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SAN FRANCISCO TRIAL LAWYERS ASSOCIATION

How to Use High Tech
(and sometimes low tech)
to Prove Your Case

Litigation Practice



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Section II

Winning the Close Case with Technology

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Winning The Close Case and Increasing Your Damages With Technology

by William B. Smith and R.J. Waldsmith

VISUAL EVIDENCE MAKES A DIFFERENCE

Most evidence admitted at trial is presented through witness testimony. In every trial jurors hear hours upon hours of testimony, which can get repetitive and boring. Trial lawyers invest a significant amount of time preparing witnesses and witness examinations.

Traditionally, documents are photocopied and photographs are reproduced to be offered into evidence during witness examinations. Because they are cumbersome and expensive, only important documents and photographs are usually enlarged and mounted on boards to show the jury. Much more time is spent preparing the presentation of witness testimony rather than the documentary or visual evidence.

Today, fewer and fewer jurors choose to receive their information verbally (e.g., via the radio) as opposed to visually (e.g., television or computers). News television shows such as 60 Minutes, 20/20 or Dateline are very popular and persuasive, whether or not the information advanced is true. These television shows have been so successful because their formula of using technology to explain complex issues is readily accepted by the general public. They use narration over video or still photographs. Documents are shown with the pertinent text highlighted and lifted off the page for clarity and emphasis.

Similarly, lawyers should employ technology to present visual evidence at trial. Most jurors expect more technology in the courtroom, particularly in larger cases. It seems outdated and slow-paced to use a chalkboard or butcher paper to illustrate a point.

A trial never proceeds in a fixed, unchangeable format. Trial lawyers need the ability to change directions instantly, accessing exhibits, demonstrative evidence, video clips and impeachment video excerpts on demand. Presenting evidence electronically allows this flexibility. The exhibits are stored on a notebook computer and can be retrieved within seconds. The evidence is then published to the jury through a projector onto a large screen.

Because it takes so much time to handle numerous exhibits in

hardcopy format, trial lawyers oftentimes will forego offering as many exhibits into evidence as they could offer. When a trial lawyer must physically walk over and hand documents or photographs to opposing counsel, the judge and the witness each time an exhibit is identified, the process is slowed to a halt. Instead, when the evidence is presented electronically, it is immediately shown to opposing counsel, the judge and the witness on monitors without the jury seeing it. This allows a trial lawyer to present more evidence in a shorter period of time.

After a foundation is laid and the exhibit is received into evidence, it is published by displaying it on a large screen that the jury can see. All jurors see each exhibit at the same time rather than handing it to each other in the jury box, again saving time.

Hard copies of each exhibit should be presented to the court so the jury can have access to the evidence in the jury room during deliberations and so there is an appellate record. All video clips are given an exhibit number and must be placed on a labeled CD-ROM or DVD.

A multimedia presentation allows you to switch from a photo to a video to an anatomic model and back to another photo in a few clicks of a computer mouse. There is no need to stop everything to turn on a videotape player or to let a projector warm up. When done properly, it is virtually seamless.

The concepts of primacy and recency, that people tend to believe what they hear first and tend to remember what they hear last, apply to visual evidence. In fact, you can create a virtual tidal wave of evidence that will overwhelm your opponents who do not present evidence electronically. Studies have shown that people retain visual information better than verbal information. A picture IS worth a thousand words.

When you rely too much on oral presentation, each juror may have a different image in his head about the themes and facts. Technology allows you to control the image so that each juror sees the images you wish, very early in the case. It is like taking them to the movies as a group instead of giving each of them a radio to listen to on their own. This reduces the risk of misconception and gets them all on the same page rapidly.

Jurors also are likely to readily associate the evidence with *your* position when it sees it rather than simply hearing about it. Photographs of an accident scene are viewed as supporting your case, not your opponent's case.

The electronic presentation of evidence also can focus the jury's attention. As needed, relevant portions of photographs can be enlarged on a specific matter. Important text on documents can be lifted up and highlighted to also help the jury follow along.

Presenting evidence electronically allows you to easily and effectively repeat evidence that is prejudicial to your opponent. For example, depositions of parties can be read or played for any purpose during trial. (Code of Civil Procedure section 2025, subd.(u)(2).) We routinely play short segments of video depositions of parties for expert witnesses and during the closing argument to remind the jury of a bad witness or favorable testimony. Otherwise, memories fade in a long trial. We never let the jury forget about an early bad witness.

Diagrams, timelines and charts can be more specific and tailored to individual issues when created and stored electronically. A series of diagrams can be easily created to effectively present important information rather than attempting to include all relevant information on one enlarged hard copy.

When presenting evidence of economic loss, bullet point slides can help illustrate expert testimony, focus the jury's attention to particular elements of your client's loss, contrast the opinions of your expert economist vs. that of the opposing economist, and compute the total economic loss with summaries. These slides also are much more versatile than the traditional enlargements because they can be changed or corrected within minutes.

Visual evidence is extremely helpful in the presentation of noneconomic damage testimony. Use short excerpts of family videos and photographs punctuate direct examination testimony concerning pain and suffering and wrongful death damages. Several short clips are better than one or two longer ones. Your audience's attention span is very short and they are accustomed to seeing rapidly displayed images.

While presenting evidence electronically will require more time, effort and expense, the difference is tremendous. You will see its value once you try it.