A2L CONSULTING

The Complex Civil Litigation Trial Guide

3rd Edition

February 26, 2014

Jury Consulting | Litigation Graphics | Trial Technology

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Introduction to A2L Consulting

A2L Consulting (formerly Animators at Law) offers litigation consulting services to law firms and corporations worldwide. The firm's services include jury consulting, the consultative design of litigation graphics and deployment of pre-trial technology, courtroom electronics and the personnel to support that technology.

A2L headquarters is in Washington, DC and it has personnel or a presence in New York, Miami, Houston, Chicago, Los Angeles and San Francisco. The firm's work routinely takes it to those cities plus Boston, Newark, New Jersey, Wilmington, Delaware, Philadelphia, Virginia, Maryland, Atlanta, Dallas, Phoenix and London, England. 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 Consulting Firm by the readers of LegalTimes and a Best Demonstrative Evidence Provider by the readers of the National Law Journal.

Litigation Consulting Services

Litigation Graphics, Demonstratives, Physical Models and Animation for Litigation and ADR		
Sophisticated PowerPoint Presentations	Document Call-outs	Printed Large Format
Boards	2-D and 3-D Animation	Physical Models

Mock Trials, Focus Groups and Jury Consulting		
Focus Group	Witness Preparation	Juror Questionnaires
Jury Selection	Post-Trial Interviews	Opening & Closing Statements

Trial Technicians, Courtroom Set-Up and Hot-seat Personnel		
Trial Software	Video Encoding	Document Coding
Equipment Rental and Setup	Video Synchronization	

E-Briefs		
Scanning and Coding	Configure Database	Citations and Hyper-Linking
Digitally Convert Paper Briefs	Provide DVD, Flash Drive or iPad	

Enjoy Your New A2L Consulting E-Book!

There's no set definition for what complex civil litigation means. Like other things in our business, however, you know it when you see it.

In general, I would say one could call a particular piece of litigation complex when:

- the case requires the near full time attention of 5 or more lawyers for at least a few weeks; or
- the case involving more than 2 law firms on either side of the case; or
- the case involves more than a dozen witnesses; or
- the case has at least $10 million at stake; or
- the case potentially involves pattern litigation.

Most of the cases we work on fit this definition. These cases are complex because of what is at stake, how many people are involved and the shear about of time required to litigate them. More witnesses mean more documents. More documents mean more complexity.

Complexity is the enemy of the trial lawyer. A winning case is one requires clarity of message and story.

This e-book is designed to help trial teams and those who support them develop a case and win at trial. There are tips here for mock jury work, developing a story, creating ideal litigation graphics and how to communicate at trial.

I would welcome your feedback. If you have questions that relate to the litigation consultant services that we provide, I invite you to contact me - I'd be happy to provide assistance, and my direct contact information is below.

Sincerely,

Kenneth J. Lopez, J.D.
Founder & CEO
A2L Consulting

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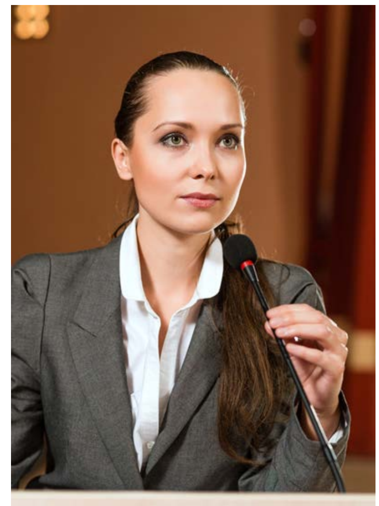
5 Keys to Telling a Compelling Story in the Courtroom

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 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:

1. The introduction (also called exposition) is where characters are introduced, the scene is set and the plot is introduced.
2. Rising action is where the hero is revealed, the conflict is identified and our hero finds the solution to the conflict.
3. The third act is the climax where our hero's situation is either clearly improved or worsened.
4. Falling action is where we see the conflict diminishing and our hero is now clearly winning or losing.
5. 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.

Many of the videos in this popular post of the Top 10 TED Talks for Lawyers are helpful for storytelling in the courtroom.

I've enjoyed hearing from you and working with more of you than ever in 2012. Here's wishing you great luck in the stories you write for 2013. It's going to be a great year.

Sample One-Year Trial Prep Calendar for High Stakes Cases

by Ken Lopez, Founder & CEO, A2L Consulting

A high percentage of the work that we do at A2L Consulting is on cases with billions at stake. Over the last 18 years, we've seen trial teams prepare well and we've seen trial teams caught underprepared, often because they believed that settlement was imminent and that there was little or no need for trial preparation.

So that no one gets caught without being prepared, here’s a sample calendar that lays out a trial preparation plan for mock trials, the creation of litigation graphics, the planning and deployment of trial technology, witness preparation and informal run-throughs on the eve of trial.

Not every case warrants this level of preparation. However if your client is in a bet-the-company situation, if there is $20 million or more at stake or if there is a threat of pattern litigation, then this level of preparation is entirely appropriate - if not required.

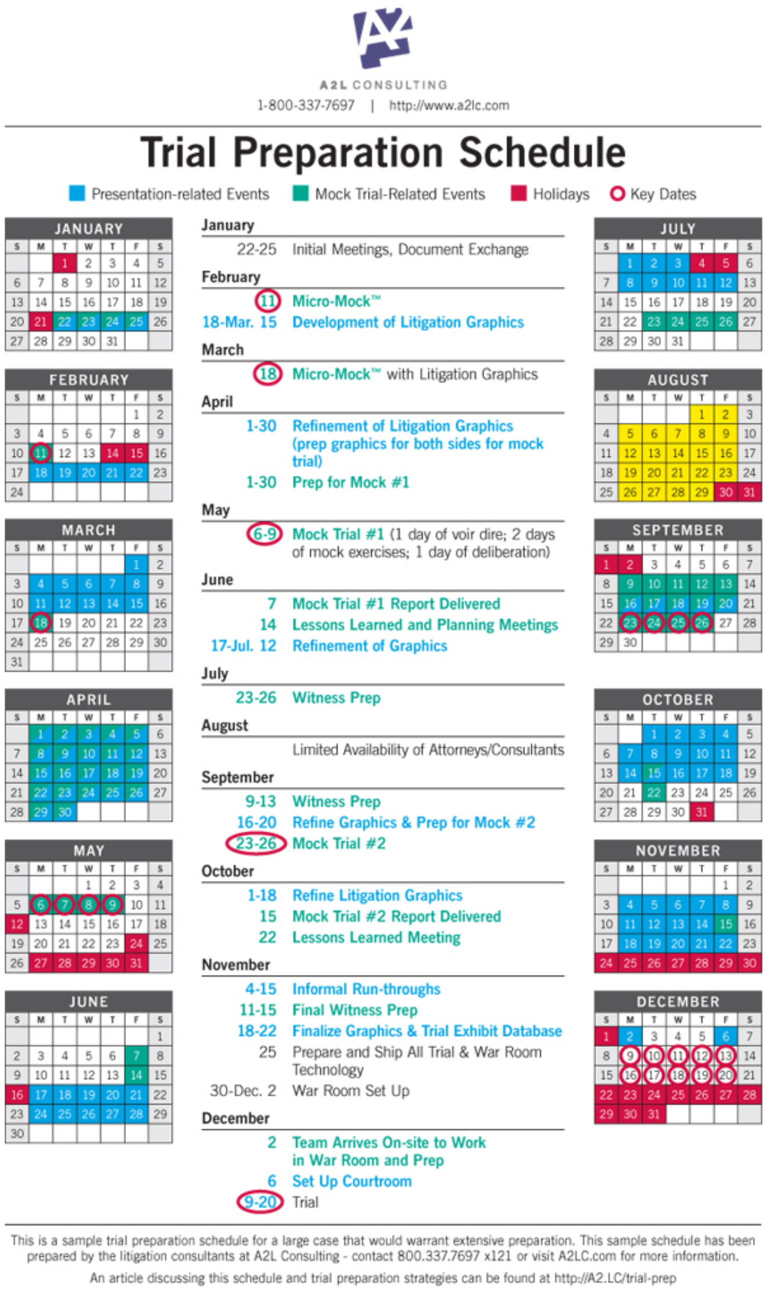
Gone are the days when a trial lawyer wings his or her way through a trial and tries to use charm to win a case. Juries and judges expect a lot more these days from attorneys than they did 10 years ago. They want to see a well-rehearsed show with evidence nicely teed up for decision-making, witnesses who are well prepared, and a lawyer who has planned everything out, including the technology. Anything less, and they'll likely punish your client for it on some level.

The best litigators that I see prepare a lot with the support of a client. Often this involves several rounds of full-scale mock trials. However, the most important thing a client can do is create an environment where the trial attorney feels that he or she can make mistakes. As they say in show biz, bad rehearsal, great performance.

In the sample calendar below, we show a year's worth of preparation for a hypothetical 2-week December trial. We use our Micro-Mock™ service for an early case assessment and to help clarify the likely trial themes and story. Preparation of litigation graphics starts early to allow for several rounds of testing, refinement and approval over the course of the year. Two mock-trial exercises are planned with three or four panels of jurors per exercise. Witnesses are thoroughly prepped and trial technology for both the war room and the courtroom are planned and set up. Finally, a series of run-throughs are scheduled just prior to trial to make sure that trial counsel, the trial technician, witnesses and the trial technology are operating like a well-oiled machine.

What we are describing below is a general sense of how this should work, using a sample calendar. There is considerable variability in the investment required, both in terms of time and money, depending on how many witnesses there will be, how long a mock trial, how many graphics there are, how long the trial is, and other variables.

Click here or on the image below to download a larger PDF version of the sample trial preparation one-year calendar for a two-week trial in a high-stakes case:



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Trial Preparation Schedule

Presentation-related Events | Mock Trial-Related Events | Holidays | Key Dates

January
22-25 Initial Meetings, Document Exchange

February
11 Micro-Mock™
18-Mar. 15 Development of Litigation Graphics

March
18 Micro-Mock™ with Litigation Graphics

April
1-30 Refinement of Litigation Graphics (prep graphics for both sides for mock trial)
1-30 Prep for Mock #1

May
6-9 Mock Trial #1 (1 day of voir dire; 2 days of mock exercises; 1 day of deliberation)

June
7 Mock Trial #1 Report Delivered
14 Lessons Learned and Planning Meetings
17-Jul. 12 Refinement of Graphics

July
23-26 Witness Prep

August
Limited Availability of Attorneys/Consultants

September
9-13 Witness Prep
16-20 Refine Graphics & Prep for Mock #2
23-26 Mock Trial #2

October
1-18 Refine Litigation Graphics
15 Mock Trial #2 Report Delivered
22 Lessons Learned Meeting

November
4-15 Informal Run-throughs
11-15 Final Witness Prep
18-22 Finalize Graphics & Trial Exhibit Database
25 Prepare and Ship All Trial & War Room Technology
30-Dec. 2 War Room Set Up

December
2 Team Arrives On-site to Work in War Room and Prep
6 Set Up Courtroom
9-20 Trial

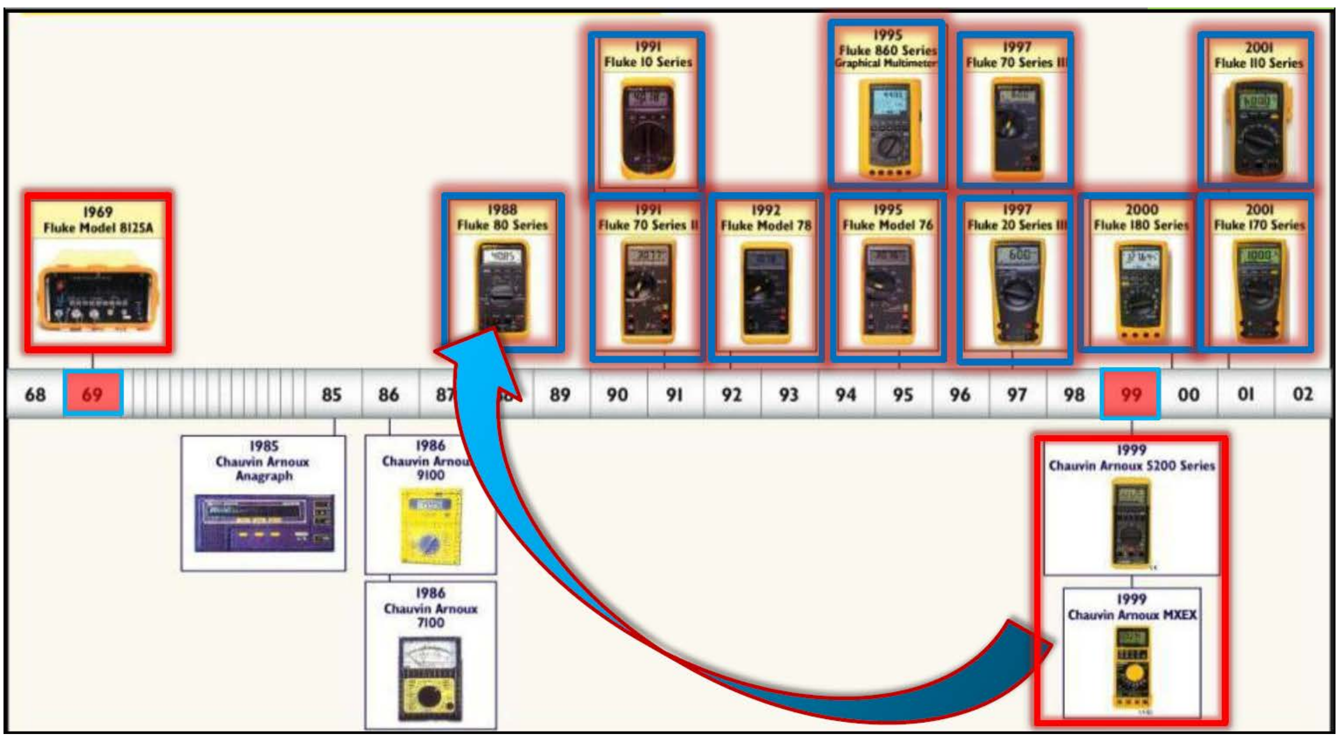
This is a sample trial preparation schedule for a large case that would warrant extensive preparation. This sample schedule has been prepared by the litigation consultants at A2L Consulting - contact 800.337.7697 x121 or visit A2LC.com for more information.
An article discussing this schedule and trial preparation strategies can be found at http://A2.LC/trial-prep

CLICK HERE TO DOWNLOAD CALENDAR

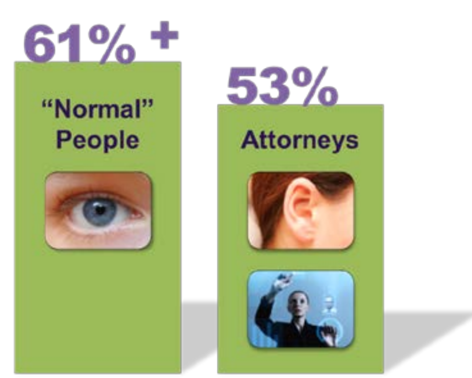
Timelines and the Psychology of Demonstrative Evidence

by Ryan H. Flax, Esq., Managing Director, Litigation Consulting

Research shows that visuals are a key to presenting information clearly and persuasively be that presentation in a courtroom, an ITC hearing, the USPTO Trial and Appeal Board, a DOJ office, or in a pitch to a potential client. Because of what you can do with them and how your audience will psychologically react, if designed properly, timelines are one of the most important demonstrative aids you can use to be more persuasive.



Studies show that the vast majority of the public (what I'll call "normal" people – not lawyers) learns visually – <u>about 61%</u> - which means that they prefer to learn by seeing. The majority of attorneys, on the other hand, do not prefer to learn this way, but are auditory and kinesthetic learners – <u>about 53%</u> - which means we typically learn by hearing and/or experiencing something – we are different than most people. This makes sense, when you think about it – we all learned this way in law school by sitting through class lectures and we continue to learn this way as practicing attorneys by having to learn litigation by experiencing it. However, most people do most of their "learning" watching television or surfing the internet.



No matter how smart you are, you typically teach the same way you prefer to learn, unless you carefully plan to do otherwise. Visual learners teach by illustrating. Auditory learners teach by explaining. Kinesthetic learners teach by performing. So, left to our own devices, we attorneys will usually teach by giving a lecture (consider your last opening statement, for example).

But, when you do this in an effort to persuade most “normal” people, you’re not playing the game to win. It is not sufficient to just relay information because that’s not how your typical audience wants to learn. You must bridge the gap between how you prefer to teach and how your audience prefers to learn and demonstratives, including graphics, models, boards, animations, and **timelines** are the way to bridge this gap, make your audience feel **better prepared** on the subject matter, feel it’s **more important**, pay **more attention**, **comprehend** better, and **retained** more information.

Besides simplifying the complex, providing an opportunity to strategically use familiar, well understood, pop culture templates, and satisfying your audience’s expectations of a multimedia presentation, timelines are a key component of your persuasion because they enable you to emulate generic fictions to produce a truth to be accepted by your audience. These are the four rules of thumb to effective visual information design.

Social psychology studies show that different sources of information are not neatly separated in juror’s minds. Timelines are one of the most effective ways to exploit this reality to be more persuasive at trial.

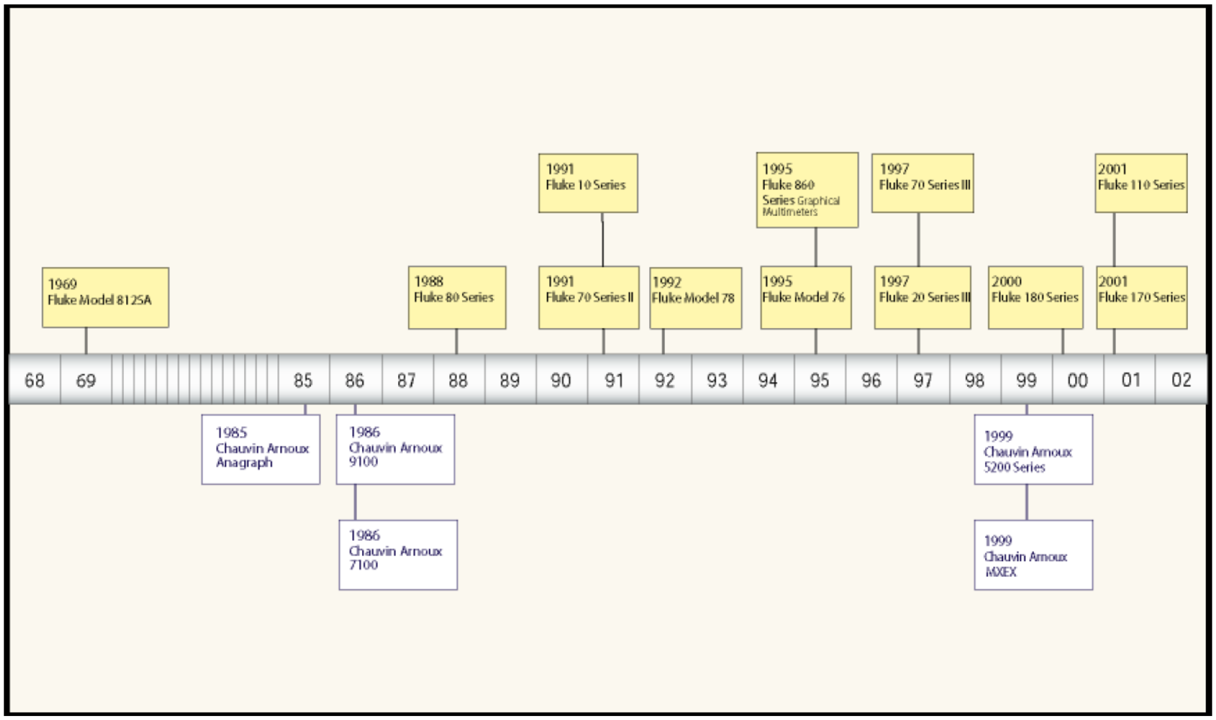
Visual meaning is malleable, so design your timelines to show a generic fiction you want the facts to fit: e.g., there was a reasonable cause for your client’s behavior or the opposing party’s actions directly led to the injuries we’re here about. The essential generic fiction for litigation (and all other circumstances, really) is that of **cause and effect** – people are intensely hungry for a cause and effect relationship to provide a basis, or perceived basis, in logic and reason for their emotional beliefs.

A timeline is the key visual aid for establishing a **perception of causation** relating to any set of facts. Once you **induce such a perception of causation** in jurors and they can **adopt** this perception **as truth**. This is the result you want in litigation. If you can set the factual stage for why your view of things makes more sense than your opposition’s version, you’ve won (unless the facts are devastating, in which case you should have settled).

So, what **perception of causation** is being established by the first timeline (above) in this article? This timeline relates to a trade dress case where the design at issue was a yellow casing for an electrical device. What you’re seeing is how long our client used this yellow casing design (since 1969 and through the trial) at top, when the defendant changed its product to have a yellow casing (1999), and how similar their accused design is to our client’s product line.

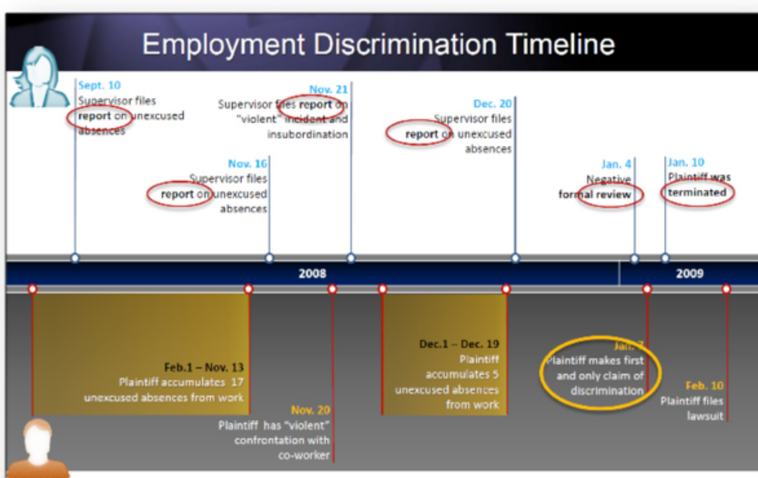
You get all this information visually from a single timeline – it doesn’t just relay information, it tells a story. Imagine having this timeline on a large board and available to show the jury over and over again.

Here's an alternative way of showing the very same information that is far less effective:



The same information is there, but there's no self-evident story. There's no cause and effect established. This is just no good as a persuasion tool, but this is what most attorneys think of when they consider developing a timeline (unless they envision the flags-on-a-stick conveying a series of events).

Below is a pretty standard, if attractive, timeline. It shows two series of related events. The series on top, as you might guess, relates to stuff our client did and the stuff in the shadows there on the bottom is what the opposing party did over the same period.



This rather simply, but clearly shows important interrelated events and *very* clearly establishes the key facts **to induce the perception of cause and effect** in the jurors. What do you learn from the timeline above? You learn that while the plaintiff claims that he was fired as retaliation for his claim of discrimination against his employer (and if you only knew that he made the claim and was then fired just days later you might believe him), the timeline shows that he had a terrible and well-documented history of unexcused absences from work and even a violent confrontation with a co-worker. This history is the real cause of the effect (his termination) and it's all conveyed in this graphic.

You must feed a jury what it needs to find for you. The more a jury feels they understand where you're coming from, the more you emulate generic fictions to establish a truth, and the better you induce the perception of cause and effect in your audience using the facts you know matter, the better your chances of winning.

6 Reasons The Opening Statement is The Most Important Part of a Case

Trials are structured in familar segments – opening statements, direct examination, cross-examination and closing arguments. Of those events, I believe that opening statements deserve more emphasis than any other portion of the case.

As trial lawyer Ira Mickenberg has said, "Opening statements are the lens through which jurors view the evidence. The most important thing to understand about opening statements is that they establish the context in which the jurors will interpret all of the evidence they hear during the trial. [PDF]"

With this context, I offer 6 reasons why I believe opening statements are the most important part of a case:

1. **FRAMEWORK:** It is a psychological truth that people like to place information in a coherent framework rather than deal with disjointed bits of data. As soon as jurors hear any facts, they will begin to connect the dots and fill in the picture of the events in their minds. Therefore, it is crucial that the framework that they use should be yours rather than the other side's.

2. **WHO HOLDS THE TRUTH?:** When the trial starts, jurors figure someone is lying and someone is telling the truth. The opening statement is when they initially reach these conclusions. The opening statement offers the best opportunity to grab and hold the high ground - while at the same time positioning your opposition as slippery.

3. **JURORS DECIDE EARLY:** Jury research has shown that as many as 80 percent of jurors make up their mind immediately after hearing the opening statements. This may seem unfair or strange, but it is true.

4. **ATTENTION:** Unless a celebrity witness like Bill Gates or Scarlett Johansson will be taking the stand, the judge's and jurors' attention levels will be at their highest during the opening statement. This is your opportunity to grab their attention with a compelling story and compelling demonstrative evidence and keep it.

5. **IT'S GOOD TO BE ROOTED FOR:** People like to pick someone to root for early. Did you ever watch a sporting event with teams you don't know well? Don't you normally pick a favorite early in the game? A trial is no different.

6. **ABC - ALWAYS BE CLOSING:** As is true of all sales events – and a trial is a sales event – emotion is what matters. People buy on emotion and justify on facts. In jury trial terms, that means they decide after opening who is the emotional winner and spend the rest of trial and deliberation justifying their emotional leaning with the facts that fit best.

As noted trial lawyer Herald Price Fahringer has said, “Cases are won or lost on the opening statement. Therefore, all your ingenuity, all your intellectual resources, all your stamina, has to be poured into that opening statement, because your failure to fully exploit that critical opportunity can mean either winning or losing a case.”

Fahringer has said, in fact, that the opening line of the opening statement is particularly critical because it grabs the jurors’ attention.

He points to an excellent example from the opening lines of P.D. James’ 1989 novel, Devices and Desires: “The Whistler's fourth victim was his youngest, Valerie Mitchell, aged fifteen years, eight months and four days, and she died because she missed the 9:40 bus from Easthaven to Cobb's Marsh.”

As Fahringer says, we need to learn from these artists.

[We shared this helpful clip from Herald Price Fahringer in a recent article and thought it was worth singling out]

5 Questions to Ask in Voir Dire . . . Always

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

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.

6 Good Reasons to Conduct a Mock Trial

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, trialtimelines, 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.

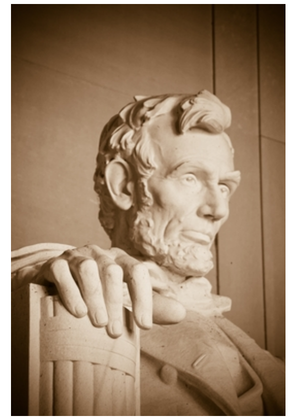
6. Finally, with trials becoming quite rare for litigators in large law firms, mock trials are a good place for lawyers to hone their trial skills.

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."

7 Ways to Draft a Better Opening Statement



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.

How to Structure Your Next Speech, Opening Statement or Presentation

by Ken Lopez, Founder/CEO, A2L Consulting

I frequently help lawyers craft presentations – whether it's the opening statement of a litigator, a pitch presentation for a law firm, or a seminar presentation for a corporate lawyer. And I too am often called upon to speak at events or even off the cuff to a group.

After a good bit of trial and error, I have found two nearly foolproof ways of organizing any of these talks that I use almost invariably, whatever the context may be.

The great thing about these models is that you can use them in an off-the-cuff speech just as well as you can in a highly scripted presentation. Whether it's the courtroom or your kid's school, these models work wonders. You will come off as inspiring, not just informative. You will appear confident. You will also be seen as following modern presentation styles – the spoken equivalent of using an electronic presentation versus using transparent overhead slides.

To understand these new approaches, which have become common in TED Talks, on the professional speaking circuit, and among A2L's clients, you need to understand the old format and why it is a recipe for audience disconnection and boredom. It goes something like this:

"Hi, I'm Ken Lopez. Thanks for having me here this morning. It's a real pleasure to speak to a group like you.

I founded A2L Consulting in 1995, and today I am going to talk to you about litigation consulting. If you heed my message about conducting mock trials, using litigation graphics and relying on trial technicians in court, you are going to be at the top of your game in the modern courtroom."

Okay, it's accurate, but it's flat. And it gets worse. The agenda slide comes up. Ugh. The parade of bullet points starts marching across the screen. Ugh again.

Compare this with the following approach. These will be the first words you hear from me:

"Litigation consulting is a process that helps people like you, the world's best communicators, persuade even more effectively. For your must-win cases, it is a must-do and includes a three-stage system of structured practice including mock trials, the consultative creation of litigation graphics to bring your trial story alive, and flawless courtroom document and electronics handling by trial technicians who make you look like a star. Your judge and jury will reward your fine preparation.

I'm Ken Lopez, and I'm the Founder/CEO of A2L Consulting, the world's best litigation consulting firm."

Delivered the right way, with the right pauses and the right tone, version two should have left you feeling something entirely different than version one. It should have left you *feeling*. And that's no accident.

I'm using a format that I call **BELIEF - ACTION - BENEFIT**. I learned it from a professional speech coach many years ago. Essentially, it goes like this:

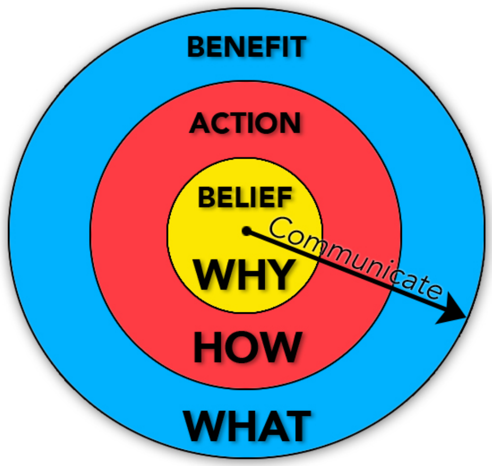
I believe ____, I think you should do _____, and if you do, the benefit will be _____. Then introduce yourself. Then go into detail about what you believe, what actions you want your audience to take and how they will benefit by doing so. Finally, repeat your initial belief - action - benefit statement.

This process needs to be modified to suit your situation. What a lawyer believes is not really relevant to an opening statement, so the belief - action - benefit approach needs to be couched a bit differently -- more like "Plaintiffs, self-described patent trolls, are attempting to wrongfully extort money from my client. You have a chance to make this right. If you do, you'll be standing up for small business and all that is just and right."

One well-known speaker who offers a similar format is Simon Sinek. He points to the golden circle of communication that follows a pattern of **WHY - HOW - WHAT**, whereas most people communicate the opposite way WHAT - HOW - WHY, which is exactly what I used in my first uninspiring example. Look at Simon's now legendary TEDx Talk:

I think Simon's format is extraordinary and pretty similar to **BELIEF - ACTION - BENEFIT**. I tend to weave both formats together when developing a story for trial, but when I am speaking off the cuff, I just find **BELIEF - ACTION - BENEFIT** to be a bit easier to remember. However you look at it, I bet this is not the presentation you would have given a year ago, or even a week ago.

Here's a chart that will help you visualize both approaches. Remember, most people, businesses and organizations communicate from the outside in. But to inspire rather than simply inform, communicate from the inside out.



Below are some additional articles and resources that you can find on the A2L Consulting site about storytelling, opening statements, making great presentations and giving a memorable and inspiring speech:

- Free Download: Storytelling for Litigators
- 10 Great TED Talks for Lawyers
- Great tools and methods for drafting an opening statement
- Why the opening statement is so important
- Great presentation techniques from Barack Obama
- 12 Reasons to Never Use Bullet Points and 74 Ways to Overcome Them!
- Practice - it's why movie lawyers look prepared
- Presentation tips lawyers can learn from the movies

The Top 14 Testimony Tips for Litigators and Expert Witnesses

by Ryan Flax, 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:

Be Prepared for "Yes or No" Questions

Stick to Your Guns & Know What You're Shooting At

Think, Don't React

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

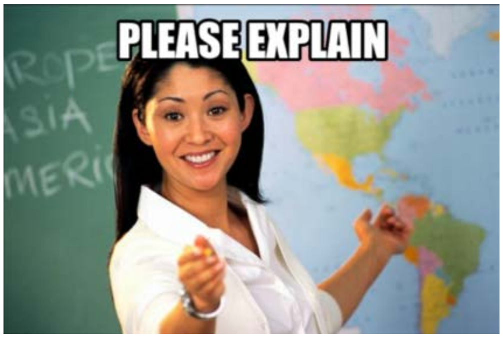
Another expert surveyed for this article suggested replying to the "yes or no" question with, "***as I understand*** **your question the answer is [insert 'yes' or 'no'].**" As this expert explains it, this is a non-answer; it means nothing because there is no way for the lawyer to know how the expert 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.

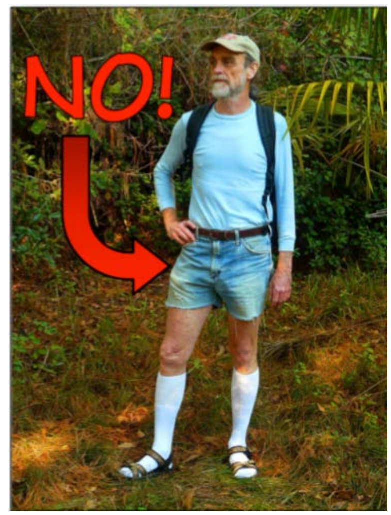
Compound questions are objectionable, whether in deposition or at trial. Nonetheless, have your experts prepared for this possibility. When asked multiple questions at one time, they should ask for clarification to be clear which part they are responding to. For example:

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.

Finally, I'd like to dedicate this article to the memory of the fantastic David M. Malone. He was a good man and a nice guy.

21 Ingenious Ways to Research Your Judge

by Ken Lopez, Founder/CEO, A2L Consulting

For small town attorneys, it is possible to get to know a local judge quite well. Not only do you spend time in front of the local judges frequently, but you very likely see them socially as well.

Most of our clients, though, work in large and medium sized law firms in big cities. They likely try more cases outside of their home town than they do within it. They likely appear in court more often on a *pro hac vice* (temporary) basis than they do in the jurisdiction where they are admitted to practice. So for these lawyers and the teams that support them, it can be a real challenge to understand your judge's likes and dislikes.

Local counsel's anecdotal statements can be helpful, it's true. All too often, however, they are hard to get much value from. Local counsel can usually tell you whether the judge has tried many cases like yours, something about his or her demeanor, his or her tolerance for outsiders, along with a sense of what arguments work. Like using Yelp for restaurants however, you have to judge not only the quality of the review but also the preferences of the reviewer.

In some jurisdictions, such as the Eastern District of Texas and the District of Delaware, local counsel know the judges well enough so that you can come to understand a judge's likely approach to your case. However, if you want more information, there are other techniques that make sense.

Here are 21 ways to research your judge:

1) **Watch the Judge:** Above all else, if your client has the budget, there is no substitute for watching your judge hear motions and preside over a similar case.

2) **Commission a Judge Study:** Our senior trial consultants prepare detailed judge studies that will help inform the tactics you use at trial.

3) **Conduct a Mock Bench Trial:** We are big believers in mock bench trials. The benefits are many and include: 1) forcing yourself to practice early; 2) hearing advice from colleagues of the judge; 3) getting a sense of what works and what does not. We have previously offered some great tips for conducting mock bench trials and getting great results.

4) **Find Past Clerks:** Here is an advanced Google search for finding former clerks of a judge. For this and other sample searches below, replace the judge's name and district as appropriate.

5) **Research Any Controversies:** Here is an advanced Google search for ferreting out controversies or scandals a judge may be involved in.

6) **Research Memberships and Affiliations:** Here is an advanced Google search for researching the memberships or affiliations of a particular judge.

7) **Consult Judgepedia:** This site is a comprehensive, up-to-date site that contains vast amounts of current information on federal and state judges. Modeled on Wikipedia, it gives useful background data on thousands of judges and on the state and federal court systems.

8) **Visit The Robing Room:** This judge-rating site is valuable because the feedback from lawyers is anonymous.

9) **Visit RobeProbe:** Here is another judge discussion site with reviews from lawyers. This site also has a number of international lawyers listed.

10) **Research Donations:** Here is a site to research donations to Pennsylvania judges' campaigns. Donations to campaigns regulated by the FEC are listed here.

11) **Consult Social Media:** Some judges are on LinkedIn, some are on Facebook and some are even on Twitter. It's up to you to find out. Our guide to social media for litigators will be generally helpful.

12) **For Federal Judges, Read the Almanac of the Federal Judiciary:** Unless you find a copy on Westlaw/Lexis or in your local law library, this tome will set you back almost $2,000. Still, it has a lot of useful information about judges including notable rulings, impressions of lawyers who have experience with the judge, as well as demeanor analysis and more.

13) **Use Westlaw Tricks:** Here is a guide that Westlaw offers for researching a judge.

14) **Use Lexis Tricks:** Here is a link to a PDF from LexisNexis entitled Researching A Judge. It has some useful tips if you use Lexis. Here are a variety of resources that Lexis lists as well.

15) **Use LawProspector Tricks:** LawProspector is a service designed primarily to help litigation support business development efforts, however litigators can use it to quickly see other attorneys who have recently had a trial or hearing before a particular federal judge. It starts at $299/month, so a one-month subscription might be useful to find out who can give you some good advice.

16) **Local Websites:** Many jurisdictions, like Pennsylvania, New York and Florida, have detailed information about state court judges online.

17) **Visit the Federal Judicial Center:** Here you will find some useful information about federal judges and there is a focus on history here as well.

18) **Subscribe to TRAC:** This tool covers cases since 2004 in the federal judiciary and claims to "provide a unique way to examine the year-by-year work product of individual federal district judges." You'll find it here.

19) **Visit Judicial Watch:** This site attempts to collect financial disclosure information about particular judges. The coverage does not appear to be extensive in the federal courts, but you might luckily find your judge listed here.

20) **How Long Will That Motion Take:** Here are a variety of lists of slow moving judges in the US Courts.

21) **Local Counsel:** Of course you should talk to local counsel. This blog article from Texas law firm Charhon Callahan does a great job of explaining the value of local counsel and what to look for when selecting them.

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.

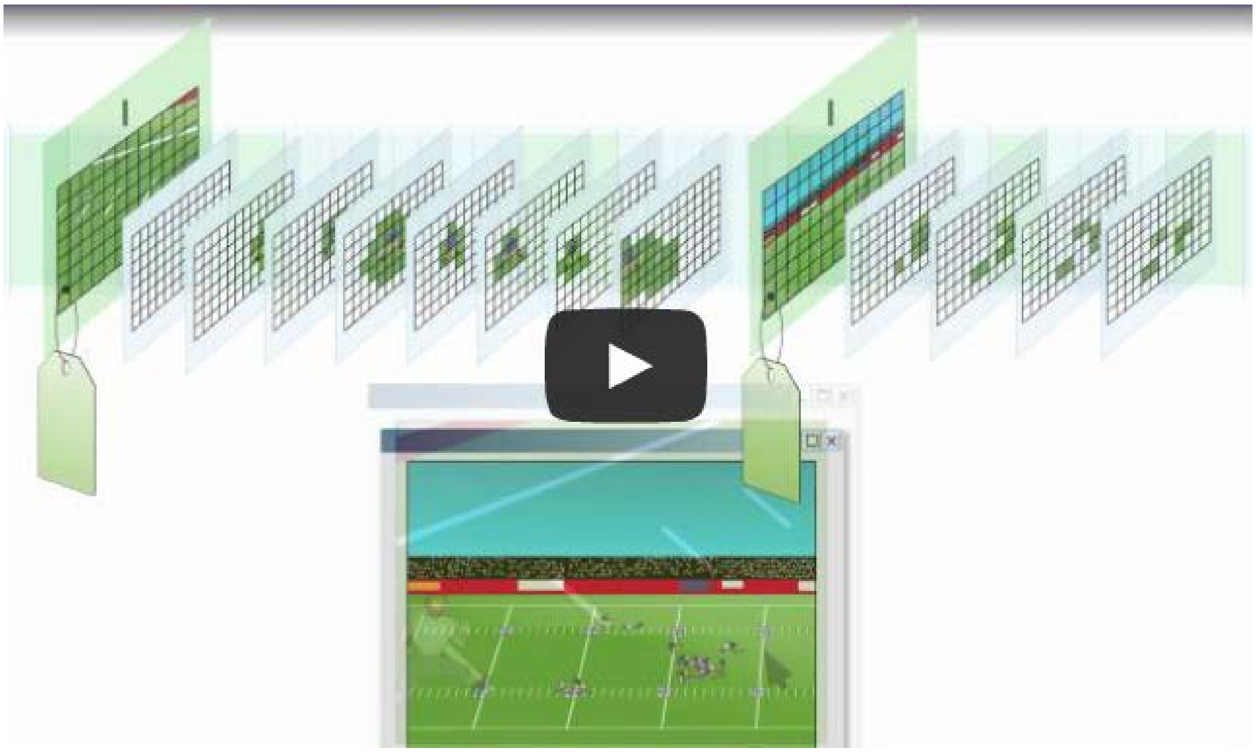
We have written before about combining illustration with PowerPoint animation to achieve great results and the four types of animation one typically sees at trial. The purpose of this article is to help you understand how far you can stretch PowerPoint. It's not the right tool for every situation, however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

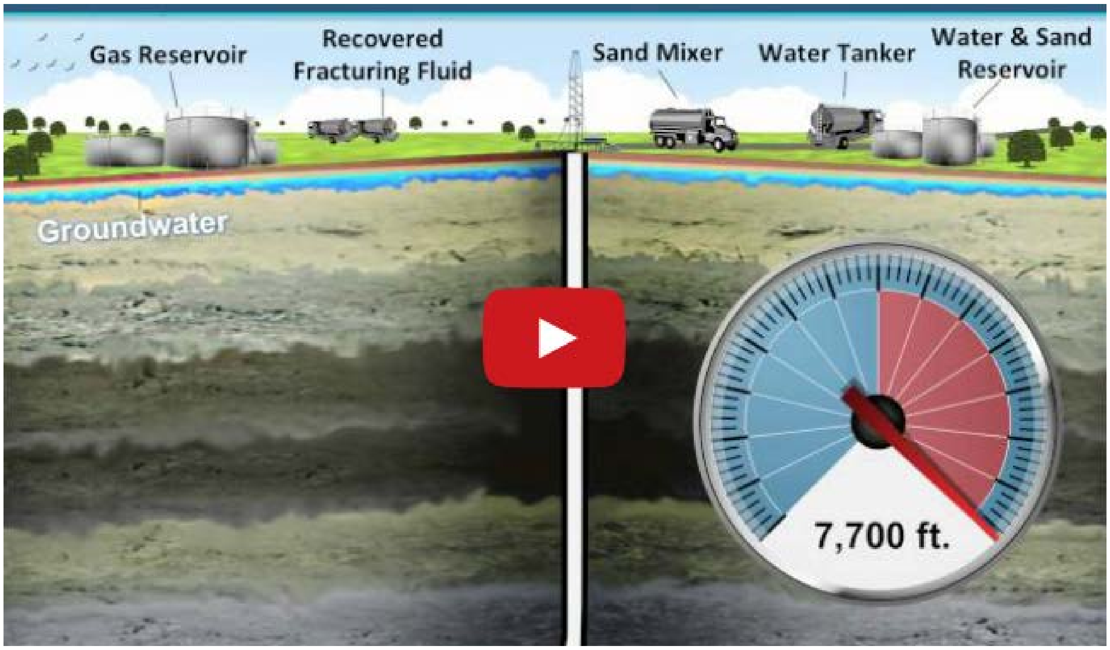
2. This PowerPoint litigation graphic was used by an expert in a patent case to explain how the design of a ship's hull affected its performance. Interested in patent litigation graphics, download our patent litigation toolkit for litigators (opens in new window).

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.



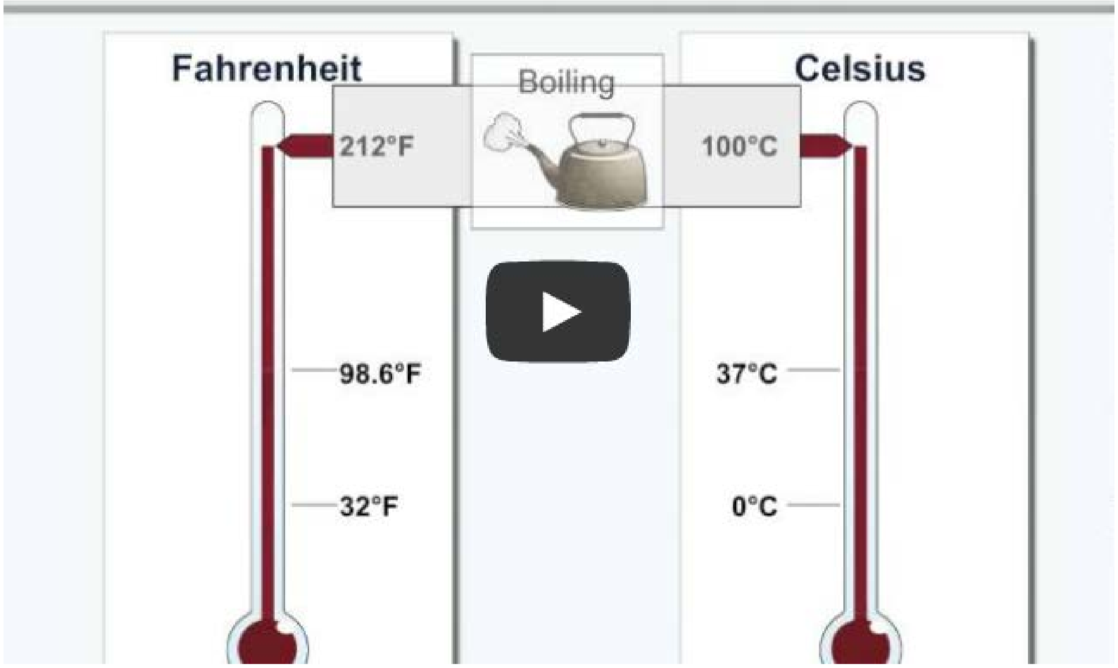
4. PowerPoint can even be used to show deposition clips. If you have more than a handful of deposition clips, you would probably want to use Trial Director to show them, but for a limited number or a group of short clips, PowerPoint does a good job.

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.

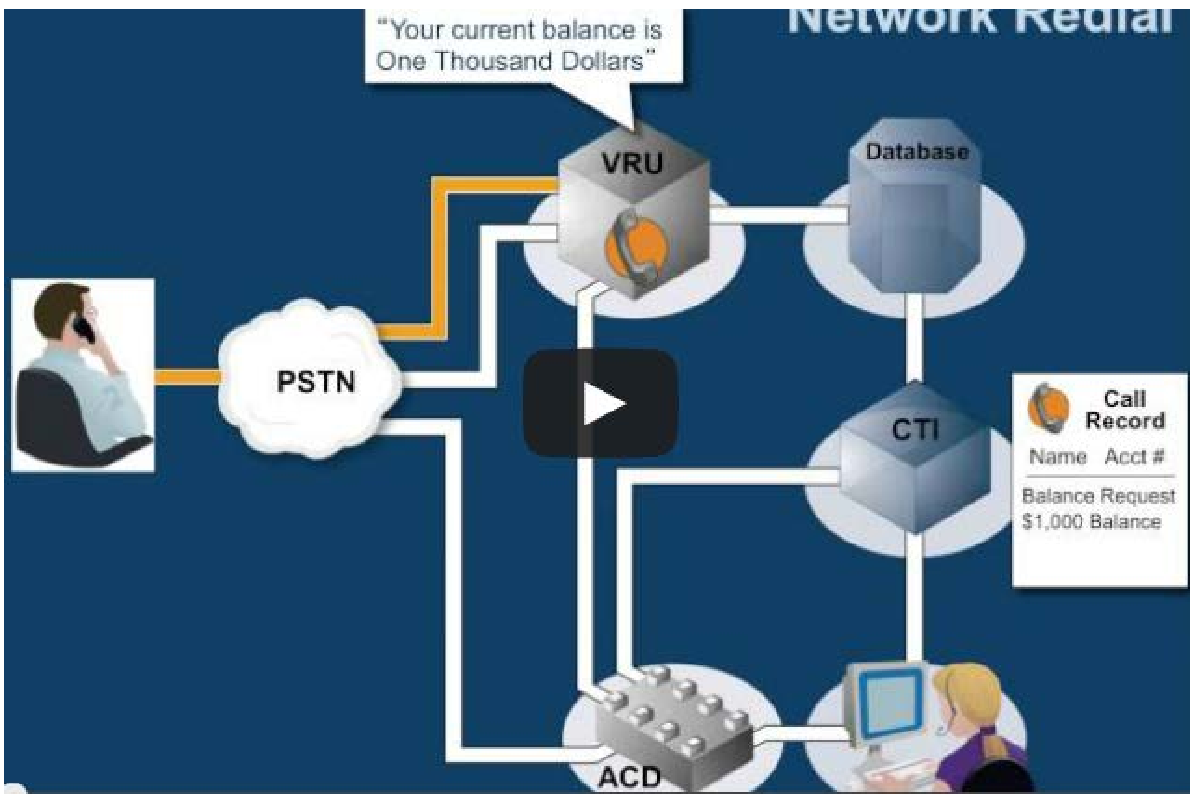


6. This simple traffic cop animation explains the roll of an operating system in an easy-to-understand format. By using illustrations combined with animation in a PowerPoint litigation graphic where small parts are varied, an animated or cartoon effect is achieved within PowerPoint.

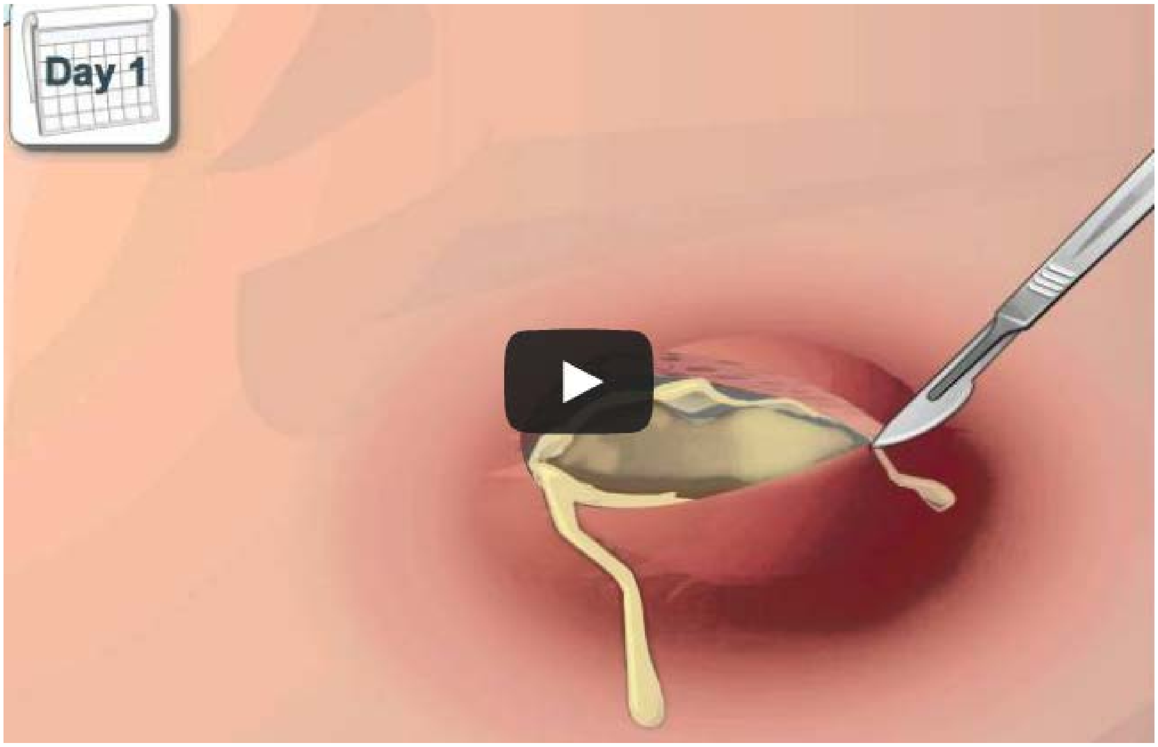
7. In a very simple way, this chart uses PowerPoint to show how Fahrenheit and Celsius scales compare to one another. Like many of the examples in this article, it's surprising that the graphic was created in PowerPoint.



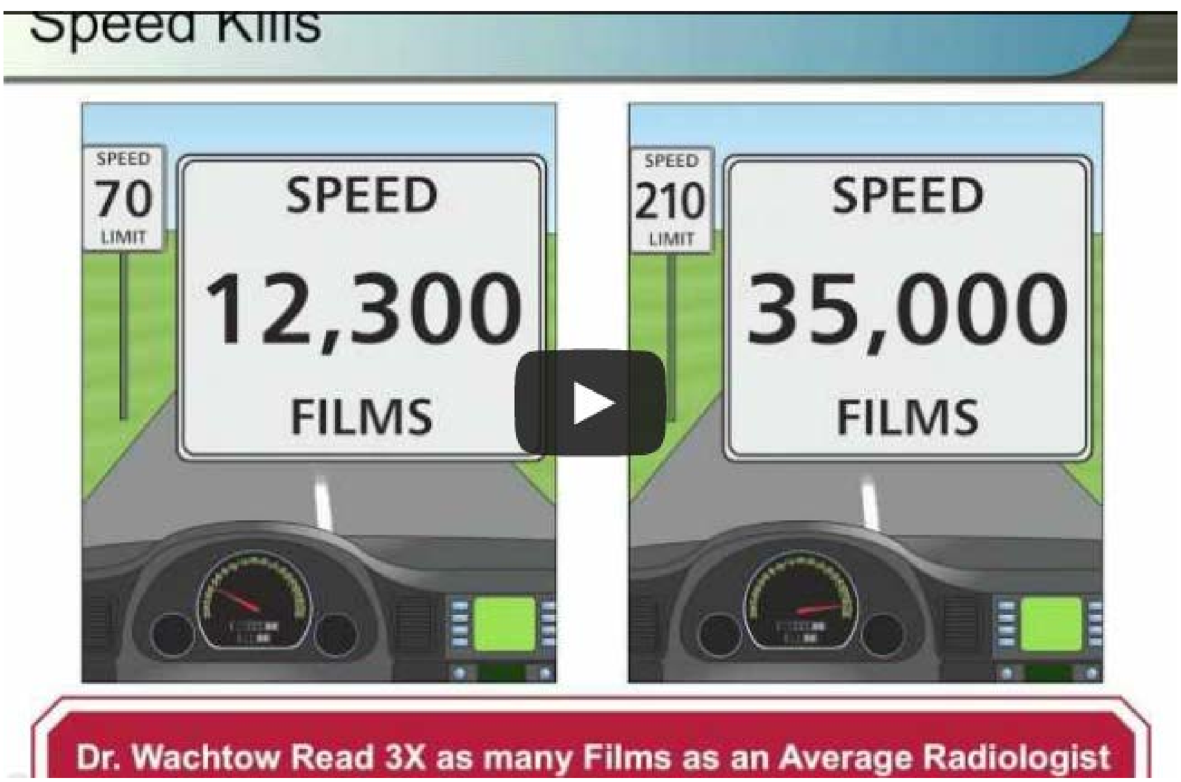
8. This chart shows how a phone dialing system works and is designed for a judge's viewing in a claim construction setting rather than jury viewing during trial. Again, it is animated and presented entirely in PowerPoint.



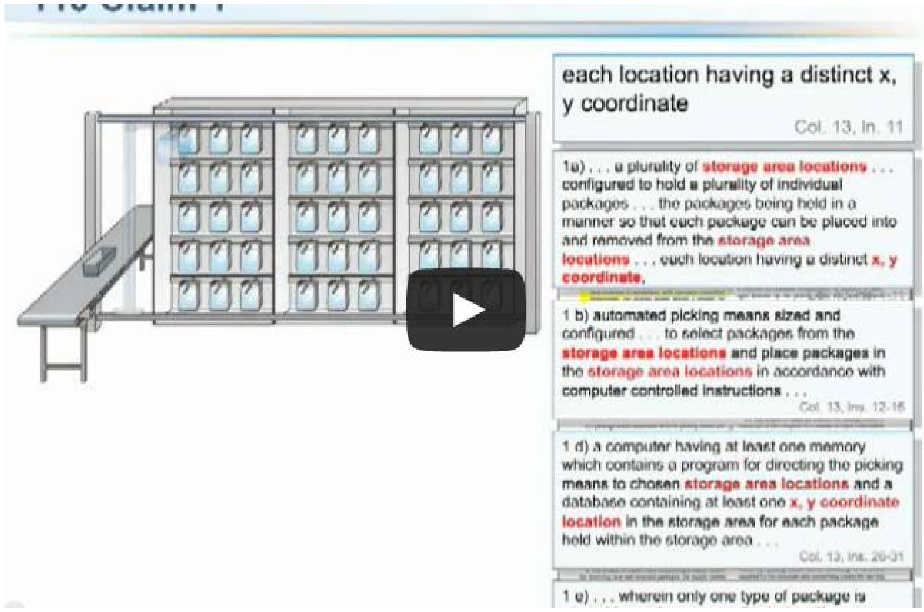
9. Even a surgical procedure can be shown using a combination of illustration and PowerPoint animation techniques. Such work can make courtroom animation economically feasible in even small cases.



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

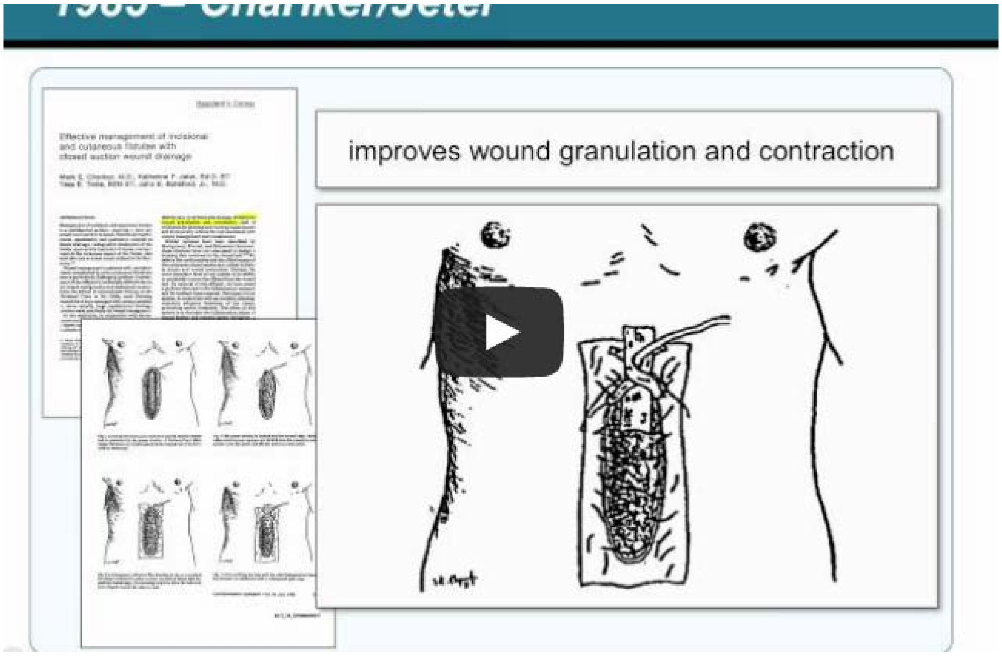


11. For a claim construction hearing, this PowerPoint was created to show how a drug delivery system works in a hospital environment. Claim language is shown in conjunction with the PowerPoint litigation graphic to give it context and meaning. I think it is a smart use of animated graphics juxtaposed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

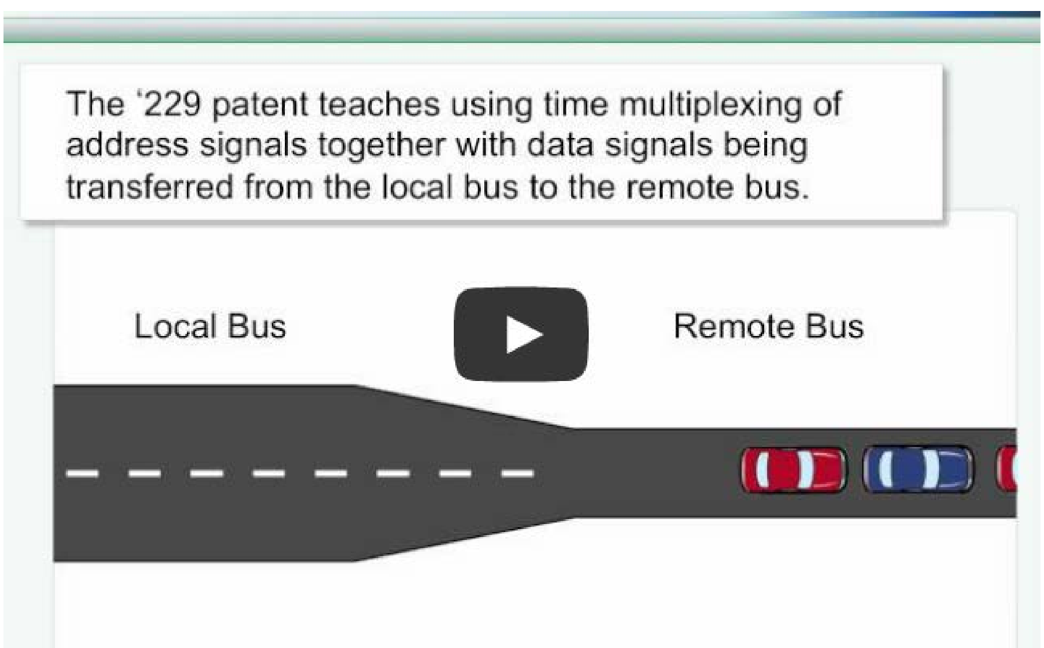


12. Here, the removal of a nuclear power plaint reactor pressure vessel is shown. By creating illustrations that are shown in quick succession, the effect of animation is achieved in PowerPoint without having to go through the expense and complications of creating an animation.

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).

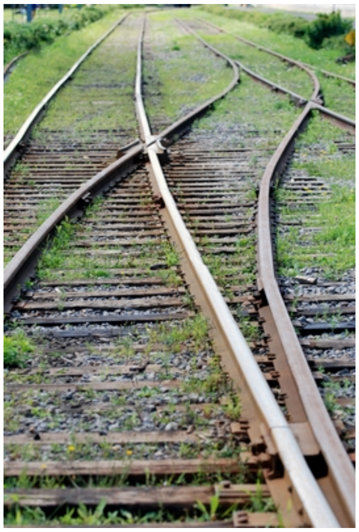


15. Making heavy use of illustration, this PowerPoint serves as a timeline that explains how a worker was electrocuted on a job site and went undiscovered for some time.

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.

Litigation Consultant: Embrace a Two-Track Strategy & Win the War



What I'm about to encourage will seem elementary to the best litigators, but I'm writing from experience as a litigation consultant and a litigator when I say that many trial attorneys **fail** to properly develop the necessary two-track strategy for their case -- and lose because of it.

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, and filling in the facts where they are needed, must change to a two-track strategy directed towards **both** a jury presentation and a solid appeal defense. These two tracks clearly **do not** have the same route or destination, but both are essential to winning.

Most attorneys are more familiar with the second of these two tracks, the solid appeal defense. This is because it is the track that is most heavily burdened with law and facts. Most attorneys approach their case by identifying what the court of last resort has to say about the relevant law, i.e., what must be proven for them to win in the eyes of the court (we must, of course, fulfill all the "prongs" of the case law). Likewise, these same attorneys focus heavily on every fact they can soak-up relating to their case to decide where it fits into their legal position, build preemptive defenses relating to any "bad" facts, and search for hidden facts to support alternative theories of their case. This is all very, very important because it really is the foundation of any case. But, it's not the only or even most important part of building a case for trial.

The first of the two tracks and the one that I've found a lot of litigators tend to overlook is building your case to satisfy a jury. What you're about to do at trial is make an extended elevator pitch for your client and you'd better make sure the jury wants to hear it and more.

Often, too little time is spent on this first track developing a sympathetic story and theme, albeit based in the all-important facts and law from the first track, that will be presented to the jury. Litigation teams tend to wait until what I'd consider the "last minute" before trial (often in the war room outside the courthouse) to really put their *story* together and in a way that will be persuasive to jurors.

In my experience as both litigator and litigation consultant, I've found that during trial juries tend to find relatively few facts very interesting and "important" and then base the entirety of their decision in the jury room on those few facts. Attorneys need to recognize this and develop their trial story around those key facts.

If you don't win at trial, you've got the short end of the stick when you head to post-trial arguments and appeal. You must carefully plan on the first track to plan to be successful on the second. The question now is, how is this done?

The first and most important thing to do is recognize this two-track necessity and begin to develop some themes around key facts early on. Work as a team to identify your *story* and what facts fit into it. Remember, stories are supposed to be interesting and entertaining. They have a beginning, a climax, and an ending. They have a theme and characters. Help your case by keeping the jurors from being bored by it and by making it understandable for them.

Once you've developed a primary theme and story and some alternates, **test them**. I encourage you to use mock juries, not for helping predict the outcome of your trial, but to see what themes and facts resonate with the jurors. Doing so will help you decide which facts and story lines are worth building your case around. You can test what images and litigation graphics help make your case and which documents really make a difference when you show them to the jurors. Finally, testing with mock juries can help you figure out what type of juror you do and don't want in your actual trial - you may be surprised.

If using a mock jury is not in your budget, find some folks at your firm that are far removed from your case and test with them. Administrative assistants, receptionists, family members, paralegals, and junior associates are good for this testing in-house. Enlist the services of local high school students to perform as mock jurors (they'll gain a unique experience and you'll have about the right educational demographic for your jury, but consider how to deal with confidentiality).

In conjunction with mock jury testing, have demonstrative graphics professionally made to support your opening and closing statements, direct expert testimony, and expert cross-examination. These trial graphics can also be used to support your expert reports, which in turn will support the expert's testimony at trial (*see* Fed. R. Civ. P. 26). Using trial graphics at trial makes your case far more persuasive and there are plenty of well-researched statistics to back up this demonstrative evidence theory. Furthermore, using graphics in your briefing and e-briefing will make you far more persuasive at these stages also.

The bottom line is that you first need to win the trial and to do so, you'll need to convince jurors, who are used to learning by watching TV and surfing the internet, that your position is the better one. To do so, you must communicate on their terms and in their language (to a degree). By using well-crafted trial graphics, you will be able to teach and argue from your comfort-zone – by lecturing, but the graphics will provide the jurors what they need to really understand what you're saying and will give them a chance to *agree* with you.

Jurors that understand you are far more likely to agree with you, because they feel that their emotion-based opinions are founded in reason. However, the trial graphics also allow you to impact them on that emotional level, which may be more important.

Now, I've strenuously urged you to put a lot of effort into the first track – that of trial presentation and working with your litigation consultant. I'm not suggesting that the other track be abandoned or even diminished. You must dot all your "i"s and cross all your "t"s and cram every important fact into evidence that will be or may become essential to a favorable appellate decision on your case. But, you should split your litigation prep into these two tracks early in the case and rigorously develop **both** for a winning litigation strategy.

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

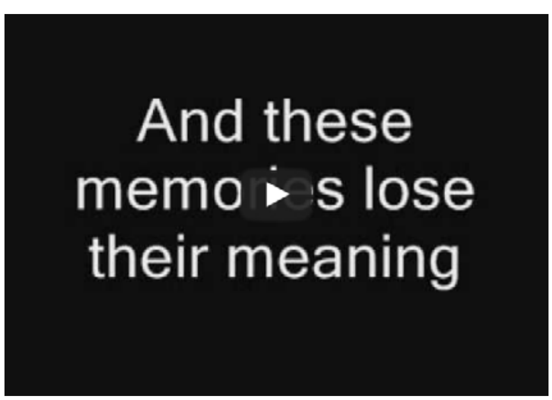
By Thomas F. Carlucci, Partner, Foley & Lardner LLP
John E. Turlais, Senior Counsel, Foley & Lardner LLP
Ryan H. Flax, Managing Director, Litigation Consulting, A2L Consulting

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.



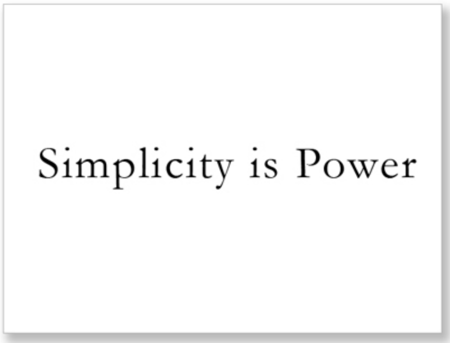
The Beatles created world-changing art, and **they made it look easy**. What winning litigation teams and litigation consultants strive to do is similar in that, to achieve their goals, they must take complex fact patterns and legal positions and make them ***both easy to understand and persuasive***.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

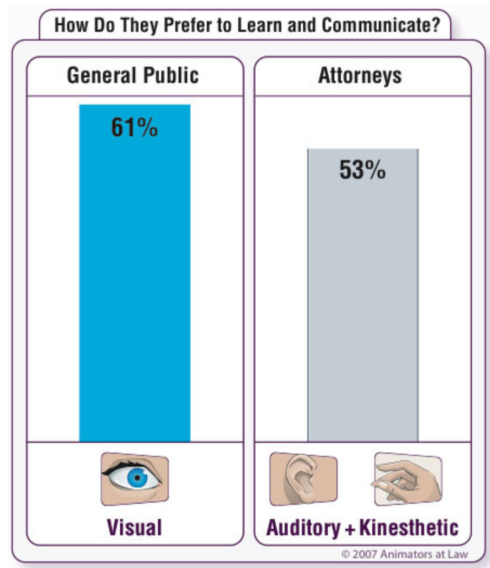
The team of litigators must deal with thousands of discrete and related facts, sometimes millions of pages of documents, and, often, multiple interested parties forwarding their own versions of the case to the same target audiences. The litigators must figure out how to refine the mountains of information 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).

6 Studies That Support Litigation Graphics in Courtroom Presentations



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.

The 12 Worst PowerPoint Mistakes Litigators Make

by Ken Lopez, Founder & CEO, A2L Consulting

Some online estimates say that about 30 million PowerPoint presentations are given every day. That number seems more than a bit high, and it's hard to find a credible source for it. But let's say it's off by a factor of 80 percent, so that just one-fifth of that many presentations are given each day. Still, that would be 6 million PowerPoints.

In the legal community, we give our fair share. Since legal services are about 1% of the total economy, we can make a guess that at least 60,000 PowerPoints are being given every day in the U.S. legal industry, or about 6,000 for every hour of the working day.

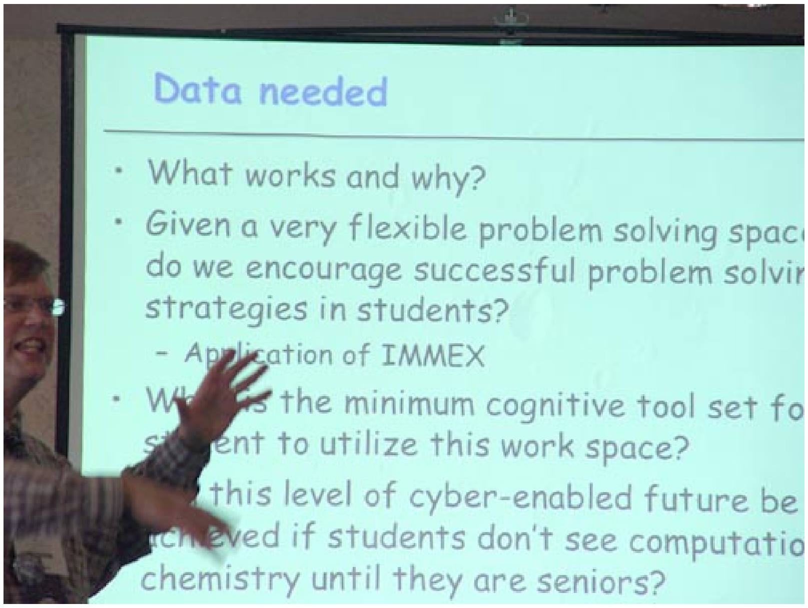
If we assume that every legal industry PowerPoint is being watched by an average of two other people and all of those people charge $200 on average for their services, America's legal industry is producing at least $3.6 million of PowerPoints every hour! That's a lot of time and a lot of money. We ought to at least use it well.

PowerPoint has been the dominant presentation software in the courtroom since 2003. When used well in the courtroom, it allows a skilled presenter to captivate an audience with a well told story, enhance the audience's understanding of a case, and persuade skeptics that the presenter's position is correct. In other words, a well-crafted PowerPoint presentation helps tip the scales of victory, potentially substantially, in your client's favor.

Unfortunately, I believe the typical PowerPoint presentation used in the courtroom causes more harm than good. Here are twelve easy-to-avoid PowerPoint mistakes.

1. **The bullet point list.** This is the mother of all PowerPoint mistakes. If you make this one, you probably make several others on the list. We have written about why bullet points are bad many times, and below is an example of what not to do. The most significant problem is that people will normally read your bullets and ignore what you are saying. Further, their brains will remember less than if they had either read OR heard what you were saying because of the split attention effect.

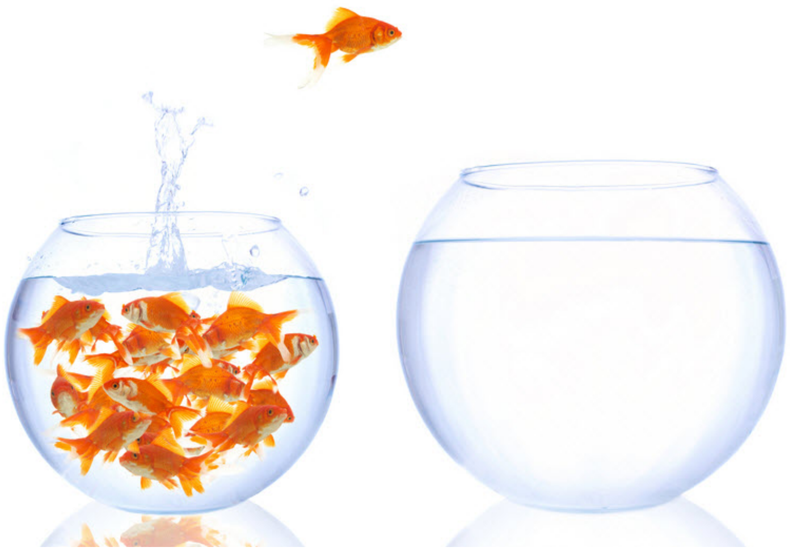
2. **The wall of text.** Courtroom presentations should be a lot more Steve Jobs and a lot less like the example below. Nobody can read it.



3. **The "who cares."** If you fail to tell a compelling story that nobody cares about, your presentation was a waste.

4. **The flying whatever.** Please do not use PowerPoint animation effects. They are distracting and add little to your presentation.

5. **The "huh" image.** Don't include images that only vaguely enhance your message.



6. **The back turn.** Do not turn your back on your audience. Watch the TED Talks for good presentation form.

7. **The itsy bitsy.** For text on a slide that is projected, I would not go below 24-point text.

8. **The slide that overstayed its welcome.** Don't leave up a slide that has nothing to do with the point you are making. Either insert a black screen slide or press the B key to toggle on and off your presentation.

9. **The Bob Marley.** "Turnnn your lights dooowwwwnnn looooowwww." If you have to, you have the wrong projector. Use 3000 lumens; that's good, and 5000 lumens is great.

10. **The highly objectionable.** Do not put up materials that the judge will rule inadmissible.

11. **The "ehhh."** If you have sound to play, make sure you have the equipment to amplify it with. Your laptop speakers are not enough for any courtroom.

12. **The End (is missing):** Please do insert a black screen on your last slide so that we don't see you hit the "next" key one more time only to reveal the desktop photo of you and your kids in Tahoe.

Jury Selection and Voir Dire: Don't Ask, Don't Know

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

John Colville once said of Winston Churchill, "He fertilizes a phrase or a line of poetry for wee ks and then gives birth to it in a speech."

The same holds true for great voir dire questions asked during jury selection. How a question is asked dictates how it is answered: Skillful voir dire questions result from keen awareness of potential nuances, precise wording, intentional phrasing, and delivery.

Notice what certain variations elicit:

"Someone who files a formal discrimination complaint probably has a valid case" (48% agree nationally). Many of the same people, however, agreed that "People often claim discrimination when they don't get what they want" (52%) and that "Poor performers are much more likely to complain of discrimination than good performers" (55%).

Similarly, when asked "Do you believe there are too many lawsuits nowadays?" 79% of people nationally say "**Yes**."

> (**Follow-up question**: If someone is badly hurt by a product, do you think it's frivolous of them to sue the company that made it? Most common answer: "**No**.")

Are you an environmentalist? Most common answer: "**Yes**."

> (**Follow-up question**: Are you a member of or do you contribute money to any environmental organizations? Most common answer: "**No**.")

Do you believe in racial profiling? Most common answer: "**No**."

> (**Follow-up question**: Should people from Muslim countries get extra scrutiny? Most common answer: "**Yes**.")

The answers to those follow-up questions reveal different mindsets than the often-misleading answers to the primary questions, which can lead to mistaken judgments. Good follow-up questions yield important information, but are often unasked. Don't be satisfied (or worried) too soon by the first answer you get.

Research by Judge Gregory E. Mize (retired D.C. Superior Court trial judge and co-chair of the D.C. Jury Project) revealed that while 28% of prospective jurors in both civil and criminal cases failed to respond affirmatively to questions in open court, 10% of those "silent ones" in civil cases and 17.5% in criminal cases later revealed biases that yielded a cause strike in follow-up individual interviews.

Posed in the proper environment, follow-up questions are indispensable tools to provide a basis for cause strikes. The more cause strikes you achieve, the better use you can make of peremptory challenges to avoid undesirable jurors. Without such measures, biased jurors end up on the jury.

Skilled investigators know that closed-ended questioning (e.g., "When did you leave the bar?") yields 85% less information than "free-format" interviews using open-ended questions (e.g., "Tell me what you did that night?"), which allow the respondent to recall and report more through free association. If given the time and space to do so without interruption, people reveal important information.

The tendency is to jump on a worrisome or interesting answer. However, better listening may provide more clues to people's character, motives, biases, and experiences. Reserve questions to learn specific information.

Here are some tips:

- **Establish rapport**, especially with unfavorable jurors.
- **Make it easy for them to reveal why they are not good jurors** for your client. It is a win-win situation: You will have a clearer basis to strike them or, if they end up on the jury, you will benefit from sharing a positive exchange with them.
- **Make jurors feel that it's safe to talk**. Beware of putting jurors on the spot or not protecting their privacy in open court, which makes them feel self-protective.
- **Leave them room to talk**. "Take a beat," a phrase borrowed from the stage, means to leave a moment's silence after the other person answers in case they have something to add. The best information often comes out as an afterthought once a juror ponders a bit.
- **Don't move on too quickly**. Following a strict list of questions removes the spontaneity of "conversation" with potential jurors, suppresses their potential disclosures, and creates a deposition-like atmosphere that sends the message: "Just tell me what I asked and nothing more." This is counterproductive.
- **Reserve scripted questions** to learn critical, specific information.

Whether due to a hidden agenda to remain on the jury or out of discomfort in revealing it, some jurors attempt to conceal bias. Stealth enemies are critical to ferret out.

- **Invite and cajole the jurors**. Make it acceptable for them to expose their bias.

- To hone your skills at getting at the truth, **read about investigative techniques** to detecting lies and deceit.

It takes two people to learn the truth: one to tell it and one to listen and make it safe for them to tell it. Inquiring lawyers must make prospective jurors feel safe to reveal the truth.

11 Traits of Great Courtroom Trial Technicians

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial Consulting, A2L Consulting

A trial technician, also known as a hot-seat operator, has an incredibly challenging job. He or she needs to manage the minute-by-minute display of evidence at a trial. Often that means bringing up deposition video that has already been synchronized with the deposition transcript, or being able to bring up one of thousands or even millions of documents on a moment's notice. In addition, a great hot-seat operator must understand what the litigator needs to prove at trial and what the pitfalls may be. He or she must almost feel like a "second skin" to the trial lawyer and must anticipate problems that will inevitably occur in the proof of the case.

Here are 11 characteristics of a great trial technician.

1. They anticipate problems and solve them before they happen. Typically, the trial technician is able to respond to requests from the litigator at trial almost before the requests are made.

2. They exude calm and confidence, even when everyone around them is tense.

3. They don't just flash massive amounts of text on screen that no one can read. Instead, they know how and when to enlarge and highlight key portions. They have an instinctive feeling for what will be relevant to a jury.

4. They are a source of solutions and better ways to achieve the presenter's goals. It's amazing how often a bright and qualified person ends up being a hindrance rather than a help to a litigator's goals.

5. They disagree when it's in the best interest of the client. The excellent trial technician sees things not only in terms of the law but also in terms of how they will fare before a jury and is unafraid to state his or her opinion.

6. They are quick on their feet and always on their toes. You only have to tell them what you want once and they get it.

7. They're flexible and make changes on short notice without a fuss. A great trial technician can make significant changes in a presentation without calling attention to himself or herself.

8. They are highly professional and blend well into the trial team.

9. A great trial technician is realistic about the limitations of the technology and the time it takes to perform certain tasks, so they can advise counsel to help prioritize for the best outcome.

10. Even when the presenter fumbles, the great trial technician can keep going and help the lawyer stay on track.

11. The great trial technician is an excellent communicator who can put even the novice technology user at ease.

7 Reasons It's Okay to Procrastinate on Your Trial Preparation

by Ken Lopez, Founder/CEO, A2L Consulting

Don't get me wrong. I'm not suggesting procrastination is a good idea. Rather, I just want you to know that even if you do procrastinate on trial preparation, things will probably work out okay.

Why? Because we have spent 18 years designing a company around managing fire drills - and there are other companies like ours with the same mentality. Yes, we all are the firemen and firewomen, indeed the smokejumpers of the litigation support world. We're routinely being called in to fight a fire that blew up unexpectedly, to put out one that looked like it was being doused, or even to fight one that got much larger than anyone ever anticipated.

Sometimes, life's realities get in the way of good planning. It might be another client. It might be a holiday. It might be that the client is in denial about going to trial. We see all of these a lot. While not great excuses, they are understandable.

Fortunately, we at A2L and other firms like A2L have been doing litigation support work for a long time. We have seen it all when it comes to trial preparation. Mock trials are run a few days before trial. Litigation graphics are prepared at the 11th hour and the use of a trial technician is only approved a day before she is needed in another city.

It's not great when things go this way. I'm pretty sure the client is hurt in the end, but I'm not saying it's malpractice either. After all, more often than not, the client is at fault in some way, and it is usually about budget.

The great law firms won't stand for this behavior from their clients. They'll fund and execute trial preparation themselves when the client is dragging his feet. However, not every lawyer has the chutzpah to work with (or around) their client this way.

Although we still hope that you will practice extensively, plan for a great presentation using a 30:1 preparation ratio, develop a one-year trial prep calendar, and not make avoidable trial preparation mistakes, here are seven reasons that you can STILL procrastinate and we'll make sure it works out anyway.

1. **We're used to it.** It is not uncommon for someone to call us and say they have a case with $100 million at stake and it's going to trial in less than a month. This used to happen more often than not. However these days, it is happening less and less. Trial lawyers have come to accept that the level of preparation expected of them is much greater than it was five years ago and hardly resembles what was acceptable 20 years ago.

2. **We have built our systems to spin up quickly.** Rushing does not equal efficiency. However, we have built staffing and technology systems that allow us to expand and contract very quickly. We, and other firms like ours, can do this on-site or off-site.

3. **We use a variable staffing model.** People often ask me how large our firm is, and my answer is usually that I don't know today. We have spent the last several years building a flexible system that can go up or down 30 or 40 employees in a week or two. This just-in-time system is brilliant if you think about it. It keeps costs down for our clients, and it avoids the problem that plagues many firms where people sit on the sidelines waiting for something to happen.

4. **We build stories for a living - often at the last minute.** This morning, our team was discussing a case that is on the eve of trial but has no story built out yet. Like a lot of cases, it arrives on our doorstep as a chronology. There is no story, no meaning and nobody would care what happened really. Our opposition, however, has a simple to understand emotional story. So, in a week or so we will build out a truly compelling story for our side. We do this routinely.

5. **Let us sweat the small stuff.** Since you now have to rush and get your case ready for trial, we can take on the challenges of preparing the trial database and being ready to present any document on a moment's notice. We can handle courtroom logistics as well and make sure all of the electronics are set up perfectly. That is what our trial technicians do every day.

6. **We can help you practice.** We have systems to do small scale and rapid testing of a case. Sometimes we conduct a Micro-Mock exercise. Sometimes we conduct a full mock exercise but use the jury consultants to present the case (thus freeing up counsel from preparing for a mock and a trial) to the mock jury.

7. **We are professional simplifiers.** If you go to trial often, you have certainly found that the simpler you make your case, the better your results. It's true for many reasons, but making a case simple for judge or jury takes a very long time. Fortunately, we litigation consultants know how to do this faster than anyone. Indeed, it may be the most valuable thing we do.

The more time we have, the better the result - always. However, when you are up against the wall for whatever reason, please be aware that our firm and many firms like ours know how to jump into battle instantly.

Will Being Folksy and Low-Tech Help You Win a Case?

by Ken Lopez, Founder/CEO, A2L Consulting

I had a conversation wit h a major law firm partner recently that sounds like a thousand I've had before. It goes something like this: “I generally delegate the preparation of litigation graphics, and I tend to keep things pretty low-tech anyway.”

To be fair, this is the way cases have been tried for a very long time, and the partner had had a great deal of success with this approach. So, what's wrong?

What’s wrong is that jurors’ expectations have changed enormously in just the last few years. Jurors expect a trial presentation to be polished and more like the nightly news than like a corporate PowerPoint. They expect a trial lawyer to be polished and well-practiced, more like Brian Williams than a dull CLE presenter. This rural Arkansas jury said it better than I ever could when they responded to a question about the use of trial technology by saying, “Today is technology. That’s what it’s all about.”

In their “Litigation Services Handbook: The Role of the Financial Expert,” authors Roman L. Weil, Michael J. Wagner, and Peter B. Frank reject the idea that trial lawyers are penalized by jurors for seeming too well practiced or knowing too much about technology:

“Some lawyers and witnesses worry about appearing too slick,” they write. “They worry that nicely designed and colorful exhibits or the use of high technology will reinforce the image that the party they represent has substantial resources and thus does not need to be awarded damages or would have little difficulty in paying them. Post-trial interviews we have conducted demonstrate that this is a needless worry. . . . Jurors often see visual communication – for example, on TV or on their own computers – that is superior to anything they see in the courtroom.”

So if you're trying cases the way your father did, you may not be meeting a jury’s expectations. Just the other day, one of our litigation consultants shared with me a conversation he had had with a California litigator. This lawyer came to us after falling so far behind in his technology in a recent trial that the judge insisted that his opponent's trial technician help him pull up documents electronically to speed up the case. Ouch.

Some consultants think a lower-tech approach is better in order to avoid looking like the 500-pound gorilla in a case. I think that is usually misguided. If you're a large company, you don’t look good for looking low-tech. You look as if you didn’t prepare.

The purpose of using technology and modern presentation techniques is not to dazzle with gadgetry. Rather, it is to clearly and efficiently present your case using technology to emphasize key points better than one can do through traditional means. By embracing technology you're not only meeting jurors’ expectations. You're also saying to them, “I worked hard at this in order to make it understandable, to save you time, and to show you we are an open book.” I think modern juries reward this approach.

Litigation Graphics: Timelines Can Persuade Judges and Juries

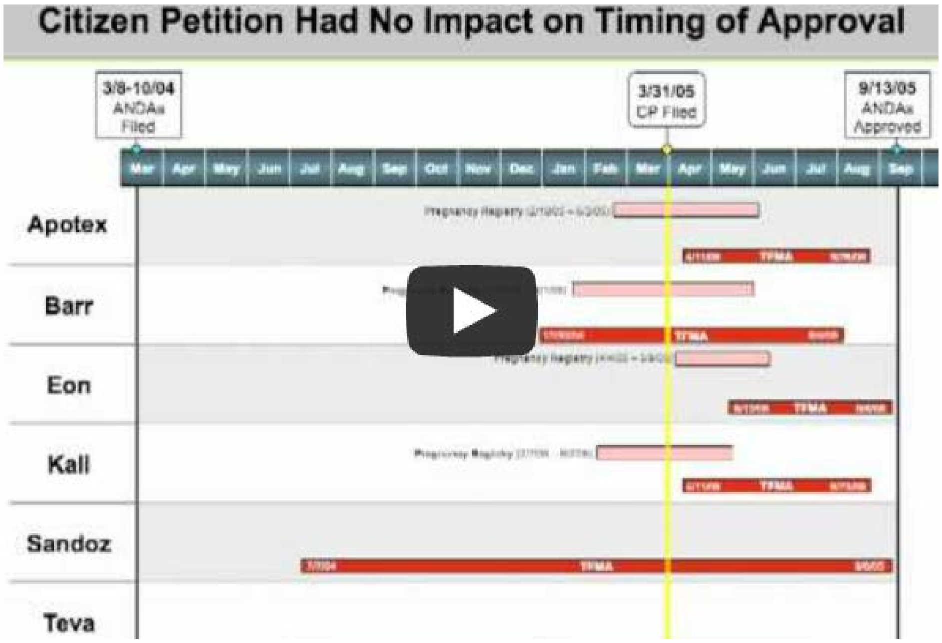
Timelines can be extremely helpful in many types of trials. Whenever the order in which events occurred is a significant issue, or a jury or judge needs to understand how a story began and ended, a timeline is appropriate.

As Texas attorney and legal technology expert Jeffrey S. Lisson has written [pdf], "Timelines are the most effective way to give a judge or jury a sense of who did what, when, and to whom. Just as bar charts and graphs help the uninitiated make sense out of a sea of facts and figures, timelines show the relationship between events. Timelines generally show events laid out on a horizontal, constant chronological scale. Events – the writing of a memo, the reading of an x-ray, or the shooting of a gun – are listed in the order they occurred. While tables of dates and facts require effort to understand, timelines are instantly clear.

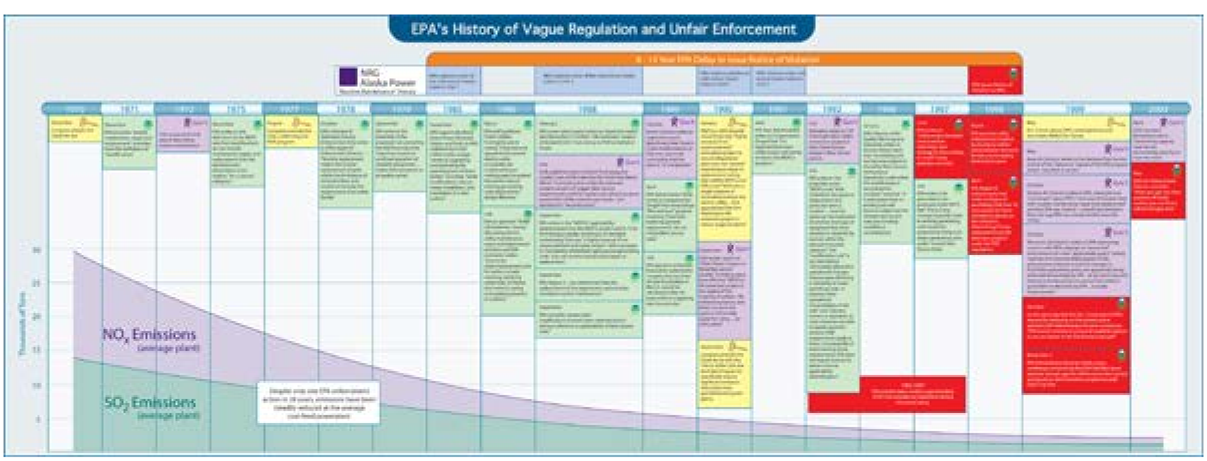
Contrary to many people's belief, PowerPoint presentations are well suited to the presentation of timelines and other litigation graphics. Because it is easy to add hyperlinks to a PowerPoint, an experienced designer can create an interactive presentation that allows the presenter to click on a "hot spot," such as a document icon, name or date, and move directly to that item.

For example, in the exhibit, "Prior Art Interactive Patent Timeline Trial Graphics," that we devised for a patent case, the presenter can show the history of the prior art related to a subsequent patented invention in any order that is convenient.

Similarly, in the “Hatch Waxman ANDA Timeline,” the colored bars represent periods of conversation with the Food and Drug Administration that delayed the approval of an Abbreviated New Drug Application (ANDA) for a generic drug. The timeline that we used shows visually that a citizen petition did not cause a delay in the approval of the generic drug. Rather, the delay resulted from the FDA taking its time in its review of the application. This timeline, which summarizes thousands of pages of documents, helped lead to a complete defense verdict for our client, a major pharmaceutical company.

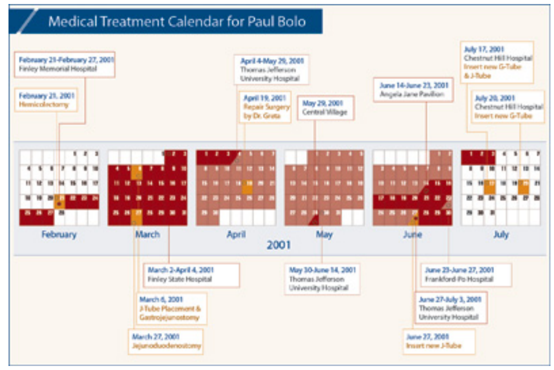


The concept behind our exhibit, “EPA’s History of Vague Regulation and Unfair Enforcement” in a new source review case was to tell the history of EPA's lack of enforcement and inconsistent messages -- and the industry’s success in lowering pollution from coal-fired power plants in spite of the EPA’s inaction. It is possible to add other information to a timeline to make it tell more of a story and persuade, not just inform. Using timelines as a persuasion tool throughout a trial represents a higher level of advocacy than merely putting events in chronological order. Click the image to zoom.



Like any litigation graphics shown to a fact-finder, the timeline can and should be a persuasion tool. We believe it should tell a story without having to read all or even most text entries. Should individual timeline entries seem to be inconsistent with the overall trial theme or should juxtaposing them with a long term graph underscore that correlation does not equate with causation, we advise telling that story visually as above.

The Best Ways to Use Calendars in Legal Graphics



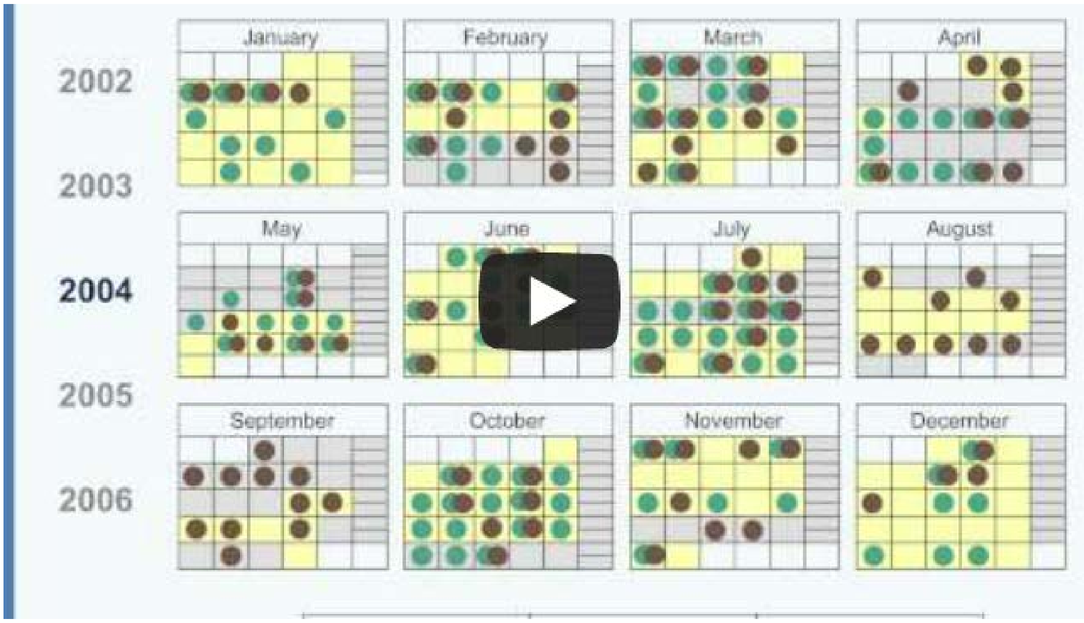
We have previously discussed how valuable timelines used as legal graphics can be in the presentation of facts at trial. As we have noted, most cases involve the placing of events along some sort of time sequence, and timelines, if they are well designed, can give jurors a straightforward introduction to the facts of a case. In fact, we recently released an e-book describing best practices for the use of timelines and legal graphics at trial.

Like timelines, calendars are also an intuitive way to organize facts and events that occur in a time sequence. In fact, they are even more intuitive because everyone is familiar with them and because they help everyone organize information on a day-to-day basis. Calendars can be especially helpful at trial when there is a lot of data that must be conveyed quickly and understandably, and when that data must be understood as a time sequence. This could involve conversations, meetings, appointments, dates of official events (such as the signing of a will or a contract), and the like.

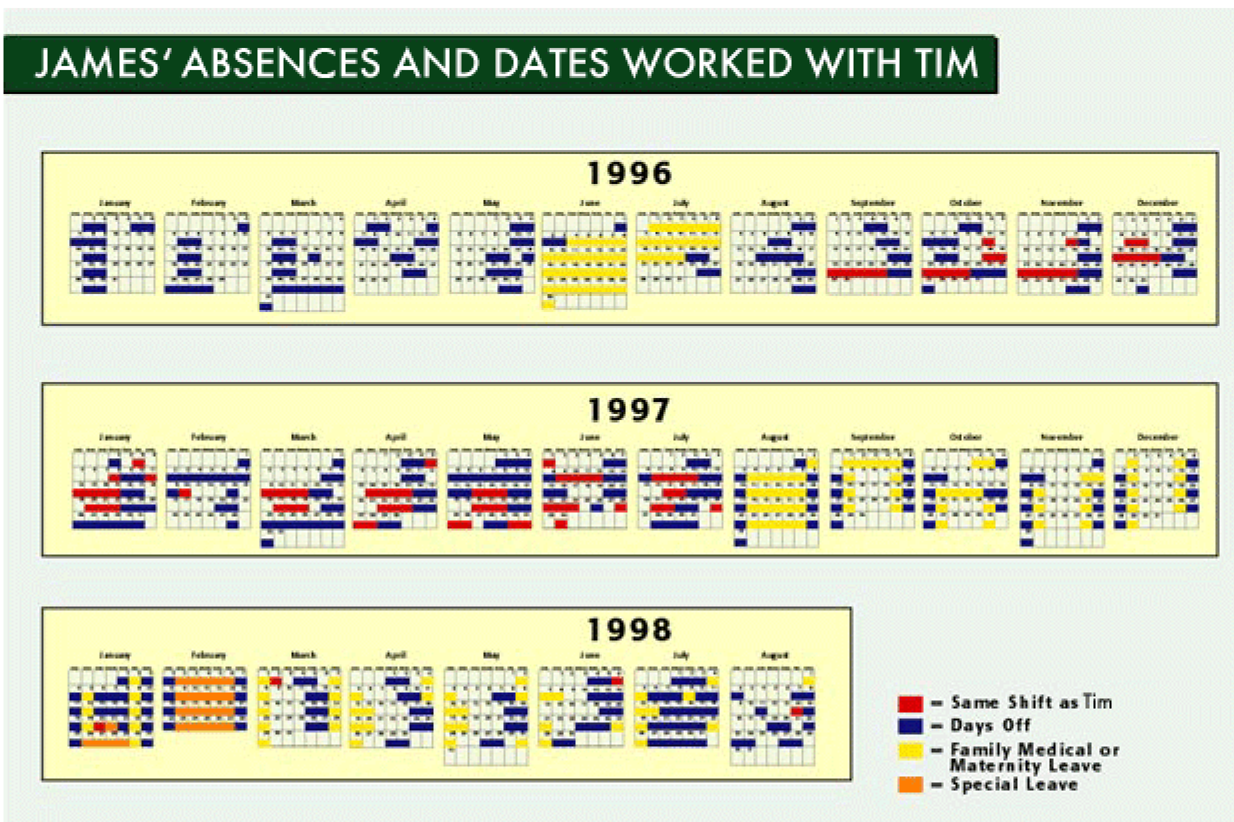
In *What You Didn't Learn In Law School About Trial Practice* (2008), longtime Indiana trial lawyer Charles Bruess wrote: "In an employment discrimination case in which the defendant company maintained plaintiff was discharged for excessive absenteeism, an issue was what days plaintiff worked or did not work. Counsel brought large monthly calendars, placed them on an easel, and, as the witness testified as to the days worked or not worked, the dates were marked accordingly on the calendars. The calendars were marked as exhibits and were introduced into evidence."

Below, to cite another legal graphics example, we used a calendar to illustrate key dates in the RFP process for a government contract, starting with the date on which the compressed RFP was issued by the Department of Defense.

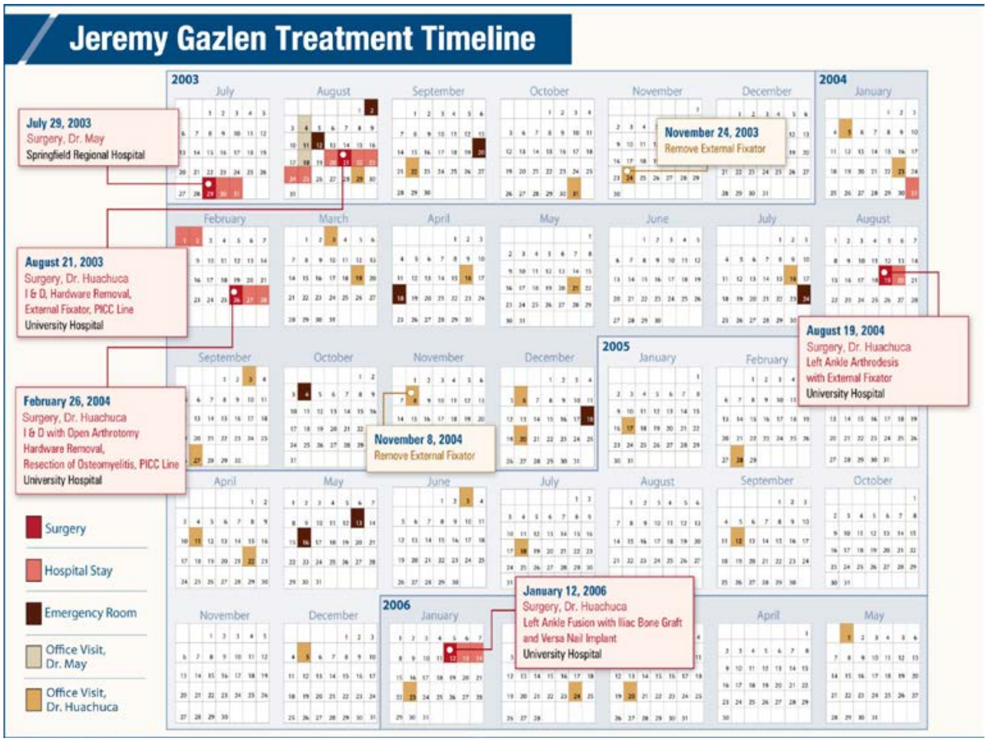
In this series of legal graphics we show, in a partnership dispute, the dates on which the defendant was in the office and the dates on which he received calls or faxes from the plaintiff.



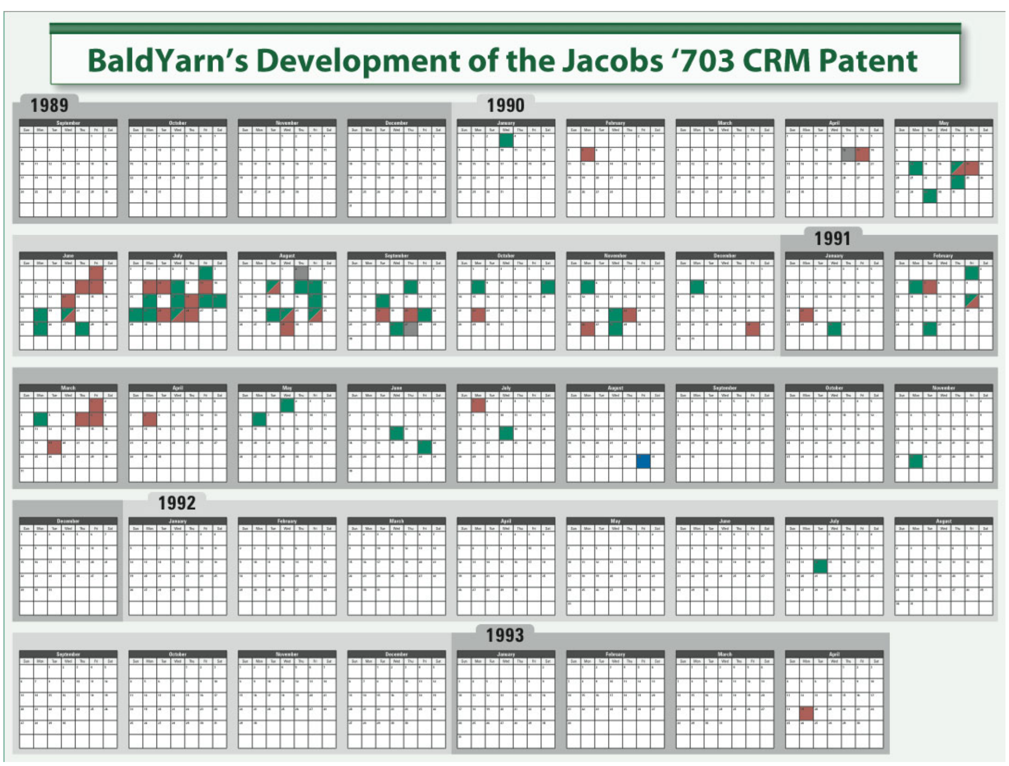
In an employment case, we used this ordinary calendar legal graphic to illustrate the dates on which a plaintiff took days off from work for various reasons. A simple color-coding technique made it easy for the jury to understand the sequence.



Next, in a medical treatment calendar legal graphic, we showed the dates of key surgeries, office visits, and hospital stays, again accompanied by a simple color-coding technique.



Finally, we used a calendar legal graphic to show key dates in the development of an invention that was at issue in a patent trial.



6 Trial Presentation Errors Lawyers Can Easily Avoid

By Ken Lopez, Founder and 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.

2. **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.

3. **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.

4. **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.

5. **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.

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.

Say Goodbye to the David vs. Goliath Courtroom Myth

We often hear from clients or prospective clients that it won't help them if they look like a big company that is attempting to overwhelm or dazzle its opponents with technology. Jurors won't buy that sort of stuff, we are told, even from a litigant that is actually a large company.

But although some may think that if the other side can present a "David vs. Goliath" story line, a major corporation will end up in danger of losing its case, research suggests that this is not so. In the first place, jurors have a pretty good idea about which corporations are large ones, and it won't help to "hide the ball."

In the second place, this sort of argument made more sense a decade or more in the past, when technology was just getting a foothold in America. Now, technology is simply a fact of daily existence, and jurors expect to see it.

In 2011, 78 percent of Americans used the Internet regularly, and just over 50 percent of Americans used Facebook. Forty-four percent of Americans owned a smartphone, up all the way from 18 percent just two years before. And these numbers are only going to go up.

Dr. Lou Genevie, a voir dire and trial consulting expert and founder of Litstrat, noted, "In our research, big companies that try to play small often pay a high price in a further erosion of their credibility. Finding the visual porridge for a big company that feels and looks 'just right' is a challenging process, very case specific, and the reason for testing the visual case long before rolling it out at the actual trial."

Trial consultant David Davis, a founder of R&D Strategic Solutions in Lexington, Mass., recalls: "In an agricultural area of Oklahoma, we worked for a client who was concerned about how their exhibits would be received by the jury and whether it would make the client appear to be slick and wealthy. In post-trial juror interviews we found there had been no problem. One juror commented, 'I see better things on my computer every day.' "

Trial Behavior Consulting's Sarah Murray, a social and cultural anthropologist recognized for her expertise in trial strategy, jury selection, witness preparation and visual communication, says, "My research and experience over the years consistently show that jurors like well-executed graphics and that a "David vs. Goliath" scenario is not a problem. The problem is when a team has not well thought out its graphics or graphic communication strategy and has a lot of graphics that go nowhere but show that a lot of money has been thrown at the case."

In a similar vein, a litigation support specialist for a United States Attorney's office has written in the United States Attorneys' Bulletin [pdf] "There is always some concern that using technology … will make the government look too slick or fuel the argument from defense counsel of the 'vast resources of the federal government.' In reality, the jury expects the government to be prepared and smooth in presenting the case to them. They already know that the government has resources."

Thus, this supposed David versus Goliath issue ultimately doesn't appear to us to be as significant as it once might have been, for either the David who is considering using its status to its advantage, or the Goliath who is concerned about appearing a giant. High quality preparation, irespective of stature, is what today's judges and juries are looking for and expecting.

10 Web Videos Our Jury Consultants Say All Litigators Must See

As litigation consultants, jury consultants, trial technology consultants and litigation graphics consultants, we have the opportunity to share our decades of experience in over 10,000 cases, working with litigators from all major law firms, with our litigation clients every day. Clearly, this is a valuable service, and I believe great litigators become better litigators for having worked with our firm.

However, I also believe that litigators can learn a lot about trying cases, just as our jury consultants do, by watching other litigators. Unfortunately for most lawyers, especially those at large law firms, having the opportunity to watch other litigators try cases is actually quite rare.

Even a large law firm has relatively few cases that actually go to trial, and client demands do not allow litigators the ability to watch a case live from beginning to end simply for the professional development opportunity. Since few courtrooms record trials on video, how is a litigator to keep improving their skill set?

For most litigators looking to add to their experience, CLE programs like those at NITA, pro bono trial opportunities and mock trials run by jury consultants have historically helped fill the training void. However, one place where many of us go to learn and improve skills outside the courtroom, a place where we might expect to learn more about litigation - YouTube, actually has very few courtroom videos. As it is in many ways, the legal industry is peculiar when it comes to cameras in the courtroom - they're banned in federal courts.

Whereas one could easily go online and learn how to build a back yard pond, do the latest laparoscopic surgical technique, become a better salesperson or refinish a valuable antique; learning great litigation skills still largely requires live attendance at trial.

Fortunately, however, the times are beginning to change. Some great CLE programs, oral arguments, trial tactics and litigator training videos are making it onto the internet. Pointing the way toward the future are companies like the Courtroom View Network, who are selling complete trials on DVD - what better way could there be to research the style and techniques of opposing counsel?

In the absence of that future ideal state where videos of great examples are plentiful and at arm's reach, or the click of a link, here are 10 must-see videos for litigators. Our litigation consultants and jury consultants have hand-picked these videos, as each offers helpful techniques for the modern litigation team.

1. **Looking Your Best in a Video Deposition:** Have you ever wondered how your client can come off looking better in a video deposition? As our jury consultants will attest - it turns out that the way you sit in your chair can change how credible you appear.

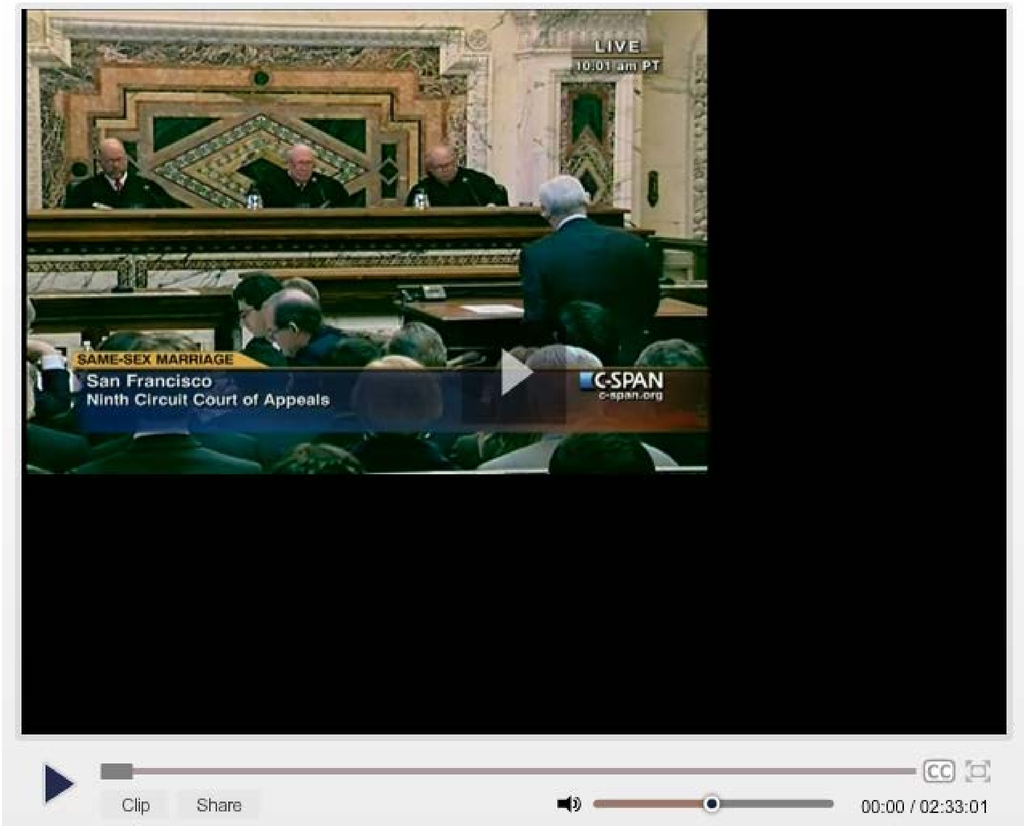
2. **Will Trial Technology Make You Look Too Slick?** We covered this topic in a previous article and thought this powerful post-trial jury interview deserved a second look. This rural Arkansas jury is not shy about sharing their feelings toward trial technology and litigation graphics. Thankfully, the jury consultants in this case captured their opinions.

3. **What Percentage of Jurors Decide a Case After Opening?** According to this litigator, the number is shocking. It's consistent with the experience of our jury consultants too. You'll never look at opening the same way again.

4. **David Boies Talks About U.S. v. Microsoft:** More than 10 years have passed since this famous antitrust case. In that time, the legend that is David Boies has only grown.

5. **F. Lee Bailey on Cross Examination:** Known for a quick mind and blistering cross, these F. Lee Bailey clips offer cross exam lessons for any litigator.

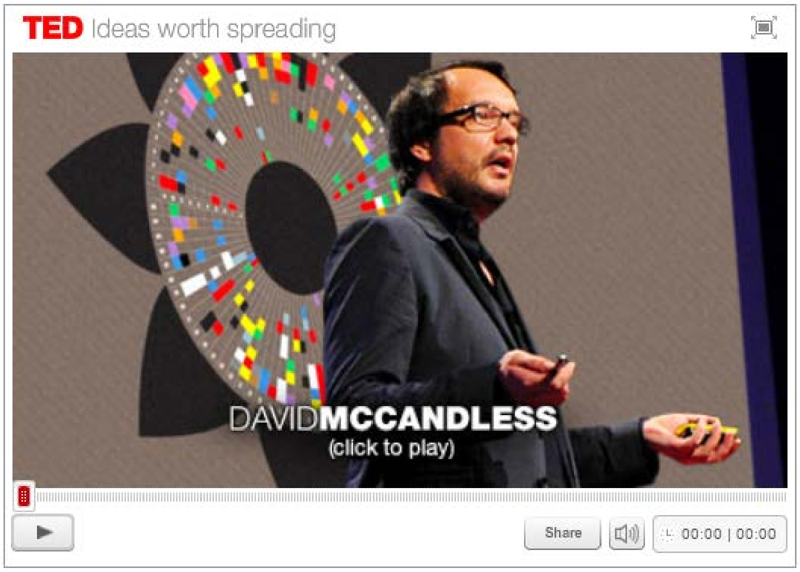
6. **Ted Olson and David Boies Deliver Oral Argument:** One of our jury consultants said this was like De Niro and Pacino appearing in the same movie. Famed litigators Ted Olson and David Boies argue Prop 8 before the court in Perry v. Schwarzenegger.



7. **What Should a Litigator to Do With Their Hands:** Here is a short reminder of how and when to gesture while speaking to a jury. Our jury consultants like this video because the instructor follows his own suggestions well and the tips are straightforward.

8. **What Jurors Want to See:** This video from a NITA (National Institute of Trial Advocacy) instructor is very much in alignment with the teachings of our jury consultants and our litigation graphics consultants.

9. **A TED Talk on Data Visualization:** We believe this speaker honors our profession with his message and approach. He reminds us that how we show data and what data we show will have a significant impact.



10. **What Litigators Can Learn About PowerPoint from a Comedian:** Don McMillan's take on what NOT to do with PowerPoint has long been a favorite of our firm. Although delivered in a comedic wrapper, these PowerPoint suggestions are especially applicable for litigators making courtroom presentations.

One day, hopefully soon, cameras will be allowed in all U.S. courts. Then, we litigation consultants, jury consultants and litigators will truly experience something special. Just imagine how much one could learn from a top 10 video list of the most effective opening statements of the last year. The practice of law would be better for it.

7 Videos About Body Language Our Litigation Consultants Recommend

By Ken Lopez, Founder and 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.

5 Demonstrative Evidence Tricks and Cheats to Watch Out For

By Ken Lopez, Founder and CEO, A2L Consulting

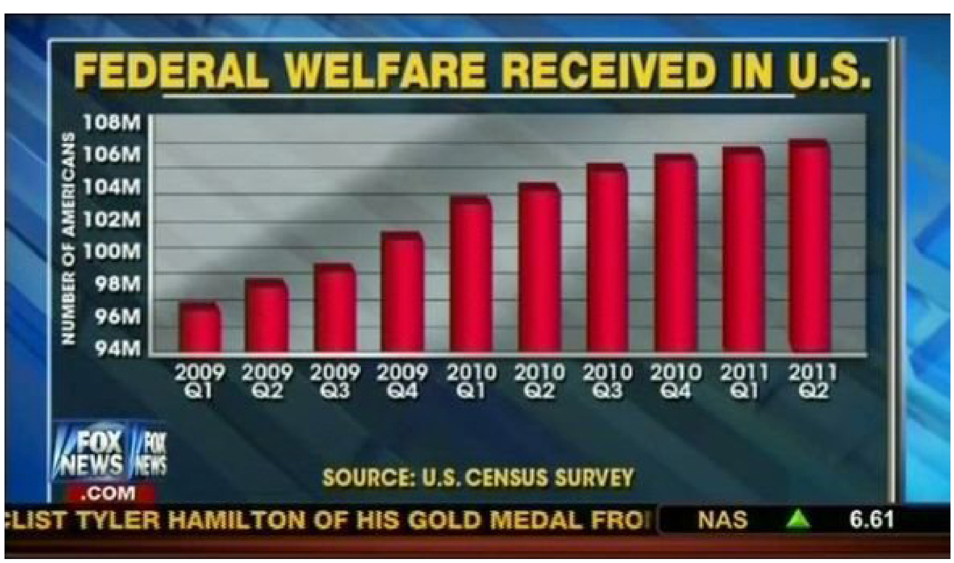
Charts don't lie, people do.

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.

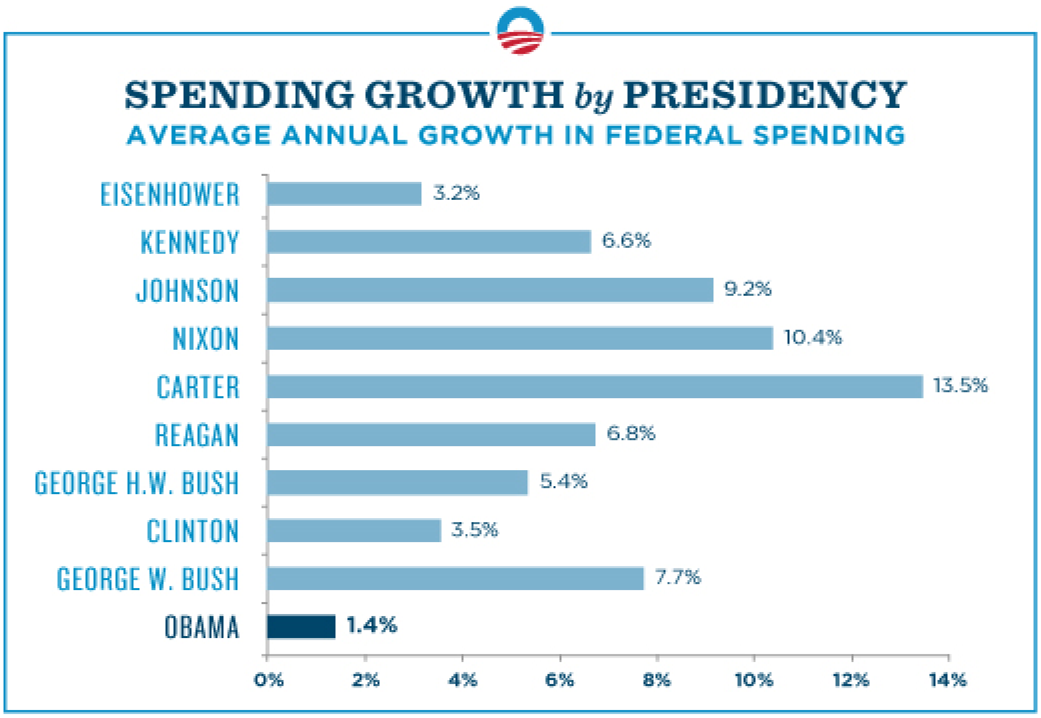
Remember that each piece of demonstrative evidence is subject to the balancing test under Rule 403 of the Federal Rules of Evidence, among other evidentiary standards. Under Rule 403, an otherwise relevant demonstrative will be excluded when its probative value is substantially outweighed by unfair prejudice,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

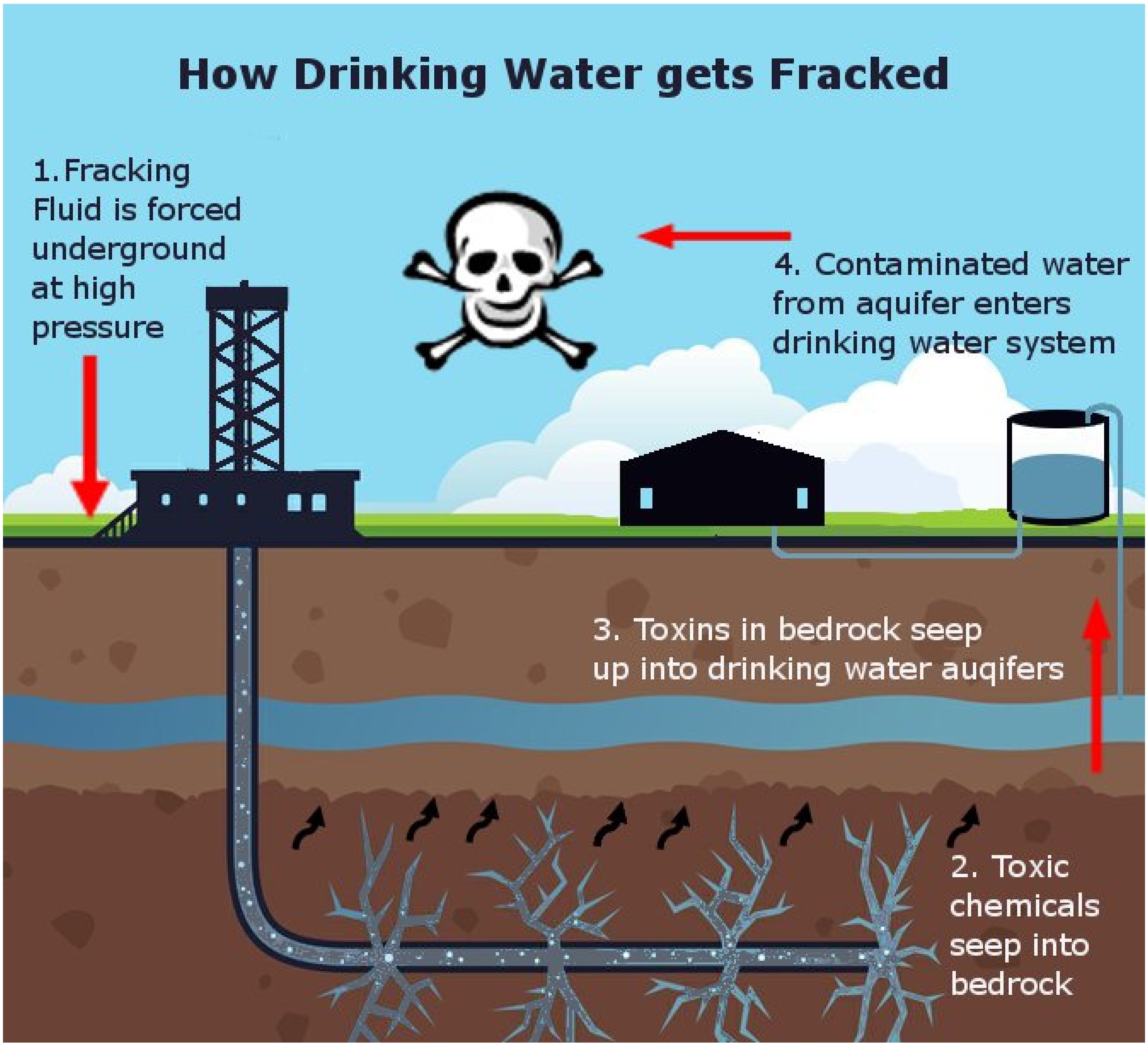


3) **The Percentage Increase Trick?** How many times have you heard someone talk about a 200% increase and really wonder exactly what they are trying to say? Do they mean it doubled, it quadrupled or something else? If they are using the percentages correctly, a 100% increase is a doubling and a 200% 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.

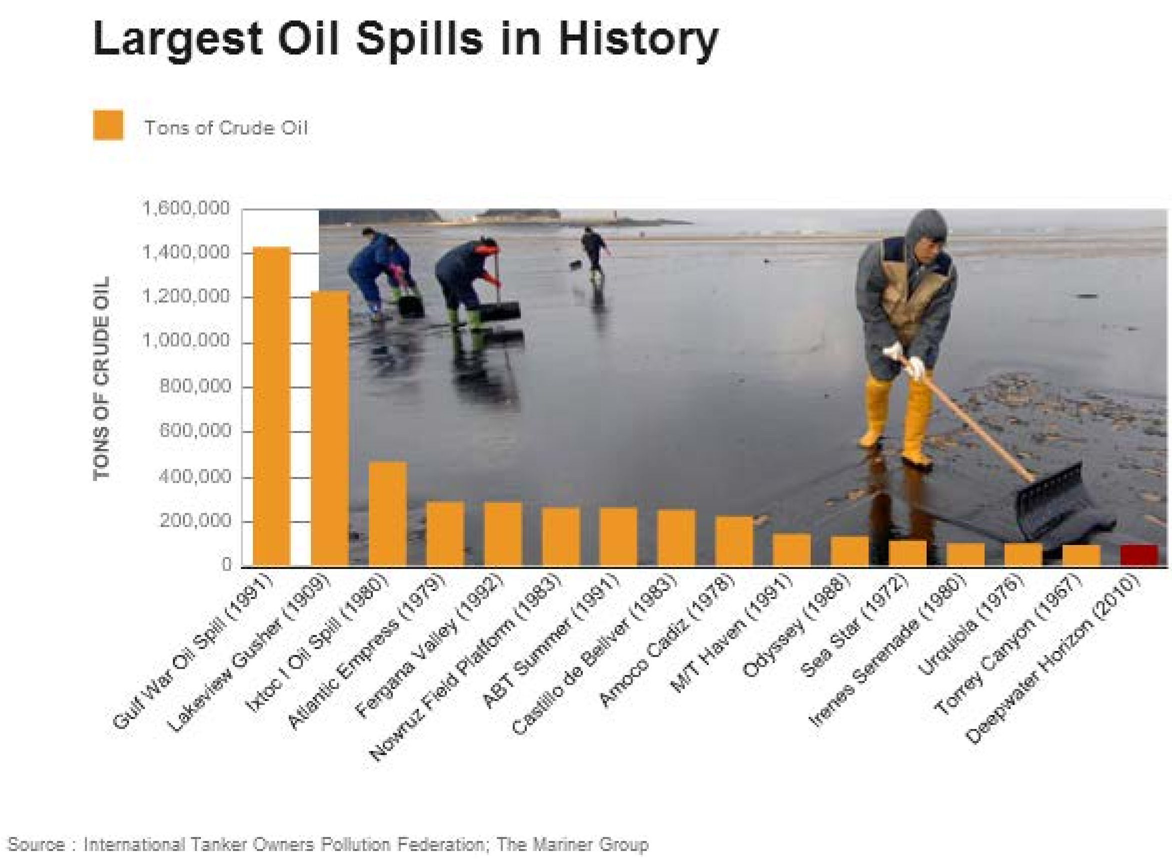
4) **Tricking the Eye with 3D Charts**: Flat charts with no depth or 3D aspect are harder to trick the viewer with, so always scrutinize your opponent's charts when the third dimension is introduced. For example, have a look at the two pie charts below. Both red areas are the same percentage of the pie, 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.

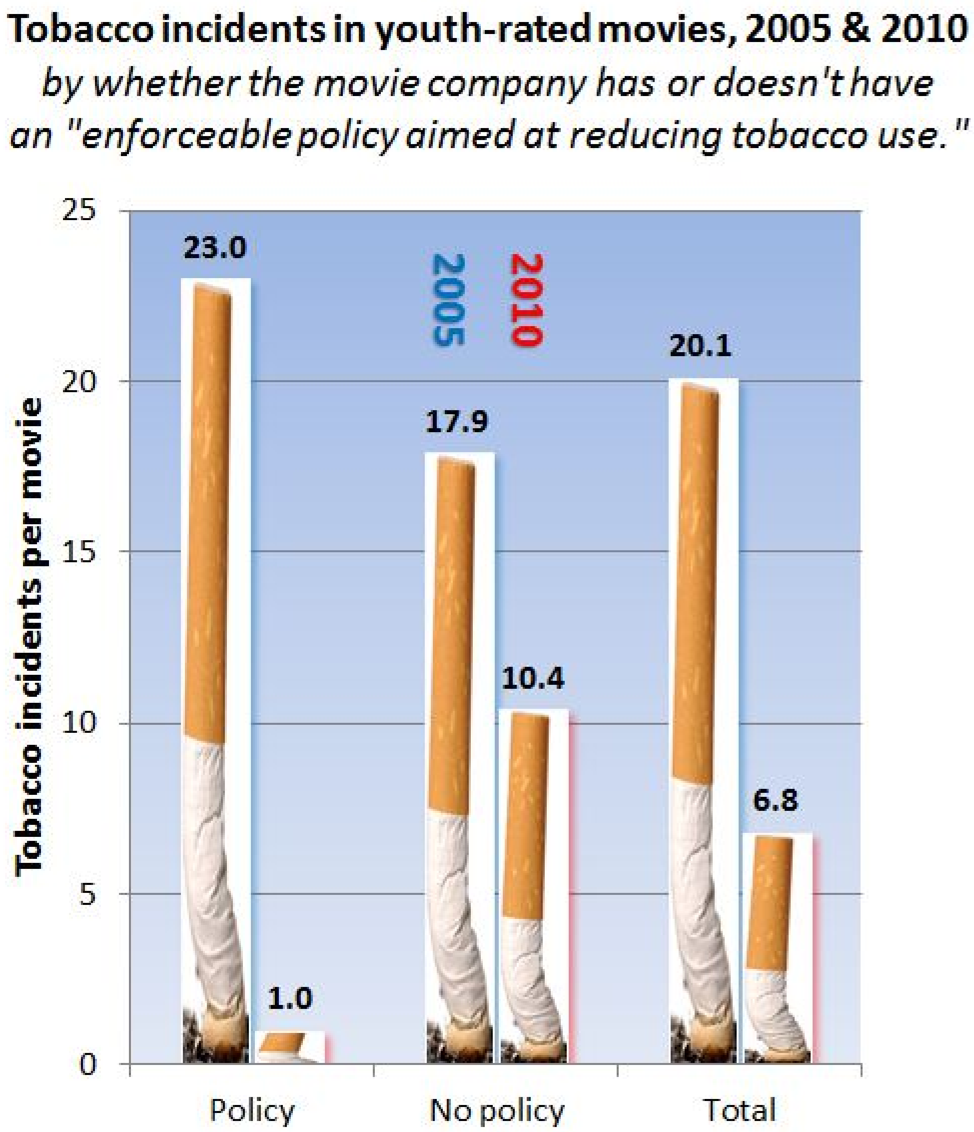
This one is used to sell water filters, but if used in court in a fracking lawsuit, the poison symbol would (if objected to) rule the chart inadmissible.



The chart below shows the surprisingly small size of the Deepwater Horizon spill when compared to historical spills. The photograph adds nothing to the viewers understanding, so it might be objectionable if used as a demonstrative.



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?


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
2005
2010
23.0
1.0
17.9
10.4
20.1
6.8
Policy
No policy
Total

12 Astute Tips for Meaningful Mock Trials

by Laurie R. Kuslansky, Ph.D., Jury Consultant

I have led or helped lead over 400 mock trials in the past thirty years. In that time, I have learned what works and what does not. Below, I share twelve of the best lessons that I believe litigators can take from all of my accumulated experience.

1) Don't pull punches on the opposing side.

In mock trials, we often see counsel hone their messages and themes, as well as throw their best ammo at their own side's presentation, but come up short when preparing the case for the opposing side, whether intentionally or unwittingly. The result is a Pyrrhic victory and makes a mockery of the process. If you aren't rigorously testing whether your position stands up to the toughest attacks, what are you actually testing, and how well will that prepare you for the actual trial? In addition, one common request by counsel is for their side to have the last word to stack the odds of winning. Actually, the opposite approach serves counsel better. It is better to mock lose and to understand why than to actually lose. One way to avoid that is to give the other side every advantage, including the last word during presentations.

2) Use balanced litigation graphics for both sides.

Understandably, in an effort to contain cost, as well as their natural desire to make the best case for their client, counsel often creates more and better-aimed litigation graphics for their own side, but may make an anemic attempt, if any, to create punchy graphics to drive home opposing points. Again, this is a disservice to their side, because what comes out of a research exercise is only as good as what goes into it, so if the input is skewed favorably, a favorable result is unreliable.

3) Less is more – 2-3 hour presentations leave less time to gather feedback and overload participants

Considering that an actual trial is typically years in the making, entails thousands of pages of testimony or hours of videotaped depositions in discovery, and may last several days, weeks or even months, it is challenging and frustrating for counsel to leave anything out of the mock presentations. There are several problems in doing so:

- Telling is not teaching and teaching is not learning, so dumping information on mock jurors' (or actual jurors') heads lacks strategy and is likely to have diminishing returns;

- Everyone has limits in attention and memory, so the more you tell, the less will be noticed and remembered;
- The more that is said, the more likely it is to be misquoted;
- There are realistic time limits to mock trials that balance format with cost, so there isn't an unlimited amount of time for presentations;
- Most mock jurors glaze over after about 35 minutes, so what difference does it make if you keep talking, but they stop listening?

A tightly constructed presentation with appropriate litigation graphics to punctuate key points respects the audience better and has more promise of driving home what needs to be tested. Actual post-trial interviews of actual jurors show that only certain key points were memorable.

4) Rehearse in advance.

The only way to actually know how long and how well a presentation runs is to do it. Paper is not reality, so while something may work well on paper, it may not work as well in 3D. It may also take a lot longer, or the segues may not flow, or the details may come off as tedious when presented in person, as opposed to listed on the page. In addition, if there is any confusion as to what should be shown when using a computer-based presentation, the operator and presenter need to coordinate their cues and timing, rather than to waste precious time learning that there is a miscue, or a document is missing, or the video is too long and the like. In addition, reading a script verbatim is a good sleeping pill but doesn't make for a presentation that will garner attention. If the presentations go longer than expected because they weren't properly tested and edited, the lost time will come from somewhere else in the schedule, such as the critical mock deliberations time. Last, but not least, if a client attends the research and/or observes the video of the presentations, and they aren't smooth, it does not show the participating lawyers in their best light.

5) Have a professional handle the technology for computer-based presentations so that visuals and video clips appear on cue.

There is a video of trial technicians working in the hot seat here.

6) Keep video clips of witnesses short – it doesn't take long to form an impression and there isn't enough time to show entire depositions for feedback on substance. Its purpose is to evaluate form.

According to Carol Ginsey Goman, who has studied and written about nonverbal behavior and communication, researchers from NYU found that we make 11 major decisions about one another in the first seven seconds of meeting. The human brain is hardwired in this way as a prehistoric survival mechanism. First impressions are more heavily influenced by nonverbal cues than verbal cues. In fact, studies have found that nonverbal cues have more than four times the impact on the impression you make than anything you say.

According to Daniel Goleman, author of *Emotional Intelligence* (1996), "brain circuitry allows a by-passing of the neo-cortex by way of the so-called amygdala hijack: 'this smaller and shorter pathway allows the amygdala to receive some direct inputs from the senses and start a response before they are fully registered by the neo-cortex'" (p.18). In just a few *milliseconds* of perceiving something, we not only unconsciously comprehend what it is, but decide whether we like it or not.

Given these findings, there is no reason to present lengthy clips to learn what first impressions witnesses make. A few minutes of video will suffice for mock jurors to form first impressions, largely based on appearance, body language and nonverbal behavior. If more than that is desired, e.g., how people react to the content of the witness's responses, it is more efficient for the presenter to summarize the substantive points, present them visually based on the transcript, or use multiple days to present them on tape, assuming the additional expense is acceptable.

7) Test your worst-case assumptions, not your best.

To determine if someone has diabetes, how meaningful would a glucose tolerance test be without glucose? Not at all. Yet we often see something similar attempted in the draft presentations and discussions leading to mock trials, which exclude the poison pills of the opposing case. Counsel squirms at the notion that we are giving the adversary an unfair advantage, prefer not to assume the worst about rulings on motions in limine, and wish to hide or shield areas of vulnerability. We understand why – they can't take off their competitive adversarial hat. However, jury research is a different animal for a different purpose – not to win, but to test. To have a meaningful test means we must put our side through the paces of vigorous attack. Otherwise, the test is meaningless.

8) Don't have a novice play the opponent and an ace play your side.

It is a waste of time or worse to stack the deck by having a seasoned litigator who is intimately familiar with the case and has his or her heart and mind invested in the case present for the client at a mock against an associate who has far less experience in front of juries and is less familiar with the nuances of the issues. The result may be the result of a "presenter effect," not the evidence and issues, yielding findings that are not instructive for if or how to try the actual case. If the purpose of the research is to compare presenters, there are other ways to do so properly – e.g., have different presenters present the same material to comparable audiences.

9) Don't have witnesses testify live at the mock.

There are a myriad of reasons not to have live witnesses at research:

- Research is not meant to be live theater. Time limits tend to be tight and must be kept to stay on track and leave enough time for the mock deliberations and other forms of data collection. If done live, there is no guarantee that the Q&A won't go over time;

- If scripted to control the content and timing, it looks like what it is,a canned presentation, garnering less attention and decreasing the ratings of the performance rather than forming a true read of the witness;

- It opens up the witness under deposition or cross examination to discovery issues as to his or her past participation at a mock trial;

- The witness will reach his or her own conclusions about the meaning and implications of the research, reducing counsel's control over trial preparation;

- If unscripted, the answers may go somewhere that counsel does not want;

- It blows your cover in jurors' eyes as to which side is sponsoring the research, since live witnesses won't be testifying for the adversary. If using actors to cover that, it is never the same as the real thing, creating an unwanted imbalance.

10) Consider who should and should not attend. Once a client or witness observes the research, they may reach their own – erroneous – conclusions.

You can't put the cat back in the bag. Once someone has observed a mock research on a case, there is no way to control their takeaways, whether correct or incorrect. If they may testify, it also opens them up on discovery of that fact. Inevitably, they will fixate on the results (We won!), or on isolated points that stood out in the moment, but had no statistical or general importance when taken in context.

11) Focus on the process of mock jurors' decision-making, not the result.

Invariably at mock jury research, we see someone dash into the hallway and call the client to report the results hot off the press ("They awarded $100 million!" "We lost 2 of the 3 groups." "They hated our CEO." "The email was a smoking gun that sank us.") We understand why they do this, but it's like going to the Mayo Clinic for a battery of tests and reporting the results of one test to decide the diagnosis, ignoring all the other results. It's likely to be faulty. What has proven reliable for decades of well-done research is the decision-making path, not the actual results. In other words, while one cannot typically predict the final result (win or lose), what seems consistent is what matters to both mock and actual jurors, such as: What ultimately caused favorable vs. unfavorable reactions to the majority? What was confusing? What information was lacking? Why? What angered them? What backfired? What themes stuck? How did multiple jurors refer to the key points in their own language? It would take many more mock jurors than is typically feasible financially to make generalizations based on the results rather than process. If a new drug were tested on 36 people and no one died, would you take it or would you wait till thousands took it without adverse effects?

12) Avoid assuming which types of jurors are bad based on one or two that stand out in mock deliberations.

Imagine you host a small dinner party and one of the five guests is obnoxious. They ruin the whole night. They happen to be male, a part-time actor/waiter, short, with curly hair. Which of those facts ruined the party? Would all short, male actor/waiters with curly hair be obnoxious and ruin your party? The fact is that we don't know. However, it is very common to react strongly when observing an individual expressing strongly adverse opinions during the mock deliberations and brand anyone like them as bad for your case. The problem is that you don't know what it is about that person, if anything, that is the root of the negative responses (is it because they are uneducated? Is it because they had a bad related experience? Is it unique and not a pattern of similar people?). Until you have enough people representing different traits and a statistically significant pattern emerges, these rushes to judgment are often misleading and unreliable. Instead, wait till the actual analyses are done that show the factors that more accurately describe adverse traits. You may be surprised that they have nothing to do with what someone assumed about one or two hostile individuals.

Here are some other resources on A2L Consulting site about jury consulting, trial consulting and mock trials:

- Contact A2L with a question about a mock trial
- Here are 6 good reasons to conduct a mock trial
- Get more information on our Micro-Mock service
- Sample One Year Trial Prep Calendar with Mock Trials
- Learn more about Mock Markman excercises
- 13 BIG changes coming to jury consulting and mock trials

10 Videos to Help Litigators Become Better at Storytelling

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.

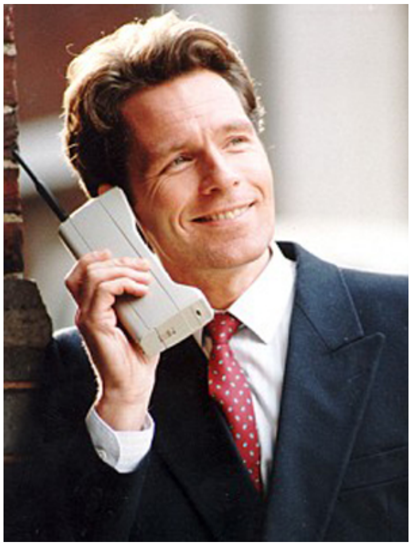
7. In this helpful video, litigator Mitch Jackson reminds us of how to share stories with a jury.

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.

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



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.

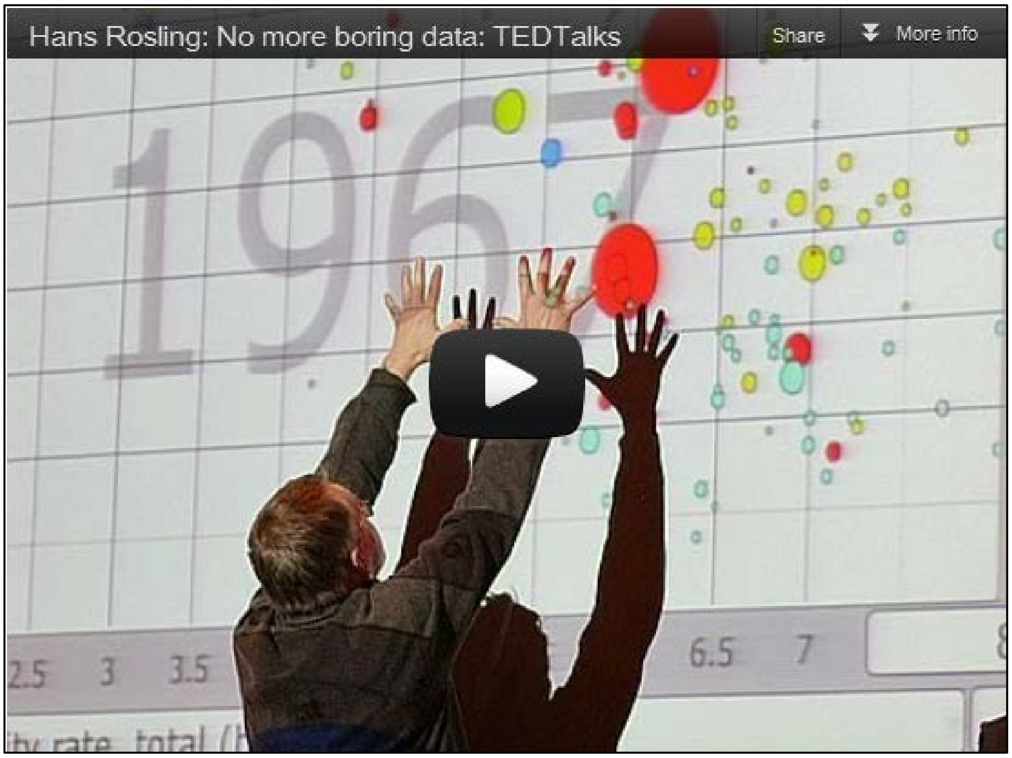
2. Chris Atherton's work confirms that bullet points do real harm to your presentation. Her scientific study validates the notion of eliminating bullet points and she lectures on the topic in this video.

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.

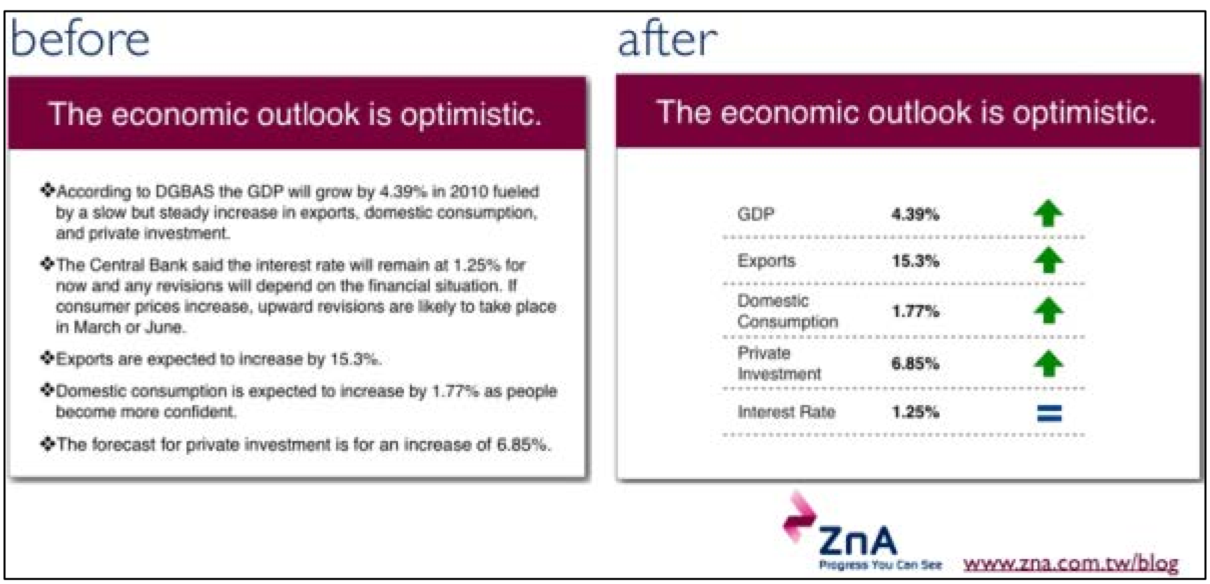


   Steve Jobs introduces the first iPhone in 2007.

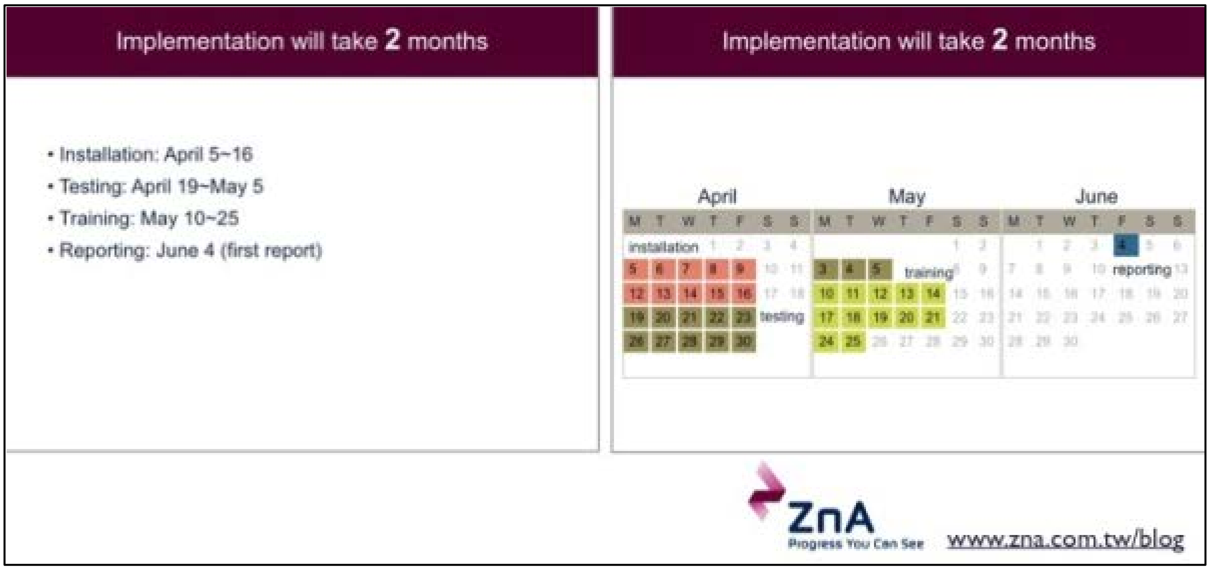
Al Gore revisits his *Inconvenient Truth* theories.

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: 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.

    a. 6 inspiring non-bullet point options
    b. 41 great alternatives to bullet points
    c. 4 before bullet point and after bullet point examples
    d. 4 great before and after bullet points from Garr Reynolds (see slides 5 through 8 - although his entire presentation is helpful)
    e. 7 ways to replace bullet points altogether
    f. 12 more ways to avoid bullet points

We believe that a well-crafted presentation -- whether in trial graphics or in the corporate world -- will change the way people make decisions. Regardless of your audience, there is something you want from them. Make your presentation the best it can be using the latest techniques.

Lists of Analogies, Metaphors and Idioms for Lawyers

by Ken Lopez, Founder and 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:

- Metaphors & Similies
- [pdf] A Downloadable Metaphor List
- An interesting book for lawyers on the topic
- A list of idioms
- A second list of idioms
- A third idiom list
- A list of similies

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

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

By Ken Lopez, Founder and 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 trial and 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.

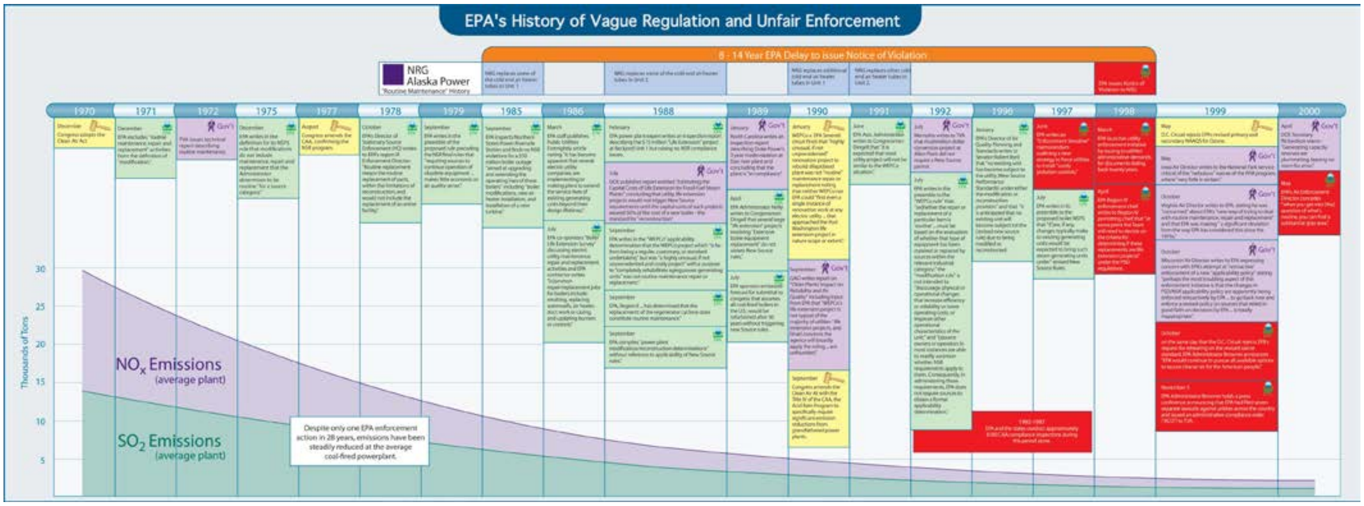
9) **Battling Bad Science and How Evidence Can Be Distorted**: An epidemiologist reminds us of how science can easily be interpreted incorrectly. Since we often consult on litigation where human health effects are alleged, sometimes on a mass scale, I find this talk helpful. It reminds me how often evidence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

Top 5 Trial Timeline Tips



Although trial consultants prepare dozens of different types of exhibits that help judges and jurors understand a case, timelines are one of the oldest and most reliable. After all, most cases involve some sort of time sequence, and the order and timing of events can be crucial. Timelines give jurors an intuitive understanding of a case – if they are done well.

While it seems simple to prepare a timeline, it is actually an art that requires practice and experience, just as any form of trial presentation would be. The following suggestions have worked well for our firm in over 10,000 cases since 1995:

Engage Your Audience: The timeline is meant for the jurors or the judge to understand. It's a device that makes the case clearer to them. The timeline is not something that is intended to jog your memory. You should know your case perfectly or nearly perfectly without the timeline. In fact, in order to keep your audience engaged, you should feel free to add devices like photos, videos, charts, and the like. The more your timeline tells a story without explanation, the better it is.

It's notabout the Bar: In general, the timeline should focus on the relative position of the events in the story that it tells, not on the date bar. If you are going to highlight a portion of the timeline, highlight the events themselves, and don't make the date bar the focal point. When was the device invented? When was it marketed? When did a competing device enter the market? Those can be key facts in a patent case, and they should be the focus of the timeline. If anything in the timeline should be highlighted with color or other design elements, it should be these events.

The Key Is Not the Key: Although a lot of people think a timeline needs a complicated legend or key, the truth is that it should be fairly self-explanatory. Rather than a legend, use logos, icons, company symbols, or other design elements to explain what the timeline represents.

Keep It Short: Jurors' attention won't remain on a timeline that is too long and complicated. Revise and redraft your timeline so that it focuses on the most important events, not on all events that are conceivably relevant.

Keep It Large: Don't make the timeline too small. Otherwise, jurors will lose interest. We think the timeline should use no smaller than 20-point type.

If you follow these tips, we think you can create a very effective timeline. If you have additional tips or comments, please use the comments box below.

Here are several other A2L Consulting resources on timelines and litigation graphics:

Trial Graphics: Using Timelines to Persuade

Using Prezi to Make a Timeline

Top 10 Reasons to Prep Trial Graphics Early

Trial Graphics, Color Choice and Culture

The Effective Use of Demonstrative Evidence

A Litigators Duty to Entertain a Jury

3 Year Juror-Litigator Study Results

Beyond PowerPoint: Trial Presentations with Prezi and Keynote

by Ken Lopez, Founder and CEO, A2L Consulting

No trial presentation exhibit specialist can perform any better than his or her tools. Although the judge and jury aren't usually aware of what software the trial consultant is using, the choice of presentation software is essential to the success of the consultant, and ultimately to the success of the case.

Over the last decade, presenting demonstrative evidence has usually meant using PowerPoint. In the hands of an expert trial consultant, PowerPoint is an extremely flexible tool. As we said earlier this year, for talented information designers, PowerPoint is a blank canvas that can be filled with works of presentation art. Among major law firms, PowerPoint still maintains nearly a 100 percent market share. After all, if something has been shown to work over and over again, there is every reason for a trial lawyer to continue using it rather than trying something new and unproven.

However, PowerPoint is beginning to face some competition. One source of competition is Apple's Keynote program. Not surprisingly since it is an Apple product, Keynote is easier to use and generates presentations that are more attractive over all. Transitions feel more professional, animation effects are more design-oriented, and the designer will find it easier to create a slick looking presentation. In addition, presentations can be imported from PowerPoint and exported for use on the iPad.

The sample below, courtesy of keynoteuser.com, *shows off some of the features of Keynote*

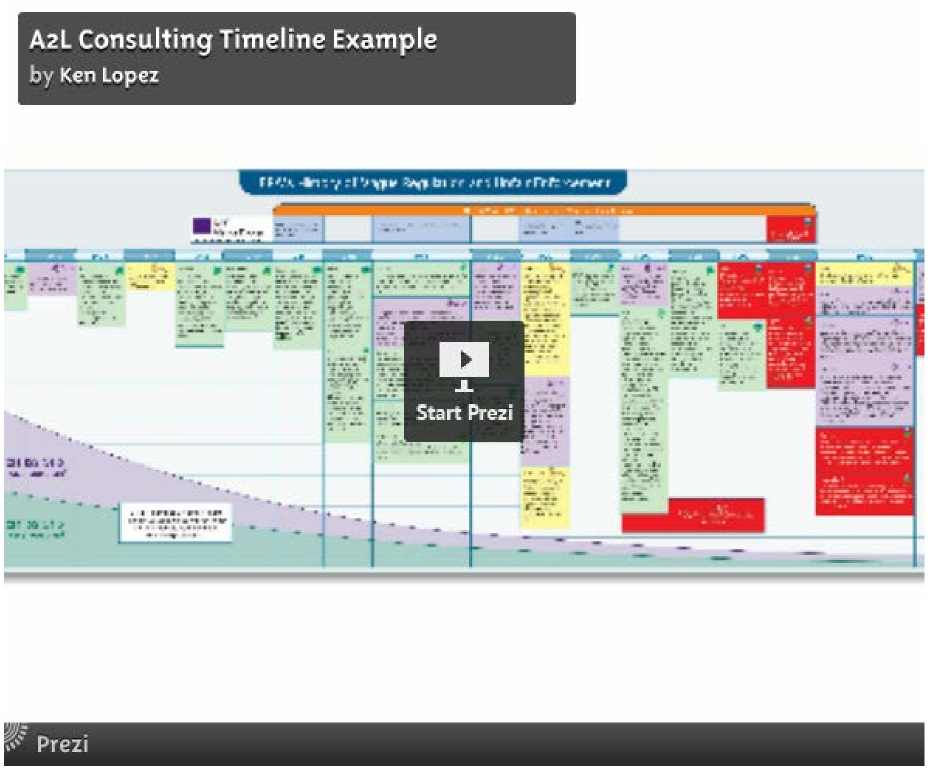
As a reviewer has noted on CNET, “Keynote is a pro-level tool, probably the application most able to compete with the 10-ton gorilla, Microsoft's PowerPoint . . . [Keynote] faces an uphill battle against the entrenched Microsoft PowerPoint. But Keynote has, from its first incarnation, done some things better than PowerPoint…”

Another much newer and arguably much more exciting competitor is Prezi, which has been referred to on wired.com as “a digital poster online” and “kind of like a giant concept map.” This is the zooming presentation tool that has wowed crowds at the TED Talks.

Rather than rely on slides, Prezi creates a very large electronic canvas and permits viewers to zoom in on a particular element of the presentation, either interactively or scripted to behave like slides. With Prezi, you never have to wait for a slide that is 20 minutes away. Every element has a location in both time and space.

For the right subject matter, Prezi can potentially be very helpful to the trial consultant. For example, if the site plans of a manufacturing plant, or the structure of a coal mine are at issue, each element could be zoomed in on without distracting the jury. In fact, a Prezi presentation might appeal to the jurors’ basic concept of spatial orientation and help them understand something that would be hard to show with another software package. Unlike PowerPoint or other presentation mediums, it is easier to maintain context.

Below is a Prezi of a large timeline originally designed for display as two printed foam core trial boards measuring five feet wide each. This short Prezi trial presentation was built in just a few minutes and designed only to introduce the use of Prezi in the courtroom. The camera pans around the timeline in a scripted fashion and is advanced using the play button. It does not take too much imagination to see how this might be useful in a trial presentation.



While I don’t see PowerPoint disappearing or even losing significant market share any time soon, competition is a good thing, and I am looking forward to a time when healthy competition will create software products that are even better adapted to litigation consultants’ needs than they are today.

Watch for an upcoming article that shows off more of the Prezi toolset.

Demonstrative Evidence & Storytelling: Lessons from Apple v. Samsung

By Ryan Flax, 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.

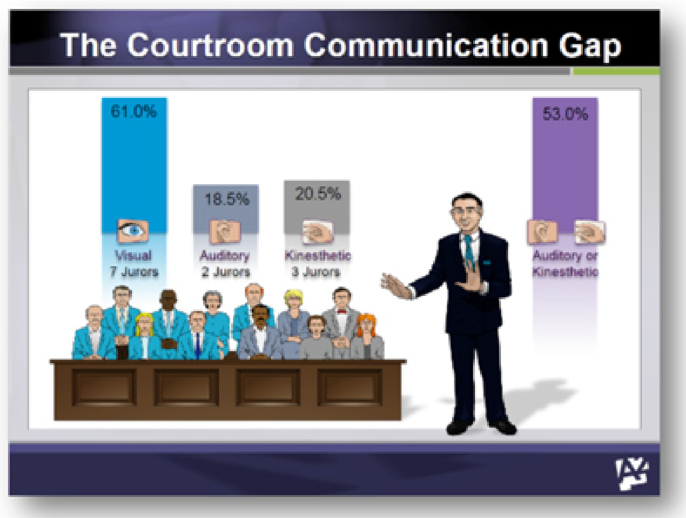
Experts agree. According to Alexander Poltorak (CEO of the patent licensing and enforcement firm General Patent Corp.), "Juries tend to simplify the case. That's a natural tendency," and "They want to figure out who is the bad guy here and let's punish them." *See also* our article on demonstrative evidence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

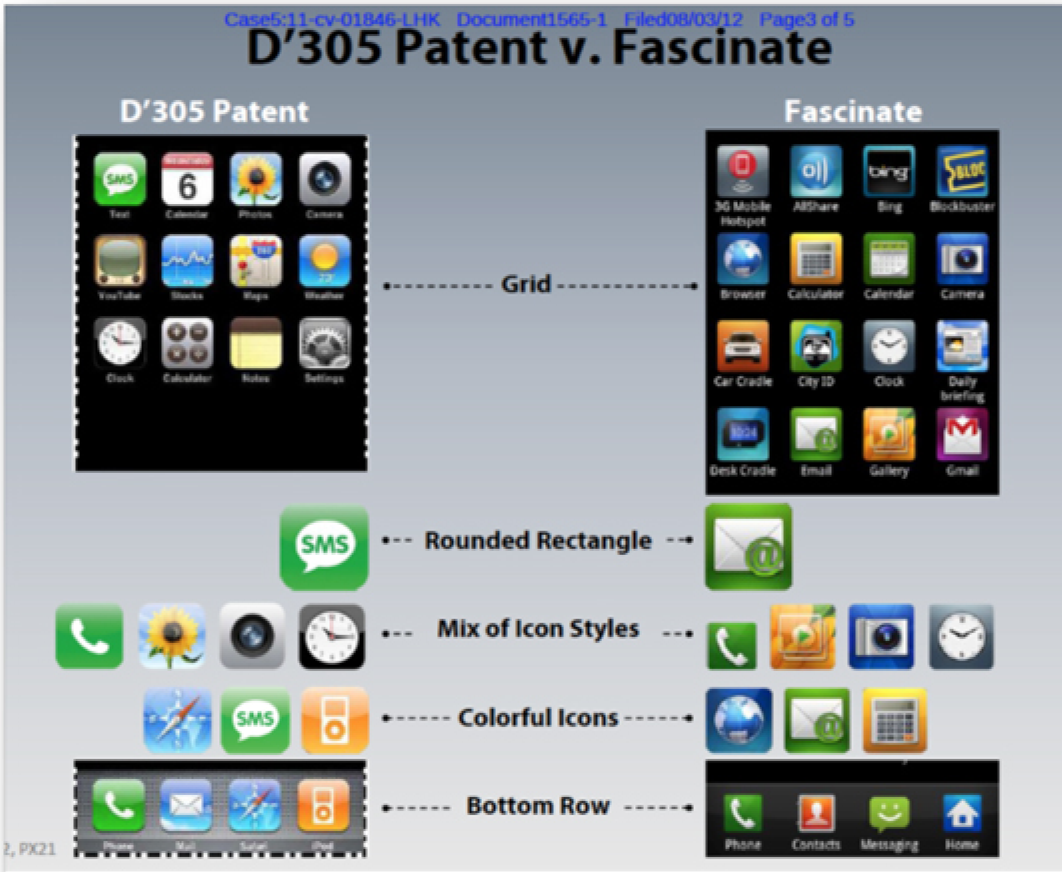
I'd say this is a fairly effective graphic. It simplifies a complex issue and makes a dramatic point.

Samsung countered with its own trial graphic, as follows:

The purpose of this graphic was 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.

Patent Litigation Graphics + Storytelling Proven Effective: The Apple v. Samsung Jury Speaks

By Ryan H. Flax, Managing Director, Litigation Consulting, A2L Consulting

In last week's article on the conclusion of the Apple *v.* Samsung patent infringement trial I emphasized that it would be the storytelling and the patent litigation graphics that accompanied the storytelling that would win the case for either Apple or Samsung. Well, now the jury has returned its verdict: 6 of the 7 Apple patents are infringed (*willfully*) by Samsung (3 utility patents and 3 design patents), none of Apple's patents are invalid, and none of Samsung's patents are infringed by Apple. The jurors awarded Apple **$1.05 billion**, or just less than half of what it asked for.

The amazing, but not unexpected, thing about the jury's verdict is not the overwhelming victory for Apple, but how the available post-verdict jury interviews ***completely validate*** the points made in last week's article. As expected, the verdict was *only superficially* based on the law and evidence, but more so on the fact that Apple's counsel had the better story and better intellectual property graphics (and the juiciest tidbit of evidence around which the story could be woven and graphics designed).

Jurors Want a Story, Not a Legal Case

When asked to point to the evidence that compelled their verdict, one juror – Manuel Ilagan – explained, "on the last day, [Apple] **showed the pictures [below] of the phones** that Samsung made *before* the iPhone came out and ones that they made *after* the iPhone came out," and **this visual evidence at the closing was enough!**

Juror Ilagen went on, "we were debating about the prior art. Hogan was jury foreman. He had experience. He owned patents himself . . . so he took us through his experience. After that it was easier. After we debated that first patent – what was prior art – because we had a hard time believing there was no prior art. In fact **we skipped that one, so we could go on faster**. It was bogging us down."

So, the jury *skipped* talking about the difficult evidence, instead relying on how they *felt* about the case and on the *story* weaved by plaintiff's counsel. And, as discussed below, relying heavily on the background and experience of the jurors.

Speaking of the jury foreman – Velvin Hogan – he also reported in a post-verdict interview that he had a revelation after first night of deliberations while watching television (he called it his "*a ha* moment"), explaining, "I was thinking about the patents, and thought, 'If this were my patent, could I defend it?' Once I answered that question as '*yes*,' it changed how I looked at things." So, once more, a juror (the foreman no less) reported basically disregarding the complex specifics of the law and evidence, here going with his*instincts* in deciding the validity of Apple's patents and then deciding whether they were infringed.

Another juror – Aarti Mathur – expressed to reporters that, "it was a*very exciting* experience and a unique and novel case." As a litigator, can you imagine one of your jurors saying this about your next trial – **what would you do to provide this kind of exciting experience for them?** This was *a patent case* and yet it instilled this feeling of excitement in the jurors. Research establishes that the best way to do this is by immersing the jurors in argument and litigation graphics throughout the trial. You want to get them interested and keep them interested.

Seasoned patent litigator, Sal Tamburo, a partner with Dickstein Shaprio LLP noted, "patent litigators, and really litigators of any complex subject matter, face a difficult task when heading to trial. The law is complicated as is the technology and it is our job to convince jurors, who are usually unfamiliar with the nuances of either the law or the technology, that we're right and should win. In essence, we need to prepare two cases, one for the jurors that is interesting, compelling, and persuasive, and one for the district and appellate courts that is solidly based in the necessary legal proof." Sal's right.

It was apparent that the complex law of patent infringement and the overwhelming jury instructions made it all but impossible for the Apple v. Samsung jury to really decide the case on its merits. Not only were the jurors *confused* by the verdict form, but they actually came back with **inconsistent verdicts and damages awards**, e.g., awarding damages of $2 million on a patent they found *not-infringed*, and had to be sent back by the judge to resolve the inconsistencies. This little "speed bump," however, did not slow them down much.

As I reported in the article last week, this was a case so complicated that the judge *begged* the parties to settle before it went to a verdict (calling it a "coin toss") and was also a case in which the jury instructions took *two hours* to explain and included a 109 page document. With all this complexity and nuance of law, these jurors were nonetheless able to return a verdict in just under 22 hours. This turn-around time would be extraordinary for even a simple case and is beyond imaginable for this patent case.

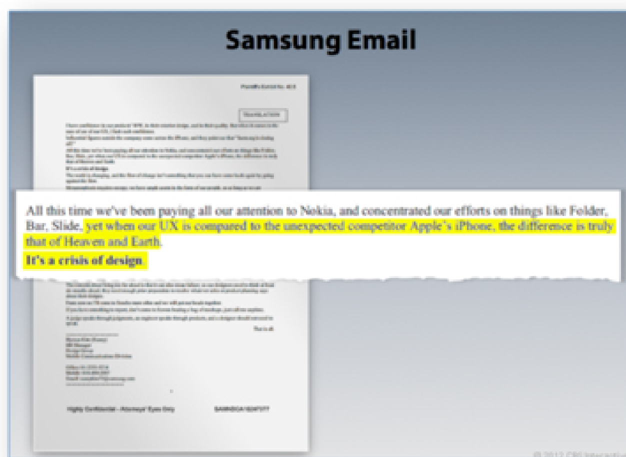
Jurors Want Great & Useful Graphics

In addition to juror Ilagan's expressed reliance on Apple's patent infringement graphics, according to its foreman the jury cut through unnecessary work by hand-drawing a matrix on a notepad to illustrate which patents Apple said were infringed by each of 26 Samsung smartphones and tablet computers. This **jury-created graphic** is exactly the type of trial graphic counsel should have shown the jury during its closing arguments and then requested be entered into the record as a summary of evidence so the jury could take it with them to the jury room.

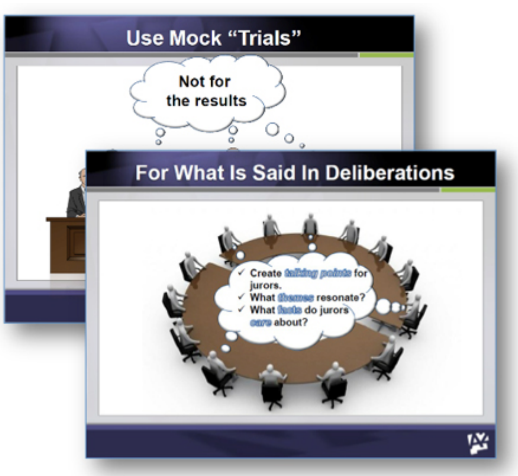
Juror Ilagan said, "my impression was that [Apple's attorneys] Bill Lee and McElhinny were pretty good in their presentation and questioning of the witnesses." Mr. Ilagan was also complementary of Samsung's counsel's presentation (recall, this was a "coin toss").

As I mentioned in last week's article, with effective patent 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 feel they understand what's being argued** and give them a chance to ***agree***. Most people, including judges and jurors, are visual learners and in court litigators must play on this battlefield and with the appropriate weapons.

Jurors Will "Hang Their Hat" on Bits of Evidence



Jury foreman Hogan explained that the jury's decision was based on documents illustrating Samsung's intent to closely mimic the look of the iPhone and that "certain actors at the highest level at Samsung Electronics Co. gave orders to the sub-entities to actually copy, so the whole thing hinges on whether you think Samsung was actually copying. The thing that did it for us was when we saw the memo from Google telling Samsung to back away from the Apple design. The entity that had to do that actually didn't back away." The litigation graphic to the left illustrates this important evidence.



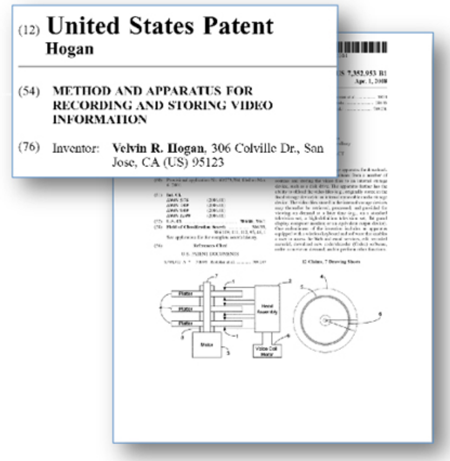
And, so, on the back of one email chain, the hammer fell on Samsung to the tune of a billion dollars.

This point is very instructive. It shows us that **testing litigation facts, themes, and stories before trial with** mock jurors is an important tool in crafting a persuasive and winning case. Before you get to the courtroom, you want to know what facts resonate with mock jurors of the same demographics as your jury pool so you'll use the right ammunition when it counts.

You Must Use Jury Consultants

Another interesting take-away from this jury's verdict is that it relied heavily on the backgrounds and experiences of the jurors, even to the disregard of the law and evidence presented at the trial and instructed by the Court. This is instructive and shows how important jury consulting can be for litigators.

For example, the jury's foreman (Mr. Hogan) was an engineer and holds a patent (relating to video compression software, at right). The jury relied heavily on him to deal with the patent law issues in the jury room and he even told the Court that the jurors had reached a decision without needing the instructions!



Experts agree this isn't uncommon at all. According to Stanford Law School Professor Mark Lemley, "if there is one juror who seems more clearly knowledgeable than the others, the jury will often look to that person to help them work through the issues, and perhaps elect him foreman."

Hogan, told the court he had served on three juries in civil cases, spent seven years working with lawyers to obtain his own patent covering "video compression software," and worked in the computer hard-drive industry for 35 years. Based on this he was elected jury foreman and, I suppose this background also **relieved the other jurors** of having to worry too much about the gritty nuances of the law of patent infringement and validity because Mr. Hogan could sort out those details for them.

It's been reported that Mr. Hogan said that the jurors were able to complete their deliberations in **just three days** and much faster than almost anyone predicted because a few jurors had engineering and legal experience, which helped with the complex issues at play. According to Mr. Hogan, once they determined Apple's patents were valid, jurors evaluated every single device separately.

These leaps in deliberations are remarkable, but, as discussed in last week's article, predictable.

One More Thing

Foreman Hogan explained in a televised interview his thought process regarding the law of patent validity and how he helped the rest of the jury come to terms with the law – it's clear that (although he's obviously very intelligent) he does not really understand it and he and the rest of the jury went on their *gut instincts in most instances*. To a patent litigator, like myself, his interview is frightening on one level because it shows how hard it is to get through to lay jurors and even technically experienced jurors on the nuances of patent law and how it should apply to the facts.

But, it's also **very instructive**. All litigators should watch and note his explanation of the jury's process. I think Mr. Hogan is fairly representative of what the *top* of the juror food chain is like and he's a good place to start when developing your trial strategy. Cater to their needs in proving your case – use graphics extensively, use jury consultants, and test your case.

Oh, *there is one more thing*. Just for the sake of stirring the pot, here's an ironic and amusing video of Steve Jobs discussing what great artists (and presumably great innovators and great companies, including Apple Inc.) do to succeed (can you guess what it is?):

I wish good luck to both the parties and their counsel in the appeal process, which I and other patent experts will be attentively watching. (write this down: *it's my bet that this case ultimately settles before any opinion from the Federal Circuit*). Stay tuned.

16 Trial Presentation Tips You Can Learn from Hollywood

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 story tellers 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 illustratethe 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.

9 Trial Graphics and Trial Technology Budget-Friendly Tips

by Theresa D. Villanueva, Esq., Director, Litigation Consulting, A2L Consulting

It is undisputed that trial graphics, trial technology and working with trial consultants & litigation graphics specialists give the modern litigator an edge when walking into the courtroom. This is true for many reasons. First, today's juror expects some type of interactive presentation, whether it is a legal animation or demonstrative exhibits. Second, trial consultants can step into the case with a fresh set of eye's and perspective, and can provide valuable insights into the key themes that the team has identified and even sometimes pointing out themes or ideas the team has not thought of.

In today's economic climate litigation support consulting companies have seen a shift towards a more economical approach towards litigation. Law firms and their clients (from large firms to solo practitioners) are looking to keep trial costs under control. With many different options and approaches to trial presentation graphics and trial technology available today, lawyers and their client's can still head to trial armed with these essential tools.

Let's take a look at 9 ways you can use trial presentation graphics and trial technology while managing costs.

1. Focus on Key Trial Themes and a Simple Narrative

One way to keep trial graphics costs low is to choose a small number of important themes that you want to emphasize and that you want the jury to pay particular attention to. By focusing on these key themes, you can limit the number of trial graphics to be created. Utilized effectively you can make a significant impact with even just one or two demonstrative exhibits.

The key here is to utilize your Trial Consultant to narrow the scope of what trial graphics will be created. This will eliminate the creation of unnecessary graphics and streamline the development process.

See Using a Two-Track Trial Strategy (trial presentation + a solid appeal record) to Win

2. Use Printed Trial Boards and Blow-ups

Using boards in lieu of electronic presentations is a great way to save on costs, and it is still by all standards a highly effective presentation method. With the introduction of PowerPoint 2003, trial graphics became more advanced and began to move in the direction of electronic presentations. However, over the last couple years, the pendulum has swung back in the direction of using trial boards. Today, it is not uncommon to see a mix of boards and electronic presentation. Boards are a great way to use trial presentation graphics on a lower budget. Another bonus of using boards is the savvy litigator can sometimes find a way to leave the board up throughout trial keeping their message consistently in front of the Judge or Jury.

See Printed Trial Boards Making a Comeback

3. Receive Training on Presentation Software (e.g. TrialDirector, Sanction or an iPad app)

Having a trial technician on-site is always favored, but the reality is that it is not always feasible from a budgetary standpoint. One of the great things about trial presentation software is it is user friendly. For a shorter or smaller engagement the presenter or another team member can receive training from an experienced Trial Technician to learn the basics.

Certain situations in which this might be a budget friendly alternative include: shorter trials, smaller document databases, trial databases that contain no deposition video or databases that will not require a lot of last minute changes or video editing.

See [Free E-Book] Finding the Best Trial Technician for Your Case

4. Limit Your Trial Database to Key Documents

Similar to developing key demonstrative exhibits, we can build a database of the key documents you plan to use - whether it is for cross, a particular witness or documents that are crucial to your case. Sometimes using the Elmo just doesn't have the same impact as having the flexibility and technological advantage of using presentation software such as Trial Director or Sanction.

See How Indata's TrialDirector Makes Litigators Look Like Stars

5. Have Your Deposition Video Edited and Burned to a DVD

If video is all you need, and editing clips can be done in advance, playing them on a DVD in court is a great budget saver. In a recent case, I had a client that was on a very tight budget but still needed to play some video deposition clips at trial. They really wanted to have a Trial Technician or use Trial Director but cost was a major concern. We discussed several different options including the option to edit the clips in trial director and export the clips onto a DVD they could play through their own computer at trial. This was a great solution all around. We still had the flexibility of editing in Trial Director, and the client ended up with a budget friendly way to show their video.

See Using Video Depositions in the Best Way at Trial

6. Streamline Your Trial Presentation

When trial presentation graphics are needed but budget is limited, you may be faced with the question of where do I need trial graphics the most? Is there an expert witness with a difficult concept to explain? Do you need litigation graphics to counter the opposing expert's testimony? Perhaps you feel that opening or closing statement is where you need to make the biggest impression with the judge or jury. If you know there is one area that is the core of your case, focusing a set of demonstrative exhibits here not only can not only save on cost it can also add value to your case.

See [Free eBook] The BIG Litigation Interactive E-Book

7. Create Your Own PowerPoint and Use Litigation Graphics Consultants to "Polish" the Work

Just as your hairdresser would not recommend cutting your own hair, generally, we do not encourage our clients to create their own PowerPoint presentations. There is just too much at risk and things can quickly go awry. However, if cost is a major concern, creating your own PowerPoint and asking for help can be an economical option. Once you layout out the basics of your presentation one of our consultants will work with you to enhance the presentation. From something as simple to creating a new template, formatting each slide for uniformity, or even adding some animation sequences. These, among other tricks can add a solid finish and give your slides the polished look they need.

See [Free eBook] The Trial Team's Guide to Creating Great Timelines for the Courtroom

8. Have a Trial Tech on Certain Key Trial Days

In many instances it is essential to have a Trial Technician on-site with the team, but the team just does not have the budget for a trial tech to be on-site for the duration of the trial. Perhaps there is one witness that will truly benefit from the interaction of using an electronic presentation, or maybe there is an opposing witness you know you can impeach with video clips from their deposition. On these occasions having a trial technician there only for certain stages of the trial can be a huge cost savings for the budget conscious team, while still benefitting from a Trial Tech's expertise.

See Free Guide to Finding and Engaging the Best Trial Technicians

9. Keep Litigation Graphics Simple - No Courtroom Animation

One of the cost drivers in the creation of demonstrative exhibits can be the addition of animation – or making a piece of the graphic move. Some animation such as "building" in certain elements is very simple and does not necessarily drive cost up. However, complex animation can be very time consuming, require more edits and can lead to higher costs. One way to avoid this is to have Litigation graphics with little to no animation. It is very easy to get caught up in the idea of using legal animations in presenting your case, but a non-animated trial graphic can have just as much of an impact on your audience.

See A2L's Complimentary Biggest and Best E-Book for Trial Attorneys

If cost is a concern, **demonstrative exhibits and trial technology no longer have to be the first items to scratch off your list** – you simply need to work with the right trial consulting firm who will find the best solution for your team and budget.

Font Matters - A Trial Graphics Consultant's Trick to Overcome Bias

by Ken Lopez, Founder & CEO, A2L Consulting

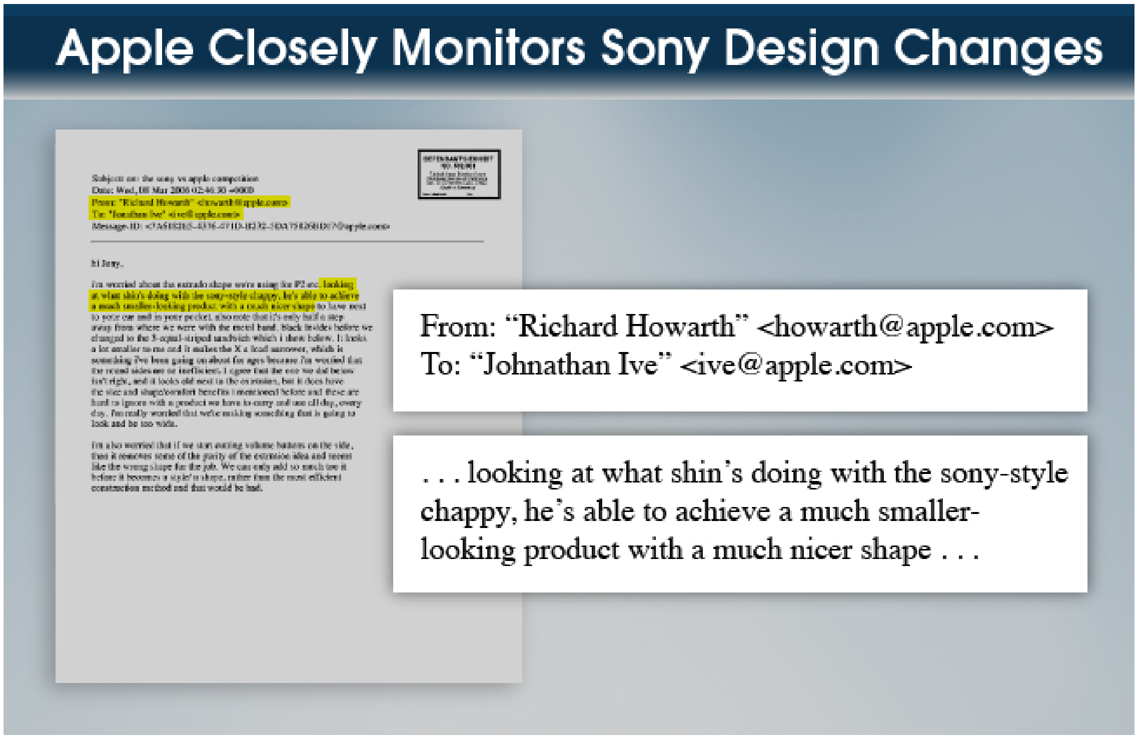
A fascinating new study in the field of social psychology indicates that the type font in which an argument is presented has an effect on how convincing it is. For trial graphics consultants and litigators alike, this is potentially very big news.

The study, published in the Journal of Experimental Social Psychology [pdf], 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**.

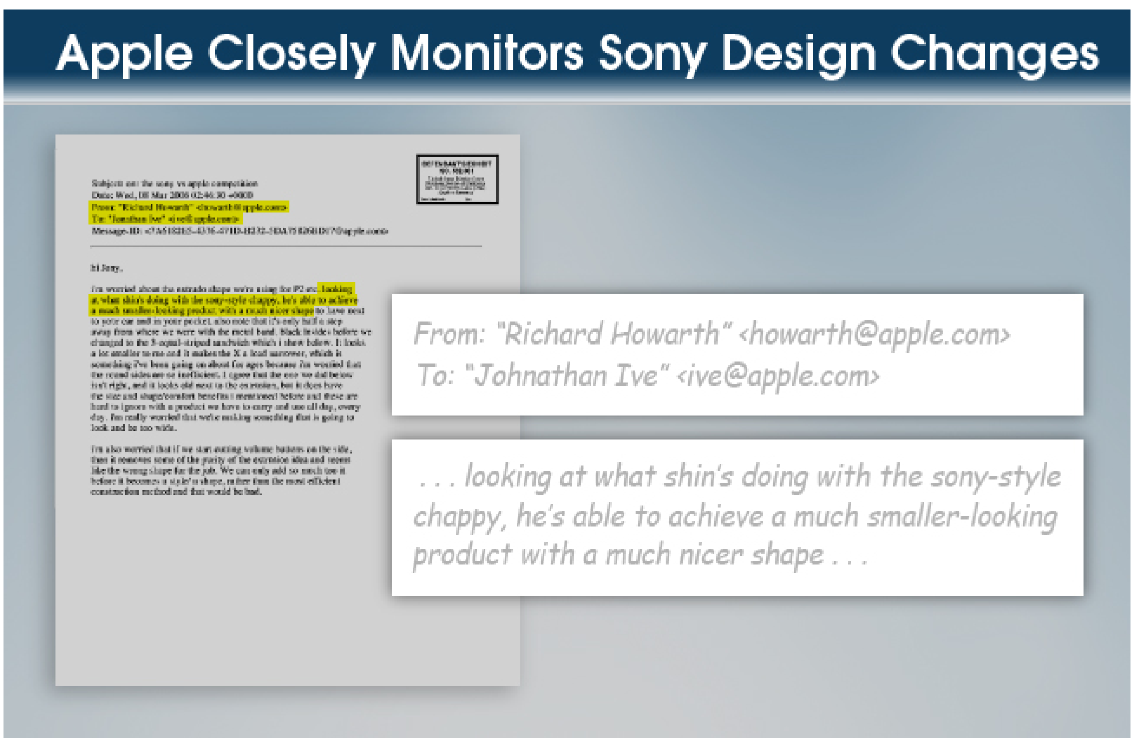
It is well known that people tend to disregard arguments that vary from their own longstanding views and to take note of arguments that support their views. This phenomenon is known as confirmation bias. For litigators and trial graphics consultants, we know this means judges and jurors will only closely 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.

Hydraulic Fracturing (Fracking): Advocacy and Lobbying

By Ken Lopez, Founder and 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.

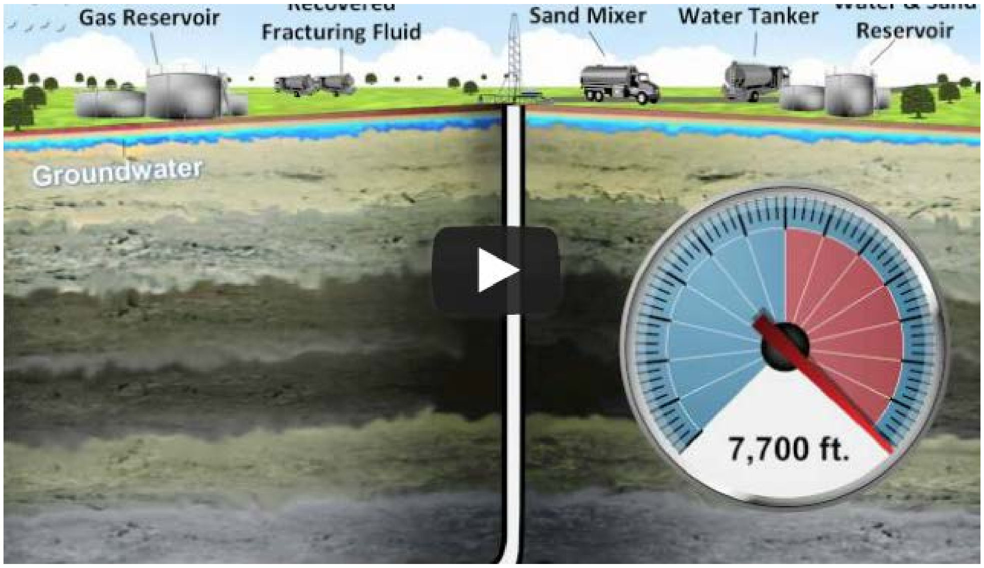
Indeed, just days ago, Animators at Law, publisher of The Litigation Consulting Report, announced its name change to A2L Consulting. This better aligns our corporate identity with additional services offerings like advocacy, grass roots and lobbying visual presentations, in addition to the services we 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 Shale can 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.

Collateralized Debt Obligations (CDOs) Explained for a Jury

by Ken Lopez, Founder and CEO, A2L Consulting

Quite often, the subject matter at issue in a major trial is very complex and technical and is not intuitively obvious for a jury composed of laypersons, or even a judge, to understand.

In fact, that's why trial consulting companies like us emerged in the early 1990s – to help lawyers explain in a clear visual manner what's at stake in a case, so that judges and jurors will be able to understand the facts and make a well reasoned decision.

As a Texas trial lawyer has written, "The typical jury has a 14th-grade education, a 12th-grade comprehension level, and a 9th grade attention span. The implications of this are important in presenting scientific or technical information to a jury. For one thing, it means you cannot assume the jury will have any pre-existing knowledge or understanding of the information you are trying to convey, particularly if it involves a scientific or technical matter."

In cases involving product liability, patents, the environment, antitrust, and other areas of law, courtroom presentations ranging from the most basic photograph or chart to the most complex computer-generated presentation have been a staple for sophisticated litigators for decades.

In securities litigation, however, lawyers have been much slower to adopt visual courtroom presentations that can help juries understand their cases. Yet as Wall Street has become much more complex than just stocks and bonds, quite often the issues in a securities trial have become every bit as opaque to the average juror with that 12th-grade comprehension level as a complicated patent infringement case would be.

Now, as litigation from the financial collapse of 2008 and 2009 is finding its way into court, jurors are being asked to understand and to pass judgment on complex financial matters such as collateralized debt obligations (CDOs).

A typical definition of a CDO is that it is "a type of structured asset-backed security (ABS) with multiple 'tranches' that are issued by special purpose entities (SPVs) and collateralized by debt obligations including bonds and loans." This definition will make little or no sense to most jurors, and a lawyer who tries to present the concept on this level in a courtroom will have little or no success.

Below, we use a new presentation tool called Prezi to explain CDOs in an intuitive way that is tailored to help juror understanding. Like much of our work in securities litigation, this is not a trial graphics-heavy presentation at all. Rather, our work was spent on *how* to best tell the story more than how to show it.

Prezi is a new type of presentation program that permits the litigator to create non-linear courtroom presentations and to escape the sameness that sometimes pervades PowerPoint exhibits. Rather than slides, Prezi relies on a large canvas or mind-map type of presentation that permits the viewers to zoom in and out of a visual story.

This Prezi exhibit shows how CDOs are created, packaged and sold and how the flow of mortgage income keeps them afloat in good times – and what happens when mortgage payments dry up.

Presentation Graphics: Why The President Is Better Than You

By Ken Lopez, Founder and 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:

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.

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.

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).

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.

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.

Finally, there are no bullet points! Good graphics don't have them.

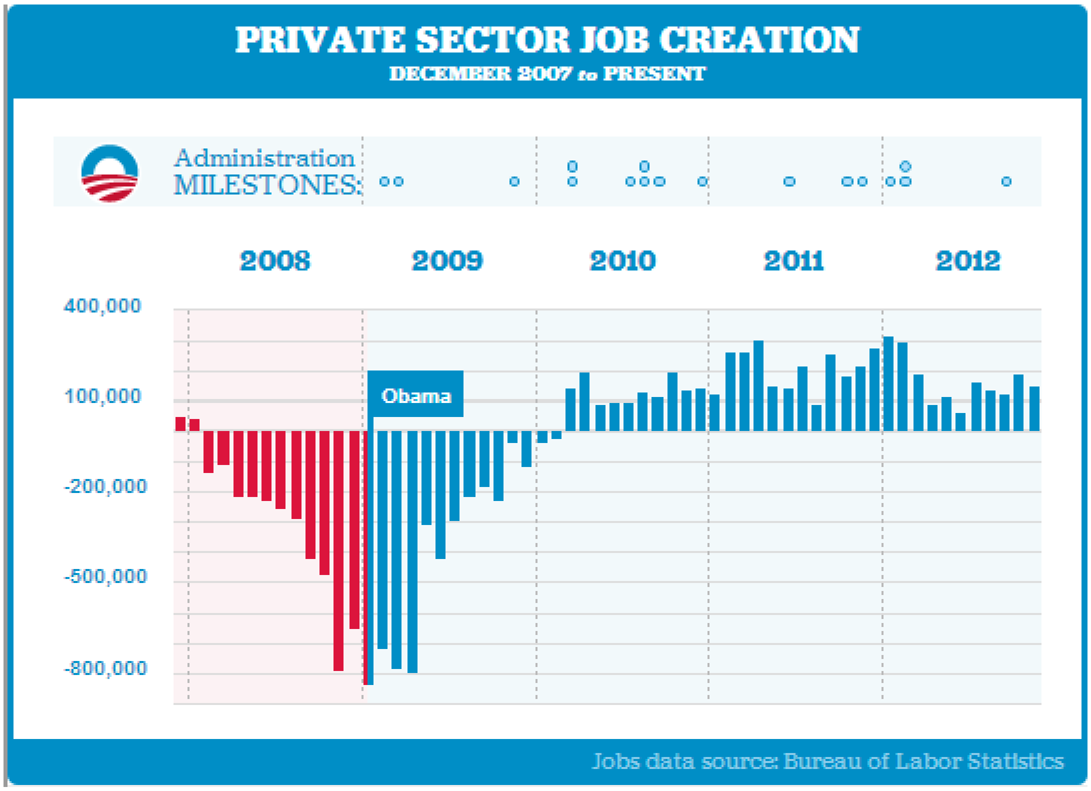
The 2011 enhanced State of the Union slides below are similar to those from 2012 above. However, the differences between the slide decks are interesting. The 2012 speech slides are more refined in style. There are fewer photos, and there were 23 more slides used in about the same time.

2011 Enhanced State of the Union Address Graphics

View more documents from White House

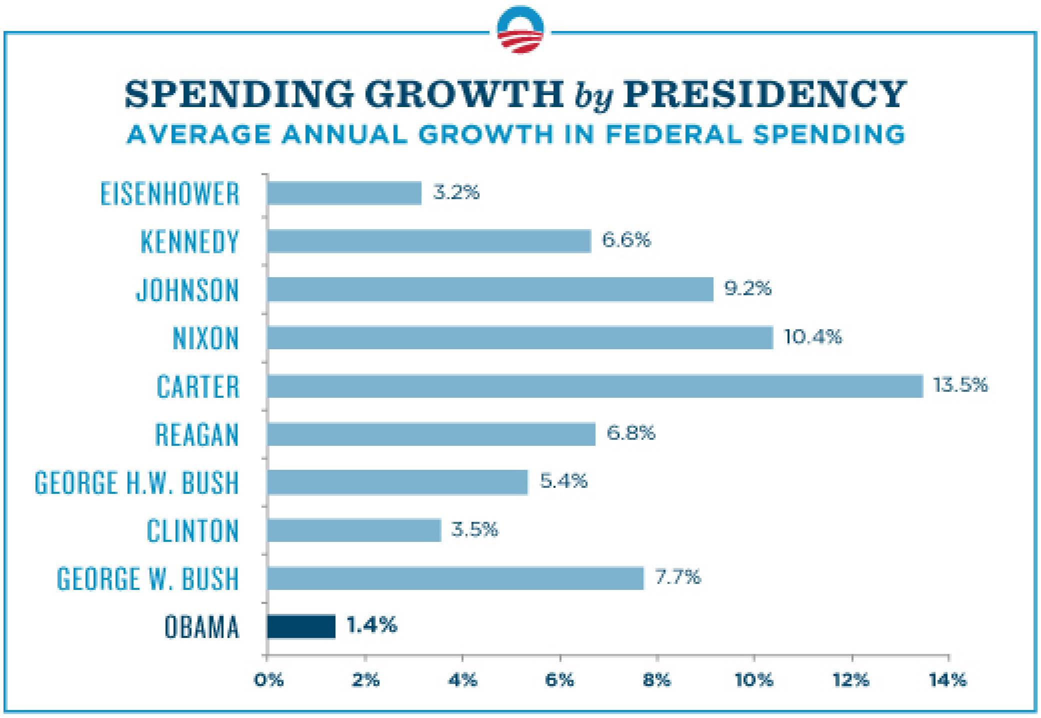
The White House has continued its push for information graphics beyond the State of the Union as well. Perhaps more so than the State of the Union, the White House's use of widely distributed information graphics (or infographics) for issue advocacy points the way for lobbying efforts generally. The 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. Here it is:



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.

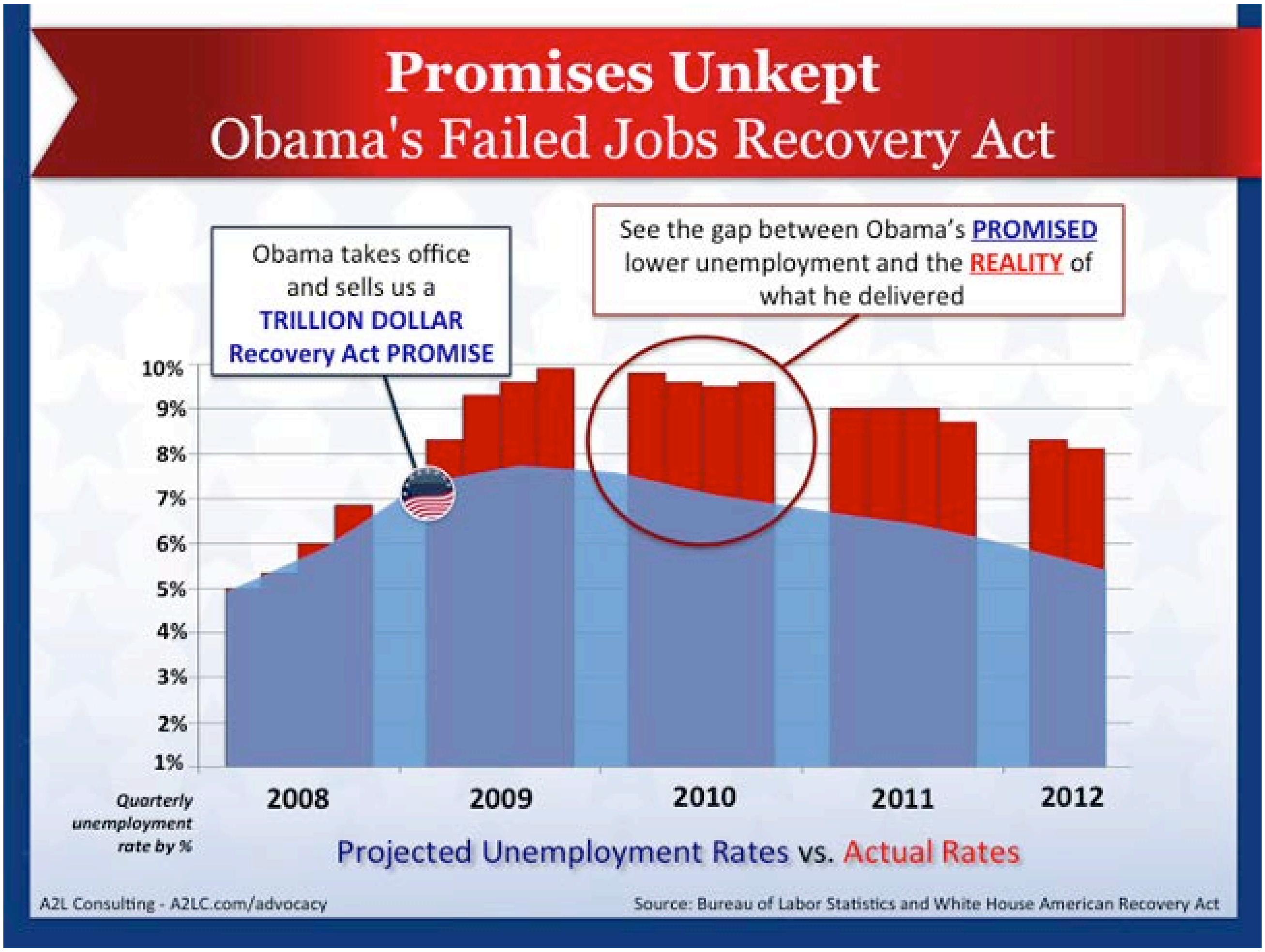


The 1.4 percent figure is absolutely correct - but only if you use 2009 as the year to compare with 2010, 2011 and 2012. It's a smart technique to use when advocating. In fact, spending in 2009 rose by about 18 percent relative to 2008. Raw data sourced from the non-partisan Congressional Budget Office (.PDF) is below.

<u>Total Federal Outlays in Trillions of Dollars</u>

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.

Making Good Use of Trial Director & Demonstratives in an Arbitration

TrialDirector, a trial presentation software package produced by InData, is an indispensable aid to the presentation of electronic and other evidence at trial. There is a reason why this product has claimed the majority of the market share for trial presentation software for more than 10 years: It can actually make it interesting for a jury or other fact-finder to listen to a witness testify about corporate balance sheets, long-ago emails, and other documents that can be fatally boring and lose the attention of the fact-finder.

At A2L Consulting, we have been using TrialDirector to support our presentations and to help our clients win cases for more than a decade. The combination of this software and a well-trained “hot seat operator” makes presentations interesting and sprightly. We generally pair TrialDirector with PowerPoint, other specialty software, specially constructed scale models, and the occasional printed large-format foam core trial board to put together a full trial presentation. We use TrialDirector for more than half the cases we support.

For example, in the case of *Railroad Development Corporation v. Republic of Guatemala,* we worked with the Railroad Development Corporation and with the international law firm of Greenberg Traurig to make an arbitration case at the International Centre for Settlement of Investment Disputes, the leading international arbitration institution devoted to investor-State dispute settlement. This was a two-week arbitration.

The video here shows how closely integrated the witness's testimony is with the document that he is describing (an excellent use of TrialDirector), as well as the use of a carefully designed PowerPoint to show the status of the Guatemalan railroad at issue and the work that was done to improve that railroad. Using Trial Director, our hot seat operator brings up documents in real time and highlights them in color to point out the key aspects that we want to emphasize.

The video also briefly shows part of the opposing side's low-tech presentation (begins at 5:15), which is based on "sticky notes" and a PowerPoint template that is not tailored to the case at hand. Our presentation is much more likely to capture the attention of the fact finders in what otherwise might be seen as a dry-as-dust case.

The basic point is that all cases benefit from the thoughtful presentation of evidence. The more haphazard the presentation, the less credible the presenter will be. Our TrialDirector operators are specifically trained in the use of that powerful software – but the key to success for a trial technician is not just the software savvy but also the ability to work on the fly, to suggest creative ways of presenting evidence, and to work long hours for weeks at a time.

Below are some other resources about TrialDirector and Trial Technicians on our site:

Trial Director Related E-Book: 20 Questions to Ask Before Engaging a Trial Technician
TrialDirector Certified Trial Technicians: Request Pricing or Availability
Trial Technicians: A2L Articles Discussing Trial Technicians and Trial Director Generally
Using TrialDirector and Trial Technicians: Why We Know Technology Won't Make You Look Slick
Trial Technicians: What You Must Know Before Using One

Trial technicians using TrialDirector are normally responsible for the following at A2L:

- creating a trial exhibit and document database before trial starts;
- making deposition clips and syncing them with a transcript;
- helping the litigation team to prepare witnesses to build their comfort with an electronic presentation;
- setting up a war room and electronic courtroom with trial presentation technology;
- helping to finalize the case-in-chief and demonstrative evidence presentations;
- running the trial presentation technology in the courtroom so any document is accessible instantly;
- creating on-the-fly demonstrative evidence to be used with a witness on cross examination;
- running the entire trial presentation using Trial Director;

Some additional trial technology, trial graphics and trial technician articles that you may find useful include:

The iPad Friendly Courtroom - The View of Daniel Carey, a Seasoned Trial Technician
A2L's Trial Technicans and Trial Technology - Main Page
A2L Pioneers Fixed Price Contracts for Trial Technicians (as Animators at Law)
More Information About Trial Director in the Courtroom
5 Ways to Research Your Judge's Likes and Dislikes

5 Trial Director Techniques for Seamless Trial Presentations

by Theresa Villanueva, Esq., Director, Litigation Consulting, A2L Consulting

InData's Trial Director is the leading software used by most trial presentation services and consulting firms. The software is designed to be user-friendly for inexperienced users and is also an incredible tool for power users such as professional trial technicians. I am always amazed at the technical abilities and savvy skills of trial technicians when operating this trial presentation software.

Imagine, you are in court doing a cross-examination of a witness and your trial technician is following along - even anticipating your every move, predicting every exhibit you want to show. In the warroom and during trial prep, it is the same experience; he/she is able to recall each document that you used that day or find any document you need. I've often heard that it's a bit like cloning yourself.

Recently, as I was thinking about the skills of our trial technicians, I decided to survey our team to get insight into what tips and tricks they find most useful. In my discussions, I discovered that each trial technician has their own style and preferred methods. But, here are 5 "tricks of the trade" our trial technicians shared with me that they use to make even the most difficult presentation seamless. (*See also*our articles: Top 10 Tips from Our Trial Consultants & 5 Tips for Using Trial Director and Trial Technicians Effectively).

1. Trial Director's "Saving Versions" Function

A great tool for when you need to track multiple versions of a document is the saving versions function. This tool will help you to track the progression of changes made to exhibits to ensure you are always displaying the correct version of the exhibit.

One of our trial technicians shared with me a challenge he encountered at trial where this function became an invaluable asset. During trial, he was faced with the task of doing redactions live in court. This is not an uncommon request, and the redaction tool can easily accomplish this. However, this situation required more than redacting exhibits. In this instance, a given exhibit would be admitted into evidence in redacted form for witness "A," only to be re-admitted with *additional* redactions the very next day with witness "B." Witness "A" would then be re-called later in the case, and they would need to revert back to the previously redacted version of the exhibit.

Thankfully, the TrialDirector shortcut for "saving versions" allowed him to accurately track the progression of changes made to each exhibit. This function saves an image of each version of the exhibit to a specific folder along with the date and time it was created, while the original exhibit (*sans* redactions) is left intact. This became an essential tool in being assured the "correct" version of the exhibit was being shown at all times to all witnesses.

2. Trial Director's Database Coding Features

Another great tool and time saver is database coding. Trial Director accepts coding directly from other case management programs such as Concordance and Summation. This is a great feature to have not only in building an accurate and complete database but it also makes searching in the database much easier. Getting it done ahead of time is key so last minute preparation can be focused on working with the attorneys and finalizing, not building, the database.

3. Customize Tool Bars and Presentation Preferences in Indata's Trial Director

Trial Director's quick access toolbar can be set up to save favorite and most often used tools e.g. arrows, circles, rectangles, etc. This enables to the user to easily find the annotation tools they use most often easily and at a glance. Additionally, trial technicians can assign their own "hotkeys" for commonly used functions such as custom stamps, snapshots among others.

4. Trial Director's Track Admitted Exhibits Feature

It is not uncommon for a trial technician to keep a running list of exhibits used in court daily or rely on the court reporter to keep track of the exhibits that were admitted. With the track admitted exhibits function - this is a thing of the past. The track admitted exhibits function in Trial Director allows you to save the exhibits as you go. During trial, and while in presentation mode – you can create a workbook called "Admitted." Here you can save the trial exhibits by the date they were admitted/used during trial. This is a great feature for a team who wants to keep close tabs on the trial exhibits used during the course of trial. This also serves as an excellent tool in preparing for cross or closing. If you need to know what exhibits were used and when, you can easily reference the admitted exhibits folder.

Tip: To retain mark-ups or annotations take a screenshot of the exhibit and save the screenshot too. This will keep a record not only of the document but also of any markups or annotations made during the trial.

5. Presentation Scripts in Trial Director

Attorneys will sometimes shy away from using Trial Director because they have become so accustomed to using linear type presentations such as PowerPoint. However, in the presentation scripts feature you can easily organize the exhibits in the order you/the attorney wish to present them. The exhibits are displayed one by one in the order of the attorney's script as he goes through his/her presentation. This is a particularly effective method for attorneys who like to be very scripted, and like the comfort of knowing the exhibits are organized according to his/her script. This can be extremely beneficial where there is more than one presenter on a team. One attorney may like to run their presentation themselves and one may not. The presentation scripts function gives a sense of familiarity and control the presenting attorney is accustomed to with more linear presentation software but also allows for the flexibility needed by the trial technician when he/she needs to step in and run the presentation.

I am not a trial technician, nor are you likely to see me sitting in the "Hot Seat" in the courtroom any time soon. However, as a trial consultant I am frequently faced with the question from clients as to why they should use one of our trial technicians to run the Trial Director software at trial. My answer is simple – we use the best Trial Technicians in the business they are incredibly well versed in Trial Director and their expertise makes them invaluable to the team.

Related Trial Director, Trial Technician and Hot Seat Operator Information:

What is a Hot Seat Operator?

Request Pricing or Availability for a Trial Tech

Show me a trial tech in action

Prove to me you make your clients happy

6 Tips for Effectively Using Video Depositions at Trial

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.

Using Trial Graphics & Statistics to Win or Defend Your Case

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]

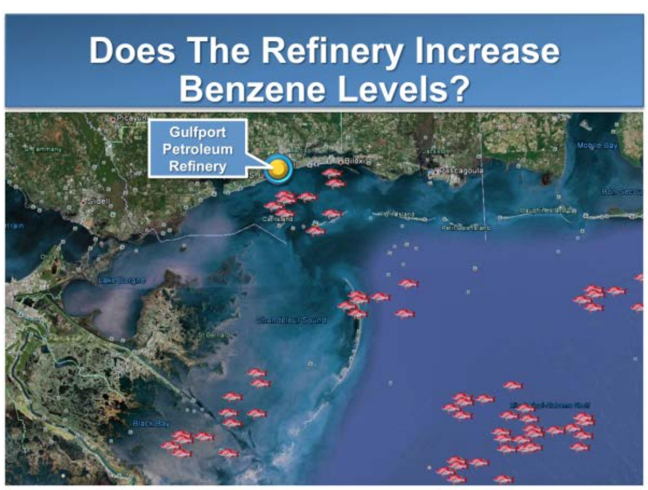
Many of us have been there in the course of a trial or hearing. An expert or opposing counsel starts spouting obscure statistical jargon. Terms like "variance," "correlation," "statistical significance," "probability" or the "null hypothesis." For most, especially jurors, such talk can cause a mental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

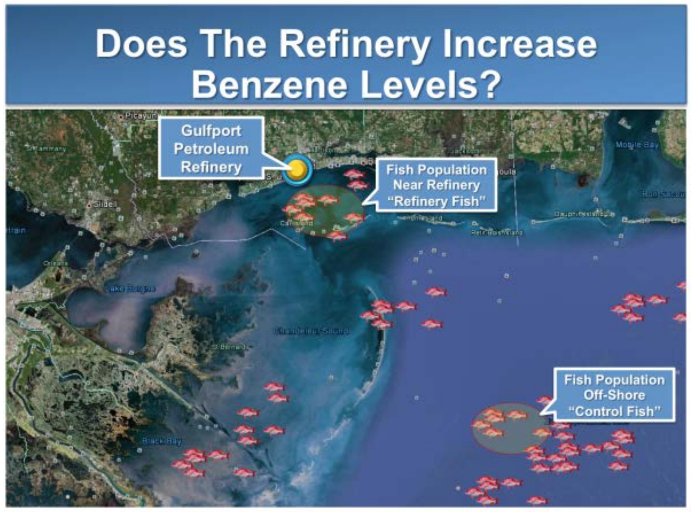
Helping judge and jury develop a clear and accurate understanding of statistical principles is critical – and using the right type of trial graphics can be invaluable.

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.



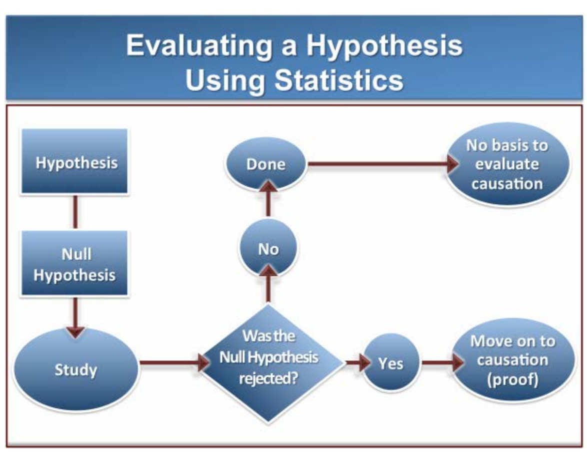
The hypothesis is that the benzene level in the coastal fish near the refinery (the Refinery Fish) is higher than the benzene level in off-shore fish that live in waters far from the refinery (the Control Fish).



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 [pdf], 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. Neverteless, 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:

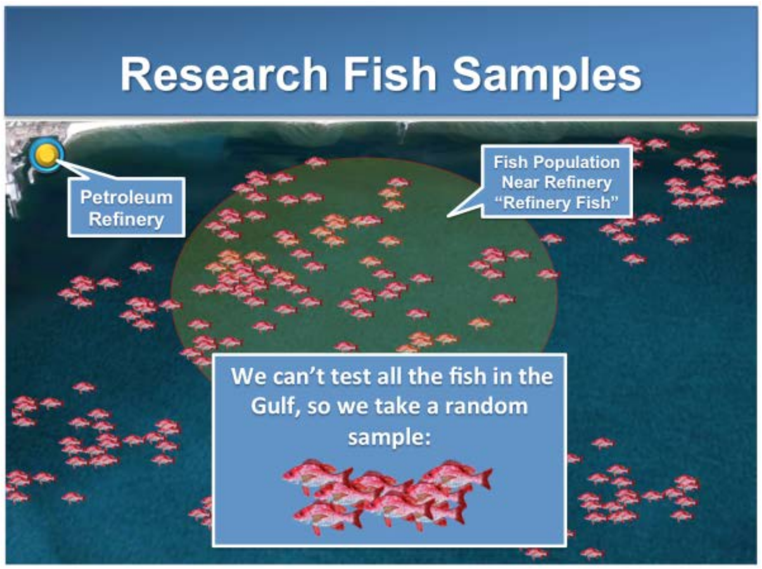
Null Hypothesis

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

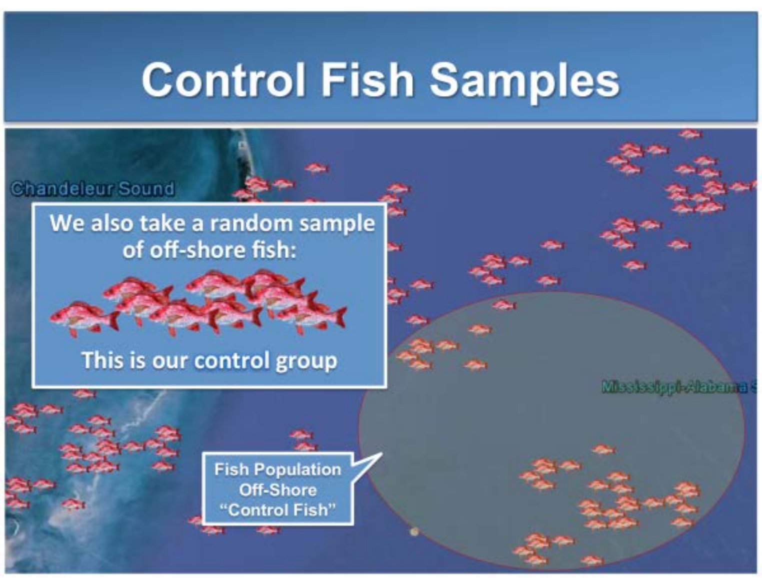
In our study, as in all scientific studies, we will be testing how likely it is that we would obtain dataat least as extreme as our data ***if the null hypothesis were true***. In other words, we will be evaluating the conditional probability of obtaining the data that we observe.

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 . . .

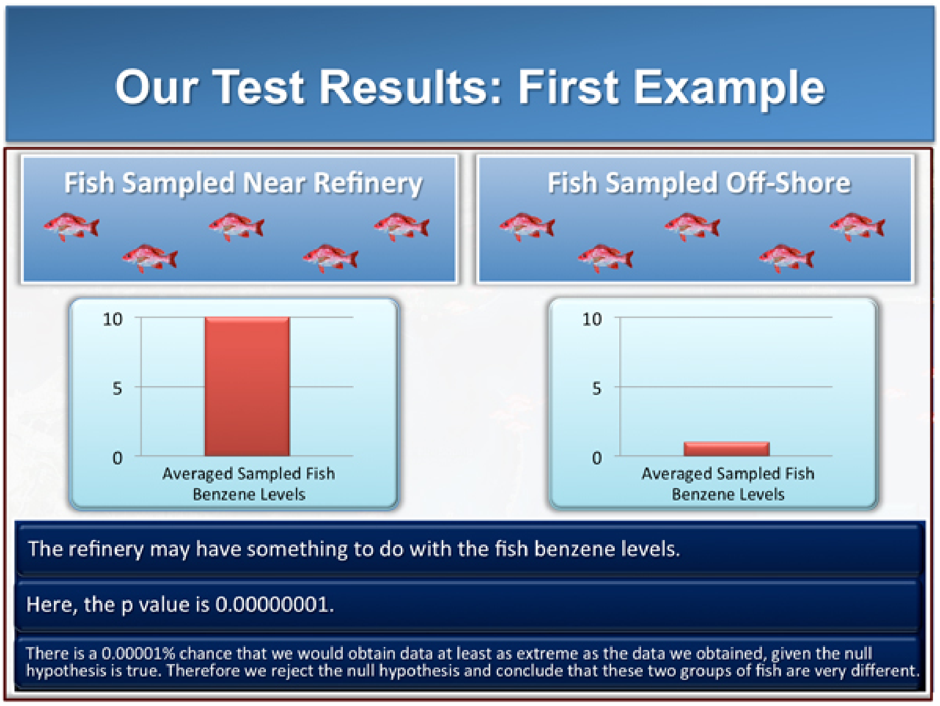


(2) a group of fish in the middle of the ocean, nowhere near the refinery (Control Fish).



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.

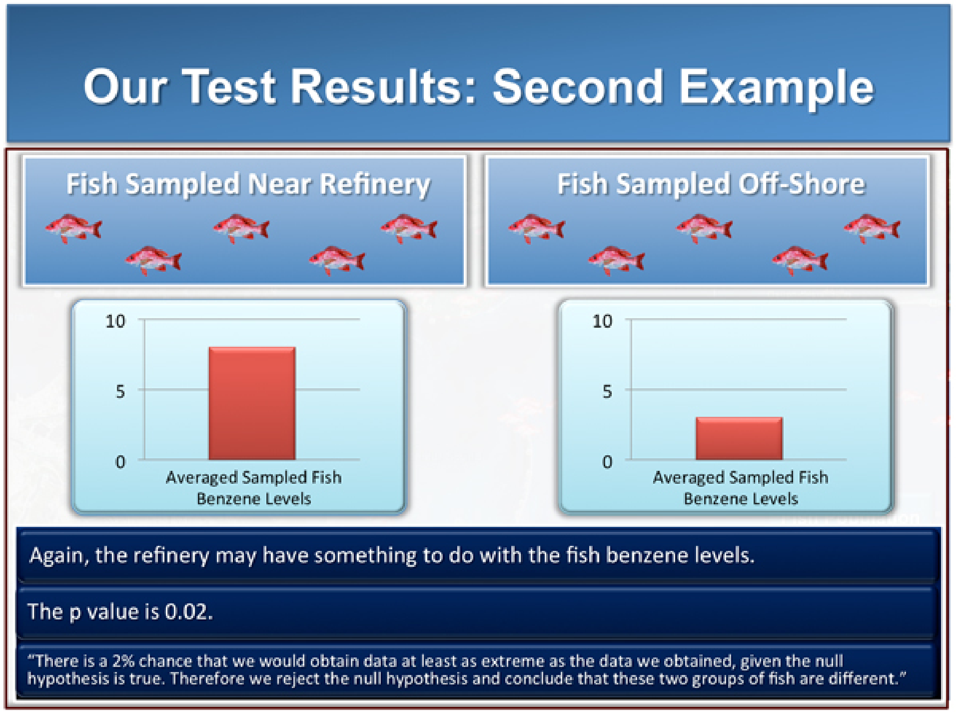


In this example, let's assume that every fish in the Refinery Fish sample had a benzene level of 10, and every fish in the Control Fish sample had a benzene level of 1. Thus, the average Refinery Fish benzene level is 10 and the average Control Fish benzene level is 1. When we do our statistical test, 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.

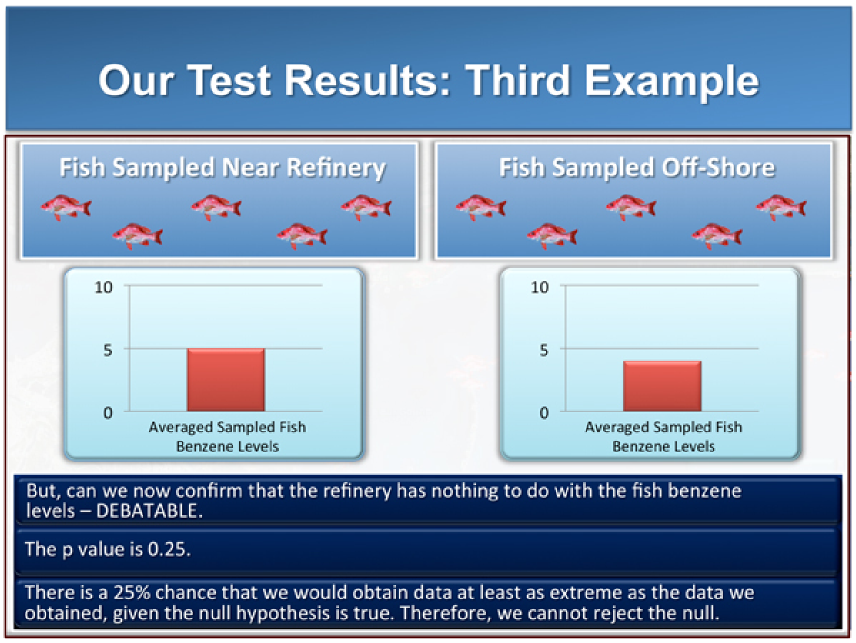


In this example, the average benzene level in the Refinery Fish sample is 8 and the average benzene level in the Control Fish sample is 3. When we do our statistical test, we learn that the p value is 0.02. Said another way, the probability that we would have obtained these findings, given that the null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

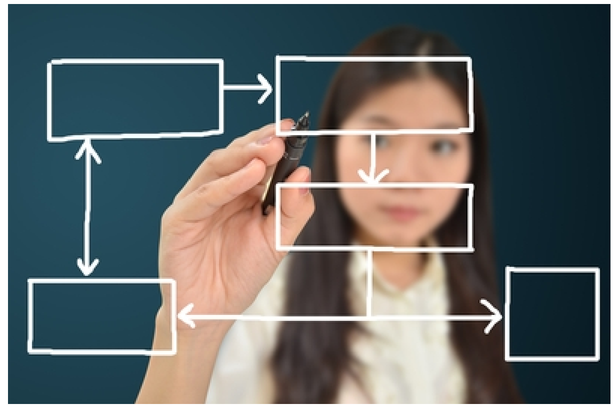
But what does it mean when we cannot reject the null hypothesis? Can we conclude that the null is true? This is actually a critical question, and it represents an area where statistics often get misused in court, in trial graphics, in the media and elsewhere. And what about other intervening factors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

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

Explaining a Complicated Process Using Trial Graphics

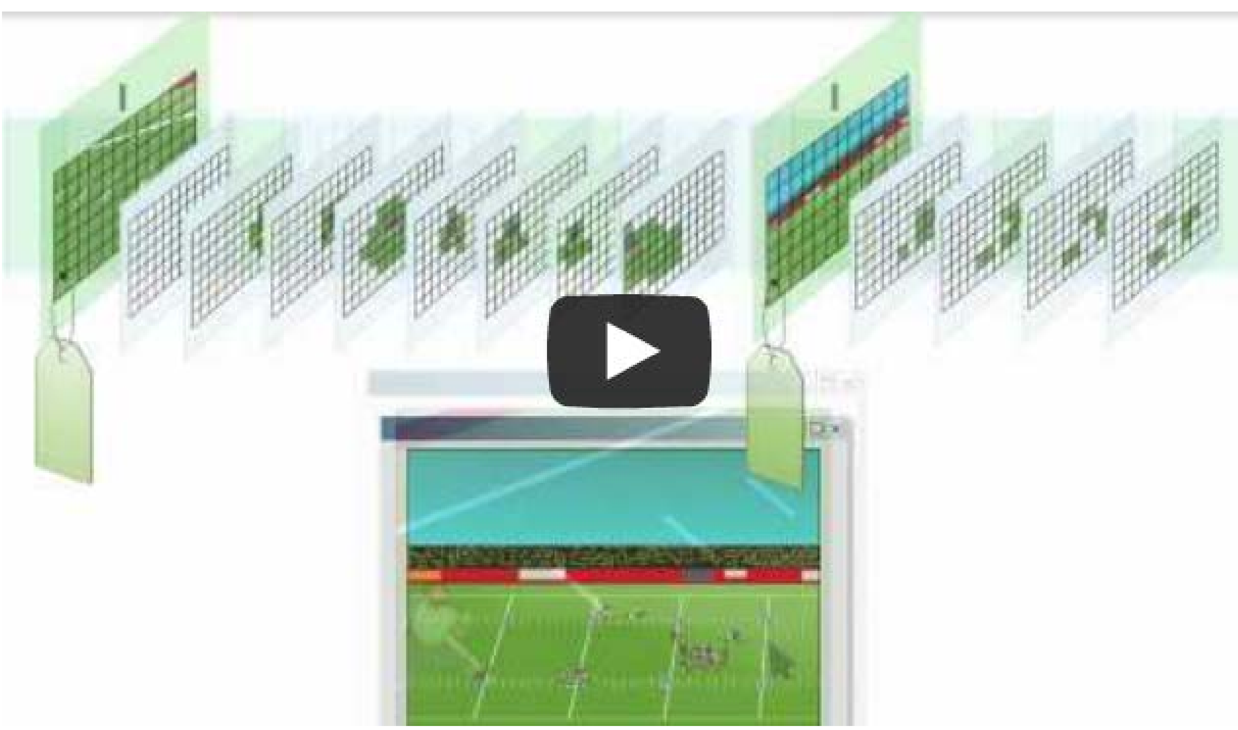
In our work as trial graphics specialists, many cases require us to prepare a demonstrative exhibit that simplifies a complex process. This could be a scientific or technical matter such as how environmental remediation is conducted, how surgical mesh is used, or how data backups are migrated, or it 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.



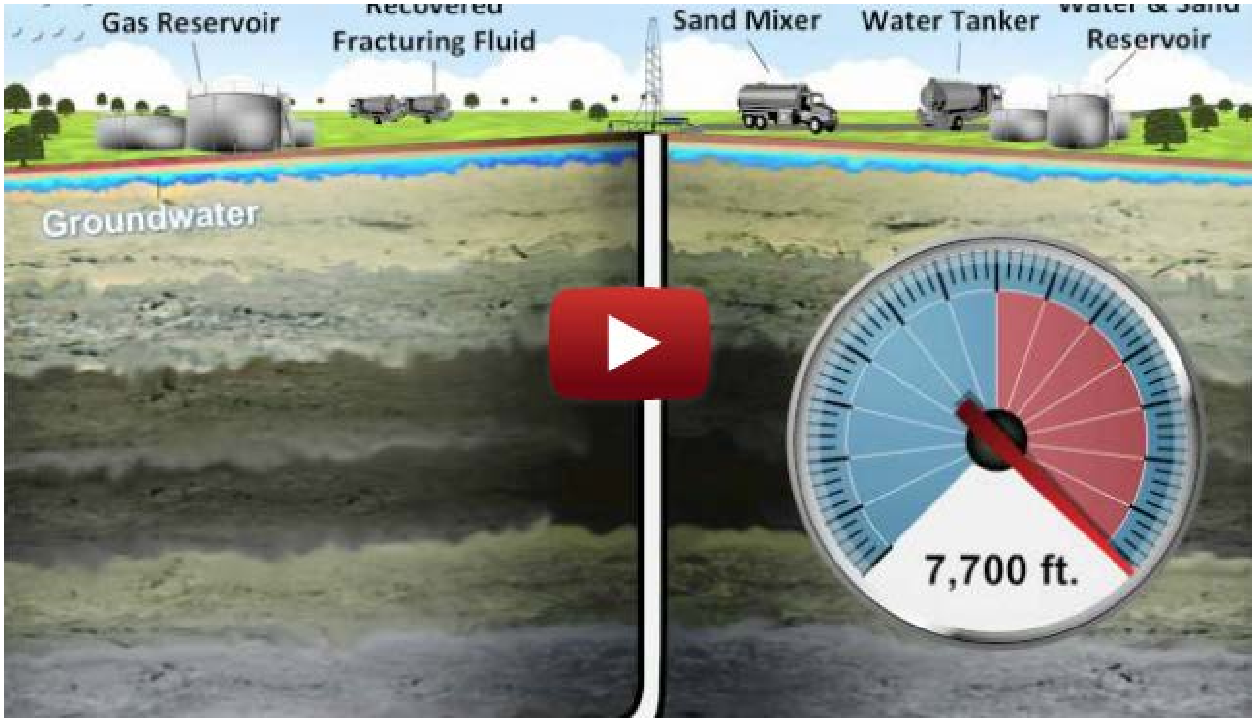
The key to making a successful process chart or flow chart is to create a simple trial graphic that anyone can quickly understand. It does not have to spell out every last detail of the science, technology, business concept, or governmental action involved; it merely has to discuss it accurately and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



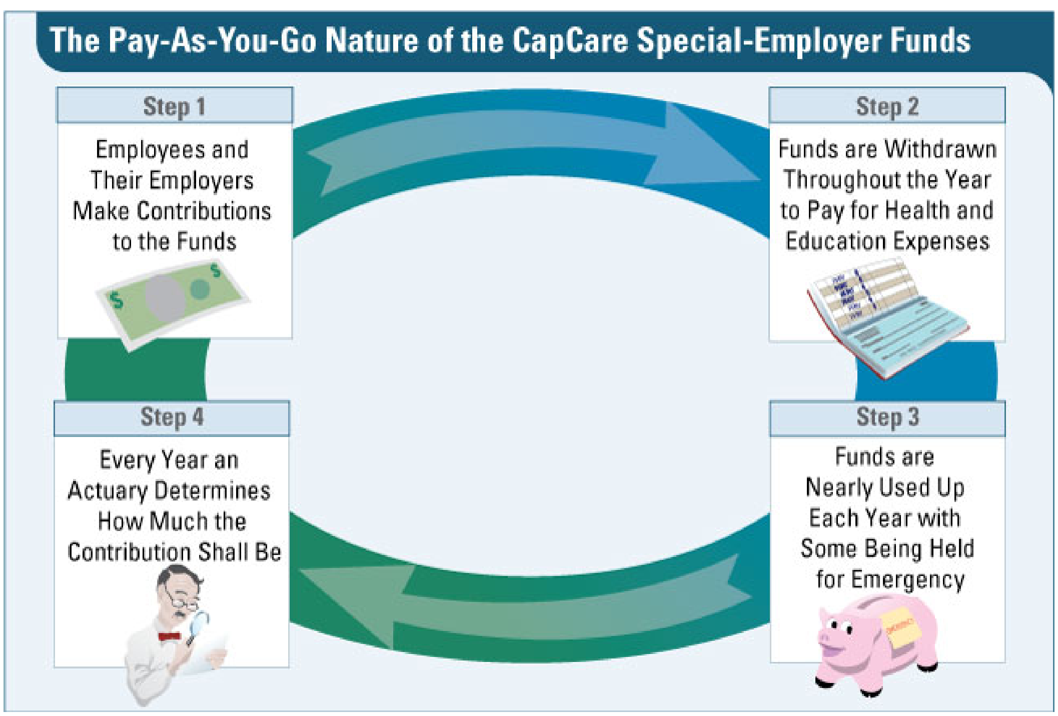
In the presentation below, we explain, in schematic form, the hydraulic fracturing (fracking) process that is used to extract natural gas from rock. The presentation shows how far below the earth's surface fracking occurs and the industry's routine use of cement and steel casings to protect groundwater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

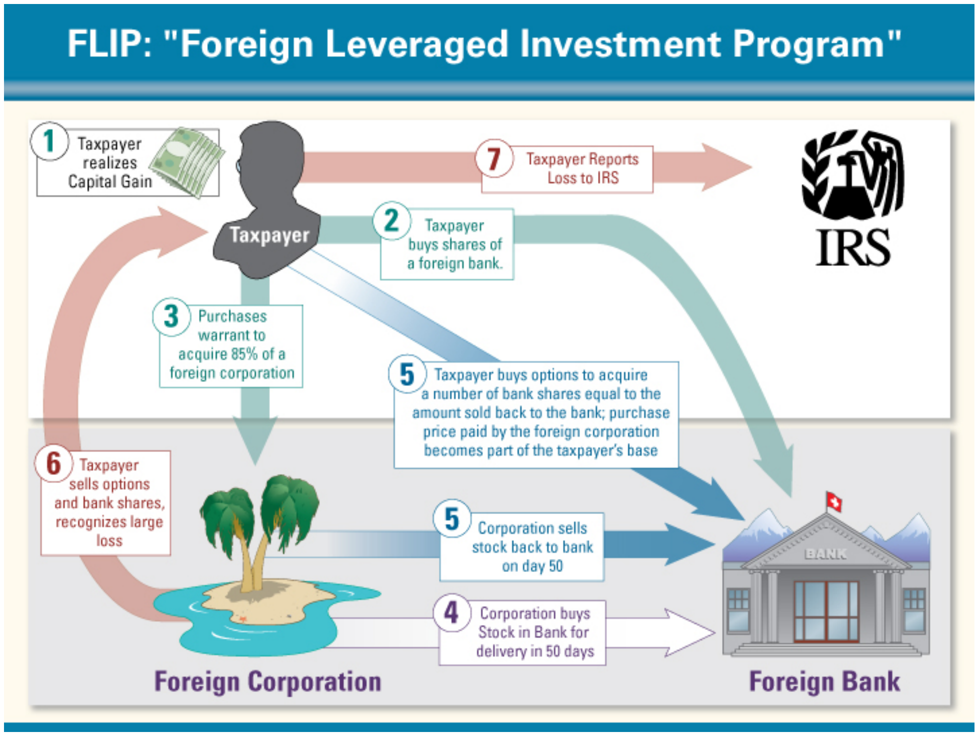


In the presentation below, we show in graphic form the process in which collateralized debt obligations are created by investment banks. Through the use of Prezi presentation software, we were able to make this highly technical and complex matter comprehensible to a fact finder by introducing the concept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

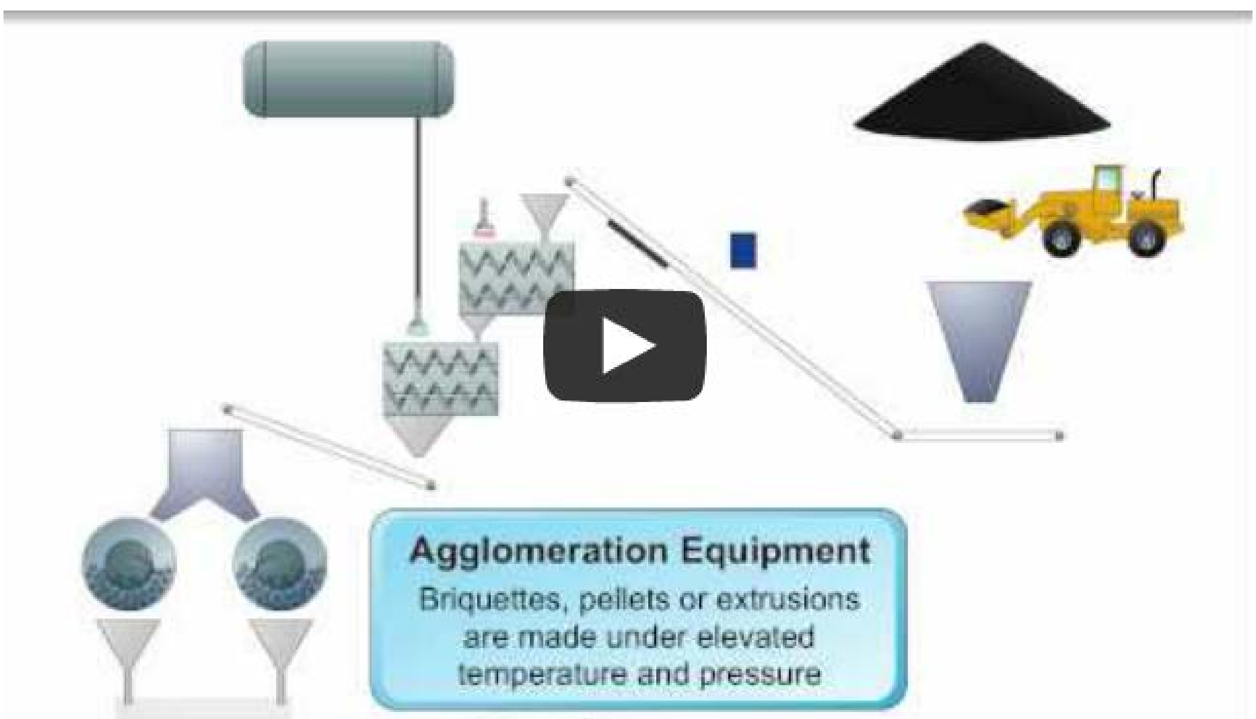
In the trial graphics, we explain the drug development process in the United States and the process for regulatory approval of new drugs by the Food and Drug Administration. This PowerPoint demonstration helped a jury understand the length of time that the process can take, why it can take so long to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



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

By Ken Lopez, Founder and 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.

Don’t Get Too Cute With Your Trial Graphics

by Ryan H. Flax, Managing Director, Litigation Consulting, A2L Consulting

You must use trial graphics and other demonstrative evidence to be as persuasive as possible and win at trial. But, if you use trial graphics incorrectly, you risk losing everything. Take the recent trial scenario that played out in Orange County, California as an example and a warning.

In The People v. Otero, a criminal prosecution over a sexual assault on a child, in her closing arguments, the prosecutor began to discuss the burden of proof – as we all know, in criminal cases it’s beyond a reasonable doubt. The question is, what does that really mean. The prosecutor wanted to make the point that the burden does not require absolute knowledge – not every fact must be supplied and not every fact supplied need be perfectly accurate to satisfy this burden.

However, the prosecutor took it one step too far.

She used a trial graphic to demonstrate her point. It was similar to a combination of the graphics I’ve supplied above and below. Instead of showing an incomplete puzzle, it showed the state of California, without an identifying label and with some incorrect city locations and names. She began explaining that she wanted to identify the name of a state that looked like the one in the image (the trial was in California, by the way) and even though there was some incorrect or incomplete information, she knew the state was California. Well, the defense jumped right up and objected to that trial graphic.

The court sustained the objection and instructed the trial graphic be taken down and not referred to again. Then the judge instructed the jury to disregard the trial graphic and the discussion thereof. The trial and closing arguments continued and ultimately, the jury found the defendant guilty.

On appeal, the defense argued that the prosecutor’s little stunt with the map of California amounted to misconduct warranting reversal of the conviction. The Court of Appeal agreed that the trial graphic and argument was misconduct, but that it was harmless because it was taken down so quickly and because the strong evidence for conviction in the case.

The court explained the problem: the prosecutor was misstating the law relating to its burden of proof. The beyond a reasonable doubt burden is not quantitative – it’s not based on a certain number of puzzle pieces of evidence fitting together. So, it’s misconduct for the attorney to present it that way. It’s misconduct to tell the jury that if they have “X” number of puzzle pieces they should convict. So, although its always very tempting to make a graphic like this because the subject matter simply lends itself to visuals, you need to take a step back and decide just how to make this point visually and appropriately.

I don't know for sure, but I imagine that the prosecutor's path to this misconduct went something like this: "Hey, I've got a great idea!" And, if the law didn't matter, she certainly did have a good idea. Make your case using trial graphics. Explain to the jurors that it's okay to convict this guy even though you don't feel 100% positive of his guilt (he *admitted* to the crime by the way). What this attorney was missing was someone by her side to say, "hold on a minute, you can't do that" or "let's rethink this before committing to this strategy."

This is where a litigation consultant is invaluable. No matter how many trials you've been through as an attorney, we've seen more as consultants (we're attorneys, too, by the way). Our specialty is how to get your "persuasion on" and how to do it the right way. A good litigation consultant is someone to bounce these ideas off of and work through the way to graphically make your case and how to stay inside the lines.

Legal Animation: Learn About the Four Types Used in the Courtroom

The art and science of animated trial graphics has evolved dramatically over the past 10 years.

Animation used to refer only to 3-D animations that were produced with programs such as Autodesk Maya or Autodesk 3ds Max, formerly 3D Studio MAX.

Now a much broader array of animation tools is available to the courtroom animator, and each one has its own niche and its own strong points. We are able to provide animations of all of these varieties in-house, and we work with our clients to select the one that is best in terms of persuasive power, applicability to the problem at hand, and cost. We have done this since 1995.

PowerPoint Animation

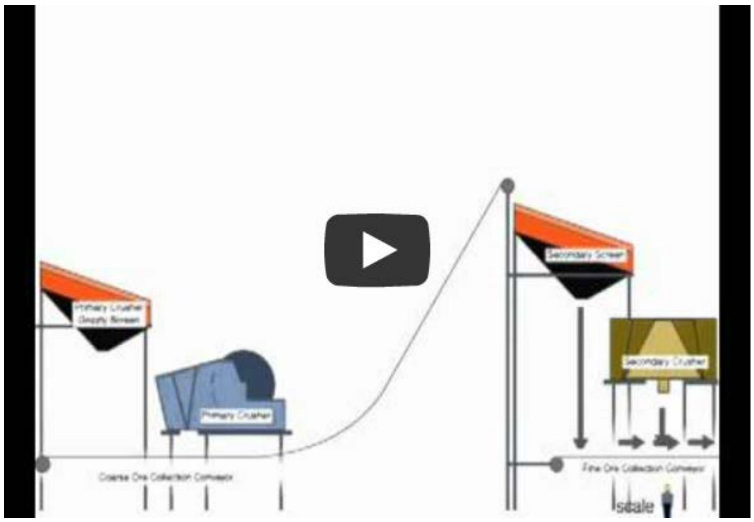
PowerPoint Animation has become by far the most widely used type of animation today. Only 5 percent or so of all courtroom animation 10 years ago, it now amounts to as much as 90 percent today. It is a flexible tool that is adaptable to many types of cases and many types of illustrations.

For example, this PowerPoint demonstrative illustrates how airbags are designed to deploy in a frontal collision, a side collision, and an oblique collision. This brief animation uses high-quality technical illustration along with PowerPoint to illuminate the airbag technology for a patent infringement case.

2-D Animation

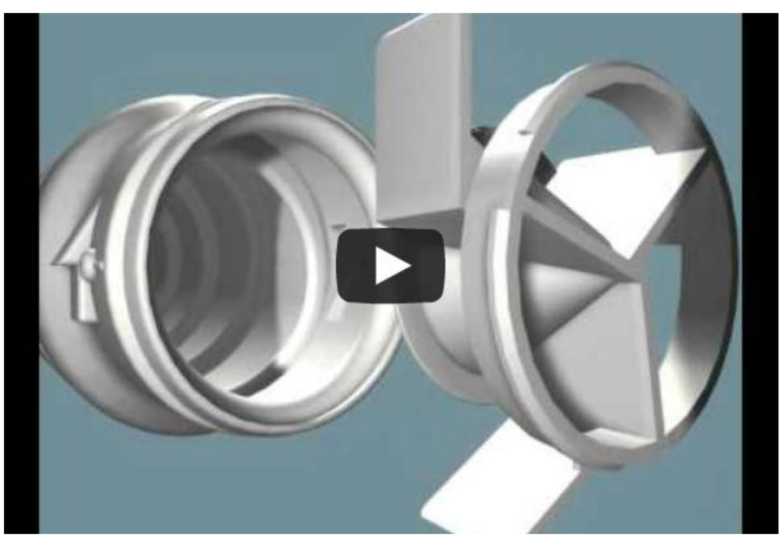
Two-dimensional animation, produced in a program like Adobe After Effects, can also be a very useful tool. It is quite inexpensive and has an immediate appeal to jurors.

In one case, for example, we provided a brief, sequential 2-D illustration of how the copper mining process works, from the raw ore to the finished product. When budget is at issue, this type of animation is ideal for describing complicated information to jurors.



3-D Animation

Three-dimensional animation is particularly useful when small details, rather than broad outlines, are at issue. For example, in a patent trial where the workings of a toner bottle were at issue, we produced a graphic that showed the toner bottle in all three dimensions, so that the jurors could understand the unique technology that permits the toner to move through the grooves of the bottle. Here, a two-dimensional representation would not have been adequate to show how all the parts of the bottle work together. We also used close-up views to show precise details.



Flash Animation

Finally, we have used Flash animation to present long-form tutorial videos. Often, these are intended for judges rather than for juries. For example, we often use Flash to build patent tutorial videos that explain the background of the technology at issue in major patent litigation. Since a great deal of patent litigation occurs in the Eastern District of Texas, we have created many 30-minute tutorials for judges there that combine audio and video.

One good example is a demonstration that we provided of the workings of a "picking machine" in a hospital that uses both information technology and mechanical technology to translate a physician's prescription orders to the actual selection by mechanical means of a medicine from an array of drugs.

With animated trial exhibits finding their way into most cases with at least millions of dollars at stake, the modern litigator must be aware of the four courtroom animation options. Fluency in this language of animation will result in savings of time and money.

4 Tips for Using Trial Graphics in Motions and Briefs

Most people, when they think of trial graphics, focus on exhibits to be used at trial. But graphics can also be used in motions and briefs presented to judges, even if jurors will never see them. After all, if you are using graphics to make your argument or tell your story at trial, why not use them at an earlier stage to make your argument convincingly in your brief?

In addition, a lawyer who introduces graphics early in a proceeding can lay the groundwork for later use at trial or in another aspect of the case. This can also give the lawyer a sense of how receptive the judge is to the use of trial graphics in the case.

Here are some tips for using graphics in your brief:

First, keep it simple. The judge is, after all, reading a document, and the images need to be easily incorporated into the document. Motion pictures and similar animations obviously won't work well -- unless of course you are submitting an e-brief.

Second, consider the amount of space you have to work with. The image needs to fit into the space appropriately.

Third, using color is OK; just because a trial graphic is embedded in a court document doesn't mean it has to be in black and white.

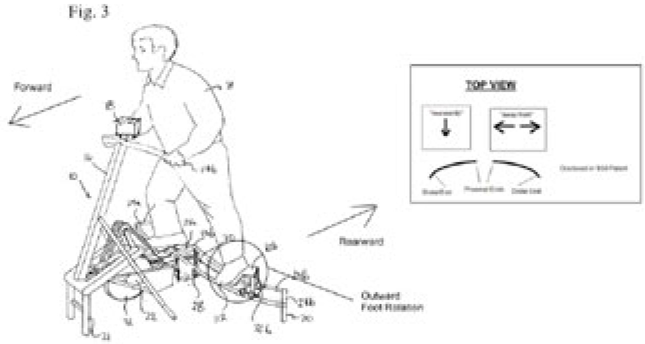
Fourth, using trial graphics to simplify a complex aspect of the case is one of the best possible uses.

Trial graphics can effectively be used to illuminate motions in a number of areas of law, including bankruptcy, patent litigation, and litigation involving highly technical areas of scientific research.

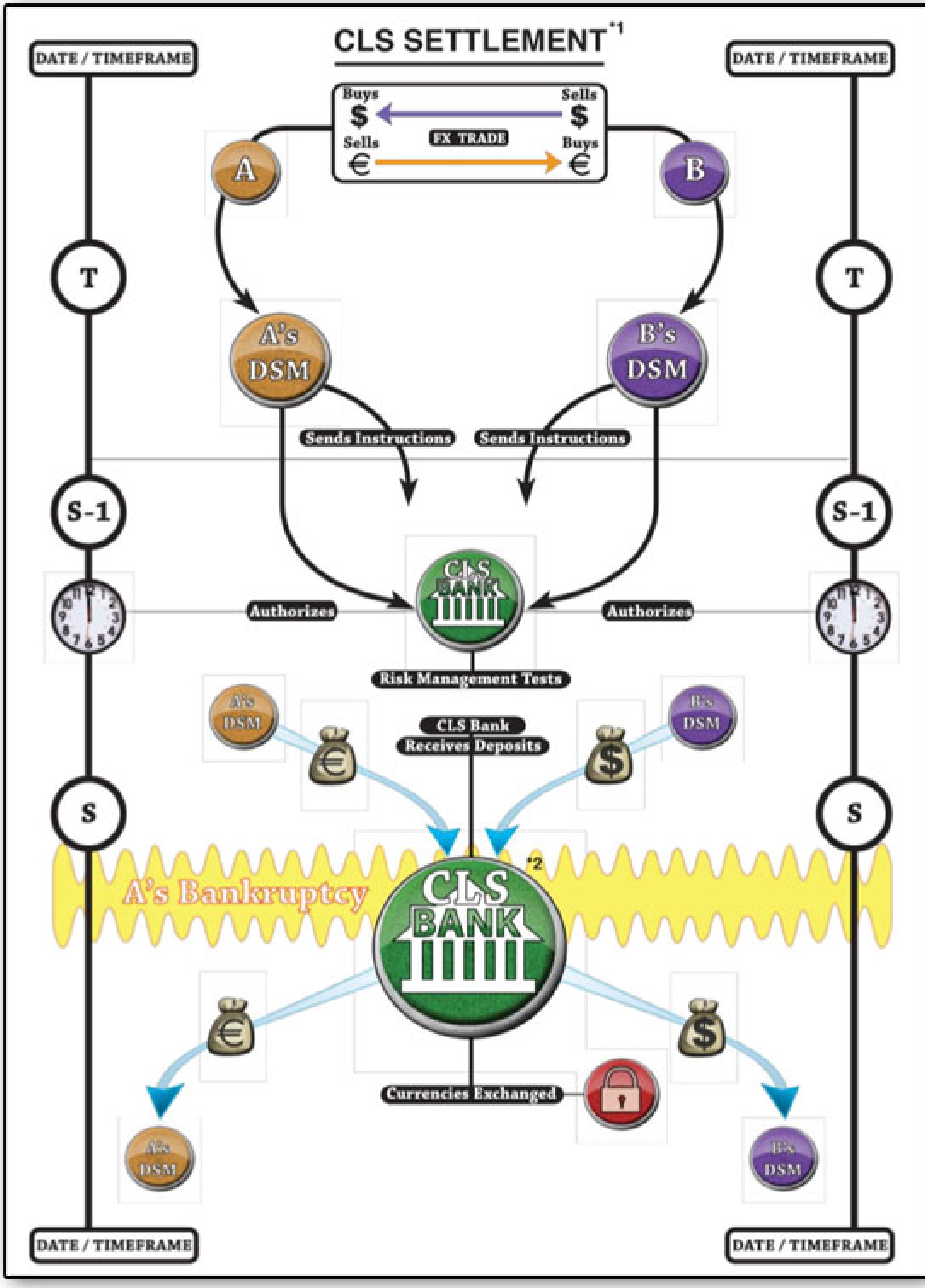
In the first example below, the issue regarding the patent was the curvature of the rails in the equipment. As a portion of the case itself involved graphics in the form of the geometric curve, the curvature was hard to explain verbally but was much easier to delineate in a sketch.

curvature depicted in the patent is only a "preferred embodiment." However, the Defendant does not wish to limit the invention to a *preferred* embodiment, but rather to the *claimed* embodiment. Rearward curvature is included in the claims, and the question is, "how should the term be constructed?" Should it be given the meaning set forth in the specification, or should it read on <u>any</u> curvature even if the curvature contradicts the express language of the disclosure and prosecution history? The patent shows one specific curvature:

Fig. 3



Second, in a bankruptcy matter, a law firm needed to explain the Continuous Linked Settlement (CLS) system that was carried out by CLS Bank to provide settlement services. The CLS settlement process is very difficult to explain, so we developed a series of graphics for use in a brief that explained the settlement and clearing process.



Finally, in a pro bono assignment that we undertook involving the interpretation of a prohibition on the use of federal funds for stem-cell research, a key issue emerged regarding the definition of the term "research" in an amendment passed by Congress.

Through a series of graphics that were incorporated in a memorandum in opposition to a motion for summary judgment, we illustrated our client's position that the term "research" can be conceptualized in many different ways and that the opposing brief, in selecting just one of those interpretations, was interpreting the term arbitrarily.

In Figure 1, for example, we showed that stem-cell research can be defined as separate from the derivation of embryonic stem cells and is not identical with the derivation process. In Figure 2, we showed that the opposing brief was trying to group stem-cell research and the derivation process together, a conclusion that was not justified by the statute. And in Figure 3, we showed that it is even possible to interpret the term "research" to encompass an entire area of inquiry, thus preventing federal funding of a whole type of research in a way that Congress could not have intended.

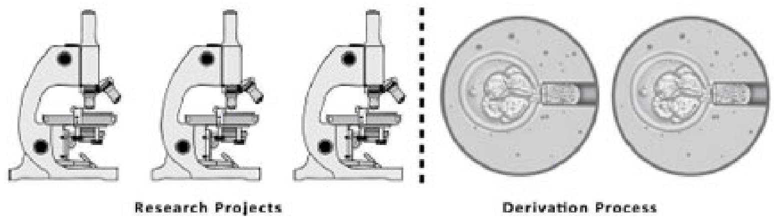


Figure 1

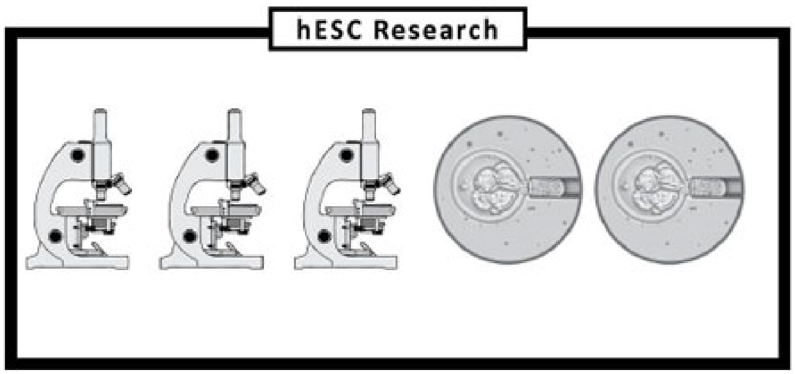


Figure 2

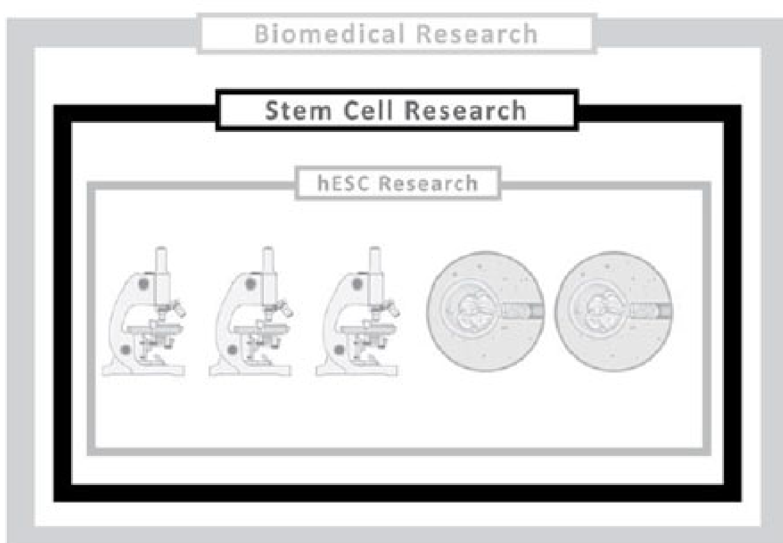


Figure 3

Using Scale Models as Demonstrative Evidence - a Winning Trial Tactic

By Ken Lopez, Founder and 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

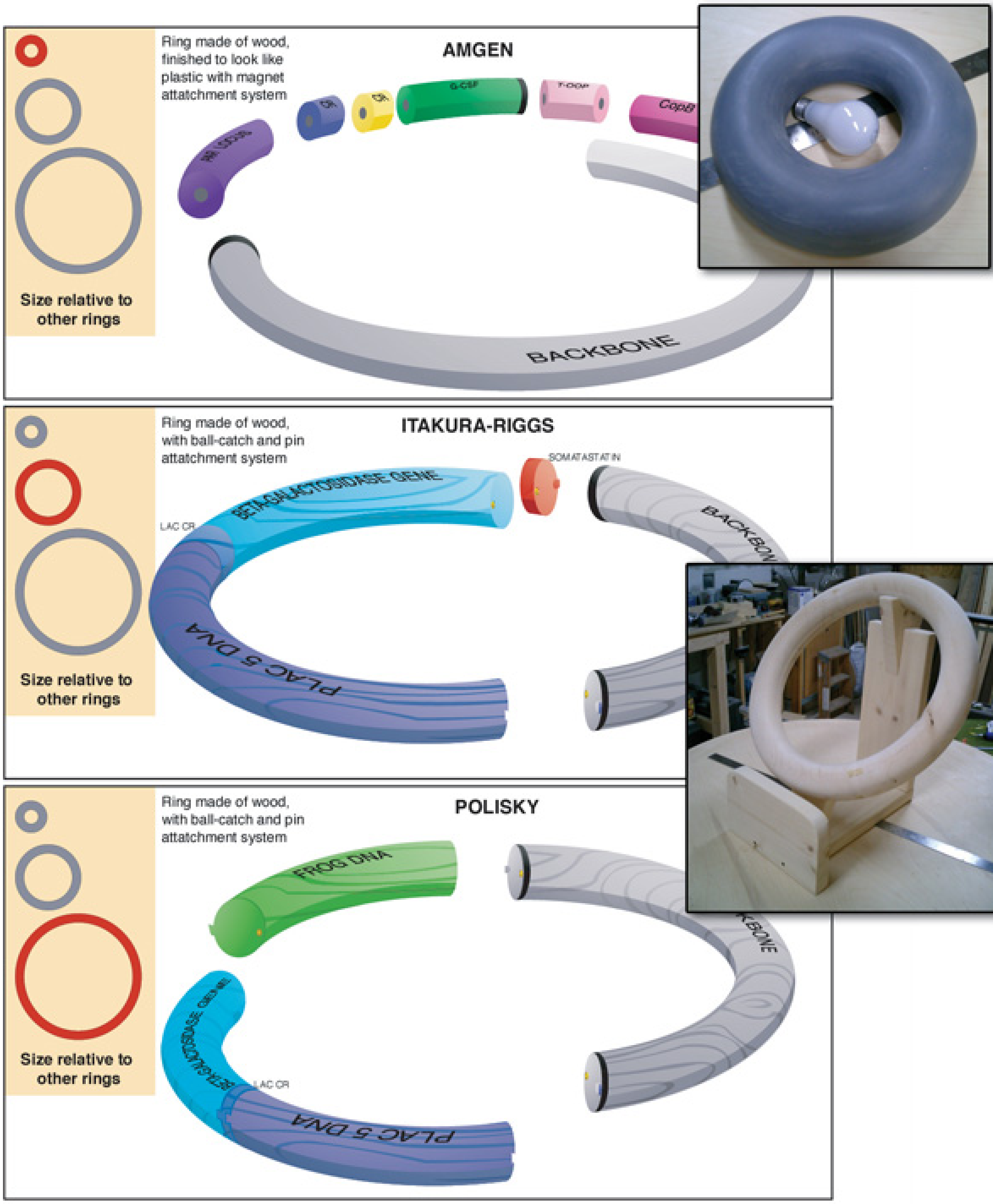
THE AQUACHIN: *Akin Gump's Jeff Sherwood, Mike Oakes and Frank Cimino display the contraption they used to illustrate the way a circuit works.*

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 on akingump.com - 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.

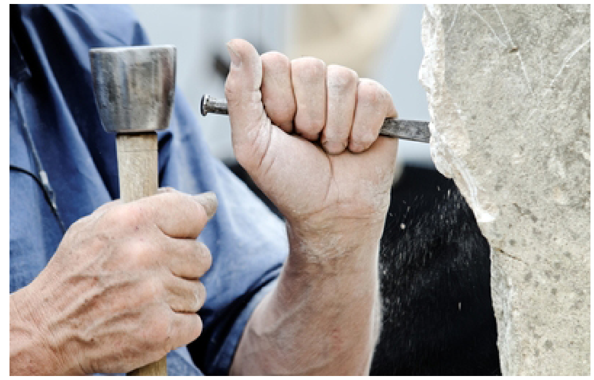
In a patent case involving blood plasmids, we built a set of wooden rings that were intended to show the composition and relative sizes of various competing products on the market.

Scale Model - Design & Prototype



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!

10 Reasons The Litigation Graphics You DO NOT Use Are Important



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.

Portray Your Client As a Hero in 17 Easy Storytelling Steps

by Ken Lopez, Founder/CEO, A2L Consulting

Much has been written about the hero's journey as Joseph Campbell described it in his seminal work, *The Hero with a Thousand Faces.* In this 1949 book, Campbell asserts that storytellers worldwide, in their best stories, have for centuries used a story structure that he calls the monomyth. From Beowulf to Ulysses to Luke Skywalker, the pattern is seen over the ages.

Leadership speakers, filmmakers, theologians and literary authorities use the 17 steps described by Campbell to tell stories that have multi-generational staying power. I had the pleasure of attending a TEDx event last month whose theme was the hero's journey.

As we have written about before and described in A2L's free Storytelling for Litigators book, humans are moved by stories at a primal level. Tapping into this human need for drama by using storytelling in the courtroom is an easy (but not simple) method of persuading your judge or jury. As is largely true in sales, I believe that juries (and probably most judges) decide on emotion and justify their decisions with facts.

Since we know that using story is a valuable courtroom strategy and since we know that painting our clients as heroes is also inherently valuable, I thought I might try to use some of the existing hero's journey charts and guides to build a narrative for a typical case. The problem that I found is that most writing (or charting) on this topic is weighed down by so much jargon (e.g. Apostasis, Belly of the Whale, Rescue from Without) that it is hard to quickly make sense of. To that end, below is a litigation-ready infographic free of literary jargon that lays out the key 17 steps of the hero's journey.

[Click on image to pop-out a larger version and to share]

As the chart above shows, the hero's journey follows a pattern of 17 steps. Campbell's cryptically described 17 steps are well discussed here. To make this useful pattern more accessible, I've attempted to use plain language to describe the steps. My plain language stage is followed in parentheses by the name that Campbell gave to it. Also, to help bring the process alive, I have matched each step with an example from a hypothetical legal and technical fact pattern, typical of the cases we most often see at A2L.

Here, our heroine is a lower level employee at a stagnant remote control manufacturing company, and she has an idea for a breakthrough product - a remote control operated not with a handheld device but by wireless physical hand gestures.

1. **Something Interrupts the Ordinary** (Campbell's Call to Adventure): Describe the status quo as it was at the time. Then describe that moment when someone sees an opportunity for change or a new threat emerges.

In the hypothetical example, remote controls are functional uninspiring devices that get lost, wear out and have undergone little change for 25 years, in the same era that saw the mass deployment of handheld phones and personal computers. Inspired by watching her nieces play a TV-displayed game that uses hang gestures instead of controllers, our heroine imagines a world where hand gestures alone can manipulate her television and replace standard remote controls. At work the next day, she here's a speech by the firm's CEO who is looking for new ideas.

2. **Obstacles Arise** (Campbell's Refusal of the Call): Share how obstacles arose from the very beginning that prevented your client from taking the leap of faith required to pursue the opportunity.

Example: After hearing the speech, our heroin brings the idea to the attention of management at the remote control factory and was laughed out of the executive suite. She figured they were in management for a reason and went back to manufacturing remote controls as before.

3. **A Mentor or Helper Appears** (Campbell's Supernatural Aid): Explain how your client gets some unexpected assistance that is a sensible next step in bringing the opportunity to reality.

Example: Our heroine attends a consumer electronics conference that shows off some new gaming technology that reminds her of her idea. She talks with the reps at the tradeshow booth about applications they've considered for their wireless controllers. They suggest she show them what she has in mind.

4. **A Big Step Forward** (Campbell's Crossing of the First Threshold): Recount how your client made the decision to move forward toward the opportunity with a large clear step.

Example: Our heroine makes the brave decision to leave her employer and set off on her own.

5. **Out with the Old, In with the New** (Campbell's Belly of the Whale): Tell how your client demonstrated a willingness to embrace the opportunity in spite of the great odds.

Example: Our heroine's savings has run out and she stays up night after night trying to perfect a prototype with the dream of returning to that gaming company to show off her work.

6. **Many Attempts with Mixed Results** (Campbell's Road of Trials): Chronicle how your client tried to reach the opportunity time and time again. Usually, there are some successes and some failures.

Example: She created prototype after prototype and each had some success and some failure.

7. **Finding a Partner** (Campbell's Meeting With the Goddess): Describe how your client came to find that right person or right organization that helped them achieve success.

Example: Our heroine goes to the gaming company, shows off her prototype, agrees to sell the technology and joins the new firm to help them commercialize it.

8. **Temptation to Stray** (Campbell's Woman as Temptress): Detail how your client was met with an opportunity to stray from the chosen path but chose the higher road.

Example: Our heroine is contacted by her former employer, who offers to bring her back to the old firm for more money and an executive position at the company if she will share the new technology they are hearing rumors about. She declines the offer.

9. **Meeting with a Mentor** (Campbell’s Atonement with the Father): Discuss how your client one day had a meeting with the person or organization at the center of the opportunity.

Example: The Chairman of the Board stops by our heroine’s prototype lab to check out the new product in development and take stock of her. He says that they are going to bet big on her idea for the holiday season.

10. **A Period of Reflection** (Campbell's Apotheosis): Explain how your client took some time to reflect on how far things progressed to date.

Example: While on vacation, our heroine watches as her young nieces again use a wireless gaming device to entertain themselves on a rainy beach day and she increasingly sees her product as the future.

11. **Success** (Campbell's Ultimate Boon): Share how your client achieved the goal set out in the opportunity.

Example: The product is launching into stores, and the early reviews are positive from the technology press. Our heroine begins to realize that her idea was not only a good one but one with vast commercial potential.

12. **Don't Forget Where You Came From** (Campbell's Refusal of the Return): Report how your client began to enjoy her success.

Example: All of the press swoon over our heroine, and she becomes a fixture on panels at technology conferences worldwide, often traveling for weeks at a time. Her nieces miss seeing her.

13. **Remember Where You Came From** (Campbell's Magic Flight): Discuss your client's return to their roots and journey home.

Example: Our heroine, now fed up with long periods of time away from loved ones, puts an end to the fame treadmill and makes a surprise journey home to be with her family.

14. **Back to Reality** (Campbell's Rescue from Without): Relate how your client had to return back to everyday life having achieved so much, only the world is now quite different for them.

Example: Our heroine is picked up from the airport by her sister who describes what was like to return from a military deployment and reminds her of the challenge of coming home from her own time away.

15. **What Did You Learn** (Campbell's Crossing of the Return Threshold): Describe what your client learned from this entire experience.

Example: Our heroine comes back to her family and shares her experiences with them. Now she watches as her nieces easily use her invention to operate the television without a physical remote control. She is also reminded that the example of the children playing is how she arrived at her idea in the first place.

16. **Mastery Is Revealed** (Campbell's Master of Two Worlds): Position your client as someone who now understands what it takes to be successful and is likely capable of replicating that success.

Example: Our hero notices that the children playing with her new remote control interface ask sensible questions about why other things like cars, bikes and computers can't work this way. We know that she is just beginning to see the possibilities.

17. **Loss of Fear** (Campbell's Freedom to Live): With success under their belt, your client now has the confidence to look for new success and trust their instincts. At this point, one might begin the story again to show how your opponent enters the story and the hero's journey begins anew with new challenges to their heroism.

Example: While watching the kids at home and at complete peace, our heroine hears a knock at the door. It's a process server. Her former company is suing, claiming that the IP was developed on their dime. And so, the hero's journey begins again, back to step one, only this time, it will be the jury who defines the ending.

Finally, I enjoy this short YouTube video on the hero's journey as it relates to Star Wars, The Matrix and Harry Potter. It will give you another perspective on the hero's journey related to films you're likely familiar with.


The Hero's Journey / Monomyth

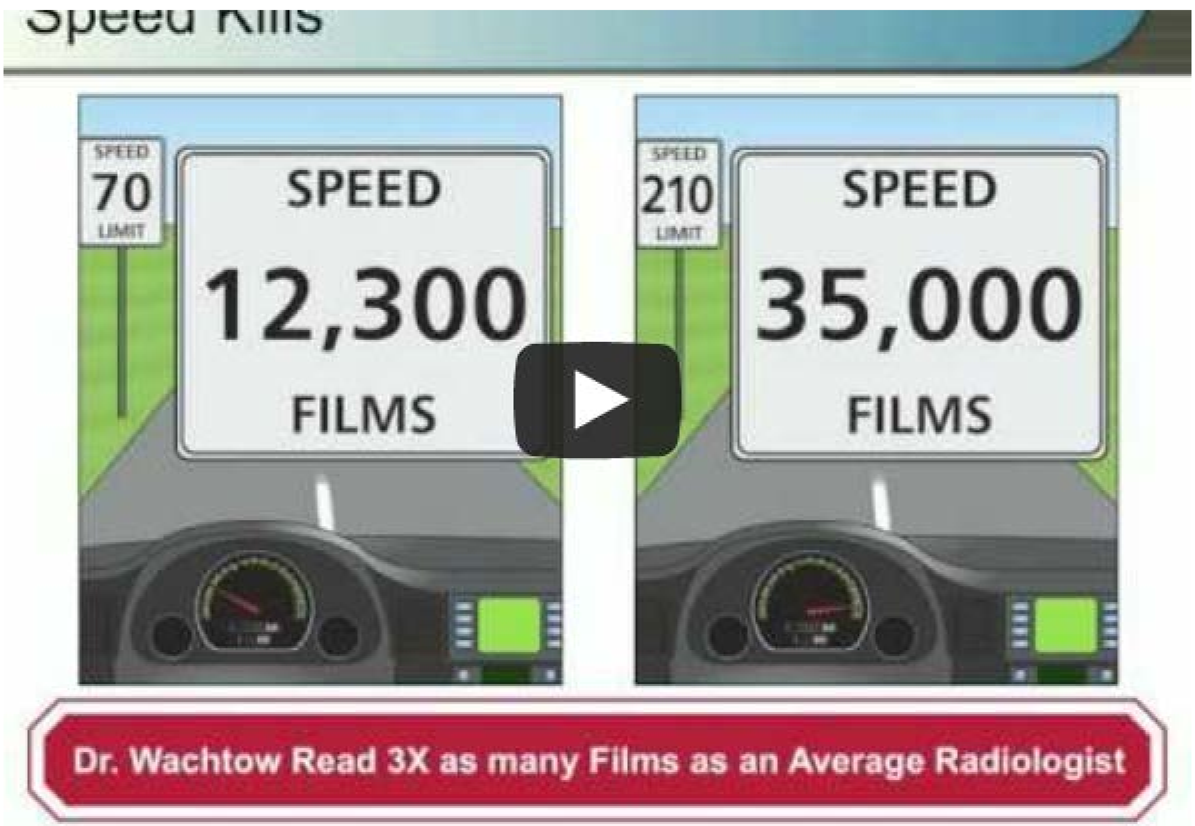
6 Ways to Convey Size and Scale to a Jury

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.

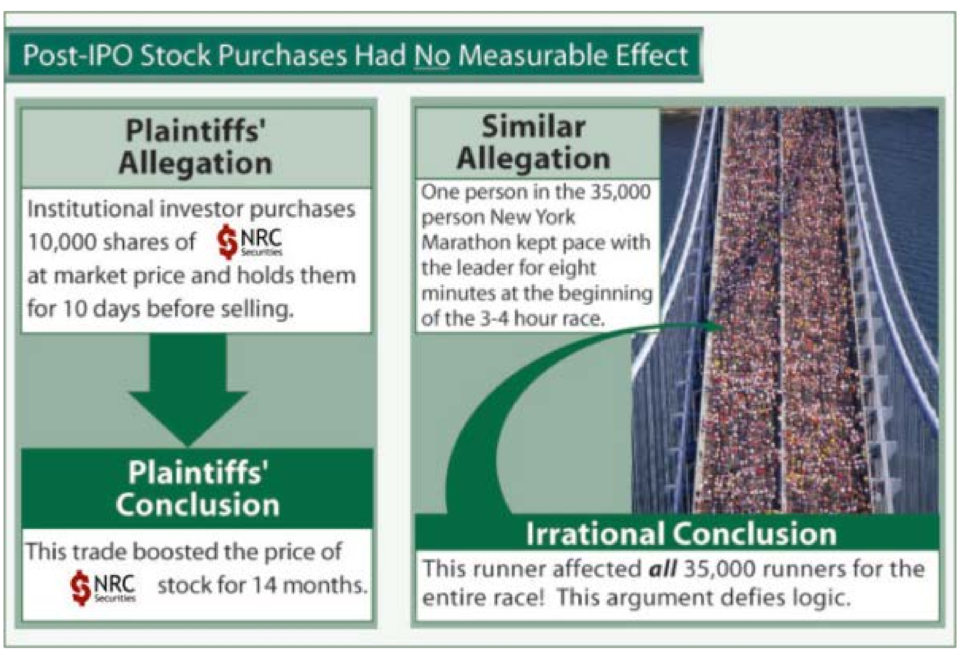
We have prepared many exhibits that work in this manner. Not only do they give the jurors useful information but they also do this in a manner that jurors will easily recall when it comes time to deliberate. If we can present something as being "as large as a football field," for example, we can lock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

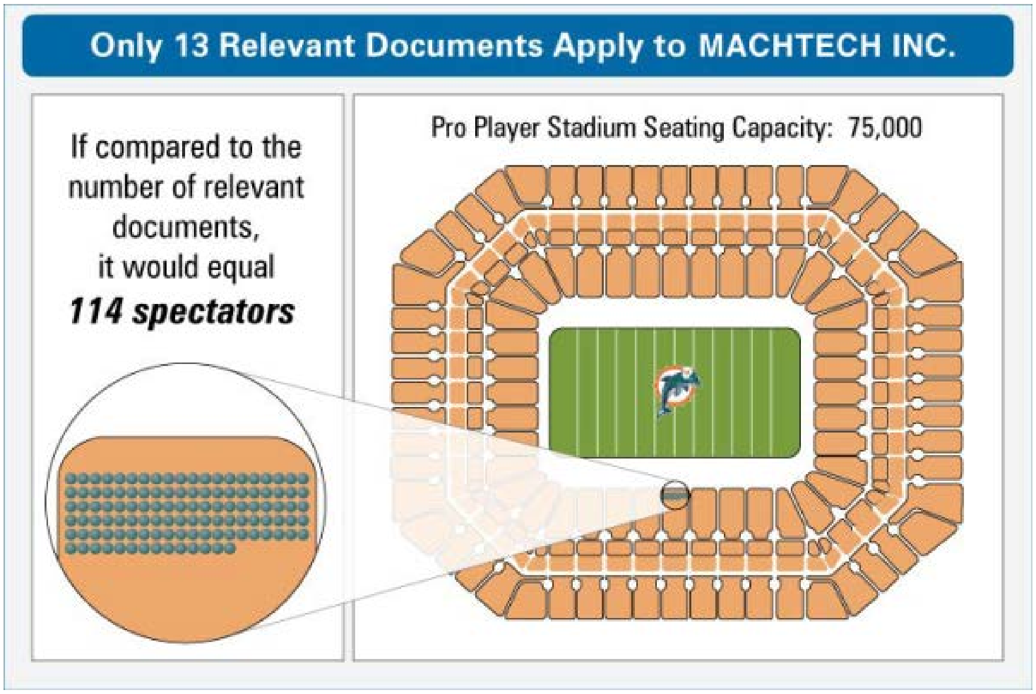


2) HOW MUCH TIME: In the graphic below, evidence proved that conspirators in a government contract dispute in New Orleans had spent 3,548 minutes on the phone. That number by itself would probably mean nothing to a jury. We translated that fact into a graphic that showed that in 3,548 minutes, someone 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.

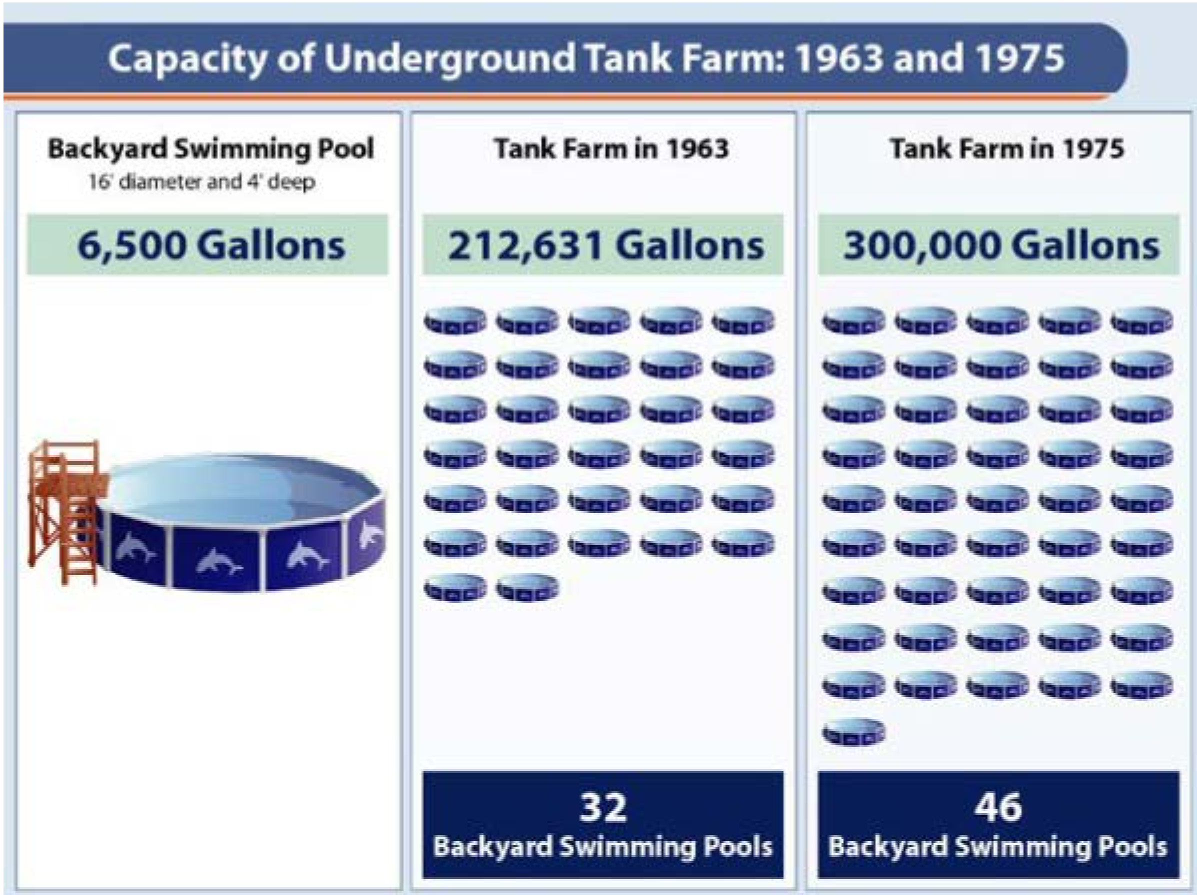


4) HOW MANY: In a Miami discovery dispute, we provided a graphic (below) of Pro Player Stadium (the then name of what is now the city's Sun Life Stadium), with a seating capacity of 75,000. If that was the universe of all the documents at issue, the number that related to one client was a small portion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



Trial Presentation Too Slick? Here's Why You Can Stop Worrying

In our 16 years in the trial presentation business, and after consulting on more than 10,000 cases, we still hear litigators concerned that their trial presentation/litigation graphics might somehow look "too slick" and will distract the jurors, or will somehow focus attention on the relative wealth of our client who is able to afford "fancy graphics."

In the early 1990s, this was a valid question. No one had used PowerPoint, no one had a cell phone – let alone a smart phone -- few people had personal computers, and most of those had black screens with green text.

That is no longer the case. Technology has penetrated into every part of the United States and indeed into most of the world. A 2011 report from the Pew Research Center's Internet and American Life Project indicates that 85 percent of U.S. adults own a cellphone, 52 percent own a laptop computer, four percent own a tablet, and only nine percent do not own any of these or other devices covered in the study. Those numbers will only increase.

According to Robert Gaskins, the creator of PowerPoint, more than 500 million people worldwide use PowerPoint, with over 30 million PowerPoint presentations being made every day.

Trial consultant Robb Helt, at the end of a trial in rural Arkansas, was able to talk with the jurors about the use of trial presentation technology/trial techncians in their just-completed trial. Helt found that the theory that jurors are uncomfortable with technology had been "blown away" by this "down home" jury. These jurors were not only comfortable with trial presentation technology – they expected to see it.

"Today is technology. That's what it's all about," one juror said.

Hear what else these rural jurors had to say below:

In their “Litigation Services Handbook: The Role of the Financial Expert,” authors Roman L. Weil, Michael J. Wagner, and Peter B. Frank write:

“Some lawyers and witnesses worry about appearing too slick. They worry that nicely designed and colorful exhibits or the use of high technology will reinforce the image that the party they represent has substantial resources and thus does not need to be awarded damages or would have little difficulty in paying them. Post-trial interviews we have conducted demonstrate that this is a needless worry. . . . Jurors often see visual communication – for example, on TV or on their own computers – that is superior to anything they see in the courtroom.”

Jurors expect trial presentation technology now. The fear of looking “too slick” is dead, and it is time to put it away for good.

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

By Ken Lopez, Founder and 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.”

I’ve 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.

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

By Ken Lopez, Founder and CEO, A2L Consulting

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?


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

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?

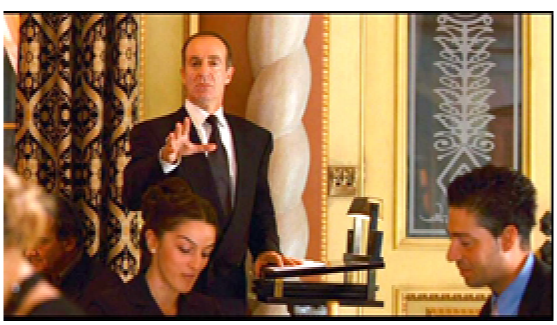
There is a noticeable gap between the way some litigators perform in the courtroom when compared to a Glenn Close, Paul Newman, Laura Linney, Matthew McConaughey or Gregory Peck. It's not just about their hair and makeup. It's about how they present their cases, how they connect better with jurors and 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

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.

How a Litigation Consultant Can Help You With Your Closing Argument

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. [a non-flash version is here and an iTunes version is here]

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.

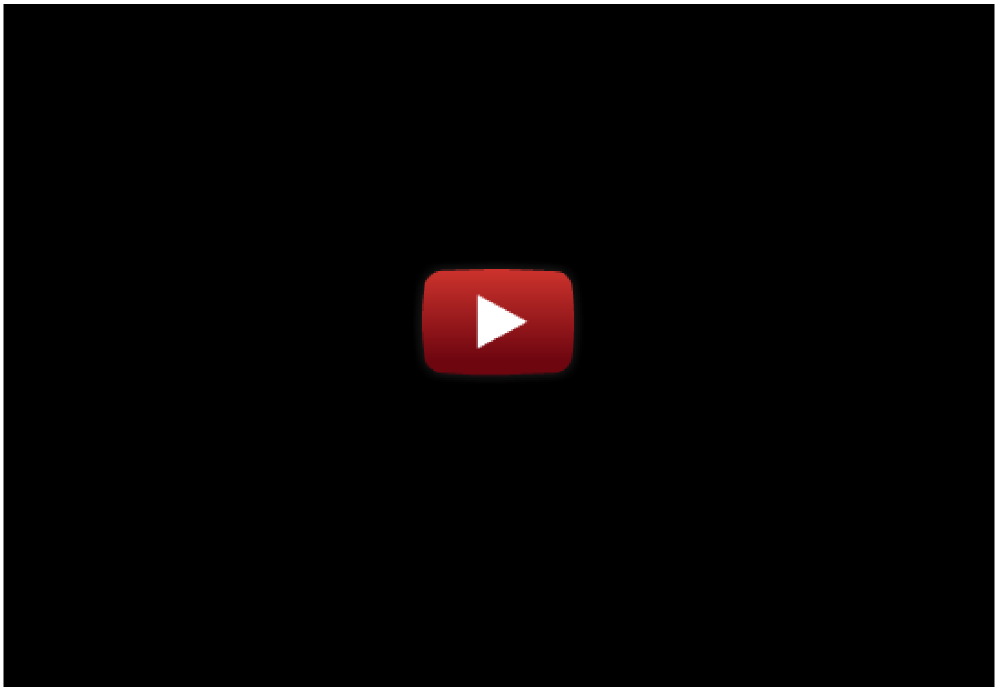
5. Memorize Your Closing Statement: Gerry Spence offers a sample closing. He has a lot of presence, but anyone's passion will come through better when an opening or closing is not being read.

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.

7 Smart Ways for Expert Witnesses to Give Better Testimony

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."

7 Things Expert Witnesses Should Never Say

by Laurie R. Kuslansky, Ph.D., Managing Director, Jury & Trial 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.

Witness Preparation: Hit or Myth?

by Laurie R. Kuslansky, Ph.D.

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.

7 Things You Never Want to Say in Court

by Ken Lopez, Founder/CEO, A2L Consulting

Lawyers say a lot of things in court – but here's a list of seven things that, for various reasons, you never want to hear yourself saying in court.

Number 1: "Your Honor, could I please have a moment to sort out this technical issue." The middle of trial is not the place to fix your technical glitches – yet one hears lawyers utter this sentence all the time. With few exceptions, technical problems are almost entirely preventable. And in any case, you always have a backup plan, right? Take a look at these related articles for more background on this:

- 12 Ways to Avoid a Trial Technology Superbowl-style Courtroom Blackout
- Free Download: Which Courtroom Trial Technician Should I Use?

Number 2: "My client." I believe the phrase "my client" should be banished from the lexicon of all litigators. Can you imagine anything more distancing? When you think about it, isn't "my client" just shorthand for "this person or organization who is paying me to say this"? Instead, humanize your clients and even turn them into heroes.

Number 3: "You might not be able to see this, but." Well, make sure they can see it! All too often we see one of the simplest mistakes being made -- failing to create a presentation with text that everyone can read. A good presentation environment includes high-quality projectors, high-quality equipment and the use of font sizes on slides that are always larger than 20 and usually larger than 30. One can easily avoid this problem, and no apologies or explanations will be needed. See these related articles for more:

- The 12 Worst PowerPoint Mistakes Litigators Make
- The 14 Most Preventable Trial Preparation Mistakes

Number 4: "Take my word for it." Just as above, if you find yourself saying something like "take my word for it" or anything that attempts to excuse the inadequate quality of a visual, you're just trying to explain away your error. This could be colors that are too light, too similar or even issues with a projector. With all the testing tools that are available to a litigator today, there's simply no excuse for this. These related articles provide additional guidance:

- Trial Graphics Dilemma: Why Can't I Make My Own Slides? (Says Lawyer)
- 24 Mistakes That Make For a DeMONSTERative Evidence Nightmare

Number 5: “Put yourself in his shoes.” Long known as the "Golden Rule" in jury trials, we still see lawyers from reputable firms make this mistake. The Golden Rule is said to be violated when a lawyer asks a jury to put themselves into the shoes of their client. I don't think it's an entirely intuitive rule, so it is understandable how mistakes are made. After all one is really just trying to help the jury understand? However this is a bright line, and you should avoid statements like: "reward my client as you would want to be rewarded" or "imagine how this suffering would feel and then pick the right damages figure." Learn more here.

Number 6: "Looking at my next bullet point." In general, the use of bullet points on your slides must be avoided. Judges and jurors alike will read them and not listen. Plus, people remember and understand less of what you both speak and show at the same time. We have written about this many times before, but my favorite article on the topic offers twelve reasons why bullet points are bad.

Number 7: "Notwithstanding," "But for," "Whereas," "Assuming arguendo," "Aforementioned," or "Heretofore" Alright, maybe sometimes you have to say "but for" when it is part of the law in question, but for (that one doesn't count) the most part you can strike (add that word to the list too) all of these from your courtroom vocabulary. Remember, you want people to relate to you. You want them to see you as approachable and trustworthy. You can achieve this by speaking to them as their family would speak to them and nothing more.

21 Steps I Took For Great Public Speaking Results

by Ken Lopez, Founder/CEO, A2L Consulting

Public speaking does not come naturally to me, but I know I can deliver good results -- so long as I am prepared. Last week, I spoke at a conference session of about 300 people, and here was a piece of feedback I received from one lawyer in the audience, someone I had never met before.

"In more than two decades since I started studying and practicing law, I have seen 1000 experts speak in person on 1000 topics. Rarely do I feel compelled to write about a lecturer. Ken Lopez presented an incredible live program at the Inbound 2013 Conference, an event which attracted 5300 people from 35 nations. His advice stands out as unique and memorable - not only for attorneys - but for anyone in any business. Ken's phenomenal seminar proved that he is clearly the best at what he does."

Incredible, right? So how did I get such good results when public speaking does not come naturally to me? Here's how.

My goal in telling you is to give you a sense of the level of preparation that we hope to see from most of our clients at A2L. After all, they have millions or even billions of dollars at stake in their presentations. I was merely giving a conference presentation where I was not likely to earn business or gain anything other than kind words.

First, some background on me. Even though most would describe me as outgoing, I am actually more introverted than extroverted. I simply chose, modeling my dad's behavior growing up, to adopt extrovert habits as I watched him win favors, airline upgrades and the best tables just by being outgoing and charming.

But, as long as I may have practiced acting extroverted, I still hate an event if I cannot connect meaningfully with one person. I actually prefer written communications to speaking, and I generally feel pretty awkward in a public speaking role. For the most part, my audience would not notice, but this is only the result of my hard work.

For the presentation I gave last week, I knew I'd be speaking to a group, half of whom knew more than me about the topic and half of whom knew less. Rather than try to research the topic extensively, I spoke simply about my experience. My topic, for what it's worth, was using publications like this blog to meaningfully connect with existing and future customers.

My scheduled talk was 40 minutes with 5 minutes of questions. Below are the 21 steps I went through to reach a great result.

Here is my exact preparation methodology. Where applicable, I make a comparison to trial preparation.

1. **Getting Started (93 Days Prior to My Presentation):** I became aware that I might have an opportunity to present at a high-profile marketing conference that I would attend anyway since I took on the Chief Marketing Officer role a couple of years ago.

2. **Forced Early Preparation (90 Days Prior to My Presentation):** I prepared a good but rough version of what I might present at a conference and presented it to a group of local CEOs. They were very happy with the content, and I indeed winged it for the most part with only a couple of practice sessions on my own. I got some valuable feedback from this group. This session was quite similar to the Micro-Mock session that we conduct at A2L, which I find helps trial attorneys gage how well their presentations are being received EARLY in the trial preparation process.

3. **Theme Design (82 Days Prior to My Presentation):** I worked with a person familiar with my actual audience to rough out my themes. In the trial presentation space, this discussion would be considered similar to my meeting with a jury consultant on a general topic.

4. **Theme Decisions (62 Days Prior to My Presentation):** I made the decision about what general topics would be included and those that would not be included.

5. **Mind Mapping Session 1 (52 Days Prior to My Presentation):** I use a technique called Mind Mapping that is useful for organizing most complex presentations -- whether an opening statement or a presentation like this.

6. **Rough Outline (43 Days):** I developed my first 12-point rough outline at this stage and shared it with my point of contact to solicit feedback.

7. **Specific Outline (40 Days):** Based on feedback from my point of contact, I refined my outline.

8. **Mind Mapping Session 2 (37 Days):** Whereas I had earlier only developed my mind map to the point where high level topics were fleshed out, I now took it to a deeper level and tried to consider the three points or so I'd like to make under each major topic.

9. **Begin Graphics Work (33 Days):** Although I had picked the designer I would be working with on my team a month before, we had our first serious walk-through of the subject matter about a month before I actually presented. He began work on a draft that was a combination of what I presented months before, what I developed in my mind map outline, and what he felt needed to be included.

10. **Finalize First Presentation Draft (23 Days):** I shared my first fully developed draft of the presentation with my point of contact at the conference.

11. **Rehearsal 1 (21 Days):** My first rehearsal via online meeting platform Go-To-Meeting occurred on this date with a couple of conference representatives.

12. **Rehearsal 2 (20 Days):** I believe that you are not really practicing unless you are practicing in front of an audience. I used a CEO peer group (my Vistage group) as my focus group for what works and what does not. I learned a lot.

13. **Rehearsal 3 (19 Days):** Another online presentation with my contact at the conference.

14. **Graphics Refinement (18 Days):** Although, there had been daily tweaking going on for two weeks, we did major refining of the graphics presentation at this point, mostly combining slides to cut out fat. As I always say, the slides you don't use are just as important as the ones that you do use.

15. **Rehearsal 4 (14 Days):** To help get new feedback, I invited 50 friends to one of 4 online practice sessions using Go-To-Meeting. This was the first. Each was attended by about 20 people.

16. **Final Presentation (12 Days):** I finalized my visual presentation.

17. **Rehearsal 5 (8 Days):** I presented to an online group of 20 and collected feedback. I also recorded this session to watch myself and adjust accordingly.

18. **Rehearsal 6 (5 Days):** I presented to an online group of 20 and collected feedback. I made some mistakes at the beginning, so I used one of my favorite memory techniques to memorize the first two minutes for my next sessions. What I do is assign each key thought to a room in a structure I know well, and then I mentally walk through it as I am speaking. I have fond memories of the house I grew up in, so I use that. For example, the sound of the doorbell reminded me to "invite" my audience in, the foyer reminded me to tell them exactly what I wanted from them, and so on. It's a very useful memory trick.

19. **Rehearsal 7 (2 Days):** I presented to an online group of 20 and collected feedback.

20. **Day Before:** I got plenty of sleep, I drank lots of water and I used my voice as little as possible.

21. **Day Of:** I continued to use my voice as little as possible and practiced my 2-minute intro in my head, walking through my childhood home.

All told, I devoted roughly 50 hours to the preparation of a 45 minute presentation. I think this ratio of roughly 1 hour of preparation for every 1 minute of presentation time is appropriate for any high-stakes presentation.

For trial, a preparation timeline along these lines is possible but probably a bit too compressed, unless it is a small case. For a medium sized case, I would double the days I indicated for each stage. If it is a large case, I would increase the prep time by a factor of 3x to 5x the number of days indicated.

Notice that I did not start prepping what I had to say in PowerPoint, and neither should you.

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? Subscribe to our litigation blog for free, and you'll see how it works (p.s. we give away an iPad once per quarter).

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.

10 Things Every Mock Jury Ever Has Said

by Laurie R. Kuslansky, Ph.D., Jury Consultant

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.”

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.

4. **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.

5. **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.

6. **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.

7. **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.

8. **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.

9. **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.

10. **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.

11. **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.

12. **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.

13. **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.

14. **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.

12 Questions to Ask When Hiring a Trial Graphics Consultant

The choice of a trial graphics firm is one of the most important decisions that a trial lawyer can make. Since experts widely agree that about two-thirds of jurors and many judges prefer to learn visually, it can literally make the difference between winning and losing your case. However, many lawyers still use the wrong approach to the selection of a trial graphics consultant.

For example, they may choose a provider based on familiarity ("I know someone who does graphics . . ."), price ("the client has a tight budget . . . "), or proximity ("they're right around the corner . . . ").

There are better ways to choose a consultant. Think of hiring a trial graphics provider as similar to the hiring of an expert witness. If you are hiring an expert witness, you are delegating a portion of the case to someone who has specialized knowledge and experience that you may not.

You would hire an electrical engineering expert witness to discuss the workings of a patented device. Similarly, you should hire a trial graphics provider, who is an expert in the field of information design, to create effective trial graphics for your case.

Here are 12 questions that you should ask any trial graphics provider that you are considering. The answers to these questions will, in all probability, lead you to the right decision.

1. **What kind of experience does the trial graphics consultant have in providing trial graphics consulting for cases like yours?** (i.e. Can you show me examples? Cite case names? Provide litigator references?)

2. **Since the attorneys will be working with the provider on a daily or hourly basis, how easy will the trial graphics provider's employees be to work with?** (i.e. How do you feel about working weekends? How do I get in touch with you after hours? Does the provider's team have their mobile phone number on their business card?)

3. **How responsive will the trial graphics provider be to unexpected developments in the case that may require quick turn-around time?** (i.e. How have they rapidly scaled a project team? Can you provide specific examples?)

4. **Is the trial graphics provider ready to work long hours at night or on weekends to help the attorneys?** (i.e. Tell me of three instances where you have had to do this? Who can call to verify these events?)

5. **How familiar are the trial graphics provider's employees with the concepts behind your case and with the basics of courtroom procedure and evidence?** (i.e. Some firms are run by lawyers and Ph.Ds while others are run by high school grads or computer scientists. Choose the right provider for your case.)

6. **Is the trial graphics provider able to suggest creative visual approaches to your case rather than merely accepting your initial thoughts and putting those into practice?** (i.e. Will the provider be a true partner in your trial effort or merely an "order-taker"? Can you provide references who can speak to this?)

7. **Who will lead the project on the trial graphics consultant's team?** (i.e. Will I have more than one point of contact to deal with? How many projects has the project lead managed previously? How will the provider update our team on critical path requirements, key deadlines and issues that could put timing in jeopardy?)

8. **Will the trial graphics provider be honest enough to be able to step back and provide an outside perspective on your case and its strengths and weaknesses?** (i.e. What is the provider's value-add? How might the provider identify potential additional case themes? Are attorneys involved in the creative process throughout the project lifecycle?)

9. **Is the trial graphics provider able to discuss the cost of a project from the outset as well as the factors that may increase or decrease that cost as time goes on?** (i.e. Will the firm consider a fixed price arrangement? If not, why not? Remember, [if] they provide these services all the time, they should be experienced enough to accurately estimate average costs).

10. **Will the trial graphics consultant keep you up to date on changes in the scope of the project that may affect the budget?** (i.e. Can they talk comfortably about money? Do they know how to keep you out of hot-water with your client?)

11. **How long has the firm provided trial graphics services?** (i.e. Are they an overseas e-discovery provider masquerading as a trial graphics consulting firm? Will your client's confidential information be sent to India?)

12. **Are the references the trial graphics consultant provides - like you?** (i.e. If the case involves billions of dollars of toxic torts, is the trial graphics consultant providing references to high-profile but low-dollar disputes or vice versa?)

How to Pick a Litigation Consulting Firm (Jury, Graphics or Tech)

by Nina Doherty, National Director, Business Development, 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?

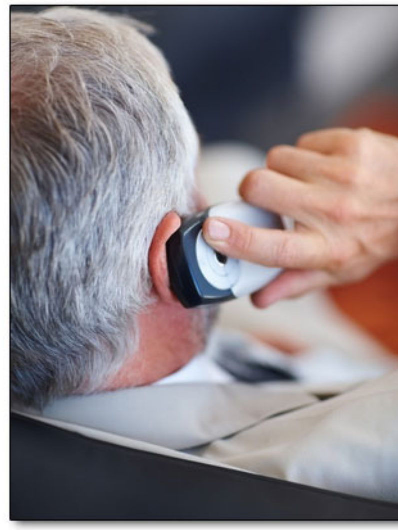
Systems and Infrastructure. Does the firm require that you use their proprietary trial presentation software or are they able to work with Trial Director and Sanction? Do they have enough people to get the job done in a timely and effective manner? On average, how many cases do their trial technicians 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, National Director, Business Development, 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 jury exercises, 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.

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

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.

10 Signs the Pressure is Getting to You and What to Do About It

by Ken Lopez, Founder/CEO, A2L Consulting

Are you shouting at your co-workers or family? Would you do almost anything to get away? Are you acting out or underperforming? Are you "losing it" from time to time under pressure from work deadlines, family life, or a combination of both?

Although I don't usually write about these issues, the nature of my work and the intense pressures that trial practice can bring make me a bit of an amateur expert in such things. Unfortunately, I have seen trial teams and individuals break down many times, and I don't think it has to end up that way.

Here are a few things that you can do, or encourage someone else to do, to gain control of your own emotions and of a situation. No one is immune to these issues; rather, we are all prone to cross an anxiety threshold that we are not comfortable with. It's all in how we handle it.

I have written before about how individuals and groups behave when their anxiety levels are high. In short, they behave in a series of progressively worse ways that are all essentially forms of a fight-or-flight response.

Instead of allowing yourself to slip into fight or flight, here are some productive ways of retraining your brain to help deal with the anxiety.

First, ask what your own role was in creating the bad situation. Often, all we see is how others caused something to happen to us. Forcing yourself to understand your role in creating the problem is often a first step to getting back on the right track.

Second, get in the habit of asking yourself what is the one thing you can do right now to make things a bit better for everyone involved. Sometimes, a solution is a bit like eating an elephant. You just have to take one bite at a time.

Third, make sure that you are not engaged in mindless bickering with co-workers or others. Fighting is, of course, one of the most common examples of a fight-or-flight response. Often, when people fight they are really trying to deal with anxiety in a dysfunctional way.

Fourth, make sure you are not simply fleeing a situation that you could help solve. Perhaps you have the skills and the opportunity to fix things. If you can help, why shouldn't you? After all, don't you want the situation to be better?

Fifth, make sure you're not just wasting your time and that of others by mindlessly talking about the person or thing that is causing the anxiety. Doing this does nothing to make the anxiety dissipate. It simply creates more unnecessary drama. Again, try doing one thing right now to make things better.

Sixth, ask yourself if you are withdrawing from the situation without even knowing it. Withdrawal is another form of fight-or-flight behavior. You can think of it as flight without moving your feet. Avoid this behavior.

Eighth, if your challenge is longer term and less situational, practice a whole range of scientifically-proven methods to make things better including meditation, managing diet, exercise, yoga, sleeping, doing peaceful things, thinking positively, asking for help and seeing a doctor.

Ninth, put one foot in front of the other. Don't be blown about by every wind. Live one day at a time. Live one hour at a time if you have to. There are a whole host of ways to simply treat big problems as little ones. Ask yourself, at this very moment, "am I okay?" If so, move on to the next moment.

Tenth, ask if you are making the problem worse. If you are engaging in behaviors that are distracting to the group and you just cannot control your emotions, then consider taking yourself out of the game, at least temporarily. After all if you want the problem solved, try not to make it worse. Even if you are headed to trial, your colleagues will understand if you need a day of downtime. They probably already know.

Anyone can learn to effectively manage one's psychology, even in very difficult times. Following these steps will help you become part of the solution and not part of the problem.

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

by Laurie R. Kuslansky, Ph.D., Expert Jury Consultant

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?”

5 Things Every Jury Needs From You

by Laurie R. Kuslansky, Ph.D., Jury Consultant

1. To be able to like you.

Ever hear someone assume everything their ex says is a lie, even when it's true? Ever notice how gullible people seem when they find a new love, even when it's all a lie?

That's because we *want*to believe people we*like* and vice versa. So, you don't need the jury to fall in love with you (although that would be nice), but you can't afford for them to *dislike* you. There is research on what creates liking and disliking, but some highlights are:

- Speak in a way they can understand
- Don't overly out-dress them to show off how rich you are
- Show respect for their time by being organized and prompt on your feet and not wasting time
- Don't overload them with information
- Don't be presumptuous ("You all know what it's like to have a 401k.")
- Don't act angry *all the time*. It's exhausting to witness.

2. To trust you and your witnesses (*after* they like you/them)

- Don't over-promise and under-deliver.
- Don't make it too personal. It's "icky" to witness other people feuding and unprofessional, especially since they view counsel as the "grownups" in the room.
- Keep it simple for them to keep score, from opening, throughout the evidence, and closing, by being thematic and giving them reminders as the pieces fit together.
- Work with your witnesses to overcome arrogance or trying too hard to be perfect.
- Demonstrate that you are qualified and that your message stays the same over time.
- Show respect to the court.
- Don't act harshly to your adversary in court, only to act like buddies as soon as you leave the courtroom. Jurors will think you are playing a game and won't trust you.

3. To feel OK about you winning/the other side losing

- If you're Goliath, jurors need a message that makes it OK to find for you or against David.
- Alternatively, you may want to shape your message to explain why it would be wrong to find against Goliath.
- Assuming that a 2D explanation that is purely factual ("The evidence is not there for liability, so you cannot find for Plaintiff.") is not a message.
- If finding for your client would feel bad to the jury, it's your job to deal with it.

4. What you actually need them to do, not vaguely, but exactly

- Asking jurors to find for your client does little to guide them when it comes time to answer actual verdict questions.
- Provide them with the actual questions, the appropriate answers as you see them, a summary of the evidence that supports those answers (ideally in graphic form), and the reasoning.

5. You're saying and showing many things. What's most important?

Everything you say and do is not equally important. You know what is critical and what is not. While you are required to lay foundations and assemble the case from the bottom up, jurors are more likely to judge the case top-down. They tend to focus on a few key things that stand out to them and form their own story of what happened, then fit the choice things that fit well into that construct.

What happens if what stands out to them misses your point altogether? What if they have no idea why you went through all that information and didn't pay as much attention because it was boring?

To avoid leaving your most important evidence – as you see it – as the stuff of their naps, reduce the risk by alerting them to vital points. Have witnesses repeat key answers. Ask, "What is the most important thing about that?" Fill your side of the courtroom with spectators when your star witness will testify. Thin out your spectators when opposing witnesses should not be seen as important. Use prefaces that alert jurors' attention like a drum roll. Have your spectators wear their finest for special moments in the trial. Avoid being too cute, but be clear and send clear signals that help lead jurors to pay more attention to (or ignore) information so they get out what you put in to the trial.

12 Alternative Fee Arrangements We Use and You Could Too

by Ken Lopez, Founder/CEO, A2L Consulting

These days, alternative fee arrangements (AFAs), agreed upon between major law firms and their clients, have become commonplace as part of the "new normal" relationship between corporate America and their law firms. The old days of the billable hour are coming to an end, if they haven't already ended. Although some commentators think AFAs are more discussed than actually used, there's no question that they are here to stay.

The same can be said of the relationships between law firms and vendors such as litigation and trial consultants. At A2L Consulting, we are pioneering the use of AFAs in our dealings with law firms, and both sides are very pleased.

We recently conducted a survey of people who downloaded some of our e-books and asked: What is your biggest fear about using litigation consultants? Of five options, fully 62 percent said they were concerned about the price for litigation consultants' services.

We are listening. In 2008, we pioneered fixed price arrangements for the preparation of trial graphics. It was a revolutionary approach that won A2L a lot of loyal customers who prefer predictability over uncertainty. In 2010, we announced fixed pricing for trial technician/courtroom technology support. In 2012, we announced fixed pricing for mock trials and some other jury consulting services.

These fixed price arrangements are just one form of AFA's that we use. Why do this? Actually, we prefer AFAs. I think they are better for our clients and better for us.

Our clients in large law firms consistently tell us that they prefer alternative fee arrangements, because they only have to have one budget conversation with their corporate client, as opposed to the old way of an easy one up front and a hard one after trial, and because it is a "set it and forget it" system that allows the lawyers to focus on getting the work done. We like them as well, because they allow us to get paid on a timely and predictable basis.

I think a fixed price alternative fee arrangement is a pretty good form of AFA, but it's just not perfect for every case. Sometimes, things are just too unpredictable weeks before trial. So we have created a number of other pricing strategies and discounting methods that have also worked well for our clients. Since our litigation consulting services are similar to the "consulting" that a law firm provides to a client, each of these alternative fee arrangement methods is applicable for law firms as well.

1. Fixed Price: The key to a successful fixed price engagement is agreement on a scope of work. In agreeing to fix price, we normally make arrangements to have payments arrive at predictable intervals. It's a win-win for all involved unless the work departs significantly (upward or downward) from the scope.

2. Capped Fees: Keeping in mind the necessity of an agreed-to scope, capped fees allow a bit of flexibility by providing a not-to-exceed level of billing. This approach can be beneficial when both sides know there's a good degree of unpredictability in how the trial will go.

3. Billable Hour + Floor and Ceiling: This approach keeps the traditional billable hour as the base but protects both us and the client in case the volume of the work proves to be greater or smaller than anticipated.

4. Blended Rate: We have a blended rate for each of our three service areas (jury/trial consulting,litigation graphics and courtroom technology support) and even a blended rate for any combination of these services. This approach allows for easier review of invoices since it is just naturally easier to evaluate a bill based on a number of hours rather than sort out the increased complexity of how various rates were balanced together.

5. Days Rates/Week Rates: These are especially appropriate for our on-site trial services like on-site preparation of trial graphics or trial technology support.

6. Success Fees: Increasingly the litigation support world is seeing the use of success fees or incentive bonuses being used by clients looking to align interests with their key vendors. Agreements of this type should be crafted with the corporate client and not the law firm, since fee splitting is not allowed between law firms and legal support vendors that work with them.

7. Holdbacks: Similar to success fees, holdbacks are usually constructed to allow costs to be covered during the litigation and then a final amount to be paid after the engagement is complete. This amount may be voluntary, at the client's discretion.

8. Firmwide Volume Discounting: For some large law firms, we offer across the board discounts up to 25 percent that are based on ongoing sales volume. After a threshold is reached in the first year or after it becomes obvious it will be reached, subsequent engagements are discounted so long as the volume levels are maintained. If you are a large law firm or corporation engaged in frequent litigation, this is a no-brainer.

9. Firmwide Marketing Discounting: For law firms that cannot achieve volume levels or those that want to avail themselves of discounts out of the gate, we offer a discount of up to 20 percent in exchange for helping us to market to their litigation counsel internally.

10. Litigation Financing: Relationships with litigation financing firms allow us to work at a reduced rate since they can be a frequent source of trial consulting work for A2L and because we refer them clients regularly.

11. Hard-line Estimates: If you have an estimate you can believe in, it can be nearly as good as the arrangements listed above – except when it's not. Sometimes, through a combination of lowball estimates and trial teams who underestimate the scope of work, a hard estimate proves quite inaccurate, to the detriment of the relationship between the law firm, the client and the trial consulting firm. However, we have an 18-year history of providing firm estimates and know how to manage to them.

12. Settlement Insurance is a term we use to describe a discounting methodology that applies in cases like fixed price alternative fee arrangements. We agree to discount proportionally if a case settles rather than enforce a fixed fee.

In the environment of the “new normal,” law firms are proposing AFAs to their corporate clients, either because they want to or because they need to. Either way, they understand the importance of AFAs and their economic value. When it comes to paying the costs of a litigation consulting firm, they would like to benefit from AFAs as a client, and we think we can benefit as a vendor. Why shouldn’t people be able to agree on price and value -- whether it is for jury consulting, litigation graphics, trial technicians, or legal services? It's just good business.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