DIRECT EXAMINATION - PLAINTIFF'S PERSPECTIVE

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Direct examination is one of the most important, yet least appreciated, aspects of trial. Attorneys often devote substantial time and effort to prepare their opening statements, cross-examinations and closing arguments but spend only minimal time and effort on their direct examinations. However, unless the plaintiff proves the case to the satisfaction of the judge, jury and appellate courts, all the effort is wasted as the case will either be dismissed, lost, or reversed on appeal. This paper will provide some practical suggestions to assist the practitioner in creating and executing effective direct examinations.

I. PROVING YOUR CASE

Since the plaintiff bears the burden of proof, plaintiff's counsel must carefully prove all the elements of the claim during the plaintiff's case in chief.

A. Elements of the Cause of Action

Before agreeing to take the case, you should research the law as to the required elements of the causes of action involved. Ultimately, to succeed on the claim, you must provide substantial evidence of each element. *The Alabama Pattern Jury Instructions* provide a literal road map. Use this early and often.

B. Trial Plan

Consistently successful lawyers almost always have a written trial plan with a checklist of elements of proof and a reminder of main trial themes. Even the most complex

trial can be reduced to the basic elements that must be admitted into evidence and the main trial themes that must be followed to maximize the chances of a successful verdict. Airplane pilots use checklists of basic safety requirements each and every time they fly. Similarly, trial lawyers should never think that they are too experienced or smart to rely on a written checklist. Set your ego aside and write it down. You will never regret having done so.

II. PREPARE, PREPARE, PREPARE

Excellence inside the courtroom only comes from many long and painstaking hours of preparation outside the courtroom.

A. Contact Your Witnesses Well Ahead of Time

Send your witnesses advance letters and always subpoena them. Ensure that the subpoenas go out on time and that they are served with plenty of notice. Have copies of served subpoenas in your file. Contact the witnesses well ahead of time so that they are there and dressed appropriately to testify.

B. Prepare Your Witnesses

Do not rely upon others to do this for you. Take the time to get in your car and go meet them in their environment. You will always learn something about your witness that will come in handy at trial if you go to their home or place of business and meet them rather than simply seeing them outside in the hall at the courthouse for the first time. Establish a relationship with them. Prepare them by literally going through their testimony to avoid any surprises. Rehearse, but do not memorize. If you have to use a foundation with them to

introduce evidence, cover this. Otherwise, they may be confused when you use the magic words.

C. Prepare Your Witnesses Not Only As to the Content of Their Testimony But Their Method and Style of Delivery

Style points matter. It is not always what the witness says, but how the witness says it that is persuasive to the fact finder. Presenting a mean, curt, impolite or otherwise unlikeable witness to tell your side of the story is a recipe for failure. You want the most likeable, confident and believable witnesses you can find. Of course, many times we have no choice as there was only one eyewitness to an event and if that person is critical to present at trial, then you are simply stuck and will have to do the best you can. However, even difficult witnesses can be coached to some degree to put their best foot forward. The bottom line is that the practitioner must make the effort well ahead of trial.

D. Use Stipulations

Most judges appreciate your having defense counsel stipulate to basic items such as medical bills, lost wages, tables, indices, summaries, damage calculations, etc. Think ahead and have the judge help you during the pretrial conference. This will make your life much easier during your case in chief.

III. ORDER OF WITNESSES AND PROOF

When the trial judge turns to you and says, "Call your first witness . . . ," you are in control of your case. You decide which witnesses to call and the order in which you present them. Although you have the list of elements from the jury charges, the last thing you want

to do is follow it. The order of the elements is immaterial. All you have to do is be sure to get them all into the record before you rest and face the inevitable motion for judgment as a matter of law.

Only you know the strengths and weaknesses of your case and how you should best present the case to the jury. You must spend long and hard hours critically thinking about what will make the best impact and how you should orchestrate your presentation.

IV. NEVER BORE YOUR JURY

This principle is so basic that one would assume that lawyers would never violate it. That assumption would be wrong. There is painful proof of this violation every day in courtrooms throughout our country. The jury is not there by choice - they are a captive audience. The last thing you, as plaintiff's counsel, want to do is further punish them with boredom. Be prepared and organized, make your points effectively and sit down. Never disrespect them by wasting their time.

V. LET THE JURY KNOW WHY EACH WITNESS IS IMPORTANT

Begin with the "almost ultimate question." When you call a witness, the jury collectively wonders who is this witness, why is she here and what does she have to say? Do not waste time before you let them know. For example: "Ms. Smith, were you an eyewitness to this wreck? At the end of your examination will you be able to tell us which of the two cars ran the red light? Now before we get there, let me ask you . . . " You can do this with virtually any witness. For example: "Dr. Walker, at the end of your examination, will you be

able to tell us your opinion as to the cause of Ms. Williams' death? Now before we get there, let's talk about your background and training . . ."

By giving this quick introduction, the jury will then know why the witness is there, what she is ultimately going to say and why they should be listening to her. Don't make it a mystery!

VI. ESTABLISH THE WITNESS'S VANTAGE POINT

It is critical that you establish the witness's credibility for the jury by establishing that the witness was in a position to observe what it is that he has been called upon to testify. Consider the following testimony presented at trial:

> "I saw the defendant sitting at the table. Suddenly, he reached over to the next table, grabbed the salt shaker, and threw it at the stage. The shaker hit the lead singer in the left eye, who screamed and fell off the stage, holding his eye."

If you were trying to prove that the defendant hit your client with a salt shaker, would this be enough proof? Or would the jury have some doubts about the testimony? If this was the only testimony the jury heard, consider the questions they might have about the testimony:

- Why should we believe him?
- How do we know he saw what he says he saw?
- Where was he located when he saw the shaker thrown?
- What is his ability to remember or recollect the events?
- Why was he paying attention to the defendant rather than watching the stage?
- What was the lighting like? How much could he see?

- Is there any history between the witness and the defendant?
- Were there any obstructions between the witness and the defendant?
- How close or far away was he when the shaker was thrown?
- Does he have any interest in the outcome of this trial?

"And that's *before* he's even cross-examined! Why do they have so many questions? Because you didn't take the time to establish the witness's vantage point - his ability to see, hear or know the things about which he testified."

The Importance of Establishing the Witness's Vantage Point During Direct Examination by Elliott Wilcox, www.trialtheater.com/direct-examination/direct-examination-vantage-point.htm, Printed 9/7/2012

VII. CONTROL YOUR WITNESS ON DIRECT

Use "topics" or "headers" to unintrusively direct your witness to the topic you want to address. An easy method of doing this is simply to announce the new topic. In his article entitled "Direct Answers" published in the *ABA Journal* May 2012, Professor Jim McElhaney explains the value of controlling your witness by using the topic or headline method as follows:

> ". . . you want to guide the witness - direct where the testimony goes, point out the areas that need filling in with much more detail - without looking like you're Geppetto, standing over his puppet and pulling the strings.
>
> "Doing all that so it sounds conversational is one of the reasons why direct examination is much harder than cross. How can you possibly do it? By using the headline method of direct.
>
> "Before each new series of questions, announce the topic: the headline that tells the witness - and everyone else - what the subject is going to be.

"Does it point the witness in the right direction?

"Without a doubt. For example: Mr. Dougan, I'm going to ask you some questions about your association with Mabel Schuster. How long have you known her?

"Can you use the headline method to get wandering witnesses back on track? Yes, and so comfortably they may not even notice: "We'll get to your engineering work in just a minute, Mr. Dougan. Right now, I'd like to ask a few more questions about you and Mrs. Schuster."

ABA Journal, May 2012, Page 23.

This method of transition allows you to control the narrative testimony in a non-invasive and conversational manner.

VIII. HIGHLIGHT A GREAT ANSWER BY REPETITION

When you get a great answer from a witness, we have all heard that we need to repeat that answer in some way. However, pure repetition will likely draw a sustained objection. To do it in a way that may not draw an objection, you might simply ask other questions while incorporating the key phrase from that great answer.

For example, in a medical negligence case, assume a pulse oximeter's alarm sounded during the course of an operation after the patient's endotracheal tube was removed. Not only must you highlight this fact, but you must emphasize the amount of time that passed before remedial medical action was taken. Although you could ask a nurse, "What happened next?," that question fails to dramatize the event. The better approach is to highlight it by repeating the key words in follow-up questions for better emphasis:

Q When the alarm on the patient's pulse oximeter went off, who was present?

Q At the point when the alarm was ringing, what did you do?

Q When the alarm first sounded, how many doctors were present?

Q How long did the alarm ring before corrective measures were taken?

Q Describe the patient's oxygen saturation levels from the time when the alarm first sounded to the time when the alarm stopped ringing?

New York Law Journal, Thursday, September 23, 2004, Ben B. Rubinowitz and Even Torgan.

If the defense attorney objects, it may only serve to highlight the fact that the witness was right there and heard the alarm sounding. You have now told the jury several times what they might have heard only once.

IX. DRAW ATTENTION TO CRITICAL EVIDENCE

Trials are full of surprises. When critically important evidence is offered, you must do something to be sure the jury hears and remembers it. One simple, yet powerful method, is to stop, go to a pad or blackboard and write the key word or phrase. This seems incredibly old fashioned, but it is visually effective. The jury will remember when you stopped and wrote something down if you remind them about that in closing argument.

An old friend who practiced here in Birmingham had a very effective tactic that he perfected. When he got a particularly great answer, he would stop and walk over to the court reporter's machine and with great flair take his pen out of his pocket and mark the transcription paper. (Yes, I am dating this story.) He would then have the reporter print the

marked portion and have it ready for closing argument. It was incredibly effective. Obviously, you only want to do something like that once in a trial.

X. DO NOT LEAD ON DIRECT

"A question is leading when it suggests the answer to the witness or contains the information that you are looking for. The best way to avoid asking leading questions during direct examination is ensure your questions start with one of Rudyard Kipling's honest serving men:

> "I keep six honest serving men,
> "(they taught me all I knew)
> "Their names are **What** and **Why** and **When,**
> "and **How** and **Where** and **Who.**"

Rudyard Kipling, *The Elephant's Child* (1902).

In addition to these magic words, you can also use the words **Explain** or **Describe.**

Remember, your goal on direct examination is to make the witness the star of the show. Whenever you ask leading questions, you shift the focus away from the witness and toward yourself. You aren't the one testifying. The jury doesn't want to hear from you – they want to hear from the witness. Make sure that you start each of your questions with any of these magic words, and you'll avoid 99% of all Leading objections."

http://www.trialtheater.com/wordpress/trial-skills/direct-examination/stop-leading-your-witness, Printed 9/7/2012.

The ideal direct examination is flowing and uninterrupted, as the direct examiner gives the witness an opportunity to tell a story to the jurors. Whenever possible, non-leading

questions should be used on direct examination. Using leading questions, which must be answered "yes" or "no" restricts the witness's opportunity to speak, and the jurors may suspect that the lawyer is putting words in the witness's mouth. If the witness projects honesty and intelligence, one wants to use open-ended non-leading questions. Such a witness should be put on display for the jury. The witness should be the center stage. Juror psychology studies suggest a further reason to avoid leading the witness. When the jurors note that the attorney is leading a particular witness, they tend to infer that the attorney is doing so due to a lack of faith in the witness. Understandably, after drawing that inference, the jurors discount the witness's credibility. *See, Alabama Evidentiary Foundations*, Terry L. Butts, Charles W. Gamble and Edward J. Imwinkelrieid, Page 5, Copyright 1999.

XI. FORCE THE NARRATIVE

Questions that begin with the following words detract from allowing the witness to narrate a story: did, didn't, were, weren't, have, haven't, had, hadn't, could, couldn't, should, shouldn't, and so on. If answered responsively each of these words at the start of a question calls for a "yes" or "no" answer. For example:

Q Did he walk into the store?

Q Did he take out a gun?

Q So, he held the gun to the woman's head?

These questions merely seek confirmation. In actuality, it is the lawyer who is testifying. The better approach on direct is to begin the question with words that call for and force the narrative: who, what, when, where, why, how, describe, explain, elaborate, define, or tell us.

These words at the beginning of a question invite the witness to talk. They also prevent the witness from answering a question with a "yes" or "no" response. For example:

Q Where did he walk?

Q When did he enter the store?

Q What did he do when he entered the store?

Q Tell us, step by step, what happened at that moment.

New York Law Journal, Thursday, September 23, 2004, Ben B. Rubinowitz and Even Torgan.

XII. TELL A "STORY"

Do not legalize your case. Let your story and your theme pick your words, not the law books. You can always tell the judge what the words meant in legalese later when you are defending your right to go to the jury.

XIII. USE PLAIN LANGUAGE ON DIRECT

In his article entitled "The Plain Truth" published September 2012 in the ABA Journal, Page 28, September 2012, Jim McElhaney urged lawyers to use simple words to communicate effectively:

> "Because we are professional communicators, it is our obligation to be plain and simple. It is not our reader's and listener's jobs to try to understand us. It is our job to make certain that everything we write and say commands instant comprehension."

Similarly, the authors of *Alabama Evidentiary Foundations* advise:

> "Use the simplest, most easily understood terms. The trial attorney must communicate effectively with laywitnesses and jurors. Such effective communication requires the use of lay language. . . . There is no need to resort to words like 'prior'

> and 'subsequent' if 'before' and 'after' will do quite nicely. There is no justification for using 'altercation' when the more common synonym 'fight' is available. Trial attorneys should realize that the examination of witnesses is a test of communicative skill rather than vocabulary."

Alabama Evidentiary Foundations, pp. 2-3, Terry L. Butts, Charles W. Gamble and Edward J. Imwinkelrieid, Copyright 1999.

Finally, there is an inverse relation between the length of a sentence and it's comprehensibility. The longer the sentence, the lower the level of reader or hearer comprehension. Rudolph Franz Flesch, *How to Write Plain English: A Book for Lawyers and Consumers*, 20-32 (1979).

Remember, you are not there to impress the jury with your vocabulary. You are there to effectively and concisely provide them the evidence they need to support a verdict for your client. Get out of the way and let it happen. This is not about you.

XIV. SIMPLIFY A COMPLICATED CASE

As plaintiff's counsel it is your job to develop a consistent theme and simplify the evidence so that each element is evident to every juror. Although the facts in the case might be incredibly convoluted and complicated, virtually every case can be reduced to a handful of main issues that, if proven, will justify the jury's verdict in your client's favor.

For example, where there are voluminous records, they may be summarized to effectively present them to the jury. The *Federal Rules of Evidence* and the *Alabama Rules of Evidence* specifically provide for the admission of such summaries in Rule 1006:

> "The contents of voluminous writings, records, or photographs 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 reasonable time and place. The court may order that they be produced in court." (Emphasis added)

Another way for lawyers to organize complex evidence is to think of them in "buckets" of facts by topic, issue, or claim.

> "Thinking about the evidence in buckets will, hopefully, drive a reasoned decision about where the focus of the evidence should be. More importantly, looking at the evidence in this way forces you to confront problems of proof, and issues for which there is little or no evidence."

How to Uncomplicate the Complicated by Michael A. Geibelson and Roman M. Silberfeld, Consumer Attorneys of California Forum, June 2006, Page 22-25.

Once the "buckets" of information have been established, they may be more easily utilized in graphics and time lines.

XV. ALWAYS PLAN YOUR FOUNDATIONAL QUESTIONS AHEAD OF TIME

Before trial, lay out all of the critical pieces of evidence and plan how to properly offer them. They will do you no good unless you get them into evidence. The general rules for laying foundations apply to direct examination. The direct examiner should lay a proper foundation before offering the evidence. Since this subject is much too broad to be covered in this article, the practitioner is referred to *Alabama Evidentiary Foundations*, Terry L. Butts, Charles W. Gamble and Edward J. Imwinkelrieid, Copyright 1999, for an exhaustive review

of Alabama law on this topic. This excellent treatise contains numerous examples of exactly how to lay a proper predicate for the admission of various types of evidence.

XVI. FACE YOUR WEAKNESSES ON DIRECT

If you are actually trying a case to a jury, it most likely is not a perfect case. The perfect case will be purchased from you by the defense attorney. You don't get to try those. You get to try the cases that have problems. They have weaknesses. They have "warts." You know about them and the defense lawyer knows about them. She is going to exploit those weaknesses. Your job on direct is to go ahead and face the music and address those problem areas in your case. You need to do this on direct to minimize the sting of what is coming on cross. One very effective way of doing this is to do a "mini-cross" of the witness. For example, in a products liability claim the plaintiff's right foot was crushed due to the lack of a door on a utility terrain vehicle.

Q John, we heard in opening statement that you were not wearing your seatbelt on the UTV when it tipped over. Is that true?

A Yes, sir.

Q Can you tell us why you were not wearing it?

A Because we were just going down the path about 100 yards to get to the cornfield and we were going slow.

Q Now your right foot was crushed by the side of the UTV when it came out [because there was no side door]; correct?

A Yes, sir, that's the only thing that got hurt.

Q When the UTV tipped over, where were you?

A I was still in the seat - my butt was in the seat.

Q If you had been wearing the seatbelt, where would your foot have gone?

A It would have gone exactly where it got crushed. So the seatbelt would not have helped.

This is an excellent strategy to employ on direct to innoculate the jury to the issue before your client is cross-examined. If done correctly, by the time defense counsel attacks your client for not wearing the seat belt, the jury will already be answering for him in their minds. "No, he didn't have it on, but it didn't matter anyway!"

XVII. ASK FORGIVENESS

Humans are imperfect creatures. We all make mistakes. But humans are willing to forgive. We seem genetically predisposed to it. Although we will punish those who claim to be perfect, we consistently forgive and understand those who confess their shortcomings. As long as you can have your witness confess the failure to the point that it does not destroy the case, you should attempt to do so. Jurors will forgive the plaintiff's imperfections if the plaintiff truly admits the issue and seeks forgiveness. Whatever you do, do not ignore the problem and hope it will go away. It won't.

XIII. TIMING AND STAGING

The courtroom is truly real life theater. Jurors desire and expect to be entertained. You must plan and decide ahead of time exactly where you want to place your key exhibits

to ensure an effective, smooth and cohesive presentation. Visit the courtroom before trial, get in the jury box and check all sight lines.

The timing as to when certain witnesses testify is also critical. A certain defense lawyer friend of mine is a master at this. He has a maddening knack for timing and gauging his direct examination of his key witnesses so that they end just in time for the lunch or evening break, thereby postponing any cross-examination. For years I thought it was a coincidence. It was not. Ending on a very high note and having the jury retire for lunch or the evening break gave him the advantage of having his best evidence percolate uncontested for hours or days in the jurors' minds.

XIX. TAKING DEPOSITIONS TO USE AS DIRECT EVIDENCE AT TRIAL

Virtually every case you have will require at least some depositions for use at trial such as medical doctors, out-of-state witnesses and 30(b)(6) representatives. Videotape these so the jury will get to see and evaluate the witness rather than listen to you read a deposition.

Energize the video by using "show and tell" items such as medical illustrations, models, graphs, etc. Remember as you take the deposition that your jury is there with you. This is not just a regular discovery deposition. Think it through and keep it short and simple. You are not in a deposition room in Chicago - you are in court.

XX. SHOW AND TELL - THE CASE FOR DEMONSTRATIVE EVIDENCE

Tangible evidence is interesting evidence. The child within us enjoys touching and feeling, smelling and tasting. The abstract and sometimes boring world of testimonial evidence should be punctuated wherever possible with something tangible or visible for the jury.

Admission of tangible items involved in an event make the event itself come to life. The well-worn cliches, "a picture is worth a thousand words" and "seeing is believing," are used and misused so often that we fail to appreciate their inherent truths. Using demonstrative evidence in the courtroom is nothing more than a natural extension of the influences which affect us every day. As consumers we "comparison shop," "test drive," and "taste test." It is naive to expect that jurors, when called upon to make the ultimate decision in a lawsuit, will behave much differently in the jury room than they do in their everyday lives.

Most importantly, psychological studies conclusively show the power of demonstrative evidence when combined with aural testimony. For example, when people are instructed through the auditory modality alone, and recall is subsequently tested, they only recall about 10% of what they heard, in contrast to recalling about 85% of information presented orally in combination with visual aids. Gail A. Jaquisch, James Ware, *Adopting an Educator Habit of Mind: Modifying What it Means to "Think Like a Lawyer,"* 45 Stan. L. Rev. 1713, 1720 (1993).

Similarly, in his book, *Jury Persuasion: Psychological Strategies & Trial Techniques, Prentiss Hall Law & Business* (1993), Dr. Donald E. Benson reports a study showing that jurors will learn from what they hear and what they see, but most of all from what they hear and see <u>at the same time</u>. The study reported by Dr. Benson shows that after 72 hours jurors retain 10% of oral evidence, 20% of visual evidence and 65% of a combination of visual and oral evidence. This means an increase of 100% is retained after 72 hours if it is visual rather than oral, and an increase of 650% is retained if it is a combination of visual <u>and</u> oral. The

frightening part of the many studies that reach similar conclusions is that without any visual aid, jurors only remember one-tenth of the evidence we present to them!

Rule 102 of the *Alabama Rules of Evidence* promotes the admission of tangible evidence. It provides that the Rules of Evidence ". . . shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Additionally, Rule 401 of the *Alabama Rules of Evidence* provides a liberal rule of relevancy under which the Judge may admit demonstrative evidence. Rule 401 provides:

> "Relevant evidence means evidence having <u>any tendency</u> to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

In the absence of some exception, all relevant evidence is admissible. Ala. R. Evid. 402.

"Demonstrative evidence is admissible so long as the proper foundation is laid. *See, e.g., Griffin v. Gregory*, 355 So.2d 691 (Ala.1978). The admissibility of such evidence is within the trial court's discretion and, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *Payne v. Jones*, 284 Ala. 196, 224 So. 2d 230 (1969)." *Standard Plan, Inc. v. Tucker*, 582 So. 2d 1024, 1033 (Ala. 1991). Properly used, the graphic illustration of testimony by maps, charts, diagrams, etc., is of great aid to

fact finders and should be encouraged by trial courts. *Crocker v. Lee*, 261 Ala. 439, 74 So.2d 429, 436 (Ala. 1954). " 'The pertinent rule [for demonstrative evidence] is that articles or objects which relate to or tend to elucidate or explain the issues or form a part of the transaction are admissible in evidence when duly identified and shown to be in substantially the same condition as at the time of the occurrence.'" *Jasper Coca Cola Bottling Co. v. Breed*, 40 Ala. App. 449, 115 So.2d 126, 129 (1959) (quoting *Liberty National Life Insurance Co. v. Weldon*, 267 Ala. 171, 100 So. 2d 696, 712).

The admission of demonstrative evidence is largely discretionary with the trial judge and is principally governed by *Alabama Rules of Evidence* 611(a), which provides:

> "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." (Emphasis added.)

Ala. R. Evid. 611(a).

Demonstrative evidence typically falls into either two types of categories: (1) evidentiary items (oral testimony placed in an exhibit, written exhibits, photographs, videotape, etc.) and (2) non-evidentiary items (chronologies, definitions and treatises, legal principles, graphs and diagrams). Because non-evidentiary items will be used in court for illustrative purposes only, the practitioner will experience the least difficulty introducing non-

evidentiary items to the jury. Therefore, "the only foundational showing required for admissibility of [non-evidentiary items] is proof that the evidence possesses sufficient accuracy as to be explanatory or illustrative of relevant testimony and thus helpful to the trier of fact." *McElroy's Alabama Evidence* § 122.01 (6th ed. 2009) (citing *Whitlow v. Moore*, 246 Ala. 472, 21 So. 2d 253 (1945). Evidentiary items, however, require the practitioner to comply with a number of different areas of evidence law. The evidence must be: (1) relevant (Ala. R. Evid. 401), (2) authentic (Ala. R. Evid. 901-903), and (3) otherwise admissible (hearsay (Ala. R. Evid. 801-807), best evidence rule (Ala. R. Evid. 1001-1009), etc.).

See Appendix A for case citations regarding admissibility of certain types of demonstrative evidence.

XXI. THINGS NOT TO DO WITH DEMONSTRATIVE EVIDENCE

Having encouraged the use of demonstrative evidence, we should also consider some very practical and important "don't's" when using demonstrative evidence before the judge or jury.

A. Don't blow up every document.

The lawyer gets lost handling them and the jury gets bored thinking they are all the same. Pick only the important documents to blow up.

B. Don't ask a witness to draw or sketch even the simplest item unless you have first prepared and practiced with the witness.

Disaster can strike because the witness may be spatially inept. You and the witness will lose credibility.

C. Don't try to authenticate tangible evidence with a live witness without having first prepared the witness. The witness may not be comfortable with nor understand the magic words you need to use in order to lay the foundation. Tell her why you have to use these legal words. She will appreciate it.

D. Don't allow your legal assistant or expert witness to prepare demonstrative evidence without your personal involvement and approval. You know the case, not them. And you must get it into evidence. If it is not correct for your case, you have wasted money.

E. Don't let someone else do a "day in the life film" without your significant presence and/or input. Only you know the injured party and his limitations. Your assistant or professional "day in the life" film maker may not be aware of the special nuances of the case.

F. Don't embarrass the injured plaintiff/witness in front of the jury by displaying his injuries in a tasteless fashion. The best way is to have a live doctor "examine" the patient (client) and demonstrate the injuries to the jury. The jury is much more comfortable with the doctor displaying the injuries to them than they are with the injured plaintiff or the plaintiff's lawyer displaying the injuries to them. Otherwise, use tasteful photographs or videotapes.

G. Don't show extraneous material in photographs. You want the jury's attention zeroed in on the important part of your evidence, not some irrelevant material in the background of a photograph.

H. Don't videotape every doctor's deposition. And if you do videotape a doctor's deposition, keep it short. Have deposition exhibits prepared, premarked and numbered so the deposition runs smoothly.

I. Don't perform any in court "experiment" unless you absolutely have to and you are absolutely sure that it will work. Nothing deflates the momentum of a case faster than a lawyer who tries to conduct an in court "experiment" that is either a dud and does not work or, worse, tends to prove or validate the other side's argument. If at all possible, videotape such "experiments" outside the courtroom and show the videotape. That way, you know they work. Your judge will also appreciate the time savings.

J. Don't pass out admitted exhibits to the jury and then begin questioning the witness. We all learned this in law school, but we tend to get nervous in a silent courtroom and feel compelled to talk. Stop everything while the exhibits are passed and don't rush the jury. Start questioning only after you collect the exhibits from the jury.

K. Don't leave material up on the court projection screen or TV monitors after you are through using them. This is totally distracting to the jurors. Keep their attention where you want it.

L. Don't overlook common, everyday tangible items to make the case come alive. Perfect examples are the baseball glove of the young man who is catastrophically injured and can never play ball again, the clothes the victim was wearing the night of the incident, the actual eye glasses worn by your client at the time of her fatal car crash, the real hard hat and work gloves and other safety equipment worn by your client who was injured in work place

accident. These real tangible items make the case come alive to the jury and should not be forgotten.

XXII. EQUIPMENT USAGE - TECHNOLOGY BLUNDERS

A. Be familiar with the technology.

B. Practice it.

C. Be sure that you don't use technology in a way that is distracting to the jury.

D. When finished, turn it off. You want to direct their attention where you want it.

E. Always have a backup plan - an extra laptop, physical models, charts, diagrams, blow-ups, etc.

F. Be careful not to fall so in love with your new skill that you win the battle but lose the war. Don't waste the jury's time aimlessly demonstrating your technology skills. They will punish you.

XXIII. LISTEN TO THE ANSWERS

Often we lawyers are so wed to our script of questions that we forget to listen to the answer given by the witness to the judge and jury. The following are true courtroom examples:

Attorney: She had three children, right?

Witness: Yes.

Attorney: How many were boys?

Witness: None.

Attorney: Were there any girls?

Witness: Your Honor, I think I need a different attorney. Can I get a new attorney?

* * * * * *

Attorney: How was your first marriage terminated?

Witness: By death.

Attorney: And by whose death was it terminated?

Witness: Take a guess!

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CONCLUSION

Hopefully, these practical suggestions will be helpful to the practitioner. Please send any other direct examination suggestions or techniques that you find effective in your practice to Greg Breedlove (gbb@cunninghambounds.com).