

DEFENDING YOUR CASE USING TECHNOLOGY

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I. Why Technology Works

How will today's juror best absorb the information you will present to them at the trial of the personal injury case you are defending? With every passing year, the typical juror becomes more and more acclimated to visual presentation of ideas and information. In 2000, members of Generation X comprised approximately 40% of the people in jury pools.¹ Consider how much communication takes place today electronically – by texting, instant messaging, Twitter, Facebook... the list goes on. Newspapers have been overtaken by internet portals like Google News.² Today's jurors are used to quickly scanning a screen full of information to grab hold of what is of interest. Take advantage of existing and accessible technology to communicate your argument to the jurors while further emphasizing the visual evidence in your case by projecting it on the big screen found in most courtrooms.

Increased use by everyday consumers of high quality visual media (think Youtube, or Hulu) means that your use of visual technology in the courtroom needs to capture the focus of the juror during his or her attention span. We know that ideas can be communicated effectively in brief bursts of information (like 15 second television commercials)³ -- of the way television and radio advertisers try to have their full message received in twenty to thirty seconds.⁴ If the advertisement does not grab the viewer's attention in the first few seconds, he or she will lose interest and disregard it.⁵ Similarly, your presentation of the defense needs to grab the jurors' attention.

The trend of the world outside the courtroom may conflict with the expectations put upon our jurors -- as jurors are supposed to see, hear, and remember every piece of admissible evidence.⁶ Effective use of technology in the courtroom will help you convey information to the jury quickly and concisely with clarifying visual support and verbal cues. Your use of courtroom technology should complement and support your verbal persuasion. Before opening arguments, be informed on the practicalities of using technology in *your* case and have the evidentiary concerns ironed out. With proper preparation you will be in position to seamlessly incorporate current technology to add visual support to your arguments and examinations at trial.

II. Weaving Technology into the Fabric of Your Defense

A trial has been described as a series of impressions.⁷ As you evaluate the evidence in your case, your trial preparation will include consideration of *structure* and *theme*. *Structure* provides jurors with a means of discerning what information is important and offers a way of getting back into the story if they lose focus.⁸ “[J]urors check in and out, sometimes paying no attention whatsoever, sometimes listening and thinking more quickly than people can speak.”⁹ Effective use of *theme* allows for the use of simple yet vivid story to reduce a complex legal notion to terms anyone could understand.¹⁰

Present the facts and evidence in a way that conjures up visual images and experiences in the minds of the jurors.¹¹ This will help to reinforce jurors’ memories and understanding of the verbal description and to better associate with ideas and concepts.¹² A story and theme, and the visual images they conjure, “give the jurors

context, continuity, and motive.”¹³ “Jury research has shown that thematic repetition vastly increases comprehension . . . on the part of the decision-makers.”¹⁴ A theme helps jurors recall evidence and other aspects of the case that they may have forgotten.¹⁵ It also creates a point of reference for jurors to filter and connect evidence.¹⁶

It is an oft-stated adage that to understand the case from the beginning, one should think about it from the end. In another words, evaluating witnesses and documentary evidence may be most effective if it is done from the perspective of trial – which necessarily requires at least some development of the theory of the case from the get-go. Begin to think about the case evidence early on in a similar fashion as each piece of the puzzle reveals itself – what quoted language from medical records can you picture projected before the jury? Do the photos in the investigatory file permit you to illustrate the story of the accident, or do you need to go out to the accident scene and take more photos? In a premises liability trip-and-fall, would extensive photography help you persuade the fact finder that the plaintiff voluntarily departed from the designated (safe) walking path? Sometimes thinking of your case from the visual presentation standpoint will help you achieve a favorable resolution even without the jury’s involvement – think about your summary judgment argument and whether you could help the court to understand your position with effective visuals.

III. Technology Particularly Apt for Emphasizing Visual Evidence

Power point displays provide you the means to communicate your defense to the jurors through presentation and emphasis of both demonstrative and substantive evidence.¹⁷ Visual aids may be as simple as a power point based display of a document, or as advanced as a computer-generated animation or simulation.

A. *Examples and Techniques*

Studies bear out the conventional wisdom that jurors assimilate the information they see more effectively than that which they hear.¹⁸ The combination of visual presentation and verbal persuasion has been shown to be more effective in communication of ideas in 90% of jurors polled, in comparison to verbal communication alone.¹⁹ Employing visuals in your summation can connect the disparate facts in the juror's memory more effectively than if you present your closing only verbally. Regardless of how epic one's closing may be, if it is solely verbal it is less effective than it could be.

The incorporation of visual presentation of bullet-points of your argument and visual evidence displayed interactively will increase your impact on the jurors because it works associatively.²⁰ Visual presentations should, whenever possible, remind jurors of their own life experiences, and focus the jury on the point the lawyer is trying to make from the evidence.²¹ Why read a damaging document to the jury when you can project it on the screen, with highlighting, zoom-in, and animation? By enlarging and projecting the important language from any document, you engage the juror's reading and listening skills concurrently, maximizing the communication of your point. In addition to just using power point as an advanced Elmo or overhead projector, use your slides to bullet-point *your* points as you argue opening and summation.

In creating PowerPoint slides, remember the following best practices²²:

DOs of PowerPoint:

- The fewer words the better. Edit slides/power point presentations down to the essence of the matter you want to communicate and use as few words as possible to convey your message.
- Visual clarity is key. Be sure the design clarifies and enhances the message, not detracts from it.
- Sprinkle in the occasional picture to relieve tension of your text. Use simple pictures or icons along with the words on bullet-point slides.
- Small bites. Build slides element by element, adding one point at a time to convey the overall message.

DON'Ts of PowerPoint:

- Avoid the “newspaper-column effect.” Don’t use too many words on a particular slide.
- Avoid the “noise effect” – don’t fall prey to runaway graphic design—the overuse of pie charts, bar graphs, and clip art.
- Don’t present all information on a slide at one time.
- Don’t show a slide before you talk about it or you risk losing your audience’s focus. Each element of your slide (e.g., each bullet-point) should appear in sequence as you verbally communicate what the next point is.
- Don’t overlook aesthetics. Keep in mind the persuasive and visual power of color and avoid color combinations that will be jarring or difficult to read.

Timelines can also be easily created and projected as power point slides. Timelines can help jurors make sense of an argument that involves numerous dates and times, or a case that involves numerous interconnected people. Flash-based demonstrative exhibits which build gradually, element by element, can effectively communicate complex data to the jurors in a manner which permits them to form an understanding of your defense as you guide them through the thicket of otherwise confusing information. And of course, computer-generated simulations and animations can incorporate videos, photographs, and satellite photos from Google Earth to display an area of an incident scene into your arguments and witness examinations. Nearly all types of demonstratives can be interwoven in or incorporated into a power point slide show.

B. Evidentiary Concerns with Visual Persuasion Technology

Lawyers employing technology in the courtroom must be cognizant of the pertinent Federal and Local Rules of Evidence, specifically those covering relevance, authentication, and prejudice.²³ Lawyers should inform themselves of the Federal Rules' interpretations in their local jurisdictions. Lawyers should also note that the standard of review for appeals of trial court rulings on evidentiary matters is the abuse of discretion standard;²⁴ an appeals court will not generally disturb rulings of a trial court on discretionary evidentiary rulings unless there was a clear abuse of that discretion.²⁵

i. Relevance and Authentication

As an initial matter, be sure that the visual evidence you intend to present to the jurors is relevant.²⁶ Rule 402 reads that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.”²⁷ Not only must the visual evidence be relevant, it must also be authenticated. Rule 901 explains that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”²⁸ The emerging interpretation in state cases is that visual evidence is admissible if it mirrors the actual facts of the case and relevant testimony.²⁹ Be sure to have all matters of authenticity sorted out well before the call of the case.

The following factors have been identified to establish the authenticity of computer-generated evidence under Rule 901: “This standard can generally be satisfied by evidence that (1) the computer equipment is accepted in the field as standard and competent and was in good working order, (2) qualified computer operators were employed [to operate the equipment/software], (3) proper procedures were followed in connection with the input and output of information, (4) a reliable software program was utilized, (5) the equipment was programmed and operated correctly, and (6) the exhibit is properly identified as the output in question.”³⁰

The question of admissibility of computer animation in terms of Georgia law has been consistent since 1999’s decision in *Cleveland v. Bryant*, where the Court of Appeals affirmed the trial court’s decision to admit into evidence a computer animation

where it was “sufficiently similar to the evidence introduced at trial” and it “appeared to be an accurate representation of the expert’s opinion as to how the collision occurred.”³¹ And so long as the trial court soundly exercises its discretion to find that sufficient foundation for the simulation exists, where it “is a fair and accurate representation of the scene sought to be depicted,” it will be admitted and the decision of the trial court to do so will be upheld on appeal.³²

ii. Proper Notice

Delayed disclosure of computer-generated exhibits can be risky, especially in federal court. For example, a federal district court in *Van Houten-Maynard v. ANR Pipeline Co.*, granted a motion in limine with respect to the use of computer animation where the defendant did not receive timely notice of the plaintiff’s intention to use it. The court concluded that the failure to provide timely notice of this evidence “severely prejudiced [the defense] in its ability to respond to the credibility, reliability, accuracy and materiality of [the] evidence.”³³ By contrast, the 1996 Georgia Court of Appeals decision in *Whitley v. Gwinnett County* shows this State’s tendency to allow for late disclosures of trial evidence as long as the problem can be “cured” by continuing start of trial.³⁴ In *Whitley*, the plaintiff argued that the defendants’ accident reconstructionist’s accident simulations should be excluded on grounds of late notice but there was no evidence of deliberate withholding for improper purposes and the trial court gave the plaintiff time to review the exhibits with the witness overnight before cross-examining him. Because trial court discretion is paramount in such situations, knowing your trial judge’s preferences and tendencies will be important if you have a late issue involving this type of evidence.

iii. Undue Prejudice

Rule 403 explains that relevant evidence may be excluded if the judge determines it is unduly prejudicial; that is, “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”³⁵ This determination is at the discretion of the trial judge, and reviewed on appeal under an abuse of discretion standard.³⁶

IV. CONCLUSION

Technology works because provides a means to support your verbal persuasive techniques that helps to communicate your message to the jury in a way that greatly increases the overall effectiveness of the time their attention is focused on you. Understand the resources and techniques available and adapt your trial skills accordingly. With your well-developed case structure and theme, creatively weave together your theory of the case with your visuals – photos, videos, flash animations, close-ups of key document language – in this way you can be sure to maximize the impact of your defense at trial.

¹ Lisa Brennan, *Pitching the Gen-X Jury*, NAT’L L. J., June 7, 2004 at 1, 1; *see also*, Ralph Taylor, *Visual Persuasion in the Courtroom: Tips for more effective trial presentations*, LITIG. NEWS, vol. 25 no. 2, Jan. 2000, at 1, 12 (while there are several date ranges offered, the consensus is Generation-X (“Gen-X”) consists of people born between 1965 and 1980).

² Jordan S. Gruber et al., *Video Technology*, 58 AM. J. TRIALS 481 § 6 (2009).

³ *Cf. id.* § 38 (“Americans are accustomed to the excellent image quality and highly sophisticated production values of Hollywood-generated entertainment programming. Consequently, presenting video evidence with inferior image quality, sound quality, or production values may result in the juror’s boredom, dislike, or general disenchantment.”).

⁴ See John Mitton, *Clear Channel’s 30-second rule has radio advertisers tuning out*, HOUSTON BUSINESS JOURNAL, Nov. 12, 2004, <http://houston.bizjournals.com/houston/stories/2004/11/15/focus4.html>. See also G. Marc Whitehead, *Juror Persuasion: New Ideas, New Techniques*, 26 A.B.A. Litig. 34 (2000).

⁵ See, e.g., Sonya Hamlin, *Who Are Today’s Jurors and How Do You Reach Them?*, 27 A.B.A. LITIG. 9, 11 (2001).

⁶ See Whitehead, *supra* note 4.

⁷ Gregory J. Morse, *Techno-jury: Techniques in Verbal and Visual Persuasion*, New York Law School Review, 249-250, Vol. 54, 2009-2010.

⁸ *Id.*

⁹ *Id.*

¹⁰ See MICHAEL S. LIEF, H. MITCHELL CALDWELL & BENJAMIN BYCEL, LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW 125 (1998).

¹¹ See Whitehead, *supra* note 4, at 35.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 36.

¹⁵ *Id.* at 35.

¹⁶ *Id.*

¹⁷ See *Clark v. Cantrell*, 529 S.E.2d 528, 535 (S.C. 2000).

¹⁸ Hamlin, *supra* note 5, at 11.

¹⁹ See Frederic I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High-Technology Courtrooms*, 50 S.C. L. Rev. 799, 815 (1999).

²⁰ *Cf.* Whitehead, *supra* note 3, at 34–35 (“[I]f [the story] makes sense in light of [the juror’s] values, attitudes, and life experiences—they will adopt it as a hypothesis and will try to fit the evidence into it as the trial progresses.”).

²¹ See FED. JUDICIAL CTR. & NAT’L. INST. FOR TRIAL ADVOCACY, *EFFECTIVE USE OF COURTROOM TECHNOLOGY: A JUDGE’S GUIDE TO PRETRIAL & TRIAL*, 223 (2001) (hereafter referred to as JUDGE’S GUIDE), <https://public.resource.org/scribd/8763731.pdf>.

²² See Morse, *supra* note 7, at 249-250. *And see, e.g.*, NAT’L. INST. OF JUSTICE, U.S. DEP’T. OF JUSTICE, *DIGITAL EVIDENCE IN THE COURTROOM: A GUIDE FOR LAW ENFORCEMENT & PROSECUTORS* 49 (2007), <http://ncjrs.gov/pdffiles1/nij/211314.pdf>; *see also* JUDGE’S GUIDE, *supra* note 21, at 247.

²³ See GUIDE FOR LAW ENFORCEMENT & PROSECUTORS, *supra* note 58, at 23–38.

²⁴ 36 C.J.S. Federal Courts § 617 (2009).

²⁵ *Id.*

²⁶ Rule 401 defines relevant evidence to mean “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401.

²⁷ FED. R. EVID. 402.

²⁸ FED. R. EVID. 901(a).

²⁹ See James E. Carbine & Lynn McLain, *Proposed Model Rules Governing the Admissibility of Computer-Generated Evidence*, 15 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 19 (1999).

³⁰ *Conn. v. Swinton*, 847 A.2d 921, 942 (Conn. 2004) (citing C. MUELLER & L. KIRKPATRICK, *EVIDENCE: PRACTICE UNDER THE RULES* § 9.16 (2d ed. 1999); E. Weinreb, “*Counselor, Proceed With Caution*”: *The Use of Integrated Evidence Presentation Systems and Computer-Generated Evidence in the Courtroom*, 23 CARDOZO L. REV. 393, 410 (2001)).

³¹ *Cleveland v. Bryant*, 236 Ga.App. 459, 460, 512 S.E.2d 360 (1999).

³² See *Cowell v. State*, 265 Ga. 904, 904, 463 S.E.2d 702 (1995); *Jones v. State*, 250 Ga. 498, 499, 299 S.E.2d 549 (1983).

³³ *Van Houten-Maynard v. ANR Pipeline Co.*, No. 89-C0377, 1995 WL 317056, at *12 (N.D. Ill. May 23, 1995).

³⁴ *Whitley v. Gwinnett County*, 221 Ga.App. 18, 22-23, 470 S.E.2d 724 (1996).

³⁵ FED. R. EVID. 403.

³⁶ 36 C.J.S. *Federal Courts* § 617 (2009).