

DIGITAL AGE & PRACTICE

BY GREGORY J. MORSE

Technology — Best Supporting Actor, Not the Star

The fact that a picture is worth a thousand words does not mean those “thousand words” are memorable. “Memorable” is where trial lawyers live in a courtroom. While technology creates the opportunity to present a client’s story and arguments more efficiently and effectively to a jury, technology has frequently become a crutch and many times is mistaken for *effective* argument. Putting a client’s entire case facts on a PowerPoint slide is neither an effective way to engage the jury nor a powerful way to convey memorable information.

Master swordsman Odagiri Ichin’s ideas on samurai techniques are instructive for using technology in the courtroom: “The first principle of the art is not to rely on tricks of technique. Most swordsmen make too much of technique, sometimes making it their chief concern.” Many lawyers make technology their chief concern in the preparation and the delivery of their case. Using this process often results in cluttered visuals that are neither engaging nor memorable.

Lawyers are relying on technology too much — at the expense of quality oration — to present clients’ stories and arguments to the jury. The great trial lawyer Clarence Darrow kept entire courtrooms at rapt attention for days, sometimes moving people to tears with just his words — no PowerPoint, video animations, or AI-produced exhibits. If he were practicing law today, Mr. Darrow would surely adapt to technology’s positive impact on evidence presentation and jurors’

decision-making process, but his powerful words would still carry the day in court.

Words Versus Images

Studies over the past several decades have consistently concluded that approximately 90 percent of jurors prefer to view evidence through a television screen.¹ Additionally, psychologist Albert Mehrabian demonstrated that 93 percent of all communication is nonverbal. A 3M Corporation research study concluded that the human brain processes visual images 60,000 times faster than text.² Further studies concluded that the human brain deciphers image elements simultaneously, while language is decoded in a linear, sequential manner taking more time. Clearly, humans are *visual* beings.

However, the results of these studies do not mean that if lawyers show it on a screen, the jury will remember it. Lawyers must do more than effectively deliver information to the jury. Advocates must make facts and arguments memorable so that jurors will remember them as they deliberate days, weeks, and even months after counsel conveyed those facts and arguments. *Words* are what makes lawyers effective orators. Digital presentations and exhibits should merely supplement counsel’s arguments, not replace them.

Do not forget about the spoken word. Study after study suggests that people remember information and accept it more frequently when told in a *story* form, and technology has not



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diminished this fact.³ After extensive research, Stanford Professor Dr. Jennifer Aaker concluded that “[p]eople remember stories up to 22 times more than facts alone.” The trial lawyer must tell a good story, not just show facts on a PowerPoint slide.

Structure is the most crucial aspect of a good story. It 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, which they invariably will during trial.

Advocates also should not overlook word choice. Colleen Szot is one of the most successful writers in the paid programming industry; she is credited with shattering the Home Shopping Network’s all-time sales record by changing a few words of its tag line. HSN originally told viewers that *operators are waiting, please call now*; sales were flat. Colleen changed the line: *if operators are busy, please call again*. This simple change gave viewers the impression that they were missing out on something immensely popular. Sales went through the roof. Thus, simple word choice can make all the difference.

Using analogies to conjure up visual images associated with facts and arguments also makes them more memorable. Employing visual imagery provides the jurors context, continuity, and motive. It also helps the jury easily understand and remember complex legal issues or facts. Below are two descriptions to a jury of the damaging effects on the alveoli, the tiny air sacs in the lungs, by toxic gases from cigarette smoke:⁴

(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 the alveoli in the plaintiff's lungs cover a grass football field — one hundred yards. Now imagine that you are standing on the 30-yard line facing the far end zone. Further, imagine that all the grass from the 30-yard line where you are standing to the far end zone is dead. It is brown — 70% of the football field. That is why the plaintiff can barely breathe on her own.

The second description is far easier to remember and evinces a better understanding of the damage because it creates a mental image that is relatable and familiar to most people — a football field.

Using an effective theme is also vital to having a jury remember facts and arguments. A theme is a short phrase that sums up counsel's story. It is essentially a cognitive shortcut for the jury. A theme helps jurors recall evidence and other aspects of a case that they may have forgotten during the trial. Today, more than ever, people are accustomed to seeing and remembering themes — the hash symbol (#) used in social media posts are really a type of theme. Here are examples of very effective themes:

If the glove don't fit, you must acquit. These words, used by lawyer Johnnie

Cochran in the O.J. Simpson case, may be the most famous theme used in a trial. The jury acquitted Simpson.

If the lion got away, Kerr-McGee has to pay. This theme was used by attorney Gerry Spence in *Estate of Karen Silkwood v. Kerr-McGee Nuclear Co.* He used the theme to sum up the legal complexities of strict liability. The lion symbolized the plutonium that infected Karen Silkwood. Thus, if Kerr-McGee's plutonium (the lion) got out and infected Karen Silkwood, Kerr-McGee was liable no matter its defense. Mr. Spence, through a simple yet vivid theme, reduced this complex legal notion to memorable terms anyone could understand. He won a multi-million-dollar verdict.

Where's Waldo? This theme was used in a trial⁵ where the government charged the client with felony burglary, theft, and cashing forged checks. *Waldo* symbolized a critical prosecution witness that the prosecution did not call at trial. Defense counsel linked the missing witness to reasonable doubt in his closing argument. The jury acquitted the client.

Remember to repeat, repeat, and repeat the theme throughout the trial or hearing. Studies verify that repetition moves information from short-term memory to long-term memory.

Use the rule of three. The rule of three is a principle that suggests a trio of events, characters, or words/phrases is more effective in the execution of the story and engaging the listener. *Omne trium perfectum* is a Latin phrase that means *everything that comes in threes is perfect*. The Founding Fathers understood the rule of three. The Declaration of Independence reads, "Life, Liberty and the Pursuit of Happiness." The *Seinfeld* character, lawyer Jackie Chiles, was a master at the rule of three in his dialect: "It's outrageous, egregious, preposterous!" It is what made him so memorable even though he was not a regular character on the show.

Technology Has a Role to Play

Despite all the advice given earlier, technology has a place in a courtroom. It is a welcomed necessity in any trial, but advocates must use it with caution. Lawyers should look at the technology they are using with a critical eye and ask themselves the following questions: Will the technology assist in emphasizing the strengths of the client's case? Am I comfortable

with the technology? Are my witnesses comfortable with it? Additionally, resolve any evidentiary issues before trial with the technology and underlying data. Most importantly, have a backup plan if the technology fails in the middle of trial, which it likely will when counsel is about to make a brilliant point on cross-examination.

PowerPoint is probably the most used visual aid in the world; it is an incredibly useful program that changed presentations forever. On average, PowerPoint has five hundred million users and approximately thirty million PowerPoints are created every day. However, putting an outline, a series of questions, or a document on a PowerPoint slide is not effective.

Two of the most common mistakes people make when preparing their slides is that they overload the slide with information, which makes the slides illegible and thus not memorable. People also forget about the principles of contrast, which makes slides difficult to read and thus not memorable.

When creating a PowerPoint presentation, apply these principles to create effective, memorable visuals: (1) ensure that the slides lack nothing but contain nothing superfluous; (2) each slide should only contain the essence of the matter; (3) the slides should clarify and enhance the client's story and arguments; (4) use pictures and bullet points on slides; (5) build each slide element by element; (6) strive for 15 words or less (excluding title and quotes) on each slide; (7) contrast the text with the slide background properly so it is readable; (8) do not overload slides with too much text or graphics; (9) set the slides to show gridlines and rulers — this helps line up the content from slide to slide; and (10) draw on the jurors' life experiences for content in the slides.

Regarding number 10 (life experiences), it is important to understand technology's effect on people. Words and pictures mean different things to different people. "Remembered facts" are subject to interpretation as they are filtered through people's attitudes, values, and life experiences. Because technology has dramatically changed the way people receive, process, and remember information, lawyers must go below the surface during voir dire and learn about the jurors' C.A.K.E. — Culture, Attitudes, Knowledge, and Experience. Knowing a Juror's C.A.K.E. will

help the lawyer pick the right jury to accept and remember the client's story and arguments and help relate to the lawyer's visual aids. Do not make the mistake of using a New York Yankee reference with a Boston jury!

When designing digital exhibits and presentations, it is helpful to remember these three principals: (1) restraint in preparation, (2) simplicity in design, and (3) naturalness in delivery.

Technology should be considered verbal support, not a verbal substitute. Clarence Darrow would surely agree.

Notes

1. 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); Gregory J. Morse, *Techno-Jury: Techniques in Visual and Verbal Persuasion*, 54 N.Y. L. SCH. L. REV. article 8, (2010); and Jennifer L. Keller & Chase A. Scolnick, *Demonstrative Evidence: Show and Tell*, ABA JOURNAL (April 19, 2021).

2. 3M Corporation research study.

3. Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision-Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992); Jennifer L. Ceglinski, *Admitting Animations: Applied Psychology Research as a Call for Improved Guidance in Assessing the Prejudicial Impact of Computer-Generated Animations*, 6 DREXEL L. REV. 177, at 201 (2013).

4. United States v. Philip Morris USA, 449 F. Supp. 2d 1 (D.D.C. 2006) (Tr. at 4803).

5. Gregory Morse was the defense attorney in the case. ■

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