

Me and My Elmo: A Middle-Tech Approach to Presentation of Evidence

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Show them what you're saying. This should be your mantra when you're trying a case before a jury. This is not a new concept. People will comprehend and retain more if they see what they're hearing. If you doubt that this is true, try this simple experiment: listen to any song that has lyrics (make it easy on yourself and pick something comprehensible); now listen to the same song while reading the lyrics. I'll bet you understand the lyrics better the second time around.

In addition to increasing jurors' comprehension, showing the jury what you're saying has the intangible bonus of making the jurors feel more involved. When you use an exhibit, you show it to your adversary, you show it to the witness, and you probably show it to the judge. What message are you sending if you don't show it to the jury? Here's the message: you're telling the most important people in the room that they are second-class citizens. Don't treat a jury that way. Let your adversary do that.

So let's assume it's a given that we have to show our evidence to the jury. What do we show them, and how do we do it? I think there are three possible ways to go here. I'll call them low-tech, high-tech and middle-tech.

Low-Tech

Low-tech is a blackboard and a big easel. Maybe a dry-erase board if you want to go crazy. You can write lists, or draw pictures. You can summarize what you're explaining to the jury. You may even get to introduce some of your drawings into evidence. You can also put prepared demonstrative exhibits on your easel. Who hasn't started at least one trial with a bunch of poster-sized demonstrative exhibits, mounted on foam core?

Low-tech has its place – sometimes nothing can beat a lawyer standing in front of a blackboard teaching the jury about a case. But low-tech has real drawbacks. The biggest one is that it is self-limiting. You can only show the jury something that you can write or draw on the spot, or that you had the forethought to have created ahead of time. If, in the middle of trial, you need to show some formerly

obscure document, there are limited options for displaying it to the jury. You can pass around the exhibit to the jurors, but there are problems with that approach: 1) it interrupts the flow of the trial; 2) it allows only one juror to see the document at any one time; and 3) it prevents the jurors from reading along as you examine the witness. You can have multiple copies, or a blowup, made during an evening run to Kinko's, but this only allows you to display the document after the key testimony is given.

Even when you have thought out the perfect demonstrative exhibit, and had it created before trial, low-tech has risks. Because you need to have your exhibit enlarged and mounted to be able to display it, it is difficult, if not impossible, to make changes once the trial is underway. How many of you wished, during trial, that you had changed a detail on one of those pretty exhibits, or had a different exhibit altogether? I know I have. How many of you have had to sit through your adversary's voir dire of your demonstrative exhibit, knowing that you won't have time to fix anything if your adversary establishes that some detail is wrong enough to keep the exhibit from the jury? Not fun.

Patrick W. Begos is a founding partner of Begos Horgan & Brown LLP, a full-service law firm representing businesses and individuals. They engage in sophisticated business, financial and insurance related litigation, trials and appeals in all courts, state and federal, in New York and Connecticut as well as arbitrations. Their practice areas include general commercial and corporate disputes, securities litigation, debtor/creditor disputes, insurance coverage disputes, real estate litigation, employment-related litigation, real estate purchase and sales, trust and estates and divorce. They have offices in Westport, CT and Bronxville, NY. For more information see www.begoshorgan.com.

High-Tech

High-tech means every document, every exhibit – in short, everything – is on a laptop in the courtroom. There are various software programs that will assist you in organizing your exhibits and displaying them when you need them. Your laptop is connected to a projector, so the jury sees whatever you see on the laptop screen. You can also manipulate documents. You can highlight passages of documents, or draw circles around them, or do pretty much whatever you want to do. You can show movies, animations, whatever you can put on a computer.

That's the good news. The bad news is that, in my experience, the higher-tech the gizmo, the more likely it is that a lawyer won't be able to operate it properly, or won't be able to fix it if (when?) it crashes. If you talk to a trial graphics company, they'll probably tell you that you should have a technician sitting in the courtroom to operate the display technology throughout the trial. No question, that is very nice to have, but how many clients will agree to that kind of expense? So you're forced to choose between a significant outlay for manpower, or trusting that you (or perhaps the associate assisting you) are savvy enough to operate the technology.

Middle-Tech

For me, the right approach is what I call middle-tech. In my view, middle-tech means using the least sophisticated technology necessary to get information before the jury. And, as far as I'm concerned, the backbone of the middle-tech approach is an Elmo.

"Elmo" is actually a trade name for a video version of the old-fashioned overhead projector. Anyone of a certain age will remember the old overhead projectors: you'd copy whatever you wanted to display on a transparent piece of plastic, and put the plastic on the projector's glass platform. Light would shine through both, and project the image on a screen.

The Elmo does the same thing, except with a video camera. And this makes all the difference. You don't need to use transparencies. You can put anything you want on the projector and it'll get displayed. That obscure document that suddenly became relevant? Put the page you want on the projector and show the entire courtroom at the same time. If you want to emphasize a particular passage, you can now use that low-tech document markup tool – the sharpie. Draw a nice big red circle around the passage in question. Or maybe just point your finger to the paragraph as you're reading it out loud.

You can still have pretty charts, graphs and other demonstrative exhibits, but now you don't have to enlarge them. You just need an 8-1/2 x 11 copy to stick on your Elmo. Making changes to those exhibits becomes easier. Your graphics person merely needs to modify her graphics image, and email you a new file, which you'll print out (OK, you'll want a color printer for this). Not having to get a graphic enlarged, mounted and messengered to you is going to save at least a day, if not more, which can be huge during a trial.

Enhancing your ability to roll with the changes is the biggest advantage of the middle-tech approach. Importantly, you are accomplishing this

without losing the ability to show the jury everything that you are saying. In fact, you'll find yourself standing next to your Elmo whenever you're talking. Any time you refer to a document, or ask a witness to read a document, you'll put it on the projector and let the jury see it.

Information First, Medium Second

Using the middle-tech does not mean that displaying information to the jury is a less important to you than to the high-tech people. To the contrary, the middle-tech approach emphasizes the desirability of always showing the jury what you're saying. In both the low-tech and high-tech approaches, the medium comes first, and determines the boundaries of what you can or will show the jury. In the middle-tech approach, the medium is determined after you decide what you want to show the jury. It is the information that moves to the front and center of your pre-trial preparation; the different display technologies become tools to choose after deciding what you want to display.

The middle-tech approach is entirely flexible. You can still use your beloved blackboard or easel when appropriate. You can still blow up exhibits if you like. You can also venture into the high-tech zone where necessary or appropriate. Sometimes, high-tech is the only way to go. Here's an example:

Let's say you have a case with several video depositions. Video depositions are essential when you have key witnesses who you know you won't be able to get to the trial. Showing videotaped testimony is light-years better than forcing a jury to listen to a tran-

script being read by the trial lawyer and her assistant, which is about the worst way to put key evidence before a jury (with the possible exception of one lawyer trying to read both parts).

So, if you had the foresight to videotape your deposition of an important, unavailable witness, congratulations. Of course, that brings up the next question: what are you going to do with six hours of videotape? Do you play it all? I don't know about you, but I wouldn't wish that on my worst enemy, let alone a jury.

You're left with editing the deposition. This sounds nice in concept, but the reality is very messy. Let's say you hire someone to do the editing, and put together a "highlights reel." But your adversary gets to object to your designations, and also gets to counter-designate. The judge might not rule on objections to designations until the eve of trial (or perhaps not even until the afternoon before you want to play the tape). How do you make changes to your highlights reel at the last minute to accommodate the judge's rulings? What if the judge orders you to play the counter-designations at the same time? Looks like you and your editor will be pulling an all-nighter. Either that or it's you standing at the VCR trying to fast forward to the correct spots while the whole courtroom watches you.

Trial display software provides an elegant solution. It is possible to synchronize the paper transcript with the videotaped testimony. You then use the software to create a list of page-and-line designations. When it's time to play the testimony, the computer will play the designated testimony, while scrolling the written transcript

underneath. If you need to add or delete a particular passage, it's as easy as editing the list of designations. The display software does the rest.

Think about this for a minute. The jury is seeing, hearing and reading the testimony at the same time. They don't have to sit through minutes, or hours, of irrelevant dross before hearing the good stuff. You are able to determine, and change, what you want them to see, hear and read up until the last minute. More importantly, you can repeat snippets of that testimony whenever appropriate during the trial. Let's say a particular witness testifies that an event never happened. All you need to do is to play the portion of his colleague's deposition admitting that the event did occur. There is no way you could do that if you had to fire up the VCR, find the right tape, and then fast forward to the right spot.

What Do You Show?

Middle-tech does not mean that you take shortcuts to avoid pre-trial preparation. Well before you select your jury, you will want to spend time thinking about what are the most important bits of evidence you want to get across to the jury, and figuring out the most comprehensible ways to display those bits.

If the case involves financial information (whether it be tax returns, investment accounts, earnings statements, or anything else), you will need to consider how that data can be summarized and illustrated most simply. My rule when it comes to financial data is never, ever use a "chart" that is composed of columns of numbers. Spreadsheets are great tools for

manipulating data, but they are lousy for conveying important information quickly. If you don't believe me, try this: find a spreadsheet that someone else has created in a case that you know little or nothing about. Take a minute to look at the spreadsheet. Now look away, and try to explain what important information was in it.

You need to simplify the financial data, and display it so there's context other than numbers. Depending on the data, you may use pie charts, bar charts, graphs, pictures, or some combination. A graph is always going to convey more information, more quickly, than columns of numbers. A spreadsheet showing a party's increasing income for each year has to be read, explained and interpreted. A chart with a bar graph showing the bars getting bigger as you go to the right can be understood at a glance.

Creating a simple graphic is not simple. You need to decide what's important about that column of numbers in your case. Is it that the numbers increase or decrease each year? Is it that they are above or below a particular benchmark each year? Until you decide what's important, you can't start to figure out how it should be displayed. The middle-tech approach forces you to make these decisions before the trial starts.

It is all too easy for us lawyers to focus on satisfying the rules – to focus on "getting the case into evidence" – to the exclusion of making the case understandable to the jury. I'm not saying you don't need to spend time making sure you can get your case into evidence. I am saying that it's not enough just to get your case into evidence; you need to make it under-

standable to the jury. Both are equally important uses of your time.

Getting Help

The middle-tech approach also recognizes the value of a graphics consultant. Here, you determine whether your particular case warrants a low-, middle-, or high-cost approach. If your case is simple, with a few key documents, you might be able to create every demonstrative exhibit in-house. With a little experimentation, you can create serviceable charts and graphs with your spreadsheet software.

In a more complicated case, you may know what you want, but need someone else to create it. Here, a graphic artist can be extremely helpful, and not terribly expensive. They can take a rough chart, graph or picture and make it display-worthy. You need to be careful here, especially if you're working with an artist with little or no litigation experience. The artist needs to understand that the

need for accuracy comes before the desire to make it look "pretty."

When possible, I suggest use a graphic designer who specializes in litigation. These people often function as part of full-service litigation support companies. And they can be truly wonderful. An experienced litigation graphics consultant can assist you in determining the best way to display the information at issue. Chances are they've done something similar before and they know what works. They often understand the psychology of color, and can use it to your advantage. They understand the evidentiary need to make the exhibits accurately reflect the data in evidence. They also understand that you're probably going to be changing things as the trial goes on, and they have the capacity for quick turnarounds. They can also typically provide and set up any equipment you will need to display what you are creating (including your Elmo!) If you have a lot of data that you need to put before the jury, or if the interests at stake are sufficiently high, it may very well be worth spend-

ing the money for consultants of this nature.

Show Them What You're Saying

The starting point for your trial preparation should be a commitment to show the jury all of the documents that you will be introducing into evidence. The easiest, and most flexible way to accomplish this is to use a document projector, or Elmo. The equipment is easy and intuitive to use, and gives you the ability to instantly display virtually anything you can hold in your hand.

Though I consider this piece of technology to be essential, be careful that you don't let your trial display decisions be driven by a fear of, or lust for, some technological wizardry. Your primary focus should be to determine what information you need to display to the jury. Once you have done that – and once you have determined how to accurately, and simply, illustrate complex parts of your case – then determine what is the minimum level of technology that will fit your needs.