How to Uncomplicate the Complicated

By Michael A. Geibelson and Roman M. Silberfeld

> "It is simplicity that makes the uneducated more effective than the educated when addressing popular audiences."
> Aristotle (384 BC – 322 BC), *Rhetoric*
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> "Things should be made as simple as possible, but not any simpler."
> Albert Einstein (1879–1955)

Over the life of a dispute and the litigation of the case, the parties and attorneys have a lengthy opportunity to learn who the players are, the terms and abbreviations involved in the dispute, and the chronology of events that led to a trial in front of a jury of strangers. Unless you make the unusual determination that it is better for the jury not to understand anything, a substantial amount of the work in the plaintiff's case must be to teach the essential elements of the claim. The jurors' confusion may squander whatever sympathy they have for your client's position, and the verdict may be given in spite of you and not because of you. Whether or not your message ultimately wins the case, making things less complicated dramatically increases the chance that your message will be understood.

I. SPOON-FEEDING ... AND LETTING THEM KEEP THE SPOON

There is no good reason to spend the jury's precious memory on details easily reduced to an uncontroversial writing, or even a controversial one, that they can use in deliberations. In considering how to permanently communicate information to the jury, you must be mindful of Code of Civil Procedure section 612, which provides:

> Upon retiring for deliberation the jury may take with them all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them any exhibits which the court may deem proper, notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

In other words, without the agreement of the other side, the jury is only permitted to take into the jury room exhibits admitted in evidence, exhibits the court permits to go in, and their own notes.

In order to apply this rule properly, the trial court should be made aware of *Conger v. White* (1945) 69 Cal.App.2d 28, 158 P.2d 415, a case involving a series of real estate transactions induced by fraud. There, plaintiff's counsel tabulated damages on a large sheet of paper which one of the jurors grabbed (in full view of the opposing party, its counsel, and the court), and took into deliberations. Counsel did not object. The Court of Appeal explained the rule of Section 612 as follows:

> Computations of interest and other such matters which summarize the testimony given by witnesses may be placed in evidence as exhibits and the jury may be allowed to take them into the jury room. Computations made by counsel and used in argument are not evidence and if reduced to writing, except by jurors, their use in the jury room is unauthorized. (*Id.* at 41.)

Although the court denied a new trial on the basis of a failure to object, the Court of Appeal also observed that the use of the computation would not necessarily have been prejudicial, because the computation included a calculation based upon appellant's theory of the case. (*Id.*)

Conger teaches several things. First, the jury is permitted to write down everything you write or show on a board to "illustrate" the testimony during the evidence. Second, the use of exhibits not admitted as evidence are not prejudicial per se, and are permitted to be used if the court deems them proper. (*Id.*, and see Code Civ. Proc. § 612.) Third, objections to the use of demonstrative evidence can be waived. Said another way, demonstrative exhibits can go to the jury without formal admission as evidence if the other side stipulates to their use, and the court finds it proper to submit them – the latter being a low hurdle in the presence of a stipulation. *Conger* confirms the principle stated by the California Supreme Court nearly a century ago in *Higgins v. Los Angeles Gas & Elec. Co.* (1911) 159 Cal. 651, 115 P. 313, that "[t]he court may


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permit the jury to take with them and use in their deliberations any exhibit where the circumstances call for it, observing the proper precaution of instructing the jury in the nature of the use which they shall make of the exhibit."

To increase the chances of obtaining a stipulation, or having the court allow the demonstrative exhibit to go to the jury in the absence of the stipulation, consider making the exhibit even-handed, and indisputably accurate.

A. Casts of Characters

Tables listing the people involved in the incident underlying the suit are particularly helpful when there are many people involved, and where two or more of them have similar names. But these tables can include much more than witnesses' names, and current titles and employers. Consider including other helpful facts which aid recall, and give the person a place in the litigation:

- Brief biographies (e.g., inventor of the O-ring; Board-certified Ophthalmologist)
- Role in the case (e.g., first physician to examine Mr. Jones)
- Contact(s) with other parties involved (e.g. former employee of ABC Corp.)
- Picture of the witness (especially in long cases with numerous witnesses)

B. Glossaries

It goes without saying that technical terms commonly used in fields of specialty are lost on jurors with no prior exposure to them. It is simply unreasonable to expect jurors to just pick these terms up through the testimony without some help. This is particularly so when similar abbreviations and acronyms are used to denote significantly different concepts. In creating a glossary, consider a few options:

- If possible, *keep the glossary on a single page*. Blowing up a single page is easier to read and use, and less distracting to others, particularly if the glossary is given to jurors for use during the evidence.
- *Consider grouping abbreviations together, at the top of the glossary, or in a separate glossary.* As the meaning of the words underlying abbreviations are committed to memory, the abbreviations should be easy to find and use. For instance, the abbreviation "DBM," in the context of spine surgery, refers to Demineralized Bone Matrix. Only after the terms "Demineralized" and "Bone Matrix" are understood does the abbreviation have any significance. But once understood, the abbreviation should not be lost among a long list of other similar terms. Putting "DBM" in a separate group among "BMP" "CaP" and "uDBM" allows for a quicker comparison of the abbreviations.
- *Do not limit glossaries to definitions and abbreviations.* Consider using them to group things together in classes. For instance, in a product identification case, consider using a glossary to juxtapose trade names with generic names for products, or to group products of similar characteristics, compositions, or by manufacturer.

C. Tutorials

In complicated or highly technical matters, consider giving a tutorial before the substantive testimony. Where the case is to be tried to a judge or arbitrator, a tutorial given weeks or months before trial can save time and effort in motion practice that would otherwise have to be devoted to teaching the technology or other complexities of the case. In a long trial, tutorials are also advisable before the evidence is taken, even if the teacher of the tutorial is someone who ultimately testifies. Learning the basic technology early on helps put the rest of the evidence in context, particularly if the expert who would otherwise give the tutorial is not going to testify until late in your case.

Beware. Despite agreeing that the pretrial tutorials are to be educational only, both sides will obviously consider a pretrial tutorial as the first opportunity to argue the case. Simply be prepared to do so in an otherwise educational way.

D. Timelines

With multiple parties in a case, witnesses taken out of order, and long proceedings interrupted by holidays and other delays, jurors bear a difficult burden in trying to synthesize the evidence into a cohesive,

chronological story. Opening statements and closing arguments help, but they are fleeting, and likely only as memorable as the jurors' ability to take notes.

In circumstances where the timing of things matters, a timeline is essential. And in nearly every case, the timing of things matters. Whether it is the medical treatment in personal injury cases, the misrepresentations in fraud cases, or the performance of obligations in contract cases, all of these create an opportunity to add simplicity to the jury's use of the evidence.

In learning the case, we create timelines for ourselves to learn what happened. There is little reason not to teach jurors the case the same way.

E. Tables and Indices

Where there are voluminous records which must be summarized to effectively (and efficiently) present them to the jury, there is no reason tables summarizing those records cannot go to the jury. Indeed, the Federal Rules of Evidence specifically provide for the admission of such summaries in Rule 1006:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

This practice should not be limited to federal court. Such tables are certainly proper for an expert to create, or simply authenticate if created by the attorney. And Code of Civil Procedure section 612 and *Conger*, *supra*, should be read to permit their admission or use by the jury.

II. IN 10 WORDS OR LESS ... STICKING TO A THEME

A. Finding a Theme

If you cannot explain your case in 10 words or less, start over and try again. Only with this diligent exercise can you truly grasp what is important. And only if you can grasp what is truly important can you convey that importance to a judge or jury. In this sense, the use and repetition of a theme is nothing devious. Rather, it is a reliable shorthand to quickly convey the fundamental correctness of your view of the case.

There are, of course, many variations on this exercise, and no one is superior to all the others. And of course it may take twelve words. But before you start making trial graphics and before you start gathering exhibits haphazardly, figure out in the most basic sense what is important to your case.

This is a very different exercise than determining what you must prove. The elements of a claim or defense are matters of law. A theme must be developed in terms of matters of the hearts and minds of the jury. The theme brings home a result because it is just and fair, because it is what is right, because it is what the law demands.

B. Refining the Theme

The use of themes is often discussed in terms of primacy, recency, and repetition. In other words, whatever the theme is, "Say it First, Say it Last, and Say It Often." This is not a comment on the intelligence of our judges and juries, but is simply the way people process information.

It also is a comment on the convention of speaking in threes: this, that and the other. Right or wrong, breaking things up into threes conveys a sense of organization, a sense of thoughtfulness, a sense of completeness. But having three themes can interfere with your ability to convey a single idea that is truly important by giving people multiple things to think about. What be may important to one person may not be to another. Therefore, even if a series of three things are used to organize thoughts, each of those thoughts must be tied back in some visible, tangible way to the central theme.

C. Conveying the Theme

The theme must pervade everything you do at trial. The words used in opening and for key questions on direct and cross-examination. The graphics used. The method of presenting the graphics. All must be chosen with the theme in mind.

And once chosen, the theme must be conveyed as a complete idea, in one place, without any interpretation required. If the theme needs to be explained too much or too often, its impact is lost.

For this reason, simple themes often work most effectively to convey a point, even where the damages are far less tangible than in a personal injury case. For instance, we used a color version of the graphic in the sidebar in a case tried last summer. In ten words or less, the case

WORK IN VIOLATION OF THE CLEAN WATER ACT

	NO PERMITS 10/02	NO PERMITS 5/03-7/03	ICMO 10/03-12/03	Emergency 1/05-2/05
WORK PERFORMED WITHOUT A 402 PERMIT OR 404 PERMIT	Violation No. 1	Violation Nos. 2-7		
PERMITTED WORK PERFORMED POORLY OR NOT AT ALL — VIOLATION OF CONDITIONS			Violation Nos. 9-15	Violation Nos. 19-22
WORK PERFORMED BEYOND SCOPE OF PERMIT			Violation Nos. 16-18	Violation No. 20

concerned: Numerous violations of the Clean Water Act by a developer. As far as we were concerned, the entire trial was about VIOLATIONS. If it were proper, we would have liked to have written the word in big, bold letters on the wall of the courtroom and vigorously scrawled a hash mark below it each time testimony came in that demonstrated yet another violation. We cataloged the violations by walking through them with the accompanying graphic on (nearly) permanent display.

The graphic displays a single idea: Work in Violation of the Clean Water Act. While breaking the violations into six different categories, most importantly, it conveys that there were ***twenty-two VIOLATIONS*** of the Clean Water Act. To primacy and repetition, we added recency by displaying the graphic to organize the expert testimony, and finally in closing argument.

But the jury should not be left on its own to memorize the graphics or the technical terms used in them. For instance, a chart such as ours must be accompanied by a timeline (or even a simple chronological list) of the numbered violations, each with a short description: e.g. "Stockpiling Dredged Material in Wetlands (7/15/2003)." And to make sure that none of its meaning is lost, a glossary should also provide ready definitions of the terms learned by the attorney over years of handling a case, but foreign and new to the jurors who will decide it. For instance, "ICMO" refers to an Interim Corrective Measures Order – an order issued by the Army Corps of Engineers to perform certain, specified work to correct a violation of the law; and "Emergency" refers to an Emergency Order – an order issued by the Army Corps of Engineers to perform certain, specified work on an emergency basis to prevent further damage.

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III. THINKING IN BUCKETS

With a full understanding of the claims and legal theories in a case, it is easy for attorneys to refer to facts as "good facts" and "bad facts." This process of categorizing facts is what I've called "Thinking in Buckets." Of course, in considering the evidence for trial, the categories are not limited to "good facts" and "bad facts," and you never need to actually talk about "buckets" or any other metaphorical grouping to categorize the facts in an uncomplicated way for the jury.

Rather, in analyzing the evidence that is going to come in at trial, you should think of the buckets of facts topic by topic, issue by issue, and claim by claim. There is never just one way to divide the evidence. But thinking about the evidence in buckets will, hopefully, drive a reasoned decision about where the focus of the evidence should be. More importantly, looking at the evidence in this way forces you to confront problems of proof, and issues for which there is little or no evidence.

In opening, closing, and through the testimony of witnesses, think of the buckets as an alternative to proving things in chronological order. Instead, where appropriate, consider talking about the facts and proving them topic by topic. Presenting the evidence in this way avoids the need for the jury to figure out for itself how otherwise random parts of a chronology combine to form a story of liability and damages. In doing so, the jury can more easily synthesize the evidence relating to your issues in a cohesive way, a way that hopefully supports your theory of the case. Perhaps more importantly, the jury can disbelieve some subset of the evidence – disregarding one bucket, so to speak – without disbelieving the entire case.

Returning to the Clean Water Act case for illustration, the graphic creates buckets of violations in two ways. The left column creates buckets for the kind of work that resulted in a violation: work performed without permits, work performed poorly or not at all, and work performed beyond the scope of the permits. The top row creates buckets for each significant time period: From October, 2002 through July, 2003 before permits issued; during October through December, 2003 when there was an Interim Corrective Measures Order (ICMO); and in January through February, 2005 when there was an Emergency Order. Assuming the trier of fact simply refused to award penalties for work performed poorly, the buckets of evidence allow the jury to very simply award penalties for the rest of the violations.

IV. SIMPLY, IN CLOSING

Attorneys commonly speak of the need to "dumb it down" or to K.I.S.S. ("Keep It Simple Stupid"). But the goal of uncomplicating the complicated should not be an end in itself. Instead, like all other decisions made at trial, you must decide on an appropriate level of simplicity for the facts and issues involved in your case to convey your message. Then, use the tools available to make things "as simple as possible, but not any simpler." ■