The Prosecutor

Multitasking Ethics and Technology

By Sean Smith and Patrick Muscat

Since the last issue of *The Prosecutor*[1] magazine there have been a number of developments addressing ethics and technology. First of all, "all attorneys must educate themselves about technology in order to meet their ethical obligations to clients. The notation of just hanging a shingle and not taking time to understand the technology runs afoul with the (ethics) rules."[2]

In the summer of 2012, the American Bar Association (ABA) adopted several amendments to its Rules of Professional Conduct that attempt to bridge the gap between technology and lawyers. What does this mean to you? In a nutshell, under the model rules, all lawyers are now required to be technologically competent.[3] Any changes are unlikely to be earth shattering as the Professional Conduct rules of 49 of our 50 states follow the ABA's Model Rules. Your state will probably be adding a similar component in the near future.

In addition to staying current on technology, smart phone, laptop, and tablet users should be aware of a new section (c) to Model Rule 1.6 – Confidentiality of Information:

> *A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.*

What happens when you lose your phone, misplace it, or leave it on the prosecution's table when you take a break? If it is not protected by a password, anyone who picks up your phone will have easy access to all your e-mail, notes, and any other data that's in your phone. For many of us, our phone contains an in-depth look at our lives—activities, contacts, friends, current projects, music, books, and more. The comments to the new section state that if you take "reasonable efforts" to secure data, you may not be in violation of the new rule. What's the take away? Make sure you protect your computer, smart phone, and tablets with some kind of password so if your device falls into the wrong hands, your data has some kind of protection.

For more information on the ABA's Amendments to the Model Rules log onto Prosecutors' Encyclopedia (PE) (www.MyProsecutor.com) and see: https://pe.nypti.org/wiki/ABA_Resolution_Addresses_Lawyers_and_Technology and additional links on that page.

Competence Is More Than Just Keeping "Abreast," It Is Also Using IT Appropriately

There is no question that some of today's technological advancements are truly incredible tools that can help you with your cases. But, like any other tool, they can quickly become dangerous weapons if not used properly: think

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DWI/DUI and the automobile; medicine in the hands of a child; a nail gun in the hands of someone with no carpenter skills.

Remember the last conference you attended. How many of the speakers made you suffer though a minefield of "Death by PowerPoint/Keynote?" Or maybe they had no slides, and instead read though complex cases covering strange fact patterns or new facets of law. They clearly knew the topic they were covering inside and out, but you couldn't pay attention because their message was lost in the dense fog of their presentation.

If you've ever done a PowerPoint or Keynote presentation, think about how you prepared:

- Did you have a theme?
- Were you telling a story?
- Did you spend more than 90 hours preparing your slides so they conveyed your message?
- Did your presentation support your theme, theory and story, or was it a convoluted collection of slides covered in complex text?
- Was your presentation ethical?

Ten Easy Tips for the Use of PowerPoint in the Courtroom

There are a few tips you should remember when using PowerPoint in a courtroom. Many jurors will have had some experience with PowerPoint; it will likely have been a bad experience. PowerPoint is often misused by otherwise talented speakers. Your PowerPoint should (in essence) be an outline of your oral presentation. You should *not* have a slide for every point you want to make, just the most important ones. Remember these 10 tips when using PowerPoint in a courtroom setting.

1. Keep it simple.

This is always the best advice. Too much info on one slide is distracting and hard for the jury to focus on your point. Use multiple slides to break up one complicated slide.

2. Can everybody see and hear?

Sit in every jury chair and run your presentation. Make sure you can see and hear all the text and audio in your slides. Use callouts to make smaller text items larger and easier to see. Also make sure your judge, defendant, and defense attorney can see the screen or your monitor. If they can't, it could cause the judge to not allow your use of the technology.

3. Colors and Backgrounds.

Don't use two primary colors in one slide. My personal preference is to use conservative dark blue or black backgrounds because research indicates white backgrounds create a glare effect that annoys some jurors. Don't use fancy fonts. There is plenty of research online about what fonts people like and don't like. Adjust colors for the room. Every room is going to be different and not every color font works in the same place.

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4. Don't read from the computer or screen.

Advocates spend years learning how to present an opening or closing without reading their notes verbatim. Don't read from your PowerPoint slides. Slides should be used to enhance your point. It is not a teleprompter. Use pauses to add drama to a slide, but once the point is made, move on.

5. Use the B button in PowerPoint.

This may sound funny, but when you are in presentation mode in PowerPoint you can use the B button on your keyboard to black out the screen (you can also use the W button to white out the screen). When you have made a dramatic point with a PP slide that you want to follow up

with some dramatic oration, use the B button to black out the screen, make eye contact with your jury, and make your point.

6. Don't use PowerPoint sound noises.
Just don't. Only use sounds from exhibits. PowerPoint sounds aren't evidence.

7. Keep animations simple.
A highly technical PowerPoint user may look at my presentations and consider them simple. I deliberately do not use fancy animations or effects. There is a fine line between a professionally constructed slide to be used in a legal matter versus a slide that weakens your case because it is too "flashy." I focus on using the slides to link one piece of evidence/legal theory to another and to the relevant law.

8. Watch your gruesome slides.
Pictures of the deceased victim can seem even more gruesome on the big screen. Several of the jurors are often seated only a few feet from your big screen. You get the point. Don't offend your jury by keeping your slides up on the screen too long or using it to project super large images of dead bodies.

9. Obtain pre-trial ruling.
Our state law allows for the use of exhibits in an opening when we have a good faith expectation that they will be admitted at trial. Only once have I had an opening interrupted by anyone (a judge) because I was showing pictures of exhibits without asking prior permission. If you are at all worried about it, motion it up before trial. You don't necessarily have to give your opponent a copy of your PowerPoint (in advance of trial). Simply tell them which exhibits you wish to display on the screen during your opening. If necessary, present your opponent a PDF copy of your slide on the morning of trial. A good case that supports the use of PowerPoint comes from Arizona; *Arizona v. Sucharew* 205 Ariz. 16; 66 P.3d 59; 2003. The Court held:

> *The trial court did not abuse its discretion in permitting the State to use a "PowerPoint" presentation during opening statements.*
>
> *Prior to trial, the prosecutor informed the court and defense counsel that he intended to use a "PowerPoint" presentation during his opening statement. The presentation consisted of a series of thirty slides including: 1) a title page; 2) photographs of the vehicles and accident scene with superimposed descriptions and headings; 3) a map; 4) a listing of defendant's blood alcohol content and physical symptoms; and 5) a list of the elements of the two charged offenses. Defendant objected on the grounds that he had not received advance notice of the presentation, that Rule 19 of the Rules of Criminal Procedure is silent on the use of such material, and that the presentation referenced evidence that might not be introduced at trial. After reviewing the proposed presentation, the trial court overruled the objection noting that the presentation was not prejudicial or inflammatory [*5] and that it did not include anything that was not likely to be admitted at trial.*

10. Have a backup laptop and/or document camera.
It never hurts to have a backup especially if you are nervous about using PowerPoint in a trial for the first time. It is good to have a backup laptop.[4] Also, you have all probably used document cameras. Print out all your slides (sans animation, but still with arrows, etc.) in color and have them available in case something goes wrong. You can attach a document camera to a monitor in seconds and simply run your opening by placing the printed slides on the document camera. Some document cameras even work as a switch so you can set up a laptop and a document camera to the same monitor. Then it is as simple as flipping a switch.

Learn From the Pros, Not Just Prosecutors

We (the authors) have an unspoken rule that whatever we create or do, the other is welcome to use and make it their own. Do we steal and pillage from each other? Of course we do, but because every case or presentation is different, it's more like borrowing an idea to propel it to the next level. In addition to learning from each other, attending CLE presentations, or reading all the articles you can, it's

crucial to read and learn from some of the pros that have made delivering excellent presentations their life's work. Typically, no matter what the book is, you'll learn something if you have an open mind.

John Wolfstaetter, chief of Vehicular Crimes in the New York County District Attorney's Office, has an incredible ability to translate and apply some of the best techniques found in business books into simple concepts prosecutors can use in almost any case. One book he recently recommended was: *The Presentation Secrets of Steve Jobs: How to Be Insanely Great in Front of Any Audience.* It doesn't matter if you're PC or Mac, it's a great read.

One thing that's pretty clear from the book is that the technology used to give a presentation is irrelevant. Before Jobs gave incredible presentations using Apple's Keynote to promote the iPhone, he used PowerPoint (Keynote wasn't released until 2003) to promote the first iPods in 2001: "*1,000 songs in your pocket!*" (See: http://youtube/6SUJNspeux8). When Jobs gave a presentation he hardly used any text at all. Instead he used powerful visual images as he spoke about the products he was promoting. In fact, a Jobs's presentation typically had less than 40 words in the entire presentation.

There's no doubt Jobs was passionate about his products. But he wasn't necessarily driven by money; instead he was motivated by an ideal to help change the world and make it better with technology. Like Jobs, most of us in the field of prosecution or criminal justice are not inspired by making money, but instead we are driven by justice, a keen sense of right and wrong, and a desire to make the communities we live in better places to live.

If you are interested in tips from the business world, tips from the trial consultants or trial presentation software see John Wolfstaetter's technology handout in PE: https://pe.nypti.org/wiki/Hollywood_in_the_Well_The_Visual_Trial_-_Wolfstaetter.

Technology or Not, Prosecutorial Misconduct = Prosecutorial Misconduct

When we get excited about using new tools, it's very easy to get carried away and lay out every detail in great length because it's easy to create slides. But a recent case from the state of Washington (see discussion below) should serve as a yellow flag for the simple proposition that: prosecutorial misconduct is prosecutorial misconduct, and the medium where it occurs is irrelevant. In fact, it doesn't matter whether you violate the Golden Rules through oral statements, unprofessional conduct, a *Brady* violation, or with a visual display. As a prosecutor, you must be ethical.

Let's take a quick look at the *National Prosecution Standards (NPS) 6-8.2*[5]:

> *In closing argument, a prosecutor should* ***not express personal opinion*** *regarding the justness of the cause, the credibility of a witness or the* ***guilt of the accused****, assert personal knowledge of facts in issue, or allude to any matter not admitted into evidence during the trial. (*Emphasis added*)*

And from the Commentary to *NPS* 6-8.2:

> *Faced with closing argument, the final opportunity to espouse the people's theory of the case,* ***prosecutors need to be keenly aware of the limitations on the methods available to them for that use. Closing arguments have been the ticket back to the trial court from many appellate courts*** *that have uttered the words "prosecutorial misconduct" in relation to words uttered by the prosecutor.*

In addition to the *NPS*, be aware of your state's ethics rules and also the American Bar Association's Prosecution Functions Standards.[6] When it comes to closing statements/summations become familiar with: **Standard 3-5.8 Argument to the Jury**

> *(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.*
>
> *(b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.*
>
> *(c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.*
>
> *(d) The prosecutor should refrain from argument which*

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would divert the jury from its duty to decide the case on the evidence.

What Can't Be Done Verbally Can't Be Done Visually Either

In the Matter of the Personal Restraint of Edward Michael Glasmann, 286 P.3d 673 (10/18/2012), the Supreme Court of Washington, (5-4), ordered a new trial because the prosecutor's misconduct was "flagrant," and "ill intentioned." One particular PowerPoint slide in the prosecutor's summation presentation really pushed the court over the edge. The slide had the defendant's mug-shot with the words, "Guilty! Guilty! Guilty!" superimposed over the defendant's face. The decision goes on to point out:

> *A prosecutor could never shout in closing argument that 'Glasmann is guilty, guilty, guilty!' and it would be highly prejudicial to do so. Doing this visually through use of slides showing Glasmann's battered face and superimposing red capital letters (red, the color of blood and the color used to denote losses) is even more prejudicial.*

The thrust of the court's opinion came from a specific slide that the prosecutor created and displayed during his closing argument. The court did not find the use of PowerPoint in delivering a summation to be objectionable, but rather objected to the content of several specific slides that the prosecutor created in PowerPoint.

The opinion in *Glasmann* is an illustrative example of what not to do in a PowerPoint summation or in any other demonstrative aid, be it a flip chart or chalk board. Had the prosecutor followed the recommendations contained in *Visuals for Today's Prosecutors*, formerly published by NDAA but now out of print, the outcome in *Glasmann* would have been far different. *Visuals For Today's Prosecutors* provides several examples for creating demonstrative aids or slides to use in a PowerPoint summation based upon the evidence admitted during the trial that points to the defendant's guilt. These examples incorporate the specific evidence from the case to reach a conclusion. They are not based out of "personal opinion," but instead upon the evidence admitted at trial.

While the *Glasmann* court went out of its way to talk about the impact of electronic visuals, citing *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*,[7] the decision boils down to an improper use of a visual on a PowerPoint slide in which the prosecutor expressed his personal opinion of the defendant's guilt. The court used several specific examples of prosecutorial misconduct throughout his summation. In fact, the case has already been distinguished. In *State v. Lindsay and Holmes* (http://www.courts.wa.gov/opinions/pdf/39103-1.12.doc.pdf) a Washington state appellate court distinguished the level of prosecutorial misconduct by pointing to the three strikes found by the court in *Glasmann*:

1. The prosecutors repeated assertions of the defendant's guilt;
2. Improper exhibit;
3. Statement that jurors could acquit only if they believed the defendant.

Appellate courts in Washington have gone on to discuss, distinguish, and apply *Glasmann* in at least nine cases.[8] These cases are all worth skimming to understand the current playing field.

A 2009 case from California is another illustrative example of a PowerPoint slide going too far because it had nothing to do with the case. There, the image used was not in evidence and according to the court, "misrepresented the 'beyond a reasonable doubt' standard." In *People v. Katzenberger*, 178 Cal.App.4th 1260 (2009) the prosecutor during summation displayed a presentation where:

> *[S]ix different puzzle pieces of a picture come onto the screen sequentially. The picture is immediately and easily recognizable as the Statue of Liberty. The slide show finishes when the sixth puzzle piece is in place, leaving two rectangular pieces missing from the picture of the Statue of Liberty—one in the center of the image that includes a portion of the statue's face and one in the upper left-hand corner of the image.*
>
> *The prosecutor went on to tell the jury that "[w]e know [what] this picture is beyond a reasonable doubt without looking at all the pieces of that picture. We know that*

that's a picture of the Statue of Liberty, we don't need all the pieces of the [sic] it. And ladies and gentlemen, if we fill in the other two pieces [at this point the prosecutor apparently clicks the computer mouse again, which triggers the program to add the upper left-hand rectangle that includes the image of the torch in the statue's right hand and the central rectangle that completes the entire image of the statue], we see that it is, in fact, the [S]tatue of [L]iberty. And I will tell you in this case, your standard is to judge this case beyond a reasonable doubt." The prosecutor argued such standard was met by the evidence.

While displaying the Statue of Liberty is certainly patriotic, it's not relevant to the case, nor is it evidence unless you're prosecuting a crime that took place on Ellis Island.

If you're interested in the state of the law throughout the country on visuals and trial presentations please take a look at: https://pe.nypti.org/wiki/Simplifying_Technology/10_The_State_of_the_Law and if you know of a case that's not listed please help us by adding it to our list. Most courts have come to encourage the use of ligation technology because of the benefits it offers.

Over the next few months we will be making additional technology resources available through Prosecutors' Encyclopedia including a revised and updated version of *Litigation Technology—Becoming a High Tech Lawyer* by Mike Rogers (2006).[9] In addition, we will have increased the training resources available from Atomic Training in PE (https://pe.nypti.org/wiki/Atomic_Training) to include Office 365, PowerPoint 2013, PowerPoint 2010, Keynote, iOS7 and are working toward developing "Best Practices" for trial technology that will encompass the tools of the trade and tips on using technology at trial.

So what's the bottom line or take away point from these cases? It's simple: **If you can't say it, don't display it.**

The next time you need to create a visual presentation think of us, Sean and Pat:

Simple;
Effective;
Artful;
No-Nonsense;
Presentations;
Are;
Tops.

There are a number of proven PowerPoint templates in PE. Use them, improve them, make them your own, and send us back an idea or two: https://pe.nypti.org/wiki/PowerPoint_Templates

Feel free to e-mail us if you're looking for advice or a suggestion on how to do something visually: Sean.Smith@NYPTI.org and PMuscat@co.wayne.mi.us. Good luck.

[1] http://www.ndaa.org/members/pdf/JanFebMar_2012_Pros_trials_tech.pdf

[2] Federal Magistrate Judge John Facciola, from the District of Columbia, during E-Discovery for Federal Government Practitioners jointly produced by the Electronic Discovery Institute and Georgetown Law CLE, see: http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1372060733624

[3] www.abajournal.com/magazine/article/new_aba_rules_require_you_to_get_with_tech_programlike_it_or_not/

[4] You can purchase a small HP, ASUS, ACER laptop for a few hundred dollars. It may be a tad bit slow, but it is small and works as a great backup in a pinch.

[5] http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf

[6] http://www.americanbar.org/groups/criminal_justice/policy/standards/ prosecution_function_standards.html

[7] http://lawweb.usc.edu/why/students/orgs/ilj/assets/docs/19-2%20Jewel.pdf

[8] http://scholar.google.com/scholar_case?about=9382563844211821589&hl=en&as_sdt=0,3

[9] https://pe.nypti.org/wiki/Litigation_Technology_-_Becoming_A_High-Tech_Prosecutor

NOTE TO LIBRARIANS

You have undoubtedly noticed that *The Prosecutor* magazine has not been printed for about a year. The last issue printed was volume 47, #1, October/November/December 2013. With this issue—volume 48, #1, January/February/March—we will resume our regular printing schedule of four issues per year in 2014. We apologize for the disruption in publication.

Jean Hemphill
Editor