

PANEL DISCUSSION ON NEW TRIAL TECHNOLOGIES

**Moderator: Craig Merkle
Goodell DeVries Leech & Dann**

LITIGATION MANAGEMENT ROUNDUP

Computer Generated Evidence: It's Not Your Daddy's Courtroom

Craig B. Merkle

Goodell, DeVries, Leech & Dann
Baltimore, MD



WHAT IS COMPUTER GENERATED EVIDENCE?

- Animations
- Mixed Media
- Simulations
- Interpretations
- Diagrams
- Transpositions
- "WEB SITES"

ILLUSTRATIVE OR SUBSTANTIVE

- **ANIMATION**
 - Illustrative
 - Aural, visual or other sensory depiction of an event or thing
 - Demonstrative
 - Used to help explain expert opinion
 - Has secondary relevance to the issues, depending on other material testimony for relevance
- **SIMULATION**
 - Substantive
 - A conclusion in aural, visual, or other sensory form formulated by a computer program or model
 - Recreation of event or experiment based on scientific principles and data
 - Has independent evidentiary value, offered to support a fact in issue
 - May be evaluated under a more strict Frye / Daubert analysis as expert opinion

USUAL RULES OF EVIDENCE APPLY

- **Authentic / Foundation**
- **Relevant**
- **Not unduly prejudicial**
- **Fair and accurate representation of the evidence**
- **Input data is scientifically reliable (substantive evidence, i.e., simulations)**
- **Aids the expert in explaining the opinion to the jury (illustrative evidence, i.e., animations)**

ADDITIONAL RULES MAY APPLY

- **Validation that the computer system used is functioning properly**
- **The input and underlying equations are complete, accurate and disclosed to the opposing party to permit challenge**
- **The program used is generally accepted by the scientific community**

Bledsoe v. Salt River Valley Water Users' Ass'n, 179 Ariz. 469, 880 P.2d 689 (Ct.App. Div. 2 1994); *State v. Sipin*, 130 Wash.App. 403, 123 P.3d 862 (Div. 1 2005).

PREPARATION IS ESSENTIAL

- **Prepare the client**
- **Prepare the witness**
- **Prepare opposing counsel**
- **Prepare the court**
- **Prepare the jury**

PRACTICAL CONSIDERATIONS

- Expense
- Start Early
- Identify witnesses
- Who will sponsor the computer generated evidence
- Timely Disclosure
 - Is it expert testimony under Rule 26(a)(2)?
 - Timely disclosure of experts needed at trial to support the evidence
 - State rules may require disclosure before trial (e.g. Maryland requires notice 90 days prior to trial)

JUDICIAL CONCERNS

- Potential to mislead the jury by inaccurate portrayal of the facts.
- Potential to create lasting impressions that unduly override other testimony or evidence.
- Need for heightened guarantees of trustworthiness due to the risk of editorial distortion.

“The extreme vividness and persuasiveness of motion pictures . . . is a two-edged sword. If the film does not portray original facts in controversy, but rather represents a staged reproduction of one party’s version of those facts, the danger that the jury may confuse art with reality is particularly great. Further, the vivid impressions on the trier of fact created by the viewing of the motion pictures will be difficult to limit or, if the film is subsequently deemed to be inadmissible, to expunge by judicial instruction.”

Clark v. Cantrell, 339 S.C. 368, 529 S.E.2d 528 (2000)

TACTICAL CONSIDERATIONS
FOR TRIAL

- **Pretrial Hearing on Admissibility**
 - **Foundation Challenges**
 - Reliability of data
 - Reliability of software
 - **Daubert Challenges**
 - **Prejudice v. Probative Value**
 - **Illustrative v. Substantive Evidence**
- **Trial Briefs on Admissibility**
- **Cautionary Instructions**

TACTICAL CONSIDERATIONS
FOR TRIAL

Cautionary Jury Instructions

- The trial court is encouraged to give cautionary instruction that the animation represents only a re-creation of the proponent's version of the event, that the animation should in no way be viewed as absolute truth, and that, like all evidence, it may be accepted or rejected in whole or in part.
- The trial court may wish to call attention to any assumptions upon which the animation is based, as well as any other particular facts that warrant cautionary instruction.

Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000).

Cautionary Instruction Given
Contemporaneously

- **If there is a proper foundation for computer animations, the trial court should issue cautionary instruction relating to animation before playing the animation to the jury and in final instructions to help insure its proper use.**

State v. Stewart, 643 N.W.2d 281, 111 A.L.R.5th 791 (Minn. 2002)

Cautionary Instruction Given Contemporaneously

- The Court should give instruction, contemporaneous with the time the computer animation is presented, that the evidence represents only the recreation of the proponent's version of the event, that it should in no way be viewed as an actual recreation and, like all evidence, it may be accepted or rejected in whole or in part.

Harris v. State, 2000 OK CR 20, 13 P.3d 489(Okla. Crim. App. 2000), *reh'g denied*, (No. 29, 2000) and *cert. denied*, 532 U.S. 1025, 121 S. Ct. 1971, 149 L. Ed. 2d 764 (2001).

CAUTIONARY INSTRUCTION

- "You are reminded that . . . This is an animation based on a compilation of a lot of different experts' opinions. And there are what we call crime scene reconstruction experts who could, without using [a] computer, get on [the] stand and testify that based on this piece of evidence and this piece of evidence and this piece of evidence that they've concluded that the crime occurred in a certain manner. And then they can describe to you the manner in which it occurred. And they can sometimes use charts or diagrams or re-create photographs to demonstrate that. And computer animation that we have here is nothing more than that kind of expert opinion being demonstrated or illustrated by computer animation, as opposed to charts and diagrams."

People v. Hood, 53 Cal.App. 4th 965, 62 Cal. Rptr. 2d 137(4th Dist. 1997), *reh'g denied*, (Apr. 18, 1997).

ARE NEW RULES NECESSARY?

Maryland Rule 2-504.3

- Distinguishes animation from simulation
- Requires notice of party's intent to use computer-generated evidence 90 days before trial
- Notice must describe the evidence, including a statement of whether it is animation or simulation
- Must produce the evidence for inspection by the opposing party
- Rule provides method for objection and hearing

ARE NEW RULES NECESSARY?

Maryland Rule 2-504.3 Expressly lists what is NOT Computer-generated evidence:

- Photographs merely because they were taken by a camera that contains a computer
- Documents merely because they were generated on a word or text processor
- Records or documents admissible under the business records exception to the hearsay rule merely because they were generated by a computer
- Or summary evidence (admissible under summary evidence rule) merely presenting or graphically depicting data taken from records admissible as exceptions to the hearsay rule



Craig B. Merkle

cbm@gdldlaw.com

410-783-4007



Craig B. Merkle, who is one of the founding partners at GDL D, has been actively involved in trial practice since entering private practice in 1982. His practice is concentrated in professional malpractice defense, pharmaceutical and medical device litigation, hospital litigation and professional disciplinary and licensing actions. In addition, he has handled a variety of general litigation matters arising in contract and tort.

Professional Liability Claims. Mr. Merkle has represented physicians and health care providers in virtually every medical specialty, as well as community hospitals and academic medical centers throughout the State of Maryland . Representative self-insured institutions and insurance company clients include: The Doctors Company, University of Maryland Medical System, Mercy Medical Center, The Medical Protective Company, Upper Chesapeake Health System, Ascension Health, and St. Agnes HealthCare, Inc. Mr. Merkle has tried to verdict numerous cases in the Circuit Courts of Maryland, United States District Court for the District of Maryland and the Health Claims Arbitration Office.

Pharmaceutical and Medical Device Litigation. Mr. Merkle is actively involved in the firm's medical drug and device practice. He has been lead trial counsel for multiparty trial groups in the diet drug litigation in the Court of Common Pleas in Philadelphia , Pennsylvania . In addition to serving as trial counsel, Mr. Merkle has been responsible for conducting discovery, case work-up, expert development and serving as the liaison for local counsel. He has also been involved in the evaluation, discovery and work-up of lawsuits arising from prosthetic knee implants and the investigational study of diabetes drugs.

Professional Disciplinary, Privileging and General Hospital Litigation. Mr. Merkle has represented academic and community health care systems in a number of matters which extend beyond the professional liability arena where he frequently practices. For example, he is often requested to provide counsel and guidance to hospital leadership on issues concerning privileging and employment disputes, impaired physicians, boundary violations, and breach of professional and fiduciary obligations. This representation involves complex problem solving challenges in an effort to balance the safety of patients, the common law and statutory obligations of the institution and the due process rights of the involved health care providers. Mr. Merkle has represented hospitals in lawsuits arising from denials and restrictions of hospital staff privileges. Theories of liability typically include antitrust, breach of contract, civil rights, conspiracy, interference with contract, defamation, and interference with prospective business advantage. He has also been involved in the defense of hospitals in wrongful discharge suits brought by health care providers. Mr. Merkle has also represented physicians, nurses, dentists, podiatrists, and other health care providers in disciplinary actions and investigations before the Board of Physicians and other state licensing boards.

Other Civil Litigation. Mr. Merkle has represented individuals, partnerships and corporations in a wide array of litigation matters arising in tort and contract. For example, he represented a major manufacturer of dental equipment and supplies in recovering damages under a Licensing Agreement following a product recall of the licensed product by the FDA, FTC and EPA. He represented a hospital system in a series of lawsuits and claims arising from multiple patient deaths allegedly due to the outbreak of Legionella. He has also been involved in the defense of building products used in commercial and home construction.

