



Attacking the Liar’s “I Don’t Remember”

June 10, 2019

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Faculty Biography

Robert Musante is the country's foremost teacher of deposition cross-examination skills. On numerous occasions, he taught trial advocacy – and was a featured speaker – for N.I.T.A. and the Hastings College of Trial Advocacy. For 16 years, he was a lecturer at the University of California at Berkeley, School of Law. As the creator and presenter of 9 nationally acclaimed seminars, he has taught the logic essential to taking great adverse depositions – of fact witnesses and experts alike – to more than 50,000 litigators in 43 states. He has made in-house presentations to the attorneys-general of 11 states and to the partners and associates of more than 100 litigation law firms. For more info, visit www.killerdepo.com

Attacking the Liar's "I don't/do remember"

Hour #1

- The 3 meanings of "I don't know."
- Case study #1: "The Homerun King"
- "I don't remember (info that favors cross-examiner)."
- Case study #2: "Fredo"
- Witnesses coached to tell memory-lies
- Memory-lies: the toughest answers to successfully attack
- Making adverse witness "pick a chair"
- The liar's *Scylla & Charybdis*

Hour #2

- Case study #3: "The Artful Dodger"
- Word-hawking (multiple tests)
- Rosetta Stone: define witness's relationship to X
- 12 lines of Qs to strengthen witness's relationship to X
- Case study #4: "Mis-underestimated"
- Cross-examiner's cardinal blunder
- Rosetta Stone: define purported limits of witness's memory

Hour #3

- More of "The Artful Dodger"
- "I don't remember (now, but may "remember" when trial comes)."
 - enumerate
 - make a speech
 - loop memory limits
 - offer witness the "get-outta-depo card"
- Case Study #5: "Fifty Months Ago"
- "I do remember (long-ago info that disfavors cross-examiner)."

Attacking the **Liar's**

“I don't remember.”

“I do remember.”

& “I don't know.”

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Webinars, & One-on-One Tutorials
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Introduction

A. Abbreviations used in this outline¹ and in the seminar's slides:

CE = cross-examiner

AD = adverse deponent

OA = opposing attorney

✕ = the information about which AD makes a claim (“*I don't remember*,” “*I do remember*,” or “*I don't know*”), which claim CE attacks with the goal of proving to the trier-of-fact the claim should be viewed as AD's attempt to deceive

B. This seminar uses statements by high-profile persons to illustrate its teaching points. These persons and statements were selected in the hope they would readily engage your interest and help make the teaching points more ... ahem, memorable.

Some of the statements were made in a deposition; several were not. You will see that neither the forum in which the non-deposition statements were made nor their subject matters in any way lessen their usefulness for teaching the best approach for attacking three 3-word deposition claims: “*I don't remember*,” “*I do remember*,” and “*I don't know*.”

C. Is the approach equally applicable to trial witnesses, criminal and civil? Yes, 100% ... though at trial CE must consider the consequences of an attack that fails in front of the jury, and must contend with the not-infrequent limitations as to time and scope of questioning that the trial judge may impose *sua sponte*, or at the urging of OA. The logic of the attack's approach, however, never changes, whether in criminal trial, civil trial, or deposition.

D. Of course, many witnesses tell the truth when they answer: “*I don't remember*,” “*I do remember*,” and “*I don't know*.” Nevertheless, for the purposes of this seminar, the playful assumption is made that each of the “guest” witnesses is indeed attempting to deceive.

E. Further, it is assumed that the subject matter of the answer – the ✕ – is important to CE and that CE has the deposition time to thoroughly challenge the answer.

¹ This outline is not intended to be a stand-alone, how-to manual; instead, it supplements the presentation.

§1 Case Theory

Litigators design, craft, and perform a case theory. Case theory is defined as the most favorable, credible application of the law to the most favorable, credible, and appealing interpretation of the facts. Litigation is the contest between the competing case theories of the opposing attorneys: CE and OA.

§2 The GUT

Trial is argument.

Deposition is trial.

Thus, deposition is argument.

**THE GRAND UNIFIED
THEORY OF DEPOSITION
CROSS-EXAMINATION**

Trial is argument:

Beginning with the motions-in-limine, and continuing with voir dire², opening statement, the directs, the crosses, the selection of exhibits, the order of witnesses and exhibits, the objections, the jury instructions, and on up through devising the verdict form, all but a handful of the decisions a trial attorney makes are driven by the paramount goal of crafting forceful arguments that support his³ own case theory and attack the other side's.

The handful of exceptions are easy to identify: they are decisions made to support a successful motion (a) for judgment on the pleadings, (b) for non-suit, (c) for mistrial, (d) for directed verdict, (e) for judgment notwithstanding the verdict, or (f) for a new trial. Each of these decisions seeks to take away from the jury, as a matter of law, the determination of what evidence is worthy of belief and the legal significance that should be given that evidence.

² All teaching points apply equally to court trials. Although, it should be noted, when a judge is the trier-of-fact – and is, presumably, a more sophisticated and more efficient evaluator of evidence than a typical jury – CE may decide to shorten some lines of cross-examination and moderate the use of some rhetoric when intensifying some arguments.

³ Our glorious English language shoulda produced by now an all-genders set of third-person singular pronouns. It hasn't, so pardon the extensive use of "he," "him," and "his."

Deposition is trial:

If the deposition of AD is done right and the trial cross-examination of AD is done right, then, at its core, the trial cross-examination of AD is, in effect, a re-enactment of the best of the deposition ... a “reading” exercise, rather than an extemporaneous, who-knows-how-it’ll-turn-out Q&A with a witness who is hostile to CE’s case theory.

Deposition is CE’s laboratory:

- At deposition CE has time to think (what a luxury!!), time to explore and develop lines of inquiry, and time to craft those lines into get-to-the-point modules of Q&A that can be reliably and efficiently re-enacted at trial. At trial, CE’s time to think, explore, develop, and craft is often squeezed by a time-challenged, perhaps impatient, trial judge.
- At deposition CE’s failed lines of examination go unseen, therefore uncriticized, by the jury, while all of CE’s failed lines of trial examination risk harming CE’s status as an effective advocate and risk harming his case theory.
- At deposition AD and OA are far less knowledgeable about their own case theory, CE’s case theory, and the evidence that supports/undermines each than they are going to be at trial ... given that discovery, settlement discussions, trial briefs, voir dire, and opening statements substantially reveal the lion’s share of each side’s case theory well before AD testifies as a trial witness. Thus, AD is far more likely to unwittingly give a good-for-CE answer in deposition than at trial.
- At deposition if CE is surprised with unfavorable information, typically there is ample time for him to conduct formal and/or informal pre-trial discovery to try to attack that information. In contrast, rare is the trial attorney who is blessed with ample time and sufficient means to obtain new information with which to rebut an unfavorable trial surprise.

- If CE determines that the unfavorable information has jury appeal, CE can modify his settlement position or modify his case theory to accommodate the unfavorable information.
- The chances of CE obtaining a favorable settlement, in light of the relative strengths of the competing case theories, are substantially greater before trial – especially before each side devotes loads of time and money – than those chances will be after trial commences.

Deposition is argument:

With the possible exception of CE’s deposition questions that seek to establish grounds for winning or defeating a motion for summary judgment, the paramount goal of every question, by every CE, in every deposition, in every case – forever! – should be to produce an answer that supports an argument favorable to CE’s case theory or unfavorable to OA’s case theory. Other deposition goals, such as assessing AD’s ability to handle Q&A, AD’s jury appeal, OA’s legal ability, OA’s jury appeal, discovering the identify of witnesses, documents, and real evidence are subordinate.

- Thus, this the all-time, stupidest orthodoxy re deposition-taking:

During the discovery phase, including the depositions of ADs (both “fact” and expert witnesses), CE should customarily conceal impeachment attacks and case theory arguments so that they can be used to surprise ADs and OA at trial.

- The vast majority of civil cases settle. As a national average, the percentage of civil cases that went to trial in 1962 – whether a jury trial or court trial – was 11.5%, but that collapsed in 2002 to was 1.8%.⁴ Of course some civil litigators try a greater percentage, especially those who have a tort or employment practice, but rare is the litigator who tries anything close to even 10% of his cases.

⁴ This data comes from a much discussed study by Professor Marc Galanter, Univ. of Wisconsin. *Do the Google* re “Marc Galanter + vanishing trial” and you’ll get 30,000+ hits and a 90-page pdf, if you wish.

- Point? Impeachment attacks against AD and arguments against OA's case theory represent value to CE, value that can only be obtained from two sources: the jury or the OA who agrees to a settlement.
- If CE adheres to the stupidest orthodoxy re deposition-taking and thereby does not road-test the quality of those attacks and arguments during the deposition of the appropriate AD, but saves them to surprise AD and OA at the trial, and that trial never happens because the case settles, then CE has squandered the value of that attack or argument. That's crazy and should be malpractice, but isn't (because it's the standard in the profession).
- Can CE choose to conceal the attacks and arguments during the deposition of the appropriate AD and then disclose them in settlement negotiations to obtain their value from OA? Of course. There is no code of civil procedure section or case law anywhere that prevents that "stratagem." But in the history of American litigation no competent litigator ever said, "*Let's not use that information in the deposition of AD. Oh no, let's save it for surprise at settlement talks, where there is no judge present to compel AD's timely answer, no judge present to prevent OA from coaching AD, and no jury present to see and evaluate AD's one-time-only, caught-in-a-problem reaction.*"
- Ditch the all-time, stupidest orthodoxy re deposition-taking (see above); here is the correct rule about keeping some information secret ... for surprise at trial:

CE should almost always⁵ road-test all trial arguments, including all impeachment attacks, that are relevant to a particular witness during that witness's deposition.

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⁵ The exceptions are set forth in §28. And, yes, these are also set forth in the written materials for the seminar *Great! Adverse Depositions: Principles & Principal Techniques*.

§3 Pick a chair: “Yes,” “No,” or “Maybe”

Aside from whatever summary judgment questions there may be, the paramount goal of every question, by every CE, in every deposition, in every case – forever! – should be to produce an answer that supports an argument favorable to CE’s case theory or unfavorable to OA’s case theory.⁶

Of course, in service of that argument-production, CE must strive to obtain and clearly memorialize AD’s universe of case-related information: his truth-full statements, his offered-in-good-faith-but-erroneous statements, and his deceitful statements. Likewise, CE must strive to obtain all the assistance AD is willing to give so CE can identify and locate other witnesses, documents, and real evidence that potentially impact – favorably or unfavorably – case outcome. In short, CE getting AD’s “story” is an indispensable component of every deposition.

When CE knows the answer he prefers, knows the answer that supports an argument, CE should almost always ask a leading question that encourages AD to give that very answer. Conversely, when CE does not know the answer he prefers, when CE is, instead, gathering information in search of an argument, CE should ask open questions and non-leading yes-no questions. It is a simple binary choice for CE: if argument-crafting, lead; if information-gathering, don’t lead. No third possibility exists.

<u>open Qs:</u>	<u>non-leading y/n Qs:</u>	<u>leading Qs</u>
“Who ... X?”	“Is/was X ... ?”	“X is/was X ₁ ... , right?”
“What ... X?”	“Has X ... ?”	“X has X ₂ ... , right?”
“When ... X?”	“Do/did X ... ?”	“X does/did X ₃ ... , right?”
“Where ... X?”	“Can/could X ... ?”	“X can/could X ₄ ... , right?”
“Why ... X?”	“Should X ... ?”	“X should X ₅ ... , right?”
“How ... X?”	“Will/would X ... ?”	“X will/would X ₆ ... right?”
“Which ... X?”		
“Describe X...”		
“Explain X ...”		
“Tell me X ...”		
“List X ...”		
“Identify X ...”		

⁶ Pardon the repetition (see p. 4), but this is **THE** most important teaching point in the entire seminar.

In an ideal litigation world, where CE is unconstrained by limitations of time or money, CE should ultimately frame every important argument – its predicates and its conclusion – as a yes-no leading question and demand, as is CE’s right, that AD “pick a chair” ... among only three choices:

- the definitive “*Yes*”⁷;
- the definitive “*No*”; *or*
- the non-definitive “*Maybe*” (“*I don’t know.*” or “*I don’t remember.*”)

The AD who is a liar – our exclusive focus in this seminar – always wants to avoid making a damaging admission and always wants to avoid making a denial that is vulnerable to an impeachment attack in the deposition, or in settlement negotiations, or at trial. Thus, in order to avoid both dangers, he tells the “*Maybe*” lie ... with great frequency.

§4 The Three Meanings of “*I Don’t Know X*”

AD’s “*I don’t know*” can be tricky to interpret because it has three⁸ quite different – each reasonable – meanings. CE should immediately make express which meaning AD intends.

Meaning #1:

- “*I’ve never known X.*”

[Similar: “*I did not know X back then.*” “Then” is an occasion (or time period) relevant to CE’s or OA’s case theory when AD considered a decision, or an occasion that gave him some reason to communicate his knowledge of **X** to someone else or to make a record of **X** for himself.]

⁷ “*Yes*” can, of course, be expressed in many ways: “*Right,*” “*Correct,*” “*Absolutely,*” “*I agree,*” “*Indeed,*” “*Of course,*” and on. Obviously, the same with “*No.*”

⁸ See §8 re AD’s three silent – often deceitful – interpretations of the question: “Do you know?”

Meaning #2:

- “*I did acquire knowledge of X, but don’t remember it now.*”

[Similar: *I did acquire knowledge of X, but did not remember it back then.* “Then” is an occasion relevant to CE’s or OA’s case theory when AD considered a decision, or an occasion that gave him some reason to communicate his knowledge of X to someone else or to make a record of X for himself.]

Meaning #3:

- “*I don’t remember if I’ve ever known X.*”

§5 AD’s Credibility Risks re “I’ve Never Known X”

If AD dishonestly claims, “*I’ve never known X,*” he risks being impeached on one or more of the following lines of attack:

- AD’s prior “knowledge trail” re X:
 - AD’s own statements made prior to his claim of “*I’ve never known X*” indicate that he did have such knowledge.
 - AD’s own actions taken prior to his claim of “*I’ve never known X*” indicate that he did have such knowledge.
 - The statements of third persons, the actions of third persons, documents, or real evidence indicate that AD did have knowledge of X at the time he made his denial.
- AD’s statements or actions subsequent to his claim of “*I’ve never known X*” indicate that he did have such knowledge.

- AD’s “*I’ve never known X*” claim is so implausible it should be viewed as an attempt to deceive.

§6 Two Axioms⁹ That Serve as Cross-Examination Pressure Points on the AD Who Claims “I’ve Never Known X”

Pressure Point #1: Civilized society expects that all honorable adults will do all they reasonably can to achieve good (i.e., fully utilize their individual abilities while adhering to admirable moral standards) and avoid evil (i.e., a harm intentionally or negligently caused to the legitimate interests of others).¹⁰

Pressure Point #2: All rational adults expect that, if afforded sufficient time, all other rational adults, before making any final decision regarding any course of conduct that impacts their self-interests, obligations, and/or values, will seriously consider (i.e., summon to mind and evaluate) the body of information that is reasonably available/obtainable that affects (i.e., facilitates or restricts) the fulfillment of those self-interests, duties and/or values.¹¹

The deceitful AD frequently claims “*I’ve never known X*” or “*I did not know X back then*” in an attempt:

- to conceal his or someone else’s poor judgment, perhaps constituting negligence);
- to conceal his or someone else’s ignoble character; or
- to conceal his or someone else’s secret agenda.

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⁹ This seminar sure hopes they are axiomatic, because no supporting proof is offered herein, unless the next two footnotes qualify as supporting proof.

¹⁰ This is the first rule of natural law according to Thomas Aquinas (c. 1225 - 1274).

¹¹ “All men [and women] by nature desire to know.” The first line of Aristotle’s *Metaphysics* (355 BCE)

§7 The Valid and Not Valid “*I Don’t Know X*”

“*What did you experience* (see, hear, taste, touch, or smell)?” (open Q.)
“*Did you experience* (see, hear, taste, touch, touch, or smell) **X**?” (non-leading y/n Q.)
“*You experienced* (saw, heard, tasted, touched, or smelled) **X, right?**” (leading Q.)

“*What did you learn?*” (open Q.)
“*Did you learn X?*” (non-leading y/n Q.)
“*You learned X, right?*” (leading Q.)

“*What did you consider?*” (open Q.)
“*Did you consider X?*” (non-leading y/n Q.)
“*You considered X, right?*” (leading Q.)

“*What did you conclude?*” (open Q.)
“*Did you conclude X?*” (non-leading y/n Q.)
“*You concluded X, right?*” (leading Q.)

“*What action* (word or deed) *did you take?*” (open Q.)
“*Did you say/do X?*” (non-leading y/n Q.)
“*You said/did X, right?*” (leading Q.)

“*What did you feel?*” (open Q.)
“*Did you feel X?*” (non-leading y/n Q.)
“*You felt X, right?*” (leading Q.)

AD: “*I don’t know*”
(not valid)
vs.
“*I don’t remember*”
(valid)

In response to any of the above questions, an “*I don’t know*” would not be a valid answer¹² because AD knows his own experiences, though he may indeed have forgotten a particular experience. The answer that CE is owed to any of these is “*I don’t remember.*” CE must compel AD to clearly make the “*I don’t remember*” claim.

¹² Three exceptions: CE’s question: “*Having read ‘Romeo and Juliet,’ what is that play’s best scene?*” AD’s responses: (1) “*I don’t know because I don’t know what you mean by term “best” and/or the term “scene.”*” (2) “*I don’t know because I have not taken the time to do that analysis.*” (3) “*I don’t know because I lack the training/experience to make that judgment.*”

§8 **AD’s Three Silent – Often Deceitful – Interpretations of the Question: “Do You Know X?”**

- “*I don’t know X.*” [Not all aspects of the whole story re **X**, thus I can’t really know the complete and definitive truth, which is what I – silently – interpret your question to be seeking.]
- “*I don’t know X.*” [Not with certainty, which is what I – silently– interpret your question to be seeking. That lack of certainty is because I didn’t see **X** with my own eyes or hear **X** with my own ears. Thus, my info is not the 1st-hand knowledge that your question seeks.]
- “*I don’t know X.*” [Not with certainty, which is what I – silently– interpret your question to be seeking. That lack of certainty is because to truly know **X** requires an assessment of factors that are not (at this time?) subject to precise determination and/or measurement.]
- CE’s potential argument: “*AD silently modified the question’s common sense meaning, thereby attempting to deceive an unknowing CE and the jury.*”

§9 **The *Rosetta Stone* Attack vs. “*I Don’t Know X*”**

Many times CE’s proof of AD’s (a) prior “knowledge trail” re **X** and (b) contrary post-deposition words or deeds is weak or non-existent; thus, “*Implausibility!?*” is CE’s only line of attack.

The ***Rosetta Stone*** attack against “*I don’t know X*” involves two interrelated lines of questioning: one that seeks to define the scope and, if his “ignorance” is not categorical, the details of AD’s purported limits of knowledge re **X**, and another that seeks to establish (CE hopes!) AD’s strong “relationship”¹³ to **X** ... for the purpose of crafting such a dramatic contrast between the two positions that CE can forcefully argue to the

¹³ There has to be a better word or short phrase that would serve as a more intuitive label for this concept, but this seminar couldn’t think of it. Help!

trier-of-fact that AD's claim of "*I don't know X*" should be viewed as an attempt to deceive.

The AD-to-*X* "relationship" questions:

- knowledge of *X* was of great and time-relevant importance to AD's self-interest, duties, and values (or to the self-interests, duties, and values he purported to have);
- AD had time-relevant awareness of unambiguous and highly reliable information that established *X*'s place in the universe of the knowable;
- AD had time-relevant awareness of multiple means by which he could have obtained knowledge of *X* (in order to enhance or protect his –purported? – self-interests, duties and values);
- the burden that would have been imposed on AD (i.e., the skill, time, money, risk, need for help, and/or travel) had he endeavored to obtain knowledge of *X* was minimal;
- AD's competing self-interests, duties and values were such that they afforded him the opportunity to seek knowledge of *X*;
- AD had a prior history (a long-standing practice?) of passively/actively obtaining knowledge of quite similar-to-*X* matters;
- AD's inadequate attempts in deposition to reconcile his "relationship" with *X* vis-à-vis his "*I don't know X*" claim (including, perhaps, why he deviated from his practice of obtaining knowledge of similar-to-*X* matters)

§10 The All-Time, Every-Case, Toughest Answer To Successfully Attack

“I did acquire knowledge of X, but don’t remember it now” is the all-time, every-case, toughest answer for CE to successfully attack as a deception:

- Axiom: Everyone remembers some stuff and forgets other stuff. Happens everyday. Everyone understands that everyone else remembers some stuff and truly forgets other stuff. Happens everyday.

Point? Members of the jury (i.e., people) have a built-in empathy for AD’s claim of *“I don’t remember,”* especially when the “failure” of memory occurs in a pressure-packed situation like a deposition.

- AD’s *“I don’t remember”* reserves an opening for a subsequent, claim of a memory revival, genuine or feigned.
- Unlike the range of potential impeachments against AD’s *“I don’t know,”* mere proof of AD’s prior knowledge trail re X is not convincing proof of his memory at the time the deposition question was posed. The only post-deposition conduct by AD that is sufficient for CE to impeach AD is limited to his express admission:

“I did remember X at the time CE asked me about it, but claimed that I didn’t. I lied to CE.”

- CE’s only argument:

“AD’s initial “poor” memory was (or his subsequent “revived” memory is) so implausible that it should be seen as an attempt to deceive.”

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§11 Three Purposes of the Deceitful “I Don’t Remember X”

- To reserve the opportunity to spring a trial surprise on CE with testimony that is unfavorable to CE.¹⁴
- To deprive CE of truthful testimony by AD that may be favorable to CE.¹⁵
- To deprive CE of discovery leads regarding information – the identity and whereabouts of persons, documents or real evidence – that may be favorable to CE.

§12 The Rosetta Stone¹⁶ Attack vs. “I Don’t Remember X”

Crucial to the successful cross-examination re any “*I don’t remember X*” by any AD, in any case, for the rest of time are two interrelated lines of questioning: one that seeks to define the scope and, if his “memory failure” is not categorical, the details of AD’s purported limits of memory re X, and another that seeks to establish (CE hopes!) AD’s strong “relationship” to X ... for the purpose of crafting such a dramatic contrast between the two positions that CE can forcefully argue to the trier-of-fact that AD’s claim of “*I don’t remember X*” should be viewed as an attempt to deceive.

There are twelve aspects to AD’s “relationship” to X. They are addressed in §13 – §24, below. (Yes, indeed there is some overlap among the twelve.)

¹⁴ But there is no trial surprise, if there is no trial. And, because the vast majority of civil cases go away with no trial, this problem is given relatively little time in this seminar.

¹⁵ This is CE’s major memory concern.

¹⁶ Wikipedia states, “The term *Rosetta Stone* has been used idiomatically to represent a crucial key to the process of decryption of encoded information.” (Note: The many borrowings from that wonderful website constitute the only “scholarship” that was involved in producing this seminar.)

§13 AD's "Relationship" to X: Recency

AD's initial knowledge re X was recent; therefore it was likely to be remembered by him.

Thus, in the Q&A of AD, CE seeks to establish recency and AD often claims that he can't remember. And, recency, of course, is not simply a matter of when AD knew of X, but what level of detail about X CE's question seeks: the more specific the detail sought, the less the recency.

- CE's challenge to AD's *I don't remember when X occurred*:

- before	}	specific date(s) and/or dateable event(s) versus AD's claim: "absolutely no clue"
- after		
- around		
- between		

- If AD claims "*I have no clue whatsoever when I acquired the information or experienced the event,*" CE goal is to craft the argument that this claim is so implausible it should be viewed as AD's attempt to deceive.

§14 AD's "Relationship" to X: Importance

X was important to AD; therefore it was likely to be remembered by him.

- CE seeks to establish that AD's acquisition of knowledge re X was important to AD at the time he first acquired it and that it continued to be important up to the present.
- CE's argument: *The greater the importance, the more lasting the importance, the less credible is AD's claim of a failed memory.*

- Corollary argument: *AD's claim of poor memory re X is true ... because his claim that X is important to him is false; otherwise he would have remembered it (better than he did).*

§15 AD's "Relationship" to X: Response Invited

X invited AD to respond; therefore it was likely to be remembered by him.

- CE seeks to establish that AD's initial of knowledge re X caused AD to consider taking responsive action or, at least, caused AD to analyze the situational information.
- CE prefers that AD's consideration of a response to X (or analysis of it) was immediate, ongoing, and remains current.
- CE prefers that the considered response was significant to AD's narrow personal interests, his duties to others, and his values.
- CE must be prepared to attack AD's claim that, even assuming the acquisition of knowledge re X, it did not require any response, or only an insignificant response.

§16 AD's "Relationship" to X: Multiple Experiences

AD experienced X on multiple occasions; therefore it was likely to be remembered by him.

- CE's argument: *The more occasions on which AD received information re X, the more likely he will remember it ... particularly if one of those occasions was recent.*

§17 AD's "Relationship" to X: Memory Revived

AD revived his initial memory of X; therefore it was likely to be remembered by him.

- CE seeks to establish that AD revived his initial memory of X by:

- thinking about it;
 - writing about it for himself;
 - speaking or writing to others about it;
 - hearing others speak about it, either directly to AD or in his presence;
 - reading about it; and/or
 - perceiving other manifestations of **X** ... its causes and/or effects.
- CE prefers AD's revivals of memory be frequent and recent.

§18 AD's "Relationship" to X: Emotion

X triggered an emotion or strong attitude in AD; therefore it was likely to be remembered by him.

- CE seeks to establish that **X** caused AD to experience an emotion or strong attitude and/or to see such a reaction in others that was caused by **X**.
- CE prefers that the emotion was immediate, frequent, ongoing, current, and significant.
- Proving that **X** caused AD to experience a strong attitude could also be useful to CE's argument. Making no attempt to be comprehensive, here are the attitudes that appear in the only-up-for-a-minute PowerPoint: bored; sympathetic; worried; grateful; pleased; confused; approving; amused; surprised; intimidated; offended; honored; optimistic; disappointed; confident; and frustrated.

§19 AD's "Relationship" to X: Familiarity

X was a type of information familiar to AD; therefore it was likely to be remembered by him.

- CE seeks to establish that AD had prior experience and/or training in observing, understanding, and retaining memory concerning the very type of information to which **X** belongs.

§20 AD's "Relationship" to **X**: Novel

X was a novel subject to AD; therefore it was likely to be remembered by him.

- CE seeks to establish that **X** is novel in the experience of the general public or, at least, novel in AD's experience and thus unlikely to be lost ... certainly in comparison to the other quotidian matters that AD said he could remember (perhaps in detail).

§21 AD's "Relationship" to **X**: Remembered by Others

Other persons could remember **X**; therefore it was likely to be remembered by AD as well.

- CE seeks to establish that other persons whose "relationship" to **X** (its importance, recency, invitation to action, etc.) was quite similar to AD's and while they were able to remember **X**, AD [CE wants to argue] suspiciously claimed he could not remember it.

To help with this argument, CE wants AD to admit that he can think of no reason why the others were somehow more likely to remember **X** than he was.

§22 AD's "Relationship" to **X**: Within Memory Power

Recall of **X** was within AD's demonstrated memory-power; therefore it was likely to be remembered by him.

- CE seeks to establish that AD demonstrated feats of memory in other instances that exceed the feat of memory that would be necessary to recall **X**.

CE's argument: *Many times in the conduct of his affairs (and/or in his testimony in this case) he has demonstrated an excellent memory for (names, places, dates, events, chronology), yet on **X** his memory-power was suspiciously feeble.*

- Thus, CE may find it valuable to make note of AD's pre-deposition and intra-deposition feats of memory that are "greater" than that involved in the particular *I don't remember* **X** claim.

§23 AD's "Relationship" to **X**: Valuable to CE

Had AD remembered **X**, it would have been valuable to CE, thus AD had a motive to "forget."

- CE seeks to obtain AD's agreement that had AD admitted a memory of **X**, such an admission would have been value to CE's case theory. In the alternative, CE seeks to force AD into making an implausible denial regarding **X**'s potential value to CE, or an implausible claim of ignorance regarding **X**'s potential value to CE.

§24 AD's "Relationship" to **X**: Selective Memory

AD's claimed memory of **X** was incomplete; what he could remember exclusively served his own interests.

- AD "recalls" an aspect of **X** that made AD look good and/or helped OA's case theory. He claimed that he could not recall a different aspect of **X** that was potentially useful to CE's case theory. CE's argument is that AD's memory is suspiciously selective.

§25 **Attacking AD’s “I Don’t Remember Now (But Will Later, or Claim I Do, If Getting X Into Evidence Supports My Case Theory).”**

- CE’s goal is to firewall the limits of AD’s memory re information that may undermine CE’s case theory. AD’s firewalling efforts will produce one of three outcomes ... AD gets to choose which.

Those three outcomes:

- AD’s memory re **X** never gets bigger than that which he initially claimed was his memory’s limits. Result: CE wins because the jury is not going to try to puzzle out what AD admits he can’t remember.
 - AD’s memory re **X** gets bigger during the deposition ... or he falsely claims it does. Either way there will be no trial surprise played on CE re **X**. Moreover, CE can attack this bigger memory free from “judge & jury restrictions.” CE can also conduct post-deposition formal and informal discovery to try to rebut, maybe even refute, the bigger memory. Lastly, CE will take this bigger memory into account regarding his settlement position and the selection of trial tactics.
 - AD’s memory re **X** gets bigger after the deposition, thus, in light of CE’s firewalling efforts at the deposition (discussed below), AD may find it hard to credibly explain why he could not remember the new information at the time of deposition but remembered (or “remembered”) later.¹⁷
- CE’s firewall argument: *“Despite the great efforts taken to plumb the depths of AD’s memory during his deposition, AD said – more than once – that he couldn’t remember anymore about **X**. That’s because there was nothing more to truthfully*

¹⁷ If CE masterfully firewalls AD’s memory limits at the deposition and AD springs a trial surprise disclosure of unfavorable-to-CE information, which information is reliably corroborated by AD’s side, how does CE effectively attack that information? This seminar has no clue. (Nor does anyone else.)

remember. Therefore, distrust this suspicious, belated “revival” of memory about X.”

- CE’s speech¹⁸ to AD (and the jury) re memory:

- *X is important to me and my client, and may well be of importance to the jury if this case goes to trial ... for the following reasons (key details here).*

- *This deposition is my one and only pre-trial opportunity to question you regarding this important subject. Thus, I want to learn today everything you can possibly remember about it.*

- *Like you, my client has a right to a fair trial. In part, getting a fair trial requires that each witness fully disclose in his deposition all the information can truly remember. A witness who conceals information for surprise later, especially a trial surprise, is not acting fairly. In fact, he is being dishonest.*

- *Thus, please understand, once this deposition is over, if you claim to remember new information about X, I may well ask the court to allow me to re-open your deposition to question you about that new information, including why you had not previously disclosed it.*

Moreover, if the case goes to trial, I may well ask the jury to consider two explanations for the belated disclosure re X: (a) you decided to conceal information during your deposition, thereby violating the oath you took to tell the whole truth, or (b) you decided to fabricate new information re X to help your side in this case, thereby violating the oath you took to tell the whole truth.

- *Thus, in the interests of all concerned, including yours, please carefully and deeply search your memory for all the information you have about this important subject, X.*

¹⁸ Yes, this speech is over-the-top, unless, as this seminar assumes X, the subject matter of AD’s “I don’t remember now,” is important to CE and CE has the deposition time to challenge that claim.

- Disabling AD’s potential memory triggers. Use leading questions!
 - “You’ve never spoken to anyone about **X**, right?”
 - “You’ve never written (or somehow memorialized) anything about **X**, right?”
 - “No one has ever spoken to you about **X**, right?”
 - “You’ve never heard anything through the grapevine about **X**, right?”
 - “You’ve never seen any writing (or heard about any writing) that referred to **X**, right?”
 - “You’ve never taken any action regarding **X**, right?”
 - “You have no information whatsoever that anyone else ever witnessed, spoke about, wrote about (memorialized in any way), or took any action regarding **X**, right?”
- In addition to the “anyone or anything in the world” questions immediately above, if CE knows of a specific person or document that AD might have dealt with concerning **X**-type subject matter, then CE should also seek to eliminate those potential memory triggers for AD.

Example:

*“You’ve never spoken to Dave, Joe, or Sam about **X**, right?”*

Without this question, AD may claim that under the pressure of deposition Q&A, Dave did not come to mind.

- The “no discovery plan” question: *“So, once this deposition is over, you can think of no steps you might take to possibly recall or find the answer to my question about **X**, right?”*

- Embed AD’s claim of memory limits by looping, an essential component of firewalled. Looping involves incorporating all or part of AD’s prior answer into new questions to make it more difficult for AD to later claim that ...
 - he misheard the question;
 - he misunderstood the question;
 - he misspoke his answer;
 - the court reporter got the question or the answer wrong;
 - he initially answered off-the-cuff and, on second thought, he sees that it was inaccurate;
 - he was somehow tricked or bullied by CE into the answer; or
 - CE misunderstood his own question or AD’s answer.

Example:

CE: *“Tell me all the bad things my client did to you.”*

AD: *“Bad thing #1 and #2 are all that I can remember now, but I know he did more bad things.”*

CE: *“So, bad thing #1 and #2 are the only bad things you can recall as you sit here right now.”*

AD: *‘Yes, but I know he did others.’*

CE: *“So of the two and only two bad things you can remember, tell me which occurred first.”* (Looping)

CE: *“Of the two and only two bad things you can remember, tell me which hurt your feelings more.”* (Looping)

CE: *“With regard to the only two bad things you can remember my client doing to you, did you ever report*

either of those two bad things to your supervisor?”
(Looping)

- Consider encouraging AD to admit that his memory is poor in general or poor regarding a particular timeframe or subject. He may want to say, *Yes* to explain why he cannot remember **X**, and CE may be able to use that *Yes* to attack AD’s claim that he can remember on other information during that same timeframe and/or about that same subject.
- CE should consider revisiting **X** at the end of the deposition and offering AD a “trade”: a “this deposition is over” in exchange for AD’s admission that he can’t remember anything more about important subject **X** than he has already said in the deposition.

In response, AD either walks away or he gives more information. If he walks, CE can argue that AD had two chances to remember, with one at the very end of the deposition when he was reminded what a “big deal” it would be to unfairly surprise CE at trial with new information.

§26 **Attacking AD’s “*I Do Remember X*,” an Unfavorable-to-CE “Fact”**

Axiom: When a person makes a claim of memory that exceeds the “normal” ability to remember, others will entertain doubt (or can be encouraged to do so) about the accuracy of the claim, and maybe the honesty of its maker, unless (a) that claim is reliably corroborated or (b) that person has demonstrated verifiable “beyond-normal” feats of memory in other instances. Absent one of these, the magnitude of the doubt about the accuracy of the claim increases the more the claimed memory exceeds the normal, and increases the more the claimed memory serves the interests of the purported remember-er.

CE’s argument: *“AD’s ability to remember was too-good-to-be-true because it wasn’t true. Few people have that kind of ability and AD did not prove that he was one of them. He did not tell the truth when he*

claimed to be able to remember X, which was so conveniently – and suspiciously!! – helpful to his case.

§27 Attacks¹⁹ vs. AD’s Unfavorable-to-CE “I Do Remember X”

- X’s occurrence (perhaps AD’s awareness of X) was not recent.
- X was not important to AD (or was important, but only briefly).
- AD was not *invited* to act by X.
- AD experienced X only once.
- AD did not *revive* his initial perception of X.
- X triggered no emotional or strong attitude in AD, or in another person so far as AD is aware.
- AD had no (little) prior experience or training re X.
- X was unremarkable to AD, not novel.
- AD’s memory-power suspiciously exceeds the normal.
- AD can’t prove other feats of “great” memory.
- AD’s memory-power was not corroborated, despite corroboration possibilities.
- AD’s memory of X was suspiciously selective: valuable to AD, not to CE.

§28 When Saving Impeachment for Surprise at Trial Makes Some Sense

There are eleven²⁰ situations when CE may reasonably decide to ignore the “nearly always road-test in the depo” rule and instead conceal during the deposition some/all of the information that CE intends to use as a trial

¹⁹ Yes, these are the counterparts to those in §13 – §24.

²⁰ The sixth and the tenth employ the same rationale, the sixth to a “fact” witness and the tenth to an expert witness.

surprise (hereinafter “secret info”²¹) to maximize its impact regarding a credibility attack or case theory argument:

1. Someone other than CE controls the secret info; perhaps it’s the opposing side. CE hopes to obtain it for use at trial. However, CE believes that a deposition-disclosure of this secret info may create an unacceptable risk that it will become unobtainable by CE because the opposing side (maybe even OA), having been given notice of its importance to CE, successfully destroys or alters a document, or successfully confuses, cajoles, intimidates, bribes, or “buries” a witness.

2. The secret evidence may be useful to the questioning of more than one AD, in which case, CE may decide to reserve disclosure of the secret info for a later and more useful deposition.

3. CE is concerned that the secret info is vulnerable to a truthful or dishonest credibility attack by the opposing side ... if allowed enough time to discover a truthful attack or to concoct a false one. (However, given how relatively easy it is for the opposing side to discover “trial secrets” through the competent use of contention interrogatories, this consideration is not a strong one.)

4. Disclosure of the secret info may focus pre-trial attention on a witness who was previously unknown to, or was deemed unimportant by, the opposing side; and, while that witness’s testimony does help CE, the witness may help the opposing side even more if given pre-trial time to investigate the possibilities. Therefore, CE may reasonably decide not to disclose the secret info at deposition.

5. CE is concerned that, if the secret info is disclosed at the deposition, OA will have time to devise a successful in-limine motion that excludes its presentation during the trial. (Note: Some judges might be quite displeased with a CE who surprise-attacks a witness with info of

²¹ “Secret info” here means: (a) OA doesn’t know of the info; (b) OA knows of it, but doesn’t know CE knows of it; (c) OA knows of the info, but doesn’t know of its importance to the case; or (d) OA knows of the info’s importance, but doesn’t know that CE also knows of its importance as well.

borderline-admissibility ... expecting that CE should have first raised the matter of the info's admissibility to the court outside the presence of the jury.)

6. AD is vulnerable to a significant character (unrelated to honesty) and/or credibility attack. But he is an optional trial witness, meaning the opposing side does not have to call him to testify at trial to prove its case. CE judges that the impeachment of this "bad-guy" witness is certain and forceful. CE may reasonably decide that, rather than impeaching him at deposition and giving opposing side a major warning about the dangers of calling this witness at trial, it would be wiser to hold the impeachment evidence for surprise at trial so CE can launch the attack in front of the jury and, impliedly or expressly, fault the opposing side for presenting and endorsing such a dishonorable witness.

7. Sometimes CE's key deposition goal is to perfect a narrow record in order to obtain a summary judgment. In that situation, CE may understandably be concerned that the application of the "nearly always road-test in the depo" rule will give AD an unnecessary and dangerous-to-CE opportunity to recognize – with the help of OA – the legal deficiency in the record and thus the opportunity to fashion an escape route from CE's summary judgment motion before the deposition is completed.

a. Sounds like a great goal and a reasonable concern. That said, this seminar offers no trick whereby CE can conduct a "deposition-is-trial" examination that simultaneously shapes effective trial arguments and fashions the kind of narrow record that fosters a victorious summary judgment motion for CE. Alas, nobody knows of such a trick.

b. There are two gambles that CE who prefers a narrow record for summary judgment motion may wish to ponder:

i. First, isn't it the rule of civil procedure in nearly every jurisdiction that deponent has 30 days from the date the court reporter produces and serves the official deposition transcript for deponent to "correct" that transcript? If that is the rule in your jurisdiction, then in that 30-day window can't deponent, with the connivance of OA, "correct" the deposition transcript to effectively fashion that escape route from CE's summary judgment motion? And what makes CE believe OA will be too summary-judgment-dumb to notice the problem before the 30-day window expires?

ii. Second, how confident is CE that the summary judgment motion will be granted? Sure enough to risk screwing up the deposition cross-examination so that at trial, instead of reenacting the “best of the deposition,” CE will be forced to test his extemporaneous cross-examination and argument skills on a key issue?

8. After the deposition, AD is moving to a faraway place forever, and CE knows that he will never be available to appear at trial to challenge the secret info that impeaches him. CE may reasonably decide to conceal that info at deposition, thereby depriving that witness of the opportunity to memorialize his expected denial or evasion of the impeachment. Instead, CE prefers to impeach that witness at trial *in absentia*.

Note: Before CE commits to this approach, a close study of the pertinent evidence code sections and case law must be made to determine if the impeachment at trial of the faraway witness will be allowed ... if the trial court learns that CE knew of the impeachment at the time of the deposition, knew of witness’s trial unavailability, and chose as a stratagem to deny witness the deposition opportunity to deny or explain away the impeachment evidence.

9. CE fears that impeaching AD will cause OA to drop the aspect of the legal case that makes that impeachment evidence relevant if there were a trial.

- Example²²: (a) CE represents the plaintiff who is seeking monetary damages arising out of defendant’s liability. (b) CE is confident that the defendant’s liability will be proved at trial. (c) CE controls evidence that forcefully impeaches defendant’s credibility regarding a matter that is relevant to the liability issue, and is irrelevant to the damages issue. (d) CE does not believe the opposing side will ever offer an acceptable settlement figure, thus the case has got to be tried. (e) CE fears that if he impeaches defendant at deposition, OA will prevent the jury from learning about that impeachment by stipulating to liability while continuing to litigate damages. (f) CE believes the jury will award greater damages if defendant can be shown to be less than admirable.

²² Actually, it’s the only one seminar speaker could think of.

10. CE reasonably fears that if adverse expert is impeached at deposition, OA will either replace the discredited expert ... or just dump him and try the case without another expert in the same field. CE certainly does not want the expert to be replaced by a less vulnerable expert ... and may, in some cases, even prefer that the expert not be dumped.

a. Example: CE can prove that the expert told a significant lie on his CV and has concluded that this will irreparably damage the expert's credibility with the jury. So, instead of disclosing the problem in deposition, CE decides to attack the expert for the first time at trial, after OA has, in effect, vouched for the expert's integrity. This delay will also allow CE to raise a question about OA's integrity for having presented/endorsed such a witness

b. Before CE decides to squander the opportunity to fully attack adverse expert in deposition (i.e., CE's laboratory!), CE must research the pertinent code of civil procedure sections to confirm that a concern of replacement is well grounded.

11. CE's attack against adverse expert will identify a flaw in his investigation and/or analysis, which flaw CE reasonably fears expert can "correct" by the time of trial ... with little or no damage to his credibility. Such flaws include:

a. An oral or written misstatement regarding case information ... a misstatement the expert authored or was authored by another person on whom the expert relied.

b. A numerical "typo" or a defective mathematical calculation ... an error authored by the expert or was authored by another person on whom the expert relied.

c. A failure to (properly) consider relevant information that is in the expert's possession.

d. The non-review of relevant information that was never in the expert's possession, but is still obtainable by the expert in time for trial.

e. An avenue of relevant investigation that expert did not conduct, but which is still doable by the expert in time for trial

APPENDIX

The “Most Comprehensive”²³ Analysis Of An AD’s Deceitful²⁴ “I Don’t Know / I Didn’t Know” Deposition Answers That Has Ever Been Published²⁵ In The History Of The World:

U.S. D.O.J. vs. Barry Bonds (Part #1)

On December 3, 2003, Assistant U.S. attorneys Jeff Nedrow and Ross Nadel conducted the grand jury deposition of home run king²⁶ Barry Bonds in course of the federal government’s investigation of the BALCO case, which involved the illegal distribution of steroids to professional athletes. Prior to the deposition, Bonds invoked the 5th Amendment. In response, the government gave him immunity and compelled him to testify. The grant of immunity, of course, did not cover any perjury he might commit during the course of that deposition.

Long story made short: In 2005 Victor Conte, the founder of BALCO, and Greg Anderson, a long-time friend and trainer of Mr. Bonds, each pled guilty to the illegal distribution of steroids. On November 15, 2007, the government indicted Mr. Bonds, alleging that he had committed perjury multiple times in the deposition. Jury selection for his trial in a federal court in San Francisco was completed yesterday. Both sides made opening statements today; testimony commenced and will continue for a few weeks.

Disclosure #1: Other than reviewing the four indictments (the original and three amended indictments), a couple of the motions related to the defense’s challenge of the legal adequacy of many of the counts of alleged perjury in the various indictments, and a close study of the deposition of Mr. Bonds, I claim to know no more about this case than any other faithful reader of the daily sports pages and/or occasional listener of San Francisco sports talk radio.

²³ “Most comprehensive” so far as seminar speaker is aware. Truth be told, it is extremely unlikely that anyone else ever bothered to attempt sooo narrow an analytical ... um, “feat.”

²⁴ Repeating a “caution” set forth earlier in these materials, neither the tone of this analysis nor its blunt judgments will be to the unqualified liking of all. *Sic est vita*. If you see what you deem to be a flaw in logic or fairness, send an email re the flaw(s) to musante@killerdepo.com ... and expect a prompt response.

²⁵ So long as either a long-ago abandoned blog or a seminar booklet like this counts as “published.”

²⁶ Henry Aaron is the real home run king at 755 no-steroidal-aided homers, unless one might wish to consider that Babe Ruth hit 715 with 3,955 fewer at-bats than Aaron ... although, no small consideration: in Ruth’s time, major league baseball was an only-white-players-allowed enterprise.

Disclosure #2: In the contest between the team of Mr. Nedrow and Mr. Nadel vs. Mr. Bonds, I was unreservedly rooting for team N & N. Even if I had not been the son of a San Francisco cop, the relative of six other San Francisco cops, a former San Francisco cop myself (and former deputy district attorney in two California counties), as a teacher of cross-examination for 30+ years, my strong sympathies are almost always with the cross-examiner, not the witness. Plus, an April 2019 Google search of *Barry Bonds + jerk* produced 45,200 well-deserved hits (pun intended).²⁷

The first 16 pages of the deposition address the 5th Amendment, Mr. Bonds's status as a baseball player, and the history of his friendship with Mr. Anderson. At page 17, there is a mention of vitamins and protein shakes and Mr. Anderson's request that Mr. Bonds provide blood and urine samples to BALCO through Mr. Anderson to determine if Mr. Bonds had a zinc or magnesium deficiency. The plot thickens ... the cross-examiners have been put on notice: "Bullshit²⁸ ahead." (The legal-oriented website thesmokinggun.com used to have the entire transcript (148 pages) but it's now disappeared!? If you want a copy (pdf), send an email to musante@killerdepo.com. Please put "Barry Bonds Depo" in the subject line.)

All the questions below were asked by Mr. Nedrow.

Pages 18/19:

Q: "Okay. How many times did you provide blood samples for testing? Was that a common thing or just happen a few times? Or what would you estimate?"

[Comment: Pick a damn question ... maybe one of the four above.]

A: "I don't know, maybe five or six times, maximum."

[Comment: "When was the first? The last? Details? So you're saying – from the time in 1998 when you and Mr. Anderson renewed your friendship up until today – for sure you gave samples of blood to Mr. Anderson – directly or indirectly – no more than six times, right?" Force him to make as many

²⁷ In the hope of increasing his meager vote count – from 44% in 2016 to the required 75% – re his floundering candidacy to MLB's Hall of Fame, in a June 1, 2016 TV interview, Bonds said of his years and years of jerk behavior, "Me. It's on me. I'm to blame for the way I was [portrayed], because I was a dumbass. I was straight stupid, and I'll be the first to admit it." [Note: It would have been impossible for anyone else to have made an admission about Bonds's own behavior. Thus, his much belated admission is hardly a mark of humility or sincerity.

²⁸ "Bullshit" is a seminar/webinar term of art: "a claim of sufficient implausibility that cross-examiner can validly argue to trier-of-fact that said claim should be viewed as an attempt to deceive.

specific claims as possible ... or force him to claim that he doesn't remember the first/last/details ... if so, how can he reliably claim a maximum number of samples?]

Q: *“And regarding the urine samples -- let me ask, I guess, the same questions [No, please don't.] regarding the urine samples. How often did you provide those?”*

[Comment: The use of “often” asks for the frequency (e.g., once a month); it does not ask for the total number of samples, though it can help get there. Small point: This question is not the same as the first question.]

A: *“Oh, I can't recall.[1] Maybe[2] four times maybe.[3] I don't recall.”[4]*

[Comment: Mr. Nedrow should be wondering if someone advised Mr. Bonds that loading 1-4 into a single response would make it more difficult to prove perjury? Thus, he should have sharpened the questions and follow-ups. “Are you saying that – from the time in 1998 when you and Mr. Anderson renewed your friendship up until today – you definitely provided more blood samples to him than urine samples?” In comments to the last two responses, I have added a time frame: from the time in 1998 when you and Mr. Anderson renewed your friendship up until today. Mr. Nedrow failed to include a time frame in many, many of his questions.]

Q: *“So, understanding four would be a kind of estimate, but kind of in the ballpark, or around four?”*

[Comment: He should have asked: “When was the first urine sample? The last? Details?”]

A: *“Yes.”*

[Comment: A “yes” to what? A kind of estimate? A kind of in-the-ballpark (pun intended) estimate? What is that? “Mr. Bonds, are you saying with certainty that it could not possibly have been 10 times? 8 times? Why are you so sure?” My case-ignorance may be showing here, but if the government has a record of the number of samples, why not show them to Mr. Bonds?]

Q. *“Did he ask you why -- or, excuse me, did he tell you why urine samples?”*

[Comment: What a crappy question. Better: “Did he ever give you any information whatsoever about any purpose he thought might be served by taking the urine/blood samples to BALCO?” Mr. Bonds and Mr. Nedrow

seem to have forgotten the purported zinc and magnesium deficiencies mentioned on page 17.]

A. *“No. I didn’t -- we were friends. [What?] I didn’t ask Greg a bunch of questions. [That wasn’t the question; it was re what Greg said to Mr. Bonds.] We are friends, we grew up together, you know, we don’t do that stuff. [What stuff?] If he needs something, fine, fine”.*

[Comment: The response screams “deception,” yet there was no challenge whatsoever by Mr. Nedrow. “It isn’t every day that a friend asks you to supply blood and urine samples so he can take them to some laboratory that you had no connection with, right? You say that you didn’t ask Greg a bunch of questions. Tell us all the questions you did ask him before agreeing to give him your blood and urine? It wouldn’t have taken very long to ask a few questions of him, and of the Giants’s trainer, right?” Mr. Nadel heard the question-dodging and returned to what Mr. Anderson said to Mr. Bonds, but didn’t do much with his two pages of questions.]

Page 21:

Q. *“What was Greg’s connection or relationship with BALCO [Victor Conte]?”*

[Comment: Again Mr. Nedrow leaves out the time frame of the question: what Mr. Bonds knew at the time the first sample was requested by Mr. Anderson, now (December 3, 2003), or sometime in between.]

A. *“I have no idea their personal relationship or any -- relationship. I don’t get into anyone’s business like that.”*

[Comment: Define the limits of Mr. Bonds’s purported ignorance: “So you had no information whatsoever whether there was any financial benefit (non-exclusive examples offered as illustrations) either one derived from the relationship. You had no information whatsoever if there was a social relationship (non-exclusive examples offered as illustrations) between the two, right? So far as you were aware, their only connection whatsoever was that where Mr. Anderson brought your blood and/or your urine to BALCO for testing and nothing else, is that your testimony? And, in all the time that you were exercising with Mr. Anderson or socializing with him, not once did he ever say anything about his association with BALCO except that of his being your blood/urine delivery man to BALCO, right? And when you say that you don’t get into anyone’s business, wasn’t your blood and your urine your business? Isn’t it true that given all the accusations in the sports world about the use of steroids, you certainly recognized that there was at least

some risk that the results of the testing of your blood/urine – true or false – might violate the privacy you hold so dear.” The possibilities for cross-examination were indeed rich.]

Page 24:

A. *“And everyone tries to give me everything. You got companies that provide us with more junk to try than anything. And you know that as well. I was fatigued, tired, and needed recovery, you know. And this guy says: ‘Try this cream, try this cream.’ And Greg came to the ballpark and he said, you know: ‘This will help you recover,’ and he rubbed some cream on my arm, like, some lotion-type stuff, and, like, gave me some flaxseed oil, man. It’s, like: ‘Whatever, dude.’”*

[Comment: By the time of this response, the team of N&N had to know that they were witnessing a crime: perjury. Thus, it was time for Mr. Nedrow to stow away his “nice-guy” mien (e.g., page 5, line 1 to page 6, line 5; page 10, lines 17-19; page 12, line 15 to page 13, lines 1-12; page 21, lines 10-12) and to go full cross-examination mode. “So, here you were, Mr. Bonds, greatly fatigued, tired, and in dire need of recovery from the heavy physical toll that the demands of your profession inflict on your body, and you’re saying that along came non-chemistry-major Greg who says ‘try the cream’ – whatever chemicals may be in that – and you do it without any question – ‘whatever, dude’ – because you and Greg went to grammar school and high school together, right? You didn’t ever say, “Let’s discuss it with the team trainer and/or the team doctor, right? That’s your bullshit story, right?”]

U.S. D.O.J. vs. Barry Bonds (Part #2)

The questioning of Mr. Bonds went on for 131 pages before Assistant U.S. Attorney Jeff Nedrow stated that he and his colleague, Assistant U.S. Attorney Ross Nadel (occasionally referred to below as “team N&N”), had “concluded our factual questions for Mr. Bonds,” at which time members of the grand jury were invited to pose questions. Thereafter, the grand jury members, the two prosecutors, and Mr. Bonds generated another 15 pages of Q&A. Apparently, another witness (baseball player Benito Santiago) was scheduled to be questioned later that afternoon (Mr. Bonds’s deposition ended at 4:16 p.m.), but I assume that the government was free to demand that Mr. Bonds return on another day for another session of Q&A. If my assumption is accurate, then by ending the

deposition (page 148: “You’re excused, Mr. Bonds. Thank you very much. You’re free to go.”) and not demanding a second day of testimony, team N&N were, in effect, saying that they had – to their satisfaction – thoroughly and skillfully questioned him on all relevant matters.

The wondrous, twin beauties of a deposition cross-examination, as opposed to a trial cross-examination, are (a) time to think and develop lines of inquiry and attack, time to take a second, even a third, shot at a subject that was poorly addressed the first time around, and (b) very low risk that a trial juror will ever learn of the cross-examiner’s **failed** lines of inquiry and/or attack.

In my judgment, Mr. Nedrow and Mr. Nadel squandered a golden opportunity (no impatient judge to hurry them along, no defense attorney to pose objections or ask for a recess, and no trial jurors to observe the questioner’s extemporaneous flubs, awkward pauses and dead-end lines of inquiry) to attack Mr. Bonds’s litany of claims of “I didn’t know,” “I don’t remember,” and “Whatever, Dude!”

The division of labor between the two prosecutors was roughly 80/20, Mr. Nedrow/Mr. Nadel. Mr. Nadel’s Q&A produced about 28 pages of the 131 pages that preceded the grand jurors’ questioning. A bit more about that division of labor will be offered another time.

At page 25, Mr. Nedrow asks Mr. Bonds about the “flaxseed oil thing,” which apparently involves putting drops of the substance underneath the tongue ... or, perhaps, drinking it. The questioning does not make that matter clear (no pun re “the clear” intended).

The questioner below is Mr. Nedrow unless otherwise noted.

Page 26:

A: *“And I was, like -- you know, to me it didn’t even work. You know, me, I’m 39 years old. I’m dealing with pain.[!] All I want the pain [!] relief, you know?”*

[Comment: Back on page 17, Mr. Bonds stated that the purpose of the blood/urine samples was to detect, and correct, any potential imbalance in his body chemistry, such as zinc and/or magnesium levels. Now the claimed rationale for his use of flaxseed oil and the cream is to relieve pain, pain, pain. There were no questions about Mr. Bonds ever having received legitimate lab reports regarding the balance or imbalance of anything in his body.]

Q: *“Mm-hmm.”*

A: “And, you know, to recover, night games to day games. That’s it. And I didn’t think the stuff [both the flaxseed oil and the cream?] worked. I was like: ‘Dude, whatever,’ but he’s my friend you know?”

[Comment: Amazing! He claims that he continued to take substances that did absolutely nothing for his pain, pain, pain. So why did he continue? Because Mr. Anderson was his friend? Incredible! What is equally incredible is team N&N left this claim unchallenged. Here Mr. Nedrow strikes out without taking the bat off his shoulder. Mr. Nadel does the same below.]

Page 29:

Q: “Okay. Had you ever taken flaxseed oil, by the way, before?”

[Comment: “By the way”? Really?]

A: “I never asked Greg. When he said it was flaxseed oil, I just said: ‘Whatever.’ It was in the ballpark.”

[Comment: It is evident that part of Mr. Bonds’s deposition strategy – to buttress his claim that he at all times had a good faith belief in the legality of the substances Mr. Anderson supplied him – was to repeatedly proclaim that his interactions with Mr. Anderson all occurred out in the open ... where people with a clear conscience, such as he, are willing to operate. His 7th-inning-deposition-stretch ditty would be titled, “Bring Me The Clear At The Ballpark” ...

Page 27: “He brought it to the ballpark.”

Page 29: “It was in the ballpark.”

Page 29: “In front of everybody. I mean, all the reporters, my teammates. I mean, they all saw it. I didn’t hide it.”

Page 30: “At the ballpark.”

Page 31: “We were in the ballpark, inside the stadium.”

Page 36: “I was at the ballpark ... he came to me at the ballpark.”

Page 37: “Greg brought it to me, brought it to the ballpark.”

Page 38: “He came with the ballpark.”

Page 55: “In front of all these people at the ballpark.”

Page 64: “He did it right there in the locker room.”

Page 88: “In front of my locker, sitting in my chair.”

Page 88: “It was always at the ballpark.”

Page 103: “At the ballpark.”

So there should have been questioning about who, at the ballpark, Mr. Bonds claims saw him receive substances from Mr. Anderson; who saw him consume/apply those substances; who he spoke with about those substances. Why not let teammates in on the (anticipated) pain relief? There were no such questions.]

Q: *“Right.”*

[Comment: Not right! He didn't answer the question that he was asked. Again!]

Page 30:

Q: *“Okay. Did you even know what flaxseed oil was at the time he [first] presented it to you?”*

A: *“Not really. [i.e., some] Not at all.” [i.e., none]*

[Comment: Make him pick one: some or none are mutually exclusive. Which ever he chooses, the limits of his purported ignorance should have been defined: “Tell us all that you know about flaxseed oil: where it comes from; how it is processed; what dangers its use poses, what respected hospitals or doctors have ever confirmed that it would relieve pain?” Define the purported limits of his efforts to obtain any information whatsoever about flaxseed oil: zero!! The first sentence of Aristotle's “Metaphysics” is “All men by nature desire to know.” Except, apparently, Barry Bonds concerning the consumption of unknown chemicals recommended by a non-doctor. Sure.]

Pages 30/31, Mr. Nadel questioning:

Q: *“Did you notice after you took it that it [flaxseed oil] had any affect --- appeared to you to have an affect on you at all?”*

[Comment: Put a time frame in the question: “From the very first time you took any of the supposed flaxseed oil ... ?” Even better, Mr. Nadel should have used the earlier “it didn't even work” answer (page 26, above) in a series of questions that began to challenge his claim that he continued using an unknown, absolutely useless substance to try to relieve his pain, pain, pain. That said, Mr. Bonds gives Mr. Nadel even better phrase to work with. See next.]

A: *"I -- I told him: 'It's not doing crap. I'm still in pain. I'm still feeling the pain.'"*

[Comment: "Not doing crap" is a wonderful piece of rhetoric that should have been turned into a refrain that was used in dozens of questions. The term "crap" was not used by either questioner after this page. Sad. Moreover, Mr. Bonds was not asked what he said to Mr. Anderson about being supplied with a substance ("the flaxseed oil") that turned out to be crap as a pain, pain, pain reliever. Also sad.]

Q: *"You yourself -- "*

A: *"I still felt fatigued and had a heart condition in Arizona. It's not working."*

[Comment: "It's not working." The same could be said of team N&N. No doubt they were trying, but that's not the same as working: effective. So yet another cross-examination "invitation" got ignored: "it didn't even work," "it's not doing crap," and "its not working."]

Page 34, Mr. Nadel questioning:

Q: *"Did Greg tell you where he got the flaxseed oil from?"*

A: *"I never asked him, I just assumed it was BALCO. I never asked him."*

[Comment: Mr. Bonds's incredible (aka: perjurious) claim that he lacked even basic curiosity regarding the efficacy, reliability, source, and safety of the uncertain substances Mr. Anderson supplied him went pathetically unchallenged.]

Page 36, Mr. Nadel questioning:

Q: *"How often were you supposed to take that lotion [the cream]?"*

[Comment: Why so vague? Better: "Based on your hundreds of opportunities to converse with (non-doctor, non-chemistry-major) Mr. Anderson, your long-time friend, what was your understanding of how often (maybe: how many times a day/week) you were supposed to use the cream, so that you could obtain the biggest relief from the horrible pains you suffered? Surely your great friend would want you to have the best information so that you could obtain the very best result, right? It was a matter of great importance to be relieved from the pain, pain, pain, right? And what did you great friend say when you told him that it was crap ... as, now doubt, a

straightforward person like you would do?"]

A: "I didn't take it that often [in comparison to what?] at all, I can't recall how many times, but it wasn't that much at all."

[Comment: Mr. Nadel accepted this non-answer by immediately moving on to a different subject. Why even bother to ask the question? Mr. Bonds often – every few pages, at least – succeeded in changing the scope of important questions because team N&N allowed him to do it. Terrible cross-examination.]

U.S. D.O.J. vs. Barry Bonds (Part #3)

The purpose of the deposition was to obtain evidence that the government could use in its prosecution of Victor Conte and Greg Anderson for their involvement in BALCO's criminal steroid distribution and money laundering schemes. Get the dealers; use the users to get the dealers. Makes perfect sense. Thus, at the outset of the deposition, Mr. Bonds was not the questioners' target; thus the initial questioning by Assistant U.S. Attorneys Jeff Nedrow and Ross Nadel was information-gathering in nature and tone. (In my seminars/webinars, I call this mode of questioning "doing the 'Battleship' game" ... getting the witness's story: who, what, when, where, why, & how.)

However, by at least page 36 – I hope by page 24 – team N&N, who I was rooting for (see disclosure of bias in Part #1), knew, unless they are the most credulous of people, that Mr. Bonds's repeated claims of complete ignorance regarding the true nature and purpose of the "flaxseed oil" and the "pain cream" were lies ... lies under oath, thus perjury. Team N&N was witnessing a series of crimes, and – truly sorry to say– their inept deposition "abetted" those crimes. Oh, Mr. Bonds may yet be convicted later this month, but, there can be no doubt, Mr. Bonds's defense attorneys must have been thrilled to see what little damage was done to their client in those hours in front of the Grand Jury. That deposition should have been the prosecution's strongest piece of evidence with which to attack Mr. Bonds's credibility ... it ain't.

Tangent: In the "kicking a 25-years-ago dead horse" department: Had Los Angeles Police Department homicide detectives Phil Vannatter and Tom Lange –

500 homicide investigations between them – on June 13, 1994, the day after the murders, conducted a competent Q&A (i.e., a cross-examination ... yes it was, and should have been) of O. J. Simpson, and had they obtained a complete timeline of Mr. Simpson’s whereabouts and activities for the night of the 12th, the defense would have had to try that case – assuming there was even a trial, instead of a plea – quite differently. How can one determine that their questioning was LOUSY? Easy: the prosecution chose not to introduce into evidence any of that no-defense-attorney-present, 5th-Amendment-waived, 32-minute Q&A botch-job.

Now back to Mr. Bonds and team N&N, mostly Mr. Nedrow, who is now trial co-counsel with Matt Parrella:

Pages 39/40:

In response to Mr. Nedrow’s question about the effects of using “the lotion” (aka: “the cream”) that was supposed to relieve his significant arthritic pains:

A: *“Oops. I -- almost said something. [Probably he had the word “shit” in mind ... and Mr. Nedrow should have encouraged him to say it!] thought it was really bad[!]. I did not think it did anything[!], to be honest with you [of course, Mr. Bonds], I didn’t think it did anything ... there’s a lot of companies and people that come up with a lot of gimmicks with us [athletes] ... you try it, you make them happy [of course you do, Mr. Bonds], instead of your [sic] have these long conversations with them all day why it’s better than this product, this product. You kind of just say: ‘Here, be happy,’ move on.” [Ahh, easy-going Barry Bonds channeling PBS’s easy-going Mr. Rogers, 1928-2003]*

Q: *“Did Greg ever talk to you about this cream actually being a steroid cream that would, you know, conceal steroids or testosterone in your blood, did Greg ever ask, -- tell you about that?” [Translation: “Would you like to completely contradict the last 20 pages of your under-oath testimony and (a) admit that you knowingly took steroids supplied to you by Greg, thereby incriminating yourself re perjury; and (b) admit that your home run achievements are bogus, thereby placing your first-ballot induction into the Baseball Hall of Fame in grave doubt?”]*

A: *“No, no.” [Translation: “The first ‘no’ is because I decline your kind opportunity to admit to perjury. The second “no” is because ... well, duh!]*

Beginning at page 44, and continuing through page 123, Mr. Nedrow conducted what quickly became a depressing (for anyone who cares about quality cross-examination) slog of dead-end lines of inquiry re Mr. Bonds’s knowledge or interpretation of the BALCO records that the government contended

memorialized Mr. Bonds's interactions with BALCO. Three representative excerpts from that slog are offered ...

Page 45, Mr. Nedrow asked about the **first** page of those documents:

Q: *"Do you recognize this document, Mr. Bonds?"*

A: *"No, I don't."*

Fast-forward to page 70, Mr. Nedrow asks:

Q: *"Do you see, again, 100404; 19 under "Test"; 0.0 and I'll keep going [Yes, he will.] 11-18-01, 16.2 under "Test," 8.0 under "EPI," and 2.0 under "Ratio." Do you see that?"*

A: *"Yes."*

Q: *"Do those numbers or entries mean anything to you?"*

A: *"I don't know what it means at all."*

Fast-forward to page 123, Mr. Nedrow asks about the **last** page of the BALCO documents:

A: *"I don't understand this piece of paper. I've never seen it before, once again."*

This brought the slog to a close, 79 pages that produced (I weasel ever so slightly here) next to nothing that can be used against Mr. Bonds in this trial, and, I suspect, produced next to nothing that was of use against Mr. Conte and/or Mr. Anderson. However, there was one time when I briefly thought Mr. Nedrow would get to some place good ...

Page 94:

Q: *"I'm sorry. Mr. Bonds, but I have to ask because you are a professional athlete, and an enormously successful athlete, but your trust in Greg with these items that don't have packages on them and trusting him on his word, without looking at these [test re steroids] results, I mean, that's a lot of trust for somebody whose body is, as you said, your work, your life, isn't it?"*

[Comment: Alright, Mr. Nedrow – we'll ignore the "sorry" and the "I have to ask" because you are onto something. Now confront him with the Ruthian-

sized contradiction between his undeniable self-interests: (a) to reduce his pain, pain, pain; (b) to stay on the proper side of baseball's drug rules, thus keeping safe his \$17,000,000 yearly salary and his first-ballot induction to the BHOFF; and (c) to avoid any risk of physically harming himself by the consumption of "bad medicine," on the one hand ... and, on the other hand, his repeated claims that he diligently continued taking two substances of uncertain nature that were obtained from uncertain sources by someone, albeit a friend, who certainly never attended, let alone graduated from, Stanford medical school ... substances that never worked the way he was told they would work re his pain, pain, pain. The label for that credibility argument: "The witness's actions were unreasonably inconsistent with his knowledge and motivation.]

A: *It's exactly right. You're right. [I am a jerk, but not a stupid one.] I did [not bizarrely] trust Greg [I knew what I was taking and they worked exactly the way Greg told me it would ... look at my home run numbers.]. And I have other people that have put stuff on my skin, too. I also have trainers in the organization I trust that put cream and stuff on me, too. I put a lot of trust in a lot of people, we do as athletes. [I hope you don't ask many more questions about this.]*

Q: *"But do you ask them questions about what this stuff is, where they're getting it, you know, that sort of thing?"*

[Comment: Good, a follow-up question to the bullshit response above.]

A: *"No, besides: 'It's hot' or 'It's cold' or 'We don't like it' that's it. [Questions such as "Why is my head becoming a balloon? Why all the acne on my back? Why the problems 'down there'? aren't nearly as important as 'hot' and cold.""] I mean, if we had to ask questions about every single item, we'd be there [?] for a while. If you had to go take it to go test it to make sure it's -- you know, that's not how it works in there [?]."*

[Comment: Mr. Bonds was praying that Mr. Nedrow would now buy this second bullshit response and move on to a different, less dangerous, subject.

Prayer answered: Mr. Nedrow immediately changed the subject to a quick, nothing question about whether Mr. Bonds had a written contract with Mr. Anderson regarding the weight-lifting training he provided. He then reliably returned to the dead-end slog through the documents about which Mr. Bonds could – rather safe from impeachment – say again and again and again he had no idea about them because they were SOMEONE ELSE'S documents. OMG!]

U.S. D.O.J. vs. Barry Bonds (Part #4)

A lot had to be on the collective mind of team N&N as the deposition of Mr. Bonds commenced. And any criticism about the quality of the deposition must allow that it may have taken a turn (no later than page 36; I say much sooner) that team N&N had no reason to anticipate: a Mr. Bonds who was determined to lie his ass off about his years-long, knowing, and eager consumption of steroids and the chemical agents that were designed to mask his use of those steroids.

The below – in the typical over-the-top fashion in which all of the teaching points in my seminars/webinars are presented – are lines of deposition cross-examination that team N&N neglected altogether and left poorly developed. I argue that they should have ditched the document slog (see Part #3) that consumed 79 pages, producing next to nothing, and endeavored to develop these. (Yes, there is some overlap among the lines.)

Neglected Line of Deposition Cross-Examination #1: Mr. Bonds's Bizarre Reliance on Greg Anderson and Bizarre Lack of Curiosity:

Mr. Anderson, your long time friend, suggested that you give him periodic samples of your blood and urine for testing, and further suggested that you take two substances (one orally and the other rubbed into you skin) that he would supply to you, which substances he said would correct any zinc/magnesium imbalance in your body and/or relieve your significant arthritic pains and constant fatigue, right?

He told you that the substance you were to take orally was flaxseed oil, right?

You had no idea whatsoever what flaxseed oil was, right?

He didn't identify the substance that you were to rub into your skin, right?

He had no formal medical training whatsoever, right?

He didn't tell where he obtained the two substances, right?

You just assumed they came from BALCO, right?

He didn't offer you any proof that these substances were effective in correcting anybody's chemical imbalance and/or relieving arthritic pains and fatigue, right?

He didn't offer any proof that these substances were safe, right?

And, according to you, you didn't ask a "bunch of questions," right?

As a matter of fact, according to you, you didn't ask him a single question about the substances' identity, source, effectiveness, or safety, did you?

Even though you could easily have asked some questions at the time he first made his suggestions or at any time during your hundreds of weight training sessions you had with him over the years that followed, you never asked a single question, right?

Would have only taken you three minutes, maybe less, to have asked the basic questions, right?

And, on the two or three occasions that you were in the company of Victor Conte, head of BALCO, for whom you did an advertisement, you never asked him a single question about the effectiveness or safety of the substances you assumed that his company, BALCO, was supplying to Mr. Anderson to give to you, right?

And, if you had been somehow too busy to ask questions about your health and your safety, you could have asked someone else to make those inquiries on your behalf, right?

You could easily have asked Steve Hoskins, who performed many duties for you, to make inquiries on your behalf, right?

You could have asked the Giants' trainer his opinion about the effectiveness and/or safety of those substances at any time over a number of baseball seasons, right?

Given that the Giants paid you \$17,000,000 per year, their trainer was certainly motivated to make sure that you were always in the best health, the best home-run-hitting health, right?

You could have asked your own doctor, the renowned Dr. Ting, about those substances on the many occasions you saw him or communicated with him by phone, right?

Dr. Ting was always quite willing to provide you with his medical expertise, right?

Or you could have sent Mr. Anderson to see Dr. Ting about those substances, right?

Mr. Anderson was on-call to show up for 4 a.m. workouts whenever you wanted and on-call to come to Arizona for weekend workouts whenever you wanted during spring training, right?

So, it would have been no big deal – in fact quite easy – for Mr. Anderson to drive 20 minutes max to Dr. Ting’s office and for him to bring along samples of the substances so that Dr. Ting could be sure that your health and safety were protected, right?

Moreover, isn’t it true that people want their doctor to know all of the medications they are taking so that the doctor can make informed judgments about what medications might conflict with each other ... what medications might even be dangerous if taken together, right?

But, correct me if I’m wrong, according to you, you never informed Dr. Ting about those two substances, right?

You didn’t really think Mr. Anderson would understand the chemistry of those substances when combined with any of your other medicine, right?

But you didn’t make any effort whatsoever to inform Dr. Ting or the team trainer about the two substances Mr. Anderson kept bringing you year after year, did you?

You kept your consumption of those two substances secret from them for years, right?

And, according to you, you never did anything to try to inform yourself about the true identify of those substances, their source, their effectiveness, or their safety, right?

And the reason why you never asked your dear friend, Mr. Anderson, anything about those substances was because you were concerned that by so doing you would intrude upon his business. He didn’t question you about your batting technique, and you didn’t question him about the unknown-to-you substances you were putting into your body, right?

You wanted him to be happy, so you unquestioningly followed his plan regarding your long-term consumption of those two substances, right? **[Isn't that your bullshit story?]**

Neglected Line of Deposition Cross-Examination #2: The Steroid Tumult in Baseball and Mr. Bonds's Need for Self-Protective Caution:

You said that everybody – including the players – talked about steroids, right?

The media made a gigantic deal out the steroid controversy, right?

There was lots of speculation in the press and by public that some players were hitting way more home runs than they had ever before and the reason was that those players were cheating by using steroids, right?

But you say that you weren't a cheater, a juicer, and you wanted your fellow baseball players and the fans to know that all of your home runs were legitimate, right?

You have said that you didn't trust baseball management and didn't trust the media, right?

Being a person who has spoken his mind many times about baseball matters, you made some enemies in baseball and in the media, right?

That didn't bother you, but you did believe that there were some people in baseball and the media that would like nothing more than the opportunity would undermine the historic greatness of your baseball achievements, to taint them with a false scandal, right?

So, you were indeed cautious about doing whatever you could to protect your reputation as one of the greatest baseball players, if not **the** greatest baseball player, of all time, and, naturally, to protect your personal privacy as a citizen, right?

But, isn't it true that, by giving samples of your blood and urine to Mr. Anderson, you were taking a risk – made even greater by his giving those samples to BALCO, a lab you knew little about ... and who knew for sure where they might go after BALCO – that your baseball reputation and personal privacy could unfairly be harmed, even destroyed, if those samples

were accidentally mishandled or intentionally tampered with, right?

You couldn't be sure that the samples wouldn't fall into the hands of negligent or dishonest people ... and that somehow a banned substance might fall into or be put into one of the samples of your precious bodily fluids, right? **[Yes, echoes of General Ripper in Kubrick's "Dr. Strangelove."]**

But, after taking that risk into account, you decided that giving samples of your blood and urine **[p.b.f.]** to Mr. Anderson and to BALCO, was worth that risk to your reputation and your privacy, right?

And it was worth that risk because you stood to get something back that was very important, right?

Correct me if I got this wrong, according to you, the important thing you stood to gain from the samples being tested – at least in the beginning – was your learning whether you had a chemical imbalance regarding the zinc and/or magnesium levels in your \$17,000.000 body, right? **[Isn't that your bullshit story?]**

And, forgive me, Mr. Bonds, I didn't mean to leave out your great desire that Mr. Anderson be happy, happy, happy.

Neglected Line of Deposition Cross-Examination #3: The Great Zinc and Magnesium Imbalances (continued):

Correct me if I am wrong, your testimony is that you never saw any paperwork that showed anything regarding any tests that were performed by anyone on any of the blood/urine samples, right?

Correcting the zinc and the magnesium imbalances was one of the two reasons you agreed to take the "flaxseed oil," right? **[The other being Mr. Anderson's happiness.]**

Tell me all of the communications that you ever had with anyone that in any way dealt with those imbalances?

Are you saying that there was always some imbalance in one or both of them, that is, your zinc and/or magnesium levels?

Or, did you continue to take the "flaxseed oil" any time after the zinc/magnesium levels were corrected?

[He has to make a choice: (a) claim the levels were never corrected and then be forced to explain why he continued taking an ineffective substance, or (b) claim they were finally corrected and then be forced to explain why he continued taking the “flaxseed oil” once the problem resolved.]

Yes, he could say that he continued with the “flaxseed oil” to maintain the proper balances as advised by “Doctor” Anderson ... but, come on, they never had any such conversation, thus he would have to extemporaneously concoct the “facts” around that lie ... always a risky proposition.]

Neglected Line of Deposition Cross-Examination #4: The “Clear” Was “Crap” as a Pain Reliever:

You said that obtaining relief from your arthritic pain and fatigue **[and making Mr. Anderson happy ... which team N&N should have used as a refrain in multiple questions]** was extremely important to you, right?

If you became pain free, you could hit more home runs to help you team win and to more quickly catch and pass Babe Ruth and Hank Aaron, so that you would become baseball’s all time home run hitter, right?

But you said the pain medication, the lotion that Mr. Anderson gave you, didn’t do anything, it was, your word, “crap,” right?

And, out of politeness to the members of the Grand Jury, you were just about to say the lotion was “shit,” but you caught yourself, right? **[Mr. Nedrow should have tried for that word.]**

Yet, correct me if I am wrong, you never complained to Mr. Anderson or Mr. Conte, who you assumed – assumed because you never bother to ask – had supplied the “crap” **[“shit” would have been even better]** to Mr. Anderson, to the effect that your pain was in no way relieved, right?

Instead, not wanting to disturb Mr. Anderson’s happiness, you kept taking the “crap” **[“shit”]** pain medication years more, right?

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Neglected Line of Deposition Cross-examination #5: Inconsistent Statements re Frequency of Flaxseed Oil Consumption:

Regarding the frequency of your consumption of the “flaxseed oil,” the first time you were asked about that today (page 30), you said one time per home stand, right?

Yet, moments ago, (page 142), in response to a member of the Grand Jury, you said “If we were home [**meaning playing a set of consecutive games in San Francisco**] for two weeks, maybe two or three times, maybe.” You said that, right?

So which is the truthful answer, Mr. Bonds?

More Neglected Lines of Deposition Cross-Examination:

- Effects of Steroids Use Experienced by Mr. Bonds, Discussed w/ Others
- Bizarre Lack of Curiosity re the Federal Search Warrants
- Steroid Cheaters Need a Friendly Laboratory
- “Beans” (page 100/101)
- Mr. Bonds: “I don’t want to know anything.” (page 126)

Pardon a repetition of an offer that’s buried somewhere in the pages above:

The legal oriented website thesmokinggun.com used to have the entire transcript of this deposition (148 pages) available to download. Although the site still refers to the depo and shows a picture of its first page, there’s nothing to download. It’s a mystery. So, if you want a pdf of the depo transcript – to double-check my scathing, and accurate, judgments regarding this woefully lame deposition – email me at musante@killerdepo.com. And, please put “Barry Bonds Depo” in the subject line.

Either way, for your next adverse deposition and all the ones after that, remember:

***Trial is Argument.
Deposition is Trial.
Thus, Deposition is Argument.***