

TRIAL

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Trial techniques

*Making the case,
one step at a time*

Keep jurors awake with powerful visuals

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Jurors shouldn't need a jolt of caffeine to keep from dozing off during your case presentation. Even simple visuals can engage jurors' interest and cement your case themes in their minds — if you use them the right way.

It's 2 p.m. The courtroom is hot. Everyone is full from lunch. Up next is your critical witness: your client's main treating physician in videotaped deposition testimony. You wheel out the TV, turn down the lights, and push play.

Within a few minutes every juror's eyes are glazed over and juror No. 1 is snoring. You want to scream at them, "Listen! This is my best evidence! This stuff is really persuasive," but even your eyelids are feeling heavy.

Jurors today come into court expecting the type of high-suspense drama they see on television shows like *Law & Order* and *Boston Legal*. They're looking for fast-paced entertainment, but too often they get slow, tedious monotony. The way to keep your jurors awake is to give them what they want: evidence that entertains them.

Even the driest and most boring point can be made persuasive, or at least informative, if you present it visually. Creating visual aids is no longer expensive or difficult. A sole practitioner can now compete with a large, well-funded defense firm.

Easy does it

You don't need an elaborate, high-tech presentation to keep the jurors' attention. Even simple, low-tech options can help you make your case visually, so jurors are more likely to understand and remember the points you make.

Flip charts. Every trial lawyer should bring a flip chart mounted on an easel

to the courtroom, along with lots of colored markers. During opening statement, you can write down specific issues you want to emphasize, or summarize what each witness will testify about. At a minimum, you should have a handwritten chart that outlines the issues and your burden.

All cases can be easily divided into three distinct topics: liability, causation, and damages. You can present your opening statement with a written chart that says, for example:

Three issues in this case:

Wrongful conduct: Did Dr. Smith fail to do the right tests on Mrs. Jones?

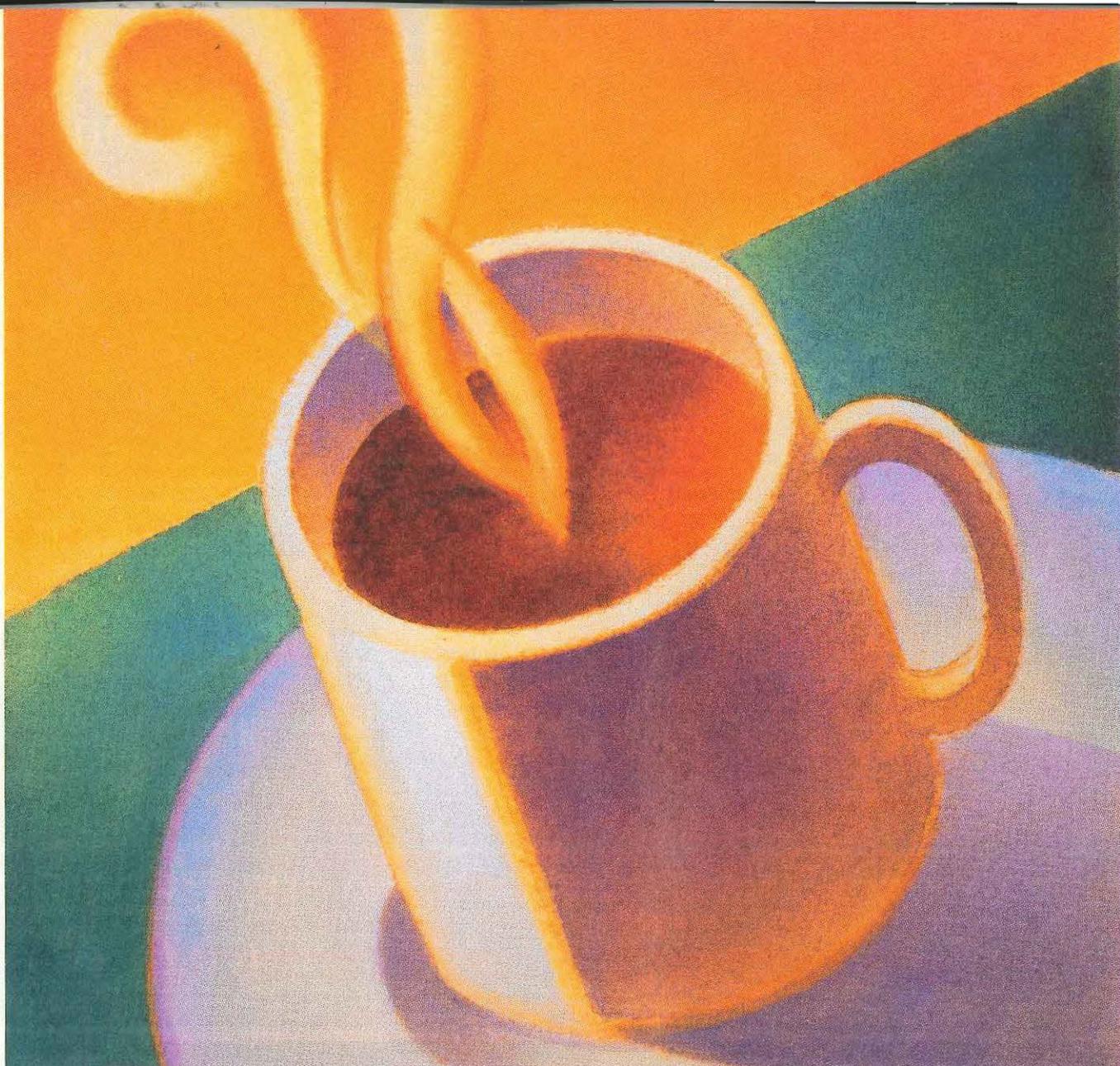
Cause: Did Dr. Smith's failure to do those tests cause Mrs. Jones's injury?

Damages: What is Mrs. Jones's injury?

A simple visual that outlines the three parts of your case will help the jurors understand the theme of your case and guide them through the testimony you will present.

Later, you can use the flip chart to highlight helpful testimony. This is especially true if a fact witness or an adverse expert blurts out a phrase during cross-examination that you want the ju-

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rors to remember during their deliberations. As soon as the witness says it, write it down. That act alone will make it more likely that the jurors remember your point. Write down, for example:

Witness Brown:

"I would have done two additional tests on Mrs. Jones."

"If it had been done, the blood test might have shown a problem."

For visuals you intend to use more than once at trial, you may want to use a foam-core poster board instead of a flip chart. You can buy foam-core boards at any office-supply store, and you can use them to display a chart or as backing for inexpensive blowups.

Causation theory checklists. One way

to highlight your causation theory is to use a checklist that tells the jury what evidence you intend to present at trial.

In a pharmaceutical case, for example, you can break your theory of medical causation into multiple parts, using simple phrases. If your theory is that a prescription drug caused inflammation of the liver that led to scarring and then cirrhosis (shrinking of the organ as the scarring progressed), break that theory into subparts, making each of them a line on your chart:

- Drugs in general can cause inflammation of the liver.
- Drug X can cause inflammation of the liver.
- Inflammation of the liver can cause scarring.

■ A scarred liver can shrink and develop cirrhosis.

■ Drug X caused inflammation, scarring, and cirrhosis of Mrs. Baker's liver.

For each subpart of your theory other than the last one, find a medical textbook or article that supports it. At the deposition of the opposition's expert, show the expert the textbooks or articles that confirm your statements and get his or her agreement with those statements on the record. If the expert changes the language of the phrase a little in the deposition, use the expert's phrasing on the causation theory checklist.

Create a simple, three-column chart, putting each specific medical theory in the left column and leaving the other two columns blank. Enlarge the chart

and mount it on a foam-core board.

As each witness testifies, you can check off the theories you've proved to the jury. Place a check mark next to each concept when your expert agrees with the statement (in the second column) and then again when the opposition's expert agrees with it (in the third column). (See example at right.)

The jury then can see that all the experts agree on 99 percent of the science. That limits your burden to proving only the last point. If the opposition's expert has agreed with all the subparts but the last one, the expert will appear unreasonable and possibly unbelievable.

At closing argument, show the jury that you have presented evidence on every issue that you said in opening statement was needed for a verdict in your client's favor. Since the jurors have seen you build the chart with witness after witness, they will be more likely to agree that you have met your burden to prove that Drug X caused the injury.

Enlargements. These can be the expensive, color, laminated version (which may cost more than \$100 each) or the inexpensive, black-and-white version (which should cost only a few dollars each). Vendors produce the first type by magnifying your visual image and laminating it onto a foam-core board. You can probably find several companies that provide this service in your area, so it may be worth calling around for a good price. These are visually effective because they look professional, but, because of their cost, you may want to reserve them for a few vital points.

Because a black-and-white blowup is inexpensive, it is a much better choice for your second-tier visuals. You can make one yourself at a copy shop, using a self-serve magnification machine, which produces an enlargement of your image that can be glued to a foam-core board. These machines are relatively easy to use, but ask for assistance the first time you try, because some are counterintuitive.

Using this type of visual, you can enlarge the key document in the case and highlight before the jury the few words that are most important. If you enlarge a diagram of a car accident intersection, you can draw on it to illustrate each wit-

Causation theory checklist		
	Your expert's name	Defense expert's name
Drugs in general can cause inflammation of the liver.	✓	✓
Drug X can cause inflammation of the liver.	✓	✓
Inflammation of the liver can cause scarring.	✓	✓
A scarred liver can shrink and develop cirrhosis.	✓	✓
Drug X caused inflammation, scarring, and cirrhosis of Mrs. Baker's liver.	✓	

ness's version and emphasize the differences among the witnesses' testimony.

Elementary e-evidence

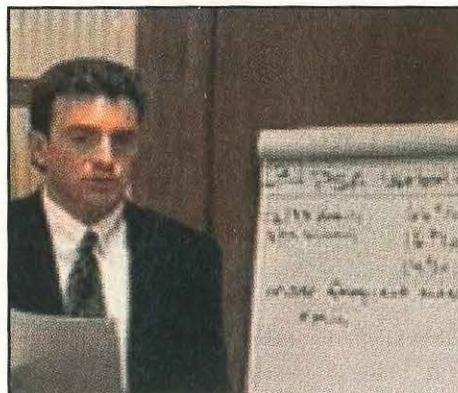
The easiest way to track and manage exhibits, even in a case with relatively few documents, is using electronic images. Many standard photocopy machines have high-speed scanners that let you put a paper document in electronic form quickly and inexpensively. Trial exhibits can then be exchanged via CD, eliminating photocopying costs and storage space issues.

Image-viewing software. Exhibits may be presented visually to the jury using basic image-viewing software—like PowerPoint, Sanctions, and Microsoft Paint—that allows you to highlight important points and even clean up blurs or marks on the documents. Many lawyers use PowerPoint presentations in

opening statement and closing argument. But you can also use PowerPoint for direct and cross-examination; it may require additional preparation, but it can be effective.

Even basic slides—for example, showing an expert's résumé or describing what a specific medical test entails—can help jurors better understand concepts or cement a theme in their minds. The Internet holds millions of images that can be used to highlight an issue. Once you choose a specific image to visually represent a concept, thought, or theme, use the same image throughout the trial to reinforce the jury's visual memory of the issue.

But don't overdo it, and beware of animated images, because they can be distracting if you stop on that slide to make a point. The jury will want you to move on to the next slide quickly just to stop



Lawyer



Witness

A deposition that was videotaped using two cameras, presented to the jury using split-screen technology, more closely resembles live testimony.

the irritating repetitive movement.

Deposition images. If a deponent is a critical witness and you know in advance that he or she cannot testify live at trial, consider filming the deposition testimony using two cameras. You can then use split-screen technology to present the testimony at trial. (See example on previous page.)

The first camera focuses on the witness and is played at trial on one side of the screen. This is the traditional, face-on image of the witness, as the rules require. The second camera is more ver-

The visual reinforces the earlier oral presentation, and the photo reminds the jurors whose opinion it is. And you get to present your evidence again as your opponent's experts are testifying.

If a deposition is videotaped, you can use a still shot of the witness from the tape in any PowerPoint slide you use to refer to that witness or his or her opinions. If you do not have a photograph of the witness, you can often find one on the Internet—on the witness's university, hospital, or company Web site. Another option is to take a digital camera to

issue, and a cartoon helps explain the matter, this may be a risk that is well worth taking.

You can find a large selection of cartoon images on the Internet, but you can also create your own. You may be able to find an art student cartoonist who can create images specific to your case for a small sum and with some guidance.

"Day-in-the-life" videos. Many lawyers believe that day-in-the-life films are too expensive to produce in most cases. But new user-friendly technology makes it easy and inexpensive to create a presentation that consists of both photographs and video. Even one great shot of your client—after surgery, in the hospital, or struggling with physical therapy or routine tasks—can replace an hour of testimony about damages.

From the first day you take the case, you should insist that your client document all injuries and, if he or she is still going through medical treatment, photograph or videotape every stage of that progress. You can incorporate these photos into a simple PowerPoint presentation at trial to dramatically show the reality of your client's damages.

A simple presentation of still photos, coupled with some basic video footage that shows your client's damages, can have a powerful impact on the jury.

Points to remember

Most of what you need you already have in your office. This includes simple software, an Internet connection (to gather images), a printer, a digital camera, a scanner, access to a copy shop, glue, and scissors.

Repetition is key. Use the same image, color scheme, font, and background consistently. By the end of even a short trial, the jury will associate certain visual images with your case themes. Closing argument then becomes a final opportunity to pull jurors into your camp and paint them a picture of your themes.

Think creatively and have fun. Spend time thinking through each theme of your case and decide how to best present the evidence visually. You'll find new ways of approaching your case that keep the jurors—and yourself—from dozing off. ■

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satile; you can use it to tape the lawyer asking the question, visual aids, or the exhibit being discussed.

Split-screen technology puts the images together to create a realistic, more interactive presentation style. The jury sees an examination of the witness that more closely resembles live deposition testimony, with both the lawyer and the witness appearing on screen.

Using two cameras at a deposition is expensive, so this technique should be reserved for critical testimony. You may also want to get a discovery court order to permit the double cameras and the use of split-screen technology at trial. A court order will prevent any last-minute objections to the split-screen presentation. (See *e.g. In re Prempro Prods. Liab. Litig.*, No. 4:03CV1507, Prac. & P. Or. No. 2 (E.D. Ark. July 2, 2003) (on file with author).)

Witness photos. Try to get a photograph of every witness in the case, yours and your opponent's. You can use these pictures repeatedly to visually represent a witness's testimony to the jury.

For example, while cross-examining a witness about your expert's opinions, use a photograph of your expert on a PowerPoint slide along with the testimony you wish to reiterate to the jury.

each deposition and snap a shot of the witness at the start of the deposition.

The best witness photograph is one from the deposition, because the witness will be in the same clothing and setting that the jurors saw him or her in when they viewed the deposition video. Then, whenever you refer to that witness, the accompanying photograph will reinforce the words the witness spoke during the deposition that you want the jury to remember.

Medical evidence. An easy way to present complex medical issues is to create visual images of the effects of the disease or injury—and then consistently use those visuals throughout the trial. Again, the Internet is a remarkable source of images for virtually every ailment, disease, and injury. You can also scan a color photo from a medical textbook and use that image at trial.

You may want to use cartoons or sketches to document a medical effect since cartoon images are often easier to understand and less intimidating. Some may argue that using cartoons is too casual or informal for a medical concept and could leave an impression that the lawyer is not taking the medical issues seriously enough. However, if the jury does not understand a disputed medical