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Los Angeles Superior Court

## Show me and I will understand: Tips on the use of technology at trial

*A True Story: During pre-trial preparation, the parties had more than 300 documents on the exhibit list. Both counsel agreed that was probably too many documents and diligently tried to whittle down the list. Ultimately, at trial, counsel used only 35 documents.*

*After the trial, in discussing the case with the jurors in the hallway, the jurors each delivered the same message to counsel: The case was too hard to understand because there were "way too many" documents.*

How can you get the jury to follow the evidence in your case, that includes 35, or perhaps many more, documents? In your hour-long closing argument, how can you summarize the evidence without putting the jurors to sleep? How will you present the testimony of a reluctant witness who lives out of state – or perhaps out of the country – but refuses to come to trial and is important to your case? How can you spice up an otherwise boring topic? Technology can be a powerful tool for each of these situations. I have become persuaded that "show and tell" in the courtroom can greatly enhance the understanding of the fact finder (yes, jurors and judges alike). Here's why.

### Adult-learning principles

I recently attended a CJER (California Center for Judicial Education and Research) course that presented fascinating information regarding how adults learn. Trial lawyers, who must present complex (or even not so complex) cases to a jury in a courtroom setting, might find it to be truly frightening. For example, research shows that the average adult's attention span is 15 to 20 minutes. Most adults engage in active listening for only eight seconds at a time. We retain, at most, seven pieces of information in

short-term memory at any one time. In western culture, the majority of learners are primarily visually oriented – they learn best when you show them something, rather than simply telling them. Retention is increased by approximately 50 percent if the teaching method is both visual and auditory. A visual presentation helps focus and maintains attention, assists visual learners comprehend information and reinforces information.

People learn primarily in one of three ways: by hearing (auditory); seeing (visual) or touching (tactile learners). An auditory learner remembers spoken words and ideas well. However, visual learners will remember best when you show them something. The tactile learners learn best by doing. Hence, the old Chinese Proverb:

Tell me and I will remember  
Show me and I will understand.  
Let me do and I will know.

As a trial lawyer, you are not going to be able to let your jurors "do" much. So at the very least, you should make sure you have reached the first two types of learners by telling your story both audibly and visibly.

This basic research regarding how adults process information has been confirmed in the jury setting. Individuals on a jury simply understand and retain information better when it is presented through images as well as words. Saul M. Kassin & Lawrence S. Wrightsman, *The American Jury on Trial: Psychological Perspectives* 146 (1988). Or, put another way, listening to a talking head for hours at a time is boring to the average juror, and he or she is likely to tune you out.

You might be surprised how many trials take place in my courtroom where the only ones who can see the document

while the witness is testifying are the witness, counsel and the court. No wonder the jury is lost. Not surprisingly, the jury — your intended audience — often does not grasp your message because they cannot see it. Consider how “60 Minutes” presents its stories. You don’t see Mike Wallace for even 30 seconds uninterrupted on the screen. The presentation constantly moves from the reporter to other people, to photos, to documents. This is what your jurors are used to. Very few of them spend their leisure time at lectures.

Of course, although this article focuses on the use of technology, technology should supplement, not replace, other visual support such as blow-ups, charts, timeline boards, good old fashioned flip charts, and other demonstrative evidence. Similarly, in a case where there are a handful of documents that will be frequently referred to, or some documents that are particularly complex, you should consider preparing juror notebooks so that each juror has his or her own copy of the important exhibits. Remember, the average adult’s attention span is only 15 to 20 minutes. You need to periodically shift their focus to keep them engaged.

### Consider a variety of technologies

- **The ELMO**

Digital Evidence Presentation Systems (otherwise known as ELMOs) are essentially video cameras that will display the hard copy of your document (or any other object) onto a screen. When you project the document onto a screen while the witness testifies about it, the jury is able to follow along, and you are able to reinforce your message. While the document is projected, you can also highlight or underline the portions of the document you want to emphasize. The ELMO allows you to enlarge key passages easily.

If you are reading a lengthy passage of deposition testimony, you can display and highlight the testimony as you read. For those who learn by seeing, they will appreciate the opportunity to follow along. And remember, the camera will display anything. So you can use it to display photos or models or anything else

on the big screen.

The Los Angeles Superior Court has a number of ELMOs available for your use. They are available in the downtown Stanley Mosk courthouse and in many of the district courts. Arrangements can also be made to move equipment for trials to other courthouses based on availability. The court’s equipment includes a document camera, a projector/screen, and a portable lectern. A technician will set up the system on the first day of trial and provide whatever instruction you need on how to operate it. If you do not have an ELMO, you should talk to your judge at the final status conference about the availability of the court’s ELMO for your trial.

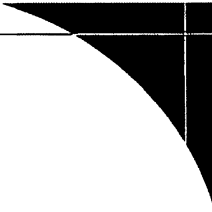
- **Overhead projector**

In much the same way as the ELMO, you can use an overhead projector and transparencies to display documents to the jury or write down what you do not want the jury to miss. I saw a very effective closing argument where counsel reminded the jury of the testimony of various witnesses and wrote brief bullet point summaries of the testimony on transparencies as he talked. The jury dutifully took down every word in their notebooks.

- **PowerPoint**

By now, everyone is familiar with PowerPoint presentations in CLE settings. Particularly when you are “teaching” the jury about your case, PowerPoint can be as powerful a tool in the courtroom as it is in the classroom. For example, your opening statement is one of the few parts of the trial that you control in advance. If your audience is only actively listening for eight seconds and only has an attention span of 15 to 20 minutes, you need some assistance to make your 30 to 40-minute opening effective.

Using a PowerPoint outline while you examine an expert witness can ensure that you cover all the points you need to make, in a logical fashion, and graphically display what might otherwise be a rather boring or difficult-to-follow presentation. The key points in testimony will come out in seconds orally, but you can keep the ideas on the screen for many minutes to emphasize your point (much



as you can with blow ups, but more dynamically). When you want to, you can make it disappear. While defense counsel can cross out your damage numbers on a flip chart, she cannot touch your PowerPoint.

PowerPoint can be particularly helpful during closing argument, to help you organize and summarize the evidence with powerful images. These are just a few examples – PowerPoint can be useful at virtually any point throughout the trial.

- **Video**

Most jurors (and judges, I might add) love a break in the testimony to watch a video. Video is one of the most interesting and effective ways to present certain types of evidence. A “day-in-the-life” video of the plaintiff in a personal injury case is often a far more powerful tool to convey the message of the difficulties plaintiff faces than is testimony alone.

A simulation of an airplane crash (or of any other complex issue) can help the jury understand far better than mere words ever would. Playing videotaped depositions of witnesses unavailable for trial gives the jury a chance to observe the demeanor and mannerisms of the witness so they can better assess the witness’ credibility. Many times, what the witness says may be less important than how he or she says it. And there is no better trial “drama” than to get the adverse witness to testify to one thing at trial and immediately play back his or her deposition testimony saying the opposite. Reading deposition testimony often bores the jury to death. With video (used with caution, as discussed below), you have their full attention.

- **Video conferencing**

Through video conferencing, you can present the “live” testimony of a witness who is not available to testify in court. This can be particularly useful where you have an important witness who lives in another state or a foreign country but who is reluctant to travel or you cannot afford to bring to trial. Teleconferencing centers now exist in most major cities throughout the country and in many foreign countries. A camera at each location allows the parties to observe each

other while the communication takes place

Here’s how it works for trial. All the witness has to do is go to a video conferencing center (such as a Kinko’s). The

witness will testify there in front of camera. On a large screen in the courtroom, the jury will be able to observe the witness as he or she testifies. A camera is set up in

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the courtroom so that the witness will be able to see and hear the lawyer as he or she asks questions.

The Los Angeles Superior Court currently has a number of mobile video conferencing systems that can be set up in the courtrooms. (There is a fee of \$400 per day for this service.) The equipment can conference to virtually all video conferencing systems nationwide and an expanding number of systems worldwide. Judge Warren Ettinger recently used the equipment in a trial, with great success. The jury was able to observe the testimony of witnesses testifying from Guatemala and Hungary. He reported that the picture was so clear that the jury was able to read on the screen the documents about which the witnesses were testifying. When the witness testified about documents, the images were shown on a split screen: the jurors could see the document at the same time as they were seeing the witness testifying about them. Obviously, the previously marked trial documents were provided to the witness before the testimony began.

If you are interested in using the video conferencing equipment, you should advise your judge as early as possible so that you can determine the availability of the equipment and arrangements can be made for setting up the process.

• ***Computer-assisted trial presentation technology***

When your documents and photos are electronically scanned into your computer and your video depositions are properly coded, you can use one of the commercially available programs to display them on the screen and highlight or blow up those portions you want to emphasize. For a trial with many documents, a bar code can be applied to the documents so that, with a swipe of the bar code, the document will appear on screen. Key deposition testimony for cross examination can be coded so that the precise testimony can be shown in a matter of seconds. The jury greatly appreciates the time saved from counsel not having to fumble through thousands of documents to find the one they are looking for.

**Some tips to keep in mind when using technology**

• ***Know your judge and the courtroom***

Be sure the courtroom can handle the technology you intend to use. Figure out what cables, extension cords or other equipment you will need. In some courtrooms, the placement of the projector and screen can be tricky. You will want to make sure that the screen does not block the judge's or a juror's view and that none of your equipment blocks the jurors' or witnesses' passage through the courtroom. The timing of setup is also important. You often have very little time for setup between the judge's law and motion

calendar and the start of trial. Find out how early you can arrive at the courtroom and when the judge will let you set up. The last thing you need is to have the judge or the jury frustrated because they are waiting on you to finish setting up your computer equipment. Obviously, these issues should be taken up with the judge at the final status conference.

Similarly, you need to know your judge's rules about the use of technology generally. Will you be permitted to use it during opening statements? You do not want to be in the position of having planned an elaborate PowerPoint opening complete with photos, video clips and documents if you will not be able to use it.

Also, if there are any evidentiary objections to simulations or other videos you have prepared, make sure they are worked out at the final status conference so that there are few disruptions during the trial.

If depositions or “day in the life” presentations are going to be shown by video, most judges will want to rule on objections in advance, so that the videotape can be edited to delete objections and questions the court finds to be objectionable. This is a good rule to follow with all demonstrative evidence. If your materials are too powerful because they are unfair or a surprise, you may be surprised by the court sustaining an objection and excluding them. If that happens during trial, you may not have enough time to recover. Also, determine how the court will handle recording the testimony for the record. For example, will the court reporter transcribe the testimony from the tape, or does the court want you to submit the certified deposition transcript of the testimony? Resolving these issues before trial begins will avoid delays throughout the trial.

• **Test your equipment**

An example from an actual case illustrates the point: In a lemon-law trial, the defense was that the computer diagnostics showed no problem with the brakes. When the “expert” for the car manufac-

turer took the witness stand, the ELMO and PowerPoint connection for his graphics kept breaking — the screen would blank, the disc would stick, the remote control refused to work. When the defense attorney asked for a brief recess to bring in technical assistance, the plaintiff’s attorney astutely said, “No objection, your honor. We are well aware how unreliable these computers can be!” Moral of the story: make sure your technology is in good working order.

You should test your equipment in the courtroom. Do not assume that what works in your office will necessarily work in court. And you should test it, not only to ensure that it is functioning, but to inform yourself about what it will look like from the juror’s perspective. Often, the jury is completely unable to read documents with small type, when displayed on an ELMO or an overhead projector. (Obviously, the same goes for blow-ups. I often see boards that lawyers have likely paid a fortune for but are completely unreadable.) If that is the case, you will need to figure out how to blow up the portions of the document you want the jury to read.

On an even more practical level, by testing your presentation, you can make sure you know how to adjust the focus, fix the document so that it can be seen on the screen without shifting it so much that

it gives the jurors vertigo, and even make sure the document is not upside down. One judge told me how, in one of his trials, every time a lawyer set a transparency on the overhead screen (with the lamp of the projector on), he shifted it around for so long it made the jury sick to watch. A number of jurors complained. Even after the judge discussed it with the lawyer, the lawyer could not avoid the annoying habit. After this went on for some time, the judge observed the jury would physically turn away and refuse to look at any more overheads used by the attorney.

If you can afford to have a good technician with you at trial (either a true computer technician or even a computer savvy paralegal from your law office), it is a good idea to have someone to help you multi-task through all of your technology.

• **Be flexible**

No matter who you have with you to help, or particularly if you are alone, here’s a good rule of thumb: have a back-up. For example, if you have an extensive PowerPoint presentation, make color photocopies (or overhead transparencies) of the software presentation in case the technology fails. All light bulbs on overhead projectors eventually burn out. If it happens during your trial, you should have a spare.

Also, just as the evidence in a trial never comes in quite the way you anticipated it would, your technology must be flexible enough to adjust to changes that occur in the trial. One judge told me of a very impressive PowerPoint closing argument that had been prepared in advance of the rulings on the motions in limine and other rulings on objections during trial. As a result, evidence that never came in at trial was included in the PowerPoint. The upshot was many objections during closing, followed by long pauses while the lawyer and tech consultant adjusted by skipping slides. The presentation was frustrating for all, including the jury. The sad thing (assuming the lawyer did not do it intentionally to show the jury inadmissible evidence) is that it takes only a few seconds to remove slides or material from slides in a PowerPoint presentation, so long as someone on the trial team knows how to use it.

- **Share**

If at all possible, try to reach an agreement with the other side about sharing the equipment. Turf fights over ELMO usage and delays caused by the transition from one party's machine to another do not leave a very good impression on jurors.

- **Avoid excess**

If used too much, technology can lose its punch. Even a flashy, impressive presentation can become mind numbing if overused. As with anything else, if the technology gets boring, the listener's mind will wander off. This frequently happens with PowerPoint. I have a friend who calls it "PowerPoint Paralysis."

You should also avoid an excess number of words on the PowerPoint or overhead transparencies you display. The rule of thumb is no more than four bullet points of text per slide and no more than seven words per bullet point. Printing a full paragraph of text on the screen will simply overwhelm the reader, and your point will be lost.

It is also important to be circumspect about how much testimony you present through video depositions. Just think what happens to you when you are

tired (or bored) with television: you fall asleep in front of the TV set. I have seen that happen a number of times with video depositions. In television shows and movies, the camera shot is always changing – it does not stay in any one place for more than a few seconds. Even in a long speech of a character, the camera angle changes, or it moves from a long shot to a close up, to a shot of the listener. In contrast, the camera at a video deposition is usually stationary, and so the visual is particularly boring (except perhaps to the lawyer who took the deposition and possibly his or her mother).

- **What technology can't do**

Finally, remember that technology can only do so much. It is a tool to make your presentation more understandable and memorable. You will still have to develop a strong case theme. You will still have to present a compelling story. You will still have to make sure the evidence you need comes in through the witnesses and documents admitted. But what technology can do is help you present the jurors with that evidence in a way that is appealing, organized and that they just might understand.

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