

Artist's rendering of courtroom scene showing, from left, defense counsel Michael Sherman, witness Dorothy Moxley, Judge Kavenewsky, and defendant Michael Skakel. (AP Photo/Janet Hamlin, artist)

Visual Persuasion in the Michael Skakel Trial: Enhancing Advocacy through Interactive Media Presentations

By Brian Carney and Neal Feigenson

S ometime after 9:30 p.m. on October 30, 1975, Martha Moxley, a 15-year-old girl from the gated community of Belle Haven in Greenwich, Connecticut, was beaten to death with a golf club. After nearly a quarter century of official and unofficial investigations that were by turns fitful and resolute, Michael Skakel, a neighbor of Martha's and also 15 years old at the time, was charged with her murder. (*Connecticut v. Skakel*, No. FST CR00-135692T (Conn. Super. Ct. 1992).) The trial began on May 4, 2002. The case against Skakel was old, lacked strong forensic evidence, and pros-

ecutors did not have eyewitnesses who could unambiguously place the defendant at the scene of the crime. Skakel claimed that he was elsewhere at the time. All in all, the prosecution faced a challenging task in convincing a jury beyond a reasonable doubt that Skakel was the murderer.

The prosecution team, however, did have something unusual going for it: a highly customized interactive multimedia evidence presentation system. As witnesses were testifying, prosecutors displayed on a large screen photographic evidence, maps, diagrams of the murder scene, and other demonstrative evidence that they were able to

summon on demand from a CD-ROM. During Prosecutor Jonathan Benedict's closing argument, jurors heard Skakel himself speak—critical passages had been digitized from an audiotaped interview with an author working with Skakel to produce an autobiography—and simultaneously followed a transcript of Skakel's words projected onto the screen.

On June 7, 2002, Michael Skakel was convicted of the murder of Martha Moxley. The press proclaimed it a "stunning" victory for the prosecution. (Bill Hewitt et al., *Called to Account*, PEOPLE, June 24, 2003, at 153.) The prosecution's success depended heavily on the collective efforts of the prosecution team (Benedict, Christopher Morano, and Susan Gill, as well as their investigator, Frank Garr). Their diligent trial preparation and especially Benedict's experience as a prosecutor and his acknowledged oratorical skill were instrumental. Dominick Dunne wrote that "[h]is summation was as brilliant as anything I have ever heard in a courtroom. He was like Gregory Peck in *To Kill a Mockingbird*. It's too bad the speech wasn't televised because it should be shown to law students." (*Triumph by Jury*, VANITY FAIR, Aug. 2002, at 123.)

In this article, we focus on the prosecution's visual communication techniques, specifically the multimedia system that the prosecution used to display its demonstrative evidence and that helped Benedict, in his summation, to "w[eave] dozens of disparate facts into a simple scenario as chilling as any thriller." (Lev Grossman & Simon Crittle, *Martha, RIP*, TIME, June 17, 2002, at 34.) Even if one does not agree with Skakel's cousin, Robert F. Kennedy, Jr., who said that the "multimedia display really convicted Michael in the end" (*48 Hours Investigates: Ghosts of Greenwich: Part II—New Clues in Moxley Case* (NBC television broadcast, Sept. 10, 2003), available at <http://www.cbsnews.com/stories/2003/04/15/48hours/main/549538.shtml>), the prosecution's effective use of visual persuasion was crucial and could very well presage the trial advocacy of the future. We first describe the interactive multimedia presentation used in *Connecticut v. Skakel* and explain why it was so effective. We then briefly discuss some evidentiary issues raised by such multimedia displays and respond to several concerns that have been expressed about their use in court. We conclude by outlining some practical lessons that both proponents and opponents of high-tech visual presentations can draw from *Skakel*.

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The interactive multimedia presentation

With strained resources and overworked employees, prosecutors or any trial lawyers can easily fall into the trap of doing things "the same old way." For some, the old way means solely offering important evidence orally, without any attempt to communicate visually. For others, it means communicating visually through enlarged posters of crime scene photographs or PowerPoint charts and graphs. For yet others, it means presenting evidence using a generic litigation presentation software package such as Trial Director, Sanction, or Summation.

Although posters, PowerPoint, and generic litigation software can be helpful at trial (if used properly and sparingly), they are not necessarily the most effective advocacy tools. One reason is that PowerPoint, although it can be used intelligently and even creatively (*see, e.g., NATIONAL INSTITUTE FOR TRIAL ADVOCACY, POWERPOINT FOR LITIGATORS* (2002)), is essentially linear in nature. (For a well-informed critique of PowerPoint, *see EDWARD TUFTE, THE COGNITIVE STYLE OF POWERPOINT* (May 2003).) Trials, on the other hand, are a fluid exercise in which witness order and witness statements may change from moment to moment. Being confined by a software program that allows immediate access to information in only one sequence does not address the need for flexibility that trial work demands.

Generic litigation software packages are excellent for certain types of cases, such as the prosecution of white-collar crimes in which access to massive amounts of documents is important and the focus is on the information those documents contain. Although these programs provide more flexible access to evidence than PowerPoint does, they are nevertheless basically just display devices. With limited exceptions, they do not encourage advocates to combine multiple pieces of evidence to create a visual argument, nor do they permit advocates to create powerful graphics that display interactions among multiple variables. And that is exactly what is needed in most criminal prosecutions, because they are not documentary in nature. Most crimes involve transactions between persons. To understand those events and to evaluate the testimony of witnesses, maps, diagrams, and photographs of the crime scene are usually among the most helpful tools.

Effective visual communication and persuasion at trial entail more than merely using computer software to project preselected items of evidence. A trial lawyer's graphics should be part of his or her overall strategy, supporting the advocate's case theory and improving the judge's and jurors' understanding and retention of the information the advocate presents. Graphical presentations are the trial lawyer's opportunity to communicate in a way that jurors, increasingly immersed in visual stimuli in their everyday lives, are familiar with and have come to expect.

The presentation used in the case against Michael Skakel was not based on PowerPoint, was not created from a generic trial presentation software package, and certainly was not the same old way of doing things. The prosecution worked with visual communication consultants to design a customized, comprehensive visual toolbox on CD-ROM that included over 100 crime scene and autopsy photographs, documents, diagrams, and digitized audio and video recordings. The toolbox was fully interactive. All of the items of graphical and audio evidence were available at any point during the trial to use whenever the prosecutors needed them. Essentially, every piece of evidence that was to be displayed or offered, except for live testimony, was available at the click of a mouse and would appear on a large screen in the courtroom behind the witness.

All of this evidence was organized and simultaneously accessible to the prosecutors in two different, highly customized ways: a hierarchical menu system and a system of hyperlinked buttons. Both of these navigational approaches made it easy for the trial lawyers—who ran the presentation in court—to access within a few seconds any piece of evidence they wished to display. The prosecutors had been intimately involved in the design of the interactive navigational systems; the program accommodated their desire to access specific types of evidence in tailored ways. Under both the menu and the buttons, the material was organized by context to facilitate immediate access and to make using the presentation more intuitive. For example, to access the 1975 police photographs of the Moxley residence, prosecutors could click on the Moxley home in an aerial photograph of the Belle Haven neighborhood and immediately retrieve all available police photographs of that location.

This customized evidence presentation system improved the conduct of the trial in a number of ways. First, it avoided the expenditure of valuable trial time ordinarily spent passing the document, photograph, or other demonstrative evidence individually from one juror to the next, and possibly to the judge. Instead, each item could be presented more or less immediately. Second, displaying the information on a large screen in the courtroom for all to see focused trial participants and observers on the substance of the testimony. Third, the presentation format eliminated any possible confusion as to what particular part of the photograph or document was being discussed. The witness could simply point to the desired part of the image on the screen by using a laser pointer, and the lawyer could do likewise by using a remote-controlled mouse. Moreover, having all visual, textual, and auditory information available on demand enhanced the prosecution's trial advocacy by making possible a seamless performance in which the prosecution could elicit informa-

tion from the witness stand and either support or contradict it through whatever medium was best suited to do the job. The prosecution team found the system easy to use because of its intuitive design and because they had been involved in the details of its development.

Visual communication should be used at trial for three purposes: to clarify, to captivate, and to convince. The prosecutors in this case used their visual toolbox for all three purposes.

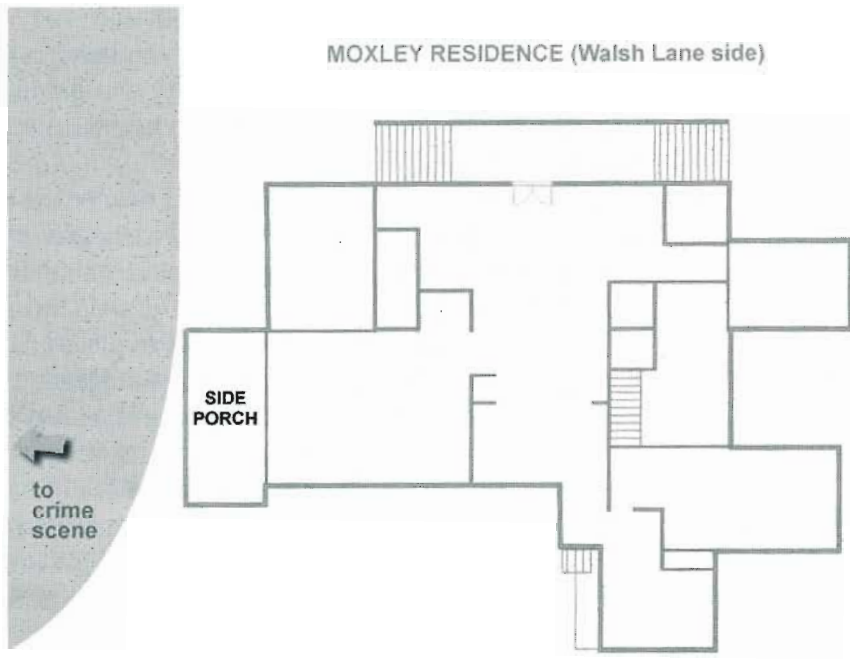
Clarifying the evidence

The multimedia presentation toolbox specifically designed for the *Skakel* prosecutors consisted of five sections: Belle Haven, photographs, medical, documents, and audio. (A sixth section consisted of a graphical presentation designed specifically for the closing argument; we discuss it below.) The main part of the prosecution's presentation focused on the gated community of Belle Haven. This section began with a black-and-white aerial photograph of Belle Haven that included a number of houses in that neighborhood, centered on the Skakel and Moxley residences. The prosecutor could roll the mouse cursor over the photograph to reveal any one of three main areas on that image: the Moxley residence on Walsh Lane, the Skakel residence on Otter Rock Drive, and the crime scene, located between the two. When the mouse rolled over one of those areas, that section would be highlighted in color, revealing a label (for example, "Moxley residence").

Clicking the mouse on any one area allowed the prosecutor to zoom in on it in the aerial photograph and to access police photographs of it. For example, if the prosecutor clicked on the Moxley residence, the display would zoom in to a closer aerial view of the Moxley home, and a second image of the Moxley home taken by the police on the day of the crime would appear in the upper right quarter of the screen. Such a quarter-screen image could be enlarged to the full screen by clicking on that image. Likewise, the full-screen image could be reduced to a quarter-screen image by clicking on it.

All police photographs of the Moxley residence were accessible this way, as were those from the Skakel residence and those of evidence found at the crime scene. Thus, two views would appear on screen: the zoomed-in aerial photograph (taking up three-quarters of the screen area) and the close-up police photograph covering a quarter or quadrant of the screen. Depending on the background aerial photograph being displayed, the first (or only) photograph would be shown in this quarter of the screen. When multiple photographs of an area were available, the prosecutor could access the next (or previous) image by clicking on a forward (or backward) button. On each police photograph the exhibit number was listed.

MOXLEY RESIDENCE (Walsh Lane side)



FIRST FLOOR
(not to scale)

The government's customized evidence presentation system included a CD-ROM with interactive navigation that allowed the prosecutor to access and display in seconds all pieces of audio and visual evidence on a large courtroom screen, including a floor-by-floor layout of the Moxley residence (left) and an overview of the Belle Haven neighborhood (below) with a close-up (inset) of the Moxley house.

Images courtesy of Interactive WIN



Once an exhibit was placed in evidence, having the exhibit number superimposed on the photograph made it easier to identify which exhibit was being used. Instead of having to rifle through 100-odd photographs at the clerk's desk, the prosecutor only had to call up the image on screen and introduce it to the witness by saying, "I am now showing you what has been marked 'Exhibit number 4'. . . ." This saved a significant amount of trial time. (The prosecution and defense had premarked all exhibits before trial.)

The prosecutor could also access a diagram of the interior of the Moxley residence. The prosecutor did this by rolling the mouse over the zoomed-in aerial photograph of the Moxley home and clicking on it again. The Moxley home would be highlighted and the presentation would zoom in on the full-screen image of the diagram. In the lower right-hand corner of the screen, icons represented each of the three floors of the residence. By clicking on any one of these, that portion of the diagram would immediately appear. The layout of the Moxley residence was important for a number of reasons. For example, the diagram was employed to indicate where Mrs. Dorothy Moxley was when she heard noises outside her window and where Martha's and her brother John's bedrooms were in relation to the trees in which Michael told various people he was masturbating that night. Other testimony that these trees were unable to be climbed undermined Skakel's statements about those two sets of trees.

To access the crime scene from the main aerial photograph, the prosecutor placed the mouse over the area between the Moxley residence and the Skakel residence, and it would be highlighted with the label "crime scene." By clicking there, the prosecutor could zoom in to a closer aerial view of the circular driveway of the Moxley home.

A number of items of physical evidence had been found in the middle of and just outside of that driveway. The evidence had been collected by Detective Thomas Keegan of the Greenwich Police Department. To help Detective Keegan explain on the stand what items were found and where, the prosecutor used the zoomed-in aerial photograph of the crime scene area, with labels showing the location and the name of each item of evidence. For instance, the golf club head used to kill Martha Moxley was found in the center of the driveway. Next to it, to the southwest, some blood and a piece of the golf club shaft were found. Further to the southwest on the driveway was more blood. Outside the driveway, a large

pool of blood and another piece of golf club shaft was found. From that area, a drag path, which had been created when Martha Moxley's lifeless body was hauled through tall grass, wove its way to the tree where her body was eventually found.

All of these items were mapped and labeled on the aerial photograph. Using the interactive presentation system, the prosecutor was able to build a graphic, one item at a time, showing where each of the items of evidence was located at the crime scene. This helped to place each item in context, showing where each piece of evidence was found in relation to the others. The presentation system

also allowed the prosecutor to focus on one piece of evidence at a time. By using each item's label as a button, the prosecutor could access the crime scene photographs of that particular item of evidence. For example, when the label pertaining to the golf club head was clicked on, all of the labels except for the one reading "golf club head" would disappear,

focusing the jury's attention on where that one item was located. Simultaneously, in the lower right corner of the screen, a photograph of the golf club head was displayed. The quarter-screen image could be enlarged to full-screen image by simply clicking on it.

As to the photographs section of the visual toolbox, prosecutors wanted a particular photograph of Martha Moxley—at age 15, holding school books—accessible from anywhere within the presentation, so that if a witness mentioned Martha, the prosecutors could display this photograph immediately to identify the person about whom the witness was speaking. The interactive presentation system easily accommodated this request. As a result, no matter where the prosecution was in its presentation, the photograph could be retrieved by choosing it from a menu item. Indeed, this photograph was the first image used at trial for the first witness, Mrs. Dorothy Moxley, Martha's mother, and it stayed on the screen for several minutes until Skakel's defense attorney, Mickey Sherman, objected.

The medical section of the toolbox consisted mostly of autopsy photographs. The prosecutors knew the order in which they wanted to show the autopsy photographs during the testimony of the medical examiner and Dr. Henry Lee, one of their expert witnesses. Therefore, the photographs were ordered in a particular sequence for each of those witnesses, so that the prosecutor could click through them in sequence from one to the next. This was akin to a PowerPoint presentation. The exhibit numbers, however,

Whenever Martha
was mentioned,
a photo of her at
15 appeared.

were listed on a main menu page where the photographs could be accessed in any order the prosecutor chose. This gave the prosecutors great flexibility by enabling them to skip from one image to another, depending on the witnesses' testimony.

A key item in the documents section of the presentation was a diagram of the murder weapon, a golf club. The club had broken into four pieces after the murder. Three of those were found at the crime scene. The Greenwich police had drawn a diagram of the golf club to help them find the missing piece, the handle. From the lengths of two other golf clubs from the same set, the police were able to estimate the length of the missing piece to be about 12 inches. They asked the public to help their investigation by sending in any broken pieces of golf clubs found in the area. Hundreds of pieces were submitted, and from the diagram, the police were able to determine that none matched the missing piece.

At trial, a digital version of this diagram was used to identify the pieces of the weapon that had been found and to show where an identifying label might have been on the edge of the missing piece that connected the club to Mrs. Skakel, Michael's mother. This visual evidence was offered to remove any doubt that Kenneth Littleton, who had just begun employment as a tutor in the Skakel home on the evening of the murder and who had been a suspect early in the investigation, was the murderer. In his closing argument, Prosecutor Benedict reasoned, "The piece that is missing has significance only to somebody named Skakel, because the label reads 'Mrs. R. W. Skakel, Greenwich, Connecticut.' . . . The murderer made sure to hide forever that part of the club that said where it came from. Now, you want to think about this for a moment. Is there any reason why a stranger, even Ken Littleton, would have any reason to hide that label [on the missing handle of the golf club]? No. Such a person would have all the reason in the world to simply leave that identifying label right next to the body." (*Connecticut v. Skakel*, No. FST CR00-135692T, trial transcript 13 (June 3, 2002).) By making it very clear that only the piece with the label was missing, the diagram helped direct jurors' attention toward the person who would have been motivated to hide that piece—a Skakel.

Captivating the jury

Sometimes placing certain evidence before the jury is necessary, but the tedious nature of the evidence, or the time it takes to present it, can cause the jury to lose attention and interest. When crucial information is hidden deep within this evidence, the trial lawyer needs to attract the jury's interest and hold it long enough so that jurors pay sufficient attention to the information that is most important.

Two items of evidence in particular required the *Skakel* prosecutors to captivate the jury. The first involved a transcript of the probable cause hearing. At that hearing, Gregory Coleman, a witness for the prosecution, had testified and had been subject to cross-examination by defense counsel. Coleman died before the case went to trial, so the prosecutors sought to introduce his prior recorded testimony from that hearing. The transcript would need to be read into the record. Coleman provided important information in his testimony, but it was scattered throughout two days of testimony. Reading 15 minutes of prior recorded testimony into evidence is boring; reading two days' worth can be unbearable.

At trial, it took approximately eight hours of continuous reading to complete the Coleman transcript. While it was being read into evidence, the words flashed upon the screen. The words spoken by each of the different participants at the hearing—Coleman, Jonathan Benedict, Mickey Sherman, and Judge Kavanewski—were displayed using a different colored font, so the jury could easily distinguish the speakers' identities while listening to the information being read. Susan Gill, one of the prosecutors, later said that she watched the jury during the reading of the transcript and believed that they were sufficiently engaged by the presentation to attend to some of the most critical aspects of Coleman's testimony, including his description of admissions that Skakel made to him. Gill said that without the multimedia presentation, the jury might have missed this crucial testimony.

Prosecutors used the audio section of the multimedia presentation to captivate the jury with regard to another item of evidence. As noted earlier, Michael Skakel was writing a book about his life with a ghostwriter, Richard Hoffman. Out of over eight hours of audiotaped conversation with Hoffman in 1997, Skakel spoke for 32 minutes about the night Martha Moxley died. That 32-minute segment contained pivotal statements by Skakel that the prosecution wanted jurors to hear, understand, and remember—and that the prosecutors would again use in the closing argument. To engage the jurors and to enhance their comprehension and retention, the prosecution team digitized the audiotape and placed it in the multimedia presentation. When they played the audio of Skakel speaking, a transcript of his words appeared on the large courtroom screen, in black text on a white background. Each part of the transcript appeared on the screen as the recording proceeded. Jurors were thus able to absorb critical information through multiple sensory modalities, both hearing and seeing, and to follow Skakel's words more easily than if they had to turn transcript pages. It is important to note that the presentation system's audio player also could be accessed randomly, which allowed the prosecutors to replay any portion of the digitized audio if they so chose

or similarly to start from a specific place had they been interrupted from playing the entire audio. Audiotope of another witness was presented in the same manner to impeach her trial testimony.

Convincing the decision makers

During closing argument, the trial lawyer is responsible for marshaling the evidence in the light most favorable to his or her client. To do otherwise would be to ignore the advocate's professional duty. For the court to prevent a trial lawyer from doing this would impair the adversarial nature of our trial system. Obviously, the primary restriction on this duty is that the argument be based on the evidence.

Jonathan Benedict's closing argument was indeed based on the evidence, and it was exceptionally persuasive. His talent as an orator had a good deal to do with this. It is what led Jeffrey Toobin to describe the summation as "chilling, riveting, and unforgettable." (*Crossfire* (CNN television broadcast, June 7, 2002), available at <http://edition.cnn.com/TRANSCRIPTS/0206/07/cf.00.html>. [hereinafter *Crossfire*].) In addition, Benedict used the customized multimedia presentation system to great effect. The graphics and audio with which Benedict accompanied his summation helped him to "connect the dots for jurors," as *Newsweek* put it (Suzanne Smalley & T. Trent Gegax, *At Long Last, 'Martha's Day'*, *NEWSWEEK*, June 17, 2002, at 36), and thus marshal the evidence to convince the jury of Skakel's guilt beyond a reasonable doubt.

In the first portion of the closing, Benedict described the facts and began to argue the evidence. As he spoke, key graphics that had been admitted into evidence and were relevant to the evidence he was arguing appeared on a screen behind him, retrieved on cue from the CD-ROM by fellow prosecutor Christopher Morano. The jury saw the photograph of Martha Moxley, photographs of the trees in which Skakel allegedly masturbated, the crime scene diagram, and other images in synchrony with Benedict's summation. The illustrated closing was performed seamlessly and successfully.

During the rebuttal portion of his closing argument, Benedict replayed three crucial clips from the 32-minute audiotape recording of Michael Skakel's conversation with Richard Hoffman, already in evidence and heard by the jury in its entirety. In the first clip, Skakel contradicted his own alibi. Referring to Andrea Shakespeare, a friend of the Skakels who had been at their house that evening, Skakel said: "And I remembered that Andrea had gone home." This statement was extremely important because every witness for both the prosecution and the defense had agreed that the alibi car—that is, the car in which Skakel claimed to have left his home well before the time of

Martha Moxley's murder—left the area of the Skakel residence *before* the car that took Andrea Shakespeare home. Had Skakel been in the alibi car—the theory upon which his entire defense rested—he could not have seen, or later remembered, that Shakespeare had gone home. During the closing, the prosecution played this audio segment for the jury and simultaneously displayed a transcript of Skakel's words, just as the jury had previously heard and seen the words, except that the critical sentence in which Skakel contradicted his own alibi was highlighted in red.

In the second audio clip, Skakel was heard discussing his latest alibi. In 1975, Skakel told the police that he had gone home after returning from his cousins' house, gone directly to bed, and had not left his own house again that night. In 1997, however, Skakel related the following to Hoffman: "I said, 'Fuck this, you know why should I do this, you know, Martha likes me, I'll go, I'll go get a kiss from Martha . . . I'll be bold tonight.' You know booze gave me, made me, gave me courage again." This statement established that Skakel changed his alibi and placed him right at the scene of the crime, looking for Martha Moxley at about the time she was being murdered. Again, the jury was able to hear Skakel's statement and simultaneously follow his words on the large courtroom screen.

The third audio clip was perhaps the most compelling of all. In it, Michael Skakel admitted to a "feeling of panic" on meeting Dorothy Moxley the next morning. As the jury heard and saw Skakel's words, they also saw photographs of Martha Moxley: one of her alive, juxtaposed with Dorothy Moxley's words to define what Mrs. Moxley was thinking about when she asked Michael Skakel where Martha was; and two of Martha's corpse where it was found under the tree, to define what Michael Skakel was thinking about when he said he had a feeling of panic:

[Screen 1] "And then I woke up, went to sleep, then I woke up to Mrs. Moxley saying 'Michael, have, have you seen Martha?' [Photograph #1 of Martha Moxley is shown] I'm like, 'What?' And I was like still high from the night before, a little drunk, then I was like 'What?'"

[Screen 2] "I was like 'Oh my God, did they see me last night?' And I'm like 'I don't know,' I'm like, and I remember just having a feeling of panic." [Photograph #2 of the corpse of Martha Moxley is shown]

[Screen 3] "Like 'Oh shit.' You know. Like my worry of what I went to bed with, like may . . . , I don't know, you know what I mean I just had, I had a feeling of panic." [Photograph #3 of the corpse of Martha Moxley is shown]

Prosecutor Benedict argued: "How could the sight of Dorothy Moxley possibly produce a feeling of panic in an innocent person, in a person who had gone to sleep knowing nothing of Martha Moxley's murder?"

(*Connecticut v. Skakel*, No. FST CR00-135692T, trial transcript 138 (June 3, 2002).)

Thus, using the interactive multimedia toolbox, Jonathan Benedict “did what lawyers are supposed to do in summation. He took different parts of the evidence, brought it all together and made you see it in a new way.” (*Crossfire*, *supra*.) Because every element of the multimedia presentation already was in evidence and had been seen by the jury in its entirety, and because the visual argument was directly connected to the evidence (using Skakel’s own words, the photographs were displayed to explain what each person he spoke of was thinking), Benedict’s closing argument was not only persuasive but also entirely appropriate, as discussed further below.

Evidentiary issues

High-tech courtroom visuals such as those used by the prosecution in *Skakel* raise important evidentiary issues. *Skakel* was conducted under Connecticut evidentiary rules, of course, but the issues extend to jurisdictions across the nation. To reflect this, we henceforth refer to the Federal Rules of Evidence and to evidentiary practice in other jurisdictions.

The Federal Rules of Evidence do not specifically address computer-generated evidence of any kind, so the rules applicable to high-tech visual displays are the same ones governing the presentation of demonstrative evidence generally. Basically, to be admissible, demonstrative evidence must be relevant to some fact of consequence to the case (Rule 401); its probative value must not be substantially outweighed by any risk of unfair prejudice, confusion of the issues, or misleading the jury (Rule 403); it must be what its proponent claims it is (that is, it must be authenticated) (Rule 901); it must not violate the rules against hearsay (Rules 801 and 802); it must conform to the rules governing the presentation of lay (Rules 602 and 701) or expert (Rules 702 through 705) testimony, as the case may be; and it must not violate any other rules pertaining to the presentation of demonstrative or other evidence (for example, Rules 102, 106, and 611). (For a detailed discussion, see Fred Galves, *Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 HARV. J. L. & TECH. 163 (2000).)

One issue is whether and to what extent jurors should have access during deliberations to the computer graphics

shown during trial. Demonstrative evidence is often not admitted into evidence as a full exhibit that goes to the jury room, but the trial judge retains the discretion to allow the jury access to it. (See, e.g., THOMAS MAUET & WARREN WOLFSON, TRIAL EVIDENCE 326 (2d ed. 2001).) Proponents of high-tech evidence may want to ask the judge to admit their graphics as full exhibits in order to prove a substantive point, to protect the appellate record, and/or to claim to the jury, in effect, “We have nothing to hide.” Even in the most state-of-the-art courtrooms, however, the issue of how the jury should access electronic evidence, especially interactive evidence, in the jury room has not yet been adequately thought through.

As a result, individual judges must decide on a case-by-case basis. One judge of the Massachusetts Superior Court in Boston came up with a unique solution in response to a jury request to view an interactive multimedia presentation shown during trial. The presentation depicted the changing location of a 911 caller as he chased another car in which three armed youths were riding. As the chase proceeded, an animated map dynamically tracked the cars’ locations in correspondence with the simultaneously played audio of the 911 call. The judge told the prosecutors that because the interactive

Computer-generated evidence is not specifically addressed by the FRE.

CD-ROM was admitted as an exhibit and therefore was in evidence, the prosecutors would be required to teach the jury foreman how to use the interactive program and to clear the courtroom to allow jurors to deliberate using the prosecution’s computer equipment. (*Massachusetts v. Brimley*, SUCR 1999-10698 (Mass. Super. Ct. 1999).) This method, unfortunately, presents several problems. Jurors may not be able to navigate the computer presentation as adroitly as its proponents did during trial, leading to confusion and frustration. Questions about other files on the prosecution’s computer, all of them extraneous and some arguably objectionable, may arise. And there is the lingering concern that the jury will be tempted to trivialize the interactive presentation by treating it as they would a computer game.

The better practice with regard to an interactive presentation, therefore, would seem to be not to allow the computer presentation to go to the jury room. If jurors want to review particular portions of the trial presentation, they can return to the courtroom and have court personnel play those portions back for them, as is currently the practice with redacted videotape evidence, for example.

Much of the debate about the use of particular high-tech visual displays is likely to boil down to the question

of fairness. Judges may consider the use of evidence presentation systems as an issue of admissibility under or by analogy to Rule 403, allowing an otherwise admissible presentation if its probative value is not substantially outweighed by the risk of unfair prejudice, confusion of the issues, or misleading the jury. We believe that it makes more sense to speak of the *permissibility* rather than the admissibility of the presentation system because, strictly speaking, the presentation system is not (necessarily) evidence in itself; it is a display device, an alternative to traditional methods for publishing admissible evidence to the jury. (See, e.g., *Commonwealth v. Kater*, 432 Mass. 404 (2000) (where both sides had used a document camera during trial, the court permitted the prosecutor to display a photograph of the victim on the document camera during closing argument while arguing that the victim “begged for her life,” analogizing it to the use of “an enlarged easel”); *Arizona v. Sucharew*, 66 P.3d 59 (Ariz. Ct. App. 2003) (allowing the prosecutor to use a PowerPoint presentation during the opening statement).) But regardless of how the issue is characterized, the court has to decide whether, all things considered, the presentation is fair, which may involve balancing the assistance it provides the trier of fact by illustrating and clarifying case information against any risks of prejudice or confusion it may pose.

Some of the very features that make the kind of customized evidence presentation system used in *Skakel* an effective case-presentation tool—for instance, the way in which it enables advocates to show the judge and jurors vivid images of the crime scene and the murder weapon, and to juxtapose compelling pictures with the verbal testimony that those pictures are offered to illustrate—can give rise to charges of unfair prejudice or misleading the jury. We address three related issues that may arise. Will proponents of computer-generated visual displays embed in them subliminal messages that are highly prejudicial to the opposing party, as the *Skakel* defense has claimed on appeal? More generally, do digital multimedia presentation technologies give advocates unprecedented power to misrepresent evidence and inflame and mislead the jury during closing argument? And, apart from any intention to inflame or mislead, are high-tech presentation formats and methods simply so effective that they render the skillful (and proper) use of digital technology “too persuasive,” making trials turn on which side has the better, slicker technology?

We believe that, when properly designed and deployed, computer-generated visual presentations can withstand all of these potential challenges.

The threat of subliminal messaging is spurious

In their motion for a new trial and on appeal to the Connecticut Supreme Court, Michael Skakel’s lawyers

claimed that the prosecution’s multimedia presentation used subliminal messaging. (*Connecticut v. Skakel*, No. SC 16844, defendant’s brief at 79 (filed Nov. 24, 2003).) If the charge had any basis in fact, upon investigation it would be verified and would indeed point to a risk of unfair prejudice that could substantially outweigh the presentation’s considerable probative value. The claim, however, is entirely groundless. Subliminal messaging involves the display of an actual stimulus (for example, words) for such a short duration (say, one-twentieth of a second or less) or in such a masked way (for example, naked bodies subtly superimposed on ice cubes in a liquor advertisement) that the viewer is not consciously aware of having perceived the stimulus but is nevertheless affected by it. (See, e.g., ZIVA KUNDA, *SOCIAL COGNITION* 279–84 (1999).) No subliminal content was concealed in the *Skakel* prosecution team’s audiovisual presentation. All of the images, audio, and text that the prosecution put before the jurors in closing argument were properly admitted into evidence. All of the elements within the presentation, moreover, were disclosed to the defense lawyers well in advance of trial, so that they could be scrutinized for any objectionable aspects. (The uses of those elements in the closing argument, however, were not disclosed, in order to protect the attorneys’ work product. We discuss this further below.)

In any event, no rational lawyer is going to risk his or her client’s welfare, not to mention his or her own professional reputation, by attempting such a readily uncoverable subterfuge. Indeed, the best description of what went on in *Skakel* was not subliminal but, rather, *blatant* messaging. The multimedia system allowed prosecutors to present images and audio already in evidence so clearly and so memorably that their impact on the jurors was profound.

High-tech presentations in closing argument can be both persuasive and proper

We suspect that when a lawyer charges that the adversary has unfairly engaged in subliminal messaging, what is really meant is that the adversary’s presentation was *too effective* in persuading jurors to draw the inferences that the adversary wanted them to draw. This leads to the second possible argument against the courtroom use of high-tech visuals: that digital multimedia presentation technologies give advocates unprecedented power to persuade and, if exploited to misrepresent the evidence, can inordinately inflame and mislead the jury, especially during closing argument. Our response is that, like any other medium of communication and persuasion, including speech, high-tech presentation systems can be deployed appropriately or inappropriately, fairly or unfairly. The prosecution’s use of its customized interactive multimedia presentation in closing argument in *Skakel* exemplifies the highly persuasive yet entirely proper use of the technology.

In his rebuttal argument, Jonathan Benedict replayed for the jury three critical audiotape clips from the Skakel interview with Richard Hoffman. These clips were neither taken out of context nor “deceptively edited,” as the defense claims on appeal. (See *Connecticut v. Skakel*, No. SC 16844, defendant’s brief at 77–79 (filed Nov. 24, 2003).) As already mentioned, during trial the prosecution played for the jury the entire audio recording while simultaneously displaying the transcript. The defense happily permitted the audio presentation of the Hoffman interview during trial because it allowed them to vigorously argue their case, including the masturbation defense to explain Skakel’s presence at or near the crime scene. Throughout his closing argument, Benedict referred to, discussed, and invalidated this masturbation theory, mentioning it nearly a dozen times.

In the first clip, the prosecution replayed the words of Michael Skakel and highlighted in large red letters the sentence in which Skakel contradicted his own alibi. Focusing the jury’s attention on a portion of the audiotape in which the defendant unwittingly contradicts his alibi is certainly proper. Failure to highlight it would have been incompetence on the part of Benedict. Clearly, a prosecutor should emphasize the importance of this statement in his oral presentation, as Benedict did. The visual presentation simply reinforced this emphasis.

The second clip, in which Skakel changed his alibi, placing himself at the scene of the crime at about the time of the murder, was replayed in summation exactly as it had been seen and heard during the original presentation at trial. Again, emphasizing this crucial piece of evidence was entirely appropriate for closing argument.

In the third audio segment that Benedict replayed, Skakel, by his own choice of words, juxtaposed what Mrs. Moxley had asked him the morning after Martha’s murder and what Skakel himself had thought at that moment. Benedict used this evidence—Skakel’s words framing the juxtaposition—as the basis for a visual argument depicting what the prosecution believed Skakel was really thinking when he said that he had a “feeling of panic.” Benedict did not just ask jurors to *imagine* what Michael Skakel was thinking about when he experienced that panic. By placing next to the transcript of Skakel’s words a photograph of Martha’s battered and lifeless body, Benedict *showed* jurors what—according to the prosecution—Skakel was thinking about. Although Mickey Sherman chose to ignore the Hoffman interview during his closing argument, jurors were not unaware of the

“context” of this use of Skakel’s words: the prosecution’s refutation of the masturbation defense.

Because Benedict’s presentation was directly and closely connected to the evidence, his visual argument was completely fair and appropriate. Had Benedict simply gratuitously displayed pictures in a chosen sequence with the sole aim of inflaming the jurors’ emotions, his use of the technology might well have been objectionable. For example, in an embezzlement case, a prosecutor who delivers a closing argument against a backdrop of dollar signs continuously filling the courtroom screen would

probably be using the technology in an inflammatory, prejudicial, and inappropriate way. In Benedict’s summation, by contrast, the images used were all in evidence and were closely and directly connected to the other evidence, that is, Michael Skakel’s own words. His use of images did not misrepresent, inflame, or mislead. Rather, he argued his case.

This use of visual presentation technology was entirely in keeping with the traditional purposes of closing argument:

Final argument is the last opportunity for the parties to convince the jury . . . Counsel for each party is permitted and expected to marshal the evidence and to argue for a decision of the controversy in favor of his client. This process involves not only the strength of his client’s case, but also the weakness of that of his opponent. . . . The prosecutor can no more be prohibited from arguing relevant evidence that was heard by the jury than can the judge be prohibited from admitting it. The fact that as a result of hearing such evidence and such argument by the prosecutor the jurors may have sympathy for the victim is understandable but unavoidable. Any other conclusion would only shield an accused from prosecution in direct proportion to the amount of brutality with which the crime was committed. (*Commonwealth v. Johnson*, 374 Mass. 453 (1978).)

During closing argument, advocates may, of course, make inferences from the facts, as long as those inferences are “based on some remotely plausible interpretation of the evidence.” (J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS & ETHICS* 378 (2d ed. 1993).) They may impute fictitious speech to persons involved in the litigated events as long as this is done for purposes of argument and does not distort the evidence. (*Id.* at 385.) They may use words to “paint a picture” of the evidence that puts the client in the most favorable light and the opposing party in the least favorable; that is what advocates are supposed to do. And, of course, they may use visual aids to help them do this. (*See id.* at 383.)

Images used in closing were completely fair and appropriate.

While the crime scene images may very well have increased jurors' sympathy toward the Moxleys and their resentment toward Skakel, and while those images, precisely timed with Skakel's words, probably increased their conviction that Skakel was guilty of the murder, using this kind of visual rhetoric, instead of words alone, to help jurors understand the evidence is legally appropriate. Indeed, Jonathan Benedict unquestionably could have played the same portions of the audiotape during closing and held up before the jury the same photographs of the murder victim, even enlarged and mounted on posterboard, that he used in the multimedia display. The only difference is that the interactive multimedia system allowed Benedict to juxtapose words and images more smoothly, preventing the jurors from being distracted from the content of his argument: that Michael Skakel was guilty of murdering Martha Moxley. By using a visual argument to explain, in the most effective method available to him, the prosecution's theory of the case, Benedict accomplished exactly the purpose of closing argument.

Effectiveness of high-tech evidence presentations does not make them unfair

A third possible issue, although it has not been raised by Skakel's lawyers on appeal, is whether the skillful and proper use of digital technology can somehow be too persuasive, turning the trial into a matter of which side has the better graphics. This argument, too, fails.

To be sure, a well-designed and adroitly used digital presentation system can be highly effective for many reasons. For instance, the interactive system the *Skakel* prosecutors used to display demonstrative evidence allowed them great flexibility to show images in any desired order, to accompany and thus reinforce precise moments in a witness's testimony or in closing argument. As a witness described, say, the Belle Haven neighborhood, appropriate labels identifying the streets and the owners of the houses would appear on the aerial photograph of the neighborhood "as if by magic" (Lynne Tuohy, *Skakel: His Fate May Rest on Reasonable Doubt*, HARTFORD COURANT, June 3, 2002, at A1), enhancing the witness's credibility as a precise and accurate conveyor of information. In addition, it seems plausible to suggest that the timely display of images on a single, large courtroom screen may have a greater impact on the jury than do those same images shown to jurors, one by one, in a standard photographic format, because the jury's perception of the demonstrative evidence becomes a shared, collective experience, condensed and focused in time.

Even if one or more of these effects actually occur—there does not yet appear to be any reliable empirical research one way or the other—we do not believe that

they should generally lead to the exclusion of high-tech presentations. The mere fact that a given format or method allows evidence to be presented more effectively cannot be a good enough reason to exclude that format or method. To suggest otherwise would mean that photographs never would have been allowed into evidence, nor would have X-rays, MRIs, photocopies, audiotapes, or any of the other techniques and media developed in the last two centuries to record and display information. Recently, courts have continued to recognize the utility of new presentation methods by approving the use of document cameras and PowerPoint to present otherwise admissible information. (See *Commonwealth v. Kater*, 432 Mass. 404 (2000); *Arizona v. Sucharew*, 66 P.3d 59 (Ariz. Ct. App. 2003).)

In addition, the thoughtfulness and effort that precede the creation of a digital presentation and the practice and skillful use of a display method are basically reflections of the advocate's competent legal training and skills. Unless there is something specifically misleading about the particular technique being employed, disallowing an effective high-tech presentation simply because it is effective would simply punish the trial lawyer for that which he or she is obligated to do and interfere with the adversarial process.

For a presentation system to be disallowed, any risk of unfair prejudice or misleading the jury that the presentation posed would have to outweigh (or, by analogy to Federal Rule of Evidence 403, substantially outweigh) the presentation's probative value. Yet the generally improved clarity, timeliness, and memorability of demonstrative evidence shown via an interactive digital presentation system would, if anything, appear to enhance the value of the technique, supporting its use at trial. Neither the format, method, or technique itself, nor its skillful use, should be objectionable. Rather, it is in the unfair, prejudicial, or confusing misuse of that method in particular instances where the potential for an objection, if any, lies. Trial judges remain fully capable of monitoring particular images shown on a high-tech system, just as they do with regard to traditional photographic, diagrammatic, or other demonstrative evidence, and thereby excluding images that they find insufficiently relevant or unduly inflammatory.

Ultimately, it seems unlikely that trials will devolve into mere contests of visual technologies. The strength of the evidence will remain the most important determinant of verdicts (see, e.g., Christy Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1 (1987)), and the effectiveness of visual presentations will continue to depend on how well the proponents marshal the evidence and how well the visuals serve the proponents' theory of the case.

Lessons for advocates

Effective persuasion requires speaking in terms that one's audience understands. Interactive multimedia courtroom presentations do just that. They communicate visually to audiences accustomed by their everyday work and leisure experiences with television, print media, billboards, movies, and computers to rely on visual information. In particular, a multimedia presentation combining maps, linked photographs, and diagrams is persuasive to jurors who are increasingly prepared from watching *CNN Headline News* and surfing the Internet to absorb and comprehend heterogeneous information in diverse formats.

Multimedia presentations allow advocates to clarify and synthesize trial information to increase the jury's interest, comprehension, and memory retention. Digital displays streamline witness examination, expedite the flow of relevant information to the judge and jurors, and facilitate the drawing of connections between the testimony of different witnesses as to the same matters, because all can speak to the same images, summoned on demand. In addition, where the evidence is quite old, as in *Skakel*, digitization of crumbling photos and diagrams allows the advocate to "smooth out the edges" on valuable demonstrative evidence and present it accurately and with the same level of polish and clarity as more recently created evidence. Yet, as beneficial as digitization was in this case, even more thorough visual presentations can be constructed for trials dealing with contemporary events, which today can be documented with digital photographs and video.

A trial is so unpredictable that it is essential to be able to adapt on the fly to the constant changes that occur. One of the most important assets a trial lawyer can possess, therefore, is flexibility. A truly interactive presentation enhances the lawyer's flexibility, giving him or her immediate access to the right information at the right time. Done properly, an intuitively designed, customized presentation that is developed in accordance with the trial lawyer's input and particular demands can make the lawyer's presentation of the evidence an easy, effective, and enjoyable experience because it is exactly what the trial lawyer ordered. By enabling advocates to present their cases more smoothly and with fewer distractions, these presentations enhance advocates' persuasiveness.

The efficiency of evidence presentation that interactive audiovisual technology makes possible is pleasing not only to proponents but also to most judges and jurors. Advocates can spend more valuable trial time on the actual content of the case—the substantive evidence—rather than on extraneous matters. Trial participants no longer waste the time it takes to search through docu-

ments, to look for a specific photograph or piece of evidence at counsel table or the clerk's desk, or to wait for all of the jurors to view a particular piece of evidence. Christopher Morano has estimated that between one-third and one-half of trial time in *Skakel* was saved as a result of using the interactive multimedia presentation.

Multimedia presentations can improve advocates' trial preparation and their in-court performance. The same visual toolbox that helped the *Skakel* prosecutors to streamline their examination of witnesses also helped them to prepare their witnesses more effectively before trial. Furthermore, Jonathan Benedict has said that, as a result of engaging in the creative process of helping to assemble and design the CD-ROM—a process that took six months in addition to the prosecution's years of other trial preparation and included some eight revisions of the visual materials—he was better prepared than he would otherwise have been for one of the most important trials of his career.

Trial lawyers often express the concern that they just do not have the time they need to prepare visual aids. They consider preparing trial visuals as an afterthought. This is a mistake. Trial lawyers should focus not on the creation of the visual aids per se but rather on their ability to communicate effectively with the jury. If they do so, they will come to understand that visual displays should be an integral component of their trial strategy, and this revised focus should lead to greater and more skillful uses of visual rhetoric.

Another concern is expense. Obviously, not every case justifies the cost of a comprehensive, highly customized, interactive multimedia presentation. Every case, however, demands trial attorneys who are thinking of ways to communicate visually to the jury. Highly persuasive legal arguments can sometimes be created using poster board or other relatively simple and inexpensive displays.

Potential proponents of visual displays should do two things to improve the effectiveness of those displays in court. First, proponents should integrate visual communication into their overall strategy. This includes but goes well beyond merely identifying the pieces of evidence that need to be shown to the jury, on screen or otherwise. It requires lawyers to think through how best to communicate key legal and factual concepts visually, and thus to add visual to traditional verbal thinking as part of their normal trial preparation.

Second, proponents should provide early discovery of the presentation to the opposition. We suggest that the materials (with an important exception noted below) be given to the opposition 30 days before trial, even where local rules do not so require, on CD-ROM, DVD, or other appropriate medium. By doing this, the proponent ensures that he or she is well prepared for trial at least 30 days in advance, because creating a comprehensive,

interactive multimedia presentation requires full knowledge of the facts, theories, and themes to be raised at trial. Moreover, early disclosure is eminently fair to the opponent. The opponent will have an adequate opportunity to review the presentation, learn to use it, and raise objections. Being this open and fair also puts the proponent in a much better position to overcome objections if the opponent waits until trial to raise them. Most judges do not like ruling on issues that could have been dealt with long before trial.

The one exception to the recommendation that the visual presentation be provided to the opposition well before trial is that anything considered attorney work product should not be disclosed, nor should the court require its disclosure. For instance, portions of the presentation that are created solely to impeach a witness's credibility should not be revealed. Also, the method or technique a lawyer will use to impeach a witness is protectable work product—for example, a presentation using a visual summary of a witness's multiple contradictory statements that the proponent may or may not need to use, depending on the witness's trial testimony—that should remain closely guarded. Similarly, a trial lawyer should not disclose to the adversary his or her anticipated closing argument, visuals included. Conflicts possibly may arise between discovery rules that require the disclosure of all visual aids to be used at trial and the work product doctrine. Without entering into a lengthy discussion of this issue, we contend that to force disclosure of these kinds of materials would be to remove the adversarial nature of those important aspects of trial. It would be the equivalent of requiring the attorney to type out the questions expected to be asked on cross-examination or to turn over a printed copy of the closing argument.

Each side should consider filing a motion during the discovery phase asking for a copy of all visual presentation materials to be used by the adversary during trial, to prevent surprises at trial. Regardless of why the presentation is produced (voluntarily or as a result of an order pursuant to a motion), the opponent of a proposed presentation should review the information within the presentation provided, learn how to use the presentation and the relevant equipment, and raise any appropriate objections. The opponent may informally request the proponent to change particular features of the presentation that the opponent deems objectionable. The proponent would be well advised to make any reasonable changes that do not needlessly interfere with the substance of the presentation. If not satisfied by the proponent's response, the opponent should then make a motion in limine to obtain the court's ruling on any outstanding issues.

The opponent should also review the presentation with an eye toward how it might be used *against* the proponent. The ability to “boomerang” the adversary's graphics

to prove points helpful to one's own side is a particularly persuasive technique. (See, e.g., DAVID BALL, *THEATER TIPS AND STRATEGIES FOR JURY TRIALS* 90 (1994).) Mickey Sherman, although impressive in other aspects of his advocacy for Michael Skakel, did not do this. Instead, as part of an overall strategy to highlight the great lengths to which the state would go to convict “poor Michael” (see *Pity Poor Michael*, <http://www.fairfieldweekly.com/articles/pitymichael.html>), Sherman downplayed the use of the high-tech visuals. During a hearing outside the presence of the jury, Sherman said that the defense team (which was reportedly paid a respectable fee to represent Skakel) did not have the resources to create high-tech graphics. And in his closing argument, Sherman told the jury: “The nature of our defense—we didn't have the high-tech delivery. We've got two kinds of boards here. You don't see the big fancy jury expert sitting at our table. It's somewhat low-key. It is me and three kids [referring to his associates], as you can see . . .” (*Connecticut v. Skakel*, No. FST CR00-135692T, trial transcript at 23 (June 3, 2002).) Such an approach might work in some cases. It is, however, crucial never to underestimate the communicative and persuasive power of interactive multimedia.

In addition to the strength of the evidence, the most important elements of success at trial today are the quality of the trial lawyer and the effectiveness of visual communication. Being completely familiar with the facts, skillfully marshaling the evidence, and convincingly arguing one's theory have always been what has made great trial lawyers great. However, because trial practice today is following society in its increasing reliance on visual communication, visual presentations are becoming ever more essential to trial lawyers' persuasive strategies. We do not expect trials to turn into contests between Spielberg and Disney, but we do believe that the use of visual communication for strategic advantage at trial will increase in frequency and quality, allowing trial advocates to do even better at what they already do well. ■

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