IADC Committee Newsletter

TRIAL TECHNIQUES AND TACTICS

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Ever had the opposing party barrage your corporate representative at trial with questions opposing counsel knows the representative can't answer (although other witnesses can)? Ever had those "I don't knows" create a negative impression of your client that affects your case? Here are some thoughts on a strategy to stop such an ambush.

Protecting Your Corporate Representative from Ambush at Trial

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ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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When you represent a corporation at trial, due process dictates that your client is entitled to have a corporate representative present at trial. Miss. R. Evid. 615. For many other strategic reasons, you want your company to have a face at trial. So you've brought someone smart and likeable to sit with you at counsel table at trial, and to provide background facts about the company.

But for various reasons, he's not the right person to testify extensively about most key issues in the case - - those matters are to be developed by other witnesses. You called him just briefly on direct examination for a very specific purpose to prove a few discreet facts. Now the other side is trying to cross examine him on every key issue in the case. Opposing counsel's cross examination is seemingly permissible because Mississippi, like some other states, allows wide open cross examination. Miss. R. Evid. 611(b).

The witness gets off to a fine start. He listened carefully in your prep sessions when you strongly admonished him not to speculate or guess. You thoroughly prepared him to say "I don't know" when that truly is the answer. But all the "I don't knows" are creating the impression that the company is incompetent or didn't fulfill its duties in this situation. To make matters worse, your witness is getting tired of saying, "I don't know." He feels like he personally is being made to look ignorant or foolish. In part, to defend his own honor, he has begun to speculate in ways that are incorrect.

What can you do to try to protect your representative from this sort of ambush and your case from damage? Here are a few thoughts. You as the lawyer can say in the form of an objection what the witness should still be saying in his testimony, but isn't – namely "I don't know." That is, you can object on the basis that the witness is being questioned on issues about which he has no personal knowledge. The relevant portion of Miss. R. Evid. 602 provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.

You can remind the court, as established in your direct examination, that your representative was not around or was not involved and thus has no personal knowledge of the issues on which opposing counsel is crucifying him. Thus, the court should stop the questioning of this particular witness on these particular subjects. Sustained or not, if your witness is paying attention, these objections may be enough to get him back on track.

The response from opposing counsel may sound something like this: "Your honor, this witness is a corporate representative. As such, he can be questioned on behalf of the corporation about anything." Opposing counsel simply is wrong. His statement confounds discovery and trial procedure. Your job will be to "un-confound" these ideas for the court.

There is no "30(b)(6) trial witness testimony" mechanism equivalent to a 30(b)(6) deposition. Trial subpoenas must be served on individual witnesses, pursuant to Miss. R. Civ. P. 45. No law or rule imposes a duty on your company to bring a witness to trial who is knowledgeable about any topic that pops into the mind of counsel opposite.

Discovery, by contrast, exists for the very purpose of allowing parties to prepare for trial. Miss. R. Civ. P. 30(b)(6) provides a vehicle for parties to obtain deposition testimony from a corporation's *knowledgeable* witnesses. That

rule also protects corporate parties from false assumptions that any employee can speak on the company's behalf on any issue. An opposing party must use interrogatories, requests for production, and depositions to identify proper trial witnesses and then can call those people to testify at trial within the bounds of the applicable rules. Allowing questioning beyond a party's personal knowledge is the equivalent of allowing the opposing party to conduct on the stand at trial the discovery he neglected to – or affirmatively chose not to - conduct before trial. Such trial by ambush simply is not fair.

You may have to overcome an incorrect sense on the court's part that stopping this questioning at trial is somehow "depriving" the opposing party of an opportunity to seek information from the corporation. Not so. The opposing party had a full and fair opportunity to take discovery in the case. The court should be reminded precisely what your opposing counsel did or did *not* do in discovery before trial.

There are a myriad of possible discovery inadequacies to point out to the court to help the judge understand that the opposing party did indeed have opportunities to discover this information and properly present it at trial, but he failed to do so. For example, the opposing party could have taken your client's 30(b)(6) deposition, but perhaps chose not to do so. If he did take the 30(b)(6) deposition, he could have, but apparently did not, subpoena the proper corporate witness to testify about this issue at trial (or he could simply use the 30(b)(6) deposition at trial under Miss. R. Civ. P. 32 and Miss. R. Evid. 801(d)(2)). If he did subpoena the knowledgeable witness to trial, he may have ultimately elected not to actually call that witness to testify at trial. If you called the knowledgeable corporate witness to testify at trial, the opposing party may have elected not to cross examine him. Perhaps the opposing party cross examined him, at length, but did not cover this topic or did not like the answers. Your opponent is just attempting, through a witness *without* knowledge, to obtain answers that create false impressions for the court and/or the jury.

The overarching goal is to gently remind the court that honest "I don't know" responses should not be allowed to create a misleading illusion that your corporate client is uninformed, failed to fulfill a duty or failed to meet a standard of care. The fact that this individual corporate representative has no personal knowledge of an issue or no evidence that some action was taken is simply not evidence that the company did not have that knowledge or take that action. The witness being improperly ambushed is not in a position to admit a failure by the corporation. He should not be permitted, much less required, to give testimony that appears to admit failure and thus misleads the court or the jury.

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