High-Tech Trial Lawyers and the Court: Responsibilities, Problems, and Opportunities, An Introduction[*]

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Excuse me, Your Honor, but I seem to be having a technical problem, may I please . . . .

Although surprisingly few members of the legal profession have fully recognized it, it is clear that the adoption and use of courtroom technology is rapidly becoming the national norm. Data obtained from surveys conducted by the Federal Judicial Center in support of Courtroom 21 research, for example, showed that for the thirty-one reporting United States district courts approximately one fourth of all courtrooms were "high-tech."[1] How far we have come can also be seen from the current intent of the Social Security Administration to convert all of its approximately 1,400 hearing rooms to incorporate modern "courtroom" technology.[2] To date we have been primarily concerned with questions of courtroom design, comparative technology use, and, occasionally, issues of law relating to that use. What we have not yet come to grips with, however, are the practical implications of that use in terms of the relationship between high-tech trial lawyers and the courts. This is especially true when for one reason or another courtroom technology appears not to work adequately.

Traditionally, judges assume that counsel will attend court on time, be properly attired, and will perform competently. All of these can be problematical at times, but everyone understands the legal, ethical, and practical requirements and assumptions. Courtroom technology, on the other hand, is new.

Assume that trial is taking place in one of the many high-technology courtrooms that dot the United States and Australia and which are slowly expanding in number elsewhere.[3] Having been advised of the availability of the courtroom's evidence display technology, counsel in the midst of a witness examination endeavors to use it, only to discover that the courtroom's

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[1] The Use of Technology in the Jury Room To Enhance Deliberations § 3-12.00 (2002), available at http://www.courtroom21.net/news/SJI/pdfs/3.12%20the%20federal%20courts.pdf

[2] Deputy Director for Courtroom design and Technology Martin Gruen and I have served as consultants on this project.

[3] High-technology courtrooms outside the United States and Australia include courtrooms in Canada, England, Scotland, Israel, Singapore, Hong Kong, and the Netherlands (the "Yugoslav War Crimes Tribunal.")

document camera[4] appears not to be working. Counsel advises the judge of the problem and requests assistance. What could or should the Court do? An appropriate answer requires that we remember that the "Court"pragmatically consists of the judges, court managers, and now, court technologists. What could be wrong?

- Counsel may not know how to use the camera properly;
- Counsel may know how to use the camera properly but may have accidentally failed to do so by chance or fluster, or even intent;[5]
- The document camera may have a mechanical or electronic malfunction;
- The judge or deputy clerk/courtroom technologist may have failed to use the courtroom switching system to enable the document camera's image to be displayed.
- The courtroom's video distribution system or switching system may have failed in part or in whole;
- The courtroom's display(s) may have failed.

Further, in light of the wonders of modern technologies any electronic or infrastructure problem could be a one time "glitch" or an amazingly difficult to diagnosis intermittent problem. In short, a judge confronted by a lawyer with an apparent technical need may have little idea of how severe the problem may be or what may be necessary to resolve it. It is easy to suggest that the judge should be sympathetic and helpful. The reality, however, makes it clear that the suggestion is overly facile.

My goal in this short essay is to set the stage for a discussion of the interdependent responsibilities of court and counsel in the context of technology-augmented trials, especially when courtroom technology fails, or appears to fail, to work adequately. Let us, then, review the general reality as it relates to courtroom technology as it really exists.

[4] A document camera is a vertically mounted television camera that when projected to a display device allows counsel to show images of anything under the camera, customarily documents, photographs, and physical objects. Often known as "Elmos," these cameras are marketed by a wide variety of companies including DO AR Communications, WolfVision, Samsung, SONY, and ELMO.

[5] Mollie Nichols of the Texas Attorney General's Office reports that she has encountered lawyers who purposefully fail to use the equipment properly, either because they do not want to appear as a slick city lawyer or because they understand that they will fail to use the equipment properly at some point in the trial. Instead, the lawyer portrays himself as a "poor country lawyer" bumbling away with the new-fangled technology hoping that the jury perceives their ability to use the equipment as a success and rather than perceiving their incompetence with the equipment as a failure.

Goals

The Court

The Court's overreaching function is to revolve disputes fairly. In the real world, the Court must do so as quickly as may be possible using the fewest possible human and financial resources. Most judges appear to wish to be perceived as firm but fair, of sound judgment, good case managers, and, usually, as courteous.

Counsel

In the Anglo-American adversary system, counsel seek to vindicate their client's positions. Success is paramount, and anything that interferes with a case presentation in such a way as to potentially harm the sought-for verdict is highly undesirable. Counsel's interests are not only the client's interests, however. Counsel are constrained not only by law but also professional ethics, the violation of which can lead to formal sanctions. The financial and human picture can be contradictory. Lawyers who represent clients on an hourly basis theoretically have no reason to be concerned about wasted time in trial. Yet, those same lawyers often have other cases pending and the need to devote time to those cases, augmented by a potential interest in marketing oneself to future clients as a cost-saving efficient litigator, may deter unnecessary time wasting. Plaintiff's counsel working on a contingency fee basis presumably wish the fastest trial compatible with winning. Pro bono or government attorneys may not be affected by fees and billing but like most lawyers usually are also short of time and desirous of efficiency.

Technology and the Courtrooms

In general

In determining who should do what when technology apparently fails, it may prove helpful to consider who has responsibility for what. Viewed from a functional perspective modern courtroom technology can be roughly divided into evidence presentation, court record, and "data" access and communications. Evidence presentation has been the primary interest of trial lawyers and the fundamental defining element of a "high-technology" courtroom. Consequently, it is with problems with evidence display technologies[6] that we are primarily concerned. At the same time, problems with other courtroom technologies are possible as well.

Court record technology is clearly the province of the court, and known problems with it may dictate a sudden halt to the proceedings. Data access and communications are more difficult to classify. Originally, this would have referred primarily to the judge's or clerk's access to

[6] This usually consists of "input" devices such as document cameras and computers and display devices such as computer monitors, televisions, and front or rear projection equipment. Annotable display devices that permit lawyers to write or emphasize images are hybrids that combine features of both.

electronic information in the courtroom.[7] Now, however, it could include court-supplied videoconferencing to provide remote appearances by judge, counsel, or witness or wireless connectivity to the Internet for counsel. The former would be a court responsibility. Wireless connectivity, however, increasingly is provided to counsel by private vendors via agreement with the court. Whether problems with such connectivity primarily would be a "court" or a "counsel" responsibility would seem to be arguable.

Evidence display technology

Initially, those lawyers who wished to use evidence presentation technology found themselves forced to obtain their own technology and ask the court's permission to bring it into the courtroom and use it. Although many courts now supply technology, counsel-supplied technology continues. This stems from a variety of reasons:

1) The vast majority of modern courtrooms as yet have little or no technology so counsel may have no choice but to bring their own;

2) The courtroom may have its own technology, but counsel wish to augment it.

3) The court may supply a complete integrated high technology courtroom, but in almost all cases requires counsel who wish to use computer-based presentations to bring their own notebook computers and connect them to the courtroom's visual display systems.[8]

When courts do supply counsel with evidence presentation technology, that technology may be permanently installed in the courtroom or may be portable and installed by the court staff in that courtroom for the given case. A number of courts are now using cart-based portable evidence display systems, often with a projector unit that projects counsel's visual materials on a permanent or portable screen.

Courts that supply technology may be classified as permissive or mandatory. A permissive court supplies technology and permits its use by counsel on a voluntary basis. A mandatory court requires the use of its installed technology by counsel.[9] The latter seems more

[7] Today this could include electronic docketing, access to e-filed materials, case and jury management software, access to legal materials, access to a realtime court record transcript, and general access to the Internet.

[8] This stems from the court's reasonable fear that allowing counsel to use CD's, DVD's, floppy disks or other media in court-supplied computers would permit at least the unintentional contamination by computer viruses of the court's computer and network

[9] And may also mandate providing discovery and evidence via computer media.

characteristic of federal than state courts within the United States and more likely to apply to major cases.[10] Mandatory courts likely are acting to maximize efficiency in case presentation.[11]

People and Resources

The Court

It should go without saying that a court consists of far more than its judges, yet we too often tend to ignore that critical fact. In the area of courtroom technology, we must also take into account the court's managers, administrative staff, and, especially, its technologists.

Few judges are "techies." When an apparently technical problem arises, those that are may choose to make a short suggestion from the bench. If that is insufficient, it would be unusual and likely indecorous for the judge to leave the bench and try to troubleshoot a problem, especially when the problem is related to counsel's presentation. I know; I've done it occasionally in student cases. It is disruptive of the judge's role, and, if repeated, can compromise the judge's necessary image of impartiality. If the judge is not to do so, who is available from the court staff to assist?

The obvious answer would be the court's technologists, but this assumes too much. The average court may not even have a staff member who is well skilled in the courtroom's technologies as distinguished from a computer or other expert whose job may overlap the area. Courts that have developed or hired courtroom technologists customarily only have a few of them and they may not be instantly available, especially if we are dealing with a courthouse with multiple technology-augmented courtrooms. Courts with technically trained deputy clerks or bailiffs should be able to provide first level immediate, onsite, help, but that help likely is to be highly limited.

The court's senior managers are unlikely to be courtroom technologists and even if they are it would be an inappropriate use of their critical skills to have them troubleshoot cases. Ultimately they are important to this discussion because they more than anyone else have the practical day-to-day responsibility to determine resource priorities and allocations and to advise the court's judges on the consequences of those decisions. In short, the court manager ought to know what the court staff can do and recommend to the judges what the staff should do.

Counsel

[10] Australia's Royal Commissions provide an Australian analog. In these major judicial inquiries (a special combination of what to an American would sem to be a legislative hearing combined with a grand jury), major technology is made available by vendors who are retained by the court for the duration of the Commission. Technology use is then mandatory; the evidence is submitted in advance to the Commission staff and then displayed during the hearing by Commission staff at the request of counsel.

[11] Based on anecdotal evidence, our usual assumption is that evidence presentation technology saves a minimum of 1/4 to 1/3 of the otherwise traditional amount of time necessary to present a case. Courtroom 21 experimentation suggests a minimum time savings of about 10% even in a short, one hour, case, with only a few documents. Display technology may also assist the finder of fact given that many people are at least visual learners who will better understand information presented visually as well as aurally.

Unless they graduated from William & Mary Law School within the last three or so years, it is safe to infer that most lawyers have not received law school-based technology-augmented trial practice instruction.[12] They must therefore develop their skills after graduation from law school. The National Institute for Trial Advocacy (NITA) has begun to offer technology-augmented trial practice instruction, and the Courtroom 21 Project expects to do so in a more comprehensive fashion in the 2003-2004 academic year. Federal and state prosecutors have access to the National Advocacy Center and its numerous technology-augmented practice courtrooms. Texas's Office of the Attorney General has provided technology-augmented evidence presentation instruction for some years. Notwithstanding these efforts, there are few in-depth opportunities for trial lawyers in general to learn technology presentations skills. This tends to trigger discussions focusing on *court* responsibility for training the bar, especially when the court unveils a new high-technology courtroom.

The question of the degree to which a court could or should provide the local bar with training assistance is an on-going debate. Most courts with high-technology courtrooms seem to have inherently agreed that they have an orientation and familiarization requirement. Thus they supply the bar with some form of information about the court's equipment, perhaps by videotape or web site, and may provide the bar with onsite opportunities to visit the high-technology courtroom when it is free. Some may conduct periodic familiarization sessions, and some may set up ad hoc case-specific meetings. These tend to be equipment specific sessions. They are rarely if ever general training sessions. When the organized bar is involved, the tendency for the bar is to provide lecture or demonstration sessions rather than detailed hands-on training. In short, most trial lawyers are unlikely to be able to easily find comprehensive trial presentation legal technology training. Of course that doesn't foreclose appropriate training and education; it just makes it harder.

Lawyers have a general professional ethical duty of competence.[13] Should that duty extend to competence in employing courtroom technology, as we would urge that it does, it creates an affirmative duty on counsel to learn how to be at least an adequately competent high-tech trial lawyer, when attempting technology use. With the ethical imperative in play, judges should be able to assume basic competence on the part of counsel appearing before them. They, and the court generally, ought not to have to assume responsibility for assisting a lawyer with basic operations that a lawyer ought to know.[14]

[12]Every William & Mary Law School student receives basic hands-on training supplied by the Courtroom 21 Project and must then try a simple bench trial using the McGlothlin Courtroom's technology. Students may also take specialized courses in Trial Advocacy or Technology-Augmented Trial Advocacy ("Tech Trial Ad"). An increasing number of other law schools offer elective trial advocacy courses in technology-augmented law school courtrooms.

[13] MODEL RULES OF PROF'L RESPONSIBILITY R. 1.1 (2002)["A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."]

[14] For example, a notebook computer ordinarily will not output its video to an external monitor (here the courtroom's display distribution system) unless it is instructed to do so, customarily by pressing keys, "fn" and F8 together. The court should not have to instruct counsel in how to do this. Similarly, unless otherwise set, most computer have default power-saving schemes that will put the computer to "sleep" if unused for a long enough time. The court

A potential complication comes into play when counsel hires an outside vendor to handle counsel's technology. The Courtroom 21 position has long been that ideally counsel should handle presentation technology personally. However, we have qualified that to add that if counsel lacks either competence or self-confidence counsel should use a competent assistant or outsource in-court support to a commercial vendor. Should a judge be able to assume that at least outsourced technology support is "expert" support? Does outsourcing potentially deprive counsel of some degree of judicial discretion with the judge assuming that although counsel might merit some court assistance an expert's help should negate the need?

Responsibilities

It is not ordinarily the court's responsibility to assist counsel who is having difficulty arguing law or trying a case. The adversary system assumes competent counsel. The court does have discretion, however, to step in so long as it can do so impartially, and in criminal cases may have a special duty to do so in a criminal case to protect the rights of the defendant. If counsel has the responsibility to act competently when using technology at trial, what, if anything, is the court's responsibility?

In part the answer to this question *may* depend on perspective. Is courtroom technology ever the court's responsibility? In courthouse design seminars and at other times United States District Judge James Rosenbaum of Minneapolis has argued that courtroom technology is so essential that it should be equated with light, heat, and air conditioning as basic responsibilities of the court. When the courthouse's basic systems fail, no one expects the lawyers to step in and restore habitability.

Yet, even if one agrees with Judge Rosenbaum, does permitting or even providing courtroom technology carry with it court responsibilities for its maintenance and use? Whether the court is mandatory or permissive could prove not just relevant but determinative. If the court mandates the use of technology, especially its own technology, one can plausibly argue that it voluntarily takes on a special responsibility to assure that its technology works and to assist counsel when counsel encounters a difficulty that counsel cannot reasonably be expected to be able to resolve without court help.

At the same time, many members of the legal professions are unsure of how to classify the use of courtroom technology. To some it appears an optional "frill," of uncertain value (a perspective of course that is hard to maintain in a mandatory court). If courtroom technology is an elective matter of no great consequence arguably its absence or failure is not a matter of consequence to counsel or court.[15]

What indeed is the consequence of the court's providing courtroom technology to counsel, even on an optional basis? Is it reasonable to argue that the court has done so without any responsibility to assure that the technology at least works? If the court's courtroom

should not need to assist a lawyer who complains of catastrophic system failure when the only problem is counsel's ignorance of the need to alter the power-saving time periods.

[15] Of course, if it is of such uncertain value, we should be questioning why we are devoting such great resources to installing and using technology in our courtrooms in the first place.

technology does work, does the court take on any responsibility to passively or actively assist counsel who cannot make the technology work properly?

The Impact of the Realities of Life

In an ideal world, we might posit the following assumptions or conclusions:

- The court has made sufficient information about its technology available to counsel well in advance of trial;
- Counsel are competent and know how to use their own (counsel supplied) technology as well as that provided by the court;
- Court supplied technology is regularly checked each day before trial and is regularly and properly maintained;
- When technical malfunctions occur, they are readily and quickly diagnosable;
- Each courtroom has in the courtroom a technically trained and competent staff member who is readily available to troubleshoot;
- Each court has at least one high-end technologist available to troubleshoot major infrastructure or other equipment problems along with sufficient spare parts for reasonable repair;
- The judge can grant a recess of sufficient length to permit any necessary repairs or adjustments;
- If a delay in presentation is necessary, a party's presentation of the case will not be adversely affected by the problem.

Note that even in an ideal world, a lengthy recess might be necessary in any given case. However we do not live in an ideal world. In the real world it is at least possible that NOT a single one of these assumptions or conclusions is accurate. Yet, the court still must deliver justice and do so in an efficient fashion. Accordingly when counsel says,

Excuse me, Your Honor, but I seem to be having a technical problem, may I please . . . .

What should the court do?