By Robert M. Hanlon, Jr. and H. Lockwood Miller III

Keeping In-House Counsel off the Stand (And Outside Counsel Out of the Doghouse)

Consider the following scenario. You are in-house counsel for a corporate defendant facing a large-exposure product liability lawsuit. You have been involved in the preparation of your company's defense, coordinating with outside counsel at every stage from the initial pleadings, through discovery, and leading up to trial. You are now present in the courtroom. Having just listened to opening statements, you are ready to listen critically to the plaintiff's presentation of witnesses. The judge asks plaintiff's counsel to call his first witness, and you are both surprised and dismayed to hear your name called. After an animated discussion at side bar, you find yourself the center of the jury's attention as you are called to the stand to answer unanticipated questions about corporate conduct, corporate documents, and the product under attack.

If this sounds too disastrous to be true, think again. In-house counsel attending trial can indeed find themselves called to the witness stand, and that scenario has played out in at least several product liability trials. Once on the stand, plaintiffs' tactics include using the witness as a human bulletin board to authenticate and then display and discuss the most damaging company documents. The results can be both unpleasant and damaging. And the risk is presented whenever in-house counsel attends trial.

Although all of this sounds daunting, there are steps that can be taken to prevent, or at least minimize, the chances of it happening. Knowing the specific rules and procedures where your case is pending is of paramount concern, as jurisdictions and judges vary greatly, and what may be an effective strategy in one circumstance may be ineffective or inappropriate in another. While bearing that precaution in mind, this article presents some useful general practice tips for both outside and in-house counsel to consider to mitigate the risk that in-house counsel will be compelled to testify at trial.

Before Trial

Trial Counsel

Consider whether in-house counsel should enter an appearance as counsel of record, even having in-house counsel admitted *pro hac vice* if necessary. As set forth in the Restatement (Third) of the Law Governing Lawyers, §108(4), "A tribunal should not permit a lawyer to call opposing *trial counsel* as a witness unless there is a compelling need for the lawyer's testimony." (emphasis added) Many jurisdictions follow this general rule, *e.g.*, Louisiana. *See* La. Code Civ. Proc. art 1452.

Plaintiff's Witness List

Object to generic listings on plaintiff's witness list, *i.e.*, "defendant" or "corporate representative." As discussed further below, the only corporate representative is the person (or persons) designated by the defendant in discovery.

24 Hour Notice

Consider an in limine motion requiring all parties to provide 24 hour notice of trial witnesses. Even if the court would otherwise allow plaintiff's counsel to compel in-house counsel to testify, requiring such notice will greatly lessen the element of surprise (which might be plaintiff's counsel's motivation) and might dissuade plaintiff's counsel from calling what would then be a more fully prepared adverse witness.

Settlement Discussions

Consider raising the issue with plaintiff's counsel before trial, suggesting (if necessary) that it will be mutually beneficial for in-house to be at trial so as to facilitate ongoing settlement talks. Obviously, any agreements reached with plaintiff's counsel that in-house counsel will not be called to the stand should be confirmed in writing.

Motion Practice and Pre-Trial Hearing

Consider an in limine motion to preclude plaintiff from calling in-house counsel or, in the alternative, for a pre-trial hearing outside the presence of the jury, the purpose of which is to establish the foundation for all applicable objections, including those suggested below.

At Trial—Before Counsel Testifies

Introduction of In-House Counsel

At trial, do not (*ever!*) introduce in-house counsel as the company "representative," and consider whether to introduce him or her at all. You would certainly think twice before introducing to the jury a representative of the company's insurance carrier who may be present to monitor the trial, so evaluate critically whether there is any worthwhile benefit to be gained by calling attention to in-house counsel's presence.

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Counsel Table
Consider where in-house counsel should sit. An argument can be made that a corporate defendant has every right to have in-house counsel present at trial and participating in its defense. On the other hand, the court may take the position that only counsel of record and party representatives may sit at counsel table. *See*, *e.g.*, *Alabama Power Co. v. Harmon*, 482 So. 2d 386 (Ala. 1986) (holding that plaintiff could call to the stand defendant's in-house insurance adjuster, who had been present at counsel table as defendant's representative during trial). Know the practice in your jurisdiction—and of your trial judge—before you decide who sits where.

Non-Disclosure
Object on the grounds that in-house counsel was not disclosed as a witness either in discovery or on plaintiff's witness list. (Be mindful of whether in-house counsel signed discovery responses.)

Improper Procedure
Object on the grounds that plaintiff is not entitled to select defendant's corporate representative. As specified in discovery rules, plaintiff is entitled only to specify topics to be addressed by a company representative, and it is the exclusive right of the defendant to select the individual(s) to address those topics. *See*, *e.g.*, Fed. R. Civ. P. 30(b)(6); *Yeary v. State*, 711 S.E. 2d 694 (Ga. 2011) (holding that the corporate designee is selected by the corporation to whom a deposition notice is directed, not by the party serving the notice). Plaintiff should not be permitted to bypass that procedure by calling in-house counsel to the stand as the company's representative. Similarly, argue (if appropriate in your jurisdiction) that there are procedures in place by which plaintiff may compel a designated witness from the company to testify at trial during plaintiff's case-in-chief. And plaintiff should not be permitted to bypass those procedures either.

Fairness—The "Ancient Rule"
Object on the grounds of fairness and justice, citing the "ancient rule," followed in some jurisdictions, which holds that a nonresident witness who is in the jurisdiction to testify in one matter may not be compelled to testify in another. *See*, *e.g.*, *Valley Bank & Trust v. Marrewa*, 237 N.E. 2d 677 (Mass. 1968); *Stewart v. Ramsey*, 242 U.S. 168 (1916). Although not directly analogous to the situation in which plaintiff seeks to call to the stand an in-house attorney who is there to observe the same case (as opposed to testify in another case), a strong argument can be made that the principle behind the rule applies nonetheless. A corporate defendant has a right to counsel, including in-house counsel, and that right must include in-house counsel's ability to participate in the defense and to stay fully informed by observing the trial. The defendant should not be penalized for exercising that right by having its in-house counsel subject to a threat of compelled testimony.

Consider asking the court to consider how it would respond if defense counsel stood up and tried to call to the stand at trial a witness who was never disclosed in discovery and is not on defendant's witness list.

Offer of Proof
Ask for an offer of proof (and a hearing if necessary)—and consider stipulations. It may well be that the primary reason the plaintiff wants in-house counsel on the stand is to authenticate corporate documents and to put them in evidence. If you suspect that is the case, consider making authentication a non-issue by stipulating to what the witness would testify to, *e.g.*, that the documents were produced in discovery, are authentic, and were kept in the regular course of business. If the court conducts a hearing, be sure to utilize it to lay the foundation for all applicable objections, including those suggested below.

Lack of Personal Knowledge
If applicable, object on the grounds that the in-house attorney has no personal knowledge and does not know anything about the issues in the case beyond the information provided in documents produced in discovery, in answers to interrogatories, and in depositions. As discussed further below, all such documents, once authenticated and admitted into evidence, speak for themselves.

No Admissible Opinions
Object on the grounds that the in-house attorney cannot offer opinion testimony. Presumably not an expert, he or she cannot offer technical opinions. And legal opinions are both privileged and otherwise inadmissible on the grounds that legal conclusions are to be made by the court, not by witnesses. Accordingly, there is no valid basis upon which in-house counsel can be asked to give his or her impressions of, or to suggest conclusions to be drawn from, corporate documents and other evidence.

Privilege
Object on the grounds of privilege—emphasizing that the in-house attorney does not know anything about the issues in the case outside of what was learned during the course and scope of his or her role as in-house counsel for the company. Be sure to know the rules in your jurisdiction. In Florida, for example, attorney-client privilege under Florida Statute §90.502 includes communications on legal matters between in-house counsel and corporate employees. *See*, *e.g.*, *Florida Marlins Baseball Club, LLC v. Certain Underwriters at Lloyd's*, 900 So. 2d 720 (Fla. Dist. Ct. App. 2005). That privilege may be waived, however, if in-house counsel is designated as a corporate representative in response to a deposition notice. Moreover, states such as New York and Texas do not automatically preclude the issuance of a subpoena to compel in-house counsel to testify at a deposition, holding instead that privilege objections may be lodged in response to individual questions if warranted. *See Vriesendorp v. State of New York*, 839 N.Y.S. 2d 437 (N.Y. 2007); *Borden Inc. v. Valdez*, 773 S.W. 2d 718 (Tex. App. 1989).

Turn About Is Fair Play

Consider asking the court to consider how it would respond if defense counsel stood up and tried to call to the stand at trial a witness who was never disclosed in discovery and is not on defendant's witness list; who was not designated as a company representative; who was not disclosed as an expert witness; and who has no firsthand knowledge of the issues in the case and can offer no information beyond what is stated in documents.

Opening Statement

If you know in advance that in-house counsel will be required to testify, consider addressing it during jury selection or opening statement.

At Trial—During Counsel's Testimony

Voir Dire

If in-house counsel is in fact called to testify, and the court permits it, request permission to voir dire the witness, both to lay the foundation for objections and to show the jury up front that the witness is an attorney with no first-hand knowledge of the issues in the case.

Privilege

Although discussed above, privilege warrants a second mention here. If the witness is required to testify, counsel must be prepared to object rigorously on a question by question basis. To do otherwise is to run the risk of waiving the privilege for purposes of appeal.

Hearsay

Don't forget the basics. The mere fact that a document was produced by defendant in discovery does not make it admissible. Require plaintiff's counsel to lay the proper foundation for an applicable hearsay exception. And always keep an eye out for hearsay within hearsay, such as customer complaints reflected in an otherwise admissible business record.

Documents in Evidence

Object on the grounds that a document, once authenticated and admitted, speaks for itself. Since the witness has no first hand knowledge of the issues and can offer neither expert nor legal opinions, there is no valid basis upon which he or she can be asked to comment on a document in evidence.

Time

Consider objecting on the grounds that the witness must be given time to read the entire contents of every document placed in front of him or her before being required to answer questions about it. This is a tactic that should be discussed before trial. If successful, it will slow the presentation of plaintiff's case to a crawl and may effectively put an end to plaintiff's counsel's attempt to use the witness as a human bulletin board or highlighter. However, the judge and jury may become frustrated with the witness, and with the company by extension, because they expect the in-house attorney to be familiar with the documents produced in discovery.

Conclusion

In-house counsel's presence at trial affords a number of important benefits to a corporate defendant, and therefore the advantages to be gained from such attendance should not lightly be foregone. However, because in-house counsel's presence in the courtroom carries the concomitant risk that he or she may be compelled to testify, it is important for in-house and outside counsel to work together to assess that risk and to take appropriate steps, such as those suggested here, to minimize it.

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