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Communication Strategies for Experts

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Trying Complex Litigation Cases

Complex litigation trials (which typically include evidence beyond the experience of the average juror) pose a challenge to litigators because of the difficulty jurors often have understanding subjects of a technical nature. An American Bar Association study (Loftus, et al., 1990) concluded that "More than 80 percent of judges polled responded that they had presided over cases they believed were too complex for a jury to render a fair verdict."

Use of Expert Witnesses

Using expert witnesses is a proven way to address the situation. Providing jurors with a credible expert can be an important strategy to help jurors understand complex subjects. But an effective expert needs more than knowledge. They must be able to

effectively communicate this knowledge in a manner that the jurors can use to help them decide who will prevail.

The use of expert witnesses has been a staple in complex litigation for a number of years. A National Science Foundation study by Cooper (1995) found that 86 percent of civil cases used expert witnesses, with an average of four experts in every trial. Rule 702 of the Federal Rules of Evidence states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

Juror Decision-Making

Litigators faced with a jury struggling to understand the issues surrounding a case may benefit from a model of how jurors reach verdicts.

Pennington and Hastie (1986) proposed the concept of "story" to model the process of juror decision-making. Jurors construct a tenable story to make sense of the evidence. This story is a narrative

summary consisting of those elements deemed by the juror to make the most sense out of the events that had transpired through the trial process. Jurors discard those elements that do not fit the story. Pennington and Hastie (1992) set out to verify their model using mock trials and juries. Consistent with the model, they conclude jurors were more likely to decide a case based on whose presentation of the evidence made it easiest to construct a story.

Jurors need complex issues presented in a manner that makes them understandable and usable as elements in the construction of their story. Expert witnesses' role in the trial is to present the information, based on the evidence, in such a way that the juror can integrate it into the construction of their story. If there is conflicting information from another expert witness or attorney, the juror will use whichever information makes the most sense to their evolving story. What can the expert witness do during their presentation to make it as easy as possible for the juror to choose their side's information (either plaintiff or defendant) over the other side's information to build on their story?

Interviews by the author with experienced expert witnesses provide anecdotal evidence that the credibility of an expert witness is an important consideration. An expert whose expertise and integrity are established before testimony on the evidence begins is more likely to be believed by the juror than one with less established credibility. It is easier to build a story based on the testimony of the expert who is most credible.

Learning with Visuals

Attorneys and expert witnesses have long used graphic exhibits to assist them in telling their stories. Beck (1984) reports the use of demonstrative evidence exhibits in court as early as 1851 when attorneys used diagrams to explain the coagulation properties of human blood in an assault case. Research supports this use of visual tools to deliver information. Drew (1984) found that those who deliver information had to repeat it less often for users to retain it in memory when they presented the information through visual means as compared to auditory means. Dombroff (1983) reports on research finding that

users retain information more effectively when it is presented visually and orally rather than just orally. After three hours, participants retained 20 percent more information introduced in a combination visual-oral presentation than in a purely oral one. After 72 hours, they remembered more than six times more of a combination visual-oral demonstration than a purely oral one.

This attention to visual means of communication is hardly surprising when considering that humans have used their eyes to process information far longer than they have used formal language. This preference for visual processing is born out by U.S. Census (1998) statistics that show that in 1996 each American watched an average of 1616 hours of television (combined with home video), compared to 343 hours of combined reading of newspapers, magazines and books.

Expert's Use of Demonstrative Evidence Solutions

Demonstrative evidence, when used correctly, can be an effective tool for an expert to make it easier for jurors to understand their testimony. Properly

designed exhibits can help the jury to focus on and remember the key points of the case. Video graphics can visually portray an incident too complex for words alone to describe.

Common sense should guide the use of demonstrative evidence. It should always be prepared to support the expert, not stand on its own. It should be a well-integrated piece of the expert's testimony – relevant and compelling. The expert needs to be rehearsed and comfortable while presenting whatever form of demonstrative evidence is used.

When cameras can't portray the incident because of the expense or danger in re-creating the incident, or because alternate scenarios need to be portrayed, attorneys and expert witnesses use video graphics consisting of animations (illustrating witness or expert testimony) and simulations (physically accurate recreations).

Video graphics can be presented on videotape or on DVDs. Recent advances in DVD technology have made these an affordable and effective option. Greater navigation control and superior quality

provide the expert a better presentation media than traditional videotape can supply for any video source – including scene video, news coverage and video depositions.

Day-in-the-life videos portray a client's life and how it has changed as a result of whatever incident brought the parties to court. Videotaped footage and photograph-based computer generated virtual panoramas of the scene of an incident are used to bring the site “virtually” to the courtroom.

Other means of presenting evidence include traditional posterboard exhibits. These may consist of enlarged photographs, scene drawings, and timelines, text excerpt from documents and depositions, and frame grabs from videotape. Scale models are another way to help jurors visualize objects such as mechanical devices and components.

Computer-based presentations are becoming more useful than ever. From simple text-based slide shows to sophisticated graphics-based interactive exhibits, these presentations can be an effective means to present evidence.

The following factors may be considered when choosing a firm to provide demonstrative evidence:

- Examples of their work
- References
- Experience working with trial attorneys
- Experience working with experts
- Experience testifying (if needed)
- Knowledge of admissibility implications
- Professional product
- Art is not enough – need knowledge of communication issues and appropriate technical expertise
- Experience makes a difference – both in quality and efficiency

Demonstrative evidence may be effective not only in trials but throughout the litigation process. There are benefits for its use in arbitration, mediation and settlement conferences.

Conclusions

During complex litigation, courts expect jurors to make critical decisions about issues beyond their experience. Using the story model, jurors construct as best they can a narrative story to represent

what happened. They choose the evidence that best makes sense and is easiest to construct into a story. To improve the effectiveness of jurors in complex litigation, it is important to facilitate this story building process as much as practicable. Expert witnesses testimony using graphical tools can be a successful solution.

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