

## Tools of the Trade for Today's Litigator

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*Modern presentation tools can do more than enhance your courtroom performance. They can help you to organize and structure a stronger and more convincing case.*

HISTORICALLY, THE TRIAL ATTORNEY'S tools of the trade for courtroom presentations were relatively simple. Starting with a chalkboard, an easel and butcher-block paper, we moved toward professionally prepared graphics boards. From there, it was a quick jump to the overhead projector, and all of those transparencies of documents, deposition transcripts, and whatever else could transfer to the mylar. Of course, many of these classic presentation tools are still used effectively today. However, new computerized presentation tools have supplemented them. When used effectively, computerized presentation tools can significantly speed up the pace of proceedings and can significantly improve upon juror comprehension of complex concepts, machines, processes, and evidence.

**PRETRIAL TECHNOLOGY TOOLS** The following are some of the best pretrial technology tools for today's complex litigation.

**Image Viewer/Scanner** In many complex cases the documents are so voluminous and will be used often enough in the course of pretrial discovery and at trial that it is cost-justified to create digital images of the documents using a scanner. In addition, in many mass tort cases a central depository of imaged documents has been created, with CD-ROMs or DVD disks being circulated to counsel in associated cases all around the United States. For these purposes, a good image-viewing program is an essential tool for today's modern litigator.

**Integrated Transcript/Database Program** It is common to create a searchable database of the documents in the case, both those that are imaged, as mentioned above, and those that have not been imaged, so that the documents can be easily located. It has also become standard for court reporters to supply diskettes of deposition, hearing, and trial transcripts to counsel, who load them into the computer and organize them with a transcript management program so that they can be searched, linked to the document database, and otherwise organized.

**Image and Database Server** Law firms with teams of lawyers and paralegals working on complex matters need a good computer network server or servers which will hold the document images, the document database, and the transcript database for searching by the entire team on a simultaneous basis. The team can be located in multiple offices any place in the world.

**Real-Time Transcription** There are several good real-time transcript products used by court reporters who, for a modest fee, can hook up all counsel at the deposition who can then view the transcript on a live, real-time basis. The newest real-time transcript software allows counsel, clients, or experts, who are not physically at the deposition to receive the real-time transcript remotely, allowing them to view the transcript as it is created. Some of this software enables a remote viewer, not in the deposition room, to communicate privately with counsel at the deposition by computer. This technology allows an expert, co-counsel or client to view the transcript as it is being created and to suggest questions or areas of examination to counsel at the deposition on a real-time basis. Although some lawyers would not dream of attending a deposition and being distracted by a real-time transcript, other lawyers refuse to attend a deposition without one. The transcript software allows the attorney to make notes and mark portions of the text as the deposition is proceeding for further review later. One significant advantage of a real-time transcript is that it prevents arguments about what the witness just said

and enables reference to the witness's exact words in framing follow-up questions. Although the transcription software produces what can sometimes be a very rough transcript, good court reporters who have a dictionary of key case terms, organizations and witness names can clean up the transcript to close to final form within an hour of the end of a deposition day.

**Deposition Videographer** Video depositions have also become quite popular with many attorneys. They like the solemnity of the video deposition environment that tends to moderate some of the extreme counsel and witness behavior that can occur in hotly contested depositions. They also like to be able to record the witness's facial expressions and demeanor and time spent answering questions at a deposition and they like having the ability to impeach a witness with prior video deposition testimony. Video depositions are expensive, however, can be cumbersome to deal with logistically, and if used in lieu of direct examination, can be only marginally less boring than reading transcripts to the jury. Many feel that the use of video depositions at trial should be limited to less than an hour each, and are used best if limited to 30 minutes maximum length per deposition.

**Knowledge Management Software** There are many new software programs which are designed to enable busy trial lawyers and their teams to capture and exchange their thoughts and ideas concerning fact development, issues, unanswered questions, witness evaluation, key documents, and the like. As mentioned above, modern transcript management software contains functions for recording attorney ideas, identifying issues in the case, identifying portions of the transcript relating to particular issues, witnesses and documents, creating links to documents and outlining the case or trial notebook in electronic format. Other programs for capturing attorney ideas or summaries of case facts, testimony and documents range from the ubiquitous e-mail on every lawyer's desk to Lotus Notes products such as Litigator's Notebook to Microsoft Access products such as CaseMap.

**TECHNOLOGY TOOLS FOR TRIAL** The classic tools such as the easel, butcher-block paper, graphics boards, and overheads, still have their place in the courtroom. But to reach media-savvy jurors, you need to be comfortable with the wide array of technology tools for use during trial.

**Computerized Presentation Software** This software manages all the other media formats that may be presented at trial, including snippets of video depositions, digital photographs, digital charts, PowerPoint or other graphics slides, and similar material. Used effectively, this type of presentation software can significantly speed the trial and aid juror comprehension. When images of documents or transcripts are being shown, portions can be enlarged, highlighted, circled, pointed to, or underlined, all in multiple colors, for emphasis. Jurors can become wary of the segment selection process and work hard to read what comes before and after the selection.

**Computer Projectors** A computer projector will be necessary if you want to use a large screen. Be careful in selecting a unit with strong candlepower and low fan noise.

**Viewing Large Area Projector Screens or Large Monitors or Small Monitors** When the material is computerized, obviously there must be a way to display it to the jury. There are definite choices here, driven by lawyer preference, judicial preference, courtroom administrative personnel preference, and by the logistics of the courtroom. Some lawyers like the large screen or large monitor because they can better determine if the jurors are paying attention. Others like small screens available to every juror or every other juror because the document clarity is better, at the cost of some loss of control, because the trial lawyer cannot always determine if all jurors are looking at the document.

**ELMO** This device is somewhat similar to an overhead projector, but uses television-type technology to show an image of a document or other object on the screen. It is more versatile than an overhead projector because different types of objects can be shown in addition to transparencies.

**Computers with Removable Hard Drives** The computerized presentation software will work much more quickly if the

material to be projected has been loaded into a large hard drive. Because video images are so large, this hardware creates some logistical issues because the material on the hard drive must be swapped, and of course it creates some security issues. The best remedy for this is to use removable, locking hard drives that can be carried back and forth from the office to the courthouse, with the contents swapped out as needed. Flat Panel Screens If a computerized projection presentation format is used, flat panel screens for the counsel, witness, and judge are the most effective because they take up the least amount of space and provide a crisp, readable image. Scanner Even with large amounts of advanced preparation, new documents, pictures, or other materials inevitably appear at trial and need to be scanned into the computer system. CD Burner All the material that is located and scanned during the trial, is most conveniently used if there is a removable media format in which to store the information. Thus, a CD burner becomes a very handy tool to have during the course of the trial. Digital Photography A digital camera or other camera with a digital service can be very useful during the course of a trial, to take pictures of witnesses, evidence boards, writing on butcher paper, and other material that can then be saved and used with other witnesses, during closing argument or on appeal. LOGISTICS Despite the fact what you can use computers to take the place of some very cumbersome traditional exhibits, the computer multimedia equipment itself will present a few logistical hurdles to overcome. Wiring the Courtroom Clearly, when one is dealing with a large amount of electronic equipment, there are many issues that can only be competently dealt with by trained professionals. These include the placement of electrical wiring for power and to connect the computer to all the peripheral devices, including the monitors, projector, sound speakers, scanner, printer, and any other devices. Courthouse and Courtroom Setup Access It can take at least a full day to set up the proper computer equipment and wire the courtroom. Sometimes the courtroom is available the day before a trial is to commence, and sometimes it is not. This is a matter that must be addressed with the court in advance. Some courts are willing to issue an order allowing 24-hour-a-day access to the courtroom, and others are not. It is important for counsel to raise these issues with the court sufficiently far in advance so that there is an action plan for installing and maintaining the equipment. Who Will Operate the Computer? This is a matter of personal preference. There are three logical choices:

- The lawyer examining the witness operates the computer;
- A lawyer or paralegal who sits in the courtroom operates the computer and is totally dedicated to that task; or
- A technician from the vendor's staff operates the computer.

Some trial lawyers like to operate the computer equipment themselves so that they can appear in control and present the information that they want when they want it without having to issue verbal commands. Other lawyers would rather not be burdened with the need to simultaneously deal with the tactics and strategy of the examination, the evidentiary issues and the technical issues of operating a computer. If someone other than the trial counsel will operate the computer, the decision becomes an issue of familiarity, comfort, and confidence in the lawyer, paralegal, or technician who will operate the equipment and the operator's comfort and familiarity with the evidence. Types of Monitors As mentioned above, there is a significant strategic question that must be answered at the outset concerning the types of monitors or screens that will be useful. The choices of devices that can be utilized in terms of projecting the information to the jury include a large projection screen, large monitors, or small monitors used by one or two jurors.

This is a matter of some personal preference. This is obviously complicated by having to negotiate and cooperate with opposing counsel, discussing the matter with the court and its administrative staff. Some so-called courtrooms of the future still use outdated equipment of such a low resolution level that the projection of legible documents or clear images is difficult if not impossible. Computer Compatibility and Switchboxes This is another issue that requires the cooperation of counsel. Not all courtroom presentation systems are compatible with each other. Most trial counsel handle this problem by means of a switchbox. This device takes the output signal from different computer systems, and allows the operator to toggle back and forth between the multiple computer systems. There must also be some agreement for how images will be displayed before their admission. The computer system must be capable of displaying the document only to counsel, the court and the witness so the preliminary foundation may be laid before the time that the document is shown to the jury. Thus, the jury monitors or projector must be on a switch that enables their video input to be turned off while the foundation is being laid. It is also important for the judge to have a "kill switch" which enables the court to turn off the jurors' monitor or projector, if it is determined that something is being shown which ought not to be shown to the jury.

**EARLY PREPARATION FOR TRIAL** For a computerized trial presentation to go smoothly, you should begin making choices and outlining your plans early on in the process, during the discovery phase.

**Thinking About Graphics** There is much to do after the close of discovery and before the time that a trial commences. Although it is certainly possible to start thinking about courtroom graphics at that point and still be successful, that is not optimal. Counsel should be thinking about trial graphics throughout the discovery process, working with graphics artists to help sharpen the case themes, perhaps using potential graphics with jury focus groups. Graphics boards can also be used effectively through the course of the discovery process, in support of or in opposition to motions for summary judgment. However, many such graphics boards are too busy and cluttered to be dealt with simply in the course of an argument, or contain so much detail that they cannot possibly be read at any distance by the court. Because of this, some counsel are bringing computerized presentation systems to court in support of their arguments on motions. PowerPoint slides and other graphics are often simpler and more powerful than the material squeezed into graphics boards. Videos, Animations, and/or Simulations All of the observations that relate to simple graphics are compounded when trial counsel is considering the use of a video or an animation or a simulation. This type of evidence raises more complex authenticity, foundation, and admissibility questions that may need to be dealt with during the discovery process. To enable opposing counsel to deal with those evidentiary issues, such materials are often required be produced during the discovery process.

**Converting Deposition Video to Digital Format** The predominant methodology for taking video depositions uses Betamax or JVC formatted video synchronized through the computer to the real-time transcript. To be effective at trial, this video material must be electronically converted to a digital format, usually "MPEG" so that it can be stored and accessed through CD-ROM, a DVD disk, or a computer hard drive. The technology does exist right now to record directly to digital media, but very few court reporters actually have that technology available. The process of converting video to MPEG format takes one hour of time for every hour of tape. Obviously, this can create great logistical problems if the tape is not converted to MPEG format early enough. Once the material is in the MPEG format, however, currently available software makes the process of creating snippets of the video material very easy. This can be an involved and time-consuming process, and should be planned in advance. Even if many documents were imaged during the discovery phase, it is often the case that additional imaging becomes

necessary. Deposition exhibits are a good example; they are seldom imaged during discovery, but should be imaged for purposes of the trial. This is vastly superior to generating second- third- and fourth-generation copies of the same document, which become harder and harder to read. When you do use computerized images at trial, it is important to get a court-approved stipulation that the images need not contain the actual trial exhibit. Obviously, if the court required that all images contain the court's exhibit number, every document would have to be completely re-imaged, which is cumbersome, expensive, and certainly unnecessary. It is also important to enter into a stipulation that cross-references the trial exhibit to the various identical copies of the exhibit used during depositions (sometimes the same document is marked over and over with different numbers) so that only one version needs to be imaged and admitted into evidence. It is possible to program most courtroom presentation systems to portray the court's trial exhibit number as a header or a footer or somewhere else on the page.

**Designating Exhibits and Transcripts** This tends to be the same cumbersome, time-consuming process utilizing computerized presentation techniques, as it is using traditional techniques.

**FINAL PREPARATION BEFORE TRIAL** As the trial draws close, usually after discovery and before trial, there are many issues to address when using the new presentation tools.

**Deciding Location of Screens, Monitors, and Projectors** This is often dictated by the courtroom configuration. If you are using a projection screen, there may be only one spot in the courtroom that will work without blocking the court or counsel. Large monitors usually work best at one or the other end of the jury box, but must not block counsels' view of the jury. Small jury screens do not block anybody's view, but have a negative feature: It is hard to tell whether the jury is looking at the evidence on the screen.

**Selecting Mix of Handouts, Boards, and Computer Graphics** With so many presentation options, you must select the presentation format best suited to the type of material presented.

**Handouts and Jury Books** For fine details in a document or numerical presentations, there is no substitute for a handout for the jury or a jury book. In a lengthy trial, however, there is a limit to such material because the jury book becomes too bulky, or circulating materials to the jury is too time-consuming.

**Graphics Boards** Graphics boards work best when something will be displayed for a long period of time and either counsel or the witness need to refer to the information on the board at close range. Counsel or the witness have the best ability to control where the jury is looking when using a board, but it can be very difficult to make the board large enough to be properly seen by all members of the jury.

**Computerized Graphics** Computerized graphics can be very effective in covering material rapidly and at a size that the jury can view easily. The disadvantage of using computerized graphics to summarize deposition or document excerpts is that it may create a credibility gap; it may appear that the information is being manufactured. Showing the actual document or an image of the actual deposition excerpt adds an aura of credibility, but creates new problems in that the material cannot be read unless it is enlarged using magnification options in the computer software.

**Opening Statement Graphics** No matter whether you use a graphics board or computerized graphics, you must develop graphics that fit the case themes and are persuasive. Trial court judges are more likely to want to review opening statement graphics than dosing argument graphics. At the time of opening statement, not all evidentiary questions have been settled, and there is thus more of a need to exclude material that may be inadmissible or may be too argumentative.

**Display Only What You Can Admit** If you plan to display images of documentary material, use only material that has already been admitted into evidence or for which there is a stipulation or no objection.

**Deposition Material: Substantive Admissibility** An interesting question is presented by the availability of deposition video material or deposition transcripts. The use of deposition videos or

transcripts in opening statements ought to be governed by the same rules that govern the admissibility of the material at trial; thus, such videos or transcripts should not be shown unless they would be substantively admissible, as part of the party's case in chief. However, some trial judges allow the use of such materials in opening statement even for witnesses who will be available at trial, even those for whom the deposition excerpt will not be substantively admissible or will be cumulative. Selecting and Preparing Deposition Clips As mentioned above, in a complex case, in which there may well be hundreds of hours of deposition videotape, preparing the actual deposition clips (to use either in lieu of direct examination or for cross-examination and impeachment) is a more cumbersome process. It breaks down into two phases: digitizing the video into a computer format, and selecting the actual deposition excerpts. Digitize First It is often easier to convert an entire deposition video before trial than to try to anticipate all of the possible clips that might be utilized during the course of a trial. When creating any particular clip, include material at the beginning or the end that the court might require for context and completeness. Select Only the Most Crucial Parts The selection of the final clips to be used is critical because this type of evidence can be extremely powerful or it can be deadly dull. Its use should be limited to the most important material. Ordering Clips by Witness or by Subject Because of the ease of creating deposition clips for use at trial, additional possibilities emerge:

- Organizing the deposition clips witness-by-witness, with each witness's testimony covering a range of subjects (the traditional style); or
- Organizing the clips on a subject-by-subject basis, gathering the material from several witnesses.
- The ABA Civil Trial Practice Standards, Standard 24, suggest that either method should be acceptable. Nevertheless, the actual experience with trial judges may differ widely, and this topic should be addressed early on before investing effort that may be wasted.

Document Highlighting and Presentation Among the features of the new computerized presentation software is the ability to enlarge selected portions of the exhibit, allowing selected passages to be highlighted, circled and underlined, all in multiple colors. It is possible to do this on an "as you go" basis during the direct or cross-examination or as part of opening statement or closing. The software also allows an alternative, pre-scripting of such highlighting which enables the enlargement, highlighting and other markings to be preprogrammed and advanced with a tap of the space bar during the actual in-court presentation. Exchanging Graphics: What is Required? Because of the differing possible uses of computerized presentation material at trial, it is far from clear when and whether disclosure of such material is required. Federal Rule of Civil Procedure 26(a)(1)(B), requires that each party disclose within four days of a discovery conference "a copy of, or a description by category and location of, all documents, data compilations, and tangible things," and Fed. R. Civ. P 26(a)(2)(B), requires a party to produce "any exhibits to be used as a summary of or support for the opinions" of its experts, at least 90 days before the trial date, or if rebuttal evidence, within 30 days after the disclosure made by the other party. Finally, Fed. R. Civ. P 26(a)(3)(C), requires that each party must provide to the other "an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises" at least 30 days before trial. In addition, many local rules and pretrial orders require the exchange of exhibits to be used during the course of the trial. Nevertheless, there is

wide room for interpretation of these rules regarding what constitutes a document or exhibit, suggesting consultation and cooperation with opposing counsel and potential stipulations concerning disclosure or exchange of summaries, demonstrative exhibits, or illustrative aids. Not all computerized presentation graphics will be offered as exhibits or sought to be introduced into evidence. Many will simply function as demonstrative or illustrative aids to be used in the opening statement, to support direct or cross-examination, and on closing argument. Consider what you would like the rules of engagement to be in terms of disclosing or exchanging such material, so that these matters can be discussed with opposing counsel and the court. Judges' views on what they think the appropriate rules should be on these matters can vary widely.

**CONTINUED PREPARATION DURING TRIAL** The power of the computerized trial presentation system lies in its ability to continuously create new material, even during the course of the trial. Some examples are discussed below. Computerized Illustrative Materials and Visual Aids Graphics programs such as PowerPoint are so powerful, flexible, and easy to use, they enable trial counsel to create illustrative materials and visual aids throughout the course of the trial on a daily basis. These programs can create or accept a wide range of material, including:

- Bullet point charts;
- Organizational-type charts;
- Timelines;
- Pie charts;
- Bar charts;
- Fade-ins;
- Document call-outs;
- All types of digital material; and
- Audio and visual clips.

The only bounds on the use of this type of material are the trial team's creativity, its willingness to work hard to create new materials throughout the trial, and the disclosure or exchange rules agreed upon by counsel or imposed by the court relating to demonstrative evidence or illustrative aids. **Impeachment Material** In addition to the material mentioned above, there are many sources available for impeachment purposes, including:

- Snippets of textual testimony;
- Video deposition segments; and
- Documents authored by the witness which can be excerpted, magnified, and highlighted, or scanned in material, such as learned treatises, articles, newspapers, or prior articles or presentations by experts.

**Witness Photos** Witness photos can be a very effective tool for use during closing argument when it is often difficult to remember specific witnesses from a long trial. Some courts impose a requirement on counsel that such photos be taken during the deposition process for use at trial. For witnesses called live during trial, consider taking photos of the witnesses for use in juror notebooks or in closing argument. If such an agreement cannot be reached, or the court will not order it, there may be published material containing photos of the witness that can easily be digitally scanned. **Selecting and Organizing Daily Transcript Excerpts** If a daily transcript has been ordered, it can be made available on diskette or sent to counsel via e-mail by the court

reporter for review on a daily basis. It is highly recommended that counsel consider assigning some team members exclusively to the task of reviewing such transcripts daily. Excerpts from the daily transcript can be used for:

- Impeachment;
- Refreshing recollections of other witnesses;
- Confronting experts;
- Presentation to the court during motions at the close of the evidence; and
- Presentation to the jury during closing argument. If one side begins effectively utilizing such material, the other side must strongly consider utilizing it or run the risk of adverse inferences by the jury.

Closing Argument Graphics Obviously this is the time to pull out all the stops to create material that powerfully organizes and summarizes the evidence for the jury. Courts are extremely reluctant to require that any such material be prescreened by the opposing counsel or the court, relying upon objections made during the course of the oral argument as a policing mechanism. Using all of the above tools and techniques, the possibilities are nearly limitless, and the real challenge is to simplify the material and the presentation so that the jury is not overwhelmed by a tidal wave of information. CONCLUSION Computerized evidence has become a familiar feature of most civil litigation. Now that the initial period of novelty has passed, a few basics have emerged. The first point is that traditional forms of demonstrative evidence are not dead. There is still a place for the old-fashioned handout or jurybook. The second is that the means of presentation has to be dictated by the point that the evidence serves to illustrate, and not vice-versa. Finally, with so much power comes more flexibility; and thus a greater need for early preparation and organization of the material. But ultimately, this extra preparation is well worth the extra effort, and will result in a presentation that is both more interesting and more effective. PRACTICE CHECKLIST FOR Tools of the Trade for Today's Litigator Technology tools for pretrial preparation include:

- Image viewers to review digital images of the documents. Scanners that digitize documents are very good for complex cases with voluminous documents, and permit the creation of a central depository of imaged documents;
- Integrated transcript/database programs to create a searchable database of the transcripts and documents in the case;
- Image and database servers that permit teams of lawyers and paralegals working on complex matters access to all of the case documents and exhibits on a simultaneous basis. The team can be located in multiple offices any place in the world;
- Real-time transcriptions software that allows counsel to view transcripts during the depositions, and clients or experts, who are not physically at the deposition, to receive the real-time transcript remotely;
- Video depositions; and
- Knowledge management software designed to enable busy trial lawyers and their teams to capture and exchange their thoughts and ideas concerning fact development, issues, unanswered questions, witness evaluation, key documents, portions of transcripts relating to particular issues, witnesses, and documents, and the like. Programs range from transcript management programs to the ubiquitous e-mail on every lawyer's desk to Lotus

Notes products such as Litigator's Notebook to Microsoft Access products such as CaseMap.

Tools for trial use include:

- Computerized presentation software to manage all the media formats that may be presented at trial, including snippets of video depositions, digital photographs, digital charts, PowerPoint or other graphics slides and similar material;
- Computer projectors, if you want to use a large screen;
- ELMO, a device somewhat similar to an overhead projector, but using television-type technology to show an image of a document or other object on the screen;
- Computers with removable hard drives. Because video images are so large, this hardware creates some logistical issues; because the material on the hard drive must be swapped, and of course it creates some security issues. The best remedy for this is to use removable, locking hard drives that can be carried back and forth from the office to the courthouse, with the contents swapped out as needed;
- Flat panel screens, because they take up the least amount of space and provide a crisp, readable image;
- Scanners. Even with large amounts of advance preparation, new documents, pictures, or other materials inevitably appear at trial and need to be scanned into the computer system;
- CD burners to store all the material on CD that is located and scanned during the trial; and
- A digital or other camera with a digital service to take pictures of witnesses, evidence boards, writing on butcher paper, and other material that can then be saved and used with other witnesses, during closing argument or on appeal.

Using computer multimedia equipment itself will present a few logistical hurdles to overcome:

- The placement of electrical wiring for power and to connect the computer to all the peripheral devices, including the monitors, projector, sound speakers, scanner, printer and any other devices;
- Courthouse and courtroom setup access. It can take at least a full day to set up the proper computer equipment and wire the courtroom;
- Types of monitors. The choices of devices that can be used in terms of projecting the information to the jury include a large projection screen, large monitors, or small monitors used by one or two jurors; and
- Computer compatibility and switchboxes. Not all courtroom presentation systems are compatible with each other. Most trial counsel handle this problem by means of a switchbox. This device takes the output signal from different computer systems, and allows the operator to toggle back and forth between the multiple computer systems. There must also be some agreement for how images will be displayed before their admission.