

The Benefits and Limitations of Courtroom Technology in Presenting the Complex Case

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In May 2003, the United States Department of Justice's Enron Task Force convinced a grand jury to indict seven former executives of Enron Broadband Services for conspiracy, securities fraud, wire fraud, insider trading, and money laundering. The indictment alleged that the defendants, over the course of a two-



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year conspiracy, (1) lied to investors about the technical capabilities of a complex nationwide telecommunications network; (2) employed a complicated accounting scheme to mislead investors with regard to the company's revenues; and (3) engaged in numerous illegal "insider" sales of Enron stock. Discovery from the government and third parties yielded over 100 million pages of documents, hundreds of hours of transcribed video, hours of audio recordings, hundreds of photographs, and thousands of electronic documents created with many different software applications. Ultimately, five defendants were tried on a total of 176 counts beginning in April 2005. Three months later, the jury acquitted the defendants on 24 of those counts and deadlocked on the remainder.

This case obviously presented a number of challenges to us as counsel for one of the defendants. Chief among those challenges was how to sort through the mountain of discovery and present our case to the jury in a clear and compelling way, notwithstanding the complexities and technical nature of the subject matter. We realized quickly that tried-and-true case preparation methods—physically reviewing all (or

at least most) of the materials produced in discovery, compiling physical "issue" binders and witness binders, etc.—were not practical. Assuming that a lawyer could review 50 pages per hour, a team of 20 lawyers working 40 hours per week would take approximately 50 years to review 100 million pages!

We turned to technology to help us. Discovery management software (Concordance® and CaseMap®) allowed us to store all of the discovery materials in a single database and to organize and sort it by a number of criteria, including by issue, witness, date, etc. At trial, we relied on Sanction® software for instant access to documents, videos and other materials during witness examinations, and to enlarge and highlight key portions of those materials for emphasis. We used PowerPoint® software during our opening statement and closing argument to create slideshows with timelines, video clips, and animations to explain difficult concepts and convey key themes. Along the way, we learned lessons that should be valuable to counsel in virtually every case, not just those as complex as Enron.



I. The Benefits of Courtroom Technology

Technology is no silver bullet. Thorough preparation, a well thought-out strategy, and compelling advocacy remain the key ingredients of an effective trial presentation. Nevertheless, when used properly, courtroom technology can make the difference between an "effective" presentation and a great one.

The lawyer who uses a well-orchestrated electronic presentation ensures that jurors literally "see" the

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evidence just as counsel does. We have all heard about gripping oral presentations that "paint a picture" for jurors, but the reality is that those mental pictures vary widely depending on the jurors' individual experiences, education, etc. Visual presentations, on the other hand, allow counsel to dictate the content of the images that will be left in jurors' minds. As a result, according to the Federal Judicial Center's study of the issue, "jurors who have seen electronic displays work better as a group because they all experienced the trial 'together' and are more likely to have a common understanding of the evidence."¹

Psychological research confirms that "bimodal" forms of communication (i.e., those that include both an auditory and a visual component) are far superior to mere oral presentations in terms of maximizing the likelihood that the audience will retain the information presented.² That is particularly true in complex trials involving numerous fact and expert witnesses, hundreds of exhibits and complex subject matters. Technology allows counsel to electronically store and instantly search and organize the entire universe of evidence in a case. Documents, photographs, videos, and other evidence may be displayed instantly on large screens or flat-panel monitors, with key portions annotated, enlarged, or highlighted. Animated graphics allow jurors to visualize complicated concepts that are difficult or impossible to explain verbally including, for example, the specifics of various financial transactions, the operation of complex technology (like a telecommunications network), and the unfolding of temporal events.

Using an electronic presentation with a variety of media also helps to break the monotony of a long trial that involves less-than-compelling issues. By presenting graphics as an integrated part of a witness's testimony or of counsel's argument, the lawyer maximizes the chances that jurors will remain attentive and participate actively in the learning process.

II. The Jury's Perspective

Although the benefits of courtroom technology may be widely accepted in theory, there remains a certain mystique attached to such technology. Many trial lawyers fear the possibility of looking too "slick" in front of the jury. Perhaps that is why, according to a 2004 survey conducted by the ABA's Legal Technology Resource Center, only 1 in 4 litigators uses litigation support software regularly.³

Study after study has demonstrated that those misgivings are misplaced, and that jurors actually appreciate it when counsel effectively incorporates technology into his or her trial presentation. The Federal Judicial Center concluded recently that "[j]urors become more involved in the proceedings when they can see the exhibits clearly and follow the lawyers' presentations more easily. . . . Jurors also appreciate the generally faster pace of trials using technology. They become impatient when lawyers spend time digging through piles of paper looking for exhibits." Reinforcing that view, the trial consulting and research firm DecisionQuest recently conducted a survey asking respondents to consider a case where one side used computer technology to present its case and the other side did not. Thirty-eight percent of respondents said that they "would feel more positively" toward the side that used technology, 62 percent said that it would make no difference either way, and no respondents said that they would feel more positive toward the side that did not use technology.

In today's world of computers, flat-screen televisions, cell phones, handheld organizers, and other devices, "[j]urors who come into a technology-equipped courtroom are usually comfortable with the surroundings and do not find the environment unusual at all."⁵ Many jurors have also seen courtroom technology used in highly publicized trials.⁶ For these reasons, "the equipment for visual displays makes it appear to jurors that what is about to go on in the courtroom will be informative and easy to understand."⁷

In short, jurors expect and appreciate it when trial lawyers incorporate technology into their trial presentations. Counsel who refuse to do so will find themselves at a competitive disadvantage as technology becomes more and more of a fixture in our courtrooms.

III. Practice Pointers

There are a number of critical considerations to keep in mind when deciding how best to incorporate technology into a courtroom presentation:

1) Plan Early.

■ Particularly in a complex case, the seeds of a compelling courtroom presentation are sown long before trial. When it comes to electronic databases, the quality of the output is only as good as the quality of the input. All the bells and whistles in the world cannot make up for poor coding and organization of documents, audio and video materials and other forms of media during the discovery phase. Discovery management software (including, for example, Concordance[®] and CaseMap[®]) offer a robust set of organizational and search tools that allow counsel to store, sort, and instantly access documents, photographs, video clips, and other media during trial.

2) Choose the Right Technology and Account for Murphy's Law.

■ Counsel should choose courtroom presentation software that is (1) compatible with the discovery management software discussed above, (2) simple to use in the "heat of battle," and (3) enabled with the basic features that counsel will need to make a compelling presentation (e.g., the ability to enlarge and highlight key passages of documents, to project "side-by-side" comparisons of various pieces of evidence, to play back video synchronized with the accompanying transcript, etc.). Sanction[®] trial presentation software by Verdict Systems satisfies all of those criteria and is very useful during witness

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examinations. With Sanction, counsel has every piece of evidence in the case available at his or her fingertips. Documents can be displayed with key passages expanded and highlighted as witnesses refer to those passages and videotape segments can be accessed "on the fly" to impeach witnesses. For more "scripted" presentations (e.g., opening statements and closing arguments), Microsoft PowerPoint allows users to create slide shows containing graphics, animations, video clips, and other multimedia content.

■ In terms of hardware, counsel should ensure that (1) projectors have a lumens or brightness of at least 2000; (2) laptops (and/or external drives) have enough memory to store all of the key evidence and access it instantly; and (3) a portable audio system is available, as many courtroom audio systems are lacking.

■ Anticipating the impact of Murphy's Law, counsel should also have available a "non-tech" alternative to his or her presentation (e.g., "anchor boards" of PowerPoint slides, etc.).

3) Understand the Limitations of Technology.

■ Standing alone, a flashy presentation is unlikely to carry the day. Communicating a message effectively requires a careful review of the evidence, an understanding of the opponent's case, the development of understandable case themes, and a great deal of thought as to how those themes can best be communicated to the jury. Only then should counsel begin to prepare a presentation that conveys those themes as simply and effectively as possible.

■ There is no substitute for the lawyer's ability to connect with jurors by looking into their eyes and conveying an absolute belief in the client's position. During key moments in the argument (e.g., when the jury is being asked to conclude that the government's star witness is a liar), the jurors' attention should be focused on the lawyer, not on the screen.

4) Reveal the Information in an Orderly and Effective Way.

■ Facts should be revealed on the screen slowly and systematically. With this type of presentation, jurors anticipate the revelation of additional facts with increased interest and curiosity. This technique also allows the lawyer to maintain the jury's attention because there is congruency between what is being presented visually and orally.⁸

■ Including too much information on a chart or slide can be counterproductive. Accordingly, charts and slides should be clear and contain only the information that will be necessary to assist jurors in recalling key information during deliberations.

5) Get the Most Out of the Technology.

■ Electronic presentations should not be viewed simply as surrogates for blow-up boards. Asking the jury to view a full-page document—whether in hard copy or as an image on a screen—is not conducive to learning. The more effective technique is to enlarge and highlight the key text in the document, while dimming or minimizing the background, so the jury focuses on and remembers the key information from the document.

■ Use a variety of tools—including sound, animation, video and other special effects—to hold the jury's interest.

■ Today's technology offers counsel limitless options for creativity in presentations. For example, Sanction® trial presentation software allows for "split screen" presentations that allow one type of media (e.g., videotaped testimony) to be displayed on one side of a screen and a document (e.g., the document that is the subject of the witness's testimony) to be displayed on the other side.

6) Use Technology to Most Effectively Complement Your Own Style.

■ Ultimately, technology is just one more weapon in the trial lawyer's arsenal. As such, the best use of technology will vary from lawyer to

lawyer, based on the lawyer's individual style and skill-set. Everything about the technical presentation—from content to where the equipment is situated in the courtroom—should be tailored to the lawyer's individual style.

IV. Conclusion

The Enron litigation may be an extreme example of the challenges that trial lawyers face in the typical case in the 21st century. Nevertheless, the technological lessons learned from that case—relating to the processing, organization, and presentation of information—can assist lawyers in their trial presentations in any case, regardless of its relative complexity. The powers of courtroom technology can be fully harnessed only by lawyers who recognize the advantages, as well as the limitations and risks, involved in choosing and using that technology. □

Endnotes

- 1 Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial at 52 (Federal Judicial Center 2001) (referred to hereafter as "Judge's Guide,").
- 2 See, e.g., Jeffrey M. Zacks & Barbara Tversky, Structuring Information Interfaces for Procedural Learning, 9 J. Experimental Psychology 88-100 (2003); Richard E. Meyer, Multimedia Learning (2001); Allan Paivio, Mental Representations: A Dual Coding Approach (1986).
- 3 See Anatomy of Trial Technology (ABA Legal Technology Resource Center 2004), available at <http://www.abanet.org/tech/ltrc/publications/trialtech.html>.
- 4 Judge's Guide, *supra* note 1, at 52.
- 5 *Id.* at 51.
- 6 *Id.* at 51-52.
- 7 *Id.* at 51.
- 8 See Roxana Moreno & Richard E. Meyer, Verbal Redundancy in Multimedia Learning: When Reading Helps Listening, 94 J. of Educational Psychology 156-63 (2002).