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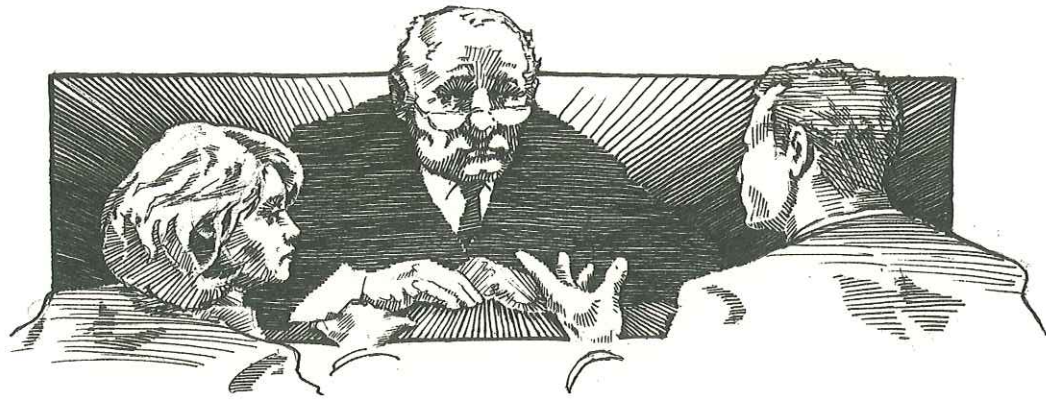
Litigation



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Under the Radar



Sidebar

Evidence—A Brand New World

“We lived on farms, then we lived in cities and now we’re going to live on the Internet.”

—*The Social Network*

We don’t talk. We text, tweet, email, and post the mundane and forgettable—little Zoe slept till 8:30, big lax game tomorrow, omg the best pepperoni pizza. We publicize unimportant, trivial incidents that reveal our lives to be painfully ordinary.

The young are addicted to these amazing instruments, but they talk less, interact less, date less. Everything is visual. Words have little value. A penny, a good old copper Abe, for each smiley face would make me as rich as Mark Zuckerberg. Words no longer express emotions; symbols convey sadness, humor, love.

Spelling rules, once inviolate, are obsolete. Words are shortened, abbreviated for speed, and space is more important than accuracy. And don’t tell me about the seafood risotto at the hip Bushwick Italian; here’s a pix. If you want to learn about the sleek bar and ancient bathroom, check out the video on my Facebook page. Words are inadequate, take too long, require too much thought and effort. Just browse the photos and videos, and you’ll see everything.

This new world has even invaded the traditional ornate rooms where serious disputes are decided. Even an ancient codger like me can’t fathom how we

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communicated years ago when we threw coins into phones. How we cursed with blood pressure exploding when the phone booth was occupied or dimes ran out. How we called the office once or maybe twice a day while traveling. How the “While You Were Out” messages piled up. How everything took so long, from doing research to typing a brief to filing a motion.

Those days are thankfully past, yet speed and ease are not without cost. Some contend we have lost an ability to contemplate, to listen, to converse, to argue in a coherent manner. Yeah, I’m one. The mania to demonize or venerate Sarah Palin’s every word, the rush to blame political rhetoric for senseless tragedies, the reckless posting of cruel words and vulgar photos are emblematic of this age of detached immediacy.

And these are our jurors; some now, all 10 years from now. Their addiction to immediacy and their ability to research parties, facts, and medical and scientific opinions present new problems for those of us who try cases. We’re arguing before those who, by age 21, have spent triple the time playing virtual games

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than reading, whose access to people, information, and thought is a click away. The practice of waiting till morning to learn the Cubbies’ losing score, of waiting till school to reveal the latest gossip, of waiting for anything is long gone.

Even we who still wear suit and tie must adapt. To succeed, we must persuade our audience, those half-dozen or so tax-paying neighbors who vow to be fair and those young citizens who are not used to or content with piecemeal information. A simple scan of a Facebook profile reveals interests, relationships, education, family—more than even the most determined stalker would crave. Not only are they used to massive amounts of data but also are adept at uncovering the most minute details in relative seconds. We must be realistic and admit that, despite Her Honor’s admonitions, some will Google and perhaps unearth more about the lawsuit on an iPhone during lunch than is provided in weeks of testimony. And they will be more influenced by what they read on a blog than by any insightful reasoning.

It’s a **New World**. And it changes each moment. The expectations of the young are much different from the expectations of my generation, who grew up with newspapers, seven TV channels, and handwritten love letters. Trial strategy must address what jurors want and how they absorb testimony and evidence. Some Neanderthals are loath to alter a winning (and even

a losing) formula. If Joe Paterno can adapt, so can we.

Use the Internet. And not just for *Above the Law*. Knowing your case means more than memorizing facts, witness statements, scientific terms. Google your client, experts, adversary, witnesses, judge. If unsure, have a teenager assist. He'll probably be able to pull up your grades from high school. And don't forget the blogs. Even a mundane two-car collision should be included. Easy to view the intersection on Google Street View. Discover info on driver, owner. You never know what'll turn up.

"I'm soooo happy" may be fodder for cross-examination if damages include medical or emotional harm.

Don't get me wrong. Having fun is in my DNA. Some of the most laughs have been at wakes and after funerals. But remember what Rooney Mara barked in *The Social Network*: "The Internet's not written in pencil, Mark, it's written in ink."

Presenting Testimony and Evidence. How and when do you provide your most effective witnesses and evidence? Do you front-load crucial documentation to satisfy this digital impatience? Do you build suspense

an injury. One personal injury blog in New York City details how the incident occurred, lists verdicts with each item of damages specified, analyzes decisions on appeal, and does it all with photos, medical descriptions, and illustrations. A half-hour search can provide numerous examples of the value of leg injuries that include biographical info about the plaintiff, types and number of surgeries, and extent of medical treatment and rehabilitation. And this blog is not unique. Should you pray that no juror stumbles across this site as you demand double that amount? Or do you make an indirect reference in your opening?

The days of using blow-ups of hospital charts, fumbling around with fuzzy X-rays, and writing on a blackboard are so Middle Ages. Demonstrative evidence must be interactive and sophisticated. It's relatively inexpensive to use deposition excerpts, videos, PowerPoints, and animations. Thirty years ago or so, we made a 20-minute "day in the life" video of a handicapped young child. Our pleas for more money were mocked by the crotchety old judge who was trying to settle the case. After viewing the tape for a few minutes, the judge turned to the defendant: You have to pay more.

Use animation to show the accident, explain the manufacturing process, make the complex clear. Perception is reality, so spend as much time on how evidence is presented as on accumulating it. You ain't gonna win if jurors can't comprehend your evidence.

Our image of an ideal attorney is of Atticus Finch standing proud, delivering righteous oratory proving the innocence of Tom Robinson. It is words we admire, the universal and gracious rhetoric that draws us to this profession. It is not some geek in stained shoes clicking a button to start an animation that has jurors nodding, smiling for now they understand everything.

Soon our entire audience will be those addicted to the visual, for whom words have less import, less influence. Oh, sure, there will be times—motions, appeals—when argument is essential, when we can exhibit the skill that attracted us to this still noble calling. Yet, to pretend that words alone, no matter how compelling, can triumph over an entertaining and enlightening video is to deny reality. Remember, Atticus's most persuasive moment is when Tom stands and shows the jury his withered left arm. ☐



Indeed, some lawyers Facebook potential jurors, searching for personal details such as TV preferences, friends, interests that may reveal empathy toward a side. I warn clients not to post anything about their claim, and you know that video of you dancing on the bar—don't you think you should delete it? As soon as the defendant smells potential liability, extensive Internet research is commenced. Posting innocuous statements like "I feel terrif" or

by slowly adding piece by piece? It depends, of course, on your case, your style, your audience. But consider all options and strategies before embarking. Do you address criticism, no matter how misplaced, that appears in a blog? Do you respond on the net, in the courtroom, or both? Neither?

As in all trial work, no rigid formulas apply, but it is a given that the net and its power create a new dimension to our practice. Easy to determine the value of