

Authentication, Exhibits and Courtroom Presentation

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I Have the Best Document/Video/Summary

- But it won't help you if you can't get it in
- Jurors want visual evidence
- It is easier to recall and use in the mental process than auditory evidence
- But you must master the foundation and authentication for the evidence, or the jury will never see it

The Five Flavors of Evidence



- Real—the lab beaker from which the hot liquid poured onto the plaintiff's hand
- Documentary—the letter to the President of Company X
- Demonstrative—The accident reconstruction video
- Summary—the chart showing all the payments made
- Testimonial—That's what she said

Basic Foundations

- Very basic
 - Make sure exhibit is pre-marked (federal or complex case) or marked for use at trial so it has a number
- Ask to approach the witness
- “I hand you what has been marked for identification as Defendant’s Exhibit 9”
 - Do you recognize it?
 - What is it?



Continued

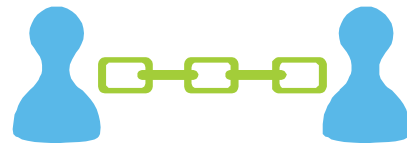
- Authentication—how do you recognize it? (Is it a receipt, letter etc)
- Relevance, what fact of consequence does it make more or less likely
- Your Honor, the Defendant moves Defendant Exhibit 9 into evidence
- Here come the objections!
- Must articulate succinctly grounds for objection
- Side bar if needed—make sure court reporter included, you need that record

Common Foundations

- Authentication of a writing
- Handwriting
- Photographs
- Video/Motion Picture
- Conversation
- Telephone Conversation
- Official Records
- Business Records
- Computer Records
- Refresh Recollection
- Past Recollection Recorded



Chain of Custody of Physical Evidence



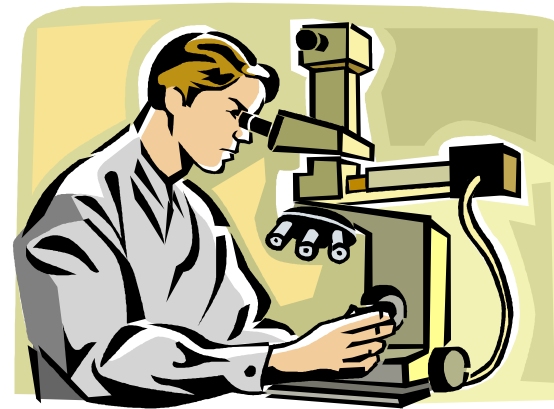
- The defective product, a blood sample, the automobile in the accident
- The propounding party must be prepared to establish this is the real one, taken from the time of the incident at issue and preserved for the jury or court's review today

The Links in the Chain

- Each one must testify, best to have supporting documents
- I took the blood sample here is the consent form signed by me and the donor
- I gave it to lab technician A, here is the form we signed and the label I put on the sample
- Lab Technician A then testifies he received, same label and he took a portion and tested
- He certifies test results

Physical Evidence and the Expert

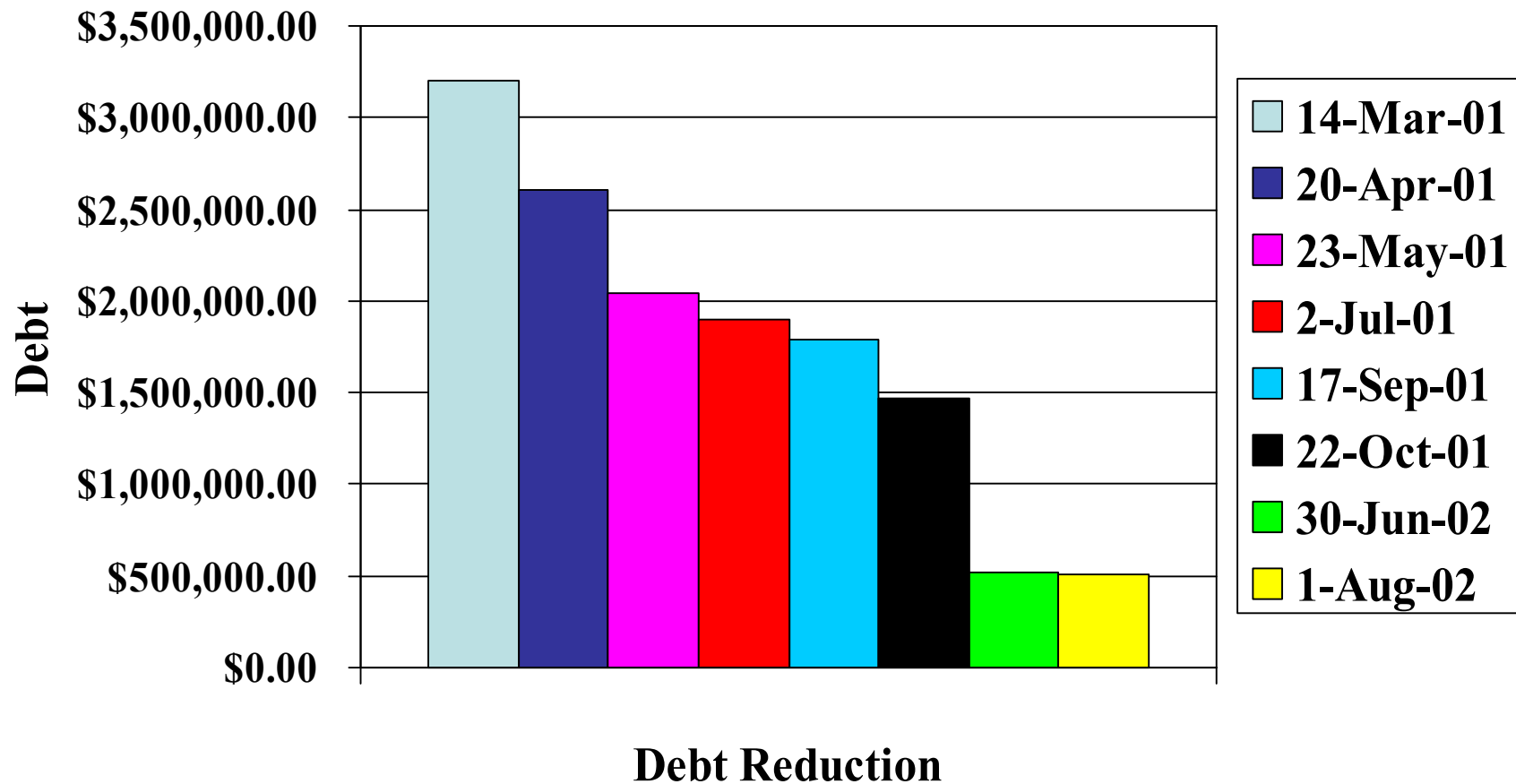
- The chain of custody must be preserved and documented and each witness brought to trial if not stipulated
- Testing must be documented and shown not to have transformed the evidence
- Destructive or transformative testing is dangerous—get court and opposing party approval



More Foundations

- Expert Witness
- Lay Opinion
- The summary
 - I usually use experts or very knowledgeable client witnesses to introduce
 - These are powerful, much information in one place
 - Very visual
 - Rule 1006

CT&E Debt Reduction to VCF



Motions in Limine

- In limine is Latin for “at the outset”
- Presented to the Judge just before or at the beginning of trial
- Great idea—know what evidence you get to use/not use, don’t be taken by surprise
- BUT in State system not a final ruling, you have to try again in the trial and have the Judge reiterate ruling or, if you fail to object, issue is not preserved

Two Ways to Get in Limine Rulings

- File a motion as to each issue
 - Expert qualifications
 - Use of video recreation
 - Use of certain documents
- Bring up in pre-trial brief under Rule 16 section on evidentiary issues anticipated and ask court to consider at pre-trial conference
- I prefer formal motion, it forces some action by the court or a gaping blank on the docket

Examples

- Use them for key issues you need resolved to develop your trial approach and strategy
- When ruling on admissibility of evidence, court can consider inadmissible material—Rule 104; Precision Piping and Instruments v. E.I. du Pont de Nemours and Co., 951 F.2d 613, 621 (4th Cir.1991).
- Exclude Testimony of Expert on Law
- Must track standards in Rule 702

Knight Textile moves the Court to exclude the proposed expert testimony of Professor Charles R.T. O'Kelley. Pursuant to Local Civil Rule 7.04, no supporting memorandum is attached. Professor O'Kelley is a law professor from the University of Georgia. He will testify about Delaware law and how it applies to the facts of this case. Legal opinions, however, are generally inadmissible. There is no need for a Georgia professor to tell a South Carolina court how it should apply Delaware law. This Court and its staff are capable of looking at the Delaware Code and analyzing its application. Because Professor O'Kelley offers no proposed testimony that will assist this Court to reach a decision, the Court should exclude his proposed testimony.

DISCUSSION

“[O]pinion testimony that states a legal standard or draws a legal conclusion by applying law to the facts is generally inadmissible.” United States v. McIver, 470 F.3d 550, 561 (4th Cir. 2006). For example, courts have found the following testimony inadmissible as a legal opinion:

- Whether an act qualifies as “extortion”;
- Whether a dog bite constitutes “deadly force”;
- Whether the parties held a “fiduciary relationship”; and
- Whether a product was “unreasonably dangerous.”

Id. (citing cases);

see also U.S. Search, LLC v. U.S. Search.com Inc., 300 F.3d 517, 522 n.4 (4th Cir. 2002) (affirming district court's decision to exclude the testimony of a trademark attorney because it "was nothing more than a legal opinion and was thus inadmissible."); Hermitage Industries v. Schwerman Trucking Co., 814 F. Supp. 484, 486 n.3 (D.S.C. 1993) ("Other federal circuit courts of appeals have concluded that opinion testimony in the form of legal conclusion is inadmissible."). Here, Professor O'Kelley, a University of Georgia professor of law, will testify about Delaware law and its application to the facts of this case. Delaware law, however, is within the reach of the Judge and his clerks through books, Westlaw, and copies of the relevant statutes and decisions provided to the Court by counsel. There is no need for a professor from Georgia to tell a South Carolina court how it should apply Delaware law. The Court is the ultimate trier of fact in this case, and Professor O'Kelley brings no unique or specialized knowledge that will assist the trier of fact.

Exclude Surprise Witness

- Opponent never named witness
- Not deposed

Federal Rule of Civil Procedure 37(C)(1) provides a self-executing sanction for failure to disclose an expert pursuant to Rule 26(a). Fed R. Civ. P. 37. That section provides as follows: (1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at trial . . . information not so disclosed. In In re Air Crash at Charlotte, North Carolina on July 2, 1994, 982 F. Supp. 1086 (D.S.C. 1997) (Joseph F. Anderson, Jr.), the court invoked Rule 37 and excluded the expert testimony from two USAir employees who had been earlier named as fact witnesses, but not as expert witnesses. Both employees had been deposed as fact witnesses, but USAir failed to identify the witnesses as experts and to disclose the materials required by experts under Rule 26(a). Id. at 1088-89; see also Basch v. Westinghouse, 777 F.2d 165, 174-75 (4th Cir. 1985) (excluding expert testimony where the expert was listed only as a fact witness until after his deposition had concluded).

In this case, the Defendants failed to name Josh Varat as a fact witness or as an expert witness. The expert-witness deadline expired last year, on August 28, 2006. Discovery closed on December 8, 2006. Varat's name never appeared until after discovery had closed, experts had been named, and summary-judgment briefs had been filed. Such a late disclosure is not "harmless." The reasonableness of Talmadge Knight's salary has been an issue in this case since the day the Complaint was filed. There is no excuse for the Defendants to wait until the last hour—after the expert-deadline had expired and discovery had closed—to name an expert to testify on that issue. Further, because discovery is closed, Knight Textile cannot depose Varat and subpoena his written materials. It is also too late for Knight Textile to locate an expert in the apparel industry to testify about the industry and about executive salaries in that industry.^[1] In short, Knight Textile would be prejudiced by such a late disclosure.

^[1] Although Knight Textile's corporate-governance expert, John Freeman, opines briefly on executive salaries, he does not work in the apparel industry, and Knight Textile would have to consider whether it needed an expert from that industry to rebut Varat's anticipated testimony.

Biggest Evidentiary Mistakes

- Everyone used the document in deposition throughout the case
- You included it on your exhibit list
- Suddenly the other side objects
 - Not an original
 - Authentication
 - Foundation
- Court entertains it even though it shouldn't, you are not prepared



Most of These Issues are Easily Dealt With

- Self authentication
- Opponent's document
- Original not needed
- Duplicate acceptable
- But you cannot make the argument you have not anticipated

Self Authentication



- These are documents or real evidence that the Court can admit without a propounding witness
- Rule 902 list

Rule 902

- Domestic public documents under seal
- Not under seal
- Foreign public documents
- Certified Copies of Public Records
- Official Publications
- Newspapers and Periodicals
- Trade Inscriptions
- Acknowledged Documents
- Commercial Paper and related documents
- Presumptions under Acts of Congress
- Certified Records of Regularly Conducted Activities (ye old business records)

Mostly Self Explanatory

- Trade Inscription
 - This means trademarks, labels, packaging and the like that show the owner/manufacturer
- Acknowledged documents
 - Generally this means acknowledgement by a person before a notary public, counsel or similar official

The Opponent's Documents May be the Easiest to Get In

- If you are prepared
- Don't need the original Rules 1004(3) and 1007
- Mere production in response to request with identifying number or logos may be sufficient foundation



Even without authentication through affidavit or deposition, a document may be authenticated by circumstantial evidence which suggests that the document is what it purports to be. Denison v. Swaco Geograph Co., 941 F.2d 1416, 1423 (10th Cir.1991); Snyder v. Whittaker Corp., 839 F.2d 1085, 1089 (5th Cir.1988) (authentication upheld where defendant provided documents during discovery and never challenged their authenticity); Fed. Trade Comm'n v. Hughes, 710 F. Supp. 1520, 1523 (N.D. Tex. 1989) (documents provided during discovery, on defendant's letterhead, held authentic under Fed. R. Evid. 901(b)(4)); New Orleans Saints v. Griesedieck, 612 F. Supp. 59, 62 (E.D. La. 1985) (interoffice memorandum on company letterhead properly admissible under Fed. R. Evid. 803 and 901), aff'd, 790 F.2d 1249 (5th Cir. 1986). Just as they may be admitted at trial, documents prepared on company letterhead and produced in discovery may be considered on summary judgment without technical authentication.

In the Grokster case, the district court conducted a careful review of the authentication of documents admitted by production. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp.2d 966 (C.D. Cal. 2006). The court found that documents can be authenticated without an affidavit by judicial admission when they are produced in response to a request to produce. Id. at 971, citing, Wright & Gold, 31 Federal Practice & Procedure, Evidence § 7109 at 39. The documents must contain suitable indicia of authenticity, like letterhead, a company logo or being authored by an employee of the defendant. Id.; see also, Maljack Prod., Inc. v. Good Times Home Video Corp., 81 F.3d 881, 889 n. 12 (9th Cir. 1996) (authentication satisfied where the documents at issue, many of which were printed on the plaintiff's letterhead, were produced in discovery by the plaintiff and offered by the defendant). As a result, the district court considered the documents on summary judgment absent an affidavit. Id. at 973-74.

Demonstrative Exhibits



- This can be some of the most effective evidence
- Visually depicts collected important facts
- Tells the jury a story
- Often good to use an expert to introduce
- No, not that kind of demonstration

Standards for Demonstratives

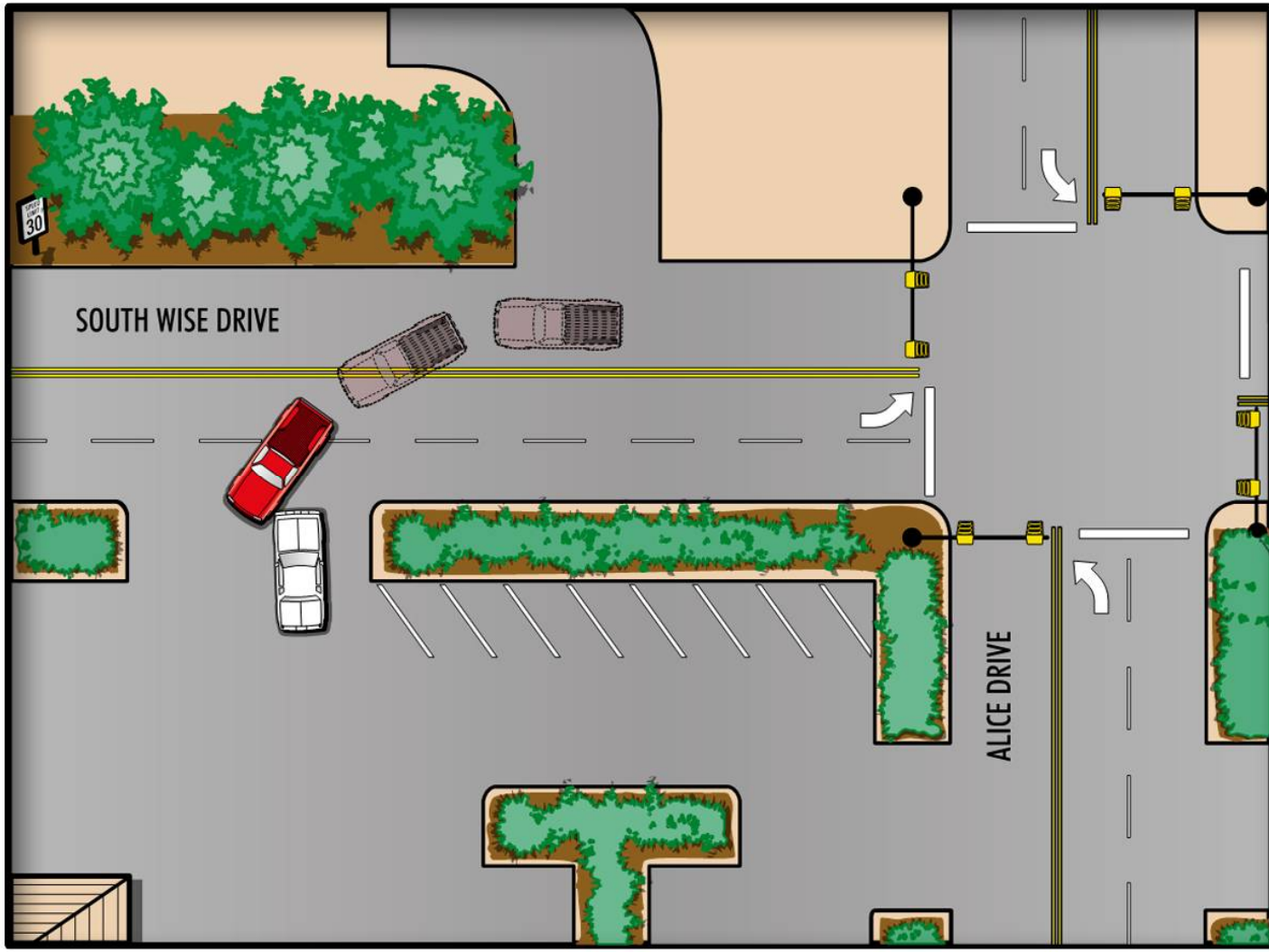
- Propounding party must demonstrate what admissible evidence underlies the demonstrative
- If it is a recreation or experiment, testimony must show that conditions are substantially similar to the factual circumstances at issue
- Demonstrative exhibits are usually not admitted as evidence, just illustrative to support testimony, summarize events, thus it is much harder to use them as a basis for appellate error



On September 24, 1994, the West Virginia state court entered an order declaring a mistrial and reserving ruling on final dismissal of the law suit pending the filing of motions for attorney's fees. [Pritt, 238 F.3d 417, 2000 WL 1699833, 9.](#) The order awarding attorney's fees was entered on July 21, 1995. In the interim, Mr. Pritt schemed to defraud the corporations and individuals to whom he owed these fees by transferring assets to his son, Donald Pritt, Jr., in order to hide them from his creditors. *Id.* At trial, the United States displayed various demonstrative exhibits showing checks negotiated by Mr. Pritt's son in connection with the scheme to defraud. These exhibits were not admitted into evidence.

Pritt v. U.S., 2002 WL 32438757 (S.D.W.Va.,2002)

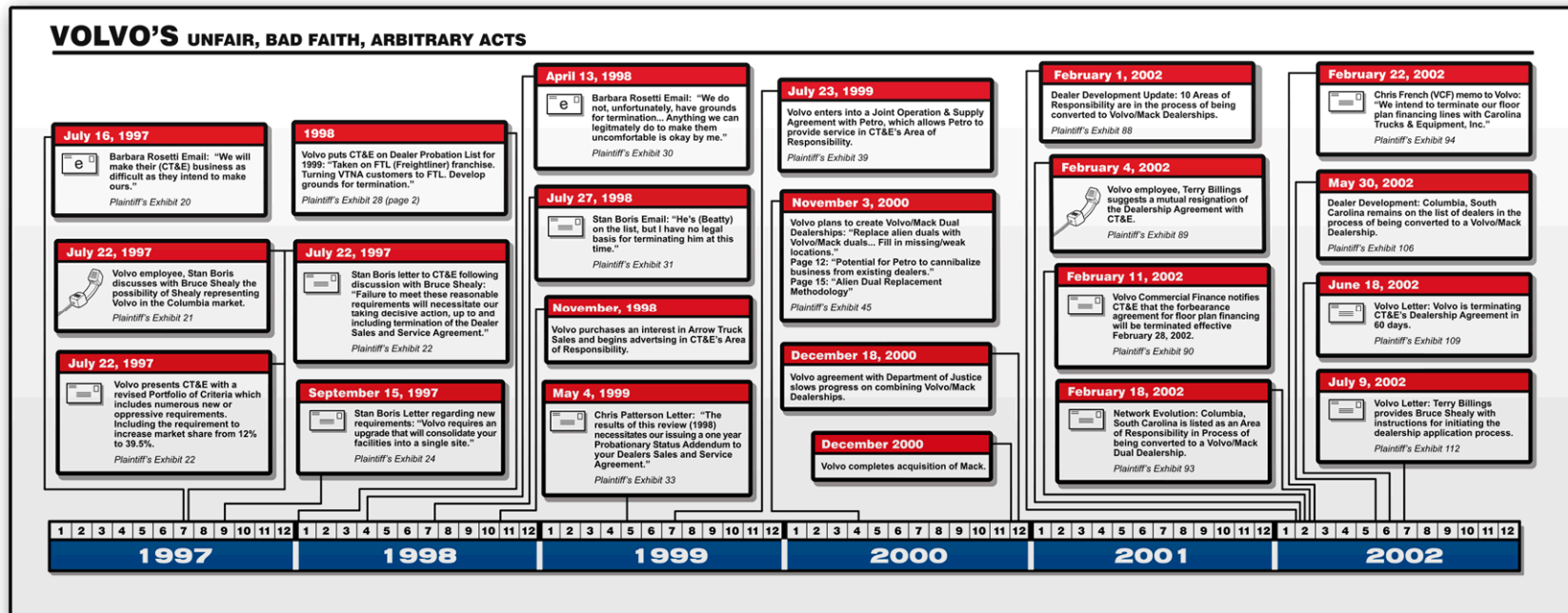
Mr. Pritt contends that he was prejudiced by the inflammatory nature of these exhibits, and that his counsel should have objected thereto and pointed out to the jury that: 1) As a minor, Mr. Pritt's son did not have the capacity to enter into a contract, and 2) that the checks were forgeries. In his objection, Mr. Pritt contends that he is entitled to an evidentiary hearing on this issue because the Government did not directly address his argument regarding his son's minority. However, it is clear from the record that this assignment of error lacks merit. Demonstrative exhibits do not constitute evidence. The jury was instructed that it could convict Mr. Pritt only upon admitted evidence. There is no indication that the jury disregarded this instruction. As the Government points out, the evidence admitted in this case was so overwhelmingly indicative of guilt that even had the demonstrative exhibits been successfully objected to, the jury had sufficient evidence upon which to convict Mr. Pritt. Therefore, this assignment of error is without merit.



Best Way to Present Evidence

- Needs to be colorful and memorable
- In my experience, most cases need a chronology
- Because of witness order, division of proof between sources, etc. evidence rarely comes in completely chronologically
- You **MUST** provide that chronology to the jury so they can have a frame work for the case

Printed on an 8' by 3' Board and Presented Throughout Trial



Reducing Complex Matters

- The highly complex can be reduced to understandable “bites” of information in demonstratives
- The following chart was used in a Procurement Review Panel hearing to explain to the Panel what a complicated internet based interface between all of South Carolina’s colleges and technical schools, a Course Articulation and Transfer Credit System (CATS) was supposed to do

WHY A CATS?

- 33 INSTITUTIONS
- FAIRNESS
- ELIMINATE DUPLICATION
- EXEMPTION BASED -AUTOMATION
- INCREASE PRODUCTIVITY
- INCREASE ADVISING FACE TIME
- FINANCES

MUST DRAW FROM:

SIS



(TRANSFER EVALUATION)

(DEGREE AUDIT)

CATS FORMS AN INTEGRAL FUNCTION

TRANSFER EVALUATION

INTERNAL TRANSFER

STUDENT
ACCESS

- COURSE
- PROGRAM
- DEGREE
- CREDITS/CREDIT TYPE
- GPA/GRADES +
- ACCREDITATION +
- EQUIVALENCIES +
- PRE-REQUISITES +
- DATE RANGE
- ACADEMIC CALENDAR

- COLLEGE/SCHOOL
- MAJOR
- GPA
- COURSE

INSTITUTIONAL
ACCESS

REQUIREMENTS:

ACADEMY ONE:

- SOUTH CAROLINA
- FEEDER INSTITUTIONS
- WORLD WIDE
- TEN YEARS

- TIME BASED 1-3 YEARS
- COST \$2-5 MILLION
- HAVE/CAN DO WHAT THEY SAY?
- "EASILY CAN BE ADDED"
- "BEING DEVELOPED"
- 20 NON-RESPONSIVE ISSUES
- OWNERSHIP

- INTERFACE AUTOMATION (IMPORT/EXPORT)
- "WHAT IF"

Graphs

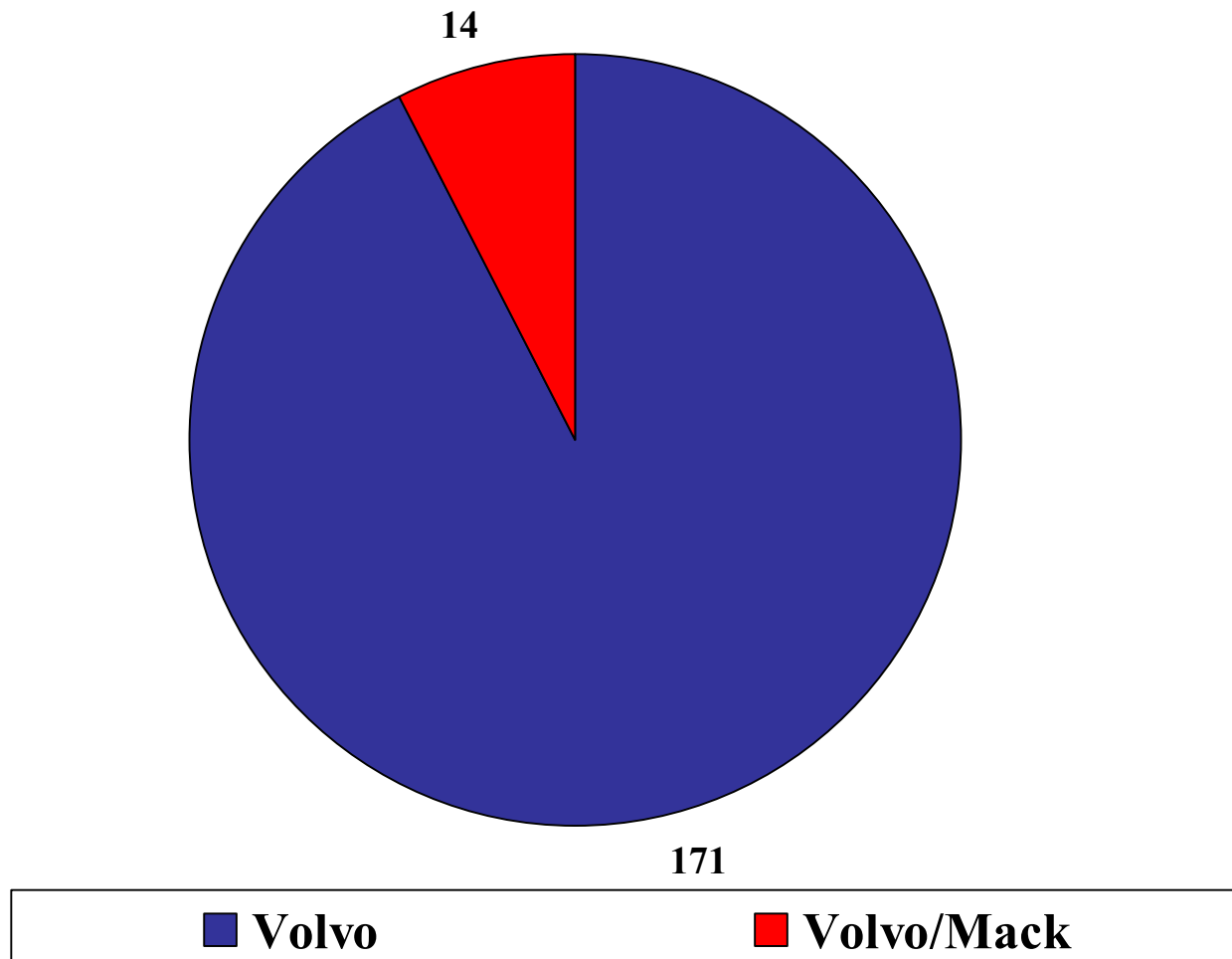
- Graphic depiction of conduct established by thousands of pages of documents and testimony from multiple witnesses can be very effective
- The following power point brought together evidence from six exhibits and three witnesses, and yes the power point author provided each source to the Court

Volvo / Mack AOR's

Consolidation History of Volvo and
Mack Areas of Responsibility

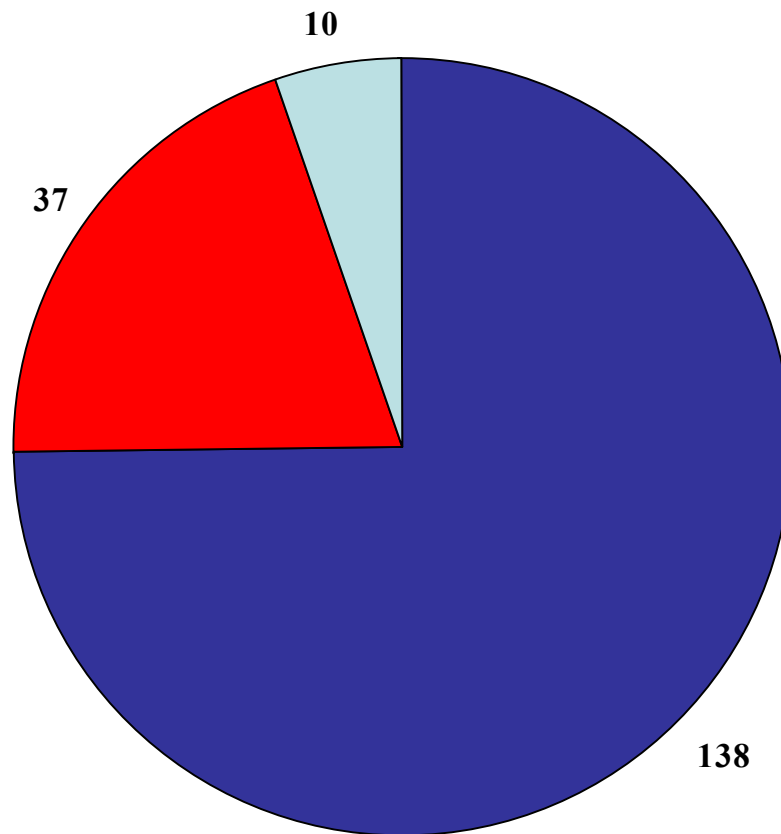
Volvo / Mack Dealers as of January 2, 2001

Plaintiff's Exhibit 106



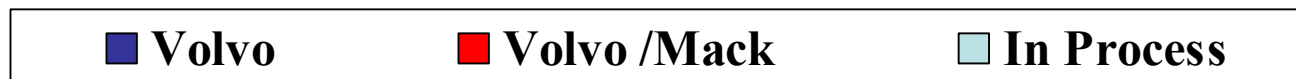
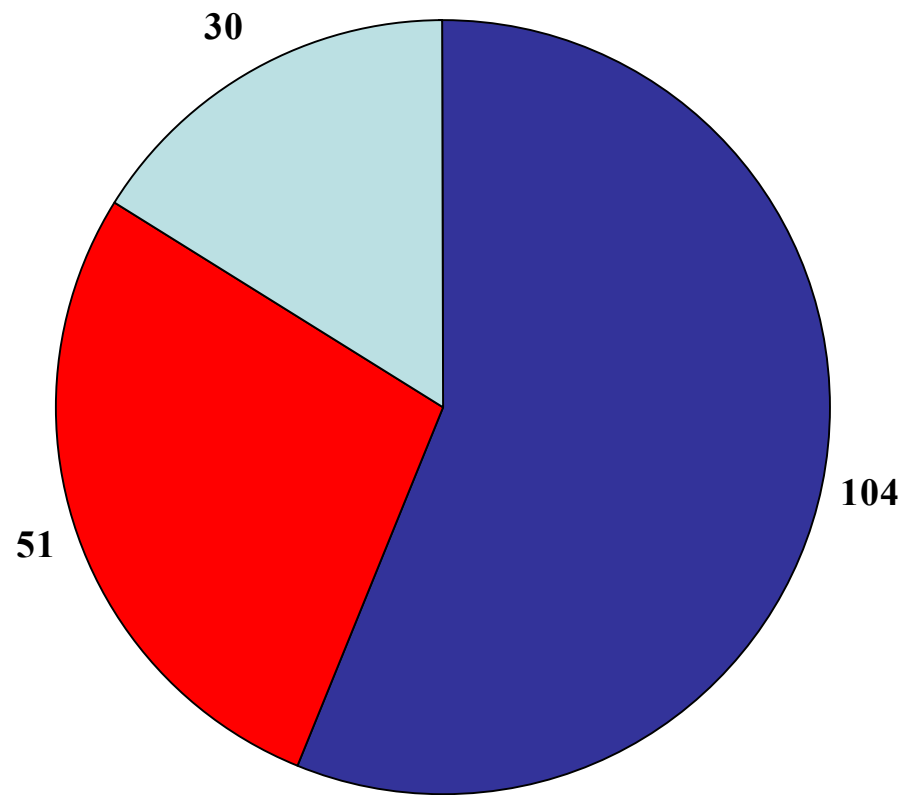
Volvo / Mack Dealers as of February 1, 2002

Plaintiff's Exhibit 88



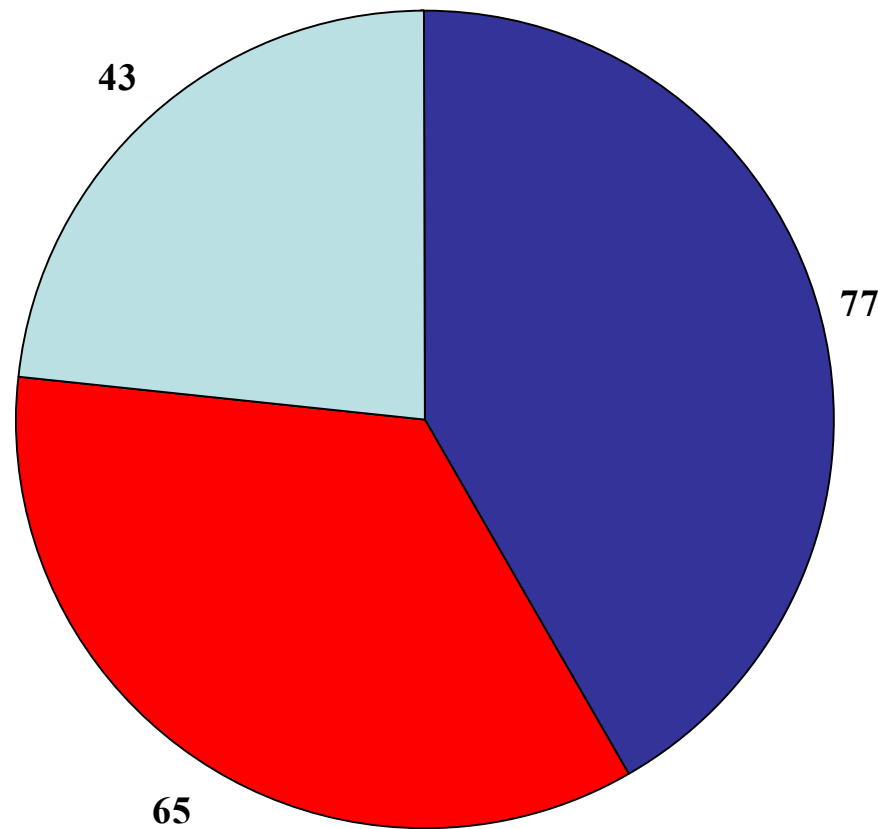
Volvo / Mack Dealers as of May 30, 2002

Plaintiff's Exhibit 106



Volvo / Mack Dealers as of November 7, 2002

Plaintiff's Exhibit 107



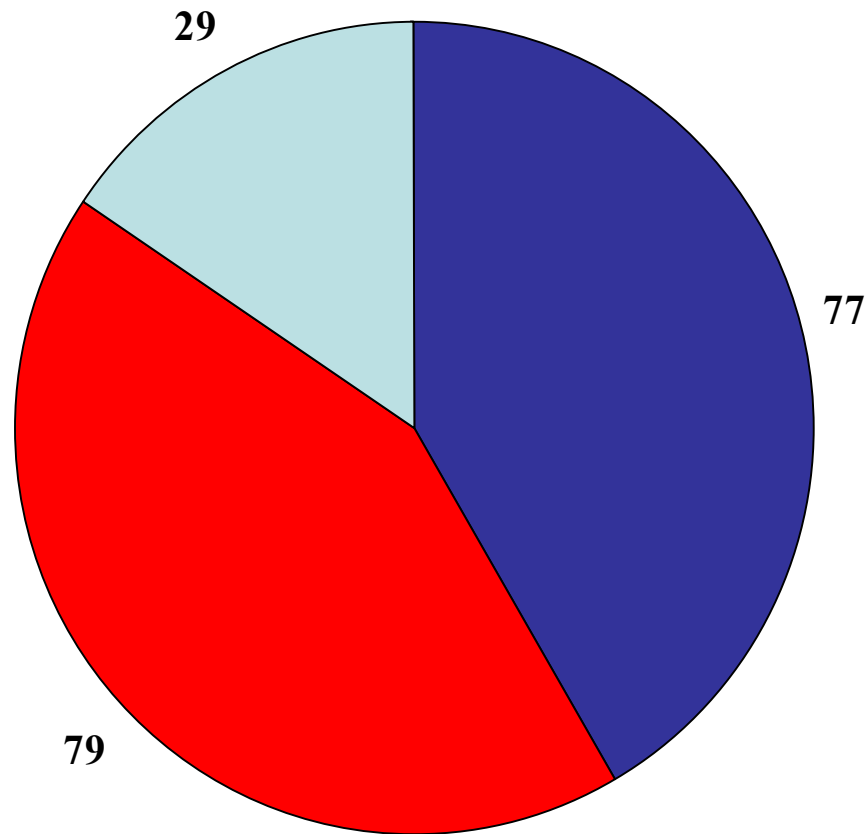
■ Volvo

■ Volvo /Mack

■ In Process

Volvo / Mack Dealers as of December 2002

Plaintiff's Exhibit 120



■ Volvo

■ Volvo /Mack

■ In Process

Presentation Techniques

- Things have changed from my notebook with acetates and maybe a TV and VCR
- Can still do that in magistrate's court, but everywhere else it is electronic presentation time
- You need a skilled assistant to run your technology



Test it Before Trial!



- Get permission from the clerk-go to courthouse
- If you can, share the system with the other side so no switch ups and jury doesn't think one side advantaged
- Practice, practice, practice and include your witnesses in some practice

DEPOSITION TESTIMONY AT TRIAL

- Becoming more common
- Use the tearing open story
- My first 10 jury trials (1989-1997) only used for impeachment
- In a 3 week jury trial in 2005—ten witnesses by deposition
- Becoming a preferred method in certain administrative contexts
 - TTAB
 - PRP before Special Referee

HOW TO PRESENT DEPOSITIONS

- Do video!
- Its not that expensive anymore, fairly easy to edit
- If reading
- Choose different witnesses
 - Let their demeanor fit the witnesses
 - Age and look
 - Good reader
- Read slowly, clearly, use emphasis and tone, no monotone
- But watch crossing line to “acting”

Tactics

- Have a document projector, like an overhead, for the unanticipated exhibit—the one that is not on your hard drive or video clips
- Cut off speaking objections! Use polite phrase “May it please the Court, I believe counsel has stated the basis of objection, may we approach?”

Side Bar

- Use them
- Keeps jury from being confused
- Must be on record though
- Use your practice time in courtroom to know how you can get court reporter to the side bar and best place to do it
- Most judge's will cooperate, understand need for record

Instructions to Disregard

- You stopped harmful testimony in mid-stream with a great objection
- Effectively argued the side bar
- Judge goes back to open court and says “Objection Sustained!”
- What now, go to Disney World? NO, your co-counsel, paralegal or assistant had better be scanning notes or records to see if you need a curative instruction



Curative Instructions Necessary

- I believe most jurors try to do as instructed by judge, thus they listen and try to obey curative instructions
- Others believe that the instruction just helps the bad evidence take root
- But whatever your belief, if you don't ask for it and judge doesn't do it, you probably have lost an appellate issue

Open Discussion

Best Practices for admission,
rejection

Questions?

Comments

For More Information

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