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Drowning in complexity Part 2: dealing with it

By: F. Dennis Saylor IV and Daniel I. Small October 13, 2016

In our last column, we talked about the importance of ruthlessly cutting back on complex cases to get them ready for trial. Every lawyer handling a complex case needs to take a pair of pruning shears, and sometimes a meat ax, to the case to make it as manageable as possible.

Now suppose you've cut as many claims and issues as you can and pared your witness list down to the minimum. Your case, unfortunately, is still pretty complex. So now what? Where do you go from here?

Our first piece of advice is to think long and hard about whether you can do more. Are you really sure you've done everything you can? Are you keeping things in the case because they're truly necessary, or because you're overly invested in them?

Often a football team — other than the Patriots, of course — will hold on too long to a top draft choice who hasn't panned out. Ego and embarrassment play a role in that, along with a large dose of wishful thinking. It's hard to admit, even to yourself, that you've wasted time and resources on something and that it's time to let go and move on.

But you need to be able to cast a cold eye on your case and make difficult (even painful) choices to eliminate unnecessary baggage. Maybe, too, you're still being overcautious — like calling a document custodian when the exhibits in question are self-authenticating or can be certified under Rule 902.

Second, remember our advice to pare away at the number of questions and the number of words you use. Don't eliminate what you really need. But no matter what you've done, you've probably fallen short of perfection, and it's almost always possible to find places to trim.

Judge Saylor would add that this is yet another reason to use a script: It's hard to eliminate excess words from an examination you haven't even written yet.

Third, think long and hard about how your evidence can be summarized, rather than eliminated entirely. Rule 1006 of the Federal Rules of Evidence permits the use of summaries "to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." For some reason, lawyers don't use the rule as often as they should, even in complex cases.

Much of the time it's simply unnecessary to admit large numbers of documents, and related testimony, to prove a particular point. That's especially true for documents such as financial and tax records, which are relatively easy to summarize. Indeed, the financial condition of a complex business enterprise may be summarized in a single one-page document.

But lots of other records — such as telephone and medical records — can be handled in the same way. Rule 1006 does not contain any specific limits on the subject matter of the summary (other than the requirement that the records be "voluminous" and "cannot be examined conveniently in court"), and, in fact, the rule expressly permits summaries even of items such as recordings and photographs.

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Of course, the summary has to be fair and otherwise has to comply with the rules of evidence. And the summary witness is subject to cross-examination.

Still, Rule 1006 can be a tremendously helpful tool to eliminate hours of technical or repetitive testimony.

A potential drawback of summaries is that important details, such as the look or "feel" of certain documents, may be lost in the translation to a summary. The easiest way to deal with this is to use sample exhibits.

Suppose, for example, the evidence involves the contents of a three-drawer file cabinet, consisting of hundreds of separate files that are more or less similar in nature. Those files can be both summarized (to prove their content as a whole) and sampled (to prove what individual files typically looked like).

Summaries don't just save time; they generally have a more powerful impact than the mountain of evidence that they replace. They do, however, have their limitations. To maximize their impact, remember three rules: (1) use visual aids and don't rely on testimony alone, (2) keep it as simple as you can, and (3) don't overuse them.

1) Use visual aids. We live in a visual world. Juries don't just want to hear things, they want to see them. And they generally want to see the concept, not the data. With rare exceptions, summaries should be presented with charts (and, often, graphs and drawings). A graph can create a visual impact that greatly magnifies the impact of the underlying numbers.

2) Keep it simple. Don't weigh your summaries down with more information than you need to make your point (and to make them fair). Don't overstate facts, don't oversimplify them, and don't omit important items. Your opponent will notice and either have your summary excluded or subject your witness to a tough cross-examination. But don't think that each summary has to summarize all the evidence. Two or three simpler graphics can often be more effective than one overly complex summary.

With modern technology, there are lots of ways to present summaries in ways that are clear, interesting and easy to follow. By the same token, there are lots of ways to clutter them with unnecessary or distracting things (such as pointless animation). Remember that you're not there to put on a technical show; you're there to tell the jury the story.

3) Don't overuse. The usual rule applies: all things in moderation. If you overuse summaries, there is a danger that your important points will be lost among the noise. Of course, it's better to overuse summaries than to over-admit the underlying evidence in tedious detail, but the point remains valid. Use summaries in moderation.

As always, the goal is to communicate and, by communicating, to persuade. If you're stuck trying a complex case, do everything you can to make it less complex and more understandable. Using summaries in place of voluminous records and tedious testimony is an important part of that process.

Previous installments of Tried & True can be found at here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.