IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

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CHAIR'S COLUMN

Fall is definitely in the air. Football season is upon us, children are back at school, and even pumpkins are beginning to appear at the supermarket. It's a time of new beginnings and optimism. And it could not come soon enough. August and September have been rough. The events in Charlottesville followed by the terrible Hurricanes Harvey, Irma and Maria as well as the strong earthquake in Mexico present what at times seem to be insurmountable challenges. We, as professionals and advocates, can do our part to instill hope by advancing the rule of law, and helping those in need and those who struggle.

Jim
Chair, Trial Techniques and Tactics Committee

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The court sanctioned a defense lawyer for unilaterally terminating her client's deposition. Even if the opposing questions were wrongful, the defending lawyer was required to invoke and follow the processes of Rule 30(d)(3).

Lawyers Sanctioned for Prematurely Terminating Deposition

ABOUT THE AUTHOR

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Carl has successfully argued before the Ohio Supreme Court and the United States Court of Appeals for the Sixth Appellate Circuit, as well as administrative agencies, district courts of appeals and trial courts throughout Ohio.

Carl serves as Contributing Editor of *Litigation News*, one of the flagship publications of the American Bar Association's Section of Litigation. He is a longstanding member of the Judicial Administration and Legal Reform Committee of the Ohio State Bar Association, and the Judicial Screening Committee of the Franklin County Democratic Party. He serves as the IADC's State Membership Chair for Southern Ohio, and is a frequent author and lecturer on evidence and trial tactics throughout the state. He can be reached at caveni@cpmlaw.com.

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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Trial lawyers beware: ongoing relevancy objections are no basis for terminating a deposition, according to one federal court. Even if the objecting lawyers believed that the questioning was intended to further discovery in an unrelated case, they risked sanctions by summarily ending the deposition. Instead, the lawyers should have expressly invoked Federal Rule 30, built a record that the questioning was in bad faith, and turned to the court for a protective order. Having failed to do that, the lawyers were liable for the costs of the prematurely terminated deposition, as well as both costs and attorneys' fees incurred in subsequent motion practice.

The litigants in *Black & Decker, Inc. v. Positec USA Inc.* were well-known to each other, having previously tried to verdict a separate $54 million trade dress case in the U.S. District Court for the Northern District of Illinois. That earlier dispute was undergoing post-trial briefings as discovery progressed in an unrelated patent case between these same parties and before the same court. During a deposition in the patent case, the plaintiff's counsel questioned the defendant's corporate representative about the product line at issue in the trade dress case. Defense counsel objected that these questions were irrelevant to the subject at hand, and ultimately instructed her client not to answer. When the questioning continued along these same lines, defense counsel suspended the deposition for a short break, and upon returning, summarily terminated the deposition. She moved thereafter for a protective order, arguing that the plaintiffs were "seeking evidentiary fodder for post-trial motions then pending in the trade dress case" where discovery had long closed.

The court disagreed and granted the defendant's motion for sanctions.

The Rules Provide a Mechanism

As the court explained, under Rule 30(c)(2) of the Federal Rules of Civil Procedure, an objection "whether to evidence, to a party's conduct, to the officer's qualification, to the manner of taking the deposition, or to any other aspect of the deposition," must be noted on the record, "but the examination still proceeds." Moreover, under Rule 30(d)(2), a party may only instruct a witness not to answer "only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." Finally, Rule 30(d)(3) provides that a party may move to terminate or limit a deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses the deponent or party."

As the court cautioned, however, relevancy alone "is not a basis for the termination of a deposition under Rule 30(d)(3)."

Make Your Record

Yet relevance was the only basis that defense counsel cited at the time. As the court observed, the defendants "never made mention of a Rule 30(d)(3) motion at the deposition. Nor did the Defendants give any indication that the directive not to answer…was based on such grounds. Instead Defendants instructed [the witness] not to

testify solely on the ground that the questions were not relevant to this lawsuit." Because the defendants did not contemporaneously claim that they found the questioning to be abusive, or that they were contemplating a Rule 30(d)(3) motion, the court found no basis for terminating the deposition.

"The opinion is a good reminder for counsel to build a strong record using the language of Rule 30(d)(3) before unilaterally terminating a deposition," says Ethan T. Tidmore, Birmingam, AL, co-chair of the Membership and Diversity Subcommittee of the ABA Section of Litigation Pretrial Practice & Discovery Committee. Because the rule identifies bad faith and oppression as grounds for limiting the deposition, counsel should invoke that language in particular where applicable, he added.

Michael P. Downey, St. Louis, MO, cochair of the Legislation & Rules Subcommittee of the Section's Ethics & Professionalism Committee agrees. "One of the big messages is that a deposition should go on—unless you can show that opposing counsel is harassing or intruding on a privilege."

Try To Work It Out

But even then, merely characterizing the objection in terms of Rule 30(d)(3) may not be enough, warns Tidmore. "It is important to repeatedly warn counsel and not pull the plug immediately." Downey agrees, noting that carefully articulated objections may have allowed counsel to work through the impasse. As Downey explains, "it's very appropriate for the lawyer to take a break and think through her objections. Since she did not do that at the time, she removed the ability for both sides to work through their issues."

Should the impasse prove intractable, Downey adds, the court is only a phone call away. "Courts often prefer that you take a break and contact them. The fact that you are going to call the court can sometimes change the questions or the objections, and tends to make everybody more reasonable." But calling the judge poses problems of its own, warns Tidmore. "The upside to contacting the court is that you often will get an immediate answer, saving time and money and avoiding the risks involved with terminating the deposition. The downside is that if the issues are complicated, a rushed and unplanned telephone call may not be the best way to frame them for the court."

In either event, Downey adds, the crucial question is whether the objecting lawyer built a record invoking Rule 30(d)(3) and showing reasonable efforts to resolve the dispute before terminating the deposition. "Judges often find it frustrating when a lawyer's response is just to take their marbles and go home."

TRIAL TIP:
"TRYING CASES IN THE DAYS OF TL;DR"

BY: KIRSTIN L. ABEL

If you don't have a teenager in the house, you may not be familiar with the abbreviation tl;dr or TLDR. It stands for "too long; didn't read" and is internet slang for "I don't have the patience or interest to spend the time reading what you wrote." As the average attention span dwindles to next to nothing, authors have started to include a tl;dr section at the beginning or end of their article, followed by a very brief summary. This practice allows the reader to forgo reading the entire article, because skimming would take far too long. We are accustomed to receiving information at a record pace, and are bored if our attention is not immediately grabbed. How, then, do we overcome this obstacle in the courtroom, knowing that our jurors just want the tl;dr version of our case?

I. Prepare a simple, but strong story

We have all been told to keep our language simple in front of juries and avoid legalese. Your story should be simple, too. Just as jurors do not want to read the whole article to get to the point, they don't want to listen to you go on about something that could have been stated concisely. The average commercial length has dropped from 60 seconds in the 1950s to 15 seconds today.[1] This is due in large part to attention-span research. It tells us we need to hit jurors hard, and in an emotional way, but we need to do it quickly. Avoid sacrificing the impact of your story in the interest of time by choosing clear, powerful words. The best words may not come naturally, but if you find them, they will get your jury's attention and hold it. Do the work to find strong words for your arguments, and put them together in a concise way.

II. Visual presentations

Those sturdy foam core boards feel like a comfy, familiar blanket and may still have their place, but we cannot rely on them exclusively. Jurors are bombarded with multimedia presentations on a daily basis and expect more than poster board. That's not to say your entire trial budget needs to be spent on tech, but you should put significant time and effort into creating visuals that focus the jurors on what is most important in your case. A good visual, whether it is a ball of clay, or a simulated surgery video, will illustrate your story and help the jurors remember it later when they are deciding your case.

[1] Voices.com, an online resource for voice actors.
https://www.voices.com/blog/effective_length_for_tv_commercials//

III. Take up a little acting

No one is asking for a Broadway performance, but even the late, great Mae West believed the courtroom was just another stage. Some theater, if handled appropriately, can be very effective in holding the precious attention of the jury.

Consider the story of Texas attorney Richard "Racehorse" Haynes from a 1970s criminal trial. The prosecutor refused to call a key witness, knowing Haynes's cross-examination could be fatal. Not wanting to miss the opportunity to sell his story to the jury, Haynes cross-examined the empty witness chair in his closing argument, asking it the questions he would have asked the witness. Haynes's client was acquitted.

In conclusion, here's the tl;dr: Juries have short attention spans. You must overcome this. To do so, use simple, strong words to convey your story as concisely as possible; highlight the story with interesting visuals; and drive it home with a little theatrical flair.

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