

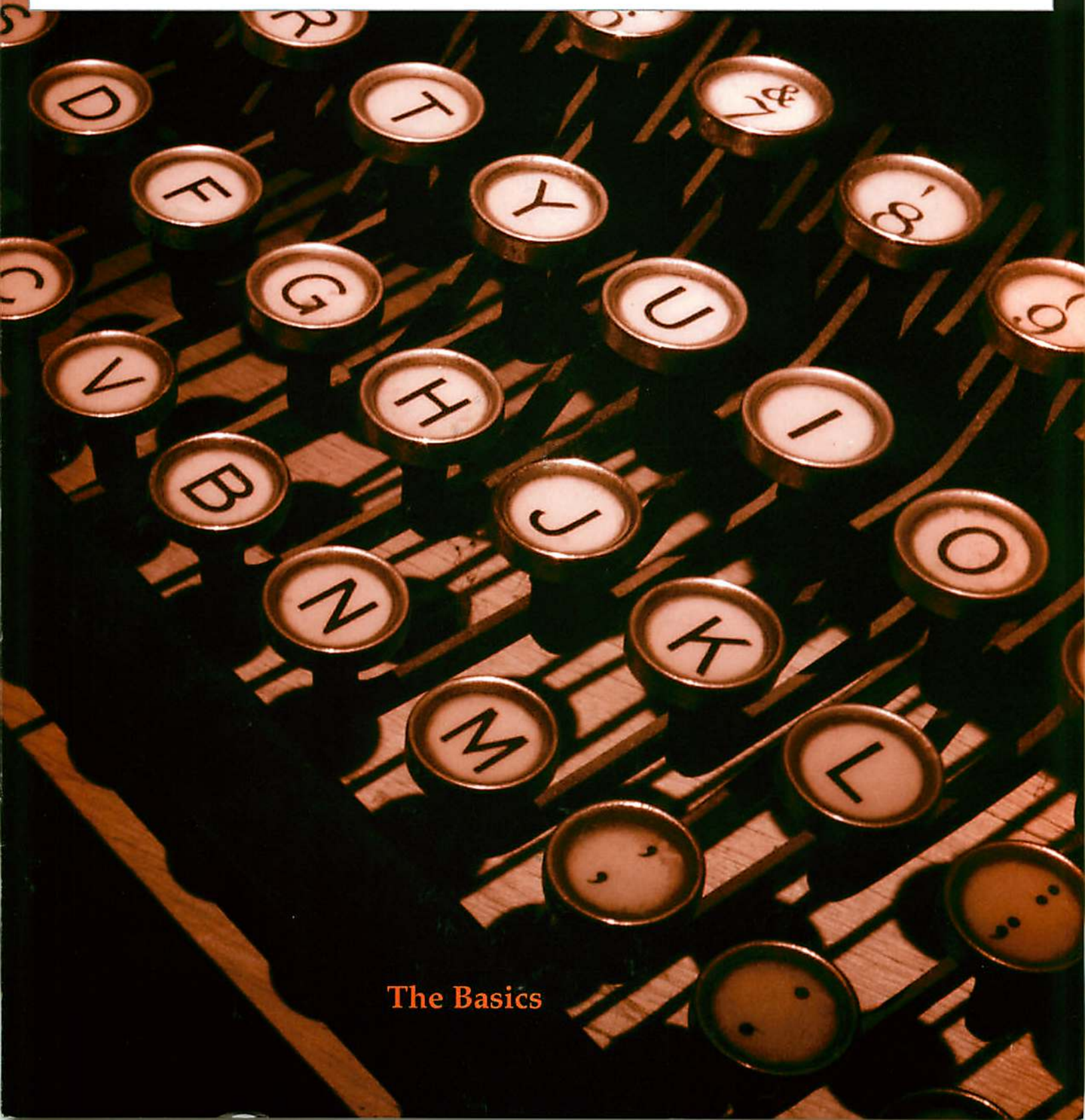
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Fall 2010



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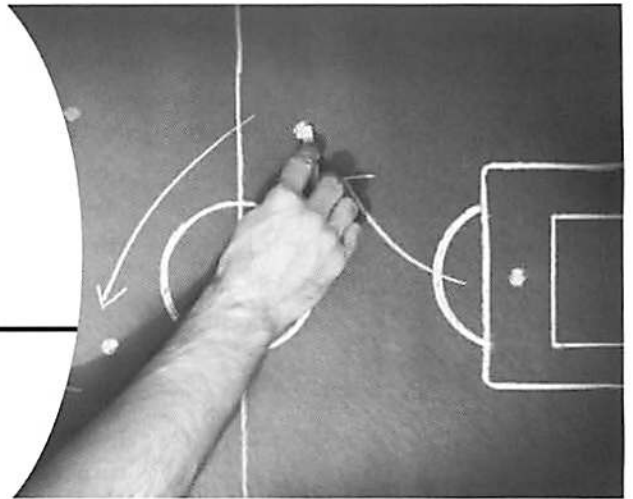
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PRACTICE MAKES PERFECT

Successful depositions
take careful planning



Josh Shulman

By Josh Shulman
OTLA Guardian

When I was in seventh grade, there was a girl named Laura Allen who had a crush on me. Laura was about a foot taller than me, had beautiful long hair and was unusually kind and generous for a seventh grader. I was at that awkward stage where I was interested in girls, and in Laura in particular, but was scared to admit it, even to myself.

In English class, we were reading a book about a man accused of burying his wife alive. The woman somehow survived, came back to town and accused her husband of having done the deed. He denied it, and the reader was left with an uncomfortable sense of not being quite sure of the truth. My memory is that the guy probably did it, but that it would be tough to prove.

Our English teacher thought it would be a good idea to make the book we were reading “come alive” by staging a trial. I volunteered to be the lawyer for the accused. Laura volunteered to be the woman who had been buried. Should I have realized this wouldn’t end well?

I took the book home and read it closely for facts that a real person would know, but that I figured Laura would have forgotten. The name of her grandmother. Her address. The name of the hospital where she gave birth to her son. Things like that. At the trial, I cross-examined Laura on all these topics. “What’s that? You don’t remember your grandson’s name! Well then, let’s try something a little easier. What color is your house?” Of course, she had no way — or inclination — to memorize the entire book. I made her look ... forgetful.

At closing, I argued that her burial (she’d been down there for a while before she got out) and the lack of oxygen must have caused her brain damage, since she couldn’t even remember such simple facts. Therefore, we couldn’t trust her testimony that her husband had killed her.

Laura left the classroom in tears, thus setting back my future plans of romance.

Digging for the truth

I went back to this experience at the moment I began to prepare for my first trial. I guess all those clinic classes in law

school didn’t hold a candle to that 7th grade mock trial. Oh wait, that’s right, there weren’t any classes on taking depositions in law school.

I faced a contested liability case with no witnesses. My client had been knocked unconscious, so he was no help. I would have to prove liability using physical evidence and the defendant’s own contradictory statements.

The case was bicycle vs. bicycle. Defendant, a well-known racer, rear-ended my client, a not-at-all-well-known member of Portland’s youth, biking to a job interview without his helmet on. Defendant tried to pass too close and slammed into my client, throwing him off his bike and breaking several of my client’s ribs. Either that, or my client turned left suddenly and without warning right in front of the defendant. Depends whom you believed.

We won 100 percent liability, and we did it because the defendant’s story did not hold together, and because his deposition captured that. When I took the depo, I was just trying to get to the truth. I didn’t have any grand plan, but I was careful to nail down the driver on all his statements. When the statements didn’t make sense, I didn’t challenge him. I just made sure his statements were clear and that he had no escape route.

He was never belligerent or argumentative. The problem was he said things

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that just didn't make sense. A defendant who makes no sense is a gift. But you have to be sure to pin the defendant down. If there's an escape route, you have failed. You have to make sure it is truly the defendant's words that are not making sense, as opposed to your concept of

A checklist is necessary to make sure you don't forget anything simple and obvious.

what you think the defendant meant by those words.

Some good "pin down" questions include: "Have you told me everything you know about X?"; "Is there anyone you could talk with that would allow you to tell me more about X?"; "Is there any document you could look at that would allow you to tell me more about X?"; "Is there any possibility you've forgotten to tell me anything about X?"; "Is there anything you could do that would allow you tell me more about X?"

Returning to the deposition

Before trial, I wrote the key questions and their answers on a flip chart. At trial, I called the defendant as the first witness. I started by reminding him of the deposition. I held the transcript up, waved it around a little, and told him that I had all the questions and the answers he had given written down. I asked him if there were any answers he'd previously given under oath that he'd like to change. He said no. Then I assured him that there would be no surprises, I was not going to trick him. I was just going to ask him the same questions I asked him at his deposition. I asked him if I would be receiving the same answers. He said yes.

Then I asked him the questions that, at his deposition, had yielded the follow-

ing: (1) defendant was a highly experienced bicycle rider capable of estimating speeds and distances with great accuracy, (2) defendant was riding 18-20 mph, (3) plaintiff was riding 15-16 mph (plaintiff claimed he was at a full stop), (4) plaintiff was five to ten feet ahead of defendant when plaintiff made a sudden left turn, (5) plaintiff's bike stayed fairly upright as it turned, (6) defendant hit plaintiff's bike at close to a right angle, and (7) plaintiff's bicycle didn't skid at all as it turned.

At his deposition, the questions had been spaced far apart and I don't think he ever considered how they would sound put together. At trial, he hesitated in answering the last few, as he started to see where the questions were going. But in the end, he answered them all the same way he did at deposition.

I did not ever refer to the deposition again, because I never had to. I did not ask, "Didn't you say at your deposition that...?" I simply asked the question using the exact same words I used at his deposition.

Only after he'd answered the questions did I unveil my prepared flip chart that had those seven questions written on it, along with his answers. I asked him to take a good look and make sure those were really his answers. He didn't like it, but he didn't have much choice. Eventually he admitted they were. My hope was that it would impress the jury and worry the defendant that I had written down his words before he said them. I believe it put me firmly in control of the witness.

My notes for his direct examination had about 70 bullet points I wanted to cover. Almost every one of them had the citation to the exact spot in his deposition where this question was answered. But the real meat of it was those seven questions. Later, my expert testified that (obviously) a bike going 15-16 mph can't suddenly turn ninety degrees while staying upright without skidding. This is just common sense, and the jury accepted it.

I don't want to make it seem like we

won the case entirely on the defendant's deposition. We also had two great experts and a sympathetic plaintiff. But I do believe the defendant's story made no sense. The key was the ability to prove that by using statements from his own deposition.

Make a good list

If done right, depositions will determine what deponents say at trial. Think about them from that point of view. What do you need the deponent to say? What do you want the deponent to say? What do you fear the deponent might say? Get all of this in black and white, and you're well on your way to a successful trial.

A checklist is necessary to make sure you don't forget anything simple and obvious. But while the checklist may just stop you from making a stupid mistake — it isn't going to win the trial for you and your client. To get the testimony you really need, you have to think through the particulars of your case and draft individual questions for those specific facts. Most importantly, you have to listen carefully, follow up on the answers you've absorbed, and make sure you've got your deponent pinned down to his or her answers.

Now, for advice on junior high romances. I'll only say it's best not to humiliate the cute girl in class — in front of the rest of the class — if you have any thought of being friendly with her in the future. In my case, Laura was extremely forgiving. We made up and danced together at the 8th grade dance. The song? Stairway to Heaven, of course.

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