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News Story

Cutting-Edge Techniques Help Leading Attorneys Win Cases

Demonstrative Evidence Highly Effective

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Leading attorneys in their respective fields say the single best way to turn a seemingly average or difficult case into a great one is through the use of cutting-edge techniques and demonstrative evidence.

Such methods can be used in any case, whether the underlying matter involves a car accident, a criminal prosecution, a divorce, or a claim of sexual harassment.

Southfield auto law expert Steven M. Gursten, who submitted the top car accident verdict in three of the last six years, and whose firm specializes in serious car and truck accident cases, said he and his colleagues rely on demonstrative evidence in every case.

"It is visual and it is powerful," Gursten said. "Every case has something that can be presented through demonstrative evidence. It will increase the value of a case at every level, whether it be on the adjuster level for settlement, for case evaluation, or for trial."

For example, Gursten recently settled a case involving a fractured arm without surgery for \$226,000. Without demonstrative evidence to "see" the severity of the fracture, many lawyers might guess an "average" fractured arm case would be worth only \$26,000.

"By showing the severity of the plaintiff's actual fracture through demonstrative evidence, you make the injury more real," Gursten explained. "The injury, its subsequent impairments, the pain and resulting disability have far more impact. It serves as an excellent anchor for damages and makes the plaintiff's complaints of pain credible."

Meanwhile, Lansing attorney F. Martin Tieber, one of the nation's top criminal appellate experts, has used cutting-edge methods such as biomedical/biomechanical engineering to debunk prosecution claims that would have been nearly impossible to refute in the recent past.

"For years prosecutors have been successful at getting juries to convict in child head injury cases with medical evidence that is not based on solid science," Tieber explained. "Cutting-edge techniques can be utilized to dispel the notion that certain head injuries could only be caused by high speed car crashes, falls from a height of several stories, or child abuse. In other words, the prosecution theory, often espoused by medical 'experts' in criminal or child custody/parental termination cases, is that serious head injuries, in some cases leading to death, could not have been caused by relatively short, accidental falls in the home."

Civil defense lawyers at the top of their games also know and understand the merits of cutting-edge technology.

Birmingham employment specialists Thomas Kienbaum and Elizabeth Hardy said that, even though employment litigation typically does not present as much opportunity for demonstrative evidence as complex products liability or commercial cases, there are still some relatively novel techniques that will materially impact the trial of an employment case.

"The most readily applied tool is the properly edited video deposition," Hardy explained. "Critical cross examination points are organized on a disc and readied for presentation to the jury, on screen, by command. The witness — if he changes his story at trial — is then confronted with a segment of his prior testimony flashed on screen with the printed text appearing below his image. The jury observes the witness, and hears and reads his prior testimony, thus maximizing the impact."

Finally, innovative methods can even be used in domestic relations cases, where experts say demonstrative evidence is not the norm.

Bloomfield Hills family law guru Richard S. Victor said there are certainly instances where it takes a veteran to overcome a difficult obstacle.

"In cases where there is a dispute as to the value of a 'cash business' — a party store, restaurant, gas station, or beauty salon, for example — where the business owner is claiming that the income received, which should be used for not only valuing the business but also in determining child and spousal support, should be the income reported on the tax returns, and the other spouse wants the 'real' amount to be found in order to have a fair distribution of property and support, we sometimes have to be creative," Victor told Lawyers Weekly.

Gen-X No-Fault

Gursten said in this age of "increased juror skepticism and cynicism," demonstrative evidence helps you connect to jurors who don't want to listen to lawyers.

"It is an important way to connect to the new 'Generation-X' jurors, who want to see things for themselves and make up their own minds," he said. "Using demonstrative evidence allows me to take the case out of the realm of two competing lawyers with competing arguments and conflicting experts. It allows me to give the jurors something they can point to and say, 'That is why we are here. That is why the plaintiff is in pain.' Even the most cynical jurors can be persuaded if they can see and understand why the plaintiff's injury is causing the pain, impairment and disability the plaintiff is complaining of."

According to Gursten, any injury can be presented visually with demonstrative evidence.

"You are only limited by your creativity and imagination," he explained. "A bone fracture can be documented by obtaining the X-ray films and turning it into a positive image so the fracture can be clearly shown. A disc herniation or bulge can be shown by the MRI or CT images. For nearly any surgery, I often obtain the videotapes of the operation by ordering the video of the surgery from an orthopedic college and having the surgeon narrate what he did during his deposition."

If the defense theme is that this was "just a little outpatient procedure" or "just a scope and poke," and not a significant ordeal for the plaintiff, "it becomes quite relevant to show a jury what my client really has gone through and why they are having the problems they are after a surgery," Gursten explained. "Defense lawyers simply can't have it both ways."

Perhaps the biggest challenge for demonstrative evidence is brain injuries, where it is often impossible to show the actual injury, Gursten pointed out.

"In these cases, video such as T-MAC or computer animation of the brain, can be used," he noted. "These illustrative aids can still show the areas of impairment, the mechanism of injury, and how the plaintiff was injured."

Microscopic injuries — such as diffuse axonal injury, shearing, and cavitation — that can cause severe injury or even death but won't show up on diagnostic tests can still be shown by demonstrative evidence video and illustrations so the jury can learn about the injury, Gursten explained.

"Even normal tests are still important in showing that there are no other possible explanations for why the plaintiff is having the problems that she or he is having — like space occupying masses, tumors, lesions, and so forth," he said.

Because he handles only auto and truck crash cases, Gursten said there is a second important reason why he always incorporates demonstrative evidence.

"One of the three prongs of the statutory definition of serious impairment of body function is that the plaintiff show an 'objective manifestation.' Using demonstrative evidence allows me to show the actual injury the plaintiff has suffered and easily satisfy the proof required for that first statutory requirement of proof," he said, adding that lawyers need to remember that you do not have to show the "exact" injury.

"It can still be an illustrative example of the injury the plaintiff has suffered," he advised. "Our law of objective manifestation is not the same as objective proof. Indeed, in *Kreiner v. Fischer* our Supreme Court only indicated that an injury has to be 'medically documented.' This phrase is far less demanding than the old standard of 'subject to medical measurement.' It is even arguably lower than the former standard of something that is 'medically identifiable and that has a physical basis.'"

Therefore, "if a doctor is able to diagnose an injury, the objective manifestation element of the threshold should be satisfied," Gursten stated. "But if the goal is to present in a visually impactful manner so you can recover the fullest measure of damages for your client, it only makes sense to try to show the plaintiff's own injury when you are able to."

Tieber said he recently retained Dr. Chris A. Van Ee, a leading biomedical engineer with Design Research Engineering in Novi, to help him with a murder case.

Dr. Van Ee used a specially designed crash test dummy to conduct tests on the stairway where Tieber's client said the baby, who subsequently died from head injuries, had slipped out of his arms as he tripped going down the stairs at a fast pace.

"The HIC [head injury criteria] values registered during the testing were more than sufficient to have caused the injuries that led to death according to Van Ee and a prominent pediatric neurosurgeon who also testified," Tieber explained. "Their conclusions were supported by actual testing, as opposed to the claims of nearly a dozen prosecution medical experts who based their claims that the injuries received could not have been caused by the accident described by the client on anecdote and conjecture. Thus, the defense presentation, unlike the prosecution's claims, was in line with recently revised MRE 702 and 703."

Tieber said Dr. Van Ee was able to put together data and film of the actual crash test to create a very effective computer generated video presentation.

"His on-site testing and his presentation and testimony, combined with the testimony of the pediatric neurosurgeon, was sufficient to overturn a bench-trying murder conviction obtained through the claims of prosecution medical experts," he explained.

Finally, Tieber recommended attorneys handling cases in this area always research the latest findings before approaching litigation and using cutting-edge science.

"A review of the work of national leaders in the areas of biomedical and biomechanical engineering makes it clear that there are ongoing developments in the science of pediatric head injury," he stated.

Breaking New Ground

Even in areas where demonstrative evidence is not prominent, practitioners are taking advantage of cutting-edge techniques to take their cases to the next level.

In addition to high-tech video depositions, Kienbaum said his firm uses software such as TrialDirector or Sanction to bring timelines and charts to life.

"Mind-dulling numbers spring on to a screen in an easy-to-grasp bar chart format as the lawyer summarizes them," he explained. "A timeline develops as the speaker moves chronologically forward with key subsections popping up on command and highlighting important points."

This technology, Kienbaum noted, "takes full advantage of the principle that jury absorption is maximized when a jury not only hears, but also sees and observes a moving image."

Victor and his clients have also benefited from living on the cutting-edge of technology. In cases involving a dispute over the value of a cash business, Victor said he often has to get "creative."

"We try to find some record of the 'second set of books' often kept by the business owner. They may be nothing more than sheets of paper," Victor explained. "In one case it was a daily log of cash in and money out. The wife found about six weeks of these documents in the trash and took them to the lawyer who, through the use of a forensic accountant, was able to determine how much money the business grossed yearly. Obviously those records did not coincide with the reported records to the IRS and the case settled quickly."

Victor has also used cell phone records and videos to win tough cases.

In one, he represented a young father who had to have supervised visitation with a child born out of wedlock because of allegations that he did not know how to care for the child. The child's mother was permitted to select the person who supervised the visits, which led to various problems.

"The young man told me this woman harassed him and tried to 'bait' him in front of his young son," Victor recalled. "I told him to stay outside during the next visit and I would have the visit videotaped to see what was going on. Sure enough, when I saw the tape, the young father was very good with his son and the boy ran to his dad, showing love and affection. But the supervisor made very disparaging remarks and did everything she could do get him to lose his temper and say or do something hostile."

At the hearing on his petition to terminate the supervised visitation and expand parenting time, the supervisor was called by the mother to testify why the supervision should not be lifted and why the father was not able to care for the young child himself based on her observations during his visitation.

"On my examination of her I went through a list of statements, asking her if she ever said to the father, 'You are a terrible father,' 'You should just disappear and never be seen again,' or 'You are a drunk and dope addict and should be in jail,'" Victor explained. "I had

a list of about a dozen such comments made to this father while he was trying to play with his son that I asked her if she ever said to him. On each one she said claimed she never said, nor would she ever say such things.' I then asked her again and she said the same thing. I then went to each statement and, after she said 'no,' I played the portion of the video in the courtroom where she was seen on tape, loud and clear, saying the exact statement to my client. After doing this about four or five times, the judge said he had heard enough and was ready to stop the supervised visits and expand my client's time with his child, away from the mother's home. He also ruled that this 'supervisor' should not be around the child when the father was there ever again."

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