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WINNING YOUR CASE THROUGH COURTROOM TECHNOLOGY

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Introduction

To be an effective advocate and litigator in the 21st century, lawyers must stay abreast of current technological offerings and developments. As the ownership of smartphones and tablets has proliferated over the past decade, the use of software, search engines, and other technology in the legal profession has become increasingly important, particularly in matters involving litigation and arbitration. Traditional presentation techniques, such as writing information on a whiteboard, handing out printed documents or photographs, or reading original testimony directly from a transcript, are viewed as antiquated by a tech-savvy generation of jurors, who have little patience for a counsel sifting through mountains of paper files. Since jurors are often visual learners, old-school methods that eschew graphics or visual aids can sometimes detract from a piece of evidence's significance. Conversely, jurors are much more responsive when evidence—be it an image or a few lines of text—pops up on a screen, with key information highlighted to make understanding the evidence's significance immediate and intuitive.

Keeping the decision-maker's attention is paramount. Via modern technology, lawyers have a growing arsenal of computer applications and programs at their disposal, enabling them to present their arguments in more engaging and dynamic ways than ever before. Many courtrooms are likewise evolving into electronic courtrooms (or "e-courtrooms"), incorporating an array of new technologies—such as hookups for laptops and display monitors—to facilitate innovative presentation techniques and approaches. However, given that the rate in adapting these advancements varies from state to state (and even from jurisdiction to jurisdiction), every lawyer would be wise to talk with the clerk and visit the courtroom in person to assess its technological capabilities before any court proceedings begin.

Lawyers thus have a substantial incentive—and, given recent ethical opinions and rules regarding competency, a professional obligation¹—to utilize technological advancements in their representation of clients and client interests. Like jurors, most clients will expect the presentation of evidence in the courtroom to be driven largely by electronic means. Even judges, who in the past resisted letting too much technology into the courtroom due to a fear of the unfamiliar, have started to recognize its many benefits. For example, electronic displays and exhibit projectors can allow the bench to quickly view an exhibit and consider its admissibility before having it presented for the jury’s viewing. Indeed, one of the major advantages offered by new technology is the time-saving factor: apps such as TrialPad greatly speed the process of organizing case materials, giving lawyers more time to focus on the substantive and strategic elements of a case. This technology-enabled speed is equally a boon to cost-conscious clients, who want to ensure the time spent on their representation is used as efficiently as possible.

Case Management Software

In anticipation of going to trial, a lawyer should pick a litigation database that is compatible with his or her trial technology. All exhibits and documents should be moved to an accessible database. Two of the most prominent databases are offered through legal research services: Case Notebook (Thompson Reuters) and CaseMap (LexisNexis), which both market themselves as programs to simplify and centralize evidence, legal research, and other relevant case information.

Looking at CaseMap, the user can compose a chronological list of key facts, link a transcript or exhibit to key facts for quick access, and print a key fact report broken down by

¹ For example, the Supreme Court of Illinois has adopted an amendment to Comment 8 of Rule 1.1, where, as part of the Duty of Competence, lawyers are required to stay informed of “the benefits and risks associated with relevant technology.” Over twenty states have joined Illinois in adopting this ethical duty of technological competence.

disputed and undisputed facts. The same holds true for composing and organizing general witness, exhibit, or issue lists: the user can make a “potential witness” list, mark documents by issue, and print an “issue report.” The Smart Assist function allows for keyword searches, with search results displayed in terms of relevancy; it also can generate PDF reports based on which spreadsheets are open, and can make both text and images searchable through optical character recognition (“OCR”) technology. In addition, CaseMap works in tandem with other LexisNexis software programs—namely, TextMap, TimeMap, and Sanction. For example, the user can create timeline graphing by sending key passages and depositions to TimeMap, and can send documents (as well as transcripts and video annotations from TextMap) to Sanction to be used in presentations.

Given the importance of coming up with compelling and intelligible graphics, litigators should look into software programs to produce videotaped deposition testimony. Per the Federal Rules of Civil Procedure (FRCP 45(a)(1)(B) and 30 (b)(3)(A)), a subpoena should include language stating an intent to videotape the deposition. The litigator should also make sure to follow either local rules or a trial order to notify opposing counsel of the clips intended to be used at trial, and to allow time for objections. Note, too, that the court may have additional rules and limitations regarding whether the video deposition is admissible and how it may be used (see, e.g., video depositions of expert witnesses and treating physicians, where notice of the deposition must specify that it was to be taken for use at trial).

TextMap, as well as TrialDirector 6 (starting at \$795; available for PC and as an iPad app), can be used to create a list of video clips for use as trial. Before transferring the clips into a software program such as TrialDirector, the lawyer should convert the video files into an .mpeg format either with video converter software (TMPGEnc) or through a third-party vendor. TrialDirector, as well as Sanction and Time Coder Pro, can also print condensed transcripts with

a word index, display video depositions alongside relevant exhibits, and synchronize the video deposition with the transcript text (i.e., have the text operate as subtitles for the video). Users can even upload an exhibit or other evidence in the courtroom at the last minute from a USB flash drive, external hard drive, or any media storage device.

Trial Presentation Software

Courts across the country have started to adopt paperless electronic filing (or “e-filing”) programs, which expedite the filing process and greatly improve access to court cases and documents. Indeed, more and more legal proceedings start entirely online, with the e-filing of pleadings, briefs, and motions helping litigators avoid administrative and postage fees—as well as potential mistakes and delays in the delivery process—associated with physical documents. There are several online providers of case management services; for example, with Case Anywhere, users can serve case documents through a secure, encrypted Internet connection. Electronic discovery (or “e-discovery”) services also have emerged: for example, Case Logistix automatically organizes and prioritizes documents into its IntelliFolder structure, using analytics to identify near duplicates, examine email threads from start to finish, and group both “paper” documents and electronically stored information (“ESI”) by shared concept. Another software program, Nextpoint, is a cloud-based e-discovery platform that specializes in ESI storage and management.

If a case has a large number of documents and video clips, a laptop software program could be the best bet to organize them in terms of both cost and convenience. Conversely, if the case has a smaller number of documents and clips, an iPad program can be just as effective, especially in situations where the client has a small budget or some other limitation. Regardless of the scenario, there are several programs on the market to help litigators present their cases at trial. Besides TrialDirector, one of the most popular is TrialPad (\$129.99), an app that allows the user

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to store and access case documents from an iPad. It includes presentation tools that “call out” sections of documents, highlight text, create side-by-side document comparisons and juxtapositions, edit and show video clips, and search document text. TrialPad also can be used as a virtual whiteboard, where the user can add annotations on a blank canvas.

First, the Callout function allows the user to select and magnify a portion of a document page so that an audience can see it more clearly. It works well with the Apple Pencil, which is much more precise than simply using a finger to select and highlight document text. Next, the Key Docs function lets the user prepare and save annotations beforehand in a Preview Window, as well as make annotations on the fly. By tapping the button at the top right of the screen, the user can add either that individual document page or the entire document to the Key Docs list. The user can preview any changes made to a document before displaying it to a jury or audience. TrialPad has some special tools for working with exhibits as well, such as the ability to apply exhibit stickers to a document or group of documents, making it easier to keep track of which exhibits have been admitted into evidence. Finally, the Snapshot function allows the user to create PDF files of an annotated document or Callout: tap the camera icon at the top right to create a PDF image of whatever is visible in the Preview Area.

With respect to strategy, the litigator should outline direct and cross exams and prepare witnesses and graphics beforehand. TrialDirector, TrialPad, and even PowerPoint can be used to prepare concise, image-heavy opening and closing statements. Displaying jury instructions and/or the verdict form to emphasize certain words may help convince the jury that the other side failed to carry its burden of persuasion. Relatedly, the litigator might consider taking digital photos of witnesses as they are sworn in and incorporate them into the closing statement, to serve as a “refresher” for the jurors at trial’s end. He or she should provide opposing counsel—and, if in

arbitration, the arbitrator—with a flash drive containing exhibits, including all potential exhibits. As mentioned above, important facts should be highlighted and annotated; where confidentiality or privilege is implicated, exhibits can also be altered or censored (e.g., pixelated images and redacted documents). If the presentation’s pacing is an issue, “hot key” shortcuts can be employed to quickly call up specific exhibits. However, the inclusion of flashier features, such as a rolling transcript, should be weighed against the risk of distracting the jurors. Having too many visual cues on screen could backfire and lead to sensory overload, where jurors are unable to fully process the information being presented and thus begin to tune out. Ultimately, jurors prefer simplicity and clarity over intricately choreographed “dog and pony show” presentations.

Trial Equipment

On top of the aforementioned software programs, a shrewd litigation attorney should learn how to use the technology in the courtroom and prepare contingency plans in case the technology fails to work or breaks down. It is essential to project an aura of confidence and self-assuredness in front of the jurors and judge. Things rarely go off without a hitch—especially when technology is involved—so having a Plan B is a must (e.g., having backups of the presentation on external hard drives, a separate iPad program, or the Cloud; having at least two hard copies of key documents, such as deposition transcripts). Preparing for potential technological failings ahead of time can help the litigator deal with any adversity that might arise during trial. Since practice makes perfect, the prepared lawyer will avoid wasting the court’s time with easily foreseen miscues, such as mixing up exhibit slides or playing the wrong deposition clip. Also, when working with a third person who is running the software, the lawyer should practice with them; both parties have to be on the same page for the presentation to run smoothly and succeed.

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When assembling an Evidence Presentation System (“EPS”) prior to the start of a court proceeding, the lawyer should first find out what the courthouse has available (e.g., document camera, VCR or DVD player, computer and/or monitors), how “wired” the court is, and how the court’s audiovisual system works. Many federal courts have guidance on their websites to help lawyers understand how these systems are used.² The lawyer should not be afraid to talk with the clerk (or judge) about what is and is not allowed. If certain technology is required but unavailable, the lawyer should ask the clerk about bringing the technology into the courtroom with him or her. The lawyer should also plan to address technological needs during the Pre-Trial Conference.

Just as important, the lawyer should keep a standard equipment checklist, detailing not just the devices and tools to bring into trial (laptop, tablet, USB external hard drive, projector, speakers, portable printer, extension cords, HDMI cable, etc.) but also who will set up and operate the devices during trial. Many trial teams have a designated member, usually a paralegal or hired vendor, whose job it is to run the program, though this can add to the cost of an already expensive product. On the other hand, TrialDirector and TrialPad are comparatively inexpensive and easy to use; the litigator can upload exhibits from Dropbox or iTunes and use an adapter to plug his or her iPad directly into a courtroom’s video input. Thus, relying solely on these programs may be preferable in cases where there are a smaller number of exhibits and deposition videos.

² A detailed description for the system used in the U.S. District Court of the Southern District of Indiana can be found at <http://www.insd.uscourts.gov/courtroom-technology>. In this example, attorneys interested in using the system must contact the judge's Courtroom Deputy at least two weeks in advance of a scheduled court proceeding.