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Connecting with your tech-savvy jury

With so much new technology available, just because we've got it, should we use it?



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We live in a fast-paced, technologically adept world. With more than half of all Americans now on-line and over two million new Internet users per month,[i] technology has become a part of everyday life. Most of us are more likely to have a cell phone, BlackBerry or iPhone in our pocket than a pen. As a result, we have come to expect that information be available instantaneously and en masse.

As Americans become accustomed to having news and search results at their fingertips, jurors expect greater quality and depth of evidence. Exposure to high-profile cases and CSI-style television shows sometimes leads to unrealistic expectations of attorney presentations. Jurors are no longer cautious of savvy litigators; they expect them. Yesterday's fear of being too slick has been replaced by today's demand for multi-media presentations and concise sound bites.

While critics continue to argue about whether technology is encouraging the "digital divide" or aiding in access to justice, one thing is certain: technology has permeated the justice system from the top to the bottom. Attorneys and courts that continue to be wary of technology must quickly get up to speed. However, success in the courtroom still depends on knowing your case and being able to connect with your jury. Technological advances must be tempered by social science. Having a basic grasp on the available technology and selecting the right tools for your case will greatly aid litigators in educating their juries.

Your jury

Attorneys who remain resistant to technology can fall into the trap of assuming that technology is a tool for the young, believing that the majority of their jury will neither expect nor understand, new technology. These attorneys misunderstand their purpose and their jury.

A poll by National Public Radio, the Kaiser Foundation and Harvard's Kennedy School of Government conducted in 1999 found that "Americans love the technological revolution." Almost all Americans (92 percent) under age 60 reported having used a computer at some point in their lives, most had used the Internet (75 percent), and 8 out of 10 currently used a computer at home or at work.[ii] This technological familiarity and enthusiasm is not limited to wealthier jurors. The same NPR poll found that 48 percent of Americans under 60 who make less than $30,000 per year now have a computer in the home.

While jurors over 60 are only half as likely to have used a computer as younger people,[iii] the Generation X and Y population (those born in the late 1960s-70s and early 1980s-90s, respectively) currently comprise 40 percent of jurors.[iv] Baby-boomers, no longer the youngest jurors, now represent the "leading edge of the senior citizen population" and have a familiarity with technology.[v]

It remains true that the focus of any case is your client's experience and your primary job is still to engage the jury. As Diane F. Wyzga explained in her July 2009 article in this magazine, jurors place "your client's particular story within the larger story of their universal experience…filtering out information that does not coincide with what they have come to expect and believe of the world."[vi] As Americans move away from hardback books and towards the screen, the way information is received and processed has changed. "As a society, we no longer read…for in-depth information and discussion. Instead, we settle for cheap 30-second sound bites and glossy talk TV, all in convenient, easy-to-swallow caplets."[vii]

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The common life experience of gleaning information from quick blurbs and high-tech animation, instead of leisurely combing through articles and lengthy books, has altered the way jurors focus on and retain information provided in the courtroom. Jurors, exposed to digital animation in video games and on television, have become accustomed to receiving information through digital media. Repeated studies confirm that juror retention is drastically increased when visual, rather than purely verbal material is presented. A 1992 McGraw-Hill study, commonly referred to as The Weiss-McGrath report, found "a one-hundred percent increase in juror retention of visual over oral presentations and a six-hundred percent increase in juror retention of combined visual and oral presentations over oral presentations alone."

Rich Mayer at the University of California Santa Barbara has long studied how humans receive, process and retain information. His research has led to the "Multimedia Learning Theory" and confirms the decade-old Weiss-McGrath findings. Mayer's theory is fairly straightforward: optimal learning occurs when visual and verbal materials are presented simultaneously, using easy to understand terms and concepts.

Mayer emphasizes five main theories:

•***Coherence principle:*** Keep it simple. People learn better when extraneous information is excluded;

•***Contiguity principle:*** Pack a punch. Introduce related words and pictures at the same time or next to each other. Presenting simultaneously allows our brains to process more deeply as we work to make sense of the connections between the two ideas. We are able to think more actively and can use our knowledge to solve new problems;

•***Modality principle:*** Speak on it. Learning is increased when animation with speech rather than animation with written text is used;

•***Signaling principle:*** Get organized. People learn better when material is presented with clear outlines and headings;

•***Personalization principle:*** Chat about it. Conversational speaking rather than formal style is more effective for learning.

Technology available

While some attorneys continue to fight for the pen over the screen, technology has gone from simple PowerPoint® presentations to simulations of car-accidents that are better analogized to the 3-D Star Wars ride at Disneyland than any courtroom evidence that existed a decade ago. Use of video and computer capabilities in the courtroom expands attorney options for how to present evidence and keep their jury engaged.

•***Demonstrative aids*** like computer-generated animation, 3-dimensional simulations, and taped reenactments are now consistently being used in the courtroom with much ease and success. Used effectively, these visual presentations apply Mayer's Multimedia Learning Theories and enable jurors to "experience" what the attorney is talking about.

•***Graphics software*** enables attorneys to create effective charts, graphs and diagrams. Litigators can present these tools in hard-copy or project the images onto a monitor or screen.

•***Visual presenters, projectors, and document cameras*** allow attorneys to immediately project the image or video to the jury. Document cameras (often referred to as Elmos®, after one of the major distributors) look like the traditional projector but instead have a color video camera mounted above a light table. Document cameras are similar to their predecessor, the projector, but can also display 3-dimensional presentations and videos. These images are then projected onto a monitor or screen.

•***Simple trial presentation software like TrialDirector® and Sanction®*** allow attorneys to blow-up, mark and compare documents side by side. Video depositions can be synchronized with their transcripts so the jury can both hear the witness and see his or her demeanor during questioning. Simple computer technology allows a witness to annotate documents and photographs in court, the courtroom clerk can then print the exhibit, enabling the attorney to introduce it into evidence. Once finished, these annotations can be made immediately visible to the jury.

•***Videoconferencing and video-based testimony*** provide attorneys the opportunity to present testimony from witnesses and experts who are physically unavailable to the court, simplifying scheduling and reducing costs. Similarly, remote foreign language and American Sign Language interpretation can be available at a moment's notice using video-based services. Since 1996, the Federal Rules of Civil Procedure have permitted judges to allow remote testimony.[viii]

•***E-data mining techniques and scanning of documents*** allow attorneys to have thousands of documents at their fingertips and the ability to retrieve individual documents almost instantaneously. Presentation technology then projects the document to the rest of the court in real-time.

Almost all American courtrooms, whether state, or federal, now have some type of technology in place. "For judges and court staff, using information technology (IT) is no longer discretionary; rather, it is simply the way they do their work."[ix]

While our understanding of learning principles and our familiarity with technology has broadened, and the full potential of these tools is yet to be seen, the attorney's objective remains constant: have the jury connect with, and relate to your client. Tell a convincing story. Keep it simple. Know your case.

While jurors respond well to technology, they will still tune out if there is too much information being presented, whether written or displayed on a glossy screen. As the old saying goes, it's not what you have; it's how you use it. Mayer's Multimedia learning theory confirms that the "[p]resentation medium does not create learning, but the presentation method does."[x] Once you have determined which portions of your case will

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best benefit from technology, there are a few considerations when choosing what you will use.

•***Determine what technology is within your reach***. Frequently, the technology may be available for rent – or the courthouse may have the technology already available.

•***Think outside the box.*** Do you really need to pay an expert to take the jury on a 3-dimensional tour of the accident scene or will Google Maps satellite view of the scene (freely available on-line) prove just as effective?

•***Find out what your courtroom will support and whether you face a fight.*** Whether a courtroom is equipped with, or able to synchronize with your technological device will vary by jurisdiction and courthouse. Similarly, there is a (legitimate) fear among judges that attorneys "will either fumble with the technology, or use it inefficiently, slowing down their already exceedingly busy dockets."[xi] Make sure to re-familiarize yourself with the rules of evidence and any local rules that will relate to whether your technology will be allowed to come in.

•***Spend the time to familiarize yourself with the purpose for the technology and practice with the equipment.*** No matter what technology is chosen, make sure you have an alternate method of presenting the material if something goes wrong.

•***Be aware of your public image, and your client's.*** As technological familiarity expands, jurors are more and more likely to search the Internet for information on you, your firm, case participants, issues, and your client. It is becoming increasingly more difficult to control one's image as information becomes more easily accessible and social media platforms expand. Familiarize yourself with what an Internet search of your firm or your client will display. Ensure that any personal or firm Web sites are appropriate for the public at large.

•***Work to reduce jurors' urges to conduct research outside the courtroom.*** Consider a request to incorporate a reference to technology in the juror admonitions if it is not already included. Take advantage of any jury improvements your court has implemented (see box for more information on new juror policies). If your court allows, use mini-openings and preliminary instructions to educate your panel and give them a framework for what to expect. Encourage jurors to take notes and raise questions and concerns during trial.

Technology has arrived and is not going away. Despite the costs associated with technological implementations, courtrooms continue to install and upgrade new technology. The judicial system is eager to use technology to simplify the process, increase juror involvement, and reduce costs in many ways. Jurors, surrounded by streaming multi-media displays, expect exciting visual presentations. Studies like Mayer's "Multimedia Learning Theory" have confirmed that visual presentations, coupled with verbal material, are the most effective method for teaching new information.

Ultimately, technology is not about what you have, but how you use it. As technology advances, the gap between what large and small firms can afford is narrowing, and attorneys' comfort with technology is increasing. Attorneys are mistaken in thinking that trials will be won by the side with the most expensive technology and must remain cautious to avoid creating an "arms race." A litigator who is familiar with a laptop, a search engine and a projector will be far more successful than one with a $500,000 3-Dimensional animated reenactment of an injury scene that is found inadmissible. While it is exciting that technology has become increasingly user-friendly and easily available, the trial process has not changed. Developing your case and educating your jury remains your primary objective.

William L. Veen founded the Veen Firm as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely-injured workers and consumers. He is a member of the American Board of Trial Advocates and he was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.

Anoush Lancaster, University of California Hastings College of the Law Class of 2009, is the newest member of the Lancaster Trial Team at the Veen Firm, P.C., in San Francisco. The Lancaster Trial Team litigates complex catastrophic injury cases involving negligence, serious injury and wrongful death. The team focuses on products-liability, dangerous-condition, and professional-negligence cases.

For more information on this article, sample motions in limine, and other helpful materials, please e-mail a.lancaster@veenfirm.com or visit our Web site: www.veenfirm.com.

Endnotes:

[i] U.S. Department of Commerce, Economics and Statistics Administration National Telecommunications and Information Administration, *A Nation Online: How Americans are expanding their use of the Internet*, www.dynamicnet.net/news/articles/a_nation_online.htm.

[ii] NPR/Kaiser/Kennedy School Poll, *Survey Shows Widespread Enthusiasm for High Technology*, www.nrp.org/programs/specials/poll/technology.

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[iv] Karen Lisko, *The Newer Generations in the Jury Box: Who Will Favor Your Cause?* (2004) www.abanet.org/lpm/magazine/articles/v32/is4/an7.shtml

[v] Philip K. Anthony Ph.D., *Meeting Juror Expectations in the Twenty-First Century* (2007).

[vi] Diane F. Wyzga, *The Wolf Was Framed! Little Red was no victim,* Plaintiff magazine, July 2009.

[vii] Frank Herrera, Jr. and Sonia M. Rodriguez, *Courtroom Technology: Tools for Persuasion*, Article for Trial, May 1999.

[viii] F.R.C.P. 43(a).

[ix] *Long Range Plan for Information Technology in the Federal Judiciary FY 2009*. www.uscourts.gov/information-technology/long-range-plan-2009/Long_Range_Plan_2009.cfm

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[xi] *Ride the Lightning: Courtroom Technology Tips from the Bench;* http://ridethelightning.senseient.com/2009/05/courtroom-technology-tips-from-the-bench.html; Viewed 6/23/2009.

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