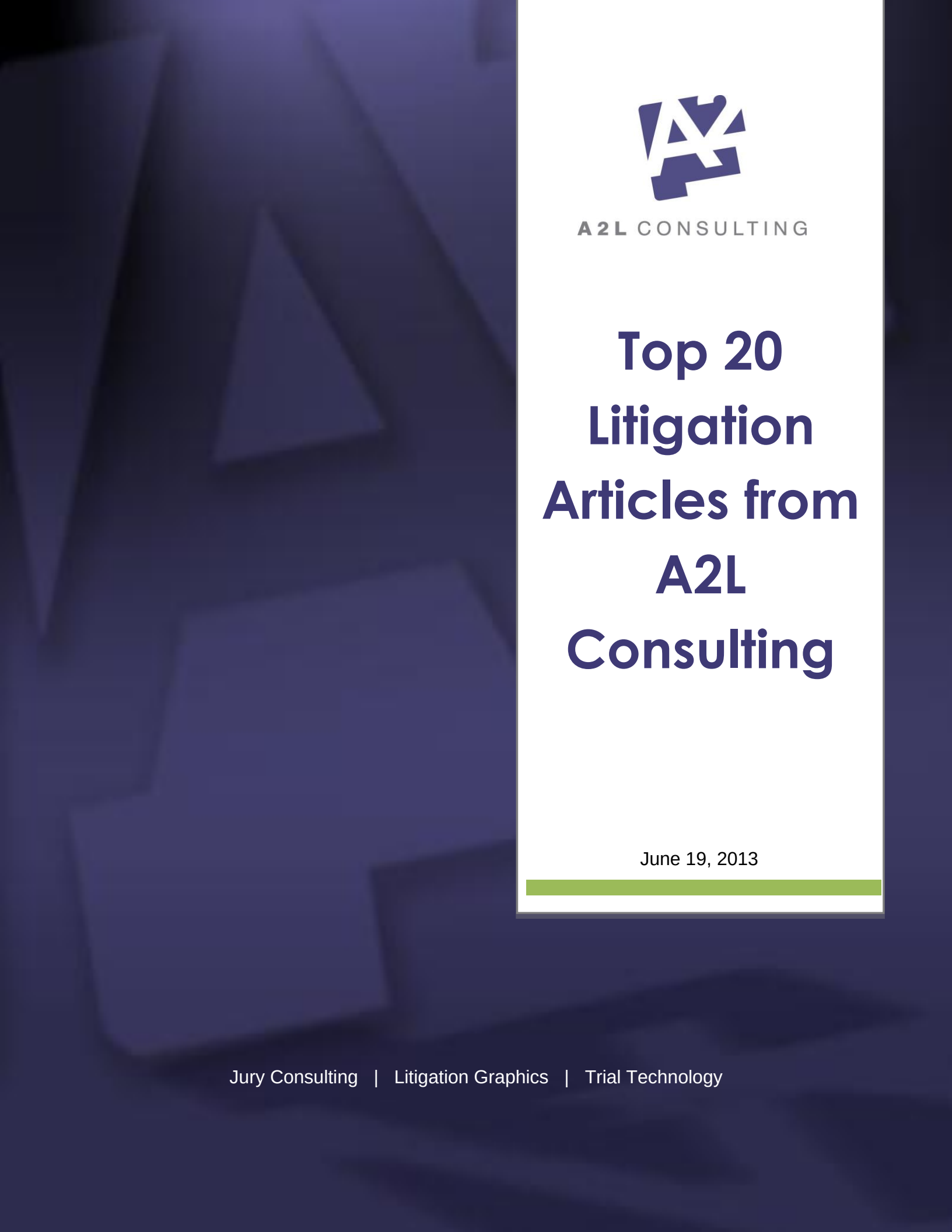

A2L CONSULTING

Top 20 Litigation Articles from A2L Consulting

June 19, 2013

Jury Consulting | Litigation Graphics | Trial Technology

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Introduction to A2L Consulting

A2L Consulting (formerly Animators at Law) offers litigation consulting services to law firms and corporations worldwide. The firm's services include jury consulting, the consultative design of litigation graphics and deployment of pre-trial technology, courtroom electronics and the personnel to support that technology.

A2L headquarters is in Washington, DC and it has personnel or a presence in New York, Miami, Houston, Chicago, Los Angeles and San Francisco. The firm's work routinely takes it to those cities plus Boston, Newark, New Jersey, Wilmington, Delaware, Philadelphia, Virginia, Maryland, Atlanta, Dallas, Phoenix and London, England. Since 1995, A2L Consulting has worked with litigators from 100% of top law firms on more than 10,000 cases with trillions of dollars cumulatively at stake.

A2L Consulting was recently voted Best Demonstrative Evidence Provider and Best Jury Consulting Firm by the readers of LegalTimes and Best Demonstrative Evidence Provider by the readers of the National Law Journal.

Litigation Consulting Services

Litigation Graphics, Demonstratives, Physical Models and Animation for Litigation and ADR		
Sophisticated PowerPoint Presentations	Document Call-outs	Printed Large Format
Boards	2-D and 3-D Animation	Physical Models

Mock Trials, Focus Groups and Jury Consulting		
Focus Group	Witness Preparation	Juror Questionnaires
Jury Selection	Post-Trial Interviews	Opening & Closing Statements

Trial Technicians, Courtroom Set-Up and Hot-seat Personnel		
Trial Software	Video Encoding	Document Coding
Equipment Rental and Setup	Video Synchronization	

E-Briefs		
Scanning and Coding	Configure Database	Citations and Hyper-Linking
Digitally Convert Paper Briefs	Provide DVD, Flash Drive or iPad	

Thank you for downloading – Enjoy your A2L Consulting eBook

We launched our popular litigation-focused blog, The Litigation Consulting Report, in 2011 and we recently published our 200th article! I'm thrilled it has been so well received by tens of thousands of people in the legal industry.

To celebrate, we are releasing this ebook of the top 20 articles as judged by the readership of the articles over the past two years. You will notice that the topics are wide ranging, but generally fall into our three key areas of expertise: Trial Consulting, Litigation Graphics and Courtroom Technology.

To be honest, the top article (The Top 50 Twitter Accounts for Litigators) is a surprise to me, but I suppose it reflects the growing use of social media to disseminate valuable content. After all, how did you find this ebook?

Other themes are less surprising and indeed encouraging, like storytelling in the courtroom, the meaning of color, jury trials, psychology and demonstrative evidence usage.

I hope that you enjoy this book and take real value from it. I would sincerely welcome your feedback. If you are not a subscriber of our blog, please become one by clicking here.

Sincerely,

Kenneth J. Lopez, J.D.
Founder & CEO
A2L Consulting
lopez@a2lc.com
www.A2LC.com

20. 5 Demonstrative Evidence Tricks and Cheats to Watch Out For

By Ken Lopez, Founder and CEO, A2L Consulting

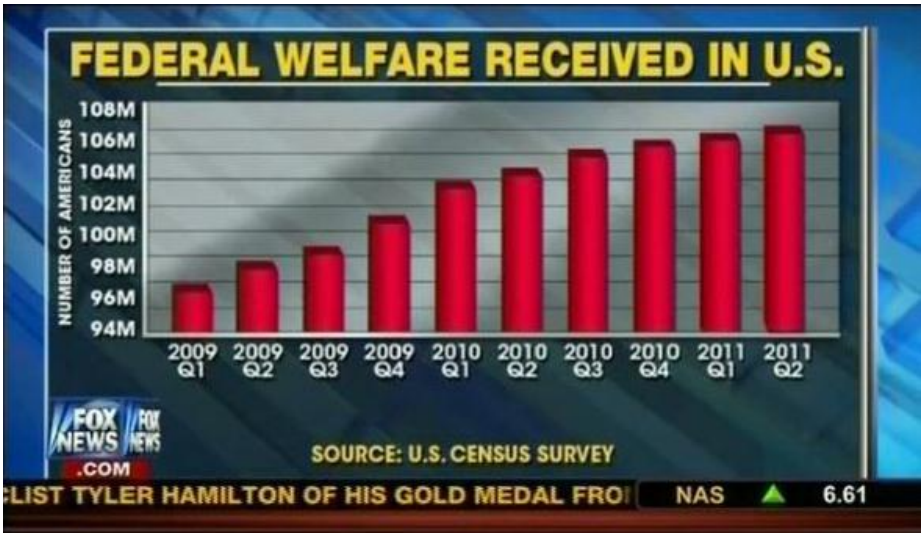
Charts don't lie, people do.

As demonstrative evidence consultants, we see a lot of charts and graphs that are designed to mislead or that end up misleading the viewer, and ultimately the jury. I don't think it is always intentional on the part of the trial team. Sometimes, a demonstrative evidence consultant is to blame for introducing a misleading tactic. This article will help you spot those misleading charts before they do damage.

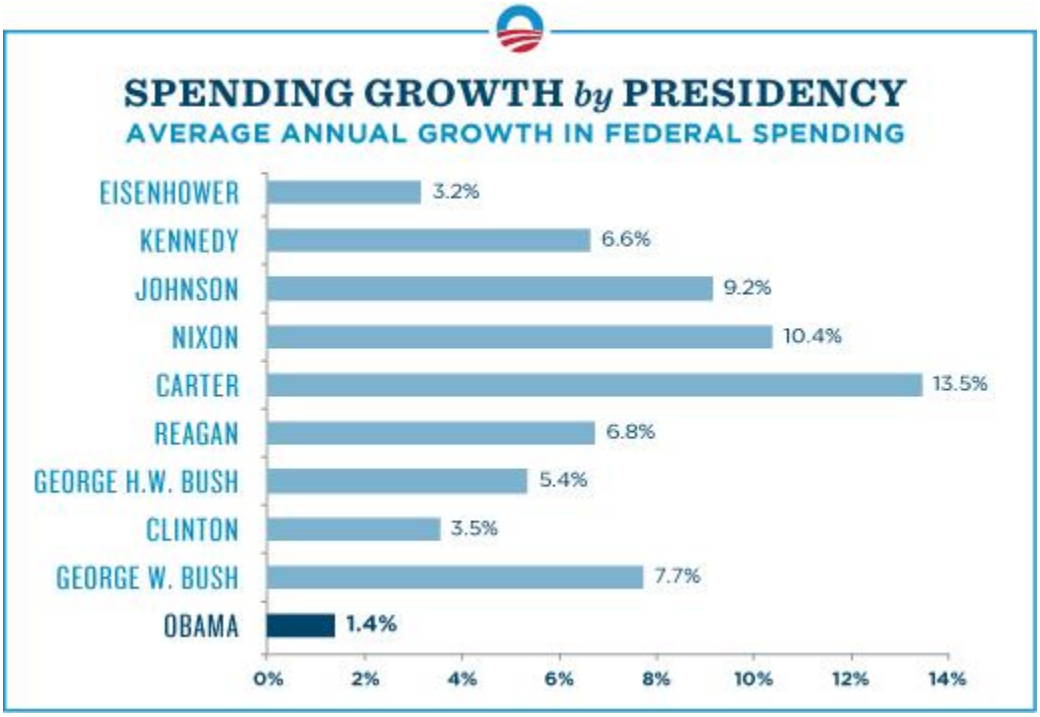
Remember that each piece of demonstrative evidence is subject to the balancing test under Rule 403 of the Federal Rules of Evidence, among other evidentiary standards. Under Rule 403, an otherwise relevant demonstrative will be excluded when its probative value is substantially outweighed by unfair prejudice, its cumulative nature or if confusing or misleading.

For example, I believe that a chart using any of these five techniques described below runs the risk of not passing muster under Rule 403; however, objections to demonstrative evidence are relatively rare. Successfully make the objection during trial and you might just call the credibility of your opponent into question.

1) **The Slippery Scale**: This is the most common trick I see, and once you know about it, you'll see it everywhere too. By setting your y-axis (the vertical one) to a narrow range not including zero (e.g. below, 94M to 108M), it is easy to make relatively small changes look enormous. For example, the Simply Statistics blog recently highlighted this technique used by Fox News. Here, this trick makes changes in the welfare rolls that are relatively small seem enormous.



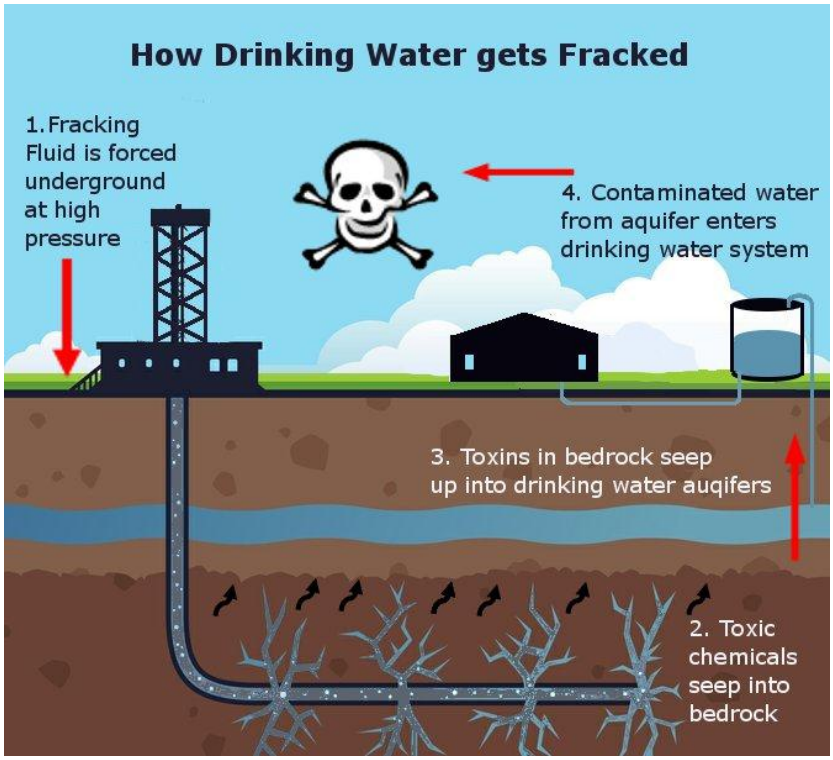
2) **Compared to what?** If you want to show a small change on a percentage basis, all you need to do is vary your x-axis (the horizontal one) so that time is literally on your side. The Obama campaign truncated its timeframe in its spending chart, claiming that in 2010, President Obama presided over the smallest increase in spending in 50 years. While technically true, 2010 was being compared to 2009, the year that the ***one-time*** stimulus spending (championed by the Obama/Clinton/Biden Congress) ballooned government spending by 18%. I wrote about this previously.



3) **The Percentage Increase Trick?** How many times have you heard someone talk about a 200% increase and really wonder exactly what they are trying to say? Do they mean it doubled, it quadrupled or something else? If they are using the percentages correctly, a 100% increase is a doubling and a 200% increase in something is a tripling – three times as much as at the outset. However, the trickery comes in where one might say in a chart that the same 200% increase is 300% of the first figure or a threefold change.

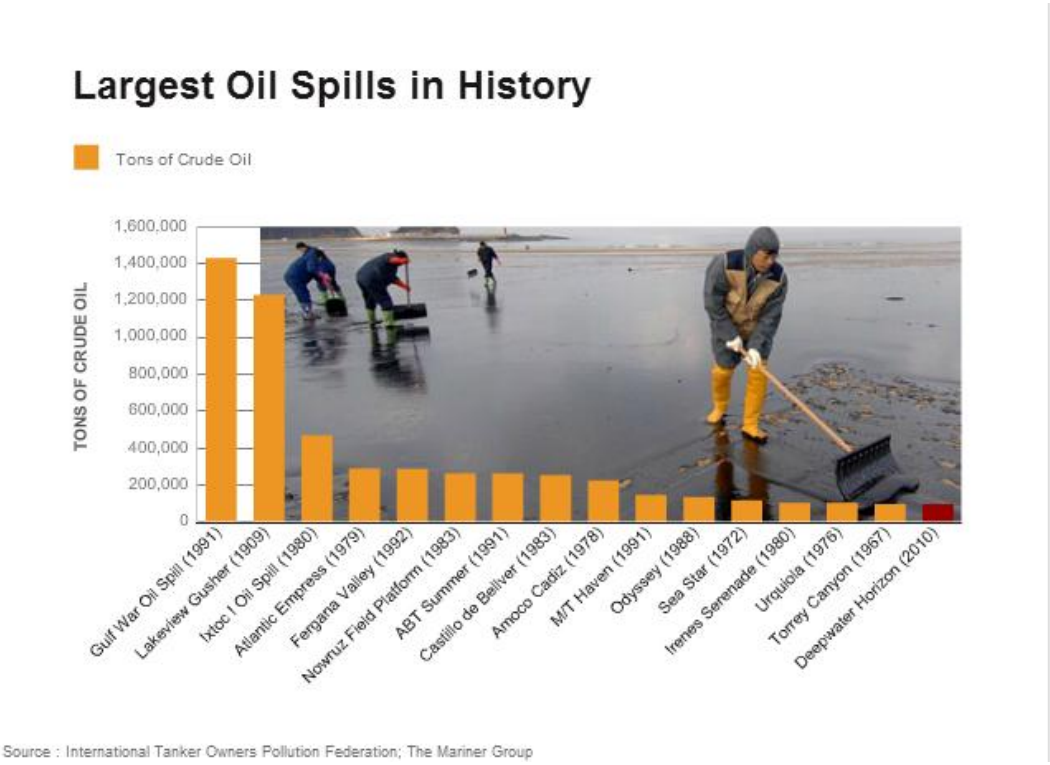
4) **Tricking the Eye with 3D Charts**: Flat charts with no depth or 3D aspect are harder to trick the viewer with, so always scrutinize your opponent's charts when the third dimension is introduced. For example, have a look at the two pie charts to the right. Both red areas are the same percentage of the pie, but if you are like most people, when the slice is closer to you, it looks bigger. A similar trick can be used with bar charts.

5) **Misleading emotional imagery**: Putting an image of a homeless person in the background of a chart about increasing homelessness is designed to evoke emotion. It might be admissible since it is clearly tied to the underlying issue. Showing an oil-covered bird in the background in an explanation of how much oil was spilled would not add to one's understanding of the amount of oil spilled. Some examples of emotional imagery in charts that add little probative value but add undue prejudice are below.

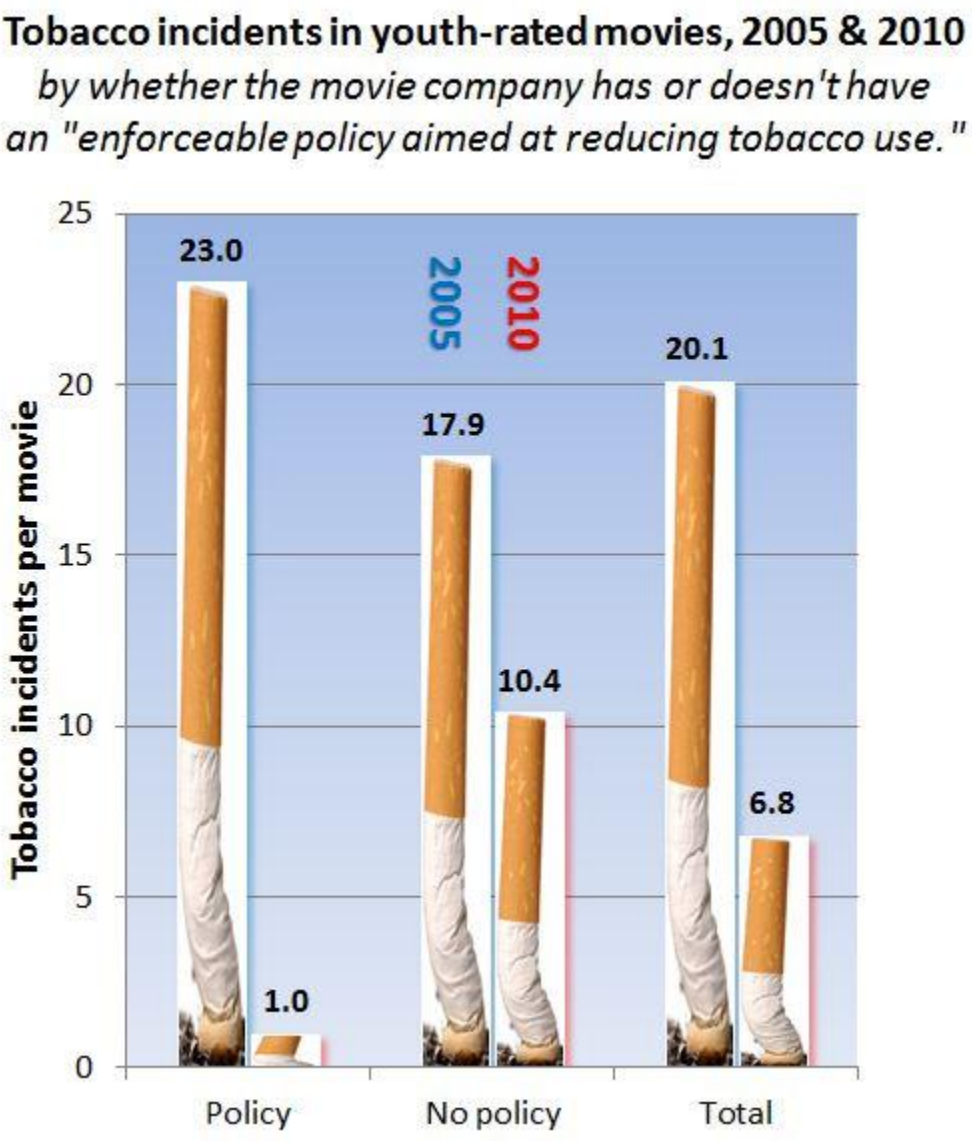


This one is used to sell water filters, but if used in court in a fracking lawsuit, the poison symbol would (if objected to) rule the chart inadmissible.

The chart below shows the surprisingly small size of the Deepwater Horizon spill when compared to historical spills. The photograph adds nothing to the viewers understanding, so it might be objectionable if used as a demonstrative.



Since it requires the viewer to decode several different riddles before understanding the message, the chart below is a model of poor chart design worthy of its own blog post. This riddle-making mistake is commonly made by those without training in preparing demonstrative evidence and non-demonstrative evidence consultants. Here a legend is used (generally speaking, this is always a bad idea), so you have to first find that. Then you have to read sideways - twice - in two different directions. Then you have to figure out from the subtle color coding of the legend that blue is left and red is right. THEN, you have to determine that left is 2005 and right is 2010. It's a chart mess, however, it provides a good example of some imagery that would potentially be objectionable. The cigarettes being snuffed out add little to the message and are there only for emotional impact. Close call though. Do you think this chart would be excluded in your jurisdiction?



19. Hydraulic Fracturing (Fracking): Advocacy and Lobbying

By Ken Lopez, Founder and CEO, A2L Consulting

The courtroom is a forum where issue advocacy is enhanced by persuasive litigation graphics. However, other settings exist where attorneys, consultants, politicians, lobbyists and advocacy organizations must persuade skeptical audiences.

This article focuses on the creation of advocacy graphics for a particular issue: hydraulic fracturing, better known as fracking. Advocacy or lobbying graphics are especially valuable as the material may be used to educate a potential jury pool, to persuade and inform government officials and to support settlement negotiations. These advocacy presentations may be distributed via PowerPoint, YouTube or even delivered in person from an iPad®.

With information flowing faster than ever before and with timelines for decisions involving billions or even trillions of dollars shrinking (e.g. the recent Congressional budget-debt debate), we believe the need for quickly produced lobbying presentations is expanding quickly.

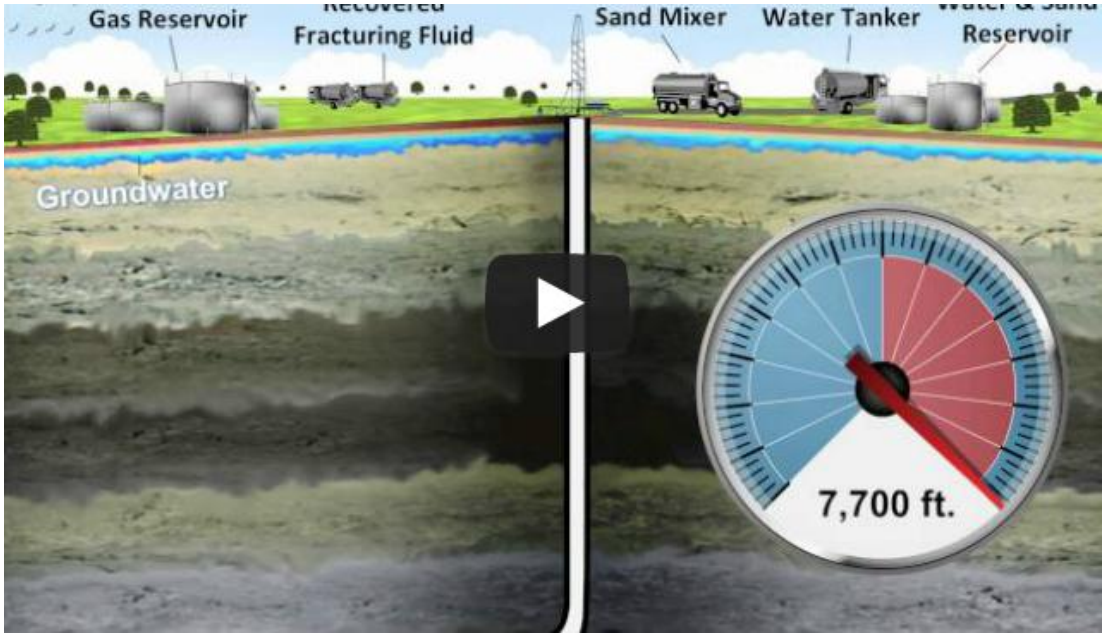
Indeed, just days ago, Animators at Law, publisher of The Litigation Consulting Report, announced its name change to A2L Consulting. This better aligns our corporate identity with additional services offerings like advocacy, grass roots and lobbying visual presentations, in addition to the services we have provided for 16 years like jury consulting, litigation graphics and trial technology. By way of example, we tackle the hot-button issue of fracking to show how issue advocacy presentations may be used when many scientific issues remain to be answered and no clear national consensus yet exists.

Fracking is the modern evolution of a 60-year old production stimulation technique that involves injecting fluid at very high pressure into a well. This technique is widely used to extract natural gas from shale, a form of rock that is found all over the United States in large quantities. The process produces tiny fissures in the rock, freeing natural gas for recovery.

Natural gas companies insist that fracking is safe for people and the environment. They also believe it can produce enough energy, from purely domestic sources, to last for decades or perhaps centuries.

Indeed, a study released in July 2011 concludes that a large field of rock on the New York-Pennsylvania border known as the Marcellus Shale can safely supply 25 percent of the Nation's natural gas needs. Thus, it is no surprise that energy companies are seeking to recover this trapped natural gas.

While we do not take any position in the heated debate over fracking, we have prepared this narrated presentation that theoretically could be used to defend fracking against its opponents in a courtroom setting or used as a widely distributed issue advocacy presentation.



Our fracking presentation first shows, in schematic form, how far below the earth's surface fracking occurs and the industry's routine use of cement and steel casings to protect groundwater from the tools and substances used in the fracking process. Whereas groundwater is typically found within hundreds of feet of the surface, fracking occurs miles beneath the surface of the earth.

Our advocacy presentation goes on to respond to challenges regarding the nature of the fracking fluid. We aid in dispelling those concerns by using a pie chart to illustrate the point that roughly 99 percent of the fluid is merely water and sand, while the remaining amount is composed of chemicals that have familiar and reassuring uses - such as soaps, deodorants and household plastics. The advocacy message is that the environmental concerns about fracking are overstated.

A two part summary chart is then used to highlight the benefits of fracking in terms of energy independence, environmental advantages, and underscores the benefits of fracking, proving the benefits far outweigh the minimal risks.

Finally, a bar graph that uses schematic drawings of gas reservoirs and a barrel of oil demonstrate that the domestic natural gas reserves that can be tapped by fracking will last decades or centuries longer than the nation's domestic oil reserves, thus contributing to the drive toward energy independence.

Such advocacy pieces are typical of the work we create. Most often our work is used in litigation or arbitration. However, we also create print and animated presentations for lobbying organizations around legislative and policy advocacy work or even as part of early settlement negotiations. From our perspective, all of these information conveyance requirements have the common theme that there is a skeptical audience who needs to learn and understand enough about an issue to see that the presenter's position is correct.

More often than not, seeing is believing in our business. Comments from all sides encouraged and welcomed.

18. Patent Litigation Graphics + Storytelling Proven Effective: The Apple v. Samsung Jury Speaks

By Ryan H. Flax, Managing Director, Litigation Consulting, A2L Consulting

In last week's article on the conclusion of the Apple *v.* Samsung patent infringement trial I emphasized that it would be the storytelling and the patent litigation graphics that accompanied the storytelling that would win the case for either Apple or Samsung. Well, now the jury has returned its verdict: 6 of the 7 Apple patents are infringed (*willfully*) by Samsung (3 utility patents and 3 design patents), none of Apple's patents are invalid, and none of Samsung's patents are infringed by Apple. The jurors awarded Apple **$1.05 billion**, or just less than half of what it asked for.

The amazing, but not unexpected, thing about the jury's verdict is not the overwhelming victory for Apple, but how the available post-verdict jury interviews ***completely validate*** the points made in last week's article. As expected, the verdict was *only superficially* based on the law and evidence, but more so on the fact that Apple's counsel had the better story and better intellectual property graphics (and the juiciest tidbit of evidence around which the story could be woven and graphics designed).

Jurors Want a Story, Not a Legal Case

When asked to point to the evidence that compelled their verdict, one juror – Manuel Ilagan – explained, "on the last day, [Apple] **showed the pictures [below] of the phones** that Samsung made *before* the iPhone came out and ones that they made *after* the iPhone came out," and **this visual evidence at the closing was enough!**

Juror Ilagen went on, "we were debating about the prior art. Hogan was jury foreman. He had experience. He owned patents himself . . . so he took us through his experience. After that it was easier. After we debated that first patent – what was prior art – because we had a hard time believing there was no prior art. In fact **we skipped that one, so we could go on faster**. It was bogging us down."

So, the jury *skipped* talking about the difficult evidence, instead relying on how they *felt* about the case and on the *story* weaved by plaintiff's counsel. And, as discussed below, relying heavily on the background and experience of the jurors.

Speaking of the jury foreman – Velvin Hogan – he also reported in a post-verdict interview that he had a revelation after first night of deliberations while watching television (he called it his "*a ha* moment"), explaining, "I was thinking about the patents, and thought, 'If this were my patent, could I defend it?' Once I answered that question as '*yes*,' it changed how I looked at things." So, once more, a juror (the foreman no less) reported basically disregarding the complex specifics of the law and evidence, here going with his*instincts* in deciding the validity of Apple's patents and then deciding whether they were infringed.

Another juror – Aarti Mathur – expressed to reporters that, "it was a*very exciting* experience and a unique and novel case." As a litigator, can you imagine one of your jurors saying this about your next trial – **what would you do to provide this kind of exciting experience for them?** This was *a patent case* and yet it instilled this feeling of excitement in the jurors. Research establishes that the best way to do this is by immersing the jurors in argument and litigation graphics throughout the trial. You want to get them interested and keep them interested.

Seasoned patent litigator, Sal Tamburo, a partner with Dickstein Shaprio LLP noted, "patent litigators, and really litigators of any complex subject matter, face a difficult task when heading to trial. The law is complicated as is the technology and it is our job to convince jurors, who are usually unfamiliar with the nuances of either the law or the technology, that we're right and should win. In essence, we need to prepare two cases, one for the jurors that is interesting, compelling, and persuasive, and one for the district and appellate courts that is solidly based in the necessary legal proof." Sal's right.

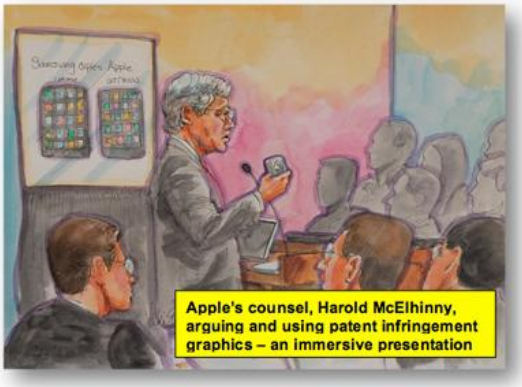
It was apparent that the complex law of patent infringement and the overwhelming jury instructions made it all but impossible for the Apple v. Samsung jury to really decide the case on its merits. Not only were the jurors *confused* by the verdict form, but they actually came back with **inconsistent verdicts and damages awards**, e.g., awarding damages of $2 million on a patent they found *not-infringed*, and had to be sent back by the judge to resolve the inconsistencies. This little "speed bump," however, did not slow them down much.

As I reported in the article last week, this was a case so complicated that the judge *begged* the parties to settle before it went to a verdict (calling it a "coin toss") and was also a case in which the jury instructions took *two hours* to explain and included a 109 page document. With all this complexity and nuance of law, these jurors were nonetheless able to return a verdict in just under 22 hours. This turn-around time would be extraordinary for even a simple case and is beyond imaginable for this patent case.

Jurors Want Great & Useful Graphics

In addition to juror Ilagan's expressed reliance on Apple's patent infringement graphics, according to its foreman the jury cut through unnecessary work by hand-drawing a matrix on a notepad to illustrate which

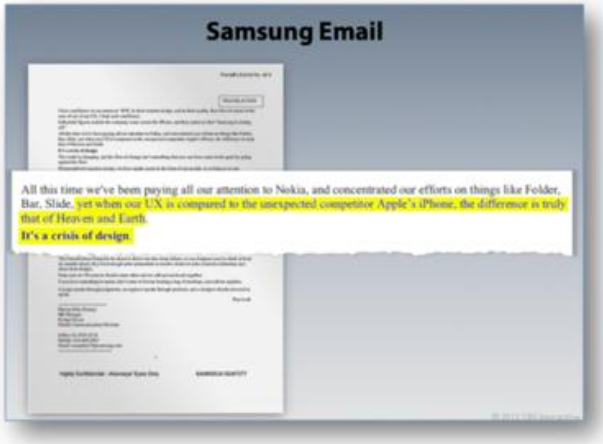
patents Apple said were infringed by each of 26 Samsung smartphones and tablet computers. This **jury-created graphic** is exactly the type of trial graphic counsel should have shown the jury during its closing arguments and then requested be entered into the record as a summary of evidence so the jury could take it with them to the jury room.



Juror Ilagan said, "my impression was that [Apple's attorneys] Bill Lee and McElhinny were pretty good in their presentation and questioning of the witnesses." Mr. Ilagan was also complementary of Samsung's counsel's presentation (recall, this was a "coin toss").

As I mentioned in last week's article, with effective patent litigation graphics attorneys can teach and argue from their comfort-zone – by lecturing, but the carefully crafted graphics will provide the jurors what they need to **really feel they understand what's being argued** and give them a chance to ***agree***. Most people, including judges and jurors, are visual learners and in court litigators must play on this battlefield and with the appropriate weapons.

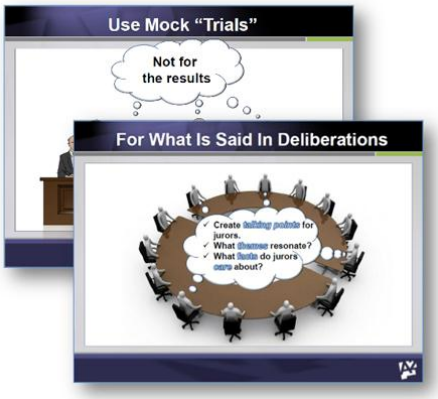
Jurors Will "Hang Their Hat" on Bits of Evidence



Jury foreman Hogan explained that the jury's decision was based on documents illustrating Samsung's intent to closely mimic the look of the iPhone and that "certain actors at the highest level at Samsung Electronics Co. gave orders to the sub-entities to actually copy, so the whole thing hinges on whether you think Samsung was actually copying. The thing that did it for us was when we saw the memo from Google telling Samsung to back away from the Apple design. The entity that had to do that actually didn't back away." The litigation graphic to the left illustrates this important evidence.

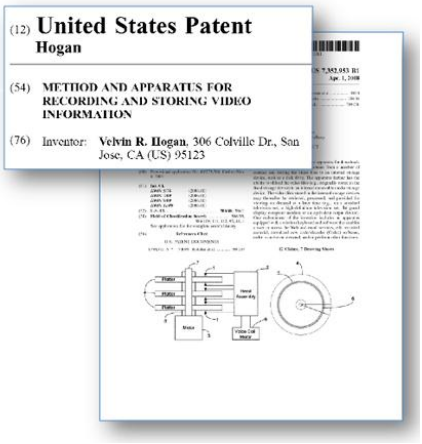
And, so, on the back of one email chain, the hammer fell on Samsung to the tune of a billion dollars.

This point is very instructive. It shows us that **testing litigation facts, themes, and stories before trial with** mock jurors is an important tool in crafting a persuasive and winning case. Before you get to the courtroom, you want to know what facts resonate with mock jurors of the same demographics as your jury pool so you'll use the right ammunition when it counts.



You Must Use Jury Consultants

Another interesting take-away from this jury's verdict is that it relied heavily on the backgrounds and experiences of the jurors, even to the disregard of the law and evidence presented at the trial and instructed by the Court. This is instructive and shows how important jury consulting can be for litigators.


(12) **United States Patent**
Hogan

(54) METHOD AND APPARATUS FOR RECORDING AND STORING VIDEO INFORMATION

(76) Inventor: **Velvin R. Hogan**, 306 Colville Dr., San Jose, CA (US) 95123

For example, the jury's foreman (Mr. Hogan) was an engineer and holds a patent (relating to video compression software, at right). The jury relied heavily on him to deal with the patent law issues in the jury room and he even told the Court that the jurors had reached a decision without needing the instructions!

Experts agree this isn't uncommon at all. According to Stanford Law School Professor Mark Lemley, "if there is one juror who seems more clearly knowledgeable than the others, the jury will often look to that person to help them work through the issues, and perhaps elect him foreman."

Hogan, told the court he had served on three juries in civil cases, spent seven years working with lawyers to obtain his own patent covering "video compression software," and worked in the computer hard-drive industry for 35 years. Based on this he was elected jury foreman and, I suppose this background also **relieved the other jurors** of having to worry too much about the gritty nuances of the law of patent infringement and validity because Mr. Hogan could sort out those details for them.

It's been reported that Mr. Hogan said that the jurors were able to complete their deliberations in **just three days** and much faster than almost anyone predicted because a few jurors had engineering and legal experience, which helped with the complex issues at play. According to Mr. Hogan, once they determined Apple's patents were valid, jurors evaluated every single device separately.

These leaps in deliberations are remarkable, but, as discussed in last week's article, predictable.

One More Thing

Foreman Hogan explained in a televised interview his thought process regarding the law of patent validity and how he helped the rest of the jury come to terms with the law – it's clear that (although he's obviously very intelligent) he does not really understand it and he and the rest of the jury went on their *gut instincts in most instances*. To a patent litigator, like myself, his interview is frightening on one level because it shows how hard it is to get through to lay jurors and even technically experienced jurors on the nuances of patent law and how it should apply to the facts.

But, it's also **very instructive**. All litigators should watch and note his explanation of the jury's process. I think Mr. Hogan is fairly representative of what the *top* of the juror food chain is like and he's a good place to start when developing your trial strategy. Cater to their needs in proving your case – use graphics extensively, use jury consultants, and test your case.

Oh, *there is one more thing*. Just for the sake of stirring the pot, here's an ironic and amusing video of Steve Jobs discussing what great artists (and presumably great innovators and great companies, including Apple Inc.) do to succeed (can you guess what it is?):

I wish good luck to both the parties and their counsel in the appeal process, which I and other patent experts will be attentively watching. (write this down: *it's my bet that this case ultimately settles before any opinion from the Federal Circuit*). Stay tuned.

17. 10 Things Every Mock Jury Ever Has Said

by Laurie R. Kuslansky, Ph.D., Jury Consultant

For decades and in every part of the nation, mock jurors who are presented with various fact patterns and legal issues tend to have the same reactions. Some are helpful and others are harmful, depending on where you stand in the case. Knowing that these issues recur over and over can help to prevent those which are unfavorable to you:

1) Why did the plaintiff wait so long to sue?

While there may be good reason to delay filing suit, mock and actual jurors often use the delay between the alleged problem and the filing of a claim as a yardstick of its merit. The longer the gap, the less credible the claim. If counsel fails to address this issue, it tends to work against the plaintiff. It is especially damaging, for example, when someone claims an issue in the workplace, but waits until they are no longer employed. To many jurors, this signals that it was the termination, separation, or voluntary departure that was the issue, not the conduct, such as discrimination, that is the subject of the complaint.

2) That doesn't make sense.

Lawyers don't always put their case through the basic "smell test" or test of common sense from the layperson's perspective. They skip this step at their own peril, because those are the tools most accessible to lay jurors. While the theory of the case may work for a sophisticated user, it may go over other people's heads and not square with more fundamental questions. Jurors' questions may and often do fall outside the strict legal requirements of verdict issues to answer -- but if left unanswered for the jury, those gaps often harm the party that failed to close them. For example, motive may not be required legally, but is required for most cases psychologically. People want to know who gained and who lost? Why did they do what they did? Did they have alternatives? Why would someone act against their own interest? Why would a rich person nickel and dime?

3) How much should we give them?

Without the benefit of law school, or knowledge of the law, lay jurors often have no difficulty separating causation from damages. Instead, some permit other motives (e.g., sympathy), to drive a desire to award some money, whether or not liability has been proven. Therefore, it is not uncommon for mock deliberations to begin not with a question of liability but with the question, "So, how much should we give [plaintiff]?" A mere reading of instructions is not the remedy. Instead, defense counsel needs to pay particular attention to this possibility and address it directly – not only legally (the law requires a finding of liability before considering damages) – but in terms of messages of why it is okay not to award damages,

or not okay to award them from a practical perspective. For example, one might argue that awarding damages to the plaintiff means that the defendant did the wrong thing and the evidence shows that these people (defendants) did not do the wrong thing.

4) That may be true, but they didn't prove it.

Thankfully for some defendants, many jurors express their belief that the plaintiff is right, but accept that the plaintiff must prove its case and that the evidence does not amount to proof. Arming defense-oriented jurors to espouse this posture to defeat plaintiff-leaning jurors is always worthwhile, especially in cases that may engender sympathy for the plaintiff. "You may think the plaintiff is right or you may want the plaintiff to win, but the test is for the plaintiff to prove their case and if they do not do so, then you cannot find for the plaintiff." This line of thinking should also be incorporated into the voir dire where available, e.g., asking questions along the lines of "If plaintiff has to prove its case and does not prove its case with the evidence, can you assure me that you will not find for the plaintiff?"

5) Let's see what everyone wants to give and divide it.

In an attempt to fairly represent everyone's position about damages, the most commonly seen approach is the quotient verdict on damages, whereby the average of the individual awards is the final one. Research has shown that it is not a true mean, but rather skewed upward because those wishing to award/punish more strongly tend to stand their ground more fervently and exaggerate the amount more than the opposing camp. To prevent this, individual jurors should be encouraged to stand their ground and should be armed with messages in summation on how to deal with this possibility.

6) Do we have to be unanimous?

No matter how clear the jury instructions when unanimity is required, someone in the deliberations will question it. This typically occurs when the group is not in agreement and seeks an easier way out of resolving their differences. If unanimity helps your side, then additional attention needs to be paid in summation to what the jury is being asked to do. Summary litigation graphics that make it easy for everyone to have a mutual reference point can help disparate thinkers converge on the points made visually, and the presenter should incorporate language that leads them to unanimity, e.g., "As we can see in this summary of the evidence, no one should disagree that x, y, z." "Everyone on the jury saw and heard the testimony of X, which showed that …., so everyone has the evidence needed to come to a unanimous decision on that issue to decide Y."

7) Were those real attorneys or actors?

It is surprising, but consistent, that mock jurors assume the actual attorneys are actors, but that the jury consultant is an attorney.

8) Where is it in writing?

People who lack legal training or involvement in fields in which spoken agreements are common are extremely skeptical about any oral agreement, absent documentary support. In some places, cultures, or age groups, a handshake is a durable bond (e.g., the South and the older generation), but in others, it amounts to a mere he said/she said and means little to nothing. Overall, most jurors and mock jurors reject the concept that a verbal agreement is as binding as a written one, no matter what the law may say. Though a course of conduct may help reinforce that there was an agreement, it often requires some writing to be believed, so it is an uphill climb to prove a binding agreement in its absence.

9) We should give them something.

When a plaintiff is especially sympathetic (e.g., a baby or a child), a defendant is disliked or perceived to be rich (e.g., a pharmaceutical or insurance company), or the conduct is notably unlikable (alleged pollution), jurors often rig their decisions in order to award money to plaintiffs, stating their discomfort and reluctance to send plaintiff home empty-handed. This echoes the process of awarding damages stated earlier, whereby there is a disconnection between liability and damages. Part of overcoming this behavior entails arming jurors with a message of why it is not okay to penalize the defendant when wrongdoing is not found, or why it is okay not to reward plaintiff. Again, it is a subject that should be addressed in voir dire. “Although you may have sympathy for the plaintiff(s) in this case, do you have any doubt or discomfort awarding no money if the plaintiff does not prove his/her case?”

10) It may be legal, but it just isn’t right.

For some mock and actual jurors, the moral barometer is sufficient to find liability, regardless of the legal standard. Counsel for the defense should make sure to address this possibility. While someone may not like the law, the law is what he or she is required to follow. The subject should also be included in voir dire, e.g., “If your personal feelings are different from the legal instructions, please explain if you would have any difficulty following only the law and the evidence to reach your decision.” “If you have any religious or moral beliefs that might stand in the way of you making a decision only based on the law, and setting those aside, please let us know/raise your hand.”

16. Litigation Graphics, Psychology and Color Meaning

by Ryan H. Flax, Esq., Managing Director, Litigation Consulting, A2L Consulting

As a litigation consultant, one of my primary responsibilities is to help litigation teams develop and effectively use demonstrative evidence to support their trial presentation. The primary means of doing this is to create litigation graphics, which are most commonly used as PowerPoint slides that accompany oral argument and witness testimony.

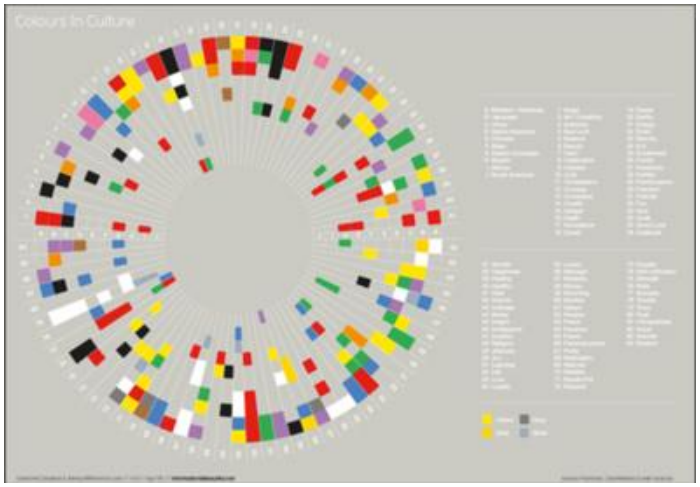
A lot of what goes into creating effective litigation graphics relies on the evidence to be presented. If the evidence relies on a document and, specifically, on a particular part of that document, a document callout is standard fare. If damages are the issue, it's not uncommon to use a chart or table to illustrate to the jury how they should add up the money to arrive at the desired result. However, a lot more goes into designing and developing really effective litigation graphics than the clever manipulation of evidence. Did you know that color plays a major role?

Litigation graphics are almost never black and white – they almost always involve the use of color. Most colors carry psychological (and even physiological), cultural, personal, emotional, and expressive implications that can impact how persuasive you are when using them. Here's an example:

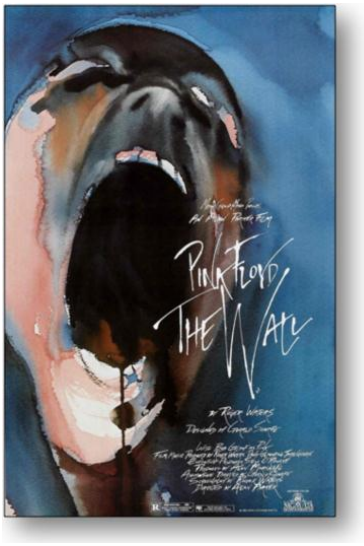
Looking at the two photos of President Bush to the right, minus any personal political views you may have, which president is more trustworthy looking? I bet you said the one on the right. Do you know why?

In modern, holistic medicine, chromotherapy is used to heal with color. This form of treatment dates back millennia to ancient Egypt, China, and India. A more prominent use of color therapy occurs in environmental design, which considers the effect of color on health and behavior and develops interior design, architecture, and landscape design accordingly. An interesting example is use of the color Baker-Miller Pink (R:255, G:145, B:175), affectionately known as "drunk tank pink" because it is commonly used in jails to keep violent prisoners calm.

Human responses to color are not just biological, but are also influenced by our culture (in China the color yellow symbolizes royalty, but in Europe it's purple that plays this role). David McCandless created this amazing color wheel (right) to illustrate how different cultures interpret colors (or "colours," as Mr. McCandless is an author and designer from the U.K.). People (and by people, I mean jurors and judges) also respond to colors in individual ways. Although research reveals variables that help explain human responses to color, it is also true that is our own color preferences are important to us and partially dictate the effect color has on us.



Color also causes emotional effects, which depend partly on the color's surroundings and partly on the ideas expressed by the work as a whole. There are two opposing ways to use color in graphics (as in art): local and expressive color. At one extreme is local color, which is the color that something appears when viewed under average lighting conditions, e.g., a banana is yellow. At the other extreme is expressionistic color, where artists use color to express an emotional rather than a visual truth. Just look at the famous art from Pink Floyd's *The Wall* here – the use of dark blue, gray and black in the background convey an intense feeling of sadness and depression, while the blacks and reds of the figure convey danger and anguish. Both of these color concepts effect a viewer's emotions. The expressionistic use of color is very important in the field of litigation graphics.



Why?

Jurors (and judges to an extent, as human beings) make decisions at trial based on their emotions above all else (download and read this paper on the subject by Todd E. Pettys, Associate Dean at the University of Iowa College of Law). Concepts like confirmation bias and research on decision making support this. Two thousand years ago, Aristotle observed that the most persuasive arguments are those that appeal, at least in part, to the audience's emotions (Aristotle, On Rhetoric: A Theory of Civic Discourse 112-13 (George A. Kennedy trans. Oxford Univ. Press 2d ed. 2007).

Traditional artists have used color to evoke emotion in specific ways:

Red – heat, passion, danger, optimism

Yellow – warmth, caution, fear, cowardice

Blue – responsibility, trustworthiness, compassion, honesty, integrity, morality, coolness, quality

Orange – confidence, creativity, fun, socialness

Green – natural, healthy, harmony, cheer, friendliness, immaturity

Purple – regality, intelligence, wealth, sophistication, rank, shock

Gray – neutrality, ambiguity, dullness, somberness

Black – evil, unknown, treachery, depression, undesirability, danger, falsity

White – innocence, purity, fairness, conservatism, harmlessness, transparency

Pink – femininity, sweetness, liberalism

Brown – natural, solid, sadness

These same principles are applied today in information graphics and the graphic arts. For example, according to Mr. McCandless's color wheel (above and at link), the color **black** represents and connotes authority, the color **blue** intelligence and rationality, and **purple** virtue – interestingly, he indicates no culturally based color in Western culture for wisdom or trust.

Did you ever notice how many law firm logos are **blue**? Why do you think that's the case?

Here's an exemplary litigation graphic that might be used by an expert witness using the above-discussed color principles to evoke a sense that the expert is honest, unbiased, and intelligent:

It may look simple, but a lot of thought went into its design. The overall color palate of **blue**, **purple**, and **gray** is intended to evoke trust and neutrality. Furthermore, the light blue color used in the text boxes is intended to again express that they are relaying true information. The accompanying icons (the check and x-marks) are similarly colored so as to relay that the top statement of opinion is trustworthy (**blue**) and that the second two are warnings (**red**) for jurors that they should not believe what they heard from the opposition's expert witness.

If you want to be more persuasive at your next trial or hearing, let us worry about these details to help you be your best.

15. 20 Great Courtroom Storytelling Articles from Trial Experts

by Ken Lopez, Founder & CEO, A2L Consulting

The power of storytelling has been recognized for millennia. From Aesop to Hans Christian Andersen to Steven Spielberg, great storytellers are celebrated by our society, almost as much as the people that they glorify in their tales. We tell our kids stories, businesses are encouraged to share stories to build culture, and we all admire that person who can captivate a group of friends with a fascinating tale, true or invented.

The reason we appreciate these great storytellers is hard-wired in the human brain. Storytelling predates written language, of course. It is how our ancient ancestors communicated what to fear, what to value and whom to love. Studies reveal that whether we are told a story or not, our brains will naturally try to build a story around a set of facts. In other words, if a trial lawyer fails to build a story, judges and jurors will build one anyway. It's how we make sense of a set of complicated facts. It's how we impose order upon chaos. It's how we resolve tension and conflict.

As more and more experts study what works best in the courtroom, the value of storytelling is being increasingly recognized. We have written frequently about the subject and plan to release an e-book on the topic next week. Other top trial consultants write about storytelling too, and I would like to highlight some of the best articles that I have found on the topic.

Here are 20 articles from trial consultants and lawyers around the industry that discuss the power of storytelling in the courtroom. Watch for a new complimentary e-book next week that we are publishing on storytelling for lawyers. If you'd like to be notified of its publication, be sure to claim your free subscription to The Litigation Consulting Report here.

1. Storytelling for Lawyers
2. Litigation: The Art of Storytelling
3. Storytelling for Oppositionists and Others: A Plea for Narrative
4. The Power of Storytelling in Your Legal Practice
5. Trial Lawyers as Storytellers, The Narratives Versus The Numbers
6. Why Trial Lawyers Say it Better
7. Psychodrama and the Training of Trial Lawyers: Finding the Story
8. Tips for Lawyers on Persuading Through Storytelling

9. The Power of the Story in the Courtroom
10. Final Argument: Storytelling
11. The Storytelling Lawyer
12. The Importance of Storytelling at All Stages of a Capital Case
13. Yarn Spinners: Storytellers' no-tech craft proves refreshing, educational
14. The Stories We Lawyers Tell
15. iPad and Storytelling for Lawyers
16. What Trial Lawyers Can Learn from a Songwriter to Strengthen Their Case
17. Fiction 101: A Primer for Lawyers on How to Use Fiction Writing
18. When You Think "Story" Think "Structure"
19. A Trial Presented as Story
20. Twelve Heroes, One Voice reviewed in the Advocate magazine

There are many great articles out there on this topic, and unfortunately many are hidden behind a paywall or require a subscription. I've endeavored to list only those that you can readily access.

14. The Top 14 Testimony Tips for Litigators and Expert Witnesses

by Ryan Flax, Managing Director, Litigation Consulting, A2L Consulting

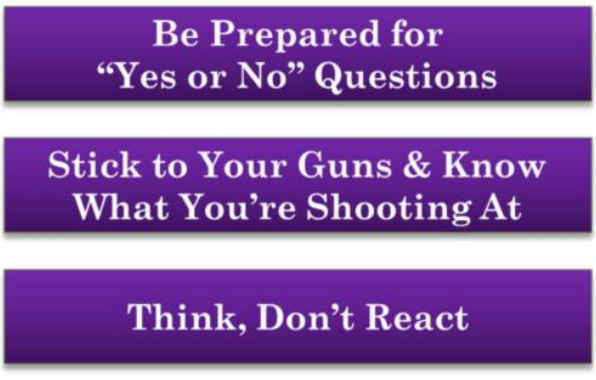
Litigators and their witnesses are confronted with difficult situations during testimony, and it's nice to have reliable ways out of those sticky situations.

Expert witnesses are engaged to provide their expert insight and opinions supporting their client's case during testimony and are there to tell the truth to the best of their knowledge when questioned at trial or deposition.

Litigators get paid to ask good and, at times, tough questions to get desired answers from the opposition's witnesses and to help their own witnesses do their best.

During both courtroom testimony and in depositions there are common situations where an attorney tries to make things difficult for the witness. Below, I identify 14 of these common situations and provide some good strategies, both from my own experience as a litigator and from tips collected from attorneys and expert witnesses. Consider the points below when advising and preparing your witnesses for trial and depositions. The main and reoccurring principles are:

1. The "Yes or No" Question



If you're a witness (an expert) you are going to be asked "yes or no" questions (where the forced response appears to be a "yes" or a "no") on cross-examination or during a deposition. This type of questioning will put you in a tough spot because whatever you're asked to respond "yes" to is most likely something you'd rather say "no" to, and vice versa. But, to be truthful, you'll feel that you must answer in a way that seems counter to your beliefs or the foundations of your case.

There are many easy ways to get yourself out of this predicament. First, you need to identify that you're in it. Then, in response to the question you say this: "**I understand that you're asking me for a 'yes or no' answer here, and I could answer you in that way, but doing so would be an incomplete answer and I don't want to mislead you or the court.**" Now, what have you done?

You've instantly made yourself look very reasonable in front of the jury/court and like someone interested in getting the "truth" out rather than an unreasonable (paid) witness who won't answer questions. If the attorney asking the "yes or no" question insists that you go ahead and answer simply "yes or no" he looks like a jerk pushing his own agenda and *un*interested in the truth – neither of which will help him in the jury's or court's eyes. It's unlikely he'll do this, but if he does, you go ahead and answer as he's asked, but you've made him look bad and also have clearly identified the issue for re-direct from your own counsel.

2. The "Yes or No" Question – Take Two

As mentioned above, there are a variety of ways to get yourself out of the sticky "yes or no" question problem. So, in addition to the solution above, here are some additional tip/tricks to consider.

One expert witness has suggested that a response she uses to combat this situation is to go ahead and answer the question with the "yes" or "no" sought by the examining attorney, and then add, "**under certain conditions**," with nothing further.

This presents the examining attorney with a dilemma. Should she let that answer stand? What circumstances is the expert referring to? Should she follow up and inquire about the circumstances the expert has in mind? Doing this surely exposes the attorney to a strong counter point by the expert. Responding in this way allows the expert to take the advantage.

3. The "Yes or No" Question – Take Three

Another expert surveyed for this article suggested replying to the "yes or no" question with, "***as I understand* your question the answer is [insert 'yes' or 'no'].**" As this expert explains it, this is a non-answer; it means nothing because there is no way for the lawyer to know how the expert understood his question and the answer can be either *yes* or *no* based on whatever is going on in the expert's mind.

So, again, this begs the question: will the attorney follow up and allow the expert to express what's on his/her mind? Again, advantage: expert witness.

As mentioned, experts will be asked "yes or no" questions during their deposition as they will at trial – the purpose being, once the examining attorney has probed the depths of the expert's knowledge and bases for opinions, he or she will want to lock the expert into some position for trial. Just as in the trial testimony scenario, experts can use the same, and even more, techniques to wiggle out of this sticky

situation during a deposition (I say "more" because you're not responding in front of a judge and will have more flexibility).

There are other types of "sticky situations" expert witnesses will be confronted with during their examination by an attorney. Several are explored below.

4. "I Don't Understand"

As an expert witness, you'll be subjected to some pretty tough, sometimes technical questions. Often the questioning attorney will offer a lot of hypothetical facts and complexity within a question. If confronted by such a question, when in doubt, respond that you just **don't understand the question and request that the attorney rephrase it**.

At worst, this buys you a moment of time to consider the question. At best, you'll throw off the questioning attorney, who may have carefully scripted his question because he or she simply had to in order to address the complexity necessary to the issue being investigated.

5. "I Don't Understand" – Take Two

When you express lack of understanding and ask the attorney to rephrase a confusing question, sometimes the attorney will ask what was confusing to you. Don't play this game. Don't parse the question for what was clear and what was not.

The entire question was confusing and it's *his* job to figure out a way to make it clear. Just make sure that, before you go this route, the question is at least too confusing for the jury to easily understand, otherwise, they'll perceive you as playing games and being deceptive.

As mentioned, often, the examining attorney will have been asking his questions from a script that he or an associate prepared or that he obtained from a book. If the expert being examined is in a dense or very high tech field, the attorney may not understand the topic well enough to craftily rephrase his question.

6. "I Don't Understand" – Take Three

Also, make opposing counsel define words if something *could* be ambiguous. Here's an example based on the examination of a fact witness in a child custody battle:

Opposing counsel began asking leading questions to the mother in the case designed to try to paint her as a promiscuous parent who paraded men in front of her kids night and day. If you knew the mom, you would know how utterly laughable this tactic was. So, the examining attorney began the questioning by asking if the mom had "dated" anyone. The mom-witness responded to each of the attorney's questions with her own, e.g., what do the terms "date," "relationship," "intimate," "boyfriend," etc., mean? The

attorney finally gave up in frustration and the mom-witness's attorney got a good laugh out of it – the examining attorney got nowhere.

Don't assume you know what examining counsel means by the words he/she uses. Make them explain it (assuming doing so isn't ridiculous enough to make you look stupid or difficult in front of the jury).

7. Think Before You Answer

The next common technique of examining-counsel is the use of rapid fire questioning. This is an easy technique to defuse since the witness can control the rate of questioning by taking the time to consider each question before answering. When the expert witness takes his time to answer, he also gives his counsel time to object.

Our CEO, Ken Lopez, was once questioned about an animation in a plane crash case and the question was something like: "the clouds in this animation are really like a video game aren't they?" Ken explained, "I felt defensive, but choose to take my time answering. After a long pause, I replied, 'I can't think of a video game like that works like that.'" He was surprised that the examining-attorney dropped the questioning at that point.

Remember, whatever you say is going permanently on the record – so make it accurate, make it useful, and make it count.

8. Don't "Help" Them

Most expert witnesses are, on some level, teachers. They want to instruct, inform, and educate. Often, the greatest and most sought-after experts are well-regarded university professors. This presents a problem when they're under questioning at trial or (especially) in depositions. It's often difficult for these witnesses to refrain from offering additional information, filling-in the pauses with education, and generally responding to questions that weren't asked.

If an expert finds that their questioning attorney is at a loss for words, don't offer any. Let the uncomfortable silences sit there. Not an easy thing to do, but necessary.

If an examining-attorney asks a question that doesn't get the science right, or misses the point somehow, don't educate them. Let them stay ignorant and let the record stay ignorant until the right time to inform it, which is when the witness is on direct.

9. Don't Guess

Remember, the expert's testimony is forever on the record and will be held against him and his client if possible. If you can't answer a question, or don't know the answer to a question, say so. If your answer

is an estimate or only an approximation, say so. If you think you might have the answer in the future, say, "**I don't recall at this time**." If you do not remember, say so.

Never think that you must have 100% total recall or something even close. Do what you can before a deposition to refresh your recollection if it's appropriate, but don't refresh yourself on irrelevant or unhelpful things.

10. Don't Guess – Take Two (or Stick to What You're There For)

Another expert recognized that a standard trick is to get an expert to answer a question that is outside her experience because of the natural tendency to try and help by giving an answer. But, doing so can trap the expert because it then calls into question everything she has previously written and all her opinions expressed in court.

It is much better to simply say you **cannot answer the question because it is outside your experience**. So the cross examining counsel's armory is even further reduced. In addition, the image that the jury (or Judge) then has of you will further be improved. Knowing your business very well and the specific limits of your experience and expertise should garner your more respect.

11. Don't Guess – Take Three (or Stick to What You're There For – Take Two)

Following the previous note, what if the line of questioning moves to a subject for which your expert *IS*knowledgeable, but not there to talk about? He can't say he doesn't know how to respond.

Another expert suggests that if the subject matter of cross exam is not outside the expert's experience, but is outside the scope work conducted in the matter, consider answering, at least in the U.S. – "**I am sorry, but that work was outside of the scope of my retention in this matter, and so was not considered.**" This expert gives the following example: "I have a specialty of deciphering Traffic Signal Timing plans to try and determine who REALLY had the green, as opposed who THOUGHT they had the green. In many of these cases, a separate Accident Reconstructionist is hired [as another expert]. If an Accident Reconstruction question is asked, it will most probably be within the scope of my EXPERIENCE and TRAINING, but is outside of the scope of my RETENTION in that matter."

The danger of this scenario is that opposing counsel will try to drive a wedge between your multiple experts' testimony, make them contradict one another, and diminish one or more of your experts and, thereby, your case. To combat this possibility, have your experts well prepared on what they are there to testify about. Have them stick to their expert reports, if they were required. Have them well prepared on what other experts on your team are testifying about and well prepared not to step on their teammate's toes.

12. Only Answer One Question At A Time.

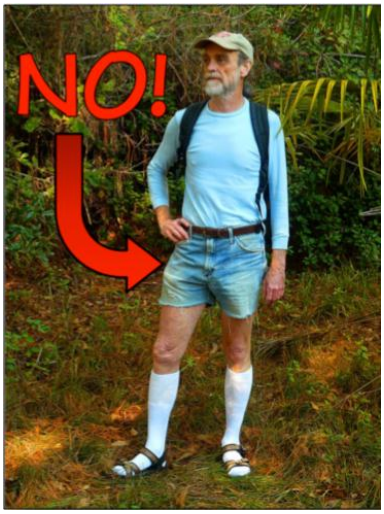
Compound questions are objectionable, whether in deposition or at trial. Nonetheless, have your experts prepared for this possibility. When asked multiple questions at one time, they should ask for clarification to be clear which part they are responding to. For example:

Q: Do you drink alcohol or take illegal drugs?

A: Yes to the alcohol; no to the illegal drugs.

There would often be an objection here. If there is no objection, and it is too complicated to easily respond to both parts, then do not be afraid to ask for the question to be restated.

13. Don't Let Yourself Get Cut Off



Another expert recommends: "If there is more that you need to say, then say it. If that means adding it to the next answer or simply saying, '**I'm sorry counselor, I wasn't finished answering your question**,' and then continuing," then do it.

Also, be careful if asked a question that attempts to cut off your response, such as: "Is that everything?" Leave the door open in case you might have forgotten something. Respond to such a question with, "**that's what I can recall at this time**" or something to that effect. Your attorney can try to fix any problems or misrepresentations on your redirect and it will be easier for the attorney to remind you what you have forgotten if you do not testify under oath that you have already covered everything.

14. Make Your Own Hypotheticals

Cross examination involving hypotheticals is common for experts. Another surveyed expert suggested that, when asked a hypothetical question, they are also very seldom complete – engineered that way to be more helpful to the opposing side and damaging to yours. This expert suggests responding with "**I am sorry, that is an incomplete hypothetical, which I cannot answer as phrased. Would you like me to fill in the missing pieces and then give you an answer?**" How can the examining-attorney possibly refuse and still appear reasonable to the jury?

I hope you find these points useful in preparing your expert witnesses if you're an attorney or useful in preparing yourself for cross examination if you're an expert. If you or your expert witness needs support in to prepare to testify, A2L Consulting is a valuable resource and here to help.

This article was exceedingly difficult to finish because all my experts who provided input kept providing new and helpful tips and examples. If you want to follow such new and helpful tips, join and follow the comments at the LinkedIn Expert Witness Network group here: LINK. If you have your own useful tips to add, please do so below in a comment below.

Finally, I'd like to dedicate this article to the memory of the fantastic David M. Malone. He was a good man and a nice guy.

13. 10 Videos to Help Litigators Become Better at Storytelling

In the courtroom, the attorney who has the best chance of winning a case is generally the one who is the best storyteller. The trial lawyer who makes the audience care, who is believable, who most clearly explains the case, who develops compelling narrative and who communicates the facts in the most memorable way builds trust and credibility.

If you follow some basic storytelling and speech making principles as a litigator, you will obtain better courtroom results. Often these storytelling techniques are used in the opening statement.

But what's the right way to do this? In law school, some of us were taught to begin our openings in a manner that often started with the phrase, "This is a case about . . . ." In speech making courses, we are taught to begin with a clever quip or to state one's belief, as I did in the opening line of this article. Some experts in persuasive communications suggest organizing content in the order of Belief - Action – Benefit, while yet other experts say to use the format of as Why - How - What.

So, which is the best way to go? The simple answer is that the science on the topic is far from settled. In view of that, here are ten 10 videos that will help a litigator tell better stories in opening and become a better storyteller.

1. Simon Sinek is loved by marketers, raconteurs and persuasion experts for this simple and incredibly compelling TED Talk. It has changed the way I present information, whether in opening statement, a corporate speech or a blog article. For litigators, the lesson to follow is to consider his golden circle when preparing an opening.

   Organize your speech on the basis of why, how, what, not what, how, why. Don't say, for example, "I represent XYZ pharma company, a great company that is more than 100 years old. XYZ stands here accused of price-fixing. I am asking you today to not reward the plaintiffs because they are simply greedy and serial plaintiffs."

   Instead say, "The plaintiff is asking you to believe the unbelievable. To find for the plaintiff, you would have to buy the notion that a dozen highly paid executives from a dozen companies and their accountants and their lawyers and their bankers all engaged knowingly in a conspiracy in which they stood to gain very little. Today, I am here representing XYZ pharma company, and I am asking you to stop plaintiffs from tarnishing our good name and put an end to plaintiff's greed."

2. A Chicago DUI attorney reminds us of the importance of telling a story that is different from your opponent. All too often I see accomplished defense counsel spending the majority of their case explaining why their opponent's case is wrong rather than telling a different story.

3. Harvard Law School's Steven Stark introduces his lecture on storytelling.

4. Ira Glass discusses the building blocks of storytelling. While he is discussing the elements of a journalistic style, his ideas are equally applicable to the courtroom.

5. A UNC Professor lectures on the topic of storytelling and provides three examples of effective storytelling.

6. In this Harvard Business Review interview, Peter Guber discusses the art of purposeful storytelling. He reminds us of the value of not reading from a script. Memorably, he reminds us that we are in the emotional transportation business.

7. In this helpful video, litigator Mitch Jackson reminds us of how to share stories with a jury.

8. Litigator Jeff Parsons discusses how to tell a story and one key to successful storytelling: knowing your audience.

9. Attorney Jeffrey Kroll moderates a panel on the Power of Persuasive Storytelling.

10. In 4 minutes, this TED Talk humorously but effectively shows the power of combining a visual presentation, here from an iPad, with an oral presentation.

12. Trial Graphics, Color Choice and Culture

Below is an article authored by a Senior Litigation Graphics Consultant at A2L Consulting. It is set for publication in PLI's Trial by Jury book. I think it does a great job of introducing the challenge of balancing color choice and culture in trial graphics.

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Color Choice, Culture and Demonstrative Evidence

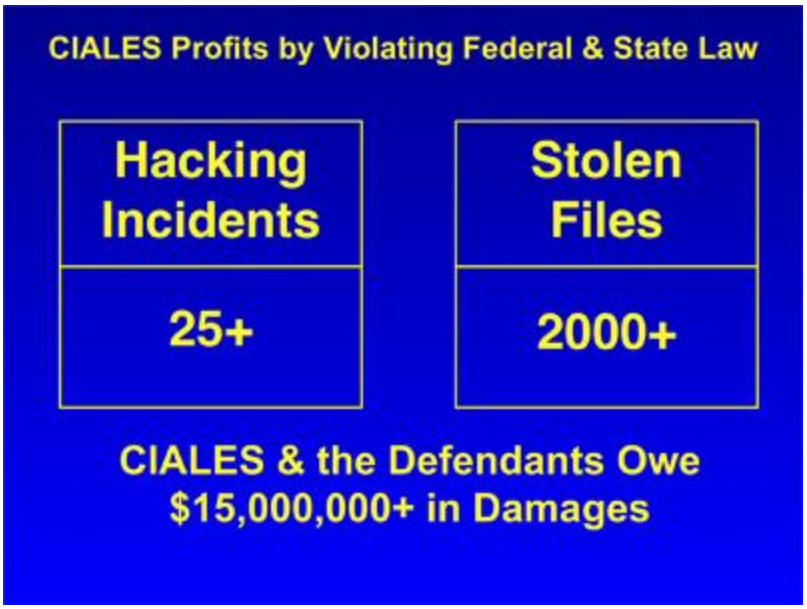
-Theresa D'Amico Villanueva, Esq.

About the Author:*Theresa D'Amico Villanueva is a Senior Litigation Consultant for A2L Consulting, an attorney owned and operated provider of litigation consulting, graphics and courtroom animations, and litigation technology for litigators from all of the world's largest law firms. Prior to her tenure as a litigation consultant, Ms. Villanueva worked as an attorney focusing on discovery for MDL and international products liability and toxic tort matters, and as in-house counsel handling title insurance claims, settlements and compliance with multi-state regulations. Ms. Villanueva holds a B.S. in Textiles and Apparel Merchandising and Design, with a business minor from West Virginia University. She received her Juris Doctor from Capital University Law School, where she was awarded Order of the Barrister. She is a member of the Pennsylvania Bar. For further information, please contact Ms. Villanueva at 800.337.7697 x 115 or via email at: villanueva@A2LC.com*

Introduction

It is long established that the use of visuals and technology in the courtroom increases understanding and retention. There are many attorneys across the country who will not even consider going to trial without being armed with creative and intuitive demonstrative exhibits to persuade and educate the jury. Color is a fundamental component of creating and developing trial graphics.

Many litigators, however, still use conventional color schemes in their demonstratives. Their reluctance to change is likely because at some point the conventional wisdom became using a blue background with yellow text. Although this color scheme does work, it is no longer enough. Like an antibiotic, if it is overused, it loses its effectiveness.



Similarly, this color scheme has lost its impact. As jury pools diversify, and as jurors become more sophisticated, they expect more from us. In turn, we need to become more creative if we intend to persuade our audience. We need to make our graphics relevant to those whom we are trying to persuade. We must truly consider our audience, who they are, where they live, and the environmental and cultural factors that influence their behavior, attitudes, and perceptions.

Color is powerful. Studies show that color can evoke certain emotional responses: it can increase learning, grab our attention, and increase perception and focus. The right color choice, used in the right way, can influence and tilt the case in your favor.

The Audience

Many label Edward Tufte as the "Galileo of Graphics" and the "Leonardo da Vinci of Data." His writings on graphics and presenting are among—if not the—most prominent of our day in regard to communicating visually to an audience. While his works do not directly relate to courtroom presentation, his ideas and theory of how to appeal to an audience are highly regarded; the underlying theme of his ideas is directly applicable to litigation presentations.

According to Tufte, "The most important rule of speaking is to respect your audience." This is certainly true when addressing a jury. Tufte argues that advocates should communicate with an audience in a clear and organized way: "Presentations largely stand or fall on the quality, relevance, and integrity of the content." Organizing a case's information and specifics in a clear way is not always an easy task. Furthermore, advocates also face the challenge of communicating in a way that will entice and intrigue our audience so as to keep their attention. There is a limited amount of time that we have the undivided attention of the jurors to present the facts. We need to use that time wisely and in a way that will keep the attention of our audience.

Jurors today have high expectations when walking into a courtroom. Despite a jury's expectation of technology and graphics to keep their attention, cluttering the screen with colorful—but ultimately not

meaningful—graphics will likely alienate the jury. Whether verbal or visual, useless information is more likely to disengage the audience than it is to draw them in. In fact, too much information can detract from the message at hand. Once you have lost the attention of the jury, it is difficult to regain it; vital information is lost. Tufte advocates a direct presentation where the visuals supplement, rather than dominate, the presentation. Bright and even animated words on the page are not automatically relevant. Rather, a presentation is persuasive when it contains succinct and understandable arguments backed by the demonstratives that accompany the presentation. Thus, the colors and content of the visuals that you choose to represent your themes and case facts are an important factor in the development of your graphic exhibits.

The use of technology and demonstratives in the courtroom is not only an integral part of a litigator's arsenal of support, but also expected by most jurors. The modern fact finder expects much from the trial team when they walk into the jury box. We can attribute this in part to the ability of demonstratives to help the jurors understand the specifics of the case. This is also due to the ever growing use of technology in today's television shows and their portrayal of the legal process. Television shows like Bones, C.S.I., and Law & Order give prospective jurors the impression that the intuitive officer easily solves a case with fancy technology and insightful comments. On television, viewers watch attorneys recreate the scene with computer images and simulations at trial. While these shows may depict more of the criminal legal process than the civil side of litigation, the expectation of drama and glamour in the courtroom remains. Thus, the legal profession faces the challenge of reaching its audience—the fact finders—in a way that will meet their expectations, hold their attention, and speak to the person as an individual.

Jurors have high expectations. The use of graphics and technology has evolved such that we need to look for new and innovative ways to reach jurors. We know that repetition via auditory and visual techniques increases retention and comprehension. We are both visual and auditory learners. Studies show that jurors retain more information when they see and hear the evidence. One particularly well-known study—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." The report also showed that subjects who only heard information had a seventy percent retention rate after three hours and only a ten percent retention rate after 72 hours. Likewise, in subjects who only saw information there was a 72 percent retention rate after three hours and a twenty percent retention rate after 72 hours. However, when you compare these results to the results of the subjects who both saw and heard the same information, there was an 85 percent retention rate after three hours and a 65 retention rate after 72 hours.

Retention is good. We want our jurors to remember our argument, and deliberate over our words. We also want to be able to reach the fact finder on a deeper subconscious level that melds with their understanding and perceptions in a way that persuades them to reach the conclusion we are seeking through our presentation. Color is an effective avenue for achieving this level of understanding.

Regardless to whom you are presenting—be it a judge, jury, or an arbitration panel—it is important to have an understanding of the characteristics of a persuasive and meaningful argument. Consider the audience. Step into their shoes. Evaluate how they will perceive you, your case, your theme, and your graphics. According to Waites, when attempting to reach our audience we should consider their attitudes and life experiences, and how that will affect their outlook on specific issues of the case, personality traits, what their values and belief systems are, and location of the trial: what demographic influences

might there be.

Research shows that messages that are the most persuasive and powerfully compelling are those already "reflected in a juror's long-term reference memory." Effective courtroom persuasion relies on the attorney's ability to reach the jurors and to activate the juror's long term memory by association and repetition. Whether we want them to or not, jurors bring life experiences, personal values, and beliefs into the courtroom. If the trial attorney is able to associate the new information—or the information they are presenting at trial to information that is stored in the juror's long term memory and belief system—this will facilitate understanding and the ability to process and store new data. The modern attorney uses visual aids such as demonstratives and technology in this process. Jurors will rely on their own life experiences and preexisting beliefs in evaluating evidence. Thus, themes reflected in demonstratives that invoke or conform to the juror's value system and long term memory have a better chance of speaking to the jury. The integration of the right color into these demonstratives can be a valuable means of activating the juror's long term memory by using color as a form of association to invoke certain feelings towards their argument.

Let us look at this from another perspective: What are the types of things that people retain in their long-term memory? Typically, people incorporate certain sounds, smells, and colors into their perceptions and memories. Reminiscences of a certain song on the radio, the smell of fresh baking bread, and even the color of your grandmother's table cloth can influence how we perceive the world around us. These recollections shape our long term memory and call to mind certain feelings that influence how we form opinions on new information, or data presented to us.

Different cultures associate different feelings with color. Again, color is powerful. It evokes emotions and influences us at every level. Thus, attorneys should consider the cultural influence of color when creating demonstratives that the attorneys intend to speak to and influence the jury. The themes used at trial to tell the story that best tap into jurors beliefs or life experiences are themes that the jurors can relate to and retain. Where the audience may have preconceived notions about a given topic, the challenge facing counsel is to find a way to persuade the audience to reconcile their longstanding beliefs about the issue at hand. The use of color to access the audience's long term reference memory is an invaluable tool in relating to people, appealing to their senses, and in turn persuading them to have a more favorable opinion of your case. This can ultimately affect the outcome of the trial in your favor. With trial exhibits, color predominantly reinforces themes and a story that fosters acceptance by the decision maker. However, there is deeper meaning to our color choices. Color and perception is such a large part of every culture, that it is imperative for the attorney to understand their audience. It is undisputed that color can be instrumental in persuading fact finders. Having a sense of cultural consideration can aid the presenter in making wise and insightful color choices when developing case themes and graphics. Choosing colors that appeal to a particular group in places where certain socio-cultural groups dominate can give a psychological edge to the presenter in reaching and appealing to their audience. Color can subtly influence our associations, and the use of color is a helpful aid in generating interest in your story.

Color, Science, and Culture

Sir Isaac Newton discovered that pure white light separates into all visible colors when it passes through a prism. In a series of experiments conducted between 1666 and 1672, Newton first recognized the idea of the rainbow, which is comprised of separate components of red, orange, yellow, green, blue, and

violet. Johann Wolfgang von Goethe, however, realized that perception also shapes the sensations of color reaching our brain. Although Goethe's ideas on color were never widely embraced by the scientific community, they did greatly influence the art world. Artists use color to express emotion a theme or a feeling. They use color to engage the viewer and draw them into their scene.

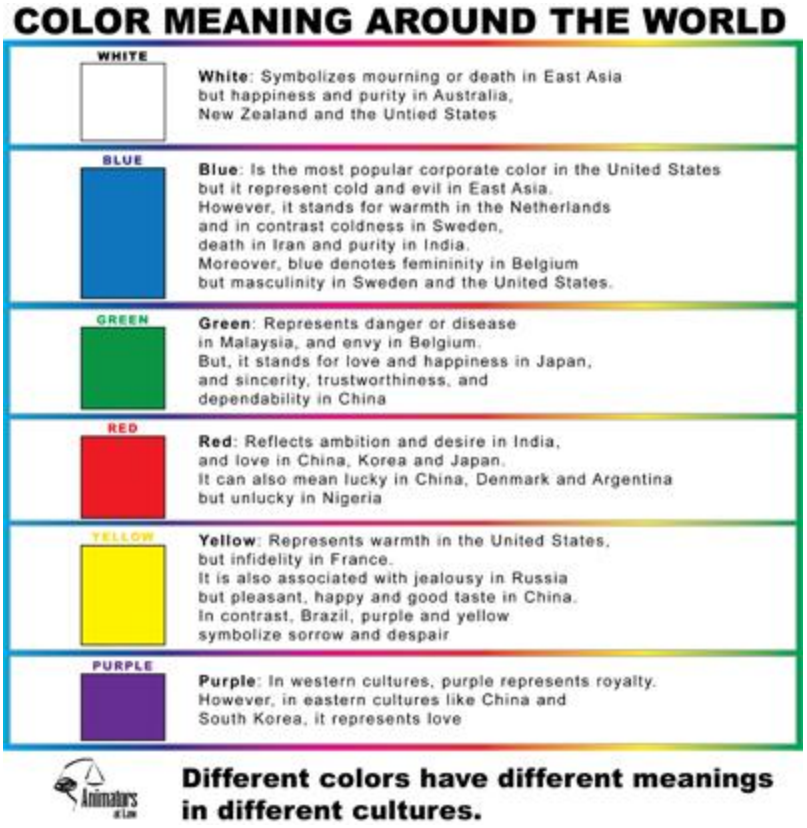
That is what we as attorneys must do. We need to engage our audience, and draw them into our story. By using colors that appeal to their psyche and belief system we are able to increase our chances of association and "win" over our audience.

Edward Tufte also recognizes the benefits of using color in an appropriate manner. He believes there is an art to putting color in the right place. Tufte outlines the fundamental uses of color in information design: to label, to measure, to represent or imitate reality and to enliven or decorate. Used at its best, color has overwhelming informational benefits. It is this aspect of color that we need to use to our advantage. The question then becomes, what are the informational benefits of color, and what is the best strategic use of color to influence our audience. We need to be able to use color in a way that gives decisive weight to the information, yet does not negatively affect the cognitive ability of the audience to digest it. Too much visual stimulation can take away from the data presented.

To effectively engage our audience at this level, we need to look at the different meanings of color, how to use color, and consider cultural and geographical location. Interpretation and color meaning varies by country and culture; people of various cultures perceive and respond to colors differently. For example, western cultures generally break down color into temperatures: Cool colors such as blue, purple, and green invoke feelings of calm, sadness, or indifference. Blue is often seen as trustworthy, dependable and committed. It affects us mentally by invoking feelings such as a calming, cooling, or sedative effect cooling, and may also aid intuition. Warm colors are in the red area of the color spectrum: Red, orange, and yellow. These colors may evoke emotions ranging from warmth and comfort to feelings of anger and hostility.

On a deeper level, individual colors have different meanings in different parts of the world. If we explore these cultural interpretations of color, it can help us to identify with our audience and develop effective demonstratives to persuade our audience at a deeper level through association and perception.
For instance:

White: Symbolizes mourning or death in East Asia, but happiness and purity in Australia, New Zealand and the United States.Blue: Is the most popular corporate color in the United States, but it represents cold and evil in East Asia. However, it stands for warmth in the Netherlands, and in contrast coldness in Sweden, death in Iran and purity in India. Moreover, blue denotes femininity in Belgium and the Netherlands, but masculinity in Sweden in the United States.Green: Represents danger or disease in Malaysia, and envy in Belgium. But, it stands for love and happiness in Japan, and sincerity, trustworthiness, and dependability in China.Red: Reflects ambition and desire in India, and love in China, Korea and Japan. It can also mean lucky in China, Denmark and Argentina but unlucky in Nigeria.Yellow: Represents warmth in the United States, but infidelity in France. It is also associated with jealousy in Russia, but pleasant, happy, and good taste in China. In contrast, in Brazil, purple and yellow symbolize sorrow and despair.Purple: In western cultures, purple represents royalty. However, in eastern cultures like China and South Korea, it represents love.



Color and courtroom graphics - where do we go from here?

As the demographics of our country, and therefore our jury pool are changing, it is important that as legal professionals we look beyond the basics of color and into the meaning behind it so we can use color to effectively persuade our audience.

The unspoken—but generally accepted—rule of courtroom graphics is to use a standard blue background with yellow text. The conventional wisdom for applying color includes using blue backgrounds, and yellow, gray, or red to highlight, neutralize, or emphasize. While somewhat successful, the changing demographics of this country and jury pool are an important consideration lost by these conventional schemes. Accordingly, attorneys may miss the psychological and socio-cultural associations of color in the courtroom.

Courtroom technology is a proven method for stimulating jurors and aiding in comprehension and retention. Attorneys generally use color to highlight a theme, emphasize a point, and to catch and hold the attention of the fact finder. This allows the litigator to hammer their point into the jury in the short time that they have the jury's undivided attention. Color becomes important here because studies show that color psychologically affects based on individual character or personality traits. Other reasons for using color are to: Emphasize key points, highlight important information, group similar items, create a mood, provide continuity, increase reading speed, and learning.

Color can also tie exhibits together and develop a theme in the case. Thus, the choice of color is not only important in selecting color combinations that effectively tell your story and highlight important facts on

the exhibit or graphic, but color must also appeal to your audience. Therefore, uniform color choice or the conventional blue and yellow color "standards" used in trial exhibits and demonstratives may not always work. Color must strategically appeal to your audiences' subconscious.

Therefore, the central inquiries are whether: (1) color preferences and meaning are learned over time and result from experience; (2) are they inherent in our culture; or (3) is it a combination of both?

Jurors or fact finders bring their personal beliefs and experiences with them into the courtroom, and use this to interpret and evaluate the facts as presented. Statistically, jurors will disregard ninety percent of the information received at trial, and focus on the few things that stick out in their mind. Indeed, fact finders are human and will remember best that information or evidence that coincides with their belief systems and personal experiences. This elevates the importance of demonstrative exhibits. Accordingly, attorneys must consider the cultural associations of color choices in exhibits and graphics. Since color has different meanings in different parts of the world, cultural background plays a significant role in the interpretation of color, and therefore in the ability to win over the judge, jury or panel.

Different cultures in different parts of the country may have a stronger environmental influence or make up a majority of the population. For example, a jury in South Florida is likely to have a higher percentage of jurors with a South American or Latin American heritage as opposed to a jury in the Midwest. The makeup in large states can also vary: a jury pool in northern California is likely to have a higher Asian influence than a jury pool from southern California, which has a predominant Latin influence. As such, these jurors are likely to respond differently to different colors based on their cultural heritage and beliefs. An attorney going to trial in these locations should consider what colors will best influence and persuade, or worse abandon their audience. If we consider the venue when deciding when or how much technology to use, and whether or not to give local counsel first chair because of jury perception, we should also consider these same concepts of the venue and jury pool when creating demonstratives, i.e., the color choices based on cultural and environmental preferences.

Marketers use the theory of cultural preferences and response to color; why should it be different in the courtroom? There is a lesson to be learned here for trial lawyers. Whether you are a marketer using the internet or advertisements to sell your product or a litigator convincing a jury of your side of the facts, the goal is persuasion. The strategic use of color can be used appeal to your audience and influence. Our culture, in general, is visually attuned: media imagery plays a significant role in appealing to persons of all cultural backgrounds. As lawyers we should learn from the success of marketers and television on how people learn and retain information.

Conclusion

As the demographics of our country change, we too must adapt our approach to presenting our case and the methods of persuasion. Gone are the days where attorneys hesitate to use technology in the courtroom for fear of being perceived as over-doing it or overbearing. The modern juror expects to see some type of technology in the courtroom. Indeed, the evolution of presenting in the courtroom has gone through many stages. There was a time when attorneys would pass around a piece of paper as evidence for the jury to review. At one point it was considered "high tech" to use a slideshow of photos or an overhead projector to show exhibits, or even a VCR to show a video. Then, as the digital era dawned, personal computers became common place and portable. Through this, it has become widely accepted that visual aids and demonstratives help attorneys to tell their story and to facilitate the retention of more

information. Now, attorneys use Power Point presentations, graphics, animations, and databases of exhibits and videos.

The use of courtroom technology was once a novel idea, and it is now not only common, audiences expect it. The same is true of color. The “standard” color schemes we once believed would win over any jury are ineffective. In short, juries have seen it all before, and the modern juror expects more. They are technologically and culturally sophisticated and look for the “wow” factor. We must use our knowledge and experience as a platform to move forward. Effective use of color is different by demographic, region, and jury. To capture the attention of the modern juror, we need to look beyond the basics of what has worked in the past towards what will influence our new audience now and in the future. As the demographics and cultural backgrounds of our jury pool changes, we must also adapt by understanding how to appeal to their values, beliefs, and cultural influences.

Marketers are using the idea of cultural considerations and cultural meanings of color in their marketing techniques. As an industry we should start noticing this concept. The jury pool is changing both culturally, and generationally. As we stand in front of the jury box, it is highly likely that the jurors staring back at us are tech, web, and culturally savvy, and are not easily influenced. We need to find a way to bridge the gap, and connect to our audience. Color is powerful when communicating with our audience. Color can increase learning and evoke an emotional response. The advocate must use the right color for the right audience.

We should rethink past theories for choosing color in a trial presentation. Is a standard blue background still the best approach or, have shifting cultural demographics and changing value systems surpassed it. The ultimate goal is appealing to and persuading our audience. We, as the legal profession must keep pace with our audience and renew our approach to appeal to the modern jury.

11. 16 Trial Presentation Tips You Can Learn from Hollywood

Why do so many TV shows and movies include courtroom dramas? Because people love drama, they love to try to figure out who committed the crime, and because they love the clash of right and wrong.

With all that focus on the creation of drama for fiction, we only need to turn on the television or start a DVD to see a lot of good acting by actors who are behaving like lawyers. Surely, there is something we can learn from their work.

After all, top-notch screenwriters have written their words, costume and set designers have made them look the part, and the actors have studied the best trial lawyers in the world and have had dozens of “takes” to get it right. So we are seeing the world's best story tellers tell a story that they think everyday people want to hear, in an intensely dramatic way.

In the first place, TV and movie viewers are ordinary people, the same ones who will become jurors some day. They are used to hearing and seeing the best in their entertainment and they will want it in the actual courtroom.

Second, we can learn from the way in which movie and TV directors distill the best and most exciting aspects of a trial to make it compelling. We can make our trial presentations just as compelling.

Here are sixteen lessons from the movies or television (**note that each movie/TV title has a link to purchase a copy from Amazon.com**):

1. **Practice.** Matthew McConaughey may not have what it takes to actually be a lawyer, but with great practice he delivers an amazing closing argument. If he can do it, you can too. Listen to this closing from *A Time to Kill*.

2. **Use jury consultants.** This clip from *Runaway Jury* doesn't illustrate the work of jury consultants any more than CSI illustrates police work accurately. However, a good jury consultant can tip a close case by either helping to pick the right jury, testing the case and the lawyers, or both.

3. **Use plain, simple language.** The best screenwriters know how to make a few words go far, and you can do that as well. Here, Keanu Reaves, playing Kevin Lomax in *The Devil's Advocate*, uses simple language and lays out a straight-forward and emotional theme in his opening statement.

4. **Be Believable.** Screen and TV actors know how to project credibility, and lawyers can do the same. Glenn Close masters believability in this scene from the show *Damages*. Do you have any question about whether she is going to take the settlement offer made in this deposition?

5. **Manage your hands.** Like many distracting mannerisms, how a litigator uses his or her hands can be a good thing or a bad thing. Look at Tom Cruise in *A Few Good Men*. In this classic scene (and we all know it NEVER ends with the witness famously breaking down on the stand) Tom Cruise never distracts. When he is at the podium, he stands strong. When he is before the jury, he gestures well. When he is before the witness, he stands with hands behind his back.

6. **Make Sure Your Audio Video Setup is Flawless.** Courtrooms rarely have *high quality trial technology equipment* that make your presentation look and sound great. It is up to you and *your trial technician* to make sure your setup works well. In this scene with Matt Damon from *The Rainmaker*, can you imagine how much less effective this deposition clip would be if it had scrolling text on screen to make up for a poor audio recording or poor courtroom audio setup.

7. **Relate to your jury.** We've successfully used Giant's Stadium, the Statue of Liberty and many other local landmarks to *convey scale to juries*. In the "magic grits" scene from *My Cousin Vinny*, Joe Pesci connects with a local Alabama jury over the cooking time of grits. Like in this scene, it is important to create a memorable dramatic moment, ideally touching on the most important part of the case. It is important to speak the local language, and it is critical to relate your knowledge of a local custom or landmark to something meaningful in the case. (Exact clip unavailable).

8. **Don't go after the sympathetic witness.** One witness can flip a case for or against you. Always ask yourself if the potential benefit is greater than the potential risk and act accordingly. This scene in *Philadelphia* is one of many examples from the movie industry.

9. **Let silence do the heavy lifting.** This has long been the advice of my mentor for having difficult conversations, and I think it applies just as well for the courtroom. In this movie classic, *To Kill a Mockingbird*, Gregory Peck delivers a now famous closing. Note how he uses pauses and silence as effectively as he uses words.

10. **Tell a Story.** You don't need Hollywood to remind you of the importance of storytelling, you need only refer back to our article on the topic: http://www.a2lc.com/blog/bid/53536/10-Videos-to-Help-Litigators-Become-Better-at-Storytelling

11. **Ask open ended and provocative deposition questions.** You never know what the witness might say. In this scene from *Malice*, Alec Baldwin's character famously lets his ego fly in this med-mal deposition.

12. **Control your emotions.** In this R-rated clip from *Primal Fear*, Laura Linney delivers her questions and her message with forceful emotion, yet you never get the sense she's lost control. It is good to show emotion, it just must always make sense to the jury why you would feel this way. If the gap between the story the judge or jurors are building in their heads, and the emotion you are showing is too great you can lose credibility.

13. **Think about the courtroom like a director.** To some degree, you have to deliver on the jury's expectations of drama. Fail to build a compelling story and you'll likely lose the case. Such was the case in the recent Apple v. Samsung dispute we wrote about here. Noted director of courtroom dramas, Sidney Lumet, comments on what makes the courtroom drama dramatic.

14. **Memorize.** Can you imagine if the lawyers were reading their closing statements here in this *Law & Order* clip? They would not work nearly as well. Still, we regularly see attorneys reading their openings or closings. Notes work great and are important to make sure nothing is missed. One Hollywood director friend of mine poignantly said, "you can memorize, but I prefer mastery. Master your subject matter. That way, memorization is not an issue." Good advice for actors and lawyers alike.

15. **Project your voice.** Follow the tips of this voice coach to learn how to project your voice better. Some of the best litigators I know use acting coaches, voice coaches, style coaches and more. As we inevitably move toward an era of more televised trials, these considerations will become more and more important.

How To Project Your Voice by VideojugCreativeCulture

16. **Connect with the jury authentically.** Paul Newman's closing argument in *The Verdict* is moving, memorized and authentic.

So, the question I often wonder about related to our courtrooms is whether Gene Hackman, Robert Duvall or Meryl Streep would deliver a better opening/closing than we professionals would? I think our job is to make sure the answer is no, and to make sure the answer is no, we're going to have to adopt some of their best techniques.

10. 5 Keys to Telling a Compelling Story in the Courtroom

by Ken Lopez, Founder & CEO, A2L Consulting

Developing a compelling story for your judge or jury may be simple, but it is not easy.

Typically, when I've ask a trial team about the case story a few months before trial, only a small minority can tell me. Most respond with one of the following:

- We just got the case;
- Everybody hates our client, because they are a oil company, tobacco company, bank etc;
- This case has to be won on the law alone;
- It's a bench trial, so story doesn't matter;
- We're too busy;
- We're working on that;
- We don't need help with that;
- I don't know what you mean by a story;

Yet, as I look at all the winning trial teams we've worked with over the last year, one common theme is that they had a well-developed story. It didn't matter whether they were trying a dry patent case or a scandalous white-collar case, they built a strong narrative. It's what great litigators do - yet so many either skip this step or procrastinate and wait too long to fully develop it.

I have written a number of times this year about the importance of storytelling at trial. As I close out the year, I think this may be the most important thing a litigation consultant can do to help a trial team. A litigation consultant brings not only the common sense that a fresh pair of eyes offers but will also bring the experience of having seen what works and what does not and the experience of having helped develop stories for hundreds of trials.

Here is an overview of storytelling for litigators with five key points every great litigator should know.

1) Why Care About Story? In his book *The Storytelling Animal*, author Jonathan Gottschall shares so much valuable science and commonsense wisdom about storytelling that I suggest it should be on the must-read list for litigators. The *New Yorker* summed up the essence of it this way: "human beings are natural storytellers—that they can't help telling stories, and that they turn things that aren't really stories into stories because they like narratives so much. Everything—faith, science, love—needs a story for people to find it plausible. No story, no sale." We've drawn parallels between sales and trials before, and I

agree that without a story, no one will side with you. Read this book, and your openings will be forever improved.

2) What is a Story? It's not a simple recitation of information and facts in chronological order. It is a tale of character-rich events told to evoke an emotional response in the listener. As one Harvard paper put it, "without [stories], the stuff that happens would float around in some glob and none of it would mean anything." Unfortunately, many opening statements don't follow that advice.

3) What is the Structure of a Story? A drama is often split into five parts:

- The introduction (also called exposition) is where characters are introduced, the scene is set and the plot is introduced.
- Rising action is where the hero is revealed, the conflict is identified and our hero finds the solution to the conflict.
- The third act is the climax where our hero's situation is either clearly improved or worsened.
- Falling action is where we see the conflict diminishing and our hero is now clearly winning or losing.
- The resolution or denouement provides a transition toward the end of our story. Morals are revealed, tension is released and a sense of relief is given to the listeners.

4) How would I structure a litigation story along these lines?

- *Introduction*: I like to start with belief or fundamental truth and introduction of the characters like, "Banks survive on greed - it's how they make money. When they make good loans, they make money. When they make bad loans, they lose money. These bankers are essentially being accused of making bad loans, which to be true would have to mean, they were not trying to make money. When is the last time you heard of bankers not trying to make money? It makes no sense."
- *Rising Action*: Here the key is to keep a logical flow and keep the tenor rising until the conflict is identified. For example, "After years of lackluster home sales, finally it looked like Miami was positioned to take off and it was these bankers' jobs to make sure their bank made money - and that meant, making loans. And that's just what they did. Month after month, loan applications were up, and month after month, the bank was making more and more money. These bankers were at the top of their game. They received awards for their actions. But a storm was brewing. A real estate collapse had begun, and these bankers had to face it head on, sometimes at great personal sacrifice."
- *Climax*: Here, we see where our heroes overcome or are instead defeated by the conflict. For example, "Our clients did their best to weather the storm, but the reality of the real estate environment was too great to overcome. Loans were not repaid, foreclosures occurred and our clients either lost their jobs or retired and the bank ultimately failed. It was a brave battle but just not one you can fight at the age of 70 after a 40-year career in banking. Even if they wanted to, the fight was not winnable."

- *Falling Action*: "So they returned to their families. They lived modestly. They played with their grandkids. On a part-time basis, each helped to wind down bank operations. In the end, they saw much of their life's work blotted out by forces that were completely beyond their control. After all, they are just a couple of retirees who did their job well – they made loans, the bank made money until the unthinkable happened.
- And the *Resolution*: "Ultimately insurance protected all of the bank customers, so no money was lost. The stockholders lost money in their investment, but not all investments work out, right? Not all of the loans these bankers made worked out, and there's no redo for them. So would it make sense to reward stockholders for their investment that didn't work out by giving them an award of money? If Bank greed makes us squirm, the greed of those trying to recoup a lost investment in a bank should make you sick."

5) Where can I learn more about storytelling for lawyers? We have written often about this topic this past year, and I think it is one of the most important topics we write about. I encourage you to view these posts:

1. 10 Great Videos to Help Lawyers Become Better at Storytelling.
2. Demonstrative Evidence Lessons from Apple v. Samsung. Yes, even patent cases have stories.
3. The output of a great collaboration between a trial team and litigation consulting team is a compelling and simple story.
4. 16 Trial Presentation tips you can learn from Hollywood.
5. Many of the videos in this popular post of the Top 10 TED Talks for Lawyers are helpful for storytelling in the courtroom.

I've enjoyed hearing from you and working with more of you than ever in 2012. Here's wishing you great luck in the stories you write for 2013. It's going to be a great year.

9. 10 Outstanding YouTube Channels for Litigators and Litigation Support

by Ken Lopez, Founder & CEO, A2L Consulting

There's no question that in this decade, lawyers looking to improve their trial practice skills cannot afford to ignore blogs, how-to videos and other visual media. We wrote recently about the best blogs and best LinkedIn groups for litigators and litigation support, and, of course, many other social media outlets exist as well.

In fact, the same trends that prompted me to launch our firm 17 years ago are largely responsible for success stories like YouTube and Pinterest. Specifically, it has been shown that many people, if not a majority, learn and assimilate information more readily by seeing something in a video or other audiovisual presentation, as opposed to simply reading about it. That's one of the secrets of trial presentation, and it's also essential for an understanding of today's Internet.

Let's take YouTube as an example. On YouTube, there's a video for how to do everything from reupholster furniture to play guitar chords to cross-examine a witness. YouTube videos are broken down and categorized by "channels."

Here's how channels work. When someone wishes to upload a video to YouTube, he or she must first create an account. On YouTube, the account's "home page" is called a channel. The channel contains links to every video that has been uploaded by that particular user. A channel is similar to an online portfolio containing all of the content created by that user. It can have only a single video, or hundreds.

In YouTube, if you see a channel that you like, subscribe to it, and you'll be notified when new videos are posted.

We've written about YouTube before in posts like this one, which provides a catalog of 10 web videos that every litigator should see or this one, which gives 10 tips from three top litigation experts.

Here are some channels that we've selected that provide useful information for trial lawyers.

1. **Trial Lawyer Expert -** A trial lawyer gives advice about deposition testimony, voir dire, and other important aspects of a trial.

2. **Practicing Law Institute -** This is the continuing legal education video channel of the Practising Law Institute, a major CLE provider.

3. **National Institute for Trial Advocacy -** This is the channel of the National Institute for Trial Advocacy (NITA), the nation's leading provider of legal advocacy skills training.

4. **A2L Consulting -** This is A2L Consulting's own video channel, with brief introductions to trial topics by A2L's consultants as well as interesting trial graphics and excerpts from actual arguments.

5. **The Lex Blog Network** – This channel draws on more than 850 publications and 7,000 authors to update viewers on important legal and litigation news.

6. **Network of Trial Law Firms** - This channel provides up-to-date continuing legal education for in-house claim and litigation managers.

7. **ABA's Litigation Section** - The American Bar Association's Litigation Section has a wide variety of videos on trial practice and technology topics. An interesting one is about how to use storytelling during voir dire.

8. **LawLine** - This is from Lawline, a leading provider of online continuing legal education.

9. **Emory School of Law** - This is the channel of Emory School of Law in Atlanta. Not all of these videos relate to trial techniques, but the ones that do are highly instructive. Look for videos featuring Professor Paul Zwier, such as the one about how to use visuals to make trial presentations.

10. **LSU School of Law** - The Louisiana State University law school has produced several helpful videos, including one on voir dire of an experts.

8. The Top 14 Blogs for Litigators & Litigation Support Professionals

by Ken Lopez, Founder & CEO, A2L Consulting

These days, much of the best information available in any area of human endeavor is found on blogs. Litigation and trial topics are no exception. An excellent blog keeps readers up to date and interested in a subject far more effectively than a textbook or even a website. And most blogs are free of charge. Everyone should keep up with blogs in his or her own field. It's a basic idea of staying abreast of what's new in your profession.

Here is a list of 14 blogs that will be of continuing interest to the trial lawyer, whether aspiring or accomplished. They deal with key issues of courtroom technology, trial tactics, evidence, and persuasion in a sprightly manner.

1. **The Litigation Consulting Report**. This, of course, is the blog of A2L Consulting – the one you're probably reading right now. Go here for a subscription and a chance to win an iPad.

2. **Persuasive Litigator**. Here, Dr. Ken Broda-Bahm, a litigation consultant, provides valuable tips on the science of persuasion that are applicable to pre-trial or trial settings for jury trials, bench trials, and arbitrations.

3. **Science, Business & Law**. Innovative Science Solutions, which provides litigation consulting on scientific subjects, explains in clear terms the science behind subjects that can come up in trials. For example: How does caffeine work in the body, and what quantities are considered safe?

4. **Complex Litigation Blog**. A New York lawyer summarizes a host of recent cases in areas relevant to complex litigation, such as evidence, civil procedure, and privilege issues.

5. **Trial Lawyer Communication Tips**. A California lawyer analyzes the ins and outs of communication, both verbal and nonverbal.

6. **Cogent Legal**. Here, a litigation support and graphics company explains how to make effective courtroom presentations.

7. **Deliberations**. A publication of the American Society of Trial Consultants, this blog discusses trial tips, tricks and foibles in a chatty manner.

8. **The Jury Room**. Keene Trial Consulting, a trial consulting firm based in Austin, Texas, discusses issues such as juror decision-making; how to uncover juror bias; how our values, attitudes and life experiences affect our decisions; and what characteristics of a witness make him or her believable.

9. **Court Technology - Trial Presentation**: Ted Brooks, a Los Angeles-based trial presentation and legal technology consultant, provides articles, reviews, and news of interest to lawyers and other legal professionals.

10. **The Jury Expert**. This blog focuses on issues having to do with jurors: What about jurors who use Google during deliberations? Or jurors who send text messages? Can a litigant legitimately try to exclude gay jurors from serving on a panel?

11. **Mass Tort Litigation**. Edited by several law professors and a part of the Law Professor Blogs Network, this blog looks at mass tort and civil justice issues from a number of perspectives.

12. **JAMS ADR Blog**. One of the leading nationwide arbitration and mediation companies discusses all sorts of issues related to alternative dispute resolution.

13. **PatLit**. Everything you could possibly want to know about patent litigation: Who's suing whom, what the rules are, what the rules ought to be.

14. **The Red Well Blog:** The Red Well is a service of the American Society of Trial Consultants -- a one-stop opportunity to browse opinion and analysis on the subjects that I care about most deeply. This includes litigation communication, persuasion, advocacy, and psychology relating to trial and pre-trial settings.

It would be easy to add to this list. There are plenty of interesting and helpful blogs out there in the areas of trial techniques, trial graphics, trial advocacy, and communication styles. Please share your favorite litigation blogs in the comments.

7. Beyond PowerPoint: Trial Presentations with Prezi and Keynote

by Ken Lopez, Founder and CEO, A2L Consulting

No trial presentation exhibit specialist can perform any better than his or her tools. Although the judge and jury aren't usually aware of what software the trial consultant is using, the choice of presentation software is essential to the success of the consultant, and ultimately to the success of the case.

Over the last decade, presenting demonstrative evidence has usually meant using PowerPoint. In the hands of an expert trial consultant, PowerPoint is an extremely flexible tool. As we said earlier this year, for talented information designers, PowerPoint is a blank canvas that can be filled with works of presentation art. Among major law firms, PowerPoint still maintains nearly a 100 percent market share. After all, if something has been shown to work over and over again, there is every reason for a trial lawyer to continue using it rather than trying something new and unproven.

However, PowerPoint is beginning to face some competition. One source of competition is Apple's Keynote program. Not surprisingly since it is an Apple product, Keynote is easier to use and generates presentations that are more attractive over all. Transitions feel more professional, animation effects are more design-oriented, and the designer will find it easier to create a slick looking presentation. In addition, presentations can be imported from PowerPoint and exported for use on the iPad.

The sample below, courtesy of keynoteuser.com, shows off some of the features of Keynote

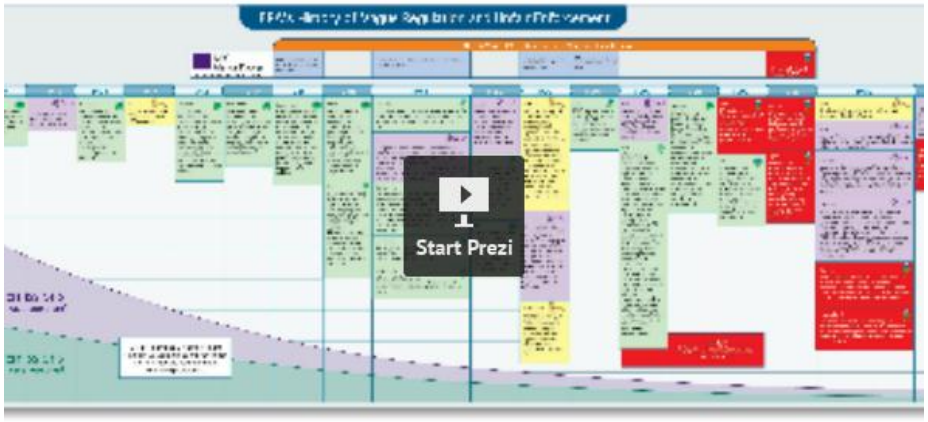
As a reviewer has noted on CNET, “Keynote is a pro-level tool, probably the application most able to compete with the 10-ton gorilla, Microsoft's PowerPoint . . . [Keynote] faces an uphill battle against the entrenched Microsoft PowerPoint. But Keynote has, from its first incarnation, done some things better than PowerPoint…”

Another much newer and arguably much more exciting competitor is Prezi, which has been referred to on wired.com as “a digital poster online” and “kind of like a giant concept map.” This is the zooming presentation tool that has wowed crowds at the TED Talks.

Rather than rely on slides, Prezi creates a very large electronic canvas and permits viewers to zoom in on a particular element of the presentation, either interactively or scripted to behave like slides. With Prezi, you never have to wait for a slide that is 20 minutes away. Every element has a location in both time and space.

For the right subject matter, Prezi can potentially be very helpful to the trial consultant. For example, if the site plans of a manufacturing plant, or the structure of a coal mine are at issue, each element could be zoomed in on without distracting the jury. In fact, a Prezi presentation might appeal to the jurors’ basic concept of spatial orientation and help them understand something that would be hard to show with another software package. Unlike PowerPoint or other presentation mediums, it is easier to maintain context.

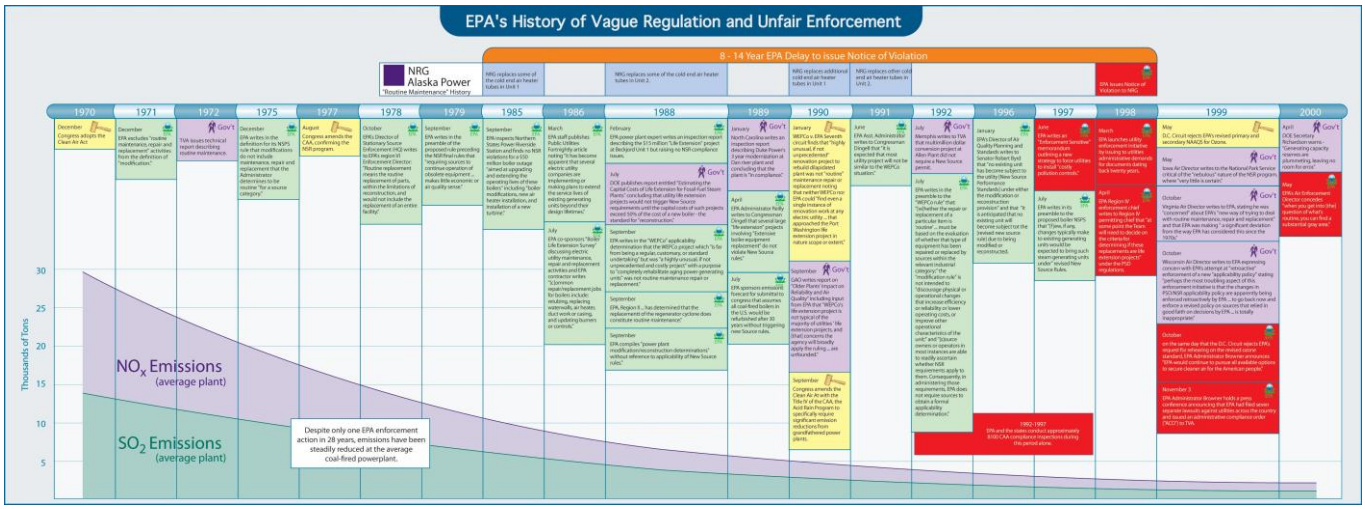
Below is a Prezi of a large timeline originally designed for display as two printed foam core trial boards measuring five feet wide each. This short Prezi trial presentation was built in just a few minutes and designed only to introduce the use of Prezi in the courtroom. The camera pans around the timeline in a scripted fashion and is advanced using the play button. It does not take too much imagination to see how this might be useful in a trial presentation.



While I don’t see PowerPoint disappearing or even losing significant market share any time soon, competition is a good thing, and I am looking forward to a time when healthy competition will create software products that are even better adapted to litigation consultants’ needs than they are today.

Watch for an upcoming article that shows off more of the Prezi toolset.

6. Top 5 Trial Timeline Tips



Although trial consultants prepare dozens of different types of exhibits that help judges and jurors understand a case, timelines are one of the oldest and most reliable. After all, most cases involve some sort of time sequence, and the order and timing of events can be crucial. Timelines give jurors an intuitive understanding of a case – if they are done well.

While it seems simple to prepare a timeline, it is actually an art that requires practice and experience, just as any form of trial presentation would be. The following suggestions have worked well for our firm in over 10,000 cases since 1995:

Engage Your Audience: The timeline is meant for the jurors or the judge to understand. It's a device that makes the case clearer to them. The timeline is not something that is intended to jog your memory. You should know your case perfectly or nearly perfectly without the timeline. In fact, in order to keep your audience engaged, you should feel free to add devices like photos, videos, charts, and the like. The more your timeline tells a story without explanation, the better it is.

It's notabout the Bar: In general, the timeline should focus on the relative position of the events in the story that it tells, not on the date bar. If you are going to highlight a portion of the timeline, highlight the events themselves, and don't make the date bar the focal point. When was the device invented? When was it marketed? When did a competing device enter the market? Those can be key facts in a patent case, and they should be the focus of the timeline. If anything in the timeline should be highlighted with color or other design elements, it should be these events.

The Key Is Not the Key: Although a lot of people think a timeline needs a complicated legend or key, the truth is that it should be fairly self-explanatory. Rather than a legend, use logos, icons, company symbols, or other design elements to explain what the timeline represents.

Keep It Short: Jurors' attention won't remain on a timeline that is too long and complicated. Revise and redraft your timeline so that it focuses on the most important events, not on all events that are conceivably relevant.

Keep It Large: Don't make the timeline too small. Otherwise, jurors will lose interest. We think the timeline should use no smaller than 20-point type.

If you follow these tips, we think you can create a very effective timeline. If you have additional tips or comments, please use the comments box below.

Here are several other A2L Consulting resources on timelines and litigation graphics:

Trial Graphics: Using Timelines to Persuade

Using Prezi to Make a Timeline

Top 10 Reasons to Prep Trial Graphics Early

Trial Graphics, Color Choice and Culture

The Effective Use of Demonstrative Evidence

A Litigators Duty to Entertain a Jury

3 Year Juror-Litigator Study Results

5. The 12 Worst PowerPoint Mistakes Litigators Make

by Ken Lopez, Founder & CEO, A2L Consulting

Some online estimates say that about 30 million PowerPoint presentations are given every day. That number seems more than a bit high, and it's hard to find a credible source for it. But let's say it's off by a factor of 80 percent, so that just one-fifth of that many presentations are given each day. Still, that would be 6 million PowerPoints.

In the legal community, we give our fair share. Since legal services are about 1% of the total economy, we can make a guess that at least 60,000 PowerPoints are being given every day in the U.S. legal industry, or about 6,000 for every hour of the working day.

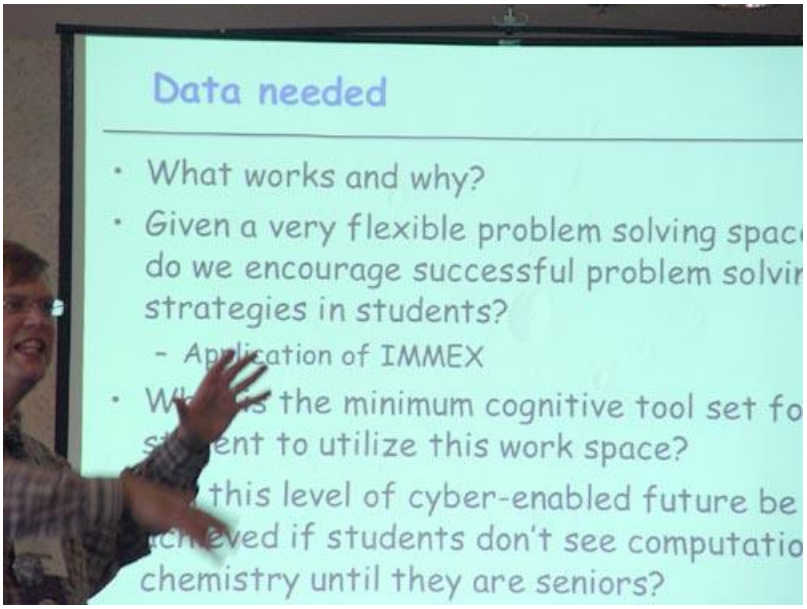
If we assume that every legal industry PowerPoint is being watched by an average of two other people and all of those people charge $200 on average for their services, America's legal industry is producing at least $3.6 million of PowerPoints every hour! That's a lot of time and a lot of money. We ought to at least use it well.

PowerPoint has been the dominant presentation software in the courtroom since 2003. When used well in the courtroom, it allows a skilled presenter to captivate an audience with a well told story, enhance the audience's understanding of a case, and persuade skeptics that the presenter's position is correct. In other words, a well-crafted PowerPoint presentation helps tip the scales of victory, potentially substantially, in your client's favor.

Unfortunately, I believe the typical PowerPoint presentation used in the courtroom causes more harm than good. Here are twelve easy-to-avoid PowerPoint mistakes.

1. **The bullet point list.** This is the mother of all PowerPoint mistakes. If you make this one, you probably make several others on the list. We have written about why bullet points are bad many times, and below is an example of what not to do. The most significant problem is that people will normally read your bullets and ignore what you are saying. Further, their brains will remember less than if they had either read OR heard what you were saying because of the split attention effect.

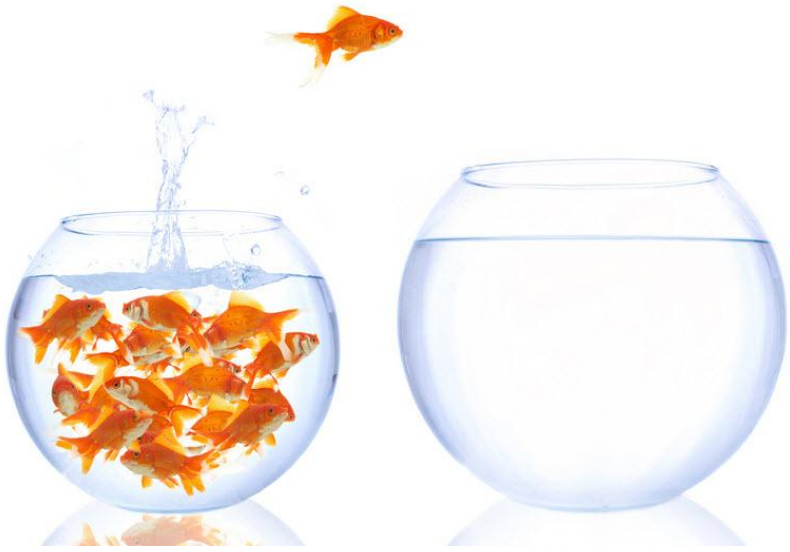
2. **The wall of text.** Courtroom presentations should be a lot more Steve Jobs and a lot less like the example below. Nobody can read it.



3. **The "who cares."** If you fail to tell a compelling story that nobody cares about, your presentation was a waste.

4. **The flying whatever.** Please do not use PowerPoint animation effects. They are distracting and add little to your presentation.

5. **The "huh" image.** Don't include images that only vaguely enhance your message.



6. **The back turn.** Do not turn your back on your audience. Watch the TED Talks for good presentation form.

7. **The itsy bitsy.** For text on a slide that is projected, I would not go below 24-point text.
8. **The slide that overstayed its welcome.** Don't leave up a slide that has nothing to do with the point you are making. Either insert a black screen slide or press the B key to toggle on and off your presentation.
9. **The Bob Marley.** "Turnnn your lights dooowwwwnnn looooowwww." If you have to, you have the wrong projector. Use 3000 lumens; that's good, and 5000 lumens is great.
10. **The highly objectionable.** Do not put up materials that the judge will rule inadmissible.
11. **The "ehhh."** If you have sound to play, make sure you have the equipment to amplify it with. Your laptop speakers are not enough for any courtroom.
12. **The End (is missing):** Please do insert a black screen on your last slide so that we don't see you hit the "next" key one more time only to reveal the desktop photo of you and your kids in Tahoe.

4. Lists of Analogies, Metaphors and Idioms for Lawyers

by Ken Lopez, Founder and CEO, A2L Consulting

The task of a trial lawyer is to convince a judge or jury to believe in the truth of a client's case. However, in many complex trials, the underlying facts are not as easily understood by the fact-finder as they would be in, say, a murder case or a traffic accident. A case, especially the type of litigation that we are involved in, often turns on complex issues of science, medicine, engineering, or some other subject that jurors and many judges are not well versed in.

How does a lawyer move from the arcane to the everyday and get jurors to follow along? Enter the metaphor, simile, or idiom.

We use these "figures of speech" all the time in conversation, often without realizing we are doing so. Whenever we say we need to "level the playing field" or "push the envelope" or "draw a line in the sand," we are using a metaphor. When we say something is "as dull as dishwater" or "as slow as molasses," we are using a simile. When we tell a friend to "break a leg" for good luck, we are using an idiom.

Briefly, a metaphor is a figure of speech that uses one thing to refer to another as a means of making a comparison between the two. A simile actually makes the comparison between two dissimilar things directly with the use of the word "like" or "as." An idiom is an expression that is more than the sum of its parts (think "raining cats and dogs" or "spill the beans"); it is usually based on a metaphor, though the metaphor may be a bit "buried" after centuries of use. These figures of speech have one thing in common: They are all used as analogies, to compare one thing to another.

In a trial, a lawyer can use a metaphor to show the jury how something works or how an event occurred, based on an analogy to another thing or process that jurors know well from their everyday lives. For example, in an antitrust case, when describing how a group of competitors squeezed another company out of the market by denying it the opportunity to buy a needed product, the lawyer might tell the jury that the conspirators choked the life out of the other company as if they had denied it the air it needed to breathe.

Ray Moses of the Center for Criminal Justice Advocacy, a Texas-based nonpartisan, grassroots training resource that helps lawyers become competent criminal trial practitioners, writes well about analogies and metaphors.

"Jurors remember facts and concepts that are familiar to them or that can be analogized to familiar subjects," Moses writes. "Those who aspire to be effective communicators and persuaders must learn to argue by analogy and to explain by stories. This is particularly true when we are seeking to clarify and tie together complex facts, abstract ideas, or legal concepts. If facts or legal issues become

overcomplicated, jurors become overwhelmed. It is here that an appropriate analogy may assist the jury in comprehending the import of the evidence that has been dished out during testimony, assessing the credibility of the sources of evidence, and/or understanding the application of law to facts that are found to be true."

Below are a number of websites that are useful in finding the best analogy, metaphor, similie or idiom to use in your case:

- Metaphors & Similies
- [pdf] A Downloadable Metaphor List
- An interesting book for lawyers on the topic
- A list of idioms
- A second list of idioms
- A third idiom list
- A list of similies

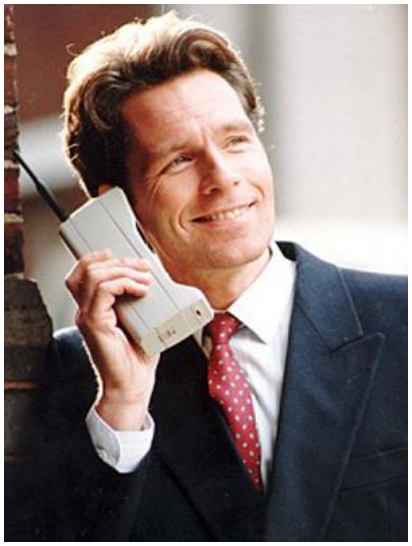
Below are some additional resources on the A2L Consulting site:

- Using Visual Metaphors and Analogies
- Teaching Science to a Jury
- Improving Storytelling Skills as a Lawyer

What others have had to say about this topic:

- [pdf] Why Analogies Often Fail
- Finding the right analogy for litigation
- Analogies and the Courtroom

3. 12 Reasons Bullet Points Are Bad (in Trial Graphics or Anywhere)



Bullet points, especially when they're found in PowerPoint slides, have become the cliché of the trial graphics and presentation worlds.**There's no good reason to use them, and plenty of reasons not to.**For many, bullet points signal a boring presentation is about to begin or one is about to hear a presenter who, like someone on a vintage cell phone, is detached from modern presentation style.

Bullets are not just aesthetically bothersome. The A2L Consulting trial graphics team, trained in cutting-edge theories of conveying information, believes that text-heavy presentations riddled with bullet points also do harm to the persuasion process.

Garr Reynolds, a leading writer on the art and science of presentation, says in *Presentation Zen,* "Bullet-point filled slides with reams of text become a barrier to good communication."

Chris Atherton, a cognitive psychologist who has scientifically studied bullet points, writes, "Bullets don't kill, bullet points do."

Attorney Mark Lanier, commenting on his $253 million Vioxx verdict after following the no-bullets advice offered by Cliff Atkinson, another top presentation theorist and author of *Beyond Bullet Points,* said, **"The idea that you could speak for 2 1/2 hours and keep the jury's attention seemed like an impossible goal, but it worked. The jury was very tuned in."**

Below is a list of reasons and resources that support the reality that bullet points do not belong in your presentation – whether a trial graphics presentation or something else.

1. People read faster than they hear -- 150 words per minute spoken vs. 275 words per minute reading. People will read your bullets before you can say them and stop listening. If jurors are spending time (and brain-power) reading your trial graphics presentation, they are not listening.
2. Chris Atherton's work confirms that bullet points do real harm to your presentation. Her scientific study validates the notion of eliminating bullet points and she lectures on the topic in this video.

3. The redundancy effect describes the human mind's inability to process information effectively when it is receive orally and visually at the same time. If you speak what others are reading in your bullets, because of the redundancy effect, you end up with less comprehension and retention in your audience than if you had simply presented either 100% orally or 100% visually. http://www.a2lc.com/blog/bid/26777/The-Redundancy-Effect-PowerPoint-and-Legal-Graphics

4. Authorities on the subject agree bullets are problematic. Read *Presentation Zen*or pick up Garr Reynolds' tips in the video below. Also see here http://beyondbulletpoints.com/ and here: http://sethgodin.typepad.com/seths_blog/2007/01/really_bad_powe.html

5. Watch great presentations and see what they are doing right (and note that they do not use bullets). Here are three stand-out and bullet-point-free presentations:

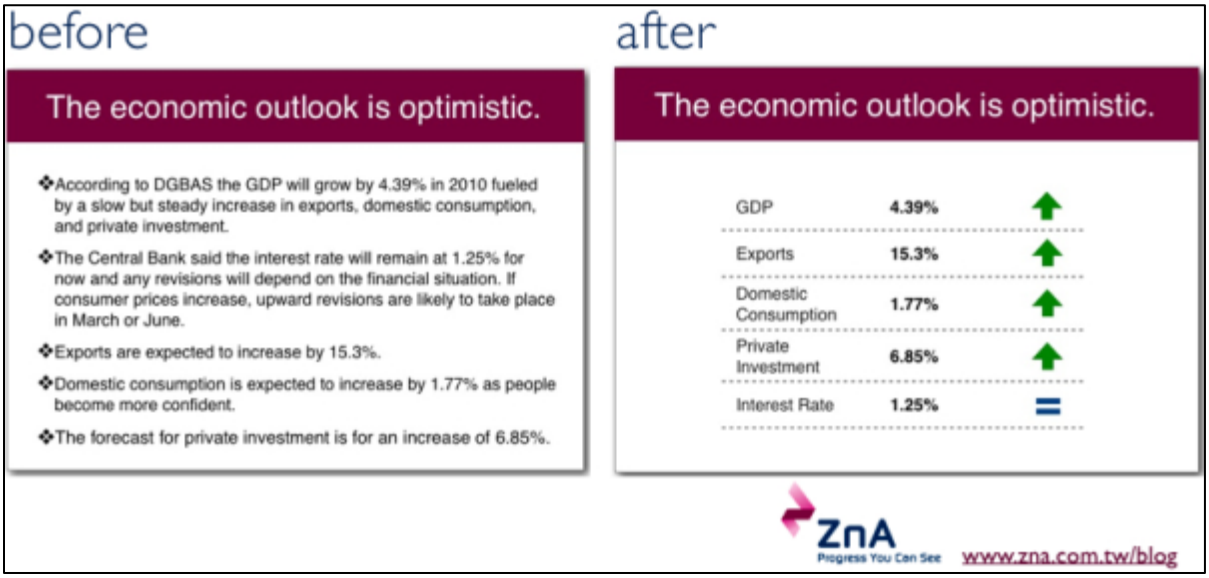
   Hans Rosling's TED Talk presenting data in an appealing way.

Steve Jobs introduces the first iPhone in 2007.

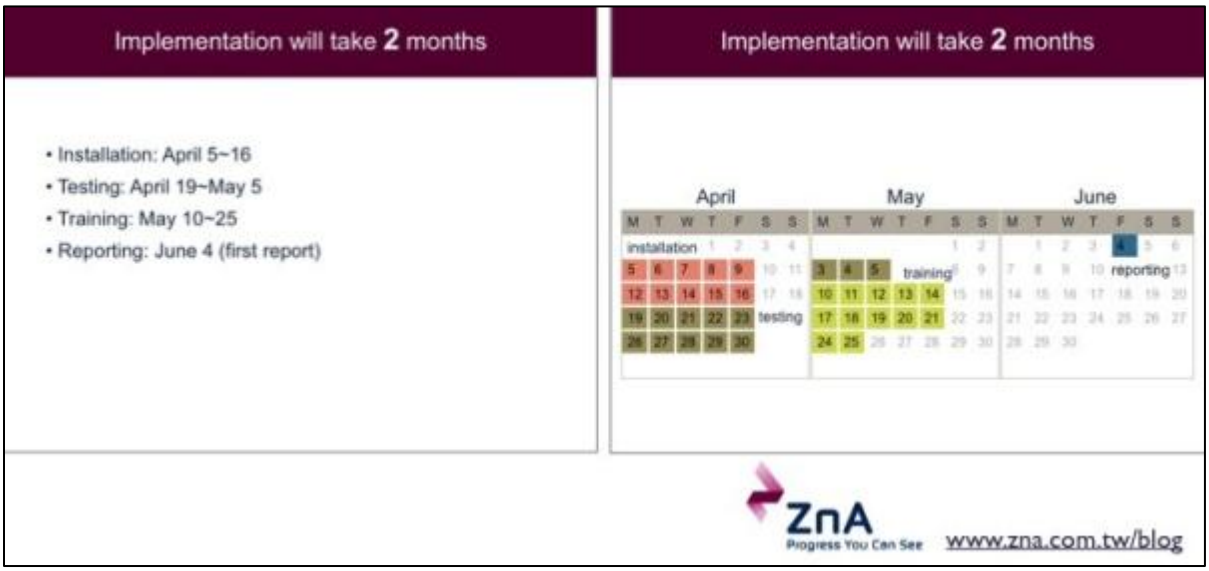
Al Gore revisits his I*nconvenient Truth* theories.

6. The more you use bullets the more people will judge you as outdated. If you are making a trial graphics presentation and your case relates to technology, this is unforgivable, but for any case this will not be helpful. Remember Chris Atherton's work from point 2 above.

7. If you are using bullets to talk about numbers, there is usually a very easy workaround. For example, here is an easy way to handle changing metrics:



and an easy way to handle dates:



8. Understand how the brain works. Developmental Molecular Biologist Dr. John Medina explains briefly one of his 12 "brain rules" from his book of the same title. Here, he explains that vision trumps all other senses and pokes fun at bullet points in the process.

Vision from Pear Press on Vimeo.

9. Whether most of your presentations are for judges and juries or whether they are for management, learn how to tell better stories; take a look at one of our most popular articles: http://www.a2lc.com/blog/bid/53536/10-Videos-to-Help-Litigators-Become-Better-at-Storytelling

10. Remember, if you are using bullet points, people are likely to tune you out as boring when you most want them to be paying attention.

11. Consider using Prezi instead of PowerPoint as we explained in this popular post, and illustrated in A2L's well-circulated Prezi sample that explains Collateralized Debt Obligations (CDOs): http://www.a2lc.com/blog/bid/40453/Beyond-PowerPoint-Trial-Presentations-with-Prezi-and-Keynote

Collateralized Debt Obligations (CDOs) Explained with Prezi on Prezi

12. Finally, while A2L Consulting would be thrilled to help, here are 74 ways to remove bullet points on your own.

    a. 6 inspiring non-bullet point options
    b. 41 great alternatives to bullet points
    c. 4 before bullet point and after bullet point examples
    d. 4 great before and after bullet points from Garr Reynolds (see slides 5 through 8 - although his entire presentation is helpful)
    e. 7 ways to replace bullet points altogether
    f. 12 more ways to avoid bullet points

We believe that a well-crafted presentation -- whether in trial graphics or in the corporate world -- will change the way people make decisions. Regardless of your audience, there is something you want from them. Make your presentation the best it can be using the latest techniques.

2. Demonstrative Evidence & Storytelling: Lessons from Apple v. Samsung

By Ryan Flax, Managing Director, Litigation Consulting, A2L Consulting

In the *Apple v. Samsung* trial, the outcome will be the result of good storytelling and demonstrative evidence, not necessarily the best legal case.

Over the last few weeks, Apple Inc. and Samsung Electronics Co. Ltd. have viciously fought over patent infringement and other claims (see Apple's complaint and Samsung's answer [pdfs]), both in the courtroom and in the forum of public opinion. The case is steeped in patent law and relates to the alleged infringement and invalidity of utility and design patents. But, it won't likely be the legal details or attorneys' satisfaction of the various prongs of proving direct infringement or obviousness invalidity that will change the future of smartphone and tablet computer technology purchasing options for the foreseeable future.

Yesterday, after closing arguments, the jurors were given their instructions by U.S. District Court Judge Lucy Koh on the legal nuances of patent infringement and validity, trade dress, contracts, and antitrust law – this took over *two hours* and covered 109 (yes, that's one hundred nine) pages of text jury instructions – and then sent them away to the jury room to decide the fate of Apple, Samsung, and the American technology consumer. I'm sure that the jurors listened attentively to those instructions, but it took me most of a semester of law school to fully understand just some of those legal issues, and I respectfully doubt that those jurors are competently ready to decide the case based on the law.

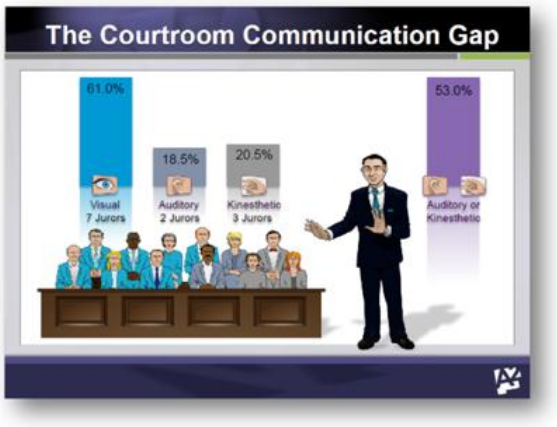
What they *will do* is base their ultimate decision on their sense of justice and upon their emotions. Those jurors brought their sense of justice with them to the court on the first day of jury selection, and their emotions have been played by plaintiff and defense counsel over the course of the trial. Remember, Lady Justice wields a sword for a reason – if you've done something wrong, you should pay and that's what either Apple or Samsung will be held to do based on which side's story was more moving and convincing during the trial.

Experts agree. According to Alexander Poltorak (CEO of the patent licensing and enforcement firm General Patent Corp.), "Juries tend to simplify the case. That's a natural tendency," and "They want to figure out who is the bad guy here and let's punish them." *See also* our article on demonstrative evidence and the opening statement.

Complicated Cases Call for Great Demonstrative Evidence

Bill Panagos (of Butzel Long) called this case "extremely difficult" and a "complicated picture of intellectual property." He went on to explain that, "juries tend to do what they think is fair or right" and "it depends now on the story that they heard from each of the attorneys -- which one of those attorneys was able to tell the story in a way that the jury understands or believes them more than they understand and believe the other side."

Even Judge Koh expressly and publicly identified this case as a "coin toss" and urged the parties to settle the case before a verdict. The Judge went further, "I am worried we might have a seriously confused jury here," and "I have trouble understanding this, and I have spent a little more time with this than they have," and finally, "It's so complex, and there are so many pieces here."



This underscores the importance of telling a convincing and persuasive story in court. Jurors want to reach the right result, so how do you help them do it?

Litigators must be as effective at storytelling as possible at trial and to do so, jurors must be reached on an emotional level. To do this, litigators should test their story and theme with mock jurors in preparation for trial and take time to develop effective trial graphics. With effective demonstrative evidence, also known as litigation graphics, attorneys can teach and argue from their comfort-zone – by lecturing, but the carefully crafted graphics will provide the jurors what they need to really understand what's being argued and give them a chance to agree. Most people (remember, jurors are people) are visual learners and do most of their "learning" by watching television or surfing the internet. In court, litigators must play on this battlefield and with the appropriate weapons.

Using the Right Demonstrative Evidence the Right Way

In a study, attorneys dramatically improved their persuasiveness when "jurors" were immersed in graphics, meaning the attorneys always gave them something to see while presenting an argument. Immersed jurors were better prepared on the subject matter, felt it was more important, paid more attention, comprehended better, and retained more information. This is your goal as a litigator – to capture the jurors' attention and coax them onto your side.

Here's a sample graphic used at trial by Apple:

The obvious goal of this graphic was to tell a visual story showing how Apple's iPhone design was the pivot point for Samsung's own mobile phone design in a simple "before and after" format.

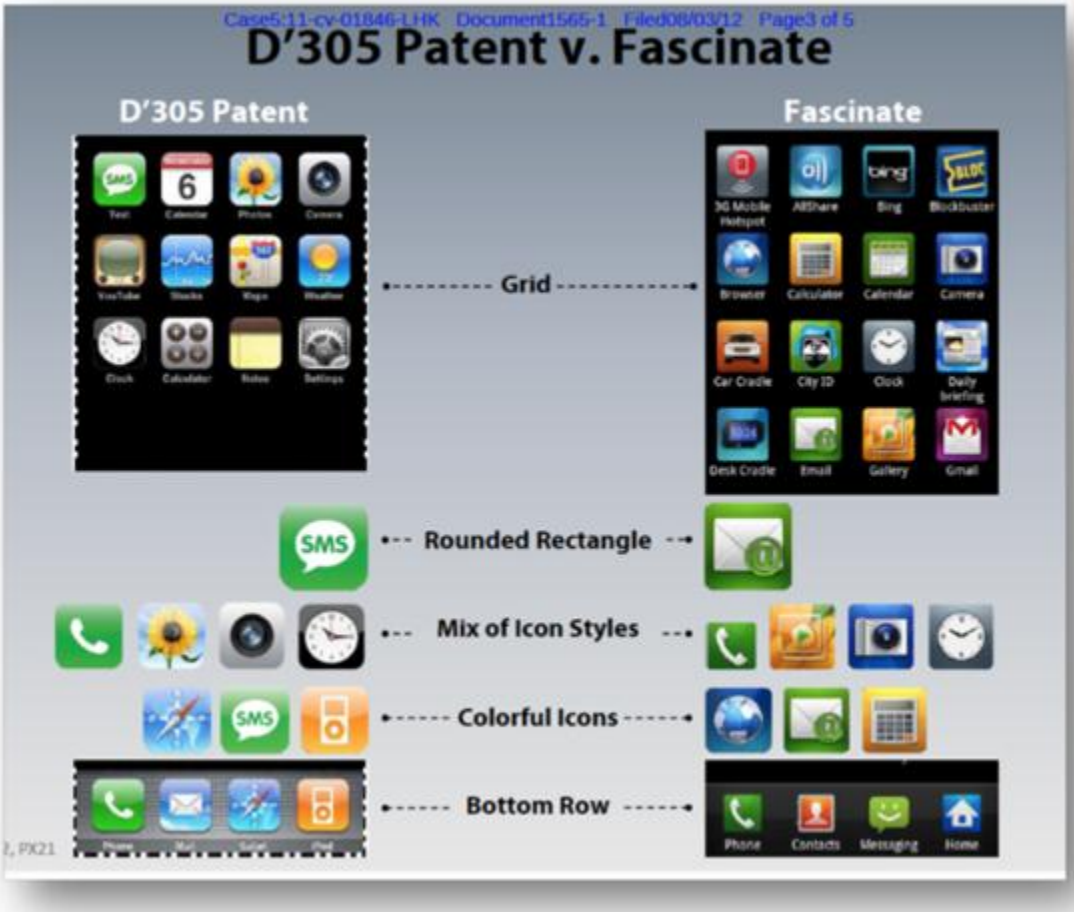
I'd say this is a fairly effective graphic. It simplifies a complex issue and makes a dramatic point.

Samsung countered with its own trial graphic, as follows:

The purpose of this graphic was showcase Samsung's own innovative, but still iPhone-like designs over the years, both preceding Apple's product release and following it.

This graphic certainly has a lot of information, but it's not quite as clear and understandable as Apple's demonstrative evidence above. The jurors' understanding of this graphic will have depended more on the attorney's accompanying argument, which is not really the goal of trial graphics.

Here are some more interesting graphics used by Apple's counsel. This first trial graphic accompanied Apple's argument as to how Samsung's user interface infringed Apple's design patent on icons.



It is another effective graphic. It's clear and fairly convincing on its own, without any explanation.

Apple also used this demonstrative evidence trial graphic below to explain that, while Samsung designed an infringing user interface, there are a variety of other ways of making an icon-based mobile device interface. Apple showed examples of "non-infringing" alternatives that Samsung did not use.

I'm not so sure about this one. Sure, there may be differences between these designs and those used in the iPhone or Galaxy devices, but I'm not sure this makes a very convincing argument that Apple's design is so special.

If the parties hold out for a jury verdict, it will be interesting to see which side told a better story here. If the jury believes influence over an industry is illegal infringement, Apple will win. If the jury believes Apple's designs are just the basic building blocks or "grammar and language" (so to speak) of mobile device design, Samsung will win.

1. The 50 Best Twitter Accounts to Follow for Lawyers and Litigators

by Ken Lopez, Founder & CEO, A2L Consulting

Some people make a habit of denigrating Twitter, saying that its well-known 140-character limit makes it useless for anything substantive. There are several responses.

First, it's possible to link to anything on the Web within a tweet (just use one of the common URL-shortening utilities), so lots more information can be conveyed. Second, a lot of people read more on Twitter than they write. They use it as a sort of personal news feed, scrolling down for a few minutes at a time during the work day to see what's new. If you pick the right accounts to follow, this works very well.

It's true, though, that A2L Consulting receives far more traffic on its website from LinkedIn than from Twitter. I recently commented on this reality for the Wall Street Journal.

So my advice to litigators is to pick a small number, say between 30 and 100, high-quality Twitter accounts to follow. Here are 50 that I recommend, but there are many more good ones. I have tried to provide a balance among news sources, trial tactics, general legal news and other interesting accounts.

Click on any of the hyperlinked Twitter handles below to open a new window where you can chose to follow that account.

1. **AP Courtside Seat** @AP_Courtside - Go courtside as The Associated Press covers the Supreme Court.

2. **Bloomberg Law** @BloombergLaw The first legal and business intelligence resource to deliver integrated legal research, premium content, news and proprietary world-class business data.

3. **American Bar** @ABAesq The American Bar Association provides resources to assist lawyers and judges, accredits law schools, and works to improve the legal system for the public.

4. **A2L Consulting** @A2LConsulting Yes, that's us. Since 1995, jury consulting, litigation graphics, and trial tech to litigators from all major law firms on 10K+ cases with trillions at stake.

5. **ABA Journal** @ABAJournal Continuous news updates from the United States' most-read and most-respected legal affairs magazine and website.

6. **N.I.T.A.** @NITACentral NITA's mission is to promote justice through effective & ethical advoacy by training and mentoring lawyers to be competent & ethical advocates.

7. **JD JOURNAL** @JDJournal Legal News, Law Firm News.

8. **Above the Law** @atlblog The widely read and often hilarius legal blog of Breaking Media.

9. **The Am Law Daily** @AmLawDaily The source for daily legal business news and analysis of leading law firms.

10. **National Law Review** @natlawreview The National Law Review is a free on-line resource of legal articles written by leading law firms & agencies.

11. **Ron Coleman** @RonColeman Commercial law focusing on trademark, copyright and litigation. Writer of the LIKELIHOOD OF CONFUSION® blog.

12. **Richardlevick** @richardlevick Richard Levick is Chairman and CEO of LEVICK, the nation's leading crisis communications and high stakes public relations firm.

13. **Greg S. Wilson** @GregSWilson Attorney. Interested in innovative ways to deliver legal services.

14. **Tammy Metzger JD, MA** @JuriSense Trial consulting & Prepare to Win workshops approved by David Ball. Formerly in-house @ plaintiffs' firm, ad. editor @TheJuryExpert, UC instructor & researcher.

15. **Kathy Kellermann PhD** @KKComCon ComCon Trial & Jury Consultants. Experts in human side of litigation. Science, research, experience & skill make cases compelling for motion, settlement, trial.

16. **Geri Dreiling** @legalmediamtrs I'm a lawyer and journalist who now provides legal PR and content writing services. Editor of Lawyer Tech Review: @lawyertechrvw.

17. **Lee E. Berlik** @LeeBerlik AV-Rated Business Litigation Lawyer. Virginia attorney handling contract disputes, intellectual property matters, defamation claims, and more.

18. **Lisa DiMonte** @lisadimonte Global court reporting, videography, videoconferencing and litigation support. Your emergency becomes our emergency. Loves cooking and traveling!

19. **Justia** @justiacom Justia works on free legal information & community projects, including free case law, codes & regulations databases & lawyer, law blog & twitterer directories.

20. **Jonathan D. Roy, Esq** @jonathandroy I am a Massachusetts attorney that specializes in #eDiscovery,#predictivecoding, and #analytics. I have a background in #litigation and #analytics software.

21. **Marilyn Bush LeLeiko** @LawWriting Conducts writing skills training at law firms and at corporate and government legal offices. Works with lawyers (CLE programs), paralegals, managers and staff.

22. **Robert B. Smith** @BobSmithLaw trial lawyer and trusted advisor to businesses, institutions and individuals. at DeMoura/Smith LLP Boston.

23. **Katherine James** @actlaw Trial & Litigation Consultant, Witness Preparation, Attorney Workshops, CLE, Applying theater and acting skills to the Law.

24. **Bitter Lawyer** @BitterLawyer Entertainment and humor for legal professionals and the people who tolerate them

25. **Law Practice News** @Law_Practice Follow us for Law Practice articles, blog posts, and related writings by lawyers, law firms, and legal professionals. A @JDSupra law content feed.

26. **Morgan C. Smith** @cogentlegal Compelling graphics and strategic consultation for attorneys in all phases of litigation. Founded by a top-rated trial lawyer with multimedia expertise.

27. **David Tate** @DavidTateEsq Writes about a wide variety of legal topics.

28. **Ted Brooks** @litigationtech Trial Consultant (High Profile, High Stakes, Complex Litigation); Law Technology & iPad Writer; Speaker; Cyclist

29. **Litigation Solutions** @LitigationSolns Providing litigation support services to attorneys since 1994. Multimedia trial presentation specialists.

30. **Mitch Jackson** @mitchjackson California lawyer who enjoys social media, trying cases and sharing 27 years of communication tips!

31. **Kevin O'Keefe** @kevinokeefe Lawyer. CEO/Founder of LexBlog: Empowering lawyers worldwide to network through the Internet.

32. **Innovative Science Solutions** @ISS_SciLaw Bridging the gap between science and the law

33. **ASTC Prof Visibility** @ASTCNow Informing trial advocates of the opportunities for advancing their skills. A publication of the American Society of Trial Consultants (ASTC).

34. **Carlos Baradat** @TekBizLaw Technology enthusiast, Business guru and Legal scholar #eDiscovery, #technology, #predictivecoding

35. **Litigator Technology** @Litig8rTech JuryStar iPad app for modern voir dire | Accessible Web Jury Consulting service for litigators & trial teams | LITIG8R TECH community

36. **Lawyerology** @lawyerology Lawyerology: the art and science of being a lawyer. Blog edited and written by Rob Sullivan and the lawyers/staff of Sullivan, Morgan & Chronic - Trial lawyers.

37. **Law.com** @lawdotcom ALM's Law.com is the web's leading legal news and information network for attorneys and other legal professionals.

38. **ABA Litigation** @ABALitigation The American Bar Association Section of Litigation serves 60,000 members!

39. **Mark Hamill, JD, CPA** @Mark_Hamill_Esq Accomplished and energetic attorney with Am Law 100 and Big 4 CPA experience.

40. **Legal Week** @LegalWeek Legal magazine and website providing news on law firms, lawyers, company legal teams and legal developments, plus blogs, briefings, jobs, comment and opinion.

41. **Christopher Levinson** @ChrisLevinson Administrator for Vititoe Law Group (prior firm was Masry & Vititoe). M&V was depicted in the film Erin Brockovich.

42. **AmLaw Litigation Daily** @litigationdaily AmLaw Litigation Daily

43. **BlawgWhisperer** @BlawgWhisperer ABAJournal.com Web editor and keeper of the Blawg Directory.

44. **WSJ Law Blog** @WSJlawblog Hot cases, emerging trends and big personalities in law from The Wall Street Journal.

45. **Alison Frankel** @AlisonFrankel Alison Frankel writes the On the Case blog for Thomson Reuters

46. **Eugene Volohk** @VolokhC Law Professors comment on legal news and major cases

47. **Mike McBride** @mikemac29 Blogger, techie, Litigation Support Trainer @AccessDataGroup, husband, amateur photographer and child abuse survivor

48. **David Hobbie** @KMHobbie litigation knowledge management attorney, husband and Dad, violinist and violist; also manage

49. **22 Tweets** @22twts Helping lawyers tell their stories, one tweet at a time.

50. **Bob Ambrogi** @bobambrogi Lawyer, writer, consultant.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