



# Taking Depositions: “The Middle of the Funnel”

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# Recap: Why Take a Deposition?

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- 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
- To posture case for dispositive motion
- Lock in testimony (no surprises at trial!)

# Recap: How Do You Use a Deposition?

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- ✓ 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

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- 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

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- Follow-up, exhaust, fill in gaps, foundation of knowledge
- 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!
- Test if witness offers first-hand knowledge or inadmissible hearsay



# Two Types of Depositions

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

# Rule 30. Deposition by Oral Examination

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(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

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(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, :  
 :  
Vs. : C.A. NO. 1:19-cv-00204-WES-LDA  
 :  
 :  
XYZ BUILDING SYSTEMS, INC. :  
Defendant. :

**PLAINTIFF’S NOTICE OF DEPOSITION**

PLEASE TAKE NOTICE that pursuant to Rule 30(b)(6) of the Federal Court Rules of Civil Procedure, the testimony upon oral examination of *Ajax Construction, Inc.* will be taken before a Notary Public, or before another person authorized to administer oaths, at the law office of OLIVERIO & MARCACCIO LLP, 30 Romano Vineyard Way, Suite 108, North Kingstown, RI 02852 on the 15th day of June 2023 at 10:00 a.m. Said examination will continue from day to day until completed and is being taken on behalf of Plaintiff John Doe. You are invited to attend and cross examine.

Ajax Construction, Inc. is hereby requested to designate the individual or individuals with the most knowledge about the subject matters identified in Schedule A herein.

**EXHIBIT A**

1. Any and all contracts and proposals to do work submitted by XYZ Building Systems, Inc. and retained by you in connection with the Charlestown Fire Station Project.
2. Any and all correspondence, memoranda, notes and/or other documents that support XYZ Building Systems, Inc.’s contention that Ajax Construction, Inc.’s work on the Charlestown Fire Station Project was incomplete.
3. Any and all correspondence, memoranda, notes and/or other documents that that support XYZ Building Systems, Inc.’s contention that Ajax Construction, Inc.’s work on the Charlestown Fire Station Project was defective.

# Take Control of the Deposition: Rule 30(c)

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(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).**

## POWER DYNAMICS AT PLAY

- Issues that arise with the witness.
- Issues that arise with Opposing Counsel.





# Power Dynamics in Virtual Depositions

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- Can the Zoom/Teams/WebEx Depositions Serve as the Great Equalizer?
- How?
- Anecdotal Accounts

# Possible Responses:

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

YOUNGER ATTORNEYS - Have the rulebook by your side... including the “*Kelvey Rules*” from *Kelvey v. Coughlin*, 625 A.2d 775, 777 (R.I. 1993).



# Middle of the Funnel – The Basics

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- 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

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



# Events or Meetings

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- 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/presented/discussed?
- Where are those documents?
- Follow-up emails or communications?



# Example – Fender Bender

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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 – Slip & Fall at School

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Q. Mr. Jacques, in your position as Director of Facilities you possess overall responsibility for ensuring that the school facilities are cleaned and maintained to ensure the safe environment for students, faculty, staff and visitors, correct?

MR. AMOS: Objection.

A. Yes.

Q. You have overall responsibility for ensuring that the facilities are maintained to be free from hazardous conditions for the benefit of the students, faculty, staff and visitors on the premises, correct?

MR. AMOS: Objection.

A. Yes.

Q. Are there any procedures, policies that you, as Director of Facilities, have promulgated relative to the level of maintenance or cleanliness for facilities that you seek to achieve for the Mansfield School District?

A. No.

# Example – (con't)

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- Q. Are you aware of national standards relating to best practices and levels of cleanliness that educational facilities should strive to achieve?
- A. Yes.
- Q. And what are those national standards?
- A. The standards that I'm aware of is the number of classrooms or square footage that can be cleaned by an individual.
- Q. And is there an association that promulgates those recommendations?
- A. I don't know.
- Q. Have you ever heard of the Association of Physical Plant Administrators or APPA?
- A. No.
- Q. Are you aware that they are an organization widely used in the facilities industry to establish certain standards for cleanliness for K-12 facilities and colleges and universities?
- A. No.



# Example – Documents

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- 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

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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

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

**(A) it sets out:**

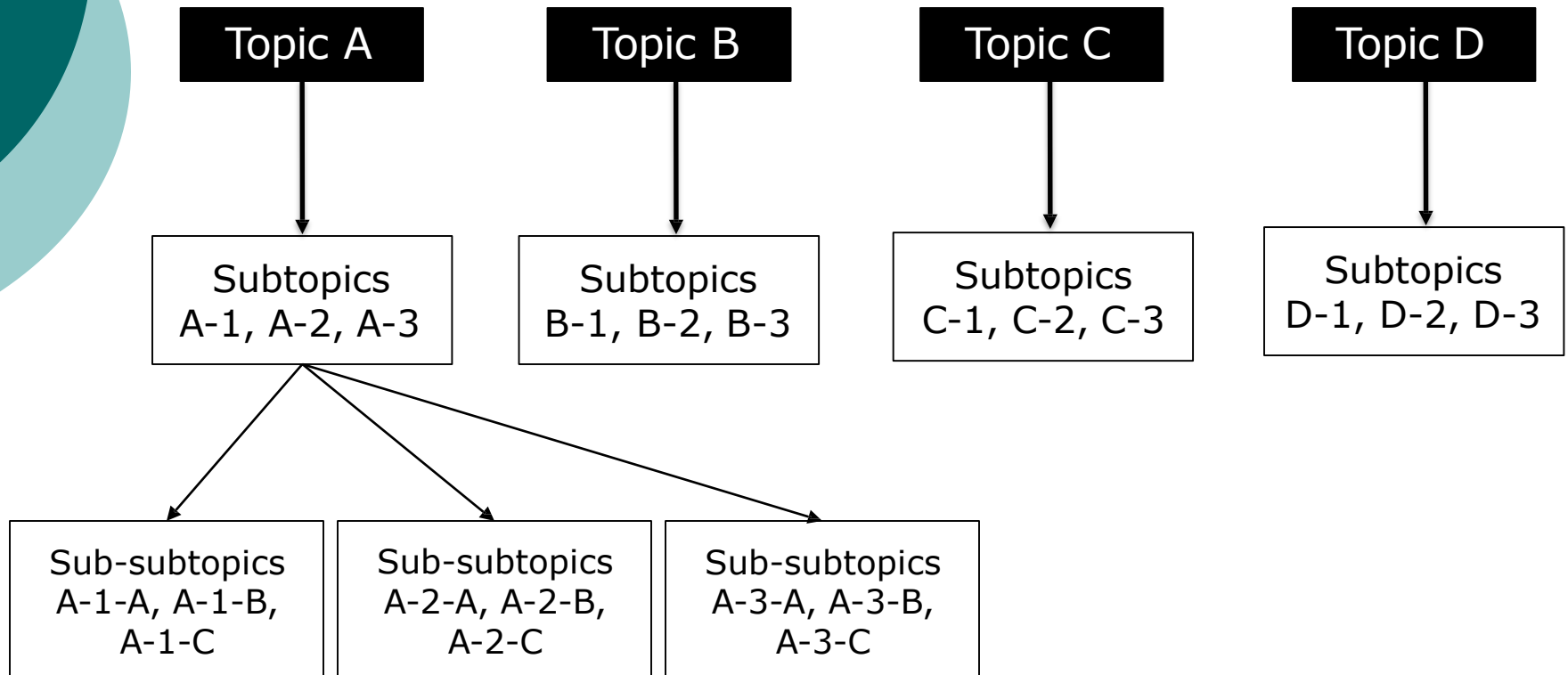
**(i) the office's activities;**

**(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

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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)

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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 executive assistant.

Q: When does your executive assistant bring in the mail?

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

Q: How is the mail processed internally once your executive assistant picks it up?

# Be a Skeptic

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- “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:

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ANYTHING ELSE?

or

HAVE YOU TOLD ME  
EVERYTHING ABOUT . . . ?



# Listen and Take Notes, But:

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- 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

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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]

You should have asked:

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

Q: Describe everything the defendant told you in that conversation about what happened?



## Example: Testing the Foundation.

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1 very high anxiety place for him to be but -- and it was  
2 really bizarre to me how this letter that he brought in  
3 was looked at. It was a dream of his, and then it was  
4 turned into something much, much different which is  
5 actually very disturbing to me too to see how that went  
6 down.

7 Q So I have some follow-up questions.

8 A Yeah.

9 Q Did you have any direct communications with Allison  
10 about that note?

11 A Yes.

12 Q When?

13 A Oh, gosh, I couldn't tell you exactly when.

14 Q Do you have an independent recollection of the specific  
15 words she said in regards to that note?

16 A Yes. I do know -- I think she even showed me the note.  
17 I did see the note.

18 Q Do you have a copy of that note?

19 A No. I did see the note though. And she did know that it  
20 was a dream. She did talk about, if I'm recalling right,  
21 she did talk about how, you know, he did, he wanted to  
22 be, you know, wayward or get being, you know, that way  
23 with us, again, resentment towards us. And he was  
24 working with her. She told him, you're crazy, I'm crazy,

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1 we're all crazy, you know. And it was almost like, I  
2 felt like she was befriending him in a way that maybe  
3 wasn't necessarily in his best health, but anyway. Okay,  
4 so back to that. Yes, she talked to me about it.

5 Q And you're characterizing some of the things she said. I  
6 just want to verify if these are actual words she said to  
7 you. You said she is crazy, we're all crazy, are you  
8 saying under oath she said those words to you?

9 A No, Michael told me she said those things.

10 Q So you didn't hear that directly from Allison

11 A Right.

12 Q You're hearing that information as to what Allison  
13 said from him?

14 A Yes.

15 Q And then he said to you what Allison said, so you  
16 never heard directly from Allison thastatement?

17

18 A Yes. No, she didn't say that to me. He told me that's  
19 how they would talk to each other.

20 Q How about the note, you referenced spiced it up, where  
21 are you getting that information from?

22 A That's from him.

23 Q Michael?

24 A Yes.



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Any Questions?