

THE FINE ART OF TAKING A BRILLIANT DEPOSITION



THE BOTTOM OF THE FUNNEL

Where the rubber meets the road:

**Change the form of questions
as you slide down the funnel**

**Move from open-ended to short tight simple
questions looking for admissions**



WHY ARE YOU TAKING THIS DEPOSITION?

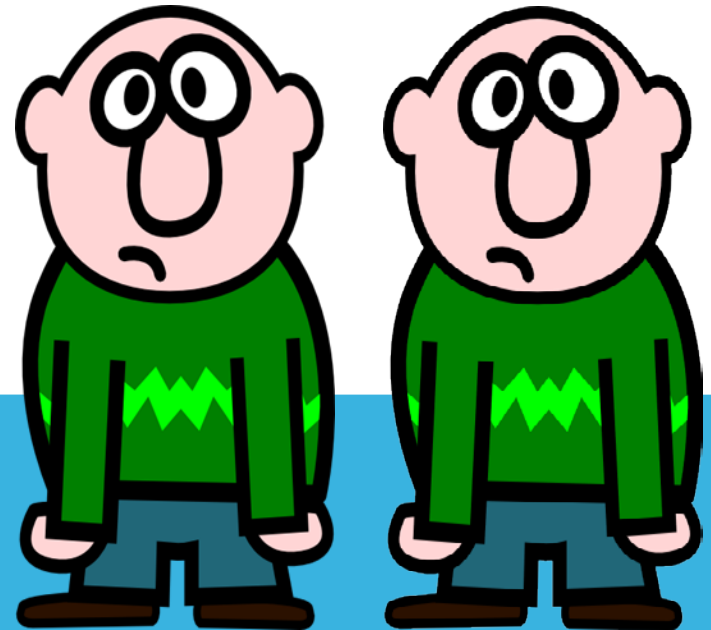
- Summary judgment
- Impeachment at trial
- Trial testimony of the witness at trial
- Box the witness out of case
- Settlement



CREATING Q/A PAIRS TO TEST YOUR THEORY AND GET ADMISSIONS

- Narrow closed-end questions
- Witness to confirm or deny one fact per question
- Break your theory of what this witness has to say into a series of questions
- See if the witness denies any link in the chain

If he does, shoot back up funnel to find out why.



AT THE BOTTOM OF THE FUNNEL

- **Tight, short, clear** questions
- Call for tight, short, clear answers YES/NO
- Now is the time to **lead**
- If question is key, consider scripting it
- One fact per question
- But, beware of simple **yes/no**
- **Pronouns** are dangerous
- Reframe if **objection** colorable



EVIDENCE RULES FOR BOTTOM OF FUNNEL

Fed. R. Evid. 602 “No foundation” – establish witness has personal knowledge

Fed. R. Evid. 611(c) “Leading”

Is this a witness you can lead?

Fed. R. Evid. 607 “Impeaching”

Is this a witness you can
Impeach?

**ANTICIPATE AND LISTEN TO
OBJECTIONS**



SAMPLE EXAMINATION

ON THE DAY OF THE ACCIDENT, YOU WERE WORKING AT YOUR LAW OFFICE DOWN TOWN

YES

YOU WERE PREPARING FOR TRIAL

YES

IT WAS YOUR FIRST JURY TRIAL

YES

YOU WERE FEELING STRESS

A BIT

IT WAS AN IMPORTANT CASE

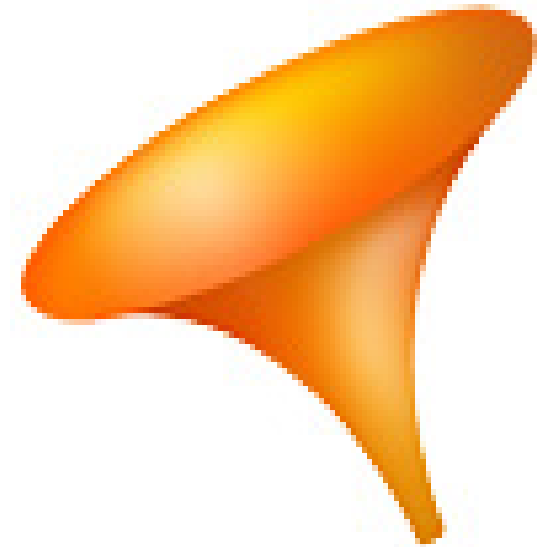
YES

YOU HAD PUT IN A LONG DAY

YES

YOU WERE GOING TO STOP TO GET GROCERIES ON THE WAY HOME

YES



YOUR WIFE HAD ASKED YOU TO PICK UP 7 OR 8 ITEMS AT THE STORE?
THAT'S RIGHT

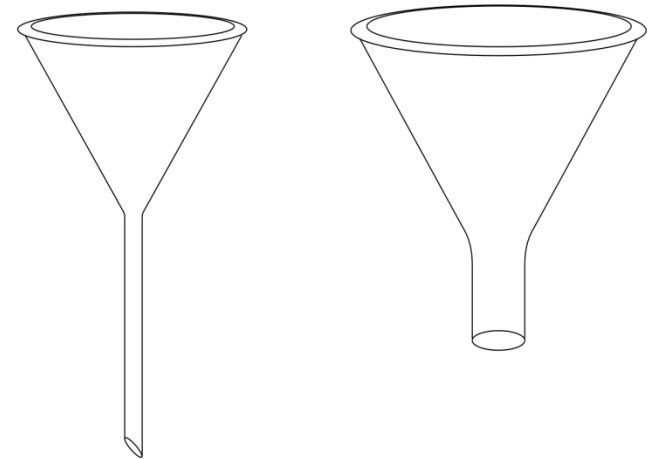
AND YOU WERE KEEPING THAT LIST IN YOUR HEAD
YES

AS YOU DROVE TO THE STORE, IT WAS RAINING
YES

RAINING STEADILY
YES

YOUR WINDSHIELD WIPERS WERE ON
YES

YOUR WIPERS WERE ON THE "HIGH" SETTING
YES



YOU WERE LATE FOR DINNER

MY WIFE WAS GOING TO HAVE DINNER WAITING

YOU DIDN'T WANT TO BE LATE FOR DINNER, ISN'T THAT CORRECT?

THAT'S RIGHT

YOU WERE EXCEEDING THE SPEED LIMIT

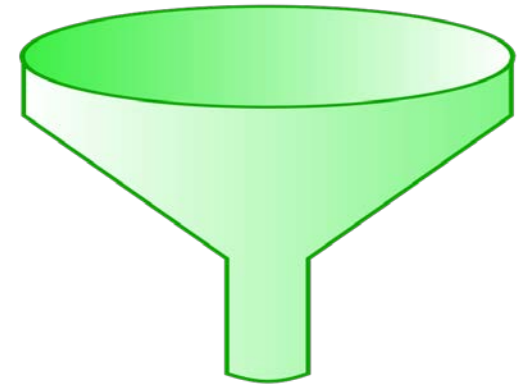
JUST A BIT

YOU WERE EXCEEDING THE SPEED LIMIT

I GUESS SO

AND AS YOU WERE SPEEDING TO THE STORE, YOU WERE THINKING
ABOUT WORK

YES



YOU WERE THINKING ABOUT THE TRIAL THE NEXT DAY
YES

YOU WERE REHEARSING YOUR OPENING
YES

GOING THROUGH IN YOUR MIND EXACTLY WHAT YOU WERE GOING TO SAY
YES

YOU WERE ALSO TRYING TO REMEMBER THE 7 OR 8 ITEMS ON YOUR MENTAL SHOPPING LIST
I GUESS SO

YOU HAD A LOT ON YOUR MIND
NOT REALLY

AND YOU DIDN'T SEE MY CLIENT'S CAR UNTIL JUST BEFORE IMPACT, ISN'T THAT CORRECT?
OUT OF THE BLUE HE HIT ME, THAT'S RIGHT

AND YOU HAD SO MUCH ON YOUR MIND, THAT YOU DIDN'T NOTICE THAT THE TRAFFIC LIGHT FACING YOU HAD TURNED FROM GREEN TO RED, ISN'T THAT CORRECT?

YOUR CLIENT HIT ME, MISTER. YOUR CLIENT HIT ME.



UNPACKING

Beware of words the witness might not understand

Dates and times unambiguous

Simple clear Anglo-Saxon words

- Thereafter → then
- Preceding → before
- Accordingly → because
- Subsequent → after



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MAKE SURE YES/NO MAKES SENSE

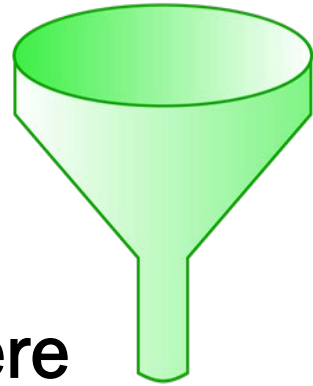
Your windshield wipers were on, right?

- YES means they were on
- NO means they were not on

VS

Do you recall that your windshield wipers were on?

- YES may just mean he/she recalls
- NO may just mean he/she does not recall



MORE YES/NO TROUBLE



So you were not present?

- YES may mean “Yes, I was not present.”
- NO may mean “No, I was present.”

Fix it: To be clear, you were not present at the 5:00 pm meeting on September 5, 2015, right?

ONE FACT PER QUESTION

At the June meeting [what year?], do you recall whether or not the CEO said the Board voted to approve the plan?

What does YES/NO mean?

- I don't recall the meeting.
- The CEO did not say anything.
- The Board did not vote.
- The vote was not to approve.



MIX IT UP

Some questions call for yes

Some questions call for no

Some questions call for a one word answer



You drove the entire trip? YES

Did your wife drive at all? NO

What color was the car? GREEN

MAKE SURE YOU LAID FOUNDATIONS

- During top and middle of funnel, get all the TIME/PLACE data
- You know your witness has personal knowledge
- If any doubt, shoot back up funnel and get foundation laid

Be sure to ask “You were at the June 2014 board meeting?”
Before asking, “CEO was at June 2014 board meeting, right?”



DON'T FORGET

Listen to objection and reform
question if it conceivably has merit.

Listen to answer!!!

Ask if again until it resp
question.



Consider whether “explanation” to be
permitted

Finish the list



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Is that all?

Anything else?

Have you told me everything you recall?

**Anything that would refresh your
memory?**

LOOPING AND LEADING

- Loop prior answer(s) into next question
 - You stopped at store on your way home? YES
 - You were driving? YES
 - You were driving to the store? YES
- Listen for “Objection, misstates prior testimony”

TECHNIQUES FOR LYING WITNESS

Be the Omniscient Examiner - use documents to make witness believe you know everything already

Have testimony from middle of funnel ready

OR let him/her lie – the deposition is not necessarily the time to impeach



MISTAKES TO AVOID

Long questions with ten pound words

Double negatives

Pronouns with an antecedent 20 pages back

Dates, places, times defined 40 pages back

Compound

Forgetting to close the list

Opinion questions without a strong foundation



AND WHEN IT'S OVER . . .

Check the transcript!

Did “You were not driving, correct?”

Get transcribed as “You were driving, correct?”



QUESTIONS?

