

GETTING YOUR MESSAGE ACROSS: VISUAL AIDS AND DEMONSTRATIVE EXHIBITS IN THE COURTROOM

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Published in the American Bar Associations'
The Journal Of The Section of Litigation
Vol. 27 No. 3 Spring 2001 pgs 41-44.

Almost 20 years ago I represented the plaintiffs in a complex fraud case involving an oil and gas drilling company. The trial lasted four weeks and required the jurors to learn much that was unfamiliar to them-the operation of drilling rigs, federal tax treatment of used versus new oil field equipment, and the difference between passive and active investments for tax purposes. Looking back, I can see that the case virtually screamed for visual aids to help the jury understand these complexities.

Indeed, our side had some. For example, we showed a drawing of a drilling rig with associated equipment. I even created a graphic on the fly with a tax expert during his testimony. The trial judge, to this day, still remembers that graphic, which, as I recall, consisted of my rudimentary drawing of an apartment building that I dubbed the "Babcock Arms" and used to illustrate the difference between a passive and an active investment.

But we did not do all we should have done with our graphics. In the end, although we achieved a plaintiffs' verdict, it was much more modest than we had hoped. The jury did not seem to grasp any of the evidence except what I talked about in my closing argument, which was limited to 45 minutes. During that argument, I made liberal use of demonstrative exhibits, and every single graphic I used in closing found its way into the jury discussions and influenced their verdict. Had I known then what I know now, I would have made much better and more expansive use of demonstrative exhibits throughout the trial.

I know now, but did not know then, that jurors retain very little, perhaps as little as 20 percent, of what they hear. The retention rate goes up significantly, to as high as 60 percent, when they see something, and research has proven that jurors retain over 80 percent of what they simultaneously hear and see. This should not surprise us. Yet, I see many younger lawyers in my firm and lawyers on the opposite side of cases fall prey to the potentially devastating misperception that if you say it in the courtroom, then the jury will hear it, understand it, and retain it. This widespread notion stems, I think, from the countless hours that lawyers spend absorbing and learning their cases, contemplating themes and theories, and ultimately establishing a dangerous "intellectual bias." The intense focus required in preparing a case for trial can obscure a lawyer's ability to perceive whether a jury understands the point he is trying to make. When lawyers fail to keep in mind the often-limited level of cognitive sophistication jurors may have when they enter the courtroom much argument and testimony may be wasted because it is too complex or convoluted for a typical jury to comprehend.

That was certainly true of my drilling case and is equally true in complex cases today. Of course, there have been clues along the way. Several years ago I attended an ABA Litigation

Section program on technology in the courtroom. The very fine Chicago lawyer Fred Bartlett was demonstrating courtroom technology prepared by plaintiffs in a wrongful death action arising out of an airplane crash. The animated simulation showed the final moments of the flight, complete with the cockpit and tower voice recordings. The trial judge kept the animation out of evidence, and the plaintiffs lost. The case was later reversed and tried a second time. This time the animation was allowed into evidence and the plaintiffs won. The animation may or may not have been case determinative, but all the trial lawyers agreed that it had a powerful impact on the jury.

As trial lawyers, we should know, but we often forget, that the jurors are blank slates who know nothing about the issues they are asked to resolve. In a real sense, jurors are grossly unprepared to resolve lawsuits, and they sincerely feel that way. They are frightened, insecure, and lacking confidence to decide a case. They have no formal legal training and are often confused by courtroom procedures. Jurors must listen to days or weeks of testimony and argument without asking a single question or discussing the courtroom proceedings with anyone else. It is a lonely job, but a responsibility that many of them take to heart.

Jurors are forced to depend on lawyers, who are complete strangers, educated through postgraduate studies, and with a propensity to use complicated language, to equip them with the information they need to perform their civic duty. As a trial lawyer, you must be conscious of the jurors' needs and recognize your role as their teacher, their tour guide on an obligatory journey through fact, fiction, rules, and laws. It is your job to convince jurors that your position makes the most sense and provides fairness to both parties.

As every good teacher knows, visual aids, by allowing jurors to see abstract concepts and relationships, significantly enhance both understanding and retention. Trial lawyers must remember that most jurors receive their primary information from television and are conditioned to learn more from visual images than from words alone. On the average, jurors watch six hours of television each day, during which they are bombarded with visual information. CNN, for example, which currently markets itself as the "get-to-the-point news network" and uses many graphics to illustrate the news, has been the number one source of news information for many jurors. News programs such as those on CNN succinctly spoon-feed information to viewers in bits. These programs make strategic use of flashy charts and graphics to illustrate the thrust of a news story. As lawyers, we should team from the success of television in capitalizing on how people want to learn and receive new information.

Then there is the Internet, considered by many to be the most significant communication tool of our generation. The Internet provides quick and easy packets of useful information in visual form. It also bridges the communication gap between the sophisticated presenter of information and the less sophisticated audience. With its visual format, the Internet facilitates learning and further reinforces the habit of paying attention to a video screen. The color and designs incorporated into Web sites entice users by attracting their attention and persuading them to read what is on the screen. There are many lessons for trial lawyers here.

One such lesson is the use of icons or visual symbols to help the jury sort information. A lawyer should attempt to create a visual format that will instantly identify graphics with the lawyer's side of the case. For example, if you are representing IBM, your graphics could have

the IBM trademark in the upper left-hand corner, and your color scheme could be blue because it is identified with the client.

Another lesson is that graphics work best when they have a clean, uncluttered look. I recently tried a case where a lawyer fell into the trap of trying to jam too much into his graphic. It was a poster board cluttered with words and information. It was not juror friendly, and I do not believe our jurors received or retained very much information from it.

The technology available today to assist the lawyer and the juror with visual aids is extraordinary. I generally use a software program called Trial Vision, which was developed by Courtroom Sciences, Inc., a trial strategy firm located near Dallas, Texas. Trial Vision allows me to put virtually everything I will need for trial on a computer disk and then load it into a computer. The software has a variety of tools that allow me to manipulate the data at trial. For example, I can get all of my demonstrative exhibits, evidentiary exhibits, and deposition excerpts onto a compact disk. I can then call up, by the touch of a button, portions of a videotaped deposition or a key document. In addition, by touching a computer screen, I can highlight portions of the document, pause a videotaped deposition, or pull particular language out of a document and make it fill the screen.

Contrast this with the old way of dealing with exhibits:

Lawyer: Your Honor, may I approach the witness?

The Court: Yes, you may.

(Lawyer marches over to the witness at the witness stand.)

Lawyer: Mr. Jones, let me hand you what has been marked as exhibit one and ask you if you can identify it.

Mr. Jones: Yes, I can.

Lawyer: And is that your signature on exhibit one?

Mr. Jones: Yes, it is.

Lawyer: Your Honor, I offer exhibit number one.

The Court: Hearing no objection, exhibit number one is admitted.

Then there ensues a lengthy discussion about exhibit number one. In the old days, the jury did not see anything of exhibit one unless the lawyer had extra copies to pass out while the witness was being interrogated. In some courts, the judge would pre-admit exhibits, and the jurors would have individual notebooks of exhibits. But in most cases, the jurors did not see the exhibit at all. Even when an exhibit was passed out or notebooks were used, the jurors had to spend time trying to keep track of all the paper they were being handed.

Now, with my computer program, once exhibit number one is admitted, I can punch a button and the document will be on a computer screen, on individual small monitors in front of the witness, judge, and opposing counsel, and on two large television sets or an even larger movie-type screen for the jurors. Then, without ever leaving the lectern or counsel table, I can take the witness through the document. The jury will therefore see exhibit one while hearing the testimony about it, helping them not only to understand the testimony better but also creating a picture in their minds to help them remember it. To realize these benefits fully at trial, I start early in my case preparation, while discovery is ongoing, to build the set of graphics I will use.

Such use of visual aids has been shown to enhance a jury's accurate perception of facts. Research demonstrates that jurors create mental images of facts they hear to help organize and comprehend them. Once these visual constructs are established, jurors commit themselves to using these versions of the facts to figure out the case. Without visual aids, these mental versions of the story may be inaccurate or misrepresent the facts as you would like the jurors to understand them. Consider how detrimental this becomes in a group setting, such as a jury deliberation, where individual erroneous perceptions may be compounded. Providing the same visual pattern to all helps to align the thinking patterns of the entire jury panel in the most favorable form. Visual aids that help jurors organize facts and relationships diminish the room for error in their individual interpretations of those facts and help protect your facts from being taken out of context.

Techniques that let the jury see the evidence do more than just teach them the facts of a case; they persuade a jury to see the case in a particular manner. Seeing it makes it believable and real. Colorful charts, excerpts from key documents, and creative illustrations provide jurors with visual stimuli to complement the words they hear from a witness or an attorney. They also generate a reference point for jurors when deciding the case. Jury research demonstrates that jurors refer to visual aids during deliberations by reciting the words or describing the images they have seen. Jurors are more successful at articulating their points, and persuading other jurors to follow, when they can instruct others to recall a particular visual aid. Post-trial interviews show that, in many cases, jurors have considered particular visual aids to be outcome determinative.

Visual aids also persuade jurors by instilling emotion into arguments or testimony. As successful trial lawyers know, emotion often is the key to successful outcomes at trial. Jurors naturally experience emotional reactions toward the facts before them. Visual aids, because they are concrete, tend to stimulate feelings and create an emotional context for persuasive argument or testimony. Abstract concepts such as negligence, failure to live up to promises made in a contract, or copying the work of another can be presented through concrete visual images that have a lasting effect on a jury because of the feelings they evoke. Later, when jurors recall what was presented visually, those same emotions are generated. Thus, you can classically condition jurors to form certain emotional ties to your theory of the case. Once these emotional ties are embedded into jurors' perceptions of the case, it becomes difficult for your adversary to negate or alter them.

Although emotional responses to visual aids are mostly attributable to their content, some of the stimulation is a product of color. Black-and-white images will not be as prominent in the courtroom, nor do they carry the same psychological impact. The use of different colors to

represent different entities, events, dates, or themes can also be extremely useful in organizing the content of visual aids and maximizing their effectiveness.

One thing I like to do is create time lines. Obviously, they go from left to right because that is how people read. The time line can range from being very simple to being an extensive, technologically smart, demonstrative exhibit. For example, you can make the boxes on your time line interactive so that when you touch that part of the computer screen, the actual document supporting the statement will pop up on the screen and allow you to discuss it with the witness or with the jury. You can build interactive mechanisms that will enable you to call up videotaped depositions or other video material on the screen.

Sometimes, just the appearance of what is on the graphic without regard to what it says will drive home your point. For example, suppose you have a case in which you are trying to prove that a person was engaged in a particular type of activity. You can build a time line that shows all of the person's conduct relating to that type of activity and boxes with specific details along the time line. The pure busyness of the boxes will demonstrate what it might take you days of testimony and argument to prove-that the person was doing lots of things relating to this activity.

Focus on Compelling Facts

Sometimes one or two key visuals can focus the jury on facts that compel a decision in your favor. For example, the State Bar of Texas recently conducted a civil trial practice program built around a mock trial concerning the gunfight at the OK Corral. Wyatt Earp and Doc Holliday were defendants in a wrongful death action brought by the mother of one of the shootout victims. I was asked to conduct a mock voir dire and opening statement for the defendants. The case, at first blush, seemed an easy one for the law enforcement officers. Both Earp and Holliday had been threatened by the decedent and his brother, who were thought to be armed. But, as with most cases, there were troubling facts that a skilled plaintiff's lawyer could turn into a compelling lawsuit.

I decided to present the case in opening statement through the use of two graphics. The first was a time line that allowed the jury to see uncontested facts about what happened during the day leading up to the confrontation. I chose only those facts that the decedent's family admitted or that were uncontested in the record. The time line clearly showed that, in the events preceding the gun fight, Earp and Holliday were acting as law enforcement officers and were meeting a legitimate and dangerous threat to the community.

I also developed a demonstrative exhibit that highlighted critical inconsistencies in the plaintiff's case. The plaintiff said that the decedent had his hands raised over his head in surrender when he was shot. The bullet wound in the decedent's hand, however, showed that the bullet entered his hand in a position more consistent with pointing a gun rather than having his hands raised in surrender.

I illustrated the point with a simple drawing showing two men, one with hands raised, the other with his hand by his side as if pointing a gun, with dotted lines leading toward a dark circle showing where a bullet would enter in each position. The raised hand of the surrendering man

showed the circle where the bullet would enter on the palm of the hand and a box next to it with the words “No Entrance Wound.” A similar box next to the circle on the back of the hand pointing a gun said “Entrance Wound,” showing the location of the decedent’s actual wound. This image showed, better than hours of testimony and argument, that the plaintiff’s theory was impossible.

Several years ago, I tried a case on behalf of Oprah Winfrey and her production company before a jury in Amarillo, Texas. The case was brought by cattle feeders in the Texas Panhandle complaining about a program Oprah did on mad cow disease. We made substantial use of graphics in that trial-in opening, during testimony, and in closing-and made full use of all available technologies. I remember two moments from the trial where technology made a crucial difference.

The first occurred during the testimony of a nonparty witness from Chicago who was affiliated with the Chicago Mercantile Exchange. He testified that the precipitous drop in cattle futures on the day of the Oprah show was caused by her program, which was broadcast at 9 a.m. in Chicago and was actually seen by some traders at the exchange. The witness had apparently forgotten that the day after the Oprah show, he had given an interview to a television reporter and, on camera, had said that the drop in cattle futures was not due to Oprah but rather due to the drought and high grain prices. This was exactly the position Oprah was taking at trial.

Without letting the witness know that I had this video clip, I asked him a question that made use of his verbatim quote from the television interview. The question went something like, “Now, sir, isn’t it true that the reason that cattle prices were where they were was not because of Oprah but because of the drought and high grain prices?” Predictably, the witness denied the premise of my question. This was not surprising because he had just testified to the contrary five minutes earlier. I asked him the question two or three more times using his precise language from the television interview. When he was fully committed to his denial, I asked him if he did not recall being interviewed by a reporter the day after the Oprah show. You can guess what happened next. I pressed a button and all of a sudden his interview was up on the television screen, showing him saying exactly what he had just denied three or four times before the jury. I could do this quickly and easily at just the right moment because all of my video clips were on disk and ready to be called up by number through the computer.

The second moment I remember came during closing. I was able to call up a one-and-a-half-minute segment from Oprah’s show that dealt with beef safety issues and had not been challenged by plaintiffs. The segment showed parents telling the story of their young child’s death from *e-coli* poisoning. I was able to weave this powerful evidence effortlessly into my closing by punching a single button and having that minute and a half pop up on the screen in front of the jury. I believe that both of these video clips contributed substantially to the verdict in Oprah’s favor.

Some lawyers worry that a splashy, high-tech, obviously expensive presentation will prejudice their clients. They worry that a jury will view the party with lots of hardware and sophisticated graphics as the Goliath versus the poor and smaller David who makes do with handwritten poster boards. These worries are needless. I have interviewed lots of jurors and asked that specific question and never found one who admitted to having that perception. Rather,

the jurors universally say that they give credit to the party bringing clear, concise graphics because it saves time and helps them understand the case (for which they are very grateful).

The advantages of using visual aids far outweigh the risk of a litigant's being perceived as "slick" because of high-tech computers in the courtroom or "fancy" artistic depictions of the facts. Jurors bred on television expect lawyers to use this technology, just as they expect lawyers to provide the information needed to resolve a dispute. They are accustomed to receiving information this way and welcome visual aids as a learning device.

The use of visual aids of all kinds has been increasing as trial lawyers realize their value and dramatic impact on communication in the courtroom. Such visual aids bridge the gap between what is being spoken and argued during trial and what is ultimately absorbed by jurors and then used to make decisions. Visual aids bring order and organization to complex situations and circumstances by validating the facts, giving context to the issues, and providing a framework on which jurors may build their interpretations of the case. More importantly, though, visual aids get to the point. In an easy and appealing manner, visual aids tell a condensed but comprehensive story by bringing into focus the crucial issues.

Visual aids are a solution. For jurors, they facilitate the learning process by helping them visualize the positions of a party in a manner that increases understanding and retention of facts, themes, and issues. By helping jurors focus, visual aids alleviate the pain associated with trying to understand complex issues and inhibit the jurors' natural tendency to resist abstract thinking. They also diffuse the "intellectual bias" that often infects trial lawyers. In addition, by reflecting lawyer empathy for the task of those who are devoting much personal time and energy to serve as jurors, visual aids strengthen the relationship between lawyers and jurors and send the message that the lawyers regard the jurors as an important part of the judicial process.

Without these learning tools, information communicated to jurors can become misinformation, issues can be easily misperceived, and the complex will remain poorly understood. Effective use of visual aids maximizes the likelihood that you will get your message across.

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