"Taking Cross Examination in Advance: The Trial Viddep"

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I. INTRODUCTION

As most trial lawyers were either born knowing or quickly figured out, one of the most effective techniques for presentation of a plaintiffs' case is to call the defendant, or if a corporation, one of its key employees, for cross examination. That is easy to do in wreck cases or medical malpractice cases where the "target" witness is subject to the subpoena power of the court. In many cases against corporate defendants, and most product liability cases, the witness often can't be forced to come to trial. In product liability cases you can generally rest assured that none of those corporate employees responsible for the damaging design will attend trial if they can avoid it. Instead, the jury will see the defendants' professional spokespersons or professional witnesses. Yet it is in precisely such cases that getting such cross-examination is most important. In products cases, for example, the corporate defendant possesses almost all the information needed by plaintiff to win his or her case. In business torts cases, executives who made the injurious decisions usually won't appear at trial. To get the testimony plaintiff needs from those witnesses, a videotaped trial deposition ("viddep") is often necessary.

Years spent fighting "discovery wars" and attempting to prepare complex cases for trial has led us to believe that trial viddeps are a crucial component of effective trial presentation. We got to that point by experience and the reflection that can make experience meaningful.

In the past, our firm did a lot of "discovery" depositions of decision-makers employed by defendant corporations. The precise reasons for that dim with the passage of time, for we now seldom take such depositions, although we do depose opposing experts. Probably the reason we did it was because 'that's what everyone did' in products cases. One problem with "discovery" depositions is, of course, that while plaintiffs' counsel may 'find out' what the witness is going to say about something, defense counsel will contemporaneously find out what subjects plaintiff is interested in, and thus be empowered to "prepare" the witness for trial or for the subsequent "evidentiary" videotaped deposition. That obviously diminishes the effectiveness of subsequent cross-examination, whether in a trial viddep or at trial.

Another problem that confounded us was defendants' habit of pretending that a particular injury-causing defect was 'news' to the defendant, when in truth the defendant

corporation may have already settled dozens of cases involving the same defect.[1] Why should defendants' have the advantage of pretending the world began anew when this particular plaintiff filed this particular lawsuit alleging there was this certain defect in defendant's product? Giving a defendant that advantage allows defendant to choose the 'battlefield'. That, we felt, was an abomination to any red-blooded offensive-minded plaintiffs' lawyer. *We* choose the battlefield. And the law supports us in this regard: after all, we filed the lawsuit. Therefore, we define the issues, not some defendant.

The videotaped trial deposition seemed a good way to resolve these problems: how to get the truth before the jury from defendant's own witnesses, rather than from their paid counsel and professional witnesses, and how, during the course of that, to overcome the pretension that the subject defect was somehow 'news' to defendant.

This technique is particularly valuable in those cases where the real focus of the trial should be on punitive damages – those cases where, in truth, there is no "defense". Taking effective trial viddeps and then playing those viddeps early in the presentation of plaintiffs' case maintains that proper focus.

Trial viddeps have become (along with OSI evidence in those cases where it can be helpful[2]) one of the cornerstones of our firm's presentation of just about any kind of case, from tractor-trailer wreck cases (viddeps of corporate executives on safety or violations issues) to automotive products (viddeps of corporate engineers and executives) to business torts (viddeps of corporate executives).

Several problems must be overcome, however:

A. Trial judges lack of familiarity with the technique, and misapprehension that anything recorded deposition-style is therefore

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[1] A perfect example is GM's stupid sidesaddle fuel tank location on its 1973-87 full size pickup trucks. When we first confronted that particular defect modality in Moseley v. General Motors, GM's *entire* strategy, in discovery, and for trial, was to act as though there was no history.

[2] Our utilization of OSI evidence also stemmed from careful analysis how to overcome defendants' attempts to keep the whole truth about the defect, its history, and defendant's knowledge of it from the jury. In Moseley v. GM (as in virtually every subsequent major case in which we've been involved), we were met by a "Stalingrad defense" to discovery, on every issue. GM would produce no information about prior cases. How to pierce GM's pretensions about its lack of awareness that this stupid design was a problem? Confronted with so many "discovery" issues, neither plaintiffs' counsel nor the Court were able to resolve them all. Ultimately, we elected to go to trial with what we had. Subsequent to the Moseley verdict we spent a tremendous amount of time brainstorming how to present to the jury the fact that a defendant has known for a long time that its defective product was killing and maiming innocent Americans. The technique ultimately selected drew from criminal case law about prior similar conduct. We chose to follow a two-pronged approach: "by the numbers" – force defendant to admit, in response to requests for admissions, and/or have an expert testify that an entire list of prior claims or cases (obtained both from the defendant in discovery and from independent research) involved similar attributes to the case at bar (the "touchstones"); and "a parade of victims" – videotaped depositions of persons who could talk specifically about one of those other claims or cases – victim, witness, police officer, etc. This two – pronged approach has been approved by every trial judge who has considered it in our cases.

"discovery", and thus relatively unimportant and subject to truncated scheduling deadlines.

B. Timing: when to take the trial viddep relative to "discovery" of the information which should be used in that examination.

C. Objections and obstruction: how to avoid the 'trap' defense counsel will try to lay – forcing plaintiff to take one deposition, return to the court for an order compelling a second deposition and overruling multitudinous objections, by which time the witness can be "prepared" by a newly-educated defense lawyer to handle the issues in a fashion more to defendant's liking.

D. How to avoid the defendants' attempts to invoke the jurisdiction of another court to decide objections raised during the trial viddep.

E. How to avoid defendant's attempts to dilute the impact of effective trial viddeps after they have been taken.

F. How to defeat the defendants' arguments that a particular witness is too important to appear for a trial viddep.

II. OVERCOMING THE PROBLEMS

A. TEACHING THE "TRIAL" TESTIMONY DISTINCTION TO JUDGES.

Amazingly, many judges simply do not understand the distinction between "discovery" depositions and "trial" cross-examination which is taken by deposition simply because there is no other choice. The two are unrelated. The former is taken, during the discovery period, for the purposes of that period -- to "discover" evidence. The latter can *only* be taken effectively *after* the "discovery" period, because its object is to convert that which has been "discovered" (e.g., documents and facts) *into* admissible testimony for use at trial. *Compare* Estenfelder v. The Gates Corporation, 199 F.R.D. 351 (D. Colo. 2001) *and* Charles v. Wade, 665 F.2d 661 (5th Cir. 1982) *with* Chrysler Inter. Corp. v. Chemaly, 280 F.3d 1358 (11th Cir. 2002) *and* Integra Life Sciences I, LTD v. Merck KGaA, 190 F.R.D. 556 (S. D. Cal. 1999).

In *any* case where important witnesses cannot be compelled to attend trial, the party needing their testimony has generally had one choice: travel to where they are and take their trial testimony by deposition -- preferably on videotape. To require, as many courts have done, that such trial testimony be obtained before the discovery period has expired defeats the very purpose of the discovery period. In our experience, *every* deposition taken 'for' discovery, even if the approach sought to mimic a trial examination, has proved to be obsolete for use at trial by the time the discovery period was over

because of the discovery and assimilation of additional information during the discovery period.

The District Judge noted in Estenfelder that most courts "which have addressed 'discovery depositions' *vis a vis* 'trial depositions' have concluded that the federal rules do not set forth any definitions or distinctions as between the two." Estenfelder, 199 F.R.D. at 353. This may be because *there's no relationship between the two except the similar location in which they occur -- outside the courtroom.* The District Court concluded:

> I question the need for these courts to ignore the very real and practical differences which exist in fact between depositions which parties need to take for purposes of discovery, and depositions which parties need to take for purposes of presenting the testimony at trial. Any effort to eliminate or ignore these practical differences will likely lead to the exclusion from trial of testimony and evidence which, under the rules, a party is entitled to preserve and present. The result is a trial which is incomplete and unfair.

Id. at 355.

B. TIMING OF THE TRIAL VIDDEP

Discovery deadlines cause discovery abuse. Corporate defendants and their counsel are acutely aware of what evidence a plaintiff needs to prove up his or her case, and very adept at making that as difficult as possible. They realize that crucial witnesses under their control or influence may be needed. They know what facts or documents are in their possession which plaintiff might want to use to prepare to cross-examine such witnesses. Their object, therefore, is obvious: avoid producing the facts and documents, and, failing that, delay doing so for as long as possible, hoping that the "discovery period" ends before motions practice can elicit the orders necessary to force production of needed evidence, so that plaintiffs then will not have that evidence available for use in cross-examination of trial viddep witnesses or at the trial itself.

Motions to compel (and, probably, motions for sanctions) will usually be necessary to obtain discoverable evidence. It is crucial that trial viddeps not be taken until all evidence to which plaintiff is adjudged entitled has been received by plaintiff. Only then can plaintiffs' counsel plan for trial, and only in the course of planning for trial can plaintiffs' counsel make sage judgments about what witnesses are needed, some of whom may not be subject to subpoena and thus will become the target of a trial viddep on cross-examination.

It is mandatory that plaintiff's counsel advise the trial court from the very outset that trial viddeps may be necessary, that such testimony will be taken on cross-examination for use at trial at a "deposition" only because the witness cannot be

compelled to attend trial[3], and that because such examination will utilize facts discovered during the "discovery" period, the trial viddeps must occur *after* completion of discovery.

C. DEFEATING THE OBSTRUCTION

Corporate defendants can be relied upon, in many instances, to obstruct a trial examination which takes place outside the presence of the trial judge. The methodologies are endless: speaking objections, threats, outright coaching, argument, etc., etc. If a trial viddep is taken, all that must be ignored. Nothing is more important than for examining counsel to 'keep your eyes on the prize', ignore the attempted obstruction, and develop the testimony for which you prepared, as you planned. Of course, things may get so bad that the viddep has to be adjourned while relief is sought from the court.

This realization places a premium on thorough preparation: before deposing a corporate employee for use at trial, *know* whether he/she has been deposed before and obtain copies of those depositions. Know the defense counsel as well. Study whether the defendant or this particular defense counsel have so obstructed attempts to depose the same or other witnesses in the past that the court should intervene even before the viddep trial testimony is taken. This may enable you to get the trial court to do something trial courts are generally reluctant to do: make defendant bring the witness to the courtroom to be deposed in the presence of the court.[4] At a minimum, the trial court may at least attempt to constrain defendants' misconduct before the trial viddep is attempted.

Modern technology may provide the means to avoid such obstruction, and the forum-shopping discussed under "D" *infra*, and "trial depositions" altogether. Rule 43(a) of the Federal Rules of Civil Procedure allows conducting live remote trial examinations of witnesses who reside outside the subpoena power of the court. See, e.g., Beltran-Tirado v. INS, 213 F.3d 1179, 1185-86 (9th Cir. 2000); Official Airline Guides, Inc. v. Churchfield Publ'ns., Inc., 756 F. Supp. 1393, 1399 n.2 (D. Or. 1990). As the advisory committee's notes emphasize,

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[3] We have attempted to obtain defendants' agreement that a particular witness will come to trial and be available to call for cross-examination during plaintiff's proof, in order to avoid the necessity of a trial deposition and to overcome defendants' objections to such depositions. No reliable such agreement has ever been obtained by us in our cases.

[4] In Roberts v. General Motors, for example, we sought the trial deposition of then-Vice Chairman (and former General Counsel) Harry Pearce. (GM objected to the deposition, basically on the grounds he was 'too important'. The court rejected the objections.) We attempted to demonstrate to the court, through use of prior depositions of Mr. Pearce, that if the deposition were conducted in Detroit, GM would so obstruct it as to render the attempt useless. The Court was unconvinced. We traveled to Detroit, sought to conduct a trial eross-examination, and were thwarted by complete obstruction. We filed a motion for sanctions and for an order requiring that Pearce be produced for examination in the presence of the Court. That motion was granted.

> The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force in truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.

Fed. R. Civ. P. 43(a) advisory committee's note to the 1996 Amendment. "Face-to-face" interaction can now be accomplished via contemporaneous satellite transmission on video during the trial. The witness is subpoenaed to appear at a location near his or her home, and counsel at the courthouse conducts the examination, during trial.[5] That same "value" to the "factfinder" can be obtained by a trial viddep. What is missing from that exercise, however, is supervision by the trial judge, without which obstruction will often occur.

Before choosing the satellite-feed alternative, however, counsel must carefully evaluate whether presentation of the evidence could best be accomplished by a trial deposition, which can be edited pre-trial, or live testimony via satellite. Potential pitfalls are apparent in the satellite-feed alternative, the most obvious of which is the failure of the witness to appear, and the inability of the trial court, in a state far distant, to do much about it without substantially delaying the trial -- something the trial judge may not be willing to do. Even if the court is willing, that delay may interfere with the orderly and logical presentation of plaintiffs' case. That does not happen with properly edited trial depositions.

The principal advantage of the satellite-feed alternative is, obviously, the presence of the trial judge, who can rule upon objections as they occur. The existence of that prospect alone will cure many obstruction problems.[6] However, since the medium is the same whether a trial viddep is shown on a television screen or a live witness is shown on a television screen, the satellite-feed alternative would likely lack the impact of a properly edited trial viddep, because objections and the attendant argument causes delay and distraction. It may be, therefore, preferable to use a trial viddep, *if* the trial court is willing to become involved before such viddeps are even taken to insure that obstruction does not occur. An order governing conduct of counsel during the taking of the viddeps plus, where necessary, advance ruling on as many issues likely to arise (e.g., privilege claims to documents), enhances the probability that obstruction will not occur.

D. AVOIDING THE FORUM-SHOPPING

One of our greatest concerns in taking trial depositions has been the possibility defendants will manufacture some excuse to try to divest the trial court of jurisdiction over the conduct of the deposition. The more important the witness or sensitive the

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[5] The United States District Court in Missoula, Montana proposed just that resolution of the dispute over trial depositions of GM witnesses and lawyers in the case of Phillips v. General Motors, CV 98-168-M-DMV (Order of July 23, 2000).

[6] Trial viddeps outside the presence of the court *always* involve many more objections than would the same cross-examination in the presence of the court, *even* in those instances where the court has admonished counsel and given clear directions about obstruction prior to the taking of the viddep. The reason is obvious: usually no 'penalty' results from obstrueting outside the presence of the court.

testimony, the more likely that might occur. This is particularly true if privilege issues are expected to arise.

We developed this concern for a very good reason: In 1994, General Motors sued us, along with our clients, in a Michigan court when we attempted to ask questions of a witness in a trial viddep ordered by federal courts in Oklahoma and South Carolina.

The reasons defendants might file such a lawsuit include the obvious: defendant may want to escape the trial court or may consider the jurisdiction where the deposition is taking place more "friendly". Even absent that reason, forcing plaintiffs to litigate over objections to the trial cross-examination of a witness in a remote court which is unfamiliar with the case or any of the issues is bound to cause delay and needless expense and loss of time, and, since trial viddeps are ordinarily conducted after the close of discovery, that separate litigation may interfere with trial preparation or the trial itself.

Frankly, the courts have not come to grips with such tactics, which should be opprobrious to all. As a matter of routine, we inform the trial court of that possibility at the earliest opportunity, and ask the trial court to obtain the defendants' assurances that if the trial court requires that the deposition be taken in another state, defendant will not take advantage of that ruling by asking a different court to rule on objections. Careful attention must be paid to the precise wording of such 'assurances', if some appear to be offered.[7]

Defendant's unwillingness to clearly promise not to engage in such forum-shopping may be just enough to convince the trial court to force defendant to bring the witness to the forum jurisdiction. Clearly courts have that authority over parties subject to their jurisdiction. "A corporation is responsible for producing its officers, managing agents, and directors if notice is given; a subpoena for their attendance is unnecessary, and sanctions may be imposed against the corporation if they fail to appear." WRIGHT, MILLER & MARCUS, 8A FED. PRAC. & PROC § 2103, at 38 (2d ed. 1994). Most of those witnesses whose testimony would be sufficiently sensitive to provoke a defendant corporation to risk engaging in forum-shopping likely meet the criteria for "managing agents" and can be compelled to travel to the forum jurisdiction to be examined.

> Though the question of whether a particular person is a 'managing agent' is to be answered pragmatically on an ad hoc basis, the courts look to see if the individual involved is invested by the corporation with general powers to exercise his discretion and judgment in dealing with corporate matters, whether he or she can be depended upon to carry out the employer's direction to give testimony at the demand of a party engaged in litigation with the employer, and whether he or she can be expected to identify with the interests of the corporation rather than with those of the other parties.

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[7] We've had cases where defendants' counsel very solemnly offered such assurances on behalf of defendant, only to travel to the deposition site and then have the witness' own lawyer seek intervention by a local court -- even though the witness was an employee of the defendant.

Id. at 39-40; see Colonial Capital Co. v. General Motors Corp., 29 F.R.D. 514, 516-17 (D. Conn. 1961); In re Honda American Motor Co., 168 F.R.D. 535, 540 (D. Md. 1996); Sugarhill Records Ltd. v. Motown Record Corp., 105 F.R.D. 166, 170 (S.D.N.Y. 1985). "The 'paramount test' is whether the individual can be expected to identify with the corporation's interests as opposed to an adversary's." In re Honda, 168 F.R.D. at 541.

E. AVOIDING DEFENDANT'S ATTEMPT TO DILUTE THE IMPACT OF AN EFFECTIVE TRIAL DEPOSITION

A properly taken, effective trial deposition has value because of its *impact.* Defendants will try many things to dilute that impact.

One of the most bizarre and pernicious tactics we've seen has been some defendants' attempt to play during plaintiff's proof, in response to trial viddeps taken by the plaintiff, portions of videotaped depositions taken of the same witness by other plaintiffs' counsel in other cases. Suzuki, in particular, repeatedly tried that tactic. A reading of the depositions Suzuki wanted to use reveals why Suzuki wanted to play those cross-examinations of its own witnesses.[8] That tactic runs afoul of any party's right to confront, cross-examine, and impeach adverse witnesses, since neither the plaintiff nor her counsel were present at such depositions and the plaintiff was not a party to the case in which they were taken.

> The [U.S. House] Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness.

JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 804.9(1), at 464 (1997). See In re IBM Peripheral EDP Devices Antitrust Lit., 444 F. Supp. 110, 112-13 (N.D.Cal. 1978); In re Eighth Judicial Dist. Asbestos Litigation, 595 N.Y.S. 2d 574 (1993); Hinnant v. Holland, 374 S.E. 2d 152, 158 (N.C. App. 1988 (citing 4 Weinstein's Evidence ¶ 804 (B) (1) [04] (1985)); Ott v. Pittman, 463 S.E.2d 101,105 (S.C. 1995). In addition, a defendant offering such other-case, other-counsel deposition testimony of its own witnesses ordinarily cannot establish that the witnesses are unavailable to the defendant.[9]

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[8] After our trial depositions of some witnesses, Suzuki even invited other lawyers to depose those same witnesses, who had by then been carefully "prepared" to retract concessions won when they were first deposed.

[9] Of course, depositions taken by other plaintiffs' counsel in other cases of the same defendants' witnesses may be used by plaintiff in any case, since the defendant was present at the deposition and had full opportunity to defend and to ask questions.

Another tactic attempted by defendants to dilute the impact of trial depositions taken on cross-examination has been to try to play, during plaintiffs' proof, the direct examination of the defendants' own employee taken at the time of the depositions. Many states prohibit direct examination during plaintiffs' case of a witness called by plaintiff for cross-examination as an adverse witness. O.C.G.A. § 24-9-81; Barton v. Strickland, 208 Ga. 163, 65 S.E. 2d 602 (1951); CSX Transp. v. Levant, 200 Ga. App. 856, 410 S.E. 2d 299 (1991), rev'd on other grounds, 262 Ga. 313, 417 S.E. 2d 320 (1992).

The reason defendants seek to play their direct examination of a trial viddep is to dilute the impact of the cross-examination. To that end, defendants often conduct prolonged, somniferous examinations lasting hours. *If* you defeat defendants' attempt to play that direct examination during plaintiff's proof, the jury will likely never hear it, as defendant won't play it during defendant's proof.[10]

F. DEFEATING THE "TOO IMPORTANT" OBJECTION

It is perhaps not surprising given the mindset of many in and some who represent corporations that they often object to having an executive deposed essentially because he or she is 'too important.' If there is a legitimate reason to depose a corporate executive that objection should never succeed.

> General Motors also objects to the deposition due to Pearce's status as a 'high-ranking GM executive'. I am befuddled by an argument that status alone creates a different set of rules for important people. A day laborer could lose his or her job for missing a shift. Nonetheless, ordinary people are constantly inconvenienced in the litigation process. Short of some proof of harassment, the rules apply to everyone in the same way. In my view, important people are subject to the same rules as the working man or woman.

Phillips v. General Motors, U.S. District Court, District of Montana, (Order of February 25, 2000 p.4). See, e.g., Int'l Ins. Service Co. v. Bowen 130 Ga. App. 140, 144, 202 S.E. 2d 540, 543 (1973); Less v. Taber Instrument Corp, 53 F.R.D. 645 (W.D.N.Y. 1971).

III. CONSIDERATIONS REGARDING TECHNIQUE

The *key* of course, is to conduct an effective cross-examination of the trial witness by videotape deposition so that it has impact at trial, and then to vigorously litigate the editing process so that the impact is preserved. This requires a keen awareness of the limitations of the medium, and the effect which television-viewing has had upon your audience's reception of the videotaped cross-examination. Those subjects will be discussed in more detail in the oral presentation.

A. BEFORE THE TRIAL VIDDEP

[10] Instead, defendant may well call the same witness live during defendants' proof. That has happened repeatedly in our cases. We anticipate it, and prepare for it.

- Consider seeking court order governing conduct of counsel, to prevent speaking objections, coaching, argument, etc.

- Create a cohesive, coherent body of trial viddeps. Beware redundancy of subjects.

- Stipulation about objections: let the videotape run continuously. Some objections may properly be played for, and heard by, the jury. (That possibility may constrain some misbehavior.)

- Insist that either counsel has the right to ask the videotape operator to turn off the video momentarily. This is simple courtesy, as any number of things might happen which necessitates a brief delay.

B. THE VIDDEP EXAMINATION

- The camera should focus on the witness only.

- Remember: it is *cross*-examination. All the "rules" of wise cross-examination apply.

- The examination should be based on documents, written facts (in pleadings, for example), prior recorded statements, or "unanswerable questions".

- Do not argue with the witness.

- Remember your audience. It is *not* the witness; it is *not* defense counsel; it is *not* the adjusters who work for defendant. *It is the jury.* Do not attempt to prove your mastery over the technical subject matter of the case.

- Have a plan. Stick to it. That enables you to seize opportunities, if and when they arise.

- Know your medium. It is entirely two-dimensional.

- Know your audience has enormous experience with the medium, which leads to very specific expectations from that particular medium.

- Recognize that there may be some direct examination, and prepare for that.

- Use modern technology to show jurors the documents being shown to the witness.

C. EDITING

- Let the court know from the outset that its involvement in editing will be necessary.

- Visualize the written words even as they are spoken during the trial viddep, *planning ahead* for the editing process.

- Listen carefully to objections, and cure those that must be cured.

- Always move to strike as nonresponsive those answers, or part of answers, that are not responsive to the question.