

PRESENTING EVIDENCE WITH AN EYE TOWARD YOUR JURY

By Jim M. Perdue, Jr.

I. YOUR JURY DOES NOT THINK LIKE YOU

Social scientists studying how the human brain gathers and assimilates data have tried to quantify how the average human being gathers information. Their research quantifies the five human senses as follows:

- a. Sight 87%
- b. Hearing 7%
- c. Smell 3.5%
- d. Touch 1.5%
- e. Taste 1%

Donald E. Vinson, *JURY PERSUASION: PSYCHOLOGICAL STRATEGIES AND TRIAL TECHNIQUES* 184 (1993). While that particular data is 26 years old, the reality that American society is now one of “visual learners” seems only more incontrovertible. From television to the Internet, Americans now learn through visual explanations. “Talking heads” and the spoken word are relegated to PBS – people now expect pictures, diagrams, and animations in every aspect of their news.

Unfortunately, law school taught our brains to become verbal thinkers – thoughts themselves become internal conversations in words rather than concepts perceived the way any other profession invents ideas. Most trial advocacy teaching doubles down on the mistake, fueling the misconception that the power of our brilliant rhetoric can overcome the fact that most people think and, more importantly, learn visually. We have been trained to live, think, and communicate in a single sensory state that does not connect to over 90% of the way people gather and process information. This leads to multiple failures in the presentation of evidence to a jury – boredom, complication, abstraction. Any one of which renders your brilliant language choices irrelevant to the decision-making process of the people you need making a decision.

Our jobs then require us to change our point of view for the presentation of evidence. Arguments and examination need to be designed with an eye for how, and the means by which, a jury receives the information we want them to receive. This requires vivid thinking, reformed into a more visual sensory experience more often than not. And this does not mean Power Point (to be discussed in more detail later). Rather, think in the multiple different forms the courtroom allows visual communication in picture forms. A single picture not only unlocks 1,000 words – it actually unlocks a story, fully formed with all the connotations that can be taken from an image that represent a holistic concept. Fortunately, the law does not constrict a good trial lawyer’s imagination on persuading visually.

II. TEXAS LAW ON ADMISSIBILITY OF YOUR VISUALS

Texas law provides broad precedent that support predicates for admissibility, whether as demonstrative or actual evidence, of various visual tools.

A. Admission for Use During Jury Deliberations Jim M. Perdue, Jr., *An Eye Toward Your Jury*, 2020 Page 2

“Charts and diagrams that summarize, or perhaps emphasize, testimony are admissible if the underlying information has been admitted into evidence, or is subsequently admitted into evidence.” *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 342 (Tex. 1998). The Supreme Court earlier recognized “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.” *Speier v. Webster College*, 616 S.W.2d 617, 619 (Tex. 1981).

Both of these cases are instructive given the underlying dispute. In *Uniroyal*, the tire company was complaining that the trial court had erred by admitting a “timeline chart” that was prepared by the plaintiff’s expert and used during his testimony at trial. Despite the complaints that the timeline contained prejudicial hearsay, the court found that “all the evidence contained on the chart was already in evidence” and that Uniroyal had not objected at that time. *Uniroyal*, 977 S.W.2d at 342. Therefore, the timeline was admissible.

In *Speier*, the plaintiff’s counsel created a chart for each of the six plaintiffs, which provided columns to enter specific amounts of damage elements. Then, on examination, counsel wrote down what the testifying witness said in the chart.

The court found:

The chart was helpful in aiding the jury in recalling testimony as to the exact amounts. In doing so, it enabled the jury to avoid mistakes in assessing damages. The fact that the chart may have emphasized the testimony of the policemen did not render the chart inadmissible.

Speier, 616 S.W.2d at 619. Thus, the damage chart, which summarized testimony during trial, was actually sent back to the jury room to assist the jurors in filling out the special verdict form.

The presentation of charts or summaries is rarely reversible error. Courts of appeals will not reverse a judgment on the ground that a trial court made an error of law unless the appellate court concludes that the error complained of “(1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the cause to the court of appeals.” Tex. R. App. P. 44.1(a). In fact, appellate courts have held that the admission of summaries is firmly within the trial court’s discretion, and if an error

at all, is harmless. See, e.g. *Houston Lighting and Power Co. v. Klein Indep. Sch. Dist.*, 749 S.W.2d 508, 519 (Tex. App.—Houston [14th Dist.] 1987, writ denied). Multiple cases continue to support the broad discretion of admitted visuals created from the evidence. “[A]dmission or exclusion [of evidence] is likely

harmless if the evidence was cumulative, or if the rest of the evidence was so one-sided that the error likely made no difference.” *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 873 (Tex. 2008). See also, *Chance v. Chance*, 911 S.W.2d 40, 52 (Tex. App.—Beaumont, 1995, no pet.). In discussing the introduction of four charts that served to summarize the evidence, the 14th Court of Appeals held that “[the charts] were merely a summary of the witnesses’ testimony which the jury had previously heard. There had been no objection to that testimony. Admission of exhibits which are merely cumulative of testimony is at worst harmless error and is not a basis for reversal.” *Blonstein v. Blonstein* 831 S.W.2d 468, 473 (Tex. App.—Houston [14th Dist.] 1992, writ denied). Jim M. Perdue, Jr., *An Eye Toward Your Jury*, 2020 Page 3

B. Conditional Admissibility

Additionally, order of proof concerns cannot exclude demonstrative evidence when “the underlying information has been admitted into evidence, or is *subsequently* admitted into evidence.” *Uniroyal*, 977 S.W.2d at 342 (emphasis added). In the effort to admit demonstrative evidence that may be based on testimony or documents to be admitted later at trial, a trial lawyer can always rely on Texas Rule of Evidence 104(b):

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

This is the traditional practice of “connecting up” evidence. In the case of demonstrative aids, the foundation can be provided upon the promise that the underlying information will come into evidence later in trial. Therefore, as early as opening statement, the lawyer should have the opportunity to use charts and diagrams that summarize and emphasize evidence in the case.

When admitting demonstratives that summarize other documents or evidence, a lawyer can also utilize Texas Rule of Evidence 1006, which states:

...[t]he 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.

To bring a summary within the guidelines of Rule 1006, the offering litigant need simply lay the proper predicate for the summary's admission. The offering party has the burden to show that the underlying documents are admissible, that they are voluminous, and that they were made available to the opposing party for inspection and use in cross-examination. *Shaw v. Lemon*, 427 S.W.3d 536, 544-546 (Tex. App.—Dallas, 2014, writ denied.)

C. Admissibility for “Demonstrative Purposes”

The majority of demonstrative aids are not “real evidence” in the case. Despite the broad rules of relevancy and potential for admissibility, there is an even broader ability to admit evidence for use during trial and demonstration before the jury. While not sent to the jury room, it is a vital part of the trial effort toward better comprehension. The Rules of Evidence themselves include an edict of their liberal construction:

These rules 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.

TEX. R. EVID. 102. Jim M. Perdue, Jr., *An Eye Toward Your Jury*, 2020 Page 4

Courts are also instructed to exercise control during the presentation of evidence “to (1) make [the interrogation and presentation] effective for determining the truth, and (2) avoid wasting time...” TEX. R. EVID. 611. Also, Texas Rule of Evidence 105(b) permits a proponent of demonstrative evidence to “expressly offer the evidence for its limited, admissible purpose” and achieve an instruction from the court so that it can be used before the jury.

The rules and case law must be seen to provide space for a trial lawyer's visual presentation to assist a jury. The anachronism of rules drafted in the early 1980's is only solved, as with the common law itself, with interpretation that adapts it to modern reality. This can take many forms, and even the case law shows that your imagination and inventiveness should not surrender to the fear of an objection.

For example, a videotape produced by the Epilepsy Foundation of America and used as a medical school teaching tool was properly admitted as a “learned treatise” under Rule 803(18). See *Loven v. State*, 831 S.W.2d 387, 397 (Tex. App.—Amarillo 1992, no pet). The court of appeals held that “videotapes are nothing more than a contemporary variant of a published treatise, periodical or pamphlet.” *Id.* And that was in 1992! The jury was able to view the videotape just as if the text of a learned treatise was before it, but the exhibit did not go into the jury room for deliberation. So too should juries be presented the incredible variety of sources for visual information available for our cases today.

III. “TALK” TO THEM IN THE LANGUAGE THEY LEARN -- VISUALS

A. Visuals to Unleash Themes

All persons, and especially jurors, will be guided by personal experience. Life experience ascribes a meaning to visual data just as it can to words. The use of graphic images for concepts or themes will assist reinforcement of the thought hopefully conveyed. For example, color has specific connotations for most Americans. Using green can convey safety, while red conveys danger.

In the neuroscience of the way the mind processes information, the deepest process, after the initial sensory reception of information through the five senses and translating it through working (short term) memory, lies in long term memory. This is where life experience lies. Long term memory from experiences is where the concept of schemata lives. Most schemas lie dormant in memory. The power of activated schemas is that they enter attention consciousness and are used instinctually, almost immediately, in problem solving. In this way, stored schemas (beliefs formed in long term memories) actually process information – the brain “subconsciously” accepts a data point or rejects it without consciously “thinking” about it. Here, the “part” (the image) activates sense of the whole (the schema associated with the image). In this way, an image of John Wayne unlocks for that person any wealth of concepts, beliefs, and memories, and thus decision processing of the details becomes subject to the larger, deeper thought. For me, inside an image of John Wayne resides any wealth of beliefs about America, heroes, and my father.

Thus, imagery provide connotations and thematic inferences well beyond the simple word. For example, a scale tilted to the side with eight persons standing against a single person on the opposite side will graphically convey the preponderance of the evidence better than “eight versus one.” A jug full of 7,300 aspirin can symbolize daily pain more effectively than a table with “Twenty-year life expectancy x 365 days = 7,300.” Jim M. Perdue, Jr., *An Eye Toward Your Jury*, 2020 Page 5

In a case involving a question of delay, the image of an hourglass may do more than pounding the table about wasted time. In a case about whether an owner has sufficient control over an independent contractor’s work, a simple picture of keys to locks signifies the concept that no one goes anywhere without the owner opening the door. In a case involving off label prescriptions, a rat in a lab with a syringe to its neck unlocks the implication that the company’s activity was an improper experiment without devolving into the law of off label use. In a case involving electronic medical records being changed, a massive medical file storage suite of old style charts signifies the permanency of a medical charts. In a case involving trade secrets, a picture of a file marked “CONFIDENTIAL” in that

iconic red stamp may convey more than a blow up of the document with the business plan.

These visual anchors allow your jury to find the facts – to which you are leading them. The challenge is finding images that are concrete, universal, and convey the message you want. Visual images are dangerous in this regard. A picture can mean a lot of different things to different people (that is its power after all). Marketing studies show this goal can be achieved, but with work not normally in a lawyer's skill set. The search for appropriate visual requires discussions with many people, more than just a few focus groups.

Ask people for an image when you give them a concept. Develop a list. Search the Internet or, better, sites that may charge for better quality images within a better search catalog. Then, take a collection of images and ask people the significance they take from them. Narrow the images down to three, and then take them to anyone you can and ask what they ascribe to them. Narrow it down to the image that seems to most uniformly get the concept across. This work can create a visual theme – something even more powerful for a modern jury because the jury provides the connotation, meaning and significance themselves. The fact that they do not know all of the work you did to finally get the best image is irrelevant.

Lastly, things created in the courtroom in front of a jury are experienced in real time and thus sensed visually. The simple power of an old school flip chart is that a jury experiences the visual creation (sketches and drawings are better but even words capturing testimony share this power) in real time. Studies repeatedly show visuals created in front of the audience are both trusted and retained at a higher level than that which could be more visually meticulous but was pre-created and simply displayed rather than created in the courtroom. This form of presentation provides an easy visual anchor, living in short term memory, that can be returned to during closing argument. The flip chart created four days earlier unlocks the living memory (assuming they were not asleep) of when it was created before them. Lawyers should work on their sketching skills – of things as simple as ven diagrams, pie charts, road intersections. All allow the lawyer to create visuals in front of the jury to convey concepts through the senses in more persuasive form than simply verbal content. These tools are not just imperative to give your jury what they want, these are the very simple forms of visually conveying information that they need.

B. Your Jury Does Not Think in Power Point

Trial lawyers know today that juries expect visuals. But do not let this truth devolve into the use of Power Point as a visual crutch. There is a difference between visuals and Power Point -- a trial lawyer's search for visuals is not a search for more Jim M. Perdue, Jr., *An Eye Toward Your Jury*, 2020 Page 6 effective Power Point. Visual presentation of documents or pictures is imperative. The jury must see the evidence to even have a chance of accepting it. To be the person providing them the information, you must be the lawyer showing it, not just reading it. The visual presentation of internal e-mails, employee power point shows, or key provisions of a witness statement is the "seeing is believing" of the relevant words in black and white for your case.

These are fundamentally different than using Power Point for yourself as a crutch in opening or examination. Lawyers fail because they use Power Point to visually convey verbal content. That is not visual communication.

Power Point presentations given to almost all vocations, from a stocker at Home Depot to a nurse at a renowned teaching hospital, now devolve into a *Dilbert* punch line or the unseen teacher in Charlie Brown cartoons. Almost every juror will be familiar with the tedium of a Power Point session from their employer supposedly educating them on some certain employment principles. Text slide with a title. Bullet points with facts. Perhaps a clever graphic in a corner that relates to the activity at issue. Trial lawyers must avoid using Power Point in the exact same form that reflects the boredom and abstraction that are the identical problem with verbal thinking.

The book *Beyond Bullet Points* by Cliff Atkinson (4th ed. 2018) is an excellent (short) treatise on how to convert Power Point into a story telling tool. The book helps in the discipline of limiting text – the most common failure of Power Point is too many words. Rather, Atkinson walks the reader through a process of imagining a presentation more like a news story or graphic novel, which happens to be much closer to the expectation that resides in your jury box.

Modern juries are not looking for bulleted lists of facts. But they want information. In this context, rethink visuals as a way to persuade subliminally and profoundly without being overtly rhetorical. Universal imagery can deliver a rhetorical message that, if the trial lawyer attempted it with words, would be rejected as that effort to "get over on me." Bullet point lists in Power Point at 18-point font are not visual tools. In fact, they are probably worse than the spoken word alone.

C. Rules to Achieve Your Goals

The principles of how average people learn and deliberate suggest certain rules that can be applied, generally, to demonstrative presentations. No matter the form of the demonstrative presentation, the general do's and don'ts will assist the lawyer in creating anything from a PowerPoint slide presentation to a single blow up.

1. The Do's of Persuasive Demonstrations

a. Keep it simple

- Use simple pictures or symbols to uniformly convey concepts;
- Use as few words as necessary to present the essence of the thought;
- Create and use recurring labels or titles for slides or blow ups to assist in giving context;
- Try to keep each slide or visual aid to a single thought.

b. Appeal to all the senses Jim M. Perdue, Jr., An Eye Toward Your Jury, 2020 Page 7

- Use effective color combinations for emphasis (e.g., black on yellow, white on blue);
- Use color to convey meaning
- Include auditory cues (let the jury hear a decedent's voice, the sounds of a siren at the accident, the beeping of monitoring machines at a bedside);
- Use aids that can be touched and manipulated (e.g., pass around an actual seatbelt latch, endotracheal tube, indwelling catheter, back brace, let jurors touch things).

c. The means can be the key to the message

- Use extra-large LCD monitors or extremely bright high lumen projectors with a good presentation screen to provide the maximum size for any images to be watched;
- If monitors are used, assure yourself that there is no glare distracting the viewer;
- Position demonstrations and projection screens for the jury/decision makers (not so you can be sure to read along);
- Place blow-ups as close to the jury as necessary for legibility;
- Place demonstrative aids in position to help your expert teach the jury;
- Place demonstrations to cut off the jury from opposing experts.

2. The Don'ts of Persuasive Demonstrations

a. Overwhelm the visual exhibit with wordiness

- Attempt to keep text to six words per line;
- Assure the text is simple and understandable;
- Keep the font size large enough to be legible (sacrifice words before you sacrifice size);

b. Create “visual noise”

- Keep graphic design relatively simple;
- Avoid the use of excessive or extreme colors;
- Don't change font styles just because there are many choices;
- Slide transitions, colors, fonts, and style should not be complex simply to show off the technology--it will distract from the message;
- Be sure that any overlays or slide transitions do not clutter or obscure the underlying information;
- It is often better to have multiple charts/graphs/time lines demonstrating a single parameter, rather than having multiple parameters graphed on the same chart/graph/time line.

c. Use too much of a good thing

- Trial is live theater, don't let it become a movie. Movies are great, but live theater is a much more powerful experience for the audience;

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- Day in the life videos are most effective when used with a live witness, but the audience's connection must still be with the witness on the stand;
- Do not use PowerPoint for the entire summation of a case; rather, use the visual slides to emphasize key areas and evidence, but always remember to create personal moments;
- Just because you have an exhibit does not mean you have to use it during trial. Sometimes less really is more.

IV. GET OUT OF YOUR TASSELED LOAFERS OR BLOCK HEELS AND STEP IN THEIR SHOES

In his book *Blah, Blah, Blah* (Penguin 2011), author Dan Roam introduces a construct to identify our over-reliance on verbal communication, re-think concepts vividly, and convey ideas both complex and simple through visuals to improve the balance between visual and verbal communication. The book tends more to an audience of marketers and business people, but it is instructive for attorneys as well. In the final chapter, he refines the means of crafting what he terms “vivid ideas” through the final, most important step: targeting our audience. As he says, “An idea aimed at no one is an idea no one sees.” *Blah, Blah, Blah*, Roam, at p. 268.

Most trial lawyers labor under the heavy burden of having lived with the case they are about to present to the jury for more than the past year. You know your client. You crafted the discovery. You took the depositions. You read the documents. You argued the motions. You are now cursed.

The curse of knowledge is an enormous barrier to connecting to your jury. Your jury does not know your case. The jury has no idea why page 20 of the medical records is important, while being curious what might be on page 19 or 21 that explains it for them. The jury has no idea who “Mr. Salazar” is, while being curious what an “eyewitness” may say. The jury has no idea what a ball valve is, while being curious what it looks and feels like.

The curse of knowledge causes trial lawyers to forget that everything in the case is new for your jurors. Everything requires a context. Not everything can be remembered. Not everything even matters. But an eyewitness who saw the defendant run a red light can be the single most important witness in the case, even if back in the jury room six of them cannot remember his name was Salazar. That wasn’t what mattered.

It is imperative for lawyers to re-create an engaged curiosity during trial in an attempt to empathize with what makes a difference for your jury. Certainly, it is your job to know your case backwards and forwards. You need this to handle the legal obligations of the efforts at trial. But the failure to provide context for facts is almost always based on the curse of knowledge; a curse that leads the lawyer to assume others know more than they do.

This forms the imperative of using stories and visuals throughout trial. Context for the larger story of the case comes in opening. Then, in direct examination, each witness requires story, sometimes more than one, as the only way to provide context for the jury about the evidence they are receiving and why it is important. Visuals explain and anchor the facts the jury receives. Jim M. Perdue, Jr., *An Eye Toward Your Jury*, 2020 Page 9

Cross examination tends to be easier for the cursed trial lawyer. The control permitted by cross allows the cursed lawyer to show the jury just how much the lawyer knows and how prepared they are. This is the curse of knowledge creating a disconnect between your jury and you. This leads to the signature failure of cross exam, victories that matter for the lawyers and mean nothing for the audience. Thorough preparation must exclusively serve the jury’s quest for information. The only way cross examination gives the jury something to remember is through asking the questions *they* want answers to and telling them stories in the case through this witness *they* want to hear.

One tool is returning to your notes from jury selection in drafting an outline of any examination. Drilling a jury of twelve with eye contact at trial to determine what they are thinking is an unworthy exercise in my personal experience. But taking the time to remember who they are, what they may have said during selection, and attempting to think something about what may matter to them assists enormously in crafting both direct and cross examinations. A computer engineer on your jury may think about the procedures for a work permit in a different way than an art teacher. A marketing consultant may view a sales force training session in a different way than a legal assistant. Work to remember who they are so you can help ask the question they want asked. This removes you from your base of knowledge and better places you in the realm of engaged curiosity that hopefully exists in your jury box.

Here, you create the discipline to consider what matters for your audience. This, quickly, assists in targeting the themes, stories, and visuals you craft for trial. As stated by the greatest trial lawyer in literature, Atticus Finch: "You never really understand a person until you consider things from his point of view...." We as trial lawyers must consider the point of views, life experiences, and expectations for information that reside exclusively inside the jury box to best deliver persuasive evidence at trial.

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