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STORY TIME: EMBRACE MULTIMEDIA ADVOCACY IN TRIAL

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Lawyers have complained for generations that trying complex suits requires them to dumb down the content of their cases for the jury.

Dean Erwin Griswold wrote in the 1962-1963 Harvard Law School Dean's Report, in words quoted widely since, that the jury trial in civil cases "is the apotheosis of the amateur. Why should anyone think that 12 persons brought in from the street, selected in various ways for their lack of general ability, should have any special capacity for deciding controversies between persons?"

In recent years, skeptics have added the growth of multimedia evidence and argument to their list of complaints about perceived impediments to fair trials.

But a compelling case exists that using multimedia increases juror competence. At least three reasons should prompt trial lawyers to use, and trial judges to embrace, multimedia devices. First, scientific and other high-level learning depends upon visualization; the best advocates, like the best teachers, teach by using visual aids. Second, multimedia argument advances the ancient art of advocacy through storytelling. Third, the forces of technological innovation will put lawyers who fail to embrace these methods out of business.

• *Visual tools are key to teaching complex subjects*. A long tradition supports using visual aids to facilitate advanced learning, in and out of the courtroom. Take Albert Einstein. As Walter Isaacson notes in his biography, "Einstein: His Life and Universe," when Einstein reflected on his accomplishments in physics, he said, "These

thoughts did not come in any verbal formulation. I very rarely think in words at all. A thought comes, and I may try to express it in words afterward."

Good trial lawyers know this. As Houston trial lawyer Mark Lanier observed in a November 2008 speech titled "Tort War Stories" at the Harvard Law School, available on YouTube.com, "Most human brains do not learn abstract or linear thought by simply hearing it." Lanier observes that "if you're going to learn something abstract or linear you need to see it to learn it." In fact, as he notes, one cannot do "the scientific thinking for the industrial revolution without the brain being able to process abstract and linear thoughts."

These so-called "abstract and linear thoughts" arise in nearly every significant personal injury, commercial or criminal case. With the increasing complexity of many types of trials, the decision-makers need, want and deserve cogent visual evidence and argument.

• *Multimedia argument is grounded in the art of storytelling*. The use of multimedia technology goes beyond teaching the facts to the core of argument itself.

Consider Lanier's trials representing plaintiffs in cases arising out of the drug Vioxx. Lanier used vibrant PowerPoint slide shows comparing his client's case to the television crime dramas "CSI: NY" and "CSI: Miami." Lanier even used the CSI logo in his PowerPoint to create "CSI: Angleton," the venue of the trial.

As legal scholars Neil Feigenson and Christina Spiesel write in their book "Law in Display: The Digital Transformation of Legal Persuasion and Judgment," Lanier's use of the CSI theme gave his presentation "visual rhythm," "visual anchors" and "visual continuity."

At the same time, however, Feigenson and Spiesel contend that some of Lanier's visuals seemed "gratuitous," "surreptitious," and calculated to "distract" and even "inflame" jurors. After all, Lanier used the device of TV storylines to argue to jurors about how to evaluate scientific evidence. These worries echo Griswold's complaint about jurors "brought in from the street" who are "selected in various ways for their lack of general ability."

But Feigenson and Spiesel conclude that despite these worries, Lanier's use of the CSI theme reflects the trial lawyer's age-old tool of offering stories to appeal to the decision-makers' sense of justice. Allusions to Shakespeare, the Bible or classical literature fill the books of the great arguments of the past, but those references fall flat today. Now trial lawyers must use stories their audiences understand.

• *The future will require advocating from the right brain*. Plenty of room exists to debate the scope and extent of using visual aids in trials, but there is little question that multimedia argument will continue to proliferate in the trials of the future.

This dynamic pervades every line of work, not just trial law. As Daniel Pink observes in his book, "A Whole New Mind: Moving From the Information Age to the Conceptual Age," professionals in all fields not only need to think analytically but must add storytelling skill. He observes that storytelling "doesn't replace analytical thinking" but rather "supplements it by enabling us to imagine new perspectives and new worlds. . . . Abstract analysis is easier to understand when sent through the lens of a well-chosen story."

Although Lanier, Pink and the other writers on the subject address the future of trial law and other professions, they all speak to old truths long tied to American notions of justice. In fact, these traditions have roots far deeper than Griswold's skepticism of the "apotheosis of the amateur." To the contrary, bringing civil disputes to juries (or to nonspecialist judges or arbitrators, for that matter), reflects a faith in common sense above technical sophistication.

As Alexis de Tocqueville wrote in "Democracy in America" (1835), the civil jury "imbues all classes with a respect for the thing judged and with the notion of right. . . . [E]very man learns to judge his neighbor as he would himself be judged. . . . The jury teaches every man not to recoil before the responsibility of his own actions. . . ." Cogent multimedia evidence and multimedia argument empower civil juries (as well as arbitrators and judges) to decide today's disputes in the way the Founding Fathers intended. TTL

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