

Three Strikes and You're Out: Judges Talk About Technology in the Courtroom

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Recently, we had the pleasure of hearing the thoughts of three tech-savvy judges about the use of technology in their courtrooms. Our thanks go to Judge Gerald Bruce Lee (EDVA), Judge Dennis Smith (Circuit Court, Fairfax, VA) and Judge Christina M. Habas (District Court, City and County of Denver) for their invaluable insights.

Three strikes and you're out.

We all know that technology is great when it works. But sometimes it doesn't. Here is Judge Lee's approach: "The first time you have trouble with your technology, I will amiably grant you a short recess. The second time, I will warn you sternly that it better be fixed, but I'll still grant you a short recess. The third time it fails, I am going to advise you that we are done with technology for the day and it's time to move on."

Crisis Management When Technology Blows Up

All judges offer the same advice: be prepared to proceed without technology and don't let a jury see the extent of your discomfort. They will not have drawn any GOOD conclusions from your technical failures, but at least they can be impressed by how prepared you are to move forward. This means making sure you have paper handouts in case your carefully prepared technology goes up in flames.

What Do You Mean There's No Outlet?

You would think this would be obvious, but the judges say it happens all the time. In walk the attorneys with all their fancy equipment and they have no place to plug it in. Moreover, you have to test the outlet. The fact that it exists doesn't mean it has juice. This is especially a hazard for big city attorneys trying a case in rural courthouses. You need to get the lay of the land before the day of trial. Where do you have working outlets? How many extension cords do you need and how long should they be? Consider projector and screen placement. Test microphone and audio connections. Don't forget your adapter cord so your battery doesn't run down. Carry surge protectors and a bootable operating system disk. Look for phone and ethernet jacks if needed. Use wireless lavalier mikes so you can walk around easily. Make sure you have everything you need on your laptop, your case files, reference materials and any software you may need in court. Most well-prepared attorneys sketch out any courtroom with which they are unfamiliar. Remember too that you will need set-up time and may need to get into the courtroom early. Smaller courthouses can be interesting – in one case, a friend of ours was simply given the key to the courthouse so he could set up his equipment the night before. Don't count on that happening in a metropolitan area!

Did You Remember to Say “May I?”

Not all judges are enamored of technology in their courtrooms. Some are downright techno-phobic. We once lectured to a group of Circuit Court judges from Southwestern Virginia about the use of computer reconstructions in court. Their collective response? “Not in our courtrooms!” The times, they are a-changing, but not everywhere, and not as fast as legal tech warriors would like. Judges should be receptive to technology since most judges find that trial time is shaved by 25-33 1/3%. But in case they are not, make sure you have permission for the technology you intend to bring and that opposing counsel has been informed in writing of your specific plans to use technology. From the very beginning, make sure the judge is alerted to your technology plans and signs off on them. File a Motion in Limine if needed to iron things out. If the plans change, advise the judge of the change. Judge Habas noted “you don’t become a trial judge because you’re NOT a control freak.” Make sure the judge feels fully informed and in control.

Judge Lee customarily sends counsel for both sides a letter asking them to come in for training on court technology. Remember, in some courts, you can bring in your own technology but in others you will have to work with the court’s technology. Judge Lee notes wryly that he is the Chair of the Technology Committee for EDVA and doesn’t even have a computer on his desk. He cautions that most judges, seeing technology in their courtroom, think “I never did this as a trial lawyer. I didn’t need it.” He further acknowledges good-naturedly that “If they give me a disk and give me a flip chart telling me that’s what is on the disk, I’m going to look at the flip chart and I’m never going to look at the disk.”

The Power of Those in Uniform

Make sure you’ve dealt with any security issues. Sometimes, you will need a court order to bring equipment in, or at least to notify security in advance so they can check with chambers. Given the current world climate, security officers are rather humorless and they tend to see technology as potentially threatening. In the Eastern District of Virginia, your cell phones and Palm Pilots won’t get past security, so you can imagine the difficulty of bringing in full scale presentation equipment. This is nothing you want to deal with on the morning of trial!

Things That Go BOING!

It is always wise to be prepared for the unexpected. One of our friends discovered to his dismay that IR ports (you’ll have to have your tech department explain those) talk to each through line of sight – and when they make a connection they go “BOING!” Naturally, he discovered this at trial. Being a bright guy, he had along a roll of duct tape, which solves many perplexing technical problems (Just ask McGuyver). He taped over the IR ports. However the “BOINGGGS” continued unabated through the duct tape. Finally, he had to put inactive computers between the machines to stop the distracting noise. It was a long few minutes.

Practice, Practice, Practice!

There is nothing that looks worse to a judge or jury than a lawyer fumbling around with technology. As Judge Habas noted, the “Columbo” routine plays great on TV but it doesn’t play well in court. If you can’t manage it yourself, and the judges seem to agree that most lawyers can’t, bring an IT person with you. This will also keep you from being distracted by the very technology that is supposed to be helping

you! Make sure your images are clear and sharp and that your text is large enough to be seen, even by those with poor eyesight. If you are going to use part of a video, make sure you can bring it up quickly without searching through it for the section you want.

MTV v. AARP Jurors

Technology presents an interesting dilemma when your jury, as is typical, consists of young people raised on MTV and fast-paced TV and those who belong to the American Association of Retired People and happily eat discounted early bird dinners at 5 o'clock after scanning a large text menu through very thick lenses. Young jurors can keep up with fast moving presentations – slow presentations are likely to bore them and their attention drifts. They want a trial to move as quickly and slickly as “Entertainment Tonight.” On the other hand, the older jurors may not be able to read small text on a screen and moving too fast will lose them because they may process information more slowly. Think of your trial as multimedia and play to both segments of your audience - use courtroom presentation technology but also provide exhibit notebooks with slightly oversized text for the jurors to pore over at their own speed.

What Can PowerPoint Presentations Do For Me?

Some attorneys love them for opening statements and closing arguments, believing their finest function is to tell a story. Others love them for exhibits. Judges Lee and Habas both agreed that the attorney with the best opening statement usually wins, so perhaps that's a good place to focus your efforts.

PowerPoints are often overused and badly used. A jumble of text on a screen doesn't help you. It's often more effective to hand photos to a jury than to flash them onscreen. Give each juror an exhibit notebook for added impact. Don't forget timelines, both onscreen and in a trial exhibit notebook – jurors absolutely love them. For many judges and jurors, timelines are what brings a case together in a cogent way. Use your PowerPoint to full capacity, with arrows, and color fill-ins to show, for example, what portion of an organ was destroyed. There are some great books on using PowerPoint in a courtroom – that's reading you can use.

Objections to Courtroom Technology

When a judge doesn't like something you're doing with technology, the all-purpose foundation objection works well. As Judge Habas noted, it is the catch-all objection and sustaining it is often the judge's way of saying, “I don't know what's wrong with it, but I don't like it.” Make sure, if you're using computer simulations, that there is a clear disclaimer explaining that it is a simulation and not real. State judges in particular seem concerned about jurors becoming confused. In Virginia, Judge Smith notes that there are very strict rules about reconstructions: “You've got to account for all variables – and that's very hard. In a judge trial, the judge will usually view the evidence, but a judge will also be a strict gatekeeper in determining whether such evidence will go to a jury – know your Daubert!” Judges also worry about parties with significant resources having access to compelling technology while the other side may not. Sometimes, the court can offer its own technology to the other side, and this may ameliorate the problem, but the lawyer on the other side may still lack sufficient expertise to use the technology effectively.

Tips and Tricks

- Some attorneys tend to look at their PowerPoints and not at the jury. Mistake, mistake, mistake. When you bring up the first slide, look at the jury and ask if everyone can see it. Wait for their

assent before continuing – it makes them feel included and they appreciate the consideration. If you need to glance at the PowerPoint, do so briefly and then return your attention to the jurors.

- Don't do anything that requires dimming the lights after lunch. You're sure to encourage siestas. Also, don't start using any technology at the point where jurors are antsy to go home for the day. They will be impatient and unreceptive.
- If you are using video depositions, think about the staging. A doctor who is your witness should be in a white coat with diplomas hanging prominently in the background.
- Courtroom technology should be seamless and not distracting.
- Use call-outs (this is like those bubbles of text you see in comic strips) of specific documents as well as highlighting – this has a great impact on juries and brings your point home. But don't overdo it and lose that impact.

Parting Advice

From the judges, who have seen it all when it comes to electronic evidence, some sage counsel for everyone: Never say anything in e-mail you don't want to explain to a grand jury!

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