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Effectively Using Technology in a Med Mal Trial

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A few years ago, many lawyers lacked the fundamental tools to effectively use technology to present evidence in a complex medical malpractice case. Records were blown up, mounted on boards and manually held up for the jury's review. As courtroom presentation technology has evolved, more and more lawyers, paralegals and IT staff have become familiar with the tools to make effective courtroom presentations. In fact, a cottage industry has sprung up, offering the full gamut of services necessary for counsel to prepare a brilliant technologic presentation at trial, and "how to" articles are now commonplace, such as Gregory P. Joseph's article titled "A Simplified Approach to Computer-Generated Evidence and Animations" and Diana G. Radcliff's article titled "Using Trial Consultants: What Practitioners Need to Know."

The question for trial counsel on both sides of the medical malpractice case is no longer whether or not we can use technology in the courtroom but whether we should. The question of the admissibility of evidence presented through technology - scanned documents, video, computer graphics and animation - is left to the sound discretion of the trial court.

While it is virtually certain that technology will be used in the courtroom in substantial matters involving commercial disputes, construction site accidents, defective products and pharmaceutical cases, the same cannot be said for medical malpractice cases.

MED MAL TRIALS LAG IN TECHNOLOGY

Medical malpractice trials have not yet gone fully high-tech. Most defense lawyers, presumably with the support of their carriers, do not use technology in the defense of a medical malpractice claim. A growing number, yet still relatively small percentage, of plaintiffs lawyers use nothing more than the simplest technology to present their

client's case. A variety of factors have led to this most interesting non-development in medical malpractice trials.

First, medical malpractice trials are typically highly charged, acrimonious battles between injured individual plaintiffs and dedicated and skilled doctors. Simply put, technology can, at times, get in the way of the jury's view of the critical issues before them. Computer-generated graphics can be overused to the extent where the witness, whose testimony is the paramount issue in jury decision-making, is overshadowed by videos and graphics.

Second, if one side uses technology and the other does not, the jury might consider the disparity as a significant issue. For example, if a plaintiff's attorney arrived in the courtroom with high tech equipment, scanned documents, synced depositions and IT support staff, while the doctor's attorney did nothing more than hold the paper record up in his/her hand in front of the jury, the jury might reach conclusions based upon considerations other than the evidence. Outside of a metropolitan courtroom it wouldn't take much to reach the conclusion that the jury might be biased against the well-financed, high-tech plaintiff's lawyer. On the other hand, the jury might believe the side using technology was better prepared. However, used effectively, some technology could add impact and credibility to either side's cause in most jurisdictions.

Third, special consideration must be given to the fine art of utilizing technology in cases that boil down to issues of credibility. In the heat of cross-examination of a plaintiff or doctor, a prior inconsistent deposition statement presented by video clip, with synced transcript, could be a powerful weapon. However, overuse will dull the knife's edge quickly. Technologic failures will have the jury laughing at the presenter. To attack credibility, technology needs to be used sparingly, in a timely manner, with precision and with keen anticipation of when it will be needed. Of course, the developing legal standards for admissibility must also be considered.

GUIDELINES FOR APPLYING TECHNOLOGY

A few general rules apply to all jury trials, including medical malpractice cases. When trying to make the decision about whether to use technology, what type to use and how to use it, the following overarching issues must be considered:

- How can you best control the jury's focus?
- What will have the greatest impact on the jury?
- What will cause the jury to believe your evidence?
- How can you improve the jury's ability to retain their memory of the critical evidence?
- What will the court permit?

In considering these five issues in a medical malpractice case, it can be said that there is nothing better than letting the jury focus all their attention on the individual testifying. Undoubtedly, there is nothing more compelling than a highly qualified, sincere physician, describing his/her caring treatment while looking the jury in the eye, other than perhaps an innocent, injured patient doing the same thing. In contrast, medical records, blown up, projected on a screen and highlighted to demonstrate supporting or inconsistent evidence can add substantial impact to mere words. Video clips presenting inconsistent testimony will no doubt be better retained in the jury's memory than counsel reading from a deposition transcript. As you prepare for trial, consider carefully each of these five overarching issues, and decide how much or how little technology will work for you.

DECIDING WHEN TO USE TECHNOLOGY

Let's address some of the practical issues in a medical malpractice case. The size of your case will often dictate whether or not you can afford to use technology and whether or not the jury will receive it well. The complexity of the medical issues might suggest that technology is not a good idea. The fact that your adversary is known to be a likeable, down to earth, "paper person" might lead you to conclude that too much technology will be

a bad idea. Be honest with yourself - consider how good you will be with technology while cross-examining high-powered medical experts and physicians, sorting through records and arguing the complex medical-legal issues before the court.

Remember that every picture does tell a significant story. Actual records, graphic depictions, blown up journal articles and graphic color drawings of the anatomy may be far better than mere words. It is well-documented in Michael E. Cobo's presentation, "A Strategic Approach to Demonstrative Exhibits and Effective Jury Presentations," that retention of detail after three days by verbal communication is minimal. Using verbal communication and technology at the same time will increase retention by as much as fourfold after the same three days.

Consider in your medical malpractice case whether the old-fashioned option will work. Good cross-examination and a few well-placed blowups might be sufficient to make your points. On the other hand, if more complex points need to be made, and there are many issues, you may want to carefully consider using technology.

If you do choose technology, have every medical record scanned into your trial software. Label and identify each document you will be using so you can access them easily with a stroke of a key. Have every deposition abstracted, synced with video and ready for use during cross-examination when the adverse party's witness makes an inconsistent statement. Have critical texts and journal articles scanned, blown up, highlighted and ready to show the jury as soon as your expert makes reference to them, or as soon as the other side's expert says something contradictory about them. Typed versions of illegible records are also helpful. Color graphic presentations of vital signs and medications will have impact and be remembered. Timelines with color and "movement" will have impact and add to the jury's memory of your version of events.

Be certain to let the jury know that you intend to have them see everything that is relevant. If the jury has the sense that you are attempting to selectively show them documents, you and your client will lose credibility. Of course, credibility is the hallmark of all successful trial lawyers. Watch out for the "old-school" adversary who turns to you and says, "Do you have that medical record scanned in so I can show the jury what I believe is relevant?" If you have failed to scan that record for

courtroom use, your entire use of technology may backfire.

PREPARATION IS CRUCIAL

Needless to say, if you make the decision to use any technology as part of your medical malpractice trial, preparation needs to begin in earnest the day the case comes into your office. If use of technology is being considered, the following 10 steps should be followed:

- Day one: Decide that you are going to move in the direction of using technology. Don't wait. Document your initial meetings electronically and make a commitment to do so throughout discovery.

- Determine who will assist you in creating this technologic presentation. Do you need outside vendors, trained IT staff or perhaps a skilled paralegal who can help all the way through?

- Scan all relevant documents from the beginning. You will have instant access to everything, and all trial exhibits will be ready for the creative process as the trial date approaches.

- Outline the issues, develop your theme and use the best technology at your disposal to support your case.

- Choose your technology carefully. Select software and hardware that will support your needs through to the conclusion of trial. There are a plethora of options; make sure you have input from a knowledgeable professional before moving forward.

- Add and clearly label all of your documents, X-ray films and pictures to the appropriate programs so that they will be accessible at trial.

- All deposition transcripts should be stored in one central location, abstracted as received and video synced so that they are ready for trial.

- Make it interesting. Make sure you use color, graphic presentations and time lines and keep the jury's attention by staying on message and using only technology that is relevant and supportive. Be aware of the one limitation - the legal standard for admissibility. If you have created a visual it must be substantially similar to, or an accurate depiction of, the record or event at issue.

- Prepare for trial well in advance. Although this is true for all trials, preparation for technologic presentations requires extensive planning. Make sure that you practice the use of whatever technology you are going to present to the jury long before you get to the courtroom. Avoid the temptation to

overuse technology. There is no substitute for knowing the case, good trial skills and well-prepared witnesses.

- Have your equipment ready and tested. You will need everything from your laptop and a projector to cables and simple things like duct tape and light bulbs. Watch someone else make a technologic presentation in the courtroom before you try it for the first time.

Medical malpractice trials are unique. Using technology is not a foregone conclusion as it has become in other litigation settings. Careful use of technology can shift the jury's focus, help them remember complex medical information, and affirm the credibility of you and your client. However, used in the wrong case, the wrong jurisdiction, or against the wrong adversary, and without proper preparation, technology can be your ticket to losing your medical malpractice case. We know you can, but don't forget to spend quality time considering whether you should. •

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