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TRIAL TECHNIQUES AND TACTICS

OCTOBER 2019

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The new normal for Plaintiff experts at trial are pre-planned power point presentations that allow the expert to deliver an almost flawless direct examination that can result in big verdicts. These presentations are rarely challenged due to the fact that they are typically based on pre-admitted exhibits and admissible testimony that are often taken out of context and highlighted with argumentative headings. In a follow up to our article last month about strategic reasons to fight bulk pre-admission of exhibits, this article will discuss the advantages of challenging these types of presentations that violate the Rules of Evidence.

Pulling the Plug on the Plaintiffs' Power Point: Effectively Challenging Expert Presentations 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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Anyone who has been around a mass tort trial knows that the direct exam of the plaintiff's lead expert can set the table for a big verdict. These experts often preview the closing argument, weaving a tale of corporate wrongdoing from an array of emails, internal documents, and quotes from witness testimony and journal articles. To make sure everything gets covered in the expert's direct, plaintiffs' counsel typically rely on a well-choreographed set of power point slides. With the presentation "in the can," the expert can sit back and let the slides do the work, wait for the points to appear on the screen, then repeat them to the jury with emphasis and erudition.

Using power point to aid a direct exam is not, of course, improper in and of itself. Both sides can and should use demonstratives and trial graphics to focus their experts' testimony. All too often, however, expert slide decks are laced with argumentative headings, incomplete quotes, and cut-outs of emails, company documents, and scientific journals that are replete with hearsay. The worst presentations are not "demonstrative" at all. Their purpose is not to teach, but to present an ugly narrative that will get the jury thinking less about causation, and more about punitive damages.

But what happens when the screen goes dark? Experience has shown that even battle-tested experts will get uncomfortable—and much less persuasive—without the aid of their would-be teleprompter. Defense advocates can significantly disrupt the plaintiff's case-in-chief by reining in and shutting down power point presentations that violate the rules of evidence.

The Uses and Abuses of Power Point at Trial

A well-done power point presentation—one that *visually demonstrates* the speaker's points, rather than simply *reciting* them—can greatly enhance an opening statement or a closing argument. Indeed, it's hard to imagine doing an opening or closing without a good slide deck. Things get trickier with witness testimony, however. That's because a proper direct examination really isn't a *presentation*, but a *conversation*.

We are taught that a direct exam should not elicit a narrative from the witness—rather, the examiner asks non-leading questions, while the witness makes her points crisply in a sentence or two. Why is this so? There is the obvious reason: opposing counsel must be given a chance to object before the witness launches into irrelevant, prejudicial, or otherwise impermissible topics. Objecting afterwards will both fail to "put the toothpaste back in the tube," and make it appear to the jury that your case just got dinged.

Another, perhaps more obvious reason for the "no narrative" rule is the fact that a dialogue can be a powerful way to communicate. Listening to a lecture might put you to sleep, but a good interview will keep your attention. And what makes for a good interview? Non-leading questions that allow the interviewee to speak their own truth. The same is true at trial: when witness and interlocutor are engaged in a genuine back-and-forth discussion that illuminates key points in the case, jurors listen intently.

Power point slides in their typical form—filled with text prompts to remind the speaker what

to say—are great for building narratives, but they do not facilitate a true dialogue with a witness. When the points come up on the screen before the witness says them, that is the very definition of "leading." The jury looks to the screen, not the witness, as the source of the evidence they will rely on to decide the issues. The slide show becomes a strange sort of ventriloquist, animating both the examining lawyer and the witness.

The impulse to script everything into a slide show is understandable: experts have a lot to cover, and examining lawyers want to make sure it all goes in. The lawyers, of course, can bring detailed outlines to the podium, but the experts can't take a script to the witness stand. As a result, some lawyers double-down on their power point slides to ensure that the witness tracks the outline. This is especially true for plaintiffs' experts when called upon to deliver the "bad company" story that will feed into closing argument; in the worst examples, the slides render the expert little more than a mouthpiece for the advocate. When this happens, trial counsel must be ready to police the line between demonstrative support for the witness's testimony and outright leading.

Calling Out Bad Power Points

Fortunately, there are rules and objections to prevent power point abuses during (or better yet, before) an expert's trial direct.

- ***Narrative***. Although there is no formal rule of evidence that prohibits it, inviting an expert to provide a narrative is improper and generally disallowed for the reasons already discussed. The examining lawyer shouldn't be allowed to hand the clicker to the expert and let her run the show. F.R.E. 611(a) empowers the Court to control the manner of examination and prevent narrative testimony.

- ***Leading.*** F.R.E. 611(c) bars leading questions during direct exams, "except as may be necessary to develop the witness's testimony." In practice, the exception is generally limited to speeding through the expert's education, training, and other qualifications. Bullet points are fine for telling the jury where the expert went to school, but not for outlining her opinions. Don't let the slides do the leading on the examining lawyer's behalf.

- ***Hearsay and hearsay-within-hearsay.*** Words on slides are hearsay, even when the expert reads them aloud. This is especially true when those words are call-outs from emails and corporate documents, which are hearsay-within-hearsay. Unless hearsay exceptions apply to both the document itself and statements in it, experts should not be permitted to smuggle it in through power point.

- ***F.R.E. 703.*** This rule—which allows an expert to rely on inadmissible evidence as long as it is "of a type reasonably relied upon by experts in the particular field"—is sometimes used to end-run the hearsay rule and other rules of evidence. Experts

should not be allowed to launder otherwise inadmissible documents and publish them to the jury in the guise of "facts and data" they considered in arriving at their opinions. When this happens, object accordingly.

- ***F.R.E. 803(18).*** Likewise, the "Learned Treatise" hearsay exception is susceptible to abuse. Experts are naturally inclined to rely on published articles and are expected to discuss them at trial. But just because the article has been published does not mean that it can be published to the jury. Rule 803(18) allows learned treatises to be "read into evidence," but prohibits them from being "received as exhibits." In some cases this rule has been interpreted to allow the expert to *read* a quote from the article, but not to *show* it in a call-out on a power point slide. Judges vary in how closely they interpret the rule, and it is wise to discuss this at the pre-trial conference.

- ***Disclosure under F.R.C.P. 26(a)(2)(B)(iii).*** Rule 26 requires experts to disclose not only their opinions and the bases for them, but "any exhibits that will be used to summarize or support them." Trial counsel rarely have a slide deck ready to serve when expert reports are due. But Rule 26(e)(2) calls for experts to supplement their materials no later than the time for pretrial disclosures under 26(a)(3)—30 days before trial. Bottom line, you should not be seeing an expert's direct exam slide deck for the first time the night before she takes the stand.

Making these objections won't necessarily torpedo the expert's entire presentation; the extent of the damage will depend on how egregious the violations are and how much time plaintiffs have left themselves to regroup. If they don't send you the presentation until the morning the expert takes the stand—which, unfortunately, is not unheard of—they're taking a big risk that the whole deck will get flushed, leaving themselves and the expert to muddle through a direct exam that looks distinctly unrehearsed. But even if your challenge is not a complete success, just knocking out a couple of slides, or forcing changes that make the slides look unfamiliar, can cause the expert to shift in his chair a little. And no one wants to look uncomfortable on the stand, least of all the person being paid thousands daily to bestow his wisdom on the jury.

Investing More in the Witness and Less in the Slides

Experienced trial lawyers know that a smooth, non-leading direct exam is much harder than it looks. It takes practice for both lawyer and witness. Even the most basic question—"What do you want to share with the jury today?"—will get a blank stare if the witness hasn't been adequately prepared. Preparing experts to testify in non-leading, non-narrative fashion takes time, and with experts, time means money. But if we are to conduct a direct exam the right way, there is no substitute. "Cheating" with power point is not the answer.

A final note: the authors are defense practitioners writing for a defense audience, and in this commentary we wag our fingers at the plaintiffs' bar for force-feeding experts with leading and argumentative slide presentations. But defense lawyers are not exempt from the same charge, and the temptation is just as strong for us to misuse power point. Following the principles we've outlined should keep you out of trouble and make your direct examinations more effective and compelling—just as the rules intended.

TRIAL TIP:

JUROR JEOPARDY: WHAT IS GENDER FLUIDITY AND HOW DOES IT IMPACT VOIR DIRE?

BY SHERRY KNUTSON AND CHARISSA WALKER

Recently, we were preparing for a trial in San Francisco County, California. As part of preparation, we consulted with colleagues who practice in the area seeking insights into the practical aspects of how the court conducted voir dire. We expected to learn typical things, such as the educational and economic status of the jury pool, the number of jurors called vs. the number seated in the jury box, the types of questions the court permitted the parties to include in the jury questionnaire, the judge's level of involvement, and how the judge resolved preemptive strikes and objections thereto. We did not anticipate a discussion of gender fluidity.

Merriam-Webster defines gender-fluid as: "of, relating to, or being a person whose gender identity is not fixed." Many Americans identify as non-binary, rather than male or female. As society becomes more diverse, so do potential jurors. We were advised that, starting with elementary school, people in San Francisco are taught about the issue of gender fluidity.

So, how does this relate to voir dire? During the jury selection process, lawyers often address potential jurors as "Ladies and Gentlemen" and using personal titles such as, "Mr.," "Mrs.," or "Miss." Individuals who self-identify as non-binary, however, may not want to be addressed with such conventional titles. On the other hand, even if a juror does self-identify as male or female, you may not be able to identify easily which gender-specific title is appropriate. Ultimately, we did not have to address these issues because our case resolved before the trial started. However, we will incorporate what we learned about gender fluidity into all future voir dire.

Trial Tips for Dealing with Gender Fluidity During Voir Dire

You only get one chance to make a first impression. This is the time you begin gaining the jury's trust and respect. Here are some tips on addressing gender fluidity during the voir dire process:

1. **Ask.** If you are unsure as to whether a juror may self-identify as male, female, or non-gender, consider asking the juror of their preference. For example, state: "How would you like to be addressed?" or "May I call you Ms. Smith?"

2. **Address jurors by number.** Check to see if the court can or will assign numbers to each potential juror. If so, instead of addressing the jurors by name, address them by number.

3. **Be respectful.** This is a sensitive issue. If you approach it that way and demonstrate your knowledge of these sensitivities, you will garner the respect of not only the intended juror, but also other members of the pool.

4. **Do your research!** Before trial, speak with friends, colleagues and local counsel regarding the potential jury pool. Ask about the LGBTQ population, noteworthy issues or events in the local news, and other jurisdiction-specific issues.

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