NEW YORK LAW SCHOOL

NYLS Law Review

Vols. 22-63 (1976-2019)

Volume 54
Issue 1 *New York Law School Law Journal Alumni Issue*

Article 8

January 2009

Techno-jury: Techniques In Verbal and Visual Persuasion

Gregory J. Morse
Morse & Morse, LLC

VOLUME 54 | 2009/10

GREGORY J. MORSE

Techno-jury: Techniques In Verbal and Visual Persuasion

ABOUT THE AUTHOR: Gregory J. Morse, ESQ., is a partner at Morse & Morse, LLC, who specializes in state and federal criminal defense and appellate litigation.

I. INTRODUCTION

Clarence Darrow stood before Judge John R. Caverly's large mahogany bench and began delivering his summation in the 1924 murder trial of Leopold and Loeb.[1] Directly behind, and on both sides of him, stood dozens of spectators. The courtroom was filled to capacity with standing room only; it remained that way for the three days that Darrow delivered his closing argument. Each morning before dawn, spectators waited outside to catch a glimpse of the great orator and, if lucky, get a spot inside the courtroom to watch Darrow deliver his impassioned summation. The spectators became so enthralled with Darrow's argument against sending Leopold and Loeb to "the chair" that they openly wept and cheered in court.[2] That is the impact lawyers should strive for when delivering their arguments in court. However, since Darrow's time, the way we receive and process information has changed dramatically.[3] Ever since I read about the Leopold and Loeb trial and Darrow's magnificent, moving summation, I have wondered: *How would Clarence Darrow fare with jurors today?*

The backgrounds and experiences of jurors today are different than they were in previous generations. In 2000, Generation-Xers ("Gen-X") comprised approximately 40% of the people in jury pools.[4] Gen-Xers grew up on television and came of age in the era of personal computers. Lawyers must keep in mind that people today have access to information twenty-four hours a day, seven days a week. Through the Internet, we can find out about any subject we want in a matter of seconds. Moreover, we are no longer only aware of the events that happen in our hometowns; we may also have in-depth knowledge of economic problems in Japan or political power struggles in Kenya. Today, jurors might even participate in news reporting by way of *YouTube* and *CNN's iReport*.[5] Television, the Internet, and cell phones have profoundly affected the very way we receive, interpret, and attach importance to all types of information.[6] We are the *On-Demand Generation*.

---

1. This account of the Leopold and Loeb trial comes from Edward Knappman, American Trials of the 20th Century (1995). A transcript of his summation can be read online at *Closing Argument: The State of Illinois v. Nathan Leopold & Richard Loeb, Delivered by Clarence Darrow*, www.law.umkc.edu/faculty/projects/ftrials/leoploeb/darrowclosing.html.

2. Leopold and Loeb did not have a jury trial; they pled guilty and Clarence Darrow delivered his summation to Judge Caverly instead of a jury during the sentencing hearing. Darrow was successful; Leopold and Loeb were spared the death penalty. Knappman, *supra* note 1.

3. *See* G. Marc Whitehead, *Juror Persuasion: New Ideas, New Techniques,* 26 A.B.A. Litig. 34 (2000).

4. Lisa Brennan, *Pitching the Gen-X Jury,* Nat'l L. J., June 7, 2004 at 1, 1; *see also*, Ralph Taylor, *Visual Persuasion in the Courtroom: Tips for more effective trial presentations*, Litig. News, vol. 25 no. 2, Jan. 2000, at 1, 12 (while there are several date ranges offered, the consensus is Generation-X ("Gen-X") consists of people born between 1965 and 1980).

5. Both of these services allow amateurs to upload video and photos to the Internet. *CNN*'s *iReport* also shows amateur video and photos on its television station. *See* iReport, http://www.cnn.com/ireport/ (last visited Oct. 28, 2009); YouTube, http://www.youtube.com/ (last visited Oct. 28, 2009).

6. Jordan S. Gruber et al., *Video Technology*, 58 Am. J. Trials 481 § 6 (2009).

The side effect of an "on-demand" society is that the same technology that is largely responsible for making jurors more intelligent and sophisticated is also causing dramatically shorter attention spans.[7] Just think of the way television and radio advertisers try to have their full message received in twenty to thirty seconds.[8] If the advertisement does not *grab* the viewer's attention in the first few seconds, he or she will lose interest and disregard it.[9] Similarly, a lawyer needs to *grab* the jurors' attention when he presents his case.

And despite our shorter attention spans, as jurors we are supposed to see, hear, and remember every piece of admissible evidence.[10] Indeed, "[o]ne often-heard criticism of the jury system today is that jurors cannot understand the increasingly complex issues presented in court."[11] However, I believe that most complex cases are lost not because the lawyers have presented too many facts and ideas, but because they have failed to convey them in a clear and concise way.[12] Imagine a General Motors commercial that described a new hydrogen-powered vehicle by having a narrator read from a physics textbook. People would lose interest quicker than the narrator could say "fossil fuel."

The technological revolution has substantially changed the way people receive and process information.[13] Today, a three-day summation, even if delivered by an orator as skilled as Clarence Darrow, and even if permitted, would probably not hold a jury's or judge's attention long enough to secure a favorable verdict or decision.[14] Thus, lawyers must convey information to the jury quickly and concisely with clarifying visual support and verbal cues. Moreover, lawyers must convey information

---

7. *Cf. id.* § 38 ("Americans are accustomed to the excellent image quality and highly sophisticated production values of Hollywood-generated entertainment programming. Consequently, presenting video evidence with inferior image quality, sound quality, or production values may result in the juror's boredom, dislike, or general disenchantment.").

8. *See* John Mitton, *Clear Channel's 30-second rule has radio advertisers tuning out*, Houston Business Journal, Nov. 12, 2004, http://houston.bizjournals.com/houston/stories/2004/11/15/focus4.html. *See also* Whitehead, *supra* note 3, at 34.

9. *See, e.g.*, Sonya Hamlin, *Who Are Today's Jurors and How Do You Reach Them?*, 27 A.B.A. Litig. 9, 11 (2001).

10. *See* Whitehead, *supra* note 3.

11. *Id.* at 36.

12. *Id.*

13. *Id.* at 34.

14. Abraham Lincoln understood the importance of brevity for what is widely regarded as one of the greatest oratories of all time—the Gettysburg Address. On November 19, 1863, in Gettysburg, Pennsylvania, Edward Everett and Abraham Lincoln each delivered a speech to a crowd of more than 15,000 people. Everett, an eminent lecturer, was the keynote speaker and delivered a nearly two-hour speech. Lincoln's speech lasted approximately five minutes, and was completed before a photographer could record it. Evidence about the crowd's reaction is mixed. The *Chicago Times* called the speech "silly, flat, and dish-watery." Everett wrote Lincoln that "I should be glad if I could flatter myself that I came as near to the central idea of the occasion in two hours as you did in two minutes." Carl Sandburg, Abraham Lincoln: The War Years, vol. 2, at 465, 468–70, 472, 475 (Harcourt, Brace & Co. 1939).

in the context of juror experiences.[15] Jurors identify with stories that are consistent with what they know and what makes sense to them based on their individual "ethnicity, education, cultural orientation, religion, [and] upbringing . . . ."[16] Extensive psychological research has shown that "remembered 'facts' are subject to interpretation as they are filtered through our attitudes, values, and life experiences."[17] To effectively present the story that jurors will adopt, lawyers should incorporate new techniques in verbal persuasion, compliment their verbal persuasion with techniques of visual persuasion, and be mindful that no two jurors will necessarily understand the same story in the same way. In this article, I discuss techniques of verbal and visual persuasion designed to better reach—and persuade—today's jurors. I also discuss the practical evidentiary concerns that lawyers must consider when employing high-tech verbal and visual persuasion techniques.

II. VERBAL PERSUASION

A trial has been described as a series of impressions. By effectively structuring her communication, the lawyer "maximizes the opportunity for the audience—the jury—to hear, retain, and recall important pieces of information" in a light favorable to her client's case.[18] Structure provides jurors with a means of discerning what information is important and offers a way of getting back into the story if they lose focus.[19] "[J]urors check in and out, sometimes paying no attention whatsoever, sometimes listening and thinking more quickly than people can speak."[20]

When verbally presenting their story to jurors, lawyers should also try to create a theme.[21] A theme is a short phrase that sums up the story. For example, "If the lion got away, Kerr-McGee has to pay."[22] This theme was used by famed trial lawyer Gerry Spence serving as the plaintiff's lawyer in *Estate of Karen Silkwood v. Kerr-McGee Nuclear Company.*[23] Spence used the theme to sum up the legal complexities of strict liability.[24] The lion symbolized the plutonium that infected Karen Silkwood.[25] Thus,

15. *See* Whitehead, *supra* note 3, at 34.

16. *Id.* at 34.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 35.

22. Michael S. Lief, H. Mitchell Caldwell & Benjamin Bycel, Ladies and Gentlemen of the Jury: Greatest Closing Arguments in Modern Law 125 (1998).

23. *Id.* at 125–26. The jury awarded Silkwood actual damages in the amount of $500,000 and punitive damages of $10,000,000. Silkwood v. Kerr-McGee Corp, 464 U.S. 283, 245 (1984). The case ultimately settled before a re-trial for $1,380,000. Lief et al., *supra* note 22, at 122.

24. Lief et al., *supra* note 22, at 125–26.

25. *Id.*

if Kerr-McGee's plutonium (the lion) got out and infected Karen Silkwood, Kerr-McGee was liable no matter its defense.[26] "Spence, through a simple yet vivid story, reduce[d] this complex legal notion to terms anyone could understand."[27]

During a criminal trial, I used the theme of *Where's Waldo*. The defendant, a young office worker at a construction company, was charged with grand theft and burglary. The defendant allegedly burglarized his place of business on a Friday night after business hours and stole company checks that he later cashed. Unfortunately for the defendant, he was also alleged to have left his wallet behind at the business. As defense counsel, I argued that the out-of-town business owner had met the defendant at the business on that Friday night and made out the checks to the defendant to pay him for his work. The prosecution did not call the business owner to testify, nor did I. In closing argument, I asked the jury, referring to the "hidden" business owner, "Where's Waldo?," thereby throwing reasonable doubt on the prosecution's case. The jury returned a not guilty verdict.

Lawyers should also present facts and evidence in a way that conjures up visual images and experiences in the minds of the jurors.[28] This will help to reinforce jurors' memories and understanding of the verbal description and to better associate with ideas and concepts.[29] For example, New York City Mayor Michael Bloomberg, when describing New York City's efforts to clear snow from 6,000 miles of city streets, stated, "It's like plowing from here to Los Angeles and back."[30] Mayor Bloomberg used an easy-to-understand analogy that conveyed the massive task of clearing snow from New York City streets. Another example of fact presentation that assists in juror visualization is seen in the following two descriptions to a jury of the damaging effects on the alveoli, the tiny air sacs in the lungs, by toxic gases:

> (1) There are millions of alveoli in the lungs. These alveoli are necessary for proper breathing. Defendants released a toxic substance that destroyed tens of millions of them in plaintiff, approximately 70% leaving the plaintiff barely able to breathe on her own.
>
> (2) There are millions of alveoli in the lungs. These alveoli are necessary for proper breathing. Imagine that all of the alveoli in the plaintiff's lungs cover a grass football field—one hundred yards. Now imagine that you are standing on the thirty yard line facing the far end of the field. Further imagine that all of the

26. *Id.* (except, of course, in the unlikely event that Karen Silkwood caused the plutonium to be released herself).

27. *Id*. at 125.

28. *See* Whitehead, *supra* note 3, at 35.

29. *Id*.

30. Robert D. McFadden, *Beautiful and Bothersome, Biggest Snowstorm of the Winter Sweeps Across the Northeast*, N.Y. Times, Mar. 3, 2009, at A23.

> grass from the thirty yard line where you are standing to the far end zone is dead, it's brown, 70% of the football field. That is why she can barely breathe on her own. Defendant's toxic gas caused all that unnecessary, permanent damage to plaintiff's lungs.[31]

The second description is easier to remember because it creates a mental image that many are familiar with—a football field.

A story and theme, and the visual images they conjure, "give the jurors context, continuity, and motive."[32] "Jury research has shown that thematic repetition vastly increases comprehension . . . on the part of the decision-makers."[33] A theme helps jurors recall evidence and other aspects of the case that they may have forgotten.[34] It also creates a point of reference for jurors to filter and connect evidence.[35]

"Words mean different things to different people."[36] Keeping the background of each juror in mind will better enable lawyers to choose words, concepts, and ideas that have a greater impact on them.[37] "[T]erms that might be very effective with Baby Boomers—'career path,' for example—may mean less or nothing to Generation X jurors who are conversant about 'skill sets' and who 'graze' through jobs with the understanding that rapid change is an inevitable part of their lives."[38] A lawyer should also understand the locality in which she is presenting her case, as well as the current events at the time she is presenting her case there.[39] To better understand the community, a lawyer may want to visit the local coffee shops, ride around in a cab, or speak with a local lawyer.[40] This might provide the lawyer with some common denominator among the jurors, upon which she can draw effective analogies and descriptions.

---

31. *See, e.g.*, Transcript of Record at 4803, U.S. v. Philip Morris USA, 449 F. Supp. 2d 1 (D.D.C. 2006) (No. 99-2496).

32. Whitehead, *supra* note 3, at 35.

33. *Id*. at 36.

34. *Id*. at 35.

35. *Id*.

36. *Id*.

37. *Id*.

38. *Id*.; Hamlin, *supra* note 9, at 9; *See also Great Xpectations of So-Called Slackers*, Time, June 9, 1997, at 4, http://www.time.com/time/magazine/article/0,9171,986481,00.html.

39. Thomas Mesereau, Jr., the prominent criminal defense lawyer who represented Michael Jackson in his 2005 child molestation trial, explained that, while the media kept saying Jackson could not get a fair trial in Santa Barbara County and should change the venue, Santa Barbara residents had a favorable opinion of Jackson. Jackson was well liked and did a lot of charity work for the community. Therefore, Mesereau thought it would be best to try the case in Santa Barbara. Michael Jackson was acquitted of all charges. Thomas Mesereau, Jr., Speech at the National Association of Criminal Defense Lawyers, Advanced Criminal Law Seminar: Trials of the Rich and Famous (Jan. 23, 2006).

40. I was recently in Delaware representing a client accused of securities fraud. Since I was not familiar with the Delaware area or its residents, I spent some time talking to the hotel clerk and a local lawyer. These conversations helped me better understand the economic diversity of my jury pool, which was relevant because the case centered around six- and seven-figure-individual incomes and large cash transactions.

Failing to learn about a juror's background may cause irreparable harm to a lawyer's case.[41] The lawyer might inadvertently use words, phrases, or examples that mean nothing to a juror, or are—worse yet—disparaging.[42] Recall the football field analogy above. Now imagine the lawyer analogized the lungs to an ice curling court rather than a football field.[43] Further imagine that the jurors are from Arizona. The jurors probably would not know what an ice curling court looked like and thus the analogy would fail. Finally, imagine you are in New York City giving a speech about baseball to a large group of Yankees fans. You begin by describing your fond childhood memories of riding the train packed with fans dressed in their favorite player's uniform, your little league glove already on your left hand, and the joy and exhilaration you experienced when you approached the stadium and finally saw the sign for FENWAY PARK. Chances are you would need security to protect you from the riotous crowd. My point is simple: In designing your verbal persuasion techniques, *know your audience*.

III. VISUAL EVIDENCE[44]

A. Examples and Techniques

Increasingly, today's jurors assimilate information better visually than aurally.[45] A 1998 report on juror perception showed that 90% of jurors polled found visual evidence presentation a more effective way to see evidence and to follow a lawyer's presentation than by verbal explanation alone.[46] Visual persuasion is not new; yet,

41. *See* Whitehead, *supra* note 3, at 35.

42. *Id.*

43. Curling is similar to shuffleboard except the court is made of ice and a broom is used to play. It is very popular in Canada.

44. There are two types of evidence: (1) demonstrative evidence, which is generally not admitted into evidence or given to the jury during deliberations, and (2) substantive evidence, which is admitted into evidence and given to the jury to review during deliberations. *See* Clark v. Cantrell, 529 S.E.2d 528, 535 (S.C. 2000). In *Clark v. Cantrell* the court further explained:

> Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony. Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance. Demonstrative evidence is distinguishable from exhibits that comprise "real" or substantive evidence, such as the actual murder weapon or a written document containing allegedly defamatory statements.
>
> These categories sometimes overlap. For example, a bank surveillance photograph of a robbery suspect may be classified as demonstrative evidence because it illustrates the crime scene; however, it also may be classified as substantive evidence of the identity of the perpetrator.

Id. (citing Christopher b. Mueller & Laird Kirkpatrick, Evidence Under the Rules §§ 9.31–9.36 (4th ed. 2000)).

45. Hamlin, *supra* note 9, at 11.

46. *See* Frederic I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High-Technology Courtrooms*, 50 S.C. L. Rev. 799, 815 (1999).

many lawyers still fail to use effective visual aids in the courtroom.[47] Visual aids may be as simple as a poster board or an overhead projector to enlarge a document, or as advanced as a computer-generated animation or simulation.[48]

In the 2002 trial of Michael Skakel for the 1975 murder of Martha Moxley,[49] the prosecution used a "customized interactive multimedia evidence presentation system. As witnesses were testifying, prosecutors displayed on a large screen photographic evidence, maps, diagrams of the murder scene, and other demonstrative evidence that they were able to summon on demand from a CD-ROM."[50] During the prosecutor's closing argument, jurors heard critical passages from an audio-taped interview of Skakel with an author working with him to produce an autobiography. Jurors simultaneously followed a transcript of Skakel's words projected onto the screen aside the images that were previously introduced into evidence.[51] At one point in the closing argument, Skakel's recorded voice said, "I had a feeling of panic."[52] At the same time, an image of Moxley's body at the crime scene flashed on the screen.[53] The visual aids provided a much more powerful summation of the prosecution's argument than if the prosecutor had merely delivered his closing verbally. Michael Skakel was convicted.[54]

---

47. If you need help learning how to effectively use technology in the courtroom, visit the Center for Legal and Court Technology website:

> The Center for Legal and Court Technology (formerly the Courtroom 21 Project) is a non-profit entrepreneurial research, education, and consulting public service organization that seeks to improve the administration of justice through the use of appropriate technology. Court-oriented, CLCT is a joint initiative of William & Mary Law School and the National Center for State Courts. CLCT works to assist courts, government agencies, law firms, law schools, judges, lawyers, court reporters, paralegals, legal technologists and other members of the legal professions.

The Center for Legal and Court Technology, http://www.courtroom21.net (last visited Oct. 28, 2009).

48. Whitehead, *supra* note 3, at 38.

49. State v. Skakel, 888 A.2d 985 (Conn. 2006); Brian Carney & Neil Feigenson, *Visual Persuasion in the Michael Skakel Trial: Enhancing Advocacy Through Interactive Media Presentations*, 19 A.B.A. Crim. Just. 22 (2004).

50. Carney & Feigenson, *supra* note 49, at 22–23.

51. *Id*.; *see also Skakel*, 888 A.2d at 1068–69.

52. *Skakel*, 888 A.2d at 1069.

53. *Id*.

54. *See id*. at 1055–56. Carney & Feigenson, *supra* note 49, at 22–23. The defense objected to the prosecutor's use of the visual aids during closing on the grounds that it was prejudicial and a misrepresentation of the facts introduced at trial; however, the objection was overruled and denied on appeal. *Skakel*, 888 A.2d at 1067. In a concurring opinion, Judge Katz noted:

> [C]ounsel is entitled to considerable leeway in deciding how best to highlight or to underscore the facts, and the reasonable inferences to be drawn therefrom, for which there is adequate support in the record. We therefore never have categorically barred counsel's use of such rhetorical devices, be they linguistic or in the form of visual aids, as long as there is no reasonable likelihood that the particular device employed will confuse the jury or otherwise prejudice the opposing party. Indeed, to our knowledge, no court has erected a

Visual persuasion works associatively.[55] Visual presentations should, whenever possible, remind jurors of their own life experiences, and focus the jury on the point the lawyer is trying to make from the evidence.[56] Instead of simply reading a damaging document to the jury, a lawyer should enlarge the document on an "Elmo" projector and highlight the damaging aspects so that the jury can also read it.[57] This visual perception of the document has a greater impact on the jurors, and they will be more likely to remember its damaging aspects.

Another useful feature of the Elmo is that a lawyer can connect a laptop to it and display a Microsoft PowerPoint presentation, which allows lawyers to easily create their own overhead documents. In creating PowerPoint slides, lawyers should remember the following best practices: [58]

DOs of PowerPoint:

- Edit slides/power point presentations down to the essence of the matter you want to communicate and use as few words as possible to convey your message.
- Be sure the design clarifies and enhances the message, not detracts from it.
- Use simple pictures or icons along with the words on bullet-point slides.
- Build slides element by element, adding one point at a time to convey the overall message.
- Use a black screen between slides to keep the jury's attention on you.
- Use visual presentations that point to life experiences that the jury can understand.
- Use a large display screen.

---

per se bar to the use of visual aids by counsel during closing arguments. On the contrary, the use of such aids is a matter entrusted to the sound discretion of the trial court.

Id. at 1069 (Katz, J., concurring) (quoting State v. Ancona, 854 A.2d 718, 737 (Conn. 2004)).

55. *Cf.* Whitehead, *supra* note 3, at 34–35 ("[I]f [the story] makes sense in light of [the juror's] values, attitudes, and life experiences—they will adopt it as a hypothesis and will try to fit the evidence into it as the trial progresses.").

56. *See* Fed. Judicial Ctr. & Nat'l. Inst. for Trial Advocacy, Effective Use of Courtroom Technology: A Judge's Guide to Pretrial & Trial, 223 (2001), http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/$file/CTtech00.pdf [hereinafter Judge's Guide].

57. *See id.* The overhead projector, which had been in courtrooms for many years, has given way to the Elmo document camera. The Elmo is a color video camera mounted above a light table that can display three-dimensional objects, flat art, documents, photos, slides, and x-rays in real-time on a large screen or monitor. ELMO, http://www.elmousa.com/applications-legal.php (last visited Oct. 28, 2009).

58. *See, e.g.*, Nat'l. Inst. of Justice, U.S. Dep't. of Justice, Digital Evidence in the Courtroom: A Guide For Law Enforcement & Prosecutors 49 (2007), http://ncjrs.gov/pdffiles1/nij/211314.pdf [hereinafter Guide for Law Enforcement & Prosecutors]; *see also* Judge's Guide, *supra* note 56, at 247.

DON'Ts of PowerPoint:

- Use too many words on a particular electronic or overhead slide.
- Fall prey to runaway graphic design—the overuse of pie charts, bar graphs, and clip art.
- Present all information on a slide at one time.
- Show a slide before you talk about it.
- Overlook the persuasive and visual power of color.
- Select color combinations that will be jarring or difficult to read.
- Obscure well-conceived visuals by poor display.
- Use technology for technology's sake. Technology should not dictate the substance of your case.

I was involved in a complex criminal fraud trial involving several defendants and multiple corporations that, according to the prosecution, had defrauded investors out of millions of dollars. The trial lasted approximately six weeks and had tens of thousands of pages of documents. One of the defendant's lawyers made a PowerPoint presentation to simplify all of the information and visually show how the government failed to prove that her client was connected to the other defendants and the investments. She was the *only* lawyer to use a PowerPoint presentation to supplement her closing argument. Her client was the only defendant found not guilty. I am not suggesting that this attorney prevailed simply because of the PowerPoint presentation, but I am sure it helped focus the jury on her theory of defense.[59]

Timelines can also be easily created on a computer and then projected through the Elmo onto a large screen. Timelines can help jurors make sense of an argument that involves numerous dates and times, or a case that involves numerous interconnected people. Additionally, graphs and charts, which have been used in the business world for decades, should similarly be used in the courtroom when appropriate. They are especially helpful to show common relationships and trends between different variables. For example, in an employment age discrimination case, a graph or chart could show the number of employees over fifty that were fired and the average age of their replacements. The graph or chart will have a much greater impact on the jury than just explaining the statistics verbally.

Computer-generated animation has revolutionized the way medical and technical experts testify. Instead of having jurors listen to a cardiac surgeon give a painfully long dissertation on the proper techniques of open heart surgery, or a physicist explain the trajectory of the alleged magic bullet that killed John F. Kennedy, these

59. The examples of visual aids discussed in this section are taken from my own experience and a combination of the following sources: Judge's Guide, *supra* note 56, at 236–47; Ray Moses, Ctr. for Criminal Justice Advocacy, Technology in the Courtroom (2001), http://criminaldefense.homestead.com/Technology.html.

experts can use computer-generated aids in their explanations. Jurors can see for themselves exactly what went wrong in the operating room and what should have happened if the surgery were performed correctly. One of the main criticisms of the prosecution in the O.J. Simpson murder trial was that its DNA expert presented his findings in an overly technical, dry, and confusing manner, and therefore, the jury did not fully understand the nature or gravity of the state's DNA evidence.[60] Computer-generated animations are the closest we can get to placing the jury at the scene of whatever is at issue in a particular case.

Videos, photographs, and satellite imagery are increasingly being used by trial attorneys. Over time, I have encountered more and more law enforcement officers and prosecutors downloading photographs from a defendant's MySpace[61] page to show their connection to a gang, guns, or a particular person or event. I have also encountered lawyers using enlarged satellite photos from Google Earth[62] to display an area of a crime scene. In the old days, a lawyer would have had a witness draw a crude map on an easel pad. Today, the lawyer can provide an accurate, highly detailed satellite photograph of the area in question and ask a witness to describe, for example, the defendant's location in relation to the crime scene at the time of the crime.

Opening-argument boards give jurors their first look at a lawyer's claims, and closing-argument boards provide jurors with a chance to review that lawyer's arguments.[63] To illustrate the concept of reasonable doubt to a jury, I used to explain that the prosecutor's case is like a balloon, and to find my client guilty, the balloon would have to fly. While I explained this, I would draw a balloon on an easel in front of the jury. I would also explain that every aspect of reasonable doubt in the prosecutor's case is like a hole in the balloon. I would then add a hole in the balloon for every piece of evidence that created reasonable doubt by its absence or presence. When I was done, it was clear that the balloon could not fly, and, I would argue, my client should be found not guilty. If I had it to do over again, I would create the

60. *See* Thomas L. Jones, *Blood Prints by the Billions*, TruTV Crime Library, http://www.trutv.com/library/crime/notorious_murders/famous/simpson/billions_13.html (last visited Oct. 28, 2009) ("The jury was subjected to forensic evidence examination for almost two months. In 50,000 pages of trial transcript there are 10,000 references to DNA. If most of it was above Alan Dershowitz's head, it is hard to see just how members of the jury could have absorbed it. The linking of the blood to Simpson and the victims through the crime scenes was perhaps the most crucial part of the trial, but the prosecution obviously failed to make these connections as far as the jury was concerned.").

61. "MySpace is a technology company connecting people through personal expression, content, and culture. MySpace empowers its global community to experience the Internet through a social lens by integrating personal profiles, photos, videos, mobile, messaging, games, and the world's largest music community." MySpace, http://www.myspace.com/ (last visited Oct. 18, 2009).

62. Google Earth is a computer program that lets the user click on any place in the world and view it from any distance and in different formats—satellite, street view, etc. It also lets the user get directions to and from anywhere in the world. Google Earth, http://earth.google.com/ (last visited Oct. 18, 2009).

63. Opening and closing argument boards are visual aids that help a lawyer visually tell his story. For example, in a criminal drug smuggling case with numerous defendants, each having a different role in the drug smuggling ring, the prosecutor may use a poster board or PowerPoint display identifying each defendant with a picture, describing their roles, and showing how they are connected.

visual aid on a computer instead of an easel. Not only are my drawing skills terrible, but a computer-generated, animated graphic of my balloon would likely leave a more lasting impression on the jury. Today, I strive to incorporate visual aids in every case I litigate.

A word of caution: No technology could ever eliminate the importance of an effective courtroom advocate. Potential overuse is a significant concern when implementing visual persuasion technology. There are ten questions lawyers should ask themselves before using technology in the courtroom:

1. Will the use of technology assist the jury in understanding the case?
2. Are you thoroughly comfortable with the technology?
3. Are the witnesses thoroughly familiar with the technology?
4. Have you made proper arrangements with the court and courtroom personnel to set up your technology?
5. Do you have a backup plan if everything fails?
6. Have you done your evidence law homework?
7. Are you presenting evidence you would not present if the technology was not available?
8. Have you remembered what you are good at in court (and what you are not!)?
9. Does the case justify the use of the technology you are employing?
10. Are you emphasizing the strengths of the case with the technology you are using?[64]

Lawyers need to answer these questions honestly before attempting to use technology in the courtroom. Technology should not be used to make up for the trial skills a lawyer lacks, but rather to enhance the skills he or she already possesses.

B. Evidentiary Concerns with Visual Persuasion Technology

Lawyers employing technology in the courtroom must be cognizant of the pertinent Federal and Local Rules of Evidence, specifically those covering relevance,

64. This list is taken from a summary of courtroom presentation techniques compiled by the law firm, Scherffius, Ballard, Still & Ayers, LLP, in an article entitled, *Using Technology In The Courtroom–10 Questions to Ask Before You Pull Out the Laser Pointer,* http://www.sbsalaw.com/CM/Articles/Using_Technology_in-the-Courtroom.html (last visited Oct. 28, 2009).

authentication, and prejudice.[65] Every new technology has problems and limitations. However, as more lawyers use technology in the courtroom, and more courts are faced with the evidentiary problems associated with it, I believe these concerns will eventually resolve themselves. In the meantime, lawyers should inform themselves of the Federal Rules' interpretations in their local jurisdictions. Lawyers should also note that the standard of review for appeals of trial court rulings on evidentiary matters is the abuse of discretion standard;[66] an appeals court will not generally disturb rulings of a trial court on discretionary evidentiary rulings unless there was a clear abuse of that discretion.[67]

i. Relevance and Authentication

As an initial matter, lawyers must be sure that the visual evidence they intend to employ in the courtroom is relevant.[68] Rule 402 reads that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."[69]

Not only must the visual evidence be relevant, it must also be authenticated. Rule 901 explains that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[70] The emerging interpretation in state cases is that visual evidence is admissible if it mirrors the actual facts of the case and relevant testimony.[71] Courts are divided about strict adherence to this rule. For example, although this rule necessitates proof of the facts depicted in a computer-generated animation, one trial court allowed an expert "to testify out of order, subject to later proof of the underlying facts on which he based the animation."[72] However, another court found an animation to be inadmissible when the expert who prepared the exhibit was not called as a witness to establish a proper foundation.[73]

---

65. *See* Guide For Law Enforcement & Prosecutors, *supra* note 58, at 23–38.

66. 36 C.J.S. *Federal Courts* § 617 (2009).

67. *Id.*

68. *See* Carlo D'Angelo, *The Snoop Doggy Dogg Trial: A Look at How Computer Animation Will Impact Litigation in the Next Century*, 32 U.S.F. L. Rev. 561, 569 (1998). Rule 401 defines relevant evidence to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

69. Fed. R. Evid. 402.

70. Fed. R. Evid. 901(a).

71. *See* James E. Carbine & Lynn McLain, *Proposed Model Rules Governing the Admissibility of Computer-Generated Evidence*, 15 Santa Clara Computer & High Tech. L.J. 1, 19 (1999).

72. Tillis Trucking Co. v. Moses, 748 So.2d 874 (Ala. 1999).

73. Stamper v. Hyundai Motor Co., 699 N.E. 2d 678, 684 (Ind. Ct. App. 1998).

The following factors have been identified to establish the authenticity of computer-generated evidence under Rule 901: "This standard can generally be satisfied by evidence that (1) the computer equipment is accepted in the field as standard and competent and was in good working order, (2) qualified computer operators were employed [to operate the equipment/software], (3) proper procedures were followed in connection with the input and output of information, (4) a reliable software program was utilized, (5) the equipment was programmed and operated correctly, and (6) the exhibit is properly identified as the output in question."[74]

In *State of Connecticut v. Alfred Swinton*, the defendant was on trial for murder.[75] At issue was the introduction of computer-enhanced photographs of bite marks and dentition overlays. The dentition overlays were created using Adobe Photoshop and were images of the defendant's dentition over the actual bite marks on the victim.[76] The trial court admitted both the photographs and the overlays into evidence.[77] The defendant was convicted and appealed to the Connecticut Supreme Court.[78] The court held that admission of the enhanced photographs of the bite marks was appropriate because they were properly authenticated, meaning an adequate foundation was established by a witness who was well-versed in the program used to create the photographs.[79] However, the court held that admission of the dentition overlay exhibits was improper because the witness who testified about their creation lacked the expertise to satisfactorily authenticate them.[80] The court stated that "in order for computer generated evidence to be admitted, there must be 'testimony by a person with some degree of computer expertise, who has sufficient knowledge to be examined and cross-examined about the functioning of the computer.'"[81]

ii. Proper Notice

Courts are also relying on other procedural safeguards to deal with admissibility problems of video and computer-generated evidence. For example, a federal district court in *Van Houten-Maynard v. ANR Pipeline Co.*, granted a motion in limine[82] with

74. Conn. v. Alfred Swinton, 847 A.2d 921, 942 (Conn. 2004) (citing C. Mueller & L. Kirkpatrick, Evidence: Practice Under the Rules § 9.16 (2d ed. 1999); E. Weinreb, *"Counselor, Proceed With Caution": The Use of Integrated Evidence Presentation Systems and Computer-Generated Evidence in the Courtroom*, 23 Cardozo L. Rev. 393, 410 (2001)).

75. *See Swinton*, 847 A.2d at 927.

76. *Id*. at 946.

77. *See id*.

78. *Id*. at 927

79. *Id*. at 932, 943.

80. *Id*. at 932, 946–52.

81. *Id*. at 941 (citing Am. Oil Co. v. Valenti, 426 A.2d 305, 310 (Conn. 1979)).

82. A motion in limine is a pretrial motion submitted to the court in an attempt to exclude evidence from the proceedings. It is usually made by a party when simply the mention of the evidence would prejudice the jury against that party, even if the judge later instructed the jury to disregard the evidence. Black's Law Dictionary 1038–39 (8th ed. 2004).

respect to the use of computer animation where the defendant did not receive timely notice of the plaintiff's intention to use it. The court concluded that the failure to provide timely notice of this evidence "severely prejudiced [the defense] in its ability to respond to the credibility, reliability, accuracy and materiality of [the] evidence."[83]

In *Clark v. Cantrell*, a South Carolina automobile accident case, the defendant Cantrell attempted to introduce a computer-generated video animation recreating the accident.[84] "The trial judge refused to admit the video animation as demonstrative evidence because it was inconsistent with prior testimony, including that of Cantrell's expert witness, and it inaccurately reflected the evidence."[85] The judge ruled that those deficiencies meant the evidence would "mislead and confuse the jury."[86] The South Carolina Supreme Court upheld the trial court's ruling and stated that where a computer-generated exhibit is the result of manipulating voluminous underlying data, the proponent must disclose the exhibit to opposing counsel before trial, allowing ample time to examine the exhibits and underlying data.[87] Resolving objections during discovery is preferable to facing those objections for the first time at trial.[88]

The consensus among judges is that the risk of alteration to computer-generated exhibits and evidence can be minimized by "early pretrial discovery and disclosure of electronic evidence."[89] Lawyers should be aware of the admissibility problems associated with visual evidence and tailor their discovery requests accordingly.

iii. Undue Prejudice

Rule 403 explains that relevant evidence may be excluded if the judge determines it is unduly prejudicial; that is, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

83. Van Houten-Maynard v. ANR Pipeline Co., No. 89-C0377, 1995 WL 317056, at *12 (N.D. Ill. May 23, 1995).

84. Clark v. Cantrell, 529 S.E.2d 528, 535 (S.C. 2000).

85. *Id.*

86. *Id.* at 535.

> The extreme vividness and persuasiveness of motion pictures [computer-generated animations/re-enactments] . . . is a two-edged sword. If the film does not portray original facts in controversy, but rather represents a staged reproduction of one party's version of those facts, the danger that the jury may confuse art with reality is particularly great. Further, the vivid impressions on the trier of fact created by the viewing of the motion pictures will be particularly difficult to limit or, if the film is subsequently deemed to be inadmissible, to expunge by judicial instruction.

Id. at 536 (citing State v. Trahan, 576 So. 2d 1, 8 (La. 1990)); *see also*, Suzan Flamm & Samuel H. Solomon, DOAR, Admissibility of Digital Exhibits in Litigation 5 (2004), http://www.doar.com/documents/Admissibility.pdf.

87. *Clark*, 529 S.E.2d at 536.

88. *See id.* at 536–37 ("But late disclosure may prevent the opposing party from adequately attempting to explain why the animation is not a fair and accurate representation which, in turn, may prompt the court to conclude its probative value does not substantially outweigh the danger of unfair prejudice.").

89. Lederer, *supra* note 46, at 817.

considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[90] This determination is at the discretion of the trial judge, and reviewed on appeal under an abuse of discretion standard.[91]

As you read the passage below, pretend you are a judge and decide whether it is unduly prejudicial. Plaintiff's counsel presented a video to the jury during his closing argument in an insider trading case against Price Waterhouse that depicted:

> The Titanic and all the people happily boarding the ship with a voice-over that stated that the Titanic was once the largest, greatest, and strongest ship in the world; but, it had internal problems caused by its creators that caused it to sink. Then a picture of the Titanic sinking. Then a picture of an advertisement for Price Waterhouse with a voice-over that stated it was the greatest, largest, and strongest investment banking firm in the world but, it too has internal problems caused by its management that caused it to sink and take the shareholders money with it.[92]

Unduly prejudicial? The trial judge did not think so and allowed the plaintiff to use this video in his closing argument.[93] The jury awarded the plaintiffs more than $300 million in damages.[94]

In *United States v. Burns*, the defendants were charged with various federal drug possession and distribution charges.[95] In his opening statement, the prosecutor used a PowerPoint presentation that included various photographs, text, and drawings.[96] "Among the images shown was a photograph of large amounts of crack cocaine and fistfuls of cash."[97] These images did not reflect the actual amount of crack cocaine and money at issue in the case.[98] The trial judge gave the jury a limiting instruction, both before opening statements and in his final instructions, that the opening statement presentations were not evidence.[99] The defendants were convicted and appealed to the Sixth Circuit Court of Appeals on the grounds that the PowerPoint presentation may have confused the jury as to the actual amounts of crack cocaine

---

90. Fed. R. Evid. 403.

91. 36 C.J.S. *Federal Courts* § 617 (2009).

92. *See* Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 358 (Ariz. Ct. App. 1997).

93. *Id*.

94. *Id*. at 323. The Arizona Court of Appeals reversed the trial judge's decision to allow the Titantic videotape. "In our view, the videotape was designed to inflame the jurors' emotions, not assist their minds. The enterprise that we engage in is not show business." *Standard Chartered PLC*, 945 P.2d at 359.

95. United States v. Burns, 298 F.3d 523, 530 (6th Cir. 2002); Flamm & Solomon, *supra* note 86, at 4.

96. *Burns*, 298 F.3d at 530; Flamm & Solomon, *supra* note 86, at 4.

97. Flamm & Solomon, *supra* note 86, at 4.

98. *See id*.

99. *Burns*, 298 F.3d at 543; Flamm & Solomon, *supra* note 86, at 4.

and cash at issue in the case.[100] The Sixth Circuit held that the trial court's limiting instructions had cured any potential harm caused by the presentation.[101]

In *State v. Robinson*, the defendant was charged with arson.[102] During his closing argument, the prosecutor used a PowerPoint presentation showing images of flaming curtains next to text listing the elements of the arson charge.[103] The defendant was convicted.[104] He appealed claiming that he was prejudiced by the prosecutor's closing argument.[105] The Washington Appellate Court held that the prosecutor should not have been permitted to use the flaming curtain images in closing argument because they were too prejudicial.[106] The court stated that "[t]he picture of flaming curtains was not in evidence, added nothing to the evidence, and was not probative of anything at issue in this case. The only purpose served by this irrelevant material was to distract or to prejudice. Its use was dangerous, unnecessary, and in error."[107]

Since judges have discretion under Rule 403, there is great inconsistency in the interpretation of undue prejudice with regard to visual evidence. However, as more lawyers use visual evidence, and more courts are faced with its introduction at trial, I believe procedures will likely develop to mitigate its prejudicial effects.

iv. Juror Mistrust and Disconnect

Some jurors may not regularly use technology, or may distrust it. Therefore, lawyers planning to use technology to supplement their arguments or display and summarize evidence should question prospective jurors in voir dire about their feelings regarding technology.[108] It is better to uncover bias or correct misconceptions in voir dire than have someone on the jury who is against you and your client from the beginning. Furthermore, in her opening statement, a lawyer can explain where,

100. Flamm & Solomon, *supra* note 86, at 4.

101. *Burns*, 298 F.3d at 543; Flamm & Solomon, *supra* note 86, at 4.

102. State v. Robinson, No. 47398-1-I, 2002 WL 258038, at *2 (Wash. Ct. App. Feb. 25, 2002).

103. *Id*. at 3; Flamm & Solomon, *supra* note 86, at 4.

104. *Id*. at 2.

105. *See id*. at 3.

106. *Id:,* Flamm & Solomon, *supra* note 86, at 4. However, the court upheld the conviction stating that the PowerPoint presentation "was not prosecutorial misconduct so prejudicial as to warrant reversal of Robinson's conviction." *Robinson*, No. 47398-1-I, 2002 WL 258038, at *3.

107. *Robinson*, No. 47398-1-I, 2002 WL 258038, at *3.

108. *See* Guide For Law Enforcement & Prosecutors, *supra* note 58, at 46. Voir dire is commonly known as jury selection. Depending on whether you have a six or twelve person jury, you will select those people from a larger pool of people. It is usually the first step in the trial process. Generally, you do not know who the people are in the pool before the trial begins. In high profile or complex cases, the court may send out a questionnaire to each potential juror well in advance of trial and then give the lawyers an opportunity to review the questionnaire and eliminate any people through a cause challenge—to strike a potential juror because they are biased, because they know one of the parties or the judge, because of a medical reason, etc. Lawyers also get to exercise a certain number of peremptory challenges, depending on the jurisdiction, which allow them to strike a juror for any reason other than a discriminatory reason.

how, and why technology will be used to assist the jury in understanding the lawyer's arguments.[109]

IV. CONCLUSION

The technological revolution is here to stay. It has changed the way we receive, process, and present information. Lawyers should understand these changes and adapt their trial skills accordingly. Lawyers should employ verbally and visually persuasive techniques and incorporate technology where appropriate, being sure to comply with local evidentiary rules. However, no technology can replace a well-developed legal and factual argument—that is the true key to every successful trial. Clarence Darrow would surely still be a great trial lawyer today, though even he would better reach today's jurors with brevity and the support of visual aids.

109. *See id.* at 39.