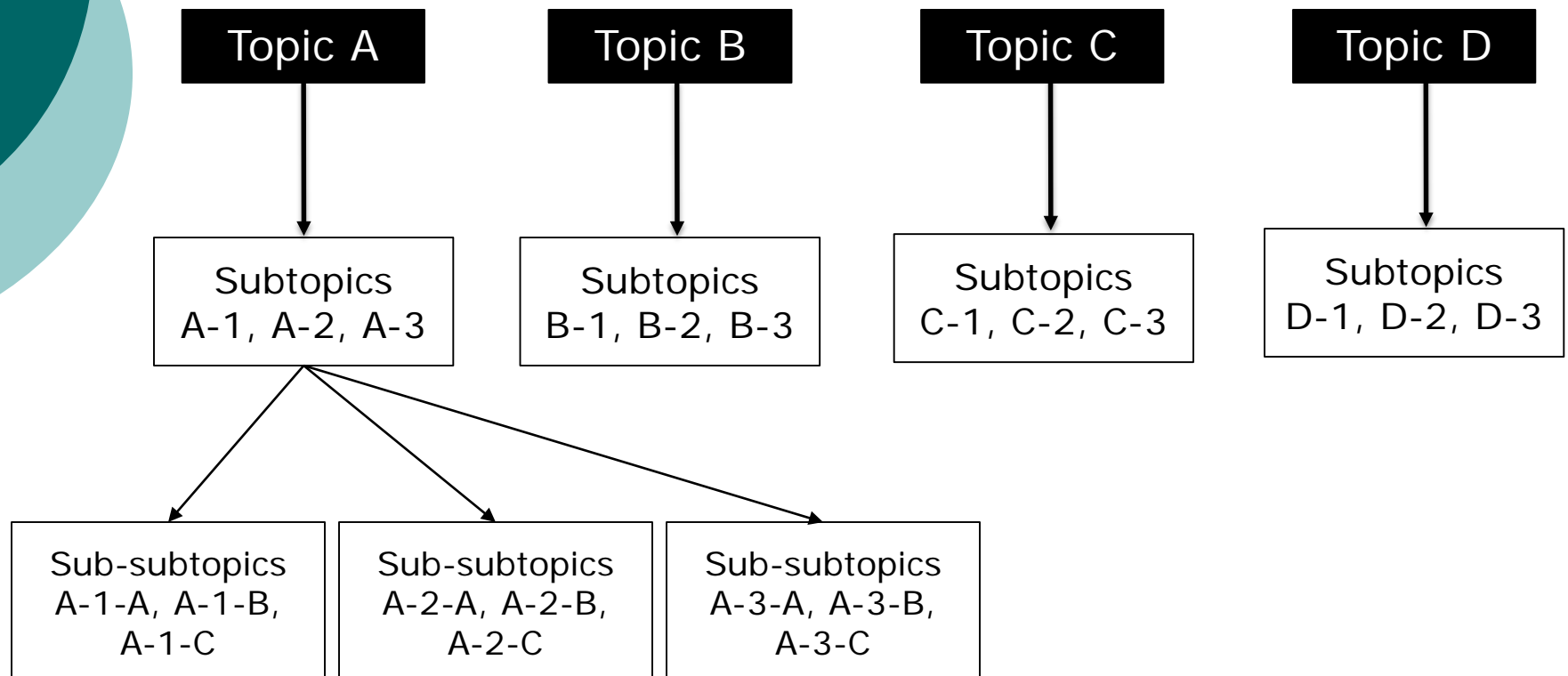
(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the opponent does not show that the source of information nor or other circumstances indicate a lack of trustworthiness.

Question Tree: Multiple Funnels





Example: Sub-funnel

Assume, for example, the deposition of an insurance agent where the issue is when the agent learned of a policyholder's request to change beneficiaries. The initial funnel might go as follows:

Q: How did you learn that the plaintiff wished to change the beneficiaries on his policy?

A: He sent a letter to my office asking me to change the beneficiaries.

Q: When did you see that letter?

A: On April 3 of last year.

Applying a new funnel to the subtopic of "how mail is handled":

Q: When is the mail delivered to your office?

A: About 11:00 a.m. each day.



Example (con't)

Q: Where does the carrier put the mail?

A: In the mailbox outside of the office front door.

Q: Who brings in the mail?

A: My secretary.

Q: When does your secretary bring in the mail?

A: He usually checks around 11:00 each day.

Q: Let's go back to what you were saying before . . . You know, about your secretary picking up the mail. What does he do with the mail after picking it up?



Be a Skeptic

- “I don’t recall”
 - Who else was present?
 - Who else knows?
 - Who else might know?
 - Who else would you expect to have that information?
 - Were there any notes that might have that information?
 - Whose responsibility would it have been to know?
 - Whose responsibility would it have been to take notes?
 - Is there anything that might help you remember?
 - Anyone you could talk to?
- Get the witness to talk!



Remember These Phrases:

ANYTHING ELSE?

or

HAVE YOU TOLD ME
EVERYTHING ABOUT . . . ?



Listen and Take Notes, But:

- Don't be slavish to your outline
- Don't be over-focused on note-taking
- Take notes of avenues of exploration
- Watch witness; pick up cues



Example – Failure to Listen

Q: Did you talk with the defendant about what had happened?

A: Not on that day.

Q: Did you let your employer know what had happened?
[switching to a different topic]

Q: If you didn't talk with the defendant that day about what happened, when did you talk with him?

Example: Mill Building Roof Collapse

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1 A. Just what I marked is what I said you could
2 see. You could see that little space, that part of the
3 roof, this roof, and that roof. You could see all that
4 from my porch.
5 Q. Okay.
6 A. And that's what Al Brien saw when he was on the
7 ladder on the fire truck when they raised him up, so he
8 could see it. I stated that earlier.
9 Q. So if I understand you correctly, you're on your
10 porch, you're talking to your wife, you're looking at the
11 sky, you're looking at the whole area; and suddenly you
12 see a lightning bolt come out of the sky from a cloud and
13 hit the center of this mill building's roof?
14 A. I stated that you could see the lightning strike
15 that center of the building because it was lightening up
16 the whole sky
17 Q. That's what I'm asking you. Is that what
18 happened? A lightning bolt -- you saw a lightning bolt
19 come from one of the clouds, and actually come down
20 through the atmosphere and hit the center of the roof?
21 A. There was no atmosphere. The way the sky was
22 from my porch, it looked like the sky was right on top of
23 the roof, and when the lightning came down it was right
24 there; and it hit the building. It just -- quick thunder

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1 clap, and then a crackle of lightning lit up the whole
2 sky; and hit the center of the building. That's what I
3 saw.
4 Q. Are you saying that the clouds were --
5 A. The clouds were --
6 Q. -- let me just finish the question, so you know
7 what you're answering. Are you saying that the clouds
8 were hovering just above the roof, these black stormy
9 rain clouds?
10 A. I'm saying that the whole sky was black. There
11 was no clouds per se. The whole sky was dark black and
12 the lightning was coming from the clouds that was up in
13 the sky.
14 Q. Right. But I'm asking you, did you see a
15 lightning bolt come from the sky and go through into
16 through the atmosphere and hit the middle of the roof?
17 MR. DONOVAN: Objection. You can
18 answer.
19 A. It's hard to fathom what you're saying. It
20 didn't come through the sky. This is the sky. The
21 lightning hit. That would -- it didn't come through the
22 atmosphere like you said. If this was the sky, the
23 lightning would come straight down and bang. Right on
24 the roof. It'd go(BANGED HAND ON TABLE) just like that.

AFFIDAVIT OF KEVEN DONNELL

I, Keven Donnell, do hereby depose and state as follows:

1. At all relevant times, I was a resident of Woonsocket, Rhode Island.
2. On July 16, 2012, at approximately 6:30 p.m., I observed a bolt of lightning strike the roof at 781 Social Street in Woonsocket, Rhode Island, and cause the roof to cave in.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 14th DAY OF SEPTEMBER, 2012.


Keven Donnell

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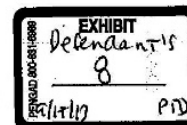




EXHIBIT
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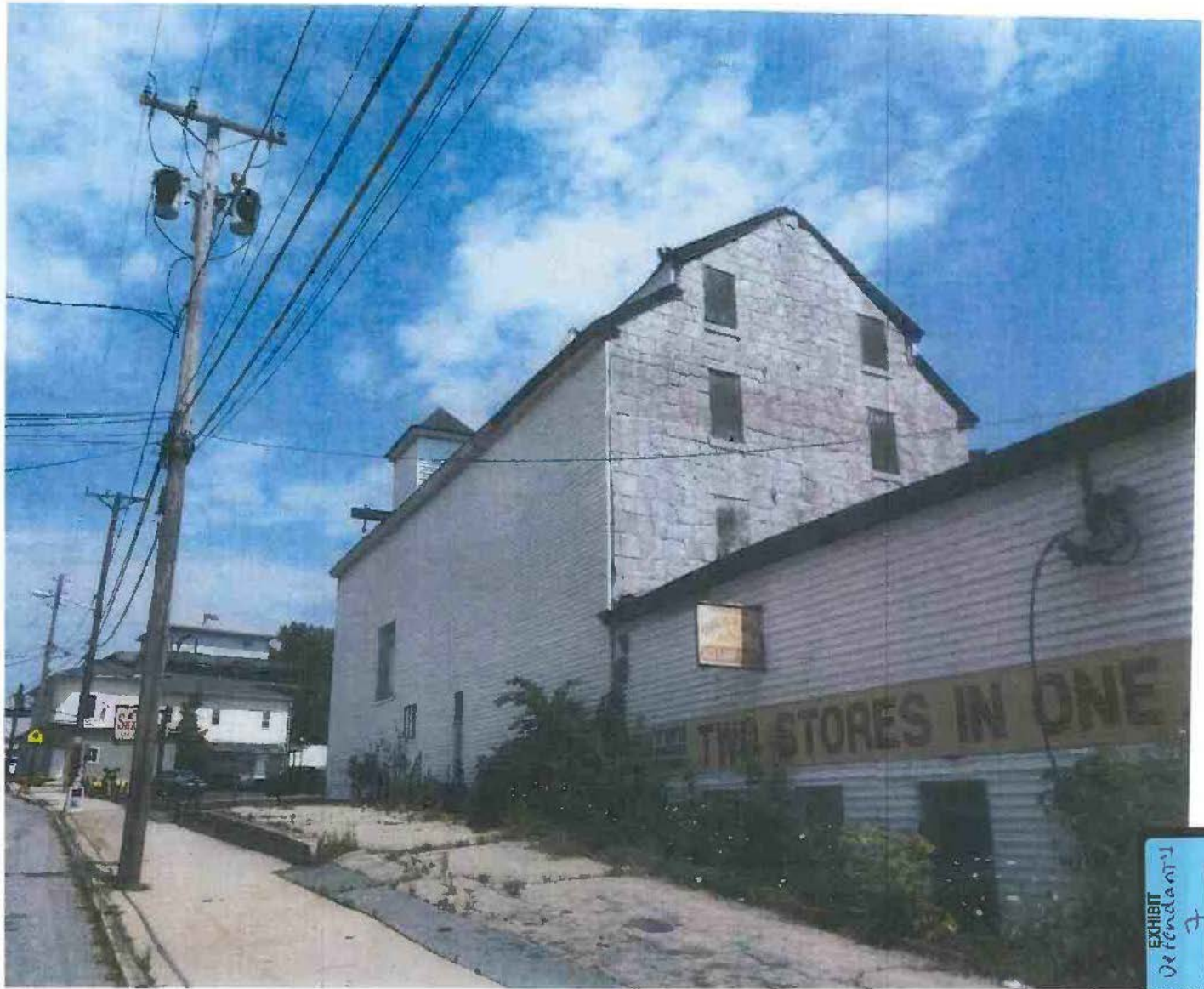


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PDS
FENGAD 000-031-1999

Fire Official

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1 First of all, how did you know the building was
2 poorly maintained?

3 A. Again, through my interaction on the Fire
4 Department, we had responded to that building, that
5 complex of buildings, several times, dozens of times
6 in my career; and we were typically responding there
7 for a sprinkler activation for multiple reasons.

8 So in the course of our usual investigation,
9 we would go through the buildings to see why the
10 sprinkler had sent a signal and why it had tripped,
11 why it had activated. And the stone building in
12 particular was, for the most part, devoid of
13 activity. It was just a vacant -- empty of just
14 about all belongings, any type of furniture, things
15 like that. It was unheated, would be my impression,
16 year-round.

17 I don't know that it had electricity to it.
18 I think my recollection is we would always be using
19 hand lights, flashlights, not flipping switches to
20 turn a light on. There were breaches in the
21 building through wood construction; you could see
22 daylight through. I know that I walked on bird poop
23 guano, so there had to have been some access to the
24 building.

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1 And with regards to the sprinkler pipes,
2 again, most of the times that we interacted with
3 this building on the Fire Department was because of
4 a sprinkler issue, a water flow issue. And I have
5 been there when, you know, pipes have developed
6 pinholes or burst and a sprinkler had been
7 activated. So I know that water had been exposed to
8 the building's interior.

9 Q. Okay. So you had a chance to look at the
10 roof during the times that you were there?

11 MR. DONOVAN: I'll object to that
12 question. You can answer.

13 MR. WOLLIN: What's the objection?

14 MR. DONOVAN: To the form of the
15 question, because I don't think he said that, but go
16 ahead.

17 Q. Okay. Well, let me go back to what was
18 reported here. It says: "Mr. Lataille said water
19 has been infiltrating the roof for years, causing
20 damage to the wood structure and rusting of the
21 sprinkler pipes."

22 So what's the basis of that statement?

23 MR. DONOVAN: I'll object. You
24 can answer.



DEFENDANT'S
EXHIBIT
1028-13
G. Lataille depo



Any Questions?