Narrative Edge
Better Stories, Better Trials

The Fundamentals of Taking Effective Depositions

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I. INTRODUCTION

To understand how to perform any task effectively, you must first understand the goal or purpose of the task. So before digging into the specific techniques and practices used in deposition, we should first answer the critical question: what, exactly, is the purpose of a deposition?

The goal of any deposition should be to acquire the specific facts necessary to tell your client's story and undermine the other side's story. This necessarily requires obtaining new facts—facts that you did not have in your record before the deposition—and locking into the record all facts in a way that is most favorable to your story.

The following guide is based on three principles for successful depositions, all of which are developed in the rest of this guide:

1. Proper preparation is key;
2. Fact-gathering, not conclusion-chasing, is the fundamental goal of deposition; you must use the facts you have to accumulate more, related facts; and
3. You can and should guide the witness to get favorable testimony.

II. PROPER PREPARATION AND PLANNING

Thorough preparation is critical. The examiner must (1) understand the major issues in the case and have thought carefully about the story her or she intends to tell in the litigation, (2) be very familiar with the paper trail, as the documents are one of an examiner's most effective tools; and (3) know the holes in the existing evidentiary record.

The preparation process should begin with a thorough examination of the case, preferably in writing. Some lawyers prepare their anticipated closing argument before taking depositions; others craft an opening statement; I prefer a combination of the two, because I want both the full

story I intend to tell (to the extent I can craft it that early in the proceedings) and an understanding of the key legal issues. Doing this work before depositions begin will highlight the holes in your evidentiary record and the facts you must discover in order to tell a complete, compelling story at trial. The document will obviously undergo substantial revisions over time. But preparing such a document before depositions is critical to taking successful depositions in a case of any real complexity. And, obviously, doing this work requires a very careful review of the documents produced in the case, all substantive pleadings, all declarations or affidavits, and the facts that you have received from your own client.

Doing this prep work will also help us identify third-party witnesses who may be of value, and it will force us to think about identifying additional potential witnesses in the course of the deposition. Few things are more effective at trial than a third-party witness who supports your story, yet lawyers often fail to focus on finding such witnesses until very late in the process, often after discovery has closed. Identifying potential third-party witnesses—which means, of course, potential third-party deponents—is critical and should be done early in the process, both before and during the key depositions.

Through preparation is also useful to plan the right timing or sequence of deposition topics. With most witnesses, even the most hostile witnesses, there are some useful facts with which the witness will agree. Most attorneys believe that starting the deposition in a manner that is as non-threatening as possible makes sense, for the witness will be more relaxed and we can chase after the facts that we should be able to get. Once the witness is hostile and defensive, however, it may be a fight to get just about anything.

This is sound thinking, but I'd add a caveat. Most witnesses are not familiar or comfortable with the deposition process. It takes them some time to feel comfortable, and when

they feel comfortable, they are likely to perform better. (Even NFL quarterbacks – people at the top of their profession who have been playing the game for many years – often struggle in the first few minutes of the Super Bowl because of nerves.) Sometimes it makes sense to challenge the witness immediately when the witness is nervous and uncomfortable, and therefore more likely to make a mistake.

Sometimes the best type of question to ask is the big-picture question on an issue of weakness for the other side's case, such as "What did the defendant do wrong?" Seldom is a witness prepared for such a question. The witness has probably spent time discussing all of the critical facts that support their position, but they probably do not have a solid soundbite in mind. Ask this question, especially early, and the witness is likely to give a half-baked, poorly thought-out response. Use the traditional funnel or listing method to lock the witness down, and you're likely to have a useful chunk of testimony. The witness may have left out important parts of the other side's theory, he or she may have characterized their position poorly, and you can probably follow up to ask a series of difficult questions. Keep in mind that the witness is now not only trying to defend what may be a weak liability theory (or damages theory or just about anything else), but the witness is also trying to defend his or her earlier answers.

One primary topic we should think about is whether to impeach in the deposition or set up impeachment and save it for trial. When possible, it makes far more sense to think through this issue in advance. One of our primary goals in a deposition is to set up the witness for impeachment. Impeachment does not always mean showing that the witness is lying, although that is one form of impeachment. Impeachment is when we establish that the witness's testimony cannot be relied upon because of truthfulness, bias, character, competency (the witness does not really know what he's claiming to know) or some other problem. If we assume that the

witness is an adverse witness, then some amount of impeachment may be necessary. A good deposition transcript is the best tool for impeaching a witness later.

Where it is necessary to impeach a witness, the examiner must decide whether to impeach the witness at deposition or wait until trial. (We are assuming that the witness will be available for trial. If the witness's attendance at trial is uncertain, you obviously have no choice but to impeach at deposition.) Which course the examiner takes often depends upon a number of factors.

First, is the case likely to settle? Most civil cases settle, and one of the litigator's goals is to convince the other side that there are sufficient problems with their case – sufficient uncertainty – that they should be eager to settle. Impeaching a critical witness at deposition on an important point may be one factor in helping the other side to take a reasonable settlement position. And foregone impeachment may never be a factor in the case if the parties settle before trial and never learned about that weakness in their case.

Second, can you steer the witness your direction through impeachment at deposition? Given the choice, it is almost always better to have the witness agree with you than it is to impeach the witness. If you want the witness to agree with you on a point, and the witness refuses, impeaching the witness at deposition may force the witness to take your position at trial. Note that your impeachment will likely not be used as impeachment at trial. Instead of showing the jury that the witness answered the question "incorrectly" in deposition, you simply have the witness answer the question "correctly" at trial since the witness knows he or she will be impeached otherwise. Note, however, that if the witness still chooses to take the "incorrect" position, the witness may be in a better position to fight your impeachment efforts at trial, having had months (or in some cases, years) to think about a way out of the trap that they know you will try to spring.

Third, how comfortable are you with the impeachment trap you wish to spring? The danger of waiting until trial to impeach is that you don't necessarily know what the witness will say in response. If the witness has a good response to your impeachment efforts, your impeachment may fall flat, and worse, you may harm your own credibility to losing a high-stakes battle with the witness in front of the jury. Saving impeachment for trial is only an option when you are comfortable that the impeachment will be effective and the witness does not have a reasonable out.

Fourth, special considerations apply with expert witnesses. Experts are in a much better position to fix impeachment than percipient witnesses are. If a percipient witness was not in a position to see whether the light was red or green, there is very little the percipient witness can do to fix this problem. But experts form opinions based on assumptions and factual conclusions they are given or arrive at through their analysis. Thus, a little further analysis after the deposition usually gives the expert a plausible path around the impeachment efforts.

For example, imagine that the expert's opinion is subject to attack because the expert did not consider a fact that came out in a deposition of one of the other side's witnesses. Expert witnesses tend to be most vulnerable on the inputs they receive from counsel or the factual assumptions they make. Garbage in, garbage out is a proven strategy for undermining expert witness testimony, and usually works better than trying to out-physics the physicist, for example. So whether we impeach the expert at deposition or save the impeachment we will probably start the same way: locking down the expert as to what he or she considered, and ensuring that the deposition transcript makes clear that the fact we believe undermines the expert's opinion was not considered. Now we either confront the expert with the relevant testimony in deposition or wait and do so at trial.

If we impeach at deposition, a good expert will admit that he did not consider it, will give a reason why it probably does not affect his opinions, but will also state that he will want to consider this fact after. At trial, he will say he considered it and will have the best possible explanation for why it does not matter. Therefore, in most cases with an expert, we are better off saving the impeachment. But, note, this is risky. If we're not sure how the expert will explain his position once he is confronted with the testimony at trial, we do not know whether we will want the exchange. And, finally, saving impeachment for trial only makes sense where the impeachment material and position can remain hidden. If you have an expert on your side who issues an expert report criticizing the opposing expert for failing to take these facts into consideration, waiting makes no sense. Run the issue to ground in the deposition.

III. FOCUS ON GATHERING FACTS RATHER THAN CHASING CONCLUSIONS

A. We're trying to tell a story in litigation, and stories are built from facts

Success in litigation is strongly correlated with telling compelling stories. Stories are built from facts; people do things, say things, hear things. To tell a compelling story, you must first build out the factual record.

One of the most common mistakes in deposition is chasing conclusions. A fact is what happened: somebody said, did, or wrote. A conclusion is what you want people to believe based on the fact(s). The defendant drove immediately after drinking five shots of tequila; that's a fact. The defendant was driving recklessly; that is a conclusion derived from the fact.

Lawyers want witnesses to agree to conclusions, because it is the conclusion—a finding of negligence, for example—that is what we ultimately seek. But stories aren't built from conclusions. Doris drove recklessly is not a story. Doris had five tequila shots in rapid succession, and then she stumbled out of the bar, started her Ford F-150, and turned out of the

parking lot right into a semi. That's a story. Conclusions are useful; we should not accept a useful conclusion from a witness. But lawsuits are built on stories, and therefore we must develop the factual record.

It's often hard to get a witness to agree to an adverse conclusion. That's the one thing that most witnesses are prepared to avoid and will fight against with all their might. But avoiding every fact that undermines the witness's case is a much harder task, and one for which witnesses tend to be far less prepared. Often your only hope of getting a useful conclusion from the witness (if that's your goal) rests on your efforts to build a wall of adverse facts such that the witness does not believe she can deny the conclusion without telling an obvious lie.

And, finally, conclusions aren't always as effective as you would like when you don't have a factual record to support them.

One of the least effective things examiners do in deposition is take a good fact—often from a document, put it in front of the witness, and demand that the witness reach the same conclusion the examiner has reached about that fact. Yet this happens routinely.

B. Facts are interconnected; use the facts you have to gather additional, related facts

Understand that all facts are related; they are social animals and don't live in isolation. The facts of a lawsuit are like the pieces of a jigsaw puzzle. The more facts we have to support our story—the more puzzle pieces we have in place—the clearer the picture becomes, and the more complete and compelling the story we can tell. At some point, even without all of the pieces in place, you can see the picture.

But the fewer pieces we have, the more likely it is that the decision-maker—who (brain science tells us) is constantly taking in the facts and trying to create a coherent

narrative based on the fact patterns already present in her brain—might come up with a wildly different narrative. The decision-maker might even ignore facts you think are crucial because, absent a narrative that can replace the one already in her brain, the decision maker has already started to adopt a different story, and your new facts may not fit the existing pattern. They simply get rejected, ignored.

But how is it possible to multiply facts? The same way we put together a jigsaw puzzle. We take the pieces we have and we find the additional, related facts like the connecting jigsaw pieces. Each fact is part of a much bigger picture, and each fact is connected to a whole series of related facts just like jigsaw pieces are related to other pieces. Because of the shape and color of a jigsaw puzzle piece, we can make informed inferences about the pieces that connect to it, and we can therefore look for them. That's how we identify the pieces we need and build the picture.

The same is true of trial facts. Taking the facts we know and, using logic, we can deduce that other, related facts must also be true. And, therefore, while they may not appear in the document we're using, for example, we can often have a firm conviction that they are true and that we can establish them, even through an adverse witness.

Let me provide a simple example in an area where lawyers often fail: the use of documents. Imagine that a witness wrote a memo summarizing a meeting. We have the facts that appear inside the memo. But there are a whole range of useful, related facts that are almost certainly true that do not appear in the memo. For example, this was a meeting that was important enough for the witness to take the time to summarize it. The writer cared to memorialize the meeting. The writer wanted to capture the most important things that were said or decided, etc. We can continue, but you probably already see the point. We can infer all kinds of additional facts here, and many of those will likely work their way into our eventual cross.

The simple fact that a particular witness attended a meeting can lead to any number of potentially related facts. The meeting might have concerned his job. He may have driven there. People might remember seeing him. He might have spoken.

This process is almost endless. But the examiner's job is to figure out, based on what she knows to be true, what else is highly likely to be true, and then lock down those additional facts. By fully building out the factual record in that way, it becomes possible to tell a whole, complete, and compelling story.

Thus, if the examiner takes out a useful document, establishes with the witness that he sent that document, and then tries unsuccessfully to get that witness to agree to a conclusion based on that document, the examiner has failed. *The examiner must always come out of the deposition room with more useful facts than he had when he entered; using established facts to fill the record with additional, related facts is the heart of the examiner's job.*

C. The funnel or listing method of fact-gathering

One of the major challenges in deposition taking is gathering all of the information you need without leaving holes in the record while also staying nimble enough to follow up on unexpected issues that arise during the course of the deposition. This task is made easier with proper organization.

One useful method for staying organized is what I call the listing method. (NITA calls is the funnel method; the process is the same. But for reasons I won't go into here, I think NITA has the analogy backwards.) In each area of examination, create a list of categories of information that fit within that subject, and close out your list before moving on to the specifics of any one category. For example, if we're interested in the witness's educational background, we might start by having the witness list all of the schools and educational programs she has attended. Then close out the list. (Are there any others?) Once you have your full list—all of your categories for potential follow up—you can begin to explore one or more of them.

As we explore one of the categories in that list, we make a new list of relevant categories of information under that initial category. So if one of the witness's schools was Harvard Medical School, we can create a list, for example, of what courses the witness took at Harvard. Close out the list. (Are there any others?) Then you can choose to explore any of the items on your new list, such as Intro to Human Anatomy.

By staying organized in this manner, you can constantly move back and forth between different levels of specificity and different topics while still being confident that you have notes that will allow you to fully understand the scope of a category (so you don't miss something important) and concentrate your time on those categories that matter most.

IV. Guiding the witness effectively

The tools discussed below are useful in steering the witness the direction you want him or her to go. Let's assume we have thought enough about our case to have some big-picture goals for the deposition: undermining the other side's damages case might be an example. And let's assume that instead of spinning our wheels just trying to get the witness to agree to a helpful conclusory statement – something a witness is not inclined to do – we are committed to doing the painstaking and truly important work of building the factual admissions necessary to support our conclusion that there are no damages. We have committed, that is, to establish as many underlying facts as possible to establish our desired conclusion. What tools can we use to accomplish that goal?

A. Stay simple

Our goal is to get useful soundbites. A soundbite is useful only if it is clear and generally short and uncomplicated. To get soundbites like that, our questions must be clear, short, and

uncomplicated. Long, complicated questions almost always give rise to long, complicated answers. And long, complicated answers are seldom useful.

This does not mean that all of our questions have to be short. It does mean, however, that when we uncover something valuable, a fact that we will want to use in a motion, at mediation, or at trial in cross, we must get it into a useful soundbite. If the witness makes a statement in a long, complicated answer, we must pull the useful statements out of the long answer and put each of them into a short, clear question and answer to get our soundbites.

To summarize, as a general rule, do not cram multiple facts or assumptions into a single question unless you have to. And if you have to, follow up with shorter, punchier questions that break up the pieces of the longer, more complicated question.

B. Misdirection, or Deposition Judo

Witnesses have kneejerk reactions. That is, they are predisposed to behave in certain ways on any issue when it is not obvious what the significance of the issue is and they have not been coached. We can often steer them our direction by taking advantage of these kneejerk reactions. Here are two examples.

Many witnesses are inclined to disagree with the lawyer deposing them, thinking rightly that the lawyer is not their friend and does not want what is best for them – so if he wants it, I don't. This kneejerk reaction can often be exploited to great effect. We use the witness's natural response against him, much the same way a judo master uses his opponent's momentum against him. But success hinges on keeping the witness in the dark as to your true intentions.

It is also true that, all else being equal, witnesses do not like to be portrayed as lazy, stupid, careless, or in any other derogatory manner. This means that, unless the witness is prepared to understand the significance of a line of questioning, a witness will almost invariably

defend his or her honor, so to speak, in deposition. Thus, most witnesses will have a kneejerk reaction to defend themselves from inferences that they are lazy, careless, greedy, and the like. But, again, to use this kneejerk reaction effectively, we must hide our real intent.

Thus, we need to distinguish between cross examination at trial and hunting for soundbites through misdirection in deposition. At trial, misdirection is risky and often counterproductive. To score points in cross examination, the jury must be able to follow the logic of the examination and understand why it matters. And if the jury understands, it is highly likely that the witness also understands.

But in deposition, misdirection is critical. Imagine that it is useful to establish that the witness reviewed a contract and understood its terms. A witness who is predisposed to disagree with the examining attorney and protect himself (or herself) can often be very easily directed toward the examiner's goal. Questions that imply the witness was lazy, stated in a way that implies the examiner is deeply skeptical that the witness was actually careful or conscientious and is trying to prove they were lazy or careless in this case, will often do the trick. Long before we pull out the critical contract, get the witness to lay a foundation that the witness cares about his job, does it to the best of his ability, reads critical emails and other correspondence, makes sure he is up-to-speed on critical events, etc. As a knee-jerk response, most witnesses will give you those types of soundbites. Later, when trying to establish that the witness carefully read the contract at issue, those soundbites will make it much more difficult for the witness to argue that he did not look at it carefully.

C. Cloaking

Another related tool is cloaking. Here the focus is not so much on pushing the witness in one direction in order to get the witness to push back in the other direction. Here we're simply

talking about cloaking the significance of a fact. If, to use the example in the last section, it is useful to establish that a witness reviewed a contract, we are more likely to get the witness to agree that she reviewed the contract before she knows that that fact will hurt her. Therefore, we must think carefully about the order in which we examine a witness and how we group topics. We are more likely to get useful admissions on damages, for example, if the witness has no idea that the facts being elicited concern damages. Don't do all of our damages questions at the same time. Break them up; intersperse them with other issues; and ask yourself whether some of those factual admissions are more easily obtained if you seek them early in the deposition before the witness understands the significance of the questions. You are always better off if the witness does not understand the significance of the questions you are asking.

An especially useful technique is cloaking through boredom. If a fact is useful to you but not of obvious significance, try to get the witness's agreement to that fact while asking a series of trivial and unimportant questions, maybe by going through a whole series of documents and having the witness authenticate each one and answer a question or two about each that is designed merely to bore the witness and convince the witness that this whole procedure is a giant waste of time.

D. Steering with Documents

All else being equal, a witness is inclined to agree with his or her past writings, the writings of the company or organization to which he or she belongs, and the writings of the witness's lawyer. Every competent examiner understands this, and most will come into a deposition prepared to use a document with a favorable statement. The question is how best to use it.

Too often, attorneys see documents like this as an opportunity to set up impeachment. Hide the document, have the witness say something inconsistent, and then impeach, usually in the deposition itself, sometimes at trial. I think this is almost always the wrong approach.

Where the statement in the document is on an issue on which the witness can be steered, it is almost always better to use the document to have the witness provide a soundbite with the useful fact. This is true for two reasons. First, lawyers almost always overrate impeachment. Impeachment is difficult, especially for novice examiners, and often falls flat at trial. And impeachment at deposition is even less useful in most cases. Showing deposition impeachment by video is largely ineffective, and getting the witness to agree on cross examination that the witness was impeached at deposition is not much better.

Second, shouldn't we always want the other side to agree with us? Isn't our best-case scenario in litigation that we put the other side's witnesses on the stand and witness after witness agrees with our story on all key issues in the case? What could be better than that? Therefore, when you have a choice between having the witness agree with you and having the witness disagree with you, with rare exceptions you should choose to have them agree.

How do we do this? Before asking the relevant questions, put the documents in front of the witness and ask them questions that get them to buy into what's on the paper. For example, "This is an email you sent? You generally tell the truth in your emails? Do you make a habit of lying? You can't think of any reason why you'd be lying here?" And then have the witness start agreeing to the statements in the document. In doing so, combine the document with cloaking or misdirection. It's usually best, that is, not to focus only on the statement that matters to you. Indeed, sometimes it's best not to focus even on the document you care about. Have the witness

agree to a series of statements in a series of emails. Make it as boring as possible. Cloak your real intentions. Usually the witness will go along. And now that fact is established in your case.

E. Looping

This is a common deposition technique and will be familiar to any experienced practitioner. Looping is when the questioner uses the witness's own words in follow-up questions. One obvious benefit is that it removes the definitional issues that so often plague depositions – "I don't know what you mean by that word – can you rephrase?" We deal with some specific times when looping is beneficial in the sections ahead, and there is no reason to spend substantial time talking about it here.

But it is important to raise one issue with looping. Sometimes it makes sense to get away from the approach you planned and use the witness's own language in deposition. Sometimes it doesn't, because the particular words are critical to the case. The only way to know which of those situations you are in is to come fully prepared. You must know when the specific word choice is required – maybe the case law uses a particular word on a particular element, and it's critical to use that word throughout that deposition – versus when you're free to use the witness's own words and loop throughout the deposition. You only know this after thorough preparation.

F. Taking a position to its logical (absurd) conclusion; putting the witness on the slippery slope

One of the most effective deposition techniques when the witness takes a position that the examiner does not like involves pushing the witness to the logical extremes of his position, where he will either look foolish or he will abandon the position as it relates that that extreme. But once the witness is willing to abandon the position in the extreme case, the witness is on a

slippery slope. He must figure out where to draw the line, and if the position he chooses is arbitrary, he will have no ability to do so in a compelling fashion.

Let's imagine the following hypothetical. Imagine that we want to establish that the defendant company was careless in handling some dangerous materials. And imagine further that we are deposing the shipping manager of the defendant company. We would like the witness to concede that he was careless in how he and his employees handled the materials. He will not want to concede that point. But imagine that we've established a series of errors that he and his people made. Let's take his position to the extreme. "You handled this situation perfectly?" "This was a textbook operation?" "Your people were flawless in how they shipped the materials?" Notice that all of these questions put the witness in a terrible position. If he agrees that he and his people were flawless, even though an accident took place and even though there are a series of facts that would seem to support their negligence, he looks foolish and his credibility is damaged. But if he admits that they were not flawless in their handling of the situation, he is on the slippery slope. We will not only get him to list the things he could and should have done differently, but we can also get him to characterize his work in his own language. "You agree your people weren't flawless. How would you describe their efforts?" If his word choice is favorable to his side – "they were competent" – then we're back to the same game as before: "It's competent to leave flammable materials to new employees?" "It's competent to give new employees 15 minutes to move and store dangerous materials?" On and on we go. Every time he tries to use his favorable-to-him word choice we contrast it with their established failures, and the witness loses credibility.

Conversely, if the witness gives a favorable-to-us characterization – "this was handled inexpertly" – then we have the witness a little closer to our desired conclusion, and we have laid

another brick in our coming trial impeachment. We can loop using the witness's own words and get a series of answers using the helpful language. (List all the ways your group's work was handled "inexpertly.") Or we can try to get yet another favorable characterization, another admission that is closer to our desired conclusion that the witness and his employees were careless.

G. Training the witness through discipline

Witnesses are not machines; they're people. And that means they are subject to the same psychological ploys as any other human being. For example, people do not like to appear stupid in front of others; it's embarrassing, and people don't like to be embarrassed. They also do not like to be punished for wrong behavior, and they tend to stop the wrong behavior if it will stop the punishment. This means that witnesses are similar to puppies; if you smack them on the nose when they misbehave, most witnesses will begin to behave. Thus, there must be consequences for bad behavior.

One example of how to apply this principle involves objections. Many witnesses are taught never to answer a question if the defending lawyer objects that the question is "vague and ambiguous." This is inappropriate. But we can frequently fix the problem by putting the witness on the spot. When the lawyer objects and the witness reflexively says he doesn't understand the question, make the witness identify what he doesn't understand. "What is confusing about my question?" If that doesn't work, take the witness word-by-word and have the witness tell you whether he or she understands each of the words you used. Usually the witness will capitulate in the middle of the process. And if the witness does identify a word, define it or change it and ask again.

This process frequently makes the witness look foolish – because the witness usually is being foolish – and the witness does not like that. The witness was also forced to answer a series of questions – embarrassing questions – that the witness would like to have avoided. For both of these reasons, the witness will not be inclined to continue with the same foolish tactic of claiming that he doesn't understand the question just because his lawyer said "vague and ambiguous."

A similar approach should be used when a witness unfairly refuses to answer an understandable question. Obviously, if the question is important and the witness refuses to answer it squarely, we must get an answer. But even on questions that are not critical, the witness cannot refuse to answer a question. Any time the witness dodges a question, the witness must pay a price. Most witnesses will quickly conclude that dodging questions simply doesn't pay; they will ultimately have to answer anyway, and they'll spend a lot of time and pain in a hopeless effort to avoid answering. By insisting on an answer to every question, you train the witness.

One final example: impeachment. When you impeach at deposition, the witness learns that there is a cost to be paid for answering inconsistently with the lawyer's expectations. The witness is made to look like a liar or a fool in front of her lawyer, the court reporter, the videographer, opposing counsel, and sometimes other witnesses. This is painful. Some witnesses are so traumatized by the process that they quickly learn to give the answer that the attorney seems to want. They simply stop fighting.

IV. CONCLUSION

This guide does not list all of the tools of the deposition trade. With experience, examiners will learn discover more tools, refine the ones they already know, and develop their own individual style. But using the tools described above can help an examiner achieve competency on the path to mastery.