COURTROOM GRAPHICS: WHY TO USE THEM AND HOW NOT TO ABUSE THEM

By Professor Fred Galves

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Attorneys have long used visual aids, such as charts and photographs, to help juries understand key facts and issues during trial. That tradition continues, but many of today's trial attorneys have upgraded to sophisticated computer graphics and automated display systems to improve their connection and communication with modern jurors. No matter how high or low tech the visual aids, enhancing an attorney's arguments and persuasive presentation of evidence remains the goal.

There are some in our profession who still prefer an overhead projector, or the seductive sound of their own voice, to all the "fancy computer stuff." But in more and more cases, especially those involving complex technology or issues, computer graphics can simplify, clarify, and vivify intricate, technical, and even boring, but critical, information for jurors in a way that a static flip chart or a poster board exhibit cannot.

Notwithstanding the clear benefits of using visuals, there are some common mistakes attorneys make when using computer graphics, including legal admissibility/disclosure related errors, as well as strategic presentation/persuasion related missteps. Fortunately, these mistakes can easily be identified and remedied.

This article addresses why attorneys should use computer graphics at trial, how to avoid mistakes when using them, and how to overcome certain objections.

Why Use Computer Graphics At All?

The time-honored notion that "A Picture Is Worth a Thousand Words" is the short answer to this question; especially when one considers that the modern juror has an even shorter attention span, and much more exposure to complex visual information than the typical juror of the past. Remember that at one time, great attorney orators such as Clarence Darrow made long spell-binding closing argument soliloquies, keeping the jurors—whose information intake was primarily via political speeches, preacher homilies, and theatrical plays—on the edge of their seats. Today, many jurors come to court conditioned to assimilating information through a stimulating combination of visual and oral media via TV, the Internet, Computer Games, and Special Effect Movies.

It is telling that the typical modern juror receives close to 12,000 hours of classroom instruction by high school graduation, compared to over 14,000 hours of watching TV, and very few hours listening to an attorney in court. But instead of accusing modern culture of "dumbing down" society by bombarding people with visual images, lawyers should acknowledge that people, more than ever before, are processing vast amounts of information visually and therefore rise to the occasion in trial. Like it or not, people are accustomed to cable news shows with multiple picture frames and running text across the bottom of the screen.

To use another time-honored cliché, "seeing is believing." It is important to understand that, psychologically, words are just verbal clues for the listener to reconstruct a particular abstract concept, and then create their own mental image or idea about which the speaker is speaking. Many researchers assert that most people—and therefore most jurors—"think in pictures," according to their own mental "storyboard" that they create during trial. In virtually every forum, information conveyed by *showing* or *doing* is much more concrete and tangible than mere speech. Good visuals

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control the coherent "story" the attorney is trying to convey and convince the jury to believe.

In one of my courses, I teach foreign attorneys and law students U.S. corporate law and civil litigation. For most of these students, English is their second language. These foreign attorneys routinely remark how well they are able to understand the information I convey when I use computer graphics because they receive that information through two senses simultaneously—hearing *and* seeing—and are therefore better able to translate the abstract legal English words into more comprehensible concepts. Similarly, jurors often find that complicated factual or technical trial information seems like a "foreign language" to them. They can better understand this legal "foreign language" when it is complemented with visuals. Imagine constructing a model airplane if the directions were verbal only, without diagrams showing how the complicated pieces logically fit together. In fact, note how many products today are accompanied by an instructional DVD explaining assembly and usage.

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Even if the jury understands a case and is persuaded by your presentation during trial, it does no good if those jurors cannot recall vital information during deliberations. Numerous studies demonstrate that recall is improved when oral presentations are coupled with visual presentations. One study found that when jurors were given visual presentations, they retained 100% more information than those given only oral presentations. Even more importantly, those given a combination of oral and visual presentations retained 65% more information than those given presentations without visuals.

Perhaps some attorneys have avoided the use of visual technology in trials for fear of making mistakes or not being able to sufficiently overcome objections. If so, it is important that such mistakes and objections do not become reasons, or rationalizations, for disregarding this powerful vehicle of information conveyance.

How to Avoid Abuse or Misuse of Computer Graphics:

Disclosure and admissibility mistakes

1. Many attorneys forget to disclose to the judge and opposing counsel their intentions to use technology in their opening statements and to determine beforehand if certain images or exhibits can be shown. Some courts will not allow any exhibit to be used during an opening statement that has not first been admitted, while others will allow it if there is a good argument for its admissibility that will be made during the case-in-chief. Lawyers should get any images and exhibits they want to use in their openings either stipulated to, or they should file motions in limine in order to obtain a pretrial ruling on admissibility, so there can be no objections or unfortunate surprises requiring changes during their openings.
2. On the other hand, some lawyers disclose too much of their visual technology so that their opponents get an unfair preview of their entire opening statement, which is a strategic blunder. Attorneys should not disclose their entire PowerPoint presentation that accompanies their openings anymore than they should disclose a written outline of their opening statement. Attorneys should request admission for both their opening statement exhibits, along with their other trial exhibits, so that the opposing side does not know which particular exhibits will be shown during the opening and during trial. Also, the work product doctrine should be claimed for anything in the presentation that is not itself an evidentiary exhibit.
3. If it is ruled that opposing counsel must disclose a PowerPoint or other computerized visuals, a savvy attorney requesting such disclosure will argue that the visuals should

be disclosed in a computer-based format that reveals motion, layering, or other special effects, because these aspects can on their own present ideas and arguments. If only a printout of the PowerPoint is what is disclosed, note that printed versions of slides may hide images that are displayed in an overlapping format and will not reveal motion or other special effects.

4. A very basic reason to obtain pretrial admissibility rulings is to avoid last minute adjustments to your trial presentation. If the attorney and witnesses are prepared using certain computer visuals that are not allowed at trial, or have to be redacted in some way, then the attorney and witnesses will have to adjust on the spot and conduct examinations in a manner in which they have not adequately prepared. The discomfort and quick adjustment might be mistaken for lack of credibility or lack of professionalism.
5. A strategic benefit of disclosing powerful, computerized graphics is that they often send a message of strength, preparedness, and resolve to the other side that may enhance one's bargaining position if settlement is still an option. They let your opponent know in a very striking way that your side "means business." In other words, their effectiveness should not be reserved only for the jury.
6. Bogus evidentiary objections to visual technology often need to be responded to adequately. For example, the extreme effectiveness of a compelling visual presentation should not sustain an "unfair prejudice" objection any more than should an attorney's extreme effectiveness of his or her unique, clear style of speech. The concern for unfair prejudice does not mean the judge is required to equalize the representation resources and effectiveness of both sides.
7. Proper timing between testimony and visual technology is necessary in order to avoid sustainable objections. A witness being asked "what happened next?" when a computer generated timeline of events is already up on the screen for all to see may prompt a "leading question" objection because the answer is already presented. Therefore it is crucial to ask a verbal question about the event, let the witness answer, and then support that answer with the computer graphic that visually represents the testimony. Even without an objection, a timeline or any completed graphic can be distracting if it contains information that the witness is not yet addressing. Additionally, the exhibit is more understandable and digestible to the jury if it comes in small bites. Attorneys should build or layer their graphics, rather than present them all at once, which can be confusing, intimidating, distracting, and objectionable.
8. Opponents sometimes object to expert witnesses using computer animations to testify about complicated technical or scientific information because the expert witness cannot explain how the computer animation itself was created. The response to this objection is that the expert is not being presented as a computer animation expert. When a physician uses a wax human model to testify about a neck injury, for example, he or she does not also need to be an expert in creating wax models. If a judge requests that the computer animation expert testify, an attorney should provide that, although it is no more required than the testimony from a wax model expert. An expert need only be an expert in the area the expert is tendered as an expert, unless the computer animation is itself rendering the expert's opinion (see below).
9. The novelty and effectiveness of visual technology sometimes mistakenly attracts the application of a higher evidentiary standard for admission. When an exhibit is used as a *demonstrative* exhibit, it is simply used to help clarify testimony, but is not evidence itself. Therefore, as long as it is a "fair and accurate" representation of what an eyewitness saw, or is a helpful clarification of an expert's opinion, no more foundation is necessary—whether it is a hand-drawn chart or a colorful computer slide. However, if the exhibit is being used *substantively*—if, for example, the computer program took input information and then rendered an image of what an accident or some other event *must have* looked like—then the computer program and the rendered graphic will require a much more elaborate foundation.

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Presentation and persuasion mistakes

1. When computer graphics are properly disclosed and deemed legally admissible, it is important not to waste the opportunity by presenting them poorly. As a general guide, good graphics are those that are easy to understand, largely self-explanatory, and cost-effective; they are not overly complex for the point, or more of a showcase for the technology than for the justness of a client's case.
2. A common presentation mistake is to use too much text in a PowerPoint presentation, and/or to read the visuals to the jury like a large visible teleprompter. These mistakes lead to one of the undesirable results attorneys are hoping to *avoid* by using technology—bored jurors. You should never expect the jury's "undivided attention," if you are dividing their attention between simultaneous written words and spoken words, and boring them in the process. Instead, toggle between relying solely on your oral presentation, letting your visual aids speak for themselves, and using your visual aids emphasize and underscore your speech.
3. With visual aids, often *less is more*. Every detail in a case is not so important that it should be emphasized visually. Like new law students who highlight almost all of the text in their assigned reading, if most of a case presented is highlighted by visuals, then the important points are hard to distinguish. To correct this problem, instead of trying to edit down your visuals, put aside everything you have created for trial, start over, and include only visuals that are absolutely necessary. Like a good movie director, you should leave much material on the cutting room floor.
4. With all visuals, attorneys need to have a basic command of the medium and equipment. Most jurors will not hold your lack of knowledge about how to restart a PowerPoint presentation against your client. However, jurors will not be so forgiving if the problem is not quickly remedied. As a result, many attorneys have back up systems in case of a computer crash, as well as spare hardware, such as extra projector bulbs or VGA cables in case there is a hardware malfunction. Such problems are fairly rare, but they do happen, and the "show must go on."
5. In the end, if the focus is on the case and not the technology, the visual aid will not fail from the distraction of the use of a computer. If a jury dismisses an attorney using a computerized exhibit as being "too slick," that attorney should reflect on themselves and their case and avoid blaming the technology. Long before electronics were invented, jurors would find some attorneys unbearable—and the reasons were usually their presentation style and personality, not their props. Technology merely reflects an attorney's message and makes it clearer. Thus, if the message is not such a good one to begin with, then the technology will just make that mediocre message even more mediocre. But if the message is a good one at its core, then the technology will make that message even better.

The Bottom Line

Attorneys should use visual technology in cases involving a high volume of complicated information because, by all accounts, it will improve the jury's ability to understand, remember, and ultimately be persuaded. Attention and basic preparation regarding admissibility issues and presentation style should eliminate mistakes and the inability to overcome many objections. With so much to gain and so little to fear, computerized exhibits should continue their trajectory towards the commonplace in the courtroom, especially as more jurors come to expect them, and more attorneys are comfortable and adept at using them.

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