

STATE-OF-THE-ART ADVOCACY

Virtually all current judicial and legislative processes - formal or informal - entail collecting, organizing, and communicating evidence to prove pertinent facts, followed by argument urging how those facts should be interpreted and applied to determine the outcome of the proceeding.

Dispute resolution processes, generically referred to as "judicial proceedings," may involve only the disputing parties, as in informal negotiations. More likely, however, they involve presentations to third-party *fact-finders* and *rule-appliers*, as in conciliation, mediation, arbitration, or formal trial.

Legislative and administrative proceedings also involve fact-finding upon which *rule-makers* predicate the formation of policies and procedures which we categorize, generally, as "legislation."

In short, legislative and judicial proceedings, alike, almost always involve the presentation of evidence, followed by argument to persuade third-parties how that evidence should be interpreted in light of applicable rules of logic, science, morality, public policy, or law.

Some, but by no means all, judicial or legislative processes are subject to one form of appeal or another, the purpose of which is to insure that the fact-finders have conformed to established principles. In most cases, facts found or rules made or applied, in the original proceeding are overturned in the appellate process only if demonstrably

erroneous. Nonetheless, even appellate processes rely heavily upon the communication of evidence and argument by advocates.

Ironically, despite our explosively expanding intellectual and technical sophistication, and despite the critical importance of fact-finding in both legislative and judicial contexts, no means of determining and interpreting disputed facts has yet been devised which is demonstrably more reliable than having advocates present evidence to theoretically disinterested, unbiased persons and then argue how that evidence should be interpreted.

Thus, the effective presentation of evidence and argument is critical to success in any dispute resolution or legislative process, formal or informal, placing a premium on the ability of the advocate to communicate both evidence and argument in a form which is *readily understandable, memorable, and persuasive*.

The need for effective communication is especially great today because of the bedazzling variety and complexity of the issues with which advocates must now deal.

Fortunately, the same technological revolution which has spawned such a dizzying array of issues has also provided advocates with highly persuasive methodologies for analyzing, communicating, and arguing their cases.

These new "technologies of persuasion" can be used with great effect in both presenting evidence and arguing how it should be interpreted. Central to the success of such technologies is the demonstrably synergistic influence, on both

comprehension and retention, of simultaneously appealing to more than one sense.

Simply stated: multi-media presentations are the order of the day.

Traditionally, advocates have relied heavily on evidence presented in the form of *live testimony* and actual *documents or things*. Virtually anything capable of being, seen, heard, felt, smelled, or tasted may constitute evidence. Recently, however, advocates have come to rely more-and-more on a wide variety of graphic or electronic media specifically prepared for the proceeding, to communicate with and persuade their audiences.

In order to appreciate how various media can be used to enhance the presentation of evidence and argument, it is important to understand some basic concepts and definitions:

"Real Evidence" is testimony about the transactions or events in dispute, or the actual documents or other objects which, in most instances, came into existence independent from the proceeding in which it is presented, at or about the time of the events in question, which evidence is used to prove the existence or non-existence of a disputed fact.

"Real evidence," may include both direct and circumstantial evidence.

"Direct evidence" is evidence that, by itself, without inference or presumption, conclusively establishes a disputed fact.

To illustrate: The fact that a written contract existed between the disputants may be proven simply by the live testimony of a witness to its existence or, better yet, by presenting the contract itself to the fact-finders. The written contract is "direct evidence" of both the existence of the contract and its terms.

Frequently, only limited provisions in a lengthy contract may be in dispute, in which case it may well be desirable to focus the fact-finders' attention on those provisions by using pre-printed blow-ups or, even better, interactive electronic imaging to emphasize the terms at issue.

"Circumstantial" or "indirect" evidence is evidence which logically and reasonably permits, but does not compel, a fact-finder to infer or deduce the existence or non-existence of a different disputed fact. Some form of analytical process - logical or technical - is necessary to process certain foundational facts to establish the existence of an ultimate fact.

Circumstantial evidence, which our legal system accords equal dignity with direct evidence, is frequently the only evidence available to prove certain facts. Hence, *effective* use of circumstantial evidence involves both proving foundational facts *and* effectively arguing or demonstrating why the fact-finder should interpret those facts in the desired fashion.

Which brings us to the topic of "demonstrative evidence."

Unlike "real" evidence, "demonstrative," or "illustrative" evidence almost always takes the form of exhibits prepared expressly for the purpose of communicating, summarizing, illustrating, analyzing or arguing facts or inferences to the fact-finders.

As with any evidence, demonstrative evidence may appeal to any or all of the five senses. However, "demonstrative evidence" most frequently takes the form of pre-prepared photos, slides, movies, computer simulations, models, videos, charts, graphs or tables which, in conjunction with live testimony, simultaneously appeal to the senses of *sight and hearing*. Such materials may also be prepared on-the-spot.

Interactive exhibits are also available utilizing pointers, markers or other physical or electronic means to emphasize specific aspects of an exhibit or the live testimony which accompanies it.

Some interactive exhibits may even be instantly "adjustable," allowing on-the-spot alterations to illustrate the impact of changed circumstances on the final analysis reflected in the exhibit.

In addition to appealing to one or more of the "physical" senses, interactive exhibits - if properly used - can appeal to the audiences' kinesthetic sense and its desire to "be involved."

"Demonstrative evidence" may be grouped into four general categories: Images; Summaries; Illustrations; Analysis; and Argument.

In addition to conceiving and executing an effective media plan, advocates must take great care to insure that its use will be permitted. Whether real or demonstrative, only evidence which is both relevant *and* admissible is proper, at least in judicial proceedings, although this rule is frequently honored more in the breach than in the observance, especially in non-jury proceedings.

In order to be "relevant," evidence must have a tendency in reason to prove or disprove any fact that is of consequence in the proceeding, including the credibility of witnesses.

In order to be "admissible," evidence must - with various arcane and frequently incomprehensible exceptions - be presented directly to the fact-finders in the form of testimony or tangible things; it must be "reliable," that is, predicated on an adequate foundation to insure its authenticity; it must generally be subject to effective cross-examination; it must not be cumulative or otherwise involve undue consumption of time; and, most importantly, it must not tend to create a danger of undue prejudice, confusing the issues, or misleading the jury, which is disproportionate to its probative value.

The prime example of evidence which does *not* meet all these criteria is "hearsay."

"Hearsay" is evidence offered to prove the truth of a statement made other than by a witness in court. Put in slightly different terms, "hearsay" is *any* out-of-court statement offered to prove a fact it asserts. Hence, communication or recordation of any kind which does not occur in the courtroom, and which is offered to prove its own truth, is "hearsay."

Subject to numerous important and frequently opaque exceptions, "hearsay" is generally objectionable since its creation *outside* the courtroom deprives the adverse party of the highly valued right of cross-examination - which our adversarial system considers the touch-stone of reliability.

Despite the fact that most demonstrative evidence is "hearsay," since it generally has been prepared outside the courtroom, ample precedent exists for the admission of both reproductions of "real" evidence (such as still or moving visual representations or audio recordings) and "demonstrative" evidence (such as charts; graphs; computer summaries; models; experiments; reconstructions; projections; and the like) so long as the proffered evidence has a proper foundation; is a fair representation of reality; and has a probative value which outweighs any potential it may have for unduly influencing the fact-finders.

Thus, even assuming evidence is both relevant and otherwise admissible, Courts enjoy considerable "discretion" to admit or exclude evidence, real or demonstrative, if it may unduly engender shock, outrage, revulsion, or otherwise be unduly persuasive for one reason or another; or is simply a waste of time.

One highly effective technique for creating illustrative evidence before the very eyes of a judge, jury or legislative body is to have a witness illustrate his or her testimony while testifying.

Graphic or electronic reproductions of relevant real evidence generally are received without significant opposition so long as they are not cumulative; are reasonably representative and reliable; and have a probative value which outweighs any unduly biasing or inflammatory impact.

Demonstrative evidence which does more than simply reproduce a visual image of a place, person or thing is sometimes viewed with some judicial skepticism since it frequently involves at least some degree of argument, and because it was probably prepared for use in the course of the proceeding for the express purpose of persuading the fact-finders.

Accident reconstruction videos; computer simulations; day-in-the-life videos; and experiments are examples of demonstrative or illustrative evidence which may simultaneously communicate pure probative facts and advance analytical arguments to fact-finders, as well.

While traditional evidentiary objections have little practical application in most non-jury proceedings - predicated on the debatable notion that sophisticated conciliators, mediators, arbitrators, or legislators are immune to being swayed by slick or misleading presentations - the judiciary remains skeptical about the use of certain types of demonstrative evidence. Consequently, advocates must lay a firm foundation as to the *representativeness*, *reliability*, and *objectivity* of such evidence before seeking to use it. This is especially true where experiments, accident reconstructions, or "slick" presentations are involved.

Simply stated, great care must be used to insure that the factual and analytical predicates of any such evidence can be firmly established.

As with their traditional reliance on oral testimony and real things to prove facts, advocates have long relied almost exclusively on oral presentations to argue their cases.

Demonstrative evidence, however, can also be *highly* effective adjuncts to opening statements; closing arguments; and legislative presentations.

In judicial proceedings, opening statements are limited to a statement of the issues in the case and an outline of the evidence counsel both intends to offer and believes, in good faith, will be available and admissible at trial. If expressed in a temperate manner, the advocate's intention to impeach opposing witnesses may also be declared.

Time-lines, selected portions of important documents, and graphics of basically undisputed sites, things, or processes can be very useful in creating an opening statement "road map" of the case for fact-finders. Permission to use any such materials, however, should be obtained prior to their use.

In contrast to the strictures imposed on opening statements, counsel are usually accorded wide latitude in summing up, and may properly indulge in all fair arguments in favor of their clients' case. Thus, while utilizing such materials in closing is still in its infancy, demonstrative evidence is both proper and can be highly effective in closing arguments.

One note of caution here: Despite the wide latitude accorded advocates during closing argument, the risk of mistrial makes it advisable for counsel to pre-clear any "unusual" closing techniques with the court or its counterpart.

Finally: While the Constitutional right of petition permits participants in legislative proceedings to say virtually anything, the assertion of illogical arguments or unfounded facts in such proceedings frequently opens the credibility of their proponents to potentially debilitating attack, and should be avoided.

In all cases, creating and preserving an aura of credibility is of paramount importance to effective advocacy and must be kept firmly in mind while designing any media plan.

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To summarize:

Evidence and argument must be both: (1) relevant - that is, it must have a reasonable tendency to prove or disprove any disputed fact which is of consequence in the proceeding; and, (2) admissible - that is, it must be authentic; based on a verifiable or otherwise reliable foundation; and not disproportionately persuasive to the point of being misleading or inflammatory.

To maximize its persuasive effect, both evidence and argument must be communicated to fact-finders, *understandably, memorably, and persuasively.*

To be *understandable*, exhibits, testimony, and argument must be simple, logical and believable.

To be *memorable*, the medium or media used to communicate both evidence and argument should maximize repetition; compel or at least encourage the attention of the fact-finder; and appeal to multiple senses, if possible.

In addition to enhancing comprehension and retention, and of significant importance to effective advocacy, well-organized and persuasive presentations almost always significantly enhance the credibility of the advocate, which pays handsome dividends in both trial and legislative proceedings.

In the final analysis, the outcome of any judicial or legislative proceeding frequently depends on how effectively the advocate communicates both evidence and argument. Making

judgments regarding what and how to communicate involves a complex interplay among advocates, witnesses, clients, and media experts. The choice of communicators; the things to communicate; and the means of communication should thus be made thoughtfully, with care, and by seasoned experts.

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