

Monday, August 25, 2008

CIVIL PRACTICE

Litigation

The Future Is Now

[Computer-powered case presentation may be a necessity to persuade today's juries](#)

By Daniel E. Cummins

dancummins@comcast.net

Special to the Law Weekly

In today's society, computer powered presentations and displays are everywhere. With the world's reliance on the Internet for information, it seems as if no data or news is disseminated without colorful and eye-catching computer graphics. In other words, the idea of a future world where information is provided primarily through the use of computers has arrived.

As such, when jurors are summoned to the courtroom in this day and age, they may come with the expectation that the case will be presented in a manner that is consistent with how they receive all of their other information in society, i.e. in a visually stimulating and computer generated fashion. An attorney who instead simply presents as a talking head, relying on index cards or notes along with enlarged exhibits on poster board, may sorely disappoint jurors to the detriment of his or her client.

Accordingly, there has been increasing trend in civil litigation in the use of computer generated presentations at mediations, binding arbitrations, and trials in both the federal and state court contexts. As a result, various companies offering computer consulting services to litigators have prospered across the Commonwealth.

One such company, Exhibit A, is run by Joe Cardoni with offices in Northeastern Pennsylvania, Philadelphia, and New Jersey. Cardoni and his colleagues have been in the business of providing digital services to attorneys for the past nine years and have participated in hundreds of trials and ADR proceedings. The following review of the increasing use of computer services in civil litigation matters is generated from an interview with Joe Cardoni as well as from prior personal experience in the use of computer powered presentations at trial.

Computer Friendly Cases

Obviously, not every case demands a computer presentation. Although demonstrative exhibits should still be used in simple cases of clear liability and straightforward damages, such cases may not require a computer generated presentation from either a plaintiff or defense perspective.

In terms of a proper case for a computer powered presentation on the plaintiff's side, Cardoni noted that cases involving photos showing significant property damages or graphic personal injuries may benefit from the use of computer graphics. Additionally, in cases where there is a lack of a prior medical history and/or a lengthy and continuous post-accident treatment history, the use of a timeline in a PowerPoint display can be a visually compelling way to convey to the jury that all of the plaintiff's damages are all related entirely to the subject accident.

On the defense side, automobile accident cases with liability issues may benefit from the use of photographs of the accident scene or photos depicting minimal property damages through a PowerPoint presentation or

the Trial Director computer program in an effort to bring the liability defense to life. Cases involving soft tissue injuries with minimal treatment, or gaps in treatment, can be emphasized through a defense-oriented timeline up on the big screen for the jury to see.

Projected Costs

Cardoni estimated the cost for a PowerPoint presentation could range from \$2,500 in simple matters, such as a one-day mediation or arbitration, to \$8,500 or more for a complex multi-day trial.

The consulting fee includes a series of pre-trial collaborative meetings with the attorney to create the presentation, setting up all of the necessary equipment and the consultant's attendance and technical support during the proceedings.

The computer consultant will provide a high-quality display of your evidence for everyone in the courtroom using a notebook computer and high-resolution projector and a document camera. This use of technology gives the trial attorney the freedom to command center stage in front of a colorful and visually stimulating big-screen presentation.

'But I'm not computer literate'

An attorney's fear of technology should not be a roadblock to a better result for the client through the use of computers. Cardoni emphasizes that when working with a company such as Exhibit A to prepare a PowerPoint display or computer generated presentation, the attorney will never have to even touch a computer if he or she does not want to.

Rather, the role of an attorney in preparing the presentation is the same as if computers were not going to be used. The trial attorney will still focus all of his or her attention and energy on fully preparing the case for trial. With or without computer generated displays, the attorney will still have to come up with a theory of the case and gather and highlight any and all exhibits in support of that theory. The use of PowerPoint and other computer programs designed for trial use simply allows for a more visually compelling presentation of the case.

In fact, Cardoni noted that the attorney should not even meet with a computer consultant until he or she has finalized the theory of the case presented and gathered the appropriate exhibits. Once an attorney's case-in-chief is in "first draft" form, a meeting can be scheduled with a consultant about two weeks or so before trial to review how to apply the case to a computer presentation. At that point, the consultant will get to work on scanning the necessary documents, creating a digital archive, preparing relevant highlights and creating demonstrative exhibits in an effort to bring the case to life.

Cardoni also noted that during the course of the actual trial, the attorney again will not be required to worry about the equipment or in any way work a computer. Rather, it is the job of the computer consultant to set up the computer, the screens and all the necessary wiring in the courtroom. It is also the job of the consultant to remain at counsel's table to work the computer and pull up documents and exhibits onto the big screen as the attorney presents the case and questions the witnesses. In this way, the attorney remains free to channel all of his energy toward presenting the case in the most compelling and entertaining fashion.

Another beautiful thing about the use of computers in the courtroom is the ability of the consultant to immediately scan and display on the big screen a document that suddenly becomes relevant during the course of the trial. This clean maneuver takes the place of an attorney scrambling to have the document blown up as a poster board exhibit overnight or the time-consuming and momentum-ending process of producing the document to the jury by having it passed from juror to juror.

Allowance by Court

Another factor in determining whether to retain a computer consultant is the extent to which the judge presiding over the trial will allow such a presentation.

The computer generated presentation can be considered to be a form of demonstrative evidence and the finalized work product can be marked as an exhibit.

Whether or not an attorney will be allowed to use the PowerPoint or computer presentation during opening statements usually depends upon the judge. More innovative judges will typically allow the computer generated presentation to be used during openings, assuming everything in the presentation will be placed in evidence during the course of the trial.

Cardoni noted that, in his experience, an analogy successfully used to convince judges to allow the use of computer generated information is that bullet points appearing on a screen through the computer is the same as if the attorney was writing on an easel. The use of computer generated bullet points will surely prove to be faster and easier to read.

Other judges may, within their discretion, and with the presumable goal of keeping opening statements shorter, preclude the use of computer generated displays during an attorney's initial address to the jury. Still other judges may allow its use during openings only when there is an agreement between counsel that demonstrative exhibits can be used at that time.

Once the trial is underway, attorneys will usually have free rein to use PowerPoint and other computer programs during direct and cross-examinations as well as during closing argument. The proviso is, of course, that anything displayed on the screen to the jury is properly stated and displayed, is admissible, and has been previously disclosed to the opposing counsel.

As a professional courtesy and in an effort to avoid objections, the attorney using a computer presentation may be wise to first attempt to clear with opposing counsel the particular uses of PowerPoint and other computer programs anticipated during the trial.

Uses at Trial

Cardoni reviewed the ways a computer presentation can be used as an effective tool at trial or ADR proceedings to present a client's case to the jury in a more vivid and memorable fashion.

A PowerPoint presentation of the injured party's medical history allows the attorney to present important documents -- such as an emergency room record or a treatment note -- in the context of an event on a timeline. In this way, the jurors will be more likely to stay with the argument as you move along rather than zoning out due to information overload.

The Trial Director program allows the operator to instantly magnify and highlight pertinent portions of the documents being displayed to drive the attorney's point home to the jury. This software also allows the consultant to display two or more documents simultaneously to compare evidence or support or discredit a witness's testimony.

Another effective tool, for both the plaintiff and the defense side, is the use of calendars to show post-accident treatment histories. With all 12 months of a calendar year on the screen, the consultant can mark each treatment date with dots of different colors for each doctor or physical therapy visit.

A plaintiff's attorney with a client who has undergone frequent and extensive medical treatment may end up with a calendar as crowded and colorful as a gumball machine. Such an approach visually conveys to the jury in a compelling fashion the extent of the plaintiff's medical treatment as a result of an accident.

Conversely, a defense attorney may utilize the same approach to show few colored dots spread out over the course of a year for a plaintiff who has had minimal treatment, or who has large gaps in treatment. Through this clear visual display, the defense counsel may call into question the plaintiff's claims of great pain and suffering.

Cardoni also said the computer consultant has the ability to create three-dimensional models of objects involved in the litigation as well as animation to show how the injury-causing event occurred. Whether these

items will be allowed into evidence during trial may become an issue. In the less formal ADR mediation and arbitration proceedings, such displays are generally permitted.

The computer consultant should also have technical ability to play video depositions and surveillance tapes. In this manner, the party may save on the cost of separately retaining a video playback company to appear at trial. The video playback by a computer consultant may have the additional benefits of including closed captioning, cuts to screens showing and highlighting the actual documents being referred to by the expert during his testimony, as well as the creation of clips of the important parts of the testimony to be played back during closing argument.

Last but not least, the trial attorney can benefit from a computer consultant's observations and opinions about the jury's tone and reception of the material being presented. Such feedback can be used to make decisions about changes in strategy during the course of the trial.

Closing Argument

The most compelling use of a computer generated presentation at trial will come during the closing argument.

Today's younger generations -- tomorrow's jurors -- are totally immersed in computer generated information sources at work, at school, and at home.

Without rapid fire, visually stimulating blips of information, these tech-savvy jurors may simply tune out and daydream the trial away and thereby reach the deliberation room in no position to decide the case in a manner based on the presentation of evidence in the courtroom.

Additionally, it has been said that people generally retain about 25 percent of what they hear, 30 percent of what they see, and an impressive 50 percent of what they both hear and see. In courtrooms where a judge allows jurors to take notes, the retention rate could be as high as 80 to 85 percent with the use of a computer generated presentation. By using PowerPoint for openings and closings the jury will obviously hear and see information a piece at a time as they follow along in the presentation of the case.

During closing argument, any of the techniques discussed above that may have been employed during the course of the trial can be reiterated in a single, coherent fashion for the jury to see, hear and, most importantly, remember.

The digital presentation displayed on the screen can also serve as the attorney's notes, enabling counsel to present the closing argument without relying on index cards. The closing argument will flow through the courtroom in a more forceful and credible fashion as the jurors not only listen to counsel's argument but also see it unfold before them up on the large video screen in an unforgettable fashion.

Thus, it is easy to see the importance of computer presentations in the courtroom, particularly with respect to closing argument where counsel has the widest latitude to make his last pitch to persuade the jury, arbitrator or mediator to accept the theory of the case presented.

Surely, an attorney utilizing a computer presentation in support of his client's case will appear to present a more visually compelling case than an attorney who does not. In today's computer age, where the computer-oriented transfer of information is the norm, the visual edge may be all it takes to win a trial or ADR proceeding. •

Daniel E. Cummins practices insurance defense law and is a partner in the Scranton law firm of Foley Cignetti Comerford Cimini & Cummins.