SOFTWARE TECHNOLOGY ON A BUDGET

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CHAPTER 20

STEPHEN F. MALOUF

Stephen Malouf is a member and Life-Fellow of the American Board of Trial Advocates and a Fellow of the American Bar Foundation and the Dallas Bar Foundation. He has been selected a “Texas Super Lawyer” by Texas Monthly Magazine and recognized as one of the "Best Lawyers in Dallas" by D-Magazine.

Recently, Mr. Malouf represented the government of the Congo in litigation involving a claim of unlawful expropriation of a gold-mining project and in negotiating resolution of sovereign debt judgments of the High Court of Justice in London. He was also retained by the surviving relatives of 17 passengers killed in the crash of the Air France Concorde at Charles de Gaulle Airport in Paris.

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Austin Lawyer, Jason Coomer, has been practicing law since 1995 and helps Texans that have been wrongfully injured or killed as well as people that have lost their home and personal property through fire, toxic mold, lead paint, or other toxins. **The Law Office of Jason Coomer** handles Personal Injury Claims including Residential Fires, Toxic Exposures (toxic mold, lead paint, black water), Automobile Collisions, Wrongful Death, Dangerous Conditions, & Construction Accidents. The Office also handles Consumer claims including Apartment Fire, Lemon Home, Negligence Construction, Construction Defects, Fraud and Misrepresentation, and Residential Fire & Toxic Tort claims. The Office also handles Computer Law including Domain & Intellectual Property Disputes, Business Development, & Breach of Contract.

AbogadosdeTejas.com, LLC, is an information technology consulting firm that provides Web Presence Development, Litigation Support, and Law Office Information Technology Consulting. Web Presence Development includes designing a Web presence that is tailored to the specific practice of a lawyer or law firm. Litigation Support includes development of presentations, creation of graphics, organization of large amounts of data, preparing and responding to E-discovery, video editing, and trial preparation. Law Office Information Technology includes setting up networks, databases, and other information technology used in law offices.

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I. INTRODUCTION

Technology is the great equalizer in a trial practice. Let me tell you what I mean. In 1996 my office spent about $75,000 to pay for computer-based legal research, including Medline access. In 2004 my office spent less than $4,000, and probably conducted at least twice as much computer-based research as it did in 1996. The reason for this is simple. Let's start at the beginning.

The Digest system for locating caselaw grew out of necessity. Most courts do not publish their opinions. And those opinions that are published appear in the books in chronological order. The Digest system was intended to make it easier to locate cases by subject. The alternative to using the Digest system was to read EVERY case from EVERY court of interest, trying to locate cases on a particular subject. West Publishing Company decided to collect, analyze, and index court opinions, and publish them in the Reporter system, with the Digest acting as the subject matter index.

The process of indexing cases using the Digest system grew out of the need to group cases by subject matter in order for the lawyer to have some reasonably logical way to locate cases of interest. For example, if you had a contract case and were interested in the defense of failure of consideration, you would go to the Digest and look in the section on "Contracts" and the subsection on "Defenses." And you would hope that the individual at West responsible for reading cases and slotting them by subject was competent at his job. Computer-based research has rendered that model irrelevant.

Computer-based research services such as Loislaw, Westlaw, and Lexus now make the full text of opinions available, allowing you to search every opinion without the need for using the Digest, or similar system. And a service such as Loislaw allows you unlimited searches of every state and federal database for about $1,800 a year. Similarly, the Internet has become the go-to source for information on every subject from stress fractures to neurosurgery. Simply stated, information management has displaced information gathering as the practice challenge for the trial lawyer.

II. CHEAP (MOSTLY) TECHNOLOGY THAT WORKS

A. Presentation Software PowerPoint and Corel Presentations

Utilizing basic graphics software, such as Microsoft PowerPoint or Corel Presentations, you can create text images which might consist of a question and/or answer in a deposition. If you use a recent version of WordPerfect, a copy of Corel Presentations may have come "bundled" with your word processing program. The same is true of Microsoft Word and PowerPoint. You can also create graphics, bar charts, and import scanned photographs or x-rays, as well as animations and videotape. These various "files" can then be incorporated into a "slide show" utilizing the same graphics program. This will generally permit you to plan and present the images sequentially (or at random). I will demonstrate the use of these programs during my presentation.

Sanction II: Several companies sell software designed to allow an attorney to display photos, videos, documents and other forms of evidence to a jury. We use Sanction II from Verdict Systems LLP at 480-627-2430. The cost is $595. I will demonstrate its use during my speech. With this package, and a scanner, you can make your entire presentation demonstrative.

Macromedia and Quest: These are relatively expensive programs that allow you to author interactive CD's. Within the past few years we have begun to create Interactive Settlement Brochures. The Brochure is much like any multimedia title incorporating graphics, text, animation, photographs, and videotape in an interactive format. We create our CDs and distribute them to the defense attorneys and their clients at mediation. We also make certain to have a computer set up at mediation in the room in which the defendants are going to spend their day. The defendants then have an extended opportunity to "interact" with our Settlement CD as the mediator shuttles back and forth. We have published approximately 60 of these Interactive Settlement Brochures and they have been extremely useful in our mediations. If you would like a copy of one of our written settlement brochures or Interactive Settlement Brochures please call my office or drop me a note and I will send you two or three examples on a disk. You are free to utilize these brochures and adapt them to your own cases. I am also delighted to speak with you regarding the use of multimedia operating software to create your own interactive settlement brochures.

B. Content

There are three sources of medical illustrations that we use frequently. Frank Netter's *Atlas of Human Anatomy* is available on CD for approximately $99, on the Internet, or a medical school bookstore. It contains hundreds of anatomical illustrations that can be copied into a graphics presentations program such as Corel Presentations or Microsoft PowerPoint.

Another source of medical illustrations is the Internet. There are a number of sites that permit you to download, free of charge, all types of medical illustrations. In order to access these sites, you should conduct a search using the phrase "medical illustrations." As with Netter's Atlas, these images can be pasted into a presentation program.

We also use a commercial medical illustration company by the name of MediVisuals. MediVisuals will provide you stock images in hard copy enlargements ($422-$595) or as digital files ($250-$350). If you purchase the blow ups, MediVisuals will send a digital file, free of charge. The digital file can then be used in your presentation software.

Photographs are another type of demonstrative evidence that are used quite frequently. Normally, you might expect to use a 4x6 inch photograph as evidence. If you don't have a scanner in your office I would suggest that in the future you identify the significant photographs that you intend to use during trial and have your local film lab either scan the negatives to a digital file or scan the photographs to a digital file. These files can then be incorporated into a presentation.

I also strongly recommend that you search the Internet for information on the opposing party. In a commercial case, or any case involving a large business, chances are that you will find useful information by simply going to that party's website.

C. Projectors and Screens

It is now possible to purchase a data/video projector like the one I am using for this presentation for less than $1,500. Indeed, if you search on eBay, you can purchase a new projector such as a Dell 2300P for less than $1,300. Ten year ago, a projector having the same brightness would have cost over $10,000.

We use projectors manufactured by Dell, Sony, Viewsonic and Epson. In-Focus and Proxima also make terrific projectors that will perform well in the courtroom. You should be sure to get a projector that has enough light output to allow you to make your presentation of evidence without dimming the other courtroom lights. Light output is measured in lumens and a projector capable of an output of 2000 - 3000 should be adequate.

A large screen for your projector will cost between $500 and $3,000. I recommend Dalite, Stewart, or Draper screens. Dalite makes series called "Fastfold" and "Insta-Theater" that work well in the courtroom.

D. Other Stuff

When you are trying a lawsuit, you do not want to be tethered to a keyboard and mouse. A wireless mouse or wireless keyboard (or both) are terrific tools for a trial lawyer to use in the courtroom. The BEST wireless products are sold by Gyration and can be seen at gyration.com. I recommend either the GyroRemote or the GyroMouse as well as the Mobile Keyboard.

Finally, there are several Internet sites that the trial lawyer MUST know about:

sec.gov
publicdata.com
Pacer
Medline
Texas Secretary of State
google.com

I will discuss each of these during my presentation. Now that you know what to buy, let me tell you how we use it.

III. TRIAL LAW

Trial law has changed dramatically over the past 20 years. First, because of the incredible amount of information now available on the Internet, the old discovery models are substantially less relevant today. Of course, case specific discovery is still essential. But even that has been revolutionized by the ease with which information is now available online. Second, technology has expanded greatly the methods by which we are able to present information to the jury and completely leveled the playing field of trial law -- the 500 person law firm should never out-present the solo practitioner, and it never will if you are prepared to communicate effectively with demonstrative evidence.

The vernacular for trial lawyers really does not accurately describe how we present our cases to the trier of fact, whether judge or jury. For example, although we talk about "demonstrative evidence," this phrase is virtually absent from the rules of procedure in every jurisdiction. Indeed, it does not appear ANYWHERE in any of the Texas rules and appears in only 119 of the 177,819, Texas cases on Loislaw. It is therefore appropriate to first ask ourselves what is it that we do as trial lawyers, and how might we do it more effectively.

Our job as trial lawyers is rather simple -- we **gather, analyze, synthesize,** and **present** information.

Our success as trial lawyers largely depends upon how well we perform these tasks.

Gathering information involves utilizing the discovery methods permitted by the rules of civil procedure as well as exploring other sources of information, such as public records. The Internet is an unparalleled resource of information, and has expanded significantly our ability to locate relevant information.

A lawsuit is a relatively simple exercise and consists of two phases: 1) discovery of facts; and 2) planning and presentation of IMPORTANT facts to a jury. That's it. It is not opposing counsel's job to help you discover the facts. I have never had a defense lawyer call me up and say "hey, Steve, I have some very important documents that you didn't ask for in discovery and I am going to have them sent over this afternoon so you have all the facts." Your first job is to get the facts.

Analyzing information involves understanding the issues in your case and recognizing the significance of various facts uncovered during the discovery process. This involves and requires a review of **EVERY** document and deposition related to your case. Although at times tedious, a careful, thoughtful, and complete review of the file is essential.

Synthesizing information involves **diligently** discriminating between what may be interesting and what is **truly important**. Every client has a story to tell. But each fact upon which the totality of the story is built may or may not be significant in our efforts to impose or avoid liability. For example, I represented a client in a legal malpractice case. It seems that his prior lawyer failed to properly document a transaction involving the sale of a business. My client insisted that I know that he and his prior attorney had been good friends. On balance, although significant to my client, this fact was not too terribly relevant to the issues in the litigation. In short, **edit, edit, edit.**

Lawyers are afflicted with an apparent inability to discriminate. The lawyer as advocate often believes that if a fact is known, it must be communicated to the jury. But it doesn't. Only those facts important to your theme should be communicated. The reasons for this are simple. First, each fact you introduce into evidence is simply another fact the defendant has an opportunity to challenge. And then, each one of hundreds of facts which are otherwise completely irrelevant to your case become significant to the defense - as examples of your "stretching" the facts.

Second, the more "facts" you introduce into evidence, the less focus the jury will have on those that are truly significant. Discovery may yield hundreds or even thousands of facts, including everything from the name of the middle child of the other party's expert, to the amount of money that the plaintiff lost in earnings as a result of the tortious interference of the defendant. All too often, we are seduced by our own depth of knowledge and forget **the jury doesn't want to know the name of the accounting expert's middle child.** In other words, don't get bogged down, and don't let the other side lead you down silly bunny-trails.

Presenting information involves developing a case theme, editing the information we have gathered to fit the case theme, and planning the mechanics of the presentation, whether to opposing counsel, a mediator, or a jury. The information that you are so proud of having gathered will only be compelling if you effectively communicate it to the person or persons who will decide your fate, whether opposing counsel, opposing parties, or a jury. For this reason, you **MUST** plan how to present the information.

For some reason, **presenting** information, perhaps the most important thing we do, has traditionally been the bane of trial lawyers. For example, when it comes to trial presentations, we often leave the mechanics of presentation to hired technicians who labor without understanding the subtleties of our case. The occasional use of a videotape, graphic, or animation is not in keeping with state-of-the-art in presentation technologies -- technology can and should be used to present your case in an engaging and comprehensive way. And it can be done on a VERY limited budget. Indeed, for less than $2,000, you can make a state-of-the-art presentation to a jury.

Our presentation planning generally involves three steps, regardless of the value of the case - preparation of a statement of facts, preparation of a Story Board, and creation of demonstrative aids/evidence for trial.

IV. PRESENTATION PLANNING

A. Introduction

It is easy to "approach and then avoid" the challenges of using computers to complement your litigation skills. It takes time to learn the basics of computer operation and to understand how to utilize a computer to more effectively present your case, whether to a jury, opposing counsel, or a mediator. The key to successfully integrating a computer into your case preparation and presentation is understanding the limitations inherent in the computer and the programs one might use as part of the theater we call trial. Despite their limitation, however, computer use can make VISUAL presentations in trial virtually seamless.

Speech is the least effective manner of communicating ideas. Professionally, we are accustomed to

communicating verbally, not visually. The world, however, is becoming increasingly more **VISUAL**. For example, imagine the difference between having someone **tell** you the story of the sinking of the Titanic and **seeing** the movie *Titanic*. The movie is obviously more engaging, both because it is visual **AND** because it humanizes the event.

A good trial lawyer humanizes the case and communicates effectively by utilizing demonstrative evidence and demonstrative aids. If you go to trial expecting to **tell** your story to the jury, an attorney prepared with compelling demonstrative evidence and aids will slaughter you, whether or not he or she wins the case. The only way to avoid being slaughtered is to be prepared to effectively **show** your case to the jury. The same is true of a settlement proposal. In order to do this, you must:

1. know your case better than anyone else;
2. know how to identify and maintain focus on what's important; and
3. create compelling visual aids to assist you in your efforts to present your case to the opposing party or jury.

All other things being equal, you will out-lawyer your opponent every time if you use computers to prepare and present your case and your opponent does not. Anyone who tells you differently doesn't use computers to prepare and present demonstrative evidence. But, ALL THINGS MUST OTHERWISE BE EQUAL. In other words, never forget that demonstrative evidence or demonstrative aids are no substitute for passion and preparation in the advocacy of a cause. Take for example the last 40 seconds of Martin Luther King's speech on the Mall in Washington on August 28, 1963, considered by many to be the culmination of the greatest speech of the 20th Century. Before a crowd of over 250,000 people, King crystalized his struggle, articulated its theme, and revealed the path to its realization in the following words:

> *And when this happens, when we allow freedom [to] ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics will be able to join hands and sing in the words of the old Negro spiritual: Free at last, free at last, thank God almighty, we're free at last.*

With no props, or demonstrative aids, King defined the issue that had vexed generations. Keep this in mind as your prepare your case for presentation to a jury.

B. The Visual

1. <u>The Statement of Facts</u>

Planning for the courtroom presentation first involves the preparation of a detailed statement of facts well in advance of trial or mediation. The statement of facts is a narrative chronology of important events and a discussion of damages, much like a trial brief. We support the statement of facts by attaching important exhibits, including excerpts from depositions. Even our largest cases do not generally involve utilization of more than 35 to 40 exhibits attached to the statement of facts. The statement of facts is then utilized to prepare a mediation brief, as well as a trial plan and trial brief.

The statement of facts should be the product of a focused effort to read EVERYTHING in the file, understand its significance, and develop a **THEME.**

2. <u>The Story Board</u>

After we have completed the statement of facts, we move next to the preparation of a Story Board, using the statement of facts as our reference. A Story Board is a chronological listing of the most important events in a case, distilled from our statement of facts. You can prepare the Story Board on any word processing program. We generally try to limit a Story Board to no more than three pages and include **only** those facts for which we have solid evidence. We have each page blown up to 30" x 40" and mounted on foam core board. Generally, the cost of having this done is less than $150.

We use the Story Board in voir dire and opening, telling the jury that "these are the facts that will satisfy you that our client is entitled to prevail." Each fact included on the Story Board contains a reference to an exhibit which proves that fact. We also advise the jury that if we prove each fact on the Story Board, we believe the court will ask the jury several questions at the end of the trial. We then give the jury examples of the questions we **know** the court will ask. By doing so, we prepare the jury by establishing a connection between what is on the Story Board and what we know the charge will include. We then use the Story Board during the interrogation of witnesses. Opposing counsel almost always validate the Story Board by referring to it frequently during their cross examination of my witnesses. This is an example of a Story Board:

TIME	FACT
	July 29, 2003
07:00	Colon surgery. (Ex. 1 at 38).
11:00	To Recovery Room. (Ex. 1 at 38).
12:35	RR to Surgical Intensive Care Unit. (Ex. 1 at 128)
0.6666667	Nurse phones Appel - blood pressure is elevated. Dr. Appel orders drug to lower blood pressure. (Ex. 1 at 128).
17:00	Urine output begins to drop. (Ex. 1 at 59).
0.75	Central Venous Pressure drops from 10 to 9 to 7 to 4. (Ex. 1 at 60).
0.9097222	Nurse phones Appel - hemoglobin and hematocrit have dropped, urine output is marginal, and cvp is dropping. (Exhibit 1 at 62; Breuel testimony).
23:00	Temperature begins to drop. (Ex. 1 at 60).

As we prove each fact set forth on the Story Board, we check it off with a big green marker in front of the jury. The exhibits supporting the facts on the Story Board are the most important elements of the demonstrative evidence we use in trial. We have these exhibits readily available in the form of blowups, edited videotape, or computer generated images. At the conclusion of the case, we use the Story Board in closing argument to support our case. It is important to recall for the jury that each fact on the Story Board has been proven and the court will therefore ask the jury specific questions.

3. The Presentation

While we frequently use the term "demonstrative evidence," its meaning is sometimes unclear. Indeed, as noted above, the term "demonstrative evidence," appears in only 119 of the 177,819, Texas cases on Loislaw. **Demonstrative evidence** is anything admitted into evidence and shown to the jury. A **demonstrative aid** is anything shown to the jury, but **not** admitted into evidence. For example, you may draw on a blank chart during the testimony of a witness but elect not to offer the finished chart into evidence. That is a **demonstrative aid.** (No judge would ever prohibit you from writing on a chart during your questioning, yet you would hear no end of objections if you brought a finished chart into court and attempted to use it to examine a witness without having it admitted into evidence.)

One commentator in Texas has articulated the following distinction between demonstrative evidence and demonstrative aids:

> *Contrasted with the use of visual aids as actual evidence is the use by counsel in a personal injury case of charts upon which they list the various items of damage sought. They are used both in the opening statement and in the argument to the jury. Though frequently referred to as demonstrative evidence, they are not evidence at all in the sense that they constitute any proof of a fact or meet the tests of any of the exclusionary rules. They are merely props which counsel uses in trying his case.*

2 Ray, *Texas Law of Evidence* § 1465 (Texas Practice 3d ed. 1980). As to whether this kind of demonstrative aid is admissible, most courts follow the rule as set forth in *Harvey v. State of Texas,* 89 S.W.2d 692 (Tex.Civ.App.--Dallas 1965, writ ref'd n.r.e.):

> *[W]e have no difficulty in concluding that this chart was not admissible in evidence. It was not proof of any fact material to any issue being tried, being nothing more than the attorney's memorandum of what a witness had testified. We can think of no purpose it would serve except to aid the jury to remember the testimony of a certain witness, and we agree with appellants' counsel that the approval of such a practice would encourage the attorneys in every case to make similar charts of the testimony of all witnesses. This in our opinion would lead to much confusion,*

> *would unduly encumber records on appeal and would be contrary to the spirit, if not the letter, of Rule 281, Vernon's Texas Rules of Civil Procedure.*

Harvey, 89 S.W.2d at 693. Other types of demonstrative aids include images containing text, such as a bullet chart and Story Boards. I will discuss each of these during my presentation.

Demonstrative evidence may be nothing more than a blowup of a photograph or document that is otherwise admissible. The importance of this type of demonstrative evidence should not be underestimated. For example, if you have a case in which 1,000 pages of medical records have been admitted, blowing up one or two of those pages will focus the jury's attention on that part of the record you believe to be significant to your claims. If the underlying documents are admitted, the court is likely to also admit the enlargements.

The second type of demonstrative evidence consists of models, charts, and out-of-court experiments, etc., that are offered as proof of a fact important to your claims or defenses. For example, you might videotape an experiment such as a crash test and offer the videotape into evidence. In most jurisdictions, out-of-court experiments are generally admissible if there is a substantial similarity between conditions existing at the time of the event at issue and the conditions existing at the time of the experiment. Even when there is dissimilarity in the conditions, admission of the experiment is within the trial court's discretion if the differences are minor or subject to explanation.

You might also build a model of the scene of an automobile accident or create an animation of blood flow for a medical negligence action, hoping to have each admitted into evidence. There is a surprising lack of caselaw dealing with models or animations. Generally, however, the rules applicable to models and animations should be the same as those that apply to experiments. That is, you must show substantial similarity between the model and the scene or between the animation and medical event it purports to depict. *See, e.g. Fort Worth & Denver Ry. v. Williams*, 375 S.W.2d 279, 281-82 (Tex.1964); *Garza v. Cole*, 753 S.W.2d 245, 247 (Tex.App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.). In other words, when using models, animations, or other analogs, be certain to have them created by someone with the ability to defend their accuracy. Otherwise, you are probably wasting your money.

These general statements of the rules provide you with all you need in the way of legal argument to proffer an out-of-court experiment, model, or animation. The benchmark is accuracy **AND** the ability to prove accuracy. But understanding the basic law related to the use of demonstrative evidence is just the first step in a cohesive presentation at trial.

During the course of my presentation I will show the following types of demonstrative evidence or aids:

1. Story Board (aid);
2. Digitized, animated, 3-D CAT scan of a newborn's brain (evidence);
3. Photograph (evidence);
4. Deposition videotape (testimony);
5. Document (evidence);
6. Bar chart (evidence); and
7. Summary of voluminous records (aid).

Most of these demonstrative exhibits or aids can be shown to a jury very inexpensively. **(NEVER HAND THE JURY A DOCUMENT OR PHOTOGRAPH TO REVIEW WHILE YOU ARE IN THE PROCESS OF INTERROGATING A WITNESS.** Instead, utilize a blowup, or plan to show the document to the entire jury on a large television monitor. You may also prepare 12 binders with a copy of each exhibit and attempt to get your exhibits pre-admitted. You can then have the members of the jury follow along as you conduct your examination.)