Effective Exhibits And Courtroom Technology

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EFFECTIVE EXHIBITS
AND
COURTROOM TECHNOLOGY

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I. Overcoming Fear and Confronting Technology

A. What is Courtroom Technology?

Courtroom technology is merely using devices to assist effective communication to a jury. Since I first started practicing law in the early 1990s, technological advances have exponentially added ways to communicate with the judge and jury. It used to be that courtroom technology consisted of the following: a large pad on an easel, a white board, documents and photographs mounted on foam boards, passing copied documents to the jury and reading testimony from deposition transcripts.

When I had just started practicing law, I tried one of my first jury trials in a small North Carolina county. It involved a contractor dispute. I sat with my engineering expert, a computer and a copy machine to brainstorm what the expert would like to use to prove his points. Among other exhibits, we ended up with extra large thick poster board printouts of pictures of the (before and after) failed retaining wall with clear removable overlays that showed where the wall specifications did not meet the North Carolina building code. Apparently that was high tech back in 1994, because I had at least four old timers (including the defense attorney trying the case) who asked me who I hired to do my exhibits. How far we have come!

Do not fear! In the courtroom arena, technology is only the extra tools we lawyers have to organize and communicate. The part that makes technology sometimes scary is the seemingly overwhelming number of courtroom technology "tools" available, the learning curve necessary to learn these tools and the speed which new tools are "invented" while old tools (that you have already spent considerable time learning) become obsolete.

B. Why use Courtroom Technology?

The purpose of using courtroom technology is the same as the purpose of using any courtroom communication techniques: to help the jury learn and remember key points. Juries (and even some judges) are addicted to technology's instant gratification of quick, to the point, snippets that they may receive through the latest "tweet" on their IPhone. We used to talk about juries attention spans being the average time period between television commercial breaks, about 10 to 15 minutes. Now we must deliver information to many jurors that are used to reading texts and tweets of 140 to 160 characters or less. Jurors take pictures and videos with their phones and upload them to Facebook and YouTube. We must use technology that jurors are comfortable with if we are to have a chance to effectively hold their attention and communicate with them. Furthermore, technology can help us organize and streamline our presentation of evidence and argument to keep the jurors listening (and, more importantly, watching).

C. Too much Tech?

I want to make a few words of caution to those who are ready to go buy every software program so they can bombard juries with hundreds of flashy exhibits: Don't do it just because you can. You would (hopefully) not use a month to try a case that should be tried in 3 days. In planning your trial, you winnow down your evidence in a matter similar to when you pack for a vacation: pack what you think you need, take away one-half of what you packed, then take away another one-half of what is left. Just as you can overwhelm jurors with information from too many witnesses, you also can flood them with too many flashy (and cool) exhibits. The purpose of using technology in the courtroom is to help jurors remember key facts and points, not tangential facts and points. Technology should never get in the way or confuse the jury. What is on the video screen should help explain your point, not compete with it.

II. Preparing for the Digital Trial

A. Digital Case Storage and Organization

1. Adobe

Regardless of the size of my case, I try and have all documents related to a case scanned in .pdf format. This includes documentary evidence, correspondence, pleadings, discovery, statutes, case law and anything else that might be related to the case. Practically the first technology I purchased for trial presentation was the full Adobe Acrobat Pro software (not just the reader).

Adobe is compatible with just about everything, so the chance of it failing to project onto that screen is considerably less than the off-brand blue light special you thought was a good idea to purchase.

I try and combine the similar documents (pleadings, evidence, correspondence, etc.) into one Adobe document. Then I use the bookmark feature to create a table of contents-type feature for easy access to each sub-document. Adobe has a built in OCR feature that can recognize the words on the document. Once the text is recognized, it is easy to search the document for individual words. There are highlighting and commenting features that you can mark-up the documents as you review them (that you can choose to print/display OR NOT).

If you are a little scared of jumping into the deep end of technology, then Adobe is a good starting place.

2. Lexis Products

Lexis has made a concerted effort over the years to buy up some of the best legal technology software to incorporate into the Lexis suite. The problem I have had with Lexis is that they took programs (such as the CaseMap Suite) that were purchased once and made them into subscriptions. Nevertheless, I do believe that the software programs that Lexis acquired include some of the best legal technology out there.

a) CaseMap, TextMap, TimeMap, NoteMap

CaseMap (with its brothers and sisters TextMap, TimeMap and NoteMap) is a program that forces attorneys to organize their cases from the get-go. At the start of the case, you just input all of the "cast of characters" (parties, witnesses, etc.) along with the chronology of case facts. You can link the facts to the issues (defined by you) in the case as well as evidence. If the evidence is documentary, then you can scan it into .pdf format and use a nifty add-on to Adobe that sends highlighted text from the document to a CaseMap fact and automatically links it as evidence to prove the fact. Similarly, you can link (through CaseMap's Research field) highlighted portions of statutes, case law, journals (scientific, legal, medical or otherwise), books, or any other authority to the issues in the case (i.e. if one of the issues is intent, you can link authorities and excerpts of authorities to the intent issue).

Through TextMap, CaseMap can incorporate depositions into your proof database. TimeMap is useful in taking the data from CaseMap and making (in their words) "polished timeline visuals." NoteMap is an outlining tool that works with CaseMap to create outlines. For what it is worth, I used NoteMap once.

After you have been forced to organize your case from the start, CaseMap is a very nifty tool to quickly bring up any aspect of your case. It works great for surprises during trial. For those of you that have a little ADHD, CaseMap is a great program to force you to plan from the start that also allows you to jump to another subject without losing the work (or the organization of your work) you just started (and did not complete).

b) Concordance

I have never used Concordance, so in anticipation of writing this manuscript I set out to figure out what exactly Concordance does and how it does it. According to Lexis, it apparently identifies key documents for trial, prepares witness kits, organizes document responses, prints chronology reports, generates deposition digests, manages e-mail and electronic documents, maximizes scanned OCR text with innovative synonym builder,

and conducts LexisNexis Research ("instantly"). It seems to do much of what CaseMap, TextMap and Adobe Acrobat already does, but it must do it much better to justify its steep price. In all fairness, it appears to have a better search feature than Adobe Acrobat, but nothing that cannot be worked around in Acrobat. After you buy the software (or the subscription to pay for it indefinitely), you can look at the 49 page getting started guide, pay for the one day $1,650.00 on site consulting to get started, pay for the $2,500.00 user training on site, and pay for the $300.00 for two hours online training, you may be able to do all these tasks more easily in Concordance than in Adobe Acrobat, TextMap, and CaseMap. Concordance appears to be geared toward cases with huge amounts of documents and E-Discovery (though I have successfully managed cases with hundreds of thousands of documents with Adobe Acrobat and CaseMap). I am somewhat a tech savvy attorney and I do not have confidence that I could learn to use this program to an extent that it merits the cost and learning curve.

c) Sanction

Sanction allows you to have a seamless organization of your case file and all of your electronic exhibits, graphics, documents, images, photographs, animations, videotaped depositions, transcripts, and other files from PowerPoint, PDF, TIFF, JPG, DOC, XLS, MDB, ASCII, PTR and others. Sanction is fairly user friendly and is the engine to run all of the different types of media files through. The chief advantage of Sanction over programs like Powerpoint is that you can present the evidence and exhibits in Sanction in a nonlinear form whereas Powerpoint presents in a linear format. Trials rarely happen in the exact order you anticipate.

3. TrialDirector

TrialDirector seems to be Sanction's main competition for the moment. It is a presentation software engine that also organizes and runs your electronic exhibits, graphics, documents, images, photographs, animations, videotaped depositions, transcripts, and other files from PowerPoint, PDF, TIFF, JPG, DOC, XLS, MDB, ASCII,

PTR and others. Historically, TrialDirector was better geared toward more complex larger database structures, whereas Sanction was viewed as more user friendly.

B. Blending Technology Use into Your Presentation for Seamless Delivery

Jurors are very sensitive to both the flow of your case at trial as well as the speed in which you present your case. Try not to let your technology dictate the flow or speed of your case. Try and have knowledgeable helpers to assist with keeping your technology flowing. There are few things worse than spending minutes (seemingly hours) bumbling around the Smartboard trying to get the damned video to turn on, while the jury starts to fall asleep and while the judge's face turns shades of red you have never seen.

Test everything at least once, in the courtroom if possible. Check out the compatibility of your software with your hardware, your hardware with other hardware, and everything with the plugs and wires. Have a backup plan available for possible equipment failure. The backup plan may be backup equipment or a resort to the old timey paper copies to the jury method. Just be prepared for technology to fail, Murphy's Law is alive and well with technology.

Use your exhibits and technology to illustrate and teach points made through your witnesses' testimony. The technology should flow from the testimony, not the other way around. Jurors may not be able to process two things at once. If you are examining a witness, they probably cannot hear the testimony and read the document projected on the screen at the same time. Give the jury time to process the information. Similarly, be careful to choose the best time to flash up your best photos or video. You want the proper dramatic effect, but you do not want the jurors to tune out what your witness is saying.

Make sure that your technology lines up with what you are presenting at trial. When it is time to move to the next point, make sure your exhibits do the same. Once you have finished with your point, take down the exhibit immediately (dim the screen).

Though you should give them sufficient time to digest your exhibit, you don't want the jurors ignoring what you are doing now while they stare at the video screen projection of your last point.

Finally, and perhaps most important, if technology is slowing your trial down, then you should not be using it in that trial.

III. Choosing the Right Method and Form of Exhibit

A. Physical vs. Image

Hearing a description of the plates and screws used to reattach the Plaintiff's shoulder is acceptable. Looking at a picture of the plates and screws is better. An exhibit which shows an x-ray superimposed on a drawing of the Plaintiff's body (at the shoulder) is great. In my mind, however, nothing beats having the jury passing around the (now) removed plates and screws that had actually been inside your client's body. Simply playing back the tape of a 911 call can be remarkably chilling (and effective). Technology is not always better. Sometimes it is important that the jury has the opportunity to touch and feel something. The key point is that you should think through what is the best way to illustrate your point to a jury and use diverse exhibits so as to reach the jurors in different ways, using different senses.

B. Comfort Level with Technology

If you are not comfortable with how to use your technology, then find someone in your office to come to trial to help. If no knowledgeable person in your office is available, then hire someone to help. If have no help from your office and your case cannot afford to hire someone, then don't use that particular piece of technology.

IV. What Can Opposing Counsel Do with the Evidence I Introduce?

I don't know how many exhibits of mine were destroyed by opposing counsel

over the years. I first noticed the problem in depositions. I would have a nice picture drawn by the witness. The next thing I know, the opposing counsel has x's, y's, names, stars and everything else marked over my nice simple picture, rendering it useless. It is worse in trial. Opposing counsel might ask in front of the jury if he could borrow your exhibit during an examination or argument. If you object or protest, you look like a jerk to the jury. If you agree, then the next thing you know, your (sometimes expensive) exhibit is marked up and ruined. In depositions, I always agree to make a copy of my exhibit for them to mark as their own exhibit before they "mark" all over it. At trial, it is worth mentioning to opposing counsel and the judge that you would like the court to address opposing counsel's requests to use your demonstrative exhibits be raised, discussed and ruled upon outside the presence of the jury.

V. Video Depositions (Prior Testimony)

For cases large enough to support it, I professionally videotape every deposition. For smaller cases, I take my own video camera and mike and put it up during a deposition just in case I need to show a judge or jury what happened. Not only can having a video deposition make a case, but it can also prevent deposition abuse by adverse counsel.

A. When to Use

North Carolina Rules of Civil Procedure, Rule 32, governs the use of depositions in court proceedings. Rule 32(a) allows the use of video depositions under the following circumstances: 1) impeachment of a witness at trial; 2) as substantive evidence by parties adverse to the party that called the witness or as substantive evidence by the party that called the witness to the extent the facts testified to are inconsistent or in conflict with the facts contained in the deposition; 3) a Rule 30(b)(6) or Rule 31(a) witness's deposition may be used by an adverse party for any purpose; 4) a deposition may be used if the witness is an expert, dead or otherwise unavailable (age, illness, infirmity, outside the United States, in prison, not able to be subpoenaed, over 100 miles away, or other exceptional circumstances);

B. Advantages and Pitfalls

There are several well known advantages to using a video deposition. Unavailable witnesses come across much better by video than by a paralegal reading their deposition. The treating doctor in a personal injury case may color his testimony or demeanor in a detrimental way if he is required to sit at trial all day to testify live.

Video depositions are also great to use for impeachment by prior inconsistent statement. Once the witness has testified in direct examination, you begin your cross examination by locking in his testimony. You continue by reminding the witness of the prior deposition and that he had testified truthfully under oath during the deposition. Then you confront the witness with the contrary deposition testimony (hopefully on videotape) and force him to admit the truth of his deposition testimony.

One less known advantage of a video deposition is that they are great to ensure adverse counsel behaves themselves. Improper signaling or coaching seems to disappear when the video camera is on.

Videotaping your own witnesses can be used against you if your witness behaves badly during the deposition. Poor body language or bad presentation can hurt your case, so videotaping your witnesses does pose some degree of risk.

I find that videotaped depositions can work well in focus groups to determine what juries may think of different witnesses and arguments. After learning problems with your case or your witnesses, you can work on correcting them before trial. Of course, whatever is in the deposition may be used at trial against you anyway.

C. Rules of Completeness

The Rule of Completeness is alive and well in the playback of video depositions. There are two places that may govern the playback of video depositions. North Carolina Rules of Civil Procedure, Rule 32(a)(5) states that "if any only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which is relevant to the part introduced, and any party may introduce other parts." N.C. Rules of Civ. Pro., Rule 32. North Carolina Rules of Evidence, Rule 106 states that

"[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." N.C. Rules of Evidence, Rule 106. What Rule 32 and Rule 106 do not say is that the adverse party is allowed to play back the entire video deposition or whatever parts the adverse party chooses. The court may require the party playing to video to admit only those parts "which is relevant to the part introduced" or "which ought in fairness to be considered contemporaneously with it." Note for purposes of last argument, it appears that an adverse party is not the one introducing the added evidence. Rather, the party is forced to introduce the additional portions. The adverse party has the burden to show to the judge that the additional portions of the video deposition are relevant. Factors that a judge may look at are whether the added portions are necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the trier of fact, or to insure a fair and impartial understanding what was said.

D. Objections

Generally, objections as to admissibility of a video deposition "may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying." N.C. Rules of Civ. Pro., Rule 32(b). Exceptions to the general rule include: "[o]bjections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." N.C. Rules of Civ. Pro., Rule 32(d)(3).