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TECHNOLOGY AND INNOVATIVE TRIAL EXHIBITS

I. Introduction

We currently live in a visually oriented world. People receive most of their information about the world around them through television or the computer. Product liability cases often times involve complex issues of engineering along with numerous technical witnesses. This can be taxing on the juror. As the plaintiff's trial attorney, our job is to provide the juror with the information in a way that they can process. Using trial presentation software in your product liability trial can help to bring that vision into the courtroom.

Jurors are a cross section of the local environment in the area of the trial. They are the very viewers that television and the internet intrigues and educates on a daily basis. Now, with vehicles such as trial presentation software, we as lawyers can better educate and intrigue them in the courtroom. We were previously limited to the story we told the jury and, although we must never forget to tell the story, we have additional tools. Perhaps the greatest danger associated with using trial presentation software or PowerPoint is emphasis it removes from our oral advocacy. We can't let that happen, but technology can supplement those oral advocacy skills.

Now, using the senses of sound and sight together in a viewer friendly format we can convey more of our message than before. Our firm has found courtroom technology to be so important that we have a full time Graphics Department. Our in house graphics department serves many functions, ranging from layouts for company brochures to providing technical support for case presentation during mediations and trials. But the most important function of that department is putting together the case graphics for mediation and trial.

They use several programs to create and present courtroom presentations for our Firm. For each case, the Graphics Department creates the presentation and is usually responsible for its trial or mediation presentation. With technology we are able to present everything from pages of a deposition to audio/video depositions in court. The impact of a television like form of media is much greater on a juror than just a bland paper presentation. We have found that the average juror remembers far more of your case when you use litigation presentation technology.

II. The Art of Persuasion

No doubt, great trial lawyers are remembered most fondly by their closing arguments. The closing argument is the trial lawyer's single opportunity for pure oratory in the trial process. By the time trial counsel rises to deliver his closing arguments, there is no longer an issue of a "burden of proof." Instead, the concern is now focused on the "burden of persuasion." However, it is a rare case that can be salvaged through even the most eloquent of closing arguments if the foundation or building blocks of persuasion have not been firmly established throughout the preceding

stages of trial.

At best the closing argument confirms jurors' general impressions and conclusions to which they are already predisposed by the evidence. It provides a logic within which facts can be organized and reasoned and rationales that jurors can rely on to support their opinions and defend them during deliberations. Ideally, it is the goal of every trial lawyer to fashion a closing argument that turns skeptics into committed advocates. But, in the final resolve, it will be the facts of the case and not the fashion of counsel which will be of paramount persuasion.

William L. Mock, Closing Argument: A Checklist for the Experienced Trial Lawyer, Trial Advocacy College: Essentials of Civil Litigation, October 1996.

In order to persuade, there must be evidence that shows that a wrong has been committed that has harmed your client. The jury must understand and comprehend the evidence. The jury must also perceive a need to acknowledge and act upon that evidence. The old adage, "hit them where they live," is a good adage to follow. It means to appeal to what your jury already uses and finds meaningful. To put it another way, it is much more effective to work with the thoughts, beliefs, attitudes, and values already in the jury's heads than to try to implant new ones. Persuasion has two basic elements:

- (1) evidence to support your position; and
- (2) your position must appeal to the needs and values of the audience/jury.

Researchers at Yale identified five steps that persuasion can be broken down into:

- (1) securing attention;
- (2) comprehension;
- (3) acceptance;
- (4) retention; and,
- (5) action.

If you do not have the audience's attention, if they do not understand your message, and if they do not accept it, remember it, and act on it in the desired fashion (i.e., if they do not reach the desired verdict) you have not succeeded. It is in these areas that technology can be and is extremely effective with a jury.

III. The Tools of Persuasion: The Use of Courtroom Technology

The challenge for a litigator in today's high tech world is to avoid boring the jury while continuing to clarify and promote the major themes of his or her case. We live in an age of images and electronic media. People are constantly bombarded with information. Individuals simply cannot process every bit of this information overload. As a result, we no longer read newspapers or magazines for in depth information and discussion, but instead we settle for 30-second sound bites or glossy talk television. Visual minded computer literate individuals are filling the chairs of juries. This TV generation jury doesn't want attorneys taking hours and days making and proving their points. The jury wants the attorney to get to the point while using a medium it feels comfortable with, i.e., the TV screen and computers.

In the world outside the courtroom, jurors' ideas are being guided by television shows. I recently heard about an article discussing something known as the "CSI Effect." CSI: Crime Scene Investigation is a popular television show on CBS. The basis premise of the show is that forensic scientists use sophisticated technology to find physical evidence and then use even more high tech equipment to link the physical evidence to the

person who committed the crime. The article recounted a criminal trial in which a defendant was acquitted. Apparently, one of the jurors noted that there was no physical evidence linking the defendant to the crime, although there was apparently other compelling evidence presented. The author opined that since jurors believe that they know what sophisticated technology exists to find physical evidence, they now expect to see this type of evidence in every case. If there is a lack of physical evidence, it creates reasonable doubt. He called this the “CSI Effect.” Jurors work with computers and graphics on a daily basis at their homes and jobs. They watch television shows that glorify advanced technology in the legal settings. Thus, when they enter the courtroom, jurors expect and require graphic and visually stimulating presentations that are fast, efficient, and powerful.

IV. The Benefits and Advantages of Using Technology

1. Attention and Retention

Because of the technology-driven society that we live in today, pure oral presentations will have a more difficult time maintaining jurors’ attention. Remember, these jurors are bombarded every day with flashy advertisements and graphic animations on television. Simply talking no longer holds an individual’s attention. In fact, studies show that jurors focus primarily on the visual evidence used during trial. Demonstrative evidence that invokes visual attention is an invaluable tool in helping the jury comprehend difficult concepts and complex facts.

Not only does graphics and technology grab jurors’ attention and

maintain it, the use of technology has the added advantage of helping jurors retain what they hear and see for a longer period of time. Post-trial interviews with jurors confirm what studies have long shown: visually delivered information is 650 times more effective than just oral argument. The powerful impact of computer graphics and animations on juries is certain. Visual materials can often successfully convey ideas and facts in a far more comprehensible and persuasive fashion than mere oral testimony. “A wise lawyer is always mindful of the fact that although jurors only retain 15% of what they hear alone, they retain 85% of what they both hear and see.”

2. Simplifies and Organizes

The use of technology and graphics can be especially helpful when you have a very complex trial, such as a product liability case. For example, your average juror is not going to know the ins and outs of how a vehicle is supposed to crash in an accident. In order to convince a juror that the vehicle is not crashworthy and, thus, defective, you must first educate them on how the system should work. Obviously, the technical details could get boring and tedious. Visual exhibits and animations are effective in simplifying complex issues and help juries comprehend difficult concepts and complex facts. Plus, technology livens up a potentially boring subject matter. Jurors now expect the lawyers to entertain and inform as well as television does.

Further, because you are taking something complex and attempting

to simplify it, visual aids and technology assist you in organizing your case. You are forced to think through how best to use diagrams, charts, illustrations, and animations for a more effective presentation. It forces you to concentrate on the big picture and helps focus your litigation team on how best to present your themes in an easy to understand fashion. However, technological tools are just that -- tools to implement a trial strategy. They are not the trial strategy itself. It is only after the trial strategy is developed, should an attorney ask what is the best way to implement the trial strategy through the use of technology. Some of the following questions may be asked:

- 1) Is this a document-intensive case?
- 2) What photographs, drawings, or videos are already available that could help jurors understand the case?
- 3) What critical points will we need to convince the jury of in opening, case in chief, and closing argument?
- 4) What visual support will each of our witnesses need for their testimony to be effective?

Once these questions have been answered, a separate visual strategy can be designed to best support the trial's themes. Lawyers should always be careful to remember that it is the message, not the median, that wins at trial.

3. Technology Builds Confidence

Seeing technology-based visual presentations demonstrates commitment, organization and strength. Your client will gain confidence because he/she will see visual proof of the case. Jurors will see a confident

attorney. This type of presentation sends a clear signal to both the jury and the opposing counsel that you believe your case is strong and will be won.

V. The Effective Use of Technology During Opening Statement

The opening statement is the first chance you have to impress upon the jury the issues in your case, the face of your client, or the wrongs that have been committed. Using presentation software to visually interact with the jury during opening statements can make a far greater impact than simply stating your case. An effective opening statement can and will persuade the jury. In fact, every effort should be made to persuade the jury during that portion of the trial. There is nothing wrong with this, which can occur within the bounds of ethics and the particular fact situation involved.

Never assume that a juror will keep an open mind about your case during the entire course of the trial. The importance of the first impression cannot be overstated. Your window of opportunity to persuade jurors is shorter than you think. The first thoughts someone has about a subject usually constitute what they believe.¹ Studies have shown that 80 percent of jurors make up their mind during opening statement. Said another way, one jury consultant once informed me that 85-90% of jurors do not change their decision between the end of opening statements and the conclusion of the trial.

¹ It is a whole other topic of discussion whether someone has preconceived notions about a subject before hearing your side of the case. It is the opinion of this author, after personal experience and hearing discussion on the topic, that many jurors' preconceived notions cannot be overcome by facts and argument in the short period of a trial. It is therefore, many times, necessary to adopt those notions and incorporate them in to your case where possible. This discussion assumes a blank slate on the opinions of your jurors.

That is not to say that jurors realize that their minds are made up, but rather that they have made crucial decisions about credibility and positions that determine how they interpret the forthcoming evidence and ultimately how they make verdict decisions. Therefore, the time provided for opening statement should not be wasted. Start strong. Your purpose should be to persuade and gain credibility from the beginning.

I have found that the best way to do this is through the use of trial presentation software. With the goal of gaining credibility and persuading the jury, what better than showing the evidence in visual form while you are discussing it to the jury. Point to the document that you are discussing with blown up and highlighted portions for the jurors ease of viewing. Show them the photographs that illustrate the point you are making. If you have an animation, play it while you discuss how the wreck occurred or how the particular component failed. Likewise, playing the opponents video depositions in clips can be very powerful evidence.

You are allowed to discuss during opening statement what evidence you expect the jury will be shown. Show it to them now. This is the time they are most impressionable. Pay particular attention to the order in which you present this evidence. It should flow just the same as an opening statement without technology. In fact, one shouldn't adjust the oral side of their opening statement much with or without the presentation.

There are two reasons for this in my opinion. First, it is boring to go through a PowerPoint slide by slide. Jurors expect visual evidence these days, but they haven't forgotten the old Perry Mason shows. They equally expect strong oral

advocacy. Second and equally important reason, the computer might break. Be prepared to go forward without the presentation. I assure you the judge or the jury isn't interested in waiting on you to repair or replace your computer while the jury waits.

VI. The Effective Use of Graphics and Technology in Closing Argument

The beauty of graphics and technology is that it can be tailored to your facts and it can be changed frequently as the case develops and more information is discovered. This makes technology ideal for closing argument. It is highly persuasive at highlighting your points and discrediting theirs. What is more persuasive than a video clip of an opponent admitting a key fact or a doctor establishing liability? Here are some simple recommendations when using technology, especially when used in closing arguments:

- (1) Effective closing arguments continues to personify the art of oral advocacy;
- (2) The use of technology in presentation graphics must be cautiously used;
- (3) Selectively incorporate and weave your technology presentation into your closing argument;
- (4) The basic rule is, less is more;
- (5) Keep it simple;
- (6) Technology should enhance the persuasiveness of the closing argument and not become its focus;
- (7) Do not speak to the presentation/screen; only speak to the jury;
- (8) Your presentation graphics should be consistent with your trial theme; and,
- (9) Only use technology/presentation graphics if you believe it will

assist the jury in deciding in favor of your client.

VII. Conclusion

We live in a technological age, and the technology of everyday life is affecting the legal profession. A tour of any new federal courthouse demonstrates that it would actually be difficult to try a case without using the technology available. Lawyers simply can no longer avoid the use of graphics and technology. Juries and judges expect it. Technology is flexible and can be cost efficient. There can be no doubt that, when used properly, the use of technology or visual graphics is an effective and an integral part of the persuasive advocacy.