

Presentation of Evidence – Impacting The Jury

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A. CREDIBILITY OF THE SOURCE

1. Introduction

Crucial in the trial of any matter is not only the substance of what a witness will testify to, but the manner in which the witness testifies as well. For the advocate to make any connection to the jury, he or she will have to establish the witness' credibility. Trial and appellate courts will routinely defer to the trier of fact when credibility of the witnesses is an issue in the case.

The credibility of the witness will be tested usually during three crucial stages: direct examination, cross examination and re-direct examination. Before having the witness testify, the proponent should thoroughly prepare the witness. The attorney should not only thoroughly familiarize the witness with the subject of their testimony, but also acquaint the witness with the courtroom as well.

2. Pre-Trial and Trial Preparation

a. Lay Witnesses

For either side, making the witness comfortable in the courtroom is paramount. For lay witnesses who have never testified, counsel should take the witness to court and show them the jury box, where you will be examining the witness. Take the podium behind the last juror's seat and run through your examination with the witness. If you cannot hear the testimony, not only will the witness' testimony fall upon deaf ears, but too soft-spoken a witness may negatively impact upon his credibility.

The jury will clearly assess the credibility of the witness in her ability to recall the particular events of the situation. It is imperative that the attorney prepare the witness in advance of trial. Prior to witness preparation, send the witness her deposition transcript, if applicable, Answers to Interrogatories, and any relevant documents. Review all of these documents with the witness during your trial preparation. During preparation, it is not enough for the advocate to discuss the subject matter of what the witness is expected to testify to. Rather, the attorney should run through the direct examination as many times as necessary before taking the stand. The lawyer should not, however, provide the “script” to the witness as the testimony will appear to be rehearsed. Maintaining a conversational tone with the witness will make the examination appear “live.” Explain what documents that you intend to introduce into evidence through the witness. Advise the witness what a foundation is, and what questions will be asked to lay the proper foundation. Counsel should also prepare a mock cross-examination, anticipating what the opponent will test your witness on.

Appearances of the witness are important and can have a profound impact on credibility. Have the witness dress comfortably, but appropriately in light of his station in life and role in the case. A blue collar worker need not wear a suit, but a police officer or fireman, especially since 9-11, should be in uniform. Plaintiffs in personal injury cases should avoid wearing expensive clothes and wear minimal jewelry. Advise the witnesses to be circumspect about their conduct, even when they are not testifying.

The witness should be given the following standard instructions when testifying, similar to that of providing deposition testimony:

- Take your time when responding to questions;

- Advise opposing counsel if you do not understand the question;
- Use simple words and your own vocabulary unless explaining something technical;
- Do not speculate as to an answer;
- Do not fight with opposing counsel;
- Do not talk over opposing counsel when an objection is made;
- Testify only as what you personally observed or heard;
- Do not volunteer information;
- Always tell the truth, even when it appears to be a damaging admission.

b. Expert Witnesses

Experts are often used to help the trier of fact to understand complex issues. In certain cases, they are required to prove Plaintiff's prima facie case, such as in medical malpractice cases or product liability actions. Other times, they may be useful to establish liability issues (safety expert), or matters that are germane to damages, such as psychiatrists, vocational rehabilitation experts or economists.

What affects the credibility of an expert witness? In addition to the same factors as a lay witness, a number of other issues come into play. If the witness lacks the requisite qualifications, the expert's testimony may be barred by the trial court. Alternatively, the trial court may allow the testimony but bar the expert from proffering one or more opinions. The advocate should explore the following areas which directly bear upon credibility before having direct or cross-examination:

- Educational background. While it is impressive for the expert to possess stellar academic qualifications, it may not be required for the expert to make a strong impression.
- Real world experience. A juror may make a much stronger connection with the expert if the witness has had substantial hands on experience.
- Bias. Does the expert physician always testify for the Plaintiff? No matter what the expert's academic credentials, and real world experience, if the expert's testimony appears to be biased in favor of one side, it is likely that the jury will entirely disregard the expert's testimony. Always check the Jury Verdict Reporter before your witness takes the stand, or conversely check your opponent's witness history.
- Professional expert. Perhaps more devastating than an apparent bias for one side or the other, is the appearance that the expert will testify as to anything, as long as he gets his fee. During the expert's deposition, explore what percentage of his income is derived from expert testimony work. If the expert cannot recall the percentage, the expert may appear to be dodging the issue.
- Testing the expert's familiarity with the case. In certain circumstances, the expert may have excellent academic credentials and substantial work-like experience. He does not appear to be biased, so how does the advocate test the expert's credibility? Cross-examine the expert as to his knowledge of the case. Has the expert reviewed all of the depositions in the case? Is the expert familiar with all of the witnesses' testimony? Ask the expert if he thinks it would have been

important to review a particular deposition. You will probably get a winning response regardless of the answer.

3. Plaintiff Strategies When Impeaching the Defense Witness

Plaintiff should obtain all documents where the defense witness may have made an inconsistent statement. At deposition or trial, ask the defense witness the critical question. If it is inconsistent with a prior written statement, ask the defense witness if he made the prior statement. Ask the defense witness to identify his signature if there is one on the document. Plaintiff's counsel should determine that the statements are inconsistent and are material, i.e., relate to a significant issue in case.

Set the foundation for the impeachment, and make sure that the defense witness has authenticated the impeaching document. At trial, Plaintiff may wish to call the defense witness in his case-in-chief to immediately show the jury that the defendant is lying. To prepare for this impeachment, have a large blow-up made of the impeaching document.

The following sources may provide for valuable information to impeach the defense witness:

- Internal memoranda
- E-mail
- Letters
- Letters to third parties, such as vendors
- Responses to grievances

- Website pages
- Transcripts from administrative hearings
- Answers to Interrogatories
- Answer to the Complaint
- Depositions
- For an expert, learned treatises

4. Defense Strategies When Cross Examining the Plaintiff

Before confronting Plaintiff's witness on the stand, defense counsel should obtain any statement made by the Plaintiff, whether a deposition, sworn or unsworn statement made to a third party such as a police officer, or documents prepared or made by the witness such as letters or employment applications.

At trial, it is imperative that Defendant impeach the Plaintiff on a key issue in the case. Otherwise, Plaintiff may have a successful objection on relevance/collateral impeachment. Further, Defendant's tactics may backfire in front of the jury who may perceive defense counsel as berating the Plaintiff. It is also essential that the impeaching testimony track the prior inconsistent statement.

The following sources may provide valuable information to impeach Plaintiff:

- Previous employers' job applications
- Employer's job application
- Resume
- Applications for short term or long term disability benefits
- Social Security disability applications
- Transcripts from worker's compensation hearings

- Applications for unemployment compensation
- Transcripts from unemployment compensation hearings
- Tax returns
- Subsequent employment applications
- Answers to Interrogatories
- Depositions
- The Complaint

B. CLARITY TO THE JURY

1. Introduction

Now that you have your witnesses lined up, how do you effectively present your case to the jury? Should you call every witness, and what order should you present your evidence? This section will address some of these concerns. Prior to trial, counsel should thoroughly prepare his direct and cross examinations. I recommend using Mauet, Trial Techniques for template examinations.

2. Basic Considerations

While counsel may realize that she must call certain witnesses to prove her prima facie case, occasionally she may have a choice to call more than one witness to prove the same point. Avoid overkill. Counsel would be wise to pick her strongest witness to testify and provide some corroboration. Oftentimes, attorneys call too many witnesses and simply bore the jury. Weak witnesses may be subject to intense cross examination. Only call witnesses to prove a point. Do not wait to call a strong witness in your rebuttal case. First, it is imperative to win the jury as soon as possible. Second, depending upon your opponent's trial strategy, you may be precluded from calling the witness at a later time.

3. Themes

It is crucial for the advocate to develop a theme or themes to his or her case. Keep it simple. Plan on developing no more than three concrete themes throughout your case. With more than that, the jury will either not remember the points you will be trying to make, or will be confused. Keep the language consistent. If a witness refers to a technical term, repeat it during examinations of other witnesses and during closing argument. Some themes which Plaintiffs may wish to use during the following types of cases include the following:

Accountability

- The buck stops here

Brain Injury

- A mind is a terrible thing to waste
- You can break a watch without breaking the crystal. My client doesn't have a fractured skull, but she doesn't "tick" anymore.

Contracts

- Let's put honor back in the handshake

Defamation

- When you throw a rock into a pond, ripples go out.

Negligence

- The defendant was asleep at the switch
- The left no one to mind the store

Products liability

- The defendant created an illusion of safety

4. Adverse Witnesses

Either side may call the opposing party as an adverse witness in accordance with 735 ILCS 5/2-1102. Supreme Court Rule 238 (b) permits counsel to question the witness as if under cross examination. It is the status of the witness at the time that he is called as opposed to at the time the cause of action accrued that determines the witness' adversity. Kuhn v. General Parking Corp., 98 Ill. App. 3d 570, 424 N.E.2d 941, 948 (1st Dist. 1981). Plaintiff may wish to call the Defendant as an adverse witness in her case-in-chief. In a personal injury case, this is often Plaintiff's first or second witness. Calling the Defendant as an adverse witness to elicit admissions is surely one way to grab the jury's attention. In turn, the adverse witness may then testify in his or its respective case to rebut any testimony elicited as an adverse witness.

5. Demonstrative Evidence

In addition to calling witnesses and introducing substantive evidence, the parties may wish to rely upon demonstrative evidence. Demonstrative evidence differs from substantive evidence in that the former has no evidentiary value in and of itself. The compelling nature of this evidence, however, has been described as the "most convincing and satisfactory class of proof." Virgil v. New York, C. & St. L.R. Co., 347 Ill. App. 281 (1952). Among the types of demonstrative evidence that counsel may wish to consider are illustrations, models, maps, or still photographs. The use of video and computer simulations is discussed in Section C, below.

The trial court will admit the demonstrative evidence when it is relevant, explanatory, and not misleading. Pappas v. Fronczak, 249 Ill. App. 3d 42, 618 N.E.2d 878 (1993). The use of demonstrative evidence is favored when it is used to help the jury

better understand the issues in a case, Burke v. Toledo, Peoria & Western Railway, 148 Ill. App. 3d 208 (1st Dist. 1986), but will be excluded when it is solely used for dramatic impact and to emotionally appeal to the jury. Bugno v. Mt. Sinai Medical Center, 201 Ill. App. 3d 245, 250 (1st Dist. 1990).

At trial, the proponent should use the demonstrative evidence during opening statements. A party is allowed to show the jury exhibits which will later be admitted into evidence. Decker v. St. Mary's Hospital, 249 Ill. App. 3d 802 (5th Dist. 1993). Once admitted, counsel should use the exhibits during closing argument as well.

a. Illustrations, Maps, Models and Drawings

Maps, drawings and models may be helpful in depicting the scene to the jury. Medical illustrations may be useful in depicting Plaintiff's injuries in a personal injury case. As long as the party properly authenticates the evidence, it will almost always be admitted. Burke v. Toledo, Peoria & Western Railway, 148 Ill. App. 3d 208 (1st Dist. 1986). In the case of a model or map, however, a further requirement may be that the map or model was prepared to scale. Thus, if the map or model is inaccurate or misleading or does not aid the jury in understanding the evidence, it will not be admitted. Peterson v. Lou Bachrodt Chevrolet Co., 76 Ill.2d 353, 392 N.E.2d 1 (1979). Thus, it was proper for the trial court to exclude a cardboard model of a forklift where it prejudicially implied instability. Little v. Tuscola Stone Co., 234 Ill. App. 3d 726, 600 N.E.2d 1270 (1992). Counsel, of course, must lay the proper foundation for the evidence. Cunningham v. Cent. & S. Truck Lines, 104 Ill. App. 2d 247, 244 N.E.2d 412 (1968).

b. Plaintiff's Injuries

Illinois law holds that it is proper for a Plaintiff to show his injuries to the jury. Duffy v. Midlothian Country Club, 135 Ill. App. 3d 429 (1st Dist. 1985). This includes the removal of prosthetics to show the jury. Burnett v. Caho, 7 Ill. App. 3d 266, (3rd Dist. 1972) (removal of artificial eye). *See also*, Hehir v. Bowers, 85 Ill. App. 3d 625, 407 N.E.2d 149 (2d Dist. 1980). Plaintiff's counsel should show these injuries to the jury discretely. Further, counsel should also describe on the record what part of the body was burned, the length of the scar, etc. so to maintain a solid record on appeal.

c. Still Photographs

Counsel can use still photographs to show the jury what the scene looked like on the date of the occurrence, or show the jury what the Plaintiff's injuries looked like shortly after the accident. The proponent must lay the proper foundation that the photograph is a fair and accurate representation of the scene or object at the time of the occurrence. Gaunt & Haynes, Inc. v. Moritz Corp., 138 Ill. App. 3d 356 (5th Dist. 1985). The proponent, however, need not demonstrate complete similarity of what is depicted in the photograph to what the scene looked like. *See*, Reid v. Sledge, 224 Ill. App. 3d 817 (5th Dist. 1992). If changes to the scene are explained to the jury, and the jury can comprehend the correct portrayal, the photograph will not be rendered inadmissible. *Id.* However, the trial court properly excluded a picture of a rail crossing in summer with the trees in bloom and where construction was under way since it did not depict the crossing on the winter morning in question. Tedrowe v. Burlington Northern Inc., 158 Ill. App. 3d 438, 511 N.E.2d 798 (1st Dist. 1987).

C. VIDEO BRINGS THE WORLD TO THE JURY

1. Introduction

In today's technology driven society where television shows seem to showcase the latest scientific innovations, jurors have become increasingly technology savvy. It takes more to wow a juror than during the days of the infancy of the personal computer. While a juror may only retain 15% of what he hears, he may retain as much as 85% of what he sees and hears. The advocate has an array of visual tools to help explain her case. While there are a number of tools available such as MS Powerpoint, CD-Roms, DVDs, and bar code scanners, these applications exceed the scope of this article; rather, we will focus instead on video and video-related presentations. While video technology may impress a jury, counsel should be wary of engaging the jury in a media overload – it is wise to combine both technological and “static” presentations to keep the jury's interest.

2. Videotapes

The admissibility of motion pictures and videotapes are determined on the same basis as photographs – they must material and relevant. Department of Public Works & Buildings v. Oberlaender, 92 Ill. 2d 174 (3rd Dist. 1968). This type of evidence is admissible for two purposes: 1) to corroborate the witnesses' testimony, and 2) to act as probative evidence of what the video depicts. Stenger v. Germanos, 265 Ill. App. 3d 942 (1st Dist. 1994). As with photographs, a proper foundation must be laid for the videotape's admission.

3. Video Depositions

In federal court, a party seeking to present a videotaped deposition to the jury must comply with the requirements of FRE 804(b)(1). According to the Rule, the witness must be “unavailable” as defined under FRE 804(a). The party whom the former

testimony is being introduced must have had an opportunity to question the witness. In state court, the party seeking the deposition must comply with Supreme Court Rule 206(g). There is no requirement that the witness be unavailable. The party seeking the deposition should give notice that the deposition will be videotaped and also identify the operator on the notice. Prior to the deposition, the video operator must identify himself, the date, time and place of the deposition, the deponent, the caption of the case, the name of the witness, the party on whose behalf the deposition is being taken, and who requested that the proceeding be videotaped. Supreme Court Rule 206(g)(1).

While the attorney who videotaped the deposition now has the transcript and the videotape, the question now becomes should the video be shown to the jury. Often, the deponent has a flat appearance on the video. Counsel should weigh the appearance of the video against having an actor read the transcript before the jury. If you decide to show the video, the court will generally require the parties to edit out the objections prior to its showing. Plaintiff's counsel should consider taking video depositions of elderly plaintiffs in tort litigation and physicians who are out of state or are particularly difficult to schedule.

4. Day In the Life Videos

An extremely compelling piece of demonstrative evidence in the catastrophic personal injury case is the day in the life video. The video may incorporate still photographs and movie footage of the Plaintiff before his injury, and the consequences of the debilitating injury afterwards.

A day in the life video is a visual aid to the jury in comprehending verbal testimony of a witness and has no probative value in and of itself. Cisarik v. Palos

Community Hospital, 144 Ill. 339, 341 (1991). The preparation of the day in the life film falls within the work product of the lawyer who is directing and overseeing its preparation. Id. Thus, defense counsel's attempt to argue that he had a right to be present during the filming has been rejected by our supreme court. Id. The proper time for the court to deal with the admissibility of the film is at trial. Id. Where such demonstrative evidence is created for trial, but is not used at trial, it need not be disclosed to opposing counsel. Wiker v. Peiprzyca, 314 Ill. App. 3d 421, 430; 732 N.E.2d 92 (1st Dist. 2000).

Once a party decides to introduce into evidence a day-in-the life film into evidence, he must satisfy a two pronged test. First, an individual having personal knowledge of the filmed object must lay a foundation that the film is an accurate portrayal of what it purports to show. Cisarik, 144 Ill. 2d at 342. Second, the film is only admissible if its probative value is not substantially outweighed by the danger of unfair prejudice. Id. As long as the video accurately depicts the pain and suffering which the Plaintiff experienced, objections stating that the evidence is cumulative or prejudicial will be overruled. Georgacopolous v. University of Chicago Hospitals & Clinics, 152 Ill. App. 3d 596 (1st Dist. 1987).

The trial court allowed the Defendant to show the day in the life video during voir dire in Roberts v. Sisters of St. Francis Health Services, 198 Ill. App. 3d 891 (1st Dist. 1990), but the appellate court subsequently held that a trial court's decision to allow the video to be shown to the jury during jury selection was discretionary. Golden v. Kishwaukee Community Health Services Center, Inc., 269 Ill. App. 3d 37 (1st Dist. 1994).

5. Other Visual Aids

Visual imagers and visual presenters are the new generation of overhead projectors. A visual presenter projects a hard copy image as opposed to its predecessor technology, which relied upon transparencies. A visual presenter will work with projecting photographs.

A video projector has an internal zoom lens which allows the operator to zoom in on a portion of a document. The lawyer may bring a letter sized document to court and blow it up to larger than life. Thus, the need for costly blow-ups is eliminated. Further, counsel can highlight part of a document for added impact. The downside of using these technologies is that if the devices go down during trial, counsel will lose the flow of her presentation.

In a personal injury or medical malpractice case, counsel may wish to use computerized illustrations of physical injuries. One type of software, ADAM® (Animated Dissection of Anatomy for Medicine) provides access to color illustrations of different parts of the body. Coupled with a treating doctor's or expert's testimony, Plaintiff's counsel can provide a compelling presentation.

Counsel may wish to use computer generated graphics and simulations to recreate how an accident occurred. There are two main types of computer generated animation – computer generated images, which provide single still images, and computer generated simulations which provide “footage” as a demonstrative aid. Such simulations can take the jury back to the time of the accident and give the jurors the perspective of anyone involved in the occurrence. This evidence may be used not only for

demonstrative purposes, but for substantive evidence, and expert testimony as well. An expert may seek to base his testimony in part on a computer generated simulation.

While the case law in Illinois is sparse regarding the admissibility of this evidence, counsel should expect objections when attempting to proffer this evidence. If rejected as substantive evidence, the party proffering the simulation evidence should always argue that it should be admitted for demonstrative purposes. If used for demonstrative purposes, the party seeking to offer the simulation must disclose it, or it may be barred. Marshall v. Taylor Wharton, 234 Ill. App. 3d 596, 599 N.E.2d 1015 (1st Dist. 1992). The simulation evidence may also be rejected in Federal Court under FRE 403 if it gives too much weight to one party's position. Racz v. R.T. Merriman Trucking, Inc., 1994 WL 124859 (E.D. Pa.).

6. Checklist

The party proffering video evidence is wise to consider the following:

- Make sure the jury can see the video evidence
- Have a memoranda of law and cases ready to rebut any objections
- Make sure the evidence accurately portrays the incident as supported by the evidence or the injuries in the case
- Consider balancing with more "static" exhibits
- Obtain evidentiary rulings at the outset of the case concerning the admissibility of the evidence and for what purpose it may be used
- Use video exhibits during opening statement and closing argument
- Have an assistant on hand who can work the necessary equipment
- Keep it simple