

# AMERICAN BAR ASSOCIATION

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Digital Litigators: Tips and Tricks To Practicing In e-Courtrooms



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## INTRODUCTION

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# 1 INTRODUCTION

Litigation today requires not only an attorney to be savvy with evidentiary and court rules, but also with technology. Technology has reconfigured modern practice—online legal research has all but displaced books, documents are reviewed in .TIF images more often than paper, and emails have supplanted letters as the primary mode of written communication. Courts are catching up, and the way litigators try cases continues to evolve with the technology as more courtrooms become digital.

Courts offer different technology, and some not at all, to practitioners depending upon if the court is at the municipal, state or federal level and its location. These wired courtrooms are known as digital courtrooms, e-courtrooms, and smart courtrooms, but all share the goal of making technology available to litigators, to judges and the jury. No longer is technology necessarily an option: the American Bar Association Model Rules for Professional Conduct define the duty of competence to not only know the law but also know enough about technology to assess its benefits and risks.<sup>1</sup> Access to technology, however, is only as helpful as the proficiency of the user. To successfully integrate technology into the courtroom, litigators must learn how to effectively organize their electronic files from the start. This article addresses how to practice in a digital courtroom, and offers best practices to ensure each attorney is trial ready for every e-courtroom.

## 2 Digital Courtrooms: Available Equipment, Software and Services

Digital courtrooms are those electronically equipped for attorneys to weave in technology during appearances. Broadly, digital courtrooms differ from traditional courtrooms because the use of electronic devices is accessible to attorneys; this includes, even simply, having sufficient electrical outlets for counsel to plug in their own equipment. Some digital courtrooms are specifically outfitted with built-in devices and equipment for attorneys to use, including:

- Digital Evidence Presentation Systems (“DEPS”);
- Integrated Document Camera Systems;
- Integrated Video Conferencing Systems;
- Evidence Presentation Station;
- Multiple serial connections and cabling;
- Real-time transcribed testimony;
- Flat panel monitors (at counsel’s table, jury boxes, and judge’s desk); and
- Monitors in cell blocks for prisoners to view courtroom proceedings.

This equipment is designed to enhance an attorney’s presentation of evidence, for example by magnifying documents for a witness and juror to easily view a document. For example, Integrated Document Camera Systems<sup>3</sup> is a portable document camera and projector in one. It would enable counsel to project an image of a construction drawing. While the witness testifies about at what station or designation is at issue, the witness, the Court and the jury, are all focused at the same document at the same time (rather than privately giving the document to the witness to inspect and then circulating it among the jury). Further, these Digital Evidence Presentation Systems have annotation features that enable a witness to digitally mark a document while being questioned. Using a stylus, a witness can draw diagrams, circle the location of the construction defect on the as-builts, and highlight the line item requisition that remains unpaid. The picture clarifies the testimony and the jury has an image to remember.

The services and equipment differ among courtrooms and locations, both geographically and procedurally. Before filing a complaint, it is critical that the attorney become familiar with the level and type of technology used by the court. Indeed, certain courts still use faxes and have no option to email the judge or law clerks.

Generally, the federal bar has greater access to technology than do state courts, due in part to increased funding and interests from attorneys and judges. The Federal Judicial Center commissioned a June 2002 report on technology that revealed:







94% of district courts have access to an evidence camera; 66% to a digital projector and projection screen; 93% to wiring to connect laptop computers; 57% to monitors built into the jury box; 77% to monitors located outside the jury box; 89% to a monitor at the bench; 88% to a monitor at the witness stand, at counsel table or at the lectern; 77% to monitors or screens targeted at the audience; 80% to a color video printer; 91% to annotation equipment; 95% to a sound reinforcement system; 92% to a telephone or infrared interpreting system; 92% to a kill switch and control system; 81% to an integrated lectern; 93% to audioconferencing equipment; 85% to videoconferencing equipment; 81% to real-time software for use by court reporters; 74% to a real-time transcript viewer annotation system; and 66% to digital audio recording.

Comparatively, relatively few state courts are poised to handle digital lawyering from document filing to evidence presentation systems. State courts, however, with available funding are moving towards further integration of technology at all levels. New York Supreme Court, Queens County boasts the “Courtroom for the New Millennium” also known as “Courtroom 2000.”<sup>5</sup> Within Courtroom 2000, attorneys have access to (i) real-time court reporting facilities; (ii) electronic transcripts; (iii) presentation of electronic evidence; (iv) interactive “whiteboard”; (v) touch screen monitor; (vi) animation; (vii) customized integrated electronic podium; (viii) personal computer docking station; (ix) video cassette recorder; (x) component computer.

### Electronic Filing Systems (e-filing)

Disparities do exist even within state courts; certain judicial parts may require e-filing or adopt technology rather than others. The divide within state courts is evident with e-filing jurisdictions. E-filing permits an attorney to electronically file documents via a website from the comfort of her own office, instead of physically traveling to the courthouse for the clerk of the court to affix a “filed” stamp. An attorney only needs a computer, scanner and internet access, and, of course, a credit card, to file with the court. For example, New York State Supreme Court uses the NYS Courts Electronic Filing (“NYSCEF”) for attorneys to submit all filed documents electronically and its use is becoming mandated.<sup>6</sup> Alternatively, in jurisdictions without e-filing, filings must still be personally delivered to the Court before its doors close at 5:00 p.m.

## 3 BENEFITS OF DIGITAL COURTROOMS

Embracing technology in practice can minimize delays, reduce costs, as well as emphasize a litigator’s argument. The Federal Judicial Center estimates “common evidence display equipment can save trial time (some estimate 30% or more) compared to traditional methods, primarily because all exhibits are maintained electronically and can be called up instantaneously;” Real-time testimony transcribing, for example, significantly reduces the lag-time associated with waiting for the court reporter to read back a question and answer or a line of testimony. The real-time technology includes search features allowing the reporter to recall testimony faster. As a direct result, a judge’s ruling on whether a question or objection is permissible is expedited by quickly being able to find the disputed testimony, read it, and render a ruling. The proceeding can thus continue with less interruption and downtime.

Similarly, e-filing can assist judges in rendering decisions, not only expediently but also accurately. A judge equipped with a computer on the bench has the entire case file at her fingertips and can pull up relevant documents. Traditionally, attorneys who wish to have a judge consider a document, must remember to physically bring copies to court. But with e-filing, a judge can locate, for example, a prior decision before rendering a ruling to obviate any conflicts or pull up the complaint to confirm a plaintiff alleged all elements of a cognizable claim.

### Keep Jurors Engaged with Visual Evidence

Using technology to try a case is help for many reasons, not least of which is juror engagement. In Washington D.C., 94% of jurors surveyed agreed or strongly agreed that using technology in the courtroom improved the juror’s ability to serve. See *Evolution of a High Technology Courtroom*, Honorable Herbert B. Dixon, Jr.<sup>9</sup> With electronic evidence, the images can be enlarged to emphasize an attorney’s verbal argument. In contract disputes, an attorney can immediately direct the witness

(and jury) to a disputed clause, highlight the provision and ensure all (witness, judge and jury) are focused together at the single provision of the important facts quickly. Indeed, digital evidence was said to affect a jury's outcome in *Tanasecu v. Cayuga Excavating Co.*, N.Y. Sup. Ct., Queens Co. (Index No. 16098/2011) (personal injury case zooming in on skid marks demonstrating the direction of the truck); *Ben of Levinson & Santoro Elec. Corp. v. American Home. Assur. Co., Inc.* 2009 WL 1940442 (E.D.N.Y. 2009) (using technology to zoom in on contract language); see 4A N.Y. Prac., Com. Litig. in New York State Courts §65:18 (4th ed.).

It is not, however, a zero-sum game that a litigator use technology to the exclusion of paper evidence. The two should be used in tandem as there is value in leaving a poster-board enlarged picture of a construction site, a party's damages or particular defect, up throughout questioning a witness. The attorney can leave that important visual evidence in the background but project other evidence electronically.

## 4 BEST PRACTICES FOR LITIGATING A SMART COURTROOM

Before an attorney enters a digital courtroom, there is much back office work to complete to ensure seamless uses of technology. Even those courts that embrace technology make clear adjournments will not be granted to troubleshoot computer issues. The attorney is presumed to have confirmed—before the appearance—that it is ready to boot-up and start the first day. As one California court makes clear, “Parties who intend to present evidence electronically via the Court’s electronic evidence presentation systems must be familiar with the systems prior to the hearing/trial. No court/jury time will be provided during court proceedings to allow the parties to troubleshoot issues with the parties’ equipment or the equipment in the courtroom.”

### Office Preparation

Properly staffing a legal case now not only requires competent legal prowess but also members who understand (or are willing to learn) about the technology your office has available, the ability to coordinate with vendors, and the lingo.<sup>12</sup> Having an attorney or paralegal who understands how to communicate between hard copy, .ptx files, .dwg files and natives with the IT vendor will reduce headaches as the case progresses. Staff wisely.

A well-staffed legal and IT team will get the file e-courtroom ready from the start. This includes deciding on a consistent file architecture that is easy for your team and the court to understand. Files should be saved in an easily discernable format that will enable you and the Court, if requested, to view the digital evidence on the computer and easily recall it. This may include saving the files by the document's year, month, date format and a brief description of the file to ensure all records are always in chronological order. A corresponding index should be created to itemize what pre-marked exhibits or records may be used at trial. The index can be provided to the court for use in identifying exhibits and help you stay organized.

Being organized and methodical has its overt benefits: it will reduce attorney time finding the documents. On a typical construction case, be it delays or alleged defects, nearly each will require the attorneys to review pertinent contracts, specifications, change orders, and drawings. Knowing this, when documents from clients or adversaries come in, immediately sort them categorically through the document reviewer database (i.e., Concordance or Relativity) and the central location where files are stored at your office. If a “share” drive is available for the office, which permits all attorneys access at the same time, create uniform files there (again, for contracts, drawings, RFIs, etc.). Further, have the documents scanned in a searchable format to expedite attorney review.

When appearing before the Court, either for motions or trials, the electronic documents are readily accessible to burn to a CD, upload to a thumb drive, and even print for the court. Certain trial software, like TrialDirector, requires the user to formulate a file architecture on a local drive and those files are duplicated in the software. As the trial continues, with new exhibits and transcripts, the files are saved on the local hard drive and uploaded each night into the software. Having a legal team be organized and anticipating trial once the complaint is filed will facilitate this process.







Guided by understanding how files will need to be arranged for trial, the legal team can minimize duplicative efforts during trial preparations. Otherwise, a significant amount of time and money will be redirected from preparing your case to the administrative functions of renaming files and creating folders.

To this end, it is imperative that the attorney understand what file types are needed for the trial software before discovery commences. For those who still purchase hardcopy transcripts of depositions or court appearances, later you will need to purchase (again) the file in .txt or .ptx format if you want to clearly project testimony at trial using trial software. To avoid this, order the appropriate digital file at the outset.

Companies, like Westlaw's CaseNotebook, have developed electronic systems to organize electronic files. Essentially, it is an internal database where documents are housed and annotated by counsel as the case progress. For example, once an RFI containing the crucial design change is identified, the attorney can highlight the text where the design professional clarified a modification or a contractor confirmed the installation method. From the highlighted text, a "key fact" can be created, which catalogues important information, date, description and includes a hyperlink back to the highlighted document. The fact is immortalized in the entry and the attorney or paralegal can always find it. From this, an attorney can overlay its key fact timeline over a construction schedule to show the events causing a delay, for example.

Also, CaseNotebook stores digital transcripts, and the attorney can prepare summaries and designations through the program. The electronic designations can be exported to the trial software and ready for the counsel to call up on the screen during direct examination. With all of the deposition exhibits and pertinent files stored in these systems, preparing joint pre-trial submissions are relatively easy. The exhibits are easy to locate by the descriptive filing names and once identified, can be exported to pdfs and digital "Exhibit stickers" affixed. No longer does counsel need to pre-order thousands of stickers or unnecessarily print thousands of pages of documents. Most of the attorneys' and paralegals' work can be done electronically and instead of printing five draft versions, printing can wait for the final version to provide to the Court and anyone else.

### Profile the Courtroom Before the Hearing or Trial

All of the digital preparation, however, is of no use if the judge prohibits it or the courtroom cannot support it. Counsel and its IT support staff must survey the courtroom well before trial to ascertain its ability to support the presentation the attorney hopes to give. If the courtroom has no outlets at counsel's table, then the attorney better know that before voir dire. Does the courtroom have computers? Projection screens? Portable tables? All of these questions will be answered the moment counsel travels to the courtroom.

Though certain courts may provide technology to counsel, it may not be readily accessible. The court may require counsel to fill out forms or obtain certain authorizations. When the trial team travels to the courtroom to assess the technology, it should confer with the law clerk and identify what, if any, forms or approvals are required, and obtain them as soon as possible.

The court will advise counsel of the particular date and time she is summoned. A digital litigator aware that the appearance starts at 9:00 a.m. should arrive much earlier to ensure all systems are ready when the judge takes the bench. If possible, then ask the law clerk if the attorneys (and vendors) can arrive at 8:30 a.m. and plug everything in and boot-up all systems. It would behoove the attorney to run a mock set-up with the equipment in the office and understand how much time is necessary to prepare. If the attorney cannot arrive earlier, then counsel can confidently inform the Court at the outset that it will take 35 minutes to setup. Once the attorney's presentation commences, it must be ready for any objections and know how to remove the projected image immediately while the Court renders an opinion, if so directed. If the objection is sustained, then the attorney must be prepared to transition without faltering or any delay. The sustained objection could affect the next three slides; be prepared to jump quickly to another point.

## Making the Courtroom Digital

If the courtroom does not support the digital trial envisioned, then engage a vendor (or the firm's IT department) to bring the equipment, cables, and devices necessary. Some courts, too, may welcome technology but cannot provide the attorney with the equipment necessary and are in an antiquated courtroom. Vendors can temporarily convert a courtroom to an e-courtroom with advanced permission from the Court.

While a vendor will increase trial costs, confer with opposing counsel to consider sharing equipment to reduce the expense to both parties. Conversely, if you are approached to share equipment costs but you were considering a hard-copy trial, take time to evaluate how the technological disparity may affect the client's position and your arguments. The vendors are also a great resource to troubleshoot any equipment malfunction that may (read: will) arise at trial.

## When Technology Fails

Inevitably, the best efforts to prepare for a digital trial will not insulate an attorney from technology failures, troubleshooting issues, and frozen screens. It is imperative that the attorney not only attend the trial with someone aware of how to correct these issues, but also be prepared to move seamlessly to hard-copy evidence until a break will allow time to address the technology failure. Courts will generally not grant an adjournment of the trial or hearing simply because the attorney's projector failed. Counsel is expected to proceed with or without technology.

Proceed accordingly by preparing accordingly. A set of all digital evidence should be printed and organized for immediate use at trial. All of the digital evidence should be saved in multiple locations: the local drive, the trial software, the thumb-drive, and even a CD. If for some reason additional copies need to be printed or accessed, then the attorney can quickly hand off the thumb-drive or CD to support staff in the courtroom to have copies made while the attorney questions the witness or proceeds through the hearing. When technology fails, or if an objection is sustained and the Court does not permit your electronic evidence, then the attorney must gracefully transition to the next slide immediately. If the documents are readily accessible to those in the back-office, then the crisis further dissipates because with a quick email explaining what is needed, the office team can corral the physical evidence and arrange for technical support to arrive in the courtroom.

Having a designated IT support person in the courtroom is also critical to ensure the technology bends to the court's rulings and directives. If any adversary objects to an electronic image and counsel is directed to immediately remove the image, the attorney or the support staff must be ready to hit a switch and turn the system off. If the attorney is less familiar with how to use the technology, then having support responsible for manipulating the electronic evidence and being competent in its use is crucial. Further, if the court issues a ruling precluding certain evidence, the IT support staff can work to segregate those items from the trial software, the PowerPoint, or wherever the files are located to ensure the attorney does not accidentally present precluded evidence.

## 5 CONCLUSION

A digital trial offers an array of benefits to a litigator, the court and the jury. It can increase organization, reduce delays and costs, and provides visual cues to the jury and judge to understand the issues in dispute. With its attendant benefits, however, a litigator cannot forget the rules of evidence<sup>13</sup> or that the court rules are not relaxed simply because a document is in a .pdf form, displayed on monitors or projected on a screen. Moreover, digital evidence will not cure the weaknesses in a case. Nor is it a substitute for preparedness or legal acumen. Electronic evidence is tool to amplify an already well-prepared trial strategy.

Technology can also not be ignored by the modern litigator. The proliferation of technology in our personal lives will continue to influence the legal profession and how cases are tried. The number of courtrooms offering computers, monitors, digital presentations systems will likely only increase. At some point, attorneys may not be able to opt-out of its use.





## ABOUT ZETLIN & DE CHIARA LLP

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Zetlin & De Chiara provides counsel throughout the construction planning, design and building process, from drafting and negotiating contracts to developing risk management strategies. Well-known for its courtroom prowess, the firm also represents clients in mediation and alternative dispute resolution. Zetlin & De Chiara represents domestic and international clients in high-stakes, bet-the-company matters. Many of the lawsuits in which the firm has been involved have concerned projects outside of the United States. Zetlin & De Chiara also assists clients with business formation, licensing and corporate issues. Clients also seek the firm's guidance on the benefits and challenges of new technologies, innovative methodologies, alternative construction delivery methods and industry trends. Zetlin & De Chiara serves as general counsel to numerous design, construction and real estate professional associations.

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