

Top 10 Tips for Presenting Electronic Evidence in Court

By Bruce A. Olson

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A poor courtroom performance can derail even a slam dunk case. And most cases are not slam dunks. In addition to being well-rehearsed and on your game, trial presentation technology can help you persuade judges or jurors. But caveats abound ranging from literally tripping over wires to figuratively tripping over the rules of evidence. In this TechnoFeature article, former litigator and current trial technology consultant Bruce Olson offers his considerable wisdom in the form of ten tips.

INTRODUCTION

Trial presentation technology has made great strides since its introduction in the mid-1990s. PowerPoint enables you to make visually compelling opening and closing statements. Programs like Sanction II and TrialDirector enable you to work dynamically with exhibits in real time. Everything can be presented to a jury on individualized monitors or on a gigantic screen.

All of these techniques are designed to more effectively educate and engage a jury. There is a danger, however, in focusing too much on the technology. It may lead you to ignore the fundamentals. Technology has not eliminated the rules of evidence, nor given attorneys the option of ignoring them just because they bring a laptop to court.

The following tips should help you advocate at your best when presenting evidence electronically.

1. KNOW YOUR EVIDENTIARY BASICS

Prior to trial every attorney must review every exhibit for admissibility issues. Do you have a witness to lay an appropriate foundation? Are you able to authenticate the exhibit? Does the exhibit contain hearsay, and if so, does an exception apply? Is the exhibit relevant, and is its relevance outweighed by any potential risk of misleading or inflaming a jury?

There are numerous other evidentiary considerations that must be addressed. Every attorney should read *Lorraine v. Markel American Insurance Company*, Civil Action No. PWG-06-1893 (D. Md. May 4, 2007) each time they embark on a trial using electronic evidence. In that decision Judge Paul W. Grimm set forth a primer on the use and admissibility of electronic evidence at trial. It is a must read.

2. KNOW YOUR VENUE

Every courtroom is different. Sightlines, acoustics, availability of electrical outlets, space for projectors and visual presenters, and other factors vary from place to place.

Prior to trial, spend time in the courtroom assessing its physical characteristics. Draw a sketch. Note the location and number of electrical outlets. Determine if a sound system is necessary and whether your technology can tie into it. Check juror and judge sightlines. Can you place a projector and screen near the jury box without blocking the door to the jury room?

Can the judge see the big screen as easily as the jury? Determine where you will lay your cables to prevent courtroom personnel not to mention yourself from tripping.

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3. KNOW YOUR EQUIPMENT

Laptops, computer projectors, visual presenters (often known generically as "Elmos"), and big screens or computer monitors, are the standard pieces of equipment currently used for presentation of electronic evidence in court. A color printer and some type of a scanner should also be included.

If you haven't hired an outside service to handle setup and operation for you, make sure you know how to set up and operate every piece of equipment. You cannot afford a technology breakdown that you cannot fix in the midst of examining a witness. It will damage your credibility with the jury.

Simple things help such as labeling each end of a cable with a corre-

sponding label on the equipment connector, or preparing a laminated startup sheet that gives the sequence of starting the laptop, projector, and visual presenter.

Equipment includes more than hardware. Bring extra cables, power strips, extension cords, and gaffer's tape to anchor your cabling safely. Prepare a checklist for all equipment to be brought to court, and a checklist for all equipment to be taken away at the end of each day.

If you doubt your capabilities consider the use of a professional who has the experience to meet your anticipated (and often unanticipated) needs.

4. KNOW YOUR SOFTWARE

There are two types of software typically used for the presentation of electronic evidence. The first is PowerPoint, and the second is trial presentation software such as Sanction II, TrialDirector, or Visionary.

The advantage of using PowerPoint is that it typically is already part of your Microsoft Office Suite so no additional software purchase is necessary. It has drawing and animation tools built in to create basic graphics. PowerPoint lends itself to linear presentations such as opening or closing, or direct examination. It does not lend itself to dynamic presentations, which explains why most trial attorneys also use trial presentation software.

Trial presentation software enables you to call up an exhibit on the fly, zoom it, annotate it, and otherwise manipulate it, all while you are engaged in questioning the witness. It also enables you to create and present clips from video depositions to use as impeachment of a prior inconsistent statement.

If you use this software you need to know how to load exhibits on the fly in case some unanticipated document is introduced in paper form. You need to know how to call up an exhibit, move between exhibits, place multiple exhibits on the same screen, and annotate them using all of the available tools. It is not difficult to learn how to do this, but you do need training and practice.

Again, if you are unsure of your abilities, consider the use of an appropriate expert.

There is enough going on at counsel table during a trial that you do not want the use of technology to become an impediment to an effective presentation of your case.

5. KNOW YOUR AUDIENCE

In deciding what type of technology to use you must first assess your audience. Are you dealing with a middle-aged judge in a bench trial, a jury trial in a university town in which a large number of panel members are students, etc.

Commentators are beginning to talk about the "CSI effect" at trial, and the differences between the older generation and the "MTV generation" of jurors. Based on their exposure to television, all jurors are increasingly expecting the use of technology at trial. However, younger jurors typically have shorter attention spans and are more visual than aural in the way they assimilate information. Thus, you need to consider what type of technology will have the desired effect on the presentation of your case.

6. KNOW YOUR STRATEGY

Just because you use technology at trial doesn't mean you can bamboozle a jury or judge. Trial technology is just another tool for persuasion. If you have no coherent strategy no technology in the world can help. However, when used effectively, technology can augment the presentation of evidence. Like so much in life, too much may not be a good thing. Thus, part of your strategy should be to use the proper type of technology at the proper point in the witness's testimony. Don't use it when it isn't necessary or doesn't add to the presentation. Don't overuse it.

7. KNOW YOUR WITNESSES

In deciding whether and how much technology to use with a given witness you must first understand your witness' capabilities. Some witnesses may become flustered or confused by the use of trial presentation technology. On the other hand, there are some experts who believe they are John Madden, and can't wait to get their hands on a mouse to start marking up an exhibit with colored arrows, free-form circles, and lines. You need to decide who will control the mouse.

If your presentation involves the use of data that has been manipulated in a particular program you must be certain the witness who intends to offer the testimony is familiar with the program. If you present an expert actuary who doesn't know how to use Excel and relies on assistants to do the number crunching, then you need to call both the assistant as well as the expert as witnesses. The assistant must lay the foundation as to the methodology, data input, manipulation of data, and output. Only then can an expert use the results to offer ultimate opinions.

There are reported cases where an expert's lack of familiarity with a piece of software resulted in the entire testimony of the expert being barred or stricken.

8. KNOW THE MECHANICS OF ADMISSION OF EVIDENCE

It is important to understand and follow the rules with respect to the admission of evidence prior to publication to the jury. I've noticed, particularly in state court, that some judges have become fairly loose in terms of following the evidentiary rules of laying a foundation, offering an exhibit, having it received, and then enabling it to be published to a jury. The use of technology exacerbates the problem. There is a tendency to splash the exhibit up on the screen immediately before these necessary steps have been taken.

The best way to deal with this issue is to obtain a stipulation at the outset of trial on the admission of specified exhibits. Barring that, the judge and counsel should consider how best to deal with the situation at the start of the trial. There are still many judges out there who haven't thought through the process of using presentation technology in court. Thus, to avoid the risk of an adverse ruling by a judge, everyone in the process, including the clerk and the court reporter, should be part of such a pretrial discussion.

9. KNOW YOUR LIMITATIONS

It is very important to know your limitations. Some lawyers are geeks; others don't know what it means to boot up a computer. There is enough going on at counsel table during a trial that you do not want the use of technology to become an impediment to an effective presentation of your case.

If you intend to run the technology yourself, you need to make certain you can do so in an unobtrusive way. Bringing up an exhibit in a trial presentation program should be as effortless as placing a blowup on an easel. If you can't handle that, bring a well trained paralegal to trial. If you don't have that luxury, hire a professional. If the case is big enough and complex enough, you may be better served by an outside consultant rather than in-house talent.

The worst thing you can do is underestimate what is required to use this technology effectively. Consideration of how you intend to present electronic evidence should be well thought out early in the trial preparation phase.

10. PRACTICE, PRACTICE, PRACTICE

Whether you intend to run the technology yourself or have someone assist you, the only way to ensure a seamless presentation is to practice, practice, practice well before trial.

This includes practice in launching exhibits, annotating exhibits, and using the technology with witnesses.

You need to determine when to use computer-based presentation technology, an Elmo, or simply do it the old-fashioned way using a paper document or photograph. There is nothing wrong with adopting a mixed-media approach, interspersing selected blowups on foam board with an electronic presentation of other evidence.

If there is any question whether the witness would have difficulty following your line of questioning if such technology is used, rehearse the witness with the technology. If they can't be trained then revert to the tried-and-true presentation techniques all trial attorneys know.

CONCLUSION

The use of presentation technology in court can be a wonderful thing. It can enhance the juror's and judge's understanding of your case. It can speed the trial process, thus saving your client money. It can even add credibility to your case if you use technology effectively and your opposition doesn't.

There are many potential traps, but thinking through the process and making the right decisions can help you win your case.

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