

# Seeing is believing: Effective use of demonstrative evidence

by Carolyn S. Koch

"John Smith," a hot-shot attorney, shook his head in disbelief as mock jurors criticized him from the other side of a two-way mirror: "The first thing the plaintiff needs to do is get a different lawyer!"

"That guy is terrible!"

What Attorney Smith didn't realize was that the problem wasn't him; it was his case. Attorney Smith retained us to do a mock trial and witnessed something we see time and again: great lawyers are perceived as mediocre (and even terrible!) when presenting a case the jury rejects. The converse is also true: so-so lawyers can be perceived as great when presenting a case the jury embraces.

The lesson here is two-fold. First, the attorney is really a *conductor*, orchestrating information, rather than an actor whose performance dictates the result. Certainly charisma doesn't hurt, but it alone does not win cases.

Second, juror resistance to lawsuits is growing every day. Therefore, as *conductors of information*, lawyers need to present compelling information in ways that the jury is most likely to remember.

This brings us to one of the most important aspects of case presentation that is consistently overlooked: the creation of demonstrative evidence that is capable of both *quantifying* the client's harm AND *capturing the theme* of the case.

From my experience as a consultant interviewing jurors after a lawyer has lost, I have found that the reasons for losing are often directly related to inadequate tangible evidence and juries' misperceptions about legal concepts.

For example, a legal *concept* instructs

that money should be awarded for emotional harm. But if the plaintiff hasn't seen a psychologist and has only slight behavioral problems, the concept is not real to jurors. Or, if the plaintiff has experienced pain, but his lifestyle hasn't significantly changed, the pain and suffering concept fails to become a reality in the jurors' minds.

For many lawyers, demonstrative evidence means taking a type-written document and enlarging it. Many don't think of creating demonstratives to illustrate the more intangible claims and concepts; instead, they ask jurors to *imagine* how the client feels.

The problem with this approach is that it overlooks the fundamental tenet of jury psychology—that people are different and perceive information differently. For example, 75 percent of the population are psychologically motivated to focus on *facts* and *details*. They are what we call "sensing" types. Only 25 percent of the population are "intuitive" types—people who rely more on their *imagination* and focus on *themes* and *theories*.

For a variety of reasons, it is not uncommon for juries to be made up almost entirely of sensing types, thereby necessitating the use of physical, visual pieces of demonstrative evidence.

As effective demonstrative should connect the legal *concept* to the *facts* proving it—so that a destroyed career, pain and suffering, an indifferent corporation—can be viscerally experienced by the jury. Here, then, are a few examples:

• *An image that will stay with the jury:*

In a wrongful termination case, a horizontal time-line can show only the *length* of the plaintiff's career.

A *life line*, on the other hand, depicts the *depth* of loss by showing the "mountain-climbing" aspects of building a career. As the line climbs upward over time, it shows breadth of experience and the sudden obliteration of that achievement caused by the defendant's conduct.

• *Quantification of pain and suffering—seeing is believing*

Because people have grown so suspicious of this claim, it isn't enough to just have testimony about physical therapy visits and doctor's appointments.

Most people use calendars to record their daily activities. A big block calendar can become a demonstrative to show the degree to which the injury interferes with the plaintiff's life. Every doctor's appointment, physical therapy visit, missed day of work, etc., is blocked off. When a calendar is illustrated correctly, jurors can see how the plaintiff's life is defined by the injury from week to week, month to month, year to year.

This demonstrative *quantifies* each "injury-related event," making the concept of "pain and suffering" real.

## Practical Considerations

• *A picture proving liability*

In a discrimination case when a person claims to have been isolated from his peers, a *floor plan* can show it physically: his office is far away from others; inter-office mail flows in a path that misses his desk; customers are ushered in away from his location, etc. While listing the various allegations might be helpful, a floor plan allows jurors to envision the *physical* consequences of discrimination.

• Work with a professional trial consultant and graphic designer. To take a

concept, fortify it with facts, and create an effective image takes special expertise and experience.

• Keep presentations simple. You don't need 20 beautiful charts—two or three factually thematic and professionally produced illustrations can tie your entire presentation together.

• Don't wait until the eve of trial! A minimum of two to three weeks is necessary to fine-tune demonstratives of evidence.

Attorneys would never hesitate to spend thousands of dollars on expert testimony, even though experts are widely perceived to be "hired guns" and are almost never the key reason a case is won or lost. Using a professional trial consultant to create demonstrative evidence is likely to be one of the least costly and wisest investments towards winning your case.



Carolyn S. Koch, J.D., is a trial consultant and principal of Jury Solutions. She is an expert in personality typing and specializes in jury selections and focus groups in all areas of the law. Her work has helped plaintiffs' employ-

ment attorneys achieve some of the largest awards in New Jersey state history. She has delivered talks and educational seminars on both local and national levels. She welcomes your questions at (908) 991-2404 or 105 Branch Road, Vienna, VA 22180.

