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Advanced Deposition Techniques: Leveraging Exhaustion, Boxing-In, and Summarization Approaches with Adverse Witnesses

THURSDAY, APRIL 3, 2014
1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:
Paul E. White, Partner, Sugarman Rogers Barshak & Cohen, Boston
William E. Hammel, Partner, Constancy Brooks & Smith, Dallas

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
1. **Introduction: Why Most Depositions Are Not Effective.**

   When a lawyer takes an ineffective deposition, it is usually due to one of two problems. The first problem is where the lawyer asks badly phrased questions (or even lets the witness avoid answering good ones). The second reason why many depositions are ineffective is the lawyer asks the wrong questions or, put differently, asks questions that elicit answers that are not particularly useful at trial. This usually happens because the lawyer failed to decide on a theme and theory for the case before taking the deposition and, as a result, misses crucial opportunities to obtain testimony that would support his client’s case, neutralize his opponent’s case or provide opportunities for impeachment when the case is tried. Asking well-formed questions that will support the theme and theory of your case results in an effective deposition that enhances your ability to win the case at trial.

2. **The Purpose Of Taking Depositions.**

   a. Obtain admissions;
   
   b. Obtain information that is otherwise unavailable to the questioner;
   
   c. Obtain impeachment material;
   
   d. Neutralize certain adverse evidence;
   
   e. Develop an argument that supports the credibility of a favorable witness;
   
   f. Preserve testimony;

   Which of the above you will need in any given case depends on what is the proposed theme and theory of the case.
3. **The Theme Of The Case.**

Whether you represent the plaintiff or the defendant, before filing suit or answering the complaint you should already have most of the evidence you will introduce at trial -- before taking any depositions. (For example, if you represent the plaintiff in a products liability case, your principal evidence is likely to be evidence that is (or should be ) known to you before you even file suit -- the expected testimony of your own client, that of your liability and damage experts, and that of your client’s treating physician). In short, you should have a very good idea of what your key witnesses will say before you take a single deposition. You must make use of this information in framing and taking your depositions.

We take depositions to use at trial. To know which depositions to take and what their purpose will be, we must first develop the theme and theory of the case. This need not be fixed in stone (and sometimes you may have more than one case theory until the discovery makes clear which theories will ultimately work and which will not) but it should have been thought through in sufficient detail that you know that you have an outline of a **STORY** that meets the legal elements of a *prima facie* case (or, if you are defending, will defeat the plaintiff’s *prima facie* case).

The theme and theory of the case must:

a. Be consistent with facts presently known;

b. Explain or be supported by the motives of the relevant players;

c. Makes common sense – how do normal reasonable people act in these situations.
In developing the theme and theory of the case you should do the following:

a. Conduct and review written discovery. As a general rule, you should use interrogatories to identify communications, events, fact and expert witnesses, and any data-heavy information. Beware of asking detailed interrogatories concerning specific events before key depositions are taken. Too often such discovery generally forewarns a deposing party so that an adverse witness is better prepared at deposition. Review documents produced in response to discovery requests.

b. Research the law;

c. Conduct and review all factual investigation such as witness statements, police reports, corporate filings, depositions from other cases, and press reports.

**TIP:** One of the best ways to develop the theme and theory of your case is to prepare and deliver your closing argument based on the information in your file at the start of the case. There is no surer way to recognize the gaps in your case and what additional evidence you need to neutralize your opponent’s case.

A deposition provides you the opportunity to assemble your trial questions and to defuse those of your opponent. To take advantage of the opportunity you must have thought through what your case is going to look like at trial. Your theme and theory must touch every significant fact in the case. A story is not believable if it ignores bad facts and you must be able to explain them all either by explaining why they are not significant or by impeachment. Once you have determined the theme and theory of your case the purpose of your depositions will be to fill in any gaps in your story (by obtaining
information) and to obtain evidence (admissions, neutralizing evidence and impeachment material) that will support your story and enable you to effectively cross-examine the witnesses for the other side. That way, your story will be better, i.e. more believable from the story presented by the other side. You need to do this because...the lawyer who tells the best story wins.

Questions From MacSoft Fact Pattern:

- What is the theme and theory of Scott Smith’s age discrimination claim against MacSoft?
- What relevance is Scott’s military service to how you will question MacSoft’s witnesses?
- How will you use MacSoft’s statements in its MCAD Position Statement, e.g., that Scott was “was unable to retool” and that his work on CMAS was “speculative”? You need to think hard about how you will question about these statements at deposition to support a theory of pretextual discrimination. What is your story? What is your closing argument?

4. Areas For Examination.

The following are some of the most common areas for inquiry that are applicable to every witness no matter what questioning technique you use:

- Observational questions (e.g. “What did you see [or hear]?”);
- Action questions (e.g. “What did you do?”);
- Procedural questions (e.g. “What procedures were in place? What did you typically do when such an event took place?”);
• Identification questions (e.g. “Who did you speak to? Who was responsible for reviewing your work?”); and

• Admissions.

5. **Questioning Techniques.**

There are two principal types of questioning techniques at deposition – questions used to gather information and questions that seek admissions.

   a. **Gathering Information.**

   Questioning aimed at discovering information should start with broad, open-ended questions that calls for all of a witnesses’ knowledge of a particular topic (typically these are “what,” “when” and “why” questions. Then the questioner will probe further to follow up on particular answers (these are “do” and “did” questions.) Finally, the line of questioning is closed off to establish that the witnesses’ memory has been exhausted on a particular subject. If the exercise has been a lengthy one, it often advisable to conclude with a leading question that summarizes the testimony in a single module that can be easily repeated at trial, for example by asking the following type of question: “Let me see if I have this right, first you did X, then you did Y and finally you did Z, do I have that right?”

   **TIP:** When you are closing off, the form of your question will often dictate whether you get further information. “What else?” encourages the witness to recall more, while “Is that it?” discourages any further answer.

   **TIP:** When eliciting conversations, always ask the witness to provide the exact words, as a summary or general recollection will be useless to impeach a witness who is asked at trial to state exactly what words were said or used.
Examples From MacSoft Fact Pattern:

Q: When did you first learn there was to be a RIF?

Q: What did you learn?

Q: What procedures were put in place for carrying out the RIF?

Q: What did you do as a supervisor?

Q: Did you do anything else?

Q: Did you speak to anyone?

Q: How did that conversation come about?

Q: As best you can recall the exact words, what did you say to Champert and what did he say to you?

Q: Did you speak to anyone after the meeting? (Who, where, what was discussed? – all these details are key –why??

Q: Is there any reason why you would not have told the truth to Frankel when he spoke to you after the meeting? – why is this important? Why is Frankel important?

Q: Was Scott a loyal employee? (describe – and get him to list all Scott’s qualities)

Q: Did you receive Scott’s memo concerning CMAS that he prepared after he was terminated?

Q: Was it helpful?

Q: Please explain how it was helpful.

\[b. \quad Obtaining \ Admissions.\]

This is your opportunity for testing the theme and theory of your case. It is important to understand that the format of a deposition and the rules of evidence permit you to ask questions of an adverse or hostile witness at deposition that you would never ask at trial. At trial you must never ask a witness a question on cross-examination to
which you do not know the answer. Subject to one significant exception, this rule does not apply at depositions. Here, you can and should ask such questions without fear that a bad answer can hurt you because any unhelpful answers cannot be read at trial by your opponent at least where the witness is available to testify at trial within the meaning of Rule 32(a)(3). In short, at most depositions you can take the risk of getting a bad answer in order to obtain a good one because the bad answer can rarely be read in against you at trial. For example, at trial you probably would not ask a question like: “Was Scott a loyal employee?” The reason is, you cannot control the answer to such a question and White could equivocate or even use the question to point out problems with his work. But at a deposition, you can ask open-ended questions even to an adverse witness with little risk and can possibly obtain an answer that will significantly enhance the theme and theory of your case. You still have an opportunity to develop impeachment evidence later in the deposition if you get a bad answer in case the witness becomes unavailable or, more likely, when the same testimony is given live at trial. On the other hand, where the answer is helpful, it can be read by you at trial as an admission if the deponent is a party and it can be used for impeachment if the witness is a hostile non-party witness. So use this opportunity to road-test your theory of the case by asking both open ended and leading questions to gain admissions that buttress that theory. What admissions you seek will depend on the chosen theme and theory of the case. They may bolster your theory or may neutralize your opponent’s theory but your questions must have this purpose to be used effectively at trial.

TIP: It is important to break down the theory of your case into its constituent factual elements. An adverse witness will not agree with all of those elements but will often agree to some of them. Obtaining those admissions at deposition not only simplifies your task at trial.
but neutralizes some of the arguments your opponent would otherwise have.

Examples:

Q: Mr. Stempel asked to talk to you about whether Scott should be on the RIF list, correct?

Q: Scott was one of the hardest workers in the division, was he not?

Q: Did you have an opportunity to review MacSoft’s Position Statement before it was filed with the MCAD?

Q: The position statement was your opportunity to set out all of the true reasons why Scott was terminated, correct?

Q: You had an opportunity to change any statements that were incorrect, did you not?

Q: Are the reasons in the Position Statement the same reasons you shared with the rest of the Executive Team when the decision was made to put Scott’s name on the list? Describe any differences.

Q: Scott’s work on CMAS was important to MacSoft because the process was to be used on products due in the next 12 months, correct?

Q: Scott’s work was giving MacSoft a competitive advantage over its competitors, correct?

Q: Scott’s work on CMAS was not long-term R&D, was it?

Q: Scott’s work on CMAS was not speculative, was it?

Q: It wasn’t true that Scott was unable to retool after the CCF work was cancelled, was it?

Q: And it wouldn’t be a fair statement either, would it?

6. Preparation Of The Outline.

To take an effective deposition, you must prepare a deposition outline. When completed, your outline should contain all the topics you need to cover at deposition and list all the relevant facts you need to ask about within each topic. The outline will be
different depending on the type of questioning you plan to use. In preparing an investigative outline, you must resist the urge to write out the questions you plan to ask the witness. There are two exceptions to this rule:

a. where the form of the question has independent significance because of (i) a specific legal rule that governs admissibility or otherwise requires that a question use specific phrasing (ii) you need to use a specific form of words to successfully question about a particular subject (e.g. to effectively question about a specific statement you must quote the words of the statement correctly); and

b. when questioning about documents, most of the questions will relate to specific phrases in the document at issue. You can and should write down these questions, but on a copy of the document rather than on your outline. The most effective way to do this is explained below.

Any leading questions you plan to ask should also be written out in detail. This is because many such questions are based on specific facts and frequently must be asked in a particular order. Also, there is not the same need to listen to the answer as when you are asking an investigative, non-leading question. This is because a good cross-examination question suggests only one answer – “yes” – the question should be asked in such a way that the witness has no choice but to agree. There should be no follow up questions to be asked, merely the next leading question. Writing down the question
ensures that you phrase the question as you planned and fully control the witness’s testimony.

As can be seen, the significant difference between investigative questioning and cross-examination is the difference in the goal you are trying to achieve. In taking an investigative (discovery) deposition, you are interested in learning about all of the evidence and leaving no stone unturned. A good cross-examination however, does not even attempt to cover all of the evidence; rather it picks at specific items of evidence which can best be attacked as a way of casting doubt on all of the witness’ testimony by demonstrating that in these specific areas, the testimony is not credible. Another goal of cross-examination is to obtain key admissions that support the questioner’s theme and theory of the case. Again, such questioning will usually be highly fact specific.

The differences in types of questioning are reflected in how the depositions outline should be set up. Organize your outline in a logical systematic way (typically either chronologically or by topic). Under each topic, list all the themes/issues and documents you want to question the witness about as well as those specific questions that must be asked in a particular way. The most effective way to prepare the outline is to use three columns. The middle column should contain a list of each of your topic areas and the relevant facts you need to ask about within each topic. The left-hand column should contain a list of all of the specific questions that you need to ask as well as a list of the documents you will question the witness about. The right-hand column should be left blank for any notes you wish to take during the deposition, for example, specific answers you wish to follow up on or new questions that you think of during the deposition. Once
you have highlighted, marked up and made copies of your documents, you are ready to take the deposition.

A proposed sample outline for the deposition of White is attached to these materials.

TIP: Consider starting each topic on a separate page and put the outline in a slim, three-ring binder. This way you can change the order of your topics as needed and it makes it easy to adapt the outline for use with future witnesses.

7. You Must Use Your Own Style In Questioning At A Deposition And Connect With The Witness, Not Opposing Counsel.

Whatever that style, the most important thing is that you must connect with the witness. This means that at all times during your questioning you should maintain eye contact with the deponent, you must never deceive or mistreat a witness, or you will break the contract that you should make at the start of the deposition. The “contract” is that you will ask the witness that he will agree to answer all of your questions truthfully as long as he understands them and will ask you to rephrase them if he does not. This contract is vital and must be relied on whenever opposing counsel interjects inappropriate objections or seeks to coach the witness by attacking your questioning. In these circumstances, you must not let yourself be sidetracked by such tactics. Instead, keep focusing on the witness and once your opposing counsel has finished, simply ask the witness if he understood the question. Many times you will find that the witness will tell you that he did understand the question (an answer that will go a long way to preventing future interjections by opposing counsel). The witness may not approve of his lawyer’s overzealous tactics and may resent the implication that he does not understand your questions. If the witness states that he did not understand the question, remind him of the
contract and then ask him what part of the question he did not understand, a question that will likely enable you to reformulate the original question immediately in a way that produces a responsive answer. Handle interruptions in this fashion and you stand a good chance of remaining in control of the deposition and of the witness at all times.

It is imperative that you not permit a witness to avoid answering legitimate questions. Often, you will come across a witness who uses rambling or non-responsive answers to derail your questions. When this happens, you should wait until the end of the answer and then politely re-ask the question. (Do not complain or argue that the witness did not answer your question as this will simply lead to a useless debate on this subject.) If the question was a good question, you will find that the witness will usually (ultimately) answer it. The evasion will be clear in the transcript and potentially useful at trial. This only works if you asked a clear question. If you did not, don’t beat a dead horse. Move on and ask a better question.

8. **Strategic Considerations In Taking A Deposition And Deciding Whether To Videotape.**

How much of your deposition will be devoted to investigative questions and how much will seek admissions or otherwise is adversarial cross-examination will depend on the interplay of three factors:

- The likelihood that the witness will be available or unavailable to testify at trial;
- Whether any elements of the witnesses testimony will be necessary to prove part of your *prima facie* case or an affirmative defense; and
- Whether the witness is likely to appear at trial and offer damaging testimony to your case.
It is important to understand that how you question a witness is driven by the answers to these strategic questions when considered in light of the rules governing the use of depositions at trial that are set forth in Mass R. Civ. P. 32. Particularly relevant are the following parts of the rule:

(a) **Use of depositions.**

At the trial . . . *any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness was then present and testifying,* may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) That the witness is dead; or (B) that the witness is out of the Commonwealth or . . . [other circumstances of unavailability].

(c) **Effect of Taking or Using Depositions.**

A party does not make a witness his own witness for any purpose by taking his deposition. The introduction and evidence of the deposition or any part thereof, for any purpose other than that of contradicting or impeaching the deponent, makes the deponent the witness of the party introducing the deposition . . .

These provisions should give you pause whenever you decide to depose a witness who you know is likely to be unavailable at trial, for example an out-of-state witness. Unless you are careful, the deposition you have taken as an investigative exercise or to provide material for impeachment in the event the witness testifies live, could end up
being used against you at trial, without you ever getting the chance to cross-examine the
witness in front of the jury. In those circumstances, unless you can effectively cross-
examine the witness at the deposition, you may be deprived of any opportunity to ever
cross-examine the witness. The problem becomes more acute when you choose to
videotape such a deposition, for example where you think the witness may offer some
favorable testimony that you think you want to show to the jury.

There are no easy solutions to this problem. At a minimum, you can try to limit
the admissibility of any adverse testimony by not asking open-ended questions except
where you are confident the testimony will be helpful. While the orthodox approach
about how to question a witness, even an adverse one, at deposition is to save cross-
examination for trial, that traditional approach presents grave risks where it is likely that
the witness will not appear for trial or where such a deposition (particularly if videotaped)
presents an opportunity to your opponent to introduce your deposition of the witness as
evidence at trial without giving you the opportunity to cross-examine the witness.

Since under Rule 32(c) the deponent becomes “the witness of the party
introducing the deposition” and since such a party may not question his own witness by
means of leading questions, there is at least one tactic you can use to prevent your
opponent from reading unhelpful parts of the deposition. To the extent possible, your
deposition of such a witness should be dominated by leading rather than investigative-
type questions so that you have some impeachment material available if the witness
comes to trial while preventing your opponent from introducing that testimony as part of
his case if he elects not to call the witness. And at least in circumstances where the
deposition is being taken for defensive purposes and the likelihood of obtaining favorable information to your case is slim, you should not videotape such a deposition.

As an example of the problem under discussion, consider how you would question Terry White if he was no longer employed by MacSoft and had moved out of state. Would you ask any non-leading questions? Would you videotape his deposition? Do you need his testimony at all? Why?

9. How To Get Good Answers To Questions At Deposition.

Asking good questions at your deposition will not guarantee that you get good answers, but it is certainly true that if you ask bad questions, you will get bad answers -- answers you cannot use at trial because the question is so poorly phrased that it gives the witness a chance to give a rambling, non-responsive answer. It is important to practice asking admissible questions that use non-legal language and contain just one idea or concept at a time. Use the looping technique to develop your questioning. Looping is when you incorporate a helpful answer to a prior question into your next one.

For example:

Q: Are you a conscientious supervisor?
A: Yes

Q: As a conscientious supervisor, would you agree that it is important to review the pre-discussion worksheet before filling out a performance review?
A: Yes

Q: And as a conscientious employer, you would meet with the employee to obtain an accurate list of his projects?

NOT –

Q: Is it important to be conscientious and review a pre-discussion worksheet before doing a review? (Question is compound)
10. **Use of Documents At Depositions.**

Asking about documents requires careful preparation but is easy when done correctly. You must make sufficient copies of the document to provide one to the witness and one copy to other counsel. Don’t have just one copy which you have to ask the witness and lawyer to share as this provides the lawyer with opportunities to improperly coach the witness, for example by pointing to parts of the document. It also interrupts your goal of connecting solely with the witness and not engaging with the opposing lawyer. A shared document encourages opposing counsel to insert himself into the deposition.

Highlight every phrase of the document that you plan to ask about and jot your questions about the highlighted part next to it. This is one of the few exceptions to the rule against writing down questions. None of the problems with reading scripted investigative questions apply to your prepared questions about documents because here you must distribute the document and ask the witness to read it and can you use that dead time to look at the document and re-familiarize yourself with the highlighted portions and your prepared questions.

All you need to do is clip a few clean copies of the document beneath your marked up copy to give one to the witness (after having it marked by the court reporter) and others to counsel. Keep all the documents in a pile in the order you plan to question the witness about them.

A copy of Scott’s 2003 performance review is attached to these materials with highlighting and proposed questions to illustrate these techniques. All of the following questions should be written on the document for when you question the witness about it.
Q: You filled out the performance review as part of your official duties as Scott’s supervisor at MacSoft?

Q: You had no reason to lie when you filled out the performance review form, did you?

Q: It was important to fill it out accurately?

Q: What were the projects/devices, etc. that are referred to in the results column for goals 1, 2, 3, etc.

Q: So Scott worked with manufacturing groups to develop these processes for products going into production in just the following year, correct?

Q: And that project was urgent or essential for MacSoft as you indicated on the performance review itself?

Q: Agree that this work was not speculative?


Effective questioning involves asking follow up questions to clarify prior answers and then obtain further information. You cannot ask good follow up questions if you do not listen to the witness’s answers and you cannot listen to his answers if you are checking your outline for your question. That is why you should not write out your investigative questions – they prevent you from listening to answers and following up. Examples of good follow up questions are the following:

- What do you mean by that?
- What else did he/she say?
- Did you do anything after that?
12. **Questions About What The Witness Did To Prepare For The Deposition.**

Two areas of inquiry are often fruitful: What documents did the witness review in preparing for his deposition; and who did the witness speak to in preparing for his deposition.

**Documents Reviewed**

The witness will often have reviewed documents to prepare for his deposition which may provide critical information concerning the case. Opposing counsel may object to such questions on the grounds that they invoke the work-product privilege. If such an objection is made, be sure to ask if the reviewed documents refreshed the witness’s recollection of events *about which he testified* (a question you can only effectively ask after you have obtained his testimony on this subject.) Typically, you are entitled to see any document used to refresh a witness’s recollection concerning the matter on which he testifies – and this is so even if the document is otherwise privileged by the attorney-client privilege. Do not forget that documents that a witness independently reviewed that were not selected by counsel would not even be covered by the work-product privilege.

**Discussions With Third Parties**

Questions about any conversations the witness had with third parties in preparing for his deposition are fair game for examination. Such communications are often a fertile ground for useful admissions.

13. **The Importance Of Catching The Witness In A Lie.**

It is rare that an adverse witness will agree with your theory of the case and so your efforts to obtain admissions will typically be directed to constituent facts of your
theory of the case. However, evidence that can be just a valuable as admissions is testimony that demonstrates that a witness is a liar. It is important to understand a basic psychological truth – a witness who is inclined to lie is more likely to do so when he/she thinks you do not know the truth. So if you have good impeachment material, make sure that you question the witness in a way that does not reveal your knowledge and instead suggests that you are ignorant of the truth. A corollary to this is that when you want to make the witness tell the truth, ask the question in a way that suggests that you have evidence of the truth in your possession.

There are multiple ways in which you can seek to demonstrate that a witness has lied on a given subject:

- The witness admits an error or a false statement;
- You can establish the existence of evidence contrary to the witness’s testimony;
- You can establish that the witness has a motive to lie;
- The witness as failures of memory that are not reasonable, e.g. he recalls fact X but not fact Y where a reasonable person would expect the deponent to recall fact Y;
- The witnesses actions are inconsistent with his testimony (i.e. he says X but did Y where a reasonable person would see these as inconsistent and unreasonable);
- The witness evades answering a question or questions.
14. Should You Impeach At The Deposition?

After establishing the foundation for your impeachment, you must decide whether to actually impeach at deposition or whether to save the impeachment evidence for trial. The orthodox view is that you should save the impeachment for trial but there are several good reasons for not doing so. To begin with, the orthodox view is premised a questionable premise - that the witness and his lawyer will not figure out the upcoming impeachment at trial or take steps to defuse it. In fact, competent counsel will all too frequently anticipate what the likely trial impeachment is going to be following the deposition and will take steps to prepare the witness. In those circumstances, you do not have any way in determining what the likely explanation for the deposition testimony will be when trial comes around. If that premise is accepted, it follows that you should impeach at the deposition, take steps to make the witness acknowledge that he has been impeached and, if possible, cut off all escape routes that the witness might otherwise rely on in escaping the impeachment at trial. To do this, first ask the witness: “Do you have any explanation for why you told my client X but now say Y?” Make the witness commit to an explanation or admit that he has no explanation. Ask specifically whether there is any other explanation for this conduct.

If the witness claims not to remember something that would (he might later claim) explain the impeachment, draft leading questions to cover his/her possible escape and make it more difficult for the witness to come up with a story to defeat the impeachment at trial. For example, if the claim is a faulty memory that prevents him from recalling all the damaging evidence he has against your client/case, ask e.g. “you don’t remember X
saying [bad evidence]?” and ask “You don’t remember reading [bad evidence]?” and ask “You can’t think of any documents that would refresh your recollection?” etc.

While an impeachment exercise should be attempted with most witnesses, there are undoubtedly a few situations where you will choose not to impeach a witness at depositions. These include the following:

- If you impeach at the deposition is it likely that the witness will be deterred from testifying at trial where your impeachment is so effective that you would not want to lose the opportunity to impeach him in front of the jury;
- The impeachment material would be useful against other witnesses and its effectiveness will be lost again them if you use it at this deposition.
- The impeachment will require disclosure of a secret, adverse witness whose existence will be revealed if you impeach.
- The witness to be impeached is an adverse expert who would be replaced by a new expert.
**MACSOFT**

**PERFORMANCE REVIEW AND PLAN**

**NAME:** Scott Smith  
**SUPERVISOR:** T. White  
**REVIEW PERIOD FROM:** 11/02 TO 11/03

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<thead>
<tr>
<th>POLICY</th>
<th>INSTRUCTIONS</th>
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<tr>
<td>The overall goal of the performance review process is to ensure a high level of performance by promoting meaningful communication between supervisor and employee. Specifically, the supervisor and the employee should:</td>
<td>1. At the beginning of the review cycle the supervisor and employee meet to discuss job responsibilities, priorities, goals, measurements, competencies, and other expectations.</td>
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<tr>
<td>• Verify a mutual understanding of position requirements.</td>
<td>2. At the end of the review cycle, the supervisor and employee participate in the performance assessment.</td>
</tr>
<tr>
<td>• Review past performance related to these position requirements, performance competencies and achievement of goals.</td>
<td>• The employee provides a self-assessment with the Pre-Discussion form. The supervisor encourages completion of the form. However, the review process is not to be delayed.</td>
</tr>
<tr>
<td>• Determine, where relevant, training and/or developmental activities related to performance and career development.</td>
<td>• As appropriate, the supervisor is encouraged to obtain inputs from others to determine performance.</td>
</tr>
<tr>
<td>• Discuss the overall assessment of performance that is used in making merit pay decisions.</td>
<td>3. The supervisor and employee then follow the procedures outlined by their division or organization to complete the performance appraisal process, including the setting of goals for the next review cycle.</td>
</tr>
<tr>
<td>• Develop goals and an action plan for the future.</td>
<td>4. The supervisor refers to the Performance Rating Descriptions in the Employment Guide.</td>
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To achieve these objectives, both the supervisor and the employee must actively participate in the steps outlined in the instructions.  

5. Human Resources keeps the original review form in the employee's permanent file. The supervisor and employee should retain copies of the review form for future reference, and for updating goals.
RESULTS ACHIEVED (this review cycle)

List and comment on all goals which were set for this review cycle. Goals include specific outcomes, measurements, and time frames. Goals should have been linked to departmental or organizational objectives and should have supported the achievement of the Benchmark and 1 Year Plan. Goals may also have been prioritized, e.g.,

A = Urgent and essential  B = Important  C = Helpful, given time and resources

To clarify results achieved, indicate any changes, additions or deletions to goals set during this review cycle.

<table>
<thead>
<tr>
<th>GOALS</th>
<th>PRIORITY</th>
<th>RESULTS</th>
</tr>
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<tbody>
<tr>
<td>1. Development of CMAS technology to support process development. Work with manufacturing group to define CMAS process.</td>
<td>A</td>
<td>Held meetings with key users. Prioritized device requirements and made presentations on spec needs. Traveled to clients to make joint presentations in support of process development and implementation on existing and upcoming projects. Communicated product roadmap and timetables.</td>
</tr>
<tr>
<td>3. Investigate improvement techniques for CMAS processes.</td>
<td>A</td>
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<td>5. Low-threshold development for XXX.</td>
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<td>Will probably go forward in '04.</td>
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RESULTS

CMAS process technology: Scott's work has produced excellent results enabling a competitive advantage in CMAS technology.
RATING OF RESULTS ACHIEVED

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<tr>
<th>Significantly below requirements (Marginal)</th>
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OVERALL REVIEW SUMMARY
Reference performance to goals, competencies and other job requirements.

Scott is making strides toward improving MacSoft’s technical arsenal especially with enhancements to CMAS processes. The array of new devices has supported MacSoft’s overall chips development strategy. Scott has positioned himself in a role that could have a huge positive impact on mixed-signal circuits if successful. His success will depend on his ability to synthesize product critical needs and follow through with an implementation that’s competitive and timely. Scott’s results to date are meeting expectations and I’m encouraged that expectations can be exceeded in the coming year.

GOALS FOR NEXT REVIEW CYCLE

Establish with your employee the goals for the next review cycle. Identify goals that specifically support the achievement of business objectives and goals which support the employee’s development. These may include competencies and related behaviors. Agreed upon goals form the basis of the next performance evaluation. This sheet should be copied and retained to aid in quarterly goals updates.

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<tr>
<td>1. Complete the development of the mixed-mode CMAS process.</td>
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EMPLOYEE COMMENTS concerning the performance assessment, review discussion, and/or new goals.

SIGNATURES

Employee_________________________ Date_________________________

(A signature indicates that the review discussion took place)

Manager_________________________ Date_________________________

#433748
MACSOFT

PERFORMANCE REVIEW AND PLAN

NAME: Scott Smith

SUPERVISOR: T. White

REVIEW PERIOD FROM: 11/02 TO 11/03

<table>
<thead>
<tr>
<th>POLICY</th>
<th>INSTRUCTIONS</th>
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<tr>
<td>The overall goal of the performance review process is to ensure a high level of performance by promoting meaningful communication between supervisor and employee. Specifically, the supervisor and the employee should:</td>
<td>1. At the beginning of the review cycle the supervisor and employee meet to discuss job responsibilities, priorities, goals, measurements, competencies, and other expectations.</td>
</tr>
<tr>
<td>• Verify a mutual understanding of position requirements.</td>
<td>2. At the end of the review cycle, the supervisor and employee participate in the performance assessment.</td>
</tr>
<tr>
<td>• Review past performance related to these position requirements, performance competencies and achievement of goals.</td>
<td>• The employee provides a self-assessment with the Pre-Discussion form. The supervisor encourages completion of the form. However, the review process is not to be delayed.</td>
</tr>
<tr>
<td>• Determine, where relevant, training and/or developmental activities related to performance and career development.</td>
<td>• As appropriate, the supervisor is encouraged to obtain inputs from others to determine performance.</td>
</tr>
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<td>• Discuss the overall assessment of performance that is used in making merit pay decisions.</td>
<td>3. The supervisor and employee then follow the procedures outlined by their division or organization to complete the performance appraisal process, including the setting of goals for the next review cycle.</td>
</tr>
<tr>
<td>• Develop goals and an action plan for the future.</td>
<td>4. The supervisor refers to the Performance Rating Descriptors in the Employment Guide.</td>
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To achieve these objectives, both the supervisor and the employee must actively participate in the steps outlined in the Instructions

Q: You filled out the performance review as part of your official duties as Scott's supervisor at MacSoft?
Q: You had no reason to lie when you filled out the performance review form, did you?
Q: It was important to fill it out accurately?
RESULTS ACHIEVED (this review cycle)

List and comment on all goals which were set for this review cycle. Goals include specific outcomes, measurements, and time frames. Goals should have been linked to departmental or organizational objectives and should have supported the achievement of the Benchmark and 1 Year Plan. Goals may also have been prioritized, e.g.,

A = Urgent and essential  B = Important  C = Helpful, given time and resources

To clarify results achieved, indicate any changes, additions or deletions to goals set during this review cycle.

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<td>Development of CMAS technology to support process development. Work with manufacturing group to define CMAS process.</td>
<td>A</td>
<td>Held meetings with key users. Prioritized device requirements and made presentations on specs. Traveled to clients to make joint presentations in support of process development and implementation on existing and upcoming projects. Communicated product roadmap and timetables.</td>
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RESULTS  COMMENTS

CMAS process technology  Scott's work has produced excellent results enabling a competitive advantage in CMAS technology.

Q: For products going into production in the following year?
Q: Why was that work important to MacSoft?
RATING OF RESULTS ACHIEVED

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SIGNATURES

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(A signature indicates that the review discussion took place)

Manager ____________________________ Date ____________________________

#433706
# OUTLINE FOR DEPOSITION OF TERRY WHITE

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<tr>
<td><strong>1. Witness Background</strong>&lt;br&gt;• Education&lt;br&gt;• Prior employment&lt;br&gt;• Employment at MacSoft</td>
<td></td>
<td></td>
</tr>
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<td><strong>2. Supervision of Scott</strong>&lt;br&gt;• When/how became Scott’s supervisor&lt;br&gt;• Scott’s projects prior to his supervision&lt;br&gt;• Understanding of outcome of CCF and reason for termination of project</td>
<td>Q. Agree that CCF was a long-term R&amp;D project&lt;br&gt;Q. Agree that you and Scott set his new goals for 2003&lt;br&gt;Q. Agree Scott’s new work on CMAS technology was product development not R&amp;D</td>
<td></td>
</tr>
<tr>
<td><strong>3. Decision to RIF Scott</strong>&lt;br&gt;• Criteria of RIF&lt;br&gt;• Pre-meeting discussions (esp. with Champert)&lt;br&gt;• Discussions at meeting</td>
<td>Q. Agree that it was Champert who first suggest Scott be riffed?&lt;br&gt;Q. Agree that Charles Frankel approached you after the meeting&lt;br&gt;Q. Not aware of any reason why Frankel would not tell the truth re: his conversation with you after the meeting</td>
<td></td>
</tr>
<tr>
<td><strong>4. Importance of Scott’s work to MacSoft</strong>&lt;br&gt;• What is CMAS?&lt;br&gt;• Explain differences between product development and R&amp;D (including time-frames for each).&lt;br&gt;• CMAS is product development?</td>
<td>• 2002/2003 Performance Review&lt;br&gt;<strong>[QUESTIONS SHOULD BE WRITTEN OUT ON THE DOCUMENT]</strong></td>
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| 5. Reason for termination of Scott:  
  - Describe all reasons you had for proposing Scott.  
  - Reasons given by others  
  - Ever hear any other reason? | Q. Fair statement that Scott “was unable or unwilling to retool after the demise of the CCF technology?”  
  Q. Agree the following factors did not contribute to the decision to put Scott’s name on list:  
  - The realization that the CCF technology on which Smith had been working had been so extensively was no longer a viable endeavor, at least not for the near term  
  - The desire to include in the RIF those employees who would have a minimal impact on projects expected to generate near term revenue and profit  
  - The desire to shift resources away from long-term research and development  
  - The recognition that Mr. Smith was failing to live up to the expected level of influence of a senior engineer with his status credentials and salary. For those reasons, and these reasons only, MacSoft decided to terminate Mr. Smith’s employment.” |   |