

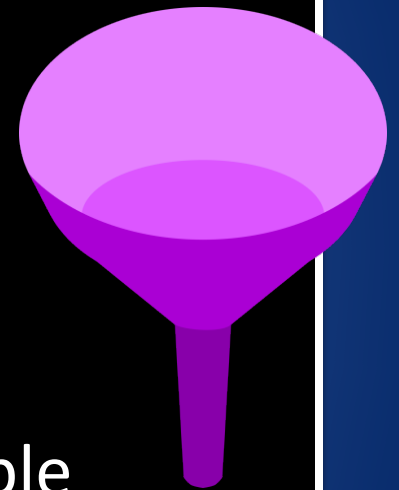
THE FINE ART OF TAKING A BRILLIANT DEPOSITION



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?

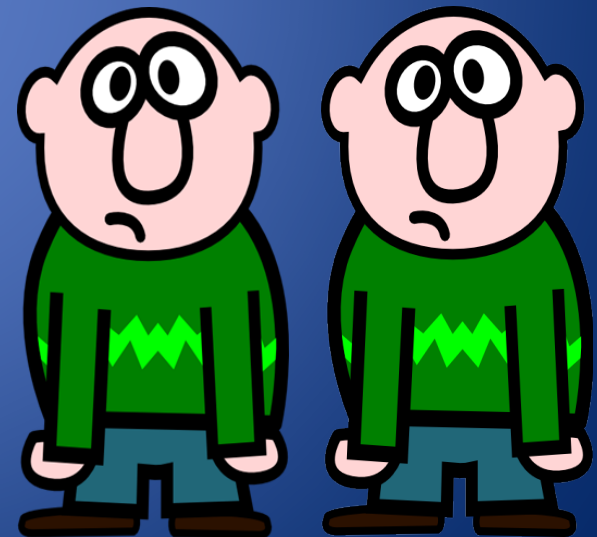
- Summary judgment
- Impeachment at trial
- Trial testimony of the witness at trial
- Box the witness out of case
- Settlement



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



UNPACKING

- Beware of words the witness might not understand
- Dates and times unambiguous
- Simple, clear words
 - Thereafter → then
 - Preceding → before
 - Accordingly → because
 - Subsequent → after



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 witness recalls
- NO may just mean witness 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 – get it!

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 again until question is answered.
- Consider whether “explanation” would be permitted



FINISH THE LIST

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 were driving a 1964 Buick Skylark? YES
 - On your drive, you stopped at the Sack-O-Suds convenience store? YES
 - When you stopped, you parked your 1964 Buick Skylark in the parking lot in front of the Sack-O-Suds convenience 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

PUTTING IT INTO PRACTICE

Getting to “so” (your conclusion)

Scenario: You need to establish the date that the witness had knowledge of a fact. Is a dated email to the witness sufficient?

Q: You’re looking at a document that we have labeled as Exhibit 13, which is an email from Plaintiff to several people, including you on October 4, 2015, correct?

A: Yes

Q: That is an email that you received?

A: Yes

Q: You received it on October 4, 2015?

A: Yes

Q: And in this email, Plaintiff runs through the values of investments that he earned in 2014, correct?

A: Yes

Q: So, as of October 4, 2015, you understood that the value of the reported investments was \$1 million?

A: Reported value, yes.

PUTTING IT INTO PRACTICE

Non-committal testimony –

Scenario: Medical expert in malpractice case testifies:

Q: Do you intend to offer any opinions about the effect of a three year delay in discovering the tumor?

A: No.

Q: Do you intend to offer any opinions about a causal relationship between the medical malpractice and the plaintiff's injuries?

A: No.

PUTTING IT INTO PRACTICE

Non-committal testimony (cont.)

Arguably, no conflict exists between [expert's] deposition statement that he did not intend to offer any opinions about causation and his later affidavit rendering such opinions. An expression of one's intent not to opine does not necessarily conflict with a later expression of an opinion. In other words, saying, "I do not intend to tell," is not inconsistent with later telling.

Pettiford v. Aggarwal, 2011 WL 4688737 (Ohio Ct. App. Oct. 7, 2011)

PUTTING IT INTO PRACTICE

Closing the loop

Scenario: Allegation of “unlawful appropriation and conversion” of money and “electronic data” on a hard drive.

DEPOSITION OF PLAINTIFF:

Q: What did Mr. Smith steal from you?

A: I don't know.

Q: Did Mr. Smith steal anything from you?

A: I believe he took a hard drive.

Q: Did Mr. Smith steal anything else from you?

A: Not to my knowledge but that is being investigated.

Q: When I use the word steal, I don't want to get bogged down on nuances here. Your complaint made reference to, I believe it was, unlawful appropriation. Did Mr. Smith unlawfully appropriate anything other than the hard drive that you referenced?

A: That remains to be seen.

PUTTING IT INTO PRACTICE

Closing the loop (Cont.)

Q: Okay, did Mr. Smith convert anything other than the hard drive that you referenced?

A: I have no knowledge of that.

Q: Do you know whether the hard drive was your property?

A: I can't say whether or not that even belonged to me.

Q: Let me ask about the electronic data that was on the hard drive. What's the value of that electronic data?

A: As I say, we didn't put a monetary damage to it.

Q: You have not been financially harmed, in any way, as a result of the claims you've made against Mr. Smith?

A: Well, not yet. That's - not yet. That remains to be seen.

PUTTING IT INTO PRACTICE

Closing the loop (Cont.)

- SUMMARY JUDGMENT DECISION

[I]f any actual evidence of misappropriation of funds existed, [Plaintiff] should have been able to reference some concrete indication of it. Instead, when asked if Mr. [Smith] stole anything from him, [Plaintiff] first responded that he did not know and then said that he ‘believe[s] [Mr. Smith] took a hard drive.’ When asked if Mr. [Smith] stole anything else from him, [Plaintiff] answered, “Not to my knowledge.” Given this lack of support in the record, it is the Court’s belief that no reasonable jury could find that Mr. [Smith] misappropriated funds from [Plaintiff].

[Plaintiff] also admits that he does not ascribe any monetary value to the electronic data [contained on the hard drive] he charges Mr. [Smith] with taking. Even viewing this record in the light most favorable to [Plaintiff], it fails to reach the summary judgment bar.

PUTTING IT INTO PRACTICE

Unclear question/answer - negative, followed by “correct?”

Q: So, you don't know if the IRS appeals officer actually asked whether the taxpayer wanted to pursue the issue of a retroactive extension, correct?

A: No

REPHRASED

Q: Do you know if the appeals officer asked if the taxpayer wanted to pursue the issue of a retroactive extension?

A: I don't know specifically what happened, but I think he would have asked.

Q: Okay, so you are speculating that the IRS Appeals officer asked whether the taxpayer wanted to pursue the issue of a retroactive extension?

A: Yes.

AND WHEN IT'S OVER . . .

Check the transcript!

Did “You were not driving, correct?”

Get transcribed as “You were driving, correct?”

Questions?

