

[LETTER to a young trial lawyer]

WHEN TO USE THE ELEMENT OF SURPRISE

by DAVID K. BISSINGER

Imagine discovering that an opponent has presented fabricated evidence. Imagine further that the opponent's lawyer has failed to see it. Is it best to confront the opponent with this information in deposition or hold on to it for a surprise at trial? In this age of the vanishing jury trial, do surprise tactics even make sense?

Robert Keeton, one of the great teachers of trial advocacy, says in his classic "Trial Tactics and Methods" that "[s]urprise is frequently essential to the most effective disclosure of the dishonesty of a witness." In fact, he writes, "every exposure of a fabricated claim or defense comes about through some form of surprise tactics."

But Keeton's advice dates back decades. Since then, the number of civil cases tried to a jury has plummeted, and the discovery rules require far more disclosure now than they did then. Holding back may mean forgoing that damaging confrontation, and that may hurt the client's negotiating posture.

To decide, first consider whether the rules even offer the option of holding back evidence. For example, federal rules require disclosure of documents "that the disclosing party may use to support its claims or defenses, unless solely for impeachment." But evidence that a party uses "solely" for impeachment may fall into the category of collateral impeachment. Under that doctrine, the court will bar extrinsic evidence of specific instances of conduct to impeach a witness on a collateral matter — that is, a matter irrelevant in the litigation to establish a fact of consequence. In short, it's a dangerous

game to withhold evidence: Even when complying with the disclosure rules, you may lose under the collateral-impeachment doctrine.

Likewise, some ethical rules also require lawyers to "comply with known local customs of courtesy or practice of the bar or a particular tribunal" unless the lawyer "giv[es] opposing counsel timely notice of his intent not to comply." ABA Code of Professional Responsibility, DR 7-106(C)(5). Although this provision does not appear in the Texas Rules of Professional Conduct, the advocate will need to make a judgment about how the jury might react: Will jurors consider it, as Keeton puts it, "cheap subterfuge," or will they appreciate the need to hold back to reveal a serious fabrication?

Next, use trial preparation to help make the decision. Consider how to use the damaging document. Try role playing with a colleague or the client. Play out some of the likely scenarios the testimony might take. Also, think of ways in which the opponent might recover from the surprise — sometimes damaging evidence turns out not to be that damaging.

Remember also that at trial the jury will hear the case for the first time. What seems like a surprise to the attorney may not seem like it to the jury, because the jurors have not spent two years on the case. Likewise, don't let the prospect of a surprise affect your judgment. Be sure to have a good case without the surprise.

Trial Surprise

Finally, lawyers should consider whether they really are ready to spring a big surprise on an opponent. That may sound odd, but it's true. As Terence MacCarthy puts it in "MacCarthy on Cross-Examination," "[d]espite our expectations,

few lawyers are prepared for the consequences of an actual *Perry Mason* experience.” The trial process assumes few such dramatic events will occur. Instead, in MacCarthy’s words, “a cross-examiner seldom wins with a knockout, but rather should strive to win on points with jabs, counterpunching, and defensive boxing.”

In reality, if a case goes to trial, the advocate will have ample opportunity to use good-faith subterfuge without holding back in pretrial. A great example appears in David Boies’ book “Courting Justice.” There, Boies recounts his representation of the Department of Justice in its antitrust case against Microsoft in 1999.

The government alleged that Microsoft violated the antitrust laws by illegally tying Microsoft’s Windows Explorer Web browser (over which it had no monopoly) to its Windows 98 operating system (over which it had a strong monopoly). In short, the government claimed Microsoft used its Windows monopoly to extend its monopolistic power from operating systems into the far more cutthroat market of Internet browsers.


Microsoft countered with the defense that untying Explorer from Windows 98 would degrade the performance of Windows 98. In support, Microsoft offered into evidence a professionally produced, narrated videotape demonstration that Microsoft claimed would prove this degradation and Microsoft’s good faith in tying Explorer to Windows 98.

But Boies’ team found the Microsoft tape fishy. First, his team found that, contrary to Microsoft’s claim that performance would suffer when Explorer was de-linked or shut off, the tape unwittingly revealed that the supposed point of degradation occurred before Explorer was turned off. In the

trial, Boies proved on cross-examination that whatever software problems the tape showed, the problems had nothing to do with untying Explorer from Windows 98.

Boies’ cross-examination on this issue went well, so he passed the witness while holding back other evidence — mostly damning e-mails — for more garden-variety impeachment. Boies knew Microsoft would need to redirect the witness on the videotape. Boies knew he could use the e-mails on recross. He could never have anticipated what else would happen on recross.

As Boies began recrossing the witness using his e-mails, his team continued its mid-trial study of the tape. The team found something even more shocking: the spliced videotape involved two different machines. The icons on the screens changed, inexplicably, halfway through the tape. Boies used this dramatic evidence to turn a good recross (using the damning e-mails) into a transcendent one. Microsoft’s witness admitted that, indeed, “there were multiple machines involved.” Microsoft never recovered from the revelation of this phony evidence.

The lesson: Trials contain enough surprises without building pretrial preparation around them. Charge ahead. The trial itself will present ample opportunity for holding back. 

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