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A Survey of Sanctions Awarded for E-Discovery Violations

By David A. Kotler

The last 25 years have witnessed an explosion in the growth of information technology that few could have possibly predicted. Today, over 210 billion emails are sent each day, text-messaging is de rigueur, and Internet-ready laptops and PDAs are ubiquitous. Unsurprisingly, the enormous amount of information generated and disseminated each day has caused a seismic shift in the landscape of litigation, most notably in the practice of discovery.

Where discovery once involved the tangible process of digging through boxes of paper and generally required only knowledge of case-specific facts and the rules of privilege and work-product doctrines, it is now conducted almost entirely electronically, and demands technological expertise. This new brand of discovery—termed "e-discovery"—quickly grew over the last decade, and is now the norm in litigation.

As litigators continue to polish their

Continued on page 23

"Hands On" Evidence

By Kathleen M. Grover

We have all heard the saying "A picture is worth a thousand words." During trial, however, the actual subject of the photograph is worth more than a thousand words when it can be entered into evidence. The question is which is more convincing for a client's case: a picture of the smashed bicycle helmet or the actual helmet? A printout of the bank statement up on an electronic screen or an actual document in full color on the heavy paper issued by the bank? A picture of the wheeled stool or the actual stool? In each case, both the picture and the actual item contain the same information, but the physical item is three-dimensional and can be experienced by an additional sense—touch. Because attorneys work primarily with documents and more and more in the electronic realm, we may forget or dismiss the importance of nonvisual experiences in making the case for our clients. Using the sense of touch can reinforce the information and can sometimes make the point more vividly than verbal testimony or an electronic image.

During a recent trial, I was once again reminded of the value of exhibits that can be physically experienced. This civil matter was tried in front of an experienced judge without the presence of a jury. One of the issues in the case was the plaintiff's claim that she had no notice of a debt that she claimed was

Continued on page 25

in this issue

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Using Hearsay to Establish State of Mind: Rule 803(3) in Action

By Barbara L. Horan

In many cases, proof at trial of a certain state of mind is an essential element of a claim or defense. The most obvious are criminal cases requiring proof of *mens rea*. But civil cases frequently require evidence of state of mind as well, e.g., to prove pretext in employment discrimination cases, to prove improper motive in tortious interference cases, or to prove intent to deceive in cases alleging fraud. Direct testimony of the defendant as to his or her state of mind is unlikely to be forthcoming in most circumstances. Can hearsay be used at trial instead?

In federal court the answer may be "yes" if the hearsay falls under Federal Rule of Evidence 803(3):

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will,

is *not* excluded by Rule 802, the rule against hearsay.

In the ideal situation, witnesses testify under oath, in the presence of the trier of fact, and subject to cross-examination, so that their perception, memory, narration, and sincerity can be best evaluated.[1] Assuming hearsay evidence of the declarant's state of mind is otherwise admissible, Rule 803(3) allows a party to introduce statements that satisfy *none* of these ideal conditions. How does this happen?

As with all the Rule 803 exceptions to the rule against hearsay, Rule 803(3) operates on the theory that under appropriate circumstances, hearsay—an out-of-court statement offered to prove the truth of what it asserts—may possess circumstantial guarantees of trustworthiness sufficient to justify its introduction at trial, just as if the declarant were on the stand. In cases where what is to be proven is the declarant's then-existing state of mind, the theory is that the spontaneity of the statement, and thus the proximity of the declaration to the mental state being described, makes deliberate—i.e., conscious—fabrication or misrepresentation unlikely.[2]

Rule 803(3) thus works in the same manner and for the same reasons as Rule 803(1), the hearsay exception for present sense impressions, and Rule 803(2), the hearsay exception for excited utterances. The contemporaneity requirement of all three rules is that the declaration be in the presence—i.e., in the "present"—of the mental state created by the event or condition being perceived. This is sometimes expressed as the requirement that the declaration "mirror" the state of mind being declared.[3]

All three hearsay exceptions permit hearsay evidence of state of mind to be offered as substantive evidence at trial of the occurrence of actual facts or conditions. In the case of present sense impressions, for example, Rule 803(1) provides that an out-of-court statement made while the declarant is seeing, hearing, smelling, tasting, or feeling (touching) something, may be offered as evidence of the existence of the event or condition being perceived. The rationale generally offered is that a statement about what is being perceived, made while the perception is ongoing, is likely to be reliable because there is little or no opportunity for cognitive machination that could cause the description of the event or condition to diverge from the perception of it. For example, in a trial of a garment factory owner for arson and insurance fraud, a district court admitted the statement "Job well done," under Rule 803(1), where the statement was made by the owner's son at the site of the fire immediately after observing the damage.[4] Anonymous, tape-recorded statements to a 911operator narrating ongoing events related to a shooting, and reporting that someone was running around with a gun, were admitted under Rule 803(1) against a defendant on trial as a felon in possession of ammunition.[5] An employee's email to his supervisor, reporting a conversation with the defendant investment banker in which the defendant explained his scheme to defraud public service entities, was admitted under Rule 803(1).[6] By contrast, a trial court excluded self-exculpatory statements contained in lengthy memoranda drafted by a supervisor after an employee complained to him that she was being passed over for promotion because of her gender; such statements fell outside the "spontaneity exceptions" in Rules 801(1)-(3).[7] One commentator has noted that although the admission of hearsay under Rule 803(1) has been

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relatively infrequent because unexciting events rarely engender statements material to litigation, the explosion in the use of cell phones, electronic mail, and text messages may increase the number of occasions in which contemporaneous statements of present sense impressions are narrated to others, and a concomitant increase in applications of this rule.[8]

Rule 803(2) allows out-of-court statements made by a declarant who is still in an excited mental state ("under the stress of excitement") to be offered as evidence of the actual occurrence of a startling event or condition. The same reasoning applies; in an excited mental state, there is little (mental) opportunity for reasoned reflection and fabrication influenced by self-interest: "[A] condition of excitement . . . temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Thus, the trial court's admission of a wife's hearsay statement to an FBI agent, "Oh, my God, that looks like Johnny," after recognizing her husband in a surveillance photograph of a bank robbery, was upheld on appeal.[9] The court found that the woman's statement was made in the course of experiencing a startling event, she uttered the statement as soon as she saw the photograph, prior to any opportunity to "contrive or misrepresent" her perception, and she reaffirmed the identification with tears in her eyes, evidence that she was still under the stress of the moment. Courts and commentators alike have recognized the possibility that the stress of perceiving a startling event could cause perception to be inaccurate and subsequently distort recall, thereby affecting the accuracy or validity of the declaration.[10] Nevertheless, especially where the excited utterance is so spontaneous that it reasonably negates premeditation or possible fabrication, and because excited utterances are thought unlikely to be affected by the possibility of memory lapse, Rule 803(2) continues to be widely employed.

Rule 803(3) excepts hearsay describing *any* state of mind, emotion, sensation, or physical condition, so long as out-of-court statements of memory are not offered to prove that the fact remembered is true, and out-of-court statements of belief are not offered to prove that the fact believed is true. The statement must be otherwise admissible and it must express the present mental state of the declarant. The operation of Rule 803(3), like Rules 803(1), 803(2), and 803(4), is predicated upon the presumed reliability of spontaneous declarations as well as the belief that circumstantial evidence of internal mental states are usually inferior to the person's own contemporary assertions of those conditions.[11] As with Rules 803(1) and 803(2), hearsay admitted under Rule 803(3) may be used to establish limited classes of external facts: that the declarant acted in accordance with his or her expressed state of mind; and to explain the subsequent conduct of another person who knew of the declarant's state of mind. But unlike Rules 803(1) and 803(2), hearsay admitted under Rule 803(3) may be used to establish the existence of internal events and conditions as well, namely states of mind. And unlike Rule 803(4), which excepts out-of-court statements about past or present physical sensations so long as the statements are made for the purpose of medical diagnosis, treatment, or medical history, Rule 803(3) allows a proponent of hearsay to offer into evidence out-of-court statements of any state of mind, emotion, sensation, or physical condition—including intentions, plans, motives, designs, mental feelings, pain, and bodily health—made to any person, for any purpose, even if the declarant is available for cross-examination.

The fundamental assumptions about the nature of mental states underlying the operation of Rule 803(3), as this has been traditionally understood, have been articulated by philosophers of mind at least since René Descartes (1596–1650). Mental states have been regarded as private, privileged, translucent, and incorrigible.[12] Mental states such as emotions, sensations, intentions, plans, motives, designs, feelings, and pains are inherently private. I am the only one with direct access to my own mental states; everyone else must infer what they are from what I do and what I say. In addition, each of us is thought to have a privileged access to our own mental states, but we are denied access to the mental states of others, in the sense that we cannot observe them like we observe physical objects. I must infer your mental states from your conduct. Mental states have also been held to be translucent: It is logically impossible for me to be unaware of my own states of mind, either "occurrently," in the case of my sensations and feelings, which exist only when I am aware of them, or "dispositionally," in the case of beliefs, intentions, and emotions, which are such that, if they exist, I can call them to mind and would affirm them. Finally, it has been thought that statements I can make about my own mental states are incorrigible: My beliefs about them cannot be mistaken or corrected.

All four assumptions about mental states have been challenged by contemporary philosophers of mind.[13] For example, it has been argued that while awareness of a mental state might be incorrigible, my ascriptions or descriptions of my own mental states are not. Thus, while I cannot be mistaken when I report that I seem to see Elvis Presley in my living room, I could be mistaken about who

it is I seem to see (it's really Johnny Cash).[14] Second, there are complex states of mind known as "intentional states" (knowledge, belief, intentions, desires, etc.) to which others may have superior access. I believe I know the location of the restaurant where I am to dine this evening, but such knowledge will be evidenced better by whether I can reach the destination without having to stop for directions than by self-reflection. Thus, not only can I be mistaken about one of my own mental states (here, my belief that I know the location of the restaurant), but my behavior is better evidence for it than my own introspection. Thus, there appear to be circumstances in which evidence of my mental states is not only public, but to which others may have better access than I do. Third, many mental states are opaque, in the sense that a person may be genuinely confused or even unaware about the mental states he or she is experiencing. For example, in societies where expressing anger has been socially unacceptable for women, women may disguise or transform their anger into hurt, sadness, worry, attempts to control, headaches, insomnia, ulcers, back pain, or obesity.[15]

Seventh Circuit Judge Richard Posner recently acknowledged that the traditional view of the operation of Rule 803(3) appears to depend on what may be outmoded presumptions about the nature of human mental states:

> The rationale for these [spontaneity] exceptions [Fed. R. Evid. 801(1)-(3)] is that spontaneous utterances, especially in emotional circumstances, are unlikely to be fabricated, because fabrication requires an opportunity for conscious reflection. As with much of the folk psychology of evidence, it is difficult to take this rationale entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances. Old and new studies agree that less than one second is required to fabricate a lie. It is time the law began paying attention to such studies.[16]

In a law review article urging courts to strengthen Rules 801(1)-(3), Professor Douglas D. McFarland described studies that measured reaction times between the occurrence of an event and the utterance of true and false statements about it.[17] One study reported response latencies to be .8029 seconds for a previously prepared lie, 1.656 seconds for a truthful statement, and 2.967 seconds for a spontaneous lie.[18] Another study found that the personality of the declarant—in particular, his or her "Machiavellianism" score (a measure of an individual's willingness to manipulate others)—had an impact on response latencies:

> Response latencies for prepared lie responses averaged .81 seconds for high Machs and .73 seconds for low Machs; the response latencies for truthtellers were 1.17 seconds and 1.48 seconds for high and low Machs, respectively; and the response latencies for spontaneous lie responses were 1.35 seconds and 1.78 seconds for high and low Machs, respectively. In this study, again all prepared liars were quicker than all truthtellers, and some spontaneous, manipulative liars were even quicker than some nonmanipulative truthtellers. The slowest subjects to fabricate, nonmanipulative spontaneous liars, required fewer than two seconds to fabricate a lie.[19]

Professor McFarland was surely correct to emphasize the need to limit hearsay exceptions for present states of mind to declarations that are strictly contemporaneous with them. Courts responding to his suggestion, however, may have reacted by pushing the envelope in a different direction, e.g., by expanding the concept of "contemporaneity."[20] Nevertheless, as suggested, even when restricted to reports of "then-present" states of mind, the admissibility of such contemporaneous declarations still depends on the challenged folk psychological views that the mental states being reported are immediately and incorrigibly accessible to the declarant, and that the contemporaneity of declaration and mental state provides out-of-court statements with the circumstantial guarantees of trustworthiness that all hearsay must possess to be admissible at trial. Because the validity of the folk psychology theories on which hearsay exceptions involving states of mind can be questioned, it would seem that we need to think differently about the operation of Rule 803(3) when out-of-court statements are offered at trial to prove the existence of mental states.

One plausible suggestion for how to proceed is implicit in two important recent U.S. Supreme Court cases involving the admissibility of hearsay. In *Crawford v. Washington*,[21] the Court held that out-of-court testimonial statements are barred by the Sixth Amendment's Confrontation Clause, unless the defendant had a prior opportunity to cross-examine the unavailable declarant. The Court explicitly overruled its previous holding in *Ohio v. Roberts*[22] that such testimonial hearsay may be admitted if the court found that the hearsay fell under a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." Justice Scalia wrote, "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[23] In *Davis v. Washington*,[24] the Court distinguished testimonial from nontestimonial statements according to whether a declaration was made as a solemn declaration or affirmation made for the purpose of establishing

or proving some fact. Statements made under circumstances objectively indicating that the primary purpose of the interrogation was to meet an ongoing emergency are non-testimonial. The Confrontation Clause demands the opportunity for prior cross-examination of a declarant unavailable to testify at trial before his or her out-of-court testimonial statements are admissible in criminal prosecutions. Non-testimonial statements are not subject to this requirement, though they are still governed by Rule 802, the rule against hearsay, in the context of the various exceptions adopted in Rule 803.

The *Crawford* Court acknowledged that in certain special cases, testimonial hearsay might be admitted in criminal prosecutions even where the declarant was available, or despite the absence of prior opportunity for cross-examination. In *White v. Illinois*,[25] the trial court had admitted hearsay testimony of a child in prosecuting the defendant for aggravated criminal sexual assault. The Supreme Court agreed with the courts below that the child's statements, made shortly after the assault to caretakers and medical personnel, were "spontaneous declarations and statements made in the course of receiving medical care," and as such the statements were "made in contexts that provide substantial guarantees of their trustworthiness." In support of his view that the child's out-of-court statements were properly admitted, despite the defendant's lack of opportunity to cross-examine, Justice Rehnquist relied upon the long history of the hearsay exception for excited utterances.[26]

The doctrine to which Rehnquist referred is known as *res gestae* ("things done"). According to Professor Kenneth Broun, this doctrine came into common usage in the early 1800s in connection with the admissibility of statements accompanying acts or events.[27] *Res gestae* explained the admissibility of hearsay of certain statements that had been made naturally, spontaneously, and without deliberation during the course of an event. Because such out-of-court statements left little room for misunderstanding or misinterpretation by a witness who could subsequently testify about them at trial, hearsay testimony about them was deemed to carry a high degree of credibility that sanctioned their role as trial evidence.

Professor Broun suggests two important motives behind the adoption of *res gestae* as a rationale for the admission of hearsay:

> One is a desire to permit each witness to tell his or her story in a natural way by reciting all that happened at the time of the narrated incident, including those details that give it life and color. Events occur as a seamless web, and the naturalness with which the details fit together gives confirmation to the witness' entire account. The other policy, emphasized by Wigmore and those following his leadership, is the recognition of spontaneity as the source of special trustworthiness. This quality of spontaneity characterizes to some degree nearly all the types of statements which have been labeled *res gestae*.[28]

In *White*, Justice Rehnquist drew upon the second of the two policies inherent in the two-century old doctrine of *res gestae*. In analyzing the propriety of the lower court's admission of hearsay evidence of the child's out-of-court statements, Rehnquist acknowledged spontaneity as a special source of reliability of out-of-court declarations. But equally present in the doctrine, and equally important for understanding the operation of Rule 803(3), is the first policy, viz., the reliability of detailed narratives that display a high degree of consistency or coherence:

> The admission of *res gestae* is sometimes treated as an exception to the rule against hearsay and sometimes as a distinction from hearsay because of the connection with the principal fact under investigation. But, however classified, the admissibility of the proofs as *res gestae* has as its justifying principle that truth, like the Master's robe, is of one piece, without seam, woven from the top throughout, that each fact has its inseparable attributes and its kindred facts materially affecting its character, and that the reproduction of a scene with its multiple incidents, each created naturally and without artificiality and not too distant in point of time, will by very quality and texture tend to disclose the truth. And this is the principle which is relied upon to justify the admission of the disputed paper.[29]

Thus, the facts that mental states may not be private and may not be privileged (accessible by the declarant and only by the declarant) appear to undermine the theory that contemporaneous reports of present sense impressions or other mental states are *ipso facto* sufficiently reliable to be admitted as evidence at trial. However, those facts also create opportunities to ratify, or at least test, hearsay offered under Rule 803(3) against external events. Hearsay offered to prove a state of mind should be consistent with external facts and events that are presupposed or implied by that state of mind. For example, evidence of a businessman's intent to interfere with a competitor's contract with his own supplier of cheap materials, offered in the form of out-of-court declarations of his desire to best his competitors, could can be tested against other testimony showing he was unfamiliar with the competitor in question. Secondly, the mental states of a declarant may not always be translucent, but they should be coherent: free from internal inconsistencies, at the very least, and consonant with his or her strongest emotions, sensations, intentions, plans, motives,

The mental states of a declarant may not always be translucent, but they should be coherent.

designs, and feelings. A fact-finder should be suspicious of hearsay testimony by the declarant whose out-of-court declarations of belief in the sanctity of life cannot be reconciled with his advocacy of violent lynchings.

Indeed, recent studies suggest that jurors process trial evidence by actively constructing narratives or stories from information they receive, filling in missing details to increase the story's internal consistency and convergence with their own knowledge of the world.[30] Juries are thought to engage in schematic processing to filter information received during trial, an activity that takes place during trial, not just during deliberations, and that affects what is perceived and how evidence is understood.[31]

We can understand the operation of Rule 803(3), which allows hearsay to be introduced at trial as evidence of then-existing mental states, in terms of a theory of *res gestae* that emphasizes the consistency and coherence of mental states with external facts and other internal states of mind. The greater the consistency and coherence of the expressed state of mind with internal and external conditions, the more reliable the out-of-court declarations will be as evidence. Because jurors apparently evaluate evidence along these lines, courts and counsel may benefit from renewed attention to this historical doctrine, once rejected in favor of the more modern hearsay analysis that we know as Rule 803(3).

Endnotes

1. Advisory Committee's Introductory Note on the Hearsay Problem, 56 F.R.D. 183, 288–289 (1973), and cases cited therein.
2. Margaret A. Berger and Jack B. Weinstein, *Weinstein's Evidence Manual*, § 16.02[1] (1999).
3. Colasanto v. Life Ins. Co. of N.A., 100 F.3d 203, 212 (1st Cir. 1996), citing John W. Strong, *McCormick on Evidence*, § 274 (4th ed. 1992).
4. U.S. v. Schlesinger, 372 F. Supp. 2d 711, 721 (E.D.N.Y. 2005).
5. U.S. v. Thomas, 453 F.3d 838, 844 (7th Cir. 2006).
6. U.S. v. Ferber, 966 F. Supp. 90, 99 (D.Mass. 1997).
7. Lust v. Sealy, Inc., 383 F.3d 580, 588 (7th Cir. 2004).
8. *McCormick on Evidence*, § 271 (6th ed.).
9. U.S. v. Beverly 369 F.3d 516, 540 (6th Cir. 2004).
10. Sven-Åke Christianson and Elizabeth Loftus, *Memory for Traumatic Events*, 1 APP. COG. PSYCH. 225 (1987) (essence of traumatic events relatively well retained in memory while memory for specific, peripheral details is impaired or attenuated).
11. *Wigmore on Evidence*, § 1714 at 90 (Chadbourn rev. 1976).
12. K.T. Maslin, *Introduction to the Philosophy of Mind*, 17–20 (2nd ed., Polity 2007).
13. *Id.*
14. *See, e.g.*, Alfred Mele, *Self-Deception Unmasked*, Princeton: Princeton University Press, 2000 [p. 3], reporting that a survey of one million high school seniors reported that 25 percent thought they were in the top 1 percent in their ability to get along with others.
15. Beverly Engel, *Honor Your Anger: How Transforming Your Anger Style Can Change Your Life*, Hoboken, NJ: John Wiley and Sons, 2003, p. 183.
16. *Lust*, 383 F.3d at 588 (Posner, J.), citations and quotations omitted.
17. Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U.L. REV. 907, 916 (2001).
18. John O. Greene et al., *Planning and Control of Behavior During Deception*, 11 HUMAN COMMUN. RES. 335, 350–59 (1985).
19. McFarland, 20 FLA. ST. U.L. REV. at 917, citing Henry D. O'Hair et al., *Prepared Lies, Spontaneous Lies, Machiavellianism, and Nonverbal Communication*, 7 HUMAN COMMUN. RES. 325, 327–29 (1981).
20. *See, e.g.*, U.S. v. McCullough, 150 Fed. Appx. 507, 509 (6th Cir. 2005) (statements made by companion of defendant up to two-and-a-half hours after arrest for felonious possession of firearm admitted as excited utterances).
21. Crawford v. Washington, 541 U.S. 306 (2004).
22. Ohio v. Roberts, 448 U.S. 56 (1980).
23. *Crawford*, 541 U.S. at 61.
24. Davis v. Washington, 547 U.S. 813 (2006).
25. White v. Illinois, 502 U.S. 346 (1992).
26. *Id.*, 502 U.S. at 356 n.8 ("The exception for spontaneous declarations is at least two centuries old, *see* 6 J. *Wigmore on Evidence*, § 1747, p. 195 (J. Chadbourn rev. 1976), and may date to the late 17th century. *See* Thompson v. Trevanion, 90 Eng. Rep. 179 (K.B.1694)").
27. Kenneth S. Broun, "The Hearsay Rule and Its Exceptions," *McCormick on Evidence*, § 268 (6th ed.).
28. *Id.*
29. *Id.*, quoting Robertson v. Hackensack Trust Co., 63 A.2d 515, 518–19 (N.J. 1949).
30. Paula L. Hannaford, Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman, *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TNLR 627, 630 (2000), citing Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making* 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986); *see also* Neil Vidmar and Valerie Hans, *American Juries: The Verdict* (2007).
31. Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 L. & SOC'Y REV. 513, 517 (1992).

The Trouble with Internet

Continued from page 7

Luke's Cataract and Laser Institute PA v. Sanderson, 2006 WL 1320242, *3–4 (M.D. Fla. May 12, 2006) (excluding exhibits because affidavits used to authenticate exhibits showing content of web pages were factually inaccurate and affiants lacked personal knowledge of facts).

15. *See* Gregory P. Joseph, *Internet and Email Evidence*, 13 PRAC. LITIGATOR (Mar. 2002), *reprinted in* 5 STEPHEN A. SALTZBURG ET AL., FED. R. EVID., Part 4, at 20 (9th ed. 2006).
16. Joseph, at 21; *see also* SALTZBURG , §901.02[12].
17. *Lorraine*, 241 F.R.D. at 555–56 (quoting Joseph, at 22).
18. *Id.* at 542.
19. Serial 78542726; 78542734, 84 U.S.P.Q.2d 1028, 2007 WL 1751192 (Trademark Tr. & App. Bd. 2007).
20. *Id.* at *4 (citing In re Total Quality Group, Inc., 51 U.P.S.Q.2d 1474, 1475–1476 (Trademark Tr. & App. Bd. 1999).
21. *Id.* (quoting Noam Cohen, *A History Department Bans Citing Wikipedia as a Research Source*, N.Y. TIMES (February 21, 2007).
22. *Id.* (quoting Alfa Corp. v. OAO Alfa Bank, 475 F. Supp. 2d 357, 362 (S.D.N.Y. 2007) (analyzing reliability of Wikipedia in support of expert opinion)).
23. *Id.* at 4–5.

Challenging Financial Records at Trial

By David J. Volkin

You are in the middle of a trial defending Z Company in a breach of contract action brought by Y Company. Y's attorney is doing the direct examination of the CFO to get the damages into evidence. During the testimony, the CFO is handed an exhibit by counsel followed by the litany of questions that form the foundation for the business record exception, or Rule 803(6) in the Federal Rules of Evidence. As an example, let us assume that Y Company's attorney is attempting to get in a document that is alleged to reflect loss of revenues. It is a document that does not contain all of the data sources that went in to it, but rather a filtered spreadsheet showing quarterly revenues over a three-year period and an attached chart. In many instances, it is these types of documents that have some of the most substantial impact on your case.

The obvious benefit of a financial record is that, unlike oral testimony, it is a tangible record the jury can take back with it. It is very persuasive substantive evidence that can be used to prove liability or damages. Your options at that point will depend on how well you have prepared and your knowledge of the rules of evidence, particularly Rule 803(6) and Rule 1006.

First, a little bit about financial records. A corporation's financial records are often used to prove damages in commercial litigation cases. However, the term "financial records" can encompass many types of documents. It can include check registers, bank statements, and other such unfiltered evidence, as well as spreadsheets that collect data that is derived from information kept in the ordinary course of business. While a financial record is hearsay, courts admit financial records and other similar hearsay statements as business records because of the supposed reliability of the out-of-court statements themselves.[1]

To get financial records into evidence, it requires the party to lay the proper foundation. The business records exception requires 1) that the record was made and kept in course of regularly conducted business activity; 2) that it was the regular practice of that business to make the record; 3) that the record was made or transmitted by a person with knowledge; 4) that the record was made at or near the time of the event recorded; 5) that the record is authenticated by the custodian or other qualified witness; and 6) that there is a trustworthy source of information and method of preparation.[2] Knowing these foundations prior to engaging in discovery is as important to preparing your case as is understanding the substantive law of the substantive allegations.

Step 1: Document Discovery

One of the first things done in most cases is a request for documents and interrogatories. In particular, specific requests should be made for any financial data that reflect damages. Do not rely or let your opponent rely on corporate tax returns, even if they are useful to have, or rely merely on the financial disclosures made in Federal Court in the initial disclosure requirement. It is also important to engage the professional assistance of accountants at an early stage because they can assist in spotting errors or omissions in the document production, and can also assist in creating targeted document production requests after the initial documents come in.

Next, you need to understand the difference between "source data" and "derived data" documents. Source data are data that are originally input into the database or spreadsheet. For example, dollar amount spent on equipment purchases, wages, commissions, as well as cash received for sales are all "source data," even if produced as gross figures, because it is not a category that needs to be combined with any other. It can also be physical documents such as a check register or bank statement.

Derived data is what separates accounting from bookkeeping. Derived data would include spreadsheets listing profit, revenue, or other data that are derived from combining different source data. However, even with "source data," it is best to get all of the data input, including each individual entry, to make sure that it is complete.

The point of acquiring the documents is to determine what data points are being used to calculate damages. Importantly, you need to drive down with each data point to its original source to determine whether a) the derived data was calculated in accordance with General Accounting Principles (GAP), b) other relevant data points were omitted, c) unusual data points were included, d) the same source data are used consistently, and e) if there are other alternative accounting methods to calculate data that are more favorable

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to your case. For example, with commissions relating to a specific product, you may want to look at each commission and each individual sale to ensure that there is a consistency in how it is determined, or, if there is an inconsistency, a way of determining the reason for the same.

It is also important not to simply rely on your expert to tell you what the documents mean. He or she should teach you how to comprehend the documents so you can get a good understanding of how to deal with financial documents. The fact is, if you don't know some general accounting terms and practices, you won't know when or how to question what you are seeing or hearing, including information from your own expert.

Step 2: Depositions

Once you have all of your documents, or at least all of the ones that you are going to get, it is time to start deposing! Be wary of expecting to get to the heart of this data through a 30(b)(6) deposition. If it is a complex case, going through financial data can be a time-consuming endeavor, and this could cause some problems if you are in a jurisdiction that limits the amount of time you have to conduct your deposition. You may want to notice the deposition of the opposing parties CFO or other person responsible for the accounting, in addition to including several categories within the 30(b)(6) notice relating to the financial documents. Although the corporation may not be formally bound by the responses, most jurors will not care about the distinction.

It is important to use the deposition to identify the accounting methods regularly used by the company, the types of reports that are regularly generated by the company, which reports the company is required to generate, and the routine practices that the company uses to prepare documents that would typically show the type of information it indicated demonstrates its damages. It is important to be thorough and follow up with each answer received because, especially with numbers, the devil is in the details, and it will make the heart of your objections to admissibility and your cross-examination, as well as provide the foundation for your expert's testimony if you require it.

Step 3: Pretrial Practice

Y Company's attorneys, as part of their required practice, have provided you with its pretrial disclosures. It is important to note which financial records they expect to introduce and any summaries of the same, including any graphical representation of the data. If you have seen all the documents and if you have properly prepared, you would have already have gone over it (with your expert if necessary) to determine the accuracy of any derived data. If it is a summary, it is vital that you request the citation for all source data that the summary is based per Rule 1006. Some jurisdictions require the party wishing to use a summary to have provided the information in advance. For example, in Federal Court in Massachusetts, a party wishing to use a summary cannot rely passively on stating that the documents would be made available if requested, but has an affirmative obligation, once the summary is prepared, to provide (or make available) the documents that form the basis of the summary prior to trial, even if the documents were not requested during discovery.[3]

You should compare Y Company's summaries with the data that you have culled and analyzed to note any deviations. It is critical that you attempt to reconcile those deviations prior to Y Company's attempt to introduce those documents.

This is also the time to determine whether you are going to use an in limine motion to preclude any of the financial records Y Company wants to introduce. Part of this decision must be based upon the judge who is trying the case. If the judge is either liberal on allowing evidence or dislikes motions in limine, then you may not want to telegraph your potential cross-examination. Other judges prefer that you inform them ahead of time if there is going to be a significant evidentiary issue via the in limine motion. However, regardless of the judge you have, if opposing counsel has not provided which substantive documentation the summary or graph is based upon, that should be raised to the court either at the pretrial conference or via motion or both. Even if your jurisdiction doesn't have a specific rule pertaining to disclosures of the documents on which a summary is based, most judges will, in fairness, require opposing parties to disclose the basis at some reasonable point prior to its introduction into evidence.

The practitioner should be aware that Rule 1006 does not specify a particular time, only a "reasonable" time. Also, while there is no specific requirement under the rule to require a proponent of a summary to provide a citation to the materials, there may be case law in your jurisdiction requiring that extra step.[4]

Step 4: Trial

So, now we are back in court. Y Company's counsel has the CFO on the stand and is laying his foundation and offering to introduce the document into evidence. At this point, if you have properly prepared, you have several tactics of which you can employ one or all.

Tactic 1

The first tactic is to object to the document being admitted once it has been offered. If you want an objection to a financial record to be sustained,

you must be well prepared. One attack depends on whether the source documents were produced. If not, you can object to the document coming in because, out of fairness, you have been inhibited in your ability to cross-examine the document because you hadn't been properly provided with the identification of the source data on which it is based. Some jurisdictions allow you to object to the admission of the summary if it is inaccurate; however, others require that to be determined through cross-examination.[5] Keep in mind, a failure to object in many jurisdictions will waive the issue on appeal even if you seek to move the court to strike the document later.

If such documents were produced, then you should look to the foundation requirements under Rule 803(6) or its state equivalent. Even if the financial records are presented as a summary, the documents upon which it is based must still be admissible evidence, and the same objections apply.[6] Make sure that counsel has asked all of the proper questions to lay a proper foundation because a general objection "foundation" is not likely to produce positive results. Rather, you should be prepared to state which particular aspect of the foundation was lacking.

When it comes to financial records based upon derived data, if there is usually one issue, it will be the foundation that the report itself was not made in the ordinary course of business or not derived from a report made in the ordinary course of business. Also, if the record was made solely for the use in litigation, then it should not be admitted. The Advisory Committee Notes of Proposed Rule of Evidence 803(6) and case law state that a business record should not be one calculated for use essentially in litigating a claim.[7] Using our example, if Y Company's exhibit showing lost revenues calculated revenue in a manner different from the manner in which it is normally calculated, it should not be admitted. For example, it would be objectionable if Y Company normally calculates revenue using cash basis accounting, but then presents evidence using accrual basis accounting because it provides it with evidence of higher damages. In this instance, if they didn't state that the evidence was created in the ordinary course of business, you want to object based on foundation. If they did state that it was prepared in the ordinary course, you will likely lose the objection, but you set the stage for later cross-examination.

The bottom line is that if you plan to challenge the evidence as being an improper summary or not a proper business record, it is important to object to preserve your right to move to the court to strike the evidence later.

Keep it simple: You may dazzle jurors with your knowledge of financial analysis, but it doesn't help your case if they don't understand the importance of the testimony.

Tactic 2

If the document or testimonial evidence derived from such document is extremely damaging, you may want to consider requesting to *voir dire* the witness on foundation.

Tactic 3

The most likely and perhaps most effective tactic is to use your preparation to create an effective cross-examination. Because Y Company has posed this document as reliable evidence of damages, the credibility of the witness and the company can be called into question if the document presented was questionable. Further, it puts all the testimonial evidence based upon the document as questionable. Although financial records and accounting can be complex, it is even more important to stick to the basic guidelines when cross-examining such witnesses. Keep it very simple. It is easy to lose the focus of the jury if you start getting into complex ideas and accounting terminology. You may dazzle the jurors with your knowledge of financial analysis, but it doesn't help your case if they don't understand the importance of the testimony. Also, even if you can make a large number of points, it is best to cross-examine only on your best points if your purpose is to dent the credibility of the evidence. In our previous example, a straightforward approach can be something as simple as:

- Mr. CFO, do you recall you were asked some questions about your lost revenues?
- And Mr. CFO, you were presented with a document that summarized those lost revenues?
- And you testified that this document was created in the ordinary course of business, correct?
- Do recall your deposition where you answered questions about Y Company under oath?
- In that deposition, you indicated that Y Company only uses the "cash basis" type of accounting, correct?
- Now, as you testified that this document was created in the ordinary course of business, you were familiar with how it was calculated?
- And since you are familiar with how it was calculated, you know that it was calculated using what's called the "accrual method" of accounting?
- And using this "accrual method" of accounting, a method that Y Company does not use, you were able to inflate the amount of your damages?
- In fact, the purpose of using "accrual method" basis was specifically for the purpose of inflating your damages for use in this litigation to present to this jury?

At this point, regardless of the answers to the last few questions, you have a strong basis to move to strike the report and all attendant testimony regarding the report. At that point, it will be difficult for Y Company to introduce a new exhibit or provide new testimony of damages using this witness, and any further testimony will be viewed with suspicion by the jury. Even if the court does not strike the report from evidence, you have laid the foundation for an appellate challenge to the damages award if you lose the case.

Tactic 4

Another tactic you can use to challenge this evidence is to attack it using your own expert witness. When challenging this evidence, one of the most important decisions you need to make is whether you want to offer an alternative dollar figure for damages. On the one hand, it is the plaintiff's burden to prove its damages. However, if you leave jurors who are going to award damages to figure out the number on their own, many will base the damages off the fixed numbers presented to them, even if it is the opposing party's numbers that you impeached. Regardless of whether you offer an alternate damages figure, it is important to keep it simple with any evidence you wish to present, similar to cross-examination. As opposed to the previous example, assume that Y Company's exhibit reflected the same accounting method that the company ordinarily uses, but an alternative method of accounting produces better numbers for your case. You may want to promote this alternate method to the jury. If the method used by your expert is the preferred method by most companies, then you can use that testimony to explain why the jury should use your expert's calculation if they find liability. If not, then you can simply leave the information for the jury to consider as an alternate amount properly derived using GAP. If you are going to attack Y Company's document because of the calculations made, have the expert testify about there being numerous errors and be prepared with a few concrete examples based on the original source document rather than by itemizing every error.

Conclusion

Dealing with financial records can pose a challenge to those uninitiated into the realms of accounting. If there is anything to take away, it is that effective preparation is all about the details, while effective trial advocacy is about presenting the data or the attack on the data in a simple and easy-to-understand manner, and to be wary of data that has been manipulated for purposes of litigation.

Endnotes

1. U.S. v. Trenkler, 61 F.3d 45, 58 (1st Cir.1995).
2. *See* 2 Jones, et al., *Federal Civil Trials and Evidence*, § 8G (2008).
3. Air Safety, Inc. v. Roman Catholic Archbishop of Boston, 94 F.3d 1, 8 (D. Mass. 1996), citing *Weinstein's Evidence* ¶ 1006[04], at 1006–16, Square Liner 360 Degrees, Inc. v. Chisum, 691 F.2d 362, 376–377 (8th Cir. 1982).
4. *Air Safety, Inc.*, 94 F.3d 1, 8 (D. Mass. 1996).
5. *Compare* United States v. Driver, 798 F.2d 248 (7th Cir. 1986) *and* Amaral v. Connell, 102 F.3d 1494 (9th Cir. 1996).
6. *See, e.g.*, Fagiola v. National Gypsum Co., AC&S, Inc., 906 F.2d 53, 58 (2nd Cir. 1990).
7. U.S. v. Grossman, 614 F2d 295 (1st Cir. 1980).

2. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 537 (D. Md. 2007).
3. *Lorraine*, 241 F.R.D. at 538.
4. *Lorraine*, 241 F.R.D. at 538.
5. *See* Fed. Sav. & Loan Ass'n v. Genser, 383 A.2d 475 (N.J. Super. Ct. 1977), *overruled by* Hahnemann Univ. Hosp. v. Dudnick, 678 A.2d 266, 268 (N.J. Super. Ct. 1996)).
6. Givens, *supra* note 7, at 104 (citing Transp. Indem. Co. v. Seib, 132 N.W.2d 871, 875 (Neb. 1965)).
7. *See* FED. R. EVID. 901(a) advisory committee's note.
8. *Lorraine*, 241 F.R.D. at 543 (citing Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 900.06[3] (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997)). *See also Sedona Evidence*, *supra* note 5, at 3.
9. *Lorraine*, 241 F.R.D. at 542.
10. FED. R. EVID. 901(b); FED. R. EVID. 901(b) advisory committee's note.
11. Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 901.03[2] (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997) [hereinafter *Weinstein*].
12. *See, e.g.*, U.S. v. Safavian, 435 F. Supp. 2d 36, 40 n.2 (D.D.C. 2006); St. Luke's Cataract and Laser Inst., P.A. v. Sanderson, No. 8:06-CV-223-T-MSS, 2006 WL 1320242, at *3-4 (M.D. Fla. 2006).
13. *Lorraine*, 241 F.R.D. at 545.
14. In re Vee Vinhnee, 336 B.R. 437, 446 (B.A.P. 9th Cir. 2005) (citing Edward J. Imwinkelried, *Evidentiary Foundations* § 4.03[1] (5th ed. 2002)).
15. *Lorraine*, 241 F.R.D. at 549 n.27.
16. FED. R. EVID. 901(b)(4).
17. *Id.* at 13.
18. *Id.* at 14.
19. *Id.* at 15.
20. FED. R. EVID. 902.
21. FED. R. EVID. 902(7).
22. *Id.* at 553 (citing Weinstein, *supra* note 21, at § 900.07[3][c]).
23. Rambus, Inc. v. Infineon Tech. AG, 348 F. Supp. 2d 698, 701 (E.D. Va. 2004). *See also In re Vee Vinhnee*, 336 B.R. 437, 444 (B.A.P. 9th Cir. 2005).
24. *Id. See also* FED. R. EVID. 902(11).
25. State of New York v. Microsoft, No. CIV A. 98-1233(CKK), 2002 WL 649951, at *2 (D.D.C. 2002).
26. U.S. v. Safavian, 435 F. Supp. 2d 36, 40-42 (D.D.C. 2006).
27. FED. R. EVID 201(b).
28. FED. R. CIV. P. 36(a)(1)(B).
29. FED. R. CIV. P. 16(c)(2)(C).
30. Rojhani v. Meagher, 22 P.3d 554, 556-57 (Colo. Ct. App. 2000).
31. FED. R. CIV. P. 26(a)(3)(B).
32. Imwinkelried, *Evidentiary Foundations* § 4.09[4][a] (5th ed. 2002).
33. *Id.*
34. *See* Comm. Union v. Boston Edison, 591 N.E.2d 165, 168 (1992).
35. U.S. v. Ferber, 966 F. Supp. 90, 98 (D. Mass 1997).
36. *Id.* at 99.
37. *Lorraine*, 241 F.R.D. at 574.
38. *Lorraine*, 241 F.R.D. at 562.

Overcoming Hurdles

Continued from page 15

invalid; in her suit, she was seeking a ruling declaring the creditor could not pursue her for the allegedly invalid debt. The amount of the debt appeared on the monthly statements sent to her address. Our client, the defendant creditor, sent us copies of most of the necessary documents, including copies of the monthly statements, via electronic mail. At the last minute, I asked one of the defendant's employees called as defense witness to bring with her an actual statement of the type that had been sent to the plaintiff account holder.

As I held the paper document in my hand, on heavy stock and complete with the familiar company logo and color scheme, I realized how much more convincing it was than the "account screen" or the paper copy of the electronic screen showing the statement information and listed on our exhibit list. At trial, opposing counsel and I argued over whether the hardcopy document should be admitted into evidence as it had not been specifically identified on the exhibit list. The judge sustained opposing counsel's objection. Fortunately, the information it contained came in through my witness as she testified about the account screens that were admitted. Ultimately, judgment entered in our favor, and the fact that the actual document was not admitted did not have a deciding impact on the result.

Although I was unable to use the document, I was reminded that while the new tools available to streamline the presentation of trial evidence are exciting and fun to use, sometimes a "real" exhibit is more persuasive. Using these exhibits requires some advance planning, particularly as it can be a little different from the routine of making sure that the documents or e-data are admissible evidence.[1]

What Is Demonstrative Evidence? When Should It Be Used?

Physical objects are routinely used as exhibits in criminal cases or in civil cases involving product liability, shoddy construction, or faulty design. This article concerns the other kinds of cases in which physical evidence can help support a claim or bolster the defense, but the case itself does not turn on the use, design, or construction of the item.

Black's Law Dictionary[2] defines demonstrative evidence as "evidence addressed directly to the senses without intervention of testimony. Such evidence is concerned with real objects which illustrate some verbal testimony and has no probative value in itself." Consider demonstrative evidence as a prop to help illustrate the story to be set forth at trial.

Demonstrative evidence should be used only if it will help tell the story on behalf of the client. It must meet the same tests used to evaluate any other exhibit. Is it material? Is it relevant to a claim or defense? More than that, is it credible? How does it help tell the story on behalf of the client? Is there a credible witness through whom the exhibit can be offered? Often there is an even more important question—is the particular item still available?

The vast majority of civil cases settle before trial. Many times cases are evaluated and worked up based on the assumption that they will never be tried. In doing so, however, it is easy to ignore or forget to gather items that could later be persuasive demonstrative evidence in the event of a trial. Early on in the fact-gathering stage, the client and any witnesses should be asked about physical items that may be helpful later on if the case does not settle. Sometimes by the time litigation begins, it is too late to obtain or safeguard the item, but it is well worth asking the questions. Not asking the questions or gathering the items that could be used as demonstrative evidence may damage the ability to make a persuasive case.

If the item is unique, it will need to be kept safe and unchanged until the trial. It should be tagged or otherwise identified by the name of the file, the date it was placed into safekeeping, and the person or persons who can identify it. If possible, it should be described in as much detail as possible. As an example, if a plaintiff who was hit by a car while riding a bicycle comes in and mentions that she was wearing a helmet that cracked when she was knocked off the bike, she should be asked if she still has the helmet. If so, she should be asked to bring it in, and she and a staff member should write up a detailed description of it for the file. When the time comes to submit the list of trial exhibits or make arguments at the pre-marking conference, the party offering the exhibit must be able to establish the civil equivalent of a chain of custody in order to overcome any objections from opposing counsel concerning the validity of the exhibit.

Sometimes the exhibit is one of many such items in common use, or the party wishing to use the item does not have custody or control of it. In that case, as part of the discovery process, request an inspection of the premises and as a follow-up, issue a deposition notice accompanied by a subpoena duces tecum and list the item or items to be produced at the deposition. For example, several years ago, a plaintiff brought an action claiming she was injured when she tried to sit on a stool at her physician's office and it rolled out from under her. She alleged that the staff failed to warn her that the stool had wheels. The defense did not deny that she fell in the examining room, but

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denied liability on the grounds that the plaintiff was familiar with the stool and that the wheels were clearly visible to her. The plaintiff's attorney requested the opportunity to inspect the office and both counsel went to the office after hours and inspected the stools and the examining room. The plaintiff identified the stools in use in the office during the inspection as identical to the one she said rolled out from under her. Through interrogatories, plaintiff's counsel identified the staff working on the day the plaintiff alleged she was injured. Later, the plaintiff deposed the staff members on duty on the day in question and asked about the stool. While the plaintiff chose not to issue a subpoena duces tecum for the stool, she certainly could have done so. Counsel for the parties agreed at the time of the inspection on a particular stool; marked it with the date of the inspection, the examining room from which it was obtained, and the name of the case; and it was agreed that defense counsel would retain it in a locked evidence closet until the time of trial.

Unless the exhibit is going to be used as impeachment evidence only, its existence and the fact that it will be a trial exhibit must be disclosed during the discovery process. If in doubt about disclosing it, evaluate whether you would want to try the case without it—late disclosure or failing to disclose an exhibit intended to be used at trial will often result in a ruling barring the use of the exhibit. And, if this is a case that would be better settled, the existence of a credible and convincing exhibit ready for use at trial could help make settlement a reality.

The Case Didn't Settle—Now What?

For some unknown and now irrelevant reason, a case didn't settle, and it is going to have to be tried. In the midst of trial preparation, there are some special considerations for demonstrative evidence, not the least of which may be how to physically get it into the courtroom.

Most courthouse staffs are by now well acquainted with requests to set up various electronic tools to be used at trial. However, if the demonstrative exhibit is unusual, advance notice to the security staff and the court clerk can be very helpful. In particular, anything that is bulky or contains enough metal to set off the detectors or arouse security concerns should be discussed with the appropriate security and staff well before the day of trial. If the exhibit won't make it in the front door, it can't help make the case in the courtroom. The trial clerk should be made aware of the possible need for extra space in the vault to store the trial exhibits.

In preparing a witness to testify regarding demonstrative evidence, start from the very beginning to make the connection between the exhibit and the witness. Make sure the witness is very familiar with the exhibit, can identify it, and can verify the connection between the exhibit and the issues in dispute. Give the witness an opportunity to become very familiar with handling and talking about the exhibit as part of testifying. By doing so, the witness is likely to be less nervous on the stand and will sound much less like a participant in a scripted exchange.

In order to get the exhibit actually into evidence, the testimony offered by the witness will have to establish what the item is; how the witness is familiar with it; how it relates to the issues in dispute; and if appropriate, when, how, and by whom it was kept safe between the incident giving rise to litigation and the actual trial. A clerk or support staff person from the client or counsel's office may be required to testify as to the methods used to safeguard the item or items in custody, should either the opposing party or the judge raise a question concerning the safekeeping of the exhibit.

Assuming that the item is now a full exhibit, for full effect, it must be published to the jury. If the item was important enough to go to the trouble of getting it admitted as an exhibit, it is equally important that the finder of fact be allowed to handle it and experience it for themselves at the time it is admitted, particularly if more testimony regarding it will be elicited from witnesses. If necessary, permission should be obtained in advance from the court to allow the jurors to leave the box to examine the object if it cannot be passed from hand to hand. Unlike the big-screen exhibit, or exhibit notebooks, there will be considerable "dead time" while the members of the jury (or the bench) actually handle the item. While it may feel extremely awkward, particularly in jurisdictions that frown on any delay, it is important not to distract the jury while the exhibit is being examined. Either stand quietly to one side or remain at the podium. Unless directly instructed to do so by the judge, do not yield to the temptation to fill in the silence by asking a question of the witness.

Once the jury has had the opportunity to examine the item, do not ignore it. Refer to it as often as is appropriate. It does not need to be published again, and in fact, the suggestion is quite likely to be met with an objection that will be sustained. However, subsequent witnesses can certainly be asked to refer to it as appropriate. For example, in the case involving the wheeled stool, office staff—employees of the defendant—were called to testify concerning admission records, other visits, and medical charts. Each witness was asked to look at the exhibit and state whether he or she could identify it and where it was used in

the various rooms. Unlike a document or an electronic screen, a piece of demonstrative evidence can remain fairly visible during much of the trial.

Certainly the exhibit should be used during closing argument where such argument is permitted; hold it before the jury, or place it where the jury can see it and make sure the members of the jury are reminded that they will have another opportunity to handle it for themselves during deliberations. Practice the closing argument with the exhibit to make sure it is used effectively in the flow of the argument. For instance, turning the wheeled stool upside down to show the wheels only works if the stool can be easily lifted and held up long enough to make the point.

The Verdict Is In—What Now?

Trial is over and let's hope the result was favorable. What now? During the posttrial period, especially with a favorable result, the exhibits are often forgotten as the next case or the work that piled up during trial becomes a priority. Because a demonstrative exhibit is often one that cannot be duplicated, care must be taken to ensure that the exhibit is not lost, misplaced, or accidentally destroyed. In the event of an appeal, particularly one that may result in a new trial, that exhibit may be needed. While it should be standard trial practice, do not forget to verify with the trial clerk at the end of the trial that the exhibit list is complete and accurate and that all the exhibits are safely stored pending decisions on posttrial motions and the running of the appeal period.

It is always a good idea to be on good terms with the courthouse staff, but when the case involves something unusual, it is essential. Make sure the courthouse staff knows that the exhibit will not be abandoned in the wake of the trial. While some jurisdictions will send notice to the parties before trial exhibits are destroyed, others do not. It is always appropriate to ask that notice be attached to the exhibit stating that it should not be destroyed without prior notice and giving the applicable contact information. Make sure the exhibits are picked up as soon as the applicable time periods have expired. The less trouble the courthouse staff is caused, the more cooperation they will give next time.

Next Time

When the next client file comes in, think in three dimensions. Go beyond the electronic box and investigate whether this is a case when demonstrative evidence can be persuasive in making the case for the client. Sometimes "hands on" evidence is the best evidence. It can be well worth the extra effort and time needed to identify it, obtain the item, safeguard it, and ensure that it will be available at the settlement conference or, if necessary, admissible at trial.

Endnotes

1. It should be noted that the author does not do any criminal litigation work and the suggestions offered here arise out of civil litigation work only. The author wishes to acknowledge the training provided by Donald O'Brien and Thomas Anderson on the use of demonstrative evidence.
2. *Black's Law Dictionary*, (6th ed. 1990).