

The Trial Lawyer

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Winning The Close Case and Increasing Your Damages With Technology

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GIVE 'EM WHAT THEY WANT!

In the business world, marketing is far ahead of the legal profession in effective communication. Marketing developed and perfected focus groups to understand its audience and PowerPoint presentations to persuade them. Trial lawyers are just beginning to embrace these tools. However, the technology gap is widening as lawyers fall farther and farther behind the curve.

The legal profession is based on precedent and tradition, which can limit advancements. Trial lawyers can learn from marketing because they also are both trying to "sell" something. A lawyer's products are intangible: case themes, his or her view of the facts, and how the themes and facts apply to the law. Trial lawyers have an advantage over businesses with large audiences as they only have to sell to a small group at a time (i.e., nine out of twelve). So, why do trial lawyers continue to use a horse and buggy approach to presenting evidence when state of the art technology is available?

The next time you are at your local mall, go into a clothing store that caters to people in their 20's and 30's and look around. You will see video monitors everywhere. They are used

in airports, bars, restaurants, record stores and even on local and network TV to sell and communicate ideas. They have replaced the big sign and the poster. Video attracts attention and conveys information that is more readily absorbed in a more efficient presentation.

Jurors under age 40 have been raised with video monitors, handheld video games, computers and MTV. (Believe it or not, MTV has been around since 1981.) The images the younger jurors choose to watch move very rapidly, which has taught the younger generation to process visual information more quickly. They trust what they see rather than what they hear.

Those who have perfected marketing, e.g., Pepsi or McDonalds, monitor their audience and change their advertising campaigns accordingly. Similarly, trial lawyers must adjust their presentations to fit their audience. The same old opening statement and direct examination are less likely to persuade younger jurors or jurors who use computers and regularly watch TV.

Visual learning however is not exclusive to the younger generation. Fewer and fewer jurors receive their information verbally

(e.g., via the radio) as opposed to visually (e.g., television or computers). Not only are they used to it, most people believe what they see on 60 Minutes, 20/20 or Dateline, whether or not it is true. These television shows have been so successful because their formula of using technology to explain complex issues is readily accepted by the general public. They use narration over video or still photographs. Documents are shown with the pertinent text highlighted and lifted off the page for clarity and emphasis.

Most jurors expect more technology in the courtroom, particularly in larger cases. It seems outdated and slow-paced to use a chalkboard or butcher paper to illustrate a point. It is a brand new ballgame, so give the jury what it wants to see.

WHY ARE LAWYERS SO RELUCTANT TO USE TECHNOLOGY?

There are three excuses commonly given by lawyers for not using available technology at trial. The first is that they are technophobic, i.e., they are afraid to use it because they are unfamiliar with it and something could go wrong. This is the easiest fear to allay. All you need to do is contact a professional consultant who will familiarize you with what can be done and can do it for you. The risk of failure is extremely low and nothing to lose sleep over. The benefits far outweigh the risks.

The second excuse is cost, i.e., the concern that it might not be worth the cost or the cost would be too much for the size of the case. The response to that is another question: How much more will your case be worth by using effective presentation techniques? The investment in technology will pay great dividends if it is used effectively. In our cases, it usually pays for itself. Of course, you should have a budget and make sure that your

consultant does not go beyond it without your approval.

Other ways of reducing costs are to share it with other parties on your side of the case or you can share it with your opponent. Consider negotiating with opposing counsel a split of the costs of the presentation equipment and installation, since most (if not all) judges will not allow two sets of equipment in the courtroom.

The third excuse is that an electronic presentation will be perceived as a slick show that will tell the jury that your client has a lot of money and the jury will hold it against you. In fact, the empirical evidence with juries is just the opposite. We have spoken with every juror after our electronic trials and there has been unanimous approval. Jurors do not accept appeals to poverty or references to our "fancy show." They expect a good video presentation because they see it on TV every evening.

If you are concerned that your opponent may comment in front of the jury about the expense of the technology or that your presentation is "slick," it would be appropriate to make a motion in limine under Evidence Code section 352 on the basis that such an argument is unduly prejudicial because it appeals to a party's wealth or poverty and is not relevant.

WHY SHOULD YOU USE TECHNOLOGY IN YOUR NEXT TRIAL?

There are several obvious reasons to present evidence electronically:

1. People accept and retain visual evidence more readily. Studies have shown that people retain visual information better than verbal information. Jurors retain up to 80% of what they see and it is as low as 20% without visual input. A picture IS worth a thousand words.

This is no surprise to trial lawyers because we have always dealt with the concepts of primacy and recency. People tend to believe what they hear first and tend to remember what they hear last. The same concepts apply to visual evidence. In fact, you can create a virtual tidal wave of evidence that will overwhelm your opponents who do not present evidence electronically.

The ability to support everything said in an opening statement or closing argument with video, photographs, documents, charts, bullet points, and timelines is very powerful. The jury can more readily associate the evidence with your position when it sees it rather than simply hearing about it.

2. Technology helps overcome juror bias. An effective presentation highlights the favorable evidence which reduces the risk that traditional juror biases will affect the result. A juror who may not initially support your case is more likely to change his or her mind based on visual information rather than verbal information. Visual presentation allows you to break down these biases with clear messages and repetition. The advertising industry has been doing this for years.

3. A well planned visual presentation dramatically shortens your case. U.S. District Judge Richard M. Bilby, one of the first judges to approve use of digital evidence at trial, estimated that computer technology can reduce trial time by 25-50%. Our experiences confirm this estimate.

When a trial lawyer must physically walk over and hand documents or photographs to opposing counsel, the judge and the witness each time an exhibit is identified, the process is slowed to a halt. Instead, when the evidence is stored in a laptop computer and presented electronically, it is immediately shown to opposing counsel, the judge and the witness without the jury seeing it. This allows a trial lawyer to present more evidence in a shorter period of time.

After a foundation is laid and the exhibit is entered into evidence, it is published to the jury by a flip of a switch that activates the screen the jury can see. All jurors see each exhibit at the same time rather than handing them to each other in the jury box.

Electronic presentation of evidence allows the jury to absorb the evidence rapidly, making it easier to prove your points. When you rely too much on oral presentation, each juror may have a different image in his head about the themes and facts. Technology allows you to control the image so that each juror sees the images you wish, very early in the case. It is like taking them to the movies as a group instead of giving each of them a

radio to listen to on their own. This reduces the risk of misconception and gets them all on the same page rapidly.

Professional exhibit creators use color science and marketing techniques in making trial exhibits. This can also help a jury accept a message.

4. It will help you win the close case. When one vote is all you need to avoid a hung jury, visual evidence will help you get it. It allows you to easily and effectively repeat evidence that is prejudicial to your opponent. For example, depositions of parties can be read or played for any purpose during trial. (Code of Civil Procedure section 2025, subd.(u)(2).) We routinely play short segments of video depositions of parties for expert witnesses and during the closing argument to remind the jury of a bad witness. Otherwise, memories fade in a long trial. We never let the jury forget about an early bad witness.

5. It will enable you to get higher damages. Traditionally, evidence of economic damages is presented quickly and ineffectively. There is nothing more boring than a verbal presentation of numbers, supplemented with a few enlarged summaries.

Bullet point slides can help illustrate expert testimony, focus the jury's attention to particular elements of your client's loss, contrast the opinions of your expert economist vs. that of the opposing economist, and compute the total economic loss with summaries. These slides also are much more versatile than the traditional enlargements because they can be changed or corrected within minutes.

Visual evidence is extremely helpful in the presentation of noneconomic damage testimony. Use short excerpts of family videos and photographs and punctuate direct examination testimony concerning pain and suffering and wrongful death damages. Several short clips are better than one or two longer ones. Your audience's attention span is very short and they are accustomed to seeing rapidly displayed images.

A multimedia presentation allows you to switch from a photo to a video to an anatomic model and back to another photo in a few clicks on a computer mouse. There is no need to stop everything to turn on a videotape player or to let a projector warm up. When done properly, it is virtually seamless.

HOW DO YOU GET STARTED?

CONTACT AN EXPERT TO HELP YOU

Unless you are confident you can efficiently and effectively present electronic evidence at trial, an electronic trial consultant is needed to maximize the benefits of the technology. Trial

experience is an important factor in selecting these consultants. We have had tremendous success with Litigation-Tech (www.litigationtech.com) and its main technician and president, Ted Brooks (415-794-6454).

In addition to organizing and presenting the evidence, an electronic trial consultant also will make arrangements for the rental, setup, dismantling and return of all the necessary equipment. A typical setup would include the following:

1. Laptop computer (and a backup).
2. Projector (3000 lumens).
3. Screen (7 to 10 sq.ft.)
4. Flat panel monitors (4 total – judge, counsel tables and witness stand).
6. ELMO for display of non-digital documents and as an emergency backup.
7. Speaker set, for deposition video playback.
8. Switching and cabling for toggling from plaintiff to defense.

ISN'T POWERPOINT ENOUGH?

Although PowerPoint may still be used in certain portions of a trial (e.g. opening statement and closing argument), it lacks the flexibility to support all trial needs. It was designed as a business presentation program in a linear format that requires that each slide be serially advanced before getting to the end. A trial never proceeds in a fixed, unchangeable format. Trial lawyers need the ability to change directions instantly, accessing exhibits, demonstrative evidence, video clips and impeachment video excerpts on demand.

TrialDirector (www.indatacorp.com) was developed specifically for litigation. We first used TrialDirector software in a five-week jury trial in April 2003 in Contra Costa County (*Shropshire v. City of Walnut Creek*) which resulted in a \$27,500,000 verdict. Law Technology News (the leading trial technology magazine) recently recognized our use of technology in that trial by awarding us the 2004 national award for Most Innovative Use of Technology During a Trial.

HOW DO YOU GET ACCESS TO THE COURT FOR SETUP?

Be sure to mention your desire to present your case electronically to the trial judge at the pre-trial conference to ensure that you can do it, learn the applicable local rules, and arrange the

set up. Some progressive judges like Judge Steven Austin of the Contra Costa Superior Court and Judge Charlene Mitchell of San Francisco are very comfortable with technology in the courtroom and make it easy for you to try your case. Some other judges are still afraid of technology and may be less receptive.

WHAT ABOUT A RECORD OF EXHIBITS FOR APPEAL?

Even though no written documents may actually be used during your electronic trial, you have to make a record of exhibits. An exhibit binder with exhibit tabs should be given to the trial judge, opposing counsel and the court clerk at the beginning of trial. Each item of evidence presented electronically should be printed in a hard-copy form and provided to the court, opposing counsel and the clerk. Some judges want the hard-copies pre-marked and others will allow the hard-copies to be marked at the end of the proceedings each day.

All video clips are given an exhibit number and must be placed on a labeled CD-ROM or DVD in a notebook page equipped with a plastic pouch or pocket. You have the option of putting video impeachment on disc, too, if you want the trial judge or appellate justice to “see” exactly what the jury saw.

CONCLUSION

Once you overcome your excuses for not doing an electronic trial, you will see that it is the best option for presentation of evidence. Jurors feel more like active participants in the trial rather than as a passive audience. It also allows you to show the jury much more evidence, which is more persuasive and translates into higher damages. ■

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