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INSTITUTE

# 2017 Southwest Bankruptcy Conference

## Technology in the Courtroom

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## Technology in the Courtroom

### **I. Technology Advances are unmistakable**

#### Office Technology Evolution

- Fortune 1000 companies around the globe are entirely revamping their space around the fact that employees are already mobile. Studies repeatedly show they are not at their desk 50-60% of the time. January 2016  
(<http://globalworkplaceanalytics.com/telecommuting-statistics> )
- In 2015, 37 percent of American workers telecommuted compared with just 9 percent in 1995, according to Gallup.
- “Fax machines were once hailed as powerful innovations for their ability to transmit documents electronically. But today they're almost extinct, as cloud technology and scanners allow the same process to be conducted digitally...
- “Face-to-face meetings were once essential for collaborating in groups with colleagues or partners, videoconferencing technology makes it possible for people to work together without ever needing to travel or meet in person. Today, online tools such as Skype, WebEx and GoToMeeting facilitate web conferencing and allow people in different locations to collaborate and view the same presentation in real time...
  - <https://www.adp.com/spark/articles/office-evolution-how-technology-has-transformed-business-9-888> November 2016
- Video Conferencing can also be used to deposition prep

#### *SmartPhones & Tablets*

- Roughly 77% of Americans now own a smartphone, based on a survey conducted in November 2016 by Pew Research Center; that number was 35% in 2011.
  - <http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/>
- When the Pew Research Center first began tracking tablet ownership in 2010, just 3% of Americans owned a tablet of some kind. That figure has risen to 51% as of November 2016.
  - <http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/>

#### *Drones*

- Quickly becoming an essential tool across many industries, including real estate. Inspection firms have been using them for several years to survey roof conditions.

*As of May 22, 2016, according to DMR*

(<http://expandedramblings.com/index.php/drone-statistics/>)

- Top industry use: Photography
- Second largest industry use: Real Estate
- Companies like United Aerobotics are looking to push drone technology to the next level as human inspections are often limited when it comes to heights or confined spaces. The next generation of drone inspections can provide a safe and efficient solution as they do not require the use of additional equipment, nor do they require an inspector to enter, climb on top of or go under a residence. A camera is attached to the drone (which can be aerial or ground-based) and captures high-resolution footage and full high-definition recordings and, can even include multispectral thermal imaging to detect leaks and mold issues.
- Most experts agree that drone inspections can be completed faster and at a lower cost than traditional methods.
  - <http://realestate.usnews.com/real-estate/articles/the-future-of-real-estate-5-ways-technology-is-shaping-how-you-invest/>

### *Virtual Reality Tours:*

- Utilizing Google Maps and similar programs to wander the area
- Brokers Live Streaming/Video Tours for investors purchasing outside of their local market area is not being able to walk a property or neighborhood in person.
- Development of Digital Floor Plans

### Efficiencies as a result of Apps and Mobile Access

- Access to documents/contracts/court filings via Web Based Platforms/Cloud
  - Pacer: Tracking of case progression and party involvement
    - PACER started in 1988 as a system accessible only by terminals in libraries and office buildings. Starting in 2001, PACER was being made available over the Web.

#### DebtWire:

- Tracks cases across all US bankruptcy courts, for ease of following distressed names (news, corporate information and cases), details by sector, breakdown by country

#### E-Signatures/Docusign: Sign and Track Contract Progression/Document Filing

- Provides electronic signature technology and Digital Transaction Management services for facilitating electronic exchanges of contracts and signed documents.

DropBox or GoogleDocs

- Confidentially allow documents to be shared between parties – password protected
- Access to comparables and research

LoopNet/CoStar

- Provides real property information including property facts (sales, sale history and tenants, property photos, owner contacts), market trends (vacancy and market rates) and search features to compare your property to the market.
  - Details are for owned and available lease space

Lexis Nexis: News article/archive research for expert testimony and discovery

- Computer-assisted legal research as well as business research

Hoovers: Corporate details and industry competition

**Court**

- CourtCall: For the ability to remain productive, eliminating travel and minimizing time in court
  - The idea for CourtCall came to Mark Wapnick in 1995 after being in stuck in traffic for hours after a 5 min court appearance.

**Real Estate Marketing – Past, Present, Future**

**1980s and 1990s**

Bulk Faxing (aka Junk Faxing)-\

- Widespread use in the late 1980s as a result of the development of relatively inexpensive desktop fax machines, which resulted in rapid growth in the number of fax machines in the U.S.
- The invention of the computer-based fax board provided an efficient platform for reaching those fax machines with minimal cost and effort.
- The fax machines of this period typically used expensive thermal paper and a common complaint about junk faxes was that they consumed that expensive paper without permission, thus shifting the cost of printing the advertisement to the recipient.
- Telephone Consumer Protection Act in 1991 along with action by individual states reduced the use of junk faxes at that time.

- Late 1990s, junk faxing had once again become a widespread problem in the U.S., with the entry of a number of large-scale fax broadcasters such as fax.com who boasted of the capacity to send millions of fax advertisements per day.
- In 2005, the United States Congress passed the Junk Fax Prevention Act of 2005, which additional modifications put into effect in 2006
  - We used MarketFAX Leasing, Inc. and J. Blast
  - <http://www.nytimes.com/1994/01/16/nyregion/enhanced-fax-machine-does-a-selling-job.html>

### **Late 1990s through early 2000s**

- Sending marketing messages through email or email marketing is one of the most widely used direct-marketing methods. One reason for email marketing's popularity is that it is relatively inexpensive to design, test, and send an email message. It also allows marketers to deliver messages around the clock, and to accurately measure responses.

### **Mass Mailings**

- We utilized a mailing service to reach contacts from our proprietary database.
- Where we had gaps in target groups (organizations, geographic, business type/SIC Code, etc.) we would provide criteria to our mailing service who would purchase distribution lists

### **eMail Blasts**

- In the 1990s, email was seen as a novelty for consumers; as more and more marketers started to jump on the bandwagon, inboxes soon become cluttered with unsolicited mailings and rules began to be put in place to protect consumers from 'spam'.

## **II. Using and Getting the Information to the Court**

### **Video Depositions**

- **Federal Rule 32 governs the use of depositions in court proceedings**
  - Under the 1993 Amendment too subdivision (c) of Rule 32, it states "Under this rule a party may offer deposition testimony in any of the forms authorized under Rule 30(b) but, if offering it in a non-stenographic form, must provide the court with a transcript of the portions so offered. On request of any party in a jury trial, deposition testimony offered other than for impeachment purposes is to be presented in a non-stenographic form if available, unless the court directs otherwise. Note that under Rule 26(a)(3)(B) a party expecting to use non-stenographic deposition testimony

as substantive evidence is required to provide other parties with a transcript in advance of trial”

- Federal Rule of Civil Procedure 30(b)(2) allows a party to tape a deposition by video recording without leave of court and without stipulation from opposing counsel
  - Rule 30(b)(5)(B)-(C) states that the deponent’s and attorney’s appearance or demeanor must not be distorted through recording techniques and that at the end of the deposition, the officers must state on the record that the deposition is complete and set out any stipulations made by the attorneys about custody of the recording or other pertinent matters
  - There are some types of deposition which Federal Rule of Civil Procedure 32 states can be used “for any purpose” which leads some attorneys to argue that those pieces of deposition can be used in opening arguments
    - Federal Rule of Civil Procedure 32(a)(3) and 32(a)(d) give types of deposition which may be used “for any purpose”

**American Bar Association, Litigation News, “Rockstars, Lies, and Videotape: Using Videoed Deposition Testimony at Trial”, Christina L. Dixon and Jennifer K. Hohnstein, Fall 2008**

- The article talks a lot about how body language is something that’s very important that can be conveyed in a video that cannot be conveyed just with a transcript
- Courts varying regarding allowing video use in opening statements
- “to avoid being blindsided by unexpected video clips during opening statements, attorneys should take advantage of trial-management orders and local rules to ascertain in advanced what video clips, if any, opposing counsel intends to use”
- suggests writing a letter to opposing counsel asking about their intention to use video clips in their opening statements
- also cautions that using video that is not admissible as evidence could lead to mistrial or sanctions

**56 Cath. U. L. Rev. 683, “Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials”**

- Is an article about video-teleconferencing
- Allows a witness to testify from anywhere in the world
- Questions whether or not this is constitutional since a defendant in a criminal matter has a right to confront the people that are witnesses against them and there is a question as to whether you are really able to confront someone who is only present over teleconference
- In federal civil trials there are evidentiary rules which indicate the permissible use of video-teleconferencing
- There are no clear rules in federal criminal trials about the use of Video-Teleconference

- Have to balance a defendant's right to confront a witness against the advantages/time saved of allowing witnesses to teleconference
- **Maryland v. Craig, 497 U.S. 836 (1990)** – Supreme Court case where court found that “use of one-way closed circuit television was an acceptable limitation on a defendant's confrontation right only upon a case-specific finding that such a limitation was necessary to promote an important public policy” – case where child who was victim of abuse was allowed to testify over a one-way closed circuit television – Confrontation Clause is 6th amendment
- The supreme court has found that the Confrontation Clause is not an absolute guarantee of a right to confront a witness face-to-face
- But Confrontation Clause only applies in criminal trials
- **Edwards v. Logan, 38 F.Supp.2d 463 (1999)** – case where District Court judge allowed interactive video conferencing at trial because the claim was relatively simple so there would be no difficulty in presenting facts and contentions over teleconference and the teleconference would alleviate costs and security risks of transporting the prisoner – the prisoner was being held in New Mexico and the trial was being held in Virginia so the court found it appropriate for the prisoner to participate through videoconference – judge looked at the Prison Litigation Reform Act of 1996 in part to make their decision, which states in part “To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to [section 1983](#) of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined” – must weigh the rights of the prisoner, as a defendant, to be present under Federal Rule of Criminal Procedure 43, against the greater efficiency provided by a teleconference appearance

#### **Federal Rule of Civil Procedure 43, Taking Testimony**

- 1996 amendment states “contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances... transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial”
- Even with the clear federal rule, there is still some disagreement in courts about use of video-teleconferencing for witnesses

#### **27 Suffolk U. L. Rev. 789, Jurors at the Movies: Day-in-the-life video as effective...**

- Attorneys use day-in-the life video to show the effect of injuries on plaintiffs' daily lives
- Jurors can often give heightened weight to day-in-the life videos and can be persuaded or misled by the videos

#### **44 Am. Jur. Trials 171, Videotape Evidence**

- **Editing**
  - o Inappropriate or too much editing, even if the video isn't actually tampered with, can hurt the credibility of the party offering it

- Any editing needs to avoid allegations of evidentiary tampering
- The more editing, the most difficulty with admissibility that be expected
- Video its self has the potential to be highly distorting in how it portrays events
- **Video use in Trial**
  - In some jurisdictions, the videotaped deposition of any witness who lives more than a certain distance from the place of trial may be converted into the trial testimony of the witness
  - Video can also be useful to show a demonstration of a certain technique or activity, such as a surgery or use of machinery, but the court tends to require it be shown that there is good reason for the video and that the video is not just self-serving or deceptive or prejudicial in light of conflicting evidence

### Questions

- **How can it be verified that the testimony isn't being offered out of context?**
  - **Federal Rule of Civil Procedure 32(a)(6) says:** "If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts."
- **How to properly establish foundation to authenticate video**
  - **Federal Rules of Evidence §901, Authenticating or Identifying Evidence**
    - Video must be authenticated properly, the same as any other evidence
    - "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."
    - Then gives a list of the types of stuff that authenticates evidence
    - Foundation requirements for video are same as for still photographs
- **Handbook of Federal Evidence §401:7 – Demonstrative Evidence: Photographs, motion pictures, videotapes, digital recordings, animation**
  - Is an explanation of Federal Rule of Evidence 401
  - Video tapes are admissible on the same basis as still photographs
  - Sometimes it is necessary to show that the operator was experienced and that the camera or video equipment was in good working order
  - Video of an injury can be admitted "to the same extent that the injury itself might be exhibited"
  - Videotape is generally not considered hearsay, however "if the image depicted is a person making an oral or writer assertion, or performing



non-verbal conduct intended as an assertion, such depiction is hearsay when offered to prove the truth of the matter asserted

- Ex: the driver of one car stating on video that the driver of another car ran a red light

- **Section 1983 Litigation - Federal Evidence §4.08 Videotapes**

- The foundation requirements for videotapes are derived from the foundation requirements for photographs
- **It must be demonstrated that the videotape is a “fair and accurate depiction of what it purports to depict”**
- One difference between video and still photos is consideration of whether the videotape fairly represents the pace of events
- You will need someone to be the foundation witness for the video and testify that the video provides a fair and accurate portrayal of the person, objects, places, or events depicted
- The Original Documents Rule applies to videotapes under the Federal Rules of Evidence, but in mostly cases it doesn’t apply
- The original document rule only really applies when the litigation is about the content of the video, such as in libel, copyright, and pornography cases
- The video must also be proven to be relevant and pass Rule 403
- It can be difficult to satisfy rule 403 with video because of its highly persuasive nature
- “Rule 403 plays an especially prominent role when: the tape is selective; the tape was cut and spliced; the tape has other distortions; the tape is a composite that was made after reviewing voluminous tapes; the videotape is of a staged reproduction; or the tape is a “day-in-the-life” film”
  - **Federal Rule of Evidence 403:** The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.
- **Bannister v. Town of Noble** – Case about Rule 403 and the use of day-in-the-life films in court
  - The important considerations under Bannister (1) whether the videotape fairly represents the facts in relation to the injury of the plaintiff and the impact of those injuries on the plaintiff’s everyday life (2) whether the plaintiff knew they were being videotaped for litigation (3) consideration of whether the “dominating nature of film evidence” will cause the jury to give it too much weight (4) whether the injured party can be cross-examined at trial

- If the speaker is the party against who the video is offered, the statements in the video are considered admissions and are exempt from hearsay
- Under 403, if a video is meant to be a simulation or reenactment, it needs to be “substantially similar in conditions” to the events in question, but generally you don’t need as much similarity of conditions if the video is meant to show only a general scientific principle
- **Scott v. Harris, 550 U.S. 372 (2007)** – deadly force claim arising out of a high speed pursuit – the court allowed video of the event to be used which lead to more courts depending on video tapes in court proceedings – in opinion by Scalia, court held that the court needed to view facts “in the light depicted by videotape which captured events underlying excessive force claim” in summary judgment motion when the videotape when “respondent’s version of events is so utterly discredited by the record that no reasonable jury could have believed him” -

**Use of “Evidence” in Opening Statement: The Most Dangerous Weapon in a Litigator’s Arsenal, Mindy Barfield, 2009, “For the Defense”**

- Use of videotaped deposition in opening statements is something not many courts have looked at
- **Hynix Semiconductor Inc. v. Rambus Inc., 2008 WL 190990 (N.D. Cal. 2008)** – District court granted *in limine* request that neither party use portions of videotaped deposition in their opening statements
  - o “the movant in Hynix pointed out that a party offering live testimony does not have the option to allow a jury to “preview” exactly what live witnesses will say in the opening statement”
  - o Court in opinion cites **MBI Acquisition Partners, L.P. v. Chronicle Pub. Co., 2002 WL 32349903 (W.D.Wis. Oct. 2, 2002)** as example of a time when the court did allow a party to play segments of a video deposition in its opening statements
- “courts appear to be most suspicious of displays of unsworn pieces of evidence” during opening statements
- Says that some courts don’t allow portions of a trial witness’s video deposition to be replayed during closing arguments

**Financial analysis – Live Documents**

- Electronic courtrooms make static documents a thing of the past.
- Experts often present financial predictions and analysis based on certain underlying assumptions (interest rate, value, time, etc.)
- Ability to change those assumptions on the fly in the courtroom provide in valuable information and evidence to the Court
- Logistics
  - o Laptop or iPad system

- Who controls – witness, attorney, paralegal
- Evidentiary support
  - Spreadsheet likely qualifies as demonstrative evidence
  - Foundation is similar to that of the expert report and assumptions therein
- Practice practice practice
  - If not prepared for it then don't try it

### III. The Future Use of Technology

#### Artificial Intelligence and the Law

##### How is AI being used in the legal field?

- A. Document Review. Companies are continuing to refine their AI technology for use in document retrieval, but the trend is toward developing predictive litigation analytics.
1. Westlaw – Thomson Reuters is one of two companies that is using Watson, a technology owned by IBM, to enhance its legal products. Paige E. Kohn, *How Artificial Intelligence is Revolutionizing the Legal Practice*, 43 *Litigation* 12, 12 (Fall 2016).
    - a. No discussion on how Westlaw is developing predictive litigation analytics.
  2. LexisNexis – acquired Lex Machina in November 2015 and is developing its system to provide analytics for litigation (i.e. predict average time for case termination in a particular district.) *Id.* at 12-13.
  3. Bloomberg – created its own product called Smart Code, which identifies paragraphs within cases that cite a particular statute or rule and then scores them with a strong, moderate, or weak rating." *Id.* at 13.
    - a. Still developing predictive litigation analytics to determine "the likelihood of success of particular motion type, how long it might take for a particular type of case to resolve, and how often has [a] judge been affirmed or reversed." *Id.*
  4. ROSS Intelligence – like Westlaw, it employs IBM's Watson platform.
    - a. [https://www.youtube.com/watch?v=ZF0J\\_Q0AK0E](https://www.youtube.com/watch?v=ZF0J_Q0AK0E)
    - b. Partnered with Fennemore Craig, PC for use in the firm's Bankruptcy, Restructuring, and Creditor's Rights team.
    - c. Ability to draft memos independently of human input
    - d. Artificial intelligence used to find and pull relevant case law and statutory information
  5. Ravel – this company has teamed up with Harvard to digitize Harvard's law library and uses three different approaches to the digitized court decisions:
    - a. *Case Analytics*—this approach shows how often a case has been cited in other court filings, examples of the language used, and where subsequent cases have cited certain parts of an earlier case.

- b. *Judge Analytics*— in addition to maintaining complete CVs for every US judge, this approach maintains profiles for the judges which allows users discover what wording judge's tend to use in relation to particular types of rulings.
- c. *Court Analytics*—this newest approach, released in December 2016, can help users assess possible outcomes for certain actions by showing the patterns within each U.S. court.

*AL Interview: Ravel and the AI Revolution in Legal Research*, Artificial Lawyer, <https://www.artificiallawyer.com/2017/01/23/al-interview-ravel-and-the-ai-revolution-in-legal-research/> (last updated Jan. 23, 2017).

- B. Generating legal memos. There has been some success in the area of memo generation.
  - 1. In addition to document review, "[artificial intelligence ("AI")]" has been used to generate legal memos." Sherry Xin Chen; Mary Ann Neary, *Artificial Intelligence Legal Research and Law Librarians*, 21 AALL Spectrum 16, 17 (2017).
  - 2. ROSS Intelligence, another user of the Watson technology, was "trained to produce a basic memo on issues in bankruptcy law." *Id.* at 17-18.
  - 3. "Attorneys can rate the memo as positive or negative to refine the results," but there is no other review process. *Id.* at 18.
- C. E-Discovery Software.
  - 1. [U]ses specifically programmed algorithms to determine the relevance of a given set of documents. Mark McKamey, *Legal Technology: Artificial Intelligence and the Future of Law Practice*, 22 Appeal Rev. Current L & L. Reform 45, 49 (2017).
  - 2. E-discovery software found to be more accurate than manual review of electronically stored information (ESI). *Id.* at 49-50.
  - 3. More cost-efficient than manual review. *Id.* at 50.

### **What are the limits of AI in the law?**

- A. Assists, but cannot replace, lawyers
  - 1. "[T]his kind of automation is targeted to eliminate the tedious tasks, allowing lawyers to perform high-level work that requires human judgment. . . ." Kohn, *supra* at 13.
  - 2. Algorithms for legal use are more difficult to construct than computational algorithms because "[f]ew legal problems have clear yes or no answers." McKamey, *supra* at 52.
- B. Requires training to avoid risks
  - 1. Can give users a false sense of accuracy. Chen, *supra* at 20.
    - a. "A lawyer who does not understand computer searching language is unable to evaluate and correct the search." *Id.* (internal citation omitted).
  - 2. The best trained users will have the best systems
    - a. Cognitive tools . . . absorb the biases of those that train them. *Id.* at 19.

- b. Users with poor search strategies will not teach the AI system as efficiently or return the most refined results. *Id.*
  - c. Since the algorithms used in AI systems are confidential, the users cannot know the best way to search with that AI system. *Id.*
- 3. Ethical duties now extend to technology competence in over half the states. *Id.*
  - a. In 2012, the ABA's House of Delegates voted to amend Comment [8] [in Rule 1.1 of the ABA *Model Rules of Professional Conduct*] to extend the competence requirement to technology." *Id.*