Demonstrative Evidence in the Courtroom: Evolution or Revolution?

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While you can still find evidence presented on paper and foam boards in courtrooms, the days of the paper world are clearly numbered. Commentators routinely ballyhoo the "revolution" in presenting trial evidence electronically. Certainly there are many courtrooms and trials where technology reigns supreme. In case you've wondered, the two technologies most often used are the document camera followed by PowerPoints. Overall, we believe the move toward presenting evidence electronically is more of an evolution than a revolution, though certain revoluntionary elements exist.

Revolution: The iPad's Conquest of the Legal Profession

The most notable change of late has been a rapid rise in the number of litigators using their iPads to "drive" courtroom presentations. According to the ABA's 2012 Legal Technology Survey, more than a third of lawyers now own tablets – and more than 90% of them have iPads. CLE sessions like "The iPad for Litigators" have drawn SRO crowds across the country.

The small form factor of the iPad and the ability of a litigator to be mobile while presenting evidence has been a game changer. With the lawyer no longer tied to the technology at the podium, the focus is more on advocacy skills than the technology itself. It is the best of both worlds – the wizardry of technology combined with old-fashioned lawyering.

Evolution: Electronic Demonstrative Evidence

For all the inroads the iPad has made, the number of litigators comfortable with presenting their own electronic evidence remains small. Most lawyers still hire experts, not only to prepare exhibits but to present them. While, as noted above, you will still find blow-up foam boards in many courtrooms, most lawyers are turning to electronic demonstrative evidence.

We interviewed Dan Bender of Digital Evidence Group (http://www.digitalevidencegroup.com) to get some sense of demonstrative evidence in the courtroom today. As Dan notes, the most common usage of technology is to show electronic images of paper exhibits. This eliminates shuffling pages in witness notebooks, but more importantly, it allows the attorney to present exhibits more quickly while appearing well- organized. A witness can be directed more

efficiently through a line of questions, and jurors are better able to make a credibility determination if they can see on a screen what the witness is reading.

Video is often a critical component at trial, especially deposition videos. The best format is MPEG-1. Why? Because almost all computers come with a "codec" that can read that format, which means it is the least likely to malfunction in courtrooms. If you are using synchronized video (for instance, syncing a deposition video to the transcript), you'll need to make sure that your expert is using appropriate quality checks and high quality software. As an example, some software offers auto-syncing, which doesn't always provide the precision you want for a smooth presentation at trial.

Demonstrative evidence today has become a true specialty. Once you know what you want to prove, you must work backwards to figure out what kind of exhibit will work best – timelines, animations, technical illustrations, document callouts, etc. Whatever you decide must have the right tone, look and feel. You need to consider color, how much information to put on the exhibit, positive space, negative space and design that will have the desired impact. Some of these considerations will be influenced by whether you are dealing with a jury trial, a bench trial, a hearing – or perhaps an arbitration proceeding.

Money is always an issue, except in the largest cases. Sometimes you really want a 3D animation to demonstrate how a surgery went astray or how an engineering malfunction caused an explosion. Your budget may prohibit that, in which case you may have to settle for a 2D animation using PowerPoint or other presentation software. The upside is that 2D exhibits are so much cheaper and easier to change if needed. It is also true that sometimes you don't want to overwhelm a judge or jury with the sense that you spent a fortune on exhibits for your case. If you're thinking that a lot of considerations are at stake when dealing with the electronic presentation of exhibits, you're right.

So what software is generally used for electronic courtroom presentations? InData's Trial Director (http://www.indatacorp.com/TrialDirector.html) and LexisNexis' Sanction (http://sanction.com) are the two most popular. As you might imagine, both have strengths and weaknesses, Good trial presentation professionals will be able to use both. Single user licenses start at $695.00 plus maintenance for Trial Director. LexisNexis does not include pricing on its Sanction site and its sales department did not reply to our inquiry about pricing.

Do You Really Need a Professional?

So why hire an expert? For the same reason we did in the paper world – to get better and more professionally produced demonstrative exhibits and deposition videos, with the latter often being a valuable impeachment tool if done well. In an age where the average attention span of

jurors seems to be eight seconds, using professionally done exhibits and videos can keep jurors (and judges) engaged. Echoing our advice above, Dan warms against the overuse of technology having seen cases where the technology became the focus for the jurors rather than the compelling arguments in a trial.

It is really not that hard to learn the basics of Trial Director or Sanction, but do you really want to be responsible for both the lawyering and the technology? Will you be distracted? What will you do if the technology bellies up? Might you end up hurting your case by looking inept with technology? What if you need to make a change on the fly? Can you handle that?

For years, we have recommended hiring a professional, as they generally have a lot more trials under their belts than the average lawyer. This is still probably sound advice in large trials, but we are beginning to see a shift – and it is happening more quickly than anyone thought possible.

Back to the Revolution: TrialPad and the iPad

New age litigators using iPads are most often using TrialPad. Many of them seem comfortable with the technology and don't feel the need for a professional to present the evidence. The question is – will YOU feel comfortable? Those who are fairly tech-savvy seem inclined to follow a DYI approach, while others will rely on an associate, a paralegal or even an outside consultant. And, of course, it is still true that outside consultants may be hired to prepare the exhibits.

One piece of trial presentation software clearly owns the iPad beachhead – TrialPad. With a price tag of $89.99, TrialPad is quite a bargain. It won't do everything that Trial Director and Sanction can do but it will do all that many litigators need. TrialPad's fan club grows exponentially by the month, aided by the fact that you can master its basics in an hour or two – and the website at www.trialpad.com contains plenty of helpful information, videos and FAQs.

Lawyer James Moncus turned to the iPad in what would become his largest verdict - $37.5 million in a wrongful death suit. He and his law partner carefully examined Exhibit A, Evidence and TrialPad before selecting TrialPad – but they were careful enough to keep copies of their exhibits on the other two apps in case of trouble.

With 45 key trial exhibits, TrialPad worked seamlessly in the courtroom. They were able to play the deposition video with the iPad's native video app and sync it to the transcript. They were never more than seconds away from any document and able to enlarge parts of the text through the touchscreen by pinching or expanding their fingers. They could annotate documents with circles and lines or simply highlight a key portion of the text.

As long as they started each day with the iPad fully charged, the 10-hour battery life was sufficient for that day's proceedings. A key feature (shared by Trial Director and Sanction) was the ability to process mark-ups and highlights which would not be seen until the "active" indicator was pressed. This allowed one attorney to examine a witness while the other prepared a document for impeachment purposes.

TrialPad also allowed the two partners to mark "hot docs" as well as organize documents into folders for the opening, the closing and each witness. They used Dropbox to sync documents so, if needed, colleagues back at the office could take a document and sync it, making it immediately available for use in court. Mr. Moncus' description of the trial in an article published on Law.com is a fan letter to both Apple (for the device) and TrialPad (as affordable DIY trial presentation software). While it is true that laptops are more powerful devices, the ability instantly to manipulate documents and images via the touchscreen is magic in the courtroom. And in lieu of PowerPoint, litigators often use Apple's Keynote app ($9.99) to create displays for trial. Alternatively, the iPad will also play a PowerPoint file - though be forewarned that formatting issues crop up from time to time if you're using anything more than the basic features of PowerPoint.

Final Words: When Mr. Murphy Comes Calling

In the midst of trial, Murphy's Law will sometimes rule the courtroom and your technology will die and refuse to be revived. Always, always be prepared to return to the paper world. Even the expert consultants can get burned. So have a second laptop or tablet as well as spare accessories and **still** be ready to try your case with paper. Multiple redundacies may be painful but they are critical insurance against catastrophes.

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