Trial News

September 1990 | Washington State Trial Lawyers Association | Volume 26, Number 1 | $2.00

Practice Tips...

Dirty Tricks—Anticipate, React, Make Them Backfire

by Robert K. Dawson

I don't know whether hardball tactics and dirty tricks are on the increase or not. I do know that in my last three jury trials, two judges ruled that defense counsel intentionally violated orders in limine, and in a third trial the defense attorney hid a defense medical report until the time of opening statement. While the great majority of attorneys are ethical, it pays to be prepared. What follows are a few hardball tactics I have encountered and some ways to deal with them.

Incomplete or Evasive Interrogatory Answers

Everybody has received incomplete or evasive answers to interrogatories. While there is no easy solution to this problem I believe that it pays to send a set of interrogatories that are tailored to the case. It seems to me that judges have little patience with massive sets of form interrogatories but are likely to compel answers to a set of 25 interrogatories that go to the heart of the case.

I also suggest that you don't send an interrogatory unless you expect an answer. If you accept evasive or incomplete answers to your interrogatories, that will set the tone for the rest of the discovery on the case. If a fair interrogatory is not answered or the answer is evasive, then bring a motion to compel.

When you have a problem with interrogatory answers it makes sense to try and work out your differences with opposing counsel. Local Rule 37 should not just be a formality to be complied with before bringing your motion to compel. However, if it is necessary to bring a motion to compel, the extensive briefing usually isn't necessary. In most cases the judge just needs to know enough about the facts and your legal theories to see that the question is relevant and ought to be answered.

I have had a chance to question approximately ten Superior Court Judges on their feeling about Civil Rule 11. As a result of their responses I seldom ask for CR 11 sanctions. The judges I spoke with uniformly said that they do not want to enter CR 11 sanctions against an attorney unless the situation is aggravated.

It also pays to watch interrogatory practices carefully. Recently our firm took over a case and while reviewing the prior discovery we noticed that the defendants had taken interrogatories that had been sent to them and "scanned" interrogatories into their computer. Thereafter they printed out our interrogatory questions and the answers on their firm's pleading paper. When reviewing that discovery I noticed that the preamble to the interrogatories had been deleted and that some of the interrogatory questions had been altered. It pays to check.

Deposition Tactics

Another are a where problems seem to occur is in depositions. When a witness refuses to answer, or is being coached by his attorney, you should make every effort to resolve those disputes through your questions on the record or discussions off the record. What I have done when such problems continue is to take a break in the deposition and call presiding and ask if we can be assigned to a judge who is handling a nonjury trial. The jury room is available for the deposition and the judge can be available during the day. There is something about taking the deposition in a judge's jury room that seems to eliminate most obstructionist tactics.

Another thing you might consider when you encounter an attorney who uses obstructionist tactics is to put the rest of the depositions in the case on videotape. Videotape seems to have an inhibiting effect on counsel who coach a witness or obstruct a deposition.

Settlement Tactics

Perhaps it does not fall into the class of true "dirty tricks," but one thing that has always bothered me is the practice of some insurers to refuse to disclose the cost of a structured settlement offer. They say they want to "protect" your client from constructive receipt or some other perceived problem. There is absolutely no basis for failure to disclose this information except to take advantage of the plaintiff. My response is simple. I tell the client that I believe there is no proper purpose for the insurer failing to disclose the information and that I cannot realistically evaluate the settlement offer without knowing the cost of the structured settlement. In every case where I have refused to negotiate until receiving the cost of a structured settlement, the insurer has provided the information and settlement discussions continued.

Trial Tactics

There is an infinite variety of dirty tricks that can occur at trial. Because of my recent experiences, perhaps I am most sensitive about motions in limine. It is important when you argue your motions in limine not to do so by rote. There are many standard motions in limine and judges are used to ruling on them and moving on to other things. It is important to convey to the judge the importance of having these orders in limine granted and followed. Having said that, it is also important to decide in advance what you will do if any of the orders in limine are violated by opposing counsel.

Sometimes you can make a violation of an order in limine backfire on defense counsel. If the information that comes in is prejudicial, but is really irrelevant, then you can show that to the jury and say "It's hard enough to come to Court and be questioned

(Continued on page 15)

Dirty Tricks

(Continued from page 3)

about your personal life, but to have your reputation smeared by irrelevant information, by an attorney who is interested in trying to make the plaintiff look bad, not get at the truth, well that's unfair." Jurors want to see a fair fight.

If an order in limine is violated, or some other unfair tactic is used at trial, then consider asking the Court for a jury instruction to minimize the problem. Being creative in how you word the instruction may actually minimize or draw the jury's attention away from what was said and focus it on the real issues of the case.

There is a treatise that is available to help counsel deal with unfair tactics. Its title is *Dombroff on Unfair Tactics*, published by Wiley Law Publications.

There are many other dirty tricks and hardball tactics that can occur in a trial practice and those tactics are not limited to defense attorneys. While writing this column I contacted several defense attorneys and asked what dirty tricks they had observed. Most of their comments were variations on the "hide the ball" answers to interrogatories and coaching witnesses in depositions. Such tactics don't pay. The Seattle legal community is small enough that over time people become aware whether you will deal with them in a straightforward manner or not.

When you represent your client you can be aggressive without crossing the line. If opposing counsel uses dirty tricks or tactics, then work hard to show the judge or jury why the tactic was dirty, and make it backfire.

Robert K. Dawson is a partner in the Seattle firm of Pence & Dawson; his practice is limited to plaintiff's personal injury cases.