A2L CONSULTING

The Trial Lawyer's Guide to Environmental, Toxic Tort, and Product Liability Litigation

3rd Edition

OCTOBER 2017

Litigation Graphics
Jury Consulting
In-house Litigation Advisory
Visual Persuasion

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Introduction to A2L Consulting

At A2L Consulting, our primary mission is to help you communicate your message in its most persuasive form. Often, this involves helping to explain difficult concepts to judges and jurors through the use of visual design and technology -- collectively called litigation graphics. Our litigation graphics are designed to speak to a specific narrative. Our industry-leading litigation and jury consultants are experts in the development and enhancement of narratives for trial – what we call, Winning, by Design.

A2L's headquarters is in Washington, DC and it has personnel or a presence in New York, Miami, Houston, Chicago, Los Angeles, San Francisco and many other cities around the world. Since 1995, A2L Consulting has worked with litigators from 100% of top law firms on more than 10,000 cases with trillions of dollars cumulatively at stake.

A2L Consulting was recently voted Best Demonstrative Evidence Provider and Best Jury Consultants by the readers of LegalTimes and a Best Demonstrative Evidence Provider by the readers of the National Law Journal.

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Video Synchronization
Provide DVD, Flash Drive, or iPad

Thank you for downloading – Enjoy your A2L Consulting eBook

In this third edition of a book first released in 2011, we have dramatically expanded the scope and the depth of the book. We've added additional topics and updated this book to included dozens of new and relevant articles.

Environmental, toxic tort, and product liability cases have similar challenges. Each typically involves disputes over science and they often end up in a battle involving expert testimony. As a result, these cases are some of the hardest cases to litigate.

If you are to be successful litigating environmental cases, you have to be among the best in the profession. The natural complexity of these cases means that demonstrative evidence must be used extensively, jury consulting is often appropriate, and the use of trial technicians allows you to focus on maintaining your connection with the jury – rather than staying connected to the technology.

This E-Book will help you to better prepare to litigate environmental, toxic tort, and product liability cases. From making the most of your mock trial, to managing trial team psychology, to specific demonstrative examples, there is something in here for all trial lawyers.

I hope you enjoy this book and will take a moment to share some feedback by contacting me. If you ever have a question about how to prepare an environmental case anywhere in the world, please ask.

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Environmental Litigation Demonstrative Exhibits and Trial Graphics

By Ken Lopez Founder/CEO, A2L Consulting

In a trial in which harm to the environment is at issue, the major challenge for any litigator is to present complex scientific information in a way that is easy for an average person to understand. For our litigation graphics consultants, this is true whether we are helping to represent an alleged polluter against a landowner or other person who alleges environmental damage, or whether it's an insurance coverage case in which our client is asking an insurer to cover a claim under a business insurance policy.

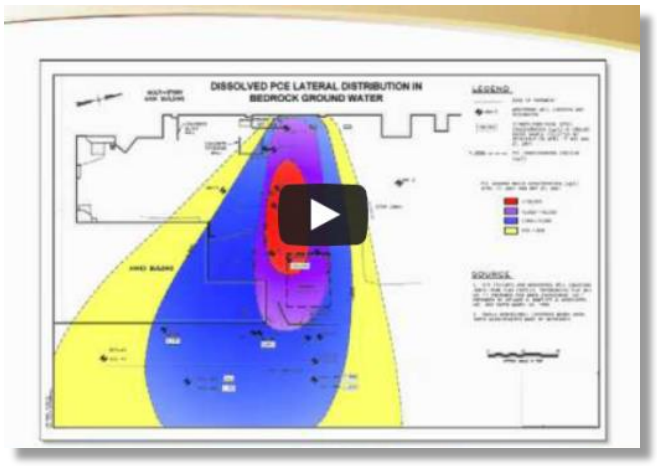
In many cases, the task is further complicated by the fact that environmental harm occurs over a period of years or even decades. In such situations, it is crucial to show not only how the damage occurred initially but how it became more serious, or less serious, over a period of time.

Both sides in a major environmental case usually bring in environmental experts to help explain their side of the case to the jury. However, these experts are trained in science and engineering, not in information design, so their testimony, however scientifically compelling, may be presented in a way that is too complex to appeal to jurors. An astute expert knows that their testimony can be bolstered by the inclusion of a visual presentation and trial graphics.

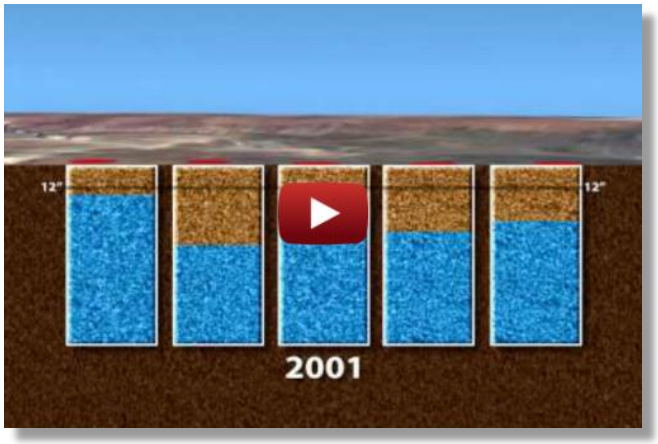
Neil Shifrin, Ph.D., a Director at Gnarus Advisors LLC, a leading consulting firm specializing in expert analysis, litigation testimony and business advisory, says, "Clear, graphical presentations of complex scientific information can be critical to judge and jury understanding. Graphical portrayals are almost always superior to tabulated information, but the challenge is to keep it accurate while making it interesting and most pertinent. In court, it is true that a (good) picture is worth a thousand words."

For example, Animators at Law produced a 3-D animation for an insurance coverage mediation. This showed that one block in a tank had been installed sideways by the property owner. As a result, oil, solvents and cleaning agents leaked into the spaces between cinder blocks over a period of time. Because this graphic was intended for a mediation, not a court case, we were free to use a glowing green color to highlight the pollutants – a feature that would have been considered overly prejudicial in a jury trial under Rule 403.

In another case, we used a three-dimensional cross-section to show the path that PCE (perchloroethene) plume took when it was released into the environment and how it ultimately contaminated the bedrock in the area and the water supply. This exhibit was built in PowerPoint and combines 3-D technical illustration with PowerPoint to create an animated effect in a cost effective manner.



Finally, in yet another case our task was to show that a particular piece of land was not a wetland under the applicable law. We used animated bar graphs to show water levels at test wells. These showed that groundwater did not stay close enough to the surface for the area to be considered a wetland. The key to this exhibit was that it was not static in time. It used data taken from several consecutive years to show a moving water level that at no point reached the required level of one foot.



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In each of these examples, complex concepts were distilled down to an easily digestible level using trial exhibits. Care should be taken in environmental litigation to ensure that any judge or juror can quickly understand the information being presented.

The Importance of Litigation Graphics in Toxic Tort Litigation

By Tony Klapper, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

If anyone thought the era of toxic tort litigation was coming to an end, they were wrong. The Environmental Protection Agency recently announced its priority list of 10 chemicals, including asbestos, that it is considering banning under the Frank R. Lautenberg Chemical Safety for the 21st Century Act. Although it remains an open question how aggressive the Trump administration will be with safety regulations, the reality is that regulatory lists like this, and the inevitable studies that follow, often become a treasure trove of "support" for a plaintiffs' bar eager to add scientific credibility to their legal claims.

This presents challenges for defense lawyers – especially given the continued currency of quasi-scientific principles or principles that are fine for regulators to rely on, but have no place in today's courtroom, such as the "precautionary principle." This is most evident with the mantra of "no safe dose" that asbestos lawyers and some environmental groups trumpet as justifying liability for even the most meager and infrequent of chemical exposures. Of course, toxicology, epidemiology and other scientific disciplines have exposed the fallacy of principles like "no safe dose" (after all, Paracelsus teaches us that "dose makes the poison – more about this later). But the appeal of the seemingly aphoristic "no safe dose" is tough to counter in court when an effective advocate plays to a jury's fears and is buttressed by governmental pronouncements that, albeit for different reasons, embrace the notion that there is *some* theoretical, modeled risk from exposure to virtually any chemical.

So the task for the defense bar is how to convince juries to reject these and other fallacious concepts that serve as easy, digestible substitutes for the more complex elements of true causation.

This task requires more than just the hiring of well-credentialed risk assessors, toxicologists, epidemiologists and pathologists, and the deployment of powerful rhetoric. It also requires careful thought on the best way to persuade jurors *visually* that many of the concepts proposed by plaintiffs in toxic tort cases are indeed spurious. With some creativity, defense lawyers and graphic artists working with them can come up with ways to explain complex scientific concepts, such as exposure pathways and epidemiology, so that jurors can understand them.

A good example is the basic principle of toxicology that "the dose makes the poison." This doctrine states that the *amount* of exposure to a substance is what defines the impact that that substance has on the human body. A moderate amount of water is a good thing.

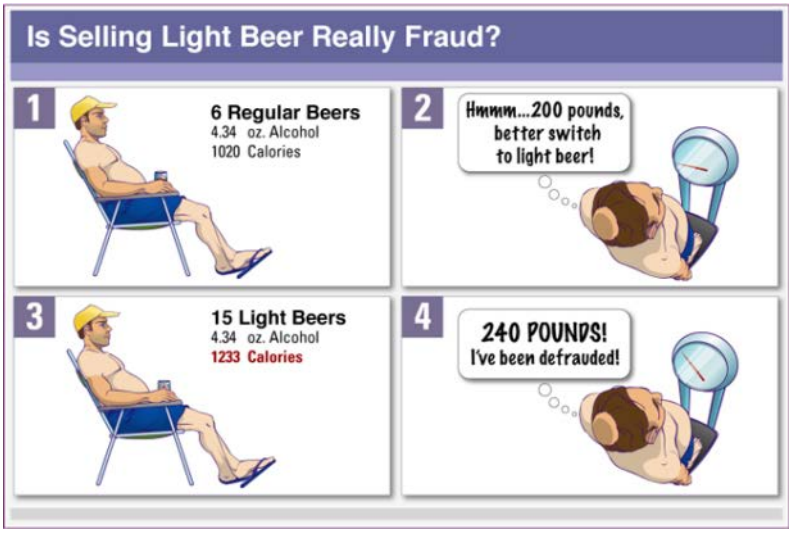
Actually consuming too much can kill you (hyperhydration). This concept should be relatively easy for lawyers and graphic artists to explain to juries without becoming overly technical and resorting to scientific mumbo-jumbo that will only confuse. 3-D and 2-D animations can be useful in this type of case, as can the simple bar chart or creative illustrations that analogize concepts like thresholds and total dose. Sometimes the simplest approach is the best.

Too often, when lawyers think about litigation graphics in toxic tort cases, they rely excessively on callouts of phrases in long-forgotten documents or hopelessly complicated charts presenting arcane data. If the message from the plaintiff's lawyer is very simple – as in "this case is as easy as A, B, and C—**A**sbestos in **B**rakes cause **C**ancer" – the defense needs to respond with a similarly basic approach that will remain in jurors' minds.

Product Liability Demonstratives - Defects and Failure to Warn

By Ken Lopez Founder/CEO, A2L Consulting

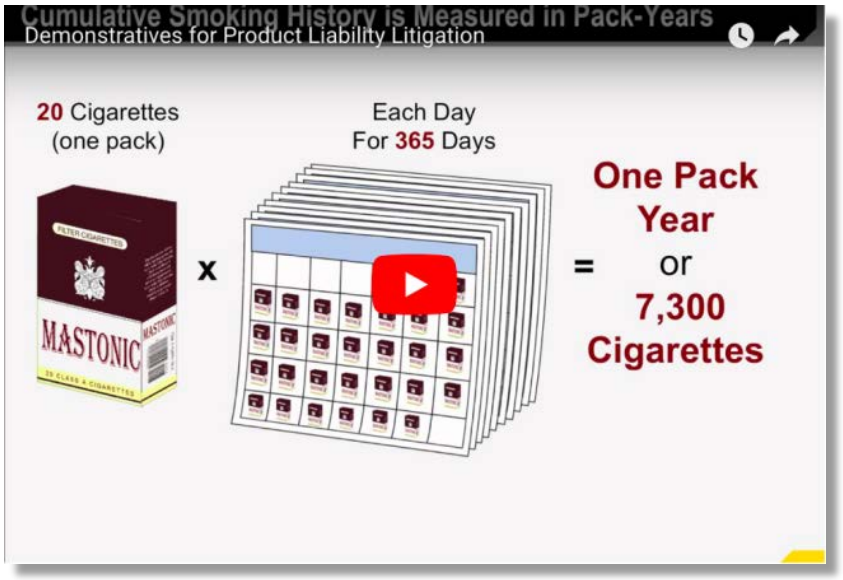
Demonstratives can frequently be used very effectively in product liability litigation, in which the issue is whether a product was manufactured negligently, causing harm – or in some cases, whether a product that was manufactured and used properly still caused harm to a consumer that leads to liability on the part of the manufacturer or seller.



The demonstrative below shows that in order to get the same alcohol consumption as six regular beers, a consumer would have to drink 15 light beers – which, taken together, have more calories than the six regular beers. This "compensation" effect is an issue in some product liability cases.

As a popular website notes "People tend to drink more light beers than regular beers. It is because the consumer will have the need or urge to drink more light beer because drinking a single bottle of such won't give the same effect as drinking a bottle of regular beer . . . because the alcohol may have been reduced significantly, the drinker tends to take in more light beer just to achieve that certain 'drunk' effect."

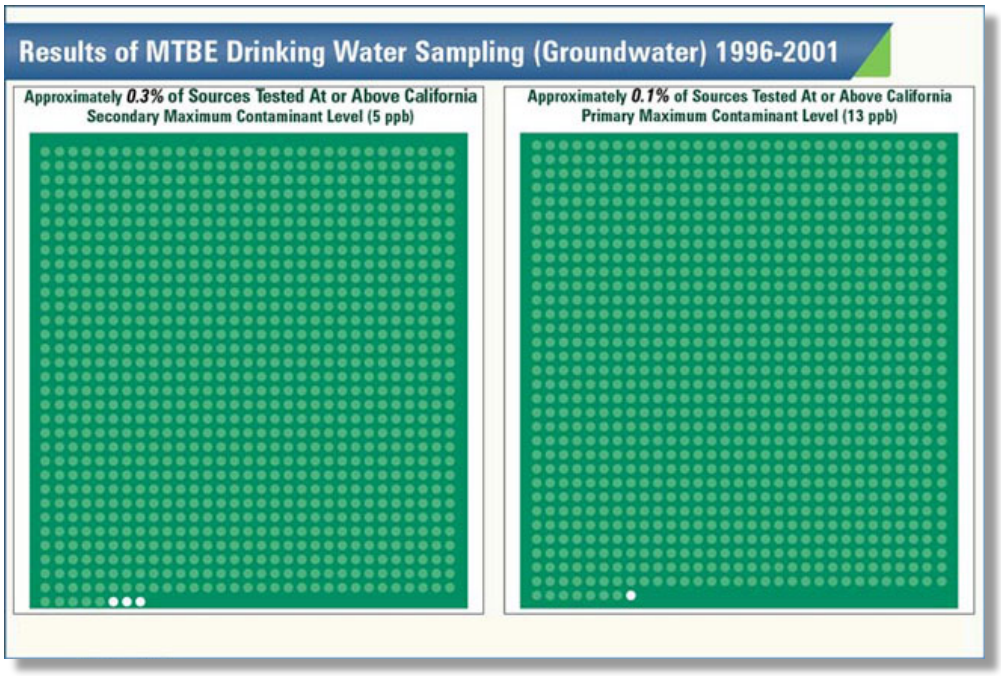
The demonstratives below introduce the subject of "pack years" to the jury. In tobacco litigation, the number of "pack years" is relevant to the diseases caused by tobacco. A pack year is the number of cigarettes smoked annually by a person who smokes a pack a day, every day. If someone smokes two packs a day, he or she consumes a "pack year" in just six months.



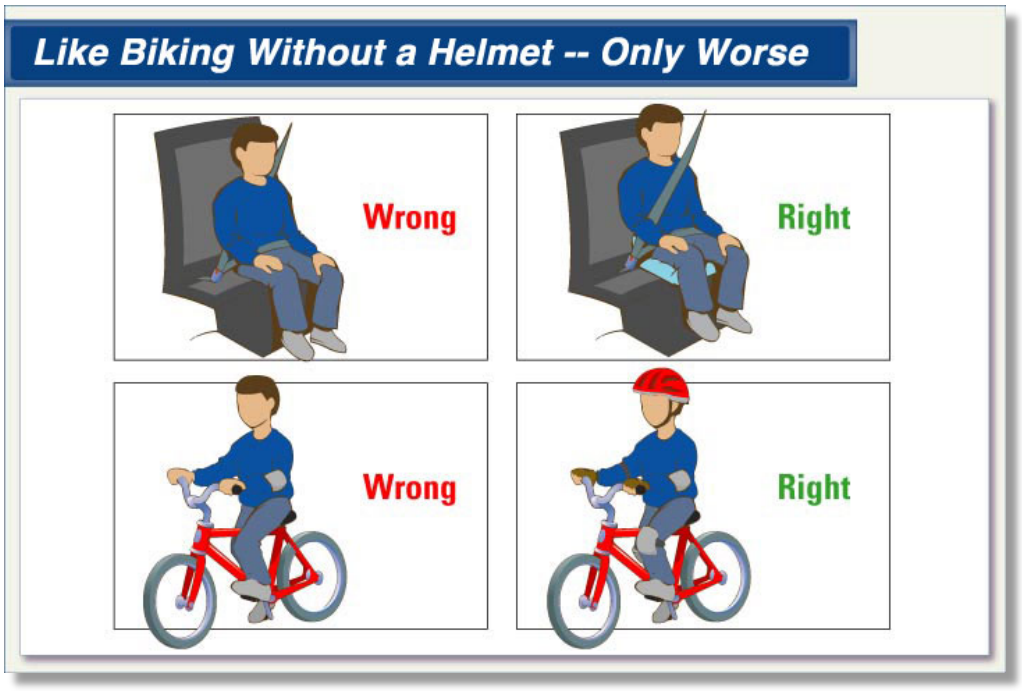
By using a size comparison to the Golden Gate Bridge, the demonstrative shows how many cigarettes are included in 30 pack years or 50 pack years and how large a volume those cigarettes would occupy.

A person who has smoked two packs of cigarettes per day for 10 years is considered to have a 20 pack-year smoking history. While the risk of lung cancer is increased with even a 10 pack-year smoking history, those with 30 pack-year histories or more are considered to have the greatest risk for the development of lung cancer.

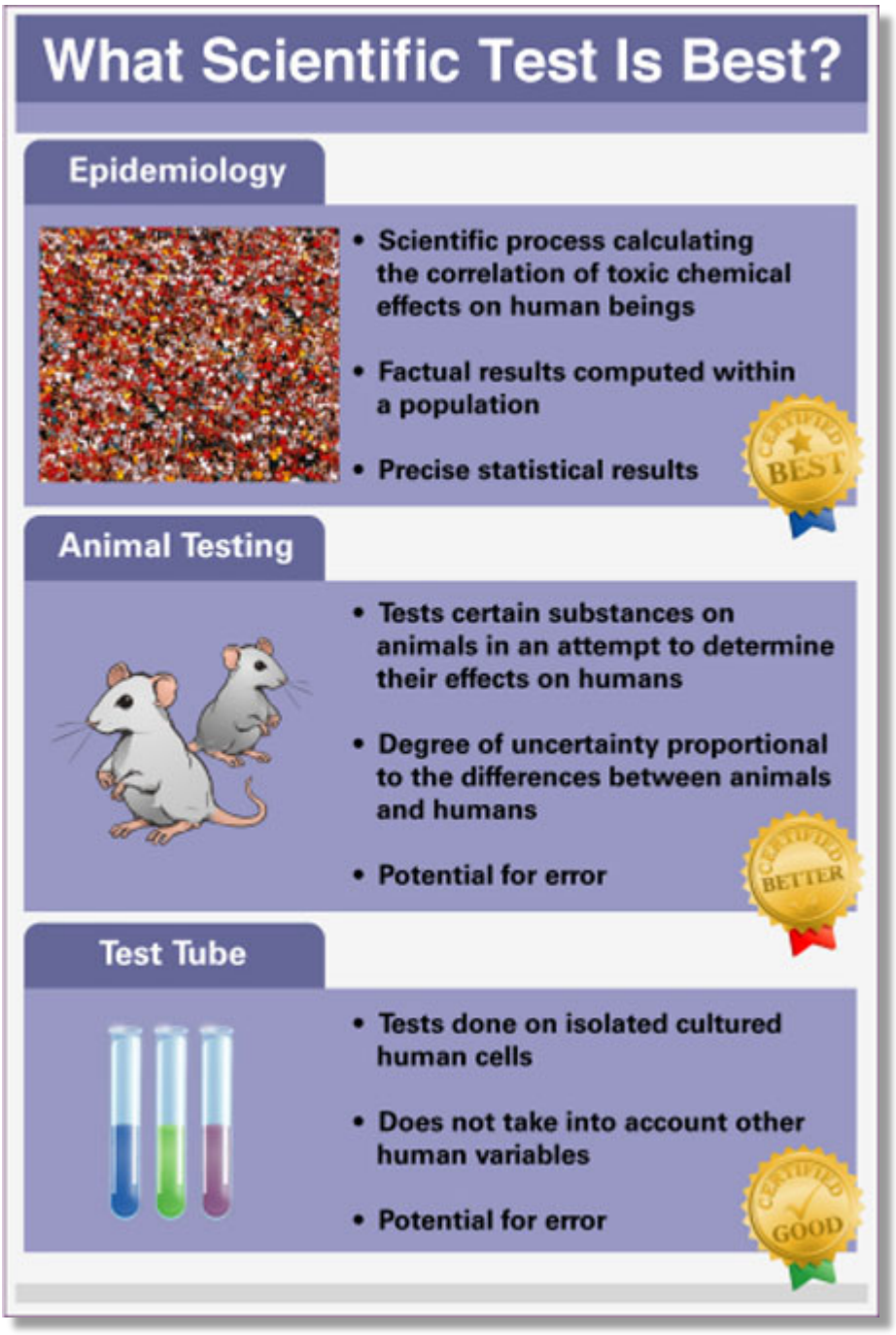
The demonstrative below was introduced in litigation concerning MTBE, a gasoline fuel additive that is often noted as a pollutant of ground water. It shows how small a percentage of ground water samples were actually shown to be polluted by MTBE at a level that is considered possibly dangerous to humans. The number of harmful readings appears as one tiny dot, or three tiny dots, in a large green field of safe levels of this chemical. This demonstrative graphic effectively summarizes the testimony of an expert.



The demonstrative exhibit below shows that neglecting to use a booster seat is an unsafe practice – just as riding a bicycle without a helmet and other protective devices is also unsafe.



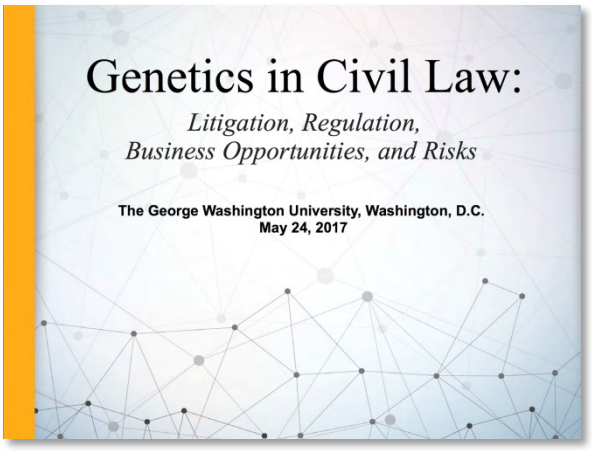
The demonstrative below arranges preferred scientific tests in descending order of accuracy. We used a vertical printed trial board format to emphasize the preeminence of epidemiological testing in this case. While plaintiffs attempted to make the case that laboratory and animal testing were sufficient, the epidemiological science favored our defense position.



When complexity must be simplified and laypersons are called upon to decide whether a product has caused harm, demonstratives are a must. Simple is best. Fewer is more. However, getting to simple and arriving at fewer almost always requires lots of hard work and creativity which takes time. Often the demonstratives presented at trial are just the tip of the iceberg compared to what was prepared. This reflects effective litigation consulting.

7 Key Takeaways from the Genetics in Civil Law Conference

By Ken Lopez Founder/CEO, A2L Consulting



We recently had the opportunity to co-host a conference focused on the use of genetics in the courtroom. The conference was entitled *Genetics in Civil Law: Litigation, Regulation, Business Opportunities, and Risks.* A2L was joined in hosting by three science-focused expert firms that are pioneers in the law and genetics field.

For me, the real pleasure of participating in the conference was how much I learned. That's kind of unusual for a conference, right? There are just a handful of valuable takeaways at most conferences I attend. Here, there were dozens of them, simply because of the nature of the material and the state of the art. The work being done by the speakers, the hosts, and many of the participants is genuinely pioneering -- both as it applies inside the courtroom and outside.

Here are seven key takeaways that highlight some of the most valuable aspects of attending the conference. Please note that number 7 is your ability to download the slides for free from the key speakers without further obligation of any kind.

1. **The use of DNA evidence in the courtroom is relatively new.** From watching TV, from the OJ case, and from our practices, we're all generally familiar with how DNA evidence is used in criminal cases. Many people are surprised to learn that its use as evidence in the courtroom dates only to the mid-1980s. That's right, in the courtroom, DNA evidence is just 25 years old.

2. **The use of genetic evidence in civil cases is just beginning.** For trial lawyers involved in big-ticket litigation, the present is the equivalent of the mid-1980s for criminal lawyers. Genetics and DNA evidence are being used by plaintiffs and defendants in big cases.

3. **Genetics have been successfully used in many big cases.** Not many cases of this sort have made it to trial, but some have. The cases thus far have been related to exposure to substances like benzene, asbestos, and tobacco. Companies have found a successful defense with the use of genetics. We can expect to see such a defense in talc litigation and other emerging pattern litigation soon.

4. **Genetics can be used to establish an alternative cause.** Genetic profiling can not only be used to question or prove causation, but it can also be used to establish an alternative cause, because exposure to certain substances leaves a genetic trace and certain cancers have unique genetic profiles.

5. **The science is accepted.** There is ample precedent for the use of genetic evidence at trial. Indeed, there is 25 years of precedent.

6. **The eggshell plaintiff worry is just a worry.** Defense lawyers know that they have to accept plaintiffs as they find them. That is, if a plaintiff is extra-sensitive to a chemical exposure, that extra sensitivity might provide the plaintiff with extra ammunition. So, the worry I've heard expressed is that if we genetically profile a plaintiff and find that he or she is indeed extra sensitive, we help make the plaintiffs case. However, I learned at this conference that one can assess a case and make a decision about whether genetic analysis will be worthwhile without doing the work and potentially find valuable and powerful alternative cause defenses.

7. **Click here to download an e-book containing the slide decks from the conference for free.**

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10 Key Expert Witness Areas to Consider in Your Next Toxic Tort Case

By Ken Lopez Founder/CEO, A2L Consulting

The key to any toxic tort case involving complex scientific concepts is retaining the right experts. However, as any experienced litigator well knows, finding the right expert is not a simple or straightforward matter. Although getting the right lead on a specific individual can be challenging, half the battle is often identifying the right type of expert for your case.

Here are 10 broad expert areas that you should consider for your next toxic tort case. We subdivide each expert area into the relevant sub-disciplines that you should consider.

1. **Toxicology**

   In many ways, the toxicologist is the core expert in any toxic tort case. Toxicology is the branch of biology, chemistry, and medicine concerned with the study of the adverse effects of chemicals on living organisms. Like a pharmacologist in a pharmaceutical case, a toxicologist specializes in evaluating adverse health risks posed by chemical exposures.

   There are many kinds of toxicologists that should be considered for any toxic tort case. A clinical or medical toxicologist is a physician with a board certification in toxicology. A reproductive toxicologist is an individual (Ph.D. or MD) who specializes in evaluating adverse health effects of chemical exposures on the fetus or offspring. Some toxicologists have particular expertise in evaluating human exposures, while others specialize in assessing animal exposures. Finally, risk assessment toxicologists focus on quantifying and assessing risks from chemical exposures. Retaining the right kind of toxicologist (or multiple toxicologists) for your toxic tort case is critical.

2. **Epidemiology and Statistics**

   An epidemiologist specializes in studying exposure-disease relationships, a key factor in achieving a positive outcome in a case. It is rare to see a toxic tort case where there are no published data on the chemicals of interest. A skilled epidemiologist is critical to an effective analysis of those data since he or she can

provide relevant testimony to address claims that the data support plaintiffs' case. Epidemiologists relevant to toxic tort cases can be broadly divided into occupational and environmental specialties, and the appropriate choice is dictated by the type of exposure that is at issue in the case.

In addition to an epidemiologist, because all scientific data (including epidemiological data) is interpreted using statistical techniques, you will also probably require a statistician. Therefore, whether you are confronting animal experiments, epidemiological studies, or in vitro mechanistic data, you probably need a statistician to help interpret the data and respond to your adversary's interpretation of the same data. You probably need a biostatistician, but depending on the specific nuances of the case, you may require a statistician who specializes in psychological data. Finally, you may require an expert who specializes in data analytics or informatics.

3. **Industrial Hygiene**

   Industrial hygiene is the study of workplace factors that may result in harm or injury to employees or contract workers. You will need an industrial hygienist for any case involving workplace exposures in which you confront allegations that those exposures resulted in injury. Different industrial hygienists specialize in different kinds of assessments. Some individuals focus on airborne exposures, while others focus on assessment of physical agents, such as machinery. If radiation is a particular concern in a case, a certified health physicist may be a valuable expert to pursue.

4. **Environmental Science**

   Environmental science is the study of environmental factors that could affect human health. These individuals are soil scientists or air and water modeling experts. Scientists in these areas excel at providing hazard assessments from soil exposures or dispersion modeling for airborne chemical releases and water exposures.

5. **Medicine**

   By definition all toxic tort cases involve alleged injuries to human beings. You will therefore need credentialed physicians as experts in the specific medical areas related to the allegations in the case. These experts will most often testify as to the plaintiff's specific medical condition, including whether or not the diagnosis is appropriate and whether there is general acceptance that the exposure is linked in some way to the disease state at issue. Quite often, toxic tort cases will require surgical or medical oncologists to testify about cancer issues, but all kinds of other medical specialties often come into play including dermatology, neurology, pulmonology, and cardiology.

6. **Clinical Psychology**

   When human behavioral issues come into play, it is critical to enlist an expert in psychology. In our experience, the most relevant type of psychologist is a licensed neuropsychologist to deal with allegations of brain damage and neuropsychological deficits. However, there is often a need for a trained clinical psychologist.

7. **Scientific Specialty**

   Quite often a toxic tort case will involve issues that call for a scientist in a specific

discipline. These specific scientific disciplines can include genetics, molecular biology, physiology, psychology, and neuroscience. These experts will often be called upon to provide general education to the judge or jury and can be an extremely important component of making the defense case.

8. **Regulatory**

   The goal of an expert in this area is to provide testimony that your client complied with the appropriate regulations. Every lawyer who tries toxic tort cases knows that regulatory experts can be among the most difficult to find. Depending on the nature of the case, you may require an expert with specific experience dealing with the EPA, OSHA, or sometimes even the FDA. Most often, you will want someone who was actually employed at one of these regulatory agencies, but sometimes it is sufficient to have an expert who has experience complying with the regulations in some capacity.

9. **Physical Sciences**

   Many toxic tort cases require the retention of experts in the physical sciences, including hydrogeologists, seismologists, petroleum engineers, materials scientists, and process engineers. The need for these experts and a decision as to which kind is critical is usually tightly aligned to the specific facts and allegations made in the individual case.

10. **General Causation**

    A general causation expert is an individual who is going to wrap up your case and tell the causation story. This expert is often an epidemiologist or a clinical toxicologist, but in our view, it is helpful to think of him or her in a separate category. This expert should have special knowledge and training that will allow them to synthesize the science in the case and come to an educated conclusion about causation.

The Top 14 Testimony Tips for Litigators and Expert Witnesses

By Ryan H. Flax, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

Litigators and their witnesses are confronted with difficult situations during testimony, and it's nice to have reliable ways out of those sticky situations.

Expert witnesses are engaged to provide their expert insight and opinions supporting their client's case during testimony and are there to tell the truth to the best of their knowledge when questioned at trial or deposition.

Litigators get paid to ask good and, at times, tough questions to get desired answers from the opposition's witnesses and to help their own witnesses do their best.

During both courtroom testimony and in depositions there are common situations where an attorney tries to make things difficult for the witness. Below, I identify 14 of these common situations and provide some good strategies, both from my own experience as a litigator and from tips collected from attorneys and expert witnesses. Consider the points below when advising and preparing your witnesses for trial and depositions. The main and reoccurring principles are:

1. The "Yes or No" Question

If you're a witness (an expert) you are going to be asked "yes or no" questions (where the forced response appears to be a "yes" or a "no") on cross-examination or during a

deposition. This type of questioning will put you in a tough spot because whatever you're asked to respond "yes" to is most likely something you'd rather say "no" to, and vice versa. But, to be truthful, you'll feel that you must answer in a way that seems counter to your beliefs or the foundations of your case.

There are many easy ways to get yourself out of this predicament. First, you need to identify that you're in it. Then, in response to the question you say this: "**I understand that you're asking me for a 'yes or no' answer here, and I could answer you in that way, but doing so would be an incomplete answer and I don't want to mislead you or the court.**" Now, what have you done?

You've instantly made yourself look very reasonable in front of the jury/court and like someone interested in getting the "truth" out rather than an unreasonable (paid) witness who won't answer questions. If the attorney asking the "yes or no" question insists that you go ahead and answer simply "yes or no" he looks like a jerk pushing his own agenda and *un*interested in the truth – neither of which will help him in the jury's or court's eyes. It's unlikely he'll do this, but if he does, you go ahead and answer as he's asked, but you've made him look bad and also have clearly identified the issue for re-direct from your own counsel.

2. The "Yes or No" Question – Take Two

As mentioned above, there are a variety of ways to get yourself out of the sticky "yes or no" question problem. So, in addition to the solution above, here are some additional tip/tricks to consider.

One expert witness has suggested that a response she uses to combat this situation is to go ahead and answer the question with the "yes" or "no" sought by the examining attorney, and then add, "**under certain conditions**," with nothing further.

This presents the examining attorney with a dilemma. Should she let that answer stand? What circumstances is the expert referring to? Should she follow up and inquire about the circumstances the expert has in mind? Doing this surely exposes the attorney to

a strong counter point by the expert. Responding in this way allows the expert to take the advantage.

3. The "Yes or No" Question – Take Three

Another expert surveyed for this article suggested replying to the "yes or no" question with, "***as I understand* your question the answer is [insert 'yes' or 'no'].**" As this expert explains it, this is a non-answer; it means nothing because there is no way for the lawyer to know how the expert understood his question and the answer can be either *yes* or *no* based on whatever is going on in the expert's mind.

So, again, this begs the question: will the attorney follow up and allow the expert to express what's on his/her mind? Again, advantage: expert witness.

As mentioned, experts will be asked "yes or no" questions during their deposition as they will at trial – the purpose being, once the examining attorney has probed the depths of the expert's knowledge and bases for opinions, he or she will want to lock the expert into some position for trial. Just as in the trial testimony scenario, experts can use the same, and even more, techniques to wiggle out of this sticky situation during a deposition (I say "more" because you're not responding in front of a judge and will have more flexibility).

There are other types of "sticky situations" expert witnesses will be confronted with during their examination by an attorney. Several are explored below.

4. "I Don't Understand"

As an expert witness, you'll be subjected to some pretty tough, sometimes technical questions. Often the questioning attorney will offer a lot of hypothetical facts and complexity within a question. If confronted by such a question, when in doubt, respond that you just **don't understand the question and request that the attorney rephrase it**.

At worst, this buys you a moment of time to consider the question. At best, you'll throw off the questioning attorney, who may have carefully scripted his question because he or she simply had to in order to address the complexity necessary to the issue being investigated.

5. "I Don't Understand" – Take Two

When you express lack of understanding and ask the attorney to rephrase a confusing question, sometimes the attorney will ask what was confusing to you. Don't play this game. Don't parse the question for what was clear and what was not.

The entire question was confusing and it's *his* job to figure out a way to make it clear. Just make sure that, before you go this route, the question is at least too confusing for the jury to easily understand, otherwise, they'll perceive you as playing games and being deceptive.

As mentioned, often, the examining attorney will have been asking his questions from a script that he or an associate prepared or that he obtained from a book. If the expert being examined is in a dense or very high tech field, the attorney may not understand the topic well enough to craftily rephrase his question.

6. "I Don't Understand" – Take Three

Also, make opposing counsel define words if something *could* be ambiguous. Here's an example based on the examination of a fact witness in a child custody battle:

Opposing counsel began asking leading questions to the mother in the case designed to try to paint her as a promiscuous parent who paraded men in front of her kids night and day. If you knew the mom, you would know how utterly laughable this tactic was. So, the examining attorney began the questioning by asking if the mom had "dated" anyone. The mom-witness responded to each of the attorney's questions with her own, e.g., what do the terms "date," "relationship," "intimate," "boyfriend," etc., mean? The attorney finally gave up in frustration and the mom-witness's attorney got a good laugh out of it – the examining attorney got nowhere.

Don't assume you know what examining counsel means by the words he/she uses. Make them explain it (assuming doing so isn't ridiculous enough to make you look stupid or difficult in front of the jury).

7. Think Before You Answer

The next common technique of examining-counsel is the use of rapid fire questioning. This is an easy technique to defuse since the witness can control the rate of questioning by taking the time to consider each question before answering. When the expert witness takes his time to answer, he also gives his counsel time to object.

Our CEO, Ken Lopez, was once questioned about an animation in a plane crash case and the question was something like: "the clouds in this animation are really like a video game

aren't they?" Ken explained, "I felt defensive, but choose to take my time answering. After a long pause, I replied, 'I can't think of a video game like that works like that.'" He was surprised that the examining-attorney dropped the questioning at that point.

Remember, whatever you say is going permanently on the record – so make it accurate, make it useful, and make it count.

8. Don't "Help" Them

Most expert witnesses are, on some level, teachers. They want to instruct, inform, and educate. Often, the greatest and most sought-after experts are well-regarded university professors. This presents a problem when they're under questioning at trial or (especially) in depositions. It's often difficult for these witnesses to refrain from offering additional information, filling-in the pauses with education, and generally responding to questions that weren't asked.

If an expert finds that their questioning attorney is at a loss for words, don't offer any. Let the uncomfortable silences sit there. Not an easy thing to do, but necessary.

If an examining-attorney asks a question that doesn't get the science right, or misses the point somehow, don't educate them. Let them stay ignorant and let the record stay ignorant until the right time to inform it, which is when the witness is on direct.

9. Don't Guess

Remember, the expert's testimony is forever on the record and will be held against him and his client if possible. If you can't answer a question, or don't know the answer to a question, say so. If your answer is an estimate or only an approximation, say so. If you think you might have the answer in the future, say, "**I don't recall at this time**." If you do not remember, say so.

Never think that you must have 100% total recall or something even close. Do what you can before a deposition to refresh your recollection if it's appropriate, but don't refresh yourself on irrelevant or unhelpful things.

10. Don't Guess – Take Two (or Stick to What You're There For)

Another expert recognized that a standard trick is to get an expert to answer a question that is outside her experience because of the natural tendency to try and help by giving an answer. But, doing so can trap the expert because it then calls into question everything she has previously written and all her opinions expressed in court.

It is much better to simply say you **cannot answer the question because it is outside your experience**. So the cross examining counsel's armory is even further reduced. In addition, the image that the jury (or Judge) then has of you will further be improved. Knowing your business very well and the specific limits of your experience and expertise should garner your more respect.

11. Don't Guess – Take Three (or Stick to What You're There For – Take Two)

Following the previous note, what if the line of questioning moves to a subject for which your expert *IS* knowledgeable, but not there to talk about? He can't say he doesn't know how to respond.

Another expert suggests that if the subject matter of cross exam is not outside the expert's experience, but is outside the scope work conducted in the matter, consider answering, at least in the U.S. – "**I am sorry, but that work was outside of the scope of my retention in this matter, and so was not considered.**" This expert gives the following example: "I have a specialty of deciphering Traffic Signal Timing plans to try and determine who REALLY had the green, as opposed who THOUGHT they had the green. In many of these cases, a separate Accident Reconstructionist is hired [as another expert]. If an Accident Reconstruction question is asked, it will most probably be within the scope of my EXPERIENCE and TRAINING, but is outside of the scope of my RETENTION in that matter."

The danger of this scenario is that opposing counsel will try to drive a wedge between your multiple experts' testimony, make them contradict one another, and diminish one or more of your experts and, thereby, your case. To combat this possibility, have your experts well prepared on what they are there to testify about. Have them stick to their expert reports, if

they were required. Have them well prepared on what other experts on your team are testifying about and well prepared not to step on their teammate's toes.

12. Only Answer One Question At A Time.

Compound questions are objectionable, whether in deposition or at trial. Nonetheless, have your experts prepared for this possibility. When asked multiple questions at one time, they should ask for clarification to be clear which part they are responding to. For example:

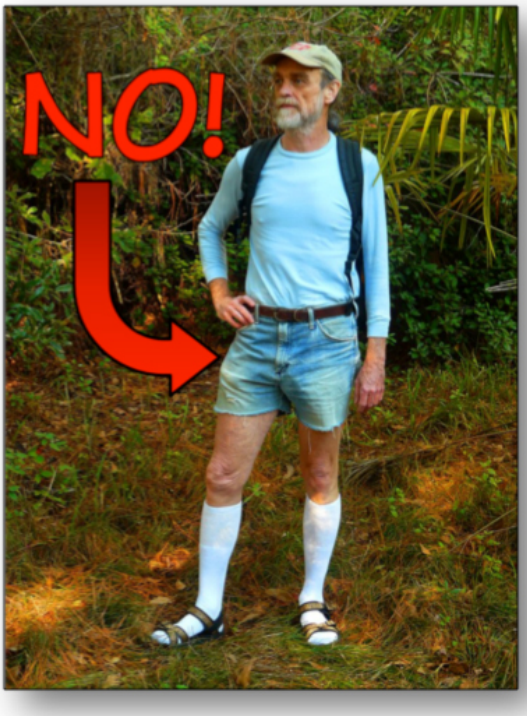
Q: Do you drink alcohol or take illegal drugs?

A: Yes to the alcohol; no to the illegal drugs.

There would often be an objection here. If there is no objection, and it is too complicated to easily respond to both parts, then do not be afraid to ask for the question to be restated.

13. Don't Let Yourself Get Cut Off

Another expert recommends: "If there is more that you need to say, then say it. If that means adding it to the next answer or simply saying, '**I'm sorry counselor, I wasn't finished answering your question**,' and then continuing," then do it.



Also, be careful if asked a question that attempts to cut off your response, such as: "Is that everything?" Leave the door open in case you might have forgotten something. Respond to such a question with, "**that's what I can recall at this time**" or something to that effect. Your attorney can try to fix any problems or misrepresentations on your redirect and it will be easier for the attorney to remind you what you have forgotten if you do not testify under oath that you have already covered everything.

14. Make Your Own Hypotheticals

Cross examination involving hypotheticals is common for experts. Another surveyed expert suggested that, when asked a hypothetical question, they are also very seldom complete – engineered that way to be more helpful to the opposing side and damaging to yours. This expert suggests responding with "**I am sorry, that is an incomplete hypothetical, which I cannot answer as phrased. Would you like me to fill in the missing pieces and then give you an answer?**" How can the examining-attorney possibly refuse and still appear reasonable to the jury?

I hope you find these points useful in preparing your expert witnesses if you're an attorney or useful in preparing yourself for cross examination if you're an expert. If you or your expert witness needs support in to prepare to testify, A2L Consulting is a valuable resource and here to help.

This article was exceedingly difficult to finish because all my experts who provided input kept providing new and helpful tips and examples. If you want to follow such new and helpful tips, join and follow the comments at the LinkedIn Expert Witness Network group here: LINK. If you have your own useful tips to add, please do so below in a comment below.

One Voir Dire Must Do and One Voir Dire Must Never Do

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

You're defending an alleged polluter. You ask prospective jurors, "Who here thinks there is too much government regulation of business?"

You represent an individual hurt in a workplace accident. You ask, "Has anyone ever filed a worker's compensation claim?"

Your client is an employer accused of gender discrimination. You ask, "Please raise your hand if you believe that workers sometimes claim wrongful treatment when they simply don't get what they want."

Why would you do that, if the only answers you can get to these questions are ones that reveal potential allies? That is your adversary's job, not yours. Your job is to help your supporters fly under the radar so that they can remain on the jury. If your question is likely to reveal nothing useful to you -- or worse, will point out who your friends are -- don't use that question.

In other words: What is the single most important **"Never Do"** in *voir dire*? Clearly, it is to never ask questions that reveal who your fans are.

Instead, here is a *voir dire* **Must Do**: Invite your enemies to show themselves and make it as easy as possible for them to do so.

For example, defending the toxic tort, ask "Some people feel that there isn't enough government regulation because companies cannot be trusted to mind the environment on their own. Can anyone here relate to that at all? Explain."

Or as the personal injury plaintiff's counsel, you'd be better off asking: "Some people favor capping damages, meaning putting a limit on the amount of money to pay in lawsuits, even if the plaintiff – meaning the injured party, such as my client – proves their case. Can you raise your hand if that makes some sense to you or you feel that way even a little bit?

For the employment defense, you might ask: "Many people are unhappy with their jobs or have had bad experiences in the workplace. Some feel they've been treated badly or

unfairly at their job in some way. Can you think of any examples of how that may apply to you or someone close to you?"

As the song says, "Don't believe me – just watch!" When someone *says* they can be fair, it is meaningless. "Fair" means using their yardstick. Instead, *watch* and *listen* to what they actually believe by asking meaningful and cautiously phrased questions. Assume that what they believe cannot be put aside, certainly not based on the transient request of a stranger to whom they have no allegiance and from whom they reap no benefit. Their beliefs can only stay where they live ... on their minds and in their decisions in deliberations. Better to reveal what they are before it's too late.

A2L CONSULTING

Automobile Litigation: Patent Infringement and Product Liability

By Ken Lopez Founder/CEO, A2L Consulting

As one can imagine, automobiles are the subject of a good deal of complex litigation these days -- whether the case has to do with the validity of a patent for use in the manufacture of an automobile, the possible liability of an auto manufacturer for an accident, a class action claiming a design defect in a certain model of car, or another legal issue.

Automobiles present interesting challenges for the trial graphics consultant. On the one hand, nearly everyone has driven a car, and many people think of themselves as fairly knowledgeable in auto mechanics (while they would not fancy themselves as computer or jet-engine experts, for example). On the other hand, today's vehicles are incredibly complicated items with sophisticated computer systems and electronics.

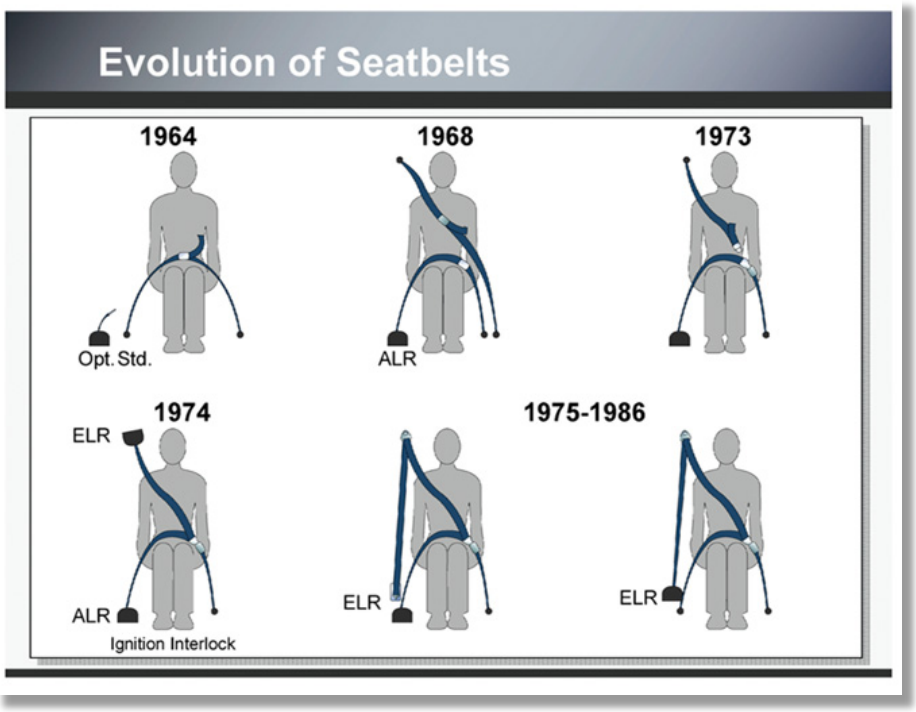
In 2010, for example, IBM wrote in a press release that due to the "exponential growth in the automotive electronics industry, owning a modern vehicle is equivalent to operating thirty or more computers on wheels," and that "the average automobile now has several millions of lines of code -- more than a space shuttle."

So jurors do need considerable education about a seemingly basic item like a car.

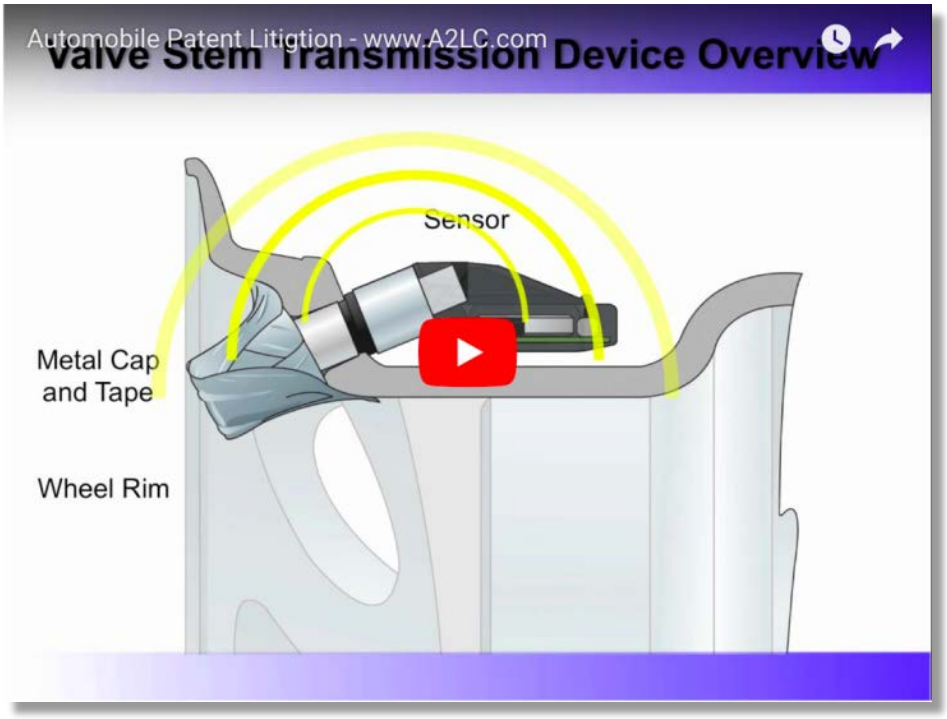
Since 1995, many of our cases have involved patent disputes about items such as brake parts, valve stems, engines, wheel parts, window glass, and many other parts of the automobile.

In fact, patent litigation in the automotive industry is as old as the industry itself. A recent article in the Legal Intelligencer noted that "patent litigation in the auto industry dates back to the first days of cars" and discussed patent attorney George Selden, who sued all the early auto makers, including Henry Ford, for infringing on his patent, which was granted in 1895.

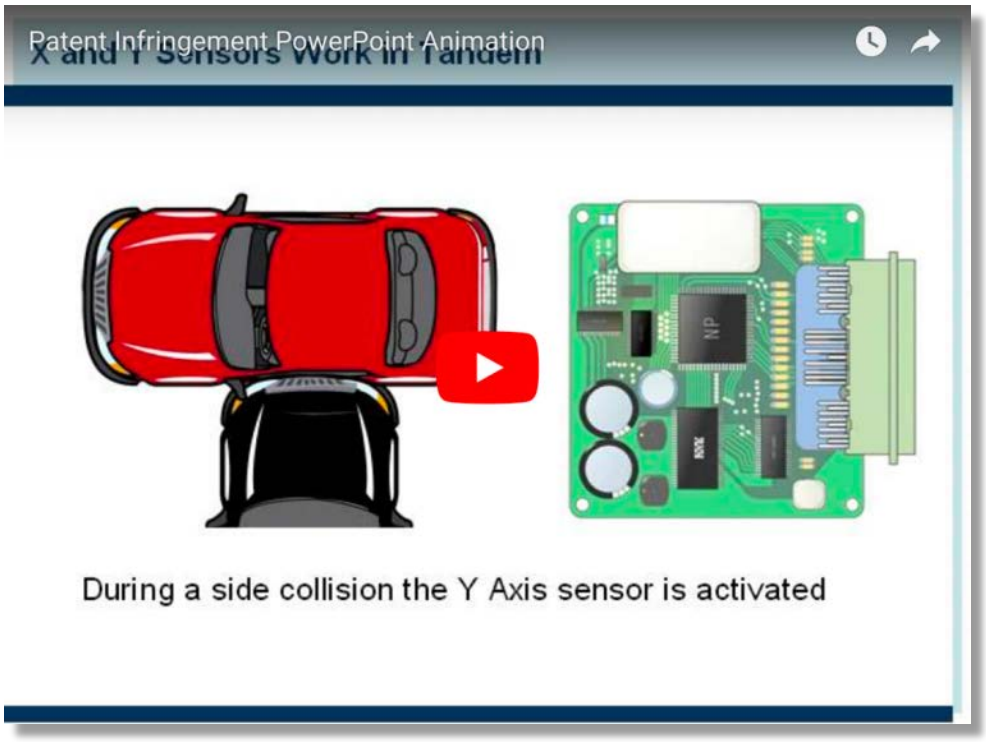
Patent litigation and automobile product liability litigation is very much alive in the industry. The exhibit below shows the evolution of seatbelts from their introduction as mandatory features in 1964 to the introduction of emergency locking retractors (ELRs) in the 1970s and 1980s. It was used in a major product liability case.



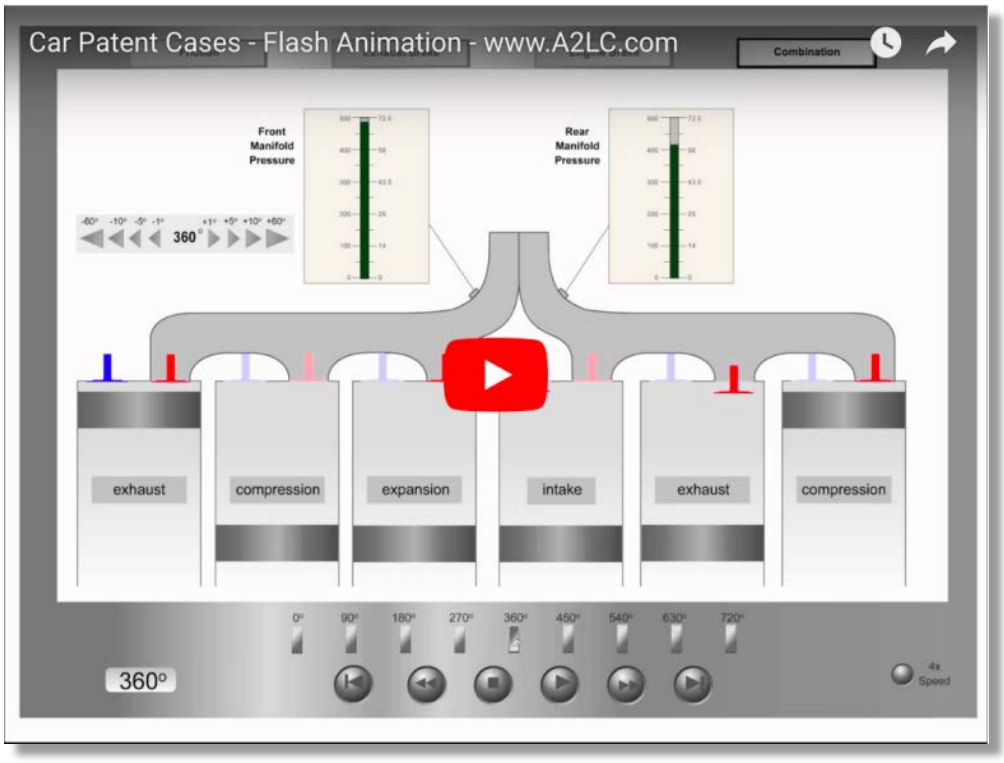
In a case involving litigation over an automotive patent for a valve stem transmission device, we showed in a brief motion picture (just over one minute) how the device works, using a sensor.



In another patent case, we showed how two sensors work in tandem to activate air bags and how they respond to frontal, side, and oblique collisions.



In this Flash interactive exhibit, our information designers created a simple interface that allowed trial counsel in yet another patent infringement matter to illustrate how an engine and engine braking system works.



This type of litigation, as old as the automobile itself, is a mainstay of our work.

Three Top Trial Lawyers Tell Us Why Storytelling Is So Important

By Ken Lopez Founder/CEO, A2L Consulting

We recently had the opportunity to interview three top trial lawyers. We asked them for their views about the practice of law and about what really works at trial.

Collectively, more than 100 years of wisdom are speaking in these interviews. I couldn't agree more with these trial lawyers' positions, and over the coming weeks, we will share some of these interviews, edited for clear and quick messages and understanding.

These three lawyers, Patrick Coyne, Rob Cary, and Bobby Burchfield, are at the top of their field. Let's hear what they have to say about storytelling at trial.

Finnegan partner Patrick Coyne, an intellectual property litigator, said: "I think a lot of lawyers approach IP cases with the idea that all I have to do is convince them that I'm right. Wrong. People make their decisions based on their values and beliefs. What the story does is give the jurors a narrative that you can tie in to their values and beliefs, and they can then fill in the gaps themselves. It makes sense to them based on their perspective."

Rob Cary, a litigation partner at Williams & Connolly, said, "Being a litigator is about storytelling, making a narrative that makes sense and that is credible and reasonable. So much of what is taught in law school is so complicated and so nuanced that it inhibits good storytelling. So I think all lawyers when they get out there, and especially if they practice before jurors, need to be good storytellers. It is crucial to stick to the truth, and of course you need to be able to show as well as to tell."

Said Bobby Burchfield, a litigation partner at King & Spalding, "I think of a trial in terms of putting together a comprehensible and comprehensive story in terms of what I can get people to remember and what I can get people to believe. That's when you really mature as

a lawyer, when you understand it really that is the narrative that decides the case and not whether you think you're right."

As is clear from the interviews with these top trial lawyers, building a narrative is essential to the consulting work that A2L does, because developing a persuasive narrative is essential in the modern trial. All too often it's overlooked or only considered at the eleventh hour.

We've written about storytelling extensively in articles like 5 Essential Elements of Storytelling and Persuasion, Storytelling Proven to be Scientifically More Persuasive, $300 Million of Litigation Consulting and Storytelling Validation, and Winning BEFORE Trial - Part 3 - Storytelling for Lawyers. And we've even created a compendium-style book of articles related to storytelling - it's a free download.

Finally, if you happen to miss last week's A2L Consulting storytelling webinar delivered by A2L's Managing Director of Litigation Consulting, Tony Klapper, and attended by nearly 500 of your peers, you can now watch a recorded version here.

Why You Should Pressure-Test Your Trial Graphics Well Before Trial

By Tony Klapper, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

Quite often, law firms hire companies like A2L before trial to do jury research. That research usually takes the form of bringing in a mock jury, exposing the mock jury to the story that will be presented by both sides, and then engaging the mock jury in a single-day (and sometimes multi-day) focus group exercise to find out what aspects of the two sides' presentations worked and what didn't.

The central part of these mock jury events is the dueling "clopenings" that are put on by different attorneys from the trial firm – one embodying the narrative that the firm is planning on behalf of its client and the other representing the firm's best estimate of what its courtroom opponents are planning to do and say at trial. A "clopening," as the term suggests, is a combination of opening statement, evidence and closing argument that is typically used in a mock trial.

What many people don't realize is that in addition to testing the plausibility and effectiveness of the narratives for each side, mock trials are a crucial way, indeed the best way, to test the demonstrative evidence that one intends to use at trial.

Testing the visual persuasiveness of the exhibits is very important. For one thing, it is a key step in the iterative process that creates better and more helpful trial graphics. Fine-tuning the demonstrative evidence before trial through a carefully planned series of assessments can only make the graphics more convincing. Subjecting the graphics to the thoughts of people who may be similar to the jurors in the jury pool is invaluable. For another, this procedure gives the mock jurors the opportunity not only to tell the lawyers which graphics worked for them, but also to suggest ideas for new trial graphics that can help illuminate the case. Mock jurors are likely to help identify "holes" in the set of demonstratives that can be filled in. They can do that because mock jurors are ideally situated to identify areas of confusion or gaps of knowledge that that graphics are well-suited to clarify or close.

Trial lawyers should always think of testing the arguments in the "clopenings" and testing the graphics as a single, seamless process. You simply can't separate the evaluation of the narrative from the evaluation of the demonstrative evidence that is designed to support it.

Litigator & Litigation Consultant Value Added: A "Simple" Final Product

By Thomas F. Carlucci, Partner, Foley & Lardner LLP
John E. Turlais, Senior Counsel, Foley & Lardner LLP
Ryan H. Flax, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

There is a certain irony in providing high-level litigation and litigation consulting services. Namely, if we, as litigators and litigation consultants, do our jobs correctly, the end product – whether it be a presentation to a jury or to the government – should be simple.

For this reason, it can be difficult for some clients to appreciate the value of the process required to create that end product, even when that end product serves the ultimate goal of a trial win or a favorable settlement. **A simple end product, however, most often signifies a deliberate, detailed, and thoughtful process**.

Foley & Lardner LLP and A2L Consulting recently collaborated on a project relating to an elaborate fraud carried out through numerous, complex transactions. The fraud was executed over many years and related to dozens of contracts and hundreds of thousands of pages of documents. Complicating matters further, the case proceeded on parallel litigation tracks, with civil claims being pursued by numerous sophisticated entities, while the U.S. Government investigated criminal charges. From all this, a presentation had to be prepared boiling down the complexities and complications to a simple, straight-forward, and persuasive position.

Crafting a winning litigation presentation, including the accompanying litigation graphics, can be analogized to writing a song. Take most anything the Beatles ever wrote, for example. Once you have heard the song, it seems simple – so simple, in fact, that you might proclaim: "I could do that, I could write a song." Until you actually try doing it.

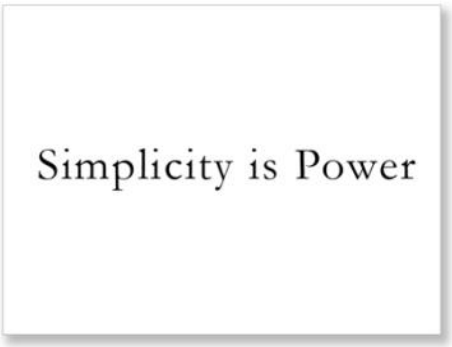
The Beatles created world-changing art, and **they made it look easy**. What winning litigation teams and litigation consultants strive to do is similar in that, to achieve their goals, they must take complex fact patterns and legal positions and make them ***both easy to understand and persuasive***. They must make the case look easy.

Simplify the complex is the first rule in developing both a litigation narrative and the litigation graphics that elucidate it. Unlike the trial attorneys or line prosecutors, a jury has not "lived" with a case for many years. Nor, for that matter, do government attorneys high in the chain-of-command necessarily have the same deep understanding of the facts and intricacies of a case as do their investigators or line prosecutors. Dumping all of the facts on the table in the hope that the audience will latch on to a winning argument almost invariably leads to another result – confusion and, ultimately, failure. The key is to present the evidence and information in a manner that can be easily digested by those who, based on limited time and/or limited exposure to the case, want and need to see the big picture.

Making the complex simple, however, takes time, creativity, and hard work. As Blaise Pascal (French mathematician, physicist, inventor, writer, and philosopher) famously said, **"I would have written a shorter letter, but I ran out of time."** (often also-attributed to Mark Twain and Abraham Lincoln). But it is through this process that value is generated.

Ideally, and when a litigation team employs a litigation consulting and litigation graphics firm, the process involves a bit of a witches' brew. A lot of facts, ideas, theories, and storylines get thrown into the pot, and the attorneys, litigation consultants, and litigation artists must work together to explore and decide what facts fit and which story lines are most persuasive. The process is rarely straightforward and smooth, and it involves occasionally wandering down dead ends to find the right path. But this process is ***necessary*** to chip away at marginal, unnecessary, and/or potentially distracting and detracting portions of the case.

The team of litigators must deal with thousands of discrete and related facts, sometimes millions of pages of documents, and, often, multiple interested parties forwarding their own versions of the case to the same target audiences. The litigators must figure out how to refine the mountains of information into a neat and compact outline of evidence that ***tells a compelling narrative***. The litigation consultants and graphics firm must then take the evidence that the attorneys believe most important, understand the narrative forwarded by the trial team, and push the attorneys to further hone and sharpen the presentation of their case. The graphics must be developed with equal precision so that a narrative emerges from the slides that not only emphasizes the key evidence, but also provides ***simple and persuasive themes***.



At the end of the process, the team is left with a streamlined and seemingly simple presentation that the audience can readily understand and, more importantly, be compelled to agree with on some level.This streamlined and simple end-product, however, is often all the client sees as well. The work that goes on behind the scenes – the effort and expense needed to develop the themes, to frame the evidence, and to refine the message to its basic core – constitutes the majority of the work that goes into the case. When done correctly, it *should* look easy, as if anyone could have done it. Most importantly, clients should recognize that this is precisely the ***value added*** by their litigators and litigation consultants.

In simplicity, there is power. Give the right people the power to create simplicity, and you, as client, will get astonishing results (that look easy).

A2L CONSULTING

How Creative Collaboration Can Help a Litigation Team

By Tony Klapper, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

I was reading the *Washington Post's* Business section on Sunday morning, and a front-page article about Sean Parker caught my eye. Parker, dubbed "Silicon Valley's Bad-Boy Genius," co-founded Napster and was the first president of Facebook. He was also played by Justin Timberlake in "The Social Network." Far from a routine business profile, this article provides several fascinating lessons concerning the importance of creative collaboration.

Apparently tired of catering to the entertainment needs of millennials, Parker recently launched the Parker Institute for Cancer Immunotherapy. Although it was notable that Parker invested $250 million to support groundbreaking research into eradicating a disease that kills millions each year, even more important is his model of creating a "sandbox" for scientific research. At press time, six premier medical research institutions—Stanford, Hopkins, MD Anderson, UPenn, UCSF, and UCLA—had signed up to be part of the consortium that Parker is creating to fight cancer. The premise behind the effort is that working together in the sandbox is far more effective than working alone. That truism is not one that is always followed.

I have worked with some great litigation teams over the past 20 years—teams that constantly encourage fresh ideas and reassessment of the facts; that meet and openly share ideas; that reward free expression and discourage groupthink. But I have also worked with teams that do none of these, where the lead lawyers are either too egotistical or too insecure to foster the free exchange of ideas. It seems obvious that spending the time to brainstorm is a good thing, not a bad thing. But institutional factors and personality traits can often sabotage implementation of the obvious.

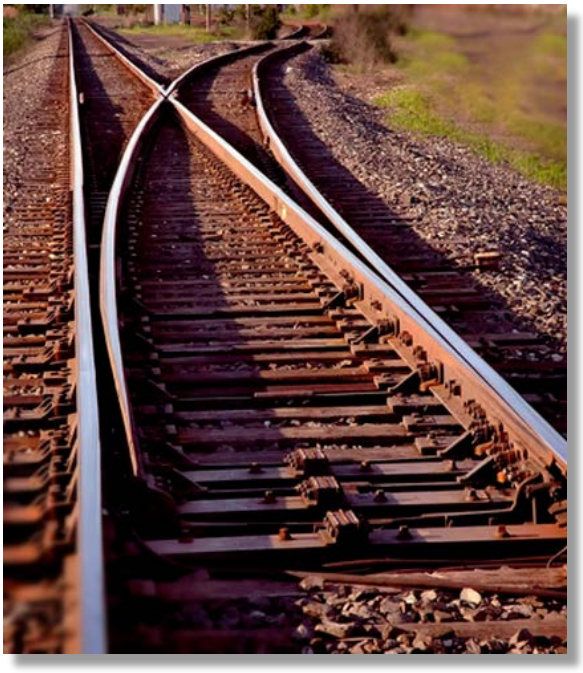
At A2L Consulting, we have a sandbox and we enjoy playing in it. When a new matter comes our way, we first individually get our arms around it, and then we meet. Whether at the table in a conference room, in front of one of our many whiteboards, or on a conference call, we work together, each of us bringing his or her own unique perspectives and experiences to bear. Our owner has been providing litigation consulting services since the mid-1990s; our lead Ph.D-educated jury consultant has been doing this work for over 30 years; I have been in the trenches on a diverse array of cases for 20 years; and our team of litigation graphic artists have collectively been at this for decades. Not only can collaboration be fun and rewarding; it brings a better product to the table.

That's also the beauty of the consulting business itself. To be effective consultants, we always ask our clients to tell us the best *and worst* about their cases and to tell us the best and worst of our performance as consultants. Similarly, we are not afraid to offer our own perspective on the strengths and weaknesses of our client's arguments and to offer constructive critiques on their presentations. We all become better when we share, openly work together, and move beyond the barriers of ego.

Having a sandbox and being able to play nice in it constitutes the beginnings of collaboration. Sharing ideas, pressure-testing them, and brainstorming about new ones is the hallmark of creativity.

Planning For Courtroom Persuasion? Use a Two-Track Trial Strategy

By Ryan H. Flax, (Former) Managing Director, Litigation Consulting, A2L Consulting



How early in the litigation process should you think about how a jury will react to your case, your client, or you? When should you begin to develop your case themes and storylines? Which is more important to your chances of winning a trial – having a compelling story to tell, or bringing in solid evidence under the law? Here's an easy one: When you get to the appeal, would you rather be writing the red or blue brief (hint: it's the red one for respondents)?

What I encourage in this article will seem elementary to the best litigators, but I'm writing from experience when I say that many trial attorneys fail to properly develop the necessary two-track strategy for their case – and lose because of it.

The Two-Track Strategy

What begins at the early stages of case preparation as a *single* track, which includes general case building, wrapping one's mind around the full scope of the relevant law, filling in the useful facts where they are needed and identifying the harmful facts, must quickly change to a *two*-track strategy directed towards both a jury presentation and a solid evidentiary record. (Although this article is focused on courtroom persuasion in jury trials, it also applies well to a bench trial to a judge, an arbitration to a panel, or a mediation before a mediator, which are all forums with an audience of human beings.)

These two tracks clearly do not occupy the same route, but both are essential to winning.

The "Law Track"

Most attorneys, especially those closer to their law school graduation than to retirement, are more familiar with one of these two tracks than the other -- the creation of a solid evidentiary record that is focused on a winning defense on appeal. We'll call this track the "law track." That's because it's the track that is most heavily burdened with law and facts, which is what we are taught in law school: we were tasked daily with reading and briefing cases and statutes and being prepared to recite legal requirements when called upon by our professors.

Most attorneys approach their cases in this same way – by identifying what the court of last resort has to say about the relevant law, i.e., what must be proved for them to win in the

eyes of the court, ordinarily by fulfilling all the "prongs" of the case law. Then these attorneys slowly build up their "garden of weeds" around the case, based on these issues.

These same attorneys focus on every fact they can soak up to decide where it fits into their legal position, they build preemptive defenses relating to any "bad" facts, and they search for hidden facts to support alternative theories of their case. This is very important because it's the foundation of any case. But it's not the only or even most important part of building a case for trial. Moreover, as the "garden of weeds" grows and grows as discovery develops, it's often very difficult for even the sharpest attorneys to extricate themselves from the weeds and see the bigger picture of the case they're about to try.

So, in addition to the "law track," what else should a trial lawyer consider?

The Persuasion Track

The other of the two tracks, and the one that many litigators tend to overlook, is building a case to satisfy a jury (or judge in the event of a bench trial) in a "real life," non-legal sense. I call this the "persuasion track."

After all, trying a case in court is something like making an extended elevator pitch for your client, and you need to make sure that the jury wants to hear it and that the jurors will be affected by your pitch in the way you intend.

Often, a litigator will spend too little time, or none at all, on this courtroom persuasion track. Most litigation teams tend to wait until the last minute before trial (often in the war room outside the courthouse) to really put their *story* together in a way that will be persuasive to jurors.

I have found that during trials (and mock trials), juries tend to find relatively few facts very interesting and "important" and that they then base the entirety of their decisions in the jury room on those few facts. There is a well-known psychological phenomenon called *confirmation bias*, which is the tendency to interpret new evidence as confirmation of one's existing beliefs or theories. After observing many mock trial exercises and seeing the results of dozens of jury trials, I have concluded that most juries tend to decide the outcome of a case in the first few minutes of opening statements and then use facts that fit their version of the case as reasoning in deliberations (the strongest or loudest or pushiest jurors typically triumphing in these deliberations). Attorneys need to recognize this and to develop their trial story around the key facts onto which jurors will tend to latch.

If you don't win at trial, you've got the short end of the stick when you head to post-trial arguments/motions and appeal. You must carefully develop your case along the persuasion track to plan to be successful on the second, law track. The question now is, *how is this done*? That will be the subject of my next article.

*This article updates a 2012 article and lays the groundwork for a more detailed explanation of the two-track strategy in subsequent articles.

Teaching Science to a Jury: A Trial Consulting Challenge

By Ken Lopez, Founder/CEO, A2L Consulting

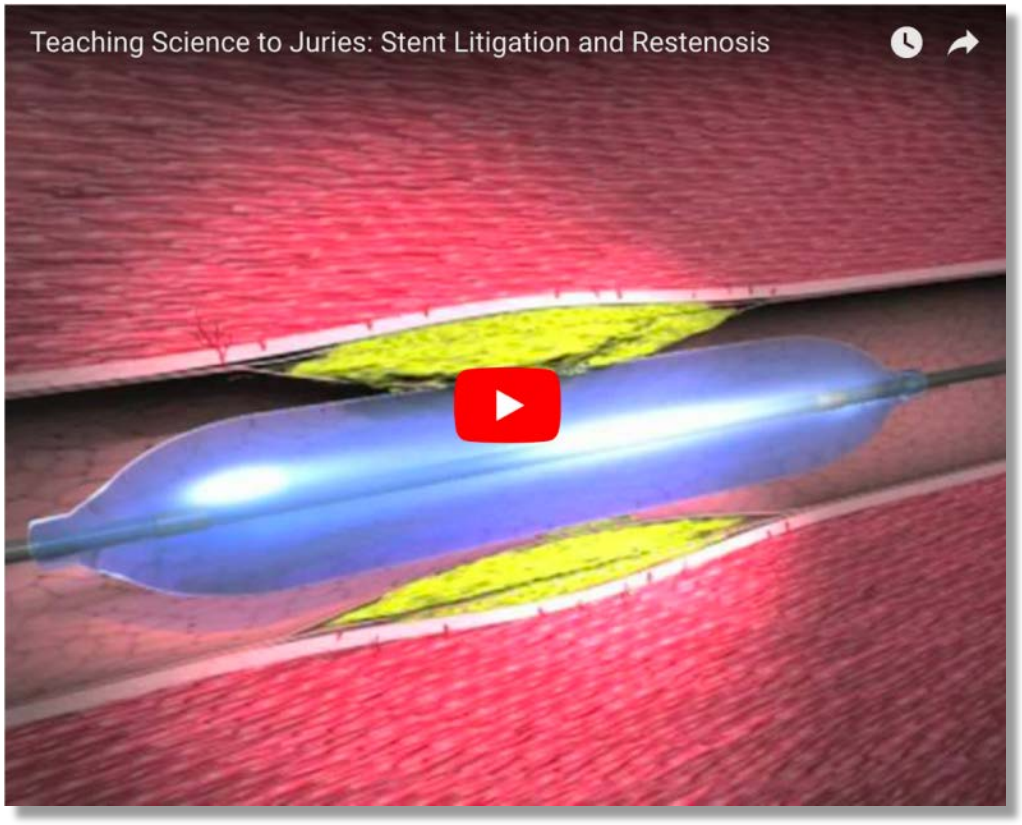
Very often, trial attorneys in complex cases need to explain extremely difficult and elusive scientific concepts to jurors who are not well versed in science. The lawyer's job is to convey the science correctly to the jury so that they can make a rational decision – yet not to bury the jury under a blizzard of scientific terms and concepts that they will never understand.

The answer is to use visuals in the form of photographs, schematic diagrams, animation, timelines, demonstrative evidence, document call outs or whatever is suited to the situation, and to explain them in terms that jurors who are not specialists in the scientific subject can understand.

Analogies (in other words, what is something like?), contrasts (how is something different from something else?), and simple definitions (what are the components of an object? how is it used?) are very useful tools for the trial lawyer.

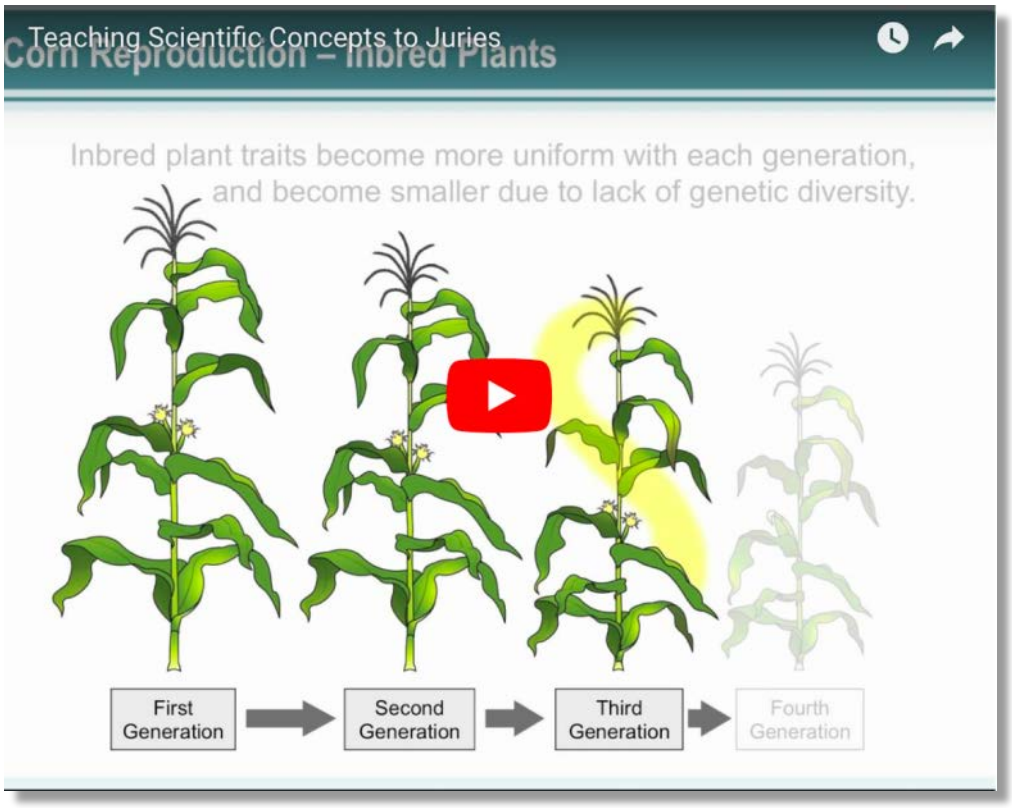
As Jan D'Arcy wrote in 1998 in *Technically Speaking*, "Many scientific subjects are hard to describe; they can be difficult to see, touch, measure or imagine. A presenter should find ways to illuminate a concept in known terms with the least amount of distortion. . . . Comparisons and contrasts are two of the best ways to translate your information clearly to your audience. Similes, metaphors, and analogies are comparisons that can often lead to amazing insights."

The brief movie below shows how restenosis (the formation of new blockages at the site of an angioplasty or stent placement) can form in blood vessels when a non-drug-eluting stent (one that does not contain an anti-stenosis drug) is used by a heart surgeon. This is a highly technical medical subject, yet after seeing the presentation, jurors will understand how stents work and why such drugs are used. Just months ago, this A2L Consulting animation and others like it helped a long-time client win the 6th largest patent litigation verdict in history totaling $593,000,000.

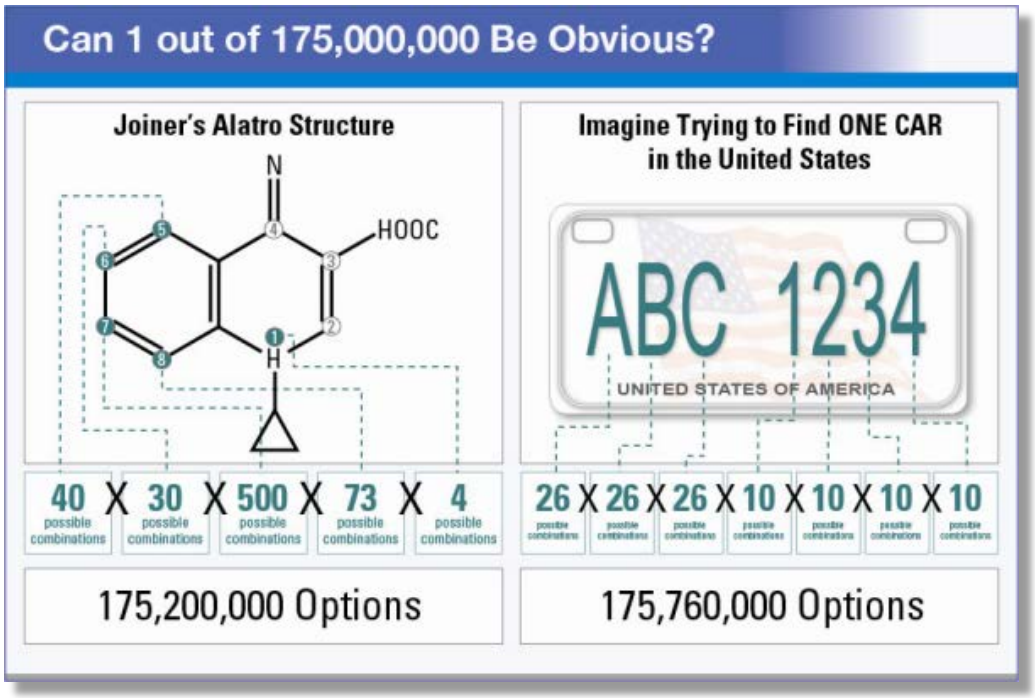


Below, we created a very straightforward, highly memorable patent litigation graphic that shows one person walking his own path, away from conventional wisdom, to show that an inventor's idea was unique and non-obvious.

Similarly, we have devised a 78-second video presentation that details the challenges of inbred reproduction, and the advantages of hybrid reproduction, in the corn plant. This is easily understandable to a juror, even one who does not have a background in biology or food science.



Finally, the schematic diagram below uses the excellent analogy to the letters and numbers in a license plate – an object familiar to jurors – to indicate how many possible structures of a chemical compound can exist and thus how the one structure designed by a client was not obvious and therefore was deserving of patent protection.



As Matthew Weinberg, CEO of the scientific consulting firm The Weinberg Group notes, "Successful litigation relies upon a strong science story. An expert who can explain the

science easily and clearly makes a difference. Juries want to understand the science and can be helped by an expert who makes it interesting and believable."

We believe that no scientific concept is too difficult to teach to a jury. In our 16 year history, we have found a way to successfully teach and persuade about everything from the genetic development of cancer, genetically modified corn, stem cells, physical separation in patented pharmaceuticals, metal fatigue, the transportation of air, water and ground pollution, DNA, bioequivalence, how allergies work, epidemiology, physics, chemistry and countless applied science medical principles.

With the right combination of trial team, trial consulting firm and expert consulting firm, any concept can be made understandable by combining a good explanation and a good visual.

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7 Reasons the Consulting Expert is Crucial in Science-Based Litigation

By Tony Klapper, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting
David H. Schwartz, Ph.D., Co-Founder, Innovative Science Solutions

The successful litigator knows that one of the first and most important steps to be taken when confronted with complex science-based litigation is to identify and engage a top-notch testifying expert. The ideal testifier is one who is highly qualified, able to credibly communicate to a jury, and can educate the legal team. These characteristics go for experts involved in patent disputes, product liability litigation, and consumer fraud cases involving allegations that a supplement, drug, or device is not effective.

Testifying experts are indeed critical for the success of a case, but as we have discussed in a previous post, many litigators fail to recognize that it is equally important to engage an experienced and litigation-savvy consulting expert. To understand why, consider the following seven points.

1. Availability

If you have recruited the ideal testifying expert, his or her time may be limited by the day-to-day obligations as an opinion leader in their field. I am sure that most of the litigators reading this post have experienced the challenges of working with a testifier who teaches, is conducting scholarly research, or has just simply overcommitted to too many legal clients. When this happens, getting the expert's attention may prove just as difficult as understanding the science upon which the expert relies. And because understanding the science enough to cross-examine the other side's expert is a critical component of effective advocacy, having a consulting expert available to take the time to educate you and help you prepare your case can be indispensable.

2. Context

Consulting experts tend to understand the litigation landscape better than an academic testifying expert. With the exception of the oft-used professional testifier, most testifying experts are not particularly litigation savvy and may not be familiar with the manner by which scientific evidence in their field may be twisted and turned by more experienced testifiers. A consulting expert who has studied not only the literature, but the positions espoused by the adversary's experts—as articulated in expert reports, depositions and trials—can help

litigators more effectively prepare their testifiers' reports and direct examinations, as well as prepare for cross.

3. Cost-Containment

Third, consulting experts provide the litigator with a means of evaluating an adversary's case, as well as his or her own, and understanding where the strengths and weaknesses lie. As we all know, we live in an age when early case assessments have become critically important to the business client. Those clients increasingly demand that their outside counsel find ways to resolve resolvable disputes well before hundreds of thousands (if not millions) of dollars are spent in motions practice, discovery and expert retention. Having a consulting expert help assess your case before retaining your testifier often proves to be one of the most cost-effective ways to satisfy the client's cost-saving demands.

4. Discoverability Concerns

Notwithstanding changes to Fed. R. Civ. P. 26(b)(4)(B)-(C), discoverability concerns remain with testifying experts (particularly in state courts) that are not as relevant with consulting experts. Know your jurisdiction. In addition to all the reasons mentioned above and below for retaining a consulting expert, if you litigate in a state court that does not provide full work product protection to communications with testifying experts, beware. The consulting expert might be your only safe harbor for open and candid discussion about the scientific evidence.

5. Find the Best Testifiers

Fifth, the right consulting expert can help you find and recruit the ideal testifying experts, especially when the issues are extremely complex and esoteric. This is particularly true when the litigator has not had the time to fully immerse him or herself into the science. Until that happens, finding the right testifier can be a complete crapshoot. Who are the real thought-leaders in the field? Among them, are there any candidates who have espoused views antithetical to my client's? They may say they haven't, but how do you know without fully understanding the literature and that expert's writings? Can the candidate's methodology expose him or her to a blistering *Daubert* attack? These and other questions are critical in the search process. But who has the time and the skills to make these judgment calls? A good consultant can help in the vetting and selection process in ways that busy litigators often cannot.

6. Help To Ensure Victory

Sixth, in the age of increasing *Daubert* (and other expert) challenges, having a consultant available to help assess the adversary experts' methodologies and brainstorm areas of attack can be the difference between winning and losing a case. Yes, lawyers can be very skilled at identifying the logical flaws, errors of omission, and unfounded inferences that plague many an expert's analysis. But having a consulting expert dig into the literature and/or serve as a sounding board for lawyer-based "scientific" musings helps ensure that potential arguments are carefully vetted and those selected are truly effective.

7. Some Examples

Where can these consultants and consulting services be most helpful? Consider their use in patent disputes, personal injury litigation, and consumer fraud matters.

For example, pharmaceutical and medical device patent disputes revolve around demonstrating issues of patent validity and infringement. If you represent an innovator, you will be focused on demonstrating that the patent is valid under intense scrutiny and that your adversary is infringing on the teaching present in your patent. If you are defending a generic manufacturer, your goals will most likely be reversed. Consulting experts can help you perform these tasks and identify the right testifying experts to make these assertions. These non-testifying experts can scrutinize the laboratory notebooks and meeting minutes to spot documents that both support and potentially refute your case. For these types of cases, you will be looking for consulting experts with credentials in medicinal chemistry, drug metabolism, as well as basic cell and molecular biology.

In personal injury product liability cases involving healthcare products—such as pharmaceutical and medical devices, dietary supplements, agra-chemicals, and foods—consulting experts are perfectly positioned to work closely with counsel. The knowledgeable consulting experts can be instrumental resource in matters that involve a complex regulatory landscape and equally complex science-based issues. Consulting experts can help clients develop strategies and approaches that are central to the defense, and they can help identify the difficult-to-find regulatory testifying experts.

Finally, as many of our readers know all too well, consumer fraud cases are becoming extremely common, especially for products such as dietary supplements, cosmetics, and other consumer healthcare products. These cases generally involve allegations that no competent and reliable scientific evidence supports the advertised benefits of the products at issue. Like personal injury litigation, consulting experts are critical to an in-depth understanding of the science relevant to the case. Because there is a specific regulatory standard at issue in these cases, it is sometimes less important to have experts who are experts in the medical area at issue and more important to have consultants who understand regulatory standards and the types of studies that would be considered competent and reliable scientific evidence. Consulting experts in these cases will be able to evaluate and assess the substantiation reports that the defendant may have generated and they will help you perform an up-to-date, comprehensive review of the scientific literature relevant to a substantiation of the advertising claims at issue.

The Jodi Arias Trial, A Case Study in Experts, Witness …or Witless?

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

While you know your expert is tops in their field, a jury only sees them briefly, when your expert witness may come across "witless." Avoid pitfalls so your witness truly comes across as an expert witness.

Why do deer freeze in the headlights? Because they are built to see in low light at dawn and dusk, not bright lights. What are your expert's blind spots?

Competence versus Performance

Lawyers often overlook the difference between **competence** (qualifications) and **performance** (real-world output). An expert witness may know a subject very well, but how would an observer know? Since there is no direct way to assess it, it is only by observing if that expert "passes the test" of testifying that observers can measure, by inferring, whether the witness possesses the knowledge of an expert witness. There are many real-life examples in which someone may have knowledge, but tests poorly. Does it mean they don't know? No, but sometimes, only the grade matters.

When performance is successful, it reveals **competence:** "the ability to perform in effective ways on different occasions, including in differing and unexpected contexts" (Black, H. & Wolf, A., Knowledge and Competence. Careers and Occupational Information Centre/HMSO, London, UK., 1990).

There are generally three types of expert witnesses: Regardless of their level of competence, they have:

1) … testified so much that they are hacks/hired guns;

2) … testified enough to be confident;

3) … have *never* or *rarely* testified and are deer in the headlights.

Expert Witness - Type 1

While people experienced in a particular field (such as colleagues, competitors or the litigators) might know that a witness is a hack, it may not be apparent to jurors who lack the

experience to judge them as critically. Instead, since such witnesses know how not to fall prey to classic cross-examination tactics, they tend to elicit confidence rather than skepticism. The criticism of those truly in the know may undermine the testimony, but go over the heads of the general public or jury for whom the points are too subtle and unfamiliar. It is often only when a hack overdoes it and appears "slick" -- not polished – that they lose jurors' confidence.

Expert Witness - Type 2

Those with just enough experience to be confident without being cocky are in the sweet zone, but are hard to find. They are not absolutist and know when to stand their ground versus when to concede. They pick their battles, don't play silly word games, and behave similarly on direct and cross examinations. They aren't know-it-alls. They don't freeze under attack, offer good examples, and speak in plain language. They aren't "canned," but candid.

Expert Witness - Type 3

A common mistake litigators tend to make is hiring an expert witness of the third type – one from a rare field with no experience testifying. Because it can be challenging to find an expert in an esoteric field, counsel may be put in the position of choosing someone without experience testifying. Such "experts" know their stuff – but only to those who *already know their stuff, too*. When they cannot communicate what they know effectively and lay jurors observe them flail when faced with skilled cross examiners, the expertise gets missed, but the flailing doesn't.

What can interfere with performance?

- **Anxiety** over loss of control, unpreparedness or inexperience, causing intrusive thoughts that interfere with task-focused thinking
- **Stress** that decreases memory, information processing and attention
- **Mood**, sleep-deprivation, hunger, or impaired state
- **Naïveté**
- **Distraction** from the current question, anticipating to forestall future challenges
- **Fear** that conceding anything shows weakness

When a situational challenge is imposed externally (as opposed, say, imposed by the person himself or herself, e.g., to complete a marathon), there is a greater likelihood it will cause stress and more task-irrelevant ideas due to a perceived loss of control (Lazarus, R.S., 1982, The psychology of stress and coping. In C.D. Spielberger, et al. (Eds.), Stress and anxiety (Vol.8, pp.23-36). Wash., DC: Hemisphere).

Why Consider Competence <u>and</u> Performance?

For experts witnesses, subject-matter competence is necessary, but insufficient for success on the stand. In fact, for experts to consistently provide high-quality responses, litigators should place greater emphasis on how they perform in real-life legal settings, such as deposition and trial, rather than upon competence alone because jurors pay more attention to form over substance:

Why do jurors focus on performance over competence?

Because that is what they know – actions, not words. Jurors typically lack the expertise to appreciate nuances of the placement of a carbon atom, the DSM IV-TR, or the standard of care, but they know when someone looks nervous or evasive. A witness may be very competent in their field, but lack skill in performance, i.e., be poor at fielding questions and responding properly, yielding an expert that is *witless*. If their "look" isn't as good as their book, jurors will miss their points. Conversely, a witness less competent in their field, but a great performer, may be perceived as a better expert witness.

Although counsel may spend hours and thousands of client dollars word-smithing an expert's message, they may miss problems with the messenger – what they communicate through their demeanor which comes across loud and clear to anyone watching from the outside, but not by counsel.

12 Common mistakes that can make experts seem *witless*:

1) Attacking the questioner, not the question
2) Taking it personally
3) Being absolutist without picking battles
4) Reversing positions

5) Asking to repeat questions as a stalling tactic

6) Fighting over the meaning of words with common meaning

7) Breaking basic procedural rules: asking questions of the cross examiner, speaking over objections, making comments when there is no question pending, etc.

8) Not giving an inch, and thus, appearing unreasonable

9) Over-reaching and under-qualifying

10) Opining on subjects outside their expertise

11) Failing to use understandable litigation graphics

12) Being unavailable for or resistent to witness preparation

Case Study - The Jodi Arias Trial

In the recent criminal prosecution of accused murderer Jodi Arias, for example, the defense put forth two "experts," Dr. Richard Samuels, clinical and forensic psychologist, and Alyce LaViolette, M.S., MFCC, a domestic violence expert.

Despite their credentials, possibly attesting to their competence (for Samuels, a Ph.D., licensed Psychologist since 1975, Diplomate and Fellow in various related disciplines; for LaViolette, a 20-page CV, M.S. in psychology and a state license in Marriage, Family and Child Counseling), *both came across witless*. Why?

- Dr. Samuels was a mess:

- He was the subject of disciplinary action from the New Jersey Board of Psychological Examiners, a huge red flag.
- He switched theories midway through his testimony.
- He was missing crucial materials on the stand because he left them on his desk.
- He had re-scored test results when they didn't yield the desired outcome.
- He used outdated materials.
- His work was obviously sloppy.
- He took challenges personally.
- He could not back up his positions with objective, professionally-recognized and standard testing.
- He was overdue for a haircut.
- He tried too little.

His performance was a failure.

- Ms. LaViolette, personable and accessible, lacks a Ph.D. credential (a fact obvious to lay jurors). She acted like what she is – an advocate for abused women – not an unbiased expert.
  - She wouldn't reply "Yes" or "No" if her life depended on it.
  - She dressed as if she were going to an organic food convention.
  - She attacked the prosecutor, asking if he was angry at her.
  - She made inappropriate impromptu comments, suggesting he needed a" time out" for his aggressive questioning.
  - She didn't give an inch, even when an inch was obvious.
  - Playing tug of war was unresponsive.
  - She believed, relied on and liked the defendant, an admitted liar.

- The way she attempted to stand her ground lost ground. She missed the difference between battle and war. In an attempt to be perfect instead of real, her opinions became more unreal. She tried too hard.

While her competence has been recognized for decades, her performance failed.

These criticisms do not go to the substance of their testimony or qualifications, i.e., competence, but to their performance.

- In contrast, the prosecutor's rebuttal witness, psychologist Janeen DeMarte, Ph.D.:
  - Admitted without apology, "I would not call myself an expert in domestic violence specifically."
  - Her answers were short and sweet, "That's correct." "I'm aware of that." "Yes."
  - She rejected having words put in her mouth, "Looking at that broad category that doesn't relate to this case, yes."
  - She conceded flatly, "If those memories were not encoded, you can't get them back."
  - She made her points and stood her ground appropriately. She didn't strive for perfection, which is unreal, but was realistic and thus, real.

She has decades less experience than the defense experts, but her *performance matched her competence*. Was it enough?

- As a Hail Mary, the defense put on sur-rebuttal witness, "Dr. Credentials," licensed psychologist Robert Geffner, Ph.D., expert in family violence and sexual assault, Diplomate in two areas, professor, researcher and clinician with over 30 years of

experience, who's allegedly testified more than 100 times in 25 years. He reviewed and rescored psychological tests done by the prosecution's expert. He conceded points and was less defensive than the prior defense experts, but still had problems:

- For hours on end, he droned on in a monotone. Length is not always strength. As Shakespeare said, "brevity is the soul of wit," so seeing the forest for the trees was a challenge.
- He suffered from TMI, providing so much detail that he created an information overload, not impact;
- He co-edited an article by defense witness, LaViolette, they've referred clients to one another, and have crossed paths at conferences before;
- His "expert" testimony had been restricted or tossed out because of his reliance on a defendant's testimony without independent verification in other cases.
- He never interviewed the (mendicant) defendant in this case (a double-edged sword)

Although he overcame the lack of credentials of LaViolette, and had more gravitas than DeMarte and Samuels, it was too much, too late. He seemed competent, but his performance was lackluster.

- Finally, the prosecution's sur-sur-rebuttal witness, Dr. Jill Hayes, licensed clinical, forensic, and neuropsychologist, with expertise in testing, rebutted Dr. Geffner. She asserted that tests are invalid if the person tested lied. She supported the methods and conclusions of the prosecution, but with more heft in experience than Dr. DeMarte. Her demeanor was assured and balanced, articulate and unflappable.

Net result in the Jodia Arias case

Justice for Travis

In the end, while no doubt a myriad of factors unrelated to the experts sealed the defendant's fate, the fancy footwork of the defense experts could not explain away Jodi Arias' conduct with her convenient amnesia or allegation of being a battered woman who

suffered from PTSD. The defense experts' shifting opinions, lack of objective support, reliance on her for information, and poor performance on the stand did nothing to help her.

How to prevent your expert from being *witless*?

1) **Research their background** thoroughly to make sure there are no skeletons in their closets so that red flags don't completely undo their credibility;

2) Knowledge is power, so make sure to **orient novice expert witnesses to the process**, underscoring common mistakes and how to avoid them;

3) **Have them watch "experts" testify** on televised trials to observe what does and does not work well;

4) **Explain how they can maintain control** effectively, e.g., through re-direct, making sure they understand the question, avoiding letting others put words in their mouths, waiting for objections and attending to the objection's coaching, only opining in their area of expertise, how to deflect questions, etc.

5) Dull the sting of cross examination by **drilling the expert in mock cross-examinations** prior to deposition and trial, especially focused on their weaknesses (Do they guess? Do they stray off campus to answer what they don't know? If so, ask questions to elicit these behaviors and provide better alternatives).

6) **Have someone unfamiliar with the expert do the mock cross** so that the witness does not have a false sense of security, doesn't feel betrayed by his or her own side, and the examiner doesn't pull their punches in attacking questions.

7) **Have the expert reverse roles with their handler** to reveal the most dreaded questions and see model responses on how the subject can be handled. This works better than merely "telling" them.

8) If possible, **choose an expert with impressive credentials on their surface to the common person** (e.g., MIT graduate sounds more impressive than graduate of Bob's Online College) and jurors may not understand a word they say, but may give higher grades because of the source.

9) If possible, **choose a female for a field not stereotypically female-oriented** – it will be perceived as better than it is, compared to a male of equal qualifications (due to the contrast effect, making the quality of their testimony exaggerated because it is unexpected, and the equity principle, whereby it is rewarded more).

10) **Raise the expert's self-awareness**, asking them to consider:

1. How much does the average juror know about their field?
2. What visual support may help as tutorial material?
3. What will jurors pay attention to in deciding?
4. How will the expert draw jurors' attention to what is most important?
5. What may *surprise* jurors?

6. What in the expert's appearance is *inconsistent* with the stereotype for their profession and how can they match the stereotype better? Do cowboy boots fit jurors' image of a scientist? Does long, unkempt hair match jurors' expectations of an economist? Do spike heels, a lot of makeup and jewelry match jurors' idea of a medical expert?

Assess and prepare your experts considering *both* competence and performance so you present an expert witness who is not *witless*.

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Witness Preparation: Hit or Myth?

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

Have you ever helped a witness get up to speed, or interviewed a witness who seemed all put together, only to see him or her take the stand and unravel? For example, had Mark Fuhrman been able to appropriately acknowledge his regrettable actions of the past in the O.J. Simpson criminal trial, how many days of courtroom drama would we have been spared?

Recent high-profile cases suggest the need to rethink basic assumptions about witness preparation – to, in effect, probe the essentials of this fine art more deeply than is encouraged in most litigation skills training.

There are two fundamental levels of witness preparation:

- **Witness Prep Level 1**: Surface, which includes observable outward appearance, demeanor, body language, and delivery of verbal testimony.

- **Witness Prep Level 2**: Subsurface, which includes the emotional/ personal/professional conflicts that act as an undercurrent to the surface level.

Witness Preparation Level 1 – Surface

Many practitioners (lawyers and others) attempt to modify the exterior aspects of witness testimony (i.e., the surface level) by rehearsing the "correct" responses with witnesses, admonishing them about incorrect responses, and telling them how or how not to look (i.e., cosmetic fixes). It is common to discuss the selection of the appropriate suit and tie for a male witness or the right style of dress and accessories for a female witness.

It is also common to provide witnesses with lawyer-generated outlines or scripted responses for Q & A sessions, and to ask them to study and internalize the scripts. Efforts of this type require witnesses to perceive, attend to, comprehend, store and recall information. In other words, they must use their perceptual and cognitive abilities.

However, traditional witness preparation tends to yield unreliable results because it is superficial and does not address subsurface conflict. For example, we have often heard counsel advise a witness, "Don't worry about this particular issue in your testimony," without knowing what the witness actually does have to worry about.

Progress made through surface-level preparation alone is transient and highly susceptible to being reversed in the absence of constant reinforcement. Conflict tends to undermine surface-level preparation because it interferes with the perceptual and cognitive skills

involved in processing and recalling the information. Distractions or emotional concerns may cause the witness to simply forget the answer due to limited recall of the "correct" response when under pressure. Second, even when the witness recalls the "correct" response, the delivery can unwittingly communicate unaddressed, underlying discomfort or conflict and betray the intended message. In other words, the delivery (through intonation, choice of words, facial expression, body language, posture and eye contact) can sabotage the response (for example, when the mouth says "no" but the head nods yes).

Finally, since rote feeding of responses cannot predict every possible question, it cannot supply every possible answer. The witness may progressively fail to hold up under attack on cross examination because he or she does not know the prescribed response to an unanticipated question. If, in the face of the unexpected, a witness senses that they've lost control, it will throw them off track and into a tailspin.

Witness Preparation Level 2 – Subsurface

The surface-level approach thus ignores two powerful sources of potential witness failure:

1. The inability to predict every possible question and thus to model every possible response for the witness.

2. The fact that, in some way that relates to the case or the experience of testifying, the witness is conflicted. Such conflict tends to undermine surface level preparation because it interferes with the perceptual and cognitive skills involved in processing and recalling the information necessary for effective witness performance. In addition to pondering and reviewing legal or technical facts, almost every witness is likewise preoccupied by internal and personal issues. These may pertain to his or her real or imagined vulnerabilities, may or may not be case-related, and may be known or unknown to the trial team. Usually they are *unknown.*

For example, there was "the man who bent over backwards," a caring, hardworking disaster-claims adjuster with an impeccable professional record who had an extramarital affair during a claim assignment. The handling of that claim later became the issue of a lawsuit. The adjuster's diligence might be a positive issue under cross, but because of his affair (not the work he had done), he experienced great angst while preparing to testify. The consequences of being exposed threatened to undermine his testimony. It was only by bringing the issue of his affair to light, discussing possible consequences and solutions, and reconciling them in the context of the case that the witness was able to cope with it. Once free of his dark secret, he was prepared to assert affirmative points, focus on his proper handling of the disputed claim, and present himself with dignity. In fact, further dialogue revealed that, in some instances, his on-the-road relationship may have actually benefited the insured because he had offered extra assistance to his coworker paramour (crawling into difficult-to-reach inspection sites, for example), which he would not have done had they not been so close.

The sources of conflict are typically not cognitive, but emotional or personal in origin. Since one's emotional state affects perception and memory as well as overall competence and performance, it is risky to engage in preparing a witness on the surface level until the covert, subsurface-level issues are addressed first and fully. The conflicts must be explored,

revealed and resolved before a witness can come to a state of optimal competence and reliable performance in which he or she is fully able to process and handle information.

During typical preparation sessions, witnesses are unlikely to voluntarily bring their personal conflicts and concerns to the surface and reveal them to the trial team, either because they are unaware of the conflicts themselves or because they experience shame, regret, dread of repercussion, or self-recrimination. This is particularly so for expert witnesses who often fancy themselves (or believe others should see them) as invincible. Admitting a problem could shatter that image.

The goal is to prepare a witness to be conflict-free. The term "conflict-free" does not mean "problem-free," in which witnesses would be reassured by simply playing down the challenges to overcome in the testimony. Instead, it means a witness free of unaddressed emotional dread about undisclosed issues. Internal conflict is fueled by anxiety and is then unwittingly disclosed on the stand in a variety of self-defeating behaviors. These include defensive preempting of, or sparring with, the cross-examiner; anticipating questions; interrupting the examiner; becoming antagonistic; misstating known facts; failing to recall memorable facts; or contradicting prior testimony.

Solving Conflict: Important Steps

Being conflict-free is achieved by:

1. Establishing rapport and trust with the witness;

2. Empowering the witness with knowledge about the case, the process, procedure, case progress, and expectations; and

3. Exploring and addressing internal personal fears by providing concrete coping strategies and helping to reframe issues. It is not necessarily a "bad fact" that undermines a witness; rather, it is how the witness views and reacts to the bad fact that determines his or her credibility and durability as a witness. One senior engineer had a habit of jotting down highly provocative and inflammatory comments in the margins of his company's internal memos. In a lawsuit years later, he was terrified those notations would come back to haunt him. The day was won by shifting his focus from the notations to his behavior, and by getting him to acknowledge outright that he had a bad habit of writing "cockamamie" things which were immature, impudent, and intended to get a rise out of his superiors, but which did not relate to the plaintiff's allegations of fraud.

4. Establish rapport and trust. Ask fundamental questions that show concern for witnesses. Who are they outside the context of the case? What are their family histories and backgrounds? Place in birth order? Role in family, role in business, role in the case? How has all of this affected their personal and professional lives? What makes them angry or worried or upset? What is the best and worst outcome they could expect? How do they feel about the possible consequences? What is their prior experience testifying? What from that experience still applies? What's different now? What, if anything, do they regret regarding this

case? How, if at all, can it be remedied? What would they have done differently if they knew then what they know now?

Maximizing contact between the witness and the trial team helps to maintain the established rapport and sends a message to the witness that the trial team is receptive and values their participation. Individuals such as junior or lower level associates and staff who are capable of building rapport with witnesses can act as communications liaisons between witnesses and senior members of the trial team. Such liaisons are commonly more accessible and less threatening. Witnesses are apt to ask them questions or express concerns to them. These contacts can be especially valuable during the pretrial countdown days when what the witness considers important can be superseded by the trial team's priorities.

Empower the witness with knowledge. Even a seasoned professional can be reassured by a review of fundamentals and details of what is expected in an upcoming procedure (whether deposition, hearing or trial). Make sure witnesses are kept up to date regarding the status of the trial and changes that may impact the order and substance of their testimony. The communications liaisons discussed above can assure that witnesses are continually apprised of developments. Address areas of conflict and provide coping strategies. Particularly troublesome witnesses who have difficult dispositions, attitudes, and/or substantive problems can be significantly aided with the help of professionals.

Appropriate professionals to consult include those who specialize in psychology and law, who have an astute understanding of trial tactics as well as the know-how to deftly elicit and manage witness conflict. Psychologists who lack an understanding of trial context and strategy will be of limited value. Explore, through nonjudgmental dialogue, how the witness witnesses reframe issues to alleviate undue stress and resolve internal conflict. Perhaps most importantly, do not supply answers before hearing out the witness. Here are a few specific coping strategies:

Reframe Difficult Issues

From: "I did the wrong thing."

To: "Knowing what I knew at the time, I did my best under the circumstances: I made a reasonable choice and took reasonable action. I did not know and could not have known then what I know now."

Overcome Anticipated Criticism or Exposure

From: "I fear this issue is going to come out. I pray it doesn't. I don't know what to say. I should have done a better job/more/shouldn't have done what I did."

To: "That issue may very well come out. If it does, I can respond with x, y and z. It is not really relevant because it has nothing to do with this case. It is simply intended to make me look bad. Knowing that, I can prepare for it. In any case, I can bring the focus back to my main point."

Modify Unrealistic Expectations

From: "I wish I had read everything, knew what everyone else was going to say or said, and could remember everything so I don't get tripped up and look stupid."

To: "No one can read, know or remember everything. I can reasonably review what's important, make a plan and be diligent. After that, it's perfectly fine to ask to see documents to refresh my recollection, to take my time and contemplate questions, and to say I don't know/remember' if that is the case. I do not have to be perfect, I just have to be myself and do my best."

Take Reasonable Control

From: "No one is really looking out for me. The lawyers don't even know the right questions to ask. I'll have to straighten them all out."

To: "I'm part of a relay race. I have my part, no more and no less. My part is a-b-c. If my lawyers

choose not to ask for a certain detail, that's based on their expertise. They probably know something I don't, so I'd better do my job and let them do theirs. "I'll just stay cooperative and answer the questions asked as best I can. If the other lawyer asks a poor question or a mistaken assumption, I will simply offer accurate information and not attack the lawyer. I'll have another chance on redirect to respond if my lawyer thinks it is necessary. If not. I'll have to trust their judgment. They're running the show, not me."

Learn Where to Pick Fights

From: "I'd really like to show up (opposing counsel). He really gets my goat. I'm not going to give him an inch."

To: "I'd rather win the war than the battle. When I respond cooperatively and make my point, I show real strength instead of showing I have something to be afraid of by playing tug-of war. If I let go of the rope, my opponent will fall, not me. Otherwise, I'll be sending a red flag and creating smoke. That hurts me, not them. "Conceding minor points is sometimes appropriate. Otherwise, it will seem like I am difficult and combative, which is unpleasant and not persuasive. What really matters in this case is that the jury understands x, y and z. I can help send that message."

How Not to Take It Personally

From: "If I don't blow it on the stand, I'll be a hero; if I do and we lose, it will all be my fault."

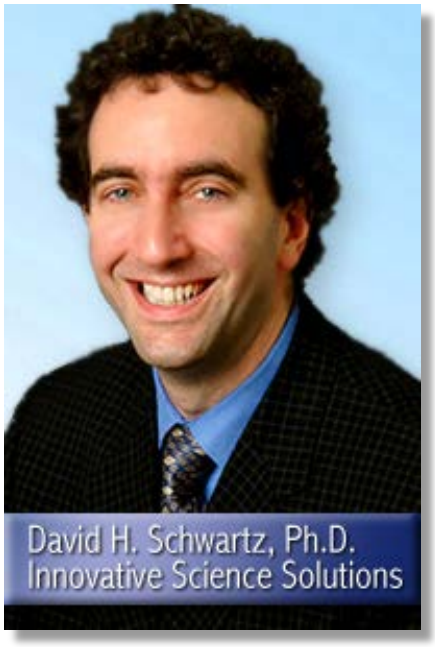
To: "I know what I know, I'll prepare well and do my best. My goal is to communicate two points, 'a' and 'b.' Beyond that, I have no control over what happens. I am only one part of the case. I will let the lawyers and other competent witnesses do their part. I will make a sincere effort. Whatever happens, I'll be the same person afterwards as I was before."

In sum: To present a witness who is well-prepared, it is vital to reveal and remove conflicts which, like hidden land mines, can cause irreversible damage.

A2L CONSULTING

Using Trial Graphics & Statistics to Win or Defend Your Case

By Ken Lopez Founder/CEO, A2L Consulting



This article is coauthored by A2L Consulting's CEO, Kenneth J. Lopez, J.D., a trial graphics and trial consulting expert and David H. Schwartz, Ph.D. of Innovative Science Solutions. Dr. Schwartz has extensive experience designing programs that critically review the scientific foundation for product development and major mass tort litigation. For 20 years, he has worked with the legal community evaluating product safety and defending products such as welding rods, cellular telephones, breast implants, wound care products, dietary supplements, general healthcare products, chemical exposures (e.g., hydraulic fracturing components), and a host of pharmaceutical agents (including antidepressants, dermatologics, anti-malarials, anxiolytics, antipsychotics, and diet drugs).

[*See also follow-up article discussing the null hypothesis*]

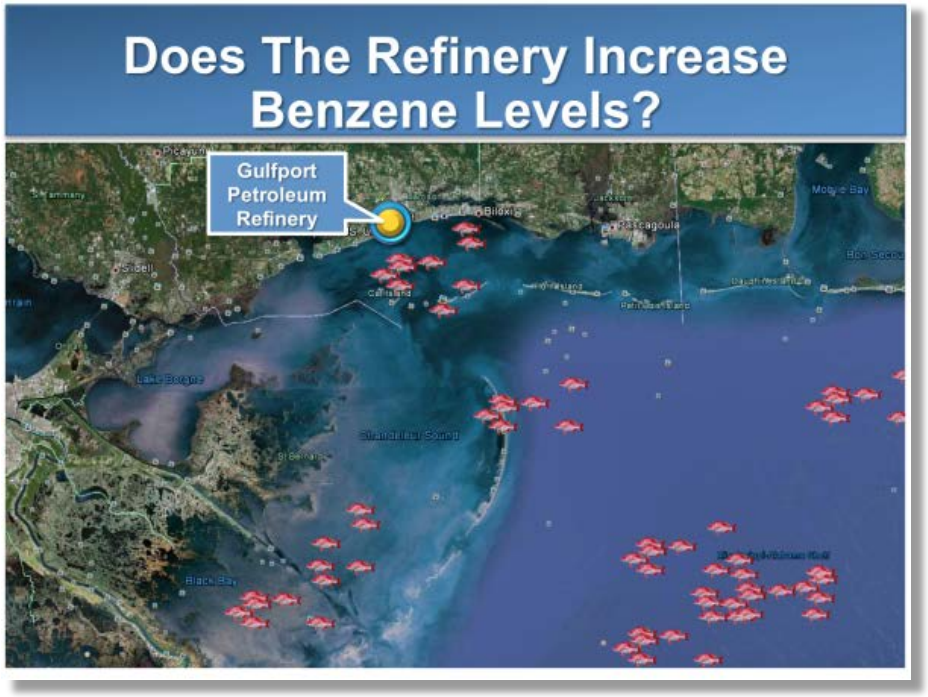
Many of us have been there in the course of a trial or hearing. An expert or opposing counsel starts spouting obscure statistical jargon. Terms like "variance," "correlation," "statistical significance," "probability" or the "null hypothesis." For most, especially jurors, such talk can cause a mental shutdown as the information seems obscure and unfamiliar.

It's no surprise that talk of statistics causes confusion in a courtroom setting. Sometimes, a number can be much higher than another number and yet the finding will not be statistically significant. In other instances, a number can be nearly the same as its comparison value and this difference can be highly statistically significant.

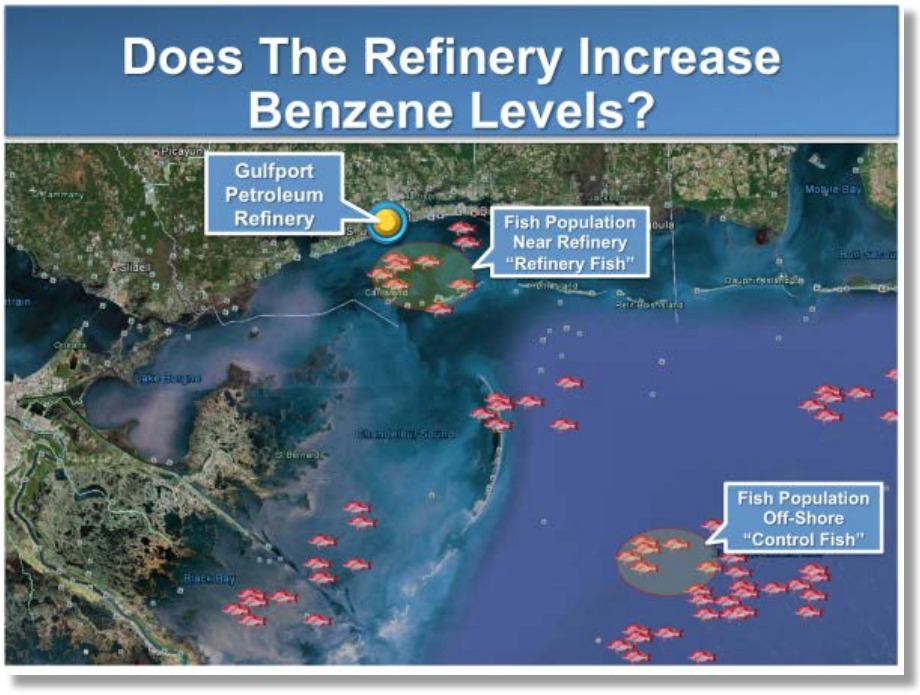
Helping judge and jury develop a clear and accurate understanding of statistical principles is critical – and using the right type of trial graphics can be invaluable.

Let's demonstrate this by way of example.

Suppose we want to know whether a petroleum refinery increases the level of benzene in fish that inhabit the coastal waters near the refinery.



The hypothesis is that the benzene level in the coastal fish near the refinery (the Refinery Fish) is higher than the benzene level in off-shore fish that live in waters far from the refinery (the Control Fish).

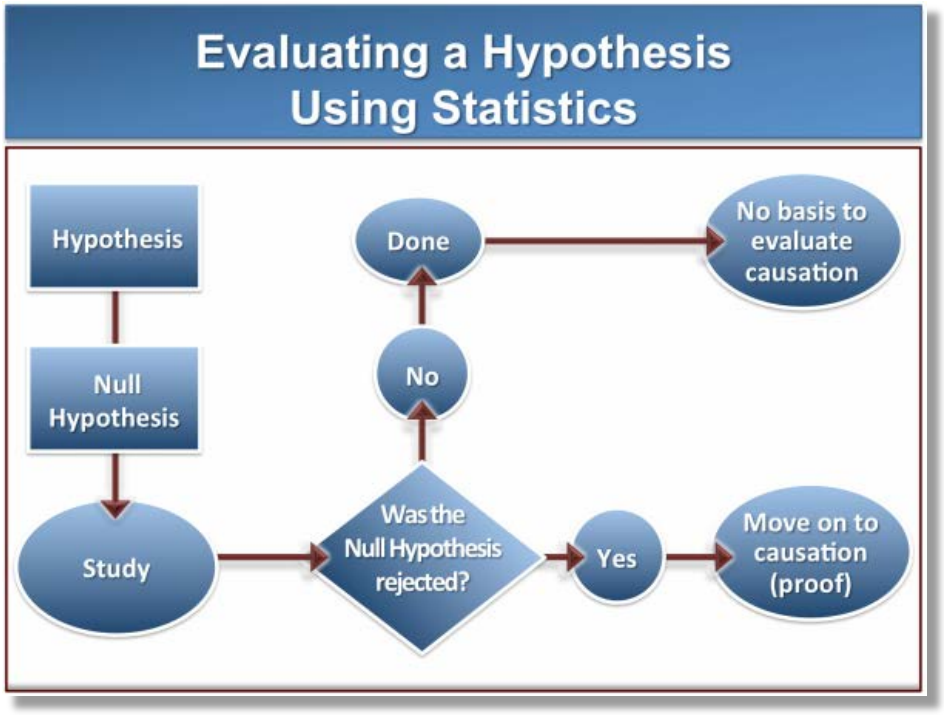


Because we can never collect every single fish and measure benzene levels in all of them, we will never know the precise answer to the hypothesis (not to mention the fact that if we did, the study would be irrelevant because there would be no more fish). But we *can* sample some of the fish near the refinery and then compare the benzene levels in these fish to a sample of fish collected from the middle of the sea. Statistical techniques are a clever tool

that we use to answer the research question, even though we haven't measured all the fish in each location.

Unless one is trained in statistics, the evaluating might appear easy and straightforward. Simply compare benzene levels in the Refinery Fish sample to the benzene levels in the Control Fish sample and see which is higher. But what if our sample only reveals a very small difference between the benzene levels in the Refinery Fish sample compared to the Control Fish sample? How do we know if that difference we observed in our samples is a real difference (i.e., potentially due to a causal relationship with the refinery) or whether it was simply due to our sampling techniques (i.e., due to chance)? Statistical techniques provide us with a way to properly interpret our findings.

An overview of well-established statistical techniques surrounding hypothesis testing is in the trial graphic below:



While this graphic is somewhat oversimplified, it does provide the basic steps that are taken in the hypothesis testing decision tree.

Although imperfect, a criminal case serves as a useful analogy to help understand how statistics work. In a criminal case, the defendant is assumed to be innocent unless proven guilty beyond a reasonable doubt. In statistical terms, the overall trial can be likened to statistical testing of a hypothesis (i.e. did he do it?), and the presumption of innocence can be likened to the "null hypothesis." Like the null hypothesis, the starting point in a criminal trial is that defendant is not guilty, and in statistical terms, that the connection you've set out to establish is just not there. The trial graphics below provide an overview of this concept. Again, this is an imperfect metaphor and is subject to criticism from a pure statistical vantage point. Nevertheless, it provides some assistance to the novice in clarifying the fundamental tenets of hypothesis testing.

Returning to our refinery hypothetical, we form our null hypothesis.

In this case, the null hypothesis is that the Refinery Fish are exactly the same as all the other fish in the ocean in terms of benzene levels — specifically, that they come from the same population. Succinctly, the null hypothesis is as follows:

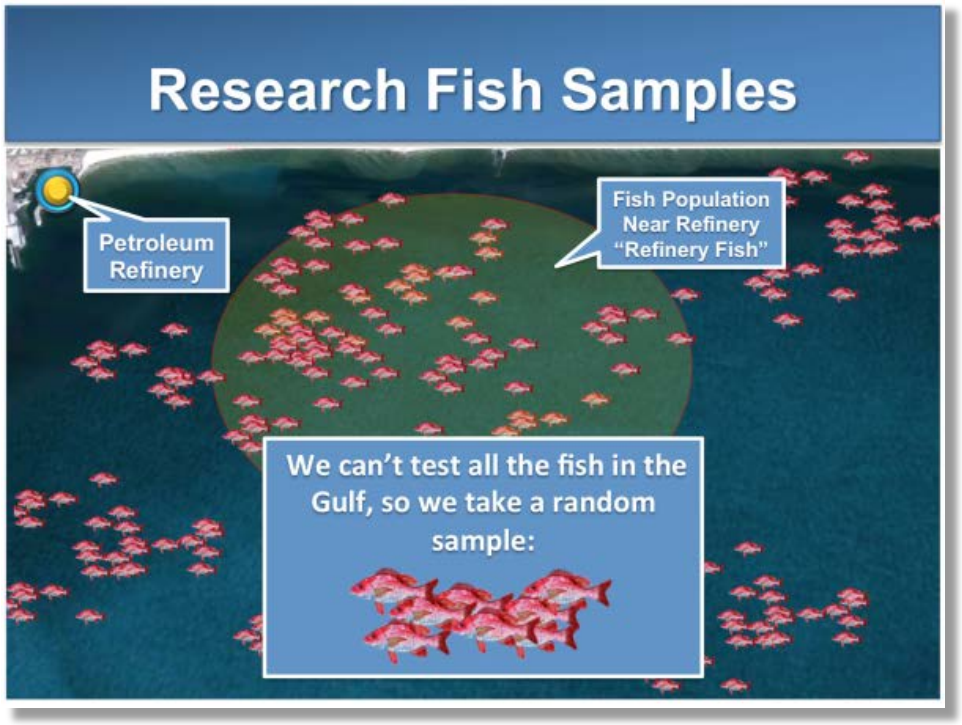
Null Hypothesis

There is no difference in benzene levels between the Refinery Fish and the Control Fish.

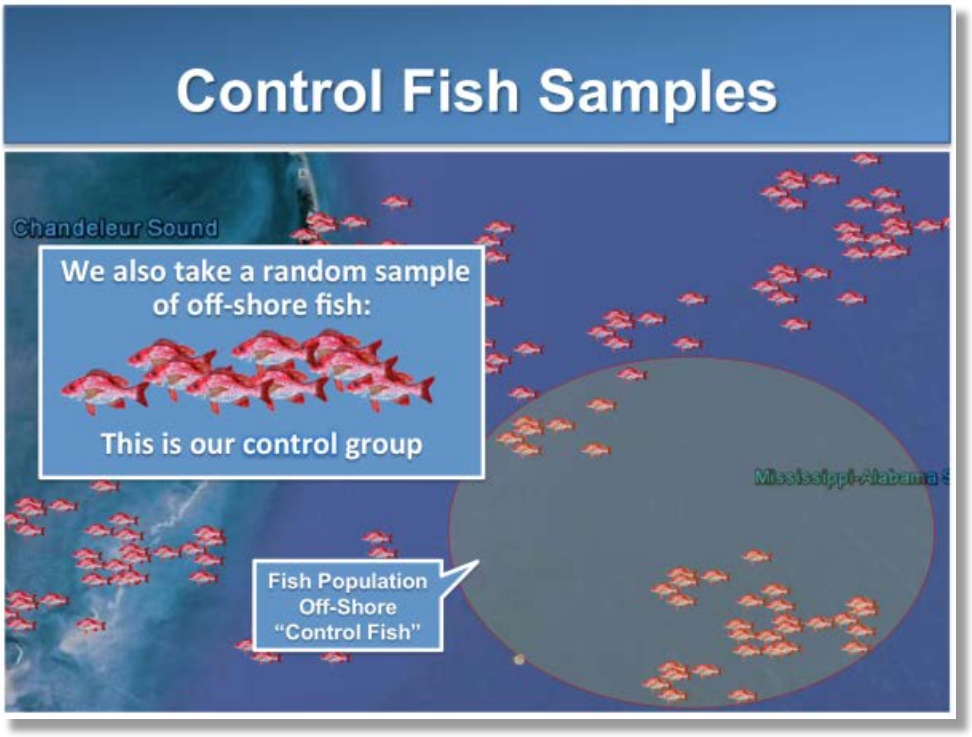
In our study, as in all scientific studies, we will be testing how likely it is that we would obtain dataat least as extreme as our data ***if the null hypothesis were true***. In other words, we will be evaluating the conditional probability of obtaining the data that we observe.

In plain English, proper statistical testing means assuming your hypothesis is wrong and then evaluating the likelihood that you would come up with the findings that you did. Statistical testing is not about proving things true. Rather, it is about proving that the alternative — i.e. your null hypotheses — is likely not true. Only then can we reject the null hypothesis and conclude that our research hypothesis is plausible.

Determining whether or not it is reasonable to reject the null hypothesis is done by collecting data in a scientific study. Here, we start by measuring benzene levels in two samples of fish: (1) a group of fish near the refinery (Refinery Fish); and . . .

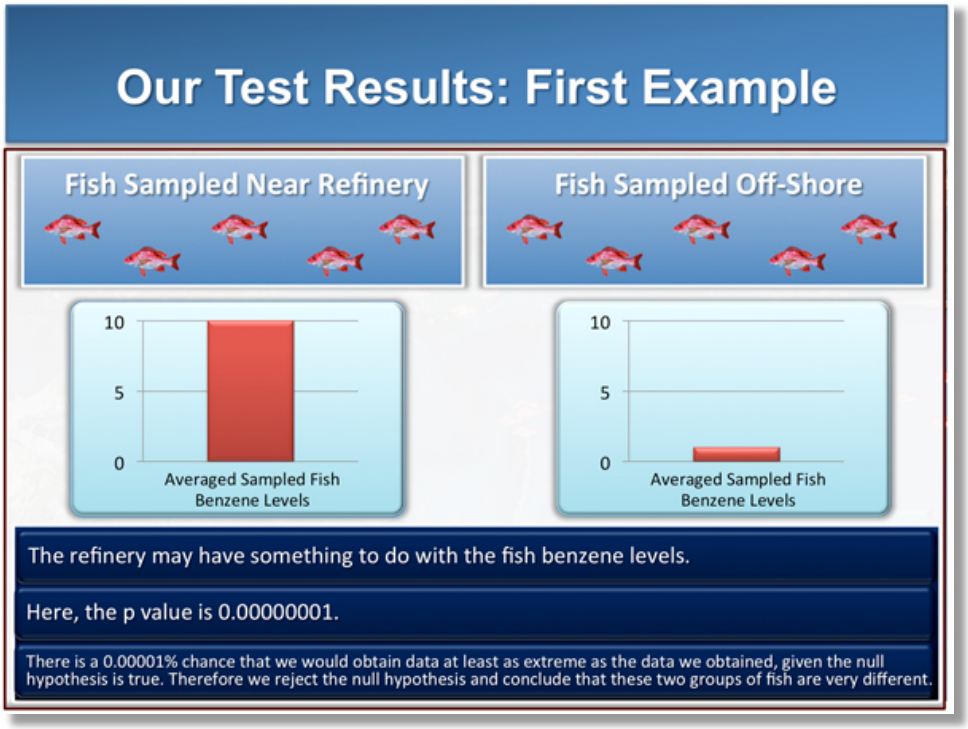


(2) a group of fish in the middle of the ocean, nowhere near the refinery (Control Fish).



We will then calculate an average benzene level in each group of fish, which will serve as a reasonable estimate of the benzene level in each population of fish (i.e., all fish living near the refinery and all fish not living near the refinery). Of course, how we take our samples is a critical component of the study design, but we will assume for this example that we have used appropriate sampling techniques.

Let's examine 3 possible outcomes in the trial graphics below. The first possibility will deal with an obvious result.

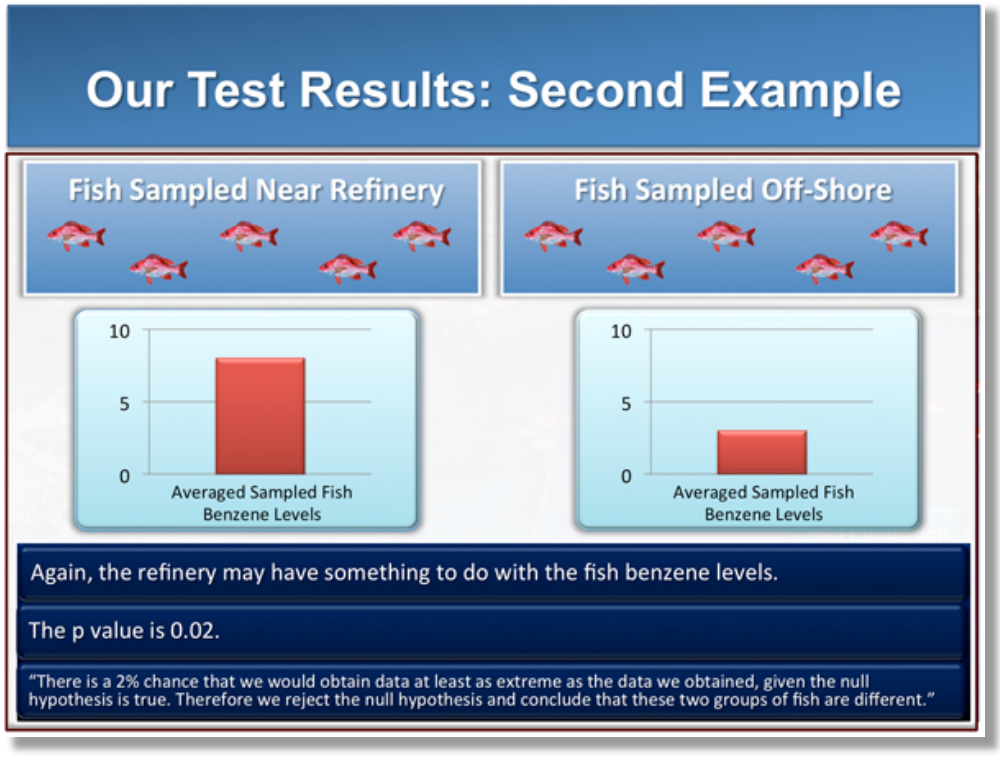


In this example, let's assume that every fish in the Refinery Fish sample had a benzene level of 10, and every fish in the Control Fish sample had a benzene level of 1. Thus, the average Refinery Fish benzene level is 10 and the average Control Fish benzene level is 1. When we do our statistical test, we calculate the conditional probability – i.e., the probability that we would have obtained this dramatic difference (10 vs. 1) ***given that the null hypothesis is true***. This probability is called a "p value."

In this case, the p value is so low (let's say: p = 0.00000001) that we reject the null hypothesis. Stated another way: The probability of obtaining such extreme data if the null hypothesis were true ***is 0.0000001.*** Based on this analysis, it doesn't make sense to believe that we would have obtained these results if the null hypothesis were true. So we reject the null hypothesis.

Our study was a success. We reject the null hypothesis, and we draw a clear-cut conclusion -- i.e., the Refinery Fish come from a different population of fish with respect to benzene levels. So we conclude that the refinery, absent other factors, may have something to do with the benzene levels in these fish. Because this difference was so clear-cut (every single fish in the Refinery Fish sample had extremely high benzene levels and every single fish in the Control Fish sample had extremely low values), we didn't even need statistics to get our answer.

Now let's look at another, more realistic, possibility. This time the difference between the two samples is a little less clear cut.

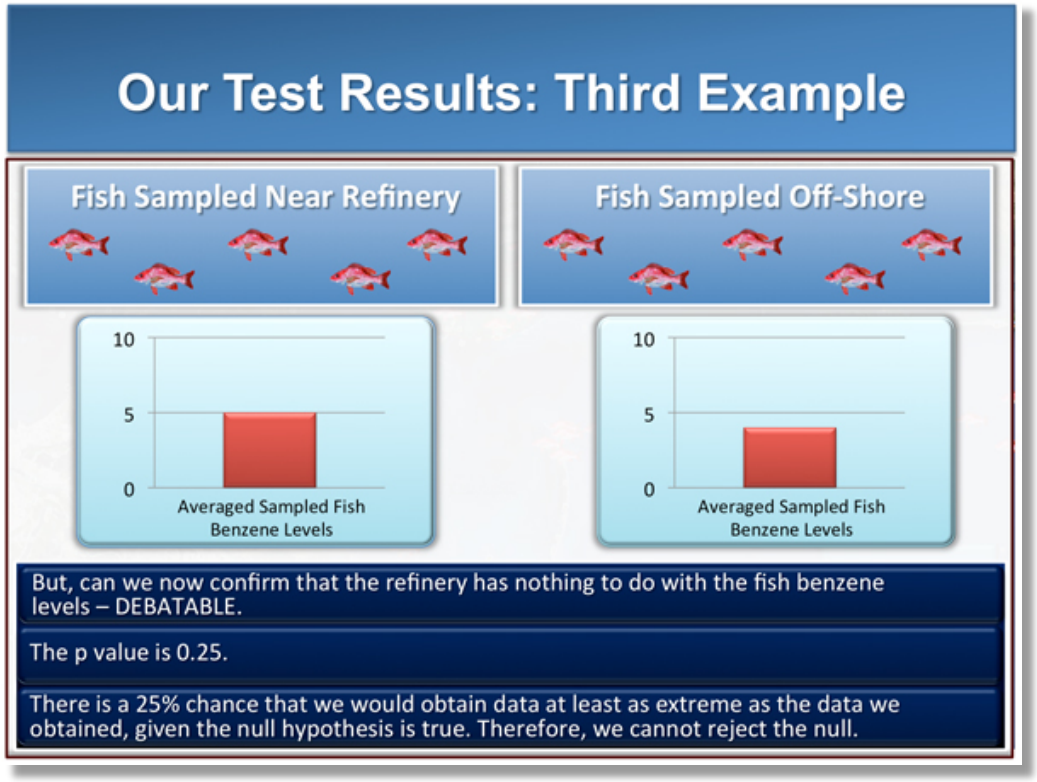


In this example, the average benzene level in the Refinery Fish sample is 8 and the average benzene level in the Control Fish sample is 3. When we do our statistical test, we learn that the p value is 0.02. Said another way, the probability that we would have obtained these findings, given that the null hypothesis is true, is about 2%.

Thus, as with the extreme example above, the probability of obtaining these findings, given that the null hypothesis is true is very low (not quite as low as in the prior example, but still pretty low). This raises the question: how low a probability is low enough?

Traditionally, statisticians have used a "cut-off" probability level of 5%. If the probability of obtaining a certain set of results is less than 5% (given the null hypothesis), then scientists and statisticians have agreed that it is reasonable to reject the null hypothesis. In this case, we reject the null hypothesis and conclude that the Refinery Fish must come from a different population than the Control Fish. Again, as with the earlier example, we conclude that the refinery must have something to do, absent other factors, with the benzene levels.

So far, so good. Now, let's do one more. This time let's assume that the difference between the Refinery Fish sample and the Control Fish sample has gotten much smaller.



In this example, the average benzene level in the Refinery Fish sample is 5 and the average benzene level in the Control fish sample is 4. The benzene levels, on average, are numerically higher in the Refinery Fish compared to the Control Fish. But are they statistically higher? In statistical terms, how likely would it be to obtain these findings if all the fish were the same with respect to their benzene levels? In other words, is it reasonable to conclude we would have obtained findings this extreme if the refinery had nothing to do with the benzene levels?

When we do our statistical test, we learn that the p value is 0.25. Thus, the probability that we would have obtained findings this extreme, given that the null hypothesis is true, is about 25%. One in four times that we take these samples, we will get findings like this if the null hypothesis is true.

A twenty-five percent chance is not so unlikely. It certainly doesn't meet the 5% cut-off rule (i.e., less than 5%). Therefore, statistical best practices tell us that we cannot reject the null hypothesis.

But what does it mean when we cannot reject the null hypothesis? Can we conclude that the null is true? This is actually a critical question, and it represents an area where statistics often get misused in court, in trial graphics, in the media and elsewhere. And what about other intervening factors like bias and confounding?

Our next posts on using trial graphics and statistics to win or defend your case will grapple with these important questions. Please do leave a comment below (your email address is not displayed or shared).

Hydraulic Fracturing (Fracking): Advocacy and Lobbying

By Ken Lopez Founder/CEO, A2L Consulting

The courtroom is a forum where issue advocacy is enhanced by persuasive litigation graphics. However, other settings exist where attorneys, consultants, politicians, lobbyists and advocacy organizations must persuade skeptical audiences.

This article focuses on the creation of advocacy graphics for a particular issue: hydraulic fracturing, better known as fracking. Advocacy or lobbying graphics are especially valuable as the material may be used to educate a potential jury pool, to persuade and inform government officials and to support settlement negotiations. These advocacy presentations may be distributed via PowerPoint, YouTube or even delivered in person from an iPad®.

With information flowing faster than ever before and with timelines for decisions involving billions or even trillions of dollars shrinking (e.g. the recent Congressional budget-debt debate), we believe the need for quickly produced lobbying presentations is expanding quickly.

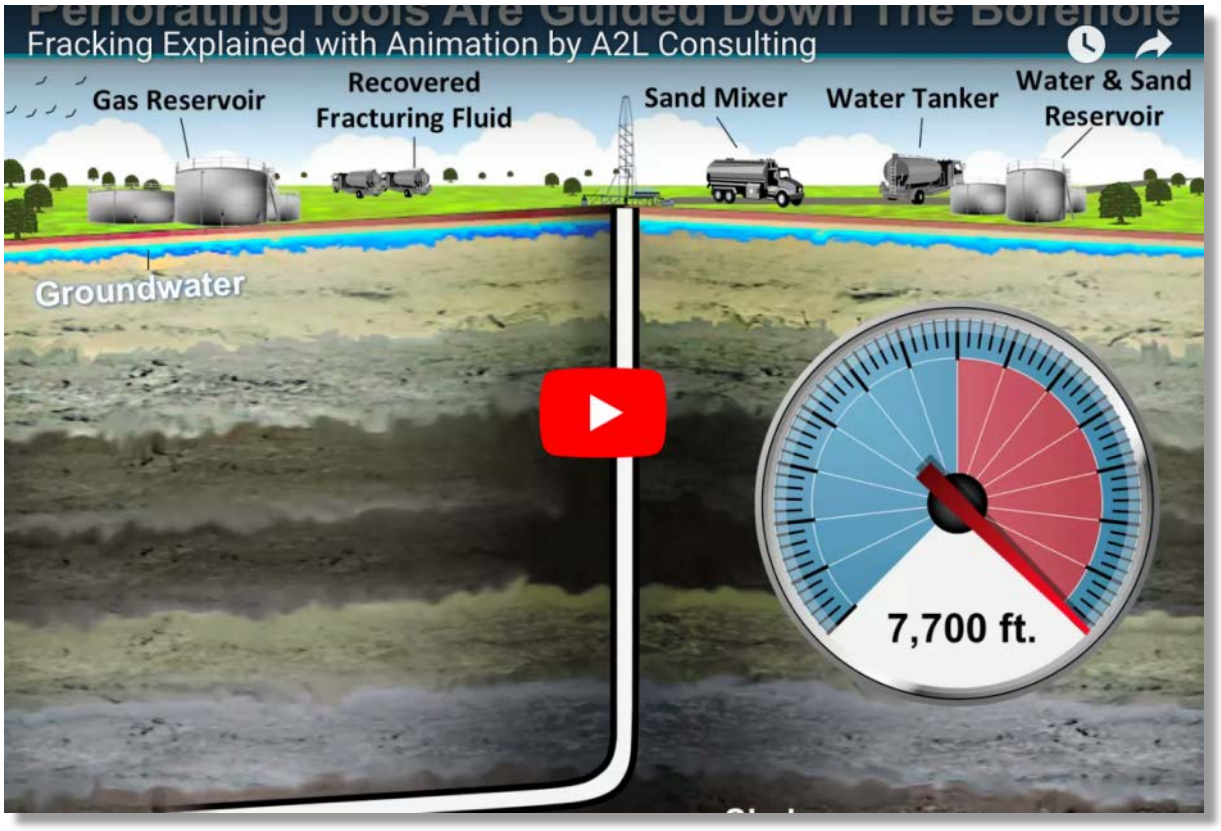
Indeed, just days ago, Animators at Law, publisher of The Litigation Consulting Report, announced its name change to A2L Consulting. This better aligns our corporate identity with additional services offerings like advocacy, grass roots and lobbying visual presentations, in addition to the services we have provided for 16 years like jury consulting, litigation graphics and trial technology. By way of example, we tackle the hot-button issue of fracking to show how issue advocacy presentations may be used when many scientific issues remain to be answered and no clear national consensus yet exists.

Fracking is the modern evolution of a 60-year old production stimulation technique that involves injecting fluid at very high pressure into a well. This technique is widely used to extract natural gas from shale, a form of rock that is found all over the United States in large quantities. The process produces tiny fissures in the rock, freeing natural gas for recovery.

Natural gas companies insist that fracking is safe for people and the environment. They also believe it can produce enough energy, from purely domestic sources, to last for decades or perhaps centuries.

Indeed, a study released in July 2011 concludes that a large field of rock on the New York-Pennsylvania border known as the Marcellus Shalecan safely supply 25 percent of the Nation's natural gas needs. Thus, it is no surprise that energy companies are seeking to recover this trapped natural gas.

While we do not take any position in the heated debate over fracking, we have prepared this narrated presentation that theoretically could be used to defend fracking against its opponents in a courtroom setting or used as a widely distributed issue advocacy presentation.



Our fracking presentation first shows, in schematic form, how far below the earth's surface fracking occurs and the industry's routine use of cement and steel casings to protect groundwater from the tools and substances used in the fracking process. Whereas groundwater is typically found within hundreds of feet of the surface, fracking occurs miles beneath the surface of the earth.

Our advocacy presentation goes on to respond to challenges regarding the nature of the fracking fluid. We aid in dispelling those concerns by using a pie chart to illustrate the point that roughly 99 percent of the fluid is merely water and sand, while the remaining amount is composed of chemicals that have familiar and reassuring uses - such as soaps, deodorants and household plastics. The advocacy message is that the environmental concerns about fracking are overstated.

A two part summary chart is then used to highlight the benefits of fracking in terms of energy independence, environmental advantages, and underscores the benefits of fracking, proving the benefits far outweigh the minimal risks.

Finally, a bar graph that uses schematic drawings of gas reservoirs and a barrel of oil demonstrate that the domestic natural gas reserves that can be tapped by fracking will last decades or centuries longer than the nation's domestic oil reserves, thus contributing to the drive toward energy independence.

Such advocacy pieces are typical of the work we create. Most often our work is used in litigation or arbitration. However, we also create print and animated presentations for lobbying organizations around legislative and policy advocacy work or even as part of early settlement negotiations. From our perspective, all of these information conveyance requirements have the common theme that there is a skeptical audience who needs to learn and understand enough about an issue to see that the presenter's position is correct.

More often than not, seeing is believing in our business. Comments from all sides encouraged and welcomed.

A2L CONSULTING

14 Places Your Colleagues Are Using Persuasive Graphics That Maybe You're Not

By Ken Lopez Founder/CEO, A2L Consulting

People often focus on the use of trial graphics in, well, trials. And there's no doubt that that's where persuasive graphics, presentations, and exhibits are most often used. But you might be surprised to see how many other places are appropriate for the use of litigation style graphics. Here are 14 good examples.

1. **In motions:** A juror will never see them but a judge will. For more on this topic, read our article on using litigation and trial graphics in motions.

2. **In briefs:** Generally, trial graphics are used for perfectly normal reasons in briefs. Occasionally, an attorney will use them for the sake of humor or just to prove a point. See this comical courtroom brief.
3. **In depositions:** One of our clients recently asked us to prepare litigation graphics for depositions with an eye toward using those same graphics at trial.
4. **In mock trials:** These can be an excellent investment of money and time in a case that is large enough and significant enough to justify the use of litigation graphics during the mock. See our article on using litigation graphics during a mock trial.
5. **In pre-trial hearings:** We all know graphics are used in Markman hearings, but they are also frequently used in summary judgment hearings and in hearings on motions to dismiss. Again, the jury will not see the exhibits but a judge will.
6. **In arbitration and alternative dispute resolution:** This use of trial graphics is overlooked more than others. Many arbitrations follow rules of evidence and resemble trials, and litigation graphics are quite appropriate in them and in ADR generally.
7. **In class certification hearings:** Graphic demonstrations can be used in many aspect of class actions, and the issue of "predominance" is one in which they are especially useful.

8. **In advocacy and lobbying presentations:** Hydraulic fracturing is a controversial issue, and the graphic that we prepared shows how fracking works and may dispel some unwarranted myths and fears about fracking. It's received 60,000 views as of this writing demonstrating how one might use PowerPoint and video to get a message out.

9. **In presentation graphics:** Most of us prepare and deliver presentations as part of our work. This article on presentation graphics showing how the President prepares and delivers an effective visual presentation using persuasive graphics is a good guide for any of us.

10. **In e-briefs:** This technique is being used more and more frequently by trial lawyers, and e-briefs are now including litigation graphics, sometimes animated graphics too.

11. **In e-discovery disputes:** Sometimes, a courtroom presentation consultant will demonstrate what documents were missing and why sanctions were warranted. Sometime the graphics illustrate, to the contrary, that the documents were completely or largely produced or that the matter in dispute is not large enough to require sanctions. E-discovery hearings are utilizing persuasive graphics more and more.

12. **In settlement discussions:** We have seen trial graphics prepared for settlement many times in the last two decades. Recently, however, the sophistication demanded of those graphics has been on the rise. Sometimes, even high-end 3-D animations are prepared. The trick, of course, is to balance the persuasive benefit of the graphics with the risk that settlement talks fail, and you tip your hand leading up to trial.

13. **In pre-indictment meetings:** As government budgets have increased over the last four years, so too have pre-indictment meetings with prosecutors. We have prepared countless 'clopening' style presentations for these meetings hoping to help our client avoid indictment altogether. Well-thought-through persuasive graphics may help avoid a negative life or company changing event.

14. **In technology tutorials:** No longer are technology tutorials used only in patent cases to help educate the judge. Litigators are requesting to submit them in other cases where educating the judge is beneficial to both sides. This could include complex financial cases, large antitrust matters with a complex product at issue and many other types of cases.

How to Handle a Boring Case

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

I once asked an actuary why he chose that profession, and he replied, "Because I didn't have enough personality to become an accountant." The truth is, though, that nearly everything is interesting in some way. It's the rare case, for example, that's really dry as dust.

But many cases have aspects that are, at first glance, boring. As an advocate, what do you do when faced with one of them? Here are some suggestions.

1. **Use the boredom to your advantage.** There may be facts that are not advantageous to your side. Don't emphasize them, and they may not draw attention.

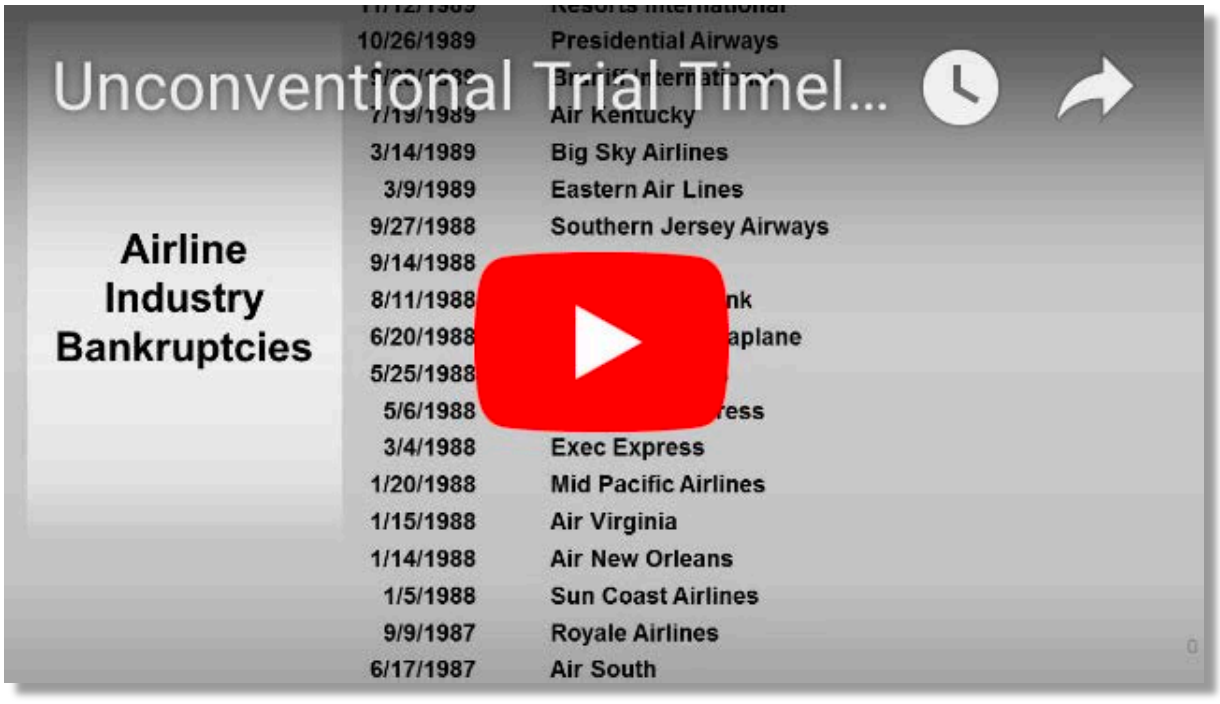
2. **For points that are advantageous, create excitement.** Use verbal "drum rolls," as in "Now THIS is really important." Or, "If you remember just ONE thing about this case, it should be . . . "

3. **Create visual distractions.** Your graphics don't have to be black and white blow-ups of Excel spreadsheets. There are many ways to put forth the same information, but making them interesting takes a professional and an artist/designer, not a paralegal or an associate with no training in information graphics.

Another approach is to create a memorable experience by evoking discomfort. For example, you could simply present a list of airline bankruptcies and say that no one wants to see one more, or you could develop an uncomfortably long scrolling list that presents the same information in a thought-provoking way.

A [edit]

- AAXICO Airlines (1946 - 1965, to Saturn Airways)
- Access Air (1998 - 2001)
- ADI Domestic Airlines
- Aeroamerica (1974 - 1982)
- Aero Coach (1983 - 1991)
- Aero International Airlines
- Aeromech Airlines (1951 - 1983, to Wright Airlines)
- AeroSun International
- AFS Airlines (Arcata Flying Service)
- Air America (owned and operated by the CIA in Southeast Asia)
- Air America (1980s)
- Air Astro
- Air Atlanta (1981–88)
- AirAtlantic Airlines
- Air Bama
- Air Berlin, Inc. (Air Berlin USA) (1978-1990 [reconstituted as Air Berlin GmbH & Co.
- Airborne Express (1946 - 2003)
- AirCal (formerly Air California (1967-1987, to American Airlines)
- Air California with name change to AirCal (1967-1987, to American Airlines)
- Air Carolina
- Air Central West (Nebraska)
- Air Central (Michigan)
- Air Central (Oklahoma) (to Trans-Central Airlines)

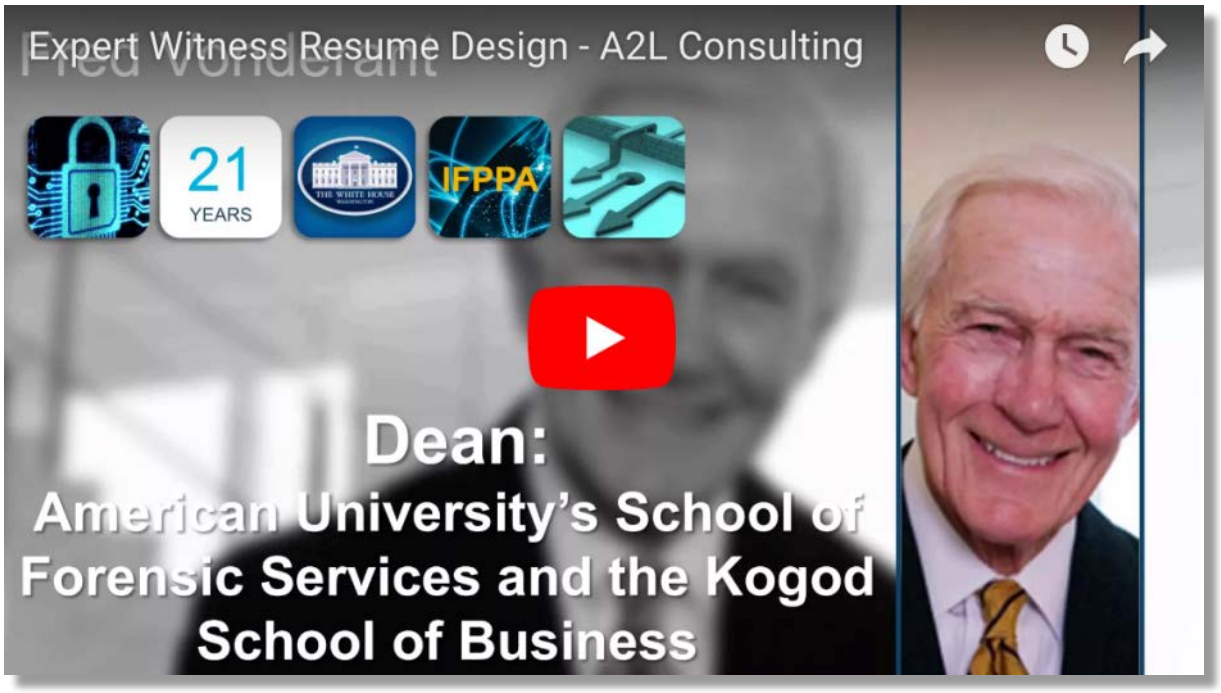


4. **Work with the jury.** Acknowledge that there is information in the case that may be less than interesting, but add that you will do your best to keep it moving. Then keep your word.

5. **If the stakes warrant it, pre-test the case through mock-jury research**, searching for ways to streamline the case so that the trial is neither longer nor more tedious than it needs to be. Learn the themes that emerge, the ways that lay people express the issues in their

own terms, what they find confusing, what matters to them, and what aspects of the case, if any, they don't view as boring. Perhaps the most exciting point is damaging to your case. It's better to know in advance.

6. **Bring out the significance of your expert** instead of assuming that the jury knows it already. Here's where name-dropping can be helpful. "Our expert has a doctorate from Harvard and trained at the London School of Economics." Or, "Our expert worked on these issues for the largest accounting firm in America." Make sure that the expert exudes confidence, but not arrogance, looks the part, and speaks in language lay people understand. Bring out the expert's accomplishments graphically and explain them in a way that the jury will understand.



7. **Use graphics to keep things moving.** If you show jurors (and judges) something good to look at, it keeps them interested, reinforces memory, makes you appear more competent and organized, and cuts down on boredom.

8. **Use mixed media.** Don't present everything in a PowerPoint. Mix it up, switching at a comfortable pace between slides on screen to enlarged boards, from static images to animations, etc.

9. **If appropriate, use humor.** Instead of being the egghead with the nerdy information that no one else can relate to or appreciate, bond with jurors by seeing it from their perspective. If you can't do that, add someone to the trial team who can.

10. Now THIS is really important and if you remember just ONE thing, it is that **nothing has to be boring**. It's up to you. The moment you acknowledge that it is, and find a way to link it to other people's experience, especially in ways that are potentially universal, teach people in a way that is painless and aesthetically pleasing, and find a way to tell a story about it, ta da! It isn't boring any more.

In Trial Presentation - A Camel is a Horse Designed by Committee

By Ken Lopez Founder/CEO, A2L Consulting

There is an old expression that a camel is a horse designed by committee.

The expression means that when many individuals design something as a group, every imaginable feature will go into the finished product – and it will end up with many important features. But the product will have lost its beauty – and sometimes will have lost some of its usefulness as a complete entity.

Working with trial teams to create a trial presentation can sometimes feel a bit like designing a horse and ending up with a camel. Many people provide lots of input on a particular presentation and sometimes, it ends up that too many features have been added to a single trial presentation. Unless a strong leader seizes control and dictates the final content, the project can go in any number of directions at once, and it may fail to be as outstanding a product as it can be.

An easy business comparison is Apple. There, great design is at the core of the company's success and has made it the most valuable company in the world. Since the 1990s, the man behind this great design is London-born designer Jonathan Ive. Ive, Apple's senior vice president of industrial design, has been responsible since 1996 for leading a design team widely regarded as one of the world's best. Ive has been said to have "the obsessive desire to create products that are meaningful to people."

Ive is ultimately responsible for the design of the iMac, the iPod, the iPhone and the iPad. It was he who brought the great designs to Steve Jobs for his consideration. Jobs would pick among Ive's proposed designs. Fortunately for us, Jobs was right most of the time. What we never see from Apple, however, are all the rejected designs.

At A2L, we see ourselves as the Jonathan Ive of a trial team, constantly bringing great trial presentation ideas and prototypes forward with the hope that the first chair litigator will see something that he or she likes. In my experience, the stronger the leader, the more likely it is that a good trial presentation design approach will be selected and the camel-like result avoided.

Our recommended approach when lots of individuals need to provide input on a project is simple. Everyone has a voice, but only one person has a vote.

16 Trial Presentation Tips You Can Learn from Hollywood

By Ken Lopez Founder/CEO, A2L Consulting

Why do so many TV shows and movies include courtroom dramas? Because people love drama, they love to try to figure out who committed the crime, and because they love the clash of right and wrong.

With all that focus on the creation of drama for fiction, we only need to turn on the television or start a DVD to see a lot of good acting by actors who are behaving like lawyers. Surely, there is something we can learn from their work.

After all, top-notch screenwriters have written their words, costume and set designers have made them look the part, and the actors have studied the best trial lawyers in the world and have had dozens of "takes" to get it right. So we are seeing the world's best storytellers tell a story that they think everyday people want to hear, in an intensely dramatic way.

In the first place, TV and movie viewers are ordinary people, the same ones who will become jurors some day. They are used to hearing and seeing the best in their entertainment and they will want it in the actual courtroom.

Second, we can learn from the way in which movie and TV directors distill the best and most exciting aspects of a trial to make it compelling. We can make our trial presentations just as compelling.

Here are sixteen lessons from the movies or television (**note that each movie/TV title has a link to purchase a copy from Amazon.com**):

1. **Practice**. Matthew McConaughey may not have what it takes to actually be a lawyer, but with great practice he delivers an amazing closing argument. If he can do it, you can too. Listen to this closing from *A Time to Kill*.

2. **Use jury consultants.** This clip from *Runaway Jury* doesn't illustrate the work of jury consultants any more than CSI illustrates police work accurately. However, a good jury consultant *can* tip a close case by either helping to pick the right jury, testing the case and the lawyers, or both.

3. **Use plain, simple language.** The best screenwriters know how to make a few words go far, and you can do that as well. Here, Keanu Reaves, playing Kevin Lomax in *The Devil's Advocate*, uses simple language and lays out a straight-forward and emotional theme in his opening statement.

4. **Be Believable.** Screen and TV actors know how to project credibility, and lawyers can do the same. Glenn Close masters believability in this scene from the show *Damages*. Do you have any question about whether she is going to take the settlement offer made in this deposition?

5. **Manage your hands:** Like many distracting mannerisms, how a litigator uses his or her hands can be a good thing or a bad thing. Look at Tom Cruise in *A Few Good Men*. In this classic scene (and we all know it NEVER ends with the witness famously breaking down on the stand) Tom Cruise never distracts. When he is at the podium, he stands strong. When he is before the jury, he gestures well. When he is before the witness, he stands with hands behind his back.

6. **Make Sure Your Audio Video Setup is Flawless.** Courtrooms rarely have high quality trial technology equipment that make your presentation look *and* sound great. It is up to you and your trial technician to make sure your setup works well. In this scene with Matt Damon from *The Rainmaker*, can you imagine how much less effective this deposition clip would be if it had scrolling text on screen to make up for a poor audio recording or poor courtroom audio setup.

7. **Relate to your jury:** We've successfully used Giant's Stadium, the Statue of Liberty and many other local landmarks to convey scale to juries. In the "magic grits" scene from *My Cousin Vinny*, Joe Pesci connects with a local Alabama jury over the cooking time of grits. Like in this scene, it is important to create a memorable dramatic moment, ideally touching on the most important part of the case. It is important to speak the local language, and it is critical to relate your knowledge of a local custom or landmark to something meaningful in the case. (Exact clip unavailable).

8. **Don't go after the sympathetic witness.** One witness can flip a case for or against you. Always ask yourself if the potential benefit is greater than the potential risk and act accordingly. This scene in *Philadelphia* is one of many examples from the movie industry.

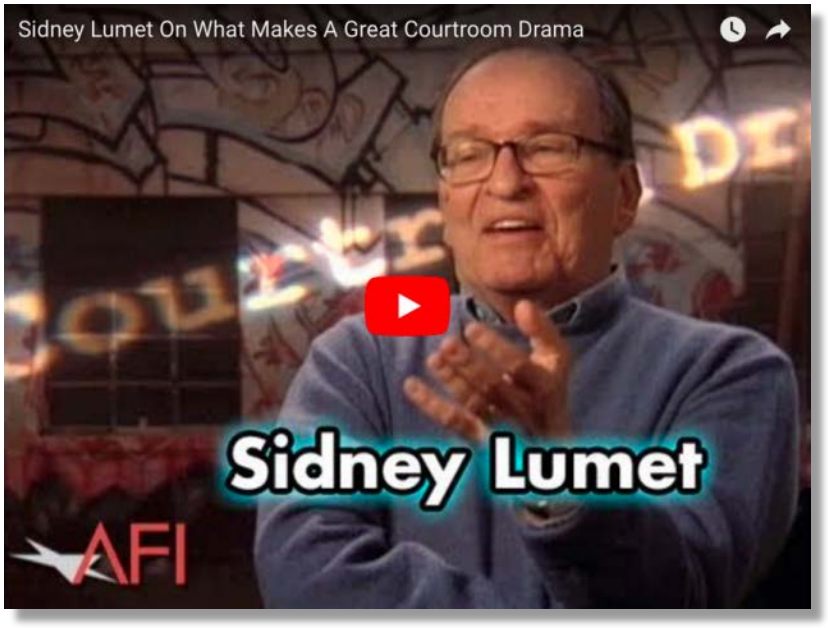
9. **Let silence do the heavy lifting.** This has long been the advice of my mentor for having difficult conversations, and I think it applies just as well for the courtroom. In this movie classic, *To Kill a Mockingbird*, Gregory Peck delivers a now famous closing. Note how he uses pauses and silence as effectively as he uses words.

10. **Tell a Story**. You don't need Hollywood to remind you of the importance of storytelling, you need only refer back to our article on the topic: http://www.a2lc.com/blog/bid/53536/10-Videos-to-Help-Litigators-Become-Better-at-Storytelling

11. **Ask open ended and provocative deposition questions**. You never know what the witness might say. In this scene from *Malice*, Alec Baldwin's character famously lets his ego fly in this med-mal deposition.

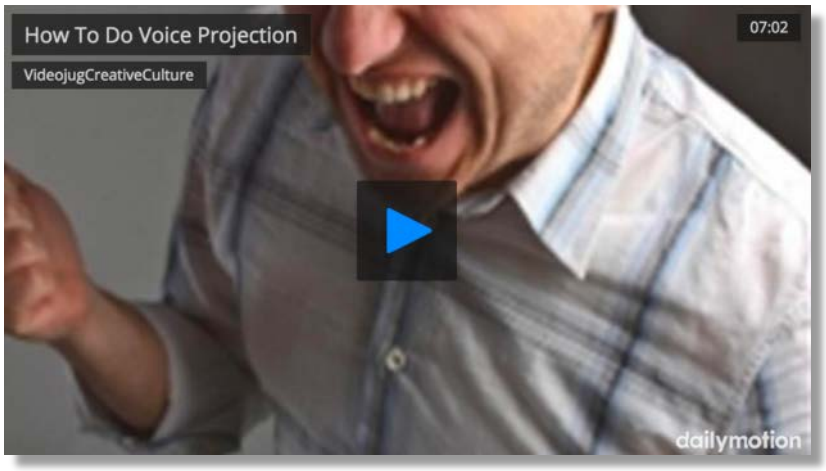
12. **Control your emotions**. In this R-rated clip from *Primal Fear*, Laura Linney delivers her questions and her message with forceful emotion, yet you never get the sense she's lost control. It is good to show emotion, it just must always make sense to the jury why you would feel this way. If the gap between the story the judge or jurors are building in their heads, and the emotion you are showing is too great you can lose credibility.

13. **Think about the courtroom like a director**. To some degree, you have to deliver on the jury's expectations of drama. Fail to build a compelling story and you'll likely lose the case. Such was the case in the recent Apple v. Samsung dispute we wrote about here. Noted director of courtroom dramas, Sidney Lumet, comments on what makes the courtroom drama dramatic.



14. **Memorize**. Can you imagine if the lawyers were reading their closing statements here in this *Law & Order* clip? They would not work nearly as well. Still, we regularly see attorneys reading their openings or closings. Notes work great and are important to make sure nothing is missed. One Hollywood director friend of mine poignantly said, "you can memorize, but I prefer mastery. Master your subject matter. That way, memorization is not an issue." Good advice for actors and lawyers alike.

15. **Project your voice**. Follow the tips of this voice coach to learn how to project your voice better. Some of the best litigators I know use acting coaches, voice coaches, style coaches and more. As we inevitably move toward an era of more televised trials, these considerations will become more and more important.



How To Project Your Voice *by VideojugCreativeCulture*

16. **Connect with the jury authentically**. Paul Newman's closing argument in *The Verdict* is moving, memorized and authentic.

So, the question I often wonder about related to our courtrooms is whether Gene Hackman, Robert Duvall or Meryl Streep would deliver a better opening/closing than we professionals would? I think our job is to make sure the answer is no, and to make sure the answer is no, we're going to have to adopt some of their best techniques.

6 Good Reasons to Conduct a Mock Trial

By Ken Lopez Founder/CEO, A2L Consulting

One type of litigation consulting that is underused is the planning and conducting of a mock trial. A good litigation consultant can put together a mock trial that is every bit as real in appearance and challenges the litigation team as much as an actual trial.

After a mock trial, the whole team – lawyers, paralegals, trial graphics consultants, courtroom hot-seat operators and everyone else – is ready for trial. They have prepped fully for the mock trial just as if they were going to trial. Not only that, they have prepped both sides of the case. We find that truly wise clients with a lot on the line deeply appreciate the value of getting inside opposing counsel's case via a mock trial.

At A2L Consulting, our team organizes the mock trial (i.e. acquiring the venue and representative mock judges or mock jurors), prepares trial exhibits, courtroom technology, PowerPoint presentations, trial timelines, and whatever is needed for both sides of the case in a mock trial.

So just as our trial team becomes prepared to deal with the other side's legal case and its witnesses, it figures out how to tackle the trial graphics that the other side is likely to use.

A mock trial can have many advantages:

1. Interviews with or real-time measurement of the mock judge or mock jury can show what is most persuasive, and what is the least persuasive, in counsel's presentation well before the actual trial.

2. The client or in house counsel has a real opportunity to judge the match of litigator to their case when they observe a mock trial.

3. A mock trial can help establish a dollar range for the settlement value of the case.

4. The trial team can learn what themes need more explanation, foundation or visual and graphic development.

5. As we said earlier, getting inside the opposition's case leads to discovering its strengths and weaknesses allowing counsel to better prepare defenses, trial graphics and best structure their case for a win.

6. Finally, with trials becoming quite rare for litigators in large law firms, mock trials are a good place for lawyers to hone their trial skills.

As Ken Broda-Bahm, senior litigation consultant at Persuasion Strategies, says: "We are used to seeing mock trials as essential steps in trial preparation -- to discover your strengths and weaknesses, test and refine your message, and gain irreplaceable live practice -- but today, when goals often focus on dispute resolution rather than trial, focus groups and other mock jury exercises are vital tools of case assessment. They help you analyze and quantify your risks and benefits, and serve as a critical supplement to the gut check that attorneys and clients apply to all cases, including the majority that settle."

Broda-Bahm notes that "the expense of jury research project can strike some as high, but in complex litigation, the cost of a well-run project is just a tiny fraction of what is at stake. Cost-wise, it is a rounding error, but benefit-wise, it is a good way to invest in your case, your client-relationship, and your ultimate message at trial or mediation."

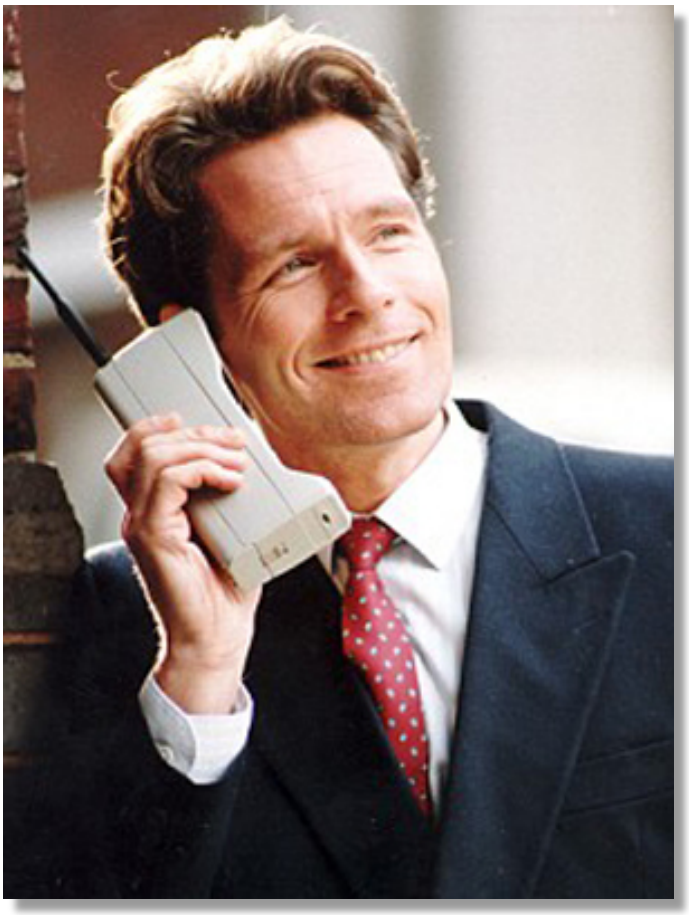
As Milwaukee attorney Paul Scoptur said in an article on the website of the State Bar of Wisconsin, "You don't want to find out what 12 people think about your case on the first day of trial. That's a little late."

A2L CONSULTING

12 Reasons Bullet Points Are Bad (in Trial Graphics or Anywhere)

By Ken Lopez Founder/CEO, A2L Consulting

Bullet points, especially when they're found in PowerPoint slides, have become the cliché of the trial graphics and presentation worlds. **There's no good reason to use them, and plenty of reasons not to.** For many, bullet points signal a boring presentation is about to begin or one is about to hear a presenter who, like someone on a vintage cell phone, is detached from modern presentation style.



Bullets are not just aesthetically bothersome. The A2L Consulting trial graphics team, trained in cutting-edge theories of conveying information, believes that text-heavy presentations riddled with bullet points also do harm to the persuasion process.

Garr Reynolds, a leading writer on the art and science of presentation, says in *Presentation Zen,* "Bullet-point filled slides with reams of text become a barrier to good communication."

Chris Atherton, a cognitive psychologist who has scientifically studied bullet points, writes, "Bullets don't kill, bullet points do."

Attorney Mark Lanier, commenting on his $253 million Vioxx verdict after following the no-bullets advice offered by Cliff Atkinson, another top presentation theorist and author of *Beyond Bullet Points,* said, **"The idea that you could speak for 2 1/2 hours and keep the jury's attention seemed like an impossible goal, but it worked. The jury was very tuned in."**

Below is a list of reasons and resources that support the reality that bullet points do not belong in your presentation – whether a trial graphics presentation or something else.

1. People read faster than they hear -- 150 words per minute spoken vs. 275 words per minute reading. People will read your bullets before you can say them and stop listening. If jurors are spending time (and brain-power) reading your trial graphics presentation, they are not listening.

2. Chris Atherton's work confirms that bullet points do real harm to your presentation. Her scientific study validates the notion of eliminating bullet points and she lectures on the topic in the video below.

3. The redundancy effect describes the human mind's inability to process information effectively when it is receive orally and visually at the same time. If you speak what others are reading in your bullets, because of the redundancy effect, you end up with less comprehension and retention in your audience than if you had simply presented either 100% orally or 100% visually. http://www.a2lc.com/blog/bid/26777/The-Redundancy-Effect-PowerPoint-and-Legal-Graphics

4. Authorities on the subject agree bullets are problematic. Read *Presentation Zen* or pick up Garr Reynolds' tips in the video below. Also see here http://beyondbulletpoints.com/ and here: http://sethgodin.typepad.com/seths_blog/2007/01/really_bad_powe.html

5. Watch great presentations and see what they are doing right (and note that they do not use bullets). Here are three stand-out and bullet-point-free presentations:

   Hans Rosling's TED Talk presenting data in an appealing way.

   Steve Jobs introduces the first iPhone in 2007.

Al Gore revisits his I*nconvenient Truth* theories.

6. The more you use bullets the more people will judge you as outdated. If you are making a trial graphics presentation and your case relates to technology, this is unforgivable, but for any case this will not be helpful. Remember Chris Atherton's work from point 2 above.

7. If you are using bullets to talk about numbers, there is usually a very easy workaround. For example, here is an easy way to handle changing metrics:

and an easy way to handle dates:

8. Understand how the brain works. Developmental Molecular Biologist Dr. John Medina explains briefly one of his 12 "brain rules" from his book of the same title. Here, he explains that vision trumps all other senses and pokes fun at bullet points in the process.

Vision from Pear Press on Vimeo.

9. Whether most of your presentations are for judges and juries or whether they are for management, learn how to tell better stories; take a look at one of our most popular articles: http://www.a2lc.com/blog/bid/53536/10-Videos-to-Help-Litigators-Become-Better-at-Storytelling

10. Remember, if you are using bullet points, people are likely to tune you out as boring when you most want them to be paying attention.

11. Consider using Prezi instead of PowerPoint as we explained in this popular post, and illustrated in A2L's well-circulated Prezi sample that explains Collateralized Debt Obligations (CDOs): http://www.a2lc.com/blog/bid/40453/Beyond-PowerPoint-Trial-Presentations-with-Prezi-and-Keynote

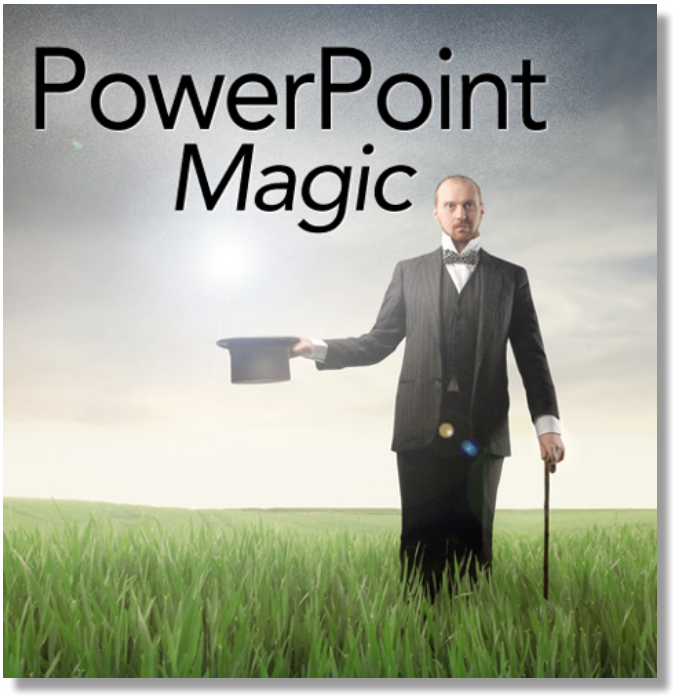
Collateralized Debt Obligations (CDOs) Explained with Prezi on Prezi

12. Finally, while A2L Consulting would be thrilled to help, here are 74 ways to remove bullet points on your own.

16 PowerPoint Litigation Graphics You Won't Believe Are PowerPoint

By Ken Lopez Founder/CEO, A2L Consulting

Litigators **do not** need to know *how* to create advanced PowerPoint litigation graphics. However, litigators *do* need to understand what a skilled artist is capable of producing using the program. Most will be surprised to learn what's possible, and even veteran users of PowerPoint will think there's an element of magic in some of the presentations shared in this article.



As a litigation graphics consultant who has been using PowerPoint since the 1990s, even I am amazed by the litigation graphics some artists are able to create using PowerPoint. Using real artistic skill combined with PowerPoint's built-in features unleashes impressive creative potential. What used to require 2D and even 3D animation just five years ago can now often be produced within PowerPoint faster and with a fraction of the investment that used to be required. Then, best of all, everything created is available for a litigator or their trial technician to present right from PowerPoint without any additional software or fancy hardware. In many cases, it can even be presented right from an iPad.

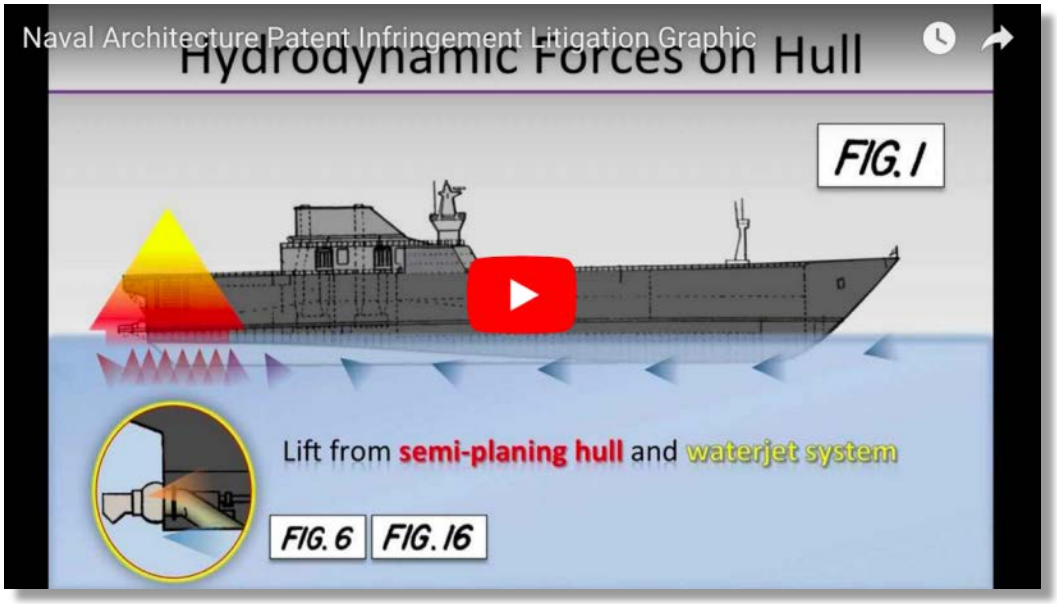
Too often, people view PowerPoint as a program that helps someone put their speaking outline, usually in bullet-point form, in visual form on a series of slides. We have long counseled that the use of bullet point riddled slides hurts your trial presentation, especially when one reads bullet points. Fortunately, most litigators are changing with the times and paying attention to the good science that shuns the use of bullets.

We have written before about combining illustration with PowerPoint animation to achieve great results and the four types of animation one typically sees at trial. The purpose of this article is to help you understand how far you can stretch PowerPoint. It's not the right tool for every situation, however when used the right way and in the right hands, it is a powerful weapon of advocacy.

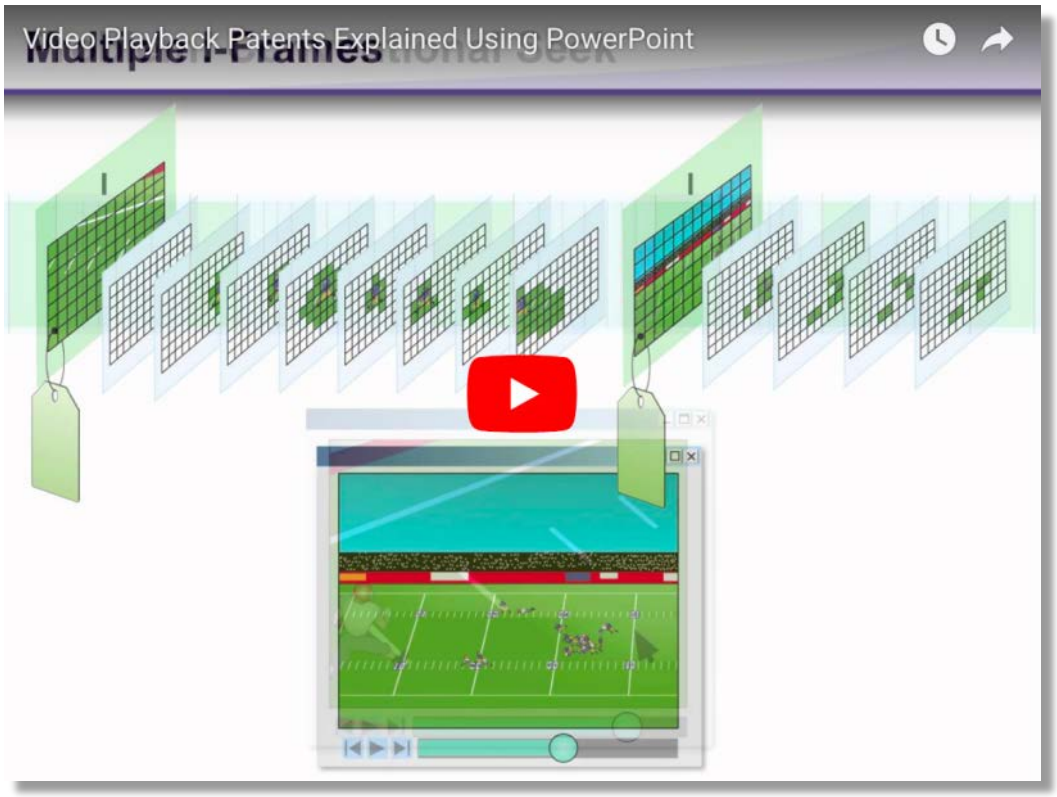
Below are 16 PowerPoint litigation graphics presentations (all converted into movies for easy online viewing) that most will be surprised to learn were created in PowerPoint by artists at A2L. We'd certainly welcome questions about how we created these graphics, and we would absolutely love to hear from artists who can do this kind of work well.

1. This PowerPoint litigation graphic prepared for a recent antitrust trial is really a timeline in an unusual format. To emphasize how difficult it is to run an airline in the United States, a long list of bankruptcies is set to scroll like movie credits in PowerPoint. Interested in more timeline examples, download our timeline book (opens in new window).

2. This PowerPoint litigation graphic was used by an expert in a patent case to explain how the design of a ship's hull affected its performance. Interested in patent litigation graphics, download our patent litigation toolkit for litigators (opens in new window).

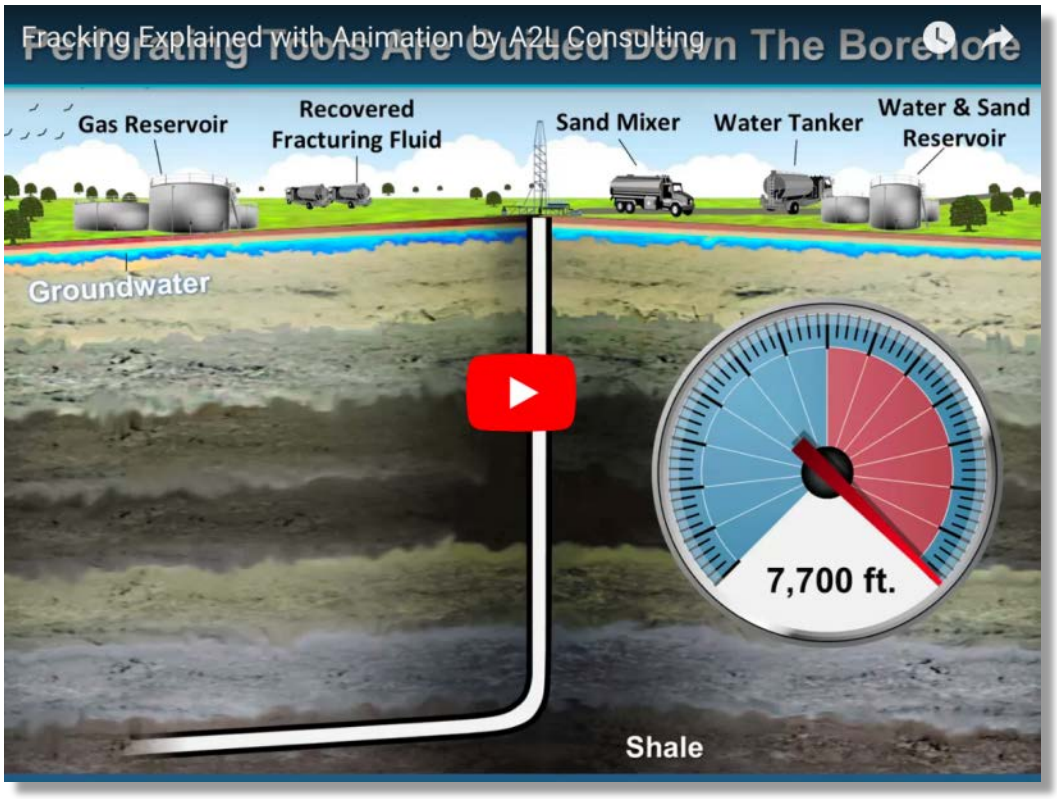


3. This clever PowerPoint makes good use of motion path animation and illustration to explain video playback patented technology. The use of "tags" helps explain the concept of keyframing in video encoding and playback in a jury-friendly way.

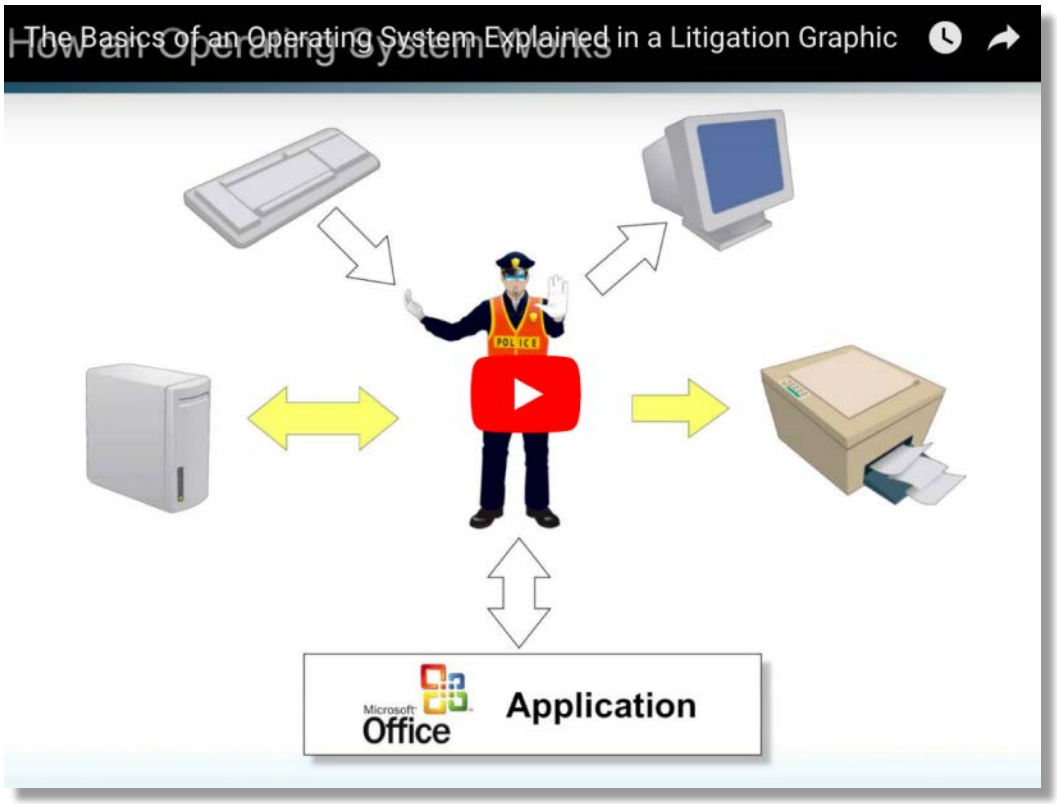


4. PowerPoint can even be used to show deposition clips. If you have more than a handful of deposition clips, you would probably want to use Trial Director to show them, but for a limited number or a group of short clips, PowerPoint does a good job.

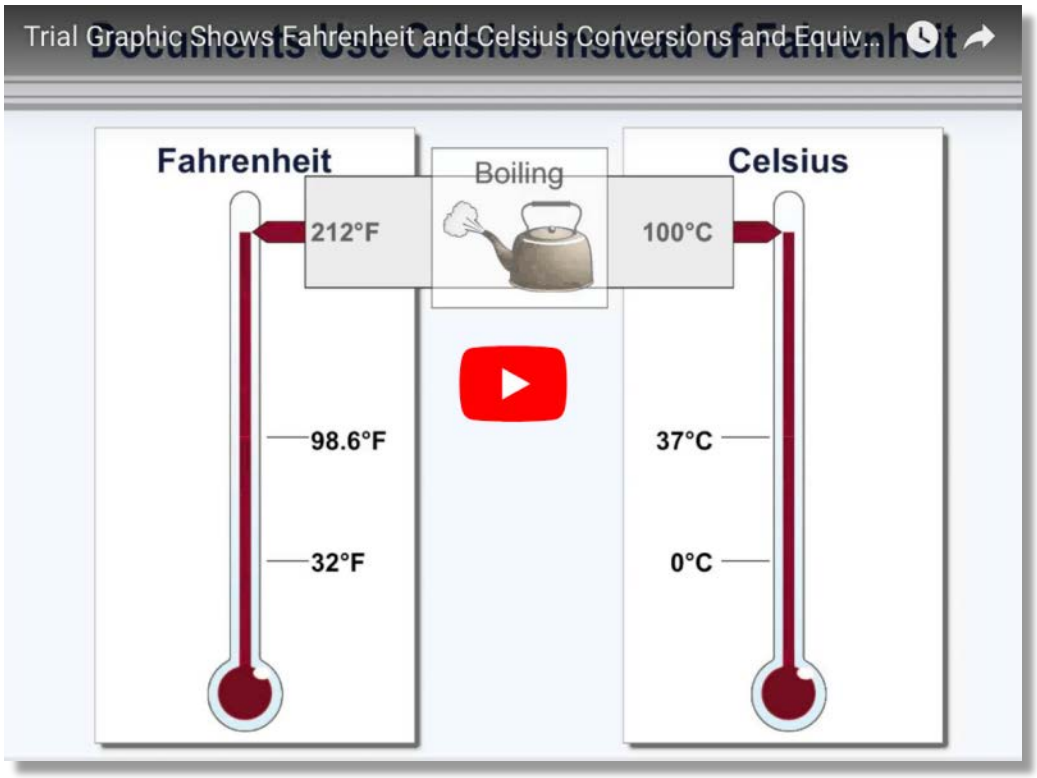
5. This A2L PowerPoint litigation graphic, explaining how hydraulic fracturing (aka fracking) works, has been viewed more than 180,000 times on YouTube. The use of dials and animation of the drill head are not what you would normally expect from PowerPoint (link set to start video at 1:27). The voiceover audio is embedded into the PowerPoint.



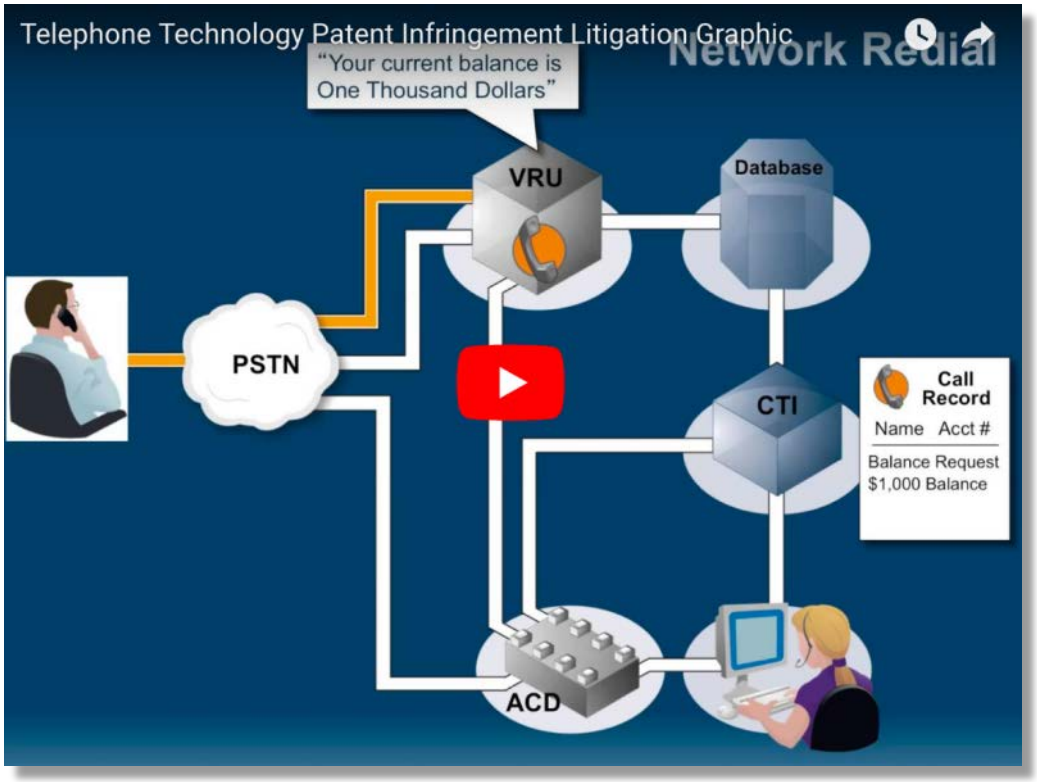
6. This simple traffic cop animation explains the roll of an operating system in an easy-to-understand format. By using illustrations combined with animation in a PowerPoint litigation graphic where small parts are varied, an animated or cartoon effect is achieved within PowerPoint.



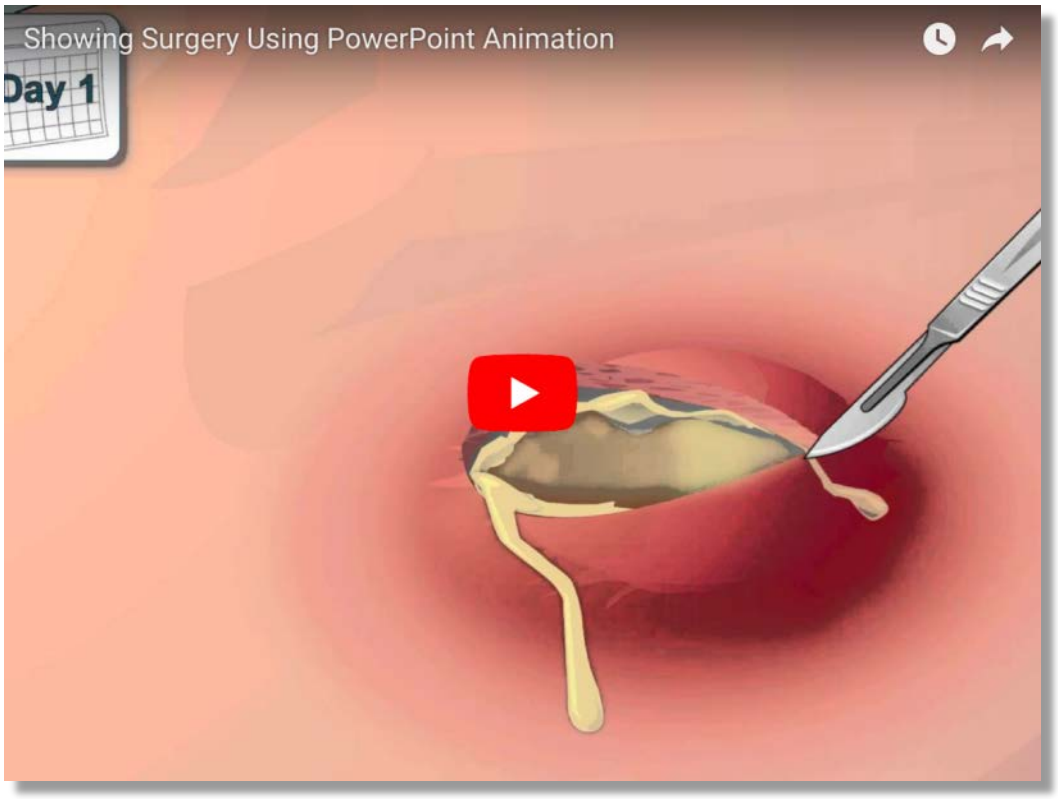
7. In a very simple way, this chart uses PowerPoint to show how Fahrenheit and Celsius scales compare to one another. Like many of the examples in this article, it's surprising that the graphic was created in PowerPoint.



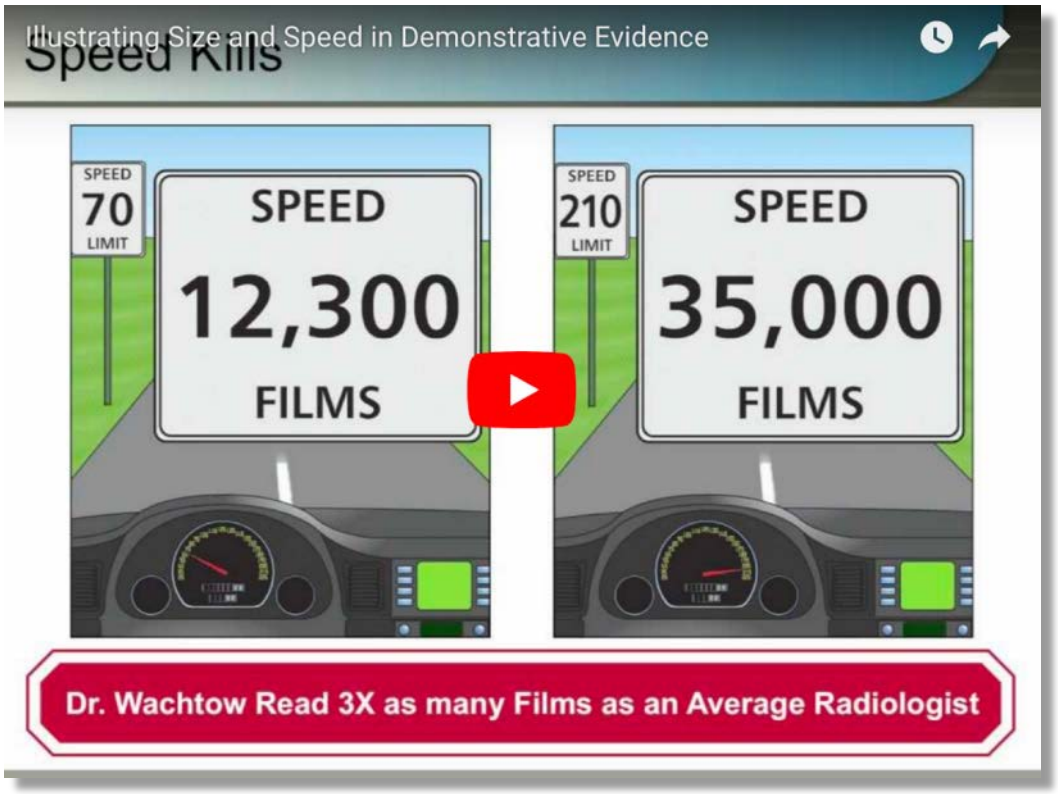
8. This chart shows how a phone dialing system works and is designed for a judge's viewing in a claim construction setting rather than jury viewing during trial. Again, it is animated and presented entirely in PowerPoint.



9. Even a surgical procedure can be shown using a combination of illustration and PowerPoint animation techniques. Such work can make courtroom animation economically feasible in even small cases.



10. Here, to help demonstrate that a doctor was reading films too quickly to maintain an appropriate standard of care, an analogy to speeding is created in PowerPoint.

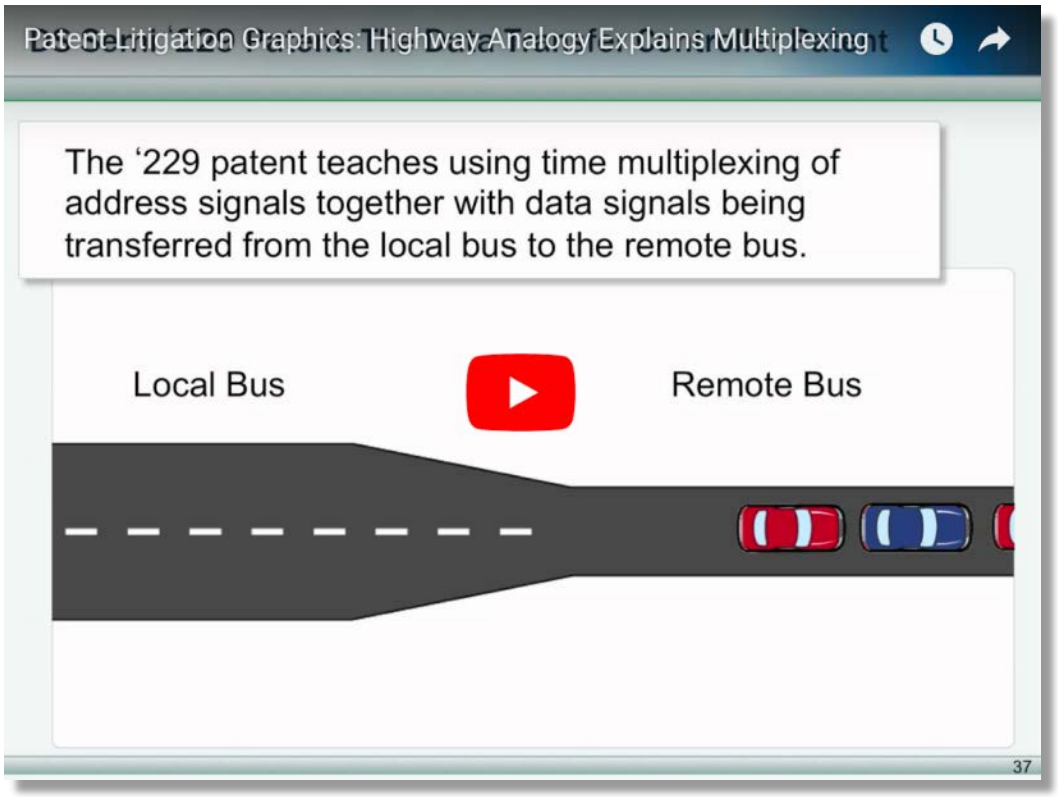


11. For a claim construction hearing, this PowerPoint was created to show how a drug delivery system works in a hospital environment. Claim language is shown in conjunction with the PowerPoint litigation graphic to give it context and meaning. I think it is a smart use of animated graphics juxtaposed with claim language.

12. Here, the removal of a nuclear power plaint reactor pressure vessel is shown. By creating illustrations that are shown in quick succession, the effect of animation is achieved in PowerPoint without having to go through the expense and complications of creating an animation.

13. Using PowerPoint's native interactive features, one can create hot-spots on a graphic that show a document or another image. This means that images do not need to be shown in linear order. This becomes useful when one wants to use a timeline built in PowerPoint and still have the flexibility to jump around to other documents. Interested in more timeline examples, download our timeline book (opens in new window).

14. Explaining complicated patent terms with PowerPoint litigation graphics becomes much easier when coupled with a straight-forward analogy like the one shown here. Simply a local bus and remote bus (computer communication systems that move data between components) bear similarities to traffic patterns that are easy for a jury to understand. Interested in patent litigation graphics, download our patent litigation toolkit for litigators (opens in new window).



15. Making heavy use of illustration, this PowerPoint serves as a timeline that explains how a worker was electrocuted on a job site and went undiscovered for some time.

16. Finally, here is an example of how one might use the interactive features of PowerPoint to tell a complicated story in a mortgage-backed securities case. The user is free to click on any of the state icons to view developments in other locations in any order they choose.

Using PowerPoint litigation graphics will solve many trial challenges, however one needs to know when to use PowerPoint, Flash, a physical model, a trial board or a more sophisticated 3D animation program. To make that judgment, ask your litigation graphics consultants or contact A2L.

Repelling the Reptile Trial Strategy as Defense Counsel - Part 1

By Ken Lopez Founder/CEO, A2L Consulting

Last week, I spoke at an annual gathering of defense attorneys whose subtitle was "Lawyers and Other Reptiles."

What's going on? Who are these reptiles? It's an interesting story. This conference was planned as a way to bring together defense attorneys around the nation who want to learn how to turn aside a frequently used set of trial tactics championed by David Ball and Don Keenan in their "Reptile" series of books and webinars. Ball is a North Carolina-based jury consultant, and Keenan is an Atlanta-based plaintiffs trial lawyer.

According to Ball and Keenan's publicity materials, the "reptile" concept is "the most powerful tool in the fight against tort reform." Ball and Keenan say that through their books, DVDs, seminars and workshops, "the Reptile is revolutionizing the way that trial attorneys approach and win their cases." The proof, they say, is in the numbers, as more than $6 billion in verdicts and settlements have resulted from these tactics since they launched them in 2009.

William A. Ruskin of Epstein Becker & Green has summarized the concept well in a 2013 Lexis-Nexis article:

The Reptile theory asserts that you can prevail at trial by speaking to, and scaring, the primitive part of jurors' brains, the part of the brain they share with reptiles. The Reptile strategy purports to provide a blueprint to succeeding at trial by applying advanced neuroscientific techniques to pretrial discovery and trial. The fundamental concept is that the reptile brain is conditioned to favor safety and survival. Therefore, if plaintiff's' counsel can reach the reptilian portion of the jurors' brains, they can influence their decisions; the jurors will instinctively choose to protect their families and community from danger through their verdict.

While the "science" described by the authors is laughable and amateurish, the strategies they recommend are effective. As a result, defense attorneys nationwide are taking notice and developing strategies to combat these tactics.

The Reptile strategy is showing up mostly in single-plaintiff cases on the coastal areas, but it is spreading geographically and is now being used in larger cases. Looking at the Reptile trial strategy more as a comprehensive litigation tactic, I'd summarize the approach this way:

- Beginning as soon as the complaint, articulate a set of common sense safety rules that people as good members of a community should follow.
- Get experts and fact witnesses, in discovery, to agree that these common sense safety rules are reasonable for society. For example people shouldn't drive fast, pouring chemicals into rivers and streams is not ideal, a single company should not own too much of the market, doctors shouldn't hurt people.
- Use fear as a persuasion device to frighten jurors into defending their communities by adopting what is effectively a new standard of liability.

When fully implemented, the strategy sees the defendant's conduct as a secondary consideration to what might have occurred. For example, what if it had been a school bus in the accident? What if the contamination would have been of drinking water for a pregnant mom? These arguments substitute for the actual standard of liability and the actual conduct of the defendant.

The rationale for this approach is that fear will cause jurors to abandon rational thought and penalize the defendants. That's not how people think, that's not how juries reach decisions, and that's not actual science. But just because the authors flub the science it doesn't mean their recommended trial strategies are bad. Ball and Keenan make some suggestions that defense lawyers must be aware of.

I believe it's possible to overcome these strategies, particularly at trial, by simply being a good lawyer and doing what you should be doing at trial anyway -- specifically by articulating a strong narrative that makes sense to people and that people care about.

If you have not seen the Reptile trial strategy in one of your cases yet, you probably will soon. A show of hands at my speaking engagement showed more than half of a large audience having seen it in one of their cases recently.

I will go more into detail about how to spot the Reptile trial strategy and how to respond to it in upcoming articles. Click here to be notified of subsequent articles.

Parts 1, 2, 3, 4, & 5.

A2L CONSULTING

When a Good Trial Team Goes Bad: The Psychology of Team Anxiety

By Ken Lopez Founder/CEO, A2L Consulting

Learn why the work of the father of group psychology from 70 years ago is so important to the leadership of a modern trial team.

Stories about a trial team breaking down at or just before trial are legendary. The breakdowns are typically triggered by some event that creates anxiety that then causes the team to engage in one of three progressively severe sets of behaviors:

1. **Deification of the Leader:** Looking to the leader of the team to make the anxiety go away or the leader taking dictatorial control over the team;

2. **Fights and Departures:** Fighting among members of the team or abrupt departures from the team;

3. **Coups:** Two or more people plotting to overthrow the leader or change leadership.

These breakdowns follow something going wrong in or around the trial team's work that produces fear. For example, I have seen trial teams slip into one of these behavior patterns after inter-team relationships are brought to light, when a judge discovers and makes public ethics problems on the team, when a client stops paying bills, when layoffs are being announced at the office, when something unexpected happens mid-case, when a team-member dies, when a ruling goes the wrong way or when the first chair is revealed to be unprepared, distracted or unqualified to try the case.

Ever see these things happen on a trial team or similar things happen to any team for that matter? Well, it turns out that these three behavior patterns were first described 68 years ago by the father of group psychology, Wilfred Bion. In my business career, nothing has proven more valuable than the knowledge Bion revealed, and for leaders of a trial team and the members of that team, learning a little bit about Bion can pay off enormously in the long run.

It turns out that the three patterns described at the beginning of this article are all increasingly severe subconscious group responses to anxiety and were described by Bion as:

1. **Dependence:** Where the followers subconsciously act in a way that forces the leader to take action to make the anxiety go away. If that fails, the team subconsciously moves onto the second and more severe breakdown.

2. **Fight/Flight:** Team members run away from the anxiety by fighting amongst themselves for distraction or try, as individuals, to escape the team altogether. As above, if this fails to make the anxiety go away, the team subconsciously proceeds to the next stage of breakdown.

3. **Pairing:** In this, the most destructive of the subconscious responses, a pair of team members plots to replace the leader through secret meetings or to find any other way to run away from the anxiety en masse.

In the eyes of Bion, teams are either in productive work mode or they are in moving through one of these three states, collectively called Basic Assumptions. The sole purpose of going into Basic Assumption mode is to make anxiety go away, a response that is completely knee-jerk and subconscious. Perhaps, you will not find it surprising to learn that these rules apply to any team whether it is a trial team, an executive committee, a club or even a family.

One noted expert in human behavior, Robert M. Young similarly remarked on his experience with groups and teams, "My experience was that, sure enough, from time to time each group would fall into a species of madness and start arguing and forming factions over matters which, on later reflection, would not seem to justify so much passion and distress. More often than not, the row would end up in a split or in the departure or expulsion of one or more scapegoats. This happened all over the place -- in high school, college dormitories and societies, university departments, teams making tv documentaries, collectives editing periodicals, communes, psychotherapy training organizations. Every time this happened to groups of which I was a member I thought it was either my fault or that I had once again fallen among thieves, scoundrels, zealots, dim-wits or some combination of the above." This probably sounds familiar, right?

So, what is the takeaway? I think Bion's work is valuable to leaders of a trial team or leaders of teams of any sort for several reasons.

- First, if you know about Dependence, Fight/Flight and Pairing, you can always tell how far into distress your team really is by using these progressively worsening stages as something of a measuring stick.

- Second, the leader should learn to keep their head, no matter what. For once a leader loses control of their own emotions, they too have succumbed to the Basic Assumption. Thus, one job of a leader is to constantly increase their own capacity to handle anxiety and to the extent possible, help their team increase their capacity for managing the stress.

- Third, there is actually a way for a skilled leader who has a team with enough emotional intelligence and intellectual strength to help pull the team out of Basic Assumption mode and return to productive work mode. Like many leadership lessons, however, it is simple, but it is not easy. All a leader needs to do is to force

the group to talk about the thing at the root cause of the anxiety. With enough conversation and the right people, the team can return to productive work.

Using Scale Models as Demonstrative Evidence - a Winning Trial Tactic

By Ken Lopez Founder/CEO, A2L Consulting

When most people think of courtroom presentations, they think of computer-aided graphics like PowerPoint presentations or movies – or of written guides such as charts, graphs, and timelines. They don't usually think of physical, scale-model creations.

In the appropriate cases, however, physical models or scale models can be extremely convincing to jurors, especially those jurors who are "kinesthetic learners" – those who learn best from three-dimensional objects. Every jury is likely to include one or even two of these people, and it is important to present information in ways that are suitable to their learning style.

We have built effective models in a variety of case types including patent infringement cases, Hurricane Katrina cases, and aviation cases.

As Dallas attorney James L. Mitchell wrote in 2003 [pdf] in a paper presented at a litigation and trial tactics seminar: *Scale models which are fabricated specifically for a case . . . can serve an explanatory, illustrative function which is difficult to duplicate with any other medium. It is important to remember that even when the model is present in the courtroom, it is still useful to present it with photographs (and/or slides) or with the use of the courtroom video visualizer. After the jurors look at the model and grasp the overall spatial relationships involved, they may get a clearer view of the specific areas at issue through a photograph rather than the model.*

MONDAY, JULY 16, 2007

UP CLOSE | STRATEGIES

Infringement claim meets watery demise

A wet analogy helped sell technical arguments to jurors in a patent case.

By Emily Heller

SPECIAL TO THE NATIONAL LAW JOURNAL

A MONTH-LONG patent infringement trial in August 2006 between Japan's Matsushita Electric Industrial Co. Ltd. and South Korea's Samsung Electronics Co. Ltd., had the makings of a painfully complex ordeal for jury and judge: A late-summer slog through brain-numbing minutiae of computer circuitry.

Much was at stake in the Trenton, N.J., federal courtroom. Matsushita, which labels its products Panasonic, sought at least $300 million in damages. It also sought an injunction barring Samsung, the world's largest manufacturer of the

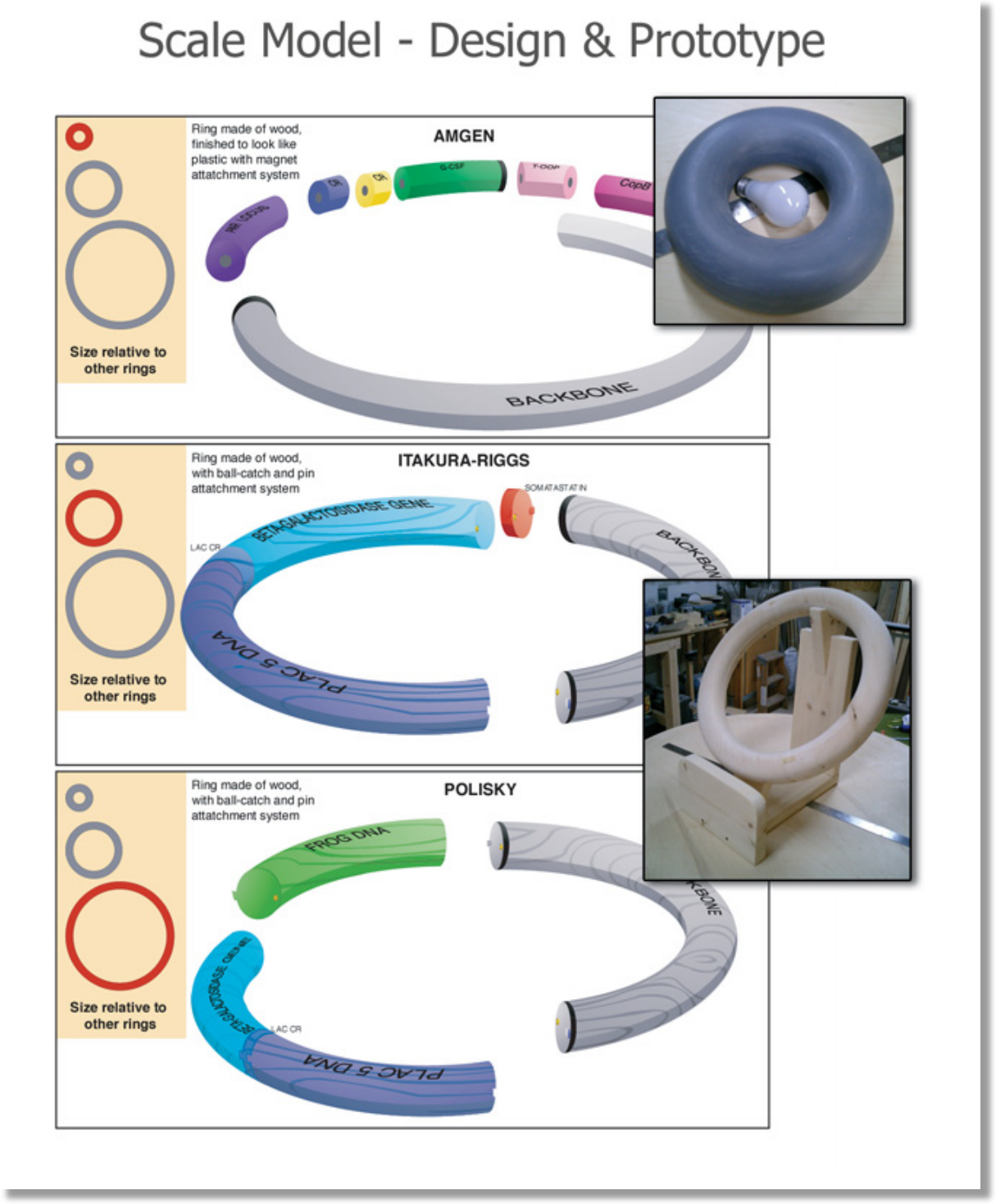
THE AQUACHIN: *Akin Gump's Jeff Sherwood, Mike Oakes and Frank Cimino display the contraption they used to illustrate the way a circuit works.*

In a major patent case, we helped attorneys for Samsung Electronics Co. Ltd., show how electricity flows through computer memory by building a 15-gallon, clear plastic water tank. [View full article at right here pdf] At issue were Samsung patents for reading the electrical charges in computer circuitry. Samsung's expert contended on the stand that the way the Samsung circuit was built, electricity would discharge completely under the proper circumstances. The opposing expert from In Matsushita Electric Industrial Co. Ltd. disagreed. In a courtroom demonstration, the water in the tank did in fact completely run out, into a tub on the floor. In a month-long trial, the jury ended up rejecting a challenge to the patents that had been posed by Matsushita.

In an aviation case, we built models of airplane instruments that were 4 feet by 4 feet in

length in order to show how what happened when the knobs on the instruments were turned: The dials moved as well via a gear system that we designed and built.

In a patent case involving blood plasmids, we built a set of wooden rings that were intended to show the composition and relative sizes of various competing products on the market.



Each of these examples nicely illustrates what is possible when good trial lawyers work with highly creative people to thoughtfully prepare for trial. As we say -- it is a winning model!

Demonstrative Evidence & Storytelling: Lessons from Apple v. Samsung

By Ryan H. Flax, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

In the *Apple v. Samsung* trial, the outcome will be the result of good storytelling and demonstrative evidence, not necessarily the best legal case.

Over the last few weeks, Apple Inc. and Samsung Electronics Co. Ltd. have viciously fought over patent infringement and other claims (see Apple's complaint and Samsung's answer [pdfs]), both in the courtroom and in the forum of public opinion. The case is steeped in patent law and relates to the alleged infringement and invalidity of utility and design patents. But, it won't likely be the legal details or attorneys' satisfaction of the various prongs of proving direct infringement or obviousness invalidity that will change the future of smartphone and tablet computer technology purchasing options for the foreseeable future.

Yesterday, after closing arguments, the jurors were given their instructions by U.S. District Court Judge Lucy Koh on the legal nuances of patent infringement and validity, trade dress, contracts, and antitrust law – this took over *two hours* and covered 109 (yes, that's *one hundred nine*) pages of text jury instructions – and then sent them away to the jury room to decide the fate of Apple, Samsung, and the American technology consumer. I'm sure that the jurors listened attentively to those instructions, but it took me most of a semester of law school to fully understand just some of those legal issues, and I respectfully doubt that those jurors are competently ready to decide the case based on the law.

What they *will do* is base their ultimate decision on their sense of justice and upon their emotions. Those jurors brought their sense of justice with them to the court on the first day of jury selection, and their emotions have been played by plaintiff and defense counsel over the course of the trial. Remember, Lady Justice wields a sword for a reason – if you've done something wrong, you should pay and that's what either Apple or Samsung will be held to do based on which side's story was more moving and convincing during the trial.

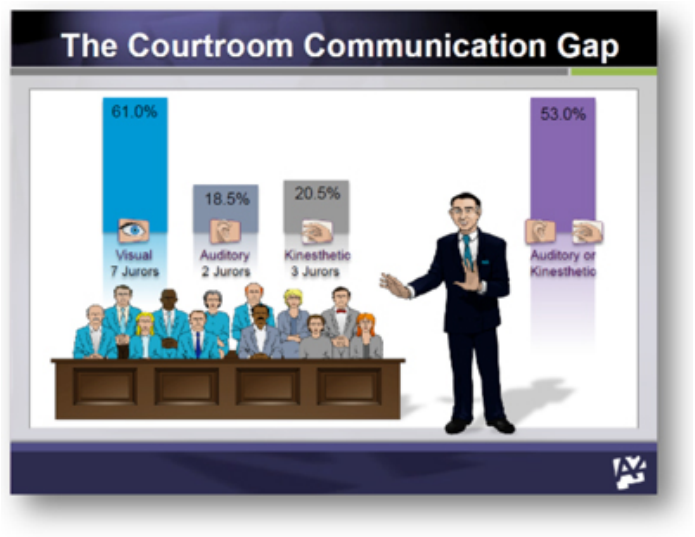
Experts agree. According to Alexander Poltorak (CEO of the patent licensing and enforcement firm General Patent Corp.), "Juries tend to simplify the case. That's a natural tendency," and "They want to figure out who is the bad guy here and let's punish them." *See also* our article on demonstrative evidence and the opening statement.

Complicated Cases Call for Great Demonstrative Evidence

Bill Panagos (of Butzel Long) called this case "extremely difficult" and a "complicated picture of intellectual property." He went on to explain that, "juries tend to do what they think is fair or right" and "it depends now on the story that they heard from each of the attorneys -- which one of those attorneys was able to tell the story in a way that the jury understands or believes them more than they understand and believe the other side."

Even Judge Koh expressly and publicly identified this case as a "coin toss" and urged the parties to settle the case before a verdict. The Judge went further, "I am worried we might have a seriously confused jury here," and "I have trouble understanding this, and I have spent a little more time with this than they have," and finally, "It's so complex, and there are so many pieces here."

This underscores the importance of telling a convincing and persuasive story in court. Jurors want to reach the right result, so how do you help them do it?



Litigators must be as effective at storytelling as possible at trial and to do so, jurors must be reached on an emotional level. To do this, litigators should test their story and theme with mock jurors in preparation for trial and take time to develop effective trial graphics.

With effective demonstrative evidence, also known as litigation graphics, attorneys can teach and argue from their comfort-zone – by lecturing, but the carefully crafted graphics will provide the jurors what they need to really understand what's being argued and give them a chance to agree. Most people (remember, jurors are people) are visual learners and do most of their "learning" by watching television or surfing the internet. In court, litigators must play on this battlefield and with the appropriate weapons.

Using the Right Demonstrative Evidence the Right Way

In a study, attorneys dramatically improved their persuasiveness when "jurors" were immersed in graphics, meaning the attorneys always gave them something to see while presenting an argument. Immersed jurors were better prepared on the subject matter, felt it was more important, paid more attention, comprehended better, and retained more

information. This is your goal as a litigator – to capture the jurors' attention and coax them onto your side.

Here's a sample graphic used at trial by Apple:

The obvious goal of this graphic was to tell a visual story showing how Apple's iPhone design was the pivot point for Samsung's own mobile phone design in a simple "before and after" format.

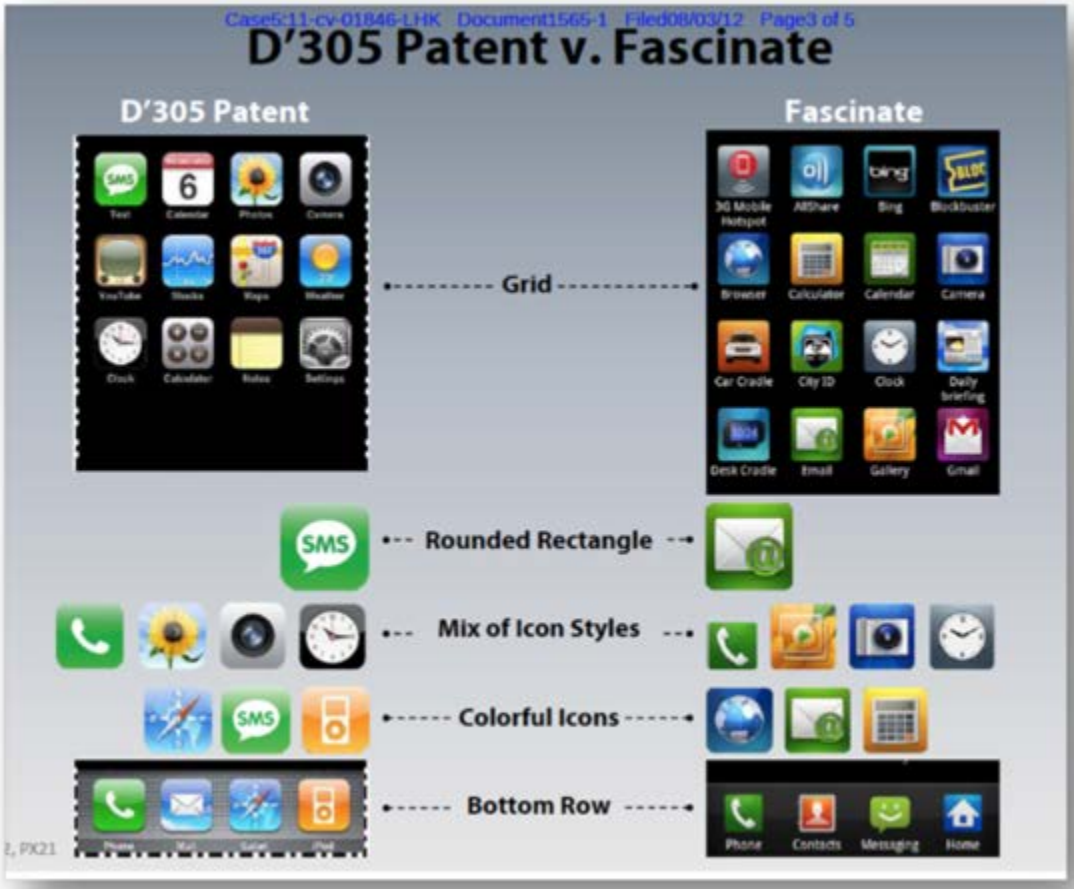
I'd say this is a fairly effective graphic. It simplifies a complex issue and makes a dramatic point.

Samsung countered with its own trial graphic, as follows:

The purpose of this graphic was to showcase Samsung's own innovative, but still iPhone-like designs over the years, both preceding Apple's product release and following it.

This graphic certainly has a lot of information, but it's not quite as clear and understandable as Apple's demonstrative evidence above. The jurors' understanding of this graphic will have depended more on the attorney's accompanying argument, which is not really the goal of trial graphics.

Here are some more interesting graphics used by Apple's counsel. This first trial graphic accompanied Apple's argument as to how Samsung's user interface infringed Apple's design patent on icons.



It is another effective graphic. It's clear and fairly convincing on its own, without any explanation.

Apple also used this demonstrative evidence trial graphic below to explain that, while Samsung designed an infringing user interface, there are a variety of other ways of making an icon-based mobile device interface. Apple showed examples of "non-infringing" alternatives that Samsung did not use.

I'm not so sure about this one. Sure, there may be differences between these designs and those used in the iPhone or Galaxy devices, but I'm not sure this makes a very convincing argument that Apple's design is so special.

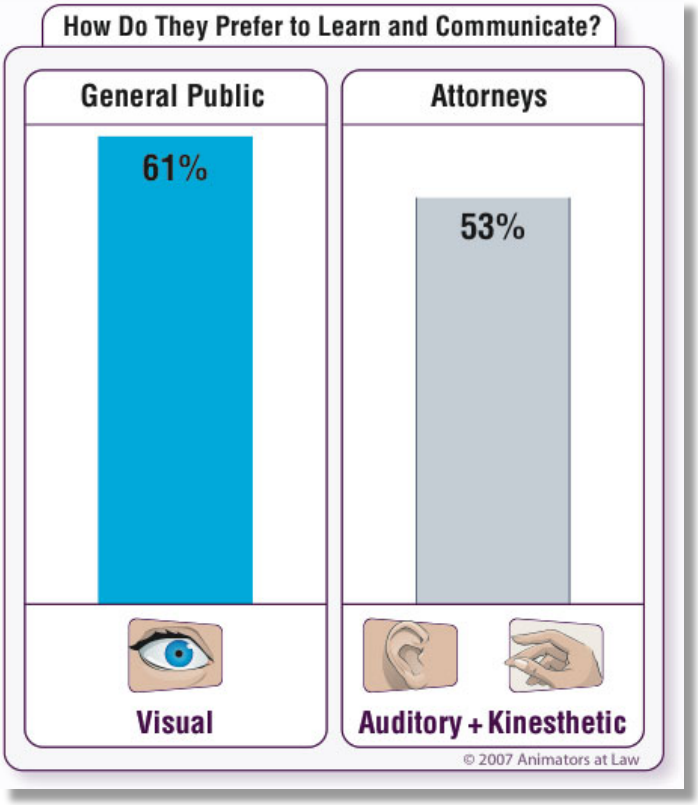
If the parties hold out for a jury verdict, it will be interesting to see which side told a better story here. If the jury believes influence over an industry is illegal infringement, Apple will win. If the jury believes Apple's designs are just the basic building blocks or "grammar and language" (so to speak) of mobile device design, Samsung will win.

Ryan Flax is the Managing Director of Litigation Consulting at A2L Consulting. He joined A2L after practicing as a patent litigator who contributed to more than $1 billion in successful outcomes.

Edit: see post-verdict follow-up article here.

6 Studies That Support Litigation Graphics in Courtroom Presentations

By Ken Lopez Founder/CEO, A2L Consulting



When we started A2L in 1995, our focus was on educating the legal market about the value of using visual aids in courtroom presentations. It may seem hard to believe now, but twenty years ago, most people did not believe visuals aids would help much with a jury. As one partner famously said to me in a Paper Chase-esque voice, "I went to Harvard and Yale, I'm pretty sure people understand me when I speak."

Since then, the vast majority of litigators have come to realize that the litigation graphics used in courtroom presentations are not used to make up for poor communications. Rather, these visual aids, in the form of demonstrative evidence, trial exhibits, trial boards, scale models, courtroom animation and trial director generated visuals are used to increase the likelihood of winning cases.

Visual aids help win cases for many reasons including 1) nearly two-thirds of jurors (and many judges) are visual learners who process visual information far better than information delivered orally; 2) people forget most of what they hear; 3) visual aids simplify cases and speed them up; 4) visual aids are known to increase persuasion.

Below are 6 studies and articles that support the science behind using litigation graphics and visual aids of all types in courtroom presentations.

1. The Wechsler Memory Scale (1946): First developed in 1946, this standardized measure of memory has come to be used to measure everything from the progression of Alzheimer's to juror memory and retention. It has been used to authoritatively show that **people quickly forget about two-thirds of what they hear**. Many studies draw similar conclusions.

2. Enhancing Juror Comprehension and Memory Retention (1989) [pdf]: "[t]rial attorneys unknowingly present arguments and issues that exceed jurors' capacity to understand. . . . being confused or feeling intellectually inferior is psychologically uncomfortable, and jurors may respond with resentment and

antagonism toward the presenting attorney. . . . **Present as much of your case as possible using visual aids.**"

3. The Persuasive Effect of Graphics in Computer-Mediated Communication (1991): **Those exposed to graphics are more persuaded to act than those who are not.** The test constructed here was whether graphics (either static or dynamic) made someone more inclined to pledge a donation to their alma matter than someone who was exposed to only text.

4. A2L's Communication Style Study (2003): Practicing attorneys and non-lawyers prefer to learn and communicate differently. A majority of non-lawyers prefer visual communications. A majority of attorneys prefer non-visual communications. Thus, **litigators must bridge this communication gap with visual courtroom presentations**.

5. Visual Evidence (2010) [pdf]: **Visual aids in courtroom presentations enhance juror attention and recall** and improve recall of key events. Charts and diagrams improve comprehension of quantitative information, and animation improves understanding of a dynamic process.

6. Broda-Bahm Study (2011): We referenced this study in a previous article. It found that **an immersive (as opposed to an occasional or absent) use of graphics during courtroom presentations yielded the best results**.

One cautionary note about vaguely cited studies and especially the often cited 1992 Weiss-McGrath Report courtesy of Pepper Hedden, a detail-oriented reference librarian in the New York County District Attorney's Office [pdf pp 27-30]. The results of the Weiss-McGrath study are impressive - a 650% increase in juror retention when oral and visual evidence are combined. Many in the courtroom presentations business have cited this study for decades. Google returns millions of results for it.

However, it turns out that the study does not actually exist. Rather, in 1992 an article was published in the ABA Journal which cited this study. Weiss and McGrath did write an article in *1963* that mentioned similar results, but they were quoting an *1856* internal corporate presentation and not a study at all. The 1856 reference does in fact note that a study was done, but it is not cited.

Please post links to additional studies and references in the comments section below. Your email address is never shown, published or used, and you do not need to enter your full name.

6 Trial Presentation Errors Lawyers Can Easily Avoid

By Ken Lopez Founder/CEO, A2L Consulting

In our view, many common techniques that lawyers use in making courtroom trial presentations actually represent very common errors.

"Error" is a strong word, since trial presentation skills and techniques are not an exact science. However, every litigator and courtroom professional should know that there is a strong body of evidence that supports the idea that these approaches are less desirable and likely to be less effective.

1. **Don't Split the Audience's Attention**. The redundancy effect and related split attention effect are the negative results of presenting information visually and orally ***at the same time***. The classic example of the redundancy effect is a presenter who presents bullet points and then reads them. The human mind will struggle to process both -- and your audience will end up with less comprehension of your points than if you had presented either 100 percent visually or 100 percent verbally. Similarly, if you show something on screen, learn to pause to let your audience take it in.

1. **Don't Use All Pictures**. On the other hand, one recent study suggests that jurors will perform better if there is *some* redundancy between what is said and what is shown in text. So for example, if you were explaining how LCDs work using a PowerPoint in a patent trial, it would be ideal to show litigation graphics with a few key words or phrases in the presentation that are repeated orally.

2. **Don't Just Speak**. In the legal field, we see litigation graphics used in all sorts of contexts including arbitrations, patent technology tutorials for judges, Markman hearings, hearings on summary judgment motions or motions to dismiss, trials, mock trials, motions and briefs, administrative patent office disputes, ITC hearings, pre-indictment meetings with prosecutors, and many more contexts. No matter what the situation, there is well established science that combining visual and verbal materials results in optimal learning. The question that remains is what combination works best. Although it is not written in a very accessible manner, I think this 2011 article about the modality effect and factors that contribute to it is one of the best that I've read for an overview of the science in this area, although you may want to read our primers on statistics for litigators before diving in.

3. **Don't Use Bullet Points**. They're not just bad due to the redundancy effect and the likelihood that people will just read your bullets and not listen to you. They generally come across as outdated, boring, and even condescending to the listener. See our

article about bullet points from earlier this year.

4. **Don't Just Make Spotty Use of Litigation Graphics.** One study we wrote about earlier this year demonstrates that the most effective trial presentation technique for showing litigation graphics is a so-called "immersive style." That is, constantly showing litigation graphics throughout the entire trial presentation.

5. **Don't Use Only Static PowerPoint Slides**. One recent study about modality effects (also mentioned above) suggests a strong advantage is gained using dynamic presentations (i.e. animated PowerPoint slides, courtroom animation, etc.) over a series of static slides.

A2L CONSULTING

6 Tips for Effectively Using Video Depositions at Trial

By Ken Lopez Founder/CEO, A2L Consulting

The old-fashioned deposition, with the court reporter recording every word and producing a written transcript, is giving way to the video deposition, which permits a jury and judge to actually see the witness and get a feeling for his or her style and credibility that can't be obtained by looking at a printed page. In addition, the witness's body language, which was completely opaque in a written deposition, is now available to the jury.

Video depositions are now used in most large trials – and as much as the rules of evidence will allow, they are used both in direct testimony and on cross-examination. As a legal employment website notes, "With the prevalence of multimedia technology, video depositions are now preferred over simple transcript."

We polled our six national trial technicians at A2L Consulting with more than 500 courtroom appearances between them for their tips on using video depositions at trial and using TrialDirector most effectively at trial.

Here are six good tips to follow:

1. **PREPARE DEPO CLIPS EARLY:** Daniel Carey, our lead "hot seat" trial technician, suggests that it's always important to leave a lot of lead time for preparation, if there's some possibility that an opposing witness will say something at trial that contradicts his or her deposition testimony. Possible impeachment clips need to be created in advance, then reviewed and saved in such a way that they are able to be pulled up on the fly in the rare occasion that they are actually used in court -- usually with a witness that wasn't prepped to the best of opposing counsel's abilities.

2. **KEEP DEPO CLIPS SHORT:** Keep deposition videos short and sweet. You run the risk of losing jurors if they are too lengthy. This especially holds true if you play them after lunch, when everyone's attention tends to flag.

3. **USE THE SCROLLING TRANSCRIPT SELECTIVILY:** Some attorneys think that subtitling (placing the witness's words on the screen and scrolling down as he or she speaks) can be distracting, but, like much in the law, it depends. Seeing and hearing the words simultaneously can cause memory retention problems due to the redundancy effect. We recommend using the text only when the sound quality in the

courtroom is poor, the sound quality on the recording is poor or the accent of the deponent is unfamiliar to the jury panel.

4. **AVOID COURTROOM OBJECTIONS:** Try to get advance agreement from all parties on any depositions to be played in place of live testimony and any objections ruled on by the court before trial begins.

5. **LIMIT THE NUMBER OF DEPO CLIPS USED:** Using video depositions for impeachment can have a powerful effect, but using the transcript for most answers is sufficient. By saving the most powerful clips for video, they do not become routine. Quality is better than quantity.

6. **MAKE GOOD DEPOSITION VIDEOS IN THE FIRST PLACE:** Train your witness to move forward in his or her chair rather than leaning back or slouching. This form of body language has been shown to provide greater credibility and authority.

A2L CONSULTING

Practice, Say Jury Consultants, is Why Movie Lawyers Perform So Well

By Ken Lopez Founder/CEO, A2L Consulting

Gregory Peck accepts the Oscar from presentor Sophia Loren for his role as courtroom lawyer, Atticus Finch, in *To Kill a Mockingbird*

Most of the lawyers that our jury consultants work with go to trial about once a year - if that often. Some might find that surprising, but it's quite true that even the best big-firm litigators in the world don't go to trial that often. How could they become so good when they get jury face time so infrequently?

All of these litigators have a gift for connecting with jurors. Most will regularly conduct mock trials and solicit advice from our jury consultants. They heavily use litigation graphics and work with our courtroom trial technicians, who ensure that the lawyer has his or her mind on his connection with the jury, not on his or her connection with the Internet.

But, even among the very best, there are some who are the simply the best of the best, and their habits are quite different from most. They comfortably rely on image consultants. They use acting coaches. They videotape themselves doing run-throughs, review the tapes, refine and repeat. And, more important than anything else, they practice openly in front of a group of trusted advisers. In a nutshell, they spend most of their careers asking, *How can I be better*?

When I watch these great litigators at work, I notice that they are a great deal like the fictional depictions of lawyers in the movies. And I don't think it is an accident. They've worked with jury consultants and other consultants to slowly mold themselves into who they are now.

I've written before about how lawyers can learn a lot about trial presentation from the movies, how the litigation business is not all that unlike the movie business and how litigators can benefit from learning to tell better stories - just like the movies. So, this got me thinking.

Since juries expect litigators to be a lot like those in the movies, and since the best in the business are not all that dissimilar from lawyers in the movies, might the gap in performance between good litigators and great litigators be the degree to which they practice?

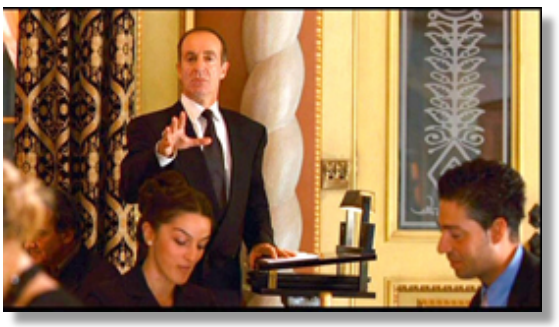
There is a noticeable gap between the way some litigators perform in the courtroom when compared to a Glenn Close, Paul Newman, Laura Linney, Matthew McConaughey or

Gregory Peck. It's not just about their hair and makeup. It's about how they present their cases, how they connect better with jurors and how they tell better stories that are more emotionally compelling. So, rather than guess, I've turned to a few friends from the movie industry and asked them, ***How much practice goes into a performance like those we see in film***?

Hollywood director John Carter has had a chance to work with and coach some of the best in the business. He observes, "Putting ego aside and working the material is critical to performance. A screenwriter spends months contemplating a character and a line of dialog before a final draft. Often the screenwriter listens to actors read the material long before production of a film. Then there is the rehearsal process involving props and wardrobe as the actor becomes the character, even masters the character. Imagine someone else playing Forest Gump. At one point there was just Tom Hanks and a script. That character came from a special collaboration and hard work. At some point, the great ones aren't even thinking about the material anymore, they have become the character. I wonder how much Roger Federer thinks about the mechanics of his serve before he hits it. Not much. After 17 Grand Slam titles, he still has a coach."

Paul Dano, famous for his roles in films like *Little Miss Sunshine* and *There Will Be Blood* remarked, "It's hard to speak for anyone else, but I think a lot of actors enjoy their preparation. It is a time when you can learn, discover, and push yourself. I find the more deep my preparation, the more fun I have on the actual day of shooting. Each actor is very different, but I think hard work is the most common characteristic between the great ones I have worked with."

Kaili Vernoff, who's appeared in multiple Woody Allen films, has also played a lawyer on TV in the series *Law & Order*. For her role, she noted, "by the time I'm on set, I've already run the scene with other actors - or my very supportive husband - until I know it back and forth. If I'm still stumbling over the words, I'm not able to breathe any life into the character. For professionals, it's that kind of practice and preparation that makes all the difference."



Michael Allosso, has appeared alongside Steve Martin and others in a long career as actor and director for both film and stage. He said, echoing the teachings of our jury consultants, "Structure allows you to be more spontaneous. If you prepare, rehearse, practice - no matter how many flaws there are in those rehearsals - you will be ready to be

more improvisational in the moment. Be impeccably prepared. Then, you are upping the chances of delivering a believable, natural performance."

Jules Haimovitz, former president of MGM Networks and former Vice Chairman and Managing Partner of Dick Clark Entertainment, sees a vast difference between prepared entertainers and those who extemporize. He reminds, "in the movie and television business, like in life, there is no substitute for careful preparation. Those who fly by the seat of their pants do not position themselves well for repeatable success."

So, just as our jury consultants suggested to me, it seems to me that litigators can learn a lot from actors, directors and movie moguls about preparation. As someone who also gives speeches and presentations regularly, I know that I am far better when I've prepared. No matter how many times I've done a run-through in my car or practiced in front of a mirror, there is simply no substitute for practicing in front of others. Yet, sometimes I, like many litigators, resist the humiliating feeling of not performing well, even in practice. But, I know, to get long-term gain, you often have to suffer some short-term pain.

That's where a great jury consultant or trial coach can come in. As my mentor reminds me from time to time, it requires two people to really grow yourself. This is true because the feedback you receive in real time is where much of your growth comes from. A jury consultant can provide feedback on everything from your style of dress, to how you use your hands, to how you structure your argument.

One key difference between a fictional lawyer and a real litigator is that some things just cannot be practiced. While you can practice your opening and closing until you're as convincing as Gregory Peck, learning how to conduct a good cross, managing objections, handling everything that leads up to trial as well as maintaining a good client relationship are all special challenges that no amount of memorization can prepare you for.

Ultimately, as some of Hollywood's brightest have shared and as our jury consultants remind, it is how you practice that defines how you present - and there are no short cuts.

14 Differences Between a Theme and a Story in Litigation

By Ken Lopez Founder/CEO, A2L Consulting

The goal of developing and communicating a theme is to give your fact-finder(s) an organizing principle that they can fit the evidence into neatly. However, for as much as we talked about themes, one thing I was not taught much about in law school was storytelling.

The two devices, themes and storytelling, are related, but they are not the same. A case theme can be thought of as a case's tag line, somewhat similar to corporate slogans like "when it absolutely, positively has to be there overnight" or "the ultimate driving machine." It's a shorthand version of the case designed to connect with the life experiences of the fact-finder(s).

I have seen cases where a story was told, but no theme was used. I have seen cases where a theme was used, but no story was told. The reality is you need both, particularly during opening statements, and appreciating the differences between themes and stories is critical for success at trial. With estimates running as high as 80 percent for the number of jurors who have made up their minds just after opening statements, getting your theme-story combo right is nothing short of essential - for BOTH plaintiff and defendant.

Here are fourteen key differences between themes and stories used in litigation:

1. **Themes are attention getters, stories are attention keepers.** You're a clever lawyer, and you can rattle off a great case theme that gets people thinking. However, without a meaningful story to back up your opening line, fact-finders are just going to make up their own story or just tune you out.

2. **Themes provide a reason to be interested, stories provide the emotional connection required to care.** If a jury does not care about your case, they are likely not going to get on your side and could very well just be daydreaming even while making eye contact.

3. **Themes explain, stories motivate**. A well-told courtroom story will trigger a biological and an emotional response that leaves your fact-finder open to being persuaded.

4. **Themes sound like you are being a lawyer, stories sound like you are being human.** It is very important to be likable at trial, and being likable generally means behaving like someone people can really relate to. If you are over-using lawyer-language, you create distance between you and a jury.

5. **Themes provide a smidgen of structure, stories provide a decision-making framework.** You know that you've told a story well in the courtroom when the jury tells the same story to one another during deliberations. We see this occur during mock trials regularly. See *10 Things Every Mock Jury Ever Has Said*.

6. **All lawyers know to use themes, many lawyers will fail to use stories.** I recommend downloading our free Storytelling for Litigators book and watching our free Storytelling for Persuasion webinar to rapidly improve your storytelling skill set. I've watched good lawyers lose cases when they failed to articulate a good story.

7. **Themes are mostly tools for opening and closing statements, stories are incorporated throughout the trial.** If you have set up your story well and worked with every member of your trial's cast including fact and expert witnesses, everyone will add clarity to a story throughout the trial.

8. **Juries will not usually talk about your themes, juries will talk about your stories and often adopt them as their own.** See *Your Trial Presentation Must Answer: Why Are You Telling Me That?* and *10 Videos to Help Litigators Become Better at Storytelling*.

9. **Stories have many characters with understandable motives, themes provide little in the way of character development.** See *Are You Smarter Than a Soap Opera Writer?*

10. **Themes may offer the what or how, but stories offer the why.** See *Your Trial Presentation Must Answer: Why Are You Telling Me That?* and *20 Great Courtroom Storytelling Articles from Trial Experts*.

11. **Themes offer something quickly relatable, stories offer something you can get lost in.** See *5 Essential Elements of Storytelling and Persuasion*

12. **Themes affect one part of the brain, stories affect another.** See *Storytelling Proven to be Scientifically More Persuasive*

13. **Themes don't really persuade, stories will persuade.** See *Storytelling as a Persuasion Tool - A New & Complimentary Webinar*

14. **Themes don't need litigation graphics to support them but stories sure do.** See *Why Trial Graphics are an Essential Persuasion Tool for Litigators*.

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Storytelling Proven to be Scientifically More Persuasive

By Ryan H. Flax, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

In my last post, I discussed how important it is for every litigator to tell a story, because jurors will always frame the facts of a trial in the form of a story. As storytelling litigators, we need to relay to our audience: (1) what happened; (2) where it happened; and (3) why we care. We must set the scene: By the time you're done with your opening statement, your audience should know "what the weather was like" (literally or figuratively) when liability arose. Finally, it's necessary to provide a social tie-in – **some reason why** your jurors would wish to absorb and retell the story you're telling. Otherwise, there's no reason for them to pay attention.

That last bit is somewhat surprising, but is very important to remember. One of the first things that humans consider when taking in new information is its social value to them – whether it's worth their remembering so that they can reap some value in its retelling (consider, by analogy, Facebook "status updates" and "sharing"). New information is filtered through a social network of the brain more than by our IQ centers.

When researchers studied human information uptake using MRI scanning, the areas of the brain expected to be most activated, i.e., those relating to memory, deep encoding, higher-level abstract reasoning, and executive function, **were not** activated. Instead, the brains' regions central to thinking about other people's goals, feelings, and interests ("theory of mind") were those most highly activated. This was surprising, but is an important lesson to those of us who rely on persuasion for our livelihood.

What are the implications? Spreading ideas, norms, values, and culture depend less on IQ-type intelligence and more on the influencer's social-cognitive abilities, use of emotions, and motivation.

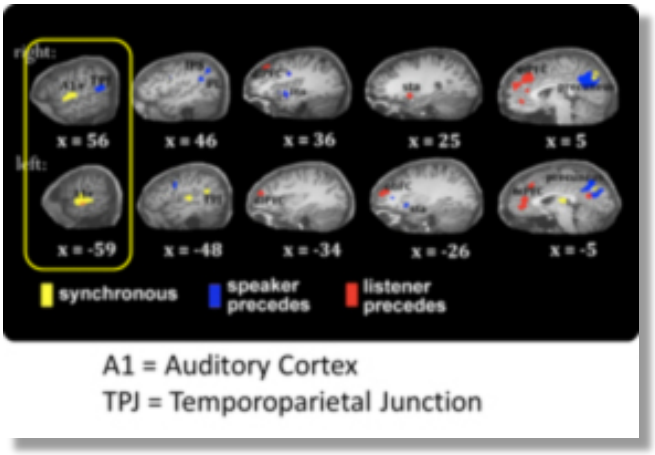
We must understand two things about persuasion:

1. You cannot change jurors or their capacities; but

2. You can change your approach to them. You can tailor your approach by putting the facts into the context of a story, both verbally and visually.

An effective story provides relationships between the facts and the characters. It addresses the characters' motives or intentions. It puts this information into a context, a physical and psychological environment – the setting. Doing these things will make you more persuasive. How do we know this? We can read the brains of storytellers and story-listeners.

Studies show that while listening to an effective story, listeners' brains react more like participants than spectators. We say that people experiencing a deep connection are "on the same wavelength." What's amazing is that there is neurological truth to that.



Scientists at Princeton University looked at brain scans (fMRI) of storytellers and listeners to the stories. They found that the most active areas of the brains of the speakers and listeners matched up; they were in sync, or coupled. However, this synchronized activity was found in the areas of the brain relevant to theory of mind, not in areas that drive memory or the prefrontal cortex associated with cognitive processing. The stronger the reported connection between speakers and listeners, the more neural synchronicity was observed in the test subjects (yellow color in the image above). The extent of brain activity synchronicity predicted the success of the communication – **so connecting with your audience more makes you more persuasive.**

Other research using brain scans reveals other important information relating to effective storytelling and will help us plan our course of action on the persuasion track. This research shows that our brains react differently based on the types of words used. Information (e.g., evidence) presented to test subjects without using sensory language stimulates only the brain's language areas (Broca's and Wernicke's areas), and this is interpreted as "noise" (blah, blah, blah, blah). The task for the listener is seen as remembering words and more words – which is not fun and not interesting for the audience and makes keeping them engaged and persuading them much more difficult.

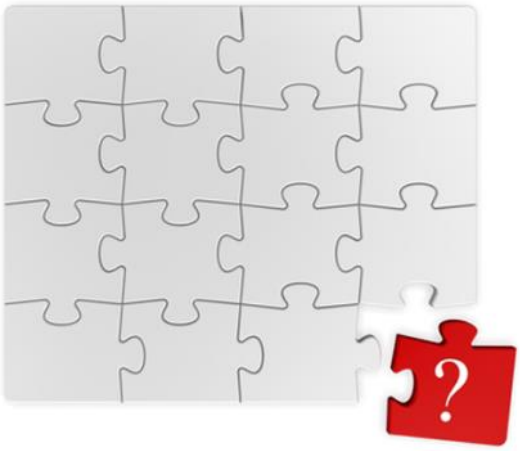
Research finds that use of sensory language actually stimulates the same areas of subjects' brains as the original action would (e.g., the olfactory cortex when hearing descriptive words involving smell such as lavender and cinnamon, or the motor cortex when hearing about movement). Litigation is about persuasion, which can only happen, research shows, by literally changing the brain of your audience. This brain-changing requires accessing the correct neurotransmitters, which are especially present when a person is: curious, predicting, and/or emotionally engaged. These are your goals when planning your persuasive track strategy.

Oxcytocin is the neurotransmitter we most care about when attempting to persuade an audience. It's the trust/empathy molecule. It is increased in audience members after they listen to stories eliciting empathy. Hearing inspirational stories causes more blood to flow to our brain stem. The brain stem is the part of our brain that makes our heart beat, regulates our breathing and keeps us alive. Thus, using effective storytelling to persuade means you've literally induced a reaction from the very substrate of your audiences' foundation for biological survival.

No Story, No Glory: Closing Arguments that Don't Close Loops

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

A trial lawyer can have all the facts, but unless he or she can weave them into a story that makes sense and doesn't leave unanswered questions in the closing argument, the facts aren't likely to add up to the result the lawyer seeks at trial.



For example, in the recent Jodi Arias murder trial, in which Arias was convicted in an Arizona court of murdering her ex-boyfriend Travis Alexander, prosecutor Juan Martinez left several critical holes and questions:

1) Why would the defendant have sex all afternoon with the victim and then kill him?

2) How could her killing him not be in the heat of passion or the result of an argument after they had sex that day?

3) Why would she have sex with the victim if she headed to his home with the premeditated plan to kill him?

4) Why not kill him when his back was turned?

5) Why use a knife if she had a gun?

6) Why take photographs and create evidence if you're planning a murder?

The evidence pointed to the notion that the defendant's Plan A was winning the victim back:

- Arias brought CDs and the couple watched photos of good times they'd had together on trips
- They had sex twice that afternoon
- Arias "relented" and agreed to have Alexander take nude photos of her to "please him"

The defense claimed she snapped and that "something happened in this moment in time between 5:29:20 and 5:32:16." "Something happened" just before the victim was killed, i.e., something different than the sexcapades that preceded it, *but what was it*?

The answer could have been that Plan A, which was reconciliation, did not work, so Arias resorted to Plan B, to kill him and spin it as self-defense. The evidence points to this common-sense story, but the prosecutor didn't tell it to the jury.

The story of what really may have happened with Plans A and B leads to confusion of another sort: reconciling them with the legal instructions, also unanswered by the prosecutor in summation.

For example:

1) Could it be premeditated and heat of passion at the same time? If the murder was solely premeditated, she wouldn't have had sex with him before killing him. If it was in the heat of passion (when Plan A failed), how could it be premeditated?

2) The crime clearly shows high emotion and overkill (28 stab wounds, a gunshot, a slashed throat), not a well-planned method. Why? If it was planned, wouldn't it have happened earlier upon her arrival and been "neater"?

3) Doesn't Plan A (winning him back) undermine premeditation? Doesn't Plan B require an argument (related to his refusing to take her back/to Cancun)?

4) If there was an argument, doesn't that cancel out premeditation?

It is a serious oversight for a litigator not to explain a defendant's actions in closing argument and close the gaps in light of the legal instructions. Although the prosecutor reviewed Arias' actions for the jury, he did not tie them directly to the full story. He did not educate the jury on how it was possible that both plans were premeditated, and that not winning Travis Alexander back with Plan A could have caused an argument and passion, yet could have been in Arias' plan all along. This could have been an example of premeditated murder for just that reason. His solution was potentially risky – to offer that the premeditation occurred at two different times and circumstances: 1) at the end of May, after the break up, in advance of planning her trip to see Travis Alexander AND/OR 2) at the time of the crime.

The prosecutor did yeoman's work trying the case solo, rarely using notes, and doing his summation after a marathon in court the prior day. This article is not intended as criticism, but as a lesson to learn to reduce the risk of failure.

Ultimately, the 12 jurors determined that the defendant was guilty of premeditated first-degree murder: 7 of them finding premeditated *felony* murder.

However, so much hard work can be left on the cutting-room floor if the story is not told in a manner that satisfies tough questions. Jury research has shown that when questions are unanswered and gaps are not filled, jurors do so themselves, which is very risky and often inaccurate. While in the Arias case in Arizona, one of the few states that permits ongoing juror questions, jurors revealed their questions and counsel was able to answer them before it was too late. In most other states, it is up to counsel to anticipate and address jurors' questions.

It is better to try to have more control over how such questions and gaps are handled by addressing them at the very latest, in your closing argument, if not earlier.

Your Trial Presentation Must Answer: Why Are You Telling Me That?

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

Have you ever heard a lengthy joke and started wondering, "Where is this going? It better be worth it!"?

In any area of human endeavor, the longer the buildup, the more your mind wanders and the less you expect a worthwhile payoff. A mystery novel that takes too many twists and turns makes a satisfying resolution less likely because there is too much to reconcile coherently. The same holds true for anything that is presented to a jury -- such as long, winding opening statements, intricate, piecemeal expert examinations, and the like. Any trial presentation that causes jurors to ask, "What's the point?" has not been presented well.

That's because it's much easier for a jury to remain focused and motivated and to understand the relevance of information when the jury has a headline that helps it know where the information is going and that it is worth paying attention to the information. Although counsel knows where he or she is heading and why, the jury may not.

And without knowing the underlying reasons, jurors feel that they are being subjected to random information for its own sake. The result is that they question its relevance and importance. They feel that they, as the audience, are being disregarded. For an attorney, keeping jurors focused until the end to appreciate the meaning of the mosaic, piece by piece, as it brings the full picture into view, requires knowing what the final puzzle is supposed to look like before viewing the pieces individually and assembling them. However, many attorneys wait until the end to tell jurors what the picture will look like, in part due to legal procedure and in part due to their own style. This is not how jurors' minds work.

The same evidence can lead lawyers and jurors to different destinations, because litigators' reasoning method (inductive) conflicts with jurors' reasoning method (deductive).

Litigators are required to build foundations, block by block, from the bottom up, before reaching conclusions. They are trained to wait and see -- to attend to specific details until a pattern emerges that forms a theory. Hence, lawyers tend to present jurors with a series of facts, assuming that jurors will wait for, and then recognize, the pattern - *after* the pieces stack up to reach the same conclusion.

However, jurors don't work that way. They start at the end and work backward, forming a general theory into which they fit specific evidence from the top down. Once a juror's theory is formed, new information is filtered through that theory and tested for how well it fits with

the theory. Information confirming the theory is selectively attended to; ill-fitting information is missed, ignored, forgotten, or distorted to fit the theory, through cognitive dissonance.

Evidence does not change jurors' minds as much as their minds change the evidence. Remember the infamous "glove demonstration" in the O.J. Simpson criminal trial? Those who believed he was guilty saw it as proof that he was faking the misfit. Those who believed he was innocent saw it as proof that it did not fit. No one changed their mind because of it.

An up-front theory and story provide jurors with a map that enables them to see where you are going and to follow you. Jurors need to know that the punch line will be worth it before hearing a long joke. They need to see the map before going on the journey with you. Without knowing where you are starting and where you are going, GPS cannot lead you there; neither can you lead jurors to your destination without that information.

To satisfy the conflicting needs of the law, the record, the judge, yourself, and last but not least, the triers of fact (jurors), you can:

• Use case themes: short, memorable phrases that outline your case and conclusions in your opening statement and that are repeated throughout trial to create a relay race between the evidence and where it is heading;

• Reinforce case themes and key points with visuals and repetition in your trial presentation;

• Provide "evidence sandwiches": simple bottom lines first/detailed information as filler/recap of the bottom line;

• Speak "bilingually": Translate legal and technical lingo into layman's language for the jury;

• Anticipate and address consequences of the jurors' verdict options in terms of their lives;

• Tell a simple story (with a start, middle, and end), and fit your evidence into it, not vice versa.

You can overcome common, known and avoidable obstacles to jurors, by starting with the end and making clear what your point is and why it matters, so jurors are more willing to follow you there.

Most of all, don't take the scenic route, lest jurors ask prematurely, "Are we there, yet?"

The Top 10 TED Talks for Lawyers, Litigators and Litigation Support

By Ken Lopez Founder/CEO, A2L Consulting

In the 1980s, a small conference was started in California focused on topics related to technology, entertainment and design. Now known by the acronym TED, what was once a small conference is now an international movement devoted to the dissemination of "Ideas Worth Spreading."

The format is simple. Compelling speakers with compelling messages are invited to speak for between five and 20 minutes to a live audience. The talks are video recorded and generally posted online. These online TED Talks have been viewed over one billion times worldwide.

Some TED Talks are among the most popular educational materials on the Internet, and there is a lot that lawyers, litigators and litigation support professionals can learn from them. Whereas a PSY video may be the most watched video of all time on YouTube, TED Talks are the viral videos of the intellectually curious.

While the TED Talks are a pricey conference to attend live, there are now TEDx events as well. These are locally organized TED Talks that are only loosely affiliated with the parent. On average five occur every day somewhere in the world in over 1,200 cities, and they are inexpensive or free to attend.

I regularly attend TEDx talks that are close to me. They are inspiring, they are motivating, they are moving, and sometimes you even find a major law firm litigation partner speaking at one. I recommend you find one near you to attend.

Here are 10 TED videos that I believe are especially helpful to lawyers, litigators and litigation support professionals.

1) **Changing How You Are Perceived by Changing Your Body Language**: Whether you are trying a case in front of a jury, negotiating a deal, or managing a litigation support team, how you are perceived will change how people react to your message. Oddly, it turns out that by purposefully changing your body language, you will not only change how you are perceived, you will measurably change your own body chemistry.

2) **Inspire and Persuade Others by Speaking in this Order**: If you see me speaking somewhere or if I am advising on the development of an opening statement, you'll notice that I follow the teachings of Simon Sinek. I have recommended his golden circle talk before, and I still think it is among the best TED Talks, because it is just so easy to implement.

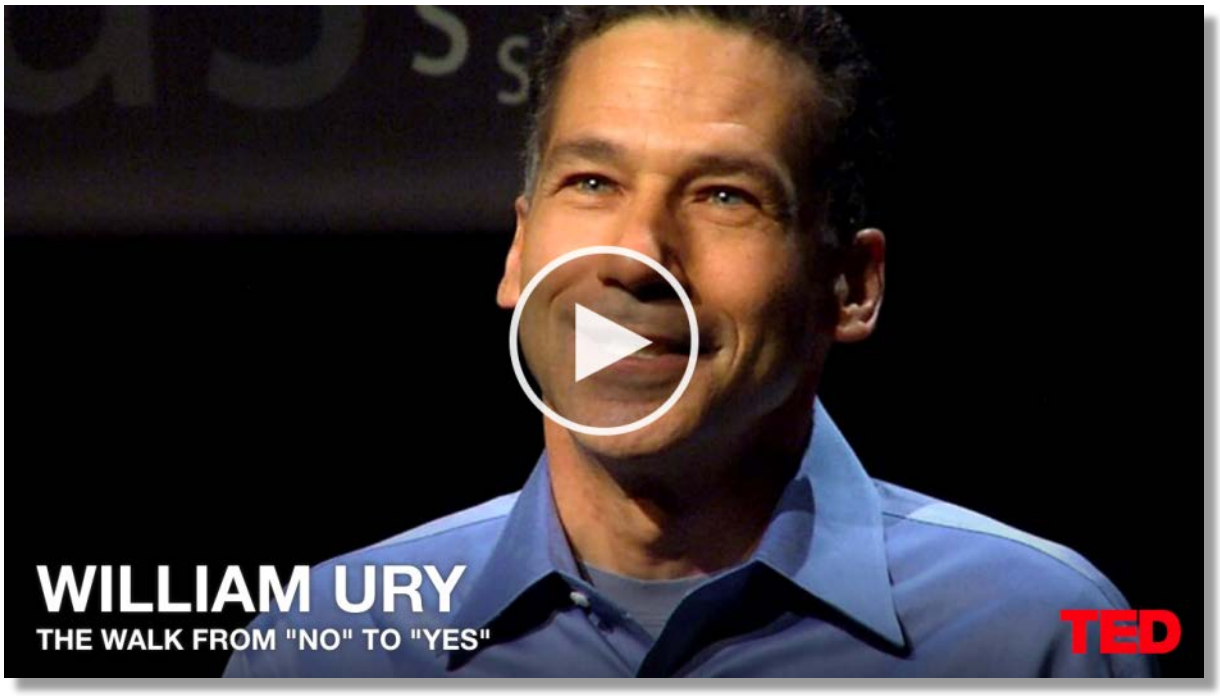
3) **How Lawyers Can Tell a Great Story (R-Rated)**: The writer of Toy Story, WALL-E and others reminds us of something critical to any trial presentation, "Make me care!" Learning to tell better stories may be one of the best skills a litigator can learn. Making an emotional connection with your audience is how you get them on your side - not by overloading them with facts, details and backup.

4) **How to Structure a Great Talk**: Nancy Duarte does a great job of explaining how to structure a good story and offers a format that can be applied easily to any brief, opening or closing statement.

5) **Persuading the Rational Decision-maker**: The speaker reminds us that decisions are made on emotion and justified on fact. This is true in sales, and it is true in the jury deliberation room. To persuade, we must trigger people's encoded memories and their emotions. Even if your role is that of litigation support on a trial team, it is critical to remind trial counsel of the importance of these lessons. Remember, you can always forward this article.

6) **How Statistics Fool Juries**: We've written before on topics related to statistics including the use of trial graphics to teach statistics for trialand statistical significance as it relates to litigation. For anyone making a *Daubert* challenge, this is an especially useful talk.

7) **Negotiating Effectively** from the author of *Getting to Yes*: He shares his journey of walking in the steps of Abraham and how it may serve as a model for Middle East peace. In the process, he reminds us of how to negotiate effectively as lawyers, litigators and litigation support professionals by looking at the third side.



8) **Let's Simplify Legal Jargon**: As a designer with a law degree and a passion for simplicity, my eyes open wide any time someone says they want to simplify legal things. Here, in less than five minutes, another designer who has spent some time in law school, Alan Siegal, shows how he simplified IRS notices and credit card statements.

9) **Battling Bad Science and How Evidence Can Be Distorted**: An epidemiologist reminds us of how science can easily be interpreted incorrectly. Since we often consult on litigation where human health effects are alleged, sometimes on a mass scale, I find this talk helpful. It reminds me how often evidence is distorted to try to create liability.

10) **Harnessing the Power of Introverts**: I saw former corporate lawyer Susan Cain speak at a conference recently, and I found her talk eye-opening. Not only did I re-discover some of my buried but natural introvert roots, but I learned better techniques for leading introverted members of my team. Whether you lead a trial team, a litigation support group or a law firm, this is an important talk to hear for leaders.

I hope you've enjoyed the videos. If you've watched a number of them, you'll notice a similar presentation style. It's one that you might compare to a Steve Jobs keynote, or like that of Garr Reynolds, or Cliff Atkinson would follow. This style is one that I want to see more litigators embrace during opening and closing arguments.

Notice the lack of bullet points throughout the presentations. We wrote about avoiding the use of bullet points in July, and it has been one of our most popular articles ever. And I don't think a TED Talk is all that dissimilar from an opening or closing statement.

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7 Videos About Body Language Our Litigation Consultants Recommend

By Ken Lopez Founder/CEO, A2L Consulting

The truth is I am skeptical about the alleged science of body language reading. You can tell because my arms are crossed. But I cross my arms when I don't like what someone is saying, when I'm bored, and also when I'm cold. Body language, it seems to me, is a great tool – except when it doesn't work. It's far from an exact science.

Still, I'm a believer – up to a point. I know that I want to believe this since every time I watch a mock jury, a potential jury being questioned during voir dire, or a seated jury, I always wonder what they are thinking. And I always wonder if I can decode what they are thinking by looking at them.

Well, here's what the best and the brightest in body language studies have to say on the topic. Our litigation consultants have tried to pull out only the most concrete examples to come up with seven great body language videos for lawyers.

1. **Tips for reading a jury.** This expert suggests that "I can teach you how to tell when people are lying to you." For example, when someone is in the courtroom with a rigid hand with wide-apart fingers, this says they are terrified and will tell us the whole truth.

2. **How one body language consultant read the Casey Anthony jury.** As a reminder, the case ended in a conviction of Ms. Anthony, but not for the murder in question, only for lying to law enforcement. The body-language consultant said, "I'm watching which ones are noting specific details or are writing down specific details on specific types of evidence. What I'm finding is that we've got a pretty strong analytic jury pool and about seven of them or more are state jurors, and are paying specific attention towards more damning evidence against the defense."

3. **How you might read a video deponent.** Repetitive movements can be distracting – even for people who are telling the truth. The body language of Charlie Rose and Bill Gates, however well trained, can be seen as distracting. The challenge for the speaker is to use virtual space to identify different concepts.

4. **Can you spot a liar?** Theoretically, it is possible to tell from someone's body language that he or she is lying, but this has not been scientifically proved. Such techniques are used by some litigation consultants during the voir dire process.

5. **How lawyers should behave in front of the camera (or not):** Expert Tonya Reiman analyzes the body language and tone used by lawyers for Drew Peterson. It serves as a

reminder that as lawyers, we are always being watched during litigation - whether in the courtroom, in the hallway, in the bathroom or in front of a camera.

6. **Your body language after a sidebar.** Remember, it is not just the lawyers who are paying attention to body language in the courtroom. Jurors are watching too. The professionals at NITA posted this short video about how one lawyer behaved every time he wrapped up a sidebar. Working with litigation consultants before and during trial is an excellent way to be reminded of these tips in real time.

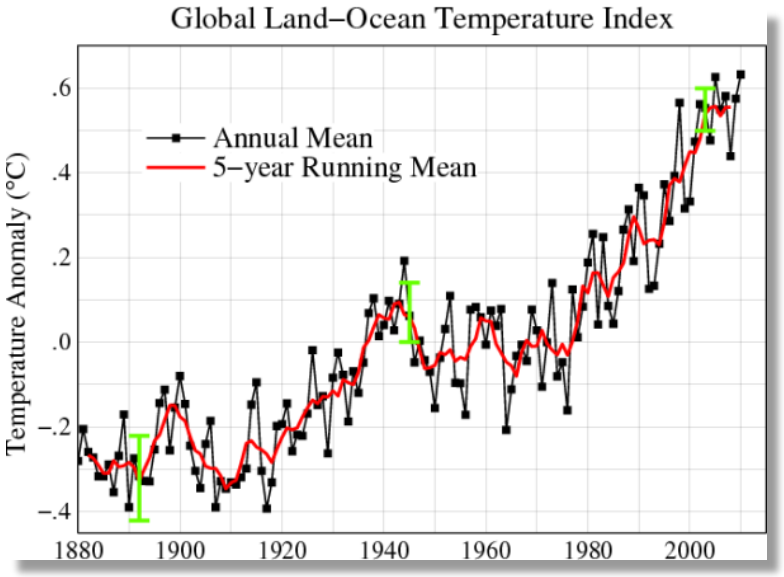
7. **It has been said that 93 percent of communication is non-verbal.** Ready for a deep dive on body language? Here is an entire 90-minute History Channel show on body language that summarizes most of what was discussed above. There is no question that body language can betray us and that we need to look beyond the words.

Still, I would be skeptical of any expert or litigation consultant who says that body language is the only thing that matters.

Trial Presentation Graphics: Questioning Climate Change in Litigation

By Ken Lopez Founder/CEO, A2L Consulting

In trial presentation graphics, a great deal can depend on the quantity of data that is presented to the jury and on the way in which it is presented.



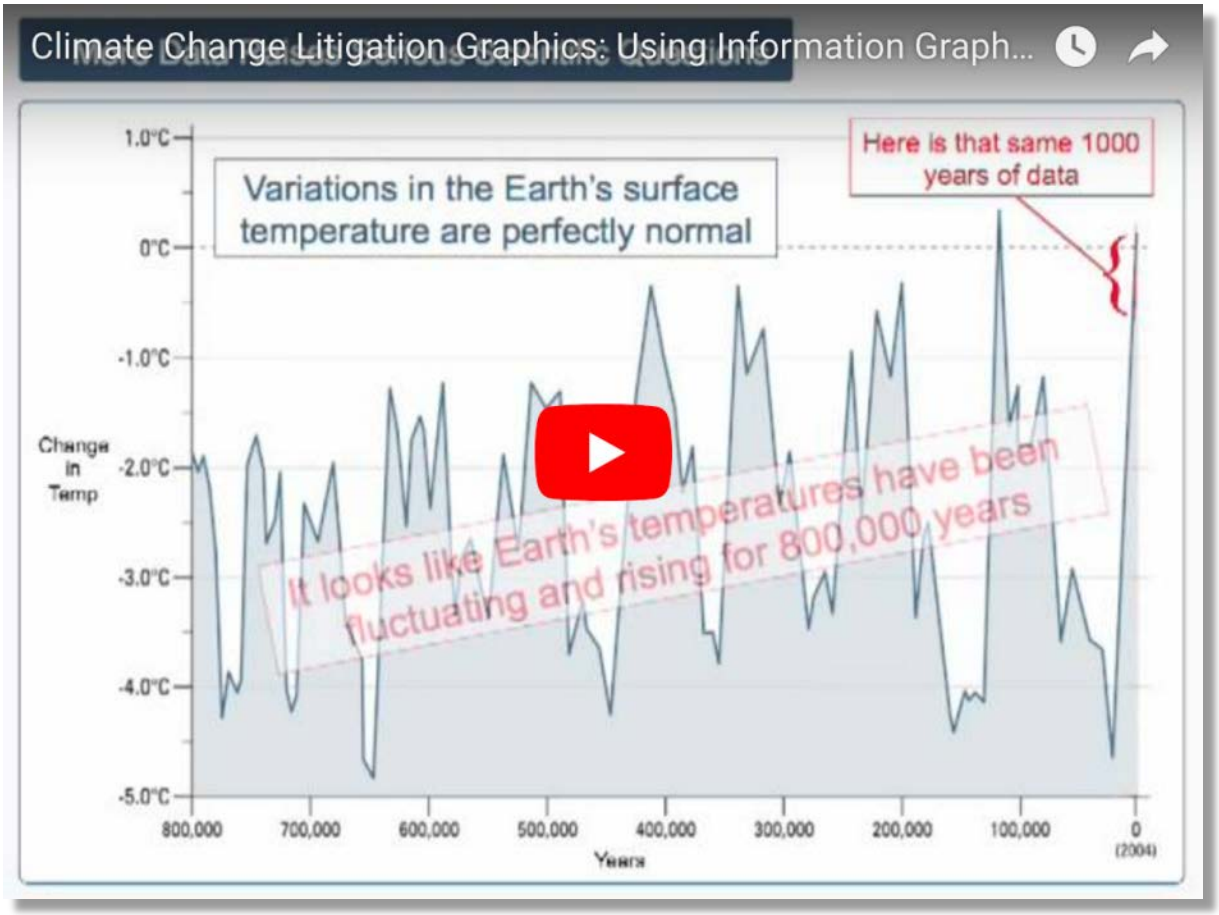
For example, it has become conventional wisdom that humans generate pollution in the form of carbon dioxide, that carbon dioxide and other pollutants cause a greenhouse effect on the planet, and that this effect noticeably raises global temperatures and/or causes climate change. Al Gore's movie, *An Inconvenient Truth*, cemented this belief in the minds of the public and future jurors, largely through the use of effective visual presentations.

The U.S. Government chart below captures the conventional wisdom well. As large quantities of carbon dioxide entered the atmosphere with rapid industrialization in the past 100 years or so, global temperatures went up, it shows.

Because of the recent rapid spread of the conventional wisdom, as illustrated in charts like this one, it has become almost unthinkable to suggest an alternative. But in the trial context, it can be necessary to do just that.

Climate change litigation is making its way through court systems around the world. The targets can be government agencies or large power companies, especially the coal-fired power plant industry. Should a jury be called upon to decide such a case, conventional wisdom will be on the side of the plaintiffs. But the defendants are entitled to show their version of the world's fluctuations in average temperature – without falsifying facts, of course.

The answer is to add more data that can call into question the conventional wisdom. Changing the scale of the horizontal and vertical axes can change the climate story.



We believe the above 2.5-minute PowerPoint presentation goes a long way toward making the defendant's case that global warming of human origin is not a scientific certainty. By expanding the time frame from 120 years or 1,000 years to 800,000 years or even more, this trial presentation graphic tells a different story from the conventional wisdom.

In the courtroom, our goal in using such trial exhibits would be to create enough doubt about the plaintiff's case so that a jury cannot reasonably award money to the plaintiff. Using additional data from scientifically valid sources and from paleoclimatologists, telling this story in way that creates doubt is possible.

Our point in creating these trial presentation graphics is not to disprove climate change. Rather, our goal is to show how even the most skeptical viewer can be persuaded through the use of effective presentation graphics. Wasn't that part of what Al Gore taught us all?

We are in the business of telling the right story, our client's story. You can almost hear the closing argument that a defendant's lawyer would make: "More data is better, isn't it? Does the other side want you to look at less data? Do they want to hide the whole truth, inconvenient though it is?"

5 Demonstrative Evidence Tricks and Cheats to Watch Out For

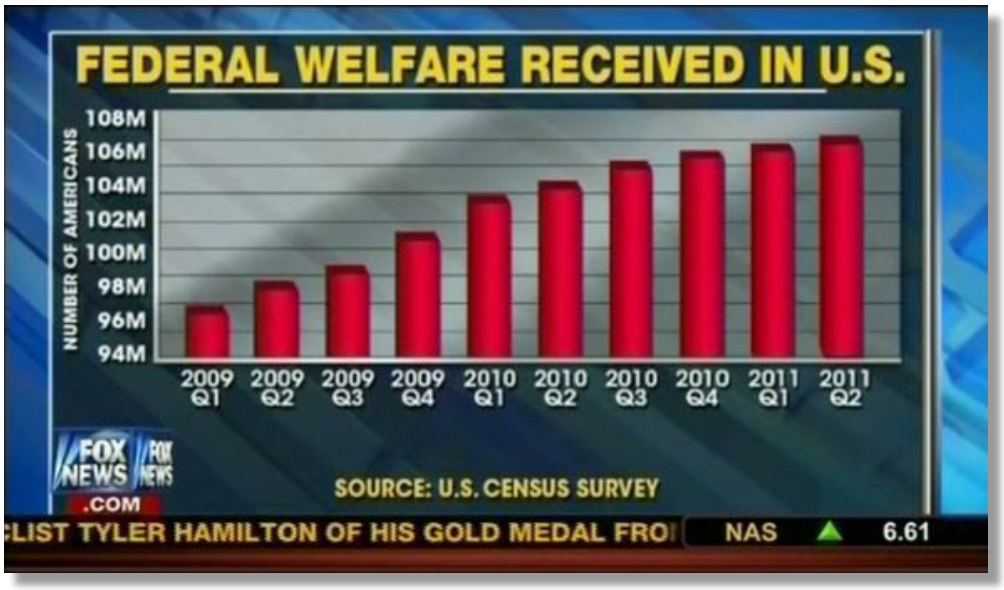
By Ken Lopez Founder/CEO, A2L Consulting

As demonstrative evidence consultants, we see a lot of charts and graphs that are designed to mislead or that end up misleading the viewer, and ultimately the jury. I don't think it is always intentional on the part of the trial team. Sometimes, a demonstrative evidence consultant is to blame for introducing a misleading tactic. This article will help you spot those misleading charts before they do damage.

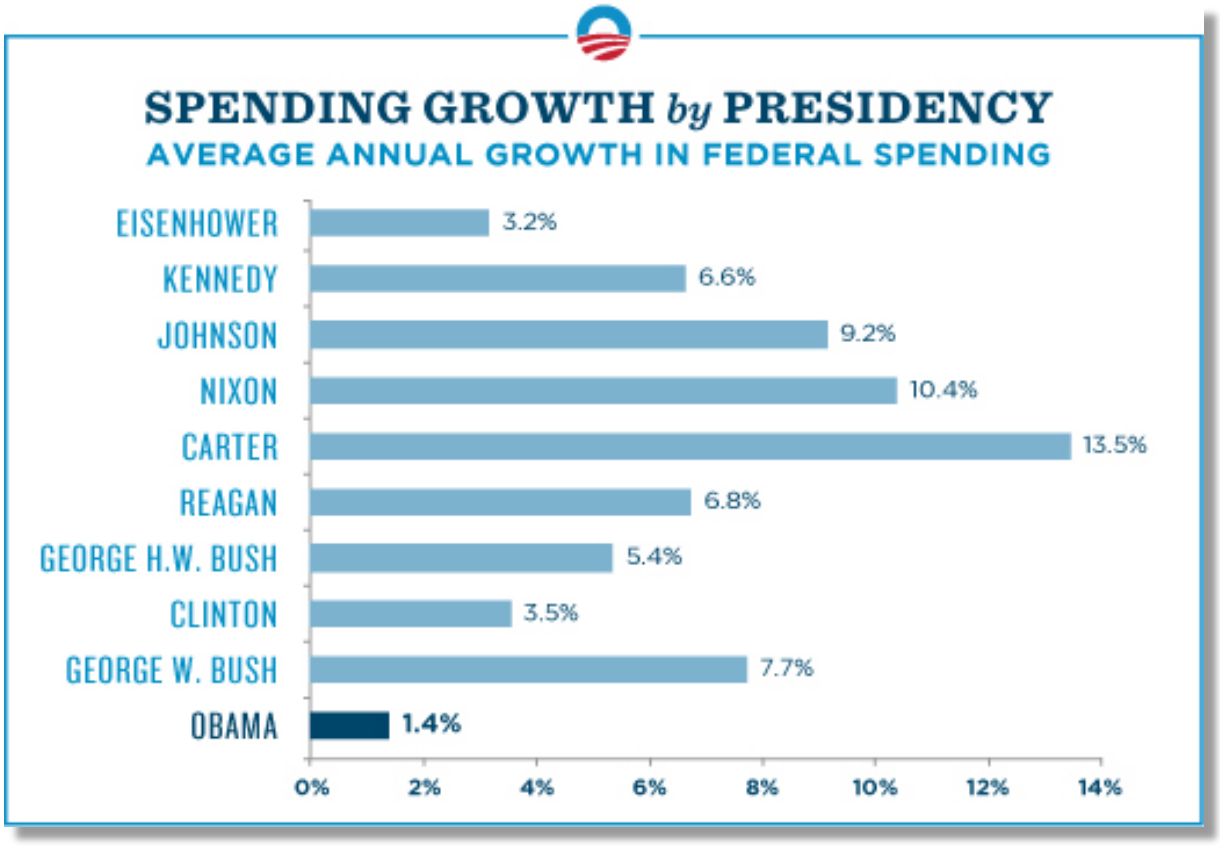
Remember that each piece of demonstrative evidence is subject to the balancing test under Rule 403 of the Federal Rules of Evidence, among other evidentiary standards. Under Rule 403, an otherwise relevant demonstrative will be excluded when its probative value is substantially outweighed by unfair prejudice, its cumulative nature or if confusing or misleading.

For example, I believe that a chart using any of these five techniques described below runs the risk of not passing muster under Rule 403; however, objections to demonstrative evidence are relatively rare. Successfully make the objection during trial and you might just call the credibility of your opponent into question.

1) **The Slippery Scale**: This is the most common trick I see, and once you know about it, you'll see it everywhere too. By setting your y-axis (the vertical one) to a narrow range not including zero (e.g. below, 94M to 108M), it is easy to make relatively small changes look enormous. For example, the Simply Statistics blog recently highlighted this technique used by Fox News. Here, this trick makes changes in the welfare rolls that are relatively small seem enormous.

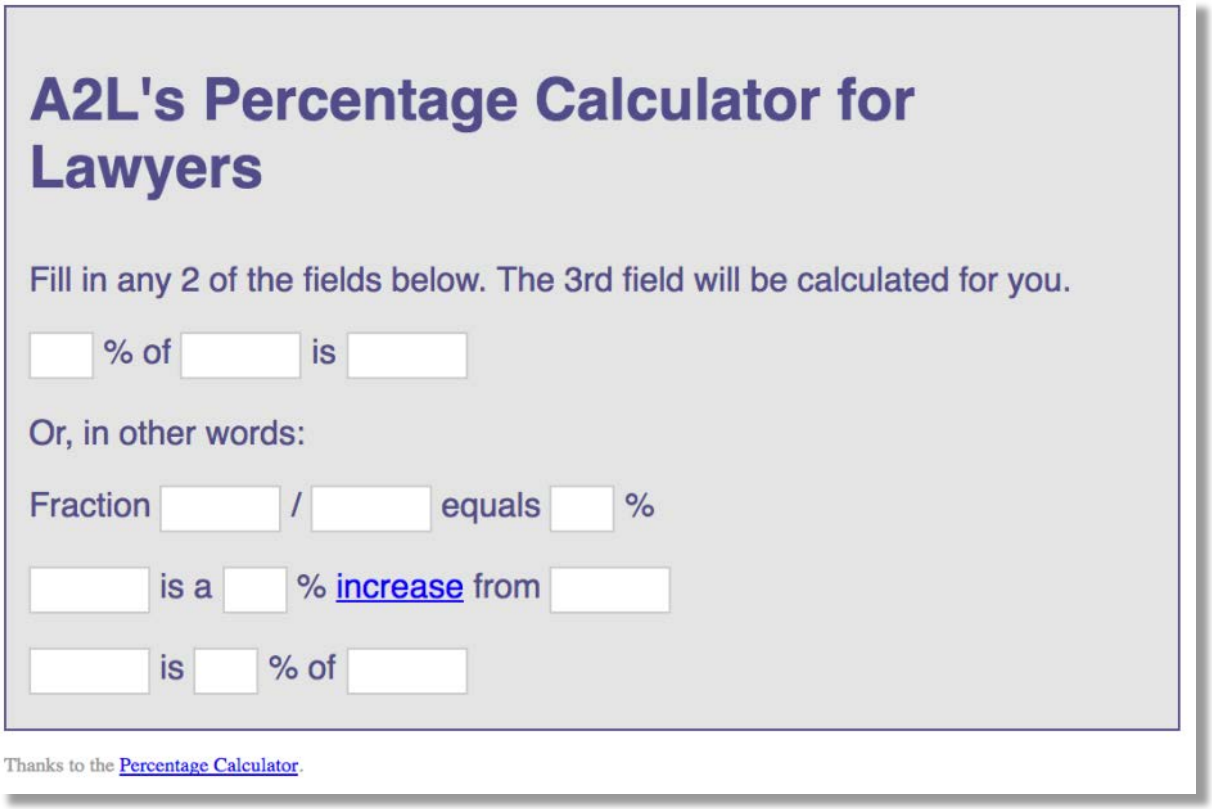


2) **Compared to what?** If you want to show a small change on a percentage basis, all you need to do is vary your x-axis (the horizontal one) so that time is literally on your side. The Obama campaign truncated its timeframe in its spending chart, claiming that in 2010, President Obama presided over the smallest increase in spending in 50 years. While technically true, 2010 was being compared to 2009, the year that the ***one-time*** stimulus spending (championed by the Obama/Clinton/Biden Congress) ballooned government spending by 18%. I wrote about this previously.



3) **The Percentage Increase Trick?** How many times have you heard someone talk about a 200% increase and really wonder exactly what they are trying to say? Do they mean it

doubled, it quadrupled or something else? If they are using the percentages correctly, a 100% increase is a doubling and a 200% increase in something is a tripling – three times as much as at the outset. However, the trickery comes in where one might say in a chart that the same 200% increase is 300% of the first figure or a threefold change. To help stay accurate and monitor your opponents, use ***A2L's Percentage Calculator for Lawyers*** below.

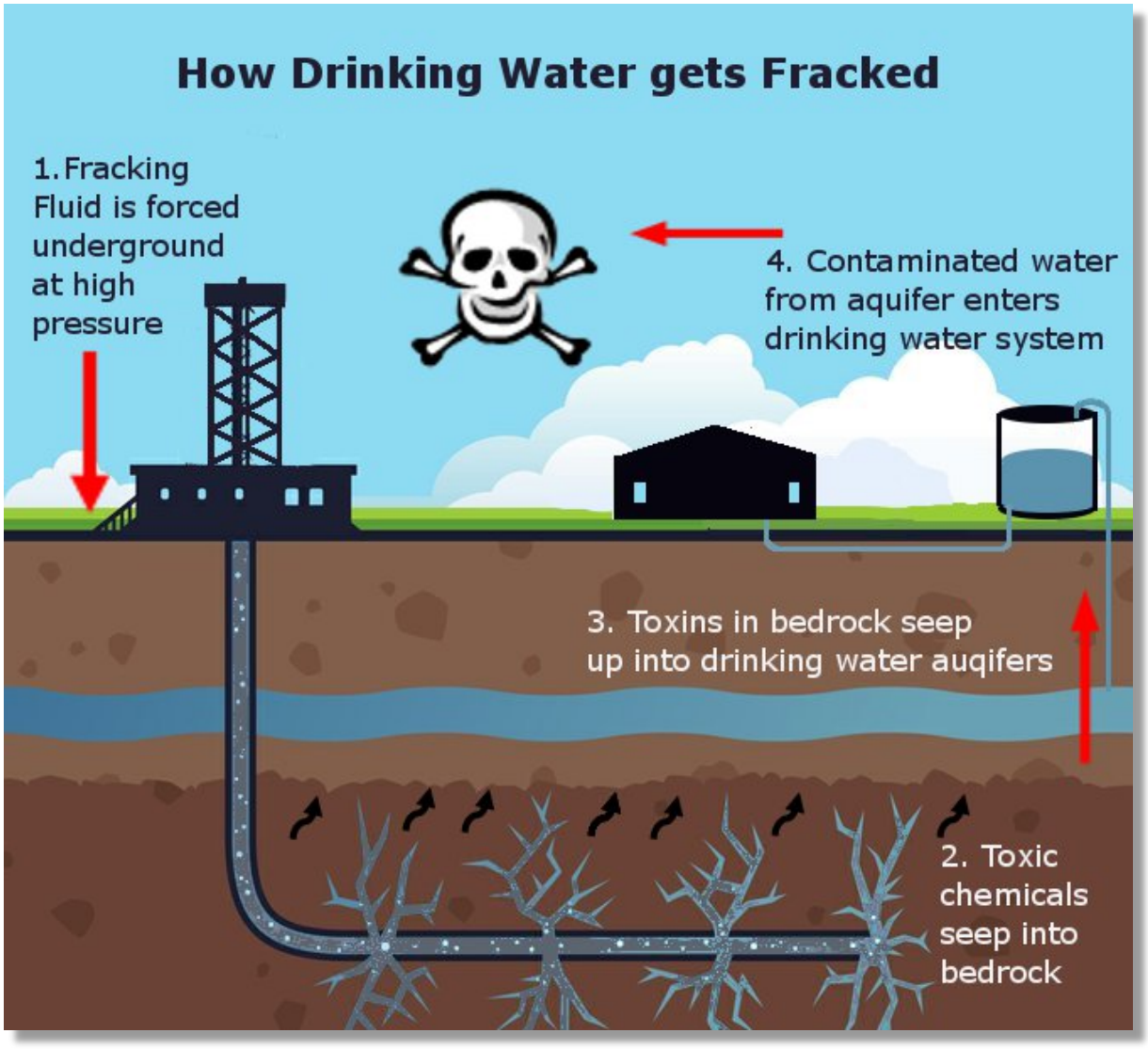


4) **Tricking the Eye with 3D Charts**: Flat charts with no depth or 3D aspect are harder to trick the viewer with, so always scrutinize your opponent's charts when the third dimension introduced. For example, have a look at the two pie charts below. Both red areas are the same percentage of the pie, but if you are like most people, when the slice is closer to you, it looks bigger. A similar trick can be used with bar charts.

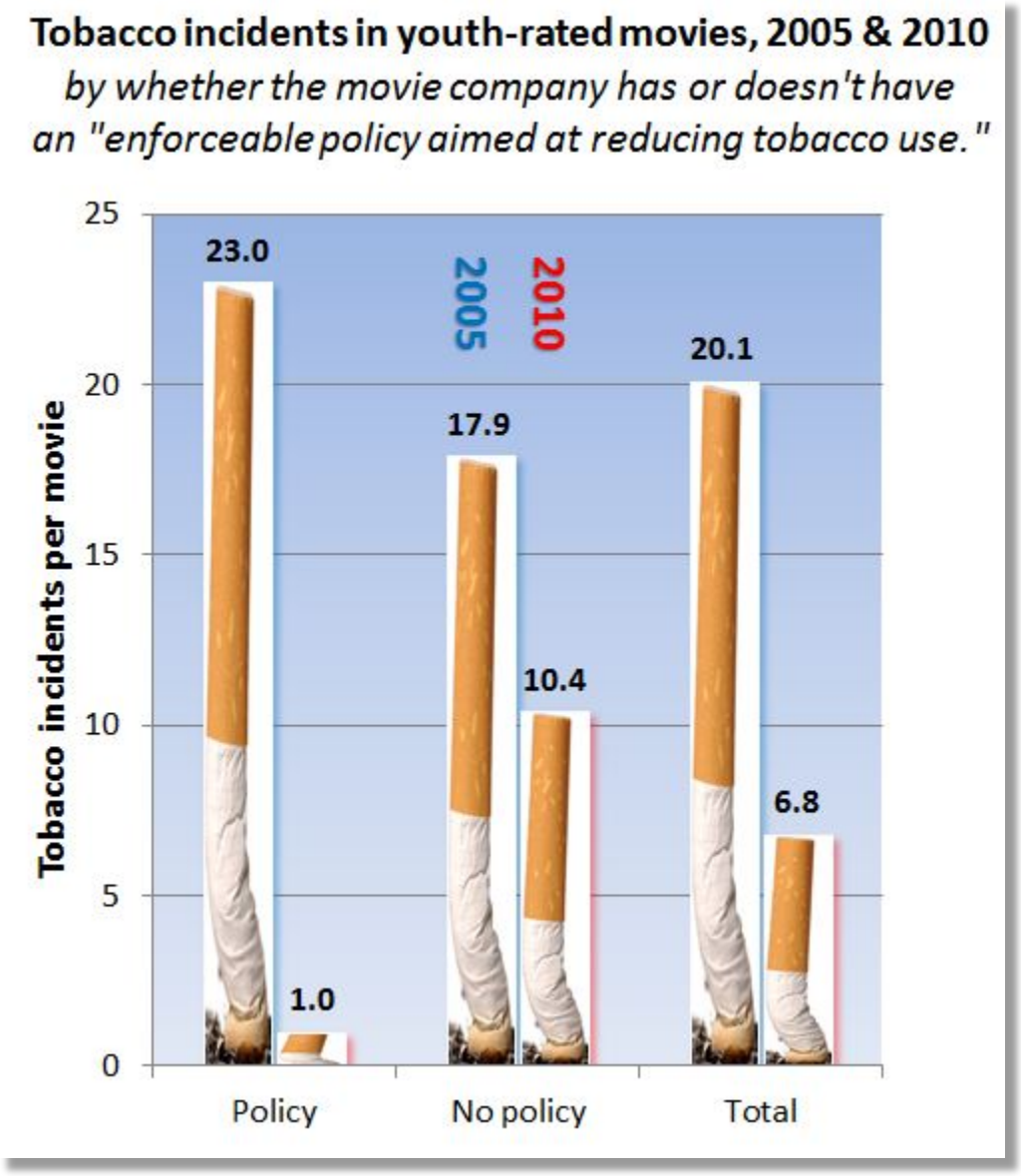
5) **Misleading emotional imagery**: Putting an image of a homeless person in the background of a chart about increasing homelessness is designed to evoke emotion. It

might be admissible since it is clearly tied to the underlying issue. Showing an oil-covered bird in the background in an explanation of how much oil was spilled would not add to one's understanding of the amount of oil spilled. Some examples of emotional imagery in charts that add little probative value but add undue prejudice are below.

This one is used to sell water filters, but if used in court in a fracking lawsuit, the poison symbol would (if objected to) rule the chart inadmissible.

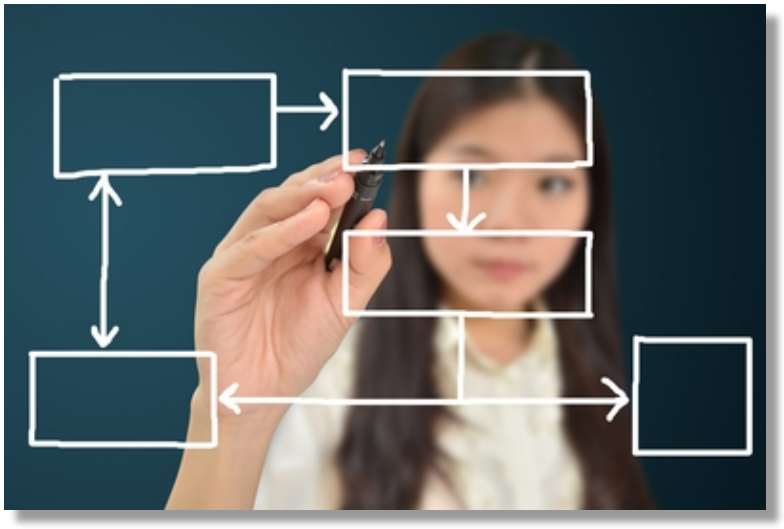


Since it requires the viewer to decode several different riddles before understanding the message, the chart below is a model of poor chart design worthy of its own blog post. This riddle-making mistake is commonly made by those without training in preparing demonstrative evidence and non-demonstrative evidence consultants. Here a legend is used (generally speaking, this is always a bad idea), so you have to first find that. Then you have to read sideways - twice - in two different directions. Then you have to figure out from the subtle color coding of the legend that blue is left and red is right. THEN, you have to determine that left is 2005 and right is 2010. It's a chart mess, however, it provides a good example of some imagery that would potentially be objectionable. The cigarettes being snuffed out add little to the message and are there only for emotional impact. Close call though. Do you think this chart would be excluded in your jurisdiction - leave a comment below?


Tobacco incidents in youth-rated movies, 2005 & 2010
by whether the movie company has or doesn't have an "enforceable policy aimed at reducing tobacco use."
Tobacco incidents per movie
25
20
15
10
5
0
23.0
1.0
17.9
10.4
20.1
6.8
2005
2010
Policy
No policy
Total

Explaining a Complicated Process Using Trial Graphics

By Ken Lopez Founder/CEO, A2L Consulting

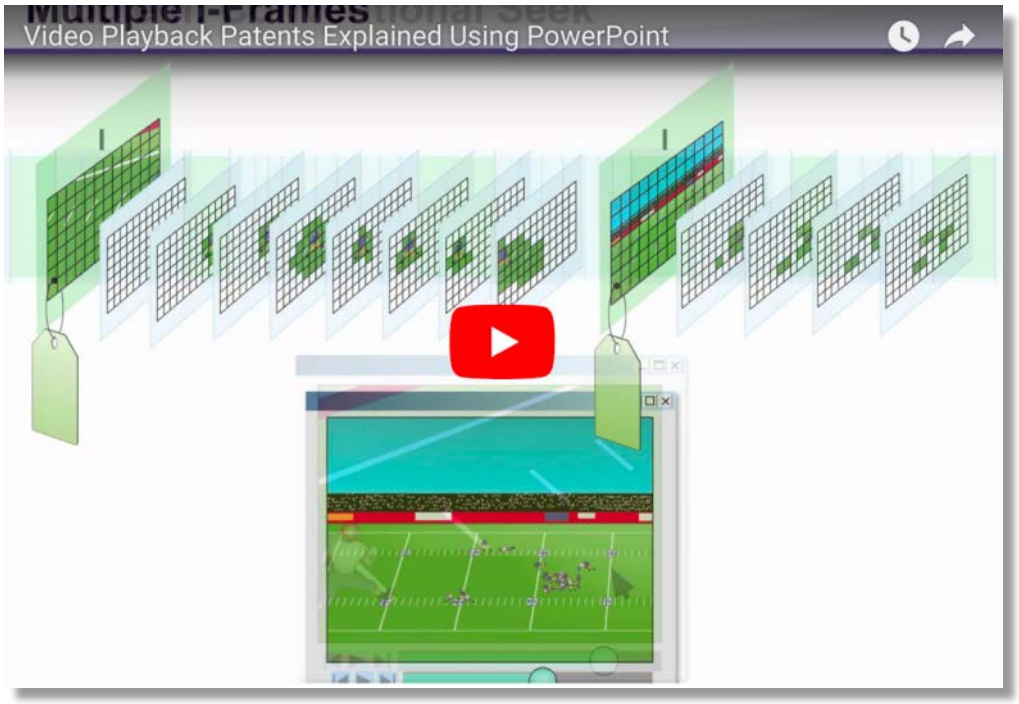


In our work as trial graphics specialists, many cases require us to prepare a demonstrative exhibit that simplifies a complex process. This could be a scientific or technical matter such as how environmental remediation is conducted, how surgical mesh is used, or how data backups are migrated, or it could be a business or governmental matter such as how a form of bond obligation is created and sold or how a government contract is bid and awarded.

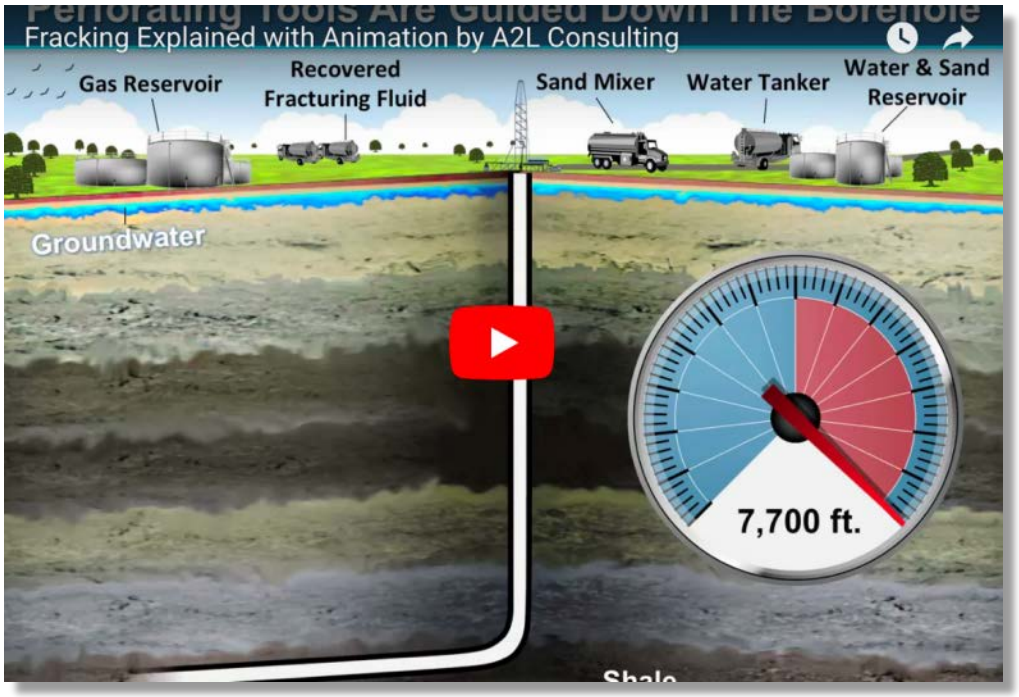
The key to making a successful process chart or flow chart is to create a simple trial graphic that anyone can quickly understand. It does not have to spell out every last detail of the science, technology, business concept, or governmental action involved; it merely has to discuss it accurately and in a way that will help the judge or jury understand what is at issue in the case.

Here are some examples of process chart trial graphics that we have used and that we thought were effective.

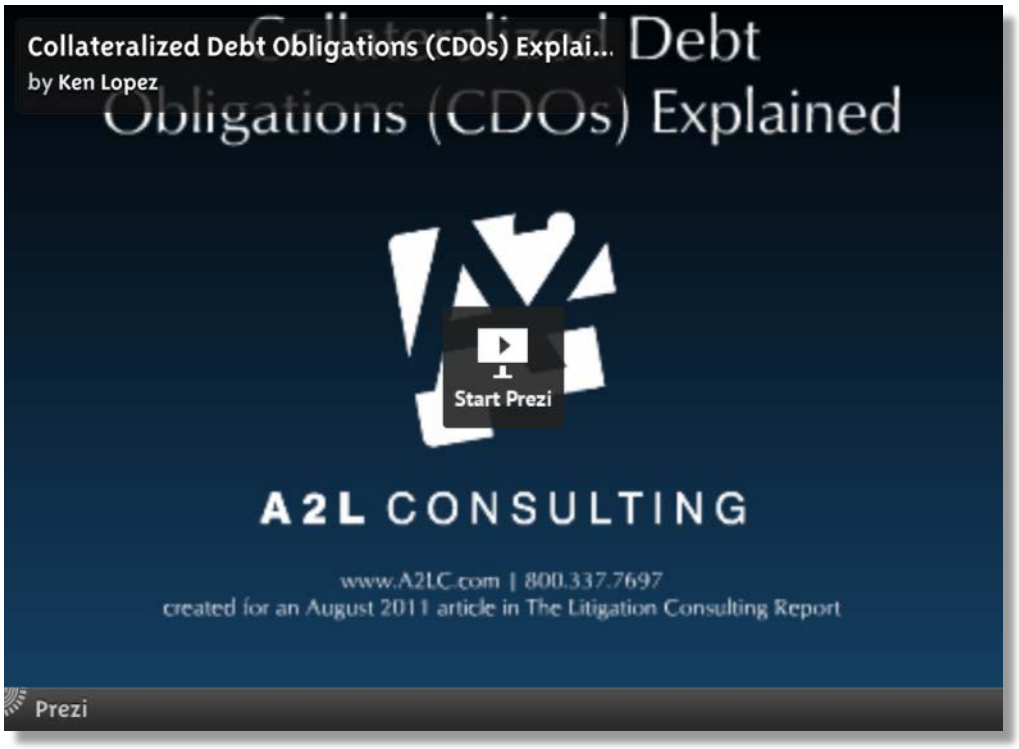
In this video below, we use PowerPoint intellectual property graphics to explain how video playback and freeze frames are handled through the use of tagging technology. This was a very valuable trial graphic in a patent case.



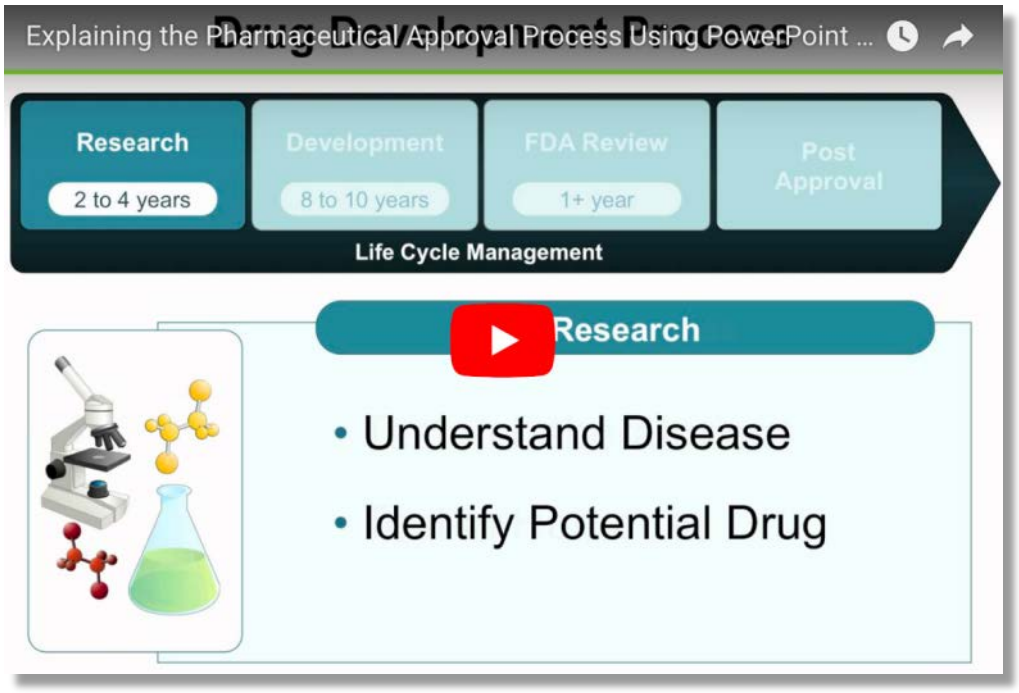
In the presentation below, we explain, in schematic form, the hydraulic fracturing (fracking) process that is used to extract natural gas from rock. The presentation shows how far below the earth's surface fracking occurs and the industry's routine use of cement and steel casings to protect groundwater from the tools and substances used in the fracking process.



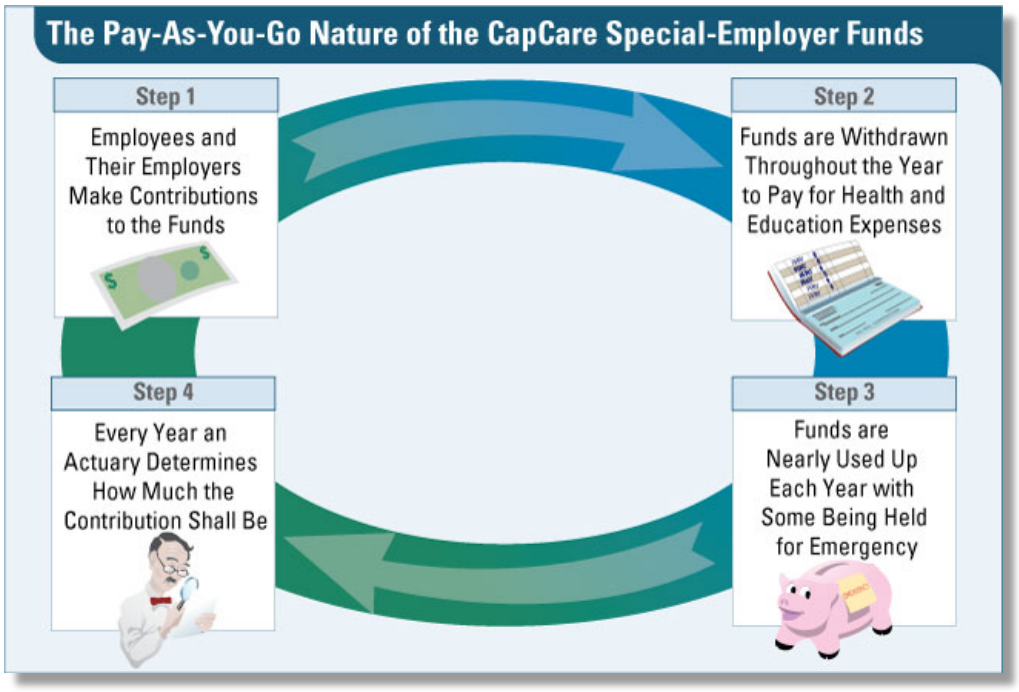
In the presentation below, we show in graphic form the process in which collateralized debt obligations are created by investment banks. Through the use of Prezi presentation software, we were able to make this highly technical and complex matter comprehensible to a fact finder by introducing the concept of an "investment" and then showing how CDO's are simply a type of investment.

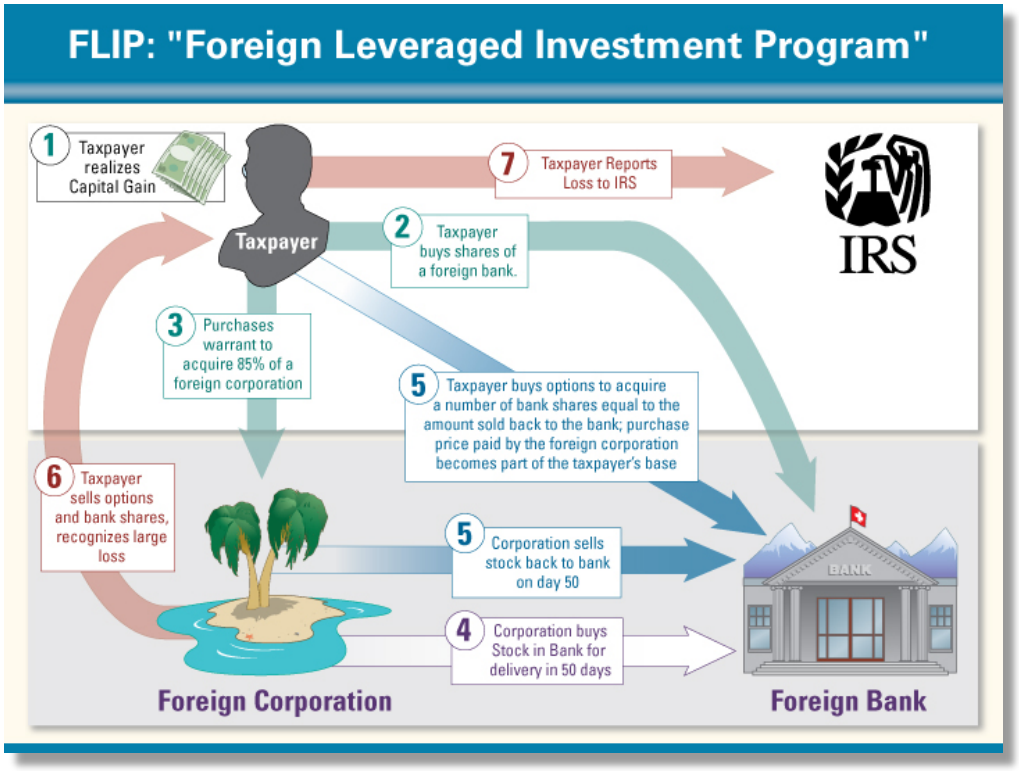


In the trial graphics, we explain the drug development process in the United States and the process for regulatory approval of new drugs by the Food and Drug Administration. This PowerPoint demonstration helped a jury understand the length of time that the process can take, why it can take so long to bring a drug to market, and all the steps involved.

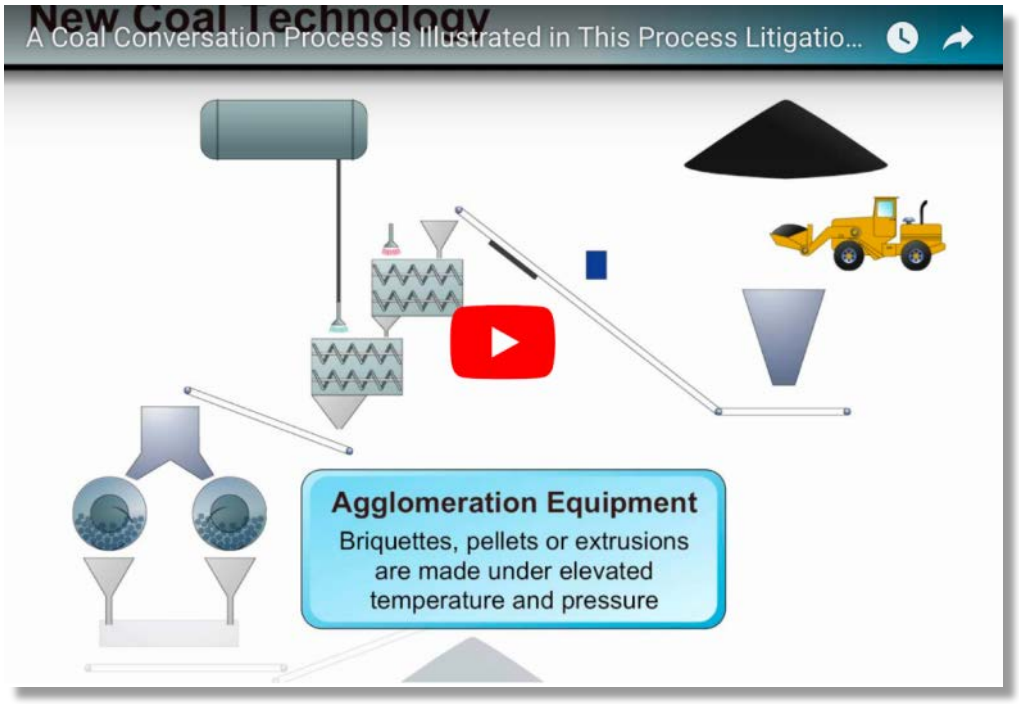


Below, we introduce a jury to the process of creating a FLIP (Foreign Leveraged Investment Program). By numbering the steps in the process and creating arrows from the taxpayer to other entities, we were able to show how this tax shelter unfolds.





The PowerPoint trial graphics below, created for a patent trial, shows how a coal conversion process occurs.


New Coal Technology
A Coal Conversation Process is Illustrated in This Process Litigatio...
Agglomeration Equipment
Briquettes, pellets or extrusions are made under elevated temperature and pressure

Demonstrative Evidence: Using Maps as Courtroom Exhibits

By Ken Lopez Founder/CEO, A2L Consulting

Because maps are used by jurors constantly in their daily life and because they are so frequently used to represent common locations and processes, they are one of the most frequently used and most effective types of demonstrative evidence. Whenever something can be conveyed geographically, through the use of space, it is worth considering the use of a map. Even though maps don't always represent the highest and newest technology, their importance cannot be underestimated.

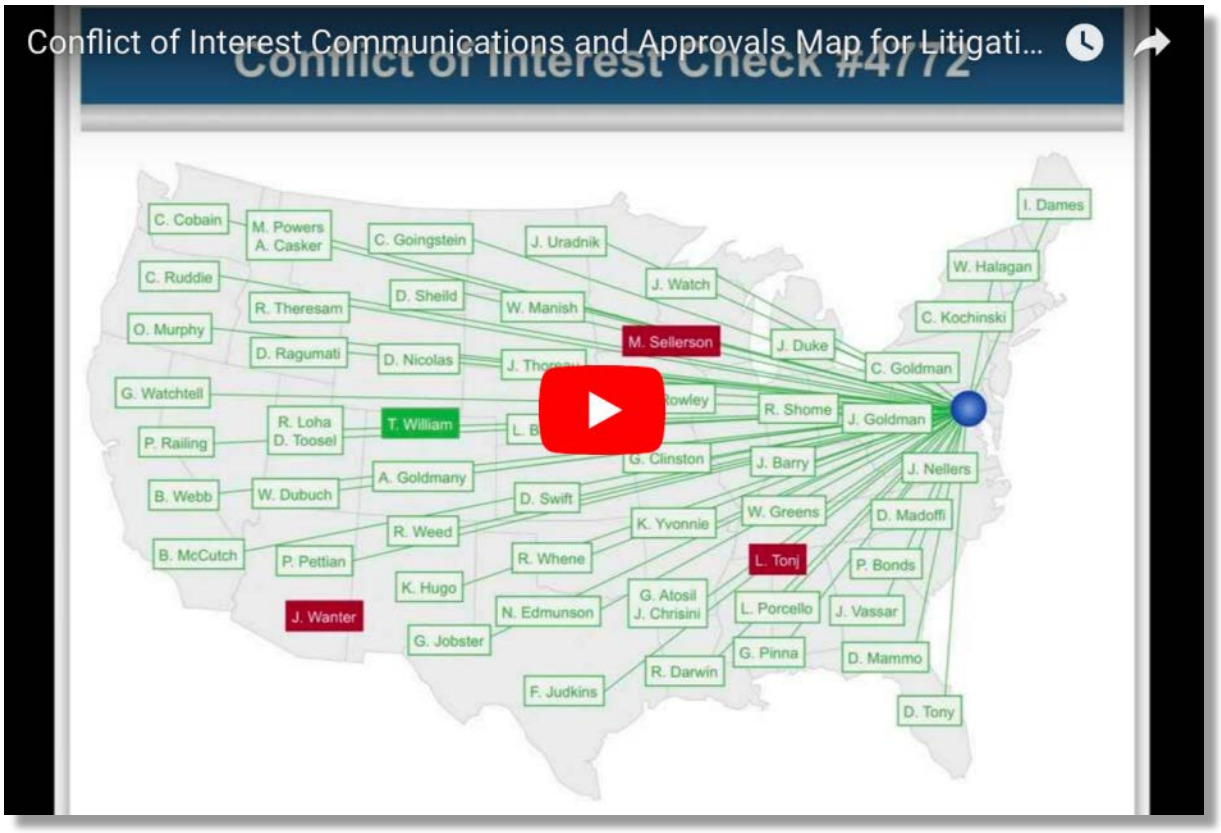
In the words of Ray Moses of the Center for Criminal Justice Advocacy, which was formed in Texas as a grass-roots training resource to help new lawyers in becoming competent criminal trial practitioners: "Visuals (graphics) such as time lines, charts, illustrations, maps, etc. are sufficiently important to communicating your message that you owe it to your client and yourself to learn how to incorporate visuals into your presentation."

We have used maps in any number of ways as demonstrative evidence to help make our clients' cases understandable to juries and judges. Here are a few of them.

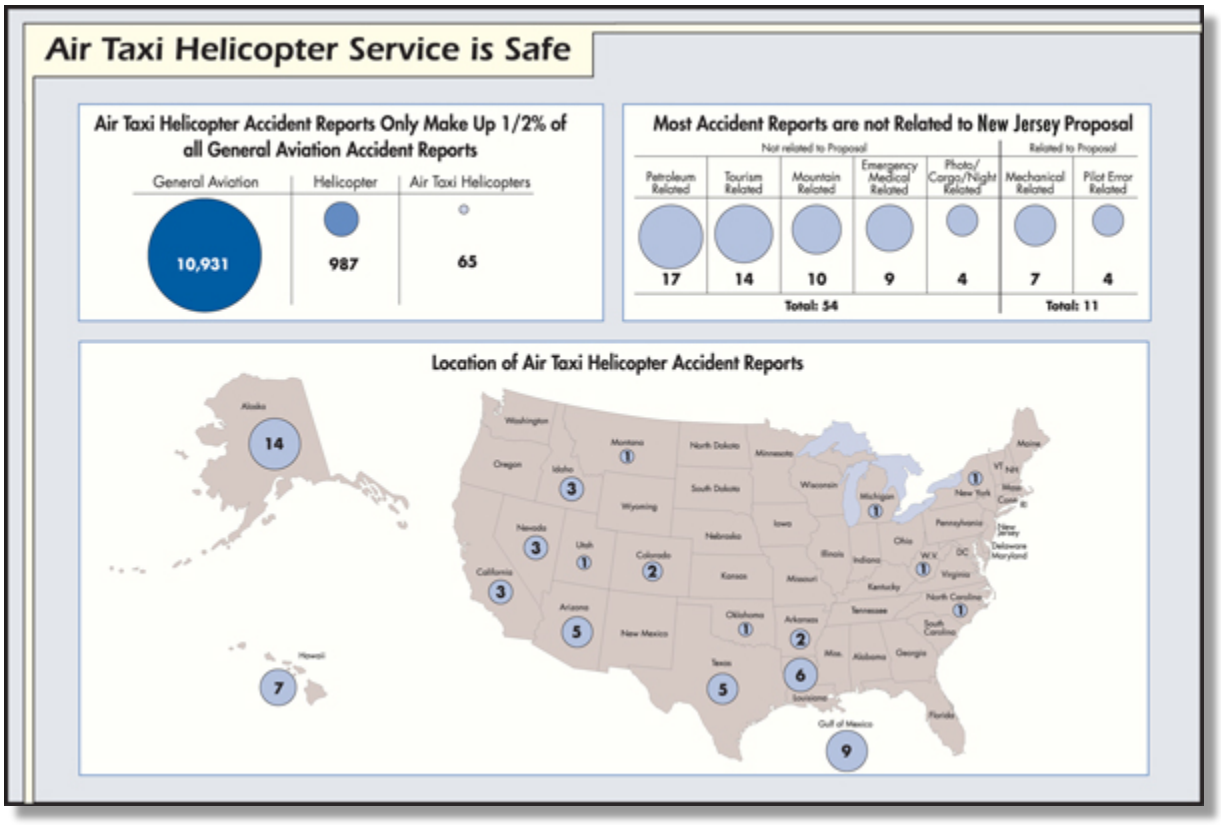
The demonstrative exhibit below is a screen capture of a PowerPoint interactive trial presentation developed to show that an area was not actually a wetland. Specific spots on the map are pegged to portions of a video that show that there is no water channel in the affected area.

The below animated demonstrative map is a screen capture of a PowerPoint interactive demonstration developed to show how New York City gets its water supply. The demonstrative graphic successfully combines the known geography of the New York State region with the actual flow of water from the reservoirs.

The next demonstrative exhibit, below, is a screen capture of a PowerPoint trial presentation developed to show how a conflict of interest was vetted in a government contracting False Claims Act dispute. This map is an excellent example of demonstrative evidence. It shows the entire United States and the locations in which vetting officers were located.



The final piece of demonstrative evidence is a map of the United States showing where various air taxi helicopter accidents occurred, to show that they are a very small percentage of all general aviation accidents.


Air Taxi Helicopter Service is Safe
Air Taxi Helicopter Accident Reports Only Make Up 1/2% of all General Aviation Accident Reports
General Aviation
Helicopter
Air Taxi Helicopters
10,931
987
65
Most Accident Reports are not Related to New Jersey Proposal
Not related to Proposal
Related to Proposal
Petroleum Related
Tourism Related
Mountain Related
Emergency Medical Related
Photo/ Cargo/Night Related
Mechanical Related
Pilot Error Related
17
14
10
9
4
7
4
Total: 54
Total: 11
Location of Air Taxi Helicopter Accident Reports
Alaska
14
Hawaii
7
Washington
Oregon
California
3
Idaho
3
Nevada
3
Montana
1
Wyoming
Utah
1
Colorado
2
Arizona
5
New Mexico
North Dakota
South Dakota
Nebraska
Kansas
Oklahoma
1
Texas
5
Minnesota
Iowa
Missouri
Arkansas
2
Louisiana
6
Gulf of Mexico
9
Wisconsin
Illinois
Michigan
1
Indiana
Ohio
Kentucky
Tennessee
Mississippi
Alabama
Georgia
Florida
South Carolina
North Carolina
1
Virginia
WV
1
DC
Pennsylvania
New York
1
Maine
Delaware
Maryland
New Jersey

6 Ways to Convey Size and Scale to a Jury

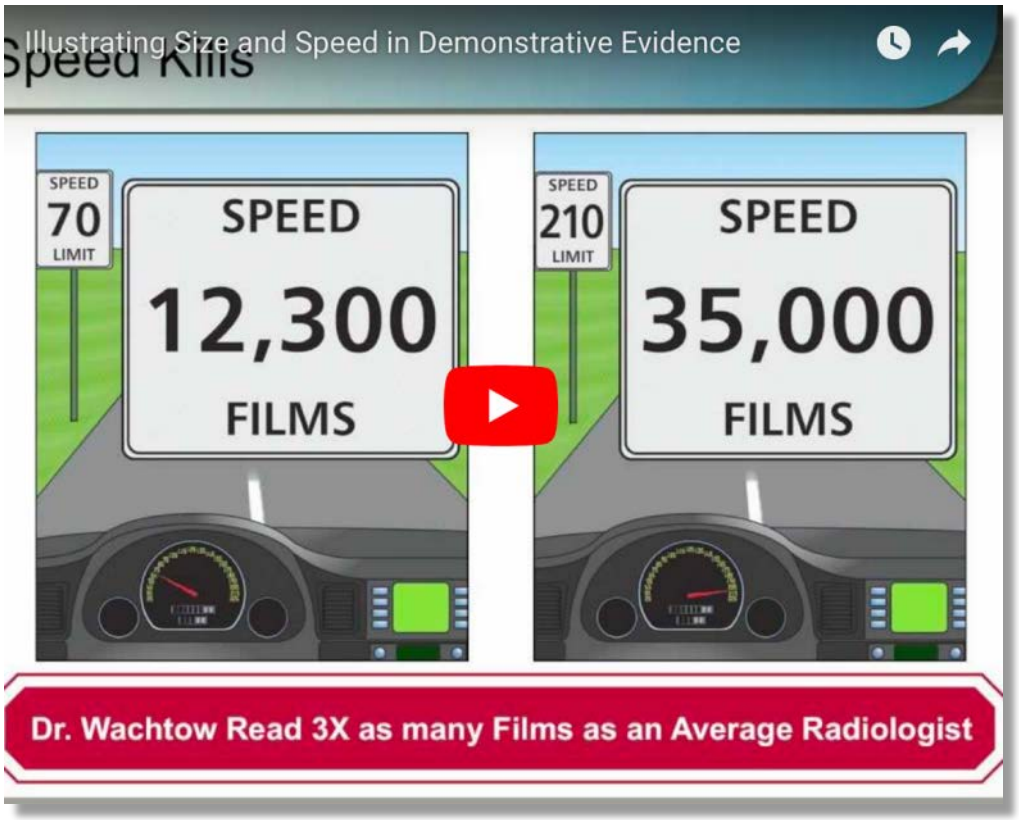
By Ken Lopez Founder/CEO, A2L Consulting

All good trial exhibits have one thing in common: They are able to appeal to juries by referring to ideas, principles, objects, or locations that jurors already know about in their daily lives.

For example, a trial lawyer may need to show how large, or how small, something at issue in the litigation actually is. An effective way of doing this is to relate it to the size or scope of an object with which a juror has personal experience.

We have prepared many exhibits that work in this manner. Not only do they give the jurors useful information but they also do this in a manner that jurors will easily recall when it comes time to deliberate. If we can present something as being "as large as a football field," for example, we can lock that picture into the jurors' minds.

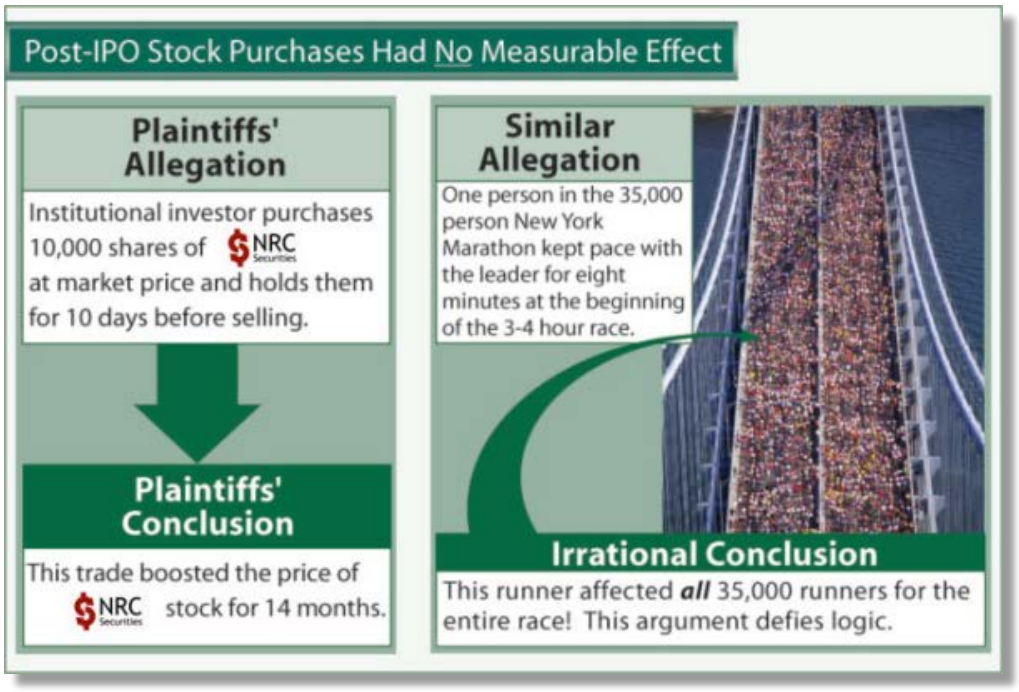
1) HOW FAST: In the below graphic that we used in a medical malpractice case, evidence showed that a radiologist rushed his work and missed cancer diagnoses. He read X-ray films three times as fast as an average radiologist. What did that mean? Jurors know that "speed kills," and a very effective trial exhibit compared that speed to traveling three times the speed limit on a highway – 210 miles per hour instead of 70. That intrinsically seems reckless.



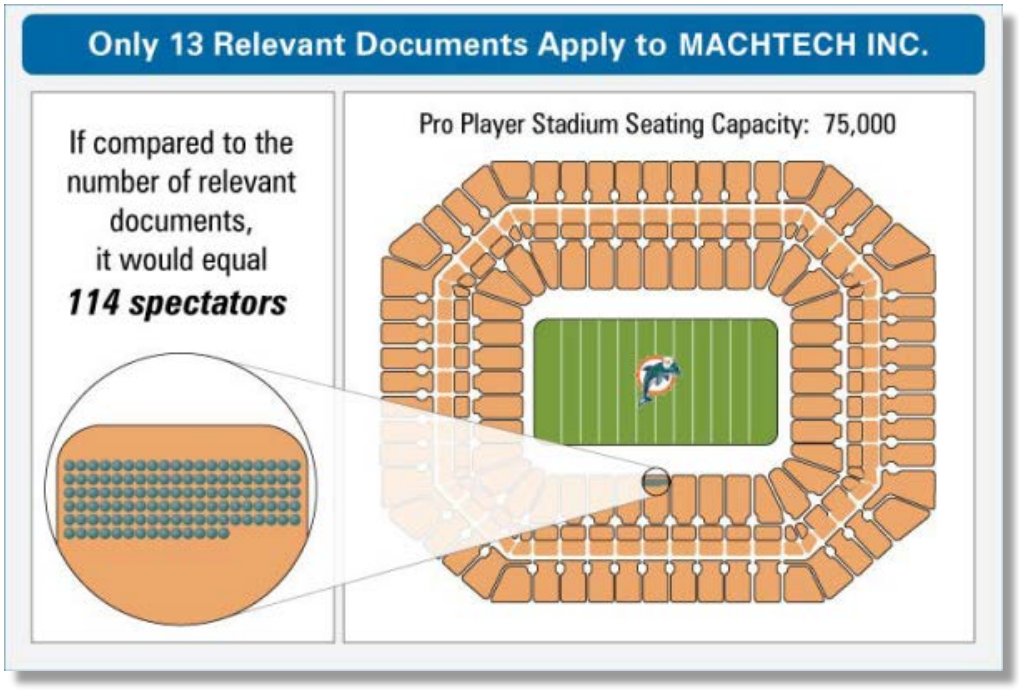
2) HOW MUCH TIME: In the graphic below, evidence proved that conspirators in a government contract dispute in New Orleans had spent 3,548 minutes on the phone. That

number by itself would probably mean nothing to a jury. We translated that fact into a graphic that showed that in 3,548 minutes, someone could drive from New Orleans to Wasilla, Alaska (an election year reference). In that amount of time, a lot of conspiring could be accomplished.

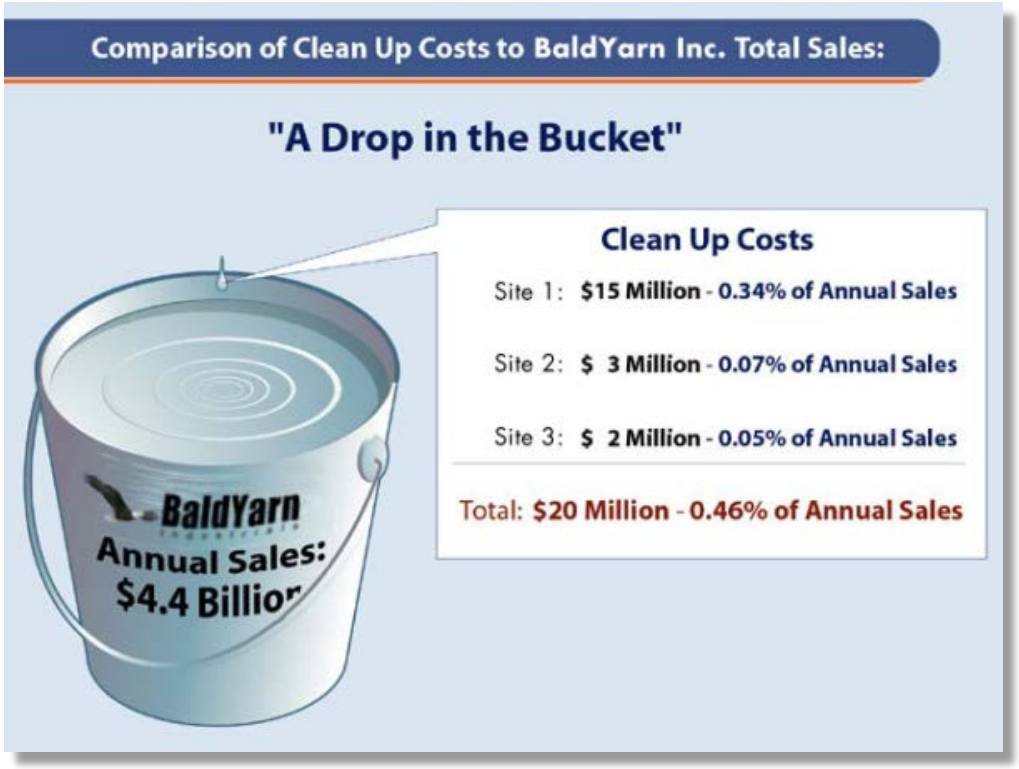
3) HOW LITTLE IMPACT: In a securities case, we likened the plaintiff's allegation that a single stock purchase affected the stock price of a company for 14 months to the notion that a single runner's taking the lead in a marathon for eight minutes affected all 35,000 contestants in the three- to four-hour race. That defies common sense, and jurors could conclude that the allegation regarding the stock price also defied common sense.



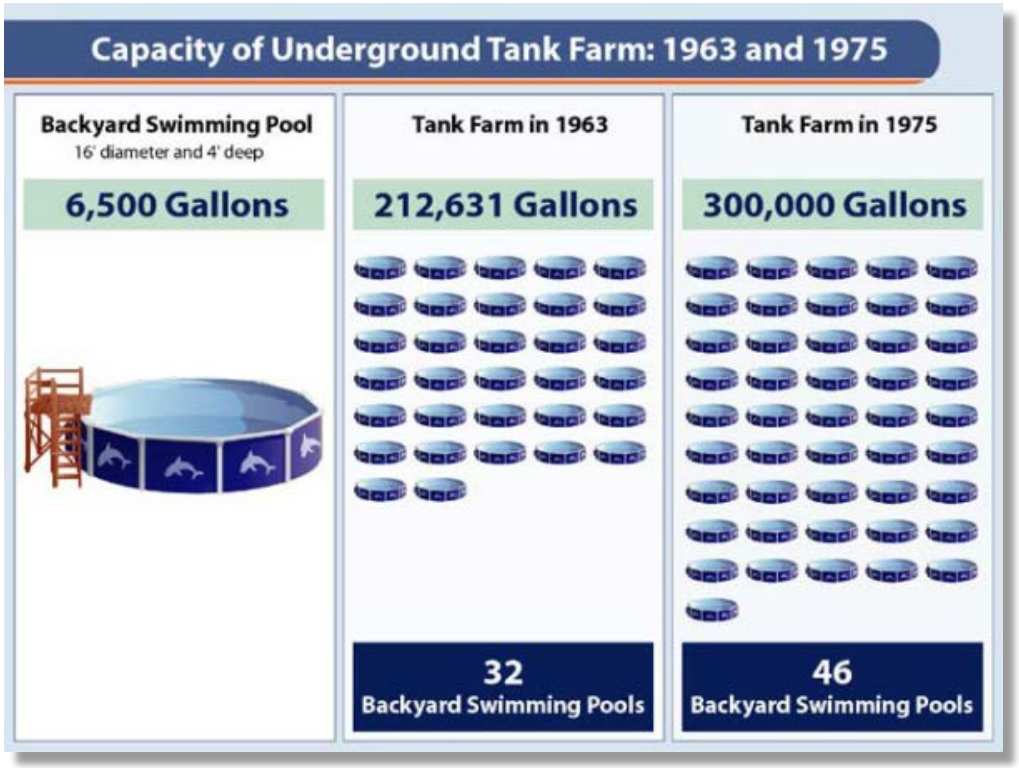
4) HOW MANY: In a Miami discovery dispute, we provided a graphic (below) of Pro Player Stadium (the then name of what is now the city's Sun Life Stadium), with a seating capacity of 75,000. If that was the universe of all the documents at issue, the number that related to one client was a small portion of one section of the stadium, we showed.



5) HOW LITTLE: In an environmental case, our exhibit (below) showed that the cleanup costs at issue, when compared with the company's annual sales, were the proverbial "drop in a bucket." That is far easier for a juror to remember than the numbers $20 million out of $4.4 billion.



6) HOW MUCH: In this environmental insurance coverage litigation exhibit, the capacity of an underground tank farm is related to above ground pools. It was a small amount of property and the capacity of the tanks was surprising when conveyed in this way.



Don't Be Just Another Timeline Trial Lawyer

By Ken Lopez Founder/CEO, A2L Consulting

In my 18 years in the litigation consulting business, I've noticed that there are two types of trial lawyers. The first one is what I call a timeline lawyer. Usually, his or her opening statement always starts at the beginning, in terms of time, and ends at the end.

The second type, and by far the more successful type of trial lawyer, is the storyteller. Storytellers don't start at the beginning unless it serves them, and normally it does not.

Instead, the storyteller will begin where the story ought to begin. Usually it takes a form similar to this: Things used to be this way, then something happened, and now they have changed. Sometimes the storytelling trial lawyer will also follow Joseph Campbell's paradigm of the hero's journey. We have prepared an infographic that places the hero's journey in context for trial.

We have written often about storytelling. We've shared how storytelling is being used increasingly as a persuasion device in the courtroom. We have offered five tips for effective storytelling in court. We have even produced an entire book, which is a free download, called Storytelling for Litigators.

That's not to say that timelines are a bad thing. Timelines are, in fact, key exhibits in most trials. They help orient the fact finder and serve as a memory stimulator for the trial lawyer and expert witness alike. They can also serve as a persuasion device if they are set up as a permanent exhibit at trial. Given the importance of timelines, you will not find it surprising that we've written an entire book about trial timelines too! And yes it's a free download.

I still advise you to rethink your strategy if your plan is to start at the beginning and end at the end. It's not a very effective strategy at all. You want your fact finders to care. You have to provide meaning and context for a judge or jury. As our senior jury consultant said in a related article, "[jurors] start at the end and work backward, forming a general theory into which they fit specific evidence from the top down. Once a juror's theory is formed, new information is filtered through that theory and tested for how well it fits with the theory. Information confirming the theory is selectively attended to; ill-fitting information is missed, ignored, forgotten, or distorted to fit the theory, through cognitive dissonance."

We see this play out all the time. In a recent mock trial exercise, we watched as mock plaintiffs' counsel developed a story with meaning and emotional connection. Then we watched as our client, who was using the mock trial properly to figure out the best strategy

for trial, stood up and told a chronological story that was so logical and syllogistic that a computer would certainly have found for the defendant.

However computers don't decide cases. In fact, here, all the mock jury panels came back vigorously against our client. When asked if they could articulate the story of each side during deliberations, the mock jury was able to spit out an elevator speech of the plaintiffs' case in seconds complete with emotional meaning and impact. However not a single juror was able to articulate the defense story with any clarity.

Unless we tell stories and ask judges and juries what we want from them and give them an easy roadmap for giving us what we ask for, we're doing our clients a horrible disservice. Use your timelines in every case, but don't use them to organize your openings and closings, and you'll be a more successful trial lawyer for it.

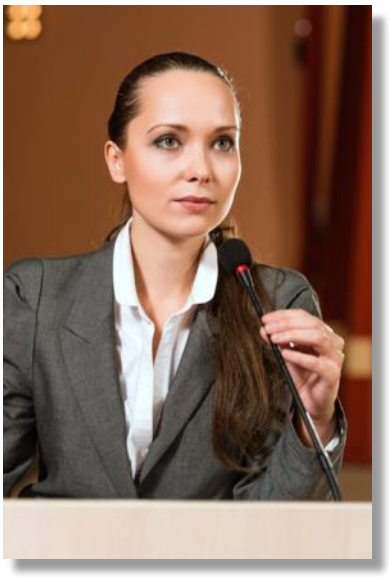
5 Keys to Telling a Compelling Story in the Courtroom

By Ken Lopez Founder/CEO, A2L Consulting

Developing a compelling story for your judge or jury may be simple, but it is not easy.

Typically, when I've ask a trial team about the case story a few months before trial, only a small minority can tell me. Most respond with one of the following:

- We just got the case;
- Everybody hates our client, because they are a oil company, tobacco company, bank etc;
- This case has to be won on the law alone;
- It's a bench trial, so story doesn't matter;
- We're too busy;
- We're working on that;
- We don't need help with that;
- I don't know what you mean by a story;



Yet, as I look at all the winning trial teams we've worked with over the last year, one common theme is that they had a well-developed story. It didn't matter whether they were trying a dry patent case or a scandalous white-collar case, they built a strong narrative. It's what great litigators do - yet so many either skip this step or procrastinate and wait too long to fully develop it.

I have written a number of times this year about the importance of storytelling at trial. As I close out the year, I think this may be the most important thing a litigation consultant can do to help a trial team. A litigation consultant brings not only the common sense that a fresh pair of eyes offers but will also bring the experience of having seen what works and what does not and the experience of having helped develop stories for hundreds of trials.

Here is an overview of storytelling for litigators with five key points every great litigator should know.

1) **Why Care About Story?** In his book *The Storytelling Animal*, author Jonathan Gottschall shares so much valuable science and commonsense wisdom about storytelling that I suggest it should be on the must-read list for litigators. The *New Yorker* summed up the essence of it this way: "human beings are natural storytellers—that they can't help telling stories, and that they turn things that aren't really stories into stories because they like narratives so much. Everything—faith, science, love—needs a story for people to find it plausible. No story, no sale." We've drawn parallels between sales and trials before, and I agree that without a story, no one will side with you. Read this book, and your openings will be forever improved.

2) **What is a Story?** It's not a simple recitation of information and facts in chronological order. It is a tale of character-rich events told to evoke an emotional response in the listener. As one Harvard paper put it, "without [stories], the stuff that happens would float around in some glob and none of it would mean anything." Unfortunately, many opening statements don't follow that advice.

3) **What is the Structure of a Story?** A drama is often split into five parts:

- The introduction (also called exposition) is where characters are introduced, the scene is set and the plot is introduced.
- Rising action is where the hero is revealed, the conflict is identified and our hero finds the solution to the conflict.
- The third act is the climax where our hero's situation is either clearly improved or worsened.
- Falling action is where we see the conflict diminishing and our hero is now clearly winning or losing.
- The resolution or denouement provides a transition toward the end of our story. Morals are revealed, tension is released and a sense of relief is given to the listeners.

4) **How would I structure a litigation story along these lines?**

- *Introduction*: I like to start with belief or fundamental truth and introduction of the characters like, "Banks survive on greed - it's how they make money. When they make good loans, they make money. When they make bad loans, they lose money. These bankers are essentially being accused of making bad loans, which to be true would have to mean, they were not trying to make money. When is the last time you heard of bankers not trying to make money? It makes no sense."

- *Rising Action*: Here the key is to keep a logical flow and keep the tenor rising until the conflict is identified. For example, "After years of lackluster home sales, finally it looked like Miami was positioned to take off and it was these bankers' jobs to make sure their bank made money - and that meant, making loans. And that's just what they did. Month after month, loan applications were up, and month after month, the bank was making more and more money. These bankers were at the top of their game. They received awards for their actions. But a storm was brewing. A real estate collapse had begun, and these bankers had to face it head on, sometimes at great personal sacrifice."

- *Climax*: Here, we see where our heroes overcome or are instead defeated by the conflict. For example, "Our clients did their best to weather the storm, but the reality of the real estate environment was too great to overcome. Loans were not repaid, foreclosures occurred and our clients either lost their jobs or retired and the bank ultimately failed. It was a brave battle but just not one you can fight at the age of 70 after a 40-year career in banking. Even if they wanted to, the fight was not winnable."

- *Falling Action*: "So they returned to their families. They lived modestly. They played with their grandkids. On a part-time basis, each helped to wind down bank operations. In the end, they saw much of their life's work blotted out by forces that were completely beyond their control. After all, they are just a couple of retirees who did their job well – they made loans, the bank made money until the unthinkable happened.

- And the *Resolution*: "Ultimately insurance protected all of the bank customers, so no money was lost. The stockholders lost money in their investment, but not all investments work out, right? Not all of the loans these bankers made worked out, and there's no redo for them. So would it make sense to reward stockholders for their investment that didn't work out by giving them an award of money? If Bank greed makes us squirm, the greed of those trying to recoup a lost investment in a bank should make you sick."

5) **Where can I learn more about storytelling for lawyers?** We have written often about this topic this past year, and I think it is one of the most important topics we write about. I encourage you to view these posts:

1. 10 Great Videos to Help Lawyers Become Better at Storytelling.
2. Demonstrative Evidence Lessons from Apple v. Samsung. Yes, even patent cases have stories.
3. The output of a great collaboration between a trial team and litigation consulting team is a compelling and simple story.
4. 16 Trial Presentation tips you can learn from Hollywood.
5. Many of the videos in this popular post of the Top 10 TED Talks for Lawyers are helpful for storytelling in the courtroom.

10 Reasons The Litigation Graphics You DO NOT Use Are Important

By Ken Lopez Founder/CEO, A2L Consulting

Like creating a new logo or a new ad campaign or hiring a speech writer - or perhaps the best comparison of all, like a trial attorney preparing for trial - we normally find that a lot of work goes into creating draft litigation graphics that are not ultimately used at trial, in a hearing or for some other originally intended purpose.

Michelangelo, sculptor, artist and architect, said, "Every block of stone has a statue inside it and it is the task of the sculptor to discover it."

Creating litigation graphics is a lot like that. When we come into a case, more often than not the trial team has not considered how to present the case, and we are just months or weeks from trial. Our job is to quickly understand the case, assess the trial team's style, whether creative or plain, whether wordy or more modern, whether multimedia or single-channel, and then begin generating litigation graphics, sometimes hundreds of them, in short order.

What may seem like chaos is actually a well-rehearsed act of creativity. Like Michelangelo's block of stone, we begin to visualize the finished piece by chipping away the unnecessary portions of stone. In practical terms, that means running a lot of litigation graphics by the trial team and then paring down. So, in a sense, we have to both build the stone and sculpt it. From chaos comes order.

Just as a branding firm will usually give you three to nine designs to pick from, or as a speech is refined over time, or as a trial team will abandon themes, arguments, or claims at trial, when creating litigation graphics **the final product is *properly* a product of a whittling down process**. Thus it is in a trial team's best interest and the client's best interest to accept a large number of litigation graphics early on that won't be used in the final product.

You see, without a set of boundaries or a map to navigate by, the trial team has to work harder under increasingly stressful conditions to express their desires clearly to the litigation graphics consultants. Thus, it is best to be frugal closer to trial rather than earlier in the development of litigation graphic designs. Otherwise, one is being penny-wise and pound-foolish.

Here are 10 reasons that those bits of creative stone you chipped away when creating litigation graphics were more important than the finished product.

1. **You may not know what you like until you know what you don't like.** Whether you are picking out new furniture, a new car or deciding on the right approach for litigation graphics, it is normally easier to rule things out than conjure the perfect end result.

2. **You know it when you see it.** Many people have a good artistic eye but lack the experience and training to execute the vision. This is typical and a good quality among most litigators.

3. **Choosing from a menu of options is easier than designing from scratch.** You don't often go to a restaurant and say I'd like you to combine these 10 ingredients into something I like. The same is true of litigation graphics. You order from a menu, because it is easier for you.

4. **Choosing from a menu of options is faster** than designing or describing in precise detail what your end product should look like (and your hourly rate is higher than ours).

5. **It's easier to pick and choose elements.** If you have ever been involved in a logo design project or redecorated a house, you'll surely have experienced this phenomenon. You'll often like one thing from here and another from there. It's normal.

6. **You can avoid the problem of "a horse designed by committee."** (It results in a camel, in case you were wondering.) A graphic in draft form has some amount of stickiness; it is less likely to be radically changed than an idea in someone's head.

7. **This process helps the litigation graphics firm match your style earlier, not later.** Different trial teams have wildly different approaches. One of the best ways to assess a team's approach is to put work in front of them and assess their reaction. This is why we insist that the first review of any first draft presentations is done in person or by video call. Our litigation graphics consultants must work from the team's reactions.

8. **You find an opportunity to assess admissibility.** Sometimes a graphic that someone on the team wanted to create is just not going to be admitted, but it needs to be created anyway - just to get ruled out. At the insistence of counsel, we've put devil horns on alleged thieves, we've made people look like they had a mug shot, and we've illustrated the opposing party's image to look like a robber baron. We know they won't be used and won't be admitted, but it was an exercise that had to be seen through.

9. **Time to reflect produces better results.** Whether it be a new way of looking at analogy or a way we open the door to evidence we don't want in - putting more exhibits out there helps us deliver a high level of creativity.

10. **Most importantly, without having gone through the process of many drafts becoming one final graphic, you would not have arrived at what is your David or Sistine Chapel** - whether that be your opening

presentation, your *Markman* hearing, your patent tutorial, your ITC hearing or your arbitration, without all the efforts to get there.

8 New Ways to Connect with Clients - How Our Litigation Consulting Firm Does It

By Ken Lopez Founder/CEO, A2L Consulting

At A2L, we work hard to stay in touch with our clients, potential clients and our industry. Like most litigators, lawyers and even litigation consultants, we use many traditional methods of communication like meetings, lunches, phone calls, and emails. But in the modern era of social networks, developing and maintaining relationships presents a new challenge.

In the past several years, we've enthusiastically embraced the movement toward communication via social networks and other modern communication methods. I think it is a great trend since it's a way of finding out how much we have in common with our clients and other industry members, both in terms of common contacts and common interests. Also, since all of us receive too many phone calls from sales people, the more closed, self-selected network makes it easier for us to limit the number of people who can reach us. With social networking done right, clients can choose to spend virtual time 'with us' rather than via the old fashioned method of interrupting what they are doing.

While nothing can replace a face to face conversation with a long trusted adviser, social networking and modern communication tools are providing methods for lawyers, law firms, litigation consultants and litigation support firms to communicate in a meaningful way. Obviously, our clients agree that we're staying in touch successfully - we've grown more in the last two years than ever before in our 17-year history - and I believe social media has had a lot to do with it.

I want to share eight new ways that we stay in touch with clients so that you may find one that benefits your client relationships. As described below, they all work for our clients in different ways. I encourage you to connect with us in any or all of these ways, and you'll quickly see how we do it. My hope is that by seeing how we do it, you can use these tools to form closer relationships with your client base.

1. **Blogging** is the single biggest and easiest change a firm can make to increase client engagement. Our blog, *The Litigation Consulting Report*, covers timely topics in litigation, trial advocacy, and courtroom presentations and is updated several times a month. Since you are reading this, you probably see the value, right?

2. **LinkedIn**, with many recent improvements and functions, is the new powerhouse of social media for the legal industry. We create new discussions on a variety of

litigation groups each week and reach out to specific clients. It's a great way to keep up with business developments of all sorts. Go to our company page and choose "Follow" to be notified of new articles in your LinkedIn newsfeed.

3. **Twitter** is a powerful albeit quirky tool. It is a quick and easy way to see what's going on, with links to our blog articles and other notable news items. Go here and press "follow" to see how we use Twitter as a business communication tool.

4. **Facebook** is definitely not just for teenagers, vacation pictures and cute cats anymore. Yes, Facebook can be used for business purposes as well. Since I watch it everyday anyway, I find it especially useful to see news in my newsfeed, like articles A2L posts or litigation news. See A2L news in your Facebook newsfeed by going here and pressing "Like."

5. **Google+**? Ever heard of it? Although Google+ hasn't caught on as quickly as many expected, its interface is very clear and easy to use. I think it may find a place as a good business alternative to Facebook over the next year. Drop by our page and "Follow" us, and you'll get a sense of how we are using the tool. We're happy to add you back if it helps you.

6. **YouTube** creates a lot of buzz for A2L. Just one of our videos has been viewed 70,000 times. So much of what trial lawyers do successfully can best be captured on video. Watch a brilliant closing argument that follows A2L's advice or post one of your own. Visit our YouTube Channel and choose "Subscribe" to see how you might use it for your business.

7. **RSS** readers allow you to aggregate stories from multiple sources in one feed. I think it is not the most user-friendly tool, but some people love RSS Feeds. If you subscribe to a number of RSS feeds, you can effectively create your own publication catered to exactly your interests. Here's our feed on Feedburner for you to subscribe to.

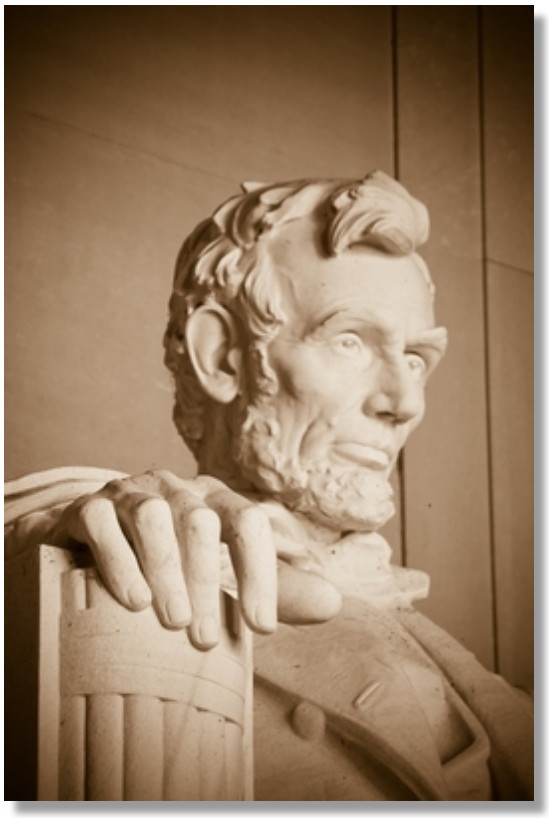
8. **Pinterest** is one of the newest but one of my favorite social networks. We post a wide variety of materials here, some that we generate and some that are generated by others. You can even see a wider range of updates on Pinterest. This, the newest to catch on of all social media, is also going well beyond the personal and is a good source for business information. Visit A2L's Pinterest page and choose "Follow" to connect with a stream of litigation content you might not normally see.

I believe each of these tools can be useful for individual lawyers, litigators, law firms, litigation consultanthat ts and litigation support firms. For an individual, creating LinkedIn discussions may be enough. For a firm, several of these may allow you to reach a wider audience. For a sophisticated business, you really must make use of all of these services in a thoughtful way to properly communicate with your audience.

A2L CONSULTING

7 Ways to Draft a Better Opening Statement

By Ken Lopez Founder/CEO, A2L Consulting



For any trial lawyer, writing an opening or closing statement is one of the best parts of a trial. It lets us use our writing skills, speaking skills, and persuasion skills like no other moment of trial. I happen to believe that the opening statement is the single most important part of a trial.

Blow the opening by showing documents not yet in evidence, reading your opening from a script, misusing your time, not telling a story -- and you put yourself at a severe disadvantage from the outset. Nail the opening and you are doing more than just starting off on the right foot. Some astute trial observers believe that 80% of cases are won or lost in opening.

Sitting down and drafting an opening, especially one of more than an hour's length, can be especially daunting. Fortunately, the great speakers of today and of the past, as well as persuasion theorists, have developed practical ideas that can be applied to the drafting of an opening statement.

One technique that should be avoided, though, is simply sitting down to write your opening in Microsoft Word. Like setting off on a hike without a good plan, this technique will usually end up leaving you feeling lost.

Instead, here are seven approaches to drafting an opening statement:

1. **Go old school.** It is said that Abraham Lincoln kept notes in his hat as a technique for writing speeches. Lincoln, of course, wasn't able to resort to a smartphone, but you are. Today, leaving snippets in a notepad application is an excellent way to build up an opening statement. Each time a great idea comes to you, you simply store it in the same app, and if you use iOS devices, this ends up getting synched across your iPhone, iPad, laptop and desktop instantly.

2. **Use mind mapping techniques.** We've written about mind mapping before, and we offer it as a service to help trial teams organize their thoughts around an opening or the overall case strategy. Mind mapping describes the very useful and sensible process of making large outlines that are usually printed poster size and tapped up on the first chair litigator's wall.

3. **Follow the Post-It approach.** Although I tend to prefer the use of mind mapping, this is still a favorite technique of mine. It works as follows: First, use a pad of Post-Its to write down all your thoughts about an opening statement, one thought per Post-It. Second, put them all up on a wall. Third, put related concepts together, using no more than five or six groups. Fourth, title those groups. These will be your chapter headings. Fifth, put the Post-Its in order under the chapter headers, and now you have a well organized speech.

4. **Use an integrated graphics approach in your notes.** Using Microsoft Word, speakers' notes in PowerPoint, or a mind mapping program like Mind Manager (the one we use), prepare your slides so that they are laid out next to your text. This technique can be see in video #9 in our recent article on closing statements.

5. **Join Toastmasters.** One problem most litigators have is that they do not have enough time to practice their speeches. Some advocate practicing in unexpected places such as the car, and doing so in small segments. One easy place to practice in a structured way is at a Toastmasters meeting.

6. **Memorize your opening.** My favorite technique for memorizing a speech is to use a spatial technique. Since I remember my childhood home very well, I make sure to associate elements of my speech with places in my house, starting in the foyer, moving to the living room, sitting on the sofa, and so on.

7. **Test your work with a mock jury or mock judge panel.** There is no substitute for presenting a case in front of mock juries or judges. You will likely prepare earlier than you would have, and the feedback from the mock jurors or judges will guide what to include in your opening statement at trial.

The 14 Most Preventable Trial Preparation Mistakes

By Ken Lopez Founder/CEO, A2L Consulting

Compared with even the largest law firms, we go to trial a lot. After all, even the busiest litigators in major firms try at most 30 cases in their lifetimes. We consult on many more cases than that in a year. Indeed, we have spent 20 years going to trial, and our clients are mostly major law firms that are working on very high-stakes cases.

This unique perspective on how litigators conduct trial preparation for cases has given us enough best practices to fill this blog for a lifetime. No two litigators are quite alike. From the trial attorney who knows his case perfectly months in advance to the one who only learns the case a couple of days before trial, there is no one right way to do things.

However, it is easy to make fundamental mistakes when preparing for trial. After all, unless you have worked in a prosecutors' office or have cut your teeth at a smaller firm, the chances are that trial is a rare event for you.

Here are 14 mistakes we have seen in trial prep that are completely and easily preventable.

1. **Where's the story?** As more and more science emerges about the proven value of storytelling as a persuasion device, it is critical that your case have a story. Many teams arrive at our doorstep with no story in place at all, so we craft one for them through mock jury work and other exercises like a Micro-Mock.

2. **Where's the meaning?** In addition to telling a story, you have to be prepared to tell jurors why they should care about your client and the case. If you can't do that, don't expect a good result.

3. **Being penny-wise and pound-foolish:** This old phrase means, of course, that one is focused on small costs, not on the ultimate result. Let's say you or the client chooses hotel accommodations that are five miles away from the courthouse to save money, or that you adopt a software solution that isn't tailored to your needs because it's cheaper. These choices don't help in the long run.

1. **Using paralegals or associates as trial technicians:** It's not fair to these good people who support litigation partners to ask them to run software at trial that they

have not had adequate training and experience with. We had a recent case where a law firm attempted to use an under-experienced person to handle trial presentation and lived to regret it. They, the judge and their jury waited in silence for ten minutes during opening statements for the technology to work. As our happy (and winning) client said, "you don't get a second chance to make a first impression." I couldn't agree more.

2. **Going with the low estimate on graphics:** As one client said to me recently after a competitor of ours was brought into a case on a low estimate and then dismissed for performance issues, "it was a false economy." If a consultant makes your trial preparation more difficult, or even just less easy, that always costs your client hard dollars. Explaining this value to in-house counsel is critical.

3. **There's last minute, and then there's really last minute:** Often people think a case will settle and they put off trial preparation, only to find that the settlement didn't occur. Unfortunately, trial preparation is just one of those things that takes time, and there really is no fast-forward button. Put off trial prep to keep the client bill down in the near time, and you will likely be the one getting blamed for a bad trial result in the end.

4. **Insufficient practice:** We have published some very popular articles on the subject of practice. From how actors prepare to how professional athletes practice, there are countless examples of the benefits of good practice. One estimate for great presentations suggests that to be really effective, you must devote and an amount of time to practicing equal to at least thirty times the length of your presentation.

5. **Using PowerPoint amateurishly:** I used to race cars a bit, and I noticed on the track that there is a surprisingly wide gap between adequate and great drivers. It shows up on a stopwatch of course, but I would see it more in the mistakes people made. Preparing litigation graphics on your own is quite similar. Almost all of us know how to drive a car and even drive fast, but very few people can consistently make the right choices on the track. Similarly, almost anyone can prepare a slide in PowerPoint, but making the right choices to win over your jury is much more difficult.

6. **Failing to survey the courtroom in advance:** Just as a professional athlete will visit a new stadium or arena in advance, you should visit the courtroom wll before the trial begins. Often litigators learn too late that a courtroom is too small for a standard projector or that a timeline they want to use has no place in a particular courtroom layout.

7. **Failure to role play:** Like an actor who tries to practice alone, an attorney must work with experts, assist in witness preparation and conduct drills of their opening and closing statements.

8. **Failure to test graphics in advance:** I remain astounded that mock trials are conducted without litigation graphics being tested. You don't want to find out during the trial that your graphics or your equipment are incompatible with the courtroom setup or are ineffective. As any qualified jury expert will tell you juries rely on more on what they see than what they hear, roughly by a factor of 2:1.

9. **Failure to understand your judge:** There are many good ways to research a judge, some of which we have detailed in a popular article. You simply must understand how he or she decides things. In the court nearest me, there are judges who will not tolerate trial technology of any sort, and there are judges who get annoyed when you don't use it.

10. **Losing it during trial preparation:** Sometimes even great trial teams go bad, but the single worst thing that can go wrong is when the leader loses his or her cool close to trial when anxiety is at its highest.

11. **Failing to brainstorm what could go wrong:** Plan for the worst and expect the best. This should be just as true for pre-trial motions as it is for trial technology.

A2L CONSULTING

How a Litigation Consultant Can Help You With Your Closing Argument

By Ken Lopez Founder/CEO, A2L Consulting

Usually, the vast majority of the time that a litigation consultant will spend with a trial team focuses on jury selection, mock trials, witness preparation, opening statement and expert testimony. A litigation consultant will usually spend less than ten percent of his or her time in supporting a trial team in its development of the closing argument. This is very curious, because closing arguments are a critical part of any trial. They are the last words jurors will hear out of your mouth, and they are the punctuation mark on your case and the story you have developed.

This short-change in time is probably because by this point in litigation, the arguments are fairly well formed and many of the litigation graphics used at closing argument will be variations of those used in opening statements or during the case in chief. We've written about preparing good opening statements and the importance of storytelling before, but closing arguments deserve their own discussion.

The closing argument differs from the opening statement in several key ways:

1. Argument is allowed and encouraged
2. Evidence can be shown (again) to judge and jury
3. Demonstrative evidence can include conclusions or argument in titles
4. A complete story can be told
5. Credibility of witnesses can be discussed
6. The facts can be easily applied to the law

A ***good*** **litigation consultant** will tell you to be very careful not to create an appealable issue by referring to facts not in evidence or offering your opinion of the merits of the case, opinion about opposing counsel, or offering opinion about the credibility of a witness or violating the golden rule. If opposing counsel makes such a statement, an objection should be made -- or it may be considered waived. Of course, any violation of the golden rule (i.e. asking jurors' to step into the plaintiff's shoes) must be avoided, or a mistrial may be quickly declared.

Closing statements are ripe for summation litigation graphics that recount all the wonderful proof of your case presented over the course of trial. New trial graphics should be prepared to illustrate how overwhelming your proof was and how credible and comprehensive your expert witnesses were. Closing is an excellent time to put some dollar signs and damages amounts in front of the jurors' eyes to drive home what they should do in the jury room. Likewise, prepare a closing graphic of the verdict form they're about to get and show them exactly how you want it filled out. You want the jurors walking out of the courtroom with rich memories of your best points so they can argue your case when they hit deliberations.

Below are 15 videos and tips that a good litigation consultant will agree are helpful to any litigator's preparation and delivery of a winning closing statement.

1. **Learn from the Greats:** The ABA put on a great program in 2009 featuring Robert S. Bennett, David Boies, Willie Gary, Robert Morvillo and Judge Denise Cote.

2. **Avoid Going 90 in a School Zone:** Appellate Attorney Kim Boldt reminds us of the importance of preserving error; closing arguments often go awry when lawyers are on a roll - what she smartly describes as, "before you know it, you're going 90 in a school zone."

3. **Start Strong, End Strong:** In this summary portion of a 12-part video series, Judge Daniel Bay Gibbons offers a good overview of the key points of a closing. He reminds us to start strong, end strong, and avoid classic unethical behavior during closing. The other 11 parts are also available on YouTube.

4. **If It Does Not Fit . . .** Johnny Cochran's classic, "if it does not fit, you must acquit" closing. It is a good lesson in arming your strong jurors with the language they'll need to argue during deliberations.

5. **Memorize Your Closing Statement:** Gerry Spence offers a sample closing. He has a lot of presence, but anyone's passion will come through better when an opening or closing is not being read.

6. **Practice - A Little at a Time:** Frequent NITA faculty member Marsha Hunter makes the case that you should practice in small chunks.

7. **Use metaphor in closing statements:** We recently created a directory of metaphors and analogies for lawyers.

8. **Use your opponent's materials against them.** In this clip, litigator Allen Foster (assisted by an A2L trial technician using TrialDirector) makes a closing statement during a World Bank arbitration and begins by using his opponent's materials in his presentation. The contrast between his presentation and his opponent's (at the end of the clip) is noteworthy particularly since Mr. Foster and his client prevailed.

9. **Use an illustrated closing argument notebook.** See how District Attorney David Walgren uses a notebook with his demonstrative exhibits. He shares the law and talks about how the facts apply to it, in two hours in this well-delivered closing in the Michael Jackson doctor case.

10. **Do something memorable:** Another well-delivered closing argument by plaintiff's attorney Mark Lanier in a Vioxx case. He does a good job of diffusing the "CSI Effect" and discussing the concept of preponderance of the evidence and calls Merck's executives "Desperate Executives."

11. **Don't read your closing:** Yes, we've said this twice, because it is that important.

12. **Ask for what you want:** Mock juries usually begin analyzing damages the way they were presented by the side they most agree with. Give your jury a baseline from which to work for damages. If the right answer is $0, then say so and show why. If the right answer is $5 billion, then say so, and show them the math at a high level that shows why this is true. Behavioral psychologist Susan Weinschenk reminds us why asking is so critical.

13. **Tell Great Stories:** See A2L's article on being a better storyteller.

14. **Give a Great Opening:** See A2L's article on opening statements.

15. **Revisit lessons learned in the mock trial:** If you conducted a mock trial, lessons were learned. Many of these lessons were likely applied during opening, but don't forget to do the same during closing arguments. Here is an A2L article on mock trials as well.

Whether you work with a litigation consultant or not, we encourage you to put emphasis on the closing statement. While it is not as important as your opening, it is your best opportunity to help the judge or jury organize the way they will analyze the case.

4 Litigation Graphics Tactics When the USA is a Client or a Foe

By Ken Lopez Founder/CEO, A2L Consulting

I created my first trial exhibit while working for the U.S. government in 1992 as a clerk in the Eastern District of Virginia. Two assistant U.S. attorneys were having a hard time explaining why a witness was able to see the defendant in a drug bust in spite of a four-foot wall. I created a simple map exhibit using my Mac and they were thrilled.

Twenty years later, my colleagues and I at A2L have had the chance to work both on behalf of and against the U.S. government on countless occasions.

On behalf of the government, we have defended air traffic controllers accused of negligence, pursued countless antitrust cases for the Department of Justice's Antitrust Division, worked on environmental cases for the department's Environment and Natural Resources Division, pursued securities law violators for the Securities and Exchange Commission, and even helped prosecute the 9/11 perpetrators.

Our work opposing the government has been equally varied. It has included many False Claims Act and *qui tam* cases, environmental disputes involving water, ground and air, bankruptcy cases, EEOC cases, labor cases, tax cases and antitrust cases. Over the last two years, we have been frequently involved in helping individuals and businesses avoid indictment or civil penalty.

Much of this work involves our litigation graphics consultants' efforts to create presentations that will show the government that no crime has been committed or at least that the likelihood of succeeding in front of a jury is unjustifiably low to pursue the case. This litigation consulting work is especially challenging since prosecutorial inertia is hard to stop. However with so many recent and high profile prosecution failures at DOJ, I believe fear of yet another public loss is a useful button to push.

When we are working for the government, resources are tight. The federal government seems to have only a limited capacity to spend taxpayers' money on such services as mock trials, litigation graphics consulting or on-site courtroom technologists. On the other hand, when we are opposing the government, our clients routinely talk about the unlimited resources of the government. I think they are both right.

In my experience, the government is quite efficient in how it spends money on litigation support services including litigation graphics, mock trials and courtroom hot seat operators. On the other hand, I have seen the government relentlessly pursue a defendant, spending

countless thousands of hours on what is at best a legal peccadillo.

With this background in mind, care must be taken to handle the government carefully, whether as client or opponent. Below are some techniques we recommend.

1. **Test the attitude toward the federal government:** Regardless of whether the trial will be litigation graphics-intensive or not, the degree to which pro- or anti-government feelings exist varies from jurisdiction to jurisdiction and at different times is critical to evaluate. We recommend testing the jury pool's "temperature" in pretrial work and designing litigation graphics (and your case's themes) accordingly.

2. **If your client is the U.S. *and* the juror attitude is friendly, make extensive use of agency logos.** For example, if the government is attempting to regulate hydraulic fracturing (aka fracking), its efforts are likely to be received differently in New York City than in pro-gas North Dakota. If we were working for the government, under such circumstances, litigation graphics and themes would make heavy use of government logos, seals and insignia in Manhattan, but in Fargo the case would take a tone more akin to "this case is brought on behalf of the people of North Dakota" and the government's identifiers would be downplayed.

3. **If your client is the government, stop worrying about looking big.** The government is often concerned with looking too big, but I think this fear is greatly exaggerated. Like big companies worried about looking too slick (see previous posts about David vs. Goliathand trial technology), the government is the government, and everyone knows it is big. The question is not size. The question is whether it appears to be overreaching. The point to be made, perhaps, again is that "we are here to defend your (the taxpayers') rights."

4. **If your opponent is the government, find a way a way to make this a strength.** Perhaps you are in an anti-government jurisdiction. Perhaps the government has overreached. At one time or another, particularly around April 14 each year, we all feel victimized by the government — make use of this universal feeling.

Litigating for or against the United States is a special situation. It requires different tactics than everyday civil or criminal litigation.

Presentation Graphics: Why The President Is Better Than You

By Ken Lopez Founder/CEO, A2L Consulting

Have you ever seen the President of the United States give a PowerPoint presentation? Probably not. But he's actually quite good at it, as you will see below.

For at least the past two years, President Obama's team has created PowerPoint-style presentation graphics that support his speeches and policies. The work they are doing is excellent and is relevant to trial attorneys and lobbyists alike.

Below is a White House-created "enhanced" version of the 2012 State of the Union address. It was broadcast at the same time as the State of the Union address but only on the Web (an asset in wooing younger voters, who increasingly use only the Internet for news and media). It places the live feed of the president's speech next to a series of trial-like presentation slides.

In many ways, a State of the Union address is similar to an opening or closing statement. Accordingly, for the trial attorney, there are many lessons to take from this speech/presentation combination. These include:

1. Watch how the President uses emotion-evoking photographs to tell a story. In a mock trial setting, photographs are normally received very well by the jurors, but many litigators erroneously leave them out of their opening statements.

2. Look at the obvious high quality style of the President's presentation. The fonts used are not standard Arial or Times New Roman; colors are well chosen; and the presentation seems worthy of the office of president. Such style in presentation is not reserved for the Commander-in-Chief but is available to anyone who wants it.

3. Notice that each slide is simple enough to understand in a moment or two. A common trial mistake is to try to put too much into a single slide. I urge you to adhere to the philosophy that one slide = one sentence of meaning (with no conjunctions).

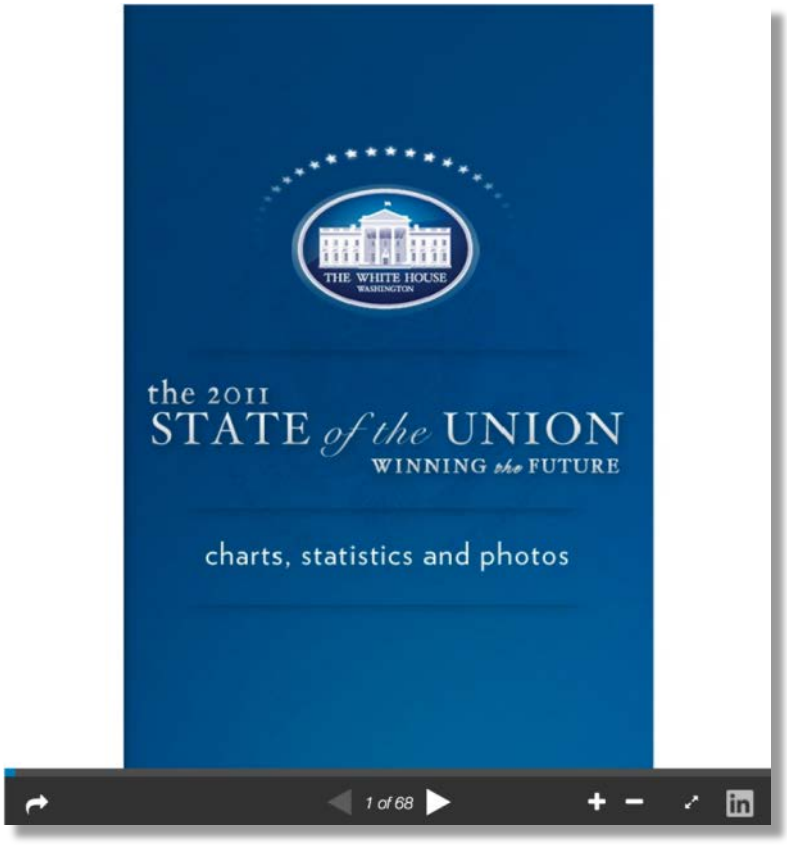
4. Notice also that the President is using an immersive (i.e. continuous) graphical presentation. A recent study showed this to be the most effective form of presentation (particularly for persuasion), and I encourage you to adopt this technique.

5. Note that the President used roughly 91 slides for a 65-minute speech or about one slide every 42 seconds. That's consistent with the latest research, but part of the reason the President's presentation was so successful is that he did not need to specifically speak to any of the slides. The graphics spoke for themselves, which is how such graphics should be designed.

6. Finally, there are no bullet points! Good graphics don't have them.

The 2011 enhanced State of the Union slides below are similar to those from 2012 above. However, the differences between the slide decks are interesting. The 2012 speech slides are more refined in style. There are fewer photos, and there were 23 more slides used in about the same time.

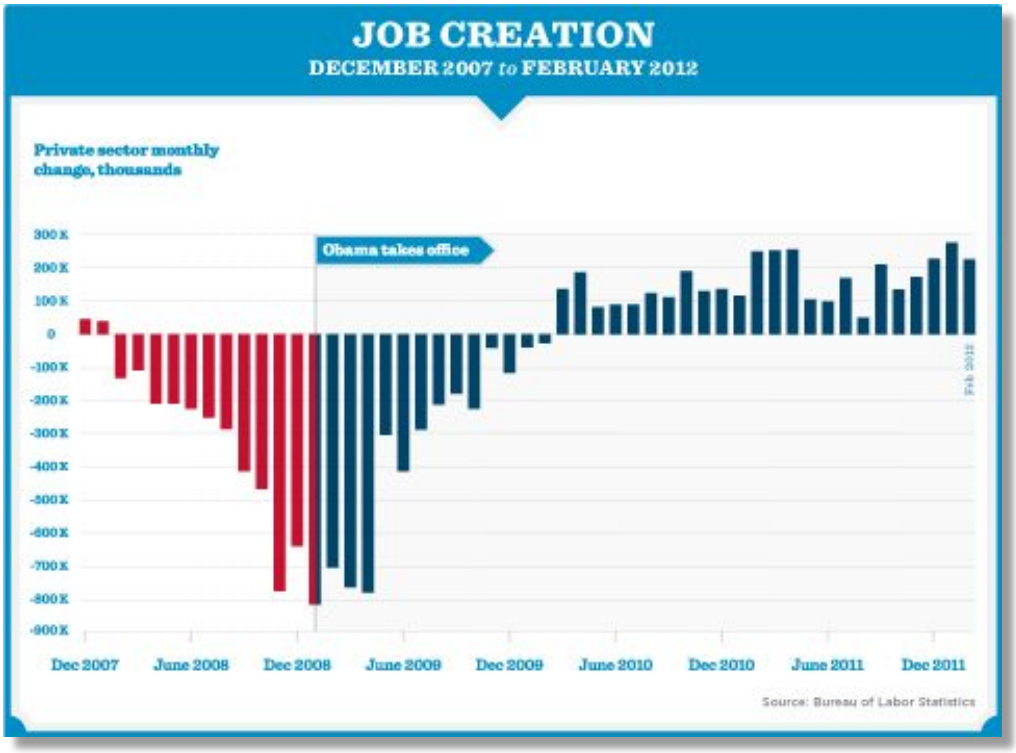
2011 Enhanced State of the Union Address Graphics



View more documents from White House

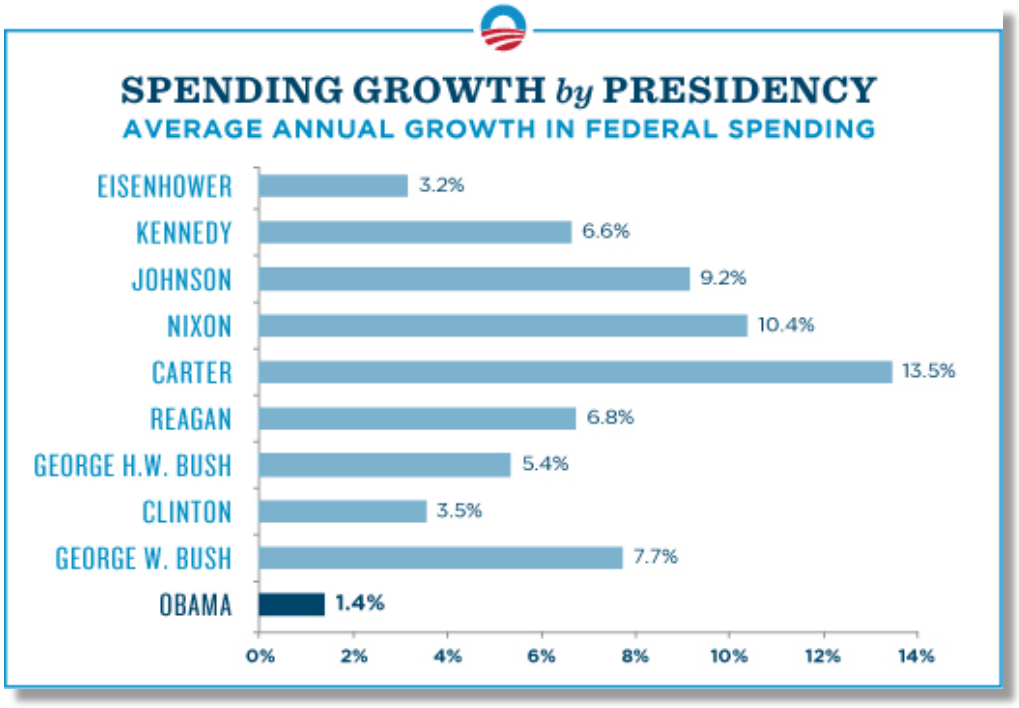
The White House has continued its push for information graphics beyond the State of the Union as well. Perhaps more so than the State of the Union, the White House's use of widely distributed information graphics (or *infographics*) for issue advocacy points the way for lobbying efforts generally. The administration often uses captivating postcard-style information graphics that speak to a single issue. These are often widely distributed on social networks.

The Obama-Biden campaign's most successful use of an infographic was the one that recently made the rounds about job growth.



This image above has been shared millions of times on Facebook and Twitter. It is similar to a timeline that A2L might use in a trial format, and it is similar to the work we do in issue advocacy outside the courtroom. It has been well designed to be shared easily, and I have seen it countless times on my friends' Facebook pages.

The presentation graphic below was released just this week. It does a fine job of responding to criticisms of the administration's spending. However, if a presidential contest were litigation, this chart would not likely survive an objection. See if you can spot the issue.

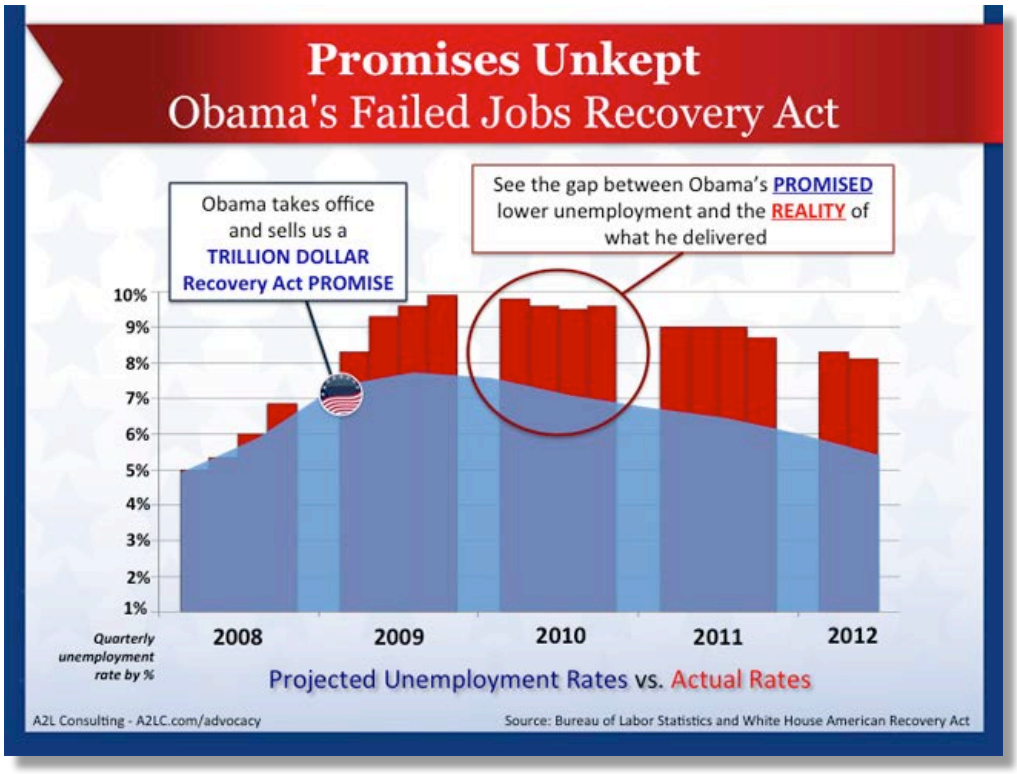


The 1.4 percent figure is absolutely correct - but only if you use 2009 as the year to compare with 2010, 2011 and 2012. It's a smart technique to use when advocating. In fact, spending in 2009 rose by about 18 percent relative to 2008. Raw data sourced from the non-partisan Congressional Budget Office (.PDF) is below.

Total Federal Outlays in Trillions of Dollars

2007 - 2.729
2008 - 2.983
2009 - 3.518
2010 - 3.456
2011 - 3.598

I have friends in all parts of the political spectrum, but I have yet to see a Romney campaign infographic on Facebook. As the campaign goes on, this may, of course, change. Perhaps the Romney campaign should consider using an infographic similar to that below. This graphic effectively hits back at the Obama-Biden jobs infographic while calling into question the credibility of future campaign promises.



Sharable infographics are the new sound bites. Advocates distribute them to their followers who then share the graphic with millions of people within a few days. Followers use these tools in online conversations similar to the way one might say flip-flopper, draft-dodger, war hero, patriot, or socialist in face-to-face conversations. They are a form of shorthand that can be quickly digested.

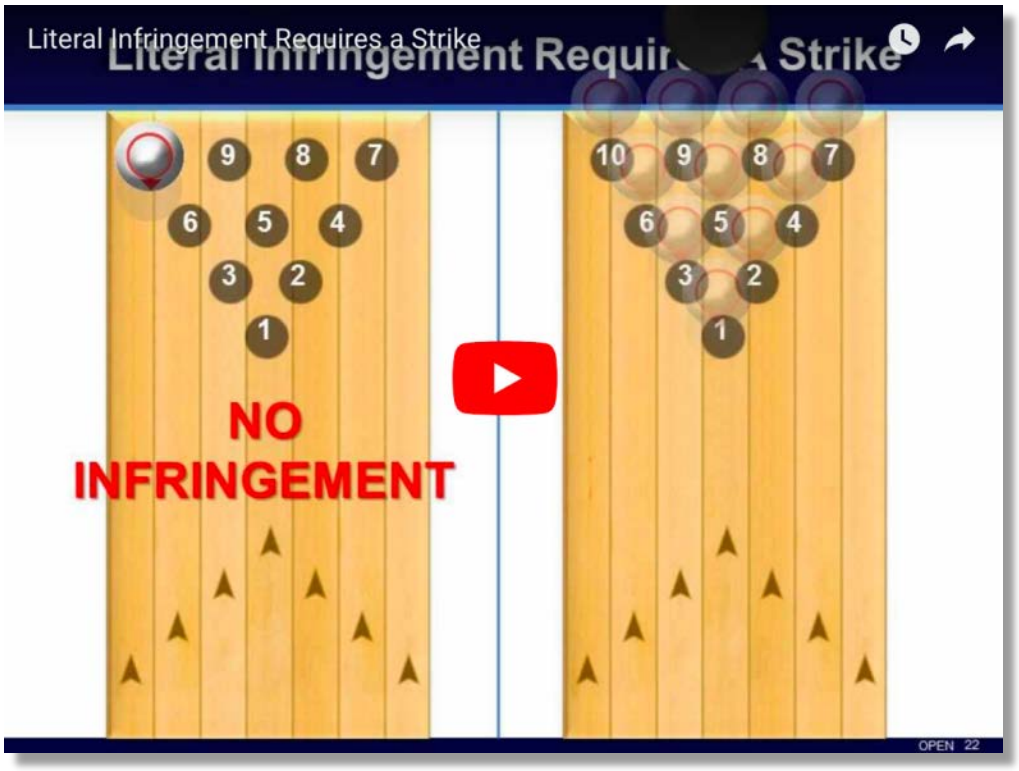
As is often the case in the courtroom or in issue advocacy, the best presentation graphics distributed in the most effective ways will likely help one side prevail in this presidential contest.

Trial Graphics Dilemma: Why Can't I Make My Own Slides? (Says Lawyer)

By Ryan H. Flax, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

In a previous article I told you about five surprises I found in moving from my previous position as an IP litigator to my current position as a litigation consultant. After a few more weeks on the job and a bit more day-to-day experience as Managing Director, Litigation Consulting for A2L, I find that there is another big surprise: the amount of thought, time and work that goes into *each and every* trial graphic.

As an attorney, and particularly one well versed in technology generally and litigation technology specifically, even I had no idea what *really* went into the development of top notch trial graphics. Like other litigators, I had plenty of experience in making presentations and creating PowerPoint slides to help make my points. But, I've discovered that there is a huge difference between what an attorney can create at his desk at a law firm and what can be built by a team of litigation consultants and trial graphics artists working with that attorney.



Compare this PowerPoint trial graphic (above) produced by our litigation consulting team at A2L with another trial graphic (below) that I'm sure you'll agree is similar to what you'd produce at your desk at a law firm (this subject matter is near to my heart as a patent attorney).

https://www.youtube.com/watch?v=4Vx6wk-0yHAl

The law firm example slide is clear and straightforward and conveys all the information you need – that to infringe a patent claim literally (not considering the doctrine of equivalents), every limitation of that claim must be in the accused product (or process). This slide could easily be used in any presentation, for example, in a client pitch meeting or in an explanatory presentation by an associate to a partner.

Now compare it with the litigation consultant-created trial graphics example at the top. The litigation consultants' work conveys all the same information provided in the basic text-based slide (i.e., if the accused product is missing even one element of the claim, there's no literal infringement), but it provides it as a visually "catchy" analogy for the jurors -- one they'll never forget). It is persuasive, not just informative. And it does all this without adding complexity. These additional aspects of the consultants' slide are what makes it a key to winning at trial.

It may surprise you to learn that it's not so easy to take these additional steps in developing a persuasive presentation. To make this "magic" happen, a team of litigation consultants (preferably made up of attorneys, as is our team at A2L) and experienced trial graphics artists devise the best way to present key evidence or themes graphically *and* textually to make points with a jury. Visual input, such as that presented in the bowling slide above, tends to have impact and stick with jurors and helps them make difficult decisions on contentious points, even when they might otherwise tune out pure verbal/textual argument.

This extra step constitutes some of the value added by a litigation consulting firm. The very trial graphics slide you see above (the bowling one, of course) contributed to a major recent win in a patent infringement case for an A2L Consulting client in *Power Integrations, Inc. v. Fairchild Semiconductors International, Inc., et al.*, C.A. No. 08-309-LPS.

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7 Things Expert Witnesses Should Never Say

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

Expert witnesses, if they are well prepared and know your case well, can go a long way to helping you win your case at trial. Often, a case will center on an engineering, scientific, environmental, or similar issue, and having the right expert can make all the difference.

However, the flip side is that a poorly prepared expert witness, or one who does not testify effectively, can help you lose your case.

Here are seven things that your expert witness should never say.

1. **"That's not my field of expertise, but …"** The classic mistake an expert can make is to wander outside his or her area of knowledge and expertise. An expert should never sound evasive or ill-informed. If the answer to a question on cross-examination is truly outside his or her field, it's not relevant to his or her direct testimony, or the question should draw an objection, the best way for an expert to be believed about what they *do* know is to admit what they don't know when it isn't in their domain. If it's relevant, the expert should be prepared and should answer.

2. **"I have no idea."** Again, don't sound evasive or ill-informed. A better answer is, "Under the assumptions that I am making, which are …, here is what I'd expect to happen." In addition, the expert should explain why it is not relevant.

3. **"I said that in my report, but …"** Do not back down from the report and create uncertainty. The report should be carefully crafted to embody the expert's conclusions. A significant weakness for any witness is to reverse positions. If for some reason such as new information that was not available when the report was prepared became known to the expert, then it should be made clear that the report was based on what was known at the time. Otherwise, there are better ways to explain apparent inconsistencies. Cross examination is likely to exaggerate such points and it is the expert's job to neutralize them and put them into better perspective.

4. **"I changed my mind."** Again, this creates a dangerous amount of uncertainty for the jury and leads them not to rely on an expert as an expert. If the expert really needs to modify some aspect of his or her testimony, tackle that directly by explaining in open court what slight change is needed and why.

5. **"I could be wrong, but …"** The expert should never make this concession. The expert's job is to be forceful and help the jury. The jurors may discount part of the

expert's testimony, but his or her job is not to help them do this. Such type of humility does not serve an expert well.

6. **"I'm not really an expert."** Then why are you on the stand? Under the law, expert testimony is admissible only if the expert is qualified, if his or her testimony will help the jury decide issues in the case or understand the evidence, and if the expert's testimony is based on sufficient facts or data, is the product of reliable methods and principles, and if the expert has reliably applied the methods and principles to the facts of the case. Otherwise, the expert shouldn't be on the stand. If an expert is unwilling to make a firm commitment to an opinion and to their area of expertise, do not risk putting them on the stand. This is especially relevant when using an expert without experience testifying.

7. **"The lawyers told me to say that."** No. Although the expert is on your side, he or she is not a mouthpiece for the lawyers. He or she has objective expertise based on science and technology and has composed an independent opinion. It is up to the expert to own it.

7 Smart Ways for Expert Witnesses to Give Better Testimony

By Ken Lopez Founder/CEO, A2L Consulting

Expert witnesses can be an extremely valuable portion of your case. If they are well-prepared, convincing and convey a clear, uncomplicated message to the jury, their testimony can lead directly to a verdict in your favor. If they are unconvincing and don't communicate well, they are at best useless and at worst damaging to the case.

The essential problem is that expert witnesses – whether they are testifying on engineering, scientific, financial, or other issues – tend to be very intelligent and knowledgeable. At the same time, however, they are prone to using terms that are well above the jury's experience and educational levels and thus these experts are prone to be dismissed by some jurors as ivory-tower types who have nothing useful to say.

We believe our firm plays several important roles helping expert witnesses get prepped for trial. Since our goal is winning by telling a clear and convincing story, the value of expert testimony must be maximized in each case. Expert witnesses are an essential piece of the litigation persuasion puzzle.

Here are our seven tips for preparing expert witnesses and expert testimony to the best effect possible:

1. **USE VISUAL COMMUNICATIONS TOOLS:** Use litigation graphics as demonstrative evidence to help the expert explain his or her opinion. No testimony, however favorable to your cause, is helpful if jurors don't understand it. Don't simply rely on whatever Excel charts or graphics the expert may have included in his or her report. Those are designed for lawyers and specialists in the field to understand, not for the jurors. Two-thirds of jurors learn primarily through visual means, and the expert's testimony is no exception.

2. **PREP WITH A TRIAL TECH:** Have your hot-seat trial technicians practice direct testimony with the expert. Even experts who have testified before need to remain familiar with the flow of seeing documents presented in real time, making requests for live call-outs and highlights and working with demonstrative evidence. Experts are more likely to focus on their research and their conclusions than on the potential jurors' responses to the information.

3. **PRACTICE DIRECT EXAMINATION:** It is remarkable how often, in the rush to prepare for trial; expert witnesses go basically unprepared in high-stakes cases. Every bit of direct testimony should be practiced. Direct should be like driving a high performance automobile on the autobahn, exhilarating but quite predictable.

4. **PRACTICE CROSS EXAMINATION:** The importance of this cannot be overstated. An expert witness can make a great impression on direct examination, but a cross-examiner can be ready with one or two devastating questions that cast doubt in jurors' minds on the expert's conclusions, or even worse, on his or her methods and techniques. You should go over all possible lines of cross-examination and be ready for them. Very often, the same attorney who will ask questions on direct will prepare the witness for cross. We recommend recruiting a less friendly face from within the firm to ask questions to prep the witness.

5. **VIDEO AND REVIEW:** Record a practice session for both direct and cross-examination. Review it. Refine it. Re-record it. Repeat until you are satisfied.

6. **USE EXPERTS AT A MOCK:** We recommend testing expert witnesses in a mock trial format to see what lines of testimony work the most effectively. For some mock trials different strategies for the same expert can be tested.

7. **KEEP IT SIMPLE:** No matter how complicated the issues at trial may be, the jurors need to remember a point or two from the expert's testimony that they will understand. Get past the technicalities. You want the jurors to think something like this: "Remember what that expert said -- as much as the prosecutor was condemning the defendants for these commodities trades, they're basically no different from trades that people do on the exchanges every single day."

3 Ways to Handle a Presentation-Challenged Expert Witness

By Ken Lopez Founder/CEO, A2L Consulting

At A2L, we have the privilege of working with experts in many diverse and highly technical fields, such as software patents, polymer patents, semiconductor patents, medical device design, environmental remediation, construction, financial disclosure, economic damages, transportation safety, corporate management and many more.

When we work with these highly educated and often brilliant specialists – people whose testimony can often make the difference between victory and defeat for our clients – our task is, quite simply, to help them be as effective as possible. We achieve this primarily by helping the attorneys painstakingly prepare them for their deposition testimony before trial and for their direct testimony during trial, including the development of visual presentations that track their testimony. Experts must not only be well prepared for their own set testimony, but even more so for every possible attack by cross-examination, which is really where the case can be won or lost.

In general, experts fall into two camps when it comes to their ability to use visual aids to support and even explain their testimony. Some welcome the help from trial graphics consultants so that their highly technical presentation will be better understood by a jury of laymen (and even the judge, who may not be technically savvy), but some are already quite certain that they will be well understood by judges and juries and don't think "charts" are going to help.

This article provides tips for how a litigator can deal with the latter, more difficult, type.

Twenty years ago, many trial lawyers believed that trial graphics were unnecessary to help them be persuasive to juries and judges. But now we have studies showing the overwhelming benefit of using visual tools in the courtroom, and especially because the pace at which people (remember, judges and juries are people) expect to receive information is ever increasing, these old-school views are no longer valid.

So how does one convince an expert witness who is a specialist on his or her subject matter and often testifies about it in court that he or she should accept some help at being understood?

I suggest three possible strategies.

1. **Appeal to the expert's ego.** Tell the expert that most jurors and many judges are just not as smart as the expert, so they need the visual tools to help them understand

it. A useful quote may inspire a willingness to accept the need to communicate more effectively. Machiavelli said, "Before all else, be armed." But, be armed with the right tool and the understanding that the typical juror may not have a college degree and is most used to learning by watching television.

2. **Video-test the expert.** If the expert has shown any interest in improving the quality of his or her testimony, there is no better way to begin than using repeat video tests. This can be done with or without a live mock jury or an online evaluation service. In the world of performing, there is a cliché that is equally useful for the courtroom: A bad dress rehearsal means a great performance.

3. **Give up.** Why try to force someone into a situation that he or she is not ready for? The expert, whom you need to look as confident as possible, will simply register discomfort on the stand. And in expert testimony, persuasion is 20% what you know and 80% how you feel about what you know. The reality is that, if the suggestions above have failed, this is probably the wrong expert, and next time, you should shop around. As a litigator, you should no more have to explain the need for thoughtfully developed visual aids to an expert any more than a client should have to explain this to you. After all, one cannot after all expect to solve today's problems with yesterday's tools.

How to Be a Great Expert Witness (Part 1)

By Tony Klapper, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

You are a specialist in your field of study. You are about to take the stand as an expert witness in court. You have read hundreds, if not thousands, of articles in your field. You likely have an advanced degree that touches on the area about which you have been asked to testify. You may have taught classes on the subject at a university. You may have presented your thoughts and research at conferences attended by your peers. You are smart. You are well-credentialed.

But are you prepared to testify in a court of law? Do you know what you have to do to be just as effective on the witness stand as you are at the podium?

To help you answer these questions, here is a series of articles that chronicle the unique challenges that a testifying expert faces and lays out a road map for overcoming those challenges and becoming a truly effective expert witness.

"Supercalifragilisticexpialidocious." Too often, that is what jurors hear when experts speak to them in court. The nonsense word made popular by the Disney musical, Mary Poppins, "supercalifragilisticexpialidocious" certainly sounds impressive. But, like many arcane polysyllabic terms used by experts in various specialized fields, it serves only to obfuscate, not clarify, concepts for a jury—a jury composed of people who are likely far less educated than the expert witness herself.

The fact is, experts in a particular field are most comfortable speaking to those who have a similar base of knowledge. They speak at conferences to peers who share a common language and experience. They speak to students who attend multiple lectures, read the course book, and presumably have a particular interest in the material. And even when they discuss their work in more social settings, their milieu is typically more sophisticated and educated than the milieu of your typical juror. When an expert speaks about her field of expertise, it is typically the kind of thing that only those in the field will regularly understand.

That does not mean that the expert must dumb down her words in order to be effective. It means that for an expert to be effective, she must deconstruct her presentation so that every element and every term in her opinion testimony is explained and not assumed to be understood. And it also means that if the process of explaining every element and every term leads to an unwieldy, complex and dense presentation, maybe the presentation itself needs to be simplified.

Learning to speak to a different audience in a different way is not easy. It requires patience and practice, and it requires visuals, given that the majority of people are visual learners. But it also requires a keen awareness of whether you are losing your audience. The attorney who is asking you questions on direct examination should be asking you to speak to the jury, not to the lawyer. You are there as a teacher. If your students' eyes are glazed over or completely shut, you will see it, you will know it, and you will want to do something about it. Explaining information simply and without the jargon of your profession will go a long way towards keeping the jury engaged and helping your client achieve its goals. If you are too readily dismissed as the ivory-tower, detached, and inscrutable presenter, the one or two key points that your testimony is intended to convey will be lost in a sea of big words.

Our next topic will be about how and why an expert should use graphics in his presentation.

Font Matters - A Trial Graphics Consultant's Trick to Overcome Bias

By Ken Lopez Founder/CEO, A2L Consulting

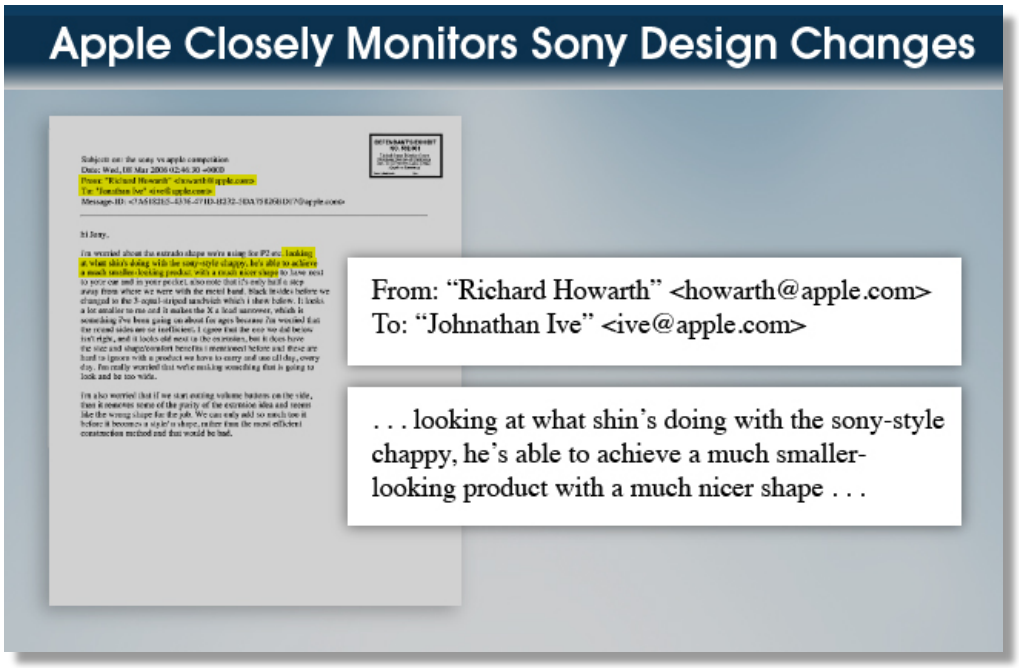
A fascinating new study in the field of social psychology indicates that the type font in which an argument is presented has an effect on how convincing it is. For trial graphics consultants and litigators alike, this is potentially very big news.

The study, published in the *Journal of Experimental Social Psychology*, tested the effectiveness of political arguments in convincing people to change their minds – and **also tested people's attitude to a hypothetical defendant in a mock trial**.

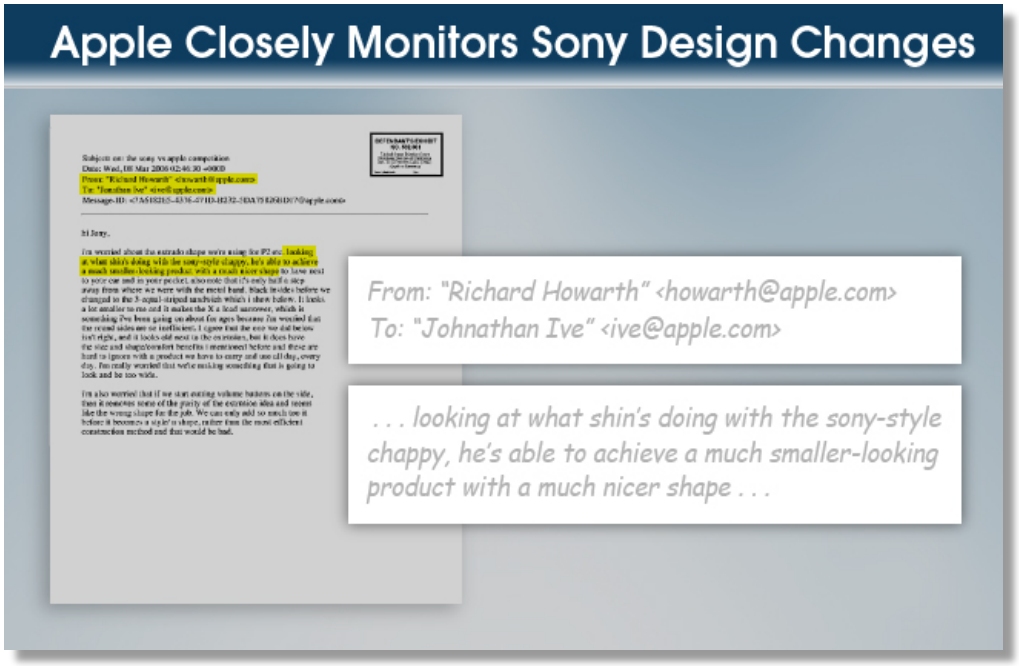
It is well known that people tend to disregard arguments that vary from their own longstanding views and to take note of arguments that support their views. This phenomenon is known as confirmation bias. For litigators and trial graphics consultants, we know this means judges and jurors will only closely pay attention long enough to confirm what they already believe - so, we need tactics to overcome this bias.

The idea behind such research was to present the arguments in hard-to-read type faces (e.g. light gray bold and italicized Haettenschwiler, and, the scorn of all design professionals, Comic Sans italicized) and to see whether confirmation bias was just as strong as when the arguments were presented in normal, easy-to-read type (Times New Roman).

Below are two sample trial graphics that compare two of these fonts. The first image uses easy-to-read Times New Roman for the callout.



And the second uses hard-to-read light gray Comic Sans italicized.



The result of the study was that confirmation bias was moderated by the use of the hard-to-read type. Normally, those who believed the defendant was guilty would stay with that view after reading the arguments pro and con, and the same would be true of those who thought the defendant was innocent. They wouldn't change their views.

But with the hard-to-read type, more people began to seriously consider the arguments against their initial position.

"We showed that if we can slow people down, if we can make them stop relying on their gut reaction -- that feeling that they already know what something says -- it can make them more moderate; it can have them start doubting their initial beliefs and start seeing the other

side of the argument a little bit more," said graduate student Ivan Hernandez, one of the leaders of the study.

What might this research mean for trial graphics consultants and litigators?

First, there's no question that confirmation bias exists among jurors. A juror who, because of the opening statement or for some other reason, approaches the trial evidence with a certain perception, is unlikely to change that perception. That is one of the trial lawyer's toughest challenges – to reach a juror (or judge) who starts out against his or her client and to get that juror to reconsider.

This study seems to say that hard-to-read typography will "disrupt" that bias and lessen its persistence, perhaps by making people "slow down." This may affect the preparation of litigation graphics by trial graphics consultants by forcing them to consider whether a bias against their clients exists, and if so, making exhibits more, not less, difficult to read. This might mean that text call-outs from scanned documents should not be retyped and that persuasive titling should be in harder to read fonts.

We will begin testing these findings with our mock juries, and if they prove successful, testing them at trial as well. Anything to make jurors (metaphorically) stand up and listen (that is within ethical and legal boundaries) is fair game for trial graphics consultants. We will keep you posted.

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10 Videos to Help Litigators Become Better at Storytelling

By Ken Lopez Founder/CEO, A2L Consulting

In the courtroom, the attorney who has the best chance of winning a case is generally the one who is the best storyteller. The trial lawyer who makes the audience care, who is believable, who most clearly explains the case, who develops compelling narrative and who communicates the facts in the most memorable way builds trust and credibility.

If you follow some basic storytelling and speech making principles as a litigator, you will obtain better courtroom results. Often these storytelling techniques are used in the opening statement.

But what's the right way to do this? In law school, some of us were taught to begin our openings in a manner that often started with the phrase, "This is a case about . . . ." In speech making courses, we are taught to begin with a clever quip or to state one's belief, as I did in the opening line of this article. Some experts in persuasive communications suggest organizing content in the order of Belief - Action – Benefit, while yet other experts say to use the format of as Why - How - What.

So, which is the best way to go? The simple answer is that the science on the topic is far from settled. In view of that, here are ten 10 videos that will help a litigator tell better stories in opening and become a better storyteller.

1. Simon Sinek is loved by marketers, raconteurs and persuasion experts for this simple and incredibly compelling TED Talk. It has changed the way I present information, whether in opening statement, a corporate speech or a blog article. For litigators, the lesson to follow is to consider his golden circle when preparing an opening.

   Organize your speech on the basis of *why, how, what*, not *what, how, why.* Don't say, for example, "I represent XYZ pharma company, a great company that is more than 100 years old. XYZ stands here accused of price-fixing. I am asking you today to not reward the plaintiffs because they are simply greedy and serial plaintiffs."

   Instead say, "The plaintiff is asking you to believe the unbelievable. To find for the plaintiff, you would have to buy the notion that a dozen highly paid executives from a dozen companies and their accountants and their lawyers and their bankers all engaged knowingly in a conspiracy in which they stood to gain very little. Today, I

am here representing XYZ pharma company, and I am asking you to stop plaintiffs from tarnishing our good name and put an end to plaintiff's greed."

2. A Chicago DUI attorney reminds us of the importance of telling a story that is different from your opponent. All too often I see accomplished defense counsel spending the majority of their case explaining why their opponent's case is wrong rather than telling a different story.

3. Harvard Law School's Steven Stark introduces his lecture on storytelling.

4. Ira Glass discusses the building blocks of storytelling. While he is discussing the elements of a journalistic style, his ideas are equally applicable to the courtroom.

5. A UNC Professor lectures on the topic of storytelling and provides three examples of effective storytelling.

6. In this Harvard Business Review interview, Peter Guber discusses the art of purposeful storytelling. He reminds us of the value of not reading from a script. Memorably, he reminds us that we are in the emotional transportation business.

7. In this helpful video, litigator Mitch Jackson reminds us of how to share stories with a jury.

8. Litigator Jeff Parsons discusses how to tell a story and one key to successful storytelling: knowing your audience.

9. Attorney Jeffrey Kroll moderates a panel on the Power of Persuasive Storytelling.

10. In 4 minutes, this TED Talk humorously but effectively shows the power of combining a visual presentation, here from an iPad, with an oral presentation.


Joe Sabia: The technology of storytelling

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Lists of Analogies, Metaphors and Idioms for Lawyers

By Ken Lopez Founder/CEO, A2L Consulting

The task of a trial lawyer is to convince a judge or jury to believe in the truth of a client's case. However, in many complex trials, the underlying facts are not as easily understood by the fact-finder as they would be in, say, a murder case or a traffic accident. A case, especially the type of litigation that we are involved in, often turns on complex issues of science, medicine, engineering, or some other subject that jurors and many judges are not well versed in.

How does a lawyer move from the arcane to the everyday and get jurors to follow along? Enter the metaphor, simile, or idiom.

We use these "figures of speech" all the time in conversation, often without realizing we are doing so. Whenever we say we need to "level the playing field" or "push the envelope" or "draw a line in the sand," we are using a metaphor. When we say something is "as dull as dishwater" or "as slow as molasses," we are using a simile. When we tell a friend to "break a leg" for good luck, we are using an idiom.

Briefly, a metaphor is a figure of speech that uses one thing to refer to another as a means of making a comparison between the two. A simile actually makes the comparison between two dissimilar things directly with the use of the word "like" or "as." An idiom is an expression that is more than the sum of its parts (think "raining cats and dogs" or "spill the beans"); it is usually based on a metaphor, though the metaphor may be a bit "buried" after centuries of use. These figures of speech have one thing in common: They are all used as analogies, to compare one thing to another.

In a trial, a lawyer can use a metaphor to show the jury how something works or how an event occurred, based on an analogy to another thing or process that jurors know well from their everyday lives. For example, in an antitrust case, when describing how a group of competitors squeezed another company out of the market by denying it the opportunity to buy a needed product, the lawyer might tell the jury that the conspirators choked the life out of the other company as if they had denied it the air it needed to breathe.

Ray Moses of the Center for Criminal Justice Advocacy, a Texas-based nonpartisan, grassroots training resource that helps lawyers become competent criminal trial practitioners, writes well about analogies and metaphors.

"Jurors remember facts and concepts that are familiar to them or that can be analogized to familiar subjects," Moses writes. "Those who aspire to be effective communicators and persuaders must learn to argue by analogy and to explain by stories. This is particularly true when we are seeking to clarify and tie together complex facts, abstract ideas, or legal concepts. If facts or legal issues become overcomplicated, jurors become overwhelmed. It is here that an appropriate analogy may assist the jury in comprehending the import of the evidence that has been dished out during testimony, assessing the credibility of the sources of evidence, and/or understanding the application of law to facts that are found to be true."

Below are a number of websites that are useful in finding the best analogy, metaphor, similie or idiom to use in your case:

- [pdf] A Downloadable Metaphor List
- A list of idioms
- A second list of idioms
- A third idiom list
- A list of similies
- Have another List? Please leave the link in the comments!!!

Below are some additional resources on the A2L Consulting site:

- Using Visual Metaphors and Analogies
- Teaching Science to a Jury
- Improving Storytelling Skills as a Lawyer

What others have had to say about this topic:

- [pdf] Why Analogies Often Fail
- Finding the right analogy for litigation
- Analogies and the Courtroom

10 Things Every Mock Jury Ever Has Said

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

For decades and in every part of the nation, mock jurors who are presented with various fact patterns and legal issues tend to have the same reactions. Some are helpful and others are harmful, depending on where you stand in the case. Knowing that these issues recur over and over can help to prevent those which are unfavorable to you:

1) Why did the plaintiff wait so long to sue?

While there may be good reason to delay filing suit, mock and actual jurors often use the delay between the alleged problem and the filing of a claim as a yardstick of its merit. The longer the gap, the less credible the claim. If counsel fails to address this issue, it tends to work against the plaintiff. It is especially damaging, for example, when someone claims an issue in the workplace, but waits until they are no longer employed. To many jurors, this signals that it was the termination, separation, or voluntary departure that was the issue, not the conduct, such as discrimination, that is the subject of the complaint.

2) That doesn't make sense.

Lawyers don't always put their case through the basic "smell test" or test of common sense from the layperson's perspective. They skip this step at their own peril, because those are the tools most accessible to lay jurors. While the theory of the case may work for a sophisticated user, it may go over other people's heads and not square with more fundamental questions. Jurors' questions may and often do fall outside the strict legal requirements of verdict issues to answer -- but if left unanswered for the jury, those gaps often harm the party that failed to close them. For example, motive may not be required legally, but is required for most cases psychologically. People want to know who gained and who lost? Why did they do what they did? Did they have alternatives? Why would someone act against their own interest? Why would a rich person nickel and dime?

3) How much should we give them?

Without the benefit of law school, or knowledge of the law, lay jurors often have no difficulty separating causation from damages. Instead, some permit other motives (e.g., sympathy), to drive a desire to award some money, whether or not liability has been proven. Therefore,

it is not uncommon for mock deliberations to begin not with a question of liability but with the question, "So, how much should we give [plaintiff]?" A mere reading of instructions is not the remedy. Instead, defense counsel needs to pay particular attention to this possibility and address it directly – not only legally (the law requires a finding of liability before considering damages) – but in terms of messages of why it is okay not to award damages, or not okay to award them from a practical perspective. For example, one might argue that awarding damages to the plaintiff means that the defendant did the wrong thing and the evidence shows that these people (defendants) did not do the wrong thing.

4) That may be true, but they didn't prove it.

Thankfully for some defendants, many jurors express their belief that the plaintiff is right, but accept that the plaintiff must prove its case and that the evidence does not amount to proof. Arming defense-oriented jurors to espouse this posture to defeat plaintiff-leaning jurors is always worthwhile, especially in cases that may engender sympathy for the plaintiff. "You may think the plaintiff is right or you may want the plaintiff to win, but the test is for the plaintiff to prove their case and if they do not do so, then you cannot find for the plaintiff." This line of thinking should also be incorporated into the voir dire where available, e.g., asking questions along the lines of "If plaintiff has to prove its case and does not prove its case with the evidence, can you assure me that you will not find for the plaintiff?"

5) Let's see what everyone wants to give and divide it.

In an attempt to fairly represent everyone's position about damages, the most commonly seen approach is the quotient verdict on damages, whereby the average of the individual awards is the final one. Research has shown that it is not a true mean, but rather skewed upward because those wishing to award/punish more strongly tend to stand their ground more fervently and exaggerate the amount more than the opposing camp. To prevent this, individual jurors should be encouraged to stand their ground and should be armed with messages in summation on how to deal with this possibility.

6) Do we have to be unanimous?

No matter how clear the jury instructions when unanimity is required, someone in the deliberations will question it. This typically occurs when the group is not in agreement and seeks an easier way out of resolving their differences. If unanimity helps your side, then additional attention needs to be paid in summation to what the jury is being asked to do. Summary litigation graphics that make it easy for everyone to have a mutual reference point can help disparate thinkers converge on the points made visually, and the presenter should incorporate language that leads them to unanimity, e.g., "As we can see in this summary of the evidence, no one should disagree that x, y, z." "Everyone on the jury saw and heard the testimony of X, which showed that …., so everyone has the evidence needed to come to a unanimous decision on that issue to decide Y."

7) Were those real attorneys or actors?

It is surprising, but consistent, that mock jurors assume the actual attorneys are actors, but that the jury consultant is an attorney.

8) Where is it in writing?

People who lack legal training or involvement in fields in which spoken agreements are common are extremely skeptical about any oral agreement, absent documentary support. In some places, cultures, or age groups, a handshake is a durable bond (e.g., the South and the older generation), but in others, it amounts to a mere he said/she said and means little to nothing. Overall, most jurors and mock jurors reject the concept that a verbal agreement is as binding as a written one, no matter what the law may say. Though a course of conduct may help reinforce that there was an agreement, it often requires some writing to be believed, so it is an uphill climb to prove a binding agreement in its absence.

9) We should give them something.

When a plaintiff is especially sympathetic (e.g., a baby or a child), a defendant is disliked or perceived to be rich (e.g., a pharmaceutical or insurance company), or the conduct is notably unlikable (alleged pollution), jurors often rig their decisions in order to award money to plaintiffs, stating their discomfort and reluctance to send plaintiff home empty-handed. This echoes the process of awarding damages stated earlier, whereby there is a disconnection between liability and damages. Part of overcoming this behavior entails arming jurors with a message of why it is not okay to penalize the defendant when wrongdoing is not found, or why it is okay not to reward plaintiff. Again, it is a subject that should be addressed in voir dire. "Although you may have sympathy for the plaintiff(s) in this case, do you have any doubt or discomfort awarding no money if the plaintiff does not prove his/her case?"

10) It may be legal, but it just isn't right.

For some mock and actual jurors, the moral barometer is sufficient to find liability, regardless of the legal standard. Counsel for the defense should make sure to address this possibility. While someone may not like the law, the law is what he or she is required to follow. The subject should also be included in voir dire, e.g., "If your personal feelings are different from the legal instructions, please explain if you would have any difficulty following only the law and the evidence to reach your decision." "If you have any religious or moral beliefs that might stand in the way of you making a decision only based on the law, and setting those aside, please let us know/raise your hand."

A2L CONSULTING

Construction Litigation Graphics: Construction Delay or Defect

By Ken Lopez Founder/CEO, A2L Consulting

Construction cases are among the most difficult for even the most experienced litigator to present to a jury.

As Gary Greenberg, a professional engineer and frequent expert witness in construction cases, has written on a construction blog, trials involving construction defects, failures to perform up to specifications, scheduling problems, and similar issues create many practical problems for trial lawyers.

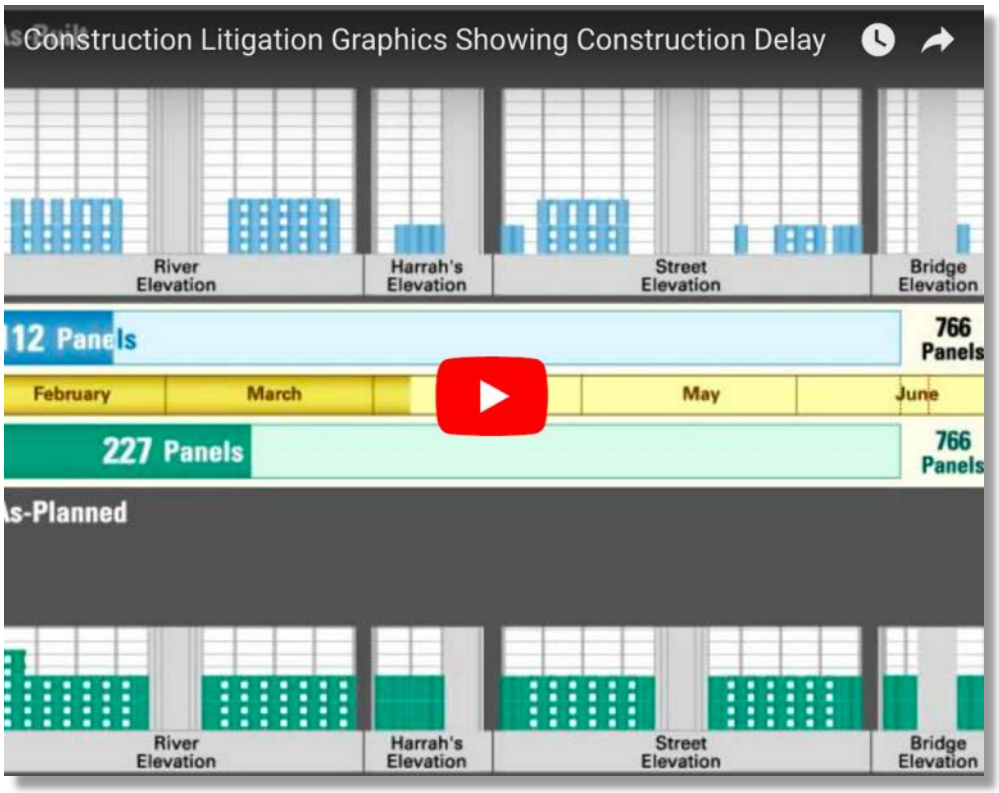
Greenberg notes that jurors often become lost in technical jargon, don't understand the sequence of activities required to complete a construction project or the relationships and responsibilities of the various parties, and fail to see why every major construction project is truly unique and cannot be compared to producing widgets in a factory.

Greenberg, who works for Arcadis, a well-known consulting firm, writes that in one case in which he testified, a jury found that a design professional violated the standard of care, caused a six-month delay to the opening of a new hospital wing, and was responsible for the need to rework various essential systems, but was assessed only one dollar in damages by the jury.

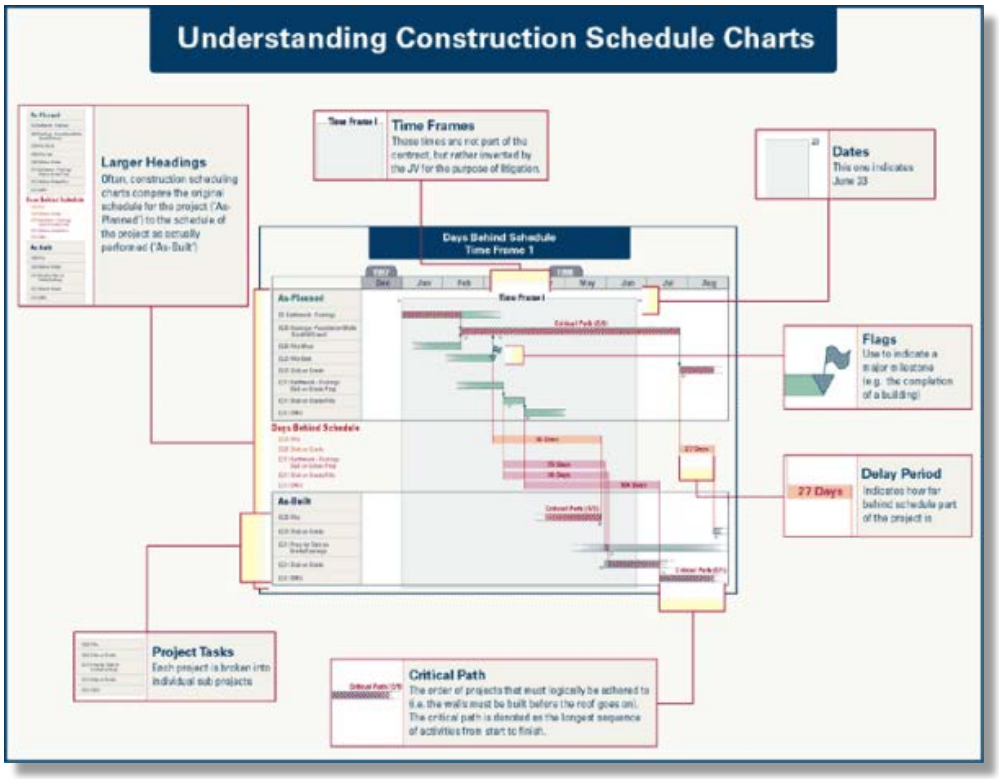
Clearly, many otherwise skillful attorneys have often failed to do a good job in persuading juries to award damages to their clients, even when there has been considerable proof of a significant loss.

We are aware of all these issues and problems, and we have prepared a number of trial presentations that have successfully set forth a complex set of facts in a way that is appealing and intuitive to jurors.

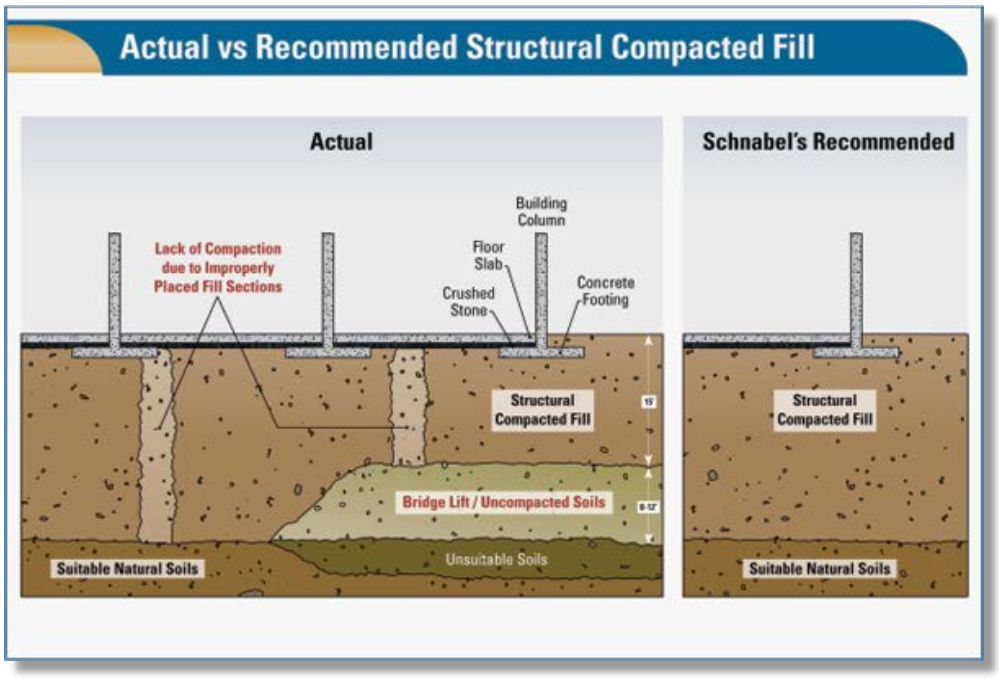
The "Construction Litigation Graphics Showing Construction Delay" animation covers months of construction in less than three minutes, using small boxes to represent panels needed in the project and to show how many areas were left unfilled during construction. This gives jurors a clear picture of the delay that occurred in this particular instance.



In a construction project, delays in one part of the project often have cascading effects and cause construction delay in the entire project. Jurors often have a hard time understanding the concept of a "critical path" – a sequence of activities that must be followed in order to get the project done. This idea is developed on a visual basis in the below overview trial exhibit, "Understanding Construction Schedule Charts." We use standard construction chart flags, colored bars, and other graphic devices to introduce the subject.



A typical construction defect case, involving an inadequate technique for soil compaction, is clearly explained in our trial graphic, "Actual vs. Recommended Structural Compacted Fill." Here we show graphically how a building footing was placed on top of unsuitable or uncompacted soils, potentially leading to serious damage.



These trial exhibits show the breadth of ways in which we can make complex construction concepts clearer to juries.

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Learn About Nuclear Power Plants Through Litigation Graphics

By Ken Lopez Founder/CEO, A2L Consulting

The world is watching in shock as a nuclear drama unfolds in northeastern Japan. In only a few days, most of us have somehow come to accept that there are degrees of a nuclear meltdown and that explosions at a nuclear power plant may not always point to a cataclysmic outcome. A week ago, those beliefs would have been unthinkable. Then, nuclear power was a binary condition: it was either safe, clean and efficient, or it was Chernobyl, with no in between.

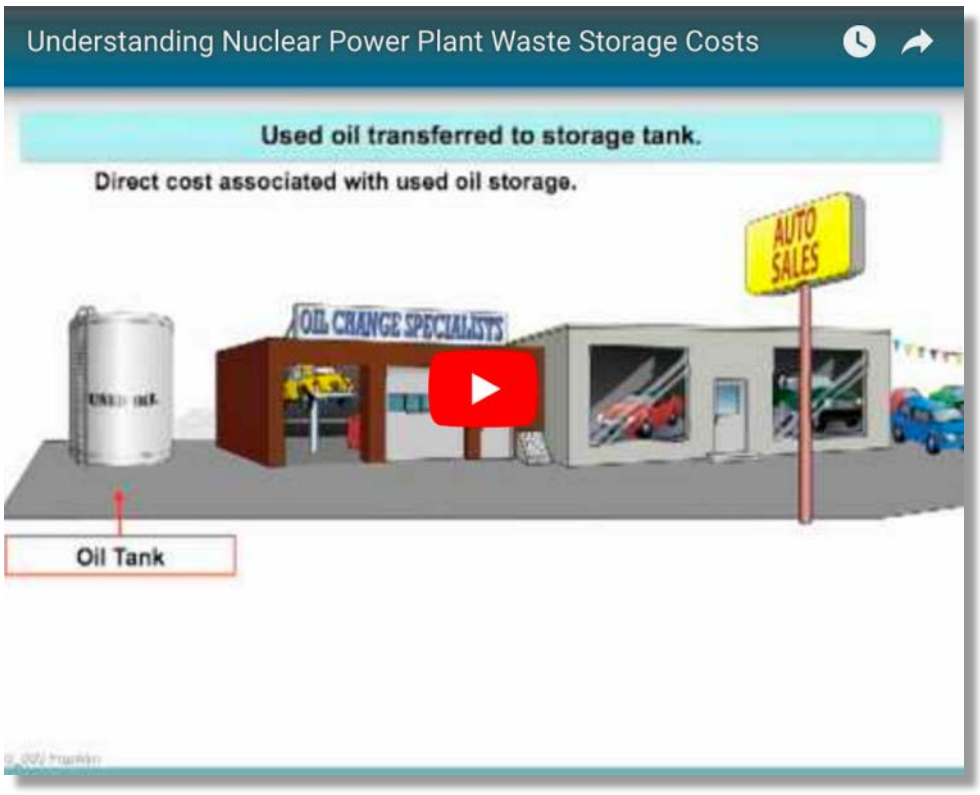
Even in the safest of times, generating power through nuclear energy presents major challenges. One of the key challenges is handling the inevitable nuclear waste, primarily spent nuclear fuel. After conducting extensive studies in the late 1970s and early 1980s, the U.S. Government thought it had found an answer. In 1983, the U.S. Government contracted with operators of nuclear power plants to begin picking up nuclear waste starting in 1998 and storing it in a central facility.

The U.S. Government had then agreed to become the primary shipping and storage mechanism for the nuclear power industry. The plan was to store nuclear waste at the now defunct Yucca Mountain storage facility located about 100 miles from Las Vegas. Ultimately, fears of geologic instability at the site combined with election-year politics doomed the project. So, instead of one underground facility located on the site where 904 atomic bomb tests have already been conducted, America is left with more than 100 storage sites around the country where nuclear waste is stored in pools or barrels.

When the U.S. Government breached their agreement to pick up the nuclear waste, operators of nuclear power plants sued. In this line of cases, the question is not whether a breach has occurred, but rather how much it will cost the facility to store the waste if that is even possible. Animators at Law has been involved in quite a number of these spent fuel cases typically heard in the U.S. Court of Federal Claims. Below are some litigation graphics from these cases.

The animation below shows the removal of a reactor pressure vessel. When a plant must be closed due to age or due to an inability to store more waste, the reactor pressure vessel may be removed. The boiling water reactors at Japan's Fukushima nuclear power plant use a similar reactor pressure vessel. Originally created in PowerPoint using dozens of technical illustrations played in succession, this litigation animation shows two methods of removing the reactor pressure vessel that contains the plant's nuclear core.

The trial exhibits below are shown as a screen capture of some PowerPoint litigation graphics. These trial exhibits analogize the problem an automobile service station would have if its used oil collection stopped to the spent nuclear fuel storage problem faced by nuclear power plant operators. Further, it helps make the case that costs do not stop with storage (as the U.S. Government contends) but also include indirect and overhead costs related to storage (e.g. security, accounting and management).



Animators at Law has helped its clients recover hundreds of millions of dollars in spent nuclear fuel litigation cases, and effective litigation graphics have been key to this success.

For more on how nuclear power works: http://en.wikipedia.org/wiki/Nuclear_Power

To learn more about the crisis in Japan or to make a donation: http://www.google.com/crisisresponse/japanquake2011.html

Power Plant Legal Animation and Effective Information Design

By Ken Lopez Founder/CEO, A2L Consulting

Part 1 of 2

In the 1990's the DOJ/EPA initiated litigation against a large number of coal-fired power plants based on the New Source Review (NSR) process under the Clean Air Act. Among other things, the NSR process requires operators of coal-fired power plants to seek EPA review and approval to make modifications to their plant that would increase emissions. Exceptions exist for routine maintenance at the plant and any emission increase must also be significant. Unfortunately, Congress neglected to define routine and significant.

Animators at Law has been called upon to create legal animations and other information design focused trial graphics in a number of these cases. These cases typically have billions of dollars at stake, and the more EPA-friendly the current presidential administration, the more cases get filed.

In this two-part post, I want to share portions of a 13-minute animation created for use in opening in one of these NSR bench trials. We worked on behalf of the power plant operator in this matter, and we faced a Government trial team who came armed with their own legal animation.

Throughout the history of NSR cases, the Government has taken the position that any big change at the plant requires EPA approval. This includes large parts that are changed routinely. It turns out, however, that most parts in a plant this size are large, and the government argues that by maintaining the plant, one is extending its operating life thus increasing emissions.

The Government opened its case with an animation that compared the size of parts changed during routine maintenance to elephants, houses and semi-trucks. Our challenge was to make the point that while large parts were changed, they are relatively small in the context of such a large facility.

We knew two things that were helpful in this bench trial. First, the government was comparing our parts to semi-trucks. Second, the judge was known to visit the old Busch Stadium where the St. Louis Cardinals played and where semi-trucks were often parked outside.

The message delivered by the clip below in opening was: yes, we changed big parts, but everything at our plant is big, thus we must ask, big compared to what? Is a semi-truck really that big compared to not one Busch Stadium but twenty? I think this legal animation reflects a good use of information design to convey scale when billions of dollars where at stake.


Power Plant Legal Animation Using Effective Information Des...

A2L CONSULTING

Power Plant Legal Animations and Effective Information Design (pt. 2)

By Ken Lopez Founder/CEO, A2L Consulting

Part 2 of 2

I will begin by reiterating key elements of the first post in this this two part series.

More than 20 years ago, the Justice Department began filing lawsuits against a large number of coal fired power plants based on a Clean Air Act provision called New Source Review (NSR). The NSR process calls on power plant operators to seek EPA review and approval before making modifications to their power plant that would significantly increase emissions. An exception exists routine maintenance. Since Congress neglected to define routine and significant, litigation has followed over these definitions.

Animators at Law has worked on many of these cases and created trial graphics and legal animations. I want to share portions of a 13-minute animation used in the opening of an NSR bench trial in 2003. We worked on behalf of the power plant owner in this matter. We faced multiple challenges such as:

1. conveying the scale of the plant;
2. explaining the plant's operation;
3. showing how the projects in question were not large;
4. showing how these projects were in fact routine maintenance;
5. showing how none of the projects increased emissions.

After the Justice Department opened its case with an animation that compared the size of parts changed during routine maintenance to elephants, houses and semi-trucks, we had to make the point that while large parts were changed, they are relatively small in the context of such a large facility. With billions of dollars at stake, Animators at Law prepared a large number of trial boards and legal animations for the case.

In part one of this post, I shared how Animators at Law compared the size of the facility to Busch Stadium using legal animations. Below is an example of how we combined technical illustration with a legal animation overlay to provide an overview of the plant, to explain how the plant worked and to again emphasize scale.

Below is a trial exhibit used in an NSR trial that effectively compared the routine maintenance of the bridge to the routine maintenance at a coal fired power plant. We think it was a very effective analogy and a leading environmental publication agreed and remarked on its use.

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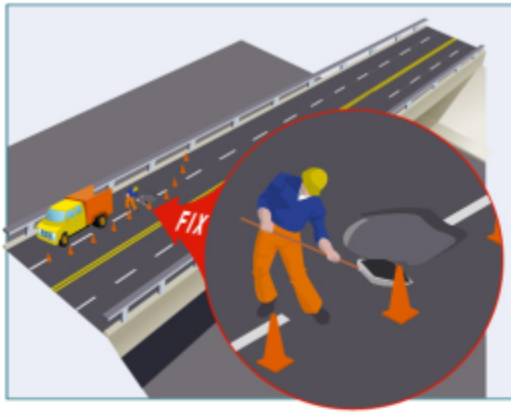
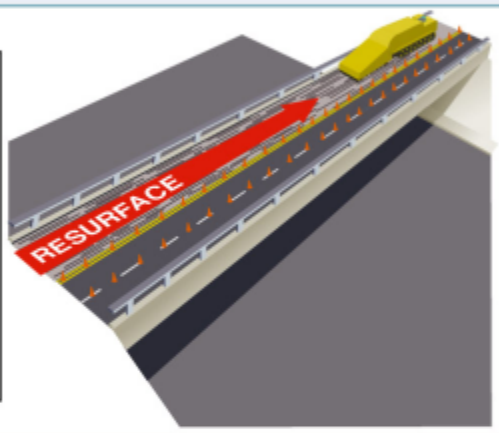
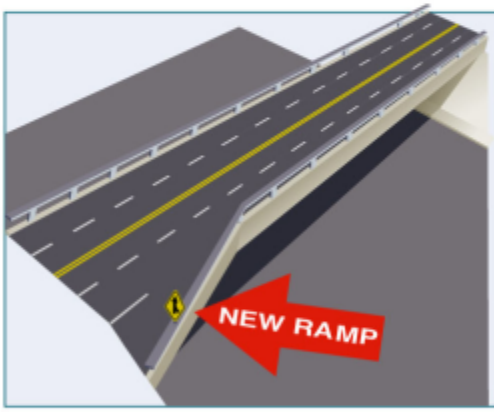
Maintenance Repair and Replacement Analogy



Project:
Fixing potholes
Characterization:
Routine maintenance

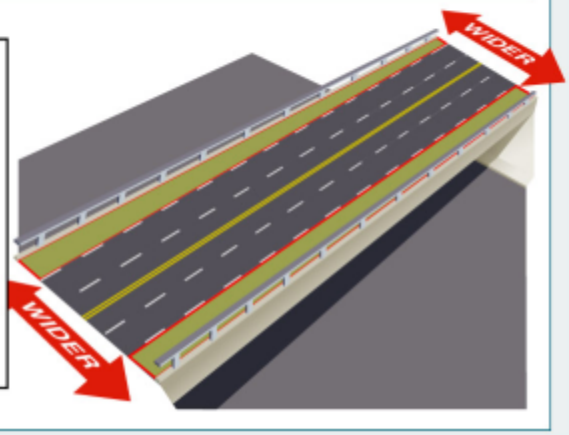
Project:
Resurfacing Road Bed
Characterization:
Routine repair and replacement



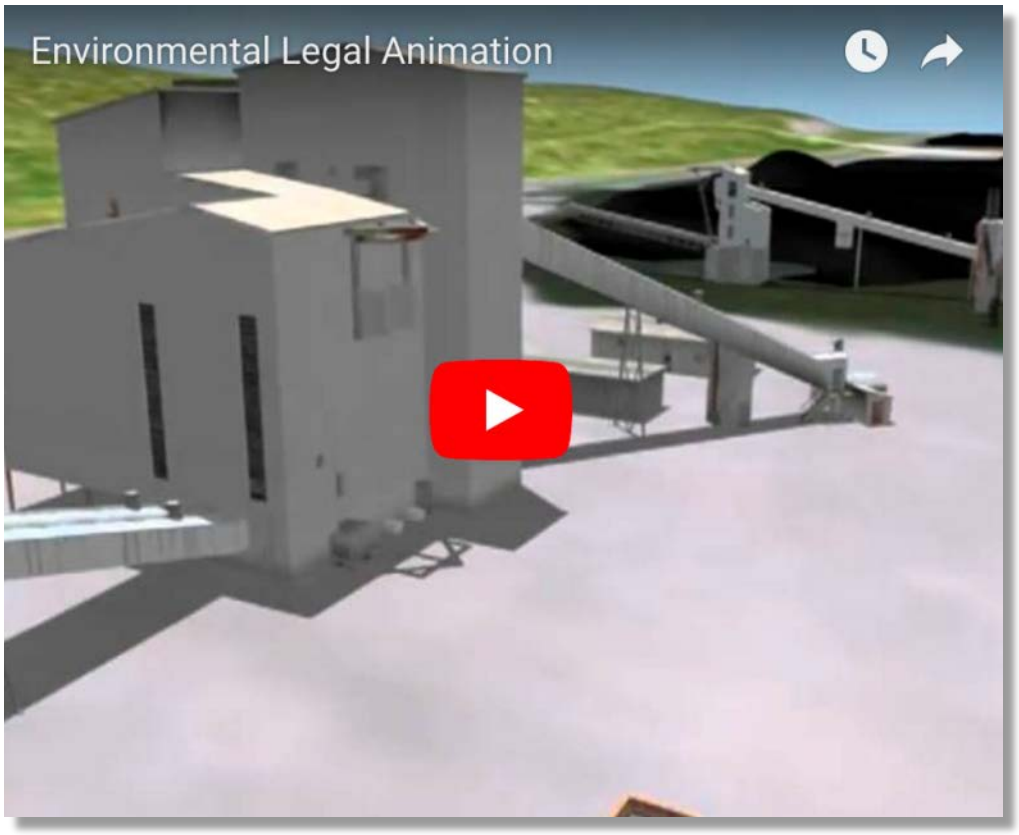


Project:
Adding On-Ramp
Characterization:
Physical Change
-Determine Increase

Project:
Adding Lanes
Characterization:
Physical Change
-Increase Anticipated



Below is another legal animation showing some highly skilled 3-D modeling and animation used in another New Source Review Case. The 3-D model was used in other legal animations and graphics to explain the unique geography of the plant.



The Key Elements of a Good Narrative – at Trial or Anywhere Else

By Tony Klapper, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

Here in these pages, we often talk about storytelling as a fundamental principle of successful trial work. But what are the elements of a good story?

A good story is one that will be retold – it's one that begs to be retold. Just as our ancestors told and retold the fundamental stories of their nations by the fireside, a great story is one that people today will repeat at the watercooler, in the bar, in the line at the grocery, or anywhere that there's time for a narrative. A compelling movie (think of the Pixar films or a Steven Spielberg production) or a great epic (as far back as the Iliad or the Odyssey) or even an account of business success (think Steve Jobs, Bill Gates or Thomas Edison) will have the essential elements of a story. And as trial lawyers, we want jurors to pick up the story that we tell, and retell it in the jury room during deliberations.

Each of these great stories has a few things in common: a distinct source of conflict or tension, compelling character development, and a message that is conveyed, either directly or subtly, that conforms with the values of the people who are hearing the story.

A legal dispute in the courtroom also takes advantage of those essential narrative elements – if the trial lawyer is aware of them and uses them appropriately. A trial lawyer can and should tell the story of the case through the perspective of a real human being – a quality control supervisor at a factory, an inventor who was cheated out of the fruits of his creativity, or a woman who applied on her late husband's life insurance policy and was denied. A company as well could be portrayed as having a particular orientation or purpose: Our company has persevered for a century because it treats people fairly, or our company is an innovator that is dedicated to making people's lives better and more enjoyable.

The story told at trial, through witnesses, documents, visuals and all the other elements, should have a plot with conflict and tension; should have distinct characters; and should also have a message that's easy to remember and is consistent with the community's values. The message could be that cheaters never win, or that honesty and hard work are rewarded, or that a deal is a deal and must be adhered to.

If you don't frame the facts of the case into a story that is easy for jurors to create in their minds, easy to remember and easy to retell, your opponent will. And that's at least half the battle right there. If jurors go into deliberations telling the story your way, your chances of winning are quite good. It's all about the narrative.

Still Think Persuasion is About Talking While Showing Bullet Points?

By Ken Lopez Founder/CEO, A2L Consulting

We recently asked three top trial lawyers about what makes them so successful in the courtroom. They are quite a successful trio. One of them is Bobby Burchfield of King & Spalding, whose bio notes, "Mr. Burchfield has never lost a jury trial." That's an especially impressive track record as he's been in practice more than 30 years.

So what does winning take? Well, as we saw in previous clips from the same interviews, these trial lawyers believe, as we do, that storytelling is at the heart of building a successful case. Furthermore, as all demonstrative evidence consultants and most trial lawyers will tell you, combining persuasive visual evidence with persuasive oral communications produces a truly synergistic persuasive effect. Persuasion is a rare circumstance where 1+1 really does equal more than 2.

Of course, as we have long counseled, just because something is projected on a screen does not make it helpful at a trial. In many cases, as in the case of lawyers who use bullet points to summarize their arguments on screen, some visuals actually make you less persuasive. If yours looks like the image here, then you are certainly doing more damage than good.

For more on why that's true, please see our articles 12 Reasons Bullet Points Are Bad (in Trial Graphics or Anywhere), The 12 Worst PowerPoint Mistakes Litigators Make, and Why Reading Your Litigation PowerPoint Slides Hurts Jurors.

In this three-minute clip, we hear from the best of the best -- Bobby Burchfield of King & Spalding, Rob Cary of Williams & Connolly, and Patrick Coyne of Finnegan. And we certainly don't hear them talking about the power of bullet pointed lists.

Instead, you hear these trial-tested litigation experts talking about the use of animation, the value of timelines, and the importance of showing real evidence to ground your argument in credibility.

Burchfield said, "People learn both by seeing and by hearing, and if you can combine those two in one presentation, the more sensory perceptions you combine, the better off you are. Timelines are powerful persuasive tools. A timeline shows from left to right who did what and to whom. Sometimes you show in a timeline above the line what your client knew and below the line what your client didn't know. It can be a powerful story to show contrasting events that were going on simultaneously. This helps the jury put the entire case into context."

Cary noted, "When a jury can see something that visually displays the evidence, that cloaks you in credibility. That's critical in earning their trust."

Coyne pointed out, "People are predominantly visual. Most people need an image. They need it to tie things together. Ken [Lopez] and his people did a fantastic animation for us. The judge turned to the other side and said, 'If I credit this animation, you lose. Do you know that?' It was a very compelling animation. That's what I mean by appealing to the judge by giving him a visual that explains what you're trying to say."

Watching lawyers like these work is a pleasure and their teams score high on our assessment of what makes a great trial team.

Are You Smarter Than a Soap Opera Writer?

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

Believe it or not, soap opera writers are better at storytelling than some litigators. Why? Not because of their subject matter or their wisdom, but because they know how to activate more of the brain than some lawyers. They put events into a story context, and they know how to use language to activate the brain better. If they can do it, so can you. Why is that important?

Raymond Mar, a psychologist at York University in Canada, performed an analysis of 86 brain imaging studies, published last year in the Annual Review of Psychology, and concluded that there was substantial overlap in the brain networks used to understand stories and the networks used to navigate interactions with other individuals — in particular, interactions in which we're trying to figure out the thoughts and feelings of others. Scientists call this capacity of the brain to construct a map of other people's intentions "theory of mind." **Narratives offer a unique opportunity to engage this capacity, as we identify with characters' longings and frustrations, guess at their hidden motives and track their encounters with friends and enemies, neighbors and lovers**. [1]

But where is the "story" in a complex patent?

Where's the emotion in tedious insurance language?

The answer is that if people are involved, there is *always* a story, including emotion, social interaction, sensory experiences and more – but they are usually left on the cutting-room floor in favor of dry facts and figures. This actually turns off the brain, rather than bringing it into action. Reciting facts using only factual words is like wrapping a gift of cardboard in a brown paper bag. Not very exciting or memorable, is it?

We understand why some litigators resist simplifying and looking for the "story." For one, they know too much and can't unlearn what they know in order to simplify. They are also concerned about oversimplifying to the point of inaccuracy. In a jury trial, they also must present to a diverse audience with conflicting needs: the judge and the record on one side and the jury on the other. There are also experts to satisfy who earn their keep by the details they can dispute and the hairs they can split – the more, the better. The less understandable their charts, the more diligence they may think they show, bolstering their expertise and justifying their high rate of pay. Finally, some trial lawyers may think that telling just the facts -- rather than telling the story -- is more powerful and credible.

Unfortunately, science disagrees.

Brain scans have revealed that just the facts, absent sensory language, only stimulate the language areas of the brain, and that hackneyed metaphors are processed as mere words by the frontal cortex.

Employing stories that incorporate metaphors and sensory experience activates the whole brain. It actually stimulates the same areas of the brains of the audience as the original action does (e.g., the olfactory cortex when hearing descriptive words involving smell such as lavender and cinnamon or the motor cortex when hearing about movement). Of course the facts matter, but the adjectives, the motives, the cause and effect, and the reasons jurors should feel, remember and care, matter too.

There's always a story, but if you don't tell yours, jurors will use their own.

Humans automatically make stories out of virtually all life events in order to make sense of them. Random events are given meaning through personal interpretation because we crave an explanation for the cause and effect of life. It gives us a sense of control, even if it's false. If you don't provide your version of the story, jurors will create their own narrative anyway, so it's better for you to exercise more control over the story than to leave it to amateurs and detractors.

How can you make the case into a story? It is easier than you may think. For one, make it priority one. We often find that lawyers overlook this task, or worse, resist it. Instead of merely tracking the facts, ask questions in terms of human behavior, not just the law or the chronology, such as:

"What *really* happened here on both sides?"

"Why did they do that?"

"What were they thinking and feeling?"

"What did they know or not?"

"What were their options and choices?"

"What were they each trying to accomplish?"

"Why did they succeed or fail?"

"How did that affect everyone involved?"

"Who tried to correct it? Did it work? Why or why not?"

"How did the story end? Who won or lost?"

"What caused the problem to become a lawsuit?"

"What would make it right?"

"Why is that fair?"

"Why should anyone *care* about what happened?"

But this is just the beginning of the process, not the end. After you've figured out "what *really* happened," you need to breathe life into it. You need to put jurors in the shoes of your client – from the beginning -- so they can experience what your client did, understand the client's dilemmas, feel the client's frustrations, and align with the client's decisions – in human terms, not legal ones. And you need to tell it using the art and the science of effective description and compelling storytelling.

1. The simpler the story, the better.
2. The simpler the language, the better.
3. Use metaphors involving sensory descriptions (e.g., prickly personality, velvet voice, leathery hands, etc.).
4. Reduce the facts to a story connecting to jurors' real-life experiences, feelings and thoughts. Make it relate to what jurors may have experienced.
5. Assume jurors have no context for the facts unless you provide one.
6. Remember how long it took you to wrap your head around the case, whereas jurors have only a few days, so don't start in the middle or the end.
7. Use word pictures, including visual and sensory details of important moments, and have witnesses do the same, for example:

Q: Why did that email in particular stand out to you?

COMPARE:

A: "Because the subject was in all caps."

TO:

A: "Because when that email came in, it was very early in the morning. I was groggy and drinking my second cup of black coffee, while I was pressing the down arrow key on my computer to quickly see my new emails. That email stood out when I was scrolling through my inbox because the subject was the only one all in capital letters, so it caught my attention."

8. After jury selection, when you know more about jurors' individual backgrounds, refine your story to connect better with them.

Don't only use your brain, but jurors' brains too. Activate their senses, their feelings, their thoughts, and their social experience. Take the extra step, while sipping on warm green tea or frothy cappuccino, to choose more descriptive words. Wear a comfy, plush robe or close your eyes in the breeze to figure out the story, but do it.

[1] Your Brain on Fiction by Annie Murphy Paul, Published: March 17, 2012 in the NY Times. http://www.nytimes.com/2012/03/18/opinion/sunday/the-neuroscience-of-your-brain-on-fiction.html?pagewanted=all&_r=0

Using Litigation Graphics in Bench Trials: How Different Is It From Jury Trials?

By Tony Klapper, Esq., (Former) Managing Director, Litigation Consulting, A2L Consulting

We've spoken here more than once about the fact that jurors, unlike most attorneys, tend to be visual learners who like to be shown, not told. The best way to show them what they need to know, as we have said, is through litigation graphics. Science has also taught us that the best way to keep a jury's attention is by telling a story in the courtroom. These insights obviously have major implications for how trial lawyers should use the arts of persuasion in a jury trial.

What about a bench trial or an arbitration? Here, the decisionmaker is trained as an attorney. Do we toss out all that we know about jury trials and proceed in an entirely different manner?

Not at all. First, narratives are just as important in a trial before a judge as they are in a jury trial. Judges are human beings, and like all human beings, they have minds that search constantly for an organizing principle, a way to tame the vast river of information that flows to them in a trial. A narrative is the best way for them to do that. Even a brilliant judge who happens to be an aural learner, not a visual learner, needs some way to organize data. That's where your narrative comes in. ("First this happened, then this happened, then something else happened.") Not only does story-telling make the trial lawyer's job's easier by making his or her case easy to understand; it also makes the case easier to remember.

After all, judges are not computers. They come to any case with their human values, perspectives and predispositions. A narrative will help them connect the case with these values and will help them build a story in their mind, based on those values and on the information they receive at the trial.

The same is true with litigation graphics. Even someone who learns predominantly through aural or kinesthetic means can still find a chart or a timeline interesting and helpful as a way of organizing information. For example, in *Markman* hearings, which occur exclusively before judges, patent lawyers almost invariably present diagrams of the patent figure or blow-ups of the patent language. In hearings like these and in bench trials, a trial lawyer may sometimes need fewer litigation graphics, but that doesn't mean that the lawyer shouldn't use any at all.

Just as top trial firms often use mock juries to test their case on before the actual trial, they can use "mock judges" in the case of a bench trial. If their budget permits, they could find a retired judge, possibly someone who knows the judge in the case, and present their evidence before him or her.

They can ask the judge what types of evidence and themes were most convincing, and which demonstratives did or did not work. It's another good practice in presenting a case to a judge who is the decisionmaker.

5 Questions to Ask in Voir Dire . . . Always

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

The meaning of the term "*voir dire*" translated literally, means "See say," but figuratively means "to speak the truth." In common practice, "*voir dire*" describes the process of questioning potential jurors, by judge or litigator, in advance of a jury trial to uncover conflicts, biases or other reasons to dismiss the potential juror.

The stated goal of *voir dire* is to impanel an impartial jury. However, in the majority of courts that allow *voir dire* questions by counsel, the goal of each side of the case is to get the best jury for their client possible through a process of revealing and eliminating those who are most adverse. Through a combination of dismissals for cause and peremptory challenges, potential jurors are removed from the pool of jurors. As an example of the traditional process, see this description of the *voir dire* process written for those called for jury duty in the Southern District of New York.

In cases where the sides agree and the judge permits, jury selection often begins with a series of written questions agreed to by all parties. Ideally, mock jury pre-trial research is conducted to identify the most important and revealing questions to include based on the types of jurors who tend to look most unfavorably on the client's case. In court, once prospective jurors' information and responses are received, there is often very limited time in which to conduct additional fact-finding research and evaluate the responses.

Many litigators mistakenly believe that *voir dire* is conducted only by judges in federal court. This is simply not true. I have conducted mock trials focused on *voir dire* and *voir dire* consulting in a majority of states in the U.S. On many occasions, this was done in preparation for a federal trial. This recent ABA article does a good job of describing the state of *voir dire* in the federal courts. Even in those courts where the judge or the clerk conducts the *voir dire*, many accept proposed questions from counsel. The key is to know which, few questions are most productive.

Since the *voir dire* process can help determine the outcome of a case, it is essential to use it to your advantage. With the foregoing in mind, here are five questions I would always suggest asking in *voir dire*, whether in state court, in federal court, on a jury questionnaire, or among the questions presented to your judge to ask.

1. **If you were my client, would you be completely comfortable having you as a juror on this case?**

2. **Can you think of anything in your own life that reminds you of this case? What and how?**

3. **Is there anything that you have seen or heard that would make it hard for you to guarantee to judge my client the same as the other side?**

4. **Is there anything you'd prefer to discuss in private?**

5. **Is there anything we haven't asked you that you think we should know?**

Each of these questions is designed in one way or another to uncover biases that might hurt your client. Each is designed to provoke deeper thinking and candid responses, rather than meaningless knee-jerk ones which are politically correct, but not helpful in decision making during jury selection. Each is open ended and designed to avoid a simple yes or no answer.

10 Ways to Spot Your Jury Foreman

By Laurie R. Kuslansky, Ph.D., Managing Director, Jury Consulting, A2L Consulting

While someone ends up sitting in the first seat on a jury and is presumed or named foreperson by the Court, they may very well be one *in name only*. In fact, someone else may function as the foreperson.

Guess Who?

Who do you think is the most likely foreperson? Do you think someone old enough to be her parent will defer to a 20-something pixie in seat 1? Will an accountant in seat 6 rely on the homemaker foreperson for damages decisions? Is it the butcher, the baker, or the candlestick-maker? Unlikely.

Is there a pattern?

Yes. Surprise, surprise! The power pattern in the jury room mirrors real life outside court:

1. **Male,**[1] despite the proportion of males to females in a venue's population.
2. **White**[2]
3. **Higher socio-economic status** [3]
4. **Better educated** [4] (such as a graduate degree)
5. **Past juror**[5]
6. **Age 45 to 65**[6] (possibly related to prior jury service)
7. **Act like leaders,**[7] such as:
    - **Sit at the head** of the table[8]
    - **First to speak**[9]
    - **First to *mention* needing to choose a foreperson** [10]
    - **Participate and speak more often** than other jurors [11]
8. **Extroverted** [12] (although extroverts are more likely to be struck during jury selection)[13]
9. **Higher levels of political self-efficacy** [14]
    - **More regular voting records of participating in past elections**.[15]

- **More experience discussing politics** in conversation[16]

10. **Statistics background** (3:1 more likely to be foreperson than someone without it!)[17]

A perceived **"expert"**

Alternatively, someone on the jury who is perceived by other jurors to have expertise seen as relevant to the case may emerge as the foreperson. The funniest part of perceived expertise is how tenuous it can be. For example, in a high-tech patent case, an entry-level, part-time mechanic may be the closest available "expert" on the panel. Someone married to a lawyer may be the "expert" on a legal malpractice case. It is often a matter of "a little knowledge is dangerous."

But -- Haven't Things *Changed* Since the Women's Movement?

Uh… not so much on juries. As recently as 2007,[18] 71%-78% of forepersons were *male*, echoed in 2010.[19] In addition, how males and females act as foreperson also differs, in the off-chance that a female is elected (rather than typically volunteers) and actually functions as foreperson. Female forepersons tend to encourage others to *share their opinions* to build consensus and exert *less influence* on others' opinions, whereas male jurors tend to *interrupt, hold the floor*, and make *more declarative statements*.[20] Result? Male-led juries tend to reach verdicts quicker.

There is no guarantee of who will be the leader on your jury, but pay special attention in jury selection to leadership qualities and the traits noted here, because they will likely have significant influence if they end up on your jury. They may end up as juror #1 or enemy #1 if they become the foreperson.

[1] Boster, et al. (1991). An information-processing model of jury decision making. Small Group Research, 18, 524-547. Dillehay, R. C., et al. (1985). Juror experience and jury verdicts. Law and Human Behavior, 9, 179-191. Hastie, R., et al. 1998), (1998). A study of juror and jury judgments in civil cases: Deciding liability for punitive damages. Law and Human Behavior, 22, 287-314. Sannito, T.,et al. (1982, Spring). Jury study results: The factors at work. Trial Diplomacy J., 6-11.

[2] Devine, D. J., et al. (2001). Jury decision making: 45 years of empirical research on deliberating groups. Psych., Public Policy, and Law, 7, 622-727.

[3]Baldwin, J., et al. (1979). Trial by jury: Some empirical evidence on contested criminal cases in England. Law and Society Review, 13, 861-890. Strodtbeck, F. L., et al. (1985). Becoming first among equals: Moral considerations in jury foreman selection. J. of Pers. and Soc. Psych., 49, 927-936.

[4] Diamond, S. S., et al. (1992). Blindfolding the jury to verdict consequences: Damages,experts, and the civil jury. Law & Soc. Review,26 , 513–564. Foley, L. A., et al. (1997). The influence of forepersons and nonforepersons on mock jury decisions. Am. J. of Forensic Psych., 15, 5-17. Hastie, R., et al. (2002). Inside the jury. Cambridge, MA: Harvard Univ. Press. Hastie, R., et al. (1998). A study of juror and jury judgments in civil cases: Deciding liability for punitive damages. Law and Human Behavior, 22, 287-314.

[5]Cowan, C. L., et al. (1984). The effects of death qualification on jurors' predisposition to convict and on the quality of deliberation. Law and Human Behavior, 8, 53-79. Dillehay, et al., 1985, ibid. Kerr, N. L., et al. (1982). independence of multiple verdicts by jurors and juries. J. of Applied Social Psych., 12, 12-29.

[6]Ellison, L., et al. (2010). Getting to (not) guilty: Examining jurors' deliberative processes in, and beyond, the context of a mock rape trial. Legal Studies, 30(1), 74-97.

[7] Sanders, L. M. (1997). Against deliberation. Political Theory, 25, 347-376.

[8] Cowan at al., ibid. Diamond & Casper, 1992, ibid.

[9] Diamond & Casper, 1992, ibid. Sannito & Arnolds, 1982, ibid.

[10] Boster et al., 1991, ibid. Strodtbeck & Lipiniski, 1985, ibid.

[11] Hastie, R., et al, (1983). Inside the Jury. Cambridge, MA: Harvard Univ. Press. Velasco, P. D. P. (1995). The influence of size and decision rule in jury decision-making. In G. Davies,S. et al. (Eds.),Psychology, law, and criminal justice: International developments in research and practice (pp. 344–348). Berlin, Germany: de Gruyter.

[12] Clark, J., et al. (2007). Five factor model personality traits, jury selection, and case outcomes in criminal and civil cases. Crim. Justice and Behavior, 34(5), 641-660.

[13] Wigley, C. J. III. (2000). Verbal aggressiveness and communicator style characteristics of summoned jurors as predictors of actual jury selection. Communication Abstracts, 23(2).

[14] First among Strangers: The Selection of Forepersons and Their Experience as Leaders in Civil and Criminal Juries." Co-authored with Laura Black and John Gastil. INGRoup: Interdisciplinary Network for Group Research, Kansas City, MI, July 2008.

[15] Ibid

[16] Ibid

[17] Diamond, 1992, ibid.

[18] Devine, D. J., et al. (2007). Deliberation quality: A preliminary examination in criminal juries. J. of Empirical Legal Studies, 4, 273-303.

[19] Ellison, L., et al. (2010), ibid.

[20] Tannen, D. (1994). Gender and Discourse. New York, N.Y.: Oxford U. Press.

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How to Pick a Litigation Consulting Firm (Jury, Graphics or Tech)

By Nina Doherty EO, A2L Consulting

A2L has been around since 1995 and can work on hundreds or even thousands of cases in a given year. With that experience, we have seen a great many law firms and in-house departments go through the process of finding a litigation consulting firm for litigation services such as trial consulting, litigation graphics and trial technician support.

Here is our suggested approach to an effective vetting process for a law firm considering litigation consulting services. As you will see, we think the process works best when it is structured and when each potential vendor is asked to provide the same information. Always make sure that you cover the following questions in interviewing the potential provider:

Experience and Process. How long has the firm been in the litigation consulting business – specifically, how long has it been doing litigation graphics, trial technology and jury research? Does the firm have a project management process? Will the law firm need to deal with multiple support groups, or will there be a single point of contact for the project? Does the firm have lawyers and Ph.D. consultants on staff, or is it one that focuses mostly on art or courtroom technology?

Capabilities and Work Product. What are some good examples of the firm's litigation graphics work, its ability to create a hyperlinked e-brief, and its juror survey and jury consulting approach? Has the firm supported cases of a similar size to the one that is now before you? Has the firm received any industry awards or won similar accolades for its work? Can the firm provide on-site graphics support, in addition to trial technology?

Systems and Infrastructure. Does the firm require that you use their proprietary trial presentation software or are they able to work with Trial Director and Sanction? Do they have enough people to get the job done in a timely and effective manner? On average, how many cases do their trial technicians support at any given time? What method does the firm use to create demonstrative deliverables: Can the lawyers modify the text created by the vendor in the PowerPoint slides? Can the firm produce large boards and in what time frame? Can they make their e-briefs iPad accessible? What processes do they support for file delivery and exchange – email only, web-based, or ftp transfer?

Pricing Options. Does the firm have flexible pricing arrangements? Will it consider a fixed fee? How does the firm work to manage or avoid cost overruns? Can the firm estimate expenses in advance to develop a budget, and stick to that budget?

A law firm that consistently uses this approach is likely to find a litigation consulting firm that it will be pleased with. We sincerely wish you the best in your search!

Explaining the Value of Litigation Consulting to In-House Counsel

By Nina Doherty EO, A2L Consulting

In an era in which clients are scrutinizing their legal bills and negotiating discounts and alternative fee arrangements with their law firms, it is no surprise that they are also looking closely at the bottom line when it comes to litigation support costs. Of course, that includes the costs of litigation graphics, trial technology, and the other litigation consulting services that we provide. In the typical piece of litigation, most of those costs are incurred in the months and weeks just before trial – and they can seem expensive to a client who is not accustomed to dealing with these services.

At A2L, our invoice pales in comparison with that of the law firm(s) that we work with. (We usually estimate that it will run between half of 1 percent of the legal fees at the low end, and 5 percent at the high end.) Still, the litigator who is the client's chief contact in the law firm must often justify the value of litigation consulting services to a client who may not be familiar with the requirements of modern litigation.

Here are some points that a trial lawyer can make to a client in a high-stakes case that shows the value of our work.

Litigation Graphics: For our **litigation graphics** services, it is well documented that 60 percent of human beings, and thus 60 percent of jurors, are visual learners. A compelling and clear visual presentation can help ensure that the client's case is easily conveyed and understood. In order to create such a presentation, a litigation consulting firm requires a specialized graphic artist's skills. This is not a matter of "dumbing down" the presentation; quite the contrary, it is difficult and challenging to convey complex ideas to jurors.

In addition, when we use a mix of mediums such as presentation boards, PowerPoint, 3-D scale models, document call-outs and highlighting, we minimize jurors' boredom and keep them interested in the client's case. Finally, when we create graphics for mock juryexercises, we are testing case themes and helping the client decide which ones will be presented at trial.

Trial Technology/Hot-Seaters: For our **trial technology** services, it's important to note that in an age of "CSI" and "Law and Order," jurors expect a seamless performance by the legal team. The use of a "hot seat operator" permits the client's lawyers to focus on their presentation, not on the technology supporting it. The jurors like to think that the lawyers

respect their time by making presentations that go off perfectly, without glitches. And since the other side's lawyers will probably be using similar technology, it is important to keep up with them or even to surpass them in skill.

Trial & Jury Consulting: **Jury research and witness preparation** can easily be seen as having direct and immediate effects on the client's litigation success. A mock jury or focus group can provide crucial information about whether the trial plan is the best one possible and can further determine whether a trial is a good idea in the first place. Preparing witnesses is vital to ensuring that their testimony will have the desired effect. And the use of jury experts during jury selection can help the client obtain the best pool of fact finders for winning the case.

Ebriefs: For **electronic brief production,** the filing of briefs in electronic format is becoming a preferred mode or even a requirement in some courts. Electronic hyperlinking of citations in a brief makes it easier for judges and their clerks to access the client's briefs anywhere and at any time – even on their iPads.

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5 Tips for Working Well As a Joint Defense Team

The 5 Biggest Issues in Patent Law Right Now

12 Insider Tips for Choosing a Jury Consultant

7 Things Expert Witnesses Should Never Say

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