



## WHEN OLD DOGS LEARN NEW TRICKS: COURTROOM PRESENTATION TOOLS AND THE RULES OF EVIDENCE

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There's a new generation of computer-based tools which are increasingly being utilized by trial lawyers. Some are behind-the-scenes tools, designed to enhance the ability of the lawyer to map out case strategy, build timelines of events, and even produce trial books. Other tools are designed to organize and present evidence in the courtroom. These latter tools are often referred to as visual aids or presentation tools. But they are much more sophisticated than the enlargement-on-foam-board tools of yore. They include such tools as computer animation, which visually represent an expert's testimony, projected images of photos, documents, charts and graphs, deposition testimony which is highlighted and annotated, or which combines video and text and is indexed for precise recall by the attorney during a witness' testimony.

These high-tech courtroom presentation and litigation tools require a fair amount of computer expertise, a commitment of firm resources, and a lot of detailed preparation prior to and during trial. Why are trial lawyers embracing these tools in increasing numbers?

**More effective.** Studies have consistently shown that visually reinforced information remains easier to understand and remember, and is in fact up to 650 times more effective than oral argument alone. Today's jurors are largely a television generation. Even the baby boomers who preceded the computer age are still used to viewing a television screen. Therefore, computer-based presentation tools are more appealing and effective to today's jurors..

**Greater impact.** The use of high-tech visual aids makes a great impact on the client as well as the juror. John Brown, a trial lawyer with Philadelphia-based Cozen & O'Connor, has frequently made use of animation. His reason for using it is

“that for most folks, ‘visuals’ are a major factor in memory retention — this is a major factor for jurors in particular who have to digest a concentrated stream of information in a short period of time, delivered by attorneys and experts who have ‘lived’ the case. I think all the clients that have authorized the use of animation technology for ‘their cases’ have been convinced at the end of the process that the combination of ‘stills’ and animated sequences are the most effective means of communicating ‘their point of view’. When presented in the courtroom on a screen and left on the screen during the examinations of witnesses (with witnesses referring to the images during their testimony), the themes that we try to present through the image selection are ‘burned’ into the minds of the jurors and they really do ‘get it’. As far as the case presentation and theory, they associate everything they learn through the lay and expert witnesses with the visual image, and it becomes a reminder that we can attach the major themes of the case to.”

**Best first impression.** Trial lawyers have learned that appearances and first impressions count in everything they do. In trials, first impressions are magnified because of procedural rules that limit the manner in which one can convey information. (More on that later.) As a result, attorneys often use visual aids to help them create a favorable impression and “sell” their case.

**Save time and money.** Trials progress more quickly when visual aids are used. They provide clarity, and enable concepts to be presented and grasped more quickly. As a result, time and money are saved for the courts, attorneys, and clients. And when visual aids are used during mediation, issues emerge earlier, helping the parties assess risks and benefits more quickly.

The most popular presentation tool is Microsoft’s PowerPoint. It comes bundled as part of the Microsoft Small Business Edition or Professional suite of software. It is very easy to learn and use. It helps attorneys avoid the “11<sup>th</sup> hour panic” concerning preparation of or modification of exhibits, particularly photographs. Even if it’s over a weekend, the attorney can create his/her own powerful exhibits, or modify existing exhibits, with relative ease. It’s a tool which is equally effective for zoning and planning commission hearings, tax assessment appeals, pretrial matters, and mediations. In fact, it’s especially good for mediations because the materials are easy to present, can be viewed by all parties together, and all the materials are kept in one location.

There are many add-on or “plug-in” packages which enhance the innate capabilities of PowerPoint. They do everything from integrating many forms of



media including pictures, photos, movies, and voice-overs easily, and can add animations, enhanced highlighting, plus the ability to make changes to presentations “on the fly.” For WordPerfect users, the Corel Presentations suite of products offers functionality similar to PowerPoint.

Harvard Graphics ([www.harvardgraphics.com](http://www.harvardgraphics.com)) offers a suite of products, including Easy Presentations (\$70), Advanced Presentations (\$199) and Instant Charts (\$30). Their software has always been recognized for reliability and robust feature sets. When the data which must be visually displayed consist of numbers, trends, or other information which are best presented in graphic mode, Harvard Graphics is one of the best tools to use.

A very powerful tool is Sanction 1.7 Trial Presentation (\$395 — <http://www.datacompanies.com/html/products/sanction.asp>). This software handles digital video, and enables establishment of a link from every line of text in a deposition to a searchable location on the video tape. It is mostly used for impeaching testimony. One can also make an arrangement of clips in advance based on issues, ready for playing on cue.

Using Sanction requires quite a degree of technical savvy. In most cases a professional outside consultant is retained to assist the firm in setting up the various links and arrangements. The firm would also likely use the consultant during trial to set up and operate the equipment, as an integral part of the trial team.

Another powerful tool is TrialDirector (\$695 — [www.indatacorp.com](http://www.indatacorp.com)). This software provides the ability to project multiple exhibits side-by-side for comparison, with on-screen annotation tools and multiple zoom capabilities. There are in fact so many litigation-oriented presentation tools, it is impossible to reference all in the space of one article.

Finally, custom video animation is used to visually present complex and comprehensive information which would normally be impossible to view or comprehend with the naked eye. For example, underground construction in a liability case, or the inside workings of a mechanical mechanism in a patent case.

Of all the courtroom presentation tools, custom animation is certainly the most costly. Prices begin at about \$10,000 - \$15,000, and can go as high as \$100,000 depending on the complexity of the case, and whether there's something on which to



base the visual creation upon (photographs of an accident scene and site surveys, for example) or not. Yet in spite of their cost, attorney John Brown states confidently, “I have not had any disappointed clients who feel the money has not been well spent.”

Animations are not just for use in the courtroom. They are highly effective tools to assist the trial team in better preparing for their case. They help identify facts that don’t make sense. Often they are an important tool to help settle a case early on, as they provide clarity of the facts which are supported by scientific data.

Attorneys typically have one of two reactions when shown these available technologies. First, they believe that anything which appears on a computer screen becomes an acceptable exhibit, and instantly credible to a juror. Not true. Second, they presume that there is no way to authenticate the evidence created by use of these tools. Again, not true.

Most of this presentation software gives trial lawyers a new, faster way of doing what they have done for years. The computer and projector are, in part, a substitute for the blackboard, the chart, and enlarged documents. The rules for the use of these items are well established, and will be applicable to similar courtroom presentations.

They must meet the tests of relevance, avoiding prejudice and waste of time under Pennsylvania and Federal Rules of Evidence 401, 402 and 403. Permission to use them is within the trial court’s discretion. Charts have been used to illustrate a complex conspiracy, Commonwealth v. Rickabaugh, 706 A.2d 826 (Pa. Super. 1997), and to illustrate the process of prisoners through police headquarters in a case asserting that the police were bribed to expedite the release of two alleged mob hit men and keep their bail low. Commonwealth v. Trudell, 371 Pa. Super. 353, 538 A.2d 53 (1988). In complex cases the Court has allowed the chart to be exhibited throughout the trial. Commonwealth v. Cullen, 340 Pa. Super. 233, 489 A.2d 929 (1984).

When visual aids were blackboards, courts required that they be shown to the judge and opposing counsel before being displayed for the jury. Davis v. Haldeman, 150 F. Supp. 669, 672 (E.D.Pa. 1957). Judges prefer, and often order, that displays be provided prior to trial to avoid having objections interrupt the presentation of the case. E.g., United States v. Bloom, 78 F.R.D. 591 (E.D.Pa. 1977) Even in a case in



which it was conceded that the charts were accurate, their last minute presentation before closing was sufficient to deny their use. United States v. LaBar, 521 F. Supp. 203 (M.D.Pa. 1981).

None of these cases involved computer presentation, but their rules should apply. Make sure your presentation is accurate and supported by the evidence. Provide a printed version to your opponent during discovery, if requested, and include it with your pretrial memorandum. Have the printed copy with you in court for the record. Submit it as an offer of proof if your presentation is refused.

Technology sometimes makes lawyers overlook basic rules of courtroom procedure. Even when a document is admissible it must actually be received in evidence and the Court's permission obtained before it can be shown to the jury. Commonwealth v. Gease, 548 Pa. 165, 696 A.2d 130 (1997). I have seen lawyers fail to object to their opponent putting enlargements of documents on an easel and questioning a witness about them before they have been admitted. This is just as objectionable when a computer image is displayed on a screen.

This principle and Rule of Evidence 613 means that "instant impeachment" with transcript, audio and video, is not possible if an objection is made. The witness is entitled to be asked about the prior testimony and to have an opportunity to explain it before the transcript is admissible. The state and federal rules differ on the timing of this, but their effect is the same.

While computer animations have some resemblance to films or videotapes of demonstrations, they do raise issues that Pennsylvania's courts have not yet addressed. Anyone preparing or preparing to oppose, an animation needs to read 22 Wright and Miller, Federal Practice and Procedure §5174.1 (supplement) "The 'MTV Defense'". The title is enough to tell you the authors' view of computer animation. They explain that what the lawyer or witness tells an animator is hearsay. They disagree with the analogy to a witness with a chalkboard both because of the impact of animation, and the impossibility of altering the video in the light of cross-examination. Still, computer animation is gaining ground, and is admissible when the animation is properly authenticated.

Pierce v. State, 718 So.2d 806 (Fla. App. 4<sup>th</sup> Dist. 1997), explains the difference between the use of computer animation as a demonstrative exhibit in conjunction with an expert's testimony, and as substantive evidence having independent significance. When it is demonstrative, the proponent need only show that the



evidence would be helpful to the trier of fact, the witness using it is qualified as an expert, it has a foundation in the evidence, and its prejudice must not outweigh its probative value. On the other hand, when the computer is performing calculations or otherwise presenting a conclusion based on information supplied to it, the animation must meet the test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) in state court, and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) in federal court. It is best to file a motion in limine to avoid interrupting the trial.

Although gaining ground, use of high tech presentation tools, or visual aids, is still largely limited to those attorneys who are ahead of the curve. As a result, those attorneys have an advantage which enhances their chances of prevailing at trials and settlement conferences. In addition, they are impressing their clients and cementing important relationships. It's never too late for an attorney to learn to make use of these new tools. Just keep the Rules of Evidence in mind when you do so.

*A version of this article originally appeared in the Pennsylvania Lawyer*

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