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Checkmate: A Winning Opening, Middlegame & Endgame For Witness Exams

By Amy Van Ostrand, ROWE & HAMILTON – March 19, 2020



Today's Game Plan

- **Introduction.**
- **Part I: Opening The Game** – Make Moves That'll Let You Control The Chess Board Later.
- **Part II: Middlegame** – Plan Several Moves Ahead, And Use Multiple Pieces In Combination To Get To Checkmate.
- **Part III: Endgame** – Before You Release The Witness, Bring Your King Out Of The Corner.
- **Conclusion.**

Magnus vs. 10 Harvard Lawyers – Blindfolded!



- Magnus Carlsen is a focused guy

**Part I: Opening The
Game – Make Moves
That'll Let You
Control The Chess
Board Later.**





1. Establish Whether A Legitimate Attorney/Client Relationship Exists Between Opposing Counsel And The Witness (And Whether It's Been Inadvertently Waived).

- If the witness is not a party, establish whether and when they signed a fee agreement, paid a retainer and how much, have received documents from opposing counsel, and why they've hired an attorney when they're not a party. You may have a basis for a motion to compel if opposing counsel purports to represent a witness and the defendant, where their interests conflict.
- If the witness is a party, establish who's had visibility to their communications with their counsel, and details about when, how, and for how long their deposition preparation occurred, as they may have waived attorney/client privilege, and, if not, the information you obtain will still be valuable.



2. Set Ground Rules For Breaks, To Minimize Coaching & Disruption By Opposing Counsel.

- How to deal with an opposing counsel who requests breaks frequently, with questions pending; extends 5-minute breaks to 20; and coaches during breaks.
- Ask 3 questions in Opening to prevent this.

3. Start To Box The Witness In By Getting Them To Agree To Ground Rules.

- Ask 2 questions in Opening to ensure you can impeach the witness at trial, without them credibly claiming they didn't understand the ground rules of the deposition, or a question.



- 4. In The Age Of Zoom Depositions, Establish Where The Witness Is, And Who's With Them, Out Of Camera Range.**
 - Ask 4 questions in Opening to address this, so that you don't find the witness has their wife hiding behind a shower curtain to coach them, like I did.
- 5. In The Zoom Age, Ask What Documents (Including On Devices) The Witness Will Be Looking At.**
 - Witnesses should be held to the same standard in Zoom depositions as in-person depositions.
 - Ask 3 questions in Opening to address this.

6. In The Zoom Age, Manage Exhibits Before & During The Deposition.

- Use Zoom’s “Share Screen” feature.
- Decline opposing counsel’s request that you e-mail your exhibits in advance “for ease, because of Zoom.”

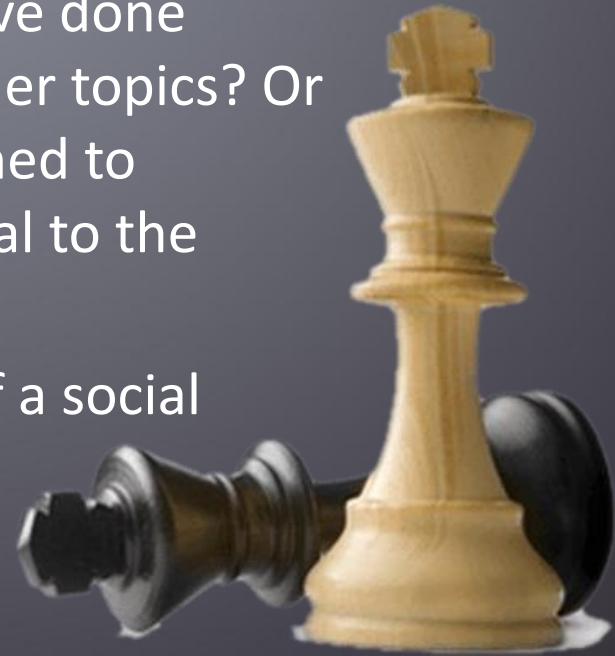
7. For Zoom Depositions, Commit The Witness To Their Ability To Focus On Their Testimony.

- In 2020, witnesses who’ve testified via Zoom while driving to the grocery store, smoking, making baby bottles, answering the front door, fighting with family members, etc. have become common.
- Ask 2 questions in Opening to address this.



8. Have A Plan About The Best Time To Challenge The Witnesses' Provable Lie Responses To Questions About Their Criminal & Social Media History.

- Ask witnesses about whether they've testified under oath; been a party to a lawsuit; have a criminal history; and/or have social media accounts.
- Decide **before** the deposition when you'll challenge provable lie responses. Will you challenge them **immediately**, to put them on notice you've done homework, and encourage candor on other topics? Or will you wait, and let them feel emboldened to continue to bend the truth on facts central to the case?
- My witness who claimed to be a victim of a social media "imposter."



**Part II: Middlegame –
Plan Several Moves
Ahead, And Use
Multiple Pieces In
Combination To Get
To Checkmate.**



Magnus vs. Bill Gates ... Checkmate In 9 Moves!



1. Create A Detailed Outline, Goal Checklist & Exhibit List.

- “Choose Your Own Adventure” **Outline**, with each question; citations to exhibits with known answers; and questions for different paths to take, depending on the witness’ testimony.
- **Goal Checklist** for admissions you need to prove your case and refute defenses; topics you need to cover to show the witness’ bias, lack of credibility or knowledge, prior inconsistent statements; topics you need the witness to educate you on; and a sentence about how the witness fits into the case’s theme.
- **Exhibit List** on the first page of the deposition outline with a list of each exhibit you plan to use, in order, with the number and document description. A “red alert” for each exhibit in your outline. If you choose to skip one, it’s easy to quickly update the Exhibit List.



2. Exhaust The Witness' Recollection And Seal Off The Exits.

- **Do not** let the “I don’t know,” “I can’t remember” witness exhaust you, and prompt you to give up and move on.
- **First**, try to refresh the witness’ memory.
 - Present exhibits that might help.
 - Share other witness’ testimony.
- **Second**, if the witness can’t be refreshed, then seal off the exits, so they can’t later offer “refreshed” testimony, or contradict testimony favorable to your client.
 - Ask 6 questions that’ll seal off the exits for this witness.



**Part III: Endgame –
Before You Release
The Witness, Bring
Your King Out Of The
Corner.**



1. Get A Soundbite, *Reptile* Style.

- Set the witness up with self-explanatory questions they'll **have** to answer affirmatively.
- Then ask the follow-up question to elicit the **soundbite**.

2. Complete The Box For Your Opponent.

- Ask 6 questions to prevent the witness from changing or adding to their testimony at trial.



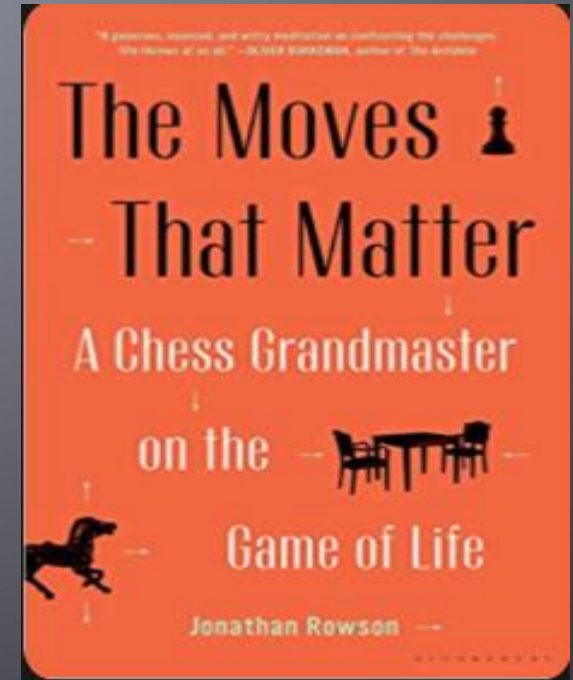
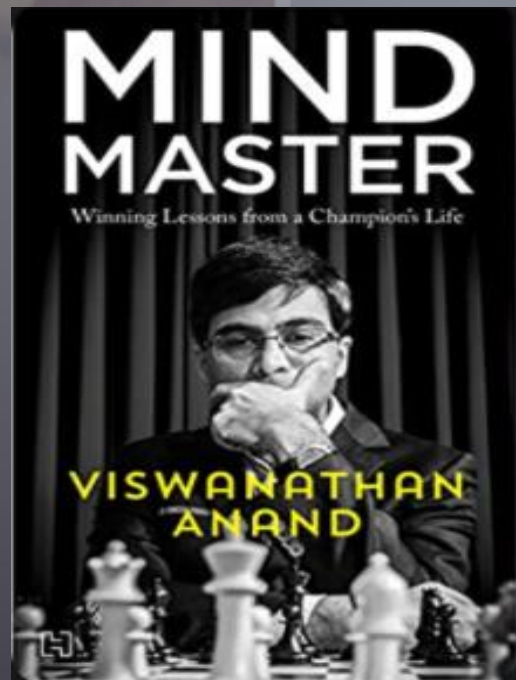
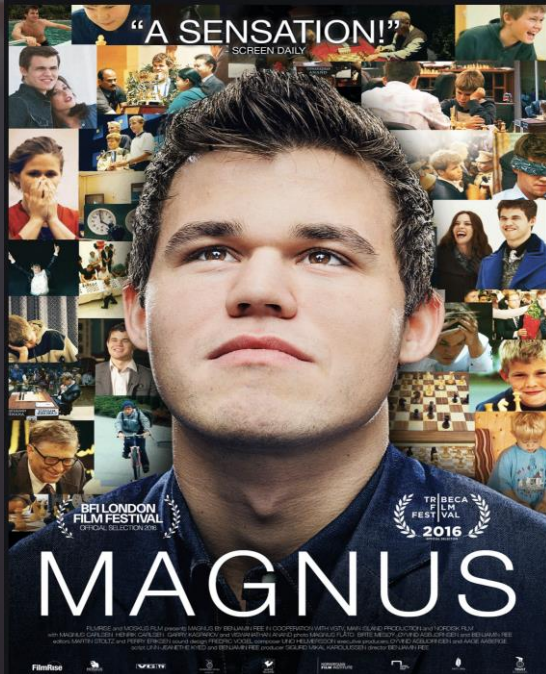
3. Practice “Chess Notation” After The Deposition.

- Note witness’ demeanor, key testimony, appearance, rapport with opposing counsel, etc.
- Memorialize nuances a transcript won’t.
- Save client costs and, in some cases, avoid ordering the transcript.





Inspiration!





Thank You!

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