

FEDERAL PRACTICE: USING TECHNOLOGY AT TRIAL

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INTRODUCTION

To successfully bring or defend a federal civil action, trial counsel must learn how to use courtroom technology effectively. To do so, counsel must understand and appreciate the practical, legal, and ethical concerns raised by the use of courtroom technology. Although only a small percentage of federal civil actions reach trial, employment discrimination and other labor-related actions represent a significant percentage of those that do. Consequently, trial counsel handling labor and employment actions must learn not only how to use courtroom technology, such as document cameras, presentation software, and videoconferencing, but must understand and appreciate the many practical, legal, and ethical concerns it raises, including its impact on the fact-finder and the various procedural and evidentiary issues related to presenting evidence and examining witnesses via technology. Below, I briefly discuss many of the fundamental concerns that guide the effective use of courtroom technology.

A. PRELIMINARY CONCERNS

1. Plan in advance. Sufficiently before trial, counsel should determine what technology/equipment is available in the courtroom, what technology/equipment counsel desires to bring to and use in the courtroom, and whether opposing counsel will be using some form of technology, such as electronic exhibits or illustrative aids, during trial. Often, counsel on one side of the case is familiar with courtroom technology and plans to utilize it at trial. If opposing counsel is not familiar or comfortable with courtroom technology, he/she must decide whether his/her client will be at a disadvantage with the fact-finder if he/she does not also utilize courtroom technology and, at the very least, learn to respond appropriately to the other side's use of electronic exhibits and illustrative aids.

2. Additional equipment. Counsel should alert the court sufficiently before trial whether they intend to bring additional equipment into the courtroom.

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3. Videoconferencing. Counsel should alert the court sufficiently before trial whether they intend to utilize technology that may need advance preparation and planning, such as videoconferencing.

4. Backup equipment and alternative means. Counsel and the court should determine what backup equipment or alternative means exist if the equipment fails. Counsel should have backup equipment available, such as a traditional overhead system, and paper copies of all exhibits and displays as a last resort (i.e., doing it the old-fashioned way).

- if all files are on a laptop, counsel should have (1) an extra laptop containing the files; and (2) a backup copy of software and files on CD, floppy disk, etc.
- counsel should make sure the court has an extra light bulb for the projector, as bulbs are very expensive and may not be immediately obtainable.

5. Operators of equipment. Counsel should identify for the court the people who will be operating the equipment, whether co-counsel, paralegals or others. Operators should be especially responsive to instructions from the court (particularly if the court does not have a “kill switch” – an override function that allows the court to turn off the audio and/or video of a display upon an objection).

6. Inspection and testing of court’s equipment. Counsel and their staff should request from the court an opportunity to inspect and test equipment in the courtroom, particularly to determine compatibility of their equipment to the court’s equipment.

7. Sufficient audio. Counsel must confirm that the audio in the courtroom is sufficient. If supplemental audio equipment is needed, it must be compatible with the court’s system.

8. Reasonably viewable displays. The display areas must be reasonably viewable to the jurors, judge, law clerk, and counsel (and even the public). Counsel should consider that the projection of material may reduce crispness of the characters or detail of the visual display as compared to the appearance of the same material on a computer monitor; accordingly, counsel may want to choose simpler fonts when enlarging, since fonts with more flourishes will be less crisp when enlarged.

9. Special accommodations for trial participants. Counsel should determine sufficiently before trial whether a participant at trial will need a special accommodation available through some form of technology. For instance, if a witness cannot

communicate through sign language or handwriting, the witness may be able to do so through a computer or similar device.

10. Hearing-impaired trial participants. Judicial Conference policy is to accommodate hearing-impaired counsel, parties, and witnesses.

11. Kill switch for court. Counsel should inquire whether the court has a kill switch or override for removing electronic exhibits or illustrative aids from the jurors' view and hearing. Otherwise, responsibility for removing electronic exhibits or illustrative aids falls on counsel.

B. COURT REPORTING CONCERNS

1. Availability of real-time reporting. If real-time reporting is available, and the parties choose to use it, they should consult with the court reporter before trial to make sure that the appropriate equipment is available and appropriate connections can be made.

2. Access to real-time transcript. It must be determined who will have access to the real-time transcript. Some judges have real-time displays on the bench. If the court reporter provides real-time reporting, counsel may request access, although the costs may be significant.

3. Witness access issues. Cross-examining counsel may not want the witness to have access to the real-time transcript. If the witness has access, cross-examining counsel may request that the monitor be turned off during cross-examination. However, counsel may find it acceptable for an expert witness to have access to the real-time transcript during cross-examination, particularly if lengthy hypotheticals will be posed to the expert witness.

4. Instructing jurors on real-time displays. If real-time display is used in the case, the court may want to instruct the jurors that the display will not be available to them.

5. Accommodating hearing-impaired trial participants. Because the court is authorized to accommodate hearing-impaired counsel, witnesses and jurors at court expense, this may include access to real-time reporting.

6. Providing court reporter list of names, places, and special terms. If real-time reporting is used, counsel should provide to the court reporter a list of names, places, and medical, technical or other special terms that will arise during the trial so that the percentage of untranslated words can be minimized.

7. Level of real-time reporting service provided. A basic level of real-time reporting allows counsel to see the translated text scrolling down the monitor as it is fed from the court reporter's computer. An enhanced level of service, so-called interactive real-time, allows counsel to annotate the transcript with notes as text is presented and to scroll back in the transcript even as new text is fed from the court reporter's computer. Counsel's notes are then maintained in a separate file, which can be displayed, searched, and printed with the transcript even after the transcript is finalized by the court reporter.

8. Use of unedited real-time transcript. Counsel should ask the court for direction on the use that can be made by counsel of the unedited real-time transcript. Typically, counsel may use the unedited real-time transcript only for counsel's notes and, therefore, may not read from it in questioning witnesses or in arguing to the jury. Rather, the court reporter will read from the reporter's notes or counsel must await the certified, edited copy of the transcript. Thus, counsel generally is limited to using the unedited real-time transcript for counsel's own notes. Moreover, if Internet access is available from the courtroom, counsel can stream the real-time transcript to co-counsel or other support personnel outside the courtroom.

9. Cost of real-time reporting. Counsel should seek to share the costs of real-time reporting with opposing counsel.

10. Ability to see and hear displays/exhibits. As in any case, counsel should be sure that the court reporter is sufficiently able to see and hear the displays and exhibits.

C. JURY CONCERNS

1. Ability to see and hear displays/exhibits. The jurors must be able to see and hear the exhibits and displays. The monitors should be of sufficient size and within a reasonable distance from the jurors. The court should be asked to remind the jurors to bring required glasses for reading and/or distance.

2. Colorblind or color-deficient jurors. If any juror is colorblind or color-deficient, counsel may have to alter the colors of displays.

3. Hearing-impaired jurors. Judicial Conference policy is to accommodate hearing-impaired trial participants, which would include otherwise qualified jurors.

4. Effectiveness of visual presentation with prospective jurors. Counsel should consider whether a television-oriented presentation will be more effective than a paper-oriented presentation with particular jurors given the nature of the issues presented and the evidentiary matter relied on.

5. Court's introductory explanation of courtroom technology. Counsel should request that the court explain to the jurors the different types of equipment and the technology that is available to the parties for use in the case, including:

- monitors and touch screen technology
- evidence camera
- projector and screen
- real-time reporting equipment
- laptop computers
- videoconferencing and teleconferencing equipment
- audio equipment
- hearing assistance equipment
- sidebar white noise

6. Court's preliminary instructions via technology. If counsel will rely on a significant amount of technology during the case, the court may be urged to present preliminary jury instructions on a monitor or projection screen as a way to introduce technology into the case. If so, the court should be urged to use a method which introduces the text paragraph by paragraph so that jurors follow along rather than read ahead.

D. OPENING STATEMENTS

1. Use of technology in opening statements. Counsel should determine what exhibits/displays can be used in the opening statement.

2. Advance ruling on exhibits/displays. Generally, counsel should (or may be required to, depending on local rules or an individual judge's practices) disclose to opposing counsel exhibits/displays counsel intends to use during the opening statement to avoid interruption and delay of the proceedings. Counsel should consider obtaining an advance ruling from the court as to the use of such exhibits/displays during opening statement. However, counsel should consider whether it is more important not to provide opposing counsel an opportunity to preview aspects of the opening statement.

3. Use of exhibits/displays in opening statements. The basic rule is that documents and other evidentiary material that will be admissible at trial can be used in the opening statement.

4. Use of different format. If an exhibit is not presented in its same format, it may be objectionable. For example, computer-driven displays may add, *inter alia*, titles, labels, colors, highlights, motion, or sound; or text may be enhanced with color

highlighting, callout boxes, or lines; or various documents may be pasted on one display. If an objection is made, counsel must be prepared to readily modify the presentation to overcome the objection.

5. Simple bullet-point presentation. Counsel new to using technology in the courtroom should consider using a simple bullet-point presentation during the opening statement. As a rule of thumb, if counsel can say the words in the display without objection, then counsel can put those words in a simple bullet-point presentation, just as counsel traditionally is permitted to use an easel or chalkboard to list bullet points. For example, in a case involving alleged breach of a sales contract, counsel can include a very simple bullet-point presentation to present the basic elements that must be proven (existence of a contract, agreed upon price or method of determining price, performance, and damages), and then continue bullet points for each of the elements.

6. Sophisticated bullet-point presentation. Counsel may consider a more sophisticated bullet-point presentation, such as using a visual display with the full text of a document on one-half of the monitor and bullet points on other half of the monitor. However, caution must be used in not making the presentation argumentative. Thus, counsel should carefully consider whether the points used are literal or fair characterizations of actual text or whether they are argumentative or unfair characterizations of actual text. Opposing counsel must be prepared to digest the visual presentation and make prompt objections, particularly if opposing counsel has not been afforded a preview of the bullet-point slides.

E. OBJECTIONS TO EVIDENTIARY EXHIBITS AT TRIAL

1. Completeness. One of the main objections likely to be interposed to evidentiary exhibits that are displayed electronically is “completeness,” whether dealing with documents, photographs or videos. Rules 106 and 611(a) of the Federal Rules of Evidence (“FRE”) are particularly relevant in this regard. FRE 106 provides: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” FRE 611(a) provides: “The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” By its terms, FRE 106 applies to “a writing or recorded statement,” which would include documents, videotapes, and audiotapes; given that limitation, FRE 611(a) can be applied by the court to cover materials not within FRE 106. A completeness objection may arise, for example, where examining counsel displays to the

witness only a portion of a written document in a slide. If counsel uses callout boxes to extract and highlight relevant portions of the text without showing the balance of the document, opposing counsel would have a completeness objection to the showing of the document, which is a writing under FRE 106. The objection is easily overcome if the full document is available for display on the evidence camera, which can be used to zoom into relevant text during the examination of the witness. Completeness objections arise similarly for photographs and videotapes. For instance, if a digital photograph is “cropped,” that is, only a portion of the photograph is displayed, opposing counsel may have a completeness objection to the showing of the portion of the photograph. Similarly, if a digitally recorded video is edited or excerpted to shorten the playing time or if the order of the video is rearranged, opposing counsel may have a completeness objection to the showing of the portion of the video or the rearranged video.

2. Unfairness. Another objection that is frequently interposed to evidentiary exhibits displayed electronically is “unfairness.” FRE 403 is particularly relevant in this regard. FRE 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” An unfairness objection may arise for a document, photograph or video. For instance, if a document is shown in a different color or without margins, opposing counsel may have an unfairness objection. If a digital photograph is “resized,” that is, reduced or enlarged, opposing counsel may have an unfairness objection to the resized photograph. Similarly, if a digitally recorded video is edited or played at a speed other than normal, or if still images from the video are used, opposing counsel may, depending on the circumstances, have an unfairness objection to the use of the edited video, the use of a different speed, or the use of the extracted image.

F. OBJECTIONS TO ILLUSTRATIVE AIDS AT TRIAL

1. Procedure for dealing with objections. Counsel should consider in advance of trial the manner in which the court will deal with objections to illustrative aids that are created and displayed electronically. For instance, the court may adopt a procedure whereby illustrative aids must first be displayed only to the court and opposing counsel (*i.e.*, outside the view of the jurors) just prior to being used with a witness on direct examination. Or the court may direct or counsel may agree that illustrative aids be disclosed sufficiently prior to trial or examination of the witness. Thus, counsel should inquire in advance whether and how copies of illustrative aids should be made available to opposing counsel and the court. During cross-examination, on the other hand, a court probably would be reluctant to require advance disclosure of illustrative aids since that may unduly compromise the effectiveness of the cross-examination.

2. Unfairness. Counsel must be prepared to raise objection to illustrative aids. One of the main objections likely to be interposed to illustrative aids is “unfairness.” The unfairness may arise for any number of reasons including, for instance, the use of labels, colors, or various text treatments such as callout boxes, underlining, and highlighting of text from documents. Unfairness may also arise where motion or sound is used, or where a time line is utilized and the time intervals are chosen to make the time period appear longer or shorter than the actual time period. Unfairness may also occur where illustrative aids are used to repetitively present a certain point.

3. Other common objections. Other common objections include leading, argumentative, narrative, no foundation, misstates evidence, assumes facts not in evidence, and calls for lay opinion not meeting the requirements of FRE 701.

4. Animations and digitally-altered photographs. Objections commonly arise as to animations and digitally-altered photographs. For example, a digitally-recorded photograph may be altered to make it look more like the relevant scene actually looked at a time relevant to the action. It may be that the witness can testify that the altered photograph substantially reflects all aspects of the scene at the relevant time and counsel could argue for its admission into evidence. In any event, the altered photograph may serve the same purpose as a drawing of the relevant scene and therefore serve as an illustrative aid. As for animations, generally they are offered as illustrative aids to assist an expert in testifying and to assist the jury in understanding the expert’s testimony. An unfairness objection is commonly asserted as to animations, with the objection generally grounded in the variations that inevitably exist between the alleged actual occurrence or event and the portrayal of that occurrence or event by the visual and audio presentation of the animation.

G. PRESERVING ILLUSTRATIVE AIDS FOR THE RECORD

1. Preserving illustrative aids for the record. Counsel must be prepared to preserve illustrative aids for the record. For example, if the witness marks a photograph displayed on a monitor, counsel must determine in advance the method for making a copy for the record.

H. VIDEOCONFERENCING

1. Notice of videoconference use. If videoconferencing will be used at trial, counsel should notify the court sufficiently before trial so that the appropriate connections can be arranged.

2. Rule for presenting witness by videoconference. Remote transmission of testimony is permitted under the Federal Rules of Civil Procedure (“FRCP”) under certain conditions. FRCP 43(a) provides: “For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” While this showing may be excused upon the parties’ consent, the court is not bound by a stipulation and can insist on live testimony. Remote transmission typically has been permitted for witnesses who are (1) incarcerated; (2) incapacitated; (3) remotely located and only peripherally involved in the trial; or (4) children. However, as the Advisory Committee explains, remote transmission “cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.” Advisory Committee Note to FRCP 43. As the Advisory Committee further explains: “The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place.” Id. While the Advisory Committee also notes that depositions, including video depositions, ordinarily “provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses,” good cause and compelling circumstances may exist where “[a]n unforeseen need for the testimony of a remote witness . . . arises during trial” and likely exist “if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.” Id. Nevertheless, the Advisory Committee suggests that the required showing may be more difficult to make where the party “could reasonably foresee the circumstances offered to justify transmission of testimony.” Id. In any event, notice should be given to opposing counsel and the court “as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.” Id.

3. Audio vs. video transmission. The Advisory Committee suggests that audio transmission, without video images, may be sufficient in some circumstances; but “[v]ideo transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission.” Id.

4. Safeguards for remote transmission. Safeguards must be adopted by counsel and the court to ensure: (1) accurate transmission of the testimony; (2) accurate identification of the witness; (3) protection against influence of the witness by those present with the witness; and (4) adequate opportunity for opposing counsel to object to the use of remote transmission. As the Advisory Committee suggests, advance notice should be “given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission” to ensure opposing parties “the opportunity to argue

for attendance of the witness at trial . . . , [and] the opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.” Id.

5. Backup equipment or means. Backup should be available if problems arise during the videoconferencing.

6. Rule rejected for criminal cases. Notably, in April 2002, the United States Supreme Court rejected a proposed amendment to Rule 26 of the Federal Rules of Criminal Procedure, as recommended by the Judicial Conference, that would have allowed the court to permit live, two-way video presentation of testimony in criminal cases, provided it was in the interest of justice and the requesting party showed exceptional circumstances, appropriate safeguards for the transmission, and the witness was unavailable within the meaning of FRE 804(a)(4)-(5).

I. CLOSING ARGUMENTS

1. Leeway accorded counsel in use of illustrative aids. During closing argument, counsel is not limited to using only exhibits offered into evidence or illustrative aids used during opening statements or at trial. Given the leeway typically accorded counsel during closing argument, counsel can present new materials to the jury, such as illustrative aids adding new or different visual or audio effects.

2. Using illustrative aids to make closing arguments more effective. Appropriate use of illustrative aids can make a closing argument more effective by making it shorter, more orderly, more logical, and more persuasive. In complex cases or those with a large number of exhibits and/or witnesses, illustrative aids can facilitate a summary of the evidence to make it more easily recalled and understood from that party’s perspective.

3. Advance ruling on illustrative aids. Counsel should seek advance approval from the court as to illustrative aids that counsel intends to use in closing argument to avoid or mitigate interruption, delay, and prejudice. However, counsel should consider whether it is more important not to provide opposing counsel an opportunity to preview aspects of the closing argument.

4. Alterations of digital photographs or videos. Given the leeway counsel enjoys during closing argument, it may be fair game for counsel to use digitally altered photographs or videos for purposes of argument (provided the alteration is made obvious to the jury and court) to enhance the logic or persuasiveness of counsel’s argument or detract from the logic or persuasiveness of opposing counsel’s argument.

5. Use of edited real-time transcript. If real-time recording was used during trial, counsel can request that the real-time transcript be edited and certified before closing argument. The edited, certified transcript can then be used for closing argument, with relevant portions shown to the jury on the monitors or projection screen.

J. JURY INSTRUCTIONS AND JURY REVIEW OF EVIDENCE

1. Court's jury instructions via technology. Whether or not the court provided preliminary jury instructions via technology, the court may present final jury instructions on a monitor or projection screen. If so, the court should be urged to use a method which introduces the text paragraph by paragraph so that jurors follow along rather than read ahead.

2. Jury review of electronic exhibits. During deliberations, the jurors are entitled to review the evidence presented in the case, including electronic exhibits. To the extent that electronic exhibits were presented in the case and are available on paper copies, the court may decide to present the paper copies to the jurors. However, if the exhibits are in digital records for which there are no paper copies, the parties may consider placing the material on a CD for viewing by the jurors, preferably via a laptop computer and monitor. This procedure is similar to providing the jurors with a player for traditional videotapes and audiotapes.