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Get visual

Your clients and experts are some of your “exhibits” so dress them appropriately; also thoughts on how to make simple, inexpensive exhibits come alive at trial

BY DEBRA F. BOGAARDS

As a trial attorney, you control the courtroom for your plaintiff. You are the master storyteller. You create the magic that appears before the jury every day in trial. So, let’s focus on making the best visual magic for your jury.

As you arrive in the courtroom, you are met with a sea of faces of potential jurors. Behind each face is a potential juror who is wondering how this courtroom trial will unfold. You don’t even know their names and yet you are faced with the daunting responsibility to ensure that each juror learns and understands your plaintiff’s story.

There are visual, auditory, and kinesthetic learning styles. All three styles should be integrated into your storytelling at trial since you need to reach each juror and you don’t know each juror’s primary learning style.

The visual juror learns, understands, and remembers things by seeing. This juror takes notes; uses maps, lists, charts, and diagrams; watches audio visuals like videos; and learns from seeing things written on butcher paper, foam core boards, and PowerPoint presentations.

The auditory learner retains information through hearing and listening. This juror needs to sit where they can hear. This juror has a good memory for spoken information. When you are storytelling in your opening statement and closing argument, the auditory juror is most swayed.

Then there is the kinesthetic juror who learns best by doing or having a hands-on experience. In a courtroom, where reading, seeing, and hearing are the primary learning sets utilized by the

trial attorney, tactile learning takes some creativity. Passing around an exhibit from juror to juror is one way, which will be addressed later.

The focus of this article is on visual learning and reaching the jury visually. There are many ways that you reach a jury visually. We will explore three ways: (1) through your clothing, (2) exhibits, and (3) counsel’s table.

Your clothing does matter, vis a vis the Elizabeth Holmes trial

As the trial attorney, you are the one who decides how you, your plaintiff, and even experts should dress in the courtroom. Thought should be given to the image you wish to create for your client. It is no longer sufficient to instruct your client to dress for “church or synagogue.” Many clients don’t go to either and I’ve seen shorts or too casual attire in both. For a businessperson, suiting may be appropriate, although you may suggest navy blue, brown, or grey, which make one look more trustworthy. For a female non-professional, a floral dress or pale pink or cream outfit may be worn to soften her appearance. While your plaintiff should appear genuine and authentic, you should still put together their clothing to create the right image.

In the very recent fraud trial against Elizabeth Holmes, the entrepreneur accused of lying to investors and patients about her blood-testing start-up, Theranos, created a new courtroom image which may affect the jury’s decision. As New York Times author, Vanessa Friedman, aptly notes: “When the verdict comes down, the transformation of wunderkind founder of Theranos from black-clad genius to besuited milquetoast will be

an integral part of the story. Did it work or was it a seemingly transparent effort to play the relatable card? (Perhaps the jury indeed saw through it, as they found her guilty on multiple counts. – *Editor*) But rarely has there been as stark an example of Before and After.” Or, as an article in the journal of the American Bar Association put it: “How you dress makes an impact on a jury or judge’s attitude about you. The goal is to look appropriate and non-threatening while not discussing the case.”

In an employment case involving sexual harassment of the medical assistant by the doctor, which went to trial in Marin County Superior Court, I took my client, the plaintiff medical assistant, shopping at Nordstrom. She looked worn out and tired, according to my trusted court reporter. So, we went for a refresh. Her clothing style was somewhat sexy and low cut, tight blouses and skintight pants. We took the advice of my jury consultant and opted for a pair of loose pleated trousers and a flowy skirt.

We searched for and found in the dead of winter a pale pink cashmere cardigan and matching sweater set. We purposefully went one size up to de-emphasize her curves. Plaintiff was comfortable with the new look, which softened her appearance and made her more sympathetic. It worked.

In another employment case (which was settled at mediation), my client was a whistleblower at a tech start-up who had aspired to be at the C-level. He felt that he had started the San Francisco office of an international company and so he was losing his entire identity. He slumped into a deep depression, losing his long-term girlfriend and never leaving his condo



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(pre-pandemic). By the time mediation was approaching, he had put on weight and let his hair and beard run wild.

My hair stylist gave him an emergency appointment and then my client bought a new Zegna suit that fit him beautifully. My goal was to have him appear at the mediation as the C-level professional that we knew he was, with a confident air that would make him relatable to both the high-powered mediator, and the CEO, COO, and CFO who had flown out to the mediation from abroad. In other words, the company wrongfully fired a powerful member of the team. We were still able to effectively communicate his depression and downward spiral. And it too worked.

In a personal-injury case in which I represented a 26-year-old young man who lost his meth-addicted mother when a diseased eucalyptus tree branch fell on her on a public pathway, I took his younger brother and his baby mama shopping at Banana Republic. First, however, my hair stylist cut his wavy, past-his-shoulder-length hair matted down with argan oil and soul patch. Then, I replaced his only pair of ratty jeans and red hoodie with a non-descript pair of casual slacks, button-down plaid shirt, and tennis shoes. Since his baby mama would be with him and she was pregnant with his fourth baby, she also got a simple makeover. The new image put my client on an even playing field so that he could be compensated fairly.

As to your experts, sometimes they may need some guidance. Once, I had an electrical engineering expert in a fire loss case turn up with a brownish-greenish suit with flood length pants that caused the jury to comment afterwards. I still won the trial, but I prefer the jury listen to my expert, rather than examining their poor choice of clothing.

Another expert, a licensed psychologist, wore a navy-blue double-breasted blazer with brass buttons and '80s shoulder pads, with a matching mini skirt, navy opaque stockings with a run down the back and navy pumps. Again, although I won the trial, the jury shared

with me afterwards that they were so surprised that she was *my* expert! Once she started talking, however, they appreciated her knowledge and testimony.

One or two experts nailed it. One forestry expert who testified in a trial about a creekside remediation measure in Woodside, wore a denim button-down work shirt with his company's logo embroidered on the pocket, and brought an envelope of root hair fibers to pass around to the jury. He was dressed appropriately for an expert who works with trees and dirt. Moreover, by passing the envelope containing his root hair fibers to the jury, he was able to employ kinesthetic learning.

Another expert who nailed it is a well-known orthopedic surgeon who wore a well-worn brown wool sport coat and used a femur bone as his pointer for the easel. He was down to earth and spoke plain English, a delightful and stark contrast from the opposing expert who wore a Brioni sleek suit and peppered his talk with Latin.

Exhibits: Show the jury and you win!

Demonstrative exhibits are intended to demonstrate an important fact or set of facts in your case, usually including a visual depiction. An exhibit can be helpful to establish a context or provide a reference point for events that occurred. Demonstrative exhibits include timelines, illustrations, graphs, animations, diagrams, human anatomy renderings, as well as photographs, physical objects, text messages, emails audiotapes and videos. They recreate or represent something in the case so that jurors can visualize the events of the case in their mind.

Not all documents presented as evidence will be marked as an exhibit. Only those items that the court deems as relevant will be marked as evidence.

Paralegals can organize and copy exhibits. You will need exhibit stickers and at least four copies of each exhibit (for the court, court clerk/judge, yourself, and opposing counsel). Keep your sealed

original deposition transcripts to lodge with the court and organize your copies of the transcripts (in a binder). Perhaps purchase a large exhibit bag to bring your oversized exhibits – 30" x 40" foam core boards – for the court. (You'll want to make an 8" x 10" copy for the court to mark as it's exhibit.) Make a typed transcription of each videotape, so you can note the sections of the case, you want to enter into evidence. Lastly, create a master index so you know all of your exhibits.

Familiarize yourself as the trial attorney with the steps for introducing exhibits. Check the judge's courtroom rules in advance. These are the basic six steps:

1. Mark the exhibit for identification;
2. Show the exhibit to opposing counsel;
3. Request the court's permission to approach the witness;
4. Show the exhibit to the witness;
5. Lay a foundation;
6. Ask the court to enter the exhibit into evidence.

Start thinking about exhibits in the beginning

Start thinking about your exhibits when you have your initial client meeting. In a wrongful death case, ask the family of the decedent to gather photos and videos from birth to the present of the decedent. Arrange a meeting at the family's home to get a feel for the family dynamics and love. You may spot a beautiful, framed family photo on the wall. Recently, the daughter of the decedent scrolled through her mother's iPhone at our initial client meeting to send me photos and videos for use in the case. Ask whether there is a video from the church memorial or celebration of life.

When you review medical records, there may be certain chart notes that you can blow up for the jury. Perhaps keep a folder in your file marked "Exhibits" of the key medical chart notes.

Other essential documents in a disputed liability automobile accident case may be the video recordings at the scene, the police photographs, your



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expert's photographs, scene diagrams and vehicle photos from an expert inspection. It is your responsibility as the trial attorney to ensure that your office obtains all relevant evidence for your expert in discovery. These photos are solid gold at trial.

In a recent motorcycle case, my client's custom-built motorcycle and defendant's van inspections were critical to the finding of the 100% liability on the driver of the van. By attending both inspections, I learned what parts of the motorcycle and van made contact. In turn, this knowledge better prepared me for the driver of the van's intense deposition. The photos and excerpts of the driver's deposition made excellent exhibits. And in disputed liability accidents, all of the measurements, photos and deposition transcripts are utilized by your accident reconstruction expert and professional exhibit maker to create an animation.

Types of exhibits

There are many types of exhibits for the courtroom, including the simple 30" x 40" foam core board, or a pad of butcher paper with an easel and colorful marking pens, to a professional human anatomy rendering to a full-on PowerPoint presentation.

PowerPoint is an easy way to organize a lot of documents (medical records), diagrams, deposition excerpts, human anatomy drawings and more. My firm has a graphic designer who made a template with a simple blue border and the firm name discreetly in the lower corner for every PowerPoint. The tailored PowerPoint frame is a good branding tool.

You may want to have someone run the IT for you, so you don't have to worry about it during trial. Bring two projectors just in case there is a problem. There are services that provide an IT person to handle courtroom tech during trial. However, my associates like to run the tech systems so they can be present during trial. Once, I had my daughter run the IT before she went to law school.

You will want to mix it up. Have one or two 30" x 40" foam core boards as exhibits and put them on easels before the jury or in the background in the courtroom. Perhaps it is a blowup of a photo of the damage to your client's car. Perhaps it's a timeline. Feedback from one jury was to use timelines since that's how techies organize data in their workplaces. (Naturally, if you decide to draw or create a timeline in real time in front of the jury, make sure it's not accidentally phallic and that you have good handwriting. An opposing counsel once inadvertently created a phallic timeline, and I couldn't unsee it for the rest of the trial!)

Lastly, use plain old butcher paper and colorful markers. Bring an extra easel for the pad of butcher paper. Experts are more comfortable out of their chair (i.e., the witness stand) and in front of the jury, drawing or writing on the pad. This gives the expert an opportunity to be a professor. Teaching comes naturally to the experts, and it makes the experts more relatable.

There are excellent graphics and exhibit makers in the SFTLA community. For anatomy drawings of the plaintiff's injury, timelines, and more, you can retain the services of David Rosenthal of Legal Vision SE, Morgan Smith of Cogent Legal, and Matthew Kimmins, all of whom I have had the pleasure of working with at some point in my career.

Animations are critical in disputed liability cases. Often, your accident reconstruction expert will provide calculations to your animator for the animations. While animations can be costly, they are an excellent tool to illustrate your theory of the case. Most jurors are visual learners, and your animation will win your case for you.

As you create exhibits, design the exhibits for readability. According to the Harvard website for digital accessibility, "[r]eadability and legibility are key considerations for all users..." For optimal readability, Harvard's digital accessibility team recommends the following pointers: (1) use visual and

semantic space, (2) provide the right amount of space between lines of text, (3) use clean typography, (4) avoid using all caps, (5) don't underline text, (6) use left aligned text, (7) don't put two spaces after a period, and (8) support text resizing.

Counsel's table is your personal museum space

The Jasper Johns exhibit at the Whitney Museum in NYC is filled with light and space. The setting is clean and minimalist. The museum created a sublime backdrop to showcase the artist's works without distraction and in a thoughtful, organized sequencing.

While at counsel's table, put the spotlight on yourself, just like in the Whitney Museum. The jury is literally stuck in the courtroom, so the jurors notice everything. Are you following the advice of What Not to Wear? Jury consultants can assist but so can your *sechol* or common sense. A tailored navy, brown, or dark grey suit is a good investment. Your shoes should be polished and resoled. Your watch and any jewelry should not draw attention. Naturally, the more seasoned the trial attorney, the more apt they will be to stray from these guidelines, which may be acceptable due to their courtroom savvy and experience.

Next, look at counsel's table. Is it organized with binders and neat stacks of folders, papers, etc.? In one trial, counsel put all of their 8" x 10" glossy photos of both vehicles all along the floor of the well of the courtroom at lunchtime to organize them. The problem was that when the jury came back in from lunch, all of opposing counsel's exhibits were still strewn all over the floor. Also, this same attorney could never find his copy – whether physical or electronic – of the deposition transcript that I used for impeachment purposes. Each time I wanted to read from a deposition transcript for impeachment, I'd stand at the lectern in front of the jury with my finger pointing to the lines. Then, I'd



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turn to the judge and counsel and say: "I'd like to read from Dr. So and So's deposition transcript, page 15, lines 10-25 and I'll wait." The judge would open the sealed copy and find the page. Counsel would look for his physical copy (which he had ordered from the court reporter) and come up short. Then, counsel would ask me and the judge if he could read over my shoulder. I'd say "yes" immediately as a professional courtesy. This happened at least a half dozen times. It didn't help counsel. He seemed disorganized and ill-prepared. Based on the favorable outcome for my client, it certainly had an effect on his case.

In another case I observed, plaintiff was a tenant whose apartment caught fire while she was at work. The defense argued that plaintiff had her mattress and her bedding on the floor, as well as heaps of clothes that rested on top of the cord to her portable heater, which caused the combustion, not the old electrical outlet in the Victorian apartment building. Counsel and her client sat at counsel's table with binders, loose paper and exhibits heaped in a mess on it. The floor near their table was covered with purses, briefcases, backpacks, sweaters, scarves, and other *schmatas* that defense counsel had to tiptoe around to get in

and out. The visual helped plaintiff lose the trial as it closely mirrored the defense's theme of the case.

In summary, trial is a visual art form. Creating exhibits is worth the investment of time. Whenever I finalize my exhibits, I take a deep breath of satisfaction, a wee dram of Craigellachie 23, and smile to myself, knowing that I'll win my case!

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