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The Opening Statement Toolkit

APRIL 2015

Litigation Graphics
Jury Consulting
Trial Technology
Visual Persuasion

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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 by the readers of LegalTimes and a Best Demonstrative Evidence Provider by the readers of the National Law Journal.

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Thank you for downloading our latest e-book

When I was a full-time litigator, I had a chance to help develop a handful of opening statements. As a litigation consultant and adjunct trial advocacy professor, I have had the opportunity to work on countless openings and to delve into the science of what works.

At A2L, I regularly assist trial teams in developing their opening statements. Perhaps more importantly, I also have a chance to help test what works in opening statements. There are often surprises, and good science is still emerging about what works and why.

The articles in this book are here to help you develop the best opening statement that you can. Often, the opening statement can be a time when jurors form strong opinions about the winners and losers in a case — but it does not have to be that way if you so choose. There are best practices for impacting judge and juror decision-making, and many of those are described in the articles herein.

I would welcome hearing from you as you consider developing your opening statements, whether at the mock trial stage or for trial. Our firm can be a valuable and trusted partner at these and other stages of your litigation.

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Table of Contents

5 Ways to Maximize Persuasion During Opening Statements - Part 1

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

It has been widely reported that more than 80 percent of jurors make up their minds about your case during opening statements.[1] There is actually no quantitative study confirming this, but the best lawyers and the top litigation and jury consultants agree that a winning opening statement is critical.

Probably the most important reason that an opening statement is critical is that it establishes the lens through which your jurors will view the trial.[2] If that lens is clear and focused on the issues and the evidence that you know are keys to victory, great. If the lens is cracked, foggy, or unfocused, you've got problems.

The concept of primacy effect is another reason that opening statements are critically important. Primacy means that information provided to an audience first is the most valuable and meaningful.[3] Jurors are encoded with the first information they receive from you. If you give your jurors the first information that they receive, you're creating the right lens for your case.

An example of the primacy effect can be seen in these sentences describing "Steve."

Steve is smart, diligent, critical, impulsive, and jealous.

Steve is jealous, impulsive, critical, diligent, and smart.

Those exposed to the first sentence view Steve positively. Those exposed to the second view Steve negatively. But they, of course, contain exactly the same information in different order.

This is how the primacy effect works -- and the same thing happens to your case in opening statements. At the very beginning of opening statements, jurors form their working hypothesis for the case, and this hypothesis affects their interpretation of the rest of the information presented at trial. So the information at the beginning of an opening statement matters a lot. Primacy means that if you're plaintiff's counsel, you need to set a strong theme for your case and immediately tell the brief story of the wrong that got you to court. If you're defense counsel, introduce the "dagger" that kills the plaintiff's case immediately. Jurors only care about assigning blame, so make it easy for them.

Finally, confirmation bias plays a critical role because jurors will decide your case based on their views, not your evidence (for the most part). As a general rule, decision makers lack objectivity, and people tend to favor one choice over another and subsequently evaluate information to confirm that leaning.[4] Your jurors will believe what they already believe and will remember evidence and arguments that supports those beliefs while ignoring evidence to the contrary. Tune your opening statement with this in mind.

1. Give Your Jurors a Reason to Like You

In opening statements, we want to get the jurors' attention and make them care about the case and the client. This requires that they like you and appreciate what you're doing.

It is natural for everyone to take sides to have someone to root for. Have you ever watched a sporting event in a totally neutral way? Probably not. The same goes for jurors in the courtroom.

Remember the "90 Second Rule." Within 90 seconds of meeting someone new, people decide whether they like the person or not, if they feel comfortable around them, if they trust them. This goes for jurors and you in the courtroom.

To make jurors like you, help them do their job. Make it easier for them. You'll want the case and evidence to take center stage, but you need to make it interesting and easier to understand for jurors who are all new to the case, new to being jurors, new to you, and new to each other.

Litigation is confusing; make things simple. Do you remember your first day of law school? Did you feel confident that you understood what your professors were talking about? Probably not.

The trial is probably the most confusing and complicated thing your jurors will ever be put through in their lives. They'll be asked to digest a bit of law it likely took you an entire semester of law school to understand. They'll be asked to digest a ton of facts that you think are important and then to apply the law to those facts. Then they'll be asked to decide which

party should either get or not get a lot of money or lose their freedom. This is a confusing process, so if you can help make this job easier by distilling facts, simplifying the application of the law, and making the case easier to understand, jurors will appreciate it. In one study, jurors indicated that the prime value they saw in opening statements (and closing arguments) was that they provided a framework for the jurors to evaluate the case.[5] This is perhaps the most effective way to influence juror decision making.

Litigation is boring, so make your presentation and case interesting. The *Apple v. Samsung* or*Marvin Gaye Estate v. Pharrell Williams* cases are few and far between, so your case is probably not inherently interesting. Make it so. There *is* conflict. There *is* betrayal. There *is*stealing and lying and deception and scheming. There is also honor and valor and compassion. Use these as tools to develop an interesting take on your case. Moreover, make the case visually interesting by using litigation graphics to help you make your points.

Litigation may be critical to you and your client. But to many jurors, it is an unwelcome interruption of their lives. In the opening statement, try to establish that you'll get the jurors back to their lives quickly. Almost no juror wants to be in the jury box. They've probably each considered what they might say during voir dire to escape and failed. Assure them that your case is simple and that you'll put it on in an efficient way so as not to waste their time.

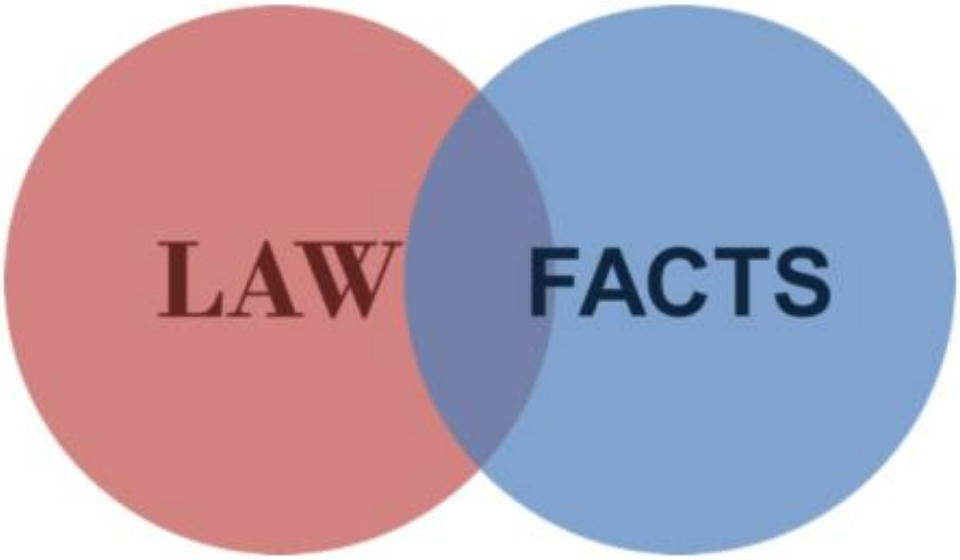
Take the case seriously, but don't forget to smile at the jury. It will make your appear more likable, more credible, more intelligent, and more trustworthy.[6]

Make the jurors feel good about you and your case. Make them happy to see you stand up when it's your turn to talk. Do what the best teacher you ever had did – compare the old and new, the known and unknown, make learning simple, use analogies and metaphors, be tour guides, not lecturers, remove obstacles in the path to learning.

*** Watch for 4 more tips about opening statements soon - get notified of publication by clicking here ***

5 Ways to Maximize Persuasion During Opening Statements - Part 2

by Ryan H. Flax, Esq., Founder/CEO, A2L Consulting



In our most recent post, we discussed how important it is to use an opening statement to make jurors like you as a person and thus embrace your client's case. Another key theme of opening statements is storytelling. Everyone is always advising lawyers to use storytelling to be more persuasive. So, why isn't it happening more?

Maybe no one is reading these publications. Or perhaps when preparing for trial, we're mired in details and chronology.

In law school, we're taught how to deal with this Venn diagram involving the intersection of the law and the facts.

Never are we taught that the real intersection we care about involves human beings, how they think, how they learn, and how their influenced.

Studies and countless mock jury exercises show us that deliberating jurors discuss the case as a story – a complete story with a beginning, middle and end and a whole set of characters. If this is so, whose story do we want the jury using: ours, opposing counsel's, or some completely novel concoction of their own making?

Don't be a slave to chronology. The natural tendency is to tell it exactly as it happened in chronological order. The problem is that this isn't interesting, and, as we know, the theory of primacy means that the important stuff must be said first even if it didn't happen first.

Your story must have structure. Give your story a logical beginning (where did your client start out?), middle (where did the relationship between your client and the opposing party begin?), climax (why are we really here?), and ending ("so here we are in the courtroom"), but don't just place the events in the order in which they occurred. Which ones matter?

Which ones convey the emotion and theme of your case? Sort out these questions to distill your case into a terse and interesting story.

Have a theme, tell a story. Give your jurors a reason to listen to you. Keep them interested.

Why use storytelling? Let's briefly go through the science.

FMRI scanning studies at Princeton University have shown that good storytelling causes the brains of the listeners and the storytellers to sync up in terms of the parts that are most active and when.[1] So the saying "we're on the same wavelength" can be literally true. In such cases, the listener's brains act more like participants in the story than observers of the action – they become psychologically and emotionally invested, which is what we want.

When telling a story, it is essential to use sensory language. Paint a picture of the scene and the characters.[2] Simply using words and argument without sensory language is interpreted by jurors as noise and is not interesting. Sensory language activates the whole brain and does so in the areas related to the senses (sight, taste, movement, etc.).[3]

Stories also do for jurors what they need to be good jurors. Stories interrupt daydreaming, organize information, and make the case more interesting.

When organizing your story, remember these five rules of thumb: The simpler the story, the better. The simpler the language you use, the better. Using metaphors and analogies is essential. You must distill your facts to make the story relatable. You must use sensory language and word pictures.

Star Wars, The Godfather, Harry Potter are all movies with strong stories and strong themes. Can you represent either side of the controversies in these "cases" and craft an opening line for your opening statement story for each? Here's an example of how you might approach each. Can you tell which side is which?

Star Wars

Good men must meet evil with resistance.

Against overwhelming odds and a seemingly insurmountable force, our band of rebels has bravely fought for freedom for all the citizens of the galaxy.

We have here a group of terrorists.

Terrorists that want to see chaos reign across the galaxy and that will stop at nothing, not even the murder of hundreds of thousands of our brave military, to see the fall of our government.

The Godfather

Murder. Robbery. Extortion.

The Corleone crime syndicate has cost the people of this State billions of dollars and has cost countless lives. This is the story of these crimes.

This is the story of a man forced into dire circumstances. He has fought to keep his family together, to protect them against powerful enemies, to protect their lives.

Harry Potter

Orphaned and then mistreated for 11 years, Mr. Potter has risen above his upbringing to fight for the lives and the freedom of his friends and even those who call themselves his enemies.

His offer of friendship rejected, Mr. Malfoy was made to look the fool time and time again by Mr. Potter. In the end, Mr. Potter intentionally destroyed Mr. Malfoy's entire way of life.

Don't be a lawyer who chokes the humanity out of a story by reducing it to its legal essentials.[4] Don't turn a story about broken promises into a breach of contract lawsuit. Don't turn a story about the tragic death of a loving wife into a survivor seeking damages for wrongful death. Don't turn the defendant's laying waste to acres of pristine woodlands into an environmental contamination and remediation case. Jurors live in the real world, so relate your case to that world.

5 Ways to Maximize Persuasion During Opening Statements - Part 3

by Ryan H. Flax, Esq., Founder/CEO, A2L Consulting

In our two previous posts, we discussed two important roles that an opening statement can play: making you and your client appealing to the jurors, and telling a convincing story. Here are two other key functions for an opening statement.

Showing How the Facts Fit the Law

You cannot argue in an opening statement. That is objectionable. But you can accurately tell jurors what you need and intend to prove to win, thus giving the jurors in effect a list that they can check off during the trial. Don't tell the jury what the law is; that's for the judge to do. Instead, tell them what you're going to prove and why it's important. You'll want to combine this with your storytelling. Most cases aren't as complicated as lawyers think they are, and if jurors are to do their job, they simply can't be too complicated. Boil down the things you need to prove into a simple list. Tell the jury that you're going to show them all these things.

For example, in a basic breach of contract case the question is: Shouldn't a deal be honored? To win the case, you need to first show that there was a valid contract, that it was reasonable, and that there was performance by your client.

Once you've established the framework of proof, give your jurors a taste of the evidence that will be presented at trial and explain that it's enough to win without any more evidence (but of course there will be more). For example, there is already deposition testimony from the defendant that there was an agreement, a contract. The defendant has also already conceded in testimony that the amount in the contract was reasonable. Finally, there can be no doubt that our client performed under the contract. Now, if we can just get a stipulation from the defendant that he hasn't paid our client, we're there.

Now that the jury knows what to expect at trial, they're primed and they have a working outline for the trial.

Deflating The Opponent's Balloons

Every case has a weakness, even yours. How do you handle weaknesses in the opening statement? Beat your opponent to the punch — identify your opposition's strongest points and explain why they don't matter. Bringing out weak points in your case in as positive a way as possible takes the sting out of the issues, makes you appear honest, and lessens the negative impact of your opponent pointing them out.[1]

If you go first and identify for the jury what opposing counsel will say in their opening and discount it, you're

How do you handle weaknesses in the opening?

Beat your opponent to the punch.

[1] J. Alexander Tanford, The Trial Process: L

already winning. Lawyers who ignore their weaknesses lose credibility. Jurors will not believe a lawyer who is perceived to be hiding important facts.

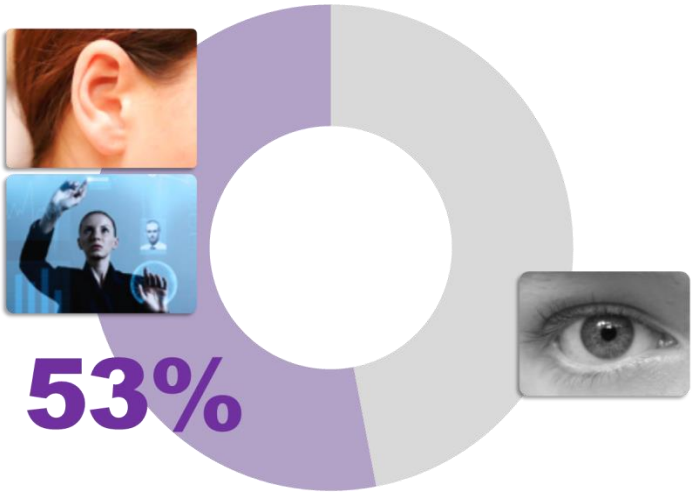
The key to handling weaknesses is to make them part of the story and turn them around. Admit them as if they were “no big thing” or if they seem to be a big deal, explain why they’re not really that big. Reason and logic rule: You’ll need a reasonable and convincing but terse explanation for why your client waited three years to sue or why a couple of beers before heading home didn’t matter.

Deflating balloons doesn’t mean telling the jury about every single piece of conflicting evidence or argument the opposition may use. Deal with major problems that could really matter if left to your opponent to introduce.

5 Ways to Maximize Persuasion During Opening Statements - Part 4

by Ryan H. Flax, Esq., Founder/CEO, A2L Consulting

We have discussed various important uses for the opening statement. The last one is the use of demonstrative evidence in connection with the statement.



You need to be aware that most folks, other than lawyers, are visual preference learners. Most lawyers, in contrast, are auditory or kinesthetic preference learners.[2] Most people teach the same way they prefer to learn – so lawyers typically teach by lecturing, since that is most comfortable for them. But this strategy does not help with the majority of jurors, who would prefer to be taught visually, at least in part. So bridge this courtroom gap with demonstrative evidence, including litigation graphics.

You cannot just relay information and be persuasive. A study has shown that lawyers who use PowerPoint in their opening statements enhance persuasion though jurors' central and peripheral processing.[3] In that study, the use of litigation graphics made the lawyers appear (in jurors' eyes) more competent, more credible and more likable, helped jurors retain information better, and resulted in better verdicts.

Another study shows that you cannot just show some graphics once in a while during your opening statement, but you must immerse the jury in visuals throughout the entirety of your opening.[4] Immersion means constantly providing visuals for an audience throughout a presentation.

Ken Broda-Bahm, Ph.D., tested this by presenting opening statements to jurors accompanied by no graphics, old-school-style flip chart graphics, sporadically shown professionally made graphics, and sporadically shown animated graphics. Surprisingly, he found that none of these techniques were persuasively distinguishable. Only when he used the immersion technique did he find that persuasion was significantly improved. With this technique, jurors were found to be more prepared on the evidence, they paid more attention,

[2] ABA Commissioned Study: Attorney Communications Style Study (Jan 2, 2007) (available at http://www.a2lc.com/pressarticles/presslearningstudy.html).
[3] Jaihyun Park and Neal Feigenson, *Effects of a Visual Technology on Mock Juror Decision Making*, APPL. COGNIT. PSYCHOL. 27:235-46 (2013)
[4] Dr.Ken Broda-Bahm, Persuasive Litigator: Show, don't Just Tell, http://www.persuasivelitigator.com/2011/07/show-dont-just-tell-continuity.html (2011).

they felt the evidence was more important, they comprehended better, and they retained information longer.

However, you cannot just make some PowerPoint slides and run off to court and be persuasive. The easiest and most common way lawyers make their own trial presentations is by outlining or scripting an argument in Word and then copying and pasting that script into PowerPoint. This is worse than ineffective and all but promises to harm your case.

Interestingly, a recent study shows that the perceived cost of something matters.[5] The study researched the effectiveness of placebos on patients with Parkinson's disease and found that placebos were effective but that patients who believed they were getting more expensive drugs got significantly more effectiveness from their placebos. This translates to trial persuasiveness in that if your graphics seem expensive, jurors will believe that you and your case are better, all things being equal.

You cannot just make some PowerPoint slides and run off to court and be persuasive.

Never simultaneously say what you're also showing in a graphic (this does not necessarily go for something you're affirmatively quoting). A well-researched phenomenon called the redundancy effect happens when you do this and the result is your jurors' brains are switched off and they stop taking in any information at all.[6] You've subjected them to a cognitive load that their brains cannot handle and, so, they turn off. This is not desirable in an opening statement.

And never use bullet point lists as your graphics.[7] No great presenter does this. This is often the result of the self-prepared graphics that I mentioned a minute ago where you transfer your script of outline to slides. Using bullets probably means your presentation is "text-heavy," which is a barrier to effective communication. Also, people can read and understand faster than they can listen to you and understand: 275 words per minute vs. 150 words per minute. By using bullet lists you've challenged your audience to read your slides before you can explain their content, and your audience will win every time and stop listening.

The "Don'ts"

Finally, as an extra bit of info, here are some things to avoid in opening statements.

[5] Espay et al., *Placebo Effect of Medication Cost in Parkinson Disease*, Neurology vol. 84, No. 8, 794-802 (Feb 24, 2015).
[6] *See, e.g.*, Mayer et al., *Cognitive Constraints on Multimedia Learning: When Presenting More Materials Results in Less Understanding*, J. EDU. PSYCH. Vol. 93, No. 1, 187-98 (2001).
[7] *See, generally*, research by Dr. Chris Atherton (e.g., https://youtu.be/OwOuVc1Qrlg).

Don’t re-introduce yourself. Don’t waste your first 90 seconds of opening by re-explaining who you are. It’s likely that the judge has already done this or that the jury has heard it already. Even if that’s not the case, wait a few minutes to do it if it must be done.

Don’t suck up. Don’t tell the jurors how important their job is or how great it is that they’re doing their civic duty or how thankful you are that they’re here. This is patronizing, and they’ll know it and resent you for it. If you must, simply say that you appreciate their time and are going to try and get them through the trial as efficiently as you can.

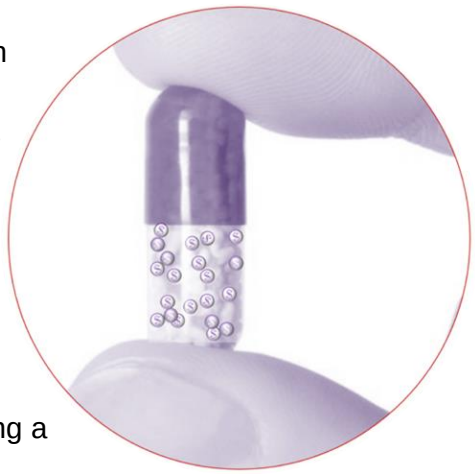
Don’t explain how an opening statement works. Don’t explain that your statement isn’t evidence. The judge might do that, but you sure as heck shouldn’t. Most likely, your jurors won’t distinguish between actual evidence, demonstrative evidence, and attorney argument. Why enlighten them?

Don’t tell jurors how proud you are to represent your client. I hear this so often and cringe every time. It’s not persuasive. It sounds insincere. It’s B.S. and jurors will know.

Don’t oversell your case. If you know you cannot prove something, don’t say you can. Promising more than you can deliver will hurt your case and, potentially, constitutes reversible error.

Why Expensive-Looking Litigation Graphics Are Better

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



I am not advocating that you spend more to develop top-notch demonstrative evidence. What I want you to do is make sure that the litigation graphics that you do use look like you paid a million bucks for them. Make sure you're getting what you're paying for. Let me explain why.

Recently published and widely reported research out of the University of Cincinnati relating to treating Parkinson's disease shows that the placebo effect is a real thing and a powerful psychological phenomenon. Interestingly, what the study also shows is that it matters greatly to those experiencing a strong placebo effect how much they believed the pseudo-pharmaceutical cost. Amazingly, seemingly-more-expensive drugs turned out to be much better "drugs" in effect (even though they were not drugs at all). The more a patient believed a drug cost (here the artificial difference was $100 vs $1,500 per dose), the more effective it was at treating their symptoms of Parkinson's.

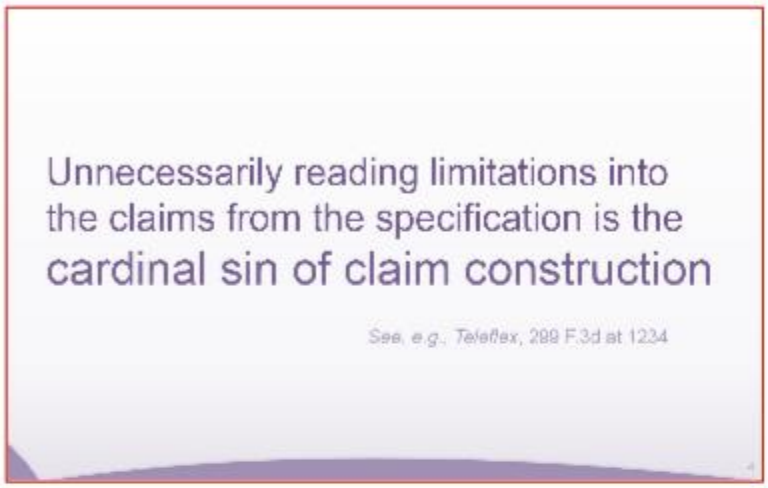
Perception of cost was capable of influencing physical and psychological behavior and responses on a subconscious level. Wow.

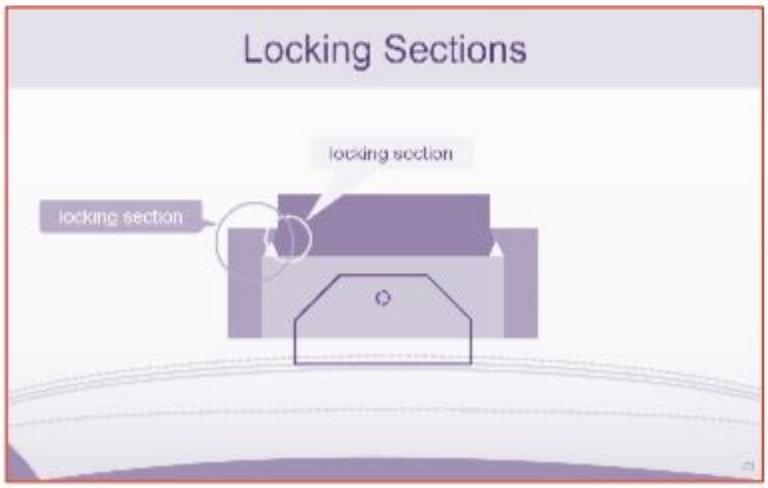
Knowing this new and interesting bit of science, how can we use it to be more persuasive in litigation, ADR, or similar situations? An easy step is making it *appear* that your demonstrative evidence, e.g., trial graphics, were very expensive. This is easy – just make your graphics, boards, scale models, etc., look fantastic: creative, well designed, well composed, simple, beautiful, and well-targeted to their specific purpose.

Perception of cost was capable of influencing physical and psychological behavior and responses.

I became aware of the above-identified research while driving to the office and listening to NPR's Morning Edition. The show very briefly discussed the research and it really struck a chord with me because just the day before I'd been in a client's patent claim construction (*Markman*) hearing at the U.S. International Trade Commission (ITC) and had the opportunity to compare our supporting graphics to those of opposing counsel. I know ours satisfied the requirements for looking very expensive (see above). The opposition's, on the other hand, while arguably supportive of their argument, and were rudimentary and just plain ugly.

What makes litigation graphics ugly? Not paying attention to style, lack of client and/or case branding (must be subtle though), inconsistency in color/font size/font type, lack of composition, use of improper font for electronic display, poor slide aspect ratio choice, too much text, too small text, use of bullet-point lists, use of PowerPoint effects for no good reason, and many other things. Basically, if slides look like *anyone* could make them, they're not worth the effort or cost. Litigation graphics must look intentional, beautiful, and purposeful. They should look like they cost a lot (but they don't, really).



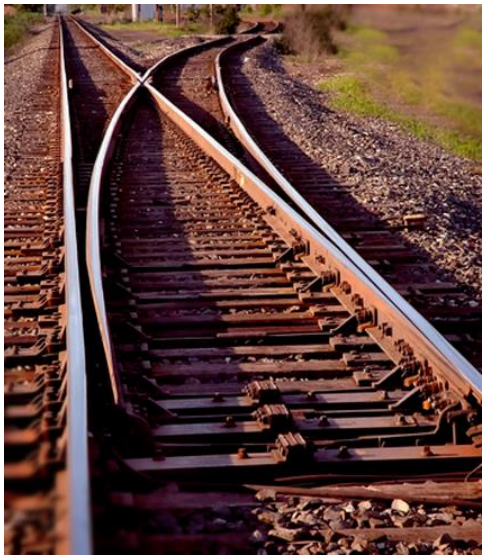


I am confident that there was no significant difference in how much either set of *Markman* hearing PowerPoint slides cost, ours versus theirs. But I witnessed a huge difference in the way the Court received each side's counsel at oral argument and the general momentum throughout the hearing. It all went our way. The arguments on our side were better, no doubt, but I believe the "high-priced-placebo" effect also played an important role. Our more appealing, more professional-looking, higher-design, more focused graphics enhanced the entire experience for the judge and resulted in better rapport and a lot more nodding at and softball questions for our attorney.

Don't pay more. But, make sure you get more.

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

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



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

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

The Two-Track Strategy

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

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

The "Law Track"

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

Most attorneys approach their cases in this same way – by identifying what the court of last resort has to say about the relevant law, i.e., what must be proved for them to win in the eyes of the court, ordinarily by fulfilling all the "prongs" of the case law. Then these attorneys slowly build up their "garden of weeds" around the case, based on these issues.

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

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

The Persuasion Track

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

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

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

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

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

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

How I Used Litigation Graphics as a Litigator and How You Could Too

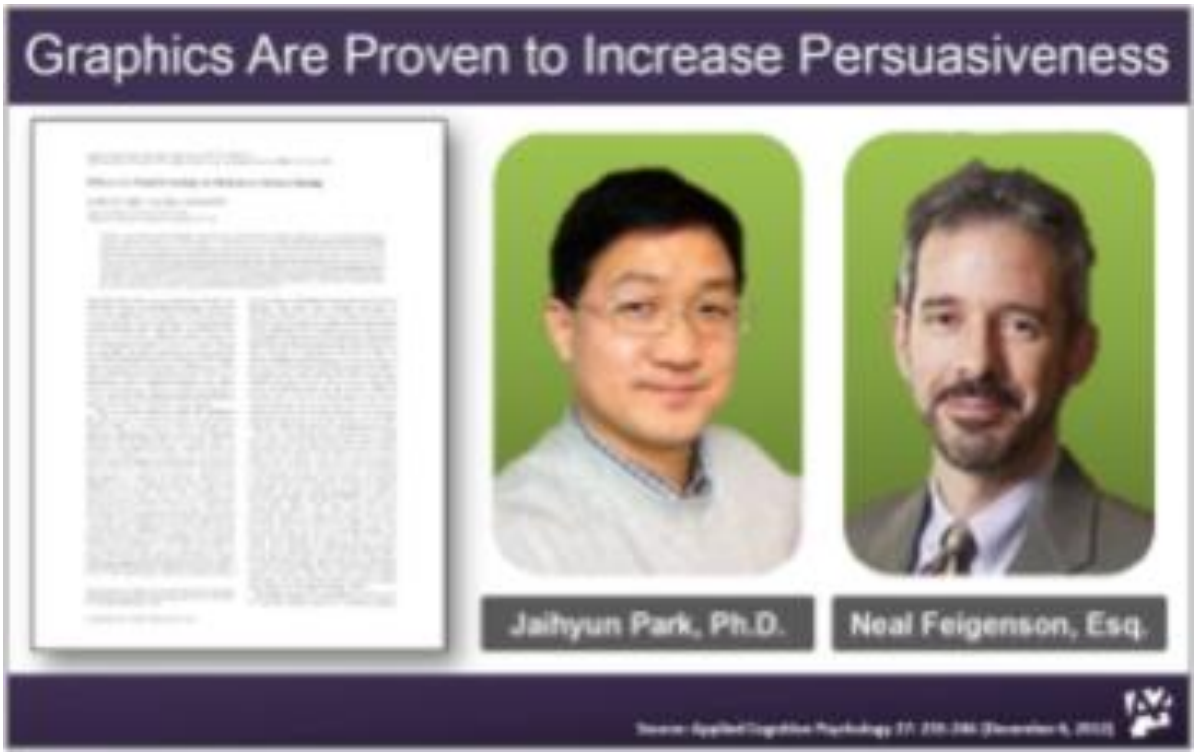
by Ryan H. Flax, Esq., Managing Director, Litigation Consulting, A2L Consulting

It is well known and generally accepted by the top performers in the litigation community that you need to use demonstrative evidence, including litigation graphics, to be persuasive at trial. As a scientific certainty, using visual support to back up your key points and arguments is critical to maximizing persuasiveness. As a litigator, I've personally created and used graphics, and developed litigation graphics for others, to use at trial, at *Markman* (patent claim construction) hearings, and for other presentations. As a litigation consultant, I've seen countless terrific litigators both understand that they do need graphics and at the same time misunderstand how they should be using litigation graphics in these and similar settings.

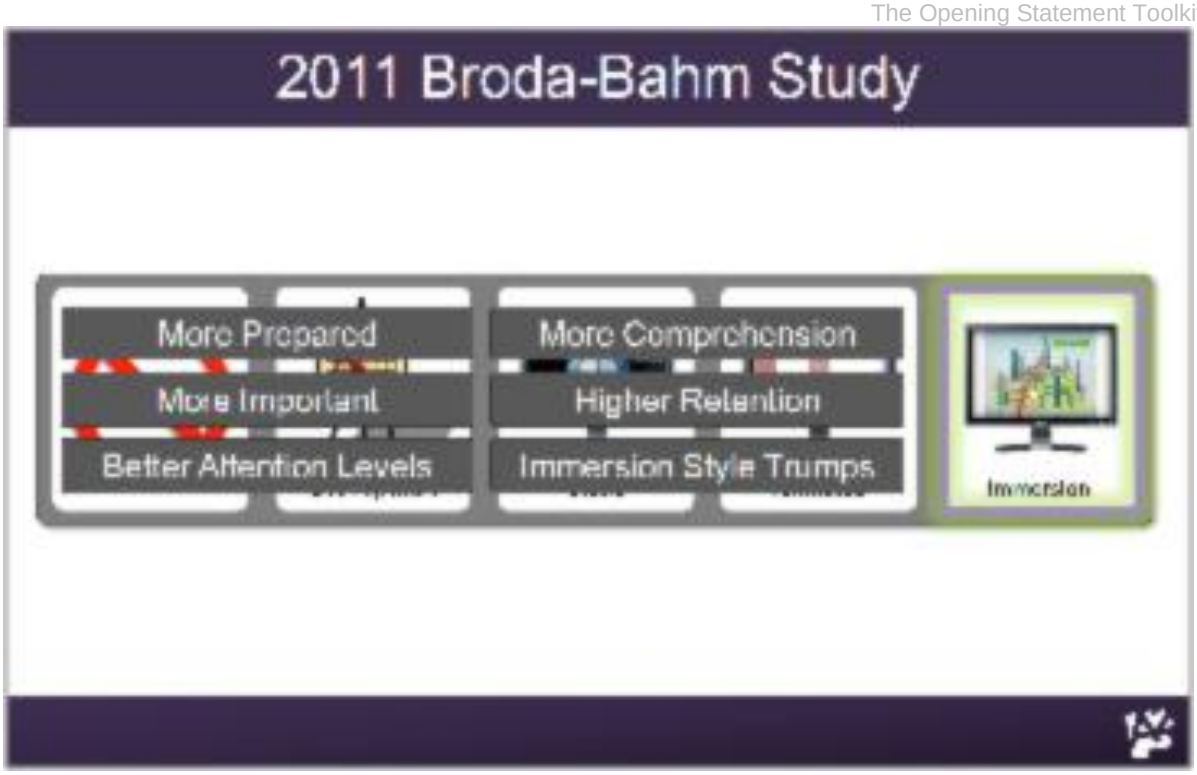
My new friend, Alan Fisch of the DC-based, IP litigation powerhouse Fisch Sigler LLP, and I were just discussing this over lunch and agreed that it's remarkable how true this is and how many great litigators lose at trial because they fail to master the basic principles of trial persuasion. Using trial graphics incorrectly can be as bad as or worse than not using them at all.

Before getting into the "how," the question of "why" visual support is so critical to trial success must be touched-upon. Studies show that the majority of people are visual-preference learners, or at least combination visual and some-other-learning-style-learners. *See, e.g.*, Felder and Spurlin, *Applications, Reliability and Validity of the Index of Learning Styles*, Int. J. Engng. Ed. Vol. 21, No. 1 at 103-112 (2005); Ayse Esmeray Yogun, *Match or Mismatch Between Business Students' and Business Academicians'*

Learning Styles: A Research at Toros University, The Macrotheme Rev. 3(2), 38-46 (Spring 2014); see also, *Animators at Law Communication Style Study*. This means that people want to be taught and will better understand lawyer argument and witness testimony if it is not only spoken to them, but also shown to them visually. The theory is that by presenting information and argument to jurors (and judges) in the way they likely prefer to receive it, they'll enjoy and pay more attention to your presentation and remember what you say.



There is actual scientific research to back this up, specifically in the litigation setting. A wonderful man named Dr. Jai Park and his research partner, attorney Neal Feigenson, studied the effects of using visual support (in the form of PowerPoint graphics) during opening statements of a basic employment discrimination lawsuit. Dr. Park and Mr. Feigenson found that using litigation graphics improved ultimate results (verdicts) by making jurors believe that the attorney using them was more capable, better prepared and probably more likable. Jurors were able to understand and remember the facts better when graphics were used.



Beyond merely knowing that visual support must be used at trial, we know that you need to use an immersive technique when arguing and showing graphics. Jury consultant Dr. Ken Broda-Bahm performed a study on mock jurors by using five different techniques for presenting oral argument (opening statements): (1) no graphics at all; (2) old-school flip charts; (3) professionally made, static graphics that were only sporadically shown; (4) fancier professionally made animated graphics still sporadically shown; and (5) a combination of 3 and 4 where the jurors were always given something to see during the presentation. Surprisingly, only the last technique, the immersive style, made any significant improvement in persuasiveness.

Another important point is that we know that your argument needs to be structured as a story. People are hard wired to enjoy and expect stories. Storytelling literally gets the teller (you) and listener (juror) on the same mental wavelength. By this I mean that the very same areas of the brain are activated in synchronicity in the storyteller's and listener's brains – they share thinking patterns. Also, good storytelling causes release of oxytocin, called the trust molecule, in listener's bodies. This physical reaction to a good story makes an audience more likely to be sympathetic and ready to "help," which is what you want a jury feeling when your case is presented.

And this word – feeling – is the key to victory at trial. As Dr. Maya Angelou famously said, "[p]eople will forget what you said, people will forget what you did, but people will never forget how you made them feel." This is doubly true for jurors and litigators. Jurors will most remember how they felt about you and your case, and thus, about your client, and will decide your fate based on that feeling, sprinkled with some of the salient facts from the trial that fit with their conclusion on how the case should turn out. Make them feel like you won.

All the above is essential knowledge to be persuasive at trial. You need to tell a compelling story, you need to support that story with litigation graphics, and you need to show those litigation graphics in an immersive way. But, how do we as litigators do this in real life? Here's how:

When I explain these concepts to other litigators, and I do this *all the time*, I analogize trial presentation to the television news, where there are two kinds of presentation graphics. We are all well acquainted with the broadcast news and are comfortable with the style and format of its typical (really universal) presentation. The news is an informative presentation that always uses an immersive graphical style to tell story after story after story. The goal of the broadcast is usually to quickly inform you as a consumer of mass media, probably to evoke some emotion, and sometimes to persuade. What do we see news broadcasters doing and how can we adopt a similar style to be persuasive in presenting trial argument?

Take a good look at the photo here of anchor Brian Williams of the NBC Nightly News. Most news reports, like those presented by Williams, are dominated by the anchor speaking directly to us through the camera. Almost always, next to the anchor's head is a large

graphic, which is almost always static, but for (maybe) some sort of animated entrance for the graphic. This is what you see in this photo of Brian Williams reporting on an airline crash.

You obviously cannot hear anything of what Williams was saying because I've only provided you a picture, but you "*know"* what he's saying nonetheless. You've already created some "story" in your own mind explaining what you're seeing in the picture – to explain the emotions evoked in you by seeing the image of the crashed plane and the look of concern on Williams's face. Your concocted story may or may not be correct, but the mere fact that you've developed one for yourself is proof that everything I've said above is correct.

This is how you'll use the lion share of your trial graphics during your immersive presentation. You'll make your points and tell your client's story orally and show the jury graphics that support those point, storylines, and themes. However, this is not what most litigators think of when they think they need litigation graphics. What they typically think of is the weather man.

To continue with my news report analogy, there is a wholly different kind of litigation graphic that will be interspersed within your larger visual courtroom presentation. These second type of graphics are more complex, are directed to more complicated subject matter and issues, and are expressly spoken to by the presenter (you). These types of graphics are like those used by Washington, DC's NBC4's Doug Kammerer here in the photo of him doing a weather report and forecast.

Kammerer is standing in front of his graphics (actually, they are superimposed over a green screen in production, but he can see what he's doing) and discussing them in detail. You

see that he is pointing to the jet stream pattern and the cold front it's pulling down from Canada into the United States. You know what that weather pattern is doing – it is making us very cold – because the colors and graphics tell us that.

He's looking us in the eye, but talking about the complicated weather patterns graphically displayed behind him – he's explaining complex things to us in a way that we understand even though we are not meteorologists.

Here's America's beloved weatherman, Al Roker of the Today Show explaining how to talk to a graphic like this:

What's the benefit of following the "TV news" style of presenting? First, it allows you to use an immersive visual technique without it seeming over-done. Second, you'll be presenting your case to the jury in a way that they expect and are very comfortable with. You'll be able to connect with your jurors, you'll make the trial more entertaining and enjoyable for them, and they'll appreciate it. As Dr. Angelou said, they'll remember how you made them feel, and it will have an impact when they decide the outcome of our case. If you choose not to follow the advice of this article you risk alienating, confusing, irritating, boring, or otherwise losing your jury-audience. This is disastrous for trial lawyers.

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When litigators come to us for the first time seeking litigation graphics for their trial, they usually say things like "I need a graphic that shows _____" (fill in this blank with any

complex issue that's hard to explain) rather than I need a visual presentation that supports this story, these themes, and tracks this opening statement. Once they get it, though, it's the later they understand they really need and want. The complicated issues in any litigation present themselves more obviously to us and are, thus, the first things litigators realize they need to educate a jury about. It's more difficult to unveil the heart of the case, develop and story around it (why are we really here in court?), and support that story visually and in conjunction with the important evidence of the case. Following the path I've set out above, developing a story, committing to supporting that story with an immersive visual presentation, and presenting the story and visuals in the "TV news" technique will make you a better litigator.

Storytelling Proven to be Scientifically More Persuasive

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

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

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

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

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

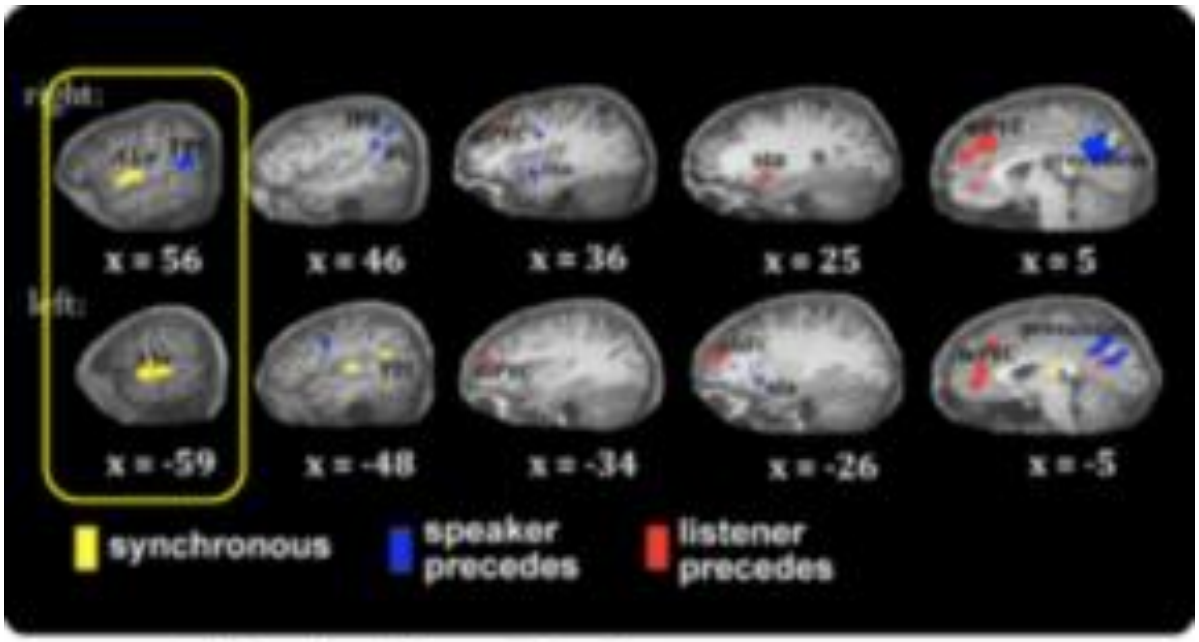
We must understand two things about persuasion:

1. You cannot change jurors or their capacities; but

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

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

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



A1 = Auditory Cortex
TPJ = Temporoparietal Junction

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

predicted the success of the communication –**so connecting with your audience more makes you more persuasive.**

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

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

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

Are You Smarter Than a Soap Opera Writer?

by Laurie R. Kuslansky, Ph.D, Expert Jury Consultant, A2L Consulting

Believe it or not, soap opera writers are better at storytelling than some litigators. Why? Not because of their subject matter or their wisdom, but because they know how to activate more of the brain than some lawyers. They put events into a story context, and they know how to use language to activate the brain better. If they can do it, so can you. Why is that important?

Raymond Mar, a psychologist at York University in Canada, performed an analysis of 86 brain imaging studies, published last year in the Annual Review of Psychology, and concluded that there was substantial overlap in the brain networks used to understand stories and the networks used to navigate interactions with other individuals — in particular, interactions in which we're trying to figure out the thoughts and feelings of others. Scientists call this capacity of the brain to construct a map of other people's intentions "theory of mind." **Narratives offer a unique opportunity to engage this capacity, as we identify with characters' longings and frustrations, guess at their hidden motives and track their encounters with friends and enemies, neighbors and lovers**. [1] [Emphasis added]

But where is the "story" in a complex patent?

Where's the emotion in tedious insurance language?

The answer is that if people are involved, there is *always* a story, including emotion, social interaction, sensory experiences and more – but they are usually left on the cutting-room floor in favor of dry facts and figures. This actually turns off the brain, rather than bringing it into action. Reciting facts using only factual words is like wrapping a gift of cardboard in a brown paper bag. Not very exciting or memorable, is it?

We understand why some litigators resist simplifying and looking for the "story." For one, they know too much and can't unlearn what they know in order to simplify. They are also concerned about oversimplifying to the point of inaccuracy. In a jury trial, they also must present to a diverse audience with conflicting needs: the judge and the record on one side and the jury on the other. There are also experts to satisfy who earn their keep by the details they can dispute and the hairs they can split – the more, the better. The less understandable their charts, the more diligence they may think they show, bolstering their expertise and justifying their high rate of pay. Finally, some trial lawyers may think that telling just the facts -- rather than telling the story -- is more powerful and credible.

Unfortunately, science disagrees.

Brain scans have revealed that just the facts, absent sensory language, only stimulate the language areas of the brain, and that hackneyed metaphors are processed as mere words by the frontal cortex.

Employing stories that incorporate metaphors and sensory experience activates the whole brain. It actually stimulates the same areas of the brains of the audience as the original action does (e.g., the olfactory cortex when hearing descriptive words involving smell such as lavender and cinnamon or the motor cortex when hearing about movement). Of course the facts matter, but the adjectives, the motives, the cause and effect, and the reasons jurors should feel, remember and care, matter too.

There's always a story, but if you don't tell yours, jurors will use their own.

Humans automatically make stories out of virtually all life events in order to make sense of them. Random events are given meaning through personal interpretation because we crave an explanation for the cause and effect of life. It gives us a sense of control, even if it's false. If you don't provide your version of the story, jurors will create their own narrative anyway, so it's better for you to exercise more control over the story than to leave it to amateurs and detractors.

How can you make the case into a story? It is easier than you may think. For one, make it priority one. We often find that lawyers overlook this task, or worse, resist it. Instead of merely tracking the facts, ask questions in terms of human behavior, not just the law or the chronology, such as:

"What *really* happened here on both sides?"

"Why did they do that?"

"What were they thinking and feeling?"

"What did they know or not?"

"What were their options and choices?"

"What were they each trying to accomplish?"

"Why did they succeed or fail?"

"How did that affect everyone involved?"

"Who tried to correct it? Did it work? Why or why not?"

"How did the story end? Who won or lost?"

"What caused the problem to become a lawsuit?"

"What would make it right?"

"Why is that fair?"

"Why should anyone *care* about what happened?"

But this is just the beginning of the process, not the end. After you've figured out "what *really* happened," you need to breathe life into it. You need to put jurors in the shoes of your client – from the beginning -- so they can experience what your client did, understand the client's dilemmas, feel the client's frustrations, and align with the client's decisions – in human terms, not legal ones. And you need to tell it using the art and the science of effective description and compelling storytelling.

1. The simpler the story, the better.
2. The simpler the language, the better.
3. Use metaphors involving sensory descriptions (e.g., prickly personality, velvet voice, leathery hands, etc.).
4. Reduce the facts to a story connecting to jurors' real-life experiences, feelings and thoughts. Make it relate to what jurors may have experienced.
5. Assume jurors have no context for the facts unless you provide one.
6. Remember how long it took you to wrap your head around the case, whereas jurors have only a few days, so don't start in the middle or the end.
7. Use word pictures, including visual and sensory details of important moments, and have witnesses do the same, for example:

Q: Why did that email in particular stand out to you?

COMPARE:

A: "Because the subject was in all caps."

TO:

A: "Because when that email came in, it was very early in the morning. I was groggy and drinking my second cup of black coffee, while I was pressing the down arrow key on my computer to quickly see my new emails. That email stood out when I was scrolling through my inbox because the subject was the only one all in capital letters, so it caught my attention."

8. After jury selection, when you know more about jurors' individual backgrounds, refine your story to connect better with them.

Don't only use your brain, but jurors' brains too. Activate their senses, their feelings, their thoughts, and their social experience. Take the extra step, while sipping on warm green tea or frothy cappuccino, to choose more descriptive words. Wear a comfy, plush robe or close your eyes in the breeze to figure out the story, but do it.

[1] Your Brain on Fiction by Annie Murphy Paul, Published: March 17, 2012 in the NY Times.http://www.nytimes.com/2012/03/18/opinion/sunday/the-neuroscience-of-your-brain-on-fiction.html?pagewanted=all&_r=0

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:

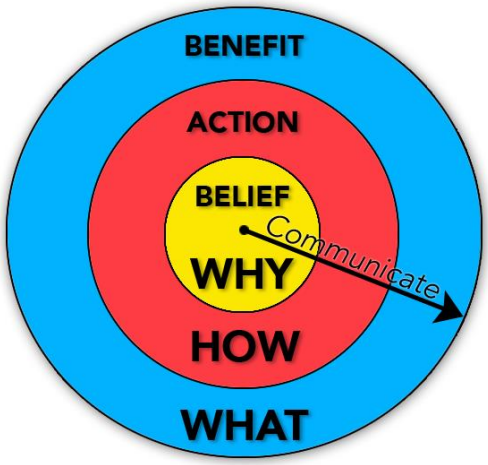
I believe ____, I think you should do _____, and if you do, the benefit will be _____. Then introduce yourself. Then go into detail about what you believe, what actions you want your audience to take and how they will benefit by doing so. Finally, repeat your initial belief - action - benefit statement.

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.



14 Differences Between a Theme and a Story in Litigation

by Ken Lopez, Founder/CEO, A2L Consulting

Twenty years ago in my trial advocacy class, we talked a lot about developing a theme for a case. We learned to say things in an opening statement like, "this is a simple case about right and wrong" or "no good deed goes unpunished."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

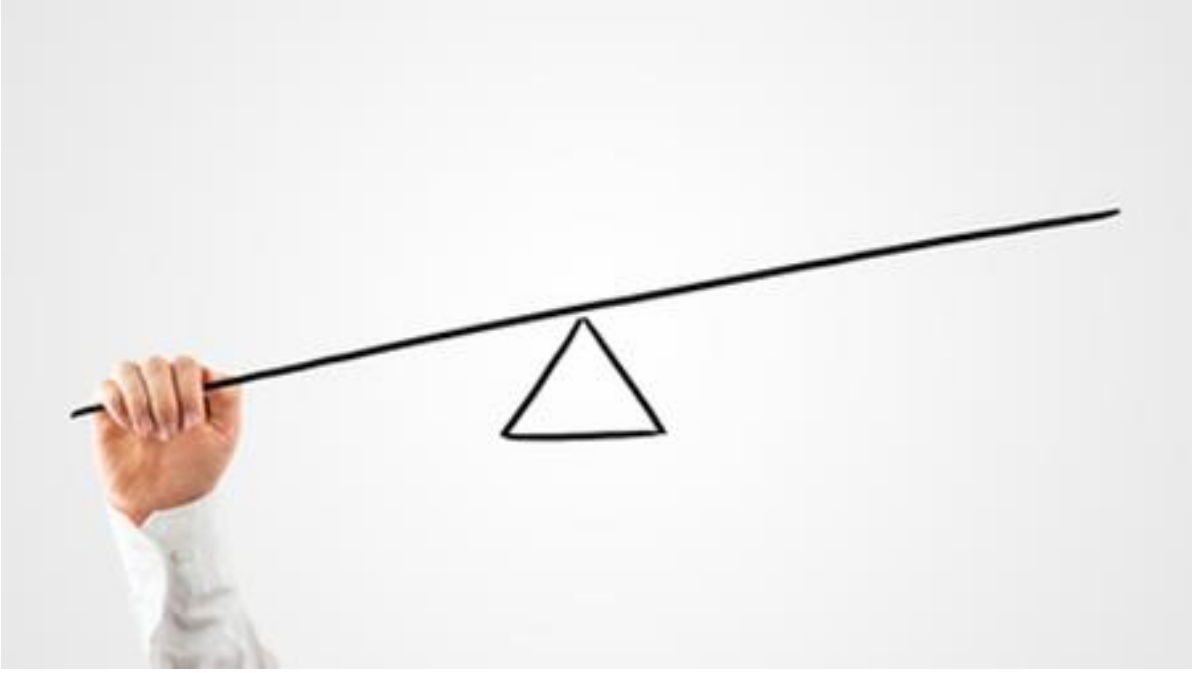
12. **Themes affect one part of the brain, stories affect another.** See *Storytelling Proven to be Scientifically More Persuasive*

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

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

5 Essential Elements of Storytelling and Persuasion

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



As I pointed out in my previous blog post, when a lawyer uses storytelling effectively at trial, he or she is literally eliciting a reaction from the brain areas and the neurochemicals that are the basis of any human being's foundation for biological survival.

Storytelling, in fact, serves the biological function of encouraging pro-social behavior. Effective stories reinforce the concepts that if we are honest and play by the right rules, we reap the rewards of the protagonist, and that if we break the rules, we earn the punishment accorded the bad guy. Stories are evolutionary innovations: They help humans remember socially important things and use that information in their lives.

To impact an audience such as a jury, a story must do three things: (1) emotionally transport the audience by moving them and having them get "lost" in it; (2) include characters facing problems and trying to overcome them, but not engaging in mere meaningless problem solving; and (3) communicate some message or moral, meaning some set of values or ideas. Otherwise, the story will seem "empty" and not important enough to pay attention to.

There are several guidelines to help you turn your evidence into a story worth telling. The essential elements you need to provide are:

1. Theme(s) of your case
2. Compelling characters (good/bad)
3. Motive

4. Conflict/Resolution
5. Messages/Consequences

In order to figure out these elements in a lawsuit setting, the first and critical question to ask and answer is: “What really happened here?”

The most common mistake is that litigators don’t bother to ask the question, or they answer it with how it (whatever “it” is) happened. Rattling off a series of events – but not the bottom line of what happened - is disastrous to connecting with jurors and telling a compelling story about your client. As a litigator, you must ask yourself “Why must you tell THIS story?” and “What’s the belief burning within you that your story feeds off?”

Other questions that will lead to the real story are:

“Why did they do that?”

“What were they thinking and feeling?”

“What did they know or not know?”

“What were their options and choices?”

“What were they each trying to accomplish?”

“Why did they succeed or fail?”

“How did that affect everyone involved?”

“Who tried to correct it? Did it work? Why or why not?”

“How did the story end? Who won or lost?”

“What caused the problem to become a lawsuit?”

“What would make it right?”

“Why is that fair?”

“Why should anyone care about what happened?”

These are the questions that the first-chair litigator and the entire trial team should brainstorm in developing the most persuasive way to present their case. When I consult for or with trial teams, these are the types of questions I ask and insist the first chair can answer.

Finally, these rules of thumb should be followed in developing an effective trial story:

- The simpler the story, the better.
- The simpler the language, the better.
- Use metaphors involving sensory descriptions.
- Reduce the facts to a relatable story.

- Use word pictures.

With the basics of storytelling and its importance to courtroom persuasion in mind, we must also consider how to develop a complete package of storytelling presentation. This complete package is not just the oral telling of a story, but must be accompanied by visual support. We will discuss that next.

With So Few Trials, Where Do You Find Trial Experience Now?

by Ken Lopez, Founder/CEO, A2L Consulting

I have recently interviewed dozens of in-house counsel from large companies. One subject that continues to come up fascinates me and reflects the changing practice of litigation-focused law.

As my litigator turned litigation consultant colleague Ryan Flax says, "they call it the practice of law, but no one is practicing." That is, with so few trials occurring, the normal go-to litigators at big law firms are just not going to trial like they used to, and thus are not getting the practice that they used to get. Since that's true, where does one look for trial experience now, and will there be a shortage of experienced trial lawyers soon at large law firms? Let me offer some observations and five solutions.

The same trial lawyers I once saw go to trial at least once per year a decade or two ago, now go to trial every few years—at best. In their non-trial time, they are not watching trials since they are not being paid to go watch trials, and they do not usually participate in mock trial practice either. The difference between how often a large law firm goes to trial, let alone a single litigator, and a litigation consulting firm like A2L has never been greater than it is right now.

Whereas a major law firm may go to trial perhaps a dozen or two dozen times per year and a single litigator may go to trial every few years, a single litigation consultant at A2L will be involved in at least a dozen trials and often several dozen trials or more, every single year.

If you think trial-loving partners at big law firms are unlucky, think of their associates, and ask yourself, how is anyone getting any trial experience any more? That is a question that in-house counsel are beginning to ask. As one noted, the people who now look truly comfortable in front of a jury are often plaintiff's counsel, since they are more frequently in court.

One in-house counsel at a large company poignantly noted about about the plaintiffs' counsel they face, "they have a swagger and body language that comes from experience, and that experience comes off as confidence, and confidence helps win cases." So, if in-house counsel recognizes that an experience gap is growing, what is the solution?

Here are five ideas for maximizing the amount of valuable trial experience on a trial team:

1) **Litigation Consultants Add Experience to the Team:** In-house counsel no longer expect a law firm to have all of the answers. They expect the involvement of litigation consultants early in a case. With litigation consultants in trial almost full-time, they are a logical add-on both from the trial team's and the client's perspective when considering early case assessment, mock exercises or trial. See, *Litigator & Litigation Consultant Value Added: A "Simple" Final Product* and *25 Things In-House Counsel Should Insist Outside Litigation Counsel Do* and 21 Reasons a Litigator Is Your Best Litigation Graphics Consultant.

2) **Learning by Doing Programs:** Programs like those offered by NITA and others that allow for practice to occur should be a part of a litigators life-long-learning program every year. See NITA programs here.

3) **Watch Trials on CVN:** Until the Supreme Court figures out that televised trials will improve trial practice, there is an amazing resource trial lawyers can rely on. The Courtroom View Network captures video from trials and makes it available to watch online. In my view, every major law firm should be subscribing to this service to support the training of their litigators. See CVN discussed here.

4) **Take Every Opportunity to Run a Mock Trial:** In-house counsel support the idea of a mock trial but are often afraid of the time and money investment. That's understandable, and while a multi-panel mock trial will always yield the best data, there are other solutions like a focus group or a Micro-Mock. Each offers a litigator the chance to practice his or her craft. See, *In-House Counsel Should Make Outside Litigation Counsel Feel Safe* and *7 Reasons In-House Counsel Should Want a Mock Trial* and *Introducing a New Litigation Consulting Service: the Micro-Mock™*.

5) **Read this Blog and Others Like it:** There are several organizations who are publishing information that is far ahead of traditional CLE's when it comes to litigation. The ABA recognized our blog as one of the top ten litigation blogs, and I have highlighted other blogs helpful to litigators in the past. Subscribe free to this blog here. See, *The Top 14 Blogs for Litigators & Litigation Support Professionals* and *Top 100 Legal Industry Blogs Named by the American Bar Association*.

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]

[New and Free Webinar] 12 Things Every Mock Juror Ever Has Said

by Ken Lopez, Founder/CEO, A2L Consulting

If you can learn the secrets of how mock jurors commonly behave during mock trial deliberations, you will be better positioned to win at trial. These behavior patterns are understandably foreign since most people see mock juries deliberate infrequently. However, when you are a jury consultant, mock trials are routine, and repeat behavior patterns become clear over a long career.

Surprisingly, it turns out that no matter where you go in the country, mock jurors tend to act in similar ways. Although there are venue-specific idiosyncrasies, mock jurors act quite similarly from locale to locale. If you understand the questions they almost always ask, the order of deliberations they usually follow and how mock juries address damages almost every time, you will be far ahead of almost all of your peers.

We at A2L have put together a free 75-minute webinar, *12 Things Every Mock Juror Ever Has Said*. It will be conducted live on December 9, 2014 at 1:30pm ET and is designed to share A2L's accumulated knowledge about mock jurors. **Click here to register for it for free**.

This webinar will be led by Laurie R. Kuslansky, Ph.D., one of the world's top jury consultants and managing director of A2L's jury consulting team. She has conducted over 400 mock trials in more than 1,000 litigation engagements throughout the country over the past 20+ years. Dr. Kuslansky will describe **how mock jurors make decisions about liability and damages**. She will address how mock jurors tend to apportion justice, how they calculate damages, how they react to contracts and how mock jury trial deliberations compare to real-life trial deliberations.

Other topics expected to be discussed are how to best position a jury to discuss damages, how mock jurors handle verdict forms and instructions, how mock jurors split up blame among multiple parties, how mock jurors use graphics, what juries forget and much more. This event is suitable for anyone with an interest in litigation, but this webinar is designed for the courtroom lawyer.

How PowerPoint Failures in Demonstrative Evidence Can Sink a Case

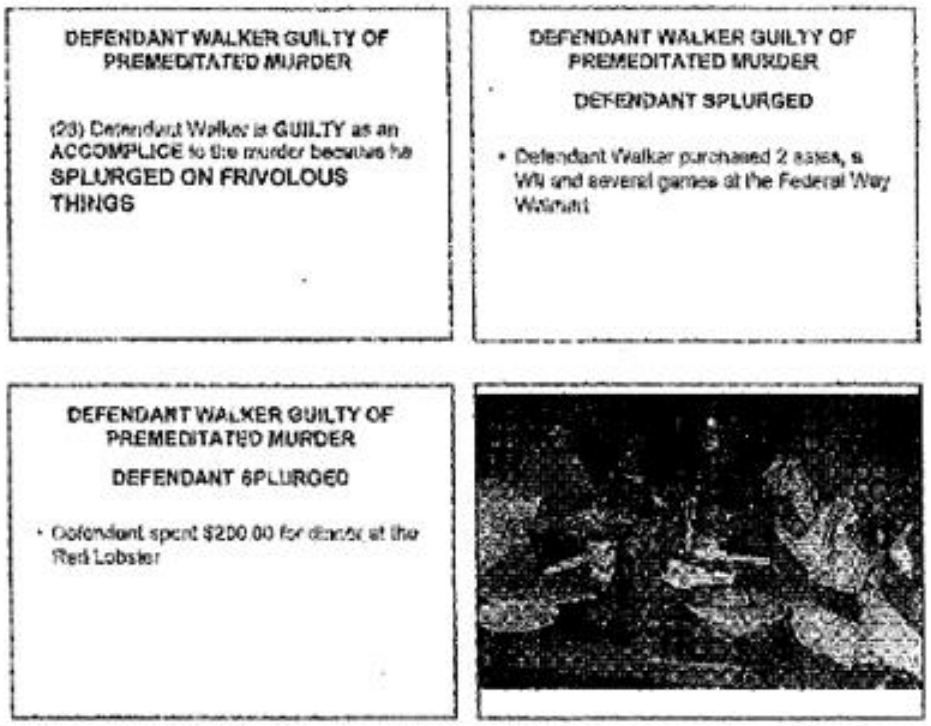
by Ryan H. Flax, Managing Director, Litigation Consulting, A2L Consulting

We strongly advocate that counsel must use a visual presentation to support his or her oral argument at trial (and anywhere they need to be persuasive). This most commonly happens during opening statements and closing arguments at trial and the dominant format for such presentations is PowerPoint – a very good tool. However, like cutting your own hair or doing your own dental work, we must again caution you that you must really know what you're doing because your case may depend on it.

On January 22, 2015, the Supreme Court of the State of Washington published its opinion in *State v. Walker*, overturning the State Prosecutor's conviction of an accused murderer because the attorney went too far with his demonstrative evidence in closing. A murderer has potentially been freed because, in the Court's view, counsel was inflammatory in his presentation and "appealed to passion and prejudice" of the jury.

Certainly as zealous advocates we do want to appeal to the passion of jurors on some level. We need their emotions to be in sync with the law and evidence, but what might be too much so as to prejudice the proceedings? Let's explore the Washington Supreme Court's opinion to see.

What Did the Prosecutor Do?



I'll preface these notes with the fact that based on the Court's findings of facts, the evidence was pretty overwhelming against the defendant, and he appeared to be a cold-blooded killer. The prosecution proved its case.

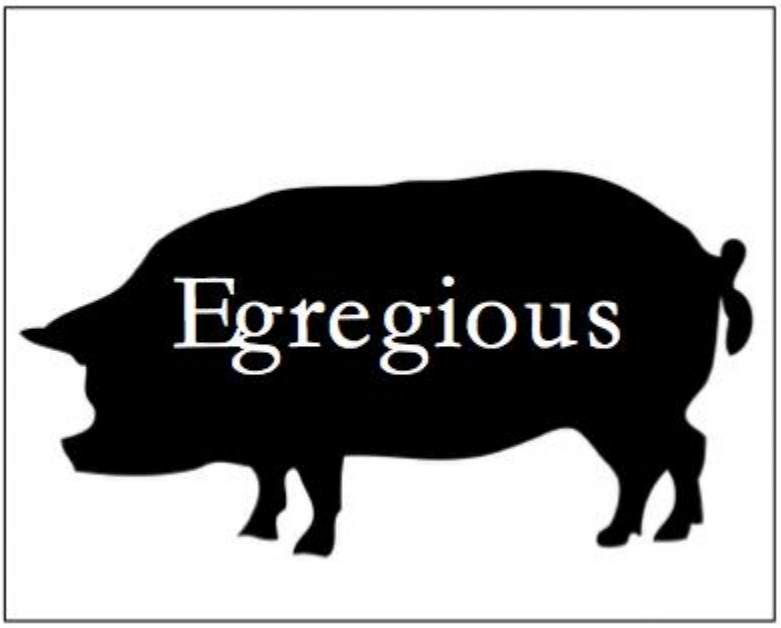
During closing arguments the prosecutor used a PowerPoint presentation of approximately 250 slides – that's a lot of slides. Over 100 of those 250 were titled "DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER." They also included a slide with the defendant's face and the text "GUILTY BEYOND A REASONABLE DOUBT" superimposed thereover in bright red letters. As you see in the slides reproduced above, the prosecutor argued (visually at least) that the defendant was guilty because he spent the stolen money on toys, safes, and a lobster dinner.

The prosecutor showed slides composed of trial exhibits – photographs – with the prosecutions take on the significance. For example, one slide showed a table littered with stolen money – real evidence – captioned with "MONEY IS MORE IMPORTANT THAN HUMAN LIFE," which was not a statement in evidence. Another showed a photograph of the murder victim in life, captioned with "DEFENDANT'S GREED AND CALLOUS DISREGARD FOR HUMAN LIFE."

During the prosecution's closing, defense counsel objected unsuccessfully to the prosecution's discussion of premeditaiton and a slide analogizing it to stopping at a railroad crossing, but never objected to the PowerPoint slides mentioned above.

Why Did the Court Find It Wrong?

The Court indicated that "[t]he primary question in th[e] case [was] whether those [accomplice to first degree murder, first degree assault, first degree robbery, solicitation, and conspiracy] convictions must be reversed in light of the PowerPoint presentation the prosecuting attorney used during closing argument."



The Court held that "prosecutorial misconduct violated Walker's right to a fair trial" because of the prosecution's PowerPoint presentation. Why?

The real reason is that a prosecutor represents the state and the judiciary and must be impartial so as to act only in the interest of justice. According to Washington, "advocacy has its limits, and a prosecutor has the duty to 'subdue courtroom zeal,' not add to it."

The Court professed to have had "no difficulty" holding that the prosecutor's PowerPoint presentation was "egregious misconduct." Why?

The Court felt that the prosecutor had presented "altered versions of admitted evidence" and "derogatory depictions of the defendant." [recall, this defendant is pretty much, absolutely a murderer – his also-guilty girlfriend testified to it]. The Court took offense to the inflammatory nature of the PowerPoint slides – the superimposing of text and captions that suggested the defendant "should be convicted *because* he is a callous and greedy person who spent the robbery proceeds on video games and lobster." The Court indicated that the presentation "plainly juxtaposed photographs of the victim with photographs of [the defendant] and his family, some altered with racially inflammatory text." Finally, the prosecution's slides "repeatedly and emphatically expressed a personal opinion on [the defendant's] guilt."

The Court found all this a "clear effort[] to distract the jury from its proper function as a rational decision-maker." It held that "[t]he voluminous number of slides depicting statements of the prosecutor's believe as to defendant's guilt . . . is presumptively prejudicial and may in fact be difficult to overcome, even with an instruction."

Finally, the Court suggested that there is a "serious need to curb abuses of such visual presentations" and encouraged "trial court judges to intervene and to preview such slides before they are shown to a jury."

How to Navigate the Minefield.

This all seem a bit crazy to me, but I do get it from the perspective of the State needing to exert control over itself as it's represented in the judicial system. State prosecutors are held to a higher standard than other lawyers in the courtroom. I suspect that had the defense used a similar counter-point PowerPoint presentation in its own closing arguments, it would not have been misconduct or even close thereto. But, the State is supposed to be more even-handed and tempered.

I'm fairly certain that the prosecutor made his own PowerPoint presentation and had absolutely no guidance from anyone that knew how such a presentation should be made – this is fairly clear from the examples of slides above. First, regardless of how long the closing argument was, there is simply no reason that there should have been 250 slides. I cannot imagine what all these slides presented and how each one could be needed to tell the simple story of how very bad this bad guy was. So, the fact that there were 100 or so slides that expressed the prosecution's flaming belief that the defendant was guilty of premeditated murder is, to say the least, excessive.

If I could get into my time machine and travel back in time to help this prosecutor, my advice would have been to tighten up the presentation as a whole, to use more well-crafted and less over-the-top graphics, and to make his hard-hitting, prosecutorial-belief slides just those at the very beginning and very end of the presentation (which would reduce the "inflammatory" slides from 100 to maybe 4 or 5). I can imagine prosecution counsel pounding on the lectern and shouting during closing arguments, too – my advice: don't (the facts are on his side). I would advise counsel to have a tight and reasonable story, to develop well-composed slides that fit with this story and show the evidence, and to summarize the evidence only at the beginning and end with the thematic, "**Defendant is Guilty – Defendant is a Callous Murderer – Defendant Put No Value A Real Man's Life**" slide. I suspect with this advice, the murder stays in prison and the prosecution is saved embarrassment.

In non-criminal cases and cases outside of Washington, I suspect this case and the sentiment of Washington's Supreme Court are mostly irrelevant. It is our goal as litigators to zealously advocate for our clients and when we don't work for the state, we probably have a lot more leeway to do so. It is imperative that we use strong and reasonable stories, themes, and well-crafted, supporting visuals to evoke sympathetic and empathetic emotions in jurors. As a professional litigation consultant, I help identify ways to do this that are not so heavy handed as Washington's state attorneys' tactics.

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.

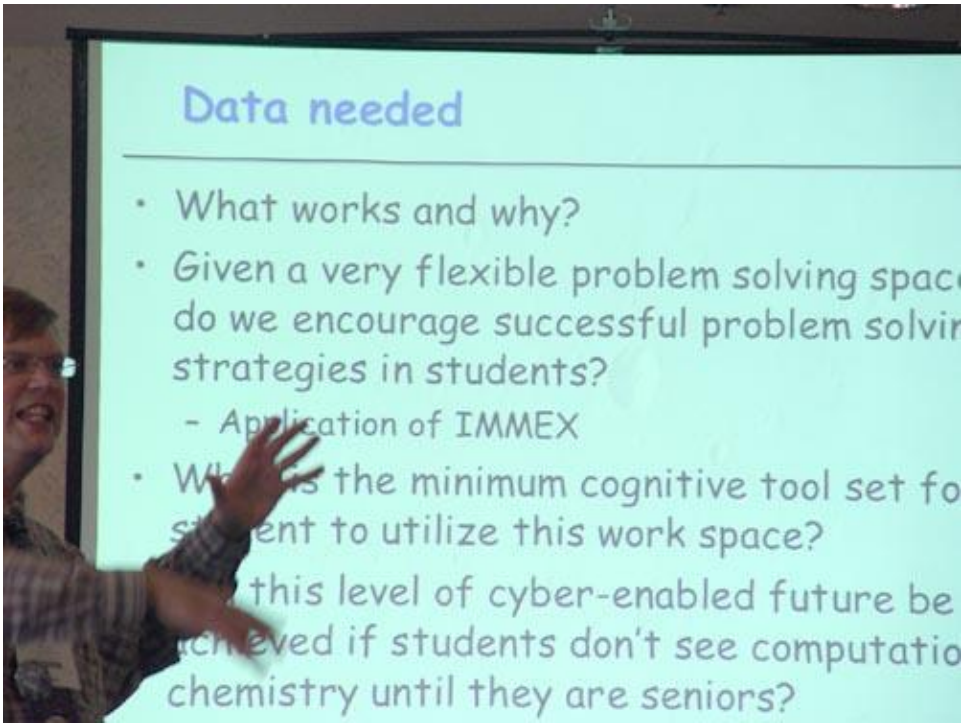
If we assume that every legal industry PowerPoint is being watched by an average of two other people and all of those people charge $200 on average for their services, America's legal industry is producing at least $3.6 million of PowerPoints every hour! That's a lot of time and a lot of money. We ought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

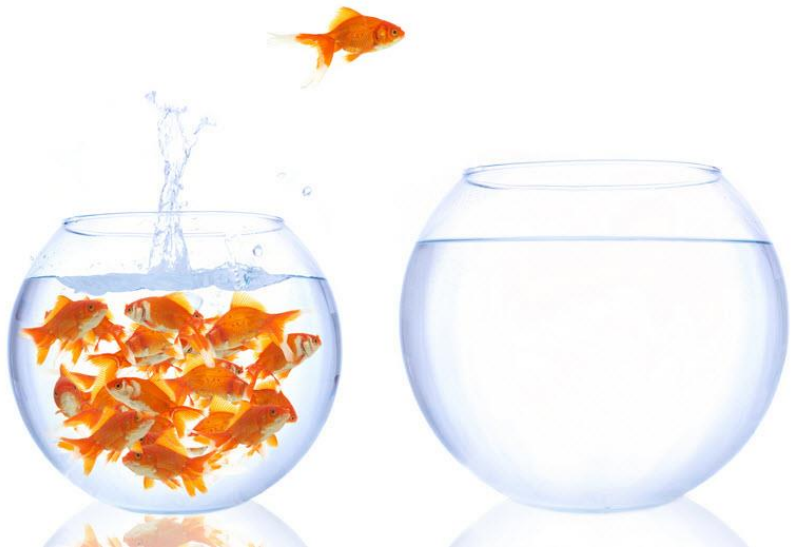
2. **The wall of text.** Courtroom presentations should be a lot more Steve Jobs and a lot less like the example below. Nobody can read it.



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.

How Long Before Trial Should I Begin Preparing My Trial Graphics?

by Ken Lopez, Founder/CEO, A2L Consulting

"How long in advance of trial should I be working with my trial graphics firm?"

I hear this question in some form quite regularly. Often the person asking it has some idea of what they are planning to do, and they are looking for validation of their plan. However, for those who are genuinely looking for best-practices, I can offer meaningful guidance based on 20 years of advising top litigators and watching top trial teams prepare for trial.

Clearly, a balance must be struck between the likelihood of settlement and the value of preparing your trial presentation long in advance of trial. Prepare too late and you risk not helping your fact finders understand your case, and you surely won't be maximizing your persuasiveness. Prepare too early and you run the risk of doing work that won't be needed if settlement occurs, and you might be focusing too much on your trial presentation and not enough on developing a good record.

So what's the right amount of prep time for trial graphics?

For some cases that we work on at A2L, we will begin graphics preparation and mock trial testing years in advance of trial. Sometimes we start working a potential issue before a single lawsuit has been filed. For other cases, we begin our work only days ahead of trial. The right answer for your case depends on several factors.

- **How much is at stake?** If the answer is billions of dollars, a minimum of six months of trial graphics preparation is required, and the best practice approach would be a year or more. If the answer is a few million dollars, a month should be sufficient. If the answer is in between (and most of the time it will be), follow a best-practice approach of nine months of lead time and never dip below three months of lead time.
- **Is this pattern litigation?** For pattern litigation, apply the rules above, but measure what is at stake by looking at the overall value of the potential cases combined.
- **Is the subject matter challenging?** Some cases are more complex than others. A patent case involving chemistry with twelve patents at issue is much harder for a judge and jury than a single-site environmental contamination case. An antitrust case requiring complex economic testimony about market power is more complicated than a employment discrimination case. If you can't explain your case and why you should win to your grandparent in less than 30 seconds, it's probably complicated. In these instances, follow best-practice schedules, not a minimum allowable time approach.

- **Is it a close call?** Be honest. Can you see a way that your opponent can win this case? If the answer is yes, prepare at a best-practice level time frames, not on minimum schedules.
- **Do you plan to test your trial graphics with a mock jury or in a mock bench trial?** Without the benefit of having tested your trial presentation, it's very hard to know how well you prepared. Testing a case once is helpful, but real value happens when a case is tested multiple times, thus allowing for course corrections from the first event to be tested in subsequent events. If you are planning for a mock trial add three to six months to the trial graphics prep schedule.

A great deal can be achieved at the 11th hour. The litigation consultants, the litigation graphics consultants and the jury consultants on our team can very quickly assess whether best practices are being applied to persuasive storytelling, courtroom communications and trial presentation. Quick changes are possible that yield big results even late in the game. So, in a sense, it is never too late to focus on trial graphics.

Of course, it is probably never too early either. Building a compelling and persuasive story that people care about takes time, and a lot is left on the cutting room floor. There are just some things that cannot be rushed no matter how much talent, experience or intelligence are involved in trial preparations.

You will know that you've prepared enough when you know your presentation is going to work. You know it's going to work because you've tested it in a mock trial, a micro mock event, or by some other method. Great law firms and great in-house counsel favor intense trial preparation early regardless of the possibility of settlement.

No Advice is Better Than Bad Advice in Litigation

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

Often, celebrities and other litigants have entourages, a circle of advisors, and all kinds of ties with other people, so it is understandable that they will turn to them for advice when engaged in legal battles. The problem is that often those people have little to no experience or expertise dealing with this arena, but are chock full of advice, are motivated to jockey for attention and control, know which buttons to press with their friend/client to gain their consent for a course of action, but have trouble admitting they need help, may feel threatened to do so, and thus, misguide the litigant. We have seen this phenomenon many times with the same result . . . bad.

In an infamous criminal trial of a famous football star, the best and brightest jury consultants, armed by lots of good data, advised the prosecution and provided a solid and reliable trial strategy based on decades of experience plus case-specific mock-trial testing. Was it accepted? No. What was? The advice of a psychiatrist neighbor with no such expertise, prior (different) experience, and personal opinion. Result? Bad.

In a lesser known matter, a bookworm-style intellectual property attorney with no jury trial experience turned away mock-jury testing and the expertise of a jury consultant. He concluded they were outside his normal comfort zone of operating, and instead, replaced them with the advice of someone who saw things “his” way – i.e., ignored how real people decide these cases and what they cannot understand or use as evidence because they lack the cognitive ability, interest, or motivation to do so, and relied on dry, tedious, technical information and a deep understanding of the guiding legal principles to guide the jury’s decisions – which as warned and predicted all failed at trial. Result? Bad.

A well-known movie producer had a number of people hanging on to his coattails, enjoying the reflected glory of being in his inner circle. A new group of wannabes wanted to garner his attention and become his new entourage, replacing his old one. How? By claiming the others were mismanaging his business and that his best friend and financial supporter cheated him out of money. They knew that a great way to attract the attention of an artist is to alert them to the notion that they are being cheated out of money. And so, to no good avail, the producer sued his best friend. Result? You guessed it.

If your best friend was a dentist, and you had heart problems, you might ask your friend for a referral, but would you take their advice over a well-regarded cardiologist?! Of course not, but we see this pattern in litigation all the time. When heeding someone’s advice, make sure they are coaching you or your client based on more than your relationship, but on information, experience and expertise. If not, you may as well treat your heart with a dentist.

5 Ways to Apply Active Teaching Methods for Better Persuasion

by Ken Lopez, Founder/CEO, A2L Consulting

As I mentioned in my article about the value of litigation consulting earlier this week, studies offering guidance on the best ways to persuade in the courtroom are released almost daily. Most are not courtroom-focused studies *per se*. Instead, they focus on topics like how best to educate, how best to use visual aids, and how best to influence decision-makers.

Virtually all litigators have made it over the hurdle of *whether* to use litigation graphics at trial - almost all now do. The challenge now is *how* to use litigation graphics and demonstrative evidence most effectively - and learning *how* is getting harder, not easier. Like a lot of things, the more you understand the subject, the more complex you realize it is.

At A2L, we advocate strongly for the use of science-proven methods of persuasion in the courtroom. Many of these methods are counterintuitive, like the technique for overcoming confirmation bias by using a hard-to-read font. Many techniques make more obvious sense, like the avoidance of bullet points.

I noticed an education-sector study released last month that proves how bad lecture-only courses are for learning. The traditional expert-exposition method is simply the worst method one can use for education when compared to more active learning methods like small group exercises. As one Harvard professor commenting on the study in the *ScienceInsider* noted, "the impression I get is that it's almost unethical to be lecturing if you have this data."

I concur, and I believe there are lessons for the courtroom as well.

Of course, we can't engage our jurors in a thoughtful Q&A session during trial, but what can we do is use scientifically-validated education methods to beat out our opponents. Here are five takeaways based on this and other educational studies that you can apply in the courtroom.

1. **Switch Your Methods Often:** I sometimes say, mix your media to get the point across. I sometimes say you need to use surprise to your advantage in the courtroom. The overarching point here is change, visual or otherwise, drives attention, and you need attention to persuade. Switch up your presentation methodology often.

2. **Have Your Expert Interact With Your Judge or Jury:** Whether it is by using a scale model that an expert can hand to the jury or whether it is by using a trial board that an expert can stand up an interact with, find a way to let them get more involved with your decision-makers. Just remember toprepare your expert witnesses thoroughly. Here's a recorded webinar that covers this topic too.

3. **Remember a Jury Trial IS a Small Group Exercise:** The study referenced above points to how well small group exercises are for learning in a classroom setting. A

trial might seem like a lecture since your "students" can't really interact. However, at the end of your "lecture," jurors actually do have to work together (deliberate) to solve a problem. So give them all the tools they need to do that - this includes very clear guidance on damages, a discussion of the verdict form and a suggestion of how to structure their deliberations that favors your positions.

4. **Lead Them There - Don't Just Lecture:** As this study suggests, if all you do is lecture, you are going to lose your jury. So, inject some storytelling in your opening and closing statements and create a path that inevitably leads the jury to the right conclusion. Give them all the tools they will need in the classroom's lab exercise (a.k.a. deliberations) like demonstratives that can be taken into jury room.

5. **Show Them - Don't Just Tell Them:** As one of the original litigation graphics consulting firms, A2L was, of course, founded on this principle. Good science now shows just how important litigation graphics are to a successful case outcome. You must practice continuous learning if you are going to be effective. Here is a good webinar on using PowerPoint litigation graphics successfully, taught by the top visual persuasion consultant at A2L who happens to have also tried complex cases for more than a dozen years.

How to Apply Cialdini's 6 Principles of Persuasion in the Courtroom

by Alex Brown, Director of Operations, A2L Consulting

Last year, we talked about the pros and cons of business development professionals -- specifically, the good and bad traits of people in this profession. Here, I start a new series on the six principles of persuasion. I have long been a huge fan of Dr. Robert Cialdini and find myself repeatedly going back to a book he wrote called "Influence: The Psychology of Persuasion." In this book, he discusses the six principles of persuasion. I want to share with you these principles in a six-article series, starting with principle number one: Reciprocation.

According to the Merriam-Webster dictionary, reciprocation is a noun that refers to a mutual exchange, a return in kind or of like value. Now before the emails come in about the ethics of giving the jury something in exchange for a favorable verdict, hear me out.

The idea of reciprocity is to give something to get something in return. So a litigator must put himself or herself into the shoes of each juror. What can you legally give them that has a perceived value above what they expected? To do this, you have to know what the jurors are expecting from the trial -- and most of that is negative. They feel that they are being taken away from work, family, personal time. They feel the pressure of making a decision that will help or hurt someone or something (a company), and they expect to be bored to death with statistics, witnesses, and the legal side of the case.

One of the things that the jurors do hope for is to be interested in the case or entertained -- but in truth, they expect just the opposite. When you are putting together your case, you should take to heart the immortal words from Gladiator: Are you not entertained!

1. **Entertain the audience.** Regardless of the seriousness of the case, levity can defuse the pressure that the jury is feeling. There are levels of levity; choose the appropriate level for the case. A term related to this is the CSI effect. Jurors expect to see amazing displays of evidence, just as good as what they see on the hit TV show. Give them what they expect. Use professionals to develop slide decks, use professionals to videotape and digitize depositions, use professionals to prep the witnesses. If you don't, the audience will notice, and your credibility will be harmed.
2. **Connect with the audience.** Engage them mentally and if possible personally.This concept needs to be infused into the strategy and the theme of your case from the start and repeated throughout the whole trial. Give them a reason to be engaged.

3. **Respect the audience.** Make them feel welcome and make them think positively about you and your client. You can do this by creating easy-to-understand points, easy to-follow demonstratives and exhibits, and easy-to-believe witnesses.

Remember, the audience members are not lawyers. The old adage that you can lead a horse to water but you can't make it drink applies to juries. Make it easy for them to come to a conclusion in your favor.

If you think about what you can give to the jury that they can appreciate, you will not only Increase the odds that they will listen to your argument, but you will create an easier path for them to understand and agree with your argument.

How To Emotionally Move Your Audience

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

"One ought to hold on to one's heart; for if one lets it go, one soon loses control of the head too."

— Friedrich Nietzsche

In other words, once emotion comes into play, fact and reason go out the door. For at least one side of the courtroom, that is the precise goal. For the other, the goal is to combat it, but if you cannot beat them, then you must learn how to join them. What does that mean?

There are several emotions that can often play a role in jury trials: anger and sympathy being chief among them.

Sympathy

"Can I see another's woe, and not be in sorrow too? Can I see another's grief, and not seek for kind relief?"

— William Blake

Many attorneys are concerned about the role of sympathy in jury trials for fear that it will dictate how the jury rules. This is a well-placed concern in cases involving a truly helpless victim (such as a newborn in a “bad baby case”).

However, decades of jury research through mock trials and post-trial interviews of actual juries show something different in many other instances: that jurors measure a party’s actions by what they knew or should have known and what they did or failed to do about it based on what they knew (i.e., knowledge and control). If the party knew too much (or should have known) and did too little, for example, it trumps sympathy.

For example, a journeyman electrician and popular, well-liked football star, was engaged to his high-school sweetheart. He was tasked with cleaning the electrical workings on a ship on a fast turnaround. The floor of the ship had salty sea water. He was to clean high-voltage equipment. He didn’t check if the electricity was on or off (“tagged out”) and did the unthinkable – cleaned the equipment with a metal brush, while standing in salt water. Sadly, the power was not turned off and he was almost killed by the electrical shock that resulted. Miraculously, he survived, but was in very bad shape, and no longer the baby-faced young man, but a disfigured, disabled one. Although he was highly sympathetic, the yardsticks of knowledge and control yielded a failing grade. Any housewife knows not to mix electricity and water, let alone salt water. Anyone knows this from common sense, so while they were greatly sympathetic, jurors faulted him for engaging in such risky behavior. As a result, their damages award was significantly discounted for his contributory negligence. Although they also blamed a failure in supervision, his own actions undermined sympathy for him and the result.

A retired school-bus driver dreamed of driving around the country with his wife in an RV in their golden years. Before departing for such a trip, he realized he needed to change one of the tires. Unlike tires on a typical car, tires on this vehicle clearly required – as would those on a school bus – special procedures to avoid injury, such as placing chains on the tire and other precautions. Sadly, despite his years of professional experience with a bus that required a similar procedure, he cut corners and simply approached changing the tire as if it was on a VW bug. It exploded and nearly killed him. He was no longer going to tour the country. He could hardly walk and had significant and permanent brain damage. His wife, a nurse, was on permanent duty to care for him. Again, while some felt sympathy, jurors used the yardstick of knowledge and control, concluding he should have known better and exercised more appropriate caution. Goodbye windfall.

So, if you represent the Plaintiff, before you seek sympathy (or damages), first hold a mirror up to the actions of your client to consider what they knew or should have known, and what they did or failed to do. To the extent you can minimize these for your client and increase them for the defense, the better you will do.

Similarly, defendants may be assumed to be more knowledgeable and powerful and to have an obligation to be so, but being able to show a lack of access or ability for control can diminish liability, and in turn, damages. For example, what was the state of the art? What was the basis for your client’s beliefs and actions? Why was that reasonable and keeping with industry standards? What lack of control did your clients have over changes? Why wasn’t the “ideal” possible”? Often times, jurors will believe that profits motivated

defendants' actions or inactions, putting profits over safety, for example. This in turn often leads to the most powerful emotional driver in litigation: anger.

Anger

"*Anger cannot be dishonest.****"***

— Marcus Aurelius

One of the most potent drivers of jury decisions is anger, whether in deciding liability, awarding compensatory damages, or most relevantly, punitive damages. Even in cases in which punitive damages are not a real option, jurors often express their punitive emotions by awarding higher compensatory damages. One of the best ways to move a jury is to move them to anger and vice versa.

Angry jurors are more committed to their position, loath to abandon it, and prone to accelerate the amounts to award, thereby raise the ceiling, while less likely to want to listen to reason or facts. While facts, if they do seep in somehow, are a powerful way to combat anger, failing to address the causes of anger is a risky approach.

Anger shows you care. One cannot get angry about something one doesn't care about, so the trick is to discover what matters to the jury. In order to access their anger – or overcome it – you must know the trigger. What do people care about most? Themselves. They ask, "What if that was me? Or my child?" "Can that happen to me?" "What if they don't fix that problem?" Next, people care about greed and unfairness, particularly when those in power take advantage of those who are not.

For example, a young construction worker working on the roof of a building in which a sky light was under construction did not notice the open hole and fell through, suffering permanent brain injury. Plaintiff's counsel could display safety rules and OSHA guidelines and the like, as well as medical records, but none of that promised to anger the jury outright. It would only make them think. The goal was to infuriate the jury. How? By having an expert testify about the proper way to secure the hole – including some plywood and some 2x4s blocking access to it – and then, marching those items into court during summation and showing the Home Depot receipt for about only $80.00. Once angered by the callous cost-cutting of the owner, jurors were angry that it would have taken so little to prevent so much harm, and showed their anger honestly in the currency of jury anger by awarding significant damages.

As a defendant, there are ways in which one can *inadvertently* anger jurors and thus, move them in the wrong direction. This often occurs when counsel considers facts without considering the emotions that can naturally attach to them. While the facts in a vacuum may seem very convincing, they can backfire in the context of jurors' feelings. For example, while it may be true that an M.I.T. study shows that women make less in the workplace largely due to their own work/life choices, how do real people react to that? By saying that since women are the ones who have babies, employers should make adjustments to level the playing field by taking that into account. Or, say that an industry study shows that most people in an industry do precisely what the defendant did in the case, but jurors find that behavior objectionable. In that case, jurors will use the verdict as a means to correct the industry, starting with your client. In another instance, in order to refute claims of "pain and suffering"

of passengers on an ill-fated flight, expert testimony may show, that depressurization in the cabin results in hypoxia, which causes a mild sense of euphoria and feeling “high” before passing out and eventually dying due to lack of oxygen as a way to say that people on a crashing flight didn’t suffer. Try selling a bridge. Even if true, jurors are likely to storm the defense counsel’s table rather than accept this factual position as helpful. Instead, they ended up mocking it and displaced it with their own disaster fantasies of what the last 18 seconds of life was like for the poor people on the doomed flight on their way down. The expert testimony backfired and made them angry.

Skilled plaintiff attorneys tend to know how to dial up emotions. They know how to include details that bear the ring of truth, words that touch the soul, and images that relate to jurors’ own lives. It is usually the defense that needs greater awareness in this realm. When one considers presenting only the facts, they are giving their opponent a great advantage. Instead, consider also how the facts will play on jurors’ feelings. For the defense to succeed, it must consider how the events impacted everyone involved as well as how the verdict may impact everyone involved, and then, how all of that may impact the jury. It may be tedious, but failing to do so is perilous and failing is not a good feeling.

10 Things Litigators Can Learn From Newscasters

by Ken Lopez, Founder/CEO, A2L Consulting

High-caliber newscasters are an interesting group. They inform, they teach and they persuade us.They use visuals in a way that complements what they are saying quite seamlessly. Their attire is impeccable, they look the part, and their delivery feels more like a conversation than a lecture. Somehow, they confidentially speak to an audience who can't talk back to them, and yet they manage to build a relationship with that audience.

If you think about this description, it sounds a lot like a litigator.

Of course, there are big differences between litigators and newscasters. Litigators don't simply read what is in front of them (at least not the good ones). Preparation for a newscast takes hours or days, not the months or years a trial might take. And of course, the skill set of a litigator is quite broad outside of the courtroom performance aspect of the job, typically requiring the ability to negotiate, write well, organize well, think on your feet, lead a team, sell and much more.

Still, I believe there are some very useful lessons to be learned from watching how the news is put together. *The Nightly News with Brian Williams* is a good example of a high-quality newscast, and about 10 million people watch it every day. Whether the evening's anchor is Brian Williams, Lester Holt or Savannah Guthrie (she happens to be an attorney), the presentation is well-refined, the delivery is exceptional and overall, it serves as a good model for how to communicate in the courtroom.

Let's look at 10 things that litigators, especially those who participate in jury trials, can learn from a high-quality news broadcast.

1) **Newscasters never speak in jargon:** The language used is comfortable and accessible to all audiences. Litigators must work hard on themselves and with experts to strip away as much jargon and tech-speak as possible in their presentations.

2) **Newscasters look the part.** Brian Williams has been named to Vanity Fair's fashion hall of fame for his consistent well-tailored looks that convey professionalism without distracting from the information presented. I know great litigators who use style consultants to help plan their courtroom attire. If you can't or don't want to do that, read up on what works well as far as attire goes.

3) **The graphic presentation style is simple and clear.** A newscast is short. To get a lot of information across quickly and clearly, useful visual aides are critical. This chart below shown Wednesday night certainly gets the attention of those of us on the East Coast and quickly conveys information. It follows the simple rule of 'one concept, one slide' that we promote.

4) **The graphic presentation style is immersive.** We learned about the value of an immersive style of visual presentation from Dr. Ken Broda-Bahm. Watch this segment and notice how the visuals never stop coming. Indeed, they never stop during an entire newscast. Studies suggest this approach is best for courtroom persuasion. [38 seconds]

5) **The graphics complement what is being said.** Litigation graphics should not compete with what you are saying. They should only complement what you are saying. Watch here as visuals are constantly in motion, informative and persuasive. The golden moment is at the end when he describes the size of the search area. The visual combined with the phrase "size of Colorado" is unforgettable whereas neither would really be all that memorable alone. [23 seconds]

6. **The presentation is not just informative.** The presentation is entertaining as well. Brian Williams does a good job of appropriately injecting humor into his presentation. It makes him more credible and trustworthy. With that said, please remember that you never want to force courtroom humor and get a result like the one we discussed last June.

7. **Convey massive amounts of information.** In 20 minutes of the news, we learn quite a bit about some key subjects. The visuals are essential to this process as mentioned above. Also, clear language goes a long way to making it digestible. Many trials are much longer than they need to be because the trial team has not made proper use of demonstrative evidence. Free Downloads: A2L's Complex Civil Litigation Trial Guide or A2L's Litigator's Guide to Using Litigation Graphics

8. **Attention is switched (intentionally) between spoken word and visuals.** You must keep your audience on their toes. You must surprise them. Watch any *Nightly News* broadcast, and you'll see a combination of photos, graphics, video and talking heads used every time. The frequent switching of presentation methods keeps the viewer engaged. Try to match this style at an appropriate pace in the courtroom.

9. **The nightly news is on every night.** Until we can watch federal trials regularly, we have to learn from other sources like mock trials, state trials, televised appeals, CLE's, YouTube clips and the way they do things on the news. One of the great things about watching how they do things on the Nightly News is that it is on every day of the week, and they keep improving their approach. It is an easy and free place we courtroom experts can learn from.

10. **Don't take yourself too seriously.** Brian Williams is brilliantly funny, and it's his dry delivery that really sells his humor. He does not show too much of that on the Nightly News, but he shows just enough to forge a relationship with the audience. In this story, there is a two-and-a-half-minute video with some funny Brian Williams moments.

Why the Color of a Dress Matters to Litigators and Litigation Graphics

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

Today, the internet is abuzz over what color this dress is:

The online debate was whether the dress is **white and gold** or **blue and black**. There *is a right answer*, by the way, and I'll get to that below.

The debate has raged for hours and hours and has been widely, globally reported (at, e.g., NBC Today, CNN, NPR, BuzzFeed, Independent (UK),Reddit, and hundreds of other places) – just search "what color is the dress" on Google right now if you haven't yet heard of this dress.

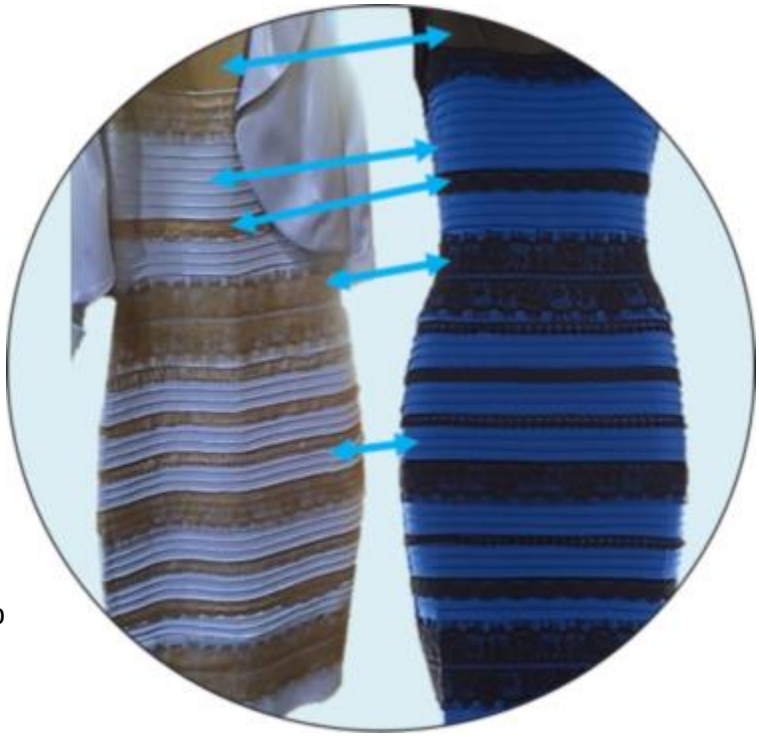
Celebrities like Ellen DeGeneres, Kim and Kanye, Taylor Swift, and Matt Lauer have all weighed in. BuzzFeed.com alone has reported over **21 Million** views of this dress. Wired.com has even gone to the length of engaging an expert to analyze the image and assign real color values to the dress's various parts – who said it is blue and black. Even after this expert photo analysis and knowing of it, NPR's David Greene still swore it was white and gold and told Renee Montagne she was "wrong" for believing it to be blue and black.

I've been staring at the photo above for many, many minutes now and I must admit that I see it as pale blue with gold stripy-trim. I'm crazy (holy cow – before I got to the end of writing this article I looked back at the photo above and see it as blue and black now!).

So, why does this matter to you as a litigator?

It matters because **THERE IS A CORRECT ANSWER HERE**, but millions of people seeing actual, real evidence (the photo above) have divergent and strongly held opinions on the issue and are willing to take time out of their day to argue it. NPR's David Greene told his coworker she was wrong about it. Folks on Gawker are insulting one another in comments debating the issue. These people are your potential jurors, and this blip on the internet's timeline shows you that sometimes the facts are less important than perception and impression.

I'm sure you can imagine a jury arguing over what is and what is not "reasonable" or whether a patent's claim limitation is infringed by some plastic, flexible component of an accused windshield wiper blade product in a similar fashion to the folks on Gawker.com arguing with one another over a dress's hue. This dress shows how scary this reality can be when your client's case, life, company, and/or money is on the line.



Well guess what – here's a photo of *the dress* in a different light:

It's pretty clear now, isn't it, that the dress really is blue and black. How can there be any debate?

What is this photo to the right? Is it actual evidence of the color of the dress above, the one the whole world is consumed with? **No, it is not**.

What we have here in the photo to the right is demonstrative evidence. We are using it to

illustrate that a similar dress, from the same company, designed in the same way as our dress-at-issue, but photographed differently, shows our dress's actual colors. Here, it's the only "proof" we'll get, and this shows the critical impact demonstrative evidence (litigation graphics, scale models, animations, etc.) can have on an audience you're trying to persuade.

Whether this is real evidence or demonstrative evidence **matters not** to jurors according to the top jury researcher in the country (Dr. Laurie Kuslansky). Jurors simply don't distinguish between actual evidence and what you show in litigation graphics to demonstrate your points – it's all just "evidence" to them.

Are you now convinced that the real dress is blue and black? I am (however, I just looked at the real dress photo one more time and it looks blue and gold to me again).

Could Surprise Be One of Your Best Visual Persuasion Tools?

by Ken Lopez, Founder/CEO, A2L Consulting

I notice something about audiences in the PowerPoint presentation era. They seem to get easily disengaged part of the way into a presentation. This tendency is especially problematic in a courtroom setting since judge and juror visual attention is critical for courtroom persuasion.

We've all seen this before whether at trial or elsewhere. An audience member will start out sitting up straight and smiling, and then, after some time passes, they are looking at you, but you know there's some other unrelated processing going on behind the stare (i.e. family issues, work challenges or what's for lunch). This behavior occurs in all types of presentations whether a trial presentation, a board meeting presentation or a sales presentation.

To cope with drifting off, consultants have long encouraged presenters to put their important material at the beginning and at the end of presentations when audience attention is at its highest. That suggestion has always bothered me, since at trial, we really need our jurors to stay with us the whole time. But how can this be achieved?

I've noticed a peppering of articles and research on the topic of surprise over the years. Some researchers connect surprise with attention *and* persuasion. It's common sense that surprise would create attention, but it's less obvious how visual surprise would support persuasion. Let's look at some examples.

I wrote in 2012 about a study involving font choice. The study concluded that by choosing a hard-to-read font, one could force an audience member to stop, pay attention, read carefully what was written and overcome a natural human behavior called confirmation bias. Confirmation bias is the tendency of people to make up their mind about something, such as about a case during opening statements, and then only really listen to subsequently provided information that supports their predetermined conclusion. Choosing a difficult-to-read font is a form of surprise that forces the viewer to drift back in after drifting off, but how far can we take that?

I have long encouraged our clients to mix their media throughout their trial presentations. For example, use trial boards, then switch to PowerPoint litigation graphics, then play video depositions for the jury, then use a scale model in court, and then tell a story etc. It's all just another form of surprise, and anecdotally at least, I can tell you it keeps an audience engaged when you use these methods.

A criminal defense lawyer has written about using surprise and humor to force jurors to think more deeply (less reptilian) about a case. Fellow jury consultants have described how jurors can be encouraged to remember something with surprise and how disrupting expectations may yield better results. There have also been some interesting studies performed on this topic.

Some well-known and well-studied psychological phenomenon also support the use of surprise, particularly visual surprise, in a courtroom context to maximize persuasion. The doctrine of just noticeable difference is a good and simple rule to be aware of. Essentially, one should be sure to introduce visual differences that others will notice, if one is hoping to grab attention. Further, the Hawthorne Effect reminds us that changing anything significant will produce change, and ideally the change we want is for people to pay close attention.

Few studies have discussed the topic of visual surprise as a persuasion device, but I think there is enough closely-related science and enough anecdotal evidence to support employing techniques like:

- On your slides, don't just keep your title bar at the top. Move it to unexpected locations when you want to grab attention. Use a title bar on some slides and not on others.
- Change your fonts throughout a presentation. Your designers won't love this, but remind them that the most beautiful design is the one that delivers results, not the prettiest.
- Change your background colors and template entirely during the same presentation.
- Use color coding schemes to signal topic changes.
- On your slides, don't just show text slide after text slide. Instead, mix it up with charts, photographs and more.
- Mix your presentation media as discussed above.
- Use silence creatively to grab attention.
- Tell stories. Tell visual stories.

- Change where you are standing in the room.
- Remember the opposite is true too. If you are hiding bad information, put it in clear graphics that look similar to recently presented slides. It **is** possible to use visual boredom intentionally for a courtroom advantage.

12 Ways to SUCCESSFULLY Combine Oral and Visual Presentations

by Ken Lopez, Founder/CEO, A2L Consulting

A lot of litigators express confusion about how best to use litigation graphics. Top litigators are asking smart questions like:

- Should I pause to let a jury take in a graphic before speaking?
- Should I turn off my presentation while I am speaking?
- How much text should I put on a slide?
- How much of my slide should I read?
- And, what's all this negative talk about bullet points (especially when the author of this very article uses bullet points to talk badly about bullet points)?

In many cases, it is litigation graphics consultants who are to blame for this general state of confusion. For decades, litigation graphics consultants have been telling litigators that combining oral and visual messages will increase judge and jury information-retention and understanding. That's correct, but most litigators have never been taught *how* to combine the two exactly, and getting good results depends entirely on the *how*.

To drive the home the need to use courtroom visuals, litigation graphics consultants have used science to emphasize their message. Most of us have heard of or talked about the much-cited Weiss-McGrath study. Among other things, it is reported to conclude that

combining oral and visual messages will result in a 650% increase in people's retention of information.

So, what have litigators done in the face of all of these confusing messages? They listened and they adapted to the changing times.

Litigators started using graphics in earnest over the past twenty years. Printed trial boards were used at first, and then PowerPoint litigation graphics arrived in the mid-2000's. Despite these efforts to improve courtroom communications, I fear that many times the way oral and visual presentations are being combined is doing more harm than good.

Why? Well, I believe three key things have gone awfully wrong:

1. Over the last 20 years, very few litigators received guidance from litigation graphics consultants about what works when combining graphics and oral communications.

2. Without real guidance, litigators made an understandable mistake by using litigation graphics as a means to read bullet point filled slides to jurors.

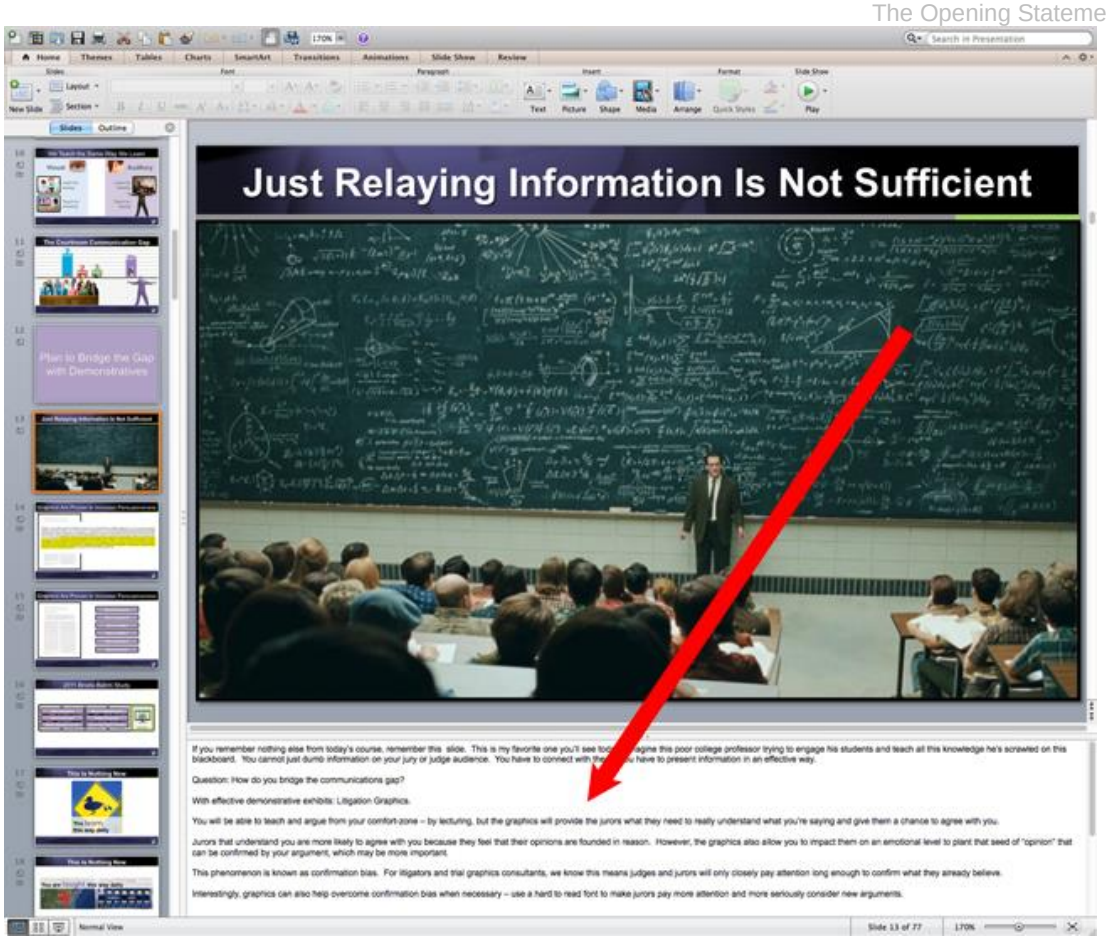
3. As for the science, despite thousands of citations to it, there never was a Weiss-McGrath study. Still cited by many trial graphics firms as their Raison d'etre, this report was recently proven to never exist by an diligent law libarian [p27-30 of this pdf]. Fortunately, the science supporting the use of litigation graphics turns out to be better than what this mythological study reported, and I'll describe it below. The fact that this study never existed just underscores the confusion that both litigation graphics consultants and litigators have suffered through these past 20 years.

So, I think we find ourselves in a time where litigators are trying hard to figure out what works best when using visual evidence, and litigation graphics consultants are not doing enough to help them. My hope is to remedy this problem by describing what we modern litigation graphics consultants mean when we promise that you will get better results if you *do* combine oral and visual presentations - the right way.

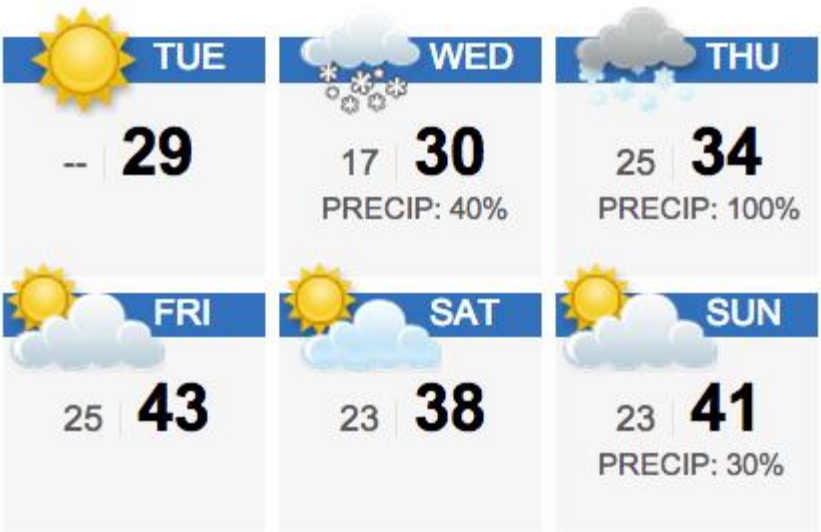
Here are 11 ways you should combine your spoken presentation and your visual presentation to achieve maximum persuasion:

1. **Forget about bullet points in the way we've come to expect them (like the slide below)**. Yes, at A2L, we talk about bullets every third article or so, and for good reason. If you read your bullets (and you're likely to do so if you use them) you are almost certainly worse off than if you had not used litigation graphics at all. See these 11 A2L articles about bullet points for more. This applies only to presentations, **not** written materials where bullets can be quite valuable.

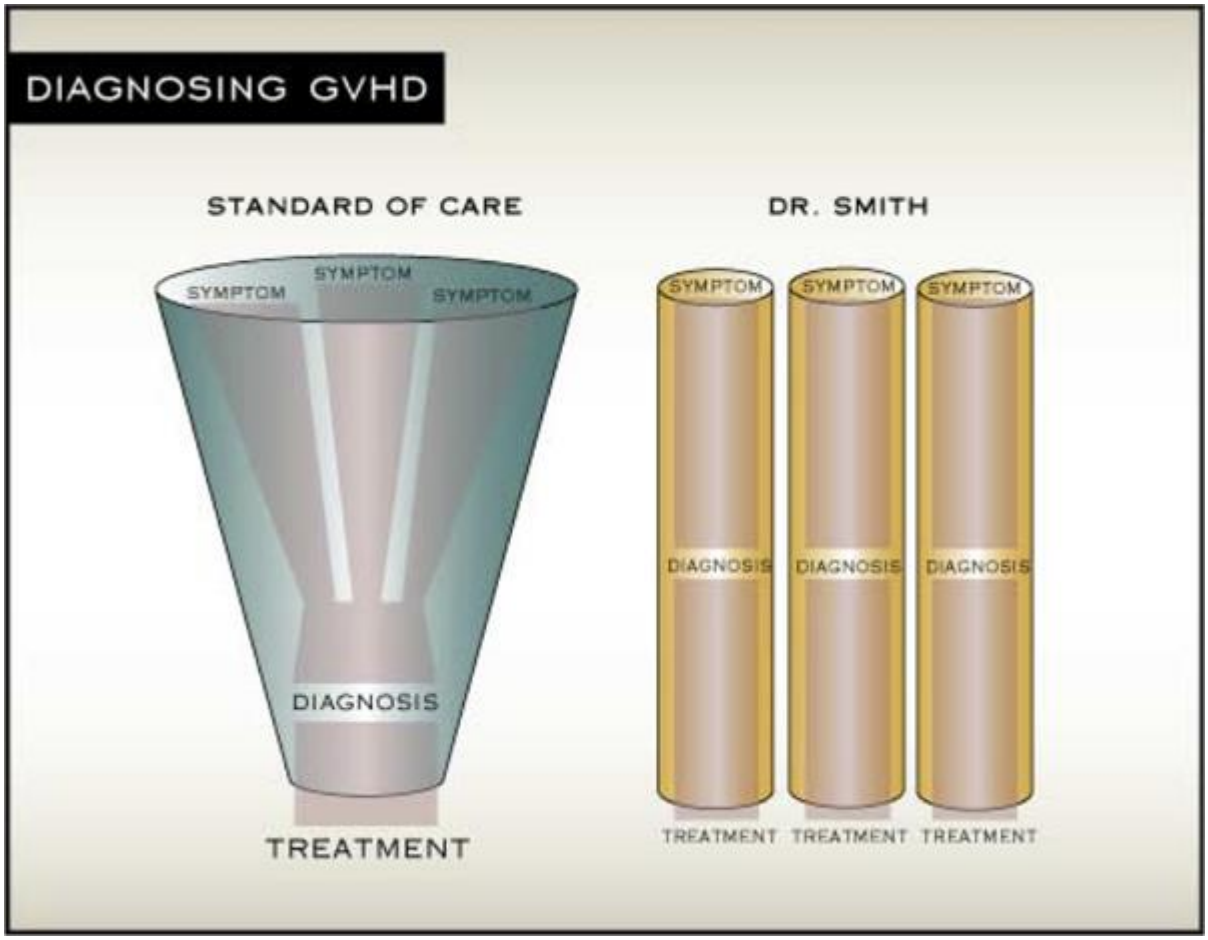
2. **Use speaker notes.** Whether you simply print this information out or you use a dual screen set-up when you project your slides, having your notes available within PowerPoint is simple. Simply place them in this area shown below, and you will be able to print these notes next to your slides or print them alone. Either way, this will help you avoid putting everything you want to say on your slide.



3. **Never duplicate your spoken message on screen**. Instead of reading your slides, plan to have some of your message spoken have some of it be visual. Try to think of yourself as a popular on-air meteorologist. While the weather forecast is easily conveyed with a simple graphic like the one below, it helps to hear additional details, story, and meaning from a person. It is a much more memorable experience to look at this chart while hearing someone say, "Wednesday's snowstorm will be crippling for parts of the DC region."



4. **Create some graphics that you can speak to**. It's okay - indeed it is possibly better - if you have a graphic that needs some explaining. It will give you something important to say and enhance your message overall. For example, this circa 1997 litigation graphic below does not stand on it's own since you really cannot tell what it means. However, if you explained, using this chart, that the standard of care requires a differential diagnosis (i.e. narrow the cause of several symptoms to a specific disease whenever possible) and Dr. Smith instead diagnosed and treated nine separate problems, you get a clear and memorable picture.



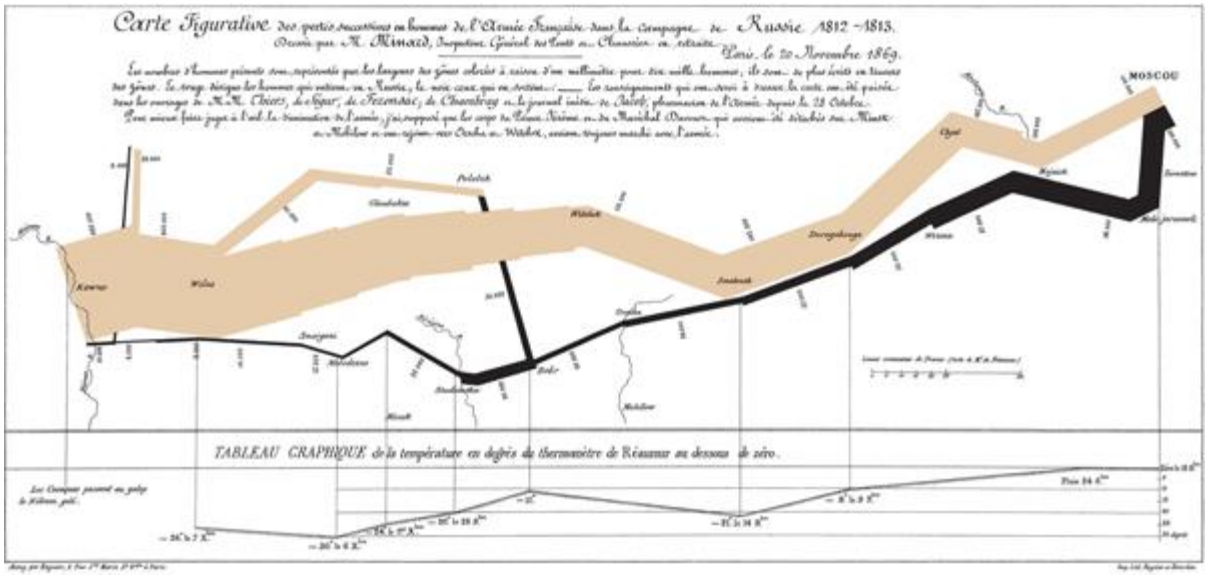
5. **Use the B-Key**. Don't leave up or show a slide that is unrelated to what you are saying unless that is an intentional tactic used to distract from what you are saying. The b-key displays a black screen when pressed and returns you to your presentation when pressed again. If you think of a news anchor for a moment, wouldn't it look strange if Brian Williams was talking about the Winter Olympics while there was a video playing of a hurricane over his shoulder? Of course it would. Use the b-key to subtly tell your judge and jury to return their attention to what you are saying, not what you are showing.

6. **You don't always need to be speaking, but you probably need to be always showing something**. A recent study demonstrated that an immersive style of trial graphics presentation will yield the best results. The results of this study suggest that you should always be showing a visual when you can.

7. **Pause**. When you bring up a new graphic, let your silence encourage the jury to look at your litigation graphics and soak it in.

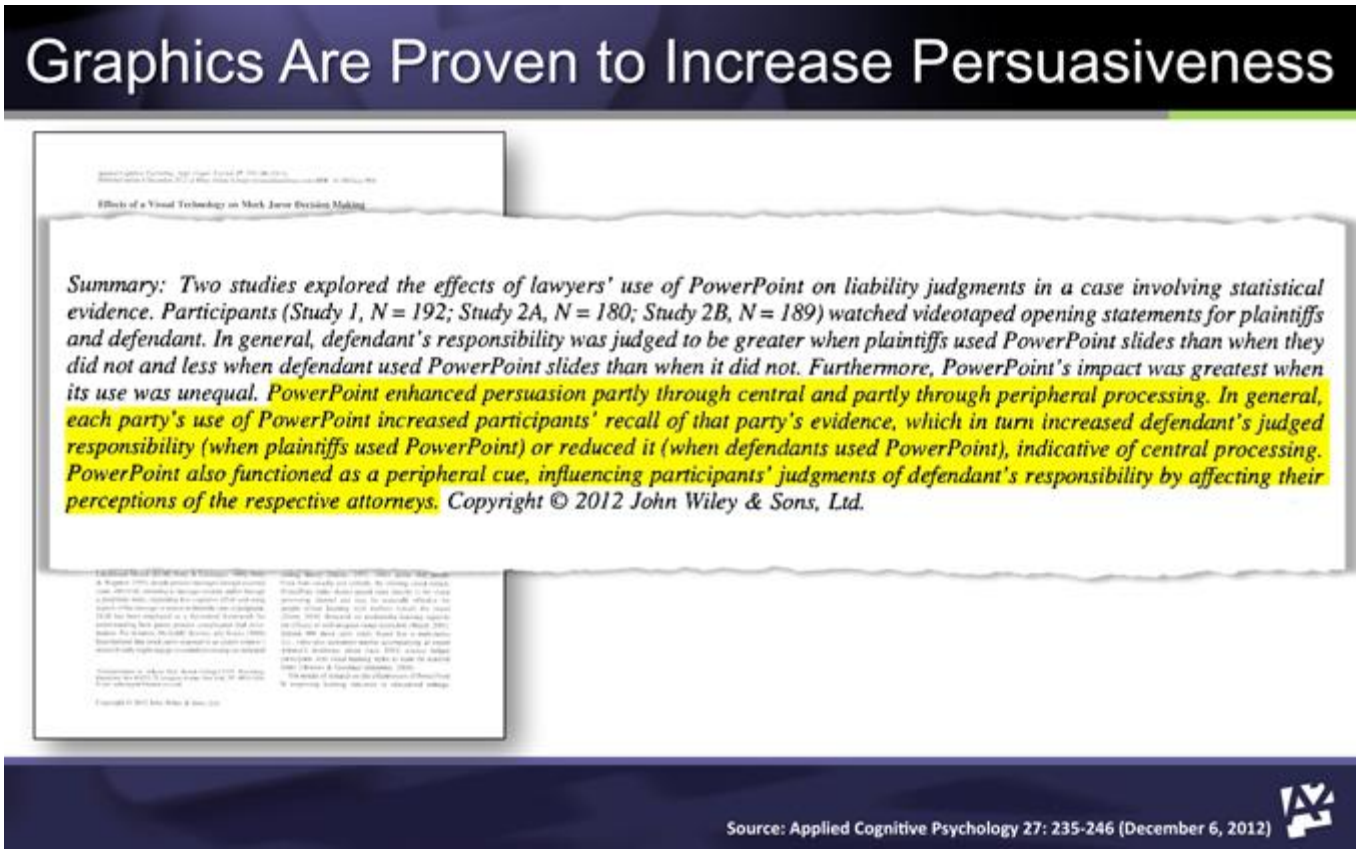
8. **Subscribe to this blog**. This is not (only) a self-serving pitch, I really mean it. If you are in litigation, there are only a couple of blogs that cover this information with real authority. If you are watching what we are publishing, you will stay ahead of others around you. About 3,800 of your peers subscribe already.

9. **One concept per slide**. Lots of people talk about the graphic below and how it is a great example of effective information design. It is beautiful, but it would make a terrible demonstrative exhibit at trial. Why? Because there is way too much information shown on a single graphic. At trial, keep it simple - one concept per slide. If you have to use a chart like this one, build it up over a number of slides and then display it as a printed trial board.



10. **Minimize text**. In general, never use less than 28 point font size in PowerPoint, and you will be in good shape. This rule will force you to limit the amount of text that you use, and will keep your presentation legible at the same time. You don't want to try to mimic a Steve Jobs iPhone launch exactly, but you want to limit your text as much as possible.

11. **Keep up with the science**. Academics are turning their attention how one best persuades with graphics. In 2012, one of the most important studies to date was released. It showed specifically that the use of PowerPoint increases persuasiveness. Part of the abstract is shown below. You'll find this article helpful too: 6 *Studies That Support Litigation Graphics in Courtroom Presentations*.



12. **Practice, practice, practice**. Don't spend time and money developing a great argument and great litigation graphics only to fail to practice combining the two. We advocate a 30:1 practice to performance ratio.

Combining oral and visual messages is the best way to communicate with your jury. This is based on commonsense, experience and good science. Many lawyers have never been taught the right way to do it, and I hope this article has been a help. I would welcome hearing from anyone interested in learning moreor talking about how this applies to a specific trial presentation challenge.

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.

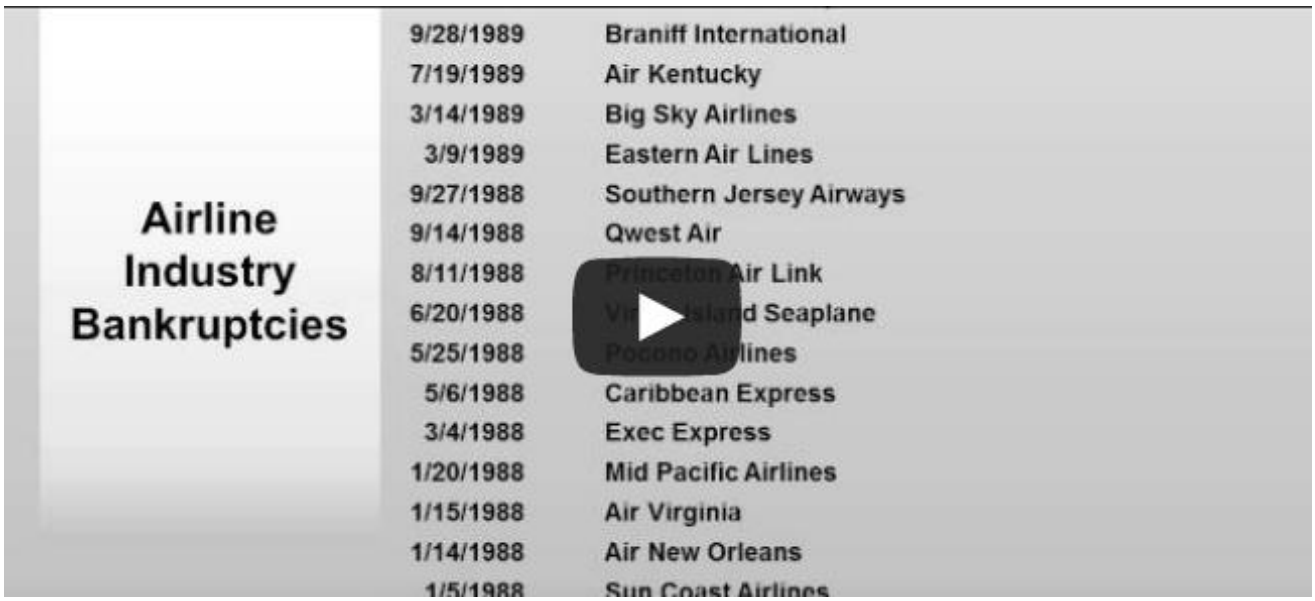
As a litigation graphics consultant who has been using PowerPoint since the 1990s, even I am amazed by the litigation graphics some artists are able to create using PowerPoint. Using real artistic skill combined with PowerPoint's built-in features unleashes impressive creative potential. What used to 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.

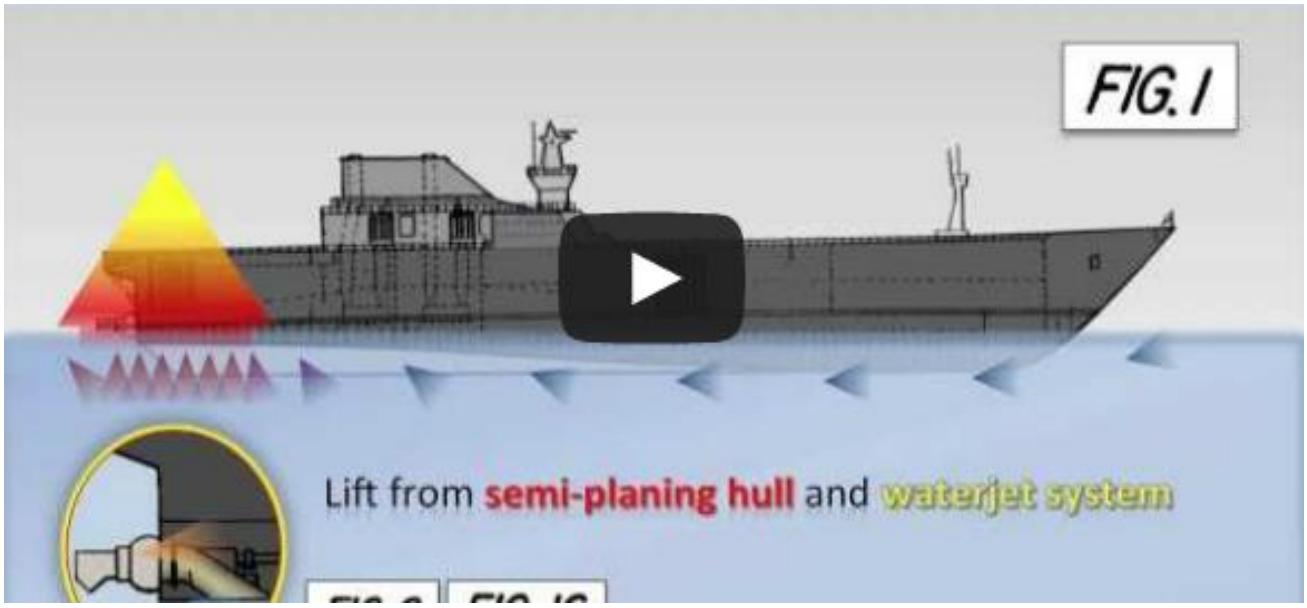
We have written before about combining illustration with PowerPoint animation to achieve great results and the four types of animation one typically sees at trial. The purpose of this article is to help you understand how far you can stretch PowerPoint. It's not the right tool for every situation, however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

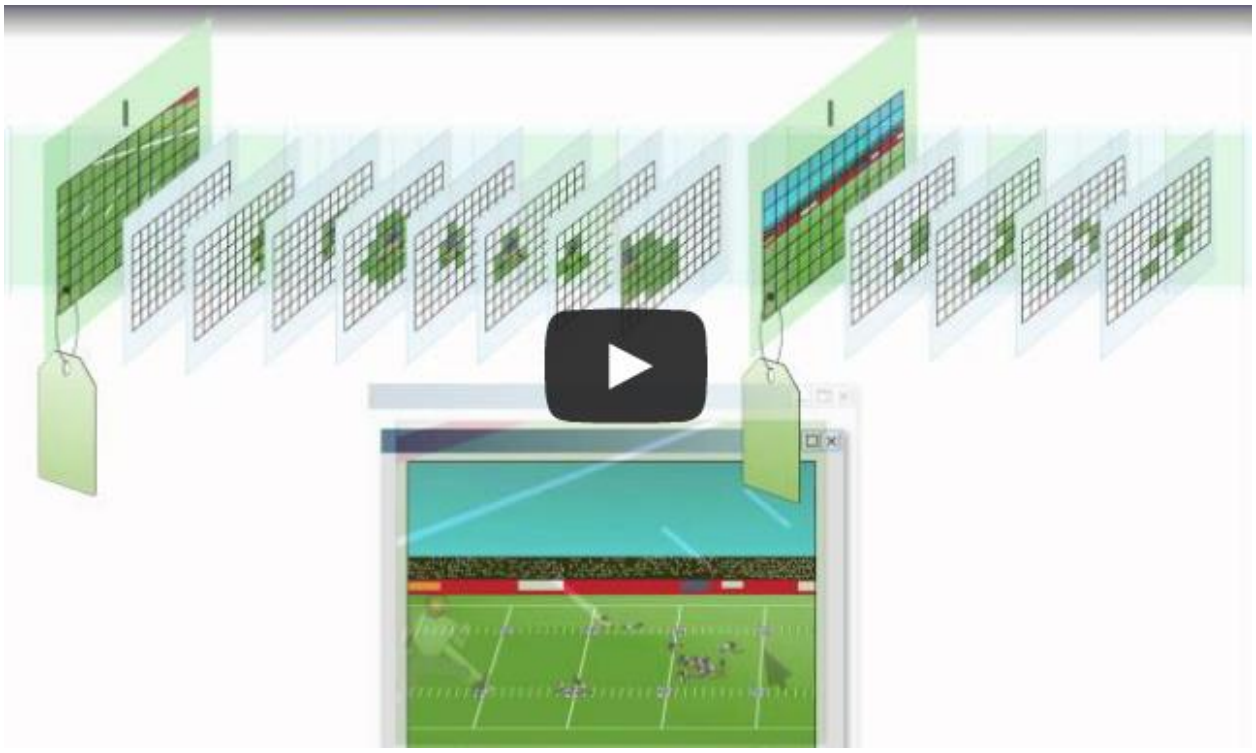
1. This PowerPoint litigation graphic prepared for a recent antitrust trial is really a timeline in an unusual format. To emphasize how difficult it is to run an airline in the United States, a long list of bankruptcies is set to scroll like movie credits in PowerPoint. Interested in more timeline examples,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

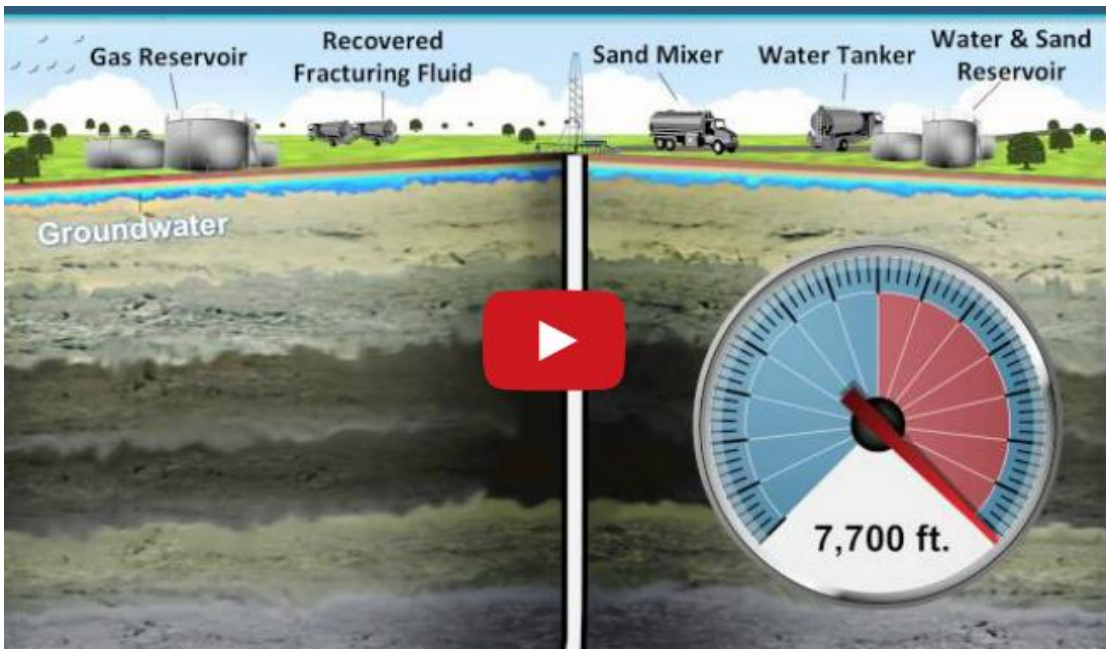


3. This clever PowerPoint makes good use of motion path animation and illustration to explain video playback patented technology. The use of "tags" helps explain the concept of keyframing in video encoding and playback in a jury-friendly way.



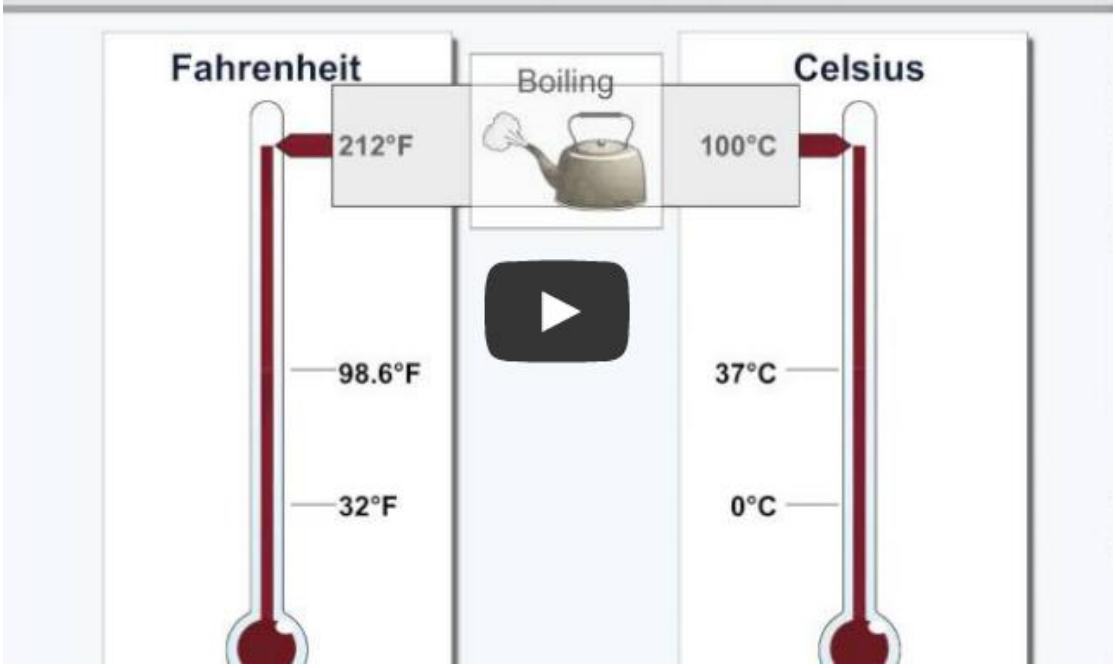
4. PowerPoint can even be used to show deposition clips. If you have more than a handful of deposition clips, you would probably want to use Trial Director to show them, but for a limited number or a group of short clips, PowerPoint does a good job.

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.

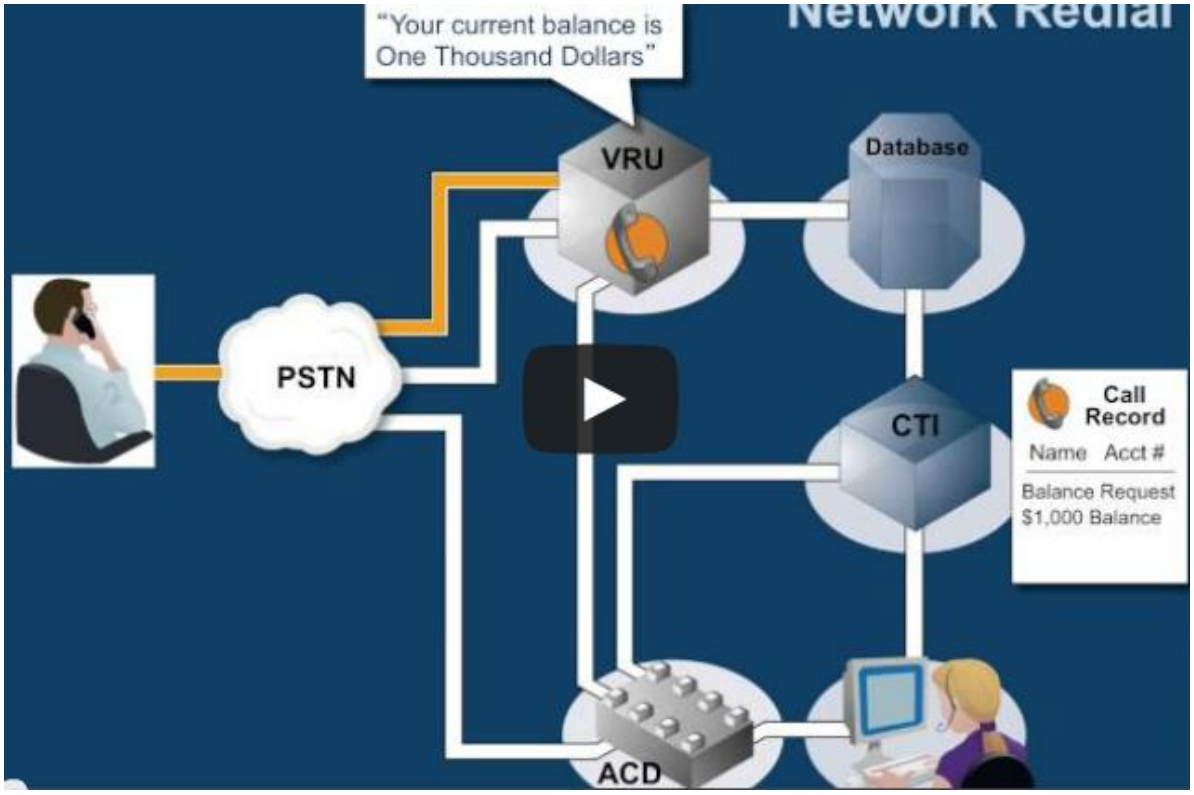


6. This simple traffic cop animation explains the roll of an operating system in an easy-to-understand format. By using illustrations combined with animation in a PowerPoint litigation graphic where small parts are varied, an animated or cartoon effect is achieved within PowerPoint.

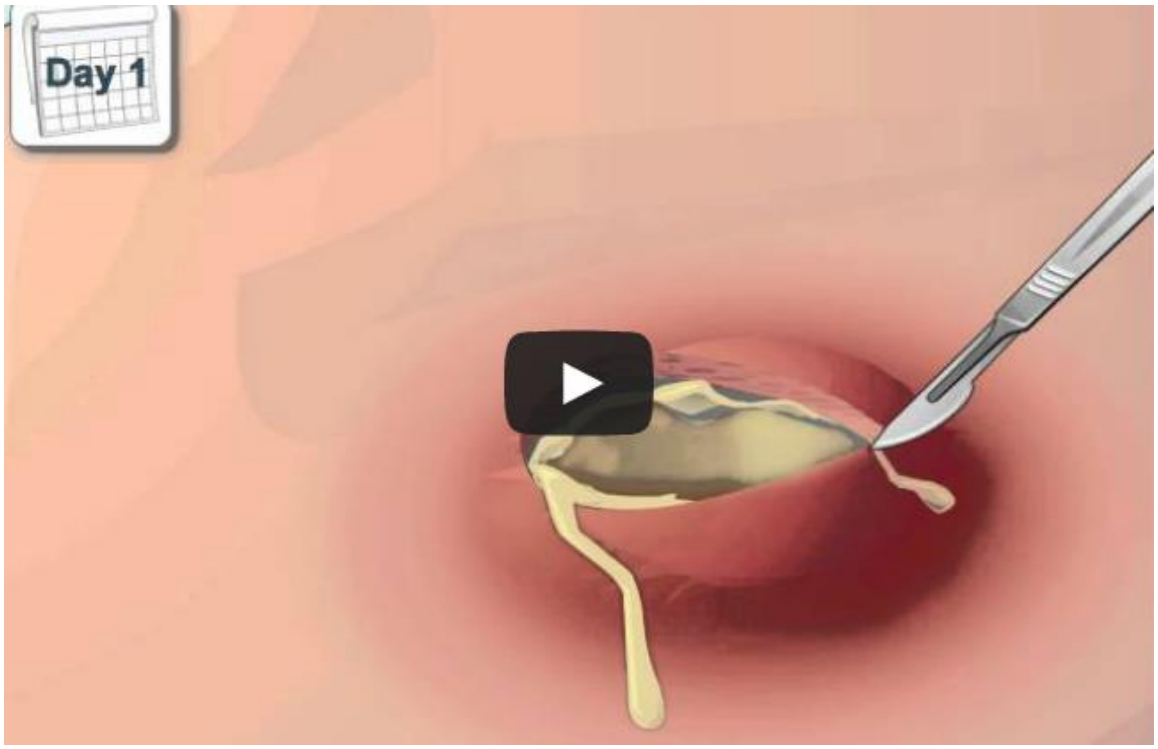
7. In a very simple way, this chart uses PowerPoint to show how Fahrenheit and Celsius scales compare to one another. Like many of the examples in this article, it's surprising that the graphic was created in PowerPoint.



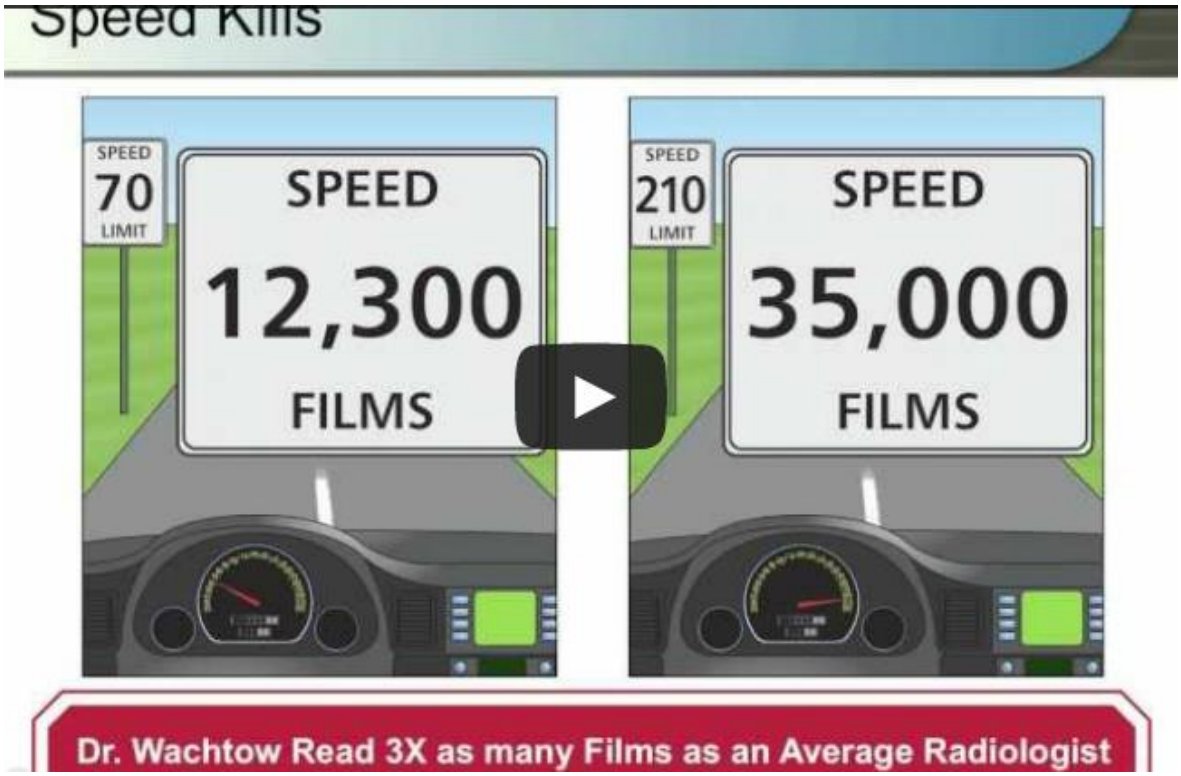
8. This chart shows how a phone dialing system works and is designed for a judge's viewing in a claim construction setting rather than jury viewing during trial. Again, it is animated and presented entirely in PowerPoint.



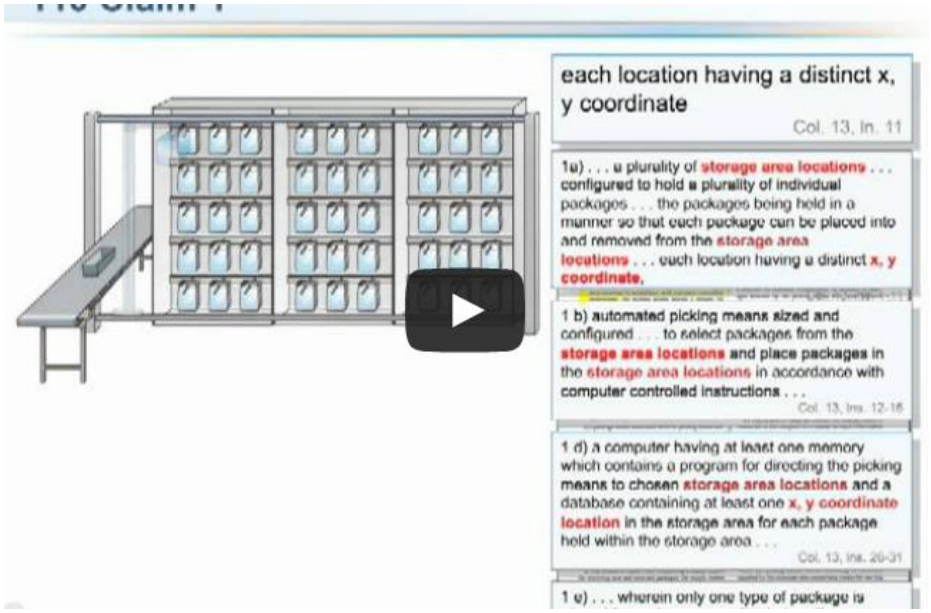
9. Even a surgical procedure can be shown using a combination of illustration and PowerPoint animation techniques. Such work can make courtroom animation economically feasible in even small cases.



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.

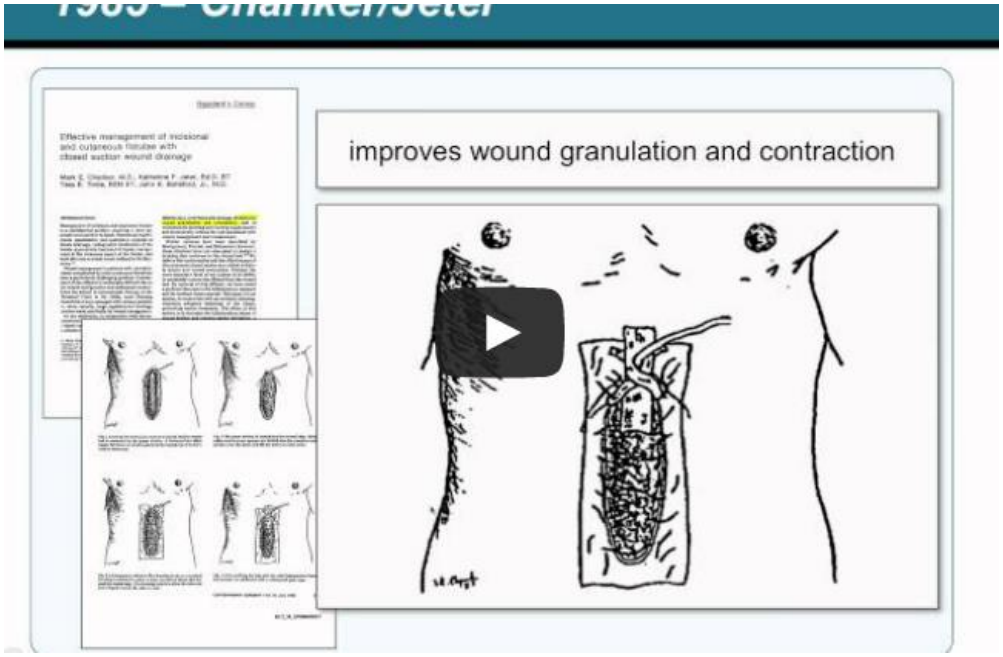


11. For a claim construction hearing, this PowerPoint was created to show how a drug delivery system works in a hospital environment. Claim language is shown in conjunction with the PowerPoint litigation graphic to give it context and meaning. I think it is a smart use of animated graphics juxtaposed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

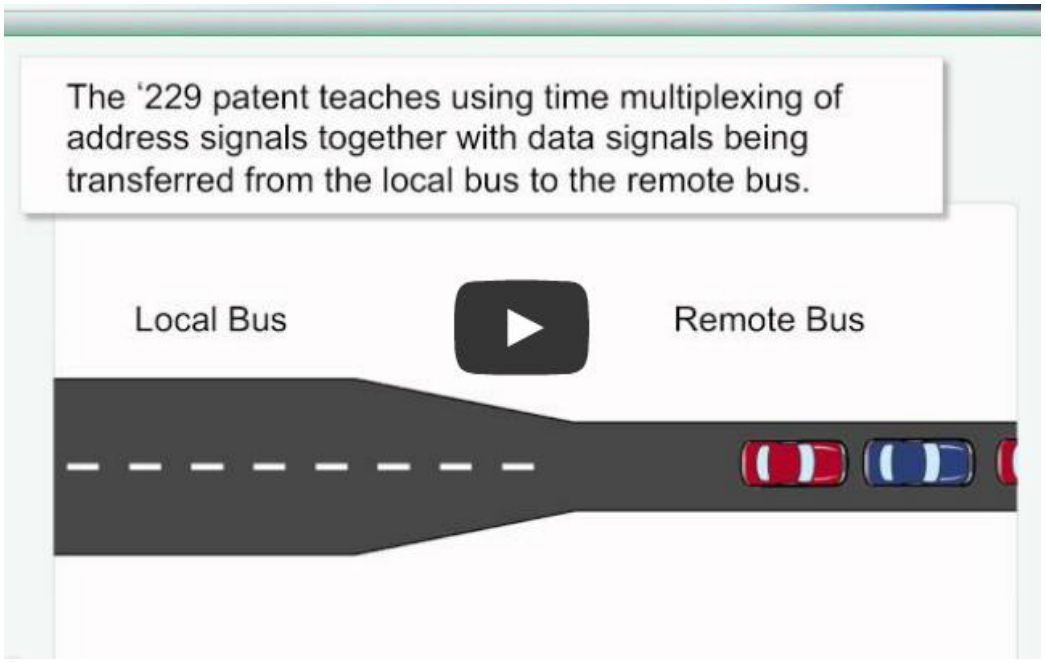


12. Here, the removal of a nuclear power plaint reactor pressure vessel is shown. By creating illustrations that are shown in quick succession, the effect of animation is achieved in PowerPoint without having to go through the expense and complications of creating an animation.

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.

[New Webinar] 5 Ways to Maximize Persuasion During Opening Statements

by Ken Lopez, Founder/CEO, A2L Consulting

If you can win the battle of opening statements, you'll likely win your trial. Up to eighty-percent of jurors will make up their minds about your case during opening statements. In this webinar you'll learn the top-five ways to maximize persuasiveness during opening statements.

From how to tell compelling stories to visually supporting your key arguments, this one-hour will reveal the best secrets from courtroom persuasion experts. Ryan H. Flax, Esq., A2L's Managing Director of Litigation Consulting is an accomplished litigator who helps trial teams perfect their trial story and trial presentation using the latest persuasion science.

Even if you can't make it to the live event, you'll receive access to the recorded version just for registering.

WEBINAR TOPICS:

1. Why and how to frame your case as a story
2. What NOT to do when introducing your case to jurors
3. Why and how to support your opening statement with images and graphics
4. Pitfalls and the dangers of poor visuals

Here are the details of the free webinar:

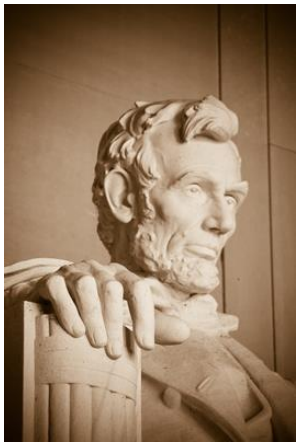
What: 5 Ways to Maximize Persuasion During Opening Statements
When: Tuesday, March 24, 2015 at 1:30pm ET How long: 45 minutes + 15 minute Q&A
Where: Online, once registered you will receive a personal login link
How much: Free
Why: Understand how to best persuade fact-finders during opening statements.
Who: Led by veteran litigator, Ryan H. Flax, Esq, A2L Consulting's Managing Director of Litigation Consulting.
How: Click here or on the button below to register for the complimentary webinar.

Whether you are in-house counsel, outside counsel, or litigation support, this 45-minute webinar will prove valuable and reveal secrets learned by one of the world's top persuasion experts.

5 Ways to Maximize Persuasion During Opening Statements

Click to Watch The Free Webinar Now

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.

4 Tips for Stealing Thunder in the Courtroom

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

"*In Limine*" in Latin means "at the threshold" and some judges wait for the threshold of trial to rule on *motions in limine*. Using this motion, litigants may attempt to preclude arguments and/or evidence that one side believes is a "side show" by the other side, but may not find out until trial begins if it will be in or out of the case. Lenient judges may let in such information, despite cogent protests against it. When that happens, how do you deal with it?

The Problem

In many venues, and for many jurors, the *side show* is more interesting, understandable and dramatic than the drier facts of the case. For example, wording of a contract pales in comparison to illicit acts alleged against some of the key actors. Nasty remarks ring louder

than appropriate conduct. A spotty personal history is a bigger attention-getter than that person's work history. An affair outside the workplace is juicier than business as usual.

When to deal with the side show?

Answer: As soon as possible.

We understand the reluctance of counsel to appear defensive and side-tracked by overly-attending to the opposing side's case. However, not doing so leaves too much room for the opponent to enjoy an unwanted advantage. If the jury gets the wrong impression from your adversary, it is difficult to reverse it by waiting too long or worse, leaving it to jurors to figure out themselves. Leave nothing to chance. In order to downplay the relevance or importance of distracting, negative information, address it head on and early. Some refer to the potential techniques as "stealing thunder" or "raining on their parade."

What is thunder?

"Thunder" in litigation is potentially powerful, negative information asserted by an adversary. It may be front-and-center information that is harmful, a weakness in your case presented by your opponent, or the stuff of a side show that is not immediately relevant, not really probative, but presented for that very reason – to be loud and problematic in order to leave a lasting impression.

Where does "thunder" come from for jurors?

Anywhere.

There are numerous real-life anti-heroes in the news who can easily roll off the tongues of potential jurors (e.g., Bernie Madoff, Toronto mayor Robert Ford, Olympian-turned-murder defendant, Oscar Pistorious, George Zimmerman, or good-turned-bad teen idols, such as Justin Bieber, Miley Cyrus, Lindsay Lohan, Amanda Bynes and Chris Brown).

Antiheroes became all the rage in TV and movies of late. Popular culture and its vivid images are easy points of reference for many jurors. For example, 10.3 million viewers watched the final episode of Breaking Bad. Such figures lend credence and impact for negative impressions.

If jurors have seen movies such as "Wolf of Wall Street" or characters on TV shows such as Tony on The Sopranos, Walter White, the meth-making chemistry teacher on Breaking Bad, Patty Hewes, the super-lawyer representing amoral corporations on "Damages" and others – they have immediate access to highly negative images of anti-heroic characters in fiction that are summoned when evaluating key figures in a lawsuit who may share negative traits with them. Or, at least, that is the hope of a trial lawyer trying to use negative information as thunder. Here is a list of TV's top 17 anti-heroes of 2013. After all, jurors may have seen them, so you should know what you may be up against if they have.

"Stealing Thunder"

If you are certain your opponent will raise potentially negative information that can highlight weakness to your case, thereby creating thunder, it is foolhardy to let it echo unaddressed. If such weaknesses will not be raised by your opponent, of course there is no reason for you to do so.

One way to do counter damaging negative information is by stealing its thunder, i.e., "a dissuasion tactic in which an individual reveals potentially incriminating evidence first, for the purpose of reducing its negative impact on an evaluative audience." [1]

How to Steal Thunder?

It isn't enough to tell people not to think about the pink elephant in the room, or at trial, to simply "tell" jurors what doesn't matter. You have to go the extra step of explaining how and why it doesn't matter. Taking the bull by the horns requires showing that the side show doesn't pass muster in specific ways:

1) **Do it first.** If you are the Plaintiff, anticipate the defense presenting a side show, and steal their thunder by addressing the negative information in your opening – before the defense does so in its opening statement.

2) **Actions speak louder than words.** For example, were there any actual actions taken at the time to show that the complaints had merit? Did anyone lodge a formal complaint at the time? Did anyone go to HR? Did anyone file a lawsuit? If not, then those are issues that were not issues at the relevant time, but only ones magnified after the lawsuit.

3) **Now vs. Then.** If possible, show that those allegedly disgruntled about such conduct *now* did not take action at the time. Contrast the two time frames to show a lack of support for the allegations at the time and that they only became alleged issues after the fact.

4) **Options and control:** Key in succeeding to defeat such issues is showing that, at the time they allegedly mattered, the aggrieved had the wherewithal to make choices and take actions, but did not – not because they couldn't, but because they didn't have reason to do so. Otherwise, dismantling their complaints is anemic.

Does it work?

Yes. Stealing thunder *significantly reduces* the impact of negative information. [2] It minimizes the importance and reduces the potential damage of negative information. However, this tactic is "no longer effective when opposing counsel revealed that the stealing thunder tactic had been used on them."[3]

Sorry, but I have to steal your thunder, too.

You may be countering the advice provided here with the thought that you don't want to draw attention to the opposing side's *side show* by talking about it directly in your case. While that is understandable, it is ill advised. Even if you don't talk about it, and your opponent does, the jury will, too, and decades of real-life jury interviews have shown that when jurors talk about your client, you do worse, and vice versa. Litigation is just the opposite of what Oscar Wilde once said, i.e., There is only one thing in litigation worse than not being talked about, and that is being talked about -- so take heed to direct the talking.

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.

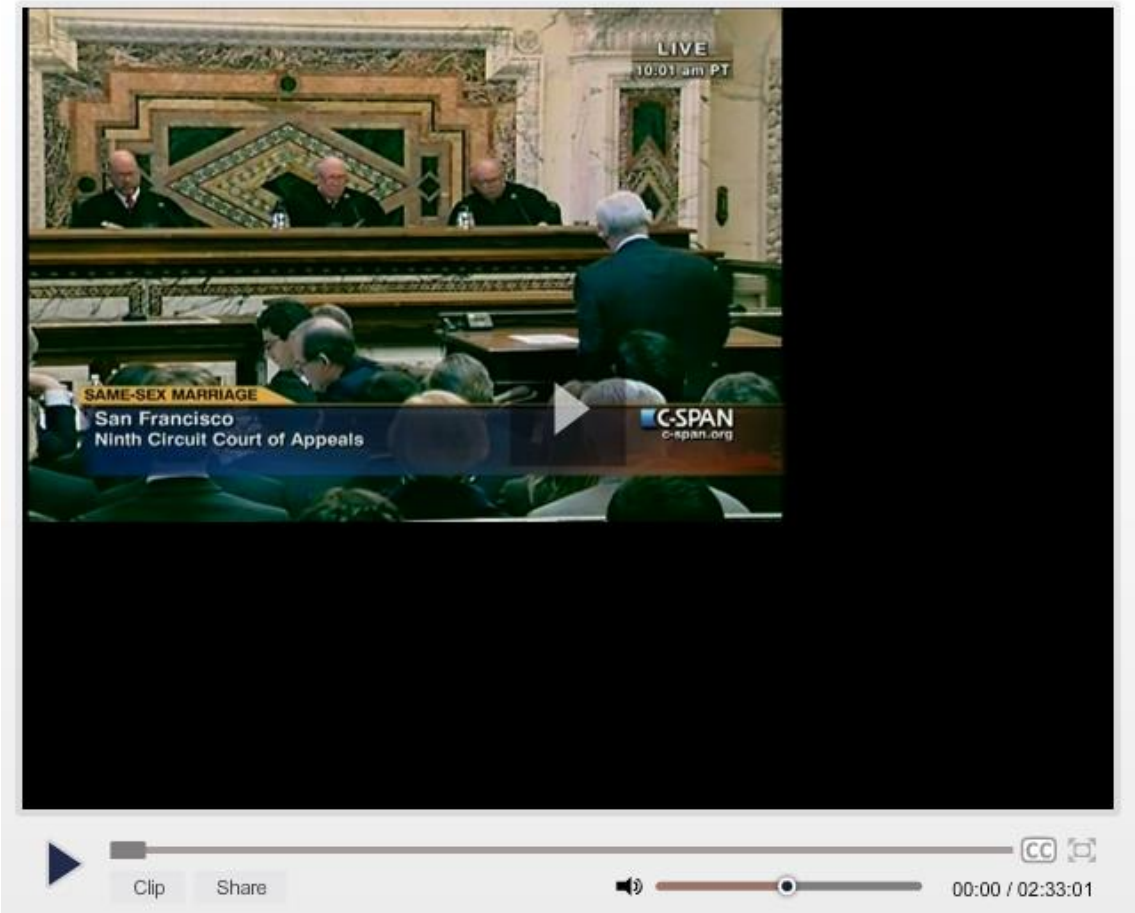
2. **Will Trial Technology Make You Look Too Slick?** We covered this topic in a previous article and thought this powerful post-trial jury interview deserved a second look. This rural Arkansas jury is not shy about sharing their feelings toward trial technology and litigation graphics. Thankfully, the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

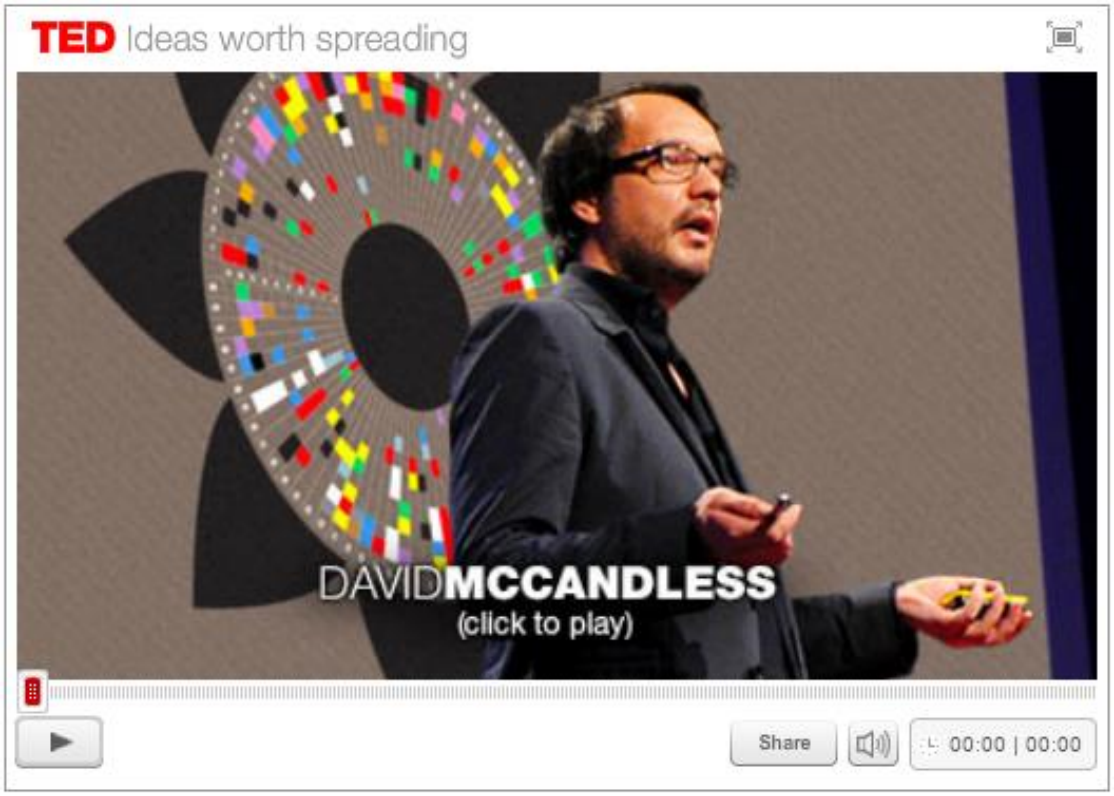
6. **Ted Olson and David Boies Deliver Oral Argument:** One of our jury consultants said this was like De Niro and Pacino appearing in the same movie. Famed litigators Ted Olson and David Boies argue Prop 8 before the court in Perry v. Schwarzenegger.



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.

Why Do I Need A Mock Trial If There Is No Real Voir Dire?

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

Answer: So you can learn the best story for the worst jury.

Have you ever gotten to your seat on an airplane and, without speaking to anyone, seen who was next to you and thought, “This is gonna be trouble!”? Or boarded a train and decided to keep walking before choosing your seat? Of course you have. And that’s because there is a wealth of information that we, as humans, gather instinctively and automatically all the time.

We observe a myriad of valuable information before any questions are asked out loud, such as:

- How does someone look?
- Are they attractive?
- Are they neat or sloppy?
- Do they appear dressed appropriately for court?
- Are they flamboyant or conservative?
- Did they show up on time?
- Are they chatting with neighbors or reading a book?
- Are they using Kindle or reading People magazine?
- Are they fidgeting?
- Are they asking someone questions?
- Did they drop everything on the floor?
- Are they limping on the way to their seat?
- Are they having problems seeing or hearing?
- Did they complete the jury summons form correctly?
- According to the form, where do they live and work? Do they have children and where do they work? How’s their spelling and punctuation on the form?
- Are they speaking too loudly?
- Are they laughing and acting like they’re on stage?
- Do they have photos on their Facebook profile for the entire world to see?

- Are they on LinkedIn or on Plenty of Fish?

If you can answer these questions, you know most of what you need to know to make important jury-selection choices – but only if you know how best to use this information, i.e., what are the personality traits that may indicate adverse jurors, who are unlikely to favor your client and your view of damages. So, the real issue isn't whether you can control voir dire, but what to do with the information that you *can* glean with your ears and eyes (and maybe a few keystrokes on a laptop).

For an amusing read on what merely seeing how someone dresses can tell you, for example, see http://lamasatonline.net/en/psychology-of-clothing

What does "no real voir dire" mean?

There are several typical scenarios for voir dire:

1) Counsel has almost unlimited ability to directly ask prospective jurors questions

2) Counsel can use an extensive written jury questionnaire

3) Counsel can ask a few questions directly

4) Counsel can only ask a few follow-up questions

5) The judge or clerk conducts an extensive or abbreviated voir dire and accept a few proposed questions from counsel or not

6) There is a liberal or draconian policy about letting people off for claimed hardships.

7) Cause is construed very narrowly or broadly by the Court.

8) The judge or clerk conducts voir dire just looking for a pulse and accept everyone who does.

In each of these scenarios, you will be permitted unlimited strikes for cause that the judge accepts and limited (usually 3 per side) peremptory strikes. The key is to fight to use cause strikes against harmful biases and exercise your peremptory strikes against true enemies and not inadvertently strike potentially good jurors or mildly bad ones in favor of worse ones. The question is: how do you know which ones they are? It isn't because you can't get relevant information about them because you didn't get to ask, but because you need a reliable blueprint for what makes a potentially bad juror for your case, or you risk striking blindly.

"The only thing worse than being blind is having sight but no vision." (Helen Keller)

Jury research is one of the only ways to avoid that by informing your vision. In particular, several critical outcomes emerge from properly conducted jury research which can provide counsel with night vision goggles, so that even if you operate largely in the dark at voir dire, you are armed with:

1) A thematic story of your case that works best for most jurors – good and bad alike;

2) A list of statistically significant traits, attitudes and experiences that jurors most adverse to your case seem to share.

3) A clear sense of the issues, facts, evidence and arguments that detractors reject in your case and why, as well as how to overcome them (e.g., What they'd need to hear or see to accept your position, which reasoning or argument turned them off and how you can modify it, and the like).

4) Knowledge about what was misunderstood, distorted or unclear, and what you need to do about educating before you advocate.

"No voir dire" is a myth. It's that simple. It is only a short-sighted, narrow view of voir dire that permits the belief that, just because counsel doesn't ask the questions or there isn't an extensive opportunity to make inquiry of prospective jurors, that it is an all-or-nothing proposition when it is not.

In our daily lives, without interrogating strangers, we make judgment calls all the time about who seems dangerous, who seems friendly, and many other "attributions." That is, we can draw inferences about other people without asking them a single question. It is ingrained and a matter of survival. The key to doing so effectively in court is to be a skilled observer, knowing what you are looking for and looking out for, and avoiding what is called the "fundamental attribution error" (Lee D. Ross), which is attributing causes for observed traits to internal factors (such as personality characteristics) rather than to external, situational variables (such as how the setting may alter a person's behavior, dress and mannerisms). Consider how the setting may itself be altering prospective jurors' natural tendencies, if at all.

What is interesting and useful in the courtroom setting is that the situational variables (an unusually authoritarian, formal setting to most prospective jurors) and how people react to it is, in and of itself, critical information to consider in limited voir dire situations insofar as one can see, for example, how people dress for court. If they are wearing a running suit or a business suit speaks volumes, and if they are doing so because they hope to get out of being picked and going straight to work – whether as a gym instructor or financial analyst – you are likely to know and draw the proper inferences about them. If someone is tardy or punctual is itself a marker of behavior that people draw inferences about everywhere else in life, so why not in the courtroom?

In brief, jury research is more important than ever when you will be making important decisions based on limited information and the information you get matters, but only reliable data can tell you how.

How To Find Helpful Information Related to Your Practice Area

by Ken Lopez, Founder/CEO, A2L Consulting

Not every page, blog article, webinar or e-book on A2L Consulting's site is right for everyone. As the saying goes, what is everyone's favorite radio station? WII – FM, of course. Otherwise known as "what's in it for me?"

With hundreds of articles, dozens of e-books and hundreds of other pages, A2L's website has over 2,500 pages of valuable content. Sometimes, finding materials that are specific to your litigation practice area or need can be a challenge with all the available options.

You can search A2L's site or even browse by topic area using a topic list in the sidebar of every blog post. In spite of this, I still hear from a lot of people who wonder whether we have experience working in their specific practice area or where they can find useful information related to their practice.

I wrote this article to highlight some very useful information organized by practice area below. I've broken down the practice areas into 14 topics that cover most of the work we do. The alphabetical list with links under each topic should prove helpful when looking for the information most relevant to you.

Antitrust: Our work in antitrust often involves making complicated economic principles make sense to judge and jury. Working with experts is essential in these cases to help them develop a coherent story.

- Free Download: Antitrust Litigation Guide to Trial Prep and Trial Litigation E-Book Download
- Antitrust Litigation Graphics: Explaining Complex Information Simply
- Click to see articles mentioning antitrust litigation

Banking, Securities & Finance: Our banking litigation work has most often included allegations of banking fraud, disputes involving CDOs or some other financial industry-collapse related litigation.

- 5 Ways the Economic Crisis Has Changed Jurors
- Click to see A2L articles mentioning banking litigation
- Click to see A2L articles mentioning securities and finance litigation

Bankruptcy: Our bankruptcy work usually involves advisory disputes or the failure of a large company.

- Click to see articles mentioning bankruptcy litigation

Complex Civil Litigation: Many disputes we are involved in are contract disputes between large corporations. Goliath vs. Goliath litigation requires special care given the stakes and resources available to both sides.

- Free Download: The Complex Civil Litigation Handbook
- Free Watch: Using PowerPoint Litigation Graphics in Complex Cases
- Free Download: Storytelling for Litigators
- Free Download: Using Litigation Graphics to Persuade in Complex Cases

Construction & Architecture: Architecture one type or another construction disputes typically relate to defects in construction or leasing disputes or construction delays

- Legal Graphics in Cases Involving Architecture
- Construction Litigation Graphics: Construction Delay or Defect

Employment & Labor: Our labor work often involves allegations of discrimination or other large scale labor disputes. Increasingly wage and hour disputes are finding their way to trial.

- Courtroom Graphics in Labor and Employment Cases
- Winning Jury Support for the Employer When Plaintiff Is Union-Backed

Environmental & Energy: Environmental work often involves discussing human health risk from a particular chemical or the migration of a particular leak.

- Free Download: The Environmental Litigation Trial Presentation & Trial Prep- E-Book
- Environmental Litigation Demonstrative Exhibits and Trial Graphics
- Fracking Litigation & Advocacy
- Other A2L articles mentioning environmental and energy litigation

International: Our international work often involves arbitration work at ICSID at the World Bank, at the ICC in New York or at some other venue around the world.

- Clip from our work at ICSID at the world bank

Life Science-Related: Science-focused topics dominate many forms of litigation. This includes disputes around pharaceuticals, medical devices, biotech and many products. Our challenge as a litigation consulting firm is frequently to make the material understandable for judge and jury.

- Free Download: Using Science to Prevail in Your Next Case or Controversy
- Free Watch: How Can Litigators Meld Expert Evidence with Winning Arguments?
- Teaching Science to a Jury: A Trial Consulting Challenge
- Making the Complex Understandable in Pharmaceutical Cases

- 7 Things Expert Witnesses Should Never Say
- Other A2L articles discussing scientific challenges in litigation

Medical Malpractice: Our medical malpractice work sometimes involves showing how a surgery occurred and sometimes involves handling allegations of errors.

- Other A2L Articles mentioning medical malpractice

Patent, Trademarks & Copyright: Our are patent work is wide ranging and frequent, covering all lines of marketplace. About half of the cases we consult on are complex patent cases.

- Free Download: The Patent Litigation Toolkit (3rd Edition)

- Free Watch: Patent Litigation Graphics Secrets
- 11 Tips for Winning at Your Markman Hearings
- ITC Hearings: An Overview from Section 337 Practitioners
- 11 Tips for Preparing to Argue at the Federal Circuit
- Litigation Graphics and Demonstrative Evidence at the USPTO
- Trademark Litigation Graphics: Making Your Best Visual Case
- Other A2L articles discussing intellectual property litigation

Product Liability: We have spent the last several decades consulting on everything from tobacco litigation to cell phone litigation to fracking litigation.These cases always involve detailed interaction with consulting experts and testifying experts.

- Product Liability Demonstratives - Defects and Failure to Warn
- Free Download: Using Science to Prevail in Your Next Case or Controversy
- Free Watch: How Can Litigators Meld Expert Evidence with Winning Arguments?

Transportation (Aviation, Space, Automobiles, Trains and Ships): Although trials are rare since most cases tend to settle that involve a crash of planes trains or automobiles. More often transportation cases involve product liability or some other cause of action.

- Automobile Litigation: Patent Infringement and Product Liability
- Aviation Litigation Graphics and Effective Demonstrative Evidence

White-Collar & Criminal: Our work in criminal cases used to be restricted to basic white collar criminal work. Increasingly though, we are being called upon to consult on everything from campus sexual assault cases to murder cases.

- Litigation Graphics in White Collar Cases
- No Advice is Better Than Bad Advice in Litigation

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.

New Webinar - PowerPoint Litigation Graphics - Winning by Design

by Ken Lopez, Founder/CEO, A2L Consulting

One month ago, I published an article (pictured right) about PowerPoint litigation graphics that you just could not believe were in PowerPoint. I was quite surprised by the attention it generated.

Five-times the number of normal readers have read that article, and it so far has 75 Facebook likes, 20 Google+ +1's and 77 shares on LinkedIn. From those readership statistics, I knew we had a topic that people wanted to know a lot more about.

So, I asked my A2L colleague Ryan Flax, Esq., who is arguably the foremost authority on how best to use litigation graphics at trial, to conduct a free webinar on the topic. I'm pleased to share the news that this webinar, *PowerPoint Litigation Graphics - Winning by Design*, will be conducted live next week - and yes, it is completely free and without any obligation.

Over the past six months, we have hosted many online webinars and CLE's. Most notable and well-attended were *Patent Litigation Graphics* and *Storytelling in Litigation*. Combined, more than 1,000 attendees have watched those webinars so far. About half of the attendees were from AmLaw 200 law firms, and half were from a combination of smaller firms, competitors, governments and other institutions.

Before A2L created its award winning jury consulting operation and it's courtroom technology operation, it was a litigation graphics firm. Now in our 19th year, litigation graphics are still something I am passionate about. For me and for people like Ryan, the creation of persuasive visual evidence is something that mostly comes naturally. But, creating an effective trial presentation would not be possible without the amazing team of highly trained and experienced litigation consultants and litigation graphics artists we have on staff here. Many of the important lessons we've learned from our work will be shared at this webinar.

Topics that will be covered in the webinar include some of the most important and misunderstood information in the trial graphics business including:

- Why bullet points almost always do damage to your presentation.
- The real science behind what works with litigation graphics and what does not.
- How to weave litigation graphics into a story you are telling at trial.
- How to use complementary rather than competing graphics in a visual presentation.

Ryan Flax, the webinar's presenter, is an experienced litigator. As such, the webinar will be directed at anyone who spends time in a courtroom or who makes persuasive presentations for a living. With that said, litigation support professionals and those who aspire to persuade others with visual tools will find significant value in this presentation.

I hope that you'll take a moment to register for this free webinar, *PowerPoint Litigation Graphics - Winning by Design*. If you have a schedule conflict on Tuesday, March 18th at 1:30pm ET, register anyway, and we'll send you an archived version after the live webinar occurs.

New Study: A Graphically Immersive Trial Presentation Works Best

A recent study about the best use of litigation graphics during trial reveals some new insights. This study was conducted by Persuasion Strategies, a litigation consulting firm that is part of Holland & Hart, a law firm.

The study team was led by Ken Broda-Bahm, a leader in the art of visual presentation in the courtroom. With a doctorate in speech communication that emphasizes rhetoric and legal communication, Dr. Broda-Bahm is a genuine expert in jury consulting.

In the Visual Persuasion Study, Dr. Broda-Bahm and his team conducted extensive research about the best approach to trial presentation in the courtroom. Their experience, which remains the topic of continued research, reveals that a graphically immersive approach to trial presentation gets the best results with jurors.

In a project that compared various uses of graphics and their effects on potential jurors, Dr. Broda-Bahm wrote, he and his team learned something very important: “The occasional use of graphics is not enough.”

The study looked at 1375 mock jurors and tested five different ways of presenting a defense case: (1) no litigation graphics; (2) flip chart graphics created live; (3) static graphics; (4) animation; and (5) an immersion style of presentation in which animated and static graphics were in constant use.

The team found that in order to obtain the full benefits of visual persuasion, attorneys should be using a continuous approach, giving the jury something to look at in a constant manner, at all times. Instead of following the practice of most attorneys of only using the screen periodically to show a document or image when a particular need presents itself, effective attorneys use graphic immersion -- an approach relying on continuous imagery to reinforce all parts of the message. This approach turns out to be most effective of all the graphic modes that were tested.

Graphic immersion, Dr. Broda-Bahm's test results concluded, greatly enhanced positive juror response, beyond the results that came from occasional use of static graphics or animation. It is possible that this result springs from the fact that when something is both shown and told to jurors, they engage two separate sensory processing areas of their brain – the auditory cortex and the visual cortex -- thus sharing the cognitive load and making it easy for the brain to process the information.

Dr. Broda-Bahm told me that the study has convinced him that "attorneys should be using PowerPoint throughout opening and closing and the same is true while experts are speaking."

We believe that as the disciplines of jury consulting and litigation graphics become increasingly intertwined, more study is needed on what are the most effective techniques throughout the trial presentation.

Are Jurors on Your "Team"? Using Group Membership to Influence

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

People who identify as being in the same group as others are more likely to give others in their group preferential treatment over people not in the same group (also known as in-group favoritism or in-group bias).[1] In litigation, if you lead jurors to identify with *your* client as a member of the same group as the jurors in terms of their social identity, the jury may be more likely to "help" your client in their decision-making.

Team fan or Soccer fan

Two fascinating studies in the U.K. illustrate how far a little group membership can go, showing that **people are more likely to help "in-group" members than others**.

In one study,[2] fans of a popular English soccer *team*, Manchester United, filled out a questionnaire about that team and wrote an essay on the **joys of being a Manchester United fan**.

They were then directed to walk to another building across a parking lot. En route, the group witnessed a (staged) accident in which someone was running, tripped, fell and clutched his ankle in pain, wearing one of three T-shirts: a plain one, a Manchester United one, or their arch rivals' team, Liverpool FC. Observers who noticed the accident were significantly more likely to help the injured man when he wore **their group's Manchester United T-shirt** than either of the other two shirts.

A second study[3] showed how flexible group boundaries are and how important inclusion in a category can be.

In that instance, instead of aligning subjects with Manchester United as the group's identity, they were aligned with *soccer* in general. The questionnaire asked about soccer and the essay was about **the joys of being a soccer fan**. This time, observers were equally likely to help the injured man when he wore**either soccer team's T-shirt**, but not when he wore one unrelated to soccer.

Imagine that, instead of a soccer team, the group identity was Plaintiff or Defendant. What about your client represents a group to which a jury can identify? How can you "prime" the jury to focus on that factor? As seen in research, rather little effort was required in order to underscore the focus of the observers' social identity (a questionnaire and an essay) prior to observing the in-group preference.

In court, how can you recreate such focus?

Conventional wisdom suggests only seeking out adverse jurors who reject your case and that still holds true. However, if you are permitted to provide *voir dire* questions or a written questionnaire to prospective jurors, it is worth considering including "priming" questions, e.g., say that your client is the Plaintiff and has a rags-to-riches history. Your questions can ask about valuing such a history. If your client is the defendant unfairly accused of wrongdoing, perhaps you can ask about such experiences of prospective jurors. In opening statement, you can reinforce that group story to further prime the jury to identify with your client. To the extent you can align jurors with specific traits or experiences of your client that they may share, you may raise the odds of jurors' bias being in your favor and becoming fans. In addition to other considerations of people who may be an unfavorable juror, those who do not exhibit any relationship with the social identity of your client may merit being moved up on your strike list.

[1] Turner, J. C.; Reynolds, K. H. (2001). "The Social Identity Perspective in Intergroup Relations: Theories, Themes, and Controversies". In Brown, S. L.; Gaertner. Blackwell Handbook of Social Psychology: Intergroup processes 3 (1): 133–152.

[2] Levine, M., Prosser, A., Evans, D. & Reicher, S. (2005) Identity and Emergency

Intervention: How Social Group Membership and Inclusiveness of Group Boundaries

Shapes Helping Behavior. Personality and Social Psychology Bulletin, 31, 443-453.

[3] Op Cit., Levine, et al.

21 Reasons a Litigator Is Your Best Litigation Graphics Consultant

By Ken Lopez, Founder/CEO, A2L Consulting

Since the founding of our attorney-led litigation consulting business 19 years ago, I've been asked this question hundreds of times: "why would I need an attorney to help me prepare my litigation graphics?" It's an understandable question, and I have a very good answer - indeed 21 good answers.

Before I explain why an attorney or litigator can help a fellow litigator better than others can, a review of A2L's history is in order.

I founded A2L (then Animators at Law) as a litigation graphics consultancy after I finished law school in the 1990s. After a few years in the industry, I recognized that litigators who build visual aides for trial and work with other creatively-minded lawyers to do so get better results than those who work alone or those who work only with a graphic artist. By the latter part of the 1990s, we started calling this work "litigation consulting," and an industry was born. Here is a 1999 article about how our piece of the litigation graphics industry developed.

Back then, litigation graphics industry leaders were mostly engineering firms. They were great at illustrating and very poor at persuading. So, firms like A2L and others came to dominate the industry and were quickly relied upon by the legal industry's top trial attorneys.

Now, all these years later, with the majority of litigation rapidly shifting from large law firms to midsize law firms, I'm again hearing questions about why lawyers should be helping other lawyers with litigation graphics and more. I think the frequency of questioning has increased because midsize law firms are trying to understand how best to win big cases without spending huge sums of money. Fortunately, litigation consulting services are quite inexpensive compared to legal fees or e-discovery fees, and the ROI is just enormous.

From some of these newer big-ticket litigation market entrants, we're hearing that they are planning to skip the litigation graphics development stage and just rely on their trial tech for visuals. Unfortunately, this means that some midsize law firms are making the classic mistake of believing they are using litigation graphics when they are simply displaying electronic evidence and text PowerPoint slides via a projector in the courtroom.

Some are planning to use in-house law firm marketing graphics staff or a freelance graphic artist. In most cases, that's about as likely to produce a successful result as hiring a 3rd year law student to 1st chair a trial. Sadly, it's pretty common for us to be engaged to rescue a trial team on the eve of or even mid-trial that has made these mistakes.

These well-intentioned but misguided uses of "graphics" may not be actionable malpractice yet, but I bet they will be one day. If you think that statement is strong, consider that judges are already demanding that litigators understand technology at a fairly complex level when it comes to e-discovery. Can the expansion of the duty of competence to include competent visual advocacy be far behind?

So, to understand why a litigator is your best litigation graphics consultant, I offer 21 observations based on watching visually creative litigators on our team serving as litigation graphics consultants, how they work with trial counsel and the good results they regularly achieve:

1. **Using a Litigator as Your Litigation Graphics Consultant Saves Money.** Imagine being able to speak in lawyer short hand about amici, claim language, market power, causation, Rule 403, bioequivalence and hundreds of other concepts that you don't want to take five minutes to explain during the run up to trial. When you have a litigator serving as your litigation graphics consultant, you don't have to spend your client's money training someone about a legal concept or procedure. They already understand what the fact-finders will not, and they will automatically design this into the presentation.

2. **Using a Litigator as Your Litigation Graphics Consultant Saves Time.** Time is money, so the same reasons listed above for money apply here for time too. Additionally, commonsense should answer the questions: who is going to understand and process your case faster, a visually creative litigator with trial experience or a project manager/graphic artist? They're all good people, but only one will save you time.

3. **Using a Litigator as Your Litigation Graphics Consultant Removes Stress.** I have a couple of pet peeves, although the team at A2L might tell you the list is longer than that. One pet peeve of mine is that I really don't like having the same conversations more than once. I think most litigators feel similarly especially during pre-trial prep. A litigator turned graphics consultant is much more likely to recall details or be in a position to find the answer on their own. This saves the trial litigator time, money and most importantly, stress.

4. **Using a Litigator as Your Litigation Graphics Consultant Gets You Graphics + Trial Experience.** Nearly all good litigators tell me that they would love nothing more than to go to the courthouse and watch trials they are not involved in and learn from watching peers. Unfortunately, they cannot due to the incessant pressure to keep billing hours. Until the days comes when cameras are finally allowed in federal courtrooms and we can all learn from watching the best, one of the best ways to get meaningful training is to use your litigation graphics consultant a bit like a coach. Remember, they watch your peers all of the time, and they have been exactly where you are.

5. **Using a Litigator as Your Litigation Graphics Consultant Is Like an Insurance Policy.** One hopes to not use insurance, but we're all grateful when it's there. The same is true for your litigation consultant. If you really rely on them and invite them to be there for all or part of your trial, you have a cost-efficient method to adapt as the trial unfolds. They can anticipate new visuals that need to be used and put their development in motion midday. They can offer new strategies at a peer level. They can be a non-judgmental sounding board.

6. **Using a Litigator as Your Litigation Graphics Consultant Helps You in the Venue.** Chances are we have spent time in your venue. We even write about trying cases in popular venues like SDNY. Local counsel is a big help, but why not rely on a litigator who likely has expertise persuading the jury pool or judge using visuals and who has probably watched trial lawyers from many firms in the venue?

7. **Using a Litigator as Your Litigation Graphics Consultant Is a Bit Like Getting Graphics AND a Trial Consultant.** Litigators who are also litigation graphics consultants blur the lines between what is considered a trial consultant and a litigation graphics consultant. They are an especially nice fit when there is not enough budget for a proper mock trial.

8. **Using a Litigator as Your Litigation Graphics Consultant Means You'll Likely Get More Meaningful Feedback.** A lot of litigators say they like to get commonsense feedback from family and non-attorney staff. I agree that helps, but sometimes non-attorneys give bad advice like encouraging counsel to ask a jury to put themselves in the shoes of the injured and other rookie mistakes. A litigator knows what advice helps and what distracts.

9. **Using a Litigator as Your Litigation Graphics Consultant Means They're Not (as) Scared of You.** A lot of litigators I know appreciate that a good litigation graphics consultant is honest with them. Too often they are surrounded with too many "yes" people. Your litigation graphics consultant is trained to tactfully deliver honest feedback after asking permission to do so.

10. **Using a Litigator as Your Litigation Graphics Consultant Means Your Relationship With In-House Is Understood.** A good litigation graphics consultant who is a litigator will keep watch over your relationship with in-house counsel. It is not unusual to be approached by an in-house lawyer during a mock trial or during trial who wants our litigation consultant's opinion of outside counsel. A good litigation consultant knows how to support counsel even when no one is looking.

11. **Using a Litigator as Your Litigation Graphics Consultant Means that You Have Someone Who Understands Law Firm Politics On Your Side.** We all wish the workplace was politics-free, but that is not realistic. Whether there is a subtle battle for 1st chair, whether there are hidden relationships on the trial team, whether someone is underprepared, we have seen it all - and you'll never hear about it. Keeping yourself out of the politics is a task best left to those who understand it, and a litigator who has worked at a law firm knows best.

12. **Using a Litigator as Your Litigation Graphics Consultant Means You Know You Have Someone Who REALLY Understands Confidentiality.** I've heard trial techs and graphic designers talking about degrees of confidentiality, and I hope that we can all agree it's really a binary issue. When you have a litigator as your graphics consultant, your confidential information is better protected.

13. **Using a Litigator as Your Litigation Graphics Consultant Means They Have Ethical Obligations.** No matter where a lawyer goes, they have ethical obligations. This is certainly true when working in litigation, regardless of the role they are playing. Woundn't it be nice to know your consultant has a higher duty when supporting your team?

14. **Using a Litigator as Your Litigation Graphics Consultant Means They Will Understand How to Treat a Judge and Clerks.** In law school, we were all taught to treat the court with honor and respect. A graphic designer may be a respectful person, but they have not been trained like us, right? I think it matters when we have to talk to clerks, interact with opposing counsel and in how we dress for court.

15. **Using a Litigator as Your Litigation Graphics Consultant Means You Have Another Warrior on Your Side.** I referenced one of the reasons I started our firm at the beginning of this article. In 1995, I was disappointed to see engineering firms playing such a large role in litigation as litigation graphics firms do. In retrospect, I was right. Having passionate advocates work in parallel with the trial team to develop a visual presentation is like having one more believer - as opposed to just one more follower - on your team.

16. **Using a Litigator as Your Litigation Graphics Consultant Ensures Appearance Will Be Considered for All Personnel.** I am very concerned with how people dress for court or even a client meeting. In my jurisdiction, shirts that are not solid and white are still frowned upon by many judges. A litigator will help make sure that litigation decorum is followed for the litigation support team.

17. **Using a Litigator as Your Litigation Graphics Consultant Helps Prevent Typos.** One of my pet peeves is shared by many litigators. I really cannot stand it when typos make it onto a draft of a demonstrative for trial. Of course, one can never occur at trial, because it would damage the credibility of the trial team. Who do you think is less likely to make a mistake, a litigator or a graphic designer? I can tell you from decades in this industry that the answer is the former, 100-fold to 1.

18. **Using a Litigator as Your Litigation Graphics Consultant Gives You an Observer Free from the Details of the Case.** Hard as we may try, we litigation consultants will never know the case as well as trial counsel. This is a feature, not a bug. Staying out of the weeds allows an attorney litigation graphics consultant to offer meaningful advice about how to persuade the fact-finder(s) while not getting lost in the details.

19. **Using a Litigator as Your Litigation Graphics Consultant Means You Have a Professional Storyteller at Your Disposal.** Good litigation graphics consultants are always pushing a trial team to clearly articulate a meaningful and emotional story in a case - even in a seemingly dry patent trial. If you have not watched our

recent storytelling in litigation webinar yet, you should (or share it with someone you know).

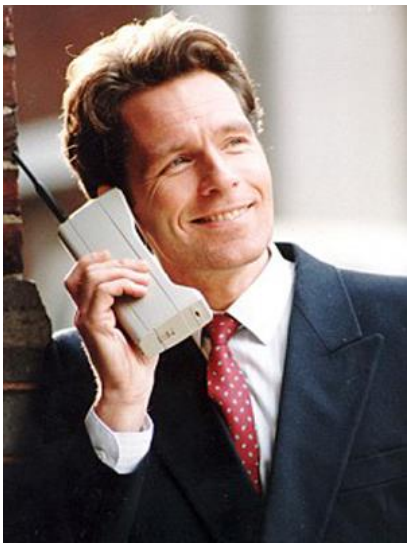
20. **Using a Litigator as Your Litigation Graphics Consultant Gets You a Ton of Trial Experience at a Low Price.** If you are in house counsel, wouldn't you want to have the benefit of another trial lawyer in the room acting as a support system to the team. You might be surprised to learn that we could go to trial more than 50 times in a given year. That's more than any single major law firm. For a fraction of the price of another trial lawyer, you get the benefit of that experience plus the value created during the develop of litigation graphics.

21. **Using a Litigator as Your Litigation Graphics Consultant Means You Indirectly Learn from Your Peers.** As litigation consultants we see both good and bad trial teams. Cross pollination of good ideas and tactics between firms is pretty rare. If you want to learn from your peers, one of the best and least expensive ways to do so is to ask a qualified attorney litigation graphics consultant what they see that works well.

Our team at A2L includes the kinds of people I would want on my side if I were spending our firm's money on litigation. They are members of a small group of 5-10 creative-minded lawyers in the country with the experience, the training and the talent to meaningfully affect a trial team's experience going to trial. If you don't want to work with our firm for some reason, I would be happy to refer you to someone else who fits this description.

Try to remember this - when you fail to find and locate a litigator who can be your creative guide when developing litigation graphics, you are failing to follow what are now common best practices, and you put your case, client and reputation at risk. Again, it's commonsense . . . who would you trust to give you advice, a litigator with millions or billion of dollars of jury verdicts, the experience of working with your peers and a creative background or a twenty-something artist who does not understand the impact of their advice? I believe that using a litigation graphics consultant who is also an experienced trial lawyer puts you in the best position to win a case.

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:

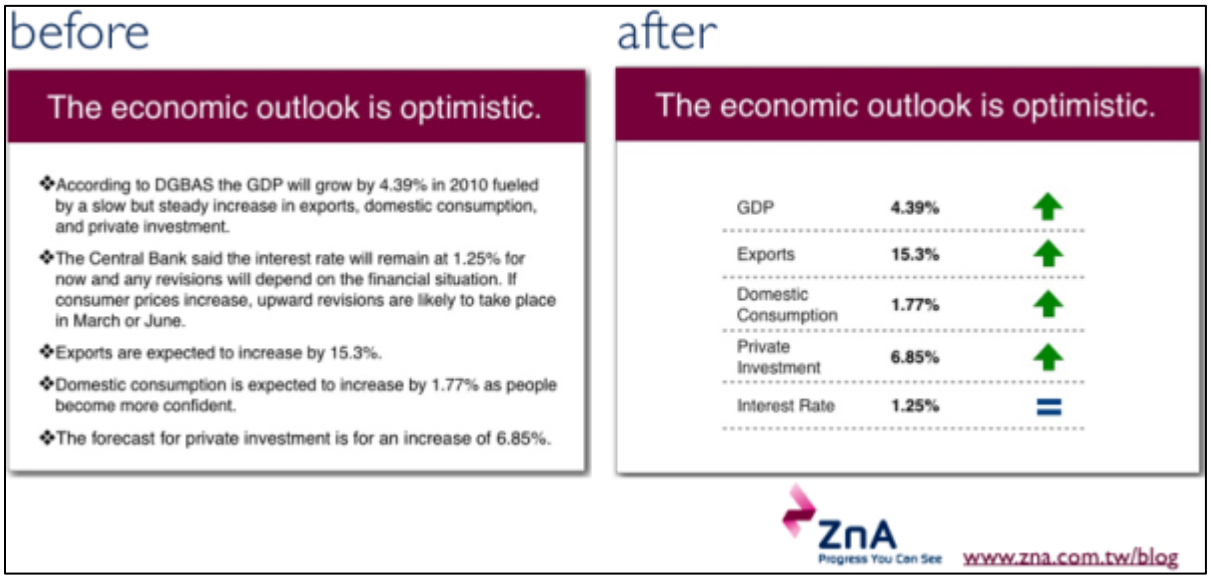
Hans Rosling's TED Talk presenting data in an appealing way.

Steve Jobs introduces the first iPhone in 2007.

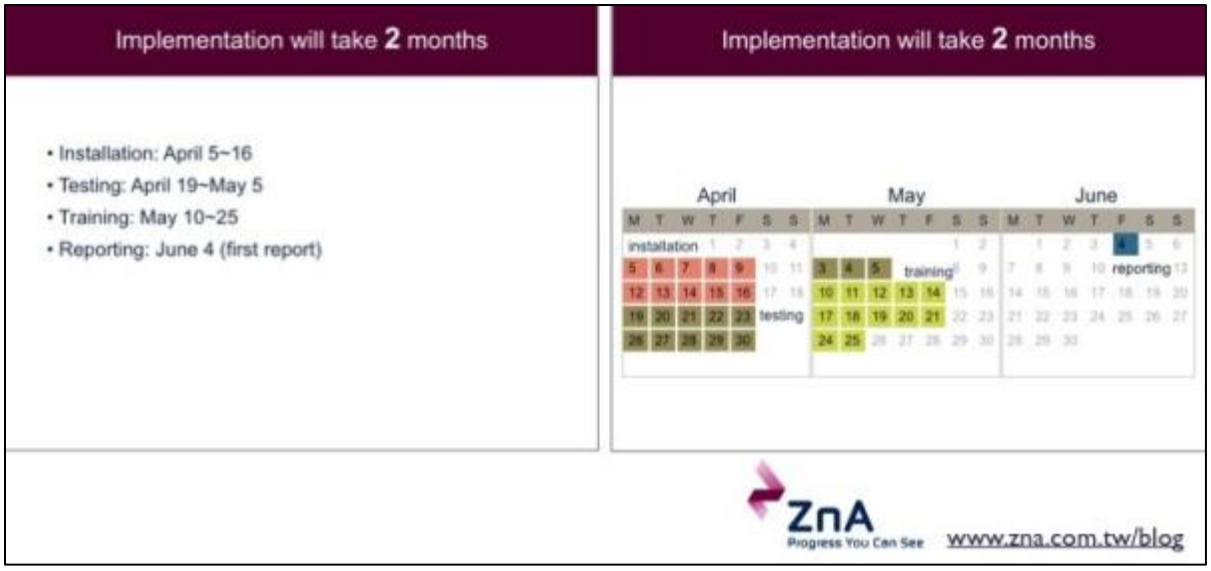
Al Gore revisits his I*nconvenient Truth* theories.

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

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



and an easy way to handle dates:



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

Vision from Pear Press on Vimeo.

9. Whether most of your presentations are for judges and juries or whether they are for management, learn how to tell better stories; take a look at one of our most popular articles: 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

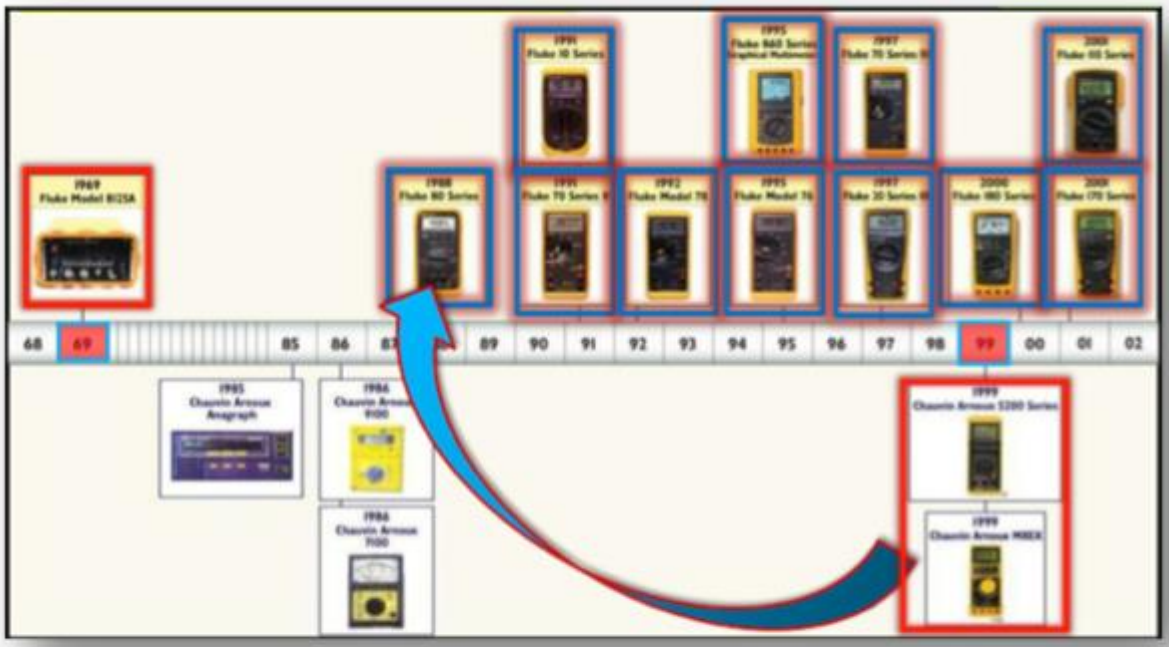
12. Finally, while A2L Consulting would be thrilled to help, here are 74 ways to remove bullet points on your own.
    a. 6 inspiring non-bullet point options
    b. 41 great alternatives to bullet points
    c. 4 before bullet point and after bullet point examples
    d. 4 great before and after bullet 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.

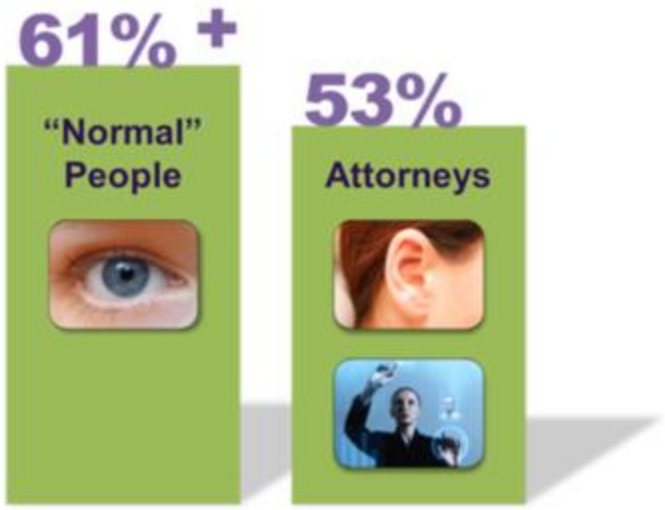
Trial Timelines and the Psychology of Demonstrative Evidence

by Ryan H. Flax, Esq., Managing Director, Litigation Consulting, A2L 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, trial 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 us lawyers) learns visually – about 61% - 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 – about 53% - 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 demonstrative evidence, including graphics, models, boards, animations, and **trial 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 **retain** 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, trial 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. Trial 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.

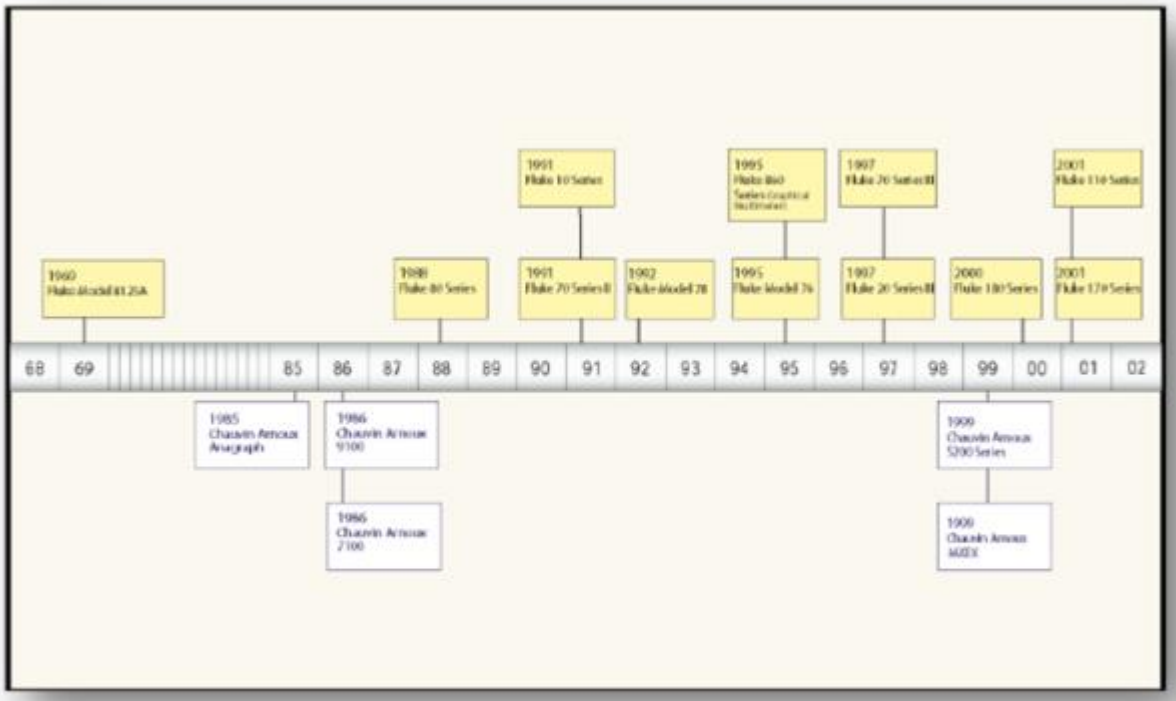
A trial timeline is the key visual aid for establishing a **perception of causation** relating to any set of facts. Once you **induce such a perception of causation** in jurors and they can **adopt** this perception **as truth**. This is the result you want in litigation. If you can set the factual stage 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.

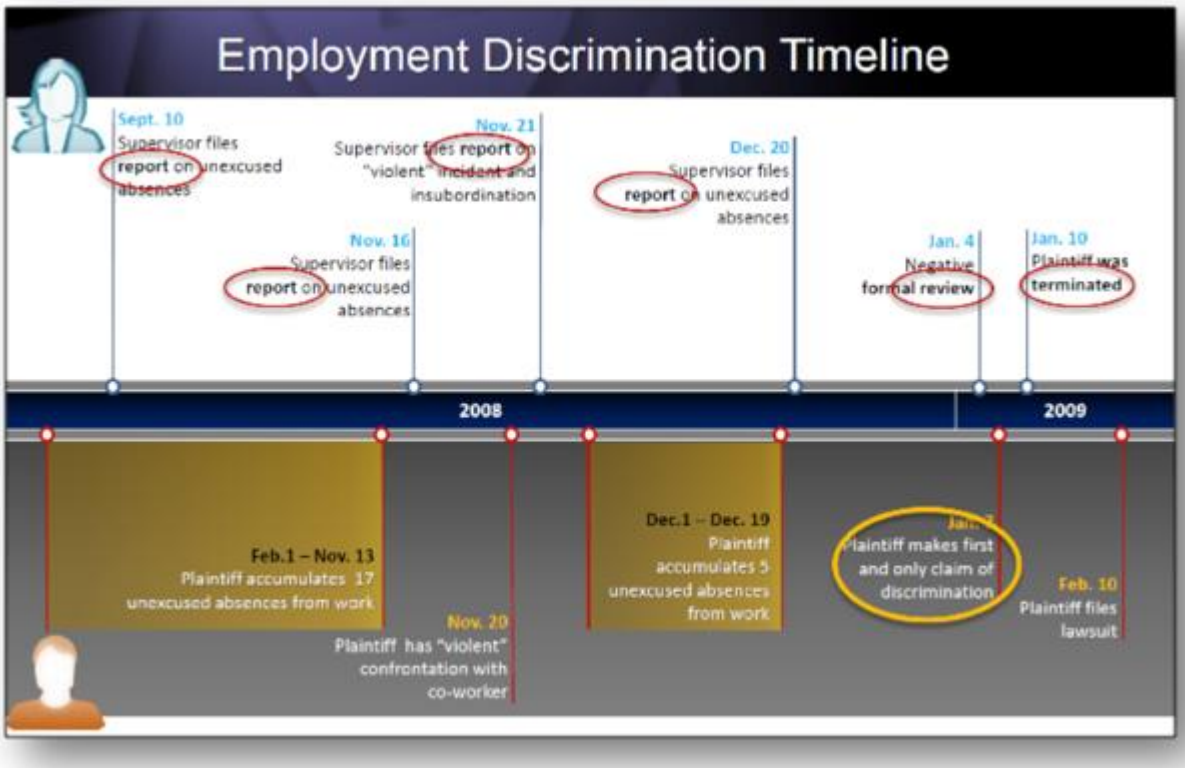
You get all this information visually from a single trial timeline – it doesn't just relay information, it tells a story. Imagine having the timeline at the top of this article on a large board and available to show the jury over and over again.

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).

Here is a pretty standard, if attractive, trial 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.

Don't Be Just Another Timeline Trial Lawyer

by Ken Lopez, Founder/CEO, A2L Consulting

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

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

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

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

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

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

We see this play out all the time. In a recent mock trial exercise, we watched as mock plaintiffs' counsel developed a story with meaning and emotional connection. Then we watched as our client, who was using the mock trial properly to figure out the best strategy for trial, stood up and told a chronological story that was so logical and syllogistic that a computer would certainly have found for the defendant.

However computers don't decide cases. In fact, here, all the mock jury panels came back

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

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

Practice is a Crucial Piece of the Storytelling Puzzle

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

This article is the last in a series of six articles about storytelling and trial preparation. Parts 1-5 are linked at the bottom of this article.

What is a trial attorney supposed to do after he or she has developed a theme and a story plus some graphics to support them visually?

The answer is, **test them**. I encourage you to use mock juries, not to 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.

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. Enlist the services of local high school students to perform as mock jurors (they'll gain experience and you'll have about the right educational demographic for your jury, but consider how to deal with confidentiality).

A mock trial and testing on your peers are fancy forms of practice in litigation. Practice may not make perfect, but it will make "as good as possible." By the week of your opening statement, you should have tried out your presentation dozens of times. So many times that you can recite it without notes, without looking at your graphics and so that you are speaking and showing in perfect synchronicity. Practice it until you could sing it.

The bottom line is that to win in litigation you usually first need to win the trial. To do this you'll need to convince jurors, who are biologically programmed to respond to stories and

used to learning by watching TV and surfing the internet, that your position is the better one. To persuade such an audience, you must communicate on their terms and in their language (to a degree). By framing your case in storylines and traditional themes and by using well-crafted visual support, you will be able to teach and argue from your comfort zone – by lecturing -- but you will provide the jurors what they need to really understand what you're saying and give them a chance to agree with you.

Jurors who understand you are more likely to agree with you, because they feel that their emotionally based opinions are founded in logic and reason.

Although I've strenuously urged you to put a lot of effort into the persuasion track of trial preparation, I'm not suggesting that the other, the law track, should be abandoned or even diminished. You must dot all your "i"s and cross all your "t"s and address every important fact that may become essential to a favorable appellate decision in 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.

The Very Best Use of Coaches in Trial Preparation

by Ken Lopez, Founder/CEO, A2L Consulting

Some time ago, I wrote about my intensive preparation for a conference speech that I was asked to give and about the 21 steps I took that made it successful. We've also written about how even the greatest athletes practice with their coaches and how great actors prepare with the assistance of others.

It seems to me, however, that most lawyers preparing for trial are hesitant to take advantage of coaching as a means of practice. So I thought I would share my experience, in close to real time, about how I am preparing for an upcoming commencement speech.

This coming May, I'm giving a speech at the graduate campus of the University of Mary Washington, where I serve on the Board of Visitors. It will only be 10 to 15 minutes long, but it is an important speech for me -- and that much more so for my audience. So I'm taking preparation for this event quite seriously.

One of the first steps I took after being asked to deliver this speech was to engage a coach. Now, I'm an experienced speaker. Part of my business is to train others on how to best present themselves. My firm publishes books on the topic of presenting well and making great visual presentations. So why would I need a coach?

I need a coach because my responsibility is to do as good a job as I possibly can in this speech, and a coach can help me do that. This responsibility is quite similar to the duty that a litigator owes to his or her client.

Perhaps it's helpful to remember that every professional athlete works with a coach, no matter how far along in their craft they are. I've always wondered why most lawyers don't do the same during their trial preparations.

So over the coming two months I'll be meeting with my coach several times and delivering practice commencement speeches. The coach's job will be to give me feedback on my style, my content, and my message. I have no question that my talk will be better with his help than if I had done it alone.

So if you have a trial coming up, I invite you to talk to me. I can recommend a coach of almost any variety who can assist with your trial preparation. Some work at A2L on the litigation consulting and jury consulting teams. However, I know people ranging from acting trainers to body language experts. There are good people working in the industry. Take advantage of them, be courageous and improve your trial presentation. You and your client deserve it.

The Magic of a 30:1 Presentation Preparation Ratio

by Ken Lopez, Founder/CEO, A2L Consulting

I find that by knowing how long something typically takes to do well, one can actually become better at doing that task. It makes sense, right? Once you know how long great work takes, you stop second-guessing your schedule as you do the work. I remember noticing this when I was doing computer animation in the 1990s.

Back then, I had recently finished law school, I was launching A2L, and I could do a bit of 3D animation work myself. However, with the company taking off, I had a chance to work with trained professional animators for the first time. I was shocked to learn that they could spend months working on a single minute of 3D animation to get everything looking just right.

Rendering, the computational process of allowing a computer to create the frames of an animation, could take hours for just a single frame (there are often 30 frames for every second). A minute of animation might have 1,800 or even 3,600 frames of animation. That time scale surprised me and took some getting used to. Once I did get used to it, however, I became a much better animator and designer.

Of course, understanding how long it takes to create great work is not limited to art.

I find the same is true for giving speeches, planning an opening statement, prepping for a mock trial or making a sales presentation. To do them well, it takes time, but how much?

I believe the right answer lies in a 30:1 preparation to speaking-time ratio. That is, if you have prepare a one-hour opening statement, you should take 30 hours to write, prepare and practice that opening statement. I think the same is true for a speech or a sales pitch.

Last week, I had a chance to deliver a commencement speech to the graduate-level students at the University of Mary Washington, my undergraduate alma matter. As I wrote about in *21 Steps I Took For Great Public Speaking Results*, I practiced a lot, I used a coach and I exceeded a 30:1 preparation ratio by a wide margin for my 18-minute speech. I'm happy to say it was very well received.

"They call it the practice of law, but nobody is practicing."

My colleague Ryan Flax said this not long after he joined A2L and after 13 years of litigating cases. I think it is an insightful statement.

Perhaps driven by client cost pressure, very few litigators are practicing like they should be. The ones who do are mostly those at the top of the profession. Perhaps it is because they have less cost pressure and can afford to conduct multiple rounds of mock trials and other preparation events.

We have written about the importance of practice before. In *3 Ways to Force Yourself to Practice Your Trial Presentation*, we discussed some specific strategies for encouraging more practice. Hollywood chimed in on its approach to getting ready for a performance in *Practice, Say Jury Consultants, is Why Movie Lawyers Perform So Well*. In *Accepting Litigation Consulting is the New Hurdle for Litigators*, I related the value of using a litigation consultant to help prepare for trial to the role of a coach helping a professional athlete.

3 Articles Discussing What Jurors Really Think About You

by Ken Lopez, Founder/CEO, A2L Consulting

I enjoy reading any article about juror feedback. However, finding such articles is pretty tough. Few authors have the time, budget or access to jurors to ask them what they think about the experience of trial and the lawyers involved.

As a litigation consultant, I have had the privilege of seeing many trials and mock trials over the past 20 years. In that time, I've observed certain characteristics that all mock juries possess. My colleague, Dr. Laurie Kuslansky, wrote a great article about commonalities among mock juries that is one of the best I have seen on the subject. Still, while we litigation consultants spend quite a bit of time with juries and mock juries, there is real value in hearing what others, such as judges and law professors have observed through study.

Below are three articles that offer meaningful insight into the minds of jurors. I think by reviewing these articles, any litigator will be better prepared for trial.

1. What Jurors Think About Attorneys: What if a judge collected data over a ten-year period from more than 500 jurors and compiled it in a meaningful way? Well, that is exactly what one Minnesota state court judge did, and the recently published results are fascinating.

Eighty-nine percent of this judge's jury trials were criminal. His goal in surveying his juries was to collect data about many aspects of the trial from the court building to the evidence displayed to the performance of counsel. The jurors were mostly from a rural part of the state.

You should read Judge Hoolihan's article. I found some of the interesting takeaways to be these:

- Jurors tended to rate attorneys highest when they represented the prevailing party. From the data, I can't tell whether jurors tended to side with the attorneys that they liked best, or whether the high ratings were the result of a form of the Ben Franklin effect where jurors tended to like the people they sided with more, simply because they sided with them.
- Jurors rated defense lawyers lower than plaintiff-side lawyers who were mostly prosecutors. Judge Hoolihan wonders whether this results from an anti-defense lawyer bias generated by Hollywood, but I would ask whether this is because the government generally has an advantage. I suspect it is mostly the latter.

- Jurors tended to rate defense attorneys much lower when they lost a case compared to the ratings of plaintiff side attorneys when they lost.
- Jurors wanted to see and hear more evidence.

2. Trial Presentation Too Slick? Here's Why You Can Stop Worrying: I wrote this article in 2011, and the real focus of the article is on a trial consultant who smartly took the time to interview a jury post-trial and record it. The results are fascinating, especially when you consider that this was a rural Arkansas jury. The jurors shared that:

- Jurors expect the use of technology.
- Jurors expect the use of PowerPoint.
- Video depositions synced with the transcript were very helpful.

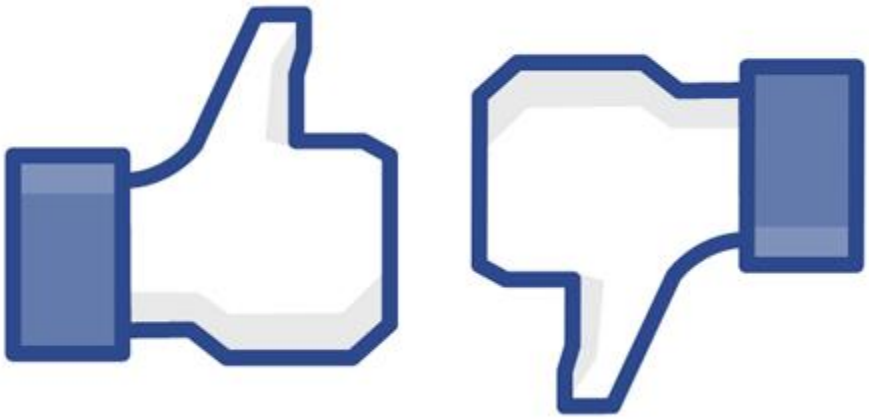
3. What Jurors Think About Trials [PDF]: In this book chapter from a law professor at Northwestern University Law School, the surprisingly limited scientific study of jury trials is well-summarized. Here are some interesting findings:

- About 40 percent of all jurors initially want to get out of jury duty. When they were done with jury service though, more than 60 percent thought highly of jury service.
- 40 percent of jurors thought jury selection lasted too long.
- Jurors "are active information processors who bring expectations and preconceptions with them to the jury box, filling in missing blanks and using their prior knowledge about the world to draw inferences from the evidence they receive at trial."
- 51 percent of jurors wonder why certain people mentioned at trial did not testify. 27 percent of jurors held that very lack of testimony against the side that did not call the witness.
- 83 percent of jurors in civil trials said that an exhibit helped them reach a decision.
- 30 percent of civil trial jurors say that the verdict ultimately reached was not the majority viewpoint when deliberations started.

I find many of these statistics fascinating and helpful, and I hope you do too. If you are aware of similar articles that discuss the scientific study of jurors, I would encourage you to post them in the comments section below.

Like It or Not: Likeability Counts for Credibility in the Courtroom

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



In the courtroom or anywhere else, for that matter, it's hard to believe someone you don't like … because you don't want to. Credibility depends on likeability and likeability is one of the easiest variables to overlook, at your own peril, whether we are talking about the likeability of a litigator, a client or a witness. When assessing the likeability of someone on your side's team, it is difficult to be objective because it's your job to like them (say, if you are lead counsel, or lead counsel is your boss, plus the client, the client's employees and your expert witnesses). You already have plenty of motivation to do so – whether a paycheck, a promotion, a relationship, or other rewards. A jury does not. Jurors will not only have no rose-colored glasses on; they may have shades on altogether.

According to the "friendship/liking rule,"[1] people are more favorable to people they know and like and are more willing to comply with their requests. This principle can be used for good or evil. For example, it is evident in one of the most successful business models to evolve: the Tupperware home party. Tupperware found that sales pitches are received more positively from friends and neighbors than from strangers, since we believe people we like more than ones we dislike. It is also evident in affinity fraud, whereby people trust their money to people they know and like, which is exploited by many a con artist engaging in Ponzi schemes. As the U.S. SEC states (emphasis added):[2]

- "These scams exploit the trust and friendship that exist in groups of people who have something in common."
- "Affinity frauds can target any group of people who take pride in their shared characteristics, whether they are religious, ethnic, or professional."

Notice that the common thread here is having common ground. Having and using the common ground between participants in conversation is one of the most important routes to effectively communicating. The converse is also true. Among the most important building blocks toward reaching the skill of successful communication during development are the abilities to take another's perspective, include it in forming one's messages, making sure to use the common ground, and making one's utterances contingent on the other's input

(rather than having a collective monologue, whereby each one says something that does *not* relate back to what the other just said). Many of us can recall bad dates or failed relationships in which this has happened and how frustrating and unsatisfying such communication can be. This behavior is more common (and age appropriate) for 3-year olds. For example, one may say "I like ice cream," to which the other responds, "Look, a puppy!"

Using common ground to increase likability and trust is a variation on xenophobia, i.e., we are more likely to like and trust people more like ourselves than people who are different, like it or not. Similarity (about opinions, personality traits, dress, background or lifestyle) has been shown to increase likability, so it is worthwhile for trial counsel and key witnesses to *match styles* with the local flavor of the jury, or, as Marisa Tomei said in My Cousin Vinny, "You blend" with your decision maker(s).[3] Another way to increase similarity between your litigation team and the jury is to mirror body language by subtly matching the judge's or jurors' postures and gestures to make them feel more at ease and positive about you because you seem more like them. In contrast, during cross examination, or when facing hostility in the courtroom, it may be more powerful not to match the style of the adversary.

Your job as a persuasive litigator is to understand the factors that can be used properly and ethically to be more likable, and thus more persuasive. As your case is more complicated, jurors are more likely to seek shortcuts and give more weight to easier factors to understand, such as whom they like or not. The less personally involved jurors are with evidence, such as information that is too dry or difficult, the more they tend to rely on peripheral cues rather than on an argument's actual strength.[4] Being liked is an important ingredient in the cocktail of peripheral cues jurors use to decide whom to believe. Knowing that likeability is so critical to credibility in litigation, what can you do about it?

What Increases "Liking" in the Courtroom?

Attorneys and witnesses who – by design – cannot share an existing friendship with jurors -- can still benefit from applying the liking/friendship rule by understanding a number of relevant factors outlined below.[5]

Factors of liking and friendship include:

- **Physical attractiveness**
- **Pretty positive**: Positive reactions to good physical appearance generalize to talent, kindness, honesty, and intelligence.[6] Thus, attractive attorneys, witnesses and clients at counsel table are generally more likely to be persuasive at changing attitudes and getting what they request.[7]
- **The truth isn't pretty**: In fact, more physically attractive defendants have yielded less certainty of guilt from jurors and received recommendations for less severe punishments than less physically attractive defendants.[8]
- **Compliments** can create return liking and willing compliance. For example, the actor McClean Stevenson once said: "My wife tricked me into marrying her – she said she liked me."

- **Flattery**, if not overtly manipulative, creates liking[9] and is just as effective at creating liking when true as when not true, and even when the recipient realizes that the flatterer stands to gain from being liked.[10]

- **Cooperation**: People working together toward a goal, such as pulling together against a common enemy, feel more positive toward one another[11] Car salesmen and others often engage the principle of good cop/bad cop by setting up their manager or "Corporate" or someone more senior as the villain so the salesman and customer can do battle to win him/her over, creating a common alliance toward a mutual goal. To the extent possible, create mutual goals toward which you can help the jury work with you, whether a mystery you will help them solve, a more efficient way to get through certain procedures, clear tutorial graphics to become educated about facts, or another end you can help them reach.

- **Scarcity** improves positive attitudes because if less is available, what is available seems better. Limited access to information makes us want it more and makes it more influential.[12] Hence, explaining "little-known facts of interest," or information only the courtroom is privy to which are relevant to the case, and making jurors aware of this fact when possible, makes them feel special. Scarcity has increased how things are valued throughout history. Collectors know it; precious mistakes such as a misstamped coin are valuable because of it. It's a shortcut to something's value, it can cause the loss of freedoms, and people hate to lose freedoms they already have (because it diminishes personal control), also called "psychological reactance theory."[13] The more threatened we are about losing something, the more we want to keep it and value it (you don't know what you've got till it's almost gone).

- **Reciprocity**: Offering someone something first makes them more likely to want to give you something back, known as the "reciprocity reflex."[14] Phrasing what you promise the jury in voir dire in such terms (I promise to do "x" for you, and rely on you to do "y"), then keeping your word, is one way to act on this principle.

- **Smooth Talking**: People highly responsive in conversation (those who responded faster and more, used more diverse words, and were more effusive when responding) were also perceived to be likeable, intelligent, and interesting, and were valued as a possible friend.[15] This implies that both attorneys responding to the Judge's questions and witnesses responding to attorneys' questions should beware of overly laboring the timing of their responses and should be conversational when responding – without overdoing it.

- **Other factors** which have added to likeability are self-disclosure, listening, cordiality, showing interest, and of course, appropriate smiling. A variety of research has yielded other highly valuable findings about the relationship of social validation (fitting in with what others are doing as a model for what to do), consistency (between prior and current actions) and authority (whereby credentials merit trust), among others, to increase persuasion.[16]

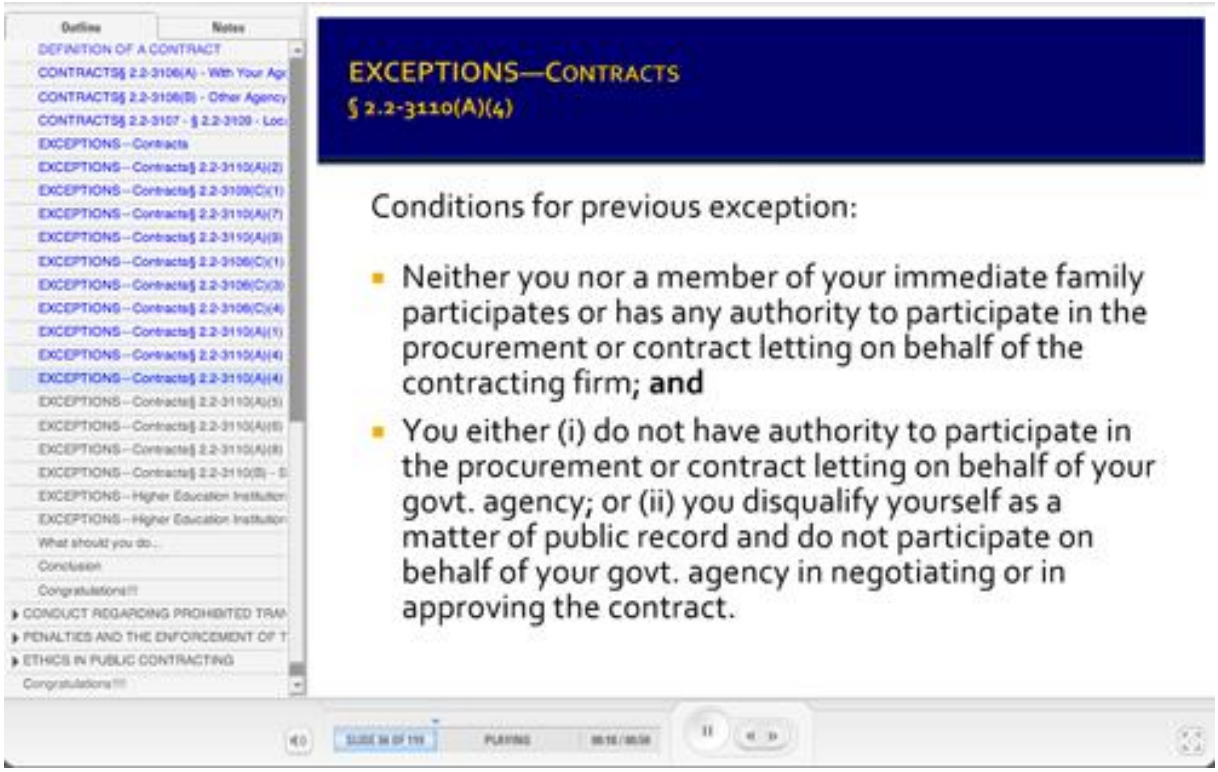
Jekyll vs. Hyde

Likeability and trust also come from consistency. Knowing that what you see is what you get, over time, helps. It is no wonder, therefore, that witnesses who drastically change their demeanor from friendly and cooperative on direct examination, and then morph into someone who refuses to answer questions, becomes antagonistic and uncooperative on cross – is not likable nor trusted. The truth should look and feel the same, no matter who's asking the questions.

In the end, sincerity bonds people together. Allowing them to see in you and your clients and witnesses the same truths and human traits that they recognize in themselves makes you genuine, likeable, and believable, like it or not.

Why Reading Your Litigation PowerPoint Slides Hurts Jurors

by Ken Lopez, Founder/CEO, A2L Consulting



I was just painfully reminded of how bad a juror's experience can be when we fail to put them first. Yesterday morning, like many of you recently, I had to complete a continuing education course. It was your typical recorded one-hour one-credit online course. That's one of the slides pictured here.

While listening to the instructor, it struck me that the experience I was having was eerily similar to most opening statements. It lasted about an hour, 119 PowerPoint slides were presented, there were lots of bullet points, almost no actual graphics were used, and the content of the slides was dutifully read to me by a well-spoken middle-aged gentleman.

And it nearly killed me.

You see, even though I have a law degree, I am much more like a typical juror than a typical lawyer. When someone presents to me with the intent of persuading and/or teaching me something, I expect a lot, and boy did this presentation fail to deliver.

I expect compelling visuals, I expect videos, I expect to be entertained, and I expect to hear scenarios and examples that I can imagine experiencing. I am a lot like most jurors, impatient and spoiled by twenty years of information being delivered efficiently online or on television. In learning style terms, I am a somewhat rare dominant-kinesthetic learner with a secondary preference for visual learning. In other words, I prefer to experience something when I am learning it, but if I have to, I am almost equally comfortable seeing it.

Most jurors are visual learners. Most lawyers are not. Most lawyers prefer to speak when they teach or persuade. Most jurors are wondering why we are not showing them more. The same is true for online training attendees like me, and that experience provides a valuable reminder for litigators, one that most of us can relate to.

Why does reading your litigation PowerPoint slides really cause a problem for people?

When you read a slide, you are actually worse off than if you had *either* only shown a slide and said nothing *or* if you had only spoken and shown no slide. This is true for at least two reasons, one is commonsense and the other rooting in neuropsychology.

The commonsense reason is that people read faster than you can speak. On average, people speak at 150 words per minute while people can read 275 words per minute. Unless you want to race against your listeners or properly combine oral and visual methods, it is best to choose one approach or the other.

The other reason one should not read litigation PowerPoint slides is not as obvious. It involves something called the split-attention effect and cognitive load. In plain language, our brains get overloaded when someone tries to show us something and tell us the same thing at the same time. The result is that our brains bounce back and forth between communication mediums and end up retaining and understanding less than they otherwise would have had we used only one method.

To be clear, the opposite is true too. If we supplement good visual aids, like well-prepared demonstrative evidence, with spoken words, a jury will remember more and understand more than if you had just done either. A recent study [pdf] confirmed this fact.

So, for someone like me, I learned what I needed about conflicts of interest in this online module and earned the requisite certificate in the course, but I was miserable along the way. I was bored, I felt my time was not respected, and I felt that little effort was made to make my experience a good one. If I could have punished my lecturer, I would have, and that is precisely the opposite way you want your jurors to feel, right?

Storytelling as a Persuasion Tool - A New & Complimentary Webinar

by Ken Lopez, Founder/CEO, A2L Consulting

One thing that all successful trial teams seem to have is the ability to tell a well-developed story. It doesn't matter whether it's a patent case, a white-collar crime case, or a commercial case – they always know how to build a narrative that appeals to a judge or jury. It's what great litigators do. They know that human beings are natural story-tellers and that story-telling is therefore the best means of persuasion.

Remember: A story is 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.

Simplicity is power. A successful litigator can refine mountains of information into a neat and compact outline of evidence that tells a compelling narrative that provides simple and persuasive themes. That task, however, can be easier said than done.

How, then, should a litigator actually go about telling stories? We have found that telling stories effectively is part art and part science. At A2L, we know what works in practice, and we know what works based on real science, and, most importantly, we will tell you both in our next webinar.

We are running a webinar on "S*torytelling as a Persuasion Tool*," on Tuesday, January 14, 2014, at 1:30 pm Eastern time. This will be a free 60-minute program taught by our top litigation persuasion experts, Dr. Laurie Kuslansky and Ryan Flax, Esq.

Dr. Kuslansky will reveal the science behind why storytelling works, using lessons learned from more than 400 mock trials and 1,000 litigation engagements. Litigator turned litigation consultant Ryan Flax will share what he has learned about storytelling, especially visual storytelling, while trying complex cases for a dozen years and helping to amass more than $1 billion in jury verdicts for his clients. He is now helping hundreds of top litigators as a litigation consultant at A2L.

The webinar will begin on January 14, 2014, 1:30pm Eastern Time, and will last for one hour, with an additional 15-minute question-and-answer period.

In the webinar we will cover:

- The science behind the storytelling
- When it's appropriate to use stories
- A useful plan that will help you tell your stories more effectively

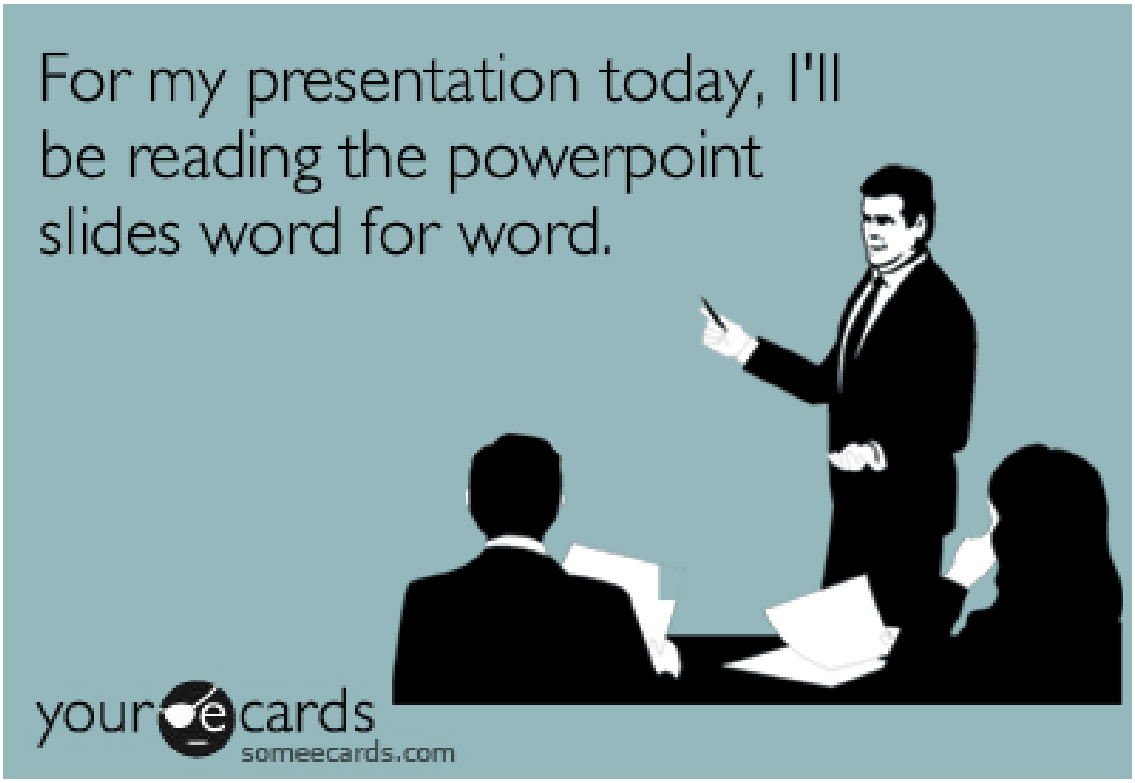
- How to use litigation graphics to enhance your storytelling

This webinar is suitable for anyone with an interest in litigation, but it is primarily designed for the courtroom lawyer.

To register for this free program, please click here.

Don't Use PowerPoint as a Crutch in Trial or Anywhere

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



The goal of a presentation is always the same -- to engage the audience, to move them. This rule of thumb holds true regardless of the stage. It's so in the courtroom, on the floor of the U.S. Congress, in the boardroom, and in the classroom. Litigators engage a jury to win their case for their client; professors engage their students so that they can best teach the subject matter. Engagement leads to better understanding, which then leads to better retention and enhanced persuasiveness. Retention and understanding are the keys to success.

As a student of presentation technique, I was especially lucky over the last summer to have two terrific sources of experiential information on the subject and a good deal of insight in to what works and what does not. My sources were Ms. Shawn Estrada and Ms. Jessica Dunaye, two of our summer interns at A2L, who have some pretty specific thoughts about presentation style after having sat through over 2,000 lectures from many, many professors and students throughout their college careers. After having spent a summer with A2L, learning first-hand how great litigators operate and now they are counseled themselves by litigation and jury consultants, they strongly believe that the litigation presentation techniques espoused by the A2L team are relevant in many aspects of life.

Here are some of the interesting tidbits from these two. They had so much to offer, I've divided their points into a series of articles.

Don't use PowerPoint as a crutch.

PowerPoint is a great presentation tool and the standard foundation for most courtroom, business, and classroom presentations. It enhances a presenter's points when used correctly. However, it can also ruin a presentation and make its user a tremendous bore.

It is easy to feel prepared after pasting a few words on a slide and/or committing your entire presentation outline to a series of slides, but we all know the result: the unprepared presenter; and its consequence; overwhelming the audience with a wall of text. It's painful to watch such a presenter grappling with the technology, fumbling with their notes, and stuttering through their content.

It doesn't go unnoticed when a presenter seems to be hiding a lack of knowledge, a lack of mastery of the subject matter, or a failure to practice a presentation behind a PowerPoint slide filled with text, reading it word for word. During a presentation, it is important to convey your position as an authority on your subject matter, which is why it is crucial to prepare yourself thoroughly. The best ways to ensure that you are not using your PowerPoint as a crutch are to make sure that you know your presentation perfectly and to make sure that you are using graphics to supplement, not to direct your presentation. You should NOT be relying on the content of your slides to drive your presentation.

This is true for professors teaching a classroom of students and for students presenting as part of their coursework. Student presentations are a college classroom staple. Every semester it's déjà vu: a nervous, obviously unprepared, student slowly walks to the podium at the front of the class to take his or her turn presenting something to the class. Usually their goal is to teach the class that day, and professors expect nothing but the best. It's a reasonable expectation, too, as the subjects are straightforward and presenting is simply an exercise in corralling the facts into a neat package.

The biggest give-away that a presenter does not know what they are talking about and is uncomfortable making the presentation is reading directly from the PowerPoint slide. Not only does this almost instantly*dis*engage the audience; it also shows a lack of command of the subject (this also goes for burying your head in note cards).

Also, a presenter needs to know his subject and presentation well enough to that he can dodge some curveballs. Some students will go to great lengths to "participate" in your discussion because they know it's an easy grade booster. This sometimes means asking random questions just to show the professor they are trying to engage in the topic of the day. For an unprepared presenter, these students are their worst nightmare. Being prepared means researching your topic fully and practicing until you know your presentation by heart.

We can all plan to keep from using PowerPoint as a crutch. In fact, at A2L we have many tips on how to make PowerPoint your very best friend. The combination of a well-prepared presenter and a carefully-designed graphic is sure to be a recipe for success for any student or litigator alike.

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.

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

By Ken Lopez, Founder/CEO, A2L Consulting

I had a conversation with 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.

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?"

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 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.

"Similarly, almost anyone can prepare a slide in PowerPoint, but making the right choices to win over your jury is much more difficult."

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 well 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.

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.

10 Ways to Spot Your Jury Foreman

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

While someone ends up sitting in the first seat on a jury and is presumed or named foreperson by the Court, they may very well be one *in name only*. In fact, someone else may function as the foreperson.

Guess Who?

Who do you think is the most likely foreperson? Do you think someone old enough to be her parent will defer to a 20-something pixie in seat 1? Will an accountant in seat 6 rely on the homemaker foreperson for damages decisions? Is it the butcher, the baker, or the candlestick-maker? Unlikely.

Is there a pattern?

Yes. Surprise, surprise! The power pattern in the jury room mirrors real life outside court:

1. **Male,**[1] despite the proportion of males to females in a venue's population.
2. **White**[2]
3. **Higher socio-economic status** [3]
4. **Better educated** [4] (such as a graduate degree)
5. **Past juror**[5]
6. **Age 45 to 65**[6] (possibly related to prior jury service)
7. **Act like leaders,**[7] such as:
    - **Sit at the head** of the table[8]
    - **First to speak**[9]

- **First to *mention* needing to choose a foreperson** [10]
- **Participate and speak more often** than other jurors [11]

8. **Extroverted** [12] (although extroverts are more likely to be struck during jury selection)[13]
9. **Higher levels of political self-efficacy** [14]
    - **More regular voting records of participating in past elections**.[15]
    - **More experience discussing politics** in conversation[16]
10. **Statistics background** (3:1 more likely to be foreperson than someone without it!)[17]

A perceived **"expert"**

Alternatively, someone on the jury who is perceived by other jurors to have expertise seen as relevant to the case may emerge as the foreperson. The funniest part of perceived expertise is how tenuous it can be. For example, in a high-tech patent case, an entry-level, part-time mechanic may be the closest available "expert" on the panel. Someone married to a lawyer may be the "expert" on a legal malpractice case. It is often a matter of "a little knowledge is dangerous."

But -- Haven't Things *Changed* Since the Women's Movement?

Uh… not so much on juries. As recently as 2007,[18] 71%-78% of forepersons were *male*, echoed in 2010.[19] In addition, how males and females act as foreperson also differs, in the off-chance that a female is elected (rather than typically volunteers) and actually functions as foreperson. Female forepersons tend to encourage others to *share their opinions* to build consensus and exert *less influence* on others' opinions, whereas male jurors tend to *interrupt, hold the floor*, and make *more declarative statements*.[20] Result? Male-led juries tend to reach verdicts quicker.

There is no guarantee of who will be the leader on your jury, but pay special attention in jury selection to leadership qualities and the traits noted here, because they will likely have significant influence if they end up on your jury. They may end up as juror #1 or enemy #1 if they become the foreperson.

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How NOT to Go to Court: Handling High Profile Clients

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

On July 9th, 2013, Manhattan Criminal Court was graced with the presence of Amanda Bynes, dressed for a costume party at the gym, but not for court (photo on right).

Recently, a television celebrity showed up for her videotaped deposition in a tight black top, complete with finger loops – all caught on tape.

In yet another example of bad behavior, a high-powered foreign bank owner did not own a white button-down shirt and never wore ties, so he had none for court.

It is not uncommon for high-profile clients to make up their own rules, or better yet – break them, at their own peril. They are typically difficult to control because they are used to expecting special treatment.

The problem is that judges don't view them the same way as starry-eyed fans or star-struck followers. Instead, such demeanor sends the wrong message to the wrong audience, one of disrespect, bordering on contempt.

What to do?

If you have a celebrity client, you know how challenging it can be to be the agent of "bad news," i.e., telling them they can't do whatever they please when it comes to court and litigation.

What may seem obvious to you is not necessarily obvious to them, so it is worth considering the following:

1. Ask in advance what they intend to wear to a deposition, hearing or trial. Assume nothing and don't rely on vague descriptions ("Something appropriate.") You may have something very different in mind as to what is appropriate.

2. If there will be media, consider how they will arrive to court. Will it help or hurt their case to show up in a flashy limo with an entourage?

3. What impression are you and they trying to make? What steps will you both take to achieve that?

Unless you are trying to establish that your client is, in fact, in the circus, avoid creating one when it comes to litigation settings.

Knock, Knock. Misuse of Humor in Litigation and the George Zimmerman Trial

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

In a high-profile murder case, defense counsel began the cross-examination of the prosecution's star witness by saying, "No questions, your honor." But then he quickly added, "Just kidding." The courtroom filled with laughter. Everyone had anticipated a character assassination. The legal levity not only eased tensions, but softened the blow of the attack to come.

In another trial, a dull expert witness was asked to qualify his credentials on the stand: "Why did you become an auditor?" to which he responded, "Because I didn't have enough charisma to become an accountant." Again, the court erupted. The witness's humor endeared him to the jury and made him instantly more interesting.

However, humor can also be grossly misused, as it was in the defense's opening statement on June 24, 2013, in the second-degree murder case of George Zimmerman for shooting the unarmed, 17-year-old Trayvon Martin.

Evidently referring to the jury-selection process asking prospective jurors of their familiarity with the case, attorney Don West said (here's the actual video):

"Knock, knock.

Who's there?

George Zimmerman.

George Zimmerman who?

All right, good. You're on the jury."

West later apologized and said he wouldn't make any more jokes. Too little, too late. He already violated trust, decorum, and common sense, and the rules of using humor in litigation appropriately.

Humor is no laughing matter in litigation because it affects being liked and believed . . . or not. In the courtroom (or your own home), it's hard to believe someone you don't like. Since credibility depends on likeability, and humor enhances likeability (or detracts from it if used inappropriately), it makes sense to take a serious look at humor in litigation.

Not only is it common sense, but according to the "friendship/liking rule,"[1] people are more favorable to people they know and like and are more willing to comply with their requests. This principle is borne out by one of the most successful business models to evolve: the Tupperware home party. Tupperware found that sales pitches are received more positively from friends and neighbors than from strangers, since we believe people we like more than ones we dislike.

No Sex, No Drugs, No Rock and Droll

Humor is important because persuasion depends on a variety of circumstantial factors surrounding the facts, not just the facts themselves. Like other people, jurors use two different routes of persuasion: central and peripheral. [2] Using facts is the most powerful way to persuade jurors, using the "central route." If the facts are too complex, too dull, or both (too scientific, technical, theoretical or statistical), and the subject matter is not intrinsically interesting, thoughtful consideration of the facts is unlikely.

In such instances, jurors resort instead to positive or negative "cues" that they associate with the issues (not the issues themselves) as shortcuts to base their decisions on, using the "peripheral route." For example, jurors might be persuaded to find for a defendant because defense counsel showed more documents, brought more experts and played up their credentials better than plaintiff counsel, not because of the quality of defense arguments or opinions. The less personally involved jurors are with evidence, the more they tend to rely on peripheral cues than on an argument's actual strength.[3] Being liked is an important ingredient in the cocktail of peripheral cues jurors use to decide whom to believe.

What Increases "Liking"?

Sales professionals know and use this information – perhaps too well. Attorneys and witnesses who do not share an existing friendship with jurors can still benefit from applying the liking/friendship rule by understanding a number of relevant factors outlined below.[4]

How?

Appropriate vs. Inappropriate Humor in the Courtroom: What Is Funny?

Allowing jurors to see you smile, share a laugh, have something in common, laugh with you, laugh at a common enemy – this is humor. If used properly, it can be powerful. But, like knowledge, a little humor can be dangerous if misused.

Appropriate humor cannot proceed at the expense of a litigant or witness who will be hurt and sympathized with; instead, appropriate humor brings consensus, provides comic relief, or is self-disclosing, universal, and honest.

Recommendations on Using Humor Appropriately[5]

In voir dire: Humor can be used to create contact, compliments and cooperation with prospective jurors. For example, asking about driving experience (say, in vehicle accident cases) with someone who carpools children frequently, you might respond, “So, you’re a professional driver.” Instead of disdaining people like stay-at-home moms, your lightheartedness while validating and acknowledging them creates a useful bond.

In opening statement: Humor can be used during introductions, poking fun at your own name. “My name is Laurie Kuslansky. With a name like that, it isn’t easy making reservations in a hurry.” “With a name like Bob Johnson, I have to work twice as hard and dress better so people remember that I am THAT Bob Johnson.” OR “My name is Andrje Czernovsky – which is too hard to spell, so most people call me Joe.”

In closing argument: Remind jurors of lighter moments of the trial to show you identify with them. “There were times you’d rather be somewhere else . . . me too!” “Speaking of the technology, which, fortunately, we heard about AFTER the judge gave us all a coffee break . . .”

Benefits of Humor in the Courtroom

Humor makes attorneys less “lawyerly,” more human and animated. Appropriate humor also provides other important benefits, besides likeability; e.g., it allows jurors to see you smile, relaxes them, disarms the authoritarian setting of a courtroom, makes you more accessible, makes jurors want to listen to you, creates bonding (if it uses a common denominator or is universal), helps jurors identify with you, enhances jurors’ attention and memory, and lightens things up when jurors feel oppressed or stressed. Evidence of jurors’ need for comic relief comes from the fact that they often come up with playful nicknames for key players in the case, including counsel, as revealed in post-trial jury interviews.

Risks of Humor in the Courtroom: When in Doubt, Leave It Out

Don’t risk it if you aren’t sure you can. Inappropriate humor is unkind or makes others uncomfortable. A witness who is funny may be seen as disrespectful and irreverent. Inappropriate humor is at the expense of a person who draws sympathy; it shows mean-spiritedness, is an inside joke that excludes some participants, is about something others cannot relate to, is an expression of concealed hostility (such as saying “Only kidding” to dodge responsibility for a cruel remark). It is sarcastic, smug, bullying, or used in inappropriate settings. It is not appropriate in most criminal cases or ones involving individuals hurt physically or emotionally. What is funny depends on at whose expense it is expressed. Ask yourself whether it is really funny or something else, perhaps snide, veiled anger, defensive, distracting, a lack of confidence, overly self-deprecating, or to conceal

your own discomfort. It is not an appropriate way to apologize. If misdirected, humor can create resentment or reduce credibility. It backfires if used as a defense/deflector when actually reacting to anxiety or anger. Humor is also an unreliable way to cover up a lack of preparation or disorganization; just be better prepared and organized.

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.

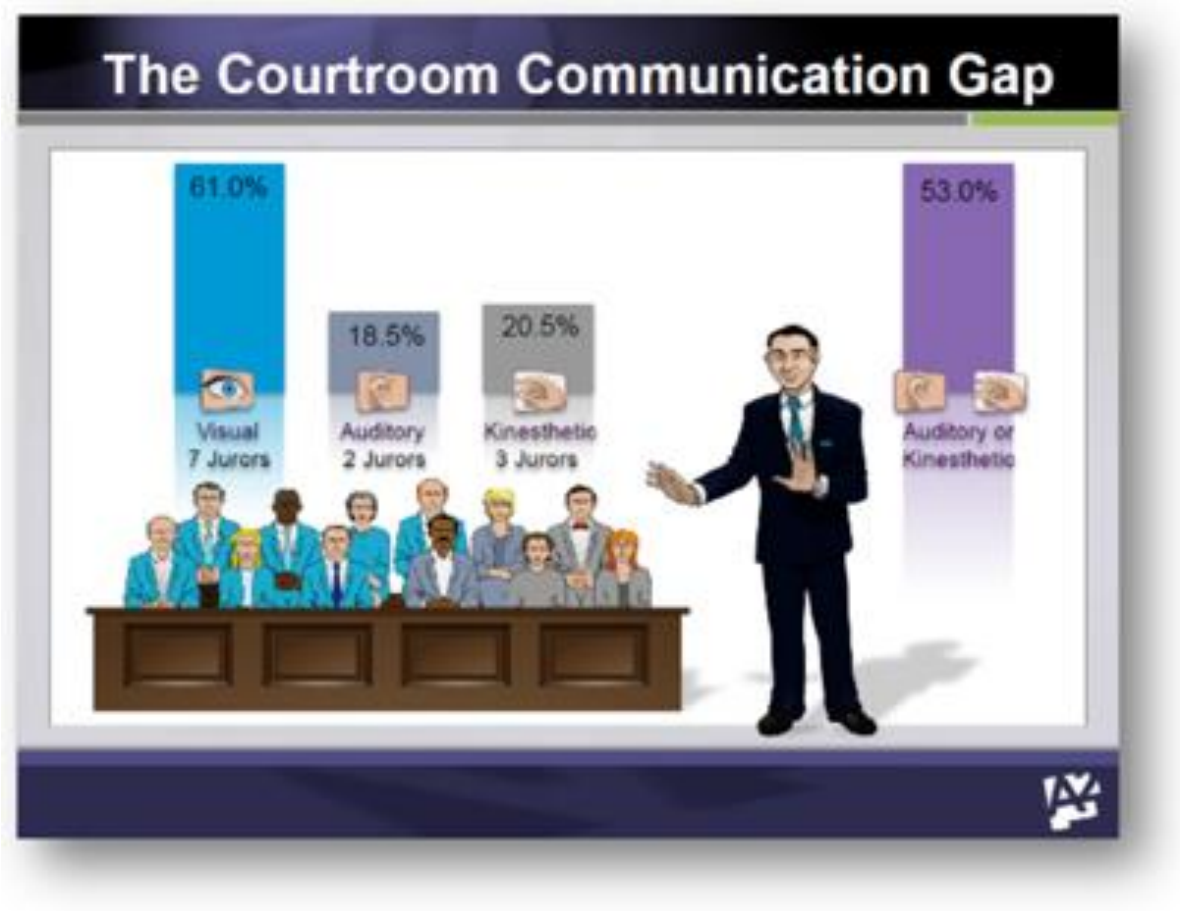
Experts agree. According to Alexander Poltorak (CEO of the patent licensing and enforcement firm General Patent Corp.), "Juries tend to simplify the case. That's a natural tendency," and "They want to figure out who is the bad guy here and let's punish them." *See also* our article on demonstrative evidence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

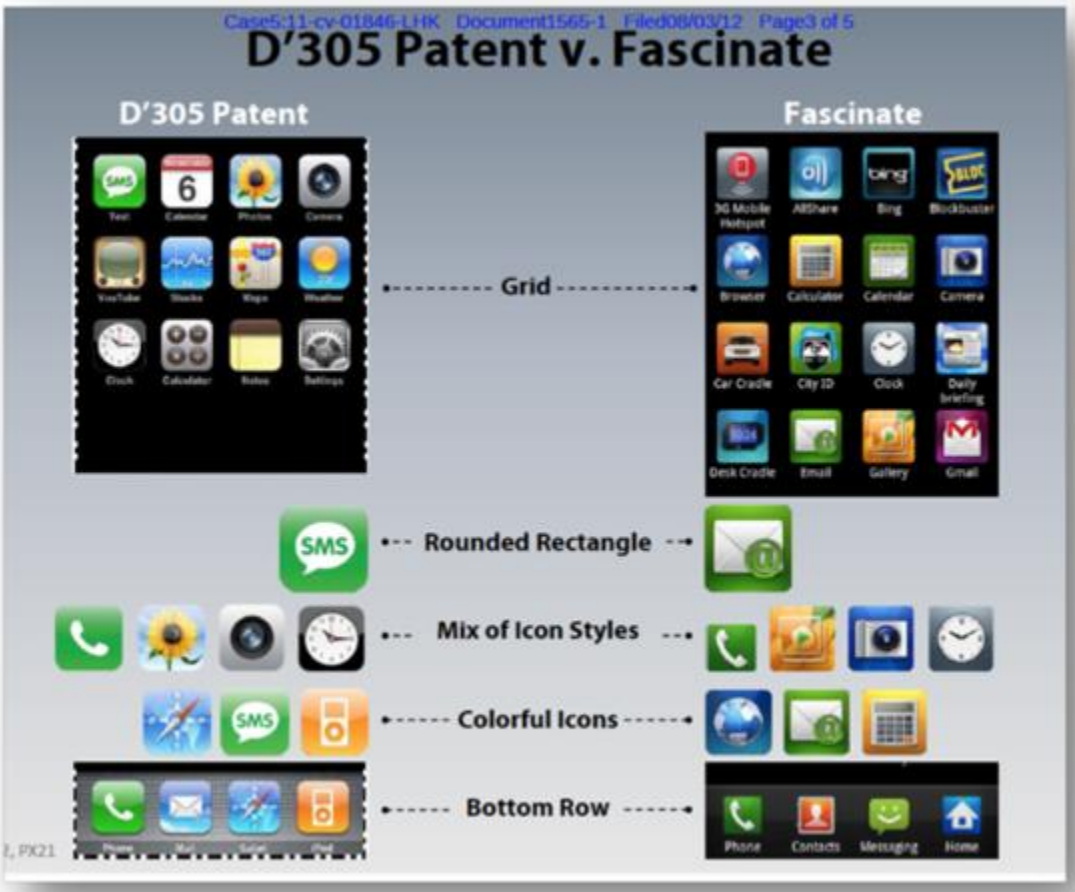
I'd say this is a fairly effective graphic. It simplifies a complex issue and makes a dramatic point.

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.

10 Reasons The Litigation Graphics You DO NOT Use Are Important

by Ken Lopez, Founder & CEO, A2L Consulting

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

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

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

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

Just as a branding firm will usually give you three to nine designs to pick from, or as a speech is refined over time, or as a trial team will abandon themes, arguments, or claims at trial, when creating litigation graphics **the final product is *properly* a product of a**

whittling down process. Thus it is in a trial team's best interest and the client's best interest to accept a large number of litigation graphics early on that won't be used in the final product.

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

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

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

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

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

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

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

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

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

8. **You find an opportunity to assess admissibility.** Sometimes a graphic that someone on the team wanted to create is just not going to be admitted, but it needs to be created anyway - just to get ruled out. At the insistence of counsel, we've put

devil horns on alleged thieves, we've made people look like they had a mug shot, and we've illustrated the opposing party's image to look like a robber baron. We know they won't be used and won't be admitted, but it was an exercise that had to be seen through.

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

10. **Most importantly, without having gone through the process of many drafts becoming one final graphic, you would not have arrived at what is your David or Sistine Chapel** - whether that be your opening presentation, your *Markman* hearing, your patent tutorial, your ITC hearing or your arbitration, without all the efforts to get there.

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 illustrate the work of jury consultants any more than CSI illustrates police work accurately. However, a good jury consultant can tip a close case by either helping to pick the right jury, testing the case and the lawyers, or both.

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

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

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

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

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

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

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

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

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

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

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

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

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

How To Project Your Voice by VideojugCreativeCulture

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

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

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.

12 Ways to Avoid a Trial Technology Superbowl-style Courtroom Blackout

by Ken Lopez, Founder & CEO, A2L Consulting

If you saw the Super Bowl this past Sunday, you saw some interesting things.

1) The Baltimore Ravens beat the San Francisco 49ers.

2) Neither Beyonce nor Alicia Keys lip synched her performance.

3) The game was delayed 34 minutes because of a power failure.

That's right. The most watched event in human history was delayed because the lights in the stadium went out. How is this possible?

It's hard to calculate the cost of such a mistake, but since the average 30-second ad cost $4 million, you could make the case that this was at least a quarter billion dollar snafu.

How could this happen and what caused it? It's hard to say at this point, but it does seem inconceivable.

Well, inconceivable trial technology failures are precisely the kind of thing you need to plan for in the courtroom. At some point in everyone's career, something is bound to go wrong during trial, and you need to minimize the chance of something going wrong with your trial technology.

Here are 12 possible problems that could lead you to fumble the ball during your trial presentations, and here are ways of preventing them.

1) **Inadequate planning.** If you are going to be at a trial site for some time, whether you are working at a firm office or out of a hotel, you must plan a month or more in advance. If you

do not, you will stay in the wrong hotels, end up with the wrong equipment, eat bad food, and inject stress into an already stressful situation.

2) **Too many points of contact.** Assign a single trial technology coordinator for the entire trial team rather than allow multiple orders to be placed by multiple partners.

3) **Slow Internet speed.** If you are planning a war room, you'll probably want to use a dedicated Internet connection rather than use a hotel's Internet. This takes time to set up.

4) **Computer failure.** It could be a hard drive, a screen, or something more serious. It's very rare, but you have to have a backup. You have to have at least one level of complete redundancy for everything that you will use in the courtroom, and a plan for replacement of war room technology at any time 24/7.

5) **Dim projectors.** Generally speaking, most courts will not have adequate projectors. At a minimum, you'll need 3000 lumens, but that is usually not enough. Instead, rent a 5000+ lumens projector and you will not have to dim the lights at all to see the image.

6) **Inadequate backup of your trial database.** You should bring backup copies of all trial software that you rely on and have a complete copy of your entire trial exhibit database.

7) **The unexpectedly quirky judge.** Some judges will not allow you to bring in technology without a motion. Some will not allow the use of graphics or technology at all. Know your judge.

8) **Trying to admit the inadmissible.** Play the wrong deposition clip and you could easily cause a mistrial.

9) **No courtroom survey.** Some courtrooms are long and narrow with juries just feet from the opposite wall. Plan with that in mind. We keep a database of courtrooms we visit often.

10) **Software failures.** Failing software is much more likely than failing hardware. You must have backups onsite for even basic software.

11) **Not using a courtroom trial technician.** Going to trial without a trial technician is a bit like doing your own surgery. It can be done, but why would you do it? The trial technician is there to make you look good.

12) **The unprepared presenter.** This is the most common source of technology failure at trial. If you have not practiced and worked out an unspoken language with your trial technician and tested your technology thoroughly, you are asking for something to go wrong.

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.

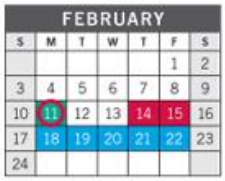
What we are describing below is a general sense of how this should work, using a sample calendar. There is considerable variability in the investment required, both in terms of time and money, depending on how many witnesses there will be, how long a mock trial, how many graphics there are, how long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

A2L CONSULTING
1-800-337-7697 | http://www.a2lc.com

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

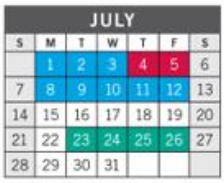
30-Dec. 2 War Room Set Up

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

3 Ways to Force Yourself to Practice Your Trial Presentation

By Ken Lopez, Founder & CEO, A2L Consulting

and Ryan Flax, Managing Director, Litigation Consulting, A2L Consulting

The old adages roll off the tongue when someone says the word “practice,” don’t they?

“Practice makes perfect”
“Practice makes the master”
“Practice is everything”
“Perfect practice makes perfect”

- or one of my favorites -

“In theory there is no difference between theory and practice. In practice there is.”

Whether you hear these in the voice of a parent, the *Karate Kid* mentor, Mr. Miyagi’s voice, Yoda’s, or Morgan Freeman’s, these words resonate. Yet many highly regarded litigators resist practicing their trial presentations.

Take a look at what a proven winner, Coach Pete Carroll, has to say about practice theory:

Jeff Stott, an expert consultant to business and sales professionals, confirms the importance Carroll puts on carefully planned practice and confirms how reluctant most non-athlete professionals are to engage in the activity:

We don’t know why they resist it exactly, but it may have something to do with not wanting to be seen as less than perfect. While this is a valid emotion, succumbing to it does an injustice to your case, your client, and yourself.

For the real best of the best professionals, including trial lawyers, practice is not only common, it is usually public. These people create a culture in which presentations are not expected to be perfect at the outset, and everyone is better for the experience. Accustoming yourself to this mindset, much less creating such a culture, is not easy. But you can make it happen.

Take some tips from Victoria Labalme, a communications consultant to Fortune 100 executives:

Victoria makes some terrific points in her six-minute video:

1. First, you must practice to be any good
2. Practice on the clock
3. Practice with an audience
4. Watch yourself practice
5. Video (and audio) record your practice

Practice as you'll play – wear the clothes you'll wear, rehearse as you'll do the presentation, imagine yourself in the "arena" you'll be playing in

Finally, Marsha Hunter advises attorneys in NITA on the best ways to practice presentations, speeches, and opening statements. Here's an excerpt of a 2012 NITA talk she gave to a group of litigators:

We strongly believe in continuous self-improvement. It's best for us and the people around us, and it is certainly best for our clients. With that in mind, here are three ways in which you can build practice into your trial preparation routine:

1) Use a mock jury (trial). We offer a variety of mock jury formats that range from the full multiday event involving 50 to hundreds of mock jurors to single-panel focus groups or mock jurors. Either way, you get access to a Ph.D. jury consultant, a formal report, and a review session. If you can afford it and have the time, this is the way to both practice your case and get the maximum feedback.

2) If a full mock jury session is not in your budget, you don't have the time, or it's too early in your case to do it, use a Micro-Mock™ session. The Micro-Mock™ is A2L's proprietary service. There are a variety of options, but at a minimum you get access to our expert litigation consulting team and tremendous feedback on your case. This is the ultimate in

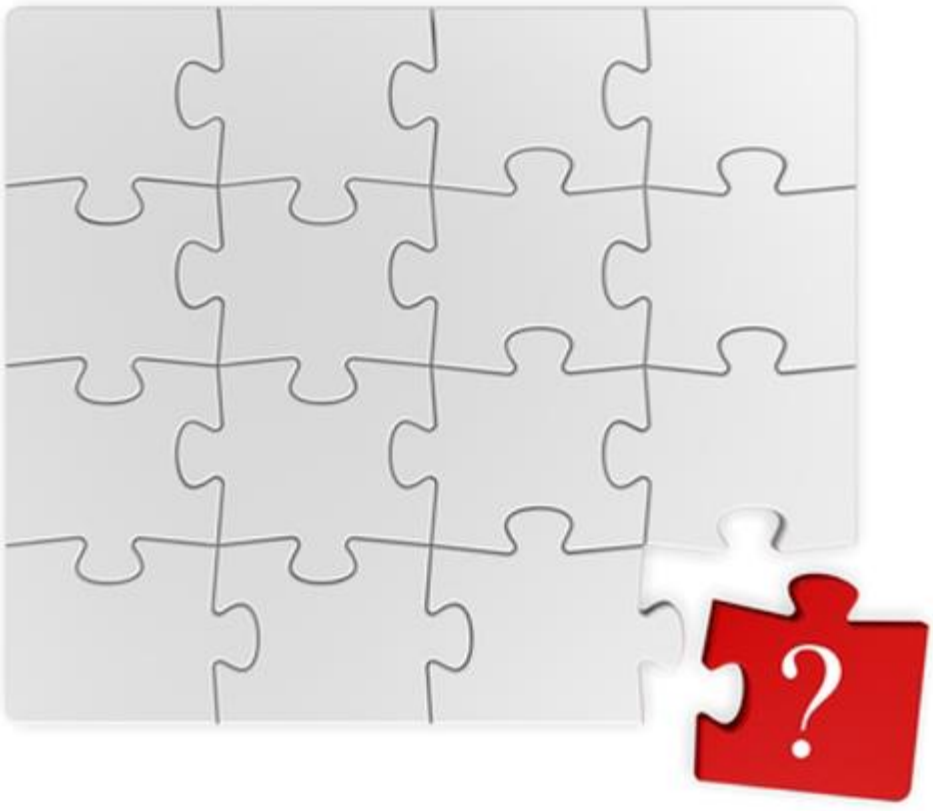
balancing budget and results. No other service is as effective at forcing you to practice your case and get the formal feedback you need to improve.

3) On your own, **practice, practice, practice** your opening statement or oral argument. Do it yourself at home, in the car, in your firm's conference room, in your partner's office, and do it over and over again. Enlist your peers as well as non-attorneys as your audience. Get their feedback. Listen to yourself talk out loud and try different ways of getting your points across.

It's best to use all three of these suggestions. Progress from very informal practice to very formal practice and back again. Put these things on your calendar now and be a better litigator for it when it counts.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

For example:

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

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

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

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

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

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

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

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

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

5 Tips for Working Well As a Joint Defense Team

The 5 Biggest Issues in Patent Law Right Now

12 Insider Tips for Choosing a Jury Consultant

7 Things Expert Witnesses Should Never Say

10 Things Litigators Can Learn From Newscasters

11 Traits of Great Courtroom Trial Technicians

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