

TITLE: SSF LITIGATION TECH ADVISORY: THE CURRENT STATE OF COURTROOM TECHNOLOGY

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INTRODUCTION

Increasingly, administrative, civil, and even criminal cases are being presented with technology. Technology-based evidence presentation is substantially faster than traditional methods, and many agree that it also does a better job of presenting information. Some judges, especially those who preside in high-technology courtrooms, may even require technology. Other possibilities such as realtime transcription, in which court reporters supply judge and counsel with immediate draft transcript for use at trial, can be immensely useful. And, of course, technology permits options sometimes not otherwise possible. Electronic display of computer spreadsheets may be unavoidable, for example, if counsel needs to display the underlying formulae and assumptions on which the numbers are based. Videoconferencing permits remote witness testimony as well as remote foreign language and American Sign Language interpretation.

Small firm lawyers sometimes dismiss the use of case presentation technology erroneously reasoning that they lack adequate resources. If counsel won't be in one of the increasingly numerous integrated high technology courtrooms, presentation hardware is easily available today to most lawyers. The most basic form of technology is the use of a document camera (sometimes called an "Elmo," after one of the major vendors) and a projector. Aimed at a portable screen or wall, counsel can then display to the court large images of documents and objects. Adding a computer, preferably a laptop, to the system gives counsel even greater opportunities. For software, Acrobat, Word, WordPerfect, PowerPoint or Corel Presentations can all be used for case presentation. Purchase of a dedicated software solution such as Trial Director, Sanction, or CaseMap gives even greater options. Although equipment rental is possible, it tends to be expensive. A good projector can be purchased for as little as about \$1,000 dollars, a cost that can be amortized among many different cases and clients.

When planning your case presentation, consider:

- 1) Does some part of your case **require** or benefit from the use of technology?
- 2) Is your opponent likely to use technology?
- 3) Is your courtroom or hearing room technologically equipped and if not, do you have affordable access to the necessary technology?

4) Do you and your staff have the necessary training, skill, and software to prepare, support, and present a high-technology case?

Note that to decide whether your case would benefit from technology, you need to know what you **can** do with it and the effects of such use. If all of this is new, consider attending a training program such as William & Mary Law School's Center for Legal and Court Technology two day certification program.

Although technology-based case presentation is only a new tool for the lawyer, it is an important one of growing importance.

COURTROOM TECHNOLOGY BASICS

The modern litigator finds a slightly different courtroom than existed 10-15 years ago. Buzz words like e-courtrooms, wired courtrooms and built-in technology are starting to be heard nationwide. Federal Courts are usually the first to automate their courtrooms. Pre-wired courtrooms in state and federal courts are a breath of fresh air for those of us who have been lugging lots of heavy equipment into court. Even if the courthouse claims to be high-tech, there are things you need to consider before you can use technology effectively in court. Here are some things to consider:

To begin with, trial lawyers and their teams can expect some level of technology to assist with their presentations in most federal courtrooms. At a minimum, monitors on each of the parties table, one for the witness and one for the court. Sometimes you find monitors for the clerk, court reporter and occasionally, the gallery.

In addition to the monitors being installed in the courtroom, there is a cable or port on each counsel table to allow both parties to connect their laptops to the courts presentation system. Most court rooms also have an audio cable that allows the use of any digital audio portions of their presentation. The system is usually run by the parties but controlled by the court, which can monitor and regulate who is "publishing" onto the display devices throughout the court room.

With all this technology built in to courtrooms, one must do a considerable amount of due diligence before attempting to use the system. Most litigators are familiar with how to use the document camera but have rarely used the full extent of the additional technology in the courtroom. And remember, the court staff technician is not going to be there during the entire trial so if something goes wrong with the setup you are on your own until this technician is found.

Have one of your staff or your consultant meet with the court staff technician to thoroughly review the set up of the courtroom in order to anticipate potential

problems and make necessary adjustments. You will want to find out if there are any glitches in the system before you come into court to present.

Also consider that although the “automated podium” is well adapted for using trial technology, most trial lawyers like to stand at the podium and let someone else run the presentation from a laptop sitting at the counsel table. In those instances you will probably have to arrange for a different podium and different wiring options and this may cause some resistance from the court staff that you will need to address well in advance.

Finally, after long experience, I continue to stress that you should stop installing individual monitors for jurors. This concept simply does not work. Have you even seen a CEO or motivational speaker presenting a message on 15” monitors sitting in front of everyone in his or her audience? You don't go to a movie theater and find a 17” flat panel monitor in front of every seat and the average consumer does not buy (5) 15” TV's for her home instead of one large 61” Big Screen TV.

The projector/screen combination is still the best solution and should always be used whenever possible and whether for the jury or audience, bigger is better. You will find the focus and attention of the jury increases when they look up at you speaking with your witness while a screen behind you displays the exhibit you are discussing.

CHECKLIST FOR AUTOMATING A CASE FOR TRIAL

■ Appoint a Project Leader or Coordinator

This should be someone who is extremely familiar with the technology. They should also be the “point of contact” with any consultant or vendor that is being used to assist in the trial's automated presentation. They should possess a good measure of technical competency as well as sensitivity to communication and deadlines since a great deal of the work in automating a case is the planning and scheduling.

This person should oversee the automation of the case including, but not limited to:

1. Picking the scanning vendor
2. Setting up training schedule
3. Coordinating with trial technology consultants and equipment vendors
4. Coordinating with court staff

The Project Leader should also not be spread too thin as to overshadow any other duties they may have that are important and relevant to the trial team.

- **Make decision to digitize the case-related evidence**

This decision is better made early in the litigation, but can be employed at any stage of the case development. Once this decision is made, select a comprehensive and compatible case management system in which to organize your case.

- **Select the Litigation Support Software**

This decision should also be done early in the process. Most firms choose a litigation support software or trial presentation software on a firm wide basis. Once selected, the litigation team and staff must be oriented to the technology tools available in the various applications.

- **Training**

Training must take place twice: first, during the discovery phase and again, later, for trial. Using computerized litigation management systems which incorporate databases, transcript or text search & retrieval, image management, outliners, and the ability to develop a case timeline is beneficial to the legal staff managing a case. With the proper planning and training, this system of electronic evidence management can be carried through to trial.

You can never do this type of training too early and many firms are now choosing to have the training done immediately after they select the litigation support software. Training early in the project will allow team members to get to a comfort level that will allow them to use the benefits of the technology without losing their focus on case-related legal work. It also gives them a chance to ask questions and have follow-up sessions in solving specific problems or requests by the team.

- **Ask the Court for Approval to Use Technology**

In some instances simply notifying the court of your desire to use technology is sufficient. On rare occasions you may have to file a motion or submit a brief as to why and how you plan to use it. In these instances the court may not have the experience of trying a case where the major method of presentation is done with technology and you may need to “educate” the court on your intent and the process you plan to use. Typically this topic is discussed at the pre-trial conference. This may still give you time to resolve any objections or problems that may arise. In some instances you may want to also check to see if your adversaries plan on using technology in the courtroom. You may come to an agreement as to what additional equipment you both need, thereby reducing the overall rental or purchase costs. There is some strategy as

to when you decide to notify your adversary as to your intent to use technology. Just use common sense.

■ **Establish a Contact with the Court**

It is always important to establish a contact with a member of the judge's staff. This person is usually the court clerk, the bailiff, or the judges' secretary. This court staff member should be someone you can coordinate with for entrance to the courtroom before the trial starts. This court contact will be a valuable source of information as to what you can do in the courtroom and what is not allowed. This person will also be a valuable source of information as to what type of equipment is allowed in a specific courtroom, where the judge does not allow monitors, etc. Best case scenario, you will need at least one day to wire the courtroom in advance of the trial date, however, you may not have that much time in advance. Your court contact should be able to assist you with this scheduling.

■ **Inspect and design the courtroom**

As early as possible, the trial team, often with the assistance of an experienced consultant, should inspect the actual courtroom where the trial will be held. By making arrangements with the court contact, the trial team should arrange to spend at least one hour taking measurements and notes of the actual courtroom and sketching out the room and its permanent furnishings and fixtures.

Some of the more important things to look for when you inspect your courtroom are the overall size, the dimensions of furniture, the power availability, where the electrical outlets are, the arrangement of the furniture, where the jury sits, where the judge sits, and the overall spatial arrangement of the courtroom.

The trial team will need to know how the technology will fit in the courtroom. You should walk away from this visit with at least a sketch of the courtroom that will assist you on the size and type of hardware you plan to use.

Also, ask your court contact if you can come back for follow up visits. Unfortunately, each courtroom is a little different. Even courtrooms in the same building and on the same floor are not identical. There is no "cook book" recipe for placing hardware in a courtroom and wiring the cable to each component. Someone experienced in automating a courtroom needs to view and inspect the courtroom each for each trial.

■ **Select the additional hardware and courtroom equipment**

The hardware portion of this decision is based on what equipment, if any, is in the courtroom. We are finding more courtrooms with some technology built into them, especially at the Federal level. Many equipped courtrooms have jury monitors for each jury (or every two jurors). However, we feel the best method of displaying the multi-media trial presentation is to use a large screen and projector so that you can focus the jury in one place. Don't rely totally on the court, their staff and their equipment for your presentation. Once you know the courtroom you can begin to decide the rest of the equipment necessary to optimize your trial presentation. .

▣ **Designing the War Room**

The equipment in the war room is just as important, as the equipment in the courtroom. Typically, if an attorney or a law firm decides to use technology in the courtroom for automated trial presentation purposes, they will want similar technology in a war room. In most cases, the war room is in the office of the law firm involved in the case. In this case, the war room becomes the offices and conferences of the representing law firm. It is when the trial team must travel to another city or location to try a case that some additional planning becomes necessary. During the course of the trial, many changes will be made to the electronic presentation. The war room is the ideal place for this to occur. War rooms are also used for other technology applications, such as preparing a witness to view evidence on a computer monitor, receiving and sending faxes, an Internet connection, immediate scanning capability for document and photographs that come in during trial, etc.

▣ **Training in the Trial Phase**

A final training session should be held to train the trial team on the exact trial courtroom procedures and the use of the presentation system. Attorneys who will be examining witnesses should become familiar with the system, or understand the procedure and protocol of asking a system operator to display a specific image or enhancement. In addition, it is useful to familiarize your witnesses with the technology so that they are not surprised in trial.

▣ **Setup and Installation of the Courtroom Equipment**

At this point, you should make an appointment with the court contact to set up, install and test your equipment in the courtroom. Ideally, if you can get into the courtroom with sufficient advance time, you should go through a dry run of examining a witness and displaying exhibits on the courtroom system. Every installation is different because every courtroom is different

and every equipment plan is different. Plan on delays and some equipment problems. Make sure you have a backup plan for equipment and hardware in the courtroom, i.e. a spare monitor, laptop, etc.

CONCLUSION

Courtroom technology has seen an astonishing degree of change since I first began my work as an independent litigation consultant in the early 90's. My first exposure to trial technology was a presentation by Neil Aresty, the founder of Lextranet and Stuart Hubbard, currently the Lit Support and ED Manager at Schiff Hardin in Chicago, at the annual Lawyers Advocate CLE held at the Hotel Del Coronado in San Diego every 4th of July. They were showing a video deposition and trial presentations system using a proprietary laser disc system which took up two entire tables, had approximately 5 miles of cable and a price slightly higher than the GNP of Peru.

The year was 1993. Legal technology was in its infancy. Windows 98 was still 5 years away, there were virtually no courts that were pre-wired for technology and Fred Lederer was just starting the Courtroom 21 project at William & Mary Law School. Now every Federal courthouse has at least one tech ready courtroom and many state courts are following suit. Trial presentation systems are software centric and readily available at a reasonable price with a number of attorneys even using off the shelf applications such as PowerPoint.

Do trial attorneys prefer to use these systems? I sent an email to a group of friends asking for their first reaction to the phrase, "using technology at trial to find out and Craig Ball, a noted trial presentations expert (www.craigball.com) said "For me, naturally, it's visual presentation technology: PowerPoint, Sanction, Trial Director, digital projection." Russ Aoki, a Seattle attorney who is often appointed by the U.S District Court in that city as the coordinating defense counsel on large cases, replied, " ... the ability to bring what you used to leave behind in your office right to the counsel table and then tell your story with more than just words."

So courtroom technology is in place and more than 90% of today's business information is generated in an electronic format which can be easily used in a digital presentation format. Since we know that juries prefer to make decisions based on visual evidence (cf, *The Impact of Graphics On Jurors*, Chad Lackey, PhD at www.doar.com), then it stands to reason that most trials today must use digital presentation of evidence.

My own experience is that doesn't seem to be happening and that the most common use of technology at trial is no more than attorneys using PowerPoint in opening or closing arguments. Why? Because the real issue is people and not technology. Attorneys aren't really sure how to best use the technology in trial

and when they reach a technological stumbling block with the other side, they often have trouble articulating the problem to a judge. And if the judge is not technologically proficient, the result is simply an exclusion of the digital presentation altogether.

As an example, last year I was involved as a consultant on a case with a large document population. Both sides shared the cost of imaging and numbering the documents and then loaded them into their own systems. However, on the eve of trial our opponent gave us a copy of their trial exhibits which they had loaded into Sanction and renumbered. Since they did not give us a load file, in essence what we had was thousands of documents without an index that would allow us to quickly retrieve them during trial. When we tried to explain to the judge what we needed and why, he became very frustrated and finally ordered both sides to submit paper exhibits ...the next day.

Shortly into the trial, after several days of both sides going thru prolonged delays as they tried to find an exhibit in their own database that had been put up on the screen by their opponent so they could ask a question, the utility of the load files became apparent and it was provided. All the hardware in the courtroom came to a standstill because the attorneys weren't tech savvy enough to clearly explain what they needed and the judge wasn't tech savvy enough to realize how the technology needed to be used in order to operate effectively.

So the most important technology consideration is, do you understand it well enough to explain it? When I get into an overly technological discussion with attorneys and judges, I'm always reminded of that great line from the movie *Philadelphia* when Denzel Washington says: "explain this to me like I'm a four-year-old, okay?" That may be your most persuasive argument.

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