



Effective use of exhibits in closing argument helps win \$12.2 million verdict

When you tie it all together, technology can capture jurors' attention and prevent boredom

BY TED BROOKS

We learn and retain best when information is delivered in such a manner that we engage multiple senses in the process – the two most common and obvious in trial being hearing and sight. Arguing a case to the jury is standard practice in most cases and, when done properly, can help “turn on the light bulb” for those jurors who may need a little assistance in putting together the pieces of the case. Often, during the evidence phase of a trial, bits and fragments of information come in at seemingly unrelated points. Any effort to emphasize the connection at that point may draw an objection or, even worse, may offer clues to opposing counsel as to your trial strategy.

The best closing arguments I have seen (and I have seen many) effectively sew together all of these fragments for the jury in summation at the end of the trial. Up to that point, it would have been extremely difficult for even the most diligently listening juror to make the connections. What I have observed of jurors during closing arguments is that your exhibits – in addition, of course, to your commanding voice and presence – are what seem to catch and hold their attention. Since so much of holding a jury's attention is dependent on the exhibits, we'll break exhibit technology into three groups:

- Old school
- Middle of the road
- High tech

Old school – hard-copy exhibits

More cases are tried using hard-copy exhibits without the use of technology than any other method – even today. While that may be true, it doesn't mean that it is the most effective or efficient method available. Teaching a new subject to jurors and then leading them to view it from your perspective can be a difficult process and jurors can easily become bored or distracted. The easiest way to prevent this is to give them something to look at.

While passing a document, diagram or photograph among jurors that they can “touch and feel” may seem like a good idea, you really have no control over what they actually read or see on the exhibit. Further, unless you wish to delay the trial while every juror has an opportunity to examine the exhibit, there may be only one or two who actually see what it is you want them to read/see, when you want them to read/see it.

And yes, you can still enlarge or blow-up your exhibits, paste them on foam board and carry around a stack of exhibit boards with an easel, setting it up where half of the jury has to squint to read it and the judge can't see it at all. If you do wish to use blow-ups for a key document or timeline, I would recommend limiting their use to only a few, and use at least 4'x6' boards.

Middle of the road – ELMO

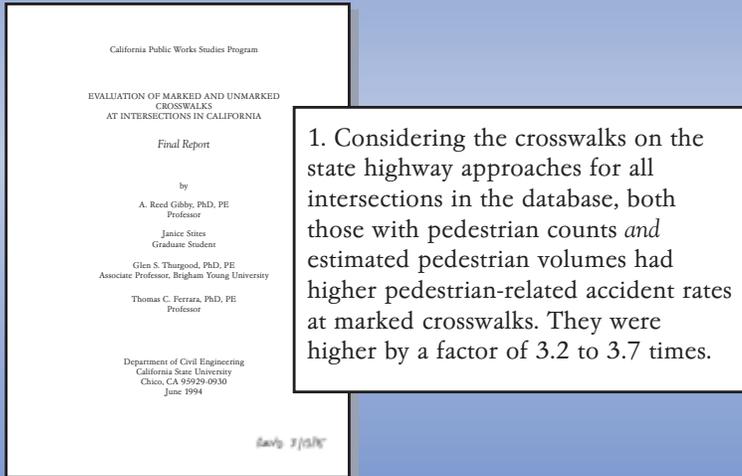
One of the more frustrating things in trial is listening to counsel and a witness discussing the key points of a document, while no one can see it. This can cause jurors to feel excluded from the conversation – and essentially they are. While it is important during evidence presentations to make sure the jury can actually view the evidence, it is even more critical in closing argument. Presenting your exhibits on an ELMO is a good step in the right direction.

A modern version of the overhead projector, the “ELMO,” (also document camera or visual presenter – ELMO is actually a brand-name) has been available for over 20 years. Used by itself as a means in which to get all of the jurors on the same page, it is a quantum leap beyond the dependency of the hard-copy exhibit, and can help the jury see much more of the evidence.

The downside of using an ELMO is the fact that it is simply little more than a video camera, allowing the same type of area-zooming you can do with any other camera. Since it is actually a camera, it can also be effective in examining a small exemplar exhibit. It is effective, but cannot zoom *directly* in to a specific paragraph of a document, or perhaps a specific item in a photograph or map. While it is certainly not on the cutting edge of technology it is highly



Marked Crosswalks Increase Pedestrian Accidents 3.2-3.7 Times



1. Considering the crosswalks on the state highway approaches for all intersections in the database, both those with pedestrian counts and estimated pedestrian volumes had higher pedestrian-related accident rates at marked crosswalks. They were higher by a factor of 3.2 to 3.7 times.

Trial Exhibit 5, p.58

Figure 1

Marked Crosswalks: A "False Sense of Security"



Trial Testimony:

Katie Yim Ed Ruzak
William Kunzman

Trial Exhibit 284

Figure 2

available, being found in most high-tech courtroom setups. When added to the complete system, the ELMO can function as an emergency method of presenting something that wasn't included in the trial database.

High tech – trial presentation software

Presenting your evidence and making your closing argument from a trial database using TrialDirector™ or other trial presentation software will enable the most efficient and effective means of getting your message across. It is efficient because far more evidence may be displayed in much less time when compared to using only hard-copy exhibits. In other words, it keeps it you "moving along." Post-trial surveys confirm that jurors, like judges, are truly appreciative of any effort made by counsel to speed things along.

In addition to speed, trial presentation software is effective because counsel now has control over exactly what the jury sees and when they see it (all at the same time). It even provides an opportunity to argue the document to some degree by zooming into specific language and highlighting key text.

Other effective features include the ability to zoom in on a photograph or Google Earth image, circle or place arrows at key points, and show what would otherwise be "hidden" to the viewer. In the latest version of TrialDirector, all of these features can even be performed on a video as it plays for the jury. Regardless of what you are showing the jury, it is far more effective when displayed on 7 or 8 feet of screen.

Rehearsal – always

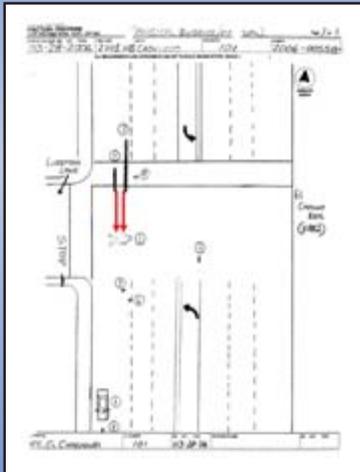
Regardless of which method you choose to present your closing argument, the best argument is a rehearsed argument. A prepared outline is essential, containing all of the key exhibits you wish to tie together, and in the proper order. Be prepared to use to your best advantage this final opportunity to connect with the jury as your visuals are presented, rather than shuffling papers and slides or fumbling with boards and generally appearing unorganized.

Pulling it all together for \$12.2 million

The recent case of *Emily Liou v. State of California*, (Case No. CIV 460659. County of San Mateo) tried by Doug Seltzer and Rich Schoenberger of Walkup, Melodia, Kelly & Schoenberger, illustrates the effectiveness of trial technology. This case involved a 17 year-old girl who was struck within a marked crosswalk at an uncontrolled intersection (no traffic lights or stop signs) on El Camino Real (SR82) in Millbrae, California.



Skid or No Skid?



Trial Exhibit 59

Figure 3

It was important to establish that Caltrans had knowledge that a marked crosswalk in an uncontrolled intersection (no traffic lights or other significant warnings to approaching motorists) was not only actually more dangerous than not having one at all, but also that pedestrians tend to have a false sense of security within a crosswalk. An effective exhibit helped to do this (See Figure 1 on previous page).

The evidence also showed that there were four dangerous intersections on SR82, the worst being Ludeman Lane. What makes Ludeman Lane even worse than the others is the fact that the crosswalk is hidden behind a rise in the roadway when drivers are driving in the southbound direction. This was demonstrated by showing photographs of the roadway and zooming in to show

how hilly it actually was. This little stretch of roadway had a very high rate of pedestrian accidents. Simple demonstrative evidence helped to explain visually that although each intersection would stand out on its own as dangerous, when combined with the other nearby intersections it became extremely obvious that there was a major safety problem on SR82 (See Figure 2 on previous page).

Several factors were shown to contribute to a dangerous condition existing on SR82 at Ludeman Lane: Not only was the road wide, busy and fast with visibility problems, but it also included a marked crosswalk at an uncontrolled intersection. A simple bullet-point slide was used in closing to demonstrate these points.

The defense theory ignored the fact that there were skid marks in the road at the accident scene, with one expert even going so far as to suggest that perhaps they were made just a couple of hours prior to the accident. Plaintiff's experts successfully demonstrated that this accident had occurred exactly as described by police investigators.

If the skid marks were indeed made by the co-defendant, Ms. Liou's body would have been exactly where it was shown in the police report diagram. Simply adding a couple of arrows to the diagram helped emphasize this during closing. In each instance where a slide was created based on an actual trial exhibit, the exhibit number was clearly displayed on the slide for easy reference and juror note-taking (See Figure 3).

Could this case and closing argument have been presented without the use of technology during trial and closing? Possibly, but given the number of exhibits and photos that jurors needed to see and "connect" in order to reach their decision, it would have been more difficult and certainly would have delayed the jury's \$12.2 million verdict.



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Ted Brooks is a widely-recognized figure in the trial presentation and technology consulting field. He is the founder of Litigation-Tech LLC (Los Angeles and San Francisco), and is a winner of the Law Technology News Award for Most Innovative Use of Technology during a trial. e-mail: tbrooks@litigationtech.com or www.litigationtech.com