

**DIRECT EXAMINATION:
GETTING THE INFORMATION OUT OF
THE WITNESS STAND AND INTO THE JURY BOX**

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DIRECT EXAMINATION: GETTING THE INFORMATION OUT OF THE WITNESS STAND AND INTO THE JURY BOX

I. INTRODUCTION

A. The wisest lawyer never discovers the merits of his cause til the trial. William Wycherley (1640-1716) *The Country Wife*, I, i.

B. It has been noted that the initial attention span of jurors is 30 seconds or less.¹

C. When information is presented orally, people tend to recall 70% of the information within three hours of perception, while only 10% of it is recalled after 72 hours.²

D. When information is presented visually, retention rates average around 72% after three hours, and only 20% after 72 hours.³

E. However, when the information is presented both orally and visually, retention rates more than triple after 72 hours, increasing to 65%.⁴

F. Furthermore, 95% of human perception is based on the visual and auditory senses.⁵ What all of this boils down to is the notion that the most effective method of communication involves presenting information in a way that appeals greatest to a person's auditory and visual senses. This is particularly so when presenting a case to today's jurors, most of whom come from the television generation, cultured, raised and educated by television and videos. Herein lies the value of technology.

II. PRACTICE AND PERSUASION

A. Going to trial provides the best opportunity for the practicing attorney to serve as an advocate on behalf of his or her client. Counsel's role is to organize and execute the presentation of the case in the most persuasive manner possible. Ordinarily this entails maintaining complete control of the way information is presented to the jury. Unfortunately, however, in the area of witnesses, many litigators tend

to forget this. As a result, the usual presentation of testimony tends to be rather dry and uninteresting. Consequently, testimony which could have potentially had a profound impact is often presented to the jury in a somewhat less than persuasive manner.

B. Therefore, the practitioner can use demonstrative evidence to help overcome the problem of juror boredom. Not only does demonstrative evidence break up the monotony of testimony, but it also aids jurors in retaining the information. Furthermore, when describing statistics or other complex transactions, counsel should try to get the witness off of the stand to illustrate and explain the charts or diagrams.

C. What the practitioner putting on witness testimony must remember is that to the jury, an expert witness is just like any other witness with respect to one issue: Credibility. Being a persuasive advocate means presenting crucial witnesses so as to make them appear more credible than the opposition's witnesses. This paper will provide some approaches used in the effective presentation of lay and expert witnesses through the use of demonstrative evidence.

III. THE BENEFITS OF TECHNOLOGY DURING DIRECT

A. Witness testimony combined with demonstrative evidence can center the jury's attention on critical evidence.

B. The display of documents on a large television monitor will reduce circulation of documents which removes attention from witness testimony.

C. The presentation of photos, documents, videos, deposition excerpts, and computer animations linked with the witness' explanations enhance persuasive communication, juror retention and comprehension.

IV. THE TOOLS

A. Charts and Graphs

1. Charts and graphs are ideal for the witness to simplify statistical data. When properly used, this type of evidence can be very useful in illustrating trends and relationships among pieces of information over time. There are many commercially available presentation graphics software packages that provide the tools necessary to create professional charts and graphs rather easily.

1 *Id.* William S. Bailey, "Expert Witnesses in the Sound-Bite Era", *TRIAL*, Feb. 1993, 65, 65.

2 *Id.* Fred Misko, Jr., "Demonstrative Evidence", State Bar of Texas, Advanced Personal Injury Seminar, Seminar Paper 1993.

3 *Id.*

4 *Id.*

5 *Id.* Howard Nations, "Developing Effective Demonstrative Evidence", National College of Advocacy, Computers and the Trial Lawyer, Seminar Paper 1990.

2. These software packages also help organize direct examination in an outline form, and often include transition effects between slides. The benefits of creating and presenting graphs and charts by computer are numerous as compared to the traditional foam board presentation.

3. It is of vital importance that you prepare your witness using the demonstrative evidence to enable him or her to understand the purpose and the practice of merging their oral testimony with something the jury can see and/or hear.

4. In effect, the primary advantage of doing a presentation by computer is the flexibility involved. Traditional charts and graphs mounted on foam board, once fabricated, are difficult to modify. Computer generated graphs and charts, on the other hand, can be modified in an instant. This can prove to be invaluable in the event that an error is discovered on the eve of trial or during witness preparation.

5. Furthermore, the ability to modify charts and graphs easily, provides the opportunity to visually demonstrate alternative scenarios based on varying hypotheticals.

B. Diagrams and Illustrations

1. The scaled drawing is customarily used for both analysis and as an exhibit to depict your witness' conclusions. The diagram or illustration will represent the physical evidence measured and other descriptive evidence described by witnesses, police measurements and photographs. The same types of advantages available in graphics presentation programs are also found in programs that generate diagrams and illustrations.

2. One useful type of software package allows users to organize complicated expert analysis and to depict cervical and thoracic injuries in a clear manner by way of flow charts. Information can be presented to the jury in a clear and concise manner step by step, or otherwise as it becomes available through direct examination testimony. Again, the ability to instantly modify presentations by way of computer is a major advantage over similar presentations done on ordinary foam board.

3. In the area of medical illustrations, one particular piece of software deserves special mention. Animated Dissection of Anatomy for Medicine (ADAM) is a software package that was originally designed to aid in the instruction of anatomy in medical schools. ADAM allows users to peel away layers of skin and organs with the aid of tools such as lasers and scalpels. Because the program was originally designed for and is currently extensively used within the medical community, the illustrations can provide a very credible source of evidence. Some

of the features included in the package allow for zooming in, simulation of medical procedures such as surgeries, and some animation. Additionally, ADAM provides a set of editing tools in ADAM Author which allows one to modify illustrations by coloring, cutting, drawing, and adding text. These capabilities can provide invaluable illustration materials to accompany expert testimony.

4. One other technological toy recently on the market is the computer illustrator which hooks up to a laptop and allows the practitioner to highlight, mark and footnote documents or images on the computer screen using a pen-like instrument. For example, if the witness is shown the page of a document or a photo, the significant portion of the document or photograph can be highlighted while the witness is being questioned. Further, if the image is a lengthy document, a title page may lend explanation to the witness of the document's contents. A hard copy should be handed to the witness to compare it to the computer image.

C. Computer Generated Video Footage

1. Animation and Simulation

a. Computer generated footage, whether animated or simulated, serves as a powerful communication aid to bare oral testimony. Footage allows the jury to view some rendition of the action described in the testimony, such as the reconstruction of an industrial, airplane, or automobile accident. Likewise, visual footage allows the jury to view the complicated movements of a technical piece of machinery. More importantly, however, such footage allows the jury to view the inside of objects, such as the intense pressures occurring in the spinal column or the brain during violent collisions.

2. Animation vs. Simulation⁶

a. A distinction should be made between computer generated video animation and computer generated video simulation. The difference between these two types of footage is significant mainly for purposes of challenging the accuracy of the video footage.

i. Animation

A computer generated animation is generally based on the testimony of a witness. The animation footage serves basically as a tool used to demonstrate

⁶ *Id.* See generally E. X. Martin III, "Using computer Generated Demonstrative Evidence", TRIAL, Sept. 1994, 84-88; C. Caverhill Schaefer, et al., "Computer Simulations in Court", TRIAL, July 1987, 69-74.

what was seen by the witness, such as the operator or the injured party. The predicate for admissibility thus focuses on whether or not the animation footage is an accurate portrayal of what the witness saw. Because the footage is based primarily on the testimony of a witness, it can sometimes be rather easily discredited.

Animated modeling also allows the jury to compare the proper workings of a product with those of a defective product. By demonstrating the manner in which a product is supposed to operate as contrasted with the way it actually operated due to some defect, complicated expert testimony can be easily reduced to terms the jury can understand. Furthermore, when the defective product is some type of a medical device or machine, the resulting effects on the plaintiff can also be easily explained with the aid of animated footage depicting the results on the internal workings of the human body.

ii. Simulation

More significant than animation is computer generated simulation. Simulations are not based on a witness's perceptions, but rather on a given set of quantifiable facts, such as speed, friction, vehicular mass, skid marks, etc. The available facts are then taken and combined with the laws of physics to create a simulation which presents a scientifically accurate model under a given set of facts. Because every fact necessary to create an absolutely unquestionable simulation will rarely be available, simulations in and of themselves are not entirely free from challenge. But because simulations are based on factual evidence combined with scientific principles, the challenges made to simulations will be much more complicated than those made to animations.

In any case, the predicate for the admissibility of simulations is similar to that required for animations. Simulations are like animations in that they serve as a demonstrative tool used to clarify the witness's testimony. Thus in order to be admissible, experts must testify that the simulation accurately depicts the testimony that they will provide.

V. GETTING THE INFORMATION INTO THE JURY BOX

A. Once the graphics are created by use of the computer, there are various methods of projection for view by the jury.

1. Simulations on Video

Computer generated simulations can then be recorded onto videotape or laser video disks for presentation to the jury by way of an ordinary television monitor. One of the benefits to providing information in an animated setting is that the footage can be paused. Thus the information can be viewed in the same manner as an ordinary diagram or

illustration. In addition, the footage can be played in slow motion, in reverse, and re-played with several witnesses. Thus, a five minute piece of footage could potentially provide several days worth of memorable illustration materials.

2. Elmo

One method involves linking an overhead projection system, commonly known as ELMO, directly to a notebook computer by way of a special adapter. This presenter displays photos, documents, x-rays and even three-dimensional objects.

3. Adapters

Various types of high resolution adapters are also becoming available, which convert the video signal sent out to the computer monitor into a signal which can be viewed on an ordinary television monitor. Recent impressions found with these types of adapters have indicated that the resolutions seen on television monitors has been rather impressive.

4. Slides

Nonetheless, the technology is improving, and one should be aware of this method of projection. Many presentation graphics packages also provide the ability to print slides overnight through an independent slide processing business.

5. Laser and Color Printers

Additionally, anyone having access to a laser printer or a color printer can also use laser printer transparency film to print copies for use with an overhead projector.

6. Visual Printers

Further, supplementary attachments to visual presenters allow a hard copy color printout of a still or video image. The printouts can be used as jury handouts and exhibits and can be printed in less than a minute. The printouts can be given to the jury to view during examination.

7. Exhibit Makers

This tool permits document blowups to be used at trial and can be created during trial. Blowups of photos, documents and drawings always reinforces testimony.

VI. CONCLUSION

A. Although direct examination basics were not discussed here, the trial litigator must prepare, prepare, and prepare for witness testimony. Technology does not change witness examination techniques it strengthens them. However, technology cannot replace witness examination technique and style. Witness questioning remains the most effective way of getting information into the jury box.

B. While it is true the use of technology should not be overstated, the importance of using technology combined with witness testimony goes to the heart of

your case. The jury will listen and watch with curiosity and will retain presented information upon entering the room where the fate of your client's case will be decided.