

## **Showboat vs. Peter Pan: How to Approach Using Technology in the Courtroom**

Here in the Valley, we were recently treated to a remarkable production of the popular musical *Showboat*. The sets and scenery were more elaborate and complex than any previous *Showboat* production. It was a crowd-pleaser.

Several years ago, another production, starring Kathy Rigby, played in the same auditorium. The sets and scenery were not nearly as elaborate as those in *Showboat*, yet when Peter Pan flew effortlessly (it seemed) over the audience seating, accompanied by Tinkerbell, my fellow theatergoers and I were charmed. Two extremes, yet both productions achieved their purpose – to draw me, a member of the audience, into the world on the stage, make me a part of it, keep my attention, and stay in my memory.

**Stage left -- the courtroom.** No, a trial is not a play. It's real life, especially to the clients whose lives and businesses are affected by all that occurs during the trial. While not a play, most litigators realize the similarities between a trial and a stage show. The judge is the director. The court personnel and paralegals act as the stagehands and prop managers. The litigators and witnesses are the actors that weave the facts of the case into a comprehensible and, hopefully, sympathetic story for the juror audience. And, finally, the jury -- the audience, the people to be convinced. Like *Peter Pan*, some trials are elegant in their simplicity. Others, unfortunately, are cumbersome not only in the amount of evidence being presented to the jury but in the way the evidence is presented, almost obscuring rather than shedding light on the facts.

Litigators also realize that in spite of the adrenaline flowing through the trial team's systems, jurors often fail to share the same enthusiasm for the justice system and its legal battlegrounds. In fact, many jurors confess that they find the whole process tedious and boring. *Showboat* captured the audience's imagination in part through the elaborate use of sets and scenery. *Peter Pan* achieved the same effect, even though its sets and effects were quite simple. Some trials call for a *Showboat* production; others succeed using a moderate amount of technology. The point is, when using technology in the courtroom, the goal is to present the evidence in a way that is understandable and memorable for the jurors.

Experienced trial consultants charge between \$900 and \$1500 a day to help litigators through *Showboat*-type trial productions. Believe me, a good trial consultant is worth every dollar. These trial consultants are the stage managers whose responsibility it is to coordinate the various aspects so the technology supports the litigators but doesn't overwhelm the proceedings. If your trial is a *Showboat*, hire an experienced trial consultant. (Remember to check the references!)

The focus of this article, however, is on those trials of the *Peter Pan* variety. Cases are presented every day that do not require elaborate technology set-ups. Some may succeed using a simple overhead projector and transparencies, or blow-ups. Others will benefit from a moderate use of simple technology.

Don't let the word "simple" fool you, though. "Simple technology" is nearly an oxymoron. Even the simplest set-up requires planning, teamwork and organization. Here are some suggestions if you are anticipating using technology to assist in your next trial.

1. **Timing *is* everything.** If this is your first attempt at using technology in the courtroom and the trial is set for tomorrow or next week or even next month, *forget it*. Technology is only a tool to help achieve a result. In the weeks just before trial, other more critical aspects relating to the trial of the case must take precedence. A day, week or month before trial is not the time to sit down for training on a complex computer program! Depending upon several factors (such whether the documents are already imaged and indexed or whether you are already comfortable with computers and the programs), you should allow a minimum of 60 days before trial to prepare for the presentation of evidence by electronic means in the courtroom.

2. **Don't try and ambush the other side by walking in at the last minute with a computer, projector and screen.** Judges don't like it, and you may find yourself precluded from using *any* computer equipment in the courtroom. Obtain the court's permission in advance. This may require educating the judge (and opposing counsel) on how you plan to use the technology.

3. **Technology will never replace the skills of a good litigator, nor will it make a good advocate of a poor one.** But technology may make a good advocate *appear* to be a poor one if the process isn't carried out well. It's important that opening and closing arguments go well because of the impressions left with the jurors. The same holds true for electronically presenting evidence.

4. **Obtain help, in advance of the first day of trial, in planning for the computerization.** If you have never used technology in the courtroom before, sit down and talk with someone who has. No matter how simple the approach, the coordination of all the factors is crucial if you want to end up with a good presentation. Some of the things to consider are: How do you want to use technology? Do you have a database now or do you need to build one? If so, what documents will be included? Will they all be imaged or will only some be selected? (Be careful. There seems to be an axiom – the document you don't image is the one you end up wanting to use in trial!)

Physically go to the courtroom and prepare a diagram of the environment, including measurements. Based on the placement of the furnishings and lighting, you will need to determine whether a single projection system will be effective or whether you will need to place monitors around the courtroom to get the best result. How long will the cables have to be? Does the judge want a monitor on the bench? Where should it be located, given the judge's preferences? Do you want to present only documentary evidence using the computer or do you want to use video clips or animations? If so, who will prepare them for how much and how long will it take? What computer equipment will you need, and how will it be configured? Do you have the right software to do the job – and do you know how best to use it in the courtroom?

5. **Follow the Scout Maxim: Be prepared!** In a paper-based trial, a skilled litigator would never think of waiting until a witness takes the stand to decide to use a previously non-existent blow-up of an exhibit. The preparation of paper exhibits (especially blowups) requires planning.

While intuitively one would think that technology slices through such problems, the presentation of evidence is not as spontaneous as it (hopefully) seems to an observer. The system must be thoroughly tested before the trial starts, and any problems must be resolved in advance. Set up

the projector(s), computer(s), cables, screens – everything you plan to use just as it will be laid out in the courtroom. Make sure all the pieces work correctly. Then, as early as you can get access to the courtroom before trial (at least one or two days), set up the equipment there and test it again and again.

Thorough preparation also includes running through all of the exhibits you plan to use on the presentation system. If you're using a barcode wand to retrieve the exhibits, make sure all of the barcodes work properly. If something is wrong with an image or the medium on which it is stored has been damaged, then it may take some time to correct the problem. If a certain phrase is going to be excerpted or blown up or highlighted for the jurors to see, then you must work with the person who will be actually operating the computer so that person understands your strategy and can take the necessary steps to help you implement it.

This doesn't mean that you can't spontaneously use an exhibit that wasn't in the pre-planned line-up. It's just important to have pre-tested every exhibit so that no unfortunate surprises crop up during trial.

6. **How do you get to Carnegie Hall?** You're an experienced litigator, so why should you waste time practicing the simple presentation of exhibits to a witness when you have other things to do? Because, as I said before, technology can make a good litigator appear inept. With the help of a computer, an advocate can enhance the appearance of an exhibit to illuminate a critical point. But if the wrong exhibit is called up on the screen, or the wrong point in the document is highlighted, or the timing is off, or an exhibit not yet admitted is inadvertently presented, the jury will be more intrigued with the mishaps than with your point. Practice running through the exhibits for each witness *before* you get to the courtroom.

7. **Successful warriors know that if the gun fails to fire, you'd better have a knife, and if the knife breaks, you'd better know hand-to-hand combat.** Computers fail. The more complex the system, the more opportunities exist for problems. Hard drives crash, CD-ROM media gets scratched or warped, power strips go bad, cables develop weak points, batteries die, projector bulbs burn out, software programs develop corrupted files, and sometimes the computer angels just seem to go on vacation. If you're lucky, all of these won't happen to you during the same trial, but they might.

Be pessimistic, and you'll be prepared should something go awry with the equipment:

- Assume the computer will fail, and have an identical back-up system in the courtroom, ready to go if needed. A five-minute downtime is less disturbing to the judge than a request for a one-hour break while you locate another computer.
- Take for granted that the projector's bulb will burn out, the power strip will go haywire, and the batteries will die. Have extras on hand in the courtroom.
- Understand that one or more of your key software program's files is likely to become corrupted. Carry back-up program disks to the courtroom every day.
- If you're using a CD to hold the images for your trial presentation, keep a duplicate of the CD in the courtroom. (A duplicate of a single CD that can hold images of 12,000+ pages of exhibits costs only \$50.)

- If you're using a projector to present the images on a screen, insist that the projection system's vendor have a spare projector that will be in your hands in the courtroom within 30 minutes of a crisis call. (Get the vendor's agreement signed in blood if you have to.) If you're on an out-of-town trial, insist that you be provided with a back-up system at the hotel. Out-of-town vendors do not usually have an ongoing relationship with out-of-state lawyers. If there is a crunch between a vendor's current client and a one-shot out-of-state firm, who do you think will get the projector?
- Consider having access to an Elmo-type overhead projector. An Elmo is the system that projects the image of a paper document or physical object just like an overhead projector does with a transparency. If something happens to the projection of an imaged exhibit or if you're caught by surprise with a new exhibit introduced by the opponent, you can still present the exhibit to the jury using the Elmo projector. I recently talked with a trial consultant who said that they considered it a failure to have to use an Elmo to present an exhibit that should have been presented from the computer. I don't call it a failure – I call it smart crisis management!
- Keep a list of contact numbers (including technical support numbers and names) in the courtroom. It is also a good idea to have a cell phone for use outside of the courtroom doors, too. If something goes wrong, every minute is important in getting the problem resolved.
- Finally, back up all of the files you will be using at trial. Trial presentation and litigation support programs can create huge sets of files, depending upon your evidence strategy. Take steps to have the appropriate systems in place to make frequent and reliable backups. Use a huge hard drive, a direct cable connection between two computers, a zip drive, or a back-up tape (or some combination of these) for backups. You may skimp on the backup process during your normal workday (not wise, but human nature); *don't ignore it during trial!*

8. **Now is not the time to be chintzy on critical systems to save a dollar.** Imagine how it would feel to be standing in front of a jury, judge and opposing counsel while you wait in silence for an exhibit to appear on the screen. After an agonizing span of time – 15 seconds tops – you turn to your computer technician only to see a quizzical look and a bead of sweat running down that person's forehead. The CD-ROM drive you bought at a closeout sale has stopped working or the software program that you got at a bargain basement price has suddenly developed a serious glitch or the cable that only cost \$15 can't carry the signal properly. At this moment, that \$100 or \$200 you saved will seem both insignificant and terribly significant. If only.... You don't want to be embarrassed in front of a tough audience because you decided to save pennies in a fit of cost consciousness. Pay for reliability, both in your equipment and your service.

9. **Hire an experienced guide or two to help you find your way through this new territory.** Even Peter Pan had a stage manager, a person to help smooth out all the details so the director and actors could concentrate on the presentation of the play. (*Showboat* required the expertise of several stage managers.) If you have never before used technology in a trial, rely on someone who has.

Depending upon your firm's staffing, you may have someone on your payroll that is able to handle many of the facets of trial presentation. But if they've never done it before, hire someone who has

experience to handle your first trial and to train your staff to take over on subsequent trials. By the way, while your network support company may claim they can set you up in the courtroom, get references from clients for whom they've performed the same services. If the network service company has never set up a courtroom before, don't be their guinea pig. Cabling a courtroom is more like setting up a rock concert than a computer network. In a trial, you can't afford a drawn-out troubleshooting process like many of us have experienced with network problems. By the time the problem is resolved, the trial will be over. Experience counts here; take advantage of it.

**10. Even the best litigators with the best equipment and the best planning lose cases.** Technology will not, on its own, magically transform a losing case into a winner. Nor will technology convert a group of citizens designated as jurors into brilliant economists or analysts. Jurors unfortunately sometimes hang their decision-making hats on irrelevant points, ignoring critical evidence. It happens, and technology is not going to change the nature of a jury.

I recently assisted one of the best teams of trial attorneys I've ever had the honor of working with. We decided to use a straightforward system of managing and then presenting the evidence in a trial. It was a sound decision, and the attorneys were pleased with the process and the ease with which everything flowed in court. Based on what we and others observed, the jurors' attention was appropriately grabbed when we presented documents on the screen. We kept it simple because we didn't want to overwhelm them. Because it was a damages trial, we felt we could better educate the jury if we presented key exhibits electronically. We used technology judiciously. The litigators were highly skilled and likely the most competent I've seen in my career. The client was supportive of the trial team and did everything possible to facilitate the background details of our lives while on an out-of-state trial so the litigators could keep their focus on the day-to-day process of trial. We were faced with more technology problems and obstacles than any trial team should have to deal with (the computer angels were on vacation), and we overcame them all. Yet we still ended up with a poor jury decision, nowhere near as bad as it could have been, but nevertheless disappointing. In the course of the post-trial juror interviews, it was clear that many of the jurors just decided our client was in the wrong, in spite of evidence to the contrary.

Technology isn't a magician that can transform a world in which juries sometimes make incomprehensible decisions. Cases were lost before anyone ever brought a computer in the courtroom, and cases will be lost in the future, regardless of how effectively they are presented, using computers or not. Still, a litigator's responsibility is to represent the client to the best of his or her ability. Sometimes using technology in the courtroom helps fulfill that responsibility.

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