

[LETTER to a young trial lawyer]

SALVATION BY SUMMARY

Make Complex Facts Easy for Jurors to Understand

by DAVID K. BISSINGER

Thanks to technology and the vanishing jury trial, every complex case risks becoming a quagmire of disorganized data. To quote Fyodor Dostoyevsky, “The facts aren’t everything. At least half the case is in knowing what to do with the facts.”

Salvation for lawyers and jurors lies in summaries. Just ask the Enron Task Force. As the *American Lawyer* reported in September 2006, the prosecutors struggled over how to present their case. The solution: They hired a graphic artist to teach the jury through “visually persuasive storytelling.” With the artist, the prosecutors created graphics showing how former Enron Corp. Chairman Kenneth Lay and former CEO Jeffrey Skilling hid losses, sold stock, and deceived employees and shareholders.

Summaries deliver the most value when the court admits them into evidence. Summary exhibits will drive the closing argument and jury deliberations.

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As Michael Tigar observes in his book “Persuasion: The Litigator’s Art,” the exhibits lie at the heart of all great closings. The exhibits remain in the jury room long after the lawyers’ words have ceased to echo in the jurors’ minds. Assuming the case is good (hopefully great), the advocate will have some



jurors in his camp but also a few holdouts. Good summary exhibits will arm the jurors to win over the holdouts.

So how do these summaries and charts get into evidence? Federal Rule of Evidence 1006 provides one basis for getting summary charts admitted. Rule 1006 allows admission of summaries of large amounts of data — without the requirement that the court admit the underlying data itself. The offering party

need only make the data available to opposing counsel.

DVD-ROMs and high-speed printers enable lawyers to offer the underlying data into evidence with ease, reducing the value of Rule 1006. Again, the trouble comes not with the facts, but with how

the advocate uses them — in a witness examination or in closing. A good table can be a savior, and the jury will remember how the advocate used the summary if the court has admitted it.

Courts will admit so-called “summary evidence.” For example, in *United States v. Osum* (1991) and *United States v. Duncan* (1990), the 5th U.S. Circuit Court of Appeals refused to reverse criminal convictions in which the prosecution offered and the trial court admitted exhibits containing “summary evidence” of matters already in evidence. In both cases, the court reasoned that summaries relieve jurors from having to examine hundreds of individual exhibits. (In both cases, the trial judge had instructed the jury to disregard any summary that lacked support in the underlying evidence admitted. That invites the opponent to cross-examine a proponent of a summary for errors, bias and so on.)

What summaries should the trial lawyer use? A few basic ones show up in just about every case.

- *Cast of characters.* In many business cases, corporate titles and corporate personalities seem almost indistinguishable. Give jurors a cast of characters. With the aid of digital still shots, little thumbnail photographs of the relevant executives can even be included. Jurors like handy reference items such as this. Plus, it’s likely that opposing counsel will see the benefit of

that device and will agree to use it, too.

- *Timelines.* Jurors also appreciate timelines. Again, in business or intellectual-property cases, the lawyers might know the events by heart, but the jurors have no clue. They will have little idea of the general business practices let alone the facts that might show up in an outline involving a complex sale or the development of a particular type of technology. A simple timeline gives the jury orientation. In fraud cases, a simple outline can be devastating.

- *Transaction schematics.* As the Enron Task Force discovered, Enron’s arcane deals cried out for summaries. In any multiparty business case, a transaction schematic will help jurors understand the roles of the different players such as multiple subsidiaries, “special purpose entities,” financial institutions and so forth.

Be Prepared

Whenever feasible, prepare graphics early. Insert them into pleadings and briefs. Use them in depositions. Include them in the pretrial exhibit exchange. Prepare for objections to them at trial. Prepare mini-briefs in advance of the pretrial conference or, at the very least, in advance of the judge’s ruling on the exhibit at trial.

Be sure to fact-check the summary. In some instances, this might mean taking a version of the summary and attaching

a tabbed notebook of the supporting data. For example, in a broker-dealer case, summarize the transactions but back them up with things such as broker notes, order tickets and confirmation statements. In a products liability case, use summaries of all the testing conducted on the part at issue backed up with the test reports themselves. In a royalty case, summarize each month’s production and the appropriate royalty paid — or which should have been paid.

Prepare the sponsoring witness to explain the summary to the jury. Spontaneity will hurt. The sponsoring witness must tell the jury what the exhibit summarizes, who prepared it, why it was prepared, how it was prepared and when it was prepared. Have the witness show the jury where important items came from. This will have the secondary benefit of disciplining the advocate against cross-examination. If the advocate is prepared, she will anticipate and avoid criticism about the summary.

All this work pays dividends. If done right, the point (and perhaps the case) will find salvation. ■■■

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