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TRIAL TECHNIQUES AND TACTICS

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IN THIS ISSUE

In the modern trial, courts and counsel typically attempt to avoid the lengthy formalities of entering trial exhibits into evidence by pre-admitting exhibits in bulk. However, there are both tactical and strategic reasons to fight bulk pre-admission. This article discusses the various strategies and tactical reasons to avoid bulk pre-admission and gain the advantage over your opponent.

The Perils of Pre-Admission

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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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Handling exhibits in modern trials often does not resemble what we were taught in evidence class. Courts pressure parties to agree in advance of trial on the authenticity, or even the admissibility, of huge numbers of exhibits. And you can understand why: neither judges nor jurors want to sit through endless rounds of laying the foundation for documents. Some courts seem to view parties as *obligated* to reach agreement on the admission of all documents to be used in the case. That's not what we were taught. And it's not necessarily how trials should be. In my view, parties are being pushed too hard to pre-admit exhibits, particularly where those exhibits are your client's records. While there is rarely a reason to fight over *authenticity* of such records, I believe defense lawyers make a mistake when they agree, wholesale, to *admissibility*. There are both tactical and strategic reasons to fight bulk pre-admission.

1. Tactically: Why not Make your Opponent Work?

Agreeing to admissibility takes one worry off of your opponent's plate: How will she lay the foundation to get this document in with *her witnesses*? A plaintiff's expert or even a disgruntled former employee probably cannot lay the foundation for the business records exception to the hearsay rule. Fed. R. Evid. 803(6). How does that adverse witness know, for example, whether a record was "made by—or from information transmitted by—someone with knowledge"? *Id.*

Your opponent must then decide whether to (1) call one of your witnesses to lay this foundation or (2) wait for you to call that witness. There can be significant risks to either: For example, a well-prepared defense witness can score points in the middle of the plaintiff's case, or at least slow the plaintiff's momentum, while plaintiff tries to use them to lay a proper foundation. And waiting for the defense to call a witness is worse; you might not call anyone who can lay the foundation. While you may not actually damage an opponent's case by forcing them to grapple with foundational questions, you can at least make them work harder and think strategically. And every time the other side has to jump a hurdle, there is a chance that they could trip.

2. Preadmission Turns Lawyers into Experts and Experts into Dummies

The main evil I have seen perpetrated with pre-admitted exhibits is the courtroom version of a ventriloquist act. The plaintiff's expert is on the stand and opposing counsel simply throws up document after document, reads a couple of sentences (out of context) to the expert, and has the expert agree "that's what it says" or "that's really disturbing." The lawyer and the witness never have to explain what the document really is, never have to put it into context, and never have to explain to the court (or the jury) how it is actually relevant. What's worse, a thinly-qualified (or unqualified) expert can skate by without actually understanding, or even reading, a document at all --- the expert just needs to know her lines: "Yes," "no," or "I agree, they are did not use reasonable care."

The more subtle effect is to make the expert appear better informed than he really is. Having a huge stack of pre-admitted corporate documents—which the expert may have only skimmed—makes him look like he's

done his homework. Odds are, he hasn't. And while this may open lines for cross examination, it is difficult to impeach an expert by arguing with him about random details from unfavorable corporate records; the expert looks smart, and you look petty.

In the most extreme case, a crafty opponent can take a pre-admitted exhibit, not actually show it to *any* witness, and just discuss it in closing. After all, it's in evidence, isn't it? This dispenses with the pesky requirement of paying an expert witness. The lawyer becomes her own witness, her own expert, and just turns her argument into facts.

Opposing pre-admission gives you the opportunity to derail this process. At the very least, making the opposing expert and lawyer actually lay a foundation for exhibits they want to admit slows them down and makes their presentation more boring—and less like the fast-paced, true-crime story they'd like to tell.

3. How to Fight It

To persuade those judges who can be persuaded—and to protect the record before those who cannot—here are a few arguments that can be used to fight wholesale pre-admission of exhibits. The first is the most obvious: Before any testimony has been taken, a judge should hesitate to rule that large groups of proffered exhibits are relevant and admissible. Fed. R. Evid. 401. While a judge is not bound by the rules of evidence in making these preliminary decisions, Fed. R. Evid. 104(a), where relevance depends on the existence of a fact, "proof must be introduced sufficient to support a finding that the fact does exist," Fed. R. Evid. 104(b). Most records' admissibility is dependent upon some disputed fact: that the product in question was actually used, that it was used during the time period referenced by the records, or that they actually do mean what the proffering party says they mean. In a case of any complexity, a careful judge should hear at least some testimony before deciding—for multiple separate records—that the Rule 104(b) predicate fact questions have been satisfied.

Even if evidence is relevant, it may still be excluded under Rule 403, if the court finds its probative value is substantially outweighed by factors such as jury confusion and needless presentation of cumulative evidence. If opposing counsel seeks pre-admission of records, like some medical records, that repeat the same facts or contain scientific issues likely to be confusing to a jury, Rule 403 cautions against their bulk admission.

At least some courts have rejected bulk pre-admission, particularly of medical records, because it allows the proffering counsel to ascribe meaning to those documents without expert testimony. *See, e.g.*, *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503, 508 (Ky. 1989) (finding that admitting medical documents without expert testimony to explain the documents to the jury would allow counsel "to draw whatever conclusions they wanted without fear of evidentiary contradiction," which could increase the "probability that distortion, confusion or misunderstanding would have resulted"); *Bishop v. Com.*, 2010 Ky. App. Unpub. LEXIS 1013, at *12 (Feb. 5, 2010) (excluding medical records without the requisite expert testimony to preclude counsel from drawing "whatever conclusions they wished without fear of evidentiary

contradiction"); *Bullington v. Bush*, 2009 Ky. App. Unpub. LEXIS 217, at *9-11 (May 15, 2009) (excluding medical records where there was no expert testimony to aid the jury in understanding the records to prevent misleading the jury or confusion of the issues). In other words, pre-admission of scientific records improperly turns lawyers into experts, allowing them to simply state their arguments as fact.

Finally, even if you lose the pre-admission fight, arguing the issue can help. Especially in a complex case, relevance arguments allow you an opportunity to provide factual context and educate the court. These facts may benefit you in future rulings. For example, where plaintiffs seek to pre-admit results of product testing, you can point out that plaintiff's experts actually don't have the background to explain these tests, or that the results satisfied government standards. These facts, of course, can help on close *Daubert* rulings or suggests that punitive damages should not be in play. At the very least, contesting wholesale admissibility allows you a chance to get your trial themes before the court.

4. Conclusion

Many judges find the lure pre-admission irresistible: It speeds up trial and reduces the number of rulings they have to make before the jury. As a result, fighting pre-admission is a battle that should be picked carefully. But where plaintiff's counsel seeks pre-admission as a means of making experts irrelevant or slopping into the record a bunch of documents they would otherwise struggle to admit, the battle is worth fighting. And in any case, the decision whether to fight this battle should be made strategically, and exhibit-by-exhibit.

TRIAL TIP:
THE DOUBLE WHAMMY: WHAT TO DO WHEN CALLED TO TRIAL BY TWO COURTS ON THE SAME DAY
BY: ZANDRA E. FOLEY

The jury trial is dying. This is something that you hear lawyers, judges and legal scholars say all of the time. While jury trials have generally declined by over 30% since 1976, many of us can attest they are definitely not dead. While we do our best to make sure we get those trials scheduled appropriately so that we are not double-booked or preparing for more than one trial at the same time, every once in a while events out of our control may result in getting hit with the double whammy of being called to trial by two different courts on the same day.

Generally, we expect courts to understand our predicament when these situations come up. And more often than not, they do. Who knows better about the trials and tribulations of going to trial than the courts and the judiciary who run them? Nevertheless, because a court usually wants to move their docket along and, if the case is one that has been pending for some time, any delay is sometimes frowned upon, including a delay because of another scheduled trial. In most situations, this dilemma is easily rectified by explaining the situation to both courts. If you are lucky, the courts will take it upon themselves to discuss the matter and come to an agreement on which case will be tried and which case will be delayed. However, if you are not so lucky, it will create quite the predicament that could have an impact on your ability to prepare your cases for trial. This is especially a concern when your trials are in different counties, states or jurisdictions (federal vs. state).

Recently, I experienced the double whammy with respect to two state court trials in the same county. I was named as lead counsel on both trials. Both trials were pretty old and had seen several continuances. Trial A had been set on the trial date for months but was second on the docket behind another trial. Within 30 days of the trial date, Trial B was set on the trial date by the Court B sua sponte. On the day of Trial A's Pre-Trial Conference, which was two weeks before the trial date, Court A announced that Trial A would go to trial on the trial date. We immediately informed Court A that we had another trial setting on that same day. As a result, Court A agreed to speak with Court B and work out which trial would actually go forward. A short time later, Court A sent an email to all counsel and copied Court B stating that Trial A would go forward on the trial date. We then asked the Court B if that meant we would be reset. After not getting an immediate response, we filed a Motion for Continuance as a precaution citing the competing trial settings and arguing that it was impossible to prepare two cases for trial at the same time. Eventually, Court B's staff informed us Trial B would be taken off the trial docket and we would need to get a new trial setting.

Well, that worked out perfectly, right? Not so fast. On the Monday before the trial date, Trial A settled. Once Court B learned of the settlement, it informed us that it expected us to show up for trial on the trial date. Obviously, this caused a great deal of concern as up until that point, we were preparing for Trial A and had not been preparing for Trial B. Luckily, during a hearing prior to the start of trial, we learned that the Judge in Court B had not seen our continuance and was unaware that the Court B's staff had informed us that Trial B would be taken off the docket. Accordingly, the Judge granted our continuance. Whew!

Trial Tips for the Double Whammy

Luckily, my predicament was the result of a misunderstanding. However, if you ever find yourself in a similar predicament, below are some tips that will make sure you protect yourself and your clients from the double whammy:

1. As soon as you learn that you have two trials settings on the same day, inform both courts immediately. This can be done at a hearing or with a simple letter addressed to both courts. This notice provides you an opportunity to get the issue resolved as soon as possible so that you are not having to waste time preparing for a trial that may not proceed. It also helps you to avoid any arguments that you were not diligent or, worse, you intentionally delayed informing the courts to avoid a trial setting or frustrate opposing counsel.

2. If advance notice fails to result in a timely resolution, file a Motion for Continuance in each Court explaining the situation and outlining how the double setting impacts your ability to prepare and announce ready for trial. Be sure to attach any exhibits or evidence, including affidavits or declarations, to the motion regarding your attempts to resolve the issue before filing the Motion for Continuance.

3. If the Motion for Continuance fails and one or both courts are unwilling to provide timely relief, seek emergency relief by contacting the administrative judge for your venue and/or seeking appropriate appellate remedies.

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