

Utilizing Available Resources

# Reaching Jurors with Courtroom Technology

by Ted Brooks

Rare is the litigating attorney these days who has never seen technology used for evidence presentation during a trial. Once thought of as presenting a risk of appearing as a deep-pocket party in a high-stakes case, with media exposure by Court TV and news shows such as *60 Minutes* or *20/20*, jurors have now become adequately desensitized to electronic trial presentations to the point they have even come to expect it. While the argument of not wanting to appear "too flashy" may have held some water in the past, it has long-since dried up.



In fact, according to post-trial jury surveys, the opposite is true—the jury appreciates the fact that counsel has attempted to speed the pace of the trial and increase the level of comprehension at the same time. Additionally, although they are certainly aware there is a cost involved, their perception is that it is only a tiny fraction of the cost of litigation. If that's not enough, even the courts are encouraging efficient methods of trial presentation. Although most courtrooms are not yet “wired” with a permanent presentation system, the fact that they are spending money on even a small percentage of facilities should make a strong statement.

### Juror Statistics

It is estimated that approximately one-third of our national jury pool is part of generations X (born 1965–1980) and Y (born after 1980). The remainder is made up of approximately 40 percent baby boomers (born 1946–1964), leaving only about one-fourth in the group least likely to have a high degree of familiarity and exposure to computers, multimedia, and the like.

Observations have been made in numerous post-trial jury surveys, including the fact that when opposing counsel has not used technology, appreciation is expressed to the party who has made an effort to speed up the process, thus helping to shorten the jury service time. Additionally, although using technology does not necessarily directly influence the verdict, one can safely assume that if jurors understand one side of the story more clearly than the other, it will carry into deliberations. Further, the sheer number of exhibits admit-

ted can outpace traditional methods by as much as 10 times. When the jury is asked to consider the weight of the evidence, a hundred or more admitted exhibits can help tip a scale much more than 10 or 20 hard copies admitted by opposing counsel.

### Plaintiff Firms

More and more, plaintiff firms are using technology to win—and win big. One example may be found in a recent article in the Spring 2004 issue of *The Trial Lawyer* (publication of the San Francisco Trial Lawyers Association), “Winning the Close Case: Increasing Your Damages with Technology,” by Bill Smith and R.J. Waldsmith. The title alone should raise concern, and the topic is spreading like wildfire. The article features a case study of a swimming pool diving accident (*Shropshire v. City of Walnut Creek*), wherein a jury delivered a verdict of nearly \$28 million—a verdict of as much as 40–50 percent more than might have been expected using traditional presentation methods, according to Mr. Smith.

Examples such as this are sounding a wake-up call to defense firms, insurance companies, corporate in-house legal departments, and government agencies. Cost used to be a prohibitive factor for smaller firms, but trial presentation software prices have dropped, education and awareness have increased, and court presentation consultants may be found to support their cause.

With much of the early use of trial technology having been adopted, developed, and practiced in-house by large defense firms, it has now spread to the masses. Many of these pioneers in litigation support departments have gone on to join or become vendors and litigation technology consultants, offering the plaintiff's bar the same powerful tools as their counterparts.

### Defense Firms

Having once led the litigation technol-

ogy parade, the defense bar may now be scrambling to catch up to even the smallest plaintiff firms. Perhaps part of the reason is that early on defense firms had to make efforts to hide the perceived “deep pockets” of their clients from jurors, thus causing a reluctance to utilize electronic presentations in all but the largest of cases. With the level of multimedia exposure combined with an increasingly lower percentage of jurors having not been raised on technology and electronic media, this is no longer such an issue.

Whereas insurers were at one time reluctant to pay high-tech litigation support costs, now many are willing to cover these services. In many cases, they are even encouraging counsel to utilize all that is available. The results tell the story.

Safeco Insurance (Law Offices of Larry D. Langley) recently gave technology a chance in a couple of cases, and landed defense verdicts in both (*King v. Dillon* and *Washington v. Koerber*). In *King v. Dillon*, one absentee witness who was unwilling to testify in court was available to the jury via his videotaped deposition. His testimony had a significant impact on the outcome, and played well with the court's instructions to consider the weight of the testimony to the same degree as if the witness were on the stand. Plaintiff's attorneys hired an accident reconstruction expert to prepare an animation to support the testimony of the plaintiff. Langley successfully used it against them by playing it for the reconstructionist as he methodically reduced it to only one theory among many possible, while exposing visual misrepresentations, including plaintiff's clothing color and time of day. The defense also countered with an effective animation of their own. Had the defense come to court without the same capabilities as the plaintiffs, this would have been very difficult. The deposition video and the animation were played again in closing arguments, helping to solidify and refresh the jury of these holes in the plaintiff's case. In *King*, Larry Langley (a DRI member since 1983) tried his first technology-enhanced case, and he was able to incorporate it with his own presentation style. Langley believes



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than incorporating technology into his trial made his arguments much stronger, and noted the marked increase in both efficiency and effectiveness. With the degree of flexibility in modern trial presentation software, a litigator can continue to try cases in much the same fashion as without.

### Then and Now

There was once a great fear by the defense bar of appearing as “deep pockets” or too “slick.” While this argument may have had some strength several years ago while much of this was new and considered on the “cutting edge,” it’s simply no longer an issue. The facts are that jurors expect to see it due to media exposure or previous jury service, plaintiffs are gearing up now that the field has been leveled, the courts are pushing for it due to the increased efficiency and speed of trials, and even insurance carriers and government agencies have secured season tickets on this bandwagon, often after witnessing opposing counsel present a powerful case.

When laptop computers first came out, they were considered the flashiest technology on the planet. Now, it is likely that more attorneys use them than not. The same goes for court presentation technology. Nearly everyone has seen a projector and screen, and the jurors are exposed to little more than just that with respect to what goes on behind the scenes. Sure, they may see a paragraph blow up and get highlighted in front of them, and some may even show some amazement the first time they witness it. However, unless your trial is less than an hour or so, they will quickly become desensitized to any of the magic you might display. And, they do not see the complex database “engine” required to run all of this.

### Court’s Opinion

With only a few rare exceptions, most judges these days are willing to allow you to set up a traveling road show in their courtroom. Don’t tread where you shouldn’t, however. Showing up in court on the day of trial with no advance notice, wishing to set up a small theater, may find your equipment waiting outside when the day is done. Every judge, clerk, and bailiff will have valuable informa-

tion as to what has been done before, what works well in their courtroom, and what does not. Also, setting up trial equipment may take as much as two hours or more, so proper arrangements must be made with the court. Often, property passes and/or orders from the judge are required.

The fact that court presentation technology shortens trial length by as much as 50 percent, and that it greatly enhances the jury’s comprehension is not a bad

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thing at all. These are reasons the courts are willing to spend money on permanent technology installations in these financially strapped times. Additionally, many judges have written and commented very favorably regarding the use of technology during trial.

### Post-Trial Jurors’ Opinions and Perception

This writer has participated in and studied numerous post-trial juror surveys, and the story remains consistent. Once jurors are selected, although they then begin to develop a sense of ownership, they also have a strong desire to conclude the matter and return to their normal lives. When one firm uses technology in presenting their case and the other does not, the difference in efficiency is noted. Although this does not necessarily have a great deal of effect on the verdict, it can certainly help in the perception that someone is trying to help this matter move along. Jurors are also keen to the fact that, as opposed to passing along hard copy exhibits, having a document zoomed and highlighted on the screen helps them to quickly focus and better understand the message.

### Technology v. Old School

Using technology to display exhibits, an attorney can normally cover much more

ground when compared to passing out hard copies of everything, or fumbling with numerous stacks of posterboard enlargements. This is due in part to the processes in which documents are displayed. Using a trial presentation software database to store all exhibits, demonstratives, and videotaped depositions, counsel can simply request to have Exhibit X displayed to the witness, judge, and counsel for review and authentication, normally on a small flat-panel monitor. Once the witness buys into the exhibit, permission is then asked of the court to “publish to the jury,” or to have the exhibit admitted at that time (actual procedure depends on the judge).

As an added bonus, juror retention can increase by as much as 60 percent (as low as 20 percent with aural input only, up to 80 percent with aural/visual), while reducing the duration of the trial by as much as 50 percent. When measuring costs, these statistics should be considered.

When comparing methods of presenting exhibits, one can see the difference by simply counting the number of exhibits introduced and displayed during a closing argument. This number has been observed to be as much as five times greater when displaying documents on-screen as opposed to using hard copy paper documents.

### Technology Options

There are many means to an end. While the verdict may be the prize, getting near it won’t be any easier using substandard methods and techniques of trial presentation. It is very easy to get so dependent on technology that its use becomes predictable, and even boring. Not to mention that if you don’t have a decent case to begin with, or if your trial skills are in a state of disrepair, simply bringing in some technology is not likely to change much.

Court presentation technology can range from an ELMO, to PowerPoint, and all the way to other, specifically designed, trial presentation software. Each item, used properly, can greatly enhance the presentation of evidence.

An ELMO can be loosely compared to an overhead projector, in that it looks somewhat similar. However, instead of being

forced to print transparencies of exhibits or demonstratives, now one can place a paper exhibit on the table, and it can be zoomed and focused. Additionally, small exemplar items (*i.e.*, pen, gun, etc.) can be placed and displayed. The ELMO is actually a video camera system, and it will require a projector and screen for display. It does not simply beam a light onto the screen like an overhead projector.

PowerPoint has been used in numerous trials, and although it is certainly a great presentation tool, its strength is also its weakness. That is, PowerPoint is designed to present one slide after another, and in a predetermined order. It's great for business or sales presentations, but the problem in using it for trial is that rarely (if ever) does a trial go according to plans. A witness steers off in another direction, or perhaps timing becomes an issue. When this happens, it is not always easy to jump to a given slide which is not next in order.

Software (*e.g.*, Sanction II, TrialDirector, Visionary) has been specifically developed for organizing and presenting evidence to juries during trial. Many different types of media, including deposition and non-depo video, document exhibits, demonstrative graphics, and even animations may be quickly located and presented to the jury in a random fashion. Documents and graphics may be zoomed in to direct focus to a particular paragraph or sentence, while text is highlighted, arrows pointing, circles drawn, and the list goes on. All of this trains attention to exactly the desired point, preventing further examination of the document, while at the same time all 12 jurors see the same thing. One of the biggest problems encountered when passing paper copies to the jury is that by the time juror number 12 gets the exhibit, counsel is long past the topic. Another problem previously noted is that there is no control as to which part of an exhibit the juror is actually viewing.

Comparing trial presentation software applications is similar to comparing automobiles. One will have a preference for a Chevy, and have good reasons for it. Another will have just as strong a conviction in selecting a Ford. Both vehicles will get you there, but there are differences. The

trial databases will look similar, functionality is similar, and the end result is similar.

The point to be made for using trial presentation software is not so much to compare it with its direct competitors (although that should also be considered when purchasing), but rather to compare it with other applications which are non-specific. That is to say, when compared with general business presentation or graphics programs, now the comparison might be better represented as between a bicycle and an automobile. Yes, they will both get you there, but one has a decided advantage in that it is much faster, more efficient, and more effective at its primary task—be that daily transportation or trial presentation.

### Action Steps: How to Prepare

There are many ways to begin utilizing trial technology, from putting together a PowerPoint slideshow to completely digitizing all of your evidence. There are also options with respect to who will do what—from doing it all yourself to having a consultant handle everything for you, and anywhere in between.

For the tech-savvy attorney who is willing to do the work, court presentation software is certainly simple enough to use in preparing and presenting your trial. With minimal training, or just spending enough time working with the software, one can quickly master the basics. Although nobody knows the material like the attorney on a case, there will be tradeoffs with respect to the time required to build and maintain the database, along with the inherent risks of technology “issues” during trial. For those desiring to do it themselves, a line is often drawn with respect to the duration or monetary value of the matter.

In matters where the volume of work mandates someone devoted solely to the task of trial technology, a consultant or in-house staffer may be brought in to assist. This can free up the attorney's time to do things better-related to the actual trying of the case. A good trial technology consultant or experienced in-house support person can quickly take the lead in gathering the materials, setting up document naming conventions, converting every-

thing to digital format, developing the trial database, setting up the courtroom equipment, and assisting with evidence presentation during trial.

One may also wish to consider a “middle-of-the-road” approach, having much of the preparatory work done, perhaps getting some help through opening and closing, and a couple of key witnesses. On trial days in which less important witnesses are scheduled, or where there is less likelihood of needing to display the documents, the attorney may choose to run the show.

### Equipment Needs

Don't overlook the fact that you will need court presentation equipment to share your evidence with the jury. A typical setup will include a high-powered projector (minimum 3,000 lumens), large screen (7 or 8 feet), four flat-panel monitors (for previewing evidence—one for judge, witness, and each counsel table), ELMO, amplified speaker set (for deposition video), plus switches and cables to connect computers from each side.

Arrangements must be made with the court well before the trial, as there is likely not a judge in the land who will allow two full setups of this type. Consequently, you will need to approach opposing counsel regarding sharing equipment and rental expenses. One safe method of handling this without showing all of your cards is to suggest that you plan on showing a “little PowerPoint” during opening, and that you've been informed you will need this equipment to display to the jury, and have the ability to preview in order to address any objections. The response you get can often give a bit more insight than anticipated as to technology plans from the opposition. In the event opposing counsel will not cooperate or agree to share expenses, make sure to address this before the judge. This can prevent comments along the lines of who can afford to spend money where, and requests to display your evidence in front of the jury. If you are asked to display something, the best path might be to go ahead and cheerfully oblige, and then request a sidebar at the appropriate time.

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**Conclusion**

The rising wave of trial technology continues to roll at a rapid pace, and matters tried with technology are becoming commonplace. Insurers are demanding an equal footing, and it is probably only a matter of time until the first case of malpractice is filed for failing to utilize the readily available resources.

The use of technology to display evidence in trial does not necessarily replace the methods that have worked for years, but rather it should supplement them, and should be flexible enough to conform to trial skills which have been developed over the years. In the *King* matter previously mentioned, the 62-year-old Mr. Langley did not dramatically alter the way in which he tried his case. In fact, he

began his opening statement, continuing several minutes before he casually recalled that he had “some photos and things to show (the jury) about what I’ve been telling you.” His first two technology-enabled cases having netted defense verdicts, you can imagine he might just continue this course.

**FD**