PRACTICAL DEPOSITION TECHNIQUES

by
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In-House Presentation for
HOWREY LLP

October 13, 2005

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Mr. Fulkerson maintains a diverse litigation practice that encompasses oil and gas technology, royalty, joint venture and joint interest disputes, civil fraud, contractual conflicts, partnership disputes, bankruptcy fraud and other areas. In his entertainment-related practice, Mr. Fulkerson has represented both artists and institutional clients, including Destiny's Child, Beyoncé Knowles, Kelly Rowland and Michelle Williams, and Sony Music Entertainment Inc. In his commercial trial practice, he has represented ExxonMobil Corporation, B.P. Huddleston & Company, Duke Energy, EOG Resources, Inc., the Celotex Corporation, Gyrodata, Inc., JMB Properties Company and numerous estates in bankruptcy.

Mr. Fulkerson has lectured and written on a variety of legal topics relating to elements of his practice, including bankruptcy litigation, parent/subsidiary corporate liability law and both procedural and tactical aspects of the trial practice. He has recently completed continuing legal education speeches sponsored by the University of Houston School of Law and at the invitation of the Harris County district judges. He is a member of numerous bar organizations, has served on the board and as president of St. Catherine's Montessori School, as a YMCA soccer and baseball coach and as a den leader with Pack 130 of the Sam Houston Area Counsel of the Boy Scouts of America.

Mr. Fulkerson was born in Louisville, Kentucky on October 18, 1958. He grew up in central Kentucky where he lead LaRue County High School to a state debate championship and the first perfect record in the history of the tournament. He obtained a B.A. in Economics from Northwestern University in 1980 where he and his partner won the National Debate Tournament. Between 1978 and 1980, Mr. Fulkerson won or was in the finals or semi-finals of 16 nationally ranked debate tournaments and one of the top speakers at competitions held at Harvard University, Emory University, Dartmouth College, the University of Southern California and the University of Kentucky.

Mr. Fulkerson received his J.D. *cum laude* in 1983 from Baylor Law School, where he was case notes and comments editor of the *Baylor Law Review* and the winner and two-time top speaker of the Leighton B. Dawson open moot court competition. Mr. Fulkerson has been a member of the State Bar of Texas since his admission in 1983 and is admitted to practice before various federal courts, including all four federal districts in Texas and the United States Court of Appeals for the Fifth Circuit. Mr. Fulkerson carries an AV rating in the Martindale-Hubble™ rating system.

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I. Objective.[1]

This outline is intended solely to provide guidance on the practical art of deciding when to take a deposition and, once you have decided to take one, how to go about it. It does not delve into the rules of law or procedure governing depositions, except as necessary to discuss strategy and tactics. The suggestions made here apply equally to depositions used in either trial or arbitration.

Throughout this outline it is assumed that the lawyer is involved in the prosecution of a theft of trade secrets and tortious interference claim on behalf of Smartco against Bigco, which has hired away employee X. Employee X has recently been listed as one of the co-inventors of a chemically engineered widget that competes directly with Smartco.

II. When do I take the deposition of a potential witness?

A. Factors disfavoring depositions.

There are as many good reasons to refrain from taking the deposition of a potential witness as there are to take them. Among the factors that weigh against taking a deposition are:

1. Their cost in scheduling time, including preparation time and deposition time.

2. Their cost in out-of-pocket expenses such as court reporter fees and travel expenses, expert fees or payment to a third party for his or her time;

3. Unexpected testimony that is damaging to your case, or helpful to your opponent's case; and

4. The intrinsic emotional cost for you and for the client if he or she attends.

B. Factors favoring depositions.

In my opinion, there are only three good reasons to take a deposition:

1. To secure favorable testimony that will not otherwise be available for trial;

2. To make the favorable testimony of a witness plain so that a case might be pushed to settlement; or

3. To isolate and neutralize the story of an adverse witness who is likely to be at trial and whom you cannot risk examining for the first time at trial.

[1] I would like to thank Kendall Gray of Andrews Kurth, L.L.P. and Tara Porterfield of Vinson & Elkins, L.L.P. for their invaluable assistance in reviewing and editing this presentation.

C. What *process* should be used to decide whether to depose a witness?

Knowing the *factors* that you should consider to determine whether to depose a witness is only half the fight. You still need a regimen to tell you how and in what order you weigh those factors.

Attachment 1 is a "decision tree" analysis of the kind that have become common in cost benefit analyses, complex settlement negotiations and business management. It is greatly simplified because it assumes that on each branch of the tree the probability is either "1" or "0". In other words, it assumes that you can answer the needed questions with a definitive "yes" or "no". Life should be this simple. While there are some things we can ascertain with comparative certainty (is a witness within subpoena range?), others are much more difficult (will a witness outside of subpoena range show for trial?). Assigning numbers to the probabilities of events represented in the decision tree is where your experience and judgment will be applied.

But whether you use this decision tree or one like it, in each and every case using a decision tree type analysis is essential to obtain good testimony, and to avoid accumulating bad testimony during depositions or surprises at trial.

D. The devil in the details.

Like most decisions involved in handling a lawsuit (if not the practice of law generally), in using a decision tree, the devil is in the details. The following is a *non-exclusive* list of considerations that will help you decide whether to depose a witness:

1. Know what the witness will say (as much as possible) before you make the decision.

Using the documents, other testimony or circumstances to guide you often will clearly dictate whether the witness will be good or bad for you. There is, however, no substitute for knowing the witness' motivations and as much as you can about their knowledge before deciding whether to take the deposition.

2. Know whether the witness' testimony is perishable.

In commercial litigation, particularly where the interest of a witness' employer may change with changing business alliances or settlements, the witness' motivation (and thus testimony) may change. One key to determining whether to depose is assessing the risk that the witness' good (or bad) testimony may evaporate. Obviously, if a witness has good but ephemeral testimony, you should strongly consider taking the deposition and locking the witness down while he or she is oriented in your client's favor.

3. Can you create a "bell cow" witness?

As any old plaintiffs lawyer will tell you (typically over hard liquor), you look for the "bell cow" juror on the venire panel who will lead other jurors into your camp. A similar effect can occur with witnesses. If you take the testimony of Bigco's VP of engineering and she concedes that the

materials found in her associate's file are trade secrets not developed from within, and that they are identical to the product Bigco has now developed, then consider follow-up questions to pre-empt testimony by others.

a. You are the person in your company most familiar with this information/widget, aren't you?

b. You have spoken to Mr. Assistant VP about this and he would be of the same opinion you are, wouldn't he?

c. Mr. CEO really would not be in a position to contradict your opinion about this, would he?

d. Mr. Thievious Employee would have to acknowledge the same thing, wouldn't he?

This sort of testimony hits like Dawn™ in a sink full of greasy water. It is very difficult to obtain, but when you can carry it off, you not only establish good testimony, but also establish major momentum in the case, create the high probability of internal conflicts in your opponent's testimony and alleviate the need to take the depositions of ancillary witnesses.

4. Is the witness redundant?

Often the testimony of a single credible witness is all you need at trial. Many experienced trial lawyers refuse to call one more witness than absolutely needed to tell their client's story. You should apply the same practice for depositions because whether you think of them this way or not, they are trial testimony. If you have already established the absence of fiduciary duty through your deposition of one plaintiff do not risk asking the same question of a second witness who might contradict or negate the testimony you have in the bank.

5. Will a subpoena turn the witness?

There is some interplay between the decisions you must make along the decision tree. Occasionally you will be told by a witness that she has valuable testimony but that, for one reason or another, she does not want to become involved and that if you subpoena her, you will regret it. When this happens the key assessment is whether the testimony can be gotten elsewhere, and if not, can you mitigate the witness' resistance.

6. Do you care what the witness says?

Stated alternatively, is the witness credible even if loaded with negative testimony? In some cases, a witness' credibility is so shot by the possibility of pecuniary gain, prior inconsistent statements or criminal convictions that you should not care whether they show for trial or not. You actually hope that the crooked witness is brought to trial and "sponsored" by your opponent. The key again is having enough factual background.

7. Do I want to force my opponent to call this witness?

Trial psychologists tell us that jurors frequently make up their mind about a controversy within the first few minutes of hearing about it in voir dire or opening, then select information to support the conclusion they have previously reached. It is rare that the testimony of an honest witness is universally favorable or unfavorable. Even the plaintiff's business partner may have to concede the existence of customs in the industry that are useful to your client. The effect of the testimony of such a witness is often *improved* if your opponent calls her. By calling a witness at trial, you are announcing to the jury that "this witness is good for us." If the witness then offers up gems that contradict the case of the lawyer who calls her, the fact that your opponent put her on the stand makes that testimony more believable to the jury. Thus, in the calculation of whether a witness is so negative that they must be deposed, consider letting the opposition sponsor the witness so that their concessions become more powerful.

III. How do I get ready for the deposition?

A. Preparation, preparation, preparation.

Once you have made the decision to depose, the next step is preparation. There is no substitute for *effective* homework for a deposition. If you are not going to prepare well enough to clearly identify your objectives and how you are going to achieve them, then don't waste your time and the client's money taking the deposition. We generally spend three to five hours of preparation time for each hour of deposition that we take. We have all seen depositions in which lawyers receive crippling testimony that they did not anticipate and flail about (and generally fail) to counter it.

But how to prepare for the deposition? If you have gone through a reasonably rigorous exercise in deciding whether to take a deposition, you will usually have in your mind a general outline of the issues that a witness will bring to the table, and thus what you must prepare for. While every lawyer has his or her own way of preparing for a deposition, my experience has indicated that there are certain tools of the trade that universally work.

B. Get all of the documents!

In virtually every case imaginable, and certainly in any commercial case, a complete and thorough knowledge of the key documents and of the time-line of key events is essential to your ability to conduct an effective deposition. Witnesses are smart and some are criminally so. If they sense that you are unprepared and that they have "free range" over their testimony, you will get testimony that neither you nor your client can tolerate.

While having all possible documents with which to cross examine a witness prior to the oath is the preferred practice, it almost never occurs. Your opponent frequently "forgets" to conduct as thorough a review of its documents as required by the rules or, in more egregious cases, "loses" its documents or works them onto a privilege log under a water-colorable claim of privilege. As a result, you are frequently faced with the decision of whether to depose a witness now or later. My advice is to depose them now and try to depose them again later if they are hiding documents. I have yet to encounter the judge who, upon timely and complete proof of improper document withholding or document destruction, has closed the door to further needed examination based upon newly discovered documents.

The following advice will sound cynical but so be it: the very earliest depositions in a case should be taken under the assumption that the opposing party has not fully produced documents and is likely withholding those documents that are most hurtful to it. I wish it were otherwise, but it is the rare case (in fact so rare that I have yet to encounter it) in which full production is made at the inception of the case without forceful "reminders" having been filed by the opposition. When you are taking these early depositions, ask broad questions requiring the identification of classes of documents, the names of those involved in the case, the whereabouts of the key documents and all the facts you need to pin down the failure by your opponent to produce.

C. List your objectives first.

1. Why list your objectives before outlining?

All of us have seen lawyers go through extraordinary preparation only to wind up mummified by their deposition outline. Some firms have been so notorious for encouraging their young attorneys to work off of firm-generated outlines that observers could predict the firm, the outline and even the next question. The other risks that arise from working off of a pre-set outline *alone* should be obvious to any good trial attorney:

a. The examination is so patterned that the witness knows where you are going long before you get there, and has ample opportunity to end effective inquiry;

b. You may misallocate your limited deposition time; and

c. The examiner fails to listen fully to the witness' responses, causing him to move to the next question and miss potential key areas of examination.

Therefore, the first step I take in preparing for a deposition is to list the objectives I want to accomplish with the witness in their order of importance. Listing objectives is a good check on my decision of whether to take the deposition in the first place. If after completing my list and the objectives are paltry or unimportant, then I may reassess whether to bother with the deposition. Second, the objectives are the skeleton around which you wrap the body of the outline. When you focus on them you break out of the regimen imposed by the outline and remember your key points. The objectives also help drive the creation of the outline, the order of examination, the use of documents and virtually everything else that takes place during the deposition.

2. How do objectives differ from outlines?

So what then is the difference between an "objective" and the "points" that collectively make up your outline? The easiest analogy I can identify for the two are that the outline constitutes the foundation and the objectives are the apex of a pyramid. The objectives are more visible and usually more important to your case, but they cannot be achieved without working through the facts you are trying to elicit via the outline. Attachments 2 and 3 are examples of objectives and outlines, respectively, in our hypothetical trade secret case.

3. How to set your objectives for a witness:

a. Start by keeping in mind your objectives for the trial or resolution[2] of the case as a whole. Then, identify the role that the witness to be deposed plays in meeting or potentially defeating those objectives;

b. Identify the jury issues where the witness will likely help or hurt. Jury issues do not necessarily equate with "special issues" or "jury questions". A jury issue is one that will cause the jury to turn for or against you, or significantly increase or decrease damages. Your common sense or jury research will help you identify the basic facts that will cause jurors who favor your case to vote for you and cause jurors who disfavor your case to vote against you. Once you have identified these key jury issues and prioritized them, assess how the witness' testimony will impact these key jury issues and go after him;

c. Assess the personality of the witness as best you can and adapt your objectives to it. If you approach the formulation of your objectives for every witness the same way, you are missing a major opportunity. If all of your objectives begin with the words "destroy, obliterate, humiliate or expose" regardless of the personality of the witness, then your depositions will never fulfill your goals. If, from the documents, other testimony or interviews, you determine that the witness you are about to depose will be perceived by the jury as honest and good, engaging in an all out attack will strengthen that witness and reduce the jury's opinion of you;

d. Consider where you are in the case at the time of the deposition. Cases morph. The defenses that seem to be good at the beginning of a case may prove useless after a time and you may be forced to find new ones. Conversely, be aware of the way your opponent's case or defenses are changing and try to be a step ahead when preparing for and conducting the deposition;

e. Think of the end game in the beginning and always. In creating the objectives you may ask a question solely to obtain the commitment of a key witness to favorable testimony or clearly commit him to a lie. For instance, if you have determined that the witness is both a key actor and a bad guy and likely to repeatedly lie, consider committing this key witness to his lie so that you thereby commit the entire client to the defense of a lie. By committing the opposing party to an

[2] There is a big distinction here between the trial and resolution. If you are deposing the settlement decision-maker and expose fraud, he may scurry towards settlement out of the desire for self-protection. If you are deposing the decision-maker's sworn corporate enemy, your success in proving his fraud may tempt the decision-maker to protract the lawsuit to serve his own ends.

untenable position, sometimes even before document production, you empower yourself to rack the witness and to smear the client with his testimony. You also establish momentum by causing the other side to feel that they are in a poor strategic position from the start.

These points are just starters. After you have done a few objective lists, you will get the knack of it, see results and develop more effective lists based upon your experience.

IV. Creating the outline and conducting the deposition.

Giving advice that will be *universally* helpful on the conduct of a deposition is difficult because conducting a good deposition is an intensely personal affair. Assuming that you have done the things identified above, however, it is my opinion that for any lawyer the key to conducting a successful deposition is knowing your own personality and coming to know your witness' personality as quickly as possible. After you have done this, and assuming that effective preparation has been done, then you are set to achieve results.

A. What kind of questioner are you?

Some lawyers are friendly and open, others are quiet and studied, still others have a long, sneaky streak and some are just plain mean. To figure out how to best question a witness, you have to figure out something about yourself and your technique. I am convinced that this is one of the hardest parts of taking a deposition. Why? First, it involves self assessment, something that we all find difficult. Second, a good deposition often requires you to take on personality attributes that you do not come by naturally or which are uncomfortable to you. If you are by nature open, cooperative and talkative, your style will mesh with a witness who like you is open, cooperative and talkative. It is when this open, cooperative lawyer faces the mean, stubborn or deceitful witness that he must put on an aspect of his personality that is not necessarily natural or comfortable, but is nonetheless essential.

B. What kind of witness do you have?

People can be driven by the most Byzantine and bizarre hierarchy of needs. Virtually all witnesses want to be seen as truthful, virtuous and correct, but they approach that goal in radically different ways depending upon their motivation. The business partner accused of embezzlement may be motivated solely by the desire for revenge against his partner for a series of perceived or real slights that have occurred over many years. If so, the witness is likely to go on long, rambling diatribes offering up trivial transgressions by his former partner to justify his predation. This testimony may then convince the jury that the embezzler hated his partner and wanted revenge. The inventor accused of stealing her former employers trade secret may feel the need to "prove herself" and thus engage in a long winded explanation of the invention process that can be easily contradicted by the documents and the time-line of the case. The former gas trader may in fact be an honest, dedicated straightforward person capable of fulfilling three-fourths of your evidentiary wish list. But if you approach all three of these hypothetical witnesses as though they have the same personality profile, you will not fully accomplish your goals. Here are some "give-aways" that tell you about the witness' personality and give you an idea of the systematic responses you are likely to receive.

1. What motivates this witness?

Is the witness motivated by guilt and a need to purge it? Is she motivated solely by the dollar and the fear that honest testimony will end her employment? Is she motivated by the desire to ensure that this case "goes away" so that her career path isn't blocked. Does she have an employment contract under which she obtains a piece of royalties or revenues created by any invention by her employer? Answering these questions will frequently dictate the tone and approach that the witness will take. More importantly, they identify whether or not the adverse witness' personality contains triggers that will permit you to obtain *helpful* testimony. If the witness is newly hired to Bigco and hated the former project manager, she may characterize the former project manager as inept or inefficient and thereby give you good proof that Bigco was not likely to have developed Newtool on its own under such leadership. Use your analysis of the witness' personality to look for opportunities.

2. Is the opposing lawyer or client representative uncomfortable?

If the opposing lawyer is not unnaturally high strung but comes into the deposition uncomfortable from the beginning, then it is likely that there are "issues" with the witness. Perhaps the witness has just made a major negative disclosure to the lawyer and she hasn't fully had time to digest and think through it. Perhaps the lawyer has spent time preparing the witness only to learn that the witness is the classic "loose cannon on deck." In any event, watch the opposing counsel and client representative for keys.

3. What does the witness' body language tell you?

Other than well practiced experts, virtually every witness you face will have a substantial amount of initial nervousness about the deposition. Being deposed is not what they do for a living. Most are worried about perjury, or even the potential accusation of perjury. Most are worried about "saying the wrong thing" and thus betraying the interest of their employer or friends. In the first 15 to 30 minutes of a deposition you can tell whether this initial nervousness has faded and the witness is willing to speak openly with you. Let this be your guide as to the timing and focus of questions.

4. Has the witness been under-prepared?

Occasionally you will encounter the witness who is under-prepared. This usually can be detected by the answer to an early key question. The poorly prepared witness rambles through dangerous monologues or consciously lies about the facts without much thought of being caught. Each type of poor preparation warrants a different response. Your job is to fully exploit the poorly prepared witness for all the favorable testimony you can muster. When you face a consciously deceitful witness, force the opposition to adopt him, then expose him so that the jury slams not only his credibility, but the entire opposing party's credibility as well.

5. Is the witness over-prepared?

Many lawyers have a tendency to over-prepare their witnesses to the point that the witness arrives for the deposition highly stressed and worried that he will "say the wrong thing" or "forget

what the lawyer told me to say." How you handle the over-prepared witness depends on whether the witness un-winds and comes to trust that you will ask fair questions.

Many over-prepared witnesses come to trust a fair examiner more than their own attorneys because they can understand the straightforward nature of the questions they are receiving and can respond to them with less worry. Others just get tighter and tighter and they have to be dealt with differently. In my experience the most effective strategy for the over-prepared witness who cannot or will not unwind is *reductio ad absurdum*.

Take the positions that the lawyer has carefully crafted in lawyer-speak and reduce them to the absurd so that the jury can understand that this is not a witness to be trusted. For example, when the over-prepared witness asks you to define "any" (and praying for a moment that you have all this on videotape) you pause....., for a long while and permit the witness to become ever more uncomfortable with his brand of stupidity. You then ask (calmly but incredulously), "Mr. Smith, have you ever used the word "any" before in your life? Well, Mr. Smith, I mean it the same way you do when you use it. Can you answer my question now?"

The hard part of dealing with the over-prepared witness is keeping calm (rather than say reaching across the table and placing your hands around the witness' neck), so that the witness' natural obstreperousness contrasts with your straightforward, simple question. To accomplish this, I try to keep in mind the conscious thought that this witness and his lawyer are gifts that help me destroy the credibility of their story.

V. The nuts and bolts of the deposition.

A. Preserving the testimony of a favorable witness.

Let's return to the first branch of your decision-tree and assume that you have good testimony from a witness who may not be at trial. There are several practical tips that make an enormous difference in how effective that witnesses' testimony will be:

1. Conduct a thorough interview.

Learn both the good and bad testimony that the witness has to offer. This is a corollary of knowing the witness before deciding whether to depose. If the witness has key testimony for you and gems for the opposition but the balance favors deposing him, know what the opposition's gems may be but whether the witness has any mitigating testimony. Formulate the design of the examination accordingly.

2. Prepare the helpful witness for the onslaught.

Often the favorable testimony of an independent witness is needlessly washed away by cross examination. The strong willed person you met in your office has been reduced to a series of feeble "yes" answers as your opponent destroys all you have built during the direct examination. This often occurs because the witness has no idea that he will be facing cross examination, much less the nature of it. Prepare the witness for all the basics. Here are some common sources of examination and responses for a third party.

a. Let the witness know that it is fine to admit that he has met with you before the deposition. Jurors do not expect us to have never spoken to our witnesses.

b. Let the witness know that the opposing attorney will ask about the details of our conversation. Your advice should be: "the lawyer told me to make sure I understood your questions and to tell the truth." Your practice should conform to this advice so that the witness is answering honestly. Avoid advising the witness to respond that your opponent is a tricky schlep whom he should be careful about. Another very true and acceptable answer is "he asked me the same questions in that meeting he asked again today."

c. Let the witness know that the opposing attorney is likely to ask if we "practiced" our testimony.

d. Let the witness know that the opposing attorney is likely to inquire about whether any financial or other connection exists between the witness and client and your law firm. The opposition wants to undermine his credibility and he needs to know it.

e. Let the witness understand that his testimony and particularly his conclusions are well reasoned and that he doesn't need to apologize for them. This advice is particularly important when you are dealing with a witness whose testimony inherently condemns another's conduct or with a bullying opponent.[3]

3. Use twenty minute maximums.

Juries are not used to watching you or anyone else drone on for 45 minutes or an hour. The weather takes three minutes, an advertisement takes 30 seconds. Fishing shows play only the last 10 seconds when the bass is lugged into the boat. Do not wear out your welcome with third party witnesses or any other witness. You may take 2 hours of testimony, but make sure your "nuggets" fit within 20 minutes or less.

4. Do not oversteer.

I coach in a coach-pitch little league. In our league, after the child has had five swings (and misses) at balls thrown by the coach, he gets to hit off a tee. The ball is just sitting there - - it is

[3] People generally do not like to point fingers at others, so a witness may think of his testimony as "I saw X stealing trade secret stuff" when in fact, he saw X leaving the office the day before his firing with three bankers' sized boxes, one spilled out blueprints all over the floor and X scurried to clean up the papers while looking over his shoulder to see if he was detected. Directing the witness to the general conclusion, without empowering his testimony with the specific supporting observations that convinced him of the theft makes him an easy target. Do not make a sand castle.

immobile, it is *delicious*. Invariably the child swings so hard that he destroys the tee and causes the ball to fall backwards towards the umpire. We do the same with cooperative third party witnesses. The witness is just sitting there. He's cooperative, he likes you, he wants to do your client a good turn and we swing too hard and miss. We so desire to control the testimony that we either put the witness in a position he cannot defend by over-extending him, or we so carefully lead him down the path that our examination looks like what it is - a show orchestrated by a lawyer. In either case, the witness loses credibility. How do we avoid it?

a. Use who, what, where, when and why questions.

These questions are inherently open ended and permit the *witness* to tell the story. It is easy to do. Just write down the information you know the witness possesses in the order you want to hear it, then ask the simplest who, what, why, when or where questions needed to get it. Once you have thought through this pattern of examination a couple of times and completed it, you will be comfortable with the process.

b. Do not over-extend the witness.

Returning to the baseball analogy, as lawyers we are not happy with the stand-up double that the third party witness gives us, we want a home run. So we push our cooperative witness into a position that is beyond his comfort. We therefore open up the witness to a much more rigorous examination than he would have received had he stayed on the straight and narrow, and turn our stand up double into a single or an out.

c. Let the witness "surprise" you with inconsistent testimony.

One of the most effective experts I have ever seen is a man who will purposefully and pointedly disagree with his examining attorney at least once or twice during the direct exam. This causes the jury to sit up and take notice and say "this guy isn't owned by the lawyer, he is telling his own story." Have the witness correct you on something and you convey the message that he is his own man.

d. Present the narrowest possible aperture of attack.

This is a corollary of the advice that you ought to conduct the deposition in 20 minutes or less. If third party witness believes that employee X stole trade secrets, but also believes that X is basically a good guy and that the company wrongfully kept him from getting his proper retirement fund benefits then you want fact number one and hope that your opponent doesn't uncover facts two and three. You are most likely to accomplish this goal by examining the witness on the narrowest possible field of inquiry necessary to accomplish your

objective. In the case of our hypothetical, the examination in attachment 4 focuses on about a five minute interaction between the witness and employee X and absolutely nothing else. If this tactic is carried off properly, opposing counsel's case has been dealt a severe blow and she faces the Hobson's choice of going into detail on a very explicit but narrow group of facts, or opening Pandora's box with what looks like a very adverse witness.

B. Basic approaches for handling the adverse witness.

1. Many weapons work.

Always remember that there is more than one way to skin a cat (sorry, PETA). Jurors disbelieve witnesses for any number of reasons. I have actually had a mock juror issue the heartfelt opinion that one of our expert witnesses was sleeping with the client representative and that this was the only explanation for her testimony. You cannot predict why a jury might choose to disregard a witness' testimony, but there are some common approaches available to attack credibility.

2. The "Perry Mason moment" is incredibly rare.

If our study of a witness tells us that the witness is lying our natural instinct is to confront the witness to elicit the witness' confession that he is lying. This virtually never happens. I have caught witnesses throwing out documents the day before their deposition only to have them pretend it never happened. I have, in too many cases to mention, had witnesses testify to "X" with a straight face while I possessed documents demonstrating beyond question that "not X" was the case. Having had these things happen many times, I still have never once had a witness say "well, I guess you're right, I did it" or "I lied".

3. Make the false witness pay with credibility.

Anyone can give false testimony - all it takes is breath and time. The trial lawyer's task is to make the witness (and his employer-opponent) pay the price for lying. The witness' fraud must be exposed. When accompanied by the proper documentation and technique this is, in my experience, the most effective method of undermining credibility. Some examples are in item 6. below.

4. The clueless witness.

Entire books have been written on the many avenues available to limit the credibility of a witness. Demonstrating bias or prejudice fueled by revenge or a profit motive are among the most common. Demonstrating that the witness is in no position to actually know what went on, or that he learned of it only through hearsay are others.

5. Use the 20 minute rule with adverse witnesses; summarizing and "looping."

The 20 minute rule applies with equal force to an adverse witness but it is harder to accomplish because she does not want to cooperate with you and give you the broader conclusions

you seek. The objective is the same, however, which is to obtain very short, very high impact "strings" of testimony that can be played for the jury and that leave a ringing impact. How then do you create "condensed" testimony that serves your purpose?

a. Sense the high points from the whole deposition and string them together using the witness' exact phraseology. Assume for a moment that you have been in a dogfight all day with an adverse witness but that you have uncovered some hard points of information that help your case. *Make absolutely sure you are faithfully repeating the prior testimony* so that the witness cannot back out, then string it together in a summary form. For example:

Q: You knew of Mr. X's non-compete when you hired him, right?

Q: You knew that he told Smartco he wouldn't be working on Newtool, didn't you?

Q: You knew before he left Smartco that he was interviewed to head the Newtool project for Bigco, right?

Q: You talked with the Bigco attorneys about the non-compete contract, right?

Q: You talked with the President of Bigco about the non-compete, right?

Q: They let Mr. X work on Newtool, didn't they?

Q: You put Mr. X to work on Newtool the next day after he was hired, didn't you?

Q: And you did that with full knowledge of Smartco's contract with Mr. X?

Q: X worked on Newtool for the next year and a quarter until it was completed, didn't he?

Q: X was one of the inventors of Newtool, as you said in your patent, wasn't he?

Q: And you have agreed with me, haven't you, that Newtool competes directly with the line of products that Smartco produces, doesn't it?

b. "Loop" prior concessions into more expansive questions. Let's say for example that in a theft of trade secret tortious interference case

the witness has conceded all of the items in the questions above. Your next summary question might be:

Q: So, you, the President and the attorney for Bigco, all agreed to put X to work on Newtool the day after he began with full knowledge of the existence of his non-compete contract, didn't you?

Q: And after Bigco put him to work on Newtool he worked on it continuously for the next year and a quarter until it was patented and introduced to the market, didn't he?

Q: And the Newtool that he helped invent for Bigco over that year and a quarter competes directly with Smartco's business, doesn't it?

The key to either creating a summary "string" of deposition high points or "looping" those high points into a single question is presenting a formulation of the questions that the witness cannot dispute without contradicting her own prior testimony. To accomplish this, you must use the prior testimony verbatim, or quotes lifted as close to verbatim as possible.

6. Force the witness to choose.

Use direct, leading questions to force the witness to choose between honesty and dishonesty.[4] The adverse witness is not your client's friend and if given a choice he will ignore your question, obfuscate, act confused, answer a different question from the one you asked, artificially forget or employ any number of other avoidance tactics. The basic techniques to undo these practices are as follows:

a. Make every question a choice for the witness. If your questions are properly formed, they force the witness to choose between answering truthfully or answering falsely.

b. Being direct without being meaner than you have to be. All too often as lawyers we equate being "effective" with a witness with being "tough" or "mean" to the witness. In my experience you need to be *insistent* in getting the truth, not abusive. If the witness dodges the question by strategically forgetting, remind him with the documents. If he doesn't like your question and chooses to answer one he finds to his liking, object that he isn't responsive and re-ask the question until he answers it. Ask the question ten times if you need to, but if you

[4]A good compendium of the techniques that are presented here in a summary way is the work of Robert Musante, an instructor and frequent lecturer in deposition practice. I strongly recommend his seminar and the related materials entitled "Take a *Killer* Adverse Deposition." His materials may be obtained online through http://www.killerdepo.com.

can avoid it, don't raise your voice on the 10th version of the question above the level of volume on the first.

c. Make the witness pay for intentional dishonesty through a loss of credibility. The single most common technique used to reduce a witness' credibility when the witness lies under oath is to contradict and thereby undermine the testimony through prior inconsistent statements, documents or the testimony of others. Generally, I prioritize the impact that these tools carry as follows:

i. Prior inconsistent statements by the deponent under oath, particularly from the same deposition;

ii. Prior inconsistent statements by the deponent not under oath;

iii. Documents authored by the deponent;

iv. Documents authored by others but directly involving the witness' input;

v. Testimony of co-defendants, fellow employees or others "on his side" inconsistent with his story; and

vi. Juxtaposing surrounding events or behavior that is logically inconsistent with the witness' position.

7. Get the whole story.

Isolate and limit the adverse testimony that a witness will give at trial. Adverse depositions are no place for the timid. The purpose of the deposition is to *fully expose* that testimony so that it can be attacked and undermined at trial. The first step in attacking the testimony, however, is understanding *precisely* what the witness will say.

In the hypothetical example we have been using, let us assume that the defense of the case is that Bigco did not just suddenly develop Newtool after employee X came on board, but that instead it had Newtool under development for many years prior to X's employment. Bigco has produced some documents over the course of years showing the existence of its prior programs but they are incomplete. The key for the party hoping to limit this testimony is that you understand it as completely as possible so as to develop the condensed cross examination you will use at trial. Attachment 4 is a detailed example of the kind of questions that would be used in this hypothetical situation in an attempt to turn Bigco's defense into more proof of your claim.

VI. Dealing with the manipulative or bellicose lawyer.

A. Preparing to present witnesses.

The mean, abusive or manipulative lawyer can be a real problem to deal with, but presents enormous opportunities to do your client real good. Most lawyers are bullies because you permit them to be. They believe that a test of wills, usually early in the case, is critical to establish themselves as the dominant pack animal. Unfortunately, the only way to effectively address this problem is with equally or superior determined force. By determined force, I do not mean screaming matches, name calling, false renditions of prior conversations or any other annoying or deceptive practice. Instead, I mean that you must first *understand how* the abusive or manipulative lawyer will approach your witness or the defense of their witness, and that you must think through a *specific strategy* well in advance of the crisis to tame the opposition.

1. Detecting the bully.

Usually the bully gives herself away with the first contact you field in the case. Perhaps it is the tone of the teleconference, the refusal to grant an extension to answer the case or discovery, insistence on *ipso facto* propositions or an attempt to force your client to take a position to its detriment early in the case, but whatever the sign, you can often detect well in advance of your first deposition if you are likely to have problems with a lawyer. Houston is, also, a surprisingly small community of attorneys. A lawyer who has spent his career scorching earth leaves few friends and his enemies are usually happy to speak with you about the villain's tactics.

2. Common forms of intimidation.

a. Refusal to permit your witness to answer.

Surprisingly, one of the most common bullying techniques is the refusal to let a witness answer a question fully. When the bully dislikes the witness' answer he simply cuts off the answer with a new question. Correcting this is your job.

b. Manipulation of your witness' prior answers.

If your witness says he saw a box of blueprints spill out onto the floor, the bully recasts the question into "now you couldn't see any confidentiality notices on these *papers* that you claim were spilled could you?" Object to such a question as inherently misleading and instruct not to answer.

c. Repetition.

Frequently, the bully who doesn't get the answer she wants to a question simply asks it again and again, perhaps formulating the question in a slightly different manner to avoid raising an objection, hoping that the witness will give a different answer the 7th time the question is asked.

Again, it is your job to figure out if your witness has fairly answered the question then instruct against further answer. If the bully threatens you, offer him the trial court judge's phone number.

d. Misreading documents.

The bully's stock-in-trade is to take statements out of context from prior depositions, prior statements or documents and to selectively render the facts. Again, the instruction is "inherently misleading". Alternatively, do a redirect in which you show the parts of the memo that opposing counsel has hidden and ask the witness to tell how the "part the lawyer didn't show you" alters her testimony.

e. Refusing to show your witness documents.

Early in the life of a case, the opposition may have documents that your client has not seen. The bully holds these cards close to his vest and asks a series of misleading questions about them to secure unduly favorable testimony. Coach the witness to ask for the documents and make the lawyer refuse to show them. This leaves him looking as unfair as he is. Make sure your witness knows that he does not have to answer questions about documents he hasn't been shown.

f. Asking the "near miss" question.

This question is a fundamentally dishonest question, designed to create an impression to the jury that is incorrect, without giving the witness a full opportunity to explain herself. Instead of asking "are the designs of the rotors in the two tools identical?" the bully asks "do you deny that these are both rotors?" with great panache and emphasis on the word *rotors*. If possible, I let my witness answer these questions because they are usually harmless or explainable. Opposing counsel has real difficulty using this testimony at trial to impeach because it is not flatly inconsistent with your witnesses' in-trial testimony.

B. How to prepare the witness (and yourself) for the abusive questioner.

1. Don't permit "pop-ups" to go for base hits.

Often the bully makes headway because of uncertainty between the lawyer and witness about who will handle the wrongful conduct. The result of such confusion is that both are frozen and the bully gets answers that he isn't entitled to and which are not the truth. The cure requires that you as the lawyer know how the problematic lawyer is going to be handled. Once you have decided, communicate the division of responsibility to your witness long in advance of the deposition. Practice it with a colleague taking the place of the abusive questioner.

2. Be active.

Under our rules of procedure, you are entitled to instruct a witness not to answer an inherently misleading question. Tex. R. Civ. P. 199.5(f). Use this tool and use it as frequently as is necessary *without overusing it*. The way to walk this line is to imagine that your trial judge is sitting at your elbow. If the question is troublesome but legitimate, do not instruct a refusal to answer. If the question is illegitimate then don't permit it to be answered.

a. Caution your witnesses against absolutes.

The words "ever, never, always" or other words like them are the playground of the bully. He wants your witness to swear under oath that he has never had a conversation with X about Y, so that he can then show an e-mail or telephone log where X did in fact converse with Y, and he can then ask "why did you lie about so simple a fact." The cure is witness caution whenever absolutes are invoked.

b. Caution your witness about normative words.

Certain words in our language are inherently powerful. "Wouldn't you agree that the *fair* thing to do under these circumstances would be to tell the purchaser about the termites?" Isn't it *ordinary* in your industry for the commission to be 10% or better?" In the verbiage of one of my partners, these questions are where the truth goes to die. Your witness, wanting to appear honest and cooperative, readily agrees to what she thinks is a general principle, only to be run down with that general principle when she wants to explain the exception to it. Remember to equip your witness with the possibility of a two word answer to these broad questions: *"it depends."* The bully is forced to either accept this equivocation, or permit your witness to give a fair answer.

c. Don't be afraid to redirect.

Very frequently, the bully's questions create a house of cards. It is a joy to pull out a card or add one to the mix in redirect and to watch the entire construct collapse. The effect on the bully is also sometimes striking because he realizes that all of his ruthlessness has been wasted.

C. Taking depositions defended by the manipulative counsel.

All of us have shared the frustrating of conducting a lengthy examination pointing to a single conclusion, only to have the lawyer defending the deposition make a suggestion to his client in the form of an objection and derail the entire examination. Here lies the cure.

1. Know your judge.

The Texas Rules of Civil Procedure provide very effective remedies for the manipulations of an attorney during deposition defense. *See, e.g.* Tex. R. Civ. P. 199.5(d)-(f). The defense attorney may not (1) engage in a private conference with his witness during the deposition. (Tex. R. Civ. P. 199.5(b) or (d)) make argumentative or suggestive objections or explanations (Tex. R. Civ. P. 199.5(e)). But these rules can only be used if you have a judge willing to get involved. Therefore, knowing the judge's tolerance for addressing question-by-question disputes is critically important. If you have a judge who is unwilling to answer the telephone and hear in-deposition disputes, you must figure a different way to handle the issue.

2. Suggestions on obtaining the best result on in-deposition disputes.

a. Pick your spots carefully.

Judges are overwhelmed by discovery disputes, so pick an event where the opposing counsel's conduct is clearly wrong and the testimony is on a subject in the lawsuit that obviously matters.

b. Educate the judge early in the case.

If you have another hearing on the case involving venue or the pretrial order, mention to the judge that you have been having trouble in some of the early depositions, and ask whether, under these circumstances, it would be acceptable for you to call if there are extreme problems in future depositions. Let the court know that you will not waste her time with marginal issues or improprieties. Then, if you must call during a deposition, remind her that "Judge, as you will recall, I mentioned that we're having problems in the deposition and that we might be calling, and you confirmed that it would be fine to call you." You will get a better reception.

c. Have your reporter well organized.

The judge *may* have 5 minutes for you in a break during her trial, so have your court reporter mark the offending instruction or answer so that it can be played back immediately and quickly. You are on the clock, don't fumble.

d. Make your pitch in one minute.

Pick testimony that doesn't take 10 minutes of background explanation. Think of the one minute explanation before you begin: "Judge, this is a theft of trade secret case. We're deposing my client's former employee to establish that theft. He's just told us that he took technical data owned by his prior employer before joining us. We think this shows habit under Rule 406, rebuts their claim of independent invention and is relevant to punitive damages against him as a repeat offender. Opposing counsel has

ordered his witness not to testify about any previous theft. Here's her instruction.[5] (Reporter reads back question and attorney's instruction)."

e. Put your best shot first.

If there are several instances of abusive conduct pick the worst for argument and presentation first. If, in the likely event the judge has little time, she may judge the good faith of your opponent by the first thing she hears, so pick a good excerpt. If you do not have a lead pipe cinch example, then you probably should not be calling the judge at all.

f. Take your shot during the deposition.

The in-deposition approach, if available, is by far the best because it establishes the tone for the remainder of the deposition. I have literally seen a very abusive attorney scoot his chair two feet away from the table after being throttled in such a hearing and fold his hands in his lap. The risk in this procedure is that if the hearing is mishandled you will lose momentum and give inadvertent approval to the liberties your opponent is taking.

g. Remember your job.

Opposing counsel wants to get you off your track and destroy the value of the testimony you are taking, or to make you so upset that you forget to ask key questions. Your frame of mind will then dictate the outcome. Recognize this conduct for what it is, the lawyer's smokescreen designed to draw you away from his damaged witness. When you hear it happen, realize that the lawyer is telling you "you've hurt me, go away." You must maintain the ability to remember the last 5 to 20 answers within a subject field to recall where you must go to finish the inquiry. Keeping focused on your objectives will always help you avoid the problem.

h. Ask questions - - don't answer them.

Defending attorneys will frequently ask you questions during the deposition designed to put you off your game. Don't rise to that bait. You aren't there to answer your opponents' questions. The simplest reply to any question from your opponent is "I'm sorry, but I have only six hours for this deposition so I don't want to talk about this on my time. If you have an instruction make it, otherwise I need an answer to my question and we can talk in a break."

[5] Remember that with real time reporting and Judges on the internet, you have the possibility of e-mailing transcripts to the court during the deposition.

i. Tell the other attorney the train is coming and he's lying on the track.

Whether you are asking for in-deposition relief or filing a post-deposition motion, the court will be impressed by basic notions of fair play. Tell the opposition early in the deposition: "Bob, you have suggested an answer in violation of Rule 199, please don't do it again. Ms. Court Reporter, please mark the transcript here." When Bob acts up the second time it becomes "Bob, you have for the second time suggested an answer to the witness in violation of Rule 199, if you do so again we're going to stop the deposition to contact Judge Unfriendly. Ms. Court Reporter please mark this part of the deposition." Then, when the hearing arises, you can emphasize to the Court that you asked for compliance with the rules twice (or three or four times as you determine) before asking the court for help.

j. Read it to the jury.

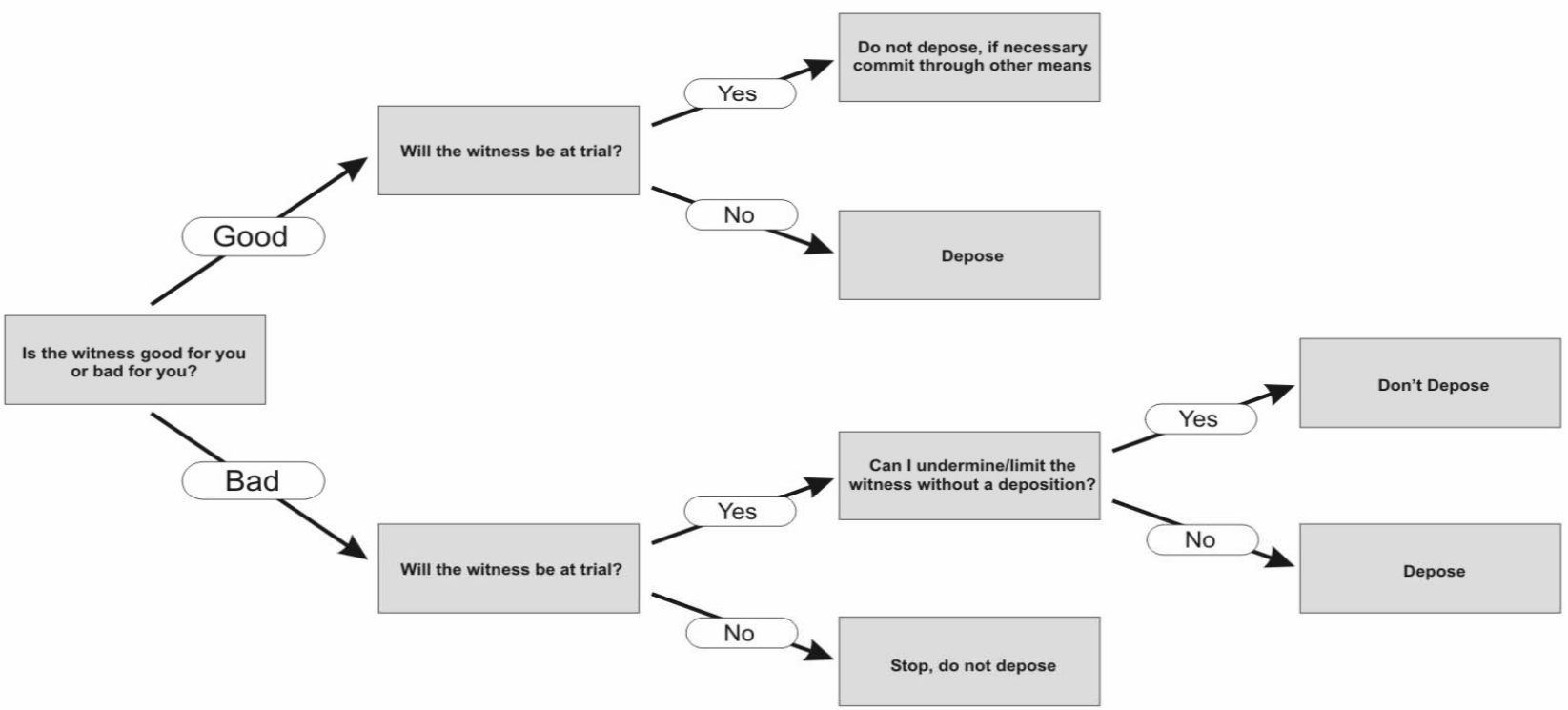
If you haven't figured it out, juries particularly dislike lawyers who are manipulating the process. So, ask the court under Tex. R. Civ. P. 199.5(d) or the "other sanctions" provisions of 199.5(e) to allow you to read (or show on videotape) your opposing counsel's instructions to the witness. Your opponent's credibility is key and there are too many lawyers who play fast and loose during pretrial only to "come clean" before the jury. Show them both Dr. Jekyll and Mr. Hyde.

VII. CONCLUSION

Hundreds of depositions are conducted daily in Texas with less than full effectiveness. The keys to collecting good testimony and exposing the weakness of your opponent's case lie in using basic principles: understand if you must take the deposition at all and if you must take it, formulate both your *objectives* and your *outline* fully utilizing all assets at your disposal. Once your game plan is set, *assess* the personality of your witness and adjust on the fly to maximize the results of the deposition, *distilling* the useful testimony as much as possible. Finally, be aware of the obstacles that opposing attorneys consistently raise to a good deposition and figure out in advance what mechanisms you will use to defeat them. The result of employing these principles will be testimony that you, your client, and ultimately the jury, can appreciate.

ATTACHMENT 1

DECISION TREE ON WHETHER TO DEPOSE



ATTACHMENT 2

OBJECTIVE, MR. X

III. Demonstrate to the jury that he is a liar.

IV. He stole information. Make him acknowledge it to be trade secret.

V. He competed with Smartco and knew that he was doing it.

VI. Establish the *Sine qua non* nature of the trade secrets that he stole - i.e., without them the tool is useless.

VII. Establish that Bigco management knew of and encouraged his theft of trade secrets and continue to do it today.

VIII. Establish that he personally benefited from it;

1. Got bonuses, recognition, some % of the proceeds;
2. Got job recommendations.

ATTACHMENT 3

BLOW BY BLOW ON MR. X.

EGO **BIGCO** ***SINE QUA NON***

1. Patent.

   Background, know enough to know you have to have an invention new, not in the public domain.

   In fact, it is a fraud to knowingly present something as private which is public in a patent application.

   BC said each and every one of these was new and not in the market.

   Go claim by claim.

   Patent application been withdrawn?

2. Lock him into the absence of any training in widget work prior to the time he came to work for Smartco.

   - never acquired a widget
   - never recommended a particular widget for wellbore use
   - never ran a widget survey or seen one conducted
   - never looked for suppliers of widget component parts
   - never tested a widget on a calibration stand
   - never set up a test facility
   - never viewed in any depth a widget test facility
   - never been on a well
   - never conducted or reviewed error modeling calculations
   - never conducted temperature modeling calculations
   - never seen the electronics diagram
   - never seen someone configure a sensor array for indexing
   - never calibrated a widget before coming to Smartco
   - never looked at the organic chemistry of a widget
   - never designed a sensor array for chemical widget
   - had never seen the inside “guts” of a widget before coming to SmartCo

3. His work.

   - Explain why this is important

   · Show blank paper, do a basic diagram, how the widget works

   - Durability of the widget is critically important

· **Show software with his calculation on it**

- get him to authenticate
- get him to translate
- get him to discuss whether it was an advancement

REMEMBER THAT THIS IS USED LATER TO COMPARE WITH THEIR SOFTWARE TO SHOW THAT IT IS IDENTICAL.

- complete access to all SmartCo information (if no)
- identify any technical information you ever asked for that was refused you
- identify any time you were excluded from conversations about the tool
- identify each and every time some piece of information about configuration, software, electronics, widget or any other component was denied to you.
- complete access to design of the widget
- complete access to design drawings of the widget
- complete access to design drawings of the widget layout

· **Show drawings**

- Primary man working on the widget project for us;

· **Show report (Call it the widget report)**

- How much of this did GU do? (He'll say NONE)
- So all yours, choice of language all yours?
- How long did it take to do?
- What information did you draw upon to compile it?
- The whole thing was confidential wasn't it? (If no)

· **Show "confidentiality language"**

- You wrote that didn't you?
- Wrote it long before this suit was filed, right?
- Wrote it because it was true.
- Each and every thing in the report was confidential, wasn't it?
- Never before this case filed ever contended that it was not.

4. Establish that what he saw were trade secrets of SmartCo.

- point blank, they were trade secrets
- flush each and every reason he believes that they were not
- Negative inferences

· For each secret we identify -

- Ever sell it?
- Ever copy it and send it to anyone?
- Ever give it away?

- Ever let all employees see it?
- Ever leave it out in the open where just anyone could get it?
- You think you could just go and sell it?
- And give it away?

· For each secret he says is public -

- Where is it available?
- Identify the document or source of the public information.

· **Show** Section 31.05 of the Texas Penal Code

- No doubt in your mind that it was a crime in Texas to knowingly take and copy a trade secret, wasn't it?
- No doubt, it is a third degree felony, isn't it?
- Did you think about that when you went to work at BIGCO on the widget tool?

5. Inevitability of disclosure.

- learned far more than you knew before about widget, didn't you?
- knew you wouldn't forget what you learned, didn't you?
- knew it was inevitable that you would use the knowledge you accumulated while at SmartCo in the widget project, didn't you?
- Are you saying you are capable of putting all you learned in some compartment of your mind and not touching it?

6. Whack him on the increase in compensation, being bought off/HIRING PROCESS.

- Interview with the lawyers?
- At the time you weren't an employee?
- Certainly hadn't hired these lawyers had you?
- Weren't looking to them to provide you advice, were you?
- When were you told "it's ok" –if beforehand, then no AC Relationship existed.
- What did they say?
- Certain, they had a copy of the Confidentiality Agreement before they hired you.
- Called you at home.
- Called you at night, never at work.
- Kept your hiring a secret until it was an accomplished fact
- Did BIGCO pay you for you vacation time you took in October? (I bet we did too, it will show he's generically a thief.)

7. Contractual interference.

- Ever tell anyone it wasn't binding on you?
- Ever write a simple letter and say, I don't think that contract really controls?
- Ever do anything that would indicate to anyone you didn't think the contract was absolutely enforceable?
- Anyone at BIGCO tell you this contract is no good?

- Before you went to work for BIGCO you had every intention in the world of honoring this agreement, didn't you?

· **Separate consideration.** Not all they did for you is it?

- paid your way to Houston
- provided you a Visa at their expense
- hired the lawyers who did the work on your work visa
- provided a housing allowance during the move
- provided you complete access to their information as well.

· Exactly what he did at BIGCO using the documents they have provided so far -

- How long was he employed by them?
- What was he hired to do?
- What did they explain?
- Why did they tell him they were hiring him?
- Was this a feasibility study?
- If someone claimed it was a feasibility study that would be untrue wouldn't it?

· **Show e-mails (working prototype w/in 1 year)**

- When did he begin work on the widget program?
- Was his work more concentrated in the beginning of employment or at the end?
- Find out what the work setup was like.
- Who he worked with.
- Find out the chain of command.
- Where work
- What was the nature of the office arrangement?
- Who worked well with, who poorly with?
- Draw diagram of chain of command
- Identify every single person in the company who knew about the SC confidentiality agreement

8. EGO EGO EGO EGO EGO

- Did they have anyone on board who could handle widgets?
- Did they have anyone on board with any practical experience with widgets?
- Anyone who had ever developed a widget tool?

· Mr. E,

- Ever done widget based work?
- Ever bought a widget before?
- Ever a major purchasing decision before?
- Ever designed a widget based tool?
- Any real experience with widgets?

· Mr. JK,

- Ever done widget based work?
- Ever bought a widget before?
- Ever a major purchasing decision before?
- Ever designed a widget based tool?
- Any real experience with widgets?
- Establish that BIGCO did not have a:

    - widget in the house
    - calibration stand
    - test stand to test for vibration and shock
    - working set of error models for how a widget would work in the wellbore
    - any temperature compensation mathematics for widget
    - any mechanical drawings of a widget tool
    - any mechanical drawings of a sensor array with widgets
    - any mechanical drawings of sensor array layout
    - any electronic circuit designs for a widget tool
    - supplier for the shock absorber system to be used in a widget tool
    - design for use of a battery pack to power the tool.

· What do you consider that you contributed to the BIGCO Widget project?

- Each and every thing contributed to the tool
- By the end of his work did they have a functioning prototype?
- Did you keep up with the project?
- Did they use your work?
- Did they reject any of your work that you know of?
- So, as far as you know, all the work you did on the BIGCO widget was used by BIGCO to complete the tool they are using today?
- What effect did your contributions have?
- Tell you they appreciated your contribution?
- Tell you they couldn't have done it without you?
- Do you think they could have brought the widget project onstream without your efforts? (KEEP AFTER HIM ON THIS)

- Any follow up work after he left in 1998?
- Any consulting?
- How much, how much paid for it?
- Attend tests, etc.?
- BIGCO seeking approval of the tool through Snell now?
- Who is assigned to work on it?
- Are the results etc. of the tool in Snell's hands?
- Are materials relating to the functioning of the tool also in Snell's hands?
- Couldn't be sold in the market without the level of accuracy your work supplied (inaccurate widget tool is a useless piece of steel).

· **Show his proposal at BIGCO**

- Commit him to the lie, did this, all on your own.
- RE help you re-write the first draft?
- Says on the cover, “confidential”.
- Reason for confidentiality warning, true
- Who was the proposal made to?
- Who was it shared with?
- Challenge him - - you simply copied what you had at SmartCo?
- You took it and used it for BIGCO changing enough of the language so it would cover the same subjects, but not look identical, right?

· **Show bottom of the first page**

- Duplicate phraseology isn’t it, word for word, the same?
- Layout is exactly identical to the prior product, isn’t it?
- Covers the exact same subjects, using different language, doesn’t it?

· **Show misspelling**

- Are you telling the jury it is just a coincidence?
- Isn’t a coincidence, is it?
- Same word is misspelled in both because you copied the entire SmartCo widget report when you left SmartCo, didn’t you?
- You just lied to me and to everyone assembled here under oath, didn’t you?
- You copied and used this seminal and trade secret report by SmartCo, didn’t you?
- Everyone at BIGCO knew you were copying it, didn’t they?

· **Show software comparison**

· **Show electronic files**

- Where are each of the items of software that were in place at the time you left? TRAIL THROUGH THE LIST “BQ” GAVE ME

· **Show his software contribution**

- The two are identical, aren’t they?
- Not another coincidence, is it?
- You copied the calculation from SmartCo.
- You could never improve upon it or recommend changing it.
- So, you simply copied it for use by BIGCO, didn’t you?
- Did they approve of your actions in doing this?

9. Off-topic hit on damages/market size.

- Why did BIGCO want to develop a widget tool?
- Would such a tool eliminate the widget surveying market?
- BIGCO thought it would also help them corner the entire widget market?

- What did BIGCO say about what it would do to others in the widget market?
- Tell you how much money they thought they'd make off the tool?
- Tell you they'd run the competitors out of the business?

10. Computer passwords.

- At BIGCO
- On his own computer
- Anyone ever ask him for his password?
- Required to report his password to anyone?
- Who, where was it recorded?

11. Missing or destroyed documents.

Establish his method of taking down work

· **Show (10 examples of SmartCo paper he did)**

- this was your ordinary method
- all of this got destroyed by BIGCO

· **Show interrogatory Answers**

- Lie, wasn't it?

· Rigs tool

- What is the Rigs tool?
- Rigs tool is without question a widget survey system, isn't it?
- Worked directly on the rigs system in violation of your contract

· **Show emails 1/8/98**

· **Show more e-mails 1/8/98**

12. PROVE THAT OTHER DOCUMENTS EXIST.

- Notes he took
- Improvements he made?

Q. Let me show you your answer in this case. You state that "Bigco had active programs to develop Newtool long before X was ever hired and such programs were well on their way to commercial success" did I read that right?

A. Yes.

Q. What programs did Bigco have to develop a Newtool before X was hired?

A. The Xenon, Zoe and Alpha programs.

Q. Did Bigco's Xenon project ever produce a tool that anyone cared to buy?

A. No.

Q. Did the Xenon ever produce a single patent application?

A. No.

Q. Did the Xenon ever produce a single patentable idea?

A. No.

Q. When was Xenon begun?

Q. 1982.

Q. When was Xenon finished?

A. 1987.

Q. What exactly was the Xenon project designed to accomplish?

A. A genetically engineered widget.

Q. Newtool is a chemically engineered widget not a genetically engineered widget, true?

A. Well its all the same.

Q. Objection, non-responsive. Is Newtool a chemically engineered widget?

A: Yes.

Q: Did the Xenon project try to accomplish a genetically engineered widget?

A. Yes.

Q. Did the Xenon project try to accomplish a chemically engineered widget?

A. No.

Q. How much was spent on Xenon?

A. I don't know.

Q. Give me your best ballpark figure?

A. Maybe $2 million.

Q. Could it have been as much as $6 million?

A. No, I don't think so.

Q. Look at Exhibit 116, the End of Year Capital expenditures for the research and development division of Bigco. The row next to Xenon shows the total expense of the project to date from 1982 through 1986 doesn't it?

A. Yes.

Q. Total Xenon expenditures were $6,014,692.18, right?

A. Looks like it.

Q. The figure is three times higher than you just testified to, wasn't it?

A. I guess so.

Q: Is your memory always off by a factor of three?

A. No.

Q. Xenon was a failure, wasn't it?

A. No, it wasn't a failure.

Q. Did Xenon ever produce a commercial widget?

A. No.

Q. Did the Xenon project ever produce a single patentable invention?

A. No.

Q. Did Xenon ever produce as much as a penny of royalty revenue from the ideas generated from that project?

A. It was discontinued before that could happen.

Q. Objection. Non-responsive. Did any idea develop during Xenon ever generate a penny in revenue?

A. No.

Q. Can you show me one single part of Newtool that came from Xenon?

A. Sure, lots of them.

Q. Would you name one please?

A. Well, I can't tell you right now what they all are sitting here, but I can darned sure tell you that we relied very heavily on Mr. Estroghausens prior work in Xenon for the Newtool project.

Q. What work from Estroghausens did you rely on?

A. I don't know.

Q. Can you identify so much as a single idea from Mr. Estroghausen or anyone else on staff at Bigco during the Xenon project that is present in Newtool?

A. Sure, lots of them.

Q. Okay, what are they? I have as much time as we need to discuss them.

A. Well I can't put my finger on any right at this instant.

Q. Did you prepare for this deposition?

A. Yes.

Q. In fact you spent two days getting ready for it, didn't you?

A. Give or take.

Q. You helped put together this answer that says the prior programs like Xenon lead to Newtool?

A. Yes.

Q. You helped find the documents that have been produced about Xenon, haven't you?

A. Yes.

Q. You know that the claim that Bigco developed Newtool from its own prior work in an important defense in this case, don't you?

A. I leave all that for the lawyers.

Q. I am asking you as an individual, you wouldn't have put this claim that Newtool was developed out of Xenon in your answer if you didn't want a jury to believe it, would you?

A. I guess not.

Q. So, as a person who was involved in Xenon for many years, as well as being the project manager for Newtool, you knew both projects intimately, you helped find the old Xenon documents, you prepared for this deposition for two days and helped prepare Bigco's claim that the Xenon work helped create Newtool, right?

A. Yeah.

Q. With all of this knowledge can you identify for our jurors who will hear your testimony one single concept or design in Newtool that came from Xenon.

A. Well, not while I'm sitting here, but I'm sure there is one.

Q. Object to the non-responsive part of the answer. I am not asking you what you believe Mr. Smith, I am asking what you know and this is my last chance before trial to find out what you will say at trial. With that in mind, I repeat for now the fifth time, can you identify for our jury a single design feature or idea from Xenon that made its way into Newtool?

A. Not an exact piece, no.

[REPEAT FOR ZOE AND ALPHA]

[LOOP TOGETHER ANSWERS]

Q: So, as we sit here today and if I've done the math right, Bigco spent a total of $22.6 million on Xenon, Zoe and Alpha trying to develop either genetically or chemically engineered widgets, right?

A. Yes.

Q. And before Mr. X arrived to work here, Bigco had never produced a single genetically or chemically engineered widget that anyone was willing to buy, had it?

A. No. I don't suppose so.

Q. All of those projects were written off as a total loss weren't they?

A. That is my understanding.

Q. Yet, you call this 22.6$ million write off a “success” because of all that Bigco learned during the Xenon, Zoe and Alpha projects, right?

A. Sure was.

Q. Did they pop open a bottle of champagne when they wrote off that $22.6 million in research costs and celebrate their success?

A. Objection: don’t answer that.

Q. And as you sit here today, after getting prepared for this deposition for two days, after years of involvement in Xenon, Zoe and Alpha and as project manager for Newco, and after reviewing the documents in those projects and the Newco project you cannot identify for the jury a single design feature or idea from any of those projects that was used in Newtool can you?

A. No, but I’m real sure they’re there.

Q. Objection, non-responsive. Mr. Smith, again, I need to know what you know not what you believe or hope is the case. Is there any design feature or idea growing out of the Xenon, Zoe or Alpha projects that you can identify for our jury that appears in Newtool?

A. Not right now.