Using Demonstrative Evidence In Employment Trials

Monday, May 07, 2007 --- It is easy to complain about jurors.

Fully half of the lawyers in any trial end up complaining about the jurors after the verdict is returned.

While complaining is simple, what is more difficult is acknowledging that jurors are being asked to do something new and unusual for them, and to take that fact into account in trying to present the case to the jury—to recognize, and attempt to address, the very issues that might create an ineffective or unfavorable juror.

This is particularly true for counsel in employment cases. For plaintiff’s counsel, inattentive jurors can miss critical evidence necessary to establish plaintiff’s claims.

Defense counsel have an altogether different challenge. Where jurors are not focused, they would seem to be more likely to reach a verdict based on factors such as sympathy or fairness, rather than on the evidence.

And in employment cases, which often involve persons who have lost their jobs or are alleged to have been subjected to inappropriate conduct, the plaintiff is much more likely to receive sympathy votes in the jury room than the defendant.

Using demonstrative evidence can assist both plaintiff’s and defense counsel in presenting their cases to a jury and creating effective jurors.

* A Basic Misconception about Storytelling at Trial *

Trial lawyers can be great storytellers. In fact, some have gone on to establish lucrative second careers as authors of legal thrillers based on those skills. Most lawyers can quickly identify a colleague who has a gift for storytelling.

Just how much, though, do those storytelling skills transfer to the courtroom? How much of a trial lawyer’s success in the courtroom can be attributed to his or her ability to tell a story?

Legal commentators and professors have long shared their opinion that the difference between great trial lawyers and weak ones is the ability to “tell a story” to the jury. If you tell a great story, the theory goes, the jury will be enthralled and will be more likely to decide in favor of your client. If you tell a poor story, you will lose the jury’s interest and, consequently, its support.
The theory is an excellent one in the sense that it certainly appears logical: If a jury is listening to what you have to say, it is more likely to agree with you; if it is not listening, it has nothing to agree with.

However, this simple theory is weakened more than a bit when it runs head-on into a number of studies that have been conducted on a different, but related, issue: How much do juries actually retain of what they hear?

For trial lawyers who spend hours polishing their opening statements and closing arguments, and fretting over the details of witness examinations, it can be discouraging to learn how little of what is presented to jurors orally is retained by them.

Over the years, several studies have been conducted, and most seem to conclude that jurors retain as little as 10% to 20% of the content of that which is presented to them orally. See, e.g., John Selbak, The Prejudicial Effects of Computer–Generated Animation in the Courtroom, Berkeley Technology Law Journal, Fall 1994, 338, 352 (citation omitted).

What that means is that the overwhelming majority of that great "story" that a trial lawyer carefully and enthusiastically presents is ultimately lost on the jury. Days, weeks and even months of listening to the judge, lawyers and witnesses talk, and talk, and talk, and talk, and talk can have the effect of white noise on jurors. They experience the phenomenon of talking, but do not hear the actual words.

That critical point you made 30 minutes into your opening statement about the gender breakdown of the employer’s workforce? Lost.

The crucial admission from the plaintiff about his failure to seek other employment, which you obtained on the second day of the plaintiff’s testimony, just before the lunch break? Lost.

The artful manner in which you tied together Fact A and Fact B in the second hour of your closing argument, establishing that Fact C was simply not possible? Lost.

The 24th jury instruction, the one with the critical language about an employer’s liability for an employee’s conduct, the one you fought over tooth and nail? Lost.

In one ear and, eventually, out the other.

The fact that spoken words can be lost in the courtroom is not meant as a criticism of jurors. Their job is an enormously difficult and taxing one, one that challenges them to listen to and recall hours upon hours of speaking at the very time when we know that what we ask of them runs contrary to human nature.
We are not designed to sit in a poorly lit courtroom and listen to day after day of testimony, and to retain all, or even most, of what we hear. Most people can barely sit still for a two hour movie, yet we ask them to sit still in a jury box for days, weeks or months, and somehow expect them to retain every word spoken.

This is not to say that there is no hope. At the same time that studies have concluded that jurors retain a very small percentage of what is presented to them orally, they also indicate that jurors may retain as much as 65% to 80% of that which is presented to them visually or through a combination of oral and visual components. Id. See also Mary Quinn Cooper, Practitioner's Guide—The Use of Demonstrative Exhibits at Trial, TULSA LAW JOURNAL 1999, 567, 568 (footnotes omitted).

The difference in retention that visual elements can make is clearly a staggering one. Present everything orally, and jurors will likely retain 10% to 20%.

Add a visual component, and they may retain as much as 65% to 80%.

One need not be blessed with great intellect to reach the conclusion that appears inescapable: In many, if not most, employment cases, adding a visual component through a demonstrative exhibit can be the key to having the jury receive, understand and remember the essential points of your case.

That does not mean that a trial lawyer’s storytelling skills are worthless. Demonstrative exhibits are support, not substitution, for a well-presented and well-argued case.

Combining a trial lawyer’s storytelling skills with the effective use of demonstrative exhibits could be the difference between winning and losing a case.

That would appear to be true for both plaintiff’s and defense counsel in employment cases.

Defense counsel have to present their opening statements after the jury has already sat through plaintiff’s opening statement, they have to cross-examine plaintiff’s witnesses after the jury has already had to sit through the direct examination, and they have to present their case after the jury has already spent days, weeks, or months sitting through the plaintiff’s case.

Defendants’ counsel, it seems, are always talking to the jury after they have already been tired out by plaintiff’s counsel. Demonstrative exhibits could be the key to getting juries to sit back up and pay attention.

At the same time, plaintiff’s counsel have to be concerned that even attentive jurors may forget the plaintiff’s opening statement, or the plaintiff’s case, after hearing from the defendant. Demonstrative exhibits can remind them of what they heard—and believed—before.
* Over-Simplification of the Jury’s Role at Trial *

To a layperson, the jury’s role at trial is a deceptively simple one: To receive evidence, then apply the law to that evidence. Of course, what sounds relatively straightforward is really a much more complex process.

In order to do their jobs effectively, the jurors must do each of the following:

1. Jurors must remain awake and alert. Do not underestimate how difficult it is for an individual to sit still for hours at a time, listening to people talk in (frequently) monotone voices using legal expressions that (frequently) have no meaning whatsoever to a layperson. It is not unusual for jurors to doze off. And it goes without saying that a juror who is sleeping is a juror who is not receiving the evidence that is being presented.

2. Jurors must understand what is being presented to them. If jurors do not understand the evidence, they cannot make an informed decision based on that evidence. Technical language must be explained in terms they can comprehend. A doctor’s testimony about a patient’s myocardial infarction means nothing to a juror who does not know what “myocardial” or “infarction” mean.

3. Jurors must be able to determine the importance, or lack of importance, of the evidence being presented to them. Not all evidence has the same value. A witness’s testimony about the spelling of his last name is not as critical as his testimony about his whereabouts when a harassing comment was allegedly made. Jurors must sift through the evidence and determine what is important and what is not.

4. Jurors must be able to recall the evidence that is important. Bombarded with evidence, jurors can easily forget the information they identified as important, particularly in a long trial. After several weeks, jurors may have difficulty remembering witnesses’ names, let alone their testimony.

5. Jurors must understand the laws they are to apply. Attorneys argue vehemently over the language of jury instructions, often forgetting that the instructions will provide little help to the jury if the jury does not understand them. How often does a jury make a decision based on whether an action is the “approximate cause” of some event, rather than the “proximate” cause? In considering a harassment case, how many jurors know what the word “pervasive” means?

6. Jurors must be able to articulate to the other jurors how they feel about the merits of the case—and why. Of course, the jurors’ role only starts in the jury box. It continues into the jury room. And, once there, the jurors must be able to tell each other, in words they can all understand, how they feel about merits of the case—and why. A juror who cannot articulate his or her opinion, or support it with references to evidence, is not going to be effective in persuading other jurors. In fact, he or she may not even try to persuade
7. Jurors must be invested enough in the case to care about its outcome. If jurors do not care about the case, they would seem unlikely to want to speak out in the jury room about their feelings about the case. They may be inclined to just go along with the majority just so they can all go home. Of course, that could work to your advantage. Just as easily, it could work against you and your client. No attorney wants a juror who agrees with his or her position in the lawsuit, but does not care enough to maintain that opinion in the jury room.

* Use of Demonstrative Exhibits at Trial *

Each of the seven criteria set forth above for an effective juror should be considered goals of the trial lawyer. The use of demonstrative exhibits can assist in helping jurors to fulfill each of these criteria so that they will reach a decision based upon the evidence rather than on sympathy or vague notions of fairness.

Whether through the use of enlargements of key documents, timelines, graphs, text insets or some other device, demonstrative exhibits can be helpful in achieving the following:

1. Stimulating the jurors.
2. Keeping jurors focused on the evidence.
3. Summarizing key points.
4. Reminding the jurors of the key testimony.
5. Helping to explain otherwise complex information in a meaningful way.
6. Help jurors to understand and retain the facts of the case.
7. Persuading them.

In short, demonstrative exhibits can help trial attorneys to create good jurors.

* Misuse of Demonstrative Exhibits *

The mere use of demonstrative exhibits alone would seem unlikely to turn a sure-fire loser of a case into a victory. As mentioned above, such exhibits are support for a well-presented, well-argued case, not a substitute.

At the same time, not all demonstrative exhibits are helpful—and some could be counterproductive. Demonstrative exhibits that may appear meaningful to the attorneys involved in the case may not have the desired impact upon a jury, arbitrator or mediator if they use confusing language or are difficult to read.

The same is so if a demonstrative exhibit includes too much information or unnecessary information, or if too many demonstratives are used. Simply, there can be a point of diminishing returns.

The more information that is contained in a demonstrative exhibit and the
more demonstratives that are used, the less likely a jury, arbitrator or mediator would seem to focus on the most critical information.

Of course, a demonstrative that includes “facts” not based upon admissible evidence is not likely to be permitted by a court, and is likely to raise the ire of an arbitrator or mediator.

Many trial attorneys and their clients have spent a great deal of time and money preparing demonstrative exhibits that they were ultimately unable to use because the evidence upon which they were based was not admitted.

This can be avoided by preparing alternate versions of a demonstrative exhibit, or by not finalizing the exhibit until all of the underlying evidence has been admitted.

There is another concern about demonstrative exhibits of which defendants in employment lawsuits in particular should be mindful. On the one hand, jurors appear to enjoy the use of technology.

On the other hand, the use of a great deal of expensive demonstrative exhibits or technology could send two unwanted messages to a jury: It can convey to the jury that the defendant is troubled by the case and, as a result, has spent a great deal of money on these materials; and the use of expensive materials and technology can also remind the jury that the defendant has “deep pockets” and can afford to pay the plaintiff something, regardless of the merits of the case.

A defense lawyer should weigh these concerns in determining what types of demonstrative exhibits to use in a particular case.

To avoid misuse of demonstrative exhibits, trial lawyers may want to ask themselves the following seven questions:

1. Is the exhibit unclear or confusing?
2. Is there too much information in the exhibit?
3. Is there unnecessary or unimportant information in the exhibit?
4. Are there words or phrases used that jurors may not understand?
5. Is the exhibit deceptive or otherwise vulnerable to attack by opposing counsel?
6. Do the demonstrative exhibits send an unintended message to the jury about the party’s financial status?
7. Is there anything in the exhibit that is not supported by admissible evidence?

If your answer to any of these questions is “Yes,” you may want to go back to the drawing board. Demonstrative exhibits should help you tell a “story” to the jury, not detract from that story.

--By Michael Kun, Epstein Becker and Green PC
Michael Kun is a member of Epstein Becker and Green PC, practicing employment law in Los Angeles, California. He is also the author of several novels, including You Poor Monster and The Locklear Letters, as well as the short story collection Corrections to My Memoirs.