

USING COURTROOM TECHNOLOGY--SOME OBSERVATIONS AND TIPS

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Historically, courtroom technology has been utilized in high-profile criminal, personal injury and products liability cases, where sensational computer generated animations of crashing airplanes, car accidents or heinous crimes have been used to effectively recreate and present a party's theory of the case, or to demonstrate and explain complicated scientific evidence. With the burgeoning availability of sophisticated and affordable software programs and hardware, technology is increasingly being utilized in less sensational commercial cases to assist the court in managing, the lawyers in effectively presenting, and the trier of fact in understanding voluminous documentary, deposition, and other evidence. Many courtrooms here in South Florida are now "wired" to accommodate the use of computers and multimedia tools. Triers of fact, both judges and jurors alike, now expect, and in fact appreciate, the use of some type of technology to help them understand the case they have been asked to decide. Commercial litigators and the clients we represent are therefor increasingly faced with the competitive challenge of effectively and efficiently integrating technology in the way we prepare cases for trial and in the way we present evidence to the trier of fact.

Available Technologies

Databases with Search Engines. Available courtroom technologies include databases with powerful search engines which assist the lawyer in managing, searching and retrieving the deposition, documentary and other evidence accumulated during the discovery and trial preparation phase of the action. Although such databases provide numerous benefits and cost savings during the discovery and trial preparation phase beyond the scope of this discussion, they are of great help during trial because they allow you to quickly locate and retrieve vital information on the fly in a matter of moments with a few simple computer key strokes. You can now find that document or portion of a deposition that suddenly or unexpectedly becomes vital during trial, by a simple date, word or phrase search, and print it out right at the trial table, instead of desperately searching or fumbling through boxes of exhibits, documents and depositions. Everyone in the courtroom, except perhaps, your opponent, appreciates it when you can quickly and effortlessly obtain that cross examination or impeachment material germane to the moment.

Multimedia. Experts tell us that we have used pictures and drawings to communicate far longer than writing; that we learn vastly more from what we see than what we hear; that we are far more likely to remember what we see than what we hear; that we have watched television since almost from birth, and have seen literally millions of commercials and advertisements of one kind or another by the time we reach the age of thirty; and that we have somewhat short attention spans and want our information instantaneously, visually, and entertainingly. Multimedia technologies, some of which have been used far longer in other

industries, are being utilized by lawyers with increasing frequency to visually present evidence and argument so that it can be better understood and remembered by the trier of fact.

For years, the primary multimedia tool utilized by lawyers was the overhead projector. Today we have ELMOs and much more. An ELMO is not a Sesame Street character. It is a device that looks like an overhead projector, but is really a fixed video camera that allows you to display physical and documentary evidence on monitors or on large screens. Elmos are more flexible than overhead projectors because they can be used to display small items of physical evidence as well as all forms of documentary evidence, not just transparencies. Although it has its limitations, the ELMO is a popular multimedia tool which is superior, yet similar in use to the traditional overhead projector. Some courts in South Florida make their own ELMOs available to the parties for use during hearings or trial.

With today's powerful laptops and readily available monitors and extremely clear and bright projectors that can project anything that is on your computer screen, one can now easily and cost-effectively utilize the pen based CD-ROM systems which allow you to present imaged documents, video, photographs, deposition transcripts and even PowerPoint presentations with the simple swipe of a bar code reader. These systems, unlike the ELMO, provide you much more flexibility with documentary evidence and allow you to enlarge, highlight and even circle key portions of important documents with a light pen (much like TV sports commentators) when examining, cross-examining or impeaching a witness. Strategic use of this tool with your own witnesses can help you keep the attention of the trier of fact by making the presentation of tedious, monotonous documentary evidence more interesting. With a little rehearsing, presentation of documents during direct examinations can be made more memorable if you or the witness zoom in, highlight or even circle key portions of documents while those portions are being discussed.

CD-ROM systems also allow you to easily present portions of video depositions. The recent impeachment proceedings and pending Microsoft antitrust litigation have provided examples of how powerful the use of video depositions can be in a trial setting. Available technology now allows you to electronically synchronize video depositions with the written transcript and the documents that have been examined so that any portion of a video deposition can now be searched, retrieved and displayed to the jury at trial on the fly. This technology allows you to create your own video snippets, link them together so that only key portions of the video deposition are presented to the jury, or quickly edit your snippets in the event of objection or cross designation from opposing counsel. What is more, you can display the text at the same time you are displaying the video and sound portions of the deposition. This allows the trier of fact to read along with what he or she is hearing, and the testimony is visually reinforced, and thus, more easily understood and remembered.

The use of CD-ROM technology can also be extremely effective in cross-examination and impeachment. Nothing at trial is more frustrating for a lawyer than ineffectual impeachment. When prior inconsistent deposition testimony or an inconsistent statement in a letter or document is merely read at trial, the importance or the extent of the inconsistency can easily be lost on the judge or jury. With the use of a CD-ROM system, you can visually reinforce the impeachment by displaying the imaged document or transcript to the jury as you read it. Nothing is more effective, however, than using a video snippet to impeach a witness, where the trier of fact can hear the voice and observe the facial expressions and demeanor of the witness when he or she has testified differently in deposition than at trial.

Trial lawyers are also utilizing effective and easy to use presentation software such as Microsoft's PowerPoint to visually reinforce the key factual or legal points made during opening statement or closing argument. Some creative lawyers are incorporating pictures of their witnesses into their opening presentations along with bullet point outlines of the testimony those witnesses will provide. Others are using such presentations in closing argument to illustrate the necessary elements of proof or to show how damages have been calculated.

Some Tips for Using Technology at Trial

Utilization of technology in commercial cases is an emerging area of our practice that presents exciting opportunities for creativity and competitive advantage. It is also an aspect of our practice that will change significantly as present applications are refined and developed. Here are some suggestions about using state-of-the-art technology in your practice:

1. Obtain the assistance of a good consultant. A good consultant will help you choose the appropriate hardware and software for your needs, and will help you learn how to utilize the technology you have purchased. After you or someone on your staff have gone through the initial learning curve, your reliance on consultants will diminish.

2. Employ the use of technology as early as possible, especially in large cases. Much of the savings in time, effort and money resulting from the use of technology in the discovery and trial preparation phase is lost if you don't start early and use it consistently.

3. Use the technology you have obtained! If you don't use it, it won't help you.

4. Use trial presentation tools at settlement meetings, mediations, and key pretrial hearings. Although there is always the risk of educating your opponent, the practice will help you for trial, and effective computer-aided presentations of your case can often lead to early settlements.

5. To avoid objections, advise your opponent and the court as early as possible that you intend to utilize technology in the courtroom. Courts are very receptive to the use of computers and other technologies to facilitate the trial process, provided no one is surprised by its intended use. A motion to utilize technology at trial, setting forth the technology and the manner in which you intend to use it at trial should be filed by no later than the time to file the joint pretrial stipulation; alternatively, such matters can be negotiated and set forth in the pretrial statement itself. You should also obtain an order directing the courthouse security personnel to provide you with access to the courtroom, as needed, before the commencement of the trial for purposes of setting up and configuring the equipment you intend to utilize.

6. Be sure that the courtroom can meet your technological needs. Although many courtrooms are wired for the use of technology and can even provide internet access during trial, most are not. You need to view the courtroom ahead of time with your consultant so that you can assess what equipment to use and how it can be configured for maximum effectiveness.

7. Practice, practice, practice! When intending to utilize technology in your trial presentation, you can never practice your presentation enough. Effective use of technology requires a careful, concise, and efficient use of the tools. The advantage you seek by utilizing technology can be lost if you fumble, fidget, or look uncomfortable.

8. Use trial presentation tools sparingly to avoid minimizing their effect. Although jurors are used to viewing information from a television screen — some experts think that jurors are more likely to remember and believe what they see from a screen — too much, too long is not a good thing. Mix in more traditional demonstrative aids such as poster boards, especially if you have an effective witness and you wish to get he or she out of the witness box and in front of the jury.

9. When utilizing technology, always expect the unexpected. Always have a backup and always have an alternative plan for presenting your evidence.

10. Shutdowns and glitches can occur. How you react to them is key. Don't lose your cool and, where possible, keep on going. If you react in a relaxed fashion and with humor, you will garner even more respect from the trier of fact once the problem is solved.

Conclusion

Using technology for the first time in trial can be a stressful experience, but it's like anything new, once you do it once, you realize that it's not that difficult—especially if you are prepared. The expense barrier is quickly receding as the needed hardware and software become more affordable. Be proactive and give it a try, if even in a limited fashion. Using an ELMO or a presentation software like

PowerPoint is an easy and effective way to begin. Don't wait until the situation arises that you have to make use of technology because your opponent is using it. If it hasn't already happened to you, it soon will.