THE FLORIDA BAR TRIAL LAWYERS SECTION

The Advocate

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## *MESSAGE FROM THE CHAIR*

# Lawyers and Judges

## What can we do to make each other's lives easier?

We all know that in 2009, and probably more so in 2010, our courts suffer from lack of consistent and dedicated funding. We also know that judges are overworked and further lack sufficient support to assist them in performing their duties. How can we, as trial lawyers, make their lives easier? And, in return, how can judges make lawyers' lives easier? In a recent (informal and unscientific) survey of lawyers and judges I took on professional issues, focusing on the interplay between judges and lawyers, I came up with some overall observations:

**1. Attorneys.**

a. Respect for time. Perhaps the leading pet peeve of judges is lawyers cancelling hearings without notifying the court. There may on occasion be a valid reason for a last minute cancellation, but many times notice could have been given to the court so that the hearing time could have been used by other attorneys. This is particularly irksome to the judges who are currently burdened by a huge flood of foreclosure cases (2,000 per week in my county and close to 3,000 per week in Miami-Dade).

b. Preparation. It would seem axiomatic that the professional attorney would be prepared, and yet

*See "Message from the Chair" page 2*

# Using Demonstrative Evidence To Win

**by Trey Cox***

Lawyers need demonstrative exhibits so jurors can hear them. Today, jurors live in a grab-and-go world of CNN, USA TODAY, sound bites, commercials, and one-page US Weekly magazine articles. In newsrooms, conference rooms, and classrooms, key information is identified and visually organized to communicate both simple and complex ideas. When jurors enter a courtroom, the visual stimulation that they rely on in the outside world disappears. They are left to plow through a mass of orally delivered, artificially sequenced information about a topic they may have never dealt with.

Studies show that jurors are over whelmed by the amount of information presented during a trial.[1] They can become easily bored, confused, and frustrated. If your evidence is not delivered in a format jurors can easily digest, your efforts (and your case) are lost. The best jury consultant of my generation, Jason Bloom,[2] is fond of saying that "people only hear what they understand."

This is a surprising insight for most lawyers, who think that jurors understand everything we tell them.

*See "Demonstrative Evidence" page 8*

**In This Issue:**

too many attorneys come to hearings and pretrial conferences unprepared. If, for example, an order requires counsel to meet and view evidence, then that must be done prior to this pretrial conference.

c. Feedback. Attorneys can give feedback through the judicial mentor program. Each new judge is assigned a mentor. Additionally, there are judicial feedback forms online that go directly to the judges once completed by the attorneys. Unfortunately, the bar rarely utilizes them. Most chief judges are receptive to comments that practicing attorneys have about the performance (or lack thereof) of judges under their supervision. But the chief judges can only react when they have the information. Some local bars have judicial relations committees (such as our Ninth Circuit) which can be used for that purpose. I have heard that in other circuits members of ABOTA are approached by the chief judge for assistance. In other words, stop complaining, and get involved.

d. Assisting the judge in preparation. Judges want to rule correctly in their cases. If you have a large notebook or stacks of material you want the judge to consider at a hearing, then send it to the judge well in advance of that hearing. Handing a judge a large notebook, a lengthy memorandum or stack of cases as one walks in the hearing will neither impress the judge nor assist your client in obtaining the result you wish to achieve. And, if you want a ruling sooner, rather than later, if you have provided the judge a lengthy memorandum on the day of the hearing, and your opponent has not, the judge will probably give your opponent a chance to respond, delaying your case even further.

e. Communicate with your adversary. Most of the circuits require the attorney setting a hearing to confer with his/her opponent prior to setting a particular motion for a hearing. Even if you have done that, however, it should be common sense to call your opponent to see what really is at issue. Most of the issues can be worked out by good trial lawyers. Obviously there are issues that require judicial intervention, but those should be fewer than we now have. Don't wait till you arrive at the courthouse.

**2. Judges.**

a. Respect for time. Scheduling of multiple trials for the same time. This seemed to be the leading pet peeve of the attorneys I talked to around the state. It is common in some of the circuits for a judge to require all of the cases going to trial on a docket to appear on a Monday morning, refusing to rank cases and assign specific times for the lawyers and clients to appear. For any lawyer with a busy client, whether they be a physician, a store manager, banker or business owner, that becomes very difficult and expensive, especially when one must have his/her expert ready to be at the trial and you do not know until Monday morning what day you may or may not go to trial. Lawyers uniformly want the judge to rank the cases so that the lawyers can confer with each other and plan their witnesses' arrival accordingly. While I realize that from the judge's perspective he/she wants to conserve judicial resources and have that second case ready to go if the first one settles, that puts an expensive burden on the backs of our clients. An example I would give is one that happened to me where I picked a jury and gave an opening statement on a Monday over in Bradenton and then the case was never reached during the rest of the one week docket. I ended up starting the trial over from scratch six months later when we retried it. That, I would submit, is an unnecessary burden upon our clients.

b. Time, part 2. The same topic was raised about appellate arguments. In most of the D.C.A.s three arguments are scheduled for 9:00 a.m. when everyone knows that those arguments will be at 9:00, 9:40 and 11:00 a.m., or thereabouts. To require case number 3 to show up two hours early does not seem fair to the clients tied to case number 3. Why not set each argument at a specific time?

c. Professionalism. The lawyers I spoke with asked that out-of-state lawyers have some type of mandated review of our professionalism guidelines. Good lawyers want judges to enforce the rules and demand professionalism. If attorneys know they will need to be prepared and in total compliance with the rules or face consequences, the system will work better for all of us. I am not advocating zero tolerance, and some judicial discretion is always permitted by law, rules and professional guidelines, but when there is no legitimate reason for lapses in behavior or conduct, judges should act to enforce, thereby setting high standards. Judges should provide leadership by example, meaning they should be prompt, prepared, thorough and involved as leaders of the bar.

d. Judges should rule promptly (especially if the attorneys give them materials ahead of time and are prepared at the hearing). Trial lawyers are given absolute deadlines by the court and under the rules, but there are very few deadlines imposed on judges in civil cases. Decisions on, for example, summary judgments, should not take more than ten (10) days in all but the rarest of cases.

**3. Lawyers and judges.** Respect each others' time, be professional, and help set a standard of excellence in Florida. And, if you are worried about further legislative funding cuts to our judiciary, (an independent branch of government), call, write or visit your state legislators and let them know you want our courts to be properly funded.

# Defensive Lawyering (and Why It's Good for Both Lawyers and Clients)

**by Mark J. Fucile***

I recently did a series of law firm risk-management classes with two lawyers who represent, respectively, claimants and lawyers in legal malpractice litigation and two others who prosecute and defend bar grievances. Despite their varying practice perspectives, they all shared a common theme: Lawyers need to contemporaneously document key client decisions throughout the course of a representation. For lawyers, the documentation provides a clear record of advice given. For clients, that same documentation provides an equally clear channel for communications on the key aspects of the representation.

For a variety of reasons, lawyers' decisions today are increasingly being "second guessed," and the civil and regulatory consequences of "wrong" decisions are potentially more severe than in the past. One way lawyers can protect themselves in the face of these trends is "defensive lawyering" – managing your practice in a way that attempts to reduce civil and regulatory risk by documenting the key milestones in a representation: at the beginning, along the way, and at the end.

At the Beginning

Defensive lawyering should begin at the beginning. When you are taking on a client (or a new matter for an existing client), it is important to define who your client will be and the scope of your representation, to confirm any necessary conflict waivers, and to set out your compensation arrangements. Engagement letters offer an ideal venue for covering all four.

Defining the Client. At first blush, it might seem odd that you need to say who your client is. In many circumstances, however, you may be dealing with more than one person or entity as a part of the background context of a representation – multiple company founders, a developer and a property owner, one distinct part of a corporate group, or several family members. In those situations, it is important to make clear to whom your duties will – and will not – flow, so that if the other people in the circle you are dealing with are disappointed later, they can't claim you were representing them too, and that you didn't protect them.

Whether an attorney-client relationship exists in a particular circumstance is usually governed by a twofold test. The first element is subjective: Does the client subjectively believe you are the client's lawyer? The second element is objective: is that subjective belief objectively reasonable under the circumstances? Engagement letters allow you to set out clearly who your client will be in a given circumstance. Depending on the setting, polite "nonrepresentation" letters to those you will not be representing may also offer a useful supplement to an engagement agreement to let the nonrepresented parties know which side you are on. In the face of an engagement agreement with your client, conduct consistent with that agreement, and depending on the circumstances, nonrepresentation letters, it will be difficult for another party to assert that you were his or her lawyer, too. Defining who is being represented also benefits your client because it clarifies from the outset whom you will be looking to for strategic and tactical decisions on the "client side" of the relationship.

***Defensive lawyering means to avoid civil and regulatory risk.***

Defining the Scope of the Representative. Engagement letters offer an excellent opportunity to define the scope of a representation. As the law grows more complex, it is becoming more common for businesses and even some individuals to have more than one lawyer handle discrete aspects of their legal needs. If you are handling a specific piece of a client's work, it is prudent to set that out in the engagement letter. That way, you are less likely to be blamed later if another aspect of the client's work, which you were not responsible for, doesn't turn out to the client's liking.

Professional conduct rules usually allow a lawyer to limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. And requires lawyers to communicate the scope of the representation to clients. An engagement letter that outlines the scope of the services to be provided will go a long way toward meeting this requirement. It also benefits the client by fostering at the outset of the representation a conversation between the lawyer and the client concerning the client's goals and the lawyer's assessment of those goals.

Defining the scope of the representation can also offer a practical tool in managing conflicts by structuring the relationship in a way that eliminates conflicts in the first place. A conflict exists when the positions of multiple current or former clients are directly or materially "adverse." If a representation is structured in a way that eliminates adversity between the positions of the clients involved, it may be possible to take on work that might otherwise have been precluded outright or that at the least would have required waivers. For example, a manufacturer and a distributor with consistent positions in a product liability claim might wish to hire the same lawyer to handle their defense more efficiently. By agreeing (among themselves and without the lawyer acting as an intermediary) to litigate any cross-claims for indemnity in a separate forum with separate counsel, the two clients may have effectively eliminated any potential

*continued, next page*

conflict that would have precluded a single lawyer from defending both. An engagement letter is the perfect place to document structural arrangements of this kind.

Documenting Conflict Waivers. Lawyers have important professional responsibilities for managing conflicts. At the same time, conflicts of interest (or alleged conflicts of interest) can also present themselves in other litigation directed against lawyers – including disqualification, breach of fiduciary duty, fee forfeiture, and Consumer Protection Act claims. Given these risk factors, carefully documenting client consent to conflicts in writing is important – both ethically and practically – and engagement letters offer an ideal time to do that.

Engagement letters that either include a conflict waiver or incorporate a separate stand-alone waiver protect both the lawyer and the client because they (1) document the disclosures that the lawyer made to the client and (2) confirm the basis upon which the client granted the waiver. In that context, the more detailed the letter, the better – both from the perspective of fully explaining the issues involved to the client and increasing the likelihood that the client will be held to the waiver.

Documenting Rates and Mechanisms to Change Rates. An engagement letter is a great venue to both confirm existing rates and related charges for the work to be performed and to preserve your ability to modify those rates and charges during the course of the representation. Moreover, clearly communicating current rates can prevent misunderstandings with the client later. Finally, reserving the right to change those fees will generally avoid having to go back to the client for specific consent, because the ability to modify the rate has been built-in up front.

Along The Way

Even with the best of intentions and honorable motives, memories fade and recollections can vary from reality. Therefore, it is important to document important strategic and tactical decisions reached by the client during the course of a representation. The amount of the documentation will vary with the gravity of the decision involved. In many circumstances, however, the documentation need not be overly detailed. A quick e-mail back to the client following a telephone call will often suffice. It is the contemporaneous record that will be important later. Confirming decisions with the client again fosters communication with the client and provides the client with a useful record of decision-making in the case as well.

At The End

The end of a representation may seem like an odd topic for defensive lawyering. With most matters, we know when we have come to the end of a specific project – the advice sought has been given, the transaction has been closed, or the final judgment has been entered. And, in some instances, the next work for a client flows seamlessly from one project to another. But at least in some situations, when we complete a project for a client we're not sure whether the client will be back even if we got a very good result. For example, we might have done a great job in a case for an out-of-state company, but that firm might have only very occasional operations here. In those situations, defensive lawyering becomes important in documenting the completion of the representation, so that if circumstances change over time and another client asks us to take on a matter against that out-of-state company in my example, we aren't left wondering whether that company is a current client or a former client.

***The key to defensive lawyering is a contemporaneous written record.***

The distinction between classifying someone as a current or a former client is significant when it comes to the need for conflict waivers. Current clients have the right to object to any representation a lawyer proposes to take on adverse to them. This right flows from the broad duty of loyalty lawyers owe their current clients. Former clients, by contrast, may have a much narrower right to object. Usually, former clients can block an adverse representation by denying a conflict waiver only when the new work is essentially the same or substantially related to the work the lawyer handled earlier for the former client or would involve using the former client's confidential information adverse to the former client. Absent a trigger, a lawyer may be permitted to oppose a former client without seeking a waiver.

That's where defensive lawyering comes in. If you have completed a project for a client and you think it is relatively unlikely that you may see the client again, a polite letter thanking the client for the opportunity to handle the completed matter and letting the client know that you are closing your file may play a key role later in classifying the client as a former client. In the face of an "end of engagement letter," it will be difficult for a former client to argue later in the context of, most likely, a disqualification motion that the former client reasonably believed that you were still representing it.

Summing Up

Defensive lawyering isn't an insurance policy. But in an environment in which lawyers' decisions are increasingly being "second guessed" and the consequences of "wrong" decisions can be significant, defensive lawyering can give you practical tools to reduce civil and regulatory risk. And, because it is built around the goal of clear communication with clients, lawyers shouldn't be defensive about defensive lawyering.

** Mark Fucile, of Fucile & Reising LLP, handles professional responsibility, regulatory, and attorney-client privilege matters and law firm-related litigation for lawyers, law firms, and legal departments throughout the Northwest.*

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THE FLORIDA BAR CLE

**The Florida Bar Continuing Legal Education Committee and the Trial Lawyers Section present**

# Civil Trial Certification Review

• Live
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**COURSE CLASSIFICATION: ADVANCED LEVEL**

**Live Presentation and Webcast: February 1 - 2, 2010**
**Tampa Airport Marriott • 4200 George J. Bean Parkway • Tampa, FL 33607**
**813-879-5151**

**Course No.0987R**

## Monday, February 1, 2010

8:30 a.m. – 8:50 a.m. **Late Registration**

8:50 a.m. – 9:00 a.m.
**Opening Remarks**
*Edward K. Cheffy, Naples, Program Chair*

9:00 a.m. – 10:45 a.m.
**Civil Procedure**
*The Honorable Philip J. Padovano, Tallahassee*

10:45 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 11:45 a.m.
**Trial Skills: Opening and Closing**
*F. Gregory Barnhart, West Palm Beach*

11:45 a.m. – 1:15 p.m.
**Lunch (included in registration fee)**
***Remarks About the Certification Exam***
*Susan J. Cole, Coral Gables*
*Civil Trial Certification Committee*

1:15 p.m. – 2:45 p.m.
**Trial Skills: Preserving the Record for Appeal**
*Jack J. Aiello, West Palm Beach*

2:45 p.m. – 3:00 p.m. **Break**

3:00 p.m. – 4:00 p.m.
**Trial Skills: Examination of Witnesses (including Experts, Frye Motions and Motions in Limine)**
*The Honorable Margaret O. Steinbeck, Fort Myers*

4:00 p.m. – 5:00 p.m.
**Trial Skills: Voir Dire**
*William E. Hahn, Tampa*

## Tuesday, February 2, 2010

8:45 a.m. – 10:30 a.m.
**Ethics**
*Edward K. Cheffy, Naples*

10:30 a.m. – 10:45 a.m. **Break**

10:45 a.m. – 12:00 noon
**Recent Developments in Personal Injury and Wrongful Death**
*Gary D. Fox, Miami*

12:00 noon – 1:15 p.m. **Lunch (on your own)**

1:15 p.m. – 2:30 p.m.
**Recent Developments in Business Litigation**
*William B. Wilson, Orlando*

2:30 p.m. – 2:45 p.m. **Break**

2:45 p.m. – 5:00 p.m.
**Evidence**
*Professor Charles Ehrhardt, Tallahassee*

### WEBCAST CONNECTION:

Registrants will receive webcast connection instructions two days prior to the scheduled course date via e-mail. If The Florida Bar does not have your e-mail address, contact the Order Entry Department at 850-561-5831, two days prior to the event for the instructions.

### CLE CREDITS

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Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

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This seminar is intended to assist those who have applied to take the certification exam in preparing for the exam or thinking about taking the test in the future. It is developed and conducted without any involvement or endorsement by the BLSE and/or Certification committees. Those who have developed the program, however, have had no communication with the certification committee that prepares and grades the examination and they have no information regarding the examination content or format other than the information contained in the exam specifications which are also provided to each examinee. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination or that the examination will cover all topics in the course material.

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TO REGISTER OR ORDER AUDIO CD / DVD OR COURSE BOOKS BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

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LOCATION (CHECK ONE):

- ❑ **Tampa - February 1 - 2, 2010**
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- ❑ **Live Webcast / Virtual Seminar**
  **February 1 - 2, 2010**
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***Registrants who participate in the live webcast will receive an email with a web-link and log-in credentials two days prior to the seminar to include access to the course materials. Call The Florida Bar Order Entry Department at (800) 342-8060, ext. 5831 with any questions.**

❑ Check here if you require special attention or services. Please attach a general description of your needs. We will contact you for further coordination.

REGISTRATION FEE (CHECK ONE): WEBCAST

- ❑ Member of the Trial Lawyers Section: $340 ❑ $430
- ❑ Non-section member: $365 ❑ $455
- ❑ Full-time law college faculty or full-time law student: $232.50
- ❑ Persons attending under the policy of fee waivers: $50

*Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.) Fee Waivers are only applicable for in-person attendees.*

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❑ Enclosed is my separate check in the amount of $50 to join the Trial Lawyers Section. Membership expires June 30, 2009.

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# Lawyers Earn Board Certification in Aviation Law and Civil Trial

**by Lisa M. Tipton, APR**

The Florida Bar Board of Legal Specialization & Education in 2009 approved board certification for 157 lawyers in 18 specialty areas of legal practice, including the following lawyers who earned board certification in the aviation law and civil trial specialties:

**Aviation Law**
James W. Jarvis, Miami
Timothy M. Ravich, Miami

**Civil Trial**
Kimble Clark Bouchillon, Bartow
Todd Benjamin Miller, Bradenton
Steven G. Goerke, Delray Beach
Steven Lawrence Lubell, Fort Lauderdale
Jennifer Cates Lester, Gainesville
Gary Lamar Sanders, Ocala
Troy Alan Rafferty, Pensacola
Catherine Marie Douglas, Port Charlotte
James Elliott Messer Jr., Tallahassee
Michael John Thomas, Tallahassee
Joseph Thomas Tucker Metzger, Tampa

Certified attorneys are the only Florida lawyers allowed to identify or advertise themselves as specialists or experts. Board certification evaluates attorneys' special knowledge, skills and proficiency in various areas of law and professionalism and ethics in practice. Applications for board certification in aviation law and civil trial are available at FloridaBar.org/certification and are due each year by Aug. 31.

"The Florida Bar's board certification program sets high standards for lawyers who aspire to further their professionalism credentials," said Florida Bar President Jesse H. Diner. "Attorneys who earn Florida Bar board certification have demonstrated their expertise and commitment to excellence in the practice of law."

Certification is the highest level of evaluation by The Florida Bar of the competency and experience of attorneys in areas of law approved for certification by the Supreme Court of Florida. Florida currently offers 22 specialty areas of practice for which board certification is available, the greatest number of state-approved certification areas in the nation. Two new areas – adoption law and education law – have been approved by The Florida Supreme Court and will be available to lawyers for application later this year.

A lawyer who is a member in good standing of The Florida Bar and who meets the standards prescribed by the state's Supreme Court may become board certified in one or more certification fields. Only 4,300 of Florida's 87,000 lawyers are board certified. Minimum requirements for certification are listed below; each area of certification may contain higher or additional standards.

- A minimum of five years in law practice
- Substantial involvement in the field of law for which certification is sought
- A passing grade on the examination required of all applicants
- Satisfactory peer review assessment of competence in the specialty field as well as character, ethics and professionalism in the practice of law
- Satisfaction of the certification area's continuing legal education requirements

Board certification is valid for five years. The attorney during that time must continue to practice law and attend Florida Bar-approved continuing legal education courses. Recertification requirements are similar to those for initial certification. Not all qualified lawyers are certified, but those who are board certified have taken the extra steps to have their competence and experience evaluated.

For more information, please visit The Florida Bar Web site at Floridabar.org/certification or contact The Florida Bar's Legal Specialization & Education Department at 850/561-5842.

# New areas for board certification

On June 11, 2009, the Supreme Court of Florida adopted rules regarding two new areas of board certification –**EDUCATION LAW** and **ADOPTION LAW–** to Chapter 6 of the Rules Regulating The Florida Bar. In re: Amendments to the Rules Regulating The Florida Bar– Rules 6-27 and 6-28, SC08-1981, effective June 11, 2009.

Florida attorneys will be able to apply later this year for certification in adoption law and education law.

For more information, go to: *http://www.floridabar.org/certification* or contact *spiland@flabar.org* (adoption law) and *jcoiro@flabar.org* (education law).

Applicants are also being sought for the adoption law and education law certification committees.

The rules can be found on the Florida Bar's web site: *http://www.floridabar.org/divexe/rrtfb.nsf/WContents?OpenView.*

The court opinion can be found on the Court's web site: *http://www.floridasupremecourt.org/decisions/opinions.shtml.*

**DEMONSTRATIVE EVIDENCE**
*from page 1*

But that is simply not true. You will only be heard if you deliver a message that people can understand. Thus, a trial lawyer's ability to persuade depends primarily on the jury's understanding the evidence. Demonstrative exhibits ensure that your jurors hear your arguments.

Unfortunately, how to make a trial presentation fun and interesting is not included in the law school curriculum. New lawyers are left to trial and error as the only means to learn effective courtroom communication techniques. The interactive and multisensory aspects of demonstrative aids make it easy for a jury to learn the important issues in the case, as well as increase your ability to win at trial.

The Basic Purpose of Demonstrative Exhibits

Demonstrative evidence should be used to clearly or memorably convey the theme or concept. There are five broad purposes for the use of demonstrative evidence: (1) to organize facts and themes, (2) to explain scientific or technical information, (3) to make your facts and themes "sticky" (i.e., more memorable), (4) to reinforce key concepts or themes, and (5) to refresh jurors' memories in long trials. Demonstrative evidence is not a substitute for testimonial evidence.

Why Demonstrative Evidence Works

Commentators offer many reasons why demonstrative evidence works, but it all starts with effective communication. In today's Internet and sound-bite world, we are conditioned to receive information in short, quick bursts reinforced by large, easily understood graphics. This conditioning is caused by everything from TV programs to the Internet to text messages. We expect easily digestible packets of information broken by frequent intermissions. As a result, the average person's attention span lasts no longer than a few minutes. And what's worse is that if you do not meet that expectation, the audience quits listening. The average television news program takes 90 seconds to cover a story: 30 seconds to set the stage, 30 seconds to provide the details, and 30 seconds to wrap it up.[3] Conversely, lawyers consume blocks of time with oral testimony and argument, but offer very few visuals to explain or emphasize an important point to the jury. That makes lawyers hard to follow and puts jurors to sleep. It does not take many post-trial interviews with jurors to understand that they do not retain boring or hard-to-follow information; they "changed the channel" and long ago forgot your boring broadcast.

***People only hear what they can see and understand.***

Jurors' demand for information in a bite-sized, easily accessible format is so strong that I liken it to a news broadcast: If you are not providing interesting content, your audience grabs the remote and goes channel surfing. Demonstrative aids that were once just beneficial are now essential for keeping today's jurors tuned in to your program.

Common Sense Tells Us Pictures Are More Interesting

As trial lawyers, we have to provide information in the format that our jurors require. There are many studies that document why demonstrative evidence works, but we do not need a study or a book to tell us that demonstrative evidence strengthens any presentation by making it more interesting and memorable. My first-grade teacher was right: Show-and-tell works best because everyone can see and hear your story at the same time. The show-and-tell of demonstrative evidence focuses attention, makes evidence accessible, and breathes life into evidence that would otherwise be unacceptably dull and boring. That explains why grabbing a juror's attention, much less maintaining his or her focus, during the reading of a deposition is nearly impossible.

The Weiss-McGrath Study

The common-sense conclusion that demonstrative evidence makes a presentation more memorable is supported by science. For example, McGraw-Hill published the Weiss-McGrath study, which was designed to evaluate information retention.[4] The study compared retention of information presented in three different formats: orally only, visually only, and both visually and orally. After the presentation, researchers measured retention at various intervals. After 72 hours (the length of a short trial), the group that was presented information solely by oral means retained only 10 percent of the total material presented. Those who received the information both orally and visually retained 65 percent of the information presented. In simple terms, individuals presented with both visual and oral information retain the information much longer—three to six times longer. In addition to making the subject matter more interesting, showing the jury a diagram, chart, or animation lends credibility to what is said by the lawyer or witness. Jurors are simply more likely to believe something they see with their own eyes rather than something a lawyer or a witness says is true.

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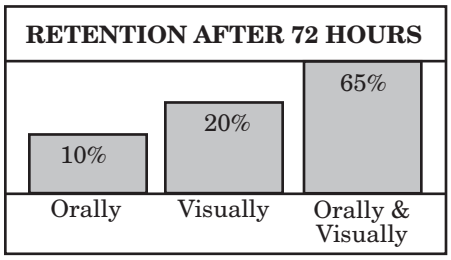
By the way, what makes my point more clearly: the preceding paragraph, or the chart below?




Embracing Technology to Win

I cannot imagine trying a case without a laptop and a good projector. These tools expedite the presentation of evidence. Judges appreciate them and jurors like them. The ritualistic procedures and evidentiary rules of court complicate the communication process, making it difficult to keep jurors' attention. When you have to ask the witness to turn to Exhibit 4 in Plaintiff's Exhibit Binder Volume I, wait for him to find the right binder, turn to the right exhibit, and then publish it to the jury, even P.T. Barnum would have lost the jurors' attention. The administration of evidence is so much cleaner with a projector.

Nonetheless, I have heard many lawyers refuse to use technology, claiming the jury will believe they are fat-cat corporate defendants. I disagree. That is old-school, outdated thinking. Jurors are no dummies; they can tell if you represent a successful business or a penniless victim. Whether you use technology has no effect on this. And in fact, an awareness of a corporate client's revenues may actually increase jurors' expectation of well-presented information. So a decision to forgo technology because it makes you look "rich" may prove very costly indeed. Technology allows you to replicate the grab-and-go pace that jurors operate in every day. Jurors reward lawyers who make their case accessible and easy to understand. Courtroom presentation technology is too powerful a tool to ignore.

Dealing With Problems

Even with sufficient planning and preparation, problems with demonstrative aids are inevitable. Presentation problems do not determine the outcome of the case as much as do the lawyer's reactions to those problems. To alleviate potential pitfalls, create a backup plan in the event a video re-creation is denied admission at trial. Most often, the backup plan is an eyewitness who, using photos or drawings, can gain admission of the same evidence.

If a problem with an exhibit or equipment arises in front of the jury, stay calm and request a brief recess to fix the problem. Most judges will be reasonably patient for a minute or two. Use the recess to eliminate the problem without significant interruption to the jury or the court. If the judge does not allow recess, stay calm, move forward and, if feasible, introduce the demonstrative evidence at a later time. When dealing with highly technical demonstrative evidence or equipment, try offering such evidence first thing in the morning, soon after lunch, or after a brief recess. That way, the equipment can be properly prepared and tested just prior to admission, thereby reducing the possibility of equipment malfunction in front of the jury.

***The retention rate of material presented both orally and visually is three times longer than either kind of presentation alone.***

Admissibility of Demonstrative Exhibits

Demonstrative evidence is cool and persuasive, but how do we take that next step and place it in the jury room for deliberations—the real final argument? It is really not that hard. With a few basic predicates and some supporting substantive evidence, demonstrative aids are generally no problem to admit into evidence.

Demonstrative evidence is typically admissible if it is shown to be relevant, if it will assist a witness in explaining his or her testimony, and if its probative value outweighs its prejudicial effect.e As a result, the primary foundational elements for the use of demonstrative proof should be that it relates to a piece of admissible substantive proof, fairly and accurately reflects the substantive proof, and aids the trier of fact in understanding or evaluating the substantive evidence.[6] In other words, the demonstrative aid must be relevant and the witness must testify that it will help with his or her explanation to the jury. Whether a particular exhibit is to be used as an aid or admitted into evidence may well depend on the difficulty of laying the predicate for admissibility, and the trial judge's attitude regarding admissibility of demonstrative evidence. The trial judge is given broad discretion in determining whether to admit or reject evidence, and the judge's ruling will be overturned only when there is a clear abuse of discretion.[7] If you want to admit a medical illustration of the heart in a medical malpractice case, the exchange with your expert would go as follows:

Q1: Dr. Jones, you intend to testify regarding the condition and function of a healthy heart in order to explain the actual complications Mr. Patient suffered from prior to the operation?
A1: Yes
Q2: And for the benefit of the jury, you intend to use this diagram of the heart, which we have marked as Exhibit 13 for identification?
A2: Yes.
Q3: Does Exhibit 13 fairly and accurately reflect the condition and function of a healthy heart?
A3: Yes.
Q4: Your honor, Defendant moves to admit Exhibit 13.

Now, your show-and-tell can begin. Everyone can see and hear at the same time. I know, I know, you are thinking "objection, leading. You can't do that on direct with your own witness." Not true. Rule 104 permits you to suspend the Rules of Evidence when you present issues regarding the admissibility of evidence.[8] So what you have done is lead the witness in a perfectly acceptable way through the predicate to admit a demonstrative exhibit.

As the proponent of demonstrative evidence, you may also need to respond to a Rule 403 objection. The balancing approach of Rule 403 states that evidence, even though otherwise admissible, "may be excluded if its probative value is substantially outweighed by the risk of: (a) undue prejudice, confusion of issues, or misleading the jury; or (b) undue delay,

*continued, next page*

**DEMONSTRATIVE EVIDENCE**
*from page 9*

waste of time, or needless presentation of cumulative evidence."[9] This "catchall" objection is used frequently as a last resort by those attempting to exclude demonstrative evidence. Generally, courts welcome and appreciate demonstrative aids, but be prepared to have a sponsoring witness testify that the demonstrative aids fairly and accurately represent some substantive evidence (see Q3 in the example above), and that the demonstrative evidence will help explain his or her testimony to the jury (see Q2 in the example above).

Summary Evidence: Demonstrative Exhibits and Rule 1006

To increase the power and persuasiveness of demonstrative exhibits, use Rule 1006 to amplify and drive your point home. Summary exhibits can be made into demonstrative exhibits and are one of my personal favorites; they are one of the most persuasive advocacy weapons you have in your exhibit arsenal. Think about how often we, as lawyers, use summaries and why we do it.

We summarize depositions, documents, and arguments. Should we not also use summaries to make life easier for the jury? Summaries provide the jury with the highlights of voluminous and otherwise inaccessible information. Summaries save time and clarify testimony. They may be made from documents or computer records:

> The contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.10

The rule authorizes the use of charts, summaries, or calculations, instead of the original documents, where the underlying documents cannot be conveniently examined in the courtroom in the presence of the jury. A proper predicate must be laid showing what the underlying documents are and explaining how they were created.[11] If the proper predicate is laid and the underlying records are admissible, a summary will, likewise, be admissible.[12] The underlying documents need only be made available for inspection by the opposing side to allow for determination of the accuracy of the summary.

***A summary chart of evidence can be a very effective demonstrative aid.***

There is a difference between a summary of voluminous records and a visual aid that is prepared from some other evidence in the case. That difference was the subject of discussion in Speier v. Webster College,[13] in which there was an attempt to offer summaries of portions of the testimony of several different plaintiffs on the amounts of their lost wages. The court ruled the summary admissible, holding as follows:

> [C]harts and diagrams designed to summarize or perhaps emphasize the testimony of witnesses are, within the discretion of the trial court, admissible into evidence. This assumes, of course, that the testimony summarized is admissible and already before the jury. We recognize that such summaries are useful and oftentimes essential, particularly in complicated lawsuits, to expedite trials and to aid juries in recalling the testimony of witnesses.[14]

Our goal as trial lawyers is to synthesize, from the mountains of documents, volumes of testimony, and a mass of confusion, a concise, credible explanation of what happened.

# Mark your Calendars!

(Look for brochures in the mail and find information on the Trial Lawyers Section's website: www.flatls.org)

**2010**

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| **January 20 – 23** | **The Florida Bar Midyear Meeting**<br>Hilton Orlando |
| **January 20 – 21** | **Chester Bedell Mock Trial Competition**<br>Hilton Orlando and Orange County Convention Center |
| **January 22** | **Executive Council Meeting**<br>Hilton Orlando |
| **February 1 – 2** | **Civil Trial Certification Review (0987R)**<br>Tampa Airport Marriott and Webcast |
| **March 4** | **Topics in Evidence (0994R)**<br>Co-sponsored with Criminal Law Section<br>Tampa Airport Marriott and Webcast |
| **April 22 – 25** | **Executive Council Meeting**<br>Santa Fe, New Mexico |
| **May 7** | **Maritime Law Update (1021R)**<br>TBA, Ft. Lauderdale<br>Co-sponsored with Admiralty Law Committee |
| **May 11 – 15** | **Trial Advocacy Seminar (1024R)**<br>University of Florida, Gainesville |
| **June 23 – 26** | **The Florida Bar Annual Meeting**<br>Boca Raton Resort & Club, Boca Raton |
| **June 25** | **Executive Council Meeting**<br>Boca Raton Resort & Club, Boca Raton |

Moreover, the explanation must be a coherent and persuasive story that allows our client's version of the facts to come through clearly and comprehensibly.

Consider this problem: 13 plaintiffs contend that Acme's operations at its local plant are a nuisance and have diminished the value of the plaintiffs' property. You have great evidence that the county tax appraiser has increased the value of each plaintiffs' home every year for the last three years, including last year after the Acme production plant went operational.

You can make this point with each of the 13 plaintiffs as they testify, but your point would be defuse, repetitive, and boring. How do you organize and synthesize the property valuation data for all 13 plaintiffs to make your point powerfully and persuasively?

The recipe is easy: You call the county tax appraiser, create a chart that summarizes the tax data and apply liberal amounts of Rule 1006. Create a chart that compiles all 13 property tax appraisals for all three years into one single chart. As long as the county tax appraiser confirms that the data is accurate, the originals were made available to opposing counsel, and the data is voluminous, most judges (except for the most strict "evidentiarian") will admit your summary exhibit. Be sure to add a line in your summary that shows the average annual value increase to really drive your point home. Here is how it would sound:

Q1: Now Mr. Tax appraiser, as the county's highest tax official, have you reviewed the appraisals for each of the plaintiffs' property?
A1: Yes.
Q2: And the results of your appraisals have previously been admitted as Exhibits 13-26 in this trial?
A2: Yes.
Q3: Based on those documents, have you prepared Exhibit 27, which is a summary of these property values and their percentage increase?
A3: Yes.
Q4: Are the values and percentage increases for each of the 13 plaintiffs' property fairly and accurately reflected in Exhibit 27?
A4: Yes.
Q5: Move to admit Exhibit 27.
JUDGE: Exhibit 27 is admitted.
Q6: Mr. Tax Appraiser, as the highest tax official in the country, can you tell the jury how much the average value of the plaintiffs' property increased in the year Acme's plant went into operation?
A6: Yes. 6.2 percent increase on average.
Q7: In your professional opinion, did the plaintiffs' properties go up or down in the year Acme's plant went into operation?
A7: The average plaintiff's property increased in value 6.2 percent.

Once in evidence, your self-created, wonderfully argumentative, and powerfully persuasive chart goes into the jury room and continues to make your points well after you have stopped talking. If you are lucky, one of your friendly jurors will hold your demonstrative evidence up during deliberation and repeat your arguments based on the chart. What could be better than a juror wielding your own demonstrative evidence to make your point long after you sit down?

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**Endnotes:**

[1] Roy Kreiger, Now Showing At A Courtroom Near You, 78 A.B.A. J. 92 (Dec. 1992).
[2] Bloom Strategic Consulting, Inc., a litigation and communication strategy firm, www.bloomstrategy.com
[3] See William S. Bailey, Lessons From 'L.A. Law' winning through Cinemagraphic Techniques, TRIAL, Aug. 1991, at 98.
[4] H. Weiss and J.B. McGrath, Technically Speaking: Oral Communication for Engineers, Scientists and Technical Personnel (McGraw-Hill 1963).
[5] See Fed. R. Evid. 403; Tex. R. Civ. Evid. 403; Ford Motor Co. v. Miles, 967 S.W.2d 377, 389 (Tex. 1998).
[6] See Robert D. Brain and Daniel J. Broderick, Demonstrative Evidence: Clarifying its Role at Trial, Trial, Sept. 1994, at 74; The Derivative Relevance of Demonstrative Exhibits: Charting Its Proper Evidentiary Status, 25 U.C. Davis L. Rev. 957, 968 (1962).
[7] See Geoff v. Cont'l Oil Co., 678 F.2d 593, 596 (5th Cir. 1982).
[8] Fed R. Evid. 104
[9] Fed R. Evid. 403
[10] Tex. R. Evid. 1006
[11] Baylor Med. Plaza Servs. Corp. v. Kidd, 834 S.W.2d 69 (Tex. App – Texarkana 1992, writ denied).
[12] Victor M. Solis Underground Util. & Paving Co. v. Laredo, 751 S.W.2d 532 (Tex. App. – San Antonio 1988, writ denied).
[13] Spier v. Webster Coll., 616 S.W.2d 617, 619 (Tex. 1981) (internal citations omitted).
[14] Id.

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