

The Move Toward Electronic Presentation of Evidence¹

As a society, we have become dependent upon a broad range of electronics in both our professional and personal lives. The change has not been subtle; there has been a seismic shift in how we communicate, how we create and store information, and how we share information. The world has become a place of fast moving and ever advancing technology – where emails and text messages have replaced face to face meetings and telephone calls, documents are created, revised, exchanged, and even executed electronically, pictures and messages are shared with the universe at large and at every juncture the information is saved and stored. Even the biggest technophobes among us cannot deny that the rise of technology has changed – for better or worse – the practice of law, how we communicate, how we proceed with discovery, and ultimately, how we present evidence in the courtroom.

The rules of court have adapted to this change by specifically addressing electronic evidence, both in the context of discovery and introduction at trial. Most recently, the Federal Rules of Evidence have been amended to allow for the self-authentication of electronic evidence. Federal Rules of Evidence 902(13) and 902(14), which became effective on December 1, 2017, allow for electronic evidence to be authenticated by certification instead of by testimony. Rule 902(13) applies to electronic evidence such as computer files, social media posts, and smart device data. Rule 902(14) applies to data copied from an electronic source.

Sticking with Tradition:

We are all likely familiar with the traditional methods of presentation in the courtroom. Whether it is holding up a foam board, publishing pictures, or working with an ELMO to move through documents, these are the tried and true methods of presenting our client's case. Of course, traditional methods such as these may still be effective in today's world, especially in a smaller scale case where there are limited documents, but they are not without issues. Foam boards are difficult to manage in that the jury must be able to both see and have the time to read what is on the board, which, in turn, limits what can be displayed. Similarly, use of an ELMO comes with a host of logistical problems, from fighting to make sure the document is not blurry while still sufficiently magnified, to projecting the correct portion of the document and of course, continued progress through the document or documents in a seamless way as the witness is testifying. As with nearly any method, keeping the jury's attention is critical, something made more difficult by page upon page of black letter type on a white sheet.

Now amplify this by a factor of ten or more as we now deal with clients that have exchanged telephone and in-person conversations for potentially hundreds of emails, documents, drafts, Facebook posts, Twitter exchanges, text messages, and many other forms of documents and communications that have now become available as evidence in your case. The

¹ These materials are adapted from an article by Kate Mahan of Cook, Little, Rosenblatt and Manson, PLLC that appeared in the N.H. Bar News.

notion of choosing what to put on a foam board or the task of analyzing a ream of paper through the ELMO becomes daunting. One inevitably thinks there must be a better way.

Why Switch to Electronic Presentation? – The Upsides

Like many aspects of technology, software allowing electronic evidence presentation is ever changing and expanding. There are programs available that may be limited to the trial presentation, but also those that are designed to take you from day one of discovery through the last day of trial. Needless to say, the various programs available offer a variety of features intended to streamline and augment trial presentation. There is no shortage of marketing for both software and consultants versed therein. Some examples are attached hereto for reference. While extreme measures such as a catered “war room” likely exceed most or all of our trial needs, marketers do properly identify some of the benefits of electronic trial presentation.

Ultimately, electronic evidence is merely another means of enhancing trial presentation through visual aids and demonstration. The effectiveness of adding visual aids to oral presentations is well established. See Cooper, *The Use of Demonstrative Exhibits at Trial*, 34 Tulsa L.J. 567, 568 (2013) (noting that “when people are instructed through auditory modality alone, and recall is subsequently tested, they recall about 10 percent of what they heard, in contrast to recalling 85 percent of information presented orally with visual aids”) (citing Jaquish & Ware, *Adopting an Educator Habit of Mind: Modifying What It Means to ‘Think Like a Lawyer’*, 45 Stan. L. Rev. 1713, 1721 (1993)); Gonzales & Teal, *No Ideas but in Things: A Practitioner’s Look at Demonstrative Evidence*, Florida Bar Journal, p. 2 (Dec. 2015) (noting that visual aids used in conjunction with oral presentation may increase understanding and retention levels by as much as 65 percent) (citing Butera, *Seeing is Believing: A Practitioner’s Guide to the Admissibility of Demonstrative Computer Evidence*, 46 Clev. St. L. Rev. 511, 513 (1998)). While the methods of presenting electronic evidence are new, the reasoning behind doing so is not. Indeed, in not-that-ancient history, it was “not uncommon [in paternity proceedings] to exhibit the child to the jurors so that they can compare his appearance with the appearance of the alleged father.” Ladd, *Demonstrative Evidence and Expert Opinion*, 1956 Wash. U. L.Q. 1, 2 (1956).

Without providing an exhaustive list, some prominent trial presentation programs are Microsoft’s Power Point, and for software specifically designed for trial presentation, inData’s (now Ipro’s) Trial Director, and LIT’s TrialPad. With respect to local resources, Julie Laboe, a consultant based in Concord, specializes in Ipro programs.

So what are some of these features of such programs, and how are they different from the more traditional methods? The most immediate change is the set-up. Walking into court, one is left with a laptop and thumb drive, rather than boxes upon boxes of paper and the hopes that you will be able to find what you need in an organized manner. Depending upon the program used, counsel tables, the witness and the judge each have a monitor displaying what is also being displayed on a large, centrally located screen for the jury, for easy and extended

viewing by all. In addition, if counsel can agree upon electronic presentation, there are programs available to facilitate an easy “switch” in who controls what is on the screen depending upon who is questioning. In other words, there need not be a delay as parties shift between questioners, but rather, the process can be as seamless as a flip of a switch.

There are also many different avenues available for the actual presentation. For example, one can retrieve an exhibit and in real time, pull out to magnify or highlight a specific phrase or provision, circle relevant language, provide a comparison to another exhibit through a split screen, and many other features. The movement and dynamic changes may keep the jury engaged in an otherwise static set of documents, all while allowing counsel to highlight specific provisions without the drawbacks of some of the more traditional methods.

Thus, electronic evidence presentation allows the practitioner to appear efficient and organized to the jury, to maintain the ability to adapt on the fly to the evidence actually presented at trial, and to exert control over the flow and framing of evidence.

The Drawbacks

Although electronic presentation of evidence provides many benefits, there are a number of potential drawbacks and other restricting factors that should be considered before employing this method. The first, and perhaps most obvious, is whether the volume and type of evidence lends itself to an electronic presentation – there is no need to create a five-lane superhighway when a simple road will do. This goes hand-in-hand with the cost factor associated with electronic presentation: is the cost of the presentation justified by the amount at issue? While many firms may have the necessary equipment (projector, screen, monitors, etc.) at their disposal, for most others equipment will need to be rented or purchased, a not-insubstantial undertaking. Depending upon the volume of information to be presented and one’s familiarity with the system, having an I.T. person familiar with both the software and the equipment at trial may be desirable. This person serves the dual purpose of running the software as you question/present while also dealing with any problems that may arise. As with any technology, there is always a risk that some error or other issue may arise and, in the context of trial, will need to be dealt with immediately – potentially while the trial continues. With that in mind, the practitioner should have a backup plan for introducing any evidence otherwise to be presented electronically.

Additional Practice Tips

Know Thy Courtroom

Whether your particular court is capable of an electronic presentation must be addressed. While many courthouses have been recently renovated, making them more capable of such a presentation, there still remain logistical issues (power, placement, etc.) that need to be addressed as early as possible. A visit to the courthouse to see the actual room and a conversation with the clerk can go a long way in preempting potential problems on the eve of

trial. The U.S. District Court may be the only local venue to support the more sophisticated electronic presentations.

Know Thy Judge

Similarly, any questions or concerns as to whether certain methods of trial presentations will be allowed should be determined beforehand with the presiding judge. Rule 611 under both the New Hampshire and Federal Rules of Evidence governs the mode of witness examination and evidence presentation and places control with the court.

K.I.S.S.

However sophisticated the technology used to present your case, visual presentations to the jury should be kept simple and easily understood. The purpose of such aids is to focus the jury's attention on a particular point, not distract, and to enhance the jury's understanding and acceptance of your case.

Preparation

This probably goes without saying, but with any method of trial presentations, preparation is key. Electronic trial presentations should be practiced repeatedly to work out inevitable kinks and until the presenting attorneys and staff are comfortable.

Which way to go?

Although the traditional methods of presentation remain available, the reliance upon electronic methods of creating and dispersing information by our clients and society at large calls for a new take on how we present our client's case. When used correctly, electronic presentation of evidence combines the best aspects of traditional methods while keeping up with the new demands that advances in technology bring.

Whichever method you choose, whether newfangled or traditional, preparation and persuasion remain fundamental considerations.