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USING TECHNOLOGY AT TRIAL

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Almost every trial now involves the use of technology by lawyers. The extent to which lawyers use technology at trial, of course, varies according to differences in particular cases and the preferences of individual lawyers, but technology is now a fact of every trial lawyer's life. Technology has contributed a variety of new tools that trial lawyers can employ to streamline the presentation of evidence, communicate information and ideas with greater force and clarity, and heighten credibility and persuasiveness. The following materials seek to assist lawyers in identifying and understanding available technology and using it to improve performance at trial.

What Does Technology Allow Us To Do?

Effectively Present And Manage Tangible Evidence

Using technology at trial can be as simple as using an ELMO or evidence camera to project documents on screens or computer monitors for viewing by the judge and the lawyers and, when appropriate, the jury. Displaying exhibits on screens or monitors at trial avoids the cumbersome publication of physical exhibits to jurors in the middle of or even after the examination of witnesses, and it allows for the efficient presentation of documentary evidence.

Lawyers can also take a step beyond simply using an ELMO or document camera to display tangible evidence and employ computer equipment to present evidence. Images of

documents can be scanned and stored on a computer and then projected onto screens or computer monitors in the courtroom. When this technology is coupled with technology allowing images to be displayed for only the judge and the lawyers—but not the jury—until the judge admits the documents in evidence, physical copies of documents can become entirely unnecessary. If the judge will allow jurors to view imaged exhibits on a computer during jury deliberations and if the court reporter can accept imaged exhibits for the record, the lawyers do not need to make any paper copies of documents. Even if the jury needs physical exhibits for jury deliberations or the court reporter needs physical exhibits for the trial record, one copy (instead of the typical numerous copies for the judge, all the jurors, and all the lawyers) will suffice.

These types of tools are especially useful in document-intensive trials. Trial, of course, is not scripted. It is difficult to locate a particular document quickly, on the spur of the moment, among paper copies of hundreds (or thousands) of exhibits—much less to provide multiple copies of the document. Imaged exhibits greatly minimize these types of challenges. Some trials, moreover, involve voluminous electronic data like accounting spreadsheets, Internet sites, electronic-mail databases, and statistics. Computer technology allows a lawyer to manipulate this type of data and manage it effectively for use during trial.

Create And Present Powerful Demonstrative Aids

Demonstrative aids available to trial lawyers are no longer limited to drawings on flip charts, blown up documents, and physical props. To be sure, those types of demonstrative aids maintain a prominent place in the trial lawyer's arsenal. Other options now available, however, include PowerPoint and trial display software. PowerPoint is a computer software program that combines the versatility of a computer with the image-projection capability of a slide projector; it

allows a lawyer to create slides, display those slides from a laptop computer onto a screen or monitor, and print those slides. Trial display software—Trial Director, for example—is more versatile and powerful: It allows editing, enhancing, enlarging, and annotating images spontaneously during the presentation. With both PowerPoint and trial display software, a lawyer can project onto a screen or monitor outlines, statements, images of documents, photographs, videos, graphs, charts, and testimony. Unlike PowerPoint, trial display software is interactive, allowing manipulation of projected images during the presentation. For example, this technology allows for highlighting, circling, zooming, annotating, and using split-screen effects. The resulting images can be saved and printed with all the additions, modifications, and emphasis preserved. Similarly, software exists that brings timelines to life by allowing the windows, or call-outs, to appear and disappear as the lawyer discusses them.

Maximize The Effectiveness Of Video Testimony

Videotaped depositions are nothing new. Interactive trial technology like the software discussed above, however, now allows editing videotaped depositions on the fly, in the midst of trial, for use in cross examination and incorporating videotaped depositions into opening statements and closing arguments without the need for a television and VCR or DVD player. Moreover, current software allows a lawyer to synchronize video with the written transcript, allowing the judge and jury to see and hear the witness testify by video and read the transcribed testimony simultaneously next to the video of the testifying witness.

An extension of videotaped testimony comes in the form of live testimony through videoconferencing. Videoconferencing in court proceedings came to prominence during first appearances and arraignments in criminal proceedings, but efforts to allow live testimony from

prosecution witnesses by videoconference have encountered objections rooted in the Confrontation Clause of the U.S. Constitution. (The same objections may not apply in situations in which criminal-defense witnesses testify by videoconference.) In any event, Federal Rule of Civil Procedure 43(a) authorizes testimony by videoconference in certain situations in civil cases: “At trial, the witnesses’ testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”

Get Transcripts Immediately

Many court reporters are now trained in “real-time reporting.” Real-time reporting allows lawyers to obtain a transcript virtually instantaneously—at a cost. When justifiable, having a transcript readily available can enhance cross examination and closing argument, especially when used in conjunction with the display technology discussed above.

Access The Outside

Computers and the Internet, when available and when permitted by the court, allow lawyers to access the outside world in the midst of trial. Lawyers can perform computerized legal research on unexpected issues of law from the courtroom. They can search social media for information about prospective jurors during jury selection. They can communicate by electronic mail with clients, experts, and colleagues without leaving the courtroom. All of this makes trial, like much of the practice of law, more quickly paced than ever before. It also allows lawyers to

be more thorough, to deal with unexpected situations more capably, and to perform more ably during trial.

When Can We Use Technology?

Opening Statement

Opening statement affords the lawyer the opportunity to preview the evidence in the case and to relate the story he believes that evidence will tell. The power of images—photographs, documents, videos, charts, and graphs—is widely recognized. Using the tools discussed above, a lawyer can project these images from a laptop computer in a common format without the clutter and cumbersome shuffling of posters and paperwork. The lawyer's message is enhanced, and his credibility is bolstered. Projecting images for the jury allows the lawyer to document and confirm contemporaneously his oral statements in the opening. It also provides a visual structure for the entire case. The jury sees the evidentiary outline and relies on it going forward. Supporting the oral opening with images that corroborate what the lawyer anticipates the evidence will show makes the opening presentation more effective and enhances the lawyer's credibility. Because opening statements, by their nature, should be prepared in advance of trial, PowerPoint is an effective tool for opening statements, and it is easy to use, as well, presenting limited risk of operator error. Projection of digitized images is most effectively used not as the exclusive mode of presentation but as the primary mode, with other traditional media used throughout the presentation. As with any other use of demonstrative aids, the use of technology must enhance the lawyer's presentation, not overtake it and become the focus.

Direct Examination

It can be difficult to maintain the attention of jurors during direct examination, particularly in a document-intensive case. Often, without the benefits of technology, jurors spend time examining previously admitted documents while the lawyer tries to make an important point with a different document currently before the witness on direct examination. Projecting the image of the document under consideration for simultaneous examination by the witness and the jury effectively avoids that problem. Further, by using technology to isolate or enhance certain portions of the document, the lawyer can focus the attention of the jury on those particular portions. Presenting evidence this way during direct examination can also furnish an effective aid to the witness and maintain a good tempo for the direct examination, making it more interesting and persuasive for the jury. Using a PowerPoint presentation, particularly with expert witnesses, can provide an outline for the direct examination, assisting both the witness and the jury; make complicated issues easier to understand; summarize lengthy testimony; and provide to the jury a visual reference for recall during deliberations. Use of a PowerPoint, of course, requires a great deal of advance preparation, which generally will have the added benefit of improving the direct examination.

Cross Examination

Using technology on cross examination requires a great deal of preparation and flexibility, and often the pace and alacrity required of the lawyer on cross examination make using technology ineffective. PowerPoint, for example, is an inflexible tool not particularly well suited to use on cross examination. Other imaged technology, however, can enhance cross examination. The lawyer can project prior inconsistent statements on a screen or monitor,

amplifying the effectiveness of impeachment with such statements. The same is true of using videotaped deposition testimony containing prior inconsistent statements: It is particularly damning to watch the witness on video testifying inconsistently under oath. And real-time reporting allows the use of prior inconsistent statements from the ongoing trial. Like projecting testimony for the jury, projecting documents amplifies the importance of the point the lawyer is trying to make. It also gives the lawyer an advantage by diminishing the witness's ability to dodge the question or divert the examination; everyone can see—not just hear—the point. As with any good cross examination, though, the lawyer must take care not to be so wedded to using his prepared technological presentation that he fails to adjust to the testimony on direct examination and conducts an inartful cross examination. Perhaps more crucially on cross than at any other time, the technology must not overtake the presentation, and the lawyer must always rely on his skill as an advocate.

Motions

Using a PowerPoint presentation, for example, during an argument on a motion (such as a motion for directed verdict) can help the court follow the lawyer's presentation, provide an outline for the lawyer, and help to ensure preservation of all arguments available for appeal. The lawyer can also provide a printed copy of the visual presentation to the court reporter to supplement his oral presentation for the benefit of the appellate court.

Closing Arguments

The extent to which a lawyer should use technology during closing argument has been the subject of debate. One school of thought is that, because the focus of closing argument is

oratorical, it derives its persuasive power from the spoken word, and technology, particularly if overdone, detracts from that power. But it is important in any phase of a trial not to let the use of technology overpower the presentation; technology is the means, not the end. To this point, some lawyers are emphatic that damages calculations be done the old-fashioned way—by hand. A lawyer can use technology effectively in closing argument to review the evidence with the jury, particularly the crucial exhibits and testimony from the trial, and remind the jury of the lawyer's opening statement.

Jury Instructions and Deliberations

Even jury instructions and deliberations have a place for technology today. A judge can use technology to display jury instructions to jurors as the judge reads the instructions, providing visual and aural input, and, as mentioned above, judges can allow jurors to review admitted exhibits on computer monitors during their deliberations.

What Are Some Of The Issues To Consider When Contemplating Technology At Trial?

What's There And What's Not. It is crucial that the lawyer know well in advance of trial what technology will be available in the courtroom and what he will have to provide himself if he wants to use it. Some courtrooms have no technology at all available for lawyers, and the lawyer must bring anything he wants to use beyond a podium—even an easel or flip chart. At the other end of the spectrum, for example, the U.S. District Court for the Eastern District of Arkansas has 16 permanent systems in the Richard Sheppard Arnold U.S. Courthouse in Little Rock that are available for use by lawyers. The technology available in the Eastern District includes:

- an evidence camera that allows the lawyer to present evidence such as documents, photographs, x-rays, and 3-D objects to the judge, witness, and jury by video monitors;
- video monitors at the judge's bench, clerk's station, witness stand, jury box, and attorney tables and on the presentation cart;
- 50-inch LCD monitors for displaying evidence to the gallery;
- touch-screen monitors at the witness stand and presentation cart that let the witness and lawyer annotate on the video monitor any document displayed through the system without harming the original document;
- a VCR and DVD player allowing playback of evidence through video monitors;
- an audio cassette recorder and CD player allowing playback of evidence through a sound system;
- wireless headphones for use as assisted-listening devices or for foreign-language interpretation;
- real-time reporting at lawyer tables, as arranged through the court reporter in advance;
- videoconferencing and teleconferencing for conferencing with remote sites worldwide; and
- attorney tables configured with inputs for computer, audio, and AC power.

The Eastern District Clerk's Office provides training in using the evidence-presentation system when requested by lawyers. The Eastern District also issues court technology permits to lawyers upon collection of the biennial assessment and upon written request that allow lawyers to bring devices like BlackBerries into the courthouse.

May I Set Up And Test? It is crucial when a lawyer intends to use technology at trial that he have the opportunity to set up the appropriate equipment and, even if there is nothing to set up, to test the technology he intends to use. He must know whether the volume for any audio presentation will be adequate; he must know whether the jury will be able to see any evidence he intends to display; he must know whether his interactive software will work in the courtroom. Many judges have no patience for failed efforts to use technology at trial, and the lawyer fumbling to make technology work has lost any of the benefits afforded by technology. The point is to use technology to enhance credibility and persuasiveness, not to detract from it. The lawyer must know, then, that the technology he intends to use will work properly in the courtroom.

Can I Do This Myself, And Should I? It is essential that using technology not distract the lawyer from the task at hand, whether that task is giving an opening, examining a witness, *et cetera*. Again, technology is a means, not an end. To that end, the lawyer must consider whether he should operate the technology himself or have someone else do it. Some technology—document cameras, PowerPoint—is simple to use, and it may be more cumbersome to have another person operate it during the lawyer's presentation. Interactive technology, on the other hand, can be more difficult to use, and it can be extremely beneficial to have it operated by another person, so long as the presentation is carefully planned and appropriate communication has taken place in advance. In cases involving extensive presentations and documentary evidence, so long as the cost can be justified, the lawyer should consider hiring an outside vendor or consultant to assist with technology at trial. As with most trial preparation, and particularly

when technology is concerned, advanced planning is crucial if the lawyer wants to use a vendor or consultant. Regardless who runs the technology, it is essential that the lawyer practice and make the presentation as seamless as possible.

What If The Technology Doesn't Work? If the technology does not work on the day of trial, the lawyer must have a back-up plan. He must be able to do the opening, examine the witness, or argue the close, as appropriate, if his technology fails. The lawyer must consider what he will do if he cannot use the technology he has planned to use. Redundancy, therefore, is essential. For example, a lawyer planning to use PowerPoint might also print out the slides to display on an evidence camera in the event his computer fails. Or a lawyer planning to ask an expert witness to annotate a document might ensure that he has a blow-up of the document and a marker in the event the annotation technology fails. Whatever the problem may be, the lawyer has to be able to function without the technology.