

COURTROOM 2000

MASTERING THE MEDIUM OF THE MILLENNIUM

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INTRODUCTION

As we balance on the cusp on the new millennium, it's an appropriate time to consider that the Year 2000 has many positive offerings for lawyers in the courtroom, none of which are concerned with computer glitches, financial crises or disastrous insurance disputes. In the Courtroom 2000, the progressive and successful trial lawyer will partner with technology to reach an ever-changing and modern audience to secure victory for the client.

WHY USE TECHNOLOGY IN THE COURTROOM?

1. THIS JOB IS TOUGH ENOUGH.

Technology in the courtroom is merely a logical extension of the modern techno-based law firm. The size and scope of today's complex litigation has fostered an ever - expanding demand for efficient document and file handling strategies and devices. Whether a case deals with toxic torts, mass-torts, product liability, large subrogation losses, antitrust litigation, class actions, civil conspiracy or some other tort-du-jour, the sheer volume of documentation and the logistics of dealing with the file in an efficient and meaningful way, is more and more making life without technology a practical impossibility for trial lawyers, and the defense community in general. While document files that fill entire rooms in your law firm may be acceptable, once the trial arrives very few courtrooms or court buildings have the ability to accommodate the volume of records or the ability to give the trial lawyer ready access to the documents when needed. The only conceivable way to deal with these "paper monsters" is through electronic technology.

Fortunately, techno-geeks have responded to the challenge, creating organizational databases and programming designed for the over-burdened trial lawyer. Now, every document or exhibit can be stored electronically on a disk or CD-ROM, with a bar code peculiar to each labeled document or exhibit. The bar code is linked to the exhibit or document's image and can be retrieved at will by simply scanning the bar code in a manner similar to that employed at retail store registers. Employment of this technology requires an early determination of its necessity since the burden of having to scan voluminous documents during trial preparation can be time consuming and costly. It is a much superior practice to scan the documents into your system as they are obtained. Also, in that way, the documents are readily available to you throughout discovery. Several companies have developed trial display packages that provide easy access to documents and toys for pointing out important details. For example,

Trial Director by InData, Corp., includes a document director that allows for document management and retrieval, as well as at will annotation and highlighting and a trial director that allows for split and quarter screen demonstrations with independent control of the screens and a tool bar for additional on-screen highlighting. The cost is around \$900 for a single user license. There is also a deposition director that uses video that has been downloaded onto CD ROM for video display at an additional \$500 charge. Trial-Link by InVzn is a similar product, as is Trial Pro by IDEA, Inc., which costs around \$800 with more basic features. Some of these programs are able to integrate with LiveNote, which provides Full Text search capability for about \$600 and RealTime for about \$300.

2. **THIS IS NOT YOUR FATHER’S OLDSMOBILE!**

More and more, your audience expects technology-based presentations. Most practicing trial lawyers have developed their careers on a deep understanding of the psyche of the post-WWII and Baby-Boomer jurors who have dominated venues for the last several decades. However, one-third of jury venues that tends to be between the ages of 20 and 35 no longer falls within either of those demographic subsets. Now, effective “jury selection” calls for consideration of the cultural profiles of Generation – X(ers), Next(ers)and Tech(ees)...and what about Generation -Y?

For this section of society, everything moves at a dynamic pace. They have grown up with MTV, computers, video games, microwaves and now the Internet. They not only appreciate, but expect (and in some cases demand) a pace of presentation that can only be accomplished through computer-based technology. The natural fear of the unknown and alien computer menace experienced by many Baby Boomers has no role in the culture of Generations- X and Y. To them, technology is a natural reality of the world in which they live.

3. **SHOULD WE CATER TO GENERATION X-ERS?**

It is fairly well-accepted that the Baby-boomer generation (as a cultural/sociological group) brings with it a liberal bent based on a desire to correct wrongs, aid the down-trodden and a belief in government responsibility for the underprivileged. This has translated into a generosity in the courtroom the likes of which was never before experienced.

Studies have shown, however, that Gen-Xers are, by and large, conservative, firmly opinionated, fiscally prudent and willing to speak their respective minds about positions they hold. They, unlike their Baby Booming predecessors, are not “out to save the world” or driven by a

perceived divine mission to remediate the sins of others. Cheung, *Baby-Boomers, Generation X and Social Cycles* (Longwave Press 1994); *What makes Juries Listen Today*, Sonya Hamlin, Glassware Legal Works (1998 ed.); *Beyond Generation X* (Crisp Publications 1997). These beliefs set them apart from other prospective jurors and are likely to translate into a more favorable defense dynamic.

4. **THE MEDIUM IS THE MESSAGE [sic]...Marshall McLuhan.**

“[Communication is] the process by which an individual (the communicator) transmits stimuli (usually verbal) to modify the behavior of other individuals (the audience). Hovland, C.I., Janis, I.L., and Kelly, H.H. *Communication and Persuasion*. New Haven: Yale University Press, 1953, p.12.

Studies of human behavior tell us that the medium that is employed to impart a message to an audience can amplify, clarify and (if precautions are not taken), itself become the message. Recall the age-old teaching of litigation masters that “If it’s worth saying once, it’s worth saying three times.” This teaching was based on the truism that jurors never get it the first time. They hear it, but they aren’t listening. The second time, they start to listen. The third time, they process and understand. Unfortunately, this tactic can have three potentially adverse impacts on the trial lawyer: (1) jurors are bored by repetition, (2) jurors perceive the redundancy as a reflection of the lawyer’s lack of anything else to say, or (3) jurors will think that the lawyer thinks they are too stupid to get it the first two times. Any of these perceptions could detract from the defense presentation. Technology offers a solution to this Hobson’s choice. If “a picture is worth a thousand words”, computer-enhanced presentations should increase juror receptivity geometrically. It is now basically a truism that jurors only retain 15% of what they hear alone and retain 80-90% of what they hear and see.

Professor McLuhan and others have taught that while a visually-based medium out of control can become the message, short of that, it can “massage the message” into the brain of the intended listener. Effectively, this process lessens the need for repetition of the message because the hearing, listening and processing phases of communication are melded into one dynamic process that not only adds speed to the presentation, but enhances the listener’s comprehension. Indeed, researchers and thinkers from DesCartes to Pavlov have recognized that communication based on sight (an intermediate cortical function) is easier to process than communication based on verbal stimuli (a higher cortical function).

Given that jury consultants constantly remind us that the outcome of any trial is usually determined in the first ten minutes of the opening remarks,

can any of us afford to let that ten minutes pass without effectively getting our points across?

Additionally, electronic presentations, by enhancing ease of document and other exhibit access in complex trials, by their very natures speed up the trial... a factor that is appreciated by jury and judge alike. The 1998 Judicial Conference Committee on Automation and Technology's (Federal Courts) survey regarding video evidence presentations concluded that 83% of judges felt that such presentations helped them manage proceedings better and 90% of jurors approved of these presentations based upon clarity of evidence and being able to follow the presentation being made.

Keep in mind that the technology is no substitute for the cleverness of the trial lawyer. The exhibit or presentation is still only as good as the soundness of the defense theory that it purports to express. Technology is there as an enhancement tool, not as an endgame

WHAT'S IN SANTA'S SACK?

While most trial lawyers consider themselves progressive and modern, many defense attorneys are finding themselves behind the learning curve in the office, home and courtroom technology arenas. Is this result the product of inertia, a natural repulsion for all things new and different, a busy practice with a perception of "no time to learn", or just a melancholy reverence for tradition? Whatever the reason, on the eve of the new millennium, trial law has become a marketplace where the johnny - come - lately technophobe can find him or herself quickly eaten alive by the speed and volume capabilities of an opponent's technological armamentum. Plaintiff's lawyers with small shops have quickly realized that they can compete with large defense firms traditionally built on armies of manpower by employing computer technology to either even the playing field or control it by catching the sleeping giants unprepared to match the plaintiff's technology.

Fortunately, many technological "toys" exist that can be employed in each of these venues with only a modest amount of training and, in most instances, expense.

1. **FOR THE OFFICE** – Document handling, E-mail and networking technology.

The "old-fashioned" way of handling documents was to drop them into file cabinets. The technologically efficient methods involve document scanning, bibliographic coding, and CD-ROM burning. A document production involving 5,000 pages could cost at least \$250 if one copy is made for opposing counsel. Scanning the

documents on the commonly available office copier with built in scanning, then saved on CD-ROM, costs about \$50.

The documents on CD-ROM can be emailed to clients, experts and others in need of the materials, at the cost of a local telephone call. In contrast, 5,000 pages of documents stored the old-fashioned way must be shipped via costly overnight mail services.

A scanned document can be projected on a screen at trial with a few clicks of a mouse. The enlargement of a document on to foam board and displayed to a jury at one-quarter the size of the projected image, can cost anywhere from \$30 - \$120, depending on the jurisdiction and the urgency with which the enlargement is needed.

With a technologically-modern office, documents can be revised and transmitted via the Internet. This avoids the restrictions imposed by overnight delivery times and limited service areas, along with the exorbitant cost. Emailed documents avoid hotel fax charges and delays associated with obtaining the fax. The use of toll-free access numbers to the office further eliminates the costly hotel surcharges on telephone calls.

Substantial savings can be realized by automating some key activities in the office. The added benefit is the flexibility it yields to the lawyer to work anywhere outside the office at a reduced cost.

2. FOR THE HOME – EXTENSION OF THE OFFICE

It has been a long held dream of many trial lawyers to be able to spend more time in their homes and still compete in an increasingly aggressive and demanding profession. Until very recently, this has been a pipe dream since effective representation means being constantly linked to communication and network centers providing access to the “guts” of your caseload. This technology has been relatively slow in coming. It has now arrived. Remote network access is now a practical reality. (See for example, 3Com’s Super Stack II Remote Access System 1500 (1999)) From your home, via telephone lines, your laptop can access your otherwise fully integrated office network and the Internet. What you previously could do only in the office, can now be done at home, on the road, or in other attorney offices. All you need is a telephone line and an electric outlet. To be truly effective, however, your home needs to have telephone lines dedicated to this remote access set-up since a spouse or children on

the telephone would preclude your use of this link to your files. A separate dedicated telephone line for Internet access is significantly more efficient and cost effective, and contributes to domestic tranquility, that trying to schedule telephone calls around computer time in the home. The cost of an additional telephone line with the bare minimum service features more than pays for itself when you consider the cost-savings from not having to drive to the office on weekends to do the work that now can be done at home.

3. **FOR THE COURTROOM – TOYS AND TECHNIQUES**

While we tend to think of the Courtroom 2000 as a futuristic enterprise, it already exists, in one form or another, in several venues throughout the United States. Examples of the Courtrooms we can expect for the future can be found in The University of Arizona Courtroom of the Future Project; Courtroom 21 (A Joint Project of the William & Mary School of Law and the National Center for State Courts); the Phoenix District Court Computer - Integrated Courtroom; Court 4 New Hampshire Federal Court, the courtrooms of several United States District Court Judges including Judge Donald Walter of Shreveport, La., James M. Rosenbaum of Minneapolis and Judge William Mauer of Kansas City, Mo., as well as the courtroom of Judge Thomas Hogan in the District of Columbia where the Microsoft Anti -Trust Litigation has been ongoing.

A. PHYSICAL PLANT

Many currently used courtrooms are not set up to accommodate the electrical requirements of courtroom technology. Thus, lawyers seeking to employ electronic demonstrations need to carefully plan courtroom proxemics well before a trial is scheduled to begin and obtain approval from the court to make any modifications that will be necessary. Many courts are now setting aside special courtrooms to accommodate large-scale trials. Until this is a universal practice, lawyers will find themselves tripping over the occasional power cord on the way to the witness stand.

In several of the futuristic courtrooms referred to above, the designers have placed “false-flooring” to hide all wiring, data links and peripheral hook-ups and have added 360 degree rotating podiums which serve as command centers for questioning. The podiums are equipped with ports for the attorney to plug in the laptop of choice.

B. TECHNOLOGY

The computer- integrated courtroom offers both the hardware and the software to display electronic opening statements, evidence presentation and closing arguments. While there is no “blueprint” for the ideal courtroom, several items are likely to be standard fare in the Courtroom 2000. Many of these are provided at a per day charge of \$300 to \$400 as standard equipment in courtrooms like the Phoenix CIC. This may be the wave of the future. Basic slideshow presentation software can be obtained from various manufacturers including Corel (around \$450), Microsoft (around \$350) and SlimShow.

- **Realtime Court Reporting** – which allows counsel and the court to have access to a witness’ testimony, displayed on a monitor, for instant use as a reference or cross-examination tool.
- **Trial Presentation system** – including: Monitors (like TVs) for evidence display (provided for the judge, counsel, the witnesses and the jury in varying numbers depending on the needs of the case); Pentium computer with CD ROM (for accessing Power Point-type slides or documents scanned onto disks); a television camera-like visual demonstrator (like Elmo or DOAR or the Electohome Marquee used in Judge Ito’s courtroom, which allows for the display of solid objects or hard copy exhibits, transparencies, and can invert black and white for X-Rays); VCR (for viewing depositions, scene videos or animations) and; an SVGA or equivalent switch (which allows the controller – be it the bailiff, the Judge or counsel’s assistants – to turn on and off the monitors serving the jury until rulings on admissibility and publishability have been made).
- **Document Handling** - A bar code reader at the podium to call up any desired exhibit or document and a mouse pen (at the podium or witness stand) to highlight or annotate the exhibit as it is being used by a witness. [Note: Any image of an exhibit that has been changed or altered by mouse pen or other form of highlight or annotation needs to be saved to the hard drive for preservation of the court record.]

Many kinds of technology currently exist that have not been widely used in jury trials but are available in courtroom projects like those listed above, including Computer Whiteboard (which is a board that can be written on with markers and the writing appears

on the computer screen where it can be copied and saved), like the Microfield Graphics SoftBoard. For a comprehensive list of what is available and other links to sources of information, check out Litigation Support Systems: An Attorney's Guide, by James Keane, www.cbcllegal.com/catalog/lit./lss.html.

BEYOND THE COURTROOM 2000 –“VIRTUAL TRIALS”

The ultimate extension of courtroom technology would be the development of “virtual trials” where everyone participating is linked by sophisticated electronics. Theoretically, there would be no need for “a courtroom” at all since all documents and exhibits would be electronically filed and stored on disc and the parties and witnesses would appear and prosecute or defend through videoconferencing.

Whether this will come to pass anytime soon is the subject of considerable speculation. It certainly would take a lot of the fun out of trying a case. It is, however, significant to note that while satellite based videoconferencing provides excellent video and audio, it remains cost prohibitive as an method for conducting a “virtual trial”. However, ISDN which is a non-satellite based, high capacity data line (sometimes called “dial-up” videoconferencing), is coming into greater vogue for various courtroom purposes. Even though it suffers from short audio delays which interfere with cross-examination tactics by prohibiting immediate witness interruption, it can be cost efficient at about \$40/hour in telecommunications charges (not including hardware and any associated costs) and has been used in 34 U.S. District Courts in multiple locations throughout the country for mini-hearings (like prisoner’s rights trials) and by several U.S. Circuit Courts of Appeal (Second, Tenth and the District of Columbia) for oral arguments. It is perhaps not that great of a leap to envision it being employed first for remote testimony and later expanding to entire trials. [Note that in 1996 Federal Rule of Civil Procedure 43 (b) was modified to give judges discretion to allow evidence by a remote access.] Video appeal records are currently a rarity in the United States with very few states routinely allowing it.

THE INTERNET IS YOUR FRIEND.

1. LEGAL RESEARCH

There are many resources on the Internet that can be used to find legal information, as well as evidence or trial exhibits, to be used in the courtroom. Lori’s Links (www.thefederation.org) provides

helpful research avenues to the practitioner interested in online research. Internet newsletter Legal.online (<http://www.legalonline.com>) provides exhaustive listings of state by state web sites for regulations, laws, administrative and other code listings. Cornell (www.law.cornell.edu) provides links to many legal resources. Findlaw (www.findlaw.com); and LawInfo (www.lawinfo.com), are among the best search engines for legal information on the Internet. The benefit of using these resources is that they can be accessed any time, anywhere through an ordinary telephone line, if you have acquired the technology necessary to use these resources: a laptop computer.

2. **DOWNLOADING EXHIBITS AND IN-COURT DEMONSTRATIVE EXHIBITS**

There are alternatives to paying a graphic artist hundreds, if not thousands, of dollars to custom design visual exhibits for courtroom use. While consideration needs to be given to copyright concerns, the Internet can be a very useful source for demonstrative exhibits ranging from medical and anatomical concerns to engineering. This does not eliminate the need to use other non-electric forms of display since you may want some exhibits to be displayed for long periods throughout the trial. This would require a more traditional poster or other display.

With just a few clicks of a mouse, exhibits can be created from photographs, text, charts, illustrations (practically anything) found on the Web.

- Search the Web for an appropriate exhibit (Note: you may want to save any productive sites in your FAVORITES folder for ease of future access).
- Place the cursor on the photo, illustration or text,
- Right click on the mouse.
- Choose “Save picture as...” or “Save text as...”.
- Pick a file to save the item to or create a new file (ex: “clip art”).
- Once the folder has been identified, click “OK”.
- Now that you have saved the material, you can make an exhibit out of it at any time.

- To make an exhibit, use a presentation software (like Microsoft's Power Point, Corel's Presentations or Freelance Graphics) to create a slide.
- Once the slide is created, click on the insert button on your toolbar, scroll down to "choose picture" or "choose movie", click on the sub-box entitled "from file", and click on the item you want to insert. The item will appear on the slide. It can be modified by cropping or changing colors as you deem necessary.

CONCLUSION –

The **Courtroom 2000** is already with us. Acceptance of that will take some time and the willingness of trial lawyers to experiment with its effectiveness in creative ways. Taking risks will be necessary. In order to keep up with Moore's Law (that the process speed of computers will double every 18 months) lawyers will need to be on their toes. Technology cannot serve as a substitute for good and creative lawyering, but it can help to emphasize important aspects of a case and streamline an otherwise unmanageable litigation. It behooves every trial lawyer to get online with technology, for economic reasons, for trial management, for client service, and for ease of management of one's personal workload.

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